Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of State, County and Municipal Employees, District Council 20, Local 2921, AFL-CIO,	
Complainant,	PERB Case No. 10-U-49
v.	Opinion No. 1111
District of Columbia Public Schools,	Motion for Preliminary Relief Motion to Dismiss
Respondent.	

DECISION AND ORDER

I. Statement of the Case

American Federation of State, County and Municipal Employees, District Council 20, Local 2921, AFL-CIO ("Complainant", "Union" or "AFSCME") filed the instant Unfair Labor Practice Complaint ("Complaint") against District of Columbia Public Schools, ("Respondent", "DCPS" or "Agency"). The Complainant is alleging that the Respondent violated D.C. Code § 1-617.04(a)(1) and (5) of the Comprehensive Merit Personnel Act ("CMPA") by: (1) failing and refusing to provide relevant information to the Union; (2) unilaterally implementing a new evaluation system; and (3) rating bargaining unit members under the new evaluation system as "ineffective" and terminating those employees. (See Complaint at pgs. 2-3).

DCPS filed an Answer to the Unfair Labor Practice Complaint ("Answer") denying the allegations set forth in the Complaint and any violation of the CMPA. (See Answer at pgs. 2-3). In addition, DCPS asserted affirmative defenses to the Complaint's allegations and requests that the Board dismiss the Complaint. (See Answer at pgs. 3-4). Following its Answer, DCPS filed a document styled "Respondent's Motion to Dismiss Unfair Labor Practice Complaint" ("Motion"), on January 28, 2011. AFSCME responded to the Motion with a pleading styled "Union's Opposition to Motion to Dismiss and Cross-Motion for Decision on the Pleadings" (Opposition" and "Cross-Motion"). DCPS countered the Opposition with a pleading styled "Respondent's Reply Motion to Union's Opposition to Motion to Dismiss & Cross-Motion for Decision on the Pleadings" ("Reply"). The Union's Complaint (including its request for

preliminary relief *via* Opposition and Cross-Motion) and DCPS' Answer, Motion and Reply are before the Board for disposition.

II. Discussion

AFSCME alleges the following facts in support of its Complaint:

> 3. On or about November 4, 2009, DCPS labor relations official Peter Weber, his assistant Jennifer Kimball, and Jason Kamras, gave AFSCME District Council 20 representatives Al Bilik and Michael Reichert and Local 2921 president Lucille Washington, a briefing on a new evaluation system under consideration by DCPS. Weber told the Union that DCPS was considering implementing it and that it would be used for reductions in force ("RIFs") as well as for overall evaluations. The system was described in a manual and the Union asked for a copy of the manual. The Union also asked how the evaluation system fit into RIF procedures. Weber said: "We will get back to you." DCPS never provided the requested information. DCPS also did not contact AFSCME District Council 20 representatives Reichert or Bilik over the evaluation system under consideration. The Union is justified in the belief that DCPS will not provide the requested information.
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> 4. On or about June 11, 2010, Reichert sent an agenda to Sandra Walker-McLean, the point of contact for DCPS Deputy Chancellor Kaya Henderson, in advance of a scheduled June 22, 2010, monthly labor-management meeting. Among the items listed was "Evaluations at DCPS." DCPS failed to discuss this issue with the Union at this meeting.
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> 5. Officials of DCPS were and continue to be aware that representatives of District Council 20 represent the Union on the issue of evaluations, yet intentionally bypassed them with respect to these issues.
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> 6. On a date unknown to the Union, DCPS unilaterally implemented a new evaluation system known as IMPACT.
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> 7. On or about July 2, 2010, DCPS sent notices to approximately 20 employees, and on or about July 23 2010, DCPS sent notices to approximately 20 employees, informing them that they had been rated as "Ineffective" under the new IMPACT evaluation system and that they would be terminated effective July 16 or July 30, 2010, respectively.

> 8. On information and belief, IMPACT also affects other terms and conditions of employment, including step increases.

(Complaint at pgs. 1-3).

As a result of DCPS' alleged actions, AFSCME argues that:

> By failing and refusing to provide relevant information to the Union and unilaterally implementing IMPACT and terminating employees for allegedly having been rated "Ineffective" under IMPACT, DCPS interfered with, restrained and coerced employees in the exercise of their rights and refused to bargain in good faith, in violation of D.C. Code §§ 1-617.04(a) (1) and (5) . These unfair labor practices are continuing to date.

(Complaint at p. 3).

In addition, AFSCME asks that the Board remedy this situation by: (1) ordering DCPS to cease and desist from violations of D.C. Code §§ 1-617.04 (a) (1) and (5); "restore the status quo, including but not limited to, reinstating employees terminated under IMPACT, and making all employees affected by IMPACT whole;" (2) "bargain in good faith with the Union over IMPACT;" (3) "pay attorneys' fees and costs;" (4) "provide the information about IMPACT requested by the Union;" (5) "post an appropriate notice to employees;" and (6) "desist from or take such affirmative action as effectuates the policies and proposes of the [CMPA]." (Complaint at p. 3).

AFSCME also asks that the Board grant its motion for preliminary relief, as provided under Section 520.15 of the Board's Rules. (See Complaint at p. 4).

DCPS denies the allegations set forth in the Complaint. However, Respondent does "admit that Peter Weber informed the Union's representatives that the IMPACT evaluation system had been implemented." (Answer at p. 2). Furthermore, DCPS:

> admits that "Evaluations at DCPS" was listed on the agenda submitted by AFSCME to DCPS as indicated in paragraph four of the Complaint. Respondent asserts that the only issue that the Union raised was a demand that the evaluations be negotiated. Respondent further asserts that Complainant fails and/or refuses to acknowledge or even state what it must clearly have known namely, that under controlling District Law, DCPS was and is under no obligation whatsoever to negotiate the evaluation process or instrument with the Union . . .

(Answer at p. 2).

As such, Respondent "admits that it implemented a new evaluation tool without negotiating with AFSCME." (Answer at pgs. 2-3).

As an affirmative defense, Respondent contends that: "[t]he Complainant fails to state a claim for which relief can be granted, in that the Complaint does not allege any facts that constitute an unfair labor practice in violation of Sections 1-617.04(a)(1) and (5) of the CMPA." (Answer at p. 3). DCPS also reiterates its argument that:

> under controlling District Law, DCPS was and is under no obligation whatsoever to negotiate the evaluation process or instrument with the Union since:
>
> > Notwithstanding any other provision of law, rule, or regulation, the evaluation process and instruments for evaluating District of Columbia Public Schools employees shall be a nonnegotiable item for collective bargaining purposes. D.C. Code $ 1-617.18. Pub. L. 109-356. Oct. 16. 2006. 120 Stat. 201^9. Short title, see 5 U.S.C. 101 § 302.

(Answer at pgs. 3-4).

Motion for Preliminary Relief

The criteria the Board employs for granting preliminary relief in unfair labor practice cases are prescribed under Board Rule 520.15, which provides in pertinent part:

> The Board may order preliminary relief ... where the Board finds that the conduct is clear-cut and flagrant; or the effect of the alleged unfair labor practice is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, and the Board's ultimate remedy will be clearly inadequate.

In addition, a review of the parties' pleadings reveals that the parties disagree on the facts in this case. Therefore, establishing the existence of the alleged unfair labor practice violations would turn on making credibility determinations on the basis of these conflicting allegations. We decline to do so based on these pleadings alone. In such cases as this, the Board has found that preliminary relief is not appropriate. See *DCNA v. D.C. Health and Hospital Public Benefit Corporations*, 45 DCR 6067, Slip Op. No. 559, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

Moreover, the Board has held that its authority to grant preliminary relief is discretionary. See *AFSCME, D.C. Council 20, et al. v. D.C. Government, et al.*, 42 DCR 3430, Slip Op. No. 330, PERB Case No. 92-U-24 (1992). In determining whether or not to exercise its discretion under Board Rule 520.15, the Board has adopted the standard stated in *Automobile Workers v. NLRB*, 449 F.2d 1046 (CA DC 1971). There, the Court of Appeals - addressing the standard for

granting relief before judgment under Section 10(j) of the National Labor Relations Act - held that irreparable harm need not be shown. However, the supporting evidence must "establish that there is reasonable cause to believe that the [NLRA] has been violated, and that remedial purposes of the law will be served by *pendente lite* relief." *Id.* at 1051. "In those instances where [the Board] has determined that the standard for exercising its discretion has been met, the [basis] for such relief [has been] restricted to the existence of the prescribed circumstances in the provisions of Board Rule 520.15 set forth above." *Clarence Mack, Shirley Simmons, Hazel Lee and Joseph Ott v. Fraternal Order of Police/Department of Corrections Labor Committee, et al.*, 45 DCR 4762, Slip Op. No. 516 at p. 3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997). Moreover, the Board has held that preliminary relief is not appropriate where material facts are in dispute. See *DCNA v. D.C. Public Health and Hospitals Public Benefit Corporations*, 45 DCR 6067, Slip Op. No. 559, PERB Case Nos. 98-U-06 and 98-U-11 (1988).

We conclude that the Complainant has failed to demonstrate that the allegations, even if true, are such that the remedial purposes of the law would be served by *pendente lite* relief. Moreover, should violations be found in the present case, the relief requested can be accorded with no real prejudice to the Complainant following a full hearing. In view of the above, we deny the Complainant's Motion for Preliminary Relief.

Motion to Dismiss

DCPS contends that "it had no obligation to negotiate with the Union before implementing a new evaluation process for DCPS employees because the D.C. Code says the evaluation process for DCPS employees shall be a non- negotiable item for collective bargaining. Although DCPS was not obligated to negotiate or meet with the Union before implementing IMPACT, it met with Union officials concerning IMPACT and briefed them on it as a courtesy. Notwithstanding the clear and unambiguous language of the law, the Union alleged in the Complaint that DCPS failed to provide the Union with information before implementing the new evaluation process known as IMPACT and then using IMPACT to separate ineffective DCPS bargaining unit employees. Because DCPS was not obligated to negotiate with the Union before implementing IMPACT, it is impossible for DCPS to have committed an unfair labor practice, as alleged by the Union. Rather, DCPS went above and beyond its legal obligation by meeting with the Union before implementing IMPACT and this Complaint is frivolous and unsupportable in light of controlling District law. Furthermore, at no time did the Union demand impact and effects bargaining regarding the IMPACT instrument, its implementation or process. Therefore, DCPS moves to dismiss this Complaint, with prejudice, for failing to state a claim for which relief may be granted." (Motion at pgs. 1-2).

Board Rule 520.10 - Board Decision on the Pleadings, provides that: "[i]f the investigation reveals that there is no issue of fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral argument."

While a Complainant need not prove their case on the pleadings, they must plead or assert allegations that, if proven, would establish the alleged statutory violations. See *Virginia Dade v. National Association of Government Employees, Service Employees International*

Union, Local R3-06, 46 DCR 6876, Slip Op. No. 491 at p. 4, PERB Case No. 96-U-22 (1996); and *Gregory Miller v. American Federation of Government Employees, Local 631, AFL-CIO and D.C. Department of Public Works*, 48 DCR 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994). Also, the Board views contested facts in the light most favorable to the Complainant in determining whether the Complaint gives rise to an unfair labor practice. See *JoAnne G. Hicks v. District of Columbia Office of the Deputy Mayor for Finance, Office of the Controller and American Federation of State, County and Municipal Employees, District Council 24*, 40 DCR 1751, Slip Op. No. 303, PERB Case No. 9l-U-17 (1992). Without the existence of such evidence, Respondent's actions cannot be found to constitute the asserted unfair labor practice. Therefore, a Complaint that fails to allege the existence of such evidence, does not present allegations sufficient to support the cause of action." *Goodine v. FOP/DOC Labor Committee*, 43 DCR 5163, Slip Op. No. 476 at p. 3, PERB Case No. 96-U-16 (1996). Furthermore, when considering a motion to dismiss for failure to state a cause of action, the Board considers whether the alleged conduct may result in a violation of the CMPA. See *Doctors' Council of District of Columbia General Hospital v. District of Columbia General Hospital*, 49 DCR 1137, Slip Op. No. 437, PERB Case No. 95-U-10 (1995).

In the present case, the Union's Complaint alleges violations of D.C. Code § 1-617.04(a)(1) and (5). D.C. Code §1-617.04(a)(1) (2001 ed.), provides that "[t]he District, its agents and representatives are prohibited from: . . . [i]nterfering, restraining or coercing any employees in the exercise of the rights guaranteed by this subchapter[.]" [1] D.C. Code § 1-617.04(a)(5) provides that "[r]efusing to bargain collectively in good faith with the exclusive representative" is a violation of the CMPA.[2] Specifically, Complainant alleges that DCPS violated the CMPA by refusing to bargain in good faith and attempting to undermine the Union as the bargaining representative for the food service workers.

The Board finds that the Complainant has pled allegations that, if proven, would constitute a violation of the CMPA. However, as stated above, it is clear that the parties disagree with respect to a number of facts in this case. Specifically, the parties' dispute the nature and substance of the negotiations that took place throughout the period at issue. On the record before the Board, establishing the existence of the alleged unfair labor practice violations requires

[1] "Employee rights under this subchapter are prescribed under D.C. Code [§1-617.06(a) and (b) (2001ed.)] and consist of the following: (1) [t]o organize a labor organization free from interference, restraint or coercion; (2) [t]o form, join or assist any labor organization; (3) [t]o bargain collectively through a representative of their own choosing . . .; [and] (4) [t]o present a grievance at any time to his or her employer without the intervention of a labor organization[.]" *American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks*, 45 DCR 5078, Slip Op. No. 553 at p. 2, PERB Case No. 98-U-03 (1998).

[2] The Board notes that pursuant to the CMPA, management has an obligation to bargain collectively in good faith and employees have the right "[t]o engage in collective bargaining concerning terms and conditions of employment, as may be appropriate under this law and rules and regulations, through a duly designated majority representative[.]" *American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2921 v. District of Columbia Public Schools*, 42 DCR 5685, Slip Op. 339 at p. 3, PERB Case No. 92-U-08 (1992). Also, D.C. Code § 1-617.04(a)(5) (2001) provides that "[t]he District, its agents and representatives are prohibited from...[r]efusing to bargain collectively in good faith with the exclusive representative." Further, D.C. Code §1-617.04(a)(5) (2001ed.) protects and enforces these employee rights and employer obligations by making their violation an unfair labor practice.

credibility determinations about conflicting allegations. "The validation, i.e. proof, of the alleged statutory violation is what proceedings before the Board are intended to determine." *Jackson and Brown v. American Federation of Government Employees*, Local 2741, AFL-CIO, 48 DCR 10959, Slip Op. No. 414 at p. 3, PERB Case No. 95-S-01 (1995).

In addition, the Board finds that the circumstances presented in this case do not warrant a decision on the pleadings consistent with Board Rule 520.10. The issue of whether the Respondents' actions rise to the level of violations of the CMPA is a matter best determined after the establishment of a factual record, through an unfair labor practice hearing. Consequently, the motion to dismiss is denied, and the Board directs that this matter undergo an unfair labor practice hearing.

For the reasons discussed above, we: (1) deny the Respondents' Motion to Dismiss; (2) deny the Union's request for preliminary relief and a temporary restraining order and Cross-Motion; and (3) direct the development of a factual record through an unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation of State, County and Municipal Employees, District Council 20, Local 2921, AFL-CIO's Motion for Preliminary Relief (or Cross-Motion) is denied.

2. The District of Columbia Public Schools' Motion to Dismiss is denied.

3. The Board's Executive Director shall refer the American Federation of State, County and Municipal Employees, District Council 20, Local 2921, AFL-CIO' Unfair Labor Practice Complaint to a Hearing Examiner utilizing an expedited hearing schedule. Thus, the Hearing Examiner will issue the report and recommendation within twenty-one (21) days after the closing arguments or the submission of briefs. Exceptions are due within ten (10) days after service of the report and recommendation and oppositions to the exceptions are due within five (5) days after service of the exceptions.

4. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.

5. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

August 12, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and the Board's Decision and Order in PERB Case No. 10-U-49 are being transmitted via Fax and U.S. Mail to the following parties on this the 12th day of August, 2011.

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