

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	)	
	)	
International Brotherhood of	)	
Teamsters, Locals 639 and 730,	)	
	)	
Complainant,	)	PERB Case No. 88-U-10
	)	Opinion No. 226
v.	)	
	)	
District of Columbia	)	
Public Schools,	)	
	)	
Respondent.	)	

DECISION AND ORDER

On December 22, 1987 the International Brotherhood of Teamsters, Locals 639 and 730 (Teamsters) filed an Unfair Labor Practice Complaint with the District of Columbia Public Employee Relations Board (Board). The Complaint alleged that the District of Columbia Public Schools (DCPS) violated the Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Code Sections 1-618.4(a) (1) and (5) by its failure and refusal to supply certain information that was necessary and relevant to the Union's preparation for an arbitration hearing on a grievance concerning the demotion of a maintenance employee (Grievant).

The Grievant was employed as a Boiler Plant Foreman at Anacostia High School from May 29, 1985 until his demotion in 1987. The Teamsters requested the performance ratings of the Grievant's predecessors for 1984 and 1985, the preventative maintenance inspection records of Anacostia High School for 1983, 1984 and 1985, and the number of maintenance employees and their job descriptions at the school for 1983, 1984 and 1985. See Complaint, Attachment 2. <sup>1/</sup>

DCPS filed an Answer to the Complaint on January 6, 1988. DCPS denied that it committed an unfair labor practice, claiming that both employee performance ratings and maintenance inspection records were confidential, and therefore urged dismissal of the Complaint.

<sup>1/</sup> DCPS provided the number of employees and their job classifications to the Teamsters, as requested, for the preceding three (3) years. Therefore, the furnishing of this information is not an issue in this Complaint.

The Board referred the Complaint to a Hearing Examiner, who heard the matter on September 16, 1988. The Hearing Examiner's Report, and Recommendation was received by the Board on January 27, 1989. <sup>2/</sup>

The Hearing Examiner noted in his report that an arbitration hearing concerning the grievance had been conducted on June 10 and July 12, 1988. During the arbitration proceedings the Arbitrator ordered DCPS to produce the maintenance inspection records, while denying the Union's request for production of the performance appraisals. The arbitration award, dated September 13, 1988, upheld the grievance, and reinstatement of the employee to his original higher level position was ordered, along with back pay.

The Hearing Examiner recommended in his Report that the Complaint allegation concerning the refusal of DCPS to provide the maintenance records be sustained. He concluded, however, that because of confidentiality concerns, DCPS was not obliged to provide the Union with the performance appraisals of the Grievant's predecessors and its refusal to do so did not constitute an unfair labor practice.

On February 17, 1989, DCPS timely filed Exceptions to the Hearing Examiner's Report and Recommendations, along with a supporting memorandum. DCPS excepts to the Hearing Examiner's findings and conclusions that: (1) the Union carried its burden of proof that the maintenance records were relevant and necessary to the Union's representational functions; (2) the maintenance records were not privileged; (3) the production of the maintenance records pursuant to an arbitral subpoena does not render the unfair labor practice complaint moot; (4) maintenance records are presumptively relevant whenever the matter involves performance-based discipline of a member of the maintenance staff; and (5) DCPS engaged in bad faith bargaining by refusing to provide the Union with the requested maintenance inspection records. (DCPS Exceptions, p. 1-2).

The Board, after reviewing the record, adopts the findings of fact and conclusions of law set forth in the Hearing Examiner's Report and Recommendation (hereinafter "R & R"), except as modified below.

DCPS, in Exception No. 1, alleges that the basis for the demotion was the failure of the Grievant to perform satisfactorily as a boiler plant foreman and not the unsatisfactory condition of the building. Thus, according to DCPS the maintenance inspection

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<sup>2/</sup> The Report is attached hereto as Appendix 1.

records were not relevant or necessary to the Union's preparation for the arbitration hearing.

The Hearing Examiner, however, found that the Union had demonstrated the relevance and necessity of the maintenance inspection records because the demotion of the Grievant was based on subsequent records of the same type. (R&R at 13). The Hearing Examiner found these records vital in assessing the Grievant's performance. As the Hearing Examiner noted, the letter informing the Grievant of his demotion specifically referenced a preventative maintenance report (though none of the deficiencies referenced therein were charged to the Grievant). Thus the Hearing Examiner concluded that there was a relationship between the maintenance inspection records and the Grievant's performance, which was the basis for the demotion. It is the Board's view that DCPS has failed to demonstrate that the Hearing Examiner's factual findings and legal conclusions on this issue were clearly erroneous and should be set aside.

DCPS also claims, citing C.B. Buick, Inc. v. NLRB, 506 F.2d. 1086 (3rd Cir. 1974), that the Hearing Examiner erred by not applying the appropriate standard, which is whether the information requested is presently relevant to the Union's representational duties. C.B. Buick, however, dealt with whether the enforcement of an order of the National Labor Relations Board (NLRB) that the employer supply information to the union is required when the information sought is no longer "presently relevant" at the time enforcement is sought.

The Court in C.B. Buick carefully observed that the NLRB's order did not contain a cease-and-desist sanction which would subject the employer to contempt proceedings in the event that the offending conduct was repeated. The Court found that the NLRB was ordering the employer to furnish data which was no longer relevant and necessary to the union since the negotiations for which the information was originally requested had concluded. This result, the Court concluded, would not effectuate the policies of the Act. (506 F.2d. at 1089).

Therefore, we reject DCPS's contentions that based on C.B. Buick the information sought by the Union is presently relevant and has been rendered moot by the Respondent's compliance with the arbitral order to furnish these documents. While we are not willing to adopt the Hearing Examiner's recommendation that maintenance inspection records are presumptively relevant in

performance-based actions involving maintenance employees,<sup>3/</sup> we nonetheless conclude that DCPS's conduct in not furnishing this information upon request undermined productive good-faith bargaining and thereby violated the letter as well as the spirit of the CMPA. Under the circumstances, we find that a cease-and-desist order is warranted.<sup>4/</sup>

Moreover, the Board agrees with the Hearing Examiner that the requested maintenance records were both relevant and necessary to the Union's handling of the grievance since, as the Hearing Examiner found, the demotion was based in part on these types of records.<sup>5/</sup> Cf. NLRB v. Truitt Mfg. Co. 351 U.S. 149 (1956); NLRB v. ACME Industrial Co., 385 U.S. 432 (1967)

The Board is not persuaded that DCPS's compliance with the arbitral order to provide the maintenance inspection records to the Union moots that portion of the unfair labor practice complaint. In University of the District of Columbia/National Education Association and University of the District of Columbia, 31 DCR 4156, Opinion No. 92, PERB Case No. 84-U-11 (1984), Reconsideration denied 32 DCR 2511, Opinion No. 106, (1985), which is relied upon by DCPS to support its claims that the instant complaint is moot, one of the parties failed to attend the first collective bargaining session dealing with a successor collective bargaining agreement. The parties, within a short period of time resumed bargaining and the Board dismissed that case in part for mootness. That case is not apposite here. In this case, DCPS refused to furnish the Union with necessary and relevant information during the entire period of the Union's preparation for an arbitration hearing, thus denying it the opportunity to prepare. Compliance

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<sup>3/</sup> The Board finds it more appropriate to deal with such questions on a case-by-case basis.

<sup>4/</sup> Contrary to DCPS's exceptions, we find nothing in the Hearing Examiner report that concludes that DCPS's conduct was indicative of "bad faith" bargaining. The Hearing Examiner has concluded that DCPS has failed and refused to honor its affirmative obligation to bargain in good faith; but there is no conclusion or findings in support of a conclusion that such conduct on the part of DCPS amounts to bad faith bargaining.

<sup>5/</sup> The Board agrees with the Hearing Examiner's findings and conclusions that "[i]n the absence of an articulated or documented DCPS position which justifies a policy of confidentiality as to records of this type, the record in this case does not support either its initial refusal to disclose or the attendant delay in production." (H.E. Report at 13.)

with the arbitral order thereafter cannot moot the violative conduct. Cf. Pennco Inc., 212 NLRB 677 (1974). <sup>6/</sup>

The Board finds the Report and Recommendation to be well reasoned and adopts it in its entirety, except as herein noted. The Board rules that on the basis of the undue delay by DCPS in providing the Teamsters with the requested information, which the Board deems was necessary and relevant to the Union's representational function, DCPS violated Sections 1-618.4(a)(1) and (5) of the D.C. Code.

ORDER

IT IS ORDERED THAT:

- 1) DCPS has violated D.C. Code Sections 1-618.4(a) (1) and (5);
- 2) DCPS shall post the attached Notices conspicuously at the affected employee work sites;
- 3) DCPS shall notify the Public Employee Relations Board, in writing, within fourteen (14) days of this Order that the Notices have been posted accordingly.

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

June 19, 1989

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<sup>6/</sup> In support of its mootness argument DCPS also relies on Glaziers Wholesale Drug Co., 211 NLRB No. 155. However, in that case the union had failed to prove the relevancy of the information.



Public  
Employee  
Relations  
Board

Government of the  
District of Columbia

415 Twelfth Street, N.W.  
Washington, D.C. 20004  
(202) 727-1822/23



# NOTICE

TO ALL EMPLOYEES IN THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE GOVERNMENT OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 226 PERB CASE NO. 88-U-10.

WE HEREBY NOTIFY our employees that the Government of the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL cease-and-desist from failing and refusing to timely honor requests by the International Brotherhood of Teamsters, Local 639 and 730 for information necessary and relevant to its representational functions.

WE WILL NOT in any like or related manner interfere with restrain or coerce our employees in the exercise of rights guaranteed them by the Comprehensive Merit Personnel Act.

District of Columbia Public Schools

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Superintendent

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning the Notice or compliance with any of its provision, they must communicate directly with the Public Employee Relations Board, whose address is: 415-12th Street, N.W. Suite 309, Washington, D.C. 20004

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
PUBLIC EMPLOYEE RELATIONS BOARD



\* \* \* \* \*  
IN THE MATTER OF: \*

International Brotherhood of \*  
Teamsters, Locals 639 & 730 \*

Complainant, \*

and \*

District of Columbia \*  
Public Schools, \*

Respondent. \*

PERB Case No.  
88-U-10

\* \* \* \* \*

REPORT AND RECOMMENDATION

I.

STATEMENT OF THE CASE

This case arises under the District of Columbia Government Comprehensive Merit Personnel Act of 1978<sup>1/</sup> (the "Act" or "CMPA") and concerns unfair labor practice ("ULP") charges filed pursuant to the Act by the Complainant union locals (the "Union"). The case concerns whether the District of Columbia Public School system ("Respondent" or "DCPS"), acting in its dual capacity as an employer and a keeper of [management] records, violated CMPA sections 1704(a)(1) and (5), D.C. Code section 1-618.4 (a)(1) and (5). The cited provisions basically declare that it shall be an ULP for an employer to fail or refuse to bargain in good faith with the certified representatives of its employees. The Respondent is alleged to have violated the Act by failing to comply with requests by the Union for certain information in connection with a grievance filed by one of its members under the applicable negotiated grievance procedure. As part of its ULP complaint, the Union also seeks reimbursement for certain costs associated with the filing of the charge and with a related arbitration hearing. Hearing Transcript ("H.T.") at 5.

II.

BACKGROUND:

On December 21, 1987, the Union filed unfair labor practice charges against the DCPS with the District of Columbia Public Employee Relations Board ("PERB"). Respondent answered the

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<sup>1/</sup> D.C. Law 2-139, D.C. Code sections 1-601.1 et seq. (1981).

complaint on January 6, 1988, by denying the allegations of unfair labor practices charged. It also asserted in its answer that the PERB is not statutorily empowered to order Respondent to reimburse the Union for costs related to the alleged ULP violations or the associated arbitration proceeding.

By notice of July 29, 1988, the parties were notified by the PERB that it had completed its own preliminary investigation of the charges pursuant to Section 502(c) and (g) of CMPA and Board Rules 103.6 and 103.9. The parties were further notified that a hearing had been scheduled in order to afford them an opportunity to present documentary evidence and give testimony with respect to the ULP charge. Examiners' Ex. No. 1.

The hearing of the unfair labor practice charge before this hearing examiner was held on September 16, 1988, in the offices of PERB though, significantly, following a grievance arbitration hearing of June 10, and July 12, 1988, under the parties collective bargaining agreement, Examiner's Ex. No. 4, before Arbitrator Roger P. Kaplan concerning the demotion of bargaining unit member Martin F. Proctor by the Respondent/employer. <sup>2/</sup>

As related by Arbitrator Kaplan, the key factual circumstances which bear on the issues for consideration here appear to be as follows:

- 1) Martin F. Proctor is an employee with approximately 23 years of seniority with the Respondent/employer;
- 2) Effective August 17, 1987, Mr. Proctor was demoted from his position as a Boiler Plant Operator Foreman, SW-8/5, at Anacostia Senior High School, Washington, D.C. (a position which he had held for approximately 12 years at at least two different schools) to the position of Boiler Plant Operator, RW-09;
- 3) The demotion was preceded by a demotion letter of July 27, 1987, issued by Mr. Andrew Weeks, Director of the Division of Building and Grounds, which generally alleged poor or unsatisfactory work performance by Mr. Proctor;
- 4) While the July 27, 1987 letter listed five (5) reasons or specifications for the proposed demotion, four of the five can fairly be described as performance-based criticisms. However, one of the reasons cited had to do with a July 1, 1987, report of preventive maintenance indicating unsatisfactory findings in Proctor's area of

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<sup>2/</sup> By mutual agreement of the parties, the facts of this matter, as set forth in Arbitrator Kaplan's Opinion and Award of September 13, 1988, AAA Case No. 16-39-00393-87L, have been stipulated to as a complete and accurate portrayal of the relevant background facts needed to understand and decide the issues presented here. See Joint Exhibit No. 1.

responsibility. The Arbitrator notes that the preventive maintenance report, "listed 102 deficiencies at Anacostia High School. Although there were 102 deficiencies listed, none were charged to Proctor, the Boiler Plant Operator Foreman." Joint Exhibit No. 1 at 7.

- 5) "Several preventive maintenance inspections were conducted at Anacostia High School between February 1987 and August 1987. The February 10, 1987 preventive maintenance inspection report rated the facility as unsatisfactory. There were 154 deficiencies listed at Anacostia. Proctor was charged with 72 of these deficiencies. Of these 72 deficiencies, each of 60 missing faucets was counted as a separate deficiency. The Union claimed that a work request was submitted for the 60 faucets in 1985. These faucets did not arrive until 1987. Proctor stated that when these faucets did arrive, they were the wrong type of faucets and could not be installed. In addition, the Union contended that many of the deficiencies resulted from the univents being dirtied by the private contractors attempting to repair the property. Proctor testified that he did not receive the preventive maintenance report of February 10, 1987 until the later part of February. On March 2, 1987, another preventive maintenance inspection was conducted. This inspection reported the same results as the February 10th inspection." Joint Exhibit No. 1 at 7-8.
- 6) Another preventive inspection was conducted on June 30, 1987. As noted above, supra at No. 4, this report, citing 102 deficiencies none of which were charged to Proctor, rated Anacostia High School as unsatisfactory. Joint Exhibit No. 1 at 8.
- 7) "The final preventive maintenance inspection was conducted on August 10, 1987. The reinspection indicated that 37 deficiencies had been completed, but that 65 deficiencies remain at the school. Still, none of the deficiencies were found to be chargeable to Proctor." Joint Exhibit No. 1 at 8.
- 8) On July 31, 1987, a grievance was filed by Mr. Proctor for the purpose of contesting his demotion.
- 9) Prior to his proposed demotion and subsequent grievance, it was found that the grievant, who had begun his career with DCPS as a laborer in 1965, had been performing as a Boiler Plant Operator for approximately 12 years; had been transferred to Anacostia High School on May 29, 1985, following a term in a similar position at the Friendship Educational Center, and that he had secured a 3rd class engineer's license in 1970 which qualified him to perform in the position of Boiler Plant Operator Foreman. Joint Exhibit No. 1 at 5.

The Arbitrator also found that:

- 10) Until his demotion in 1987, Mr. Proctor had always received satisfactory performance ratings though he had received "a few written reprimands" during his DCPS employment and a three (3) day suspension for gross neglect of duty during his tenure at Anacostia High School which he served in May of 1986. Joint Ex. No. 1 at 5.
- 11) With respect to his employment at Anacostia High, that the school had suffered a serious fire in 1985 and that evidence of the "extensive damage" caused by the fire was "still prevalent" in 1987. Specifically, the Arbitrator found that, "There was no dispute that when Proctor arrived at Anacostia, the physical plant of the school was in need of repair. There was also no dispute that when Proctor assumed his duties in 1985, Anacostia High School had not been properly maintained. This was evidenced by the recent failure of Anacostia to pass two maintenance inspections. Joint Ex. No. 1 at 6.
- 12) Prior to Proctor's arrival at Anacostia, his predecessor had been assigned three (3) subordinates yet, shortly after Proctor's arrival, the number of subordinates was reduced to two (2) neither of whom possessed a required 6th class engineer's license. Joint Ex. No. 1 at 6.
- 13) Prior to Proctor's transfer to Anacostia in 1985 and the retirement of his predecessor Boiler Plant Operator Foreman in 1987, Anacostia High School had failed two (2) maintenance inspections -- even with a larger maintenance staff. Joint Ex. No. 1 at 6.
- 14) Evidence was adduced indicating that Proctor had made "numerous" requests for repair related materials and that many of these materials were never secured. In addition, some of the requested materials, once secured, did not fit and could not be installed. Joint Ex. No. 1 at 6-7.
- 15) A demotion letter was issued to Mr. Proctor on July 27, 1987, from Mr. Andrew Weeks, Director of the Division of Building and Grounds, listing five (5) reasons for the action. Although, taken together, the five reasons amount to generalized allegations of poor performance, the specific grounds were:

- a) unsatisfactory work performance in the areas of quantity, quality, work habits, personal relations, adaptability and supervision and planning as set forth in a March 4, 1987 memorandum to Proctor from a Mr. Pollard, the Regional Facility Manager.<sup>3/</sup>
- b) a "below average" performance rating that Proctor received for the period covering April 1, 1986 to March 31, 1987. Proctor was found to be unsatisfactory in the work areas of quantity and work habits.
- c) a July 1, 1987 report of preventive maintenance indicating unsatisfactory findings in Proctor's area of responsibility -- though none were charged to Proctor, see Finding No. 4, supra at 3.
- d) a memorandum dated July 27, 1987, from Pollard to Proctor informing the latter of "unsatisfactory work performance." Joint Ex. No. 1 at 7.

Following the invocation of the negotiated grievance mechanism with the filing of Mr. Proctor's July 31, 1987, grievance contesting his demotion, the Union began the process of analyzing and investigating the grievance and made requests for certain allegedly relevant information from the Respondent which set the stage for and lie at the heart of the subsequent ULP charges. By letter of November 13, 1987,<sup>4/</sup> the Union's Trustee and Business Agent, Mr. Roy Essex, requested of Mr. Kenneth Nickoles, the Director of Labor Relations for DCPS, the following information which was said to be "necessary and relevant to our investigation and the preparation of the grievance of Martin Proctor." The information requested (within 10 days) was as follows:

- 1) The performance rating for the Boiler Plant Operating Foreman at Anacostia Senior High School for the years of 1984 and 1985.

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<sup>3/</sup> An earlier memorandum from Pollard to Proctor, dated December 23, 1986, allegedly informed him of "performance problems" but because this letter could not be located, it was never introduced into evidence at the arbitration hearing. As a result, the five separate reasons set forth for Proctor's demotion were, in reality, reduced to four (4).

<sup>4/</sup> Attachment B to Examiner's Ex. No. 2.

- 2) The preventive maintenance inspections for the years 1983, 1984 and 1985 at Anacostia High School.
- 3) The number of employees and their job descriptions in the Engineers Unit at Anacostia Senior High School for the years of 1983, 1984 and 1985.

On December 2, 1987, the Union, per Mr. Essex, received the DCPS response which denied the information requested in items 1 and 2, supra, as confidential material and provided the information on employees and their job descriptions as requested in item 3. Attachment C to Examiner's Exhibit No. 2. The information on employee performance ratings was conditionally denied, i.e. DCPS's response was that it could be released only with the signed release of the employee concerned, while the maintenance inspection reports were unconditionally denied<sup>5/</sup> as "confidential, internal material." Id.

It is this action of denying requested information which the Union, in its Unfair Labor Practice Complaint of December 21, 1987, cites to as violative of CMPA Sections 1704 (a)(1) and (a)(5).

### III.

#### ISSUES PRESENTED

1. Whether Respondent's failure and refusal to provide the Union with material which was specifically requested in order to aid the Union in its performance of representative responsibilities under an existing negotiated grievance procedure constitutes an unfair labor practice in violation of Section 1704(a)(1) and (5) of the CMPA?

2. Whether the nature of the material requested by the Union--performance ratings and maintenance inspection reports -- or the reasons advanced by the DCPS for their refusal to comply with the Union's requests i.e., confidentially and privileged internal management data, militates against the finding of an unfair labor practice?

3. Whether the DCPS's subsequent production of requested maintenance inspection reports at an arbitration hearing renders the unfair labor practice charge moot as to that information?, and

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<sup>5/</sup> The maintenance inspection reports were subsequently provided by the DCPS at the hearing before Arbitrator Kaplan. The reports were provided pursuant to a subpoena issued by the Arbitrator. (H.T. at 26).

4. Whether the DCPS must reimburse the Union for any and all costs, including costs associated with a delay in the scheduled arbitration hearing date, if any portion of its unfair labor practice complaint is sustained by the PERB?

IV.

POSITIONS OF THE PARTIES

a. The Union (Teamsters Locals 639 and 730)

The Union alleges that unfair labor practices were committed by the Respondent in denying to the Union certain necessary and relevant information which was allegedly required in order to investigate and prepare its case for grievance arbitration. The refusal to supply this information constituted a violation of CMPA, D.C. Code Section 1-618.4(a)(1) and (5). By way of remedy for the alleged violation, the Union ask that Respondent be ordered to provide all of the requested information and post appropriate notices. Also, the Union seeks reimbursement for all costs resulting from the violation, including any costs resulting from the delay and/or cancellation of the originally scheduled arbitration hearing.

b. District of Columbia Public Schools (Employer)

DCPS ask that the Union's request for withheld information be denied. Requested material was denied pursuant to District of Columbia laws, rules and regulations which it was bound to follow and to the established policy of DCPS to protect the confidentiality of its employees as well as its internal management operations. For these reasons, DCPS asserts that the Union has failed to state a claim which supports the charge of unfair labor practices and ask that the complaint be dismissed. DCPS also asserts that the PERB is not authorized to order them to reimburse the Union for costs incurred as a result of the alleged violations, including those costs associated with delayed arbitration hearing(s).

V.

APPLICABLE STATUTORY PROVISIONS

1. D.C. Code Section 1-618.4

(a) The district, its agents and representatives are prohibited from:

(1) Interfering, restraining or coercing any employee in the exercise of the rights guaranteed by this subchapter;

\* \* \* \* \*

(5) Refusing to bargain collectively in good faith with the exclusive representative.

## 2. D.C. Code Section 1-618.13

(a) Remedies of the Board may include, but shall not be limited to, orders which: Withdraw or decertify recognition of a labor organization; direct a new representative election; recommend that disciplinary action be taken against an employee or group of employees by an appropriate agency head; reinstate with or without back pay, or otherwise make whole, the employment or tenure of any employee, who the Board finds has suffered adverse economic effects in violation of this subchapter, though for adequate cause under the provisions of subchapter XVII of this chapter; compel bargaining in good faith; compel a labor organization or the District to desist from conduct prohibited under this subchapter; or direct compliance with the provisions of this subchapter.

(d) The Board shall have the authority to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may determine.

## VI.

DISCUSSION AND CONCLUSIONS OF LAW

Clearly, the central concern of this case is the question of information sharing and more specifically, the employer's duty to furnish such to the union which represents its employees, in the context of good faith collective bargaining under a negotiated agreement. The complaint alleges, in substance, that the Respondent has refused to bargain in good faith with the Union and to comply with the law by failing and refusing to furnish the Union with information which is relevant and necessary to the intelligent performance of its collective bargaining duties in a contract administration function, i.e., representation in a grievance proceeding.

Because the Respondent/employer's response involves an equally well established legal duty, i.e., the employer's duty to protect the privacy rights of its employees<sup>6/</sup>, important and respected labor relations policy considerations exist on both sides on the contested issues. Those policies: the employer's duty to protect the privacy of its employees and the Union's duty to represent employees and to enforce the collective bargaining agreement must be analyzed and balanced in order to arrive at a

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<sup>6/</sup> See, in this regard, the statutes and regulations submitted in evidence as Respondent's Exhibit No. 1. Specifically entered into evidence were: the D.C. Code provision at section 1-1524 (Exhibit 1-A) regarding material which is exempted from disclosure requirements; D.C. Code provision at section 1-632.3 (Exhibit 1-B) regarding the disclosure of personnel information; section 1315 of D.C. Municipal Regulations on Records Management and Privacy of Records (Exhibit 1-C) and Part I, Chapter 31A of D.C. Personnel Regulations: Records Management and Privacy of Records.

resolution here. In addition to these considerations is the one which generally and normally holds the employer to a duty of furnishing necessary and relevant information to the certified bargaining representatives of its employees.

a. The Right to Information/The Presumption of Relevance

The Union contends that once Mr. Proctor grieved his demotion in the summer of 1987, it requested the information described above from the employer. This information, contends the Union, was both necessary and relevant to it in its "investigation and evaluation" of the grievance and the Respondent refused to provide it because, in its view, the Union was not entitled to receive it under CIPA. (H.T. at 6-7). Moreover, the Union contends, its request was specifically tailored to obtain information which it had to have in order to provide effective representational assistance and not a "fishing expedition." In the absence of the requested information, "the Union was faced with a decision whether to proceed to arbitration without that information or not" and ultimately, "was forced to go to arbitration because it could not obtain information which was needed to evaluate the case." (H.T. at 7-8).

The Union correctly asserts that the issue of its entitlement to the requested information is a matter of "fundamental labor law" (H.T. at 6) and, as such, a matter which is subject to the relevant guidance which can be gleaned from the decisions of the National Labor Relations Board (NLRB) and the federal courts under the National Labor Relations Act, as amended 29 U.S.C. sections 151-169 (1982). See, Fraternal Order of Police, PERB Opinion No. 94 (1984) (regarding the PERB's willingness to accept NLRB decisions as precedent on issues concerning the commission of unfair labor practices). Indeed, there is no real dispute between the parties over the general proposition that, as a matter of law, an employer must provide a bargaining representative with information which the employer possesses that is needed for the proper performance of a representative's bargaining duties. NLRB v. Truitt Mfg. Co. 351 U.S. 149 (1956). Moreover, the Supreme Court has held that the duty to disclose, "unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." NLRB v. Acme Industrial Co. 385 U.S. 432, 436 (1967) (and cases cited therein). However, as Respondent notes, a union's right to information, while broad, is not unlimited or automatic. The NLRB, which has adopted a rule of presumptive relevancy with regard to information concerning wages and related financial benefits, NLRB v. Yawman & Erbe Mfg. Co., 27 LRRM 2524 (2d Cir. 1951); International Union of Electrical, Radio, and Machine Workers v. NLRB, 105 LRRM 3337 (D.C. Cir. 1980),

and thus requires disclosure of such information unless it is plainly irrelevant, has adopted a case-by-case determination approach for other kinds of arguably "relevant" requested information. The Supreme Court, in Truitt Mfg. Co., supra, has also endorsed the the case-by-case approach and rejected a rule which would call for an automatic finding of bad-faith bargaining whenever an employer rejects a request for relevant information.

In this case, the record reveals that the Union, which has the burden of proving the relevancy and/or necessity of the information requested, has joined the issue by two of its requests -- one for the performance appraisals of Mr. Proctor's predecessor as the Boiler Plant Foreman and another for certain maintenance inspection reports which bear on the condition of the Anacostia High School physical plant. In a situation where an employee/bargaining unit member was disciplined by DCPS for "poor performance" and in a real sense blamed for the condition of the school building, the requested information certainly appears at least relevant, if not necessary, to the Union's legitimate administration and representational functions. The Union goes further, arguing that the employer's refusal to provide the information is tantamount to a refusal to meet and confer with it, Union's Post-Hearing Brief (UB) at 3, and that, as information pertaining to a bargaining unit member, it is "presumptively relevant." UB at 4. As noted above, this position goes beyond the current state of the law but the Union's burden is satisfied by the mere showing of relevance and I find that they have met that burden. In light of a factual record which reveals a physical plant that was in need of repair when Proctor arrived, Joint Ex. No.1 at 6,; had not been "properly maintained" prior to Proctor's assumption of foreman duties in 1985, id at 6, and had failed two inspections prior to the period of Proctor's sole responsibility, the Union's request seems to be a reasonably tailored one, aimed at securing comparative information with which to either analyze Proctor's grievance or defend it, or both. DCPS arguments to the contrary -- that the grievance concerned merely the physical condition of the school and the grievant's failure to satisfactorily perform his duties -- is without merit. It is clear that the crucial issues in arbitration had to be the proportion of blame, if any, which could be attributed to Proctor as opposed to other employees, or other factors beyond his control and, thus, the reasonableness of his demotion.

As a result, I find that the Union has carried its initial or threshold burden though this in itself does not dispose of the ultimate ULP issue. Since DCPS's refusal was based at least in part upon considerations of the confidential and private nature of the information sought, a further analysis of their conduct and reasoning is necessary.

b. The Specific Information Sought and the Bases For DCPS' Refusal

By the time the arbitration hearing commenced in June of 1988, (after having been postponed from its originally scheduled

date in February of 1988) the Union had been supplied, to its satisfaction, with one of the three pieces of information originally sought -- the number of employees and their job descriptions in the Engineer's Unit at Anacostia High for the years 1983, 1984 and 1985. Examiners Ex. No. 2(C) and H.T. at 27. Thus, the only items remaining from its original request of November 13, 1987, were ones involved in this dispute.

With regard to that information, the Respondent defends its refusal to disclose on the basis of distinctly different legal theories which require distinct analysis here. Generally, however, Respondent's position, as noted above, is that the prosecution of the Proctor grievance should have gone forward without any information which did not directly relate to the issue of Proctor's individual performance. The Union, for its part sees its mission in broader terms -- Proctor's performance should be viewed in the context of those who had preceded him in the job and the condition of the facility he inherited. From the standpoint of fairness alone, the Union's intent is noble but the employer's duty to supply information is, under the applicable standard of Truitt Mfg. Co., supra, a flexible one which turns on the circumstances of the particular case. Much the same may be said for the type of disclosure which will satisfy that duty. Detroit Edison Company v. NLRB, 440 U.S. 301, 314-315 (1979).

The Performance Appraisals (1984 and 1985) of the Grievant's Predecessor

DCPS's challenge to the Union on this matter relates to its relevance, its confidential nature and the Union's failure to seek the consent of the predecessor which would have allowed the employer to ignore its responsibilities regarding the protection of its employee's privacy.

The Union does not deny its failure to seek the predecessor's consent (though it did, apparently, offer to accept "sanitized" versions of the documents, H.T. at 22)<sup>7/</sup> but argues instead that the appraisals are "presumptively relevant" to the demotion of the grievant under liberalized, "discovery-type" standards of disclosure applicable to information sharing in the labor relations context. UB at 4.

Under the circumstances, I find the Union's position amounts to little more than a bare assertion of relevance which is insufficient under the law to establish its right to this particular information. See, Detroit Edison, supra, at 317-320 (where the employer's refusal to disclose individual psychological test scores was upheld in the face of union arguments of relevance to its processing of a grievance). Here, as in Detroit Edison, the employer's interest in preserving the

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<sup>7/</sup> Though the facts indicate that sanitizing would not have been of much use in any event since the identity of the predecessor would have been obvious from the calendar years in question. H.T. at 39, 40.

confidence of its employees that their personnel records (or other personal type information) will be secure from the scrutiny of outsiders without their consent has been established and outweighs the Union's interest in processing the grievance. Even if one assumes the relevance of the appraisals to the Union's case, that consideration does not predominate over the employer's legitimate and demonstrated interest in maintaining the confidence of its employees. Moreover, from a more practical standpoint, the Union was able to successfully prosecute the grievance in the absence of the information and, most importantly, presented no evidence whatsoever that it took any action to obtain the consent, or waiver of confidentiality, from the affected employee. Without doing all that it could to seek the employee's consent, the Union cannot legitimately charge the employer with bad faith bargaining under the Act. This is not to suggest that a lack of harm suffered is the standard for measuring the relevance of information, or that the appraisals were not relevant to this matter simply because the Union was able to put together a case without them but, rather, that under the circumstances of this case, the possible impairment to the function of the Union in processing its grievance is justified and overcome by the employer's competing interest in preserving its confidential system of personnel records.

#### The Maintenance Inspection Reports

The Union's request in this regard relates not to the personal details of an employee's service record but to records which concern the condition of the facility. Significantly, the employer's defense to the ULP charges all appear to be geared towards the issue of its employees' personal privacy. See, Respondent's Exhibit No. 1. While Respondent has firmly established a government policy against the unwarranted disclosure of information of a personal nature, it offers little at all by way of defending its failure to disclose the requested inspection reports -- until ordered to disclose them by the arbitrator. Even its most relevant submission in this regard, the Freedom of Information provisions of the D.C. Code, Respondent's Exhibit 1-A, provides little by way of support for its refusal to disclose maintenance inspection records. See, the "Exemption from disclosure" provision at section 1-1524. As a result, the employer is reduced to defending on the basis of: a) a generalized position on the confidentiality of internal management operations and b) arguing that its production of the documents in response to an arbitral subpoena renders its initial refusal a moot issue. As to the former, I can find no basis in the law or the hearing record for such a generalized exception to the ordinarily broad duty to disclose. As to the latter, as discussed below, the question is whether the employer's action is capable of being repeated if review is precluded or evaded at this time.

An employer's claim of confidentiality or privacy will generally not stand scrutiny once information is proven to be both relevant and necessary to a union's legitimate collective bargaining functions. NLRB v. Acme Industrial Co., 385 U.S. 432

(1967). In light of the general duty to disclose which the law places upon employers, the key factual determination which this case requires is whether the inspection reports were truly necessary to enable the Union to intelligently evaluate the grievant's case. Moreover, as the Union notes, the promptness of the employer's response should also be considered in determining whether the goals of effective collective bargaining have been frustrated. Unwarranted and/or unjustified delays in the submission of pertinent information obviously frustrates the efficient functioning of grievance processing and such delay has been held to constitute a violation of the duty to bargain. Pennco Inc. 212 NLRB 677, 678 (1974).

The facts of this case reveal a physical plant which had been ravaged by fire in 1985 and had never been fully renovated in the fire's aftermath. In addition, it is clear that Mr. Proctor was not alone in failing to deal with the building's physical condition; that he was working with a staff that was both shorthanded and not fully competent under the required licensing standards, and that he had requested materials to help him in his job which were either not delivered or not sufficient for the desired purpose. See Joint Exhibit No. 1. As a result, it becomes clear that previous maintenance reports were vital to a determination of how well Proctor was performing. This is especially so when subsequent inspection reports were relied upon by Respondent in arriving at the decision to demote. See, p.5, item (c), supra. Even if, as DCPS claims, Proctor's performance exaggerated the problems and even if, as they further claim, maintenance problems were only part of the reason for his demotion, the matter of the degree of Proctor's responsibility remains. In examining that issue, the only possible analysis is a comparative one and that is impossible without records which facilitate comparison. In the absence of an articulated or documented DCPS position which justifies a policy of confidentiality as to records of this type, the record in this case does not support either its initial refusal to disclose or the attendant delay in production. The scenario here does not reflect productive collective bargaining. To the contrary, the refusal to promptly and voluntarily disclose the requested reports when there seems to have been no specific policy prohibiting their disclosure violates the spirit and the letter of the Act.

c. The Issue of Maintenance Inspection Report Production Has Not Been Made Moot

Respondent argues that their production of the maintenance inspection records in response to an arbitral subpoena renders the unfair labor practice charge moot as regards that information. "Since the arbitration proceeding has occurred and an arbitration award has been entered, the issue concerning the production of information is moot." Respondent's Post-Hearing Brief (RB) at 12.

The Union argues that the case is "live" and not moot because not all of their requested information has been provided, i.e.,

the requested performance ratings and, because the issue of DCPS's failure to disclose has evaded review in this case and yet is capable of repetition. UB at 7. In addition, the Union alleges that the wrongful behavior here could reasonably be expected to recur. Id. at 6.<sup>8/</sup>

In a sense, both parties are correct and, yet, the Union has too broadly stated its concerns because there is no longer a live case as to the performance appraisals. The grievance has been heard and decided without them. In addition, there are all types of conduct which are theoretically capable of being repeated. Respondent is correct in asserting that the arbitration of this case has been concluded; that decision making tribunals should not engage in speculative rulings on theoretical issues and that the production of information is generally to be decided on a case by case basis. However, Respondent's argument that, "there is no reasonable expectation that the production of that information would be considered relevant or necessary in the investigation or evaluation of a completely different grievance," (RB at 13) has disturbing long-range implications and fails to address the issue of whether their wrongdoing with regard to maintenance inspection reports is capable of repetition. As noted, the concern of the Respondent with regard to the privacy of personnel records is adequately documented and justified by governmental regulations. There appears to be, however, no corresponding legislation or regulation which regulates the disclosure of institutionally generated reports such as the one at issue here. Mr. Proctor was engaged in maintenance activities at the time of his demotion (H.T. 30,31) and, as described by his Union representative, inspection reports of the type at issue here are regularly done to determine a facility's compliance with the school board's preventive maintenance program (H.T. at 23). It appears to this examiner that whenever a member of the school system's maintenance staff is slated for performance based discipline, Union requests for recent inspection reports would be reasonably forthcoming. If the DCPS is left with an impression that these reports are subject to the laws regarding privacy or confidentiality of personnel records -- as they could very well be if this issue evades review here, it most definitely is a matter which is capable of recurrence.

Thus, I deny Respondent's request to have the issue of maintenance inspection report production declared as moot in this instance because I find the matter to be capable of repetition in light of the DCPS's flawed legal position that inspection reports

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<sup>8/</sup> The Supreme Court, in Sosna v. Iowa, 419 U.S. 393 (1975) has found the capable of repetition, yet evading review doctrine to be limited to the situation where two elements are combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. I find both of these conditions are satisfied in the circumstances of the legal dispute here over the production of maintenance inspection reports.

are akin to personnel records. My recommendation to the Board is that these reports be declared as presumptively relevant to the performance-based grievances of appropriate maintenance personnel. In any event however, a clarifying order should be issued so that general considerations of confidentiality do not frustrate reasonably tailored, specific requests for information such as the one made in this case.

d. The Union's Request For Cost and Attorney Fees

The pre-hearing position of Respondent, which was repeated at the hearing, was that PERB is not authorized by statute to order the payment of costs as a result of [alleged] violations of CMPA, including those costs associated with the delay in arbitration proceedings. (H.T. at 12). Respondent has retreated from this firm position of "no authorization" however in its post-hearing submission. Respondent now appears to recognize that the PERB is indeed authorized; pursuant to D.C. Code section 1-618.3, to make broad remedial orders including those which require the payment of reasonable costs incurred by a party to a labor dispute. RB at 14.

Respondent now asserts that it should not be ordered to pay any costs of litigation, including attorney's fees, unless it is found to have engaged in "patently frivolous litigation." RB at 13. Clearly, says Respondent, it has not engaged in any such thing. Id. at 14. Moreover, says Respondent, RB at 14, the applicable collective bargaining agreement's Grievance and Arbitration provision requires that the fees and expenses of the arbitration shall be borne equally by both parties. See Examiner's Ex. No. 4 at Article XI, p. 18.

In addition, Respondent asserts that under well-established principles of labor relations law, litigation expenses are not recoverable since the orders of labor tribunals are considered to be remedial and not punitive. RB at 15 (citing to Heck's Inc. 191 NLRB 146 (1971)). With particular regard to the question of attorney's fees, Respondent cites the landmark Supreme Court case of Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), for the proposition that the majority "American rule" on the awarding of attorney's fees is that each litigant should bear its own litigation expenses with the result that attorney's fees are generally not available unless explicitly authorized by statute, contractual entitlement or recognized common law exception. Id. at 247, 249.

Respondent summarizes by asserting that no authorization exists under PERB case law or established labor relations policy for the costs reimbursement sought by the Union in this case. "The award of attorney's fees is not expressly provided for by statute, and therefore, under the American rule, must not be awarded. RB at 16.

The Union contends that the appropriate remedial order in this case must include an award of reasonable costs which it has incurred in the litigation plus an award of attorney's fees.

Such costs are allowable it argues not only under the relevant provisions of the D.C. Code, but under a recent decision of the District of Columbia Court of Appeals which authorized the award of attorney's fees for employees of the District of Columbia whose hiring date preceded the enactment of CMPA.<sup>9/</sup> District of Columbia v. Hunt, 520 A.2d 300 (D.C. 1987). The Union contends that this decision, interpreting CMPA, has the effect of the explicit statutory authorization needed to supersede the general American rule. Moreover, the Union points to the "bad-faith" bargaining of DCPS as an example of oppressive conduct, and the common benefit that a ruling awarding costs would confer upon the public as factors which, it says, distinguish this case from the normal, "American rule," situation.

Finally, the Union asks that the arbitration award of Mr. Kaplan, Joint Ex. No. 1, be taken as evidence of Respondent's unlawful conduct, for which it should be sanctioned. This request must be denied since the parties agreed to submit the arbitration award into evidence for the sole purpose of establishing a factual background to the case. The substantive findings of the Arbitrator are not a part of the record in this case and, thus, cannot be considered in fashioning a [recommended] remedial order. In any event, the issue in the arbitration hearing concerned the reasonableness of the discipline imposed rather than Respondent's bargaining practices under CMPA.

As for for the Union's request for costs and attorney's fees, the weight of the evidence supports the Respondent's position that these costs not be awarded. While the Union has established a persuasive case that such costs are allowable under CMPA, there is simply not enough evidence in this record, and certainly not a preponderance of the evidence, to suggest that the normal practices of cost allocation should be suspended in this instance. While I have found that Respondent's have engaged in bad faith bargaining by their refusal to disclose the requested inspection reports prior to arbitration I cannot find on this record sufficient evidence of either oppressive conduct or frivolous litigation to warrant the extraordinary action sought by the Union. Of the three items originally sought by the Union, Respondent promptly complied with one request and was apparently willing to consider another (the performance appraisals) had the Union taken the step of requesting the employee's consent to have his appraisal released.

While there is some indication in the record that the arbitration hearing was delayed on account of the dispute over non-disclosed information, there is insufficient evidence to allow for anything more than a speculative recommendation in this

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<sup>9/</sup> It appears from the record that Mr. Proctor began working for the Board of Education in 1965, long before the enactment of CMPA.

regard -- both in terms of how that delay came about and of the precise costs which are attributable to this delay. In light of such an equivocal evidentiary record, the intent of the parties, as set forth in their bargaining agreement, should prevail and each side should bear its own costs.

## VII.

RECOMMENDATION

1. That the Unfair Labor Practice Complaint of December 21, 1987, be SUSTAINED with respect to the DCPS's failure to disclose requested maintenance inspection reports prior to arbitration, as a violation of the Act.
2. That the PERB issue an appropriate remedial order pursuant to its authority under the Act and the PERB's own Interim Rules, Sec. 103.12.
3. That the Union's request for an award of costs and attorney's fees be DENIED.

Respectfully submitted,

  
K. WAYNE LAUDERDALE  
Hearing Examiner

Dated: January 27, 1989