

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)	
)	
Psychologists Union, Local 3758 of the D.C.)	
Department of Mental Health, 1199 National)	
Union of Hospital and Health Care Employees,)	
American Federation of State, County and)	
and Municipal Employees, AFL-CIO,)	
Complainant,)	PERB Case No. 05-U-41
)	
v.)	Opinion No. 809
)	
District of Columbia Department)	
of Mental Health,)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

I. Statement of the Case:

The Psychologists Union, Local 3758 of the District of Columbia Department of Mental Health, 1199 National Union of Hospital and Health Care Employees ("NUHHCE"), American Federation of State, County and Municipal Employees, AFL-CIO ("Complainant" or "Union"), filed a "Verified Unfair Labor Practice Complaint and Request for Judgment on the Pleadings", in the above-referenced case. The Complainant alleges that the District of Columbia Department of Mental Health ("DMH" or "Respondent") violated D.C. Code § 1-617.04 (a)(1) and (5) (2001 ed.) by refusing "to provide the information relevant and necessary for the Union to properly represent a bargaining unit member in the negotiated grievance process challenging [DMH's] termination of that bargaining unit member." (Compl. at p. 2)

In addition, the Complainant asserts that the "verified facts and documents provided . . . including [DMH's] own letters. . . establish that [DMH] has refused to provide information that it is required by law to provide to the Union, thereby violating D.C. Code § 1-617.04 (a)(1) and (5).

[Therefore, the Complainant claims that there] is thus no issue of fact to warrant a hearing.” (Compl. at p. 7). As a result, the Complainant is requesting that the Board decide this case on the pleadings and order DMH to: (1) provide the requested information within ten days; (2) cease and desist from refusing to provide the requested information; and (3) pay attorney fees. (Compl. at p. 6).

DMH filed a document styled “Answer to Verified Un[*fair*] Labor Practice Complaint, Opposition to Request for Judgment on the Pleadings and Verified Counterclaim.” In their submission, DMH denies that it has violated the Comprehensive Merit Personnel Act (“CMPA”). In addition, DMH claims that “it is clear that there are issues of fact warranting a hearing in this case to address the validity of the Union’s allegations and its own unlawful conduct in filing the present frivolous complaint.” (Answer at p. 10)

The Complainant’s motion for a decision on the pleadings and DMH’s opposition are before the Board for disposition.

II. Discussion

The Complainant claims that on February 14, 2005,¹ bargaining unit member Dr. John Bruce received a Form 533 (Recommendation for Disciplinary Action and Investigative Report) from DMH. The Complainant notes that this “document alleged that Dr. Bruce had violated certain DMH policies and stated that Carroll Parks, Director of Adult Services at the CSA, was ‘recommending that disciplinary action be taken against [Dr. Bruce].’” (Compl. at p. 3) Subsequently, Dr. Bruce submitted a response to the Form 533, in which it is alleged that he responded to each of the allegations and set forth arguments as to why he had not violated any policy and should not be disciplined. Thereafter, on March 17th, Dr. Bruce received an Advance Notice of Discipline-Removal from DMH. The Complainant contends that the “advance Notice contained some of the same allegations and charges found in the initial Form 533 as well as other allegations and charges.” (Compl. at p. 3)

The Complainant asserts that the time limit for responding to the Advance Notice was extended to April 11, 2005. The Complainant alleges that on March 29th, a letter was faxed to Brendolyn McCarty-Jones, DMH Human Resources Specialist, informing her that, in order to respond to the Advance Notice of Discipline, Dr. Bruce and the Union’s attorney needed to review certain relevant items. The Complainant notes that the March 29th letter listed those items which were being requested.

The Complainant claims that on March 31st, Ms. McCarty-Jones responded to the Complainant’s request stating that “[the Complainant’s] request is better suited for arbitration related matters and not any agency administrative review.” (Compl. at p. 4) In addition, the Complainant

¹ Unless otherwise noted, all dates referred to in this decision are to the year 2005.

contends that in their response, “[DMH] refused to provide any of the requested information except for a copy of CMHS Policy #500000.482.1 and the missing pages of another document.” (Compl. at p. 4)

On April 11th, the Complainant’s attorney submitted Dr. Bruce’s written response to DMH’s Advance Notice of Discipline. The Complainant asserts “that [Dr. Bruce’s] response was prepared without the benefit of reviewing the materials that had been requested on March 29th and which [DMH] had refused to provide.” (Compl. at p. 4)

The Complainant claims that on May 12th, DMH issued a Final Notice of Termination, in which it removed Dr. Bruce from employment effective May 13th. The Final Notice stated that it “incorporated by reference” the written report of findings and recommendations made by a DMH-assigned hearing officer. (See Compl. at p. 4)

Pursuant to Article 18, Section 3 of the parties’ collective bargaining agreement (“CBA”), the Complainant filed a grievance on May 31st challenging DMH’s termination of Dr. Bruce. The Complainant claims that the grievance alleged that DMH’s actions violated due process, the CMA and the parties’ CBA. (See Compl. at p. 5)

The Complainant alleges that on June 16th, it submitted an information request to DMH in connection with its representation of Dr. Bruce in the negotiated grievance procedure. The Complainant claims that the June 16th “[information] request sought most of the same information that had initially been sought from [DMH] on March 29th, when the [Complainant’s attorney] was trying to respond [on behalf of Dr. Bruce, to DMH’s] advance Notice of Termination-information which [DMH] at that time said was ‘better suited for arbitration related matters’.” (Compl. at p. 5) The Complainant contends that the June 16th request “also sought some additional information, which the Union needed in order to investigate statements about the basis for termination that were contained in [DMH’s] Final Notice of Termination and the hearing officer’s report that was incorporated into the Final Notice by [DMH]. (Compl. at p. 5)

The Complainant asserts that on June 20th, their attorney received a letter from Ivy McKinley, DMH Director of Human Resources, notifying the Complainant that DMH was refusing to provide any of the information requested by the Complainant. The Complainant claims that DMH “refused to provide the information on the stated grounds that the parties’ CBA ‘does not require . . . [DMH] to furnish such information during the grievance process’.” (Compl. at p. 5)

The Complainant claims that their function as exclusive bargaining representative includes representing bargaining unit members in the negotiated grievance process. The Complainant contends that the information requested by the Complainant is necessary and relevant to the Union’s representation of Dr. Bruce in the grievance process challenging his termination.

The Complainant alleges that by the conduct described above, DMH is violating D.C. Code § 1-617.04(a)(1) and (5).²

The Complaint alleges that “[o]n June 16, the Union submitted an information request to DMH in connection with its representation of Dr. Bruce in the negotiated grievance procedure.”³ (Compl. at p. 5) However, to date, DMH has not provided the requested sixteen items. DMH does not dispute the factual allegations in the Complaint. Instead, DMH claims that the Union has requested “a whole host of information in an effort to delay the termination of Dr. Bruce and for the purpose of harassing and preventing [DMH]. . . from asserting and carrying out its rights under D.C. Code § 1-617.08.” (Answer at p. 6) In addition, DMH asserts that: (1) the requested information is not relevant to the basis for Dr. Bruce’s termination; (2) some of the requested information has previously been provided to the Union and its representatives; (3) some of the requested information is available on-line through a number of websites including the District of Columbia’s website, Lexis and Westlaw; (4) DMH policy #482.1 is available on the DMH intranet which is available to all DMH employees; (5) the Union’s request for information concerning all disciplinary actions taken by DMH for violation of DMH policy 482.1 and violation of D.C. Mun. Regs., Title 6, Sec. 1803.1, is overly broad and unduly burdensome; and (6) the Union’s request for all Client Services Management Reports for 2004 and all quarterly “Productivity Reporting” documents for 2004, is overly broad, unduly burdensome and not relevant. (See Answer at pgs. 6-7)

Also, DMH contends that “the documents sought by the union are documents regarding matters other than those used by [DMH] in making its decision. [Furthermore, DMH argues that such] discovery is not part of the grievance process outlined in the CBA between the parties.” (Compl. at p. 3)

Finally, DMH contends that the Complainant’s request for information concerning complaints submitted to DMH by DMH consumers between January 2003 and February 2005, is overly broad

² D.C. Code § 1-617.04(a)(1) and (5) provide as follows:

(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.

³ In their June 16th information request, the Union listed in numerical sequence the sixteen items it was requesting.

and unduly burdensome. (See Answer at p. 8). Furthermore, DMH asserts that “with respect to the medical files and reports of other consumers ... there are great concerns and issues regarding HIPAA⁴ protected information which should not be divulged to Dr. Bruce ... and [his] legal representatives for the mere purpose of engaging in their desperate fishing expedition.” (Answer at p. 8)

For the above-noted reasons, DMH requests, among other things, that the Board: (1) find that the Complainant has committed an unfair labor practice; (2) deny the Complainant’s request for a decision on the pleadings; (3) order a hearing; and (4) issue a protective order in which its finds that DMH is not required to produce the information being sought by the Union in its letter of June 16, 2005. (See Answer at pgs. 10-11)

With respect to requests number 3, 4 and 6, DMH has raised no defense concerning its failure to produce these documents.⁵ As a result, we must decide whether DMH has an obligation to produce these documents. This Board has previously considered the question of whether an agency has an obligation to provide documents in response to a request made by a union. In University of the District of Columbia v. University of the District of Columbia Faculty Association, 38 DCR 2463, Slip Op. No. 272 at p. 4, PERB Case No. 90-U-10 (1991), we determined that “the employer’s duty under the CMPA includes furnishing information that is ‘both relevant and necessary to the Union’s handling of [a] grievance’ ...” Also, see Teamsters, Locals 639 and 730 v. D.C. Public Schools, 37 DCR 5993, Slip Op. No. 226, PERB Case No. 88-U-10 (1989). Moreover, the Supreme Court of the United States had held that an employer’s 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. 32, 36 (1967).

Furthermore, “[w]e have held that it is not the Board’s role to determine the merits of a grievance as a basis for determining the relevancy or necessity of information requested by a union in the processing of a grievance.” Doctors’ Council of the District of Columbia v. Government of the District of Columbia, et al., 43 DCR 5391, Slip Op. No. 353 at p. 5, PERB Case No. 92-U-27 (1996); University of the District of Columbia v. University of the District of Columbia Faculty Association *supra*, Slip Op. No. 272 at n. 6. DMH contends that the requested information regarding productivity and the discipline of other employees, is not relevant or necessary because “the termination of Dr. Bruce is based on his own conduct as admitted by him and there is no issue of

⁴Although DMH does not provide a citation or text for HIPAA, we believe that they are referring to the Health Insurance Portability and Accountability Act of 1999, 45 CFR Part 164. These regulations were issued by the U.S. Department of Health and Human Services pursuant to the Secretary’s authority to prescribe standards under part C Title XI of the Social Security Act, and section 264 of P.L. 104-191, 42 U.S.C. 1320d-1320d-8, for maintaining the confidentiality of “individually identifiable health information.”

⁵ See DMH’s letter to the Board’s Executive Director dated August 5, 2005.

'productivity' with respect to the reason behind his termination." (Answer at p.7) We have stated that these issues present "an initial question for the arbitrator to decide. . .". American Federation of State County and Municipal Employees, D.C. Council 20, AFL-CIO v. District of Columbia General Hospital, et al., 36 DCR 7101, Slip Op. No. 227 at p. 5, PERB Case No. 88-U-29 (1989). In addition, we find nothing in the pleadings to suggest that the requested information is not necessary and relevant to the Complainant's representational responsibilities with respect to Dr. Bruce's grievance.⁶ In light of the above, we find that DMH must produce the documents identified in requests number 3, 4 and 6.⁷

In the present case, DMH claims that they do not have to provide requests number 1, 2, 5 and 9 because that information has either been previously provided and/or is available to the Union from other sources (i.e. the District of Columbia government website, Westlaw, Lexis and DMH's intranet). In American Federation of State, County and Municipal Employees, Council 20 v. District of Columbia General Hospital and District of Columbia Office of Labor Relations, 36 DCR 7101, Slip Op. No. 227 at p. 3, PERB Case No. 88-U-29 (1989), we indicated that this "Board agrees with the private sector holdings that a union should not be forced to undertake a time-consuming and potentially fruitless effort to look elsewhere each time it seeks information when the information sought is in the employer's possession, and especially when such a search is a poor substitute for employer records in terms of accuracy and completeness. Cf., ACF Industries Inc., 231 NBLRB No. 20 (1977), en^d. ACF Industries, Inc v. NLRB, 592 F. 2nd 422 (8th Cir. 1971); C&P Telephone Cop. v. NLRB, 687 F. 2d 633, n. 3 (2nd cir. 1982)." After reviewing the parties' pleadings, we believe that the information requested by the Complainant in requests number 1, 2, 5 and 9, are readily available to responsible DMH officials. In addition, we find that the requested information is both relevant and necessary to a legitimate collective bargaining function to be performed by the Union, i.e. the

⁶ DMH asserts that the Union's request for information was made in bad faith and therefore, DMH has no statutory duty to provide the information. Specifically, DMH claims that "in a bad faith attempt to delay [DMH's] termination of Dr. Bruce, and to harass [DMH], the Union proceeded to file a Step 3 grievance . . . alleging that [DMH] has violated the parties' CBA by improperly placing [the] grievant Dr. John Bruce on administrative leave." (Answer at p. 9) DMH argues that the Union's conduct constitutes an unfair labor practice. As a result, DMH has filed a counterclaim against the Union. However, the Union filed an answer denying the counterclaim. Thus, we believe that issues of fact exist with respect to DMH's counterclaim. Therefore, we can not decide DMH's counterclaim on the pleadings. In view of the above, DMH's counterclaim that the Union's actions violated the Comprehensive Merit Personnel Act, is a matter best determined after the establishment of a factual record through an unfair labor practice hearing.

⁷ All references to requests numbers, refer to the sixteen numbered items noted in the Union's June 16th letter to DMH and in the Union's July 28, 2005 letter addressed to the Board's Executive Director.

investigation, preparation and processing of a grievance under the negotiated grievance procedure. Moreover, DMH has failed to show any substantial countervailing concerns which outweigh its duty to disclose the requested information. Therefore, consistent with our holding in American Federation of State, County and Municipal Employees, Council 20 v. District of Columbia General Hospital and District of Columbia Office of Labor Relations, *supra*, we find that DMH's asserted defense, lacks merit. Therefore, we conclude that DMH has to produce requests number 1, 2, 5 and 9. With respect to requests number 10, 11, 14 and 15, DMH asserts that these requests are "overly broad and unduly burdensome." (Answer at p. 7). We recognize that beyond the mere question of the employer's duty, however, are the more factual questions of availability and burdensomeness to the employer in supplying information which the law says they should provide. In this regard, we note that the National Labor Relations Board has indicated that the extent of the employer's duty to disclose must be determined on a case by case basis in instances where bad faith bargaining is, as here, alleged. See, NLRB v. Tritt Mfg. Co., 351 U.S. 149 (1956). DMH claims that some of the information requests are overly broad and burdensome. The question concerning whether the scope of the information requested in requests number 10, 11, 14 and 15 is too broad or that disclosure would put an undue burden on DMH, is a matter best determined after the establishment of a factual record through an unfair labor practice hearing. Therefore, requests number 10, 11, 14 and 15 do not have to be produced at this time.

DMH contends that the information noted in requests number 13 and 16 concerns medical files and reports of other consumers. DMH asserts that this is HIAA protected information which can not be divulged to Dr. Bruce and his legal representatives. We believe that the issue concerning whether requests number 13 and 16 are protected by HIAA is a matter best determined after the establishment of a factual record through an unfair labor practice hearing. In view of the above, requests number 13 and 16 do not have to be produced at this time.

With respect to requests number 7, 8 and 12, DMH contends that this information was not provided because it either does not exist or is not available. DMH's defense involves an issue of fact that can best be determined after the establishment of a factual record through an unfair labor practice hearing. Therefore, requests number 7, 8 and 12 do not have to be produced at this time.

The Board, having reviewed this matter, concludes that by the failing and refusing to produce requests number 1, 2, 3, 4, 5, 6 and 9, DMH failed to meet their statutory duty of good faith bargaining, thereby violating D.C. Code § 1-617.04(a)(5). In addition, we have held that "a violation of the employer's statutory duty to bargain [under D.C. Code § 1-617.04(a)(5)] also constitutes derivatively a violation of the counterpart duty not to interfere with employees' statutory rights to organize a labor union free from interference, restraint or coercion; to form, join or assist any labor organization or to refrain from such activity; and to bargain collectively through representatives of their own choosing." American Federation of State, County and Municipal Employees, Local 2776 v. D.C. Department of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245 at p. 2, PERB Case No. 89-U-02 (1990); Also see, University of the District of Columbia v. University of the District of Columbia Faculty Association, *supra*.

Concerning the Complainant's request for attorney fees, this Board has held that D.C. Code § 1-617.13 does not authorize it to award attorney fees. See, International Brotherhood of Police Officers, Local 1446, AFL-CIO v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992); and University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia, 38 DCR 2463, Slip Op. No. 272, PERB Case No. 91-U-10 (1991). Therefore, the Complainant's request for attorney fees is denied.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The Psychologists Union, Local 3758 of the District of Columbia Department of Mental Health, 1199 National Union of Hospital and Health Care Employees, American Federation of State, County and Municipal Employees' Motion for a Decision on the Pleadings is granted in part and denied in part.
- (2) The District of Columbia Department of Mental Health ("DMH"), its agents and representatives shall cease and desist from refusing to furnish the Psychologists Union, Local 3758 of the D.C. Department of Mental Health, 1199 National Union of Hospital and Health Care Employees ("NUHHCE"), American Federation of State, County and Municipal Employees, AFL-CIO, with copies of the documents requested in paragraphs number 1, 2, 3, 4, 5, 6 and 9 NUHHCE's June 16, 2005 letter.
- (3) DMH shall provide NUHHCE with the documents requested by NUHHCE in paragraphs number 1, 2, 3, 4, 5, 6 and 9 of NUHHCE's June 16, 2005 letter. These documents shall be provided to NUHHCE no later than fourteen (14) days from the service of this Decision and Order.
- (4) DMH, its agents and representatives shall cease and desist from interfering, restraining or coercing its employees by engaging in acts and conduct that abrogate employees' rights guaranteed by "Subchapter XVII Labor-Management Relations" of the Comprehensive Merit Personnel Act to bargain collectively through representatives of their own choosing.
- (5) The issue concerning whether requests number 13 and 16 are protected by HIAA, is referred to a Hearing Examiner in order to determine the relevance and application of HIAA to the documents noted in requests number 13 and 16.
- (6) The question concerning whether the scope of the information requested in requests number 10, 11, 14 and 15 is too broad or that disclosure would put an undue burden on D.H., is referred to a Hearing Examiner for disposition.

- (7) DMH's claim that the information noted in requests number 7, 8 and 12 was not provided because it either does not exist or is not available, is referred to a Hearing Examiner for disposition.
- (8) DMH's counterclaim concerning NUHHCE's alleged unfair labor practice is referred to a Hearing Examiner for disposition.
- (9) NUHHCE's request for attorney fees is denied for the reasons stated in this Decision and Order.
- (10) NUHHCE's request for a protective order is denied.
- (11) DMH shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice where notices to bargaining unit employees are customarily posted. The Notice shall remain posted for thirty (30) consecutive days.
- (12) Within fourteen (14) days from the issuance of this Decision and Order, DMH shall notify the Public Employees Relations Board ("Board"), in writing, that the Notice has been posted accordingly. Also, DMH shall notify the Board of the steps it has taken to comply with paragraphs 3 and 11 of this Order.
- (13) The Board's Executive Director shall: (a) refer the issues noted above in paragraphs 5, 6, 7 and 8 of this Order to a Hearing Examiner and (b) schedule a hearing under the expedited schedule set forth below.
- (14) A hearing shall be held in this case before October 14, 2005. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.
- (15) Following the hearing, the designated Hearing Examiner shall submit a report and recommendation to the Board no later than twenty-one (21) days following the conclusion of closing arguments or submission of the parties' post hearing briefs.
- (16) The parties may file exceptions and briefs in support of the exceptions no later than seven (7) days after service of the Hearing Examiner's report and recommendation. A response or opposition to the exceptions may be filed no later than five (5) days after service of the exceptions.

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(17) Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

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

September 9, 2005

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 05-U-41 was transmitted via Fax and U.S. Mail to the following parties on this the 9th day of September 2005.

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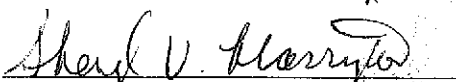
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Public
Employee
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Government of the
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 809, PERB CASE NO. 05-U-41 (September 9, 2005)

WE HEREBY notify our employees that the 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 violating D.C. Code § 1-617.04(a)(1) and (5) by the actions and conduct set forth in Slip Opinion No. 809.

WE WILL cease and desist from refusing to bargain in good faith with the Psychologists Union, Local 3758 of the District of Columbia Department of Mental Health, 1199 National Union of Hospital and Health Care Employees ("NUHHCE"), American Federation of State, County and Municipal Employees, AFL-CIO, by failing to provide information to NUHHCE.

WE WILL NOT in any like or related manner interfere, restrain or coerce, employees in their exercise of rights guaranteed by the Labor-Management Subchapter of the District of Columbia Comprehensive Merit Personnel Act.

DISTRICT OF COLUMBIA DEPARTMENT OF
MENTAL HEALTH

DATE: _____

BY: _____

Director

The 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 this Notice or compliance with any of its provisions, they may contact the Public Employees Relations Board at 717 14th Street, N.W., Suite 1150, Washington, D.C. 20005. Phone (202) 727-1822.

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