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: American Federation of Government, Employees, Local 631, Complainant, v. District of Columbia Water and Sewer Authority, Respondent.	PERB Case No. 03-U-52 Opinion No. 734 Motion for Preliminary Relief **CORRECTED COPY**

DECISION AND ORDER

I. Statement of the Case

The American Federation of Government Employees ("AFGE"), Local 631 ("Complainant" or "Union"), filed an Unfair Labor Practice Complaint and a Motion for Preliminary and Injunctive Relief, in the above-referenced case. The Complainant alleges that the District of Columbia Water and Sewer Authority ("WASA" or "Respondent") violated D.C. Code § 1-617.04 (a)(1), (3), (4) and (5) (2001 ed.) by retaliating "against seven (7) employees because they won a favorable award from Arbitrator Jonathan Kaufman." (Compl. at p. 3). The Complainant is asking the Board to grant its request for preliminary relief. In addition, the Complainant is requesting that the Board order WASA to: (1) immediately allow the seven (7) employees to return to work; (2) transfer the employees pursuant to the arbitration award; (3) comply with the arbitrator's award; (4) pay attorney fees; (5) pay costs; (6) post a notice to employees; and (7) cease and desist from violating the Comprehensive Merit Personnel Act. (Motion at pgs. 5-6).

The Respondent filed an answer to the Unfair Labor Practice Complaint denying all the substantive charges in the complaint. In addition, WASA filed a response opposing the Complainant's Motion for Preliminary Relief. In its response to the Motion, WASA argues that the Complainant has not satisfied the criteria for granting preliminary relief. Also, WASA argues that

the arbitrator exceeded his jurisdiction and was without authority to render the award.[1] The "Motion for Preliminary and Injunctive Relief" is before the Board for disposition.

II. Discussion

On June 4, 1998, WASA and AFGE, Local 631 entered into a collective bargaining agreement (CBA). Article 27 of the CBA provides that "... [all] employees holding certain job positions should be certified or licensed." (Award at p. 5). Exemptions to this licensing requirement were provided for employees who have a: (1) current license or certification; (2) minimum of 20 years in a related job at WASA or its predecessor and who have satisfactory work performance; or (3) minimum of 20 years of service and who have a prior license or certification. The above-noted exempted employees could retain their present position without obtaining an additional license or certification. In addition, the CBA provides that any employee who has a minimum of 20 years of service and certificate in Environmental Science or other job related studies from the University of the District of Columbia or its equivalent, is deemed licensed and/or certified, and therefore exempt from the provisions of Article 27.

Pursuant to Article 27, WASA agreed to assure that all other employees who were employed in these positions at the time this agreement became effective, would be trained and otherwise assisted in satisfying the licensing requirement. In order to accomplish this, WASA agreed to supply and pay for the training of employees for whom such licensing or certification is required as part of their job requirement. Furthermore, it was agreed that this training would be available for at least twelve (12) months before any certification or licensing test would be required. Also, any employee subject to this provision would be allowed to take the test at least twice before being deemed unable to continue in the affected position. Finally, if an employee fails the test, WASA agreed to train the employee for a minimum of six (6) months, prior to the second and third test, in those skill areas in which the employee was deemed deficient. Employees who wish to take the test again would only be required to be re-tested in the areas in which they were deemed deficient.

In the event an employee could not obtain the required certification or license after being trained and tested at least three times, that employee would be transferred to any vacant position for which he/she is qualified or can perform with minimum training, regardless of seniority.[4] Transferred

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[1] Pursuant to Board Rule 538, WASA filed an Arbitration Review Request appealing the Arbitrator's Award which is the subject of this Motion. In Slip Op. No. 733, the Board denied WASA's Arbitration Review Request.

[4] If the employee is transferred to a position of a lesser grade, that employee would retain his/her wage rate salary that was in effect at the time of the third test, for a period of one (1) year after being transferred to a lesser grade position.

employees would be allowed to take a re-test for a license or certification (in their original position) whenever the test is scheduled.

The seven (7) employees ("Grievants") who are the subject of this Motion, are all Waste Water Treatment Operators with varying degrees of experience. On January 21, 2001, WASA issued a Waste Water Treatment (WWT) Operator Certification Policy. Pursuant to that policy, WWT Operators were required to be certified.

On January 22, 2001, each of the Grievants was notified that they had one year to obtain the necessary certification. To assist in meeting that requirement, WASA indicated that it would provide certification training and sponsor the certification examination at no cost.

Approximately two years later, on January 14, 2003, WASA notified the Grievants that they had not obtained the required certification. In addition, the notice indicated that effective January 26, 2003, the Grievants would be temporarily assigned to duties that did not require them to perform duties as certified WWT Operators. Specifically, the Grievants would be assigned work that would include performing housekeeping tasks at WASA.

On July 22, 2003, the seven Grievants received a "Notice of Proposed Disciplinary Action." The July 22nd Notice informed the Grievants that pursuant to Article 57 (Discipline provision) of the CBA, they would be terminated because they failed to obtain the required certification.

AFGE filed for arbitration concerning the planned terminations. In an Award issued on August 29, 2003, the Arbitrator upheld AFGE's grievance. Specifically, he concluded that the CBA does not provide for an absolute guarantee of employment for those WWT Operators who did not obtain the necessary certification. However, he found that WASA should within 180 days of the Award attempt to transfer the Grievants to vacant positions. In addition, he determined that the date for determining when to apply the 20-year exemption would be October 4, 2001. (See Award at p. 19)

AFGE asserts that on September 12, 2003, WASA contacted the Grievants and informed them that pursuant to the Arbitrator's Award, the Grievants would be allowed an additional 180 days from the date of the Award (August 29, 2003) to be transferred to a vacant position. However, WASA notified the Grievants that they would not be able to return to work. Instead, they must use any available annual leave or compensatory leave. In addition, once their annual leave is exhausted, the Grievants would have to be placed on leave without pay. (See Compl. at p.)

AFGE claims that forcing the Grievants to use annual leave during this 180-day period, amounts to retaliation against the Grievants. Specifically, AFGE argues that WASA's actions violate D.C. Code § 1-617.04(a)(1), (3), (4) and (5) (2001 ed.). As a result, AFGE filed an unfair labor

practice complaint and a motion for preliminary relief.

The criteria the Board employs for granting preliminary relief in unfair labor practice cases is prescribed under Board Rule 520.15.

Board Rule 520.15 provides in pertinent part as follows:

> 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.

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-U24 (1992). In determining whether or not to exercise its discretion under Board Rule 520.15, this 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 judgement 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 [this] 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, et al. v. FOP/DOC 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).

In its response to the Motion, WASA disputes the material elements of all the allegations asserted in the Motion. Specifically, WASA claims that on January 14, 2003, the Grievants were assigned to temporary positions that did not require them to be certified or licensed as WWT Operators. (Response at p. 3). In addition, WASA asserts that the "temporary assignments were to end on July 22, 2003. However, the time frame of the temporary assignments were extended as a good faith effort between Management and the Union [in order] to expedite the arbitration process." (Response at p. 3). Furthermore, WASA contends that the "parties understood that the affected employees [would] be placed on administrative leave or would remain in a work status, until receipt of the Arbitrator's decision." (Response at p. 3). As a result, WASA claims that when the Arbitrator's decision was issued on August 29, 2003, the agreement to keep the Grievants in their temporary work assignments ended because the Arbitrator found that WASA "is not under an obligation to create a job for these employees." (Response at pgs. 3-4). In view of the above, WASA asserts that on September 11th and 12th they issued letters to the Grievants informing them

of vacant positions and how they could apply for those positions. Also, WASA contends that the letters issued on September 11 and 12, 2003, instructed the Grievants that they would have to use annual leave because they could no longer perform their duties as WWT Operators. (See Response at p.4)

Finally, WASA argues that the: (1) Arbitrator exceeded his authority and (2) award did not draw its essence from the collective bargaining agreement. (See Response at pgs. 1-2) As a result, on September 15, 2003, WASA filed an arbitration review request with the Board appealing the August 29, 2003 arbitration award. (See footnote 1)

In light of the above, it is clear that the parties disagree on the facts in this case. In cases such as this, the Board has found that preliminary relief is not appropriate where material facts are in dispute. See, DCNA v. D.C. Health and Hospitals Public Benefit Corporation, 45 DCR 6067, Slip Op. No. 550, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

Also, the Board has held that "when a party simply refuses or fails to implement an award or negotiated agreement where no dispute exists over its terms, such conduct constitutes a failure to bargain in good faith and, thereby, an unfair labor practice under the CMPA." American Federation of Government Employees, Local 872, AFL-CIO v. District of Columbia Water and Sewer Authority, 46 DCR 4398, Slip Op. No. 497 at p. 3, PERB Case No. 96-U-23 (1996). In the present case, WASA acknowledges the existence of the Arbitrator's Award and claims that it has contacted the Grievants concerning vacancies. However, there appears to be a genuine dispute over some of the terms of the award. Specifically, the parties disagree as to whether the Grievants must use available annual leave, compensatory leave, leave without pay or administrative leave, while they wait during the 180-day period to see if they can be transferred to a vacant position. Furthermore, WASA has exercised its right to appeal the Arbitrator's Award by filing an arbitration review request with the Board. In view of the above, we believe that WASA's actions do not appear to be clear-cut and flagrant as required by Board Rule 520.15. Therefore, the question of whether WASA's actions occurred as AFGE claims or whether such actions constitute violations of the Comprehensive Merit Personnel Act ("CMPA"), are matters best determined after the establishment of a factual record through an unfair labor practice hearing.

In the present case, AFGE's claim that WASA's actions meet the criteria of Board Rule 520.15, are a repetition of the allegations contained in the Complaint. Even if the allegations are ultimately found to be valid, it does not appear that any of WASA's actions constitute clear-cut or flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. WASA's actions presumably affect seven (7) bargaining unit members, who are affected by WASA's decision to place them on annual leave or leave without pay for a 180 days while they wait to see if they will be transferred. However, WASA's actions stem from a single action (or at least a single series of related actions), and do not appear to be part of a pattern of repeated and

potentially illegal acts. While the CMPA asserts that District agencies are prohibited from engaging in unfair labor practices, the alleged violations, even if determined to be valid do not rise to the level of seriousness that would undermine public confidence in WASA's ability to comply with the CMPA. Finally, while some delay inevitably attends the carrying out of the Board's dispute resolution processes, AFGE has failed to present evidence which establishes that these processes would be compromised, or that eventual remedies would be inadequate, if preliminary relief is not granted.

Under the facts of this case, the alleged violations and their impact, do not satisfy any of the criteria prescribed by Board Rule 520.15. Specifically, we conclude that AFGE has failed to provide evidence which demonstrates that the allegations, even if true, are such that 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 seven (7) Grievants following a full hearing. Therefore, we find that the facts presented do not appear appropriate for the granting of preliminary relief. In view of the above, we deny the Complainant's Motion for Preliminary Relief.

Finally, we believe that the root of the issue regarding the 180-day transfer period involves a dispute over the terms and interpretation of the arbitrator's award issued on August 29, 2003. Specifically, the parties have a disagreement concerning whether the August 29th award, requires the Grievants to use available annual leave, compensatory leave, leave without pay or any other form of leave, during the 180-day transfer period. As a result, we are not going to refer the issue regarding the 180-day transfer period to a Hearing Examiner. Instead, we are remanding the leave issue concerning the 180-day transfer period, back to Arbitrator Jonathan Kaufman and directing the arbitrator to resolve the parties' dispute regarding this issue. Specifically, we are remanding this matter to Arbitrator Kaufman for the limited purpose of resolving the question of whether the Grievants were required to use available annual leave, compensatory leave, leave without pay or any other form of leave, during the 180-day transfer period. Furthermore, since the parties have been disputing this award for over a year, we are directing that the parties contact the arbitrator within five days of receipt of this decision in order to schedule a hearing with the arbitrator. Also, we are directing that if the arbitrator's schedule permits, this matter should be scheduled for a hearing within forty five days of this decision. We are referring all other issues involved in this case, to a Hearing Examiner for a determination concerning whether WASA's actions occurred as AFGE claims and whether such actions constitute violations of the Comprehensive Merit Personnel Act.

For the reasons discussed above, the Board: (1) denies the Complainant's request for preliminary relief; and (2) directs the development of a factual record through an unfair labor practice hearing which will be scheduled before November 8, 2004. In addition, we are remanding the question of whether the Grievants were required to use leave during the 180-day transfer period, back to the arbitrator for clarification of his award as it relates to this issue.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The Complainant's Motion for Preliminary and Injunctive Relief is denied.

(2) This case is remanded to the arbitrator for a decision clarifying the terms of his award dated August 29, 2003. Specifically, we are directing the arbitrator to clarify whether the seven Grievants involved in the award, must use available annual leave, compensatory leave, leave without pay or any other form of leave, while they wait during the 180-day period to see if they can be transferred to a vacant position. Also, we are directing that if the arbitrator's schedule permits, he should schedule this matter for an arbitration hearing within forty five days of this decision. We are referring all other issues involved in this case, to a Hearing Examiner for a determination concerning whether WASA's actions occurred as AFGE claims and whether such actions constitute violations of the Comprehensive Merit Personnel Act. The unfair labor practice hearing will be scheduled before November 8, 2004.

(3) 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.

October 7, 2004

CERTIFICATE OF SERVICE

This is to certify that the attached Corrected Decision and Order in PERB Case No.03-U-52 was transmitted via Fax and U.S. Mail to the following parties on this the 15th day of October 2004.

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