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

In the Matter of:)
)
American Federation of Government,)
Employees, Locals 631, 872 and 2553,)
American Federation of State, County)
and Municipal Employees, Local 2091,)
and National Association of Government)
Employees, Local R3-06,)
)
Complainants,)
)
v.)
)
District of Columbia Water and Sewer)
Authority,)
)
Respondent.)
_____)

PERB Case No. 04-U-28
Opinion No. 767

Motion for Preliminary Relief

CORRECTED COPY

DECISION AND ORDER

I. Statement of the Case

The American Federation of Government Employees, Locals 631, 872 and 2553, American Federation of State, County and Municipal Employees, Local 2091, and National Association of Government Employees, Local R3-06 ("Complainants" or "Unions"), filed an Unfair Labor Practice Complaint and a Motion for Preliminary and Injunctive Relief, in the above-referenced case. The Complainants allege that the District of Columbia Water and Sewer Authority ("WASA" or "Respondent") violated D.C. Code § 1-617.04 (a)(1), (2), (3) and (5) (2001 ed.) by refusing to bargain "with the Complainants on compensation and non-compensation matters, until the conclusion

of [WASA's] request for a unit modification in PERB Case No. 03-UM-03."¹ (Compl. at p. 3). The Complainants are asking the Board to grant their request for preliminary relief. In addition, the Complainants are requesting that the Board order WASA to: (1) bargain with the Complainants over compensation and non-compensation matters; (2) make the Complainants and their members whole for any and all loses; (3) pay costs; (4) pay attorney's fees; and (5) post a Notice indicating that they have violated the Comprehensive Merit Personnel Act. (See, Motion at p. 4 and Compl. at p. 7).

WASA filed an answer to the Unfair Labor Practice Complaint. In addition, WASA filed a response opposing the Complainants' Motion for Preliminary Relief. In its response to the Motion, WASA argues that the Complainants have not satisfied the criteria for granting preliminary relief. The "Motion for Preliminary and Injunctive Relief" is before the Board for disposition.

II. Discussion

In 1996 WASA and the Complainants executed a six year coalition agreement wherein they agreed, *inter alia*, to bargain for a single master labor contract covering both compensation terms and non-compensation working conditions. The Complainants allege that the master agreement would be effective from the date of execution and beyond, until any party provided the other signatories with written notice that the agreement would no longer be binding following the 180th day after such notice.

The Complainants claim that on June 9, 2003, WASA sent a letter to the Complainants requesting to bargaining a successor collective bargaining agreement ("CBA") on compensation and non-compensation matters. Subsequently, on June 11, 2003, the Complainants contend that they informed WASA that they would negotiate a successor CBA. Furthermore, the Complainants assert that on July 10, 2003, they met with WASA to "begin face to face negotiations." (Compl. at p. 4) In addition, the Complainants allege that on July 10th they provided WASA with: (1) the ground rules for compensation negotiations; and, (2) letters stating that they wanted to negotiate separately regarding working conditions. See, *Id.* at pgs. 4-5. Thereafter, in a letter dated July 14, 2003, WASA informed the Complainants and George Johnson (Complainants' chief negotiator), that WASA was still working on providing the Complainants with an answer to both the Complainants' ground rules

¹On October 17, 2003, Complainant AFGE, Local 631 filed an unfair labor practice complaint against WASA. That case was assigned docket number 04-U-02. In PERB Case No. 04-U-02, AFGE, Local 631 alleges that WASA has violated D.C. Code § 1-617.04 (a)(1), (2), (3) and (5) (2001 ed.) by refusing to bargain with Local 631 about non-compensation issues while [WASA's] petition for unit modification is pending. As a result, in the present case, AFGE Local 631 is only alleging that WASA violated the Comprehensive Merit Personnel Act by failing to bargain on compensation issues. The other four complainants are alleging that WASA failed to bargain on compensation and non-compensation issues. (See, Compl. at p. 3)

and the Complainants' request to bargain separately regarding working conditions. See, Id. at p. 5. The Complainants claim that WASA "never gave the Complainants a response that specifically addressed the substance of [the Complainants'] request to negotiate working conditions separately. [In addition, the Complainants contend that WASA] never gave the Complainants a response that specifically addressed the substance of their proposed ground rules." Id.

The Complainants claim that after receiving WASA's July 14th letter, they have made several requests to continue bargaining. However, WASA has not responded to any of the Complainants' request to continue bargaining. Instead, the Complainants claim that on August 15, 2003, WASA filed a "Petition for Unit Modification" (PERB Case No. 03-UM-03).

The Complainants assert that on September 9, 2003, Anne Wagner, Assistant General Counsel for AFGE, informed WASA that the Unions had agreed to "rescind their request to bargain working conditions separately and were willing to bargain together for one Master Agreement on compensation and working conditions." Id. at p. 5. However, in newsletters issued on October 2, 2003 and October 7, 2003, WASA's General Manager, Jerry Johnson "informed the Complainants and all of their members that [WASA was] not going to bargain over compensation and non-compensation [concerning a successor CBA] until after the conclusion of their effort to [consolidate] the five [existing] unions into one union." Id. at p. 6. In addition, the Complainants allege that at a July 1, 2004 hearing in PERB Case No. 04-U-02,² "WASA's Labor Relations Manager, [Stephen Cook,] testified that WASA was not going to bargain a successor CBA covering compensation and non-compensation matters, with the Complainants because [WASA] filed for a unit modification in PERB Case No. 03-UM-03." (Motion at p. 3)

The Complainants contend that despite WASA's "Petition for Unit Modification," the agency is required to bargain with the five existing unions. In addition, the Complainants assert that by refusing to bargain, WASA is attempting to discriminate, interfere with and "coerce the Complainants and . . . bargaining unit employees in the exercise of their rights as guaranteed by the [Comprehensive Merit Personnel Act] in violation of D.C. Code § 1-617.04 (a)(1), (2), (3) and (5) (2001 ed.)." (Compl. at p. 6) Furthermore, the Complainants claim that the "appeals process [regarding WASA's] . . . unit modification petition could take years . . . [As a result,] WASA's failure to bargain with the union[s] while they wait for the resolution of [the] unit modification petition to be resolved, seriously affects the public interest, labor relations, [and] employee morale." (Motion at p. 3) In view of the above, the Complainants filed an unfair labor practice complaint and a motion for preliminary relief.

²See footnote number 1 for a description of the facts involved in PERB Case No. 04-U-02.

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-U-24 (1992). In determining whether or not to exercise its discretion under Board Rule 520.15, the Board has adopted the standard stated in Automobile Workers v. NLRB, 449 F.2d 1046 (CA DC 1971). There, the Court of Appeals-addressing the standard for granting relief before 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 [PERB] 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, WASA contends that the Motion for Preliminary Relief should be denied because: (1) the Complainants have failed to state a claim under the Comprehensive Merit Personnel Act and (2) there are disputes over material elements of the allegations asserted in the Motion and the Complaint. (See, WASA's Opposition at pgs. 4-6) For example, WASA claims that "the Unions have continually changed their mind about how they want to bargain, and therefore there is not currently a pending request to engage in bargaining on behalf of all of the Unions. [As a result, WASA argues that] this is plainly a material dispute that is most fundamental to the underlying action, and can only be resolved (absent an agreement by the parties) in the related unfair labor practice matter." (WASA's Opposition at p. 6).

In addition, WASA argues that the Motion should be denied "[b]ecause the Complainants have failed to produce sufficient evidence of widespread [violations], flagrant violations, [violations which] serious[ly] impact public interest, or irreversible harm in the absence of preliminary relief." (WASA's Opposition at pgs. 7-8).

Finally, WASA asserts that the Complaint is untimely because it does not comply with the 120 day requirement of Board Rule 520.4.. Specifically, WASA claims that “[n]o later than October 2, 2003, the Unions were fully aware of WASA’s position that it could not bargain over a successor collective bargaining agreement until PERB Case. [No.] 03-UM-03 had been resolved. [However, WASA contends that since] this unfair labor practice charge was not filed until July 7, 2004, [it] must be dismissed.” (Answer at p. 8). In view of the above, WASA is requesting that the Complaint be dismissed because it was not timely filed.

Accepting the truth of the matters asserted in the pleadings and in the supporting exhibits accompanying the Complainants’ request, we find that there is reasonable cause to believe that WASA’s actions and conduct form the basis of an unfair labor practice as codified under D.C. Code § 1-617.04(a) (5) (2001 ed.).³ Relying on Washington Teachers’ Union, Local 6 and D.C. Public Schools, 34 DCR 3601, Slip Op. No. 151, PERB Case No. 85-U-18 (1987), WASA argues that it has no duty to bargain with the Complainants until the Board resolves its pending unit modification petition. We disagree.

In the WTU case, the complainant filed an unfair labor practice complaint alleging that the D.C. Public Schools violated the Comprehensive Merit Personnel Act by refusing to bargain in good faith with the union concerning wages for teachers working in adult education and summer school programs. As a remedy, WTU requested that the Board compel the school system to bargain in good faith over the wages for teachers working in adult education and summer school programs. In that case, WTU was the certified bargaining agent for a unit composed of permanent full-time and part-time teachers. In addition, WTU claimed that it also represented adult education and summer school teachers and alleged that by refusing to bargain about wages for such persons, the D.C. Public Schools failed to bargain in good faith. To prove its contention, WTU argued that every collective bargaining agreement since 1971 made reference to adult education and summer school teachers. The issue before the Board was whether the summer and adult education teachers were within the unit for which WTU was the exclusive representative. The Board found “that adult education and summer school teachers [were] not members of the bargaining unit represented by WTU, that DCPS [had] never recognized WTU as the bargaining agent for adult education and summer school teachers and [had] no legal obligation to do so. [As a result, the Board concluded] that DCPS’ refusal to bargain [with WTU] over wages for these employees. . . [was] not an unfair labor practice.” Slip

³D.C. Code Sec. 1-617.04(a) (4) provides as follows:

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

* * *

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

Op. No. 151, at p. 2.

We believe that the facts in the WTU case bear no resemblance to those in the instant matter: Specifically, the WTU case concerned the legality of an employer's refusal to bargain with a single union over the wages of adult education and summer school teachers, who were never part of the bargaining unit. In the present case, the central issue focuses on the legitimacy of the Respondent's refusal to bargain with the Complainants, until the unit modification question is resolved. Also, in the present case, the Complainants are the certified representatives for all the unionized employees at WASA and there is no dispute that all of the employees involved are represented by one of the five Complainants. In view of the above, it is clear that the facts, the issue and the Board's decision in the WTU case do not support the Respondent's position that it has no duty to bargain with the Complainants.

Furthermore, the facts and principle discussed in International Brotherhood of Teamsters, Local 639 and 730 and D.C. Public Schools and AFSCME, District Council 20 and Local 2093.⁴ 35 DCR 8155, Slip Op. No. 176, PERB Case Nos 86-U-14 86-U-17 (1988), are more applicable to the issue in the instant case. In that case, the Board addressed the question of whether an employer may refuse to bargain for a successor contract while a rival union's recognition petition is pending. In resolving that question, we relied on the rationale set forth in RCA Del Caribe, Inc. and IBEW, Local 2333, 262 NLRB No. 116, 1369 (1982), to decide that:

[W]hile the filing of a valid petition may raise a doubt as to majority status, the filing, in and of itself, should not overcome the strong presumption in favor of the continuing majority status of the incumbent ... [T]he ... policy enunciated by the [NLRB] in RCA Del Caribe with respect to the requirements for employer neutrality when an incumbent union is challenged by an "outside union" is grounded in the rationale that "preservation of the status quo through an employer's continued bargaining with an incumbent is a better way [than cessation of such bargaining upon the filing of a representation petition] to approximate employer neutrality." Id. at 1371 So, here, preservation of the status quo "is a better way" to protect both stability and employee representational choice than shortening ... [the employer's] duty to continue dealing with the incumbent union prior to that union's legal replacement through an election and Board certification. (Slip Op. at pgs 7-8).

The reasoning in RCA Del Caribe case, which we adopted in the International Brotherhood

⁴Although distinctions clearly exist between this case and the present one, the principle it espouses is relevant here.

of Teamsters case, is equally applicable in the present case. Although WASA's actions involve a unit modification petition rather than a recognition petition, we believe that the duty of the employer to preserve the status quo by bargaining with the incumbent unions, is the preferred way to promote stability and employee free choice.

Also, WASA argues that it "would commit an unfair labor practice if it engaged in bargaining with the Unions and the PERB ultimately determined that some or all of them no longer represented appropriate bargaining units at the time." (WASA's Opposition at p. 5) To support this position, WASA relies on the National Labor Relations Board's (NLRB) ruling in Point Blank Body Armor, Inc., 312 NLRB 197 (1993). In that case, the NLRB ruled that an employer may not lawfully bargain for a successor labor contract where there is objective evidence that the incumbent labor union has lost its majority status. In the Point Blank Body Armor case, the NLRB found that the employer and the incumbent union possessed a petition signed by a majority of unit employees that they no longer supported the incumbent union. However, in the present case, WASA has not produced any objective evidence which demonstrates that any of the Complainants has lost its majority status. As a result, we find that WASA must maintain the status quo by bargaining in good faith with the Complainants. In view of the above, we conclude that WASA's argument lacks merit.

For the reasons discussed above, we find no legal basis to support WASA's decision not to bargain over non-compensation and compensation matters regarding a successor agreement. As a result, we believe that WASA's actions and constitute an unfair labor practice as codified under D.C. Code Sec. 1-617.04(a)(1) and (5). In addition, the Complainants have demonstrated that WASA's actions amount to a clear cut violation of the CMPA. Specifically, in two newsletters issued by the WASA's general manager, WASA makes it clear that it "will [only] return to the bargaining table after PERB [rules on the unit modification petition]." (WASA Newsletters dated October 2, 2003 and October 7, 2003, at p. 2).

Under the facts of this case, we conclude that the alleged violation and its impact satisfies two of the disjunctive criteria proscribed by Board Rule 520.15 for which preliminary relief may be accorded. Also, the remedial purposes of Board Rule 520.15 will be served by pendente lite relief for the Complainants, who (in the instant case) would otherwise not be able bargain on behalf of their members, pending the full extent of the Board's processes before relief is ordered.

In their answer to the complaint, WASA asserts that the complaint in this case is untimely because it does not comply with the 120 day requirement of Board Rule 520.4.⁵ Specifically, WASA claims that "[n]o later than October 2, 2003, the Unions were fully aware of WASA's position that it could not bargain over a successor collective bargaining agreement until PERB Case. [No.] 03-

⁵WASA only raised this issue in its Complaint and did not raise it in its opposition to the motion for preliminary relief. However, since we are granting Complainants' request for preliminary relief, it is necessary to rule on the timeliness issue.

UM-03 had been resolved. [However, WASA contends that since] this unfair labor practice charge was not filed until July 7, 2004, [it] must be dismissed.” (Answer at p. 8). In view of the above, WASA is requesting that the Complaint be dismissed because it was not timely filed.

Although the complaint was filed on July 7, 2004, approximately nine (9) months after WASA refused to engage in bargaining for a successor agreement, we find that WASA’s actions constitute a continuing refusal to bargain. Therefore, we conclude that WASA’s continued refusal to bargain amounts to a continuing violation. In view of the above, we conclude that the complaint is timely.

Also, some of the issues raised in the instant case are identical to the issues raised and considered by the Hearing Examiner and the Board in PERB Case No. 04-U-02. However, the Board could not consider the Hearing Examiner’s report and recommendation in PERB Case No. 04-U-02 on the same date that we considered this motion for preliminary relief. In light of the above, we are reluctant to consider and rule on any other factual issues in the present case, that may be relevant and identical to issues which are pending in PERB Case No. 04-U-02.. Once we issue a decision and order in PERB Case No. 04-U-02, we will be in a position to determine whether there are any other outstanding issues in the present case that were not addressed in either this decision or in the decision involving PERB Case No, 04-U-02. As a result, we will retain jurisdiction in this matter in case it becomes necessary to consider any outstanding issue which was not addressed.

For the reasons discussed above, the Board grants the Complainants’ request for preliminary relief.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The Complainants’ Motion for Preliminary and Injunctive Relief is granted.
- (2) The District of Columbia Water and Sewer Authority (WASA), its agents and representatives shall cease and desist from refusing to bargaining in good faith with Complainants (American Federation of Government Employees, Locals 872 and 2553; American Federation of State, County and Municipal Employees, Local 2091; National Association of Government Employees, Local R3-06) over compensation and non-compensation matters regarding a successor agreement.
- (3) The District of Columbia Water and Sewer Authority (WASA), its agents and representatives shall cease and desist from refusing to bargaining in good faith with Complainant, American Federation of Government Employees, Local 631 over compensation matters regarding a successor agreement.

- (4) WASA, 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) WASA and the Complainants (American Federation of Government Employees, Locals 872 and 2553; American Federation of State, County and Municipal Employees, Local 2091; and National Association of Government Employees, Local R3-06) shall within seven (7) business days from the service of this Decision and Order agree on a date for the first bargaining session concerning compensation and non-compensation matters for a successor agreement. The first bargaining session shall be held no later than fourteen (14) business days from the service of this Decision and Order.
- (6) WASA and the Complainant, American Federation of Government Employees, Local 631 shall within seven (7) business days from the service of this Decision and Order agree on a date for the first bargaining session concerning compensation matters for a successor agreement. The first bargaining session shall be held no later than fourteen (14) business days from the service of this Decision and Order.
- (7) Within ten (10) business days from the issuance of this Decision and Order, WASA shall notify the Public Employee Relations Board, in writing, of the specific steps it has taken to comply paragraphs 5 and 6 of this Order.
- (8) Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

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

January 31, 2005

CERTIFICATE OF SERVICE

This is to certify that the attached Corrected Copy of the Decision and Order in PERB Case No. 04-U-28 was transmitted via Fax and U.S. Mail to the following parties on this the 31st day of January 2005.

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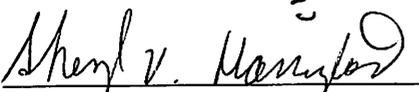
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