

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
Business and Professional License Administration**

NOTICE

**Public Hall License for the Most Worshipful King Solomon Grand Lodge
Ancient Free & Accepted Mason Scottish Rite Jurisdiction Inc. Extended to
May 31, 2005**

D.C. Official Code Title 47 Section 47-2805.1 authorizes the Mayor to establish a licensing period for which a license was issued under the general Licensing law may be issued. Before the public hall license is renewed, D.C. Official Code Title 47 Section 47-2820 requires that the Director of the Department of Consumer and Regulatory Affairs (DCRA) shall give written notice by mail to licensees and the affected Advisory Neighborhood Commission thirty (30) days prior to granting or renewing a license. Further, the Director shall cause the notice to be published in the D.C. Register.

This Notice is notifying the public that DCRA hereby extends the renewal deadline for Public Hall establishment, **the Most Worshipful King Solomon Grand Lodge Ancient Free & Accepted Mason Scottish Rite Jurisdiction Inc.** until **May 31, 2005**. A renewal notice will be mailed to the affected parties 45-30 days prior to the extended deadline.

If you would like more information pertaining to this notice, please contact the Basic Business License Info-Center at (202) 442-4311.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES
LABOR STANDARDS BUREAU
OFFICE OF WAGE-HOUR**

PUBLIC NOTICE

Notice is hereby given that pursuant to Act 15-614, "Minimum Wage Emergency Amendment Act of 2004," signed by the Mayor on November 30, 2004, the minimum wage in the District of Columbia will be \$6.60 per hour, effective January 1, 2005.

A service rate minimum of \$2.77 per hour may be paid to employees who engage in occupations in which tips are customarily and regularly received from patrons.

Copies of the emergency legislation are available at the D.C. Department of Employment Services, Office of Wage-Hour, 64 New York Avenue, N.E., 3rd floor, room 3105. Notices will be mailed to all employers in the District of Columbia for posting in the workplace. Please contact the Wage-Hour Office, at 671-1880, for additional information.

**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

FOR PUBLICATION

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

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Motion for Preliminary Relief
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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

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.

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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

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practice complaint and a motion for preliminary relief.

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

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 pendent 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

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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

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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.

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Motion for Preliminary Relief
PERB Case No. 03-U-52
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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

Government of the District of Columbia
Public Employee Relations Board

_____)	
In the Matter of:)	
)	
Rebecca Owens,)	
)	
Complainant,)	PERB Case Nos. 04-U-07, 04-S-01
)	and 04-S-04
v.)	
)	Opinion No. 748
)	
American Federation of State, County and)	FOR PUBLICATION
Municipal Employees, Local 2095 and)	
National Union of Hospital and Health Care)	
Employees, DC 1199,)	
)	
Respondent.)	
_____)	

DECISION AND ORDER

On March 11, 2004, Rebecca Owens ("Complainant") filed a document styled "Ex Parte Communication Complaint," against the Executive Director of the Public Employee Relations Board, the American Federation of State, County and Municipal Employees (AFSCME), Local 2095 and the National Union of Hospital and Health Care Employees (NUHHCE), DC 1199. The Complainant's Ex Parte Communication Complaint is related to the Complainant's claims in PERB Case Nos. 04-U-07, 04-S-01 and 04-S-04. These three cases have been assigned to a Hearing Examiner and a hearing has been scheduled for May 27, 2004. Therefore, pursuant to Board Rule 500.21, the Board is referring the Complainant's Ex Parte Communication Complaint to the same Hearing Examiner who is presiding over PERB Case Nos. 04-U-07, 04-S-01 and 04-S-04. At the May 27th hearing, the Hearing Examiner shall solicit and consider the positions of the parties regarding the Ex Parte Complaint and make all necessary determinations pursuant to Board Rule 500.21 and Board Rule 556.1.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) Pursuant to Board Rule 500.21, the Complainant's Ex Parte Communication Complaint is referred to the same Hearing Examiner who is presiding over PERB Case Nos. 04-U-07, 04-S-01

Decision and Order

PERB Case Nos. 04-U-07, 04-S-01 and 04-S-04

- (2) Pursuant to Board Rule 556.1, the Hearing Examiner shall prepare a Report and Recommendation concerning PERB Case Nos. 04-U-07, 04-S-01 and 04-S-04.

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

May 17, 2004

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

_____)	
In the Matter of:)	
)	
Fraternal Order of Police/Department of)	
Corrections Labor Committee,)	
)	PERB Case Nos. 01-U-21, 01-U-28
)	and 01-U-32
Complainant,)	
)	Opinion No. 749
)	
v.)	
)	Petition for Enforcement
District of Columbia Department of Corrections,)	
)	
)	FOR PUBLICATION
Respondent.)	
_____)	

DECISION AND ORDER

I. Statement of the Case:

Pursuant to Board Rule 560.1, the Fraternal Order of Police/Department of Corrections Labor Committee ("FOP" or "Complainant"), filed a Petition for Enforcement, in the above-referenced matter. FOP asserts that the District of Columbia Department of Corrections ("Respondent" or "DOC") has failed to comply with Slip Op. No. 722, which was issued on August 13, 2003. FOP is requesting that the Public Employee Relations Board ("Board" or "PERB") initiate an enforcement proceeding in the Superior Court of the District of Columbia in order to compel DOC to comply with Slip Op. No. 722.

DOC filed a response to the Petition for Enforcement ("Petition") denying that it has failed or refused to comply with the Board's August 13, 2003 Decision and Order. As a result, DOC has requested that the Board dismiss the Petition. FOP's Petition and DOC's answer are before the Board for disposition.

II. Discussion

In Slip Op. No. 722 the Board found that DOC violated the Comprehensive Merit Personnel Act. Specifically, the Board determined that DOC violated D.C. Code §1-617.04(a)(1), (4) and (5) by: (1) failing to bargain collectively and in good faith with FOP concerning the impact and effects of a reduction-in-force (RIF); (2) refusing to provide information necessary for FOP to conduct its representational function concerning the impact and effects of the RIF; and (3) taking reprisals against William Dupree when it sought to eliminate four years of service he had earned. As a result, the

Decision and Order

PERB Case Nos. 01-U-21, 01-U-28 and 01-U-32

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Board ordered DOC to: (1) cease and desist from refusing to bargain with FOP; (2) cease and desist from refusing to produce documents; (3) bargain on an expedited basis and with retroactive effect over the impact and effects of the previous RIF; (4) cease and desist from retaliating against William Dupree for engaging in protected activity; and (5) restore four years of service to William Dupree. (See, Slip Op. No. 722 at p. 8). In addition, the Board issued a Notice to employees which was to be posted by DOC. Subsequently, DOC filed a "Petition for Agency Review" with the Superior Court of the District of Columbia. The Board through its counsel filed a "Motion to Dismiss Petition for Review." On February 2, 2004, Judge Melvin Wright of the Superior Court of the District of Columbia dismissed DOC's "Petition for Agency Review", with prejudice.

On March 25, 2004, FOP filed a Petition for Enforcement with the Board. FOP contends that DOC has failed to comply with Slip Op. No. 722 by failing to: (1) post the Notice which was attached to the Board's Decision and (2) provide FOP with dates for retroactive bargaining. (Pet. at p. 2). FOP is requesting that the Board initiate an enforcement proceeding in the Superior Court of the District of Columbia in order to compel DOC to: (1) comply with the terms of the Board's Decision and Order and (2) post a Notice to employees.

The Office of Labor Relations and Collective Bargaining (OLRCB) filed a response on behalf of DOC. In its response DOC has requested that FOP's Petition be dismissed. In their submission DOC "admits that as of the date of the filing of the Petition, no dates had been provided to [FOP] to engage in PERB's unique 'retroactive bargaining' order."¹ (DOC's Response to Motion for Enforcement at p. 3). However, DOC claims that on April 7, 2004, it submitted several proposed dates "to the FOP/DOCLC on which to conduct the 'retroactive RIF bargaining' pursuant to the PERB Decision and Order." (DOC's Response to Motion for Enforcement at p. 3). In addition, DOC asserts that it has not posted the Notice because the Board did not order DOC to post the Notice.

The Board's Decision and Order was issued on August 13, 2003. In addition, Superior Court Judge Melvin Wright dismissed DOC's appeal on February 2, 2004. Also, FOP's Petition was filed

¹DOC contends that the Board's Order directing retroactive bargaining in this case is a unique remedy. However, we note that this remedy is not unique. For example, in International Brotherhood of Police Officers, Local 445 v. D.C. Office of Property Management, Slip Op. No. 704 at pgs. 7-8, PERB Case No. 01-U-03 (2003), the Board stated the following:

[T]he Board recognizes that the passage of time may have rendered some of the issues concerning management's decision moot. Nonetheless, we believe that ordering the parties to engage in impact and effects bargaining over issues which are still ripe or relevant is appropriate. We believe that this remedy will achieve the goals of the Board's remedies, as outlined in the CMPA and the relevant Board precedent.

Decision and Order

PERB Case Nos. 01-U-21, 01-U-28 and 01-U-32

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on March 25, 2004. In view of the above, it is clear that at the time FOP filed its Petition, more than seven months had elapsed since the Board's Decision and Order was issued. In addition, almost two months had elapsed since Judge Wright dismissed DOC's Petition for Review. Despite this passage of time, DOC has not complied with all of the terms of the Board's Order. In fact, DOC did not provide FOP with possible dates for commencing impact and effects bargaining, until after FOP asked the Board to enforce the August 13th Order. Specifically, FOP filed its Petition on March 25, 2004. However, DOC acknowledged that it did not provide FOP with possible meeting dates until April 7, 2004. (See DOC's Response to Motion for Enforcement at p. 3). In light of the above, we believe that DOC has had more than a reasonable period of time within which to initiate compliance with the impact and affects bargaining ordered by the Board. However, DOC has failed to commence bargaining.

Regarding the posting of the Notice, DOC "admits that as of the date of the filing of the Petition, the Respondent had not posted the Notice attached to PERB's Decision and Order." (DOC's Response to Motion for Enforcement at p. 3). However, DOC claims that it has not posted the Notice because the Board did not require it to do so. We find that DOC's argument concerning its failure to post the Notice, is not persuasive for several reasons. First, DOC acknowledged that the Notice was attached to the Board's August 13, 2003 Decision and Order. In addition, paragraph one of the Notice provides as follows: "**WE HEREBY NOTIFY** our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered us to post this notice." Furthermore, the Notice contains the following language: "**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.**" In view of the above, we conclude that DOC's argument that it was not required to post the Notice, lacks merit.

For the reasons noted above, we find that DOC has not complied with our Order in Slip Op. No. 722; therefore, FOP's Petition for Enforcement is granted. Before seeking judicial enforcement of our August 13th Decision and Order, as provided under D.C. Code §1-617.13(b) (2001 ed.), we will grant DOC five (5) business days from the issuance of this decision to finally and fully comply with our Decision and Order in Slip Op. No. 722. However, we emphasize that continued disregard of the Board's Decision and Order, will be met with prompt action for enforcement and other sanctions as the Board may deem appropriate.

ORDER**IT IS HEREBY ORDERED THAT:**

1. The Fraternal Order of Police/Department of Corrections Labor Committee's (FOP) "Petition for Enforcement," is granted.

Decision and Order

PERB Case Nos. 01-U-21, 01-U-28 and 01-U-32

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2. The District of Columbia Department of Corrections' (DOC) request that FOP's Petition be dismissed with prejudice, is denied.
3. The Board shall proceed with enforcement of its Order pursuant to D.C. Code §1-617.13(b) (2001 ed.), if full compliance with the Board's Order in Slip Op. No. 722 is not made and documented to the Board within five (5) business days of the issuance of this Decision and Order.
4. DOC shall post conspicuously, within three (3) business days from the service of this Decision and Order, the attached Notice. The Notice shall be posted where notices to bargaining unit members are customarily posted. The Notice shall remain posted for thirty (30) consecutive days.
5. DOC and FOP shall within three (3) business days from the service of this Decision and Order agree on a date for the first impact and effects bargaining session. Also, DOC shall bargain on an expedited basis and with retroactive effect over the impact and effects of the previous reduction-in-force.
6. Within five (5) business days from the issuance of this Decision and Order, DOC shall notify the Public Employee Relations Board (PERB), in writing, that the Notice has been posted. Also, DOC shall notify PERB of the specific steps it has taken to comply: (a) with our Order in Slip Opinion No. 722 and (b) paragraph five (5) of this Order.
7. 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.

May 26, 2004



Public Employee Relations Board

Government of the District of Columbia

DEC 10 2004

415 Twelfth Street, N.W. Washington, D.C. 20004 [202] 727-1822/23 Fax: [202] 727-9116



NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS (DOC), THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 722, PERB CASE NOS. 01-U-21, 01-U-28 and 01-U-32 (August 13, 2003).

WE HEREBY NOTIFY our employees that 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 refusing to bargain in good faith with the Fraternal Order of Police/Department of Corrections Labor Committee (FOP) concerning a reductions-in-force related to the closure of the Lorton Correctional Complex by the conduct set forth in Slip Opinion No. 722.

WE WILL cease and desist from refusing to produce documents, upon request, where those documents are relevant and necessary for the exclusive bargaining agent's representational functions.

WE WILL cease and desist from retaliating against William Dupree, FOP's former Chairman, and any other DOC employees represented by FOP, for engaging in protected activities.

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 Comprehensive Merit Personnel Act.

District of Columbia Department of Corrections

Date: _____ By _____
Director

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 this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 717 14th Street, N.W., Suite 1150; Washington, D.C. 20005. Phone: (202) 727-1822.

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

Government of the District of Columbia
Public Employee Relations Board

_____)	
In the Matter of:)	
)	
D.C. Water and Sewer Authority,)	
)	
)	
	Petitioner,)	PERB Case No. 03-UM-03
)	
)	Opinion No. 751
)	
	v.)	FOR PUBLICATION
)	
American Federation of State, County and)	
Municipal Employees, Local 2091, American)	
Federation of Government Employees, Locals 631,)	
872 and 2553, and National Association of)	
Government Employees, Local R3-06,)	
)	
)	
	Respondents.)	
_____)	

DECISION AND ORDER

I. Statement of the Case:

On August 15, 2003, the District of Columbia Water and Sewer Authority ("WASA"), filed a "Petition for Modification of Bargaining Units" with the Public Employee Relations Board ("Board" or "PERB"). The Petition seeks to consolidate the five existing non-compensation units at WASA, into one non-compensation unit.

This matter was referred to a Hearing Examiner. At a pre-hearing conference the unions asserted that the Board does not have the authority to consolidate bargaining units unless they are represented by the same labor organization. In addition, the unions argued that the modification which is being sought by WASA is contrary to public policy. In view of the above, the unions requested that the Hearing Examiner dismiss the Petition. On March 29, 2004, the Hearing Examiner denied the unions' motion to dismiss. In addition, the Hearing Examiner informed the parties that a hearing would be scheduled to consider the merits of the Petition. The American Federation of State, County and Municipal Employees ("AFSCME"), the American Federation of Government Employees ("AFGE") and the National Association of Government Employees (NAGE) have each filed an interlocutory appeal concerning the Hearing Examiner's denial of the unions' motion to dismiss.

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PERB Case No. 03-UM-03
Page 2

WASA has filed an opposition to the unions' request for interlocutory appeal. The unions' request for an interlocutory appeal and WASA's opposition are before the Board for disposition.

II. Discussion:

Pursuant to Board Rule 504.1,¹ WASA filed a "Petition for Modification of Bargaining Units." In their Petition WASA is seeking to consolidate the five existing non-compensation units at WASA, into one non-compensation unit.

At a January 29, 2004, pre-hearing conference the five unions asserted that PERB does not have the authority to consolidate bargaining units unless they are represented by the same labor organization. In addition, the unions argued that the modification which is being sought by WASA is contrary to public policy. In view of the above, the unions requested that the Hearing Examiner dismiss the Petition. At the January 29th pre-hearing conference, the parties and the Hearing Examiner agreed that "further proceedings would be held in abeyance until PERB has an opportunity to rule on any exception by either Petitioner or Respondents to [the Hearing Examiner's] ruling on the motion to dismiss." (Hearing Examiner's Ruling on the Motion to Dismiss at p. 4).

On March 29, 2004, the Hearing Examiner denied the unions' motion to dismiss. In addition,

¹Board Rule 504. 1 provides as follows:

504.1 A petition for unit modification of either a compensation or non-compensation unit may be filed by a labor organization, by an employing agency or jointly. A unit modification may be sought for any of the following purposes:

- (a) To reflect a change in the identity or statutory authority of the employing agency;
- (b) To add to an existing unit unrepresented classifications or employee positions created since the recognition or certification of the exclusive representative;
- (c) To delete classifications no longer in existence or which, by virtue of changed circumstances, are no longer appropriate to the established unit; or
- (d) To consolidate two (2) or more bargaining units within an agency that are represented by the same labor organization.

Decision and Order

PERB Case No. 03-UM-03

Page 3

the Hearing Examiner informed the parties that a hearing would be scheduled to consider the merits of the Petition. Specifically, in his decision the Hearing Examiner notes the following:

Respondents', argument that PERB has authority to consolidate units only when the affected units are represented by the same labor organization is without merit. PERB Rule 504.1(d) is derived from DCC §1-617.09(c) which provides as follows:

Two or more units for which the labor organization holds exclusive recognition within an agency may be consolidated into a single larger unit if the Board determines the larger unit to be appropriate. The Board shall certify the labor organization as the exclusive representative in the new unit when the unit is found appropriate.

This subsection establishes the principle that *if* a labor organization represents two or more units and asks PERB to consolidate them; and *if* PERB determines the consolidated unit to be "appropriate"; *then* PERB is without choice and "*shall* certify; the labor organization as the exclusive representative" of the consolidated unit (emphasis supplied). This unique situation does not preclude consolidation of bargaining units under other circumstances, in which other interests and considerations will come into play. PERB does have the authority to grant the primary relief sought by Petitioner. PERB clearly has authority to grant the alternative relief sought by Petitioner under PERB Rules 504.1(b) and (c).

The threshold issue raised in ¶16 of the Petition is whether the five existing bargaining units represented by Respondents are appropriate at the present time. Whether the events that have occurred since establishment of the Agency in 1996 (including the unit modifications approved by PERB in 1997) are such that the current bargaining units are no longer appropriate and, if so, whether a single consolidated unit is the only appropriate unit (Petitioner's preferred outcome) or if modifications should be made in accordance with PERB Rule 504.1(b) and (c), are questions that can be answered only after the development of a factual record through a hearing. (Hearing Examiner's Ruling on the Motion to Dismiss at pgs. 3-4).

Also, the Hearing Examiner acknowledged that he initially agreed with the parties' request to hold this matter in abeyance until the Board had an opportunity to rule on the unions' exceptions to his ruling. However, after reviewing the Board's Rules he concluded that such a course of action is prohibited by Board Rule 554.1. As a result, the Hearing Examiner determined that he would not hold this matter in abeyance. Instead, he informed the parties that he would proceed with a hearing in order to consider the merits of WASA's Petition.

The unions disagree with the Hearing Examiner's ruling on the motion to dismiss and believe

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Page 4

that they should be allowed to file an interlocutory appeal concerning the Hearing Examiner's ruling on the motion to dismiss.

Board Rule 554.1 provides as follows:

Unless expressly authorized by the Board, interlocutory appeals to the Board of rulings by the Executive Director, Hearing Examiner or other Board agents shall not be permitted. Exceptions to such rulings shall be considered by the Board when it examines the full record of the proceedings.

It is clear from the language contained in Board Rule 554.1, that the Board will: (1) not allow interlocutory appeals unless expressly authorized by the Board and (2) consider a party's exception to a ruling when it examines the full record of the proceeding. In light of the express language of Board Rule 554.1, AFSCME asserts that in the present case, the Board should authorize the parties to file interlocutory appeals. Specifically, AFSCME contends that "WASA's Petition raises legal questions that are of significant magnitude, both as precedent and as they bear on the proceedings in the instant case. [Furthermore, AFSCME claims that] the parties agreed that they are issues that require the PERB's consideration immediately." (AFSCME's Request at p. 4). As a result, AFSCME is requesting that PERB grant their request and authorize its review of the Hearing Examiner's ruling.

AFGE is also seeking permission to file exceptions to the Hearing Examiner's ruling on the motion to dismiss. AFGE asserts that the Hearing Examiner's ruling is contrary to the Comprehensive Merit Personnel Act. In addition, AFGE claims that the present case "presents exceptional circumstances which merit review by [either the Executive Director or] the Board, prior to a hearing being conducted in this matter." (AFGE's Submission at p. 3). In their submission, NAGE asserts that it concurs with AFSCME's and AFGE's position.

WASA filed an opposition to all of the pleadings filed by the unions. In their opposition, WASA asserts that the Hearing Examiner's ruling is correct. In addition, WASA claims that Board Rule 554.1 expressly prohibits interlocutory appeals. Finally, WASA contends that the unions' appeal are an effort to delay the proceeding.

After reviewing the pleadings, we have determined that the unions have not made a persuasive argument to justify the Board taking the extraordinary step of allowing the unions' request for interlocutory appeal. Therefore, we deny the unions' request for interlocutory appeal. However, we would like to point out that once the Hearing Examiner issues his Report and Recommendation in this matter, all of the parties will have an opportunity to file exceptions to the Hearing Examiner's findings. As a result, all of the parties will still have the opportunity to challenge this and any other ruling at the end of the proceeding.

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For the reasons discussed, we deny the unions' request for interlocutory appeal.

ORDER

IT IS HEREBY ORDERED THAT:

1. The unions' request for interlocutory appeal is denied.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

May 26, 2004

Government of the District of Columbia
Public Employee Relations Board

_____)		
In the Matter of:)		
)		
American Federation of Government)		
Employees, Local 2725,)		
)		
)		
Complainant,)	PERB Case No. 03-U-18	
)		
)	Opinion No. 752	
)		
v.)	FOR PUBLICATION	
)		
District of Columbia Department of Health,)	(CORRECTED COPY)	
)		
)		
Respondent.)		
_____)		

DECISION AND ORDER¹

I. Statement of the Case:

On March 11, 2003, the American Federation of Government Employees, Local 2725 ("Complainant", "AFGE" or "Union"), filed an Unfair Labor Practice Complaint, in the above-referenced case. The Complainant alleges that the District of Columbia Department of Health ("Respondent" or "DOH") violated D.C. Code § 1-617.04 (a)(5) (2001 ed.) by failing to comply with the terms of a negotiated settlement agreement. (Compl. at p. 2).

DOH filed an answer to the Complaint denying that it violated the Comprehensive Merit Personnel Act. As a result, DOH has requested that the Board dismiss the Complaint. The Complaint is before the Board for disposition.

II. Discussion

¹On March 31, 2004, this office transmitted a Decision and Order to the parties concerning the above-referenced matter. Subsequently, this decision and Order was published in the D.C. Register (51 DCR 5152 (2004)). Unfortunately, the Opinion Number originally assigned to this case (Opinion No. 742) was not accurate. The Opinion Number which should have been assigned to this case is "Opinion Number 752." As a result, please disregard the earlier Decision and Order and substitute this "corrected copy" in its place. Also, please be advised that the "corrected copy" will be published again in the D.C. Register.

Decision and Order
PERB Case No. 03-U-18
Page 2

AFGE contends that Nicholas Kauffman was hired by DOH as a DS-9 environmental specialist. Subsequently, Mr. Kauffman was detailed to an unclassified position of higher responsibility and authority. Mr. Kauffman's detail was for more than ninety days. As a result, AFGE asserts that Mr. Kauffman should have been compensated at a higher grade. However, AFGE claims that DOH did not adjust Mr. Kauffman's salary. AFGE contends that DOH's actions violate the parties' collective bargaining agreement. In view of the above, AFGE filed a grievance on behalf

of Mr. Kauffman in May 2001. AFGE claims that at Step 2 of the grievance, DOH granted partial relief to the Grievant by agreeing to promote him from a DS Grade 9 to a DS Grade 11. (Compl. at p. 1). Despite the promotion, AFGE asserts that the grievance was not completely resolved at Steps 2 and 3 of the grievance process. Therefore, AFGE filed a Step 4 grievance. AFGE contends that prior to the disposition of the Step 4 grievance, the parties negotiated a settlement agreement. The settlement agreement was signed by DOH's Director on April 29, 2002 and was signed by both the Union and the Grievant in May 2002. (Compl. at p. 2) The settlement agreement "provides for back pay and establishment of a career ladder from DS-1301-11 to DS-1301-12, and DS-1301-13 for the Complainant's position description." (Answer at p. 3). In addition, paragraph two of the agreement provides that within 60 days of the execution of the agreement: (1) Mr. Kauffman shall receive his back pay and (2) DOH shall establish a career ladder description for the employee's position. However, to date, DOH has not complied with the terms of the settlement agreement.

AFGE asserts that DOH's failure to comply with the terms of the settlement agreement constitutes a violation of D.C. Code § 1-617.04(a)(5) (2001 ed.).² (Compl. at p.2). As a result, AFGE filed an unfair labor practice complaint. AFGE is requesting that the Board order DOH to: (1) comply with the terms of the settlement agreement; (2) pay costs; (3) cease and desist from violating the Comprehensive Merit Personnel Act ("CMPA"); and (4) post a Notice to employees.

DOH filed an answer to the unfair labor practice complaint denying that it violated the CMPA. DOH does not dispute the factual allegations underlying the asserted statutory violation. Instead, DOH claims that the agency's Director "submitted memoranda dated January 15, 2003, February 14, 2004, and March 3, 2003, requesting preparation of the appropriate documentation to effectuate compliance with the terms of the alleged Settlement Agreement. In addition, [the Respondent asserts that its Director] has signed a 'Request for Personnel Action' to effect the back pay for the

²D.C. Code § 1-617.04(a)(5) 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.

Decision and Order

PERB Case No. 03-U-18

Page 3

Complainant. “ (Answer at p. 4). For the above-noted reasons, DOH is requesting that the complaint be dismissed.

After reviewing the pleadings, we believe that the material issues of fact and supporting documentary evidence are undisputed by the parties.³ As a result, the alleged violations do not turn on disputed material issues of fact, but rather on a question of law. Therefore, pursuant to Board Rule 520.10, this case can appropriately be decided on the pleadings.⁴

The Board has previously considered the question of whether the failure to comply with the terms of a negotiated settlement agreement constitutes an unfair labor practice. In Teamsters, Local Union No. 639 and 730, IBTCWHA v. District of Columbia Public Schools, 43 DCR 6633, Slip Op. No. 400 at p.7, PERB Case No. 93-U-29 (1994), the Board observed that “[i]f an employer has entirely failed to implement the terms of a negotiated or arbitrated agreement, such conduct constitutes a repudiation of the collective bargaining process and a violation of the duty to bargain.” In addition, 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. D.C. 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, DOH acknowledges the existence of the settlement agreement. Furthermore, DOH does not dispute the factual allegations underlying the asserted statutory violation. Instead, DOH claims that DOH’s Director “submitted memoranda dated January 15, 2003, February 14, 2004, and March 3, 2003, requesting preparation of the appropriate documentation to effectuate compliance with the terms of the alleged Settlement Agreement. In addition, [the Respondent asserts that its Director] has signed a ‘Request for Personnel Action’ to effect the back pay for the Complainant. “ (Answer at p. 4). For the above-noted reasons, DOH is requesting that the complaint be dismissed, despite the undisputed fact that most of the terms of the settlement agreement remain unfulfilled. In addition, DOH offers no further explanation for its failure to fully comply with the

³The Respondent claims that the “Settlement Agreement contains a determination that the grievance would be partially resolved upon [Mr. Kauffman’s] promotion to DS-grade 11.” (Answer at p. 3. However, we did not find this language in the settlement agreement. Therefore, there is no genuine dispute concerning the terms of the settlement agreement.

⁴At the parties request, this matter was held in abeyance from July 31, 2003 until February 7, 2004, in order to allow the parties an opportunity to resolve this matter. However, on February 10, 2004, AFGE informed the Board that there “has been no viable progress in compliance with the Step 4 Settlement Agreement.” As a result, AFGE requested that a hearing be scheduled as soon as possible. For the reasons noted above, this case can be decided on the pleadings. Therefore, it is not necessary to consider AFGE’s request for a hearing.

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PERB Case No. 03-U-18
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terms of the settlement agreement.

After reviewing DOH's arguments, we have determined that DOH's reasons for failing to comply with the terms of the negotiated settlement agreement do not constitute a genuine dispute over the terms of the settlement agreement; but, rather a flat refusal to comply with the negotiated grievance settlement. As a result, we believe that DOH has no "legitimate reason" for its on-going refusal to comply with the settlement agreement. As such, we conclude that DOH's actions constitute a violation of its duty to bargain in good faith, as codified under D.C. Code § 1-617.04(a)(5) (2001 ed.). Furthermore, we find that by these same acts and conduct, DOH's failure to bargain in good faith with AFGE constitute, derivatively, interference with bargaining unit employees' rights in violation of D.C. Code § 1-617.04(a)(1) (2001 ed.). See, Committee of Interns and Residents v. D.C. General Hospital, 43 DCR 1490, Slip Op. No. 456, PERB Case No. 95-U-01.

As to the Complainant's request for reasonable costs, the Board first addressed the circumstances under which the awarding of costs to a party may be warranted in AFSCME, D.C. Council 20, Local 2776 v. D.C. Dept. of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). In that case the Board observed:

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued. We do not believe it possible to elaborate in any one case a complete set of rules or earmarks to govern all cases, nor would it be wise to rule out such awards in circumstances that we cannot foresee. What we can say here is that among the situations in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive bargaining representative. Slip Op. No. 245, at p.5.

In cases which involve an agency's failure to implement an arbitration award or a negotiated settlement, the Board has been reluctant to award costs. See, AFGE, Local 2725 v. D.C. Housing Authority, 46 DCR 6278, Slip Op. No. 585 at p. 5, PERB Case Nos. 98-U-20, 99-U-05 and 99-U-12 (1999). However, the Board has awarded costs when an agency has demonstrated a pattern and practice of refusing to implement arbitration awards or negotiated settlements. See, AFGE, Local 2725 v. D.C. Housing Authority, 46 DCR 8356, Slip Op. No. 597, PERB Case No. 99-U-33 (1991).

In the present case, the Complainant has not asserted that DOH has engaged in a pattern and practice of refusing to implement arbitration awards or negotiated settlements. Nor has any other persuasive case been made to justify the awarding of costs. As a result, we believe that the interest-of-justice criteria articulated in the AFSCME case, would not be served by granting the Complainant's request for reasonable costs. Therefore, we deny the Complainant's request for

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PERB Case No. 03-U-18
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reasonable costs.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Health (DOH), its agents and representatives shall cease and desist from refusing to bargain in good faith with the American Federation of Government Employees, Local 2725 (AFGE), by failing to comply with the terms of the negotiated settlement agreement rendered pursuant to the negotiated provisions of the parties' collective bargaining agreement.
2. DOH, 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 XVIII Labor-Management Relations", of the Comprehensive Merit Personnel Act, to bargain collectively through representatives of their own choosing.
3. DOH shall fully implement the terms of the negotiated settlement agreement.
4. AFGE's request for costs is denied for the reasons stated in this Opinion.
5. DOH 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.
6. Within fourteen (14) days from the issuance of this Decision and Order, DOH shall notify the Public Employee Relations Board ("PERB"), in writing, that the Notice has been posted accordingly. Also, DOH shall notify PERB of the steps it has taken to comply with paragraphs 3 and 5 of this Order.
7. Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

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

March 31, 2004

**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. 04-U-16
Opinion No. 766

Motion for Preliminary Relief

FOR PUBLICATION

DECISION AND ORDER

I. Statement of the Case

The American Federation of Government Employees, 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), (2), (3) and (4) (2001 ed.) by failing to comply with an arbitration award issued on August 29, 2003. (Compl. at p. 2). 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) comply with the arbitrator’s award; (2) immediately allow Regina Smith, Adrian Smith and Harold Davis to return to work; (3) pay attorney fees; (4) pay costs; (5) post a notice to employees; (6) reinstate the Grievants to their housekeeping duties during the 180-day transfer period; (7) extend the 180-day transfer period by starting the 180 days from the date that the Board issues a decision in this matter; and (8) cease and desist from violating the Comprehensive Merit Personnel Act. (Motion at p. 4 and Compl. at p. 7).

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

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Motion for Preliminary Relief
PERB Case No. 04-U-16
Page 2

if the Board grants preliminary relief in this case, it would violate Article 4 of the parties' collective bargaining agreement. (WASA's Opp. at p. 5) The "Motion for Preliminary and Injunctive Relief" is before the Board for disposition.

II. Discussion

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. The policy language promulgated by WASA contains language that tracks much of the wording found in Article 27 of the parties' 1998 collective bargaining agreement (CBA). Article 27 of the CBA provides in pertinent part that "... [all] employees holding certain job positions should be certified or licensed." 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 employees would be allowed to take a re-test for a license or certification (in their original position)

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.

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PERB Case No. 04-U-16
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whenever the test is scheduled.

On January 22, 2001, employees were 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 contacted those employees that had not obtained the required certification. WASA informed these employees that effective January 26, 2003, they would be temporarily assigned to duties that did not require them to perform as certified WWT Operators. Specifically, the employees were notified that they would be assigned work that would include performing housekeeping tasks at WASA.

On July 22, 2003, seven bargaining unit members received a "Notice of Proposed Disciplinary Action." The July 22nd Notice informed these seven individuals 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 seven 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.

AFGE asserts that on September 12, 2003, WASA contacted the seven 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. AFGE claims that as a result of WASA's actions, these employees are currently on a leave without pay status or on forced retirement. Furthermore, AFGE contends that these employees were not able to apply for "workers compensation or any other monetary benefits for individuals who do not have income." (Compl. at p. 3)

AFGE notes that WASA appealed the arbitrator's award and that this Board denied WASA's arbitration review request. However, AFGE asserts that despite the denial of WASA's arbitration review request, WASA has failed to comply with the terms of the arbitrator's award. Specifically, AFGE claims that WASA has failed to comply with the award by: (1) forcing the Grievants to use annual leave during this 180 day transfer period; (2) failing to transfer the Grievants to vacant

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Motion for Preliminary Relief
PERB Case No. 04-U-16
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positions; (3) requiring the Grievants to compete for positions with inside and outside applicants; and (4) failing to evaluate each of the Grievants to determine what their range of skills and abilities are. (Compl. at pgs 4-5) AFGE asserts that WASA's actions violate D.C. Code § 1-617.04(a)(1), (3) and (4) (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 are 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 to the Motion, WASA disputes 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). 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. [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. [As a result, WASA claims that] when the Arbitrator's decision was awarded on August 29, 2003, the agreement

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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.” (WASA’s Opp. at p. 2). 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 September letters instructed the Grievants that they would have to use annual leave because they could no longer perform their duties as WWT Operators.

It is clear that the parties disagree on the facts in this case. 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).

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 complied with the award. There appears to be a genuine dispute over whether WASA has complied and over some of the other terms of the award. Specifically, the parties disagree as to whether the Grievants may be placed on administrative leave or required to use annual leave or must be retained at work while they wait during the 180 day period to see if they can be transferred to a vacant position. In addition, they disagree over whether the Grievants were: (1) evaluated as required by the award and (2) told they had to compete for jobs along with inside and outside applicants. (See Compl. at p. 5). 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, 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 little more than 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 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 prohibits District agencies from engaging in unfair labor practices, the alleged violations, even if proved do not rise to the level of seriousness that would undermine public confidence in PERB’s ability to enforce the CMPA. Finally, while some

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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.

The facts of this case 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 the remedial purposes of the law would be served by pendent lite relief. Moreover, should violations be found in the present case, the relief requested can be accorded with no real prejudice to the Grievants following a full hearing. Therefore, we find that the facts presented are not appropriate for the granting of preliminary relief.

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 dated August 29, 2003. Specifically, the parties have a disagreement concerning whether the Grievants are to be returned to work or may be required to use available annual leave, compensatory leave or leave without pay, during the 180-day transfer period. We are remanding these issues to the arbitrator and directing the arbitrator to resolve the parties' dispute regarding these issues. The arbitrator's determination in this regard will be binding in both this case (PERB Case No. 04-U-16) and PERB Case No. 03-U-52⁵ to the extent that it raises the same issues. 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 PERB Case Nos. 03-U-52 and 04-U-16 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 Personnel Act. This referral includes the issues of whether WASA reviewed the Grievants' qualifications as required by the arbitrator and whether the Grievants were required to compete with other inside and outside applicants for positions.

For the reasons discussed above, the Board: (1) denies the Complainant's request for preliminary relief; and (2) consolidates this case with PERB Case No. 03-U-52 and directs the development of a factual record through an unfair labor practice hearing which will be scheduled before November 15, 2004. In addition, we are remanding the question of whether the Grievants

⁵PERB Case No. 03-U-52 involves an unfair labor practice complaint filed by AFGE, Local 631. In their complaint AFGE, Local 631, claims that WASA violated D.C. Code § 1-617.04 (a)(1), (3), (4) and (5) (2001 ed.) by retaliating against seven employees because they won a favorable award from arbitrator Jonathan Kaufman. PERB Case No. 03-U-52 also involves a dispute concerning the terms of the award dated August 29, 2003.

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should have been returned to work or could be required to use leave during the 180-day transfer period, 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 (PERB Case No. 04-U-16) and PERB Case No. 03-U-52 are remanded to the arbitrator for a decision clarifying the terms of the arbitrator's award dated August 29, 2003. Specifically, the arbitrator shall only consider the issues of whether the Grievants were required to be returned to work or could be required to use available annual leave, compensatory leave or leave without pay during the 180-day period noted in the award. All other issues involved in PERB Case Nos. 03-U-52 and 04-U-16 shall be referred to a Hearing Examiner for a consolidated hearing.
- (3) The Board's Executive Director shall refer the consolidated unfair labor practice complaint to a Hearing Examiner and schedule a hearing under the expedited schedule set forth below.
- (4) A hearing shall be scheduled in this case before November 15, 2004. The Notice of Hearing shall be issued seven (7) dates prior to the date of the hearing.
- (5) 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 written closing arguments or post-hearing briefs.
- (6) 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.
- (7) Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

October 13, 2004

Government of the District of Columbia
Public Employee Relations Board

_____)	
In the Matter of:)	
Dr. Emanuel Chatman,)	
Complainant,)	PERB Case No. 03-S-02
v.)	Slip Opinion No. 769
University of the District of Columbia Faculty)	FOR PUBLICATION
Association/National Education Association,)	CORRECTED COPY
Respondent.)	
_____)	

DECISION AND ORDER

I. Statement of the Case

Dr. Emanuel Chatman ("Complainant"), filed a standards of conduct complaint against the University of the District of Columbia Faculty Association/National Education Association. The case was assigned to a Hearing Examiner and a hearing was scheduled for September 1, 2004. However, the Complainant failed to appear. As a result, the Hearing Examiner issued an "Order to Show Cause." In his "Order to Show Cause," the Hearing Examiner directed that the Complainant respond within fourteen (14) days with good cause why this matter should not be dismissed with prejudice. The Complainant failed to respond to the "Order to Show Cause." In view of the above, the Hearing Examiner is recommending that the Complaint be dismissed in its entirety for want of prosecution. The Complainant did not file any exceptions to the Hearing Examiner's Report and Recommendation (R&R).

The Hearing Examiner's R&R is before the Board for disposition.

II. Discussion

The Complainant filed a standards of conduct complaint, in the above-referenced case. The Complainant alleges that the University of the District of Columbia Faculty Association/National Education Association, violated D.C. Code § 1-617.03 (a) (2001 ed.) by failing to hold a fair election. (Compl. at p. 2). In a notice dated July 29, 2004, the parties were informed that a hearing was

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scheduled for September 1, 2004. The hearing was to begin at 10:00 a.m. The Respondent's representative and a court reporter were present at the hearing. However, the Complainant failed to appear. Therefore, at 10:30 a.m. the Hearing Examiner decided to open the record. (See Order to Show Cause at p. 2). Despite the Complainant's failure to appear at the scheduled hearing, the Hearing Examiner did not dismiss the case. Instead, on September 3, 2004, the Hearing Examiner issued an "Order to Show Cause." In his "Order to Show Cause," the Hearing Examiner directed that the Complainant respond within fourteen 14 days with good cause why the Hearing Examiner should not recommend "the dismissal of this matter with prejudice for failure of Complainant to prosecute this case." (Order to show Cause at p. 2). As a result, the Complainant's response to the "Order to Show Cause" was due no later than the close of business (4:45 p.m.) on September 17, 2004. However, as of September 23, 2004, the Complainant had not filed a response to the "Order to Show Cause." In view of the above, the Hearing Examiner recommended that the Complaint be dismissed in its entirety for want of prosecution.

Pursuant to D.C. Code § 1-605.02 (3) (2001 ed.) and Board Rule 520.4, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. Specifically, we find that the Hearing Examiner's recommendation that the Complaint be dismissed is supported by the record. For example, we note that the Hearing Examiner made his recommendation to dismiss, approximately twenty-two days after the Complainant failed to appear at a hearing and approximately five days after the Complainant failed to respond to the "Order to Show Cause." In addition, on September 24, 2004 the Complainant was provided with a copy of the Hearing Examiner's report and informed that he could file exceptions to the Hearing Examiner's report. The Complainant's exceptions were due on October 14, 2004. However, to date, the Complainant has neither filed a response to the "Order to Show Cause" or submitted any exceptions to the Hearing Examiner's report. In view of the above, we adopt the Hearing Examiner's recommendation and dismiss the Complaint with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Hearing Examiner's recommendation is adopted in its entirety and the complaint is dismissed with prejudice.
2. Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

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

October 27, 2004

**DISTRICT OF COLUMBIA RETIREMENT BOARD ("BOARD")
NOTICE OF PUBLIC INTEREST
CERTIFICATION OF WINNER OF THE ELECTION TO SERVE AS THE
ACTIVE TEACHER MEMBER OF THE BOARD**

The District of Columbia Retirement Reform Act (Pub. L. 96-122), effective November 17, 1979, at section 121(b)), (D.C. Official Code § 1-711(b)) requires the District of Columbia Retirement Board ("Board") to conduct elections for an employee who serves in a salary class position ET 1-15 ("Active Teacher") under the D.C. Public School System to serve as a member of the Board. The Board through the American Arbitration Association (the "A.A.A."), in accordance with the Rules for the Election of Members to the D.C. Retirement Board 30 DCR 4333-4345, as amended, (election rules") conducted the election for the active teachers.

The ballots were counted on November 12, 2004, at the A.A.A. office, located at 601 Pennsylvania Avenue, N.W., Suite 700, Washington, D.C. in the presence of a Board representative, and under the supervision of Maria Gonzalez, A.A.A., New York City Office.

Pursuant to section 408.1 of the election rules, A.A.A. submitted a consolidated election report which was received on November 16, 2004. Based on this report and pursuant to sections 408.2 and 408.3 of the election rules, the Board hereby certifies the results of the election and declares the winner to be Mary A. Collins, an active teacher of the District of Columbia.

Pursuant to section 408.4 of the election rules, any qualified candidate for the election of an Active Teacher may petition the Board in writing for a recount of votes within seven (7) calendar days of publication of this certification. The petition must be filed at the Board's executive office located at 1400 L Street, N.W., Suite 300, Washington, D.C. 20005, along with a deposit by the petitioner of the estimated costs of conducting the recount. In the absence of a request for a recount, the election results will become final and not subject to further appeal thirty (30) days after the date of this publication of the certification of the winner.

Please address any questions regarding this notice to:

Darrick O. Ross, Chairman of the Board
Attn: Betty Ann Kane, Executive Director
D.C. Retirement Board
1400 L Street, N.W., Suite 300
Washington, D.C. 20005

**DISTRICT OF COLUMBIA RETIREMENT BOARD ("BOARD")
NOTICE OF PUBLIC INTEREST
CERTIFICATION OF WINNER OF THE ELECTION TO SERVE AS THE
RETIRED POLICE OFFICER MEMBER OF THE BOARD**

The District of Columbia Retirement Reform Act (Pub. L. 96-122), effective November 17, 1979, at section 121(b)), (D.C. Official Code § 1-711(b)) requires the District of Columbia Retirement Board ("Board") to conduct elections for one retired member of the District of Columbia Metropolitan Police Department ("Retired Police Officer") to serve as a member of the Board. The Board through the American Arbitration Association (the "A.A.A."), in accordance with the Rules for the Election of Members to the D.C. Retirement Board 30 DCR 4333-4345, as amended, conducted the election for the retired police officers.

The ballots were counted on November 12, 2004, at the A.A.A. office, located at 601 Pennsylvania Avenue, N.W., Suite 700, Washington, D.C. in the presence of a Board representative, and under the supervision of and under the supervision of Maria Gonzalez, A.A.A., New York City Office.

Pursuant to section 408.1 of the election rules, A.A.A. submitted a consolidated election report which was received by the Board on November 16, 2004. Based on this report and pursuant to sections 408.2 and 408.3 of the election rules, the Board hereby certifies the results of the election and declares the winner to be George R. Suter, a retired police officer of the District of Columbia.

Pursuant to section 408.4 of the election rules, any qualified candidate for the election a retired police officer may petition the Board in writing for a recount of votes within seven (7) calendar days of the publication of this certification of the winner. The petition must be filed at the Board's executive office located at 1400 L Street, N.W., Suite 300, Washington, D.C. 20005 along with a deposit by the petitioner of the estimated cost of conducting the recount. In the absence of a request for a recount, the election results will become final and not subject to further appeal thirty (30) days after the date of this publication of the certification of the winner.

Please address any questions regarding this notice to:

Darrick O. Ross, Chairman of the Board
Attn: Betty Ann Kane, Executive Director
D.C. Retirement Board
1400 L Street, N.W., Suite 300
Washington, D.C. 20005

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