

DCPS engaged in this conduct while simultaneously engaging in related unfair labor practices, as PERB ruled just last week, by failing to bargain with WTU during the pandemic. *WTU v. DCPS*, PERB Case No. 20-U-26, Slip Op. No. 1755, at 4 (2020).

DCPS's conduct is "clear-cut" and "flagrant[ly]" violates the District's Comprehensive Merit Personnel Act ("**CMPA**"). *See* PERB Rule 520.15. Without PERB intervention, bargaining unit members will be forced to decide whether to comply with DCPS's directive and agree to return to in-person work under conditions that were never negotiated with their collective bargaining representative and which could be dangerous to their health, or refuse to comply with the directive and subject themselves to discipline. This will harm the public interest and interfere with "the Board's processes" in a way that will make an ultimate Board remedy "inadequate." *See* PERB Rule 520.15. The PERB should therefore stop DCPS's blatant attempt to sidestep the collective bargaining process and order preliminary relief. As discussed further below, WTU's request is fully consistent with other recent cases where the PERB has ordered preliminary relief during the COVID-19 pandemic. *See AFGE, Local 631 v. D.C. Office of Labor Relations & Collective Bargaining*, PERB Case No. 20-U-23, Slip Op. No. 1743 (2020); *Fraternal Order of Police v. D.C. Dep't of Corr.*, PERB Case No. 20-U-24, Slip Op. No. 1744 (2020).

FACTS

As detailed further in WTU's Unfair Labor Practice Complaint and in the Affidavits of Elizabeth Davis ("**Davis Affidavit**") and Kimberly-Celeste Boyd ("**Boyd Affidavit**") submitted this same day, DCPS schools have been closed for in-person learning since March 13, 2020. Davis Affidavit ¶ 4. On or around Friday, May 8, 2020, the WTU negotiating team met with the DCPS negotiating team and Chancellor Ferebee to discuss ideas and recommendations regarding

DCPS's plans to reopen schools, and the educational challenges faced by students and teachers during the COVID-19 pandemic. *Id.* ¶ 7. Chancellor Ferebee stated that the May 8 meeting “was not a contract negotiating session” and that “further collective bargaining negotiations should be handled by the bargaining teams in a manner agreed to by both teams.” *Id.* ¶ 7; Exhibit 8.

However, DCPS refused to participate in bargaining sessions during the pandemic, a practice which the PERB found to be an unfair labor practice by DCPS on July 2, 2020. *WTU v. DCPS*, PERB Case No. 20-U-26, Slip Op. No. 1755, at 4 (2020).

On June 22, WTU President Davis sent DCPS officials a copy of the recommendations prepared by WTU's Taskforce on Reopening DC Schools. *Id.* ¶ 8. The Taskforce then briefed DCPS officials on the recommendations on June 24 and 26. *Id.* ¶ 9. No bargaining took place at these sessions. *Id.*; Boyd Affidavit ¶ 10.

On June 30, 2020, without further discussion or bargaining with WTU, DCPS sent WTU bargaining unit members two documents via email: (1) DCPS Return to In-Person Work Guidelines (“**Guidelines**”); and (2) DCPS Employee Return to In Person Work Intent Form (“**Intent Form**”). Davis Affidavit ¶ 10; Exhibits 10 & 11.

The Guidelines unilaterally imposed new terms and conditions of employment on bargaining unit members without bargaining with WTU, including terms and conditions that affect the health and safety of bargaining unit members and subject members to new categories of discipline. The Guidelines announce that “DCPS will implement a hybrid learning model for the 2020-21 School Year (SY) that will include continued virtual instruction and in-person instruction for a portion of our students.” Exhibit 10 at 1. In light of that return, the Guidelines set forth unilaterally-established new policies relating to COVID-19. For example, the

Guidelines address use of masks, health screenings, use of leave, and COVID-19 related training. *See* Exhibit 10 at 1–3. None of these policies were discussed with WTU.

The Guidelines further note that “A detailed operational guidebook that will provide guidance and requirements to ensure we are creating a safe learning environment is forthcoming. School-specific operational plans will be developed with school leadership in July.” *See* Exhibit 10 at 2 n.1. Again no such guidebook has been negotiated with WTU, nor has it even been provided to the union as of the filing of this motion.

The Intent Form similarly unilaterally imposes new terms and conditions of employment on bargaining unit members. Although the Intent Form states that the “in-person return to work date for employees” has not been determined yet, it requires bargaining unit members to complete and sign the Intent Form no later than July 10, 2020. *See* Exhibit 11.

The Intent Form gives employees two options that they must choose from under the heading “Work Setting Considerations”:

“I plan return to in-person work, with the provision of safety measures aligned to DC Health recommendations.”; or

“I believe I have a qualifying medical condition pursuant to FMLA and/or ADA and I plan to apply for leave or I do not have a qualifying medical condition, but I believe I am at higher risk (Higher Risk Guidance) for severe illness due to COVID-19 pursuant to the Families First Coronavirus Relief Act (FFCRA) and do not plan to return in person for safety and/or health reasons for myself or someone in my household.”

Id. The form includes an Acknowledgment section that employees must sign, stating “By typing my name below, I certify that I have answered all questions to the best of my ability, and I acknowledge that DCPS will use this information to assist with planning for the in-person return to work for DCPS staff.” *Id.*

DCPS did not bargain with WTU regarding the employment conditions outlined in the Guidelines or Intent Form, the supposedly forthcoming “detailed operational guidebook” and “[s]chool-specific operational plans”, or the requirement that bargaining unit members sign the Intent Form by July 10. Davis Affidavit ¶¶ 11, 18; Compl. ¶¶ 16–18.

WTU and its members have serious concerns regarding whether DCPS’s unilaterally-developed Guidelines are adequate to protect teachers, students, and the general public from COVID-19. For example, the Guidelines provide no detail on exactly when school employees or visitors will be required to wear masks, or what kind of masks will be required; no requirements or guidelines for handwashing; no quarantine guidelines for asymptomatic individuals; and no protocols for dealing with infected students. *See* Exhibit 10.

Despite these clear gaps in its safety protocol, and despite DCPS acknowledging that it is not yet completed the “detailed operational guidebook” and “[s]chool-specific operational plans,” DCPS demanded that WTU members sign and return the Intent Form by July 10. Thus, DCPS has ordered teachers to decide whether they would return to in-person instruction without any detailed information on how DCPS plans to protect them from the spread of COVID-19, or how the school at which they work plans to operate, and without bargaining with employees’ designated bargaining representative.

On July 5, 2020, WTU President Davis sent Chancellor Ferebee a request to bargain regarding the Guidelines and the Intent Form. Davis Affidavit ¶ 13; Exhibit 9. Also on July 5,

WTU sent Chancellor Ferebee a request for information regarding the documents and DCPS's reopening plan. Davis Affidavit ¶ 13.

As of the date of this filing, DCPS has not responded to the information request.

On July 6, 2020, Donielle Powe, Deputy Chief of DCPS's Labor Management & Employee Relations responded to WTU's request to bargain. Exhibit 9. However, Ms. Powe did not state that DCPS would bargain over the Guidelines or Intent Form, nor did she state that DCPS would rescind those documents, or the July 10 deadline, pending negotiations. *Id.* Further, Ms. Powe did not agree to meet or to substantive negotiations prior to July 10. *Id.* Instead, Ms. Powe stated, "As previously discussed, DCPS is willing to engage in impacts and effects bargaining with you concerning reopening. Before we begin bargaining for the reopening, we should meet to discuss initial ground rules. We would like to be efficient while observing that everyone is busy at this time of year. Since we already have Thursdays set aside, are you available to meet on Thursday, July 9." *Id.*

Ms. Powe's comment that "[a]s previously discussed DCPS is willing to engage in impacts and effects bargaining with you concerning reopening," made little sense, since DCPS had refused to bargain over any topic (including reopening) for several months. Davis Affidavit ¶ 16. Regardless, President Davis responded that WTU was requesting again that DCPS rescind the Guidelines and Intent Form and that the parties begin bargaining immediately. *Id.* ¶ 18. As of this filing, DCPS has not responded to that request.

THE BOARD SHOULD AWARD WTU PRELIMINARY RELIEF AND ORDER DCPS TO RESCIND ITS DIRECTIVES TO BARGAINING UNIT MEMBERS

A. Relevant law regarding preliminary relief.

The PERB may order preliminary relief where it finds that a party's "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 may be inadequate.” PERB Rule 520.15. The Board need not find “irreparable harm” prior to granting preliminary relief, but instead may order preliminary relief where “there is reasonable cause to believe that the CMPA has been violated and that the remedial purpose of the law will be served by *pendente lite* relief.” *AFGE, Local 631 v. D.C. Office of Labor Relations & Collective Bargaining*, PERB Case No. 20-U-23, Slip Op. No. 1743, at 7–8 (2020) (quoting *AFGE, Local 872 v. WASA*, 60 D.C. Reg. 16507, Slip Op. No. 1441 at 4, PERB Case No. 13-U-19 (2013)).

During the COVID-19 pandemic, the Board has twice awarded preliminary relief under circumstances similar to those presented here.

First, in *AFGE, Local 631*, the Board awarded preliminary relief where the agency refused to bargain over the impacts and effects of unilaterally implemented changes to working conditions made in response to the COVID-19 pandemic—concluding that such a refusal to bargain was “clear-cut and flagrant conduct” that “seriously interfere with the Board’s process.” PERB Case No. 20-U-23, Slip Op. No. 1743, at 7–8.

Second, in *Fraternal Order of Police v. D.C. Dep’t of Corr.*, the Board found that preliminary relief was warranted where the agency refused to bargain with the union regarding health and safety issues related to the COVID-19 pandemic, and also the impacts and effects of unilaterally implemented changes. PERB Case No. 20-U-24, Slip Op. No. 1744, at 6–7 (2020). As the Board noted, the COVID-19 pandemic presents circumstances where union “representation is most critical” and therefore an agency’s decision to limit a union’s representational capacity “strikes at the heart of collective bargaining.” *Id.* at 7.

B. Relevant law regarding DCPS’s bargaining obligations.

An agency violates the CMPA and commits an unfair labor practice when it refuses to bargain in good faith regarding a mandatory subject of bargaining. D.C. Official Code § 1-617.04(a)(5). One such mandatory subject is “the health and safety of employees.” *AFGE, Local 631*, PERB Case No. 20-U-23, Slip Op. No. 1743, at 9. Relatedly, an agency violates the CMPA when it deals directly with represented employees, rather than bargaining with the employees’ chosen representative. *Fraternal Order of Police v. D.C. Metro. Police Dep’t*, PERB Case No. 11-U-52, Slip Op. No. 1227, at 5 (2011).

Regarding non-mandatory subjects of bargaining, including management rights that are considered nonnegotiable under DC law, an agency must still bargain with a union over “the impact and effects of its exercise of those rights.” *Fraternal Order of Police v. D.C. Dep’t of Corr.*, PERB Case No. 20-U-24, Slip Op. No. 1744, at 7–8 (2020).

An agency also violates the CMPA by implementing a “unilateral change in employees’ existing terms and conditions of employment” without bargaining. *AFGE, Local 2978 v. D.C. Dep’t of Health*, PERB Case No. 14-U-14, Slip Op. No. 1499, at 2 (2014).

C. WTU is entitled to preliminary relief.

DCPS’s actions in issuing the Guidelines and forcing employees to sign the Intent Form violate the CMPA and constitute unfair labor practices for three reasons.

First, the Guidelines and requirement to sign the form are unilateral changes to terms and conditions of employment on a mandatory subject of bargaining, namely the health and safety of DCPS employees. *AFGE, Local 631*, PERB Case No. 20-U-23, Slip Op. No. 1743, at 9. Consequently, DCPS was required to bargain with WTU prior to implementing these policies. However, DCPS has failed to bargain on any of the issues contained in the Guidelines, or

regarding the new requirement that employees sign the form. Further, the subjects outlined in the Guidelines and the requirement to sign the Intent Form are not terms of the parties' CBA, and are therefore changes to employees' terms and conditions of employment.

Although DCPS initially met with WTU representatives to discuss reopening DCPS schools, it then unilaterally issued the Guidelines and Intent Form without consulting WTU. Specifically, while DCPS officials met with the WTU negotiating team on May 8, and attended briefing given by WTU's Reopening Taskforce on June 24 and 26, DCPS provided no response to WTU's proposals prior to DCPS's unilateral decision to implement the Guidelines and order members to sign the Intent Form. DCPS did not discuss the Guidelines or the Intent Form with WTU prior to sending it to members on June 30. Further, when WTU requested bargaining on July 5, DCPS refused, instead insisting on a session to "discuss initial ground rules" which would prevent bargaining prior to the date by which teachers were instructed to sign the Intent Form.

Accordingly, in refusing to bargain over mandatory subjects and unilaterally implementing changes in employees' terms and conditions of employment, DCPS violated the CMPA.

Second, DCPS unlawfully dealt directly with WTU members when it sent the Guidelines and Intent Form without first bargaining with WTU. By contacting bargaining unit members regarding reopening without first discussing the matter with WTU, and further requiring members to sign the Intent Form, the school district severely undermined WTU's role as the bargaining representative.

Third, to the extent DCPS claims that any of the new terms and conditions of employment outlined in the Guidelines or Intent Form fall within the category of "management

rights” (which WTU disputes), DCPS still violated the CMPA by refusing to bargain over “the impact and effects of its exercise of those rights.” *Fraternal Order of Police v. D.C. Dep’t of Corr.*, PERB Case No. 20-U-24, Slip Op. No. 1744, at 7–8 (2020). DCPS made no attempt to bargaining over the impact and effects of the two documents prior to issuing them. Indeed, it only notified WTU that it was issuing the documents a few hours before they were sent to bargaining unit members. And since the documents were issued, it has refused to bargain regarding their impacts and effects, including the requirement that teachers sign the Intent Form by July 10.

DCPS’s “conduct is clear-cut and flagrant.” PERB Rule 520.15. We note that the Board recently concluded that DCPS violated the CMPA when it refused to engage in contract negotiations with WTU. *WTU v. DCPS*, PERB Case No. 20-U-26, Slip Op. No. 1755, at 4 (2020). The instant case is yet another attempt by DCPS to ignore its collective bargaining obligations. Moreover, “the public interest is seriously affected” by DCPS’s decision. The public—especially DCPS students and parents—have an interest in ensuring that the school district and its teachers are on the same page regarding conditions in the schools during the COVID-19 pandemic. Labor discord could cause confusion and disruption in the district’s efforts to control the spread of the virus, thereby endangering the health of students and the community at large. Further, input from teachers is likely to improve the effectiveness of protective measures in the schools.

As Kimberly-Celeste Boyd, a DCPS School Library Media Specialist, states in her attached affidavit, she joined WTU’s Taskforce on Reopening Schools to help develop standards and procedures during the pandemic. Boyd Affidavit ¶ 4. However she was “upset and nervous” to receive DCPS’s email with the Guidelines and order to sign the Intent Form. *Id.* ¶ 12. She saw

the email as a threat to teachers and as “imposing potentially unsafe work conditions.” *Id.* She was especially concerned because she has a medical condition that places her at high risk for experiencing adverse side effects of COVID-19, were she to contract the disease, and also lives with family members who are at a high risk. *Id.* For that reason, she did not want to declare her intent to return to in-person work without knowing specifically how DCPS plans to protect her health and safety. *Id.* However, she is afraid that if she does not sign the form, she will be disciplined for refusing to do so. *Id.*

Collective bargaining is intended to prevent this type of confusion. It is particularly necessary to promote labor peace during a time of uncertainty, such as the COVID-19 pandemic. Accordingly, granting preliminary relief and ordering DCPS to rescind the documents and bargain over reopening would promote the public interest.

Finally, “the Board’s processes” will be interfered with and “the Board’s ultimate remedy may be inadequate” without preliminary relief. Teachers are being directed to sign the Intent Form by July 10, 2020, and WTU therefore asks the Board to issue a preliminary order before then. Even if PERB cannot act within that time frame, it is imperative that issues regarding COVID-19 protective measures be negotiated and resolved before the start of the upcoming school year, which is scheduled to begin on August 31, 2020, since DCPS has said that at least some instruction will take place in person during the school year. If PERB issues no relief by then, teachers will be required to work under health and safety conditions unilaterally imposed by DCPS—and those conditions threaten the lives of WTU members.

CONCLUSION

WTU members are anxious to continue their important work in educating DC’s youth. But they want to do so safely—both for their protection, and the protection of their students.

DCPS's decision to disregard its collective bargaining responsibilities frustrates a safe return to the classroom. For the foregoing reasons, the Board should order DCPS to rescind its unilateral changes and bargain with WTU regarding these important health and safety matters.

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Respectfully submitted,

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