Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
Council of School Officers, Local 4, American Federation of School Administrators, AFL-CIO,	)	
Complainant,	)	PERB Case No. 09-U-08
v.	)	Slip Opinion No. 1016
District of Columbia Public Schools,	)	
Respondent.	)	

I. Statement of the Case

On December 4, 2008, the Council of School Officers, Local 4, American Federation of School Administrators, AFL-CIO ("Union" or "Complainant") filed an Unfair Labor Practice Complaint ("ULP") against the District of Columbia Public Schools ("DCPS" or "Respondent") alleging that DCPS violated the Comprehensive Merit Personnel Act ("CMPA") D.C. Code §1-617.04(a)(1) and (5) by failing to: (i) provide documents associated with grievances filed on behalf of two probationary employees (and bargaining unit members); (ii) "abide by the terms of the parties' collective bargaining agreement ["CBA"] and process the Union's grievances [which] is also a violation of Sections 1-617.04(a)(1) and (5) because it serves to undermine the Union's role as the exclusive collective bargaining representative for the employees"; and (iii) abide by a previous arbitration award between the parties which determined that a probationary employee could arbitrate an adverse action. (Complaint at p. 5). On January 6, 2009, Respondent filed an Answer to the Unfair Labor Practice Complaint ("Answer"), denying that it committed any unfair labor practices. (See Answer at pgs. 5-6).

II. Background:

The above-captioned matter was assigned to Hearing Examiner Lois Hochhauser. The parties stated that there were no factual issues in dispute. (See R&R at p. 1). As a result, the parties agreed there was no need for a hearing and requested that they be allowed to submit their arguments on briefs. (See R&R at p. 1). "After the proceeding was concluded, the representatives contacted the Hearing Examiner by telephone and stated that they had resolved all but one issue." (R&R at p. 1). Specifically, the parties agreed that the issue regarding DCPS' alleged failure to provide information was removed from the proceedings, leaving the issue concerning DCPS' failure to process the grievances for resolution by the Hearing Examiner. (See Respondent's Post Hearing Brief at p. 2). "They recited the issue to the Hearing Examiner who memorialized it in an Order dated May 13, 2009. . . . The parties filed their briefs in a timely manner, and the record was closed on June 25, 2009." (R&R at p. 1). On October 8, 2009, the Hearing Examiner issued a Report and Recommendation ("R&R"), recommending that the Complaint be dismissed. (See R&R at p. 6).

Complainant submitted Exceptions to the Hearing Examiner's R&R ("Exceptions"), and the Respondent submitted an Opposition to Complainant's Exceptions ("Opposition"). The Hearing Examiner's Report and Recommendation, Complainant's Exceptions and the Respondent's Opposition are before the Board for disposition.

III. Hearing Examiner's Report and Recommendation

A. The Hearing Examiner's Findings of Fact Based upon the Undisputed Facts as Agreed Upon by the Parties.

1. Complainant is the exclusive bargaining representative of certain employees of DCPS. See PERB Certification Nos. 82-R-19, 88-R-06 and 96-UM-05.

2. Respondent, through the Chancellor, is the entity with the authority to negotiate and execute [CBA's] with labor organizations for the purpose of establishing wages, hours and other terms and conditions of its employees. The parties entered into a [CBA] which includes a grievance procedure. . .

3. By letter dated October 10, 2008, DCPS terminated the employment of Galeet BenZion as principal of Shepard Elementary School. The letter stated, in pertinent part:

> This letter serves as notice that based on input from your Instructional Superintendent and your status as a probationary employee pursuant to 5 D.C.M.R. §1307, your position as principal . . . is terminated . . . immediately. . .

> The Union filed a grievance on Ms. BenZion's behalf with DCPS [,] challenging the termination. On or about November 7, 2008, DCPS notified the Union that it would not process Ms. BenZion's grievance because she was in probationary status at the time of termination.
>
> 4. By letter dated October 23, 2008, DCPS terminated the employment of Walter Bowman as assistant principal of Kelly-Miller Middle School. The letter stated in permanent part:
>
> > This letter serves as notice that, based on your status as a probationary employee pursuant to 5 D.C.M.R. §1307 and because of your failure to provide accurate and complete information about your legal history on at least three different employment applications you submitted to [DCPS] your employment as an Assistant Principal with DCPS is terminated, effective immediately.
>
> The Union filed a grievance on behalf of Mr. Bowman with DCPS regarding the termination. On November 7, 2008, DCPS notified the Union that it would not process the grievance because Mr. Bowman was in probationary status at the time of his removal.
>
> 5. Both Ms. BenZion and Mr. Bowman were in probationary status at the time they were terminated.

(R&R at pgs. 3-4).

B. Issue before the Hearing Examiner, the parties' positions and her Analysis and Recommendation.

The issue presented to the Hearing Examiner was as follows:

> Did [DCPS] commit any unfair labor practice by failing to process the grievances filed by Walter Bowman and/or Galeet BenZion?

(R&R at p. 2).

1. The Parties' Positions.

The Hearing Examiner stated that the Union's position argued that DCPS had failed to process the grievances of Bowman and BenZion in violation of the parties' CBA. (See R&R at p. 4). In addition, the Union alleged "that by refusing to process these grievances, DCPS

committed [unfair labor practices] in violation of D.C. Code §§1-617.04(1) and (5)." (R&R at p. 4). "[The Union also] argue[d] that DCPS was required to process the grievances pursuant to an arbitration award issued in another matter between the parties and that its failure to do so is a change in the terms and conditions of employment." (R&R at p. 4).[1] The Hearing Examiner observed that DCPS' opposition to the Union "maintain[ed] that it did not commit any ULP because a probationary employee cannot grieve a termination. [DCPS] contend[ed] that it was not bound by the prior arbitration award. Further, it argue[d] that [the Board] lacks jurisdiction to hear this matter, which, it argue[d], is contractual in nature." (R&R at p. 4).

2. Hearing Examiner's Discussion

The Hearing Examiner found that the Union's Complaint relied substantially on DCPS' alleged failure to meet its contractual obligation to permit probationary employees to pursue grievances under the parties' CBA. The Hearing Examiner observed that the Board has "[differentiated between those] obligations that are statutorily imposed under the CMPA and those mandated by a collective bargaining agreement." (R&R at p. 4). The Hearing Examiner also stated that:

> [a] charge involving a violation of a collective bargaining agreement alleges a breach of an obligation contractually agreed-upon between the parties while a charge of a refusal to bargain over a mandatory subject of bargaining or a unilateral change in established and bargainable terms and conditions of employment constitute ULPs. The CMPA provides for the resolution of these violations while the parties have contractual remedies for the violation of the provisions of their agreement.

(R&R at p. 4).

Applying this reasoning, the Hearing Examiner opined that:

> [b]ased on a careful consideration of the documents and arguments presented . . . [she] conclude[d] that [the Union] did not meet its burden of proving that the refusal of DCPS to process the grievances constituted unfair labor practices. Rather, the matter appears to be governed by the longstanding principle that the Board will not address rights secured by a collective bargaining agreement. In this matter, the Union can pursue contractual remedies to secure the rights of its members.

(R&R at pgs. 5-6).

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[1] The Union refers to an arbitration award issued on March 22, 2005, which involved both the Union and DCPS. The award was attached as an exhibit to the Union's Post-Hearing Brief. The Union claims that in that award, the arbitrator made a determination that grievances filed by probationary employees were arbitrable, and that this determination is binding in the present matter.

Next, the Hearing Examiner addressed the Union's assertion that DCPS "refus[ed] . . . to abide by an arbitration decision which had previously determined that probationary employees may make use of the grievance procedures contained in the parties' collective bargaining agreement . . . [and which] amount[ed] to a refusal to bargain in good faith, and thus a violation of Sections 1-617.04(a)(1) and (5) of the CMPA." (Complaint at p. 5). However, the Hearing Examiner concluded:

> that the Union's reliance on the arbitration award is misplaced for several reasons. First, arbitration awards have little if any precedential value unless the parties and the facts are the same. How Arbitration Works (6th Ed.) Elkouri and Elkouri. Although the parties are the same, the Union did not establish that the underlying facts are the same. In addition, arbitrations rely on the collective bargaining agreement for guidance while matters before [the Board] rely on the District of Columbia laws and regulations. Therefore [in the Award] the Arbitrator relied on the Agreement, while [the Board] relies on the CMPA. There was insufficient evidence and argument presented that DCPS engaged in an egregious and pervasive change in the terms and conditions of employment so as to constitute a repudiation of the agreement.

(R&R at p. 5).

Based upon the foregoing, the Hearing Examiner concluded that the Union's argument that DCPS violated the parties' CBA and failed to adhere to an arbitration award were allegations of a contractual nature and failed to establish either a repudiation of the contract or a violation of Sections 1-617.04(a)(1) and (5) of the CMPA. Therefore, the Hearing Examiner recommended that in light of the undisputed facts, the parties' arguments, and her findings and analysis, that the Complaint should be dismissed. (See R&R at p. 6).

IV. The Union's Exceptions, Agency's Opposition and the Board's Discussion

Generally, the Union's exceptions assert that the Hearing Examiner failed to fully consider: (1) the facts the Union believes establish an unfair labor practice; and (2) the arguments that the Union provided in its Post-Hearing Brief. (See Exceptions at p. 2). Therefore, the Union claims the Hearing Examiner's findings and conclusions are unsupported and not reasonable. (See Exceptions at p. 2).

The Union's first exception contends that "[t]he Parties' [CBA] Does Not Restrict a Probationary Employee's Ability to File a Grievance and for that Grievance to be Processed." (Exceptions at p. 7). Specifically, the Union argues that probationary employees should be allowed to utilize the grievance/arbitration provisions of the parties' CBA because it believes the CBA contains language that proves the parties intended probationary employees to be able to

pursue grievances under the CBA. (See Exceptions at pgs. 8-9). The Union maintains that if the Hearing Examiner had properly considered its argument (that the parties' CBA does not prohibit probationary employees from pursuing grievances), she would have concluded that DCPS: (1) prevented the Union from exercising its statutory rights; and (2) violated its duty to bargain in good faith and committed an unfair labor practice when DCPS refused to process Bowman's and BenZion's grievances. (See Exceptions at p. 9).

DCPS' Opposition disagrees with the Union's assertions, and maintains that the Hearing Examiner "thoroughly considered the issues, legal arguments and facts before her. . . . [and] did not err in her treatment of the Complainant's arguments." (Opposition at pgs. 4-6).

The Board finds that the Union's first exception asserts that the Hearing Examiner should have found that the Union's statutory rights were violated and that DCPS refused to bargain in good faith. The Union's exception is based on its belief that DCPS' alleged violations of the CBA should have compelled the Hearing Examiner to conclude that DCPS committed an unfair labor practice. Clearly, this exception is a reiteration of the arguments Complainant made in its Brief and that were rejected by the Hearing Examiner. Moreover, pursuant to Board Rule 520.11, "the party asserting a violation of the CMPA shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." Whether exceptions have been filed or not, the Board will adopt the hearing examiner's recommendation if it finds, upon full review of the record, that the hearing examiner's "analysis, reasoning and conclusions" are "rational and persuasive." *D.C. Nurses Association and D.C. Department of Human Services,* 32 DCR 3355, Slip Op. No. 112 , PERB Case No. 84-U-08 (1985); See also *D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corporation*, 46 DCR 6271, Slip Op. No. 583, PERB Case No. 98-U-02 (1999).

To that end, the Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Tracy Hatton v. FOP/DOC Labor Committee*, 47 DCR 769, Slip Op No. 451 at p. 4, PERB Case No. 95-U-02 (1995); See also *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, Slip Op. No. 285, PERB Case No. 86-U-16 (1992); and see *Charles Bagenstose et al. v. D.C. Public Schools*, 38 DCR 4154, Slip Op. No. 270, PERB Case No. 88-U-34 (1991); and *Haynesworth, et al. and American Federation of Government Employees, Local 631*, 45 DCR 1479, Slip Op. No. 528, PERB Case Nos. 97-S-02 and 97-S-03 (1997). As a result, the Board will reject challenges to the Hearing Examiner's findings based on: (l) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. *American Federation of Government Employees, Local 2741 v. D.C. Department of Recreation Parks*, 46 DCR 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999); and *American Federation of Government Employees v. District of Columbia Water Authority*, _DCR_, Slip Op. No. 702, PERB Case No. 00-U-12 (2003).

Thus, Complainant's disagreement with the Hearing Examiner's findings is not grounds for reversal of her recommended findings, as they are fully supported by the record. See *American Federation of Government Employees Local 874 v. D.C. Department of Public Works*, 38 DCR 6693, Slip Op. No 266, PERB Case Nos. 89-U-15, 89-U-18 and 09-U-04 (1991); and

see *Teamsters Local Unions 639 and 670, International Brotherhood of Teamsters AFL-CIO v. District of Columbia Public Schools*, 54 DCR 2609, Slip Op. No. 804, PERB Case No. 02-U-26 (2005). Consequently, the Board rejects Complainant's exception.

In addition, the Union's only allegation that DCPS violated D.C. Code § 1-617.04(a)(1) and (5) is in its Complaint, where it alleged that DCPS' refusal to process the grievances of Bowman and BenZion in accordance with the parties' CBA amounts to an unfair labor practice.. (See Complaint at p. 5). No arguments concerning violations of the D.C. Code were made in the Union's Brief submitted to the Hearing Examiner and, consequently, the Hearing Examiner concluded that Complainant had not met its burden of proof.[2] It should be noted that D.C. Code § 1-617.04 – Unfair Labor Practices, provides in relevant part, that:

> (a) The District, its agents, and representatives are prohibited from:
>
> > (1) Interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;

The Board has determined that "[e]mployee rights under this subchapter are prescribed under D.C. Code. [§1-617.06(a) and (b) (2001 ed.) and consist of the following: (1) [t]o organize a labor organization free from interference, restraint or coercion; (2) [t]o form, join or assist any labor organization; (3) [t]o bargain collectively through a representative of their own choosing. ..; (4) [to] present a grievance at any time to his or her employer without the intervention of a labor organization [.]" *American Federation of Government Employees, Local 274 1 v. District of Columbia Department of Recreation and Parks*, 45 DCR 5078, Slip Op. No. 553 at p. 2, PERB Case No. 98-U-03 (1998); and see *Carl L. White v. District of Columbia Department of Corrections and FOP/DOC Labor Committee*, 49 DCR 8973, Slip Op. No. 686 at p. 4, PERB Case No. 02-U-15 (2002).

As stated above, Complainant's arguments do not allege or establish that any of the rights described above were violated. Instead, they specifically concern DCPS' alleged violation of the CBA. For example, Complainant argues that:

> [i]n a case like the instant matter, the first place to look for guidance must be the parties' [CBA]. . . . Here, the parties' labor contract contains a detailed grievance and arbitration provision. [See] Labor Contract at Article VIII. This contractual provision

[2] The Complainant did not have to prove its case on the pleadings, but it must plead or assert allegations that, if proven, would establish the alleged statutory violation. See *Virginia Dade v. National Association of Government Employees, Service Employees International Union, Local R3-06*, 46 DCR 7253, Slip Op. No. 491, PERB Case No. 96-U-22 (1996); and *Gregory Miller v. American Federation of Government Employees, Local 631, AFL-CIO and DC Department of Public Works*, 48 DCR 6560, Slip Op. No. 371, PERB Case No. 93-S-02; 93-U-25 (1994). Furthermore, this Board has held that in order to maintain a cause of action, a complainant must allege that some evidence exists that, if proven, would tie the respondent's actions to a statutory violation. In the absence of such evidentiary allegations, a respondent's conduct cannot be found to constitute an unfair labor practice because the complainant has failed to present allegations supporting the cause of action. See *Goodine v. Fraternal Order of Police*, 43 DCR 5163, Slip Op. No. 476, PERB Case No. 96-U-16 (1996).

> makes no distinction between probationary and/or permanent employees with respect to the right to file a grievance. Indeed, the parties' grievance/arbitration provision is devoid of any reference to different types of employees. It simply states that if a grievance is not resolved on an informal level, "it shall be reduced to writing, signed by the grievant and presented to the same person(s) referred to in the informal steps." See Labor Contract, Article VIII, C.2. Moreover, a review of the entire labor contract leads to the conclusion that there is sparse reference to probationary employees. But, even these references fail to provide any support for the refusal by DCPS to process the grievances of Ms. BenZion and Mr. Bowman. For example, the labor contract provides that "school officers, except term appointees, who have satisfactorily completed the probationary period in a position, shall be considered to be an employee with permanent tenure only in that position." See Labor Contract, Article XI, Section B, at p. 16.

(Exceptions at p. 7).

The Board finds that the Union's allegations fail to meet its burden to prove that any of the employee rights as prescribed under D.C. Code §1-617.06(a) and (b) were violated in any manner by DCPS. Instead, the Union's Complaint and Exceptions are based upon its argument that DCPS' actions were contrary to the provisions of the parties' CBA. (See Exceptions at pgs. 6-9).[3]

Similarly, Complainant's argument that DCPS has failed to bargain in good faith also relies on alleged violations of the CBA. D.C. Code § 1-617.04(a)(5) provides that "[t]he District, its agents and representatives are prohibited from ...[r]efusing to bargain collectively in good faith with the exclusive representative." In addition, D.C. Code 1-617.04(a)(5) protects and enforces, respectively, these employee rights and employer obligations by making their violation an unfair labor practice. Again, Complainant only asserts that "the blatant refusal by DCPS to abide by the provisions of the collective bargaining agreement is clearly an unfair labor practice. . . [because] [t]he duty to bargain in good faith extends to the implementation [of] and compliance with a negotiated agreement." (Exceptions at p. 9).

However, in *Carlease Madison Forbes v. Teamsters, Local Union 1714 and Teamsters Joint Council 55*, 36 DCR 7097, Slip Op No. 205, PERB Case No. 87-U-11 (1989), the Board

[3] The Board has addressed the issue of whether a party's refusal to adhere to the parties' contractual grievance and arbitration procedure also constitutes a statutory violation. Generally, the Board has determined that "[t]he failure of a party to a grievance proceeding to comply with contractual . . . requirements governing a grievance procedure, does not state a cause of action within the jurisdiction of the Board." *Virginia Dade v. National Association of Government Employees. Service Employees International Union. Local R3-06*, 46 DCR 6876, Slip Op. No. 491 at p. 4, PERB Case No. 96-U-22 (1996). See also *Alice P. Morgan v. District 1199E-DC, Service Employees International Union, AFL-CIO*, 49 DCR 4360, Slip Op. No. 665, PERB Case No. 01-U-26 (2002).

observed that "[w]hile some state and local laws make the breach of a collective bargaining agreement by employer or union an unfair labor practice, the CMPA contains no such provision, nor do we find such a necessary connection implicit in the Act." (*Id.* at p. 3). The Board has also found that "[u]nder the CMPA, breach of a contract does not constitute a *per se* statutory violation." Consistent with this pronouncement, in *Georgia Mae Green v. District of Columbia Department of Corrections*, 37 DCR 8086, Slip Op. No. 257 at p.4, PERB Case No. 89-U-10 (1990), the Board ruled that "the Board (and therefore ... its Examiner) is without jurisdiction to rule in contract breach claims as such." Also, in *American Federation of State, County and Municipal Employees, DC Council 20, Local 2921, AFL-CIO v. District of Columbia Department of Human Services, Commission on Mental Health Services,* 47 DCR 6535, Slip Op. No. 372, PERB Case No. 93-U-28 (1993), the Board held that an agency's refusal to respond to grievances did not amount to a repudiation of the contract or a failure to bargain in good faith under the CMPA.

Complainant's exception asks that the Board reverse the Hearing Examiner's R&R because she did not adopt its interpretation of the CBA. However, the Board has held that it lacks the authority to interpret the terms of contractual agreements to determine the merits of a cause of action. See *American Federation of Government Employees, Local 3721* v. *D.C. Fire Department*, 39 DCR 8599, Slip Op. No. 287, PERB Case No. 90-U-11 (1991).[4] Moreover, "the Board has always made a distinction between obligations that are statutorily imposed under the CMPA and those obligations that are contractually agreed-upon between the parties. The CMPA provides for the resolution of the former, [the Board has] stated, while the parties have contractually provided for the resolution of the latter, *vis-a-vis*, the grievance and arbitration process contained in their collective bargaining agreement. [The Board has] concluded, therefore that we lack jurisdiction over alleged violations that are strictly contractual in nature." *American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2921 v. District of Columbia Public Schools*, 42 DCR 5685, Slip Op. 339, PERB Case No. 92-U-08 (1992); See also, *Washington Teachers' Union. Local 6. American Federation of Teachers. AFL-CIO v. District of Columbia Public Schools*, 42 DCR 5488, Slip Op. No. 337, PERB Case No. 92-U-18 (1992); and *Carlton Butler, Iola Slappy, Julian Battle, Lawrence Benning, John Busby, Jr., Dancy Simpson and Andrea Byrd District of Columbia Department of Corrections and Anthony Williams, Mayor*, 49 DCR 1152, Slip op. No. 673, PERB Case No. 02-U-02 (2001).

A review of the undisputed facts does not establish that DCPS committed an unfair labor practice. Instead, Complainant has only provided allegations regarding an alleged breach of the CBA by DCPS. Therefore, the Board finds that Complainant has not met its burden of proof, and that the basis of its dispute is strictly contractual in nature. In view of the above, the Board adopts the Hearing Examiner's findings and conclusions that Complainant has not met its burden to prove that DCPS' actions constituted a violation of the CMPA. Instead, the Union only alleges a contractual violation, and therefore has not met its burden of proof under D.C. Code §

[4] Moreover, the Board lacks the authority to retain jurisdiction pending the resolution of threshold contractual issues through the parties' grievance arbitration procedures when the remainder of the Complaint fails to allege, as does the instant Complaint, any statutory cause of action within our jurisdiction. *Id.*; See also *American Federation of Government Employees, Local 2725, AFL-CIO v. District of Columbia Housing Authority*, 46 DCR 6872, Slip Op. No 488, PERB Case No. 96-U-19 (1996).

1- 617.04(a)(1) and (5). Whereas, the Hearing Examiner's findings and conclusions are rational, supported by the record and consistent with Board precedent, the Union's exception is denied.

In its second exception, the Union states that "[t]he District of Columbia Municipal Regulations [("DCMR")] Provides No Support for the Refusal to Process the Grievances of Ms. BenZion and Mr. Bowman." (Exceptions at p. 9). The Union's second exception suggests that the Hearing Examiner erred by not including a discussion in the R&R about the application of provisions in the DCMR. (See Exceptions at p. 9). The Union contends that the Hearing Examiner should have adopted its argument that provisions in DCMR do not prohibit probationary employees from filing grievances. (See Exceptions at p. 10).

The Board finds that the Union has failed to establish that alleged infractions of the DCMR meet its burden to prove DCPS's conduct violated the CMPA. In addition, the Union has failed to provide any authority that the Board's jurisdiction extends to resolving alleged disputes or violations of the DCMR. The Union has failed to present a proper exception to the Hearing Examiner's R&R. Therefore, the Board denies this exception.

The Union's third exception contends that "[t]he Hearing Examiner's Analysis of a Previous Arbitration Decision is Flawed and Provides No Basis for Her Dismissal Recommendation." (Exceptions at p. 11). This exception maintains that the Hearing Examiner erred by not adopting its argument that DCPS was bound by an arbitration award (the Nichols-Anderson Award issued in March of 2005) that concerned both parties and also addressed whether probationary employees could resolve adverse actions through the grievance procedure.

The Hearing Examiner's recommendation is consistent with the Board position that an arbitration award does not create binding precedent, even when based on the same parties to the same contract. The District of Columbia Court of Appeals affirmed the Board's position in *District of Columbia Metropolitan Police Department v. District of Columbia Public Employee Relations Board*, 901 A. 2d. 784 (2006). In that case, the Court of Appeals affirmed the District of Columbia Superior Court's order affirming the Board's decision to sustain an arbitrator's dismissal of misconduct charges that had resulted in MPD's discharge of police officer.[5] One of the arguments MPD made, was the arbitrator's award should be considered contrary to law and public policy because of the precedential impact it would have on future disciplinary cases. The Court, in its deliberation of the matter stated:

> Finally, and equally important, PERB has made clear in its brief to the court that it does not regard the arbitrator's interpretation here as binding on another arbitrator in another case, even construing the same paragraph. [See] Br. for PERB at 30 n. 8

[5] The Court of Appeals held that MPD failed to establish that decision of arbitrator "on its face" violated controlling "law and public policy," as would warrant setting aside of arbitrator's award in a proceeding in which arbitrator found that MPD violated 55-day rule in collective bargaining agreement and dismissed misconduct charges that had resulted in MPD's discharge of police officer; arbitrator's interpretation that the provision of collective bargaining agreement imposing 55-day time limit on agency action was mandatory and conclusive was not contrary "on its face" to any law. (See *DCMPD v. DC PERB*, 901 A. 2d at p. 1.)

> ("[I]n bargaining for an arbitrator to make findings of fact and to interpret the Agreement, the parties chose a forum that is not bound by precedent. Arbitration decisions do not create binding precedent even when based on the same collective bargaining agreement. [See], *e.g., Hotel Ass'n of Washington, D.C., Inc. v. Hotel & Restaurant Employees Union, Local 25,* [295 U.S.App. D.C. 285, 286-88,] 963 F.2d 388, [389-]391 (D.C.Cir.1992).").

Id. at 790.

Moreover, the Board lacks the statutory authority to seek or enforce compliance with decisions rendered pursuant to the parties' contractual agreement. See *Fraternal Order of Police/Metropolitan Police v. District of Columbia Metropolitan Police Department*, 39 DCR 9617, Slip Op. No. 295, PERB Case No. 91-U-18 (1992); and see *American Federation of State, County and Municipal Employees, DC Council 20, Local 2921, AFL-CIO v. District of Columbia Public Schools*, 42 DCR 5685, Slip Op. No 339, PERB Case No. 92-U-08 (1992).

Thus, the Hearing Examiner's sound reasoning and analysis in this respect is consistent with Board precedent and the authority cited above. The Board, therefore, adopts the Hearing Examiner's conclusion that Complainant's burden to establish violations of the CMPA was not met by its allegations that DCPS failed to abide by the Nichols-Anderson Award. As a result, the Board rejects Complainant's exception.

Lastly, the Union argues that, with respect to probationary employees, the Hearing Examiner:

> wrongly claims that the Complaint should be dismissed because "the Union can pursue contractual remedies to secure the rights of its members" (R&R at p.6) [and] [t]hat if the Complaint is dismissed, as the hearing examiner recommends, [probationary employees] will be entirely foreclosed from any possible relief, and the actions of DCPS will be completely insulated and protected from impartial review.

(Exceptions at p. 6).

The Board finds the Hearing Examiner's conclusion to be consistent with the Board's holding that relief from such conduct (i.e. a violation of a collective bargaining agreement provision) is not within the statutory authority of the Board, but in the available remedies under the negotiated agreement between the parties. See *American Federation of Government Employees, Local 1550, AFL-CIO v. District of Columbia Department of Corrections*, 48 DCR 6549, Slip Op. No. 59, PERB Case No. 83-U-03 (1983); and *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 39 DCR 9617, Slip Op. No. 295, PERB Case No. 91-U-18 (1992). The Board has applied this holding specifically where, as in the present case, the parties' CBA

contains a provision that allows either party to invoke arbitration when a grievance remains unresolved. See Complaint, Exhibit 1, CBA Article VIII, Subparagraph C, part 2.c.2. As a result, the Board denies the Union's exception.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Council of School Officers, Local 4, American Federation of School Administrators, AFL-CIO unfair labor practice complaint is dismissed.

2. Pursuant to Board Rules 559.1 this Decision and Order is effective and final upon issuance.

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

July 16, 2010

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-U-08 was transmitted via Fax and U.S. Mail to the following parties on this the 16th day of July 2010.

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