Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that th ey may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

Government of the District of Columbia
Public Employee Relations Board

In the matter of:	
Vartan Zenian, Complainant,[1]	PERB Case No. 04-U-30
v.	Opinion No. 890
American Federation of State, County and Municipal Employees, Local 2743, Respondent,	
and	
Department of Insurance, Securities And Banking, Respondent.	

DECISION AND ORDER

I. Statement of the Case

Vartan Zenian, Karen Moore and Yvette Alexander ("Petitioners") filed a Petition for Decertification requesting that the Board decertify the American Federation of State, County and Municipal Employees, Local 2743 ("AFSCME" or "Union") as the exclusive bargaining representative for a group of employees employed by the District of Columbia Department of

[1] Vartan Zenian is the sole Complainant in this case (PERB Case No. 04-U-30) and is one of the petitioners in a decertification case (PERB Case No. 03-RD-02). An individual who files a decertification petition is referred to as a "petitioner" while one filing an unfair labor practice complaint is identified as a "complainant". A union named in a decertification matter is referred to as a labor organization. A party accused of committing an unfair labor practice or violating the standards of conduct for a labor organization is designated as a "respondent". The Department of Insurance, Securities and Banking and the American Federation of State, County and Municipal Employees, Local 2743, both, are named as a respondents in this unfair labor practice complaint.

Insurance, Securities and Banking ("DISB" or "Agency").[2] The matter was referred to a Hearing Examiner. AFSCME filed a Motion to Dismiss.

Subsequently, Vartan Zenian ("Complainant" or "Mr. Zenian") filed an unfair labor practice complaint ("Complaint") which raised allegations similar to those in the decertification petition, i.e., that the Agency and the Union knowingly and willingly conspired to defraud the complainants by taking mandatory union dues from them through misrepresentation of fact, and that the Union had held unfair elections and had not maintained fiscal integrity. The Agency and the Union filed Answers to the Complaint. The cases were then consolidated and the hearing was held in abeyance for approximately a year while the parties engaged in mediation. When mediation was unsuccessful, the matters were returned to the Hearing Examiner. After several continuances, a hearing was scheduled. (R&R at pgs. 1-2). The Hearing Examiner: (a) denied AFSCME's motion to dismiss; (b) consolidated the two matters; and (c) scheduled an evidentiary hearing for February 2, 2006. Vartan Zenian did not attend the February 2, 2006 scheduled hearing. As a result, on September 13, 2006 the Hearing Examiner: (1) issued a Report and Recommendation ("R&R") in the decertification case; (2) vacated the portion of her previous Order which consolidated the two matters; and (3) issued an Order directing Mr. Zenian to show cause why he didn't appear at the February 2, 2006 hearing to prosecute his Complaint.

On January 5, 2007, the Hearing Examiner issued a Report and Recommendation in this unfair labor practice complaint. In her R&R the Hearing Examiner recommended that the Board dismiss the Complaint. The Complainant filed exceptions. The Agency filed an Opposition to the Complainant's exceptions.[3] The Hearing Examiner's R&R and the Complainant's exceptions are before the Board for disposition.

II. Hearing Examiner's Report

In the Hearing Examiner's January 5, 2007 Report and Recommendation ("R&R") she addressed the following issue: "Did the Complainant present good cause why this [unfair labor practice] complaint should not be dismissed?" (R&R at p. 4).

On February 1, 2006, Mr. Zenian requested a continuance for a hearing scheduled for the next day. Board Rule 550.6 requires that "[e]xcept for the most extraordinary circumstances, no request for postponement shall be granted during the five (5) days immediately preceding the date of a hearing." The Board's Executive Director denied the request.

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[2]That case was assigned PERB Case No. 03-RD-02.

[3]The Union did not file an Opposition to the Complainant's exceptions to the unfair labor practice complaint.

On February 2, 2006, at 10:00 a.m., the attorneys and witnesses for the Respondent-Union and the Respondent-Agency were present at the hearing. "The Hearing Examiner noted that Ms. Alexander, one of the petitioners in the decertification proceeding, arrived at about 10:40 a.m. and gave no explanation regarding Mr. Zenian's absence.[4] The Hearing Examiner [informed the parties] that Mr. Zenian had sought and been denied a continuance the previous afternoon by the Executive Director and had not contacted [the Board] since that time. Ms. Alexander then requested a continuance, explaining that Mr. Zenian was absent because his mother was 'gravely ill' and he had to take her to the hospital. Ms. Alexander explained that Mr. Zenian's mother "took a turn for the worse; so that's why he is not able to attend. Ms. Aléxander stated that she was a complainant in both matters [the unfair labor practice complaint and the decertification petition] but was not ready to go forward." (R&R at p. 2). The Union objected to the granting of another continuance. The Agency took no position.

The Hearing Examiner denied the request for a continuance of the hearing noting that there were other named complainants and each one of those named complainants should have been ready to proceed with the hearing. She told the parties that the matter had been pending for more than two years and many requests for continuances had been granted to both parties over objections from the opposing party. She noted that ten individuals were present at the proceeding, most of whom had been waiting for almost an hour for the hearing to begin. In light of the representation made by Ms. Alexander, the Hearing Examiner determined that there may have been good cause for Mr. Zenian's absence. Therefore, the matter proceeded to hearing with Ms. Alexander and Mr. Van Niel testifying concerning the unfair labor practice allegations. (See R&R at pgs. 2-3).

"Throughout these proceedings, both parties in the decertification matter had referred to petitioners in [the decertification case] . . . as the complainants in the ULP complaint. . . . [Also,] [t]he pleadings filed in the ULP . . . refer to multiple complainants . . . [and] Ms. Alexander referred to herself as a complainant in the ULP and Mr. Zenian, in his letter [to the Board on] February 1, 2006, referred to 'Petitioners/Complainants'. [Nonetheless,] [t]he Hearing Examiner determined that, despite the subsequent conduct and assertions of the parties, . . . Mr. Zenian as the sole [*pro se*] Complainant bore the burden of proof [in the ULP complaint]. He [was] not present . . . and had not authorized anyone to act on his behalf. Having determined . . . that good cause may have existed for [Mr. Zenian's] absence from the hearing, the Hearing Examiner concluded that she should have delayed the ULP portion of the case to permit him to establish good cause why a continuance should be granted under emergency circumstances." (R&R at p. 3).

The Hearing Examiner's September 13, 2006 Order directed Mr. Zenian to show good cause for his failure to appear at the proceeding and failure to notify the Board of his absence. The Hearing Examiner specified in her order that Mr. Zenian's submission "shall be in the form of an affidavit sworn before a Notary Public" (Order at p. 5) and that if Mr. Zenian could establish good cause for

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[4]See footnote No. 1.

his absence, a hearing would be scheduled in the unfair labor practice complaint. If not, the matter would be dismissed. (See Order at pgs. 4-5). Mr. Zenian made a timely submission. After considering his submission, on January 5, 2007, the Hearing Examiner issued a R&R in this matter recommending that the complaint be dismissed.

The Hearing Examiner stated that the Board has consistently recognized that *pro se* litigants generally lack the same level of expertise and experience as attorneys and that the Board does not hold *pro se* parties to the same standards required of parties represented by counsel.[5] She noted that this approach is consistent with federal agencies such as the National Labor Relations Board ("NLRB") and the Merit System Protection Board ("MSPB"). The Hearing Examiner stated that "[t]he fact that the individual is proceeding *pro se*, however, is not a *carte blanche* for the litigant to ignore rules or 'Orders'. *Pro se* litigants are obligated to exercise 'diligence or ordinary prudence under the circumstances'.[6]. . . Decisions must be made on a case by case basis. Complainant's *pro se* status must be assessed in the context of his education, experience and familiarity with PERB procedures. . . . In addition, the Hearing Examiner must assess the impact of Complainant's action on Respondents." (R&R at p. 6).

The Hearing Examiner noted that she was cognizant of the Complainant's *pro se* status when she drafted the Order to show cause. Therefore, "she did not merely direct him to submit an affidavit, but stated explicitly in [her] 'Order' that he was required to sign the document before a Notary Public." (R&R at p. 7). In response to the Hearing Examiner's Order, the Complainant made a submission accompanied by two exhibits, in which he asserted that "he was unable to attend the proceeding because his 'elderly mother fell ill suddenly that morning, and he was required to rush her to her treating physician . . . where she was treated'." (R&R at p. 7).

The Hearing Examiner indicated that Mr. Zenian's statement was not notarized as required by her order. Also, she concluded that the exhibits he provided did not support his claim that his absence was due to an emergency. The Hearing Examiner noted that exhibits consisted of: (1) "a copy of a confirming note" written by Mr. Zenian's mother's doctor which stated that "Vartan Zenian accompanied his mother to my office today" on February 2, 2006; and (2) a prescription for Fosamax for Mr. Zenian's mother's osteoporosis. "The Hearing Examiner was familiar with the medication because it is frequently advertised in the media as a medication for people with osteoporosis (thinning

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[5]See *Owens v. American Federation of State, Country and Municipal Employees, Local 2095 and National Union of Hospital and Health Care Employees, Local 1199*, ---- DCR ----. Slip Op. No. 750, PERB Case No. 02-U-27 (2004).

[6]Citing *Belton-Mish v. Department of Veterans Affairs*, 69 M.S.P.R. 310 (1996), where the MSPB determined that an appellant had not demonstrated that her medical appointments or disability justified failing to meet a filing deadline. The appellant had to be held accountable despite her *pro se* status.

bones), but she nevertheless checked its website to learn more about the medication. The website confirmed that it is a medication commonly prescribed for individuals who have been diagnosed with osteoporosis. There is no evidence that t was prescribed under emergency or critical circumstances." (R&R at p. 7). She found no evidence that the prescription submitted by the Complainant was prescribed under emergency or critical circumstances or that his mother's visit to the doctor was due to an emergency. Therefore, she concluded that the submission was fatally deficient.

In determining that the Complainant's submission was fatally deficient, the Hearing Examiner considered the following: (1) the Complainant's *pro se* status, including his education, experience and familiarity with Board processes - and found that "he is an educated individual who has experience and familiarity with [Board] proceedings";[7] (2) her Order which specifically required that the submission must be signed before a Notary Public; (3) Complainant's familiarity with the requirement for "extraordinary circumstances" under Board Rule 550.6";[8] (4) the impact of the Complainant's failure to attend the proceeding on the other parties who were prepared to go forward; (5) continuances that were granted to the Complainant in the past; (6) Complainant's request for a continuance for the February 2nd hearing only one day before he failed to appear at the hearing, which request was denied; and (7) the Hearing Examiner's Order and Board Rule 550.6 are readily understood and not open to multiple interpretations. (See R&R at pgs. 8-9).

The Hearing Examiner determined that "[i]n sum, although [the] Complainant asserted that he was absent from the hearing due to an unforeseen medical emergency, the statement was unsworn and the attachments did not support the contention that there was an extraordinary circumstance. The Hearing Examiner does not challenge [the] Complainant's assertion regarding his mother's need to go to the doctor. However, his submission only supports the conclusion that he accompanied his mother to a medical appointment, which, though admirable, does not meet the standard of 'extraordinary circumstances' required to grant a postponement of the proceeding in accordance with [Board] Rule 550.6. Something more than an unsupported unsworn statement was required, and it was not provided. . . . [D]espite [the] Complainant's pro se status, for the reasons already discussed, there was no reason to offer [the] Complainant another opportunity to comply with her directive. The Hearing Examiner found no basis to offer the Complainant another opportunity to comply with her directive and recommended that the complaint be dismissed.[9] (R&R at p. 8).

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[7](R&R at p. 8)

[8]Board Rule 550.6 provides as follows: "Except for the most extraordinary circumstances, no request for postponement shall be granted during the five (5) days immediately preceding the date of a hearing."

[9]Board Rule 550.19: If a party fails to prosecute a cause of action, the Hearing Examiner may recommend that the Board or Executive Director dismiss the action with prejudice against the defaulting party.

III. Complainant's Exceptions[10]

The Complainant takes exception to the Hearing Examiner's recommendation that the unfair labor practice complaint be dismissed. (See Complainant's Exceptions at p. 2). The Hearing Examiner based her recommendation to dismiss the Complaint on procedural grounds, the Complainant's response to her show cause order. The Complainant alleges that "the main charge in the unfair labor practice complaint [has been] proven [in a companion case]. [Therefore, the Complainant asserts that] it is appropriate for the Board to find a violation of CMPA § 1-617.04(b)(1) . . . and to direct a remedy." (Exceptions at p. 5). We note that this exception ignores the factual basis for the Hearing Examiner's recommendation to dismiss this matter. Rather, the Complainant makes arguments based on the merits of the case. However, the Complainant must first prevail on the issue of his failure to show cause why this matter should not be dismissed. Only then can the Board consider any arguments on the merits of the case. Therefore, we must first consider the Hearing Examiner's procedural basis for recommending dismissal of this matter.

In his second exception, the "Complainant excepts to the Hearing Examiner's recommendation that the unfair labor practice complaint be dismissed with prejudice, based on Complainant's February 2, 2006 absence from the scheduled hearing in the above matter." (Exceptions at p. 6). The Complainant argues that a "more detailed medical explanation of the circumstances of the Complainant's family medical emergency [was not requested and therefore] the Hearing Examiner erred and made an abuse of discretion by rejecting Complainant's reasonable and adequate explanation." (Exception at p. 7).

The Agency filed a document styled "Response to Petitioner's Exceptions" ("Agency's Response") arguing that Mr. Zenian failed to prosecute this matter even though he had an understanding of Board rules due to the many continuances he previously obtained during these proceedings, resulting in extreme delay. The Agency asserts that the three year delay since Mr. Zenian filed the unfair labor practice complaint "has resulted in actual prejudice, as many potential witnesses are now unavailable . . . [and the] agency [is] being forced to mount a defense after the passage of so much time." (Agency's Response at pgs. 3-4). Further, the Agency argues that "Mr. Zenian's statements, by themselves, are insufficient to establish good cause." Citing *Andre v. Department of the Army*, 91 M.S.P.R. 342 at p. 6 (2002). The petitioner in that case submitted an explanation for the untimeliness of a petition for review. The submission was not in the form of an affidavit or a statement signed under penalty of perjury and this was found to be insufficient to establish the assertions it contained.

We find that the Complainant's assertion that the Hearing Examiner's Order should have been more specific, misconstrues the order as well as the Hearing Examiner's analysis of the Complainant's

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[10]Although the Complainant was *pro se* at the hearing, he retained counsel for the purpose of filing his exceptions.

submission. The Complainant correctly states that the Hearing Examiner's Order did not specifically request medical documentation. Rather, it simply stated that the Complainant must respond to the Order with an affidavit sworn before a Notary Public and that he must show cause pursuant to the requirements of Board Rule 550.6, i.e., "extraordinary circumstances." These instructions are straightforward. Thus, the Complainant's refusal to comply cannot be attributed to the lack of a request for a more detailed medical explanation of the circumstances of the Complainant's family medical emergency - as argued by the Complainant. The Complainant submitted a statement that was not notarized, in direct contradiction to the Hearing Examiner's instructions. In the absence of the required submission *and* in the absence of a showing of extraordinary circumstances, the Hearing Examiner properly found that the submission did not meet the requirement of "extraordinary circumstances" found in Board Rule 550.6.

The Board has dismissed a complaint when the complainant fails to appear at a prescheduled hearing and failed to show good cause for failure to appear. *(See Tonya Johnson v American Federation of State, County and Municipal Employees, Local 2091*, 51 DCR 9770, Slip Op. No. 762 at p. 2, PERB Case No. 03-U-21 (2004) and *Dr. Emmanuel Chatman v. University of the District of Columbia Faculty Association/National Education Association*, 51 DCR 11410, Slip Op. No. 769 at p. 2, PERB Case No. 03-S-02 (2004). Under the circumstance of this case, the Complainant has failed to comply with the Hearing Examiner's order to show cause under Board Rule 550.6.

Furthermore, the Complainant has raised nothing that would show error or abuse of discretion by the Hearing Examiner. The Board has held that merely disagreeing with the Hearing Examiner's finding without providing any authority or other support for a position, is not sufficient to meet the standard for reversible error. See *American Federation of Government Employees, Local 2741 v. District of Columbia Department of Parks and Recreation,* 50 DCR 5049, Slip Op. No. 679, PERB Case No. 00-U-22 (2002); *Hoggard v. District of Columbia Public Schools,* 46 DCR 4837, Slip Op. No. 496, PERB Case No. 95-U-20 (1996).

Here, the Complainant is merely disagreeing with the Hearing Examiner's finding that the Complainant did not meet the requirement of Board Rule 550.6. 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 D.C. Reg. 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*, 39 DCR 6238, Slip Op. No. 285, PERB Case No. 86-U-16 (1992); *Charles Bagenstose, et al. v. D.C. Public Schools*, 38 DCR 4154, Slip Op. No. 270, PERB Case No. 88-U-34 (1991). Nothing in the Complainant's response to the Hearing Examiner's show cause order supports the "extraordinary circumstances" requirement under Board Rule 550.6. Particularly in light of the fact that the Complainant had been denied a continuance the day prior to his failure to appear at the hearing, it was incumbent upon the Complainant to show that his absence was due to extraordinary circumstances.

The Hearing Examiner's finding that the Complainant's submission in response to the order to show cause did not meet the requirement for "extraordinary circumstances" under Board Rule 550.6 is reasonable, consistent with Board precedent and supported by the record. The Complainant has not shown cause for his failure to prosecute this matter. Therefore, the matter must be dismissed. As a result, we need not reach the Complainant's arguments on the merits of the case.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Hearing Examiner's recommendation is adopted in its entirety and the complaint is dismissed.

2. 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.

June 18, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached corrected Decision and Order in PERB Case No. 04-U-30 was transmitted via Fax and U.S. Mail to the following parties on this the 18th day of June 2007.

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