Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
	)	
Fraternal Order of Police/Department of Corrections Labor Committee,	)	
	)	
Complainant,	)	PERB Case Nos. 03-U-15 and 04-U-03
	)	
v.	)	Slip Op. No. 888
	)	
District of Columbia Department of Corrections,	)	
	)	
Respondent.	)	
	)	

DECISION AND ORDER

I. Statement of the Case

The Fraternal Order of Police/Department of Corrections Labor Committee ("FOP" "Complainant" or "Union"), filed an Unfair Labor Practice Complaint against the District of Columbia Department of Corrections ("DOC" or "Respondent") in PERB Case No. 03-U-15. The Complainant alleged that the Respondent violated the Comprehensive Merit Personnel Act ("CMPA") by implementing, without notice and in violation of prior agreements, non-bargaining positions of unit criminal investigator, case management employee and mechanical parts repair foreman. The Complainant filed a second Complaint in PERB Case No. 04-U-03 alleging that the Respondent: (1) unlawfully refused to provide information and refused to bargain regarding the impact of refusing to recall two criminal investigators in the warrant squad and (2) discriminated against William Dupree for engaging in protected union activities. The Respondent filed an Answer to each Complaint denying all the charges.

The Complainant filed an unopposed Motion to Consolidate the two cases and PERB Case

Nos. 03-U-15 and 04-U-03 were consolidated.[1]

A Hearing Examiner was appointed to conduct a hearing in these matters. At the hearing, the Complainant withdrew all allegations concerning 03-U-15. The Hearing Examiner issued a Report and Recommendation ("R&R") finding that DOC's failure to fill two permanent criminal investigator positions was due to lack of funding. The Hearing Examiner determined that DOC had no duty to bargain over its decision to not fill the two positions because of fiscal limitations. The Complainant filed Exceptions to the R&R and DOC filed an Opposition.

The Hearing Examiner's R&R, the Complainant's Exceptions and DOC's Opposition are before the Board for disposition.

II. PERB Case No. 03-U-15:

At the hearing, the Union withdrew its allegations that the Respondent violated the Comprehensive Merit Personnel Act ("CMPA") by implementing, without notice and in violation of prior agreements, non-bargaining unit positions of criminal investigator, case management employee and mechanical parts repair foreman positions. No testimony was given and no argument was made concerning these non-bargaining unit positions. Therefore, this matter is dismissed.

III. Hearing Examiner's Report PERB Case No. 04-U-03

William Dupree was employed by Respondent in 1980. He became a criminal investigator in 1999 and starting in 2000 he served as Chairman of the Union. He was subject to a reduction in force ("RIF") in 2002.

Pamela Chase, the Union's Chairperson at time in question who succeeded Mr. Dupree, testified that two criminal investigators retired and one was on active military duty, thus a temporary position was also open. According to Ms. Chase, pursuant to negotiations, on July 18, 2002, the Respondent agreed to recall two permanent criminal investigators to the Warrant Squad. The Respondent requested names from the District of Columbia Office of Personnel to fill the positions.

Ms. Mobley, Supervisory Personnel Management Specialist at the District of Columbia Office of Personnel ("D.C. Office of Personnel"), provided the Respondent with the names of two employees on the retention register. The retention register for recall is based on the following qualifications: (1) seniority; (2) performance ratings; (3) veteran's preference; and (4) District residency. (See R&R at p. 5). Ms. Chase testified that the D.C. Office of Personnel determined that

[1]We note that the violations asserted in PERB Case Nos. 03-U-15 and 04-U-03 concern the same subject matter, i.e., involve the same parties and have common issues.

one of the names was reached in error. (See R&R at p. 5). Michael Clarke and William Dupree were to be recalled to fill two permanent criminal investigator positions. Ms. Mobley testified that she consulted with Ms. Joan Murphy, the Respondent's Special Projects Officer in its Human Resources Department, concerning the recalls. Ms. Murphy commented that she was glad that Mr. Dupree would no longer be working with DOC. (See R&R at p. 6).

Ms. Murphy denied making this comment. She testified that on September 28, 2002, the Mayor announced to that there was a 325 million dollar deficit and some positions in all departments were to be abolished. On that date, a decision was made to abolish six (6) positions within the DOC, including the two permanent criminal investigator positions. (See R&R at p. 7). DOC subsequently informed the Union that the permanent criminal investigator positions were cancelled for budgetary reasons. At the time of the hearing, the two permanent criminal investigator positions had not been filled. (See R&R at p. 5). One temporary position was created by the absence of a criminal investigator who was called to active military duty, and was filled by Michael Clark. William Dupree was not rehired. Therefore, the Union filed the unfair labor practice charge in PERB Case No. 04-U-03.

The Union alleges that DOC violated D.C. Code § 1-617.04(a)(1) by interfering, restraining or coercing William Dupree in the exercise of the rights guaranteed by the CMPA and D.C. Code § 1-617.04(a)(3) by discriminating in regard to hiring or tenure of any term or condition of employment to encourage or discourage membership in any labor organization. (See Complaint at p. 3). Specifically, the Union claims that DOC failed to rehire Mr. Dupree because of his union activities when he served as Chairman of the Union, i.e., successfully filing two unfair labor practice complaints before the Board and aggressively defending union members. The Union introduced two cases where, in 2003, the Board found that DOC discriminated against or took reprisals against Mr. Dupree for engaging in protected union activity concerning a RIF and his involvement in seeking impact and effects bargaining concerning the RIF, in Slip Op. No. 698 and Slip Op. No. 722. (See R&R at p. 5).

Relying on *Wright Line*, 251 NLRB 1083 (1980) enf'd 662 F.2d 899 (1st Cir. 1981),[2] the Hearing Examiner stated that the Union must prove by a preponderance of the evidence the following elements: "(1) the employee was engaged in protected union activity, (2) management had knowledge of the union activity; (3) there was animus against the union activity; and (4) discriminatory activity was engaged in, to punish that union activity." (R&R at p. 10).

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[2]The Board has previously adopted the National Labor Relations Board's reasoning in *Wright Line*. See *Charles Bagenstose and Dr. Joseph Borowski v. D.C. Public Schools*, 38 DCR 4154, Slip Op. No. 270, PERB Case Nos. 88-U- 33 and 88-U-34 (1991) and *Ware v. D.C. Department of Consumer and Regulatory Affairs*, 46 DCR 3367, Slip Op. No. 571, PERB Case No. 96-U-21 (1998).

The Hearing Examiner found that "Mr. Dupree had engaged in union activity because he had functioned as a union official prior to his leaving the agency under the RIF and the Respondent clearly knew that [he] was a union official." (R&R at p. 12). Thus, the Hearing Examiner determined that the Union established that Mr. Dupree had engaged in protected activity and management had knowledge of the activity.

The Hearing Examiner noted the Union's reliance on two cases in which the Board found that DOC discriminated against Mr. Dupree or took reprisal against him, to support its contention that "[DOC] had animus against Mr. Dupree's union activity." (R&R at p. 11).[3] In the Hearing Examiner's view, the Board's findings in prior cases was not, *per se*, enough evidence to satisfy the preponderance of the evidence standard on the issue of animus in the present case. Furthermore, he determined that "Ms. Murphy was not the agency official who had the power to determine whether certain positions would be abolished or retained when the agency was under fiscal pressure." (R&R at p. 11). Also, he found credible Ms. Murphy's testimony refuting that she had some hostility toward Mr. Dupree. (See R&R at p. 11). Therefore, the Hearing Examiner found that there was no showing of animus by DOC.

Finally, the Hearing Examiner determined that the Union did not prove there was discriminatory conduct designed to punish Mr. Dupree for his previous union activity. Rather, the Hearing Examiner found that DOC established a legitimate business reason for canceling two permanent criminal investigator positions. He found that "[DOC] presented persuasive and thorough evidence that the District of Columbia was facing a fiscal crisis which was massive. [DOC] was forced by the Mayor's office to abolish some jobs, and abolition reached jobs in the DOC other than the two permanent criminal investigator positions. . . . [Thus, the Hearing Examiner determined that] the [Union] presented absolutely no evidence whatsoever to counter the agency's claim that the failure to recall Mr. Dupree was due solely to fiscal restraints imposed on the agency the Mayor's office." (R&R at pgs. 12-13).

III. Complainant's Exceptions regarding Mr. Dupree not being recalled to the criminal investigator position

First, the Union takes exception to the Hearing Examiner's finding that the Union was *usually* given notice by DOC of the persons being recalled after a RIF. The Union maintains that the Chairperson, Ms. Chase, was *always* given prior notice of persons being considered for recall by means of a selection certificate forwarded to the Union, but this was not done in Mr. Dupree's case. Therefore, DOC acted differently in Dupree's case. Furthermore, the Union asserts that DOC handled Mr. Dupree's certificate of recall differently by not acting on it quickly, giving no reason for

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[3]The Union relied on *FOP v. DOC*, Slip Op. No. 698, PERB Case No. 01-U-16 (2003); *FOP v. DOC*, Slip Op. No. 722, PERB Case Nos. 01-U-21, 01-U-28 and 01-U-32 (2003).

the delay. Citing *Charlene Haynesworth and Darnell Lee v. AFGE. Local 631*, 45 DCR 1479, Slip Op. No. 528, PERB Case No. 97-S-02 (1997), the Union asserts that the Hearing Examiner overlooked this critical evidence and therefore the Board should sustain its exceptions. (See Exceptions at pgs. 1- 4). The Board finds that the Union's reliance on *Haynesworth* for the proposition that the Board will sustain exceptions when the Hearing Examiner overlooks critical evidence, is misplaced. In *Haynesworth*, the Hearing Examiner made no findings concerning certain terms and conditions in the union's bylaws. *Id.* at pgs. 3-4. Here, the Hearing Examiner expressly considered the facts presented, included them in the record and made determinations based on the record before him. Therefore, the ruling in *Haynesworth* is not applicable to the facts of the present case.

The Union takes also takes exception to the Hearing Examiner's finding that the "[DOC's] evidence on . . . lack of fund[ing] for the criminal investigator position was adequate and unimpeached." (Exceptions at p. 5). The Union argues that the evidence pertaining to lack of funding should have been presented by DOC's Budget Director and not by other witnesses. The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Tracey Hatton v. FOP/DOC Labor Committee*, 47 DCR 769, Slip Op. No. 451 at pgs. 3-4, PERB Case No 95-U-02 (1995). We find that the Union's exception regarding DOC's evidence on lack of funds, is merely a disagreement with the Hearing Examiner's findings and conclusions. Mere disagreement with the Hearing Examiner's findings is not grounds for reversing findings which are fully supported in the record. *Fraternal Order of Police/DOC v. D.C. Department of Corrections*, 49 DCR 8937, Slip Op. No. 679 at p. 16, n. 30, PERB Case Nos. 00-U-36 and 00-U-40 (2002); *Hoggard v. D.C. Public Schools*, 46 DCR 4837, Slip Op. No. 496, PERB Case No. 95-U-20 (1996).

Here, the Hearing Examiner found that DOC presented a legitimate business reason for canceling the permanent investigator positions (a lack of funds) and that the Union did not rebut DOC's legitimate business reason. Under the *Wright Line* analysis, the Board has held that "the Complainant's '*prima facie* showing creates a kind of presumption that the unfair labor practice has been committed.' Once the showing is made the burden shifts to the employer to produce evidence of a non-prohibited reason for the action against the employee. This burden however, does not place on the employer the onus of proving that the unfair labor practice did not occur. Rather, the employer's burden is limited to a rebuttal of the presumption created by the complainant's prima facie showing. The First Circuit in *Wright Line* articulated this standard as 'producing evidence to balance, not [necessarily] to outweigh, the evidence produced by the [complainant].'" *Valerie A. Ware v. District of Columbia Department of Consumer and Regulator Affairs,* 46 DCR 3367, Slip Op. No. 571, n. 2, PERB Case No. 96-U-21 (1998). We conclude that the Hearing Examiner's findings that DOC presented a legitimate business reason for canceling the permanent investigator positions are reasonable, based on the record, and consistent with Board precedent.

The Union also takes exception to the Hearing Examiner's "failure to consider . . . that [DOC was] . . . found to have discriminated against Mr. Dupree for engaging in protected activity in *FOP v. DOC,* Slip Op. No. 698 (2003) and *FOP v. DOC,* Slip Op. No. 722 (August 2003). [The Union asserts that] . . . DOC's conduct in this case was in fact motivated by the same anti-union animus that was found to have motivated . . . DOC in [prior Board cases]." (Exceptions at p. 8). The Union requests that the Board reverse the Hearing Examiner's findings and find that DOC violated the CMPA by cancelling the recall of former FOP/DOC Chairperson William Dupree.

The Board notes that the discrimination argument was considered and rejected by the Hearing Examiner. We find that the Complainant's argument amounts to no more than a disagreement with the Hearing Examiner's findings. The Board has held that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the findings where they are fully supported by the record. *See, American Federation of Government Employees, Local 874 v. D.C. Department of Public Works*, 38 D.C. Reg. 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). The Complainant's disagreement with the Hearing Examiner's findings is not a sufficient basis for setting aside the Hearing Examiner's findings. We find the Hearing Examiner's findings that our holdings in Slip Op. Nos. 698 and 722 are insufficient to establish anti-union animus under the facts of this case are reasonable, based on the record and supported by the evidence.

IV. Complainant's Exceptions regarding the failure to provide information and refusal to bargain

The Union challenges the Hearing Examiner's findings concerning management's failure to bargain. The Union requested impact and effects bargaining over whether the two criminal investigator positions should be retained. The Hearing Examiner found that ". . . the Respondent had no duty to bargain about whether there would be a recall of persons to the two permanent criminal investigator positions." (R&R at p. 8). Nonetheless, the Hearing Examiner determined that management must bargain upon request concerning the impact and effects of the exercise of management's right on the remaining employees. He determined that although Union Chairperson Chase testified that she sought impact and effects bargaining over the safety of the diminished crew, her testimony revealed that the only subject she wanted to address was the reversal of the Respondent's *decision* to not fill the two permanent criminal investigator positions due to lack of funding. (See R&R at p. 9). The Hearing Examiner concluded that "the Complainant was demanding negotiation of a subject which was wholly within the discretion of management and was absolutely not subject to bargaining on the merits." (R&R at p. 10). The Hearing Examiner found no violation of the CMPA by management's refusal to bargain over not filling two criminal investigator positions. We find that these findings are reasonable, based on the record and consistent with Board precedent.

The Complainant asserts that on October 17, Ms. Murphy refused to provide information on the criminal investigator positions. The Complainant contends that Ms. Murphy knew on October 17 meeting that the criminal investigator positions would not be filled but that "[she] was intentionally misleading [the Union] in response to a . . . request for information concerning the recall." (Exceptions at pgs. 4-5). The Board finds that the Complainant is merely disagreeing with the Hearing Examiner's findings that management was under no obligation to bargain over the cancellation of the Criminal Investigator positions. Mere disagreement with the Hearing Examiner's findings is not grounds for reversing findings which are fully supported in the record. *Id.*

The Complainant relies on *American Federation of Government Employees, Local 2725 v. D.C. Department of Public and Assisted Housing and D.C. Housing Authority*, Slip Op. No. 492, PERB Case No. 95-U-11 (1996), for the proposition that the Hearing Examiner may draw an adverse inference against a party who fails to comply with a subpoena. The Complainant asserts that DOC did not respond to a pre-hearing subpoena asking for information on the agency's budget and therefore an adverse inference should be drawn. (See Exceptions at p. 7). Instead of responding to the subpoena, the Respondent provided at the Hearing a financial spreadsheet in support of its position that the criminal investigator position was unfunded. (See Exceptions at p. 6).

Board Rule 550.18(a) provides as follows: "If a party fails to comply with an order for the production of evidence within the party's control or for the production of witnesses, the Hearing Examiner may: (a) Draw an inference in favor of the requesting party with regard to the information sought". The Board finds no basis for drawing an adverse inference concerning the Respondent's failure to provide information, in response to the Complainant's subpoena. We note that Board Rule 550.18 is not mandatory. The information requested concerned a management decision which the Hearing Examiner has found is a management right which is not subject to the negotiation process. Furthermore, we note that Board Rule 552.5 addresses the failure of a party to obey a subpoena and provides as follows: "In the case of contumacy or failure to obey a subpoena issued, the Board, pursuant to D.C. Code § 1-605.216 (1987 ed.), may request enforcement of the subpoena in the Superior Court of the District of Columbia." There is no evidence that the Complainant requested enforcement of his subpoena either at the hearing or prior to the hearing. Had such a request been made, the Board would have honored it.

We find that the Complainant is merely disagreeing with the Hearing Examiner's findings. The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Doctors Council of the District of Columbia and Henry Skopek v. D.C. Commission on Mental Health Services*, Slip Op. No. 636 at p. 4, PERB Case No. 99-U-06; see also *Tracy Hatton, supra*. The Hearing Examiner found that the Respondent's decision to eliminate two permanent criminal investigator positions was based on a lack of funds and that this decision was a management right and there was no duty to bargain over it. The Board finds that the Hearing Examiner's findings in this regard are reasonable and supported by the record and consistent with Board precedent. Therefore, we adopt these findings.

Pursuant to D.C. Code § 1-605.2(3) and Board Rule 520.14, we find that the Hearing Examiner's findings and conclusions are reasonable, supported by the record and consistent with Board precedent. Therefore, the recommendation of the Hearing Examiner that the complaint be dismissed is adopted.

ORDER[4]

IT IS HEREBY ORDERED THAT:

1. The Hearing Examiner's findings and recommendations are adopted. The unfair labor practice complaint is dismissed.

2. Pursuant to Board Rule 559.1, this decision is final upon issuance.

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

September 30, 2009

[4]This Decision and Order implements the decision and order reached by the Board on June 11, 2007, and ratified on July 13, 2009.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 03-U-15 and 04-U-03 was transmitted via Fax and U.S. Mail to the following parties on this the 30th day of September 2009.

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