

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 they 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**

William S. Dupree,)	
)	
Complainant,)	PERB Case No. 05-S-01
)	and 05-U-45
v.)	
)	Opinion No. 959
American Federation of State, County and)	
Municipal Employees, Local 2401,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case:

William H. Dupree (“Complainant” or “Mr. Dupree”) filed an unfair labor practice complaint alleging that the American Federation of State, County and Municipal Employees, Local 2401 (“Respondent” or “Union” or “Local”), failed to fairly represent him in violation of D.C. Code § 1-617.03 and 617.04(b). The Union filed an Answer denying that it violated the Comprehensive Merit Personnel Act (“CMPA”) and requesting that the Board dismiss the Complaint.

A hearing was held in this matter. The Hearing Examiner determined that no violation of the CMPA had occurred. The Complainant filed Exceptions. The Hearing Examiner’s Report and Recommendation (“R&R”) and the Complainant’s exceptions are before the Board for consideration.

II. Hearing Examiner’s Report and Recommendation

The Complainant is an Investigator employed by the District of Columbia Office of the Attorney General (“OAG”), assigned to the Child Protection Section. He is a bargaining unit member. The Union and OAG are parties to a collective bargaining agreement containing a grievance and arbitration procedure. The “Complainant received two performance appraisals for the rating period between April 1, 2003 and March 1, 2004. The first was received in April 2004 (April appraisal) and the second in June 2004 (June appraisal).” (R&R at p. 4). The Complainant

alleges that his appraisal was deficient because it did not contain the requisite signatures, he was not rated in one category and the agency had not established performance standards.

The Complainant and his co-worker, Albert Jones, approached Joseph Bradley, a representative of the local Union, in July 2004, and complained that their evaluations were signed by someone not affiliated with the Child Support Division, where they were assigned. "Mr. Bradley indicated that since the Union was filing a grievance regarding performance appraisals on behalf of the Child Support Division, he would include them in that grievance." (R&R at p. 5).

The Complainant "maintained that from July 2004 until September 2004, Joseph Bradley, the Local's representative, assured him that the Local was following through with his grievance but when Mr. Bradley could not provide him with supporting documentation, Mr. Dupree met with Deborah Courtney, Local President, who, he asserted, gave excuses why the matter was not being handled. . . . [Mr. Dupree] claims that he was told that there could be a problem because he had filed an individual grievance, although he had not done so; and that performance ratings are non-negotiable, although the Local had recently represented members in a grievance about performance ratings. Mr. Dupree contended that the Local's interpretation of Article 22 of the Agreement is incorrect. . . . Finally, he argued that between January and May 2005, Ms. Courtney (President of the Local) did not respond to his requests for information regarding his grievance, and that she did not provide him with a copy of an e-mail he requested." (R&R at pgs. 4-5).

The Respondent counters that Mr. Dupree's "complaints were investigated and the applicable law was researched . . . and the Union communicated with Mr. Dupree at length." (R&R at p. 5). In April 2004, the Respondent had filed a grievance on behalf of the Child Support Division related to the April 2004 annual performance appraisal. "This grievance was not related to the appraisals *per se* but rather challenged [the] Agency's use of worksheets to score performance, which had resulted in lower ratings. . . ." (R&R at p. 5). Mr. Bradley testified that Mr. Dupree and Mr. Jones approached him about the April appraisals. Specifically, Mr. Dupree's appraisal had been lowered from an "outstanding" rating to an "excellent" rating. Therefore, "the Local included [the] Complainant and Mr. Jones in the Child Support Division grievance because it perceived the issues as similar." (R&R at p. 5).

As a result of the April 2004 grievance the Union filed on behalf of the Child Support Division, the OAG issued new evaluations in June 2004. (See R&R at p. 5). The Respondent contends that Mr. Dupree's June appraisal had the proper number of signatures and was signed by persons with authority to sign the appraisal. (See R&R at p. 6). Ms. Courtney testified that "she told Mr. Dupree that since performance evaluations are non-negotiable the Union would not file a grievance on his behalf. She [stated] that she erroneously told him that he could take the matter to the Office of Employee Appeals (OEA)." (R&R at p. 6).

Based on an e-mail from the OAG's Labor Liaison, Ms. Courtney believed that Mr. Dupree had filed an individual grievance. Ms. Courtney met with OAG Deputy Attorney General Eugene Adams regarding Mr. Dupree's concerns about the appropriate signatures. She also met with Mr.

Dupree and his supervisor at Mr. Dupree's request. After the meeting, Mr. Dupree stated that he was satisfied with the answers he received from the supervisor. (See R&R at p. 6).

With regard to the testimony of the witnesses, the Hearing Examiner found that "the issue is not one of credibility, but rather, one of confusion, forgetfulness, and misinterpretation." (R&R at p. 7). The Hearing Examiner considered the evidence and made the following factual findings: (1) the Complainant first met with Mr. Bradley in April 2004. (See R&R at p. 7); (2) before January 2005, Mr. Bradley and Ms. Courtney informed Mr. Dupree that the Local was not going forward with a grievance on his behalf concerning his June 2004 appraisal (See R&R at p. 7); (3) e-mails between the OAG and the Complainant reasonably support the conclusion that Mr. Dupree had pursued this matter on his own. (See R&R at p. 7); (4) Mr. Bradley received Mr. Dupree's June 2004 evaluation from Mr. Dupree (See R&R at p. 7); (5) the Union researched the issue of signatures on the appraisal and pursued the matter with the OAG (See R&R at p. 7); and (6) the Local did not file a grievance on behalf of Mr. Dupree. (See R&R at p. 7).

The Hearing Examiner noted that "[t]o breach its duty, the Union's conduct must be deemed [to be] arbitrary, discriminatory, in bad faith or based on considerations that are 'irrelevant, invidious or unfair'." Further, the Board has held that "the examination is 'not the competence of the union, but rather whether its representation was in good faith and its actions motivated by honesty of purpose'." [Citing] *Roberts v. American Federation of Government Employees, Local 2725*, 36 DCR 1589, Slip Op. No. 203, PERB Case No. 88-S-01 (1989). Thus pursuant to this standard, the merits of the grievance and the correctness of the Local's decision not to proceed with it, do not determine the outcome only the Local's good faith and honesty of purpose are relevant." (R&R at p. 8).

Relying on Board precedent, the Hearing Examiner concluded that the evidence did not establish that the Union acted in bad faith, was dishonest or acted in an arbitrary manner in this case². The Hearing Examiner further concluded that "the Local's decision not to pursue the matter in this Complaint was a 'judgmental act of discretion' and did 'not constitute the requisite arbitrary, discriminatory or bad faith' needed to establish a violation."³ (R&R at p. 10).

¹Citing, *inter alia*, *Stanley Roberts v. AFSCME, Local 2725*, 36 DCR 1590, Slip Op. No. 203, PERB Case No. 88-S-01 (1989).

²Citing *Freson v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 31 DCR 2239, Slip Op. No. 74, PERB Case No. 83-U-09 (1984); *Enoch Williams v. American Federation of State, County and Municipal Employees, District Council 20, Local 2290*, 43 DCR 5598, Slip Op. No. 538, PERB Case No. 97-U-26 (1995).

³Citing *Brenda Beeton v. Department of Corrections and Fraternal Order of Police/Department of Corrections Labor Committee*, 45 DCR 2078, Slip Op. No. 538, PERB Case No. 98-U-04 (1998).

III. Complainant's Exceptions

The Complainant takes exception to the following findings made by the Hearing Examiner:

Exception No. 1: "Based on the evidence presented, I find that complainant first met with Mr. Bradley after receiving the April 2004 appraisal as a result of which he and Mr. Jones were included in the Child Support Division Grievance." ([citing] R&R at p. 7);

Exception No. 2: "Mr. Dupree contends that the Local did not notify him that it would not file a grievance on his behalf in January 2005, but both Ms. Courtney and Mr. Bradley stated they told Mr. Dupree of the decision before that date, i.e., according to Mr. Bradley it was closer to the date that the second performance appraisals were issued. Based on the evidence presented, I find that Mr. Bradley and Ms. Courtney informed Mr. Dupree that the Local was not going forward with a grievance on his behalf related to the June appraisal before January 2005." ([citing] R&R at p. 7);

Exception No. 3: Based on the evidence presented the Hearing Examiner found that Mr. Dupree had not filed an individual grievance, however, the evidence reasonably supports the conclusion that he pursued the matter on his own. ([citing] R&R at p. 7);

Exception No. 4: The Hearing Examiner found that the Complainant was included in the Child Support Division grievance but this grievance was not introduced into evidence, nor was it provided in response to a subpoena for "all documents showing or relating to the representational efforts made by the Respondents." ([citing] R&R at p. 7). The Complainant asks the Board to draw an adverse inference pursuant to Board Rule 550.18;

Exceptions No. 5: The Hearing Examiner admitted into evidence a worksheet introduced by the Union and which was not submitted to the Board prior to the hearing;

Exception No. 6: The Hearing Examiner did not allow evidence concerning Mr. Bradley's side deal with OAG;

Exception No. 7: The Hearing Examiner failed to consider evidence that Mr. Bradley filed a grievance on behalf of the Child Support Division, where he works, but did not file a grievance on behalf of the Complainant on a similar issue.

The Complainant requests that the Board find that the Union has violated the CMPA and vacate the Hearing Examiner's R&R. In the alternative, the Complainant would have the Board reopen the record to enforce his subpoena and develop a full record.

IV. Discussion

Regarding Exceptions Nos. 1, 2, 3 and 7, above, the Complainant would have the Board adopt his view of the evidence. The Board finds that the Complainant's exceptions amount to a mere disagreement with the Hearing Examiner's findings. A mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's findings where the findings are fully supported by the record. *See American Federation of Government Employees, Local 872 v. D.C. Department of Public Works*, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). Furthermore, where the Hearing Examiner's Report and Recommendation is supported by record evidence, as here, exceptions challenging those findings lack merit. *See American Federation of Government Employees, Local 2725 v. District of Columbia Housing Authority*, 45 DCR 4022, Slip Op. No. 544, PERB Case No. 97-U-07 (1998).

Thus, regarding Exception Nos. 1, 2, and 3, the Board finds that the Hearing Examiner's findings that: (a) the Complainant and Mr. Jones were included in the Child Support Division grievance; (b) Mr. Bradley and Ms. Courtney informed Mr. Dupree before January 2005 that the Local was not going forward with a grievance on his behalf related to his June appraisal; (c) Mr. Dupree did not file an individual grievance but pursued the matter on his own; - are reasonable and supported by the record. Therefore, we adopt these findings.

The Complainant asserts that he served the Union with a subpoena for information concerning the Union's effort to represent him, but the Union did not provide a copy of the Child Support Division grievance in which he was allegedly included, challenging the April 2004 performance appraisals. (See Exception No. 4). The Complainant alleges that the Hearing Examiner should have drawn an adverse inference based on the Union's failure to comply with the subpoena. The Complainant requests that, pursuant to Board Rule 550.18, the Board draw an adverse inference concerning the Union's failure to provide the grievance in response to the request in his subpoena.

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." Here, 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.

Furthermore, 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". We note that Board Rule 550.18 is not mandatory. Furthermore, the Board finds no basis for drawing an adverse inference concerning the Union's failure to provide a grievance document for the Child Support Division grievance.

The Complainant also asserts that the Hearing Examiner should have excluded a worksheet⁴ introduced by the Union in order to prove that it filed a grievance challenging the April 2004 performance evaluations. This document was presented at the hearing but had not been previously submitted to the Board. (See Exception No. 5). In addition, the Complainant contends that the Hearing Examiner did not allow evidence concerning a side deal between Mr. Bradley's and the OAG, (see Exception No. 6), and did not consider the fact that Mr. Bradley filed a group grievance concerning the standards used for performance appraisals in the Child Support Division, but stated that performance appraisals were not grievable regarding the Complainant's grievance. (See Exception No. 7).

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*, 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). In the present case, the Hearing Examiner found insufficient evidence to establish that the Union's actions violated the CMPA. We find the Hearing Examiner's findings to be reasonable and based on the record.

We find that the Complainant is merely disagreeing with the Hearing Examiner's findings. After reviewing the record, the Board finds that the Complainant has not met his burden of proof in this matter. Pursuant to Board Rules 520.14⁵ and 544.14⁶ we adopt the Hearing Examiner's recommendation that there has been no violation of the CMPA in this matter.

⁴The Union asserted that DHS used this worksheet to evaluate employees and this resulted in lower graded evaluations, therefore the Union filed a group grievance challenging the April 2005 evaluations, resulting in new evaluations in June 2005.

⁵Board Rule 520.14 pertains to standards of conduct appeals and provides as follows: "The Board shall reach its decision upon a review of the entire record. The Board may adopt the recommended decision to the extent that it is supported by the record. The Board shall issue its decision and order and serve it on all parties on the same day that the decision is issued."

⁶Board Rule 544.14 concerns unfair labor practice appeals and provides as follows: "The Board shall reach its decision upon a review of the entire record. The Board may adopt the recommended decision to the extent that it is supported by the record. The Board shall issue its decision and order and serve it on all parties on the same day that the decision is issued."

ORDER⁷

IT IS HEREBY ORDERED THAT:

1. The Hearing Examiner's recommendation is adopted in its entirety.
2. The unfair labor practice complaint and the standard of conduct of complaint are dismissed.
3. Pursuant to Board Rule 559.1 this Decision and Order is final upon issuance.

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

September 30, 2009

⁷This Decision and Order implements the decision and order reached by the Board on February 14, 2008, and ratified on July 13, 2009.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 05-U-45 and 05-S-01 was transmitted via Fax and U.S. Mail to the following parties on this the 30th day of September 2009.

William Dupree
FOP/DOC Labor Committee
10606 Cedarville Road
Brandywine, MD 20613

U.S. MAIL

Joseph P. Bradley
Secretary/Treasurer
AFSCME, Local 2401
6606 Killarney Street
Clinton, MD 20735

U.S. MAIL

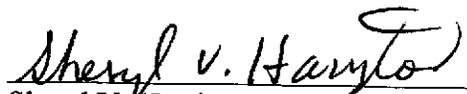
Deborah Courtney, President
AFSCME, Local 2401
1724 Kalorama Road, N.W.
Suite 200
Washington, D.C. 20009

U.S. MAIL

Courtesy Copies:

Lois Hochhauser, Esq.
1101 14th Street, N.W.
Suite 500
Washington, D.C. 20005

U.S. MAIL



Sheryl V. Harrington
Secretary