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**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)	
)	
University of the District of Columbia)	
Faculty Association/NEA,)	
)	PERB Case No. 07-U-52
Complainant,)	
)	Opinion No. 1350
v.)	
)	
University of the District of Columbia,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

Complainant University of the District of Columbia Faculty Association/NEA (“Complainant” or “Union”) filed an unfair labor practice complaint (“Complaint”) against Respondent University of the District of Columbia (“Respondent” or “UDC”), alleging violations of the parties’ collective bargaining agreement (“CBA”) and § 617.04 of the Comprehensive Merit Personnel Act (“CMPA”). Specifically, the Union alleged that UDC failed to adhere to guidelines for faculty promotions and student evaluations, and that this failure constituted a refusal to bargain in good faith. (Complaint at 2-3).

In its Answer (“Answer”), UDC denied that it refused to bargain in good faith, and asserted several affirmative defenses: (1) the portion of the Complaint alleging a failure to follow the faculty evaluation guidelines is untimely; (2) the allegation of a failure to meet an October 1, 2007, deadline is not ripe; (3) the Union failed to provide specific instances of UDC’s alleged failure to bargain in good faith; and (4) the Complaint fails to state a claim upon which relief can be granted. (Answer at 2-3).

On June 6, 2008, Hearing Examiner Lois Hochhauser conducted a hearing in the instant case, and subsequently issued a Report and Recommendation (“Report”). The Hearing Examiner determined that the Union failed to prove by a preponderance of the evidence that UDC refused

to bargain or otherwise acted in bad faith, and recommended that the Complaint be dismissed. (Report at 8). The parties did not file exceptions. The Report is before the Board for disposition.

II. Discussion

The Board will affirm a hearing examiner's findings if they are reasonable and supported by the record. See *American Federation of Government Employees, Local 872 v. D.C. Water and Sewer Authority*, Slip Op. No. 702, PERB Case No. 00-U-12 (March 14, 2003).

The Hearing Examiner found the following undisputed facts:

The [CBA] addresses faculty evaluations, which include student assessments of faculty. Among other requirements is that the assessment form is administered in the Fall semester beginning on the third Friday in November and in the Spring semester between the third Friday in March and the first Monday in April. Faculty members are responsible for assembling an Evaluation Portfolio which must be submitted to the Department Chair by the third Friday in March. The Department Evaluation and Promotion Committee (DPEC) and/or Department Chair must assist the member in obtaining information, including the student evaluation data. The Dean forwards the recommendation and rating decisions of all faculty to the Provost and Provost and Vice President for Academic Affairs by May 9.

The Agreement also contains provisions related to faculty promotions. Applications must be submitted to the Department Chair by the third Friday in September. The Chair must make a recommendation by no later than the fourth Friday in October. The DEPC must make its recommendation to the College Promotion Committee (CPC) by the third Friday in November. Comments from the applicant are due by the first Friday in January. The CPC must complete its review by the first Friday in February. The Dean's recommendations are due by the fourth Friday in February. A dissatisfied applicant can appeal the result by April 1.

Compensation is governed by Article XVIII of the [CBA]. Faculty hired in Academic Year 2006 and thereafter are part of the merit pay system and are evaluated annually. Faculty hired prior to that time may remain eligible for step increases or opt into the merit pay system. The University was required to set aside a percent of the total faculty salary as a Merit Pool, beginning October 1, 2006 (1%) and October 1, 2007 (2%). The Merit Pool funds were divided into the Standard Merit Pool and Discretionary Merit Pool

components. All funds in the pool had to be paid to eligible faculty members yearly, with the funds distributed based on performance during the most recent evaluation cycle.

(Report at 3-4) (internal citations omitted).

First, the Hearing Examiner addressed the fact that the Complaint raised both contractual and statutory violations. (Report at 6). The Hearing Examiner stated that although a violation that is solely contractual is not properly before the Board, the contractual violation will be deemed an unfair labor practice if the Complainant can establish that it also violates the CMPA, or constitutes a repudiation of the contract. (Report at 6) (*citing American Federation of Government Employees, Local 3721 v. D.C. Fire Department*, 39 D.C. Reg. 8599, Slip Op. No. 287, PERB Case No. 90-U-11 (1991)).

The Hearing Examiner found that the Union presented evidence that UDC failed to meet deadlines imposed by the CBA, and that UDC conceded that some (but not all) deadlines were missed. (Report at 7). The Hearing Examiner concluded that “failure to adhere to contractual time frames is a contractual violation, which, standing alone, would not constitute a ULP.” *Id.* Nonetheless, the Union claimed that UDC’s actions are equal to a failure to bargain in good faith – a charge that, if proven, would constitute a violation of the CMPA. *Id.* The Hearing Examiner concluded that the Union’s claims were properly before the Board. *Id.* The Board finds that the Hearing Examiner’s conclusion is reasonable and supported by the record.

Further, the Hearing Examiner determined that there was documentary and testimonial evidence to support a conclusion that UDC continued to bargain in good faith with the Union over the issues of merit pay, promotions, and student evaluations. (Report at 7). The Hearing Examiner stated that “[t]he evidence did not establish that [UDC] refused at any point to discuss these issues with the Association, although the parties did not agree on the meaning of all the terms.” *Id.* The failure to agree on the meaning of all of the terms of the CBA was not evidence of bad faith or a refusal to bargain, but rather that in developing the “complex procedures” of promotions, merit pay, and student evaluations, “the parties did not reach accord on every item.” *Id.* Based upon the evidence presented, the Hearing Examiner concluded that “the parties met in person and communicated by email on a number of occasions to discuss, and possibly resolve,” the issues over merit pay, promotions, and student evaluations. *Id.* Additionally, the evidence established “that [UDC] believed, in good faith, that it was meeting its responsibilities...” *Id.* The Board finds that the Hearing Examiner’s conclusion is reasonable and supported by the record.

Based upon the evidence presented and her analysis of the issues, the Hearing Examiner concluded that the Union did not meet its burden of proof by a preponderance of the evidence, as required by Board Rule 520.11. (Report at 8). The Hearing Examiner recommended that the Board dismiss the Complaint. *Id.*

A hearing examiner has the authority to determine the probative value of evidence and draw reasonable inferences from that evidence. *Hoggard v. District of Columbia Public Schools*,

46 D.C. Reg. 4837, Slip Op. No. 496, PERB Case No. 95-U-20 (1996). The Board will adopt a hearing examiner's recommendation if it is reasonable and supported by the record. *American Federation of Government Employees, Local 872, Slip Op. No. 702*. Pursuant to Board Rule 520.14, the Board finds the Hearing Examiner's conclusions and recommendations to be reasonable and supported by the record. Therefore, the Board adopts the Hearing Examiner's Report, and the Complaint is dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

1. The University of the District of Columbia's Faculty Association/NEA's Unfair Labor Practice 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

January 2, 2013

CERTIFICATE OF SERVICE

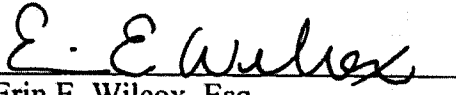
This is to certify that the attached Decision and Order in PERB Case No. 07-U-52 was transmitted via U.S. Mail and e-mail to the following parties on this the 3rd day of January, 2013.

Ms. Andrea Bagwell, Esq.
University of the District of Columbia
4200 Connecticut Ave, NW,
Building 39, Room 301Q
Washington, DC 20008
abagwell@udc.edu

U.S. Mail and E-MAIL

Mr. Jonathan G. Axelrod, Esq.
Beins, Axelrod, PC
1625 Massachusetts Ave, NW
Suite 500
Washington, D.C. 20036
jaxelrod@beinsaxelrod.com

U.S. MAIL and E-MAIL


Erin E. Wilcox, Esq.
Attorney-Advisor