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

_____	)	
In the Matter of:	)	
	)	
Doctors' Council of the	)	
District of Columbia,	)	
	)	PERB Case No. 11-U-22
Complainant,	)	
	)	Opinion No. 1460
v.	)	
	)	Motion for Reconsideration
District of Columbia Department of	)	
Youth and Rehabilitation Services,	)	
	)	
Respondent.	)	
_____	)	

**MOTION FOR RECONSIDERATION**

**DECISION AND ORDER**

**I. Statement of the Case**

On October 25, 2013, the Board issued a Decision and Order in *Doctors' Council of the District of Columbia v. D.C. Dep't of Youth and Rehabilitation Services*, 60 D.C. Reg. 16255, Slip Op. No. 1432, PERB Case No. 11-U-22. On November 8, 2013, the Doctors' Council of the District of Columbia ("Complainant" or "DCDC") timely filed a Motion for Reconsideration of PERB Decision and Order No. 1432 ("MFR"). No response to the Motion for Reconsideration was received by the Board.

**II. Background**

On February 22, 2011, Complainant filed an Unfair Labor Practice Complaint ("Complaint") against the District of Columbia Department of Youth and Rehabilitation Services ("Respondent" or "DYRS"). On March 10, 2011, Respondent filed an Answer to the Complaint ("Answer"), denying the Complaint's allegations and requesting that the Board dismiss the Complaint.

The Board denied the Respondent's request to dismiss the Complaint on the grounds that the pleadings alone were insufficient for the Board to resolve the disputed issues. *Doctors' Council of the District of Columbia v. D.C. Dep't of Youth and Rehabilitation Services*, 59 D.C. Reg. 6865, Slip Op. No. 1208, PERB Case No. 11-U-22 (2011). The Board ordered an unfair labor practice hearing before a Board-appointed hearing examiner.

On August 24 and September 19, 2012, a hearing took place before Hearing Examiner Lois Hochhauser ("Hearing Examiner"). *Doctors' Council*, Slip Op. No. 1432. The Hearing Examiner issued a Report and Recommendation ("Report" or "HERR"). No Exceptions were deemed timely. *Id.* The Board issued a decision on the disposition of the Report, adopting the Report's recommendations with respect to two allegations, remanding on two allegations, and *sua sponte* ordering factual findings by the Hearing Examiner on issues of timeliness. *Id.*

Complainant filed a timely Motion for Reconsideration, requesting that the Board reconsider its decision regarding the timeliness of the Complainant's Exceptions and the adoption of the Hearing Examiner's recommendations to dismiss two of the four unfair labor practice allegations. The Motion for Reconsideration is before the Board for disposition.

### III. Discussion

The Board has repeatedly held that "a motion for reconsideration cannot be based upon mere disagreement with its initial decision." *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 59 D.C. Reg. 6013, Slip Op. No. 1004 at p. 10, PERB Case No. 09-U-26 (2009); *see also FOP/MPD Labor Committee v. MPD*, 59 D.C. Reg. 6579, Slip Op. No. 1118, PERB Case No. 08-U-19 (2011); *American Federation of Government Employees Local 2725 v. D.C. Dep't of Consumer and Regulatory Affairs and Office of Labor Relations and Collective Bargaining*, 59 D.C. Reg. 5041, Slip Op. No. 969, PERB Case Nos. 06-U-43 (2009); *D.C. Dep't of Human Services v. FOP/Dep't of Human Services Labor Committee*, 52 D.C. Reg. 1623, Slip Op. No. 717, PERB Case Nos. 02-A-04 and 02-A-05 (2003); *MPD v. FOP/MPD Labor Committee*, 49 D.C. Reg. 8960, Slip Op. No. 680, PERB Case No. 01-A-02 (2002). Absent authority which compels reversal, the Board will not overturn its decision and order in this case. *See Peterson v. Washington Teachers Union*, Slip Op. No. 1254 at p. 2, PERB Case No. 12-S-01 (March 28, 2012); *Collins v. American Federation of Government Employees National Office and Local 1975*, 60 D.C. Reg. 2541 Slip Op. No. 1351 at p. 3, PERB Case No. 10-S-10 (2013).

#### A. Timeliness of Exceptions

The issue presented is whether the Board's Decision upholding the Acting Executive Director's denial of a one-day extension was in accord with the Board's Rules. In its Motion for Reconsideration, Complainant argues that the Board should have considered Complainant's Exceptions, because the Decision's "recitation of the facts is incomplete and erroneous, in ways that influenced PERB's conclusion that the Exceptions not be considered." (MFR at 2). In particular, the Complainant raises: "[T]hat '[The Decision stated][t]he Parties...submitted post-hearing briefs to the Hearing Examiner fails to point out that the Executive Director denied

Petitioner's last motion and directed that the Petitioner's Post-Hearing Brief, filed January 15, 2013, not be considered by the Hearing Examiner." (MFR at 2). Further, the Motion for Reconsideration raises that "[t]he statement 'On August 20<sup>th</sup> and August 26<sup>th</sup>, 2013, Complainant filed a motion for reconsideration of the Acting Executive Director's denial of the motion for a one-day extensions to file Exceptions,' fails to acknowledge that the August 26<sup>th</sup> motion for reconsideration was specifically addressed to PERB, not to the Acting Executive Director." *Id.*

In addition, the Complainant argues that there were other facts that the Board did not "highlight." *Id.* The Complainant argues that its July 8, 2013, request for a one-day extension did not address Board Rule 501.2, in whether Complainant had shown good cause for an extension, and that the Acting Executive Director based the July 25, 2013, denial of the extension on the former Executive Director's statement that Complainant would not be granted any further extensions in the case. (MFR at 2-3). Complainant argues that the first time the Acting Executive Director discussed Board Rule 501.2 was in response to the motion for reconsideration of the extension's denial. (MFR at 3). Further, the Complainant asserts that the Acting Executive Director should have inferred that the Respondent consented to the extension, because the Respondent had requested an extension of time to file its opposition to the Exceptions. *Id.*

The Complainant argues that the above assertions evidence that the Acting Executive Director's denial of the one-day extension for filing Exceptions to the Report amounts to an abuse of discretion. *Id.* The Complainant asserts that the Board did not provide analysis for its conclusion that the Exceptions were untimely and would not be considered by the Board. *Id.*

Board Rules 501.1, 501.2, and 501.3 govern extensions for filing pleadings:

501.1. The rules of the Board shall be construed broadly to effectuate the purposes and provisions of the CMPA. When an act is required or allowed to be done within a specified time by these rules, the Board, Chair or the Executive Director shall have the discretion, upon timely request therefor, to order the time period extended, or reduced to effectuate the purposes of the CMPA, except that no extension shall be granted for the filing of initial pleadings.

501.2. A request for an extension of time shall be in writing and made at least three (3) days prior to the expiration of the filing period. Exceptions to this requirement may be granted for good cause shown as determined by the Executive Director.

501.3. The request for an extension of time shall indicate the purpose and reason for the requested extension of time and the positions of all interested parties regarding the extension. With the exception of the time limit for the filing of the initial pleading that begins a proceeding of the Board, the parties may waive all time limits established by the Board by written agreement in order to expedite a pending matter.

The Complainant asserts that the Acting Executive Director by denying the one-day extension for filing Exceptions and the upholding of that decision by the Board amounts to an abuse of discretion. (MFR at 3). Further, Complainant asserts that the Board did not review the record adequately in making its decision to uphold the Acting Executive Director's denial. (MFR at 2).

The Board rejects Complainant's assertions. The Board reviewed the documents submitted by the Parties and by the Acting Executive Director, concerning the one-day extension issue. The Board included in its review prior related filings that the Acting Executive Director relied upon in her July 25, 2013, letter, in which she denied Complainant's motion for a one-day extension to file exceptions and the Complainant's motion for reconsideration, concerning the denial of the one-day extension. *DCDC v. DYRS*, Slip Op. No. 1432 at p. 2, PERB Case No. 11-U-22. The August 26, 2013, Motion for Reconsideration of the Acting Executive Director's Denial of Motion for One-Day's Extension to File Exceptions to Hearing Examiners Report and Recommendations ("MFR of Denial to File Extension") states, "The Acting Executive Director's decision denying the one-day extension request and thereby directing that Petitioner's Exceptions to the Report not be considered is not consistent with the CIPA labor relations chapter or with PERB Rule 501.1, is an abuse of discretion, is arbitrary and capricious, and will not serve the interests of fairness or of administrative or judicial economy or efficiency." (MFR of Denial to File Extension at p. 2).

In determining whether denying the one-day extension is an abuse of discretion, arising from arbitrary and capricious decision-making, the Board reviews the record before it. Complainant submitted and received the following extensions during the post-hearing briefing stage: one-week extension (Letter dated November 30, 2012) (granted November 30, 2012); a motion for eleven (11) business days (Letter dated December 17, 2012) (granted Dec. 17, 2012); and a motion for three (3) business days (Letter dated January 3, 2013) (granted Jan. 3). On January 8, 2013, Complainant requested a one (1) business day extension to January 10, 2013. Respondent did not consent to the extension. Nevertheless, former Executive Director Harris granted Complainant an additional five (5) day extension, including three (3) business days. In granting the extension, the former Executive Director stated, "No further extensions will be granted to the Complainant in this case." (Letter dated January 9, 2013). Respondent timely filed its Post-Hearing Brief. Complainant filed a "Petitioner's Motion for Permission to File After-Hours Today," in which Complainant requested to file its post-hearing brief after the designated time ordered by the former Executive Director in the January 9, 2013, letter to Complainant. The Complainant filed its post-hearing brief the next day. The former Executive Director denied the Motion for Permission to File After-Hours, stating that "no further extensions would be granted to the Complainant in this case," and that the filing would not be considered by the Hearing Examiner in the case. (Letter dated January 15, 2013).

On January 18, 2013, Complainant filed "Petitioner's Motion for *Nunc Pro Tunc* Extension of Time and Reconsideration of Executive Director's January 15, 2013 Letter Denying Then-Pending Extension Request and Directing that Petitioner's Post-Hearing Brief Not Be Considered by the Hearing Examiner" ("*Nunc Pro Tunc* Motion"). Complainant asserted that the *Nunc Pro Tunc* motion should be granted due to "cost, efficiency, fairness and conservation

of resources-including PERB's resource." (*Pro Nunc* Motion at 3). Complainant asserted that allowing the Hearing Examiner to consider Petitioner's post-hearing brief would aid the Hearing Examiner in examining the entire record. (*Nunc Pro Tunc* Motion at 4). On May 17, 2013, the former Executive Director denied Complainant's *Nunc Pro Tunc* Motion, stating: "I was absolutely clear that no further extensions would be granted. To renege on that clear deadline would be unfair to opposing counsel, and detrimental to the authority of PERB." (Letter dated May 17, 2013).

The Hearing Examiner's Report and Recommendation was mailed June 17, 2013, providing the Parties a July 8, 2013, due date for Exceptions. On July 8, 2013, Complainant filed "Petitioner's Motion for One Day's Extension of Time for Exceptions" ("Motion for Extensions for Filing Exceptions"). Complainant asserted that an injury to counsel's thumb created problems with writing Exceptions, and that the injury occurred after July 4<sup>th</sup>, thus "it was not possible to know the need for the motion 3 days prior to July 8<sup>th</sup>." (Motion for Extensions for Filing Exceptions at 1). Notwithstanding, Complainant asserted that "[a]lthough it is possible that but for the distraction caused by writing and processing this motion, the requested one day extension would not have been needed, to be cautious, the undersigned files this motion well before the midnight e-filing deadline." (Motion for Extensions for Filing Exceptions at 2). Respondent filed Motions for an Extension of Time to file its Opposition on July 17 and 22, 2013. On July 25, 2013, the Acting Executive Director denied the motion, citing the former Executive Director's decisions, and stated that the response to the latest request "must be consistent with the responses to your last three requests for an extension of time." (Letter July 25, 2013).

On August 26, 2013, Complainant filed a "Motion to PERB for Reconsideration of Acting Executive Director's Denial of Motion for One-Day's Extension to File Exceptions to Hearing Examiner's Report and Recommendations." At the time of Complainant's motion, Complainant had not met Board Rule 501.2's three-day deadline for requesting an extension. On August 27, 2013, the Acting Executive Director denied the motion based on Board Rule 501.3, finding that the Complainant had not shown good cause to be granted an extension. (Letter dated August 27, 2013). The Acting Executive Director found that the motion was not made until 10:13 p.m. on July 8, 2013 – the day Exceptions were due, and that counsel did not try to obtain consent from opposing counsel until 9 p.m. that night. *Id.* Further, the Acting Executive Director stated, "Waiting to file your Motion for Extension to File Exceptions less than two (2) hours before the deadline to file your exceptions; faulting physical injuries for an inability to process work; blaming the motion, itself, for taking away from writing the exceptions, coupled with the fact that you were previously granted four (4) consent motions for an extension of time and one (1) unconsented motion for an extension of time, are factors I took into consideration when I decided that you failed to show good cause." (Letter dated August 27, 2013 at 2).

Based on a thorough review of the record, the Board determines that the Board's decision to uphold the Acting Executive Director's denial was not arbitrary and capricious or an abuse of discretion but rather was based on the Board's reliance upon the Acting Executive Director's discretion in denying the extension based on the record of Complainant's actions before the Board. As discussed by the Acting Executive Director, Complainant requested and received a

number of filing extensions, including an unconsented to extension with more business days granted than requested, for which the Complainant still untimely filed its post-hearing brief, after receiving notice that Complainant would not be provided any additional filing extensions to the five extensions requested and received. In addition, the Acting Executive Director based her decision on the timing of the motion for the one-day extension, Complainant's actions in obtaining opposing counsel's consent, and the reasons for the one-day extension, including Complainant's asserted reason for the extension was for writing the motion. The Board notes that nowhere in the July 8, 2013, motion for a one-day extension to file Exceptions, does the Complainant assert that Respondent consented to the motion for an extension. The Board reviews the record and the totality of the circumstances of Complainant's actions and finds that the Acting Executive Director's decision was not an abuse of discretion, arising from arbitrary and capricious decision-making.

Complainant asserts that the notice given by former Executive Director Harris that Complainant would not be granted additional extensions for the above-captioned case was an unfair basis for being denied the one-day extension to file Exceptions. (MFR at 3-4). As stated above, Board Rule 501.2 allows a Party to request an extension of a non-initial pleading up to three (3) business days prior to a deadline. In order to receive an extension after the three-day requirement, Board Rule 501.2 requires that cause be shown. Board Rule 501.1 grants the Executive Director discretion in granting extensions. Denying the one-day extension was within the authority granted to the Acting Executive Director. Complainant neglects to acknowledge that the Acting Executive Director considered the total requests for extensions by the Complainant and the timing and circumstances of the motion for the one-day filing extension. The Board determines that the Board and the Acting Executive Director's denial of the Complainant's motion for a one-day extension for filing exceptions were in accordance with the Board Rules.

The Board has held that untimely exceptions may be stricken from the record. *See American Federation of Government Employees, Local 631 v. D.C. Dep't of Public Works*, Slip Op. No. 1001, PERB Case No. 05-U-43 (2009); *Doctor's Council of the District of Columbia General Hospital v. DC General Hospital*, 43 D.C. Reg. 5159, Slip Op. No. 475, PERB Case No. 92-U-17 (1996). Therefore, the Board was proper in denying the admission of Complainant's untimely exceptions.

The Board notes further that "[w]hether 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.'" *Council of School Officers, Local 4, American Federation of School Administrators v. D.C. Public Schools*, 59 D.C. Reg. 6138, Slip Op. No. 1016 at p. 6, PERB Case No. 09-U-08 (2010) (quoting *D.C. Nurses Association and D.C. Department of Human Services*, 32 D.C. Reg. 3355, Slip Op. No. 112, PERB Case No. 84-U-08 (1985)). The Board upon review of the Hearing Examiner's Report and Recommendation remanded two of the four allegations to the Hearing Examiner.

As PERB properly applied its Rules to the facts of this case, Complainant's arguments submitted in its Motion for Reconsideration amounts to no more than a disagreement with the

Board's underlying decision. The Board has repeatedly held that "a motion for reconsideration cannot be based upon mere disagreement with its initial decision." *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 59 D.C. Reg. 6013, Slip Op. No. 1004 at p. 10, PERB Case No. 09-U-26 (2009). Complainant's Motion for Reconsideration has not provided any authority, which compels reversal of the Board's decision. See *Peterson v. Washington Teachers Union*, Slip Op. No. 1254 at p. 2, PERB Case No. 12-S-01 (March 28, 2012). A mere disagreement with the Board's findings does not merit reconsideration of its Decision and Order. Therefore, we conclude the Complainant's Motion for Reconsideration cannot be granted.

**B. Impacts and Effects Bargaining Allegation Dismissal**

Complainant asserts that the Board erred in adopting the Hearing Examiner's recommendation to dismiss the Complaint's allegation that Respondent did not engage in impacts and effects bargaining of the RIF, after Complainant had requested bargaining. (Motion at 4-5). The Complainant argues that "the Hearing Examiner completely omitted—and thereby ignored—three crucial undisputed facts directly related to whether a violation of good faith I & E bargaining occurred." (Motion at 5). Complainant raises the following in support of its factual argument:

[1.] That prior to, and on, the October 12, 2010 face-to-face bargaining session, the Union made very specific proposals to reduce the impact and effects of the upcoming RIF on the affected individuals.

[2.] That, except for rejecting one of the Union's specific proposals on October 12<sup>th</sup>, the Employer never even responded to the Union's specific I & E proposals even though the negotiators continued to communicate with each other after October 12<sup>th</sup> and before the October 22<sup>nd</sup> RIF—as well as after the RIF.

[3.] That, as frankly conceded by Management's experienced chief negotiator Aqui, unlike the normal process of I & E bargaining with OLRCB, these parties did not reach a consensus either that agreement could not be reached, or that the I & E bargaining process was complete.

*Id.* (footnotes omitted). Complainant argues that "these undisputed facts—ignored by HERR (and PERB) compel a reversal of the conclusion that Complainant did not meet its burden of proving the Respondent implemented the RIF before completion of I & E bargaining." (Motion at 6) (footnote omitted). Complainant argues that the Board committed error of fact and law "in placing the Union at fault for not being more diligent about the frequency of bargaining sessions." (Motion at 7-8).

Board Rule 520.11 provides the burden of proof for an unfair labor practice complaint, which states, "[t]he party asserting a violation of the CMPA, shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." Thus, the Complainant had the burden to prove by preponderant evidence that Respondent's actions amounted to an unfair labor practice under the CMPA.

As issues of material fact were in dispute, pursuant to Board Rule 520.9, the Board sent the Complaint to an unfair labor practice hearing before a Hearing Examiner to develop the factual record and make recommendations. *Doctors' Council of the District of Columbia v. D.C. Dep't of Youth and Rehabilitation Services*, Slip Op. No. 1208, PERB Case No. 1208. A hearing was held, and the Hearing Examiner issued a Report and Recommendation. After reviewing the record, the Board adopted the Hearing Examiner's recommendation that the Complainant did not meet its burden of proof for the unfair labor practice allegations regarding requested impact and effects bargaining of the RIF. *Doctors' Council*, Slip Op. No. 1432, at p. 8-9.

Complainant argues in its Motion for Reconsideration that undisputed facts were ignored by the Hearing Examiner and, consequently, by the Board in reaching its decision to adopt the Hearing Examiner's recommendation. (MFR at 4-6). Further, Complainant asserts that the way in which these facts were applied to the Board's case law would necessitate a reversal of the Board's decision, because impacts and effects bargaining had not concluded prior to the implementation of the RIF. (MFR at 8). The Complainant bases this on its assertion that the factual record would show that an outstanding proposal by Complainant to Respondent, required Respondent to take the initiative to respond, and thus the Complainant was not required to do anything further. *Id.* Complainant argues that, since it asserts no action was required by the Complainant, that the Respondent failed to bargain over impact and effects prior to the implementation of the RIF. *Id.*

The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Council of School Officers, Local 4, American Federation of School Administrators v. District of Columbia Public Schools*, 59 DC Reg. 6138, Slip Op. No. 1016 at p. 6, PERB Case No. 09-U-08; *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). 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 (2003).

The Board found that "[t]he Hearing Examiner evaluated the credibility of the witnesses and made factual findings and conclusions based on the record that are reasonable and in accordance with Board precedent." *Doctors' Council*, Slip Op. No. 1432 at p. 9. Based on the above Board precedent, the Board had the authority to adopt the Hearing Examiner's recommendations. *American Federation of Government Employees, Local 872*, Slip Op. No. 702, PERB Case No. 00-U-12.

The Board finds that the Complainant's assertions are all based on weighing the evidence presented in favor of Complainant's interpretation of the Board's case law. As stated above, the Board has repeatedly held that "a motion for reconsideration cannot be based upon mere disagreement with its initial decision." *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 59 D.C. Reg. 6013, Slip Op. No. 1004 at p. 10, PERB Case No. 09-U-26 (2009). Therefore, the Board cannot grant the Complainant's Motion for Reconsideration.



**C. Dismissal of Allegations Regarding Replacement of Bargaining Unit Positions**

Complainant alleges that in Complainant's Post-Hearing Brief and Exceptions, Complainant has "requested that this allegation—based on the same facts as are involved in a portion of the Union's grievance—be deferred to the grievance procedure if arbitration was ordered, or if not, be withdrawn." (Motion at 9). As Complainant's Post-Hearing Brief and Exceptions have not been considered, the Complainant does not put forth any argument as to why the Board should grant its Motion for Reconsideration of this allegation. Therefore, the Board finds that the Complainant merely disagrees with the Board's adoption of the Hearing Examiner's recommendation to dismiss the unfair labor practice allegation, and denies the Complainant's Motion for Reconsideration. *See University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 59 D.C. Reg. 6013, Slip Op. No. 1004 at p. 10, PERB Case No. 09-U-26 (2009).

**IV. Conclusion**

The Complainant has asserted no grounds, other than mere disagreement with the Board's initial Decision, for its Motion for Reconsideration. The Board denies the Complainant's Motion for Reconsideration. The Complaint's allegations regarding impacts and effects bargaining of the RIF and the replacement of bargaining unit positions are dismissed with prejudice. The remaining issues will be remanded to the Hearing Examiner for further factual findings and conclusions.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. Complainant's Motion for Reconsideration is denied.
2. The Hearing Examiner shall make factual findings and conclusions as to whether the Respondent failed to furnish relevant and necessary information at the request of the Complainant. The Hearing Examiner may conduct further proceedings, if necessary.
3. The Hearing Examiner shall make factual findings and conclusions as to whether the Respondent's refusal to arbitrate was an unfair labor practice. The Hearing Examiner may conduct further proceedings, if necessary.
4. The Hearing Examiner shall make factual findings and conclusions as to whether any of the remaining allegations were untimely.
5. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

Washington, D.C.

April 1, 2014

**CERTIFICATE OF SERVICE**

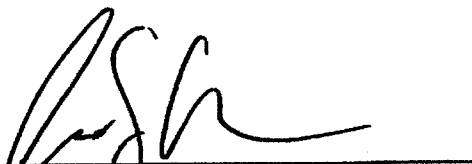
This is to certify that the attached Decision and Order in PERB Case No. 11-U-22 was transmitted to the following Parties on this the 7th day of April, 2014:

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