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

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)	
In the Matter of)	
Michael E. Brown, et. al.,)	
)	
Complainants,)	
)	
v.)	
)	PERB Case No. 08-U-58
District of Columbia Department of)	
Consumer and Regulatory Affairs,)	Slip Opinion No. 1229
)	
And)	
)	
American Federation of Government)	
Employees, Local 2725,)	
)	
Respondents.)	
_____)	

DECISION AND ORDER

I. Statement of the Case

Complainants are employees of the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"). Complainants' claims arise out of a decision by the DCRA to require Complainants to take and pass an exam by which they would obtain a certification offered by the International Code Council. The International Code Council is a "membership association dedicated to building safety and fire prevention" that "develops the codes used to construct residential and commercial buildings, including homes and schools." (See <http://www.iccsafe.org/news/about/>.) Between the period of 2001 and the early part of 2003, DCRA informed Complainants (with the exception of Marc Vaughn) that their job titles would change from Housing Inspectors to Neighborhood Stabilization Officers. Complainants allege that both duties and position descriptions were changed without the benefit of collective bargaining.

A. Procedural History

On August 1, 2009, Complainants filed an Unfair Labor Practice Complaint ("Complaint") against the Respondents: the DCRA and the American Federation of Government Employees ("AFGE") Local 2725. The DCRA filed an Answer on August 20, 2008. Thereafter, on November 9, 2009, DCRA file a Motion to Dismiss the Complaint. On November 17, 2009, the Complainants filed a Motion to Strike and opposition to DCRA's Motion to Dismiss, on the grounds that DCRA's Answer and its Motion to Dismiss were untimely filed, and did not comply with PERB's rules of procedure. On October 22, 2009, Complainants filed a motion with PERB to extend to October 27, 2009, their time to respond to AFGE's Motion to Dismiss their Complaint. By letter date October 23, 2009, PERB notified Complainants by fax and U.S. mail, that their request for an extension of time was granted. On October 28, 2009, Complainants filed their Opposition to Respondent AFGE, Local 2725 Motion to Dismiss together with a Motion for Leave to file their Opposition out of time. On November 20, 2009, a hearing took place at the PERB office where the case was heard by a hearing examiner. A Report and Recommendation was issued on December 30, 2009. On March 17, 2010, Complainants submitted Exceptions to the Hearing Officer's Report and Recommendations on Motions to Dismiss. On March 18, 2010, AFGE submitted an Opposition to the Complainants' Exceptions. On March 29, 2010, DCRA submitted an Opposition to Complainants Exceptions. The Hearing Examiner's Report and Recommendation, Complainant's Exceptions and Respondents' Opposition are before the Board for disposition.

II. Discussion

Respondents, upon separate motions, seek dismissal of the Complaint in this case on the ground that the Public Employee Relations Board (PERB) lacks jurisdiction over their alleged, respective misconduct. Specifically, the Complaint alleges that DCRA committed unfair labor practices by failing to negotiate with AFGE, Local 2725, about job requirements for the Complainants, who are bargaining unit employees, by failing to bargain in good faith with AFGE, and by interfering and violating Complainants' right to bargain collectively through AFGE when DCRA failed to negotiate with AFGE about their working conditions, and placed bargaining unit employees on administrative leave.

The Complaint alleges that the District of Columbia Government was guilty of breach of contract when it failed to bargain with AFGE about position descriptions for bargaining unit employees. The Complaint alleged that DCRA breached the collective-bargaining agreement by unilaterally imposing new working conditions on bargaining unit employees, failing to pay bonuses to bargaining unit employees and failing to provide job descriptions for bargaining unit positions.

The Complaint alleges that AFGE committed unfair labor practices by acquiescing in DCRA's refusal to negotiate about job requirements of bargaining unit employees "by failing to take affirmative action to prevent or stop it" (See Complaint p.17). The Complaint also alleges that AFGE breached the collective-bargaining agreement by its failure to "take action" (See Complaint p. 18) against DCRA for changing bargaining unit working conditions, and by failing to represent bargaining unit employees in matters involving DCRA's adverse actions against them or regarding other employment issues.

The parties appeared at a pre-hearing conference on November 20, 2010, at PERB. The three parties presented oral arguments and introduced copies of the pleadings and other documents, including affidavits, in support of their respective positions.

A. Unfair Labor Practice Complaint and PERB Jurisdiction

DCRA and AFGE, respectively, move to dismiss the Complaint on the ground that the District of Columbia Comprehensive Merit Personnel Act ("CMPA") does not grant PERB subject matter jurisdiction over the unfair labor practices alleged against them, respectively. In its Motion to Strike DCRA's Motion to Dismiss, (pgs. 3 and 4), and at the pre-hearing conference, Complainants argued that DC Code §1-605.02(5) authorizes PERB to determine whether unfair labor practices have been committed by Respondents in this case. Turning to that section of the DC Code, entitled: "Power of the Board" (PERB), we find that Code §1-605.02 provides that PERB "shall have the power to... (3) decide whether unfair labor practices have been committed and issue an appropriate remedial order."

Complainants also seek support for its position from D.C. Code § 1-617.02, which commands PERB to "issue rules and regulations establishing a labor-management relations program to implement the policy set forth in [§ 1-617.02]." Complainants also rely on DC Code §1-617.02(b), the portion of the policy in this subchapter requiring PERB's labor-management program to provide for "[t]he resolution of unfair labor practice allegations" (b)(2) "the protection of employee rights as set forth in § 1-617.06", (b)(3), "the right of employees to participate through their duly-designated exclusive representative in collective bargaining..." (b)(4) and "any other matters which affect employee-employer relations" (b) (7).

As DCRA has noted in its Motion to Dismiss, PERB has recognized that "the right to require the District to bargain in good faith pursuant to D.C. Code § [1-617.04(a) (5)] belongs exclusively to the recognized bargaining representative, and not to the employees represented by their designated bargaining agent." George Parker and Emily Washington v. Washington Teachers Union, Local 6 and D.C. Public Schools, 46 DCR 6996, Opinion No.594 at n.1, PERB Case Nos. 99-U-25 and 99-S-05 (1999) quoting Willard Taylor et al. v. University of D.C. and the National Education Association, 41 DCR 6687, Opinion No. 324 at n.2, PERB Case No. 90-U-24 (1994); See also, Georgia Mae Green v. D.C. Dept. of Corrections, 37 DCR 8086, Opinion No. 257 at n.2, PERB Case No. 90-U-24 (1994). Thus, the Complainants have no standing to ask PERB to entertain their allegations that DCRA failed to bargain in good faith and therefore violated D.C. Code §1-617.04(a)(5). The same result confronts Complainants' allegations that DCRA violated D.C. Code §1-617.04(a)(5) by failing to negotiate with AFGE about job requirements for bargaining unit positions, and by interfering with and violating their rights to bargain by failing to negotiate with AFGE about working conditions, by submitting removal notices to bargaining unit employees, and by removing and placing bargaining unit employees on administrative leave.

With regard to the Unfair Labor Practice Complaint itself, it is well settled under PERB law that an alleged violation of a collective-bargaining agreement does not constitute an unfair labor practice under CMPA. *Carlease Madison Forbes v. Teamsters, Local Union 1714 and Teamsters Joint Council*

55, 36 DCR 7097, Slip op. No. 205, PERB Case No. 87-U-11 (1989). PERB repeatedly has held that allegations of breach of contract do not fall within its jurisdiction. E.g. Georgia Mae Green, supra, 37 DCR 8086, Opinion No. 257 at p.4. In the instant case, the complaint alleges six counts of breach of contract by AFGE, which fall outside the Board's jurisdiction.

B. Duty of Fair Representation

The Complainants' allegations that AFGE committed unfair labor practices by failing to file an unfair labor practice charge and "by failing to take affirmative action to prevent or stop ["DCRA's unauthorized interference of Complainants' employment"] are, in essence, allegations that AFGE has breached its duty of fair representation. Under D. C. Code §1-617.03(a) (1), members of a bargaining unit are entitled to "fair and equal treatment under the governing rules of the labor organization." The Board has declared: "The Union as the statutory representative of the employees is subject always to complete good faith and honesty of purpose in the exercise of its discretion regarding the handling of union members' interests." Hairston and Fraternal Order of Police and The Metropolitan Police Department, 31 DCR 2793, Opinion No. 75, PERB Case Nos. 83-U-11, 83-U-12, 83-S-01 (1984), quoting Hines v. Anchor Motor Freight Inc., 424 U.S. 554 (1976). To show that this duty of fair representation has been breached the complainant must show that the union's conduct was "arbitrary, discriminatory or in bad faith, or be based on considerations that are irrelevant, invidious or unfair." Stanley O. Roberts and American Federation of Government Employees, Local 2725, 36 DCR 3631, Slip Op. No. 203 at p.3, PERB Case No. 88-S-01 (1989), quoting Teamsters, Local 310 v. NLRB, 587 F.2d 1176,1181 (D.C. Cir. 1978).

PERB has observed that a union's duty of fair representation "does not require it to pursue every grievance to arbitration." Freson and Fraternal Order of Police, Metropolitan Police Department Labor Committee, 31 DCR 2290, Slip Op. No.74 at p.3, PERB Case No. 83-U-09(1984). Here, the Complaint alleges that the AFGE failed to bring an "unfair labor practice action" and "to take affirmative action" in the face of DCRA's alleged failure to bargain in good faith. Absent from the complaint is any allegation that AFGE's conduct was the product of AFGE's bad faith, or that it was arbitrary or discriminatory. The failure to specifically allege one of those three prohibited behaviors on the part of AFGE and its decisions to refrain from filing an unfair labor practice complaint and from filing grievances is fatal to the alleged cause of action. Ulysses S. Goodine, v. FOP/DOC Labor Committee, supra, Slip Op 476, at p.3. Nowhere in their Motion do complainants allege any violation of this code section. In addition, assuming all facts in the motion are true, Complainants do not allege any facts that would indicate that any conduct prohibited by Code§1-617.04(a) occurred. Thus, this claim does not fall under PERB jurisdiction.

The Complaint further alleges that AFGE breached the collective-bargaining agreement by failing to take action against DCRA for unilaterally imposing new conditions of employment upon bargaining unit employees, and by failing to represent bargaining unit employees regarding their individual grievance against AFGE. As noted above, in discussing PERB's jurisdiction over allegations of DCRA's breaches of its collective-bargaining agreement with AFGE, PERB has repeatedly held that allegations of breach of contract do not fall within its jurisdiction. E.g. Georgia Mae Green, supra, 37 DCR

8086, Opinion No. 257 at p.4. In the instant case, the complaint alleges seven counts of breach of contract by AFGE which fall outside the Board's jurisdiction.

The Board finds that with regard to the alleged breach of the collective bargaining agreement which gave rise to the Unfair Labor Practice Complaint, Complainants have made allegations over which PERB has no jurisdiction. With regard to the alleged breach of the Union's duty of fair representation complainants have failed to state a cause of action.

Pursuant to Board Rule 520.11, "the party asserting a violation of the CMPA, shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." In the present case, the Hearing Examiner found insufficient evidence to establish that DCRA and Local 2725's actions violated the CMPA. After reviewing the record, The Board agrees that the Complainant has not met his burden of proof in this matter.

Pursuant to D.C. Code § 1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and finds them to be reasonable, supported by the record and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner's findings and conclusions that DCRA and AFGE Local 2725 did not violate D.C. Code § 1-617.04(a)(5) or 1-617.04(b)(3) respectively. In light of the above, the Complaint must be dismissed.

The Board thus dismisses the Complaint.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complainants' Complaint is dismissed.
2. Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

**Washington, D.C.
November 22, 2011**

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and the Board's Decision and Order in PERB Case No. 08-U-58 are being transmitted via U.S. Mail to the following parties on this the 22nd day of November, 2011.

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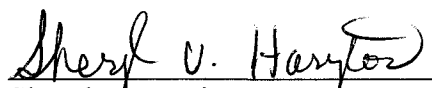
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