

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:)	
)	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2741)	PERB Case No. 00-U-22
)	
Complainant,)	Opinion No. 697
)	
)	
)	
)	
v.)	
)	
DISTRICT OF COLUMBIA)	
DEPARTMENT OF PARKS AND RECREATION)	
)	
)	
Respondent.)	
)	

DECISION AND ORDER

This case involves an Unfair Labor Practice Complaint filed by AFGE, Local 2741 ("Complainant", or "AFGE") against the D.C. Department of Parks and Recreation and its Director, Robert Newman ("Respondents", "Agency", or "DPR"). The Complainant is alleging that the Respondents violated D.C. Code § 1-617.04 (a)(1) and (5) (2001 ed.)¹ by: (1) interfering with,

¹D.C. Code §1-617.04 (a)(1) and (5)(2001 ed.) provide as follows:

- (a) The District, its agents and representatives are prohibited from:
 - (1) Interfering, restraining, or coercing any employee in the exercise of the rights guaranteed by the subchapter...; and

(continued...)

restraining and coercing an employee during his testimony at an arbitration hearing; (2) reprimanding the employee after his testimony; (3) failing to provide the Complainant with a list of bargaining unit employees that was needed in connection with the arbitration proceeding; and (4) failing to make employee witnesses available to attend and testify at the arbitration hearing.²

In its Answer and Motion to Dismiss, the Respondents deny the allegations. DPR, through its representative, the Office of Labor Relations and Collective Bargaining (OLRCB), asserts that: (1) AFGE does not have standing to assert that the rights of the witness (a supervisor) were violated and (2) no collective bargaining members' rights were affected by the exchange between the witness and DPR's representative. In addition, DPR claims that it made witnesses available for the hearing; however, instead of releasing all seventeen employees from duty simultaneously, DPR agreed to allow them to be excused as needed. Furthermore, DPR asserts that it provided three versions of the requested information to the Union, thus fulfilling its obligation with respect to the document request.

At a hearing held on October 23, 2000, Respondent's Motion to Dismiss was granted pursuant to the Hearing Examiner's authority under Board Rule 550.13(c).³ (R & R at p. 2). Specifically, the Hearing Examiner found that the Respondent did *not* violate D.C. Code §1-617.04⁴ (a)(1) and (5)(2001 ed). On November 15, 2000, the Respondents filed a Motion for Sanctions and Other Relief. Subsequently, the Complainant filed an Opposition to Respondents' Motion for Sanctions and Other Relief. The Hearing Examiner addressed both the Complaint and the various motions concerning sanctions in his Report. The Complainant filed Exceptions to the Hearing Examiner's Report and Recommendation (R& R) and the Agency filed a Response to those Exceptions.

The Hearing Examiner's R &R, the Complainant's Exceptions, the Agency's Response, and the Motions for Sanctions are before the Board for disposition.

¹(...continued)

(5) Refusing to bargain collectively in good faith with the exclusive representative.

Prior codification at D.C. Code § 1-618.4 (a)(1) (5) (1981ed.).

²The Complainant claims that Respondents ordered bargaining unit witnesses not to report to the hearing until directed to do so by the Respondents.

³Board Rule 550.13 (c) provides in relevant part that the Hearing Examiner shall have the power to rule on Motions.

⁴Prior codification at D.C. Code §1-618.4(a)(1) and(5)(1981 ed.).

I. Background:

The facts of this case arise out of an arbitration proceeding to resolve a grievance filed by AFGE⁵ on behalf of wage grade employees of DPR. These employees were seeking to receive hazardous duty and environmental pay pursuant to the parties' collective bargaining agreement. A hearing commenced before Arbitrator Ira Jaffee on February 9, 1999 and was continued on March 24, 2000, March 25, 2000 and April 17, 2000.⁶ Most of the events giving rise to the present complaint occurred in preparation for or at the March 24, 2000 hearing. A brief description of those events follows:

On March 14, 2000, AFGE 2741 requested a list of "all wage grade employees and any other employees performing wage grade tasks." The request specified that the list "must contain the official classified position of these employees." (R & R at p. 3). The Complainant contends that it repeated this request orally on several occasions, but as of the filing of the unfair labor practice complaint, the information had not been provided, or rather had not been provided in a complete and accurate form. The Respondents claim that they have provided three versions of the requested list to the Complainant.⁷

On March 17, 2000, the Complainant submitted a list of witnesses to the Respondent, Robert Newman, requesting that seventeen (17) employees, including 5 supervisors and 12 other employees, be granted administrative leave in order to attend the arbitration hearing. On March 23, 2000, DPR's Chief of Maintenance called each of the Complainant's witnesses at home and instructed them to

⁵ The Complainant, American Federation of Government Employees Local 2741, is the exclusive representative of wage grade employees at DPR. AFGE and DPR are parties to a collective bargaining agreement. Pursuant to the parties' collective bargaining agreement, AFGE filed for arbitration in this matter on January 6, 1998. Robert Newman was the Director of DPR at the time of the events giving rise to the grievance. Mr. Newman subsequently resigned his position.

⁶ The Board's staff contacted the parties and learned that to date, no decision has been issued in the above noted grievance arbitration proceeding. The Board's staff also contacted the Arbitrator to learn the status of this decision and was informed that neither party has completed presenting its case. As a result, the hearing has been in adjournment since April 2000. The Arbitrator added that he has been waiting for the parties to contact him to schedule other hearing dates.

⁷ The Respondents noted that one such version of the requested list was provided to the Complainant on April 21, 2000. (Motion to Dismiss at ¶12).

report to work as usual on March 24th and wait until called before reporting to the arbitration hearing. Claude Hill, an Electrician Foreman, was the first witness at the hearing. Mr. Hill had not been informed of the instruction to report directly to work. The Complainant alleges that DPR's representative, Tina Curtis, gestured and signaled to Hill throughout his testimony. The Complainant also claims that DPR's representative pursued and berated Hill for having ruined DPR's case. According to the Complainant, the pursuit did not stop outside of the hearing room. Finally, the Union claims that DPR's representative (Tina Curtis) followed Hill into the men's room and later into the parking lot until he drove away.

In light of the above, AFGE filed this complaint.

II. The Hearing Examiner's Report and Recommendations

Based on the pleadings and the record developed in the hearing, the Hearing Examiner identified two main issues. These issues, and his findings and recommendations are as follows:

1. *Did DPR commit an unfair labor practice in this matter?*
2. *Should either party be sanctioned as a result of the Cross Motions for Sanctions that were filed by the parties?*

Based on his review of the evidence in the record, the Hearing Examiner concluded that the Complainant's allegations did not state a cause of action under the CMPA. He based his determination on the fact that the actions alleged arose in the context of an arbitration proceeding. In the Hearing Examiner's view, the right of employees to a grievance arbitration is provided pursuant to the parties' collective bargaining agreement, not the CMPA.⁸ Furthermore, he noted that the Board distinguishes between those obligations that are statutorily imposed under the CMPA and those that are contractually agreed upon between the parties. See, American Federation of State, County, and Municipal Employees, Local 2921 v. District of Columbia Public Schools, 42 DCR 5685, Slip Op. No. 339, PERB Case No. 92-U-08 (1992). Relying on the holding in AFSCME Local 2921 v. DCPS, the Hearing Examiner also observed that the Board's authority only extends to resolving statutorily based obligations under the CMPA. Id. On the other hand, he pointed out

⁸ Specifically, he stated that the CMPA does not guarantee employees the right to a fair arbitration. He noted that the only place that grievance arbitration is mentioned in the CMPA is in D.C. Code §1-605.02(6)(2001 ed.), where the Board has the authority to consider appeals from arbitration award pursuant to a grievance procedure. (R & R at p.7).

that the Arbitrator is vested with the authority to resolve disputes that are contractually based pursuant to the parties' negotiated agreement. See also, American Federation of Government Employees, Local 3721 v. District of Columbia Fire Department, 39 DCR 8599, Slip Op. No. 287 at n. 5, PERB Case No. 90-U-11 (1991) and Washington Teachers' Union, Local 6, American Federation of Teachers, AFL-CIO v. District of Columbia Public Schools, 42 DCR 5488, Slip Op. No. 337, PERB Case No. 92-U-18 (1995)⁹. In view of the above, the Hearing Examiner asserted that any disputes arising out of the arbitration proceeding are contractual in nature and should be resolved by the Arbitrator. (R & R at p.2 and 9).

The Board does not agree with the Hearing Examiner's view that the allegations are contractual in nature and do not present a cause of action under the CMPA. We find that the allegations made in this complaint *do*, in fact, concern statutory violations, even though these alleged statutory violations arose in the context of the Union exercising its contractual right to a grievance arbitration. The CMPA grants employees the right to file a grievance.¹⁰ Therefore, it logically follows that the CMPA protects employees as they seek to exercise this right. As a result, the Board finds that a Hearing Examiner should make findings of fact concerning whether the CMPA was violated in this case.

Individual Unfair Labor Practice Allegations

Contrary to the Hearing Examiner's finding that the Union's allegations do not present causes of actions under the CMPA, we find that the Board has jurisdiction to hear and decide the allegations raised in the Union's complaint. Specifically, the statutory violations raised in this unfair labor practice complaint have been considered and addressed before by this Board and the NLRB. Specifically, both PERB and the NLRB, have addressed allegations of unfair labor practices being committed during the course of an arbitration proceeding. Therefore, we find *no* merit to the Hearing

⁹In both cases, the Board declined to consider issues that it determined were properly before the Arbitrator and arose from the parties' collective bargaining agreement. The Board reasoned that the Board lacked jurisdiction to hear the claims since the issues raised failed to assert violations of the CMPA. See, AFGE, Local 3721 v. D.C. Fire Department, 39 DCR 8599, Slip Op. No. 287 at n. 5, PERB Case No. 90-U-11 (1991) and WTU, Local 6, AFT, AFL-CIO v. DCPS, 42 DCR 5488, Slip Op. No. 337-PERB Case No. 92-U-18 (1995).

¹⁰ The Board finds that D.C. Code §1-617.06 (2001 ed.) protects employees in the exercise of their right to pursue a grievance. Specifically, D.C. Code §1-617.06(a)(2), (3) and (b) (2001 ed.), respectively, give employees the right to: (1) "form, join, or assist any labor organization... (2) bargain collectively through representatives of their own choosing... and (3) present a grievance at any time...".

Examiner's conclusions¹¹ that: (1) these allegations raise no claims under the CMPA and (2) the Board has no jurisdiction to hear these claims.¹² The specific reasons for the Board's conclusion that the Union's allegations *do*, in fact, raise claims under the CMPA follow below.

Documents

This Board has found that an Agency commits an unfair labor practice by failing to provide relevant documents in response to a request made during an arbitration proceeding. See, International Brotherhood of Teamsters Locals 639 and 730 v. D.C. Public Schools, 37 DCR 5993, Slip Op. No. 226, PERB Case No. 88-U-10 (1990). In the present case, the Complainant alleges that DPR failed to provide a complete list of wage grade employees to the Union. The Complainant contends that these actions constitute a failure to bargain in good faith in violation of D.C. Code § 1-617.04 (a)(1) and (5) (2001 ed.).¹³ The Respondent denies the allegations stating that it had complied with the request and had even submitted three versions of the list to the Union. Based on the precedent cited above, we find that this Board is empowered to decide whether DPR committed an unfair labor practice concerning the Union's document request, even though the document request was made during an arbitration proceeding.

Alleged Retaliatory Behavior Toward Supervisor Hill

This Board has also addressed the issue of whether an Agency commits an unfair labor practice by allegedly retaliating against an employee for participating in the grievance arbitration process or testifying on behalf of another employee in a grievance arbitration. See, Bagenstose and Borowski v. D.C. Public Schools, 38 DCR 4254, Slip Op. No. 415 at pg. 9, PERB Case Nos. 88-U-33 and 88-U-34 (1991) (where the Board found that the Complainant was unlawfully retaliated against for testifying on behalf of another employee); See also, Valerie A. Ware v. D.C. Department of Consumer and Regulatory Affairs, 46 DCR 3367, Slip Op. No. 571, PERB Case No. 96-U-21 (1999) (where the Complainant alleged that Agency retaliated against her for filing a grievance and where the Board found that supervisors may bring claims alleging retaliation in violation of the

¹¹The Hearing Examiner bases his conclusions on the fact that the events giving rise to the unfair labor practice complaint occurred during an arbitration proceeding.

¹²The Complainant's Exceptions also disagree with the Hearing Examiner's position that the alleged unfair labor practices do not present statutory causes of action under the CMPA. The Complainant relies on PERB and NLRB precedent in support of its position.

¹³Prior codification at D.C. Code § 1-618.4 (a)(1) and (5) (1981 ed.).

CMPA for participating in grievance process); and See, Parker Robb Chevrolet v. Automobile Salesmen Union, Local 1095, 262 NLRB 402 (where the NLRB considered whether a supervisor was terminated for giving testimony adverse to an employer's interest at an NLRB proceeding). On this basis, we find that the Board has jurisdiction to determine whether Supervisor Hill was retaliated against for providing testimony in this matter.¹⁴ As a result, the Hearing Examiner should be directed to make specific findings concerning: (1) what was actually said to supervisor Hill; (2) who heard the statements; (3) how Hill was affected; and (4) whether any other employees refused to testify as a result of hearing about Hill's treatment.¹⁵

Reporting to Work First

Finally, this Board has not addressed whether it is an unfair labor practice for an employer to refuse to simultaneously release several employees to attend an arbitration hearing due to work coverage concerns. However, this Board has addressed whether an Arbitrator exceeded his authority by ruling that a sequestration clause¹⁶, which only allowed a certain number of witnesses to be present

¹⁴We find that this is the case even though supervisor Hill is not a member of the bargaining unit represented by AFGE. The Hearing Examiner found that even though Supervisor Hill retained rights under D.C. Code §1-617.01(b)(1) (2001 ed) to assist a labor organization, AFGE had no legal authority to assert a violation of his rights on his behalf. Furthermore, the Hearing Examiner found that nothing in the records indicated that Hill had asserted the violations on his own behalf. Therefore, "under these circumstances, the Respondent's treatment of Hill did not present a cause of action under D.C. Code §1-617.04(a)(1)(2001 ed.)." We disagree. Notwithstanding the Hearing Examiner's finding on this issue, we find that Supervisor Hill is protected from retaliation pursuant to D.C. Code §1-617.04(4), which prohibits the District and its agents from taking reprisal against an employee for giving testimony. In addition, we conclude that the above noted PERB and NLRB precedent protect a supervisor/employee, such as Hill, from being retaliated against for pursuing grievances or providing testimony in an arbitration hearing. See, Id.

¹⁵ The Complainant alleges that two supervisors, Herbert Williams and Glen Tapscott, gave very guarded and vague testimony after hearing about Hill's treatment. In addition, the Complainant claims that two other supervisors, James Boone and Darnell Thompson did not return to testify as scheduled after hearing about Hill's treatment. (Opposition to the Respondent's Motion to Dismiss at p. 10).

¹⁶The parties' collective bargaining agreement limited witnesses to being present at the grievance hearing "only at such time as their personal testimony is presented". See, Washington Teachers' Union, Local 6, AFT, AFL-CIO v. District of Columbia Public Schools, 49 DCR 4357, (continued...)

to testify at a time, was discretionary. Washington Teachers' Union, Local 6, AFT, AFL-CIO v. District of Columbia Public Schools, 49 DCR 4357, Slip Op. No. 432, PERB Case No. 95-A-07 (2002). In the present case, no provision of the parties' contract is cited as requiring sequestration. In addition, the Agency indicated that it merely wanted its employees to be called one by one so that the work area would be covered. Therefore, the Washington Teachers' Union, Local 6, AFT, AFL-CIO v. District of Columbia Public Schools, would not be applicable to the facts of the present case. Id.

When this Board does not have precedent on an issue, it looks to the decisions of other labor relations authorities, such as the National Labor Relations Board (NLRB), for guidance. Forbes v. IBT Local 1714, 36 DCR 7107, Slip Op. No. 229, PERB Case No. 88-U-20 (1989). In BMC America, Inc. and Genino Garcia, the NLRB considered whether an Employer commits an unfair labor practice by citing work coverage concerns as a reason for refusing to release employees to participate in an NLRB proceeding. 304 NLRB 362 (1991). In BMC America, Inc. and Genino, the NLRB found that management committed an unfair labor practice and interfered with the rights of employees to seek representation where management refused to allow a group of employees to attend an unfair labor practice proceeding. Id. The NLRB reasoned that the Employer's behavior was unlawful because it discouraged employees from participating in the collective bargaining process. See, Id.

This Board follows NLRB precedent where relevant. See, Forbes v. IBT Local 1714, 36 DCR 7107, Slip Op. No. 229, PERB Case No. 88-U-20 (1989). Since the NLRB has addressed this issue of releasing employees to attend Board proceedings, we find that by analogy, this Board could assert jurisdiction in the present case to decide whether or not DPR committed an unfair labor practice by refusing to release seventeen employees simultaneously to attend an arbitration proceeding. However, whether DPR's actions constitute an unfair labor practice is a question of fact. Therefore, we find that the present case should be remanded to the Hearing Examiner for a findings on: (1) whether the Agency's action of ordering employees to report to work and releasing employees only as needed to testify constituted an effective "refusal" to allow employees to participate in the arbitration proceeding; (2) whether DPR's action coerced or discourage participation in the arbitration¹⁷; and (3) whether the Agency's action of releasing the employees as needed was taken for a legitimate business reason to ensure that there was proper coverage in the work area.

¹⁶(...continued)
Slip Op. No. 432 at pg. 3, PERB Case No. 95-A-07 (2002).

¹⁷We find that this is an issue of fact that the Hearing Examiner must decide because the Agency asserts that it did not refuse to allow employees to attend; it merely directed that they only be released to attend when their actual testimony was needed.

Only after making a finding on these threshold issues will the Board would have the necessary information to make a determination on the ultimate issue of whether the Agency committed an unfair labor practice by the actions alleged in AFGE's Complaint. As a result, we order this case be remanded to the Hearing Examiner for an appropriate finding on these issues.

Motion for Sanctions

The Respondent's Motion for Sanctions alleges that the Complainant's claim was: (1) filed in bad faith; (2) frivolous; and (3) lacked merit. DPR also alleged that Complainant's representative, Beverly Crawford, "engaged in unprofessional and inappropriate conduct in an effort to create undue confusion, delay and expense to the District." In addition, the Respondent argues that the Complainant should be sanctioned because the Complainant, through its representative, Beverly Crawford, refused to stipulate to the factual allegations of the Complaint. On this basis, the Respondent asserts that it should receive costs pursuant to the Board's decision in AFSCME 2776 v. D.C. Department of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02(1990). The Complainant's Motion for Sanctions asserted, *inter alia*, that: (1) Respondent's Motion was filed as an attempt to punish a zealous advocate and (2) DPR should be sanctioned for forcing Complainant's representative, Beverly Crawford, to defend herself and her actions, in response to DPR's Motion for Sanctions.

The Hearing Examiner determined that neither party pointed to any statutory authority for imposing any sanctions other than the costs allowed pursuant to the Board's precedent in AFSCME 2776 v. D.C. Department of Finance and Revenue. In AFSCME 2776 v. D.C. Department of Finance and Revenue, the Board held that costs are allowable where: (1) the losing party's claim or position was wholly without merit; (2) the challenged action was taken in bad faith, and (3) a reasonable foreseeable result of the successfully challenged conduct is the undermining of the union. *Id.* Under this test, the Hearing Examiner determined that *neither* party had met the standard required for costs to be awarded pursuant to AFSCME 2776 v. D.C. Department of Finance and Revenue. *Id.* As a result, the Hearing Examiner recommended that both parties' Motions be denied.

Both parties excepted to the Hearing Examiner's finding on this issue by merely disagreeing with the Hearing Examiner's finding and reiterating the arguments previously raised in their original motions. The Board has held that merely disagreeing with the Hearing Examiner's finding without authority or other support for a position is not sufficient to meet the standard for reversible error. Hoggard v. District of Columbia Public Schools, 46 DCR 4837, Slip Op. No. 496, PERB Case No. 95-U-20 (1996).

Consistent with the above, the Board concludes that the Hearing Examiner's findings on both Motions for Sanctions are reasonable and supported by the record. Therefore, we adopt these

findings.

Pursuant to D.C. Code §1-605.2(3)(2001 ed.) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendation of the Hearing Examiner. Accordingly, we reject the Hearing Examiner's Report and Recommendation, as it relates to the unfair labor practice allegations and order that the case be remanded to the Hearing Examiner for findings consistent with this Opinion. In addition, the Board adopts the Hearing Examiner's findings with respect to the parties' Motions for Sanctions.

ORDER

IT IS HEREBY ORDERED THAT:

1. PERB Case No. 00-U-22 is remanded to a Hearing Examiner for findings consistent with this Opinion. The Board shall schedule a hearing on this matter within (30) days of this Order.
2. The D.C. Department of Parks and Recreation's Motion for Sanctions is denied.
3. The American Federation of Government Employees, Local 2741's Motion for Sanctions is denied.
4. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

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

November 26, 2002