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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. 11-U-02
Complainant,)	
)	Opinion No. 1430
v.)	
)	
University of the)	
District of Columbia,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

On October 14, 2010, the University of the District of Columbia Faculty Association/NEA (“UDCFA” or “Union”) filed an Unfair Labor Practice Complaint against the University of the District of Columbia (“UDC” or “Agency”). On November 3, 2010, UDC filed an Answer to Unfair Labor Practice Complaint (“Answer”) and Motion for Judgment on the Pleadings And/Or Motion to Strike. On November 8, 2010, the Union filed an Opposition to Motion to Dismiss or Strike. On February 22, 2012, the Union filed an Amended Unfair Labor Practice Complaint (“Amended Complaint”). On March 22, 2012, the Union filed a Motion to Disqualify Respondent’s Counsel.

On March 22, 2012, former Executive Director Ondray Harris issued an Executive Director’s Administrative Dismissal (“Dismissal”), dismissing the Union’s Complaint, on the grounds that portions of the Complaint involved protected discussions or evidence under Board Rule 500.4. On April 2, 2012, the Union filed a Motion for Reconsideration of the Executive

Director's Administrative Dismissal. On May 1, 2012, UDC filed an Opposition to Motion for Reconsideration of Executive Director's Administrative Dismissal.

On May 24, 2012, former Executive Director Harris issued an Order Denying Reconsideration of Executive Director's Administrative Dismissal, finding that the Union did not assert that the Dismissal was unreasonable or unsupported by Board precedent. On June 6, 2012, the Union filed an Appeal from the Executive Director's Administrative Dismissal to the Board. On July 11, 2012, UDC filed an Opposition to the Appeal from the Executive Director's Administrative Dismissal.

On August 24, 2012, the Board issued a Decision and Order, overturning the Executive Director's Administrative Dismissal, on the basis "that the protections of Rule 558 cease once the parties have reached a tentative agreement." *University of the District of Columbia/NEA v. University of the District of Columbia*, 59 D.C. Reg. 12677, Slip Op. No. 1319 at p. 3, PERB Case No. 11-U-02 (2012). The Board found that the "issue of whether UDC's actions rise to the level of a violation of the CMPA is a matter best determined after the establishment of a factual record through an unfair labor practice hearing." *Id.* at p. 3.

On October 2, 2012, Johnine P. Barnes withdrew as counsel for UDC. On January 3, 2012, UDC filed an Answer to Amended Unfair Labor Practice Complaint.

On January 8, 2013, a hearing was held before Hearing Examiner Lois Hochhauser ("Hearing Examiner"). Both Parties submitted post-hearing briefs. On June 13, 2013, the Hearing Examiner issued a Report and Recommendation ("Report"), which is before the Board for disposition. The Parties did not file Exceptions to the Hearing Examiner's Report and Recommendation.

II. Hearing Examiner's Report and Recommendation

The Hearing Examiner identified the issues as the following:

- (1) Did the University commit an unfair labor practice when President Sessoms failed to recommend to the University's Board of Trustees that it ratify the Bridge Agreement?
- (2) Did the University commit an unfair labor practice by sending an email on September 24, 2010 to UDC employees, including bargaining unit members?
- (3) If a ULP was committed by the University, what relief should be ordered?

(Report at 2).

The Hearing Examiner found the following undisputed facts:

Complainant is the exclusive bargaining representative of UDC faculty holding permanent appointment, including librarians and media specialists. Respondent is the public post-secondary institution of the District of Columbia. The parties have negotiated six Master Agreements. The most recent Agreement, i.e., the Sixth Master Agreement, was scheduled to expire in 2008. At the time of this proceeding, that Agreement had not been replaced by a subsequent agreement.

The efforts of the parties to negotiate a Seventh Master Agreement were unsuccessful and led to the filing of a ULP, an interest arbitration demand and a negotiability appeal by Complainant. Julio Castillo, former Executive Director of PERB, met with the parties in 2010 in order to assist them in resolving some of the disputes. However, these efforts were not unsuccessful.

Mark Farley, then UDC's Vice President of Human Resources and its Chief Negotiator, and Dr. Mohammed El-Khawas, then President of UDCFA and its Chief Negotiator began to meet informally in June 2010 to negotiate what was termed as a "Bridge Agreement." It was called a "Bridge Agreement" because the parties considered it to be a "bridge between the Sixth Master Agreement and a successor agreement." Mr. Farley was authorized by then UDC President Alan Sessoms to negotiate this Agreement on behalf of the University and he so informed Dr. El-Khawas.

Both Dr. El-Khawas and Mr. Farley agreed there was a degree of urgency in this effort because neither wanted to "wait another four years to get an agreement." The meetings took place at a restaurant and changes were made directly on the Sixth Master Agreement so that continuing language appeared in one color and new language in another color. In August 2010, after about six meetings, they completed drafting the Bridge Agreement, which then required ratification by UDCFA membership and the UDC Board of Trustees. The parties recognized that the Bridge Agreement required "compromise" on the part of both parties. After the document was finalized, it required ratification by the UDCFA and the UDC Board of Trustees. It was presented for ratification without signatures. Dr. El-Khawas and Mr. Farley anticipated that after ratification, individuals would be assigned by each party to sign the Bridge Agreement. They also agreed that additional work would be required by the parties after ratification. According to Dr. El-Khawas, they agreed that:

[O]nce the agreement was ratified, a committee would be formed, and half of the representatives [would] be appointed by the Association; the other half by the administration. And we [the Parties] that the committee will get together and draft a report to the

university president as well as the association president to serve for finalizing the criteria, the guidelines and a memo of understanding. (Tr, 66).

UDCFA members ratified the Bridge Agreement on or about August 18, 2010.

In April 2010, the Budget Control Act [{"freeze legislation"}] was introduced in the Council of the District of Columbia. The Act imposed wage freezes on most government agencies, including UDC. The legislation was approved by the Council on May 26, 2010, and signed on July 2, 2010, subject to congressional review. The Act froze with-in grade salary increases and cost of living adjustments at UDC, stating in pertinent part:

Notwithstanding any other provision of law, collective bargaining agreement...settlement, whether specifically outlined or incorporated by reference, all fiscal year 2010 salary schedules shall be maintained during fiscal year 2011, and no increase in salary or benefits, including increases in negotiated salary, wage, and benefits provisions and negotiated salary schedules, shall be provided fiscal year 2011 from the fiscal year 2010 salary and benefits levels.

Both parties represented that they were unaware of the legislation during negotiations, although the Union asserts that "Mr. Farley knew or should have known that the District intended to freeze wage increases and step increases for Fiscal Year 2011." Respondent denies the assertion. It is undisputed that the issues of the legislation was not raised or discussed by either Dr. El-Khawas or Mr. Farley during negotiations.

At its September 22, 2010 meeting, the UDC Board deferred voting on the Bridge Agreement, citing the freeze legislation. UDC declined the Union's recommendation that it could ratify other portions of the Bridge Agreement.

On September 24, 2010, Mr. Farley sent the following memorandum to UDC union and non-union employees:

The UDC administration and Board were unable to ratify the [Bridge Agreement] when they met on 9/22/10. Subsequent to the time representatives of the University and the NEA negotiated the Bridge Agreement, the D.C. Council passed a budget act that forbids the University from giving any Within Grade Increases (steps) during FY 2010 and forbids any agreement to provide additional compensation or benefits in FY 2011. It would violate this law to

agree to the terms in the Bridge Agreement. The Administration will be pursuing binding interest arbitration concerning the successor to the Sixth Master Agreement that expired in 2008, and other matters that pending before [PERB]. We are reaching out to the NEA leadership to try to find ways to expedite these processes. We are hopeful that these government bodies will now expedite a resolution of this long standing impasse and enable us to move forward with a New Collective Bargaining Agreement for the future. (Ex U-33).

The Council exempted UDC from the freeze in the 2011 Supplement Budget Support Act, which the Council enacted on January 27, 2011 and which became law on May 13, 2011. The effective date of Supplemental Act was April 8, 2011.

At its June 8, 2011 meeting, the UDC Board voted not to ratify the Bridge Agreement. Mr. Farley notified Dr. El-Khawas of this decision and offered to resume negotiations and to distribute "available money in order to keep moving forward toward comprehensive bargaining in the future and resolve our differences back to 2008." UDCFA did not accept this offer.

(Report at 3-5) (citations omitted).

Before the Hearing Examiner, Complainant argued that UDC committed two unfair labor practices during the Bridge Agreement negotiation and ratification time period. (Report at 5). The Union's first assertion is that an unfair labor practice was committed by UDC when President Sessoms failed to urge the UDC Board to ratify the Bridge Agreement, because the CMPA "required him to 'endorse tentative agreements to the trustees in negotiations that are subject to his control' and he failed to do this." *Id.* The Union contended "that since Mr. Farley was authorized by Dr. Sessoms to negotiate the Bridge Agreement, Dr. Sessoms was obligated to recommend its ratification to the UDC Board." *Id.* The Union's second argument that UDC committed an unfair labor practice was based on a September 24, 2010, email sent by Mr. Farley to UDC employees, which included bargaining unit employees. *Id.* The Hearing Examiner stated: "The Union contends that the email was an impermissible communication by UDC directly with bargaining unit members. The Union contends that some of the information in the email was inaccurate or incorrect, which it argues adds to the egregiousness of UDC's conduct." *Id.*

Regarding UDC's position, concerning the Union's first ULP allegation, the Hearing Examiner stated:

It [UDC] argues that it negotiated the Bridge Agreement in good faith. It asserts that both parties were unaware of the freeze legislation during the time they were engaged in negotiations. UDC contends that President

Sessoms's failure to urge ratification to the UDC Board is not a ULP because others urged the UDC Board to reject the Bridge Agreement. UDC contends that although Dr. Sessoms initially agreed with the terms, he later changed his mind and that he had the right to express his opinion to the Board of Trustees.[...][T]he Bridge Agreement was subject to ratification by the Board of Trustees, and the decision of the UDC Board was not determined by Mr. Farley as the Chief Negotiator or by Dr. Sessoms as the UDC President. Respondent maintains that in April 2011, after the University had been exempted from the wage freeze, the UDC Board's Budget and Finance Committee considered the Bridge Agreement and "rejected it for substantive reasons." At the June 2011 UDC Board meeting, the Budget and Finance Committee reported its view to the UDC Board which after discussion voted not to ratify it.

(Report at 5-6). UDC's position on the Union's second ULP allegation is that "Mr. Farley's email was sent to both bargaining unit members and non-union employees and did not seek to undermine the Union's status as the exclusive bargaining agent." (Report at 6).

With respect to the Union's allegation that UDC committed a ULP when Mr. Farley acted in bad faith because he was aware of or should have been aware of the freeze legislation during negotiations, the Hearing Examiner found "[t]here is no evidence, either direct or circumstantial, that would support a conclusion that Mr. Farley was aware of the freeze legislation during negotiations or that he acted in bad faith throughout the negotiations." (Report at 9). The Hearing Examiner further stated: "[T]he gravamen of this charge is that Dr. Sessoms, who had authorized Mr. Farley to negotiate on behalf of UDC in these negotiations, was obligated to recommend ratification of the Bridge Agreement to the Board and that his failure to do so constituted an unfair labor practice." *Id.* The Hearing Examiner found:

[T]hat Dr. Sessoms authorized Mr. Farley to negotiate on UDC's behalf; that Mr. Farley met with Dr. Sessoms prior to the start of negotiations and did not proceed on any matter in which Dr. Sessoms raised an objection; and that Mr. Farley reviewed the final document with Dr. Sessoms and counsel, and that although concerns were raised by Dr. Sessoms and counsel, all agreed it would be better for UDC to ratify the Bridge Agreement than to proceed with binding arbitration.

Id. In determining whether Dr. Sessoms was required to recommend ratification to the UDC Board, or in the alternative, was prohibited from expressing his concerns or even his dissatisfaction with the Agreement to the UDC Board, the Hearing Examiner applied *Teamsters Local Unions No. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools*, 43 D.C. Reg. 6633, Slip Op. No. 400, PERB Case No. 93-U-29 (1994). The Hearing Examiner distinguished the present case from *DCPS*, as the parties in *DCPS* had reached agreement and were bound by arbitration awards. (Report at 10). The Hearing Examiner found two grounds on which *DCPS* was distinguishable. *Id.* First, the Hearing Examiner stated: "[T]here could be no

binding agreement until the Bridge Agreement was ratified by both parties.” The second ground was that the underlying allegation of the ULP was that UDC failed to proceed to the next step in negotiations. *Id.* The Hearing Examiner found that, notwithstanding the Union’s allegation that UDC was to forward the matter to the City Council for approval, “UDC did take the required next step by forwarding the Bridge Agreement to the UDC Board for review and ratification.” *Id.*

The Hearing Examiner reviewed the record, “considered the larger context as well as circumstantial evidence,” and found the following:

The only evidence presented on this issue [of Dr. Sessoms’s recommendations to the UDC Board] was Mr. Farley’s testimony that at the UDC Board’s committee meeting which he attended with Dr. Sessoms, he heard Dr. Sessoms state that the Bridge Agreement “wasn’t enough to move us along.” The Hearing Examiner finds that Dr. Sessoms did make that statement. However she [the Hearing Examiner] does not conclude that this statement standing alone or statements similar to it, if made, is evidence [of] bad faith on the part of UDC and constitutes a ULP. According to Dr. El-Khawas, the parties agreed that after ratification of the Agreement, committees would be appointed to finalize criteria, establish guidelines and draft a memorandum of understanding. Thus, the parties recognized that there was still considerable work that had to be accomplished after ratification, and Dr. Sessoms’s statement that the Bridge Agreement did not move the parties far enough along may be reasonably interpreted to mean that it did not completely resolve important issues. The statement, by itself, cannot be considered untrue. There is no requirement that an individual, even a negotiator, cannot express sincere concerns or reservations about terms of a negotiated agreement, particularly one in which certain matters will not be addressed until after ratification and one which the parties agree required serious compromise. The evidence does support the finding that both Mr. Farley and Dr. Sessoms attended the UDC Board’s Budget and Finance Committee meeting in April 2011, that at this meeting Dr. Sessoms made the comment quoted above, that at this meeting at least three other individuals expressed reservations about the Bridge Agreement, expressing concerns about its lack of accountability features, about the evaluation process and student outcomes provisions, and about the ability of UDC to meet the financial commitments due to its depleted resources. There is no evidence in the record, either direct or circumstantial, regarding statements made by Dr. Sessoms, other than the one statement in the record. There was no evidence that the concerns raised at the committee meeting, the recommendation of the committee to the UDC Board to reject the agreement, and/or the UDC Board’s decision not to ratify the agreement was based or even influenced by Dr. Sessoms.

(Report at 10). Further, the Hearing Examiner found that “the [UDC] Board deferred consideration of the Bridge Agreement on advice of counsel based on the freeze legislation.” *Id.* The Hearing Examiner stated, “[T]here is no evidence that he [UDC’s counsel] gave his advice if (sic) bad faith or that the UDC Board accepted the advice in bad faith.” (Report at 10-11).

The Hearing Examiner rejected the Union’s assertion that the UDC Board could have considered parts of the Agreement not affected by the freeze legislation. (Report at 11). The Hearing Examiner found that “there was no evidence presented that the UDC Board was required to proceed in the manner or that its failure to do so constituted bad faith.” *Id.* The Hearing Examiner found that the Union did not meet its burden of proof that Respondent committed a ULP. *Id.*

The second ULP concerned the email sent by Mr. Farley to UDC employees. (Report at 12). The Hearing Examiner found that Mr. Farley’s “intention in sending the email was to affirm to UDC employees that despite the current problems, the University wanted to move forward work with Complainant on resolving these issues.” *Id.* Further, the Hearing Examiner stated: “The statement itself appears to be a straightforward and conciliatory attempt to notify employees, particularly bargaining unit members of the status of negotiations.” *Id.* The Hearing Examiner concluded: “Even if, as the Union asserts, Mr. Farley was not entirely accurate in his interpretation of the freeze legislation, errors alone do not constitute bad faith.” (Report at 11). The Hearing Examiner applied the Board’s holding in *AFSCME Council 20 v. District of Columbia, et al.*, 36 D.C. Reg. 427, Slip Op No. 200, PERB Case No. 88-U-32 (1988), and found that Mr. Farley’s email was “nothing more than the employer communicating to its employees on the status of negotiations, which does not, standing alone, constitute a violation of the D.C. Code.” (Report at 11-12). The Hearing Examiner found that the Union did not meet its burden of proof that UDC committed a ULP in violation. (Report at 12).

Based on the record, the Hearing Examiner concluded that UDC did not commit any ULP. *Id.* The Hearing Examiner recommended that the Complaint be dismissed with prejudice. *Id.*

III. Discussion

No Exceptions were filed by the Parties. “Whether 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 determines whether the Hearing Examiner’s Report and Recommendation is “reasonable, supported by the record, and consistent with Board precedent.” *American Federation of Government Employees, Local 1403 v. District of Columbia Office of the Attorney*

General, 59 D.C. Reg. 3511, Slip Op. No. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012). 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).

Pursuant to Board Rule 520.11, "[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." 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).

In light of these standards, the Board reviews the Hearing Examiner's findings and conclusions below.

A. Duty to bargain in good faith

Complainant alleged that UDC violated D.C. Code § 1-617.04(a)(1) and (5) by "bargaining in bad faith by failing to disclose the freeze legislation until after the [Complainant] Association had ratified the Bridge Agreement and significantly after the University [of the District of Columbia] had reached a tentative agreement," by "bargaining in bad faith by the President [Dr. Sessom] and Chief Negotiator's [Mr. Farley's] failure to endorse the agreement to the Trustees," and by "bargaining in bad faith by refusing to implement the portions of the tentative agreement not prohibited by the wage freeze legislation despite the Trustee' failure to reject the tentative agreement." (Amended Complaint at 6-7).

The Hearing Examiner found that UDC did not commit the above ULPs, because there was a lack of evidence of bad faith and that UDC had taken reasonable steps towards bargaining the Bridge Agreement, considering the impact of the freeze legislation. (Report at 9-10). The Hearing Examiner declined to accept the Union's argument that UDC knew or should have known about the freeze legislation and, therefore, bargained in bad faith. (Report at 10). The Hearing Examiner stated: "Complainant was required to establish by a preponderance of direct or circumstantial evidence that Respondent acted in bad faith, or that its actions were motivated by anti-Union animus and/or to undermine the Union's relationship with its members." (Report at 9).

The Hearing Examiner asserted without any citation to PERB precedent a requirement of bad faith for a finding of an unfair labor practice. In fact PERB has ruled that "a showing of bad faith is not required in order to establish an unfair labor practice. A conclusion that a party failed to bargain in good faith does not equate to a conclusion that the party acted in bad faith." *American Federation of State, County and Municipal Employees, District Council 20 v. District of Columbia Government*, Slip Op. No. 1387 at p.5, PERB Case No. 08-U-36 (2013). Despite the deference the Board provides the Hearing Examiner as a fact-finder, the Hearing Examiner's analysis and conclusions must be made in accordance with Board precedent. See *American*