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

In the Matter of:)	
)	
American Federation of Government)	
Employees, Local 2741,)	
)	
Complainant,)	PERB Case No. 98-U-16
)	Opinion No. 588
)	
v.)	
)	
District of Columbia Department)	
of Recreation and Parks,)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

The background and issues underlying this case are set out by the Hearing Examiner in her Report and Recommendation.^{1/} The Hearing Examiner found that the Complainant the American Federation of Government Employees, Local 2741 (AFGE), did not by a preponderance of the evidence establish that the Respondent District of Columbia Department of Recreation and Parks (DRP) failed to bargain in good faith during negotiations over a successor collective bargaining agreement. Therefore, the Hearing Examiner concluded that DRP did not violate the Comprehensive Merit Personnel Act (CMPA), as codified under D.C. Code § 1-618.4(a)(1) and (5).

Based on her findings and conclusions, the Hearing Examiner recommended that the Complaint be dismissed in its entirety. AFGE filed timely Exceptions to the Hearing Examiner's Report and Recommendation. The Hearing Examiner's Report and Recommendation and AFGE's Exceptions are now before us for disposition.

We find the Hearing Examiner's factual findings and conclusions adequately supported by the record. We reject her analysis of those facts, however, below we describe the legal framework we believe should be used to evaluate AFGE's

^{1/} The Hearing Examiner's Report and Recommendation is attached as an appendix to this Opinion.

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allegations. Ultimately, we reach the same conclusion as the Hearing Examiner—that AFGE failed to demonstrate violations of the CMPA.

The Hearing Examiner found that the evidence did not support a finding that the acts and conduct of the Office of Labor Relations and Collective Bargaining (OLRCB) --who, along with DRP representatives, bargained on behalf of DRP— rose to a level of establishing a failure to bargain in good faith. The Hearing Examiner relied on N.L.R.B. v. Katz, 369 U.S. 736 (1962) in her analysis to determine whether alleged acts or conduct constituted per se violations of the duty to bargain in good faith and concluded that none of the allegations did. AFGE's allegations also create an inference that DRP impermissibly engaged in surface bargaining. If proven, such allegations would support a finding that the CMPA was violated. We believe that Katz is inappropriate for deciding whether DRP representatives engaged in surface bargaining.

Instead, ^{would} look to precedent under National Labor Relation Act (NLRA) cases to provide guidance on what factors to consider when examining this issue. To establish surface bargaining, no one factor is determinative. Rather, the totality of a party's actions during collective bargaining must be examined to determine whether or not a party's conduct establishes a purpose or intent to frustrate or avoid reaching an agreement. See, Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732 (D.C. Cir. 1950). Any single factor, standing alone, usually will not demonstrate bad faith. Also, the fact that extensive negotiations fail to produce a contract does not justify an inference that the employer is engaged in bad faith bargaining. NLRB v. Fitzgerald Mills Corp., 133 NLRB 877, enforced, 313 F.2d 260 (2nd Cir. 1963), cert. denied, 375 US 834 (1963).

AFGE's claims, and its exceptions to the Hearing Examiner's Report and Recommendation, can be read as supporting two different types of claims. First, AFGE claims that the violations of the parties' ground rules and other procedures constituted per se violations of the duty to bargain under the CMPA. The Hearing Examiner rejected that claim and we see nothing in AFGE's Exceptions to warrant overturning her conclusion.

AFGE's claims might also justify a finding of failure to bargain in good faith if AFGE proves DRP engaged in the motions of bargaining with no real intent of reaching agreement. Sending negotiators to meetings when they have no authority to reach agreement, changing times of meetings, and violating procedural ground rules for negotiations could be evidence, considered in

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the totality of the circumstances, of bad faith bargaining. The Hearing Examiner improperly failed to consider AFGE's allegations in this light.

Our review of the record reveals the Hearing Examiner considered the breaches of the parties' ground rules when determining whether OLR/DRP failed to bargain in good faith. The Hearing Examiner determined that the ground rules allegedly violated by DRP were procedural, e.g., designation of bargaining team member and chief negotiators, location and time of sessions, cancellation procedures, etc. The Hearing Examiner further found that both parties had violated some ground rules. Moreover, the Hearing Examiner concluded that infrequent *de minimus* violations of procedural ground rules was not a violation of DRP's statutory duty to bargain. We therefore deny AFGE's exception as not supported by the record.

AFGE's remaining exceptions stem from asserted violations of the same grounds discussed above. AFGE argues that the Hearing Examiner could not have found that an impasse existed because OLR/DRP representatives had not met the ground-rule requirements to establish an impasse.^{2/} AFGE asserts that the ground rule provision provides that "all proposals to be addressed at least three (3) times prior to the declaration of an impasse." (Except. at 6.) AFGE asserts that there was no finding that this had occurred.

A determination of whether or not there was an impasse pursuant to the parties' ground rules requires an interpretation of the disputed contractual ground rule provision. If such an interpretation of a contractual obligation is "necessary and appropriate to a determination of whether or not a non-contractual, statutory violation has been committed", the Board has deferred the contractual issue to the parties' grievance arbitration procedure. AFSCME, D.C. Council 20, Local 2921 v. D.C. Public Schools, 42 DCR 5685, Slip Op. No. 339 at n. 6, PERB Case No. 92-U-08 (1995). The Board has retained jurisdiction

^{2/} The ground rule in question provides as follows:

"Once all proposals have been considered during negotiations have (sic) either been tentatively agreed to, tabled or dropped, further attempts will be made to reach an agreement on all tabled items. If such final efforts are not successful, the parties may declare the remaining tabled items at an impasse when its is (sic) determined that further discussions will be non-productive."

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only where a concurrent grievance over the issue is pending. Id. The Board further observed that where the parties have agreed to allow their negotiated agreement to establish the obligations that govern the very acts and conduct alleged in the complaint as statutory violations of the CMPA, the Board lacks jurisdiction over the complaint allegation. Id.

In view of AFGE's statement, pursuant to Board Rule 520.3(f), that there are no other related proceeding or other proceedings involving the matters contained in the Complaint, e.g., grievance/ arbitration process, no basis exists for retaining jurisdiction over this issue pending the disposition of such proceedings. Therefore, the grounds for AFGE's exception to the Hearing Examiner's finding of an impasse presents an issue of contract interpretation outside the jurisdiction of the Board.^{3/} Therefore, the exception is denied.

Dispersed within AFGE's exceptions are objections that take issue with the Hearing Examiners' failure to accord certain evidence the probative value AFGE would like. We have held that challenges to a Hearing Examiner's findings which are based on: (1) competing evidence; (2) the probative value accorded the evidence; or (3) the credibility resolutions made, do not give rise to a proper exception when, as here, the record contains evidence supporting the Hearing Examiner's conclusions. See, Clarence Mack v. D.C. Dept of Corrections, 43 DCR 5136, Slip Op. No. 467, PERB Case 95-U-14 (1996) and American Federation of Government Employees, Local 872 v. D.C. Dept of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). See, also University of the District of Columbia Faculty Association/NEA v. University of the District of

^{3/} The Hearing Examiner concluded that her findings supported a conclusion that DRP's chief negotiator "had reasonable cause to believe and sincerely believed that an impasse had been reached", i.e., a standard for determining impasses under the NLRA. See Cheney California Lumber Co. v. N.L.R.B., 319 F.2d 376, 380 (9th Cir. 1963). The Hearing Examiner based her conclusion on the following findings: (1) OLR/DRP's declaration of impasse after bargaining over a period of 300 days is sufficient time to determine which issues could not be resolved; and (2) the resolution of at least 20 of 35 issues demonstrated that DRP did not have a "cast mind" against reaching an agreement. A review of the record also reveals that there is testimony from DRP's chief negotiator that the parties "got around" to every proposal with disputed success. (Tr. at pp. 127, 141-142, 149, 177-180, 184-185.) Absent superceding contractual obligations, we find the standard use by the Hearing examiner was reasonable to determine the existence of a non-compensation bargaining impasses not subject to the provisions of D.C. Code § 1-618.17.

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Columbia, 39 DCR 6238, Slip Op. No. 286, PERB Case No. 86-U-16 (1992).

Pursuant to D.C. Code § 1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings and conclusions of the Hearing Examiner and adopt them to the extent consistent with our discussion. We therefore adopt the recommendation that the Complaint be dismissed.^{4/}

ORDER

IT IS HEREBY ORDERED THAT:

The Complaint is dismissed.

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

May 14, 1999

^{4/} The Hearing Examiner also recommended that we order DRP to present the remaining issues at impasse to the Federal Mediation and Conciliation Service (FMCS). Having found no violations by DRP, such an order is beyond the scope of this unfair labor practice proceeding. However, should the parties desire assistance from the Board in this regard, either party may request for impasse resolution pursuant to Board Rule 527.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 98-U-16 was served, via (U.S. Mail), on the following parties on this the 14th day of May, 1999.

Beverly Crawford
B&C Associates
3116 Varnum Street
Mt. Rainier, MD 20712

U.S. MAIL

James O. Baxter, II, Director
Office of Labor Relations
and Collective Bargaining
441-4th Street, N.W.
Suite 200
Washington, D.C. 20001

U.S. MAIL

Courtesy Copies

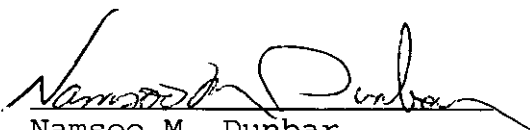
Deborrah E. Jackson
President
American Federation of
Government Employees, Local 2741
P.O. Box 64026
Washington, D.C. 20029

U.S. MAIL

Betty Jo Gaines, Director
D.C. Department of
Recreation and Parks
3149 -16th Street, N.W.
Washington, D.C. 20010

U.S. MAIL

Lois Hochhauser
Hearing Examiner
1850 M Street, NW
Suite 800
Washington, D.C. 20036



Namssoo M. Dunbar
Deputy Executive Director