GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
American Federation of Government Employees, Local 2725, AFL-CIO, Complainant,	
v.	
District of Columbia Department of Public and Assisted Housing	PERB Case No. 95-U-11 Opinion No. 492
and	
District of Columbia Housing Authority, Respondents.	

DECISION AND ORDER

The events that gave rise to this case are set out by the Hearing Examiner in his Report and Recommendation.[1]/ The Complainant American Federation of Government Employees, Local 2725, AFL-CIO (AFGE), alleged that the Respondent Department of Public and Assisted Housing (DPHA) failed to treat a group of employees occupying certain employee positions as part of the collective bargaining unit it represents in violation of the Comprehensive Merit Personnel Act (CMPA), as codified under D.C. Code § 1-618.4(a)(1), (2) and (3). The Hearing Examiner found that the Complainant established that the employees in dispute were improperly excluded from the bargaining unit. However, he concluded that the evidence did not support the charge that DPHA's exclusion of these employees was motivated by reasons proscribed under the asserted unfair labor practices.[2]/

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[1]/ The Hearing Examiner's Report and Recommendation is attached as an appendix to this Opinion.

[2]/ Respondent had requested that this matter be deferred to the parties' grievance arbitration procedure because of a provision in the parties' agreement concerning the resolution of unit disputes. The Hearing Examiner ruled that "representation issue[s] are not properly deferable" and that "the unfair labor practices

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Both parties have filed exceptions to the Hearing Examiner's Report and Recommendation. After reviewing the entire record the Board finds no merit to any of the exceptions. We find the Hearing Examiner's Report to be reasonable and supported by the evidence and applicable law, and we adopt his findings of fact, conclusions of law and recommended disposition to the extent consistent with our discussion below.

On a preliminary issue of jurisdiction, the Hearing Examiner denied a motion to dismiss the Complaint filed by the Respondent District of Columbia Housing Authority (DCHA). DCHA was established by the D.C. Housing Authority Act of 1994, D.C. Law 10-243 (which also abolished DPHA) to assume the responsibilities and operation of DPAH's public service mission. DCHA's sole exception to the Hearing Examiner's ruling centers on a provision contained in a stipulated Order issue by the Superior Court in Pearson, et al. v Kelly, et al., No. 92-CA-14030 (May 18, 1995), which appointed a Receiver to manage the affairs of DCHA commencing May 19, 1995. That provision states that "[t]he Receiver shall ... pay out the funds of DPAH or its successor agency, to the extent required by law, any settlements or judgements arising out of claims or actions based upon acts of the employees or agents of DPHA or its successor agency committed during the term of the receivership." Slip Op. at 3.

DCHA contends that this limitation of authority makes the District Government a necessary party to this cause of action since the potential monetary liability resulting from the Complaint allegations extend to a period of time preceding the Receiver's term. Notwithstanding the dismissal of the Complaint on other grounds, DCHA asserts that this issue needs to be resolved in view of the numerous cases pending and likely to be filed against DCHA. Under the circumstances of this case, we agree that this jurisdictional issue merits our consideration.

In denying DCHA's motion, the Hearing Examiner rejected DCHA's contention that the Order "limits the Receiver to the payment of prospective claims". (R&R at 4.) The Hearing Examiner's ruling turned also on DCHA's failure to fully comply with AFGE's subpoena request for "all documents which disclose that the Receiver paid or authorized the payment of any settlements or judgments arising out of claims or actions based upon acts of employees of DPHA and/or DCHA [and] the period of time covered by such settlements or judgments... ." (R&R at 3.) Pursuant to Board Rule 550.18(a), "the Hearing examiner may draw an inference in favor of the requesting

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[2](...continued)
are properly before the PERB for resolution." (R&R at 5.) We affirm this ruling by the Hearing Examiner.

party with regard to the information sought". Given the short tenure of the Receiver at the time of the hearing and the specific scope of the requested information, we agree with the Hearing Examiner's ruling that the requested documentation was not overly broad and affirm his denial of DCHA's Motion to Quash the subpoena.

Moreover, we find DCHA's reliance on the quoted and related provisions in the Order raises issues of enforcement, not jurisdiction. DCHA cites no provision in the Order or other authority that has removed DCHA from being the subject of a cause of action under the jurisdiction of the Board arising during the period of its predecessor, DPAH. To the contrary, the Order expressly provides that the Receiver shall "oversee, supervise, and direct all financial, legal, administrative, and personnel functions of DPHA" and shall have "[a]ll powers over DPHA hitherto exercised or authorized to be exercised by the Mayor of the District of Columbia... pursuant to all local authority and to the extent permitted by law". Slip Op. at 3 and 5. While this may still leave in question the funding source for settlements and judgments of DPHA for actions prior to the Receiver's term, this leaves us with no doubt as to our jurisdiction over the entire cause of action notwithstanding any failure to expressly name the District of Columbia Government as a separate respondent.[3]/

Finally, we find that the District of Columbia Government has been made, effectively, a party to this action. If not through the Receiver, then directly as the respondeat superior of DPAH. This Complaint was filed on April 6, 1995, against DPAH, which was prior to the consent Order and the appointment of the Receiver. While DPAH may have been abolished on March 21, 1995, the District of Columbia Government continued to administer the affairs of DPAH until the Receiver was appointed on May 19, 1995. Indeed, the Office of Labor Relations and Collective Bargaining (OLRCB), the Mayor's agent in such matters, represented DPAH and was served by the Board with the Notice of Hearing in this proceeding. Although OLRCB did not participate in the hearing or post hearing proceedings, it had every opportunity to preserve any separate interests not acquired by DCHA in this matter.

If or when any monetary remedial relief is ordered by the Board, any issue the Receiver perceives with respect to the apportionment of monetary liability is between DCHA and the District Government. In view of the above, we find no merit to Respondent DCHA's exception.

The Complainant excepts to nearly every conclusion made by the

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[3]/ The District Government is party and signatory to the consent Order creating the Receiver.

Hearing Examiner. The Complainant requests that the Board reconsider the evidence and make findings and conclusions that, in its opinion, should have been made to support the finding of an unfair labor practice. Complainant's exceptions are based on the probative value that Complainant accords certain evidence to reach conclusions contrary to those the Hearing Examiner made in support of his recommendation to dismiss the Complaint. As previously stated, we find the Hearing Examiner's conclusions to be supported by evidence in the record and accordingly such objections do not give rise to a proper exception.[4]/

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[4]/ The Complainant states that the Hearing Examiner's reference to the exclusion by DCHA of only 7 employees rather than 27, reflects his failure to consider all the allegations before him with respect to the number of employees affected by DCHA's alleged violative misclassification of bargaining unit employees. (Ex. at 3.) Although, by classification, the number of employees affected by DCHA's actions may be as many as 27, the Complaint allegations concerned only the seven employees addressed by the Hearing Examiner in his Report. Notwithstanding the accuracy of these numbers, in view of the Hearing Examiner's findings with respect to the non-violative nature of DCHA's action, we find the difference of no consequence to the recommended disposition. While the Hearing Examiner was convinced that Complainant believed that DPHA/DCHA's objective was to erode bargaining unit support for the union, he was not persuaded that DCHA's misclassifications was motivated by considerations proscribed by the asserted unfair labor practices. Rather, the Hearing Examiner concluded the evidence supported that DCHA's action amounted to no more than a good faith mistake. (R&R at 6.) The Hearing Examiner observed that the misclassification of 7 employees in a unit of 500 properly classified bargaining employees who are having their dues checked off under the terms of the collective bargaining agreement "is a feeble effort indeed." Id. We find no basis in the record for taking issue with this view even if the potential number of employees that occupy the disputed classifications extend to as many as 27 employees.

The Complainant also contends that the Hearing Examiner erred by not concluding that DCHA's failure to remit dues to it under the check off provision of the collective bargaining agreement for the affected employees did not constitute a violation of these employees' rights under the CMPA. The Board has held that a union's "right to receive service fees [/dues] arises entirely from the contract, and disputes over entitlement, including determinations as to when [the union] met treshold requirements ... are matters for resolution through the contractual grievance/arbitration procedures, not the Board." Fraternal Order

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Challenges to a Hearing Examiner's findings based on competing evidence do not give rise to a proper exception where, as here, the record contains evidence supporting the Hearing Examiner's conclusion. See, American Federation of Government Employees, Local 872 v. D.C. Dept. of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Cases Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). Issues concerning the probative value of evidence and, thereby, its capacity to prove, are reserved to the Hearing Examiner. See, e.g., University of the District of Columbia Faculty Association/ NEA v. University of the District of Columbia, 39 DCR 6238, Slip Op. No. 285, PERB Case No. 86-U-16 (1992) and Charles Bagenstose, et al. v. D.C. Public Schools, 38 DCR 4154, Slip Op. No. 270, PERB Cases Nos. 88-U-33 and 88-U-34 (1991). We therefore find no merit to Complainant's exceptions.

In view of the above, we deny both Respondent's and Complainant's exceptions and expressly find that the evidence failed to establish that by its acts and conduct DPAH has committed an unfair labor practice in violation of D.C. Code § 1-618.4(a)(1), (2) and (3). We adopt the Hearing Examiner's recommended disposition to the extent set forth in the Order below.

ORDER

IT IS HEREBY ORDERED THAT:

1. For the reasons discussed in this Opinion, the Board has jurisdiction over the entire Complaint, as amended.

2. In view of paragraph 1 of this Order, the Hearing Examiner's denial of District of Columbia Housing Authority's Motion to Dismiss the Complaint, is affirmed.

3. The Complaint, as amended, is dismissed.

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

November 4, 1996

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[4](...continued)
of Police/Department of Corrections Labor Committee v. Office of Labor Relations and Collective Bargaining (on behalf of the D.C. Dept. of Corrections), Slip Op. 419, PERB Case 94-U-14 (1995).