GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
Clarence T. Pratt, Sr.,	
Complainant,	
v.	
District of Columbia Department of Administrative Services,	PERB Cases No. 95-U-06 Opinion No. 457
Respondent.	

DECISION AND ORDER

The background and issues underlying this case are set out by the Hearing Examiner in his Report and Recommendation.[1]/ On the preliminary issue of jurisdiction, the Hearing Examiner held that the right guaranteed to employees under the Comprehensive Merit Personnel Act (CMPA) to file and pursue grievances are not limited to those individuals who are part of a bargaining unit. As a result, he found that the Complainant Clarence T. Pratt, Sr., a non-bargaining unit employee, is covered by the protection afforded employees under D.C. Code § 1-618.4(a)(4), and his claims of retaliation over the filing of a grievance is properly before PERB.[2]/ However, the Hearing Examiner found that the Complainant, an employee of the District of Columbia Department of Administrative Services (DAS), failed to establish that Respondent had taken reprisals against him for filing a grievance against his

---

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

[2]/ D.C. Code § 1-618.4(a)(4) provides that the "District, its agents, and representatives are prohibited from [d]ischarging or otherwise taking reprisal against an employee because he or she has signed or filed an affidavit, petition, or **complaint** or given any information or testimony under this chapter[, i.e., the CMPA.]" (emphasis added.) The CMPA provides all employees with a procedure for handling grievances and a right to present them, i.e., a complaint. See D.C. Code § 1-617.2 and D.C. Code § 1-618.6(b), respectively.

supervisors. (R&R at 2.) Therefore, he concluded that the Respondent did not commit the alleged unfair labor practice and recommended that the Complaint be dismissed in its entirety. (R&R at 7.)

On August 14, 1995, Counsel, on behalf of Complainant, filed "Complainant's Exceptions to the Hearing Examiner's Report". A Response to the Exceptions was filed by the Office of Labor Relations and Collective Bargaining, on behalf of DAS, on August 31, 1995. The matter is now before the Board to review the findings, conclusions and recommendations of the Hearing Examiner.

The Complainant claims that the Hearing Examiner was less than impartial and interfered with the representation of the Complainant during the hearing. He asserts that a full record was not developed upon which proper findings and conclusions could be based. However, the Complainant's assertions are broad and general. Board Rule 556.3 requires that exceptions to the hearing examiner's report and recommendation be "precise" and "specific". Therefore, we shall consider only those exceptions to findings specifically identified by the Complainant.

First, relying on arguments contained in his post-hearing brief, the Complainant contends that the "Hearing Examiner's conduct of the hearing essentially denied the Complainant the ability to cross-examine witnesses". (Except. at 1.) The Complainant's objection is essentially one of due process. Pursuant to Board Rule 520.11, Complainant has the burden of proving the allegations of the Complaint. The Hearing Examiner found that the evidence fell far short of showing that the challenged personnel actions taken by DAS were motivated by reasons proscribed as unfair labor practices. (R&R at 5.) The Hearing Examiner's finding that there was no violation did not turn on DAS' ability to shift the burden of proof back to Complainant since the Complainant failed to establish a prima facie case.

We have held that notwithstanding a party's inability to cross examine evidence presented during an arbitration proceeding, a party is not deprived of a fundamentally fair hearing nor is the entire decision tainted when each party has been provided an adequate opportunity to present its evidence and arguments. Cf., D.C. Public Schools and Washington Teachers Union, Local 6, AFT, Slip Op. No. 349, PERB Case No. 93-A-01 (1993). We find this standard is similarly applicable to administrative proceedings before a hearing examiner. Any impediment in Complainant's "ability to cross-examine witnesses" occurred during DAS' case with DAS witnesses. If DAS witnesses were essential for the Complainant to meet his burden of proof in establishing a prima facie case of the alleged violation, the Complainant could have presented these witnesses as part of his case. The Complainant does not contend

that he was not provided a full opportunity to present his case.

With respect to Complainant's cross-examination, the record does not reflect that the Hearing Examiner prevented Complainant's counsel from eliciting certain testimony. On the contrary, in the examples cited by the Complainant, the Hearing Examiner permitted Complainant's counsel to pursue his lines of questioning. (Tr. at 141 and 165.)[3]/ Moreover, the conclusion that no violation was established did not turn on evidence elicited during the few instances that the Hearing Examiner interjected during Complainant's cross-examination but rather on the entire record.[4]/

With respect to the conduct of the hearing, which includes the manner in which witnesses are examined, Board Rule 550.12 accords the Hearing Examiner full authority. Finally, we note that this objection by Complainant is made for the first time in Complainant's post-hearing brief. The transcript does not reflect that Complainant ever objected to the Hearing Examiner's conduct during the hearing. Board Rule 550.13 provides that "[a]ny objection not made before the hearing examiner shall be deemed waived unless the failure to make such objection is excused by the Board because of extraordinary circumstances."[5]/

---

[3]/ The two examples identified by Complainant in support of its exception, consist of comments made by the Hearing Examiner that allegedly reflect "bias" and "pre-conceived ideas" by the Hearing Examiner concerning the case. In the first example, the Hearing Examiner rephrased a question by Complainant's counsel to a DAS witness in order to elicit the testimony he believed counsel was seeking. In the second example, the Hearing Examiner attempted to protect a witness from questions he believed constituted badgering. It is our view that these comments reflect no more than the Hearing Examiner's authority to (1) assess the probative value of the evidence presented and (2) conduct the hearing. (Tr. 139 - 140 and 164 - 165, respectively.) Neither one of these examples demonstrate that the Hearing Examiner's conduct prevented Complainant's counsel from eliciting the testimony he sought from the witness.

[4]/ The Hearing Examiner concluded that "whether evaluated individually or collectively" the challenged conduct by DAS "fail[ed] to support the allegations that Respondent harassed, retaliated against or treated Pratt in a disparate fashion because he filed a grievance appeal." (R&R at 7.)

[5]/ Complainant raised a related exception that the Hearing Examiner "fail[ed] to order an effective sequestration of witnesses, thereby causing a possible tainting of testimony."
(continued...)

We therefore find no merit to Complainants' Exceptions. Pursuant to D.C. Code Sec. 1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings and conclusion of the Hearing Examiner and find them to be reasonable and supported by the record. We adopt the recommendation of the Hearing Examiner that the Complaint be dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

The Complaint is dismissed.

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

December 20, 1995

---

[5](...continued)
(Except. at 2.) In support of this exception, Complainant quotes the Hearing Examiner's statement on the record, that he could not ensure that such an order could be enforced. As we stated in the text, exceptions must be "precise" and "specific", not merely "possible". The Hearing Examiner' assessment of a sequestration order merely reflected the limits of his power, not the abuse of them. Moreover, with the exception of one witness who remained present throughout the hearing as Respondent's representative, Complainant did not object to the Hearing Examiner's handling of Complainant's request to sequester witnesses. (Tr. at 21 - 25.)