GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the matter of:	
American Federation of Government Employees, Local 383,	PERB Case No. 09-U-36
and	Opinion No. 1002
National Union of Hospital and Health Care Employees, Local 2095,	
Complainants,	
v.	
District of Columbia Department of Mental Health,	
Respondent.	

DECISION AND ORDER

On May 22, 2009, the American Federation of Government Employees, Local 383 and the National Union of Hospital and Health Care Employees ("NUHHCE"), Local 2095, filed an Unfair Labor Practice Complaint ("Complaint") alleging that the District of Columbia Department of Mental Health ("DMH" or "Respondent") committed an unfair labor practice by "refusing to bargain collectively and in good faith with Complainants". (Complaint at p. 4). On June 9, 2009, the Respondent filed its Answer denying the allegations, and asserting that the matter should be dismissed for failing to state an unfair labor practice. (See Answer at p. 7).

On October 20, 2009, a hearing was held in this matter. At the beginning of the proceedings, the parties asked for additional time to try to resolve the matter. The request was granted. After approximately three hours, the parties notified the Hearing Examiner that they had successfully resolved the matter. The Complainants' counsel "read the settlement agreement into the record. The

parties then signed the agreement. One of the terms of the settlement agreement was that [the] Complaint would be dismissed.[1] The [Complainants' counsel] requested the dismissal of the Complaint on behalf of Complainants. The Hearing Examiner stated that she would recommend to the Board that the Complaint be dismissed based on Complainants' request and the settlement agreement. The record was then closed." (Hearing Examiner's Report and Recommendation at pgs. 1-2).

On October 28, 2009 the Hearing Examiner issued a Report and Recommendation in which she recommended that the Complaint be dismissed with prejudice. (See Hearing Examiner's Report and Recommendation at pgs. 2-3). In support of this recommendation, the Hearing Examiner cites Board Rule 550.13(g) which provides as follows:

> 550.13 Authority of Hearing Examiner (Cont.)
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> Hearing Examiners shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order. Hearing Examiners shall have all powers necessary to that end, including, but not limited to, the power to:
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> . . .
>
> (g) Recommend to the Board dismissal of cases with prejudice based on a settlement agreement reached by the parties...

On October 28, 2009, a copy of the Hearing Examiner's Report and Recommendation was transmitted to the parties by facsimile and first class mail. Pursuant to Board Rule 556.3 the parties

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[1]In addition, the agreement provides in relevant part as follows:

(1) That for the temporary ITC 371 employees their CBU codes will be changed to their pre-reduction in force designation effective October 25;

(2) That the parties will commence implementation bargaining and will meet bi-weekly on Wednesdays from 2:00 to 3:30 PM commencing on November 4, 2009;

(3) That the parties will meet for the purpose of drafting a joint letter to all employees separated in the reduction in force explaining the parties' position on the employees' post-RIF rights and obligations;

(4) DMH will promptly respond, and not longer than 30 days, to a written information request from the unions concerning any outstanding information regarding the RIF. Both parties reserve the right to make information requests regarding subjects and information related to this agreement and their negotiations; and the unions will endeavor to make any information requests under this particular provision by this Friday, October 23, five o'clock p.m. to Director Stephen Barron with a copy to Frankie Wheeler; and

(5) DMH will provide unions with regular status reports regarding the placement of RIFed bargaining unit employees with the private sector providers. (Transcript of hearing at pgs. 4-6).In addition, the agreement provides in relevant part as follows:

could file exceptions by November 12, 2009. On November 4, 2009, the Complainant filed exceptions to the Hearing Examiner's recommendation that the Complaint be dismissed with prejudice. DMH did not file exceptions.

In its exceptions, the Complainants assert that the Board should "dismiss the Complaint without prejudice." In support of this position, the Complainants state the following:

> Once written and signed by the parties, counsel for the Union read the settlement agreement into the record. The consensus between the parties and the Hearing Examiner was that this reading was was sufficient to express the parties' shared agreement that the Board grant the Union's request that the complaint be withdrawn without prejudice but effective immediately. The parties have already taken action to implement their agreement.
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> The oral joint motion of the parties' here, as expressed in their settlement agreement, should be honored. The imposition of new terms on the parties' agreement by the Hearing Examiner, namely that (1) the Board must approve withdrawal of the complaint, (2) that the withdrawal was not immediate or effective October 20, 2009, and (3) that the withdrawal of the Union's Complaint is with prejudice, is inconsistent with the terms and spirit of the Board's rules and case law favoring amicable resolution of disputes before the Board. Notwithstanding the Hearing Examiner's authority to take certain actions, the parties' clear intent in their agreement was that the case be resolved and withdrawn on the terms agreed to by the parties irrespective of the Hearing Examiner's recommendation. If, instead, the parties' agreement must be contingent on the Board's substantive approval and can be amended by the Board, as is suggested here, such a finding will actually discourage settlement. Particularly here where the parties have already taken action to effectuate the terms of their settlement agreement, a revision of those terms calls into question whether the parties have a valid agreement and prejudices those who have taken action believing an agreement was in place.
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> Both on the specific issue of dismissal of the Union's Complaint "with prejudice" and on the general issue of effectuating the express terms of the parties' settlement agreement, the Board's recent decision in AFSCME v. UDC, PERB Case No. 07-U-32, Slip Op. 936 (Sept. 30, 2009), is instructive. There, the Board acknowledged that where a settlement agreement of the parties does not evince an agreement to withdraw a complaint with prejudice, and where there is no opposition by the other party or any showing of

> prejudice, the Board should effectuate the terms of the parties' agreement.[2] The Union seeks the same consideration and result here. Fundamentally, therefore, the parties agreed that the Union's Complaint should be withdrawn without prejudice as of October 20, 2009. Honoring that agreement means that this case should be considered withdrawn and therefore not ripe for the Board's review.

In the present case, the Complainants are requesting that we adopt their interpretation of the facts. Specifically, that "the parties agreed that the Union's Complaint should be withdrawn without prejudice as of October 20, 2009." (Exceptions at p. 3). This we will not do because the record does not support the Complainants' position. A review of the parties' hand written agreement and the transcript of the proceeding, reveals that neither party indicated or requested that the Complaint be withdrawn without prejudice. Therefore, the Complainants have failed to provide evidence to show that the parties' intent was that the Complaint should be withdrawn without prejudice. Moreover, the language in Board Rule 550.13(g) is clear. Namely, that a Hearing Examiner can recommend to the Board that a case be dismissed "with prejudice based on a settlement agreement." In view of the above, we find that the Hearing Examiner's recommendation is consistent with Board Rule 550.13(g) and supported by the record.

The Complainants also argue that the Hearing Examiner's recommendation imposed new terms on the parties' agreement, "namely that (1) the Board must approve withdrawal of the Complaint, (2) that the withdrawal was not immediate or effective October 20, 2009, and (3) that the [Hearing Examiner's recommendation] is inconsistent with the terms and spirit of the Board's rules and case law favoring amicable resolution of disputes before the Board." (Exceptions at p. 2). We disagree. In the present case, the Hearing Examiner states in her report and recommendation that she "would recommend to the Board that the Complaint be dismissed based on Complainants' request and the settlement agreement." (Hearing Examiner's Report and Recommendation at pgs. 1-2). We find that nothing in the Hearing Examiner's statement suggests that the parties' settlement agreement must be approved by the Board before it becomes effective. Evidence of this is the fact that the Complainants acknowledge that "[t]he parties have already taken action to implement their agreement." (Exceptions at p. 2). In view of the above, we conclude that the Complainants' argument lacks merit.

Lastly, the Complainants suggest that the Hearing Examiner's recommendation is not consistent with the Board's holding in *AFSCME, Local 2087 v. UDC*, Slip Op. No. 936, PERB Case No. 07-U-32 (2009). The *AFSCME* case involved the interpretation of Board Rule 520.5. Board Rule 520.5 provides that "A complainant may withdraw a complaint without prejudice at any time prior to the filing of an answer." In that case the Board's Executive Director determined that the Union's request to withdraw the complaint was filed after the Respondents' answers were filed.

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[2]The Complainants state that the "Board's rules do not explicitly explain how a party can withdraw its complaint after the other party has answered." (Exceptions at p. 3, n. 1).

Therefore, relying on Board Rule 520.5, the Executive Director concluded that the case could only be withdrawn with prejudice. The Union filed a motion for reconsideration challenging the Executive Director's disposition of the case. Specifically, the Union argued that the case should be withdrawn without prejudice. The Board concluded as follows:

> The Union is requesting that we adopt its interpretation of Board Rule 520.5. This we will not do because the language in Board Rule 550.5 is clear. . .[Also,] the record reveals that the Union withdrew its case eight (8) months after the Respondents filed their answers.
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> However, we note that: (1) this matter concerns a settlement of the underlying issue by the parties; (2) there is no opposition by the Respondents to the Union's request for withdrawal of the case without prejudice; and (3) there is no showing that either party will be prejudiced by withdrawing the appeal without prejudice. As a result, under the circumstances of this case, we find that this case is ripe for the Board to exercise its discretion in this matter and we grant the Union's request. (*AFSCME, Local 2087 v. UDC,* Slip Op. No. 936 at p. 4, PERB Case No. 07-U-32 (2009)

In the *AFSCME* case, the Respondents acknowledged that it did not oppose the Union's request for withdrawal of the case without prejudice. Therefore, there was proof of the parties' intent that the case be withdrawn without prejudice. In the present case, the Complainants assert that the parties' clear intent was that the case be withdrawn without prejudice; however, unlike the Complainants in the *AFCSME* case, the Complainants in this case have failed to submit evidence to support their claim. Moreover, the Complainants have not demonstrated that the Respondents do not oppose the Complainants' request. Also, the Complainants acknowledge that "the Hearing Examiner has the authority to take certain action" (Exceptions at p. 2) and we note that "dismissal with prejudice" is one of the things that a Hearing Examiner has the authority to do. As a result, under the circumstances of this case, we find that this case is not ripe for the Board to exercise its discretion in this matter and we deny the Union's request.

Pursuant to D.C. Code § 1-605.02(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. Therefore, the Board adopts the Hearing Examiner's recommendation that the Complaint be dismissed with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Unfair Labor Practice Complaint in PERB Case No. 09-U-36 is dismissed with prejudice.

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

December 23, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-U-36 was transmitted via Fax and U.S. Mail to the following parties on this the 23rd day of December 2009.

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