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**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)	
)	
Bernard Payton,)	
Complainant,)	
)	PERB Case No. 07-U-09
v.)	
)	Opinion No. 1230
)	
The University of the District of Columbia,)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

I. Statement of the Case:

This case involves an Unfair Labor Practice Complaint (“Complaint”) filed by Bernard Payton (“Complainant” or “Mr. Payton”) against the University of the District of Columbia (“Respondent” or “UDC”). Mr. Payton alleges that UDC “committed unfair labor practices against the Complainant, in violation of Complainant Payton’s rights under Subchapter XVIII of the District of Columbia Code, as amended, § 1-617.04” by: (1) improperly implementing the award of Arbitrator, Roger P. Kaplan, Esq. concerning a reduction-in-force (“RIF”) of employees; (2) failing and refusing to reinstate Complainant with full back-pay, restoration of benefits, and other necessary relief to make Mr. Payton whole; (3) interfering with, restraining and coercing Mr. Payton to forego his back pay and benefits in exchange for the University’s decision to retain Mr. Payton in the position to which he was “mistakenly” offered reinstatement in March 2002; (4) taking reprisal against him, in the form of not properly paying him his back-pay and benefits, upon which he based his decision to re-join the University of the District of Columbia; and (5) taking reprisal against Complainant Payton, in whole or in part, because he has not relented in his pursuit of the University of the District of Columbia’s failure to pay him his proper back-pay and benefits. (See Complaint at pgs. 1-2). The Respondent filed an Answer denying the allegations and a Motion to Dismiss the Complaint.

Hearings were held in this matter and Hearing Examiner Gloria Johnson issued a Report and Recommendation (“R&R”), concluding that UDC’s conduct interfered with, restrained and coerced Mr. Peyton in the exercise of his rights under the CMPA. (See R&R at p. 32).

Specifically, the Hearing Examiner recommended "that Board find that an unfair labor practice has been committed. Further, it is recommended that the parties be allowed to file briefs regarding the issue of the proposed remedy and whether Complainant's counsel is entitled to compensation pursuant to the Federal Back Pay Statute." (R&R at p. 32). UDC filed exceptions ("Exceptions") to the Hearing Examiner's R&R. Complainant filed a Response to UDC's Exceptions. The Hearing Examiner's R&R, UDC's Exceptions and the Complainant's Response are before the Board for disposition.

II. Procedural Background

The Hearing Examiner made the following findings regarding the procedural history of the instant matter:

In response to the Compliant, UDC filed and Answer in which it acknowledged:

[UDC] conducted a reduction-in-force (RIF) for which it failed to apply the collective bargaining agreement, which resulted in failing to allow union employees their bumping rights. In February 2004, an Arbitrator determined that the University had failed to follow the collective bargaining agreement when it conducted the 1997 RIF. Thereafter, pursuant to the Arbitrator's decision, the University allegedly reconstructed the 1997 RIF, in compliance with the parties' collective bargaining agreement. By letter dated March 17, 2006, it informed Complainant that the position into which he should have been allowed to bump was a temporary position that was eliminated on September 30, 1997. Complainant was also advised that his back pay and retirement contribution would be limited to the six-month period of April 1, 1997, through September 30, 1997.

However, the University advised the Complainant that he would be retained in his current position, irrespective of the fact that the position into which he would have been allowed to bump was a temporary position that was eliminated in September 1997. In its answer, the University sought dismissal of the Complainant's complaint on the basis that it:

- a. Failed to allege an unfair labor practice proscribed under D.C. Code §1-617.4
- b. The complaint was untimely filed, beyond the 120 days required by PERB Rule §520.4. The Arbitrator's decision was issued February 2004, the letter informing Complainant of how he would be affected by the arbitration award was dated March

17, 2006. Thus, all matters that can be considered related occurrences, happened outside the 120 day period.

c. PERB lacks jurisdiction over reduction-in-force matters.

On November 5, 2009, the University filed a motion to dismiss wherein in addition to the reasons set forth in its prior answer, *i.e.*, PERB's lack of jurisdiction, failure to state an unfair labor practice claim, untimeliness; the Respondent also alleged the matter was not before the proper forum, because the Complainant had failed to exhaust remedies set forth in the collective bargaining agreement and the Arbitrator's award. The University requested that PERB issue an expedited ruling no later than December 1, 2009, and urged that the matter could be decided upon the pleadings.

Complainant filed an opposition to the University's motion to dismiss on December 3, 2009, asserting, *inter alia*, the complaint herein contains allegations of coercion which is actionable in that D.C. Code §1-617.4 (a) defines unfair labor practice as, "... interfering with, restraining or coercing any employee in the exercise of the rights guaranteed by this subchapter." Further, Complainant argued the case law is well settled that when the party refuses or fails to implement an arbitration award, or negotiated agreement where no dispute exists over its terms, such conduct will constitute a failure to bargain in good faith and be considered as an unfair labor practice under the Comprehensive Merit Personnel Act.

On December 9, 2009 respondent filed a motion to quash *subpoenas ad testificandum* seeking Christine Poole's participation and *duces tecum* for the custodian of the record's attendance at the hearing set for December 15, 2009, at 10:00 a.m. On December 11, 2009, the University filed a response to Complainant's Motion to Strike Reply Brief and Cross-Motion to Strike Complainant's Motion and for Other Relief for Complainant's Violation of Board Rule 558.1. At the hearings conducted on December 15, 2009, and on April 15, 2010, all parties were given a full and fair opportunity to submit testimonial and documentary evidence. The parties stipulated that all issues with respect to discovery and motions were withdrawn or resolved to the parties' satisfaction.

III. Factual Background

At the conclusion of the hearings, the Hearing Examiner made the following factual findings and recommendations:

1. A District of Columbia Financial Responsibility and Management System Authority (Control Board) Resolution gave the University alleged "authority" to conduct a reduction-in-force (RIF) without regard to the parties' collective bargaining agreement.
2. The Court held the Control Board lacked authority to authorize the University to conduct a RIF, without resort to the collective-bargaining agreement.
3. Complainant filed an unfair labor practice complaint dated November 17, 2006.
4. Complainant had been employed by the University of the District of Columbia since 1969 (for approximately 28 years) when he was terminated from his employment on March 27, 1997; as a result of a reduction in force.
5. On March 18, 2002, a letter was issued to the Complainant containing an offer of reinstatement to the position of Sport Information Director, AD-1035-07/01; at the salary of \$45,667 per year. That letter stated that when the University conducted its reduction in force in March 1997, Complainant was "... not allowed to exercise all his bumping rights to a position held by a less senior employee in an equal or lower paying position as required by the collective-bargaining agreement..."
6. The offer of reinstatement letter dated March 18, 2002, stated Complainant would be entitled to back pay for the years that he had been separated from the University, in compliance with the settlement terms reached between the University and Local 2087, as well as an (unspecified) arbitration decision related to the matter.
7. The March 18, 2002, offer of reinstatement requested that the Complainant sign the form and return it by April 1, 2002, indicating his decision to accept or decline the offer. It also requested that he complete and return a questionnaire by April 15, 2002, in order to assist the University in calculating his back pay entitlement.

8. By letter dated March 25, 2002, Complainant Payton transmitted his acceptance of the offer, while questioning the fact that the position he was offered was two levels below the level V he previously worked, and it paid \$20,000 less than his prior position. He requested reconsideration.

9. According to Union President Walter L. Jones, prior to the 2002 reinstatements, the University's Human Resources Department sent the Union draft registers for review.

10. President Jones testified the Union requested University payroll reports and personnel manning charts reflecting University personnel staffing during the relevant period in 1997.

11. Union President Jones testified that the Union RIF Committee examined payroll reports as well as retention registers in 2005 and 2006 and found discrepancies, inaccuracies and concerns; regarding seniority, service computation dates, names that did not match or were omitted.

12. The Union did not seek arbitration on behalf of the Complainant herein and the Complainant did not file a grievance in that regard.

13. The registers were reviewed by the Union RIF Committee, who advised Union President Jones of errors on the registers.

14. According to Mr. Jones, the Union met with 10 reinstated employees and discussed the fact their offer was directly with the University and the Union would not participate in the process.

15. Arbitrator Kaplan's decision determined that from 1997 until September 9, 2003, the University acted as if it had conducted a RIF in 1997 and found that it was clear that the control board and/or the Appropriations Act did not give the University of authority to abrogate the collective bargaining agreement. The only appropriate remedy was to "... reconstruct the conditions of that existed in 1997." [UDC] was instructed to follow the collective bargaining agreement. Arbitrator Roger Kaplan stated in his February 25, 2004 decision, "positions in existence in 1997 should be utilized. "My goal is to place employees in the same employment situation they would have found themselves had the UDC conducted the RIF using the proper CBA procedures for each category of employees."

16. On March 14, 2006, Complainant Payton sent an e-mail to Human Resources Director Poole, requesting clarification of his employment status in light of the Arbitrator's decision.

17. Three days later, on March 17, 2006 Human Resources Director Poole issued a reduction-in-force notice correcting and superseding the March 18, 2002 letter. The March 17, 2006 letter stated "The University has determined that when it conducted a reduction-in-force in March 1997 you were not allowed to exercise all your bumping rights to a position held by a less senior employee in an equal or lower paying position as required by the collective-bargaining agreement... accordingly, you were improperly terminated in the 1997 reduction-in-force. You were entitled to be offered the following position: Position Title: Program Specialist Position Grade: AD-06, \$52,812 (current salary), Position Series: 301, Office: Institute of Gerontology. Because this position terminated on September 30, 1997, you will receive back pay and retirement contributions for the period [covering] April 1, 1997 through September 30, 1997 with interest pursuant to the terms of the arbitration decision, NLRB Compliance Proceedings for back pay... applicable laws and regulations."

18. The University's revised March 17, 2006 reduction in force letter advised Complainant that he was entitled to be offered the position of program specialist at \$53,812 salary, however that position terminated on September 30, 1997. Therefore, he would receive back pay and retirement contributions for the period April 1, 1997 through September 30, 1997, with interest.

19. By letter dated March 22, 2006, to Director Poole, (copy to President Pollard) Complainant Payton questioned what mechanism or internal process was used to arrive at the conclusion that he was only entitled to the position of program specialist in the Institute of Gerontology which was terminated in six months; *i.e.*, on September 30, 1997. He sought a review of his situation.

20. By letter dated April 12, 2006 (in response to Complainant's March 22 letter) Director Poole, stated there were no other vacant or continuing full-time positions to which Complainant was qualified to bump in the 1997 RIF; Complainant's job title, salary and chain of command would remain the same, irrespective of the fact that he was returned to duty in error in 2002, his Vice President decided to allow him to

retain his current position. Ms. Poole also stated the Arbitrator's decision regarding a 1997 reduction in force was final and binding on all parties.

21. On April 24, 2006, Complainant sent a letter to President Pollard seeking reversal of the Director Poole's decision; and requesting all retention registers, personnel lists and information used to determine his RIF placement.

22. By letter dated July 19, 2006, Complainant Payton was advised by University General Counsel Robin C. Alexander that his letter of appeal to Dr. Pollard seeking reversal of the decision of Human Resources Director Christine Poole was not a matter that could be appealed.

23. Complainant's November 17, 2006 unfair labor practice complaint contains a statement of fact statement #54 which states:

54. Complainant Payton contends that the terms of this letter amount to coercion, as the terms imply Mr. Payton should accept the fact that the process is "final" and he should be comforted that he will nor (not) be demoted to a job that was terminated in 1997; essentially, Mr. Payton was told, "be thankful you have a job."

24. Nine non-faculty employees whose positions were eliminated and they were RIF'd in 1994; subsequently, were reinstated in 1999 into "re-created" positions they previously held.

25. The 1994 RIF'd employees were reinstated and made whole, with full back pay for the years they were separated between 1994 and 1999, and restoration of benefits; including retirement, COLA increases, TIAA-CREF contributions, as well as restoration of annual and sick leave.

26. The 2006 decision of Arbitrator Kaplan stated the University should follow the proper RIF procedures and reconstruct the conditions in existence in 1997.

27. The University determined the reconstruction of the 1997 workforce that was ordered in 2006 would not include the 1994 RIF'd employees who were reinstated in 1999; if that they did not

physically encumber their positions for part of the University budget in 1997.

28. The University filed an answer to the unfair labor practice complaint on December 7, 2006.

29. The parties differed in their interpretations of Arbitrator Kaplan's decision and whether or not employees RIF'd in 1994 should be included in the 1997 restructuring of the landscape - after they were brought back in [1999 and 2002, respectively]; and whether Complainant Payton should have been allowed to bump those reinstated employees.

30. The Union created a 1997 reduction in force committee; consisting of Mr. Hackley and 4 or 5 employees.

31. When the RDF was conducted in 1997, the University did not abide by the collective-bargaining agreement. In 2002, the University sought to correct the RIF one.

32. The Union did not challenge (through grievance or arbitration) the University's decision not to place the reinstated employees on the 1997 registers.

33. Ms. Pole admitted on the record that she advised Mr. Hackley and the members of the union RIF committee that including 1994 RIF reinstated employees would cause the committee members themselves to would lose their jobs.

34. Article 34 (E)(2) of the parties' collective bargaining agreement states that grievances regarding terms and conditions of employment or alleging a violation of the collective bargaining agreement should be filed within 15 days of the University's final decision and heard before the District of Columbia Office of Employee Appeals.

(R&R at pgs. 4-10) (citations to the record omitted).

IV. Hearing Examiner's Report and Recommendations

Based upon the foregoing findings of fact, the Hearing Examiner determined that the Complaint was both timely and that it stated a prima facie cause of action under the CMPA. (See R&R at pgs. 19-22). In addition, the Hearing Examiner made the following legal conclusions and recommendations:

The dispositive issue in this case is did the agency commit an unfair labor practice in violation of the statute by interference, restraining or coercion § 1-617.04(a)(1); or by refusing to bargain in good faith § 1-617.04(a)(5). The undersigned Hearing Examiner finds there was a violation of the statute. What has impressed the Hearing Examiner in the instant case, is what appears on its face to be manipulative acts on the part of the University that clearly fall within the realm of interference.

(R&R at p. 24).

In addition, the Hearing Examiner concluded:

that given the totality of circumstances the Complainant's general pleading was sufficient to allow a finding of unfair labor practices. There was sufficient evidence on the record to support the finding that the statute was violated.

(R&R at p. 27).

The Hearing Examiner also found that although UDC "properly argued that PERB does not decide whether a proper interpretation was made. . . . PERB has authority to make a determination that the University's actions violated the statute. Moreover, the undersigned Hearing Examiner does not reach the question of which aspects of Arbitrator Kaplan's decision was properly implemented." (R&R at p. 29).

Directing her analysis to D.C Code at §1-617.04 (which prohibits interference, restraint or coercion), the Hearing Examiner determined that, in the instant case:

Management admittedly advised the Union RIF Committee members they themselves would be personally jeopardized if they pressed the issue of protecting the Complainant (and other union members') rights. The Examiner finds that was interference within the meaning of the statute.

Given the totality of the circumstances of interfering with the RIF Committee (advocating or questioning the matter of protecting the membership) and the admission (in the letter -to Complainant dated March 18, 2002) that members had not been given their full bumping rights, but promising he would receive back pay "for the years you have been separated," compounded by placing the Complainant retroactively in a job that was limited to six months and tied to a grant that had expired almost four years prior; by the time it was identified and communicated to the Complainant as his only option; and thereafter denying promised back pay upon which

his reinstatement acceptance was based, seems suspect and objectionable.

The failure to provide accurate retention registers to the Union RIF representatives interfered with their ability to adequately represent and protect Complainant's rights.

(R&R at p. 29).

As to the remedy for UDC's violation of the CMPA, the Hearing Examiner observed that the "Complainant stated he took the reinstatement position, because he had a reasonable expectation and was led to believe he would receive back pay. Complainant argued that since the RTF was illegal as determined by Arbitrator Kaplan's February 2004 decision, the federal back pay statute applies and requires that he be reinstated and back pay restored. The Hearing Examiner does not reach that issue and recounts that the University moved to be able to provide guidance and argument on that issue. That request should be granted by PERB." (R&R at p. 30).

V. UDC's Exceptions

UDC's exceptions to the Hearing Examiner's R&R argue that although:

[t]he material facts in this case about what UDC did, and its articulated reasons, are not in dispute[;] [t]he Hearing Examiner made 34 "Findings of Fact" in Section II (R&R at 2-10) and other express or implicit factual findings in Section IV (Analysis and Recommendation)" which it considers incomplete.¹

The Board finds that all of UDC's exceptions represent a disagreement with the Hearing Examiner's findings of fact and that, consistent with its own factual assertions, the Hearing Examiner should not have found that the Complainant's statutory rights were violated. UDC's exceptions are based on its argument that the a examination of the facts in this case should have compelled the Hearing Examiner to conclude that UDC's actions did not amount to an unfair labor practice. Clearly, this exception is a reiteration of the arguments UDC made to, and rejected by, the Hearing Examiner.

To that end, the Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Tracy Hatton v. FOP/DOC Labor Committee*, 47 DCR 769, Slip Op No. 451 at p. 4, PERB Case No. 95-U-02 (1995); See also *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, Slip Op. No. 285, PERB Case No. 86-U-16 (1992); and see *Charles Bagenstose et al. v. D.C. Public Schools*, 38 DCR 4154, Slip Op. No. 270, PERB Case No. 88-

¹ In addition, UDC's arguments assert that the Board lacks jurisdiction to consider violations of the parties' collective bargaining agreement (CBA). However, the Board finds that the Hearing Examiner's analysis does not include any interpretation of the parties' CBA. (See R&R at p. 23).

U-34 (1991); and *Haynesworth, et al. and American Federation of Government Employees, Local 631*, 45 DCR 1479, Slip Op. No. 528, PERB Case Nos. 97-S-02 and 97-S-03 (1997). As a result, the Board will reject challenges to the Hearing Examiner's findings based on: (1) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. *American Federation of Government Employees, Local 2741 v. D.C. Department of Recreation Parks*, 46 DCR 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999); and *American Federation of Government Employees v. District of Columbia Water Authority, _DCR_, Slip Op. No. 702, PERB Case No. 00-U-12 (2003).*

Thus, UDC's disagreement with the Hearing Examiner's findings is not grounds for reversal of her recommended findings, as they are fully supported by the record. See *American Federation of Government Employees Local 874 v. D.C. Department of Public Works*, 38 DCR 6693, Slip Op. No 266, PERB Case Nos. 89-U-15, 89-U-18 and 09-U-04 (1991); and see *Teamsters Local Unions 639 and 670, International Brotherhood of Teamsters AFL-CIO v. District of Columbia Public Schools*, 54 DCR 2609, Slip Op. No. 804, PERB Case No. 02-U-26 (2005). Consequently, the Board rejects UDC's exceptions.

The Board finds the Hearing Examiner's sound reasoning and analysis in this respect is consistent with Board's precedent and the authority cited above. The Board, therefore, adopts the Hearing Examiner's conclusion that Complainant has met his burden establishing that UDC violated the CMPA.

ORDER

IT IS HEREBY ORDERED THAT:

1. Complainant Bernard Payton's Unfair Labor Practice Complaint is granted.
2. The University of the District of Columbia ("UDC"), its agents, and representatives shall cease and desist from violating D.C. Code § 1-617.04(a) (1), by the acts and conduct set forth in this Opinion.
3. UDC, its agents and representatives shall cease and desist from interfering with, restraining or coercing employees in the exercise of their rights under the Comprehensive Merit Personnel Act ("CMPA") in any like or related matter.
4. UDC shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice, where notices to employees are normally posted.
5. Within fourteen (14) days from the date of this Decision and Order, UDC shall notify the Public Employee Relations Board ("PERB"), in writing that the attached Notice has been posted accordingly, and as to the steps it has taken to comply with paragraphs 4 and 5 of this Order.

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6. Pursuant to Board Rules 559.1 this Decision and Order is effective and final upon issuance.

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

December 2, 2011