



## **II. Hearing Examiner's Report and Recommendation**

### **A. Summary of the Issues and Findings of Fact**

The Hearing Examiner identified three issues relevant for disposition of this matter:

(1) Should UDC's motion to dismiss be granted in that AFSCME's claims are contractual in nature?

(2) Should any of AFSCME's claims be dismissed as untimely?

(3) Did Complainant meet its burden of proving that Respondent committed any unfair labor practice?

(R&R at p. 2).

The Hearing Examiner found the following facts to be undisputed:

1. Complainant is the exclusive representative of certain non-faculty employees of the University. (Ex A-12).

2. Respondent is the District of Columbia's public institution of higher education.

3. Complainant and Respondent are parties to a collective bargaining agreement.

4. Bargaining unit members were originally in Compensation Unit 15. On February 4, 2005, Comp. Unit 15 was consolidated with Comp. Unit 1. Comp. Unit 1 includes employees of other District Government agencies.

5. By Order dated May 29, 2007, PERB modified the collective bargaining unit.

6. As a result of these changes, a number of employees were "cross walked", i.e., moved from non-union to union, or union to non-union positions.

7. On or about October 12, 2007, the parties entered into a Settlement Agreement, resolving PERB Case Nos. 03-UM-01 and 07-U-32. Pursuant to that Agreement, employees in former Comp.

Unit 15 retained their TIAA-CREF benefits and the Comp. 15 pay schedule. The University, with the assistance of the D.C. Office of Human Resources (OHR), agreed to determine the accuracy of the classifications and assignments of employees in the unit. The parties also agreed to meet to negotiate an appropriate educational service schedule for new hires.

(R&R at pgs. 2-3).

### **B. The Parties' Positions**

The Hearing Examiner found that "[t]he Union alleges [ ] UDC failed to respond to requests for documents that the Union needed to determine if UDC complied with prior agreements and to determine if UDC was implementing its obligations appropriately. AFSCME maintains that PERB has jurisdiction because UDC did not release "full work product" needed to determine compliance with an arbitration award and a PERB decision." (R&R at p. 3). In opposition to the Union's position, the Hearing Examiner observed that "[UDC] disputes that it committed any ULP. It also argues that many of the allegations raised by the Union are time barred in that they are based on a 1996 Memorandum of Understanding that required the University to provide certain documents to the Union, and the 1997 RIF." (R&R at p. 5).

### **C. The Hearing Examiner's Conclusions and Recommendations**

In regard to UDC's motion to dismiss the Complaint as untimely, UDC argued "that the Complaint should be dismissed because it raises contractual violations, i.e., allegations that the University did not comply with agreements it reached with complainants, rather than violations of the CMPA." (R&R at p. 7). The Union claimed that UDC's actions "violate[d] the CMPA because it needs the information to properly represent its members and its failure to obtain the information has negatively impacted on its ability to do so." (R&R at p. 7).

The Hearing Examiner noted that:

This Board has long distinguished obligations imposed by the CMPA and those contained in collective bargaining agreements and settlements. In *Carlease Madison Forbes v. Teamsters, Local Union 1714 and Teamsters Joint Council 55*, 36 DCR 7097, Slip Op. 205, PERB Case No. 87-U-11 (1989), the Board concluded that while "some state and local laws make the breach of a collective bargaining agreement by an employer or union an unfair labor practice, the CMPA contains no such provision, nor do we find such a necessary connection implicit in the Act". Again, in *Georgia Mae Green v. District of Columbia Department of*

*Corrections*, 37 DCR 8086, Slip Op. 257, PERB Case No. 89-U-10 (1990), the Board concluded that the breach of a collective bargaining agreement is not a *per se* unfair labor practice. *American Federation of Government Employees, Local Union No. 3721 v. D.C. Fire Department*, 39 DCR 8599, Slip Op. 287, PERB Case No. 90-U-11 (1991).

However, an employer's obligation to provide documentation requested by a bargaining unit representative may also constitute an unfair labor practice under the CMPA because it impacts on the Union ability to represent its members. The obligation to bargain in good faith includes a requirement that an employer to furnish information needed by a union to represent its members. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). See also, *American Federation of State, County and Municipal Employees, Council 20, AFL-CIO v. D.C. General Hospital and the D.C. Office of Labor Relations and Collective Bargaining*, 36 DCR 7101, Slip Op. 227, PERB Case No. 88-U-29 (1989).

(R&R at p. 7).

Based on the analysis above, the Hearing Examiner found the "Complainant's contention that the failure of Respondent to provide information it has requested and that it needs to properly represent its members could, if proven, establish a violation of the CMPA. Therefore, the University's motion to dismiss based on the argument that the violation, if it exists, is contractual and not an unfair labor practice, should be denied." (R&R at p. 7).

UDC also requested that the Complaint be dismissed as untimely. The Hearing Examiner observed that:

[Board] Rule 520.4 requires that an unfair labor practice complaint must be filed no later than "120 days after the date on which the alleged violations occurred". This Board has long held that PERB Rules establishing the time allowed to initiate a complaint is jurisdictional and mandatory. *Glendale Hoggard v. D.C. Public Schools*, 43 DCR 1297, Slip Op. 352, PERB Case No. 93-U-10 (1993), See also, *Public Employee Relations Board v. D.C. Metropolitan Police Department*, 593 A.2d 641 (1991).

The Hearing Examiner rejected the Union's position that the 120 days should begin to run only when the Union became aware of the violation. Therefore, the Hearing Examiner concluded that "the allegations based on the 1996 Memorandum of Understanding that required the University to provide certain documents to the Union, and the 1997 RIF were untimely raised since she concludes that ten years is an unduly excessive period to wait to determine

compliance.” (R&R at p. 9). However, the Hearing Examiner found the allegations based on the failure to provide documentation as timely. The Hearing Examiner agreed with the Union “that there is no specific time period that it was required to wait before deciding that the University failed or refused to respond to its requests.” (R&R at p. 8)

Whereas the Complaint was found to be timely concerning the allegations that UDC failed to provide requested documents, the Hearing Examiner next considered whether the allegations might constitute a violation of the CMPA. The Hearing Examiner opined that a “determination of whether the failure to provide information constitutes a [unfair labor practice] is decided on a case-by-case basis based on the totality of the circumstances and an assessment as to whether the employer acted in good faith.” (R&R at p. 9). The Hearing Examiner also noted that:

In this case there were significant circumstances that impacted on the University’s ability to respond to the Union. One of the circumstances was the conversion to PeopleSoft, which both parties appear to agree created significant problems for the University. Another circumstance that negatively impacted on the University was that the change to Comp. Unit 1, meant that OLRCB rather than the University became responsible for administering the benefits. These two factors impacted negatively and significantly on the University’s ability to respond promptly and completely to requests for information made by the Union. However, even with these factors, one must still assess whether the University acted in “good faith”. “Good faith” cannot be viewed in the abstract. *NLRB v. Alva Allen Industries, Inc.* 369 F.2d 210 (8<sup>th</sup> Cir.).

(R&R at p. 9).

Based on the evidence and testimony submitted at the hearing, the Hearing Examiner concluded that although UDC may have failed to provide all the requested information in a prompt manner, “[that failure] does not, standing alone, constitute bad faith. (R&R at p. 9). In addition, the Hearing Examiner observed:

It is understandable that the Union became frustrated because it does [not] have all of the information it needs to be completely responsive to its members. However, under the circumstances presented, this does not equate to a decision that the University acted in bad faith in this matter.

(R&R at p. 10).

The Hearing Examiner concluded that:

Pursuant to PERB Rules 520.11, Complainant has the burden of proof in this matter. It must prove its allegations by a preponderance of the evidence which has been defined as evidence "which is of greater weight or more convincing than the evidence which is offered in opposition". Black's Law Dictionary, 5<sup>th</sup> Ed., p. 1064. After reviewing the evidence and arguments presented in this matter, consistent with the discussion herein, the Hearing Examiner concludes that Complainant did not meet its burden of proof. There was insufficient evidence presented to support the allegations in the Complaint that the University "failed to bargain in good faith" with it over the impact and implementation of rights, wages and benefits. There was insufficient evidence presented that the University "ignore[d] the exclusive representative...and discriminated against union members" by "delay[ing] negotiated benefits...and back wages, to some union members". There was insufficient evidence in the record that the University had "misrepresented its position to the Union with respect to settling outstanding Working Agreement cases and ...AAA Award...and [had been] intentionally ...selective in its release of selected documents". (Complaint, pp. 3-4). Finally the Union did not meet its burden that the University committed an unfair labor practice with regard to the production of documents.

As a result, the Hearing Examiner concluded "that Complainant did not meet its burden of proof by a preponderance of evidence as required by PERB Rule 520.11 . . . [and] recommend[ed] that the Board dismiss this Complaint."

(R&R at p. 10).

### III. AFSCME's Exceptions

AFSCME contends that the Hearing Examiner utilized the wrong standard in determining whether UDC's failure to provide requested information constituted a violation of the CMPA. (See Exceptions at p. 11). Specifically, the Union argues that the Board's standard is that:

an agency's failure to provide requested information in a timely manner constitutes a violation of D.C. Code § 1-618.4(a)(1) and (5). *Teamsters Local Unions 639 and 670 v. D.C. Public Schools*, Slip Op. No. 804, PERB Case No. 02-U-26 (2005) (quoting *Doctors Council of D.C. General Hospital v. D.C. General Hosp.*, Slip Op. No. 482, PERB Case Nos. 95-U-10, 95-U-18 (1996));

*Doctors Council of the D.C. General Hosp, v. D.C. Health and Hospitals Public Benefit Corp.*, Slip Op No. 641, PERB Case No. 00-U-29 (2000)); *Fraternal Order of Police/Metropolitan Police Dept. Labor Comm. v. D.C. Metropolitan Police Dept.*, Slip Op. No. 835, PERB Case No. 06-U-10 (2006).

(Exceptions at p. 10).

Consequently, AFSCME claims that the Hearing Examiner:

flatly disregarded this standard. Contrary to the Hearing Examiner, the test does not depend on “the totality of the circumstances and an assessment as to whether the employer acted in good faith.” [R&R at p. 9] Additionally, the Hearing Examiner compounded her error by requiring a finding of bad faith as a prerequisite to a violation of the statute. As she declared, “[a]ssuming [this consideration] is true, it does not, standing alone, constitute bad faith.” [R&R at p. 9] Yet, PERB has long held that “a showing of bad faith is not required in order to find a ULP; rather, the Complainant must show that the delay was unreasonable and that the Respondent failed to produce the documents in a timely manner.” *AFGE Local 631 v. D.C. Water and Sewer Authority*, [51 DCR 4163, Slip Op.] No. 730, PERB Case No. 02-U-19 (2003). Taken together, the Hearing Examiner’s report thus fashions a broad legal standard incompatible with the statute.

(Exceptions at p. 11).

AFSCME claims that the Union is not required to demonstrate “bad faith” in order to prove that UDC violated the CMPA by refusing to provide the Union with the requested bargaining information. (Exceptions at pg. 11). The Union is correct in its assertion that the Board’s precedent has not required that there be an affirmative showing of bad faith in delaying to produce documents before an unfair labor practice violation can be found. Nevertheless, the Board finds the Hearing Examiner’s finding concerning the document production issues to be reasonable and supported by the record.

In the present case, the Hearing Examiner found that:

[UDC’s witnesses] testified credibly that they were making every effort to be responsive, and their testimony was not contradicted. Witnesses for both parties agreed that they had met about these issues, and that documents had been provided. The Union’s witness testified that the problem that had resulted in information not being provided for a period of time, was corrected to the

Union's satisfaction in October 2008. (Tr, 41-43). Although the witness stated that he was not uncertain if all other problems had been resolved because the Union was still receiving complaints, the Union did not establish that it had renewed or revised its requests as new information was received from its members.

As a result, the Hearing Examiner concluded that AFSCME had not met its burden of proof. (R&R at pgs. 9-10).

The Board has found that failing to timely produce document is an unfair labor practice where the delay was unreasonable. See, *Doctors Council of D.C. General Hospital v. D.C. General Hospital*, 46 DCR 6268, Slip Op. No. 482, PERB Case Nos. 95-U-10 and 95-U-18 (1996). In the present case, the Hearing Examiner concluded that the Complainant had not met its burden of proof in showing that the Respondent refused to bargain in good faith by failing to provide the requested documents. The Hearing Examiner's findings that UDC had provided some documents and that UDC had not made recent requests for new information establishes UDC's delay in providing documents was reasonable. In view of these facts and the Board precedent noted above, we find that the Hearing Examiner's conclusion that UDC's conduct did not rise to the level of an unfair labor practice seems reasonable, although her suggestion that "bad faith" needed to be shown is not an accurate statement of the Board's standard. Therefore, in this Opinion, we seek to clarify the standard by noting that a showing of bad faith is not required in order to find a ULP; rather, the Complainant's must show that the delay was unreasonable and that the Respondent failed to produce the documents in a timely manner.

In addition, the Board finds that the Union's Exceptions are merely a disagreement with the Hearing Examiner's findings of fact. Although the Union's Exceptions object to the standard utilized by the Hearing Examiner, the Union's actual challenge is to the Hearing Examiner's finding that UDC's failure to supply all the requested documents was not unreasonable. AFSCME would merely have the Board adopt its version of the facts, in which UDC's actions were found unreasonable.

In the instant matter, the Hearing Examiner's reasoning is consistent with the precedent discussed above. Moreover, the Board has held that it will adopt a Hearing Examiner's recommendation if it finds that, upon review of the record, that the Hearing Examiner's analysis, reasoning and conclusions are rational, reasonable, persuasive and supported by the record. See *D.C. Nurses Association and D.C. Department of Human Services*, 32 DCR 3355, Slip Op. No. 112, PERB Case No. 84-U-08 (1985) and *D.C. Nurses Association and D.C. Health and Hospitals Public Benefit Corporation*, 46 DCR 6271, Slip Op. No. 583, PERB Case No. 98-U-02 (1999). The Board has also rejected 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).

Because the Hearings Examiner's findings and conclusions are rational, supported by the record and consistent with Board precedent, the Board denies AFSCME's Exceptions and adopts the Hearing Examiner's finding that the Union failed to present evidence that UDC's failure to provide all requested information was in violation of the CMPA. Accordingly, the Complaint is dismissed.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The American Federation of State, County and Municipal Employees, Local 2087's unfair labor practice complaint is dismissed.
2. 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 31, 2009

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision in PERB Case No. 08-U-54 was served via FAX and U.S. Mail to the following parties on this the 31st day of December, 2009.

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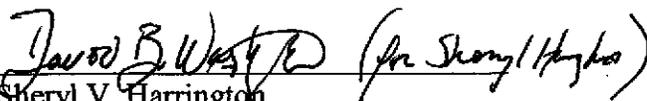
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