GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
REBECCA OWENS, Complainant,	PERB Case No. 02-U-27
v.	
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 2095	Opinion No. 750
and	
NATIONAL UNION OF HOSPITAL AND HEALTHCARE EMPLOYEES, DISTRICT 1199, Respondents.	

DECISION AND ORDER

This case involves an unfair labor practice complaint filed by Rebecca Owens ("Complainant" or "Owens") against the American Federation of State, County, and Municipal Employees, Local 2095 ("Respondent" or "Local 2095") and the National Union of Hospital and Healthcare Employees, District 1199. ("Respondent" or "NUHHCE"). The Complainant is alleging that Local 2095 and NUHHCE breached their duty of fair representation and violated various subsections of D.C. Code §§ 1-617.04 and 1-617.06[1] by failing to: (1) adequately assist her

[1]See, the Hearing Examiner's Report and Recommendation for the full text of the D.C. Code sections that Owens' alleges were violated. (R & R at pgs. 5 and 6). In summary, the Complainant is contending that pursuant to D.C. Code §§1-617.04 and 1-617.06, the Union, *inter alia*: (1) violated its duty to fairly represent her; (2) discriminated against her; (3) refused to bargain in good faith; and (4) did not properly pursue her grievance. Furthermore, in light of the Complainant's *pro se* status, and the Respondents' clear understanding of the allegations made by Owens, the Hearing Examiner made a finding that the Complaint alleged a breach of

in the processing of a grievance and (2) move her grievance to arbitration. The Respondents denied the allegations.[2]

A hearing was held. The Hearing Examiner found that the Respondents did *not* violate the sections of the Comprehensive Merit Personnel Act (CMPA) noted above. The Complainant filed Exceptions to the Hearing Examiner's Report and Recommendation (R & R). The Respondents filed an Opposition to the Complainant's Exceptions. The Hearing Examiner's R &R and the parties' Exceptions and Opposition are before the Board for disposition.

I. Background:

In 2002, the Complainant sought a promotion to a DS-9 Program Support Assistant at the Department of Mental Health.[3] (R & R at pg. 2). Complainant sought this promotion based on the additional duties she was performing. Owens contends that her supervisor originally told her she could receive the promotion, but later told her she could not be promoted because funds were not available. On March 11, 2002, Owens met with Greg Williams, a Local 2095 officer, to seek assistance in getting the promotion. Shortly thereafter, Mr. Williams met with the Complainant's supervisor about the matter and was told that no funds were available to support the promotion. However, Owens' supervisor suggested to Williams that there was a potential DS-8 promotion

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the Respondents' duty of fair representation. (R & R at pg. 7).

[2]In her Post-hearing brief, the Complainant alleges that her Employing Agency, D.C. Department of Mental Health Services (DMH), violated the Comprehensive Merit Personnel Act and the District Personnel Manual when it failed to promote her. In addition, she claimed that DMH created a hostile and abusive environment. However, the Hearing Examiner did not make any findings with respect to any of DMH's alleged actions because the Complainant did not name DMH as a Respondent in this case.

In addition, the Hearing Examiner did not consider the Complainant's claims that the Respondents-Unions failed to bargain in good faith, in violation of D.C. Code §1-617.04 (b)(3). The Hearing Examiner observed that the Board has held that the right to require a union to bargain in good faith belongs exclusively to the District of Columbia, as the Employer, and an individual employee represented by the Union has no standing to allege violations of D.C. Code §1-617.04 (b)(3). See, Taylor, et. al. v. University of the District of Columbia Faculty Association/NEA, 41 DCR 6687, Slip Op. No. 324, PERB Case No. 90-U-24(1994). Furthermore, the Hearing Examiner found that Complainant presented no evidence that the Respondents violated D.C. Code §1-617.06 (a)(3).

[3]At the time she sought this promotion, Complainant was working as a Program Support Assistant, DS-7.

opportunity available in another department. Williams advised Complainant of what he had learned in the meeting regarding the other promotion opportunity. In response, Owens informed him that she was not interested in the other promotion opportunity. (R & R at pg. 2).

When the Complainant was dissatisfied with Mr. Williams' findings, she contacted Ed Ford, the Area Director for NUHHCE, and requested assistance from someone " efficient and effective" in order to get her complaint resolved.[4] (R&R at pg. 2). By April 8, 2002, Complainant filed a grievance over her failure to receive the promotion she contends she was promised. She filed the grievance without the assistance of the Union. On May 17, 2002, once the grievance had been denied, Owens notified the Director of DMH that she was invoking arbitration. Ms. Mary Horne, then President of Local 2095, signed the "Request for Arbitration Panel", which Complainant submitted to the Federal Mediation Conciliation Service (FMCS). Complainant then advised the FMCS to send further correspondence concerning the arbitrator's list to the Union and provided the names and addresses of Ed Ford and Cynthia Perry at NUHHCE, as contacts.

When Owens had not heard anything regarding the status of her arbitration case from Mr. Ford or Ms. Perry by June 26, 2002, she wrote to NUHHCE's President asking him to research the matter. On July 9, 2002, Ms. Owens met with management officials about her matter, without the presence of a Union representative[5], although Ms. Diana Flowers, a shop steward for Local 2095, was present at the meeting as a witness, but not as a Union representative. (R & R at pg. 3). Owens' grievance was not resolved to her satisfaction.

In light of the above, Complainant filed the present unfair labor practice complaint on July 22, 2002.

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[4]She made this contact by letter on April 4, 2002. According to the record, Mr. Ford assigned the matter to Cynthia Perry for handling. Ms. Perry spoke with Ms. Owens in mid-June and informed her that the matter would be investigated and she would contact her again when she had more information. (R& R at pg. 3). In addition, Ms. Perry indicated to Owens that it was the Union that would decide whether or not to proceed to arbitration in this matter. (R & R at pg. 3)

[5]Owens testified that she did not ask Mr. Williams or Ms. Perry to attend the meeting because they had not responded to her previous calls. (R & R at pg. 3; Tr. 89-92).

II. Issue:

The principal issue in this matter is whether the Respondents' level of assistance to the Complainant in pursuing her grievance through the various steps of the negotiated grievance procedure and their failure to move that grievance to arbitration constitutes an unfair labor practice and a breach of the Respondents' duty of fair representation.

III. The Hearing Examiner's Report and Recommendations and the Parties' Exceptions and Opposition:

Based on the pleadings and the record developed in the hearing, the Hearing Examiner determined that the Complainant did *not* submit sufficient evidence to meet her burden of proof regarding any of the alleged violations of the CMPA. As a result, he recommended that the Complaint be dismissed and made further findings, which will be discussed in detail below.

The Hearing Examiner first noted that Board Rules 520.11and 550.15 require that the Complainant prove her case by a preponderance of the evidence. Additionally, the Hearing Examiner points out that this burden is not relaxed because the Respondent is a *pro se*[6] litigant. After reviewing the evidence presented by the Complainant, the Hearing Examiner determined that the Complainant failed to show that the Respondents breached their duty of fair representation. As a result, he concluded that the Respondents did not commit an unfair labor practice in violation of the CMPA.

In making his determination, the Hearing Examiner considered the fact that the Respondents did not prevent the Complainant from filing her grievance and even provided her with some assistance in resolving the matter. For example, he noted that the union representative, when contacted, met with Complainant's supervisor and conveyed information to Owens concerning the opportunity for a promotion in another area. Additionally, the Hearing Examiner noted

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[6]Before discussing his findings in detail, the Hearing Examiner noted that "neither the original Complaint or Complainant's presentation at the hearing are models of clarity." (R & R at pg. 7) As a result, he observed that as a general rule, *pro se* litigants are *not* held to the same standard of technical accuracy or specificity in their pleadings that might be applicable to litigants who are represented by trained counsel. Therefore, he noted that the Board construes those claims liberally to determine whether a proper cause of action has been alleged. Thomas J. Gardner v. District of Columbia Public Schools and Washington Teachers' Union, Local 67, AFT-AFL-CIO, 49 DCR 7763, Slip Op. No. 677, PERB Case Nos. 02-S-01 and 02-U-04 (2002).

Complainant's contacts with Cynthia Perry, Local 2095 officials, Ed Ford, and the fact that the Union representatives were investigating the matter of the promotion. The Hearing Examiner also noted that the Complainant was assisted in pursuing the matter to arbitration. However, once the grievance reached the final stage, the Union declined to pursue the matter through arbitration, as is its right under the parties' collective bargaining agreement. Furthermore, the Hearing Examiner did not find that the Respondents' failure to attend the final meeting with management supported the Complainant's claims that the union failed to provide her with assistance.

Finally, the Hearing Examiner found that the Respondents' failure to advance the Complainant's grievance to arbitration did *not* constitute a violation of the Comprehensive Merit Personnel Act. Relying on the parties' collective bargaining agreement, the Hearing Examiner determined that the authority to invoke arbitration lies with the Respondent, not with an individual employee. Furthermore, the Hearing Examiner noted that the Complainant failed to present any evidence which would support a finding that the Respondent was required to move her grievance to arbitration.[7]

In reaching his determination, the Hearing Examiner points out that the Board has held that the duty of fair representation does not require a union to pursue every grievance to arbitration. Freson v. Fraternal Order of Police/Metropolitan Police Department Labor Committee, 31 DCR 2290, Slip Op. No. 74, PERB Case No. 83-U-09 (1984).

In order to show that a union has breached its duty of fair representation, the Board has held that a Complainant must demonstrate that the union's decision not to file for arbitration was arbitrary, discriminatory, or the product of bad faith. Ulysses S. Goodine v. Fraternal Order of Police/Department of Corrections Labor Committee, 43 DCR 5163, Slip Op. No. 476, PERB Case No. 96-U-16 (1996). In addition, the complaining employee must allege facts that, if proven, would tie the union's actions to some prohibited factor. Id.

Moreover, a union's handling of an employee's grievance, including its decision on whether to pursue arbitration, is not arbitrary, discriminatory, or the product of bad faith simply because the grievant disagrees with the union's judgment. (Brenda Beeton v. D.C. Department of Corrections and Fraternal Order of Police/Department of Corrections Labor Committee, 45 DCR 2078, Slip Op. No. 538, PERB Case No. 97-U-26 (1998). Furthermore, the Hearing Examiner notes that the Board has consistently held that the applicable standard in cases involving the duty of fair representation is not the competence of the union, but rather whether the union's representation was in good faith and its actions were motivated by honesty of purpose. Finally, the Hearing Examiner

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[7]The Hearing Examiner cited the Board's line of cases regarding the duty of fair representation and the failure to process grievances through arbitration. (See, R & R at pgs. 7 and 8).

determined that the union cannot violate its duty of fair representation with respect to the filing and processing of a grievance if the aggrieved employee does not even request the union's assistance[8]. The Hearing Examiner made *no* finding that the Unions' conduct was arbitrary, discriminatory, or the product of bad faith

Because the Unions provided Owens with some assistance, the Hearing Examiner determined that the Complainant's claims did not meet the burden required to prove a breach of the duty of fair representation. In addition, the Hearing Examiner did not find a breach of the duty of fair representation because of the Unions' failure to go to arbitration.

In her Exceptions, the Complainant argues that the Hearing Examiner erred in finding that the Respondents did not breach their duty of fair representation. Specifically, she alleges that the Hearing Examiner's findings were "inconsistent, confusing and contradictory." (Exceptions at pg. 2) . She also accuses the Hearing Examiner of not being neutral. Furthermore, she alleges that the behavior of the Hearing Examiner demonstrates an "Earmarking of Conspiracy." (Exceptions at pg. 2). As a result, the Complainant requests that the Board make corrections to the Hearing Examiner's decision and render a fair decision. After reviewing the Exceptions[9], the Board finds that Complainant makes no viable substantive challenges to the Hearing Examiner's report. Instead, she merely attacks his credibility and the quality of his work. As a result, the Board believes that the Complainant's Exceptions are nothing more than a disagreement with the Hearing Examiner's findings of fact. The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." Doctors Council of the District of Columbia and Henry Skopek v. D.C. Commission on Mental Health Services, Slip Op. No. 636 at p.4, PERB Case No. 99-U-06. Also see Tracey Hatton v. FOP/DOC Labor Committee , 47 DCR 769, Slip Op. No. 451 at P.4, PERB Case. No. 95-U-02. Therefore, a mere disagreement with the Hearing Examiner's findings is not a sufficient ground for the Board to reject the finding. See, Id.

The Respondents' Opposition to the Complainant's Exceptions refutes Complainant's accusations that the Hearing Examiner: (1) perjured himself; (2) was biased; and (3) abused his power. The Respondent contends that these assertions are wholly and completely baseless and indicates that Mr. Shapiro was fair and neutral. The Respondents agree with the findings made by the Hearing Examiner and assert that his findings are correct as a matter of law. Therefore, the Respondents request that the Board adopt the Hearing Examiner's findings in their entirety.

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[8]On this basis, the Hearing Examiner concluded that the Respondents did not violate D.C. Code §§1-617.04 (b)(1) or 1-617.06(b).

[9]While each specific Exception made by Complainant is not discussed in detail in this Opinion, the Board did consider each argument made by the Complainant. As a result, the Board has determined that none of the Complainant's argument have merit.

In view of the above, the Board finds that the Hearing Examiner's determination that Local 2095 and NUHHCE did not violate their duty of fair representation is supported by the record. Specifically, we find that the Complainant did not allege facts or submit evidence which demonstrates that the union engaged in arbitrary or discriminatory conduct, or conduct influenced by bad faith. [10] Furthermore, we find that Owens merely disagreed with the union's judgment in the handling of her grievance. The Board's precedent is clear that a disagreement with a union's judgment in handling a grievance or its decision not to pursue arbitration does not breach the duty of fair representation. (Brenda Beeton v. D.C. Department of Corrections and Fraternal Order of Police/Department of Corrections Labor Committee, PERB Case No. 97-U-26, Op. No. 538 (1998)). Additionally, the Board notes that the Complainant clearly has *not* met her burden, particularly where there is no dispute that the Union provided her with assistance on several occasions. Furthermore, Board precedent and the parties' collective bargaining agreement, in this case, gives the Union discretion to handle the grievance in the way it sees fit and to pursue the grievance to the level it deems necessary. See, Brenda Beeton v. D.C. Department of Corrections and Fraternal Order of Police/Department of Corrections Labor Committee, PERB Case No. 97-U-26, Op. No. 538 (1998).

There is no question that Owens was dissatisfied with the union's decision; however, that in and of itself, does not constitute a breach of the duty of fair representation where no evidence of arbitrariness, discrimination, or bad faith is shown. Brenda Beeton v. D.C. Department of Corrections and Fraternal Order of Police/Department of Corrections Labor Committee, PERB Case No. 97-U-26, Op. No. 538 (1998)), (Freson v. Fraternal Order of Police/Metropolitan Police Department Labor Committee, PERB Case No. 83-U-09, Op. No. 74 (1984). As a result, the Board has no basis to find an unfair labor practice in this matter.

Pursuant to D.C. Code §1-605.2(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 hereby adopts the Hearing Examiner's finding and conclusion that Local 2095 and NUHHCE did *not* violate the CMPA in their handling of the Complainant's grievance and by their failure to pursue the grievance through the arbitration stage. As a result, we find that Owens' complaint should be dismissed.

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[10] As noted earlier, in order to show that a union has breached its duty of fair representation, the Board has held that a Complainant must demonstrate that the union's decision not to file for arbitration was arbitrary, discriminatory, or the product of bad faith. Ulysses S. Goodine v. Fraternal Order of Police/Department of Corrections Labor Committee, 43 DCR 5163, Slip Op. No. 476, PERB Case No. 96-U-16 (1996).

ORDER

IT IS HEREBY ORDERED THAT:

1. The Unfair Labor Practice Complaint be dismissed.

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.

May 27, 2004

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 02-U-27 was transmitted via Fax and U.S. Mail to the following parties on this the 27th day of May, 2004.

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