

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

In the Matter of:)	
)	
District of Columbia Public Schools)	
Petitioner)	PERB Case No. 20-U-29
)	
v.)	Opinion No. 1792
)	
Washington Teachers' Union Local 6, American)	
Federation of Teachers, AFL-CIO)	
)	
Respondent)	

DECISION AND ORDER

I. Statement of the Case

On June 25, 2020, District of Columbia Public Schools (DCPS) filed an Unfair Labor Practice Complaint (Complaint) against the Washington Teachers' Union (WTU). DCPS alleged that WTU violated the Comprehensive Merit Personnel Act (CMPA), D.C. Official Code §1-617.04(b)(1) and (3),¹ by refusing to bargain in good faith.² On July 9, 2020, WTU filed an Answer and a Motion to Dismiss. On July 16, 2020, DCPS filed an Amended Complaint, which narrowed the issues presented.³

PERB ordered a virtual hearing that was held on December 15, 2020, and January 5, 2021. On April 30, 2021, the Hearing Examiner issued a Report and Recommendations. The parties did not file exceptions.

As discussed herein, the Board finds that the Hearing Examiner's conclusions are reasonable, supported by the record, and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner's recommendations that WTU did not violate D.C. Official Code § 1-617.04(b)(1) and (3) and dismisses the Complaint in its entirety.

II. Hearing Examiner's Report and Recommendations

¹ Report at 16. DCPS alleged a violation of D.C. Official Code §1-617.08 but failed to plead or argue facts to support a violation. The Hearing Examiner found that DCPS abandoned its claim. The Board dismisses this claim.

² Report at 1-2.

³ Report at 6.

A. Factual Findings

The Hearing Examiner made the following factual findings. DCPS and WTU have been negotiating a successor agreement to the current collective bargaining agreement (CBA) since September 2019.⁴ The current CBA provides for a three-step grievance procedure: Step 1 involves internal meetings between WTU and DCPS representatives, Step 2 advances unresolved matters to a hearing officer, and Step 3 permits the submission of unresolved grievances to arbitration.⁵ By practice the parties' hold grievance meetings, grievance hearings, and arbitration hearings in-person.⁶ However, the CBA allows the parties to consent to virtual hearings for grievance hearings and arbitration hearings.⁷

As a result of the coronavirus (COVID-19) public health emergency, the parties suspended in-person grievance and arbitration hearings.⁸ WTU retained its contractual right to consent to virtual grievance and arbitration hearings.⁹ Since the onset of the public health emergency, two grievances were processed by the parties through virtual grievance and arbitration hearings.¹⁰

In March and April 2020, DCPS and WTU began separate negotiations on a Memorandum of Understanding (MOU) to expand the virtual grievance process to all steps of the grievance procedure.¹¹ The parties reached some tentative agreements but failed to agree on whether WTU or the affected grievant retained the right to object to virtual grievance and arbitration hearings.¹² WTU's MOU proposals preserved the CBA's consent requirements for virtual hearings.¹³ DCPS's counterproposals eliminated the consent language.¹⁴

WTU provided a revised proposal that permitted the grievant, in addition to the WTU, to object to a virtual grievance or arbitration hearing. DCPS sought a concession that would toll backpay and other liabilities when a grievant objected to virtual grievance and arbitration hearings as a condition for agreement to WTU's proposal.¹⁵ WTU rejected DCPS's offer and prepared a counterproposal.¹⁶

On or about May 19, 2020, DCPS received an email that contained counterproposals to the MOU on virtual grievance and arbitration hearings. The counterproposal permitted a grievant to object to a virtual hearing but eliminated WTU's right to object, which was a significant change from the CBA.¹⁷

⁴ Report at 9.

⁵ Report at 9.

⁶ Report at 9.

⁷ Report at 9 (citing Article 6.5.9, which states, "The Parties to this collective bargaining agreement may, only by mutual, written consent, agree that either Party may present witness testimony using video conferencing technology at Step 2 and/or arbitration Hearing.").

⁸ Report at 8.

⁹ Report at 8.

¹⁰ Report at 8.

¹¹ Report at 9.

¹² Report at 9.

¹³ Report at 9.

¹⁴ Report at 9.

¹⁵ Report at 10.

¹⁶ Report at 10.

¹⁷ Report at 10.

Inadvertently attached to the electronic counterproposal was a separate email written by WTU's counsel to the union's president suggesting that the new language in the counterproposal might "not be an issue" when a grievant "heeds WTU's advice regarding virtual grievance and arbitration hearings."¹⁸

DCPS concluded that the email from WTU's counsel revealed its intent to secretly advise grievants to "wholesale" refuse virtual grievance and arbitration hearings.¹⁹ Thereafter, DCPS filed an unfair labor practice complaint, asserting that WTU's conduct amounted to bad faith bargaining, because it would render any MOU on virtual grievance and arbitration hearings meaningless.²⁰

B. Issues and Recommendations

The Hearing Examiner considered DCPS's allegations that WTU acted in bad faith while negotiating the MOU on virtual grievance and arbitration hearings. DCPS argued that WTU planned to advise grievants to object to virtual grievance and arbitration hearings and that alleged plan breached WTU's duty to negotiate an effective agreement in good faith.²¹

WTU argued that it disclosed the email by mistake. WTU asserted that the email was protected by attorney-client privilege and should not be permitted into evidence. Nevertheless, WTU asserted that DCPS failed to prove that WTU intended to "blanketly" advise grievants against virtual grievance and arbitration hearings.²² WTU argued that DCPS's assertion was speculative and contradicted by the record. Moreover, WTU argued that the MOU would establish procedures for virtual grievance and arbitration hearings, which WTU would be free to advise against, and which WTU already has a right to decline under the CBA.²³ WTU asserted that it is not illegal to negotiate an MOU procedure or contingency, which it intends to avoid.²⁴

The Hearing Examiner acknowledged that Board Rule 550.1 requires DCPS to prove by a preponderance of evidence that WTU violated D.C. Official Code § 1-617.04(b)(1) and (3). Further, the Hearing Examiner determined that D.C. Official Code § 1-617.04(b)(1) and (3) requires labor organizations to negotiate in good faith. The Hearing Examiner applied the Board's precedent in interpreting good faith bargaining that: (1) examines the totality of a party's conduct to determine if negotiations have been used to frustrate or avoid mutual agreement and noting that a single factor, standing alone, will not generally demonstrate bad faith²⁵, and (2) recognizes that the duty to bargain in good faith imposes no duty to reach agreement but does include the

¹⁸ Report at 11 (The complete email states the following: "Liz, Attached per your request is a draft MOU regarding virtual grievance meetings, Step 2 hearings, and arbitrations. I've attached a Word version that shows changes from DCPS's last counter-proposal on this subject, and a PDF that shows a clean version. Please be aware that, as the MOU is currently crafted, the Grievant can object to a particular case being held virtually, but the WTU cannot (though this may not be an issue in cases where the Grievant heeds WTU advice). Also, you should be aware that we have heard about there being issues with virtual arbitration hearings conducted by other union lawyers. The Union may want to consider those before finalizing any proposal on the MOU to send to DCPS - let me know if you'd like us to investigate this further. Please let me know if you have any questions or concerns.").

¹⁹ Report at 11.

²⁰ Report at 11.

²¹ Report at 12.

²² Report at 13.

²³ Report at 14.

²⁴ Report at 14.

²⁵ Report at 16 (citing *AFGE v. DDS*, 59 D.C. Reg. 10771, Slip Op. No. 1284 at 3, PERB Case No. 09-U-56 (2012)).

obligation to take reasonable efforts to ensure the effectiveness of agreements that are actually reached.²⁶

The Hearing Examiner found that the parties spent significant time engaged in negotiations and reached tentative agreements on most procedures for virtual grievance and arbitration hearings, except for terms on who may object to virtual proceedings, which prevented agreement.²⁷ The Hearing Examiner found that WTU waived the attorney-client privilege by the disclosure of its counsel's email and admitted the email into evidence.²⁸ Nevertheless, the Hearing Examiner concluded that there was no evidence to support a finding that WTU planned to recommend in every case that all grievants should be advised to reject virtual grievance and arbitration hearings.²⁹ The Hearing Examiner found that the record refuted DCPS' assertion that WTU planned to advise all grievants against virtual grievance and arbitration hearings. The Hearing Examiner cited to the testimony of a WTU Field Representative and a WTU grievant. The Field Representative testified that WTU polled grievants on whether they wanted virtual grievance or arbitration hearings and respected their choice. While the WTU grievant testified that WTU did not counsel her not to have a virtual grievance hearing.³⁰ The Hearing Examiner found that DCPS's interpretation of the email raised an unreasonable inference unsupported by evidence in the record.³¹ Further, the Hearing Examiner found that "WTU's proposal of a contingent precedent for the grievant to have the right to refuse a virtual grievance and arbitration hearing does not amount to a failure to bargain in good faith or bad faith bargaining."³² Based on the above-mentioned, the Hearing Examiner recommended that the Board dismiss the Complaint with prejudice.³³

III. Discussion

The parties did not file exceptions to the Hearing Examiner's Report and Recommendations.

The Board's precedent in interpreting good faith requires examination of the totality of a party's conduct, both at and away from the table, to determine if negotiations have been used to frustrate or avoid mutual agreement.³⁴ The Board notes that a single factor, standing alone, will not generally demonstrate bad faith.³⁵ The Board recognizes that the duty to bargain in good faith imposes no duty to reach agreement but does include the obligation to take reasonable efforts to ensure the effectiveness of agreements that are actually reached.³⁶

Upon review of the record and the Hearing Examiner's findings and recommendations, the Board finds that the Hearing Examiner's recommendations are reasonable, supported by the

²⁶ Report at 16 (citing *Teamsters Local 639 and 730 v. DCPS*, 43 D.C. Reg. 6633, Slip Op. No. 400 at 5-6, PERB Case No. 93-U-29 (1994)).

²⁷ Report at 16.

²⁸ Report at 8 (citing *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989)).

²⁹ Report at 18-19. (see also,

³⁰ Report at 14.

³¹ Report at 20.

³² Report at 20.

³³ Report at 21.

³⁴ *AFGE v. DDS*, 59 D.C. Reg. 10771, Slip Op. No. 1284 at 3, PERB Case No. 09-U-56 (2012).

³⁵ *AFGE v. DDS*, 59 D.C. Reg. 10771, Slip Op. No. 1284 at 3, PERB Case No. 09-U-56 (2012).

³⁶ *Teamsters Local 639 and 730 v. DCPS*, 43 D.C. Reg. 6633, Slip Op. No. 400 at 5-6, PERB Case No. 93-U-29 (1994).

record, and consistent with Board precedent.³⁷ Therefore, the Board adopts the Hearing Examiner's Report and Recommendations.

IV. Conclusion

The Board has reviewed and adopted the findings, conclusions, and recommendations of the Hearing Examiner, and finds that WTU did not violate D.C. Official Code § 1-617.04(b)(1) and (3). Therefore, the Complaint is dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint is dismissed; and,
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Douglas Warshof, and member Barbara Somson and Peter Winkler

June 17, 2021
Washington, D.C.

³⁷ *WTU, Local 6 v. DCPS*, 65 D.C. Reg. 7474, Slip Op. 1668 at 6-7, PERB Case No. 15-U-28 (2018); *See AFGE, Local 1403 v. D.C. Office of the Attorney General*, 59 D.C. Reg. 3511, Slip Op. No. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012).