Government of the District of Columbia

Public Employee Relations Board

In the Matter of:	
American Federation of State, County and Municipal Employees, District Council 20, AFL-CIO,	
Complainant,	PERB Case No. 08-U-36
v.	Opinion No. 1387
District of Columbia Government,	**Amended Decision and Order**
Respondent.	

AMENDED DECISION AND ORDER[1]

I. Statement of the Case

The American Federation of State, County and Municipal Employees, District Council 20, AFL-CIO, ("Complainant" or "Union") and the District of Columbia Government ("Respondent" or "District") entered into a "Collective Bargaining Agreement between the District of Columbia and Labor Organizations Representing Compensation Units 1 and 2" ("Agreement"), which took effect in 2006. The Agreement established a Joint Labor-Management Technical Advisory Pension Reform Committee ("Committee") to develop an enhanced retirement program for employees hired after October 1, 1987, and set forth procedures to present that program to the City Council including preliminary submission of the program to the City Administrator.

The Union alleges in an unfair labor practice complaint it filed with the Board that the City Administrator failed and refused to act on the Committee's recommendations and that "the District has no intention of carrying out its duty to implement the joint report and recommendations mandated by Article 7, Section (3) (A) (d), of the . . . Agreement." (Amended Complaint at para. 9). The Union contends that by the alleged conduct "the District is interfering

[1] This decision and order was originally issued March 27, 2013 (Slip Opinion No. 1377), but due to a clerical error the parties did not receive it timely. To preserve the parties' rights to judicial review, the Board is re-issuing the decision and order.

with, restraining and coercing employees in the exercise of their rights and refusing to bargain in good faith. . . ." (*Id.* at para. 10).

The matter was referred to a hearing examiner, who held a hearing and issued a Report and Recommendations ("R & R"). The R & R recites the following undisputed facts:

> 1. Complainant is the exclusive collective bargaining representative of certain employees in Compensation Units 1 and 2.
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> 2. Respondent employs individuals in Compensation Units 1 and 2.
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> 3. Complainant and Respondent are parties to a collective bargaining agreement (Agreement), which has an effective date of July 7, 2006 and remains in effect until the end of Fiscal Year (FY) 2010.
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> 4. District of Columbia Government employees hired after October 1, 1987 do not receive the same retirement benefits as those who [were] hired before that date in that their pension system has no defined benefit component and no guaranteed pension.
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> 5. The Agreement provided that the parties would appoint a committee to develop a retirement program for post-October 1987 hires; that the Committee would submit its report and recommendations to the City Administrator within 120 days of the effective date of the Agreement; and that by October 1, 2008, the District would plan and implement an enhanced retirement program which included deferred compensation and a defined benefit component. (Ex C-1).
>
> 6. Natwar Gandhi, Chief Financial Officer (CFO), submitted a memorandum dated September 14, 2006, to Linda Cropp, Chair of the Council of the District of Columbia entitled "Fiscal Impact Statement: "Compensation Collective Bargaining Agreement Between the District of Columbia Government and Compensation Units 1 and 2 . . . Compensation System Changes Approval Resolution of 2006. . . Draft Resolution to be Introduced. . .". The memorandum referred to the establishment of the Joint Committee which was tasked with proposing an enhanced retirement program, effective October 1, 2008, for eligible employees. It noted that the Agreement required the program to have "a deferred compensation component and a defined benefit component". The memorandum concluded:

> The fiscal effects of an enhanced retirement program to be developed by the [Joint Committee] cannot be determined at this time. The District's CFO will require the findings of the Committee in order to project the fiscal impact on the District's budget and financial plan. It would be noted that because of the size of the membership of the Collective Bargaining Units 1 and 2 and the projected aggregate of their annual salary, the Committee's findings have the potential to greatly impact the local consensus budget and financial plan. (Ex C-2). (emphasis added).

7. The Joint Committee submitted its recommendations to the City Administrator on February 7, 2008. (Ex C-3).

8. The City Administrator returned the plan to the Committee and asked that it revise its recommendations to make them more financially feasible for the District.

9. The Committee submitted revised recommendations to the City Administrator, who returned the revised recommendations to the Committee in June 2008.

10. AFSCME members of the Committee asked to meet with the City Administrator before continuing their participation on the Committee. The meeting took place on or about December 9, 2008.

11. At the meeting, each party designated its labor economist to work on the matter. Brian Klopp, AFSCME Labor Economist and Idi Ohikhuare, OLRCB Labor Economist, were designated to work on the matter on behalf of the parties. Mr. Klopp and Mr. Ohikhuare communicated about the matter in subsequent months. (Tr, 107-111).

12. The Committee has not met or submitted any recommendations since June 2008.

13. The CFO did not prepare a fiscal impact statement based on either of the Committee's submission[s].

14. None of the Committee's recommendations have been presented to the City Council for approval.

15. To date, Respondent has not implemented an enhanced retirement program pursuant to the Agreement.

(R & R at pp. 5-7).

The hearing examiner found that there were significant disputes over the provisions of the Agreement, that the District was amenable to continuing the process of developing a retirement program, that the Complainant did not prove that the Committee had completed its tasks, and that the Complainant did not prove bad faith and pervasive and unilateral changes on the part of the District. The hearing examiner concluded that the Complainant did not meet its burden of proof by a preponderance of the evidence and recommended that the Board dismiss the complaint.

The Complainant filed Exceptions in which it stated that it excepted to the following findings and recommendations in the Report:

> 1. "In *AFGE, Local 872 v. D.C. Water and Sewer Authority*, 46 DCR 4398, Slip Op. No. 497, PERB Case No. 96-U-23 (1999), this Board utilized the approach taken by the National Labor Relations Board in *National Labor Relations Board in [sic] Electronic Reproduction Serv. Corp.*, 213 NLRB 758 (1978) and stated that it would limit its finding that an unfair labor [sic] existed to circumstances where 'no dispute' exists over contractual provisions at issue." (R&R at 14.)
>
> 2. (A) "On the other hand, if the City Administrator's role was only that of a conduit, as argued by Complainant, there would be no reason to have the document submitted to that office in the first place. It could be submitted directly to the CFO." (R&R at 15.)
>
> (B) Related to this exception, the Union further excepts to the Hearing Examiner's refusal to permit the Union to offer witness testimony regarding the role of the City Administrator. (See Tr. 116-17.)
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> 3. "The Hearing Examiner found the one page submission did not, in her view, meet the contractual requirements of providing a report with recommendations which: '[e]stablish a formula cap for employee and employer contributions; [e]stablish the final compensation calculation using the highest three year consecutive average employee wages; [i]nclude retirement provisions such as disability, survivor death benefits, health and life insurance benefits; design a plan sustainable within the allocated budget; [and draft] and support legislation to amend the D.C. Code in furtherance of the "Enhanced Retirement Program."' (Ex. C-1). The memorandum from the CFO stated that he would require 'the findings of the Committee in order to project the fiscal impact on the District's budget and financial plan.' (Ex. C-2). The document submitted by the Committee did not make findings. Thus, it is not

> established that the Committee had completed its tasks." (R&R at 16.)
>
> 4. "Viewing the totality of the circumstances, i.e., the omission of any guidance regarding the role of the City Administrator, or the reasonableness of Respondent's interpretation, the paucity of the Committee's final product, and the request by Respondent to continue this endeavor, the Hearing Examiner cannot make a finding of bad faith." (R&R at 16.)

(Exceptions at pp. 1-2). The Respondent filed an opposition to the Exceptions ("Opposition"). The Report, the Exceptions, and the Opposition are before the Board for disposition.

II. Discussion

A. Elements of the Alleged Unfair Labor Practice

As the hearing examiner noted, a "breach of a collective bargaining agreement is not a *per se* unfair labor practice." (R & R at p. 14) (citing *Green v. D.C. Dep't of Corrections*, 37 D.C. Reg. 8086, Slip Op. No. 257 at p. 4, PERB Case No. 89-U-10 (1990), and *AFGE, Local Union No. 3721 v. D.C. Fire Dep't*, 41 D.C. Reg. 1585, Slip Op. No. 297 at pp. 4-5, PERB Case No. 90-U-11 (1991)). Nonetheless, the Board has asserted jurisdiction where a violation of the collective bargaining agreement constitutes an unfair labor practice. *AFGE, Local 631 v. District of Columbia*, 59 D.C. Reg. 7334, Slip Op. No. 1264 at p. 4, PERB Case No. 09-U-57 (2012).

Among the tests the hearing examiner applied in determining whether there was an unfair labor practice were two tests that are not called for by the Board's precedents. First, the hearing examiner asserted without citation of authority that "[i]n order to establish an unfair labor practice, the Hearing Examiner must conclude that the City Administrator acted in bad faith by returning the product to the Committee for additional work." (R & R at 16). Contrary to this assertion, a showing of bad faith is not required in order to establish an unfair labor practice. *AFSCME Local 2087 v. Univ. of D.C.*, 59 D.C. Reg. 6064, Slip Op. No. 1009 at p. 7, PERB Case No. 08-U-54 (2009). A conclusion that a party failed to bargain in good faith does not equate to a conclusion that the party acted in bad faith. *Int'l Bhd. of Teamsters v. D.C. Pub. Schs.*, 36 D.C. Reg. 5993, Slip Op. No. 226 at p. 4 n.4, PERB Case No. 08-U-10 (1989). The hearing examiner determined that in view of the totality of the circumstances she could not make a finding of bad faith. (R & R at 16). In its fourth exception, the Complainant excepts to this determination, but as it is an unnecessary determination, the Complainant's exception is immaterial to the outcome of the case.

The second test that the hearing examiner erroneously added was a test for a repudiation of a collective bargaining agreement. The hearing examiner stated, "This Board must find that Respondent initiated pervasive unilateral changes to an existing agreement or rejected the bargaining relationship in order to conclude that a party has repudiated a collective bargaining agreement. American Federation of Government Employees, Local 3721 v. D.C. Fire

Department, 39 DCR 8599, Slip Op. No. 287, PERB Case No. 90-U-11 (1992)." (R & R at p. 16). The cited case does not support the asserted proposition, but the Board has cited that case for the principle that when "pervasive unilateral changes in an effective agreement are precipitated by a fundamental rejection of a bargaining relationship, a request to bargain is not a prerequisite to finding a violation of a duty to bargain." *Dist. Council 20, AFSCME Locals 1200, 2776, 2402 & 2087 v. D.C. Gov't*, 46 D.C. Reg. 6513, Slip Op. No. 590 at p. 7, PERB Case No. 97-U-15A (1999). This principle is not germane to the present case as the Respondent does not contend that the Complainant failed to request bargaining.

The tests that the Board has applied in determining when a contractual violation is an unfair labor practice are discussed in *Teamsters Local Unions No. 639 & 730 v. D.C. Public Schools*:

> The Board has previously held that disputes over the meaning or application of terms of a collective bargaining agreement are matters for resolution through the grievance procedure rather than an Unfair Labor Practice Complaint. See, e.g., Fraternal Order of Police / Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department, 39 DCR 9617, Slip Op. No. 295 at n. 2, PERB Case No. 91-U-18 (1992). However, if an employer has entirely failed to implement the terms of a negotiated or arbitrated agreement such conduct constitutes a repudiation of the collective bargaining process and a violation of the duty to bargain. Cf., Electronic Reproduction Serv. Corp., 213 NLRB 758 (1974).
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> In the absence of any specifics indicating a repudiation of the agreement as opposed to disputes over its terms, we conclude that this portion of the Complaint does not state a statutory violation, and it is, accordingly, dismissed.

43 D.C. Reg. 6633, Slip Op. No. 400 at p. 7, PERB Case No. 93-U-29 (1994). *See also D.C. Water & Sewer Auth. v. AFGE, Local 872*, 59 D.C. Reg. 4659 Slip Op. No. 949 at pp. 6-7, PERB Case No. 05-U-10 (2009).

The present case is one in which there is an absence of proof of a repudiation of the Agreement, and instead there are numerous disputes over the terms of the Agreement. As a result, the Complainant has not proven a statutory violation.

B. The Union Did Not Prove Repudiation of the Agreement.

The Union did not prove that the District entirely failed to implement the Agreement. The District did a number of things to implement the Agreement. In accordance with the

Agreement, the District appointed three of the members of the Committee and also had technical advisors sitting with the Committee. (Tr. at p. 44; Ex. C-1 at p. 20). The City Administrator reviewed two reports of the Committee and requested changes. (R & R at p. 6). After the City Administrator requested changes, the City Administrator met with the Union's representatives (*Id.*; Tr. at p. 81), and an economist for the Office of Labor Relations and Collective Bargaining met with the Union's economist. (R & R at p. 6; Tr. at pp. 103 & 106-107). Finally, the hearing examiner found that "Respondent presented credible evidence that it is amenable to continuing the process." (R & R at p. 16).

By sending the recommendations back to the Committee, the City Administrator did not repudiate the Agreement. In the District's view, the City Administrator's duty to perform under the Agreement did not arise because the Committee had not fulfilled the condition precedent of designing a plan sustainable within the budget and completing a report with its recommendations. (Respondent's Post-Hearing Br. at 7). Whether the Committee had fulfilled a condition precedent is a contractual issue not within the jurisdiction of the Board. *See F.O.P./Metropolitan Police Dep't Labor Comm. v. Metropolitan Police Dep't*, 59 D.C. Reg. 5427, Slip Op. 984 at pp. 7-8, PERB Case No. 08-U-09 (2009). The contractual nature of the issue is underscored by the Union's extended discussion in its post-hearing brief of canons of contractual interpretation that it regards as applicable. (Complainant's Post-Hearing Br. at pp. 18-20).

C. The Parties Have Genuine Disputes over the Terms of the Agreement.

"[W]hen a party simply refuses or fails to implement an award or negotiated agreement where no dispute exists over its terms, such conduct constitutes a failure to bargain in good faith and, thereby, an unfair labor practice under the CMPA." *AFGE, Local 872 v. D.C. Water & Sewer Auth.*, 46 D.C. Reg. 4398, Slip Op. No. 497 at p. 3. PERB Case No. 96-U-23 (1996). The Complainant correctly points out in its first exception that the phrase "where no dispute exists over its terms" as used in the preceding case, which the R & R cites, has been understood to refer to a *genuine* dispute. *See AFGE, Local 631 v. D.C. Water & Sewer Auth.*, 51 D.C. Reg. 11403, Slip Op. No. 766 at p. 5, PERB Case No. 04-U-16 (2004); *AFGE, Local 631 v. D.C. Water & Sewer Auth.*, 51 D.C. Reg. 11379, Slip Op. No. 734 at p. 5, PERB Case No. 03-U-52 (2004). If a dispute asserted by a respondent is not genuine, failure to implement an agreement is an unfair labor practice. *Psychologists Union Local 3758 v. D.C. Dep't of Mental Health*, 59 D.C. Reg. 9770, Slip Op. No. 1260 at p. 3, PERB Case No. 06-U-40 (2012). This point does not change the result in the present case because the disputes over the terms of the Agreement are genuine.

The parties have genuine disputes concerning the duties of the Committee and of the City Administrator as set forth in article 7, section I(3)(A)(4)(c) and (d) of the Agreement. Those two sections provide:

(c) Responsibilities of the [Committee]

The Committee shall be responsible to:

- Plan and design an enhanced retirement program for employees hired on or after October 1, 1987 with equitable sharing of costs and risks between employee and employer;
- Establish a formula cap for employee and employer contributions;
- Establish the final compensation calculation using the highest three-year consecutive average employee wages;
- Include retirement provisions such as disability, survivor and death benefits, health and life insurance benefits;
- Design a plan sustainable within the allocated budget;
- Draft and support legislation to amend the D.C. Code in furtherance of the "Enhanced Retirement Program."

(d) Duration of the Committee

The Committee shall complete and submit a report with its recommendations to the City Administrator for the District of Columbia within one hundred and twenty (120) days after the effective date of the Compensation Units 1 and 2 Agreement.

(Ex. C-1 at pp. 20-21).

1. Duty to Design a Plan Sustainable within the Budget

The parties disagree on whether the Committee designed "a plan sustainable within the allocated budget" as required by section I(3)(A)(4)(c) of the Agreement. The Committee concluded that it carried out this duty, and the Complainant argued that the Committee's conclusion is entitled to deference. (Complainant's Post-Hearing Br. at pp. 6 & 17; Exceptions at p. 15). The Respondent and its witnesses insisted that the plan was not sustainable within the budget. (Tr. at pp. 25, 27-28, 61-65, 77-76; Respondent's Post-Hearing Br. at pp. 3 & 7).

2. Duty to Submit a Report with Recommendations to the City Administrator

The Agreement directs the Committee to "complete and submit a report with its recommendations to the City Administrator. . . ." (Ex. C-1, § I(3)(A)(4)(d)). The parties disagree about the import of the words "complete" and "recommendations" in this directive. The Respondent contends that the Committee's report and recommendations were not complete. (Tr. 75 & 96-97). Similarly, the hearing examiner noted that the Committee attached a one-page table to its report and recommendations. The hearing examiner found that that submission did not meet the requirements listed in section I(3)(A)(4)(c), which she quoted. In addition, the hearing examiner noted that a memorandum from the Chief Financial Officer stated that he

would require "the findings of the Committee in order to project the fiscal impact on the District's budget and financial plan." (Ex C-2). The hearing examiner stated that the "document submitted by the Committee did not make findings." (R & R at p. 16).

In its third exception, the Complainant objects that "the Hearing Examiner reached beyond the parties' agreement to require compliance with a unilaterally issued memorandum by the Chief Financial Officer. This memorandum was not the parties' agreement." (Exceptions at p. 14). This assertion is inconsistent with the testimony of the Complainant's own witness, Al Bilik, Executive Assistant to the Union's Executive Director. Exhibit C-2 was introduced into evidence by the Complainant and identified by Bilik as "a condensed version of the agreement that negotiated [*sic*] that was referred to earlier. . . ." (Tr. at p. 39). Counsel for the Complainant had the witness read into the record the very language of the exhibit regarding findings that the hearing examiner also quoted to the dissatisfaction of the Complainant. (*Id.* at 41-42). Even if Exhibit C-2 were not what the Complainant's witness testified it was, the Complainant's objection would still be of no merit because the hearing examiner first noted that the Committee's report and recommendation did not satisfy the text of the Agreement and then alluded only secondarily to Ex. C-2.

Aside from the bearing of Ex. C-2 on the question, the Union's position is that the Committee by consensus agreed upon the submission. (Tr. at pp. 44-45 & 76; Exceptions at p. 15). The Union argues, "If the parties agreed that they made their submission to the City Administrator, it is not for the Hearing Examiner to second-guess the recommendations as being incomplete." (Exceptions at p. 15). This is an incongruous argument for the Complainant to make as the reason the hearing examiner took a second look at the Committee's recommendations is because the Complainant brought this case before the Board, which referred the case to the hearing examiner. If the hearing examiner simply assumed that either side's version of the facts was correct, she would not have been performing her assigned task and she could not make findings that would assist the Board in determining whether there was a genuine dispute. Because the hearing examiner performed her assigned task, it is clear from her findings and the arguments of the parties that there is a genuine dispute on what was required for the Committee's report to be complete.

In addition, the parties do not agree on the meaning of the word "recommendations" as used in section I(3)(A)(4)(d) of the Agreement. The District contends that the Committee was to make its recommendations to the City Administrator, who could reject them. (Tr. at pp. 85-86; Opposition at p. 4). The Union regards the City Administrator's role as ministerial and contends that the Agreement uses the word "recommendations" because "the plan could not be anything other than a recommendation until the City Council appropriated money to fund it." (Complainant's Post-Hearing Br. at p. 17).

Thus, the parties genuinely dispute the role of the City Administrator under the Agreement. The District adduced testimony and presented arguments in support of its view that the understanding and practice of the parties was that the City Administrator had an active role in the approval of recommendations. (Tr. at pp. 75, 79-80, 96; Opposition at pp. 8-9). Pursuant to that role, the City Administrator sent the recommendations back because they were not

sustainable within the budget and were not consistent with the provisions of the Agreement. (Respondent's Post-Hearing Br. at p. 3). The Union denies that the Agreement gave the City Administrator the authority to reject recommendations, asserting that "the City Administrator's sole function in the pension reform process is to take the steps necessary to implement the plan." (Complainant's Post-Hearing Br. at p. 17). The step the Union identifies in particular is the step of requesting the Chief Financial Officer to propose a fiscal impact statement. The City Administrator could make this request, but the Committee could not because only the mayor or his designee, a Council member, or a Council committee clerk may ask the Chief Financial Officer to prepare a fiscal impact statement. (*Id.* at 10-11).

The hearing examiner found logical flaws in both positions:

> If Respondent is correct, i.e., that the Committee makes recommendations to the City Administrator who then can respond to those recommendations, then it seems illogical to the Hearing Examiner that the parties would have explicitly provided that the Committee ceased to exist after it completed its submission to the City Administrator. The result would be that the City Administrator would not have an entity to which to respond. Thus, by default, the City Administrator would be the decision maker, a result not stated in the Agreement and not, to this reader, a reasonable interpretation of the language. (Elkouri & Elkouri, 6th ed., pp. 470-471). On the other hand, if the City Administrator's role was only that of a conduit, as argued by Complainant, there would be no reason to have the document submitted to that office in the first place. It could be sent directly to the CFO.

(R & R at p. 15).

The Complainant objects in its second exception that it gave a reason to have the Committee submit the document to the City Administrator rather than to the Chief Financial Officer directly: "In its brief, the Union presented a statutory[2] explanation for the parties' need to include the City Administrator in the process. But rather than consider the Union's argument, the Hearing Examiner determined the District's admittedly unreasonable explanation must be the only explanation, or at least that it was enough, in the absence of a counter-argument, to create a genuine dispute." (Exceptions at p. 10). In the *presence* of the Union's counter-argument, however, the District's argument that the City Administrator had decision-making authority is enough to create a genuine dispute.

Related to this exception, the Union excepts to the hearing examiner's refusal to allow Eric Bunn, president of Local 2725 of the American Federation of Government Employees, to testify on the contractual role of the City Administrator. *Id.* Before Mr. Bunn began his

[2] Actually, the Union cited the website of the Chief Financial Officer rather than a statute in support of its assertion that only the mayor or his designee, a Council member, or a Council committee clerk may ask the Chief Financial Officer to prepare a fiscal impact statement. (Complainant's Post-Hearing Br. at p. 11).

testimony, the hearing examiner tried to determine the probative value of his testimony on this point:

> HEARING EXAMINER: But is that something your witness could testify about?
>
> MS. ZWACK: Yes. . . . Based on being part of the -- when in two negotiations and having drafted the Article 7.
>
> HEARING EXAMINER: I mean, how does he know what the authority of the City Administer is?
>
> MS. ZWACK: Based on a contractual authority?
>
> HEARING EXAMINER: Then he's interpreting what this is. . . . Again, I don't really want these provisions on [pages] 18, 19, 20 and 21 [of Ex. C-1] reviewed any more. They say what they say and each side interprets it differently, and I think the language is open to interpretation on both parts and I'm more interested in reading your final arguments on that, but I don't need for him to say, this is what he thinks it said, I really don't.

(Tr. at pp. 116-17).

Thus, the hearing examiner determined that the witness's testimony interpreting the Agreement would not have probative value. Issues concerning the probative value of evidence are reserved to the hearing examiner. *Bonaccorsy v. Exec. Council F.O.P./Metro. Police Dep't Labor Comm.*, 59 D.C. Reg. 3364, Slip Op. No. 826 at p. 6, PERB Case No. 03-S-01 (2011).

D. Conclusion

The evidence received by the hearing examiner along with the arguments of counsel are more than enough to support the hearing examiner's conclusion that "[t]he role of the City Administrator is only one of the items in the relevant provision of the Agreement that [the] Hearing Examiner found was 'reasonably susceptible of different constructions or interpretations'." (R & R at p. 15) (quoting *Lee v. Flintkote Co.*, 593 F.2d 1275, 1282 (D.C. Cir. 1979)). The Agreement's provisions calling for completion of a report and a plan sustainable within the budget are also reasonably susceptible of different interpretations. On all these matters the parties have genuine disputes. Those genuine disputes, along with the Union's failure to prove a repudiation of the Agreement, prevent the Union from establishing an unfair labor practice. Therefore, the Board adopts the hearing examiner's recommendation that the case be dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint is 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 9, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision in PERB Case No. 08-U-36 was served via U.S. Mail and electronic mail to the following parties on this the 9th day of May, 2013:

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