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: American Federation of Government Employees, AFL-CIO Local 631, Complainants, v. The District of Columbia *et al.*, Respondents.	Unfair Labor Practice Complaint PERB Case No. 09-U-57 Opinion No. 1264

DECISION AND ORDER

I. Statement of the Case

The American Federation of Government Employees, AFL-CIO, Local 631 ("Union", "AFGE", or "Complainant") filed an Unfair Labor Practice complaint against The District of Columbia, *et al.*, ("Respondent") alleging unfair labor practices ("ULP") in violation of D.C. Code §1-617.04(a). Respondent denies these allegations in its Answer. Complainant filed a response styled "Answer in Response to Answer." The matter proceeded to a hearing examiner who issued a Report and Recommendation that recommended a determination in favor of the Complainant. ("R&R").[1] Respondent then filed Exceptions to the Hearing Examiner's Report and Recommendations ("Exceptions"). Complainant then filed a response to the Respondent's Exceptions to the Hearing Examiner's Report and Recommendations ("Response to Exceptions").

[1] Respondent filed a Post-Hearing Brief with the Hearing Examiner.

II. Discussion

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

> The American Federation of Government Employees, Local 631 (Union), Complainant, filed this Unfair Labor Practice Complaint. . . alleging that the District of Columbia Government (DCG), Respondent, through its Office of Labor Relations and Collective Bargaining (OLRCB) and its Office of Property Management (OPM) committed unfair labor practices (ULP) when it "interfered with, restrained and prevented LOCAL 631 from representing its members as the exclusive representative [and] prevented Local 631 from arbitrating grievances on behalf of its members" which, the Union contends, constitutes "failing to bargain in good faith... in violation of D.C. Code § 1-617.04(a)(1) and (5) (2001 ed.). (Complaint at 3).
>
> ...
>
> In the Answer, respondent put forth several affirmative defenses: that PERB lacks jurisdiction to hear the matter because it relates to a contractual dispute, that the parties do not have a binding collective bargaining agreement, that the allegations "do not make out a claim under the PERB statute or its jurisdiction" and that the Complaint is time barred. Second, it filed a Motion of Respondents to Allow Out of Time Answer to be Filed and Considered, stating that although it did not respond in a timely manner, since it did not dispute the facts as alleged, but only disagreed with the Complainant's legal conclusions there was no harm in accepting the pleading. Third, it filed a Motion for Administrative Dismissal in which it argued that the matter should be dismissed because PERB lacked jurisdiction to grant the relief sought by Complainant.
>
> ...

(R&R at pgs. 1-2).

Having considered the pleadings filed with the Board, the Hearing Examiner identified the following issues for resolution:

> **<u>Issues</u>**
>
> 1. What sanctions, if any, should be imposed on Respondent for its failure to submit its response in a timely manner?

2. Does PERB lack jurisdiction to hear this matter?

3. Did Complainant meet its burden of proving that Respondent committed an unfair labor practice in this matter?

(R&R at p.3).

In addition to the issues presented, the Hearing Examiner, made the following recommendations regarding the Complainant's procedural motions:

Motions

1. What sanctions, if any, should be imposed on Respondent for its failure to submit its response in a timely manner?[2]

. . .

The language of Board Rule 520.6[3] is mandatory and not precatory.

. . .

Complainant, on the other hand, contends that the answer should not be admitted, and that, pursuant to Board Rule 520.7[4], Respondent should be deemed "to have admitted the material facts alleged in the complaint and to have waived a hearing."

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[2] Complainant filed a pleading styled "Union's Response to the Motion of the Respondent's to Allow Out of Time Answer to be Filed and Considered.

[3] 520.6 - Answer - Contents

> A respondent shall file, within fifteen (15) days from service of the complaint, an answer containing a statement of its position with respect to the allegations set forth in the complaint. The answer shall also include a statement of any affirmative defenses, including, but not limited to, allegations that the complaint fails to allege an unfair labor practice or that the Board otherwise lacks jurisdiction over the matter.
>
> The answer shall include a specific admission or denial of each allegation or issue in the complaint or, if the respondent is without knowledge thereof, the answer shall so state and such statement shall operate as a denial. Admissions or denials may be made to all or part of an allegation but shall clearly meet the substance of the allegation.

[4] 520.7 - Untimely Answer

> A respondent who fails to file a timely answer shall be deemed to have admitted the material facts alleged in the complaint and to have waived a hearing. The failure to answer an allegation shall be deemed an admission of that allegation.

> . . .
>
> Therefore, pursuant to Board Rule 520.7, Respondent will have been deemed to have "admitted the material facts alleged in the complaint and to have waived a hearing." *See, e.g., Unions in Compensation Unit 20, v. D.C. Department of Health,* 49 DCR 11131, Slip Op. 688, PERB Case No. 02-U-13 (2002).
>
> 2. Does PERB lack jurisdiction to hear this matter?[5]

Although the Hearing Examiner determined that the Respondent's Motion for Administrative Dismissal was untimely, she concluded that the issue of the Board's jurisdiction must still be addressed. (See R&R at p. 6).

> Relying on *Louisville and Nashville Railroad Company v. Mottley,* 211 U.S. 149 (1908), Respondent argues that jurisdiction is always at issue whether or not it is raised by the parties. Therefore, even if its pleadings are barred, the Hearing Examiner has the authority, even the duty, to determine jurisdiction. Respondent contends that PERB lacks jurisdiction for two reasons. First, it asserts that the D.C. Official Code requires that all reductions-in-force be appealed to the D.C. Office of Employee Appeals. Second it contends that Article 4B of the Labor Agreement between the parties takes precedent, and cites *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960) in support of its position. It contends that arbitration is consensual and therefore compelling arbitration would violate *Warrior and Gulf,* and other cases it cites. (Tr, 12). (Citations corrected).
>
> . . .
>
> [T]he Board has asserted jurisdiction of contractual disputes where it determines that the violation of a collective bargaining agreement constitutes an unfair labor practice. The Board will

[5] Respondent filed a document styled "Motion for Administrative Dismissal." The Motion asserted three reasons to dismiss the Complaint: (1) timeliness; (2) that disputes regarding a Reduction in Force ("RIF") are outside the Board's jurisdiction; and (3) that the basis for the complaint is contractual, and therefore, not within the Board's jurisdiction. The Hearing Examiner addresses the latter assertions but not the argument that the Complaint is untimely. Respondent's Motion for Administrative dismissal asserts that the timing of the complaint should be based on when Complainant filed its grievance pertaining to the implementation of the RIF (April 9, 2009). However, the Complaint establishes that the Union was not made aware that the District refused to proceed to address the grievance (or submit to arbitration) until May 28, 2009. Board Rule 520.4 requires that a complaint be filed no later than 120 days from the date the alleged violation occurred. Here the alleged violation took place on May 28, 2009, when the District informed the Union that it would not engage in arbitration of the grievance filed on April 9, 2009, and the Complaint was filed on August 14, 2009 (less than 120 days). Therefore, the Board finds that the Complaint is timely.

often find that the charged action is "egregious and pervasive" and amounts to a repudiation of the collective bargaining agreement and of the bargaining relationship. *See, e.g., District Council 20, American Federation of State, County and Municipal Employees, Locals 1200, 2776, 2401 and 2087 v. District of Columbia Government,* ___ DCR ___, Slip Op. 590, PERB Case No. 97-U-15A (1997).

...

Analysis, Findings and Conclusion

This Board has concluded that where a bargaining obligation exists between the parties, an employer's failure to comply with contractual provisions based on its refusal or failure to recognize its bargaining obligation may constitute a repudiation of the collective bargaining process and violates the employer's duty to bargain in good faith. *See, Teamsters Local Unions No. 638 and 730 v. D.C. Public Schools*, 43 DCR 6633, Slip Op. No. 400, PERB Case No. 93-U-29 (1996). In order to establish an unfair labor practice, the Hearing Examiner must first conclude that Respondent demonstrated bad faith when it refused to arbitrate the grievance. The determination of "good faith" or "bad faith" cannot be made in the abstract. *NLRB v. Alva Allen Industries, Inc.* 369 F. 2d [310] (8th Cir. [1966]). As the Federal Labor Relations Authority noted in *Social Security Administration*, 18 FLRA 511 (1985), in order to ascertain if a party has acted in good faith, the fact finder must look at the totality of the circumstances. Complainant contends that Respondent refused to proceed to arbitration despites the fact that its position that the Agreement could no longer be enforced had been rejected by this Board.

...

For these reasons, the Hearing Examiner concludes that Respondent's action was a repudiation of the parties' agreement and constituted an unfair labor practice. *See also, 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).

Pursuant to PERB rule 520.11, Complainant has the burden of proof in this matter. It must prove its allegations by a preponderance of the evidence, i.e., evidence "which is of greater weight or more convincing that the evidence which is offered in opposition." <u>Black's Law Dictionary</u>, 5th Ed., p. 1064. After

> reviewing the evidence and arguments presented in this matter, consistent with the discussion herein, the Hearing Examiner concludes that Complainant met its burden of proof in this matter.
>
> . . .
>
> **Conclusion and Recommendation**
>
> Based on the evidence presented, and the analysis contained herein, the Hearing Examiner concludes that Complainant met its burden of proof by a preponderance of evidence as required by PERB rule 520.11 that Respondent committed an unfair labor practice. She recommends that the Board award the following relief:
>
> 1) Order respondent to cease and desist from violating D.C. Code 1-617.04(a)(1) and (5);
> 2) Order Respondent to arbitrate the grievance filed by Complainant (Ex U-1);
> 3) Order respondent to post the appropriate notice to employees; and
> 4) Order Respondent to pay the Union its reasonable costs for prosecuting this matter.

(Hearing Examiner's Report at pgs. 1, 2, 3, 5, 8, 9, 10, 11).

In the Respondent's Exceptions to the Hearing Examiner's Report and Recommendation, Respondent asserts the following:

> The power of a tribunal to adjudicate is always the first consideration. In this case, the HE (Hearing Examiner) completely ignored that fundamental tenet.
>
> . . .
>
> PERB jurisdiction is limited by statute. *See* D.C. Official Code §1-605.02 (enumerating the authority of the Board). Adjudicating RIFs (reduction-in-force) is not among powers granted to PERB. The HE failed to address material jurisdictional arguments presented by DGS (District of Columbia Government), as these are governed by statutes outside the CMPA.
>
> . . .
>
> DGS cited *Washington Teachers Union, Local 6 v. D.C. Public Schools*, 960 A.2d 476 (D.C. 2008), in which the District of Columbia Court of Appeals considered the union's appeal of the

> Superior Court decision that dismissed the union's claims. The unions had asserted that the unions could avoid the clear jurisdiction of the Office of Employee Appeals (OEA), the agency assigned by statute to review RIF related complaints. The trial court held that such cases must be brought to OEA. At the beginning of its decision, the Court of Appeals remanded the cases to the trial court and directed the cases be sent to OEA for its consideration. Instead of dismissal, the cases were stayed pending disposition at OEA. *Local 6,* 1125.
>
> In its analysis, the Court of Appeals for the District of Columbia rejected the unions' attempts to avoid the administrative processes of OEA. Throughout the opinion, the Court of Appeals cites to and relies upon D.C. Official Code §1-624.01 (2001 ed.) *et seq.* The unions claimed that they only challenged the promulgated regulations rather than arguing that DCPS reduced the employee compliment in violation of those regulations. However, the colloquy between union counsel and the court showed that the union did in fact claim the RIF was done incorrectly. *Local 6,* 1131. Once the true claim was clearly articulated, the court enforced the Comprehensive Merit Personnel Act. "[T]he claim must be submitted to the appropriate District agency, and the determination whether the OEA has jurisdiction is quintessentially a decision for the OEA to make in the first instance."

(Exceptions at 10, 11, 12, 13).

Complainant raises the following in the Response to the Exceptions:

> **An Agency's Jurisdiction May Not Be Repealed By Implication And Failure to Bargain Includes A Refusal To Carry Out The Terms Of A Negotiated Agreement**
>
> The grounds for the District's Exceptions are that the Public Employees Relations Board (PERB) lacked jurisdiction over the unfair labor practice filed by the Union, asserting D.C. Code §§1-624.01, 1-624.04, and 1-624.08(j) exclude reduction-in-force issues from arbitration.
>
> The jurisdiction and authority of the PERB, for a ULP, including appeal rights from Board decisions, is set forth in the CMPA, D.C. Code §§ 1-605.02, 1-617.02, 1-617.04, and 1-617.13 (2001). PERB has authority to establish and implement a labor management relations program for the District of Columbia; to hear and resolve unfair labor practices; and a party, who is dissatisfied with the Board's decision, may appeal to the D.C.

Superior Court. *District Council 20, American Federation of State, County, and Municipal Employees, Locals 1200 v. District of Columbia, Office of the Controller*, Slip. Op. 503, PERB Case No. 96-UC-01 (1996) and *American Federation of State, County, and Municipal Employees, D.C. Council 20 and District of Columbia, Office of the Controller*, Slip Op. 508, PERB Case No. 96-UC-01 (1997), held the Board's jurisdiction is not limited, unless a cause of action has been expressly placed in the jurisdictional authority of another forum or when here is an actual and express conflict between the Board's authority under the CMPA and another statute. Repeal by implication of existing collective bargaining rights, are narrowly construed by the Board. *District Council 20* at 3-6 and *D.C. Council 20* at 2-3.

The statutory reduction-in-force procedures do not limit the rights of employees and/or unions to arbitrate issues, which may arise during a reduction in force. The specific provisions of the reduction-in-force procedures, D.C. Code § 1-624.08(a) and (j), reference collective bargaining, limit the negotiability of the identification of positions, which are to be abolished and prohibits negotiation of reductions-in-force, but does not cover the arbitration of reduction-in-force issues covered by a party's collective bargaining agreement. D.C. Code §1-616.52 (d), e, and (f) governs disciplinary grievances and appeals and permits an employee to appeal adverse actions under the OEA procedures or a collective bargaining agreement, but not both. D.C. Code § 1-606.02 (b), of the CMPA, outlines the authority of the OEA and excludes, from the authority of OEA, reduction-in-force reviews which are included in a collective bargaining agreement. There is no specific statutory exclusion for arbitration of reduction-in-force issues, which are covered by a party's collective bargaining agreement. As the Board held in *District Council 20 and D.C. Council 20*, to remove a cause of action from the jurisdiction of the Board, through statutory authority, the repeal must be express and explicit. It is clear that the authority of the Board to resolve a dispute on negotiation, over a reduction in force, is prohibited by the Statute. The Board would lack subject matter jurisdiction over a negotiability appeal. *American Federation of State, County and Municipal Employees, Council 20 v. District of Columbia General Hospital*, Slip Op. 227 at p 4-5, PERB Case No. 88-U-29 (1989), rejected an argument that a matter, which is non-negotiable, is not arbitrable. The reduction-in-force statute did not expressly exclude matters, covered by a collective bargaining agreement, from the grievance and arbitration provisions of a binding collective bargaining agreement. Further, the statutory authority granted to the OEA specifically excluded any reduction-in-force review,

> which is covered by a collective bargaining agreement. The Hearing Examiner's Report correctly determined the Board has subject matter jurisdiction of this ULP, *R & R 5-7.*

(Opposition at pg. 2).

For the reasons articulated by the Complainants in their Opposition, the exceptions to the Hearing Examiner's R&R filed by the Respondent shall be denied. The Board rejects Respondent's argument that the Board lacks jurisdiction of this matter. As to the recommendations of the Hearing Examiner, the Board finds that the recommendations are reasonable, consistent with Board precedent and supported by the record. As a result, the Hearing Examiner's findings and analyses are adopted by the Board.

ORDER

IT IS HEREBY ORDERED THAT:

1. Respondent District of Columbia shall cease and desist from violating D.C. Code 1-617.04(a)(1) and (5);

2. Respondent District of Columbia shall arbitrate the grievance filed by Complainant;

3. Respondent District of Columbia shall post the appropriate notice to employees; and

4. Respondent District of Columbia shall pay the Union its reasonable costs for prosecuting this matter.

5. 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.

February 23, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order and Notice in PERB Case No. 09-U-57, Slip Opinion No. 1264 is being transmitted electronically and *via* U.S. Mail to the following parties on this the 9th day of May, 2012.

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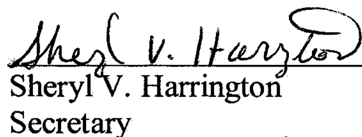

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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1264, PERB CASE NO. 09-U-57 (February 23, 2012).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered the DISTRICT OF COLUMBIA to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by the actions and conduct set forth in Slip Opinion No. 1264.

WE WILL cease and desist from interfering, restraining, or coercing employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act ("CMPA").

WE WILL cease and desist from refusing to bargain collectively in good faith with the American Federation of Government Employees, AFL-CIO, Local 631 as the exclusive bargaining agents.

District of Columbia

Date:____________________ By:________________________

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 1100 4th Street, SW, Suite E630; Washington, D.C. 20024. Phone: (202) 727-1822.

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

May 9, 2012