



## II. Hearing Examiner's Report and Recommendation

### A. Background

AFSCME Local 2087 is the exclusive representative of a bargaining unit of all full-time, non-faculty and continuing employees of UDC.<sup>3</sup> These employees are part of Compensation Units 1 and 2.<sup>4</sup>

In its Complaint, AFSCME Local 2087 alleged that UDC refused to pay step increases to bargaining unit employees since fiscal year (FY) 2011. Prior to FY 2011, UDC awarded step increases to employees subject to satisfactory completion of particular requirements.<sup>5</sup> The Fiscal Year 2011 Budget Support Act of 2010, D.C. Law 18-223, took effect and prohibited step increases and cost of living adjustments, notwithstanding any other provision of a collective bargaining agreement for the period between October 1, 2010, through September 30, 2011.<sup>6</sup> On October 27, 2011, the District lifted the statutorily mandated freeze on step increases for FY 2012.<sup>7</sup> The D.C. Department of Human Resources issued an electronic District Personnel Manual instruction stating “the freeze on within-grade increases (WIGIs) implemented and continued during fiscal year 2011 is being discontinued in FY 2012...Consequently, appropriate agencies are directed to take required steps to ensure that any system restrictions are removed to ensure that WIGIs resume this fiscal year.”<sup>8</sup> UDC, asserting that the lift of the freeze with respect to the University must come from the UDC Board of Trustees, took no action and has not paid bargaining unit employees step increases since the freeze.<sup>9</sup>

On August 7, 2014, AFSCME Local 2087 received a memorandum from UDC's Vice President of Human Resources stating that UDC would not provide step increases to any employees until further notice, due to budgetary pressures and an upcoming implementation of the District's Department of Human Resources Classification and Compensation Reform Project.<sup>10</sup> AFSCME Local 2087 did not file a complaint at that time. On April 14, 2015, the Union informed the University, in writing, that the University's withholding of the WIGIs constituted “an unfair labor practice.”<sup>11</sup> The Union did not file a complaint at that time, either.

In the years following the August 2014 memorandum, the parties met and had discussions several times a year regarding the step increases, but never reached an agreement. Current AFSCME Local 2087 President LaVerne Gooding-Jones testified that, on September 3, 2015, UDC officials stated that, if the District's Classification and Compensation project went

---

<sup>3</sup> PERB Certification No. 149.

<sup>4</sup> Report at 3.

<sup>5</sup> Complaint at 2.

<sup>6</sup> Report at 4.

<sup>7</sup> Report at 4.

<sup>8</sup> Exhibit E-DPM Instruction

<sup>9</sup> Report at 18. UDC's former Vice President of Human Resources stated that some employees received step increases due to an automated system.

<sup>10</sup> Report at 6.

<sup>11</sup> Report at 6-7, Union Exhibit 16.

forward, all union members who were not at their correct steps would be adjusted. Gooding-Jones testified that during the discussion UDC officials stated that UDC would pay step increases back to 2012.<sup>12</sup> In October of 2015, AFSCME Local 2087 requested a meeting with UDC President Ronald Mason. The agenda for the meeting included step increases. Gooding-Jones testified that President Mason gave her the impression that he believed union members were entitled to the funds and he was going to find the funds.<sup>13</sup> Gooding-Jones and other union officials met with UDC again in November of 2015, on December 3, 2015, on February 4, 2016, and on March 17, 2016. During all these meetings step increases were discussed and Gooding-Jones testified that UDC did not report any change to the status of the step increases but that it was still trying to find funding.<sup>14</sup> The March 17, 2016, meeting was the last meeting attended by UDC's former Vice President of Human Resources, Myrtho Blanchard. Gooding-Jones testified that Blanchard informed her that, while she was leaving UDC, the administration would continue to work to get the step increases for members.<sup>15</sup> Blanchard did not testify at the hearing.

AFSCME Local 2087 continued to meet with Blanchard's successor, Patricia Johnson, on November 3, 2016, and with President Mason, in December of 2016.<sup>16</sup> During the November meeting Gooding-Jones testified that UDC offered to pay the step increases for 2015 forward. This proposal was submitted to the union members and not accepted because they wanted retroactive payments to 2012.<sup>17</sup>

On June 2, 2017, UDC emailed Andrew Washington, Executive Director of AFSCME District Council 20. The email addressed the issue of the step increases and stated UDC's position that nothing in the collective bargaining agreement required UDC to grant step increases.<sup>18</sup> The email also stated that UDC was interested in resolving the matter without legal recourse and proposed a meeting between the parties.<sup>19</sup> On June 5, 2017, the parties met to discuss the step increases, but no resolution was reached.<sup>20</sup> AFSCME Local 2087 did not file a complaint at that time. Afterwards, Mr. Washington sent a follow-up email to UDC, requesting a status update. On June 22, 2017, UDC responded to Mr. Washington by resending the June 2, 2017, email.<sup>21</sup> On June 28, 2017, AFSCME Local 2087 filed a grievance regarding the step increases. On July 26, 2017, UDC denied the grievance.<sup>22</sup> After UDC's denial, AFSCME Local 2087 filed the instant Complaint.

---

<sup>12</sup> Report at 8-9.

<sup>13</sup> Report at 9.

<sup>14</sup> Report at 9-10.

<sup>15</sup> Report at 10.

<sup>16</sup> Report at 11.

<sup>17</sup> Report at 11.

<sup>18</sup> Report at 15.

<sup>19</sup> Report at 15.

<sup>20</sup> Report at 22.

<sup>21</sup> Report at 23.

<sup>22</sup> Report at 12.

## **B. Recommendations**

The Hearing Examiner addressed two issues: (1) whether AFSCME Local 2087 timely filed the Complaint, and (2) whether UDC unilaterally and without bargaining ceased paying certain step increases.<sup>23</sup>

The Hearing Examiner found that the Complaint was timely filed. Based on the evidence presented at the hearing, the Hearing Examiner concluded that AFSCME Local 2087 was not clearly and unequivocally on notice of UDC's refusal to pay the step increases until June 22, 2017.<sup>24</sup> The Hearing Examiner also concluded that the unfair labor practice was ongoing and continuing as of 2012 to the date of the Complaint's filing.

The Hearing Examiner further concluded that UDC violated section 1-617.04(a)(1) and (5) of the D.C. Official Code by unilaterally failing and refusing to pay the bargaining unit employees step increases without first bargaining over the matter.<sup>25</sup>

## **III. Discussion**

The Board will affirm a Hearing Examiner's Report and Recommendation if the recommendation is reasonable, supported by the record, and consistent with Board precedent.<sup>26</sup> The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the hearing examiner."<sup>27</sup> Mere disagreements with a hearing examiner's findings or challenges to the hearing examiner's findings with competing evidence do not constitute proper exceptions, if the record contains evidence supporting the hearing examiner's conclusions.<sup>28</sup>

The Board has reviewed the findings, conclusions, and recommendation of the Hearing Examiner and, for the reasons discussed below, the Board rejects the Hearing Examiner's determination that the Complaint was timely filed.

---

<sup>23</sup> AFSCME Local 2087 also alleged that UDC committed an unfair labor practice by refusing to arbitrate the Union's June 28, 2017 grievance. The Hearing Examiner stated that AFSCME Local 2087 did not seriously pursue this allegation at the hearing or in its brief. The Hearing Examiner recommended dismissal of AFSCME Local 2087's position that UDC violated the D.C. Official Code by refusing to arbitrate over the June 28, 2017 grievance. Board Rule 550.18 states that if a party fails to prosecute an action, the Hearing Examiner may recommend the Board dismiss the action with prejudice. No Exceptions were filed on this issue. Therefore, we accept the Hearing Examiner's dismissal of this allegation.

<sup>24</sup> Report at 36.

<sup>25</sup> Report at 38.

<sup>26</sup> See *Am. Fed'n of Gov't Emp., Local 1403 v. D.C. Office of the Attorney General*, 59 D.C. Reg. 3511, Slip Op. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012).

<sup>27</sup> *Council of Sch. Officers, Local 4, Am. Fed'n of Sch. Adm'r v. Slip Op.* 1016 at 6; *Tracy Hatton v. FOP/DOC Labor Comm.*, 47 D.C. Reg. 769, Slip Op. No. 451 at 4, PERB Case No. 95-U-02 (1995).

<sup>28</sup> *Sinobia Brinkley v. Fraternal Order of Police/Metro. Police Dep't Labor Comms., District 20, Local 2087*, 60 D.C. Reg. 17387, Slip Op. No. 1446, PERB Case No. 10-U-12 (2013).

### **A. Past Practice**

In its Complaint, AFSCME Local 2087 asserts that UDC violated the CMPA by unilaterally changing a past practice of providing step increases to bargaining unit employees. In its Exceptions, UDC argues that the Hearing Examiner erred in finding that UDC had a past practice of paying step increases and that the failure to pay step increases constituted an unfair labor practice.<sup>29</sup> UDC argues that AFSCME Local 2087 has not satisfied its burden by a preponderance of the evidence that such a past practice existed.<sup>30</sup>

The Board has stated that a unilateral change in established and bargainable terms and conditions of employment constitutes an unfair labor practice, unless such terms and conditions are specifically covered by the parties' collective bargaining agreement.<sup>31</sup> A past practice is an unwritten term and condition of employment.<sup>32</sup> Employers are obligated to observe these unwritten terms and the Board has found that a unilateral change to a past practice is an unfair labor practice.<sup>33</sup>

The Hearing Examiner credited the testimony of AFSCME Local 2087's witnesses in finding that the practice of step increases dated back to the 1970s.<sup>34</sup> The Hearing Examiner also noted that UDC's witnesses did not include Blanchard and President Mason, whom the Hearing Examiner considered "vital" witnesses.<sup>35</sup> The Hearing Examiner also noted that UDC's witnesses were hired after the step increases became an issue.<sup>36</sup> Furthermore, the Hearing Examiner noted that there had been interruptions in the payments of the step increase before the 2011 freeze, but payments resumed following each interruption. The Hearing Examiner found that "these events did not relieve UDC of its obligation to pay the WIGIs after the lifting of the 2011 freeze unless it first bargained with the Union."<sup>37</sup> The Hearing Examiner made a factual determination that a past practice existed based on the evidence presented, which is supported by the record.

The Board agrees with the Hearing Examiner's conclusion that there was a past practice of paying employees step increases.

---

<sup>29</sup> Exceptions at 8.

<sup>30</sup> Exceptions at 11.

<sup>31</sup> *AFGE, Local 2978 v. DOH*, 62 D.C. Reg. 2874, Slip Op. No. 1499 at 1-2, PERB Case No. 14-U-14 (2015).

<sup>32</sup> *FOP/MPD Labor Comm. v. MPD*, 60 D.C. Reg. 9212, Slip Op. No. 1391 at 22, PERB Case Nos. 09-U-52 and 09-U-53 (2013).

<sup>33</sup> *Dist. Council 20 AFSCME Locals 1200, 2776, 2401 & 2087*, 46 D.C. Reg. 6513, Slip Op. No. 590, PERB Case No. 97-U-15A).

<sup>34</sup> Report at 37.

<sup>35</sup> Report at 35.

<sup>36</sup> Report at 35.

<sup>37</sup> Report at 37.

## B. Timeliness

Board Rule 520.4 states that an unfair labor practice complaint must be filed no later than 120 days after the date on which the alleged violations occurred. The Board has stated that the 120-day filing deadline for a complaint begins to run when the complainant first knew or should have known of the acts giving rise to the alleged violation.<sup>38</sup>

The Board disagrees with the Hearing Examiner's finding that the unfair labor practice violation was "an ongoing and continuing one."<sup>39</sup> The Board has previously looked to the Superior Court, which has stated, "...such violations are limited to those 'whose character as a violation did not become clear until [they] w[ere] repeated during the limitations period, typically because it is only [the] cumulative impact...that reveals [their] illegality.'"<sup>40</sup> Specifically, the Superior Court observed, "[T]he Court in *AKM* noted that the 'mere failure to right a wrong... cannot be a continuing wrong which tolls the statute of limitations,' for if it were, 'the exception would obliterate the rule.'"<sup>41</sup> The Board finds that the facts in this case do not satisfy the Superior Court's definition of a continuing violation.

The Hearing Examiner concluded that June 22, 2017, was the date that AFSCME Local 2087 first had knowledge that UDC would not pay step increases.<sup>42</sup> The Board finds the Hearing Examiner's conclusion that the Complaint was timely filed is unreasonable and inconsistent with the record.

The Board considers the record to determine when AFSCME Local 2087 knew or should have known that UDC had ended its past practice of paying step increases. The record shows that on October 27, 2011, the statutorily mandated freeze on step increases was lifted. Since the freeze, UDC has intentionally not paid step increases.<sup>43</sup> UDC's 2014 Memo clearly stated, "The University will not be issuing step increases or within grade increases to any employees until further notice due to budgetary pressures..."<sup>44</sup> AFSCME Local 2087 clearly knew as of its receipt of the 2014 Memo that UDC was not paying step increases and that its action constituted an unfair labor practice. In fact, AFSCME Local 2087 noted almost a year later, in response to the 2014 Memo, that "The University action of denying unionized positions their within-grade salary increases that have met the appropriate waiting period is an Unfair Labor Practice."<sup>45</sup> Yet, AFSCME Local 2087 did not file an unfair labor practice complaint at that time.

AFSCME Local 2087's President testified that the Union believed UDC's actions had amounted to an unfair labor practice for almost two years as of 2016, but still failed to file a

---

<sup>38</sup> *Pitt v. D.C. Dep't of Corrections*, 59 D.C. Reg. 5554, Slip Op. No. 998 at p. 5, PERB Case No. 09-U-06 (2009).

<sup>39</sup> Report at 36.

<sup>40</sup> *MPD v. FOP/MPD Labor Comm.*, 62 D.C. Reg. 14606, Slip Op. No. 1535, PERB Case No.09-U-48(R)(2009) (citing *AKM LLC, d/b/a Volks Constructors v. Sec'ty of Labor*, 675 F.3d 752, 757 (D.C. Cir. 1977)).

<sup>41</sup> *Id.*

<sup>42</sup> Report at 36.

<sup>43</sup> Answer at 2.

<sup>44</sup> Union Exhibit 15.

<sup>45</sup> See n.11, above.

complaint until 2017.<sup>46</sup> The record shows that the unilateral change occurred in 2011 when the salary freeze was lifted and UDC did not resume its past practice of paying step increases, and AFSCME Local 2087 knew or should have known of the unilateral change by 2014, at the latest, well before the Complaint was filed on October 17, 2017. Although a unilateral change to a past practice is an unfair labor practice, the Board finds that the Complaint is untimely.

UDCs representatives continued to assure AFSCME Local 2087, in several meetings from 2011 through 2016, that employees were entitled to the within-grade salary increases and that the University wanted to resolve the matter amicably without legal recourse. Those assurances could be viewed as an attempt to lull AFSCME Local 2087 into complacency and, if the facts were different, could have provided a basis to toll filing deadline. However, the Union witnesses' testimony, noted by the Hearing Examiner, indicates that AFSCME Local 2087 was clearly aware of the unfair labor practice years before it filed the complaint at issue here. Notwithstanding UDC's actions, the Union was put on notice of the unfair labor practice when it received the University's August 2014 memorandum, and it sat on its rights to its detriment.<sup>47</sup>

#### **IV. Conclusion**

The Board finds that the unfair labor practice complaint was filed untimely and dismisses it in its entirety.

#### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. The American Federation of State, County, Municipal Employees, District Council 20, Local 2087's unfair labor practice 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**

By unanimous vote of Board Chairperson Douglas Warshof and Board Members Mary Anne Gibbons, Ann Hoffman, Barbara Somson, and Peter Winkler.

May 28, 2020

Washington, D.C.

---

<sup>46</sup> Tr. at 46.

<sup>47</sup> The Hearing Examiner found that the Union was put on notice of the University's unfair labor practice by the June 22, 2017 email that University Vice President Johnson's executive assistant sent to Union Executive Director Washington. The June 22 email, however, was simply a verbatim retransmission of a June 5 email that Johnson herself had sent to Washington. Neither the Union nor the Hearing Examiner satisfactorily explained what the Union learned on June 22 that it did not already know on June 5. Accordingly, even if we agreed with the Hearing Officer regarding the significance of the email, we would find that the Union had 120 days from June 5 to file a complaint, and therefore that the October 18 complaint was untimely.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 18-U-03, Opinion No. 1751 was sent by File and ServeXpress to the following parties on this the 17<sup>th</sup> day of June, 2020.

Brenda C. Zwack  
Murphy Anderson PLLC  
1401 K Street, NW  
Suite 300  
Washington, D.C. 20005

Anessa Abrams  
FordHarrison LLP  
1300 19<sup>th</sup> Street NW  
Suite 420  
Washington, D.C. 20036

/s/ Merlin M. George  
PERB