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**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:)	
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)	
)	
Barbara Hagans,)	PERB Case Nos. 99-S-06 and 99-U-26
)	
)	
Complainant,)	
)	
)	Opinion No. 646
v.)	
)	
)	
)	
)	
AMERICAN FEDERATION OF STATE,)	
COUNTY AND MUNICIPAL EMPLOYEES,)	
LOCAL 2743,)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

This case involves a consolidated standards of conduct and unfair labor practice complaint filed by Barbara W. Hagans (Complainant) against the American Federation of State, County and Municipal Employees (AFSCME), Local 2743 (Respondent). The Complainant is alleging that AFSCME, Local 2743 violated D.C. Code §§1-618.3 (a)(1) and 1-618.4(b)(1)¹ by failing to: (1) assist her in the processing of a grievance; and (2) move her grievance to arbitration. The Respondent denied the allegations.

¹The Complaint also alleged that the Department of Consumer and Regulatory Affairs (DCRA) and the Department of Health violated the collective bargaining agreement between DCRA and AFSCME, Local 2743. However, the Executive Director dismissed this allegation. The Complainant did not appeal the Executive Director's determination.

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A hearing was held. The Hearing Examiner found that the Respondent did not violate D.C. Code §§1-618.3 (a)(1) and 1-618.4 (b)(1). The Complainant filed Exceptions to the Hearing Examiner's Report and Recommendation. The Hearing Examiner's Report and Recommendation and the Complainant's Exceptions are before the Board for disposition.

I. Background:

In 1998, the Complainant was a Contact Representative at the Department of Consumer and Regulatory Affairs (DCRA). In this capacity, she served as a liaison between several licensing boards (those for nursing, pharmacy, podiatry, and physical therapy) and DCRA. Among other things, her duties included: reviewing license applications, handling complaints, preparing correspondence for board members, and preparing agendas for monthly meetings. In February 1998, the Complainant was detailed to the Department of Health (DOH) to provide support for the Board of Nursing.

In July 1998, the Complainant received a performance appraisal from her supervisor of record at DCRA. Although the overall performance rating was "Excellent", the Complainant was unhappy with several narrative comments that she regarded as derogatory and unfair. As a result, she attempted to contact AFSCME, Local 2743 and District Council 20 for assistance with a grievance.

Her request for assistance occurred just after the conclusion of elections for Local 2743. The Complainant ran unsuccessfully for a seat on the Executive Committee on a slate which opposed the winning candidate for the office of president. The Complainant asked the former vice president of Local 2743 for help with the grievance. According to the Complainant, the former vice president laughed and said "[w]ell you get who you ask for." It does not appear that the Complainant's concerns about her July 1998 performance appraisal were ever formally submitted as a grievance in accordance with the parties' collective bargaining agreement.

The second event which caused her to seek the union's assistance with a grievance involved her supervisor at DOH. The Complainant's supervisor at DOH was James R. Granger, Jr., Executive Director, Office of Professional Licensing. The Complainant claims that she experienced some difficulty in working for Granger. Several memoranda written by Granger to Hagans identified deficiencies with the Complainant's work. As a result, the Complainant filed a grievance. In her grievance, the Complainant charged Granger with sexual harassment for the manner in which he communicated with her. In addition, she alleged that: (1) Granger did not treat her with respect and (2) her work assignment was outside of her position description. AFSCME, Local 2743 assisted Hagans with this grievance.

The Complainant was unsatisfied with the response she received to her grievance. As a

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result, she wrote to the president of AFSCME, District Council 20, expressing her dissatisfaction with the representation provided by Ted Jenkins, the new president of AFSCME, Local 2743. Specifically, she complained about the way union representatives conducted themselves at her grievance meetings. Additionally, she alleges that Prather (union representative) told her to consider dropping the sexual harassment charge against Granger or face a potential countersuit. The Complainant also contends that when she asked if there was a union attorney she could talk to, Jenkins told her "no". Hagans also claims that from time to time, she would ask Jenkins about getting Local 2743's assistance in resolving her grievance, to no avail. Further, she asserts that Jenkins kept telling her there was "nothing to talk about."

Subsequently, the Complainant submitted a revised grievance in which she dropped the sexual harassment charge. The grievance was later denied by Geraldine K. Sykes, Administrator, Licensing Regulation Administration. The Complainant then advanced the grievance to Step 4.

There was no response to the Step 4 grievance until the Complainant's attorney contacted DOH. Subsequently, the Complainant and DOH's employee relations officer met. However, no one representing Local 2743 attended the meeting. Shortly after the meeting, a step 4 response was issued by Marlene Kelly, Interim Director of DOH.

The Step 4 response did not satisfy the Complainant. As a result, the Complainant sent correspondence to Jenkins and Prather requesting that her grievance be moved to arbitration. Neither Jenkins, nor Prather ever responded to her request.

In light of the above, Ms. Hagans filed this Complaint.

II. The Hearing Examiner's Report and Recommendations and the parties' Exceptions:

Based on the pleadings and the record developed in the hearing, the Hearing Examiner identified one principle issue. This issue, his findings and recommendations, and the Complainant's exceptions are as follows:

- 1. The principal issue is whether the Respondent's level of assistance to the Complainant in pursuing her grievance through the various steps of the negotiated grievance procedure and its failure to move that grievance to arbitration constitutes an unfair labor practice and a breach of the Respondent's duty of fair representation?*

Although notified of the time and place of the Board's hearing, the Respondent did not appear. However, the Complainant testified and introduced 40 exhibits. Under Board Rule 550.14,

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the Respondent's failure to appear or to be represented at the hearing, means it has effectively waived its right to challenge evidence presented by the Complainant.²

The Hearing Examiner noted that Board Rules 520.11 and 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 even though the Respondent failed to appear at the hearing. After reviewing the evidence presented by the Complainant, the Hearing Examiner determined that the Complainant failed to show that the Respondent breached its duty of fair representation. As a result, he concluded that the Respondent did not commit an unfair labor practice.

In making his determination, the Hearing Examiner considered the fact that the Respondent did not prevent the Complainant from filing her grievance and even provided some assistance. For example, he notes that union representatives attended grievance meetings. Also, the Hearing Examiner did not find that the Respondent's failure to attend the Step 4 meeting supported the Complainant's claims that the union failed to provide her with assistance. He reasoned that it was not clear that the Respondent was even aware that the meeting had been scheduled, since the impetus for the meeting was a letter to DOH from the Complainant's personal attorney.

The Hearing Examiner found that the Respondent's failure to advance the Complainant's grievance to arbitration did not constitute a violation of the Comprehensive Merit Personnel Act. Relying on Article 8 of the collective bargaining agreement, the Hearing Examiner determined that the authority to invoke arbitration lies with the Respondent, not with an individual employee.³ 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.

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).

²Rule 550.14 provides that: " All objections to evidence shall be raised before and presented to the Hearing Examiner. Any objections not made before the Hearing Examiner shall be deemed waived unless the failure to make such objection is excused by the Board because of extraordinary circumstances."

³Article 8, Step 5 reads as follows: If the grievance remains unsettled [after Step 4], the Union, within fifteen (15) working days from receipt of the Director's response, shall advise the Director in a signed statement whether the Union intends to request arbitration of the matter on behalf of the employee (s). (Article 8, Section B.3.e)

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In order to show that a union has breached its duty of fair representation, 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)).

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)).

In light of the above, 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.

Further, the Hearing Examiner found that the Complainant did not present any facts to establish that the Respondent retaliated against her because she opposed the slate of candidates that won office in the union election. Specifically, the Hearing Examiner determined that the Complainant's allegations of retaliation were conclusory, and not supported by any evidence. Relying on Ulysses S. Goodine v. Fraternal Order of Police/Department of Corrections Labor Committee⁴, the Hearing Examiner found that the Complainant provided no basis for concluding that the Respondent had breached the standards of conduct prescribed in D.C. Code §1-618.3. 43 DCR 5163, Slip Op. No. 476 at pg. 4, n. 2., PERB Case No. 96-U-16 (1996).

As previously noted, the Respondent did not appear at the hearing; however, the Respondent did submit a general denial of the allegations. The Respondent characterized the Complaint as a misrepresentation of facts and claimed that it represented Ms. Hagans in accordance with the collective bargaining agreement.

In its Exceptions, the Complainant argues that the Hearing Examiner erred in finding that the Respondent did not breach its duty of fair representation. As a result, the Complainant requests damages based on the alleged breach. After reviewing the record, we find that the Complainant's exceptions are nothing more than a disagreement with the Hearing Examiner's findings of fact. This Board has held that "issues of fact concerning the probative value of evidence and credibility resolution are reserved to the Hearing Examiner." Doctors Council of the District of Columbia and Henry Skopek v. D.C. Commission on Mental Health Services, 47 DCR 7568, Slip Op. No. 636 at p.4, PERB Case No. 99-U-06 (2000). 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 (1995). Moreover, a mere disagreement with the Hearing Examiner's findings is not a sufficient ground for the Board to reject the finding.

⁴ 43 DCR 5163, Slip Op. No. 476 (1996), at page 4, footnote 2.

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disagreement with the Hearing Examiner's findings is not a sufficient ground for the Board to reject the finding.

We believe that the Hearing Examiner used the correct legal standard when concluding that the union did not violate its duty of fair representation. In addition, we note that the Complainant did not allege facts or submit evidence which demonstrated that the union engaged in conduct which was arbitrary, discriminatory or the product of bad faith. Moreover, the record reveals that the union provided the Complainant with assistance.

Also, we concur with the Hearing Examiner's finding that Ms. Hagans merely disagreed with the union's judgment in the handling of her grievance, namely its refusal to take her grievance to arbitration. This Board has held that a disagreement with a union's 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, 45 DCR 2078, Slip Op. No. 538, PERB Case No. 97-U-26 (1998)). Thus, this Board finds 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. There is no question that Hagans was dissatisfied with the union's decision not to pursue arbitration; 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, 45 DCR 2078, Slip Op. No. 538, PERB Case No. 97-U-26 (1998), (Article 8, Section B.3.e), (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))

Furthermore, the Board finds that the Complainant failed to show a nexus between the union's actions and some prohibited factor. 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).

Pursuant to D.C. Code §1-605.2(3) and Board Rules 520.14 and 544.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and finds them to be reasonable, persuasive and supported by the record. The Board hereby adopts the Hearing Examiner's findings and conclusion that AFSCME did not violate D.C. Code §§ 1.618.3(a)(1) and 1-618.4(b)(1).

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ORDER

IT IS HEREBY ORDERED THAT:

The Complaint is dismissed.

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

April 4, 2001

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 99-S-06 and 99-U-26 was transmitted via U.S. Mail to the following parties on this 5th day of April 2001.

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