

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

In the Matter of:)	
)	
AMERICAN FEDERATION OF)	
GOVERNMENT EMPLOYEES, LOCAL 631,)	PERB Case No. 02-U-19
)	
Complainant,)	Opinion No. 730
)	
)	
)	
v.)	
)	
DISTRICT OF COLUMBIA)	
WATER AND SEWER AUTHORITY,)	
)	
)	
Respondent.)	
)	

DECISION AND ORDER

This case involves an unfair labor practice complaint filed by the American Federation of Government Employees, Local 631 (“Complainant”, “AFGE” or “Union”), alleging that the District of Columbia Water and Sewer Authority (“Respondent”, “WASA” or “Agency”) violated D.C. Code §1-617.04 (a)(1) and (5) (2001 ed.). Specifically, AFGE alleges that WASA committed an unfair labor practice by: (1) failing to bargain, upon request, over Reduction-in-Force (RIF) procedures; (2) failing to bargain, upon request, over the impact and effects of new employer policies and changes to existing polices, procedures and practices; and (3) failing to produce documents upon request.¹

¹ AFGE’s Complaint makes the following specific claims. First, AFGE claims that WASA violated the CMPA by failing to bargain over RIF procedures. In addition, AFGE contends that WASA unlawfully refused to bargain over changes to the following: (1) Duty task lists; (2)Policies for Annual Leave, Sick Leave and Termination of Employment; (3) Neutral Party Process; (4) Sign In and Sign Out Policy and Record of Discussion Document; (5) Other Personnel Policies; (6) Evaluations; (7) Internal Improvement Plan (“IIP”) at Blue Plains; (8) Minimum crew sizes, consolidation of facilities; (9) relocation of employees; (10) permitting contractors to take WASA certification classes; and (11) refusing to permit or making it difficult for bargaining unit members to take training. Finally, AFGE claims that WASA unlawfully

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The Respondent denies the allegations. Specifically, the Respondent contends that it had no duty to bargain over RIF procedures because the Comprehensive Merit Personnel Act (CMPA) gives Agency Heads the exclusive authority to abolish positions through a RIF.² In addition, WASA claims that it informed the Union, in writing, of its position concerning negotiating over RIF procedures. WASA denies claims that the Agency implemented new or changed existing policies and procedures, without first the Union to opportunity to bargain over their impact and effects. In support of its denial, WASA claims and cites instances where it gave the Union opportunities to comment on the new policies and procedures and AFGE did not respond in the time specified. In addition, WASA also cites instances where the Union did not respond to its requests for clarification on policies it objected to. WASA also contends that it made no changes to the policies in many cases where the Union alleged that it did; rather, it merely updated the same language that had been used before. As to the document request, WASA contends that although there was some delay, it did provide the requested information to AFGE.³

A hearing was held, and the Hearing Examiner issued a Report and Recommendation (Report). In her Report, the Hearing Examiner found that AFGE failed meet its burden of proof as to any of the allegations raised. As a result, she recommended that AFGE's complaint be dismissed.

AFGE presented numerous exceptions⁴ to the Hearing Examiner's Report. The Board will not list all of their Exceptions in this Opinion because many of them repeat the position that the Union argued unsuccessfully during the hearing. Furthermore, we find that some of the other exceptions disagree with: (1) the Hearing Examiner's analysis of the evidence; (2) the weight she

¹(...continued)
refused to respond to an information request.(Complaint).

²In their filings, the Agency cites D.C. Code §1-615.07 (2001 ed.) as the relevant section of the D.C. Code ("Code") which gives the Agency the authority to refuse to bargain over RIF procedures. However, we found that the correct section of the code is D.C. Code §1-624.08, which provides, in pertinent part, that: "each agency head is authorized, within the agency head's discretion, to identify positions for abolishment." (2001 ed.).

³In FOP v. MPD, the Board also observed that "in the interest of advancing the collective bargaining process, the better approach, upon being faced with [such] an effective refusal to bargain over any aspect of management's decision, is [for the union] to then make a second request to bargain with respect to the specific effects and impact of the management decision." 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). However, the Board qualified that statement by indicating that "a second request to bargain is not required to establish a violation of the CMPA." Id at p. 4.

⁴AFGE's objections are outlined in detail in their document entitled "Complainant's Exceptions to Hearing Examiner's Report and Recommendation." (Exceptions).

gave certain testimony; (3) and her ultimate findings on those issues. However, the Board will address several of the key issues which we believe need to be addressed or need further clarification in the paragraphs that follow.

RIF Procedures

On the issue of RIF procedures, the Hearing Examiner was persuaded by WASA's argument that they had no obligation to bargain over procedures based on the fact that the CMPA gave the Agency's Department Head authority to abolish positions through RIFs. She also noted that the Union cited no authority to dispute WASA's claim. While the Board adopts the Hearing Examiner's conclusion that WASA had no duty to bargain over the RIF procedures, we reach our conclusion on a different basis.

In Fraternal Order of Police/Department of Corrections Labor Committee v. District of Columbia Department of Corrections⁵, the Board expressly held that RIF procedures are non-negotiable. 49 DCR 11141, Slip Op. No. 692 at p.5, PERB Case No. 01--01(2002). We based our decision on a thorough review and analysis of the Omnibus Personnel Reform Amendment Act of 1998, which revised the previous RIF regulations and eliminated a provision which had allowed RIF policies and procedures to be appropriate matters for collective bargaining. See, Id. We believe that this Board precedent is applicable to the case presently before us. As a result, we find that Hearing Examiner's conclusion that the RIF procedures were not negotiable is reasonable, supported by the record, and consistent with the Board precedent noted above.

Internal Improvement Plan

In its Exceptions, AFGE argues the Hearing Examiner's denial of its request to recall Barbara Milton as a witness was in error and that it would have been able to provide information concerning the IIP allegation had Ms. Milton been able to testify.⁶ AFGE elaborates and explains that "counsel for the Union inadvertently forgot to ask Ms. Milton questions concerning the unilateral changes arising out of the IIP, but sought to rectify the oversight at the end of the Union's

⁵In this Negotiability Appeal, FOP sought to have the Board find negotiable a proposal which altered RIF procedures. The Board declined to do so after making a determination that RIF procedures were no longer negotiable under the new law. See, Fraternal Order of Police/Department of Corrections Labor Committee v. District of Columbia Department of Corrections, 49 DCR 11141, Slip Op. No. 692, PERB Case No. 01--01(2002).

⁶The Union argues that it would have offered evidence to support its allegations concerning WASA's IIP, but the Hearing Examiner improperly refused to allow a witness to be recalled before WASA started its case-in-chief. (See, Exceptions at pg. 6).

case-in-chief by recalling Ms. Milton⁷.”

The Board is not persuaded by this argument because after reviewing the transcript, we find that the Union had concluded its case-in-chief before seeking to reserve the right to recall Ms. Milton.⁸ In addition, the Board’s Rules give the Hearing Examiner broad authority to conduct hearings. See, Board Rules No. 550.12-550.14. In addition, we have held that a hearing is not tainted where parties have adequate opportunity to present evidence and argument. Pratt v. D.C. DAS, 43 DCR 1490, Slip Op. No. 457, PERB Case No. 95-U-06 (1996). We have also held that a Hearing Examiner has the authority to conduct a hearing and decide evidentiary matters. See, Id. and Mack, Lee and Butler v. FOP/DOC, 47 DCR 6539, Slip Op. No. 421, PERB Case No. 94-U-24 (2000). In the present case, by the Union’s own admission, its Counsel forgot to present testimony concerning the issue during their case-in-chief, despite the fact that they had an opportunity to present evidence and argument on this matter. In view of the precedent listed above, we find that the Hearing Examiner’s decision is consistent with Board precedent. Furthermore, we find that the Hearing Examiner’s decision not to allow further testimony from Ms. Milton once the Union had rested its case-in-chief is reasonable and supported by the record. We have found that challenges to evidentiary findings do not give rise to a proper exception where, as here, the record contains evidence supporting the Hearing Examiner’s finding. Hatton v. FOP/DOC Labor Committee, 47 DCR 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (2000). As a result, we find that the Union’s exception on to the Hearing Examiner’s finding, that AFGE did not meet its burden of proof concerning changes to the IIP, lacks merit. Therefore, we adopt the Hearing Examiner’s finding on this issue.

Document Production

In this Exception, AFGE claims that the Union is not required to demonstrate “bad faith” in order to prove that WASA violated D.C. Code §1-617.04 (a)(5) (2001 ed.) of the CMPA by refusing to provide the Union with the requested bargaining information.”⁹ (Exceptions at pg. 8).

⁷The reference to Ms. Milton in this sentence refers to Barbara Milton, the Union’s President.

⁸We find that the record reflects that Hearing Examiner asked the Union’s counsel if she was finished with her case-in-chief and she indicated “yes”. The Union’s counsel later added that she might like to reserve the right to call Ms. Milton in terms of a couple of issues on the IIP. WASA’s counsel objected to the Union being able to recall Ms. Milton to address those issues based on the fact that the Union had not raised IIP issues in its case in chief. (See, Exceptions at pg. 6 and Tr. at pgs. 165-166).

⁹The Union also argues that it had no obligation to request documents twice, as it claims
(continued...)

AFGE is correct in its assertion that the Board's precedent has not required that there be an affirmative showing of bad faith in delaying to produce documents before an unfair labor practice violation can be found.¹⁰ Nevertheless, the Hearing Examiner's finding concerning the document production issues seems reasonable and supported by the record.

In the present case, the Hearing Examiner found that the documents were eventually produced and that the delay did not rise to the level of an unfair labor practice. The Hearing Examiner also looked at the course of dealing between these two parties and found that both parties had delayed responding to each other's requests on occasion. As a result, she concluded that AFGE had not met its burden of proof.

The Board has found that failing to timely produce document is an unfair labor practice where the delay was unreasonable. See, Doctors Council of D.C. General Hospital v. D.C. General Hospital, 46 DCR 6268, Slip Op. No. 482, PERB Case Nos. 95-U-10 and 95-U-18 (1996). In one such case where the Board found an unfair labor practice for failing to produce documents: (1) the Union had made two requests; (2) there was a six month delay in producing the documents; (3) and the Union had filed a Motion for Summary Judgement on the issue before the Agency produced the documents. In the present case: (1) the delay was over 3 months; (2) there had only been one request for the document; and (3) the documents were, in fact, produced.

In the present case, the Hearing Examiner concluded that the Complainant had not met its burden of proof in showing that the Respondent refused to bargain in good faith concerning this matter. In view of these facts and the Board precedent noted above, we find that the Hearing

⁹(...continued)

the Hearing Examiner suggests in her decision. (Exceptions at pgs. 9-10). We also find no merit to this Exception. The Board finds that Hearing Examiner merely points to a prior decision by the Board which suggests that in the interest of labor relations, it may be better to request documents a second time when it is unclear as to whether the other party is refusing to produce them or refusing to bargain in good faith. See, Report at pg. 15 and International Brotherhood of Police Officers, Local 446 v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992). We do not read the Hearing Examiner's decision as requiring that AFGE request the documents twice. Instead, she suggested that "where there has not been a negative response, but a somewhat vague and delayed communication", it may be helpful to make a second request. (Report at pg. 15). In this case, there was a delay in producing the documents, and they were eventually produced. She suggests that a second request may have made WASA's position more clear. (See, Report at pg. 15). Therefore, we do not find that the Hearing Examiner erred in making this suggestion.

¹⁰ In finding that no unfair labor practice was committed, the Hearing Examiner stated that "the delay in responding is in excess of three months." While significant, it is not, standing alone, sufficient to establish bad faith on the part of WASA." (See, Report at 15).

Examiner's conclusion that WASA's conduct did not rise to the level of an unfair labor practice seems reasonable, although her suggestion that "bad faith" needed to be shown is not an accurate statement of the Board's standard. Therefore, in this Opinion, we seek to clarify the standard by noting that a showing of bad faith is not required in order to find a ULP; rather, the Complainant's must show that the delay was unreasonable and that the Respondent failed to produce the documents in a timely manner.

As to the other Exceptions raised in AFGE's Exceptions, we find that they lack merit and merely represent a disagreement with the Hearing Examiner's findings.

After reviewing the record in the present case, we find that the Hearing Examiner's findings, are reasonable and supported by the record, in view of the clarifications noted above. Additional review of the record reveals that the Agency's Exceptions amount to no more than a disagreement with the Hearing Examiner's findings of fact. This Board has held that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's findings where the findings are fully supported by the record. American Federation of Government Employees, Local 874 v. D. C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). The Board has also rejected challenges to the Hearing Examiner's findings based on: (1) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. American Federation of Government Employees, Local 2741 v. D. C. Department of Recreation Parks, 46 DCR 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999). On this basis, we conclude that the Union's Exceptions lack merit. Therefore, we adopt the Hearing Examiner's finding that WASA did *not* commit an unfair labor practice in this matter. In doing so, we clarify the Board's precedent on an unfair labor practice based on a party's failure to produce documents, as noted above. We also clarify and incorporate the Board's precedent and position that there is no duty to negotiate over RIF procedures..

Since we have adopted the Hearing Examiner's finding that WASA did not violate the CMPA, we dismiss AFGE's Complaint in its entirety.

Pursuant to D.C. Code §1-605.02(3) (2001 ed.) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and for the reasons discussed above, we adopt the Hearing Examiner's findings, with the clarifications mentioned above.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint filed by the American Federation of Government Employees, Local 631, against the *District of Columbia Water and Sewer Authority (WASA)*, is dismissed.
2. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

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

September 30, 2003