GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In The Matter Of:	
Washington Teachers' Union, Local 6, AFL-CIO, Complainant,	
v.	PERB Case No. 90-U-28 Opinion No. 329
District of Columbia Public Schools, Respondent.	

DECISION AND ORDER

The duly-designated Hearing Examiner issued a Report and Recommendation (a copy of which is annexed hereto) in the above-captioned proceeding ruling that Complainant Washington Teachers' Union, Local 6, AFL-CIO (WTU) did not meet its burden of proving, in accordance with Board Rule 520.11, that Respondent District of Columbia Public Schools (DCPS) engaged in unfair labor practices, as alleged in its Complaint. [1]/ Specifically, the Hearing Examiner concluded that "WTU ha[d] not met its burden of proof that the memorandum of August 21, 1990 resulted in unilateral changes in the leave policies" in violation of D.C. Code Sec. 1-618.4(a)(1) and (5), and recommended that the Complaint be dismissed. [2]/

On September 17, 1992, WTU filed Exceptions to the Hearing Examiner's Report and Recommendation. No opposition to these exceptions or exceptions were filed by DCPS.

---

[1]/ Summary judgment in favor of WTU was entered on the Complaint allegation concerning unilateral changes by DCPS in one payment of employees' compensation in Washington Teachers' Union Local 6, AFL-CIO v. District of Columbia Public Schools, 38 DCR 2654, Slip Op. No. 271, PERB Case No. 90-U-28 (1991). In that Decision and Order, the Board deferred ruling on the remaining Complaint allegations concerning unilateral changes in employee leave "since there [were] material questions of fact[.]" Id., Slip Op. at 4. Those allegations were referred by the Board to the hearing examiner in the instant proceeding.

[2]/ According to the Hearing Examiner, the Complainant was "offered several opportunities to present testimonial evidence" but "declined" to do so relying instead on six exhibits it introduced into evidence. (R&R at n.2.)

WTU's exceptions consist of a series of vexatious complaints concerning the conduct of these proceedings which WTU contends, in the main, caused it to be "ensnared by trickery in a procedural conundrum and then blind-sided by the Hearing Examiner." As a result, according to WTU, it was "denied due process, and a fair opportunity to present its case." (Except at 1.)

The Board, after reviewing the entire record and applicable rules and authority, finds no merit to WTU's exceptions to the Hearing Examiner's Report and Recommendation.

Pursuant to an earlier Decision and Order issued in this case on April 2, 1991 (see n.1), a hearing was scheduled to resolve "material questions of fact" in the remaining Complaint allegation not disposed of by summary judgment. Washington Teachers' Union, Local 6, AFL-CIO v District of Columbia Public Schools, 38 DCR 2654, Slip Op. No. 271 at 4, PERB Case No. 90-U-28 (1991). By Order dated June 2, 1992, the Board issued a Notice of Unfair Labor Practice Hearing "pursuant to Section 502(q) and (g) of the District of Columbia Merit Personnel Act of 1978 (CMPA), D.C. Code Section 1-605.2(3) and Board Rules 520.9 and 520.11[.]" The Notice advised the parties that the hearing was being conducted "to afford all interested parties an opportunity to appear in person or otherwise to present documentary evidence and give testimony[.]" The Notice further advised the parties that, in accordance with Board Rule 520.11, the purpose of the "hearing is to develop a full and factual record upon which the Board can make a decision." [3]/ Board Rule 520.11 further provides, as noted by the Hearing Examiner in her Report, that "[t]he party asserting a violation of the CMPA, shall have the burden of proving the allegations of the complaint by a preponderance of the evidence."

Therefore, we find WTU's contention that it was "ambushed" by these expectations at the hearing to be totally unfounded. The "utter puzzlement" WTU claims it had with respect to what "material questions of fact" remained to be resolved can be attributed to no more than a lack of preparedness or WTU's inability at hearing to

---

[3]/ The delay in referring the remaining Complaint allegations to hearing resulted from WTU's request to "postpone[] until further notice, so that the subject of the underlying issue may be discussed by the principals for possible resolution." The July 8, 1992 Hearing took place approximately 15 months after the Board advised the parties in Opinion No. 271 of the manner in which the instant Complainant allegations would be resolved. We therefore find no basis to WTU's "substantive exception" that this "case ended up before the Hearing Examiner on cross-motions for summary judgment" which caused "the parties [to be] unwittingly content with their factual proof." (Except at 4.)

prove the allegations of its Complaint in accordance with Board Rule 520.11. (Except at 2.) WTU's assertion that a pre-hearing conference could have avoided this "ambushing" begs the question why WTU did not request one if, as WTU declares, it "was totally and completely in the dark when the hearing commenced." (Except at 2 and 3.) If WTU believed such a conference would have been beneficial to it, or the proceedings in general, it had ample opportunity to request one after the Notice of Hearing and prior to the scheduled hearing date. [4]/ (See n. 3.)

The issues in any unfair labor practice proceeding are not determined by the Hearing Examiner but by the allegations made by the Complaint. The Hearing Examiner, as an agent of the Board, is required to develop findings of fact and make credibility determinations based on the evidence introduced into the record by the parties. Based on these findings and determinations, the Hearing Examiner reaches conclusions of law upon which a recommendation is made to the Board. University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia, ____ DCR ____, Slip Op. No. 285, PERB Case No. 86-U-16 (1992); American Federation of Government Employees, Local 872 v. District of Columbia Department of Public Works, 38 DCR 6693, Slip Op. No. 266, at p.3, PERB Case No. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). See also, American Federation of Government Employees, Local 872 v. District of Columbia Department of Public Works, 38 DCR 6710, Slip Op. No. 275, PERB Case No. 89-U-13 (1991) and American Federation of State, County and Municipal Employees, District Council 20, Local 2776, AFL-CIO v. District of Columbia Department of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990).

Based on the evidence that WTU presented at the hearing, the Hearing Examiner concluded that the evidence did not support a finding, with respect to leave policies, that the August 21, 1990 memorandum was inconsistent with provisions in the parties' then-effective collective bargaining agreement concerning leave. [5]/

---

[4]/ Given the narrowly-focused issue in this case as framed by the Board in Opinion No. 271, the scheduling of a pre-hearing conference by the Board pursuant to Board Rule 550.1 was not, in our view, warranted.

[5]/ Notwithstanding WTU's intimation to the contrary, D.C. Code Sec. 1-618.4(a)(5), which provides that "[t]he District, its agents and representatives are prohibited from ... [r]efusing to bargain collectively in good faith with the exclusive representative," makes an unfair labor practice conduct "in the nature of a refusal to bargain over a mandatory subject of

(continued...)

In its Exceptions, WTU concedes that it failed to present any evidence to support that DCPS' policy set forth in the August 21, 1990 memorandum or DCPS' actual practice with respect to affected employees represented a unilateral change in the existing leave policy. WTU asserts that its failure to present such evidence stems from its contention that there exists "no difference between its legal position and evidentiary proof on the one issue, [i.e., unilateral change in compensation payment policy,] and its legal position and evidentiary proof on the remaining issue [,i.e., unilateral change in leave policy]." WTU's dual reliance on the "evidentiary proof" which established a violation with respect to compensation policy in our Decision and Order in Opinion No. 271 is clearly at odds with our ruling in that Decision that "material questions of fact" precluded the establishment of a violation with respect to leave policy. (See n.1.)

We therefore find WTU's Exceptions without basis and, indeed, frivolous. We therefore, adopt the Hearing Examiner's findings, conclusions and recommendation that the remaining allegations of the Complaint be dismissed on the basis that WTU did not meet its burden of proving the alleged unfair labor practice violation.

ORDER

IT IS HEREBY ORDERED THAT:

The remaining Complaint allegations are dismissed.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

October 27, 1992

---

[5](...continued)
bargaining or a unilateral change in established and bargainable terms and conditions of employment (not covered under an effective agreement between the parties)...." American Federation of Government Employees, Local Union No. 3721 v. District of Columbia Fire Department, ____ DCR ____, Slip Op. No. 287 at fn. 5, PERB Case No. 90-U-11 (1991). (Emphasis added)

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB case No. 90-U-28 was hand-delivered and/or mailed (U.S. Mail) to the following parties on the 27th day of October, 1992.

William B. Peer, Esq. — U.S. Mail
Barr, Peer & Cohen
1620 I Street, N.W., Suite 603
Washington, D.C. 20006

Ellis A. Boston, Esq. — Hand-delivered
Deputy Director
Office Labor Relations
415-12th Street, N.W.,
Suite. 200
Washington, D.C. 20004

Courtesy Copy

Jimmy Jackson — U.S. Mail
President
Washington Teachers' Union
Local 6, AFT, AFL-CIO
1030 15th Street, N.W.
Suite 865
Washington, D.C. 20005-1503

Lois Hochauser — U.S. Mail
1850 M Street, N.W.
Suite 800
Washington, D.C. 20036

LaShawn R. Williams