Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 383, Complainant,	
v.	PERB Case No. 05-U-40
	Opinion No. 939
	Motion to Dismiss
District of Columbia Department of Human Services, Respondent.	

DECISION AND ORDER

I. Statement of the Case:

The American Federation of Government Employees, Local 383, AFL-CIO ("Complainant" or "Union") filed the instant unfair labor practice complaint ("Complaint") against the District of Columbia Department of Human Services ("Respondent", "Agency" or "DHS"). The Union alleges that DHS violated D.C. Code § 1-617.04(a)(1) and (5) of the Comprehensive Merit Personnel Act ("CMPA") by failing or refusing to proceed with an arbitration requested by the Union (the Thorpe grievance). DHS filed an Answer denying the allegations based on its position that there is no collective bargaining agreement ("CBA") between the parties. (See Answer at p. 5). DHS filed a Motion to Dismiss, in which it argued that the "question of whether the parties agreed to arbitrate [is] beyond the jurisdiction of the PERB" and that since there is no agreement to arbitrate, the Union has failed to state a cause of action. (Motion at pgs. 3 and 6).

A hearing was held and Hearing Examiner Lois Hochhauser issued a Report and Recommendation ("R&R"), that denied DHS' Motion to Dismiss And recommended that the Board find that DHS violated the CMPA. (See R&R at p. 9). No exceptions were

filed to the Hearing Examiner's R&R. The Hearing Examiner's R&R is before the Board for disposition.

II. Background.

The Union is the certified exclusive representative of employees in the bargaining unit of the DHS. (See R&R at p. 3). The parties entered into a CBA which was effective through September 30, 1995. (See R&R at p. 3). The CBA provided that it shall automatically renew for a one year period unless one of the parties gives the other party written notice that it intends to terminate or modify the CBA between 90 and 150 days of the anniversary date. (See R&R at p. 3). In 1998, the parties negotiated a new agreement. However, the District of Columbia Financial Responsibility and Management Assistance Authority, which had final approval authority at the time, rejected all collective bargaining agreements before it, including the one between the Complainant and DHS. (See R&R at p. 4). Nevertheless, the parties continued to abide by the terms and conditions of the 1995 CBA. (See R&R at p. 4).

By letter dated June 29, 2001, Mary Leary, then Director of the Office of Labor Relations and Collective Bargaining ("OLRCB"), notified the National Vice-President of AFGE District 14 (which includes Local 383), of its decision to: (1) terminate the CBA; (2) negotiate a successor agreement; and (3) continue to observe all existing terms and conditions of employment until a new agreement has been negotiated. (See R&R at p. 4). The parties continued to arbitrate grievances until December 22, 2004, when DHS sent a letter to the Federal Mediation and Conciliation Service ("FMCS") stating that OLRCB "refuse[d] to participate in an arbitration of subject matter because of the lack of a collective bargaining agreement." (R&R at p. 5, citing Exhibit U-8). Specifically, OLRCB refused to arbitrate the Thorpe grievance. On December 23, 2004, OLRCB notified the Union that DHS could "elect . . . on an *ad hoc* basis, to process grievances and participate in arbitration, but OLRCB expressly declines to arbitrate all matters at the present time." (R&R at p. 5, citing Exhibit U-10). On January 3, 2005, OLRCB sent the Union another letter that stated "OLRCB will not select arbitrators in the future until a new collective bargaining agreement is concluded." (R&R at p. 6, citing Exhibit U-11).

In her R&R, the Hearing Examiner concluded that DHS violated D.C. Code § 1-617.04(b)(1) and (5) by repudiating the CBA and refusing to proceed to arbitration on the Thorpe grievance. (See R&R at p. 9). The parties did not file exceptions to the R&R. The Hearing Examiner's R&R is before the Board for disposition.

III. The Hearing Examiner's Report and Recommendation

Based on the pleadings, the record developed at the hearing and the parties' post-hearing briefs, the Hearing Examiner identified two issues for resolution. These issues and her findings and recommendations are as follows:

A. Motion to Dismiss

At the hearing, both parties presented oral arguments concerning DHS' Motion to Dismiss. DHS argued that the Board lacked jurisdiction over the issue of whether there was an agreement to arbitrate. In support of its position, DHS cited the District of Columbia Arbitration Act, D.C. Code § 16-4302(a), and contended that only a court can order the parties to arbitrate. The Union countered that "although the remedy may be the same as it would be in a cause of action to compel arbitration, the matter is brought as [an unfair labor practice complaint ("ULP")], over which PERB does have jurisdiction." (R&R at p. 6).

The Hearing Examiner stated that the only issue to be determined in a motion to dismiss is the legal sufficiency of the complaint. (See R&R at p. 6, citing *Aronoff v. Lenkin Co.*, 618 A. 2d 669 (D.C. 1992). The Hearing Examiner determined that a complaint will be dismissed only if, after accepting all the facts as true, the complaint does not give rise to any unfair labor practices or other claims over which the Board is authorized to address under the CMPA. (R&R at p. 6, citing *JoAnne Hicks v. D.C. Office of the Deputy Mayor for Finance and American Federation of State, County and Municipal Employees, District Council 20*, 41 DCR 1751, Slip Op. No. 303, PERB Case No. 91-U-17 (1992)). For purposes of deciding DHS' Motion, the Hearing Examiner accepted as true the Union's allegation that a binding agreement between the parties still existed. (See R&R at p. 6). The Hearing Examiner noted that although the CMPA does not specifically make violation of the CBA an unfair labor practice, the Board has long held that a party's refusal to comply with the CBA may constitute a violation of the CMPA. (Citing *American Federation of State, County and Municipal Employees, District Council 20, Local 2921, AFL-CIO v. District of Columbia Public Schools*, 50 DCR 5077, Slip Op. 712, PERB Case No. 03-U-17 (2003) (See R&R at pgs. 6-7)). The Hearing Examiner stated that each case must be examined on its own merits to determine if the allegations constitute an unfair labor practice and that a hearing is required. In view of the above, she denied DHS' Motion to Dismiss. (See R&R at p. 7).

No exceptions were filed to the Hearing Examiner's recommendation denying DHS' Motion to Dismiss. The Board has reviewed the findings, conclusion and recommendation of the Hearing Examiner with respect to the denial of the Motion and believes them to be reasonable, supported by the record and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's recommendation to deny DHS' Motion to Dismiss.

B. Unfair Labor Practice

1. Did DHS repudiate the CBA and thereby commit an unfair labor practice in violation of the CMPA?

The Union argued that DHS committed an unfair labor practice by (1) "unilaterally modifying the parties' negotiated grievance and arbitration procedure"; and

(2) refusing to continue to process the Thorpe grievance. (R&R at p. 7). The Union also asserted that by refusing to arbitrate, DHS has negatively affected membership's confidence in the Union's leadership. (See R&R at p. 9). DHS claimed that it effectively terminated the CBA, and absent any agreement, it had no duty to arbitrate. DHS contended that Board decisions hold that a violation of the collective bargaining agreement "does not state an unfair labor practice proscribed under the CMPA."[1] (R&R at p. 7).

The Hearing Examiner found that "there [wa]s no dispute that the parties extended the terms of the CBA after its expiration in September 1995." (R&R at p. 7). Specifically, although the June 29, 2001, letter from Mary Leary notified the Union that the Agency was terminating the CBA, the letter also stated that DHS "would continue to observe all existing terms and conditions of employment until a new agreement has been negotiated." (R&R at p. 7). In addition, the Hearing Examiner found that "[e]ven if the Leary letter was intended to provide the required notice of termination, [the] Agency itself did not adhere to the notification and continued to adhere to the Agreement, including participating in arbitrations." (R&R at p. 7). The Hearing Examiner noted that the insufficiency of the Leary letter "has been assessed on a number of occasions and determined to be insufficient to terminate the Agreement." (R&R at p. 7, citing *District of Columbia Department of Human Services v. Fraternal Order of Police/Department of Human Services Labor Committee*, 50 DCR 5028, Slip Op. No. 691, PERB Case Nos. 02-A-04 and 02-A-05 (2002), recon. den., Slip Op. No. 717. The Hearing Examiner observed that although the letters sent by DHS to the Union indicated its view that the CBA had been terminated, none of the letters had been sent within the prescribed period for terminating an agreement under Article 34 of the parties' CBA.[2] (See R&R at p. 8). The Hearing Examiner concluded that since the parties' CBA had not been terminated, it remained binding on the parties. (See R&R at p. 8, citing D.C. Code § 1-617.15(a)).[3]

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[1] DHS cites to *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 (1991) and *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 46 DCR 7605, Slip Op. No. 384, PERB Case No. 94-U-23 (1999).

[2] Article 34, Duration, of the parties' CBA states:

> Section 2: This Agreement shall be automatically renewed for a one (1) year period thereafter, unless either party gives to the other party written notice of intention to terminate or modify the Agreement one-hundred fifty (150) days and no later than ninety (90) days prior to its anniversary date. In the event that either party requests modification of any Article or parts of any Article, or the inclusion of additional provisions, only the related Articles and/or parts of the Articles shall be affected and unrelated Articles or parts of Articles shall continue in full force and effect.

[3] The Hearing Examiner citied the prior codification of the 1981 ed., D.C. Code § 1-618.15. Nevertheless, D.C. Code § 1-617.15(a) provides:

> An agreement with a labor organization is subject to the approval of the Mayor or his or her designee, or in the case of employees of the District of Columbia Board of Education or the Board of Trustees of the University of the District of Columbia, by the respective

The Hearing Examiner determined that DHS' "statements that it did not recognize the Agreement as binding and that it had no duty to arbitrate constitutes a repudiation of the Agreement." (R&R at p. 8). The Hearing Examiner concluded that this "repudiation interfered with the relationship between the members and the Local leadership." (R&R at p. 8).

The Hearing Examiner noted that the Board has held that "where there is a bargaining obligation between the parties, a failure to comply with the Agreement which arises from a refusal to recognize this obligation, violates the party's duty to bargain in good faith and constitutes a repudiation of the Agreement." (R&R at p. 8, citing *American Federation of State, County and Municipal Employees, Council 20, Locals 1200, 2776, 2301, 2087 v. District of Columbia and Williams*, 46 DCR 6513, Slip Op. No. 590, PERB Case No. 97-U-15A (1999) *aff'd sub nom District of Columbia Government v. Public Employee Relations Board*, MPA 11-99 (2002). Based upon this holding, the Hearing Examiner concluded that the Union had met its burden of proof that DHS had committed an unfair labor practice by repudiating the parties' CBA. (See R&R at p. 8). No exceptions were filed with regard to this finding.

The Board has "held that a party's refusal to implement a viable collective bargaining agreement is an unfair labor practice." *Teamsters, Local Unions No. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO/CLC v. District of Columbia Public Schools*, 43 DCR 6633, Slip Op. No. 497 at p. 3, PERB Case No. 96-U-23 (1996). The Board has found that "such conduct constitutes a repudiation of the collective bargaining process and a violation of the duty to bargain." *Id.* The duty to bargain in good faith includes "the obligation to take reasonable efforts to insure the effectiveness of agreements actually reached." *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 46 DCR 7228, Slip Op. No. 485 at p. 5, PERB Case No. 96-U-14 (1996). An agency's "failure to bargain in good faith with [the Union] constitutes, derivatively, interference with bargaining unit employees' rights in violation of D.C. Code § 1-617.04(a)(1) (2001 ed.)." *AFGE, Local 2725 v. D.C. Housing Authority*, 46 DCR 8356, Slip Op. No. 597 at p. 5, PERB Case No. 99-U-33 (1991) (emphasis in the original).

Pursuant to D.C. Code § 1-605.02(3) and Board Rule 520.14, we have reviewed the record, findings, conclusions and recommendations of the Hearing Examiner. See *Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO/CLC v. District of Columbia Public Schools*, 43 DCR 5585, Slip Op. No. 375 at p. 2, PERB Case

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Boards. An agreement shall be approved within 45 days from the date of its execution by the parties, if it conforms to applicable law. If disapproved because certain provisions are asserted to be contrary to law, the agreement shall either be returned to the parties for renegotiation of the offensive provisions or such provisions shall be deleted from the agreement. An agreement which has not been approved or disapproved within the prescribed period of 45 days shall go into effect on the 46th day and shall be binding on the parties.

No. 93-U-11 (1994). We find that the Hearing Examiner's findings, conclusions and recommendation are reasonable, supported by the record and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's findings and conclusions that DHS violated D.C. Code § 1-617.04(a)(1) and (5).

2. *Did DHS commit an unfair labor practice in violation of the CMPA by refusing to proceed to arbitration of the Thorpe grievance?*

The Hearing Examiner turned to the issue of the Thorpe grievance. (See R&R at p. 8). The Union argued that DHS "should be estopped from refusing to arbitrate the grievance since it initially agreed to do so and it is now too late for the grievant to take other action." (R&R at pgs. 8-9). The Union claimed that by refusing to process the Thorpe grievance, DHS unilaterally modified the CBA, thereby committing an unfair labor practice. (See R&R at p. 9). The Union contended that DHS' actions negatively affected membership's confidence in the Union leadership. (See R&R at p. 9). DHS countered that it was under no obligation to arbitrate grievances. (See R&R at p. 9).

The Hearing Examiner found that after originally agreeing to arbitrate the Thorpe grievance, DHS later notified the Union that it would not go to arbitration. (See R&R at p. 9). The Hearing Examiner stated that DHS' refusal to proceed to arbitration negatively impacted the Union's ability to represent its members and undermined its relationship with the bargaining unit members. (See R&R at p. 9). In view of the above, the Hearing Examiner concluded that the Union had met its burden of proving that DHS had committed an unfair labor practice by refusing to proceed to arbitration on the Thorpe grievance. (See R&R at p. 9).

No exceptions were filed to these findings. The Board finds that the Hearing Examiner's findings and conclusions are rational, supported by the record and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's finding and recommendation that DHS' conduct constituted an unfair labor practice in violation of the CMPA.

C. Remedy

Since we have adopted the Hearing Examiner's finding that DHS violated the CMPA, we now turn to the issue of what is the appropriate remedy in this case.

As a remedy, the Hearing Examiner recommends that the Board:

(1) Order Respondent to cease and desist from repudiating the Master Agreement and specifically, the arbitration provision;

(2) Order Respondent to post a notice for thirty consecutive days regarding these violations in a conspicuous location, where notices to employees are ordinarily posted; and

(3) Order any other relief the Board deems appropriate.

(R&R at pgs 9-10). No exceptions were filed by either party.

The Board has "recognize[d] that when a violation is found, the Board's order is intended to have therapeutic as well as remedial effect. Moreover, the overriding purpose and policy of relief afforded under the CMPA for unfair labor practices, is the protection of rights and obligations." *National Association of Government Employees, Local R3-06 v. D.C. Water and Sewer Authority*, 47 DCR 7551, Slip Op. No. 635 at pgs. 15-16, PERB Case No. 99-U-04 (2000). In light of the above, the Board adopts the Hearing Examiner's recommendation to post a notice to all employees concerning the violations found and the relief afforded. By requiring DHS to post a notice, "bargaining unit employees . . . would know that [DHS] has been directed to comply with their bargaining obligations under the CMPA." *Id.* at p. 16. "Also, a notice posting requirement serves as a strong warning against future violations." *Wendell Cunningham v. FOP/MPD Labor Committee*, Slip Op. No. 682 at p. 10, PERB Case Nos. 01-U-04 and 01-S-01 (2002). The Board has examined the record and finds the remedy appropriate.

ORDER[4]

IT IS HEREBY ORDERED THAT:

1. The Hearing Examiner's recommendation that the District of Columbia Department of Human Services committed an unfair labor practice is adopted in its entirety.

2. The Department of Human Services, its agents and representatives shall cease and desist from violating D.C. Code § 1-617.04(a)(1) by interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by the labor-management subchapter of the Comprehensive Merit Personnel Act ("CMPA").

3. The Department of Human Services, its agents and representatives shall cease and desist from violating D.C. Code § 1-617.04(a)(5) by refusing to bargain collectively in good faith with American Federation of Government Employees, Local 383, AFL-CIO ("Union").

4. The Department of Human Services' Motion to Dismiss is denied.

5. The Department of Human Services shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice where notices to

[4] This Decision and Order implements the decision and order reached by the Board on April 29, 2008 and ratified on July 13, 2009.

bargaining unit employees are customarily posted. The Notice shall remain posted for thirty (30) consecutive days.

8. Within fourteen (14) days from the issuance of this Decision and Order, The Department of Human Services shall notify the Public Employees Relations Board ("Board"), in writing that the Notice has been posted accordingly. Also, the Department of Human Services shall notify the Board of the steps it has taken to comply with provisions of this Order.

9. 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.

October 2, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order and Notice in PERB Case No. 05-U-40, Slip Opinion No. 939 is being transmitted electronically and *via* U.S. Mail to the following parties on this the 15th day of June, 2012.

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