GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
District of Columbia Health and Hospitals Public Benefit Corporation,	**PERB Case Nos. 97-UM-05, 97-CU-02 and 99-U-02**
Agency,	**Opinion No. 604**
and	
All Unions Representing Bargaining Units in Compensation Units 12, 20, 21, 22, 23 and 24 and employees employed by the Health and Hospitals Public Benefit Corporation,	
Labor Organizations.	

DECISION AND ORDER

On October 9, 1998, the Doctors Council of the District of Columbia (DCDC) filed an Unfair Labor Practice Complaint (PERB Case No. 99-U-02). DCDC alleged that the Health and Hospitals Public Benefit Corporation (PBC) and the Doctors Council of the District of Columbia General Hospital (DCDCGH) violated the Comprehensive Merit Personnel Act (CMPA), as codified under D.C. Code Sec. 1-618.4(a)(1) and (5) and 1-618.4(b)(1). DCDC asserted that the PBC and DCDCGH unlawfully negotiated a pay increase for only the DCDCGH-represented medical officers. In addition, DCDC asserted that the PBC subsequently implemented the wage increase while the Board directed election between DCDC and DCDCGH was pending in PERB Case No. 97-UM-05.[1]/ DCDC further asserted that

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[1]/ We determined that a consolidated single unit of DCGH and clinic medical officers (continued...)

the PBC negotiated the wage increase with DCDCGH while refusing to negotiate with it during this same period.

DCDC's charges stem from the PBC's implementation of a "Revised Wage Scale" which eliminated the wage disparity between DCGH and clinic medical officers. The salary increase was implemented before the Board made a determination concerning the certified representative for the consolidated unit. DCDC asserted that implementation of the revised wage would interfere with the election process by unilaterally awarding increased benefits to only those medical officers represented by its rival DCDCGH. DCDC further asserted that the PBC failed to bargain in good faith by negotiating a wage increase with DCDCGH while refusing to bargain with DCDC. DCDC also alleged that DCDCGH has interfered with bargaining unit employees rights under the CMPA by engaging in collective bargaining negotiations with the PBC.

DCDC subsequently filed a Motion requesting an indefinite stay of the directed election. We granted DCDC's Motion and stayed the election pending the disposition of DCDC's Complaint. (Slip Op. No. 575.) The Complaint was then referred to a hearing examiner.

On April 15, 1999, the Hearing Examiner issued his Report and Recommendation. The Hearing Examiner found that the PBC implemented the disputed wage increase pursuant to a collective bargaining agreement between DCDCGH and the District of Columbia General Hospital (DCGH) which predated the time the PBC was

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[1](...continued)
employed by the PBC was appropriate. As a result, we directed that an election be held. (PERB Case No. 97-UM-05, Slip Op. No. 559.) In order to determine the certified bargaining representative (as between DCDCGH and DCDC) for the consolidated single unit of PBC medical officers. Clinic medical officers were paid a higher salary than DCGH medical officers. As a result, our determination created a consolidated unit of medical officers with the same job classification but with two different salary scales.

capable of assuming functional control of DCGH pursuant to the PBC Act. (R&R at 13.) The Hearing Examiner concluded that the PBC's actions were not unfair labor practices because PBC implemented the wage increase pursuant to a validly negotiated agreement. With respect to PBC's alleged refusal to bargain with DCDC, the Hearing Examiner found that there was no evidence that DCDC "ever initiated a request to bargain with the respondent PBC." (R&R at 16.) Based on these findings, the Hearing Examiner concluded that the actions of PBC and DCDCGH were not unfair labor practices. The Hearing Examiner further concluded that the wage increase agreement in question was reached before the transfer of DCGH and clinic medical officers into the PBC. As a result, he determined that DCDCGH did not interfere with DCDC represented employees' (clinic medical officers) rights by negotiating a wage increase only for medical officers represented by DCDCGH. (R&R at 16.)

On May 7, 1999, DCDC filed Exceptions to the Hearing Examiner's Report and Recommendation. Exceptions were only filed by DCDC; however, both DCDCGH and the PBC filed Oppositions to DCDC's Exceptions. The PBC also filed a Motion to Strike DCDC's Exceptions. DCDC filed an Opposition to the PBC's Motion. The case is now before the Board for consideration of the Hearing Examiner's Report and Recommendations and disposition of DCDC's Exceptions.

Pursuant to D.C. Code § 1-605.2(3) and Board Rule 520.14, we have reviewed the findings of fact and conclusions of law. To the extent consistent with our discussion below, we deny DCDC's exceptions and adopt the Hearing Examiner's findings, conclusions and recommendations with respect to the alleged violations.

I. PBC's Motion to Strike DCDC's Exceptions

The PBC filed a Motion to strike DCDC's Exceptions as untimely in view of the Board's previous Order abbreviating the

time frames for: (1) the notice of hearing; (2) completing the Hearing Examiner's Report and Recommendation; (3) filing post-hearing briefs; and (4) filing exceptions and any opposition to exceptions. Slip Op. No. 575 at 4. As a result, Exceptions were to be filed "not later than seven (7) days after service of the hearing examiner's report and recommendation." The Hearing Examiner's Report and Recommendation was served on the parties on April 19, 1999.

There is no question that under the Board-ordered schedule and applicable Board Rules, DCDC's Exceptions were due on May 3, 1999. However, DCDC filed its Exceptions on May 7, 1999. DCDC asserts that, notwithstanding the Board's Order, it relied on the Executive Director's April 19, 1999 cover letter which was attached to the Hearing Examiner's Report and Recommendation. The April 19th letter referenced Board Rule 556.3 which ordinarily governs the due date for exceptions and established a due date of May 10, 1999.[2]/

In light of the above, we conclude that it was reasonable for DCDC to rely on the May 10th due date. The PBC does not claim it was prejudiced by DCDC's May 10, 1999 filing.[3]/ See, e.g., Washington Teachers' Union, Local 6 v. D.C. Public Schools, 43 DCR 5406, Slip Op. No. 409, PERB Case No. 92-U-13 (1996). Therefore, we deny the PBC's motion.

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[2]/ Board Rule 556.3 does not establish a time period for initiating a cause of action before the Board. As such, Board Rule 556.3 is not mandatory and jurisdictional. Hence, the Board has discretion to shorten or extend the respective time periods.

[3]/ We have held that a party's reliance on Board correspondence containing a miscalculated filing deadline date, to be good cause for making an exception to the governing Board Rule. In such cases we have granted the relying party the additional time reflected in the correspondence. Washington Teachers' Union, Local 6 v. D.C. Public Schools, Slip Op. No. 431, PERB Case No. 95-U-08 (1995). Moreover, the PBC was served with the April 19th letter and raised no objection to the non-conforming due date until after DCDC filed its exceptions.

II. DCDC's Exceptions

DCDC lists 10 exceptions to the Hearing Examiner's findings and conclusions. However, we address DCDC's Exceptions within the context of the seven (7) distinct arguments made by DCDC to support its Exceptions.

A. D.C. General Hospital Lacked Authority to Negotiate With DCDCGH

The Hearing Examiner concluded that the PBC's September 1998 implementation of the "September 1996 pay increase agreement" for DCDCGH medical officers did not constitute a violation because it was implemented pursuant to an agreement that was validly negotiated between DCGH and DCDCGH prior to December 17, 1996. The Hearing Examiner found the PBC did not exist as a functional entity prior to December 17, 1996, and could not have negotiated with unions representing employees placed under its authority. Therefore, affected agencies (which include DCGH and DHS clinics) placed under the PBC were not subject to the bargaining constraints of the PBC Act until sometime after December 17, 1996.

DCDC's exceptions take issue with this conclusion. DCDC argues that DCGH did not maintain its legal authority during this period relying on Doctors Council of DCGH, et al. v. DCGH, et al., 45 DCR 314, Slip Op. No. 525, PERB Case No. 97-U-24 (1998).

DCDC contends that this PERB decision means that the PBC Act extinguished DCGH's authority to negotiate the collective bargaining agreement with DCDCGH that accorded DCGH medical officers the disputed pay increase. DCDC argues that this constraint commenced August 28, 1996, the effective date of the PBC Act.

In Doctors Council of DCGH, et al. v. DCGH, et al., supra., we determined that the PBC Act became effective on August 28, 1996. However, we held that agencies affected by the PBC Act (which included DCGH and DHS clinics) became subject to the PBC's bargaining constraints when they were transferred to the PBC.[4]/ We later determined that "DCGH and other affected agencies were transferred to the jurisdiction of the PBC sometime between September 29 and October 1, 1996." D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corporation, D.C. General Hospital, et al., 46 DCR 2461, Slip Op.No. 565, at p. 6, PERB Case No.95-U-03 (1999). Moreover, we specifically held that under the PBC Act bargained terms and conditions of employment are binding on the PBC if reached before October, 1, 1996, the date affected agencies/employees were transferred to the PBC. D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corporation, D.C. General Hospital, et al., supra.

The Hearing Examiner concluded that the agreement between DCGH and DCDCGH was reached by mid-September 1996. (R&R at 12.) Since the agreement predates the October 1, 1996 transfer of affected agencies/employees to the PBC's authority, existing PERB precedent does not restrict DCGH's authorization to make the agreement. Exceptions 1 and 2 are, therefore, denied.

B. The Hospital-DCDCGH Agreement was not an "existing collective bargaining agreement" when the PBC came into existence.

DCDC contends that no agreement can be found where: (1) the record does not contain a document that can be construed as a collective bargaining agreement and (2) there is no evidence

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4/ We found that the PBC did not "assume[] actual management and control of the functions of the agencies placed under it [until] October 7, 1997." PERB Case No. 97-U-24, Slip Op. No. 525, at n. 8.

which shows that DCGH obtained the approval of the Mayor or D.C. City Council before the first meeting of the PBC Board. With respect to its first contention, documentary proof of the existence of the September 1996 agreement was not an issue in this case. The Hearing Examiner's finding that DCDCGH and DCGH reached an agreement in mid-September 1996 is based upon a signed stipulation by the parties. (R&R at 12; Factual Stipulation of the Parties Offered in Lieu of Live Testimony.)

DCDC further asserts that there is evidence that after September 1996, formal compensation negotiations had not commenced. However, the Hearing Examiner found the mid-September 1996 agreement to be separate and apart from a subsequent effort by DCDCGH to negotiate with DCGH over a compensation agreement. (R&R at 12.) The Hearing Examiner made no findings that this effort produced the disputed wage increase agreement or any other agreement. The Hearing Examiner concluded that the evidence cited by DCDC was evidence of this subsequent unconsummated negotiation effort.

DCDC further argues that, notwithstanding the mid-September 1996 agreement, there is no evidence that DCGH obtained the Mayor's and D.C. City Council's approval of the agreement pursuant to the requirements of the CMPA. Therefore, the agreement cannot be found to be effective before DCGH became subject to the "constraints" of the PBC Act. As previously discussed, we have held that the PBC is "bound to implement bargained terms and conditions of employment reached either by agreement or as a result of statutory impasse resolution processes initiated before the transfer of covered employees."(emphasis added.) D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corporation, D.C. General Hospital, et al., supra. We further held that arbitrated compensation agreements between DCGH and unions representing its employees are binding on the PBC so long as DCGH and the union (1) have exhausted their negotiations over the agreement and (2)

have initiated the CMPA's requirements for impasse resolution and/or compensation agreement approval prior to the time DCGH became subject to the bargaining restrictions under the PBC Act, i.e., October 1, 1996. D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corporation, D.C. General Hospital, et al., supra. Moreover, we concluded that the PBC was bound by the arbitrated compensation agreement between DCGH and the D.C. Nurses Association notwithstanding the fact that the political approval process required by the CMPA had not been obtained before October 1, 1996.

Notwithstanding DCDC's assertions to the contrary, we have determined that an agreement is effectively binding when "actually reached" or, in the case of impasse, when the CMPA's statutory impasse procedures have been invoked. Teamsters Local Union No. 639 and 730 a/w IBTCWHA, AFL-CIO v. D.C. Public Schools, 43 DCR 6633, Slip Op. No. 400, PERB Case No. 93-U-29 and D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corporation, D.C. General Hospital, et al., supra.

DCDC also contends that the September 8, 1998 implementation of the wage increase by the PBC constituted a unilateral change in negotiable terms and conditions of employment. As previously discussed, the disputed wage increase was contained in a legitimate agreement that was binding on the PBC. Therefore, the PBC's implementation of the wage increase pursuant to the agreement was not unilateral. As a result, implementation of the wage increase does not constitute a basis for a statutory violation under the CMPA. See, e.g., Washington Teachers Union, Local 6, AFT, AFL-CIO v. D.C. Public Schools, 42 DCR 5488, Slip Op. No. 337, PERB Case No. 92-U-18 (1992).

C. The PBC Lacked Authority to Negotiate with DCDCGH

DCDC contends that the Hearing Examiner erroneously concluded that even if the PBC could not be compelled to bargain

with an incumbent union before PERB certified the new exclusive representatives, the PBC still had the discretion to bargain with either incumbent union. (DCDC Except. at 19; R&R at 12.) The Hearing Examiner based these conclusions on his interpretation of the Board's Decision in Doctors Council of DCGH, et al. v. DCGH, et al., 45 DCR 3999, Slip Op. No. 539, PERB Case No. 97-U-25 (1998).

The Hearing Examiner's interpretation of the Doctors Council's case is not germane to the resolution of the alleged violations presented by this case. This case requires a determination of whether or not the PBC was bound to implement a wage increase pursuant to an agreement between DCDCGH and DCGH which was reached before DCGH was placed under the PBC's jurisdiction. The PBC's ability under the PBC Act to mutually enter into negotiations with incumbent bargaining representatives after agencies and employees were placed under its jurisdiction, is not germane to determining the binding nature of DCGH/DCDCGH's September 1996 wage increase agreement which predates the PBC's jurisdiction over DCGH. To this extent, we decline to adopt the Hearing Examiner's findings and conclusions concerning the subject of this exception.[5]/

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[5]/ Since the wage increase agreement in this case was reached before DCGH's transfer to the PBC, the Board's holding in PERB Case No. 97-U-25, Slip No. Op. 539 –concerning the PBC's obligation with respect to reaching and effecting agreements reached after DCGH and other affected agencies were transferred to it– is not applicable. The Board has held that the PBC's failure to accord "less than even-handed treatment" to one of two incumbent representatives of the consolidated unit of medical officers constitutes a violation of the CMPA as proscribed under D.C. Code Sec. 1-618.4(a)(2). Doctors Council of DCGH, et al. v. DCGH, et al., Slip Op. No. 539 at p. 4, PERB Case No. 97-U-25. However, the disputed wage parity increase did not result from the PBC's discretion or mutual agreement to bargain with DCDCGH. Instead, the PBC implemented the wage increase because it was binding on it as a "bargained terms and conditions of employment reached [ ] by agreement ... before the transfer of covered employees" to the PBC. D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corporation, D.C. General Hospital, et al., Slip Op. 565. As such, the PBC was bound to do so once covered DCGH medical officers were transferred to its jurisdiction.

D. The Parity Increase Was Not Given "in the normal course of business."

Upon concluding that the wage increase was pursuant to a binding agreement (i.e., mid-September 1996 agreement), the Hearing Examiner found its implementation, while an election was pending, lawful since it "would otherwise have been granted in the normal course of business (see Martins Industries, 290 NLRB 857)." R&R at 13.[6]/ DCDC does not take issue with the legal principle; however, it asserts that it is not applicable because DCGH/PBC was not authorized after August 28, 1996, to negotiate the September 1996 agreement with DCDCGH. As such, the increase provided by the agreement was not lawful and therefore could not be implemented in the normal course of business "because the PBC Emergency Act froze the terms and conditions of employment." (DCDC Except. at 22.) We previously determined October 1, 1996, not August 28, 1996, to be the date that DCGH became subject to

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[6]/ In Martins Industries, the NLRB found that the employer violated employees' right to organize and be represented when, prior to a union campaign, the employer withheld quarterly wage increases that employees would have received pursuant to an established merit wage policy. The NLRB found that notwithstanding the employer's intention, the employer's actions without any non-discriminatory explanation, had the foreseeable effect of discouraging union activity since non-organized employees' pay increases received their pay increases pursuant to the wage policy during the same period. The NLRB observed that "[t]he withholding of pay raises from employees who are awaiting the holding of a Board election violates the Act if the employees otherwise would have been granted the pay increase in the normal course of the employer's business." Id.

In this case, the Hearing Examiner found that the wage increase was pursuant to a preexisting agreement reached before the advent of the Board directed election between DCDC and DCDCGH. The Hearing Examiner further found that the PBC "acted expeditiously to implement the agreement upon being advised that no further external approvals were necessary." (R&R at 13.) Under the holding in Martins Industries, the PBC would have risked committing an unfair labor practice if it withheld the wage increase when it completed the funding process necessary to implement it.

the obligations under the "PBC Emergency Act." Since DCDC's contention is based on this erroneous premise, we find no merit to this exception.

E. The Hearing Examiner's reliance upon the PBC's absence of proof that the parity increase was intended to indicate support of DCDCGH over DCDC.

The Hearing Examiner found no support for the contention that the wage increase granted to Hospital doctors was intended to favor DCDCGH over DCDC in the scheduled representation election.

Pursuant to Board Rule 520.11, "[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." The PBC was not required to prove it did not violate the CMPA. Rather, its burden was to rebut any prima facie showing by DCDC that it committed the alleged violation. See, e.g., Valerie Ware v. D.C. Dpet of Consumer and Regulatory Affairs, 46 DCR 3367, Slip Op. No. 571, PERB Case No. 96-U-21 (1999). DCDC, having failed to meet its burden, provides no basis for this exception.

F. The Hearing Examiner's Statement that DCDC lacked standing to challenge the parity pay increase.

DCDC excepts to the Hearing Examiner's finding that DCDC lacked standing to challenge the wage increase.(R&R at 15.) In our view, the Hearing Examiner's finding refers only to DCDC's standing to contest whether or not the wage increase conformed with the terms of an agreement between DCGH and DCDCGH since DCDC was not a party to the agreement. DCDC does not provide any basis for a more expansive interpretation. In this limited context, we find this exception to be unfounded.

G. The Hearing Examiner's conclusion that DCDCGH did not violate D.C. Code § 1-618.4(b)(1).

DCDC takes issue with the Hearing Examiner's conclusion that "[a] union does not commit an unfair labor practice in violation of D.C. Code § 1-618.4(b)(1) simply by pursuing the interest of its members." (R&R at 16.)[7]/ The "interest" pursued by DCDCGH refers to its negotiations with DCGH over the September 1996 wage increase agreement covering DCGH medical officers. The negotiations that resulted in the wage increase were conducted concluded at a time when DCDC and DCDCGH represented two different units of medical officers. The PBC's implementation of the wage increase, at a time when we determined that a consolidated unit of medical officers was appropriate, does not alter the legitimacy of DCDCGH's negotiations that resulted in the wage increase.[8]/ In this regard, we find no basis for disturbing the Hearing Examiner's conclusion under the established facts of this case.

ORDER

IT IS HEREBY ORDERED THAT:

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[7]/ The Hearing Examiner did not qualify his conclusion by including the standard governing a labor organization's conduct in a cause of action brought against a union under D.C. Code § 1-618.4(b)(1), i.e., that the union's actions with respect to its members must not be arbitrary, discriminatory or done in bad faith. See, e.g., Carlease Madison v. International Brotherhood of Teamsters, Local 1714, 37 DCR 7107, Slip Op. 229, PERB Case No. 88-U-20 (1989.)

[8]/ Although none of the parties have raised it, we note an apparent jurisdictional issue concerning the timeliness of this allegation against DCDCGH. Specifically, the Hearing Examiner found that DCDCGH's challenged conduct, which served as the basis for this alleged violation, occurred in 1996. However, the Complaint was not filed until 1998. See Board Rule 520.4.

1. The Complaint is Dismissed.

2. The Stay of the Board Directed Election ordered in Slip Op. No. 575 is lifted.

3. The election of the medical officers unit will be by mail ballot in accordance with Board Directed Election Procedures. The D.C. Health and Hospitals Public Benefit Corporation (PBC), Doctors Council of the District of Columbia (DCDC) and the Doctors Council of the District of Columbia General Hospital (DCDCGH) may mutually agree to bear the cost of retaining a third party (under the auspices of the Board) to conduct an on-site election. The parties have fourteen (14) days from the issuance of this Decision and Order to reach such an agreement and submit a signed copy for review by the Board's Executive Director. If the parties do not select this option within the time prescribed in this paragraph, the Board shall issue forthwith, Board-Directed Election Procedures.

4. No further matters involving these parties concerning the claims contained in this case or in any new matter will be considered prior to the conduct of the Board Directed Election between DCDC and DCDCGH to determine the exclusive certified bargaining representative for the consolidated unit of PBC medical officers.

5. Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

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

November 24, 1999

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 97-UM-05, 97-CU-02 and 99-U-02 was transmitted via facsimile and firs class mail to the following parties on this the 24th day of November, 1999.

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