GOVERNMENT OF THE DISTRICT OF COLUMBIA

PUBLIC EMPLYEE RELATIONS BOARD

In the Matter of:	)	
	)	
District of Columbia Nurses Association,	)	
	)	
Complainant,	)	PERB Case No. 08-U-56
	)	
v.	)	Opinion No. 1128
	)	
District of Columbia Department of Mental Health,	)	
	)	
Respondent.	)	
	)	

DECISION AND ORDER

I. Statement of the Case

On July 15, 2008, the District of Columbia Nurses Association ("Complainant", "DCNA", or "Union") filed an Unfair Labor Practice Complaint alleging that the District of Columbia Department of Mental Health ("Respondent", "DMH" or "Agency") violated Sec. 1-617.04(a)(5) of the Comprehensive Merit Personnel Act ("CMPA"), by failing to bargain with the WAE registered nurses. The Respondent denies any violation of the CMPA.

On May 9, 2006, DCNA filed a petition for exclusive recognition of "all nurses classified as while actually employed ("WAE"), employed by the Department of Health." (The case is docketed PERB Case No. 06-RC-02). On August 22, 2007, the Board gave notice that it had completed the investigation of the showing of interest and determined that the "Petition satisfied the requirement of Board Rule 502.2." (See Complaint at paras. 4-5). In its Complaint, the Union alleged as follows:

> 6. In or about December 2007, Ms. Diane Atkinson Jones, Associate Director of Nursing, approached a WAE registered nurse and advised her that because the [Registered Nurse] RN was not "putting in enough hours"

she should terminate her position as a WAE nurse and seek employment through the nurse contracting agency to perform contract nurse services at St. Elizabeth's Hospital.

7. Furthermore, during the same conversation described in paragraph 6, supra, Ms. Jones told the employee that the WAE nurses "would not get what they wanted," referring to the rights of union representation.

8. In or about February 2008, management eliminated work hours from at least one WAE registered nurse.

9. In or about April 2008 and continuing to date, management terminated the employment of at least two WAE registered nurses, without providing notice to DCNA or advance notice to the employees.

10. On or about May 9, 2008, the Agency notified all WAE registered nurses that, effective June 1, 2008, "all WAE employees must work a minimum of 16 shifts per month of which at least 4 must be on the weekend..."

11. DCNA notified Ms. Frankie Wheeler, Director, Human Resources, DMH of the conduct described in paragraphs 6-10, supra. To date, neither Ms. Wheeler nor any other management official employed by DMH has taken any action to resolve the issues.

(Complaint at pgs. 2-3).

As a remedy the Complainant requests that the Board: (1) order the Agency to cease and desist taking action that affects the conditions of employment of the petitioned for bargaining unit; (2) order the Agency to immediately rescind the actions described in the Complaint; (3) order the Agency to discipline Ms. Atkinson Jones for attempting to directly deal with an employee during the pendency of the Petition in PERB Case No. 06-RD-02; and, (4) post a notice admitting its violation of the CMPA. (See Complaint, last page).

On September 26, 2008, DCNA filed a Motion for Default Judgment ("Motion"), noting that DMH failed to file an Answer by August 4, 2008. DCNA requested that the Board render a decision based on the record in accordance with Board Rule 520.7. Board Rule 520.7 provides as follows: "[a] respondent who fails to file a timely answer shall be deemed to have admitted the material facts alleged in the complaint and to have waived a hearing. The failure to answer an allegation shall be deemed an admission of that allegation." DCNA asserted that pursuant to this Board rule, there were no material facts in dispute and requested that the Board make a decision based on the record. (See Motion at pgs. 1-3).

On October 3, 2008, DMH filed an Opposition to the Motion for Default Judgment and Request for Extension to File Answer ("Opposition"), asserting that DCNA did not serve DMH with a copy of the Complaint. The matter was referred to a Hearing Examiner, who heard arguments on the Motion on January 29, 2009. The Hearing Examiner denied DCNA's motion and directed DMH to file its Answer by February 6, 2009. DMH complied. (See R&R n.1).

A Hearing was held on March 23, 2009, and the Hearing Examiner issued a Report and Recommendation ("R&R").

II. Positions of the Parties and Hearing Examiner's Recommendation

DCNA alleged that "after it filed the [Representation] petition with the showing of support on May 6, 2006, DMH committed unfair labor practices between December 2007 and May 2008 by making unilateral changes in the terms and conditions [of] WAE nurses by reducing their hours and not renewing their appointments without notifying the Union, although the Union had demonstrated majority support. DCNA also alleges that DMH made negative comments about the Union." (R&R at p. 4). The Union provided evidence of changes in the terms and condition of employment for the WAE nurse, Ms. Blunt. (See R&R at pgs. 4-6).

By definition, DMH denied imposing any unilateral changes and argues that WAE registered nurses work as needed to "fill in the gaps for all kinds of shortages that occur in nursing", including on weekends. (R&R at p. 5). They do not work specific tours of duty. One WAE registered nurse's contract expired, and it was not renewed. Nonetheless, she was offered full-time employment, and she declined. DMH offered testimony that the hours of work were increased for WAE registered nurses due to the increased need for coverage for the shifts of full-time employees. (R&R at pgs. 5-6).

The Hearing Examiner considered the following issues:

A. Whether there are any of the allegations raised by DCNA that are untimely.

DMH argued that the charges relating to the December 2007 conversation between Ms. Jones and Ms. Blunt, and the reduction of hours of at least one WAE registered nurse in February 2008, should be dismissed as untimely. DCNA contended that the 120 days began to run not when the charged conduct took place, but rather when the Union "knew or reasonably should have known of the matter. DCNA asserted that Ms. Blunt did not notify the Union of the alleged incidents until May [2008]. DCNA argued that there would be no prejudice to DMH if the allegation is heard." (R&R at p. 6).

Citing *Glendale Hoggard v. D.C. Public Schools*, 43 DCR 1297, Slip Op. 352, PERB Case No. 93-U-10 (1993), the Hearing Examiner noted that Board rules establishing the time allowed to initiate a complaint are jurisdictional and mandatory. In *Hoggard*, the Board addressed circumstances under which it would designate when the violation took place, stating: "Board rules do not permit the filing of complaints based on the discovery of alleged latent violations. Nor has the Board, to date, accepted such." The Hearing Examiner also quoted the Board in *AFSME, Local 2725, AFL-CIO v. D.C. Housing Authority*, 46 DCR 119, Slip Op. No. 509 at p.2, PERB Case No. 97-U-07 (1997), as follows:

> As noted in the Executive Director's letter [dismissing the matter], our jurisdictional requirement of 120 days in which to file an unfair labor practice complaint commences from the date the violation occurred... DCHA provided notice that it had exercised its authority to RIF these employees, [and] any violation by DCHA that may exist with respect to his act occurs when notice or knowledge is received or reasonable ascertained.

The Hearing Examiner found that DCNA's argument that it was not informed of the problem until May 1, 2008, does not excuse the late filing in this instance, where WAE registered nurses were aware of DCNA's involvement. In addition, Mr. Smith, Union Representative, described Ms. Dixon, a WAE nurse, as the Union's "de facto WAE representative." Thus, the Hearing Examiner found that DCNA had an additional means of learning of problems related to WAEs. (R&R at p. 7). The Hearing Examiner concluded that "charges related to matters alleged to have taken place in December 2007 and February 2008 were untimely and should be dismissed." *Id.*

No exceptions were filed on this issue. The Board notes that it has no discretion to enlarge the 120 day period for initiating an unfair labor practice complaint under Board Rule 520.4. The facts alleged in December 2007 occurred over 200 days prior to July 15, 2008, the date on which the Complaint was filed. The facts alleged in February 2008, even if they occurred on the last day of February, occurred at least 17 days after the 120-day period expired.

The Board finds that the Hearing Examiner's conclusions are reasonable, based on the record, and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's recommendation to dismiss the allegations that occurred in December 2007 and February 2008.

B. Whether DCNA met its burden of proving that DMH committed an unfair labor practice.

DCNA argued that DMH was required to notify the Union of any changes in the terms and conditions of employment of the WAE nurses once the Union filed the recognition petition and demonstrated its majority support. The Hearing Examiner considered DCNA's argument and reasoned as follows:

> Assuming, *arguendo*, that there were changes in the terms and conditions of employment,...the Union's reliance on...*Idaho Pacific Steel Warehouse Co.*, 227 NLRB 326 (1976), to support its position that DMH had such an obligation, is misplaced. In *Idaho Pacific*, the parties had agreed that the Idaho Labor and Industrial Services Board would review the authorization cards and certify the Union as the exclusive representative. After the review was completed and the Union certified, the Union asked to bargain. The employer refused, however, to recognize the Union, stating that only NLRB could certify a union. The National Labor Relations Board held that once an employer... [allows] an entity

> other than the NLRB [to] determine majority status, the employer cannot then refuse to recognize the union. In its analysis, the NLRB referenced *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301 (1974) ("*Linden Lumber*"), in which the Supreme Court held that an employer may lawfully refuse to bargain on the basis of union authorization cards and insist on an election so long as it refrains from conduct that would tend to preclude a free election. In this matter, DCNA had not yet been recognized as the exclusive representative of the WAEs. DMH had not agreed to recognize the Union without an election. Therefore, DCNA did not meet its burden of establishing that DMH had a duty to notify DCNA of any changes in terms and conditions of employment of WAEs.

(R&R at p. 8).

Furthermore, the Hearing Examiner found that:

> WAE [registered nurses] have limited appointments which must be renewed once they expire for the WAE to continue working. DMH is under no obligation to renew WAE appointment. In addition...AEs appointments are temporary and their schedules are 'intermittent', at the agency's discretion. [The Hearing Examiner found that] [t]he evidence did not establish that DMH changed the number of hours required of WAEs...and did not renew Ms. Blunt's appointment when it expired, because of anti-Union animus. Rather, the evidence supports the conclusion that these decisions were a result of the changing needs of DMH for coverage by WAEs to supplement coverage provided by the full-time permanent registered nurses.

(R&R at p. 9).

Based on the above analysis, the Hearing Examiner concluded that DCNA did not meet its burden of proof and recommended that the matter be dismissed. (See R&R at p. 9).

Pursuant to Board Rule 520.11, the Complainant has the burden of proving that the Respondent committed an unfair labor practice. As the NLRB noted when discussing *Linden Lumber,* the Supreme Court held that an employer may lawfully refuse to bargain on the basis of union authorization cards and insist on an election, so long as it refrains from conduct that would tend to preclude a free election. Here, it has not been established that DMH engaged in such conduct. The evidence does not establish that the actions of DMH, concerning the hours assigned to WAE registered nurses, created a unilateral change in the terms and conditions of employment. Finally, DCNA failed to establish that DMH's actions were motivated by anti-union animus. Although DMH did not recognize DCNA as the representative of the WAE registered nurses, there is no proof that its actions were designed to preclude a free election.

Based on the facts presented, the Board concludes that DMH has no duty to bargain with DCNA concerning the WAE registered nurses, until an election is held.[1]

The Board finds that the Hearing Examiner's findings and conclusions are reasonable, based on the record, and consistent with Board precedent. Therefore, this matter is DISMISSED.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Unfair Labor Practice complaint filed by the District of Columbia Nurses Association alleging that the District of Columbia Department of Mental Health violated D.C. Code Sec. 1-617.04(a) (1) and (5) is **DISMISSED.**

2. 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 7, 2011

[1] On August 11, 2011, the Board granted a petition for an election among the WAE registered nurses at the District of Columbia Department of Mental Health, in a consolidated case, -DCR-, Slip Op. No. 1013, PERB Case No. 04-UM-03, 05-U-17, 06-RC-02, 08-UC-02.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-U-56 was transmitted via Fax and U.S. Mail to the following parties on this the 7th day of October 2011.

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