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**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)	
)	
American Federation of Government Employees, Local 2725,)	
)	
Complainant,)	PERB Case No. 05-U-30
)	
v.)	
)	Opinion No. 841
District of Columbia Department of Health and Office of Labor Relations and Collective Bargaining,)	
)	
Respondents.)	
)	

DECISION AND ORDER

I. Statement of the Case:

On April 13, 2005, the American Federation of Government Employees, Local 2725, ("Complainant", "Union" or "Local 2725") filed an unfair labor practice complaint ("Complaint") in the above-referenced case. Specifically, the Complainant alleges that the District of Columbia Department of Health ("DOH" or "Respondents") and the Office of Labor Relations and Collective Bargaining ("OLRCB" or "Respondents") violated D.C. Code § 1-617.04(a)(1) and (5) by: (1) undermining the authority of the Public Employee Relations Board ("Board") by refusing to implement a Board order; (2) failing to provide pertinent information; (3) refusing to bargain in good faith; and (4) restraining and coercing employees in the exercise of their rights. (See Complaint at p. 5). The Complainant requests that the Board order the Respondents to: (a) cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5); (b) comply with the Board's order; (c) comply with the Union's request for information; (d) post a notice to employees; (e) pay attorney fees and costs.

In an Answer filed on May 3, 2005, 2005, the Respondents: (1) denied the Complainant's allegations; (2) affirmed their willingness to negotiate stating that they met with the Union on May 2, 2005; and (3) asserted that the Union failed to appear for a scheduled meeting on April 29, 2005.

On September 7, 2005, the Respondents filed a "Motion to Dismiss" alleging that the Complainant failed to state a cause of action and that the Complaint was moot because the parties were currently following impasse procedures. (Motion to Dismiss at pgs. 4-7). In addition, the Respondents filed a document styled "Motion to Hold the Hearing in Abeyance". In their motion to hold the hearing in abeyance, the Respondents requested that this matter be held in abeyance until completion of the parties' impasse proceedings. The case was referred to a Hearing Examiner. The Hearing Examiner denied both the motion to dismiss and the motion to hold the hearing in abeyance. As a result, a hearing was held.

The Hearing Examiner issued a Report and Recommendation ("R&R") finding that the Respondents violated the Comprehensive Merit Personnel Act ("CMPA"). The Respondents filed exceptions to the R&R and the Complainant filed an Opposition. The Hearing Examiner's R&R, the Respondents' Exceptions and the Complainant's Opposition are before the Board for disposition.

II. Background

The Union filed a recognition petition with the Board seeking to represent the statistical employees at DOH's State Center for Health Statistics Administration ("SCHSA"). On April 20, 2004, the Board certified the American Federation of Government Employees, Local 2725 as the exclusive bargaining representative for a unit of twelve (12) professional SCHSA employees employed by DOH. Subsequently, on July 2, 2004, the Board determined that these SCHSA employees should be "placed in Compensation Unit 1."¹ (R&R at p. 2)

The parties anticipated the placement of the DOH, SCHSA employees into Compensation Unit 1 even before the Board's determination of the appropriate compensation unit. (See R&R at p. 2) By e-mail dated July 20, 2004, Business Agent Lola Reed asked Walter Wojcik, OLRCB Representative, what could be done to speed up the implementation of the Board's Compensation Order. (See R&R at p. 2) A week later, Mr. Wojcik informed the Union that "OLRCB's general policy is to negotiate the transition of employees and working conditions at the same time[.] [In addition, he stated that the] immediate transfer of employees to the union roles" was not required. (R&R at p. 3) There was no further communication between the parties concerning this matter. In mid-August 2004, management officials from DOH, including Monica Lamboy, Chief Operating Officer, attended a labor-management meeting with the Union to resolve outstanding grievances. At the August 2004 meeting, Union President Eric Bunn raised the issue concerning DOH's implementation of the Board's July 2, 2004 Order placing the DOH, SCHSA employees in Compensation Unit 1. In response, Monica Lamboy, Chief Operating Officer for DOH indicated that

¹Compensation Unit 1 consists of all career service professional, technical, administrative and clerical employees who currently have their compensation set in accordance with the District Service (DS) Schedule.

she made budgetary allowances for the placement of the affected employees into Compensation Unit 1. (See R&R at p. 3; and Answer, paras. 6-7, at p. 3) However, as of the date of the filing of the Complaint, the affected employees were not placed in Compensation Unit 1.

In November 2004, at the request of the Union, Councilmember Phillip Mendelson attended a meeting with Mary Leary, Director of OLRCB and Eric Bunn "in an effort to hasten the [placement] of the DOH statistical employees into Compensation Unit 1." (R&R at p. 3) Ms. Leary indicated that the Union should request a meeting in writing. By letter dated November 3, 2004, Mr. Bunn wrote to OLRCB and to Dr. Gregg, Acting Director of DOH, requesting that the parties meet as soon as possible in order to comply with the Board's July 2, 2004 Compensation Order.

Thereafter, on December 9, 2004, the parties held their first negotiating session. (See R&R at p. 3) At the December 2004 negotiation session, Ms. Leary made an offer to place the DOH, SCHSA employees on the Compensation Unit 1 salary scale effective January 2005. "Leary stated that the [SCHSA] employees would be [placed in] Compensation Unit 1 in January 2005 at the same grade they presently held, but at [a] step within the grade that most closely mirrored their current [pre-union] wages." (R&R at p. 4) Under Ms. Leary's proposal, placement into the Compensation Unit 1 salary scale would result in a lateral move. Mr. Bunn requested the proposal in writing in order to formulate a position. "At the same time, he told [Ms.] Leary that the Union was not required to negotiate about [placement]; rather, the employees were entitled to [be placed in] their Union positions [on the Compensation Unit 1 pay scale] at the identical grade and step they held before they were unionized. . . . [Ms.] Leary was unwilling to discuss the Union's position. Instead she declared that the newly-certified unit employees were not entitled to the wages that long-standing union members had earned as a result of negotiations and posed the following alternative: Local 2725 could accept [management's] unwritten proposal or litigate." (R&R at p. 4) Nonetheless, she agreed to provide documentation detailing the impact of the Respondents' proposal on the DOH statistical employees. (See R&R at p. 4)

As of December 21, 2004, the Union had not received a written proposal from Ms. Leary. As a result, Ms. Reed e-mailed Ms. Leary requesting the promised documentation within ten (10) days. The Respondents did not respond to Ms. Reed's e-mail. On January 14, 2005, the Union sent another request for the documentation. Thereafter, in March 2005, Joslyn Williams, President of the Metropolitan Washington Council, AFL-CIO, attended a meeting with Ms. Leary and Mr. Bunn regarding a number of outstanding issues affecting several AFGE Locals. At the March 2005 meeting, Ms. Leary agreed to provide the Union with a written proposal and a "crosswalk" containing "specific data showing how [the] Respondents' proposal would affect the unit employees".² (R&R

²The term "crosswalk" is used by the Respondents and pertains to a "document that was supposed to reflect the wage rates the statistical employees would earn if they were placed in the Compensation Unit at a step that mirrored their present earnings." (R&R at p. 5; Tr. at p. 59).

at p. 4) Approximately two weeks later, a second meeting was held with Mr. Williams, but the documentation was not provided.

The parties scheduled a bargaining session for April 11, 2004, but Mr. Bunn was co-chairing a Task Force meeting with management and labor representatives at about the same time. As a result, Mr. Bunn did not attend the bargaining session. That day, OLRCB delivered a proposal together with a list of the SCHSA employees to Mr. Bunn at the Task Force meeting. The proposal contained the same terms that Ms. Leary had proposed at the December 9, 2004 meeting.³ This proposal would position the affected employees at a lower compensation level than they would enjoy if they were placed on the same nominal step they held prior to being placed on the Compensation Unit 1 pay scale. (See R&R at p. 5).

On April 13, 2005, the Union filed an unfair labor practice complaint alleging that DOH violated the CMPA by: (1) refusing to implement the Board's July 2, 2004 order which placed the newly-certified unit in Compensation Unit 1; (2) refusing to bargain in good faith; (3) failing to provide pertinent information; and (4) restraining and coercing employees in the exercise of their rights.⁴ The Respondents filed an answer on May 3, 2005, denying these allegations. As a result, the

³"OLRCB made a proposal to place the SCHSA employees in Compensation Unit 1 "at their present grade but not at the same nominal step. Instead, effective as of the first period after January 1, 2005, they would be assigned to a step that provided a wage rate most closely matching their present, pre-union pay. In other words, [OLRCB's] proposal positioned the affected employees at a lower step (and correspondingly lower compensation level) than they would enjoy if they were placed on the same nominal step (and higher pay) that they held prior to [placement in Compensation Unit 1]." (R&R at p. 5). (Parenthesis in the original.)

⁴After the Complaint was filed, the parties held a bargaining session for an hour on May 2, 2005. (See R&R at p. 5) At this session, OLRCB presented a crosswalk with the same proposal that Ms. Leary had made in December 2004, explaining that budgetary concerns prompted the proposal. The Union responded to OLRCB's refusal to change its initial proposal and to budgetary concerns that were raised for the first time at the May 2005 meeting. "[T]he Local presented a handwritten proposal providing that the unit employees would transfer at their same grade but at the step closest to their current rate of pay on October 4, 2004." However, the counteroffer also provided that in January 2005, the affected unit employees would transfer to the nominal step he or she held on September 30, 2004 . . . and that any appropriate steps due an employee during the process would remain in effect." (R&R at p. 5 and fn. 6; Tr. pgs. 245-246). The parties met again on June 24, 2005. OLRCB made a final proposal titled "Memorandum of Understanding" ("MOU") containing the Respondents' initial offer. However, the effective date of the terms of the MOU was moved from January 2005 to July 2004. In response, Local 2725 countered with an effective date of July 2, 2004, while retaining its proposed two-step placement in Compensation Unit 1. (See R&R at p. 6) Subsequently, on July 21, 2005, OLRCB sent the Union a memo explaining for the first time the methodology that it used to place the SCHSA employees to Compensation Unit 1. In August 2005, the parties commenced the CMPA impasse procedures. (See R&R at p. 6).

matter was referred to a Hearing Examiner. Prior to the hearing, the Respondents filed a motion to dismiss and a motion to hold the hearing in abeyance.

III. Hearing Examiner's Report and Recommendation, the Respondents' Exceptions and the Complainant's Opposition:

As a preliminary matter, the Hearing Examiner considered the Respondents' motions. In their first motion, the Respondents argued that the unfair labor practice complaint should be dismissed because the: (1) Complainant failed to state a cause of action under D.C. Code § 1-617.04, and (2) Complaint was moot since the parties were currently following the CMPA's impasse procedures. (See Motion to Dismiss at pgs. 4-7) The Complainant filed an Opposition asserting that the facts alleged, when proven, describe an unfair labor practice. (See Opposition at p. 2)

The Respondents filed a second motion requesting that the hearing be held in abeyance until completion of the impasse proceedings. In support of that motion, the Respondents argued that the underlying dispute in the Complaint would be resolved in the impasse proceedings. (Motion to Hold the Hearing in Abeyance at p. 2, citing PERB Case No. 05-I-05) The Complainant opposed the Respondents' motion, claiming that the impasse proceedings would not resolve the alleged failure to bargain in good faith. (See Opposition at p. 1). The Hearing Examiner rejected the Respondents' arguments and denied both motions.

The parties did not file exceptions to the Hearing Examiner's rulings concerning these two motions. We find that the Hearing Examiner's denial of the two motions is reasonable, supported by the record and consistent with Board precedent.⁵ Therefore, we adopt her rulings.

⁵When considering a motion to dismiss for failure to state a cause of action, the Board considers whether the alleged conduct may result in a violation of the CMPA. See *Doctors' Council of District of Columbia General Hospital v. District of Columbia General Hospital*, 49 DCR 1137, Slip Op. No. 437, PERB Case No. 95-U-10 (1995). Also, the Board views contested facts in the light most favorable to the Complainant in determining whether the Complaint gives rise to an unfair labor practice. See *JoAnne G. Hicks v. District of Columbia Office of the Deputy Mayor for Finance, Office of the Controller and American Federation of State, County and Municipal Employees, District Council 20*, 40 DCR 1751, Slip Op. No. 303, PERB Case No. 91-U-17 (1992). In the present case, we believe that the Complainant's factual allegations, if proven, would constitute an unfair labor practice. As a result, we concur with the Hearing Examiner's ruling denying the Motion to Dismiss.

Concerning the Hearing Examiner's denial of the motion to hold the hearing in abeyance, we previously considered this issue in *American Federation of Government Employees, et al. v. Government of District of Columbia, et al.*, 45 DCR 8071, Slip Op. No. 502 at p. 2, PERB Case No. 97-U-01 (1996). In that case, the Respondent argued that "the culmination of the impasse resolution procedures provided [in] D.C. Code § 1-617.17(f) [would] . . . render moot all the allegations contained in the [unfair labor

After ruling on the two motions, the Hearing Examiner identified several issues for resolution in the unfair labor practice proceeding. These issues, her findings and recommendations, the Respondents' exceptions and the Complainant's opposition, are set forth below.

1. *Did the Respondents lawfully demand that Local 2725 bargain about wages in the transfer of SCHSA unit employees to Compensation Unit 1?*

Citing D.C. Code § 1-617.04(a)(5), the Hearing Examiner noted that the CMPA makes it an unfair labor practice for an agency, upon request, to refuse to bargain collectively in good faith with an exclusive representative. The Hearing Examiner observed that this includes the requirement to negotiate over compensation at reasonable times and in good faith.⁶ (See R&R at p. 7) Consistent with this finding, she focused on the issue of: "*whether DOH was obligated to place the newly-certified employees into the Compensation Unit 1 pay scale at the same grade and step they previously held, without bargaining over the wage scales with the Union*". (R&R at p. 7)⁷ (emphasis added).

practice] [c]omplaint". The Board disagreed, stating that the impasse procedures would not necessarily render moot all the allegations contained in the complaint. Nonetheless, the Board granted the request to hold the hearing in abeyance, noting that there was a significant, but not complete, overlap in the issues raised by the two proceedings and that "[there was no] objection [to the motion] from the [opposing party]". In the present case the Board notes that: (1) the impasse procedures would not necessarily render moot all the allegations contained in the complaint in this matter, and (2) the Complainant objects to the Respondents' motion to hold in abeyance. For these reasons, we believe the motion should be denied. As a result, we adopt the Hearing Examiner's ruling denying the motion to hold in abeyance.

⁶D.C. Code § 1-617.17(b) provides in pertinent part as follows: "... ("management") shall meet with labor organizations ("labor) which have been authorized to negotiate compensation at reasonable times in advance of the District's budget making process to negotiate in good faith with respect to salary, wages, health benefits, within-grade increases, overtime pay, education pay, shift differential, premium pay, hours, and any other compensation matters."

⁷The Board notes that management and the Union have previously negotiated a collective bargaining agreement (CBA) containing a pay scale with built-in step increases. This CBA is effective from fiscal year 2004 to 2006. (Tr. pgs. 72-73 and 109, and 116-117) In the present case, the Complainant refers to this pay scale as the "union pay scale" and asserts that the newly-certified employees should be placed on the union pay scale at their *current grade and step*, (automatically) without bargaining over a new pay scale assignment, resulting in higher pay. (Tr. p. 34,) The Respondents assert that the newly-certified employees should be placed on the Compensation Unit 1 pay scale as a result of bargaining by the parties, at their *current wages, i.e.*, "at the same grade and [at] the closest step to their current salary, without loss of pay". (Tr. p. 128)

The parties raised the following four issues in support of their respective positions regarding the placement of the employees into Compensation Unit 1: (1) past practice; (2) the Comprehensive Merit Personnel Act (CMPA); (3) 2002 and 2004 amendments to the CMPA; and (4) the language of the Compensation Unit 1 collective bargaining agreement.

With respect to past practice, the Union's witness, Eric Bunn, testified that he has served as union president for the past fourteen (14) years. During this time, newly-certified employees were always placed into an existing compensation unit at their current grade, step and position, without bargaining over compensation. (See R&R at p. 8; Tr. at pgs. 28, 34 and 38) The Respondents countered that it was the policy and practice of OLRCB to bargain with the unions over the pay scale assignments of employees in newly-certified units when placing them into a compensation unit. (Respondents' Brief at pgs. 2, 4 and 12) In support of this contention, the Respondents' witnesses testified that between 2002 and 2004, some union locals had accepted their terms to place newly-certified employees in Compensation Unit 1 at their current rate of pay. (See Tr. at pgs. 94; 146-147 and 172).

The Hearing Examiner observed that the Respondents' witnesses had relatively short tenure in the District government. Their knowledge concerning the past practice of the parties did not extend to practices that occurred prior to their employment. Also, she found that the evidence presented by the Respondents did not establish a consistent practice. Some union locals had accepted the Respondents' terms to place newly-certified employees in Compensation Unit 1 at their current rate of pay, but others had rejected this offer. Therefore, the Hearing Examiner found that the Respondents did not establish that their position represented the past practice of the parties. Further, she noted that the testimony of the Union's witness was not directly challenged. (See R&R at p. 8) As a result, she relied on Mr. Bunn's extensive experience and his testimony that newly-certified employees were, as a matter of practice, placed into an existing compensation unit at their current grade, step and position, without bargaining over compensation. Consistent with this finding, the Hearing Examiner concluded that "Local 2725 was not obliged to bargain about pay scale assignments for the SCHSA employees on [placement into] Compensation Unit [1]." (R&R at pgs. 8-9).

In support of their position, the Respondents also relied on the provisions of the CMPA. Specifically, the Respondents maintained that to ensure funding for the salaries of the newly-certified employees, D.C. Code § 1-617.17(f) (2002),⁸ requires that the parties bargain in advance of the

⁸D.C. Code § 1-617.17(f) (2002 amendment) -

(A) Collective bargaining for a given fiscal year or years shall take place at such times as to be reasonably assured that negotiations shall be completed prior to submission of a budget for said year(s) in

budget cycle for the next fiscal year. (See Respondents' Brief at p. 14) The Union countered that in anticipation of the Board's certification order, Monica Lamboy had already "made budgetary allowances for the [placement] of the affected employees in [Compensation] Unit [1]". (Tr. at pgs. 45 and 54; R&R at p. 3) Therefore, DOH had previously funded the salaries for the newly-certified unit. The Hearing Examiner noted that the Respondents admitted in their Answer to the Complaint that DOH had previously funded the new salaries - thereby rejecting the Respondents' position. (See Answer, Para. 8, at p. 3, R&R at p. 3).

Citing the 2002 amendments to the CMPA at D.C. Code § 1-617.17(f)(A) and (m) (2002),⁹ the Respondents further asserted that the parties must negotiate working conditions and compensation matters concurrently. (See Respondents' Brief at p. 14) The Union contended that the 2002 amendments do not specifically address compensation negotiations for newly certified bargaining units assigned to an existing compensation unit. Also, the Union argued that a later amendment, the 2004 amendment, "accurately reflects the parties' past practice". (R&R at p. 8). Further, the Union relied on the legislative history of the 2004 amendments to interpret the new language in the amendment. The Hearing Examiner found that in 2002 the CMPA was silent on the issue of negotiations for newly-certified units assigned to existing compensation units. It was not until 2004 that the CMPA specifically addressed this issue. (See R&R at P. 7).

The Hearing Examiner observed that "although the 2004 [a]mendments are not retroactive, [and do not apply to the facts of this case] the parties agree that they clarify certain provisions of the 2002 statute. In addition, the legislative history of the 2004 [a]mendment[s] is particularly useful in

accordance with this section.

⁹D.C. Code § 1-617.17.17 (2002 amendments) -

(f)(A) Collective bargaining for a given fiscal year or years shall take place at such times as to be reasonably assured that negotiations shall be completed prior to submission of a budget for said year(s) in accordance with this section.

(m) When the Public Employee Relations Board makes a determination as to the appropriate bargaining unit for the purpose of compensation negotiations pursuant to section [1-616.16], *negotiations for compensation between management and the exclusive representative of the appropriate bargaining unit shall commence as provided for in subsection (f) of this section.* The Mayor shall negotiate agreements concerning working conditions at the same time as he or she negotiates compensation issues. [New language in italics].

considering the [a]mendment's purpose regarding the scope of bargaining for newly certified units." (R&R at p. 7) As a result, the Hearing Examiner analyzed the parties' respective interpretations of the comments by Councilmember Mendelson when he introduced the 2004 amendments. Councilmember Mendelson stated as follows:

... For units placed into a new compensation unit . . . non-compensatory matters shall be negotiated simultaneous[ly] with negotiations concerning compensation. [italics added] where the agreement is for a newly[-]certified collective bargaining unit assigned to an existing compensation unit, the parties shall proceed promptly to negotiate simultaneously any working conditions . . . and coverage of the compensation agreement. There should not be read into this new language any intent that an existing compensation agreement shall become negotiable when there is a newly certified collective bargaining unit. Rather, the intent is to require prompt negotiations of non-compensatory matters as well as application of compensation (e.g. when pay scale shall apply to the newly-certified unit. (Emphasis added by the Hearing Examiner).

The Hearing Examiner noted that "[o]n the one hand, [the] Respondents argue that the [first sentence in the quoted language requires] Local 2725 to bargain about wage scales for the affected employees. On the other hand, Local 2725 contends . . . that the [last sentence in the quoted language] establishes that bargaining for newly-certified units should address procedural, not substantive, wage issues." (R&R at p. 8) In order to analyze the parties' interpretations, the Board believes that the Hearing Examiner compared the two relevant provisions in the 2004 amendments which address negotiations for "newly certified collective bargaining units", D.C. Code § 1-617.17(f)(A), subsections (ii) and (iii).¹⁰

¹⁰Specifically, D.C. Code § 1-617.17(f)(A), subsections (ii) and (iii) state as follows:

(ii) Where the compensation agreement to be negotiated is for a newly certified collective bargaining unit *assigned to a newly created compensation unit*, working conditions or other non-compensation matters shall be negotiated concurrently with negotiations concerning compensation.

(iii) Where the compensation agreement to be negotiated is for a newly certified collective bargaining unit *assigned to an existing compensation unit*, the parties shall proceed promptly to negotiate concurrently any working condition . . . and coverage of the compensation agreement.

Subsection (ii) requires the parties to bargain over wages for newly-certified collective bargaining units. However, the Hearing Examiner reasoned that both of the subsections, (ii) and (iii), cannot mean the same thing. Therefore, she concluded that subsection (iii) does not require the parties to bargain over the substantive issue of wages when placing a newly-certified unit in an existing compensation unit, such as here. Rather, the parties must bargain over the procedural aspect of compensation bargaining, such as when to place the newly-certified employees in Compensation Unit 1. Finally, the Hearing Examiner determined that the 2004 amendments incorporate the past practice of the parties as described by the Union when placing newly-certified units into an existing compensation unit. (R&R at pgs. 7-8) As a result, the Hearing Examiner determined that "Local 2725 [had no obligation] to bargain about pay scale assignments for the SCHSA employees [when placing them in] Compensation Unit [1]". (R&R at p. 9).

Finally, the parties made arguments pertaining to the Compensation Unit 1 collective bargaining agreement (CBA). "Article 1, Wages" in the Compensation Unit 1 CBA, states that "employees who are actively employed in Compensation Unit 1 . . . as of the date of the approval of this agreement [August 21, 2003]" are entitled to the salary increases contained in the agreement. (CBA at pgs. 2-3) The Respondents maintained that this provision restricts coverage of the Compensation Unit 1 CBA to employees who were actively employed in Compensation Unit 1 when the CBA was approved. They argued, therefore, that the Compensation Unit 1 CBA does not cover employees in newly-certified bargaining units who were not actively employed at the time the CBA was approved. (See Respondents' Brief at p. 3; Tr. at p. 109)

The Union countered that "failure to assign salaries in accordance with the already negotiated pay scale [in the Compensation Unit 1 CBA] . . . commensurate with the [salary] of other employees in the same DS series and grade would create a two-tier wage system for the same job in the District government." (Complaint at p. 3) Further, Bunn testified on behalf of the Union that "[t]he practice has been [that] employees [who are] hired after the compensation agreement [becomes effective,] receive the same exact wages . . . as the employees [who were actively employed as of the date of the approval of the agreement]." (Tr. at pgs. 31-32)

The Hearing Examiner did not directly address the parties' arguments pertaining to Article 1 of the Compensation Unit 1 CBA.¹¹ Nonetheless, she rejected the Respondents' argument by concluding that "bargaining for newly-certified units [assigned to an existing compensation unit] should address procedural, not substantive, wage issues. . . . [Specifically, she concluded that] Local 2725 was not obliged to bargain about pay scale assignments for the SCHSA employees on [placement into] Compensation Unit [1]." (R&R at pgs. 8-9)

¹¹The Board addresses this issue below, under "Exceptions" at fn. 15.

Exceptions

The Respondents take exception to the Hearing Examiner's findings that "Local 2725 [had no obligation] to bargain over the pay scale assignments for SCHSA employees on [placement] to Compensation Unit [1]". (Exceptions at p. 2) The Respondents assert that the Hearing Examiner: (1) incorrectly relied on the legislative history of the 2004 amendment in D.C. Code § 1-617.17(f)(1)(A)(iii) when interpreting the 2002 amendment; (2) incorrectly relied on the evidence presented by the Union concerning the past practice of the parties; (3) failed to give due weight to OLRCB's actual conduct starting in April 2005; and (4) committed reversible error by finding that the Union had no obligation to bargain over "the [placement] of the SCHSA employees to the Compensation Unit 1 pay schedule".¹²

The Respondents argue that the legislative history of the 2004 Amendments became effective after the facts of this case occurred. (Exceptions at p. 2) The Board finds that the 2004 amendments to the CMPA are not applicable here. We note that although the amendment is entitled the "Labor Relations and Collective Bargaining Amendment Act of 2004" ("2004 amendment"), it became effective April 12, 2005. (See D.C. Code § 1-617.17(f)(1)(A) (2005 ed.)). With the exception of an overtime provision, the amendment was not made retroactive. The Complaint in this matter was filed almost concurrently, on April 13, 2005. However, the material facts in this case occurred prior to the effective date of the amendment. As a result, we conclude that the amendment does not apply to the facts of this case. However, in their briefs to the Hearing Examiner, both the Respondents and the Complainant made arguments based on the 2004 amendments.¹³ (See fn. 10, *supra*; Respondents' Brief at p. 14; Tr. at pgs. 103-105; Complainant's Brief at pgs. 16-17). Thus, the Respondents' argument that the Hearing Examiner improperly relied on the legislative history of the "2004 amendment", is inconsistent with their earlier arguments. In light of this, we find that the Hearing Examiner properly considered these arguments in reaching her conclusions in this matter.

¹²See Exception No. 1, at p. 1; "Memorandum in Support of Respondents' Exceptions" ("Exceptions") at pgs. 2-5 and 8-11.

¹³The Respondents argued as follows: "The statute in effect on July 2, 2004 when the [Board] placed the affected employees in Compensation Unit 1, required the [p]arties to negotiate the terms of the transfer . . . The statute was later clarified in the following manner: . . . [citing] D.C. Official Code § 1-617.17(f)(1)(iii)(Pocket part 2005 ed.) . . . [The Respondents maintained that][th]e statutes were enacted to ensure the government's ability to fund [salaries] in agreements negotiated." (Citation omitted) (Respondents' Brief at p. 14) Further, in response, the Complainant argued that "[w]hether the 2002 or the 2004 amendments are applied, the conclusion that bargaining is limited to process-oriented details and not wage level and amounts[,] remains the same. Neither the 2002 nor the 2004 amendments expressly require negotiation over wage level or change this type of [placement] as described by Bunn." (Complainant's Brief pgs. 16-17)

Next we turn to the Respondents' arguments that the Hearing Examiner incorrectly relied on the evidence presented by the Union concerning the past practice of the parties and failed to give due weight to OLRCB's actual conduct of the negotiations starting in April 2005. We believe that the Respondents are merely disagreeing with the findings of the Hearing Examiner and asking this Board to adopt the Respondents' interpretation of the facts. However, we have "previously stated that the relative weight and veracity accorded both testimonial and documentary evidence are for the Hearing Examiner to decide." *American Federation of Government Employees, Local 872*, 38 DCR 6693, Slip Op. No. 266 at p. 3, PERB Case Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). Also see, *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 39 DCR 6238, Slip Op. No. 285, PERB Case Nos. 88-U-33 and 88-U-34 (1991). In the present case, the Board has reviewed the relative weight attributed to the evidence in support of the Hearing Examiner's findings. We find that the Hearing Examiner fully considered all relevant issues of fact when determining that there was no obligation to bargain over the placement of SCHSA employees to the Compensation Unit 1 pay scale. Therefore, we conclude that this exception lacks merit and adopt the Hearing Examiner's findings.

In conclusion, the Respondents assert that the Hearing Examiner committed reversible error by finding that the Union had no obligation to bargain over "the [placement] of the SCHSA employees to the Compensation Unit 1 pay schedule". (Exceptions at p.2) In support of this claim, the Respondents maintain that: (a) the CMPA at D.C. Code at § 1-617.17 (2002 ed.) requires the parties to negotiate over compensation and working conditions simultaneously and in advance of the budget cycle;¹⁴ and (b) only employees actively employed in Compensation Unit 1 as of the date of the approval of the agreement are entitled to the salaries contained in the Compensation Unit 1 CBA.¹⁵ (Exceptions at pgs. 6-7) The Respondents contend, therefore, that the Hearing Examiner's findings are contrary to the CMPA. However, this is just a repetition of the arguments raised before the Hearing Examiner. We find that the Hearing Examiner fully considered and rejected these arguments in reaching her conclusions of law. As a result, we believe that the Respondents' exception amounts to a disagreement with the Hearing Examiner's findings. As previously stated, we have held that a mere disagreement with the Hearing Examiner's findings is insufficient to find reversible error. See *Fraternal Order of Police/Department of Corrections Labor Committee and D.C. Department of Corrections*, 49 DCR 8937, Slip Op. No. 679 at p. 16, PERB Case No. 00-U-36 and 00-U-40 (2002); *Glendale Hoggard v. District of Columbia Public Schools*, 46 DCR 4837, Slip

¹⁴Exceptions Nos. 1, 3, 4, 10 at pgs. 2-3; "Memorandum in Support of Respondents' Exceptions" at pgs. 1-6.

¹⁵The Board notes that this argument is inconsistent with the only bargaining proposal made by the Respondents to the Union. In their proposal, the Respondents were willing to place the newly-certified employees in Compensation Unit 1, but on the Respondents' own terms. The Respondents cannot now claim that the collective bargaining agreement prevents the parties from placing the newly-certified employees in Compensation Unit 1.

Op. No. 496, PERB Case No. 95-U-20 (1996). Furthermore, this Board will not turn aside the findings of the Hearing Examiner where they are reasonable and supported by the record, as here. In light of the above, we conclude that the Respondents' exceptions lack merit.

The Hearing Examiner next considered the following issues:

2. "Given the totality of the circumstances did [the] Respondents violate [D.C. Code] § 1-617.0[4](a)(1) and (5)?"
3. "Did the Respondents present their wage scale proposal to the Union on a "take it or leave it" basis?"
4. "Did the Respondents fail to meet with the Union in a timely manner?"
5. "Did the Respondents unlawfully delay delivering information to the Union for a prolonged period of time?" (See R&R at p. 6).

The Hearing Examiner noted that on December 9, 2004, the Union made a request for a written proposal with a "crosswalk". The Hearing Examiner found that the requested information was not provided until five (5) months later, and only after the Union filed the complaint in this matter. (R&R at p. 11) She concluded that "OLRCB and DOH failed to supply the Local with clearly relevant information in a timely manner in violation of D.C. Code § 1-617.04(a)(1) and (5) of the CMPA."¹⁶ (R&R at p. 11)

Noting that determining good faith, or its absence, in specific situations requires an analysis of the totality of the circumstances on a case by case basis, the Hearing Examiner considered the entire record.¹⁷ She determined that the Respondents did not fulfill their obligation to meet at reasonable times finding that the Respondents engaged in dilatory conduct by failing to meet for over five (5) months without giving any justification for the delay.¹⁸ (R&R at p. 10) In addition, the Hearing Examiner found that on December 9, 2004, the Respondents' conduct demonstrated "a take it or leave it attitude, reflecting a mind closed to compromise. [Furthermore,] . . . throughout the eight months that preceded their declaration of impasse, the Respondents never wavered from their

¹⁶Citing *Rhodes St. Clair Buick, Inc.*, 242 NLRB 1320, at 1323 (1979).

¹⁷Citing *Continental Ins. Co. v. NLRB*, 495 F.2d 44, at p. 50 (CA 2, 1974). See also *Atlantic Hilton and Tower*, 214 NLRB 1103 (1984), stating that "the key to good faith bargaining requires that the parties enter into negotiations with a serious intent to adjust differences and to reach an acceptable common ground." (R&R at p. 10)

¹⁸See *Richard Mellow Electrical Contractors Corporation*, 327 NLRB 1112, 1116 (1999).

insistence that the SCHSA employees had to be [placed on] the union wage schedule according to their own terms.” [R&R at p. 11] Finally, the Hearing Examiner observed that “[the] Respondents engaged in unseemly haste to arrive at impasse soon after the parties’ third meeting.” (R&R at p. 12) The Hearing Examiner concluded that the Respondents’ actions constituted bad faith in violation of D.C. Code § 1-617.04(a) (5) and (1) of the CMPA. Although she determined that the Respondents’ conduct was in violation of the CMPA, the Hearing Examiner nevertheless found that their conduct did not “unlawfully interfere with the employees’ right to engage in collective bargaining”.¹⁹ (R&R at p. 12)

The Respondents take exception to the Hearing Examiner’s findings that: (1) “the Respondents violated the good faith requirement of the CMPA”; (2) “the Respondents’ failure to meet with Local 2725 constitutes dilatory conduct”; (3) “the Respondents engaged in take it or leave it bargaining” (Exceptions at p. 2); (4) “the Union presented the Respondents with a valid request for bargaining no later than April 20, 2004,²⁰ and (5) the “Respondents’ failure to meet with the Union

¹⁹The Hearing Examiner stated that “[her] conclusion[s] concern only those units that [the Board] certified and placed into Compensation Unit [1] prior to the effective date of the 2004 Amendments to the CMPA.” (R&R at p. 9, ft. 14)

²⁰Exceptions at p. 3; R&R at p. 13. At p. 13 of the R&R, in the “Conclusions of Law” the Hearing Examiner stated: “3. The Union presented Respondents with a valid demand for bargaining no later than *April 20, 2004*.” Here, the Respondents are challenging this date. On April 20, 2004, the Board certified the SCHSA bargaining unit for conditions and compensation bargaining. However, the Board finds that this certification did not create a duty to bargain over compensation. We conclude that pursuant to D.C. Code § 1-617.17(m), it is the date of the Board’s Compensation Order determining the appropriate compensation unit which gives rise to compensation bargaining. See *American Federation of Government Employees, Local 1403 v. Government of the District of Columbia Office of Corporation Counsel, and Office of Labor Relation and collective Bargaining*, __ DCR __ (), Slip Op. No. 805 at p. 5, PERB Case No. 02-U-28 (November 30, 2005), (stating that “compensation bargaining cannot begin until the Board has established an appropriate compensation unit for affected employees.”) Here, the Board’s Compensation Order is dated July 2, 2004. The Hearing Examiner found that the Union made a demand for bargaining even before this date, on April 20, 2004, erroneously relying on this date as the date which gave rise to a duty bargain over compensation.

Shortly after July 2, 2004, by e-mail dated July 20, 2004, the Union, through Lola Reed, asked Walter Wojcik, at OLR CB, what could be done to speed up the implementation of the Board’s Compensation Order. (See R&R at p. 2) In view of the evidence presented, the Board finds that this constitutes a demand for bargaining. Therefore, we find that pursuant to the requirements of D.C. Code § 1-617.17(f) (1)(A)(I), the Union made a written demand for bargaining on July 20, 2004. Nevertheless, the Hearing Examiner’s error in citing the wrong date (April 20, 2004) does not materially affect her analysis of the bargaining relationship of the parties, nor does it change the outcome of this case or the remedy granted by this Board.

and engage in good faith bargaining from April 20 to 1(sic) December 9, 2004, and thereafter, until May 2, 2005, violated [§] 1-617.04(a)(1) and (5) of the CMPA".²¹ The Respondents assert that the Hearing Examiner "failed to review the totality of OLRCB's conduct" when bargaining with the Union.²² In addition, the Respondents claim that it was the Union who failed to bargain in good faith.

The Board has "previously stated that the relative weight and veracity accorded both testimonial and documentary evidence are for the Hearing Examiner to decide." *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 Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991).²³ Furthermore, as stated above, a mere disagreement with the Hearing Examiner's finding is not a basis for setting aside those findings where, as here, they are fully supported by the record. Here, the Board concludes that the Respondents' exceptions amount to no more than disagreements with respect to the relative weight attributed to the evidence by the Hearing Examiner. The Hearing Examiner fully considered and rejected these contentions in reaching the conclusions of law which we find fully supported by the record. We adopt the Hearing Examiner's findings that the Respondents' "take it or leave it" position and dilatory actions constitute a failure to bargain in good faith in violation D.C. Code § 1-617.04(1) and (5). This Board has held that a refusal to bargain in good faith derivatively constitutes interference with employee rights under § 1-617.04(a)(1).²⁴

Pursuant to D.C. Code § 1-605.02 (3) (2001) and Board Rule 520.14, the Board adopts the Hearing Examiner's Report and Recommendations except as modified herein.

²¹Exceptions at p. 3, R&R at p. 13.

²²Exceptions at p. 16

²³See, *Tracy Hatton and Fraternal Order of Police Department of Corrections Labor Committee*, 47 DCR 796, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (1995), (where the Board held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." See also, *Clarence Mack v. D.C. Department of Corrections*, 43 DCR 5136, Slip Op. No. 467 at p. 2, PERB Case No. 95-U-14 (1996), (where the Board held that a Hearing Examiner's findings based on competing evidence does not give rise to a proper exception where . . . the record contains evidence supporting the Hearing Examiner's finding.)

²⁴See *International Brotherhood of Police Officers, Local 446, AFL-CIO/CLC v. District of Columbia General Hospital*, 39 DCR 9633, Slip Op. No. 322 at p. 5, PERB Case No. 91-U-14 (1992). See also, *American Federation of State, County and Municipal Employees, Local 1959 and 2921 v. District of Columbia Public Schools and the Government of the District of Columbia*, __ DCR __ (), Slip Op. No. 796. PERB Case No. 05-U-06 (2005).

V. Request for Attorney Fees and Costs

The Complainant requests that the Board award: (1) attorney fees, and (2) costs. (See Complaint at p. 5). In her Report and Recommendation, the Hearing Examiner did not address the issues of attorney fees and reasonable costs. We believe that the failure of the Hearing Examiner to address these two issues may have been an oversight on her part. As a result, we will address these two issues.

First, the Complainant has requested attorney fees. "[This] Board has held that D.C. Code § 1-617.13 which expressly permits the Board to require the payment of reasonable costs incurred by a party, does not include attorney fees. Nor are we properly authorized to provide attorney fees elsewhere in the Code." *Tracy Hatton and Fraternal Order of Police Department of Corrections Labor Committee*, 47 DCR 769, Slip Op. No. 451 at p. 8, PERB Case No. 95-U-02 (1995). See also, *International Brotherhood of Police Officers, Local 1446, AFL-CIO v. District of Columbia General Hospital*, 39 DCR 9633, Slip Op No. 322, PERB Case No. 91-U-14 (1992); and, *University of the District of Columbia Faculty Association NEA v. University of the District of Columbia*, 38 DCR 2463, Slip Op. No. 272, PERB Case No. 91-U-10 (1991). Therefore, the Complainant's request for attorney fees is denied.

The Complainant has also requested that reasonable costs be awarded. The Board first addressed the circumstances under which the awarding of costs to a party may be warranted in *AFSCME, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue*, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). In that case, the Board concluded that it could, under certain circumstances, award reasonable costs, stating:²⁵

First, any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed. . . . Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice.

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued. . . . What we can say here is that among the situations in which such an award *is* appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those

²⁵The Board has made it clear that attorney fees are not a cost.

in which a reasonable[y] foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive bargaining representative. *Id.* at pgs. 4-5

In the present case, it is clear from the record that the Respondents engaged in dilatory conduct for over five (5) months by failing to meet with the Union and not complying with the Union's reasonable requests for information, without giving any justification for this delay. The Respondents engaged in "take it or leave it" bargaining, insisting on their proposal for new salaries. They argued that the law required that the new salaries be negotiated in advance of the budget cycle to ensure appropriate funding although they admitted in their response to the complaint that DOH had allocated the necessary funds prior to the Board's July 2, 2004 Compensation Order.

The Board concludes that: (1) the Respondents' actions' were undertaken in bad faith, and (2) a reasonably foreseeable result of the Respondents' conduct was the undermining of the union among the employees for whom it is the exclusive bargaining representative. *Id.* We believe that awarding costs in this case is in the interest of justice and consistent with our holding in *AFSCME, Council 20, Id.* See also, *Teamsters Local 639 and 670, International Brotherhood of Teamsters v. District of Columbia Public Schools*, Slip Op. No. 804, PERB Case No. 12-U-16 (2005).

The award in this matter shall be retroactive to July 2, 2004, the date of the Board's determination to place the employees in the newly-certified SCHSA bargaining unit in Compensation Unit 1.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Health ("DOH") and the Office of Labor and Collective Bargaining ("OLRCB"), their agents and representatives shall cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) (2001 ed.) by refusing to bargain in good faith upon request with the American Federation of Government Employees, Local 2725 ("the Union").
2. DOH and OLRCB, their agents and representatives, shall cease and desist from refusing to bargain in good faith by failing to timely provide a proposal with a "crosswalk" requested by the Union on December 9, 2004, in conjunction with implementing the Board's Compensation Order to place the SCHSA compensation bargaining unit in Compensation Unit 1.