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

In the Matter of:

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 383,

Complainant,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF
YOUTH REHABILITATION SERVICES,

and

DISTRICT OF COLUMBIA OFFICE OF
LABOR RELATIONS AND COLLECTIVE
BARGAINING,

Respondents.

PERB Case No. 09-U-04

Opinion No. 1301

DECISION AND ORDER

I. Statement of the Case

On November 1, 2008, the American Federation of Government Employees, AFL-CIO, Local 383 ("Complainant," "Union", or "Local 383") filed a document styled "Unfair Labor Practice Complaint and Request for Preliminary Relief and Temporary Restraining Order" ("Complaint") against the District of Columbia Department of Youth Rehabilitation Services ("DYRS," "Agency," or "Respondents"), and the District of Columbia Office of Labor Relations and Collective Bargaining ("OLRCB," or "Respondents"). The Complainant alleged that the Respondents violated the Comprehensive Merit

Protection Act ("CMPA"), D.C. Code § 1-617.04(a)(1), (2), and (5) by DYRS's unilateral decision to reclaim office space it previously allowed Local 383 to use and by OLRCB's refusal to bargain with Local 383 about DYRS's actions. (Complaint at 2).

On November 17, 2008, the Respondents filed a Motion to Dismiss Request for Preliminary Relief and Temporary Restraining Order ("Motion"), alleging that the Union's request for preliminary relief should be denied. In addition, on November 24, 2008, the Respondents filed an Answer to Unfair Labor Practice Complaint ("Answer"). The Public Employee Relations Board ("Board") denied the Complainant's Motion for Preliminary Relief and referred the Complaint to a Hearing Examiner for disposition. (Slip Opinion No. 957).

On December 15, 2009, a hearing was held. On March 8, 2010, the Complainant filed a Post Hearing Brief, and on March 17, 2010, the Respondents filed a Post Hearing Brief. On April 21, 2010, the Hearing Examiner filed a Report and Recommendation ("Report").

Hearing Examiner Lois Hochhauser found that Article IV, Section B of the Supplemental Agreement from the Union's Exhibit 1 contained a contractual provision that was relevant to the Union's use of the office. (Report at 6-7). Then the Hearing Examiner concluded that the Respondents had both statutory and contractual obligations. *Id.* at 9. She stated that "the Board has determined that where there are violations of statutory and contractual provisions, the outcome will be determined by whether the parties have provided for the resolution of contractual disputes through a grievance and arbitration process in their collective bargaining agreement."¹ *Id.* She found that "Article 30 of the Agreement contained a grievance procedure, and the Agreement defines a grievance as any alleged violation of this Agreement. Thus, a remedy was available through the grievance procedure of the Agreement." *Id.* She explained that if the contractual agreement provided for such a process, the Board lacks jurisdiction, and the parties must utilize the processes outlined in the Agreement. *Id.* Accordingly, the Hearing Examiner recommended that the Complaint be dismissed. *Id.* at 10.

The Complainant filed Exceptions with the Board, ("Exceptions"), alleging that because the issue of the Supplemental Agreement had not been addressed by the parties, the Hearing Examiner should have allowed them to brief that issue. (Exceptions at 5-6). The Respondents filed an opposition to the Exceptions ("Opposition"), maintaining that the Hearing Examiner had authority to address the issue based on Board Rule 550.13.² (Opposition at 4). The Complainant filed a Response to the Opposition ("Response"), pointing out that the Respondents did not argue that either Local 383 or DYRS was a party to the Supplemental Agreement relied upon by the Hearing Examiner. (Response at 2).

On August 5, 2011, the Board issued a Remand Order and an Order for Briefs. (Slip Opinion No.

¹ The current Board precedent provides that the Board will defer jurisdiction in cases only where the issue is strictly contractual.

² 550.13 – Authority of Hearing Examiner (cont.)

Hearing Examiners shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order, Hearing Examiners shall have all powers necessary to that end including, but not limited to, the power to:

(f) Call and examine witnesses and introduce documentary or other evidence.

1027 at 7). The Board found that the Hearing Examiner's findings concerning its jurisdiction may not be supported by the record. *Id.* Thus, the Board remanded the matter to the Hearing Examiner to develop a full record. *Id.* On September 30, 2011, the Complainant submitted a Remand Brief, and On October 3, 2011, the Respondents submitted a Remand Brief. In its brief, the Complainant asserted that the Union's submission of the Supplemental Agreement into evidence was erroneous, and therefore, it should not control the substantive outcome of the case. (Complainant's Remand Brief at 8-14). In addition, the Complainant submitted that PERB had jurisdiction over this matter because the Respondents failed to bargain over the mandatory subject of office space. *Id.*

After the remand hearing, the Hearing Examiner issued another Report and Recommendation ("Remand Report") on November 30, 2011. No party filed exceptions to this report. The Hearing Examiner's Remand Report is before the Board for disposition.

II. Background

The Complainant is the exclusive bargaining representative of certain employees of DYRS, and John Walker is the president of the Union. (Remand Report at 4). DYRS is an agency and an employer within the meaning of the CMPA. *Id.* OLRCB is responsible for collective bargaining on behalf of the government. *Id.* Approximately since 1999, Local 383 has occupied some manner of office space provided by DYRS. (Complainant's Post Hearing Brief at 2). From approximately 2003, until February 2008, there were two offices in use by Local 383: one office for the Union's exclusive use and another for Mr. Walker's non-union DYRS work. *Id.* at 3. On November 6, 2007, DYRS verbally notified Mr. Walker that it required either the union office or his cubicle to be vacated because of an office space shortage. *Id.* Additionally, DYRS's request was submitted in writing to Mr. Walker in a letter dated November 14, 2007. *Id.*

DYRS and Local 383 met on December 4, 2007 to discuss the office issue. (Remand Report at 5). On December 5, 2007, Local 383 submitted a letter to OLRCB stating that it considered the elimination of the space a mandatory subject of bargaining. *Id.* OLRCB responded and agreed to impact and effect bargaining. *Id.* The matter was resolved sometime in February 2008, when DYRS merged Mr. Walker's DYRS cubicle into the Union's office, which remained secure with a key kept by Mr. Walker. *Id.* From that time forward, Local 383 had continuously occupied the merged office space. (Complainant's Post Hearing Brief at 3).

In September 2008, Mr. Walker was separated from DYRS pursuant to a reduction-in-force (RIF), but he remained in the position of Local 383 president. (Remand Report at 5). In a letter, dated October 23, 2008, DYRS notified to vacate the remaining office space by October 30, 2008 and to perform his union representational duties by scheduling the use of a conference room. *Id.* On October 29, 2008, on behalf of Local 383, Yvonne Desjardins, the AFGE National Office Field Representative, demanded that the Agency reconsider its position regarding the elimination of the office space and asked for additional time to process vacating the office. *Id.* at 6. On October 29, 2008, DYRS responded, asserting that Local 383 was not entitled to an office, and Local 383 had been aware since 2007 of DYRS's directive to vacate the space. *Id.* DYRS

extended the deadline for Mr. Walker to vacate the office to November 13, 2008. *Id.* Local 383 placed its possessions in storage and at Mr. Walker's home, and he vacated the office space in November 2008. *Id.*

III. Discussion

The Complainant maintained that two Unfair Labor Practices were committed: 1) DYRS's ordering Local 383 to vacate its office space in October 2008; and 2) OLRCB's refusing to bargain over the order to vacate. (Remand Report at 7). The issues before the Hearing Examiner were whether the Respondents committed Unfair Labor Practices, and, under the circumstances, whether the Complainant sought to bargain and the Respondents refused the request. *Id.* at 3. The Hearing Examiner addressed the following questions in her reasoning:

A. Whether the supplemental agreement is relevant

In response to the questions directed to the parties by the Board in the Remand Order, the Hearing Examiner found that the Supplemental Agreement was submitted in error and had no relevance to this matter. *Id.* at 7. The record contains evidence that the Respondents acknowledged that the Supplemental Agreement does not pertain to DYRS and Local 383. (Respondents' Remand Brief at 2). The Board finds that the Hearing Examiner's findings are reasonable and supported by the record.

B. Whether providing office space to the Union is a mandatory subject of bargaining and advance notice was given

The Respondents asserted that no Unfair Labor Practices were committed because the collective bargaining agreement does not require the Agency to provide the Union with office space. (Motion at 3; Remand Report at 6). Further, the Respondents contended that the use of the space was voluntary on the part of the Agency. *Id.*

Moreover, the Respondents stated that even if there had been such an obligation to bargain over the order to vacate, the 2007 notice was closely related to the matter of 2008. (Remand Report at 7). Therefore, the Respondents argued that advance notice was given and the process of bargaining was already commenced. *Id.*

With regard to the Respondents' assertion, the Complainant alleged that the only subject of the December 2007 demand was the merger of Mr. Walker's work cubicle into Local 383's office; conversely, the Complainant argued that the subject of the October 2008 demand was the total elimination of Local 383's office space. (Complainant's Post Hearing Brief at 8-9). Therefore, the Complainant asserted that the October 2008 demand of total elimination was separate and distinct from the December 2007 demand for an office merger. *Id.*

The Hearing Examiner agreed with the Complainant's position that the matter was resolved when DYRS merged Mr. Walker's DYRS cubicle into Local 383's office on February

2008. (Remand Report at 5). The Hearing Examiner found that the Respondents' 2008 notice to the Union to vacate its office was not a continuation of the 2007 incidents. *Id.* at 8. Hence, the Board finds that advance notice was not given in this matter.

This Board has long held that an office space provided by an Agency to a Union is a term and condition of employment and is therefore a mandatory subject of bargaining. *International Brotherhood of Police Officers, Local No. 445, AFL-CIO, V. D.C. Department of Administrative Services*, 43 D.C. Reg. 1484, Slip Op. No. 401, PERB Case No. 94 U-13 (Aug. 5, 1994). Therefore, The Hearing Examiner concluded that the Agency's unilateral decision to eliminate the space allocated to a Union without prior notice and bargaining may constitute an Unfair Labor Practice. (Remand Report at 8). The Board finds that the Hearing Examiner's findings are reasonable and supported by the record.

C. Whether the use of office space is a past practice

The Hearing Examiner explored whether the use of office space constitutes a custom or past practice. *Id.* at 8-9. The Respondents denied any past practice of providing office space. *Id.* at 7. Even if there may have been such a past practice, the Respondents insisted that the practice ended when DYRS gave notice to Local 383 in 2007 to vacate one of office spaces. *Id.*

The Hearing Examiner found that since 1999, the evidence established that DYRS provided the Union with office space that it could keep secured and use for maintaining files and other Local 383 work. (Remand Report at 9). She found that since Mr. Walker became Local President, "the office space was located in proximity to the Local President's work site and that the Local office space moved with the location of its president." *Id.* Additionally, the Hearing Examiner found that the issue of office space was not addressed in the Master Agreement, but it was understood between the parties. *Id.* She stated that it is generally agreed that "[a past practice] must be readily ascertainable over a reasonable period of time as a fixed and established practice." (*Id.* at 8-9, citing *Celanese Corporation of America*, 24 Lab. Arb. Rep. BNA, 168 (Justin 1954)). In addition, the Hearing Examiner noted that the customs and past practices that parties have maintained over time are particularly important in the absence of a documented agreement. (*Id.* at 9, citing *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960)).

The Hearing Examiner stated that "DYRS's notification of its decision to reclaim the space in 2008 was related to Mr. Walker's separation from the agency. These appear in two separate practices, and Mr. Walker's separation from DYRS was not sufficient to eradicate the past practice of providing the secured office space, although it would require a decision to be made as to where the office should be located." *Id.* Thus, the Hearing Examiner concluded that "there is sufficient evidence to determine that the provision to Local 383 of office space by DYRS was a custom or past practice." *Id.*

This Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Tracy Hatton v. FOP/DOC Labor Committee*, 47 D.C. Reg. 769, Slip Op No. 451 at p. 4, PERB Case No. 95-U-02 (Sept, 19,

1995). See also *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 35 D.C. Reg. 8594, Slip Op. No. 285, PERB Case No. 86-U-16 (April 21, 10, 1992); *Charles Bagenstose et al. v. D.C. Public Schools*, 38 D.C. Reg. 4154, Slip Op. No. 270, PERB Case No. 88-U-34 (June, 6, 1991). In the instant case, the Board finds that the Hearing Examiner's findings are reasonable and supported by the record.

D. Whether providing an office to Local 383 is too costly

Additionally, the Respondents argued that the Agency incurred an additional cost for the space, and it was economically impractical to maintain the office. (Remand Report at 6). The Agency asserted that it should not be required to support critical Union functions by providing free office space. In fact, D.C. Code § 1-617.04(a)(2) (2001 ed.) specifically forbids the District from "contributing financial or other support [to unions that represent its employees]." (Respondents' Post Hearing Brief at 6). The Agency maintained that this level of support violates the law by providing impermissible financial support. *Id.* at 7.

With regard to this issue, the Hearing Examiner found that the Agency failed to offer any evidence that it incurred any additional cost, and thus, the Agency's argument lacked merit. (Remand Report at 8). The Board finds that the record contains evidence that the Respondents' own witness, Denis Durham, admitted that the former Local 383 office has been continuously empty since the day that Local 383 moved. (Complainant's Post Hearing Brief at 4). Therefore, the space remaining vacant at least until the hearing date in 2009 supports the Hearing Examiner's finding.

E. Whether the Complainant sought to bargain and the Respondents refused the request

The Hearing Examiner next considered whether the Complainant sought to bargain and the Respondents refused the request. (Remand Report at 3). The Hearing Examiner made the following findings of fact:

"Following the issuance of the letter to Mr. Walker in October 2008 to have the Local vacate the office space, The AFGE National Office Field Representative, Yvonne Desjardins, contacted OLRCB on behalf of the Local, asking Respondents to reconsider the decision, requesting alternative space and asking for additional time. On October 29, 2008, Mr. Aqui responded on behalf of OLRCB, that the Local was not entitled to an office, that Complainant was aware since 2007 of DYRS's directive to vacate the space and that the deadline would be extended until November 13, 2008."

(*Id.* at 10)

The Respondents insisted that they did not refuse to provide any office space but rather directed the Union President to contact one of the Agency's employees to schedule the use of a

conference room to conduct union business related to the administration of the collective bargaining agreement. (Answer at 3; Respondents' Post Hearing Brief at 2).

Notwithstanding, the Complainant argued that the Respondents alternatively offered a conference room did not alleviate the severity of the loss of the office. (Complainant's Post Hearing Brief at 8). The Complainant asserted that the loss of an office deprived Local 383 of confidentiality and subjected it to remaining in a transient status. *Id.* Furthermore, the Complainant argued that one such example of the inconvenience of not having their own office space would result in Mr. Walker having to contact a storage company and having to go to the storage facility to search all boxed Union materials. (Remand Report at 6). As another example of the inconvenience the Union would be subjected to, it submitted that Mr. Walker would not be able to schedule a meeting without contacting DYRS to reserve a conference room. *Id.*

The Hearing Examiner found that Mr. Walker's testimony that the lack of an office has negatively affected the Union's ability to function was reasonable. *Id.* Based on a totality of the circumstances and the facts, the Hearing Examiner concluded that Local 383 had established that it sought to bargain on the matter in 2008, and the Respondents had refused this request. *Id.* at 10. The Board finds that the Hearing Examiner's findings are reasonable and supported by the record.

IV. Board's Conclusion

As required by PERB Rule 520.11, the Hearing Examiner concluded that, the Complainant had met its burden of proof by a preponderance of evidence, and as such, the Respondents had committed Unfair Labor Practices. She recommended that the Board awards the following relief: 1) the Respondents provide Local 383 with office space comparable to the space provided prior to November 2008; 2) the Respondents cease and desist from violating the CMPA; 3) Respondents post a Notice regarding the violations; and 4) Respondents notify the Board of compliance within 30 days of this Board's Decision and Order. *Id.* at 10-11.

The Respondents' arguments as to the appropriate findings and legal conclusions in this matter were rejected by the Hearing Examiner. What's more, this Board has held that a mere disagreement with the hearing examiner's findings is not grounds for reversal of the findings where they are fully supported by the record. *See Teamsters Local Unions 639 and 670, International Brotherhood of Teamsters, AFL-CIO v. District of Columbia Public Schools*, 54 D.C. Reg. 2609, Slip Op. No. 804, PERB Case No. 02-U-26 (Jan. 17, 2003); *see also American Federation of Government Employees, Local 874 v. D.C. Department of Public Works*, 38 D.C. Reg. 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (March, 28, 1991).

Pursuant to D.C. Code § 1-605.02(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and the entire record. The Board finds the Hearing Examiner's analysis is reasonable, supported by the record, and consistent with Board precedent.

Therefore, the Board adopts the Hearing Examiner's recommendation.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Unfair Labor Practice Complaint is granted.
2. The District of Columbia Department of Youth Rehabilitation Services, and the District of Columbia Office of Labor Relations and Collective Bargaining, shall cease and desist violating D.C. Code § 1-617.04(a)(1), (2), and (5) by unilaterally eliminating Union office space and by refusing to bargain.
3. The District of Columbia Department of Youth Rehabilitation Services, its agents and representatives, shall restore the Union office space for the purpose of conducting union business.
3. The District of Columbia Department of Youth Rehabilitation Services, its agents and representatives, shall conspicuously post within ten (10) days from the issuance of this Decision and Order the attached Notice where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.
4. Within fourteen (14) days from the date of this Decision and Order, the Department of Youth Rehabilitation Services, through the District of Columbia Office of Labor Relations and Collective Bargaining, shall notify the Public Employee Relations Board in writing that the attached Notice has been posted accordingly.
5. 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.

July 26, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-U-04 was transmitted via U.S. Mail and e-mail to the following parties on this the 30th day of July, 2012.

John Walker, President
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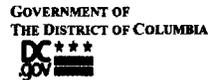
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH REHABILITATION SERVICES ("DYRS"), THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1301, PERB CASE NO. 09-U-04 (July 26, 2012)

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered Department of Corrections to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1), (2) and (5) by the actions and conduct set forth in Slip Opinion No. 1301.

WE WILL cease and desist from interfering, restraining, or coercing employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act ("CMPA").

WE WILL cease and desist from discharging or otherwise taking reprisal against an employee because he or she has signed or filed an affidavit, petition, or complaint or given any information or testimony under the Labor-Managements subchapter of the CMPA.

WE WILL NOT, in any like or related manner, retaliate, interfere, restrain or coerce employees in their exercise of rights guaranteed by the Labor-Management subchapter of the CMPA.

District of Columbia Department of
Youth Rehabilitation Services

Date: _____ By: _____

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 1100 4th Street, SW, Suite E630; Washington, D.C. 20024. Phone: (202) 727-1822.

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

July 26, 2012