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

_____)	
In the Matter of:)	
)	
Doctors' Council of the)	
District of Columbia,)	
)	PERB Case No. 11-U-22
Complainant,)	
)	Opinion No. 1432
v.)	
)	
District of Columbia Department of)	
Youth and Rehabilitation Services,)	
)	
Respondent.)	
_____)	

DECISION AND ORDER

I. Statement of the Case

On February 22, 2011, the Doctors' Council of the District of Columbia ("DCDC" or "Complainant") filed an Unfair Labor Practice Complaint against the District of Columbia Department of Youth and Rehabilitation Services ("DYRS" or "Respondent"), alleging violations of the Comprehensive Merit Personnel Act ("CMPA"), D.C. Code §§ 1-617.04(a)(1) and (5).

On March 10, 2011, DYRS filed an Answer to the Complaint ("Answer"), denying the Complaint's allegations and requesting that the Board dismiss the Complaint.

On October 29, 2011, the Board denied the Respondent's request to dismiss the Complaint on the grounds that the pleadings alone were insufficient for the Board to resolve the disputed issues. *Doctors' Council of the District of Columbia v. District of Columbia Department of Youth and Rehabilitation Services*, 59 D.C. Reg. 6865, Slip Op. No. 1208, PERB Case No. 11-U-22 (2011). The Board ordered an unfair labor practice hearing before a Board-appointed hearing examiner.

A hearing took place on August 24 and September 19, 2012, before Hearing Examiner Lois Hochhauser ("Hearing Examiner"). (Report at 2). The Parties presented testimonial and documentary evidence at the hearing, and submitted post-hearing briefs to the Hearing Examiner. *Id.*

The Hearing Examiner's Report and Recommendation ("Report") was received by the Board and sent to the Parties on June 17, 2013, providing the Parties until the close of business July 8, 2013, to submit Exceptions to the Report. On July 8, 2013, Complainant requested a one-day extension to file Exceptions, because Complainant's representative asserted that she had experienced a hand injury that constituted good cause for an extension. On July 9th and 10th, 2013, Complainant filed Exceptions. On July 22, 2013, Respondent requested an extension to file an Opposition to Complainant's Exceptions. On July 25, 2013, the Acting Executive Director denied Complainant's motion for a one-day extension. The grounds for the Acting Executive Director's denial was that Complainant was put on notice by PERB's former Executive Director Ondray Harris that no further extensions would be granted to Complainant in the present case, after the former Executive Director Harris had granted Complainant's four consented-to motions for extensions and one unconsented-to motion for extension during the Parties' post-hearing briefing. On August 20th and August 26th, 2013, Complainant filed a motion for reconsideration of the Acting Executive Director's denial of the motion for a one-day extension to file Exceptions. On August 27, 2013, the Acting Executive Director denied Complainant's motion on the grounds that the Complainant had not shown cause as determined by the Executive Director, pursuant to Board Rule 501.2. Complainant's Exceptions to the Hearing Examiner's Report are deemed untimely filed, and therefore, will not be considered.

The Hearing Examiner's Report and Recommendation is before the Board for disposition.

II. Hearing Examiner's Report and Recommendation

A. Factual Findings

The Complaint arises out of a reduction-in-force ("RIF") taken at DYRS and impact and effects ("I&E") bargaining. The factual findings have been summarized by the Hearing Examiner as follows:

1. Complainant is the exclusive bargaining representative of physicians, dentists and podiatrists employed by Respondent and certain other agencies of the District of Columbia.
2. Respondent is the District of Columbia Government agency which administers detention, commitment and aftercare services for youth held in its facilities or residing in the DC community. As part of its mission, DYRS provides medical services.

3. The parties are signatories to a collective bargaining agreement (Agreement).
4. The Office of Labor Relations and Collective Bargaining (OLRCB), the District of Columbia entity responsible for labor relations, notified the Union that a RIF was contemplated at DYRS in July 2010. Dean Aqi, Esq., OLRCB supervisory attorney-advisor, represented the Respondent in matters relating to this RIF. He received and responded to requests for documents and information submitted by the Union. On July 14, 2010, he emailed Ms. Kahn and explained that his earlier efforts to notify the union of the proposed RIF had not been successful. He stated that DYRS was proposing a RIF "for budgetary and efficiency reasons." He provided Ms. Kahn with the RIF notice letter. At the time the RIF had not been approved.
5. The Union requested I&E bargaining. The first bargaining session took place on August 11, 2010. At the time of the first meeting, no RIF notice had been issued. At the meeting, DYRS informed the Union that it intended to replace bargaining unit medical officers, ie. Doctors, with a non-bargaining unit supervisory medical officer (MSS), referred to as "replacement position." The replacement position was a supervisory position. The three RIFed positions were non-supervisory positions.
6. Complainant requested certain information at the meeting and memorialized the request on August 18, 2010. The request included approximately 25 items, including a copy of the job description for the replacement position, all reports related to the proposed RIF and a report completed by Dr. Ronald Shansky, with whom Respondent had contracted to review its operations.
7. Respondent provided approximately 12 of the items requested between August 19, 2010 and September 3, 2010.
8. The Shansky Report consists of a letter dated February 7, 2010 to Dr. Andrea Weisman of the Youth Services Center....
9. On August 13, 2010, Robert Hildum, DYRS Interim Director, requested that the City authorize DYRS to conduct a RIF....¹

¹ In pertinent part, Mr. Hildum relied upon the Shansky Report and decided to "reconfigure" staff resources. The memorandum stated: "DYRS would eliminate the existing three (3) Medical Officer positions and hire one (1) Supervisory Medical Officer who would provide clinical guidance, supervision and oversight of activities performed by the Physician Assistants (Pas) and Medical Records Technician." (Report at 5).

10. The Director of the D.C. Department of Human Resources authorized the RIF on August 18, 2010.
11. On August 20, 2010, OLRCB provided Complainant with a copy of the Administrative Order authorizing the RIF.
12. From August 2010 through November 2010, Complainant continued to request documents and Agency continued to respond to those requests. Respondent did not provide all of the documents requested.
13. By letter dated August 20, 2010, Agency notified [the three (3) medical officers] ... that they would be RIFed from Agency, effective September 24, 2010.
14. On September 16, 2010, Agency notified [the medical officers] ... that the effective date of separation was changed to October 22, 2010. The change was based on OLRCB's recognition that two of the doctors may not have received the requisite 30 day notice.
15. On September 16, 2010, Complainant asked to meet during the week of September 20. It [Complainant] also sought additional information.
16. On September 17, 2010, the Union filed a grievance with Respondent regarding the RIF, the elimination of bargaining unit positions and other matters it alleged violated the Agreement and applicable regulations. Respondent denied the grievance on October 19, 2010.
17. The second I&E bargaining session took on October 12, 2010. The parties did not reach consensus at the end of the session and did not execute any documents.
18. The RIF, implemented on October 22, 2010, eliminated the three bargaining unit medical officer positions....
19. Dr. Samia Altaf, Supervisory Medical Officers (SMO), was hired on or about October 25, 2010 to fill the newly created replacement nonbargaining unit position.
20. On November 30, 2010, OLRCB attorney James Langford informed Ms. Kahn that OLRCB determined that the grievance was not arbitrable and had so notified FMCS...[by letter] dated November 23, 2010, stat[ing] that Respondent was under no "legal obligation" to arbitrate the matter. Respondent took the position that the Abolishment Act, D.C. Official Code Section 1-624.08, "invalidated the contractual grievance and arbitration procedures related to RIFs.["]

In support of its position, OLR CB cited *American Federation of Government Employees, Local 383 v. The District of Columbia*, Case No. 2008 CA 006932B issued by the D.C. Superior Court on April 26, 2009, in which the Court denied a Union's motion to compel arbitration regarding a RIF, concluding that the Abolishment Act rendered the arbitration clause of a collective bargaining agreements (sic) "inapplicable ...by providing the exclusive and non-negotiable procedures to which an employee aggrieved by a RIF is entitled."

(Report at 4-7) (citations omitted).

B. Hearing Examiner's Recommendations

The Hearing Examiner determined that the Complainant's position was that the Respondent committed unfair labor practices, when Respondent: "(1) RIFed the three bargaining unit members and replaced them with a non-bargaining unit physician who, it contends, performs the same duties as the RIFed doctors, (2) refused and/or failed to provide the Union with material it requested so that it could properly represent its members; (3) implemented the RIF before I&E bargaining was completed; and (4) refused to arbitrate the grievance." (Report at 7).

Before the Hearing Examiner, the Respondent argued that it did not commit any unfair labor practices; because the RIF was a management right, and necessary and cost-efficient. (Report at 8). Respondent asserted that it had provided all relevant information, and that it did not implement the RIF until after the completion of I&E bargaining. *Id.* The Respondent contended that it did not act in bad-faith by refusing the Union's proposals. *Id.* As to arbitrating the matter, the Respondent argued that the issue was non-arbitrable and relied upon a Superior Court decision, and that the two Superior Court decisions that were presented by the Union were issued after OLR CB had refused to arbitrate. (Report at 8-9).

The Hearing Examiner determined the issues for resolving the Complainant's allegations were the following:

1. Did Complainant meet its burden of proof that Respondent committed a ULP by failing to engage in good faith bargaining before implementing the RIF?
2. Did Complainant meet its burden of proof that Respondent committed a ULP by failing to provide the Union with relevant and necessary information that it requested?
3. Did Complainant meet its burden of proof that Respondent committed a ULP by replacing bargaining unit employees with non-bargaining unit members?
4. Did Complainant meet its burden of proof that Respondent committed a ULP by refusing to select an arbitrator?

(Report at 2). The Hearing Examiner's conclusions and recommendations are discussed below in the order they were addressed.

1. Did Complainant meet its burden of proof that Respondent committed a ULP by failing to engage in good faith bargaining before implementing the RIF?

The Hearing Examiner found that the Parties disputed whether the RIF occurred prior to completion of I&E bargaining. (Report at 10). The Hearing Examiner found that two I&E bargaining sessions occurred on August 20 and October 10, 2010. *Id.* While the initial RIF notices provided a separation date of September 24, 2010, the "Respondent issued a second letter on September 16, 2010, changing the effective date to October 22, 2010." *Id.* Complainant sought to meet with the Respondent during the week of September 20, however, the meeting did not take place until October 12. *Id.*

The Hearing Examiner found that "[t]he record did not establish that the Union sought additional sessions before its September 20 request, that it asked that the October 12 [meeting] be moved to an earlier day, or that it sought additional sessions after October 12." (Report at 11). As a result, the Hearing Examiner determined that "Complainant did not meet its burden of proving that Respondent committed an unfair labor practice by refusing to engage in impact and effects bargaining or by implementing the RIF" before completion of I&E bargaining. (Report at 12).

2. Did Complainant meet its burden of proof that Respondent committed a ULP by failing to provide the Union with relevant and necessary information that it requested?

The Hearing Examiner found that Mr. Aqui was "the individual who responded to the information requests." (Report at 13). Based on Mr. Aqui's testimony, the Hearing Examiner found that some requests were not completed due to error, some were delayed or incomplete due to DYRS, and that "Mr. Aqui also made determinations of relevancy." *Id.* The Hearing Examiner found that Mr. Aqui provided credible testimony on the issue of the information requests. *Id.* The Hearing Examiner concluded "[u]pon a careful analysis of the evidence and argument presented, ... DCDC did not meet its burden of proof with sufficient evidence, direct or circumstantial, that Respondent acted in bad faith, or that its conduct was motivated by anti-Union animus, or an effort to undermine the Union." (Report at 14).

3. Did Complainant meet its burden of proof that Respondent committed a ULP by replacing bargaining unit employees with non-bargaining unit members?

The Hearing Examiner found that the newly-created position of Supervisory Medical Officer ("SMO") took on duties of the RIFed employees, as well as supervised staff, which were not included in the RIFed employees' job duties. (Report at 14). No evidence was presented that any other positions, either hired or contracted by the Respondent, performed work that was previously done by the RIFed employees. *Id.* The Hearing Examiner determined that the

Complainant did not meet its burden of proof that the Respondent committed an unfair labor practice. *Id.*

4. Did Complainant meet its burden of proof that Respondent committed a ULP by refusing to select an arbitrator?

The Hearing Examiner found, based on Mr. Aqui's testimony, that the Respondent had relied upon a D.C. Superior Court decision, regarding its obligation to arbitrate, and that Respondent's reliance was credible and "reasonable under the circumstances." (Report at 15). The Hearing Examiner decided "that DCDC did not meet its burden of proof with a preponderance of the evidence, direct or circumstantial, that Respondent acted in bad faith, or that its conduct was motivated by anti-Union animus, or an effort to undermine the Union on this issue." *Id.*

The Hearing Examiner found on all four issues that the Complainant did not meet its burden of proof with a preponderance of the evidence. *Id.* As a result, the Hearing Examiner recommended that the Complaint be dismissed in its entirety. *Id.*

III. Discussion

As discussed above, no Exceptions were timely filed for the Board's consideration. "Whether exceptions have been filed or not, the Board will adopt the hearing examiner's recommendation if it finds, upon full review of the record, that the hearing examiner's 'analysis, reasoning and conclusions' are 'rational and persuasive.'" *Council of School Officers, Local 4, American Federation of School Administrators v. D.C. Public Schools*, 59 D.C. Reg. 6138, Slip Op. No. 1016 at p. 6, PERB Case No. 09-U-08 (2010) (quoting *D.C. Nurses Association and D.C. Department of Human Services*, 32 D.C. Reg. 3355, Slip Op. No. 112, PERB Case No. 84-U-08 (1985)).

The Board determines whether the Hearing Examiner's Report and Recommendation is "reasonable, supported by the record, and consistent with Board precedent." *American Federation of Government Employees, Local 1403 v. District of Columbia Office of the Attorney General*, 59 D.C. Reg. 3511, Slip Op. No. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012). The Board will affirm a hearing examiner's findings if they are reasonable and supported by the record. See *American Federation of Government Employees, Local 872 v. D.C. Water and Sewer Authority*, Slip Op. No. 702, PERB Case No. 00-U-12 (2003).

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 Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Council of School Officers, Local 4, American Federation of School Administrators v. District of Columbia Public Schools*, 59 DC Reg. 6138, Slip Op. No. 1016 at p. 6, PERB Case No. 09-U-08; *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 (1995).

In light of these standards, the Board reviews the Hearing Examiner's findings and conclusions below.

A. Whether Complainant met its burden of proof that Respondent committed an unfair labor practice by failing to engage in good-faith impact and effects bargaining before implementing the RIF?

In Slip Op. No. 1208, the Board found that the Complaint alleged that Respondent violated D.C. Code §§ 1-617.04(a)(1) and (5) by "failing to engage in good faith impact and effects bargaining." *Doctors' Council of the District of Columbia v. District of Columbia Department of Youth and Rehabilitation Services*, 59 D.C. Reg. 6865, Slip Op. No. 1208 at p.1, PERB Case No. 11-U-22 (2011) (quoting Complaint at 9). The Board referred the issue of "whether the RIF occurred prior to the completion of the I&E bargaining" for determination of whether Respondent had failed to engage in good-faith I&E bargaining. Slip Op. No. 1208 at p.6.

As noted above, the Hearing Examiner found that, prior to the October 22, 2010, implementation of the RIF, "[t]he record did not establish that the Union sought additional sessions before its September request, that it asked that the October 12 [meeting] be moved to an earlier day, or that it sought additional sessions after October 12." (Report at 11). The Hearing Examiner found that the Respondent provided sufficient information at the October 12 meeting for the Complainant to engage in I&E bargaining. (Report at 12). The Hearing Examiner concluded that "[t]he evidence did not establish that at that time, Complainant lacked sufficient information to engage in meaningful bargaining or that Respondent refused to consider Complainant's input." *Id.* The Hearing Examiner concluded that the Respondent met its obligation to meet with the Union prior to the implementation of the RIF. (Report at 11). The Hearing Examiner found that "there was insufficient evidence to establish that Respondent did not engage in good faith impact and effects bargaining." (Report at 12).

RIFs are a management right under D.C. Code § 1-617.08. *See, e.g., FOP/DOCLC v. Dept. of Corrections*, 49 D.C. Reg. 11141, Slip Op. No. 692, PERB Case No. 01-N-01 (September 30, 2002) ("After reviewing D.C. Law 12-124 'Omnibus Personnel Reform Act of 1998,' the Board finds that this Act amended the CMPA by, *inter alia*, excluding RIF procedures and policies as proper subjects of bargaining."). The Board has long held that "an Employer violates the duty to bargain in good faith by refusing to bargain, upon request, over the impact and effects of a RIF and by refusing to produce documents related to the RIF." *AFSCME District Council 20, Local 2921, v. D.C. Dept. of General Services*, Slip Op. No. 1320, 09-U-63 (2012); *FOP/DOCLC v. DOC*, 52 D.C. Reg. 2496, Slip Op. No. 722, PERB Case Nos. 01-U-21, 01-U-28, 01-U-32 (August 13, 2003); *see also Teamsters Unions No. 639 and 730, et al., v. D.C. Public Schools*, 38 D.C. Reg. 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1990).

The Board has held that meetings where the Agency requests only input "[are] not sufficient to fulfill the duty and meet the standard for bargaining over the impact of a management right." *AFGE Local 383 v. D.C. Dept. of Mental Health*, 52 D.C. Reg. 2527, Slip Op. No. 753, PERB Case No. 02-U-16 (2004); *see also Int'l Brotherhood of Police Officers,*

Local 446 v. D.C. General Hospital, 39 D.C. Reg. 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992); *FOP/MPDLC v. Metropolitan Police Dept.*, 47 D.C. Reg. 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000); *FOP/DOCLC v. Dept. of Corrections*, 49 D.C. Reg. 8937, Slip Op. No. 679, PERB Case Nos. 00-U-36 and 00-U-40 (2002). The Board has found that an agency's notice to the union and its meeting with the union to receive its "input" was insufficient to meet its bargaining duty. *International Brotherhood of Police Officers v D.C. General Hospital*, 29 D.C. Reg. 9633, Slip Op. No. 322 (1992).

The Hearing Examiner evaluated the credibility of the witnesses and made factual findings and conclusions based on the record that are reasonable and in accordance with Board precedent. Therefore, the Board adopts the Hearing Examiner's recommendation to dismiss the Complainant's allegation that Respondent committed an unfair labor practice by failing to engage in good-faith impact and effects bargaining.

B. Whether Complainant met its burden of proof that Respondent committed an unfair labor practice by failing to provide the Union with relevant and necessary information that it requested?

In Slip Op. No. 1208, the Board stated that the Parties disputed "whether DYRS denied DCDC's requests for information" and that the pleadings did not establish that the information requested was "both relevant and necessary" for the Union to represent its members. *Id.* at 7. The Board referred these issues to the Hearing Examiner. *Id.*

The Hearing Examiner found that there were numerous requests for information. (Report at 12). The Hearing Examiner stated: "It is undisputed that the Union requested a great deal of information and documentation, and that it [the Union] did not receive all of the documents and information it requested. In addition, some responses were delayed and/or provided piecemeal." *Id.* The Hearing Examiner found that a number of information requests were fulfilled, but a number of requests were not completed or only partially completed. *Id.* The Hearing Examiner relied upon the testimony of Mr. Aqui from OLRCB, who asserted responsibility for handling the information requests. (Report at 13). The Hearing Examiner found that "[t]he delay and completeness [of the information requests] were a result of DYRS, and that he [Mr. Aqui] provided documents to the Union when he received them," that Mr. Aqui "may have overlooked some items or misunderstood some requests," that "some of the documents did not exist," and some documents Mr. Aqui determined were not relevant. *Id.*

The Hearing Examiner stated: "In order to make a determination that Respondent committed a ULP on this matter, there must be a finding of bad faith on its part." (Report at 14). The Hearing Examiner determined based upon the evidence and arguments presented by the Parties that "DCDC did not meet its burden of proof with sufficient evidence, direct or circumstantial, that Respondent acted in bad faith, or that its conduct was motivated by anti-Union animus, or an effort to undermine the Union." *Id.*

The Board has held that materials and information relevant and necessary to its duty as a bargaining unit representative must be provided upon request. *See Fraternal Order of*