Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Doctors' Council of the District of Columbia,	
Complainant,	PERB Case No. 11-U-22
v.	Opinion No. 1432
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 Aqui, 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 medial 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, OLRCB 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 OLRCB had refused to arbitrate. (Report at 8-9).

The Hearing Examiner determined the issues for resolving the Complaint'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 Complaint'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*

Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department, Slip Op. No. 835, PERB Case No. 06-U-10 (2006). The Board's precedent is that an agency is obligated to furnish requested information that is both relevant and necessary to a union's role in: (1) processing of a grievance; (2) an arbitration proceeding; or (3) collective bargaining. *See id.*; *see also American Federation of Government Employees, Local 2741 v. District of Columbia Department of Parks and Recreation*, 50 D.C. Reg. 5049, Slip Op. No. 697, PERP Case No. 00-U-22 (2002); *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 (2002). Further, "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 Hearing Examiner asserted without any citation to PERB precedent a requirement of bad faith for a finding of an unfair labor practice. In determining whether an unfair labor practice has occurred, "a showing of bad faith is not required in order to establish an unfair labor practice. A conclusion that a party failed to bargain in good faith does not equate to a conclusion that the party acted in bad faith." *American Federation of State, County and Municipal Employees, District Council 20 v. District of Columbia Government*, Slip Op. No. 1387 at p.5, PERB Case No. 08-U-36 (2013). Despite the deference the Board provides the Hearing Examiner as a factual-finder, the Hearing Examiner's analysis and conclusions must be made in accordance with Board precedent. *See 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). In the present case, the Hearing Examiner made her conclusion that no unfair labor practice had been committed, because the Complainant had not met its burden of proof that Respondent acted in bad faith. (Report at 14). There is no heightened burden on the Complainant to establish that the Agency's failure to provide requested information that is relevant and necessary to the Union's role was due to the Agency acting in bad faith. *AFSCME, District Council 20*, Slip Op. No. 1387 at p.5. The Hearing Examiner erred in her analysis of PERB precedent by requiring the Complainant to prove by a preponderance of the evidence that the Respondent acted in bad faith. The Board rejects the Hearing Examiner's analysis.

In addition, the Hearing Examiner's factual conclusions are unclear as to the individual information requests, as the Hearing Examiner did not provide any detailed discussion of the information requests: "The record contains numerous examples of items requested that were not provided or not completely provided. It would probably triple the size of this Report if such itemization was provided and it is not necessary in analyzing this issue." (Report at 12). Further, the Hearing Examiner does not provide an analysis of DYRS's actions in providing information. The Hearing Examiner relies primarily on Mr. Aqui's testimony as to his actions as representative for the Respondent, not the actions of the Respondent. The Hearing Examiner's factual conclusions regarding the Respondent's actions are unclear.

The Board concludes that the Hearing Examiner's factual findings are unclear and her analysis was inappropriately based on a bad faith standard, which is not in accordance with Board precedent. *See AFSCME, District Council 20,* Slip Op. No. 1387 at p.5. Therefore, the Board remands to the Hearing Examiner the issue of whether the Agency committed an unfair labor practice when it failed to provide information requested by the Union.

C. Whether Complainant met its burden of proof that Respondent committed an unfair labor practice by replacing bargaining unit employees with non-bargaining unit members?

The Board referred to the Hearing Examiner the issue of "whether DYRS contracted or hired additional positions to perform functions previously conducted by the bargaining unit medical officers." Slip Op. No. 1208 at p. 7. The Complainant alleged that the RIFed employees' positions were being replaced with non-bargaining unit positions or contracted out. (Complaint at 9). Based on the record before her, the Hearing Examiner concluded that the SMO position included supervisory duties not performed by the RIFed medical officers, and that no other positions were created or contracted to replace the bargaining unit positions. (Report at 14). The Hearing Examiner recommended that the Complaint based on these allegations be dismissed, as the Complainant had not met its burden of proof by a preponderance of the evidence. *Id.*

As stated above, 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). The Board finds that the Hearing Examiner's findings are reasonable and supported by the record. Therefore, the Board adopts the Hearing Examiner's recommendation that the Complaint's allegations, concerning replacement of bargaining unit positions with non-bargaining unit positions, be dismissed.

D. Whether Complainant met its burden of proof that Respondent committed a ULP by refusing to select an arbitrator?

The Board found that the Parties did not agree on whether the matter was appropriate for arbitration. Slip Op. No. 1208 at p.7. The Board found that the Parties did not dispute that DYRS refused to select an arbitrator. *Id.* The Board referred to the Hearing Examiner the issues of "whether the matter was suitable for arbitration;" "whether the Agency was required to select an arbitrator," and "whether FMCS put the arbitration matter on hold." *Id.* The Hearing Examiner determined that the Respondent relied upon D.C. Superior Court Judge Leibovitz's opinion that a RIF could not be arbitrated and that the Abolishment Act had prevented the Parties from arbitrating, despite a contractual provision in the Parties CBA. (Report at 15). The Hearing Examiner found that the Respondent did not dispute that the Complainant had raised two subsequent D.C. Superior Court decisions by other judges with contrary conclusions. *Id.* The Hearing Examiner stated: "The issue is not whether Respondent made the correct decision

but whether it acted in good faith in relying on the Leibovitz decision. Since that is the only relevant factor, it is not necessary to weight the merits of the Leibovitz decision against the merits of the subsequent decisions." *Id.* Based on the Hearing Examiner's determination that Mr. Aqui's testimony was credible and "his rationale reasonable under the circumstances," the Hearing Examiner determined that the Union did not meet its burden of proof by a preponderance of 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 applied a bad faith standard without any citation to Board precedent. As discussed above, there is no Board precedent requiring a showing of bad faith for finding an unfair labor practice. *See American Federation of State, County and Municipal Employees, District Council 20 v. District of Columbia Government*, Slip Op. No. 1387 at p.5, PERB Case No. 08-U-36 (2013). Further, the Hearing Examiner's factual conclusions and analysis are unclear. Therefore, the Board finds that the Hearing Examiner's findings and conclusions are not supported by Board precedent. The Board remands to the Hearing Examiner the issue of whether the Agency committed an unfair labor practice by refusing to select an arbitrator for this matter.

E. Timeliness of the Complaint's allegations

On review of the Hearing Examiner's Report, the Board has found that Hearing Examiner has discussed allegations occurring across several months, e.g. information requested throughout August 2010 through November 2010. (Report at 6). In addition, the Hearing Examiner stated: "It would probably triple the size of this Report if such itemization [of the information requests] was provided and it is not necessary in analyzing this issue." (Report at 12). As neither Party raised timeliness issues, the Hearing Examiner did not make any factual determinations of specific dates of the Complaint's allegations. Notwithstanding, upon its review of this case, these factual determinations are necessary for the Board to determine its jurisdiction over the Complaint's original allegations. Therefore, on remand, the Board orders the Hearing Examiner to make factual determinations as to when the cause of action for the Complainant's allegations initially occurred. *See Fraternal Order of Police/Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department*, Slip Op. No. 1372, PERB Case No. 11-U-52 ("[T]he Board has the authority to raise jurisdiction before a Decision and Order becomes final.").

The Board received the Complaint on February 22, 2013, and therefore the Board can only decide unfair labor practice allegations that occurred 120 days prior to the filing date of the Complaint. *See* Board Rule 520.4 (stating "Unfair labor practice complaints shall be filed not later than 120 days after the date on which the alleged violations occurred."); *see also Fraternal Order of Police/Metropolitan Police Department v. D.C. Metropolitan Police Department*, Slip Op. No. 1372, PERB Case No. 11-U-52 (2013) (finding "Pursuant to Board Rule 520.4, the Board only has authority to review unfair labor practice allegations that took place during the 120 days preceding the filing of an unfair labor practice complaint"). The Board has held that Board Rule 520.4 is jurisdictional and mandatory. *Hoggard v. D.C. Public Schools and*

AFSCME Council 20, Local 1959, 43 D.C. Reg. 1297, Slip Op. No. 352, PERB Case No. 93-U-10 (1993), *aff'd sub nom., Hoggard v. Public Employee Relations Board*, MPA-93-33 (D.C. Super. Ct. 1994), *aff'd*, 655 A.2d. 320 (D.C. 1995). As the Hearing Examiner's Report is unclear regarding the specific dates of the Complaints allegations, the Board orders the Hearing Examiner to make these factual findings.

IV. Conclusion

The Board has reviewed the Hearing Examiner's Report and Recommendation to determine whether it is reasonable, based on the record, and supported by Board precedent. The Board adopts the Hearing Examiner's Report and Recommendation in part, and remands it in part, as discussed above.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint's allegation that Respondent failed to engage in impact and effects bargaining prior to the implementation of the RIF is dismissed with prejudice.
2. The Complaint's allegation that Respondent replaced bargaining unit positions with non-bargaining unit positions is dismissed with prejudice.
3. The Hearing Examiner shall make factual findings and conclusions as to whether the Respondent failed to furnish relevant and necessary information at the request of the Complainant. The Hearing Examiner may conduct further proceedings, if necessary.
4. The Hearing Examiner shall make factual findings and conclusions as to whether the Respondent's refusal to arbitrate was an unfair labor practice. The Hearing Examiner may conduct further proceedings, if necessary.
5. The Hearing Examiner shall make factual findings and conclusions as to whether any of the remaining allegations were untimely.
6. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

Washington, D.C.

September 26, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 11-U-22 was transmitted to the following Parties on this the 25th day of October, 2013:

Repunzelle Johnson **via File&ServeXpress**
D.C. Office of Labor Relations and Collective Bargaining
441 4th Street, N.W., Suite 820 North
Washington, D.C. 20001

Wendy Kahn **via File&ServeXpress**
Zwerdling, Paul, Kahn & Wolly, P.C.
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Erica J. Balkum
Attorney-Advisor
Public Employee Relations Board
1100 4th Street, S.W.
Suite E630
Washington, D.C. 20024