Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
Dr. Henry Skopak,	)	
Complainant,	)	PERB Case Nos. 02-S-07 and 02-U-21
v.	)	Opinion No. 737
D.C. Commission on Mental Health Services and Doctors Council of the District of Columbia,	)	
Respondents.	)	

Decision and Order

I. Nature of the case

This case involves a consolidated unfair labor practice complaint and standards of conduct complaint filed by Dr. Henry Skopak ("Complainant" or "Skopak") alleging that the District of Columbia Commission on Mental Health Services ("CMHS") and the Doctors Council of the District of Columbia ("Doctors Council" or "Union") violated D.C. Code §1-617.04(a) and (b) and D.C. Code § 1-617.03 by entering into a settlement agreement on the day of a scheduled arbitration hearing.

Both the Doctors Council and CMHS filed answers to the complaint denying the allegations. In addition, each Respondent filed a motion to dismiss.

This matter was referred to a Hearing Examiner. The Hearing Examiner issued a Report and Recommendation. The Complainant filed exceptions to the Hearing Examiner's Report and Recommendation. In addition, the Doctors Council filed an opposition to the Complainant's exceptions. Also, a document styled "Amicus Brief in Support of the Complainant," was filed by Johnnie Landon, Esquire. The Hearing Examiner's Report and Recommendation ("R&R") and the Complainant's exceptions, are before the Board for disposition.

II. Background:

The Complainant was employed as a psychiatric physician at Saint Elizabeth Hospital ("Hospital") from 1964 until 1987. (R&R at p. 4) In 1987, the federal government transferred control of the Hospital to the District government. At that time, the Complainant was offered an opportunity to continue working at the Hospital as a District employee. However, the Complainant declined. Instead, he chose to work at the Hospital as an independent contractor. As a result, the Complainant worked a series of contract positions between 1987 until 1997. In 1997, a Receiver was appointed to operate the Hospital. After the Receiver was appointed, the Complainant asked to be hired as a regular employee. On October 14, 1997, the Complainant was hired as a regular employee. The Complainant's employment was subject to a one-year probationary period. Also, the Complainant claims that after he was hired as a regular employee, he continued to perform certain outside part-time employment. (R&R at p.4). In order to accommodate his outside employment, the "Complainant alleges that he arranged with CMHS to take leave without pay (LWOP) until he accrued sufficient compensatory time and or annual leave to cover his outside employment." (R&R at p 4.). On October 13, 1998, CMHS notified the Complainant that his employment would be terminated on October 14, 1998. The Doctors Council grieved the Complainant's termination. As a result, CMHS rescinded the termination notice and advised the Complainant that he would instead be terminated on November 12, 1998. Subsequently, the Complainant was terminated on November 12, 1998.

CMHS asserts that at the time of his termination, the Complainant was a probationary employee. However, the Complainant contends that CMHS erroneously calculated the date on which he completed his one year probationary period, due to questions involving the time charged to cover his outside employment. (R&R at p. 4). The Doctors Council and CMHS engaged in mediation in an attempt "to resolve the question regarding the date on which [the] Complainant's probationary period ended." (R&R at p. 5). Unfortunately, the parties could not settle the issue. Therefore, the Doctors Council grieved the termination and pursued it to arbitration. The case was scheduled for a March 12, 2002 arbitration hearing.

The Complainant claims that on the date of the arbitration hearing he was informed that the Doctors Council had decided to settle his case. Also, the Complainant contends that '[d]espite [his] objection, the Union and CMHS drafted and executed [a] Settlement Agreement." (R&R at p.6) As a result of the executed agreement, the Complainant asserts that the Doctors Council arbitrarily withdrew the case from arbitration. The Complainant contends that the settlement agreement precluded him from: (1) having his evidence heard by an arbitrator; (2) returning to his position of employment; and (3) obtaining his full back pay. (Compl. at p. 6). Furthermore, the Complainant claims that the settlement agreement was "the product of a bad faith, collusive agreement to divest [the] Complainant of his asserted right to have the arbitrator resolve the grievance." (R&R at p. 2). Also, the Complainant asserts that at no time prior to the execution of the settlement agreement did either CMHS and/or the Doctors Council provide any explanation as to why they were executing a settlement agreement that would preclude him from returning to his position of employment.

Finally, the Complainant alleges that the settlement agreement provided that CMHS would

pay him $100,000. (Compl. at p. 6). However, he claims that this amount is far less than the more than $300,000, that he would have been entitled to upon receiving a favorable arbitrator's award. (Compl. at p. 6). In addition, he asserts that the settlement amount is less than the several hundred thousand dollars that he could have earned over future years upon reinstatement to his position of employment. (Compl. at p. 6).

In view of the above, the Complainant filed a consolidated unfair labor practice and standards of conduct complaint against CMHS and the Doctors Council. The consolidated complaint alleges that CMHS and the Doctors Council violated the Comprehensive Merit Personnel Act. Both Respondents filed answers denying the allegations contained in the consolidated complaint and filed motions to dismiss. Subsequently, the matter was referred to a Hearing Examiner.

III. The Hearing Examiner's Report and Recommendations and the Complainant's Exceptions:

Based on the pleadings and the discussions held at a pre-hearing conference, the Hearing Examiner identified two issues for resolution. These issues, his findings and recommendations, and the exceptions taken by the Complainant to those findings and recommendations, are as follows:

A. Respondent Doctors Council Motion to Dismiss for Failure to State a Cause of Action Under D.C. Code §§ 1-617.03(a)(1) and 1-617.04(b)(1) and (2)

The Complainant contends that the Doctors Council violated the Comprehensive Merit Personnel Act (CMPA) by entering into a settlement agreement on the day of the scheduled arbitration hearing. As a result, the Hearing Examiner reasoned that the issue to be considered was whether the Doctors Council failed to provide the Complainant with adequate representation in violation of D.C. Code §§ 1-617.03 and 1-617.04. The Hearing Examiner observed that the Board has on numerous occasions considered the question of whether a union's conduct concerning a bargaining unit member's grievance, constitutes a violation of D.C. Code § 1-617.03 and D.C. Code § 1-617.04. Relying on the Board's holding, in Osborne v. AFSCME, Local 2095, __ DCR __, Slip Op. No. 713, PERB Case Nos. 02-U-30 and 02-S-09 (2003), the Hearing Examiner noted that:

> The applicable standard in cases [like this], is not the competence of the union, but rather whether its representation was in good faith and its actions motivated by honesty of purpose ... [Furthermore,] 'in order to breach this duty of fair representation, a union's conduct must be arbitrary, discriminatory or in bad faith, or be based on considerations that are irrelevant, invidious or unfair.'
>
> While a complainant need not prove their case on the pleadings, they must plead or assert allegations that, if proven, would establish the alleged statutory violations.

> Furthermore, the Board has determined that '[t]o maintain a cause of action, [a] Complainant must [allege] the existence of some evidence that, if proven, would tie the Respondent's actions to the asserted [statutory violation]. Without the existence of such evidence, Respondent's actions [can not] be found to constitute the asserted unfair labor practice.' Therefore, a Complaint that fails to allege the existence of such evidence, does not present allegations sufficient to support the cause of action. Slip Op. No. 713 at pgs. 5-7.

After reviewing the various pleadings and exhibits, the Hearing Examiner observed that the Amended Complaint and the Complainant"s Affidavit contain "numerous allegations of fact offered in support of [the] Complainant's belief that the Union illegally settled an arbitration case that [the] Complainant believed to be a 'winner'." (R&R at p. 8.) However, the Hearing Examiner concluded that "there is no allegation of fact within the consolidated complaint which supports a finding that the Union's settlement of [the Complainant's] grievance constitutes either a violation of the Union's duty to fairly represent the Complainant, or of the standards of conduct applicable to the Union." (R&R at p. 8). Also, the Hearing Examiner observed that the Complainant had ample opportunity to shore up his Complaint. Specifically, the Hearing Examiner notes that the Complainant filed his Complaint on July 17, 2002. Subsequently, Respondent CMHS filed its Motion to Dismiss on or about August 23, 2002 and Respondent Doctors Council filed its Motion to Dismiss on or about August 28, 2002. The Complainant opposed those motions in mid-September 2002. In his R&R, the Hearing Examiner indicated that at a February 24, 2003 Pre-Hearing Conference, he agreed to the Complainant's request to serve a subpoena duces tecum on Respondent CMHS. However, the Hearing Examiner found that despite the time that elapsed, the Complainant failed to assert or demonstrate that the Doctors Council's conduct in handling the Complainant's grievance, was arbitrary, discriminatory, or the product of bad faith. (See, R&R at pgs. 8-9). Instead, the Hearing Examiner concluded that in the present case, the Complainant appears to disagree with the union's decision to accept a $100,000 settlement. Relying on the Board's holding in Christian v. UDCFA, 50 DCR 6786, Slip Op. No. 700, PERB Case No. 02-S-05 (2003), the Hearing Examiner noted that a "[m]ere disagreement with the Union's settlement of [a] case. . .is not a sufficient basis to state a cause of action under the CMPA. [Furthermore, he indicated that the Board] has found that judgmental acts of discretion in the handling of a grievance, do not constitute the requisite arbitrary, discriminatory or bad faith element needed to find a violation of the CMPA." (R&R at p. 9) In addition, the Hearing Examiner noted that the Board has found "that the fact that there may have been a better approach to handling [a] Complainant's grievance or that the Complainant disagrees with the approach taken by [the union] does not render the [union's] actions or omissions a breach of the standard for its duty of fair representation." (R&R at p. 9, citing Christian v. UDCFA). Also, the Hearing Examiner found that the Complainant asserted no basis for attributing an unlawful motive to the union's decision to settle or to the manner by which the union handled his grievance. Finally, the Hearing Examiner concluded that the Complainant failed to provide any allegations or assertions that, if proven, would establish a statutory violation. In conclusion, the Hearing Examiner found that the Complainant neither sufficiently pled bad faith or discrimination, nor raised circumstances that would give rise to such an inference.

For the above noted reasons, the Hearing Examiner determined that the complaint allegations concerning the Doctors Council should be dismissed.

In his exceptions, the Complainant asserts that the Hearing Examiner: (1) erred in finding that the Complaint failed to state a cause of action under the CMPA and (2) erred by failing to determine that there was collusion in this case. (Complainant's Exceptions at pgs. 8-9). In view of the above, the Complainant is requesting that the Board reject the Hearing Examiner's findings. However, the Complainant raises no new contention or arguments not considered and addressed by the Hearing Examiner. Furthermore, the Complainant does not identify any law or legal precedent which the Hearing Examiner's findings contravene. Instead, the Complainant contends that the Hearing Examiner ignored the evidence and asserts that his case was a winner. (Complainant's Exception at p. 8). In addition, the Complainant claims that the union's conduct was unfair and discriminatory. (Complainant's Exceptions at p. 8)

In the present case, we believe that the Hearing Examiner used the correct legal standard when determining whether the Doctors Council violated its duty of fair representation. In addition, we note that the Hearing Examiner did not find any evidence of arbitrary, discriminatory, or bad faith conduct on the part of the Doctors Council. Furthermore, we conclude that the Hearing Examiner's finding on this issue is supported by the record and Board precedent. Specifically, the record demonstrates that the "Complainant acknowledge[d], [that] the Union: [1] prosecuted an unfair labor practice complaint on [his] behalf; [2] grieved his termination; [3] undertook extensive efforts on his behalf in the period leading to the arbitration proceeding; and [4] proceeded to arbitration before settling the case during the pendency of the arbitration proceeding." (R&R at p. 10). Also, it is apparent in this case, that the Complainant was dissatisfied with the Doctors Council decision to settle the grievance concerning his termination. However, that fact, in and of itself, does not constitute a breach of duty of fair representation where no evidence of arbitrariness, discrimination, or bad faith is shown. See, Barbara Hagans v. American Federation of State, County and Municipal Employees, Local 2743, 48 DCR 10967, Slip Op. No. 646 at P.6, PERB Case Nos. 99-U-26 and 99-S-06 (2001)

In his exceptions, the Complainant simply reiterates arguments that were previously made and rejected by the Hearing Examiner. As a result, we find that the Complainant's exceptions amount to nothing more than a disagreement with the Hearing Examiner's determination. The Board has found that a mere disagreement with a Hearing Examiner's findings is not grounds for reversal where the findings are fully supported by the record. See, IBPO, Local 445 v. DCOPM __ DCR __, Slip Op. No. 704 and Allen Lewis et al. v. AFSCME, Local 2401, ___DCR___, Slip Op. No. 703; American Federation of Government Employees, Local 874 v. D.C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). As noted above, we have determined that in the present case, the Hearing Examiner's findings are supported by the record and Board precedent. Therefore, we can not reverse the Hearing Examiner's findings.

Also, the Complainant asserts in his exceptions, that once the union initiated arbitration, it "had the moral obligation to continue." (Complainant's Exceptions at p. 8). We have stated that while "an employee has a statutory right under the CMPA to present grievances without union intervention, no similar employee right exists to arbitrate or otherwise exhaust the administrative process of a negotiated grievance/arbitration procedure, the terms of which are governed by the parties'... collective bargaining agreement." Frederick v. AFSCME, Council 20, Local 2776, 43 DCR 7024, Slip Op. No. 407 at p. 2, n. 2, PERB Case No. 94-U-20 (1994). In the present case, the

Complainant's grievance was brought on his behalf by the Doctors Council. However, the Hearing Examiner determined that the Complainant did not demonstrate that the Doctors Council's decision to settle its demand for arbitration, was motivated by animus, dishonesty or bad faith. "[Furthermore, we have held that] as the exclusive representative of the collective bargaining unit which includes [the] Complainant, [a labor organization's] right to settle a grievance on behalf of unit members is within its discretion, notwithstanding the absence of a grievant's signature upon a settlement agreement." Id. In light of the above, the Complainant's argument that he objected to the settlement and that the Doctors Council had a moral obligation to continue, is not a basis for finding that the Doctors Council violated the CMPA.

Finally, the Complainant asserts in his exceptions that "since the Hearing Examiner cites excessive delays impeding the progress of this case, [he believes] that these delays influenced [the Hearing Examiner's] decision." (Complainant's Exceptions at p. 7). As previously noted, we believe that the: (1) Hearing Examiner used the correct legal standard when he determined that the Doctors Council did not violate its duty of fair representation and (2) Hearing Examiner's findings are supported by the record and by Board precedent. As a result, this exception lacks merit.

Pursuant to D.C. Code § 1-605.2(3)(2001 ed) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. Specifically, we find that the Hearing Examiner's findings that the Complainant failed to state a cause of action, is supported by the record and Board precedent. As a result, we adopt the Hearing Examiner's recommendation and dismiss the complaint allegations concerning the Doctors Council..

B. Respondent CMHS' Motion to Dismiss for failure to State a Cause of Action Under D.C. Code § 1-617.04(a)(1)(2)(3) and (5)

The second issue before the Hearing Examiner was whether CMHS committed an unfair labor practice in violation of D.C. Code § [1-617.04](a)(1), (2), (3), and (5).[1] (R&R at p. 12).

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[1]D.C. Code § 1-617.04 (a)(1), (2), (3), (4) and (5) provide as follows:

> (a) The District, its agents, and representatives are prohibited from:
>
> (1) Interfering, restraining, or coercing any employee in the exercise of rights guaranteed by this subchapter;
>
> (2) Dominating, interfering, or assisting in the formation, existence or administration of any labor organization, or contributing financial or other support to it, except that the District may permit employees to negotiate or confer with it during working hours without loss of time or pay;
>
> (3) Discriminating in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization, except as otherwise provided in this chapter;

Turning first to the Complainant's claim under D.C. Code § 1-617.04(a)(5), the Hearing Examiner found that pursuant to Board precedent, the Complainant lacks standing to assert that CMHS failed to bargain collectively in good faith with the Union. As a result, the Hearing Examiner determined that this allegation should be dismissed.

D.C. Code §1-617.04(a)(5) (2001ed.), provides that "[t]he District, its agents and representatives are prohibited from ... [r]efusing to bargain collectively in good faith with the exclusive representative." However, it is clear from the language in D.C. Code §1-617.04(a)(5) (2001ed.), that the right to require a District agency to bargain collectively in good faith, belongs exclusively to the labor organization. Therefore, in the present case, only the Doctors Council can require that CMHS bargain in good faith. As a result, the Complainant lacks standing to assert that CMHS has violated D.C. Code §1-617.04(a)(5) (2001ed.) In light of the above, we adopt the Hearing Examiner's finding that the Complainant lacks standing.

As for the remaining claims under § 1-617.04(a)(1), (2), and (3), the Hearing Examiner found that the Complaint allegations against "Respondent CMHS [should be dismissed] because, as with the complaint against Respondent [Doctors Council,] the Amended Complaint as supplemented by the Affidavit does not sufficiently state a cause of action against Respondent CMHS. [Specifically, the Hearing Examiner concluded that,] the Amended Complaint and Affidavit are devoid of specific factual allegations tying the settlement of the Complainant's termination grievance to any statutory violation. At most, the allegations, if proven, demonstrate the Complainant's disagreement with the settlement itself. [Furthermore, the Hearing Examiner determined that,] the Amended Complaint does not provide any factual allegations in support of the bare assertion of unlawful collusion between [CMHS and the Doctors Council.]." (R&R at p.12). Finally, the Hearing Examiner noted that unless there are specific factual allegations tying the fact of the settlement agreement to some unlawful purpose, an employer does not violate the CMPA by entering into a settlement agreement. In the present case the Hearing Examiner found that the Complainant failed to assert any allegation that, if proven, would constitute a statutory violation.

In his exceptions, the Complainant asserts that the Hearing Examiner erred in finding that the Complaint failed to state a cause of action against CMHS. As a result, the Complainant is requesting that the Board reject the Hearing Examiner's findings with respect to CMHS. However, the Complainant raises no new contention or arguments not previously considered and addressed by the Hearing Examiner. Furthermore, the Complainant does not identify any law or legal precedent which the Hearing Examiner's findings contravene. Instead, the Complainant contends that: (1) the Hearing Examiner ignored the evidence; (2) his case was a winner and (3) the settlement itself demonstrates the existence of collusion between CMHS and the Doctors Council. (See Complainant's Exceptions at pgs 8-9). We believe that these arguments are just a repetition of the allegations contained in the Complaint. In view of the above, we find that the Complainant's exceptions concerning CMHS amount to nothing more than a disagreement with the Hearing Examiner's determination. As

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> (4) 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 this subchapter; or
>
> (5) Refusing to bargain in good faith with the exclusive representative.

previously noted, a mere disagreement with a Hearing Examiner's findings is not grounds for reversal where the findings are fully supported by the record. See, IBPO, Local 445 v. DCOPM Slip Op. No. 704 and Allen Lewis et al. v. AFSCME, Local 2401, Slip Op. No. 703.

Pursuant to D.C. Code § 1-605.2(3)(2001 ed) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. Specifically, we find that the Hearing Examiner's findings that the Complainant failed to state a cause of action, is supported by the record and Board precedent. As a result, we adopt the Hearing Examiner's recommendation and dismiss the complaint allegations concerning the CHMS.

C. Respondent CMHS' Request for Costs and Expenses

In the present case, CMHS has requested that the Board award costs and expenses associated with its defense of this action. The Hearing Examiner indicated that the Board has ruled that a party may be awarded certain reasonable costs when the losing party's claim or position is wholly without merit, and upon a showing by the movant that an award of costs is in the interest of justice. AFSCME v. DCDFR, Slip Op. 245 at 5, PERB Case No. 89-U-02 (1990).

The Hearing Examiner found that "[o]ther than to characterize the Amended Complaint as 'frivolous,' and to note the earlier proceedings initiated by the Union on Complainant's behalf, Respondent CMHS provided no basis for an award of costs in this matter." (R&R at p. 13). Therefore, the Hearing Examiner recommended that CMHS's request be denied.

CHMS did not file an exception concerning this finding. Furthermore, we believe that the Hearing Examiner's finding is reasonable and consistent with our holding in the AFSCME case. As a result, we conclude that the interest-of-justice criteria articulated in the AFSCME case, would not be served by granting CHMS' request for reasonable costs. Therefore, we adopt the Hearing Examiner's finding and deny CHMS' request for reasonable costs.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complainant's consolidated unfair labor practice and standards of conduct complaint is dismissed.

2. The District of Columbia Commission on Mental Health Services' request for reasonable costs, is denied.

3. 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.

May 24, 2004

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 02-S-07 and 02-U-21 was transmitted via Fax and U.S. Mail to the following parties on this the 24th day of May, 2004.

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CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 03-UM-03 was transmitted via Fax and U.S. Mail to the following parties on this the 26th day of May 2004.

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:		
HENRY SKOPEK, M.D.,		
Complainant,		
	PERB Case Nos.	**02-S-07**
		02-U-21
v.		
COMMISSION ON MENTAL HEALTH SERVICES, *et al.*		
Respondents.		

HEARING EXAMINER'S REPORT AND RECOMMENDATION

I. STATEMENT OF THE CASE

On July 17, 2002, Complainant filed the instant Amended Unfair Labor Practice and Standards of Conduct Complaint asserting several violations of the unfair labor practice and standards of conduct provisions of the Comprehensive Merit Personnel Act ("CMPA"), codified at D.C. Code §§ 1-617.03(a) and 1-617.04(a) and (b), by Respondents Commission on Mental Health Services (CMHS) and Doctors Council of the District of Columbia (Union), in connection with Respondents' March 12, 2002, action in settling, during the pendency of arbitration proceedings, a Union grievance challenging the termination of grievant's employment by CMHS on November 12, 1998.

Respondents both answered the Amended Complaint, and, in addition to raising certain affirmative defenses and in CMHS' case a request for costs and expenses associated with its defense of what it terms a "frivolous" complaint, separately moved for the dismissal of the Amended Complaint on a variety of bases. Complainant opposed the motions to dismiss, and the matter was set for hearing on February 24, 2003, at the offices of the District of Columbia Public Employee Relations Board ("Board" or "PERB") in Washington, District of Columbia. Subsequently, the scheduled hearing was converted to a Pre-Hearing Conference. At the Pre-Hearing Conference, both Respondents urged the Hearing Examiner to dismiss the Amended Complaint, but the Hearing Examiner reserved ruling on the motions to dismiss and agreed to provide Complainant, at Complainant's request, with a further opportunity to seek information from Respondents and to file any additional affidavit(s) in support of the Amended Complaint.

By early August 2003, Complainant had not yet filed any additional documents in support of his Amended Complaint, at which time Respondents Union and CMHS separately, on August 8 and 12, respectively, renewed their requests that the Hearing Examiner rule on their pending motions to dismiss the Amended Complaint. Complainant filed with PERB on August 22 a request to respond to the renewed requests for action on the motions to dismiss, and on August 27, 2003, filed with PERB an 11-page Affidavit by Complainant.

As the case now stands, based on discussions at the Pre-Hearing Conference, Complainant claims violations by Respondent CMHS of D.C. Code §§ 1-617.04(a)(1), (2), (3), and (5), and by Respondent Union of D.C. Code §§ 1-617.04(b)(1) and (2), and 1-617.03(a)(1).

Additionally, the Union has limited its Motion to Dismiss to the contentions that the Amended Complaint fails to allege facts which, if true, would constitute a violation of the Standards of Conduct provisions of the CMPA set forth at D.C. Code § 1-617.03(a)(1), and that the Amended Complaint fails to allege facts which, if true, would constitute a violation of the Union's Duty of Fair Representation, as set forth at D.C. Code §§ 1-617.04(b)(1) and (2). As Respondent CMHS' Motion to Dismiss stands, CMHS asserts that the Amended Complaint should be dismissed for failure to state a claim of either asserted violation; that CMHS is not a proper party to the proceeding; that the Amended Complaint is untimely filed; that the Amended Complaint was not properly served on CMHS; and, that it should be awarded costs and expenses "associated with responding to this frivolous complaint occasioned by the Complainant's false statements."

The Motions to Dismiss are now ripe for resolution, and will be addressed separately.

II. BACKGROUND

This matter generally involves the circumstances following CMHS' November 12, 1998 termination of Complainant's employment as a physician at a time when it believed him to be a probationary employee. Of relevance to this proceeding, the Union grieved the termination and pursued it to arbitration. Ultimately, on March 12, 2002, Respondents settled the case during the pendency of the arbitration proceedings, over Complainant's objection. The Amended Complaint generally contends that the March 12 Settlement Agreement is the product of a bad faith, collusive agreement to divest Complainant of his asserted right to have the arbitrator resolve the grievance.

More specifically, the Amended Complaint alleges as follows: Complainant was represented by the Union for purposes of collective bargaining, and began his employ with CMHS on October 14, 1997, subject to a one-year probationary period. CMHS notified Complainant on October 13, 1998 that his employment would be terminated on October 14, 1998. The Union grieved that termination, after which CMHS rescinded the termination notice and advised Complainant that he would be terminated instead effective November 12, 1998. There appears to be some factual dispute on the pleadings regarding the basis for Complainant's termination, as Complainant alleges, and CMHS denies, that he was terminated "for cause," but the Board notes in an earlier Decision and Order involving many if not all of the same underlying facts that CMHS provided no reason for Dr. Skopek's termination. Doctors Council v. DCCMHS, Slip Op. 636 at 2, PERB Case No. 99-U-06 (2000). In any event, it is undisputed that CMHS took the position that Complainant remained a probationary employee at the time of his termination on November 12, 1998. The Union filed a grievance over this termination action on November 18, 1998, and took the matter to arbitration.

Of special significance to this case, Complainant alleges at ¶¶ 14 through 17 of the Amended Complaint that:

> **14. Within weeks before the March 12, 2002, scheduled arbitration date, CHMS [sic] and Doctors Council discovered conclusive evidence which established that Dr. Skopek had completed his one (1) year probationary period prior to CHMS' [sic] termination of his employment. The agency and the union also became aware of evidence which established that CHMS did not have sufficient cause that would warrant termination of Dr. Skopek's employment.**
>
> **15. Motivated by bad faith and in order to preclude the arbitrator from adjudicating the above evidence, CHMS [sic] and Doctors Council acted arbitrarily and agreed to enter into a settlement agreement of the grievance that would withdraw the case from the arbitrator and prevent Dr. Skopek from being afforded a post-termination hearing on both Dr. Skopek's probationary or non-probationary status at the time he was terminated by CHMS [sic] and CHMS' [sic] cause for terminating Dr. Skopek's employment. Although CHMS [sic] and Doctors Council attempted to obtain Dr. Skopek's concurrence to a settlement that would require CHMS [sic] to pay Dr. Skopek $100,000, Dr. Skopek refused to consent to the settlement and continued to object to any settlement that would not afford him reinstatement to his position of employment and award him full back pay.**

16. **On the March 12, 2002 arbitration date, CHMS [sic] and Doctors Council ignored Dr. Skopek's continuing objections and arbitrarily withdrew the case from the arbitrator's jurisdiction by executing a purported settlement that precluded Dr. Skopek from having his evidence heard by an arbitrator, precluded Dr. Skopeck [sic] from returning to his position of employment, and precluded Dr. Skopek from obtaining full back pay that he would have been entitled upon reinstatement to his position of employment. At no time prior to or contemporaneous with the execution of the purported settlement agreement did CHMS [sic] and/or Doctors Council provide any explanation as to why they were executing an agreement that would preclude Dr. Skopek from returning to his position of employment and/or preclude Dr. Skopek from receiving full back pay covering period of November 13, 1998, through and including, March 12, 2002.**

17. **While the purported settlement agreement provided that CHMS [sic] would pay Dr. Skopek $100,000, this amount is far less than the more than $300,000 that Dr. Skopek would have been entitled upon receiving an arbitrator's award of reinstatement and full back pay, and far less than the several hundred thousand dollars that Dr. Skopek could have earned over future years upon reinstatement to his position of employment.**

In his August 25, 2003, Affidavit, Complainant fleshes out the allegations contained in the Amended Complaint. Complainant explains that he began working at St. Elizabeths Hospital in 1967 as a staff psychiatric physician, and chose to end that employment relationship when the Hospital was transferred to the control of the Government of the District of Columbia in October 1987. Rather than accepting regular employment from the District, Complainant worked a series of contract positions at the Hospital until 1997, when a Receiver was appointed to operate the Hospital. Complainant thereupon asked to be hired as a regular employee, and was hired on October 14, 1997. Without re-characterizing the contents of Complainant's Affidavit, suffice it to say that Complainant alleges that upon his hiring as a regular employee by CMHS, he continued to perform certain outside part-time employment. To accommodate that outside employment, Complainant alleges that he arranged with CMHS to take Leave Without Pay (LWOP) until he accrued sufficient compensatory time and/or annual leave to cover his outside employment. According to Complainant, CMHS erroneously calculated the date on which he completed his one-year probationary period due to questions involving the time charged to cover his outside employment.

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Indeed, Complainant alleges that upon his initial termination effective October 14, 1998, the then-President of the Union "immediately responded ... and pointed out that I was no longer a probationary employee, and that I could not be fired without just cause." Affidavit at ¶ 1.8, citing an October 14, 1998 letter from Union President Cheryl R. Williams, M.D., to CMHS Director of Program Operations Johnny Allen, attached to the Affidavit as Exhibit 2. Complainant recognizes that CMHS then rescinded the October 14 termination, and set a new termination date of November 12, 1998. Affidavit at ¶ 1.9.

The Union and CMHS then engaged in a mediation process, ultimately unsuccessfully, to resolve the question regarding the date on which Complainant's probationary period ended.

Complainant acknowledges that the Union also filed with the Board on his behalf a charge of unfair labor practice against CMHS, alleging that he was terminated due to his conduct as a Union official. Affidavit at ¶ 1.11. In recommending the dismissal of the Union's complaint, the Hearing Examiner concluded that, "Complainants failed to show that Dr. Steury (Dr. Skopek's supervisor) was aware of Dr. Skopek's union activities, and therefore did not use his union advocacy as a basis for discharge. The Hearing Examiner also concluded that Complainants failed to show any anti-union animus, and that there was sufficient evidence supporting the reasonableness of Dr. Skopek's termination." Doctors Council v. DCCMHS, Slip Op. 636 at 3, PERB Case No. 99-U-06, (2000). In upholding the Hearing Examiner's recommended dismissal of the Union's complaint, the Board found the Hearing Examiner's findings and conclusions to be "reasonable, persuasive and supported by the record." Id. at 5.

As Complainant acknowledges, "Following the Hearing Examiner's decision and a subsequent unsuccessful appeal in the ULP proceeding, the Union pursued the grievance-arbitration process in order to address the question as to whether I was actually on probation at the time of my termination." Affidavit at ¶ 2.1.

Complainant acknowledges that the matter was brought to arbitration, and that he was in "continuous" contact with the Union's lawyer. Affidavit at ¶ 2.3. Complainant alleges that he ultimately "convinced the Union's Lawyer" and CMHS "conceded" that CMHS had miscalculated the date on which his probationary period ended. Affidavit at ¶ 2.3.

Complainant further alleges that he and the Union's lawyer discovered additional timekeeping errors, further demonstrating CMHS' erroneous calculation of the end of Complainant's probationary period. Complainant alleges that the

Union's lawyer was "elated" about the discovery of the timekeeping errors, Affidavit at ¶ 2.6, and that the Union presented evidence of those and other timekeeping errors at a February 12, 2002 arbitration hearing. Affidavit at ¶ 2.9. According to Complainant, Hospital representatives requested a continuance of the hearing until March 12, 2002, "being unable to effectively respond to this evidence." Affidavit at ¶ 2.9. Complainant describes the Union's lawyer's appraisal of the case during the interim as one of "gleeful optimism at the projected outcome of the case at arbitration." Id.

Complainant alleges that at some point in time before the resumption of the arbitration hearing, the Union's President, Dr. Raymond Brown, informed him that the Hospital was considering a settlement "in the high ninety's," to which Complainant indicated he was not interested. Affidavit at ¶ 2.10.

Subsequently, on March 10, Complainant alleges that he met with the Union's lawyer. According to Complainant, the lawyer's outlook on the case had shifted "180 degrees," and "he spent the time trying to convince me to accept a settlement of $100,000.00. He also phoned Dr. Brown to inform him of my refusal to accept such a settlement and suggested that Dr. Brown might be able to accept the settlement without my consent." Affidavit at ¶ 3.1.

The next day, Complainant alleges, the Union's lawyer telephoned him and explained that CMHS "intended to justify some of its charged LWOP hours by arguing that I had allegedly asked for LWOP for income taxes [sic] purposes," an allegation that Complainant denies. Affidavit at ¶ 3.2.

On March 12, 2002, Dr. Brown arrived for the arbitration hearing and informed Complainant that the Union decided to settle the case. Despite Complainant's objection, the Union and CMHS drafted and executed the above-referenced Settlement Agreement. Affidavit at ¶ 3.3.

Based on the foregoing allegations, Complainant asserts that CMHS fired him "for asking pointed questions of management ... in my capacity as a Union representative," and that "Dr. Brown, unlike Dr. Cheryl Williams, sold me out for some benefit from management." Thus, Complainant asserts that the Union and CMHS "agreed to deny me the opportunity to have an arbitrator evaluate the evidence in my case by using a phony settlement agreement to accomplish their objective." Affidavit at ¶¶ 4.1 and 4.2.

III. DISCUSSION

This matter is before the Hearing Examiner on Respondents' separate motions to dismiss the Amended Complaint, which will be addressed separately.

A. Respondent Union's Motion to Dismiss for Failure to State a Cause of Action Under D.C. Code §§ 1-617.03(a)(1) and 1-617.04(b)(1) and (2)

Under D.C. Code § 1-617.03(a)(1), individual members of a labor organization are entitled "to fair and equal treatment under the governing rules of the organization, and to fair process in disciplinary proceedings." Additionally, under D.C. Code §§ 1-617.04(b)(1) and (2), labor organizations are prohibited from "interfering with, restraining, or coercing any employees ... in the exercise of rights guaranteed by this subchapter," and from "[c]ausing or attempting to cause the District to discriminate against an employee in violation of § 1-617.06."[1]

In Osborne v. AFSCME, Local 2095, Slip Op. 713 at 5, PERB Case Nos. 02-U-30 and 02-S-09 (2003), the Board restates the standard for consideration of consolidated unfair labor practice and standards of conduct cases such as this:

> **Under D.C. Code Section [1-617.03], a member of the bargaining unit is entitled to 'fair and equal treatment under the governing rules of the [labor] organization'. As [the] Board has observed: '[t]he union as the statutory representative of the employee is subject always to complete good faith and honesty of purpose in the exercise of its discretion regarding the handling of union members' interest'." The Board has determined that "the applicable standard in cases [like this], is not the competence of the union, but rather whether its representation was in good faith and its actions motivated by honesty of purpose .... [Furthermore,] 'in order to breach this duty of fair representation, a union's conduct must be arbitrary, discriminatory or in bad faith, or be based on considerations that are irrelevant, invidious or unfair." (Citations omitted.)**

Specifically with respect to consideration of motions to dismiss such consolidated complaints for failure to state a cause of action, the Board also stated in Osborne that:

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[1] The Amended Complaint does not contain any allegation that Respondent Union violated any of Complainant's rights pursuant to D.C. Code § 1-617.06(a) or (b).

> **While a Complainant need not prove their case on the pleadings, they must plead or assert allegations that, if proven, would establish the alleged statutory violations.**
>
> **Furthermore, the Board has determined that "[t]o maintain a cause of action, [a] Complainant must [allege] the existence of some evidence that, if proven, would tie the Respondent's actions to the asserted [statutory violation]. Without the existence of such evidence, Respondent's actions [can not] be found to constitute the asserted unfair labor practice. Therefore, a Complaint that fails to allege the existence of such evidence, does not present allegations sufficient to support the cause of action. Slip Op. 713 at 7.**

Applying these precepts to the instant case, the Hearing Examiner recommends the dismissal of the portion of the Amended Complaint alleging violations of the CMPA by Respondent Union, for the following reasons.

The Amended Complaint, as augmented by Complainant's August 25, 2003 Affidavit, contains numerous allegations of fact offered in support of Complainant's belief that the Union illegally settled an arbitration case that Complainant believed to be a "winner," but there is no allegation of fact within the Amended Complaint or Affidavit that the Union's settlement of that grievance constitutes either a violation of the Union's duty fairly to represent Complainant, or of the standards of conduct applicable to the Union. In so stating, the Hearing Examiner emphasizes that Complainant has had more than ample opportunity to shore up his Amended Complaint. Complainant filed his Amended Complaint on or about July 17, 2002. Respondent CMHS filed its Motion to Dismiss on or about August 23, 2002, and Respondent Union filed its Motion to Dismiss on or about August 28, 2002. Complainant opposed those motions in mid-September 2002. At the February 24, 2003 Pre-Hearing Conference, the Hearing Examiner agreed to Complainant's request to serve a subpoena duces tecum on Respondent CMHS, as well as leave to file an Affidavit in support of the Amended Complaint if he so chose. Fully six months after the Pre-Hearing Conference, and almost a year to the day after the filing of the second of the two motions to dismiss, Complainant filed his Affidavit.

The Amended Complaint and supporting Affidavit do contain the assertion that the Union violated the CMPA by acting arbitrarily, but that assertion of illegal activity is not supported by any specific allegation of fact as to how the Union committed the alleged violations. While Complainant need not prove his case on the pleadings, he must plead or assert allegations that, if proven, establish the alleged statutory violations. Complainant must allege the existence of some evidence

that, if proven, would tie Respondent Union's actions to the asserted violation. Osborne v. AFSCME Local 2095, Slip Op. 713 at 7 (2003).

To be sure, there is ample basis in Complainant's allegations to determine that Complainant disagrees with the Union's decision to settle the arbitration case concerning the termination of his employment, from which Complainant invites the Board to infer illegal conduct. Mere disagreement with the Union's settlement of that case, however, is not a sufficient basis to state a cause of action under the CMPA. The Board has found that "judgmental acts of discretion in the handling of a grievance, do not constitute the requisite arbitrary, discriminatory or bad faith element [needed to find a violation of the CMPA]." Christian v. UDCFA, Slip Op. 700 at 4, PERB Case No. 02-S-05 (2003). Moreover, "the fact that there may have been a better approach to handling the Complainant's grievance or that the Complainant disagrees with the approach taken by [the Union] does not render the [union's] actions or omissions a breach of the standard for its duty of fair representation." Id. at 5 (citation omitted).

In light of the foregoing, it is not enough for Complainant to allege, as he has, that his arbitration case was settled without his approval, under circumstances where Complainant believed that he had a "winner." The Board has made clear time and again that a labor organization has the discretionary right to settle a grievance on behalf of unit members, notwithstanding the absence of a grievant's signature upon a settlement agreement. See, e.g., Frederick v. AFSCME Council 20, Local 2776, Slip Op. 407 at 2 n. 2, PERB Case No. 94-U-20 (1994). Complainant must also provide specific factual allegations as to how the Union's settlement of the case violated the CMPA. Gardner, Slip Op. 677 at 5.

Here, Complainant leaves the Board guessing, having alleged in the Amended Complaint only that the Union settled the case over his objection without providing any explanation to him, and that the settlement did not provide him with the full measure of relief he sought in his grievance. In his Affidavit, Complainant adds the assertion that he believes he was fired for his Union activity, and that the Union sold him out for some unknown and unidentified benefit from management.

Even discounting the fact that the Board already rejected Complainant's claim that he was terminated for reasons of his Union conduct, Doctors Council v. DCCMHS, Slip Op. 636, PERB Case No. 99-U-06, (2000), Complainant does not specify or provide any details regarding his assertion that the Union sold him out in collusion with Respondent CMHS. Just as the Board concluded in Gardner v. DCPS and WTU and Frederick v. AFSCME Council 20, Local 2776 that a bare assertion of illegal conduct falls short of a well-pled

complaint, so too should Complainant's bare assertion of illegality in this case be found insufficient to state a cause of action under the CMPA.

Moreover, it must be noted that Complainant admits in his Affidavit that the Union tried to convince Complainant to accept the settlement, Affidavit at ¶¶ 2.10, 3.1, and explained to Complainant that CMHS intended to challenge the Union's evidence at hearing, Affidavit at ¶ 3.2. To this, Complainant responds that CMHS' evidence "is untrue and it makes no sense." Id. The Amended Complaint, as supported by the Affidavit, presents a classic case of a unit member who disagrees with his Union's judgmental acts of discretion. Absent additional allegations of fact, such disagreement does not state a cause of action under the CMPA. Osborne, Slip Op. 713 at 6.

There are additional reasons for dismissing Complainant's complaint against Respondent Union. As detailed in the Amended Complaint and supporting Affidavit, Respondent Union undertook extensive efforts on Complainant's behalf before finally settling his case during the pendency of his termination arbitration. For example, as Complainant acknowledges, the Union prosecuted the above-referenced unfair labor practice complaint on Complainant's behalf; grieved his termination; undertook extensive efforts on his behalf in the period leading to the arbitration proceeding; and, proceeded to arbitration before finally settling the case during the pendency of the arbitration proceedings. As already noted, absent specific allegations of unlawful conduct, a Union's action in settling a grievance during the pendency of arbitration proceedings, even absent the consent of the unit member, does not constitute a violation of the CMPA.

Specifically with respect to Complainant's assertion that the Union is in violation of § 1-617.04(b)(2), Complainant alleges no violation of § 1-617.06, on account of which failing the Hearing Examiner recommends the dismissal of that portion of the Amended Complaint. The only mention of this provision is found in Complainant's Opposition to Respondents' Motions to Dismiss the Amended Complaint, in the section of the document responding to Respondent CMHS's motion to dismiss. The reference is not specific to the Union, and does not specifically allege how the Union violated Complainant's rights under § 1-617.06.

Although the Board has held that a violation of a Union's duty of fair representation under § 1-617.04(b)(1) and (2) might concomitantly constitute a breach of the standards of conduct, the connection is not an automatic one. Bagenstose v. WTU, Slip Op. 355 at 2 n. 1, PERB Case Nos. 90-S-01 and 90-U-02 (1993). There, "the Complainant [did] not identify or articulate any prescribed standard of conduct to which [the Union] failed to adopt, subscribe or comply. The failure to establish this allegation of the consolidated Complaint precludes a finding

that [the Union's] alleged breach of its duty of fair representation resulted from such transgressions by [the Union]." Id. at 3 n. 1.

Here, Complainant similarly does not identify any specific violation of the standards of conduct, tying that allegation instead to what amounts essentially to a claim of the violation of the duty of fair representation. In so claiming, Complainant relies on Hairston v. FOP, MPD Labor Committee, Slip Op. 75, PERB Case Nos. 83-U-11, 83-U-12, 83-S-01 (1984). That decision, however, expressly was clarified by the Board in Bagenstose v. WTU, in which the Board stated, "To the extent our previous decisions have treated unfair labor practice complaints alleging a breach of the duty of fair representation as encompassed also under the standard of conduct provisions, without the existence of a nexus ... we now clarify our consideration of these distinct issues." Bagenstose, Slip Op. 355 at 3 n. 1. Accordingly, the Hearing Examiner recommends that the standards of conduct portion of the Amended Complaint be dismissed.

Finally, Complainant's recent Affidavit bespeaks Complainant's attempt to relitigate here the Board's earlier dismissal of the Union's unfair labor practice complaint alleging that CMHS unlawfully terminated him for reasons related to his Union activity. Complainant asserts that, "I was fired for asking pointed questions of management about matters that management apparently did not want to be questioned about. I was very careful to do this in my capacity as a Union representative, and that apparently angered management." Affidavit at ¶ 4.1. Complainant adds that, "I believe that the Hospital determined that they did not want me to return to work even though they recognized that they could not justify my termination," and that, "[the Union] sold me out for some benefit from management and they both agreed to deny me the opportunity to have an arbitrator evaluate the evidence in my case by using a phony settlement agreement to accomplish their objective." Affidavit at ¶ 4.2. As already noted, in Doctors Council v. DCCMHS, Slip Op. 636, the Board rejected the Union's claim on Complainant's behalf that his termination by CMHS was based on anti-union animus or in retaliation for Complainant's union activities. Certainly, this proceeding is not the proper device by which to revisit the earlier claim, already rejected by the Board, that CMHS terminated Complainant for unlawful reasons. Thus, setting aside Complainant's unfounded conclusory assertions relating to the reason for his termination, not only are there no specific factual allegations to support a cause of action in this case, Complainant does not even allege a colorable motive.

Moreover, Complainant's response to Respondents' motions to dismiss should be contrasted with the asserted motive for his termination contained in his Affidavit, because the two documents differ significantly in their characterization of events. Whereas Complainant's response to the motion to dismiss characterizes

CMHS' violation as one of acceding to the Union's alleged action in discouraging grievant's membership in the Union by entering into an unlawful settlement agreement (echoing the motive asserted in the Amended Complaint), Complainant's more recent Affidavit attributes to CMHS direct responsibility for the alleged violation of the CMPA, and specifically that CMHS terminated Complainant for his Union activities, and then bought out the Union in order to avoid having to reinstate him pursuant to the grievance arbitration process. These two characterizations of events are quite divergent, and neither is supported by specific factual allegations. In the Hearing Examiner's judgment, the divergent characterizations demonstrate the dearth of factual support for Complainant's effort to tie the settlement agreement to the asserted violation of the CMPA. Other than the mere fact of settlement, there are no factual allegations supporting the asserted collusive effort, and therefore the Complaint fails to state a cause of action under the CMPA.

Absent any factual allegations that, if proven, would establish the asserted statutory violation, the Hearing Examiner recommends the dismissal of the entirety of the complaint against Respondent Union. Osborne v. AFSCME Local 2095, Slip Op. 713 at 7.

B. Respondent CMHS' Motion to Dismiss for Failure to State a Cause of Action Under D.C. Code § 1-617.04(a)(1)(2)(3) and (5)

In the Amended Complaint, Complainant asserts that CMHS "engaged in bad faith, arbitrary, and discriminatory conduct and, thereby, committed unfair labor practices in violation of D.C. Code §§ [1-617.04](a)(1), (2), (3), and (5)."

Turning first to the claim under 1-617.04(a)(5), Complainant has no standing to assert that CMHS failed to bargain collectively in good faith with the Union. Gardner v. DCPS, Slip Op. 677 at 2, PERB Case Nos. 02-S-01 and 02-U-04 (2002). Accordingly, that portion of the Amended Complaint must be dismissed.

As for the remaining claims under § 1-617.04(a)(1), (2), (3), the Hearing Examiner recommends dismissal of the complaint against Respondent CMHS because, as with the complaint against Respondent Union, the Amended Complaint as supplemented by the Affidavit does not sufficiently state a cause of action against Respondent CMHS. Simply put, as more fully described above, the Amended Complaint and Affidavit are devoid of specific factual allegations tying the settlement of Complainant's termination grievance to any statutory violation. At most, the allegations, if proven, demonstrate Complainant's disagreement with the settlement itself. The Amended Complaint does not provide any factual allegations in support of the bare assertion of unlawful collusion between Respondents to

deprive him of the opportunity to win reinstatement and full backpay through the device of grievance arbitration. Moreover, as already noted, Complainant does not have an absolute right to have an arbitrator resolve a grievance over the termination of his employment. Stated alternatively, an employer does not violate the CMPA by entering into an otherwise lawful settlement agreement. Absent specific factual allegations tying the fact of the settlement agreement to some unlawful purpose, the Amended Complaint fails to state a statutory cause of action against Respondent CMHS.

To the extent the statement of alleged motive contained in the Amended Complaint is replaced by the different assertion of motive contained in the Affidavit, the Board already has rejected the notion that CMHS terminated Complainant for his conduct as a Union representative, and that matter cannot properly be relitigated here. Absent any factual allegations that, if proven, would establish the asserted statutory violation, the Hearing Examiner recommends the dismissal of the entirety of the complaint against Respondent CMHS. Osborne v. AFSCME Local 2095, Slip Op. 713 at 7.

C. Respondent CMHS' Request for Costs and Expenses

Characterizing Complainant's allegations as frivolous,Respondent CMHS requests an award of costs and expenses associated with its defense of this action. Respondent characterizes the Amended Complaint as a "last ditched effort to garner an audience," following on the heels of his first unsuccessful effort at challenging his termination before PERB in Doctors Council v. DCCMHS, Slip Op. 636, and the settlement of his grievance at arbitration.

The Board has ruled that a party may be awarded certain reasonable costs when the losing party's claim or position is wholly without merit, and upon a showing by the movant that an award of costs is in the interest of justice. AFSCME v. DCDFR, Slip Op. 245 at 5, PERB Case No. 89-U-02 (1990). In so holding, the Board made clear that determinations as to whether an award of costs would be in the interest of justice would have to be made on a case-by-case basis. Id.

Other than to characterize the Amended Complaint as "frivolous," and to note the earlier proceedings initiated by the Union on Complainant's behalf, Respondent CMHS provides no basis for an award of costs in this matter. True, there has been no hearing convened in this case, but neither does Respondent CMHS allege sufficient facts in its pleading which, even if true, would justify an award of costs. So far as the Hearing Examiner is aware, the instant action is the sole action initiated by Complainant on his own behalf. While the Hearing Examiner notes the divergent explanations of motive in the Amended Complaint and the