



Report and Recommendation (“Report”) on May 8, 2012. The Hearing Examiner recommended that the Complaint be dismissed, and found that FOP/DCHA failed to meet its burden of proof and that the evidence did not establish that DCHA violated § 1-617.04 “by interfering in any employee’s rights to participate in the union.” (Report at 8-9). The Report and Recommendation is now before the Board for disposition.

## II. Factual Record

The parties agree that they finalized a collective bargaining agreement (“CBA”) on September 28, 2007, and were negotiating a successor agreement when this case arose. (Complaint at 2; Answer at 1). There are multiple disputes of fact in this case.

Four witnesses testified in this case. The first was Phyllis Grimes, a chief shop steward for the Department of Corrections Labor Committee, who testified that she saw Sinclair and Officer Tameika Massey looking through FOP/DCHA’s file cabinets.<sup>1</sup> (Report at 3-4; Respondent’s Closing Brief at 5). She further testified that about a month later, Sinclair tried to open one of the cabinets again and used profanities when he found it was locked, stating “Damn, that bitch [Smith] locked the cabinet” and “I’m going to get that bitch, I’m going to get all them mother fuckers.” (Report at 4). Grimes did not know whether Sinclair was a member of the bargaining unit when this incident occurred, but said she was told by Smith that he was not. *Id.* Grimes was also uncertain about the exact dates of the incidents. *Id.*

The second witness was Floyd Favors, Jr., Vice Chairman of FOP/DCHA. *Id.* He testified that Sinclair and Massey approached him and Sinclair encouraged him to run for chairman of FOP/DCHA, saying they “needed to get [Smith] out of the office.” *Id.* This incident occurred after Sinclair’s promotion to sergeant. *Id.* However, Favors stated that he “really shut them off because [he] didn’t want to hear it” and told Sinclair that he didn’t think he would be a better candidate than Smith. *Id.*

Smith was the third witness. She testified that Sinclair became a member of FOP/DCHA around 2005 and was elected Vice Chairman in 2009; he was also given “the responsibility to look at some taxes” around 2008, but was never chosen as Treasurer. *Id.* Smith stated that around 2010, Sinclair was removed from membership “because of his conduct in violation of the bylaws”. *Id.* However, Smith also testified that Sinclair was removed from his position as Vice Chairman through a petition recall around October or November 2010; this decision came after learning that investigators, of which Sinclair was the only one, were not considered to be part of the bargaining unit. *Id.* at 5. She also stated that she “had a series of interferences” from Sinclair while he was still a member, but that the Complaint was not designed to retaliate against him for his actions or his earlier complaint with the Board during his membership. *Id.* Smith also testified that Grimes told her about Sinclair going into FOP/DCHA’s cubicles in February or March 2011, and that she spoke with Favors about his conversation with Sinclair and Massey prior to the April 2011 elections. *Id.* at 4. She further stated that Sinclair had told a union member that she had a right to bereavement donations. (Petitioner’s Closing Argument at 2).

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<sup>1</sup> Grimes was a member of the Fraternal Order of Police, but in a different collective bargaining unit than Complainant.

Sinclair was the fourth and final witness. He testified that he joined FOP/DCHA around 2000, served as Interim Treasurer around the end of 2008, and was elected Vice Chairman in 2009; during the same election, Massey became the new Treasurer. (Report at 5). He further stated that he filed a complaint with the Board concerning “[u]nauthorized expenditures or spending the union’s money without permission” by certain FOP/DCHA officials.<sup>2</sup> *Id.* In regards to the aforementioned incidents, Sinclair stated he went to the union offices in 2011 after his promotion to renew his application for membership based on being a retired MPD officer, not as a FOP/DCHA member. *Id.* at 6. He claimed he did not “go into any file cabinets” or make any derogatory statements as Grimes had testified. *Id.* He also claimed he did not talk to Favors about running against Smith for the chairman position, and that after his promotion he did not make “any derogatory comments about the union or Ms. Smith and did not interfere with the Union or its business.” *Id.* He admitted discussing an entitlement to bereavement donations with Holt after his own membership was revoked. *Id.*

### III. Hearing Examiner’s Findings

#### A. Witness Credibility

Due to the conflicting testimony, the Hearing Examiner had to resolve issues of credibility. *Id.* The Hearing Examiner considered the witnesses’ demeanor and character, the improbability of their versions, inconsistencies in their statements, and their opportunity and capacity to observe the event or act at issue. *Id.*; (citing *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987)). The Hearing Examiner cited the District of Columbia Court of Appeals in *Stevens Chevrolet Inc. v. Commission on Human Rights* to show the importance of credibility evaluations being done by an individual who sees the witnesses “first hand”. *Id.*; (citing 498 A.2d 546, 549 (D.C. 1985)).<sup>3</sup>

The Hearing Examiner concluded that Grimes was credible in her testimony that Sinclair entered FOP/DCHA’s cubicle twice, leaving with some documents the first time and uttering profanities against Smith when he could not open the file cabinet the second time. *Id.* The Hearing Examiner also credited Favor’s testimony that Sinclair urged him to run for office against Smith. *Id.* at 7. Additionally, the Hearing Examiner credited Sinclair’s testimony that after his promotion, he did not attempt to interfere with FOP/DCHA’s activities. *Id.* The Hearing Examiner held that she could accept part of a witness’s testimony even if other parts are discredited. *Id.*; (citing *DeSarno v. Department of Commerce*, 761 F.2d 657, 661 (Fed. Cir. 1985)).

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<sup>2</sup>The current status of Sinclair’s earlier complaint is unknown. The parties were asked to provide information in their final written arguments, but they did not do so. The Hearing Examiner did not consider the allegations of fiscal mismanagement in the Report and Recommendation, stating they were unrelated to this Complaint, but included the testimony because it may provide the reason why Sinclair and Massey entered the file cabinet, if that allegation is true. (Report at 5, n. 4).

<sup>3</sup>The Board notes that the Hearing Examiner incorrectly cited the case here as *Stevens Chevrolet Inc. v. Commission on Human Rights*, 498 A.2d at 440-450 (D.C. 1985). 498 A.2d 546, 549 is the correct citation for the cited passage. (Report at 6).

The Board has repeatedly upheld the findings and conclusions of hearing examiners, so long as they are reasonable, supported by the record, and consistent with Board precedent. *See FOP/MPD Labor Committee v. D.C. Metropolitan Police Department*, Slip Op. No. 1358, PERB Case No. 07-U-21 at p. 7 (2013) (citing *AFGE Local 1403 v. D.C. Office of the Attorney General*, 60 D.C. Reg. 2574, Slip Op. No. 873, PERB Case Nos. 05-U-32 and 05-UC-01 (2011)). When there are “issues of fact concerning the probative value of evidence and credibility resolutions”, the Board will typically reserve them for the hearing examiner to decide. *See DC MPD*, Slip Op. No. 1358 at p. 8; *see also Hatton v. FOP/Department of Corrections Labor Committee*, 47 D.C. Reg. 769, Slip Op. No. 451, PERB Case No. 95-U-02 (1995); *University of the District of Columbia Faculty Association/NEA v. UDC*, 39 D.C. Reg. 8594, Slip Op. No. 285, PERB Case No. 86-U-16 (1992); *Bagenstose v. D.C. Public Schools*, 38 D.C. Reg. 4154, Slip Op. No. 270, PERB Case No. 88-U-34 (1991).

In light of the Hearing Examiner’s thoughtful and specific discussion of resolving the issues of credibility in this case, there is no evidence that her conclusions were unreasonable. Board precedent clearly supports deference to the Hearing Examiner on these issues, and the record of the case shows nothing to call the Hearing Examiner’s findings into question. As a result, the Board will uphold the Hearing Examiner’s assessment of the witnesses’ credibility in this case.

#### B. Findings and Conclusions

The Hearing Examiner identified two charges made by the Complaint: that Sinclair “approached at least one member of the Union and made derogatory remarks about it and its current chairman,” and that he “urged that at least one member undertake to oppose Chairman Smith in an effort to remove her from office”. (Report at 8). In regards to the first charge, the Hearing Examiner concluded that there was not enough evidence to support the Complaint, as the specifics of the charge were unclear. *Id.*

While the Hearing Examiner credited Grimes’ testimony into the incident at the FOP/DCHA offices, Grimes’ uncertainty of when Sinclair’s two visits took place made it unclear as to whether Sinclair was still a member of the bargaining unit or not. *Id.* at 6-7. Smith’s testimony was unclear as to when Sinclair was removed from membership and for what cause; the Hearing Examiner stated that “the timeframes of these decisions were not established so that findings of fact can be made.” *Id.* at 8. In any case, the Hearing Examiner held that, according to the evidence, the only bargaining unit member who would have heard Sinclair’s remarks was Massey, who was his ally, as Grimes herself was not in the same bargaining unit. *Id.* at 7.

PERB precedent states that derogatory remarks concerning a union official’s representation of bargaining unit employees, even ones made by management officials, do not on their own constitute a violation of the union’s representation rights under the CMPA. *See AFGE, Local 2741 v. D.C. Department of Recreation and Parks*, 45 D.C. Reg. 5078, Slip Op. No. 553, PERB Case No. 98-U-03, p. 3 (1998); *Jones v. D.C. Department of Corrections*, Slip Op. No.

100, 32 D.C. Reg. 1704, PERB Case No. 84-U-14, p. 2 (1985).<sup>4</sup> The Hearing Examiner cited *Corrie Corp. v. NLRB* in stating that the proper test for further interference was “whether the conduct in question had a reasonable tendency in the totality of circumstances to intimidate”. 375 F.2d 149, 153 (4th Cir. 1967); see also *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1036 (D.C. Cir. 1997). The Hearing Examiner did not find enough evidence to suggest Sinclair or Massey’s attempts to access the file cabinets was improper; that Massey, as the Treasurer of FOP/DCHA, did not have the right to be present; or that Sinclair’s presence would be enough to form an unfair labor practice if he was there at Massey’s invitation. (Report at 6). The only person the remarks may have been directed at was Massey. *Id.* at 7. The visits to the FOP/DCHA offices may have been in relation to Sinclair’s prior complaint. *Id.* Based on the totality of circumstances, the Hearing Examiner concluded that the statements overheard by Grimes and Sinclair’s visits to the FOP/DCHA offices could not be the subject of the “derogatory remarks” charge. *Id.* at 7-8. As for the other two allegations concerning FOP/DCHA’s elections and the bereavement funds, the Hearing Examiner found no evidence that those comments reached the level of “derogatory remarks.” *Id.*

Based upon the testimony and evidence presented, the Hearing Examiner concluded that FOP/DCHA failed to show that Sinclair’s remarks constituted an unfair labor practice. The Board finds that the Hearing Examiner’s findings and conclusions related to the first charge are reasonable, supported by the record, and consistent with Board precedent. Therefore, the conclusion is affirmed.

In regard to the second charge, the Hearing Examiner concluded that Sinclair’s statements to Favors, standing alone, did not constitute an unfair labor practice. *Id.* at 7. As stated above, Favors testified that he “shut” the conversation down and told Sinclair that he felt Smith could do a better job as Chairman than he could. *Id.* The Hearing Examiner found no evidence that Favors felt intimidated or threatened by Sinclair. *Id.* at 8. As previously stated, the Hearing Examiner found no evidence that Sinclair’s remarks to Favors reached the level of “derogatory remarks”, and even if they did, those remarks alone could not constitute a violation of the CMPA. See *AFGE*, Slip Op. No. 553 at p. 3; *Jones*, Slip Op. No. 100 at p. 2.

Based upon the testimony and evidence presented, the Hearing Examiner concluded that FOP/DCHA failed to show that Sinclair’s remarks to Favors constituted an unfair labor practice. (Report at 8). The Board finds that the Hearing Examiner’s findings and conclusions are reasonable, supported by the record, and consistent with Board precedent. Therefore, the conclusion is affirmed.

#### **IV. Conclusion**

Pursuant to Board Rule 520.14, the Board finds the Hearing Examiner’s conclusions and recommendations to be reasonable, supported by the record, and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner’s Report, and the Complaint is dismissed.

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<sup>4</sup> The Board notes that the Hearing Examiner incorrectly cited *Jones* as PERB Case No. 85-U-14; when 84-U-14 is the correct citation.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The Fraternal Order of Police/District of Columbia Housing Authority Labor Committee's Unfair Labor Practice Complaint is dismissed.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**

July 31, 2013

**CERTIFICATE OF SERVICE**

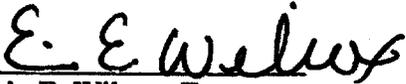
This is to certify that the attached Decision and Order in PERB Case No. 11-U-23 was transmitted via U.S. Mail to the following parties on this the 31st day of July, 2013.

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