Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of State, County and Municipal Employees, Council 20, Local 2401, Complainant,	PERB Case No. 06-U-33
v.	Opinion No. 885
District of Columbia Child and Family Services Agency, Respondent.	

DECISION AND ORDER

I. Background:

The American Federation of Government, State, County and Municipal Employees, District Council 20, Local 2401 ("Complainant," "Local 2401" or "Union") filed an Unfair Labor Practice Complaint ("Complaint") in the above-referenced case. Specifically, the Complainant alleges that the District of Columbia Child and Family Services Agency ("CFSA" or "Respondent") violated D.C. Code § 1-617.04(a)(1) and (5) by failing to abide by the terms of the grievance procedure contained in the parties' collective bargaining agreement ("CBA").

In its Answer, the Respondent denied the allegation and asked that the Complaint be dismissed with prejudice because the Complainant failed to assert a statutory cause of action. In addition, the Complainant filed a document styled "Untimely Answer" alleging that the Respondent's Answer was untimely filed and requesting that the hearing be waived and a decision be rendered in its favor on the basis of the pleadings

The Hearing Examiner denied the Respondent's request to dismiss with prejudice. However, the Hearing Examiner determined that the Respondent's Answer was untimely and accepted the facts

presented in the Complaint as admitted by the Respondent. The Complainant did not present witnesses. The Hearing Examiner made a decision based on the written record and determined that the Respondent's actions did not constitute an unfair labor practice. No exceptions were filed.

The Hearing Examiner's Report and Recommendation ("R&R") is before the Board for disposition.

II. Factual Background

The facts of the case are not in dispute. The Complainant and the Respondent are parties to a CBA. Joyce Graham is a bargaining unit member employed by the Respondent as a Resource Development Specialist, DS-301-11. Ms. Graham's position is within a career ladder that spans grades 9, 11, and 12. Employees whose positions are in a career ladder may be promoted noncompetitively to the next higher grade in the ladder under certain circumstances. (See R&R at p. 3).

The Respondent's Deputy Director for Administration issued a memorandum entitled "CFSA's Career Ladder Promotion Practice." Among other things, the memorandum noted that to receive a career ladder promotion an employee must meet all three of the following criteria:

1. Serve one (1) year at the next lower grade (based on date of hire);

2. Demonstrate to the satisfaction of the supervisor the employee's ability to perform at the next higher level (supervisor's satisfactory performance recommendation);

3. There is a demonstrated need for the higher-level work to be performed.

Ms. Graham requested a career ladder promotion to grade 12, but the request was denied. She grieved this decision and met with Yolanda Thompson, her immediate supervisor; Christine Wheeler, her second-level supervisor; and a Local 2401 representative. Pursuant to the parties' CBA, Local 2401 treated the meeting as Step 2 of the grievance procedure and asked for a response within 10 days. When no response was issued, Local 2401 moved the grievance to Step 3. Jearl Ward, Program Manager, Licensing and Monitoring Administration, CFSA, denied the grievance at Step 3. Mr. Ward justified his decision with the following comment: "There was no documentation submitted . . . to evidence that the employee met requirements # 2 and #3 of the career ladder memo dated October 18, 2005." (R&R at p. 3).

On January 17, 2006, Wayne Enoch, Local 2401 Shop Steward, submitted a Step 4 grievance to Uma Ahluwalia, Interim Director of CFSA. As with the earlier steps in the grievance, Local 2401 asked that Graham be promoted to grade 12. When no response was received within the time frame provided for in Article 22 of the parties' CBA, Mr. Enoch wrote a memorandum to Ahluwalia on April 5, 2006, concerning the Step 4 grievance. Mr. Enoch stated that Ms. Ahluwalia's "response was due by February 7, 2006; however, to this date, we have not received any correspondence which indicates your decision; as required by Article 22, Section 2." (R&R at p. 3). When Local 2401 received no response to the Mr. Enoch's memorandum, it filed the instant Complaint. The Respondent filed an Answer to the Complaint. The Complainant asserted that the Answer was untimely.

III. Positions of the Parties

The Complainant contends that the Respondent's Answer was not timely filed and therefore a decision should be rendered in its favor. Furthermore, the Complainant asserts that the Respondent had an obligation to respond to Ms. Graham's grievance at Step 4 of the contractual grievance procedure because Step 4 is a mandatory step, unlike Step 5 which allows the Union to request arbitration if it so chooses. The Complainant contends that the Respondent's failure to respond to the Step 4 grievance within 15 days, as provided in Article 22, Section 2 of the CBA, constitutes a refusal to bargain in good faith in violation of D.C. Code § 1-617.04(a)(5).

The Respondent counters that Article 22 of the parties' CBA provides that if the grievance is not resolved at Step 4, the Union may by written notice request arbitration within twenty (20) days after the reply at Step 4 is due or received, whichever is sooner. Thus, the Respondent claims that it has not prevented the Complainant from pursuing arbitration, and therefore has not violated the CBA. (See R&R at p. 5). Furthermore, the Respondent argues that under D.C. Code §1-617.08, management retains certain rights, including the right to promote employees. Therefore, the Complaint challenges conduct that is solely a management right. "In light of this, a lack of response to a . . . grievance does not constitute a refusal to bargain in good faith with the exclusive representative, as the Respondent did not have to bargain with the Complainant on matters that are within its statutory prerogative." (R&R at p. 5). Finally, the Respondent maintains that the Complaint does not give rise to a statutory cause of action and should be dismissed with prejudice.

The Complainant maintains that the Respondent's reliance on the Comprehensive Merit Personnel Act ("CMPA") is misplaced, stating that "[t]his case is based on the Respondent's misconduct and failure to abide by the [CBA]. It is not a [management] 'right' for the Respondent to [refuse to] reply to a Step 4 [g]rievance." (R&R at. p. 4).

IV. Hearing Examiner's Report and Recommendation

The Hearing Examiner determined that the Respondent's Answer was not timely filed. He noted that Board Rule 520.7 provides in relevant part that: "[a] respondent who fails to file a timely answer shall be deemed to have admitted the material facts alleged in the complaint and to have waived a hearing." *Unions in Compensation Unit 20 v. D.C. Department of Health*, 49 DCR 11131, Slip Op. No. 688, at p. 3, PERB Case No. 02-U-13 (2000). Consistent with Board Rule 520.7, the Hearing Examiner found that the material issues of fact and supporting documentary evidence were undisputed by the parties. As a result, the alleged violation is a question of law. Therefore, pursuant to Board Rule 520.10, the Hearing Examiner concluded that this case could appropriately be decided on the pleadings.

The Hearing Examiner indicated that the alleged violation consisted of the Respondent's admitted refusal to respond to a grievance at Step 4 of the grievance procedure. He further noted that under Step 5 of the grievance-arbitration procedure states that: "[i]f the grievance is still unresolved, the union may, by written notice, request arbitration within twenty (20) days after the reply at Step 4 is due or received, whichever is sooner." (R&R at p. 6). Thus, he determined that the parties' CBA allows the Union to move the dispute directly to arbitration. Therefore, the Hearing Examiner determined that the remedy for the Respondent's failure to respond to the Step 4 grievance within the contractual time frame is addressed in the parties' CBA. Specifically, if the CFSA fails to respond to the Step 4 grievance, then the Union can invoke Step 5 (arbitration).

The Hearing Examiner observed that: "PERB has previously held that where relief from an alleged failure of a party to a collective bargaining agreement to comply with the terms of the agreement is found within the agreement itself, the alleged failure does not constitute an unfair labor practice."[1] (R&R at p. 6). Also, the Hearing Examiner noted that in *American Federation of State, County and Municipal Employees, District Council 20, AFL-CIO v. D. C. Department of Human Services, Commission on Mental Health Services*, 47 DCR 6535, Slip Op. No. 372 at p. 2, PERB Case No. 93-U-28 (1993), the Board considered contract language similar to the language found in the present case.[2] The Board dismissed that complaint stating that "[s]ince this contractual provision allows the union to invoke the arbitration clause under the agreement, [the Respondent's] failure to respond to a Step 4 grievance does not prevent [the union] from pursuing its contractual remedies."

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[1]Citing *American Federation of State, County and Municipal Employees, D. C. Council 20, Local 2921, AFL-CIO v. District of Columbia Public Schools*, 42 DCR 5685, Slip Op. No. 339, PERB Case No. 92-U-08 (1992).

[2]The contractual provision in that case provided that: "If the grievance is still unresolved, the union may, by written notice request arbitration within twenty (20) days after the reply at Step 4 is due or received, which ever is sooner." *Id.* at p. 2.

(R&R at pgs. 6-7). In light of the above, the Hearing Examiner concluded that the Respondent's failure to respond to the Step 4 grievance was not an unfair labor practice in violation of the CMPA. As a result, he recommended that the Complaint be dismissed.

The Board has previously addressed alleged violations consisting of the failure of one party to comply with the terms of the CBA. We have held that "D.C. Code § 1-617.04(a)(5) protects and enforces . . . employees rights and employer obligations by making their violation an unfair labor practice. In determining a violation . . . the Board has always made a distinction between obligations that are statutorily imposed under the CMPA and those obligations that are contractually agreed-upon between the parties. 'The CMPA provides for the resolution of [statutory obligations] . . . while the parties have contractually provided for the resolution of [contractual obligations]. We have concluded, therefore, that we lack jurisdiction over alleged violations that are strictly contractual in nature." *Id.*, Slip Op. No. 339 at p. 3. The Board has consistently held that where there is an alleged failure of a party to a CBA to comply with the terms of the agreement, "relief from such conduct generally lies not within the statutory authority of the Board but in the available remedies under the negotiated agreement between the parties." See *American Federation of Government Employees, Local 1550, AFL-CIO v. District of Columbia Department of Corrections*, 39 DCR 9617, Slip Op. No. 295, PERB Case No. 91-U-18 (1992). In the present case, the Complainant alleges a contractual dispute for which the remedy can be found within the parties' CBA. Therefore, relief is not found within the Board's authority.

Pursuant to D.C. Code § 1-605.2(3) 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. The Board hereby adopts the Hearing Examiner's findings and conclusions that CFSA did not violate the D.C. Code § 1-617.04(a)(1) and (5) by failing to respond to Ms. Graham's Step 4 grievance.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint filed by the American Federation of State, County and Municipal Employees, Council 20, Local 2401 is hereby dismissed.

2. Pursuant to Board Rule 559.1 this decision is final upon issuance.

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

March 21, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 06-U-33 was transmitted via Fax and U.S. Mail to the following parties on this the 21st day of March 2007.

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