

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

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In the Matter of:	)	
	)	
Shari Acosta	)	
	)	
Complainant	)	PERB Case No. 20-U-20
	)	
v.	)	Opinion No. 1832
	)	
American Federation of Government Employees, Local 2725	)	
	)	
Respondent	)	

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**DECISION AND ORDER**

**I. Statement of the Case**

On February 25, 2020, Shari Acosta (Complainant) filed<sup>1</sup> an amended unfair labor practice complaint (Complaint)<sup>2</sup> against the American Federation of Government Employees, Local 2725 (Respondent).<sup>3</sup> The Complaint alleges, in pertinent part, that the Respondent Union violated D.C. Code § 1-617.04(b) of the Comprehensive Merit Personnel Act (CMPA) by breaching its duty of fair representation to the Complainant.<sup>4</sup> On March 3, 2020, the Respondent filed an Answer and

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<sup>1</sup> PERB granted for good cause the Complainant’s request to file the Complaint through email as a *pro se* party. The Complainant has been represented by counsel on this matter since September 23, 2021. The Complainant initially filed the Complaint as a standard of conduct claim, but the parties, the Hearing Examiner and PERB have considered the matter to be an unfair labor practice claim throughout the proceeding and at hearing. Therefore, the Board considers the Complaint to be an unfair labor practice claim.

<sup>2</sup> The Complaint named AFGE, the DC Rental Housing Commission (RHC), and former RHC Chairman Michael Spencer as joint Respondents. On February 3, 2022, the Complainant filed a motion to partially dismiss the matter with respect to RHC and Chairman Michael Spencer pursuant to a settlement agreement. On February 8, 2022, PERB granted the motion and dismissed the matter against RHC and Chairman Spencer with prejudice.

<sup>3</sup> The resolution of this Complaint was delayed in large part because there was no further communication from the parties on the matter between August 17, 2020, and September 9, 2021, after mediation was unsuccessful on the matter. There was an additional delay between December 16, 2022, and February 8, 2022, after PERB granted the parties’ joint motion to stay all deadlines and postpone hearing for settlement talks, until the case was partially dismissed against Chairman Spencer and RHC.

<sup>4</sup> Complaint at 4.

Affirmative Defenses to the Complaint (Answer) denying the allegations and further asserting affirmative responses.

In accordance with the Hearing Examiner's Prehearing Order, the Complainant filed a Prehearing Statement (Complainant's Statement), and the Respondent filed a Statement of Issues (Respondent's Statement) on June 15, 2022.<sup>5</sup> A hearing was held on the matter. Both parties submitted post hearing briefs. On December 8, 2022, the Hearing Examiner issued a Corrected Report and Recommendations (Report).<sup>6</sup> The Complainant filed Exceptions to the Report and the Respondent filed an Opposition to the Complainant's Exceptions.

For the reasons stated herein, the Board adopts the Hearing Examiner's Report recommending that the Complaint be dismissed in its entirety.

## **II. Hearing Examiner's Report and Recommendations**

### **A. Factual Findings**

The Hearing Examiner made the following factual findings. The Complainant was employed at the District of Columbia Department of Housing and Community Development as a staff assistant, a position included in the Respondent Union's bargaining unit.<sup>7</sup> On October 25, 2019, the Complainant was reassigned to a non-bargaining unit position at a newly formed agency, the District of Columbia Rental Housing Commission (RHC).<sup>8</sup> The Complainant alleges that her reassignment away from a bargaining unit position was taken at the direction of Michael Spencer, then Chairman and Chief Administrative Judge at RHC.<sup>9</sup>

The Complainant alleges that the Respondent declined to intervene to challenge her removal from the Union after the Complainant was reassigned to a non-bargaining unit position at RHC.<sup>10</sup> The Complainant further contends that the Respondent did not conduct a desk audit and did not file a complaint with PERB regarding Chairman Spencer's conduct toward the Complainant at RHC.<sup>11</sup> Finally, the Complainant alleges that the Respondent Union's president displayed personal dislike and racial animus toward the Complainant, which the Complainant alleges motivated the Respondent's decision not to challenge the Complainant's removal from the Union.<sup>12</sup>

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<sup>5</sup> At a prehearing conference held on April 12, 2022, the Hearing Examiner ordered the parties to submit a joint statement of issues, stipulations of fact, and complete list of exhibits and witnesses pursuant to Board Rule 550.2. The parties could not agree to joint stipulations of fact. As such, each party submitted their respective Prehearing Statements on June 15, 2022.

<sup>6</sup> The Hearing Examiner issued an initial Report and Recommendations on November 28, 2022. The Hearing Examiner issued a Corrected Report and Recommendations on December 8, 2022.

<sup>7</sup> Report at 1. *See also* Complainant's Statement at 2; Respondent's Statement at 1-2.

<sup>8</sup> Report at 1.

<sup>9</sup> Report at 3; Complainant's Statement at 3. The Hearing Examiner found that the Complainant instituted an action in the D.C. Superior Court against Chairman Spencer and the District of Columbia Government which was ultimately settled.

<sup>10</sup> Report at 1, 3-4; Complainant's Statement at 3.

<sup>11</sup> Report at 1.

<sup>12</sup> Report at 6; *see also* Complainant's Post Hearing Brief at 8; Exceptions at 15-17.

The Respondent denies that it failed to provide the Complainant with fair representation or that it engaged in unfair labor practices.<sup>13</sup> The Respondent notes that the Complainant was notified, before her position was reassigned, that her new position at RHC would be a non-union position because the Complainant would have access to confidential information about employee and labor management issues.<sup>14</sup> The Respondent asserts that, at the request of the Complainant, it asked the D.C. Office of Labor Relations and Collective Bargaining (OLRCB) to clarify whether the Complainant's position was correctly excluded from the Union's bargaining unit.<sup>15</sup> OLRCB confirmed to the Respondent that the Complainant was properly excluded from the Respondent Union's bargaining unit.<sup>16</sup> Thereupon, the Respondent informed the Complainant that it accepted OLRCB's determination and would take no further action regarding the Complainant's removal from its bargaining unit.<sup>17</sup>

### **B. Issues and Recommendations**

The Hearing Examiner found that, at the Respondent's request for a determination of the Complainant's Union status, OLRCB determined that the Complainant's job duties in the RHC staff assistant position "clearly and definitively are confidential in nature," and that the Complainant would be privy to information in the performance of her job duties that "creates a clear conflict of interest with retaining [her] position in [the Respondent]'s bargaining unit at RHC."<sup>18</sup>

The Hearing Examiner also found that the Respondent took affirmative steps on behalf of the Complainant to seek a determination of whether the Complainant's exclusion from the Union's bargaining unit was proper.<sup>19</sup> Based on the record, the Hearing Examiner determined that the Respondent had no reasonable basis to challenge OLRCB's decision that the position to which the Complainant was assigned was excluded from the Respondent Union's bargaining unit.<sup>20</sup> The Hearing Examiner also noted that the Respondent had a right to exercise discretion in choosing which cases to pursue.<sup>21</sup> Therefore, the Hearing Examiner concluded that the Respondent's decision not to take further action on behalf of the Complainant after receiving OLRCB's determination "is [not] a basis for finding [an unfair labor practice]."<sup>22</sup>

The Hearing Examiner further determined that credible evidence failed to support the Complainant's allegation that racial animus and personal dislike by the Union president were motivating factors in the Respondent's decision not to pursue relief beyond OLRCB.<sup>23</sup>

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<sup>13</sup> Report at 2.

<sup>14</sup> Report at 2.

<sup>15</sup> Report at 2.

<sup>16</sup> Report at 2.

<sup>17</sup> Report at 2.

<sup>18</sup> Report at 5; Joint Ex. JX-5 at 3.

<sup>19</sup> Report at 4.

<sup>20</sup> Report at 5.

<sup>21</sup> Report at 5.

<sup>22</sup> Report at 5.

<sup>23</sup> Report at 6.

The Hearing Examiner also noted that the Complainant instituted an action in the D.C. Superior Court against Chairman Spencer and the District of Columbia Government for discrimination and unfair discharge, which was ultimately settled.<sup>24</sup> The Hearing Examiner determined that the Complainant sought and obtained relief in the proper forum for any allegations of discrimination and unfair discharge by Chairman Spencer or the District of Columbia government.<sup>25</sup>

The Hearing Examiner concluded that the Respondent did not engage in an unfair labor practice with respect to any of the contentions set forth by Complainant.<sup>26</sup> For these reasons, the Hearing Examiner recommended that the Complaint be dismissed.<sup>27</sup>

### III. Discussion

Pursuant to Board Rule 550.1, the Complainant has the burden of proving by a preponderance of evidence that the Respondent committed an unfair labor practice in violation of the CMPA.<sup>28</sup> The Board will affirm a hearing examiner's findings and recommendations if they are reasonable, supported by the record, and consistent with Board precedent.<sup>29</sup> The Board has long held that issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the hearing examiner.<sup>30</sup> Mere disagreements with a Hearing Examiner's findings or challenging the Examiner's findings with competing evidence do not constitute proper exceptions if the record contains evidence supporting the Hearing Examiner's conclusions.<sup>31</sup>

In the Exceptions to the Report, the Complainant argues that the Respondent accepted OLRCB's decision that the Complainant's duties included handling of confidential information without conducting a proper investigation or desk audit.<sup>32</sup> The Complainant also takes exception to the Hearing Examiner's determination that the Complainant did not provide sufficient evidence to support allegations that the Respondent did not have a reasonable basis to challenge OLRCB's decision.<sup>33</sup> The Complainant cites to the Complainant's personal testimony at the hearing,

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<sup>24</sup> Report at 5.

<sup>25</sup> Report at 5.

<sup>26</sup> Report at 6.

<sup>27</sup> Report at 6.

<sup>28</sup> See Board Rule 550.1; *see also DCPS v. WTU Local 6*, 68 D.C. Reg. 6745, Slip Op. No. 1792, PERB Case No. 20-U-29 (2021); *NAGE v. D.C. Dep't of Forensic Sciences*, 68 D.C. Reg. 5067, Slip Op. No. 1782, PERB Case No. 20-U-08 (2021).

<sup>29</sup> *WTU, Local 6 v. DCPS*, 65 D.C. Reg. 7474, Slip Op. No. 1668 at 6, PERB Case No. 15-U-28 (2018); *see also AFGE, Local 1403 v. D.C. OAG*, 59 D.C. Reg. 3511, Slip Op. No. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012).

<sup>30</sup> *AFGE, Local 631 v. OLRCB*, 68 D.C. Reg. 2979, Slip Op. No. 1767 at 4, PERB Case No. 20-U-23 (2021); *AFSCME, Local 2087 v. UDC*, 67 D.C. Reg. 8903, Slip Op. No. 1751 at 4, PERB Case No. 18-U-03 (2020); *Council of Sch. Officers, Local 4 v. DCPS*, 59 D.C. Reg. 6138, Slip Op. No. 1016 at 6, PERB Case No. 09-U-08 (2010); *Hatton v. FOP/DOC Labor Comm.*, 47 D.C. Reg. 769, Slip Op. No. 451 at 4, PERB Case No. 95-U-02 (1995).

<sup>31</sup> *Hoggard v. DCPS*, 46 D.C. Reg. 4837, Slip Op. No. 496 at p. 3, PERB Case No. 95-U-20 (1999).

<sup>32</sup> Exceptions at 12.

specifically that the Complainant solicited assistance from the Respondent, and further believed that the Respondent would challenge the change in her duties.<sup>34</sup>

The Board finds the Hearing Examiner's determination of the probative value and credibility of the Complainant's testimony to be reasonable. The Complainant excepts solely on the basis of evidence that was put forth before the Hearing Examiner for consideration. Based on the record, the Complainant's testimony is insufficient to show that the Respondent had a reasonable basis, let alone an obligation, to pursue further challenge on the Complainant's behalf. Therefore, the Board adopts the Hearing Examiner's determination that the Respondent had no reasonable basis to challenge OLRCB's decision that the Complainant's position was excluded from the Union.

The Board concurs with the Hearing Examiner's determination that the Respondent had a right to exercise its discretion not to take further action after it sought and received OLRCB's determination on behalf of the Complainant. A union's duty of fair representation does not require it to pursue every grievance as long as it provides the member with a rational basis for its refusal to do so.<sup>35</sup> As the Respondent notes in its Opposition to the Complainant's Exceptions, its "decision not to file a grievance or a petition for clarification of the unit was rationally based upon Respondent's and OLRCB's analysis of Complainant's new duties within the newly created Rental Housing Commission."<sup>36</sup> The Board finds that the Respondent's decision not to pursue further action on behalf of the Complainant did not violate its duty of fair representation because the Respondent provided the Complainant with a rational basis for its refusal.

The Complainant further takes exception to the Hearing Examiner's determination that credible evidence failed to support the Complainant's allegation that racial animus and personal dislike by the Union president were motivating factors in the Respondent's decision not to pursue relief beyond OLRCB.<sup>37</sup> In the Exceptions to the Report, the Complainant argues that she provided sufficient evidence demonstrating that the Union president displayed personal dislike and racial animus.<sup>38</sup> The Complainant argues that the Union president referred to the Complainant as a liar.<sup>39</sup> The Complainant further cites as evidence the Complainant's hearing testimony that the Union president had a racial bias toward the Complainant because "[the Complainant] was a blonde haired white girl" and "[the Union president's] intense dislike clouded her judgment."<sup>40</sup> The Complainant contends that the Union president's alleged racial animus motivated the Respondent's decision not to file a complaint with PERB, further testifying that "it was just easier not to do anything for [the Complainant] and throw [the Complainant] to the wolves at [RHC] than [for the Union president] to do her duty and fight for [the Complainant's] union job."<sup>41</sup>

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<sup>34</sup> Exceptions at 14.

<sup>35</sup> See *Stanley O. Roberts and AFGE, Local 2725*, 36 D.C. Reg. 3631, Slip Op. No. 203 at p. 3, PERB Case No. 88-S-01 (1989).

<sup>36</sup> Opposition at 3-4.

<sup>37</sup> Exceptions at 15.

<sup>38</sup> Exceptions at 15.

<sup>39</sup> Exceptions at 15.

<sup>40</sup> Exceptions at 6, 16-17 (quoting Transcript at 198:1-18); see also Complainant's Post Hearing Brief at 6.

<sup>41</sup> Exceptions at 6, 16-17 (quoting Transcript at 198:1-18); see also Complainant's Post Hearing Brief at 6.

The Board finds reasonable the Hearing Examiner's determination of the probative value and credibility of the evidence the Complainant provided in support of her allegations against the Union president. The Hearing Examiner's finding was further supported by the record and consistent with Board precedent. A union breaches its duty of fair representation if it engages in conduct that is arbitrary, discriminatory, or in bad faith.<sup>42</sup> A complainant who alleges that the union has breached its duty by refusing to advance a grievance must allege in the pleadings the existence of some evidence beyond mere conclusory statements or beliefs that, if proven, would tie the union's actions to the alleged violation of the CMPA.<sup>43</sup>

The record reflects that the Respondent Union, in good faith and on behalf of the Complainant, sought and obtained a determination of the inclusion status of the Complainant's position within its bargaining unit. The record reflects that the Respondent's decision not to further pursue a grievance or file a complaint with PERB was not arbitrary, discriminatory, or the product of bad faith. The Complainant fails to provide a nexus between the alleged personal dislike and racial animus and the Respondent's decision not to pursue relief beyond OLRCB. For these reasons, the Board finds that the Respondent did not violate its duty of fair representation by refusing to take further action on behalf of the Complainant, and adopts the Hearing Examiner's determination that the Complainant's allegations against the Union president lack credible support.

Finally, the Complainant takes exception to the Hearing Examiner's determination that the Complainant sought and obtained relief in the proper forum for her allegations against Chairman Spencer or the District of Columbia government.<sup>44</sup> In the Exceptions to the Report, the Complainant argues that she "seeks relief in this forum as Chairman Spencer's actions catalyzed the actions of the Union."<sup>45</sup> As the Respondent properly notes in its Oppositions to the Complainant's Exceptions, both the decision to transfer the Complainant to RHC and the decision to exclude the Complainant from the Respondent's bargaining unit were made by RHC and not the Respondent.<sup>46</sup> The Board's consideration of the Complainant's allegations in this proceeding is limited to the actions of the Respondent. The Complainant's argument in the Exceptions to the Report, insofar as it alleges to the contrary, is merely a disagreement with the Hearing Examiner's determination.

Upon review of the record and the Hearing Examiner's findings and recommendations, the Board finds that the Complainant fails to state a claim that the Respondent violated its duty of fair representation. The Complainant has not demonstrated that the Respondent's actions with respect to any of the allegations were arbitrary, discriminatory, or the product of bad faith. For these reasons, the Board finds the Hearing Examiner's conclusion that the Respondent did not engage in an unfair labor practice to be reasonable, supported by the record, and consistent with Board precedent.

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<sup>42</sup> *Bagenstose v. WTU, Local 6*, 59 D.C. Reg. 3808, Slip Op No 894 at 7-8, PERB Case No. 06-U-37 (2007).

<sup>43</sup> See *Goodine v. FOP/DOC Labor Committee*, 43 D.C. Reg. 5163, Slip Op. No. 476 at 3-4, PERB Case No. 96-U-16 (1996).

<sup>44</sup> Exceptions at 10.

<sup>45</sup> Exceptions at 10.

<sup>46</sup> Oppositions at 3.

**IV. Conclusion**

The Board adopts the Hearing Examiner's findings, conclusions, and recommendations, and finds that the Respondent did not commit an unfair labor practice in violation of D.C. Official Code § 1-617.04(b). Therefore, the Complaint is dismissed in its entirety.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The Complaint is dismissed; and,
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons, and Peter Winkler.

March 16, 2023

Washington, D.C.

**APPEAL RIGHTS**

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration within fourteen (14) days, requesting the Board to reconsider its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provide thirty (30) days after a Board decision is issued to file an appeal.