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**DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:)	
)	
Billy P. Greer and Leah Farrar-Otuonye,)	
)	
Complainants,)	PERB Case No. 07-U-35
)	
v.)	Opinion No. 981
)	
Board of Trustees of the University of the)	
District of Columbia,)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case:

Billy P. Greer and Leah Farrar-Otuonye (“Complainants”) filed an unfair labor practice complaint (“Complaint”) against the Board of Trustees of the University of the District of Columbia (“Respondent”, “University” or “UDC”). The Complainants alleged that the Respondent violated “Title I, D.C. Code 1-618.1, *et seq.*,¹ the U.S. Constitution and the collective bargaining agreement” by failing to post certain vacancy announcements on bulletin boards and by filling certain positions. (Complaint at pgs. 2-3). In its answer (“Answer”), the Respondent denies committing any unfair labor practice and raises several jurisdictional challenges.

A hearing was held in this matter. The Hearing Examiner issued a Report and Recommendation (“R&R”) dated March 11, 2008, in which she determined that the Complainants did not establish the Respondent’s actions constituted a violation of the Comprehensive Merit Personnel Act (“CMPA”). Therefore, the Hearing Examiner recommended that the Complaint be dismissed.

¹ Currently codified at D.C. Code § 1-617.01 *et seq.* (2001 ed.).

On May 9, 2008, the Complainants filed a document styled "Complainants' Nunc Pro Tunc Response to the Hearing Examiner's February 2008 Order and Exceptions to the Hearing Examiner's 11 March 2008 Recommendation" ("Exceptions") and a supporting brief. ("Brief"). The Respondent did not file an Opposition to the Complainants' Exceptions.²

The Hearing Examiner's R&R and the Complainant's Exceptions are before the Board for disposition.

II. Hearing Examiner's Report and Recommendation

The Hearing Examiner set forth the undisputed facts as follows: The Complainants "have been employed by [the] Respondent as police officers for more than 20 years. They are members of American Federation of State, County and Municipal Employees, District Council 20, Local 2087 ("Union"), the exclusive bargaining representative. [The] Complainants were not authorized by the Union to bring this [unfair labor practice complaint] on its behalf. [The] Respondent is the District of Columbia's public institution of higher education. The [Respondent and the Union] entered into a collective bargaining agreement (Agreement) in 1988. Although the Agreement had an expiration date of September 30, 1990, the parties still operate under its terms." (R&R at p. 3).

The Hearing Examiner observed that "[p]ursuant to Article 12 of the Agreement, vacancy announcements must be posted on bulletin boards. In the past, [the] Respondent posted vacancy announcements on bulletin boards. Since 1997, due to the elimination of certain bulletin boards and the increased use of technology, [the] Respondent has advertised positions by posting vacancy announcements on the University's website, placing them in a vacancy booklet available to everyone in the Agency's Human Resources Office (HR), sending them to all departments at the University, and providing them to the Union. Both the Agreement and [District of Columbia Municipal Regulations] ("DCMR") [Title 8] state that [the] Respondent should give priority consideration to employees for promotional opportunities. However, [the University] has advertised positions outside of the University and has hired non-employees for some of the positions at issue." (R&R at p. 5).

The Hearing Examiner noted that "[the] Complainants contend that they would have applied for certain positions, but were unaware of the vacancy announcements because they were not posted on bulletin boards, as required by Article 12.1 of the Agreement. They maintain that there are bulletin boards in 'every building of the University'. They state that they are aware that vacancy announcements are posted on the University's website, are placed in a book of positions in the Office of Human Resources available to the public, and are given to the Union president for dissemination

² Pursuant to Board Rules 556.3 and 556.4 a party is not required to file either exceptions to a Hearing Examiner's report or oppositions to a party's exceptions.

to members. However, regardless of where vacancy announcements are otherwise located, [the] Complainants maintain that [the] Respondent is required to post them on bulletin boards. [The] Complainants also argue that both DCMR Title 8 and the Agreement require the University to promote from within, but that the University has advertised and promoted from outside the ranks of the current employees.”¹ (R&R at pgs. 5-6).

“With regard to specific positions, [the Complainants] allege that in February 2007, they learned of two positions ‘by word of mouth’ and applied for these positions, but were never contacted for interviews. They contend that the lieutenant’s position for which Steven Young was hired, was neither announced nor posted and that when Mr. Young was voluntarily demoted to sergeant, that position was not announced or posted. They assert that the captain’s position for which Glennett Hilton was hired, was not posted in accordance with the contract. They also maintain that Ronald Culmer was hired as a security specialist, but was introduced as a lieutenant, when no lieutenant position was announced or posted. [The] Complainants assert that the sergeant’s position for which Yolanda Nelson was hired, was not posted or announced and that Ms. Nelson did not have supervisory experience. They maintain that the lieutenant’s position for which Craig Morrow was hired was not posted or announced. They argue that when Ms. Hilton was promoted to Deputy Chief, the position was not posted or announced even though both the Deputy and Chief positions are career ladder positions which are covered by the Agreement.” (R&R at p. 6).

“[Mr. Greer testified that he] would have applied for the captain, sergeant, chief and deputy chief positions if he had been aware of them. He said he would have applied for the position filled by Ms. Nelson, if he had been aware of it. [Furthermore, he stated that] he did not follow through with his application for the position filled by Wayne Jones, because Officers Jones and Farrar-Otuonye both applied for the position and each had more seniority.” (R&R at p. 6).

“Ms. Farrar-Otuonye testified that she . . . applied for two sergeant and one lieutenant vacancies, which she learned of ‘by word of mouth’. She interviewed for the sergeant position that Officer Jones was selected to fill. She said she would have applied for the other sergeant position if she had been aware of the vacancy. She testified she applied for the lieutenant position, and had her application date-stamped but she did not receive a response and was never interviewed.” (R&R at p. 6).

“[The] Respondent’s position is that it did not commit any [unfair labor practice] in this matter. In response to the charge of not posting vacancies on bulletin boards, it states that the Agreement is more than 20 years old, and that since 1997, it has used other methods in part because of the elimination of certain bulletin boards at the University, and in part due to the increased use of technology. [The] Respondent states that it lists vacancy announcements on the University’s website, places them in a vacancy booklet in

¹ The Complainants did not state how this allegation violates the Comprehensive Merit Personnel Act (“CMPA”) at D.C. Code § 1-617.04(a) and (b).

the Human Resources (“HR”) Office which is available to everyone, sends them to all departments in the University and to the Union. Its position is that the Union has never complained of the change in [manner in which the University advertises] vacancies.” (R&R at p. 7).

“[The Respondent also] argues that most of the allegations in this complaint are untimely. [The Complaint was filed on April 24, 2007.]³ According to [the] Agency, the position of supervisory police officer (lieutenant) that was filled by Craig Morrow was posted on August 3, 2005 and filled on February 16, 2007. UDC contends that the promotion of Ms. Hilton as deputy chief was a temporary executive appointment and not subject to the competitive hiring process because the position reports directly to senior management.” (R&R at p. 7).

“Hattie Rogers, Human Resources Specialist is responsible for posting vacancy announcements and ranking applications. . . . She [testified that prior to 1997, job announcements were posted on a bulletin board outside of the HR Office, but when the office was relocated to its present site in 1997, there was no longer a space outside its office for a bulletin board so a ‘vacancy booklet’ was created that is available to anyone to review.” (R&R at p. 7). Ms. Rogers stated that she was responsible for handling many of the positions at issue. With regard to the position filled by Mr. Young . . . his request to be demoted was granted. . . . [T]he procedure when an employee asks for a demotion, is that if there is a position available for which the individual qualifies, management “has the right to move him into that position” without a competitive process. . . . With regard to the claim that Mr. Gray was hired as sergeant over Mr. Jones, Ms. Rogers stated that Mr. Jones was not listed as having applied for the position. . . . [T]he position of safety and security specialist for which Mr. Culmer was hired, was not reclassified. . . . Ms. Hilton came to [the University] as a temporary employee and . . . she was the only one who applied for the position [which she was awarded]. . . . [T]he Deputy Chief and Chief positions are not career ladder positions and are not governed by the Agreement.” (R&R at p. 8).

“Ms. Rogers testified that management determines if vacancies should be advertised district wide, nationwide or university wide. She noted that in order for an employee to be considered, the employee would have to apply for the position. With regard to [the] Complainants’ assertion that their applications were missing, Ms. Rogers stated that she receives all the applications and that she did not have a record of [the] Complainants applying for those positions.” (R&R at p. 8).

³ The Respondent points out that “Mr. Young was hired [in] 2004 and was voluntarily demoted [in] 2005. The vacancy announcement that resulted in the hiring of Ms. Hilton was posted [in] 2005. Agency contends that the position of Chief and Deputy Chief are executive appointees, and thus exempt from the competitive hiring process. The sergeant position for which Mr. Gray was hired was posted [in] 2004 and filled on August 15, 2005. . . . [The] Respondent maintains that the safety and security specialist position filled by Mr. Culmer was posted on July 5, 2005 and reclassified on September 6, 2005 but remained within the police officer series. Also, the vacancy announcement that resulted in the hiring of Ms. Nelson, posted on October 30, 2006 and filled on February 1, 2007, did not require supervisory experience. (R&R at p. 7).

The Hearing Examiner closed the record on October 2, 2007, except for the submission of post-hearing briefs. The Hearing Examiner received the parties briefs and the Complainants' document styled "Motion to Introduce Affidavits as Evidence Whose Probative Value Was Not Realized at the Time of Petitioners' Hearing" ("Motion"). In their Motion, the Complainants sought to reopen the record to admit photographs of bulletin boards and statements from co-workers that were not filed at the hearing. The Hearing Examiner denied the Complainants' Motion to submit evidence after the hearing closed. (See R&R at p. 2).

In her R&R, the Hearing Examiner first addressed the procedural challenges raised by the Complainants. The first procedural challenge is one of timeliness. She stated that "[w]ith regard to those positions for which the Complainants applied or would have applied, the 120 days [to file a complaint] would be counted from the date the position at issue was filled or when [the] Complainants became aware that the position was filled." (R&R at p. 8). The Hearing Examiner found that the positions filled by Steven Young, Jerome Gray, Officer Hilton and Officer Culmer occurred outside of the 120-day statutory filing period. (See R&R at p. 9). "Therefore, [the Hearing Examiner determined that] the Complaint is time-barred as to these vacancies."⁴ (R&R at p. 9).

In addition, the Hearing Examiner noted that the "Respondent has also challenged [the] Complainants' standing to raise some of the charges. [Board] Rule 520.2 states that an 'aggrieved person' may file an unfair labor practice complaint [to] the Board. [The] Complainants therefore have standing to file [a Complaint] regarding any vacancy for which they applied or would have applied . . . but would not have standing to challenge positions they [have not] applied for. . . [Thus, the Hearing Examiner found that] [t]hey are not considered aggrieved parties with regard to Mr. Jones' failure to be hired to the position awarded to Mr. Gray." (R&R at pgs. 9-10).⁵

The Hearing Examiner next addressed the Complainants' claim that the Respondent violated the collective bargaining agreement ("Agreement") by failing to post any of the vacancy announcements at issue on bulletin boards as required by Article 12.2 of the Agreement. The Hearing Examiner noted that the Board "has always distinguished between obligations that are imposed by the CMPA and those mandated by a collective bargaining agreement. A violation of a provision of the Agreement is not automatically an unfair labor practice. While recognizing that some state and local laws consider the breach of a collective bargaining agreement to be an unfair labor practice, the Board has consistently held that this is not true in the District of Columbia because the CMPA contains no such provision, explicit or implied. . . ."⁶ [The Hearing Examiner

⁴ No exceptions were filed with regard to these findings.

⁵ No exceptions were filed with regard to this finding.

⁶ Citing *Georgia Mae Green v. District of Columbia Department of Corrections*, 37 DCR 8086, Slip Op. No. 257, PERB Case No. 89-U-10 (1990).

stated that] [i]n this Complaint, there was a contractual provision requiring the University to post job vacancies on bulleting boards [at] . . . Article 12.2. . . [She determined charges that] “the University’s failure to post vacancy announcements on bulleting boards is a contractual matter that is not properly before the [the Board] since the Complainants did not present evidence that . . . the failure to continue to use bulletin boards was an unfair labor practice.” (R&R at p. 10).⁷

“The Hearing Examiner concluded that [the] Complainants failed to meet their burden of proving that [the] Respondent committed an unfair labor practice by failing to post vacancy announcements on bulletin boards within the University since it provides alternative methods such as posting announcements on the University’s website, including them in a notebook of vacancy announcements in the HR Office, and sending them to departments and to the Union.” (R&R at pgs. 10-11).⁸

The Hearing Examiner noted that the only remaining charge pertained to the Complainant’s allegation that “[i]n the month of February 2007, the University hired [by] promotion two applicants carrying the rank of Lieutenant and Sergeant in the department . . . [T]he applicant for Sergeant has no supervisory experience.” (R&R at p. 11). The Agency contended that supervisory experience was not required for this position. (See R&R at p. 11). The Hearing Examiner stated that “[t]he hiring of employees and method of advertising vacancies comes within the rights of management except as prohibited by law or statute. See [D.C. Code] §1-617.08.”⁹ Therefore, the Hearing Examiner

⁷ The Hearing Examiner further explained that “[w]here the contractual violations also violate the CMPA, the practice will be found to constitute [an] unfair labor practice. . . .” (R&R at p. 10). (citing *American Federation of Government Employees, Local Union No. 3721 v. D.C. Fire Department*, 39 DCR 8599, Slip Op. No. 287, PERB Case No. 90-U-11 (1991)).

⁸ Finally, [the] Complainants allege that they applied for certain positions and were not contacted for interviews. Ms. Rogers testified that she received [all] the applications, and that she did not have [the] Complainants on the list of [applicants]. . . . [The Hearing Examiner determined that the] [w]itnesses appeared to testify credibly in this matter. Since there was contradictory evidence on this issue, the matter was in equipoise. [Because the] Complainants have the burden of proof, they could not prevail on this issue.” (R&R at p. 11).

⁹ D.C. Code §1-617.08(a) provides:

a) The respective personnel authorities (management) shall retain the sole right, in accordance with applicable laws and rules and regulations:

- (1) To direct employees of the agencies;
- (2) To hire, promote, transfer, assign, and retain employees in positions within the agency and to suspend, demote, discharge, or take other disciplinary action against employees for cause;
- (3) To relieve employees of duties because of lack of work or other legitimate reasons;
- (4) To maintain the efficiency of the District government operations entrusted to them;
- (5) To determine the mission of the agency, its budget, its organization, the number of employees, and the number, types, and grades of positions of

determined that “there is no evidence that the appointment of the individual, even if supervisory experience was required, constituted an unfair labor practice.” (R&R at p. 11).

In view of the above, the Hearing Examiner determined that the Complainants did not establish that the Respondent: (1) interfered, restrained or coerced them from exercising their rights; (2) acted impermissibly with any labor organization; (3) discriminated in its employment practices to encourage or discourage membership in the Union; (4) fired them or retaliated against them for assisting in any complaint on any of these issues; nor (5) refused to bargain in good faith with the Union - any of which would constitute an unfair labor practice under D.C. Code §1-617.04.¹⁰ (See R&R at p. 12). As a result, the Hearing Examiner concluded that “[the] Complainants did not meet their burden of proof in this matter by a preponderance of evidence as required by PERB Rule 520.11”,¹¹ and recommended that the Board dismiss the Complaint. (See R&R at p. 12).

employees assigned to an organizational unit, work project, or tour of duty, and the technology of performing its work; or its internal security practices; and (6) To take whatever actions may be necessary to carry out the mission of the District government in emergency situations.

¹⁰ D.C. Code §1-617.04(a) Unfair Labor Practices provides that the District, its agents and representatives are prohibited from:

- (1) Interfering, restraining or coercing any employee in the exercise of the 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;
- (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 chapter; or
- (5) Refusing to bargain collectively in good faith with the exclusive representative.

¹¹ When considering the pleadings of a *pro se* complainant, the Board construes the claims liberally to determine whether a proper cause of action has been alleged. See *Beeton v. D.C. Dep't of Corrections and FOP/DOC Labor Committee*, 45 DCR 2078, Slip Op. No. 538, PERB Case No. 97-U25 (1998); see also, *Thomas J. Gardner v. D.C. Public Schools and Washington Teachers' Union, Local 6, AFT*, 49DCR 7763, Slip Op. No. 677 at p. 3, n.3, PERB Case No. 02-S-01 and 02-U-04 (2002); *Owens v. American Federation of State County and Municipal Employees, Local 2095 and National Union of Hospital and Health Care Employees, Local 1199*, 52 DCR 1645, Slip Op. No. 750 at p. 4, n. 6, PERB Case No. 02-U-27 (2004).

III. Complainants' Exceptions

The Complainants take exception to the Hearing Examiner's finding that the Respondent did not violate the CMPA because "PERB has always distinguished between obligations that are imposed by the CMPA and those mandated by a collective bargaining agreement. A violation of a provision of the Agreement is not automatically an unfair labor practice." (Brief at p. 3).

Specifically, the Complainants claim that the Respondent bargained in bad faith regarding Article 12.2 of the CBA. (See Exceptions at cover page; and Brief at pgs. 2-4). The Complainants cite *Teamsters Local Union No. 639 and 730 a/w IBTCWHA v. D.C. Public Schools*, 43 DCR 6633, Slip Op. No. 400, PERB Case No. 93-U-29 (1996).¹² The Complainants' reliance on *Teamsters* is misplaced. Specifically, *Teamsters* involves allegations of bad faith bargaining during negotiations for a new agreement, whereas the present case involves allegations concerning the violation of the parties' CBA. The other two cases cited¹³ involve allegations that the agencies failed to implement a negotiated settlement agreement. These facts are distinguishable from the facts of the present case. No settlement agreement is involved here.

The Complainants' exceptions are a mere disagreement with the Hearing Examiner's findings and conclusions. We have found that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the findings where they are fully supported by the record. See, *American Federation of Government Employees, Local 874 v. D.C. Dep't of Public Works*, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). We find that the Hearing Examiner's findings are reasonable, based on the record and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's finding that the allegations raised in this Complaint pertain to a contractual violation of Article 12.2 of the CBA and do not constitute an unfair labor practice under the CMPA.

The remainder of the Complainants' exceptions raise a procedural issue and challenge the Hearing Examiner's ruling preventing the introduction of evidence. The Complainants assert that they were not given five (5) days prior notice before the hearing that the Respondent intended to call Hattie Rogers as a witness. The Complainants claim that if they had been given prior notice of the testimony she was to present, they could

¹² *Teamsters Local Union No. 639 and 730 a/w IBTCWHA v. D.C. Public Schools*, pertains to contract negotiations for compensation and non-compensation agreements for five bargaining units for the period 1990-1993. In that case, the Board found that one of the parties at the bargaining table violated D.C. Code § 1-617.04(a)(5) by its actions pertaining to the bargaining process. Specifically, the Board found that "the failure of DCPS to comply with the procedural steps required for Council consideration of the compensation awards is a failure to bargain in good faith in violation of [D.C. Code § 1-617.04(a)(5)]" as well as other sections of the CMPA. (*Id.* at p. 5-7).

¹³ See *AFGE v. Fire Dep't*, 39 DCR 8599, Slip Op. No. 287, PERB Case No. 90-U-11 (1991); and *AFGE, Local 872 v. D.C. WASA*, 46 DCR 4398, Slip Op. No. 497, PERB Case No. 96-U-23 (1999).

have better prepared to impeach her testimony concerning bulletin boards. However, the Hearing Examiner did not rely on any witnesses to make her finding that contractual violations are not an unfair labor practice. Furthermore, the Complainants take exception to the Hearing Examiner's denial of their request to introduce photographs of numerous bulletin boards on campus, after the hearing closed.

After the close of the hearing and again in their Exceptions, the Complainants have provided the Board with additional evidence in support of allegations made in the Complaint or at the hearing. The Board has held that once closed we will deny any request to reopen a hearing absent compelling reasons. IBPO and DCDGS and AFSCME, D.C. Council 20, Local 2087, 29 DCR 4505, Slip Op. 48, PERB Case No. 82-R-04 (1982). Also, "[p]ermitt[ing] the submission of post-hearing evidence by the Complainant would unfairly prejudice the Respondent by denying it an opportunity to cross-examine the evidence. The Complainant does not contend that he was denied a full opportunity to meet his burden of proof and establish his case before the record was closed. Therefore, [the] Complainant[s] [have] not presented nor do we find any compelling reason for reopening the record." *Elliot v. D.C. Department of Corrections*, 43 DCR 2940, Slip Op. No. 455 at p. 2, PERB Case No. 95-U-09 (1995).¹⁴ Consistent with our holding in *Elliot v. DOC*, we deny the Complainants' motion to introduce new evidence in the exceptions and finds that the Hearing Examiner's denial of the Complainants' introduction of evidence after the hearing closed was reasonable and consistent with Board precedent.

Furthermore, we have held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Tracy Hatton v. FOP/DOC Labor Committee*, 47 DCR 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (1995); see also, *Doctors Council of the District of Columbia and Henry Skopek v. D.C. Commission on Mental Health Services*, 47 DCR 7568, Slip Op. No. 636 at p. 4, PERB Case No. 99-U-06 (2000). A review of the record reveals that the Hearing Examiner's findings that the alleged facts do not constitute an unfair labor practice, are based on Board precedent excluding from our jurisdiction alleged contractual violations. This finding would be the same even if the Complainants had introduced the precluded evidence and exchanged witness names in a timely manner. Therefore, we find that these exceptions, even if they had merit, have no bearing on the outcome of this case.

We find that the Hearing Examiner's determination that the alleged violation of the CBA does not constitute an unfair labor practice under the CMPA is reasonable, based on the record and consistent with Board precedent. As a result, we adopt the Hearing Examiner's recommendation to dismiss the Complaint.

¹⁴ See also, *FOP/DOC Labor Committee v. DCDOC*, 49 DCR 8937, Slip Op. No. 679 at p. 13, PERB Case No. 00-U-36 and 00-U-40 (2002); and *IBPO and DCDGS and AFSCME, D.C. Council 20, Local 2087*, 29 DCR 4605, Slip Op. 48 at pgs. 2-3, PERB Case No. 82-R-04 (1982).

ORDER

IT IS HEREBY ORDERED THAT:

1. Billy P. Greer's and Leah Farrar-Otuonye's unfair labor practice Complaint against the Board of Trustees of the University of the District of Columbia, 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

September 30, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 07-U-35 was transmitted via U.S. Mail to the following parties on this the 30th day of September 2009.

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