Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
University of the District of Columbia Faculty Association/NEA,	
Complainant,	PERB Case No. 07-U-17
v.	Opinion No. 1349
University of the District of Columbia,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

Complainant University of the District of Columbia Faculty Association/NEA ("Complainant" or "Union") filed an unfair labor practice complaint ("Complaint") against Respondent University of the District of Columbia ("Respondent" or "UDC"), alleging a violation of D.C. Code § 1-617.04(a)(1) and (5) by "unilaterally implementing a program presenting online teaching of University courses or so-called 'distance learning,' a matter that unequivocally...affects the terms and conditions of bargaining unit members' employment, and by failing and refusing to supply information reasonably requested by the UDCFA in preparation for negotiations." (Complaint at 1).

In its Answer, UDC denies committing an unfair labor practice, contending that while introducing an online course program is a management right, no such program was instituted at UDC. (Answer at 2).

On June 8, 2007, an evidentiary hearing took place before Hearing Examiner Lois Hochhauser. The Hearing Examiner issued a Report and Recommendation ("Report"), in which she determined that the Union did not meet its burden of proof that UDC violated the Comprehensive Merit Personnel Act ("CMPA") by unilaterally introducing a program of online instruction, or by refusing to or failing to provide requested information regarding the online

instruction program. (Report at 11-12). The Union filed Exceptions to the Report. The Report and Exceptions are now before the Board for disposition.

II. Discussion

A. Report and Recommendation

The Hearing Examiner found the following relevant facts: Use of new technology at UDC was discussed informally among faculty members starting in 1999 (Report at 4). UDC started using an internet-based tool, Blackboard Learning Management, the same year (*Id.*)A training institute on online teaching was conducted in the summer of 2006. All faculty were invited to attend and advised that a stipend would be provided. (Report at 5). Teaching online and training were voluntary. *Id.*

In 2003, faculty interested in expanding the use of technology created the Task Force on Online Learning ("TFOOL"). *Id.* At the request of the Provost, TFOOL was convened by Dean Cascerio, and all faculty members were invited to join. *Id.* TFOOL did not extend a separate membership invitation to the Union. *Id.* Participation in TFOOL is voluntary and faculty-driven. *Id.* In February 2007, TFOOL issued a Policy and Procedures Manual for Online Courses. *Id.* The University has not issued policies or procedures for online teaching. *Id.*

The first online course at UDC was offered in 2002. *Id.* UDC estimated that at the time of the hearing, approximately six online courses were being offered. *Id.* The decision to teach online is voluntary and determined by the instructor. *Id.*

Via letter to Union President Dr. Leslie Richards, dated December 11, 2006, Provost and Vice-President Wilhelmina Reuben-Cook informed the Union that it was "preparing to formally introduce distance learning (on-line courses)" and asked to meet with the Union to bargain over the "impact of the faculty workload, compensation, and any other issues of implementation." *Id.* A meeting was held December 19, 2006, but there was no substantive discussion about online instruction. *Id.* UDC requested another meeting, but could not schedule one at the time because Dr. Richards was going on leave until the beginning of the Spring semester. *Id.* The parties agreed to meet again after Dr. Richards returned. *Id.*

At the December 19, 2006, meeting, the Union requested information regarding the nature of the online courses and the names of the faculty teaching online courses. *Id.* The Union filed the instant Complaint on January 16, 2007. (Report at 6). In a letter dated February 2, 2007, the Provost wrote to Dr. Richards about the matters discussed at the December 19 meeting, and stated that she had planned to address the issues related to the online courses in the letter, but felt "it would be inappropriate to address" those issues since the Union had filed the Complaint. *Id.* On February 23, 2007, UDC's counsel contacted the Union's counsel requesting a meeting, and stated that she had misplaced the requested list of faculty teaching online courses. *Id.* UDC's counsel indicated she would provide the list, but as of the date of the hearing (June 8, 2007), no additional meetings have taken place and no documents have been provided. *Id.*

On the issue of unilaterally introducing an online course program, the Hearing Examiner noted that while UDC "has the right to implement policies and procedures related to online instruction, with that right comes the duty to bargain with the [Union] over the impact or effects of the implementation of its decision which impact on the terms and conditions of employment." (Report at 9; *citing Int'l Brotherhood of Police Officers, Local 446 v. D.C. General Hospital*, 41 D.C. Reg. 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994)). Further, "an agency commits an unfair labor practice when it refuses to bargain in good faith with an exclusive representative, upon request." (Report at 9; *citing* D.C. Code § 1-617.04(a)(5)).

In the instant case, the Hearing Examiner concluded that UDC "has not developed any policies or practices related to online teaching, and certainly none have been implemented." (Report at 10). While UDC "must engage in bargaining over the impact" of the online course program it ultimately develops, "the matter is not yet ripe for determining if a ULP has been committed." *Id.* A ULP would be appropriate if UDC refuses to bargain upon request once specific proposals have been submitted. *Id.*

Further, the Hearing Examiner concluded that UDC's failure to engage in a second meeting did not establish bad faith. *Id.* UDC anticipated more meetings, but scheduling was delayed due to the Union President's scheduled leave. *Id.* The instant Complaint was filed approximately one month after the first meeting, and before a second meeting was requested. *Id.* Coupled with the fact that UDC decided it would be "inappropriate" to negotiate issues that were the subject of the Complaint, the Hearing Examiner found that the Union had not proven that UDC acted in bad faith. *Id.*

The Union alleged that UDC excluded the Union from participation in TFOOL when it failed to extend an invitation to the Union. *Id.* The Hearing Examiner determined that no evidence of exclusion or bad faith existed; rather, "it was the decision of TFOOL members, most of whom were members of [the Union], that the [Union] was well represented." *Id.* Further, TFOOL was "begun by faculty, is open to all faculty, and is driven by faculty," and was "not created to develop University policy." *Id.*

On the issue of failing or refusing to produce requested documentation, the Hearing Examiner concluded that the Union did not meet its burden of proof that UDC acted in bad faith. (Report at 11). The Hearing Examiner states that the Union "filed its Complaint less than a month after it made its first request. At that time, [UDC] had not articulated a refusal to provide the information. It was not until a month later that University counsel responded that the information had been misplaced and would be sent." *Id.* Additionally, even if UDC had refused to provide the information, "the ULP should be dismissed as premature since both PERB and the courts have consistently held that a one-time refusal to bargain is not sufficient." *Id.* (*citing Int'l Brotherhood of Police Officers, Local 446 v. D.C. General Hospital*, 39 D.C. Reg. 9633, Slip Op. No. 322 at p. 4, PERB Case No. 91-U-14 (1992)).

B. Union's Exceptions

The Union excepts to the Hearing Examiner's failure to find the following facts, and alleges that "the inclusion of these facts changes the overall structure of events heading into the Fall 2006 semester and the letter from the Provost to the [Union]":

> 1. During the summer of 2006, [UDC] offered an institute, which was put on by [UDC's online learning software vendor], that certified faculty for online instruction. The faculty who attended the online training received an $8,000 stipend.
> 2. [Union] President Leslie Richards expressed concerns about the implementation of online courses to Provost Reuben-Cooke for almost a year before the Provost agreed to meet with her. In August 2006, Assistant Provost Ellis informed the Provost that he believed it was time to bargain so that courses could be instituted in the Spring of 2007.
> 3. TFOOL reconvened in the Fall of 2006 to edit and revise its recommendations to the Provost. TFOOL identified several tasks, including developing an Intellectual Property Policy for the University, identifying areas that would be well suited to online learning, identifying potential funding, and establishing a template for online courses. TFOOL formed three subcommittees to deal with the issues outlined above. The three subcommittees addressed: (1) workload; (2) policy and procedure: and (3) intellectual property.
> 4. On November 16, 2006, the Intellectual Property Subcommittee produced its "Report and Recommendations" detailing its recommended guidelines concerning Intellectual Property produced for online courses. A Policy and Procedures Manual for Online Courses was produced by TFOOL in February 2007.

(Exceptions at 3-4). Additionally, the Union alleges that the facts above relate to its exceptions to two of the Hearing Examiner's conclusions. The first conclusion is:

> The University is now undertaking a much needed effort to develop practices and policies related to online instruction, and to address such issues as class size, compensation, and proprietary rights. It must engage in bargaining over the impact of these decisions. But the matter is not yet ripe for determining if a ULP has been committed. Once UDC has specific proposals, [the Union] may file a ULP with PERB, if UDC refuses to bargain upon request.

(Report at 10; Exceptions at 3). Additionally, the Union excepts to the conclusion that:

> Online instruction has not changed since it began in 2002. It remains the individual decision of individual instructors. There are no policies or procedures that guide the decision and no standards in place.

(Report at 11; Exceptions at 3).

The Union contends that UDC's announcement that it was "preparing to formally introduce distance learning (on-line courses) to our UDC students" was an exercise of UDC's management right to implement online courses, and triggered UDC's obligation to bargain over the impact and effects of that decision. (Exceptions at 5). Further, the Union alleges that the status quo changed in the Fall 2006 semester when the English Department decided that it "could offer on-line classes" and awarded more credit to instructors teaching those classes. (Exceptions at 6-7). The Union asks the Board to find that UDC "made the decision to implement on-line courses, that the [Union] requested bargaining, that bargaining began, but that [UDC] did not bargain in good faith by failing to be prepared to bargain." (Exceptions at 7).

The Board will affirm a hearing examiner's findings if they are reasonable and supported by the record. *See American Federation of Government Employees, Local 872 v. D.C. Water and Sewer Authority*, Slip Op. No. 702, PERB Case No. 00-U-12 (March 14, 2003). A hearing examiner has the authority to determine the probative value of evidence and draw reasonable inferences from that evidence. *Hoggard v. District of Columbia Public Schools*, 46 D.C. Reg. 4837, Slip Op. No. 496, PERB Case No. 95-U-20 (1996).

In the instant case, the Hearing Examiner found that UDC notified the Union of its intent to implement an online course program, and that the parties met to bargain on December 19, 2006. (Report at 5). She determined that UDC wanted additional bargaining, but that the parties could not schedule another meeting until the spring of 2007, when the Union president returned from leave. *Id.* The Complaint was filed approximately one month after the December 19 meeting. The Union president's absence, together with UDC's reluctance to discuss issues related to the Complaint, led the Hearing Examiner to conclude that the failure to schedule a second meeting was not the result of bad faith by UDC. (Report at 10).

The Board agrees with the Union that UDC "made the decision to implement online courses, that the [Union] requested bargaining," and that "bargaining began," but it cannot find that UDC "did not bargain in good faith by failing to be prepared to bargain." (Exceptions at 7). The Hearing Examiner determined that UDC did not act in bad faith after considering the evidence at the hearing and drawing inferences from that evidence. (Report at 2). The Board finds the Hearing Examiner's conclusion is reasonable and supported by the record. Therefore, the Union's exceptions relating to UDC's alleged failure to bargain in good faith are denied.

Next, the Union excepts to the Hearing Examiner's conclusion that the Union "prematurely filed the Complaint alleging a refusal to supply requested information because the Complaint was filed less than a month after the first request, because [the Union] failed to submit

a second request for the information, and because 'a one-time refusal to bargain is not sufficient.'" (Exceptions at 3). In support if this exception, the Union alleges that the Hearing Examiner erroneously relied upon *Int'l Brotherhood of Police Officers v. D.C. General Hospital*, Slip Op. No. 322, in which the Board held that the "better approach" when faced with a refusal to bargain is to make a second request. (Exceptions at 8). Instead, the Union asserts that the Board "has never held that 'the better approach' was the only approach." *Id.* The Union cites to *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department*, in which the Board held that "a second request to bargain is not required to establish a violation of the CMPA." 47 D.C. Reg. 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (1999). (Exceptions at 8). Additionally, the Union cites to *AFGE Local 631 v. D.C. Water and Sewer Authority*, 52 D.C. Reg. 2510, Slip Op. No. 730, PERB Case No. 02-U-19 (2003), and *AFGE Local 872 v. D.C. Water and Sewer Authority*, Slip Op. No. 702, PERB Case No. 00-U-12 (March 14, 2003), in support of this allegation. (Exceptions at 8).

The Union is correct that the Board held that a second request to bargain is not required to establish a violation of the CMPA, but the cases it cites do not all support its argument. In Slip Op. No. 607, the Board held that although a second request is not required, the Union had "made no attempt to identify the issues of concern to it or present to [the agency] any specific impact and effect proposals. *Id.* at 4. In Slip Op. No. 730, the union made a similar exception to that of the Union in the instant case – that "it had no obligation to request documents twice, as it claims the Hearing Examiner suggests in her decision." *Id.* at p. 4-5, n. 9. The Board found no merit to that exception, concluding that the hearing examiner in that case did not require that the union request the documents twice, but rather suggested that "'where there has not been a negative response, but a somewhat vague and delayed communication,' it may be helpful to make a second request." *Id.* In Slip Op. No. 702, the Board rejected an agency's exception that the hearing examiner erred by not requiring the union to make a second request to bargain. *Id.* at p. 2, n. 4.

Precedent indicates that the Board has not established a specific number of times a party must request to bargain before an unfair labor practice violation occurs. Nonetheless, in the instant case, the Hearing Examiner's conclusion that the Union should have made a second request is not unreasonable or unsupported by the record. Therefore, the Union's exception is denied.

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

ORDER

IT IS HEREBY ORDERED THAT:

1. The University of the District of Columbia's Faculty Association/NEA'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

January 2, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 07-U-17 was transmitted via U.S. Mail and e-mail to the following parties on this the 2nd day of January, 2013.

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