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**GOVERNMENT OF THE DISTRICT OF COLUMBIA
Public Employee Relations Board**

_____)	
In the Matter of:)	
)	
Doctors Council of the)	
District of Columbia and)	
Dr. Henry Skopek,)	
)	
Complainants,)	PERB Case No. 99-U-06
)	
v.)	
)	Opinion No. 636
District of Columbia)	
Commission on Mental)	
Health Services,)	
)	
Respondent.)	
_____)	

DECISION AND ORDER

The Doctors Council of the District of Columbia (Union or DCDC) filed an "Unfair Labor Practice Complaint" on behalf of Dr. Henry Skopek with the District of Columbia Public Employee Relations Board (PERB or Board) against the District of Columbia Commission on Mental Health Services (CMHS or Respondent). The Union alleges that CMHS' termination of Dr. Skopek violated D.C. Code §1-618.4(a)(1),(3) and (4).

The Hearing Examiner found that the Complainants did not establish that the Respondent violated the Comprehensive Merit Personnel Act (CMPA), as codified under D.C. Code § 1-618.4(a)(1),(3) and (4).

Based on her findings and conclusions, the Hearing Examiner recommended that the Complaint be dismissed in its entirety. DCDC filed timely exceptions to the Hearing Examiner's Report and Recommendation. The Hearing Examiner's Report and Recommendation (R&R) and DCDC's exceptions are now before us for disposition.

The Commission on Mental Health Services was created in 1984 when Congress transferred authority of St. Elizabeth's Hospital to the District of Columbia and created the Commission. 24 U.S.C. § 225. St. Elizabeth's Hospital (St. Elizabeth) employed Complainant Dr. Skopek as a psychiatrist between 1967 and 1987. In September of 1987, Dr. Skopek briefly left St. Elizabeth's, but shortly returned as a consultant in geriatric psychiatry. On October 14, 1997, Dr. Skopek began a one-year probationary period as a medical officer. Dr. Skopek continued to work in the geriatric ward, supervised by Dr. Steven Steury.

On October 13, 1998, CMHS issued a formal letter of termination to Dr. Skopek.^{1/} CMHS provided no reason for Dr. Skopek's termination in its letter. DCDC and Dr. Skopek contend that the decision to terminate employment was based on Dr. Skopek's behavior at labor-management meetings, not on his job performance.^{2/}

Respondent presented evidence at the hearing illustrating Dr. Skopek's job related deficiencies. Complainants contend that the issues raised by the Respondent were pretextual, and were in violation of D.C. Code § 1-618.4.^{3/}

^{1/} On October 27, 1998, CMHS extended Dr. Skopek's termination date to November 12, 1998, based on Dr. Skopek's use of leave without pay during his probationary period.

^{2/} During the probationary period, Dr. Skopek attended labor management-meetings on behalf of the Doctors Council of the District of Columbia.

^{3/} Specifically, this section prohibits the District, its agents and representatives from:

- (1) Interfering, restraining or coercing any employee in the exercise of the rights guaranteed by this subchapter;....
- (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 signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter....

After a review of the evidence on the record, the Hearing Examiner concluded that Complainants failed to meet their burden of proof that Respondent committed an unfair labor practice by terminating Dr. Skopek. In general, the Hearing Examiner concluded that the Complainants failed to show that Dr. Steury (Dr. Skopek's supervisor) was aware of Dr. Skopek's union activities, and therefore did not use his union advocacy as a basis for discharge. The Hearing Examiner also concluded that Complainants failed to show any anti-union animus, and that there was sufficient evidence supporting the reasonableness of Dr. Skopek's termination.

DCDC presented numerous, mostly overlapping, exceptions to the Hearing Examiner's Report and Recommendations. Essentially, DCDC contends that the Hearing Examiner overlooked several pieces of critical evidence. Specifically, DCDC argues that the Hearing Examiner erred in her conclusion that Dr. Steury and CMHS did not know that Dr. Skopek was a union representative. DCDC also argues that the Hearing Examiner failed to find that the timing of Dr. Skopek's termination indicated anti-union animus. Additionally, DCDC questions the relevance of the background information the Hearing Examiner provided regarding the "Dixon Decree" and its implications with regard to Dr. Skopek's outplacements. (See R&R at pgs. 3-4). The remainder of the exceptions dispute the Hearing Examiner's finding that CMHS had a reasonable basis to dismiss Dr. Skopek. Also, DCDC suggests that the Hearing Examiner focused on an incorrect set of facts.

For the reasons discussed below, we find that CMHS did not commit an unfair labor practice by terminating Dr. Skopek's employment after the year-long probationary period. As a result, we dismiss the complaint in its entirety.

In the instant case, the Complainants have the burden of establishing that the Respondent's decision to terminate Dr. Skopek was the result of Respondent's anti-union animus or retaliation against Dr. Skopek for his union activities. To prove the claim of retaliatory discharge for union activities, the Complainants must show that Dr. Skopek engaged in protected union activities; that CMHS knew of the activities; that there was animus by CMHS; and that CMHS subsequently took adverse action against Dr. Skopek. See, Farmer Bros. Co., 303 NLRB 638 (1991); and D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corporation, D.C. General Hospital, 46 DCR 6271, Slip Op. No. 583, PERB Case No. 98-U-07 (1999). Determining motivation is difficult. Therefore, a careful analysis must be conducted to ascertain if the stated reason is pretextual. As a result, the employment decision must be analyzed according to the "totality of the circumstances";^{4/} relevant factors include a history of anti-union animus, the timing of the action, and disparate treatment.

The Hearing Examiner concluded that the Complainants presented sufficient evidence to

^{4/} NLRB v. Nueva, 761 F.2d 961, 965 (4th cir. 1985).

establish that Dr. Skopek attended labor management meetings and voiced his opinion on matters important to the Union. (R&R at p. 10). Also, the Hearing Examiner found that Dr. Skopek and Dr. Williams clearly reached an agreement authorizing Dr. Skopek to act as a union representative for DCDC.^{5/} However, she determined that with regard to the other elements, the Complainants failed to satisfy their burden. Specifically, she concluded that the Complainants presented no evidence that Dr. Steury was aware of Dr. Skopek's status as a union representative. In addition, she found that neither Dr. Skopek nor Dr. Williams ever notified management that Dr. Skopek was acting as a DCDC representative, and the meetings were not restricted to union members.

In addition, the Hearing Examiner concluded that even accepting Complainants' assertion that Dr. Steury and other CMHS officials did know that Dr. Skopek was attending labor-management meetings on behalf of DCDC, Complainants still failed to show any anti-union animus on the part of CMHS. In their exceptions, the Complainants suggest that anti-union animus is evident in that St. Elizabeth's had no problems with Dr. Skopek's performance until he began to act as an advocate for DCDC. We believe that this fact alone cannot support a claim of retaliation, particularly when the Complainants failed to show any consistent history of animus towards DCDC. See, Holiday Inn East, 1281 NLRB 573(1986). In the instant case, the Complainants merely presented the testimony of witnesses who stated that management members were upset with Dr. Skopek's line of questioning at the labor-management meetings. (Tr. 167-8). Further, Dr. Skopek was one of many vocal participants at these meetings; his behavior was not so unusual as to support an inference of retaliation.

In their exceptions, the Complainants argue that the Hearing Examiner erred by giving more "weight to the testimony of some," i.e., those who had negative views of Dr. Skopek (Exceptions at p. 17). Complainants also contend that the Hearing Examiner attached too much significance to Dr. Skopek's difficulty with record keeping. We have held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." Tracey Hatton v. FOP/DOC Labor Committee, 47 DCR 769, Slip Op. No. 451, at p.4, PERB Case No. 95-U-02 (1995). Also, see University of the District of Columbia Faculty Association/NEA v. University of the District OF Columbia, 39 DCR 6238, Slip Op. No. 285, PERB Case No. 86-U-16 (1992) and Charles Bagenstone, et al. v. D.C. Public Schools, 38 DCR 4154, Slip Op. No. 270, PERB Case Nos. 88-U-33 and 88-U-34 (1991). In the instant case, the Hearing Examiner acknowledged that Dr. Skopek was lauded as a patient advocate (R&R at p.9), and that other staff found him easy to work with, and considered him to be a fine doctor in all respects (R&R at p.6). Nonetheless, she concluded that the Complainants failed to meet their burden. This is precisely the function of the Hearing Examiner: to determine issues of credibility and to judge the sufficiency of the evidence.

^{5/} Dr. Williams is the President of DCDC.

Complainants also argue that there is no evidence to corroborate the complaint that Dr. Skopek refused to adhere to CMHS' outplacement policy as contained in the "Dixon Decree". Complainants note that although some of the Respondent's witnesses were critical of Dr. Skopek's attitude regarding outplacement, none could point to a specific offense.

Even if Dr. Skopek's discharge can be characterized as particularly unreasonable, given his 30 years of service to St. Elizabeth's, that does not mean the discharge was unlawful. Termination is only unlawful if motivated by a desire to discourage protected union activities.^{6/} We find that the Complainants failed to prove such motivation on the part of the Respondent. Instead, the Complainants merely disagree with the Hearing Examiner's findings and conclusions. However, challenges to evidentiary findings do not give rise to a proper exception where, as here, the record contains evidence supporting the Hearing Examiner's findings. See, American Federation of Government Employees, Local 872 v. D.C. Dept. of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-1, 89-U-16, 89-U-18 and 90-U-04 (1991). Therefore, we find no merit to any of DCDC's exceptions to the Hearing Examiner's evidentiary findings.

Pursuant to D.C. Code § 1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings and conclusions of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. We therefore adopt the recommendation of the Hearing Examiner and dismiss the Complaint in its entirety.

ORDER

IT IS HEREBY ORDERED THAT:

The Complaint is dismissed.

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

August 10, 2000

^{6/} NLRB v. Federal Pacific Electric Co., 441 F.2d 765, 770 (5th Cir. 1978).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 99-U-06 was transmitted by first class mail, to the following parties on this 10th day of August, 2000.

Wendy Kahn, Esq.
Zwerdling, Paul, Leibig, Kahn,
Thompson & Wolly U.S. Mail
1025 Connecticut Avenue, N.W.
Washington, D.C. 20008

Camille Shepherd, Esq.
Employee Relation Specialist
Commission on Mental Services U.S. Mail
Office of Human Resources
Labor and Employees Relations Division
2700 Martin Luther King Avenue, S.E.
St. Elizabeth's Campus/E Building/Room 314
Washington, D.C. 20032

Courtesy Copies:

David Cromer, Chief Labor Relations
Commission on Mental Health Services
Office of Human Resources U.S. Mail
St. Elizabeth's Campus/ E Building/Room 314
Washington, D.C. 20032

Lois Hochhauser, Esq.
1850 M Street, NW
Suite 800 U.S. Mail

Washington, DC 20036

Sheryl Harrington
Secretary