GOVERNMENT OF THTE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
American Federation of Government Employees, AFL-CIO, Local 383,	
Complainant,	PERB Case No. 09-U-04
v.	Opinion No. 1027
District of Columbia Department of Youth Rehabilitation Services and District of Columbia Office of Labor Relations and Collective Bargaining,	**Remand Order** **Order for Briefs** **CORRECTED COPY**
Respondents.	

REMAND ORDER AND ORDER FOR BRIEFS

I. Statement of the Case:

On November 1, 2008, the American Federation of Government Employees, AFL-CIO, Local 383 ("Complainant," "Union," "AFGE," or "Local 383") filed a document styled "Unfair Labor Practice Complaint" against the District of Columbia Department of Youth Rehabilitation Services ("DYRS" or "Respondents") and the District of Columbia Office of Labor Relations and Collective Bargaining ("OLRCB" or "Respondents").[1] The Complainant alleges that DYRS and OLRCB have violated D.C. Code § 1-617.04(a)(1), (2) and (5) by refusing to bargain with the Union regarding DYRS' unilateral decision to eliminate AFGE's current office space and DYRS' refusal to provide the Union with any office space." (Compl. at p. 2).

---

[1] The Complainant's November 1, 2008 filing included a "Request for Preliminary Relief and Temporary Restraining Order" ("Motion"). On November 17, 2008, the Respondents filed a document styled "Motion to Dismiss Request for Preliminary Relief and Temporary Restraining Order" opposing the Motion. In Slip Op. No. 957, the Board denied the Complainant's Motion and assigned the Complaint to a Hearing Examiner. (See *American Federation of Government Employees, AFL-CIO, Local 383 v. District of Columbia Department of Youth and Rehabilitation Services and District of Columbia Office of Labor Relations and Collective Bargaining*, Slip Op. No. 957, PERB Case No. 09-U-04 (August 27, 2009)).

AFGE requests that the Board: (a) order the Respondents to cease and desist from violating the Comprehensive Merit Personnel Act ("CMPA"); (b) "return to status quo ante until [the Respondents] satisfy their bargaining obligations"; (c) order the Respondents to post a notice advising bargaining unit members that it violated the law; and (d) grant its request for reasonable costs. (See Compl. at p. 5). On November 24, 2008, OLRCB filed an answer to the Complaint ("Answer") denying any violation of the CMPA. (See Answer at pgs 1-3).

A hearing was held and the Hearing Examiner issued a Report and Recommendation ("R&R") finding that there was no violation of the CMPA. The Complainant filed Exceptions to the R&R. The Respondents filed an Opposition to the Exceptions and the Complainant filed a Response to the Opposition.

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

II. Hearing Examiner's Report

AFGE, Local 383 represents employees at DYRS and is a signatory to a Master Agreement with the District of Columbia government. The Hearing Examiner found that "DYRS provided the [Union] with the use of [a union office] for at least eleven years at the time the Complaint was filed. Prior to 1999, the [Union's] office was located at the Oak Hill Youth Center. When [John] Walker became Local President in 1999, the Local moved its office to Langston Terrace, where Mr. Walker worked. Several years later when that space was needed, the [Union] was given the use of an office at 25 M Street, S.W., where it remained until 2003. At that time, DYRS gave Local 383 the use of an office located at its 450 H Street, N.W. site, where Mr. Walker worked. Local 383 kept its files, bank records, telephones, fax machines, computer, files, and furniture, in its office. The office...was secured with a key kept by Mr. Walker." (R&R at p. 3).

The Hearing Examiner stated that "[o]n November 6, 2007, Mr. Walker was told...that DYRS needed the [Union's] office and that the [Union] would have to vacate it. By letter to Mr. Walker, dated November 14, 2007, DYRS [Deputy Director] David Brown confirmed the verbal directive...and advised Mr. Walker that DYRS would provide the [Union] with a file cabinet that Mr. Walker could keep in his work space.... Mr. Walker then contacted [OLRCB Director] Natasha Campbell, and requested 'impact and effect negotiations over the decision to eliminate the office space'. (R&R at pgs. 3-4). The parties met on December 4, 2007, [and] OLRCB informed the [Union] that it was under no obligation to provide...office space..." (R&R at p. 4). On December 5, 2007, Mr. Walker informed OLRCB that "the Union considered the elimination of the space a mandatory subject of bargaining. [The Respondents agreed] to engage in impact and effects bargaining [and] the matter was resolved when "DYRS permitted Mr. Walker to move his work space to the [Union's] office which remained secure with the key kept by Mr. Walker." (R&R at p. 4).

The Hearing Examiner found that "[i]n September 2008, Mr. Walker lost his position with DYRS as a result of a reduction-in-force ("RIF"). [DYRS again gave him notice to vacate] the office space ... which [he] occupied as a DYRS employee [and instructed him as follows:] 'In relation to performing your Union representational duties to DYRS employees, please make arrangements with Ms. Denise Durham to schedule the use of a conference room or other appropriate space.... Please submit your office keys, badge and pass card'." (R&R at p. 4). The Hearing Examiner noted that Mr. Walker has remained Union President and has complied with the directives, but kept the office key "because the office contained 'confidential information' pertaining to bargaining unit members as well as financial records...." (R&R at p. 5). Mr. Walker contacted OLRCB and asked for reconsideration of the decision to have the Union vacate the office space and requested alternative space and additional time to vacate the space. (See R&R at p. 5).

On November 1, 2008, the Complainant filed the unfair labor practice complaint in this matter and a hearing was held. The Union argued before the Hearing Examiner that DYRS committed an unfair labor practice when it ordered the Union to vacate the office space in October 2008 and also when the Respondents refused to bargain about the loss of the space. The Union maintained that the provision of office space is a mandatory subject of bargaining, constitutes a past practice, and, therefore, the Respondents were obligated to bargain over the termination of the space. (See R&R at p. 5).

The Hearing Examiner recounted Mr. Walker's testimony that the lack of an office has negatively impacted the Union's ability to function and his ability to contact and meet with bargaining unit members. For example, when Mr. Walker needs documents, he has to schedule an appointment with the storage company and search for the items. Also, when Mr. Walker needs the conference room, he cannot schedule a meeting without contacting DYRS to reserve the conference room. (See R&R at p. 5).

The Respondents countered that there is no contractual or statutory right to union office space and that DYRS' decision to provide the Union with office space was voluntary. The Respondents deny any past practice of providing office space. To the extent there may have been a past practice, the Respondents maintain that the practice ended when DYRS gave notice to the Union in 2007 to vacate the space because it was needed. The Respondents take the position that providing office space constituted impermissible assistance to the Union and was costly to DYRS. (See R&R at p. 6).

The Hearing Examiner addressed the issue of whether DYRS was under any statutory or contractual duty to bargain. The Hearing Examiner stated that the Board has described union office space as "a convenience for employees, comparable to bulletin boards or mailboxes and has long held that providing office space to a union is a term and condition of employment and is a mandatory subject of bargaining...."The Hearing Examiner determined that "there may be a statutory violation when an employer unilaterally changes a matter which is a mandatory subject without prior notice and bargaining." (R&R at p. 6).

The Hearing Examiner found that: (1) the provision of office space does not constitute impermissible assistance to the Union; (2) the cost of the space was not relevant since DYRS did not have to rent extra space; and (3) the space remained vacant from the time it was vacated to the day of the hearing. The Hearing Examiner also concluded that, as a term and condition of employment, the Union's use of the office space was a mandatory subject of bargaining. Furthermore, she noted that Article IV, Section B of the Supplemental Agreement between the parties states as follows:

> The Employer agrees to provide a space for the Union stewards to meet in private with an aggrieved employee and for the maintenance of union records. This space may be used during breaks and at lunch. This space may not be used during duty hours unless with permission of the Division Chief. (R&R at p.7).

In light of the above contractual provision, the Hearing Examiner concluded that DYRS violated the agreement between the parties.

The Hearing Examiner stated, however, that Board precedent establishes that "a violation of the agreement is not a *per se* violation of the CMPA." (R&R at p. 7). The Hearing Examiner noted that the Board "will conclude [an unfair labor practice] was committed when an employer initiates pervasive unilateral changes to an existing agreement or repudiates the bargaining agreement or the legitimacy of the exclusive collective bargaining representative.... [citations omitted]. Such actions have been described ... as 'egregious and pervasive' and a violation of the employer's duty to bargain in good faith." (R&R at p. 7). "[The Board has stated that] it would limit its conclusion that there is an [unfair labor practice] to instances where there is no dispute between the parties about the contractual provisions at issue." (R&R at p. 8). The Hearing Examiner determined that DYRS' actions do not fall within any of these exceptions. She also found that there was no repudiation of the agreement, or the legitimacy of the Union, and that there was no evidence to support the notion that the applicable contractual terms were undisputed. (See R&R at p. 8).

"Since the provision of the space by DYRS to the [Union] is covered by the Agreement, the Hearing Examiner explored whether the space was used in a manner that could be considered a past practice. [She found that] although it is reasonable to conclude that there was a past practice that the space provided to the [Union] would be located in close proximity to the [Union] President's work site, this past practice terminated at the time Mr. Walker was separated from DYRS. There was no past practice or policy in place that would govern ... what would happen to the [Union] office where a [Union] President was no longer employed. For these reasons, the Hearing Examiner concluded that there was insufficient evidence to establish a past practice in this matter." (R&R at p. 9).

After concluding that the Respondents had both statutory and contractual obligations, the Hearing Examiner turned to the question of remedy. (R&R at p. 9). Relying on *AFSCME*

District Council 20, et al. v. Government of the District of Columbia and Williams, 43 DCR 5594, Slip Op. No. 387, PERB Case Nos. 93-U-22 and 93-U-23 (1996),[2] for the proposition that a unilateral change in bargainable terms and conditions does not constitute an unfair labor practice under the CMPA where such terms are covered under the provisions of a collective bargaining agreement, the Hearing Examiner found that the Board lacks jurisdiction in this matter. The Hearing Examiner thus recommended that the Complaint be dismissed.

III. Complainant's Exceptions, Respondents' Opposition, and Complainant's Response

In its Exceptions to the R&R, the Union contends that "the Hearing Examiner made three errors warranting rejection of the Hearing Examiner's [recommendation] that [the Board] dismiss the [Union's] complaint. [The Union] asserts that [the Board] should reject the Hearing Examiner's R&R because: (1) the Hearing Examiner deprived [the Union] of a fair hearing by reaching [the] issue [of jurisdiction] ... that neither party raised during this case, and without allowing the parties to first brief the issue; (2) the R&R is not supported by substantial evidence, and alternatively, is based on a non-fact and fails to draw its essence from the parties' collective bargaining agreement in that the Hearing Examiner relied on a document not in evidence; and (3) because the Hearing Examiner's finding that [the] [R]espondents' actions were not pervasive is not supported by substantial evidence." (Exceptions at pgs. 1-2).

With regard to the first exception, the Union claims that the Board should reject the Hearing Examiner's R&R because *inter alia*, "the Hearing Examiner erred by recommending dismissal of the complaint based on the absence of [Board] jurisdiction without first providing the parties an opportunity to brief the issue. Specifically, ... [although neither party raised the issue of jurisdiction,] ... the Hearing Examiner addressed the issue ... in her R&R. Consequently, Local 383 [claims that it] was denied the fair hearing mandated by [Board] Rule 550.13.... [The Union argues that] [a]lthough jurisdiction is an issue that may possibly be raised at any time,

---

2 The Hearing Examiner quoted the Board's decision as follows:

> A unilateral change in established and otherwise bargainable terms and conditions of employment does not constitute an unfair labor practice under the CMPA, when such terms or conditions are specifically covered, as here, by the provisions of a collective bargaining agreement in effect between the parties.... As a previously negotiated matter committed to the provisions of an effective collective bargaining agreement, [agency's] alleged unilateral change does not constitute a refusal to bargain in good faith.
>
> Relying on *Carlease Madison Forbes v. Teamsters*, ... the Board concluded that the allegations did "not state a claim under the CMPA upon which relief could be granted", explaining that: Relief from an alleged misapplication of or change in a practice that is specifically covered by an effective collective bargaining agreement lies not within the statutory authority of the Board, but in the available rights and obligations arising from the collective bargaining agreement. (R&R at p. 10).

Local 383 respectfully submits that under the circumstances of this case it was error for the Hearing Examiner to raise the issue *sua sponte* after the close of the record, and without first allowing Local 383 to present argument on the issue."[3] (Exceptions at p. 5).

In its second exception, the Union claims that the Board "should reject the R&R because it is not supported by substantial evidence, and, alternatively, it is based on a non-fact and ... fails to draw it's essence from the parties' collective bargaining agreement. Specifically, the Hearing Examiner based the conclusion that [the Board] lacked jurisdiction [on a provision found in a "Supplemental Agreement", Article IV, Section B]. The [Union asserts that the] parties' collective bargaining agreement, however, does not contain a "Supplemental Agreement" nor did either party to this case introduce such a document into evidence. ([The Union referenced] Union Exhibit 1 "Master Agreement Between the American Federation of Government Employees Locals 383, 2737, 2741, 3406, 3444, and 3871 and the Government of the District of Columbia")." (Exceptions at pgs. 5-6).

In their Opposition, the Respondents maintain that "the Hearing Examiner [was] correct in raising the issue of jurisdiction *sua sponte* ... after close of the record and without first allowing Local 383 to present evidence on this issue." (Opposition at p. 3). [The Respondents note that although] the pages of Ex. U-1 are not numbered, ... [however] the language in dispute is ... at the fourth page from the end of the document. Therefore, since the record contains the language cited by the Hearing Examiner, the finding is supported by substantial evidence. Additionally, under Board Rule 550.13 ... hearing examiners are charged with conducting fair and impartial hearings [and under 550.13 (f) may "call and examine witnesses and introduce documentary or other evidence]." (Opposition at p. 4).

In response to the Respondents' Opposition, the Union filed a document styled "Reply by Complainant AFGE Local 383 to Respondents' 'Opposition to Union's Exceptions'," ("Response"). The Union counters that the "master agreement applies to multiple local unions in addition to Local 383. And, although the title of the supplemental agreement is unclear, a review of the articles' text shows that the agency who was a party to the supplemental agreement, ... was the District of Columbia Department of Administrative Services - not the [Respondent] Department of Youth Rehabilitation Services. [The Union argues that] Local 383 is not now nor has it ever been certified as the exclusive representative of any bargaining unit employees employed by the Department of Administrative Services.... This means, that Local 383 is not a

---

[3] The Union states that the "Respondents did not challenge [the Board's] jurisdiction or argue a contract exclusion defense.... [Furthermore, the Union asserts that a factual hearing was held and] Local 383 did not argue that the parties' collective bargaining agreement entitled it to employer[-]provided office space. Instead, Local 383 argued that the [R]espondents violated the District of Columbia Comprehensive Merit Personnel Act ("CMPA"), ... by refusing to bargain upon demand with Local 383 over a mandatory subject of bargaining: employer provided union office space. The Respondents countered that they did not refuse to bargain, and contended that Local 383 had no contractual right to office space. [The] [R]espondents did not challenge [the Board's] jurisdiction over Local 383's claims nor did they argue that the claims raised by Local 383 should have been pursued through the parties' negotiated grievance procedure." (Exceptions at pgs. 3-4).

party to the 'supplemental agreement' relied upon by the Hearing Examiner...." (Response at p. 2). The Union submitted a sworn declaration by Local 383 President John Walker attesting to the fact that the "supplemental agreement" was never negotiated by Local 383. (See Response at p. 2). The Union also asserts that it was denied a fair hearing, not because the Hearing Examiner raised the issue of jurisdiction *sua sponte*, but because the Union was denied the opportunity to introduce evidence and/or argument on the issue of jurisdiction. (See Response at p. 3).

IV. Discussion

In its Exceptions, the Union asserts that the Hearing Examiner's findings are not supported by the record. This argument is based on the Union's assertion that the Hearing Examiner based her conclusion (that the Board lacks jurisdiction over this matter) on a contractual provision found in a supplemental agreement which the Union first claimed did not exist. The Union now asserts that the supplemental agreement exists, but maintains that it does not pertain to Local 383, as Local 383 is not a party to the agreement. (See Exceptions at pgs. 5-6).

The Respondents assert that, based on the supplemental agreement, the Hearing Examiner was correct in raising the issue of jurisdiction *sua sponte*. The Respondents maintain that the Hearing Examiner correctly found that the Board has no jurisdiction over this matter because office space is addressed in the supplemental agreement and it is, therefore, a contractual dispute. The Respondents argue that the Hearing Examiner's findings are supported by substantial evidence. (Opposition at p. 4).

It is undisputed that the Union's Exhibit 1 contains a supplemental agreement as an attachment to the Master Agreement. Despite the fact that the first page of the supplemental agreement is a poor copy which is barely legible, it appears to reference the Department of Administrative Services.

Pursuant to Board Rule 550.21, "the Board may adopt the recommended decision of a Hearing Examiner to the extent it is supported by the record." The Board finds, and it is undisputed, that the supplemental agreement is part of the record. The Hearing Examiner's finding that the Board has no jurisdiction over this matter is based on a finding that the supplemental agreement addresses the issue of employer-provided union office space. The Board is faced with the Union's position that the Hearing Examiner improperly relied on this evidence because Local 383 is not a signatory to the supplemental agreement, and with the Respondents' position that because the supplemental agreement is part of the record, the Hearing Examiner properly relied on this evidence.

If the provision in question is not applicable to Local 383, the Hearing Examiner's findings concerning the Board's jurisdiction may not be supported by the record. The Board finds that there is insufficient information upon which to make a determination as to whether the Hearing Examiner's findings are supported by the record. Therefore, the Board remands this

matter to the Hearing Examiner in order to develop a full record. The Board requests that the parties brief the issue of jurisdiction and provide the information described below.

ORDER

IT IS HEREBY ORDERED THAT:

1. On or before September 30, 2011, the parties shall brief the following:

   a) The Union claims that the supplemental agreement does not pertain to Local 383, in effect taking the position that submission of the supplemental agreement was made in error. If the Union's submission into the record was an error, the Union must state legal authority regarding the impact of this error.

   b) The Respondents claim that the supplemental agreement was properly submitted into evidence and the Hearing Examiner properly relied on this evidence. If so, the Respondents must state whether the supplemental agreement pertains to DYRS and Local 383. If the supplemental agreement pertains to Local 383, the Respondents must state whether the issue of union office space is grievable.

   c) Brief the issue of whether the Board has jurisdiction over this matter, and whether failure to bargain over employer-provided office space is a violation of the CMPA.

   d) The Hearing Examiner shall make factual findings and conclusions as to whether the Complainant requested bargaining and whether the Respondents refused to bargain under the circumstances of this case. The Hearing Examiner may conduct further proceedings, if necessary.

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

August 5, 2011

CORRECTED CERTIFICATE OF SERVICE

This is to certify that the attached Remand Order - Order for Briefs in PERB Case No. 09-U-04 was transmitted via Fax and U.S. Mail to the following parties on this the 5th day of August 2011.

Andres M. Grajales, Esq.
American Federation of Government Employees
80 F Street, NW
Washington, D.C. 20005

FAX & U.S. MAIL

Dean Aqui, Esq.
Attorney Advisor
Office of Labor Relations & Collective Bargaining
441 4th Street, NW
Suite 820 North
Washington, D.C. 20001

FAX & U.S. MAIL

Courtesy Copy:

Lois Hochhauser, Hearing Examiner
1101 14th Street, NW
Suite 500
Washington, D.C. 20005

U.S. MAIL

Sheryl V. Harrington
Secretary

Dean Aqui, Esq.