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

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| Deborah Chisholm,<br><br>Complainant,<br><br>v.<br><br>American Federation of State, County and Municipal Employees, Council 20, Local 2401<br><br>and<br><br>D.C. Office of Labor Relations and Collective Bargaining,<br><br>Respondents. | PERB Case Nos. 99-U-32 and 99-U-33<br><br>Opinion No. 958 |

## DECISION AND ORDER

### I. Statement of the Case:

The Complainant, Deborah Chisholm (Complainant), was employed by the Department of Human Services. She was terminated in 1996 and filed for arbitration. The American Federation of State, County and Municipal Employees, Council 20, ("Respondent", or "Union", or "Local 2401" or "Council 20") agreed to represent her at arbitration, then withdrew and failed to arbitrate the grievance. As a result, Deborah Chisholm filed an unfair labor practice complaint alleging that the Union's failure to represent her violated the Comprehensive Merit Personnel Act ("CMPA").

The Board has previously considered this unfair labor practice in *Chisholm v. AFSCME Council 20, AFSCME Local 2401 and D.C. Office of Labor Relations and Collective Bargaining,* 49 DCR 789, Slip Op. No. 656 at p. 5, Case Nos. 99-U-32 and 99-U-33 (2001). ("*Chisholm,* Slip Op. No.

656").[1] In *Chisholm,* the Board dismissed the complaint against the D.C. Office of Labor Relations and Collective Bargaining ("OLRCB"). However, the Board determined that "Council 20's decision to withdraw the Complainant's arbitration without providing an explanation for its action was arbitrary and constituted bad faith" and found that the Union had committed an unfair labor practice. We ordered the Union to take the necessary steps to process the Complainant's grievance through arbitration. If the grievance could not be reinstated, the Board ordered that the case be remanded so that a Hearing Examiner may consider whether the Complainant likely would have prevailed on the merits of her grievance. *(Chisholm,* Slip Op. No. 656 at p. 5).

The Complainant filed a Motion to Amend the Board's Decision and Order ("Motion"), asking the Board to modify *Chisholm,* Slip Op. No. 656 by mandating that the Federal Mediation and Conciliation Service reopen the Complainant's grievance arbitration. The employing agency, the Department of Human Services ("DHS" or "Agency") and OLRCB opposed the Motion and did not agree to resume the Complainant's arbitration. The Board denied the Complainant's Motion and remanded the matter "to a Hearing Examiner for a hearing on the issue of whether the Complainant would have prevailed in arbitration." *Chisholm v. AFSCME Council 20, AFSCME Local 2401,* 49 DCR 11136, Slip Op. No. 689 at p. 5, PERB Case Nos. 99-U-32 and 99-U-33 (2002). ("Slip Op. No. 689").

A hearing was held and on October 15, 2007, Hearing Examiner Sean J. Rogers issued a Report and Recommendation ("R&R"). He found that the "Complainant did not prove by a preponderance of the evidence that the Department of Human Services did not have cause to discharge her." (R&R at p. 33). As a result, he recommended that the Complaint be dismissed. The Complainant filed exceptions and the Respondent filed an opposition.

The Hearing Examiner's R&R, the Complaint's exceptions and the Union's opposition are before the Board for disposition.

## II. Hearing Examiner's Report and Recommendation

As stated above, in *Chisholm,* Slip Op. No. 656, the Board directed that:

> the Union request to have the arbitration reinstated. If the grievance [could not] be reinstated, then consistent with the standard enunciated in *Iron Workers*, the Board directs that the case be remanded so that a Hearing

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[1] See also *Chisholm v. AFSCME Council 20, AFSCME Local 2401,* 52 DCR 2537, Slip Op. No. 761 at pgs. 2-5, PERB Case Nos. 99-U-32 and 99-U-33 (2004), where the Board ordered the Agency to comply with the Board's subpoena to produce documents pertaining to these proceedings, i.e., 79 client files for which the Complainant was terminated.

> Examiner may consider whether the Grievant likely would have prevailed on the merits of her grievance at arbitration. We believe that this relief is consistent with our mandate under D.C. Code § 1-617.13(a), to make an employee whole for any loss resulting from unfair labor practices. By granting this relief, the Board seeks to assure that both parties to the collective bargaining agreement get the benefit of what they bargained for. Namely, the Grievant will get no more or no less than she would have been entitled to if the case had proceeded to arbitration and the Union will be required to pay no more or no less than it would have if the case had gone to arbitration.
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> In making this decision, we are overturning the remedy portion of our decision in *Hatton*, as it related to back pay, and ordering that a special hearing take place in this case to determine the Union's liability for its actions, if any. This hearing will only be necessary if the Union is unable to have the Grievant's arbitration reinstated.

*Chisholm v. AFSCME Council 20, AFSCME Local 2401 and D.C. Office of Labor Relations and Collective Bargaining ("OLRCB")*, 49 DCR 789, Slip Op. No. 656 at p. 8, Case Nos. 99-U-32 and 99-U-33 (2001).[2]

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[2] In *Chisholm,* Slip Op. No. 656 at p. 8, the Board adopted the approach set forth in *Iron Workers Local Union 377, International Association of Bridge, Structural and Ornamental Iron Workers (''), AFL-CIO and Ronald Bryant*, 326 NLRB No 54 (1998). The Board rejected the approach set forth in *Tracy Hatton v. Fraternal Order of Police/Department of Corrections Labor Committee*, 47 DCR 769, Slip Op. No. 451, PERB Case No. 95-U-02 (1995), *aff'd sub nom. Fraternal Order of Police/Department of Correction s Labor Committee v. PERB*, MPA 95-16 (D.C. Sup. Ct. 1998). Specifically, at pages 7 and 8 of *Chisholm,* Slip Op. No. 656, we noted that the *Hatton* and *Iron Workers* cases offer different approaches when fashioning an appropriate remedy in instances where a union has breached its duty of fair representation by failing to pursue a grievance through arbitration, stating as follows:

> The remedy in *Hatton* requires that the Union attempt to reinstate the arbitration. In the event that the union cannot reinstate the grievance, the Board directed the Union to pay back pay from the date it withdrew the grievance until the date that the Complainant found "substantially equivalent employment." *Id.* Under the *Iron Workers* approach used by the NLRB, no award of back pay will be made against the union unless the Complainant can demonstrate that her grievance has merit. [citation omitted].
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> * * *

As the Union was unable to reinstate the grievance, a hearing was held in this matter. The issue before Hearing Examiner Sean Rogers was: "Whether the Complainant can prove, by a preponderance of the evidence, that the Department of Human Services did not have cause to discharge her."

The Hearing Examiner noted that DHS administers programs which provide support to the neediest individuals and families of the District of Columbia. The Income Maintenance Administration ("IMA") certifies and re-certifies the eligibility of needy individuals and families for federal and District funded assistance programs including, for example: Temporary Assistance to Needy Families ("TANF"), Aid for Dependent Children ("AFDC"), Medicaid, D.C. Healthy Families, Food Stamps, General Public Assistance for Children, Burial Assistance, Interim Disability Assistance and Refugee Cash Assistance programs. (See R&R at p. 6).

The Complainant, Deborah Chisholm, served as a Social Service Representative ("SSR") from 1979 to 1992 at the Taylor Street facility, primarily involving Medicare approvals and closures for the medically needy. She also performed other case work duties as a general public assistance worker including, for example: emergency assistance; food stamps and medical assistance. (See R&R at p. 6). Agency policy requires an SSR to process food stamp applications or re-certifications within five (5) days once the client's information is provided to the SSR. DHS's assistance application and re-certification processes are subject to specific time-frame deadlines pursuant to three (3) court orders. If an application is not processed within the court-ordered deadlines, then the SSR must explain in a written memorandum to the supervisor why the application was not timely processed. At the time in question, the Complainant was detailed to the Agency's H Street facility. (See R&R at p. 6).

On November 4, 1992, the Agency implemented the generic concept regarding case processing, i.e., all benefits for one client were processed by one SSR at one location or center. Thus, SSRs who had been specialists before, now had to become generalists in the administration of all DHS's assistance programs. (See R&R at p. 7). "The Complainant attended generic concept training on May 7-10, 13-15, and 17, 1996. The generic concept requires SSRs to learn new assistance program codes and screens in DHS's data processing computer known as the Automated Client Eligibility Determination System ("ACEDS").... [The Complainant] was also trained on cultural interchange and interviewing on February

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> We now adopt the approach set forth in the *Iron Workers* case because of our concern that the Grievant could receive a windfall unless the Grievant is required to make a showing the he/she would have prevailed at arbitration. In *Iron Workers*, the NLRB required that the Grievant show by a preponderance of the evidence that the grievance would have prevailed at arbitration.

*(Chisholm,* Slip Op. No. 656 at pgs. 7-8).

19, 1997; Medicare processing on March 4 and October 14, 1997; and timely application processing on November 6, 1997. She requested additional generic concept training but none was available. [Her] supervisor, Lorraine Connor, offered to sit with [her] to help her with interviews and applications and on one occasion Connor did assist [the Complainant] with an interview and application process." (R&R at p. 7).

Subsequently, the Complainant's work deteriorated and she received several notices from the Agency stating that: (1) there were more than 50 complaints made against her by her clients (see R&R at p. 8); (2) her cases were not in compliance (see R&R at p. 9); (3) her cases were not processed in a timely manner (see R&R at pgs. 9-10); and (4) her overall performance was unacceptable. On July 10 or 11, 1997, DHS gave the Complainant a letter that was critical of the Complainant's performance regarding the quality and quantity of her work and her work habits and listed "60 cases awaiting action". (R&R at p. 10). In September 1997, she received instruction to prepare memoranda based on untimely processing of applications for benefits. Supervisor Connor determined that there were 79 case files on the Complainant's desk which needed processing. On October 15, 1997, Connor gave the Complainant notice of 14 Medicaid re-certifications which needed to be completed by October 31, 1997. On November 14, 1997 the Acting Center Director sent a memorandum to Personnel requesting termination of the Complainant. (See R&R at p. 10).

On December 1, 1997, the Complainant received "an advance notice of proposal to remove her from her position" based on three grounds: Incompetence; Inefficiency; and Inexcusable Neglect of Duty. (R&R at p. 10). The notice listed 81 case files found in the Complainant's office awaiting disposition. (See R&R at p. 11). The proposal also provided as follows:

> The material upon which this action is based may be reviewed in the D.C. Office of Personnel, Servicing Personnel Office No. 1, Operation "C", St Elizabeth's Campus, "E" Building, Room 209, 2700 Martin Luther King Avenue, S.E., Washington, D.C. 20032, telephone number 373-7265. (Compl. Exh. 3).

(R&R at p. 11).

The proposal assigned a Disinterested Designee, Carl Wilson, and advised the Complainant of her right to respond to the proposal notice at a reply hearing before Mr. Wilson. (See R&R at p. 11). The Disinterested Designee was to make a written recommendation to A. Sue Brown, Acting Commissioner, the deciding official who would make the final decision on the proposed termination. (See R&R at p. 11).

On December 5, 1997, the Complainant's counsel requested information concerning "all evidence that the Agency relied upon in issuing the propos[ed] removal notice." (R&R at p. 12). On January 29, 1998, Disinterested Designee Wilson informed the Complainant's counsel, Mr. Kaplan, that the Hearing would be on February 3, 1998. As a result of telephone conversations with an associate of the Complainant's counsel, the Disinterested Designee rescheduled the hearing to February 4, 1998. Neither the Complainant, nor her attorney attended the hearing.

The Disinterested Designee's report and recommendation had to be issued within 45 days of the receipt of the proposed notice, namely February, 6, 1998. (See R&R at p. 12). On February 5, 1998, Disinterested Designee Wilson made his report in which he recommended that the Complainant "be removed from her position." (R&R at p. 13). On February 6, 1998, the deciding official wrote a letter stating as follows: "It is my decision that the cause is sustained and warrants your removal." (R&R at p. 13). On March 8, 1998, the Complainant was removed. (See R&R at p. 13).

As stated above, the Complainant filed for arbitration. The Union agreed to represent her at arbitration, then withdrew and failed to arbitrate the grievance. The Complainant then filed an unfair labor practice complaint against the Union and the Department of Human Services alleging that the Union's failure to arbitrate her grievance violated the CMPA. The Board determined that the Union violated its duty of fair representation thereby committing an unfair labor practice. (See Slip Op. No. 656 at pgs. 8, 10). Also, the Board dismissed the Complainant's unfair labor practice complaint against DHS. The Board ordered the Union to take the necessary steps to process the Complainant's grievance through arbitration. If the grievance could not be reinstated, the Board directed that the case be remanded so that a Hearing Examiner may consider whether the Complainant likely would have prevailed on the merits of her grievance. The Union was unable to reinstate the grievance and the Board held a hearing in this matter.

The issue before the Hearing Examiner was "whether the Complainant can prove, by a preponderance of the evidence, that the Department of Human Services did not have cause to discharge her." (R&R at p. 13).

At the hearing, the Complainant made the following allegations: (a) DHS failed to comply with minimum Constitutional requirements for due process by its "failure to afford Chisholm with a pre-termination hearing and access to documents" and she requests a new hearing (R&R at p. 14); (b) DHS failed to comply with Article 7, Section 6 of the parties' collective bargaining agreement which states that "the material relied upon for a proposed discipline shall be made available to the employee and her authorized representatives for review" and also violated Article 7, Section 7, by scheduling the reply hearing only two business days in advance and at a time when the Complainant's counsel was not available (see R&R at p. 15); ( c) DHS produced only 52 of 80 cases in the current hearing and the Complainant processed almost all of them (see R&R at p. 15); (d) 28 case files were not produced at the current hearing and alleged errors in these cases cannot be used against the Complainant because she was denied the right

to review and rebut the evidence based on these cases (see R&R at p. 15); (e) at arbitration, the Complainant "would have prevailed on the merits of the charges [alleging] that she was incompetent, inefficient and inexcusably neglected her duty in handling of her cases" (R&R at p. 15); (f) the Complainant's supervisor failed to provide training and she was denied the opportunity to present this mitigating circumstance as a *Douglas* factor in order to reduce her discipline (see R&R at p. 15); and (g) DHS' inequitable distribution of a large and highly active caseload to her, compared to coworkers, hindered her ability to manage and process her cases. (See R&R at p. 16).

The Union countered that the Board's Order to hold a hearing "requires the Hearing Examiner to treat the case as a normal discharge arbitration except: [The Complainant] must prove by a preponderance of evidence that she was discharged without just cause and she would have prevailed at arbitration .... [T]he Respondent stands in place of DHS to defend the removal action." (R&R at p. 16). The Union asserted that the Complainant failed to prove that: (1) DHS committed procedural error; (2) she was not guilty of the misconduct alleged; (3) the penalty was inappropriate. (See R&R at p. 17). The Respondent further alleged that "[h]er performance was incompetent because she untimely processed cases in direct conflict with [time limitations] . . . She was inefficient as well because she was untimely in her case processing. [ Furthermore, the Respondent maintained that the Complainant] inexcusably neglected her duty by failing to follow instructions concerning the timely processing of her cases and refusing to file closed cases, which she admitted." (R&R at p. 19).

The Union also made the following assertions: (a) the Complainant did not file a grievance concerning DHS' lack of training (see R&R at p. 17) and cannot now raise this defense; (b) there was no prejudicial error based on the CBA regarding the timing of the reply hearing provision because the Complainant did not ask for an extension of time to file a reply nor did she "request an extension of the 45 day decision period" (R&R at p. 17), therefore DHS cannot be faulted for the Complainant's failure and there was no prejudicial error; ( c) the Complainant "incurred no prejudicial harm from DHS' initial refusal to produce documents because any prejudice was caused by her counsel's strategy." (R&R at p. 17). Finally, the Respondent contends that the Notice of Removal specified the location where the Complainant and her counsel could view the material but they failed to view them. (See R&R at p. 18); (d) the Complainant did not attend the reply hearing "where she would have gotten access to DHS' evidence which would have helped her in subsequent appeal proceedings". (R&R at p. 18).

Regarding the Complainant's claim that DHS did not provide her with a pre-termination hearing, the Hearing Examiner looked to the collective bargaining agreement. Specifically, he found that "Article7, Section 10 of the collective bargaining agreement establishes that the deciding official shall issue a written decision within forty-five days of the date of the receipt of the notice of proposed action." [Therefore, the deciding official, A. Sue] "Brown, wanted to issue her decision by February 6, 1998." (R&R at p. 20). The Hearing Examiner also found that Article 7, Section 10 provides that the forty-five days for issuing a final decision "may be extended by agreement of the employee and the deciding official. . . . The record

established that [Attorney] Kaplan never asked Brown for an extension [of the forty-five days]. Neither [Ms. Chisholm's attorney] nor [Ms.] Chisholm attended the reply hearing and no written reply to the proposed notice was submitted to Wilson on Chisholm's behalf." (R&R at p. 20). Instead, "on February 4, 1998, Kaplan filed a written protest of Wilson's scheduling of the reply hearing[,] asserting that '[t]his was the first time anyone from the Agency informed us that your deadline for issuing recommendations to Ms. Brown was February 6'." (R&R at p. 20).

The Hearing Examiner found that "the Complainant and her representative had a number of choices once [Disinterested Designee] Wilson set the reply hearing on February 4, 1998, despite [the representative's] unavailability. [They] could have requested an extension of the forty-five day period for issuing a final decision from Brown, but they did not. The Complainant could have attended the reply hearing without her representative and raised her protest over the scheduling [of the hearing] and any other matters, and gone on the record regarding her procedural due process claims. [They] could have filed a written reply to the proposed notice and raised all the protests which they advance in this appeal. Yet, the Complainant and her representative chose to protest in writing [Disinterested Designee] Wilson's decision to schedule [the] hearing for February 4,1998." (R&R at p. 21). The Hearing Examiner found that the Complainant was "granted an opportunity to be heard prior to the final decision [and that] Wilson's decision to hold the reply hearing on February 4, 1998 did not constitute prejudicial error or a denial of Constitutional due process rights and does not constitute grounds for an Arbitrator to find that DHS' removal action would be reversed or mitigated." (R&R at p. 21).

The Hearing Examiner next addressed the Complainant's claim that, "despite her representative's request for information on December 5, 1997, DHS violated Article 7, Section 6[3] of the CBA by not providing [her attorney] Kaplan with the material relied upon for a proposed discipline." (R&R at p.22). The Hearing Examiner found that the proposed notice of removal specified the location where the Complainant could review "the material upon which this action is based" and informed her that she may review the material. (See R&R at p. 21). However, "[n]either Chisholm nor her counsel reviewed the material.... Based on the express language of the proposed notice of removal, [the Hearing Examiner] ... [found] that DHS complied with this requirement [to allow the Complainant to review the material]." (R&R at p. 22). [The Hearing Examiner noted that] [a]lthough the Complainant requested copies of the material, there is no CBA provision requiring that DHS provide copies. (See R&R at p. 22). Therefore, the Hearing Examiner determined that "DHS satisfied its obligation to make available to Chisholm and Kaplan the material relied on for the proposed discipline . . . [and] DHS' failure to respond to [the Complainant's] request for the material and other information before the reply hearing was not harmful error

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[3] Article 7, Section 6 provides in part: ". . .The material relied upon which the proposed discipline is based shall be made available to the employee and his/her authorized representatives for review. The employee or his/her authorized representative will be entitled to receive a copy of the material upon written request." (R&R at p. 21).

or a violation of Chisholm's Constitutional due process rights and does not constitute grounds for an Arbitrator to find that DHS' removal action would be reversed or mitigated." (R&R at p. 22).

The Hearing Examiner found that the Complainant did not establish by a preponderance of the evidence that DHS failed to provide her with training for the Agency's transition to the generic concept. As a result, he determined that her claim that she would have raised lack of training as a mitigating factor and that "her removal would have been mitigated by an Arbitrator based on the Douglas factors" is not supported by the record. ( R&R at pgs. 23-24). Therefore , the Hearing Examiner concluded that this defense does not constitute grounds for an Arbitrator to find that DHS's removal action would be reversed or mitigated.

The Hearing Examiner also found that the Complainant was the most experienced SSR in work unit 512C and that the most experienced SSRs were assigned heavier caseloads. Furthermore, he concluded that the Complainant failed to show that her caseload or redistribution of assignments affected her ability to perform her assigned duties. Therefore, the Hearing Examiner concluded that the Complainant failed to establish that the penalty of removal was unreasonable because her caseload was unmanageable and determined that "this does not constitute grounds for an Arbitrator to find that DHS's removal action would be reversed or mitigated." ( R&R at pgs. 24-25).

Finally, the Hearing Examiner rejected the Complainant's argument that only 54 case files out of 81 were produced at the hearing and this serves as a basis for setting aside her termination. He found that the Respondent did not rely on the allegations pertaining to the missing cases, and determined that the DHS's assertion of the Complainant's "alleged failure to properly process the 52 case files, if proven at the hearing, is sufficient to support DHS's decision to remove her for incompetence, inefficiency and inexcusable neglect of duty." (R&R at p. 29). Limiting his analysis of the evidence to the 52 case files presented, the Hearing Examiner found that the Complainant's "assertion that she did not make any mistakes in the processing of these 52 files, is inconsistent with her defenses that her caseload was unmanageable and that she did not have adequate training in the generic concept." (R&R at p. 30).

The Hearing Examiner also found that "the Respondent credibly established through documents and testimony that: approximately 39 case files had no action; approximately 7 case files were untimely or incorrectly processed; and approximately 6 closed case files were not sent to DHS's archives." (R&R at p. 31). Thus, he concluded that the Complainant "has not proven by a preponderance of the evidence that an Arbitrator would find that DHS's removal action [for incompetence; inefficiency and inexcusable neglect of duty] would be reversed or mitigated." Therefore, he recommended that the Complainant's claim be dismissed.

## III. The Complainant's Exceptions and the Respondent's Opposition

The Complainant filed Exceptions to the Hearing Examiner's recommendation and asks the Board to find that the Complainant "has proven by the preponderance of the evidence that she would have prevailed in arbitration and her removal would have ben reversed." (Exceptions at p. 6).

In this regard, the Complainant claims that the Hearing Examiner erred by finding that: (1) "DHS satisfied its obligation to make available to Chisholm and Kaplan the material relied on for the proposed discipline" (Exceptions at p. 7); and, (2) the Complainant was "granted an opportunity to be heard prior to the final decision." (Exceptions at p. 8). The Complainant requests that the Board reverse the Hearing Examiner's findings and conclusions.

The Union filed an Opposition to the Complainant's Exceptions ("Opposition"). The Union contends that Board precedent precludes overturning a Hearing Examiner's findings of fact which are amply supported by record evidence "merely because a party proposes a different finding based on evidence the Hearing Examiner fully considered but did not find persuasive." (Opposition at p. 9). The Union asserts that the Agency made available the material upon which the discipline was based, even before the Complainant made a request for information. (Opposition at p. 10).

Regarding the Complainant's allegation that DHS violated her due process rights, the Union cited *Smutka v. City of Hutchinson*, 451 F.3d 522, 526-527 (8th Cir. 2006), which states as follows: "To satisfy minimal due-process requirements at the pre-termination stage, a public employer must give the public employee 'oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.' *To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee."* [4] (emphasis added by the Union). (Opposition at p. 12). Furthermore, the Union claims that the Complainant was provided with the opportunity to be heard, but she did not appear at the hearing or request an extension of time. (Opposition at p. 13).

## IV. Discussion

The Complainant takes exception to the Hearing Examiner's findings that DHS satisfied its obligation to make available to the Complainant the material upon which the termination action was based. She also takes exception to his finding that the Complainant was granted an opportunity to be heard prior to the Agency's final decision. The Complainant asks the Board adopt her view of the evidence.

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[4] (The Court in *Smatka* quotes *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

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, *Charles Bagenstose, et. al. v. D.C. Public Schools*, 38 DCR 4154, Slip Op. No. 270 at p. 7, n. 5, PERB Case Nos. 88-U-33 and 88-U-34 (1991); *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). The Board finds that the Complainant's exceptions amount to a mere disagreement with the Hearing Examiner's findings. A mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's findings where the findings are fully supported by the record. See *American Federation of Government Employees, Local 872 v. D.C. Department of Public Works*, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). Furthermore, where the Hearing Examiner's Report and Recommendation is supported by record evidence, exceptions challenging those findings lack merit. See *American Federation of Government Employees. Local 2725 v. District of Columbia Housing Authority*, 45 DCR 4022, Slip Op. No. 544, PERB Case No. 97-U-07 (1998). We find the Hearing Examiner's findings that DHS satisfied its obligation to make available material relied upon for the proposed discipline and that the Complainant was granted the opportunity to be heard prior to the final decision - are reasonable and supported by the record. We therefore adopt these findings.

In the present case, the Board ordered a hearing under the *Iron Workers* case to determine whether the Complainant would have prevailed on the merits of her grievance at arbitration. Thus, the Hearing Examiner stood in the place of the Arbitrator and considered whether the Complainant would have prevailed at arbitration. In order to prevail, the Complainant had to show by a preponderance of the evidence that DHS had no cause for removal. The Hearing Examiner found that DHS had cause to discipline the Complainant and that she did not meet her burden of proof in supporting her defenses to the termination. Nor did she establish that an Arbitrator would have reversed the termination based on procedural grounds or that there were mitigating factors which served as a basis for the Arbitrator to set aside her termination.

The Board finds that Hearing Examiner's findings and conclusions are reasonable and based on the record. The Board hereby adopts the Hearing Examiner's findings that the Complainant has not met her burden of proof in this matter. Therefore, we find that the Complainant would not have prevailed at arbitration. Pursuant to Board Rule 520.14, we adopt the Hearing Examiner's recommendation that there has been no violation of the CMPA in this matter. The Complaint is dismissed with prejudice.

## ORDER[5]

**IT IS HEREBY ORDERED THAT:**

1. The Hearing Examiner's recommendation is adopted in its entirety.

2. The unfair labor practice complaint is dismissed.

3. 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.

September 30, 2009

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[5] This Decision and Order implements the decision and order reached by the Board on February 28, 2008, and ratified on July 13, 2009.

## CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 09-U-32 and 99-U-33 was transmitted via Fax and U.S. Mail to the following parties on this the 30th day of September 2009.

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