Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of State, County and Municipal Employees, District Council 20, Local 2921, AFL-CIO	
Complainant,	PERB Case No. 10-U-49
v.	Opinion No. 1424
District of Columbia Public Schools,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

On August 10, 2010, the American Federation of State, County and Municipal Employees, District Council 20, Local 2921 ("Complainant" or "Union") filed an Unfair Labor Practice Complaint ("Complaint"), alleging that District of Columbia Public Schools ("Respondent," "DCPS," or "Agency") violated D.C. Code § 1-617.04(a)(1) and (5) of the Comprehensive Merit Personnel Act ("CMPA"). Respondent filed an Answer to the Unfair Labor Practice Complaint ("Answer"), denying the allegations and asserting affirmative defenses. (Answer at 2-4).

Respondent filed a Motion to Dismiss Unfair Labor Practice Complaint ("Motion to Dismiss"). Complainant opposed Respondent's Motion to Dismiss and moved the Board for a decision on the pleadings, which the Respondent opposed. On August 12, 2011, the Board denied the Agency's Motion to Dismiss and denied the Union's Motion for Preliminary Relief. *See American Federation of State, County and Municipal Employees, District Council 20, Local 2921, AFL-CIO v. District of Columbia Public Schools*, 59 D.C. Reg. 6526, Slip Op. No. 1111, PERB Case No. 10-U-49 (2012). The Board ordered the Parties to an expedited hearing. *Id.*

On March 21, 2012, a hearing was held before Hearing Examiner Sean Rodgers ("Hearing Examiner"). Both Parties filed post-hearing briefs. On August 3, 2012, the Hearing Examiner issued a Report and Recommendation ("Report") to the Board, in which he found that the Union did not meet its burden of proof that the Agency violated D.C. Code § 1-617.04(a)(1) and (5). (Report at 16). The Hearing Examiner recommended that the Union's Unfair Labor Practice Complaint be dismissed with prejudice. (Report at 24).

On August 14, 2012, AFSCME filed Exceptions with the Board ("Exceptions"); and, on August 29, 2012, DCPS filed an Opposition to the Exceptions ("Opposition").

The Board adopted the Hearing Examiner's Report and Recommendation that the Complaint's allegations regarding an information request were untimely filed. *American Federation of State, County and Municipal Employees, District Council 20, Local 2921 v. District of Columbia Public Schools*, 60 D.C. Reg. 2602, Slip Op. No. 1363, PERB Case No. 10-U-49 (2013). The Hearing Examiner, in determining whether a timely request for impact and effects bargaining occurred, applied a heightened standard that required a "clear" demand for bargaining, which was not consistent with the Board's precedent. *Id.* at 8. The Board remanded to the Hearing Examiner the issue of "whether a proper and timely request to bargain was made by the Union." *Id.*

The Hearing Examiner's Remanded Report and Recommendation ("Remanded Report") is before the Board for disposition.

II. Hearing Examiner's Remanded Report and Recommendation

On remand, the Hearing Examiner examined "whether the Complainant requested bargaining and whether Respondents refused to bargain under the circumstances of this case." (Remanded Report at 2).

The Hearing Examiner reviewed the facts concerning the meetings between the Parties involving DCPS's evaluation system, IMPACT 2.0, and further summarized the facts concerning AFSCME's representative, Michael Reichert's, meeting with DCPS's representative, Mr. McCray, at a June 22, 2010, meeting and the email communication that followed between the Parties, as follows:

> [T]he facts establish that Reichert never demanded to bargain I&E issues and Reichert's testimony is that he did not use the terms "we shall bargain." Furthermore, Reichert's referral of DCPS's representatives to [AFSCME's chief negotiator] Johnson's appointments scheduler, MacIntosh, in e-mail communications for an appointment, is not sufficiently probative to raise the inference that AFSCME demanded to bargain I&E issues concerning IMPACT 2.0. This is particularly true when all Reichert, or any other AFSCME representative, had to do, at any time, was demand to bargain I&E issues concerning IMPACT. Finally, AFSCME provides no PERB precedent supporting the Hearing Examiner's acceptance of the inference that Reichert's communications

> with DCPS representatives constituted a clear and timely demand for I&E bargaining over IMPACT 2.0.

(Remanded Report at 7).

The Hearing Examiner reviewed the record based on the Board's precedent set forth in *International Brotherhood of Police Officers, Local 446 v. District of Columbia General Hospital*, 39 D.C. Reg. 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992) (*IBPO*), and *National Association of Government Employees, Local R3-06 v. D.C. Water and Sewer Authority*, 47 D.C. Reg. 7551, Slip Op. N0. 635, PERB Case No. 99-U-04 (2000) (*NAGE*). For PERB Case No. 10-U-49, the Hearing Examiner found that "there is an absence of facts to show *any* request to bargain, whether general, specific, implied by AFSCME or, possibly, inferred by DCPS." (Remanded Report at 7).

In AFSCME's post-hearing brief, and on a conference call with the Hearing Examiner and opposing counsel, regarding the remanded issues, AFSCME asserted that IMPACT 2.0 was a *fait accompli* and that no request for bargaining was required. (Remanded Report at 8). The Hearing Examiner found that AFSCME's allegation that IMPACT 2.0 was already complete, prior to the Union being able to demand bargaining, was based on a meeting the Parties had to discuss IMPACT 2.0 in November 2009, and that the issue was untimely raised in the August 10, 2010, Complaint. *Id.*

In addition, AFSCME argued that a demand to bargain was futile, because DCPS officials' actions were a blanket refusal to bargain. *Id.* The Hearing Examiner found no factual basis for AFSCME's futility assertion, and found that the facts AFSCME raised arose from the November 2009 meeting, and were untimely raised in the Complaint. *Id.*

The Hearing Examiner recommended that the Complaint be dismissed with prejudice. (Remanded Report at 9).

III. Analysis

The Parties did not file Exceptions to the Remanded Report for the Board's consideration. "Whether exceptions have been filed or not, the Board will adopt the hearing examiner's recommendation if it finds, upon full review of the record, that the hearing examiner's 'analysis, reasoning and conclusions' are 'rational and persuasive.'" *Council of School Officers, Local 4, American Federation of School Administrators v. D.C. Public Schools*, 59 D.C. Reg. 6138, Slip Op. No. 1016 at p. 6, PERB Case No. 09-U-08 (2010).

The Board determines whether the Hearing Examiner's Report and Recommendation is "reasonable, supported by the record, and consistent with Board precedent." *American Federation of Government Employees, Local 1403 v. District of Columbia Office of the Attorney General*, 59 D.C. Reg. 3511, Slip Op. No. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012). 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 (2003).

Pursuant to Board Rule 520.11, "[t]he party asserting a violation of the CMPA, shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Council of School Officers, Local 4, American Federation of School Administrators v. District of Columbia Public Schools*, 59 DC Reg. 6138, Slip Op. No. 1016 at p. 6, PERB Case No. 09-U-08; *Tracy Hatton v. FOP/DOC Labor Committee*, 47 D.C. Reg. 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (1995).

A. Request for I&E Bargaining

To reach the conclusion that AFSCME did not make a timely request for impact and effects bargaining, the Hearing Examiner applied the Board's precedents in *International Brotherhood of Police Officers, Local 446 v. District of Columbia General Hospital*, 39 D.C. Reg. 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992) (*IBPO*), and *National Association of Government Employees, Local R3-06 v. D.C. Water and Sewer Authority*, 47 D.C. Reg. 7551, Slip Op. N0. 635, PERB Case No. 99-U-04 (2000) (*NAGE*). The Hearing Examiner differentiated *IBPO* and *NAGE* from PERB Case No. 10-U-49, because the Parties in *IBPO* and *NAGE* did not dispute that the existence of a request for bargaining. (Remanded Report at 4).

In *IBPO*, the Board held "[a]ny general request to bargain over a matter implicitly encompasses all aspects of that matter, including the impact and effects of a management decision that is otherwise not bargainable." Slip Op. No. 322 at p. 3. In *NAGE*, the Board found that "[n]otwithstanding the lack of clarity in NAGE's demands for negotiations over the reorganization, the Hearing Examiner concluded that, under Board precedent, even a broad, general request for bargaining 'implicitly encompasses all aspects of that matter, including the impact and effect of a management decision that is otherwise not bargainable.'" Slip Op. No. 635 at p. 6. In addition, the Board stated in finding an unfair labor practice that "NAGE made a sufficient and timely request for bargaining on the impact and effects of the reorganization...." *Id.*

The Hearing Examiner, applying the above Board precedents, reviewed the record to find:

> AFSCME made no proper and timely request to bargain regarding the DCPS evaluation process IMPACT 2.0. Further, the Hearing Examiner finds that, based on the *NAGE* precedent, the facts in [PERB Case No.] 10-U-49 do not establish that AFSCME 'made a sufficient and timely request for bargaining on the impact and effects' of IMPACT 2.0. Finally, the Hearing Examiner finds that the facts establish DCPS never refused to bargain because it never received a proper and timely request to bargain from AFSCME.

(Remanded Report at 7).

The question of whether there has been a timely request for impact and effect bargaining is an issue of fact. *National Association of Government Employees, Local R3-06 v. D.C. Water and Sewer Authority*, 47 D.C. Reg. 7551, Slip. Op. No. 635, PERB Case No. 99-U-04 (2000). Here, the Hearing Examiner, applying Board precedent, made a factual determination that a timely request for impact and effects bargaining did not occur. The Board finds that the Hearing Examiner's conclusion is reasonable, supported by the record, and consistent with Board precedent.

B. *Fait Accompli* and Futility Argument

AFSCME argued before the Hearing Examiner on remand that, "even if AFSCME made no proper and timely request for bargaining, because DCPS's decision to implement IMPACT 2.0 was a *fait accompli* and a demand to bargain would be futile, no request to bargain was legally required and DCPS violated the CMPA." (Remanded Report at 8). AFSCME had made the same argument in its post-hearing brief to the Hearing Examiner. *Id.*

The Hearing Examiner found that the factual "basis for AFSCME's *fait accompli* allegation involved events that occurred in the fall of 2009 specifically arising out of a meeting between the Parties on or about November 4. 2009." *Id.* The Hearing Examiner concluded that AFSCME's August 10, 2011, Complaint was untimely in regards to allegations arising from the November 2009 meeting. *Id.*

In addition, AFSCME argued that it was futile to demand bargaining, because by the time the Union learned of the IMPACT 2.0 implementation, IMPACT 2.0 was "set in stone, but even if it was not, DCPS officials determined not to bargain and said so." (Remanded Report at 9). The Hearing Examiner found no factual evidence to support AFSCME's conclusion. *Id.* Further, the Hearing Examiner found that the factual grounds for AFSCME's futility argument were based around the above-discussed November 2009 meeting, which were untimely allegations raised in the August 10, 2011 Complaint. *Id.*

The Union filed its Complaint on August 10, 2011. The Board previously considered the timeliness of the Complaint's allegations, and found that it did not have jurisdiction to consider any allegations of actions taken prior to April 12, 2011. *See American Federation of State, County and Municipal Employees, District Council 20, Local 2921 v. District of Columbia Public Schools*, 60 D.C. Reg. 2602, Slip Op. No. 1363, PERB Case No. 10-U-49 (2013). The basis for the Union's *fait accompli* and futility arguments were found by the Hearing Examiner to have factually occurred during a November 2009 meeting. (Remanded Report at 9).

Board Rule 520.4 provides: "Unfair labor practice complaints shall be filed not later than 120 days after the date on which the alleged violations occurred." Board Rule 520.4 is jurisdictional and mandatory. *Hoggard v. District of Columbia Public Schools*, 43 D.C. Reg. 1297, Slip Op. 352, PERB Case No. 93-U-10 (1996); *see also Public Employee Relations Board v. D.C. Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991). Hence, Board Rule 520.4 does not provide the Board with discretion to make exceptions for extending the deadline for initiating an action. *Id.* As the Union did not file its initial complaint until August 10, 2011, and its allegations pertaining to its *fait accompli* and futility arguments occurred in November 2009,

the Board finds that the Hearing Examiner's conclusions with respect to those arguments are reasonable, supported by the record, and consistent with the Board's precedent.

IV. Conclusion

The Board has reviewed the record, the Hearing Examiner's analysis and conclusions, and relevant Board precedent. The Board adopts the Hearing Examiner's Remanded Report and Recommendation. The Complaint is dismissed with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint is dismissed with prejudice.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEES RELATIONS BOARD

Washington, D.C.

September 26, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-U-49 was transmitted via File & ServeXpress to the following Parties on the 30th of September, 2013.

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