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GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:)

Clarence Mack, Shirley Simmons,)
Hazel Lee and Joseph Ott)

Complainants,)

v.)

Fraternal Order of Police/)
Department of Corrections)
Labor Committee, et al.,)

Respondent.)

PERB Case No. 97-S-01

Ellowese Barganier, et al.,)

and)

Clarence E. Mack,)

Complainants,)

v.)

Fraternal Order of Police/)
Department of Corrections)
Labor Committee, et al.,)

Respondent.)

PERB Cases Nos. 97-S-02
and 95-S-03

Opinion No. 516

DECISION AND ORDER ON
REQUEST FOR PRELIMINARY RELIEF

Complainants Clarence E. Mack, Shirley Simmons and Hazel Lee were the prevailing candidates for the offices of Chairperson, Treasurer and Secretary, respectively, in a Board-ordered election of the Fraternal Order of Police/Department of Corrections Labor

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Committee's (FOP) executive officers in PERB Case 95-S-02.^{1/} Complainant Ott is a FOP member who voted for Complainants Mack, Simmons and Lee. On April 4, 1997, Complainants filed a Standards of Conduct Complaint against the FOP, charging the Respondent with violating the Comprehensive Merit Personnel Act's (CMPA) standards of conduct for labor organization, as codified under D.C. Code § 1-618.3.^{2/} Specifically, the Complainants allege that FOP has unlawfully instituted disciplinary proceedings and actions that resulted in Complainants Lee's and Simmons' removal from their elected office and Complainant Mack's ineligibility to hold his elected office.

The Complainants have requested that the Board grant preliminary relief enjoining FOP from preventing Complainants Mack, Simmons and Lee from holding their respective offices. FOP filed a timely "Opposition to Complainant's Motion for Interim Relief", opposing the request as failing to meet the requirement for granting preliminary relief. FOP generally denies that its actions violate any rights the Complainants have under the CMPA.

D.C. Code § 1-605.2(9) provides the Board with broad powers to "[m]ake decisions and take appropriate action on charges of failure to adopt, subscribe, or comply with the internal or national labor organization standards of conduct for labor organizations". (Emphasis added.) The Board's remedial authority to "take appropriate action" is prescribed under D.C. Code § 1-618.13(b) and includes orders "for appropriate temporary relief or restraining orders."

The criteria the Board employs for granting preliminary relief is prescribed under Board Rule 520.15.

Board Rule 520.15 in pertinent part provides:

^{1/} In PERB Case No. 95-S-03, Opinion 507, the Board certified the results of the election ordered in PERB Case No. 95-S-02 for the office, won by Complainant Mack. The election results for the other executive board offices --which included Complainants Simmons and Lee for the offices of executive secretary and treasurer, respectively-- were certified in PERB Case No. 95-S-02, Slip Op. No. 472.

^{2/} The Complainants incorporated by reference documents and affidavits submitted in support of its Motion for Reconsideration of our Decision and Order in a related case, i.e., PERB Case No. 95-S-03.

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The Board may order preliminary relief. ...
Such relief shall be granted where the Board finds that the conduct is clear-cut and flagrant; or the effect of the alleged unfair labor practice is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, or the Board's ultimate remedy will be clearly inadequate.^{3/}

On the first occasion to consider our authority to grant preliminary relief, the Board held that its authority under Board Rule 520.15 is discretionary. D.C. Council 20, AFSCME, AFL-CIO et al. v. Government of the District of Columbia, et al., 42 DCR 3430, Slip Op. 330, PERB Case No. 92-U-24 (1992). To determine a standard in exercising this discretion, the Board turned to the standard espoused by the U.S. Court of Appeals for the District of Columbia in Automobile Workers v. NLRB, 449 F.2d 1046 (CA DC 1971). There, the Court of Appeals --addressing the standard for granting relief before judgment under 10(j) of the National Labor Relations Act-- held that irreparable injury need not be shown. However, the supporting evidence must "establish that there is reasonable cause to believe that the [NLRA] has been violated, and that remedial purposes of the law will be served by pendente lite relief." Id. at 1051. In those instances where the Board determined that this standard for exercising its discretion has been met, the bases for such relief were restricted to the existence of the prescribed circumstances in the provisions of Board Rule 520.15 set forth above.

Accepting the truth of the matters asserted in the supporting affidavits accompanying the Complainants' request, FOP's actions and conduct form the basis of a standards of conduct for labor organizations violation as codified under D.C. Code § 1-618.3(a)(1).^{4/} The Board's Decisions in two related cases, i.e.,

^{3/} While this criteria is found under our rules for unfair labor practices, we find it equally appropriate for determining whether to exercise our statutory authority to grant such relief to remedy alleged standards of conduct violations.

^{4/} D.C. Code § 1-618.3(a)(1) provides that labor organizations mandate:

"[t]he maintenance of democratic provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of

(continued...)

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PERB Cases Nos. 95-S-02 and 95-S-03, held similar ill-motivated decisions to discipline union members, including the failure to afford due process requirements pursuant to union by-laws, was a violation of this standard of conduct for labor organizations.

Board Rule 520.15 requires that requests for preliminary relief be accompanied by affidavits or other evidence supporting the request. While the Complainants have provided such evidence, FOP's has not. It merely consists of a general denial of any basis for the requested relief and a more specific Answer denying the Complaint allegations. Neither the Response nor the Answer is supported by conflicting affidavits or any other form of evidence. When affidavits and other documented evidence submitted establish the alleged violation and the criteria warranting such relief under Board Rule 520.15 is met, we have granted the requested preliminary relief. See, IBPO, Local 445 v. D.C. Dept of Administrative Services, 43 DCR 3553, Slip Op. No. 382, PERB Case No. 94-U-24.^{5/}

We now turn to the criteria for such relief under Board Rule 520.15. Given the magnitude of the claim, i.e., the alleged unlawful expulsion of duly elected officers, the remedial purposes of the law would be served by pendente lite. The Complainants' terms --already abbreviated by Board proceedings resolving related prior disputes-- continues to elapse and will come to an end in less than a year. Such relief not only redresses the Complainants

⁴(...continued)

the organization, to fair and equal treatment under the governing rules of the organization, and to fair process in disciplinary proceedings".

^{5/} Under these circumstances, the Board has denied requests for preliminary relief when the respondent has provided conflicting evidence that "leave a genuine issue of fact as to whether there is reasonable cause to believe that [the respondent's] action and conduct rose to the level of [the alleged violation]." AFGE, Local 2725, AFL-CIO v. D.C. Housing Authority, Slip Op. 486 at p. 2, PERB Case No. 96-U-26 (1996). See also, Washington Teachers' Union, Local 6, AFT, AFL-CIO v. D.C. Public Schools, Slip Op. No. 478, PERB Case No. 96-U-18 (1996) and Doctors' Council of D.C. v. D.C. Dept of Human Services, Slip Op. No. 462, PERB Case No. 96-U-06 (1996). However, as noted in the text, FOP has submitted no evidence at all. Therefore, no genuine issue of fact exists with respect to the evidence supporting the violation alleged.

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but would also extend to the members who duly elected them. This same relief pending the full extent of the Board's processes would be inadequate under these time sensitive circumstances.

The irregularities leading to the removal of Complainants Mack, Simmons and Lee from their respective offices appear clear cut and flagrant. FOP acknowledges that Complainants Lee and Simmons were not afforded any "right to cross-examine their accusers and to examine the documentary evidence submitted against them" during a November 15, 1996 hearing held to assess charges against Complainant Lee. Ans. at para. 24. FOP states that although the hearing committee was formally convened to hear evidence of charges against Complainant Lee, testimony and evidence was received on charges against Complainant Simmons that was assigned to a different committee. Ans. at para. 23. The results of the first hearing and the need for the second hearing committee to hear and assess evidence in addition to the evidence submitted in the first hearing is never made clear by FOP.

Moreover, as executive board officers, Complainants Lee and Simmons could only be removed from their office by impeachment. Article VII, Sec. 7.6. of FOP's by-laws provides that executive action to remove an officer cannot be achieved without a two-thirds majority approval of the membership. FOP neither asserts nor provides any evidence that this requirement was met. FOP contends that impeachment proceedings were never initiated to remove Complainants Lee and Simmons from office but rather Simmons and Lee were rendered ineligible to continue in their office as a result of their expulsion from union membership. Article XII, Sec. 12.13 of FOP's by-laws deems the result as effectively the same. As such, Complainants Lee and Simmons could not be removed as executive officer unless the impeachment requirements under FOP's by-laws are met.

In view of the above the alleged violations and its impact meets two of the four disjunctive criteria prescribed by Rule 520.15. The alleged standards of conduct violations appear "clear cut and flagrant" and the effect of the alleged violation is wide spread to the extent that it thwarts the will of those employee members who voted for Complainants Mack, Lee and Simmons and the democratic will of all members to properly remove elected officers in accordance with their by-laws. The further requirement that "the Board's ultimate remedy be clearly inadequate" is also met. For very little would remain of the Complainants' original 2-year terms --which is set to end in March 1998-- if the requested relief is not afforded until the conclusion of Board proceedings.

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With respect to Complainant Mack, but for the time required to conduct the proceedings and render a decision in PERB Case No. 95-95-S-03, he was eligible to assume his duly elected office of chairperson prior to FOP's promulgation of the instant charges, expelling him once again. We find the advantage taken by the current FOP executive board of the time necessary to render our decision to disregard required democratic procedures afforded an executive officer, constitutes interference with the Board's processes as prescribed under Board Rule 520.15. In this regard, any disciplinary action promulgated against Complainant Mack, in view of our finding in Slip Op. No. 507 that he was eligible to hold office, should have conformed with FOP's by-law requirements applicable to executive officers. The current administration of FOP clearly failed to do so with respect to Complainant Mack by rushing to judgement new disciplinary charges before the Board determined the validity of previous charges, a determination essential to his ability to assume office.^{6/} It is clear to us

^{6/} During the campaign in the Board ordered election of the current administration, Complainants Simmons and Lee, along with Mr. Butler, ran as a team with Complainant Mack. See, PERB Case No. 95-S-02. Affidavits and other documents establish that the alleged violative actions against Complainants Mack, Simmons and Lee followed a verbal and physical altercation between Complainant Mack and Acting Chairperson Carlton Butler in September 1996. A report prepared by DOC management concluded that the altercation resulted from a difference of opinion over union business. Following this incident Complainants Simmons and Lee maintained their support for Complainant Mack.

Shortly thereafter, on October 10, 1996, FOP commenced the disputed charges against Complainants Simmons and Lee. Although memorandums from Acting Chairperson Butler to Complainants Simmons and Lee indicate that he was aware of the disputed new grounds for expelling Complainant Mack as early as October 9, 1996, charges against Complainant Mack were not brought until February 20, 1997. This delay appears to have been due in part to FOP's need to first amend its by-laws to permit the institution of membership proceeding against Complainant Mack. While FOP states that this amendment to its by-laws occurred in November 1996, the Complainants' contention that this occurred in January 1997, appears consistent with FOP's commencement of proceedings against Complainant Mack in January. An interview by DOC officials of Mr. Butler held as late as January 1997, recommended that a cease and desist order remain in effect due to the animosity still maintained by Mr. Butler against Mr. Mack stemming from their September 1996

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that the intent of the current administration of FOP was to avoid any obligation to afford Complainant Mack the rights he would have held as an executive officer.

Finally, we note that Complainant Mack has filed a Motion for Reconsideration and Motion for Emergency Interim Relief stemming from our Decision and Order, Slip Op. 507, in consolidated PERB Cases Nos. 95-S-02 and 95-S-03. Complainants Simmons and Lee also filed a Motion to Intervene in that case. Complainant Mack's Motions in that case essentially sought the relief we now grant herein. In view of our disposition in this case, we find the Motions filed by the Complainants in PERB Cases Nos. 95-S-02 and 95-S-03 are moot and are therefore dismissed. With respect to the instant Complainant, we shall process it as expeditiously as agency funds permit in accordance with Board Rule 501.1.

ORDER

IT IS HEREBY ORDERED THAT:

1. The request for preliminary relief is granted as follows:
2. Based on the violations of the standards of conduct for labor organizations alleged in the Complaint in PERB Case No. 97-S-01, Complainants Shirley Simmons and Hazel Lee are forthwith reinstated to their elected board office of executive secretary and treasurer, respectively, of the Fraternal Order of Police/Department of Corrections Labor Committee (FOP),

⁶(...continued)
incident.

Running concurrently with this timeline were our proceedings in PERB Case No. 95-S-03, determining Complainant Mack's eligibility to assume his elected office of chairperson held in an acting capacity by Mr. Butler. The hearing concluded on September 19, 1996, the Hearing Examiner's report and recommendation was issued on January 20, 1997, and finally, the Board issued its Decision and Order in Slip Op. No. 507 on March 12, 1997. Referencing Opinion 507, FOP informed Complainant Mack on March 19, 1997, that his expulsion based on charges in PERB Case No. 95-S-03 was rescinded. However, Complainant Mack was further advised that he was being denied reinstatement based on their findings on subsequent charges, thereby rendering him ineligible to assume office. The Complaint in PERB Case No. 97-S-01 and the Motions in PERB Case No. 95-S-03 ensued.

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pending our disposition of the Complaint in PERB Case No. 97-S-01.

3. Based on the alleged violations referenced in paragraph 2 of this Order, FOP is enjoined from preventing Complainant Clarence E. Mack from assuming his elected board office of FOP chairperson and Mr. Mack is hereby eligible to assume the office of chairperson, pending our disposition of the Complaint in PERB Case No. 97-S-01.
4. FOP shall cease and desist from (1) violating the standards of conduct for labor organizations in any like or related manner or (2) taking any retaliatory action or reprisals against former or current officers of FOP for acts or conduct arising from PERB Cases Nos. 95-S-02, 95-S-03 and 97-S-01, pending our disposition of the Complaint in PERB Case No. 97-S-01.
5. The Request for Interim Emergency Relief, Motion for Reconsideration and Motion to Intervene filed in PERB Case No. 95-S-02 and 95-S-03, Slip Op. No. 507 are dismissed as moot in view of our disposition of the Request for Preliminary Relief in PERB Case No. 97-S-01.
6. As soon as agency funds permit, a Notice of Hearing shall issue seven (7) days prior to the scheduled date of the hearing.
7. Following the hearing, the designated hearing examiner shall submit a report and recommendation to the Board not later than twenty (21) days following the conclusion of closing arguments (in lieu of post-hearing briefs).
8. Parties may file exceptions and briefs in support of the exceptions not later than seven (7) days after service of the hearing examiner's report and recommendation. A response or opposition to exceptions may be filed not later than five (5) days after service of the exceptions.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

May 16, 1997

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 95-S-02, 95-S-03 and 97-S-01 was faxed and/or mailed (U.S. Mail) to the following parties on this, the 16th day of May, 1997.

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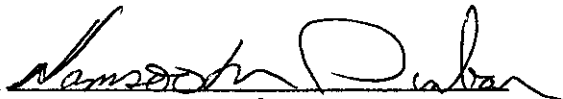
Certificate of Service
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