

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any formal errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:)

Ellowese Barganier)
and Ellsworth Alexander,)

Complainants,)

v.)

Fraternal Order of Police/)
Department of Corrections)
Labor Committee,)

Respondent.)

PERB Case No. 95-S-02
Opinion No. 464

DECISION ^{1/}

On May 30, 1995, counsel, on behalf of Ellowese Barganier and Ellsworth Alexander (Complainants), filed a Standards of Conduct Complaint against the Fraternal Order of Police/ Department of Corrections Labor Committee (FOP). Complainants charged that FOP failed to comply with the Comprehensive Merit Personnel Act's (CMPA) standards of conduct for labor organizations as codified under D.C. Code Sec. 1-618.3(a)(1) and (4) by: (1) treating a letter drafted by Ms. Barganier as a resignation of her office as FOP Chairperson; (2) leaving her name off the ballot in the special election to fill the office of Chairperson after she had been properly nominated and (3) improperly conducting the special election and tallying the ballots. Complainant Barganier sought reinstatement to her office. In the alternative, Complainants sought to have the special election voided and a rerun election with Barganier on the ballot. FOP denied that it had failed to comply with any of the standards of conduct for labor organizations. FOP further contends that the Board lacks jurisdiction over the issue of Barganier's resignation.

The matter was referred to a hearing examiner and was heard

^{1/} In view of the time sensitive nature of this case, the Board issued its Order on February 16, 1996, and advised the parties that this Decision would follow.

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on July 10, 25 and 26 and September 6 and 7, 1995. The Hearing Examiner issued his Report and Recommendation (R&R) on January 19, 1996 (attached). ^{2/}

Report and Recommendation

1. Barganier's Resignation - The Hearing Examiner concluded that the CMPA's standards of conduct for labor organizations did not extend to the propriety of FOP's determination that Barganier had effectively resigned. He further found that even if the standards of conduct apply to Barganier's resignation, the consent order that Barganier entered into with Respondent to settle a matter filed in the D.C. Superior Court is "tantamount to an acknowledgement that she had resigned." (R&R at 21.) The Hearing Examiner found the consent order to be res judicata with respect to this Complaint allegation. Despite these rulings, the Hearing Examiner proceeded to receive evidence and make findings that Complainant Barganier had effectively resigned. Id. The parties filed no exceptions to these findings and conclusions. Notwithstanding the absence of exceptions, we find that the Board has jurisdiction to consider a union member's resignation from office where, as we find here, the resignation is part of the history or course of conduct of an alleged violation that is clearly within the Board's jurisdiction.

2. Barganier's Disqualification as an Eligible Candidate - On the issue of the propriety of FOP's action in denying Barganier a place on the special election ballot, the Hearing Examiner, finding an absence of expressed guidance under the CMPA, adopted the Federal standard for assessing the propriety of a union's handling of such internal union matters. The Hearing Examiner concluded that FOP bore the burden of demonstrating that its actions were reasonable under the circumstances. (R&R at 23.) Under this standard, the Hearing

^{2/} The hearing examiner who presided over this matter on July 10, 1995, recused herself after it became known before the hearing was to commence that Complainant Barganier would be represented by counsel whom the hearing examiner knew.

On July 25, 1995, Complainant Alexander filed a separate amended Complaint containing allegations that were partially in conflict with Complainant Barganier. Essentially, Alexander took the position that Barganier had resigned through her draft letter; however, he alleged that she was improperly excluded as a candidate in the special election. Alexander had nominated Barganier as a candidate in the special election.

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Examiner found the manner in which FOP applied its bylaw to disqualify Barganier's candidacy could not be deemed reasonable on any basis. (R&R at 25.) The Hearing Examiner's conclusion, in the main, turned on two critical findings.

The bylaw in question, i.e., Section 5.4, provides that "[a]ny member of the bargaining unit [in good standing] shall be eligible for office in the Labor Committee, provided that such member has not opposed the interest of the Labor Committee on behalf of a rival labor organization within the past year." (emphasis added.) The Hearing Examiner found Barganier's actions -- holding herself out as the Chairperson of FOP following her resignation and exercising authority in that capacity with members that remained loyal to her -- did not constitute action on behalf of a rival labor organization. Rather, Barganier's actions were "indicative of classic internal union disputes" and were a challenge for control of FOP not a rival union. Id. ^{3/}

The Hearing Examiner further found that the manner in which FOP made its decision to disqualify Barganier from running for office violated FOP bylaws by depriving Barganier of the opportunity to know the identity of her accusers and denying her a fair hearing. The Hearing Examiner discredited the reasons given by the Chair of the Election Committee for disqualifying Ms. Barganier since they were deemed uncorroborated hearsay. Specifically, when questioned, the Chair was unable to support them as consistent with FOP bylaws. The Hearing Examiner concluded that FOP's failure to provide Barganier an opportunity to defend herself pursuant to FOP bylaws rendered her disqualification invalid. (R&R at 24.) The Hearing Examiner further concluded that since Barganier was never charged, in accordance with FOP bylaws, with violating their bylaws, she remained a member in good standing entitled to participate in the affairs of that organization, as set forth under D.C. Code § 1-618.3(a)(1). (R&R at 26.)

While not ruling that the bylaw itself was inconsistent with standards of conduct requirements, the Hearing Examiner found that the manner in which FOP used the bylaw against Complainant Barganier denied her "fair and equal treatment" and thereby] ✓

^{3/} FOP's defense of the manner it determined that Barganier was not eligible to run for office constitutes a clear waiver of the opportunity FOP had to make this determination in accordance with its bylaws, i.e., through due process. As this issue is inextricably a part of the determination as to whether or not there was a standards of conduct violation, the Hearing Examiner's determination of this issue is properly made within this proceeding.

violated the applicable standards of conduct. Furthermore, the Hearing Examiner concluded that by keeping a duly nominated candidate off the ballot for the special election, FOP deprived Complainants and the FOP membership of a fair election in violation of D.C. Code § 1-618.3(a)(4).] 11/20

3. Claims of Election Improprieties - Finally, Complainant Alexander claimed that FOP deprived him and other members in good standing of a fair election by not providing them ballots. The Hearing Examiner found that there was no evidence that other union members in good standing did not receive ballots. With respect to Complainant Alexander, the Hearing Examiner found his ballot would not have been determinative of the special election. Therefore, he dismissed this allegation for lack of probative evidence. (R&R at 27.)

The Hearing Examiner's remedial recommendation provided that the special election be set aside and a rerun election be conducted, with Complainant Barganier's name appearing on the ballot. Said rerun election should be under the auspices of the Board and conducted by a neutral body at the expense of FOP. He further recommended that a standard Board Notice to Employees be posted and that Complainant Alexander's request for costs and attorney fees be denied.

Based on these findings, conclusions and recommendations, FOP filed exceptions to the Report and Recommendation. Complainant Alexander also filed exceptions which we address in the margin below. ^{4/} No exceptions were filed by Complainant

^{4/} Complainant Alexander filed two exceptions to the Hearing Examiner's Report and Recommendation. The first exception does not take issue with the Hearing Examiner's findings, conclusions or recommendations. Rather, counsel for Complainant Alexander seems to question the accuracy of the Hearing Examiner's account of the extent of each Complainant's contribution in presenting the claims upon which the Hearing Examiner ultimately ruled. This objection to the Hearing Examiner's summation of the proceedings does not present a proper exception to the findings of fact or the legal conclusions reached with respect to the Complaint allegations.

The second exception objects to the Hearing Examiner's recommendation that counsel's request for costs and attorney fees be denied. Counsel believes the sole reason for this is the Hearing Examiner's failure to see the value and extent of his contribution to the success of the Complainants' action. Whatever the extent of Complainant Alexander's contribution to the outcome of the case, attorney fees are not considered costs and are,
(continued...)

Barganier. ^{5/}

FOP's Exceptions

FOP asserts that D.C. Code § 1-618.3 applies only to regular elections. FOP's contention turns on the introductory language of Section 1-618.3(a)(1) which provides for "[t]he maintenance of democratic provisions for periodic elections" (emphasis added.) FOP argues that since the disputed election was a special election, it is not subject to this standard of conduct provision. FOP's contention, however, turns on a partial reading of Section 1-618.3(a)(1), which provides, in total, as follows:

The 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 the organization, to fair and equal

⁴(...continued)
therefore, not recoverable under the CMPA. See, University of the District of Columbia Faculty Association v. University of the District of Columbia, 38 DCR 2463, Slip Op. 272, PERB Case 90-U-10 (1990).

With respect to costs, we have held that D.C. Code § 1-618.13 permits the award of costs where required in the interest of justice. See, American Federation of State County and Municipal Employees, D.C. Council 20, Local 2776, AFL-CIO v. D.C. Dep't of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). The principles governing the claims on which the Complainants prevailed were not well settled. As the Hearing Examiner correctly observed, some of the issues presented were matters of first impression for the Board. (R&R at 18.) Given these factors, the awarding of costs would not be in the interest of justice. We, therefore, deny this exception.

^{5/} On February 13, 1996, however, counsel for Complainant Barganier filed a Motion requesting that the Board hold a special meeting to consider the matter and issue an order restraining the Respondent from proceeding with its scheduled March 1996 regular election prior to the Board's Decision and Order in this proceeding. A special meeting was unnecessary since the Board had placed this matter on the agenda for its regular monthly meeting scheduled for February 14, 1996. The remainder of Complainant's request was obviated by our Order issued in this proceeding on February 16, 1996, setting aside the special election and directing that a rerun election be merged with the regular election under the Board's supervision.

treatment under the governing rules of the organization, and to fair process in disciplinary proceedings;

The provision actually provides two standards of conduct. The first is for "periodic elections to be conducted subject to recognized safeguards" and the second is for "provisions defining and securing the right of individual members [a] to participate in the affairs of the organization, [b] to fair and equal treatment under the governing rules of the organization, and [c] to fair process in disciplinary proceedings". By failing to comply with fundamental principles of due process when FOP disqualified Barganier, as provided under its bylaws, the Hearing Examiner found that FOP failed to secure the rights of Barganier to fair and equal treatment under the governing rules of FOP. This is the second part of these standards of conduct which has its own force and effect.

The Hearing Examiner's conclusion that FOP's actions violated the standards of conduct was based also on the requirement of "fair elections" under Section 1-618.3(a)(4). While it may be arguable that the intent of the term "periodic election" in Section 1-618.3(a)(1) limits this standard of conduct to regular elections, this argument is not persuasive with respect to Section 1-618.3(a)(4), which makes no reference to the type of elections that are required to be fair. In our view, these standards extend to FOP's actions in determining Barganier's eligibility to participate in the special election, which is clearly part of the affairs of the FOP labor organization.^{6/}

FOP next takes exception to the Hearing Examiner's recommendation that the special election be set aside. FOP claims that by invalidating the special election in which its Chairperson was elected, official actions of the Chairperson from the time he took office would be undermined. FOP asserts that this would lead to further disruption and litigation by litigious bargaining unit members. FOP's prediction presents no more than the fallout that often occurs when rectifying the consequences of

^{6/} There is no need to resort to Federal statutes and rationale, as FOP urges, in analyzing the scope of this statutory provision of the CMPA since Section 1-618.3(a)(4) can stand alone and its meaning is plain and unambiguous. We further note, as the Hearing Examiner observed, that FOP's breach of this standard of conduct not only affected Barganier's rights directly but also the rights of any member who was deprived of the opportunity to vote for Barganier because she was wrongly precluded from running. (R&R at n. 26.)

violative conduct. We will not let stand a state of affairs resulting from statutory violations simply because the violative act or conduct is not immediately remedied at the time it occurs.^{7/} FOP provides no extraordinary grounds for dispensing with this relief or an appropriate alternative. Respondent, by virtue of its violative acts, not the relief afforded, is directly responsible for any potential internal disruption caused by setting aside the special election.

We note, however, that Title IV of the Labor-Management Reporting Disclosure Act (LMRDA) of 1959, 29 U.S.C. § 482(a) provides, in our view, some applicable guidance with respect to the status of actions taken by the current Chairperson when the special election results for that office have been set aside. Section 482(a) provides that in the event of a challenged election, "pending a final decision thereon... in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide." We shall follow this principle as a matter of common sense.

Next, FOP states that under its bylaws, the next regular election for officers, including Chairperson, will be conducted by March 30, 1996. FOP contends that a rerun of the special election will be moot if not conducted before March 30, 1996. FOP further contends that even if a Board-ordered election could be held before the scheduled regular election, the practical effect of that election would be no different than if Complainant Barganier, who is now eligible to run for office, ran in its next regularly scheduled election. FOP claims that the proximity of the Board-ordered election to its regular election would create chaos and confusion.

While FOP raises some practical concerns, allowing the special election to stand would allow members to gain office as the beneficiary of statutory violations.^{8/} In this regard,

^{7/} Cf., Wirtz v. Local 153, Glass Bottle Blowers Association, 389 U.S. 463 (1968) (removing the "cloud" on an incumbent's title to office is paramount in remedying a standards of conduct violation with respect to a challenged election.)

^{8/} Cf., Dep't of Labor (Brock) v. Carpenters Dist. Council, 653 F. Supp 289 (E.D. Pa. 1987) (under remarkably similar facts, setting aside an internal union presidential election and ordering a new election as soon as practicable was held to be "the only appropriate remedy when the union council's violation under Section 401(g) of the Labor-Management Reporting and Disclosure Act may (continued...)

FOP's concerns fail to address the Board's mandate to effectuate the purposes of the CMPA, e.g., the standards of conduct of labor organizations.

To minimize disruption and avoid any confusion by members, we shall order that only the regular election be held. Nevertheless, as recommended by the Hearing Examiner, the election shall be under the supervision of the Board and conducted by a neutral third party at FOP's expense. On the ballot for Chairperson, Complainant Barganier shall be added to the slate of candidates that existed in the special election and the current Chairperson shall not be viewed or reflected as the incumbent of that office.

Finally, FOP asserts that the Hearing Examiner incorrectly applied the burden of proof regarding FOP's interpretation of its bylaws. FOP states that since the CMPA is "devoid of substance regarding groundrules upon which a labor organization may lawfully exclude members from running for office", resort must be made to the approach utilized in the Federal sector. Insofar as a bylaw is not "inconsistent with the Act", FOP argues that a union's interpretation of that statute should be accepted unless clearly unreasonable. (Excep. at 9.) Although the CMPA may not provide detailed rules for applying the bylaws and rules of labor organizations, the CMPA clearly provides a standard that bylaws and any other governing rules must meet.

As discussed above, Section 1-618.3(a)(1) requires that the bylaws of labor organizations provide "fair and equal treatment under the governing rules of the organization." In finding a violation, the Hearing Examiner did not rule that the bylaw in question, i.e., Section 5.4, was unreasonable. Rather, he found the manner in which it was applied to Barganier violated this standard of conduct. (R&R at 23.) While FOP's bylaw, i.e., a "governing rule[] of the organization", may arguably be reasonable, as discussed previously, the Hearing Examiner found that FOP did not afford Barganier "fair and equal treatment" in determining that Barganier's actions satisfied the disqualification-to-run-for-office proviso of Section 5.4 of its bylaws. The Hearing Examiner's finding that FOP ignored its own applicable due process bylaws supports the finding of a violation of this standard of conduct. Any contention by FOP that it need not accord its members due process under its bylaws to determine

⁸(...continued)

have affected the outcome despite the fact that the union's next regularly scheduled election was impending.) Barganier's improper exclusion from the special election ballot clearly could have affected the outcome of the election.

whether or not to deprive members of what is otherwise a membership right is clearly unreasonable.^{9/} Based on the record evidence, the Hearing Examiner properly concluded FOP did not treat Barganier fairly by failing to extend its due process bylaws to Barganier when it disqualified her from running in the special election.

In view of the above, Respondent's and Complainant Alexander's Exceptions are denied. We adopt the findings and conclusions of the Hearing Examiner, to the extent consistent with the discussion above, that Respondent violated D.C. Code § 1-605.2(9) by its failure to comply with the standards of conduct for labor organizations as provided under D.C. Code § 1-618.3(a)(1) and (4). Furthermore, we adopt the Hearing Examiner's recommended remedy as modified in our Order (previously issued), including a denial of Complainant Alexander's request for costs and attorney fees.

THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.
March 7, 1996

^{9/} FOP asserts that "nothing in the Labor Committee's Bylaws requires that a determination of eligibility to run for office be predicated upon a finding of guilt in a disciplinary proceeding." (Except. at 11.) Article XII, entitled Discipline, Sec. 12.1 provides that "[a]ny member who shall violate any provisions of the Charter, these By-laws, or who shall be guilty of conduct detrimental to the LABOR COMMITTEE (sic) or its purposes, or reflecting discredit upon it, shall be subject to expulsion, suspension, disqualification from holding office, removal from office, or reprimand." (emphasis added.) Thus, FOP's own bylaw defines FOP's action of disqualifying Barganier for violating a bylaw as disciplinary. If FOP decides that such a sanction under Section 12.1 is warranted, Section 12.4 requires that an accused member be notified of all charges and Section 12.6 requires that a hearing committee be empaneled to rule on the charges.

FOP also asserts that notwithstanding the Hearing Examiner's perception otherwise, FOP officers "viewed Ms. Barganier as a direct and immediate threat to the daily operations and the very existence of the Labor Committee." (Except. at 10.) The very fact that Complainant Barganier insisted that she had not resigned and resorted to FOP's election procedures to regain office within FOP, however, supports the Hearing Examiner's finding that Barganier's actions reflected an internal struggle for control within FOP, not an outside threat to its existence. Moreover, FOP does not state how its perceptions of Barganier's actions dispenses with any obligation to comply with due process obligations under its bylaws.

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:)

Ellowese Barganier)
and Ellsworth Alexander,)

Complainants,)

v.)

Fraternal Order of Police/)
Department of Corrections)
Labor Committee,)

Respondent.)

PERB Case No. 95-S-02
Opinion No. 464

ORDER

In view of the time sensitive posture of this case the Board has decided to issue its remedial Order now. A Decision will follow. The Board, having considered the parties' exceptions to the Hearing Examiner's Report and Recommendation, hereby denies the exceptions and adopts the recommended order of the Hearing Examiner as modified below.

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police/Department of Corrections (FOP/DOC) Labor Committee, and its officers and agents shall cease and desist from misapplying the FOP/DOC bylaws to disqualify its members as candidates for union office and to refrain from otherwise violating the Comprehensive Merit Personnel Act (CMPA) standards of conduct for labor organizations as codified under D.C. Code § 1-618.3(a)(1) and (4).

2. The FOP/DOC Labor Committee shall cease and desist from failing to adopt, subscribe, or comply with the standards of conduct for labor organizations prescribed under the CMPA in any like or related manner.

3. The results of the special election for the position of FOP/DOC Chairperson that was conducted in April 1995 are hereby set aside.

Order

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4. Any action previously taken by the FOP/DOC Election Committee with respect to the holding of the regular election scheduled to be held by March 30, 1996, shall be null and void until considered and approved by the Board and/or the neutral third party administering the election as directed pursuant to paragraph 5 of this Order. The official ballot shall include Complainant Ellowese Barganier as a candidate and shall not reflect any incumbency status for any candidate who was elected as a result of the special election set aside in paragraph 3 of this Order.

5. The regular election that is to take place by March 30, 1996, will be conducted under the supervision of the Public Employee Relations Board (Board) and administered by a neutral third party designated by the Board with the expenses of such election to be borne solely by the FOP/DOC Labor Committee.

6. The Respondent shall forthwith (not later than 3 days) from the service of this Order, post a Notice to FOP members stating that the Board has found that said Respondent has violated the standards of conduct for labor organizations under the CMPA by misapplying the FOP/DOC bylaws to wrongfully disqualify Ellowese Barganier as a candidate for the office of Chairperson and that the Board has therefore set aside the results of that election and has ordered that the regular election be conducted in accordance with paragraph 5 of this Order. This Notice to Members shall be conspicuously displayed on all bulletin boards where notices to members are customarily posted for thirty (30) consecutive days and/or until the completion of the regular election in accordance with this Order.

7. The Respondent shall notify the Board, in writing, within fourteen (14) days from the issuance of this Decision and Order, that the Notice to Members has been posted accordingly.

8. Complainant Alexander's request that the FOP/DOC Labor Committee be ordered to pay for the costs and attorney fees he incurred in pursuing this proceeding is denied.

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

February 16, 1996



Public
Employee
Relations
Board

Government of the
District of Columbia



415 Twelfth Street, N.W.
Washington, D.C. 20004
[202] 727-1822/23
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NOTICE

TO ALL EMPLOYEES REPRESENTED BY THE FRATERNAL ORDER OF POLICE/DEPARTMENT OF CORRECTIONS LABOR COMMITTEE (FOP/DOC) AT THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS: THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 464, PERB CASE NO. 95-S-02.

WE HEREBY NOTIFY our members that the Public Employee Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL cease and desist from misapplying the FOP/DOC bylaws to disqualify its members as candidates for union office and to refrain from otherwise violating the Comprehensive Merit Personnel Act (CMPA) standards of conduct for labor organizations as codified under D.C. Code § 1-618.3(a)(1) and (4).

WE WILL NOT in any like or related manner fail to adopt, subscribe, or comply with the standards of conduct for labor organizations prescribed under the CMPA.

Fraternal Order of Police/
Department of Corrections
Labor Committee,

Date: _____ By: _____
(Chairperson)

This Notice must remain posted for thirty (30) consecutive days from the date of posting and/or until the completion of the regular election, whichever is later. The Notice must not be altered, defaced or covered by any other material.

If employees have any questions concerning the Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 415-12th Street, N.W. Room 309, Washington, D.C. 20006. Phone 727-1822.