Government of the District of Columbia

Public Employee Relations Board

In the Matter of:	
Thomas C. Brown,	
Complainant,	
v.	PERB Case No. 10-U-34
District of Columbia Public Schools, Division of Transportation,	Opinion No. 1108
and	
American Federation of State, County and Municipal Employees, District Council 20, Local 1959,	
Respondents.	

DECISION AND ORDER

I. Statement of the Case

On May 19, 2010, Thomas D. Brown ("Complainant"), filed an Unfair Labor Practice Complaint ("Complaint") against the District of Columbia Public Schools, Division of Transportation ("Agency" or "DCPS") and the American Federation of State, County and Municipal Employees, District Council 20, Local 1959 ("Union" or "Local 1959").[1] . The Complainant alleges that the Agency violated § 1-617.04 of the CMPA by refusing to reinstate the Complainant and the Union violated the CMPA by refusing to arbitrate the Complainant's termination. (See Complaint at p. 26). The Complainant

[1] Collectively, the Agency and the Union are referred to as the "Respondents".

alleges that he discovered for the first time on January 19 and January 20, 2010, that the Union did not file a grievance on his behalf. (See Complaint at p. 20, # 80). The Complainant requests that the Board order that he be reinstated with back pay and benefits; that his representative be reimbursed for all reasonable fees and costs; and that the Respondents pay monetary damages equal to lost pay. (See Complaint at p. 25).[2] On June 24, 2010, the Complainant filed a "Supplement to His Complaint" requesting that the Board grant preliminary relief pursuant to Board Rule 520.15, and that the Board exercise its authority under Board Rule 520.7[3] and that the allegations against the Union are admitted a true.[4]

After requesting and being granted an extension of time, the Agency filed a document styled "First Respondent's Answer to the Wrongful Discharge, Employment Discrimination by Way of Public Policy, Breach of Contract, and Unfair Labor Practice Complaint" ("Answer") on July 8, 2010, denying any violation of the CMPA. The Agency asserted several affirmative defenses: (1) The Board's Executive Director previously issued an administrative dismissal on September 30, 2008 and the Board dismissed Mr. Brown's Motion for Reconsideration. The Board found that the complaint in that case was untimely filed.[5] (See Answer at pages 28-29). (2) The present

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[2] In a previous case filed by Mr. Brown, he alleged that the Respondents violated § 1-617.04 of the CMPA by: (1) terminating Complainant's employment in October 2006 and (2) failing to reinstate him as required by a February 2007 "verbal [settlement] agreement". In addition, the Complainant asserted that Local 1959 violated D.C. Code § 1-617.04 (2001 ed.) by "refusing to arbitrate [his] termination and subsequent reinstatement to . . . employment as a transportation driver with the DCPS Division of Transportation." See *Thomas C. Brown v. District of Columbia Public Schools, Division of Transportation and American Federation of State, County and Municipal Employees, District Council 20, Local 1959*, -DCR-, Slip Op. No. 983 at p. 1, PERB Case No. 08-U-75 (September 30, 2009).

[3] Board Rule 520.7 provides as follows: "A respondent who fails to file a timely answer shall be deemed to have admitted the material facts alleged in the complaint and to have waived a hearing. The failure to answer an allegation shall be deemed an admission of that allegation."

[4] The Union did not file an Answer to the Complaint in this matter.

[5] The Executive Director determined that the September 17, 2008 filing exceeded the 120-day filing requirement in Board Rule 520.4. (See -DCR-, Slip Op. No, 983, PERB Case No. 08-U-75 September 30, 2009); Sept. 30, 2008 letter at p. 2). The Executive Director noted that "Board Rules governing the initiation of actions before the Board are jurisdictional and mandatory. As such, they provide the Board with no discretion or exception for extending the deadline for initiating an action." See, *Glendale Hoggard v. District of Columbia Public Employee Relations Board,* 655 A.2d 320, 323 (D.C. 1995) and *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991). Moreover, the Board has held that a Complainant's ignorance of Board Rules governing [the Board's] jurisdiction over [unfair labor practice] complaints provides no exception to [the Board's] jurisdictional time limit for filing a complaint." *Jackson and Brown v. American Federation of Government Employees*, Local 2741, AFL-CIO, 48 DCR 10959, Slip Op. No. 414 at p. 3, PERB Case No. 95-S-01 (1995). (Sept. 30, 2008 letter at p. 2). In addition, the Executive Director determined that "[n]othwithstanding its untimeliness, the ... Complaint [did] not contain allegations which [were] sufficient

Complaint states in paragraphs 8-11 that the allegations occurred on September 29, 2006 and yet this Compliant was filed on May 19, 2010, beyond the 120 day filing limitation. (See Answer at pages 30-31). (3) The Complainant fails to state a claim for which relief can be granted, Counts 1-4 ... do not fall within any section of § 1-617.04(a)(1) through (5). (See Answer p. 31). (4) The Complainant has not alleged that he was discriminated against because of union animus, therefore the Board lacks subject matter jurisdiction. (See Answer p. 32).

The Complainant filed a "Reply to First Respondent's Answer..." ("Response") alleging that: (1) the Respondents violated the collective bargaining agreement under the CMPA, (See Response at p. 1); (2) failed to give the Complainant documentation, or include documentation in his personnel file of Chief Pettigrew's May 18, 2007 letter reinstating the Complainant to his position. (See Response at p.3); (3) the Union "breached the collective bargaining agreement and its duty of fair representation." (See Response at p. 3); (4) Both Respondents were grossly negligent. (See Response at p. 4).

The Complaint, the Answer and the Complainant's Response are before the Board for disposition.

II. Background

Mr. Brown was terminated from his position on or about October 3, 2006. (See Complaint at p. 7, # 15). On October 5, 2006, Mr. Brown met with his Union Shop Steward, "Donnee, who had Mr. Brown's paperwork, [and Donnee] visited Chief Pettigrew in his office." (Compl. at p. 7, # 17). Upon his return, Donnee told Mr. Brown that Mr. Pettigrew felt that Mr. Brown took off to avoid doing an additional stop on his route. "Donnee suggested that Mr. Brown file for unemployment compensation benefits while he filed a grievance on [the] Complainant's behalf." (Compl. at p. 7, # 19). During the month of October 2006, Mr. Brown attempted to speak with the Union president and Mr. Pettigrew, unsuccessfully. On October 24, 2006, the Union president said that he would speak with Mr. Pettigrew and get back to Mr. Brown, but he never did. (See Compl. at p. 11).

"During the so-called Step II, in February 2007, Mr. Brown met with DCPS Division of Transportation Chief Operation Manager, Mr. Pettigrew, along with the Union President and their Union Business Agent. After discussing the leave in question, the parties reached a verbal agreement that Mr. Brown was wrongfully terminated and that he would be brought back whole (back pay and seniority, etc.)." (Compl. at p. 12). On February 5, 2007, the Complainant was fingerprinted in anticipation of his return to work. (See Compl. at p. 12). This process resulted in an erroneous computer hit against his background check resulting in an ineligible hire status. (See Compl. at p. 13). On

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to support a statutory cause of action under D.C. Code § 1-617.04(a) (1), (3), (4) and (5) (2001 ed.)." (Sept. 30, 2008 letter at pgs. 3-7). In view of the above, the Executive Director dismissed the Complaint.

April 19, 2007, the Union President asked Mr. Brown "to report to work and to allow things to fall in place. In addition ... Mr. Brown was told he would receive back pay, etc. and that the information would be provided to him in writing. Complainant stated he had no problem returning to work, once he received the appropriate document advising the Complainant to "start working and ... let things fall into place. [The] Complainant stated he had no problem returning to work, once he received the appropriate documents describing him being brought back whole." (Compl. at p. 14).

"On May 4, 2007, Mr. Brown reported to the Penn Center with DCPS Division of Facility's Safety and Training Unit to meet with Mr. Jason Campbell, who verbally asked the [C]omplainant if he was ready to return to work.... Mr. Brown responded ... (being unaware of Mr. Campbell's position as Operations Manager for the Safety and Training Unit) stating he would first have to check with the union, in order to receive the go ahead by receiving something in writing guaranteeing back pay and seniority, etc." The Complainant did not return to work that day. On May 18, 2007, Mr. Pettigrew, sent the union's business agent a letter concerning the Complainant's employment status ... the [C]omplainant [claims that he] was unaware of [this letter] until February 28, 2008." (Compl. at p. 15, # 53, # 54 and # 56).

The Complainant alleges that the "two Respondents violated the statutory provisions in the collective bargaining agreement when they failed to bargain collectively in good faith to arbitrate this case with proper communication and written documentation and an explanation describing what if any actions taken regarding Mr. Brown being brought back whole or by the continued separation of the so-called abandonment of his employment position without any proper personnel action form for such." (Compl. at p. 18).

"[Also,] according to personnel file received January 19, 2010 from the District of Columbia Public Schools Office of Human Resource (OHR) and District of Columbia Office of the State Superintendent of Education (OSSE) [,] [the] personnel file received January 20, 2010, indicates Mr. Brown not having a grievance filed pertaining to his wrongful discharge." (Compl. at p. 20).

On May 19, 2010 the Complainant filed an unfair labor practice complaint alleging that Respondents violated the CMPA.

III. Discussion: Complainant's Allegations Concerning the Agency

Board Rule 520.4 provides that "[u]nfair labor practice complaints shall be filed not later than 120 days after the date on which the alleged violations occurred." As the Executive Director pointed out, "[t]he Board has held that the deadline date for filing a

complaint is '120 days after the date Petitioner admits he actually became aware of the event giving rise to [the] complaint allegations'." (Sept. 30, 2008 letter at p. 1).[6]

The Complainant alleged that he was wrongfully terminated on or about October 3, 2006, by DCPS. In addition, he claimed that he should have been reinstated on May 4, 2007, as required by a February 2007 verbal agreement between the Union and the Agency. However, DCPS failed to reinstate him to his position on May 4, 2007. (See Sept. 30, 2008 letter at p. 2). The Complaint in the present case was filed on May 19, 2010. This is well beyond the statutory 120-day filing period.

Furthermore, these same allegations were made in PERB Case No. 08-U-75 and the Executive Director determined that the September 17, 2008 filing in that case exceeded the 120-day filing requirement in Board Rule 520.4. (See Sept. 30, 2008 dismissal letter at p. 2). In response to the Complainant's Motion for Reconsideration, the Board dismissed the filing in PERB Case No. 08-U-75, as untimely. The facts and allegations in this Complaint are identical to the facts and allegations raised in PERB Case No. 08-U-75. The Complainant is attempting to have two bites at the apple by raising the same allegations against the Agency, concerning the same facts, again in the present Complaint. The present Complaint is dismissed for untimeliness and because it raises the same issues in PERB Case No. 08-U-75. No new information has been raised that was not available at the filing of the first complaint.

IV. Discussion: The Complainant's Allegations Concerning the Union

The Board has held that "the time within which a complaint alleging a violation of the duty of fair representation by an exclusive bargaining representative can be timely filed commences when the employee knew or should have known the union would not provide the requested representation. We also conclude that a unit member can, and should, make efforts to obtain adequate representation by the union by seeking service from the local.... Once these efforts become futile, the 120 days for filing a complaint commences." *Lloyd Forrester v. American Federation of Government Employee, Local 2725 and District of Columbia Housing Authority (David Gilmore, Receiver),* 46 DCR 4048, Slip Op. No. 577 at p. 4, 98-U-01 (1998).

Pursuant to Board Rule 520.4, the time for filing a complaint against the Union commenced 120 days after October 3, 2006 (when DCPS dismissed the Complainant and the Union allegedly failed to represent him), and 120 days after May 4, 2007 (when DCPS allegedly failed to return the Complainant to work and the Union allegedly failed to represent him). The Board finds that the 120-day filing period began when Mr. Brown

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[6] *Glendale Hoggard v. DCPS and AFSCME, Council 20, Local 1959*, 43 DCR 1297, Slip Op. No. 352, PERB Case No. 93-U-10 (1993). See also, *American Federation of Government Employees, Local 2715, AFL-CIO v. District of Columbia Housing Authority*, 46 DCR 119, Slip Op. No. 509, PERB Case No. 97-U-07 (1997).

was terminated (on October 3, 2006), and when he should have been reinstated pursuant to a settlement agreement between the Union and the Agency (on May 4, 2007). Thus, the time for filing a complaint commenced on October 3, 2006 and May 4, 2007.

The 120th day after the October 3, 2006 termination (and the Union's alleged failure to represent Mr. Brown) was January 31, 2007. The 120th day after the May 4, 2007 failure to reinstate Mr. Brown (and the Union's alleged failure to represent him) was September 1, 2007. The May 19, 2010, unfair labor practice complaint was filed almost three (3) years beyond the 120-day filing period. Therefore, the Complaint against the Union is untimely filed.

Mr. Brown also alleges that he asked for his personnel file on January 19, 2010, and discovered for the first time that the Union did not file a written grievance on his behalf. The Complainant relies on this fact as a basis for his allegation that the Union has breached its duty of fair representation. However, the Board has held that to breach its duty of fair representation, a Union's conduct must be deemed arbitrary, discriminatory, or in bad faith. Further, we have held that the applicable standard in such cases is "not the competence of the union, but rather whether its representation was in good faith and its actions motivated by honesty of purpose." *Roberts v. American Federation of Gov't Employees, Local 2725*, 36 DCR 3631, Slip Op. No. 203 at p. 3, PERB Case No. 88-S-01 (1989).

Board Rule 520.10 provides as follows: "If the investigation [of the complaint] reveals that there is no issue of fact to warrant a hearing the Board may render a decision upon the pleadings...." Here, in the absence of an Answer to the Complaint by the Union, we find true the uncontested facts as alleged by the Complainant. The record shows no written evidence of a grievance filed by the Union. Even so, there can be no finding that the Union breached its duty of fair representation, where the record shows that the Union negotiated a settlement with the Agency to reinstate the Complainant to his position with benefits and back pay and advised him to "start working and ... let things fall into place." (Compl. at p. 14).

In sum, the Complainant has raised no allegations which, if proven, would constitute a statutory violation by DCPS or the Union. For example, here, the Union represented the Complainant in the grievance procedure and negotiated a settlement in his case. Thus, it did not violate its duty of representation under the CMPA. Also, DCPS agreed to return the Complainant to work and scheduled him for a physical examination in anticipation of returning him to his position. There is no evidence that DCPS failed to reinstate the Complainant or that there was a violation of the CMPA.

The Board finds that the Complaint in this matter is a repetition of the Complaint we dismissed in PERB Case No. 08-U-75 on September 30, 2009, where we found that the complaint in that matter was untimely filed. The Complainant has provided no new

evidence that would change the outcome in this matter. In any event, he already had the opportunity to appeal our Decision and Order in PERB Case No. 08-U-75 in his Motion for Reconsideration of the Executive Director's Dismissal.

Board Rules governing the initiation of actions before the Board are jurisdictional and mandatory. As such, they provide the Board with no discretion or exception for extending the deadline for initiating an action. Therefore, this matter is dismissed.

V. Complainant's Request for Costs

Under D.C. Code §1-617.13(d), the Board has "the authority to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as [it] may determine." In *AFSCME, District Council 20, Local 2776 v. D.C. Department of Finance and Revenue*, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02(1990), the Board addressed for the first time the circumstances under which it is appropriate to award costs:

> First, any such award of costs necessarily assumes that the party to whom the pay is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed. This is not to say that we are imposing any limit on the costs that a party may incur, but only that the amount of cost incurred that will be ordered paid by the other party will be limited to that part that the Board finds to be "reasonable". Last, and this of course is the nub of the matter, we believe such an award must be shown to be in the interest of justice.
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> Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued. We do not believe it possible to elaborate in any one case a complete set of rules or earmarks to govern all cases, nor would it be wise to rule out such awards in circumstances that we cannot now foresee. What we can say here is that among the situations in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the

> employees for whom it is the exclusive bargaining representative.

In this matter, the Complainant is not the prevailing party and has filed allegations that are a repetition of a matter that he previously filed in PERB Case No. 08-U-75. There is no basis upon which the Board may award the Complainant costs in the interest of justice.

ORDER

IT IS HEREBY ORDERED THAT:

1. Thomas C. Brown's ("Complainant's) complaint against the District of Columbia Public Schools, Division of Transportation and American Federation of State, County and Municipal Employees, District Council 20, Local 1959, is untimely filed and is a repetition of a previous complaint filed by Mr. Brown in PERB Case No. 08-U-75. Therefore, the complaint is dismissed.

2. The Complainant's request for reasonable costs is denied.

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.

August 10, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-U-34 was transmitted via Fax and U.S. Mail to the following parties on this the 10th day of August 2011.

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