

**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 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:                      | ) |                                    |
|  | ) |                                    |
| Earnest Durant, Jr.,                   | ) |                                    |
|  | ) |                                    |
| Complainant,                           | ) | PERB Case Nos. 10-U-39 and 10-E-07 |
|  | ) |                                    |
| v.                                     | ) | Opinion No. 1288                   |
|  | ) |                                    |
| Government of the District of Columbia | ) |                                    |
| Department of Corrections,             | ) |                                    |
|  | ) |                                    |
| Respondent.                            | ) |                                    |
|  | ) |                                    |
|  | ) |                                    |

**DECISION AND ORDER**

**I. Statement of the Case:**

On July 8, 2010, Earnest Durant, Jr. (“Complainant”) filed a document styled, in pertinent part, “Request for Injunctive Preliminary Relief . . . Second Request for Judicial Enforcement & Sanctions And Unfair Labor Practice Complaint”<sup>1</sup> (“Complaint”) against the District of Columbia Department of Corrections (“DOC”) alleging violations of the D.C. Code § 1-617.04(a)(1), (3) and (4) of the Comprehensive Merit Personnel Act (“CMPA”). The Respondent has denied the allegations of the Complaint and moves to dismiss the Complainant’s

<sup>1</sup> The full subject caption on the July 8, 2010 pleading provides as follows:

Emergency Request for Preliminary Injunctive Relief and Issuance of a Temporary Restraining Order on the Department of Corrections Reduction in Force Administrative Order FL-2010-01 effective July 2, 2010.

Retaliation by DC DOC Officials for receipt of Freedom of Information Act Information on job vacancies within Internal Affairs/Warrant Squad.

Second Request for Judicial Enforcement & Sanctions And Unfair Labor Practice Complaint.

petitions in the following pleadings: (1) on July 28, 2010, the Respondent filed a Reply to the Petitioner's Motion for Preliminary Relief and Temporary Restraining Order ("Reply"); (2) on July 30, 2010, the Complainant filed a document styled "Response to the Second Petition for Enforcement and Claimant's Request for Sanctions"<sup>2</sup> (Response"); lastly, the Respondent filed an "Answer to Unfair Labor Practice Complaint" (Answer").

Thus, the Complainant's motion for preliminary relief, unfair labor practice complaint, petition for enforcement, request for sanctions and the Respondent's Reply, Response and Answer are before the Board for disposition.

## **II. Background**

The Complainant is an employee of the District of Columbia Government Department of Corrections, has the job title of Criminal Investigator, and is assigned to the Department of Corrections Warrant Squad. (See Complaint at p. 9).

### **A. Motion for Preliminary Relief**

The Complainant's motion for preliminary relief asks that the Board preclude the Department from proceeding with a July 2, 2010 Reduction in Force ("RIF") eliminating three DS 1811-11 Criminal Investigator positions. (See Complaint at p. 2). The Complainant asserts that the RIF was pretextual and retaliation for the Complainant's requests for information concerning the denial of promotions. (Complaint at p. 5). The Respondent replied that it abolished 13 positions within the D.C. Department of Corrections pursuant to the RIF.<sup>3</sup> (See Reply at p. 2). The Respondent added that "[o]f the 13 positions, two criminal investigator positions were abolished; including the position that the Complainant held." (Reply at p. 5). Respondent's also indicated that its action was based on the DOC's budgetary and fiscal constraints. *Id.*

### **B. Petition for Enforcement**

The Complaint requests that the Board move for enforcement of its decisions in PERB Case Nos.: 01-U-16 (Slip Op. No. 698); and 01-U-21, 01-U-28 and 01-U-32 (Slip Op. Nos. 722 and 749). In addition, the Complainant requests enforcement of a report and recommendation issued in PERB Case Nos. 07-U-43 and 08-U-57. (See Complaint at pgs. 2-3).

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<sup>2</sup> The Respondent noted that Mr. Durant filed his first Petition for Enforcement on February 15, 2010, with respect to PERB Case Nos. 01-U-16 and 07-U-43. The Respondent filed its response on March 8, 2010. In addition, the Board's Executive Director extended the time for response to the instant matter until July 30, 2010.

<sup>3</sup> The Respondent states that the RIF was conducted pursuant to Administrative Order FL-2010-01. (See Reply at p. 2).

### **C. Motion for Sanctions**

The Complainant requests that “the Board based upon allegations of continued violations of complainant’s rights codified under D.C. Code Section 1-617.04 (a), (1), (3) and (4) it include sanctions, be awarded and complainant granted all reasonable costs and fees including but not limited to attorney’s fees in accordance with D.C. Code Section 1-617.13 (2001 ed.) . . .” (Complaint at p. 3).

### **D. Unfair Labor Practice Complaint**

The Complainant states that DOC has violated the CMPA by:

repeatedly, deliberately and in complete disregard, supported, continued to retaliate, seek reprisals encouraged a deliberate pattern and practice of retaliation, reprisals, creation of a hostile, discriminatory and continued isolated workplace environment in deliberate longstanding violations of Complainant’s rights as codified under D.C. Code Section 1-617.04, which cite in part, that; (a) The District, its agents and representatives are prohibited from, (1) Interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter; (3) Discriminating in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization, except as otherwise provided in this chapter; and (4) Discharging or otherwise taking reprisal against an employee because he or she has signed or filed an affidavit, petition, or complaint or given any information or testimony under this subchapter.

(Complaint at pgs. 2-3).

## **III. Discussion**

### **A. Motion for Preliminary Relief**

The Board’s Rule concerning a motion for preliminary relief in unfair labor practice cases, Rule 520.15, provides:

The Board may order preliminary relief. A request for such relief shall be accompanied by affidavits or other evidence supporting the request. Such relief may 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, and the Board’s ultimate remedy may be clearly inadequate.

In addition, the Board has held that its authority to grant preliminary relief is discretionary. See *AFSCME, D.C. Council 20, et al. v. D.C. Government, et al.*, 42 DCR 3430, Slip Op. No. 330, PERB Case No. 92-U-24 (1992). In determining whether or not to exercise its discretion under Board Rule 520.15, the Board has adopted the standard stated 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 Section 10(i) of the National Labor Relations Act – held that irreparable harm need not be shown. The supporting evidence, however, 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 *pendent lite* relief; *Id.* at 105. “In those instances where [PERB] has determined that the standard for exercising its discretion has been met, the basis for such relief [has been] restricted to the existence of the prescribed circumstances in the provisions of Board Rule [520.15] set forth above.” *Clarence Mack, et al v. FOP/DOC Labor Committee, et al.*, 45 DCR 4762, Slip Op. No. 516 at p. 3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997); and see *D.C. Water and Sewer Authority v. American Federation of Government Employees, Local 872*, 54 DCR \_\_\_, Slip Op. No. 801, PERB Case No. 05-U-10 (2005).

In the present case, the Complainant has not met the criteria set forth above. The allegation that the July 2, 2010 RIF was implemented in retaliation against the Complainant is not supported by any affidavit or other evidence. Moreover, the Respondent denies the allegation. Consequently, there is no evidence of a clear-cut or flagrant violation of the CMPA warranting preliminary relief. Even if, after an investigation, the Board were to determine such a violation, the Complainant does not allege the effect would be widespread, affect the public interest, interfere with the Board’s process or be addressed by the Board’s remedial authority. Therefore, the Board denies the Complainant’s motion for preliminary relief.

#### **B. Petition for Enforcement**

The Complainant has petitioned for enforcement of the following matters: PERB Case Nos. 01-U-16 (Slip Op. No. 698); and 01-U-21, 01-U-28 and 01-U-32 (Slip Op. Nos. 722 and 749); and a report and recommendation issued in PERB Case Nos. 07-U-43 and 08-U-57. (See Complaint at pgs. 2-3).

The Complainant previously submitted a petition for enforcement of Slip Opinion No. 698, PERB Case No. 01-U-16, and consolidated PERB Case Nos. 07-U-43 and 08-U-57 in PERB Case No. 10-E-01. The Board denied the Complainant’s request for enforcement of these matters in Slip Opinion No. 1287, PERB Case No. 10-E-01. As a result, this part of the Complainant’s Petition for Enforcement is denied.

In Slip Opinion No. 722, consolidated PERB Case Nos. 01-U-21, 01-U-28 and 01-U-32, the Board adopted the hearing examiner’s finding that DOC had violated the CMPA by: (1) failing to provide documents requested by the Union in connection with a RIF; (2) refusing to bargain over the impact and effects of a RIF; and (3) exhibiting anti-union animus in the failure to apply four (4) years of creditable service to, then, union Chairman William Dupree. The Board ordered DOC: to cease and desist from refusing to bargain; supply the requested

documents; and cease and desist retaliating against Chairman Dupree; and post a notice of DOC's violation. (See *Fraternal Order of Police/Department of Corrections Labor Committee v. District of Columbia Department of Corrections*, 52 DCR 2496, Slip Op. No. 722, PERB Case Nos. 01-U-21, 01-U-28 and 01-U-32 (2003).

In Slip Opinion No. 749, the Union filed a petition to enforce the Board's order in Slip Opinion No. 722. Specifically, the Union alleged that DOC had failed to: (1) post the notice which was attached to the Board's decision and order; and (2) provide the Union with dates for retroactive bargaining. Based upon the pleadings, the Board found that DOC had not complied with its order in Slip Opinion No. 722, and granted the petition, providing DOC five (5) days to comply. (See *Fraternal Order of Police/Department of Corrections Labor Committee v. District of Columbia Department of Corrections*, 52 DCR 2496, Slip Op. No. 749, PERB Case Nos. 01-U-21, 01-U-28 and 01-U-32 (2004).

Pursuant to Board Rule 560.1, the prevailing party in a matter may petition the Board for enforcement of its decision and order.<sup>4</sup>

In the instant case, the Board finds that the Complainant has failed to allege how the Department of Corrections has failed to comply with either the Board's original order in Slip Opinion No. 722, or the Board's subsequent grant of the Complainant's petition for enforcement in Slip Opinion No. 749. The Respondent denies non-compliance with the Board's orders in these matters. Therefore, this part of the Complainant's Petition for Enforcement is also denied.

### **C. Unfair Labor Practice Complaint**

Although the Complainant's argument concerning his unfair labor practice charge is disjointed, the Board has identified several allegations. In addition, the Complainant identifies that he is a party in the legal actions referred to above.

First, the Complainant contends that on October 10, 2008, Supervisory Criminal Investigator Wanda Patten attempted to "negatively compromise and/or place complainant's personal health and safety and the safety of the community in jeopardy through refusal without justification at providing armed assigned criminal investigator backup when requested in apprehension of violent halfway house escapee Jose Hernandez." (Complaint at pgs. 12 and 15).

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<sup>4</sup> See also D.C. § 1-617.13(b), which provides, in pertinent part, that:

The Board may request the Superior Court of the District of Columbia to enforce any order issued pursuant to this subchapter, including those for appropriate temporary relief or restraining orders. No defense or objection to an order of the Board shall be considered by the Court, unless such defense or objection was first urged before the Board. The findings of the Board with respect to questions of fact shall be conclusive if supported by substantial evidence on the record considered as a whole. The Court may grant such temporary relief or restraining order as it deems just and proper and enter a decree enforcing, modifying and enforcing as so modified, or setting aside, in whole or in part, the order of the Board.

As a threshold matter, the Board finds that a majority of the allegations made in the Complaint do not meet the timeliness requirements for the initiation of an unfair labor practice complaint.

Board Rule 520.4 - Timeliness Requirements, provides:

Unfair labor practice complaints shall be filed not later than 120 days after the date on which the alleged violations occurred.

In addition, this Board has long held that PERB Rules establishing the time allowed to initiate a complaint is jurisdictional and mandatory. *Glendale Hoggard v. D.C. Public Schools*, 43 DCR 1297, Slip Op. 352, PERB Case No. 93-U-10 (1993), See also, *Public Employee Relations Board v. D.C. Metropolitan Police Department*, 593 A.2d 641 (1991). As such, they provide the Board with no discretion or exception for extending the deadline for initiating an action. *Id.*

The Complainant allegations indicate that he was aware of the incident concerning Supervisory Criminal Investigator Patten's actions on October 10, 2008. The last day to file an unfair labor practice complaint would have been on or about February 10, 2009. Instead, the Complainant filed the instant matter on July 8, 2010, which is 513 days after he became aware of the alleged incident. As a result, the Board finds this allegation to be untimely.

The Complainant also contends that on October 4, 2008, he became aware of alleged conduct by Supervisory Criminal Investigator Wanda Patten, involving "unjustified, unwarranted and, illegal ordering internal affairs investigation into fraudulent allegations of submitting overtime payment requests for period worked in apprehension, booking and transportation of violent halfway house escapees." (Complaint at pgs. 12 and 16-17).

Pursuant to Board Rule 520.4, the last day to file an unfair labor practice from an incident occurring on October 4, 2008, would have been February 4, 2009. The Complainant, however, did not file his Complaint until July 8, 2010, which is 519 days after he became aware of the alleged incident. As a result, the Board finds this allegation to be untimely.

The Complainant also asserts his dissatisfaction with the relocation of his position following the recommendation made by the hearing examiner in consolidated PERB Case Nos. 07-U-43 and 08-U-57, and disagreement with other personnel issues, ranging in dates from June 1, 2009 to February 4, 2010. Based on these dates, the last day for the Complainant to file a complaint would have been on June 4, 2010. The Complainant filed the instant matter on July 8, 2010, or 154 days after the last of the alleged incidents. Therefore, the Board also finds this allegation to be untimely.

Another allegation concerns the Complainant's contention that the Department retaliated against him for filing a Federal EEOC civil rights suit, when on February 5, 2010, Supervisory Criminal Investigator Patten allegedly retaliated by asking the Complainant to stand down in the arrest of escapees. (Complaint at p. 20). Whereas the Complainant fails to indicate how his

participation in an EEOC suit constitutes an exercise of his rights under the CMPA, the Board finds that the Complainant has failed to state a cause of action under the CMPA. Even if the Board were to find some merit to this argument, the Board also finds the allegation to be untimely.

The Complainant also indicates that Supervisory Criminal Investigator Patten violated the CMPA by questioning the Complainant's arrest authority concerning the apprehension of DOC Halfway House Escapee Kevin Butler and Inmate David F. Schultz on February 5, 2010. This incident was raised previously by the Complainant in PERB Case 08-E-01, apparently as evidence of failure to comply with the Board's Decision and Order in Slip Opinion No. 698, PERB Case No. 01-U-22. The alleged incident, however, would have required the Complainant to file a complaint on or before June 5, 2010. In the present case, the Complaint was filed on July 8, 2010, or 153 days after the Complaint was made aware of the alleged incident. Therefore, the Board also finds this allegation to be untimely.

Lastly, the Complaint asserts that the Department retaliated against him for filing a Freedom of Information Act request for information about his rejection for a promotion. (Complaint at p. 24). The Complainant contends that his request was denied, but that a fellow employee, William Dupree did receive a response. Mr. Dupree's response allegedly contained information which the Complainant believes established that his promotion was improperly denied.

The Board finds that the Complainant has failed to allege evidence that the denial of his Freedom of Information Act request violated the CMPA. Moreover, the Complainant has not established any causal nexus between the denial of his request and a violation of the CMPA. Therefore, the Board also rejects this allegation. See *Butler, et al. v. D.C. Department of Corrections*, 49 D.C. Reg. 1152, Slip Opinion No. 673, PERB Case No. 02-U-02 (2001).

#### **D. Motion for Sanctions**

The Complainant requests that "the Board based upon allegations of continued violations of complainant's rights codified under D.C. Code Section 1-617.04 (a), (1), (3) and (4) it include sanctions, be awarded and complainant granted all reasonable costs and fees including but not limited to attorney's fees in accordance with D.C. Code Section 1-617.13 (2001 ed.) . . ." (Complaint at p. 3).

Whereas the Board finds that the Complainant has failed to state a cause of action or raise any timely complaints, it is unnecessary to entertain a motion for sanctions. The Board, therefore, denies the request for sanctions.

Therefore, the Board finds that the Complainant has failed to: (1) establish that the Respondent has not complied with Slip Opinion Nos. 698, 722 and 749; (2) state any cause of action; and (3) allege any timely complaints that support his assertion that the Department has violated the CMPA. Thus, the Board denies the Complainant's Unfair Labor Practice Complaint and Petition for Enforcement.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The Complainant, Earnest Durant's Complaint is dismissed as untimely in part, and denied, in part.
2. The Complainant, Earnest Durant's Petition for Enforcement 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.

May 30, 2012



**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case Nos. 10-U-39 and 10-E-07, Slip Opinion No. 1288 was transmitted via U.S. Mail and e-mail to the following parties on this the 27<sup>th</sup> day of June, 2012.

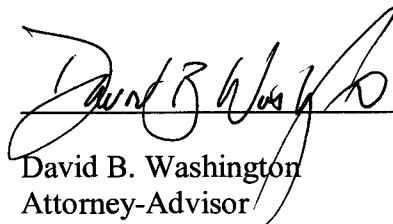
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