Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Sinobia Brinkley	
Complainant,	PERB Case Nos. 10-U-12 10-S-02
v.	
Fraternal Order of Police/Metropolitan Police Department Labor Committee, District 20, Local 2087,	Opinion No. 1446 Decision and Order
Respondents.	

DECISION AND ORDER

I. Statement of the Case

Complainant Sinobia Brinkley ("Complainant" or "Ms. Brinkley") filed an Unfair Labor Practice Complaint ("ULP") and a Standard of Conduct Complaint ("SOC") (collectively, "Complaint") against Fraternal Order of Police/Metropolitan Police Labor Committee, District 20, Local 2087 ("Respondent" or "FOP" or "Union"), alleging that FOP 1) failed to honor her request to have another union representative assigned to handle a grievance to which she was a party; 2) failed to provide her with information pertaining to her case; 3) failed to take her concerns "seriously by granting relief of professional representation and resolution"; and 4) was "biased and neglectful" in its handling of her "grievance/complaint". (Report, at 4-5, 11) (quoting Complaint, at 1).

The cases were consolidated and referred to a Hearing Examiner. A Hearing was held on November 3, 2010, December 6, 2010, February 15, 2011, and March 2, 2011, before Hearing Examiner Lois Hochhauser ("Hearing Examiner"). The Hearing Examiner, in her Report and Recommendation ("Report"), recommended that the Complaint be dismissed. *Id.*, at 14. FOP filed Exceptions to the Report, but Ms. Brinkley did not. (FOP Exceptions).

II. Background

In 2009, Ms. Brinkley was assigned to the negotiations unit within the Metropolitan Police Department's ("MPD") Special Operations Division ("SOD"). (Report, at 3). On or about May 10, 2009, MPD's Chief of Police disbanded the negotiations unit and Ms. Brinkley was transferred to the District Patrol Service Division ("DPSD"). *Id.* Ms. Brinkley filed an individual grievance challenging the change and transfer and, on the same day, FOP filed a group grievance on behalf of Ms. Brinkley and the other employees affected by the change. *Id.*, at 3-4.

On July 10, 2009, Ms. Brinkley filled out a form asking FOP to represent her, on which form she initialed a provision stating that FOP maintained the sole authority to determine whether the grievance would continue to arbitration, and further to determine whether to withdraw or settle the matter if it did proceed to arbitration. *Id.*, at 4. The form also contained a provision waiving any claims that Ms. Brinkley may have "against FOP as a result of its representation and handling of your case." *Id.*

Ms. Brinkley alleged that FOP later ignored her request to replace FOP representative, Wendell Cunningham, with another representative because "she felt he 'did not properly investigate or represent [her] properly.'" *Id.*, at 5.

At the Hearing, Ms. Brinkley testified that she and Kia Jones ("Ms. Jones"), another bargaining unit member who had been affected by the change within the SOD, contacted FOP and spoke with Monica Waleed ("Ms. Waleed") on numerous occasions and that while she and Ms. Jones were given information about the group grievance, FOP refused to give Ms. Brinkley any information about her individual grievance. *Id.*, at 5. Ms. Brinkley and Ms. Jones both testified that Ms. Waleed told them that FOP Chairman, Kristopher Baumann ("Mr. Baumann") and Mr. Cunnningham had instructed her not to give them any information about the cases. *Id.*, at 5, 7. Ms. Brinkley and Ms. Jones testified further that in September 2009, FOP informed them that they should not call there anymore for updates because the matter was going to arbitration and an attorney would be hired to litigate the case. *Id.* Ms. Brinkley and Ms. Jones claimed that when they asked for the attorney's contact information, FOP refused to give it to them. *Id.* Notwithstanding, Ms. Waleed testified that she never told Ms. Brinkley and Ms. Jones that she could not give them any information and further denied that she ever told them that any high ranking union officials instructed her to not give them information. *Id.*, at 7-8.

Ms. Brinkley alleged that she continued calling FOP and that, during one of the calls, Mr. Baumann hung up on her. *Id.*, at 5. At another time, she alleged that FOP official, Delroy Burton ("Mr. Burton"), told her FOP was dealing with bigger issues than "[her] little case". *Id.*, at 5-6. During another conversation, she alleged Mr. Baumann screamed at her that he did not have to talk to her. *Id.*

Ms. Brinkley claimed that after one of these calls with Mr. Baumann, she decided to resign from FOP. *Id.*, at 6. She completed the paperwork on October 6, 2009, and left the original form with FOP Payroll Coordinator Keeley Williams ("Ms. Williams") at FOP's offices to be processed. *Id.* Later that day, however, she started having second thoughts after discussing the decision with FOP representative Michael Millet ("Mr. Millet"), and stated that she asked Ms. Williams to hold the paperwork and not process it, which Ms. Brinkley said Ms. Williams agreed to do. *Id.* On October 7, 2009, Ms. Brinkley said she contacted Ms. Williams again and told her she had decided not to resign from FOP and asked her to shred the paperwork. *Id.* Despite this alleged communication, FOP approved Ms. Brinkley's resignation on October 6, 2009, and the paperwork terminating her membership with FOP was processed in February 2010. *Id.*, at 4, 6-9. Mr. Millet testified that he talked to Ms. Brinkley shortly after hearing that she intended to leave the Union in an effort to convince her not to resign. *Id.*, at 8. Ms. Williams testified that she remembered that Ms. Brinkley initially asked her not to process the paperwork "until after the Union election", and that she actually forgot about the paperwork for some time. *Id.*, at 8-9. Ms. Williams testified that a few months later, however, she found the completed and approved paperwork and submitted it to the D.C. Office of Pay and Retirement Services ("OPRS") to be finalized. *Id.* Mr. Baumann testified that it was his understanding that the paperwork was submitted shortly after he approved it on October 6, 2009. *Id.*, at 9. Despite the delay between October 6, 2009, the day he approved Ms. Brinkley's request, and February 2010, when Ms. Brinkley's resignation was processed and finalized by OPRS, Mr. Baumann testified that Ms. Brinkley was not considered a member of the Union as of October 6, 2009, regardless of the fact that her union dues were still being taken out of her paycheck until February 2010 because "the dues [were] being taken out erroneously." *Id.*

Ms. Brinkley testified that as a result of FOP's calculation that her membership with the union was terminated on October 6, 2009, FOP's national president refused to investigate or reply to her complaints about the Local lodge's actions, and the Local would no longer answer any questions about her grievances between October and December 2009. *Id.*, at 6.

Ms. Brinkley asserted that when she tried to rejoin the union, she was told she would only be readmitted if she "apologized to Mr. Baumann because she had violated a union bylaw by filing a PERB complaint." *Id.*, at 7.

On January 12, 2010, Ms. Brinkley filed her Complaint with PERB. *Id.*, at 4-5.

At the hearing, FOP filed motions to dismiss the Complaint for lack of timeliness, lack of jurisdiction, and lack of standing. *Id.*, at 9. After considering the parties' written and oral arguments, the Hearing Examiner denied each motion, reasoning: 1) the Complaint was not untimely because many of the allegations "took place and/or continued" less than 120 days before the Complaint was filed[1]; 2) PERB has jurisdiction over this matter because Ms.

[1] *Citing* PERB Rules 520.4 and 544.4, and *District of Columbia Department of Finance and Revenue v. American Federation of State, County and Municipal Employees, District Council 20, Local 2776*, 36 D.C. Reg. 3334, Slip Op. No. 217, PERB Case No. 88-A-01 (1989).

Brinkley's allegations, if proven, could constitute violations of D.C. Code §§ 1-617.03(a)(1)[2] and/or 1-617.04 (governing ULP's)[3]; and 3) Ms. Brinkley has standing to bring her Complaint because she was a member of the union when the violations took place and furthermore, there is "no requirement or PERB Rule that Complainant must be a member of a Union at the time she files a Complaint with PERB." *Id.*, at 10-11.[4]

In her report, the Hearing Examiner stated that while she found Ms. Brinkley's testimony to be "confusing and even contradictory at times", that did not impact her credibility because the events she testified about "happened several years ago" and it was therefore reasonable that her "recollections [had] become hazy." *Id.*, at 12. Nevertheless, the Hearing Examiner noted that Ms. Waleed's, Mr. Millet's, and Ms. Williams' testimony all contradicted Ms. Brinkley's recollections on several material facts. *Id.* In her reconciliation of these credibility issues:

> [T]he Hearing Examiner considered the demeanor of the witness, the character of the witness, the inherent improbability of the witness's version, inconsistent statements of the witness and the witness's opportunity and capacity to observe the event or act at issue. *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987). Because of the many contradictions, the Hearing Examiner adhered to these considerations carefully, particularly reflecting on the demeanor of the witness during the testimony since the substance of the testimony could be reviewed when the transcript was reviewed but the demeanor could not be captured in a transcript. *See*, e.g., *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 496 (1951). The District of Columbia Court of Appeals emphasized the importance of credibility evaluations by the individual who sees the witness 'first hand'. *Stevens Chevrolet Inc. v. Commission on Human Rights*, 498 A.2d at 440-450 (D.C. 1985). These 'first-hand' observations are critical in cases, such as this, where serious accusations have been made, where much testimony is conflicting. This Administrative Judge has many years of experience observing and

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[2] D.C. Code § 1-617.03(a)(1): "(a) ... A labor organization must certify to the Board that its operations mandate the following: (1) 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 treatment under the governing rules of the organization, and to fair process in disciplinary proceedings".

[3] *Citing Georgia Mae Green v. District of Columbia Department of Corrections*, 37 D.C. Reg. 8086, Slip Op. No. 257, PERB Case No. 89-U-10 (1990); *and American Federation of Government Employees, Local Union No 3721 v. District of Columbia Fire Department*, 39 D.C. Reg. 8599. Slip Op. No. 287, PERB Case No. 90-U-11 (1991).

[4] The Hearing Examiner's finding implies that had Ms. Brinkley not been a member of the Union when the violations took place, FOP's standing argument might have been valid. The Board notes, notwithstanding, that Ms. Brinkley's union membership and resignation should not have made any difference in the way FOP treated her or handled her Grievances. Indeed, Ms. Brinkley was entitled to representation regardless of whether or not she resigned from the Union. *See* D.C. Code § 1-617.11(a).

> assessing witnesses, and that experience and expertise were called upon and utilized in this case. The Hearing Examiner is also mindful that even if parts of the witness's testimony are discredited, other parts can be accepted as true. *DeSarno, et al., v. Department of Commerce*, 761 F.2d 657, 661 (Fed. Cir. 1985). The Hearing Examiner found all of the witnesses credible.

Id. Taking these factors into consideration, the Hearing Examiner noted that Ms. Waleed testified she gave documents to Ms. Brinkley; Mr. Millet did not substantiate Ms. Brinkley's assertion that she would be required to apologize to Mr. Baumann in order to rejoin the union; and neither Ms. Waleed's nor Mr. Millet's testimony demonstrated any evidence of animus. *Id.*, at 12-13. Furthermore, the Hearing Examiner found there "was no evidence that Complainant ever attempted to rejoin the union", so it is impossible to know "if Mr. Baumann or any other Union official would have blocked her efforts." *Id.*, at 13.

Regarding Ms. Brinkley's remaining allegations, the Hearing Examiner noted:

> Courts have looked at three criteria in determining [if] a union has met its duty to fairly represent a member: the union must treat its members without hostility or discrimination, it must exercise its discretion to assert the rights of individual members in good faith and honesty, and it must avoid arbitrary conduct. *Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW*, 469 F.2d 181 (1972). In the instant case, the evidence presented established that all three criteria were met: there was no evidence of hostility or discrimination, it exercised its discretion in reaching its decision, and its actions were not arbitrary. PERB has long utilized these criteria in reaching decisions in standards of conduct complaints. For example, in *[Carl] Freson v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 31 D.C. Reg. [2290], Slip Op. No. 74, PERB Case No. 83-U-09 (1984), the Board held that a union's refusal to proceed to arbitration on a grievance did not constitute a breach of its duty of fair representation. The Board stated that '[r]egardless of the effectiveness of a Union's representation in the handling or processing of a bargaining unit employee's grievance, such matters are within the discretion of the union [as] the bargaining unit's exclusive bargaining representative'. *Enoch [J.] Williams v. American Federation of State, County and Municipal Employees, District Council 20, Local 2290*, 43 D.C. Reg. 5598, Slip Op. No. [454 at p. 2], PERB Case No. [95-U-28] (1995). Similarly, in *Brenda Beeton v. District of Columbia Department of Corrections and Fraternal Order of Police/Department of Corrections Labor*

> *Committee*, 45 D.C. Reg. 2078, Slip Op. No. 538 [at p. 3], PERB Case No. [97-U-26] (1998), the Board concluded that 'judgmental acts of discretion in the handling of a grievance, [including the decision to arbitrate,] do not constitute the requisite arbitrary, discriminatory or bad faith [conduct element]' that is needed in order to find a violation of the standards of conduct.

Id.

In addition to finding that FOP met its duty based on the foregoing authority, the Hearing Examiner found it was clear from the witnesses' testimony that "Complainant did not have a clear or realistic understanding of several important matters, including, but not limited to the process for resigning from the Union, and the length of time for the arbitration process to be completed." *Id.* The Hearing Examiner further found that when Ms. Brinkley asked FOP for updates, "she did not distinguish between her individual grievance or the group grievance." *Id.* The Hearing Examiner found the "evidence established that the group grievance, of which Complainant is a member, was approved by the Union to proceed to arbitration, and there was no evidence presented that Respondent was responsible for any of the delay." *Id.*

While the Hearing Examiner stated "the evidence suggests that several Union officials may not have spoken to Complainant in a professional and appropriate manner and that the processes for the handling of grievances, particularly those that go to arbitration, could have been explained more fully to Complainant", those failures did not constitute a standards of conduct violation or an unfair labor practice. *Id.*, at 13-14.

The Hearing Examiner reasoned that in order to "breach a duty of fair representation or commit an unfair labor practice, a Union's conduct must be 'arbitrary, discriminatory or in bad faith, or be based on considerations that are irrelevant, invidious or unfair'". *Id.*, at 14 (quoting *Stanley O. Roberts v. American Federation of State, County and Municipal Employees, Local 2725*, 36 D.C. Reg. 3631, Slip Op. No. 203, PERB Case No. 88-S-01 (1989)). The Hearing Examiner noted that even though the pleadings submitted by Ms. Brinkley, as a *pro se* litigant, must be construed "liberally" in accordance with *Osekre v. American Federation of State, County and Municipal Employees, District Council 20, Local 2401*, 47 D.C. Reg. 7191, Slip Op. No. 623, PERB Case Nos. 99-U-15 and 99-S-04 (2000), that did not excuse Ms. Brinkley from her burden under PERB Rule 520.11 to prove her allegations by a preponderance of the evidence at the Hearing. *Id.* Considering these and the other "applicable laws and precedents" cited in the Hearing Examiner's Report, and "based on a careful review of the documentary and testimonial evidence presented, as well as the arguments advanced by the parties," the Hearing Examiner found that "Complainant did not meet her burden of proof ... that Respondent's actions constituted standards of conduct violations or unfair labor practices", and as a result, recommended that Ms. Brinkley's Complaint be dismissed. *Id.*

Because the Board is remanding certain parts of the Report to the Hearing Examiner, the Board reserves its discussion of FOP's Exceptions until after the Hearing Examiner's supplemental report has been issued.

III. Discussion

The Board will affirm a Hearing Examiner's findings if the findings are reasonable, supported by the record, and consistent with Board precedent. *See American Federation of Government Employees, Local 872 v. District of Columbia Water and Sewer Authority*, Slip Op. No. 702, PERB Case No. 00-U-12 (March 14, 2003). Determinations concerning the admissibility, relevance, and weight of evidence are reserved to the Hearing Examiner. *Hoggard v. District of Columbia Public Schools*, 46 D.C. Reg. 4837, Slip Op. No. 496 at 3, PERB Case No. 95-U-20 (1996). Issues concerning the probative value of evidence are reserved to the Hearing Examiner. *American Federation of Government Employees, Local 2725, AFL-CIO v. District of Columbia Housing Authority*, 45 D.C. Reg. 4022, Slip Op. No. 544 at p. 3, PERB Case No. 97-U-07 (1998). Mere disagreements with a Hearing Examiner's findings and/or challenging the Examiner's findings with competing evidence do not constitute proper exceptions if the record contains evidence supporting the Hearing Examiner's conclusions. *Hoggard v. DCPS, supra*, Slip Op. No. 496 at 3, PERB Case No. 95-U-20. Finally, PERB Rule 550.13(c) empowers Hearing Examiners to "[r]ule on motions."

Considering the record and the Hearing Examiner's Report, the Board finds that the Hearing Examiner failed to address several key issues in the case, and that additional analysis and clarification on the questions of standing and timeliness are required.

In regard to the question of standing, the Hearing Examiner found that Ms. Brinkley had standing because she was a member of the union when at least some of the violations took place and because PERB's Rules do not require a complainant to be a member of a union at the time a Complaint is filed. *Id.*, at 10-11. Despite the Hearing Examiner's implication that Ms. Brinkley might not have had standing if she had not been a member of the Union when the violations took place, the Board has already noted herein that Ms. Brinkley's union membership and resignation should not have made any difference in the way FOP treated her or handled her Grievances and that she was entitled to representation regardless of whether she resigned from the Union. *See* D.C. Code § 1-617.11(a); *and* Footnote 4 above. The Hearing Examiner's Report is therefore rejected to the extent it implies otherwise.

In regard to whether the provision Ms. Brinkley agreed to when she signed the Union's representation agreement constituted a waiver of her standing to challenge FOP's handling of her cases, the Hearing Examiner stated she "did not consider its applicability in reaching her conclusions since the matter was not raised by Complainant." (Report, at 14). Even if this issue was not raised by Complainant, it *was* raised by Respondent, and therefore must be addressed and given due consideration and analysis.

In regard to the question of whether the Complainant's allegations were timely in accordance with PERB Rules 520.4 and 544.4, the Hearing Examiner noted that the Complaint was filed on January 12, 2010, and therefore reasoned that "violations occurring on or after September 14, 2009 would be timely." *Id.* The Hearing Examiner found that "[i]n her Complaint, Ms. Brinkley has alleged standards of conduct violations and unfair labor practices

that occurred after that date." *Id.* The Hearing Examiner further acknowledged that "some" of Complainant's allegations predate September 14, 2009, but implied they were still timely because "Complainant also alleges violations that took place and/or continued within the covered time period." (Report, at 10) (citing *DFR v. AFCSME, supra*, Slip Op. No. 217, PERB Case No. 88-A-01). The Board notes that the case the Hearing Examiner relied on deals with the legality of an arbitration award and does not support the Hearing Examiner's statement.[5] PERB does not have jurisdiction to consider complaints filed outside of the 120-day window prescribed by PERB Rules. *Hoggard v. District of Columbia Public Employee Relations Board*, 655 A.2d 320, 323 (D.C. 1995) ("[T]ime limits for filing appeals with administrative adjudicative agencies...are mandatory and jurisdictional"). That 120-day period begins when the complainant first knew or should have known about the acts giving rise to the alleged violation. *Charles E. Pitt v. District of Columbia Department of Corrections*, 59 D.C. Reg. 5554, Slip Op. No. 998 at p. 5, PERB Case No. 09-U-06 (2009). Because time limits are mandatory and jurisdictional, the Hearing Examiner must determine which of Complainant' specific allegations were filed within the 120-day window and which ones were not. *Hoggard v. PERB, supra.*

Last, the Board notes that the Hearing Examiner's Report did not address Ms. Brinkley's allegation that the Union failed to honor her request to assign another representative to her grievance, but finds that the absence of ruling is not fatal because, even if the allegation is true, that action would not constitute a violation of the standards of conduct or an unfair labor practice. See *Enoch Williams v. American Federation of State, County and Municipal Employees, District Council 20, Local 2290*, 43 D.C. Reg. 5598, Slip Op. No. 454 at p. 2, PERB Case No. 95-U-28 (1995) (holding that "[r]egardless of the effectiveness of a union's representation in the handling or processing of a bargaining unit employee's grievance, such matters are within the discretion of the union or the bargaining unit's exclusive bargaining representative").

Based on the foregoing, the Board remands this matter to the Hearing Examiner to address these issues in a supplemental report, and to make appropriate recommendations. The Board reserves making findings on all of the other issued related to this matter, including FOP's Exceptions, until after the Hearing Examiner's supplemental report has been issued.

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[5] If the Hearing Examiner 's intention was to invoke a "continuing violation theory" to justify her finding that all the allegations "took place and/or continued within the covered time period", that theory must be applied within the parameters of PERB precedent. *See, e.g. American Federation of Government Employees, Local 3721 v. District of Columbia Fire Department*, 39 D.C. Reg. 8599, Slip Op. No. 287, PERB Case No. 90-U-11 (1991); *and Fraternal Order of Police/Department of Human Services Labor Committee v. District of Columbia Department of Human Services*, 59 D.C. Reg. 3296, Slip Op. No. 812, PERB Case No. 02-U-24 (2009). The Board notes, however, that the ruling would still be constrained by PERB's requirement that the 120-day period begins when the complainant first knew or should have known about the acts giving rise to the alleged violation(s). *Pitt v. DOC, supra*, 59 D.C. Reg. 5554, Slip Op. No. 998 at p. 5, PERB Case No. 09-U-06. If it was not the Hearing Examiner's intention to invoke a "continuing violation theory", she must still clarify her position because the case she cited in the Report (Slip Op. 217) is not applicable to questions of timeliness.

ORDER

IT IS HEREBY ORDERED THAT:

1. The case is remanded to the Hearing Examiner to address the following issues:

   A. Whether the provision in the Union's representation agreement constituted a waiver of Complainant's standing to challenge FOP's handling of her case; and

   B. Which of Complainant's allegations were timely.

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

November 26, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 10-U-12 / 10-S-02, Slip Op. No. 1446, was transmitted via File & ServeXpress™ and U.S. Mail to the following parties on this the 17th day of December, 2013.

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