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**Government of the District of Columbia
Public Employee Relations Board**

)
In the Matter of:)
)
)
Katrina Osborne, Lorraine Cozzens,)
Deborah Smith, Janet Hill and)
Kevin L. Crestwell,)
)
Complainants,)
)
v.)
)
AFSCME, Local 2095 and)
1199 Metropolitan District, D.C.,)
National Union of Hospital and)
Health Care Employees (NUHHCE),)
AFSCME, AFL-CIO,)
)
Respondents.)

CORRECTED COPY

PERB Case Nos. 02-U-30 and 02-S-09

Opinion No. 713

Motion for Reconsideration

DECISION AND ORDER

I. Statement of the Case

This matter involves a Motion for Reconsideration¹ filed by Katrina Osborne, Lorraine Cozzens, Deborah Smith, Janet Hill and Kevin L. Crestwell (“Complainants”). The Complainants are requesting that the Board reverse the Executive Director’s dismissal of their Complaint.

The Complainants filed a consolidated Unfair Labor Practice and Standards of Conduct Complaint (“Complaint”). The Complainants assert that the American Federation of State, County and Municipal Employees, Local 2095 (“AFSCME” or “Union”) and 1199 Metropolitan District, D.C., National Union of Hospital and Health Care Employees, AFSCME (“NUHHCE” or “Union”) violated the Comprehensive Merit Personnel Act. Specifically, it is alleged that the Union violated D.C. Code § 1-617.04 (b)(1) and (2) (2001 ed.) by: (1) failing to provide the Complainants with

¹The document submitted by the Complainants is titled “Appeal of Dismissal of the Complaint of the Unfair Labor Practice.” However, pursuant to Board Rule 500.4, the Complainants’ submission is a Motion for Reconsideration.

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adequate representation during a 1999 arbitration; and (2) rescinding (in June 2002) an agreement to arbitrate the Complainants' grievance concerning "acting pay." (Compl. at pgs. 2-3). In addition, the Complainants claim that the same acts and conduct alleged to constitute unfair labor practices under D.C. Code §1-617.04 (b) (2001 ed.), also constitute violations of the standards of conduct under D.C. Code § 1-617.03 (2001 ed.).

After reviewing the Complainants' submission, the Executive Director determined that the Complaint was not timely and failed to state a basis for a claim under the Comprehensive Merit Personnel Act (CMPA). As a result, the Complaint was administratively dismissed.

The Complainants filed a Motion for Reconsideration, requesting that the Board reverse the Executive Director's decision. The Respondents filed a response to the present Motion. The Motion for Reconsideration is now before the Board for disposition.

II. Discussion

We believe that the arguments raised in the Complainants' Motion were previously considered and addressed by the Executive Director. Therefore, the Board must determine whether the Executive Director erred in dismissing the Complaint.

Board Rule 520.4 provides as follows:

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

In addition, Board Rule 544.4 provides as follows:

A complaint alleging a violation under this section shall be filed not later than one hundred and twenty (120) days from the date the alleged violation(s) occurred. (Emphasis added.).

The 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." Hoggard v. DCPS and AFSCME, Council 20, Local 1959, 43 DCR 1297, Slip Op. No. 352 at p. 3, PERB Case No. 93-U-10 (1993).² Also, the Board has noted that "the time for filing a complaint

²See also, American Federation of Government Employees, Local 2725, AFL-CIO v. District of Columbia Housing Authority, 46 DCR 119, Slip Op. No. 509, PERB Case No. 97-U-07 (1997).

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with the Board concerning [] alleged violations [which may provide for] ... statutory causes of action, commence when the basis of those violations occurred ... However, proof of the occurrence of an alleged statutory violation is not necessary to commence the time limit for initiating a cause of action before the Board. The validation, i.e. proof, of the alleged statutory violation is what proceedings before the Board are intended to determine.” 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).

In the present case, the Complainants claim that at various times between 1993 and 1999, the Complainants performed work for which they should have received “acting pay.” (Compl. at p. 2). In addition, they assert that on numerous occasions the five Complainants informed the Union that they were in an “acting pay” status. (Compl. at p. 2). Also, the Complainants contend that in 1997, the Union filed a grievance on behalf of bargaining unit members who were asking for “acting pay.” Furthermore, the Complainants claim that the “1997 grievance” ultimately went to arbitration in June 1999. (Compl. at p.2). As a result, on or about June 2, 1999, the Complainants appeared at the 1999 arbitration proceeding in which the Union was grieving the fact that bargaining unit members did not receive “acting pay.” (Compl. at p. 2). Finally, the Complainants contend that “David Cromer, Chief of Employee and Labor Relations, [Department of Mental Health], confronted the Complainants and informed them that they could not attend nor be party to the [June 2, 1999,] arbitration [proceeding].” (Compl. at p. 2). In view of the above, the Complainants’ claims were not included in the June 2, 1999 arbitration proceeding. As a result, the Complainants did not receive “acting pay” for work performed between 1993 and 1999.

The Complaint allegations concerning the June 1999 arbitration proceeding fail to allege that the Union violated any of the statutory provisions that delineate unfair labor practices by a labor organization. However, when considering the pleadings of pro se Complainants, the Board construes the claims liberally to determine whether a proper cause of action has been alleged. See, Beeton v. D.C. Department of Corrections and FOP/DOC Labor Committee, 45 DCR 2078, Slip Op. No. 538, PERB Case No. 97-U-25 (1998). As a result, the Executive Director applied the above noted standard and concluded that the Complainants were attempting to assert that the Union failed to fairly represent them during the June 1999 arbitration proceeding. Specifically, the Executive Director determined that the basis of the Complainants’ claim was that the Union wrongfully failed to include them in the “acting pay” grievance which was filed in 1997 and arbitrated in June 1999. Under certain circumstances, a labor organization can violate D.C. Code §1-617.04(b)(1) or (2) (2001 ed.) by failing to fairly represent a bargaining unit employee. However, for the reasons discussed in his February 7, 2003 letter, the Executive Director determined that the Complainants’ claim regarding the June 1999 arbitration proceeding, was not timely.³

³The Executive Director informed the Complainants of his decision in a letter dated February 7, 2003.

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After reviewing the pleadings, the Executive Director found that the events giving rise to the Complaint allegation took place on or about June 2, 1999 (date of the arbitration proceeding). Therefore, the Executive Director concluded that the Complainants were required to file their Complaint within one hundred twenty (120) days of the June 2, 1999 date. However, the present Complaint was not filed until September 19, 2002. As a result, the Executive Director found that the filing in this case occurred more than three years after the Complainants became aware of the alleged violation. In light of the above, the Executive Director determined that the Complainants' allegation concerning the "1999 arbitration proceeding", exceeded the 120-day requirement in Board Rule 520.4 and Board Rule 544.4. As a result, he dismissed this portion of the Complaint based on the fact that the allegation was not timely.

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, Public Employee Relations Board v. D.C. Metropolitan Police Department, 593 A. 2d 641 (D.C. 1991). As a result, the Board cannot extend the time for filing a complaint. In their Motion, the Complainants do not dispute the Executive Director's determination concerning the timeliness of their claim regarding the 1999 arbitration proceeding. Instead, the Complainants argue that "the alleged violations for this case actually took place on June 20, 2002 and is at that point that Board Rule 544.4 should have applied." (Motion at p. 2). After reviewing the present Motion, we note that the Complainants mistakenly believe that their cause of action concerning NUHHCE's decision to rescind arbitration (in June 20, 2002), was dismissed because it was untimely. To the contrary, the Executive Director did not dismiss that portion of the Complaint because it was untimely; but rather because it failed to state a cause of action. Furthermore, the only allegation which was deemed untimely, was the allegation concerning the 1999 arbitration. In view of the above, we find that the Complainants' argument lacks merit and is not a sufficient basis for reversing the Executive Director's decision. Also, after reviewing the pleadings, we find that the Executive Director's determination is reasonable and supported by Board precedent. As a result, we concur with the Executive Director's finding that the Complainants' claim regarding the 1999 arbitration proceeding, is untimely.

Notwithstanding the untimeliness of the allegation regarding the June 2, 1999 arbitration proceeding, the Executive Director found that the Complainants also failed to state a statutory cause of action with regard to allegations concerning the Union's June 2002 decision to rescind an agreement to arbitrate the Complainants' grievance (concerning "acting pay"). D.C. Code §1-617.04(b)(1) (2001 ed.) prohibits employees, labor organizations, their agents or representatives from "[i]nterfering with, restraining or coercing any employees or the District in the exercise of rights guaranteed by this subchapter . . .". "Employee rights under this subchapter are prescribed under D.C. Code. [1-617.06(a) and (b) (2001 ed.)] and consist of the following: (1) [t]o organize a labor organization free from interference, restraint or coercion; (2) [t]o form, join or assist any labor organization; (3) [t]o bargain collectively through a representative of their own choosing. . .; (4) [to] present a grievance at any time to his or her employer without the intervention of a labor organization

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[.]” American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks, 45 DCR 5078, Slip Op. No. 553 at p.2, PERB Case No. 98-U-03 (1998). “[The Board has] ruled, . . . that D.C. Code §1-617.04(b)(1) (2001 ed.) also encompasses the right of employees to be fairly represented by the labor organization that has been certified as the exclusive representative for the collective-bargaining unit of which the employee is a part . . . Specifically, the right to bargain collectively through a designated representative includes the duty of labor organizations to represent [] the interest of all employees in the unit without discrimination and without regard to membership in the labor organization . . .”. Glendale Hoggard v. American Federation of State, County and Municipal Employees, District Council 20, Local 1959, AFL-CIO, 43 DCR 2655, Slip Op. No. 356 at pgs. 2-3, PERB Case No. 93-U-10 (1996).

In their submission, the Complainants do not claim that any of their rights as prescribed under D.C. Code §1-617.06(a) and (b) (2001 ed.), have been violated in any manner by the Union. Instead, the asserted violation of D.C. Code §1-617.04 (b)(1) (2001 ed), appears to be based on the alleged breach by the Union of the Complainants’ right to fair representation. Specifically, the Complainants assert that the Union violated the CMPA by rescinding their request for arbitration which had been filed with the Federal Mediation and Conciliation Service (“FMCS”) on December 13, 2001. However, for the reasons noted below, we find that the Complaint does not contain allegations which are sufficient to support a cause of action.

“Under D.C. Code Section [1-617.03 (2001 ed.)], a member of the bargaining unit is entitled to ‘fair and equal treatment under the governing rules of the [labor] organization’. As [the] Board has observed: ‘[the union as the statutory representative of the employee is subject always to complete good faith and honesty of purpose in the exercise of its discretion regarding the handling of union members’ interest’.” Stanley Roberts v. American Federation of Government Employees, Local 2725, 36 DCR 1590, Slip Op. No. 203 at p. 2, PERB Case No. 88-S-01 (1989). The Board has determined that “the applicable standard in cases [like this], is not the competence of the union, but rather whether its representation was in good faith and its actions motivated by honesty of purpose . . . [Furthermore,] ‘in order to breach this duty of fair representation, a union’s conduct must be arbitrary, discriminatory or in bad faith, or be based on considerations that are irrelevant, invidious or unfair’.” Id.

In the present case, the Complainants fail to assert or demonstrate that the Union’s June 2002 decision to rescind arbitration, was arbitrary, discriminatory, or the product of bad faith. Instead, the Complainants claim that after receiving an unfavorable response to the their November 13, 2001 grievance, the Union filed for arbitration on December 13, 2001. Subsequently, on February 1, 2002, an arbitration panel was provided to the parties by FMCS. Therefore, the Complainants assert that on June 13, 2002, they met with the Union’s attorney and were informed “that the acting pay case appeared to be untimely due to the [Union’s] own fault.” (Compl. at p. 3.). As a result, the Complainants claim that on June 20, 2002, they received a letter notifying them that the Union “would not represent the Complainants in arbitration and would inform management that the Union

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would be cancelling the arbitration.” (Compl. at p. 3). The Complainants assert that “the Union’s withdrawal of arbitration constituted an irrevocable election of the Complainants’ appeal rights. [Moreover, the Complainants claim that] once the Union withdrew their approval for arbitration after arbitration had been accepted and a panel selected, the Complainants were without any means to challenge [the] issue of acting pay. [Furthermore, the Complainants contend that] by the above act, the Union has interfered with the Complainants with regard to their rights under D.C. Code §1-617.04. [Finally, the Complainants assert] that the Union by its actions has been deceitful and dishonest in its conduct toward the Complainants and has breached its’ duty of fair representation.” (Compl. at p. 3).

The Board has previously addressed the question of whether a union’s refusal to proceed to arbitration on a particular grievance constitutes a breach of its duty of fair representation. In Freson v. Fraternal Order of Police/Metropolitan Police Department Labor Committee, 31 DCR 2239, Slip Op. No. 74, PERB Case No. 83-U-09 (1984), we noted, that “[i]t is a well established principle that a labor organization’s duty of fair representation does not require it to pursue every grievance to arbitration.” Also see, Stanley Roberts v. American Federation of Government Employees, Local 2725, 36 DCR 1590, Slip Op. No. 203, PERB Case No. 88-S-01 (1989). In the present case, it appears that pursuant to the parties’ collective bargaining agreement only the Union can file for arbitration. However, the Complainants fail to assert or demonstrate that the Union’s decision not to proceed to arbitration was arbitrary, discriminatory or the product of bad faith on the part of the Union. Instead, the Complainants’ claim relies solely on the fact that the Union withdrew its request for arbitration. Therefore, the Complainants assert no basis for attributing an unlawful motive to the Union’s decision to withdraw arbitration. Moreover, the Complaint indicates that the Union’s decision to withdraw arbitration was based on their determination that the “acting pay” claim was untimely. We have held 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.” Enoch Williams v. American Federation of State, County and Municipal Employees, District Council 20, Local 2290, 43 DCR 5598, Slip Op. No. 454 at p. 2, PERB Case No. 95-U-28 (1995). Furthermore, the Board has held that “judgmental acts of discretion in the handling of a grievance, do not constitute the requisite arbitrary, discriminatory or bad faith element [needed to find a violation of the CMPA].” Brenda Beeton v. D.C. Department of Corrections and Fraternal Order of Police Department of Corrections Labor Committee, 45 DCR 2078, Slip Op. No. 538 at p. 3, PERB Case No. 97-U-26 (1998). Also, we have found that the decision not to arbitrate a grievance based on cost and likelihood of success does not constitute arbitrary conduct. See, Thomas v. AFGE, Local 1975, 45 DCR 6712, Slip Op. No. 554, PERB Case No. 98-S-04 (1998). In addition, we have found that when a union properly informs a complainant that a grievance is untimely, the union’s refusal to file arbitration (on a Complainant’s behalf) is not arbitrary, discriminatory or the result of bad faith. See, Osekre v. AFSCME, Local 2401, 47 DCR 7191, Slip Op. No. 623, PERB Case Nos. 99-U-15 and 99-S-04 (2000).

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After reviewing the pleadings, it appears that the Complainants disagree with the Union's decision to rescind their request for arbitration. However, the fact that the Complainants disagree with this decision, does not constitute a breach of the union's duty of fair representation. Specifically, we have determined "that the fact ... that [a] Complainant disagrees with the approach taken by [the union] does not render the [union's] actions or omissions a breach of the standard for its duty of fair representation." Enoch Williams v. American Federation of State, County and Municipal Employees, District Council 20, Local 2290, supra. In addition, the Complainants assert no basis for attributing an unlawful motive to the Union's decision. Therefore, the Complainants have failed to provide any allegation that, if proven, would establish a statutory violation.

While a Complainant need not prove their case on the pleadings, they must plead or assert allegations that, if proven, would establish the alleged statutory violations. See, Virginia Dade v. National Association of Government Employees, Service Employees International Union, Local R3-06, 46 DCR 6876, Slip Op. No. 491 at p. 4, PERB Case No. 96-U-22 (1996); and Gregory Miller v. American Federation of Government Employees, Local 631, AFL-CIO and D.C. Department of Public Works, 48 DCR 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994).

Furthermore, the Board has determined that "[to maintain a cause of action, [a] Complainant must [allege] the existence of some evidence that, if proven, would tie the Respondent's actions to the asserted [statutory violation]. Without the existence of such evidence, Respondent's actions [can not] be found to constitute the asserted unfair labor practice. Therefore, a Complaint that fails to allege the existence of such evidence, does not present allegations sufficient to support the cause of action." Goodine v. FOP/DOC Labor Committee, 43 DCR 5163, Slip Op. No. 476 at p. 3, PERB Case No. 96-U-16 (1996). For the reasons stated above, the Executive Director determined that the Complaint did not contain allegations which were sufficient to support a cause of action. As a result, the Complaint was dismissed.

In their Motion, the Complainants assert that the Executive Director erred in finding that the Complaint failed to state a cause of action under the CMPA. As a result, the Complainants requests that the Board reverse the Executive Director's decision. However, the present Motion raises no new contentions or arguments not considered and addressed by the Executive Director. Also, a review of the exhibits reveal that the Complainants were informed by the Union, that it would not proceed with arbitration on their behalf because their claim was not timely. As a result, we believe that the Complainants' claims amount to nothing more than a disagreement with the Executive Director's determination. Moreover, we find that a mere disagreement with the Executive Director's decision is not a sufficient basis for reversing that decision. Finally, the Complainants do not identify any law or legal precedent which the Executive Director's decision contravenes. Instead, the Complainants contend that they are being denied an opportunity to have their case heard. (Motion at p. 3). However, we find that this argument is just a repetition of the allegations contained in the Complaint and is not a sufficient basis for reversing the Executive Director's decision.

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Upon review of the pleadings in a light most favorable to the Complainants and taking all the allegations as true, we find for the reasons discussed above, that the Complaint fails to state a cause of action against the Union. Therefore, no basis exists for disturbing the Executive Director's administrative dismissal of the Complaint. As a result, we affirm the Executive Director's dismissal of the Complaint.

In view of the above, we find that the Executive Director's decision was reasonable and supported by Board precedent. Therefore, we deny the Complainants' Motion for Reconsideration.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complainants' Motion for Reconsideration is denied.
2. The Complaint is dismissed in its entirety.
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 21, 2003