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

In the Matter of:	)	
	)	
Dancy Simpson, Pamela Chase,	)	PERB Case Nos. 10-S-05
Ernest Durant, Shante Briscoe, et al.	)	10-S-07
	)	10-S-08
Complainants	)	10-S-09
	)	
v.	)	Opinion No. 1537
	)	
Fraternal Order of Police/	)	
Department of Corrections Labor Committee	)	
	)	
Respondent	)	

**DECISION AND ORDER**

**I. Statement of the Case**

Standards of Conduct Complaints were filed by several Fraternal Order of Police/Department of Corrections Labor Committee ("FOP/DOC") members against FOP/DOC, alleging that FOP/DOC failed to conduct a fair election of local union officials, improperly denied a member the right to run for the election, and failed to disclose requested financial documents.<sup>1</sup> The Complaints were consolidated in this proceeding. A hearing was held, and a Hearing Examiner's Report and Recommendation was issued, which is before the Board for disposition. The Board finds that the Hearing Examiner's Report and Recommendation is inconsistent with the Board's precedents and remands the case to the Hearing Examiner for further factual findings.

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<sup>1</sup> Complainants included FOP Lodge #1 as a Respondent in Case No. 10-S-05. The Hearing Examiner found that no allegations or evidence was presented by the Complainants against FOP Lodge #1, and recommended dismissing FOP Lodge #1 as a Respondent. The Board finds that the Hearing Examiner's determination is reasonable, based on the record, and consistent with Board precedent. FOP Lodge #1 is dismissed as a party, and removed from the caption of the case.

## II. Facts and Background

### A. Case No. 10-S-05

On April 6, 2010, Dancy Simpson filed a Standards of Conduct Complaint, Case No. 10-S-05, alleging that FOP violated §§ 1-617.03(1), (3), (4), and (5); and 1-617.10 of the Comprehensive Merit Personnel Act ("CMPA"), by "failing to make its financial reports and contract terms available to members at the December 30, 2009 meeting for their approval 'for the 2010 budget as required by the By-laws and the CMPA....'"<sup>2</sup> Simpson additionally alleged that FOP's contract requires members to pay a portion of legal fees, contravening FOP's bylaws and constitution.<sup>3</sup> Simpson also challenged the appointment of Betty Wofford as the 2010 Election Committee Chairperson by FOP Chairperson Nila Ritenour, and the appointment of Theresa Capers to the Election Committee, and alleged that the election rules posted by Capers on March 1, 2010 violated state and federal laws. FOP filed an answer, denying the allegations and also filed a motion to dismiss, contending that the complaint contained allegations arising from a 2008 election that had already been resolved by PERB.<sup>4</sup>

### B. Case No. 10-S-07

On April 10, 2010, Ernest Durant filed a Standards of Conduct Complaint, asserting that FOP improperly conducted the 2010 elections, including election rules dictating that members could not vote with less than two years of service. He also objected to the location of the polling site, which was the office of the incumbent Executive Board, rather than the D.C. Jail where 90% of the members worked. FOP filed an Answer, denying the allegations.<sup>5</sup>

### C. Case No. 10-S-08

On May 14, 2010, Case No. 10-S-08 was filed by Pamela Chase, Edwin Hull, Curtis Thomas, Dancy Simpson, Jacqueline White, Keith Allison, Linwood Benton, and Ernest Durant. The Complaint alleges that FOP violated D.C. Official Code § 1-617.03, because the May 10 election was a sham election and that the poll watcher was a close friend of Capers, and did not fully observe the election. In addition, the Complaint alleged that 160 dues paying members were not permitted to vote, even though they were members in good standing, because their status was probationary.<sup>6</sup> FOP filed an answer denying the allegations.

### D. Case No. 10-S-09

On June 10, 2010, Shante Briscoe filed a Standards of Conduct Complaint against FOP. Briscoe alleged that on March 31, 2010, she was nominated and accepted a position as Executive

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<sup>2</sup> HERR at 3.

<sup>3</sup> *Id.*

<sup>4</sup> Complainants filed a motion for preliminary relief. The Board denied the motion in an Order, Slip Op. No. 1019, and consolidated Case Nos. 10-S-05 and 10-S-07 for a hearing.

<sup>5</sup> HERR at 3.

<sup>6</sup> *Id.*

Secretary, and that Capers sent Briscoe a letter stating that Briscoe could not run, because she was not a member in good standing. Briscoe contested the decision of Capers, and Capers did not respond.

### III. Discussion

A hearing was held before Hearing Examiner Lois Hochhauser on four separate dates in 2010. The record was closed with the filing of briefs in 2011. The Report and Recommendations was issued on November 8, 2011 and mailed to the parties on November 11, 2011. In a letter received from the Union's counsel dated December 4, 2004, the Union asserted that it had not received a copy of the Hearing Examiner's Report and Recommendations.<sup>7</sup> An additional copy of the Report and Recommendations was served on the parties on December 19, 2014, and the Union was provided an opportunity to submit Exceptions, which it did not do.

No Exceptions were timely received by the Board. "Whether exceptions have been filed or not, the Board will adopt the hearing examiner's recommendation if it finds, upon full review of the record, that the hearing examiner's 'analysis, reasoning and conclusions' are 'rational and persuasive,'" based on the record, and consistent with Board precedent.<sup>8</sup>

#### A. The CMPA governs Standard of Conduct cases.

D.C. Official Code § 1-617.03 establishes the standards of conduct for labor organizations under the CMPA. Section 1-617.03 (a) (1) requires labor organizations to maintain governing rules that define and secure the right of individual members to participate in the affairs of the organization and to a fair process in disciplinary proceedings. Subsection (a)(4) requires fair elections. Subsection (a)(5) requires "[t]he maintenance of fiscal integrity in the conduct of the affairs of the organization, including provision for accounting and finance controls and regular financial reports or summaries to be made available to members."

#### B. The Hearing Examiner applied the wrong legal standard to the allegations regarding the election.

The Hearing Examiner considered the Complainants' allegations<sup>9</sup> in light of "[t]he union . . . duty of 'fair representation' toward its members...to act 'without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.'"<sup>10</sup> The Hearing Examiner stated, "A union violates the standards of conduct

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<sup>7</sup> Complainants did not object to the Union's assertion.

<sup>8</sup> *Council of School Officers, Local 4, American Federation of School Administrators v. D.C. Public Schools*, 59 D.C. Reg. 6138, Slip Op. No. 1016 at p. 6, PERB Case No. 09-U-08 (2010) (quoting *D.C. Nurses Association and D.C. Department of Human Services*, 32 D.C. Reg. 3355, Slip Op. No. 112, PERB Case No. 84-U-08 (1985)).

<sup>9</sup> The Hearing Examiner considered that the Complainants appeared *pro se* and that the Board construes the claims of *pro se* complainants liberally.<sup>9</sup> The Hearing Examiner correctly applied the Board's standard for construing *pro se* complaints.

<sup>10</sup> HERR at 17, citing *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

if its actions can reasonably be considered so far outside a 'wide range of reasonableness' that they can be characterized as 'arbitrary, [or] discriminatory....'"<sup>11</sup>

The Board has held that "a breach by an exclusive representative of the duty to fairly represent its employees ... does not concomitantly constitute a breach of the standards of conduct, and vice versa."<sup>12</sup> The CMPA's standards of conduct for labor organizations address standards that apply to the internal operation of the union and union members' participation in such affairs.<sup>13</sup>

The right to be fairly represented, however, arises from a union's role as the employee's exclusive bargaining representative.<sup>14</sup> The alleged acts and conduct of FOP/DOC do not implicate obligations with respect to FOP/DOC's duty to fairly represent employees in a collective bargaining context. Rather they go to the rights of FOP/DOC members' to participate in the affairs of FOP/DOC consistent with the CMPA's prescribed standards of conduct for labor organizations, including FOP/DOC's duty to conduct fair elections and disclose certain financial information to members.

The Hearing Examiner also stated that the union violates the standards of conduct if its actions can reasonably be considered as "bad-faith". This standard of analysis when determining whether a fair election was conducted is also improper. The Hearing Examiner should examine the totality of the circumstances to determine whether a fair election was held. In addition, the Hearing Examiner should determine whether the rights of any of the Complainants were violated by the allegedly improper candidacy and voter rules. Bad faith is not required to find a violation.

C. The Hearing Examiner failed to analyze the claims of financial misconduct.

The Hearing Examiner made no findings of fact and applied no analysis to the allegations that financial reports and a summary of the contract for the Union's legal representation were not made available to the members and approved for the 2010 budget, as required by the by-laws and D.C. Official Code § 1-617.03(a)(5).<sup>15</sup> D.C. Official Code § 1-617.03(a)(5) requires, "The maintenance of fiscal integrity in the conduct of the affairs of the organization, including provision for accounting and financial controls and regular financial reports or summaries to be made available to members." The Hearing Examiner should determine whether or not these financial documents should have been provided to the membership.

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<sup>11</sup> HERR at 18.

<sup>12</sup> *Charles Bagenstose v. Washington Teachers Union, Local 6*, 43 D.C. Reg. 1397, Slip Op. No. 355, PERB Case Nos. 90-S-01 and 90-U-02 (1993).

<sup>13</sup> *William H. Dupree v. FOP/DOC Labor Committee*, PERB Case Nos. 98-S-08 & 98-U-23, Opinion No. 568 (1998).

<sup>14</sup> *Dupree*, Opinion No. 568 at p. 2. See D.C. Official Code § 1-618.06.

<sup>15</sup> HERR at 26, and Complaint 10-S-05 at 3-4.

#### IV. Conclusion

In reaching her conclusions and recommendations, the Hearing Examiner relied on case law concerning a union's duty of fair representation, which is fundamentally different than whether a fair election was conducted and whether the union met its financial reporting and disclosure obligations under the Standards of Conduct established by the CMPA. The case law concerning the duty of fair representation that the Hearing Examiner considered is inapplicable to the standards of conduct allegations in the present case. The Board finds that the Hearing Examiner's Report and Recommendation is inconsistent with law and the Board's precedents. Therefore, the Board rejects the Hearing Examiner's Report and Recommendation.

As the Hearing Examiner's conclusions regarding the allegations raised by the Complainants do not contain any discussion of applicable law, the Board declines to accept the findings of the Hearing Examiner. The complaints are remanded to the Hearing Examiner. The Hearing Examiner is instructed to determine under the totality of the circumstances whether FOP/DOC committed the alleged violations and whether those alleged violations violated its governing rules and applicable law in breach of the right of individual members to participate in the affairs of the organization, D.C. Official Code § 1-617.03(a)(1), and deprived the Complainants' of a fair election under D.C. Official Code § 1-617.03(a)(4). The Hearing Examiner may examine such factors as whether there were non-discriminatory procedures for determining voters, whether voters had access to an effective polling station, whether balloting procedures were fair and effective, whether the integrity of the ballot was safeguarded through appropriate measures, whether voters were able to cast their ballots without fear or intimidation, and whether ballot counting was secure and subject to monitoring and/or impartial verification. As the Board has not promulgated specific regulations for conducting elections, the Hearing Examiner may consider the Department of Labor's regulations and cases arising under them in making her analysis regarding whether a fair election was conducted.<sup>16</sup> The complaint concerning a breach of FOP/DOC's duties to disclose certain financial data, pursuant to D.C. Official Code § 1-617.03(a)(5), is remanded to the Hearing Examiner for proper findings of fact and conclusions of law.

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<sup>16</sup> Comparatively, in the private and federal sectors, the Labor-Management Reporting and Disclosure Act ("LMRDA") and Civil Service Reform Act of 1978 ("CSRA"), respectively, "promote union democracy through standards for union officer elections and union trusteeships." These acts "establish democratic standards for conducting union officer elections, including frequency and method of election, right of members in good standing to be candidates, rights of candidates, and voting rights of members." The Department of Labor's Office of Labor-Management Services administers and enforces most of the LMRDA and the standard of conduct regulations of the CSRA through administrative actions. Department of Labor, [http://www.dol.gov/olms/union\\_info.htm](http://www.dol.gov/olms/union_info.htm) (last accessed: August 25, 2015). The Department of Labor issues regulations for union democracy (CFR Title 29 Chapter IV Part 452 *et seq.*) and financial integrity (29 CFR 458.31-36).

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The Complaints will be remanded to the Hearing Examiner for further fact finding and legal analysis as discussed in the Decision. The Hearing Examiner may conduct further proceedings as necessary.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**

By unanimous vote of Board Chairperson Charles Murphy, Member Yvonne Dixon, Member and Member Keith Washington. Member Ann Hoffman was not present.

Washington, D.C.

July 24, 2015

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case Nos. 10-S-05, 10-S-07, 10-S-08, and 10-S-09 was transmitted to the following parties on 25th of August, 2015.

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