Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
Michael P. Roney,	)	
Complainant,	)	PERB Case No. 15-U-03
	)	Opinion No. 1634
v.	)	
Clifford Lowery in his individual capacity and Gina Walton, AFGE 1975 President.	)	
Respondents.	)	

DECISION AND ORDER

This matter is before the Board following a hearing on the damages phase of the case. Having found in *Roney v. Lowery*, 63 D.C. Reg. 4603, Slip Op. No. 1565, PERB Case No. 15-U-03 (2016), ("Opinion No. 1565") that Respondent Clifford Lowery, AFGE 1975 President ("Respondent Lowery") breached his duty of fair representation to Complainant Michael P. Roney ("Complainant" or "Roney") in the course of representing him in an appeal of his termination to the Office of Employee Appeals ("OEA"), the Board ordered a hearing to determine whether Roney would have prevailed in the appeal but for Respondent Lowery's breach and, if so, what monetary relief should be awarded. The Hearing Examiner found that Roney did not prove that he would have prevailed and recommended dismissal of the case. We adopt his recommendation.

I. Statement of the Case

A. Pleadings

Roney's complaint alleged numerous acts and omissions of Respondent Lowery that were adverse to his OEA appeal and that culminated in the dismissal of his appeal. The complaint prayed for back pay and other remedies to make Roney whole. In the absence of an

answer from Respondent Lowery, he was "deemed to have admitted the material facts alleged in the complaint."[1]

In Opinion No. 1565, the Board stated that the undisputed material facts of the case are as follows.[2]

Complainant was employed by the D.C. Department of Transportation ("DOT") as a civil engineer technician. Complainant sought the assistance of Respondent Lowery in disciplinary proceedings brought against him by DOT, but Respondent Lowery did not reply to any of Complainant's requests for his services. "This directly affected my chances of retaining my position negatively," Complainant states.[3] On January 10, 2012, DOT issued to Complainant a notice of its decision to remove him from his position.[4]

Subsequently, Respondent Lowery represented Complainant at a mediation on April 11, 2012. Respondent Lowery advised Complainant not to accept an offer to resign because he was certain he could win Complainant's case. Complainant did as he was advised and told the mediator that the relief he sought was to be returned to his position and to be made whole.[5]

Respondent Lowery informed Complainant that he would represent him in the subsequent appeal of his termination to OEA.[6] On March 28, 2014, an administrative judge at OEA held a status conference on Complainant's appeal. Respondent Lowery represented Roney at the conference. The administrative judge orally gave DOT until April 25, 2014, to submit its brief and gave Roney until May 23, 2014, to submit his brief.[7] A written order to that effect was mailed to Roney and Lowery "as all correspondence concerning this matter has been."[8]

After Complainant repeatedly called and e-mailed Respondent, the two met and discussed the content of the response they would submit to OEA. Respondent Lowery said he would prepare a letter, hand deliver it to OEA by May 23, and send Complainant a draft as well. Complainant did not hear from Respondent Lowery after the meeting. Complainant assumed that Respondent Lowery had done as he had promised until Complainant received from OEA a "show cause order" dated June 3, 2014.[9] The show cause order issued by the OEA administrative judge stated that the employee's brief was due May 23, 2014, but had not been filed. The administrative judge ordered the employee to submit a statement of good cause for his failure to file timely along with his brief on or before June 9, 2014.[10] After making telephone calls to Respondent Lowery and leaving messages that were not returned, Complainant e-mailed

[1] PERB R. 520.7.
[2] *Roney v. Lowery*, 63 D.C. Reg. 4603, Slip Op. No. 1565 at 2-4, PERB Case No. 15-U-03 (2016).
[3] Compl. ¶ 1.
[4] Compl. ¶¶ 1-3, Ex. A.
[5] Compl. ¶ 4.
[6] Compl. ¶ 1.
[7] Compl. ¶ 5.
[8] Compl. ¶ 5; Compl. Ex. D.
[9] Compl. ¶ 5.
[10] Compl. Ex. E.

Respondent Lowery on June 4, 2014, attaching the show cause order and stating, "If you need an excuse just blame it on me."[11]

Respondent Lowery answered a call from Complainant on June 6, 2014, and said that he had been hospitalized the past week but was now back from the hospital. Respondent Lowery promised to take care of the letter and to hand deliver it to OEA on time.[12]

On June 14, 2014, Respondent Lowery received OEA's Initial Decision.[13] The Initial Decision, issued June 12, 2014, stated, "To date, Employee has failed to respond to both the Post Status Conference Order and the Show Cause Order. The record is now closed."[14] That same day, Complainant called, texted, and e-mailed Respondent Lowery to no avail. Eleven days later Respondent Lowery took one of Complainant's calls. Complainant states, "I asked him if I was going to get another shot at my appeal, and he said yes. Of course this led me to believe that he was going to, or already had, file [*sic*] the Petition for Review, as allowed within 35 days of the Initial Decision."[15]

On July 13, 2014, Complainant's case appeared on OEA's website as closed, and on that date Complainant tried to contact Respondent Lowery by e-mail.[16] Complainant states, "Since time was getting close and Mr. Lowery's record of getting back to me was not good, I contacted AFGE[']s] District 14 National Representative . . . [and] our shop steward. . . ."[17] The shop steward told Complainant that he spoke to Respondent Lowery about the case and Respondent Lowery said he was going to speak to the union's lawyers about it. That was the last response Complainant received from anyone connected with AFGE 1975 or District 14 despite numerous calls and e-mails. Complainant states that thereafter "time lapsed, case closed, and I could have taken other steps to be represented had I not been led to believe that the union had control of this matter."[18]

B. Determination that an Unfair Labor Practice Was Committed

In Opinion No. 1565, the Board held that the above undisputed facts established that Respondent Lowery's bad faith in misleading Roney into thinking that Respondent Lowery would file a petition for review of the dismissal of the appeal and then failing to file such petition for review constituted a breach of the duty of fair representation by Respondent Lowery individually and in his official capacity as president of AFGE 1975. Although the Complaint was not filed timely with respect to Respondent Lowery's earlier acts and omissions in the course of the appeal, those acts and omissions helped demonstrate that Lowery's broken promise to file a petition for review was no accident but was dishonest conduct establishing bad faith.[19]

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[11] Compl. Ex. F.
[12] Compl. ¶ 5.
[13] Compl. ¶ 5.
[14] Compl. Ex. G.
[15] Compl. ¶ 6.
[16] Compl. ¶6, Ex. H.
[17] Compl. ¶ 6.
[18] Compl. ¶ 6.
[19] *Roney v. Lowery*, 63 D.C. Reg. 4603, Slip Op. No. 1565 at 6-8, PERB Case No. 15-U-03 (2016).

The Board ordered Respondent Lowery to cease and desist from breaching his duty to fairly represent Complainant; cease and desist from interfering with, restraining, or coercing, in any like or related manner, employees in the exercise of rights guaranteed by the Comprehensive Merit Personnel Act; post a notice of his violation; and take the necessary steps to reinstate the Complainant's OEA appeal within thirty days. The Board's order also directed the procedures to be taken if the appeal were not reinstated:

> In the event Complainant's appeal cannot be reinstated or has not been reinstated within sixty (60) days of service of this Decision and Order, the Board orders that the case be referred to a hearing examiner to determine whether the Complainant would have prevailed in his appeal but for Respondent's breach of the duty of fair representation in failing to file a petition for review. If the hearing examiner determines that the Complainant has shown by a preponderance of the evidence that the appeal would have prevailed, then the hearing examiner shall recommend to the Board the appropriate monetary relief.[20]

Respondent Lowery, through counsel, posted a notice furnished to him by the Board and filed with OEA a "Motion to Re-open" the case. OEA treated the motion as a petition for review and denied it on grounds of untimeliness.

C. Hearing and Report of the Hearing Examiner

The Executive Director appointed a hearing examiner to conduct a hearing on the issues stated above. The Hearing Examiner conducted a hearing on October 4, 2016. Respondent Lowery did not appear. Roney appeared and testified. Gina Walton, who is the current president of AFGE 1975, also appeared.[21] Walton presented arguments and introduced exhibits.

Following the hearing, the Hearing Examiner submitted his Report and Recommendations. The Report and Recommendations states that Roney was employed as a civil engineer technician with DOT until his termination.[22] On May 23, 2011, Roney was arrested for possession of marijuana and other charges. The U.S. Attorney's Office for the District of Columbia declined to proceed with prosecution of the charges.[23]

DOT Chief Engineer Ronaldo Nicholson considered the proposed removal of Roney and issued his decision in a January 10, 2012 Notice of Final Decision for Proposed Removal. Nicholson found that two causes for removal were supported by the evidence: (1) an on-duty act or omission that the employee knew or reasonably should have known is a violation of law and (2) an on-duty act or omission that interferes with the efficiency and integrity of government

[20] *Id.* at 10.
[21] Report & Recommendations 1.
[22] Report & Recommendations 2.
[23] Report & Recommendations 3.

operations. The specification for the first cause was Roney's arrest for possession of marijuana. The specification for the second cause was Roney's absence from his assigned work locations at the time of his arrest. Nicholson stated that he had reviewed all "Douglas factors" relevant to the penalty including mitigating and aggravating factors and stated that it was his decision to sustain the proposed removal.[24]

Roney's appeal to OEA was dismissed for lack of prosecution on June 12, 2014. OEA denied as untimely a motion to re-open the case that was filed on behalf of Roney on March 15, 2016.[25]

The Hearing Examiner stated as follows his findings and recommendations regarding the the case:

> It is most unfortunate that Petitioner Roney was not adequately represented by his Union representative in the course of the disciplinary action instituted against him by the Agency.
>
> One of the most vital functions of a Union is to protect the interests of its member when he or she is facing disciplinary action, especially the most significant penalty of termination. Clifford Lowery and AFGE 1975 abjectly failed to keep its commitment to its member, Michael P. Roney, with respect to his proposed termination by the Agency, the DC Department of Transportation.
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> Parenthetically, it should be noted that the current president of [AFGE] Local 1975, Gina Walton, was not president of the Union at the time of the events involving Roney and she took no part in the failure of the Union to protect Roney's interests.
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> However, this hearing officer cannot conclude that Complainant Roney has established, by a preponderance of the credible evidence, that his appeal to the DC Office of Employee Appeals would have succeeded but for Lowery's breach of the duty of fair representation in failing to file a petition for review.
>
> The Agency Chief Engineer, Ronaldo Nicholson, set forth a full evaluation of the record in reaching his decision to sustain the termination of Roney. He evaluated the events described in the credible police department report concerning Roney's arrest for drug possession. Despite the fact that the US Attorney exercised his discretion not to prosecute Roney for the marihuana and related offenses, the Agency Officer Nicholson carefully evaluated the

[24] Report & Recommendations 3-4; Compl. Ex. A.
[25] Report & Recommendations 4.

> police incident report. He also considered all 'Douglas factors' including mitigating factors and aggravating factors.
>
> Because of the limited scope of a petition for review to the OEA, and the fact that the Agency appears to have conducted a fair-minded and thorough analysis of the charges against Roney before confirming his termination, this hearing officer cannot conclude that if Lowery had filed a timely petition for review the outcome of the Agency disciplinary action would have been different.
>
> If Roney had been properly represented from the inception of this matter, and had availed himself of Agency resources, the outcome of the agency disciplinary action might have been different.
>
> Based on the foregoing, this hearing officer recommends that the complaint in this matter be dismissed, without costs to either party.[26]

No exceptions were filed.

II. Discussion

The complaint names Lowery as a respondent individually and in his official capacity as president of AFGE 1975.[27] His successor as president of AFGE 1975, Gina Walton, is substituted as a respondent in her official capacity.[28]

The Hearing Examiner's comment that the outcome might have been different if Roney had been properly represented from the inception of this matter is unnecessary speculation. The issue presented is limited to whether Roney proved that the outcome would have been different had Lowery filed a petition for review. Roney did not carry his burden of proof on that issue. He offered no evidence or testimony imparting the grounds that OEA would consider in a petition for review and did not indicate what argument could effectively be made on his behalf in such a petition. The next question would be whether Roney proved that he would have prevailed at a hearing had OEA ordered one. The Hearing examiner concluded from what was presented to

[26] Report & Recommendations 5-6.
[27] *Roney v. Lowery*, 63 D.C. Reg. 4603, Slip Op. No. 1565 at 5-6, PERB Case No. 15-U-03 (2016).
[28] *Cf.* Super. Ct. R. 25(d)(1) ("When a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party."); Fed. R. Civ. P. 25(d) (to the same effect); *Johnson v. Kay*, No. 87 Civ. 6482, 1989 WL 94334 at *3 (U.S. Dist. Ct. S.D.N.Y. Aug. 9, 1989) (Underlying policies of rule on substitution of a public officer who was a party to an action in an official capacity applies as well to union officers participating in a lawsuit in their official capacities.)

him, particularly Nicholson's thorough Notice of Final Decision for Proposed Removal, that Roney did not. That conclusion is reasonable and supported by the record.

Accordingly, the Board, having reviewed the entire record, adopts the Hearing Examiner's recommendation that the complaint in this matter be dismissed, without costs to either party. Section 1-605.02(3) of the D.C. Official Code empowers the Board to "[d]ecide whether unfair labor practices have been committed and issue an appropriate remedial order." We previously found that an unfair labor practice was committed in this case and issued remedial orders. In light of the above, we find that no further remedial order is appropriate.

ORDER

IT IS HEREBY ORDERED THAT:

1. The hearing examiner's recommendation is adopted in its entirety.

2. The unfair labor practice complaint is dismissed.

3. Pursuant to Board Rule 559, this Decision and Order shall become final thirty (30) days after issuance unless a party files a motion for reconsideration or the Board reopens the case within fourteen (14) days after issuance of the Decision and Order.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairman Douglas Warshof and Members Barbara Somson and Mary Anne Gibbons.

July 27, 2017
Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Number 15-U-03 is being transmitted to the following parties on this the 31st day of July 2017.

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via File&ServeXpress

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