

Decision and Order
PERB Cases Nos. 98-S-01
and 97-S-01
Page 2

set forth in those cases cited in the margin below.^{2/}

The narrative pro se effort of the instant Complaint has rendered the underlying basis for the Complainants' charges difficult to fully discern. However, the thrust of the Complaint alleges that certain FOP executive board officers have violated the Comprehensive Merit Personnel Act's (CMPA) standards of conduct for labor organizations, as codified under D.C. Code § 1-618.3(a)(1). Specifically, the Complainants allege that the Respondent board officers have engaged in a course and conduct of violating FOP by-laws in order to remove dissident officers and other FOP officials from their duly elected or appointed positions. The Complainants also allege that the Respondents have manipulated and/or ignored FOP by-laws in order to thwart an attempt by FOP members to conduct a recall election of FOP executive board chairperson, Clarence Mack.

The Complainants assert that the Respondent's acts contravene the Board's Order granting preliminary relief in PERB Case No. 97-S-01, Slip Op. No. 516, and request that the Board enforce its Order. The Complainants also filed a separate Motion requesting that the Board grant preliminary relief which would provide the following: (1) enjoin FOP from initiating any process leading to the removal of Complainants Butler and Spain from their respective elected offices; (2) restore Complainants Butler and Spain to their respective offices; (3) afford Complainants Butler and Spain access and use of union office space and equipment equivalent to that enjoyed by Chairperson Mack, Treasurer Hazel Lee and Executive Secretary Shirley Simmons; (4) upon verification of the requisite signatures, order a Board-conducted recall election of Chairperson Mack.

FOP filed an Answer to the Complaint and a "Response to

^{2/} See, Clarence Mack v. FOP/DOC Labor Committee, Slip Op. No. 443, PERB Case No. 95-U-16 (1995); Ellowese Barganier, et al. v. FOP/DOC Labor Committee, Slip Ops. 464, 472, 484, PERB Case No. 95-S-02; Clarence Mack, Shirley Simmons, Hazel Lee, Carlton Butler, et al. v. FOP/DOC Labor Committee, Slip Ops. 483, 507, PERB Case No. 95-S-03 (1996); Victor Akuchie, Rebecca Portis and Frank Jackson v. FOP/DOC Labor Committee, Slip Op. No. 524, PERB Case No. 96-S-04 (1996); Clarence Mack, et al. v. FOP/DOC Labor Committee, Slip Ops. No. 516, 521, PERB Case No. 97-S-01 (1997); and Ellowese Barganier, et al. and Clarence Mack v. FOP/DOC Labor Committee, Slip Op. 516, PERB Case No. 97-S-02 (1997).

Decision and Order
PERB Cases Nos. 98-S-01
and 97-S-01
Page 3

Motion for Enforcement and Preliminary Relief", opposing the requested relief as failing to state a claim in the Complaint upon which relief may be granted. The Complainants then filed a Response to the Respondent's Response to the Motions.

The Complaint and related Motions merges a new matter with one that remains pending before the Board. The pending matter, PERB Case 97-S-01, concerns claims that the FOP, then controlled by Complainants Butler and Spain, unlawfully removed or precluded certain FOP members, including Chairperson Mack, from holding their elected executive board office. We granted preliminary relief in that matter, Slip Op. No. 516. Our Order, among other things, restored those members, including Chairperson Mack, to their elected offices and ordered FOP and its officers to cease and desist from taking retaliatory action against current and former officers while the case remained pending before the Board.

The instant Complaint (PERB Case 98-S-01) largely consists of claims that FOP has failed to comply with the latter provision of our Order concerning retaliatory acts by FOP. With the exception of the new claims related to FOP's conduct concerning Complainants' efforts to recall FOP Chairperson Mack, the Complaint and supporting documents are presented as support for the Motion for Enforcement of our Order in PERB Case No. 97-S-01. The remainder of the Complaint consist of new instances of the same type of conduct addressed by our Order in PERB Case 97-S-01. Therefore, in the interest of clarity, we shall address these dual pleadings in this context beginning with the request for preliminary relief.

With respect to the only distinctly new matter contained in the Complaint, FOP disputes the underlying allegations supporting the basis of the requested relief. FOP denies that by any of the alleged acts or conduct, the Complainants have established a cause of action that any of the standards of conduct for labor organizations had been violated. Moreover, FOP asserts that the basis of the Complainants' asserted violation is hypothetical and disputes that FOP has hindered any actual attempt by the Complainants to recall Chairperson Mack. The Complainants, FOP avers, have not taken any of the required steps under FOP by-laws to initiate the internal union process for a recall election, relying instead on its assertions that such action would be futile. In view of these factors, FOP asserts that pursuant to Board Rule 520.15, the case clearly does not support the criteria for granting preliminary relief. We agree.

We have held that "[a]lthough irreparable injury need not be

Decision and Order
PERB Cases Nos. 98-S-01
and 97-S-01
Page 4

shown, ... the supporting evidence must 'establish that there is reasonable cause to believe that the [CMPA] has been violated, and that remedial purposes of the law will be served by pendente lite relief.' " AFSCME D.C. Council 20, et al. v. D.C. Gov't. et al., Slip Op. No. 330 at 4, PERB Case No. 92-U-24, citing Automobile Workers v. NLRB, 449 F.2d 1046 at 1051. While Complainants have provided documented evidence that appears to support that FOP has created an environment that has virtually stripped Complainants Butler's and Spain's status and ability to perform as executive officers, the Complainants do not state in their Complaint or in their Response that they have taken all the required action necessary to initiate a recall election proceeding with FOP. Therefore, this can only be viewed as a potential claim. This is expressly borne out in the Complaint.^{3/} (Comp. at p. 32.) Clearly, the probability that a violation may occur does not meet the articulated standard for granting pendente lite, i.e., preliminary, relief.

Since the asserted violation fails to meet this standard, we do not reach the criteria outlined under Board Rule 544.8 for determining whether the nature of the violation warrants such relief.^{4/} For the reasons we articulated in AFSCME D.C. Council

^{3/} The only matter presented in the Complaint that is distinct from alleged violations stemming from PERB Case No. 97-S-01 is articulated by Complainants in paragraph 40 of the Complaint which states as follows:

...Spain also informed Mack that, because of the climate he had created by his undemocratic practices in violation of the union's By-laws that she was not confident that Mack would comply with the By-laws and permit a fair election for the members to express their will, she had filed a Standards of Conduct Complaint with the PERB and had requested PERB to conduct the Recall Election.

By letter dated December 8, 1997, FOP invited Complainant Spain to submit her petition for a recall election and assured her that it would be processed in accordance with FOP by-laws. (Resp. Exh. 11.) Given the current posture of this allegation, no actual case or cause of action currently exist with respect to this claim.

^{4/} If this standard is met, a determination is then made
(continued...)

Decision and Order
PERB Cases Nos. 98-S-01
and 97-S-01
Page 5

20, et al. v. D.C. Gov't, et al., DCR, Slip Op. No. 330, PERB Case No. 92-U-24 (1992), we deny the Complainants' request for preliminary relief as inappropriate under the criteria articulated by the D.C. Court of Appeals in Automobile Workers v. NLRB, 449 F.2d 1046 (CA DC 1971). Furthermore, since the Complaint fails to allege the consummation of any act or conduct by FOP to support the asserted violation, pursuant to D.C. Code Sec. 1-605.2(9) and in accordance with Board Rule 544.6(b), we dismiss this allegation.^{5/}

In view of (1) the conflicting nature of the evidence submitted in support of the remaining timely allegation contained in the Complaint regarding new instances of reprisals by FOP executive officers and (2) our disposition of the petition for enforcement below, we find that the Complaint (PERB Case No. 98-S-01) and supporting evidence neither meets the standard for affording preliminary relief as discussed above nor warrants it.^{6/} However, in accordance with Board Rule 501.1 and as set forth in our Order herein, we shall process the Complaint in 98-S-01 to determine the validity of these claims as expeditiously as is feasible.

⁴(...continued)

whether or not the violation meets any of the criteria prescribed under Board Rule 544.8.

Board Rule 544.8 in pertinent part provides:

The Board may order preliminary relief. ...
Such relief shall be granted where the Board finds that the conduct is clear-cut and flagrant; or the effect of the alleged violation is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, or the Board's ultimate remedy will be clearly inadequate

^{5/} We note, however, that another Standards of Conduct Complaint has been filed containing similar allegations and requesting the same preliminary relief, i.e., PERB Case 98-S-03. We shall give the merits of that Complaint due consideration in light of any subsequent developments that may have occurred.

^{6/}Among FOP contentions is that Complainant Butler and Spain have consecutively missed a sufficient number of executive board meeting to warrant declaring their executive offices vacant in accordance with FOP by-laws.

Decision and Order
PERB Cases Nos. 98-S-01
and 97-S-01
Page 6

We now turn to the Motion for Enforcement of our Order in PERB Case No. 97-S-01, granting preliminary relief. The Motion seeks enforcement of that portion of our Order which requires that FOP "cease and desist from (1) violating the standards of conduct for labor organizations in any like and related manner or (2) taking any reprisals against former or current officers of FOP for acts or conduct arising from PERB Cases Nos. 95-S-02, 95-S-03 and 97-S-01, pending our disposition of the complaint in PERB Case No. 97-S-01." Slip Op. No. 516, at p. 8.

With respect to the Complainants' charges of equipment and office use deprivation, FOP's argument is threefold. First, FOP acknowledges that this action was taken at a June 3 and July 8, 1997 executive board meeting and therefore is time-barred since it exceeds the 120 days permitted under Board rules.^{7/} FOP contends that the requested relief would also conflict with the D.C. Superior Court's Order in PERB Case No. 97-S-01, i.e., Mack, et al. v. Butler, et al., Civil Action No. 3891-97, directing Complainants Butler and Spain to return all communication equipment to FOP. Finally, FOP states that the Complainants cite no authority for its entitlement to accommodations and equipment equivalent to other executive officers.

FOP observes that the Complaint and attendant Motions reflect the continuing efforts of Complainants Butler and Spain to gain control of FOP and is what gave rise to PERB Case No. 97-S-01, currently pending disposition before a hearing examiner. Notwithstanding the merits of the Complainants' claims, FOP further asserts that no harm will be suffered by the Complainant in what is actually a "political tug of war between the majority and minority factions on the Labor Committee's Executive Board" since elections for new executive board officers to be held in

^{7/} FOP also asserts that this charge is untimely. Specifically, FOP contends that the allegations that FOP unlawfully deprived Complainants Butler and Spain of the use of union equipment and office space, exceed the Board's filing requirement. Specifically, FOP asserts that the action was taken by the FOP's executive board more than 120 days prior to the filing of the Complaint. As we noted in the text, this and similar claims, while presented as part of the Complaint, actually concern matters within the scope of our order granting preliminary relief in PERB Case No. 97-S-01, Slip Op. No. 516. As such, our rules concerning time requirement to initiate an action does not apply to this charge of noncompliance with our prior Order.

Decision and Order
PERB Cases Nos. 98-S-01
and 97-S-01
Page 7

the first quarter of 1998 will resolve this power struggle. (Resp. at p. 5.) FOP further states that by the time the procedural prerequisites for removing Chairperson Mack and filling the vacancy created by his removal in a special election has run its course, the parties will be in the midst of the regular periodic election of executive officers.^{8/}

Our grant of preliminary relief in PERB Case No. 97-S-01, Slip Op. No. 516, ordered FOP (which includes its officers and agents), to cease and desist from taking retaliatory action or reprisals against former and current FOP officers for acts or conduct arising from PERB Cases Nos. 95-S-02, 95-S-03 and 97-S-01, pending the Board's disposition of PERB Case No. 97-S-01. That Order was upheld by the D.C. Superior Court, where, in pertinent part, the Court ordered that FOP "shall cease and desist from violating the standards of conduct for labor organizations or taking any improper retaliatory action or reprisals against former or current officers of FOP for acts arising from this or any case pending before the PERB." Mack, et al. v. Butler, et al., Civil Action No. 3891-97, Slip Op. at 3 (June 26, 1997).

The Complainants aver that FOP denied them use of FOP equipment and office space immediately following our Order granting preliminary relief, i.e., May 16, 1997. FOP's contention that Complainants Butler and Spain's use of FOP office space and equipment would conflict with the Superior Court's Order is unfounded. In pertinent part, the Superior Court expressly stated in its Temporary Restraining Order and Preliminary Injunction that Mr. Butler and Ms. Spain "return to [FOP] forthwith any Labor Committee property in their possession, or subject to their control, which is not located at the Labor Committee's offices." *Id.*, Slip Op. at 3. FOP contends that its action requiring Complainants Butler and Spain to return their FOP-issued equipment is consistent with the Court's Order enforcing our Order and thereby cannot constitute a failure by FOP to comply with it.

To the extent that Complainants Butler and Spain were

^{8/} Although this argument does not present a legitimate basis for declining to process an otherwise meritorious Complaint, we agree that these charges are largely the result of a perpetual power struggle between the parties that will unlikely come to an end under the current administration or by any action of the Board.

Decision and Order
PERB Cases Nos. 98-S-01
and 97-S-01
Page 8

required to return FOP equipment and property to FOP, we agree with FOP's interpretation of the Superior Court's Order. However, to the extent FOP denied Complainants Butler and Spain use of FOP office space and of FOP equipment (which is located at FOP offices), FOP exceeded the Board's Order and, in our view, the Order of the Court. If, as FOP states, that during the initial months following the issuance of our Order neither Butler nor Spain have been removed from their elected office, no legitimate basis exist for restricting Complainants from using FOP office spaces and, while there, using FOP equipment for legitimate FOP business in their capacity as FOP officers.^{9/} This includes the authorized use of reasonable official time to conduct legitimate union duties, which, contrary to FOP's position, extends beyond the mere attendance of executive board meetings.^{10/} While the Complainants' request for use equivalent to that of other officers is not necessarily required, reasonable legitimate use is. FOP's immediate and unqualified restriction of FOP office space and equipment by Mr. Butler and Ms. Spain can only be viewed as reprisals against the Complainant officers proscribed by our Order in PERB Case No. 97-S-01, Slip Op. No. 516, and we so find.^{11/}

We find that Mr. Mack, as an FOP executive officer subject

^{9/}Correspondence between FOP and DOC dated May 29 and September 2, 1997, establish FOP's actions requesting DOC to suspend official time privileges to Complainants Spain and Butler and to cease its recognition of them as officer of FOP. (Comp. Exh. 4(a), 4(b), 4(c), 4(d) and 6(c) The September letter then proceeded to advise DOC to recognize other individuals as acting replacements for Complainants Butler and Spain. Subsequent correspondence between the parties, however, reflect that the FOP executive board continued to recognize Complainant officers as members of the FOP executive board. The remaining evidence consist of conflicting affidavits and declarations concerning the legitimacy of the actions taken against Mr. Butler and Ms. Spain

^{10/} Respondent Exhibit 7(a).

^{11/}Several months have since elapsed since FOP has began its failure to comply with our Order. As a result, the power struggle between these parties continued and has resulted in additional claims by both Respondent and Complainants that may ultimately supercede FOP's failure to comply. These subsequent actions by FOP, as we previously noted, are being treated as part of the Complaint in PERB Case 98-S-01.

Decision and Order
PERB Cases Nos. 98-S-01
and 97-S-01
Page 9

to our Order granting preliminary relief in PERB Case 97-S-01, has acted in disregard of our Order and the Superior Court's Order denying Mr. Butler and Ms. Spain use of FOP offices and equipment and the use of official time with which to conduct union business. In so doing Mr. Mack has disregarded the expressed intent of our Order and effectively obstructed Mr. Butler and Ms. Spain from discharging their office as vice-chairperson and recording secretary, respectively, of FOP. In our view, Chairperson Mack's actions represent no more than simple retaliation against Mr. Butler and Ms. Spain for the same conduct he alleged Mr. Butler, while acting chairperson, committed against him and which served as the basis of Mr. Mack's Complaint in PERB Case 97-S-01.

Therefore, we shall proceed with requesting that the Superior Court enforce our Order and render null and void FOP's actions that (1) authorized DOC to withdraw recognition and use of official time from the Complainants Butler and Spain and (2) deprived them of reasonable and legitimate use of FOP office space and equipment. However, our decision to grant enforcement in this proceeding is limited to the particular facts and history of this case and these parties.

Notwithstanding our disposition, we make the following caveat. Complainant officers are themselves under the same requirement under our Order and the Superior Court Order, namely they are to refrain from any conduct that violates the standards of conduct or from engaging in retaliatory acts against other officers of Respondent FOP. We note that the alleged violations that formed the basis of the Complaint in PERB Case No. 97-S-01 were allegedly committed by the Complainants Butler and Spain. We further note that this and previous administrations of FOP have established a pattern and practice of violating the CMPA's standards of conduct for labor organizations since its certification to represent this DOC collective bargaining unit in 1994.

Mindful of a history of violations that relates back to FOP's initial certification, we remind all parties that the standards of conduct for labor organizations requires that "[r]ecognition shall be accorded only to a labor organization that is free from corrupt influences and influences opposed to basic democratic principles." D.C. Code Sec. 1-618.3(a). FOP's persistence with committing standards of conduct violations gives rise to a question as to whether or not FOP continues to be a labor organization that maintains its operation in accordance with requisite standards of conduct and thereby continues to be

Decision and Order
PERB Cases Nos. 98-S-01
and 97-S-01
Page 10

eligible for recognition under the CMPA.

ORDER

IT IS HEREBY ORDERED THAT:

1. The request for preliminary relief in PERB Case No. 98-S-01 is denied.
2. The Complaint allegation in PERB Case 98-S-01 that the Fraternal Order of Police/DOC Labor Committee violated the standards of conduct for labor organizations by failing to process the Complainants' petition to recall FOP Chairperson Mack is dismissed for failing to state a claim for the reasons discussed in this Opinion.
3. The Motion for Enforcement of our Order granting preliminary relief in PERB Case No. 97-S-01 is granted to the extent that the Fraternal Order of Police/Department of Corrections Labor Committee has failed to comply with that Order by:
 - a. Directing the D.C. Department of Correction to i) restrict the authorization of leave to conduct legitimate union duties Vice-Chairperson Carlton Butler and Recording Secretary Teretha Spain to the attendance of executive board meetings and ii) withdraw its recognition of Mr. Butler and Ms. Spain.
 - b. Depriving Vice-Chairperson Butler and Recording Secretary Spain from reasonable use of FOP offices and, while there, FOP office equipment to discharge their legitimate duties as FOP executive officers.
4. Pending disposition of the Complaints in PERB Cases Nos. 97-S-01 and 98-S-01, FOP shall take all required and necessary steps to ensure that Complainants Butler and Spain are accorded the full recognition of their elected office by other FOP executive officers and officials, D.C. Department of Corrections (DOC) Officials and bargaining unit employees. Such recognition shall include the use of official time to conduct union business in accordance with the collective bargaining agreement between FOP and DOC and

Decision and Order
PERB Cases Nos. 97-S-01
and 98-S-01
Page 11

the use of FOP office space and use of FOP equipment while at the office.

5. The Board shall proceed with enforcement of its Order pursuant to D.C. Code Sec. 1-618.13(b) if full compliance with the Board's Order in PERB Case No. 97-S-01, Slip Op. 516, is not made and documented to the Board and Complainants within five (5) business days of issuance of this decision.
6. The Notice of hearing in PERB Case 98-S-01 shall issue seven (7) days prior to the scheduled date of the hearing.
7. Following the hearing, the designated hearing examiner shall submit a report and recommendation to the Board not later than twenty-one (21) days following the conclusion of the closing arguments (in lieu of post-hearing briefs).
8. Parties may file exceptions not later than seven (7) days after service of the hearing examiner's report and recommendation. A response or opposition to exceptions may be filed not later than five (5) days after service of the exceptions.
9. Pursuant to Board Rule 559.1, and for purposes of D.C. Code Sec. 1-618.13(c), this Decision and Order is effective and final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

January 23, 1998

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Cases Nos. 97-S-01 and 98-S-01 was faxed and/or mailed (U.S. Mail) to the following parties on this the 23rd day of January, 1998.

Carlton Butler
Vice Chairperson
FOP/DOC Labor Committee
715 8th Street, S.E.
Washington, D.C. 20003

FAX & U.S. MAIL

Teretha Spain
Recording Secretary
FOP/DOC Labor Committee
715 8th Street, S.E.
Washington, D.C. 20003

U.S. MAIL

Ernest Durant
7249 Bragg Lane
Manassas, VA 20110

U.S. Mail

Deon Jones
1610 Whist Place
Capitol Heights, MD 30743

U.S. Mail

Arthur L. Fox, II, Esq.
Lobel, Novins & Lamont
1275 K Street, N.W., Suite 770
Washington, D.C. 20005

Fax & U.S. MAIL

Deon Jones
Deputy
Director
Office of Labor Relations
and Collective Bargaining
441-4th Street, N.W.,
Suite 200
Washington, D.C. 20001

U.S. MAIL

Courtesy Copies:

Dalton Howard, Esq.
Brooks and Howard
6701 16th Street, N.W.
Washington, D.C. 20012

U.S. Mail

James R. Klimaski, Esq.
Klimaski, Miller & Smith, P.C.
1988 L Street, NW, Suite 1250
Washington, D.C. 20036

U.S. MAIL

Certificate of Service
Decision and Order
PERB Cases Nos. 97-S-01
and 98-S-01
Page 2

Johnnie Landon, Esq.
4401-A Connecticut Ave., N.W.
Suite 286
Washington, D.C. 20032
Clarence Mack
Chairperson
FOP/DOC Labor Committee
715 8th Street, S.E.
Washington, D.C. 20003

U.S. MAIL

Hazel Lee
Treasurer
FOP/DOC Labor Committee
715 8th Street, S.E.
Washington, D.C. 20003

U.S. MAIL

U.S. MAIL

Shirley Simmons
Executive Secretary
FOP/DOC Labor Committee
715 8th Street, S.E.
Washington, D.C. 20003

U.S. Mail

Joseph Ott
5816 Glen Eagles Drive
Fredricksburg, VA 22407

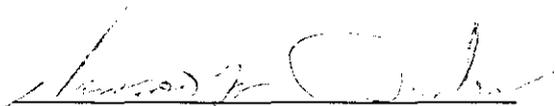
U.S. MAIL

John R. Rosser, III
11117 Lenox Drive
Upper Marlboro, MD 20772

U.S. MAIL

Margaret Moore
Director
Department of Corrections
1923 Vermont Avenue, N.W.
Suite N203
Washington, D.C. 20003

U.S. MAIL


Namsou M. Dunbar
Deputy Executive Director