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

In the Matter of:)		
)		
Dancy Simpson, Pamela Chase, Ernest Durant, Shante Briscoe, et al.,)	PERB Case Nos.	10-S-05
)		10-S-07
Complainants,)		10-S-08
)		10-S-09
v.)		
)	Opinion No.	1601
Fraternal Order of Police/Department of Corrections Labor Committee,)	CORRECTED COPY	
)		
Respondent.)		

DECISION AND ORDER

Several standards of conduct complaints were filed by various members of the Fraternal Order of Police/Department of Corrections Labor Committee (“FOP”), alleging that FOP 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.¹ The complaints were consolidated and a hearing was held before hearing examiner Lois Hochhauser. After reviewing the record, the Board issued a Decision and Order in July 2015 (hereinafter “Slip Op No. 1537”), finding that the Hearing Examiner’s Report and Recommendation was inconsistent with the Board’s precedents and remanded the case to Hearing Examiner Hochhauser for further factual findings.² Ms. Hochhauser was unavailable to prepare a supplemental report and recommendation. Accordingly, with the consent of the parties, PERB’s Executive Director assigned the case to a new hearing examiner, Mr. Bruce Rosenstein, to review the underlying transcripts, post hearing briefs, and other related documents in order to prepare and issue a supplemental report and recommendation. Mr. Rosenstein issued his Supplemental Report and Recommendation on February 19, 2016. For the reasons explained below, the complaints are sustained in part, and dismissed in part.

¹ Complainants originally included FOP Lodge #1 as a Respondent in PERB Case No. 10-S-05. The Board dismissed FOP Lodge #1 as a party in *Dancy Simpson, et al. v. Fraternal Order of Police/Dep’t of Corr. Labor Comm.*, 62 D.C. Reg. 14621, Slip Op. No. 1537 at n. 1, PERB Case Nos. 10-S-05, 10-S-07, 10-S-08, 10-S-09 (2015).

² Slip Op No. 1537.

I. Statement of the Case

A. Case No. 10-S-05

On April 6, 2010, Dancy Simpson filed a standards of conduct complaint 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....’”³ Simpson additionally alleged that FOP’s contract required members to pay a portion of legal fees, contravening FOP’s bylaws and constitution.⁴ 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 FOP’s bylaws and the CMPA. 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.⁵

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 election by adopting election rules that members with less than two years of service could not vote. 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.⁶

C. Case No. 10-S-08

On May 14, 2010, Pamela Chase, Edwin Hull, Curtis Thomas, Dancy Simpson, Jacqueline White, Keith Allison, Linwood Benton, and Ernest Durant filed a standards of conduct complaint. The complaint alleged that the 2010 election was a “sham” election, and that FOP violated D.C. Official Code § 1-617.03 because 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.⁷ 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 for the position of FOP Executive Secretary, but that Capers sent Briscoe a letter stating that Briscoe could not run because she was

³ *Id.* at 2.

⁴ *Id.*

⁵ Complainants also filed a motion for preliminary relief. The Board denied the motion in Slip Op. No. 1019, and consolidated Case Nos. 10-S-05 and 10-S-07 for a hearing.

⁶ Slip Op No. 1537 at p. 2.

⁷ *Id.*

not a member in good standing. Briscoe contested Capers' decision, but Capers did not respond.⁸

E. First Hearing Examiner's Report and Recommendation and Slip Op. No. 1537

The four cases were consolidated and a hearing was held before Hearing Examiner Lois Hochhauser on four separate dates in 2010. On November 8, 2011, Ms. Hochhauser issued her Report and Recommendation ("Hochhauser Report").⁹ In Slip Op. No. 1537, the Board noted that Ms. Hochhauser analyzed the allegations as though it was a duty of fair representation case.¹⁰ The Board further noted that Ms. Hochhauser failed to address the complainants' financial misconduct allegations.¹¹ The Board found that since the complainants' allegations were filed as standards of conduct complaints under D.C. Official Code §§ 1-617.03(a)(1), (4), and (5) and PERB Rule 544, and since the case law concerning a union's duty of fair representation "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," Ms. Hochhauser applied the wrong legal standard to the allegations.¹² Accordingly, the Board remanded the case to Ms. Hochhauser to re-analyze the allegations concerning the election under the correct legal standards, and to address the complainants' financial misconduct allegations.¹³

F. Supplemental Hearing Examiner's Report and Recommendation

Ms. Hochhauser was unavailable to prepare a supplemental report and recommendation. Accordingly, with the consent of the parties, PERB's Executive Director assigned the case to a new hearing examiner, Mr. Bruce Rosenstein, to review the underlying transcripts, post hearing briefs, and other related documents in order to prepare and issue a supplemental report and recommendation. Mr. Rosenstein's issued his Supplemental Report and Recommendation on February 19, 2016.

1. 10-S-05

In PERB Case No. 10-S-05, Mr. Rosenstein found that the complainants did not provide any evidence at the hearing to substantiate the allegation that FOP violated D.C. Official Code §§ 1-617.03(1), (3), (4), and (5), and 1-617.10 by failing to make its financial reports and contract terms available to members at the December 30, 2009 meeting.¹⁴ Mr. Rosenstein further found that no evidence was presented at the hearing to substantiate the allegations that members were required under FOP's bylaws and constitution to pay a portion of legal fees, or that Betty Wofford and Theresa Capers were inappropriately appointed to FOP's 2010 election

⁸ *Id.* at 2-3.

⁹ *Id.* at 3.

¹⁰ *Id.* at 3-4 (internal citations omitted).

¹¹ *Id.* at 4.

¹² *Id.* at 3-5.

¹³ *Id.* at 5-6.

¹⁴ Supplemental R&R at 6-7.

committee.¹⁵ Accordingly, Mr. Rosenstein found that complainants did not meet their burden of proof and recommended that these allegations in PERB Case No. 10-S-05 be dismissed.¹⁶

2. 10-S-07

In PERB Case No. 10-S-07, Mr. Rosenstein noted that Department of Corrections (“DOC”) correctional officers must complete an 18-month probationary period, after which they become permanent employees and can, if they choose, become FOP members and authorize FOP to begin deducting dues from their pay checks instead of service fees. Mr. Rosenstein further noted that according to FOP bylaws 3.2, 3.3, 3.4, and 5.4, once the membership and dues authorization forms are completed, the officer “is eligible to participate in the full range of FOP membership benefits including the right to vote in internal union elections.”¹⁷ The election rules for the 2010 election, however, added an additional requirement that dues-paying officers in good standing must have been permanently employed with DOC no less than six months prior to the election.¹⁸ Mr. Rosenstein found that this additional requirement conflicted with FOP’s bylaws and disenfranchised more than 160 employees from voting in the election.¹⁹ He further found that the added rule caused many officers to believe that “there was no point in voting or that their vote would be challenged if they did attempt to vote on May 10, 2010.”²⁰ Mr. Rosenstein noted that according to PERB case law, the simple breach of a union’s bylaw is insufficient to find a standards of conduct violation unless the complainant can provide evidence that an actual injury resulted from the breach for which PERB can grant relief.²¹ Here, Mr. Rosenstein found that the election rule’s exclusion of more than 160 employees from the 2010 election constituted an actual injury.²²

With regard to the allegation that holding the election at FOP’s Executive Board office instead of at the D.C. Jail constituted a standards of conduct violation, Mr. Rosenstein found that the complainants did not meet their burden of proof.²³ Mr. Rosenstein noted that prior to 2006, the elections were routinely held at the jail, but when an incident occurred in which lives were threatened, it was determined that future elections would be held at the Executive Board office.²⁴ He reasoned that although the complainants presented evidence at the hearing that parking was more difficult at the new location and that slightly fewer people voted than when the elections were held at the jail, those were not sufficient reasons to overcome FOP’s legitimate

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 7 (citing Transcript at 407).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* (citing Complainants Hearing Exhibits 5-8, and Respondent Hearing Exhibit 3).

²¹ *Id.* (citing *William Corboy, et al. v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 48 D.C. Reg. 8505, Slip Op. No. 391 at n. 3, PERB Case No. 93-S-01 (1994), and *Ernest Durant v. Fraternal Order of Police/Dep’t of Corr. Labor Comm.*, 49 D.C. Reg. 782, Slip Op. No. 430 at n. 2, PERB Case No. 94-U-18 (1995)).

²² *Id.* (noting that this same allegation was also raised in PERB Case No. 10-S-08).

²³ *Id.* at 8.

²⁴ *Id.* (citing Transcript at 533).

nondiscriminatory reason for moving the election. Accordingly, Mr. Rosenstein recommended that this allegation be dismissed.²⁵

3. Case No. 10-S-08

In PERB Case No. 10-S-08, Mr. Rosenstein found that the complainants did not meet their burden to prove that the 2010 election was a “sham” election, and that FOP violated D.C. Official Code § 1-617.03 because the poll watcher was a close friend of Capers and did not fully observe the election.²⁶ Mr. Rosenstein noted that the poll watcher had observed several FOP elections prior to the 2010 election.²⁷ He further reasoned that even though testimony showed that the poll observer was absent from the voting site several times during the voting period, it was also uncontested that both ballot boxes were inspected before they were locked, that the poll observer had the only keys to the boxes for the duration of the election, and that the boxes remained locked until the poll observer unlocked them to count the ballots.²⁸ Accordingly, Mr. Rosenstein recommended that these allegations be dismissed.²⁹

4. Case No. 10-S-09

In PERB Case No. 10-S-09, Mr. Rosenstein agreed with Ms. Hochhauser’s analysis that the complainants presented sufficient documentary and testimonial evidence to prove that Briscoe had been eligible to run for FOP Executive Secretary in the 2010 election, and that FOP had therefore wrongfully denied her candidacy.³⁰ As a remedy, Mr. Rosenstein recommended that a new election be held for the office of Executive Secretary and that Briscoe be included on the ballot.³¹

5. Additional Findings

Mr. Rosenstein noted that in Slip Op. No. 1537, the Board ordered the hearing examiner 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).”³²

In accordance with the Board’s Order, Mr. Rosenstein found that FOP failed to safeguard the integrity of the ballot through appropriate measures when it destroyed all election-related documents, including ballots, just thirteen days after the election.³³ Mr. Rosenstein rejected FOP’s argument that it destroyed the election documents because no one had raised any

²⁵ *Id.* (citing Transcript at 294 and 502).

²⁶ *Id.*

²⁷ *Id.* (citing Transcript at 640, 679, and 689).

²⁸ *Id.* (citing Transcript at 543, 603, 643, and 646).

²⁹ *Id.*

³⁰ *Id.* at 9 (citing Complainants Hearing Exhibit 10, and Transcript at 444-45 and 453-54).

³¹ *Id.*

³² *Id.* at 9-10 (citing Slip Op. No. 1537 at p. 5).

³³ *Id.* at 10.

complaints about the election. Mr. Rosenstein's finding was based on testimony and other evidence that demonstrated FOP knew that at least one member had challenged the election rules and that another had challenged FOP's determination that Briscoe was ineligible to run for Executive Secretary.³⁴ Mr. Rosenstein also rejected FOP's argument that it destroyed the material because it had nowhere to securely store the materials. Mr. Rosenstein looked to a guideline that the U.S. Department of Labor established in 29 CFR 452.106 that requires ballots and other election records from secret elections to be preserved for at least one year.³⁵ Mr. Rosenstein concluded that "destroying election materials two weeks after the election knowing that objections were raised to the election rules and the conduct of the election is a clear violation of the Standards of Conduct provisions under the CMPA."³⁶

Mr. Rosenstein further found that FOP violated the standards of conduct in the CMPA when it failed to effectively post nomination and election notices, which precluded at least one complainant who had intended to run from attending the nomination meeting.³⁷ Mr. Rosenstein based his conclusion on PERB case law and the un rebutted testimony of multiple correctional officers who testified that notices were not posted in their assigned work areas.³⁸

Additionally, Mr. Rosenstein criticized FOP's lack of transparency in how it safeguarded the ballots during several specific periods of time when the poll observer was not present.³⁹ However, as noted previously, Mr. Rosenstein reasoned that since the ballot boxes were locked and the poll observer was the only one with the keys during those periods, no standards of conduct violation was committed.⁴⁰

Finally, Mr. Rosenstein found that although FOP listed some candidates twice on the ballot (once individually and then once again as part of a slate), FOP's balloting procedures for individual and slate candidates complied with all of the guidelines stated in 29 CFR 452.112, and were therefore fair and effective and did not violate the standards of conduct.⁴¹

6. Recommendations

Based on his findings, Mr. Rosenstein recommended that the Board: (1) order FOP to cease violating its constitution and bylaws and the CMPA's standards of conduct in the manners sustained in his report; (2) vacate the 2010 election results in their entirety and order FOP to hold a new election consistent with the findings in his report within 60 days; (3) require that all future

³⁴ *Id.* (citing Complainants Hearing Exhibits 5-6).

³⁵ *Id.* at 5, 10; *see also* Slip Op. No. 1537 at p. 5 (authorizing the Hearing Examiner to "consider the Department of Labor's regulations and cases" when determining whether a fair election was conducted).

³⁶ Supplemental R&R at 10.

³⁷ *Id.* at 10-11.

³⁸ *Id.* (citing Transcript at 111, 199, 371, 482, and 535, and *Dupree et al. v. Fraternal Order of Police/Dep't of Corr. Labor Comm., et al.*, 47 D.C. Reg. 1431, Slip Op. No. 605, PERB Case Nos. 98-S-08 and 98-S-09 (1999) (holding that failing to provide a prospective candidate with adequate notice of a nomination meeting constitutes a violation of the Standards of Conduct in the CMPA)).

³⁹ *Id.* at 11-12.

⁴⁰ *Id.* at 8, 12.

⁴¹ *Id.* at 12 (citing Transcript at 510, 512, and 514).

elections be supervised by PERB and administered by a neutral third party which shall be designated by PERB; and (4) order FOP to post a notice of its violations.⁴²

Mr. Rosenstein's Supplemental Report and Recommendation and FOP's Exceptions are before the Board for consideration.

II. Analysis

The Board will affirm a hearing examiner's findings and recommendations if the findings are reasonable, supported by the record, and consistent with PERB precedent.⁴³ Determinations concerning the admissibility, relevance, and weight of evidence are reserved to the Hearing Examiner.⁴⁴ Issues concerning the probative value of evidence are also reserved to the Hearing Examiner.⁴⁵ 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.⁴⁶

Here, FOP filed six exceptions to Mr. Rosenstein's Supplemental Report and Recommendation.

First, FOP asserted that Mr. Rosenstein exceeded the scope of the Board's Order in Slip Op. No. 1537 when he reexamined facts that had already been found by Ms. Hochhauser.⁴⁷ Specifically, FOP argued that Mr. Rosenstein's findings contradicted Ms. Hochhauser's factual conclusions that FOP had posted adequate notice of the nomination meeting and election; that nobody in the bargaining unit was refused an opportunity to vote, felt fearful, or believed that there was no purpose in voting; and that even if all the challenged ballots had been counted, it would not have changed the outcome of the election.⁴⁸ However, Ms. Hochhauser's findings are no longer of any consequence in this matter because the Board expressly stated in Slip Op No. 1537 that it "decline[d]" to accept her findings and instructed the hearing examiner on remand 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 Standards of Conduct in D.C. Official Code §§ 1-617.03(a)(1) and/or (4)]."⁴⁹ That is exactly what Mr. Rosenstein did. Moreover, his conclusions were reasonable, supported by

⁴² *Id.* at 13-14.

⁴³ *Am. Fed'n of Gov't Emp., Local 872 v. Dist. of Columbia Water and Sewer Auth.*, 52 D.C. Reg. 2474, Slip Op. No. 702, PERB Case No. 00-U-12 (2003).

⁴⁴ *Hoggard v. Dist. of Columbia Pub. Sch.*, 46 D.C. Reg. 4837, Slip Op. No. 496 at p. 3, PERB Case No. 95-U-20 (1996).

⁴⁵ *Am. Fed'n of Gov't Emp., Local 2725, AFL-CIO v. Dist. of Columbia Hous. Auth.*, 45 D.C. Reg. 4022, Slip Op. No. 544 at p. 3, PERB Case No. 97-U-07 (1998).

⁴⁶ *Hoggard v. DCPS*, 46 D.C. Reg. 4837, Slip Op. No. 496 at p. 3, PERB Case No. 95-U-20.

⁴⁷ Exceptions to the Supplemental R&R at 3-4.

⁴⁸ *Id.*

⁴⁹ Slip Op. No. 1537 at p. 5.

the record, and consistent with PERB precedent.⁵⁰ Accordingly, the Board finds that FOP's first exception is based on nothing more than competing evidence and contrary to the Board's order in Slip Op. No. 1537, and therefore does not qualify as a valid exception.⁵¹

Second, FOP contended that the 2010 election rules did not violate its bylaws.⁵² FOP asserted that it generally takes the District of Columbia Government about six (6) months to convert an employee from a service fee status to a full-fledged dues-paying member of the union. Accordingly, the election rule was designed to prevent service fee employees from voting in the election.⁵³ FOP further asserted that no one was disenfranchised by the rule because everyone who presented themselves at the polling station was permitted to vote. If there was doubt about whether or not an employee was a dues-paying member, that employee's ballot was placed in a "challenged" votes box. FOP claimed that even if all the challenged votes had been counted, it would not have made a difference in the outcome of the election, and that the rule therefore did not result in any actual injury.⁵⁴ Further, FOP asserted that there was no evidence in the record to support Mr. Rosenstein's finding that some members did not vote because they felt their vote would not be counted.⁵⁵ FOP also contended that the complainants had an obligation under FOP's bylaws to submit their claims to FOP's internal resolution procedures before filing their complaints with PERB, and that when they failed to do so, they gave FOP a complete defense against their allegations.⁵⁶

The Board rejects FOP's second exception. Mr. Rosenstein substantiated his findings with evidence in the record provided by the parties.⁵⁷ Since determinations concerning the probative value, admissibility, relevance, and weight of evidence are reserved to the hearing examiner, the Board defers to Mr. Rosenstein's analysis and conclusions based on that evidence.⁵⁸ Additionally, since Mr. Rosenstein found that more than 160 otherwise eligible members were affected by the election rule, it cannot be definitively concluded that the election results would not have been different had the rule not been in place.⁵⁹

The Board also rejects FOP's complete defense argument. The D.C. Court of Appeals has held that union members do not need to exhaust internal union remedies before filing a standards of conduct complaint with PERB. The Court stated that although "a union has the right to compel its members to follow certain prescribed practices, among which can be the requirement to exhaust available internal complaint processes before litigating against the union, ...[s]uch requirements will not be enforced if [unions] violate clearly expressed labor policy"

⁵⁰ *AFGE, Local 872 v. DC WASA*, 52 D.C. Reg. 2474, Slip Op. No. 702, PERB Case No. 00-U-12.

⁵¹ *Hoggard v. DCPS*, 46 D.C. Reg. 4837, Slip Op. No. 496 at p. 3, PERB Case No. 95-U-20.

⁵² Exceptions to the Supplemental R&R at 3-8.

⁵³ *Id.* at 3-4.

⁵⁴ *Id.* at 5-6.

⁵⁵ *Id.* at 6.

⁵⁶ *Id.* at 7.

⁵⁷ Supplemental R&R at 7 (*citing* Complainants Hearing Exhibits 5-8 and Respondent Hearing Exhibit 3).

⁵⁸ *See AFGE, Local 2725 v. DCHA*, 45 D.C. Reg. 4022, Slip Op. No. 544 at p. 3, PERB Case No. 97-U-07; *see also Hoggard v. DCPS*, 46 D.C. Reg. 4837, Slip Op. No. 496 at p. 3, PERB Case No. 95-U-20.

⁵⁹ Supplemental R&R at 7 (*citing* Complainants Hearing Exhibits 5-8 and Respondent Hearing Exhibit 3).

such as the standards of conduct articulated in the CMPA.⁶⁰ The Court reasoned that “[t]he [CMPA] and the rules adopted by the Board express a clear intent that alleged violations of the [CMPA’s] standards of conduct [for labor organizations] be promptly brought to the Board’s attention.”⁶¹ Accordingly, the Court held that “in view of this unambiguously expressed intent that complaints alleging standards of conduct violations be filed with the Board, . . . an individual need not exhaust available union remedies before seeking the Board’s services.”⁶²

Third, FOP excepted to Mr. Rosenstein’s finding that FOP failed to effectively post nomination and election notices in all employees work areas.⁶³ FOP contended that Ms. Hochhauser had found that the complainants had failed to meet their burden of proof on this allegation because none of them could testify that they had visited all locations and therefore could not state with certainty that the notices had not been posted.⁶⁴ FOP argued that there was no cause for Mr. Rosenstein to set aside her finding. Further, FOP excepted to Mr. Rosenstein’s reasoning that although an FOP witness testified that she personally posted notices in the jail, that did not bolster FOP’s defense because the union failed to call witnesses to establish that it had posted the required notices in all other work areas.⁶⁵ FOP asserted that this erroneously shifted the burden of proof to FOP.⁶⁶

As reasoned *supra*, Mr. Rosenstein was not bound by Ms. Hochhauser’s findings because the Board set them aside in Slip Op. No. 1537.⁶⁷ Furthermore, although Mr. Rosenstein noted that FOP did not call the person who had been assigned to post the notices in other work areas to testify at the hearing, that was not the basis of his finding, nor did it constitute a shifting of the burden of proof.⁶⁸ Rather, the core of Mr. Rosenstein’s finding was expressly based on the testimony of two complainant witnesses and PERB case law.⁶⁹ As additional support for his finding, Mr. Rosenstein merely commented that FOP had failed to call the only witness who could adequately rebut the assertions of those witnesses.⁷⁰ Accordingly, since determinations concerning the probative value, admissibility, relevance, and weight of evidence are reserved to the hearing examiner, the Board defers to Mr. Rosenstein’s reasoning and rejects FOP’s third exception.⁷¹

⁶⁰ *Holden, et al. v. Fraternal Order of Police/Metro. Police Dep’t Labor Comm.*, 49 D.C. Reg. 4366, Slip Op. No. 675 at p. 5, PERB Case No. 02-S-03 (2002) (citing *Fraternal Order of Police/Metro. Police Dep’t Labor Comm. v. Dist. of Columbia Pub. Emp. Relations Bd.*, 516 A.2d 501, 505 (D.C. 1986); and *Chambers v. Local Union No. 639*, 578 F.2d 375 (D.C. 1978)).

⁶¹ *Id.*

⁶² *Id.*

⁶³ Exceptions to the Supplemental R&R at 8-9.

⁶⁴ *Id.* (citing Hochhauser R&R at 23-24).

⁶⁵ *Id.* (citing Supplemental R&R at 11).

⁶⁶ *Id.*

⁶⁷ Slip Op. No. 1537 at p. 5.

⁶⁸ *Id.*

⁶⁹ Supplemental R&R at 11 (internal citations omitted).

⁷⁰ *Id.*

⁷¹ See *AFGE, Local 2725 v. DCHA*, 45 D.C. Reg. 4022, Slip Op. No. 544 at p. 3, PERB Case No. 97-U-07; see also *Hoggard v. DCPS*, 46 D.C. Reg. 4837, Slip Op. No. 496 at p. 3, PERB Case No. 95-U-20.

Fourth, FOP excepted to Mr. Rosenstein's findings that FOP failed to safeguard the integrity of the ballots through appropriate measures when the poll observer was not present and that FOP had violated the CMPA's standards of conduct when it destroyed the ballots thirteen days after the election.⁷² FOP asserted that Mr. Rosenstein should have "looked to the applicable standards imposed in the CMPA rather than the federal regulations [stated in 29 CFR 452.106], which at best would be guidance, not binding authority on the manner in which [FOP] determined to maintain internal records."⁷³

With regard to FOP's exception concerning FOP's failure to safeguard the ballots when the poll observer was not present, Mr. Rosenstein ultimately found that although FOP could have taken safer measures to protect the integrity of the ballots, its failure to do so did not violate the standards of conduct.⁷⁴ Accordingly, it is not necessary for the Board to address FOP's arguments on that issue.

With regard to FOP's exception concerning Mr. Rosenstein's reliance on 29 CFR 452.106 in finding that FOP violated the standards of conduct when it destroyed the ballots 13 days after the election, the Board notes that it expressly stated in Slip Op. No. 1537 that since "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 [an] analysis regarding whether a fair election was conducted."⁷⁵ Since that is exactly what Mr. Rosenstein did, the Board rejects FOP's fourth exception.

Fifth, FOP excepted to Mr. Rosenstein's finding that FOP wrongfully denied Briscoe the opportunity to run for FOP Executive Secretary.⁷⁶ However, FOP's arguments were again based on nothing more than competing evidence from the record.⁷⁷ As discussed, *supra*, determinations concerning the probative value, admissibility, relevance, and weight of evidence are reserved to the hearing examiner.⁷⁸ Here, Mr. Rosenstein reasserted all of Ms. Hochhauser's findings that Briscoe was eligible to run, noted that the D.C. Superior court had also found in a separate action that she was eligible to run, and then cited additional evidence from the record to sustain his conclusion that FOP erred when it denied Briscoe's candidacy.⁷⁹ Accordingly, the Board finds that Mr. Rosenstein adequately supported his conclusion and rejects FOP's fifth exception.

⁷² Exceptions to the Supplemental R&R at 9-12.

⁷³ *Id.* at 11-12.

⁷⁴ Supplemental R&R at 8, 12.

⁷⁵ Slip Op. No. 1537 at p. 5.

⁷⁶ Exceptions to the Supplemental R&R at 12-13.

⁷⁷ *Id.* (internal citations omitted); *see also Hoggard v. DCPS*, 46 D.C. Reg. 4837, Slip Op. No. 496 at p. 3, PERB Case No. 95-U-20.

⁷⁸ *See AFGE, Local 2725 v. DCHA*, 45 D.C. Reg. 4022, Slip Op. No. 544 at p. 3, PERB Case No. 97-U-07; *see also Hoggard v. DCPS*, 46 D.C. Reg. 4837, Slip Op. No. 496 at p. 3, PERB Case No. 95-U-20.

⁷⁹ Supplemental R&R at 9 (citing Complainants Hearing Exhibit 10, and Transcript at 444-45 and 453-54).

Sixth, FOP argued that Mr. Rosenstein's recommended remedies were unwarranted, impossible, unsustainable, and/or unnecessary.⁸⁰ In part, the Board agrees. The Board finds that because Mr. Rosenstein found that the complainants were able to prove some of their standards of conduct allegations, it is appropriate to order FOP, going forward, to cease violating its constitution and bylaws and the CMPA in the manners sustained in Mr. Rosenstein's Supplemental Report and Recommendation, and to post a notice detailing its violations.⁸¹

However, the Board finds that it is not appropriate under the circumstances of these cases to vacate the 2010 election results in their entirety, or to order FOP to hold a new election consistent with Mr. Rosenstein's findings. As FOP stated, at least three elections have been held since the 2010 election that are not under review in this matter.⁸² Vacating the 2010 election and ordering that another one be held within 60 days of this Order would effectively vacate those elections as well. Furthermore, all but two of the complainants (including Briscoe) are no longer employed by DOC.⁸³ Thus, even if the Board wanted to adopt those recommendations, it could not do so. Similarly, the Board finds that it would not be appropriate to order all future FOP elections to be supervised by PERB and/or to order that they be administered by a neutral third party designated by PERB. The Board's jurisdiction and authority allow it to review statutory violations committed during union elections, but do not authorize the Board to insert itself into the everyday decision-making and administration of those elections.⁸⁴ Accordingly, the Board will not adopt Mr. Rosenstein's recommendations that suggest otherwise.

III. Conclusion

The allegation that FOP's 2010 election rules violated FOP's bylaws, constitution, and the CMPA by imposing qualifications for voting not contained in the bylaws is sustained.

The allegation that FOP violated the CMPA because the nomination and election notices were not effectively posted in all work areas where members were employed is sustained.

The allegation that FOP violated the CMPA when it destroyed all election ballots and materials 13 days after the 2010 election is sustained.

The allegation that FOP violated the CMPA when it denied Briscoe's candidacy for the office of Executive Secretary in the 2010 election is sustained.

All other allegations in the complaints are dismissed with prejudice, for the reasons stated herein and in Mr. Rosenstein's Supplemental Report and Recommendation.

⁸⁰ Exceptions to the Supplemental R&R at 13-17.

⁸¹ FOP's assertion that PERB should not order FOP to post a notice detailing its violations of the CMPA because it might harm FOP's standing in an attempted takeover of the bargaining unit by another union is now moot since the challenging union withdrew its Recognition Petition in PERB Case No. 16-RC-02 on August 4, 2016.

⁸² *Id.* at 14.

⁸³ *Id.*

⁸⁴ See D.C. Official Code §§1-605.01 and .02; and §§ 1-617 *et seq.*

ORDER

IT IS HEREBY ORDERED THAT:

1. FOP shall immediately cease violating its bylaws, constitution, and the CMPA in the conduct of its internal elections, as described in this Decision and Order;
2. FOP shall conspicuously post, within fourteen (14) calendar days of the service of this Decision and Order, the attached Notice detailing its violations of the CMPA where notices to bargaining-unit employees are customarily posted;
3. Said Notice shall remain posted for thirty (30) consecutive days;
4. Within twenty-one (21) days of the service of this Decision and Order, FOP shall notify the Board in writing that the Notice has been posted as ordered; and
5. 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, and Members Ann Hoffman and Douglas Warshof. Members Yvonne Dixon and Barbara Somson were not present.

November 22, 2016

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached CORRECTED COPY of the Board's Decision and Order in PERB Case Nos. 10-S-05, *et al.*, Op. No. 1601 was transmitted to the following parties on this the 1st day of December, 2016.

J. Michael Hannon, Esq.
J. Scott Hagood, Esq.
Hannon Law Group
1901 18th Street, N.W.
Washington, D.C. 20009

File & ServeXpress

Dancy Simpson
2236 Alice Avenue, #202
Oxon Hill, MD 20741

U.S. Mail

Pamela Chase
6225 Oaklawn Lane
Woodridge, VA 22193

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Earnest Durant, Jr.
813 Galway Lane
Fredericksburg, VA 22407

U.S. Mail

/s/ Colby Harmon
PERB



Public
Employee
Relations
Board

GOVERNMENT OF
THE DISTRICT OF COLUMBIA



1100 4th Street, SW
Suite E630
Washington, D.C. 20024
Business: (202) 727-1822
Fax: (202) 727-9116
Email: perb@dc.gov

NOTICE

TO ALL BARGAINING UNIT MEMBERS OF THE FRATRENAL ORDER OF POLICE/DEPARTMENT OF CORRECTIONS LABOR COMMITTEE, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1601 (CORRECTED COPY), PERB CASE NOS. 10-S-05, ET AL. (DECEMBER 1, 2016).

WE HEREBY NOTIFY our members that the District of Columbia Public Employee Relations has ordered FOP/DOC to post this Notice pursuant to the Board's finding in Slip Opinion No. 1601 that we violated the law in the conduct of our 2010 election of union officers, by:

1. imposing qualifications for voting in the 2010 election that were not contained in the union's bylaws;
2. not effectively posting the nomination and election notices in all work areas where members were employed;
3. destroying all election ballots and materials 13 days after the 2010 election; and
4. wrongly denying Shante Briscoe's candidacy for the office of Executive Secretary.

WE WILL cease and desist from violating the CMPA in these manners, as ordered in Slip Opinion No. 1601 (CORRECTED COPY).

Fraternal Order of Police/Department of Corrections Labor Committee

Date: _____ By: _____

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or FOP/DOC's compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board by U.S. Mail at 1100 4th Street, SW, Suite E630; Washington, D.C. 20024, or by phone at (202) 727-1822.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

December 1, 2016

Washington, D.C.