Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Thomas J. Gardner,	
Complainant,	PERB Case Nos. 02-S-01 and 02-U-04
	Opinion No. 677
v.	MOTION FOR RECONSIDERATION
District of Columbia Public Schools and Washington Teachers' Union, Local 6, AFT, AFL-CIO,	
Respondents.	

DECISION AND ORDER

This matter involves a Motion for Reconsideration filed by Thomas J. Gardner (Complainant). The Complainant is requesting that the Board reverse the Executive Director's dismissal of his Consolidated Complaint.

The Complainant filed a Consolidated Unfair Labor Practice and Standards of Conduct Complaint (Complaint) and a Request for Preliminary Relief. The Complainant asserts that the District of Columbia Public Schools (DCPS) violated D.C. Code §1-617.04(a)(1) (2001 ed.) by not: (1) allowing him to review documents concerning his termination; (2) meeting with him; and (3) delaying his termination for sixty days in order to allow him to retire. (Compl. at p. 2). In addition, the Complainant claims that the Washington Teachers' Union (WTU) violated D.C. Code §1-617.03(a)(1) (2001 ed.) and §1-617.04(b)(1), (2) and (3) (2001 ed.). (Compl. at p. 2).

After reviewing the pleadings, the Executive Director determined that the Complaint was not timely and failed to state a cause of action under the Comprehensive Merit Personnel Act (CMPA). As a result, the Complaint was administratively dismissed.

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

We believe that the arguments raised in the Complainant's Motion were previously considered

and addressed by the Executive Director. Therefore, the Board must determine whether the Executive Director erred in dismissing the Complaint.

Board Rule 520.4 provides as follows:

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

The Board has held that "[t]his deadline date is 120 days after the date Petitioner admits he actually became aware of the event giving rise to [the] Complaint allegations, i.e. [notice of] termination of employment." Hoggard v. DCPS and AFSCME, Council 20, Local 1959, 43 DCR 1297, Slip Op. No. 352, PERB Case No. 93-U-10 (1993). See also, American Federation of Government Employees, Local 2725, AFL-CIO v. District of Columbia Housing Authority, 46 DCR 119, Slip Op. No. 509, PERB Case No. 97-U-07 (1997). In view of the above, "the time for filing a Complaint begins when the employee is informed of the termination decision." Glendale Hoggard v. District of Columbia Public Employee Relations Board, 655 A.2d 320, 323 (D.C. 1995).

In the present case, the Complainant admits that on or about March 1996 he became aware that DCPS was terminating his employment effective March 15, 1996. (Compl. at p.2). Therefore, the Complainant was required to file his Complaint against DCPS, within 120 days of the March 15, 1996 termination date. However, he did not file his Complaint until November 19, 2001. This filing occurred over five (5) years after DCPS provided the Complainant with notice that it was terminating his employment. In light of the above, the Complainant's allegations concerning DCPS, clearly exceed the 120 day requirement in Board Rule 520.4.

Board Rules governing the initiation of actions before the Board are jurisdictional and mandatory. As such, they provide the Board with no discretion or exception for extending the deadline for initiating an action. See, Public Employee Relations Board v. D.C. Metropolitan Police Department, 593 A.2d 641 (D.C. 1991). For the reasons noted above, the Board can not extend the time for filing a complaint. As a result, the Complainant's claims against DCPS are not timely.

Notwithstanding the untimeliness of the allegations concerning DCPS, the Complainant fails to state a statutory cause of action in this case. Pursuant to the CMPA management has an obligation to "bargain collectively in good faith" and employees have the right" [t]o engage in collective bargaining concerning terms and conditions of employment, as may be appropriate under this law and rules and regulations, through a duly designated majority representative[.]" American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2921 v. District of Columbia Public Schools, 42 DCR 5685, Slip Op. 339 at p. 3, PERB Case No. 92-U-08 (1992). Also, D.C. Code §1-617.04(a)(5) (2001 ed.) provides that "[t]he District, its agents and representatives are prohibited from...[r]efusing to bargain collectively in good faith with the exclusive representative." D.C. Code §1-617.04(a)(5) (2001 ed.) protects and enforces, respectively, these employee rights and employer obligations by making their violation an unfair labor practice. However, the Board has held "that the right to require a District agency to bargain collectively in good faith, belongs exclusively to the labor organization." Forrester v. AFGE, Local 2725 and D.C. Housing Authority, 46 DCR 4048, Slip Op. No. 577 at p. 5, PERB Case No. 98-U-01 (1998). Therefore, in the present case, only the Washington Teachers' Union can require that DCPS bargain in good faith. As a result, the Complainant lacks standing to assert that DCPS violated D.C. Code §1-617.04(a)(5) (2001 ed.).

In addition, the Complainant fails to state a statutory cause of action under D.C. Code §1-617.04(a)(3) and (4) (2001 ed.). Under D.C. Code §1-617.04(a)(3) (2001 ed.), "[a] discriminatory act by a District government agency with respect to an employee's term or condition of employment must be motivated by an intent to encourage or discourage membership in [a] labor organization." Teamsters, Local Union 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. D.C. Public Schools, 43 DCR 5585, Slip Op. No. 375 at p.3, PERB Case No. 93-U-11 (1994). Also, the Board has held that in order to sustain a claim of retaliation for union activity a party must demonstrate a link between the employee's union activity and the action taken against the employee. See, Jones v. D.C. Department of Corrections, 31 DCR 3254, Slip Op. No. 81, PERB Case No. 84-U-04 (1984). In his submissions, the Complainant does not allege that he has been prohibited from engaging in union activity. In addition, he does not assert that his termination was motivated by an intent to encourage/discourage membership in the WTU. Thus, the allegations asserted in the Complaint do not satisfy the requirements of D.C. Code §1-617.04(a)(3) (2001 ed.). Also, D.C. Code §1-617.04(a)(4) (2001 ed.), provides that "[t]he District, its agents and representatives are prohibited from [d]ischarging or otherwise taking reprisals against an employee because he or she has signed or filed an affidavit, petition or complaint or given any information or testimony. . ." In the present case, the Complainant was terminated prior to filing his Complaint. Therefore, he has failed to assert a nexus between DCPS' decision to terminate his employment and any protected activity under D.C. Code §1-617.04(a)(4) (2001 ed.).

Finally, the Complainant claims that DCPS has violated D.C. Code §1-617.04(b) (2001 ed.). However, this subsection of the CMPA, concerns the conduct of labor organizations and not District agencies. As a result, this allegation does not meet the statutory requirements of D.C. Code §1-617.04(b) (2001 ed.).

After reviewing the present motion, we believe that the Complainant's claims concerning DCPS amount to nothing more than a disagreement with the Executive Director's determination. Specifically, the Complainant does not identify any legal precedent which the Executive Director's decision contravenes. Instead, the Complainant contends that "DCPS usurped the grievance process by being allowed to terminate [his employment] before and without a hearing ...". (Motion at pgs. 2-3) We believe that this argument is just a repetition of the Complaint allegations and is not a sufficient basis for reversing the Executive Director's decision.

In his submissions, the Complainant fails to allege that WTU violated any of the statutory provisions that delineate unfair labor practices by a labor organization. Nonetheless, we concur with the Executive Director's conclusion that the Complainant attempted to assert that WTU failed to fairly represent him when he was terminated.[1] Under certain circumstances, a labor organization can violate D.C. Code §1-617.04(b)(1) or (2) (2001 ed.) by failing to fairly represent a bargaining unit employee. However, for the reasons discussed below, we find that the Complainant's claims against the WTU were not timely. In addition, we believe that the Complainant failed to provide any allegations that, if proven, would constitute a statutory violation by the WTU.

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[1]When considering the pleadings of a pro se Complainant, the Board construes the claims liberally to determine whether a proper cause of action has been alleged. See, Beeton v. D.C. Department of Corrections and FOP/DOC Labor Committee, 45 DCR 2078, Slip Op. No. 538, PERB Case No. 97-U-25 (1998).

Board Rule 544.4 provides as follows:

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

In the present case, the Complainant indicates that it took two years for his grievance to proceed from Step I to Step III. Therefore, it appears that the Complainant was not satisfied with the pace of his grievance. Moreover, the Complainant implies that the delay amounts to a failure (by WTU) to fairly represent him after he was terminated. In view of the above, we believe it is reasonable to conclude that the events giving rise to the Complaint allegations took place between March 1996 (Complainant's termination date and Step I grievance request) and March 1998 (Step III grievance hearing). However, the present Complaint was not filed until November 2001. Based on the above, it is clear that the Complainant's filing exceeded the 120 day requirement in Board Rule 544.4. As previously noted, Board Rules governing the initiation of actions before the Board are jurisdictional and mandatory.

In the present motion, the Complainant does not assert that at any time during the above-referenced two year delay, he made any attempt to ascertain the cause of the delay. In addition, he does not state what attempt(s) he made, if any, to discover the status of his grievance or, in the alternative, offer any explanation as to why no such effort was made between his termination date (March 1996) and the filing date of his Complaint (November 2001). This Board has noted that when an alleged violation occurs more than one hundred and twenty (120) days prior to the filing of the Complaint, "it is incumbent upon the Complainant to provide a 'clear and complete statement of the facts' with respect to why the Board should accept jurisdiction over the Complaint allegations". Frederick v. AFSCME, District Council 20, Local 2776, 43 DCR 7024, Slip Op. No. 407 at p. 3, PERB Case No. 94-U-20 (1994). In the present case, the Complainant's bare assertion that it took two years for his grievance to be processed, "falls grossly short of providing [the necessary] facts to overcome [the] mandatory filing requirement under Board Rule [544.4]." Id. Consistent with our holding in Frederick v. AFSCME, we believe that the Complainant has failed to provide any compelling reason why the Board should find that the November 19, 2001 filing date, is less than one hundred and twenty (120) days from the date on which the Complainant became aware of the alleged violations concerning WTU. In light of the above, we believe that the Complaint allegations concerning WTU are not timely.

Notwithstanding the untimeliness of the allegations concerning WTU, the Complainant fails to state a statutory cause of action against WTU. D.C. Code §1-617.04(b)(1) (2001 ed.) prohibits employees, labor organizations, their agents or representatives from "[i]nterfering with, restraining or coercing any employees or the District in the exercise of rights guaranteed by this subchapter...". "Employee rights under this subchapter are prescribed under D.C. Code. [1-617.06(a) and (b) (2001 ed.)] and consist of the following: (1) [t]o organize a labor organization free from interference, restraint or coercion; (2) [t]o form, join or assist any labor organization; (3) [t]o bargain collectively through a representative of their own choosing. . .; (4) [to] present a grievance at any time to his or her employer without the intervention of a labor organization [.]" American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks, 45 DCR 5078, Slip Op. No. 553 at p.2, PERB Case No. 98-U-03 (1998). "[The Board has] ruled, . . . that D.C. Code §1-617.04(b)(1) (2001 ed.) also encompasses the right of employees to be fairly

represented by the labor organization that has been certified as the exclusive representative for the collective bargaining unit of which the employee is a part . . . Specifically, the right to bargain collectively through a designated representative includes the duty of labor organizations to represent [] the interest of all employees in the unit without discrimination and without regard to membership in the labor organization. . .". Glendale Hoggard v. American Federation of State, County and Municipal Employees, District Council 20, Local 1959, AFL-CIO, 43 DCR 2655, Slip Op. No. 356 at pgs. 2-3, PERB Case No. 93-U-10 (1996).

In his submissions, the Complainant does not claim that his employee rights as prescribed under D.C. Code §1-617.06(a) and (b) (2001 ed.), have been violated in any manner by WTU. Instead, the asserted violation of D.C. Code §1-617.04(b) (1) (2001 ed.), appears to be based on the alleged breach by WTU of the Complainant's right to fair representation. However, the Complaint does not contain allegations which are sufficient to support a cause of action.

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

In the present case, the Complainant fails to assert or demonstrate that WTU's conduct in handling his grievance, was arbitrary, discriminatory, or the product of bad faith. Instead, he asserts that "[f]rom the beginning of this legally questionable process, [he] had little faith in the Washington Teachers' Union or [its] Representatives since there were numerous instances of collusion between the Respondents, DCPS ... and WTU." (Compl. at p.3). However, the Complainant fails to identify specific examples of collusion. Instead, the Complainant asserts that "the lapse of two (2) plus years from the initiation of Step I of the grievance process to the formal Step III hearing under the auspices of a duly appointed Administrative Judge violates D.C. Code Section 1-617.04." (Motion at pgs. 2-3). In view of the above, it appears that the Complainant believes that the WTU failed to obtain a quick resolution to his grievance. However, the Complainant asserts no basis for attributing an unlawful motive to the pace or manner by which WTU handled his grievance. In addition, he failed to provide any allegations or assertions that, if proven, would establish a statuary violation. To the contrary, his submissions indicate that WTU filed and/or assisted the Complainant with his Step I and Step III grievance. In short, the Complainant has neither sufficiently pled bad faith or discrimination, nor raised circumstances that would give rise to such an inference. Therefore, the Complaint does not present allegations which are sufficient to support a cause of action.

Finally, the Complainant claims that on several occasions he had to urge his WTU representative to file the required notice in a timely manner in order to preserve his rights. The Board has determined that "[t]he failure of a party to a grievance proceeding to comply with contractual . . . requirements governing a grievance procedure, does not state a cause of action within the jurisdiction of the Board." Virginia Dade v. National Association of Government Employees, Service

Employees International Union, Local R3-06, 46 DCR 6876, Slip Op. No. 491 at p. 4, PERB Case No. 96-U-22 (1996). In view of the above, the Complainant's claim that WTU was not complying with the contractual requirements for filing a grievance, is not sufficient to establish the asserted statutory violation.

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

In the present motion, we believe that the Complainant's claims regarding WTU amount to nothing more than a disagreement with the Executive Director's findings. Also, we conclude that a mere disagreement with the Executive Director's decision is not a sufficient basis for reversing that decision. As a result, the Complainant has failed to assert any grounds for the Board to reverse the Executive Director's decision concerning WTU

After reviewing the Complainant's Motion, we find that the arguments raised by the Complainant, mirror those made in his Complaint. Moreover, the Complainant's arguments were previously considered and rejected by the Executive Director. Also, the Motion does not raise any new issues. Therefore, we believe that the crux of the present Motion is the fact that the Complainant disagrees with the Executive Director's decision. As a result, we conclude that the Complainant has failed to assert any grounds for the Board to reverse the Executive Director's decision. In view of the above, we find that the Executive Director's decision was reasonable and supported by Board precedent. Therefore, we deny the Complainant's Motion for Reconsideration and affirm the Executive Director's administrative dismissal.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complainant's Motion for Reconsideration is denied.

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

June 28, 2002

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos.02-S-01 and 02-U-04 was transmitted via Fax & U.S. Mail to the following parties on this 28th day of June, 2002.

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