Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Charles M. Bagenstose,	
Complainant,	
v.	PERB Case No. 06-U-37
	Opinion No. 894
Washington Teachers' Union, Local No. 6,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

This matter involves an unfair labor practice complaint[1] ("Complaint") filed by Charles M. Bagenstose ("Mr. Bagenstose" or "Complainant") against the Washington Teachers' Union, Local No. 6 ("Union", "WTU" or "Respondent") pursuant to the Comprehensive Merit Personnel Act ("CMPA"), D.C. Code § 1-617.03 and § 1-617.04. The Complaint alleges that the Union, through its officers, representatives and agents, violated the CMPA by refusing to represent him in a lawsuit filed against the District of Columbia Public Schools ("DCPS"), challenging his alleged wrongful termination. As relief, the Complainant "seeks meaningful WTU legal assistance or representation when his case is heard in the United States District Court for the District of Columbia and such other relief as the [Board] deems necessary and proper." (Complaint at p. 5).

[1]Complainant styled the instant matter as an unfair labor practice complaint. However, the Board notes that the Complaint alleges both unfair labor practice violations and standard of conduct violations against the Washington Teachers' Union, Local No. 6.

The Union filed an Answer ("Answer") to the Complaint denying that it violated the CMPA. The Complainant filed a reply to the Union's Answer. Subsequently, the Union filed a Motion to Strike the Complainant's reply, as well as a Motion to Dismiss. The Complainant filed Oppositions to both motions.

A hearing was held on the matter, at which time both parties were given the opportunity to argue the pending motions as well as the merits of the case. In her Report and Recommendation ("R&R"), Hearing Examiner Gloria Johnson recommended that: (1) the Union's motion to strike be denied; and (2) the Union's motion to dismiss be granted. (See R&R at p. 13). The Complainant filed exceptions to the Hearing Examiner's R&R.

The Hearing Examiner's R&R and the Complainant's exceptions are before the Board for disposition.

II. Background:

Mr. Complainant was employed as a teacher in the District of Columbia Public Schools and had been a bargaining unit member since 1979. In June of 1996, the Complainant was terminated due to a reduction-in-force. (See R& R at p. 2). Subsequent to his termination, the Complainant alleges that in April and May of 2006, he wrote and telephoned the Union's President and Vice President, requesting a meeting to discuss a lawsuit he filed against DCPS in the United States District Court for the District of Columbia. The Complainant claims that his requests for a meeting went unanswered. Thus, the Complainant asserts that the Union failed or refused to discuss his case, or provide the requested legal assistance/representation to challenge his termination and pursue his court case. (See Complaint at p. 5). On May 15, 2006, the Complainant filed the present Complaint.

III. The Hearing Examiner's Report and Recommendation:

Based on the pleadings and the record developed at the hearing, the Hearing Examiner identified three issues for resolution. These issues, her findings and recommendations, and the Complainant's exceptions, are as follows:

A. Motion to Strike:

The Union filed a Motion to Strike the Complainant's reply to its Answer, asserting that the reply "contained additional factual allegations and legal arguments. Attached to the pleadings were three separate exhibits that do not pertain to any of the original allegations in the initial complaint." (R&R at p. 4). The Hearing Examiner found that the reply, despite containing additional information,

did not "cloud the issues" nor was it "unfairly prejudicial".[2] The Hearing Examiner also considered the Complainant's status as a *pro se* litigant before the Board. The Hearing Examiner observed that where a complainant is *pro se*, (1) he must be given "a reasonable opportunity to present his case without undue focus on technical flaws and imperfections"; and (2) "[*p*]*ro* se litigants are entitled to liberal construction of their pleadings." (R&R at 5).[3] Consequently, the Hearing Examiner denied the Union's Motion to Strike.

The Respondent did not file exceptions regarding the Hearing Examiner's dismissal of the Motion to Strike. In addition, the Complainant's Exceptions do not address the Hearing Examiner's ruling on the Motion to Strike. The Board has reviewed the Hearing Examiner's ruling denying the Motion to Strike and find it to be reasonable, supported by the record and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner's conclusion that the Respondent's Motion to Strike should be denied.

B Motion to Dismiss - Timeliness of the Complaint:

The Union's Motion to Dismiss is based on its contention that the Complaint: (1) is untimely; and (2) fails to state a claim upon which relief may be granted. (Motion to Dismiss at pgs. 1 and 6). The Union argued that to the extent the Complainant challenged his termination, he was required to file his unfair labor practice within 120 days of the date of his termination in 1996, pursuant to Board Rule 520.4.

The Complainant countered that his Complaint does not exclusively challenge the 1996 termination, but also continuing acts of discrimination and retaliation through 2006, when he sought assistance and representation from the Union. (See R&R at p. 6). The Complainant contended that this continuing violation rendered his Complaint timely filed. (See R&R at p. 6). In support of this argument, the Complainant relied on *Burlington Northern & Santa Fe Railway Company v. Sheila White*, 126 S. Ct. 2405; 165 L. Ed. 2d 345 (2006), which he alleged holds that continuing retaliatory acts are actionable. (See R&R at p. 6).

The Hearing Examiner determined that there is a 120 day time period for initiating an action, and that this time limit is jurisdictional and mandatory. (See R&R at pgs.7-8). The Hearing Examiner indicated that she found no language in the *Burlington* case "that bridges the ten (10) year gap between the date of the occurrence of the alleged triggering event (termination) and the May 2006 filing of the unfair labor practice complaint." (R&R at p. 7). She stated that the Board "has no

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[2]The attachments, a newspaper article, a letter and a memo, concerned the financial records of the Union.

[3]The Hearing Examiner cited *Haines v. Kerner*, 404 U.S. 519, 520-521, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972). See also, *Mack v. Fraternal Order of Police/District of Columbia Metropolitan Police Department Labor Committee*, 49 DCR 1149, Slip Op. No. 443 at p. 2, PERB Case No. 95-U-16 (1995).

authority to extend the time for *pro se* Complainants initiating unfair labor practice complaints." (R&R at p. 7). The Hearing Examiner concluded that to the extent that the Complainant based his Complaint on his 1996 termination, the matter is untimely.

In his exceptions, the Complainant does not specifically object to the Hearing Examiner's ruling on the untimeliness of the allegations concerning his 1996 termination. Instead, the Complainant argues that:

> [t]he Report repeatedly states that the Complainant's request to the Washington Teachers' Union (WTU) for legal assistance pertained to his termination in July of 1996, as though that was his main concern. The Complainant did mention that event in his request for legal assistance, because it precipitated the actions which really do concern him. At age 76 the Complainant's termination ten years ago is hardly a major factor in his desire to go to federal court. [In addition, the Complainant asserts that certain District of Columbia adjudicative bodies, (i.e. Office of Employee Appeals, Office of Human Rights and the District of Columbia Courts)] "have established certain practices, which are designed to defeat any D.C. Government employee's discrimination or wrongful treatment complaint."

(Exceptions at p. 1).

The Complainant also contends that "[t]hese deceptive, deceitful, and unfair labor practices can affect any D.C. Government employee who files a complaint and are [of] far greater importance to the Complainant than his termination." (Exceptions at p. 1). The Complainant's exceptions enumerate the alleged practices of the aforementioned adjudicative bodies, asserting that these practices prevented him and other District of Columbia employees from successfully prosecuting cases of discrimination and retaliation. (See Exceptions at pgs. 2-5).

Board Rule 556.3 requires that exceptions to the Hearing Examiner's R&R be "precise" and "specific". See *Pratt v. District of Columbia Department of Administrative Services*, _DCR_, Slip Op. No. 457, PERB Case No. 95-U-06 (1995). In the present case, the Complainant has made a broad and general statement. Moreover, the Board finds that the Complainant's contentions regarding the practices of the aforementioned adjudicative bodies is a repetition of the arguments that were previously raised, and rejected by the Hearing Examiner.[4] Thus, the Board finds that this exception merely represents a disagreement with the Hearing Examiner's findings and is not grounds

[4]The Hearing Examiner found that the Complainant argued that the timeliness of his Complaint was affected by the "continuing course of conduct and conspiracy by . . . specified Superior Court judges." (R&R at p. 7).

for reversal of the Hearing Examiner's findings. See *Fraternal Order of Police/Department of Corrections Labor Committee (Green, Dupree and Durant) v. District of Columbia Department of Corrections*, 50 DCR 5059, Slip Op. No. 698, PERB Case No. 01-U-16 (2003).

Board Rule 520.4 requires that an unfair labor practice complaint shall be filed no later than 120 days after the date on which the alleged violation occurred. This Board has held that the deadline for filing a complaint is "120 days after the date Petitioner admits he actually became aware of the event giving rise to [the] complaint allegations."[5] "[T]he time for filing a complaint with the Board concerning alleged violations [which may provide for] . . . statutory causes of action, commence when the basis of those violations occurred."[6] Moreover, 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, *Hoggard v. District of Columbia Public Employee Public Employee Relations Board*, 655 A.2d 320, 323 (D.C. 1995). Further, a Complainant's "ignorance of Board Rules governing [the Board's] jurisdiction over [unfair labor practice] complaints provides no exception to the [Board's] jurisdictional time limit for filing a complaint." *Jackson and Brown*, Slip Op. No. 414 at p. 3. Therefore, the Board cannot extend the time for filing an unfair labor practice complaint.

In the present case, the Complainant should have filed his Complaint regarding his termination by October 1996. However, the Complainant did not file his Complaint until May 2006, approximately ten years after the event which triggered the portion of the Complaint regarding his termination. In light of the above, the Board finds that the Complaint, to the extent that it is based on the 1996 termination, clearly exceeds the 120-day filing requirement in Board Rule 520.4. As a result, we adopt the Hearing Examiner's finding that the allegations regarding the 1996 termination are untimely.

Nonetheless, the Hearing Examiner found that the Complainant's several attempts to contact the Union in April and May 2006 to request assistance with his lawsuit were made within 120 days prior to filing his Complaint. Therefore, the Hearing Examiner determined that the portion of the Complaint alleging that the Union failed to meet its duty of fair representation with regard to his lawsuit was timely. Thus, the Hearing Examiner concluded that although the portion of the Complaint relating to his 1996 termination was time-barred, the remaining allegations concerning the Union's conduct in April and May 2006 were timely.

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[5]Citing *Hoggard v. District of Columbia Public Schools and AFSCME*, 43 DCR 1297, Slip Op. No. 352 at p. 3, PERB Case No. 93-U-10 (1993); See also, *American Federation of Government Employees, Local 2735, AFL-CIO v. District of Columbia Housing Authority*, 46 DCR 119, Slip Op. No. 509, PERB Case No. 97U-07 (1997).

[6]*Jackson and Brown v. American Federation of Government Employees, Local 2741, AFL-CIO*, 48 DCR 10959, Slip Op. No. 414 at p. 3, PERB Case No. 95-S-01 (1995).

Neither the Complainant nor the Respondent filed exceptions to the Hearing Examiner's findings regarding the timeliness of the allegations concerning the Union's conduct in April and May 2006. The Board finds that the Hearing Examiner's finding that the Complaint is timely as to the allegations occurring in April and May 2006 is reasonable, supported by the record and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner's finding that the Complaint is timely as to the allegations concerning the Union's conduct in April and May 2006.

C. Motion to Dismiss - Failure to State a Claim - Duty of Fair Representation:

Having determined that the Complainant's allegations regarding the Union's conduct in April and May 2006 were timely, the Hearing Examiner focused on whether this conduct constituted an unfair labor practice. The Hearing Examiner noted that "[i]n areas where the Union does not operate as the exclusive representative of the bargaining unit, it has no obligation to represent members. . . There is no duty of fair representation assigned by any statute or regulation requiring a union to provide free legal representation for an employee who files a civil action in court challenging a termination that occurred almost ten (10) years ago." (R&R at pgs. 8-9) (emphasis added). However, the Hearing Examiner stated that a Union does breach its duty of fair representation if it engages in conduct or acts that are either arbitrary, discriminatory or done in bad faith. The Hearing Examiner found that the Complainant had failed to provide any evidence to show that the Union acted arbitrarily, discriminatoraly or in bad faith. (See R&R at p. 9).

The Hearing Examiner concluded that the Complainant's lawsuit against DCPS is not a matter that arises out of the collective bargaining agreement, and therefore the Union's duty of fair representation does not extend to absorbing legal fees and expenses based upon such a lawsuit. (See R&R at p. 10). In addition, the Hearing Examiner found that the "Complainant failed to provide any precedent for his assertion that the duty of fair representation extends to WTU the duty to provide an attorney to process Complainant's lawsuit through D.C. Superior Court and U.S. District Court." (R&R at p. 11) (emphasis added). Therefore, the Hearing Examiner concluded that based on the evidence submitted by the Complainant, he failed to state a claim or set forth a cause of action for which relief can be granted.[7]

The Complainant filed an exception to the Hearing Examiner's ruling that the Union President had not acted in bad faith in not responding to the Complainant's request for assistance with his lawsuit. Specifically, the Complainant argues that, "[t]he Report states that while the WTU President acted unprofessionally by failing to respond to the Complainant's letter and by not responding to his telephone calls, he did not act arbitrarily or in bad faith. The facts of the case show, however, that

[7]The Hearing Examiner found that the Complainant was advised in 1996 that he could not file a grievance regarding his termination. (See R&R at p. 3). She also noted that the Complainant has not asserted that he requested assistance with a grievance/arbitration proceeding nor that the Union denied any such request in 1996. (See R&R at p. 3). Instead, the Complainant was requesting assistance with an individual lawsuit against DCPS ten years later. As stated above, the Hearing Examiner concluded that the Union had no duty to assist and represent the Complainant in a lawsuit.

much, much more was involved than mere discourtesy." The Complainant also asserts that: (1) the Union President "in spite of his duty to protect the rights and interest of the membership did willingly, and knowingly, and in bad fad faith refuse to listen to the concerns of a union member by failing to respond to his repeated requests for a conference"; (2) "[t]his dereliction of duty may result in the Complainant losing his case in the U.S. District Court, which seeks to preserve the rights of all D.C. Government workers, including the members of the [Union], from deceptive and deceitful tactics sometimes employed by the D.C. adjudicative bodies"; (3) "Because the Union President has offered no explanation for his failure to perform his duty to talk to a member about his concerns, a suspicion has arisen that he may have been influenced by school officials through a secret agreement not to help a member that challenges the system"; and (4) that if the Board "decides in favor of the Respondent, it may inadvertently foster corruption."[8]

Pursuant to Board Rule 520.11, "the party asserting a violation of the CMPA, shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." Moreover, the Board has determined that "[t]o maintain a cause of action, [a] Complainant must [allege] the existence of some evidence that, if proven, would tie the Respondent's actions to the asserted [statutory violation]. Without the existence of such evidence, [a] Respondent's actions [cannot] be found to constitute the asserted unfair labor practice. 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). Upon review of the evidence in this matter, the Hearing Examiner found that the Complainant's lawsuit against DCPS is not a matter that arises out of the collective bargaining agreement, and therefore the Union's duty of fair representation does not extend to absorbing legal fees and expenses based upon such a lawsuit. Therefore, the Hearing Examiner found that there was insufficient evidence to establish that the Respondent failed in its duty to represent the Complainant. (See R&R at p. 9).

As stated above, the Board has held that a union does breach its duty of fair representation if it engages in conduct or acts that are either arbitrary, discriminatory or done in bad faith. See, *Owens v. AFSCME, Local 2095 and National Union of Hospital and Healthcare Employees, District 1199*, _DCR_, Slip Op. No. 750, PERB Case No. 02-U-27 (2004).[9] However, in the present case,

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[8]Complainant's Exceptions at pgs. 5-7.

[9]See D.C. Code § 1-617.03(a) which states in pertinent part that:

> Recognition shall be accorded only to a labor organization that is free from corrupt influences and influences opposed to basic democratic principles. A labor organization must certify to the Board that its operations mandate the following:
>
> (1) The maintenance of democratic provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing

the Complainant's exception to the Hearing Examiner's finding that the Union had no duty to represent the Complainant in his court case is a repetition of the arguments made to, considered, and rejected by the Hearing Examiner. Thus, the Board finds that this exception merely represents a disagreement with the Hearing Examiner's findings. This Board has held that a mere disagreement with a Hearing Examiner's findings is not grounds for reversal of the findings where they are fully supported by the record. See *American Federation of Government Employees, Local 874 v. D.C. Department of Public Works*, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). Therefore, the Board concludes that the Complainant has not established grounds for reversal of the R&R.

The Board has reviewed the Hearing Examiner's ruling that the Complainant has not stated a claim for which relief can be granted. The Board finds that Mr. Bagenstose's Complaint did not contain allegations which are sufficient to state a claim for which relief can be granted. Since Mr. Bagenstose's claim has no statutory basis, the Board adopts the Hearing Examiner's recommendation that the Complaint should be dismissed.

Pursuant to D.C. Code § 1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and finds them to be reasonable, persuasive and supported by the record. Therefore, the Board adopts the Hearing Examiner's findings and conclusions that the Complaint be: (a) dismissed as untimely regarding the Complainant's 1996 termination; and (b) dismissed for failure to state a claim for which relief can be granted.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The Washington Teachers' Union, Local No. 6's Motion to Strike is denied.

(2) The Washington Teachers' Union, Local No. 6's Motion to Dismiss is granted in part regarding the Complainant's 1996 termination.

(3) The Washington Teachers' Union, Local No. 6's Motion to Dismiss is denied in part regarding the allegations of April and May 2006.

(4) The Washington Teachers' Union, Local No. 6's Motion to Dismiss for failure to state a claim under the Comprehensive Merit Personnel Act is granted.

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the right of individual members to participate in the affairs of the organization, to fair and equal treatment under the governing rules of the organization, and to fair process in disciplinary proceedings.

(5) The Complainant's Unfair Labor Practice Complaint is dismissed.

(6) 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 22, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.06-U-37 was transmitted via Fax and U.S. Mail to the following parties on this the 22nd day of June 2007.

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