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

_____ )	
In the Matter of: )	
Edna McManus )	
Complainant, )	PERB Case No. 03-U-38
v. )	Opinion No. 1413
D.C. Dep't of Corrections )	
and )	
Fraternal Order of Police/Dep't of )	
Corrections Labor Committee, )	
Respondents. )	
_____ )	

**DECISION AND ORDER**

**I. Statement of the Case**

Complainant Edna McManus ("Complainant") filed the above-captioned Unfair Labor Practice Complaint ("Complaint"), against Respondents District of Columbia Department of Corrections ("DOC") and Fraternal Order of Police/Dep't of Corrections Labor Committee ("FOP") for alleged violations of sections 1-617.04 of the Comprehensive Merit Protection Act ("CMPA") and sections 1-624.1(4), 1-624.3(a-b), 1-624.13(a) and 1-624.23(1)(b)(3) of the D.C. Compensation Act. (Complaint at 3). Specifically, the Complainant alleged that she was wrongfully terminated from her position with Respondent DOC, and that Respondent FOP did not provide legal representation. (Complaint at 2). Respondent DOC filed a document styled Answer Complaint ("DOC Answer") in which it denies the alleged violations and raises the following affirmative defenses:

- (1) The Complainant has failed to allege any conduct in violation of D.C. Code § 1-617.04 for which a remedy may be ordered by [the Board];
- (2) The Complaint is facially deficient by the failure of the Complainant to specify the particular provision of D.C. Code § 1-617.04 for which it is alleged to have violated. The Respondent is prejudiced by an inability to answer this complaint due to the

- failure of the Complainant to so designate the applicable statutory provisions alleged to have been violated;
- (3) The Complainant has failed to allege that the alleged actions or omissions of the Respondent were a result of her union activity or that the Respondent was aware of such union activity or has demonstrated any anti-union animus;
  - (4) The [Board] does not have jurisdiction over §§ 1-624.1(4), 1-624.3(a-b), 1-624.13(a) and 1-624.23(1)(b)(3), concerning disability compensation for District of Columbia Employees. Jurisdiction for these matters is vested solely in the Office of Hearing and Adjudication for the Department of Employee Services.
  - (5) The Respondent has not undertaken any adverse action against the Complainant. As further information the termination of the Complainant has been held in abeyance as a result of her actions before the Office of Hearings and Adjudication.

(DOC Answer at ¶¶ 18-22).

Respondent FOP filed an Answer ("FOP Answer"), denying the alleged violations and raising the following affirmative defenses:

- (1) The claims raised in the Complaint asserting violations of D.C. Code § 1-617.04 occurring prior to January 14, 2003, are barred as untimely pursuant to the one hundred twenty-day jurisdictional limitation period of PERB Rule 520.4;
- (2) The Complaint fails to state a claim against the FOP/DOC LC or its Chairperson, Pamela Chase, for violation of D.C. Code 1-617.04 where there are no allegations in the Complaint of conduct deemed improper under § 1-617.04(b)(1),(2),(3),(4) or (5);
- (3) The Complainant has not plead any violation of D.C. Code § 1-617.03 in regard to alleged conduct on the part of the FOP/DOC LC or its Chairperson, Pamela Chase.

(FOP Answer at 3). A hearing in this matter was held on November 9, 2005, and the Hearing Examiner's Report and Recommendation ("Report") is before the Board for disposition.

## II. Discussion

### A. Facts

The Hearing Examiner found the following facts:

Complainant alleged an injury to her left wrist on February 26, 2002, for which she sought and was granted compensation from the D.C. Department of Employment Services.

While Complainant's compensation case was pending, Respondent [DOC] proposed the termination of her employment on December 2, 2002, charging her as absent without leave from August 25, 2002, through September 7, 2002. Subsequently, on February 20, 2003, [DOC] notified Complainant of a final decision to terminate

her employment for that period of unauthorized absence, to be effective close of business February 28, 2003. [DOC] advised Complainant of her right to elect to appeal the termination through either the negotiated grievance procedure or the Office of Employee Appeals.

Complainant elected to appeal through the Office of Employee Appeals, which ultimately found the appeal to be moot on the ground that the termination was never effected, and was in fact rescinded prior to its effective date.

(Report at 2). The Hearing Examiner noted that the Complainant “stated for the record her unsupported belief that the termination action was based on anti-union animus related to her efforts to represent other unspecified employees at an earlier date uncertain,” but that the Complainant did not claim to have performed such representational duties at any time within 120 days of the filing of the Complaint. *Id.* Further, the Hearing Examiner notes that the Complainant admitted that she did not seek representation from FOP with respect to workers’ compensation proceedings at any time after September 2002, and that the Complainant was unable to provide any evidence of a request for representation from FOP with respect to the termination action after December 2002. (Report at 2-3).

#### B. Analysis

The Hearing Examiner found that the Complainant raised two allegations in her Complaint: first, that DOC violated the CMPA by terminating the Complainant’s employment, and second, that FOP violated the CMPA by failing to provide representation in connection with the workers’ compensation proceeding and termination action. (Report at 3).

The Hearing Examiner concluded that the claim against DOC was “deficient for two independent reasons, and therefore should be dismissed.” (Report at 3). First, the Hearing Examiner noted that the record shows that the termination action was rescinded prior to its effective date, and stated that “[i]t requires no citation of authority to conclude that a complaint alleging a wrongful termination fails to state a claim under circumstances where, as here, there has not been, in fact, any termination.” *Id.* Second, the Hearing Examiner found that there was no competent evidence provided or offered by the Complainant upon which to conclude that the termination action related in any way to activity protected by the CMPA within the Board’s jurisdiction. *Id.* The Hearing Examiner recommended that this portion of the Complaint be dismissed for failure to state a cognizable claim upon which relief can be granted. *Id.*

Based upon the pleadings, record, and evidence provided at the hearing, the Hearing Examiner determined that the Complainant had not been terminated from her position with Respondent DOC, and therefore that her allegation of wrongful termination should be dismissed. (Report at 3). Further, the Hearing Examiner determined that the Complainant had provided “no competent evidence” to relate the termination action to the CMPA. *Id.* To maintain a cause of action before the Board, a Complainant must allege “the existence of some evidence that, if

proven, would tie the Respondent's actions to the asserted violative basis for it." *Goodine v. Fraternal Order of Police/Dep't of Corrections Labor Committee*, 43 D.C. Reg. 5163, Slip Op. No. 476 at p. 3, PERB Case No. 96-U-16 (1996). Additionally, "a complaint that fails to allege the existence of such evidence does not present allegations sufficient to support a cause of action." *Id.* In the instant case, the record shows that the Complainant was not terminated, and the Complaint fails to allege the existence of any evidence that, if proven, would tie Respondent DOC's actions to a CMPA violation. (Report Ex. 2; Complaint at 1-2). In light of these findings, the Hearing Examiner's determination that the Complainant failed to state a cognizable claim is reasonable, supported by the record, and consistent with Board precedent. Therefore, the Board will adopt the Hearing Examiner's recommendation that the portion of the Complaint alleging a violation of the CMPA by Respondent DOC be dismissed. *See American Federation of Government Employees, Local 872 v. D.C. Water and Sewer Authority*, Slip Op. No. 702, PERB Case No. 00-U-12 (March 14, 2003).

In the claim against FOP for failure to provide representation in connection with the workers' compensation proceeding, the Hearing Examiner noted that the Complainant admitted that she did not request representation in the workers' compensation proceeding any time within 120 days of the filing of the Complaint. The Hearing Examiner concluded that Board Rule 520.4's 120 day rule is jurisdictional and mandatory, and therefore this aspect of the Complaint is untimely and must be dismissed "irrespective of whether or not [FOP] had any obligation to provide representation to Complainant in connection with a workers' compensation proceeding." (Report at 3-4). The Hearing Examiner also found no support for the Complainant's contention that the alleged violation was a continuing violation. (Report at 4).

As for the claim against FOP for failure to provide representation in the termination action, the Hearing Examiner determined that the Complainant was unable to establish that she ever sought union representation within 120 days of the filing of the Complaint, and thus that portion of the Complaint must be dismissed as untimely. (Report at 4). The Hearing Examiner found no evidence that this allegation was continuing in nature. *Id.*

Board Rule 520.4 is jurisdictional and mandatory. *See Hoggard v. D.C. Public Schools and AFSCME Council 20, Local 1959*, 43 D.C. Reg. 1297, Slip Op. No. 352, PERB Case No. 93-U-10 (1993), *aff'd sub nom., Hoggard v. Public Employee Relations Board*, MPA-93-33 (D.C. Super. Ct. 1994), *aff'd* 655 A.2d 320 (D.C. 1995). Taking into account the pleadings, record, and evidence provided by the parties, the Hearing Examiner determined that the portions of the Complaint pertaining to the claim against Respondent FOP were untimely. (Report at 3-4). Based upon the Complainant's admission that she did not request union representation in the workers' compensation proceeding any time within 120 days of the filing of the Complaint, and that the Complainant could not establish that she sought union representation in the termination action within 120 days of filing the Complaint, the Board finds that this determination is reasonable, supported by the record, and consistent with Board precedent. Therefore, the Board will adopt the Hearing Examiner's recommendation that the portion of the Complaint alleging a violation of the CMPA by Respondent FOP be dismissed. *See American Federation of Government Employees, Local 872*, Slip Op. No. 702.

Therefore, the Complainant's Unfair Labor Practice Complaint is dismissed.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. Complainant Edna McManus's Unfair Labor Practice Complaint is dismissed.
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.

September 3, 2013