Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
George Parker, Gloria Guess, Alfred Hubbard and William F. Rope,	
Complainants,	PERB Case No. 03-U-20
v.	Slip Opinion No. 764
	CORRECTED COPY
American Federation of Teachers and Washington Teachers' Union, Local 6,	
Respondents.	

DECISION AND ORDER

I. Statement of the Case:

George Parker, Gloria Guess, Alfred Hubbard and William F. Rope ("Complainants"), filed an unfair labor practice complaint against the American Federation of Teachers, the Washington Teachers' Union and several officers and individuals of the Washington Teachers' Union. The case was assigned to a Hearing Examiner and a pre-hearing conference was scheduled for May 11, 2004. However, the Complainants failed to appear at the pre-hearing conference. As a result, the Hearing Examiner issued an "Order to Show Cause." In his "Order to Show Cause," the Hearing Examiner directed that the Complainants respond with good cause why this matter should not be dismissed. The Complainants failed to respond to the Order to Show Cause. In view of the above, the Hearing Examiner issued a Report and Recommendation (R&R) in which he recommended that the Complaint be dismissed in its entirety. The Complainants did not file any exceptions to the Hearing Examiner's R&R. The Hearing Examiner's R&R is before the Board for disposition.

II. Discussion

On March 18, 2003, the Complainants filed with the District of Columbia Public Employee Relations Board ("Board" or "PERB") a document titled "Complaint for Damages"[1] against the American Federation of Teachers ("AFT" or "Respondents"), the Washington Teachers' Union, Local 6, ("WTU" or "Respondents") and several officers and individuals of the Washington Teachers' Union. This case was treated as an unfair labor practice complaint and assigned a docket number. Subsequently, the Complainants filed an "Amended Complaint for Damages" which appears to be identical to the original document filed on March 18, 2003. Counsel for AFT filed an Answer contending, inter alia, that the document filed by the Complainants, did not state a proper claim for relief under PERB's jurisdiction and that PERB lacked jurisdiction over the AFT. (See, AFT's Answer at p. 3) Thereafter, counsel for Esther Hankerson filed a document styled "Motion To Dismiss And Proposed Answer", asserting, inter alia, that the Amended Complaint failed to allege any violation within the jurisdiction of PERB. Pursuant to Board Rule 550.1, the Board issued a "Notice of Pre-Hearing Conference."[2] The pre-hearing conference was scheduled for 9:00 a.m. on Tuesday, May 11, 2004.

The Hearing Examiner indicated in his R&R that "it appears that counsel for Complainants orally requested a postponement of the pre-hearing conference in this matter." (R&R at p. 2) The Board's staff informed Complainants' counsel that she should submit her request in writing.[3]

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[1]The caption also contained the following language: "(Overcharging of Dues, Breach of Contract)."

[2]This matter was originally scheduled for a hearing to be held on May 11, 2004. However, the Hearing Examiner decided that the May 11th date would be used to hold a pre-hearing conference. As a result, on April 16, 2004, the parties were informed of this change and directed to appear at the pre-hearing conference. The purpose of the pre-hearing conference was to consider the various pending motions and other preliminary matters that needed to be addressed prior to the hearing.

[3]Board Rule 550.5 and 550.6 provide as follows:

> **Board Rule 550.5 - Postponement Requests**
> Postponements of hearings shall not be granted except for sufficient cause as determined by the Executive Director. Requests for postponements shall comply with Section 501 of these rules and shall also meet the following requirements:
>
> (a) Alternate dates for any rescheduled headings shall be given; and
> (b) The positions of all other parties regarding the postponement requested shall be ascertained in advance by the requesting party and set forth in the request.
>
> **Board Rule 550.6 - Postponement Requests (cont.)**

However, the Complainants' counsel did not submit a written request for a postponement. As a result, the pre-hearing conference went on as scheduled.

On May 11, 2004, the Hearing Examiner convened the pre-hearing conference at 9:00 a.m., as scheduled. Counsel for both the AFT and WTU were present. In addition, counsel for Esther Hankerson[4] and a court reporter were also present. However, the Complainants' counsel failed to appear. After thirty (30) minutes, the Hearing Examiner decided to go forward with the pre-hearing conference, and opened the record. The pre-hearing conference concluded at 10:30 a.m.

At the pre-hearing conference, the Respondents requested that the complaint be dismissed. However, the Hearing Examiner did not grant the Respondents' request. Instead, the Hearing Examiner issued an "Order to Show Cause." In his "Order to Show Cause," the Hearing Examiner directed that the Complainants respond within thirteen (13) days with good cause why this matter should not be dismissed. Specifically, the Hearing Examiner ordered "that Complainants show cause on or before May 24, 2004, why this [matter] should not be dismissed because 1) the complaint was untimely filed; 2) [the complaint] alleges matters not within the jurisdiction of PERB; and 3) [the complaint] fails to state a claim for which relief may be granted by PERB." (Order to Show Cause at p. 2). The Complainants failed to respond to the Order to Show Cause. As a result, the Hearing Examiner issued a Report and Recommendation (R&R) in which he recommended that the Complaint be dismissed in its entirety. The Complainants did not file any exceptions to the Hearing Examiner's R & R.

In his R & R the Hearing Examiner notes that Board Rule 520.4 and 544.4 provide as follows:

> **Board Rule 520.4**
> Unfair labor practice complaints shall be filed no later than 120 days after the date on which the alleged violation(s) occurred.
>
> **Board Rule 544.4**
> A complaint alleging a violation of [the Standards of Conduct] shall be filed not later than one hundred and twenty (120) from the date the alleged violation(s) occurred.

Applying the requirements of Board Rule 520.4 and 544.4 to the facts of this case, the

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> Except under the most extraordinary circumstances, no request for postponement shall be granted during the five (5) days immediately preceding the date of a hearing.

In the present case the Complainants' counsel did not comply with the requirement of Board Rule 550.5. As a result, the Complainants' counsel did not provide the Board's Executive Director with the information necessary to determine if the Complainants should be granted a postponement pursuant to Board Rule 550.6.

[4]Esther Hankerson is one of the named Respondents. Ms. Hankerson is the former vice president of the WTU.

Hearing Examiner observed that the Complainants' pleadings indicate that "Complainants George Parker, et al., knew or should have known by September 2002 that the activities complained of in the Amended Complaint for Damages had occurred. [Specifically, the Hearing Examiner notes that] [t]his scheme began in 1995 and continued until their activities were uncovered on or around September 2002. [However,] the original Complaint for Damages was filed on March 18, 2003, more than 120 days after September 2002." (R&R at p. 2)

The Board has held that "[the] deadline date is 120 days after the date Petitioner admits he actually became aware of the event giving rise to [the] complaint allegations." Hoggard v. DCPS and AFSCME, Council 20, Local 1959, 43 DCR 1297, Slip Op. No. 352 at p.3, PERB Case No. 93-U-10 (1993).[5] Also, the Board has determined that "the time for filing a complaint with the Board concerning [] alleged violations [which may provide for] a statutory cause of action, commence when the basis of those violations occurred ... However, proof of the occurrence of an alleged statutory violation is not necessary to commence the time limit for initiation a cause of action before the Board. The validation, i.e. proof, of the alleged statutory violation is what proceedings before the Board are intended to determine." 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).

In the present case, the Complainants assert that several officers of the WTU engaged "in a scheme to illegally embezzle and convert WTU's funds. . . . [Furthermore, the Complainants contend that] this scheme began in 1995 and continued until their activities were uncovered on or around September 2002." (Amended Complaint at ¶ 12). In view of the above, the events giving rise to the Complaint allegations took place between 1995 and September 2002. Therefore, the Complainants were required to file their Complaint against WTU within 120 days of the September 2002 date. However, the present Complaint and Amended Complaint were not filed until March 18, 2003. This filing occurred more than six months after the Complainants became aware of the alleged violations. Based on the above, it is clear that the Complainants' filing exceeded 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, we concur with the Hearing Examiner's conclusion that the Complainants' claims are untimely.

In addition to the untimeliness of the allegations, the Hearing Examiner found that the Complaint and Amended Complaint fail to state a statutory cause of action in this case. Specifically, the Hearing Examiner determined that the pleadings do not: (1) disclose allegations of matters within the Board's jurisdiction or (2) state a claim for which relief may be granted by PERB. (R&R at p. 3).

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[5]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).

Also, the Hearing Examiner indicated that his "Order to Show Cause" provided that absent a showing of good cause, he would recommend that the Board dismiss the complaint. The Complainants failed to respond to the Order to Show Cause. For the reasons noted above, the Hearing Examiner is recommending that the Board dismiss this matter with prejudice. (See R&R at p. 4)

In their pleadings the Complainants assert that "[t]his action arises under provisions of the Labor-Management Reporting and Disclosure Act (Landrum Griffin Act) 29 U.S.C. 501 et seq., and various state law claims specifically, breach of contract, fraud and breach of fiduciary duties." (Amended Complaint at ¶ 14). The Board lacks jurisdiction to consider alleged violations of the Labor-Management Reporting and Disclosure Act (Landrum Griffin Act) 29 U.S.C. 501 et seq. or the Complainants' state law claims. PERB's jurisdiction extends only to violations of the Comprehensive Merit Personnel Act, and no such violations are claimed. Therefore, we concur with the Hearing Examiner's finding that the pleadings do not disclose allegations of matters within the Board's jurisdiction.

Both AFT and Ms. Hankerson have requested that Respondents be reimbursed for their costs and attorney fees. With respect to AFT's requests for attorney's fees, the Hearing Examiner indicated that "PERB has held that D.C. Code Section 1-617.13 does not authorize it to award attorney fees. International Brotherhood of Police Officers, Local 1446, AFL-CIO/CLC v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992); and University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia, 38 DCR 5658, Slip Op. No. 373, PERB Case No. 90-U-10 (1991). Accordingly, [the Hearing Examiner is recommending] to [the Board] that the request for attorney's fees be denied." (R&R at p. 3)

Relying on the Board's decision in American Federation of State, County, and Municipal Employees, District Council 20, Local 2776, AFL-CIO v. District of Columbia Department of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990), the Hearing Examiner concluded that reasonable costs should be awarded to the Respondents. Specifically, the Hearing Examiner concluded that the interest-of-justice test has been met in this case, "based on the without-merit standard, and the fact that Complainants failed to prosecute their case by not appearing for the Pre-hearing Conference and not responding in timely fashion to the Order to Show Cause." (R&R at pgs. 3-4) As a result, the Hearing Examiner recommended that the Board direct that counsel for Respondents submit to the D.C. PERB Executive Director separate statements of their reasonable costs (not to include attorney's fees) in connection with this matter, to be paid by Complainants, and that the Board provide for a hearing, if necessary, whereby such costs may be demonstrated and proved." (R&R at p. 4)

We have held that D.C. Code Section 1-617.13 does not authorize us to award attorney fees. See, Committee of Interns v. D.C. Dept. of Human Services, 46 DCR 6868, Slip Op. No. 480, PERB Case No. 95-U-22 (1996). See also, University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia, 38 DCR 2463, Slip Op. No. 272, PERB Case No. 90-U-10 (1991). As a result, we adopt the Hearing Examiner's determination that the Respondents' request for attorney's fees should be denied. With respect to costs, the Board first addressed the circumstances under which the awarding of costs to a party may be warranted in AFSCME, D.C.

Council 20, Local 2776 v. D.C. Dept. of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). We observed:

> [W]e believe such an award must be in the interest of justice. Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued. We do not believe it possible to elaborate in any one case a complete set of rules or earmarks to govern all cases, nor would it be wise to rule out such awards in circumstances that we cannot foresee. What we can say here is that among the situations in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among employees for whom it is the exclusive bargaining representative. Slip Op. No. 245, at 5.

In the present case, the Complainants were notified of the date of the pre-hearing conference. However, they failed to appear. In addition, they failed to respond to the Hearing Examiner's "Order to Show Cause." Furthermore, the Complainants were provided with a copy of the Hearing Examiner's R&R and did not file exceptions to the Hearing Examiner's R&R. In view of the above, we believe that the Complainants' conduct in this case, satisfies the standard for awarding costs. Specifically, we find that the Complainants wholly failed to prosecute their claims. We base this conclusion on the fact that the Complainants failed to prosecute their case by not appearing for the pre-hearing conference and by not responding to the Hearing Examiner's Order to Show Cause. Accordingly, we concur with the Hearing Examiner's finding that the interest-of-justice standard has been met. As a result, we grant Respondents' request for costs.

Pursuant to D.C. Code § 1-605.02(3) (2001 ed.) and Board Rule 520.4, the Board has reviewed the findings, conclusions, and recommendations of the Hearing Examiner and find them to be reasonable, persuasive, consistent with Board precedent and supported by the record. As a result, we adopt the Hearing Examiner's recommendation and dismiss the complaint with prejudice. In addition, we adopt the Hearing Examiner's recommendation granting Respondents' request for reasonable costs.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Hearing Examiner's findings and recommendations are adopted. Therefore, the Complaint and Amended Complaint are dismissed with prejudice.

2. The Respondents' request for attorney's fees is denied.

3. The Respondents' request for reasonable costs is granted. The Respondents shall submit to the Public Employee Relations Board ("Board"), within fourteen (14) days from the date of this Decision and Order, a statement of actual costs incurred processing this matter. The statement of costs shall be filed together with supporting documentation and shall be served

on Complainants' counsel. The Complainants may file a response to the statement within fourteen (14) days from service of the statement.

4. The Complainants shall pay the Respondents, their reasonable costs incurred in this proceeding within ten (10) days from the determination by the Board or its designee as to the amount of those reasonable costs.

5. Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

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

September 27, 2004

CERTIFICATE OF SERVICE

This is to certify that the attached Corrected Copy of a Decision and Order in PERB Case No. 03-U-20 was transmitted via Fax and U.S. Mail to the following parties on this the 29th day of September 2004.

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Sheryl Harrington
Secretary

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Fire and Emergency Medical Services Department,	
Complainant,	PERB Case No. 03-U-02
v.	Slip Opinion No. 765
American Federation of Government Employees, Local 3721,	
Respondent.	

DECISION AND ORDER

The District of Columbia Fire and Emergency Medical Services Department ("FEMS") filed an unfair labor practice complaint ("Complaint") against the American Federation of Government Employees, Local 3721 ("AFGE"). The Complaint alleges that AFGE failed and refused to bargain in good faith by refusing to negotiate a successor collective bargaining agreement. FEMS asserts that AFGE's conduct violates D.C. Code §1-617.04(b)(3) (2001 ed.).

This matter was assigned to a Hearing Examiner and scheduled for a hearing to be held on June 23,2004. However, by letter dated June 18, 2004, the parties notified the Board that pursuant to paragraph six of a Memorandum of Agreement executed on June 17, 2004, the parties had agreed that this case would be withdrawn.[1] As a result, the parties requested that the Complaint be

[1] Pursuant to paragraph six of the Memorandum of Agreement, PERB Case No. 02-U-22 was also withdrawn. In PERB Case No. 02-U-22, AFGE, Local 3721 alleged that FEMS committed an unfair labor practice by: (1) failing to inform AFGE that the Financial Responsibility and Management Assistance Authority (FRMAA" or "Control Board") disapproved the parties' 1995 negotiated agreement; (2) denying AFGE the Right to have the 1995 negotiated agreement approved in accordance with D.C. Code § 1-617.15; and (3) preventing AFGE from representing its members under the provisions negotiated in the 1995 negotiated agreement.