

On October 1, 1986, AFSCME filed an answer denying the alleged violations and asserting as affirmative defenses (1) that the complaint failed to state a basis upon which relief could be granted; (2) that IBT lacked standing to raise a claim on behalf of employees whom it did not represent at the time the challenged actions were alleged to have occurred; (3) that the action was barred because it was not filed within the time required by PERB rule and by laches; (4) that the action was also barred because the dues payments in question were required under a collective bargaining agreement in effect at the relevant time; and (5) that IBT lacked standing "to raise a claim arising out of a collective bargaining agreement against [AFSCME]."

By order dated November 5, 1986, the Board granted DCPS' motion to consolidate the two complaints and referred the matter to a hearing examiner. Motions to Dismiss were filed on November 25, 1986, by AFSCME and on December 4, 1986 by DCPS. Each was referred to the Hearing Examiner.

After a hearing on the consolidated complaints on December 5, 1986, and January 21, June 29 and 30, 1987, the Hearing Examiner on October 13, 1987 filed a Report and Recommendations. In the Report, as we discuss at greater length below, the Hearing Examiner did not specifically rule upon the Motions to Dismiss, but found that the complaint in Case No. 86-U-14 was untimely in that it was not filed within ninety (90) days after the challenged action as required by PERB Rule 103.1; and the Hearing Examiner found that while the complaint in Case No. 86-U-17 was timely, AFSCME had only a "passive role" in the acceptance of dues deductions after the employee revocations had been submitted. The Hearing Examiner therefore recommended that both complaints be dismissed.

While finding the complaint in 86-U-14 time-barred, the Hearing Examiner nonetheless analyzed the other procedural and substantive issues there raised, made conclusions thereon, and recommended that the Board, if it rejected his recommendation to dismiss the complaint as untimely, conclude that DCPS violated Section 1-618.4(a)(1) of the D.C. Code but dismiss the 1-618.4(a)(3) allegation. 1/

IBT and DCPS timely filed exceptions, which we discuss below, and requested oral argument. 2/

1/ The Hearing Examiner did not deal with the allegation that DCPS also violated 1-618.7. He did not make any findings on the claimed violation of Section 1-618.4(a) (2), which was first raised in the IBT's post-hearing brief.

2/ AFSCME did not file exceptions to the Hearing Examiner's Report and Recommendations. We find the positions of the parties (DCPS and IBT) have been adequately developed and therefore, oral argument is not warranted. Accordingly, the requests for oral argument are hereby denied.

ISSUES

The issues before the Board are:

1. Whether IBT has standing to file these complaints as the representative of employees for injuries they sustained before it became their exclusive representative; and if so,
2. Whether the complaint filed in Case No. 86-U-14 is timely; and if so,
3. Whether IBT was required to prove the authenticity of the request forms purportedly submitted by employees revoking their union dues payments and if so, whether it adequately met that burden,
4. Whether DCPS had an obligation to honor the revocations during the period in question and if so, whether its failure and refusal to do so constituted an unfair labor practice in violation of D.C. Code Sections 1-618.4(a)(1) and (3), and 1-618.7,
5. Whether AFSCME refused to remit dues monies which were withheld by DCPS and forwarded to AFSCME and if so, whether such refusal violated D.C. Code Sections 1-618.4(b)(1) and (3) and 1-618.7.

Except as otherwise indicated, the following statement of facts is taken from the Hearing Examiner's Report and Recommendations.

DCPS and AFSCME were parties to a collective bargaining agreement effective May 26, 1982. By its terms, the Agreement was to "remain in full force and effect until May 25, 1985.... In the event that [either party gives notice of a desire to modify or terminate the Agreement], this Agreement shall remain in full force and effect during the period of any negotiations." The Agreement also contained a provision obliging DCPS to deduct union members' dues upon authorization by individual members, and providing that "[a]ll authorization of dues deductions shall be irrevocable for the term of this Agreement unless the employee leaves the bargaining unit."

Negotiations for a successor bargaining agreement began sometime in the Spring of 1985, and a tentative agreement was reached between AFSCME and DCPS on June 21, 1985. On or about the same date, IBT filed with the Board a petition seeking certification as the exclusive representative of the employees in the units then represented by AFSCME.

On July 10, 1985, AFSCME notified DCPS that the agreement had been ratified by its membership. DCPS, however, was prevented from taking action to ratify the agreement by the D.C. Superior Court's granting of an IBT Motion for a Temporary Restraining Order on August 26, 1985. Some time during September, 1985 AFSCME withdrew its notice of ratification

and the contract was not finally ratified until a third vote of AFSCME membership during January or February, 1986. AFSCME and DCPS executed that agreement on February 27, 1986. 3/

Beginning in June and continuing through August, 1985, several employees submitted to DCPS dues deduction revocation forms bearing an effective date of September 1, 1985. In August, 1985, the DCPS Controller informed DCPS' Labor Relations Office that the forms had been received, and the DCPS' Labor Relations Office then informed the Superintendent of Schools that the deducted dues monies should be placed in escrow. The DCPS Controller also sent to the Director of Labor Relations two lists of names. In the covering letter, the Controller requested that the lists be reviewed so that the forms could be processed. 4/ The dues revocation forms contained two parts, an original white part which was forwarded to the D.C. Office of Pay and Retirement and a yellow copy which was returned to the employee. IBT proffered 200 yellow copies of the forms at the hearing, after all attempts to locate the white copies were unsuccessful. The yellow copies were admitted into evidence, over the objections of both Respondents, along with the lists which had been sent to the DCPS Director of Labor Relations by its Controller's office.

During October, 1985 IBT's representatives requested an explanation from DCPS as to why dues were being deducted despite the revocations. DCPS apparently did not respond to this inquiry and on October 10, 1985, four DCPS employees, who claimed to have submitted revocation forms, filed an action in the Superior Court of the District of Columbia. The lawsuit, which named both DCPS and AFSCME as defendants, alleged inter alia, that the deductions from the Plaintiffs' wages for the purpose of paying union dues constituted an unlawful conversion of the Plaintiffs' property and violated D.C. Code Section 1-618.7. The Superior Court dismissed the action, without prejudice to refiling after the exhaustion of administrative remedies before this Board. 5/

On March 27, 1986, the Board issued Opinion No. 134 in PERB Case No. 85-R-09, finding that the tentative agreement reached between DCPS and AFSCME on June 21, 1985, was not a bar to the representation petition filed by IBT. The Board directed that an election be held to determine whether the employees covered by the petition desired to be represented by AFSCME or IBT.

Following the election proceedings, IBT was certified by the Board on June 24, 1986 as the exclusive representative of the employees in the five units formerly represented by AFSCME.

3/ See DCPS Exhibit #4. The successor agreement contained the same maintenance of membership clause as the expired agreement.

4/ The Director of DCPS' Office of Labor Relations testified that his office ordinarily verifies dues authorization or revocation forms; this was not done here except for three forms dated between May 26 and June 20, 1985.

5/ See, Hawkins et al. v. Hall and AFSCME, Local 2093, 537 A.2d. 571 (D.C. 1988) 127 LRRM 3118 (District of Columbia Court of Appeals affirmance of Superior Court dismissal).

According to the record, the Director of Labor Relations for DCPS sent a letter dated June 25, 1986 to the Controller requesting the immediate termination of payroll dues deductions for employees who were previously represented by AFSCME. The Controller issued a Memorandum dated July 18, 1986 addressed to "all former dues-paying members of Local 2093, D.C. Council 20," wherein he advised that the cancellation of union dues deductions to AFSCME had not been accomplished for the pay period ending July 5, 1986, so that deductions were made from the paychecks which were issued on July 18, 1986. ^{6/}

On June 26 and July 18, 1986, IBT requested that DCPS return the escrowed dues deductions to employees who had submitted revocation forms. DCPS was advised by the Office of Pay and Retirement on July 23, 1986, that despite DCPS' request, no escrow account had been established. In response to IBT's requests for reimbursement of the withheld dues, DCPS offered a compromise on the payments. IBT rejected the offer and on July 29, 1986, filed the instant complaint (PERB Case No. 86-U-14).

On September 18, 1986, IBT representatives were first advised by DCPS that there was no escrow account and that the dues withholdings had been sent to AFSCME. According to testimony of the Director of Labor Relations for DCPS, the then Executive Director of AFSCME acknowledged that he was aware of a large number of dues revocation forms having been submitted. There is also testimony, however, that DCPS never forwarded to AFSCME copies of the dues revocation forms, nor any list of the persons who had submitted the forms. Upon learning that AFSCME had continued to receive dues deductions despite the revocations, IBT filed the present unfair labor practice complaint against AFSCME on September 22, 1986 (PERB Case No. 86-U-17).

DISCUSSION AND ANALYSIS

The Board has reviewed the entire record in this proceeding and concludes as follows.

A. IBT HAD STANDING TO FILE UNFAIR LABOR PRACTICE COMPLAINTS EVEN THOUGH THE ACTS COMPLAINED OF OCCURRED PRIOR TO ITS CERTIFICATION

We concur with the Hearing Examiner's conclusion that the IBT had standing to file these complaints. D.C. Code Section 1-618.11(a) states in relevant part that "[t]he labor organization which has been certified to be the exclusive representative of all employees in the unit shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees...." The Board construes this provision to permit a labor organization certified as the exclusive representative to enjoy the rights and privileges accorded by the CMPA, including the right to act on behalf of the unit employees.

^{6/} See Teamsters' Exhibit #27 and #28. It is undisputed that no further deductions were made after July 18, 1986; and IBT does not contend that DCPS failed to make adjustments for the monies deducted after IBT became the certified representative.

We find nothing in this provision which bars a labor organization, once certified, from raising matters that occurred prior to the date that the exclusive representative is certified. Accordingly IBT, which was the certified exclusive representative at the time these complaints were filed, had standing to file them. ^{7/}

B. THE COMPLAINT IN PERB CASE NO. 86-U-14 IS TIMELY SINCE THE FAILURE TO HONOR DUES REVOCATIONS WAS OF A CONTINUING NATURE

In both its post-hearing brief and its exceptions to the Hearing Examiner's Report, IBT argues that the complaint filed in PERB Case No. 86-U-14 is timely for the following reasons: (1) each payroll dues deduction after the revocations were submitted constituted continuing conduct by DCPS in violation of the relevant statutory provisions; (2) the dismissal by the D.C. Superior Court of a related civil suit effectively tolled the Board's filing requirements; (3) under the theory of equitable estoppel, DCPS should not be permitted to assert timeliness as a defense since it misrepresented material facts to the Complainant regarding the purported escrow account; and (4) given the unusual circumstances of this case, the Board should liberally construe its non-statutory time limits.

The Board concludes, contrary to the Hearing Examiner, that the complaint in PERB Case No. 86-U-14 is not time-barred. Although the complaint was filed on July 29, 1986, approximately ten (10) months after the revocation requests were submitted, the Board agrees with the Complainant that the continuing dues deductions by DCPS constituted a continuing denial of the employees' revocations, extending into the ninety (90) days prior to the filing of the complaint. ^{8/}

Since we have thus found the complaint timely, the Board need not address IBT's other arguments supporting that conclusion.

C. IBT HAD AND MET THE BURDEN OF PROOF REGARDING THE AUTHENTICITY OF THE REVOCATION REQUESTS

Board Rule 103.9 provides that the "party asserting a violation...shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." The Board concludes on the basis of this provision, that the burden of proving the existence of revocations and authenticating

^{7/} In light of the above-cited statutory provisions which expressly confer upon the exclusive representative the right to act on behalf of the designated bargaining unit, the Board rejects DCPS' arguments that IBT lacked standing because an organization must "have suffered harm itself or be the representative of employees at the time the alleged injury occurred."

^{8/} The Hearing Examiner concluded that the complaint was untimely because in his view IBT could have filed this complaint as early as October, 1985, when it first became aware that revocations were not being honored by DCPS. However, we have found that there is a continuing violation in the continuation of deductions by DCPS.

any documents proffered on this issue was the Complainant's. The CMPA and the Board's rules do not require strict adherence to the rules of evidence. The best evidence on this issue, the original (white) parts of the revocation request forms, was not available. Absent this evidence, IBT's proffer of lists from the DCPS' Controller's Office, which were derived from the forms and identified the employees who submitted them, coupled with the duplicate (yellow) copies of the request forms, adequately proved the existence of the revocations. The lists themselves were authenticated when properly identified at the hearing by the DCPS Controller.

D. DCPS WAS NOT REQUIRED TO HONOR THE DUES REVOCATIONS UNTIL THE TEAMSTERS WERE CERTIFIED AS THE NEW REPRESENTATIVE

Having determined that the complaint filed in PERB Case No. 86-U-14 was timely, and that the revocations were adequately proved by IBT, the Board now turns to the critical question whether and, if so, when DCPS was required to honor the revocation requests.

Although the Hearing Examiner found the complaint untimely, he nevertheless analyzed the issues concerning the disputed revocations and concluded that DCPS committed a violation of D.C. Code Section 1-618.4(a)(1) by its failure to honor the revocation requests after September 5, 1985, the date when AFSCME served notice of the withdrawal of its ratification of the contract. For the following reasons, the Board disagrees with this conclusion.

The evidence adduced at the hearing clearly supports the finding that there were continued efforts to achieve the ratification of an agreement between DCPS and AFSCME. Ultimately, ratification by the AFSCME membership was secured in February, 1986 and the parties executed an agreement on February 27, 1986. ^{9/} Hence, the Board concludes that the "period of negotiations" between DCPS and AFSCME which commenced in the Spring, 1985, continued until IBT was certified on June 24, 1986. As noted previously, the expired contract contained a maintenance of membership clause providing that dues deductions shall be irrevocable for the term of the agreement, and a separate provision that the agreement shall remain in "full force and effect during the period of any negotiations." Therefore, the Board finds that the maintenance of membership provision in the expired agreement continued throughout the period from May, 1985, until June 24, 1986.

The Board concludes that the dues deductions were irrevocable until June 24, 1986. DCPS attempted to terminate the deduction of dues the day after IBT was certified. Inadvertently, the deductions continued for (1) pay period after June 24, 1986; this error was subsequently corrected. In reaching this conclusion, the Board follows the rulings of analogous cases in the private sector. The National Labor Relations Board (NLRB) held in RCA Del Caribe, Inc. and IBEW, Local 2333, 262 NLRB No. 116, 110 LRRM 1369, 1370 (1982), that "[w]hile the filing of a valid petition may raise a doubt as to majority status, the filing, in and of itself, should not overcome the strong presumption in favor of

^{9/} See p. 4 supra.

the continuing majority status of the incumbent" The new policy enunciated by the Board in RCA Del Caribe with respect to the requirements for employer neutrality when an incumbent union is challenged by an "outside" union is grounded in the rationale that "preservation of the status quo through an employer's continued bargaining with an incumbent is a better way [than cessation of such bargaining upon the filing of a representation petition] to approximate employer neutrality." RCA Del Caribe, id. at 1371. So here, preservation of the status quo "is a better way" to protect both stability and employee representational choice than shortening DCPS' duty to continue dealing with the incumbent union prior to that union's legal replacement through an election and Board certification.

Thus we conclude that the dues deduction authorized by the expired agreement between DCPS and AFSCME continued to be irrevocable during the period these parties were attempting to achieve a ratified agreement, which did not end until the certification of IBT.

The Board finds further support for its decision in the recent ruling by the Court of Appeals for the Eighth Circuit, TWA v. Independent Federation of Flight Attendants, ___ F.2d ___, ___ aff.d. by an equally divided court, 56 U.S. L.W. 4218 (decided March 2, 1988). In that case, the court held that a union security clause providing for the check off of dues of flight attendants survived an impasse in bargaining between the parties. The Court of Appeals found the dues check-off provision "purely a creature of contract" which, by the terms of the parties' agreement and consistent with the policies of the Railway Labor Act, continues beyond the expiration of an agreement unless either party gives notice of intent to bargain over this issue. Since there was no notice to change this provision, an impasse reached on other issues did not terminate the employer's obligation to honor the dues check-off provisions.

Accordingly, the Board concludes that while the complaint filed in PERB Case No. 86-U-14 is timely, and the revocations were proved, they could not take effect until IBT was certified, after which time DCPS ceased deducting AFSCME dues from unit employees' wages. Thus DCPS has not been shown to have violated D.C. Code Sections 1-618.4(a)(1) or (3), nor is there a basis for finding a violation of D.C. Code Section 1-618.7. 10/

10/ IBT argued in its post-hearing brief and in its exceptions that DCPS' continuing deduction of dues in spite of the revocations constituted assistance and financial contribution in the administration of a labor organization in violation of Section 1-618.4(a)(2). Since no such allegation was contained in the complaint, the Hearing Examiner made no conclusion regarding (a)(2). The Board concludes that in any event there could be no violation of 1-618.4(a)(2) for the reasons stated in Section "D" of this opinion.

E. PERB CASE NO. 86-U-17 MUST BE DISMISSED SINCE AFSCME WAS ENTITLED TO RECEIVE THE DUES DEDUCTIONS UNTIL IBT BECAME THE CERTIFIED REPRESENTATIVE AND WAS NOT SHOWN TO HAVE RECEIVED ANY DEDUCTIONS THEREAFTER

The Board's conclusion with respect to whether and when DCPS was required to honor the revocations in PERB Case No. 86-U-14 necessarily compels the conclusion that AFSCME was entitled to receive the dues deduction monies under the provisions of D.C. Code 1-618.7 and its agreement with DCPS until IBT was certified. As discussed more fully in Section "D" of this opinion, any revocations submitted prior to the certification of IBT as the new representative had no legal effect until that time (unless of course an employee was leaving the bargaining unit, as stipulated in the maintenance of membership clause).^{11/}

The Board concludes, for all of the foregoing reasons, that both complaints must be dismissed.

O R D E R

It is Hereby Ordered that:

PERB Case No. 86-U-14 is dismissed.
PERB Case No. 86-U-17 is dismissed.

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

November 3, 1988

^{11/} IBT alleges in its complaint that AFSCME refused to return the dues deduction monies. The Board concludes, however, that even if AFSCME had an obligation to remit monies deducted, IBT failed to offer any proof with respect to AFSCME's alleged refusal to return the deductions.

APPENDIX

STATUTES AND RULES

The relevant D.C. Code provisions and PERB Rules are set forth below in pertinent part:

D.C. Code Section 1-618.4:

(a) The District, its agents and representatives are prohibited from:

- (1) Interfering, restraining or coercing any employee in the exercise of the rights guaranteed by this subchapter;
- (2) Dominating, interfering or assisting in the formation, existence or administration of any labor organization, or contributing financial or other support to it
- (3) Discriminating in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization, except as otherwise provided in this chapter;

* * * *

(b) Employees, labor organizations, their agents or representatives are prohibited from:

- (1) Interfering with, restraining or coercing any employees or the District in the exercise of rights guaranteed by this subchapter;
- (2) Causing or attempting to cause the District to discriminate against an employee in violation of Section 1-618.6;

* * * *

D.C. Code Section 1-618.7:

Any labor organization which has been certified as the exclusive representative shall, upon request, have its dues and uniform assessments deducted and collected by the employer from the salaries of those employees who authorize the deduction of said dues. Such authorization, costs and termination shall be proper subjects of collective bargaining

D.C. Code Section 1-618.11. Rights accompanying exclusive recognition.

(a) The labor organization which has been certified to be the exclusive representative of all employees in the unit shall have the right to act for and negotiate agreements covering all employees in the unit and shall be

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responsible for representing the interests of all such employees... (p)rovided, however, that the employee pays dues or service fees in an amount equal to the dues of the employees' organizations. Agency shop and other labor organization security provisions should be an appropriate issue for collective bargaining.

PERB Interim Rule 103.1:

An agency, a labor organization or an aggrieved person may file a[n unfair labor practice] complaint A complaint filed by an agency or a labor organization in its own name or by a labor organization in the name of an individual must be filed within ninety (90) days of the alleged violation.

PERB Interim Rule 103.9:

The purpose of hearings under Chapter 103 is to develop a full and factual record upon which the Board may make a decision. Provided however, That the party asserting a violation...shall have the burden of proving the allegations of the complaint by a preponderance of the evidence. The principles of relevancy and materiality are paramount. The technical rules of evidence do not apply. The procedures of Chapter 109 of these rules shall apply to the hearing.