GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
Tracy Hatton, Complainant,	PERB Case No. 95-U-02 Opinion No. 451
and	
Fraternal Order of Police Department of Corrections Labor Committee, Respondent.	

DECISION AND ORDER

On November 8, 1994, counsel, on behalf of Complainant Tracy Hatton filed an unfair labor practice complaint against the District of Columbia Department of Corrections (DOC) and the Fraternal Order of Police/Department of Corrections Labor Committee (FOP). On December 19, 1994, the Complainant amended his Complaint and removed DOC as a Respondent. With respect to FOP, the Complainant alleged that FOP violated his employee rights under D.C. Code §1-618.6(a)(1), by refusing to arbitrate his grievance because he actively supported FOP's predecessor during FOP's successful effort to become the exclusive bargaining representative of DOC employees. [1]/ Complainant asserted that

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[1]/ Throughout the Complaint and in the Hearing Examiner's Report and Recommendation, D.C. Code §1-618.3(a)(1) is cited as the source of employee rights violated in conjunction with the unfair labor practice found. D.C. Code §1-618.3(a)(1) provides, among other things, for certain standards of conduct that labor organizations must maintain with respect to its employee members, including "fair and equal treatment under the governing rules of the organization". However, at all time material to the alleged violation, the Complainant was not a member of FOP. Therefore, this standard of conduct is not implicated and a violation of it cannot be found.

The Complaint allegations, however, evoke employee rights under D.C. Code §1-618.6(a) which provides that "[a]ll employees shall have the right...[t]o organize a labor organization free from interference, restraint, or coercion". D.C. Code §1-618.6(a)(2),

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by such conduct FOP had breached its duty to fairly represent him and thereby committed an unfair labor practice as proscribed under D.C. Code §1-618.4(b)(1). [2]/

FOP denied that it committed any unfair labor practice. In addition, it asserted that the acts alleged do not give rise to an unfair labor practice and moved for summary judgment. The matter, including FOP's motion, was referred to a Hearing Examiner. A hearing was held on March 24, and May 4, 1995, and a Report and Recommendation (R&R) was issued on July 15, 1995, containing his findings, conclusions and recommendations. [3]/

The Hearing Examiner denied FOP's Motion for Summary Judgment, finding that the allegations made by the Complainant would, if proven, establish the asserted unfair labor practice. He proceeded to find that during FOP's campaign to replace the Teamsters as the exclusive bargaining representative, agents and officers of FOP threatened to retaliate against the Complainant for actively supporting the Teamsters, the then-incumbent union. He further found that once FOP became the new bargaining representative and was in a position to do so, it carried out its threat by withdrawing from arbitration Complainant's pending grievance concerning his termination by DOC. [4]/ The Hearing

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[1](...continued)
which provides that an employee has the right "[t]o form, join, or assist any labor organization or to refrain from such activity", is also implicated.

[2]/ D.C. Code §1-618.4(b)(1) provides that it is an unfair labor practice for a labor organization to interfere, restrain or coerce employees in the exercise of rights guaranteed by Subchapter XVIII. D.C. Code §1-618.6. We have held that a breach of an exclusive representative's duty to fairly represent employees in the unit it represents constitutes a violation of D.C. Code §1-618.4(b)(1). See, Charles Bagenstose v. Washington Teachers' Union, Local 6, AFT, AFL-CIO, ____DCR____, Slip Op. No. 355, PERB Case No. 90-U-02 (1993).

[3]/ The Hearing Examiner's Report and Recommendation is attached as an appendix to this Opinion.

[4]/ Complainant had been terminated by DOC as a result of an altercation with his supervisor. FOP's predecessor, Teamsters, Local 1714, was the representative of the unit at the time and had taken the appropriate steps to arbitrate Complainant's grievance. The grievance was not arbitrated before FOP succeeded the Teamsters. Once FOP became the exclusive representative, it
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Examiner further found FOP's internal procedure for deciding to take a matter to arbitration and appealing that decision to be "arbitrary in nature and that they fail to afford employees the basic protection they are entitled to under due process of law". (R&R at 5-6.) [5]/

The Hearing Examiner concluded that FOP's withdrawal of Complainant's grievance from arbitration and its subsequent decision not to arbitrate "was not for objective considerations, but rather was designed to punish Hatton for supporting Teamsters, Local 1714 and to implement the threat made earlier." (R&R at 6.) Based on these findings, he recommended that FOP be found to have breached its duty to fairly represent the Complainant in violation of D.C. Code §1-618.4(b)(1). His recommended relief directs FOP to (1) request that DOC reinstate Complainant to his former position pending arbitration; (2) take all necessary steps to ensure that Complainant's grievance is arbitrated; (3) provide the Complainant with any loss of backpay from the date FOP requested that Complainant's grievance be withdrawn from arbitration until an arbitrator resolves the grievance; and (4) reimburse Complainant for reasonable attorney fees and cost in connection with the litigation of this proceeding. The case is now before the Board on exceptions filed by FOP to these findings and conclusions.

Respondent's exceptions consist of challenges to the factual findings underlying the violations found by the Hearing Examiner, based largely on the Hearing Examiner's credibility determinations. We state at the outset that issues of fact

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assumed the responsibility and authority to arbitrate the grievances of bargaining unit members.

Significant among the reasons cited by the Hearing Examiner for concluding that an unlawful motive governed FOP's decision not to arbitrate was his finding that FOP, "after taking the rather unusual step of requesting that Hatton's case be withdrawn from OLRCB and FMCS, ... was still not able to offer any plausible explanation for its decision not to arbitrate." (R&R at 6.) The Hearing Examiner further found that FOP's breach of its duty to fairly represent Complainant met the standard of being arbitrary, discriminatory or in bad faith enunciated by the U.S. Supreme Court in Vaca v. Sipes, 386 U.S. 171 (1967). (R&R at 6-7).

[5]/ Among the reasons noted for this finding was the fact that under FOP by-laws, the members of the committee that decide which grievances to arbitrate and the members of the committee that hears any appeal of that decision are the same. (R&R at 5.)

concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner. See, e.g., University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia, 39 DCR 6238, Slip Op. No. 285, PERB Case No. 86-U-16 (1992) and Charles Bagenstose, et al. v. D.C. Public Schools, 38 DCR 4154, Slip Op. No. 270, PERB Case Nos. 88-U-33 and 88-U-34 (1991). Challenges to evidentiary findings do not give rise to a proper exception where, as here, the record contains evidence supporting the Hearing Examiner's finding. See, American Federation of Government Employees, Local 872 v. D.C. Dept. of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Cases Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991).

FOP makes several exceptions to the evidentiary findings, or absence of certain findings, and the Hearing Examiner's recommended remedy. Based on these exceptions, FOP contends that the record does not support the violations found or the relief provided. [6]/ We find no merit to any of FOP's exceptions to the evidentiary findings and summarize our disposition of them in

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[6]/ FOP states that it was not the certified representative of DOC employees at the time Ellowese Barganier, an officer of FOP, was found to have threatened to retaliate against the Complainant. Therefore, it contends that the Hearing Examiner could not rely upon this finding to attribute an illegal motive to FOP. The crucial violation alleged by the Complainant, however, was the illegal withdrawal of Complainant's grievance from arbitration. FOP was the certified representative of DOC employees when this was found to have occurred. While Board Rule 520.4 precludes the finding of an independent violation by FOP based on Barganier's threat, the threat can be used to establish motive or intent to support the alleged violation at the time FOP was in a position to carry out the threat. Georgia Mae Green v. D.C. Dep't. of Corrections, Slip Op. No. 323, PERB Case No. 91-U-13 (1992). However, we must reject as time barred the Hearing Examiner's independent finding of a violation based on Barganier's threat to retaliate against the Complainant that occurred over a year before the Complaint was filed.

We note that the Board has previously found that FOP existed as a labor organization during the period prior to becoming the certified representative of DOC employees when Barganier and Nathan Pugh were the Co-Chairpersons of FOP. See, Patricia Bush and Nathan Pugh v. Teamsters Local Union 1714 et al. and D.C. Department of Corrections, Slip Op. No. 367, PERB Case No. 92-U-10 (1993).

the margin below. [7]/ We adopt the Hearing Examiner's findings

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[7]/ In its first exception, FOP avers that Complainant made no showing that his grievance was timely filed and received by Federal Mediation and Conciliation Service (FMCS) for arbitration or that FOP made a request to FMCS and DOC's representative, the Office of Labor Relations and Collective Bargaining (OLRCB), that the Complainant's grievance be withdrawn. This assertion ignores the Hearing Examiner's findings crediting the testimony of the Complainant that he submitted documentation to FOP that the Teamsters had notified FMCS of its intention to arbitrate his grievance. (Tr. 208-211.) Furthermore, there is documented evidence of FOP's decision not to arbitrate Complainant's grievance. (Un. Exh. 4.) This evidence supports a finding that FOP reversed an on-going process to arbitrate Complainant's grievance. If FOP denies that this occurred, it had a burden of producing rebuttal evidence in its defense. American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2776 v. D.C. Dep't. of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). FOP's claim that there was no evidence that Complainant's grievance was timely belies the fact that two members of FOP's arbitration committee testified that Complainant's grievance was reviewed for arbitration. (Tr. at 439 et seq. and 451 et seq.) In fact, none of the three members of the arbitration committee who testified claimed that Complainant's grievance was untimely. One member of the arbitration committee testified that the grievance was considered weak when it was reviewed by the arbitration committee, while the other two could not recall why the grievance was denied for arbitration. Id.

The second exception takes issue with inferences made against FOP by the Hearing Examiner from FOP's records which did not affirmatively establish that Complainant's grievance was filed by the Teamsters. For the reason discussed, this does not give rise to a valid exception. Moreover, this evidence was not determinative of the Hearing Examiner's finding of a violation.

FOP next objects to the Hearing Examiner basing his conclusion that FOP's representation of Complainant was discriminatory, conducted in bad faith or otherwise a breach of its duty to fairly represent employees on his finding that FOP's arbitration review procedures were "less than optimal". FOP contends that this finding is contrary to our holding in Charles Bagenstose v. Washington Teachers' Union, Local 6, AFL-CIO, Slip Op. No. 355, PERB Case No. 90-S-01 and 90-U-02 (1993). While the Hearing Examiner made findings in this regard with respect to FOP's arbitration review procedures, his findings that FOP discriminated against or otherwise breached its duty to fairly represent

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Complainant did not turn on these findings. Rather, it turned on his findings that, among other things, (1) FOP had threatened to take reprisals against Complainant for supporting its predecessor during FOP's campaign to become the representative of DOC employees, (2) the Complainant's grievance was pending arbitration prior to FOP assuming the responsibility of referring matters to arbitration, and (3) FOP's inability to offer any plausible reason for its decision not to arbitrate. The Hearing Examiner's finding with respect to the lack of due process of FOP's arbitration procedure was not material to the violation found.

Next, FOP takes exception to the Hearing Examiner's denial of its Motion for Summary Judgement. A complainant is not required to prove its complaint at the pleading stage as long as the complaint states a cause of action under the CMPA with respect to the alleged unfair labor practice. American Federation of Government Employees, Local Unions No. 631, et al. v. D.C. Dep't. of Public Works, Slip Op. No. 306, PERB Case No. 94-U-02 and 94-U-08 (1994). Our referral of the Complaint for a hearing was premised on our previous finding that the pleadings contained disputes as to material issues of fact concerning a cause of action within our jurisdiction. Moreover, our disposition of FOP's exceptions to the findings of fact obviates further consideration of this exception at this juncture in the proceedings.

In its seventh exception, FOP argues at length that the Hearing Examiner's recommended remedy of back pay was not appropriate in view of Complainant's failure to meet its burden of proof that FOP violated its duty to fairly represent Complainant in the processing of his grievance. FOP bases this exception largely on the evidentiary challenges discussed above. In view of our disposition of those challenges, these arguments merit no further discussion.

FOP further argues that even assuming Complainant's grievance was not frivolous, FOP's decision not to arbitrate cannot be found to have been for violative reasons because Complainant's grievance would have lost at arbitration. By this argument, FOP continues to ignore and attempts to relitigate the findings of the Hearing Examiner. Whether or not the Complainant would have prevailed at arbitration, the Hearing Examiner found that FOP's decision not to go forward with arbitration was motivated by prohibited reasons. When faced with shifting burdens of proof, the Board has embraced the criteria in Wright Line, Inc. 250 NLRB 1083 (1980), enf'd 662 F. 2d 899 (1st Cir. 1981), cert. den'd, 445 US 989 (1982). Under the Wright Line analysis, the Hearing Examiner's finding that the
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and conclusions that FOP violated Complainant's employee rights by the acts and conduct alleged and thereby breached its duty to fairly represent Complainant in violation of D.C. Code §1-618.4(b)(1).

With respect to the recommended remedy, we adopt it to the extent consistent with our discussion below. Two aspects of the recommended relief warrant our attention. The first concerns the Hearing Examiner's recommendation that FOP be held "responsible for Hatton's loss of backpay commencing from the date Respondent requested withdrawal of Hatton's grievance from OLRCB and continuing until an arbitrator resolves the grievance." (R&R at 7.) We shall clarify the relief by expressly qualifying FOP's backpay liability as contingent upon an arbitrator's sustaining Complainant's grievance with an award of backpay since Complainant would not be entitled to any backpay if the grievance should be denied on the merits.

The Hearing Examiner further recommended that backpay commence from the date FOP requested the withdrawal of Complainant's grievance from OLRCB. However, as the Hearing Examiner notes, this date is not established by the record which is now closed. Therefore, FOP's liability for backpay, if awarded, shall run from, June 29, 1994, the date FOP's arbitration committee declined to arbitrate Complainant's

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Complainant made a prima facie showing that a violation had been committed by FOP created a presumption which shifted the burden to FOP to show a non-prohibited reason for its decision not to arbitrate Complainant's grievance. As stated in the text, the Hearing Examiner found that FOP failed to provide a plausible reason for that decision.

Finally, FOP contends that the Hearing Examiner committed "reversible error" when he permitted a witness, Ellowese Barganier, to "evade [her] subpoena and made her testify as his witness rather than Respondent's." (Except. at 20.) Our Order and Notice of Hearing provides that a hearing is "an investigatory and not an adversary proceeding" for the purpose of making a decision." To achieve this objective, "Hearing Examiner's shall have full authority to conduct a hearing unless restricted by the Board." Board Rule 550.12. Respondent was not precluded from having a full opportunity to examine this witness and thereby was not prejudiced by any action of the Hearing Examiner. We also note that Ms. Barganier was subpoenaed to served as a witness by Complainant, not Respondent. Her less than cooperative effort to appear at the hearing warranted the Hearing Examiner's involvement in order to achieve this objective.

grievance, to the date the grievance is reinstated. This modification to the Hearing Examiner's recommendation disposes of FOP's sixth exception objecting to commencing backpay on a date not established in the record.

Should FOP's actions, as found by the Hearing Examiner, foreclose the arbitration of Complainant's grievance, said actions shall be made a threshold issue of arbitrability to the arbitration of Complainant's grievance. If an arbitrator determines that the merits of the grievance is not arbitrable due to FOP's actions, FOP shall be responsible for Complainant's backpay from June 29, 1994, until Complainant is offered "substantially equivalent employment elsewhere." (R&R at 8.) This relief is consistent with our mandate under D.C. Code § 1-618.13(a) to make an employee whole for any loss resulting from unfair labor practices.

Finally, we reject the Hearing Examiners' recommendation that our relief require FOP to pay Complainant's attorney fees. The Board has held that D.C. Code §1-618.13(d), which expressly permits the Board to require the payment of reasonable costs incurred by a party, does not refer to attorney fees. Nor are we properly authorized to provide attorney fees elsewhere in the D.C. Code. See, University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia, 38 DCR 2463, supra. However, we find the Hearing Examiner's recommendation that FOP reimburse Complainant for his costs in connection with the litigation of his Complaint meets the criteria we adopt in AFSCME District Council 20, Local 2776, AFL-CIO v. D.C. Dep't. of Finance and Revenue, supra, Slip Op. No. 245 at pp. 4-5 (where we recognized that an award of costs would be appropriate when the successfully challenged action was undertaken in bad faith, as the Hearing Examiner found here). We therefore shall award costs in our Order.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police/Department of Corrections Labor Committee (FOP) and its agents and representatives shall cease and desist from breaching its duty to fairly represent bargaining unit employee Tracy Hatton by refusing to arbitrate his grievance because he exercised his employee rights guaranteed by the Comprehensive Merit Personnel Act (CMPA) to assist any labor organization.

2. FOP and its agents and representatives shall cease and desist from interfering with, restraining, or coercing, in any like or related manner, employees in the exercise of rights guaranteed by the CMPA.

3. FOP shall notify, in writing (with a copy to the Complainant and the PERB), the Federal Mediation and Conciliation Service (FMCS) and the Office of Labor Relations and Collective Bargaining (OLRCB), on behalf of the Department of Corrections (DOC) that FOP wishes to proceed to arbitration on the grievance concerning the termination of Complainant by DOC.

4. FOP shall take the necessary steps to process Complainant's grievance through arbitration.

5. FOP shall request that DOC reinstate the Complainant pending the outcome of its efforts to arbitrate Complainant's grievance.

6. FOP shall provide Tracy Hatton backpay in accordance with this Opinion, with interest at 4%, for any lost pay, subject to set offs from interim remuneration received from other sources and mitigating circumstances.

7. FOP shall post conspicuously within ten (10) days from the service of this Opinion the attached Notice where FOP notices to employees are normally posted.

8. FOP shall notify the Public Employee Relations Board (PERB), in writing, within fourteen (14) days from the date of this Order that the Notices have been posted and as to the steps it has taken to comply with the directives in paragraphs 3, 4, 5 and 6 of this Order.

9. The Complainant shall submit to the PERB, within fourteen (14) days from the date of this Order, a statement of the costs sought from FOP together with supporting documentation; FOP may file a response to the statement within fourteen (14) days from service of the statement upon it.

10. FOP shall pay to Complainant his reasonable expenses 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.

11. FOP shall accord the Complainant the option to be represented at any arbitration of his grievance by a representative of his choice at a rate not to exceed the rate charged by FOP's counsel in arbitration proceedings. The arbitrator shall retain jurisdiction to resolve any dispute over the fee of any representative retained by the Complainant.

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

September 19, 1995

PERB Public Employee Relations Board

Government of the District of Columbia

415 Twelfth Street, N.W.
Washington, D.C. 20004
[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

TO ALL EMPLOYEES OF THE DEPARTMENT OF CORRECTIONS REPRESENTED BY THE FRATERNAL ORDER OF POLICE/DEPARTMENT OF CORRECTIONS LABOR COMMITTEE, THIS NOTICE IS POSTED BY ORDER OF THE GOVERNMENT OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 451, PERB CASE NO. 95-U-02 (September 19, 1995)

WE HEREBY NOTIFY our bargaining unit members that the District of Columbia Public Employee Relations Board has found that the Fraternal Order of Police/Department of Corrections Labor Committee (FOP) violated the law and has ordered us to post this notice.

WE WILL cease and desist from breaching our duty to fairly represent employees by refusing to arbitrate the grievances of bargaining unit members that exercised their employee rights, pursuant to D.C. Code §1-618.6, to assist any labor organization.

WE WILL cease and desist from interfering with, restraining or coercing, in any like or related manner, employees represented by FOP in the exercise of their rights guaranteed by the Comprehensive Merit Personnel Act (CMPA).

WE WILL pay the reasonable costs incurred by Tracy Hatton for the filing and processing of his Complaint.

Date:_____ By:_____
Chairperson

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning the Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 415-12th Street, N.W. Room 309, Washington, D.C. 20004. Phone: 727-1822.