Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Thomas J. McRae,	
Complainant,	
v.	PERB Case No. 02-U-09
	Opinion No. 868
District of Columbia Department of Corrections,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

This matter involves an Unfair Labor Practice Complaint ("Complaint") filed by Thomas J. McRae ("Mr. McRae" or "Complainant") against the District of Columbia Department of Corrections ("DOC" or "Respondent"). The Complaint alleges that DOC violated the Comprehensive Merit Personnel Act ("CMPA") and the the parties' collective bargaining agreement ("CBA") by denying the Complainant his right to appeal his termination from employment as a correctional officer. (See Complaint at p. 6). As a remedy, the Complainant requests that: (1) his removal be rescinded; (2) he be given notice of the proposed removal and the opportunity to respond to the advance notice of proposed removal; (3) he be afforded an appeal hearing should the proposed removal be upheld; and (4) DOC pay costs and attorney's fees. (See Complaint at p. 6). DOC denies the allegations ("Answer") and contends that the Complaint was not timely filed. (See Answer at p. 9).

A hearing was held in this matter. At the hearing, DOC submitted a Motion to Dismiss, contending that the Complaint was untimely filed; and that even if it were timely, the Complaint failed to state a statutory cause of action. The Hearing Examiner denied DOC's Motion and proceeded with the hearing. In his Report and Recommendation ("R&R"), the Hearing Examiner found that the Complaint was "not timely filed" and recommended that the Complaint be dismissed. (See R&R at p. 10). The Complainant filed exceptions to the Hearing Examiner's R&R. DOC filed an Opposition to the Complainant's Exceptions.

The R&R, the Complainant's Exceptions and DOC's opposition are before the Board for disposition.

II. Background

Mr. McRae began his employment with DOC on September 9, 1991. The Hearing Examiner found that: (1) in October of 1995, Mr. McRae stopped reporting for work; (2) Mr. McRae claimed that he requested advance leave or leave without pay; and (3) according to DOC, Mr. McRae requested advance leave on January 9, 1999, but the request was denied. (See R&R at p. 3). Based on these findings, the Hearing Examiner concluded that the parties' disagreed as to the Complainant's status between 1995 and the date of his termination. (See R&R at p. 3).

As a result of Mr. McRae's absence from work, Deputy Warden Washington prepared a form entitled "Notification of Charge of Leave of Absence Without Official Leave (AWOL)". (R&R at p. 3). On February 26, 2000, March 11, 2000, and April 26, 2000, DOC sent by certified mail a notice to Mr. McRae at his last address of record, 3300 Sherman Avenue, N.W., Washington D.C. (See R&R at pgs. 3-4). The notice indicated that as of January 12, 1996, Mr. McRae had been on AWOL status. Mr. McRae alleges that he never received these notices. (See R&R at p. 4).

On June 5, 2000, DOC also sent Mr. McRae an advance notice proposing his removal. This notice was sent via certified mail to the Sherman Avenue address. (See R&R at p. 4). The notice informed Mr. McRae that he had a right to an administrative hearing, but that the request for the hearing must be received within ten calendar days from receipt of the notice of proposed removal. (See R&R at p. 4). On or about June 8, 2000, Mr. McRae provided DOC with a new mailing address at P.O. Box 3094, Washington, D.C. (See R&R at p. 7). The advance notice was sent to both the post office box and the Sherman Avenue address; however, Mr. McRae did not respond. (See R&R at p. 7).

On December 11, 2000, DOC prepared a notice of final decision to remove Mr. McRae from his position. This notice was sent by certified mail to Mr. McRae's post office box. (See R&R at p. 5). The notice advised Mr. McRae that he had the right to appeal the decision through the grievance process set forth in the parties' CBA. In addition, the notice informed Mr. McRae that his appeal should be forwarded to DOC's Director no later than ten days from receipt of the notice. (See R&R at p. 5). The December 11, 2000, notice was returned as unclaimed. (See R&R at p. 5). DOC alleges that it considers December 18, 2000, to be the official date of Mr. McRae's termination. (See R&R at p. 6).

Approximately eleven months later, on November 30, 2001, Mr. McRae filed an appeal of DOC's December 2000 decision to terminate his employment. (See R&R at p. 6). In the appeal, Mr. McRae asserted that he never received either DOC's notices concerning his proposed removal or the final decision. (See R&R at p. 6). On January 7, 2002, DOC responded to the appeal and

informed Mr. McRae that the aforementioned notices had been sent to him, that the ten-day period for filing an appeal of the final decision had lapsed, and that his appeal was denied. (See R&R at p. 7).

Mr. McRae filed the instant Complaint on January 24, 2002, asserting that he was first informed of his removal in mid-October of 2001. (See Complaint at p. 3). Prior to this time, the Complainant contends he had never received any notices from DOC. (See Complaint at p. 4). The Complainant argues that because he did not receive any notices, he had not been afforded the opportunity to have an administrative hearing on the matter, or to utilize the grievance procedure. (See Complaint at p. 5). Thus, the Complainant asserts that DOC's denial of his appeal is a violation of his rights under the parties' CBA. (See Complaint at p. 6). In addition, he contends that DOC is in violation of the CMPA by interfering with his rights guaranteed under: D.C. Code § 1-617.04(a)(1), (2) and (5); and D.C. Code § 1-617.06(a)(2). (See Complaint at p. 6).

In its Answer, DOC denies the allegations that the Complainant did not receive or have notice of either his proposed removal or DOC's final decision. (Answer at p. 4). In addition, DOC contends that the Complaint: (1) was not timely filed; (2) was moot; and (3) failed to state a cause of action. Also, DOC claims that the documentary evidence adequately demonstrates that the Complainant's allegations were false. (See Answer at p. 9).

III. The Hearing Examiner's Report

Based on the pleadings, the record developed at the hearing and the parties' post-hearing briefs, the Hearing Examiner identified one issue for resolution. This issue, his findings and recommendations, the Complainant's Exception to the Hearing Examiner's R&R ("Exceptions") and DOC's Opposition to the Complainant's Exceptions ("Opposition") are as follows:

1. *Did Mr. McRae file a timely Complaint?* (See R&R at p. 10).

In considering this question, the Hearing Examiner noted that Board Rule 520.4, provides that "[u]nfair labor practice complaints shall be filed not later than 120 days after the date on which the alleged violations occurred." (R&R at p. 2).

The Hearing Examiner indicated that the parties presented conflicting accounts. However, the Hearing Examiner found Mr. McRae's testimony to be less reliable. (See R&R at p. 12). As a result, the Hearing Examiner determined that the Complainant knew, or should have known, of DOC's notice of removal when DOC sent the December 11, 2000, notice of final decision to remove him from his position. (See R&R at p. 12). Specifically, the Hearing Examiner determined that DOC had sent the aforementioned notices to the Complainant's correct addresses, and that the Complainant knew the notices had been sent to him. (See R&R at p. 12). In addition, the Hearing Examiner ascertained that Mr. McRae's Complaint was not filed until January 24, 2002, over a year

after the final notice of his removal was mailed. In light of the above, the Hearing Examiner concluded that the Complaint was not timely filed in accordance with Board Rule 520.4. (See R&R at p. 12). As a result, the Hearing Examiner is recommending that the Complaint be dismissed as untimely. The Complainant filed Exceptions to the R&R and DOC filed an Opposition.

The Complainant's first exception concerns the Hearing Examiner's admission of Respondent's Exhibit's 1 through 5. (See Exceptions at p. 5). The Complainant's exception does not elaborate on why he excepts to the admission of these exhibits. Instead, the Complainant states that the reasons for his objection to the admission of these documents were explained during the hearing. (See Exceptions at p. 5).[1]

DOC filed an opposition to this exception arguing that the Complainant failed to provide a specific argument regarding his exception to the Hearing Examiner's admission of Respondent's Exhibits 1 through 5. (See Opposition at p. 4). In support of this argument, DOC cites Board Rule 556.3, which provides in relevant part that "any party may file precise, specific, written exceptions with the Board." (Opposition at p. 4). In addition, DOC cites *Pratt v. District of Columbia Administrative Services*, 43 DCR 1490, Slip Op. No. 457 at p. 2, PERB Case No. 95-U-06 (1996), in which the Board stated it "shall consider only those exceptions to the findings specifically identified by the Complainant". Finally, DOC notes that all objections relating to the admissibility of evidence were fully argued at the hearing and ruled on by the Hearing Examiner. (See Opposition at p. 4).

Board Rules provide the Hearing Examiner with broad authority to conduct hearings. (See Board Rules 550.12-550.14). In the present case, the Hearing Examiner considered and rejected the Complainant's argument regarding the admission of these exhibits. (See R&R at p. p. 2, n. 2). Ultimately, the Hearing Examiner received Respondent's Exhibits 1 through 5 into evidence. (See R&R at p. 2, n. 2). In his exceptions, the Complainant asserts that the Hearing Examiner erred by admitting the exhibits. However, the Complainant cites no authority or support for the inadmissibility of the exhibits. Instead, the Complainant merely refers to his previous objection made before the Hearing Examiner. We believe, therefore, that the Complainant's exception only involves a

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[1] At the hearing, the Complainant cited Board Rules 550.7 and 550.8, in making his objection to Respondent's Exhibits 1 through 5. (See R&R at p. 2, n. 2). Board Rules 550.7 and 550.8 provide as follows:

> Any party intending to introduce documentary exhibits at a hearing shall make every effort to furnish a copy of each proposed exhibit to each of the parties at least five (5) days before the hearing.

Board Rule 550.8 provides:

> Where a copy of an exhibit has not been tendered to the other parties because it was not available prior to the opening of the hearing, a copy of such exhibit shall be furnished to each of the other parties at the outset of the hearing.

disagreement with the Hearing Examiner's decision to admit these exhibits. As a result, we conclude that the Complainant has not provided a basis for reversing or modifying the Hearing Examiner's ruling. Thus, we deny the Complainant's exception.

In the Complainant's second exception, he asserts that the record supports his claim that he did not receive either the proposed notice of removal or the notice of DOC's final decision of removal. In support of this argument, the Complainant restates his version of the facts presented to the Hearing Examiner.

The Complainant's exception consists of a challenge to the factual findings of the Hearing Examiner. We have previously stated that "issues of fact concerning the probative value of the evidence and credibility resolutions are reserved to the Hearing Examiner." *Tracey Hatton v. FOP/DOC Labor Committee*, 47 DCR 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (2000). We have also held that "[c]hallenges to [a Hearing Examiner's] evidentiary findings do not give rise to a proper exception where, as here, the record contains evidence supporting the Hearing Examiner's finding." *Id.* at p. 4. In addition, this Board has determined that it is the Hearing Examiner that is in the best position to assess the probative value of evidence. *See Pratt* at p. 3, n. 3; and *Mack, Lee and Butler v. FOP/DOC*, 47 DCR 6539, Slip Op. No. 421 at p. 2, PERB Case No. 95-U-24 (2000). We find that the Hearing Examiner's finding that the Complainant knew, or should have known, of DOC's notice of removal, is reasonable and supported by the record. Therefore, we adopt the Hearing Examiner's finding that the Complainant knew, or should have known, of his removal upon receipt of DOC's notices.

The Complainant's third exception is that the Hearing Examiner erred in concluding that the Complaint was not timely. This exception is based on the Complainant's assertion that he did not receive the notice of final decision of removal. As stated above, the Board concurs with the Hearing Examiner's finding that the Complainant knew, or should have known, of his removal upon receipt of the December 11, 2000, advance notice. This Board has held that the deadline date 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." *Hoggard v. District of Columbia Public Schools*, 43 vDCR 1297, Slip Op. No. 352 at p. 3, PERB Case No. 93-U-10 (1996). 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 Board has noted that "the 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 . . . . However, proof of the occurrence of an alleged statutory violation is not necessary to commence the time limit for initiation of 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).

Since we have concluded that the Complainant knew, or should have known, of DOC's action on or about December 11, 2000, the Complainant had 120 days from that date to file his Complaint. However, the Complainant did not file his Complaint until January 24, 2002, which was over a year after the alleged violation took place. Therefore, we find the Complaint was untimely filed.

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). Therefore, the Board cannot extend the time for filing an unfair labor practice complaint. As a result, this exception is denied.

A fourth exception restates the argument, made in the Complaint, that DOC's actions were in violation of the CMPA. (See Exceptions at p. 7). This exception does not present an argument alleging that the Hearing Examiner erred in any manner. Instead, the Complainant's exception simply contends that DOC violated the CMPA. The Hearing Examiner, however, concluded that the Complaint was untimely. As stated above, the Board has adopted the Hearing Examiner's conclusion. Therefore, we cannot consider this allegation because the Complaint was not timely filed.

For the reasons discussed, we adopt the Hearing Examiner's recommendations that the Complaint should be dismissed because it was not timely filed.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The Complainant's Unfair Labor Practice Complaint is dismissed with prejudice because it was not timely filed.

(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.

January 30, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.02-U-09 was transmitted via Fax and U.S. Mail to the following parties on this the 30th day of January 2007.

Natasha Campbell, Esq.
Labor Relations Specialist
Office of Labor Relations
and Collective Bargaining
441 4th Street, N.W.
Suite 820 North
Washington, D.C. 20001

FAX & U.S. MAIL

Sheldon Cohen, Esq.
2009 N. 14th Street
Suite 708
Arlington, VA 22201

FAX & U.S. MAIL

Courtesy Copies:

Ernest Dubester, Hearing Examiner
17 Sherwood Avenue
East Brunswick, NJ 08816

U.S. MAIL

Jonathan O'Neill, Esq.
Office of Labor Relations
and Collective Bargaining
441 4th Street, N.W.
Suite 820 North
Washington, D.C. 20001

U.S. MAIL

Sheryl V. Harrington
Secretary