Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Thunder Lane,	
Complainant,	
v.	PERB Case No. 03-U-45
	Opinion No. 862
University of the District of Columbia,	Motion for Reconsideration
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

This matter involves a Motion for Reconsideration ("Motion") filed by Thunder Lane ("Mr. Lane" or "Complainant"). The Complainant is requesting that the Board reverse the Executive Director's dismissal of his Unfair Labor Practice Complaint ("Complaint").

The Complainant filed the Complaint against the University of the District of Columbia ("UDC" or "Respondent"). The Complaint alleges that UDC violated D.C. Code § 1-617.04 by: (1) terminating the Complainant via a reduction in force ("RIF"); and (2) reinstating the Complainant without full back pay and restoration of his benefits.

After reviewing the Complaint and UDC's Answer, the Executive Director determined that the Complaint was not timely filed and failed to state a statutory cause of action under the Comprehensive Merit Personnel Act ("CMPA"). Therefore, by letter dated August 1, 2006, the Board's Executive Director administratively dismissed the Complaint.

On August 18, 2006, the Complainant submitted the present Motion pursuant to Board Rule 500.4. UDC filed an Opposition to the Motion. The Complainant's Motion and UDC's Opposition are before the Board for disposition.

II. Discussion:

The Complainant claims that on March 31, 1997, he was terminated by UDC pursuant to a RIF. The Complainant asserts that he requested that the American Federation of State, County and Municipal Employees, District Council 20, Local 2087, AFL-CIO ("Union") file a grievance pertaining to his termination. (See Complaint at p. 2). The Complainant contends that no grievance was filed on his behalf. (See Complaint at p. 2). The Complainant claims that after approximately five years, in June of 2002, UDC informed him that he was going to be reinstated with full back pay and benefits. However, the Complainant asserts that after being reinstated, he did not receive the aforementioned full back pay and restoration of benefits. (See Complaint at p. 3). Also, the Complainant alleges that on September 23, 2002, he delivered a letter to the Union requesting a written response concerning the status of his back pay and benefits. (See Complaint at p. 3). The Complainant maintains that he received no response from the Union. (See Complaint at p. 3). In addition, the Complainant asserts that since September of 2002, he has contacted UDC concerning the status of his back pay and benefits, but with no response. (See Complaint at p. 4).

In light of the above, the Complainant filed his Complaint on July 29, 2003, against UDC alleging that it "violated, and continues to violate the provisions of [D.C. Code § 1-617.04] . . . by its action of terminating the Complainant and subsequent reinstatement of his employment to [UDC]." (Complaint at p. 2). In addition, the Complainant asserts that UDC discriminated against him "by abrogating his rights under the collective bargaining agreement, by terminating [the Complainant] illegally, and [by] failing and refusing to provide him full relief for the unlawful termination." (Complaint at p. 4). After reviewing the parties' pleadings, the Board's Executive Director determined that the Complaint was untimely. Notwithstanding the untimeliness of the Complaint, the Executive Director also determined that the Complaint failed to state a statutory cause of action under the CMPA. As a result, the Complaint was administratively dismissed.

In the Complainant's Motion, he asserts that the Executive Director's dismissal should be reversed, arguing that the Complaint should not be dismissed as untimely and that he has alleged a statutory cause of action. (See Motion at p. 4). UDC opposes the Motion. The question before the Board is whether the Executive Director erred with respect to these two issues.

A. Timeliness

The first issue to be decided is whether the Executive Director erred in finding the Complaint was untimely filed.

Board Rule 520.4 provides as follows:

> Unfair labor practice complaints **shall be filed not later than 120 days after the date on which the alleged** violations occurred.

(Emphasis added).

This Board has held that the deadline 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. DCPS and AFSCME, Council 20, Local 1959*, 43 DCR 1297, Slip Op. No. 352 at p. 3, PERB Case No. 93-U-10 (1993). 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).

In the present case, the Complainant acknowledges that he was terminated on March 31, 1997. (See Complaint at p. 2). Therefore, pursuant to Rule 520.4, the Complainant was required to file his Complaint against UDC within 120 days of the March 31, 1997, RIF. However, Mr. Lanes's unfair labor practice complaint was not filed until July 2003. The July 29, 2003 filing occurred more than six (6) years after Mr. Lane was terminated by UDC.

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. Public Employee Public Employee Relations Board*, 655 A.2d 320, 323 (DC 1995). Therefore, the Board cannot extend the time for filing an unfair labor practice complaint.

The Complainant's Motion presents no contention that the Executive Director's calculations were incorrect or not supported by the record. Instead, Mr. Lane contends that UDC's continuing violations of the CMPA (not paying him his back pay or reinstating his full benefits), make his filing of the Complaint timely. Specifically, the Complainant claims that UDC's failure to comply with two letters from UDC dated February 9, 2006, and June 1, 2006, establishes a continuing violation. The February 9, 2006 letter was a notice from UDC to Mr. Lane indicating that he had been improperly terminated during the 1997 RIF, because he was not allowed to exercise his bumping rights. (See Motion Exhibit 4). The February 9th letter also indicated that he was entitled to back pay. The June 1, 2006, letter was a follow-up letter to the February 9th letter, and requested tax information in order to process his back pay compensation. Mr. Lane asserts that despite these letters, he has not received his back pay or had his full benefits reinstated.

After reviewing the record, the Board finds that neither letter referenced in the Complainant's

Motion were mentioned in the July 2003 Complaint.[1] As a result, the content of these letters were not before the Executive Director. This Board has held that "we will not permit evidence presented for the first time in a motion for reconsideration to serve as a basis for reconsidering [the Executive Director's dismissal] when the [Complainant] failed to provide any evidence at the afforded time." *Mack, Simmons, Lee and Ott v. Fraternal Order of Police/Department of Correction Labor Committee*, 45 DCR 1472, Slip Op. No. 521 at p. 3, PERB Case No. 97-S-01 (1988). Since the existence and content of the February 9 and June 1, 2006 letters were raised for the first time in the Complainant's Motion as a basis for establishing a continuing violation, we find that these letters may not serve as a reason for reconsideration of the Executive Director's determination that the Complaint was untimely filed. In light of the above, we concur with the Executive Director that the allegation concerning the Complainant's termination clearly exceeds the 120 day requirement in Board Rule 520.4.

We conclude that the Executive Director's finding is supported by the record and consistent with Board precedent concerning the issue of timeliness. Therefore, we find that the Complainant's argument lacks merit. As a result, we adopt the Executive Director's ruling.

B. Failure to State a Statutory Cause of Action under the CMPA

The Motion presents three issues with respect to whether the Complaint stated a statutory cause of action. First, the Complainant contends that UDC has failed to comply with an Arbitration Award ("Award") that was issued on February 25, 2004. This Award ordered UDC to reinstate bargaining unit members who were affected by the 1997 RIF and to provide these individuals with back pay and benefits.

This Board has held that "when a party simply refuses or fails to implement an [arbitration] award or negotiated agreement where no dispute exists over its terms, such conduct constitutes a failure to bargain in good faith and thereby, an unfair labor practice under the CMPA." *American Federation of Government Employees, Local 2725 v. District of Columbia Housing Authority*, 46 DCR 4398, Slip Op. No. 497, PERB Case No. 96-U-23 (1996); See also *American Federation of Government Employees, Local 2725 v. District of Columbia Housing Authority*, 46 DCR 10388, Slip Op. No. 603, PERB Case No. 99-U-18 (1999); and see *American Federation of Government Employees, Local 2725 v. District of Columbia Housing Authority*, 46 DCR 8356, Slip Op. No. 597, PERB Case No. 99-U-23 (1999). However, in the present case the Arbitration Award was issued approximately seven months after Mr. Lane filed his Complaint. Furthermore, the Complaint was not amended after the Arbitration Award was issued. Therefore, the Arbitration Award and its impact on the Complainant's case, was never presented and/or considered by the Executive Director.

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[1]We note that these two letters were dated February 2006 and June 2006. However, the Complaint was filed in July 2003. Therefore, these letters were not part of the Complainant's July 2003 submission.

As previously discussed, evidence presented for the first time in a motion for reconsideration will not be permitted to serve as a basis for reconsidering and reversing the Executive Director's decision. Here, the February 2004 Arbitration Award was not mentioned in the July 2003 unfair labor practice complaint and was not presented to the Executive Director prior to his issuing his administrative dismissal. Consequently, the Board finds that the Arbitration Award may not serve as a basis for reconsideration of the Executive Director's dismissal of the Complaint for failing to state a cause of action.

Second, the Complainant asserts that dismissal of the Complaint was inappropriate in this case. In support of this argument, he cites several civil cases, mostly filed in the District of Columbia Court of Appeals.[2] However, the decisions in the cases cited by the Complainant are not analogous to the instant matter. The issue in those cases concerned the standard for maintaining a cause of action in civil law suit cases and not unfair labor practice complaints filed pursuant to the CMPA. Therefore, we do not find the Complainant's argument to be persuasive. As a result, we cannot reverse the Executive Director's decision based on this argument.

Finally, the Complainant claims that, contrary to the decision of the Executive Director, a cause of action does exist because UDC's failure to provide full back pay and benefits amounts to discrimination and reprisal against the Complainant. As a result, the Complainant requests that the Board reverse the Executive Director's decision.

In support of this contention the Complainant states:

> . . . that the action and/or inaction by the Respondent has amounted to discrimination against Mr. Lane by abrogating his rights under the CBA by terminating him and failing and refusing to provide him with full relief. Complaint ¶ 17.
> . . .

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[2]The Complainant cites these cases for the proposition that a *plaintiff's* claim upon which relief may be granted cannot be denied unless it is clear beyond a reasonable doubt that the *plaintiff* can prove no set of facts in support of his claim. (See Motion at p. 4). The Complainant cites: *Owens v. Tiber Island Condominium Ass'n*, 373 A. 2d 890 (D.C. 1970); *MacBryde v. Amoco Oil Co.*, 404 A. 2d 200 (D.C. 1979); *Atkins v. Industrial Communications Ass'n*, 66 A. 2d 885, 887 (D.C. 1985); *Ashton General Partnership v. Federal Data Corp.*, 682 A. 2d 629 (D.C. 1996); and *Oparaugo v. Watts*, 884 A. 2d 63, 77 (D.C. 2005). In addition, the Complainant contends that the "liberal rules of pleading normally protect a plaintiff from dismissal at the pleading stage when the complaint can be said to state a claim if all inferences are drawn in the plaintiff's favor." *Duncan v. Children's National Medical Center*, 702 A. 2d 207, 210 (D.C. 1997). In support of this argument, the Complainant also cites: *Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith v. Beards*, 680 A. 2d 419, 430 (D.C. 1996); and *Vincent v. Anderson*, 621 A. 2d 367, 372 (D.C. 1993); and *Fred Ezra Co. v. Pedas*, 682 A. 2d 173, 174 (D.C. 1996).

> Further, as alleged in the Complaint, the continued course of conduct by Respondent amounts to a violation of D.C. Code § 1-617.04(a)(4), by "taking reprisal" against Mr. Lane by not paying *him* his back-pay and benefits.

(Motion at p. 5).

This Board has held that while Complainants need not prove their case on the pleadings, they must plead or assert allegations that, if proven, would establish the alleged statutory violations. See, *Virginia Dade v. National Association of Government Employees, Service Employees International Union, Local R3-06*, 46 DCR 6876, Slip Op. No. 491 at p. 4, PERB Case No. 96-U-22 (1996); *Gregory Miller v. American Federation of Government Employees, Local 631, AFL-CIO and D.C. Department of Public Works*, 48 DCR 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994); and *Goodine v. FOP/DOC Labor Committee*, 43 DCR 5163, Slip Op. No. 476 at p. 3, PERB Case No. 96-U-16 (1996). Also, the Board has held that in order to assert a statutory cause of action regarding reprisal or discrimination, a complainant must demonstrate that he was involved in a union activity, and that there is a link, direct or indirect, between the employee's union activity and the action taken by the employer against the employee. See, *Jones v. D.C. Department of Corrections*, 32 DCR 3254, Slip Op. No. 81, PERB Case No. 84-U-04 (1984).

In the present case, the Complainant did not claim that any of his employee rights as prescribed under the CMPA had been violated in any manner by UDC. The allegations contained in both the Complaint and Motion, make no reference to the Complainant being involved in any union activity. Furthermore, the Complainant does not assert that either his termination or UDC's alleged failure to provide back pay and restore Mr. Lane's full benefits were linked to his union activity. Therefore, we find that the Executive Director's determination that the Complaint was devoid of allegations supporting any basis for a statutory cause of action under the D.C. Code §§ 1-617.04(a)(3) and (4) (2001 ed.) was reasonable, supported by the record and consistent with Board precedent.

The Board believes that the Complainant's claim, that he has stated a statutory cause of action, is nothing more than a disagreement with the Executive Director's determination. We have held that such a disagreement does not present a basis for reversing a decision. See *Dr. Judy A. Christian v. University of District of Columbia Faculty Association/National Education Association*, 50 DCR 6786, Slip Op. No. 700, PERB Case No. 02-S-05 (2003). Moreover, the Complainant does not identify any Board precedent which the Executive Director's decision contravenes. Therefore, we find that the Complainant has failed to present a ground for reversal.

After reviewing the pleadings, we conclude that the Executive Director's finding that the complaint failed to state a statutory cause of action is based on the record, reasonable and consistent with Board precedent. Therefore, we deny the Complainant's Motion for Reconsideration and affirm

the Executive Director's administrative dismissal of the Complaint.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The Complainant's Motion for Reconsideration is denied.

(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.

May 17, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 03-U-45 was transmitted via Fax and U.S. Mail to the following parties on this the 17th day of May 2007.

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