

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:)
Ellowese Barganier,)
Complainant,) PERB Cases No. 98-S-03
v.) Opinion No. 542
Fraternal Order of Police/) Motion to Dismiss and
Department of Corrections) Request for Preliminary
Labor Committee,) Relief
and)
District of Columbia)
Department of Corrections,)
Respondents.)
)

DECISION AND ORDER

On January 15, 1998, Complainant Ellowese Barganier filed a document styled "Verified Standards of Conduct Complaint and Request for Preliminary Relief" against the Fraternal Order of Police/Department of Corrections Labor Committee (FOP) and the D.C. Department of Corrections (DOC). The Complainant is a member and former chairperson of FOP. In addition to her individual capacity, the Complainant states that the Complaint is also brought on behalf of the "class of Labor Committee members at the D.C. Jail [] so numerous their joinder to this action is impractical... ." (Comp. at 2-3.) We note that while the effect of remedying any standards of conduct violation found would affect any FOP member affected by the violative conduct, neither the CMPA nor Board Rules formally provide for standards of conduct complaints purportedly brought on behalf of a class by an individual that does not in fact or officially represent the class described. Standards of conduct complaints may be brought by "[a]ny individual(s) aggrieved because a labor organization has failed to comply with the Standards of Conduct for labor organizations may file a complaint with the Board for investigation and appropriate action." Board Rule 544.2.

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This Complaint is the latest in a series of Complaints filed over the past two and one-half (2 1/2) years by former and current FOP officers.^{1/} This Complaint, as did the previous ones, charge the presiding majority faction of Respondent FOP's executive board with violating the Comprehensive Merit Personnel Act's standards of conduct for labor organizations. Specifically, the Complainant alleges that FOP chairperson Clarence Mack has violated the standards of conduct for labor organizations, as codified under D.C. Code Sec. 1-618.3(a)(1), by abusing his authority as chairperson and failing to comply with FOP by-laws to (1) prevent an attempt by FOP members to conduct an election to recall him as FOP's chairperson and (2) remove Complainant from her position as a chief shop steward.

On January 28, 1998, the Office of Labor Relations and Collective Bargaining, on behalf of Respondent DOC, filed an Answer to the Complaint and Request for Preliminary Relief, wherein it moved for dismissal of DOC for failure to state a claim. The standards of conduct for labor organizations under the Comprehensive Merit Personnel Act (CMPA) does not extend to District agency employers. Therefore, the Complaint against DOC is dismissed for failure to state a cause of action against Respondent DOC.

On January 21, 1998, Respondent FOP filed an Opposition to the Complainant's request for preliminary relief and a Motion to Dismiss. The Complainant did not file a response to the Motion to Dismiss. Upon review of the pleadings in a light most favorable to the Complainant, for the reasons discussed below we deny FOP's Motion to Dismiss. We also deny the Complainant's request for preliminary relief.

FOP bases its Motion to Dismiss on Complainant's failure to

^{1/} See, Clarence Mack v. FOP/DOC Labor Committee, Slip Op. No. 443, PERB Case No. 95-U-16 (1995); Ellowese Barganier, et al. v. FOP/DOC Labor Committee, Slip Ops. Nos. 464, 472, 484, PERB Case No. 95-S-02; Clarence Mack, Shirley Simmons, Hazel Lee, Carlton Butler, et al. v. FOP/DOC Labor Committee, Slip Ops. Nos. 483, 507, PERB Case No. 95-S-03 (1996); Victor Akuchie, Rebecca Portis and Frank Jackson v. FOP/DOC Labor Committee, Slip Op. No. 524, PERB Case No. 96-S-04 (1996); Clarence Mack, et al. v. FOP/DOC Labor Committee, Slip Ops. Nos. 516, 521, PERB Case No. 97-S-01 (1997); Ellowese Barganier, et al. and Clarence Mack v. FOP/DOC Labor Committee, Slip Op. No. 516, PERB Case No. 97-S-02 (1997); and Teretha Spain, et al. v. FOP/DOC Labor Committee, Slip Op. No. 534, PERB Case No. 98-S-01 (1998).

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state a claim. FOP's contention that the Complainant has failed to state a claim turns on issues of credibility and conflicting contentions accorded key acts. Critical among the conflicting contentions is whether FOP members have complied with an FOP by-law that requires recall petitions to be filed with the "secretary" of the FOP. The Complainant contends that this requirement was met when the petition was filed with FOP's "recording secretary". FOP contends that the by-law prescribes that recall petitions be filed with FOP's "secretary". The Complainant counters that, notwithstanding this denotation in the by-laws, past practice has accorded this duty to the recording secretary. The Complainant further states that the FOP Chairperson has used his authority to strip the "recording secretary" of this responsibility because the "secretary" is part of the FOP majority faction on the executive board who are loyal to Chairperson Mack.

FOP's account of the asserted violations merely dispute the allegations of the Complaint and asserts FOP's version. We have held that a complainant is not required to prove the allegations of the complaint in the pleading so long as the complaint states a cause of action. Clarence Mack, et al. v. FOP/DOC Labor Committee, Slip Op. No. 386, PERB Case No. 94-U-24 (1994) and AFGE, Local 631, et al. v. D.C. Dept. Of Public Works, Slip Op. No. 306, PERB Cases Nos. 94-U-02 and 94-U-08 (1994). The Complainant has alleged that FOP Chairperson Clarence Mack, acting in his capacity as chairperson, has used his authority to circumvent the will of FOP members and the governing rules of FOP in order to prevent a recall election. Notwithstanding the truth of the matter asserted, the allegations state a cause of action under D.C. Code Sec. 1-605.2(9) that standards of conduct under D.C. Code Sec. 1-618.3(a)(1) have been violated. Section 1-618.3(a)(1) requires labor organizations to maintain governing rules that define and secure the right of individual members to participate in the affairs of the organization and to a fair process in disciplinary proceedings.

The Complainant has also alleged that she was summarily removed from her office as a chief shop steward in violation of FOP by-laws which require that a hearing be held before such an action can be taken. A review of FOP by-laws appear to support the Complainant's contention.^{2/} Conflicting contentions by the

^{2/} By-law 12.2 provides that "[a]ny member charged with a violation shall be entitled to a fair hearing however, no member who shall be in fault in the payment of dues, assessments or

(continued...)

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parties find them placing the shoe on the other foot. FOP now embraces past practice while the Complainant holds on to the letter of the by-law. FOP contends that the executive board has interpreted its by-laws to permit such summary action by the board to remove chief shop stewards who do not "demonstrably (sic) willing and able to carry out loyally the policies and agenda adopted by the Labor Committee's Executive Board." (Mack Aff. at 3.)

In any event, the Complainant has presented allegations that, if proven, would establish violations of the standards of conduct for labor organizations. If Chairperson Mack has indeed abused his authority by circumventing FOP by-laws which require him to (1) process the recall petition and (2) accord the Complainant fair process in her removal as a chief shop steward, the FOP would have failed to (a) secure the rights of members to participate in the affairs of FOP and (b) afford a member fair process in disciplinary proceedings as required of labor organizations under D.C. Code Sec. 1-618.3(a)(1). Disputed accounts of critical elements of the alleged violation serve to demonstrate that material facts are genuinely in dispute and that a hearing is required.

Similarly, such genuine disputes of material fact undermine Complainant's request for preliminary injunctive relief. The criteria for granting preliminary relief for standards of conduct violations is set forth under new Board Rule 544.8. This criteria is identical to the criteria for such relief in unfair labor practice proceedings. We have held that in meeting this criteria "[a]lthough irreparable injury need not be shown, ... the supporting evidence must 'establish that there is reasonable cause to believe that the [CMPA] has been violated, and that remedial purposes of the law will be served by pendente lite relief.' " AFSCME D.C. Council 20, et al. v. D.C. Gov't. et al., Slip Op. No. 330 at 4, PERB Case No. 92-U-24, citing Automobile Workers v. NLRB, 449 F.2d 1046 at 1051. While we have held that we will not impose upon a pro se Complainant strict compliance with clarity standards required under Board Rule 501.8(a) and 544.3, conflicting documented evidence and affidavits demonstrate that key allegations remain in dispute with respect to the

²(...continued)

other financial obligation shall be entitled to a hearing. Such members may be summarily disciplined by the Executive Board." FOP does not contend that the Complainant's removal without a hearing was pursuant to the exception noted in this by-law.

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existence of a violation.^{3/}

In this respect, the asserted violation fails to "establish that there is reasonable cause to believe that the CMPA has been violated" that warrants preliminary relief. Therefore, for the reasons we articulated in AFSCME D.C. Council 20, et al. v. D.C. Gov't, et al., 42 DCR 3430, Slip Op. No. 330, PERB Case No. 92-U-24 (1992), we deny the Complainant's request for preliminary relief as inappropriate under the criteria articulated by the D.C. Court of Appeals in Automobile Workers v. NLRB, 449 F.2d 1046 (CA DC 1971).

FOP also argues that the impending regular election of FOP's executive Board will render redundant or moot the Complainant's requested relief for a Board-conducted recall election by the time the Board's processes has run its course. This argument has been raised by FOP before. There, we observed that "FOP's predictions presents no more than the fallout that often occurs when rectifying the consequences of violative conduct. We will not let stand a state of affairs resulting from statutory violations simply because the violative act is not immediately remedied at the time it occurs." Ellowese Barganier, et al. v. FOP/DOC Labor Committee, 43 DCR 2949, Slip Op. 464, at 6-7, PERB Case No. 95-S-02 (1996). Moreover, we are not bound by Complainant's request for relief. Should relief be warranted in this matter, the Board is authorized to "take appropriate action." D.C. Code Sec. 1-605.2(9) and Board Rule 544.6.

While we find that the conflicting nature of the evidence submitted by the parties neither meets the standard for affording preliminary relief, in accordance with Board Rule 501.1 and as set forth in our Order below, we shall consolidate this case for hearing with PERB Case 98-S-01 to determine the validity of the claims in accordance with the accelerated schedule set forth therein.

^{3/} In PERB Case 98-S-01 (Slip Op. No. 534), we dismissed an identical claim that FOP executive officers had prevented members from processing a recall of FOP Chairperson Clarence Mack. The prima facie elements of a violation, however, were not as discernable (in that case) as the Complainant has made them herein.

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ORDER

IT IS HEREBY ORDERED THAT:

1. Respondent District of Columbia Department of Correction (DOC) Motion to Dismiss the Complaint as it pertains to DOC, is granted with prejudice.
2. The Fraternal Order of Police/Department of Corrections Labor Committee's (FOP) Motion to Dismiss the Complaint is denied.
3. The Complainant's request for preliminary relief is denied.
4. The Complaint is consolidated for purposes of conducting a hearing with the Complaint in PERB Case No. 98-S-01 and subject to the expedited schedule set forth in that Order, Slip Op. No. 534.
5. Pursuant to Board Rule 559.1, and for purposes of D.C. Code Sec. 1-618.13(c), this Decision and Order is effective and final upon issuance.

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

March 11, 1998

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 98-S-03 was faxed and/or mailed (U.S. Mail) to the following parties on this the 11th day of March, 1998.

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