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GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:

Charles E. Pitt,

Complainant,

v.

District of Columbia Department of
Corrections,

and

Fraternal Order of Police/Department of
Corrections Labor Committee,

Respondents.

PERB Case No. 09-U-06

Slip Op. No. 998

Motion for Reconsideration

DECISION AND ORDER

I. Background:

This matter involves a Motion for Reconsideration filed by Charles E. Pitt ("Complainant" or "Mr. Pitt"). The Complainant is requesting that the Board reverse the Executive Director's dismissal of his unfair labor practice complaint.

The Complainant filed an unfair labor practice complaint ("Complaint") against the Fraternal Order of Police/Department of Corrections Labor Committee ("Respondent" or "Union" or "FOP") and the District of Columbia Department of Corrections ("Respondent" or "DOC"). The Complainant alleged that FOP and DOC violated the Comprehensive Merit Personnel Act ("CMPA"). Specifically, he asserted that DOC violated the CMPA by terminating him in July of 1997 for alleged conduct not related to his employment with DOC. (See Compl. at p. 1). In addition, he asserted that the FOP violated the CMPA by failing to file for arbitration concerning his termination. (See Compl. at pgs. 1-2).

DOC filed an Answer denying any violation of the CMPA and a Motion for Administrative Dismissal. The Union filed an Answer denying any violation of the CMPA. After reviewing the Complaint, on May 7, 2009, the Board's Executive Director determined that the Complaint was untimely and failed to state a claim under the CMPA. Therefore, he dismissed the Complaint. On June 3, 2009, the Complainant filed a document termed "Appeal" ("Motion for Reconsideration"), and the Union filed an Opposition. The Complainant's Motion for Reconsideration and the Union's Opposition are before the Board for disposition.

II. Discussion

The Complainant was terminated from his position in July 1997. He appealed his termination by filing a Complaint at the Office of Employee Appeals. The Complainant asserts that the Union advised him that there was no collective bargaining agreement in effect between DOC and the Union and DOC had not scheduled an arbitration in ten (10) years. (Compl. at p. 2).

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." By letter dated May 7, 2009, the Board's Executive Director addressed the timeliness of the Complaint, stating as follows:

The 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."¹ 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."²

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

¹ See, *Glendale Hoggard v. District of Columbia Public Employee Relations Board*, 655 A.2d 320, 323 (D.C. 1995) and *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991). 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).

² *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).

initiating an action.^{3]} Moreover, the Board has held that a Complainant's "ignorance of Board Rules governing [the Board's] jurisdiction over [unfair labor practice] Complaints provides no exception to [the Board's] jurisdictional time limit for filing a Complaint."^{4]}

In the present case, you assert that you were wrongfully terminated by DOC in July 1997. (See Compl. at p. 1). Therefore, pursuant to Board Rule 520.4, the time for filing a Complaint with the Board concerning DOC's alleged violations commenced when the basis of those violations occurred, namely July 1997. However, your Complaint was not filed until December 4, 2008. Your December 4th filing occurred approximately eleven years after your July 1997 termination. In view of the above, your filing clearly exceeds the 120 day requirement in Board Rule 520.4.

With respect to the allegations against FOP, all the dates noted in the Complaint involve incidents that occurred between July 1997 and calendar year 2003. (See Compl. at pgs. 1-2). Thus, pursuant to Board Rule 520.4, the time for filing a Complaint with the Board concerning FOP's alleged violations commenced when the basis of those violations occurred, namely July 1997 and calendar year 2003. Your December 4th filing occurred approximately eleven years after the July 1997 alleged violations and approximately five years after the calendar year 2003 allegation. In light of the above, your filing clearly exceeds the 120 day requirement in Board Rule 520.4.

For the reasons noted above, the Board cannot extend the time for filing an unfair labor practice Complaint. As a result, your Complaint is not timely. (May 7, 2009 Letter at p. 2).

In view of the above, the Executive Director administratively dismissed the Complaint because it was not timely. Notwithstanding the untimeliness of the Complaint, the Executive Director considered the allegations raised in the Complaint against DOC and FOP and determined that the Complainant failed to assert any allegations that, if proven, would constitute a statutory violation by either DOC or FOP. (See May 7, 2009 letter at pgs. 2-3). He made the following observations:

³ See, *Glendale Hoggard v. District of Columbia Public Employee Relations Board*, 655 A.2d 320, 323 (D.C. 1995) and *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991).

⁴ *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 Complaint you assert that DOC violated the CMPA by terminating you in July 1997 for conduct that you allege was not related to your employment with DOC (see Compl. at p. 1); however, you do not assert the "manner in which D.C. § 1-617.04] of the CMPA is alleged to have been violated. (Board Rule 520.3(d)). When considering the pleadings of a *pro se* Complainant, [the Board] construe[s] the claims liberally to determine whether a proper cause of action has been alleged." [5]. Under certain circumstances, a District agency and a labor organization can engage in conduct that violates either D.C. Code § 1-617.04(a) or D.C. Code § 1-617.04(b), respectively. However, for the reasons discussed below, I have determined that you have failed to make any allegations that, if proven, would constitute a statutory violation by either DOC or FOP. (May 7, 2009 letter at p. 2).

The Executive Director noted that under the express language contained in D.C. Code [§ 1-617.04(a)(5) the Complainant lacked standing to assert a violation of D.C. Code § 1-617.04(a)(5). (May 7, 2009 letter at p. 3). Furthermore, the Executive Director concluded that the Complainant did not make any allegations which, if proven, would constitute a statutory violation under D.C. Code §§1-617.04(a) (1), (2), (3) or (4). Specifically, the Executive Director noted that the Complainant failed to show that DOC had prohibited him from exercising his right in the selection of a bargaining representative or from engaging in union activity. Also, the Executive Director found that the Complainant did not allege any nexus between DOC's decision to terminate him and any protected activity under the CMPA. (See May 7, 2009 letter at pgs. 4-5).

In addition, the Executive Director considered the Complainant's allegation that FOP violated his rights under the CMPA, stating as follows:

In addition, you assert that FOP has violated the CMPA by not filing for arbitration concerning your termination.... Under certain circumstances, a labor organization can violate D.C. Code §1-617.04(b)(1) or (2) (2001) by failing to fairly represent a bargaining unit employee. However, for the reasons discussed below, I have determined that you have failed to make any allegation that, if proven, would constitute a statutory violation by the FOP.

D.C. Code §1-617.04(b)(1) (2001) prohibits employees, labor organizations, their agents or representatives from "[i]nterfering with, restraining or coercing any employees or the District in the exercise of rights guaranteed by this subchapter...." [The Board

⁵ See, *Beeton v. D.C. Department of Corrections and FOP/DOC Labor Committee*, 45 DCR 2078, Slip Op. No. 538 at p.3, n. 1, PERB Case No. 97-U-26 (1998).

has] ruled ... that D.C. Code §1-617.04(b)(1) (2001) also encompasses the right of employees to be fairly represented by the labor organization that has been certified as the exclusive representative for the collective-bargaining unit of which the employee is a part.... Specifically, the right to bargain collectively through a designated representative includes the duty of labor organizations to represent [] the interest of all employees in the unit without discrimination and without regard to membership in the labor organization....”⁶].

In your submission, you do not claim that any of your employee rights as prescribed under D.C. Code §1-617.06(a) and (b) (2001), have been violated in any manner by the FOP. Instead, the asserted violation of D.C. Code §1-617.04(b) (2001), appears to be based on the alleged breach by the FOP of your right to fair representation. However, your Complaint does not contain allegations which are sufficient to support a statutory cause of action.

“Under D.C. Code § 1-617.03 (2001 ed.), a member of the bargaining unit is entitled to ‘fair and equal treatment under the governing rules of the [labor] organization’. As [the] Board has observed: ‘[t]he union as the statutory representative of the employee is subject always to complete good faith and honesty of purpose in the exercise of its discretion regarding the handling of union members’ interest.⁷]. The Board has determined that “[the] applicable standard in cases [like this], is not the competence of the union, but rather whether its representation was in good faith and its actions motivated by honesty of purpose.... [Furthermore,] ‘in order to breach this duty of fair representation, a union’s conduct must be arbitrary, discriminatory or in bad faith, or be based on considerations that are irrelevant, invidious or unfair’.” *Id.*

In the present case, you acknowledge in the Complaint that the FOP responded to your request to arbitrate your termination. [May 7, 2009 letter at p. 6].

* * *

... [Y]ou suggest that the FOP failed to adequately represent you. However, you fail to assert or demonstrate that FOP’s conduct in

⁶ *Glendale Hoggard v. American Federation of State, County and Municipal Employees, District Council 20, Local 1959, AFL-CIO*, 43 DCR 2655, Slip Op. No. 356 at pgs. 2-3, PERB Case No. 93-U-10 (1996).

⁷ *Stanley Roberts v. American Federation of Government Employees, Local 2725*, 36 DCR 1590, Slip Op. No. 203 at p. 2, PERB Case No. 88-S-01 (1989).

handling your request for arbitration, was arbitrary, discriminatory, or the product of bad faith. In short, you have neither sufficiently pled bad faith or discrimination, nor raised circumstances that would give rise to such an inference. (May 7, 2009 letter at p. 7).

The Board has found that “[r]egardless of the effectiveness of a union’s representation in the handling or processing of a bargaining unit employee’s grievance, such matters are within the discretion of the union or the bargaining unit’s exclusive bargaining representative.”⁸ Furthermore, the Board has held that “judgmental acts of discretion in the handling of a grievance, do not constitute the requisite arbitrary, discriminatory or bad faith element [needed to find a violation of the CMPA].”⁹ Also, the Board has determined “that the fact that there may have been a better approach to handling the Complainant’s grievance or that the Complainant disagrees with the approach taken by [the union] does not render the [union’s] actions or omissions a breach of the standard for its duty of fair representation.”¹⁰ In your Complaint, you assert no basis for attributing an unlawful motive to the manner by which the FOP handled your grievance. Instead, you suggest that FOP’s claim that you could only appeal your termination to the Office of Employee Appeals, was not accurate. In support of your claim, you indicate that “OEA dismissed [your] appeal on the basis of lack [o]f jurisdiction finding that the Teamsters Union contract was in force and [p]recluded [your] statutory right of appeal to the OEA.” [] Thus, it appears that you disagree with FOP’s approach concerning your appeal rights. Specifically, you suggest that FOP should have filed for arbitration under the parties’ CBA and not directed you to file an appeal with the Office of Employee Appeals. However, the fact that you disagree with the advice given by FOP concerning the proper forum for appealing your termination, does not constitute a breach of FOP’s duty of fair representation. In addition, the Complaint asserts no basis for attributing an unlawful motive to FOP’s handling of the grievance. Therefore, you fail to provide any allegation that, if proven, would establish a statutory violation. In short, you have neither sufficiently pled bad faith or

⁸ *Enoch Williams v. American Federation of State, County and Municipal Employees, District Council 20, Local 2290*, 43 DCR 5598, Slip Op. No. 454 at p. 2, PERB Case No. 95-U-28 (1995).

⁹ *Brenda Beeton v. D.C. Department of Corrections and Fraternal Order of Police Department of Corrections Labor Committee*, 45 DCR 2078, Slip Op. No. 538, PERB Case No. 97-U-26 (1998).

¹⁰ *Enoch Williams v. American Federation of State, County and Municipal Employees, District Council 20, Local 2290*, supra.

discrimination, nor raised circumstances that would give rise to such an inference. (May 7, 2009 letter at p. 8).

In view of the above, the Executive Director determined that “[s]ince no statutory basis exists for the Board to consider [the Complainant’s] claims, the Complaint is dismissed.” He also noted that:

[t]he Board has determined that “[t]o maintain a cause of action, [a] Complainant must [allege] the existence of some evidence that, if proven, would tie the Respondent’s actions to the asserted [statutory violation]. Without the existence of such evidence, [a] Respondent’s actions [cannot] be found to constitute the asserted unfair labor practice. Therefore, a Complaint that fails to allege the existence of such evidence, does not present allegations sufficient to support the cause of action.”¹¹ For the reasons stated above, the Complaint does not contain allegations which are sufficient to support a statutory cause of action. (May 7, 2009 letter at p. 8).

On June 3, 2009, the Complainant filed a Motion for Reconsideration seeking reversal of the Executive Director’s dismissal of his Complaint. He claimed that: (1) in July 1997 he filed a grievance and asked FOP to arbitrate his case and they did nothing (Motion at pgs. 2 and 5); (2) the issue of whether FOP or OEA should process the appeal of his termination was not decided until 2008 (Motion at p. 5); (3) the FOP filed an untimely Answer to his Complaint (Motion at p. 1); (4) under Board rules the Board must investigate his Complaint and no investigation was conducted in this matter and he should not have to prove his unfair labor practice case at this early stage, before a hearing is held (Motion at p. 5); (5) DOC failed to bargain in good faith by not granting arbitrations between 1990 and 2000 and by stating that there was no binding contract in effect (Motion at p.2); and (6) the Board should “grant an arbitration/mediation between [FOP] and [DOC] in [the Complainant’s] behalf and not violate any due process”. (Motion at p. 3).

FOP filed an Opposition in which it asserts that: (1) the Complaint was untimely filed; (2) the Complainant raises the same issues that he raised previously; (3) the Complainant failed to state a claim for which relief may be granted; and (4) the facts do not establish a statutory violation.¹²

¹¹ *Goodine v. FOP/DOC Labor Committee*, 43 DCR 5163, Slip Op. No. 476 at p. 3, PERB Case No. 96-U-16 (1996).

¹² FOP also stated that the Complaint was not served on the Union. The Union learned of the Complaint by letter from the Board and requested an extension of time to file an Opposition. The Complainant asserted that if his Complaint was not served on the Union, the Board would have granted him “ten (10) days to correct any oversight”. Here, a review of the record shows that although the service sheet attached to the Complainant’s submission lists the Union as one of the parties served, the Union did not receive the filing. Therefore, the Board considers the Union’s Opposition to be timely filed.

The Complainant claims that in July 1997 he asked FOP to arbitrate his case and they failed to do so. The Board has noted that the time for filing a Complaint commences 120 days after the date Petitioner admits he actually became aware of the event giving rise to the Complaint allegations. *See, 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)*. Therefore, when the Complainant learned that the Union would not process his Complaint, the time for filing his Complaint began to run. Instead, he filed his Complaint on December 4, 2008, over ten (10) years later. Therefore, the Complaint must be dismissed for untimeliness.

The Complainant infers that his Complaint was timely because the issue of whether FOP or OEA should process the appeal of his termination was not decided until 2008, when the court determined that there was a collective bargaining agreement in effect between DOC and the Union. He claims that he would not have known before 2008 that he could appeal his termination to arbitration. We note that the 120-day period for filing a Complaint begins when the Complainant knew or should have known of the acts giving rise to the violation. As to alleged violations by DOC, the 120-day statutory limitation began when the agency gave the Complainant notice of termination. As to alleged violations by the FOP, the 120-day statutory filing limitation began when the Complainant knew that the Union would not pursue his termination to arbitration. Therefore, this argument is not persuasive and does not provide a basis for setting aside the dismissal.

The Complainant asserts that under Board Rule 501.2, FOP filed an untimely Answer to his Complaint. Board Rule 501.2 provides as follows: "A request for an extension of time shall be in writing and made at least three (3) days prior to the expiration of the filing period. Exceptions to this requirement may be granted for good cause shown as determined by the Executive Director." The Board notes that, unlike the mandatory 120-day statutory limitation for filing a Complaint, this rule is discretionary. It authorizes the Board to make exceptions to the rule when good cause is found. Here, the Board exercised its discretion and granted an exception to the Union, based on FOP's assertion that it did not receive the Complaint in a timely manner. Therefore, this argument raises no basis for setting aside the Executive Director's dismissal.

The Complainant contends that under Board rules, the Board must investigate his Complaint and alleges that no investigation was conducted in this matter. He asserts that he should not have to prove his unfair labor practice case at this early stage and requests that the Board schedule a hearing so that he may prove his case. Board Rule 520.8 provides that: "The Board or its designated representative shall investigate each complaint. The investigation may include an investigatory conference with the parties. The parties shall submit to the Board or its designated representative evidence relevant to the complaint. Such evidence may include affidavits or other documents, and any other material matter." We find that the Complainant is confusing an investigation with a hearing. Here, the Board investigated by reviewing the Complainant's pleadings and finding that the Complaint was untimely filed and failed to allege any facts which, if proven, would rise to the level of an unfair labor practice. Thus, the Board determined that no further proceedings were warranted in this matter.

The Complainant states that DOC failed to bargain in good faith by not granting arbitrations between 1990 and 2000 and by stating that there was no binding contract in effect. However, the Complainant has no standing to allege a violation of D.C. Code § 1-617.04(a)(1) and (5). As stated at p. 3 of the May 7, 2009 dismissal letter, “[t]he right to require a District agency to bargain collectively in good faith, belongs exclusively to the labor organization. Therefore, in the present case, only FOP can require that DOC bargain in good faith [and not the Complainant].”

Finally, the Complainant requests that the Board grant an arbitration/mediation between FOP and DOC, on his behalf. However, this is not within the authority of the Board based on the facts presented in this case. The grievance-arbitration procedure is contained in the collective bargaining agreement between DOC and FOP. Therefore, this is not the proper forum to request an arbitration hearing.

The Board notes that 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)*. As stated in the Executive Director’s May 7, 2009 dismissal letter, “[t]o maintain a cause of action, [a] Complainant must [allege] the existence of some evidence that, if proven, would tie the Respondent’s actions to the asserted [statutory violation]. Without the existence of such evidence, [a] Respondent’s actions [cannot] be found to constitute the asserted unfair labor practice. Therefore, a Complaint that fails to allege the existence of such evidence, does not present allegations sufficient to support the cause of action.”

The Complainant does not state allegations which, if proven, are sufficient to support a cause of action against DOC or FOP. A review of the pleadings in a light most favorable to the Complainant and taking all the allegations as true, and for the reasons stated in the Executive Director’s May 7, 2009 letter, the Complaint in this matter fails to state a cause of action under the CMPA and does not give rise to any unfair labor practices by DOC or FOP. In his Motion, the Complainant merely repeats the arguments previously considered and dismissed. Therefore, no basis exists for disturbing the Executive Director’s administrative dismissal

In view of the foregoing, the Complainant’s Motion that the Board reverse the Executive Director’s determination, must be denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complainant's request that the Executive Director's administrative dismissal of the Complaint be reversed is denied.
2. Pursuant to Board Rule 559.3 this Decision and Order final upon issuance.

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

December 24, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-U-06 was transmitted via Fax and U.S. Mail to the following parties on this the 24th day of December 2009.

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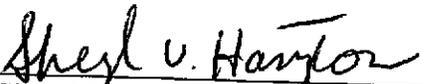
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