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**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)	
)	
)	
One Hundred and Nineteen Members of)	
Fraternal Order of Police/Metropolitan)	
Police Department Labor Committee)	
)	PERB Case No. 22-S-01
Complainants)	
)	Opinion No. 1827
v.)	
)	
Fraternal Order of Police/Metropolitan)	
Police Department Labor Committee)	
)	
Respondent)	

DECISION AND ORDER

I. Statement of the Case

On October 28, 2021, one hundred and nineteen members (Complainants) of the Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP) filed a standards of conduct complaint (Complaint) against FOP.¹ The Complaint alleged that FOP failed to prosecute the Complainants’ group grievance against the Metropolitan Police Department (MPD) in a timely manner and in the Complainants’ best interests.² Additionally, the Complaint alleged that FOP violated D.C. Official Code § 1-617.03(a)(2) and (3) of the Comprehensive Merit Personnel Act (CMPA) by electing a chairman whose extrinsic fiduciary duties as a District of Columbia Retirement Board (DCRB) trustee conflicted with his duties to FOP.³ The Complaint further alleged that the Chairman refused to hold general membership meetings and undermined FOP’s

¹ The Complaint refers to the “Respondents” and includes allegations against both FOP and the Chairman. The Board has held that a standards of conduct complaint can only be alleged against a labor organization. *Butler v. AFGE, Local 1550*, 32 D.C. Reg. 5912, Slip Op. No. 123 at 2, PERB Case No. 85-S-01 (1985). To the extent individual union officers are named as respondents in a standards of conduct complaint, any statutory claims that accrue to them or their actions are not in their personal capacity but rather in their representative capacity as officers and/or agents of the union. *Mack, et al. and Barganier, et al v. FOP/DOC Labor Committee*, 46 D.C. Reg. 110, Slip Op. No. 507, PERB Case Nos. 95-S-03 and 95-S-02 (1999). Therefore, FOP is the only respondent named in the caption.

² Complaint at 2, 9-11.

³ Complaint at 9-12. DCRB “is an independent agency of the [D.C.] Government. DCRB has the exclusive authority and discretion to manage and control the [D.C.] Police Officers[’] Retirement Fund....” *About DCRB*, District of Columbia Retirement Board (Dec. 8, 2022, 1:29 PM), <https://dcrb.dc.gov/page/about-dcrb>.

democratic processes, in violation of FOP's by-laws and D.C. Official Code § 1-617.03(a)(1) of the CMPA.⁴ The Complaint argued that the alleged violations were continuing and, therefore, the Complainants' allegations were timely.⁵ The Complaint requested that PERB order the removal of the Chairman; declare the Complainants' counsel as the appropriate representative of the Complainants in their group grievance against MPD; and award the Complainants attorney fees.⁶

On November 5, 2021, FOP filed a Motion to Dismiss the Complaint, asserting that the Complaint was untimely;⁷ that the Complaint failed to state a claim for which the Board may grant relief;⁸ and that the standards of conduct did not apply to the Chairman, as an individual.⁹ On November 12, 2021,¹⁰ FOP filed an Answer, asserting that some of the Complainants lacked standing because they were not in the FOP bargaining unit;¹¹ that PERB lacked authority to require FOP to terminate or retain a particular attorney;¹² and that PERB lacked authority to disqualify an elected leader of the bargaining unit without proper justification.¹³

A hearing was held on May 5, May 6, May 9, and May 11, 2022. On September 9, 2022, the Hearing Examiner issued his Report and Recommendations (Report), finding that some of the allegations were untimely and that the Complainants' failed to meet their burden of proof for the remaining allegations.¹⁴ Accordingly, the Hearing Examiner recommended that the Board dismiss this matter.¹⁵ Both parties filed exceptions.

For the reasons discussed herein, the Board adopts the Hearing Examiner's Report and Recommendations and dismisses the Complaint.

II. Hearing Examiner's Report and Recommendations

A. Hearing Examiner's Factual Findings

The Hearing Examiner made the following factual findings. Around the year 2000, MPD launched its lateral officer program, which "sought to hire experienced police officers mainly from other law enforcement agencies and police departments."¹⁶ MPD hired approximately 150 officers through the program over the course of about nine years and referred to those officers as

⁴ Complaint at 6, 12-13.

⁵ Complaint at 13.

⁶ Complaint at 7, 13-15.

⁷ Motion to Dismiss at 6-9.

⁸ Motion to Dismiss at 9-11.

⁹ Motion to Dismiss at 11-12.

¹⁰ On November 12, 2021, FOP also filed a Motion to Strike the Complaint for impermissibly disclosing information protected under the attorney-client privilege, the work product doctrine, and the labor relations privilege. FOP requested, in the alternative, that PERB redact the Complaint and place it under seal. PERB placed the Complaint under seal.

¹¹ Answer at 4-5, 28.

¹² Answer at 28.

¹³ Answer at 29.

¹⁴ Report at 38, 42.

¹⁵ Report at 42.

¹⁶ Report at 7.

“laterals.”¹⁷ The laterals generally joined MPD with higher salaries than first year recruits, because MPD gave them credit for their years of service with their prior employer.¹⁸ The “[l]aterals also received credit for other terms of employment such as annual leave.”¹⁹ The Hearing Examiner found that “[w]hile there [was] no written documentation on the subject, the laterals seemingly were induced in part to join MPD because at the time of hire, they were told that they had the right to contribute their years of prior service retirement funds toward the MPD retirement plan.”²⁰ However, MPD did not implement the retirement element of the lateral officer program for ten years.²¹

In 2010, MPD implemented the retirement portion of the lateral officer program, which allowed lateral officers to purchase retirement credit from DCRB for their prior years of service.²² Also in 2010, the laterals who were adversely affected by MPD’s 10-year failure to implement the retirement portion of the program filed a group grievance against MPD through FOP.²³ The Complainants in the present case were among the lateral officers who filed the group grievance.²⁴ Arbitration hearings were held in late 2017 and early 2018.²⁵ On July 13, 2018, the arbitrator issued an award, sustaining the grievance.²⁶ The award directed MPD to place the laterals who were hired between 2000 and 2010 into the same situation that existed when they were hired so they would have the ability to purchase their prior years of service at the cost they would have paid at the time of hire, fairly “adjusted to the current day.”²⁷ The award ordered MPD to negotiate with FOP to determine the manner in which the laterals’ “lost opportunity to purchase years of service [would] be calculated.”²⁸

On or about August 6, 2019, MPD submitted a spreadsheet to FOP, which contained MPD’s calculations regarding the amount each lateral was entitled to pay DCRB.²⁹ FOP did not accept MPD’s calculations and retained an actuary to analyze MPD’s spreadsheet.³⁰ On or about September 2020, FOP hired an accounting firm to review the numbers MPD had provided.³¹ To

¹⁷ Report at 7.

¹⁸ Report at 7.

¹⁹ Report at 7.

²⁰ Report at 7.

²¹ Report at 7.

²² See Report at 7.

²³ Report at 7.

²⁴ Complaint at 2.

²⁵ Report at 7.

²⁶ Report at 7-8.

²⁷ See Report at 7-8 (citing Award at 23).

²⁸ Report at 8 (quoting Award at 24). The FOP chairman who was in office at the time of the award gave testimony at the hearing in this matter. The former chairman stated that he and some of the laterals found the award contained problematic “uncertainties.” Report at 10. The former chairman testified that in 2018, he asked FOP’s then-counsel to request that the arbitrator retain jurisdiction over the matter and clarify the award. Report at 10. The former chairman testified that counsel declined to do this out of fear “that a preemptive move would trigger an appeal by MPD.” Report at 10. The former FOP chairman also testified that in 2019, he urged FOP’s then-counsel to seek enforcement of the award through the Board, but counsel wanted to “work with and through the arbitrator and MPD.” Report at 10.

²⁹ Report at 8.

³⁰ Report at 8.

³¹ Report at 8.

date, MPD and FOP have not reached an agreement regarding the amount each lateral could have paid to DCRB at the time of hire.³² Thus, the laterals have not had the opportunity to purchase retirement credit from DCRB for their prior years of service.³³

In January 2020, FOP elected a new chairman, who took office on April 1, 2020, for a two-year term.³⁴ The Chairman was reelected in 2022 and took office for his second two-year term on April 1, 2022.³⁵ The Hearing Examiner found that the Complainants regard the Chairman as responsible for the unresolved status of the laterals' arbitration Award.³⁶

B. Hearing Examiner's Recommendations

The Hearing Examiner established that the Board uses Board Rule 544 to assess the conduct "of a labor organization, acting through its official leadership in a fiduciary capacity and in an exclusive representational role for the benefit of its members."³⁷ The Hearing Examiner referenced Board Rule 544.2, which states that "[a]ny individual aggrieved because a labor organization has failed to comply with the standards of conduct for labor organizations set forth in D.C. Official Code § 1-617.03(a) may file a complaint with the Board."³⁸

The Hearing Examiner discussed Board Rule 544.4, which states that a standards of conduct complaint "must be filed no later than one hundred twenty (120) days from the date the alleged violation occurred or the date the complainant knew or should have known of the alleged violation, if later."³⁹ The Hearing Examiner found that the actionable 120-day timeframe in this matter was June 30, 2021 through the day the Complainants filed the Complaint – October 28, 2021.⁴⁰ Therefore, the Hearing Examiner established that "any standards-related complaints w[ould] be considered un-timely and w[ould] be dismissed if they d[id] not fall within th[at] period."⁴¹

The Hearing Examiner addressed the Complainants' argument that, "even though the alleged specific violations...took place prior to the 120-day limitations period," those allegations were timely because FOP's conduct constituted a continuing violation.⁴² The Hearing Examiner

³² Report at 8-9.

³³ See Report at 8-9.

³⁴ Report at 9.

³⁵ Report at 9.

³⁶ See Report at 9.

³⁷ Report at 37.

³⁸ See Report at 26-27. D.C. Official Code § 1-617.03(a) provides, in relevant part, that a labor organization must "[be] free from corrupt influences and influences opposed to basic democratic principles...[and] certify to the Board that its operations mandate...(1) The maintenance of democratic provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to fair and equal treatment under the governing rules of the organization, and to fair process in disciplinary proceedings; (2) The exclusion from office in the organization of any person identified with corrupt influences; [and] (3) The prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members...."

³⁹ See Report at 37.

⁴⁰ Report at 2, 38.

⁴¹ Report at 38.

⁴² Report at 29.

acknowledged the Complainants' contention that the Chairman took "specific ongoing actions with respect to the laterals that [we]re contrary to the best interests of the laterals."⁴³ However, the Hearing Examiner stated that he repeatedly asked the Complainants who testified "for time frames covering their particular grievance(s)" without success.⁴⁴ The Hearing Examiner found that the Complainants have had the same complaints about FOP's conduct since 2018 or earlier.⁴⁵ Accordingly, the Hearing Examiner rejected the Complainants' continuing violation argument.⁴⁶

The Hearing Examiner concluded that the "Complainants' presentation leaned heavily on their theory of continuing violation, so that much of the evidence...covered time frames outside the 120 day [period]."⁴⁷ Thus, the Hearing Examiner determined that many of the Complainants' allegations against FOP were untimely.⁴⁸ Further, the Hearing Examiner specifically found that the Complainants' allegations regarding FOP's decision not to retain the Complainants' preferred counsel were untimely.⁴⁹ However, the Hearing Examiner found that the Complainants' allegations against the Chairman were timely because he held the roles of FOP chairman and DCRB trustee during the actionable timeframe.⁵⁰

The Hearing Examiner referenced the Board's previous holding that, "in order to be an 'aggrieved individual' entitled to bring a standards [of conduct] complaint, the complain[ant] must have been a member of the labor organization at the time of the alleged violations."⁵¹ Applying this principle, the Hearing Examiner determined that to be aggrieved individuals, the Complainants must have been FOP members between June 30, 2021, and October 28, 2021.⁵² The Hearing Examiner found that three of the five Complainants who testified at the hearing did not qualify as aggrieved individuals – two because they had retired before the actionable timeframe, and one because he was promoted to management before the actionable timeframe, ending his FOP membership.⁵³ Thus, the Hearing Examiner found that those three Complainants lacked standing to bring the Complaint.⁵⁴

The Hearing Examiner also found that the Board lacked jurisdiction to determine whether the Chairman's position as a DCRB trustee created a conflict of interest with his duties as FOP

⁴³ Report at 29.

⁴⁴ Report at 41.

⁴⁵ Report at 38.

⁴⁶ Report at 38.

⁴⁷ Report at 40. The Hearing Examiner declined to recommend dismissal on timeliness grounds "[g]iven the seriousness of the case." Report at 42.

⁴⁸ See Report at 40-41.

⁴⁹ The Hearing Examiner stated that, even if these allegations had been timely, he would still have recommended dismissal because the FOP by-laws give the Chairman full discretion regarding hiring/firing of legal counsel. Report at 3.

⁵⁰ Report at 39, fn. 52.

⁵¹ Report at 37. The Hearing Examiner did not provide a citation to specific Board caselaw. However, the Hearing Examiner's characterization of the Board's precedent is accurate. See *Dupree v. FOP/DOC Labor Comm.*, 43 D.C. Reg. 5130, Slip Op. No. 465 at p. 2 n.2, PERB Case No. 96-U-05 (1996).

⁵² Report at 37.

⁵³ Report at 37-38.

⁵⁴ Report at 37-38.

Chairman.⁵⁵ The Hearing Examiner reasoned that the Chairman's "election to the trustee position constitute[d] an internal union matter over which PERB usually declines to intervene on jurisdictional grounds."⁵⁶

Despite finding that the Board lacked jurisdiction over the conflict of interest issue, the Hearing Examiner addressed the Complainants' contention that the Chairman's position as a DCRB trustee presented a conflict of interest with his duties to FOP's members as the FOP Chairman.⁵⁷ The Hearing Examiner established that a DCRB trustee must act "solely in the interest of the [plan] participants and beneficiaries" under D.C. Official Code § 1-741(a)(1).⁵⁸ The Hearing Examiner also established that, under D.C. Official Code § 1-617.03(a)(3), the Chairman is not permitted to have a "business or financial interest...which conflict[s] with [his] duty to the organization and its members."⁵⁹ The Hearing Examiner found that the Chairman credibly testified that "his duties on the DCRB are to ensure that his members' retirement benefits are maximized."⁶⁰ Furthermore, the Hearing Examiner found that the Chairman credibly testified that past FOP chairs had simultaneously served as DCRB trustees without objection from FOP's members.⁶¹ The Hearing Examiner concluded that there was no conflict between the Chairman's role with FOP and his role with DCRB, and that the positions were "in harmony with and supportive of each...other."⁶² Thus, the Hearing Examiner concluded that the Chairman's "position on the DCRB d[id] not constitute a business or financial interest that conflict[ed] with his duties to [FOP] within the meaning of the standards of conduct."⁶³

The Hearing Examiner turned to the Complainants' allegation that FOP and the Chairman caused unreasonable delay in resolving the Complainants' group grievance against MPD.⁶⁴ The Hearing Examiner concluded that "the uncertainty of result, delay, distrust, retirement urgency, and the seeming unending litigation combined to form [the Complainants'] general displeasure with the Union," particularly with the Chairman.⁶⁵ The Hearing Examiner stated that he repeatedly asked the Complainants who testified to specify the nature of their dissatisfaction with FOP and the Chairman.⁶⁶ However, the Hearing Examiner found that the Complainants only provided generalized responses, broadly alleging that the Chairman handled the group grievance inefficiently and incompetently.⁶⁷

⁵⁵ See Report at 39.

⁵⁶ Report at 39.

⁵⁷ Report at 38.

⁵⁸ Report at 38.

⁵⁹ See Report at 38.

⁶⁰ Report at 38.

⁶¹ Report at 39.

⁶² Report at 39.

⁶³ Report at 39.

⁶⁴ Report at 40.

⁶⁵ Report at 40.

⁶⁶ Report at 40-41.

⁶⁷ See Report at 40-41.

The Hearing Examiner addressed the Complainants' argument that the Chairman undermined FOP's democratic processes.⁶⁸ The Hearing Examiner found that the Chairman communicated with the Complainants concerning the status of their group grievance against MPD and informed them of the actions he had taken in furtherance of that grievance.⁶⁹ The Hearing Examiner also found that after the Mayor lifted COVID-19 restrictions, the Chairman "convened quarterly membership meetings for June 30, and September 29, 2021[,] as required by [FOP's] by[-]laws."⁷⁰ Thus, the Hearing Examiner determined that the Chairman "not only acted in the best interests of the laterals, he honored the democratic process and the rights of the members" throughout the actionable timeframe.⁷¹

The Hearing Examiner recommended that the Board dismiss this matter because the Complainants failed to meet their burden of proof regarding the alleged violations of D.C. Official Code § 1-617.03(a)(1), (2), and (3).⁷² FOP requested that the Hearing Examiner recommend the Board award attorney fees and costs to FOP, arguing that the Complaint was "frivolous and unsupported."⁷³ The Hearing Examiner acknowledged the legitimacy of the Complainants' concerns and found that the Complaint was not frivolous.⁷⁴ Therefore, the Hearing Examiner denied FOP's request for attorney fees and costs.⁷⁵

III. Discussion

Under Board Rule 544.11, "[t]he party asserting a violation of the CMPA, shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner."⁷⁶ The Board will adopt a hearing examiner's recommendations where those recommendations are reasonable, supported by the record, and consistent with Board precedent.⁷⁷

⁶⁸ Report at 41-42.

⁶⁹ Report at 42.

⁷⁰ Report at 41.

⁷¹ Report at 41. The Hearing Examiner further noted that, before the actionable timeframe, when COVID-19 was at its height, the Chairman convened monthly Executive Council meetings with restricted attendance. At least one of the Complainants attended those monthly meetings. Report at 41.

⁷² See Report at 42.

⁷³ FOP Post-Hearing Brief at 51.

⁷⁴ Report at 40.

⁷⁵ Report at 42, fn. 56.

⁷⁶ *WTU, Local 6 v. DCPS*, 65 D.C. Reg. 7474, Slip Op. No. 1668 at 5, PERB Case No. 15-U-28 (2018); *See Council of Sch. Officers, Local 4 v. DCPS*, 59 D.C. Reg. 6138, Slip Op. No. 1016 at 6, PERB Case No. 09-U-08 (2010).

⁷⁷ *WTU*, Slip Op. 1668 at 6-7; *AFGE, Local 1403 v. D.C. Office of the Attorney General*, 59 D.C. Reg. 3511, Slip Op. No. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012).

A. Timeliness

In their Exceptions, the Complainants argue that “the Hearing Examiner gave absolutely no consideration to [the] Complainants’ legal argument that [FOP] engaged in a continuing violation.”⁷⁸ FOP contends that the Complainant’s continuing violation argument is unfounded.⁷⁹

The continuing violation doctrine provides a narrow exception to Board Rule 544.4.⁸⁰ Continuing violations are limited to those “whose character as a violation did not become clear until [they] w[ere] repeated during the limitations period, typically because it is only [the] cumulative impact...that reveals [their] illegality.”⁸¹ Under this doctrine, the “mere failure to right a wrong...cannot be a continuing wrong which tolls the statute of limitations,” for if it were, “the exception would obliterate the rule.”⁸² The Complainants’ allegation that FOP and the Chairman failed to remedy the harm MPD caused the laterals is outside the actionable timeframe and is not based on a cumulative impact. Thus, the alleged ongoing, unreasonable delay and failure to honor FOP’s democratic processes did not toll Board Rule 544.4’s filing deadline under the continuing violation doctrine.⁸³

The Board adopts the Hearing Examiner conclusion that there was no continuing violation, as reasonable, supported by the record, and consistent with Board precedent.⁸⁴

B. Jurisdiction

The Complaint alleged that the Chairman “purposely made efforts to undermine [FOP’s] [d]emocratic processes and violated the Union’s by[-]laws,” amounting to a violation of D.C.

⁷⁸ Complainants’ Exceptions at 4.

⁷⁹ FOP’s Exceptions at 7-8; FOP’s Opposition at 3-4.

⁸⁰ See *Neill v. FOP/MPD Labor Comm.*, Slip Op. No. 1647 at 6, PERB Case No. 10-S-04 (2017) (holding that separate and distinct causes of action may compound to create a continuing violation and extend the deadline established in Board Rule 544.4).

⁸¹ *MPD v. FOP/MPD Labor Comm.*, 62 D.C. Reg. 14606, Slip Op. No. 1535 at 1, PERB Case No. 09-U-48(R) (2015) (quoting *AKM LLC, d/b/a Volks Constructors v. Sec’y of Labor*, 675 F.3d 752, 757 (D.C. Cir. 1977)).

⁸² *Id.* (quoting *AKM LLC, d/b/a Volks Constructors*, 675 F.3d at 757 (D.C. Cir. 1977)).

⁸³ The Board has held that the 120-day filing deadline is a claim-processing rule, subject to equitable waiver and tolling. See *MPD v. FOP/MPD Labor Comm.*, 67 D.C. Reg. 11472, Slip Op. No. 1756 at 3, fn. 14, PERB Case No. 20-A-07 (2020). The Board will not waive the 120-day filing deadline where the respondent properly raises it. See *Neill v. PERB*, 234 A.3d 177, 186 (D.C. 2020). Here, FOP properly raised timeliness, so the Board will not waive the deadline. Regarding equitable tolling, it “is a fact-specific question that turns on balancing the fairness to both parties.” *Id.* (quoting *Brewer v. OEA*, 163 A.3d 799, 802 (D.C. 2017)). When deciding whether to apply equitable tolling, the Board will consider a variety of factors, such as the benefitting party’s vigilance, the presence of “unexplained or undue delay[,]” whether “tolling would work an injustice to the other party,” and “[t]he importance of ultimate finality in legal proceedings[.]” *Id.* (quoting *Brewer*, 163 A.3d at 802). None of those factors apply here, so the Board will not toll the 120-day filing deadline.

⁸⁴ See Report at 38. In their Exceptions, the Complainants present additional arguments that they assert “would merit granting the Standard of Conduct Complaint if the Board finds [FOP] has engaged in a continuous violation.” Complainant’s Exceptions at 5. The Board finds that there was no continuing violation and those arguments are moot. The Complainants also argue in their Exceptions that the Hearing Examiner erred by “simply ignore[ing] the Complainants[’] identification of the large number of Complainants filed with this case, and rul[ing] on the standing of only those...who testified at the hearing.” Exceptions at 1, fn. 1.

Official Code § 1-617.03(a)(1).⁸⁵ The Board has held that a mere breach of a union's internal by-laws or constitution does not establish a cause of action under the Board's standards of conduct jurisdiction.⁸⁶ However, the Board will find a cause of action if in violating internal by-laws, the labor organization's action has the proscribed effect set forth in the asserted standards of conduct.⁸⁷ Section 1-617.03(a)(1) mandates that "[t]he maintenance of democratic provisions for periodic elections" and proscribes interference with "the right of individual members to participate in the affairs of the organization, to fair and equal treatment under the governing rules of the organization, and to fair process in disciplinary proceedings...." The Hearing Examiner found that FOP's actions did not have the effect proscribed in that provision.⁸⁸ As stated herein, the Hearing Examiner's finding was reasonable, supported by the record, and consistent with Board precedent. Thus, the Board lacks jurisdiction over the alleged violations of FOP's bylaws.

In their Exceptions, the Complainants allege that the Chairman "in his personal capacity is responsible for everything [FOP] did and did not do since he was elected Chairman, and any future consequences of his misconduct."⁸⁹ The Board has held that PERB does not have jurisdiction in standards of conduct cases over individually-named respondents.⁹⁰ The Board has established that only a labor organization can be the subject of a standards of conduct complaint.⁹¹ Therefore, in addition to adopting the Hearing Examiner's recommendations regarding PERB's lack of jurisdiction over internal union matters, the Board finds that PERB lacks jurisdiction over the Complainants' allegations against the Chairman as an individual.

C. Failure to state a claim

The Complaint alleged that FOP breached its duty of fair representation and violated D.C. Official Code § 1-617.03(a)(2) and (3) by electing a chairman whose extrinsic fiduciary duties as a DCRB trustee conflicted with his duties to FOP.⁹² D.C. Official Code § 1-617.03(a) mandates "[t]he exclusion from office in the organization of any person identified with corrupt influences" and "[t]he prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members." As the designated fact finder, the Hearing Examiner determined there was no evidence to show that the FOP Chairman had corrupt influences or financial interests that conflicted with his duty to the Complainants.⁹³ Thus, the Hearing Examiner found that FOP did not violate D.C. Official Code § 1-617.03(a)(2) or (3).⁹⁴ The Board adopts the Hearing Examiner's conclusion as reasonable, supported by the record, and consistent with Board precedent.

⁸⁵ See Complaint at 12.

⁸⁶ *Butler, et al. v. FOP/DOC Labor Comm.*, 46 D.C. Reg. 4409, Slip Op. No. 580 at 3, PERB Case No. 99-S-02 (1999) (citing *Corboy, et al. v. FOP/MPD Labor Comm.*, Slip Op. No. 391, PERB Case No. 93-S-01 (1994)).

⁸⁷ *Id.* (citing *Corboy, et al.*, Slip Op. No. 391).

⁸⁸ See Report at 40-42.

⁸⁹ Complainants' Exceptions at 9.

⁹⁰ See *Butler*, Slip Op. No. 123 at 2.

⁹¹ See *Dennis v. FOP/MPD Labor Comm.*, 43 D.C. Reg. 5133, Slip Op. No. 466 at fn. 2, PERB Case No. 96-S-01 (1996).

⁹² Complaint at 9-12.

⁹³ See Report at 38-39.

⁹⁴ See Report at 42.

The Complaint alleged that FOP breached its duty of fair representation by failing to prosecute the Complainants' group grievance against the Metropolitan Police Department in a timely manner and in the Complainants' best interests.⁹⁵ Under D.C. Official Code § 1-617.03(a)(1), a member of the bargaining unit is entitled to fair and equal treatment under the governing rules of the labor organization.⁹⁶ The Board considers whether the union's conduct was arbitrary, discriminatory, or in bad faith, or based on considerations that are irrelevant, invidious, or unfair.⁹⁷ For this test, the Board does not evaluate the competence of a union.⁹⁸ Rather, the Board considers whether a union's representation was in good faith and its actions motivated by honesty of purpose.⁹⁹ The Board has held that disagreement with a union's judgment in handling a grievance or its decision not to pursue arbitration does not breach the duty of fair representation.¹⁰⁰ The Hearing Examiner reviewed the record and did not find evidence of bad faith or dishonesty of purpose.¹⁰¹ Thus, the Hearing Examiner determined that FOP did not violate D.C. Official Code § 1-617.03(a)(1).¹⁰² The Board adopts the Hearing Examiner's conclusion as reasonable, supported by the record, and consistent with Board precedent.

D. Attorney Fees

In its Exceptions, FOP argues that "the meritless nature of the Complaint" and the Complainants' "bad faith impetus" for filing the Complaint warrant an award of attorney fees to FOP.¹⁰³ Specifically, FOP asserts that the Complainants' motivation for filing the Complaint was their counsel's "personal, financial desire to compel [FOP] to retain his legal services[s]."¹⁰⁴ FOP argues that "the bad faith exception to the 'American rule' on attorney fees,...provides that the prevailing party may be awarded its attorney's fees if the losing party, or its attorneys, acted in bad faith...."¹⁰⁵ The Hearing Examiner did not find that the Complainants had a bad faith impetus for filing the Complaint. The Hearing Examiner determined that the Complaint was not frivolous or meritless,¹⁰⁶ and emphasized the "seriousness" of the Complainants' concerns.¹⁰⁷ As a result, the Hearing Examiner declined to recommend that the Board award FOP attorney fees.¹⁰⁸

⁹⁵ Complaint at 2, 9-11.

⁹⁶ *Jackson v. Teamsters, Local 639*, 63 D.C. Reg. 7573, Slip Op. No. 1572 at 4, PERB Case No. 14-S-02 (2016) (citing *Dupree v. FOP/DOC Labor Comm.*, 46 D.C. Reg. 4031, Slip Op. No. 568, PERB Case Nos. 98-S-08 & 98-U-28 (1999)).

⁹⁷ *Id.*

⁹⁸ *Id.* at 5 (citing *Hicks v. District of Columbia Office of the Deputy Mayor for Finance, Office of the Controller and AFSCME, District Council 20*, 41 D.C. Reg. 1751, Slip Op. No. 303, at 2, PERB Case No. 91-U-17 (1992)).

⁹⁹ *Id.* (citing *Hicks*, Slip Op. No. 303, at 2).

¹⁰⁰ *Owens v. AFSCME, Local 2019*, 52 D.C. Reg. 1645, Slip Op. No. 750 at 7, PERB Case No. 02-U-27 (2004) (citing *Beeton v. DOC and FOP/DOC Labor Comm.*, 45 D.C. Reg. 2078, Slip Op. No. 538, PERB Case No. 97-U-26 (1998)).

¹⁰¹ See Report at 40-42.

¹⁰² See Report at 42.

¹⁰³ FOP's Exceptions at 11. FOP does not raise the issue of costs in its Exceptions.

¹⁰⁴ FOP's Exceptions at 11.

¹⁰⁵ FOP's Exceptions at 14 (citing *In re Jumper*, 984 A.2d 1232, 1247 (D.C. 2009)).

¹⁰⁶ Report at 40.

¹⁰⁷ Report at 42.

¹⁰⁸ Report at 42, fn. 56.

In its Exceptions, FOP argues that it is entitled to attorney fees under the CMPA.¹⁰⁹ Section 1-617.13 of the CMPA provides the remedies that the Board is explicitly empowered to order.¹¹⁰ That provision does not enumerate the award of attorney fees. In its Exceptions, FOP also argues that it is entitled to attorney fees under the Federal Back Pay Act (Act).¹¹¹ However, the Act only covers attorney fees against an agency.¹¹² The Complainants are not an agency. Therefore, FOP is not entitled to attorney fees under the Act.

The Board adopts the Hearing Examiner's recommendation regarding attorney fees as reasonable, supported by the record, and consistent with Board precedent. Accordingly, the Board denies FOP's request for attorney fees.

IV. Conclusion

The Board finds that the Complainants' Exceptions are a repetition of the arguments made before, and rejected by, the Hearing Examiner. Based on the findings, conclusions, and recommendations of the Hearing Examiner, the Board finds that the Complainants did not meet their burden of proof that FOP violated the CMPA. Therefore, the Board adopts the Hearing Examiner's recommendations and dismisses the Complaint.

The Board acknowledges the deleterious impact the unresolved status of the arbitration award has had upon the Complainants. Although the Board does not find that FOP breached its duty of fair representation, the Board observes that multiple factors appear to have converged to delay the award's implementation. The COVID-19 pandemic, the change in FOP chairmanship, and the appointment of new legal counsel for FOP may have contributed to the lack of resolution. The Hearing Examiner's factual findings indicate that FOP and MPD continue to negotiate regarding the amount each lateral could have paid to DCRB at the time of hire. Now that the circumstantial delay has passed, the Board expects that MPD and FOP will reach agreement regarding their calculations, and MPD will make the Complainants whole.

Should the award remain unimplemented, the Complainants have other avenues of recourse available to them. The Board suggests that if FOP and MPD do not resolve the disparities in their calculations, the Complainants may seek clarification of the award from the arbitrator. The Board further suggests that if MPD fails to comply with the terms of the award, the Complainants may file an unfair labor practice complaint with the Board, pursuant to Board Rule 520.

¹⁰⁹ FOP's Exceptions at 13.

¹¹⁰ See D.C. Official Code § 1-617.13 for the Board's remedies.

¹¹¹ FOP's Exceptions at 13 (citing 5 U.S.C.A. § 5596).

¹¹² See *id.* (holding that a complainant who prevailed against a union was not entitled to attorney fees because the union was not an agency).

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint is dismissed;
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons, and Peter Winkler.

December 15, 2022

Washington, D.C.

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board reconsider its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.