GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
Carlease M. Forbes,	
Complainant,	
v.	
District of Columbia Department of Corrections,	PERB Case Nos. 87-U-05 and 87-U-06
and	Opinion No. 244
International Brotherhood of Teamsters, Local Union 1714,	
Respondents.	

DECISION AND ORDER

The duly designated Hearing Examiner issued a Report and Recommendation [1]/ in the above-captioned proceeding finding that the Respondents had not engaged in unfair labor practices as alleged in these Complaints, which were consolidated for hearing by Order of the Board. No exceptions were filed with regard to such finding.

Pursuant to Section 1-605.2(3) of the District of Columbia Code and the Board's Interim Rule 109.24, the Board has reviewed the findings and conclusions of the Hearing Examiner and the entire record. The Board hereby adopts the Hearing Examiner's findings and conclusions that Respondents did not violate D.C. Code Sections 1-618.4(a)(1) and (2) and (b)(1) and (2) for the reasons stated in the attached Report.

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[1]/ A copy of the Report has been attached hereto as Appendix "A."

ORDER

IT IS HEREBY ORDERED THAT:

Both Unfair Labor Practice Complaints are dismissed.

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

March 28, 1990

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

CARLEASE M. FORBES COMPLAINANT, v. DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION 1714, RESPONDENTS.	PERB Case Nos. 87-U-05 and 87-U-06

REPORT AND RECOMMENDATION

I.

BACKGROUND:

Complainant Carlease M. Forbes, a Case Manager (Classification and Parole Officer) with the District's Department of Corrections, filed two separate complaints charging unfair labor practices against the above captioned Respondents under the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (CMPA or the Act), D.C. Law 2-139, D.C. Code Sections 1-601.1 et seq. (1981). The Unfair Labor Practice Complaint (ULP) against the Department of Corrections (hereafter the DOC or D.C. Jail) was filed on June 5, 1987. The complaint against Teamsters Local 1714 was filed on June 16, 1987. Hearing Transcript (H.T.) at 6. The cases were consolidated by order of the Public Employee Relations Board (PERB) after being respectively designated as PERB cases 87-U-05 and 87-U-06. H.T. at 6. In lieu of a pre-hearing conference, the issues for consideration were narrowed and set forth in a letter to the parties from the PERB's Executive Director dated January 27, 1989. Examiners' Ex. No. 1. The hearing of Complainants' charges, while also handled in a consolidated manner, was held at separate sessions. The case against the DOC was heard on March 22 and 23, 1989, and the case against Local 1714 was heard on October 11 and 12, 1989. At all sessions, all of the parties were present and afforded a full opportunity to present testimony, other evidence and argument in support of their respective contentions.

Both Respondents submitted post hearing briefs on December 12, 1989. The Complainant did not submit a post hearing brief.

II.

THE ISSUES

As noted, the issues to be examined and determined were specifically set out by the PERB's Executive Director. They are:

With respect to the case against the DOC (87-U-05):

the Complainant's allegations that the D.C. Department of Corrections committed unfair labor practices by allegedly (1) prohibiting the complainant from posting materials critical of Teamsters, Local 1714 on an "all-purpose" bulletin board; (2) prohibiting the Complainant from distributing anti-union material during non-working time and in non-work areas; and (3) threatening the Complainant if he continued to engage in the above-described activities.

With respect to the case against Local 1714 (87-U-06):

the issues are whether or not: (1) Teamsters, Local Union 1714, through its representatives, Ernest Jumalon and Eddie Kornegay, retaliated against the Complainant for having filed a complaint and (2) the Teamsters caused the Department of Corrections to discriminate against the Complainant by the conduct and actions described in PERB Case No. 87-U-05.

III.

(a.) APPLICABLE STATUTORY PROVISIONS

CMPA Section 1704 (a)(1) and (3)

D.C. Code Section 1-618.4

> (a) The District, its agents and representatives are prohibited from:
>
> (1) Interfering, restraining or coercing any employee in the exercise of the rights guaranteed by this subchapter;
>
> (2) Discriminating in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization, except as otherwise provided in this chapter

CMPA Section 1704 (b)(1) and (2)

D.C. Code Section 1-618.4

> (b) Employees, labor organizations and their agents or representatives are prohibited from:

(1) Interfering with, restraining or coercing any employee or the District in the exercise of rights guaranteed by this subchapter;

(2) Causing or attempting to cause the District to discriminate against an employee in violation of Section 1-618.6

CMPA Section 1706 (a)(1)

D.C. Code Section 1-618.6

(a) All employees shall have the right:

(1) To organize a labor organization free from interference restraint or coercion

(b.) APPLICABLE PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT [1/] (hereafter, the labor agreement)

Article 7 (Union Representation)

Section 9

The shop steward shall be afforded the opportunity to address unit employees at roll call to explain labor-management business unless conditions in the institution dictate otherwise. Such time shall not exceed five (5) minutes and may be utilized up to three (3) times per week, each shift.

Articles 8 (Use of Official Facilities and Services)

Section 1

The Department agrees to permit distribution of notices and circulars sponsored by the Union to all employees in the unit through regular distribution procedures provided that the Union receives prior approval from the Department

Section 3

Under no circumstances will the Department manpower or supplies be utilized in support of or for internal Union business except as provided elsewhere in this Article

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1/ Examiner's Exhibit No. 5

Section 6

The Department agrees to designate bulletin boards for the exclusive use of the Union in each facility where available, and to provide space on designated boards in appropriate work areas

Section 7

All material posted on Union bulletin boards shall be readily identifiable as official Union literature by the use of official letterhead, logo or signature of the Union official.

IV.

POSITIONS OF THE PARTIES

a. The Complainant

The Department of Corrections, through its agent Bernard L. Braxton, and in response to the urgings of certain officials of Local 1714, has acted improperly, collusively and illegally to deprive him of his alleged right (through his designated Fraternal Order of Correctors (FOC) Caucus), to distribute literature which, in his words, "seeks to democratize and strengthen the Local by exerting pressure so that the Local will do a better job." Complainant's Exhibit (CX) A. Complainant alleges that Local 1714, acting through its Assistant Business Agent (Oris P. Fields, Jr.) sought to have his employer interfere with and restrain certain of his activities which Complainant alleges are protected by the CMPA, and in doing so, caused or attempted to cause the employer/DOC to "discriminate against an employee in violation of Section 1706 of this title governing labor-management in the District of Columbia." Complainant's Exhibit B. By way of remedy for the alleged violations of law, Complainant ask that the Respondents be ordered to cease and desist from all such activity, and to post notices, appropriate upon a finding of violation of labor laws, in a prominent place at the work site.

b. The Respondents (DOC and Local 1714)

In their respective Answers to the separate complaints, the Respondents both seek the dismissal of such complaints in their entirety.

The Department of Corrections states that the allegations underlying the Unfair Labor Practice Complaint do not fall within the scope of an Unfair Labor Practice under the D.C. Code and are, moreover, frivolous and without merit.

Local 1714 also request dismissal of the charges. With particular regard to Complainant's claims concerning the alleged abridgement of his right to freedom of speech under the United States Constitution, Complainant's Exhibit A, the union asserts that there is no factual basis for such claims; that they are

irrelevant to the charge and, moreover, beyond the authority of the PERB to remedy. In addition, the Local asserts that because of the derivative nature of the charge(s) against it -- that is that it collusively coerced and/or influenced the Department of Corrections to engage in an unfair labor practice -- there can be no claim against it if the charge against the DOC is held to be lacking in merit.

V.

FINDINGS OF FACT

After full consideration of the complete record before me including pre-hearing pleadings, the hearing transcripts, and the parties' post-hearing statements, I make the following findings: 2/

1. Local 1714 is currently certified as the elected bargaining representative of the employees at the Department of Corrections (the D.C. Jail).

2. Local 1714 acceded to its current status as bargaining representative following its charter by the International Brotherhood of Teamsters in April of 1987; at which time its predecessor, Local 246, ceased representation of the relevant unit of employees. 3/ Post Hearing Brief of Local 1714 ("UB") at 2, fn.1. See also, The Memorandum of Understanding in PERB Case No. 84-R-09, Certification No. 33, Examiner's Exhibit No. 9.

3. Complainant Forbes was a shop steward for Local 246 up until his removal along with two other stewards in March of 1987. See PERB Case No. 87-S-02 and 87-S-03, (Opinion No. 193), Examiner's Exhibit No. 4.

4. As a result of his removal being determined to be legal and proper in the above cited PERB opinion, Mr. Forbes' activities from March 19, 1987 on were those of a regular unit member/ employee rather than an elected union official.

5. On or about this period of time, Forbes founded an organization known as the Fraternal Order of Correctors Caucus (FOC). The record reflects that this organization, consisted wholly if not solely of Mr. Forbes himself. H.T. at 368 (March 23, 1989).

2/ Because the hearing was held in two separate sessions and on four different dates, transcript page references (H.T.) are duplicative and, thus, are followed in some instances hereafter by specific dates for the sake of clarity.

3/ This accounts for the ruling during the hearing to delete Local 246 as a party respondent in the instant case -- 87-U-06. H.T. at 4 (October 11, 1989).

6. It appears that the events which led to the Complaints in these cases can be traced to a series of communication which began on April 10, 1987, with a letter from Mr. Oris P. Fields, Jr., the Assistant Business Representative for the Union to Lt. Col. Bernard Braxton, then serving as the Acting Administrator of the Central Detention Facility, D.C. Jail. CX-A, Attachment 2.

7. Previously, during the transition phase which ended with Local 1714 replacing Local 246, but prior to the PERB upholding his removal as a shop steward, Mr. Forbes engaged in the passing out of literature critical of the incoming local union. In addition, he attempted to and did post certain other material critical of the transition procedures, on what he calls, "the all purpose bulletin board." CX-A at 15.

8. Mr. Fields, April 10, 1987 letter to Col. Braxton, characterized the dissident activity of Forbes and his colleagues differently. Mr. Fields was concerned in the letter, with the matter of "unauthorized members speaking on behalf of the Union." In addition, Mr. Fields wanted to emphasize the Union's position that Article 7, Section 9 of the labor agreement provided for only Business Representatives and Shop Stewards being allowed to address unit employees at roll call to explain labor management business . . .

9. As a business representative for Local 1714 (from April, 1987 to July of 1989), Mr. Fields had as his primary area of responsibility, the Central Detention Facility/D.C. Jail. H.T. at 130.

10. Mr. Fields testified that there was a Union office on the third floor of the D.C. Jail and, in addition, two bulletin boards designated for Union use. One of these boards was on the third floor, across from the office (small board), and the other was a larger one at the entrance of the second floor. Both of these boards were originally unlocked and open, i.e. uncovered. H.T. at 131, 132.

11. Mr. Fields also testified that there were "enclosed boards for the [sole] use of the Department . . ." on the same level. Such boards were also locked. H.T. at 132 He testified further that the second floor board was the main or "official" Union board because that was where most of the employee traffic was and that, "there was a general purpose board on down further and that was not enclosed, they were all on the same side, the

right side as you went down the hallway." The Department's enclosed board was on the left. H.T. at 135, 138.

12. Fields also testified that in March of 1987, both Union boards were open -- there were none that required a key to open. H.T. at 136.

13. Fields testified that one day on or about the 17th of May, he was handed copies of literature put out by Mr. Forbes' FOC caucus during a roll call on the second floor. These documents, titled "The Triple Crown (Teamster, Truth, Tribe)" are attachments 4, 5, and 6 to CX-A. Fields also testified that roll call was official duty or "work time" for officers at the jail. H.T. 139, 140 He testified further that he had seen such literature all over the jail -- on the Union board, at the staff entrance, in the housing area -- and that they had clearly been passed out "at random." H.T. at 141.

14. Viewing this leafleting activity as a violation of the labor agreement, Fields protested to Col. Braxton, both verbally and in writing. Moveover, he testified that while he saw the documents on the Union bulletin board, he never saw them on the general purpose board. H.T. at 142.

15. Mr. Fields testified that on or about June of 1987, in response to this protest and a further one that important meeting notices were being removed from the Union bulletin board, Col. Braxton installed an enclosed and locked bulletin board for Union use on the second floor. H.T. at 144, 145.

16. Following his April 10, 1987 letter of protest to Col. Braxton, Mr. Fields, on May 19, 1987, again wrote to Braxton seeking assistance. Attachment No. 7 to CX-A. This particular letter sought aid in ending "unsanction solicitions" [sic] by the FOC. Complainant Forbes was specifically mentioned as the author of the unwanted documents.

17. On May 21, 1987, Col. Braxton, in his capacity as Acting Administrator of the Detention Facility, wrote a memorandum to Mr. Forbes advising him that it had been brought to his attention that Forbes had been, "distributing literature critical of Teamsters Local 1714 and certain representatives of the local." After advising him further that no one other than a representative of Local 1714 could "make any representation on behalf of employees except as provided by the labor-management agreement between the Department and Teamsters Local 1714," Col. Braxton went on to remind Forbes of his removal from Shop Stewart [sic] duties and responsibilities. Finally, the

memorandum ordered Mr. Forbes to, "cease and desist posting or passing out literature on government premises which attempts to make representation on behalf of employees. Any further attempts on your part to make representation on behalf of employees will result in appropriate action from this office." CX-A, Attachment 8.

18. With regard to this memorandum, Col. Braxton testified that the "appropriate action" was not a reference to potential discipline, but to either closer supervision for Mr. Forbes or to relaying such matters to his immediate supervisor in the future for action. H.T. 256, 257, 265.

19. In his testimony, Col. Braxton offered a further clarification of his intentions in issuing the May 21, 1987 memorandum. The crux of his testimony is that his intent in ordering Mr. Forbes to "cease and desist posting or passing out literature on government premises, which attempts to make representations on behalf of employee," was to stop the passing out of the challenged material "during duty hours." H.T. at 252. In addition he intended that such material not be posted on the Union bulletin board. Id. He indicated that the memorandum was issued, in part, because reports of such misdeeds by Mr. Forbes had come to his attention. Id. Finally, he indicated that he himself had observed some literature with Mr. Forbes signature on it in a "work area" -- the staff entrance to the jail. H.T. at 255 and 256.

20. Col. Braxton, in response to a question from DOC counsel, defined the term "work area" to include the entire D.C. Jail. H.T. at 253. Upon further questioning, he excluded the jail's parking lot from his working definition. H.T. at 255. Finally, Col. Braxton defined the jail as a 24 hour facility in that all hours of the day were defined as "work hours." Id.

21. Witness Leroy Anderson, the D.C. Jail's veteran (12 year) Labor Relations Officer defined the term work area even more expansively. He defined it, in this context, to be the D.C. Jail building and its 6.7 acre perimeters. Moveover, he testified, the only time any space could truly be called a non-work area was in an extraordinary situation such as a union election when certain space could be designated as a non-work area by the Department. H.T. at 316. Upon questioning, Mr. Anderson admitted that his working definition came by way of implication from Article 7, Sections 1 and 4 of the labor agreement. H.T. at 335. He was also guided by the terms of the latest union election agreement (dated July 25, 1985). Examiner's Exhibit No. 6.

22. Complainant, without providing any specific definition of his own for what is or is not a work area within the jail, admitted to distributing his "Triple Crown" materials, on his own time, at the following locations within the jail: the parking lot; the officers' dining room; the officers' lounge; the officers' barbershop; the staff pool room and the hallways. In addition, he admitted to posting his materials on the general purpose bulletin board. H.T. at 19 and 20 (October 12, 1989).

23. Following the Braxton letter/memorandum of May 21, 1987, the Complainant drafted and distributed certain other labor relations related materials under the title of the "1714 Strugglers for United Corrections Workers, UCW." These were dated March 1 and March 11, 1988. He also indicated that there was an earlier addition of this publication which he had made up and distributed, but which he had been unable to locate. H.T. at 99-103 (October 12, 1989). Finally, he testified that in attempting to comply with Col. Braxton's May 21 memorandum, he handed these publications out only on non-work time, in non-work areas, though, in keeping with his view of these terms, distribution occurred on the premises of the Detention Facility (D.C. Jail). H.T. at 103 (October 12, 1989).

24. The testimony established that there exist within the D.C. Jail a "general" or "all purpose" bulletin board, for use of all employees aside from those bulletin boards which have been designated for use by only the Union and/or DOC management officials. This board contains advertising material such as notices of sales, pleasure trips and religious information. In addition, there was testimony that this board (apparently located on the second floor of the jail) also contains signed copies of complainants against both the DOC and the Union. H.T. at 21 (October 12, 1989).

VI.

DISCUSSION AND CONCLUSIONS OF LAW

The site of the activity complained of in these consolidated cases is the Department of Corrections Detention Facility (D.C. Jail), a maximum security facility housing nearly 2,000 inmates on a continuous, i.e. 24 hour a day, basis. As a maximum security corrections facility which is also facing a court-ordered reduction of what has been determined to be a condition of overcrowding, 4/ the primary goals of the D.C. Jail's operators are security and the maintenance of order. Employer's Post-Hearing Brief at 1, 2.

4/ See, UB at 11, fn. 6 and cases cited therein.

Complainant Forbes, an obviously able and determined man, comes to this proceeding as a former shop steward whose removal from that position in March of 1987, has generated an adversarial relationship with the union he formerly served. It is clear that Mr. Forbes now sees his obligation to unit members as that of a watchdog/dissident even while he remains as a dues paying member of Local 1714. As a dissident member of Local 1714, Complainant seeks to maintain the right to address and inform his follow employees in the time honored manner of leafleting his views through written publications. While he formerly enjoyed a privileged status (shop steward) circumstances have now forced him to act as an outsider. In this capacity, he has functioned vigorously. 5/

Thus, the legal question presented concerns the right of Mr. Forbes to function as a dissenting union member within the confines of a maximum security correctional facility. His ability to do so has been challenged and the issue for consideration here has been joined by the issuance of a memorandum from the D.C. Jail's Administrator, Col. Bernard Braxton, which has basically ordered him pursue his activities away from the jail.

The memorandum, written in broad terms which essentially order Forbes to cease and desist his posting and pamphleting on "government premises," is violative of the CMPA, asserts the Complainant, because it is a restriction on his right to assist a labor organization under the Act; it coerces his activity by ordering him to stop, under the threat of further "action," and it discriminates against him with regard to a condition of his employment by treating him differently than other similarly situated employees. Moreover, he contends, the management action here is particularly odious in that it was directed and choreographed in collusion with officials at Local 1714 of whom he had been critical.

The DOC defends Col. Braxton's letter, in effect, by saying that it was simply misinterpreted by the Complainant; that what was intended was simply that Forbes stop engaging in activity which violated its agreement with the Union, i.e. attempting to address the officers' roll call and posting unofficial materials on the Union's exclusive bulletin board. Moreover, says the DOC, its actions can be justified by the unique character of the facility involved -- one where, because of its 24 hour mode of operation and its mission, there is no such thing as a non-work area or non-work time -- and by its need to maintain production and discipline at the jail. Finally, with respect to the charge of collusion/discrimination, the DOC asserts that the Union was only one of the instigators of the Braxton memorandum, citing to complaints which Col. Braxton had received about Forbes from independent sources, H.T. at 250, 251, (October 23, 1989) and to

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5/ See, in this regard, PERB Opinions 205 and 229, dismissing ULP claims brought by Complainant Forbes concerning similar issues of intimidation and inadequate representation on the part of Local 1714. Examiner's Exhibit No. 8.

the fact that Forbes has never truly been disciplined or punished for his acts in any traditional sense.

Local 1714 in addition to asserting that the charge against it (collusion) is derivative in nature also points to the fact that Forbes was never disciplined for his activities. The Local further points out that Forbes was not even intimidated by the Braxton directive since in March of 1988, he began to distribute similar materials at the jail under a different organizational name, i.e. 1714 Strugglers for United Correctional Workers, UCW. In addition, the Local asserts that no matter how inartfully crafted the Braxton directive may have been with regard to what was being restricted, it was understood by Mr. Forbes to mean exactly what Braxton had intended to say. UB at 6 and H.T. at 109-118 (October 12, 1989).

The case law relied upon by the parties in support of their positions contains numerous references to the National Labor Relations Act, as amended, 29 U.S.C. Sections 151-169 (1982) and to rulings under that Act by both the courts and the National Labor Relations Board (NLRB). While these references are perfectly proper in terms of guidance, See Fraternal Order of Police, PERB opinion No. 94 (1984) (regarding the willingness of the PERB to accept NLRB decisions as precedent in unfair labor practice cases), there are differences between the NLRA and CMPA which are significant to the resolution of this case. The employee rights provision of the NLRA (Section 7) specifically protects the right of employees to engage in concerted activity for their "mutual aid or protection" while the CMPA does not contain such a phrase. In addition, as the Union points out, the CMPA has an express provision establishing certain management rights including their sole right to, "maintain the efficiency of the District Government operations entrusted to them," D.C. Code Sec. 1-618.8(a)(5), and to "determine its internal security practices." Id, while the NLRA has no corresponding provisions.

Because of the differences in the federal and local collective bargaining statutes; the unique mission of a correctional facility and the resultant restrictive nature of the collective bargaining agreement here on the use of jail facilities (Article 8), it is not possible to treat this matter in a way which it might be determined under the federal labor law. The case law under the NLRA governs primarily the private sector and work places which cannot be generally equated with the D.C. Jail. In addition, it is worthy of note that neither of Complainant's organizations in this case (the FOC or the UCW) appears to have truly represented anyone. They were not certified by the PERB and there is no evidence of their being entitled to designation as a "labor organization" as that phrase is envisioned under the CMPA. D.C. Code Sec. 1-618.3. Thus, while the Complainant purports to be a representative of both caucuses, the recommended ruling here treats him as nothing more than a normal employee of the District government.

As a general proposition, restrictions on employee solicitation during non-work time or employee distribution during non-work

time and/or in non-work areas will be violative of the CMPA, D.C. Code Sec. 1-618.4(a), unless the employer can justify the restriction by establishing that certain special circumstances make the restrictions necessary to maintain either its production or discipline. Cf. Republic Aviation Corporation v. NLRB, 324 U.S. 793 (1945) (stating the rule under the NLRA). In this case, the outcome is determined by the validity of the restrictions imposed and by the fact of which party has legitimately interpreted the scope of the restrictions -- that is, whose conduct is most closely in accordance with the labor agreement and the law.

It appears, in this regard, that the claims against the Union are without merit. A portion of this charge (regarding Local 246 as a party Respondent) has already been dismissed. See, fn. 3, supra. As to the remaining claims, Complainant offered no credible evidence that any officials of Local 1714, (and specifically none concerning either Ernest Jumalon or Eddie Kornegay) conspired with management to abridge his rights as an employee. If the Union really believed that Forbes was improperly addressing roll calls, then there was no other way to stop him than to seek the assistance of some management authority. The Complainant has failed to show, by a preponderance of evidence, that Local 1714 attempted to do anything in collusion with the DOC other than to get the Department to enforce provisions of the collective bargaining agreement as they understood it.

As for Complainant's charge against the DOC, there are serious questions raised by the general prohibitory language contained in Col. Braxton's May 21, 1987 memorandum to Mr. Forbes. Essentially, Col. Braxton has injected himself into what is largely an intra-union dispute. Moveover, the memorandum runs counter to the generally accepted premise underlying much of the labor law -- that the free discussion of labor related matters is essential in a modern society. However, upon closer examination, it appears that Braxton was also acting in good faith to uphold what he read the contract to require and not to intimidate a union dissident.

The Alleged Prohibition Against Posting on An "All-Purpose" Bulletin Board

This is the most serious of Complainant's charges since the record indicates that, such a board does exist, (and is available for a variety of employee uses) Col. Braxton's testimony to the contrary not withstanding. 6/ Moreover, on the surface, the prohibition against posting and passing out material "on government premises" would seem to be overly broad but for the unique character of the jail as a place of business and the clearly restrictive language regarding internal union business

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6/ See, the testimony of Ricardo Landecho, H.T. at 72, 73 (March 22, 1989) and Oris P. Fields, H.T. 135, 137-138 (October 12, 1989).

and official union materials as contained in Sections 3 and 7, Article 8 of the labor agreement. While the jail is clearly a public facility, it is equally clear that the parties did not intend for it to become a public forum with respect to the airing of labor relations matters. Thus, while such an "all purpose" board may exist, Section 3 of Article 8 in the labor agreement would preclude its use, as a DOC owned piece of property or "supply", for the type of internal union business contained in the Forbes literature. Even the approved bargaining agent is required under the labor agreement (Article 8, Section 1) to obtain approval from the DOC before distributing notices and circulars. The facts regarding this situation are difficult to reconcile but what appears to be the case is that at a point in time where the Union bulletin board was unlocked, uncovered and next to the so-called "all-purpose" board, see the Fields testimony at p. 6, supra, some of Mr. Forbes material was posted there (as well as on the all-purpose board). Whether he put it there mistakenly or even put it there at all is irrelevant to the issue of how the DOC and/or the Union responded. As internal union business, the DOC had the right to prohibit it from either board, and as unofficial union material, the Union could take steps to get it removed from its own bulletin board.

The Alleged Prohibition Against The Distribution of Anti-Union Material During Non-Work Time In Non-Work Areas

It is noted that the primary concerns of the Braxton memorandum were not the matters of time or area but with the "Use of Government Facilities For Unsanctioned Activity". Indeed, he was essentially warning Forbes against making representations as an employee representative when he was no longer recognized as one by the exclusive bargaining agent. Since Mr. Forbes admits that his caucuses were not functioning as labor organizations in the statutory sense of that term and makes no claim that he was acting as an official representative of Local 1714, his actions and materials could be subjected to the same stringent requirements as set out in the labor agreement at Articles 7 and 8, for the bargaining agent itself. Actually, the Braxton memorandum does not even address the topic of non-work areas and, in its brief, the DOC takes the position that the jail has no such areas. 7/

The Alleged Threat Against The Complainant If His Actions Continued

Because, I find above that the alleged threats were nothing more than Col. Braxton's ill-crafted attempts to interpret the terms of the collective bargaining agreement and, moreover, that the usual "terms of art" for true disciplinary or adverse actions

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7/ While Col. Braxton's testimony indicated that the parking lot might be such an area, H.T. at 254, 255, this interpretation was disputed by his Labor Relations Officer's testimony. As such the evidence on this subject is inconclusive in any event.

were not used in relaying these supposed threats, H.T. at 257, 346 and Article 11 of Examiner's Exhibit No. 5, I find it credible to believe that Col. Braxton meant no more by his statements than what he said in his testimony, i.e. Forbes might subject himself to closer supervision.

To summarize the findings above and the recommendations below, I have been guided by the fact that the D.C. Jail, the site of the alleged ULPs, is not the quintessential public forum. In cases of this nature, i.e. where public property which is not by tradition or designation a forum for public communication is involved, employer conduct must be scrutinized under different standards. Perry Education Association vs. Perry Local Educators' Association et al., 460 U.S. 44, 45 (1983). In addition, the alleged violations of the CMPA were not, in this instance, supported by the appropriate preponderance of the evidence. While the Braxton memorandum could have been written differently and the parameters of what is appropriate conduct for dissenting members of an incumbent union at the D.C. Jail could definitely be more clear, that does not relieve the Complainant of his burden to establish by the appropriate standard of evidence, both his entitlement to the Act's protections and the violations which are alleged to have infringed the Act's protections. In this case, there are legitimate, non-violative reasons, based in large measure on the terms of the labor agreement, which both Respondents have put forth that explain both their motives and their conduct.

VII.

RECOMMENDATION

1) That the Complaint of June 5, 1987 (87-U-05) be DISMISSED

2) That the Complaint of June 16, 1987 (87-U-06) be DISMISSED

Respectfully submitted,

K. Wayne Lauderdale

K. WAYNE LAUDERDALE
Hearing Examiner

Dated: February 5, 1990