Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Willie L. Sparks,	
Complainant,	
v.	PERB Case No. 05-U-26
	Opinion No. 915
American Federation of State, County and Municipal Employees, District Council 20, Local 1959,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

Willie L. Sparks ("Complainant") filed an Unfair Labor Practice Complaint ("Complaint") against the American Federation of State, County and Municipal Employees, District Council 20, Local 1959 ("AFSCME", "Union" or "Respondent"). The Complainant alleges that the Union violated D.C. Code §§ 1-617.03 and 1-617.04 by refusing to arbitrate the Complainant's termination from his position as a bus operator with the District of Columbia Public Schools, Department of Transportation ("DCPS"). [1] The Complainant requests relief in the form of monetary damages from the Union in an amount equal to his lost pay as a result of his termination from DCPS. (See Complaint at p. 4). In addition, the Complainant requests that the Board issue an order reinstating him to his former position with full back pay, benefits, restoration of leave and the proper contribution by DCPS to his retirement fund. (See Complaint at p. 4). The Complainant also asks for reimbursement of all reasonable attorney fees and costs incurred in prosecuting his Complaint and "such other relief as the [Board] deems necessary and

[1] The Complainant mistakenly cites D.C. Code § 1-618.3 (1981 ed.) instead of D.C. Code § 1-617.03 (2001 ed.). In addition, the Complainant alleges that AFSCME violated D.C. Code § 1-617.03 (standards of conduct); however, he did not file a separate "standards of conduct" complaint.

proper." (Complaint at p. 4). The Union filed an answer to the Complaint denying all allegations and requesting that the Board dismiss the Complaint.

A hearing was held in this matter. The Hearing Examiner issued a Report and Recommendation ("R&R") in which he found that the Complainant had presented a *prima facie* case, but recommended that the case be dismissed as untimely filed. (See R&R at p. 5). The Hearing Examiner also found that, in the alternative, were the case to be deemed timely, that the Complainant failed to present any evidence of a violation of the Comprehensive Merit Personnel Act ("CMPA").

No exceptions were filed.[2] The Hearing Examiner's R&R is before the Board for disposition.

II. Background

On February 25, 2004, the Complainant, a school bus operator, was involved in an incident in which he was unable to find a child's proper address. As a result, there was a delay in getting the child to the proper address. On March 2, 2004, the Complainant was informed that he was "immediately removed from his position as a bus operator with DCPS for 'behavior detrimental to the operation – gross negligence.' " (R&R at p. 4). On March 18, 2004, the Union filed a grievance with DCPS, challenging Mr. Sparks' removal. On May 13, 2004, DCPS denied the grievance. The Union continued to the next step of the grievance process. On July 30, 2004, the Union notified Mr. Sparks that the Union's grievance committee "did not see enough merit in his grievance for the Union to represent him further." (R&R at p, 4). The Union withdrew from the grievance and did not represent the Complainant any further in his appeal. On March 11, 2005, Mr. Sparks filed the instant unfair labor practice complaint against the Union. The Complaint asserts that since "September 29, 2004 . . . [the Union] violated and continued to violate the provision of D.C. Code Ann. 1-618.4 [sic] by refusing to arbitrate the Complainant's termination."[3] (Complaint at p. 2). Specifically, the Complainant alleges that the Union: (1) refused to file a grievance on the Complainant's behalf; (2) failed and refused to provide the Complainant with information regarding the grievance; (3) failed to move the grievance to arbitration; (4) interfered with, constrained and coerced the Complainant with regards to his rights under D.C. Code § 1-617.04; and (5) breached the duty of fair representation owed to the Complainant. (See R&R at pgs. 4-5).

The Union countered that the Complaint should be dismissed. First, the Union asserted that the Complainant failed to present testimony or evidence that established a

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[2] On April 20, 2007, the Complainant filed a request for an extension of time in order to file exceptions to the R&R. By letter dated April 24, 2007, the Board's Executive Director granted the Complainant an extension until May 7, 2007. However, to date, the Complainant has not submitted any exceptions.

[3] The Hearing Examiner noted that the Complainant incorrectly cites a previous D.C. Code section number throughout his Complaint. The correct citation is D.C. Code § 1-617.04 (2001 ed.).

prima facie case against the Union. Second, the Union argued that the Complaint should be dismissed because it was "incomprehensible and violated the Board rules on what is required to file a complaint." (R&R at p. 5). Third, the Union contended that the Complaint was untimely. (See R&R at p. 5).

III. The Hearing Examiner's Report and Recommendation

Based on the pleadings and the record developed at the hearing, the Hearing Examiner identified three issues for resolution. These issues, his findings and recommendations, are as follows:

1. *Did the Complainant present a prima facie case against the Union?*

At the hearing, the Union asserted that the Complaint was incomprehensible due to the contradictory allegations presented. (See R&R at p. 6). The Hearing Examiner found that the Complaint clearly stated that the charge against the Union was a failure to arbitrate the Complainant's termination. (See R&R at p. 6). The Hearing Examiner concluded that the Complaint presented sufficient facts to permit the Union to understand the charges and defend itself. (See R&R at p. 6). Based on the foregoing, the Hearing Examiner denied the Union's motion to dismiss and found that the Complaint presented a *prima facie* case.

Neither party filed exceptions to the Hearing Examiner's denial of the Union's Motion to Dismiss. The Board has reviewed the Hearing Examiner's conclusion and finds it to be reasonable, supported by the record and consistent with Board precedent.[4] Therefore, the Board adopts the Hearing Examiner's conclusion that the Complaint presented a *prima facie* case.

2. *Did Mr. Sparks file a timely Complaint?*

In considering this question, the Hearing Examiner noted that 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." (R&R at p. 6).

In the Complaint, Mr. Sparks alleges that he first became aware that the Union violated its duty of fair representation on September 29, 2004. (See Complaint at p. 2). The Hearing Examiner found that this allegation was not supported by the facts presented both in the Complaint and at the hearing. (See R&R at p. 6). Instead, the Hearing Examiner found that the Complainant had been made aware in July of 2004 that the Union would not proceed to arbitration because it did not see enough merit in his grievance. (See R&R at pgs. 4 and 6). However, the Hearing Examiner, accepting the

[4] The Board has held, "that when a Complainant proceeds *pro se* in an unfair labor practice proceeding before this Board, the Board will not impose strict compliance with Board Rules . . . as a basis of dismissing a complaint." *Mack v. FOP/DOC labor Committee*, 49 DCR 1149, Slip Op. No. 443 at p. 2, PERB Case No. 95-U-16 (1995).

facts most favorable to the Complainant, found September 29, 2004, to be the date that the Complainant became aware that the Union would not arbitrate the Complainant's termination, and giving rise to the unfair labor practice charge. (See R&R at p. 7).

Based on the September 29, 2004 date, the Hearing Examiner calculated that the Complainant had until January 27, 2005 to file an unfair labor practice charge. However, the Complaint was not filed until March 11, 2005, or 162 days after September 29, 2004. Relying on Board Rule 520.4, the Hearing Examiner determined that the Complaint was not timely. Consequently, the Hearing Examiner is recommending that the Complaint be dismissed as untimely.

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." *Hoggard v. District of Columbia Public Schools*, 43 DCR 1297, Slip Op. No. 352 at p. 3, PERB Case No. 93-U-10 (1996). 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). The Board has found that "the time for filing a complaint with the Board concerning alleged violations [which may provide for] . . . statutory causes of action, commence when the basis of those violations occurred . . . . However, proof of the occurrence of an alleged statutory violation is not necessary to commence the time limit for initiation of a cause of action before the Board. The validation, i.e. proof, of the alleged statutory violation is what proceedings before the Board are intended to determine." *Jackson and Brown v. American Federation of Government Employees, Local 2741, AFL-CIO*, 48 DCR 10959, Slip Op. No. 414 at p. 3, PERB Case No. 95-S-01 (1995).

In the instant case, the Complainant claims September 29, 2004, as the day he became aware that the Union would not arbitrate the grievance of his termination. (See Complaint at p. 2). Consistent with Board Rule 520.4, the Complainant had 120 days from September 29, 2004, to file his Complaint. However, the Complainant did not file his Complaint until 162 days after the alleged violation took place. Therefore, we concur with the Hearing Examiner's finding that the Complaint was untimely filed.

Board Rules governing the initiation of actions before the Board are jurisdictional and mandatory. As such, they provide the Board with no discretion or exception for extending the deadline for initiating an action. See, *District of Columbia Public Employee Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991). 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." 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). Neither party filed exceptions regarding the Hearing Examiner's finding that the Complaint was untimely filed. The Board has reviewed the Hearing Examiner's recommendation and finds it to be reasonable, supported by the record and

consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner's recommendation that the Complaint be dismissed as untimely filed.

3. *In the alternative, did the Complainant establish that the Union committed an unfair labor practice?*

The Union requested that in case the Board does not adopt the Hearing Examiner's finding that the Complaint was untimely filed, that the Hearing Examiner make a ruling on the merits of the Complaint. (See R&R at p. 7). The Hearing Examiner granted the Union's request and found that although the Complainant had presented a *prima facie* case, he did not present any evidence to support a statutory violation of the CMPA. (See R&R at p. 8). Instead, the Complainant's testimony and evidence concerned his termination from DCPS rather than any alleged unfair labor practice committed by the Union. (See R&R at p. 7). Consequently, the Hearing Examiner recommended that in the alternative, should the Complaint be deemed timely, that the Complaint be dismissed with prejudice because the Complainant failed to present any evidence that the Union committed an unfair labor practice. (See R&R at p. 8).

Neither party filed exceptions regarding the Hearing Examiner's recommendation to dismiss the Complaint with prejudice. The Board has reviewed the Hearing Examiner's ruling and finds it to be reasonable and supported by the record.[5] Therefore, the Board adopts the Hearing Examiner's recommendation to dismiss the Complaint with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The Complainant's Unfair Labor Practice Complaint is dismissed with prejudice because it was not timely filed.

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[5] Notwithstanding the untimeliness of the Complainant's allegation, we concur with the Hearing Examiner that the Complainant failed to state a statutory cause of action under the CMPA. Specifically, the Board notes that the standard concerning whether a Union has violated D.C. Code § 1-617.04, by breaching its duty of fair representation, is whether the Union's conduct was arbitrary, discriminatory or in bad faith, or based on considerations that are irrelevant, invidious or unfair. See *Skopak v. District of Columbia Commission on Mental Health Services and the Doctors Council of the District of Columbia*, _DCR_, Slip Op. 737 at p. 3, PERB Case No.'s 02-S-07 and 02-U-21 (2004). In the present case, the Complainant acknowledges that the Union informed him that it did not find merit in his grievance. The Board has held that the decision not to arbitrate a grievance based on cost and the likelihood of success does not constitute arbitrary conduct. *See Thomas v. American Federation of Government Employees*, Local 1975, 45 DCR 6712, Slip Op. No. 554, PERB Case No. 98-S-04 (1998). Therefore the decision was not arbitrary, discriminatory or in bad faith, or based on considerations that are irrelevant, invidious or unfair. In view of the above, the Board finds that the Complainant failed to present any evidence of an unfair labor practice committed by the Union.

(2) Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

October 5, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 05-U-26 was transmitted via U.S. Mail to the following parties on this the 5th day of October 2007.

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