



**Decision and Order**

**PERB Case No. 94-U-14**

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receive them. <sup>1/</sup> OLRCB denied that it had committed any unfair labor practices, and asserted that the acts alleged raised purely contractual issues arising under the collective bargaining agreement (Agreement) over which the Board lacked jurisdiction. <sup>2/</sup> The matter was referred to a hearing on September 9. The case was heard on October 19, and the Hearing Examiner issued his Report and Recommendations (R&R) on January 4, 1995.

The Hearing Examiner rejected OLRCB's contention that the alleged violations raised purely contractual issues. He found that the Union's charges were "not confined solely to rights afforded in the collective bargaining agreement," and that while they required some interpretation of the Agreement, they "embrace[d] statutorily based] claims, which if borne out by the facts, would require findings of unfair labor practice violations" (R&R 16). On the record before him, the Hearing Examiner found no statutory violation in the period immediately following FOP's certification. <sup>3/</sup> He found, however, that OLRCB

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<sup>1/</sup> Section 1-618.4(a)(1) provides that it is an unfair labor practice for a District agency to interfere, restrain or coerce employees in the exercise of rights enumerated in Section 1-618.6(a)(1), (2) and (3), including the right of employees to organize labor organizations free from interference, restraint or coercion; the right to form, join or assist any labor organization or to refrain from such activity; and the right to bargain collectively through representatives of their own choosing. Section 1-618.4(a)(2) provides generally that it is an unfair labor practice for a District agency to dominate, interfere or assist in the formation, existence or administration of any labor organization, or contribute financial or other support to it. Section 1-618.4(a)(5) provides that it is an unfair labor practice for a District agency to refuse to bargain collectively in good faith with employees' exclusive representatives.

<sup>2/</sup> FOP succeeded to the collective bargaining agreement between the Agency and Local 1714 which continued in effect during the period covered by the Complaint.

<sup>3/</sup> The Hearing Examiner found that OLRCB did not violate the CMPA by failing, upon FOP's certification, to deduct and remit to FOP the same dues and service fees as the predecessor union had received. He found that the Agreement established preconditions for such payments to FOP (individual authorizations for dues deductions and a showing of 51% union membership for  
(continued...)

had failed to implement service fee withholdings within a reasonable time after FOP had established its contractual entitlement to such withholding; that in so doing the Agency had interfered with FOP's rights under CMPA Sec. 1-618.7 to the timely withholding of service fees, and accordingly interfered with FOP in its formation, existence and administration and with employee rights to form, join or assist labor organizations, in violation of CMPA Section 1-618.4(a)(1) and (2). (R&R 28).

CMPA Section 1-618.7 provides:

Union Security: dues deduction.

Any labor organization which has been certified as the exclusive representative shall, upon request, have its dues and uniform assessments deducted and collected by the employer from the salaries of those employees who authorize the deduction of said dues. Such authorization, costs and termination shall be proper subjects of collective bargaining. Service fees may be deducted from an employee's

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<sup>3</sup>(...continued)  
entitlement to service fees), on which OLRCB had properly relied.

The Hearing Examiner further found that OLRCB did not violate the CMPA Section 1-618.4(a)(1) and (2) by continuing to deduct dues and service fees for Local 1714 after FOP's certification. He found that while OLRCB had continued to make such deductions for a period after Local 1714's entitlement had ended, the erroneously deducted sums were not paid over to Local 1714, but were remitted to the affected employees. He concluded that while "the erroneous deductions proved to be embarrassing to [FOP] and temporarily burdensome to the employees, they did not foreclose or prevent any payment to which the Union was entitled during that period" (R&R 21).

The Hearing Examiner accordingly concluded that in the period immediately following the certification, OLRCB did not interfere with, restrain or coerce employees in the exercise of their organizational rights, interfere with FOP's existence or administration, or improperly assist Local 1714.

No exceptions were filed to these findings and conclusions. We find them to be supported by the evidence, and adopt the Hearing Examiner's findings of fact and conclusions of law with respect to these Complaint allegations. We further affirm the denial of FOP's request for attorneys fees for the reasons stated in the Hearing Examiner's Report (R&R 29).

salary by the employer if such a provision is contained in the bargaining agreement.

Article 4 of the Agreement, Union Security and Union Dues Deduction, provides in pertinent part:

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Section 3: ....Upon a showing by the Union that fifty-one percent (51%) of the eligible employees for which it has certification are Union members, the Employer shall begin withholding no later than the second pay period after this Agreement becomes effective and the showing of fifty-one percent (51%) is made, a service fee applicable to all employees in the bargaining unit who are not Union members....

\* \* \* \*

Section 6: The Employer shall be indemnified or otherwise held harmless for any good faith error or omissions in carrying out the provisions of this Article.

The Hearing Examiner found that OLR CB had failed to withhold service fees for eight (or at a minimum six) weeks after FOP had furnished evidence of 51% membership and the contractual grace period had expired. He agreed with the Union that this case is controlled by the Board's holding in American Federation of Government Employees, Local 3721 v. District of Columbia Fire Department, PERB Case No. 88-U-25, Op. No. 202 (December 22, 1988), that in case of a delay in authorized deductions of membership dues, a finding that CMPA Section 1-618.7 has been violated turns on the length of the delay and any proffered justification, and does not require a showing of malice or antiunion animus. The Hearing Examiner rejected OLR CB's contention that the delay in withholding service fees was "not inordinate" and was attributable to "good faith error and system problems... for which the District government may not be held liable in the face of the hold-harmless provision of Article 4 [Section 6]."<sup>4/</sup> As a remedy, the Hearing Examiner recommended that the District Government be required to "reimburse the Union for all service fees it failed to deduct from non-union members

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<sup>4/</sup> In so doing, he concluded that the hold harmless provision could not be construed to cover so extensive a failure to withhold, even assuming that OLR CB had acted in good faith (R&R 27).

pay" in the period after FOP had become contractually entitled to begin receiving such payments (R&R 28). <sup>5/</sup> The case is now before the Board on exceptions by OLR CB to these findings and recommendations and FOP's opposition thereto.

Exceptions 1 and 2 challenge the factual findings that underlie the findings of violations. We need not consider them, in light of our disposition of OLR CB's further exceptions.

OLRCB excepts to the Hearing Examiner's finding that the Board has jurisdiction over alleged violations of FOP's contractually based right to the withholding and remittance of service fees. It further excepts to his finding of a statutory violation on the basis of the Board's decision in AFGE, Local 3721 v. D.C. Fire Dept., supra, which involved a delay in the deduction and remittance of membership dues, to which a certified representative is statutorily entitled on request, subject only to the requirement that the deductions be authorized by the affected employee. <sup>6/</sup> Finally, OLR CB excepts to the Hearing Examiner's recommendation that the District Government be required to reimburse FOP for service fees that OLR CB failed to withhold. It argues that any service fee money due FOP is owed by bargaining unit employees who have elected not to become Union members, not by the Agency, and that if the Union is to be reimbursed, the money should come from those employees through double deductions for the appropriate number of pay periods.

We agree with OLR CB that the statute furnishes no right to the withholding and remittance of service fees, but simply authorizes such agreements if the parties so choose. FOP's right to receive service fees arises entirely from the contract, and disputes over entitlement, including determinations as to when FOP met the threshold requirements and the interpretation and application of the hold-harmless clause, are matters for resolution through the contractual grievance/arbitration

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<sup>5/</sup> The Report and Recommendation, which contains a fuller statement of the history and background of the case, may be reviewed, or a copy obtained at the Board's offices.

<sup>6/</sup> While CMPA Section 1-618.7 provides that "authorization, costs and termination shall be proper subjects of collective bargaining," and were the subject of bargaining and agreement in this case, we agree with the Hearing Examiner that with respect to membership dues, the statute is the primary source of entitlement. As noted above, no exception was taken to his findings that there were no statutory violations in connection with membership dues.

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procedures, not by the Board. <sup>7/</sup> We accordingly conclude that our reference of this portion of the Complaint to the Hearing Examiner without prior arbitral resolution of the contractual issue was improvident. While it may be that a failure to comply with contractual service fee obligations may so severely cripple a union as to amount to a statutory interference with the rights of employees to organize and assist a labor organization or interference with the existence or administration of a labor organization (CMPA Sec. 1-618.4(a)(1) and (2)), consideration of that question cannot begin until after a contractual determination has been made. FOP, MPD Labor Committee v. MPD, 31 DCR 2204, Slip Op. No. 72, PERB Case No. 84-U-01 (1984). Nor does it necessarily follow that the same criteria (with respect, e.g., to the need for evidence of antiunion animus) apply to failures in the statutory duty to deduct dues and failures to comply with contractual agreements covering service fees. Those issues are not presently before us, and we note them only to make clear that we do not adopt the Hearing Examiner's contrary conclusions.

For the reasons stated above, we direct the parties to their grievance-arbitration process to resolve the contractual issues that underlie any remaining claims of statutory violations. Time limits in the parties' agreement concerning the filing, processing and/or decision to arbitrate are waived to facilitate and effectuate the purposes of the CMPA. See, e.g., Teamsters Local Union No. 639 and 730, et al. v. D.C. Public Schools, 38 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1991). D.C. Code § 1-618.13. <sup>8/</sup>

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<sup>7/</sup> In FOP/MPD Labor Committee v. MPD and IBPO, Local 442 29 DCR 741, Slip Op. No. 31, PERB Case No. 81-U-09 (1982), the Board held that it lacked jurisdiction to consider the contractual rights and interests governing agency shop (i.e., service fee) deductions.

<sup>8/</sup> The Hearing Examiner made careful and extensive findings of fact as to when FOP produced evidence of Union membership to which an arbitrator may wish to refer, although not bound to do so. If a contractual violation is found, the remedy is properly determined through the grievance/arbitration procedures. We note, however, that we agree with OLRCB that the payment of service fees is primarily the obligation of employees who choose not to join the Union, and that uncollected fees are most appropriately recovered from those employees.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint allegations discussed in footnote 3 are dismissed.
2. The following issues are directed to the parties' grievance-arbitration procedure for determination.
  - (a) when the Agency became contractually obligated to deduct and remit service fees;
  - (b) the meaning of Article 4, Section 6, and its effect in the circumstances of this case;
  - (c) the appropriate remedy, if any.
3. The Board retains jurisdiction to consider the matter further upon a showing that claims of statutory violations remain viable on conclusion of the arbitration proceeding.

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

April 24, 1995