

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

)	
In the Matter of:)	
)	
Gerald G. Neill, Jr.)	PERB Case No. 10-S-04
)	
Complainant)	Opinion No. 1647
)	
v)	
)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee)	
)	
Respondent)	
)	

DECISION AND ORDER

I. Introduction

On March 15, 2010, Gerald G. Neill, Jr. (“Neill”) filed the above-captioned Standards of Conduct Complaint (“Complaint”), against the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP” or “Union”) for alleged failure to provide him with legal representation. The Complaint alleges that FOP violated “the express terms of the Labor Committee’s own bylaws.”¹ On February 4, 2012, the Board dismissed Neill’s Complaint for untimeliness. The Superior Court remanded this case to the Board and it was sent to a hearing. The Hearing Examiner’s Report and Recommendation is now before the Board for consideration.

For reasons stated below, the Board affirms the Hearing Examiner’s Recommendation that the Complaint is untimely.

II. Statement of the Case

On October 1, 2000, Neill was elected FOP Chairman. Neill created and appointed the members of the Union Attorney Selection Subcommittee (“UASS”) to find a general counsel for the Union. Prior to the creation of UASS, Neill expressed his dissatisfaction with the

¹ Complaint at 1.

performance of Ted Williams (“Williams”), the Union’s then-general counsel. Given Neill’s known sentiments, he did not actively participate in UASS.² On March 16, 2001, Neill was advised by the Chairperson of UASS that Williams would not be considered for retention as general counsel and shortly thereafter Neill terminated the Union’s agreement with Williams.³

On April 16, 2001, Williams filed suit in Superior Court against Neill and the Union’s new general counsel, Kenneth Bynum (“Bynum”) for breach of contract, tortious interference with contractual relations, and intentional infliction of emotional distress.⁴ Neill retained John Berry (“Berry”) to represent him in this lawsuit without consultation with the Union. In an undated memo from Gregory L. Greene (“Greene”), the Union’s Secretary, to Berry, Greene stated that the Union unanimously passed a motion that the Union would not support or finance the pending lawsuit against the current Chairman and others.⁵ On May 23, 2001, the Superior Court dismissed the case for failure to exhaust contractually required prerequisite remedies. Williams appealed the decision to the Court of Appeals, where the case was pending for seven years.⁶ On March 4, 2008, in an unpublished memorandum opinion and decision, the Court of Appeals affirmed the dismissal of the breach of contract claim and reversed and remanded the dismissal of Williams’ intentional tort claims.⁷

Seven months later, on October 31, 2008, Neill sent a “Request for Representation” to the Union asking the Union to pay his attorney fees and costs, “given that the issues in the lawsuit solely concern my alleged actions as FOP Chairman in terminating the services of an attorney for FOP.”⁸ The Union did not provide legal representation or pay legal fees for the attorney hired by Neill.

On November 18, 2008, Berry wrote to the then-Union Chairman and stated his client’s right to have his legal defense expenses covered pursuant to Article 17.1 of the Union’s bylaws. The Union’s current general counsel responded to Berry and refused to pay the legal expenses or provide representation.

On November 13, 2009, the Superior Court dismissed with prejudice all of Williams’ claims against Neill and Bynum. This judgment was not appealed by Williams.⁹ At this point Berry was replaced as Neill’s counsel by Matthew LeFande (“LeFande”); again no consultation with or approval by the Union.¹⁰

² Report and Recommendation at 4.

³ Report and Recommendation at 4.

⁴ Report and Recommendation at 4.

⁵ Report and Recommendation at 4.

⁶ Report and Recommendation at 4.

⁷ The Union also appealed the decision of the Superior Court, however the Court of Appeals dismissed this appeal as moot on March 4, 2008.

⁸ Report and Recommendation at 5.

⁹ Report and Recommendation at 6.

¹⁰ Report and Recommendation at 5-6.

On January 20, 2010, LeFande wrote to the Union's general counsel demanding payment for Neill's legal defense expenses in the amount of \$244, 006.90.¹¹ It is undisputed between the parties that the Union did not respond to this letter, did not provide Neill with any legal representation or reimburse him for any of his attorney fees and costs in defense of the lawsuit.¹²

On March 15, 2010, Neill filed a Standards of Conduct Complaint, against FOP for violating the Union's bylaws. On February 4, 2012, the Board dismissed Neill's Complaint for untimeliness. Neill appealed the Board's decision to the Superior Court. On December 26, 2012, the Superior Court dismissed the petition for review on procedural grounds.¹³ On June 19, 2014, the Court of Appeals reversed, and remanded the case to the Superior Court.¹⁴ On September 29, 2015, Superior Court Judge Herbert B. Dixon, Jr. (Judge Dixon) reversed the earlier decision of the Superior Court, vacated the Board's Decision and Order, and remanded the matter to the Board for further proceedings.¹⁵ Judge Dixon's directive instructs the Board to conduct "further proceedings to address issues related to the timeliness of the petitioner's (Neill's) standards of conduct complaint."¹⁶ Upon remand, the Board referred the matter to a hearing examiner.

III. Hearing Examiner's Report

On January 9, 2017, the parties agreed to the following at a status conference: (1) no further factual hearing was necessary, (2) no facts were in dispute, and (3) the Hearing Examiner would issue her Report and Recommendation based on the existing record regarding the issue on remand from the Superior Court.¹⁷

On the issue of timelines, the Hearing Examiner found that Neill's Complaint was untimely.¹⁸ The Hearing Examiner noted that nothing precludes the Union from paying for "outside-representation" of its members, free of charge, for counsel selected by the members if approved by the Union at the beginning of such representation.¹⁹ The Hearing Examiner stated that there are two prerequisites for the Union paying for such representation if requested to do so from the beginning: (1) a timely request made to the Union by the officer or sergeant for representation by someone other than paid union counsel; and (2) the attorney selected by the officer or sergeant must be qualified and knowledgeable in defending unions and their members.²⁰

¹¹ Report and Recommendation at 6.

¹² Report and Recommendation at 6.

¹³ Report and Recommendation at 2.

¹⁴ *Neill v. Dist. of Columbia Pub. Emp. Relations Bd.*, 93 A.3d 229 (D.C. 2014)

¹⁵ *Neill v. Dist. of Columbia Pub. Emp. Relations Bd.*, Civ. Case No. 2012 CA 002009 P(MPA) (D.C. Super. Ct. Sept. 29, 2015).

¹⁶ *Neill v. Dist. of Columbia Pub. Emp. Relations Bd.*, Civ. Case No. 2012 CA 002009 P(MPA) at p. 11 (D.C. Super. Ct. Sept. 29, 2015).

¹⁷ Report and Recommendation at 3.

¹⁸ Report and Recommendation at 14.

¹⁹ Report and Recommendation at 12.

²⁰ Report and Recommendation at 12.

The Hearing Examiner stated that it is undisputed that the events at issue began when Williams filed his suit against Neill on April 16, 2001. The Hearing Examiner also stated that, in May of 2001, Neill retained counsel to defend him without any request or approval by the Union and it is undisputed that Neill waited nearly seven years after he first retained counsel to request the Union's approval in an October 31, 2008 letter.²¹ This letter was sent about a year and half before Neill filed his Complaint on March 15, 2010. The Hearing Examiner found that Neill knew or should have known of the alleged violation in May of 2001, when he retained counsel without consultation or approval by the Union.

The Hearing Examiner alternatively found that Neill knew or should have known that the Union declined his request for representation on or about some time in 2001 when he was notified that the Union unanimously passed a motion that it would not support or finance the pending lawsuit.²² It is undisputed by the parties that Neill's counsel was informed of this development in an undated memo some time in 2001.²³ The memo was sent nine years before Neill filed the Complaint. Therefore the Complaint is untimely.

The Hearing Examiner further stated alternatively that Neill knew or should have known that the Union denied his request for representation on or about October 31, 2008, seven years after he first retained counsel and the Union did not provide him with legal representation.²⁴ The Hearing Examiner concluded that it is obvious from Neill's October 31, 2008 letter that he was not asking the Union for legal representation, but actually asking the Union to reimburse him for his attorneys fees and costs which at that time had been accumulating for over seven years.²⁵

Neill asserts that the allegations in his Complaint constitute one continuous violation, the refusal of the Union to provide him with representation in his defense of the lawsuit. The Hearing Examiner found that Neill's multiple attempts to obtain reimbursements up to January 20, 2010, cannot extend the statute of limitations by being construed as separate and distinct causes of action. A distinction is made by the Hearing Examiner between the Union's failure to reimburse Neill for attorney's fees and the Union's failure to represent Neill in breach of Article 17.1 of the Union's bylaws. The attorney's fees and costs are merely a remedy to his cause of action, which is the Union's alleged failure to provide legal representation, pursuant to its bylaws. The statute of limitations is activated by the violation not the alleged damages resulting from the violation.²⁶

The Hearing Examiner further disagreed with Neill's assertion that filing deadlines are just claim-processing rules that can be waived by the opposing party or equitably tolled. Under the CMPA, the Board has been given a great deal of authority and is deferred to by courts in all

²¹ Report and Recommendation at 12.

²² Report and Recommendation at 14.

²³ Report and Recommendation at 13.

²⁴ Report and Recommendation at 14.

²⁵ Report and Recommendation at 18.

²⁶ Report and Recommendation at 14.

CMPA matters, including determinations as to what makes a jurisdictional demand. The Hearing Examiner found that Rule 544.4 is not a claim-processing rule.²⁷

Neill also asserts that the Union waived any jurisdictional defect by participating in proceedings from the filing of the Complaint on March 15, 2010, until it filed its Motion to Dismiss for Untimeliness on July 26, 2011, more than a year later.²⁸ The Hearing Examiner states that Union did not delay in asserting the issue of timeliness. The Union's Answer to the Complaint clearly states that that the Complaint ripened as of December 10, 2008, when the Union denied Neill's request for the payment of fees.²⁹

Finally, the Hearing Examiner and both parties agree that the issue of whether Neill has a right to a jury trial under the Seventh Amendment to the United States Constitution is a matter for the Superior Court to resolve, if necessary.³⁰

IV. Discussion

A. Standard of Review

The Board reviews a Hearing Examiner's Report and Recommendation even if no exceptions are filed to determine whether the analysis and conclusions are reasonable, supported by the record and consistent with Board precedent. Issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the hearing examiner.³¹ Mere disagreements with the hearing examiner's findings and citation of competing evidence do not constitute proper exceptions if the record contains evidence supporting the hearing examiner's conclusions.³² Both parties agreed that no facts were in dispute and neither party filed exceptions to the Hearing Examiner's Report.

The Superior Court found that "PERB's final decision and order does not explicitly state or even allude to the exact date the Board found the petitioner's standards of conduct accrued."³³ Specifically, Judge Dixon concluded that: "PERB's final decision and order neither points to a discreet date or act triggering the commencement of PERB Rule 544.4's 120-day filing period nor engages in any meaningful discussion concerning when and how the petitioner was placed on

²⁷ We disagree with the Hearing Examiner's conclusion that PERB Rule 544.4 is not a "claim-processing rule". FOP properly raised PERB Rule 544.4 in their Answer to the Complaint. However, because this case is decided on different grounds, we decline to address it further in this decision.

²⁸ Report and Recommendation at 17.

²⁹ Report and Recommendation at 17.

³⁰ Report and Recommendation at 17.

³¹ *FOP/MPD Labor Comm. v. MPD* 62 D.C. Reg. 3544 Op. No. 1506, PERB Case No. 11-U-50(a) (2015).

³² *Brinkley v. FOP/MPD Labor Comm., District 20, Local 2087*, 60 D.C. Reg. 17387, Op. No. 1446, PERB Case No. 10-U-12 (2013).

³³ *Neill v. Dist. of Columbia Pub. Emp. Relations Bd.*, Civ. Case No. 2012 CA 002009 P(MPA) (D.C. Super. Ct. Sept. 29, 2015).

notice of his complaint against the police labor union."³⁴ The only issue before the Board is whether the Complaint is timely.

B. Timeliness

According to PERB Rule 544.4, standards of conduct complaint “shall be filed no later than one hundred and twenty (120) days from the date the alleged violation(s) occurred.” We agree with the Hearing Examiner that Neill should have known the Union declined his request for representation sometime in 2001. Even though Neill retained counsel without consultation or approval by the Union, we adopt the Hearing Examiner’s factual finding that on July 31, 2001, the Union passed a unanimous motion not to support or finance the pending lawsuit and shortly thereafter Neill’s counsel received a memo informing him of the Union’s action.³⁵ This fact is undisputed. Both Parties agree that a memo, even though undated, was received by Neill after that vote in 2001. These events occurred nine years before Neill filed his standards of conduct complaint, well outside the 120-day deadline.³⁶

The 120-day time period for a union member to file standards of conduct complaint begins once that union member has received an unequivocal statement from his union that he will not be represented or have any representation he secures paid for.³⁷ In this case, the unequivocal statement was the undated memo from the Union Secretary to Neill’s counsel in 2001. The memo stated clearly that the Union would not “support or finance the pending lawsuit against the current Chairman G.G. Neill Jr. and others.” The Union has not at any point afterwards stated that they would support this lawsuit or provide Neill with representation. The Board adopts the Hearing Examiner’s finding that Neill knew or should have known of the alleged violation some time in 2001 when he received the undated memo.

We also reject the argument that the allegations in Neill’s complaint constitute one “continuing violation” that continued until the dismissal of the Williams lawsuit on November 13, 2009. Even assuming *arguendo* that this was true, Neill’s complaint is still untimely because this complaint was filed on March 15, 2010; 122 days after Neill would have known of the dismissal. Similarly, Neill’s attempts to obtain reimbursement cannot be used to establish a “continuing violation”. As the Hearing Examiner stated, these attempts were no more than a remedy to his cause of action; not separate and distinct causes of action which would extend the filing limitation.

³⁴ *Neill v. Dist. of Columbia Pub. Emp. Relations Bd.*, Civ. Case No. 2012 CA 002009 P(MPA) (D.C. Super. Ct. Sept. 29, 2015).

³⁵ The Parties agreed that there were no factual disputes and this fact was uncontested at the hearing and was not challenged through exceptions.

³⁶ The Hearing Examiner also found that it was clear from Neill’s October 31, 2008 letter that he knew he would not receive legal representation from the Union and only sought reimbursement for this alleged violation. These facts are undisputed by the parties and all of these dates occurred well outside the 120-day filing deadline for a standards of conduct complaint.

³⁷ *Neill v. Dist. of Columbia Pub. Emp. Relations Bd.*, Civ. Case No. 2012 CA 002009 P(MPA) (D.C. Super. Ct. Sept. 29, 2015).

C. The December 10, 2008 Letter

The Superior Court noted that the Union's December 10, 2008 letter appears to contradict the 2001 memo.³⁸ This letter from the Union responds to Neill's request that the Labor Committee reimburse his legal expenses. The letter states:

The remanded case addresses only Mr. Williams' claims in tort that Mr. Neill's actions towards him were malicious and intentional, and therefore undertaken by Mr. Neill in his individual capacity and interest rather than for the benefit and goals of the Labor Committee. If Mr. Williams is successful, then Mr. Neill necessarily would not be shielded from personal liability based on his status as Chairman of the Labor Committee, nor would he be entitled to legal protection by the Labor Committee.

The letter does not state that the Labor Committee would pay for Neill's legal expenses if he prevailed against Williams. There are situations in which the Union may approve legal representation for Neill, as he was the FOP Chairman. However in this case, legal representation was already denied in 2001 and this letter further states that reimbursement would be inappropriate as the claims address actions taken by Neill in his individual capacity.

V. Conclusion

The Board adopts the Hearing Examiner's Recommendation that Neill knew or should have known of the alleged violation some time in 2001. The Board finds that Neill's Complaint is untimely under PERB Rule 544.4, therefore it should be dismissed and no findings need to be made regarding the underlying merits of the Complaint.

³⁸ *Neill v. Dist. of Columbia Pub. Emp. Relations Bd.*, Civ. Case No. 2012 CA 002009 P(MPA) (D.C. Super. Ct. Sept. 29, 2015).

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 unanimous vote of Board Chairperson Charles Murphy, Members Mary Anne Gibbons, Ann Hoffman, Barbara Somson and Douglas Warshof.

December 21, 2017

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-S-04, Op. No. 1647 was sent by File and ServeXpress to the following parties on this the 27th day of December, 2017.

Brenda C. Zwack
1401 K St., NW, Suite 300
Washington, DC 20005

Herman R. Brown
DC Office of Labor Relations and
Collective Bargaining
441 4th St., NW, Suite 820N
Washington, DC 20001

/s/ Sheryl Harrington
PERB