

Notice: This decision may be form revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any formal 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:)
)
)
)
)
William Dupree)
)
and) PERB Case Nos. 98-S-08
) and 98-S-09
Carlton Butler,)
) Opinion No. 605
Complainants,)
)
v.)
)
Fraternal Order of Police/)
Department of Corrections)
Labor Committee, et al.,)
)
Respondents.)

DECISION AND ORDER

These Standards of Conduct Complaints are the latest in a series of actions filed over the past four (4) years by former/current executive board officers and members of the Fraternal Order of Police/Department of Corrections Labor Committee (FOP). The Complaints charge the current majority faction of Respondent FOP's executive board with violating the Comprehensive Merit Personnel Act's (CMPA) standards of conduct for labor organizations as codified under D.C. Code § 1-618.3(a). Specifically, Complainants Carlton Butler and William Dupree assert that FOP's executive board violated the CMPA by improperly using their executive office authority to discriminate against dissident FOP members or eliminate opposition by the Complainants. These charges stem from alleged improprieties committed by FOP with respect to its last March 1998 executive board election.

Carlton Butler filed the Complaint in PERB Case No. 98-S-

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09.^{1/} Most of the Complaint in PERB Case No. 98-S-09 was administratively dismissed by the Board's Executive Director.^{2/} The remaining claim in PERB Case No. 98-S-09 and the Complaint filed by Mr. Dupree in PERB Case No. 98-S-08 contained related allegations concerning election improprieties and retaliation by FOP.^{3/} As a result, the Complaints were consolidated for hearing and disposition.

On May 21, 1999, the Hearing Examiner issued her Report and Recommendation. The Hearing Examiner decided a threshold issue concerning the parties' "burden of proof" in a standards of conduct case. The Hearing Examiner applied the general rule of evidence and the Board's Rule in unfair labor practice proceedings in order to reach her conclusion that the ultimate burden of proof rests with the Complainants in a standards of conduct proceeding. (R&R at 13.)^{4/}

The Hearing Examiner concluded that the "Complainants presented insufficient evidence to establish standards of conduct violations on the charges pertaining to the adequacy of the time period permitted to file election challenges, the [improper] use of Union funds during the election process, the pre-election challenges raised in the Butler Complaint, and the involvement of [FOP's attorney] in the election process." (R&R at 13-14.) However, the Hearing Examiner found that FOP violated the standards of conduct by allowing its Chairman to: (1) engage in election committee activities; and (2) improperly participate in the election process. In addition, the Hearing Examiner concluded that the involvement of FOP's incumbent/candidate chairman in the election process undermined the statutory mandate to conduct union elections democratically and fairly. The Hearing Examiner also found that FOP's failure to provide adequate notice concerning the election nomination meeting

^{1/} Mr. Butler is a former vice-chairperson of FOP's executive board.

^{2/} Mr. Butler did not file a motion for reconsideration.

^{3/} William Dupree alleged in his Complaint that FOP and its chairman, Clarence Mack, violated D.C. Code § 1-618.3(a)(1), (4) and (5). He also charged FOP with retaliation.

^{4/} The Hearing Examiner cited *James, Civil Procedure (1965 Ed.)*, pp. 248-266. The Hearing Examiner's ruling is also consistent with Board precedent. See, e.g., Ernest Durant v. FOP/DOC Labor Committee, Slip Op. No. 430, PERB Case No. 94-U-18 and 94-S-02 (1995).

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constituted a standards of conduct violation. The Hearing Examiner recommended relief based on the violations found.

On June 14, 1999, Exceptions to the Hearing Examiner's Report and Recommendations were filed by all the parties. Complainant Butler and FOP also filed Responses to the Exceptions.

Pursuant to D.C. Code § 1-605.2(9) and Board Rule 544.7, we have reviewed the findings of fact and conclusions of law. We deny, in part, and grant, in part, the Exceptions filed by FOP; and deny the Complainants' exceptions.

FOP's Exceptions

1. FOP excepts to the Hearing Examiner's failure to recommend dismissal of the only remaining allegation in PERB Case No. 98-S-09. The allegation remaining in PERB Case No. 98-S-09 charged that FOP violated the standards of conduct by failing to respond to Complainant Butler's internal challenge to the election. The Hearing Examiner determined that Complainant Butler "did not offer evidence at the proceeding on this issue." Therefore, she concluded that this charge was not established. (R&R at 13-14.) The Hearing Examiner's conclusion is supported by the record.

Although the Hearing Examiner did not expressly recommend dismissal of the remaining allegation, that is the effect of her findings and conclusions. As such, we grant this exception and formally dismiss the Complaint in PERB Case No. 98-S-09.

2. FOP next asserts that Complainant Dupree's failure to pursue a challenge through available internal election proceedings renders his CMPA claim unripe. Relying on Hodgston v. United Steelworker, Local 6799, 403 U.S. 333 (1971). That case addresses the authority of the U.S. Secretary of Labor to consider challenges to internal union election proceedings under Section 402(b) of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA).^{5/} Section 402(b) of the LMRDA empowers the

^{5/} Section 402(b) of the LMRDA provides as follows:

The Secretary [of Labor] shall investigate such complaints and, if it finds probable cause to believe that a violation of this title has occurred and has not been

(continued...)

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Secretary of Labor to act upon a union member's complaint concerning an internal union election so long as the union member has first attempted to seek relief through internal union avenues.

The CMPA does not contain a similar provision which establish prerequisites to the Board's jurisdiction concerning standards of conduct complaints. Moreover, the Board has held that "[p]rior exhaustion of internal union redress procedures is not required if union conduct violates labor policies as set forth under the CMPA." Deborrah Jackson, et al. v. American Federation of Government Employees, Local 2741, AFL-CIO, Slip Op. No. 414 at p. 3, PERB Case No. 95-S-01 (1995). See, also Fraternal Order of Police/MPD Labor Committee v. Public Employee Relations Board, 516 A.2d 501 (1986).

In Fraternal Order of Police/MPD Labor Committee v. Public Employee Relations Board, supra, the D.C. Court of Appeals held that unions may require under their by-laws that members exhaust available internal complaint processes before litigating against the union. However, the Court further observed that such requirement is not enforceable if unions "violate clearly expressed labor policy" such as those prescribed under the CMPA's standards of conduct. (Citing, Chamber v. Local Union No. 639, 578 F.2d 375 (1978)).^{6/} The Court found that "[t]he [CMPA] and the rules adopted by the Board express a clear intent that alleged violations of the CMPA's standards of conduct for labor organizations be promptly brought to the Board's attention." Fraternal Order of Police/MPD Labor Committee v. Public Employee

⁵(...continued)

remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the District Court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote on the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. (Emphasis added.)

^{6/} The Board has previously found that challenges to the conduct of an internal union election can properly give rise to the labor policies that are expressly provided under the CMPA's standards of conduct for labor organizations, i.e., "Fair elections" under D.C. Code § 1-618.3(a)(4). See, Ellowese Barganier, et al. v. FOP/DOC Labor Committee, 46 DCR 6273, Slip Op. No. 484, PERB Case No. 95-S-02 (1996).

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Relations Board, supra. In addition the Court held that "in view of this unambiguously expressed intent ... an individual need not exhaust available Union remedies before seeking the Board's services." Id.

Since the instant allegations assert violations of labor policies proscribed under the CMPA's standards of conduct, no basis exists for extending the requirements of Section 402(b) of the LMRDA to decline jurisdiction over the Complaint. We therefore deny this exception.

3. FOP contends that its Chairman's participation in the election process does not support the conclusion that any recognized standard under the CMPA was undermined. FOP claims that the Chairman's election activities were no more than "politically neutral, administrative chores associated with the election." (FOP Obj. at p. 4.) Therefore, the Chairman's activity did not violate any by-law. As a result, FOP asserts that the Hearing Examiner's conclusion is arbitrary and should be rejected.

The Hearing Examiner found the FOP Chairman's election activity did not violate the FOP by-law prohibiting candidates from serving as a member of the election committee. However, the Hearing Examiner found that the Chairman's role in determining the location of the nomination meeting and distributing the election rules and notices to certain facilities ~~and~~ made the Chairman a de facto member of the election committee. This constituted a violation of the by-laws. She concluded that the Chairman's participation in the election process while a candidate for re-election created a conflict of interest that undermined FOP's obligation "to insure free and democratic union elections" and "offset some of the inherent advantages [of] incumbents". (R&R at 16.) The Hearing Examiner concluded that such action violated the standards of conduct.^{7/}

^{7/} Standards of conduct for labor organizations prescribed under D.C. Code § 1-618.3(a)(1) and (4) provide as follows:

Section 1-618.3(a)(1)

The maintenance of democratic provision 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
(continued...)

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However, the Hearing Examiner did not find that FOP Chairman Mack or other candidates distributed the election notices or rules improperly or in a manner that unfairly injured the Complainant or benefitted themselves. We have held that the mere breach of union by-laws or constitution is not, standing alone, sufficient to find a standards of conduct violation. William Corboy, et al. v. FOP\MPD Labor Committee, Slip Op. No. 391, at n. 3, PERB Case No. 93-S-01 (1994). We have also held that there must be evidence of actual injury resulting from the alleged impropriety to grant remedial relief for a standards of conduct violation. Ernest Durant v. FOP\DOC Labor Committee, Slip Op. No. 430, at n. 2, PERB Case No. 94-U-18 (1995) (The underlying conduct concerned internal union election improprieties). The Hearing Examiner's findings with respect to Chairman Mack's election activities establishes only a de facto violation of FOP's by-laws. Without injury this fails to establish a violation.

4. FOP excepts to the Hearing Examiner's discussion of its attorney's role in the election process "to the extent [that] her discussion ... rose to the level of a 'finding'..." The Hearing Examiner observed that the involvement of FOP's attorney in the election process "presented a troublesome situation reflecting questionable judgement on the Respondent's part". (R&R at 14-15.)⁸/ FOP takes issue with the Hearing Examiner's conclusion that its attorney's involvement was "troublesome." FOP asserts that its attorney was merely providing the kind of legal advice for which he was employed and objects to the Hearing Examiner's characterization.

⁷(...continued)

the governing rules of the organization, and to fair process in the disciplinary proceedings.

Section 1-618.3(a)(4)

Fair elections

⁸/ The Hearing Examiner found that FOP's attorney issued a letter to FOP's executive board stating that "as an attorney for the Labor Committee, [his] only client during the upcoming elections [would] be the Union and its election committee... not any individual candidate." (R&R at 12.) The Hearing Examiner did not make any finding that established that FOP's attorney deviated in any manner from this declaration of ethical fidelity to serve the general interest of FOP and its authorized election committee.

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With respect to PERB Case No. 98-S-08, the Hearing Examiner made no findings or conclusions concerning whether FOP employed its attorney in a manner that injured the Complainants or was otherwise improper in his capacity as FOP's attorney. Moreover, the Hearing Examiner concluded that the activities of FOP's attorney did not constitute a standards of conduct violation. (R&R at 15.) Therefore, we reject those findings made by the Hearing Examiner which are not material to the determination of a violation. We believe the hearing examiner erred in suggesting conduct not violative of the CMPA could be sanctioned. To this extent, FOP's exception is granted.

5. FOP excepts to the Hearing Examiner's finding that it did not provide adequate notice of the nomination meeting. The Hearing Examiner credited Complainant Dupree and other officers' account that they did not receive notification of the nomination meeting at their work location until the afternoon of the meeting and therefore no one from Dupree's facility had time to attend or participate in the meeting. (R&R at 16.) FOP concedes that the 30-day notice requirement was not met and provided no evidence that officers at Complainant Dupree's facility ever received notice.

FOP asserts that Complainant must have known of the nomination meeting because he was closely associated with individuals who knew about the meeting failed to present evidence that would establish that Dupree had actual notice of the meeting. The Hearing Examiner refused to make the "leap of faith required by [FOP's] allegation regarding who may have told Dupree or any bargaining unit member at CCC #4 of the meeting". (R&R at 17.) It is well settled that exceptions that challenge a hearing examiner's findings based on (1) competing evidence; (2) the probative value accorded the evidence; or (3) the credibility resolution made, do not give rise to a proper exception where, as here, the record contains evidence supporting the Hearing Examiner's findings. (R&R at 16-17.) See, Clarence Mack v. D.C. Dept of Corrections, 43 DCR 5136, Slip Op. No. 467, PERB Case 95-U-14 (1996) and American Federation of Government Employees, Local 872 v. D.C. Dept of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991).

FOP also contends that these findings do not support a standards of conduct violation. We have held in a previous case involving this Respondent that FOP violated the standards of conduct when its executive officers improperly denied a member "fair and equal treatment 'by not permitting him to participate in any meaningful or otherwise appropriate manner in the internal union affairs at a [] membership meeting.'" Clarence Mack, et

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al. and Ellowese Barganier, et al. v. FOP/DOC Labor Committee, 46 DCR 110, Slip Op. No. 507, at p. 1, PERB Case No. 05-S-03 and 95-S-02 (1997).

The Hearing Examiner found that Complainant Dupree, a prospective candidate, was actually aggrieved when he did not receive notice in time to attend the required nomination meeting.

These findings coupled with the Hearing Examiner's undisputed finding that Mr. Mack knew of Dupree's intent to run for office, clearly establishes the standards of conduct violation. (R&R at 8 and 15.) In view of the above, this exception is denied.

6. FOP's final exception contends that the recommended remedy is overly expansive. FOP asserts that elections conducted by third parties would "impermissibly obliterate" FOP's internal election procedures "which were not found to be inconsistent with the CMPA." FOP further asserts that the remedy would "undermine responsible self government... after years of.... illegal conduct by former administrations." (FOP's Except. at 10.)

The Hearing Examiner recommended that: (1) the next two executive board elections be conducted by a neutral third party under the supervision of the Board; (2) the neutral third party be responsible for providing notices to members concerning the nomination meeting and election; (3) that the neutral third party be responsible for developing and distributing election rules; and (4) That the neutral third party be responsible for resolving both pre- and post-election challenges. In addition, the Hearing Examiner recommended that FOP's executive board, election committee members and attorney be excluded from participating in the election process except as candidates.^{9/}

We have once before provided relief involving standards of conduct violations arising from a union's conduct concerning an internal union election. In Ellowese Barganier, et al. v. FOP/DOC Labor Committee, 43 DCR 2949, Slip Op. No. 464, PERB Case No. 95-S-02 (1996) (hereinafter, Barganier), we concluded that an FOP member and candidate for union office was prevented from participating in an internal union election as a direct result of standards of conduct violations committed by FOP's then-incumbent executive board. We set aside the initial election and directed that a new election be administered by a neutral third party

^{9/} In view of the Hearing Examiner's conclusions that the challenged activities of FOP's attorney did not constitute a standards of conduct violation, the exclusion of FOP's attorney from participation in the next two executive board election lacks any basis.

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under our supervision.

The violations in Barganier differ significantly from the violations we find here. In Barganier, the complainant was a "duly nominated candidate" for office. Whereas in the instant case, Dupree was not a duly nominated candidate when FOP's violation occurred. In addition, FOP's violation, i.e., -failure to provide adequate notice of the nomination meeting to Dupree, and others at his work location- did not disqualify the Complainant's existing candidacy or extinguish an existing right to appear on the ballot. As such, we do not find the extraordinary relief accorded in Barganier to be appropriate given the facts and violation found in this case.

We agree that the relief recommended by the Hearing Examiner is too broad. In the instant case, no violation was found with respect to the conduct of the election itself, which was conducted by a neutral third party, i.e., AAA. Nor was it determined that FOP's by-laws, as prescribed, violate the standards of conduct. However, to address the violations found and to further ensure the propriety of the next election, we find it appropriate that FOP be directed to: (1) adhere to the schedule provided under its by-laws with respect to conducting the next executive board election (including pre- and post-election requirements); (2) issue notice of the nomination requirements and date and time of the nomination meeting to each eligible FOP member before holding the nomination meeting; and (3) engage a neutral third-party to, at a minimum, conduct the tally of ballots. Furthermore, candidates for election are prohibited from being a member of the election committee.

Complainant Dupree's Exceptions

1. Complainant Dupree, objects to the Hearing Examiner's failure to recommend that: (1) the disputed election be overturned and (2) the actions of the prevailing executive board from that election be invalidated. Dupree asserts that the effects of FOP's failure to provide notice of the nomination meeting precluded him and possibly others from their right to participate in the disputed election. For the reasons discussed under FOP's Exception 6, we find that setting aside the March 1998 executive board election is inappropriate to redress the violations found. The effect of setting aside and re-running the election would be no different than Complainant Dupree running in

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the next regularly- scheduled election.^{10/} For the reasons stated, the exception is denied.

2. Complainant Dupree excepts to the Hearing Examiner's failure to address his request for costs in the recommended remedy. This appears to have been an oversight by the Hearing Examiner. We recently addressed the issue of awarding cost in standard of conduct case involving FOP. Carlton Butler, Ernest Durant, et al. v. FOP/DOC Labor Committee, Slip Op. No. 580 & 587, PERB Case No. 99-S-02 (1999) There, we awarded FOP its costs against the unsuccessful Complainants. The Board based its decision to award costs on the interest of justice standard. One of the relevant factors used by the Board was the Hearing Examiner's findings that the charges stemmed from political infighting among past and incumbent FOP officers and not a valid belief in the alleged violations that were found to be totally without merit. In contrast, Complainant Dupree failed to prevail on all but one of the Complaint allegations. In view of the finding, conclusions and disposition of the Complaint allegation, we do not find our standard for awarding cost (set forth in the margin below) has been met.^{11/} We therefore deny Complainant Dupree's request for an award of costs.

^{10/} Complainant Dupree also sought to set aside all union actions by Chairman Mack since he gained office in the challenged executive board election. However, we have held that the effect of setting aside an internal union election would not void past or interim administrative and operational actions taken by the incumbent administration. Ellovese Barganier, et al. v. FOP/DOC Labor Committee, 43 DCR 2949, Slip Op. No. 464, PERB Case No. 95-S-02 (1996).

^{11/} In AFSCME, D.C. Council 20, Local 2776 v. D.C. Dept of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990), the Board observed:

[W]e believe such an award must be in the interest of justice. Just what characteristics of a case will warrant the finding that an award of cost will be in the interest of justice cannot be exhaustively catalogued. We do not believe it possible to elaborate in any one case a complete set of rules or earmarks to govern all cases, nor would it be wise to rule out such awards in circumstances that we cannot foresee. What we can say here is that among the situations in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among employees for whom it is the exclusive bargaining representative. (Emphasis added.) Slip Op. at p. 7.

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Complainant Butler's Exceptions

Complainant Butler is the Complainant in PERB Case No. 98-S-09. The Hearing Examiner dismissed the only allegation in that case referred to her for hearing, i.e., that FOP failed to respond to Butler's internal union objection to the disputed election. (See discussion of FOP Except. 1.) Complainant Butler's exception make no discernable objection to the Hearing Examiner's disposition of this allegation.

Rather, the assertions are general and concern the claims made in PERB Case No. 98-S-08. Board Rule 556.3 requires that precise and specific exceptions be made to a Hearing Examiner's Report and Recommendation. Complainant Butler's "exception" is a narrative of his assertions concerning the allegations in PERB Case No. 98-S-08, in order to support a remedy that he believes is warranted. We have adequately addressed specific issues properly raised by Complainant Dupree and FOP concerning the violations established by the evidence. Moreover, Complainant Butler is not a party in PERB Case No. 98-S-08. Therefore, he lacks standing to file exceptions to the disposition of the allegations made in that case. Board Rule 556.3. As a result, we find no basis for Complainant Butler's exception.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint in PERB Case No. 98-S-09 is dismissed.
2. The Fraternal Order of Police/Department of Corrections Labor Committee (FOP), and its officers and agents, shall cease and desist from failing to maintain recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization under the governing rules of FOP to Complainant William Dupree and other members of the FOP/DOC Labor Committee by failing to provide adequate notice of the FOP's executive board election nomination meeting in violation of the Comprehensive Merit Personnel Act's (CMPA) standards of conduct for labor organizations as codified under D.C. Code § 1-618.3(a)(1).
3. FOP, and its officers and agents, shall cease and desist from failing to adopt, subscribe, or comply with the standards of conduct for labor organizations prescribed under the CMPA in any

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like or related manner.

4. FOP shall: (1) adhere to the schedule provided under its by-laws with respect to conducting the next executive board election (including pre- and post-election requirements); (2) issue notice of the nomination requirements and date and time of the nomination meeting to each eligible FOP member before holding the nomination meeting; and (3) engage a neutral third-party to conduct the tally of ballots.

5. FOP shall post conspicuously within ten (10) days from the service of this Opinion the attached Notice where FOP notices to employees are normally posted.

6. FOP shall notify the Public Employee Relations Board (PERB), in writing, within fourteen (14) days from the date of this Order that the Notice to Members have been posted accordingly and as to the steps it has taken to comply with the directives in paragraphs 4 and 5 of this Order.

7. Complainant Dupree's request for reasonable costs incurred in processing PERB Case No. 98-S-08 is denied.

8. Pursuant to Board Rule 559.1, and for purposes of D.C. Code § 1-618.13(c), this Decision and Order is effective and final upon issuance.

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

December 3, 1999

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Cases Nos. 98-S-08 and 98-S-09 was mailed (U.S. Mail) to the following parties on this the 3rd day of December, 1999.

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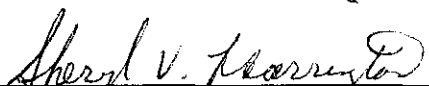
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NOTICE

TO ALL EMPLOYEES REPRESENTED BY THE FRATERNAL ORDER OF POLICE/DEPARTMENT OF CORRECTIONS LABOR COMMITTEE, AT THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS: THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 605, PERB CASE NO. 98-S-08.

WE HEREBY NOTIFY our bargaining unit members that the Public Employee Relations Board has found that the Fraternal Order of Police/Department of Corrections Labor Committee (FOP) violated the standards of conduct for labor organizations and, thereby, the law, and has ordered us to post this notice.

WE WILL cease and desist from failing to maintain recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization under the governing rules of FOP to union member William Dupree and other members of the FOP/DOC Labor Committee by: (a) failing to provide adequate notice of the FOP's executive board election nomination meeting; and, (b) otherwise violating the Comprehensive Merit Personnel Act (CMPA) standards of conduct for labor organizations as codified under D.C. Code § 1-618.3 (a)(1).

WE WILL NOT, in any like or related manner fail to adopt, subscribe, or comply with the standards of conduct for labor organizations prescribed under the Labor-Management sub-chapter of CMPA.

Fraternal Order of Police/
Department of Corrections Labor
Committee,

Date: _____ By: _____
Chairperson

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning the Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 717-14th Street, N.W. 11th Floor, Washington, D.C. 20005. Phone: 727-1822.