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

In the Matter of:	)	
	)	
Thomas C. Brown,	)	
	)	
Complainant,	)	
	)	PERB Case No. 08-U-75
v.	)	
	)	Opinion No. 983
District of Columbia Public Schools,	)	
Division of Transportation,	)	<b>Motion for Reconsideration</b>
	)	
and	)	
	)	
American Federation of State, Country and	)	
Municipal Employees, District Council 20,	)	
Local 1959,	)	
	)	
Respondent.	)	
	)	

**DECISION AND ORDER**

**I. Statement of the Case**

This matter involves a Motion for Reconsideration filed by Thomas C. Brown ("Complainant"). The Complainant is requesting that the Board reverse the Executive Director's administrative dismissal of his Unfair Labor Practice Complaint.

The Complainant filed an Unfair Labor Practice Complaint ("Complaint") against the District of Columbia Public Schools, Division of Transportation ("Agency" or "DCPS") and the American Federation of State, County and Municipal Employees, District Council 20, Local 1959 ("Union" or "Local 1959").<sup>1</sup> The Complainant asserted that DCPS violated the Comprehensive Merit Personnel Act ("CMPA") as codified at

<sup>1</sup> Collectively, the Agency and the Union are referred to as the "Respondents".

D.C. Code § 1-617.04 (2001 ed.), by: (1) terminating Complainant's employment in October 2006 and (2) failing to reinstate him as required by a February 2007 "verbal [settlement] agreement". (Compl. at pgs. 13 and 20). In addition, the Complainant asserted that Local 1959 violated D.C. Code § 1-617.04 (2001 ed.) by "refusing to arbitrate [his] termination and subsequent reinstatement to . . . employment as a transportation driver with the DCPS Division of Transportation." (Compl. at p. 20.)

By letter dated September 30, 2008, the Board's Executive Director dismissed the Complaint as it was not timely filed and failed to state a claim under the CMPA. (See Sept. 30, 2008 letter at p. 1). On October 29, 2008, the Complainant submitted a motion for reconsideration pursuant to Board Rule 500.4. DCPS opposed the motion.<sup>2</sup> The Complainant's Motion and DCPS' Opposition are before the Board for disposition.

## II. Administrative Dismissal of the Complaint

The Complainant was terminated from his position on or about October 3, 2006. (See Complaint at pgs. 9-10). In February 2007, at a Step II grievance meeting, DCPS verbally agreed that the Complainant was wrongfully terminated and agreed to reinstate him to his position. (See Compl. at p. 13). On February 5, 2007, the Complainant was fingerprinted in anticipation of his return to work. (See Compl. at p. 14). This process resulted in an erroneous "computer hit against his background check resulting in an ineligible hire status". (Compl. at p. 14). On or about April 19, 2007, the Union President advised the Complainant to "start working and . . . let things fall into place. [The Complainant] was told he would receive back pay, etc. up [to the time of] the computer hit on April 23, 2007, and that the back pay starting from the computer hit up to the present time would be dealt with later." (Compl. at p. 15). The Complainant requested this information in writing.

On May 1, 2007, the Complainant reported for a physical examination in anticipation of his return to work and, on May 4, 2007, he "reported to the Penn Center safety and training unit to meet with Mr. Jason Campbell, who verbally asked the Complainant if he was ready to return to work. . . . [The Complainant] was unaware of Mr. Campbell being Operations Manager for the safety and training unit when [he] responded [that] he would first have to check with the union and receive something in writing guaranteeing back pay and seniority, etc. [O]n May 18, 2007, Mr. Pettigrew, Chief Operating Officer sent the union's business agent . . . a letter concerning [the Complainant's] employment status, that the complainant was unaware of until February 28, 2008." (Compl. at pgs. 16-17).

<sup>2</sup>

The Union did not file an Opposition.

On September 17, 2008, the Complainant filed an unfair labor practice complaint alleging that Respondents violated the CMPA. The September 17, 2008 submission was filed approximately twenty-three months after the May 4, 2007 alleged reinstatement.

The Executive Director determined that the September 17, 2008 filing exceeded the 120 day requirement in Board Rule 520.4. (See Sept. 30, 2008 letter at p. 2). The Executive Director noted that "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.<sup>3</sup> Moreover, 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."<sup>4</sup> (Sept. 30, 2008 letter at p. 2). In addition, the Executive Director determined that "[n]otwithstanding its untimeliness, the . . . Complaint [did] not contain allegations which [were] sufficient to support a statutory cause of action under D.C. Code § 1-617.04(a)(1), (3), (4) and (5) (2001 ed.)."<sup>5</sup> (Sept. 30, 2008 letter at p. 3). In view of the above, the Executive Director dismissed the Complaint.

### III. Complainant's Motion for Reconsideration

On October 29, 2008, the Complainant filed a document styled "Petition[er's] Request [for] Reconsideration to the Board [and] Review of Executive Director Julio A. Castillo's Determination" ("Motion for Reconsideration" or "Motion") seeking review of the administrative dismissal. The Complainant alleges that the "problem in calculating the deadline for filing his [Complaint] . . . was solely caused by the Respondents who failed to provide Mr. Brown with anything in writing . . . as to what they were doing. . . ." (Motion at pgs.1-2). The Motion further asserts that "a violation occurred between the [R]espondents during their one-way communication by means of Chief Pettigrew's May 18, 2007 letter from [DCPS] to the [Union] concerning the [C]omplainant's employment. Mr. Brown was unaware of such a letter which resulted [in his] being unable to file [a] timely [Complaint]." (Motion at p. 4).<sup>6</sup> The Complainant argues that his Complaint was

<sup>3</sup> See, *Glendale Hoggard v. District of Columbia Public Employee Relations Board*, 655 A.2d 320, 323 (D.C. 1995) and *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991).

<sup>4</sup> *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).

<sup>5</sup> See Sept. 30, 2008 letter at pages 3-7.

<sup>6</sup> Furthermore, the Complainant contends that the Respondents "were both negligent and they conspired with each other to cause Mr. Brown harm denying the duty of fair representation by the breach of contract agreement between the two as it related to Article XXIII Discrimination (A), (B) and (C),

timely filed, based on his late discovery of the May 18, 2007 letter. With the exception of this new argument,<sup>10</sup> the arguments in the Motion were also made in the Complaint.

DCPS counters in its Opposition that the “Complainant still fails to state an actionable claim against the Division of Transportation or to demonstrate that the charge in this matter was timely filed.” (Opposition at p. 1). Specifically, with regard to the alleged violation of D.C. Code § 1-617.04(a), DCPS contends that “the Complainant has no standing to allege a failure to bargain in good faith (and does not allege facts sufficient to state such a claim in any event), nor has he even alleged any link between union activity or other protected activity and either his separation or the Division’s refusal to reinstate him. Finally, the Complainant fails to point to any evidence that [DCPS] actions were motivated by [the] . . . intent to encourage or discourage membership in any labor organization and, once again, doesn’t even allege such a connection. . . . [T]here is no allegation that the Complainant’s rights under D.C. Code §§ 1-617.06(a) or (b) have been violated, and for this additional reason the charge was properly dismissed.” (Opposition at pgs. 2-3).

The Complainant filed a Response to DCPS’ Opposition (“Response”) which reiterated that “both Respondents refused to provide information requested by [C]omplainant concerning his wrongful discharge and grievance.” (Response at pgs. 1-2). “[T]he Division of Transportation management violated their duty to bargain in good faith, while the AFSCME Local 1959 Union[’s] deliberate and willful acts constituted an unfair labor practice under the CMPA by not filing for any type of relief after receiving corresponden[ce] that jeopardized [C]omplainant’s employment.” (Response at p. 3).

#### **IV. Discussion**

The Complainant alleged that he was wrongfully terminated on or about October 3, 2006, by DCPS. In addition, he claimed that he should have been reinstated on May 4, 2007, as required by a February 2007 verbal agreement. However, DCPS failed to reinstate him to his position on May 4, 2007. The Complainant did not file his Complaint until September 17, 2008. (See Sept. 30, 2008 letter at p. 2).

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Article XXIV Seniority, Article XXXI Labor-Management Cooperation . . . .” (Motion at p. 1). Also, the Complainant maintains that the Union “was negligent for not informing Mr. Brown of DCPS Chief Operations Officer Pettigrew’s May 18, 2007 letter jeopardizing the complainant’s job. [The Union] could have further arbitrated or filed Mr. Brown’s case with this Board. . . .” (Motion at p. 3).

<sup>10</sup> The Complaint cited facts pertaining to a May 18, 2007 letter from DCPS to the Union which Complainant allegedly discovered in February 2008. However, no arguments were made pertaining to the timeliness of the Complaint based on the May 18, 2007 letter or based on the late discovery of the letter, until the Motion for Reconsideration was filed.

The Executive Director relied on October 3, 2006 (the date of the Complainant's termination), and May 4, 2007 (the date when DCPS allegedly failed to reinstate Mr. Brown), as the starting point for calculating the 120 days required by Board Rule 520.4. (See Sept. 30, 2008 letter). The Executive Director determined that the Complainant's September 17, 2008 submission containing alleged unfair labor practices was filed approximately twenty-three months after the October 3, 2006 allegation and sixteen months after the May 4, 2007 allegation. Furthermore, the Executive Director determined that the September 17, 2008 filing exceeded the 120 day requirement in Board Rule 520.4. (See Sept. 30, 2008 letter at p. 2).

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." As the Executive Director pointed out, "[t]he 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'." (Sept. 30, 2008 letter at p. 1).<sup>11</sup>

The Board has noted 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 violation 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). Here, the Complainant alleged that DCPS dismissed him, failed to return him to work, and the Union failed to represent him in these matters. Pursuant to Board Rule 520.4, the time for filing a complaint commenced 120 days after October 3, 2006 (when DCPS dismissed the Complainant and the Union allegedly failed to represent him), and 120 days after May 4, 2007 (when DCPS allegedly failed to return the Complainant to work and the Union allegedly failed to represent him). For the reasons noted below, we concur with the Executive Director that the 120-day filing period began when Mr. Brown was terminated (October 3, 2006), and when he should have been reinstated pursuant to a settlement agreement (May 4, 2007). Thus, the time for filing a complaint commenced on October 3, 2006 and May 4, 2007.

The 120<sup>th</sup> day after October 3, 2006 termination was January 31, 2007. The 120<sup>th</sup> day after May 4, 2007 was September 1, 2007. The September 17, 2008 unfair labor practice Complaint was filed more than one year later, well beyond the 120-day filing period. The Board adopts the Executive Director's conclusion that the Complainant's

<sup>11</sup> *Glendale Hoggard v. DCPS and AFSCME, Council 20, Local 1959*, 43 DCR 1297, Slip Op. No. 352, PERB Case No. 93-U-10 (1993). See also, *American Federation of Government Employees, Local 2715, AFL-CIO v. District of Columbia Housing Authority*, 46 DCR 119, Slip Op. No. 509, PERB Case No. 97-U-07 (1997).

“September 17<sup>th</sup> filing . . . clearly exceeds the 120 requirement in Board Rule 520.4.” (Sept. 30, 2008 letter at p. 2).

The Complainant also asserts in his Motion that he did not learn of a May 18, 2007, letter from DCPS to the Union concerning his employment until February 2008. The Board believes that the Complainant is suggesting that the Union was in collusion with DCPS and failed to fairly represent him between May 4, 2007 and February 2008.<sup>12</sup>

The Board has held that “the time within which a complaint alleging a violation of the duty of fair representation by an exclusive bargaining representative can be timely filed commences when the employee knew or should have known the union would not provide the requested representation. We also conclude that a unit member can, and should, make efforts to obtain adequate representation by the union by seeking service from the local . . . . Once these efforts become futile, the 120 days for filing a complaint commences.” *Lloyd Forrester v. American Federation of Government Employee, Local 2725 and District of Columbia Housing Authority (David Gilmore, Receiver)*, 46 DCR 4048, Slip Op. No. 577 at p. 4, 98-U-01 (1998).

As the Complainant does not provide the date in February 2008 when he learned of the letter between DCPS and the Union, the Board shall use the last day of February 2008 as the starting point for counting the 120-day filing period. The 120<sup>th</sup> day after February 29, 2008, was June 28, 2008. The Complaint was filed on September 17, 2008, more than two months after the statutory filing deadline. Thus, viewing the Complainant’s argument in the best light, the Complainant exceeded the 120-day statutory deadline by over two months.

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.<sup>11</sup> In the present case, even if the date of the violation were February 29, 2008, the Complainant’s appeal was not filed within 120 days of February 29, 2008. Furthermore, we have 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.”<sup>13</sup>

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<sup>12</sup> The Board has held that to breach its duty of fair representation, a Union’s conduct must be deemed arbitrary, discriminatory, or in bad faith. Further, we have held that the applicable standard in such cases is “not the competence of the union, but rather whether its representation was in good faith and its actions motivated by honesty of purpose.” *Roberts v. American Federation of Gov’t Employees, Local 2725*, 36 DCR 3631, Slip Op. No. 203 at p. 3, PERB Case No. 88-S-01 (1989).

<sup>13</sup> *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).

After reviewing the Executive Director's September 30, 2008 dismissal letter, the Board finds that the calculations concerning the filing deadline are based on the record and properly calculated.<sup>13</sup>

#### V. Complainant's Supplemental Pleading

On March 30, 2009, the Complainant filed a pleading, styled "Motion Concerning [Board's] Violation of the CMPA Relating to the Timeliness of Decisions", (referred to as "Supplemental Pleading"). Relying on D.C. Code § 1-617.14,<sup>14</sup> the Complainant asserts that the "Board's inability and failure to reach a quorum result[ed] [in] further delays that not only hindered this case, [but] . . . also caused the Complainant and his representative much hardship and pain from the distress due to the injury of injustice placed upon them. Complainant, Mr. Brown is a victim suffering from this entire ordeal and his representative Mr. Nichols . . . has been belittled as well as mistreated for his role as the designated representative [as] opposed to being an attorney." (Suppl. Pleading at p. 1). The Complainant asserts that "the Board should be penalized in a way favoring the Complainant" and seeks "remedies and final favorable resolution from the Board". (Suppl. Pleading at pgs. 1-2).

From June 2008 through June 2009, there were four vacancies on the Board. The Motion for Reconsideration in this matter was filed on September 17, 2008, during the period when the Board lacked a quorum and was unable to transact business. D.C. Code § 1-605.01(*I*) states as follows: "Three members shall constitute a quorum. No decision of the Board shall be valid unless supported by the majority of a quorum." Accordingly, the Board was unable to issue rulings in the instant case. Furthermore, the Complainant has provided no legal authority to support his request. Therefore, there is no basis upon which the Board may grant the request for "remedies and final favorable resolution".

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<sup>13</sup> Also, the Complainant has raised no allegations which, if proven, would constitute a statutory violation by DCPS or the Union. For example, the Union represented the Complainant in the grievance procedure and negotiated a settlement in his case. Thus, it did not violate its duty of representation under the CMPA. Also, DCPS agreed to return the Complainant to work and scheduled him for a physical examination in anticipation of returning him to his position. There is no evidence that DCPS failed to reinstate the Complainant or that there was a violation of the CMPA.

<sup>14</sup> D.C. Code § 1-617.14 states as follows:

All decisions of the Board shall be rendered within a reasonable period of time, and in no event later than 120 days after the matter is submitted or referred to it for a decision.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The Complainant's Motion for Reconsideration is denied.
2. The Complainant's Supplemental Pleading seeking a favorable remedy, is denied.
3. Pursuant to Board Rule 559.3, this Decision and Order is final upon issuance.

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

September 30, 2009



**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 08-U-75 was transmitted via Fax and U.S. Mail to the following parties on this the 30<sup>th</sup> day of September 2009.

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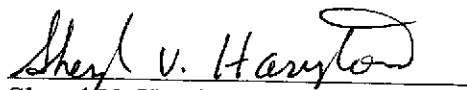
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