

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:)	
Marva W. Cooper,)	
Complainant,)	PERB Case No. 07-U-48
v.)	Opinion No. 941
University of District of Columbia,)	Motion for Reconsideration
and)	
University of the District of Columbia Faculty Association, NEA,)	
Respondents.)	

DECISION AND ORDER

I. Statement of the Case:

This matter involves a Motion for Reconsideration filed by Marva W. Cooper ("Complainant" or "Ms. Cooper"). The Complainant is requesting that the Board reverse the Executive Director's dismissal of some of the allegations in her unfair labor practice complaint ("Complaint").

Ms. Cooper filed a complaint against the University of the District of Columbia ("UDC") and the University of the District of Columbia Faculty Association, NEA ("Union") alleging that they violated the Comprehensive Merit Personnel Act ("CMPA"). Specifically, the Complainant alleged that UDC violated D.C. Code § 1-617.04(a)(1) and (5)¹ by failing to: (a) comply with the parties' collective bargaining agreement ("CBA");

¹ D.C. Code § 1-617.04(a)(1) and (5) provides in pertinent part as follows:

(a) The District, its agents, and representatives are prohibited from:

(b) comply with the parties' Remedial Agreement; (c) provide accurate information regarding the computation of back pay; and (d) bargain in good faith. (See Compl. at pgs. 4-5). In addition, Ms. Cooper claimed that the Union violated D.C. Code § 1-617.04(b)(1) and (5)² by failing to: (1) bargain in good faith; (2) fairly represent her in an April 16, 2004 grievance; and (3) file for arbitration concerning UDC's failure to comply with the Remedial Agreement. (See Compl. at pgs. 4-5).

After reviewing the parties' submissions, the Board's Executive Director determined that the allegations concerning the Union were untimely and failed to state a basis for a claim under the CMPA. Therefore, by letter dated October 2, 2007, the Board's Executive Director administratively dismissed all of the allegations against the Union and two of the allegations against UDC. The Executive Director referred the remaining allegations concerning UDC for a hearing.

(1) Interfering, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter; . . .

* * *

(5) Refusing to bargain collectively in good faith with the exclusive representative.

² D.C. Code § 1-617.04(b)(1) and (5) provide in pertinent part as follows:

(b) Employees, labor organizations, their agents, or representatives are prohibited from:

(1) Interfering with, restraining, or coercing any employees or the District in the exercise of rights guaranteed by this subchapter; . . .

* * *

(5) Engaging in a strike or refusal to handle goods or perform services, or threatening, coercing or restraining any person with the object of forcing or requiring any person to cease, delay, or stop doing business with any other person or to force or to require an employer to recognize for recognition purposes a labor organization not recognized pursuant to the procedures set forth in § 1-617.06.

In her response to the Union's Motion to Dismiss, the Complainant added an alleged violation of D.C. Code § 1-617.04(b)(3).

On November 6, 2007, the Complainant filed a Motion for Reconsideration ("Motion") seeking reversal of the Executive Director's administrative dismissal. The Respondents oppose the Motion. The Complainant's Motion is before the Board for disposition. The issue before the Board is whether the Executive Director erred as a matter of law when he dismissed the Complainant's claims.

II. Discussion

The Complainant was terminated in 1997 as a result of a reduction-in-force ("RIF"). The Union successfully challenged the RIF in court, resulting in a Remedial Agreement between the Union and UDC. As a result, on August 16, 1999, the Complainant returned to her former position at UDC. On April 16, 2004, the Union filed a grievance on her behalf against UDC concerning: (1) UDC's failure to provide full back pay in accordance with the parties' Remedial Agreement (See Complaint at pgs. 4-6); and (2) "the refusal of UDC to honor the bumping rights provision of the [parties' collective bargaining agreement] and the Remedial Agreement." (Compl. at p. 6). The grievance was denied on April 23, 2004.

In e-mail transmissions dated September 21, 2005, and November 7, 2005, the Union informed the Complainant that it would not arbitrate any grievance alleging non-compliance with the settlement agreement nor arbitrate her grievance seeking damages for expenses incurred in seeking work and in commuting to North Carolina. The Complainant filed an unfair labor practice complaint on August 7, 2007, alleging that the Union and UDC "conspired to deny the illegally RIF'd faculty due process and [failed] to follow the CBA and the [Remedial] Agreement." (Compl. at pgs. 4-6). In support of this position, the Complainant contended that: (1) UDC and the Union have not followed the parties' CBA or the Remedial Agreement; and (2) the Union concurred with UDC's claim that a posted notice listing the "'bumping' rights of a bargaining unit member was a mistake." (Compl. at pgs. 4-6). The Complainant also suggested that the Union violated the CMPA by not filing for arbitration concerning UDC's failure to comply with the Remedial Agreement.

Board Rule 520.4 provides as follows:

Unfair labor practice complaints *shall be filed not later than 120 days after the date on which the alleged violations occurred.* (emphasis added).

The Executive Director noted that the Board has held that "[t]his deadline date is 120 days after the date [the Complainant] admits [s]he actually became aware of the event giving rise to [the] complaint allegations" *Hoggard v. DCPS and AFSCME, Council 20, Local 1959*, 43 DCR 1297, Slip Op. No. 352 at p.3, PERB Case No. 93-U-10 (1993). 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). Also, the Executive Director stated that the Board has determined that "the time for

filing a complaint with the Board concerning . . . violations [which may provide for] a statutory cause 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 initiating a cause of action before the Board. The validation, i.e., proof, of alleged statutory violations 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).

The Executive Director found that “[c]onsistent with Board Rule 520.4, any allegations asserting a statutory violation against the Union concerning the April 16, 2004 grievance, should have been filed within 120 days of April 23, 2004 (the date the grievance was denied). (See Executive Director’s October 2, 2007 Dismissal Letter at p. 3). Also, the Executive Director indicated that any allegations concerning the Union’s decision not to arbitrate either - (1) a grievance alleging non-compliance with the settlement agreement; or (2) a grievance seeking damages for expenses incurred in seeking work and in commuting to North Carolina - should have been filed within 120 days of the Union’s e-mail transmissions dated September 21, 2005, and November 7, 2005, respectively. . . . However, [the Complaint] against the Union was not filed until August 7, 2007. This filing occurred three (3) years after [the] April 2004 grievance was denied and almost two (2) years after [the Complainant was] informed that the Union was not going to file for arbitration.” (Dismissal Letter at p. 3). In light of the above, the Executive Director concluded that the allegations concerning the Union were untimely filed. (See Dismissal Letter at p. 3).

The Complainant submitted with her Motion a copy of a letter sent to her by the Union via e-mail dated April 11, 2007. She contends that the allegations against the Union were timely because they were filed in response to the Union’s April 11, 2007 letter, in which the Union indicated “that it concurred with UDC in its calculations of the Complainant’s back pay.” (Motion at p. 2; see Exhibit 1 attached to the Motion). The Complainant alleges that the April 11, 2007 communication is the date of the alleged violation by the Union. (See Motion at pgs. 2-3). Therefore, she asserts that her allegations against the Union are timely.

A review of the record reveals that the Complainant’s argument concerning the April 11, 2007 e-mail is being made for the first time in the Complainant’s Motion. “This Board has held that ‘we will not permit evidence presented for the first time in a Motion for Reconsideration to serve as a basis for reconsidering [the Executive Director’s dismissal] when the [Complainant] failed to provide any evidence at the afforded time.’ [citation omitted].” *Lane v. University of the District of Columbia, _ DCR _*, Slip Op. No. 862 at p. 4, PERB Case No. 03-U-45 (2007). The April 11, 2007 e-mail was not before the Executive Director and thus cannot be considered as a basis for reversing the Executive Director’s determination. Furthermore, the language contained in the e-mail letters dated September 21, 2005, and November 7, 2005, expressly informed the Complainant that the Union was

not going to either arbitrate any grievance alleging non-compliance with the settlement agreement or arbitrate her grievance seeking damages for expenses incurred in seeking work and in commuting to North Carolina. In view of the above, we find that the September 2005 and the November 2005 e-mail letters received by the Complainant, triggered the statutory filing period. Therefore, we find that the Complainant's August 7, 2007 filing exceeded the 1220 day requirement of Board Rule 520.4.

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, *Public Employee Relations Board v. D.C. Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991). For the reasons noted above, the Board cannot extend the time for filing a complaint. As a result, the Board finds that the Executive Director did not err as a matter of law when he dismissed the Complainant's claims against the Union as untimely. Therefore, we adopt his findings and conclusions on this issue and dismiss these allegations.³

In her unfair labor practice complaint, Ms. Cooper also made allegations against UDC. She contended that UDC violated D.C. Code § 1-617.04(a)(1) and (5) by failing to: (a) comply with the parties' CBA; (b) comply with the Parties' Remedial Agreement; (c) provide accurate information regarding the computation of back pay; and (d) bargain in good faith.⁴ (See Compl. at pages. 4-5).

Concerning the Complainant's claim that UDC violated the CMPA by failing to comply with the parties CBA, the Executive Director noted that "[i]n the present case, [the Complainant's] allegation that UDC has violated the parties' CBA, presents an issue of contract interpretation. Any allegation concerning a party's failure to comply with the terms of the parties' CBA, presents an issue that is not statutorily based, but one of contract interpretation. 'Under the CMPA, [a] breach of contract does not constitute a per se statutory violation. Consistent with this pronouncement. . . [the Board has determined] that . . . it is without jurisdiction to rule [on] contract breach claims . . .' [Citing] *American Federation of Government Employees, Local 3721 v. District of Columbia Fire Department*, 39 DCR 8599, Slip Op. No. 287 at p. 3, PERB Case No. 90-U-11 (1991). See also, *American Federation of State, County and Municipal Employees, D.C. Council 20, Local,*

³ The Complainant also asserted that the Union violated D.C. Code § 1-617.03 and D.C. Code § 1-617.04(b)(1) and (2), by failing to fairly represent her. (Motion at p. 5). In view of our determination that the complaint allegations against the Union were untimely filed, we need not consider the Executive Director's conclusion that the Complainant failed to state a statutory cause of action with respect to these allegations.

⁴ The Complainant's assertion that UDC failed to bargain in good faith pertains to the allegations that UDC failed to: (1) comply with the parties' Remedial Agreement; and (2) provide accurate information regarding the computation of back pay.

2921 v. District of Columbia Public Schools, 42 DCR 5658, Slip Op. No. 339 at p. 3, PERB Case No. 92-U-08 (1995); and *Washington Teachers' Union, Local 6, American Federation of Teachers, AFL-CIO v. District of Columbia Public Schools*, 42 DCR 5488, Slip Op. No. 337, PERB Case No. 92-U-18 (1995). For the reasons noted above, [the Complainant's] allegation concerning UDC's violation of the parties' CBA, does not state an unfair labor practice prescribed under the CMPA. See Slip Op. No. 287 at pgs. 4-5." (Letter of Dismissal at p. 8). Therefore, the Executive Director dismissed this allegation.

"The Board has [determined] that . . . it is without jurisdiction to rule [on] contract breach claims." *American Federation of Government Employees, Local 3721 v. District of Columbia Fire Department*, 39 DCR 8599, Slip Op. No. 287 at p. 3, PERB Case No. 90-U-11 (1991). Thus, the issue of whether UDC violated the CBA is not within the jurisdiction of the Board. The Complainant's claim that UDC violated the CMPA by failing to comply with the CBA is best resolved in the grievance-arbitration procedures under the parties' CBA - as it is a matter of contract interpretation. As a result, we find that the Executive Director did not err as a matter of law by dismissing the Complainant's allegation that UDC violated the parties' CBA.

The Complainant also alleged that UDC refused to bargain in good faith with the Union or the Complainant. The Executive Director noted that pursuant to the CMPA, "management has an obligation to 'bargain collectively in good faith' and employees have the right 'to engage in collective bargaining concerning terms and conditions of employment, as may be appropriate under this law and rules and regulation, through a duly designated majority representative[.]' *American Federation of State, Country and Municipal Employees, D.C. Council 20, Local 2921 v. District of Columbia Public Schools*, 42 DCR 5685, Slip Op. No. 339 at p. 3, PERB Case No. 92-U-08 (1992). Also, D.C. Code § 1-617.04(a)(5) provides that '[t]he District, its agents and representatives are prohibited from . . . [r]efusing to bargain collectively in good faith with the exclusive representative.' " (emphasis in the original.) (Letter of Dismissal at p. 7).

The Executive Director determined that "it is clear from the language in D.C. Code § 1-617.04(a)(5), that the right to require a District agency to bargain collectively in good faith, belongs exclusively to the labor organization. [Citing], *Forrester v. AFGE, Local 2725 and D.C. Housing Authority*, 46 DCR 4048, Slip Op. No. 577 at p. 5, PERB Case No. 98-U-01 (1998) and *Skopak v. D.C. Commission on Mental Health Services and Doctors Council of the District of Columbia*, Slip Op. No. 737, PERB Case Nos. 02-S-07 and 02-U-21 (2004). Therefore, the Executive Director concluded that "[i]n the present case, only the Union can require that UDC bargain in good faith. As a result, [he found that the Complainant] lack[ed] standing to assert a violation of D.C. Code § 1-617.04(a)(5) with respect to both the Union and UDC." (Letter of Dismissal at p. 7). The Executive Director referred the remaining allegations against UDC for a hearing.

In her Motion for Reconsideration, the Complainant maintains that: (1) on August 7, 2007, UDC admitted in its Answer that it has not yet paid the Complainant all monies due⁵ (see Motion at pgs. 2-3); (2) UDC breached the parties' CBA by not providing her with full back pay (see Motion at pgs. 2-3); (3) UDC and the Union are in collusion and a conspiracy exists between them to the Complainant's detriment (see Motion at p. 4); (4) the Complainant did not receive back pay until October 31, 2006 and the amount was in error (see Motion at p. 6); and (5) UDC's actions "are deliberate and willful acts to interfere, restrain, and coerce the Complainant" in violation of the CMPA. (Motion at p. 6).

We have held that the right to require an agency to bargain in good faith belongs exclusively to the labor organization. (See *Glendale Hoggard v. American Federation of State, County and Municipal Employees, District Council 20, Local 1959, AFL-CIO*, 43 DCR 2655, Slip Op. No. 356 at pgs. 2-3, PERB Case No. 93-U-10 (1996). As a result, we find that the Complainant has no standing to allege a refusal to bargain in good faith. In view of the above, the Executive Director did not err as a matter of law when he dismissed this claim.

The Executive Director referred the following allegations against UDC to a Hearing Examiner: (1) UDC failed to comply with the parties' Remedial Agreement; and (2) UDC failed to provide accurate information regarding the computation of back pay. For the reasons discussed below, we find that these allegations were untimely filed and should be dismissed.

As previously discussed, Board Rule 520.4 states as follows: "Unfair labor practice complaints shall be filed not later than 120 days after the date on which the alleged violation occurred." As noted above, "[t]his deadline date is 120 days after the date [the Complainant] admits [s]he actually became aware of the event giving rise to [the] complaint allegations" *Hoggard v. DCPS and AFSCME, Council 20, Local 1959*, 43 DCR 1297, Slip Op. No. 352 at p.3, PERB Case No. 93-U-10 (1993). 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).

In the present case, the Complainant was reinstated to her position in 1999 and received back pay on October 31, 2006. Thus, the filing period concerning UDC's actions regarding back pay expired 120 days after the October 31, 2006 date. However, the Complainant did not file the present unfair labor practice complaint until August 7, 2007, - approximately 283 days after the October 31, 2006 date. Therefore, the allegations

⁵ Specifically, the Complainant is referring to UDC's Answer to her complaint and Motion to Dismiss, wherein UDC stated that : "contributions to the Complainant's TIAA-CREF account will be made, minus contributions made by North Carolina Central University once the Complainant submits the appropriate information." (UDC's Answer and Motion to Dismiss, at p. 7 of the motion).

concerning UDC's actions regarding the back pay issue clearly exceed the 120-day requirement found in Board Rule 520.4.

For the reasons discussed, we find that the Complainant's remaining allegations - - that UDC failed to comply with the Parties' Remedial Agreement and did not provide accurate information regarding the computation of back pay - - were untimely filed and must be dismissed. To the extent the Executive Director's Letter of Dismissal referred any portion of the complaint for a hearing, the Board reverses that part of the Executive Director's determination. Consistent with this ruling we dismiss the Complaint against UDC in its entirety.

III. Requests for Attorney Fees and Costs

The Complainant requests that the Board award her attorney fees. The Board has long held that D.C. Code § 1-617.13 does not authorize us to award attorney fees. See *International Brotherhood of Police Officers, Local 1446, AFL-CIO/CLC v. District of Columbia General Hospital*, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992); and *University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia*, 38 DCR 5658, Slip Op. No. 373, PERB Case No. 90-U-10 (1991). Also, the Complainant was not represented in this case by an attorney. In light of the above, the Complainant's request for attorney fees is denied.

Also, the Union has requested that reasonable costs be awarded. D.C. Code § 1-617.13(d) provides that "[t]he Board shall have the authority to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may determine." In *AFSCME, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue*, 73 D.C. Reg. 5658, Slip Op. No. 245 at pgs. 4-5, PERB Case No. 98-U-02 (2000), the Board addressed the criteria for determining when reasonable costs may be awarded. In *AFSCME*, we noted the following:

First, any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed. . . . Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice.

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued. . . . What we can say here is that among the situations in which such an award *is* appropriate

are those 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 reasonable foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive representative.

A review of the record does not support a finding that the Complainant filed her complaint in bad faith or that a reasonably foreseeable result of her filing a complaint was the undermining of the Union among the employees for whom it is the exclusive representative. Therefore, the Union has not met the interest of justice criteria set forth in the *AFSCME* case. Thus, the Board finds that awarding the Union's request for reasonable costs is not in the interest of justice. In light of the above, the Union's request for reasonable costs is hereby denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complainant's Motion for Reconsideration is denied.
2. The Complaint against the University of the District of Columbia Faculty Association, NEA ("Union") is dismissed in its entirety.
3. The Complaint against the University of the District of Columbia ("UDC") is dismissed in its entirety.⁶
4. The Complainant's request for attorney fees is denied.
5. The Union's request for reasonable costs is denied.
6. 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.

May 2, 2008

⁶ As discussed in this Opinion, the Board reverses the portion of the Executive Director's determination that referred two of the allegations against UDC to a Hearing Examiner for a hearing. Specifically, we find that all of the allegations against UDC were untimely filed.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 07-U-48 was transmitted U.S. Mail to the following parties on this the 2nd day of May 2008.

Jonathan Axelrod, Esq.
Beins, Axelrod, Kraft, Gleason
& Gibson, P.C.
1625 Massachusetts Ave., N.W.
Suite 500
Washington, D.C. 20036

U.S. MAIL

Dr. Marva Cooper
4122 18th Street, N.W.
Washington, D.C. 20011

U.S. MAIL

Carlynn Fuller, Esq.
Assistant University Counsel
University of the District of Columbia
4200 Connecticut Avenue, N.W.
Building 39, Room 301Q
Washington, D.C. 20008

U.S. MAIL

Courtesy Copies:

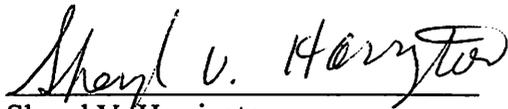
Dr. Leslie Richards
President and Chief Negotiator
UDC Faculty Association/NEA
4200 Connecticut Avenue, N.W.
Building 39, Third Floor, Room 301R
Washington, D.C. 20008

U.S. MAIL

Certificate of Service
PERB Case No. 07-U-48
Page 2

W. David Watts, Esq.
General Counsel/Vice President for Legal Affairs
University of the District of Columbia
Office of the General Counsel
4200 Connecticut Avenue, N.W.
Building #39
Suite 301Q
Washington, D.C. 20008

U.S. MAIL



Sheryl V. Harrington
Secretary