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

In the Matter of:)	
)	
Fraternal Order of Police/Metropolitan Police)	
Department Labor Committee,)	
)	PERB Case No. 08-U-09
Complainant,)	
)	Opinion No. 984
v.)	
)	
District of Columbia Metropolitan Police)	
Department and Chief Cathy L. Lanier,)	
)	
Respondents.)	
)	

REMAND ORDER

I. Statement of the Case

On November 28, 2007, the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP” or “Complainant”), filed an unfair labor practice complaint (“Complaint”) and a motion for preliminary relief against the District of Columbia Metropolitan Police Department (“MPD”) and Cathy Lanier, Chief of Police. (MPD and Chief Lanier will be referred to as “MPD” or the “Respondents”). The Complainant asserts that the Respondents have violated the Comprehensive Merit Personnel Act, D.C. Code § 1-617.04(a)(1) and (5) by interfering with “the union rights of scores of Union members by announcing and implementing the ‘All Hands on Deck’ (“AHOD”) initiative without first negotiating with the [FOP].” (Compl. at pgs. 1 and 4). FOP is requesting that the Board find Respondents violated the CMPA and order the appropriate relief. (See Compl. at p. 7).

FOP’s motion for preliminary relief requested that the Board order the Respondents to cease and desist from implementing the announced December 7 and 8, 2007 AHOD initiative. On December 10, 2007, the Respondents filed a document styled “Respondents’ Opposition to Complainant’s Motion for Preliminary Relief” (“Opposition”). On December 14, 2007, the Board issued an Order denying the

Complainant's motion for preliminary relief and referred the case to a Hearing Examiner.¹

The Respondents filed an Answer ("Answer") to the Complaint denying any violation of the CMPA. In addition, the Respondents filed a Motion to Dismiss the Complaint ("Motion to Dismiss") on December 18, 2007. On December 26, 2007, FOP filed a document styled Complainant's Opposition to Respondents' Motion to Dismiss ("Opposition"). Consistent with the Board's December 14, 2007 Order, the Executive Director set the matter for a hearing on January 14, 2008, and referred the Respondents' Motion to Dismiss to the Hearing Examiner.²

In his June 2, 2008 Report and Recommendation ("R&R") the Hearing Examiner found that "MPD's implementation of AHOD deployments is covered by the Parties' collective bargaining agreement and the [Board] does not have jurisdiction over the matter." (R&R at p. 8). Therefore, he recommended that the Motion to Dismiss be granted and the unfair labor practice complaint be dismissed. (See R&R at p. 10). No exceptions were filed.

II. Hearing Examiner's Report and Recommendation

Before considering the merits of the unfair labor practice Complaint, the Hearing Examiner addressed the Respondents' Motion to Dismiss. The Hearing Examiner noted that "[t]he Parties do not dispute the relevant facts. Rather, it is the meaning of those facts in light of [D.C. Code] § 1-617.04(a)(1) and (5) that are in dispute." (R&R at p. 3).

The Hearing Examiner noted as follows: "In Spring 2007, . . . Cathy L. Lanier, MPD Chief of Police, announced and subsequently implemented a 'series of . . . police-patrol deployments entitled 'All Hands on Deck' ('AHOD')". (See R&R at p. 3). "Specifically, in 2007 Chief Lanier announced and implemented five AHOD deployments as follows: announced on May 15 with deployments on June 8 and 9; announced June 26 with deployments on July 27 and 28, and August 6 and 7; and announced on September 26 with deployments on November 2 and 3, and December 7 and 8, all dates are in 2007." (Compl. at p. 3 and R&R at p. 3).

The AHOD deployments changed the tours-of-duty for many bargaining unit employees. Specifically, FOP asserts that:

¹ See Order denying Motion for Preliminary Relief, Slip Op. No. 929 at p. 6, PERB Case No. 08-U-09 (December 14, 2007).

² A Request for a Decision on the Pleadings was raised in the Respondents' Motion to Dismiss. However, the Respondents' Motion to Dismiss was filed after the Board had denied FOP's request for preliminary relief and directed a hearing in this matter. Therefore, the Request for a Decision on the Pleadings was moot.

On Friday, July 27, 2007 and Saturday, July 28, 2007, the Department required Union members to report to work in response to an "All Hands on Deck" initiative. To ensure that all Union members were available, the Department canceled the days off and changed the tours of duty for any and all police officers that were scheduled to be off on July 27 and July 28, 2007.

As a result, Union members were required to work outside of their normal tours of duty and were given non-consecutive (split) days off in violation of the [parties' collective bargaining agreement] . . . and the D.C. Code. (Compl. at p. 3).

In response to Chief Lanier's action, the FOP filed a "Step 2 Group Grievance" on August 6, 2007. In the grievance, the FOP asserted that as a result of implementing the AHOD deployment on July 27 and 28, 2007, the MPD violated the parties' collective bargaining agreement ("CBA") at Articles 4 and 24, [and] D.C. Code § 1-612.01,³ *Hours of Work* and MPD Special Order 99-20, *Watch and Days Off Schedules*.⁴ (See Compl. at p. 3 and R&R at pgs. 3-4). On August 14, 2007, MPD denied the Step 2 Group Grievance. Pursuant to the parties' collective bargaining agreement ("CBA"), FOP invoked

³ D.C. Code § 1-612.01, "Hours of work" provides in relevant part as follows:
(a) A basic administrative workweek of 40 hours is established for each full-time employee and the hours of work within that workweek shall be performed within a period of not more than 6 of any 7 consecutive days . . .
(b) Except when the Mayor determines that an organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, tours of duty shall be established to provide, with respect to each employee in an organization, that:
(1) Assignments to tours of duty are scheduled in advance over periods of not less than 1 week;
(2) The basic 40 hour workweek is scheduled on 5 days, Monday through Friday when practicable, and the 2 days outside the basic workweek are consecutive;
(3) The working hours in each day in the basic workweek are the same;
(4) The basic nonovertime workday may not exceed 8 hours;
(5) The occurrence of holidays may not affect the designation of the basic workweek; and
(6) Breaks in working hours of more than 1 hour may not be scheduled in a basic workday except under rules and regulations on flexible work schedules as provided in subsection (e) of this section.

⁴ MPD Special Order 99-20, *Watch and Days Off Schedule*, provides at Section VIII, that "Change of watch or days off assignments will not normally be made except as deemed appropriate based upon operational needs and in accordance with the bargaining unit contract. Circumstances may include the following: . . .
2. Operational needs of the districts such as, covering special events or circumstances and only for the duration of the event and in accordance with the existing collective bargaining agreements."

arbitration. (See Compl. at p. 3 and R&R at p. 4).

While the arbitration was pending, FOP filed the instant unfair labor practice complaint. FOP argued that the deployments violate Article 24, § 2 of the parties' CBA⁵ and do not conform with D.C. law as required by Article 4 of the CBA.⁶ FOP asserted that "CBA Article 24, provides that the Chief of Police may suspend the negotiated method for assigning days-off⁴ for a declared emergency, for crime, or for an unanticipated event'. Lanier testified that she never declared a crime emergency regarding the implementation of AHOD deployments. Therefore, [FOP maintained that] the MPD exceeded its management rights concerning scheduling and failed to honor the scheduling restrictions at D.C. Code § 1-612.01(b) [which are] incorporated by Article 4 into the CBA." (R&R at p. 5).

The FOP further argued that "[at] a minimum, the AHOD impacted and altered bargaining unit members' schedule which is a mandatory subject of bargaining. Therefore, MPD's unilateral implementation without negotiations, over impact and implementation alone, with the FOP was a violation of [D.C. Code] § 1-617(a)(5)." (R&R at p. 5). As a remedy, the Complainant requested that the Board: (a) find that there is a violation of the CMPA; (b) issue a cease and desist order; (c) order the Respondents to bargain over the impact and effects of the AHOD; (d) post a notice; (e) award the Complainant's costs, and (f) order any other appropriate relief. (See Compl. at p. 7).

The Respondents countered that "... the establishment of tours of duty is a reserved management right . . . under D.C. Code § 1-617.08(a)(5)(A). [Board] precedent holds, and the FOP Complaint concedes, that the establishing of an employee's tour-of-duty and the maintaining of the efficiency of the government are management rights. The Chief-of-Police's authority to establish tours-of-duty is analogous to her management right to order employees to perform work which involves the fundamental right to direct and deploy personnel. The Parties can bargain over and agree to the methods by which the MPD exercises its management rights, but the authority to direct work is a retained management right." (R&R at p. 8).

The Respondents maintained that "[i]n this matter, the Chief-of-Police exercised retained

⁵ Article 24, Section 1 of the CBA provides, in part, that "Each member of the bargaining unit will be assigned days off and tours of duty that are either fixed or rotated on a known regular schedule. . . . Notice of any changes to their days off or tours of duty shall be made within fourteen (14) days in advance. If notice is not given of changes fourteen (14) days in advance the member shall be paid, at his or her option, overtime pay or compensatory time at the rate of time and one half . . ."

Article 24, Section 2 of the CBA provides that "*The Chief or his/her designee may suspend Section 1 on a Department wide basis or in an operational unit for a declared emergency, for crime, or for an unanticipated event.*" (emphasis added).

⁶ Article 4 of the CBA is entitled "Management Rights".

management rights in accordance with D.C. Code § 1-612.01. The Chief-of-Police exercised delegated powers pursuant to the Mayor's Order 2000-83. She determined that, absent the AHOD scheduling changes, the MPD would have been seriously handicapped in carrying out its mission. For all these reasons, the [Board] should dismiss the Complaint because it lacks jurisdiction over the matter or, in the alternative, because the Respondent has not committed an unfair labor practice." (R&R at p. 7).

After considering the parties' arguments, the Hearing Examiner found that "[w]hile FOP recognizes that MPD has the retained right 'to determine the . . . tour of duty pursuant to CBA Article 4, it argues that MPD implemented AHOD in violation of D.C. Code § 1-612.01, *Hours of Work*. Therefore, [the Hearing Examiner found that] the connecting link, between the alleged violation of D.C. Code § 1-612.01 and the instant unfair labor charge under D.C. Code § 1-617.04(a)(1) and (5), is CBA Article 4." (R&R at pgs. 8-9).

Furthermore, the Hearing Examiner considered FOP's assertion that MPD's implementation of the AHOD deployments violated the scheduling requirements of CBA Article 24. He determined that this "[is] an allegation that there has been a violation, misapplication or misinterpretation of the terms of [the CBA which] constitutes a grievance under the provisions of [the CBA Article 19, *Grievance Procedure*]. The [Hearing Examiner further noted that] . . . FOP [had] filed grievances on the AHOD deployments. . . which are pending arbitration or resolved by MPD in FOP's favor." (R&R at p. 9).

The Hearing Examiner determined that "since the alleged unilateral change involving the AHOD deployments concerns established and bargainable terms and conditions of employment covered by the Parties' collective bargaining agreement, then . . . MPD's conduct does not constitute a violation of D.C. Code § 1-617.04(a)(1) and (5). It follows then . . . that the [Board] has no jurisdiction over FOP's Complaint." [R&R at p. 9]. Having found that the Board does not have jurisdiction over the Complaint, the Hearing Examiner concluded that "it is both inappropriate and unnecessary for the Hearing Examiner to address the merits of the Complaint." (R&R at p. 8). In view of the above, he recommended that the Respondents' Motion to Dismiss be granted and the Complainant's unfair labor practice complaint be dismissed with prejudice. (See R&R at p. 10).

The Hearing Examiner's R&R is before the Board for disposition.

III. Discussion

No exceptions were filed regarding the Hearing Examiner's R&R. Nonetheless, pursuant to D.C. Code § 1-605.02(3) and Board Rule 520.14, the Board is reviewing the Hearing Examiner's findings, conclusions and recommendations to determine if an unfair labor practice has been committed.

Before considering the merits of the unfair labor practice complaint, the Hearing Examiner addressed the Respondents' Motion to Dismiss. In their Motion, MPD asserted that "the FOP has taken the consistent position that this matter arises out of an alleged violation of the parties' collective bargaining agreement As a result of these alleged contractual violations, the FOP filed a grievance and indicated its intent to demand arbitration." (Motion at p. 2). MPD noted that the Board has consistently held that it has no jurisdiction over alleged contractual violations, citing *AFSCME, Local 2921 v. D.C. Public Schools*, 42 DCR 5685, Slip Op. No. 339 at p. 3, PERB Case No. 92-U-08 (1992). (Motion at p. 3). Therefore, MPD requested that the Board "dismiss the Complaint on the basis that it lacks jurisdiction over this matter." (Motion at p. 4).

The Hearing Examiner found that the alleged violations pertain to violation of contractual provisions of the parties' CBA, specifically Article 24 and these violations were appealed in the grievance procedure found at Article 19 of the CBA. (R&R at p. 9). He noted that the Board has jurisdiction over statutory violations and lacks jurisdiction to consider contractual violations. (See R&R at pgs. 8-9). Based on his finding that the complaint in this case involves alleged violations of the CBA, the Hearing Examiner determined that the Board lacks jurisdiction over this matter and recommended that the Motion to Dismiss be granted.

First, we will consider MPD's Motion to Dismiss. While a Complainant need not prove their case on the pleadings, they must plead or assert allegations that, if proven, would establish the alleged statutory violations. See *Virginia Dade v. National Association of Government Employees, Service Employees International Union, Local R3-06*, 46 DCR 6876, Slip Op. No. 491 at p. 4, PERB Case No. 96-U-22 (1996); and *D.C. Department of Public Works*, 48 DCR 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994). 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 2751, AFL-CIO*, 48 DCR 10959, Slip Op. No. 414 at p. 3, PERB Case No. 95-S-01 (1995).

When considering a motion to dismiss for failure to state a cause of action, the Board considers whether the alleged conduct may result in a violation of the CMPA. See *Doctor's Council of District of Columbia General Hospital v. District of Columbia General Hospital*, 49 DCR 1237, Slip Op. No. 437, PERB Case No. 95-U-10 (1995). Also, the Board views contested facts in the light most favorable to the Complainant in determining whether the Complaint gives rise to an unfair labor practice. See *JoAnne G. Hicks v. District of Columbia Office of the Deputy Mayor for Finance, Office of the Controller and American Federation of State, County and Municipal Employees, District Council 24*, 40 DCR 1751, Slip Op. No. 303, PERB Case No. 91-U-17 (1992).

MPD requests that the Board "dismiss the Complaint on the basis that it lacks jurisdiction over this matter." (Motion at p. 4). We have held that "D.C. Code § 1-617.04(a)(5) protects and enforces . . .

employee rights and employer obligations by making their violation an unfair labor practice. In determining a violation . . . the Board has always made a distinction between obligations that are statutorily imposed under the CMPA and those obligations that are contractually agreed-upon between the parties. ‘The CMPA provides for the resolution of [statutory obligations] . . . while the parties have contractually provided for the resolution of [contractual obligations]. [The Board has] concluded . . . that [it] lacks jurisdiction over alleged violations that are strictly contractual in nature.’” *American Federation of State, County and Municipal Employees, D. C. Council 20, Local 2921, AFL-CIO v. District of Columbia Public Schools*, 42 DCR 5685, Slip Op. No. 339 at p. 3, PERB Case No. 92-U-08 (1992).

The Board notes that FOP alleges the AHOD deployments by MPD violate provisions of the parties’ CBA. (See Compl. at pgs. 5-6 and R&R at pgs. 8-9). Furthermore, this same allegation is the subject of various grievances filed by FOP.⁷ The parties have contractually provided for the resolution of contractual obligations under the CBA through a grievance-arbitration process. This supports the Hearing Examiner’s finding that the violations alleged in this complaint involve contractual provisions and are the subject of grievances under the contractual grievance procedure. As stated above, the Board lacks jurisdiction over alleged violations that are strictly contractual in nature. In view of this, the Board lacks jurisdiction over the alleged contractual violations of the CBA and the Respondent’s Motion to Dismiss must be granted in this regard. In view of the Hearing Examiner’s finding that the alleged conduct pertains to contractual violations over which the Board has no jurisdiction, he found it unnecessary to address the unfair labor practice allegations raised by the Complainant concerning the unilateral change of CBA provisions and impact and effects bargaining.

In view of the above, we find that the Hearing Examiner’s findings, conclusions and recommendation that the alleged violations of the CBA are contractual violations over which the Board lacks jurisdiction, are reasonable, supported by the record and consistent with Board precedent. Therefore, we adopt his recommendation to dismiss this portion of the complaint.

Nonetheless, we disagree with the Hearing Examiner’s determination that it is unnecessary to address the unfair labor practice allegations raised by FOP concerning the implementation of management rights without first bargaining with the union. For the reasons set forth below, the Hearing Examiner’s dismissal of the unfair labor practice allegation must be reversed.

⁷ The Complainant has prevailed on at least one of the grievances that was filed. School resource officers were included in the December 7 and 8, 2007 deployment. Officer “Ronald S. Palmer testified that he filed a CBA grievance asserting the AHOD scheduling violated D.C. Code §1 -612.01. . . Terrence Welsh, MPD police officer assigned to 1D, filed a grievance challenging the AHOD deployment because his tour of duty was changed and his days-off [were] split. Diane Groomes, MPD Commander, testified that on August 23, 2007, she granted Welsh’s grievance.” (R&R at p. 4).

The Complainant alleges that the Respondent violated D.C. Code § 1-617.04(a)(1) and (5) by failing to bargain over the impact and effects of exercising its management rights. (See Complaint at p. 6, No. 17). Pursuant to the CMPA, management has an obligation to bargain collectively in good faith and employees have the right “[t]o engage in collective bargaining concerning terms and conditions of employment, as may be appropriate under this law and rules and regulations, through a duly designated majority representative[.]” *American Federation of State, County 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 representative are prohibited from . . . [r]efusing to bargain collectively in good faith with the exclusive representative.” (emphasis added). D.C. Code § 1-617.04(a)(5) protects and enforces, respectively, these employee rights and employer obligations by making their violation an unfair labor practice. Furthermore, the Board has held that “an exercise of management rights does not relieve the employer of its obligation to bargain over impact and effect of, and procedures concerning, the implementation of [that right].” *International Brotherhood Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital*, 41 DCR 2321, Slip Op. No. 312, PERB Case 91-U-06 (1994).

The Board finds that the FOP has pled allegations that, if proven, would constitute a violation of the CMPA. Therefore, we find that the issue of whether MPD violated the CMPA by failing to bargain over the impact and effects of exercising a management right is properly before the Board. In order to determine this issue, the Board must rely on factual findings by the Hearing Examiner concerning the duty to bargain. For example, in order to determine whether there is a duty to bargain, the Board must determine whether a request to bargain over the impact and effects of the AHOD implementation has been made. We have held that, “absent a request to bargain concerning the impact and effect of the exercise of a management right, an employer does not violate D.C. Code § 1-61[7].[0]4(a)(5) and (1) by unilaterally implementing a management right under [the CMPA].” *American Federation of Government Employees, Local Union No. 383, AFL-CIO v. District of Columbia Department of Human Services*, 49 DCR 770, Slip Op. No. 418, PERB Case No. 94-U-09 (1995). In the present case, there are no factual findings concerning the Union’s actions in this regard. Therefore, there is insufficient evidence in the record upon which the Board may make a determination. As a result, this matter is remanded to the Hearing Examiner for further fact finding on the alleged violations of D.C. Code § 1-617.04(a)(5) and (1).

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint of the Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP) alleging a violation of Article 4 and Article 24 of the collective bargaining agreement, is a contract issue not within the jurisdiction of the Board. The District of Columbia Metropolitan Police Department and Chief Cathy L. Lanier’s

(MPD's) Motion to Dismiss the complaint this portion of the Complaint is granted.

2. The portion of the Complaint by FOP alleging a violation of D.C. Code § 1-617.04(a)(5) and (1) by MPD's failure to engage in impact and effects bargaining over MPD's alleged unilateral implementation of its management rights is remanded to the Hearing Examiner for further fact finding on the alleged violation of the CMPA.
3. The Board's Executive Director shall refer the Unfair Labor Practice Complaint to the Hearing Examiner utilizing an expedited hearing schedule. Thus, the Hearing Examiner will issue the report and recommendation within twenty-one (21) days after the closing arguments or the submission of briefs. Exceptions are due within ten (10) days after service of the report and recommendation and oppositions to the exception are due within five (5) days after service of the exceptions.
4. 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.

September 30, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-U-09 was transmitted via Fax and U.S. Mail to the following parties on this the 30th day of September 2009.

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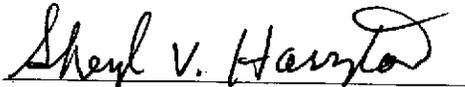
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