

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:)	
)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee,)	
)	
Complainant,)	PERB Case No. 09-U-12
)	
v.)	Opinion No. 1359
)	
District of Columbia Metropolitan Police Department,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

Complainant Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Union” or “FOP”) filed the above-captioned Unfair Labor Practice Complaint (“Complaint”), against Respondent District of Columbia Metropolitan Police Department (“MPD” or “Respondent”) for an alleged violation of section 1-617.04(a)(1) of the Comprehensive Merit Protection Act (“CMPA”). Respondent filed an Answer to Unfair Labor Practice Complaint (“Answer”) in which it denied violating the CMPA, and asked the Board to dismiss the Complaint. (Answer at 3).

In Slip Opinion No. 1123, the Board denied MPD’s motion to dismiss, finding that FOP had asserted facts which, if proven, would constitute a violation of the CMPA. (Opinion 1123 at p. 5). The Board ordered the parties to proceed to a hearing, as “the issue of whether the Respondent’s actions rise to the level of violations of the CMPA is a matter best determined after the establishment of a factual record, through an unfair labor practice hearing.” (Opinion 1123 at p. 5).

Hearing Examiner Leonard Wagman conducted an unfair labor practice hearing on December 7 and 20, 2011. The Hearing Examiner issued a Report and Recommendation (“Report”), in which he concluded that MPD violated D.C. Code § 1-617.04(a)(1) by restraining

and interfering with a FOP member's exercise of his right to seek legal assistance from FOP. (Report at 9). The Hearing Examiner recommended that the Board order MPD to cease and desist further violations of the CMPA, and to post a remedial notice. *Id.* The Report is now before the Board for disposition.

II. Discussion

A. Findings of Fact

In his Report, the Hearing Examiner found that on December 17, 2008, Detective Kevin McConnell was instructed to report to MPD's Human Resource Management Division's office. (Report at 3). McConnell requested FOP Chief Steward Hiram Rosario to accompany him to the meeting. *Id.* The meeting was held in the office of Lieutenant Gregory Stroud, and attended by Stroud, McConnell, Rosario, and Officer Ava Cole. *Id.*

At the meeting, McConnell was handed an investigative report and a memorandum stating that MPD proposed to terminate McConnell's employment for dereliction of duty. *Id.* The memorandum explained that McConnell could request a hearing on the proposed termination, and that he "may be represented by an attorney licensed to practice in the District of Columbia, or by a Union attorney." (Report at 4).

McConnell testified that in the course of the discussion, Stroud stated that "[i]f I were you, I wouldn't use the FOP attorneys. I would get my own." *Id.* Rosario's testimony substantially corroborated McConnell's recollection of Stroud's remarks. *Id.* Stroud denied warning McConnell against using FOP representation at the adverse action hearing and testified that he may have told McConnell that he had "an option as to who you want to use." *Id.* Cole first testified that Stroud said "you don't have to use the Union," but later stated that she could not "remember specifically" what Stroud had said at the December 17, 2008, meeting. (Report at 4-5).

The Hearing Examiner credited McConnell's testimony regarding the December 17 meeting, stating that "McConnell's sincere demeanor as he revisited his encounter with Lieutenant Stroud on December 17 convinced me that he was a reliable witness." (Report at 5). Further, the Hearing Examiner noted that Rosario's "frank testimony" corroborating McConnell's version of the events reinforced his impression of McConnell's credibility. *Id.*

The Hearing Examiner found that Article 12, Section 5 of the parties' collective bargaining agreement entitled McConnell to be represented by an attorney licensed to practice in the District of Columbia, or by a FOP representative. (Report at 6). Further, if McConnell chose to be represented by a private attorney instead of a FOP representative, "he would not have access to the grievance procedure, including arbitration, as set forth in Article 19 of the current collective bargaining agreement between FOP and MPD." *Id.* The Hearing Examiner credited McConnell's testimony that Stroud's advice against using FOP representation caused him to think that "the FOP attorneys weren't qualified." (*Id.*, quoting T. at 18).

B. Analysis and Conclusions

The Hearing Examiner rejected MPD's allegation that the Complaint should be dismissed because FOP failed to satisfy the evidentiary test set forth in *Wright Line v. Lamoreaux*, 251 NLRB 1083 (1980). (Report at 7). In support of his finding, the Hearing Examiner quoted the National Labor Relations Board ("NLRB") in *ITT Federal Services Corporation, et al.*, 335 NLRB 998, 1000 (2001): "In *Wright Line*...the [NLRB] set forth a test of causation for all cases alleging violations of Section 8(a)(3) or Section 8(a)(1) turning on employer motivation." (Report at 7). The Hearing Examiner noted that the instant case does not involve a question of motivation, but rather a supervisor's conduct in the presence of employees. *Id.* Thus, the Hearing Examiner concluded that the *Wright Line* test is inapplicable. *Id.*

The Board will affirm a hearing examiner's findings if they are reasonable and supported by the record. See *American Federation of Government Employees, Local 872 v. D.C. Water and Sewer Authority*, Slip Op. No. 702, PERB Case No. 00-U-12 (March 14, 2003).

As the Hearing Examiner correctly noted, the Complaint alleges that MPD violated the CMPA by "repudiating the services of [FOP] to a member of the FOP who was being served with a Notice of Proposed Adverse Action." (Complaint at 1). The Complaint does not allege that MPD was motivated to terminate McConnell for a protected union activity. In the absence of such an allegation, a *Wright Line* analysis is inapplicable, and the Hearing Examiner's conclusion to this effect is both reasonable and supported by the record. Therefore, this conclusion is affirmed.

Additionally, the Hearing Examiner found no merit to MPD's contention that Stroud's testimony shows his remarks to McConnell were lawful. (Report at 7). The Hearing Examiner chose to credit McConnell and Rosario's testimony about Stroud's remarks at the December 17 meeting, instead of Stroud's testimony about his remarks. (Report at 5, 7). Further, the Hearing Examiner noted that "McConnell's membership in the bargaining unit described in the parties' current collective bargaining agreement afforded him the protection of D.C. Code §§ 1-617.06(a)(2) and 1-617.04(a)(1) when he opted to seek FOP's assistance in defending himself from MPD's proposed adverse action." (Report at 7). Relying on NLRB precedent regarding Section 7 of the National Labor Relations Act, whose language is mirrored in D.C. Code § 1-617.06(a)(2), the Hearing Examiner concluded that McConnell was engaged in concerted activity during the December 17 meeting, that Stroud's conduct "demean[ed] FOP in front of McConnell," and that Stroud's remarks were "aggravated by the fear [they] engendered in [McConnell], who understood [Stroud's] remarks as a warning that FOP's representatives were incompetent." (Report at 8). Therefore, the Hearing Examiner determined that Stroud's remarks violated D.C. Code § 1-617.04(a)(1). *Id.*

It is the function of the hearing examiner to determine issues of credibility. *Doctors Council*, Slip Op. No. 636 at p. 4. The Hearing Examiner found that McConnell and Rosario's testimony regarding Stroud's remarks was more credible than Stroud's testimony, and that the remarks constituted a violation of D.C. Code § 1-617.04(a)(1). (Report at 9). Further, the

Hearing Examiner believed McConnell's testimony that Stroud's statements made him believe that FOP attorneys were not qualified. (Report at 6). In reaching his conclusion, the Hearing Examiner made credibility determinations and assessed the evidence presented to him. *Id.* The Board finds that this conclusion is reasonable and supported by the record. Therefore, the conclusion is affirmed.

C. Remedy

In his Report, the Hearing Examiner found FOP's demand that MPD post a cease and desist order to be unwarranted. (Report at 9). Instead, the Hearing Examiner noted that the Board's "usual remedial order and notice to employees is sufficient to remedy the violations in this case." *Id.*

The Board adopts the Hearing Examiner's recommended remedy, and MPD will post a notice acknowledging its violation of the CMPA. The Board has recognized that "when a violation is found, the Board's order is intended to have therapeutic as well as remedial effect. Moreover, the overriding purpose and policy of relief afforded under the CMPA for unfair labor practices is the protection of rights and obligations." *Nat'l Assoc. of Government Employees, Local R3-06 v. District of Columbia Water and Sewer Authority*, 47 D.C. Reg. 7551, Slip Op. No. 635 at pp. 15-16, PERB Case No. 99-U-04 (2000). "It is in the furtherance of this end, *i.e.*, the protection of employee rights,...[that] underlies our remedy requiring the post of a notice to *all employees* concerning the violations found and the relief afforded, notwithstanding the fact that all employees may not have been directly affected." *Bagentose v. D.C. Public Schools*, 38 D.C. Reg. 4154, Slip Op. No. 270 at p. 3-4, PERB Case Nos. 88-U-33 and 88-U-34 (1991).

D. Conclusion

Pursuant to Board Rule 520.14, the Board finds the Hearing Examiner's conclusions and recommendations to be reasonable, supported by the record, and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner's Report, and the Complaint is granted.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police/Metropolitan Police Department Labor Committee's Unfair Labor Practice Complaint is granted.
2. The District of Columbia Metropolitan Police Department, its agents, and representatives shall cease and desist from violating D.C. Code § 1-617.04(a)(1) of the CMPA by interfering with, restraining, or coercing employees in the exercise of the rights guaranteed under the CMPA.

3. The District of Columbia Metropolitan Police Department, its agents, and representatives shall cease and desist from violating D.C. Code § 1-617.04(a)(1) of the CMPA by warning FOP members against exercising their right to have Union representation at adverse action hearings.
4. The District of Columbia Metropolitan Police Department shall conspicuously post within ten (10) days from the issuance of this Decision and Order the attached Notice where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.
5. The District of Columbia Metropolitan Police Department shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order that the Notice has been posted accordingly.
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.

January 31, 2013

CERTIFICATE OF SERVICE

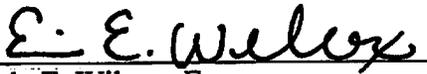
This is to certify that the attached Decision and Order in PERB Case No. 09-U-12 was transmitted via U.S. Mail and e-mail to the following parties on this the 4th day of February, 2013.

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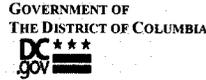
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT ("MPD"), THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1359, PERB CASE NO. 09-U-12 (January 31, 2013)

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered MPD to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) by the actions and conduct set forth in Slip Opinion No. 1359.

WE WILL cease and desist from interfering, restraining, or coercing employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act ("CMPA").

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) of the CMPA by warning Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP") members against exercising their right to have Union representation at adverse action hearings.

WE WILL NOT, in any like or related manner, interfere, restrain or coerce employees in their exercise of rights guaranteed by the Labor-Management subchapter of the CMPA.

WE WILL NOT, in any like or related manner, warn FOP members against exercising their right to have Union representation at adverse action hearings.

District of Columbia Metropolitan Police Department

Date: _____ By: _____

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 this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 1100 4th Street, SW, Suite E630; Washington, D.C. 20024. Phone: (202) 727-1822.

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

February 4, 2013