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 Nos. 11-U-38
v.	Opinion No. 1479
District of Columbia Metropolitan Police Department,	**Motions for Reconsideration**
Respondent.	

DECISION AND ORDER

Complainant Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP") and Respondent District of Columbia Metropolitan Police Department ("MPD") separately moved for reconsideration of a decision and order, *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 60 D.C. Reg. 5312, Slip Op. No. 1370, PERB Case No. 11-U-38 (2013) ("Opinion No. 1370"), that the Board issued in the above-captioned matter. The two motions for reconsideration are before the Board for disposition.

I. Statement of the Case

FOP's Complaint alleges that on March 15, 2011, Sgt. Yvonne Tidline ("Tidline") sent an e-mail on MPD's e-mail system encouraging FOP members to vote against a dues increase at an upcoming FOP meeting and to forward the e-mail to other members of the union. Inspector Dierdre Porter was a recipient of the e-mail. That same day, the chairman of FOP, Kristopher Baumann, forwarded Tidline's e-mail to the acting director of MPD's Labor and Employee Relations Unit, Mark Viehmeyer. (Complaint ¶ 4.) Baumann asked if MPD had authorized the e-mail or any others regarding FOP and requested permission to send an e-mail on MPD's e-mail system to FOP members regarding the dues assessment vote. (Complaint ¶¶ 4, 6.) Viehmeyer responded that the Department had not authorized the e-mail and that he was aware of no other e-mails related to FOP being disseminated via MPD's e-mail system. He stated that the incidents

would be investigated. He denied Chairman Baumann's request to send an e-mail because the message would solely concern internal union issues. (Complaint ¶¶ 5, 7.)

The Complaint named as respondents MPD, Tidline, Inspector Porter, and Chief Cathy Lanier. The individual respondents have since been removed from the case, leaving only MPD.[1] The Complaint alleges that by permitting Tidline to send her e-mail on MPD's e-mail system while prohibiting FOP from using that system to respond as well as taking action against union members who had used the system for legitimate communications, the respondents showed anti-union animus and violated section 1-617.04(a) of the D.C. Official Code by interfering, restraining, coercing, or retaliating against the exercise of rights that the CMPA guarantees to FOP members (Complaint ¶ 12), violated section 1-617.04(a)(2) by interfering with the existence or administration of the FOP (Complaint ¶ 13), and violated the exclusivity provision of the CMPA, section 1-617.10, by sanctioning the conduct of a rival organization. (Complaint ¶¶ 14-16.)

The Board's Order in Opinion No. 1370 stated, "FOP's Complaint, regarding Sergeant Tidline's email, is dismissed with prejudice." Opinion No. 1370 at p. 5, ¶ 1. The Order referred to a hearing examiner "[t]he unfair labor practice claim by FOP, regarding MPD's denial of the use of MPD's email system. . . ." *Id.* ¶ 3. Both FOP and MPD moved for reconsideration. For the reasons set forth below, FOP's motion is granted and MPD's motion is denied.

II. Discussion

A. FOP's Motion for Reconsideration

Opinion No. 1370 erroneously stated that FOP alleged two unfair labor practices: (1) MPD violated the CMPA "when Sergeant Tidline sent the March 15, 2011, email" and (2) MPD violated the CMPA "by permitting Tidline's email and denying Chairman Baumann use of MPD's email system to clarify information contained in Sergeant Tidline's email. . . ." Opinion No. 1370 at p. 2. The second of those two unfair labor practice claims actually constitutes FOP's entire claim as set forth in its Complaint. The first claim was not alleged by FOP.

Although FOP did not make that claim, Opinion No. 1370 dismissed it on the ground that Tidline was acting in her capacity as a union member when she sent the e-mail and her act as a union member cannot be imputed to MPD. *Id.* at p. 3. FOP objects that in reaching that decision the Board made factual determinations without a hearing. We need not consider that objection as the Board should not have addressed the issues of whether Tidline was acting in her capacity

[1] FOP dismissed Respondents Porter and Lanier, and the Board dismissed Respondent Tidline. In Opinion No. 1370, the Board stated, "As FOP has filed under § 1-617.04(a) for liability of the District for prohibited conduct, the Executive Director has removed Sergeant Tidline as an individual respondent from the caption consistent with the Board's precedent requiring individual respondents named in their official capacities to be removed from the complaint for the reason that suits against District officials in their official capacities should be treated as suits against the District." Opinion No. 1370 at p. 1 n.2. FOP's motion for reconsideration does not object to the removal of Tidline as a respondent.

as a union member and whether her act can be imputed to MPD. Addressing those issues was erroneous because FOP's Complaint does not allege that the sending of the e-mail was itself an unfair labor practice and does not impute any vicarious liability to MPD for that act. Instead, FOP's claim with respect to the March 15, 2011 e-mail is that MPD *allowed* or *permitted* Tidline to send the e-mail while disallowing Baumann's e-mail. (Complaint ¶¶ 12, 13, 16.)

With regard to the manner in which MPD allowed Tidline to send her e-mail, FOP alleges that MPD, and specifically Inspector Porter, did not investigate Tidline's e-mailing until Baumann brought it to Viehmeyer's attention. (Complaint ¶¶ 8, 12.) There is no allegation that Tidline sought permission to send the e-mail. [2]

As Opinion No. 1370 addressed an issue not raised by the pleadings, the Board grants FOP's motion for reconsideration and vacates paragraphs 1 and 3 of the Order issued with Opinion No. 1370. FOP's unfair labor practice Complaint, which does not include a claim that MPD violated the CMPA when Tidline sent her March 15, 2011 e-mail, will be referred to a hearing examiner for an unfair labor practice hearing.

B. MPD's Motion for Reconsideration

As discussed, FOP contends that MPD violated its statutory rights under the CMPA by allowing Tidline to send an e-mail critical of a proposed union dues increase on the MPD's e-mail system while disallowing the chairman of FOP to use MPD's e-mail system to e-mail a response to union members. In its motion for reconsideration, MPD contends that "[t]his issue was specifically negotiated over and agreed upon by the parties, as reflected in Article 11 of the CBA (Use of Department Facilities)." (MPD's Motion for Reconsideration 7.) Article 11, section 4 of the collective bargaining agreement states, "With specific approval by the Commanding Officer, the Union may utilize Departmental mailboxes, teletype, and electronic mail." (Complaint Ex. 1 p. 9.) Citing *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department Labor Committee*, 60 D.C. Reg. 2585, Slip Op. No. 1360 at p. 4, PERB Case No. 12-U-31 (2013), and *Government of District of Columbia v. District of Columbia Public Employee Relations Bd.*, No. 2012 CA 005842P (Super. Ct. June 10, 2013), MPD argues that the Board lacks jurisdiction over contractual matters covered by the parties' collective bargaining agreement. MPD asserts that the subject matter of this case is covered by article 11, section 4 of the collective bargaining agreement and on that basis urges the Board to reconsider its decision and to dismiss the Complaint.

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[2] Since Tidline was originally a respondent, the Complaint technically alleged that Tidline also permitted Tidline to send the e-mail. ("In permitting the Respondents to send an email on the Department's email system . . . , the Respondents have violated the exclusivity provision in the CMPA. . . ." (Complaint ¶ 16.)) Similarly, in another of the FOP-MPD e-mail cases, the Board noted that "[t]he Complaint asserts that 'the Respondents' permitted 'the Respondents' (presumably different Respondents) to send an e-mail on MPD's e-mail system containing false information about FOP while at the same time preventing FOP from using MPD's e-mail system." *F.O.P. /Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 60 D.C. Reg. 10816, Slip Op. No. 1395 at p. 2, PERB Case Nos. 11-U-35 and 11-U-44 (2013).

Assuming without deciding that FOP had a statutory right under the circumstances of this case to use MPD's e-mail system, the Board observes that the contractual provision cited by MPD does not necessarily remove the alleged violation of that statutory right from the Board's jurisdiction. The contractual provision would remove the alleged violation of the statutory right from the Board's jurisdiction only if it contains a clear and unmistakable waiver with respect to that statutory right. *See AFGE Locals 872, 1975, & 2553 v. D.C. Dep't of Pub. Works*, 49 D.C. Reg. 1145, Slip Op. No. 439 at p. 2 n.2, PERB Case No. 94-U-02 (1995). The D.C. Superior Court recognized this principle in its decision cited by MPD. The court said that "a party to a collective bargaining agreement can waive a right that its members would have under the CMPA or another statute, although it must use clear and unmistakable language to do so." *Gov't of D.C. v. D.C. Pub. Employee Relations Bd.*, No. 2012 CA 005842P, slip op. at 6 (Super. Ct. June 10, 2013).

MPD has the burden of proving that FOP has clearly and unmistakably waived the asserted statutory right. *See AFGE, Local Union No. 3721 v. D.C. Fire Dep't*, 39 D.C. Reg. 8599, Slip Op. No. 287 at p. 22, PERB Case No. 90-U-11 (1991). Allowing MPD the opportunity to meet its burden of proof at an unfair labor practice hearing is consistent with the Board's practice in cases that present this issue. *See AFGE, Local 872 v. D.C. Water & Sewer Auth.*, 52 D.C. Reg. 2474, Slip Op. 702 at pp. 2-3, PERB Case No. 00-U-12 (2003); *AFGE Local Union No. 2725 v. D.C. Dep't of Pub. & Assisted Hous.*, 43 D.C. Reg. 7019, Slip Op. No. 404 at p. 2 n.4, PERB Case No. 92-U-21 (1994); *Int'l Bhd. of Police Officers, Local 446 v. D.C. Gen. Hosp.*, 41 D.C. Reg. 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1992).

As referring this issue to a hearing examiner is consistent with the Board's precedent and appropriate in this case, MPD's motion for reconsideration is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. FOP's motion for reconsideration is granted.

2. MPD's motion for reconsideration is denied.

3. Paragraphs 1 and 3 of the Order issued with Opinion No. 1370 are vacated.

4. FOP's unfair labor practice Complaint will be referred to a hearing examiner for an unfair labor practice hearing.

5. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy and Members Donald Wasserman and Keith Washington.

Washington, D.C.

July 24, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision in PERB Case No. 11-U-38 was transmitted to the following parties on the 28th day of July 2014.

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