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

Fraternal Order of Police/Metropolitan Police Department Labor Committee,)	
Complainant,)	PERB Case No. 09-U-52
v.)	Opinion No. 999
District of Columbia Metropolitan Police Department,)	Motion for Preliminary Relief
and)	
Linda Nischan, Lieutenant for the Metropolitan Police Department,)	
and)	
Terrence Ryan, General Counsel for the Metropolitan Police Department,)	
and)	
Anna McClanahan, for the Metropolitan Police Department,)	
Respondents.)	

DECISION AND ORDER

I. Statement of the Case:

On July 10, 2009, the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP", "Union" or "Complainant") filed a document styled "Unfair Labor Practice Complaint and Request for Preliminary Relief" against the District of Columbia Metropolitan Police Department ("MPD", "Department" or "Respondents"), Lieutenant Linda Nischan, General Counsel Terence Ryan and Anna McClanahan. The Complainant alleges that MPD has

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violated D.C. Code §1-617.04(a)¹ by: (1) “interfering, restraining, or coercing Executive Steward [Delroy] Burton’s exercise of rights guaranteed by the [Comprehensive Merit Personnel Act]” (Compl. at p. 8); and (2) violating Article 12 §14 of the parties’ collective bargaining agreement (“CBA”). (See Compl. at pgs. 8-9).

FOP is requesting that the Board: (a) grant its request for preliminary relief; (b) find that the Respondents have committed an unfair labor practice; (c) order Respondents to cease and desist from violating the Comprehensive Merit Personnel Act (“CMPA”); (d) order Respondents to post a notice advising bargaining unit members that it violated the law; (e) grant its request for reasonable costs and fees; (f) order the Respondents to cease and desist from interfering with Executive Steward Burton’s ability to perform his FOP union duties; (g) order the Respondents to return Executive Steward Burton’s gun and badge; (h) order the Respondents to cease and desist from their retaliatory actions against Executive Steward Burton; (i) order the Respondent MPD to impose discipline against the MPD officials found to have engaged in unfair labor practices consistent with its disciplinary requirements; (j) order Respondents to expunge all records from Executive Steward Burton’s personnel files regarding this incident and the improper investigation; (k) order that Executive Steward Burton and any other full-time FOP official not be required to attend annual in-service training; (l) order the MPD to reinstate Executive Steward Burton’s police powers; (m) order Chief Cathy Lanier to issue Executive Steward Burton a written apology in each MPD building; and (n) order such other relief and remedies as PERB deems appropriate. (See Compl. at pgs. 11-12).

On July 17, 2009, MPD filed a document styled “Respondent’s Opposition to Complainant’s Motion for Preliminary Relief” (“Opposition”). In addition, on July 27, 2009, MPD filed an answer to the unfair labor practice complaint. Also, on July 28, 2009, MPD filed a motion to consolidate PERB Case No. 09-U-52 and PERB Case No. 09-U-53. In their submissions MPD: (1) denies that it has violated the CMPA; (2) requests that FOP’s motion for preliminary relief (“Motion”) be dismissed; (3) requests consolidation of PERB Case Nos. 09-U-52 and 09-U-53; and (4) requests that the Board order FOP to pay reasonable costs. (See Opposition at p. 6 and MPD’s Request to Consolidate at p. 5). FOP’s Motion, MPD’s Opposition and MPD’s Motion to Consolidate are before the Board for disposition.

¹“

D.C. Code §1-617.04 provides in relevant part as follows:

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

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

II. Discussion:

Executive Steward Delroy Burton is assigned to work full-time at the FOP pursuant to Article 9 of the parties' collective bargaining agreement ("CBA"). (See Compl. at p. 3 and Answer at p. 2). "[A]mong other things, [he] is in charge of the grievance apparatus for the FOP." (Compl. at p. 3).

D.C. Code § 5-107.02 provides that the MPD shall institute mandatory education training for each year. (See D.C. Code § 5-107.02). FOP claims that this section of the D.C. Code does not specify what the mandatory educational training shall consist of. (See Compl. at p. 3 and Answer at p. 2).

The FOP states that "[i]n 2008, the Chairman of the FOP, Kristopher Baumann was improperly issued a Form 62E which asserted that the Chairman had to satisfy all 2008 annual in-service training requirements prior to the end of calendar year 2008." (Compl. at pgs. 3-4).

FOP claims that "[o]n October 8, 2008, Executive Steward Burton sent a letter on behalf of the Chairman and the FOP to Chief Cathy Lanier, requesting information regarding the MPD's legal basis for extending the annual training requirement outside of the calendar year." (Compl. at p. 4). MPD responded to Executive Steward Burton's letter. FOP states that MPD's response imposed new requirements to which Executive Steward Burton and all full-time FOP representatives were now required to adhere. Furthermore, FOP asserts that MPD imposed these new requirements unilaterally and without bargaining with the FOP. (See Compl. at p. 4).

FOP argues that in "issuing the new requirements, the MPD was implementing a unilateral change in the terms and conditions of employment of Executive Steward Burton and all full-time []FOP members that were not incorporated in the CBA and had been established by mutually accepted past practices since the establishment of the []FOP and the CBA. [FOP contends that] [t]here are currently four full-time []FOP members including Executive Steward Burton and the Chairman. . .[who] must now attend forty (40) hours of annual in-service training or risk being issued a Form 62E or other discipline. [FOP claims that][t]his unilateral change by the MPD interferes with the ability of the full time []FOP members to provide approximately one month's worth of service to the []FOP and []FOP members." (Compl. at p. 4).

The FOP contends that "[i]n 2008, the MPD conducted the same investigation of Chairman Baumann based upon Chairman Baumann's alleged failure to attend in-service training. As a result of that investigation, the MPD concluded that there was no requirement for Chairman Baumann (or any other [member who is assigned to work] full-time [at the] FOP) to attend in-service training and that he had not attended in-service training in previous years." (Compl. at pgs. 4-5). Also, the FOP claims that in the past, no individual who has been assigned

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full-time to the FOP has been required to attend in-service training. Therefore, FOP asserts that the “new attempt to improperly require full-time []FOP representatives to attend in-service training is a deliberate and substantial interference with the []FOP representatives’ ability to represent []FOP members.” (Compl. at p. 5).

On July 9, 2009, Executive Steward Burton was ordered to MPD headquarters. At that time, his gun and badge were taken, his police powers were revoked, and he was placed on non-contact duty status by Lieutenant Linda Nischan as a result of “his alleged failure to complete 2008 in-service training.” (Compl. at p. 5). The FOP states that to its knowledge, no member of the MPD has ever had their badge and gun taken for failing to attend in-service training. (See Compl. at p. 5).

FOP asserts that this discipline of Executive Steward Burton was improper. FOP argues that “D.C. Code § 5-1031 prohibits the MPD from taking any action against an employee after 90 business days. . . [Specifically, FOP claims that] [t]he time period for 2008 in-service training would have expired on December 31, 2008, the end of calendar year 2008. [FOP states that] [t]he MPD has failed to provide any authority to conduct in-service training requirements outside of the calendar year. Further, the MPD’s own actions demonstrate that 2008 in-service training requirements must be conducted within calendar year 2008. When the MPD issued a Form 62E to Chairman Baumann regarding the same training requirement, the MPD required full-time []FOP representatives to complete in-service training by December 31, 2008. . . The MPD’s discipline of Executive Steward Burton occurred more than 90 business days after December 31, 2008, the date on which Executive Steward Burton was required to complete his 2008 in-service training requirements.” (Compl. at pgs.5-6).

Also, FOP states that “Executive Steward Burton was improperly additionally disciplined when his gun and badge were taken by the MPD. [FOP asserts that] Article 12 § 14 of the CBA is clear that even when a member is in non-contact status, the member shall not be automatically forbidden to carry his authorized weapon unless:

- a. The member is indicted by a Grand Jury;
- b. The member has been found guilty by a trial board and recommended for termination;
- c. The Board of Surgeons recommends that the member’s authorization to carry a weapon be revoked on account of mental illness and/or an emotional or psychological condition or because a physical disability makes the member’s use of a weapon hazardous; and
- d. Suspensions, except for those imposed for alleged activities carrying no demonstrated or potential threat to public safety, and disciplinary suspensions.

(Compl. at. p. 6).

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FOP argues that Executive Steward Burton has not been subject to any of the above circumstances and thus the MPD violated Mr. Burton's CBA rights in taking his gun and badge. (See Compl at p. 6).

The FOP claims that "[i]n 2006, the [FOP] filed grievances because the MPD had failed to comply with Article 12 § 14 of the CBA in taking weapons and badges of several [FOP] members who were placed in non-contact status but did not fall into one of the categories set forth in Article 12 § 14. . .The [FOP contends that] MPD did not dispute. . .FOP's contentions and instead reinstated the [FOP] members to full duty status and declared the issue moot. The [FOP] is unaware of any situation since 2006 where the [FOP] has had to file a grievance on behalf of a member that has been placed on non-contact status without their badge and gun that did not fall into one of the categories set forth in Article 12 § 14 of the CBA." (Compl. at pgs 6-7).

FOP contends that on July 9, 2009, Chairman Baumann presented the MPD with the fact that Executive Steward Burton had attended three (3) days of training in Chicago, Illinois and that this training was approved by Chief Lanier. (See Compl. at p. 7). However, the FOP claims that the MPD did not provide a response to this information. The FOP asserts that the Chicago training fulfilled any training requirements that applied to Executive Steward Burton. Nonetheless, FOP states that on July 9, 2009, Lieutenant Linda Nischan took Executive Steward Burton's badge and gun and revoked his police powers. (See Compl. at p. 7). In view of the above, FOP claims that on July 9, 2009, Chairman Baumann presented an informal grievance on behalf of Executive Steward Burton regarding the MPD's Article 12 violation of the CBA, and Lieutenant Linda Nischan denied the grievance. (See Compl. at p. 7).

The FOP states that to its "knowledge, except for Executive Steward Burton, historically no one has ever had their badge and gun taken for failing to attend in-service training." (Compl. at p. 7). FOP contends that Chairman Baumann informed Lieutenant Nischan of this fact and that "Lieutenant Nischan replied that Executive Steward Burton's training involved recertification for ASP training (metal baton). [However, FOP states that] [t]he MPD did not request or confiscate Executive Steward Burton's ASP baton." (Compl. at p. 8).

The FOP asserts that Executive Steward Burton has been a police officer with the MPD for fifteen years. "In disarming Executive Steward Burton without any basis or legitimate grounds, the MPD has endangered him." (Compl. at p. 8).

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The FOP contends that by the conduct described above MPD is in violation of D.C. Code § 1-617.04(a) by "interfering, restraining, or coercing Executive Steward Burton's exercise of rights guaranteed by the CMPA." (Compl. at p. 8). Specifically, FOP asserts that:

(a) Executive Steward Burton was engaged in protected union activities by using up to 40 hours each week for the purpose of carrying out his []FOP representational responsibilities under the CBA; (b) Respondents knew of the activities because they were expressly disclosed and guaranteed by the CBA; (c) there was express anti-union animus by the MPD and the Respondents demonstrated by Respondents' improper issuance of the new requirements that all full-time []FOP representatives complete in-service training despite accepted past practices, applying this requirement outside of the calendar year, improperly confiscating Executive Steward's gun in violation of the CBA in an attempt to intimidate and embarrass Executive Steward Burton, failing to provide Executive Steward Burton with identification despite having knowledge that he required this identification to enter a secure building and represent []FOP members, disarming Executive Steward Burton without any basis or legitimate grounds, and trying to cripple the []FOP and the []FOP's top officials; (d) Respondents attempted to interfere, restrain or coerce Executive Steward Burton in the exercise of his rights guaranteed by the CBA by issuing the new requirements and requiring Executive Steward Burton to attend annual in-service training, preventing Executive Steward Burton from using 40 hours each week for the purpose of carrying out his representational responsibilities under the CBA; and (e) Respondents disciplined the Executive Steward Burton by revoking his police powers and confiscating his gun and badge in violation of Article 12 § 14 of the CBA for failing to complete in-service training. (Compl. at pgs. 8-9).

The FOP is requesting that the Board grant its request for preliminary relief. In support of its position, FOP asserts the following:

The above facts set forth the MPD's interference with Executive Steward's CBA rights and harassment of Executive Steward Burton and other full-time []FOP representatives and establishes an independent basis for preliminary relief. First, the violation is clear-cut and flagrant because the MPD unilaterally change[d] the

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requirements of [JFOP full-time officers without bargaining . . . [As a result,] all full time [JFOP officers must now attend forty (40) hours of annual in-service training or risk being disciplined. Further, the MPD's selective enforcement of the in-service training requirement demonstrates the MPD's harassment of full-time [JFOP officers. Moreover, the MPD, without basis or legitimate grounds and in violation of the CBA confiscated Executive Steward Burton's gun and badge. Second, the effect of the violation is widespread because there are only four (4) full-time [JFOP representatives who represent thousands of [JFOP members. In revoking Executive Steward Burton's police powers, the MPD has had a chilling effect for the [JFOP and its members who require and will now be with very limited representation. Respondents have directly attacked the [JFOP in a manner that the MPD knows will leave the [JFOP seriously handicapped. The MPD's efforts are aimed at harassing full-time [JFOP employees in an effort to intimidate and coerce [JFOP representatives from asserting their rights, thereby clearly interfering with the exercise of those rights. Third, the public interest is seriously affected because of the clear-cut, widespread effect of the violations. Respondents' interference with and harassment of [JFOP representatives demonstrates that the MPD's actions are in bad faith and is not in the public's best interest. Fourth, the ultimate remedy afforded by the Board will be inadequate because action has already been taken against Executive Steward Burton, which is causing a substantial interference in the [JFOP's ability to represent its members. (Compl. at pgs. 10-11).

Board Rule 520.15 provides in pertinent part as follows:

The Board may order preliminary relief . . . where the Board finds that the conduct is clear-cut and flagrant; or the effect of the alleged unfair labor practice is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, and the Board's ultimate remedy will be clearly inadequate.

The Board has held that its authority to grant preliminary relief is discretionary. See, *AFSCME, D.C. Council 20, et al. v. D.C. Government, et al.*, 42 DCR 3430, Slip Op. No. 330, PERB Case No. 92-U-24 (1992). In determining whether or not to exercise its discretion under Board Rule 520.15, this Board has adopted the standard stated in *Automobile Workers v. NLRB*,

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449 F.2d 1046 (CA DC 1971). There, the Court of Appeals - addressing the standard for granting relief before judgment under Section 10(j) of the National Labor Relations Act - held that irreparable harm need not be shown. However, the supporting evidence must "establish that there is reasonable cause to believe that the [NLRA] has been violated, and that remedial purposes of the law will be served by pendente lite relief." *Id.* at 1051. "In those instances where the Board [has] determined that [the] standard for exercising its discretion has been met, the basis for such relief [has been] restricted to the existence of the prescribed circumstances in the provisions of Board Rule 520.15 set forth above." *Clarence Mack, et al. v. FOP/DOC Labor Committee, et al.*, 45 DCR 4762, Slip Op. No. 516 at p. 3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997).

In its response to the Motion, MPD asserts that the FOP's request for preliminary relief should be denied because: (1) FOP has failed to meet any of the elements necessary for obtaining preliminary relief; and (2) FOP's request is moot. (See Opposition at pgs. 3-6). In support of its position, MPD states the following:

While quite vague, Respondent can only assume that Complainant's request is that the Board order Respondent to reinstate Executive Steward Burton's powers, restore him to full duty status, and provide him with his service weapon. The Complainant's Motion for Preliminary Relief is moot as these three requests have been fulfilled by the Respondent. . .

Further, the Complainant has not established that there was *any* violation, much less that it was "clear-cut and flagrant." . . .

Nor has the Complainant demonstrated that the effect of the alleged unfair labor practice is widespread or that the public interest is seriously affected. While the Complainant alleges the alleged unfair labor practice is widespread, no evidence supporting this assertion is provided in the Complainant's motion. It is particularly unclear how the effect of the alleged violation could be widespread since this case only involves two members of the FOP, which the Complainant states in its motion consists of thousands of members. Complainant also has not submitted any evidence in support of its contention that the public interest is seriously affected. The public interest is not affected in this case because the public has an interest in *all* police officers being trained on an annual basis for the safety of the public.

(Opposition at pgs. 4-6).

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Furthermore, MPD specifically disputes that the action taken against Executive Steward Burton (taking his gun and badge, revoking his police powers and placing him on non-contact duty status) is connected to his union activities. Instead, MPD asserts that D.C. Code § 5-107.02. "clearly states that all sworn members of the Metropolitan Police Department shall complete a minimum of 32 hours of annual training. . . . The statute does not provide an exception for full-time union members. Even though Executive Steward Burton is assigned up to 40 hours per week for FOP representational duties he is still a police officer and subject to the requirements of all police officers." (Opposition at p. 4).

MPD requests that the Board: (1) find that it has not committed an unfair labor practice; and (2) deny FOP's request for preliminary relief. (See Answer at p. 10 and Opposition at p. 6).

In the present case, the parties acknowledge that Executive Steward Burton's police powers have been restored, his service weapon has been returned to him and he is no longer in a non-contact status. Therefore, MPD asserts that FOP's request for preliminary relief is moot. However, the FOP argues that MPD's argument that the issue is moot, "is fatally flawed and does not provide PERB with any basis for denying FOP's Motion for Preliminary Relief in this particular matter." (FOP's Reply in Support of Motion for Preliminary Relief at p. 3). In addition, FOP asserts that MPD's opposition is untimely.

After reviewing the parties' pleadings it is clear that the parties disagree on the facts in this case. On the record before us, establishing the existence of the alleged unfair labor practice violation turns essentially on making credibility determinations on the basis of conflicting allegations. We decline to do so on these pleadings alone. Also, the limited record before us does not provide a basis for finding that the criteria for granting preliminary relief have been met. In cases such as this, the Board has found that preliminary relief is not appropriate. See *DCNA v. D.C. Health and Hospital Public Benefit Corporation*, 45 DCR 6067, Slip Op. No. 559, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

Furthermore, FOP's claim that MPD's actions meet the criteria of Board Rule 520.15 is a repetition of the allegations contained in the Complaint. Even if the allegations are ultimately found to be valid, it does not appear that any of MPD's actions have any of the deleterious effects the power of preliminary relief is intended to counterbalance. Furthermore, MPD's actions stem from a single action (or at least a single series of related actions), and the record does not show these actions to be part of a pattern of repeated and potentially illegal acts. Although FOP claims MPD's actions affect Executive Steward Burton and other bargaining unit members, the record thus far does not show that the alleged violations have tangibly affected bargaining unit members other than Chairman Baumann and Executive Steward Burton. While the CMPA prohibits the District, its agents and representatives from engaging in unfair labor practices, the alleged violations, even if determined to have occurred, do not rise to the level of seriousness that would undermine public confidence in the Board's ability to enforce compliance

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dispute resolution process, the FOP has failed to present evidence which establishes that these processes would be compromised, or that eventual remedies would be inadequate, if preliminary relief is not granted.

We conclude that the FOP has failed to provide evidence which demonstrates that the allegations, even if true, are such that remedial purposes of the law would be served by *pendente lite* relief. Moreover, should violations be found in the present case, the relief requested can be accorded with no real prejudice to the FOP following a full hearing. In view of the above, we deny the FOP's Motion for Preliminary Relief.

Also, MPD has requested that this case (PERB Case No. 09-U-52) be consolidated with PERB Case No. 09-U-53. FOP does not oppose MPD's request to consolidate. Today, we denied FOP's request for preliminary relief in PERB Case No. 09-U-53 and directed the development of a factual record through an unfair labor practice hearing. We find that the present case (PERB Case No. 09-U-52) involves the same parties and issues presented in PERB Case No. 09-U-53. As a result, we: (a) grant MPD's request to consolidate the instant case (PERB Case No. 09-U-52) with PERB Case No. 09-U-53; and (b) direct the development of a factual record through a consolidated unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police/Metropolitan Police Department Labor Committee's Motion for Preliminary Relief is denied.
2. The District of Columbia Metropolitan Police Department's Motion to Consolidate PERB Case No. 09-U-52 and PERB Case No. 09-U-53 is granted. Therefore PERB Case No. 09-U-52 and PERB Case No. 09-U-53 are consolidated.
3. The Board's Executive Director shall refer the consolidated matter to a Hearing Examiner for disposition. Pursuant to Board Rule 550.4 the Notice of Hearing shall be issued fifteen (15) days prior to the date of the hearing.

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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.

December 23, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-U-52 was transmitted via Fax and U.S. Mail to the following parties on this the 23rd day of December 2009.

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