

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,	)	
	)	PERB Case No. 12-U-13
Complainant,	)	
	)	Opinion No. 1269
v.	)	
	)	
District of Columbia	)	
Metropolitan Police Department,	)	
	)	
Respondent.	)	

**DECISION AND ORDER**

**I. Statement of the Case**

On December 2, 2011, the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Complainant” or “FOP”) filed an unfair labor practice complaint (“Complaint”) against the District of Columbia Metropolitan Police Department (“MPD”), Chief Cathy Lanier, and Ms. Gwendolyn Crump (“Respondents”). The Complaint alleges that MPD violated D.C. Code § 1-617.04(a)(1) by attempting to intimidate the FOP membership and by engaging in direct dealing with the FOP membership. (Complaint at 5-8).

In its Answer (“Answer”), MPD denies FOP’s allegations. In footnote 1 of the Answer, MPD “move[s] for the dismissal of Chief Cathy Lanier and Ms. Gwendolyn Crump pursuant to the Board’s dismissal of the individual Respondents in PERB Case No. 08-U-19.” (Answer at 1).

FOP then filed a Response to MPD’s Answer. (“Response”). In it, FOP alleges that footnote 1 of the Answer is an improper form to seek dismissal of a party. (Response at 3). Additionally, FOP argues that Chief Lanier and Ms. Crump are proper parties to the action.

(Response at 3-4). Finally, FOP analogizes the Whistleblower Protection Amendment Act of 2009<sup>1</sup> to the Comprehensive Merit Personnel Act ("CMPA"). (Response at 7).

## II. Discussion

### A. Background

This unfair labor practice complaint arises from a September 8, 2011, order from Chief Lanier instituting twelve-hour shifts for MPD in response to a security threat on the tenth anniversary of September 11. (Complaint at 3; Answer at 2). Later that day, FOP Chairman Kristopher Baumann sent an e-mail to all FOP members entitled "Chief Lanier Declares Emergency." Additionally, the e-mail was sent to WUSA 9, a local news station. (Complaint Ex. 2). The e-mail stated:

At 3:42 p.m. on September 8, 2011, Chief Cathy Lanier sent out a Teletype suspending the scheduling provisions of the Collective Bargaining Agreement (Agreement) between the District and the Fraternal Order of Police, Metropolitan Police Department Labor Committee (FOP). Pursuant to the terms of the Agreement, the scheduling provisions of the Agreement can only be suspended "for a declared emergency, for crime, or for an unanticipated event." Chief Lanier did not consult with or contact the FOP prior to declaring the emergency.

Please remain alert and careful. If, in fact, a valid emergency exists, the residents of the District will be counting on you.

There are, however, already questions about the nature of the emergency. September 11, 2011 is not an unanticipated event and, according to the Chief and Mayor Gray, crime is down city-wide. So far the Department has not explained the extent of or the basis for the emergency.

As you are all aware, over the past month, after again losing litigation involving the rescheduling of officers under her public relations stunt All Hands on Deck, Chief Lanier has repeatedly threatened to declare an emergency in an effort to circumvent the Agreement. We sincerely hope that Chief Lanier has not decided to cover up for her failure to pre-plan as appropriate, for a time that the entire nation has anticipated needing heightened police services by declaring an emergency for the September 11, 2011 weekend because of scheduling problems.

---

<sup>1</sup> D.C. Code § 1-615 *et seq.*

Right now we must assume there is a valid emergency and prepare accordingly. As soon as Chief Lanier complies with the terms of the Agreement and provides the basis of the emergency, we will let all members know. Until then, please stay vigilant and remember that we work for the residents of the District of Columbia and they deserve our best at all times.

(Complaint Ex. 2). On September 12, 2011, local news station WJLA published a story entitled "D.C. police union criticizes overtime for Sept. 11 alert." (Complaint at 3; Answer at 2). The story quotes Chairman Baumann as saying that "because the department didn't plan for this, it'll cost taxpayers more money," and that "if it is a credible threat, we need to be at the ready. But because [I haven't] gotten any information about it, [I] can't say it warrants the resources." (Complaint Ex. 3).

Chief Lanier posted a statement on MPD's internal website addressing all MPD employees. (Complaint at 3-4; Complaint Ex. 2; Answer at 2). The statement read:

On September 8, 2011, at approximately 1400 hours, I instituted 12 hour shifts for the department by adding four hours of overtime to every members [*sic*] tour of duty. Within minutes executive union leadership contacted Assistant Chief Alfred Durham and informed him of their intentions to file an injunction in court to stop the 12 hour shifts. At approximately 1700 hours the Chairman of the Fraternal Order of Police sent the attached message to the force. See below and note that at the same time an identical message was delivered to the media via e-mail.

As you can see, this notice alleges that my suspension of the contract was in some way related to a failure to pre plan for 9/11 or in retaliation for the All Hands on Deck PERB decision. I wanted to reach out to you in order to set the record straight.

As some of you know, the MPD has been planning for the 10<sup>th</sup> Anniversary of the 9/11 terrorist attacks on New York, Washington, and Pennsylvania for many months now. Our planning was ramped up after the intelligence was gleaned from Usama Bin Ladin's compound that related his desire to strike again on September 11, 2011.

As we came into the week of 9/11 (Thursday, September 11, 2011) a credible classified threat specifically naming Washington, D.C. came to light. As the threat was investigated, there was nothing to discount its veracity. As such, we were faced with a known desire of Al Qaida to strike on September 11<sup>th</sup> and a credible threat to our

city. Therefore, I made the common sense decision to go to the top level of our 9/11 operational plan which included, amongst many things, very high visibility and increasing our manpower on the street. Thus, in order to accomplish this, and ensure the safety of our city, we instituted 12 hour shifts.

Additionally, I want to assure you that our planning was well thought out, comprehensive and scalable. It included such actions as restricting leave and days off, the preparation of detailed response plans, thorough cooperation amongst our local and federal partners, briefings for the public sector over the last eight months, updating all of our emergency rosters, focusing on enhancing our patrol rifle teams, updating and training new active shooter teams and various other measures to ensure we were prepared. In my estimation, our planning rivaled that of any major event in the District of Columbia.

While I am not sure what the intentions were by this notice being provided to the media, or by indicating a desire to file an injunction during such an important time, I am sure that I made a sound decision based on a real and present threat to the city and our Nation. Furthermore, in no way were my actions associated with anything related to the All Hands on Deck PERB decision.

As I stated, I did not want you operating on rumor, innuendo, or suggestion, and I wanted you to be armed with facts and confident in your leadership. I will be participating in several briefings today in which I will receive updated information on the status of the threat. Rest assured that as soon as the threat to the city is minimized, I will revert back to our regular schedules.

As I stated in my message to you yesterday, I am very proud of the dedication to duty displayed by every member of this department and I am honored to be your Chief.

(Complaint Ex. 2).

Additionally, Chief Lanier posted a statement on the MPD's public website entitled "Statement from Chief Lanier in response to FOP," motivated in part by the WJLA article. (Complaint at 3-4; Complaint Ex. 4; Answer at 3). This statement reads:

First and foremost, you can't put a cost on securing the Nation's Capital. I am going to do whatever is necessary to keep our community safe. I have been heavily involved in Homeland Security for more than 10 years and have rarely seen threat streams

that are *both* specific to Washington DC AND credible. So questioning whether this is necessary is a no-brainer.

That aside, the President of the United States includes funding for the District specifically for “response to immediate and specific terrorist threats to the District of Columbia.” It is created to avoid exactly this type of dilemma – choosing between the security of our City and the cost.

It’s unfathomable that Chairman Baumann would question the deployment of the dedicated men and women to safeguard the residents and visitors of the District of Columbia; after all we are sworn to protect and serve.

The White House released a similar statement today stating “this is not useless chatter and our vigilance will continue.”

(Complaint Ex. 4). Additionally, FOP alleges that WJLA broadcast a news story that was edited in a manner which took Chairman Baumann’s comments out of context, then attempted to correct its errors by replacing the broadcast with the unedited version on its website and revising the September 12, 2011, article. (Complaint at 4). FOP further alleges that the WJLA reporter responsible for the story issued an apology to Chief Lanier and Chairman Baumann. MPD denies any knowledge of the corrections and the apology. (Complaint at 4; Answer at 3).

B. Parties Lanier and Crump

FOP named Chief Lanier and Ms. Crump as respondents in the instant case. The Executive Director has removed the names from the caption consistent with the Board’s case precedent. See *Fraternal Order of Police/Metropolitan Police Dept. Labor Committee v. Metropolitan Police Dept.*, D.C. Reg. \_\_\_, Slip Op. No. 1118 at p. 5, PERB Case No. 08-U-38 (2011); *Fraternal Order of Police/Metropolitan Police Dept. Labor Committee v. Metropolitan Police Dept.*, D.C. Reg. \_\_\_, Slip Op. No. 1214, PERB Case No. 11-U-15 (2011). Slip Op. No. 1118 was issued on August 19, 2011, and Slip Op. No. 1214 was issued on November 7, 2011. Both slip opinions dismissed the individually-named MPD management representatives because they were acting in their official capacities, and both slip opinions were issued prior to FOP filing the instant action on December 2, 2011. By the time this Complaint was filed, FOP knew not to list Chief Lanier and Ms. Crump individually as respondents. Notwithstanding its knowledge of the Board’s rulings not to name respondents acting in their official capacities in a complaint, FOP chose to do so in the instant complaint. Simply put, it is disturbing that FOP disregarded the Board’s clear instruction regarding naming individuals acting in their official capacities as respondents in unfair labor practice complaints.

In addition, best practices dictate that in the future MPD should list its arguments for a dismissal of respondents as a paragraph of the pleading and not in a footnote.

C. Alleged direct dealing

FOP alleges that MPD committed an unfair labor practice in violation of D.C. Code § 1-617.04(a)(1) by dealing directly with bargaining members through the postings to the MPD internal and external websites. (Complaint at 6). Specifically, FOP claims that MPD dealt directly with FOP members “in an effort to induce FOP members to pressure their leadership and union representatives to cease questioning the scheduling changes, a subject governed by the parties’ CBA,” and “negotiated and dealt directly with FOP members concerning conditions of employment.” (Complaint at 6-7). MPD denies these allegations. (Answer at 5).

The Board has held that “mere communication with membership” does not violate the CMPA. *AFSCME Council 20 v. Barry, et. al.*, 36 D.C. Reg. 427, Slip Op. No. 200, PERB Case No. 88-U-32 (1988). In addition, communications that do not attempt to induce employees to take action against their exclusive representative do not constitute direct dealing. *Washington Teachers’ Union Local 6 v. District of Columbia Public Schools*, 48 D.C. Reg. 2931, Slip Op. No. 431, PERB Case No. 95-U-08 (1995). Alleged examples of direct dealing must be examined in context to determine whether the agency intended to disparage or undermine the union’s leadership. *AFSCME Council 20* at 4.

In the instant case, the Board finds that MPD did not engage in direct dealing with members of the FOP. The evidence shows that MPD was privy to Chairman Baumann’s e-mail to the FOP membership and the media, as well as the WJLA article. (Complaint Ex. 2; Answer at 3). Although the WJLA article may have misrepresented Chairman Baumann’s position, and Chief Lanier partially relied on the WJLA article when crafting her statements, she, Ms. Crump, and MPD cannot logically be held responsible for the accuracy of a third party’s report. This is not an example of “express anti-union animus by the MPD,” as alleged in the Complaint. (Complaint at 8).

Taken in context, it is clear that Chief Lanier’s statements on the MPD internal and external websites were intended to address concerns raised in the media and by Chairman Baumann about MPD’s preparation for September 11, 2011. MPD’s response was communicated to a range of people – FOP members, MPD employees who did not belong to FOP, and the general public. (Complaint at 3-4; Answer at 3). The statements do not expressly or implicitly encourage FOP members to take action against their exclusive representatives, nor do they call into question the union’s leadership or involve issues currently being negotiated. Chief Lanier’s statements do not rise to the level of improper direct dealing.

D. Alleged retaliation

FOP alleges that MPD’s public and internal statements regarding the September 11 scheduling were done in retaliation for unspecified FOP actions<sup>2</sup>. (Complaint at 7). This Board

---

<sup>2</sup> It is possible that FOP believes Chief Lanier’s statements to be in retaliation for a PERB decision involving MPD’s All Hands on Deck initiative, but FOP does not state this directly in the Complaint.

has held that while a Complainant is not required to prove his or her case on the pleadings, he or she must plead or assert allegations that, if proven, would establish the alleged statutory violation. *See, e.g., Hunter v. AFSCME, AFL-CIO, District Council 20, Local 2087*, \_\_\_ D.C. Reg. \_\_\_, Slip Op. No. 1201, PERB Case No. 05-U-22 (October 7, 2011). What is more, “to maintain a cause of action, [a] Complainant must [allege] the existence of some evidence that, if proven, would tie the Respondent’s actions to the asserted [statutory violation]. Without the existence of such evidence, Respondents’ actions [cannot] be found to constitute the asserted unfair labor practice. Therefore, a Complaint that fails to allege the existence of such evidence does not present allegations sufficient to support the cause of action.” *AFGE Local 2978 v. Government of the District of Columbia, Department of Health*, \_\_\_ D.C. Reg. \_\_\_, Slip Op. No. 987, PERB Case No. 08-U-47 (September 30, 2009) (quoting *Goodine v. FOP/DOC Labor Comm.*, 43 D.C. Reg. 5163, Slip Op. No. 476 at 3, PERB Case No. 96-U-16 (1996).

In the absence of a specific charge of retaliation and an allegation of evidence that would tie MPD’s actions to the asserted violation of the CMPA if proven, the Board must dismiss this portion of the Complaint.

THEREFORE, the Board finds that MPD’s statements on its internal and external websites do not constitute an unfair labor practice, and the FOP’s Complaint is dismissed.

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. The Fraternal Order of Police’s Unfair Labor Practice Complaint is dismissed.
2. The Fraternal Order of Police will cease naming management representatives operating in their official capacities as respondents in future unfair labor practice complaints.
3. 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 30, 2012

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 12-U-13 was transmitted via U.S. Mail and e-mail to the following parties on this the 31<sup>st</sup> day of May, 2012.

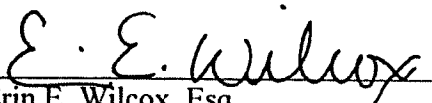
Mr. Anthony M. Conti, Esq.  
Mr. Daniel J. McCartin, Esq.  
Conti Fenn & Lawrence, LLC  
36 South Charles St., Ste. 2501  
Baltimore, MD 21201  
tony@lawcfl.com

**U.S. MAIL and E-MAIL**

Mr. Mark Viehmeyer, Esq.  
Ms. Nicole Lynch, Esq.  
Metropolitan Police Dept.  
300 Indiana Ave., N.W.  
Room 4126  
Washington, D.C. 20001  
mark.viehmeyer@dc.gov  
nicole.lynch@dc.gov

**U.S. MAIL and E-MAIL**

---

  
Erin E. Wilcox, Esq.  
Attorney-Advisor