

(See Compl. at p. 5).

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 Chief Lanier and all others from sending any communications to bargaining unit members without obtaining approval from the FOP; (g) order the Respondent MPD to impose discipline against the MPD officials found to have engaged in unfair labor practices consistent with its disciplinary requirements; and (h) order such other relief and remedies as PERB deems appropriate. (See Compl. at pgs. 8-9).

MPD filed a document styled "Respondent's Opposition to Complainant's Motion for Preliminary Relief" ("Opposition"). In addition, MPD filed an answer to the unfair labor practice complaint. In their submissions MPD: (1) denies that it has violated the CMPA; (2) requests that FOP's request for preliminary relief ("Motion") be denied; and (3) requests that the FOP's complaint be dismissed. (See Opposition at p. 6 and Answer at p. 5). Also, FOP filed a document styled "Reply In Support of Motion for Preliminary Relief" ("Reply"). In its Reply, the FOP asserts that MPD's "Opposition is untimely and should not be considered." (Reply at p. 3). FOP's Motion, FOP's Reply and MPD's Opposition are before the Board for disposition.

II. Discussion:

The FOP claims that on May 20, 2009, "it filed an unfair labor practice complaint against the MPD and Chief Cathy Lanier ("Chief Lanier"), arising out of, among other things, the District's refusal and failure to bargain and improper interference with the [FOP's rights to participate in negotiating the training and time-in-grade requirements and methods of evaluating and determining qualifications for promotion examinations presently scheduled to be administered on July 29, 2009." (Compl. at p. 3).

On May 21, 2009, Chief Lanier sent an electronic mail to all members of the MPD. FOP asserts that "Chief Lanier's electronic mail directly attacked the [FOP, and indirectly the [FOP's Chairman Kristopher Baumann, for filing the May 20, 2009 unfair labor practice complaint. Specifically, Chief Lanier's electronic mail message stated:

As you know, the 2009 Promotional Process was announced and implemented with the publication of Circular 09-01.

with the exclusive representative.

Having participated in several promotional processes myself, I am well aware of how much personal time participants spend studying and preparing.

One of the remedies requested by the FOP in its complaint is for the 2009 promotional process for sergeants, lieutenants, and captains to be postponed until the Public Employee Relations Board (PERB) has had an opportunity to rule on the underlying complaint.

[T]here is no way to tell at this point how long it will be before PERB will be able to issue decision, nor is it clear how quickly PERB will be able to address this matter given the nearly year-long backlog of cases already in the system.

The Department will oppose the FOP's demand that the written test be postponed. However, if the FOP is successful and a decision is issued preventing the Department from conducting the written test, I will inform you immediately."

(Compl. at p. 3, emphasis in original).

The FOP contends that "[i]n sending this e-mail, Chief Lanier was well aware that she was sending it directly to the entire [FOP membership. Chief Lanier was also aware of the MPD's prohibition of use of the MPD's e-mail system for purposes of discussing union activity." (Compl. at p. 4).

The FOP claims that "Chief Lanier has previously taken action against union members for using an all-MPD e-mail to communicate about issues having any bearing on a union member or issue, whether implicit or indirect. Specifically, PERB matter 08-U-65 was filed because the MPD took action against [FOP member Officer Nicholas Decutiis after Officer Decutiis sent an electronic mail message to the members of the MPD that consisted of a legitimate departmental business communication regarding the improper handling of service papers by members of the MPD. This matter is currently pending before PERB." (Compl. at p. 4).

FOP argues that "[i]t was the intent of Chief Lanier and the MPD that the e-mail message would create and foster dissension among union members and to generate controversy or create animus toward the [FOP's efforts to advance the pending unfair labor practice complaint. The

communication was an attempt to disparage union leadership and undermine the [FOP's ability to advance the subject [the unfair labor practice complaint]." (Compl. at p. 4).

The FOP asserts that in sending the e-mail message, Chief Lanier and the MPD engaged in direct dealing with FOP members in "an effort to improperly induce [FOP members to waive their Collective Bargaining Agreement rights, and is an improper smear attempt aimed at [FOP leadership." (Compl. at p. 4).

Further, FOP contends that "Chief Lanier and other management officials on behalf of the MPD have a history of direct dealing in an attempt to intimidate and coerce [FOP members. Specifically, on March 11, 2009, Chief Lanier publicly stated that the Chairman of the [FOP was not acting in the best interest of [FOP members:

Mr. Baumann speaks for the Fraternal Order of Police, but he's only one individual . . . If you ask a lot of members of the FOP, other members of the police department, they will tell you differently."

(Compl. at pgs. 4-5).

In addition, FOP claims that "Attorney General Peter Nickles also has previously engaged in direct dealing with [FOP members in an attempt to disparage [FOP leadership. Specifically, on March 30, 2009 at the Committee on Public Safety and the Judiciary Hearing on Bill-115, Mr. Nickles testified, in his capacity as Attorney General, that if he were a member of a union that took a particular position he would demand removal of the union leader and that all union members should be outraged at the union's actions. . . . At that hearing there were only two unions that testified, the [FOP being one of those unions, and the [FOP was the only union who took the position at issue which Mr. Nickles made his statement concerning." (Compl. at p. 5).

The FOP contends that by the conduct described above MPD is in violation of D.C. Code § 1-617.04(a)(1) and (5) by "dealing directly with bargaining unit members." (Compl. at p. 5). Specifically, FOP asserts that by "directly dealing with the [FOP members in an effort to induce [FOP members to pressure their leadership and union representatives to withdraw the pending unfair labor practice complaint, the Respondents improperly attempted to induce [FOP members into waiving their rights under the CBA. By doing so, the Respondents interfered with and coerced [FOP members in the exercise of their rights guaranteed by the Comprehensive Merit Personnel Act in violation of D.C. Code § 1-617.04(a)(1)." (Compl. at p. 5).

The FOP states that "[t]he Respondents' May 21, 2009 electronic mail message constituted improper coercion of [FOP members. As such, in distributing the electronic mail, the Respondents went beyond mere information and opinion gathering concerning its operations, and instead negotiated and dealt directly with [FOP members concerning conditions of employment. The

communication by Chief Lanier is a deliberate attempt to erode the [FOP's bargaining position and its ability to assert the bargaining rights of its membership." (Compl. at pgs. 5-6).

Specifically, FOP asserts that "the Respondents' May 21, 2009 [e]lectronic mail message constituted a threatening proposal and improper demand for a resolution to the 2009 Promotional Process issue, and was not merely an information tool. Respondents were required to go through the exclusive bargaining unit for input, instead of communicating directly with [FOP members concerning the request that the [FOP withdraw its unfair labor practice complaint. This is the case even when the subject matter involves a management right that may be implemented without bargaining. In short, Respondents violated the CMPA by contacting FOP members directly on the pending unfair labor practice complaint and on matters that the FOP was attempting to negotiate with the MPD." (Compl. at p. 6).

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 and direct dealings with the DCFOP relating to the DCFOP's representation of its members' rights and attempt to bargain over terms relating to the 2009 Promotional Process test and establish an independent basis for preliminary relief. First, the violation is clear-cut and flagrant because Respondents used their exclusive e-mail system to communicate with DCFOP members in a way that the DCFOP could not respond to and communicate with the same members without violating the CBA, and without being subjected to disciplinary action. Second, the effect of the violation is widespread because Respondent's one-sided direct dealing with the DCFOP members has a chilling effect for the DCFOP and any efforts by leadership to assert the rights of its members. Respondents have directly attacked the DCFOP in a manner that the MPD knows will leave the DCFOP without the ability to respond. The MPD's efforts are aimed to either force the DCFOP to move forward with its pending unfair labor practice complaint, risking that its members have been influenced by Respondents' e-mail and believing the DCFOP is not acting in its members best interest; or in the alternative, forcing the DCFOP to withdraw its pending unfair labor practice complaint, thereby harming DCFOP members who the unfair labor practice complaint was filed in order to protect. Further, Respondents' actions in this matter were conducted in such a way to intimidate and coerce DCFOP members 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. As illustrated in the pending unfair labor practice complaint, the DCFOP's actions were taken to ensure that MPD was putting the safety of the public first in its process to evaluate the most qualified candidates for promotion to serve the community and protect the public. Respondents' direct dealing and interference with DCFOP members outside of the bargaining unit demonstrates that the MPD's refusal to bargain and negotiate is in bad faith and is not in the public's best interest. Fourth, the ultimate remedy afforded by the Board will be inadequate because the Respondents have already stated in the e-mail that they intend to send further e-mails to DCFOP members on this matter, which will no doubt be aimed at criticizing the DCFOP and the effects of its leadership to protect its interests. (Compl. at pgs. 7-8).

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*, 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 bases 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 MPD's Opposition and answer to the Complaint, 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. 5 and Opposition at p. 5).

FOP contends that "MPD's Opposition is untimely. . .Therefore[,] the MPD's response should not be considered and the [FOP's Motion for Preliminary Relief should be granted." (Reply at p. 3).

Board Rules 553.2, 501.4, 501.5 and 501.16 provide as follows:

553.2 - Motions

Any response to a written motion shall be in writing and *filed within five (5) days after service of the motion.* (Emphasis added).

501.4 - Computation - Mail Service

Whenever a period of time is measured from the service of a pleading, and service is by mail, five (5) days shall be added to the prescribed period.

501.5 - Computation - Weekends and Holidays

In computing any period of time prescribed by these rules, the day on which the event occurs from which time begins to run shall not be included. If the last day of a prescribed period falls on a Saturday, Sunday or District of Columbia holiday, the period shall extend to the next business day. *If a prescribed time period is less than eleven days (11) days, Saturday, Sundays, and District of Columbia holidays shall be excluded from the computation.* Whenever the prescribed time period is eleven (11) days or more, such days shall be included in the computation. (Emphasis added).

501.16 - Method of Service

Service of pleadings shall be complete on personal delivery during business hours, depositing of the message with a telegraph company, charges prepaid, depositing the document in the United States mail, properly addressed, first class postage prepaid, or by facsimile transmission.

In the present case, FOP filed its document styled "Unfair Labor Practice Complaint and Request for Preliminary Relief" on July 1, 2009. The certificate of service attached to the July 1st filing indicates that this document was hand delivered to MPD on July 1, 2009. Pursuant to Board

Rule 553.2, 501.5 and 501.16, MPD's response to the "motion for preliminary relief" had to be filed in this case no later than the close of business on July 8, 2009.² However, MPD's response to the "motion for preliminary relief" was filed with the Board on July 9, 2009 and was transmitted on that date to the FOP. (See MPD's Opposition at p. 6). Consistent with Board Rule 553.2 and 501.5, we find that MPD's Opposition was not timely filed. Accordingly, it will not be considered.

After reviewing FOP's pleadings and MPD's answer to the Complaint, 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.

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. Moreover, MPD's actions stem from a single action (or at least a single series of related actions), and the record thus far does not show these actions to be part of a pattern of repeated and potentially illegal acts. Although 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 with the CMPA. While some delay inevitably attends the carrying out of the Board's 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.

For the reasons discussed above, we deny FOP's request for preliminary relief. As a result, we direct the development of a factual record through an unfair labor practice hearing.

² Pursuant to Board Rule 501.5, the beginning date for computing the five (5) day period contained in Board Rule 553.2, was July 2, 2009. Therefore, the five (5) day period ended on July 8th.

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 Board's Executive Director shall refer this 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.
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.

December 29, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-U-50 was transmitted via Fax and U.S. Mail to the following parties on this the 29th day of December 2009.

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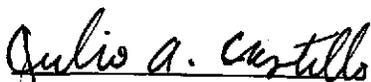
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