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

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In the Matter of:	)	
	)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee	)	PERB Case No. 18-U-08
	)	
Complainant	)	
	)	Opinion No. 1720
v.	)	
	)	
Metropolitan Police Department	)	
	)	
and	)	
	)	
Chief Peter Newsham	)	
	)	
Respondents	)	

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**DECISION AND ORDER**

**I. Introduction**

On November 17, 2017, Petitioner Fraternal Order of Police/Metropolitan Police Department Labor Committee (FOP) filed the instant unfair labor practice complaint (Complaint) against the Respondents Metropolitan Police Department (MPD) and MPD Police Chief Peter Newsham<sup>1</sup> alleging that MPD violated the Comprehensive Merit Personnel Act (CMPA), D.C. Official Code § 1-617.04(a)(1) and (5). The Complaint alleges that MPD violated the Senior Law Enforcement Officer Emergency Amendment Act of 2016 (SLEOEA or

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<sup>1</sup>MPD Chief Peter Newsham is named as Co-Respondent; however, suits against District officials in their official capacity are treated as suits against the District. Accordingly, only MPD is a respondent in this matter. *See Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 59 D.C. Reg. 6579, Slip Op. No. 1118 at p. 4-5, PERB Case No. 08-U-19 (2011); *see also Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. D.C. Pub. Emp. Relations Bd.*, Civ. Case No. 2011 CA 007396 P(MPA) (D.C. Super. Ct. Jan 9, 2013).

amended Act) by failing to bargain in good faith over the implementation of that statute.<sup>2</sup> Specifically, FOP argues that MPD: (1) failed to bargain in good faith with FOP by misreading the SLEOEA; (2) engaged in bad faith bargaining over the impact and effects of SLEOEA on FOP membership; and (3) unilaterally changed material working conditions of the FOP membership.<sup>3</sup>

On February 10, 2017, MPD filed a response denying any unlawful actions under the CMPA. MPD also asserted affirmative defenses and moved to dismiss the Complaint for untimeliness and lack of jurisdiction.<sup>4</sup>

A hearing was held on September 19, 2018. The parties submitted post-hearing briefs. On December 14, 2018, the Hearing Examiner issued a Report and Recommendation. The parties did not file exceptions.

As discussed more fully below, the Board finds that the Hearing Examiner's conclusions are reasonable, supported by the record, and consistent with Board precedent. Therefore, the Complaint is dismissed in its entirety.

## **II. The Hearing Examiner's Report and Recommendations**

### **A. Factual Determinations**

In 1992, the City Council passed the Retired Police Officer Redeployment Act (SPO Act).<sup>5</sup> The SPO Act established the temporary career service position of Senior Police Officer.<sup>6</sup> The establishment of the SPO program permitted MPD to rehire members who had previously retired, who were then referred to as "SPOs."<sup>7</sup> On October 12, 2016, the City Council enacted the Senior Law Enforcement Officer Emergency Act of 2016 (SLEOEA or amended Act).<sup>8</sup> SLEOEA amended the SPO Act by authorizing MPD to pay SPOs who retired at a rank other than officer, such as Detective or Sergeant, at their pre-retirement higher rate of pay.<sup>9</sup> Months before the amendment to the SPO Act, there were 110 candidates for the rank of Sergeant; this list of eligible candidates was scheduled to expire on February 23, 2018.<sup>10</sup>

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<sup>2</sup> Report at 2.

<sup>3</sup> Report at 1-2.

<sup>4</sup> Report at 2.

<sup>5</sup> Report at 8.

<sup>6</sup> Report at 8.

<sup>7</sup> Report at 8.

<sup>8</sup> Report at 8.

<sup>9</sup> Report at 8.

<sup>10</sup> Report at 8, 14. The promotional selection process includes two phases: First, qualifying applicants complete a multiple-choice exam; Second, applicants complete an interview and written exam. Officers that successfully complete the process are eligible for promotion and are placed on a list in the order based on their combined test scores. Officers are considered for promotion in the order of appearance on the list. The list expires after two years; if an Officer is not selected from the list within that time, they are no longer eligible for promotion. Tr. 88-98.

On October 15, 2016, MPD issued a statement to FOP, announcing enactment of the SLEOEA.<sup>11</sup> Acting on its concern that the SLEOEA diminished its members' chances of being selected for promotion before the expiration of promotional lists, FOP through its Chief Shop Steward, Hiram Rosario, requested information from MPD on or about March 8, 2017.<sup>12</sup> MPD, through then-Acting Director of the Labor Relations Branch, Mark Viehmeyer, responded by letter dated March 24, 2017.<sup>13</sup>

On April 3, 2017, FOP through then-Chairman Matthew Mahl formally requested impact and effects bargaining over the assignment of SPOs to special assignment positions<sup>14</sup> At the hearing, present-FOP Chairman Bigelow testified that Chairman Mahl was concerned that MPD was placing SPOs in special assignment positions, such as school security, narcotics, internal affairs, and homeland security, without reference to the competitive promotion process associated with the collective bargaining agreement.<sup>15</sup> On April 12, 2017, MPD through Acting Director Viehmeyer accepted FOP's request for bargaining and agreed to add it to the parties' next standard meeting.<sup>16</sup> Chairman Bigelow testified at the hearing that Chairman Mahl informed him sometime thereafter that the negotiations had broken down and the parties were not able to come to an agreement.<sup>17</sup>

On July 14, 2017, MPD submitted a written proposal regarding special assignment positions.<sup>18</sup> At the hearing, Chairman Bigelow testified that Chairman Mahl stated that, during this time, he made several attempts to bargain with MPD, but was unable to come to an agreement.<sup>19</sup> Chairman Bigelow stated that Chairman Mahl felt that MPD was not bargaining in good faith.<sup>20</sup> Negotiations between the parties broke down and, on or about August 30, 2017, FOP notified MPD that the proposal was rejected.<sup>21</sup>

On August 21, 2017, MPD rehired a retired lieutenant, John Kutniewski, at the rank of Sergeant.<sup>22</sup>

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<sup>11</sup> Report at 4.

<sup>12</sup> Report at 10, 14-15, 16.

<sup>13</sup> Report at 10.

<sup>14</sup> Report at 11.

<sup>15</sup> Report at 14-15. The Hearing Examiner notes that Chairman Mahl was not present at the hearing.

<sup>16</sup> Report at 17.

<sup>17</sup> Report at 17.

<sup>18</sup> Report at 12.

<sup>19</sup> Report at 17.

<sup>20</sup> Report at 17.

<sup>21</sup> Report at 13.

<sup>22</sup> In the Complaint, FOP alleged that in response to the re-hiring, Chairman Mahl entered into bargaining sessions with MPD over the impact of the SPO programs on the working conditions of members. The Hearing Examiner noted that at the hearing, Chairman Bigelow admitted that this statement in the Complaint was inaccurate.

In September 2017, FOP filed a grievance alleging that MPD was violating Article 20 of the parties' collective bargaining agreement by placing SPO Sergeants in special assignment positions without posting a vacancy announcement for the assignment.<sup>23</sup>

On November 17, 2017, FOP filed the instant unfair labor practice complaint against MPD. FOP first contends that the SLEOEA does not permit MPD to rehire SPOs at the rank of Sergeant or any supervisory role.<sup>24</sup> FOP asserts that any vacancies at the rank of Detective or Sergeant are to be filled through a promotional process involving a list of eligible candidates.<sup>25</sup> FOP alleges that prior to the passage of the SLEOEA, there is a past practice of not assigning SPOs to Detective or Sergeant until after the passage of the SLEOEA.<sup>26</sup> Since the passage of the amended Act, FOP contends that MPD rehired several retired Detectives and Sergeants as SPOs and assigned them to positions based on their prior rank of Detective or Sergeant.<sup>27</sup> FOP alleges that MPD's rehiring and assigning of SPOs appears to be a misreading of the amended Act.<sup>28</sup> Second, FOP alleges that on or about August 21, 2017, MPD hired retired Lieutenant John Kutniewski at the rank of Sergeant under and pursuant to the SLEOEA.<sup>29</sup> In response to this hiring, FOP and MPD entered into impacts and effects bargaining.<sup>30</sup> FOP alleges that after several attempts at bargaining, MPD engaged in bad faith bargaining in violation of the CMPA.<sup>31</sup>

## **B. Preliminary Matters**

### **1. Subject Matter Jurisdiction**

In its Motion to Dismiss, MPD contends that PERB lacks jurisdiction to interpret the SLEOEA.<sup>32</sup> MPD concedes that the parties are in disagreement with respect to the proper interpretation of the amended Act, but contends that PERB, to decide this case, would be required to interpret a statute that is not part of the CMPA.<sup>33</sup> Further, MPD argues that a disputed interpretation of a statute unrelated to the CMPA, does not provide a basis for an unfair labor practice under section 1-617.04(a)(1) of the D.C. Official Code.<sup>34</sup> In its Opposition to Respondent's Motion to Dismiss, FOP counters that it does not intend or desire PERB to interpret the SLEOEA, but provides factual information concerning the SLEOEA to support its

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<sup>23</sup> Report at 13. The Hearing Examiner notes that FOP did not respond to MPD's July 2017 proposal. The Hearing Examiner's finding of the rejection of the proposal stems from the testimony of present FOP Chairman Bigelow at the hearing.

<sup>24</sup> Compl. at 4.

<sup>25</sup> Compl. at 4.

<sup>26</sup> Compl. at 4.

<sup>27</sup> Compl. at 4.

<sup>28</sup> Compl. at 4.

<sup>29</sup> Compl. at 4.

<sup>30</sup> Compl. at 5.

<sup>31</sup> Compl. at 5.

<sup>32</sup> Report at 3.

<sup>33</sup> Report at 3.

<sup>34</sup> Report at 3.

argument that MPD has changed the working conditions of FOP's members in violation of the CMPA.<sup>35</sup>

Based on an examination of the allegations in the Complaint, the CMPA and the SLEOEA, the Hearing Examiner recommended denial of MPD's Motion to Dismiss for lack of subject matter jurisdiction. In the Hearing Examiner's view, the central issue in the current matter does not relate to an interpretation of the amended statute, but rather MPD's chosen method of implementing it.<sup>36</sup> The core of this case, in the Hearing Examiner's view, relates to the impact and effects of the amended Act.<sup>37</sup> However, to the extent that FOP alleges that MPD's alleged "misreading" of the statute is a violation of the CMPA, the Hearing Examiner concluded that PERB would not have jurisdiction over that allegation.<sup>38</sup>

MPD also contends that PERB lacks jurisdiction over alleged violations of the parties' collective bargaining agreement.<sup>39</sup> MPD notes that Article 19 of the parties' collective bargaining agreement sets out in detail the grievance arbitration process and states that "an allegation that there has been a violation, misapplication, or misinterpretation" of the terms of the collective bargaining agreement is a grievance.<sup>40</sup> With regard to FOP's complaints over MPD's assigning of members to special assignments pursuant to the SLEOEA, MPD notes that FOP has filed grievances citing to Article 20, which deals specifically with special assignment vacancies.<sup>41</sup> Further, MPD notes that PERB and the D.C. Superior Court have held that PERB does not have jurisdiction over contractual disputes between FOP and MPD.<sup>42</sup>

After reviewing the allegations in the Complaint, the Hearing Examiner concluded that FOP made a number of allegations that are covered by the parties' collective bargaining agreement.<sup>43</sup> The Hearing Examiner noted that FOP's allegations related to seniority, vacancies, and performance evaluations are specifically tied to the parties' collective bargaining agreement. To the extent that FOP has alleged that MPD has violated the parties' collective bargaining agreement, the Hearing Examiner recommended dismissal.<sup>44</sup>

## 2. Timeliness

In its Motion to Dismiss, MPD also asserts that, irrespective of whether PERB had jurisdiction, the Complaint should be dismissed in its entirety for untimeliness.<sup>45</sup> MPD submits that FOP filed the instant Complaint on November 17, 2017, and any alleged violations that

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<sup>35</sup> Report at 3.

<sup>36</sup> Report at 4.

<sup>37</sup> Report at 4.

<sup>38</sup> Report at 4.

<sup>39</sup> Report at 4-5.

<sup>40</sup> Report at 4.

<sup>41</sup> Report at 5.

<sup>42</sup> Report at 5.

<sup>43</sup> Report at 5.

<sup>44</sup> Report at 5.

<sup>45</sup> Report at 6.

occurred before July 20, 2017, would be time-barred by PERB Rule 520.4 and should be dismissed.<sup>46</sup> MPD contends that the complained of conduct (that MPD hired retired members as Sergeants and to special assignment positions) began in October 2016, soon after the enactment of the amended Act.<sup>47</sup> Moreover, MPD submits that FOP was fully aware of SPO hiring prior to July 20, 2017, arguing that the hiring of SPOs prompted FOP to file an information request regarding the program in March and April 2017.<sup>48</sup> MPD contends that FOP is attempting to bootstrap its Complaint into timeliness by alleging that it initially demanded bargaining in response to Sergeant Kutniewski's rehiring on August 21, 2017.<sup>49</sup> MPD alleges that the parties actually commenced bargaining over the SPO program in April 2017—well before Sergeant Kutniewski was rehired.<sup>50</sup>

After review of the record, the Hearing Examiner concluded that the record did not support FOP's allegations that it only became aware of MPD rehiring SPOs after Sergeant Kutniewski was hired in August 2017.<sup>51</sup> The Hearing Examiner found that FOP's allegations that MPD committed unfair labor practices by rehiring SPOs and placing them in Sergeant positions was untimely.<sup>52</sup> However, in the Hearing Examiner's reading of the Complaint, FOP also alleged that MPD failed to bargain in good faith in connection with the hiring of Sergeant Kutniewski.<sup>53</sup> In this regard, the Hearing Examiner concluded that FOP's allegations that MPD failed to bargain in good faith could proceed.<sup>54</sup>

### III. Hearing Examiner's Recommendations

The only issue remaining for the Hearing Examiner's review was whether MPD committed unfair labor practices by failing to bargain in good faith over the implementation of the SLEOEA.<sup>55</sup>

As a preliminary matter, the Hearing Examiner noted that the allegations in the Complaint are essentially tied to the parties' collective bargaining agreement.<sup>56</sup> The Hearing Examiner explained that, while FOP has alleged that MPD bargained in bad faith over the impacts and effects of the implementation of the SPO program under the SLEOEA, "the

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<sup>46</sup> Report at 6.

<sup>47</sup> Report at 6-7.

<sup>48</sup> Report at 6.

<sup>49</sup> Report at 6.

<sup>50</sup> Report at 6. The Hearing Examiner notes that at the hearing, Chairman Bigelow admitted that the statement in the Complaint that the parties began bargaining after Sergeant Kutniewski was rehired was inaccurate.

<sup>51</sup> Report at 7.

<sup>52</sup> Report at 7.

<sup>53</sup> Report at 7.

<sup>54</sup> Report at 7.

<sup>55</sup> Report at 22.

<sup>56</sup> Report at 25.

evidence on the record points more to a dispute over the contract application and interpretation.”<sup>57</sup>

As to the remaining allegation, the Hearing Examiner detailed the bargaining between the parties beginning with FOP’s initiating bargaining over the SPO program on March 8, 2017, when it made a written request for information, and ending in August 2017.<sup>58</sup> The Hearing Examiner noted that in August 2017 negotiations broke down when Chairman Mahl informed Chairman Bigelow that FOP had rejected MPD’s proposal, and that MPD would not budge from its position and was bargaining in bad faith.<sup>59</sup> The Hearing Examiner noted that FOP did not provide any “content or substance to what specifically caused Chairman Mahl to conclude that MPD had bargained in bad faith, that MPD would not budge, or budge from what specific position.”<sup>60</sup> The Hearing Examiner found that, despite having no direct knowledge of what transpired between the MPD and Chairman Mahl, Chairman Bigelow volunteered his belief that MPD engaged in bad faith bargaining and, in response, filed individual and group grievances.<sup>61</sup>

Finally, the Hearing Examiner noted that the record was silent on the question of what negotiations, if any, took place between the parties in the time from Sergeant Kutniewski’s hiring in August 2017 and when the Complaint was filed in November 2017.<sup>62</sup> The Hearing Examiner concluded that FOP did not prove its allegations that MPD bargained in bad faith.<sup>63</sup> In fact, the Hearing Examiner found that MPD engaged in good faith bargaining by responding timely and completely and in making written proposals.<sup>64</sup> The Hearing Examiner recommended that the Complaint be dismissed.

#### **IV. Discussion**

The Board will affirm a hearing examiner’s findings and recommendations when they are reasonable, supported by the record, and consistent with Board precedent.<sup>65</sup>

**A. The Board adopts the Hearing Examiner’s finding that PERB lacks subject matter jurisdiction over FOP’s allegation with respect to the rehiring and assignment of SPOs**

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<sup>57</sup> Report at 25.

<sup>58</sup> Report at 27.

<sup>59</sup> Report at 27.

<sup>60</sup> Report at 27.

<sup>61</sup> Report at 27. The Hearing Examiner noted that Chairman Bigelow did not provide any information regarding the substance or outcome of the grievances.

<sup>62</sup> Report at 28.

<sup>63</sup> Report at 28.

<sup>64</sup> Report at 28.

<sup>65</sup> *Am. Fed’n of Gov’t Emp., Local 872 v. D.C. Water and Sewer Auth.*, 52 D.C. Reg. 2474, Slip Op. 702, PERB Case No. 00-U-12 (2003).

The Board adopts the Hearing Examiner's finding that PERB lacks subject matter jurisdiction over the allegations relating to the parties' collective bargaining agreement, which dictates procedures for filling special assignment vacancies in Article 20 and seniority in Article 25. The Board has held that, if the Board must interpret the parties' collective bargaining agreement to determine whether there has been a violation of the CMPA, then the Board does not have jurisdiction over the allegations and will defer to the parties' negotiated grievance and arbitration process.<sup>66</sup> The Hearing Examiner's analysis considered the Complaint, the parties' collective bargaining agreement, and PERB case law in finding that the Board lacked jurisdiction over allegations made in the Complaint related to the rehiring and placement of SPOs. The Board finds that the Hearing Examiner's conclusion is reasonable, supported by the record, and consistent with Board precedent.

B. The Board adopts the Hearing Examiner's finding that FOP's allegations relating to MPD's rehiring of SPOs are untimely

The Hearing Examiner recommended dismissal of FOP's allegations related to MPD's rehiring of SPOs for untimeliness, pursuant to PERB Rule 520.4. The Board has held that PERB Rule 520.4 requires unfair labor practice complaints be filed within 120 days of when the complainant first knew or should have known of the acts giving rise to the alleged violation.<sup>67</sup> The Hearing Examiner's findings and the allegations presented in FOP's Complaint reveal that FOP had knowledge of the rehiring of SPOs prior to when Sergeant Kutniewski was rehired on August 21, 2017, as well as prior to the required 120-day (July 20, 2017) filing deadline for an unfair labor practice complaint. FOP filed an information request regarding SPO hiring on March 8, 2017, evidencing its knowledge of MPD's actions. The Board finds that the Hearing Examiner's findings and conclusions are reasonable, supported by the record, and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner's conclusion that FOP's allegations regarding MPD rehiring of SPOs are untimely.

C. The Board adopts the Hearing Examiner's finding that FOP failed to prove that MPD engaged in bad faith bargaining.

After reviewing the record, the Board adopts the Hearing Examiner's findings of fact on this issue. FOP is required to prove, by a preponderance of evidence, that MPD committed unfair labor practices in violation of the CMPA.<sup>68</sup> FOP provided no evidence as to how MPD bargained in bad faith. MPD did not call any witnesses to testify on its behalf regarding bargaining, and FOP's witness, Chairman Bigelow, did not substantiate FOP's claim that MPD bargained in bad faith despite prompting from the Hearing Examiner. The record shows that negotiations between the parties were conducted beginning in March 2017, when FOP made a written request for information, and broke down around August 2017, after FOP rejected MPD's proposal. The

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<sup>66</sup> *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Metro. Police Dep't*, Slip Op. No. 1534, PERB Case No. 08-U-22 (2015).

<sup>67</sup> *Pitt v. D.C. Dep't of Corr.*, 59 D.C. Reg. 5554, Slip Op. No. 998 at p. 5, PERB Case No. 09-U-06 (2009).

<sup>68</sup> PERB Rules 520.1, 550.15.

Board finds that the Hearing Examiner's conclusion that FOP did not prove its allegation that MPD bargained in bad faith was reasonable, supported by the record, and consistent with Board precedent.

**V. Conclusion**

The Board has reviewed and adopted the findings, conclusions, and recommendations of the Hearing Examiner, and concludes that MPD did not violate section 1-617.04(a)(1) and (5) of the D.C. Official Code. Therefore, the Complaint is dismissed in its entirety.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. This Complaint be dismissed.
2. 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 Board Members Mary Anne Gibbons, Ann Hoffman, and Douglas Warshof.

August 15, 2019

Washington, D.C.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 18-U-08, Opinion No. 1720 was sent by File and ServeXpress to the following parties on this the 16th day of August, 2019.

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