

FOP appealed the Board's decision to the District of Columbia Superior Court. Superior Court Judge Todd Edelman reversed the Board's Decision and Order in part and remanded the case to the Board. The case is now before the Board for a decision consistent with Judge Edelman's order.

II. Discussion

The Complaint arose from the following facts: on or about May 16, 2011, MPD employee Celia Taylor witnessed then-Chairman Baumann stopped on the side of the road, either assisting a motorist or engaged in a traffic stop. (Slip Op. No. 1223 at p. 2). Later that day, the MPD employee mentioned her observation to her supervisor. *Id.* The supervisor communicated the observation to the head of the MPD Internal Affairs Division, who initiated an investigation of then-Chairman Baumann's actions. *Id.* The investigative report ultimately concluded that "Ms. Taylor's e-mail concerning her observation of the incident contains no allegations or evidence of any violation of any District of Columbia or MPD rules, regulations, or laws." *Id.*

FOP filed the Complaint with PERB, alleging that MPD and several individually-named MPD employees had engaged in unfair labor practices by interfering, restraining, coercing, or retaliating against the exercise of rights guaranteed by the CMPA. (Complaint at 5). Specifically, FOP contended that then-Chairman Baumann was engaged in protected union activities through his representational duties as Chairman of the FOP, MPD knew of the protected union activities, MPD exhibited express anti-union animus by "the imposition of a[n] unwarranted, improper, and retaliatory investigation in which there was no allegation or evidence against then-Chairman Baumann of any violation of any District of Columbia or MPD rules, regulations or law," and MPD attempted to interfere, restrain, coerce, and retaliate against the FOP by imposing an "unwarranted, improper, and retaliatory investigation." (Complaint at 5-6).

In its Answer, MPD admitted that an investigation into the traffic stop took place, but denied that the investigation was improper or retaliatory. (Answer at 2-4).

After reviewing the pleadings, the Board found FOP provided no evidence to support its claims that then-Chairman Baumann was engaged in union activities when he stopped or assisted the motorist, that MPD knew of those activities, or that MPD demonstrated anti-union animus. (Slip Op. No. 1223 at p. 3). As a result, the Board dismissed the Complaint for failure to state a cause of action. *Id.* Additionally, the Board dismissed the individually-named respondents from the Complaint. *Id.* at p. 1, fn. 1.

FOP appealed the Board's decision to the District of Columbia Superior Court. Superior Court Judge Edelman upheld the portion of the Board's Decision and Order pertaining to the dismissal of the individually-named respondents, and reversed the Board's dismissal of FOP's retaliation allegations, stating that the Board did not address the specific argument made by FOP in its Complaint. Judge Edelman found that the Board "simply misconstrued the allegations of [FOP's] Complaint, and based its dismissal of the Complaint on the lack of evidence supporting a claim or theory never advanced by [FOP]." *Fraternal Order of Police Metropolitan Police Department Labor Committee v. District of Columbia Public Employee Relations Board*, 2011

CA 009828 P(MPA), Slip Op. at 7 (Nov. 27, 2012). Specifically, FOP did not claim that then-Chairman Baumann was engaged in union activities during the traffic stop, but rather that the investigation arose “because of and in retaliation for his general conduct as the FOP Chairman.” *Id.* at 8. Because he found that the Board’s Decision and Order did not address the specific allegations contained in FOP’s Complaint, the Board erred in making its determination. *Id.* at 8. The case was remanded to the Board for entry of an order consistent with Judge Edelman’s decision. *Id.* at 11.

In view of the above, the Board must reverse its dismissal of FOP’s claim of retaliation, and reconsider this allegation. In the Complaint, FOP asserts that the investigation into then-Chairman Baumann “was nothing more than retaliation and interference against [then] Chairman Baumann,” and that “members of the MPD breached the confidentiality required of Internal Affairs investigations by making improper disclosures and spreading rumors about [then] Chairman Baumann being under investigation, but the existence of the investigation was never confirmed by the MPD until on or about July 27, 2011.” (Complaint at 4-5). FOP contends that then-Chairman Baumann was engaged in protected union activities through his representational duties as Chairman of the FOP, MPD knew of the protected union activities, there was express anti-union animus by MPD demonstrated by “the imposition of a[n] unwarranted, improper, and retaliatory investigation,” and MPD attempted to interfere, restrain, coerce, and retaliate against FOP through the investigation of then-Chairman Baumann. (Complaint at 5-6). In its Answer, MPD denies that it retaliated against then-Chairman Baumann for his representational activities. (Answer at 4).

To establish a *prima facie* case that MPD retaliated against then-Chairman Baumann for engaging in protected union activities, FOP must show that (1) then-Chairman Baumann engaged in the protected activity; (2) MPD knew about then-Chairman Baumann’s protected activity; (3) MPD exhibited anti-union or retaliatory animus; and (4) as a result, MPD took adverse employment actions against then-Chairman Baumann. *See FOP/MPD Labor Committee v. MPD*, 60 D.C. Reg. 9212, Slip Op. No. 1391 at p. 24, PERB Case Nos. 09-U-52 and 09-U-53 (2013). The Board has held that an investigation of an employee can be an adverse action giving rise to a claim of retaliation. *FOP/MPD Labor Committee v. MPD*, 59 D.C. Reg. 5461, Slip Op. No. 988 at p. 8, PERB Case No. 08-U-41 (2009).

In the instant case, issues of fact exist concerning whether MPD’s actions were intended to interfere with, restrain, coerce, or retaliate against then-Chairman Baumann or the FOP in the exercise of protected activities. Whether MPD’s actions rise to the level of a violation of the CMPA is a matter best determined after the establishment of a factual record through an unfair labor practice hearing. *See FOP/MPDLC v. MPD*, 60 D.C. Reg. 12080, Slip Op. No. 1403 at p. 3, PERB Case No. 08-U-26 (2013); *see also Karim v. D.C. Public Schools*, 59 D.C. Reg. 12655, Slip Op. No. 1310 at p. 6, PERB Case No. 10-U-17 (2012).

ORDER

IT IS HEREBY ORDERED THAT:

1. The portion of the Decision and Order in *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department*, 59 D.C. Reg. 6952, Slip Op. No. 1223, PERB Case No. 11-U-53 (2011) dismissing the Fraternal Order of Police/Metropolitan Police Department Labor Committee's allegations regarding the investigation into then-Chairman Baumann is vacated.
2. PERB's Executive Director will refer the Fraternal Order of Police/Metropolitan Police Department Labor Committee's Unfair Labor Practice Complaint to a hearing examiner for an unfair labor practice hearing. The dispute will first be submitted to the Board's mediation program to allow the parties the opportunity to reach a settlement with the assistance of a Board-appointed mediator.
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.

June 4, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 11-U-53 was transmitted to the following parties on this the 6th day of June, 2014.

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

FILE & SERVEXPRESS

Mr. Frank McDougald, Esq.
Office of the Attorney General
441 4th St., NW
Ste. 1180 North
Washington, D.C. 20001

U.S. MAIL

Mr. Mark Viehmeyer, Esq.
Metropolitan Police Department
300 Indiana Ave., NW
Room 4126
Washington, DC 20001

FILE & SERVEXPRESS

/s/ Erin E. Wilcox

Erin E. Wilcox, Esq.
Attorney-Advisor