

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:

Officer James A. Hairston,

Complainant,

and

The Fraternal Order of Police, MPD
Labor Committee,

Respondent,

and

The Metropolitan Police Department,

Respondent.

PERB Cases Nos. 83-U-11
83-U-12
83-S-01

Opinion No. 75

DECISION AND ORDER

In October 1981, James A. Hairston, a police officer with the D.C. Metropolitan Police Department (MPD) and a member of the Fraternal Order of Police (FOP), was involved in a fatal shooting incident which occurred while Officer Hairston was engaged in authorized off-duty private employment. Immediately after the incident, Officer Hairston was placed on routine administrative leave and was later (March 23, 1983) suspended indefinitely. In June 1982, the shooting victim's estate filed a civil suit against Officer Hairston, the off-duty employer and the District of Columbia Government. In January 1983, Officer Hairston was indicted for manslaughter.

On June 15, July 11 and 12, and August 3, 1983 Officer Hairston filed a series of complaints with the Public Employee Relations Board (Board) charging the FOP and the MPD with various violations of the Comprehensive Merit Personnel Act of 1978 (CMPA) and the District of Columbia Code. The details of these charges are set out in the November 25, 1983 Report and Recommendation of the Hearing Examiner to whom the Board referred them. What were originally three cases have been combined.

In summary, Officer Hairston's charges are that the suspension action by the MPD was an unfair labor practice and that the FOP has committed unfair labor practices and violated the standards-of-conduct provisions of the CMPA by (i) conspiring with the MPD to cause his suspension, (ii) prejudicing his position in the legal proceedings against him by issuing untrue statements, and (iii) denying him fair and adequate representation, through counsel of his own choosing, in the criminal proceedings against him. The alleged violations are of Section 1704(a)(2), (b)(1), and (b)(2) and 1703 of the CMPA (D.C. Code Sections 1-618.4(a)(2) and 1-618.3). Officer Hairston seeks a variety of remedies against the FOP and the MPD. They have responded regarding all of Officer Hairston's charges.

On August 3, 1983, the Board directed that the three cases be joined and referred to a Hearing Examiner for a report and recommendation on all issues raised. All parties were afforded a full opportunity to present evidence, both oral and written, at a hearing convened on September 21 and continued on September 29, October 5, 7, 19, and 26, 1983. Post-hearing briefs were filed by all parties by November 18, 1983. The Hearing Examiner's Report and Recommendation was received by the Board on November 25, 1983. Officer Hairston and FOP filed written "Exceptions to the Hearing Examiner's Report and Recommendation" by December 13, 1983.

A review of the complete record in this case reveals an insufficient basis for Officer Hairston's charges regarding the suspension action taken against him. His being placed on administrative leave immediately after the fatal shooting incident was in accordance with routine practice. Although an Assistant Chief of Police recommended, at one point, that Officer Hairston be employed in a non-contact position and he was in fact restored to such a position for a few days, the rejection of this recommendation by the Chief of Police and the decision to suspend Officer Hairston indefinitely followed appropriate notices and investigation.

The Board notes the unusual pattern of representations to the MPD by FOP officers in connection with Officer Hairston's suspension. It confirms, however, the Hearing Examiner's findings that there was no conspiracy here between MPD and FOP representatives, that the FOP representations were legitimate and that they did not prejudice Officer Hairston's situation. Both his being placed originally on administrative leave and his being suspended indefinitely after he was indicted for manslaughter were in accordance with established and appropriate MPD policy.

The second set of charges, involving the issuance of a flyer and a magazine article by the FOP regarding Officer Hairston's case, were upheld by the Hearing Examiner. His recommendation is that the FOP retract the statements in publications to be given the same distribution the original flyer and article received.

These statements were made as part of an acrimonious exchange of charges and counter-charges, oral and written, between Officer Hairston and officers of the FOP. Their only importance will be in connection with the still pending legal proceedings against Officer Hairston. It will suffice for the Board to record its conclusion that the circumstances under which these statements were made were such as to entitle them to no weight or credibility.

The critical and difficult issue here involves the controversy that developed regarding Officer Hairston's representation in the legal proceedings that have been instituted against him. The Board accepts, in the light of its review of the record, the Hearing Examiner's findings of fact. In our judgment, however, these facts dictate different remedial action.

The FOP's original approach to this matter appears to have been fair in every respect. The counsel retained by the FOP for the handling of litigation involving its members was made available to Officer Hairston for his defense in the civil suit against him. When Officer Hairston protested that this counsel was not experienced in criminal cases, the FOP Executive Committee agreed, by a resolution adopted at its meeting of February 16, 1983, to cover the costs, up to \$100 an hour, of outside counsel selected by Officer Hairston.

For whatever reasons, professional or personal or political, Officer Hairston selected an attorney who had previously represented private security guards in opposition to the FOP position regarding the off-duty employment of police officers. Upon getting into the case, this attorney made demands going substantially beyond the terms established by the FOP Executive Committee: for a \$6,000 retainer fee, the employment of an investigator and para-professionals, and so forth.

The Executive Committee not only rejected these demands, but rescinded, at this point, its prior authorization to provide funds for Officer Hairston's retention of outside legal counsel for his defense in the criminal proceeding. This action was explained on two grounds. One was that FOP funds were inadequate to support the expenditure which now appeared to be involved if Officer Hairston was to select his own counsel. The second was that the FOP had now retained counsel experienced in criminal cases who would handle the legal problems of union members on a fee schedule basis. Officer Hairston was offered the services of this counsel. He rejected the offer.

The Hearing Examiner found that, "while the decision to rescind the prior authorization was partly based on budgetary grounds, it also was motivated in a large measure by the union's dissatisfaction with the Complainant's choice of attorney." Our own review of the record confirms this finding. It is apparent, beyond this, that the "Union's dissatisfaction" with the attorney Officer Hairston had selected was affected by what has become a serious political schism within the FOP.

In his report to the Board, however, the Hearing Examiner recommends as remedy for what happened here, in addition to the FOP's retracting its public statements, only that the FOP refund all union dues paid by Hairston since the February 24, 1983 meeting of the Executive Council, at which it rescinded its original action authorizing Officer Hairston's selection of outside counsel of his own choosing. We find this remedy unrealistic and not constructive.

The statutory standard governing this situation, set out in Section 1703 of the CMPA (D.C. Code Section 1-618.3), requires that labor organizations "secur(e) the right of individual members...to fair and equal treatment under the governing rules of the organization." The U.S. Supreme Court, interpreting a similar statutory requirement, has observed that "the Union, as the statutory representative of the employees is subject always to complete good faith and honesty of purpose in the exercise of its discretion" regarding the handling of union members interests. Hines v. Anchor Motor Freight Inc., 424 U.S. 554 (1976).

The FOP By-Laws provide in Article 17.1 that "[e]very dues paying member in good standing shall receive free of charge and as a matter of right, legal representation for the defense of any administrative, civil or criminal action against such officer...arising from performance of duty or from their status as police officers..." and also "for any purpose determined to be appropriate for the...benefit of its members." The FOP has from the beginning of this controversy recognized Officer Hairston's entitlement to representation under its By-Laws.

The FOP Executive Committee established in its original authorization, the appropriate standard of conduct in this situation. In rescinding that authorization, the committee departed from what it had recognized as "fair treatment" here and from the standard of "complete good faith and honesty of purpose in the exercise of its discretion". The rescission was combined with a pattern of action in connection with Officer Hairston's suspension and the issuance of the flyer and magazine article. These actions did not meet the appropriate standard of conduct under the circumstances.

The way to get this case back on the tracks, satisfying the statutory requirements regarding standards of union conduct, is to establish terms for implementing the original Executive Committee determination. This means leaving Officer Hairston's choice of outside counsel entirely up to him. It means the FOP's covering the costs of such representative to the extent of \$100 per hour. If additional expenses are involved, Officer Hairston will have to make other arrangements for them.

A question may arise as to the amount of legal counsel's time which can be appropriately considered compensable under this arrangement. The FOP cannot reasonably be expected, nor can it afford, to write a blank check in this respect. There should be discussion by Officer Hairston's and the FOP's representatives of what can be considered a reasonable limit in this connection or an appropriate procedure to follow in dealing with this point. The arrangements the FOP has made with the counsel it has retained for other criminal cases should be taken into account. If these discussions fall short of agreement, the Board will offer its offices to facilitate settlement. The Board retains jurisdiction over the proceedings, limited to effectuating this purpose.

O R D E R

Insofar as these cases involve allegations of unfair labor practices on the part of the D.C. Metropolitan Police Department, the charges are dismissed.

Regarding the Standards of Conduct issue involved in these cases, the Fraternal Order of Police is directed, pursuant to Section 1703 of the CMPA (D.C. Code Section 1-618.3), to provide James A. Hairston with legal representation in accordance with the decision of its Executive Council on February 16, 1983 and consistent with the opinion accompanying this Order.

The public statements made by FOP under the circumstances of this controversy are, in opinion of the Board, entitled to no weight or credibility.

All other charges filed in these proceedings are dismissed and the remedies sought are denied.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

April 27, 1984