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**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. 08-U-14
Complainant,)	
)	Opinion No. 1465
v.)	
)	
District of Columbia Metropolitan Police Department,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

On January 3, 2008, the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") filed an Unfair Labor Practice Complaint ("Complaint") against the District of Columbia Metropolitan Police Department ("MPD" or "Agency"). On January 23, 2008, MPD filed an Answer ("Answer"). On June 3, 2013, a Hearing Examiner's Report and Recommendation ("Report") was issued to the Parties. No Exceptions were received by the Board. The Hearing Examiner's Report and Recommendation is before the Board for disposition.

II. Hearing Examiner's Report and Recommendation

The Hearing Examiner found that "[t]he relevant facts largely are undisputed...." (Report at 5). The Hearing Examiner was presented with the following issues:

1. Whether the Board is precluded from considering this complaint as untimely filed?
2. If not, whether the MPD committed an unfair labor practice, and retaliated against a union official, when a captain outside of the chain of command for that official advised him of media inquiries concerning his 20-year-old trial and acquittal on unrelated charges.
3. If so, whether Chief Lanier and Captain Hoey properly are named as respondents in their individual capacities.

(Report at 8).

The underlying facts of the Complaint arise from interactions between a union official and a MPD captain. For twenty-five years, Officer Cunningham had been employed in the Special Operations Division, Emergency Response Team. (Report at 6). From 2003 until the time of the hearing, Officer Cunningham was the Vice Chairman of FOP. *Id.* Officer Cunningham interacted with the then-Sixth District Commander Captain Hoey, regarding “manpower issues, the accuracy of crime statistics and grievances over officer discipline, between 2004 and 2006.” *Id.*

From June 19 through July 2, 2007, “Officer Cunningham was designated as Acting Chairman of the FOP, as he often was when the FOP Chairman Christopher Baumann was unavailable.” (Report at 6-7). On June 26, 2007, Captain Hoey notified Officer Cunningham that Captain Hoey had received some inquiries about Officer Cunningham from news reporters. (Report at 7). Captain Hoey asked Officer Cunningham to discuss the issue. *Id.* On June 28, 2007, Captain Hoey telephoned Officer Cunningham to discuss the media inquiries. *Id.* Captain Hoey also informed the MPD Information Department about the media requests. *Id.*

On July 2, 2007, Captain Hoey and Officer Cunningham had an in-person conversation. *Id.* “The parties agree that Captain Hoey believed that the media requests pertained to the preparation of an article on the MPD ‘Lewis lists.’”¹ *Id.* The Hearing Examiner found that Officer Cunningham thought that Captain Hoey was attempting to “blackmail” Officer Cunningham for Officer Cunningham talking to the community about Captain Hoey. *Id.*

On July 9, 2007, “FOP filed a misconduct complaint with the MPD Office of Professional Responsibility” concerning Captain Hoey’s actions. *Id.* MPD opened an Internal Affairs Division (“IAD”) complaint against Captain Hoey, and concluded its investigation on August 13, 2013. (Report at 8). On September 5, 2007, FOP received notice that the investigation was completed and that MPD’s IAD did not conclude that “Captain Hoey either retaliated or attempted to coerce Officer Cunningham from fulfilling his obligations as Vice Chairman of the FOP.” *Id.* On January 3, 2008, FOP filed the present Complaint.

¹ The Hearing Examiner found that the parties did not dispute “the existence of a widespread belief within the MPD that the Office of the United States Attorney for the District of Columbia (OUSA) maintains a ‘Lewis list.’” (Report at 5). According to testimony at the hearing, the “Lewis list” is a list “that the OUSA tracks the in-court testimony of officers, records the names of those committing perjury, and declines to call those officers as witnesses in subsequent cases.” *Id.*

FOP argued before the Hearing Examiner that “a finding of retaliatory activity by the MPD is supported by the claimed ‘threat’ by Captain Hoey to disclose to the media information that would be damaging to Officer’s Cunningham’s personal career and to the FOP generally.” (Report at 9). On the issue of timeliness, FOP asserted that FOP’s Complaint was not “ripe” until FOP received notice on September 5, 2007, that the IAD’s investigation was completed, making the January 3, 2008, filing timely. (Report at 9).

MPD argued that “the complaint should have been filed 120 days from the interactions between Captain Hoey and Officer Cunningham and, accordingly, the FOP filed the complaint 65 days too late.” (Report at 9). Further, MPD denied the unfair labor practice allegations, asserting that “FOP does not identify any statements made by Captain Hoey in the context of labor negotiations or which interfered with formation of a union or with Officer Cunningham’s representational activities.” (Report at 10). In addition, MPD asserted that no reprisal action was identified by FOP. *Id.*

The Hearing Examiner rejected FOP’s assertion that the Complaint did not become ripe until September 5, 2007, when FOP received the results of the IAD investigation. (Report at 11). The Hearing Examiner found that FOP was attempting to “[ingraft onto PERB Rule 520.4 what is, in essence, an ‘exhaustion’ standard. (Report at 12-13). The Hearing Examiner found that “FOP had clear notice of all actions complained of by July 2, 2007 and was required to file its complaint by October 30, 2007.” (Report at 12). The Hearing Examiner recommended that the Complaint be dismissed as untimely filed. (Report at 12-13).

III. Discussion

No Exceptions to the Hearing Examiner’s Report and Recommendation were received by PERB. “Whether exceptions have been filed or not, the Board will adopt the hearing examiner’s recommendation if it finds, upon full review of the record, that the hearing examiner’s ‘analysis, reasoning and conclusions’ are ‘rational and persuasive.’” *Council of School Officers, Local 4, American Federation of School Administrators v. D.C. Public Schools*, 59 D.C. Reg. 6138, Slip Op. No. 1016 at p. 6, PERB Case No. 09-U-08 (2010) (quoting *D.C. Nurses Association and D.C. Department of Human Services*, 32 D.C. Reg. 3355, Slip Op. No. 112, PERB Case No. 84-U-08 (1985)).

The Board determines whether the Hearing Examiner’s Report and Recommendation is “reasonable, supported by the record, and consistent with Board precedent.” *American Federation of Government Employees, Local 1403 v. District of Columbia Office of the Attorney General*, 59 D.C. Reg. 3511, Slip Op. No. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012). The Board will affirm a hearing examiner’s findings if they are reasonable and supported by the record. See *American Federation of Government Employees, Local 872 v. D.C. Water and Sewer Authority*, Slip Op. No. 702, PERB Case No. 00-U-12 (2003).

The Board has held that “issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner.” *Council of School Officers, Local*

4, American Federation of School Administrators v. District of Columbia Public Schools, 59 D.C. Reg. 6138, Slip Op. No. 1016 at p. 6, PERB Case No. 09-U-08; *Tracy Hatton v. FOP/DOC Labor Committee*, 47 D.C. Reg. 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (1995).

The Board finds that the Hearing Examiner's factual conclusion that the Complaint's allegations occurred on or before July 2, 2007, is reasonable and supported by the record. It is also undisputed.

Board Rule 520.4 provides: "Unfair labor practice complaints shall be filed not later than 120 days after the date on which the alleged violations occurred." The Board has held that the 120-day period for filing a complaint begins when the Complainant knew or should have known of the acts giving rise to the violation. *Pitt v. D.C. Dep't of Corrections, et. al*, 59 D.C. Reg. 5554, Slip Op. No. 998, PERB Case No. 09-U-06 (2009). PERB's rule contains no requirement of exhaustion of administrative remedies.

The Complaint was filed 185 days after July 2, 2007, on January 3, 2008. FOP does not assert that it did not know of the actions leading to the Complaint at a date later than July 2, 2007. Therefore, the Board finds that the Complaint was untimely filed, and dismisses the Complaint with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Unfair Labor Practice Complaint is dismissed with prejudice.
2. 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.

April 30, 2014

CERTIFICATE OF SERVICE

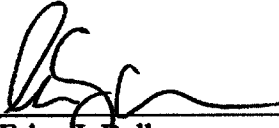
This is to certify that the attached Decision and Order for PERB Case No. 08-U-14 was transmitted to the following parties via U.S. Mail on this the 5th day of May, 2014.

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