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

In the Matter of:)	
)	PERB Case Nos. 09-U-41
)	09-U-42
Fraternal Order of Police/Metropolitan)	09-U-43
Police Department Labor Committee,)	09-U-44
)	10-U-01
Complainant,)	10-U-14
)	
v.)	
)	Opinion No. 1397
District of Columbia)	
Metropolitan Police Department,)	Motion for Reconsideration
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

On June 29, 2009, Complainant Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP” or “Complainant”) filed four pleadings styled “Unfair Labor Practice Complaint and Request for Preliminary Relief,” alleging violations of the Comprehensive Merit Personnel Act (“CMPA”) by Respondent District of Columbia Metropolitan Police Department (“MPD” or “Respondent”). The four unfair labor practice complaints were assigned the case numbers 09-U-41, 09-U-42, 09-U-43, and 09-U-44. On September 30, 2009, the Board issued decisions and orders in these four cases (slip opinions 972, 974, 985, and 986). In these decisions and orders, the Board denied FOP’s requests for preliminary relief, consolidated the four cases, and referred the cases to a hearing examiner. On November 23, 2009, PERB Case No. 10-U-01 was administratively consolidated with the other unfair labor practice complaints. On April 10, 2010, PERB Case No. 10-U-14 was administratively consolidated with the group.

Hearings in the consolidated cases were held on January 25-28, February 1-4, and February 23, 2010. The parties submitted post-hearing briefs, and on October 4, 2010, Hearing Examiner Sean Rogers issued a Report and Recommendation (“Report”). FOP and MPD filed exceptions to the Report (“FOP Exceptions” and “MPD Exceptions”), and FOP filed an Opposition to Respondent’s Exceptions (“FOP Opposition”). On January 30, 2013, FOP filed a

Line Withdrawing Complainant's Exceptions to Hearing Examiner's Report and Recommendations.

On February 4, 2013, the Board issued a decision and Order in this case. *Fraternal Order of Police/Metropolitan Police Dep't Labor Committee v. D.C. Metropolitan Police Dep't*, 60 D.C. Reg. 2283, Slip Op. No. 1361, PERB Case Nos. 09-U-41, 09-U-42, 09-U-43, 09-U-44, 10-U-01, and 10-U-14 (2013).¹ In the portion relevant to the instant Motion for Reconsideration, the Board held that in PERB Case No. 10-U-14, MPD could not raise the argument that PERB Case No. 10-U-14 was not timely filed for the first time on appeal. (*FOP/MPDLC*, Slip Op. No. 1361 at p. 20). Additionally, the Board declined to overturn the Hearing Examiner's conclusion that a labor relations privilege existed between the FOP Chairman and Vice-Chairman. *Id.*

On February 19, 2013, MPD filed a Motion for Reconsideration ("Motion"), alleging that the Board erred in concluding that MPD may not raise for the first time on appeal that the defense that PERB Case No. 10-U-14 was untimely, and for supporting the Hearing Examiner's conclusion that a labor relations privilege existed between the FOP Chairman and Vice-Chairman. (Motion at 3-9). FOP opposed the Motion, arguing in its Opposition to Motion for Reconsideration ("Opposition") that Board Rule 520.6 required MPD to raise its timeliness argument in its Answer, and that the Complaint in PERB Case No. 10-U-14 was filed less than 120 days after the date that the Notice of Proposed Adverse Action was served on the FOP Vice-Chairman. (Opposition at 4-7). Further, FOP alleged that MPD's Motion merely disagreed with the Board's Decision and Order, and that MPD misconstrued the Hearing Examiner's Report. (Opposition at 8-9). Specifically, FOP states that the Hearing Examiner's conclusions "do not turn on the existence and violation of the labor relations privilege, but instead explicitly hold that the questioning interfered with internal union business and was done to intimidate and coerce Vice-Chairman Cunningham in violation of the CMPA." (Opposition at 9). In addition, FOP alleges that the labor relations privilege exists in the District of Columbia. (Opposition at 10).

On May 14, 2013, MPD filed a Supplement to its Motion ("Supplement"), citing to the Decision and Order issued in PERB Case No. 11-U-52 as "directly on point to the timeliness issues in PERB Case 11-U-14..." (Supplement at 1). FOP opposed this allegation in its Opposition to Respondent's Supplement to its Motion for Reconsideration ("Opposition to Supplement"), reiterating its earlier assertion that PERB Case No. 10-U-14 was timely filed. (Opposition to Supplement at 4-5).

II. Discussion

The pleadings related to MPD's Motion for Reconsideration coalesce around two issues – timeliness and the existence of a labor relations privilege in the District of Columbia. (Motion at 3-9; Opposition at 4-11).

¹ For a statement of the facts of this consolidated case, see the Board's Decision and Order in *Fraternal Order of Police/Metropolitan Police Dep't Labor Committee v. D.C. Metropolitan Police Dep't*, 60 D.C. Reg. 2283, Slip Op. No. 1361, PERB Case Nos. 09-U-41, 09-U-42, 09-U-43, 09-U-44, 10-U-01, and 10-U-14 (2013)

Board Rule 520.4 states that “[u]nfair labor practice complaints shall be filed not later than 120 days after the date on which the alleged violations occurred.” The 120 day period for filing an unfair labor practice 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 at p. 5, PERB Case No. 09-U-06 (2009).

In its Motion, MPD contends that the alleged violation occurred on June 9, 2009, which was the date that Vice Chairman Cunningham attended his internal affairs interview and signed the confidentiality agreement at issue in the underlying case. (Motion at 3-4). MPD states that in his Report and Recommendation, the Hearing Examiner concluded that the questioning that occurred during the internal affairs interview and the confidentiality agreement violated the CMPA, and therefore June 9, 2009, is the date that starts the 120-day time period for purposes of Board Rule 520.4. *Id.* The Complaint in PERB Case No. 10-U-14 was filed on January 20, 2010, which is 225 days after June 9, 2009. (Motion at 4).

Further, MPD alleges that by rejecting the timeliness argument raised in MPD’s exceptions, PERB effectively extended the mandatory and jurisdictional 120-day deadline established in Board Rule 520.4. (Motion at 4). In its Supplement, MPD cites to a recent Board ruling in PERB Case No. 11-U-52, where the Board held that “parties cannot waive subject matter jurisdiction by their conduct or confer it...and the absence of jurisdiction can be raised at any time.” (Supplement at 4; citing *Fraternal Order of Police/Metropolitan Police Dep’t Labor Committee v. Metropolitan Police Dep’t*, 60 D.C. Reg. 5322, Slip Op. No. 1372 at p. 2-3, PERB Case No. 11-U-52 (2013)).

In its Opposition, FOP asserts that the 120-day time period began to run on October 9, 2009, which was the date Vice Chairman Cunningham was served with the Notice of Proposed Adverse Action. (Opposition at 5). Further, FOP states that although Vice Chairman Cunningham advised the internal affairs agents at his interview that he would be speaking with Chairman Baumann regarding the interview, the agents did not advise Vice Chairman Cunningham that he could be disciplined for such communications. (Opposition to Supplement at 5). As a result, Vice Chairman Cunningham had no knowledge of the discipline imposed and the resulting CMPA violation until he was served with the Notice of Proposed Adverse Action on October 9, 2009. *Id.*

MPD is correct that the 120-day time period of Board Rule 520.4 is mandatory and jurisdictional, and that the absence of jurisdiction may be raised at any time. *See Hoggard v. D.C. Public Schools and AFSCME Council 20, Local 1959*, D.C. Reg. 1297, Slip Op. No. 352, PERB Case No. 93-U-10 (1993), *aff’d sub nom., Hoggard v. Public Employee Relations Board*, MPD-93-33 (D.C. Super. Ct., 1994), *aff’d* 655 A.2d 320 (D.C. 1995); *District of Columbia v. American Federation of Government Employees, Local 1403*, 19 A.3d 764, 766 (D.C. 2011) (*citing Chase v. Pub. Defender Serv.*, 956 A.2d 651, 654 (D.C. 1989)). Further, the absence of jurisdiction may be raised by the Board *sua sponte*. *Fraternal Order of Police/Metropolitan Police Dep’t Labor Committee v. D.C. Metropolitan Police Dep’t*, 60 D.C. Reg. 5322, Slip Op. No. 1372 at p. 2-3, PERB Case No. 11-U-52 (2013). As the Board noted in that case, “[l]ack of jurisdiction may be raised at any time. Whenever it affirmatively appears that the jurisdiction

fails, the objection may be raised by the parties or the court itself.” *Id.* at 3, *citing In re Estate of Dapolito*, 331 A.2d 327, 328 (D.C. 1975). Therefore, the Board erred in denying MPD’s exception alleging that PERB Case No. 10-U-14 was untimely filed because MPD raised the timeliness argument for the first time on appeal. *See FOP/MPD Labor Committee*, Slip Op. No. 1361 at p. 20. Thus, the Board will address this allegation and its application to PERB Case No. 10-U-14.

As stated by the Hearing Examiner, “[t]he essence of FOP’s ULP allegations in this case is that MPD violated D.C. Code § 1-617.04(a) by asking Cunningham questions concerning internal union business and representational activities, and then by disciplining Cunningham for discussing his [internal affairs] interview with Baumann.” (Report at 42). The Hearing Examiner concluded that MPD’s questioning of Vice Chairman Cunningham “about his discussions with Baumann...constituted impermissible interference in internal union business and representational activities” in violation of D.C. Code § 1-617.94(a). *Id.* The Hearing Examiner went on to find that the MPD’s confidentiality requirement regarding internal affairs interviews violated the CMPA because it “interferes with and amounts to intimidation of internal union business, and protected representational activities and speech,” and that MPD’s discipline of Vice Chairman Cunningham violated D.C. Code § 1-617.04(a) “because the discipline constitutes interference, intimidation and coercion of Cunningham in the exercise of his rights to form, join, and assist the FOP.” (Report at 43).

In short, the Hearing Examiner’s findings identify three (3) violations of the CMPA in PERB Case No. 10-U-14: the questioning at the internal affairs interview, the confidentiality agreement Vice Chairman Cunningham was required to sign at the internal affairs interview, and the discipline of Cunningham for violating the confidentiality agreement by discussing the internal affairs interview with Chairman Baumann. (Report at 42-43). The “act giving rise” to these violations was the internal affairs interview on June 9, 2009, at which Vice Chairman Cunningham was questioned about discussions with Chairman Baumann, and at which Vice Chairman Cunningham signed the confidentiality agreement. (Report at 4-5).

Further, although the Notice of Adverse Action was issued four (4) months later, the discipline of Vice Chairman Cunningham stemmed from the illegal actions which occurred at the internal affairs interview. The Board has held that “the time for filing a complaint with the Board concerning the alleged violations as a statutory cause of action commence[s] when the basis of those violations occur[s],” and that “proof of the occurrence of an alleged statutory violation is not necessary to commence the time limit for initiating a cause of action before the Board.” *Jackson and Brown v. American Federation of Government Employees, Local 2741*, 48 D.C. Reg. 10959, Slip Op. No. 414 at p. 3, PERB Case No. 95-S-01 (1995). In other words, FOP knew or should have known of the acts giving rise to the violative conduct on June 9, 2009, when Vice Chairman Cunningham was questioned about his conversations with Chairman Baumann and required to sign a confidentiality agreement prohibiting him from speaking with Chairman Baumann about the internal affairs interview. Vice Chairman Cunningham’s rights were first violated at the internal affairs interview on June 9, 2009, and it is on that date that the 120-day statute of limitations for this unfair labor practice complaint must begin. *See Jackson and Brown*, Slip Op. No. 414 at p. 3-4; *see also Watson v. D.C. Housing Authority and AFGE*

Local 2725, 60 D.C. Reg. 58, Slip Op. No. 1342 at p. 2, PERB Case No. 12-U-32 (2012); *AFGE Local 631 v. D.C. Dep't of Public Works*, 59 D.C. Reg. 10755, Slip Op. No. 1279, PERB Case No. 06-U-39 (2012). The unfair labor practice complaint, filed January 20, 2010, was filed more than 120 days later and is untimely.

Therefore, as PERB Case No. 10-U-14 was filed outside of the statutory period required by Board Rule 520.4, the Board lacks jurisdiction over the matter. *See Hoggard*, 655 A.2d at 323. Without jurisdiction over this matter, FOP's unfair labor practice complaint in PERB Case No. 10-U-14 must be dismissed².

ORDER

IT IS HEREBY ORDERED THAT:

1. The Metropolitan Police Department's Motion for Reconsideration is granted in part, and PERB Case No. 10-U-14 is dismissed as untimely.
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.

July 1, 2013

² As the Board lacks jurisdiction over PERB Case No. 10-U-14, there is no need to address MPD's allegation that the Board erred in supporting the Hearing Examiner's determination that a labor relations privilege existed between the FOP Chairman and Vice Chairman. (Motion at 3-9).

CERTIFICATE OF SERVICE

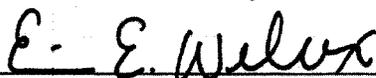
This is to certify that the attached Decision and Order in PERB Case No. 10-U-01, et al., was transmitted via File & ServeXpress to the following parties on this the 1st day of July, 2013.

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