Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/Metropolitan Police Department Labor Committee,	
Complainant,	PERB Case No. 11-U-01
	Opinion No. 1388
v.	
District of Columbia Metropolitan Police Department[1],	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

Complainant Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Complainant") filed the above-captioned Unfair Labor Practice Complaint ("Complaint"), against Respondent District of Columbia Metropolitan Police Department ("MPD" or "Respondent") for alleged violations of sections 1-617.04(a)(1) and (5) of the Comprehensive Merit Protection Act ("CMPA"). Respondent filed an Answer ("Answer") in which it denies the alleged violations and raises the following affirmative defenses:

(1) The Complaint is untimely pursuant to Board Rule 520.4; and

[1] FOP listed Chief Cathy Lanier as a respondent in this Complaint. The Executive Director has removed this name from the caption, consistent with the Board's precedent requiring individual respondents named in their official capacities to be removed from the complaint for the reason that suits against District officials in their official capacities should be treated as suits against the District. *See Fraternal Order of Police/Metropolitan Police Dep't Labor Comm. v. D.C. Metropolitan Police Dep't*, 59 D.C. Reg. 6579, Slip Op. No. 1118 at p. 4-5, PERB Case No. 08-U-19 (2011). The D.C. Superior Court upheld the Board's dismissal of such respondents in *Fraternal Order of Police/Metropolitan Police Dep't Labor Comm. v. D.C. Public Employee Relations Board*, Civ. Case No. 2011 CA 007396 P(MPA) (D.C. Super. Ct. Jan 9, 2013).

(2) the Board lacks jurisdiction because the Complaint solely concerns a dispute arising out of the application and interpretation of the parties' collective bargaining agreement ("CBA").

(Answer at 5).

II. Discussion

A. Background

The parties agree that on April 9, 2010, Sergeant Horace Douglas ("Sergeant Douglas") was advised that his scheduled tour of duty on April 17, 2010, would be changed from 7:30 a.m. through 4:00 p.m. to 2:30 p.m. through 11:00 p.m. (Complaint at 3; Answer at 2). The tour of duty change was made to accommodate an international summit held from April 11, 2010, through April 17, 2010. (Complaint at 3; Answer at 2).

Alleging that the change to his tour of duty violated Articles 4, 9, and 24 of the parties' CBA, Sergeant Douglas filed a step one grievance. (Complaint at 3; Answer at 2). The step one grievance was denied by the commander of the MPD Special Operations Division, citing "the needs of the Department." (Complaint at 4; Answer at 2). Sergeant Douglas appealed the step one grievance denial and filed a step two grievance with Chief of Police Cathy Lanier. (Complaint at 4; Answer at 3). In the step two grievance, Sergeant Douglas requested the following remedies:

a) That the Department ceases and desists from violating District of Columbia law;
b) That the Department cease and desist from violating the Agreement and manage in accordance with applicable laws, rules, and regulations;
c) That the Department compensates Sergeant Horace Douglas at the rate of time and one-half for the day he worked outside his normal tour of duty;
d) That the Command staff of the Court Liaison Division be retrained on the Agreement's scheduling provisions.
e) That a letter of apology be issued from the Director of Court Liaison Division to Sergeant Horace Douglas concerning this matter.

(Complaint Exhibit 4). On May 27, 2010, Chief Lanier issued a letter agreeing that MPD violated Article 24[2] of the parties' CBA by changing Sergeant Douglas' tour of duty without

[2] Article 24, Section 1 states:

> Each member of the Bargaining Unit will be assigned days off and tours of duty that are either fixed or rotated on a known regular schedule. Schedules shall be posted in a fixed and known location. Notice of any changes to their days off or tours of duty shall be made fourteen (14) days in advance. If notice is not given of changes fourteen (14) days in advance the member shall be paid, at his or her option, overtime pay or compensatory pay at the rate of time and one half, in accordance with the provisions of the Fair Labor Standards Act. The notice requirement is waived for those members assigned to the Executive Protection Unit and the Office of Professional Responsibility. (Complaint Exhibit 1).

providing the requisite fourteen day notice. (Complaint at 4; Answer at 3). On June 21, 2010, FOP contacted Chief Lanier to inquire when the step two grievance remedies would be implemented, particularly the Court Liaison Division command staff training and the letter of apology. (Complaint at 5, Complaint Exhibit 6). Chief Lanier responded in part that:

> As stated in my response to the grievance, the Department violated Article 24 by changing Sergeant Douglas's tour of duty without providing the requisite 14-day notice. The relief under the Agreement provides for compensation at the rate of time and one-half for the one day he worked outside his normal tour of duty. None of the other requested remedies are afforded by Article 24 or anywhere else in the Agreement.
>
> Accordingly, your request for additional relief not provided for under the Agreement is denied. To avoid any confusion regarding this matter, I am changing this grievance classification from "granted" to "denied, in part" to clarify that not all of the relief requested was provided. Sergeant Douglas will be compensated at the rate of time and one-half for the day he worked outside of his normal tour of duty.

(Complaint Exhibit 7).

B. Analysis

As a threshold issue, we must address MPD's allegation that the Board lacks jurisdiction to consider this matter, either because the Complaint is untimely, or because the issue is purely contractual. (Answer at 4-5). Board Rule 520.4 states that unfair labor practice complaints shall be filed "not later than 120 days after the date on which the alleged violations occurred." The Board does not have jurisdiction to consider unfair labor practice complaints filed outside of the 120-day window. *See, e.g., Hoggard v. District of Columbia Public Employee Relations Board*, 655 A.2d 320, 323 (D.C. 1995) ("[T]ime limits for filing appeals with administrative adjudicative agencies...are mandatory and jurisdictional."). 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*, 59 D.C. Reg. 5554, Slip Op. No. 998 at p. 5, PERB Case No. 09-U-06 (2009). In the instant case, MPD offers no explanation in support of its claim that the Complaint is untimely. (Complaint at 4). Chief Lanier's June 22, 2010, letter to the FOP was the Complainant's first indication that MPD was changing the classification of the grievance from "granted" to "denied, in part." (Complaint at 5). The Complaint was filed with the Board on October 20, 2010, less than 120 days from June 22, 2010. Therefore, the Complaint is not untimely.

MPD's second affirmative defense is that the Board lacks jurisdiction to consider this matter because it "solely concerns a dispute arising out of the application and interpretation of the parties' labor agreement and its grievance procedures." (Answer at 5). The Board

"distinguishes between those obligations that are statutorily imposed under the CMPA and those that are contractually agreed upon between the parties." *American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks*, 50 DCR 5049, Slip Op. No. 697, PERB Case No. 00-U-22 (2002) (citing *American Federation of State, County and Municipal Employees, Local 2921*, Slip Op. No. 339). In addition, it is well established that the Board's "authority only extends to resolving statutorily based obligations under the CMPA." *Id.* Therefore, the Board examines the particular record of a matter to determine if the facts concern a violation of the CMPA, notwithstanding the characterization of the dispute in the complaint or the parties' disagreement over the application of the collective bargaining agreement. The Board looks to whether the record supports a finding that the alleged violation is: (1) restricted to facts involving a dispute over whether a party complied with a contractual obligation; (2) resolution of the dispute requires an interpretation of those contractual obligations; and (3) no dispute can be resolved under the CMPA. *See American Federation of Government Employees, Local Union No. 3721 v. District of Columbia Fire Department*, 39 D.C. Reg. 8599, Slip Op. No. 287 at n. 5, PERB Case No. 90-U-11 (1991). Although a violation that is solely contractual is not properly before the Board, a contractual violation will be deemed an unfair labor practice if the complainant can establish that it also violates the CMPA, or constitutes a repudiation of the parties' CBA. *University of the District of Columbia Faculty Ass'n v. University of the District of Columbia*, Slip Op. No. 1350 at p. 2, PERB Case No. 07-U-52 (January 2, 2013); *see also American Federation of Government Employees, Local 3721 v. D.C. Fire Dep't*, 39 D.C. Reg. 8599, Slip Op. No. 287, PERB Case No. 90-U-11 (1991).

Upon considering the record of this case, the Board determines that the matter is not purely contractual and may concern a violation of the CMPA. First, the case does not involve a dispute over the terms of the parties' CBA, but rather whether MPD acted in bad faith by altering its classification of Sergeant Douglas's grievance. (Complaint at 5). Second, the Board is not required to interpret the parties' CBA to resolve the dispute. Instead, the Board may resolve the dispute based upon its interpretation of D.C. Code § 1-617.04(a)(1) and (5), and its case law. Finally, the dispute can be resolved by the CMPA; specifically, whether MPD's actions constituted a failure to bargain in good faith.

In the instant case, FOP alleges that "by initially granting the Grievance and subsequently unilaterally changing the classification of the Grievance to 'denied, in part,'" MPD failed to bargain in good faith, in violation of D.C. Code § 1-617.04(a)(1) and (5). (Complaint at 5). In support of its allegation of bad faith, FOP cites from several National Labor Relations Board ("NLRB") cases. First, FOP states that "[i]n determining whether a party has violated its statutory duty to bargain in good faith, the totality of the party's conduct, both at and away from the bargaining table, is relevant." (Complaint at 5, *citing In re Public Service Co. of Oklahoma*, 334 NLRB 487 (2001); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), *enforced* 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984)). Further, FOP cites to NLRB v. Herman Sausage Co., 275 F.2d 229, 213 (5th Cir. 1960) for the holding that good faith "includes a duty to enter into discussions with an open and fair mind, and a sincere purpose to find a basis of agreement." (Complaint at 6). In addition, FOP cites to *Chevron Chemical Co.*, 261 NLRB 44, 45 (1982) for its statement that determining whether parties have complied with the duty to bargain in good faith "usually requires examination of their motive or

state of mind during the bargaining process, and is generally based on circumstantial evidence, since a charged party is unlikely to admit overtly having acted with bad intent." (Complaint at 6). Finally, FOP states that "[t]o determine whether the duty of good faith has been assumed by a party, the Board necessarily looks at the substance of the proposals themselves..." (Complaint at 6, *citing NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953). MPD denies that it has committed an unfair labor practice. (Answer at 4).

The CMPA obligates District agencies to bargain in good faith with the exclusive bargaining representative of their employees. D.C. Code § 1-617.04(a)(5). An agency's violation of the duty to bargain in good faith under D.C. Code § 1-617.04(a)(5) results in interference with employee rights, which constitutes a violation of D.C. Code § 1-617.04(a)(1). *See D.C. Water and Sewer Authority v. American Federation of Government Employees, Local 872*, 59 D.C. Reg. 4659, Slip Op. No. 949, PERB Case No. 05-U-10 (2009). The Board has found examples of a failure to bargain in good faith where an agency refuses to produce relevant and necessary information requested by an exclusive representative, *American Federation of Government Employees, Local 2725 v. D.C. Dep't of Health*, 59 D.C. Reg. 6003, Slip Op. No. 1003 at p. 4, PERB Case No. 09-U-65 (2009); where a party engages in surface bargaining, *American Federation of Government Employees, Local 383 v. D.C. Dep't of Disability Services*, Slip Op. No. 1284 at p. 2, PERB Case No. 09-U-56 (June 21, 2012); and where an agency refuses to implement an arbitration award where there is no genuine dispute over the terms of the award, *Int'l Brotherhood of Police Officers, Local 446 v. D.C. Health & Hospitals Public Benefit Corp.*, 47 D.C. Reg. 7184, Slip Op. No. 622 at p. 4, PERB Case No. 99-U-30 (2000).

The facts of this case present a case of first impression before the Board. MPD wholly granted FOP's step two grievance on May 27, 2010. (Complaint at 4; Answer at 3). Approximately one month later, MPD altered its decision on the grievance from "granted" to "denied, in part." (Complaint, Exhibit 7). It is true, as Chief Lanier pointed out in her June 21 letter that the parties' CBA provides for "compensation at the rate of time and one-half for the one day [Sergeant Douglas] worked outside his normal tour of duty." *Id.* Nonetheless, MPD chose to grant the step two grievance without limitation. (Complaint at 4; Answer at 3). Although the facts of this case present a case of first impression before the Board, MPD's partial rescission of its initial decision to grant the grievance bears a similarity to other actions in which a party has ignored its duty to bargain in good faith. *See Int'l Brotherhood of Police Officers*, Slip Op. No. 622 (refusal to implement arbitration award where there is no genuine dispute over the terms of the award constitutes a refusal to bargain in good faith). Much like an agency that fails to implement an arbitration award, MPD's actions in this case constitute a failure to respect the bargaining relationship between itself and FOP, and a failure to adhere to its statutory duty to bargain in good faith. Therefore, FOP's Unfair Labor Practice Complaint is granted.

C. Remedies

FOP requests an order from the Board:

a. Finding that MPD engaged in an unfair labor practice in violation of D.C. Code § 1-617.04(a)(1) and (5);

b. Ordering MPD to cease and desist from engaging in an unfair labor practice in violation of D.C. Code § 1-617.04(a)(1) and (5);
c. Compelling MPD to conspicuously post no less than two (2) notices of their violations and the Board's Order in each MPD building;
d. Compelling MPD to schedule training for the command staff of the Court Liaison Division regarding the CBA's scheduling provisions;
e. Compelling the Director of the Court Liaison Division to issue a letter of apology to Sergeant Douglas concerning scheduling;
f. Compelling MPD to pay FOP's costs associated with the proceeding; and
g. Ordering such other relief and remedies as the Board deems appropriate.

(Complaint at 7-8). D.C. Code § 1-617.13(a) enumerates the remedies available to the Board, including, but not limited to, orders which "compel bargaining in good faith," "compel a labor organization or the District to desist from conduct prohibited under this subchapter," and "direct compliance with the provisions of this subchapter." In accordance with the CMPA, the Board will issue an order compelling MPD to desist from violating D.C. Code § 1-617.04(a)(1) and (5) by unilaterally changing the classification of Sergeant Douglas' grievance from "granted" to "denied, in part," and to bargain in good faith with FOP. While FOP has cited no cases supporting its request that the Board compel MPD employees to schedule training sessions or write a letter of apology, the Board's order that MPD desist from its failure to bargain in good faith encompasses a directive that MPD abide by the terms of the grievance it granted on May 27, 2010. Additionally, the Board will order MPD to post two copies of a notice in each MPD building.

D.C. Code § 1-617.13(d) provides that the Board "shall have the authority to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may determine." The Board addressed the criteria for determining whether costs should be awarded in *AFSCME, D.C. Council 20, Local 2776 v. District of Columbia Department of Finance and Revenue*, 73 D.C. Reg. 5658, Slip Op. No. 245 at pp. 4-5, PERB Case No. 98-U-02 (2000):

> First, any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the fact of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed...Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice.
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> Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued...What we can say here is that among the situation in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken

> in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive representative.

In the instant case, FOP established that an unfair labor practice was committed. Nonetheless, this is a case of first impression, as the Board is finding for the first time that unilaterally changing a grievance classification from "granted" to "denied, in part" constitutes a failure to bargain in good faith. MPD could not have known the outcome of its decision to change the grievance classification. Therefore, this is not a situation in which "the successfully challenged action was undertaken in bad faith." *AFSCME*, Slip Op. No. 245 at p. 5. As a result, an award of costs is not warranted in the interest of justice, and FOP's request for reasonable costs is denied. *See Teamsters Local 639 v. D.C. Public Schools*, 59 D.C. Reg. 6162, Slip Op. No. 1021 at p. 9, PERB Case No. 08-U-42 (2010).

ORDER

IT IS HEREBY ORDERED THAT:

1. Complainant Fraternal Order of Police/Metropolitan Police Dep't Labor Committee's Unfair Labor Practice Complaint is granted.

2. Respondent D.C. Metropolitan Police Department will cease and desist violating D.C. Code § 1-617.04(a)(1) and (5) by unilaterally changing the classification of a grievance after the grievance has been granted;

3. Respondent shall conspicuously post within ten (10) days from the issuance of this Decision and Order two copies of the attached Notice where notices to bargaining unit members are normally posted in each of Respondent's buildings. The Notices shall remain posted for thirty (30) consecutive days;

4. Respondent shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order that the Notices have been posted accordingly;

5. 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.

May 28, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 11-U-01 was transmitted via U.S. Mail and e-mail to the following parties on this the 28th day of May, 2013.

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