**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 Nos. | 12-U-16<br>13-U-38 |
| Complainant, | | |
| v. | Opinion No. 1609 | |
| District of Columbia Office of Police Complaints, | | |
| Respondent. | | |

## DECISION AND ORDER

This Decision and Order is being issued in compliance with orders issued by the D.C. Court of Appeals and the D.C. Superior Court.

On February 19, 2013, PERB's Executive Director administratively dismissed an unfair labor practice complaint filed in PERB Case No. 12-U-16 by the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP") against the District of Columbia Office of Police Complaints ("OPC"). The Executive Director determined that FOP did not have standing to bring the complaint against OPC because OPC was not a party to FOP's collective bargaining agreement with the District of Columbia Metropolitan Police Department ("MPD"). FOP did not file a motion for reconsideration, but rather appealed the dismissal directly to the D.C. Superior Court, which affirmed the dismissal on August 21, 2014. On March 8, 2016, the D.C. Court of Appeals vacated the D.C. Superior Court's Order and remanded the case to PERB to address three preliminary procedural questions and then to readdress the case's merits.

On June 11, 2015, PERB's Executive Director administratively dismissed a similar complaint that FOP filed in PERB Case No. 13-U-38 against OPC. As it did in PERB Case No. 12-U-16, FOP appealed the dismissal directly to the D.C. Superior Court without first filing a motion for reconsideration. When the D.C. Court of Appeals vacated the D.C. Superior Court's

Order affirming the dismissal in PERB Case No. 12-U-16, the D.C. Superior Court remanded FOP's appeal of PERB Case No. 13-U-38 as well and ordered the Board to address the same questions that the D.C. Court of Appeals raised with regard to PERB Case No. 12-U-16.

Since both PERB Case Nos. 12-U-16 and 13-U-38 involve the same parties and similar issues, the Board hereby consolidates the cases and addresses the questions ordered by the D.C. Court of Appeals and the D.C. Superior Court. As explained more fully herein, the Board finds that the Executive Directors rightfully granted OPC's respective motions to dismiss, and hereby dismisses both cases with prejudice.

## I. Statement of the Case

### A. PERB Case No. 12-U-16

On November 3, 2011, FOP sent an information request to OPC requesting information about OPC's use of one-way mirrors during interviews with police officers.[1] FOP stated that the request was being made pursuant to D.C. Official Code § 1-617.04(a)(5) and Article 10 of the Collective Bargaining Agreement ("CBA") between "the District of Colombia and the FOP."[2] On November 14, 2011, OPC sent a response denying the request, stating that "there is no bargaining obligation between OPC and FOP," and therefore, D.C. Official Code § 1-617.04(a)(5) "is not applicable."[3] Further, OPC asserted that since OPC "is not a party to the CBA between MPD and FOP, it is not covered by the agreement" and "not subject to the CBA's processes."[4]

On January 6, 2012, FOP filed an unfair labor practice complaint arguing that its CBA was between FOP and the entire District of Columbia government, not just MPD, and therefore, OPC was obligated to provide the requested information pursuant to Article 10 of that CBA.[5] FOP additionally argued that under D.C. Official Code §§ 1-617.04(a)(1) and (5), OPC was prohibited from interfering with, restraining, or coercing District employees in the exercise of the rights guaranteed by the CMPA, and therefore had a statutory duty to provide the information.[6] In its Answer, OPC denied FOP's arguments and asserted, among other things, that since FOP's CBA expressly states that its terms apply only between FOP and MPD, OPC had no obligation under that agreement or the CMPA to bargain collectively with FOP, or to provide the information.[7] Accordingly, OPC moved for dismissal of the complaint.

In *Fraternal Order of Police/Metro. Police Dep't Labor Comm., v. Dist. of Columbia Office of Police Complaints, et al.*, 60 D.C. Reg. 3041, Slip Op. 1364, PERB Case No. 12-U-16

[1] 12-U-16 Complaint, Exhibit 2.
[2] *Id.*
[3] 12-U-16 Complaint, Exhibit 3.
[4] *Id.*
[5] 12-U-16 Complaint at 5.
[6] *Id.* at 5-7.
[7] 12-U-16 Answer at 1-5.

(2013) (hereinafter "Slip Op. No. 1364" or "PERB Case No. 12-U-16"),[8] PERB's Executive Director administratively granted OPC's motion to dismiss, reasoning that since OPC was not a party to FOP's collective bargaining agreement with MPD, and since FOP did not represent any of OPC's employees, FOP lacked standing to bring the complaint and, even if it did, OPC did not have a duty under Article 10 of that agreement or under D.C. Official Code § 1-617.04(a)(5) to comply with FOP's request.[9] FOP did not file a motion for reconsideration, but rather appealed the Executive Director's dismissal directly to the D.C. Superior Court.

On August 21, 2014, the D.C. Superior Court affirmed PERB's dismissal in *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Pub. Emp. Relations Bd. and Dist. of Columbia Office of Police Complaints,* Civ. Case No. 2013 CA 002120 P(MPA) (D.C. Super. Ct. Aug. 21, 2014). The court reasoned in part that since OPC did not employ any members of the bargaining unit that FOP represented, had never entered into contract negotiations with FOP, and was not a party to any agreements with FOP, and because there was no privity of contract between FOP and OPC, it was reasonable for PERB to find that the CBA applied only to FOP and MPD, and not to FOP and all other District agencies. Furthermore, the Court found that it was also reasonable for PERB to conclude that OPC was not bound by the CMPA to provide the requested information.[10] FOP appealed the Superior Court's decision to the D.C. Court of Appeals.

On March 8, 2016, the D.C. Court of Appeals vacated the D.C. Superior Court's Decision and remanded the matter to PERB to address four specific questions:

> (1) [w]hether, under the PERB's rules, the FOP failed to adequately preserve an objection to the authority of the Executive Director to decide the motion to dismiss, by failing to ask the PERB to reconsider the Executive Director's ruling;
>
> (2) if so, whether the issue of the Executive Director's authority raises a question of the PERB's jurisdiction requiring the PERB to address the issue even if the FOP did not adequately preserve an objection, *compare, e.g., Washington Gas Light Co. v. Public Serv. Comm'n*, 982 A.2d 691, 708-09 (D.C. 2009), *with, e.g., Jones & Artis Constr. Co. v. District of Columbia Contract Appeals Bd.*, 549 A.2d 315, 323-24 (D.C. 1988);

[8] The Board notes that in most cases, the Executive Director's administrative dismissals are not issued with a slip opinion number or published in the D.C. Register.
[9] Slip Op. No. 1364 at 6-10.
[10] *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Pub. Emp. Relations Bd. and Dist. of Columbia Office of Police Complaints,* Civ. Case No. 2013 CA 002120 P(MPA) at p. 5-7 (D.C. Super. Ct. Aug. 21, 2014) (internal citations omitted).

(3) whether, under the applicable statutes and regulations, the Executive Director did have the authority to decide the motion to dismiss, *see* D.C. Code § 1-605.01 (k)-(l) (2012 Repl.); 6-B DCMR §§ 500.2-.5, 500.11, 520.8, 520.10-.14, 553, 559 (2013); *see also* 6-B DCMR §§ 500.2-.5, 500.11, 520.5, 520.8, 520.10, 520.14, 553, 559 (2016); and

(4) whether, on the merits, the OPC committed an unfair labor practice by refusing to provide the requested information. *See generally, e.g., Teamster Local Union 1714 v. Public Emp. Relations Bd.*, 579 A.2d 706, 712 (D.C. 1990) (vacating and remanding for consideration of issues by PERB in first instance).[11]

B. PERB Case No. 13-U-38

On July 18, 2012, FOP Chief Shop Steward Michael Millet represented an MPD officer during an investigatory interview with OPC.[12] During the interview, a dispute arose over the scope of the inquiry and Millet tried to use his cellular phone. OPC then informed him that OPC's rules did not permit the use of cellular phones during investigative interviews. FOP requested bargaining over the rule, which OPC rejected.[13] On September 4, 2013, FOP filed an unfair labor practice complaint against the OPC, asserting that OPC violated D.C. Official Code §§ 1.617.04(a)(1) and (5) when it unilaterally implemented its cellular phone rule without first providing notice to FOP, and when it refused FOP's request to bargain over the rule.[14] FOP reasoned that OPC's rule against using cellular phones during interviews directly impacted terms and working conditions between the parties, and implementing the ban "without bargaining represents a fundamental rejection of [FOP] as a representative bargaining agent."[15]

On June 15, 2015, PERB's Executive Director administratively dismissed FOP's complaint in PERB Case No. 13-U-38. The Executive Director relied on the Board's decision in *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Office of Unified Commc'ns and D.C. Office of Labor Relations and Collective Bargaining*, 62 D.C. Reg. 2902, Slip Op. No. 1505, PERB Case No. 13-U-10 (2014) (hereinafter "Slip Op. No. 1505" or "PERB Case No. 13-U-10"). In that case, FOP alleged that the D.C. Office of Unified Communication ("OUC") violated the CMPA when it refused to comply with an information request. In its decision—which FOP did not appeal—the Board reasoned that since FOP did not

[11] *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Pub. Emp. Relations Bd. and Dist. of Columbia Office of Police Complaints*, 14-CV-1015 at p. 2 (D.C. Mar. 8, 2016).
[12] 13-U-38 Complaint at 3.
[13] *Id.*
[14] *Id.* at 3-6.
[15] *Id.* at 5-6.

have a collective bargaining agreement with OUC, OUC was not obligated to provide the information, and FOP did not have standing to bring the complaint.[16]

In PERB Case No. 13-U-38, the Executive Director similarly reasoned that:

> [t]he plain language of D.C. Official Code § 1-617.04(a)(5) prohibits the District and its agencies from refusing to bargain collectively in good faith "with the exclusive representative." The Board has held that in order for a union to be considered the "exclusive representative" for the purposes of collective bargaining, the agency's employees must have "chosen" that union to be their representative. In this case, FOP is not certified as the "exclusive representative" for any employees employed at OPC; the agency from which FOP was seeking information.
>
> Further, […] OPC is not a signatory to FOP and MPD's collective bargaining agreement. Indeed, FOP's continuing assertion that its collective bargaining agreement with MPD is binding on all other District agencies has been unambiguously rejected by PERB and the D.C. Superior Court. FOP and MPD's collective bargaining agreement only creates obligations between FOP and MPD—not between FOP and all other District agencies. Accordingly, there is no privity of contract between FOP and OPC.[17]

Just as it did in PERB Case No. 12-U-16, FOP appealed the Executive Director's administrative dismissal of PERB Case No. 13-U-38 directly to the D.C. Superior Court without first filing a motion for reconsideration. After the D.C. Court of Appeals vacated the D.C. Superior Court's Order affirming the administrative dismissal in PERB Case No. 12-U-16, the D.C. Superior Court, at the request of the parties, similarly vacated the Executive Director's administrative dismissal of PERB Case No. 13-U-38 and ordered that the matter be remanded to the Board for further proceedings consistent with the D.C. Court of Appeals Order in PERB Case No. 12-U-16.[18]

Thus, PERB Case Nos. 12-U-16 and 13-U-38 are now before the Board for resolution in compliance with the D.C. Court of Appeals' and the D.C. Superior Court's orders.

---

[16] Slip Op. No. 1505 at p. 3-10.
[17] 13-U-38 Admin. Dismissal (citing *Am. Fed'n of Gov't Emp., Local 2725 v. Dist. of Columbia Dep't of Health,* 59 D.C. Reg. 6003, Slip Op. No. 1003 at p. 4-5, PERB Case No. 09-U-65 (2012); Slip Op. No. 1364; and *FOP v. PERB and OPC*, Civ. Case No. 2013 CA 002120 P(MPA) (D.C. Super. Ct. Aug. 21, 2014)).
[18] *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Pub. Emp. Relations Bd.,* Civ. Case Nos. 2013 CA 004910 P(MPA) and 2013 CA 005693 P(MPA) (D.C. Super. Ct. Mar. 17, 2016).

## II. Analysis

### A. Preliminary Issues

After PERB Case Nos. 12-U-16 and 13-U-38 were remanded to PERB, FOP filed a motion to consolidate the two cases and to have them assigned to a hearing examiner. As stated, *supra*, FOP's motion to consolidate the cases is granted.[19]

However, the Board finds that it is not necessary to assign the consolidated cases to a hearing. PERB Rule 520.8[20] states that the "Board or its designated representative shall investigate each complaint." PERB Rule 520.10 states that if "the investigation reveals that there is no issue of fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral argument." However, PERB Rule 520.9 states that in the event "the investigation reveals that the pleadings present an issue of fact warranting a hearing, the Board shall issue a Notice of Hearing and serve it upon the parties."

In these cases, there are no disputes of fact to warrant a hearing. Although OPC generally denied FOP's respective legal allegations and conclusions, it did not dispute the alleged underlying facts, which were that: (1) FOP requested information and/or bargaining; and (2) OPC denied those requests. Since those underlying facts are not disputed by the parties, leaving only legal questions to be resolved, the Board finds that a fact-finding hearing would not reveal or clarify any facts that are not already known, and that these cases can be properly decided based upon the pleadings already in the record in accordance with PERB Rule 520.10.[21]

### B. Issues Posed By the D.C. Court of Appeals

#### 1. Did FOP fail to adequately preserve its objections to the authority of the Executive Directors to decide the motions to dismiss by failing to ask the PERB to reconsider the Executive Directors' rulings?

The first question posed by the D.C. Court of Appeals is whether FOP failed to adequately preserve its objections to the authority of the Executive Directors to decide the respective motions to dismiss in PERB Case Nos. 12-U-16 and 13-U-38 when it failed to ask the

---

[19] *See Am. Fed'n of Gov't Emp., Locals 631, 872, 1972, & 2553 v. Dist. of Columbia Dep't of Pub. Works*, 43 D.C. Reg. 1394, Slip Op. No. 306, PERB Case Nos. 94-U-02 & 94-U-08 (1994) (holding that cases involving the same parties and related issues may be consolidated for purposes of efficiency and economy of the Board's processes).

[20] Unless otherwise expressly stated herein, all citations to PERB's Rules in this Decision and Order will be to the 2012 iteration of the Rules since that is the version that was in effect when the complaints were filed. *See* 6-B DCMR §§ 500-599, *et seq*. (2013).

[21] *See* D.C. Official Code §§ 1-617.13(b)-(c) (establishing in part that "[t]he findings of the Board with respect to questions of fact shall be conclusive if supported by substantial evidence on the record considered as a whole" regardless of whether the action in court is initiated by PERB or by a person aggrieved by a final order of the Board); *see also Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Metro. Police Dep't*, 60 D.C. Reg. 5337, Slip Op. No. 1374 at p. 11, PERB Case No. 06-U-41 (2013); *and Am. Fed'n of Gov't Emp., Local 2978, AFL-CIO v. Dist. of Columbia Dep't of Health*, 60 D.C. Reg. 2551, Slip Op. No. 1356 at p. 7-8, PERB Case No. 09-U-23 (2013).

Board to reconsider the Executive Directors' rulings.[22] The Board finds that, pursuant to the CMPA, PERB's Rules, and the common law's longstanding waiver and exhaustion rules, FOP did indeed fail to preserve its right to object to the Executive Directors' authority to dismiss the respective complaints in PERB Case Nos. 12-U-16 and 13-U-38 when it failed to file motions for reconsideration with the Board.

*a. Exhaustion of Remedies and Waiver Under the CMPA and PERB's Rules*

D.C Official Code §§ 1-617.13(b) and (c) establish in part that regardless of whether an action before a D.C. court concerning a Board decision is initiated by PERB or by a person aggrieved by the decision, "[n]o defense or objection to an order of the Board shall be considered by the court, unless such defense or objection was first urged before the Board." PERB Rule 500.4 sets forth, in part, that "[a] decision made by the Executive Director shall become final unless a party files a motion for reconsideration within thirty (30) days after issuance of the Executive Director's decision." The 2012 iteration of PERB Rules 559.1 and .2 prescribed that Decisions and Orders from the Board became final thirty (30) days after issuance unless the Order specified otherwise, the Board reopened the case on its own motion, or a party filed a motion for reconsideration within ten (10) days after issuance of the Decision.[23] PERB Rule 559.3 stated that "[u]pon issuance of an Opinion on any motion for reconsideration of a Decision and Order, the Board's Decision and Order shall become final." Finally, PERB Rule 559.4 established that "[a]administrative remedies are considered exhausted when a Decision and Order [from the Board] becomes final…."

*b. Exhaustion of Remedies and Waiver Under the Common Law*

The D.C. Court of Appeals has held—in articulation of its "waiver" and/or "exhaustion" rules—that it will not consider procedural claims that could have been first brought before the agency, but were not. The court has stated:

> "We have long held that we will not review a procedural claim that was not adequately raised at the agency level. Administrative and judicial efficiency require that all claims be first raised at the agency level to allow appropriate development and administrative response before judicial review....[24] Failing to object at a time when an error complained of on appeal could be corrected below is sufficient to work a forfeit of that claim on appeal." *Fair Care Found. v. District of Columbia Dep't of Ins. & Sec. Regulation,*

[22] *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Pub. Emp. Relations Bd. and Dist. of Columbia Office of Police Complaints*, *supra*, 14-CV-1015 at p. 2.

[23] The 2015 amendments to the Board's Rules expanded the time period to file a motion for reconsideration of a Decision and Order from the Board to fourteen (14) days after issuance of the Decision.

[24] *See also Hughes v. Dist. of Columbia Dep't of Emp't Serv.*, 498 A.2d 567, 570-71 (D.C. 1985) (citing *Smith v. Police and Firemen's Ret. & Relief Bd.,* 460 A.2d 997, 999 (D.C.1983); *Arthur v. Dist. of Columbia Nurses' Exam'ing Bd.,* 459 A.2d 141, 145 n. 7 (D.C. 1983); *and Gearhart & Otis, Inc. v. SEC,* 348 F.2d 798, 801 (D.C. Cir. 1965)).

> 716 A.2d 987, 993 (D.C. 1998) (internal citations and quotation marks omitted); *see also Goodman v. District of Columbia Rental Hous. Comm'n,* 573 A.2d 1293, 1301 (D.C. 1990) ("In the absence of exceptional circumstances, a reviewing court will refuse to consider contentions not presented before the administrative agency at the appropriate time."); *Jones & Artis Constr. Co. v. District of Columbia Contract Appeals Bd.*, 549 A.2d 315, 324 (D.C. 1988). "[S]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S. Ct. 67, 97 L. Ed. 54 (1952). One principal reason for the rule that procedural objections must be timely made is to give the tribunal and opposing parties the opportunity to correct or controvert the purported defect when it is still possible to do so. *District of Columbia Gen. Hosp. v. District of Columbia Office of Employee Appeals*, 548 A.2d 70, 74 (D.C. 1988). Another main reason is that "judicial review might be hindered by the failure of the litigant to allow the agency to make a factual record, exercise its discretion, or apply its expertise." *R.R. Yardmasters of Am. v. Harris*, 232 U.S. App. D.C. 171, 177, 721 F.2d 1332, 1338 (1983).[25]

The Board notes that the court has recognized several "distinct legal concepts" under its exhaustion rules.[26] One is a common law court-created exhaustion rule that the court applies in cases where exhaustion is not required by statute.[27] The court will apply this rule to specific issues and/or arguments that the parties could have brought before the agency (e.g., on a motion for reconsideration), but did not. This exhaustion concept is derived from the court's equitable powers and can therefore be waived under exceptional circumstances.[28]

Another exhaustion rule the court recognizes, and that applies to the instant cases, arises when exhaustion is expressly required by a statute.[29] In those cases, the court must determine whether the statutory restriction is discretionary or jurisdictional. If the statutory bar is discretionary, then the court can waive it. In cases where the bar is jurisdictional, however, the

---

[25] *Dist. of Columbia Hous. Auth. v. Dist. of Columbia Office of Human Rights*, 881 A.2d 600, 611 (D.C. 2005); *see also Howell v. Dist. of Columbia Zoning Comm'n*, 97 A.3d 579, 584 n. 6 (D.C. 2014) (holding that the court would not consider a claim that could have been raised in a motion for reconsideration, but was not); *and Brown v. Dist. of Columbia Dep't of Emp. Serv.*, 83 A.3d 739, 746 n. 22 (D.C. 2014) (citing favorably to a First Circuit decision refusing to consider a challenge to a ruling where the complaining party "never raised a word of protest about [the ruling] to the [agency], though it could have sought reconsideration on [that] basis").
[26] *Washington Gas Light Co.*, *supra*, 982 A.2d at 700-01.
[27] *Id.* at 700-01.
[28] *Id.*
[29] *Id.* at 701.

court cannot excuse a litigant's failure to exhaust its remedies and/or arguments at the agency level because it (the court) has no jurisdiction to do so.[30] In order for a statutory exhaustion restriction to be considered jurisdictional, the statutory language must state in clear and unequivocal terms that the judiciary is barred from hearing the action or argument until it has been first pleaded before and decided by the administrative agency.[31] Additionally, the court considers whether the statute expressly bars the courts from hearing an unexhausted action or argument, or whether it merely bars litigants from pleading the action or argument. If the latter, then the court has found that the statutory restriction is discretionary because it does not expressly restrict the judiciary's ability to hear or address the argument, only the litigant's ability to plead it.[32] Another factor the court considers is whether the statute provides for any exceptions. If the statute does not list any exceptions, then the court has generally found that the legislature intended the restriction to be jurisdictional.[33]

*c. Application of Exhaustion and Waiver Rules to PERB Case Nos. 12-U-16 and 13-U-38*

As noted *supra*, the applicable statute in these cases is D.C Official Code § 1-617.13(b), which simply states that "[n]o defense or objection to an order of the Board shall be considered by the court, unless such defense or objection was first urged before the Board." Since the statute's language clearly and unequivocally places the bar on the judiciary and not on the parties, and since it does not list any exceptions, it is evident that §§ 1-617.13(b) and (c)'s exhaustion requirement is jurisdictional.[34]

In both of the instant cases, FOP never asked the Board to reconsider the Executive Directors' dismissals as it could and should have under PERB Rule 500.4. Nor did it ever raise before the Board its argument that the Executive Directors lacked the authority to issue the dismissals. Instead, the first time FOP raised the argument was in its appeals before the D.C. Superior Court. Thus, in accordance with the express exhaustion requirement in D.C Official Code § 1-617.13(b) and in consideration of the court's waiver and exhaustion rules, the Board finds that FOP did indeed fail to adequately preserve its objections when it failed to ask the Board to reconsider the Executive Directors' rulings.[35]

Furthermore, the Board notes that the only place in its Rules (either in the 2012 iteration or in the 2015 amendments) that speaks to the exhaustion of administrative remedies is PERB Rule 559.4, which states that "[a]dministrative remedies are considered exhausted when a Decision and Order becomes final in accordance with this section"— "this section" meaning

[30] *Id.* at 701-02.
[31] *Id.* at 701.
[32] *Id.* at 704-05.
[33] *Id.* at 704 (citations omitted).
[34] *Id.* at 704-05; *see also Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (enforcing a federal statute that barred courts from hearing on appeal any objection that had not been first urged before the National Labor Relations Board);
[35] *See Dist. of Columbia Hous. Auth. v. Dist. of Columbia Office of Human Rights, supra*, 881 A.2d at 611; *see also Woelke, supra,* 456 U.S. at 666; *and Washington Gas Light Co., supra,* 982 A.2d at 700-05.

PERB Rule 559 *et seq*., which governs final Decisions and Orders issued by the Board, and not PERB Rule 500.4 which governs decisions issued by the Executive Director.[36] Furthermore, D.C Official Code § 1-617.13(c) states that "[a]ny person aggrieved by a final order *of the Board* granting or denying in whole or in part the relief sought may obtain review of such order in the Superior Court of the District of Columbia by filing a request within 30 days after the final order has been issued."[37] When read in conjunction with D.C Official Code § 1-617.13(b) and the court's waiver and exhaustion rules, it is apparent that decisions by the Executive Director cannot be appealed directly to the Superior Court, but rather must first be brought before the Board in a motion for reconsideration.[38] This is not to say that decisions by the Executive Director can never become final, since PERB Rule 500.4 expressly states that Executive Director decisions become final 30 days after issuance unless a party files a motion for reconsideration. Rather it demonstrates that if a party wants to challenge an Executive Director decision on any grounds, it must first timely seek reconsideration of the decision by the Board.[39] Once the Board has issued its final Decision and Order on the motion for reconsideration, then and only then will the parties have exhausted their administrative remedies under PERB's Rules, thus paving the way for them to file an appeal with the D.C. Superior Court under D.C. Official Code § 1-617.13(c) if they so choose. However, if a party wishing to challenge an Executive Director's decision fails to raise its objections in a timely motion for reconsideration before the Board, then the Executive Director's decision will become final and the party will have forfeited its right to raise its objections either before the Board or in the courts.[40]

Here, as stated *supra*, FOP had fair opportunities under PERB Rule 500.4 to obtain full redress of its claims from the Board by filing a motion for reconsideration of the Executive Directors' respective dismissals, but simply chose not to avail itself of that prescribed procedure.[41] Accordingly, FOP failed to preserve its right to raise its concerns for the first time in the courts.[42]

---

[36] PERB Rule 500.22 (2012) further states that "Opinions, certifications, authorizations, decisions and orders *of the Board* are final, unless otherwise stated therein, for purposes of judicial review pursuant to D.C. Official Code §§ 1-617.13(c) and 1-605.02(12) (2001 ed. & Supp. 2014)" (emphasis added).

[37] (Emphasis added).

[38] *See Dist. of Columbia Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 997 A.2d 65, 81-82 (D.C. 2010) (holding that the policies behind the exhaustion rule require parties to air their issues at the administrative level first in order to create a better record, to allow the agency which enjoys greater familiarity with the parties and issues than the courts to decide how to best apply its expertise and exercise its discretion, and to discourage unnecessary litigation in the courts).

[39] *Id.*

[40] *Id.*; *see also Woelke, supra*, 456 U.S. at 666.

[41] *Dist. of Columbia Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, *supra*, 997 A.2d at 82 (noting that, in cases where the exhaustion requirement is discretionary, the Court will sometimes forgive a party's failure to exhaust administrative remedies in cases where "exceptional" circumstances beyond the party's control deprived it of a "fair opportunity" to exhaust all available remedies at the administrative level, but will not do so when the party could have availed itself of "full redress" through the agency's "prescribed proceedings" and simply chose not to take advantage of that opportunity) (citations omitted).

[42] *See* D.C Official Code § 1-617.13(b); *see also Dist. of Columbia Hous. Auth. v. Dist. of Columbia Office of Human Rights, supra*, 881 A.2d at 611; *Dist. of Columbia Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, *supra*, 997 A.2d at 81-82; *and Woelke, supra*, 456 U.S. at 666.

2. If FOP did fail to adequately preserve its objections to the authority of the Executive Directors to decide the motions to dismiss when it did not seek reconsideration of the dismissals by the Board, did the issue of the Executive Directors' authority raise questions about PERB's jurisdiction requiring the Board to address the issues even if the FOP did not adequately preserve its objections?

The second question the court directed the Board to address was, if FOP did fail to adequately preserve its objections to the authority of the Executive Directors to decide the motions to dismiss when it did not seek reconsideration of the dismissals by the Board, whether the issue of the Executive Director's authority raised a question of PERB's jurisdiction requiring the Board to address the issue anyway.[43] The court instructed the Board to compare *Washington Gas Light Co.*, *supra*, 982 A.2d at 708-09 with *Jones*, *supra*, 549 A.2d at 323-24.[44] The Board finds that FOP's contentions concerning the Executive Directors' authority did not raise questions about PERB's jurisdiction such that it required the Board to address them *sua sponte* or upon its own motion.

In *Washington*, the court articulated one narrow exception to its waiver and exhaustion requirements. The court stated that "if an alleged defect in an agency's jurisdiction is so serious that it wholly deprives the agency of the power to act, [the court] will retain the discretion to reach the jurisdictional question notwithstanding a party's failure to raise it before the agency."[45] In other words, if an agency decision wholly exceeded the agency's statutory authority, or if the agency itself suffered from some other serious compositional or constitutional defect, then the court will retain sufficient jurisdiction to consider a challenger's argument even if the party did not raise the argument before the agency or ask the agency to reconsider the decision prior to bringing it before the court.[46] This exception, however, is very "narrow" and the court's general rule has still been that "even jurisdictional questions must be put to agencies before they are brought to a reviewing court."[47]

For example, in *Jones*, the court rejected a contractor's argument that the Contract Appeals Board did not have the procedural authority to issue a certain decision because it did not have enough members to form a quorum.[48] The court held that the contractor waived its right to raise that argument in the courts because it failed to raise it first before the agency.[49] The court reasoned that the contractor did not challenge the Contract Appeals Board's substantive power to act at all through its Chairman, but rather challenged only the procedural "authority of the Chairman to act alone in this particular case, absent a stipulation by the parties."[50] In contrast, in

[43] *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Pub. Emp. Relations Bd. and Dist. of Columbia Office of Police Complaints*, *supra*, 14-CV-1015 at p. 2.
[44] *Id.*
[45] 982 A.2d at 700.
[46] *Id.* at 708-09 (citing *R.R. Yardmasters of Am. v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983); *and Mitchell v. Christopher*, 996 F.2d 375, 378 (1993)).
[47] *Id.* at 708 (citations omitted).
[48] 549 A.2d 315.
[49] *Id.* at. 323-24.
[50] *Id.* at 324.

*Washington*, the court found that since the Public Service Commission's statutory exhaustion requirement was discretionary and not jurisdictional,[51] and since the appellant's argument was that the Commission did not have the substantive statutory authority to issue the decision at all (as opposed to challenging who at the Commission made the decision or in what capacity), then the court retained sufficient jurisdiction to hear and address that jurisdictional argument even though the appellant had not first raised it before the Commission.[52]

Here, as discussed *supra*, the exhaustion requirement in D.C Official Code §§ 1-617.13(b) and (c) is jurisdictional and not discretionary.[53] Furthermore, FOP's arguments before the court were that the Executive Directors lacked the procedural authority to grant OPC's motions to dismiss, and that even if the Executive Directors did have the authority to decide the motions, the merits of their conclusions were incorrect.[54] Neither of these arguments speaks to PERB's core substantive statutory authority to adjudicate and decide FOP's unfair labor practice allegations.[55] Additionally, the Board had quorums as defined by D.C. Official Code § 1-605.01(l) when each dismissal was issued, and thus could have fully addressed FOP's arguments if FOP had moved for reconsideration of the dismissals as provided by PERB Rule 500.4.[56] Accordingly, the Board finds that FOP's contentions concerning the Executive Directors' authority did not raise questions about PERB's substantive jurisdiction such that it required the Board to address FOP's arguments *sua sponte* even though FOP did not adequately preserve them when it failed to file a timely motion for reconsideration in either case.[57]

3. Did the Executive Directors have the authority to decide the motions to dismiss?

The third question the court ordered the Board to consider was whether, under the applicable statutes and regulations, the Executive Directors had the authority to decide the motions to dismiss. The court instructed the Board to consider in its analysis, D.C. Official Code §§ 1-605.01(k)-(l) (2012 Repl.); 6-B DCMR §§ 500.2-.5, 500.11, 520.8, 520.10-.14, 553, 559 (2013); and 6-B DCMR §§ 500.2-.5, 500.11, 520.5, 520.8, 520.10, 520.14, 553, 559 (2016). The Board finds that under the CMPA, PERB's Rules, and PERB's case law, the Executive Directors did have the authority to administratively grant the motions to dismiss.

D.C. Official Code § 1-605.01(k) states in pertinent part that the "Board may appoint such employees as may be required to conduct its business." Sec. 1-605.01(l) states that "[t]hree members of the Board shall constitute a quorum for the transaction of business." The selection of PERB's Rules that the court instructed the Board to consider fall into four basic categories: (1)

---

[51] 982 A.2d at 707-08.
[52] *Id.* at 709-10.
[53] *See Washington Gas Light Co.*, *supra*, 982 A.2d at 704-05; *see also Woelke*, *supra*, 456 U.S. at 666.
[54] *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Pub. Emp. Relations Bd. and Dist. of Columbia Office of Police Complaints*, *supra*, 14-CV-1015 at p. 2.
[55] *See* D.C. Official Code § 1-605.02(3).
[56] *See* D.C Official Code § 1-617.13(b); *see also Dist. of Columbia Hous. Auth. v. Dist. of Columbia Office of Human Rights*, *supra*, 881 A.2d at 611; *Dist. of Columbia Metro. Police Dep't v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, *supra*, 997 A.2d at 81-82; *and Woelke*, *supra*, 456 U.S. at 666.
[57] *Compare, e.g., Washington Gas Light Co.*, *supra*, 982 A.2d at 700-10 *with Jones*, *supra*, 549 A.2d at 323-24.

rules governing the role and authority of the Executive Director and PERB in general;[58] (2) rules governing unfair labor practice cases;[59] (3) rules governing motions;[60] and (4) rules governing how and when Decisions and Orders issued by the Board become final.[61]

In *Monono, et al. v. Am. Fed'n of State, Cnty., and Mun. Emp., Dist. Council 20, Local 2401*, 49 D.C. Reg. 826, Slip Op. No. 672 at p. 2, PERB Case No. 01-U-15 (2001) the Board expressly held that D.C. Official Code § 1-605.1(k) "authorizes the Board to delegate its authority to dismiss complaints administratively to the Executive Director."[62]

Furthermore, PERB Rule 500.3 states that the Executive Director is the "principal administrative officer of the Board and performs such duties as designated by the CMPA or as assigned by the Board, including the investigation of all petitions, requests, complaints and other matters referred or submitted to the Board."[63] PERB Rule 500.4 authorizes the Executive Director to, "among other things, […] conduct […] investigations, […] and, pursuant to action by the Board or by an authorized panel thereof, sign and issue decisions and orders made by or *on behalf of* the Board.[64] As noted, *supra*, PERB Rule 500.4 also provides that a "decision" by the Executive Director becomes "final" unless a party files a motion for reconsideration within 30 days. PERB Rule 500.5 states that the "duly authorized and official documents of the Board of every description and without exception, including but not limited to decisions, orders, … and other communications, may be signed on behalf of the Board by the Executive Director…." Pursuant to PERB Rule 520.8, the Executive Director acts as the Board's "designated representative" who, under the express authority of PERB Rule 500.4, investigates each unfair labor practice complaint that is filed with the Board. If, in the course of that investigation, it is determined that the complaint has not met the *prima facie* case of the pleaded allegations, has failed to raise an allegation that, if proven, could constitute a violation of the CMPA, raises an allegation for which relief cannot be granted, or suffers from some other serious defect, then the Board has long authorized the Executive Director to administratively dismiss the case, either on his/her own accord or in response to a motion to dismiss.[65] Moreover, there is nothing in PERB Rule 553, *et seq*. (in either the 2012 or 2015 versions) that mandates that motions—including motions to dismiss—be granted or denied by a quorum of the Board. If such were the case, then

[58] *See* PERB Rules 500.2-.5 & .11 (2012 and 2015 versions).
[59] *See* PERB Rules 520.8 & .10-.14 (2012); *and* PERB Rules 520.5, .10, & .14 (2015).
[60] *See* PERB Rule 553, *et seq*. (2012 and 2015 versions).
[61] *See* PERB Rule 559, *et seq*. (2012 and 2015 versions).
[62] (Internal citations omitted).
[63] PERB Rule 500.3 was not changed in the 2015 amendments.
[64] (Emphasis added). Further, PERB Rule 500.4 was not changed in the 2015 amendments.
[65] *See, e.g.*, PERB Rules 500.21 & 501.13 (2012 and 2015 versions); *and* PERB Rule 520.5 (2015); *see also, e.g., Greene v. Univ. of the Dist. of Columbia and Am. Fed'n of State, Cnty., and Mun. Emp., Dist. Council 20, Local 2087*, 43 D.C. Reg. 1290, Slip Op. No. 350, PERB Case No. 91-U-09 (1993) (affirming the Executive Director's administrative dismissal of the complaint); *Beeton v. Fraternal Order of Police/Dep't of Corr. Labor Comm.*, 45 D.C. Reg. 2078, Slip Op. No. 538, PERB Case No. 97-U-26 (1998) (finding that there was no basis to disturb the Executive Director's administrative dismissal); *Monono, supra*, Slip Op. No. 672 at p. 2, PERB Case No. 01-U-15; *and Johnson v. Dist. of Columbia Pub. Sch., et al.*, 61 D.C. Reg. 7380, Slip Op. No. 1472, PERB Case No. 07-U-07 (2014) (finding that it was proper for the Executive Director to administratively dismiss a complaint for untimeliness and because it failed to state a claim for which relief could be granted).

the Board's once-a-month meetings would be unnecessarily bogged down and encumbered by the numerous administrative tasks that the Board expressly empowered and appointed the full-time Executive Director to address and decide on its behalf.[66]

Here, the Board expressly condoned the Executive Director's administrative dismissal of PERB Case No. 12-U-16 when it issued Slip Op. No. 1505 in PERB Case No. 13-U-10. As discussed, *supra*, in PERB Case No. 13-U-10, FOP filed an unfair labor practice complaint against OUC alleging that OUC violated D.C. Official Code §§ 1-617.04(1) and (5) and Article 10 of FOP's CBA with MPD when OUC refused to comply with an information request. The Board's dismissal of FOP's complaint in PERB Case No. 13-U-10 echoed, cited to, relied upon, and fully endorsed the Executive Director's dismissal of the substantially similar complaint in PERB Case No. 12-U-16.[67] FOP did not ask the Board to reconsider its Decision and Order in PERB Case No. 13-U-10, nor did it appeal the ruling in the D.C. Superior Court. Thus, Slip Op. No. 1505 in PERB Case No. 13-U-10 articulates the Board's current and unambiguous precedent on these issues.[68] Accordingly, when FOP raised similar allegations in yet another complaint against OPC in PERB Case No. 13-U-38, the Executive Director rightfully and appropriately granted OPC's motion to dismiss.[69]

4. On the merits, did OPC commit an unfair labor practices in PERB Case Nos. 12-U-16 and 13-U-38?

The final question the court ordered the Board to consider is whether, on the merits, OPC did commit an unfair labor practice in PERB Case No. 12-U-16 by refusing to provide FOP with the requested information. Similarly, the D.C. Superior Court ordered the Board to consider whether, on the merits, OPC committed unfair labor practices in PERB Case No. 13-U-38 when it unilaterally implemented its cellular phone rule without first providing notice to FOP, and/or when it refused FOP's request to bargain over the rule. The Board finds that, in accordance with its precedent set in PERB Case No. 13-U-10 and other noted authorities, OPC did not commit unfair labor practices in either PERB Case No. 12-U-16 or Case No. 13-U-38.

*a. PERB Case No. 12-U-16*

The facts of PERB Case No. 12-U-16 are nearly identical to those in PERB Case No. 13-U-10. In both cases, (1) FOP requested information from a District agency in which it did not represent any employees and with which it did not have a CBA; (2) FOP made the requests under the authority of D.C. Official Code § 1-617.04(a)(5) and Article 10 of FOP's CBA with MPD; (3) the agencies denied FOP's requests; and (4) FOP filed unfair labor practice complaints arguing that FOP's CBA with MPD was binding on the entire District, not just MPD, and that

[66] *See* D.C. Official Code § 1-605.01(k); *and* PERB Rules 500.2-.4 (2012 and 2015 versions): *see also Monono, supra*, Slip Op. No. 672 at p. 2, PERB Case No. 01-U-15; *and Dist. of Columbia Fire and Emergency Med. Serv. Dep't v. Am. Fed'n of Gov't Emp., Local 3721*, Slip Op. No. 1556, PERB Case No. 15-U-22 (December 1, 2015) (affirming the Executive Director's decision to grant a motion to dismiss).
[67] Slip Op. No. 1505 at p. 3-10.
[68] *See* PERB Rule 559, *et seq*. (2012).
[69] 13-U-38 Admin. Dismissal; *see also,* generally, the cases cited in n. 65 and 66 herein.

the agencies therefore violated D.C. Official Code §§ 1-617.04(a)(1) and (5) when they respectively refused to produce the requested information.

In PERB Case No. 13-U-10, the Board dismissed FOP's complaint on grounds that OUC was not a party to FOP's CBA with MPD, and therefore did not have a duty under Article 10 of that agreement or under D.C. Official Code § 1-617.04(a)(5) to provide FOP with the requested information.[70]

*i.* OPC was not obligated under Article 10 of FOP's CBA with MPD to provide the information that FOP requested

In PERB Case No. 13-U-10, PERB rejected FOP's argument that OUC was bound by Article 10 of its CBA with MPD on the grounds that: (1) the title page and Article 1, Section 1 of the agreement stated it was the collective bargaining agreement between FOP and MPD; (2) the terms of the agreement were specific to FOP and MPD; and (3) FOP's and MPD's representatives were the only signers of the agreement.[71] As such, the Board found it was reasonable to conclude that the only entities upon which the agreement bestowed any rights or obligations were FOP and MPD.[72] Here, because the same CBA was in effect when PERB Case No. 12-U-16 was filed, the same analysis applies. Indeed, in the administrative dismissal of FOP's complaint in PERB Case No. 12-U-16, the Executive Director correctly reasoned:

> Erroneously, FOP claims that Article 10 of the CBA empowers it to seek and receive information from OPC. (Complaint at 3, 5-7, and Exhibit #2). Section 1 of Article 10 states, "*[t]he Parties* shall make available *to each other's* duly designated representatives, upon reasonable request, any information, statistics and records relevant to negotiations or necessary for proper administration of the terms of this Agreement." (Complaint, Exhibit #2 at 8) (emphases added). In the instant matter, "the Parties" and "to each other" are the legally operative terms. They plainly dictate, without ambiguity, that the obligation to exchange information only applies between MPD and FOP. [*Mittal Steel USA ISG, Inc. v. Bodman*, 435 F.Supp.2d 106, 108-09 (Dist. Court, Dist. of Columbia 2006)]; [*Charlton v. Mond*, 987 A.2d 436, 441 (D.C. 2010)]; and [*YA Global Investments, L.P. v. Cliff*, 15 A.3d 857, 862 (N.J. Super. Ct. App. Div. 2011)]. Furthermore, there is nothing in the four (4) corners of Article 10 or the CBA to demonstrate that the CBA imposes any contractual requirement to request or disclose information on anyone who is not MPD or FOP. *Mittal Steel USA ISG, Inc. v. Bodman. supra*; and *Charlton v. Mond, supra*.

[70] Slip Op. No. 1505 at p. 10-11.
[71] *Id.* at 4-6.
[72] *Id.*

> In its Complaint, FOP contends that its CBA is between it and the entire District of Colombia government, not just between it and MPD. (Complaint at 3, 5-7). However, such an argument cannot be squared with the CBA's plain and unambiguous identification of the parties, noted above, and therefore must fail. *See Mittal Steel USA ISG, Inc. v. Bodman. supra*; *see also American Federation of Government Employees, Local 2924 v. Federal Labor Relations Authority*, 470 F. 3d 375, 377 & 381 (D.C. Cir. 2006) (internal citations omitted). The only proper and legally sound reading of the CBA is that its terms only apply between FOP and MPD, not FOP and all other District agencies. *Mittal Steel USA ISG, Inc. v. Bodman. supra*; and *Charlton v. Mond, supra*; and *YA Global Investments, L.P. v. Cliff, supra*. To say otherwise would be to imply that a union's agreement with one (1) agency in the District is a binding contract upon all of the District's agencies. Simply put, at best, such an argument is unwarranted and ethereal. Basic contract law dictates that such is not the case. *Id.* OPC is not bound by the terms of the CBA between FOP and MPD any more than the Department of Health or some other non-party agency is. *Id.*[73]

Although the Court of Appeals vacated—on procedural grounds only—the D.C. Superior Court's August 21, 2014 Order affirming the Executive Director's administrative dismissal of PERB Case No. 12-U-16, the Superior Court's reasoning is still persuasive.[74] The Superior Court stated:

> [The argument that Article 10 applies to agencies other than MPD] has already been presented to PERB, which thoroughly explained in its ten-page Administrative Dismissal why the CBA does not extend to OPC. Taking [FOP] through the basic concepts of contract law, PERB explained that to apply the CBA to OPC would "imply that a union's agreement with one (1) agency in the District is a binding contract upon all of the District's agencies … OPC is not bound by the terms of the CBA between FOP and MPD any more than the Department of Health or some other non-party agency." To find otherwise would be overbroad and, moreover, it is clear from the PERB decision citing to the specific language of the CBA that there is no privity of contract between FOP and OPC. The CBA includes numerous explicit references to the parties bound by it, naming only FOP and MPD. It was thus reasonable

[73] Slip Op. No. 1364 at p. 7-8; *see also* Slip Op. No. 1505 at p. 4-5.
[74] *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Pub. Emp. Relations Bd. and Dist. of Columbia Office of Police Complaints, supra*, 14-CV-1015 at p. 1-2.

> for PERB to find that the CBA only applied to FOP and MPD and reject [FOP's] argument that the OPC is additionally bound by its terms.[75]

As the Board held in PERB Case No. 13-U-10, CBAs are negotiated between particular agencies and the exclusive representatives of their employees with specific agency processes and specific bargaining unit needs in mind.[76] While certain statutory rights (i.e. *Weingarten* rights) apply to all District agencies regardless of their respective agreements, the obligation to produce information is imposed by the CBA, not by statute.[77] That right therefore does not apply to agencies that are not parties to a particular agreement.[78] The plain language of Article 10 in the CBA between FOP and MPD "defines and establishes a right to seek and receive information [only] between FOP and MPD."[79] Thus, it was not reasonable for FOP to seek enforcement of that provision against OPC, which was not present during negotiations, did not have the benefit of making proposals or counterproposals, and was not a signatory to the final agreement.[80] Accordingly, the Board finds that Article 10 of FOP's CBA with MPD did not obligate OPC to produce the requested information.[81]

*ii.* <u>OPC was not obligated under D.C. Official Code § 1-617.04(a)(5) to provide the information</u>

The Board noted in PERB Case No. 13-U-10 that agencies are normally obligated to provide information to the exclusive representatives of the bargaining units of their employees.[82] Indeed, the United States Supreme Court has held that an employer's duty to disclose information "unquestionably extends beyond the period of *contract negotiations* and applies to labor-management relations *during the term of an agreement*."[83] Accordingly, the Board has held that when an agency fails, without a viable defense, to provide information requested by its employees' exclusive representative, that agency repudiates the contract and thus violates its duty under D.C. Official Code § 1-617.04(a)(5) to "bargain collectively in good faith *with the exclusive representative*." In so doing, the agency further derivatively violates its counterpart duty under D.C. Official Code §1-617.04(a)(1) to not interfere with its employees' "statutory rights to organize a labor union free from interference, restraint or coercion; to form, join or

---

[75] *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Pub. Emp. Relations Bd. and Dist. of Columbia Office of Police Complaints, supra,* Civ. Case No. 2013 CA 002120 P(MPA) at p. 7 (internal citations omitted); *see also* Slip Op. No. 1505 at p. 5-6.
[76] Slip Op. No. 1505 at p. 6 (citing *Mittal Steel USA ISG, Inc., supra*).
[77] *Id.*; *see also Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Office of Police Complaints*, 59 D.C. Reg. 5510, Slip Op. No. 994 at p. 19-20, PERB Case Nos. 06-U-24, 06-U-25, 06-U-26 and 06-U-28 (2009).
[78] Slip Op. No. 1505 at p. 6.
[79] *Id.*
[80] *Id.*
[81] *See id*.
[82] *Id.* at 6-7; *see also Am. Fed'n of Gov't Emp., Local 631 v. Dist. of Columbia Water and Sewer Auth.*, 59 D. C. Reg. 3948, Slip Op. No. 924 at p. 5-6, PERB Case No. 08-U-04 (2007).
[83] *Nat'l Labor Rel. Bd. v. Acme Indus. Co.*, 385 U.S. 432, 436 (1967) (citations omitted) (emphases added).

assist any labor organization or to refrain from such activity; and to bargain collectively through representatives *of their own choosing*."[84]

In PERB Case No. 12-U-16, however, the Executive Director's administrative dismissal correctly reasoned:

> The CBA cited and relied upon by FOP in its November 3, 2011, request for information and in its Complaint defines and establishes a right to seek and receive information between FOP and MPD, but it does not establish rights between FOP and OPC. Indeed, FOP and OPC have not engaged in any "contract negotiations" regarding information requests. *NLRB v. Acme Industrial, supra*. Likewise, FOP and OPC are not currently in the "term [(time period)] of an agreement" governing information requests. *Id.* As such, OPC was not obligated to "bargain collectively in good faith" with FOP and was not obligated to provide FOP with the information it requested under D.C. [Official] Code § 1-617.04(a)(5), as no collective bargaining agreement or requirement to bargain existed between FOP and OPC. *Id.*
>
> Therefore, FOP lacks standing to allege under D.C. [Official] Code § 1-617.04(a)(5) that OPC failed to bargain with it in good faith.[85]

In its Order affirming the Executive Director's administrative dismissal, the D.C. Superior Court stated:

> PERB acknowledged that generally agencies are obligated to provide documents in response to a request by a union. PERB cites to the United States Supreme Court in *National Labor Relations Board v. Acme Industrial Co.*, 385 U.S. 432, 436-37 (1967) for the proposition that the duty to disclose information applies to both contract negotiations and labor management relations during the term of a collective bargaining agreement. PERB explained, however, that OPC is simply not an employer of FOP, has never entered into contract negotiations, and is not a party to any agreements with OPC. Therefore, PERB held that

[84] Slip Op. No. 1505 at p. 6-7 (citing *Am. Fed'n of Gov't Emp., Local 2725 v. Dist. of Columbia Dep't of Health*, 59 D.C. Reg. 5996, Slip Op. No. 1003 at p. 4-5, PERB Case 09-U-65 (2009)) (emphases added).
[85] Slip Op. 1364 at p 9; *see also* Slip Op. No. 1505 at p. 7.

> FOP did not have standing under the CMPA to compel compliance with its request for information.[86]

Indeed, FOP is not the "exclusive representative" of any of OPC's employees as expressly required by D.C. Official Code § 1-617.04(a)(5). Further, none of OPC's employees have "chosen" FOP to be their representative as required by *Am. Fed'n of Gov't Emp., Local 2725 v. Dist. of Columbia Dep't of Health, supra*, Slip Op. No. 1003 at p. 4-5, PERB Case No. 09-U-65. FOP and OPC have never engaged in "contract negotiations," nor have they been parties to "the term of an agreement" as envisioned by the U.S. Supreme Court's holding in *Nat'l Labor Relations Bd. v. Acme Indus. Co., supra*, 385 U.S. at 436.[87] Accordingly, the Board finds that the only statutory obligations that FOP's and MPD's CBA created were between FOP and MPD, not between FOP and all other District agencies.[88] Therefore, OPC had no obligation under D.C. Official Code § 1-617.04(a)(5) to provide the information that FOP requested.[89]

*iii.* Applicability of *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Office of Police Complaints, supra*, Slip Op. No. 994, PERB Case Nos. 06-U-24, 06-U-25, 06-U-26 and 06-U-28

FOP has argued that *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Office of Police Complaints, supra*, Slip Op. No. 994, PERB Case Nos. 06-U-24, 06-U-25, 06-U-26 and 06-U-28 stands for the notion that that since the Board stated the parties to the CBA between FOP and MPD were actually FOP and the District of Columbia, the CBA's terms and conditions are binding on all other District agencies. However, the Superior Court correctly rejected FOP's argument, stating:

> [FOP] argues that PERB and the D.C. Superior Court have previously held that OPC must bargain collectively in good faith with FOP. In turn, then, [FOP] argues that PERB has consistently held that a request for information constitutes a request for bargaining. In support of its position, [FOP] cites a vacated opinion in a dismissed Superior Court case [*Dist. of Columbia Office of Police Complaints v. Dist. of Columbia Pub. Emp. Relations Bd.*, Case No. 2009 CA 008122 P(MPA) (D.C. Super. Ct., Apr. 12, 2011)] and claims that OPC had a bargaining obligation with FOP that "creates certain rights, the violation of which *could* constitute a ULP complaint even absent a collectively bargained agreement." In this instance, there is no privity of contract between OPC and FOP; OPC is not FOP's employer and

[86] *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Pub. Emp. Relations Bd. and Dist. of Columbia Office of Police Complaints, supra*, Civ. Case No. 2013 CA 002120 P(MPA) at p. 5 (citations omitted); *see also* Slip Op. No. 1505 at p. 7-8.
[87] Slip Op. No. 1505 at p. 8.
[88] *Id.*
[89] *Id.*

> OPC was not subject to any management obligations or duties provided for in the CMPA. [FOP's] cited case does not explicitly hold that OPC is definitively required to bargain "collectively in good faith" as required by the CMPA statute, but suggested that certain bargaining rights *may* exist in the absence of a CBA. The sole case cited by [FOP] does not explicitly hold that OPC has a duty to collectively bargain with FOP but merely raises the possibility. Also, given that that case was dismissed for want of jurisdiction … on September 30, 2011 [*Dist. of Columbia Office of Police Complaints v. Dist. of Columbia Pub. Emp. Relations Bd.*, 11-CV-621 (D.C., Aug. 5, 2011)], the Court does not place much weight on its conclusions.[90]

Similarly, the Board also wholly rejected this argument when FOP raised it again in PERB Case No. 13-U-10.[91] The Board stated:

> In PERB Case Nos. 06-U-24, 06-U-25, 06-U-26 and 06-U-28, the Board adopted a hearing examiner's report and recommendation which found that "the parties to the Labor Agreement [between MPD and FOP] are the District of Columbia and [FOP]." Notwithstanding, the hearing examiner expressly rejected the notion that that meant all District agencies and officials were therefore bound by all of the agreement's terms. The hearing examiner stated: "[t]he fact that the District of Columbia is a party to the [collective bargaining agreement] does not by itself mean that all definitions, provisions, and requirements of a particular collective bargaining agreement are automatically transmuted or otherwise modified or redefined to fit the organizational arrangements or circumstances of agencies other than the one that [employs] the affected employees." … The Board agreed and dismissed FOP's allegations.
>
> * * *
>
> If every collective bargaining agreement in the District was binding on all District agencies, there would be nothing to prevent FOP from enforcing against MPD a provision articulated in an agreement between another agency and another union that it (FOP)

[90] *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Dist. of Columbia Pub. Emp. Relations Bd. and Dist. of Columbia Office of Police Complaints, supra,* Civ. Case No. 2013 CA 002120 P(MPA) at p. 5-7 (citations omitted); *see also* Slip Op. No. 1505 at p. 9-10.
[91] Slip Op. No. 1505 at p. 8-10.

> failed to bargain for in its own negotiations with MPD. Reason and established contract law dictate that such cannot be the case.[92]

Thus, in accordance with the Board's finding in PERB Case No. 13-U-10 that FOP's CBA with MPD was not binding on OUC under the facts alleged in that case, the Board finds that FOP's CBA with MPD was likewise not binding on OPC under the nearly identical facts alleged in this case.[93]

*iv.* OPC's motion to dismiss FOP's complaint in PERB Case No. 12-U-16

When considering a motion to dismiss, the Board views all factual allegations in the complaint as true in order to determine whether the complaint may give rise to a violation of the CMPA for which PERB can grant relief.[94] Notwithstanding, even when viewing the alleged facts of PERB Case No. 12-U-16 as true, the Board still cannot conclude that OPC repudiated a contract to which it was not a party, or that it violated a duty that it did not have.[95] Thus, in consideration of the arguments presented by the parties in their pleadings, and based on the Board's unambiguous precedent in PERB Case No. 13-U-10, the Board finds that OPC was not obligated under Article 10 of FOP's CBA with MPD, or under D.C. Official Code § 1-617.04(a)(5), to comply with FOP's information request.[96] Accordingly, OPC's motion to dismiss is granted, and FOP's complaint in PERB Case No. 12-U-16 is dismissed with prejudice.[97]

*b. PERB Case No. 13-U-38*

As discussed, *supra*, D.C. Official Code § 1-617.04(a)(5) prohibits the District and its agencies from refusing to bargain collectively in good faith "with the exclusive representative." The Board has held that in order for a union to be considered the "exclusive representative" for the purposes of collective bargaining, the agency's employees must have "chosen" that union to be their representative.[98] In this case, FOP is not certified as the "exclusive representative" of any of OPC's employees; nor have OPC's employees made any efforts to "choose" FOP as their

---

[92] *Id.* at p. 9-10; see also *Am. Fed'n of State, Cnty., and Mun. Emp., Dist. Council 20, Local 2921 v. Dist. of Columbia Pub. Sch.*, 62 D.C. Reg. 9200, Slip Op. No. 1518 at p. 5, PERB Case No. 12-E-10 (2015) (holding that D.C. Official Code § 1-617.13(b) expressly authorizes the Board to interpret its own orders).
[93] Slip Op. No. 1505 at p. 3-11.
[94] *Dist. of Columbia Fire and Emergency Med. Serv. Dep't v. Am. Fed'n of Gov't Emp., Local 3721*, *supra*, Slip Op. No. 1556 at p. 4, PERB Case No. 15-U-22.
[95] Slip Op. No. 1505 at p. 3-11 (citations omitted).
[96] *Id.*
[97] As the Board noted in Slip Op. No. 1505 at p. 11, the Board's finding does not mean that FOP cannot request the information through other means. For example, it is possible that FOP may be able to obtain the information it seeks from OPC under the District of Columbia Freedom of Information Act (FOIA), D.C. Official Code §§ 2-531 *et seq*.
[98] *See Am. Fed'n of Gov't Emp., Local 2725 v. Dist. of Columbia Dep't of Health, supra*, Slip Op. No. 1003 at p. 4-5, PERB Case No. 09-U-65.

exclusive representative. Accordingly, OPC cannot have breached a duty to bargain where no such duty existed in the first place.[99]

Furthermore, the Board rejects FOP's assertion that its CBA with MPD applies to OPC because MPD and OPC are interrelated.[100] The Board notes that the D.C. Council specifically created and designed OPC to operate separately from MPD and to be independent from MPD's influence. Indeed, OPC's stated statutory purpose is to provide an "effective, efficient, and fair system of *independent* review of citizen complaints against police officers in the District of Columbia."[101] Additionally, OPC's structure and organization are designed to assert its independence from MPD. For example, OPC has its own Executive Director, employees, and organization—none of which are subject to MPD's Chief of Police in any way.[102] Further, only one member of OPC's Police Complaints Board can be an MPD employee,[103] and OPC investigators and mediators "may not be persons currently or formerly employed by the MPD."[104] The Council even went so far as to expressly state that when OPC becomes aware of a complaint against an officer, that occurrence does not have any impact on the statutory deadlines for MPD to begin disciplinary proceedings against the officer.[105] If OPC was meant to be so connected to MPD that the two could be considered interrelated either organizationally or for the purposes of collective bargaining, then the Council would not have gone to such great lengths to separate them.

Accordingly, even when viewing FOP's factual allegations in PERB Case No 13-U-38 as true,[106] the Board still cannot conclude that OPC repudiated a contract to which it was not a party, or that it breached a duty it did not have.[107] Thus, the Board finds that OPC did not commit unfair labor practices when it unilaterally implemented its cellular phone rule without first providing notice to FOP, or when it refused FOP's request to bargain over the rule. OPC's motion to dismiss is therefore granted, and FOP's complaint in PERB Case No. 13-U-38 is dismissed with prejudice.

---

[99] *Id.*
[100] 13-U-38 FOP Response to Order to Show Cause at 12.
[101] D.C. Official Code § 5-1102 (emphasis added).
[102] D.C. Official Code §§ 5-1105 and 5-1106(a).
[103] D.C. Official Code § 5-1104(a).
[104] D.C. Official Code §§ 5-1106(a) and (d).
[105] D.C. Official Code § 5-1107(i).
[106] *See Dist. of Columbia Fire and Emergency Med. Serv. Dep't v. Am. Fed'n of Gov't Emp., Local 3721*, *supra*, Slip Op. No. 1556 at p. 4, PERB Case No. 15-U-22.
[107] Slip Op. No. 1505 at p. 3-11 (citations omitted).

## ORDER

**IT IS HEREBY ORDERED THAT:**

1. FOP's motion to consolidate PERB Case Nos. 12-U-16 and 13-U-38 is granted;

2. FOP's motion for a hearing is denied;

3. OPC's respective motions to dismiss the complaints in PERB Case Nos. 12-U-16 and 13-U-38 are granted, and the cases are each dismissed with prejudice; and

4. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

**BY ORER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**

By unanimous vote of Board Chairperson Charles Murphy, and Members Ann Hoffman, Barbara Somson, and Douglas Warshof.

January 12, 2017

Washington, D.C.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case Nos. 12-U-16 and 13-U-38, Op. No. 1609 was transmitted by File & ServeXpress to the following parties on this the 17th day of January, 2017.

Marc L. Wilhite
Pressler & Senftle, P.C.
Three McPherson Square
1432 K Street, NW
Twelfth Floor
Washington, DC 20005

Anthony M. Conti
Daniel J. McCartin
Conti Fenn & Lawrence, LLC
36 South Charles Street
Suite 2501
Baltimore, MD 21201

Repunzelle Bullock
Kevin M. Stokes
Michael D. Levy
D.C. Office of Labor and Collective Bargaining
441 4th Street, NW
Suite 820 North
Washington, DC 20001

/s/ Colby J. Harmon
PERB