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. 07-U-51
	)	
v.	)	Slip Op. No. 1012
	)	
District of Columbia Metropolitan Police Department, *et al.*,	)	
	)	
Respondents.	)	
	)	

DECISION AND ORDER

I. Statement of the Case:

On August 28, 2007, the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("Complainant" or "FOP") filed an Unfair Labor Practice complaint ("Complaint") alleging that the District of Columbia Metropolitan Police Department, *et al.*[1] ("Respondent" or "MPD") committed an unfair labor practice by failing to bargain over the impact and effects of: (1) the Performance Personnel Management System; and (2) changing the Outside Employment policy. (See Compl. at p. 1).

The Respondents filed an Answer to the Unfair Labor Practice Complaint ("Answer") denying any violations and requesting that the Complaint be dismissed as untimely.

[1]The FOP named Chief Cathy Lanier, Assistant Chief Brian K. Jordan and Commander Diane Groomes as Respondents in this Complaint.

A hearing was held in this matter on October 6, 2008. In the Report and Recommendation ("R&R") issued on January 15, 2009, the Hearing Examiner determined that the portion of the Complaint pertaining to the implementation of the Performance Personnel Management System ("PPMS"),[2] was untimely filed. (See R&R at p. 12). The Hearing Examiner also found that the allegation pertaining to changing the Outside Employment Policy, was timely filed and that MPD committed an unfair labor practice by unilaterally changing the policy. (R&R at p. 12). The Respondents filed Exceptions to the Hearing Examiner's R&R and the Complainant filed an Opposition.

The Hearing Examiner's R&R, the Respondents' Exceptions, and the Complainant's Opposition are before the Board for disposition. For the reasons set forth below, the Board did not adopt the Hearing Examiner's recommendation.

II. Hearing Examiner's Report

The Hearing Examiner found that MPD General Order 201.17, "Outside Employment" provides the criteria for evaluating a request for approval of outside employment. (See R&R at p. 5).[3] On March 27, 2007, Officer Richard Mazloom submitted a "Request for Approval to Engage in Outside Employment." His immediate superior, Sergeant Washington, recommended denial of his request based, in part, on the officer's unexplained use of 130 hours of sick leave and "a misconduct allegation that is still pending" along with a pending intervention plan.[4] (R&R at p. 1).

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[2]PPMS is a computer information system.

[3]See General Order 201.17 entitled "District/Division Commander Responsibilities" pertaining to the evaluation of requests for Outside Employment. General Order 201.17, provides that criteria for consideration in approval of outside employment shall include, *but are not limited to* the following:

1. Sick leave (after evaluation has been done as to the reason a member was on sick leave, such as family leave, POD, etc.)
2. Punctuality,
3. Performance rating,
4. Number of court appearances (when appropriate),
5. Previous complaints or other problems arising from outside employment, and Medical problems or disciplinary problems that may be complicated, or aggravated by outside employment.

This language is also contained in a District regulation at 6A DCMR § 305.1.

[4]"District Commander Diane Groomes concurred in the recommended denial on April 30, 2007 'due to sick leave usage' noting '[a]t this time Officer Mazloom has an intervention plan in PPMS pending'. Assistant Chief Brian K. Jordan denied the request on May 2, 2007 stating as his reasons, 'the unexplained use of 127 hours of sick

On August 28, 2007, the FOP filed an unfair labor practice complaint alleging that MPD violated the Comprehensive Merit Personnel Act ("CMPA") and the parties' collective bargaining agreement ("CBA") by: (1) entering into a memorandum of agreement ("MOA") with the Department of Justice adopting a Performance Personnel Management System, and (2) unilaterally changing the criteria for approving requests for outside employment when, in the case of Officer Mazloom, MPD considered a pending misconduct investigation and a pending intervention plan as criteria for considering the request. (See R&R at p. 2).

"MPD filed an Answer to the Complaint on September 17, 2007, arguing...that the Complaint is untimely [insofar as it pertains to the adoption of PPMS][.] [MPD also claimed] that the modification of the official policy governing approval of outside employment requests is an exercise of management's rights that does not constitute an unfair labor practice unless it arises from the denial of a request to engage in impact and effects bargaining which did not happen in this case." (R&R at p. 2).

Timeliness of the Complaint

The Hearing Examiner stated that "[o]n June 13, 2001, the District of Columbia and MPD entered into an agreement with the United States Department of Justice regarding MPD's use of force. Under the MOA, MPD agreed to fully implement a computerized Personnel Performance Management System ("PPMS") to...promote accountability and proactive management and to identify, manage and control at-risk officers, conduct and situations."[5] (R&R at p. 5). The Hearing Examiner stated that one function of the PPMS is to identify potential problems early and intervene to correct them before those problems manifest themselves as problematic officer performance.[6] FOP alleged that the unilateral implementation of the PPMS information system constitutes a continuing violation of the CMPA, and

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leave and the pending Intervention Plan in PPMS'." (R&R at p. 1)

[5]The MOA was signed in 2001 and required MPD to develop a protocol for using PPMS that would include requirements that:

> All relevant and appropriate information in PPMS be taken into account for pay grade advancement, promotion, transfer and special assignment . . . and that supervisors and managers maintain written documentation of their consideration of any sustained . . . administrative investigation . . . in determining . . . when such officer is selected for special assignment . . . increased pay, transfer, promotion, and in connection with annual personnel performance evaluations. (emphasis in the original) (R&R at p. 5).

[6] The Hearing Examiner also found that PPMS "is only a management information system. The crucial issue is how the information entered and maintained in that system is used and whether, in fact, it was used to change the terms and conditions of employment for [b]argaining [u]nit employees[.] It is the employer's use of the information on 'pending' complaints and investigations found in the management information system without notice to bargaining unit employees that gives rise to the unfair labor practice charge found here." (R&R at p. 6).

therefore the Complaint was timely filed. MPD maintained that the portion of the Complaint pertaining to the PPMS is untimely.

Relying on *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Dep't*, 52 DCR 3556, Slip Op. No. 736, PERB Case Nos. 02-U-11, 02-U-14 (2004) ("*FOP v. MPD*"),[7] the Hearing Examiner found that FOP previously raised the issue of the implementation of the PPMS before the Board and it was dismissed. Therefore, she concluded that the portion of the Complaint "based on the implementation of PPMS is untimely." (R&R at p. 11). No exceptions were filed concerning the Hearing Examiner's finding that the portion of the Complaint regarding the implementation of the computerized management information system known as PPMS, was untimely filed.

The Hearing Examiner then considered whether the portion of the Complaint alleging a change in the Outside Employment policy was timely filed. (See General Order 201.17 and 6A DCMR § 305.1, n. 3 above). The Hearing Examiner determined that "the operative date to trigger the 120-day filing rule is the date upon which the FOP knew or should have known that MPD had adopted a [new] policy...." (R&R at p. 11). Officer Mazloom's request was denied on May 2, 2007. Therefore, the Hearing Examiner found that the Complaint had to be filed by August 30, 2007, i.e., 120 days later. (See R&R at p. 11). The Hearing Examiner found that the portion of the Complaint pertaining to the alleged change in policy, was timely filed on August 28, 2007. (See R&R at p. 11). No exceptions were filed concerning this finding by the Hearing Examiner.

Board's Discussion Concerning Timeliness of the Complaint

Board Rule 520.4 provides as follows: "*Unfair labor practice complaints shall be filed not later than 120 days after the date on which the alleged violations occurred.*" (emphasis added). The Board has held that the deadline date for filing a complaint is "120 days after the date the [Complainant] admits he actually became aware of the event giving rise to [the] complaint allegations." *Glendale Hoggard v. D.C. Public Schools, AFSCME Council 20, Local 1959*, 43 DCR 1297, Slip Op. No. 352 at p. 2, PERB Case No. 93-U-10 (1993). See also, *American Federation of Government Employees, Local 2725 and District of Columbia Housing Authority*, 46 DCR 119, Slip Op. No. 509, PERB Case No. 97-U-07 (1997). Also, the Board has noted that "the time for filing a complaint with the Board concerning [] alleged violations [which may provide for]...statutory causes of action, commence when the basis of those violations occurred.... However, proof of the occurrence of an alleged statutory violation is not necessary to commence the time limit for initiation of a cause of action before the Board. The validation, i.e., proof, of the alleged statutory violation is what proceedings before the Board are intended to determine." *Jackson and Brown v. American*

[7] In *FOP v. MPD*, FOP alleged that MPD failed to bargain in good faith when it implemented the PPMS system without bargaining with the Union. The Board dismissed the complaint because it was untimely filed.

Federation of Government Employees, Local 2741, AFL-CIO, 48 DCR 10959, Slip Op. No. 414 at p. 3, PERB Case No. 95-S-01 (1995).

Furthermore, Board Rules governing the initiation of actions before the Board are jurisdictional and mandatory. As such, they provide the Board with no discretion or exception for extending the deadline for initiating an action. See, *Glendale Hoggard v. District of Columbia Public Employee Relations Board*, 655 A.2d 320, 323 (D.C. 1995); see also, and *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991).

In the present case, the Union alleges that MPD's implementation of the PPMS information system constitutes a continuing violation. The Board has previously addressed an argument similar to the Union's continuing violation argument in *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Dep't*, Slip Op. No. 736, PERB Case Nos. 02-U-11, 02-U-14 (2004). In *FOP v. MPD*, the Union filed a complaint alleging that an unfair labor practice resulted when MPD entered into a memorandum of agreement concerning changes to the use of force policies and procedures, without first bargaining with the Union. The Union requested bargaining and on July 6, 2001, the Police Chief refused to bargain. FOP refrained from filing a complaint until March 7, 2002, well beyond the 120-day statutory filing period, "because FOP hoped that the parties would be able to meet and reach an agreement concerning the changes contained in the MOA." (*Id.* at p. 7). The Board rejected the Union's argument that implementation of the MOA constituted a continuing violation and dismissed the complaint for untimeliness. (See *FOP v. MPD* at pgs. 1-2 and 9).

In the present case, the PPMS management information system was implemented in 2004, thus the Union had notice in 2004 that MPD implemented the system.[8] FOP did not file the Complaint in the present case until August 2007. Therefore, FOP clearly exceeded the 120 day filing requirement found in Board Rule 520.4. We conclude that the Hearing Examiner's findings are reasonable, based on the record and consistent with Board precedent. Therefore, we conclude that the portion of the Complaint pertaining to the establishment of the PPMS was untimely filed and this portion of the Complaint is dismissed for untimeliness.

We turn now to the timeliness of the allegation that MPD refused to bargain over the impact and effects of an alleged change in the Outside Employment Policy. The Hearing Examiner found that "the operative date to trigger the 120-day rule is the date upon which the FOP knew or should have known that MPD had adopted a new policy ... to evaluate requests for leave to engage in outside employment." (R&R at p. 11). Officer Mazloom's request was denied on May 2, 2007. Therefore,

[8] In Slip Op. No. 736, the Union previously filed a complaint challenging MPD's agreement with the Department of Justice regarding the implementation of the PPMS information system. The Board found that it was untimely filed.

the May 2nd denial triggered the 120-day filing requirement and the Complaint had to be filed by August 30, 2007. The Hearing Examiner determined that the Complaint pertaining to a change in policy was timely filed on August 28, 2007. (See R&R at p. 11). The Board finds that the Hearing Examiner's findings are reasonable, based on the record and consistent with Board precedent. Therefore, we find that the portion of the Complaint pertaining to an alleged change in the Outside Employment policy was timely filed.

Unfair Labor Practice Allegation

The Hearing Examiner then considered FOP's allegation that MPD violated the CMPA when it changed the existing policy in General Order 201.17, for evaluating employee requests to engage in outside employment.[9] FOP asserted that, when evaluating employee requests for outside employment under General Order 201.17, MPD's utilization of information concerning pending misconduct investigations and pending intervention plans constituted a change in policy. FOP argued that the General Order does not include pending actions and these were not used as criteria in the past. FOP alleged that MPD gave no notice of this change in policy and failed to bargain over the impact and effects of making the change. The Hearing Examiner found that General Order 201.17 "is silent on the use of pending investigations and/or intervention plans in determinations to approve or disapprove requests for outside employment." (R&R at p. 5).

The Hearing Examiner cited Article 16 of the collective bargaining agreement ("CBA") between the parties which provides, in pertinent part, as follows: "[c]omplaints against employees that are pending Department review, or that have been classified as 'exonerated' and/or 'unfounded' shall not be used to support a current allegation of wrongdoing or proposed penalty against an employee." (R&R at p. 6). On this basis, the Hearing Examiner concluded that MPD changed its policy by considering pending actions in its evaluation of Officer Mazloom's outside employment application. (See R&R at p. 6, 12-13). (R&R at p. 12). Therefore, the Hearing Examiner concluded that "MPD committed an unfair labor practice when it unilaterally began using 'pending investigations' and 'pending intervention plans' as additional criteria upon which to evaluate requests to engage in outside

[9] In a section entitled "District/Division Commander Responsibilities" General Order 201.17, provides that the evaluation of requests for outside employment should consist of "at a minimum" the following criteria:

1. Sick leave (after evaluation has been done as to the reason a member was on sick leave, such as family leave, POD, etc.)
2. Punctuality,
3. Performance rating,
4. Number of court appearances (when appropriate),
5. Previous complaints or other problems arising from outside employment, and Medical problems or disciplinary problems that may be complicated, or aggravated by outside employment.

employment without notice to the FOP."[10] (R&R at p. 12).

III. Exceptions

First, MPD asserts that there was no change to the outside employment policy and that it acted within the existing criteria found in General Order 201.17. MPD takes exception to the Hearing Examiner's reliance on Article 16 of the collective bargaining agreement when interpreting the Order, stating that Article 16 pertains to penalties for discipline.[11] (Exceptions at p. 13-14). Furthermore, MPD contends that "there is nothing in...General Order 201.17....that prohibits the reviewing official from considering a pending misconduct investigation and intervention plan when evaluating an employee's work performance for the past year." (Exceptions at p. 14).

MPD also takes exception to the Hearing Examiner's finding that MPD must bargain over the alleged changed in policy. MPD argues that "[t]he Department's general order on outside employment reflects an exercise of management's right to regulate and approve a members request to engage in outside employment" pursuant to D.C. Code §617.08(a)(1) and (4). MPD maintains that "[i]f the Board decides [that MPD changed] the outside employment policy, [MPD] had a management right to implement this change." (Exceptions at p. 15). MPD asserts that "PERB case law has held that there are certain rights retained by management which are not subject to collective bargaining and can be unilaterally implemented.[12] (Exceptions at pgs. 13-14).

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[10]The Hearing Examiner relied on *AFGE, Local Union No. 3721 v. D.C. Fire Dep't*, 39 DCR 8599, Slip Op. No. 287, PERB Case No. 90-U-11 (1992), which provides as follows: "[w]hen management unilaterally and without notice implements a change in *established and bargainable terms and conditions of employment*, a request to bargain is not required to establish a failure to bargain in good faith. . . ." (emphasis added) (R&R at p. 12).

[11]MPD asserts that "[o]n its face, it is clear that this provision of the CBA does not deal with outside employment requests." (Exceptions at pgs. 13-14). Article 16 pertains to penalties for discipline and provides, in pertinent part:

> The Department . . . will remove from the Personnel Folder investigative reports which, upon completion of the investigation are classified "exonerated" and/or "unfounded." Complaints against employees that are pending Department review, or that have been classified as "exonerated and/or unfounded," shall not be used to support a current allegation of wrongdoing or proposed penalty against an employee.

[12]"[Citing] *Fraternal Order of Police v. D.C. Department of Corrections*, PERB Case No. 01-U-28, Slip Op. No. 671, 49 DCR 821 (2001). Also, in *Teamsters Locals 639 & 730 v. D.C. Public Schools*, [the Board] explained that under the CMPA, as codified in § 1-617.08 [formerly § 1-618.8], the right to negotiate over terms and conditions of employment extends to "[all matters, except those that are proscribed by the [CMPA]." *Teamsters Locals 639 & 730 v. D.C. Public Schools*, PERB Case No. 89-U-17, Slip Op. No. 249, 38 DCR 96 (1990). (Exceptions at pgs. 13-14).

MPD acknowledges that "the Board...has consistently held that management has a duty to bargain 'over impact on, effects of, and procedures concerning, the implementation of management rights'. See *AFGE Local 383 v. D. C. Department of Human Services*, PERB Case No. 94-U-09, Slip Op. No. 418, 49 DCR 770 (1995)." (Exceptions at p. 15). However, MPD contends that "[i]n this case, there was no evidence presented at the hearing that [FOP] demanded bargaining once it had notice of the alleged change in policy, i.e., after it received the denial of Officer Mazloom's request to engage in outside employment.... Nor did the FOP submit any exhibits reflecting any sort of demand for bargaining on this issue.... [MPD] asserts that absent such a demand to engage in bargaining, [MPD] cannot be held to have engaged in an unfair labor practice." (Exceptions at p. 16).

In sum, MPD "requests that the Board dismiss th[is] case on the basis that there has not been a change in the policy regarding outside employment. Even if the Board determines that the policy was changed, [MPD maintains] that the change represented an exercise of management's rights. Since the Union failed to demand bargaining over the impact and effects of the exercise of that management right, no unfair labor practice can lie." (Exceptions at p. 19).

IV. Union's Opposition to MPD's Exceptions

FOP contends that "the Union was never notified of the Department's decision to begin using PPMS information in its evaluation of officers requests for outside employment, [therefore] the Department's use of this information constitutes a change in its policy." (Opposition at p. 7). FOP asserts that "[a]n officer applying for outside employment is only on notice of the six criteria listed in the General Order. [FOP asserts that] [a]ccepting the Department's interpretation of the General Order would provide it with limitless and unconstrained discretion to make such a determination.[13] (Opposition at p. 8).

FOP maintains that "while the assignment of work is a management right, an exercise of management's rights does not relieve the Department of its obligation to bargain over the impact and effects of, and procedures concerning, the implementation of these decisions. See *Teamsters, Drivers, Chauffeurs and Helpers Local Union No. 639 v. District of Columbia*, 631 A. 2d 1205, 1216 (D.C. 1993); *IBPO, Local 446, AFL-CIO v. D.C. General Hospital,* 41 DCR 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994)." [Opposition at p. 7]. "However, [FOP asserts that] the Department must first provide the Union with adequate notice of its proposed changes prior to implementation. See *Washington Teachers' Union, Local 6 v. DCPS*, PERB Case No. 90-U-28, Slip Op. No. 271 (1991). (Opposition at pgs. 8-9).

[13]"[Citing] *Teamsters, Drivers, Chauffeurs and Helpers Local Union No. 639 v. District of Columbia,* 631 A. 2d 1205, 1216 (D.C. 1993); *Washington Teachers' Union, Local 6 v. DCPS,* PERB Case No. 90-U-28, Slip Op. No. 271 (1991).

V. Discussion

The Board has consistently held that "management's rights under D.C. Code § 1-617.08 "do not relieve [management] of its obligation to bargain...over the impact or effects of, and procedures concerning the implementation of...management right decisions." *American Federation of Government Employees, Local 383 v. D.C. Department of Human Services*, 49 DCR 770, Slip Op. No. 418 at p. 4, PERB Case No. 94-U-09 (2002). "The effects and impact of a non-bargainable management right decision upon terms and conditions of employment, however, are bargainable only upon request." (*Id.* at p. 4). Moreover, an Employer does not bargain in bad faith by merely unilaterally implementing a management right. The violation arises from the failure to provide an opportunity to bargain over the impact and effects once a request is made. See *Fraternal Order of Police/MPD v. D.C. Metropolitan Police Department*, 47 DCR 1449, Slip Op. No. 607 at p. 3, PERB Case No. 99-U-44 (1999).

In the present case, it is undisputed that management has the right to grant or deny authorization for police officers to engage in outside employment. Therefore, MPD is not required to bargain over an alleged change in a policy, unless the Union makes a request to bargain over the impact and effects of the change. There is no assertion, nor any evidence, that the Union requested to bargain over the impact and effects of an alleged change in policy after Officer Mazloom's request to engage in outside employment was denied.[14] Therefore, FOP has failed to establish that MPD had a duty to bargain.[15]

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[14]Rather, the Union asserts that MPD gave no notice of a policy change, depriving it of the opportunity to request bargaining. (Opposition at p. 8).

[15]FOP cited *Washington Teachers' Union, Local 6 v. DCPS*, ("*WTU v. DCPS*"), 38 DCR 2654, Slip Op. No. 271, PERB Case No. 90-U-28 (1991) in support of its position that MPD failed to give notice of a change in working conditions pertaining to compensation. However, *WTU v. DCPS* is distinguishable from the present case because it pertains to a change in the manner compensation was paid. Compensation is a bargainable matter under D.C. Code § 1-617.17(b). See *American Federation of Government Employees, Local 383 v. D.C. Department of Human Services*, 49 DCR 770, Slip Op. No. 418 at p. 4, PERB Case No. 94-U-09 (2002). The present case pertains to an alleged change of a non-bargainable management right, which becomes bargainable *only upon request*.

FOP also correctly cited *IBPO, Local 446, AFL-CIO* v. *D.C. General Hospital*, 41 DCR 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994), for the proposition that "while the assignment of work is a management right, an exercise of management's rights does not relieve the Department of its obligation to bargain over the impact and effects of, and procedures concerning, the implementation of these decisions." (See Opposition at p. 7, above).

In *IBPO v. DCGH*, DCGH exercised its management right to establish a new security post. The Board held that: "by unilaterally establishing Post 12 without first bargaining, *upon request*, with [the Union] over the effects or impact on bargaining unit employees' terms and conditions of employment, DCGH has refused to bargain in good faith...." (emphasis added). (See *IBPO v. DCGH* at p. 5). In *IBPO v. DCGH*, once a request for bargaining was made, management had a duty to bargain before implementing the assignment of work. The facts of *IBPO v. DCGH* differ from the present case, however. In the present case, a management right was implemented, but no request to bargain was made.

In view of the above, we find no basis for finding a violation of the CMPA and reject the Hearing Examiner's recommendation in this regard. The Complaint in this matter is dismissed.[16]

ORDER

IT IS HEREBY ORDERED THAT:

1. The portion of the unfair labor practice complaint filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP/MPD Labor Committee") pertaining to implementation of the PPMS information system, is dismissed for untimeliness.

2. The portion of the unfair labor practice complaint filed by the FOP/MPD Labor Committee alleging that the Metropolitan Police Department failed to bargain in good faith over an alleged change in the Outside Employment policy is dismissed for the reasons stated in this Decision and Order.

3. This Order is final upon issuance pursuant to Board Rule 559.1.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

July 15, 2010

[16]In view of the above, we rejects the Hearing Examiner's recommendation that MPD violated the CMPA. Also, we deny FOP's request for reasonable costs. We note that the Board has no statutory authority to grant attorney fees.

Furthermore, we find that the Hearing Examiner's reliance on *AFGE Local 3721 v. D.C. Fire Department*, 39 DCR 8599, Slip Op. No. 287, PERB Case No. 90-U-1 (1991) (*"AFGE v. DCFD"*) is misplaced. *AFGE v. AFGE v. DCFD* pertains to management's alleged breach of bargainable terms and conditions of employment. (*Id.* at p. 3). *DCFD* is distinguishable from the facts of the present case. Here, it is undisputed that the authorization for police officers to engage in outside employment is a management right that is bargainable upon request.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 07-U-51 was transmitted via Fax and U.S. Mail to the following parties on this the 16th day of July 2010.

Nicole L. Lynch, Esq.
Assistant General Counsel
Metropolitan Police Department
Labor and Employee Relations Unit
300 Indiana Avenue, N.W., Room 4126
Washington, D.C. 20001

FAX & U.S. MAIL

Marc Wilhite, Esq.
Pressler & Senftle, P.C.
927 15th Street, N.W.
12th Floor
Washington, D.C. 20005

FAX & U.S. MAIL

Mark Viehmeyer, Esq.
Agency Representative
Metropolitan Police Department
300 Indiana Avenue, N.W.
Suite 4126
Washington, D.C. 20001

FAX & U.S. MAIL

Courtesy Copy:

Shelly Hayes
3020 Gentain Ct.
Washington, D.C. 20017

U.S. MAIL

Sheryl V. Harrington
Secretary