Government of the District of Columbia

Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/Metropolitan Police Department Labor Committee	PERB Case No. 10-U-06
Complainant,	Opinion No. 1121
v.	**Motion to Dismiss**
District of Columbia Metropolitan Police Department,[1]	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("Complainant", "Union" or "FOP") has filed the instant unfair labor practice complaint ("Complaint") against the District of Columbia Metropolitan Police Department and Cathy Lanier, Chief for the Metropolitan Police Department ("Respondent", "MPD" or "Agency"). The Complainant is alleging that the Respondent violated D.C. Code § 1-617.04(a) (5) of the Comprehensive Merit Personnel Act ("CMPA") by failing and refusing to bargain over the impacts and effects of the implementation of a new policy, without first bargaining in good faith with the Union. (See Complaint at p. 1).

The Respondent filed an Answer to the Unfair Labor Practice Complaint ("Answer") denying the allegations set forth in the Complaint and specifically denying

[1] The Executive Director is administratively dismissing the named individuals from the caption of this case, based on the Board's decision in another case issued on this date, -DCR-, Slip Op. No. 1118 at p. 5, PERB Case No. 08-U-19 (August 19, 2011).

that it failed to notify the Union of the implementation of new Standard Operating Procedures or altered the terms and condition of employment in violation of the CMPA. (See Answer at p. 3). In addition, the Respondent asserts the affirmative defense that the Board "has no jurisdiction to decide this case." Moreover, the Respondent requests that the Board dismiss the Complaint. (See Answer at p. 5). The Union's Complaint and MPD's Answer and motion to dismiss are before the Board for disposition.

II. Discussion

FOP asserts the following facts:

> 5. On August 5, 2009, Chief Lanier published and made effective new Standard Operating Procedures for the "Automated Traffic Enforcement Unit." These new Standard Operating Procedures related to "Photo Enforcement Policies and Procedures."
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> 6. The August 5, 2009 Standard Operating Procedures included a section titled "Procedural Guidelines." This section contains administrative and logistical matters concerning the initiative's implementation.
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> 7. Specifically, the new Standard Operating Procedures mandate that members assigned to the Automated Traffic Enforcement Unit are required to perform an "hourly test shot." This requires members to perform a test each hour of the photo radar they are using. The Standard Operating Procedures also address a number of other changes that impact the member's duties and responsibilities.
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> 8. Furthermore, the Standard Operating Procedures institute severe penalties for members who fail to comply. Specifically, the Standard Operating Procedures impose a suspension from the Automated Traffic Enforcement Unit of "not less than ninety (90) days" for a violation of the Standard Operating Procedures. Further, the Standard Operating Procedures contain a section that states that "[a]ny intentional, fraudulent or flagrant omissions, deletions, and/or alterations to deployment logs or any other forms of evidence related to the photo radar program shall constitute a criminal offense and will result in official departmental investigation."
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> 9. This has resulted in numerous members of the Union facing suspensions under the Standard Operating

Procedures. Many of these members face suspensions for failing to perform the "hourly test shot," required under the new Standard Operating Procedures. Further, under the new Standard Operating Procedures, a failure to perform the "hourly test shot" may constitute a criminal offense and will result in official departmental investigation.

10. The Department failed to notify the Union of the implementation of the new Standard Operating Procedures.

11. After becoming aware of its existence, the Union leadership talked to the Department on numerous occasions and informed the Department that they could not implement the new Standard Operating Procedures, which change negotiated terms of the collective bargaining agreement, without first negotiating with the Union.

12. The Department failed to discuss or negotiate the implementation of the new Standard Operating Procedures with the Union.

13. In response and pursuant to the collective bargaining agreement, the Union filed a Step 1 Grievance and a Step 2 Grievance over the implementation of the new Standard Operating Procedures. Specifically, the Grievance was filed on behalf of Officer Wendell Cunningham who was suspended under the new Standard Operating Procedures for failing to perform the required "hourly test shots." This Grievance outlines the steps taken by the Union to address the implementation of the Standard Operating Procedures, and is an attempt to bargain over this new procedure.

14. This Grievance was denied by the Department. See Attachment 5. Specifically, the Department asserts that the Standard Operating Procedures contain no substantive difference to the "business rules that have been in place since 1999." Further, the Department asserts that the Standard Operating Procedures do not contain changes in working conditions.

The "business rules" referred to by the Department also were never presented to the Union for review, are unsigned and were prepared by a sergeant.

> 16. Consequently, the Department failed to implement its Standard Operating Procedures without violating both the CBA and the D.C. Code.
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> 17. The Department is prohibited from refusing to bargain in good faith with the recognized exclusive representative. (D.C. Code § 1-617.04(a) (5)).
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> 18. The Department failed to notify the Union of the implementation of the Standard Operating Procedures.
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> 19. The assignment of work and the implementation of standard operating procedures are a management right; however, 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. . . Prior to the implementation of the new Standard Operating Procedures, the Union was denied a chance to request bargaining over the changes to the members' working conditions.
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> 20. Article 12, Section 1(b) of the collective bargaining agreement [("CBA")] states that "[discipline may be imposed only for cause, as authorized in D.C. Official Code § 1-616.51." The new Standard Operating Procedures state that "intentional, fraudulent or flagrant omissions, deletions, and/or alterations to deployment logs or any other forms of evidence related to the photo radar program shall constitute a criminal offense." This directly impacts the working conditions of the members and must be negotiated. Indeed, the Union made an explicit demand for impact and effects bargaining over the Department's change in working conditions in the new Radar Program, and the request was denied.

(Complaint at pgs. 5-7).

The Respondent does not deny the factual allegations in the Complaint, but denies that its conduct violated the CBA. (See Answer at pgs. 2-4). It asserts "that there is no evidence of the commission of an unfair labor practice as stated in the foregoing paragraphs and, accordingly, deny Complainant's request to find that the Respondents have engaged in an unfair labor practice." (See Answer at p. 5).

In addition, the Respondent asserts the affirmative defense that the Board lacks jurisdiction over this matter as the Complainant made its requests for information

pursuant to the parties' collective bargaining agreement, and the agreement provides a grievance and arbitration procedure to resolve contractual disputes. Since the Board's precedent provides that the Board has no jurisdiction over information requests in such circumstances, the Board should dismiss the complaint in this matter. (See Answer at p. 4).

The Respondent denies that the aforementioned Standard Operating Procedure changed the negotiated terms of the CBA. (See Answer at p. 4). Moreover, MPD claims that the FOP is also pursuing its Complaint through the grievance and arbitration process set forth in the parties' collective bargaining agreement. MPD believes that "[a]s this dispute involves interpretation of the parties' contract, the [Board] does not have jurisdiction to decide this case." (See Answer at p. 4).

III. Motion to Dismiss

While a Complainant need not prove their case on the pleadings, they must plead or assert allegations that, if proven, would establish the alleged statutory violations. See *Virginia Dade v. National Association of Government Employees, Service Employees International Union, Local R3-06*, 46 DCR 6876, Slip Op. No. 491 at p. 4, PERB Case No. 96-U-22 (1996); and *Gregory Miller v. American Federation of Government Employees, Local 631, AFL-CIO and D.C. Department of Public Works*, 48 DCR 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994). Also, the Board views contested facts in the light most favorable to the Complainant in determining whether the Complaint gives rise to an unfair labor practice. See *JoAnne G. Hicks v. District of Columbia Office of the Deputy Mayor for Finance, Office of the Controller and American Federation of State, County and Municipal Employees, District Council 24*, 40 DCR 1751, Slip Op. No. 303, PERB Case No. 9l-U-17 (1992). Without the existence of such evidence, Respondent's actions cannot be found to constitute the asserted unfair labor practice. Therefore, a Complaint that fails to allege the existence of such evidence, does not present allegations sufficient to support the cause of action." *Goodine v. FOP/DOC Labor Committee*, 43 DCR 5163, Slip Op. No. 476 at p. 3, PERB Case No. 96-U-16 (1996). Furthermore, when considering a motion to dismiss for failure to state a cause of action, the Board considers whether the alleged conduct may result in a violation of the CMPA. See *Doctors' Council of District of Columbia General Hospital v. District of Columbia General Hospital*, 49 DCR 1137, Slip Op. No. 437, PERB Case No. 95-U-10 (1995).

"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 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).

In the present case, FOP contends that MPD implemented a new policy that directly impacts the working conditions of the members and must be negotiated. Indeed,

the Union made an explicit demand for impact and effects bargaining over the Department's change in working conditions in the new Radar Program, and the request was denied. (See Complaint at p. 5).

The Board finds that the Union has pled allegations that MPD violated the CMPA by refusing to bargain over the impacts and effects of the implementation of a new policy. The Union's Complaint alleges violations of D.C. Code § 1-617.04(a) (1) and (5). "The District, its agents and representatives are prohibited from: ... [i]nterfering, restraining or coercing any employees in the exercise of the rights guaranteed by this subchapter[.]"[2] (D.C. Code §1-617.04(a) (1) (2001 ed.)). Also, D.C. Code § 1-617.04(a) (5) provides that "[r]efusing to bargain collectively in good faith with the exclusive representative" is a violation of the CMPA.[3]

The Board finds that the Complainant has pled allegations that, if proven, would constitute a violation of the CMPA. Moreover, Respondent offers no authority in support of, or factual basis for, its affirmative defense. On the record before the Board, establishing the existence of the alleged unfair labor practice violations requires the evaluation of evidence and the resolution of conflicting allegations. The Board declines to do so at this time, based on these pleadings alone.

Board Rule 520.10, "Board Decision on the Pleadings", provides that: "[i]f 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." Consistent with that rule, we find that the circumstances presented do not warrant a decision on the pleadings. Specifically, the issue of whether the Respondents' actions rise to the level of violations of the CMPA is a matter best determined after the establishment of a factual record, through an unfair labor practice hearing. See *Ellowese Barganier v. Fraternal Order of Police/Department of Corrections Labor Committee and District of Columbia Department of Corrections*, 45 DCR 4013, Slip Op. No. 542, PERB

[2] "Employee rights under this subchapter are prescribed under D.C. Code [§1-617.06(a) and (b) (2001ed.)] and consist of the following: (1) [t]o organize a labor organization free from interference, restraint or coercion; (2) [t]o form, join or assist any labor organization; (3) [t]o bargain collectively through a representative of their own choosing ...; [and] (4) [t]o present a grievance at any time to his or her employer without the intervention of a labor organization[.]" *American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks*, 45 DCR 5078, Slip Op. No. 553 at p. 2, PERB Case No. 98-U-03 (1998).

[3] The Board notes that pursuant to the CMPA, management has an obligation to bargain collectively in good faith and employees have the right "[t]o engage in collective bargaining concerning terms and conditions of employment, as may be appropriate under this law and rules and regulations, through a duly designated majority representative[.]" *American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2921 v. District of Columbia Public Schools*, 42 DCR 5685, Slip Op. 339 at p. 3, PERB Case No. 92-U-08 (1992). Also, D.C. Code § 1-617.04(a) (5) (2001) provides that "[t]he District, its agents and representatives are prohibited from...[r]efusing to bargain collectively in good faith with the exclusive representative." Further, D.C. Code §1-617.04(a) (5) (2001ed.) protects and enforces, respectively, these employee rights and employer obligations by making their violation an unfair labor practice.

Case No. 98-S-03 (1998). Consequently, the motion to dismiss should be denied, and the allegations against the Respondents shall continue to be processed by a Hearing Examiner in an unfair labor practice hearing.

The Board finds that the Complainant has pled or asserted allegations that, if proven, would constitute a statutory violation. As a result, we hereby deny MPD's motion to dismiss.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Metropolitan Police Department's motion to dismiss is **DENIED.**

2. The Board's Executive Director shall refer the Fraternal Order of Police/Metropolitan Police Department Labor Committee's Unfair Labor Practice Complaint to a Hearing Examiner utilizing an expedited hearing schedule. Thus, the Hearing Examiner will issue the report and recommendation within twenty-one (21) days after the closing arguments or the submission of briefs. Exceptions are due within ten (10) days after service of the report and recommendation and oppositions to the exceptions are due within five (5) days after service of the exceptions.

4. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.

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

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

August 19, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.10-U-06 was transmitted via Fax and U.S. Mail to the following parties on this the 19th day of August 2011.

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