

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

In the Matter of:)	
)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee,)	
)	
Complainant,)	PERB Case Nos. 12-U-05, 12-U-10, and 13-U-28
)	
v.)	Opinion No. 1553
)	
District of Columbia Metropolitan Police Department,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

Before the Board are three consolidated unfair labor practice cases, case numbers 12-U-05, 12-U-10, and 13-U-28, in which the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP”) alleges that the Metropolitan Police Department (“MPD”) did not respond to requests for information. The Director consolidated the cases for hearing along with a fourth case, case number 11-U-20. In addition to an information request, that case involved a claim of retaliation against protected union activity and a claim of interfering, coercing, or restraining an employee in the exercise of protected rights. Case number 11-U-20 will be the subject of a separate decision and order.

In each of the consolidated cases, FOP requested information related to investigations conducted by MPD’s Internal Affairs Division (“IAD”). FOP filed with the Board requests for subpoenas duces tecum, seeking documents generally the same as those sought by the requests for information, and MPD moved to quash the subpoenas. Those requests and motions were referred to the hearing examiner.

Following a hearing held on December 12, 2014, and briefing by the parties, the hearing examiner submitted his Report and Recommendations on April 28, 2015. MPD submitted exceptions to the Report and Recommendations, and FOP submitted an opposition to MPD's exceptions. The hearing examiner's Report and Recommendation, MPD's exceptions, and FOP's opposition are before the Board for disposition.

II. Discussion

A. Standard for Requests for Information

An agency has an obligation to furnish information a union requests that is both relevant and necessary to the union's role in processing a grievance, in pursuing an arbitration proceeding, or in collective bargaining. Failure to do so is an unfair labor practice.¹ Applying this standard, the hearing examiner found that MPD committed unfair labor practices by failing to respond to requests for information in case numbers 12-U-05 and 12-U-10 but not in case number 13-U-28.

B. Case Number 12-U-05

On July 28, 2011, Delroy Burton, who was then FOP's executive steward, submitted to MPD requests for certain information regarding any investigations of sworn members' use of non-authorized vehicles, all complaints initiated or requested by Director Thomas Wilkins, and all investigations initiated or requested to be opened by Assistant Chief Michael Anzallo. On that same date, FOP also submitted a Freedom of Information Act ("FOIA") request for most of the same items.² MPD admitted that it failed to provide any information in response to the information request.³ At the hearing, Burton testified that the chairman of FOP was the subject of an investigation into a complaint that he was observed making a traffic stop in an unmarked vehicle. The information requested was needed for purposes of comparison, for *Douglas*-factor analysis, and for a proper defense of the chairman.⁴ The hearing examiner stated that the relevance and necessity of this request for information "is self-evident."⁵

MPD argued as a defense that FOP requested the same documents through FOIA and "as a result of the FOP's FOIA action, the MPD produced responsive, voluminous and time intensive information."⁶ The hearing examiner rejected MPD's defense, stating that FOP has the right to duplicate its request by using other means provided by laws regarding governmental obligations to respond to requests for information. In its exceptions, MPD replies that it does not deny FOP's right to use all available laws, but its defense is that MPD's FOIA response was also responsive

¹ *Washington Teachers' Union, Local No. 6 v. D.C. Pub. Sch.*, 61 D.C. Reg. 1537, Slip Op. 1448, PERB Case No. 04-U-25 (2014).

² Report & Recommendations 9-10; MPD Ex. 4; MPD Ex. 5.

³ Answer 12-U-05 ¶ 4.

⁴ Tr. 34.

⁵ Report & Recommendations 25.

⁶ Report & Recommendations 11.

to the request for information. MPD argues that it “should not be obligated to duplicate its response as that would be an unnecessary misuse of governmental resources.”⁷

Citing *Psychologists Union, Local 3758 v. D.C. Department of Mental Health*,⁸ FOP asserts that it should not be forced to undertake a time-consuming effort to look elsewhere for information in the employer’s possession. FOP argues that MPD’s production of documents as a result of expensive FOIA litigation is not a defense to MPD’s unfair labor practice of failing to respond to the information request in question. The Board agrees. MPD’s subsequent production of the information in response to a court order⁹ after giving no response to FOP’s request goes to the appropriate remedy, not to the issue of whether there was a violation. MPD’s admitted failure to respond and FOP’s proof of the relevance and necessity of the information established the violation.

As to the remedy, it is proper to require MPD to post a notice of its violation, to cease and desist from further violations, and to pay reasonable costs, as the hearing examiner recommended, but MPD will not be ordered to provide information it has already provided.¹⁰ The FOIA request contains all seven items in the request for information plus three more.¹¹ It is undisputed that MPD complied with the FOIA request.¹²

C. Case Number 12-U-10

On March 10, 2011, Burton filed a grievance stating that IAD did not permit Shop Steward Officer Benjamin Fetting to represent Officers Andrew Zabavsky and José Rodriguez at an interview.¹³ On or about September 8, 2011, Burton sent a letter to Commander LoJacono requesting information related to the investigation of and allegations against Officers Fetting, Rodriguez, and Zabavsky. On September 27, 2011, MPD delivered to Burton a letter stating that his request cannot be considered until the three officers designated him as their representative as required by section 3112.11 of the District Personnel Manual (DPM).¹⁴

Burton testified that the requested information was relevant and necessary for FOP to defend the three officers in pending disciplinary actions.¹⁵ The hearing examiner found that those actions were “directly related to the RFI.”¹⁶

The hearing examiner rejected MPD’s ground for declining to respond:

⁷ Exceptions 8.

⁸ 54 D.C. Reg. 2644, Slip Op. No. 809 at p. 6, PERB Case No. 05-U-41 (2005).

⁹ MPD Ex. 7 ¶ 7(Declaration of Teresa Quon Hyden).

¹⁰ See *Walter N. Yoder & Sons, Inc. and Sheet Metal Workers Int’l Ass’n, Local Union 100*, 270 N.L.R.B. 652, 652-53 (1984).

¹¹ MPD Ex. 4; MPD Ex. 5.

¹² MPD Ex. 7 (Declaration of Teresa Quon Hyden); Tr. 35 (testimony of Delroy Burton).

¹³ MPD Ex. 15.

¹⁴ Complaint 12-U-10 ¶¶ 1-3; Answer 12-U-10 ¶¶ 1-3.

¹⁵ Report & Recommendation 12.

¹⁶ Report & Recommendation 25.

DPM § 3112.11 provides that copies of reports of investigation shall be furnished to the subject of an investigation or to his or her representative. These personnel regulations do not, and cannot, constrain the FOP's statutory right to information necessary and relevant to the Union's role as the exclusive representative or its duty to represent Rodriguez, Zabavsky and Fetting in the instant case. DPM § 3112.11 is a personnel regulation and not statutory as is the CMPA. Simply stated, since FOP holds the certification as the exclusive representative for all members of the bargaining unit, DPM § 3112.11 cannot be read or applied so as to limit any FOP statutory rights to relevant and necessary information under the CMPA.¹⁷

In addition, the hearing examiner found that the record showed that Rodriguez and Zabavsky designated FOP in writing to represent them in the grievance that was the basis of the request for information.¹⁸ The hearing examiner recommended that the Board sustain the complaint "and grant FOP's *Notice of Deposition Duces Tecum*, Case No. 12-U-05."¹⁹

In its exceptions, MPD asserted that D.C. regulations requiring written authorization of the member involved in an investigation are derived from the CMPA, which provides

All official personnel records of the District government shall be established, maintained, and disposed of in a manner designed to ensure the greatest degree of applicant or employee privacy while providing adequate, necessary, and complete information for the District to carry out its responsibilities under this chapter. Such records shall be established, maintained, and disposed of in accordance with rules and regulations issued by the Mayor.²⁰

Section 3112.11 of the DPM requires copies of investigatory reports to "be furnished upon request to the subject of investigation or to his or her representative designated in writing." Section 3112.14 prohibits the Office of Personnel or an independent personnel authority from making such a report "available to the public, to witnesses, or, except as provided in this section, to the parties concerned in the investigation."

Like the confidentiality provisions, MPD continues, the duty of an agency to provide information upon request is also derived from the CMPA, but, unlike the CMPA it is not derived from an explicit statement of that duty. Rather, the duty to provide information is derived from section 1-617.04(a)(5), which prohibits the District, its agents, and representatives from refusing

¹⁷ Report & Recommendation 26.

¹⁸ Report & Recommendation 26 (citing FOP Ex. 15).

¹⁹ Report & Recommendation 30.

²⁰ D.C. Official Code § 1-631.01.

to bargain in good faith.²¹ “Reading these two portions of the CMPA and their derivative rights and obligations show[s] that they are not in conflict,” MPD asserts.

MPD further asserts that, in the grievance Burton submitted, Officers Rodriguez and Zabavsky authorized Burton to represent them “in this grievance” only. The authorization does not state that it extends to other matters or extends forever. The grievance does not contain an authorization from Officer Fetting.²² On April 28, 2011, Zabavsky sent Commander LoJacono a letter notifying him that Fetting would represent him and that Fetting has Zabavsky’s permission to view his records.²³

Citing PERB opinion numbers 1302 and 1521,²⁴ FOP replied that “PERB has already explicitly ruled that DPM § 3112.11 is not a proper basis for denying an information request and Hearing Examiner Rogers properly found that the MPD’s denial of the information request in this matter, relying solely on DPM § 3112.11, constitutes an unfair labor practice.”²⁵ On the issue of whether FOP provided authorizations, FOP notes that section 3112.11 does not contain a provision limiting how long an authorization lasts, as Commander LoJacono acknowledged.²⁶ The hearing examiner made a factual determination that the authorization continued and covered the investigation.

Contrary to FOP’s characterization, PERB opinion numbers 1302 and 1521 do not establish a blanket rule that sections 3112.11 and 3112.14 are not a proper basis for denying an information request. FOP quoted opinion number 1302 wherein the Board stated that “an employer’s claim of confidentiality will *generally* not stand scrutiny once information is proven to be relevant and necessary to a union’s legitimate collective bargaining functions.”²⁷ The Board went on to say, “This determination is generally to be decided on a case by case basis. . . .”²⁸ Both cases cited by FOP recognize, as the Board has consistently held, that a union’s right to information “has always been balanced against confidentiality concerns.”²⁹ The test is “whether the information sought is relevant and necessary to the union’s legitimate collective bargaining functions and whether this need is outweighed by privacy concerns.”³⁰

²¹ Exceptions 10.

²² Exceptions 10-11.

²³ MPD Ex. 12.

²⁴ *F.O.P./Metro. Police Dep’t Labor Comm. v. Metro. Police Dep’t*, 59 D.C. Reg. 11371, Slip Op. No. 1302, PERB Case Nos. 07-U-49, 08-U-13, and 08-U-16 (2012); *F.O.P./Metro. Police Dep’t Labor Comm. v. Metro. Police Dep’t*, 62 D.C. Reg. 11756, Slip Op. No.1521, PERB Case Nos. 07-U-40, 08-U-28, 08-U-34, 08-U-37, 08-U-39, 08-U-50, 09-U-11 and 09-U-40 (2015).

²⁵ Opp’n to Exceptions 10.

²⁶ Tr. 148-49.

²⁷ *F.O.P./Metro. Police Dep’t Labor Comm.*, Slip Op. No. 1302 at 2 (emphasis added).

²⁸ *Id.*

²⁹ *D.C. Nurses Ass’n v. Mayor of D.C.*, 45 D.C. Reg. 6736, Slip Op. No. 558 at 5, PERB Case Nos. 95-U-03, 97-U-16, and 97-U-28, (1998).

³⁰ *Univ. of D.C. Faculty Ass’n v. Univ. of D.C.*, 36 D.C. Reg. 3333, Slip Op. No. 215 at p. 3, PERB Case No. 88-U-16 (1989), quoted in *F.O.P./Metro. Police Dep’t Labor Comm.*, Slip Op. No. 1302 at 22, and *F.O.P./Metro. Police Dep’t Labor Comm. v. Metro. Police Dep’t*, Slip Op. No. 1521 at 3.

The hearing examiner did not apply either prong of this test. Instead, he erroneously stated that “[t]hese personnel regulations do not, and cannot, constrain the FOP’s statutory right.”³¹ Actually, these personnel regulations protecting confidentiality can constrain FOP’s statutory right if the test is not satisfied in a given case.

With regard to the first prong of the test, the hearing examiner did not expressly find that the requested information is relevant and necessary to the union’s legitimate collective bargaining functions. But he did find that “[t]he officers are members of the FOP bargaining unit and Rodriguez and Zabavsky were grievants represented by FOP in disputes directly related to the RFI.” This finding supports a conclusion that FOP’s request for documents related to the investigation of and allegations against Rodriguez and Zabavsky were relevant and necessary to processing a grievance. Officer Fetting, however, was not one of the grievants. There is no evidence in the record that he was investigated or that allegations were made against him. Perhaps for this reason FOP, in its request for a subpoena, seeks information related to Officers Rodriguez and Zabavsky but not Officer Fetting. FOP did not prove the relevance and necessity of its request for documents related to an investigation of and allegations against Fetting.

With regard to the second prong of the test—balancing the union’s legitimate collective bargaining functions against privacy concerns—the Board notes that Rodriguez and Zabavsky authorized FOP to represent them in their grievance. Even if MPD were correct that this authorization does not satisfy section 3112.11, the authorization establishes that the privacy concerns in this case are minimal or nonexistent. And on the other hand, “the information sought goes to the heart of the alleged . . . violation. Thus, the need of the Union for the information clearly outweighs the confidentiality concerns expressed by [MPD].”³² Upon review of the record, the Board concludes that the test is satisfied.

Moreover, the hearing examiner’s finding that the designation of a representative by Officers Rodriguez and Zabavsky “clearly satisfied DPM § 3112.11” is supported by the record.

As noted, the requested subpoena duces tecum, which the hearing examiner recommends issuing, seeks documents related to Officers Rodriguez and Zabavsky only. This recommendation is reasonable, supported by the record, and consistent with Board precedent.

D. Case Number 13-U-28

On January 10, 2013, Burton submitted a request for information concerning an investigation of Lieutenant Michael Lockerman. The investigation resulted from a complaint that Lieutenant Lockerman made a derogatory comment about sergeants in MPD’s Court Liaison Division. On January 18, 2013, Inspector Brian Grogan responded by stating that he could not comply with the request because DPM § 3112.14 exempted the records from disclosure.

³¹ Report & Recommendation 26.

³² *Univ. of D.C. Faculty Ass’n v. Univ. of D.C.*, 36 D.C. Reg. 3333, Slip Op. No. 215 at p. 3, PERB Case No. 88-U-16 (1989)

Inspector Grogan advised, however, that the investigation had been closed with a finding of insufficient facts.³³

At the hearing, Burton testified that the information was relevant and necessary to FOP's defense of Sergeant Arthur Hayes, who had received a notice of proposed adverse action following an IAD investigation of allegedly insubordinate remarks made to Lieutenant Lockerman at a staff meeting.³⁴

In its post-hearing brief, MPD asserted that FOP did not have an authorization from Lieutenant Lockerman pursuant to DPM § 3112.11 and that DPM § 3112.14 precluded disclosure of Lockerman's investigation. MPD stated that in the hearing examiner's report and recommendation for PERB Case 08-U-13 the hearing examiner had said that "[w]hile the Union would not normally be entitled to information concerning MPD's discipline of management officials, under these unique and narrow facts the relevance and necessity of the . . . investigative reports . . . is self-evident."³⁵ In PERB Case 08-U-13, the misconduct of the management official was the same as that of the union member, but in the present case it is not, MPD argued.³⁶

The hearing examiner stated that he did not find facts linking the investigation of Lockerman to the discipline of Hayes. "[T]he two investigations involved two separate incidents and two different allegations of misconduct."³⁷ Because of the dissimilarity of the misconduct, the hearing examiner did not accept FOP's claim that "Lockerman may serve as a *comparator employee* as regards the penalty Hayes received under MPD's analysis of *Douglas* factor 6."³⁸ The hearing examiner quoted the Merit Systems Protection Board's criteria for comparator employee: "The comparator employee must be in the same work unit, have the same supervisors, and the misconduct must be substantially similar."³⁹ The hearing examiner concluded that the requested information was not relevant and necessary to FOP's defense of Hayes and that MPD's denial of the request for information was not a violation of D.C. Official Code § 1-617.04(a). He recommended that the Board dismiss case number 13-U-28 with prejudice.⁴⁰

Neither party filed exceptions to the hearing examiner's recommendation with regard to case number 13-U-28. The Board finds that his recommendation is reasonable, supported by the record, and consistent with Board precedent.

³³ Report & Recommendation 15-17.

³⁴ Tr. 51-56; Report & Recommendation 16-17.

³⁵ Report & Recommendation 19.

³⁶ MPD Post-Hearing Br. 15-16; Report & Recommendation 18-19.

³⁷ Report & Recommendation 28.

³⁸ *Id.*

³⁹ *Id.* (quoting *Von Muller v. Dep't of Energy*, 2006 M.S.P.B. 176 (2002)).

⁴⁰ Paragraph 7 of the complaint quotes D.C. Code § 1-617.04(a) (2) and (3) but does not allege that those provisions were violated and does not allege any facts. The hearing examiner stated that FOP presented no facts or argument in support of these charges. Any allegation based upon D.C. Code § 1-617.04(a) (2) and (3) has been abandoned. Report & Recommendation 1 n.1

ORDER

IT IS HEREBY ORDERED THAT:

1. MPD shall cease and desist from refusing to bargain in good faith by failing to provide certain information and to timely provide other information requested by the Complainant in conjunction with the administration of the parties' collective bargaining agreement.
2. MPD shall furnish the Complainant with all documents requested in the subpoena duces tecum Complainant filed in Case No. 12-U-10.
3. MPD shall conspicuously post where notices to employees are normally posted a notice that the Board will furnish to MPD. The notice shall be posted within ten (10) days from MPD's receipt of the notice and shall remain posted for thirty (30) consecutive days.
4. MPD shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from receipt of the notice that it has been posted accordingly.
5. Upon request, MPD shall reimburse FOP for its reasonable costs in Case Numbers 12-U-05 and 12-U-10.
6. The complaint in Case 13-U-28 is dismissed with prejudice.
7. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairman Charles Murphy and Members Keith Washington, Ann Hoffman, and Yvonne Dixon

October 29, 2015
Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Numbers 12-U-05, 12-U-10, and 13-U-28 is being transmitted to the following parties on this the 16th day of November 2015.

Anthony M. Conti
Daniel J. McCartin
Barbara E. Duvall
36 South Charles St., suite 2501
Baltimore, MD 21201

via File&ServeXpress

Mark Viehmeyer
Nicole Lynch
Metropolitan Police Department
300 Indiana Ave. NW, room 4126
Washington, DC 20001

via File&ServeXpress

/s/ David McFadden
David McFadden
Attorney-Advisor