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**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. 11-U-48
)	
Complainant,)	Opinion No. 1628
)	
v.)	
)	
Metropolitan Police Department,)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

I. Introduction

This Unfair Labor Practice Complaint (“Complaint”) was filed on September 8, 2011, by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Union”) against the Metropolitan Police Department (“MPD”) and three individual respondents.¹ The Union alleged that MPD violated D.C. Official Code §§ 1-617.04(a)(1) and (b) of the Comprehensive Merit Personnel Act (“CMPA”) by denying administrative leave in retaliation for the Union members’ protected disclosure to the City Council regarding the improper use of on-duty sworn personnel to staff private events.²

In an Answer filed on September 23, 2011, MPD denied that it committed any unfair labor practices and asked the Board to dismiss the Complaint for lack of jurisdiction and untimeliness. The Board referred the matter to a Hearing Examiner, who issued a Report and

¹ On March 25, 2013, the Complainant filed a Line Dismissing Individually-Named Respondents, Cathy Lanier, Chief of Police, Metropolitan Police Department, Vincent Gray, Mayor of the District of Columbia, and Paul Quander, Deputy Mayor of Public Safety and Justice for the District of Columbia, as parties to this case.
² Complaint ¶¶ 7-8.

Recommendation (“Report”) on November 7, 2016. Based on the Board’s review, the issues in this case were as follows:³

1. Whether the Board has jurisdiction over the allegations in the Complaint;
2. Whether the Complaint was timely filed;
3. Whether MPD unilaterally changed the parties’ past practice without bargaining in violation of the CMPA; and
4. Whether MPD retaliated against FOP by denying administrative leave in violation of the CMPA.

For the reasons set forth below, the Board dismisses the Complaint.

II. Hearing Examiner’s Report and Recommendation

A. Facts

The Administrative Leave Request for the 2009 Conference

By letter of June 22, 2009, Union Chairman, Kristopher Baumann, contacted the Chairman of the Council of the District of Columbia, Vincent Gray, alleging that MPD Chief Cathy Lanier improperly utilized on-duty police officers at the Major Cities Chiefs and Sheriffs Conference held in the District in 2009.⁴

On July 2, 2009, Chairman Baumann contacted Chief Lanier, requesting 40 hours of administrative leave for 17 Union members to attend the biennial Union Conference (“2009 Conference”) in August 2009.⁵ At the unfair labor practice hearing, Union Vice Chairman Cunningham testified that during this time in 2009 he met privately with Assistant Chief Alfred Durham, who told him that Chief Lanier was going to deny the administrative leave request to attend the 2009 Conference because of the letter that Chairman Baumann sent to City Council.⁶ On July 14, 2009, Chief Lanier informed Chairman Baumann that she would only grant administrative leave to three members requested by the Union.⁷

On July 8, 2010, the Union filed a civil lawsuit against Chief Lanier and the District of Columbia, asserting that the 17 Union members should have been granted administrative leave to attend the 2009 Conference.⁸ On June 9, 2011, the Superior Court denied, in part, MPD’s motion to dismiss (“Superior Court Order”).⁹

³ The Hearing Examiner did not include a statement of the issues in the Report.

⁴ Report at 5.

⁵ Report at 5.

⁶ Report at 5.

⁷ Complaint at 5.

⁸ Report at 5.

⁹ Report at 6.

The Administrative Leave Request for the 2011 Conference

On July 1, 2011, Chairman Baumann made a request for 18 Union members to receive 40 hours of administrative leave to attend the biennial Union Conference (“2011 Conference”) in August 2011.¹⁰ On July 14, 2011, Chief Lanier granted administrative leave for three Union officials to attend the 2011 Conference, indicating that in accordance with the labor agreement, any other members were entitled to use their own accrued annual leave, compensatory time, and leave without pay.¹¹ During his deposition testimony in the civil lawsuit, Assistant Chief Alfred Durham explained that MPD was deploying a Summer Crime Initiative that summer and could not afford to send 20 employees to the conference.¹² This testimony was not corroborated by the two Union witnesses who testified at the unfair labor practice hearing.¹³ Chairman Bauman testified that he believed that MPD’s partial denial of the administrative leave request was precipitated by the Superior Court Order on June 9, 2011.¹⁴

The Administrative Leave Request for the 2011 Symposium

In a second request on July 1, 2011, Chairman Bauman requested administrative leave for four Union members to be detailed to the International Homicide Investigator Association’s Symposium (“2011 Symposium”) from July 31, 2011 to August 5, 2011.¹⁵ On July 14, 2011, Chief Lanier responded to the request, indicating that MPD would only send homicide detectives who would give presentations and directly benefit from attendance at the symposium.¹⁶ Chief Lanier stated that any other members could apply for and use their own accrued annual leave, compensatory time, or leave without pay, pursuant to existing MPD policy.¹⁷

B. Recommendations

Based on a review of the evidence, the Hearing Examiner concluded that MPD violated D.C. Official Code §§ 1-617.04(a)(1) and (b) by engaging in unfair labor practices against employees in the exercise of their rights guaranteed by the CMPA.¹⁸ The Hearing Examiner found that PERB had jurisdiction over this matter because no contract interpretation was required to resolve alleged violations of the collective bargaining agreement.¹⁹ The Hearing Examiner also found that the allegations in the Complaint were timely.²⁰ He reasoned that the Complaint, filed on September 8, 2011, was filed 56 days after Chief Lanier denied administrative leave for the 2011 Conference, and therefore within the Board’s 120-day limit set

¹⁰ Report at 6.

¹¹ Report at 7.

¹² Report at 7.

¹³ Report at 7.

¹⁴ Report at 7-8.

¹⁵ Report at 8.

¹⁶ Report at 8.

¹⁷ Report at 8.

¹⁸ Report at 27.

¹⁹ Report at 2-4.

²⁰ Report at 17-18.

forth in Rule 520.4.²¹ The Hearing Examiner also found that the parties had an established past practice of MPD providing approval for 20-25 employees to attend the biennial conference, and that MPD's unilateral decision to deny administrative leave in 2011 without bargaining, violated the CMPA.²² Finally, the Hearing Examiner determined that MPD denied the Union's request for administrative leave in 2011 in retaliation for the Superior Court Order denying, in part, MPD's motion to dismiss.²³ The Hearing Examiner concluded that this retaliatory action violated D.C. Official Code § 1-617.04(a)(1).²⁴ Accordingly, the Hearing Examiner recommended that the Complaint be sustained.²⁵

III. Exceptions

On November 21, 2016, MPD filed Respondent's Exceptions to the Hearing Examiner's Report ("Exceptions").²⁶ MPD asserted that the case must be dismissed in its entirety as: (1) the Report ignores controlling PERB precedent that past practice cannot override express provisions of the parties' labor agreement; (2) the Report considered matters outside of the allegations contained within the Complaint, which is not permitted by PERB rules and precedent; (3) the Hearing Examiner did not properly address MPD's argument that PERB does not have jurisdiction over this contractual dispute; (4) the Report's analysis of the *Wright Line* test incorrectly assumes facts not in the record and relies upon facts that are time barred; and (5) the Report did not address MPD's argument that the Complainant is collaterally estopped from re-litigating this case.²⁷

On December 19, 2016, the Union filed Opposition to Respondent's Exceptions to the Hearing Examiner's Report and Recommendation ("Opposition").²⁸

IV. Discussion

The Board will affirm a Hearing Examiner's Report and Recommendations if the recommendations therein are reasonable, supported by the record, and consistent with Board precedent.²⁹ Pursuant to Board Rule 520.11, "[t]he party asserting a violation of the CMPA, shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner."³⁰

²¹ Report at 18.

²² Report at 18-23.

²³ Report at 23-27.

²⁴ Report at 23-27.

²⁵ Report at 27.

²⁶ Exceptions at 1.

²⁷ Exceptions at 1.

²⁸ Opp'n at 1.

²⁹ See *Am. Fed'n of Gov't Emp., Local 1403 v. D.C. Office of the Attorney Gen.*, 59 D.C. Reg. 3511, Slip Op. 873, PERB Case Nos. 05-U-32 and 05-UC-01 (2012); See also *Council of Sch. Officers, Local 4, Am. Fed'n of Sch. Adm'r*, 59 D.C. Reg. 6138, Slip Op. 1016 at 6, PERB Case No. 09-U-08 (2010).

³⁰ *Council of Sch. Officers, Local 4, Am. Fed'n of Sch. Adm'r*, Slip Op. 1016 at 6; *Tracy Hatton v. FOP/Dep't of Corr. Labor Comm.*, 47 D.C. Reg. 769, Slip Op. 451 at 4, PERB Case No. 95-U-02 (1995).

The Board has reviewed the findings, conclusions, and recommendations of the Hearing Examiner and for the reasons discussed below, the Board rejects the Hearing Examiner's finding that the alleged retaliation violations took place within 120 days of the Complaint being filed as required by PERB Rule 520.4. The Hearing Examiner's findings are not supported by the record.

The Board has held that under Board Rule 520.4, unfair labor practice complaints shall be filed not later than 120 days after the date the petitioner knew or should have known of the acts giving rise to the violation.³¹ Board rules governing the initiation of actions before the Board are jurisdictional and mandatory and provide the Board with no discretion or exception for extending the deadline for initiating an action.³² The Board may consider acts outside of the 120-day limit only to determine a violation from related acts that occurred within the jurisdictional time limit.³³

The Hearing Examiner determined that the Complaint filed on September 8, 2011, was within the Board's 120-day limit set forth in Rule 520.4.³⁴ The Hearing Examiner reasoned that, "The operational date for challenged retaliatory action in this analysis is July 14, 2011, the date [Chief] Lanier issued the letter of denial..."³⁵ Further, the Hearing Examiner found that MPD's denial of administrative leave on July 14, 2011, was a violation of the CMPA.³⁶ In its Exceptions, and repeatedly throughout the proceedings, MPD contended that the allegations asserted in the Complaint, pertaining to the request by the Union to attend the 2009 Conference and subsequent civil suit, were untimely and should be dismissed.³⁷ The Union asserted that the violations at issue in this case occurred on July 14, 2011, when Chief Lanier denied the Union's request for administrative leave.³⁸ The Union contended that while the 2009 allegations in the Complaint provide background and context to MPD's actions, those acts are not the statutory violations at issue in this case.³⁹ Citing to *Green v. D.C. Department of Corrections*, the Union argued that the Board may consider MPD's conduct outside of the 120-day limit to determine whether MPD committed statutory violations in July 2011, and, therefore, the Complaint was timely.⁴⁰

The Board finds that the Hearing Examiner's narration of the alleged violations in this case is inconsistent with the allegations in the pleadings. In the Complaint, the Union alleged that it engaged in protected activity on June 22, 2009, when Chairman Baumann sent a letter to the Council alleging that MPD improperly used on-duty officers to staff private events.⁴¹ The

³¹ *Pitt v. D.C. Dep't of Corr.*, 59 D.C. Reg. 5554, Slip Op. 998 at 5, PERB Case No. 09-U-06 (2009).

³² See, *Glendale Hoggard v. Pub. Emp. Relations Bd.*, 655 A.2d 320, 323 (D.C. 1995).

³³ *Green v. D.C. Dep't of Corr.*, 41 D.C. Reg. 5098, Slip Op. No. 323 n. 3, PERB Case No. 91-U-13 (1994).

³⁴ *Id.* at 18.

³⁵ Report at 27.

³⁶ Report at 27.

³⁷ Exceptions at 6; Respondent's Post-Hearing Br. at 9.

³⁸ Opp'n at 17.

³⁹ Opp'n at 17.

⁴⁰ Opp'n at 18.

⁴¹ Complaint at 3.

Complaint stated that as a result of this protected activity, Chief Lanier denied the Union's request for administrative leave to attend the 2009 Conference:

Chief Lanier's denial of administrative leave, just three weeks after the June 22, 2009 protected disclosure, was retaliation for the FOP members' protected disclosure to the Council. An official within MPD later admitted that the Chief's denial of the leave request was based on the June 22, 2009 communication with the Council.⁴²

Although the Hearing Examiner determined that the alleged violation occurred on July 14, 2011, when MPD denied administrative leave for the 2011 Conference, nowhere in the Complaint does the Union allege that MPD's 2011 denial of administrative leave was an act of retaliation.⁴³ The Complaint alleges only that MPD retaliated by denying administrative leave on June 22, 2009. This alleged violation clearly occurred more than 120 days prior to the September 8, 2011 filing of this Complaint. Therefore, the Board rejects the Hearing Examiner's finding that the Complaint was timely. This finding is inconsistent with the allegations raised in the Complaint.

V. Conclusion

The Board rejects the Hearing Examiner's finding that Complaint was timely filed. Therefore, the Board dismisses this unfair labor practice complaint in its entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complainant's unfair labor practice complaint is dismissed.
2. 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 Chairperson Charles Murphy and Members Ann Hoffman and Douglas Warshof.

Washington, D.C.

⁴² Complaint at 5.

⁴³ *Fraternal Order of Police/Metro. Police Dep't v. D.C. Metro. Police Dep't*, 62 D.C. Reg. 3544, Slip Op. 1506 at 8-9, PERB Case No. 11-U-50 (2014) (stating that the "hearing examiner nor the Board may determine the existence of an unfair labor practice where no unfair labor practice has been alleged. Additionally, a hearing examiner cannot find a violation based on a set of facts that were not alleged in the complaint even if the violation has the same legal basis as an allegation that was raised in the complaint....").

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 11-U-48, Op. No. 1628 was sent by Filed and ServeXpress to the following parties on this the 9th day of June, 2017.

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