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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,)	
)	
Complainant,)	PERB Case No. 08-U-41
)	
v.)	Opinion No. 988
)	
District of Columbia, <i>et al</i> , ¹)	Motion to Dismiss
)	Motion for Preliminary Relief
Respondents.)	
)	
)	

DECISION AND ORDER

I. Statement of the Case:

The Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Complainant”, “FOP” or “Union”) filed an Unfair Labor Practice Complaint (“Complaint”) against the District of Columbia, *et al*, (“Respondents” or “MPD”). The Complainant alleges that the Respondents have violated the Comprehensive Merit Protection Act (“CMPA”). Specifically, the Complainant alleges that Respondents have violated D.C. Code § 1-617.01 and § 1-617.04(a)(1)-(5) by failing to bargain in good faith with the Complainant. (See Complaint at p. 16).

¹ The Complaint names the following parties as Respondents: District of Columbia Metropolitan Police Department; District of Columbia Office of the Attorney General; District of Columbia Office of Labor Relations and Collective Bargaining; Mayor Adrian Fenty; Chief Cathy L. Lanier Metropolitan Police Department; Attorney General Peter Nickles Office of the Attorney General; Director Natasha Campbell Office of Labor Relations and Collective Bargaining; General Counsel Terrence Ryan Office of the Attorney General; Supervisory Attorney Dean Aquino Office of Labor Relations and Collective Bargaining; Attorney Ivelisse Cruz Office of Labor Relations and Collective Bargaining; Attorney William Montross Office of Labor Relations and Collective Bargaining; Assistant Chief Winston Robinson Metropolitan Police Department; Assistant Chief Peter Newsham Metropolitan Police Department; Assistant Chief Joshua Ederheimer Metropolitan Police Department; Assistant Chief Alfred Durham Metropolitan Police Department; Assistant Chief Patrick Burke Metropolitan Police Department; Commander Jennifer Greene Metropolitan Police Department; Inspector Matthew Klein Metropolitan Police Department; and Lieutenant Linda Nischan Metropolitan Police Department.

The Complainant requests that the Board: (1) find that the Respondents have engaged in an unfair labor practice; (2) order the Respondents to cease and desist from engaging in an unfair labor practice; (3) order the Respondents to post notices of the Respondents' violations of the CMPA; (4) compel "the Respondents to settle or adjudicate all pending [unfair labor practice complaints], arbitrations and other actions that involve the interpretation, repudiation or disagreements over articles or portions of articles in the Agreement prior to negotiating new terms for those articles or portions of those articles" (Complaint at p. 19); (5) compel the Respondents to cease retaliating against members of the FOP; (6) compel the Respondents to cease retaliating and interfering with FOP officials; (7) compel the Respondents to appoint a neutral third-party monitor as selected by the FOP and agreed to by the Respondents, to monitor and approve all Respondents' proposals and actions during the negotiation process; (8) compel the Respondents to pay the FOP's costs and fees associated with the proceeding; and (9) order such other relief and remedies as the Board deems appropriate. (See Complaint at pgs. 19-20).

The Respondents filed an Answer to the Complaint denying any violation of the CMPA. In addition, the Respondents filed a Motion to Dismiss, a Cross-Complaint and a Motion for Preliminary Relief. The Union filed an Answer to the Cross-Complaint and an Opposition to the Motion for Preliminary Relief.² The parties' pleadings are before the Board for disposition.

II. Discussion

The parties' collective bargaining agreement expired on September 30, 2008. On March 25, 2008, the FOP submitted a successor contract proposal and alleges that on April 28, 2008, the Respondents' submitted a counter proposal which reflects a substantial reduction in the union members' rights. (See Complaint at pgs. 7, 9). The Complaint asserts that "[t]he Department responded with its proposal on April 28, 2008." (Complaint at p. 9). The Complaint further alleges that MPD rejected "virtually all of the FOP's proposed terms", and that "[MPD] failed to offer specific economic reasons, or other potentially legitimate justifications, for any of its proposals or its wholesale rejection of the FOP's proposals." (Complaint at p. 12).³

² The chronology of the pleadings is as follows: (1) May 30, 2008, FOP filed a Complaint against the District; (2) June 2, 2008, the Respondents filed a Cross-Complaint and Motion for Preliminary Relief; (3) June 5, 2008, the Respondents filed a Motion for Temporary Restraining Order; (4) June 11, 2008, the Respondents filed an amended Cross-Complaint and Motion for Preliminary Relief; (5) June 13, 2008, the FOP filed an Opposition to the Motion for a Temporary Restraining Order; (6) June 16, 2008, the Respondents filed an Answer to the FOP's Complaint and a Motion to Dismiss all Respondents named in their Individual Capacity; (7) June 18, 2008, FOP filed an Opposition to the Motion for Preliminary Relief; (8) June 19, 2008, FOP filed an Answer to the Respondents' Cross-Complaint; (9) June 26, 2008, FOP filed an Answer to the Respondents' Amended Cross Complaint.

³ The Complaint specifically referenced twenty-seven of the Respondents' proposals.

The FOP also alleges that the Respondents have displayed a “[d]isregard for the obligation to negotiate in good faith and honor the terms of the [Collective Bargaining Agreement (“CBA”)], including the disciplinary process.” (Complaint at p. 12). The Complainant charges that it has been forced to file numerous unfair labor practice complaints. In particular, the Complainant asserts that “the District has transferred the contractual obligations of [MPD] under the [CBA], such as its obligations regarding pay, to other district agencies without notice to the FOP.” (Complaint at p. 12). Also alleged are “[MPD’s] failure to timely transfer members’ dues payments to the FOP; interfering with the FOP’s ability to conduct business by preventing FOP officials to attend meetings (including contract negotiation meetings); and retaliation against members exercising their rights under law and the [CBA].” (Complaint at p. 13). In addition, the Complaint addresses the Department’s alleged failure to comply with orders “by various arbitrators and judges to reinstate at least 17 officers whose employment had been terminated.” (Complaint at p. 13).

Furthermore, FOP contends that the Respondents have conducted a “[r]etaliatory investigation of the FOP Chairman.” (Complaint at p. 15). Specifically, FOP maintains that “[o]n May 21, 2008, Kristopher Baumann, Chairman of the FOP Labor Committee, received a memorandum from Lieutenant Linda Nischan indicating that the Department was investigating him for an alleged failure to attend In-Service Training in 2007.” (Complaint at p. 15). The Complainant claims that MPD’s actions were meant to harm the FOP as evidenced by the timing of the investigation and the fact that “no Chairman or any other FOP representative assigned full-time to the FOP office has ever been required or ordered by [MPD] to attend the type of training at issue.” (Complaint at p. 16).

In support of these allegations, the FOP argues that “[MPD’s] overall conduct, and the substance of terms, are relevant to the determination of bad faith.” (Complaint at p. 16). The FOP asserts that “[MPD] has a statutory duty to bargain in good faith with the FOP. D.C. Code §§ 1.617.01 and 1.617.04.” (Complaint at p. 16).⁴ FOP claims that “[MPD’s] proposed contract,

⁴ D.C. Code § 1-617.01 provides:

(a) The District of Columbia government finds and declares that an effective collective bargaining process is in the general public interest and will improve the morale of public employees and the quality of service to the public.

(b) Each employee of the District government has the right, freely and without fear of penalty or reprisal:

(1) To form, join, and assist a labor organization or to refrain from this activity;

(2) To 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; and

(3) To be protected in the exercise of these rights.

which contains terms so offensive that no union could possibly give them serious consideration, coupled with its past actions and public announcement of an intent to ignore bargained-for rights and rulings by arbitrators and judges, and its retaliatory and unprecedented investigation of the FOP Chairman, reveals an anti-union bias, and a shocking disregard for the law. This conduct evidences a pattern of bad faith." (Complaint at p. 17). The FOP also contends that "[t]he proposed contract terms are so egregious that bad faith must be presumed." (Complaint at p. 18).

(c) The Mayor or appropriate personnel authority, including his or her or its duly designated representative(s), shall meet at reasonable times with exclusive representative(s) of bargaining unit employees to bargain collectively in good faith.

(d) Subsection (b) of this section does not authorize participation in the management of a labor organization or activity as a representative of such an organization by a supervisor, or management official or by an employee when the participation or activity would result in a conflict of interest or otherwise be incompatible with law or with the official duties of the employee. Supervisor means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment. The definition of supervisor shall include an incumbent of a position which is classified at a level higher than it would have been had the incumbent not performed some or all of the above duties.

D.C. Code § 1-617.04 provides, in part that:

(a) The District, its agents, and representatives are prohibited from:

(1) Interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;

(2) Dominating, interfering, or assisting in the formation, existence or administration of any labor organization, or contributing financial or other support to it, except that the District may permit employees to negotiate or confer with it during working hours without loss of time or pay;

(3) Discriminating in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization, except as otherwise provided in this chapter;

(4) Discharging or otherwise taking reprisal against an employee because he or she has signed or filed an affidavit, petition, or complaint or given any information or testimony under this subchapter; or

(5) Refusing to bargain collectively in good faith with the exclusive representative.

As a result of the foregoing, the FOP requests that the Board:

- a. Find[] that the Respondents have engaged in an unfair labor practice in violation of D.C. Code § 1-617.04(a)(1)-(5);
- b. Order[] the Respondents to cease and desist from engaging in an unfair labor practice in violation of D.C. Code § 1-617.04(a)(1) – (5);
- c. Compel[] the District to conspicuously post no less than two (2) notices of their violations and the Board's Order in each District Building;
- d. Compel[] the Respondents to settle or adjudicate all pending [unfair labor practice complaints], arbitrations, and other actions that involve the interpretation, repudiation or disagreements over articles or portions of articles in the Agreement prior to negotiating new terms for those article or portions of those articles;
- e. Compel[] the Respondents to cease retaliating against members of the FOP;
- f. Compel[] the Respondents to cease retaliating and interfering with FOP officials;
- g. Compel[] the Respondents to appoint a neutral third-party monitor as a selected by the FOP and agreed to by Respondents, to monitor and approve all Respondent' [sic] proposals and actions during the negotiation process;
- h. Compel[] the Respondents to pay the FOP's costs and fees associated with the proceeding; and
- i. Order[] such other relief and remedies as the Board deems appropriate.

(Complaint at pgs. 19-20).

The Respondents submitted an Answer, denying the allegations contained in the Complaint. (See Answer at p. 3). Specifically, Respondents' deny that it: (1) disregarded its obligation to negotiate in good faith or honor the terms of the CBA; and (2) conducted a retaliatory investigation of the FOP Chairman. (See Answer at pgs. 3-5). In addition, the Answer presents two affirmative defenses, stating that: (a) the Complaint is premature; and (b) "[e]ven assuming management made proposals as alleged in the Complaint, such proposals

would merely be evidence of lawful "hard bargaining" and, thus, could not constitute an unfair labor practice." (Answer at p. 8).

Additionally, in its Answer to paragraph 1 of the Complaint, Respondents contend that:

D.C. Official Code § 1-617.17(h) expressly provides that "[a]ll information concerning [compensation] negotiations shall be considered confidential until impasse resolution proceedings have been concluded or upon settlement."

(Answer at p. 2).

Respondents also claim that the allegations set forth in paragraph 1 of the Complaint, breaches Complainant's statutory obligation by purporting to disclose information concerning confidential compensation negotiations. (See Answer at p. 2).

Respondents assert that in order to prevent the disclosure of the alleged confidential proposals, it filed a Cross-Complaint and Motion for Preliminary Relief, and an Amended Cross-Complaint and Motion for Preliminary Relief.⁵ (See Answer at p. 2). Also, the Respondents note that they filed "a Temporary Restraining Order in the [District of Columbia] Superior Court against the [FOP] seeking to prohibit it from further release of confidential information protected by statute in its proceeding before [the Board] or in any other venue. C.A. 0004112-08." (Answer at p. 1). The Superior Court denied Respondents' request for a Temporary Restraining Order, holding that the issue fell within the Board's jurisdiction." (Answer at p. 2). The Respondents state that due to the confidential nature of the allegations in the Complaint, it cannot respond with specificity without violating the law. (See Answer at p. 3). Lastly, the Respondents submitted a pleading attached to the Answer styled "Motion to Dismiss all Respondents named in their Individual Capacities ("Motion to Dismiss" or "Answer/Motion")." (Answer/Motion at p. 9).

Motion to Dismiss

First, we will consider Respondents' Motion to Dismiss. In their Motion to Dismiss, the Respondents are requesting that the Board dismiss the named individuals in the Complaint and dismiss the Complaint in its entirety. Specifically, the Respondents contend that D.C. Code § 1-617.04 "does not confer upon the Board jurisdiction over individuals whose actions fall within their roles as agents of the government. As a result, any claim of misconduct performed within the course of their duties that may rise to the level of a [unfair labor practice] must be filed against the agency the alleged offenders represent. To act otherwise would subject individuals to

⁵ The allegations in the Cross-Complaint/Motion and Amended Cross-Complaint/Motion will be addressed below.

the Board's jurisdiction as private actors rather than government actors under § 1-617.04(a)." (Answer/Motion at p. 9). Consequently, the Respondents request that the Board "dismiss the [Complaint] in its totality." (Answer/Motion at p. 9).

Without citing any specific authority, the Respondents claim that the Board lacks jurisdiction over the named Respondents and request that the Board "dismiss the named individuals". (Answer/Motion at p. 9). The language of D.C. Code §1-617.04(a)(1) (2001 ed.), clearly provides that "[t]he 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[.]" (Emphasis added). Therefore, the Board rejects this argument as a basis for dismissal of the Complaint. In addition, The Board has determined that "[t]o maintain a cause of action, [a] Complainant must [allege] the existence of some evidence that, if proven, would tie the Respondent's actions to the asserted [statutory violation]. Without the existence of such evidence, Respondent's actions [can not] 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).

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). 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).

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). 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. 91-U-17 (1992).

The Complaint alleges that Respondents' actions, specifically the initial proposals Respondents submitted on April 28, 2008, constitute bad faith bargaining in violation of D.C.

Code §§ 1-617.04(a)(1) through (5).⁶ In addition, the Complaint alleges that Respondents' initiation of an investigation against the FOP Chairman constituted retaliatory conduct.⁷ Moreover, D.C. Code §1-617.04(a)(1) (2001 ed.), provides that "[t]he 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[.]" (Emphasis added). 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." (Emphasis added.) D.C. Code §1-617.04(a)(5) (2001 ed.) protects and enforces, respectively, these employee rights and employer obligations by making their violation an unfair labor practice.

The Board finds that the Complainant has pled allegations that, if proven, would constitute a violation of the CMPA. The parties' disagree with respect to the facts of this case and as to who are proper Respondents in this matter. On the record before us, establishing the existence of the alleged unfair labor practice violations requires credibility determinations about conflicting allegations. We decline to do so 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

⁶ The Board "[looks] to precedent under National Labor Relations Act ("NLRA") cases to provide guidance on this issue. To establish surface bargaining, no one factor is determinative. Rather, the totality of a party's actions during collective bargaining must be examined to determine whether or not a party's conduct establishes a purpose or intent to frustrate or avoid reaching an agreement. See, *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950). Any single factor, standing alone, usually will not demonstrate bad faith. *NLRB v. Fitzgerald Mills Corp.*, 133 NLRB 877, enforced, 313 F.2d 260 (2nd Cir. 1963), cert. denied, 375 US 834 (1963)." *American Federation of Government Employee, Local 2741 v. District of Columbia Department of Recreation and Parks*, 46 DCR 6721, Slip Op. No. 588 at p. 2, PERB Case No. 98-U-02 (1999).

⁷ "To prove the claim of [retaliation] for union activities, the Complainant must show that [the FOP Chairman] engaged in protected union activities; that [the Respondents] knew of the activities; that there was animus by [the Respondents] and that [the Respondents] subsequently took adverse action against the Complainant. See, *Farmer Bros. Co.*, 303 NLRB 638 (1991); and *D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corporation D.C. General Hospital*, 46 DCR 6271, Slip Op. No. 583, PERB Case No. 98-U-07 (1999). The Board has observed that determining motivation is difficult. Therefore a careful analysis must be conducted to ascertain if the stated reason is pretextual. The Board has noted that employment decisions must be analyzed according to the 'totality of the circumstances'; relevant factors include a history of anti-union animus, the timing of the action, and disparate treatment and retaliatory conduct." *Bernice Rink v. District of Columbia Department of Health*, 52 DCR 5174, Slip Op. No. 783 at p. 6, PERB Case No. 03-U-09 (2005). Also, the Board has held that in order to sustain a claim of retaliation for union activity a party must demonstrate a link between the employee's union activity and the action taken against the employee. See, *Jones v. D.C. Department of Corrections*, 32 DCR 3254, Slip Op. No. 81, PERB Case No. 84-U-04 (1984).

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. Consequently, the “Motion to Dismiss all Respondents named in their Individual Capacities” and to “dismiss the Unfair Labor Practice Complaint in its totality” is denied, and the Board will continue to process the allegations against the Respondents through an unfair labor practice hearing.

Motion for Preliminary Relief

The Respondents’ Cross-Complaint⁸ asserts that the “Department and Complainant are engaged in negotiations for a successor [CBA].” (Cross-Complaint at p. 1). In addition, the Cross-Complaint states that on “March 12, 2008, the parties executed Groundrules for the current round of negotiations.” (Cross-Complaint at p. 2). The Respondent alleges that it “proposed affirmative changes to 32 articles of the current CBA.” (Cross-Complaint at p. 2). In essence, the Respondents’ Cross-Complaint argues that FOP violated the confidentiality requirements of the CMPA by disclosing the Respondents “proposed affirmative changes” in its Complaint (PERB Case No. 08-U-41). The Respondents also allege further violations of the confidentiality requirements of the CMPA, claiming that “on June 1, 2008, FOP issued a newsletter . . . outlining substantive provisions of MPD’s proposals titled ‘Pay and Benefits,’ ‘Scheduling and Position Security,’ ‘On the Job Injuries,’ ‘Discipline,’ and ‘Representation and the Effective End of Your Union.’” (Cross-Complaint at p. 3). The Respondents’ also contend that on “June 2, 2008, FOP caused the substance of MPD’s proposals to be reported by several news outlets and posted on the internet.” (Cross-Complaint at p. 3).

The Cross-Complaint also maintains the following:

16. D.C. Official Code § 1-617.12, states in pertinent part:
“[c]ollective bargaining sessions between the District and employee organization representatives shall not be open to the public.”

17. The D.C. Official Code at § 1-617.17(h) states in pertinent part:

“[c]ompensation negotiations pursuant to this section shall be confidential among the parties; All information concerning negotiations shall be

⁸ As a point of clarification, all citations and references to the Respondents’ “Cross-Complaint” and “Motion for Preliminary Relief” are to the pleading styled “Amended Unfair Labor Practice Cross-Complaint and Motion for Preliminary Relief.” In addition, in order to avoid confusion with respect to the identity of the parties, “Complainant” in this case will always refer to the FOP, and “Respondents” will always refer to The District of Columbia, *et al.*

considered confidential until impasse resolution proceedings have been concluded or upon settlement.”

(Cross-Complaint at p. 4)

Arguing that these provisions had been violated by FOP’s disclosure in the Complaint and other alleged actions, the Respondents filed a “Motion for A Temporary Restraining Order in D.C. Superior Court on June 4, 2008.” (Cross-Complaint at p. 5). As stated above, the Motion was denied and Judge Susan Winfield held that the issue fell within the Board’s jurisdiction. (See Answer at p. 2, Cross-Complaint at p. 5).

The Respondents argue that “[t]he statutory mandate of D.C. Official Code § 1-617.12 bars the public from the bargaining process. Also, § 1-617.17(h) mandates that bargaining over compensation be kept confidential until a settlement is reached or impasse resolution proceedings have been concluded, i.e., in an interest arbitrator’s award, and the groundrules reemphasize the confidentiality of negotiations as outlined in referenced statutes by making all meetings “closed meetings” and all information shared therein confidential.” (Cross-Complaint at pgs. 5-6). The Respondents argue that the FOP, through its Complaint and contact with the media, etc., has directly interfered with “management’s right to confidential negotiations. Each publication constitutes a violation of D.C. Official Code at § 1-617.04(b)(1), an unfair labor practice.” (Cross-Complaint at p. 6).

In conjunction with the Cross-Complaint, the Respondents included a pleading styled “Motion for Preliminary Relief”. (See Cross-Complaint/Motion at p. 6). The Respondents maintain that “the violations in this case are obviously clear-cut and flagrant.” (Cross-Complaint/Motion at p. 6). Specifically, the Respondents claim that the FOP publicized “confidential bargaining proposals . . . clearly prohibited by two sections of the [CMPA], §§ 1-617.12 and 1-617.17(h), rendering the violations clear-cut.” (Cross-Complaint/Motion at pgs. 6-7). In addition, the Respondents assert that the parties executed Groundrules identifying the above provisions of the D.C. Code requiring confidentiality. (See Cross-Complaint/Motion at p. 7). The Motion also contends that the FOP’s unfair labor practice is “undeniably widespread” by publicizing MPD’s proposals to its membership and the public via radio, television broadcasts and the internet. (See Cross-Complaint at p. 7). The Respondents assert that “[t]he Board’s ultimate remedy for this widespread violation will be clearly inadequate. There is no way to cure the damage done by this widespread dissemination of proposals.” (Cross-Complaint at p. 7).

Consequently, the Respondents request that the Board:

1. Seal FOP’s Unfair Labor Practice Complaint and all subsequent proceedings in this and any related matter;

2. Order FOP to cease and desist from publicizing the content of MPD's proposals;
3. Order FOP to destroy all copies of the pleading in its possession;
4. Order FOP to recall all copies of the Complaint that were disseminated and destroy them;
5. Issue an order barring from the FOP's negotiating team any and all members found to have violated the confidentiality provisions of the law;
6. Rule that FOP is guilty of an unfair labor practice and order that FOP post a Notice to such effect wherever its members are located;
7. Order FOP to immediately notify each member of the bargaining unit, by first class mail, that it has violated the [CMPA];
8. Order FOP to immediately notify each local media outlet that it has violated the [CMPA];
9. Toll the time line for MPD to file an "Answer" to the Complaint until the Board rules on the Motion for Preliminary Relief. [sic]
10. Order a \$5,000 per day fine for every day that FOP has illegally made public management's proposals; and
11. Order any and all other appropriate sanctions and costs.

(Cross-Complaint/Motion at pgs. 7-8).

The FOP filed an Answer to the Cross-Complaint, in which it denied any violation of the CMPA. Specifically, the FOP denied the allegations in paragraph 1 of the Cross-Complaint that "[t]he Metropolitan Police Department (MPD or Management) and FOP are engaged in negotiations for a successor collective bargaining agreement (CBA)." (See Answer to Amended Cross Complaint ("Answer to AC/C" at p. 1; and Cross-Complaint at p. 1). The FOP alleges that "FOP and OLRCB have merely exchanged initial proposals for a successor contract." (Answer to AC/C at p. 1). The FOP further states that "[t]o date, the Parties have not yet begun negotiations, as no negotiation sessions have been held." (Answer to AC/C at p. 2). The FOP admits that it has executed Groundrules for the negotiations with the Respondents. (See Answer to AC/C at p. 2). However, the FOP denies that its exchange of proposals with the Respondents began negotiations between the parties. (See Answer to AC/C at p. 2). Moreover, the FOP denies the allegations "that the information contained in the Parties' initial *proposals* is

confidential.” (See Answer to AC/C at pgs. 2-3, emphasis in original). The FOP added that “[t]o date, negotiations have not yet begun, as no negotiating sessions have been held.” (Answer to AC/C at p. 3).

The FOP’s Answer to the Cross-Complaint also presents the affirmative defenses that: (1) “[t]he [Respondents’] Unfair Labor Practice Cross Complaint should be dismissed because the matter is not properly before [the Board].”; and (2) [t]he [Respondents’] Amended Unfair Labor Cross Complaint Should be dismissed because the Board does not have jurisdiction to hear purely contractual matters.” (Answer to the AC/C at pgs. 7-8). The Answer also requests the following remedies:

1. The Board should dismiss the Complainant’s Amended Cross Complaint on the basis that it lacks jurisdiction over this matter.
2. The Board should dismiss the Complainant’s [Amended] Cross Complaint on the basis that the FOP has not committed an unfair labor practice.
3. The Board should dismiss the Complainant’s Amended Cross Complaint on the basis that OLRCB has failed to comply with PERB Rules.
4. The Board should dismiss the Complainant’s Amended Cross Complaint on the basis that there is no evidence of the FOP’s commission of an unfair labor practice as stated above and, accordingly, deny the Complainant’s request that the Board seal FOP’s Unfair Labor Practice Complaint; deny Complainant’s request that the Board issue an order to cease and desist from publicizing the content of management’s proposals; deny Complainant’s request that the FOP recall all copies of the Complaint disseminated and destroy all copies of the pleading in its possession; deny Complainant’s request [that the Board] bar from the Union’s negotiating team any member found to have violated the confidentiality provisions of the law; deny Complainant’s request that the Board find the FOP guilty of an unfair labor practice, deny the Complainant’s request for FOP to notify its members and any media outlets; deny Complainant’s request to have the time line for answering the FOP’s Complaint tolled; deny the Complainant’s request for [the Board] to issue an order fining the FOP \$5,000 a day; and deny Complainant’s request for further sanctions.

(Answer to AC/C at pgs. 7-8) (Emphasis added).

The FOP also filed an Opposition to the Motion for Preliminary Relief ("Opposition"). (Opposition at p. 2). In its Opposition, the FOP admits that it is a party to the Groundrules governing successor contract negotiations, but states that under the Groundrules the initial proposals are not part of the contract negotiations. (See Opposition at p. 2). Moreover, FOP contends that Board Rule 520.3(d) requires an unfair labor practice complaint to have a "clear and complete statement of the facts constituting the alleged unfair labor practice, including date, time and place of occurrence of each particular act alleged, and in the manner in which D.C. Code § 1-618.4 of the [CMPA] is alleged to have been violated." (Opposition at p. 3). Thus, the FOP claims that it was necessary to include MPD's proposals in its Complaint. (See Opposition at p. 4). The FOP argues that "since the Union acted in accordance with the parties' negotiated ground rules, the CMPA was not violated and the FOP has not committed an unfair labor practice." (Opposition at p. 4). The FOP claims that "the Ground Rules make clear that the negotiation phase between the parties begins after the proposal phase ends, [and] it is equally clear under the Ground Rules that the confidentiality of information exchanged between the parties does not attach until negotiations begin." (Opposition at p. 5). As such, the FOP maintains that its conduct: (1) is neither clear-cut nor flagrant; (2) is "completely lawful"; and (3) does not seriously impact the public interest. (See Opposition at pgs. 5-6).

The FOP also contends that the issue of whether the Ground Rules have been violated is a contractual matter and, therefore, "[t]he Board has no jurisdiction over this matter". (Opposition at pgs. 6-7). Lastly, FOP maintains that "[t]he Motion for Preliminary Relief is not properly before [the Board] and must be dismissed." (Opposition at p. 7). The FOP claims that the Respondents Amended Cross Complaint and Motion for Preliminary Relief have not been pled in accordance with Board Rule 501.6, which requires that all pleadings filed with the Board include: (1) the name, address and telephone number of each party, if known; (2) the title of the proceeding and the case number, if known; (3) the name title, address and telephone number of the person signing and date signing; and (4) a certificate of service. The FOP asserts that the Respondents failed to identify the addresses of the respective parties and the required phone numbers. (See Opposition at p. 8). In addition, the FOP objects to the caption utilized by the Respondents and questions whether the Board Rules allow for a Cross-Complaint to be filed. (See Opposition at p. 8). Furthermore, the FOP contends that the Respondents violated Board Rule 501.8, which provides that ". . . [a] concise statement of all the information deemed relevant [] shall be set forth in numbered paragraphs." (Opposition at p. 8). The FOP asserts that no paragraphs are numbered in either the argument portion of the Cross-Complaint or the Motion for Preliminary Relief. (See Opposition at p. 8). Based upon the foregoing, the FOP requests that the Motion be denied.

The criteria the Board employs for granting preliminary relief in unfair labor practice cases are prescribed under Board Rule 520.15, which provides in pertinent part:

The Board may order preliminary relief . . . where the Board finds that the conduct is clear-cut and flagrant; or the effect of the alleged unfair labor

practice is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, and the Board's ultimate remedy will be clearly inadequate.

In addition, a review of the parties' pleadings reveals that the parties disagree on the facts in this case. Therefore, establishing the existence of the alleged unfair labor practice violations would turn on making credibility determinations on the basis of these conflicting allegations. We decline to do so on these pleadings alone. In such cases as this, the Board has found that preliminary relief is not appropriate. See *DCNA v. D.C. Health and Hospital Public Benefit Corporations*, 45 DCR 6067, Slip Op. No. 559, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

Moreover, the Board has held that its authority to grant preliminary relief is discretionary. See *AFSCME, D.C. Council 20, et al. v. D.C. Government, et al.*, 42 DCR 3430, Slip Op. No. 330, PERB Case No. 92-U-24 (1992). In determining whether or not to exercise its discretion under Board Rule 520.15, this Board has adopted the standard stated in *Automobile Workers v. NLRB*, 449 F.2d 1046 (CA DC 1971). There, the Court of Appeals - addressing the standard for granting relief before judgment under Section 10(j) of the National Labor Relations Act - held that irreparable harm need not be shown. However, the supporting evidence must "establish that there is reasonable cause to believe that the [NLRA] has been violated, and that remedial purposes of the law will be served by *pendente lite* relief." *Id.* at 1051. "In those instances where [the Board] has determined that the standard for exercising its discretion has been met, the [basis] for such relief [has been restricted to the existence of the prescribed circumstances in the provisions of Board Rule 520.15 set forth above." *Clarence Mack, Shirley Simmons, Hazel Lee and Joseph Ott v. Fraternal Order of Police/Department of Corrections Labor Committee, et al.*, 45 DCR 4762, Slip Op. No. 516 at p. 3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997). Moreover, the Board has held that preliminary relief is not appropriate where material facts are in dispute. See *DCNA v. D.C. Public Health and Hospitals Public Benefit Corporations*, 45 DCR 6067, Slip Op. No. 559, PERB Case Nos. 98-U-06 and 98-U-11 (1988).

In the present case, the Respondents have not met the criteria of Board Rule 520.15. Even if the allegations are ultimately found to be valid, they do not establish that any of FOP's actions constitute clear-cut flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. While the CMPA prohibits the employees, labor organizations, their agents, or representatives from engaging in unfair labor practices, the alleged violations, even if determined to have occurred, do not rise to the level of seriousness that would undermine public confidence in the Board's ability to enforce compliance with the CMPA. Finally, while some delay inevitably attends the carrying out of the Board's dispute resolution process, the Respondents have failed to present evidence which establishes that these processes would be compromised, or that eventual remedies would be inadequate, if preliminary relief is not granted.

We conclude that the Respondents have failed to provide evidence which demonstrates that the allegations, even if true, are such that the remedial purposes of the law would be served by *pendente lite* relief. Moreover, should violations be found in the present case, the relief requested can be accorded with no real prejudice to the Respondents following a full hearing. In view of the above, we deny the Respondent's Motion for Preliminary Relief. Also, the limited record before us does not provide a basis for finding that the criteria for granting preliminary relief have been met. In cases such as this, the Board has found that preliminary relief is not appropriate. See *DCNA v. D.C. Health and Hospital Public Benefit Corporations*, 45 DCR 6067, Slip Op. No. 559, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

For the reasons discussed above, we: (1) deny the Respondents' Motion to Dismiss; (2) deny the Respondents' request for preliminary relief and a temporary restraining order; and (3) direct the development of a factual record through an unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Respondents' Motion to Dismiss is denied.
2. The Respondents' Motion for Preliminary Relief and a Temporary Restraining Order is denied.
3. The Board's Executive Director shall refer the 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 exception 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.

September 30, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-U-41 was transmitted via Fax and U.S. Mail to the following parties on this the 30th day of September 2009.

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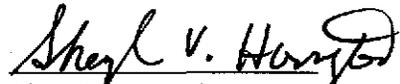
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