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. 10-U-03
v.	Opinion No. 1115
District of Columbia Metropolitan Police Department,	Motion to Dismiss
and	
Dierdre Porter, Inspector for the Metropolitan Police Department,	
and	
Cathy Lanier, Chief for the Metropolitan Police Department,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

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; Dierdre Porter, Inspector for the Metropolitan Police Department; and Cathy Lanier, Chief for the Metropolitan Police Department ("Respondents", "MPD" or "Agency"). The Complainant is alleging that the Respondents violated D.C. Code § 1-617.04(a)(1) and

(5) of the Comprehensive Merit Personnel Act ("CMPA") by failing and refusing to provide information requested by the FOP. (See Complaint at p. 7).

MPD filed an Answer to the Unfair Labor Practice Complaint ("Answer") denying the allegations set forth in the Complaint and any violation of the CMPA. (See Answer at pgs. 2-4). In addition, MPD asserted the affirmative defense that the Board has no jurisdiction over information requests and that the Board should dismiss the Complaint. (See Answer at p. 4). The Union's Complaint and MPD's motion to dismiss are before the Board for disposition.

II. Discussion

In its Complaint, FOP makes the following factual allegations:

> 2. asserts that "on or about June 2009, the MPD initiated an investigation of [FOP] Chairman Kristopher Baumann and [FOP] Vice Chairman Wendell Cunningham for their alleged receipt of a recorded transmission and subsequent release of that transmission to the media.
>
> 3. On October 9, 2009, Inspector Porter sent a Notice of Proposed Adverse Action and an Investigative Report to DCFOP Chairman Kristopher Baumann and DCFOP Vice Chairman Wendell Cunningham.
>
> 4. On October 9, 2009, DCFOP Executive Steward Delroy Burton sent a written request on behalf of the DCFOP to Inspector Porter requesting specific information relating to the investigation pursuant to D.C. Code Section 1-617.04.
>
> . . . .
>
> 5. DCFOP Executive Steward Burton requested information that was relevant and necessary to the DCFOP's legitimate collective bargaining duties as the exclusive representative of the DCFOP bargaining unit.[1]
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> 6. On October 20, 2009, Inspector Porter responded by email to Executive Steward Burton's October 9, 2009[,] request by informing him that "[a]ttachments #9, 16, 17, 33 & 36 of the investigative package" were available for

[1] Specific documents are listed at pgs. 3-5 in the Complaint.

> retrieval from her office and that a copy of these attachments was being provided to each member.
>
> 7. As of the date of this filing, Inspector Porter has failed to provide the materials listed as numbers 3 and 4 of Executive Steward's request, namely, a copy of draft[s] or any prior versions of the investigative report bearing IS 09-002129 and all e-mails concerning the investigation bearing IS 09-002129, between IAD Agent Lieutenant Dean Welch, Chief Cathy Lanier, Assistant Chief Alfred Durham, Assistant Chief Patrick Burke, Assistant Chief Michael Anzallo, Commander James Crane, Commander Christopher Lojacono, Captain George Dixon, and Captain Jeffery Harold. This failure to respond and the unreasonable delay is [alleged to be] an unfair labor practice.

(Complaint at pgs. 3-5).

Based on these factual allegations, FOP contends that:

> the "Respondents violated D.C. Code § 1-617.04(a)(l) and (5) by interfering and restraining the DCFOP executive members' exercise of their rights guaranteed by the CMPA and by failing to bargain in good faith. Specifically, (a) the DCFOP and its executive members were engaged in activities protected by the CMPA when they made the information request pursuant to D.C. Code § 1-617.04; (b) Respondents knew of the activities and Respondents' obligations because they were expressly disclosed in the information request; (c) there was anti-union animus by the Respondents as evidenced by the failure to fully comply with the information request; and (d) Respondents interfered with, restrained, and failed to deal in good faith with the DCFOP and its executive members in the exercise of their rights guaranteed by the CMPA by failing and refusing to provide the DCFOP with information relevant and necessary to the Union's collective bargaining duties.
>
> Management's duty to furnish information relevant and necessary to a union's statutory role under the CMPA as the employees' exclusive representative is derived from management's obligation to bargain in good faith and the employees' right to engage in collective bargaining concerning terms and conditions of employment, as may be

> appropriate through a duly designated majority representative. D.C. Code § 1-617.04(a)(5) protects and enforces these employees' rights and employer obligations by making their violation an unfair labor practice.

(Complaint at pgs. 6-7).

The Respondents do not deny the factual allegations in the Complaint, but they do deny that their conduct violated the CBA. (See Answer at pgs. 2-4). Moreover, the Respondents contend "that there is no evidence of the commission of an unfair labor practice as stated in the [Complaint] and, accordingly, deny . . . [they] have engaged in an unfair labor practice." (See Answer at p. 5).

In addition, the Respondents assert the affirmative defense that "[t]he 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." (Answer at p. 4).

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. 91-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, Complainant alleges that MPD violated the CMPA by refusing to bargain in good faith and attempting to undermine the Union as the bargaining representative by failing to provide requested information. (See Complaint at p. 5). The Union argues that MPD's actions were in violation of D.C. Code § 1-617.04(a)(1) and (5).

FOP states that 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[.]" [2] 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 has previously held that materials and information relevant and necessary to its duty as a bargaining unit representative must be provided upon request. (See *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department*, ___ DCR ___, Slip Op. No. 835, PERB Case No. 06-U-10 (2006). Whereas FOP has alleged facts, that if proven would violate the CMPA, the Board finds that the Complainant has plead a statutory cause of action under the CMPA.

Moreover, Respondents offer 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

[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.

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, the Board finds 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 Case No. 98-S-03 (1998). Consequently, the motion to dismiss is denied, and the allegations will continue to be processed through an unfair labor practice hearing.

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 the Board's Decision and Order in PERB Case No. 10-U-03 are being transmitted via Fax and U.S. Mail to the following parties on this the 19th day of August, 2011.

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