Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Sergeant Andrew J. Daniels),	
Complainant,	PERB Case No. 08-U-26
	Opinion No. 1403
v.	
District of Columbia Metropolitan Police Department,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

This matter is before the Board upon an unfair labor practice complaint filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Complainant") on behalf of Sergeant Andrew J. Daniels ("Daniels" or "Grievant"). FOP alleges that grievances it filed on behalf of Daniels were followed by retaliatory actions against him. FOP lists the District of Columbia Metropolitan Police Department ("Department" or "Respondent"), Assistant Chief Joshua Ederheimer, Inspector Victor Brito, and Captain Mark Carter, as respondents in this complaint. The Executive Director has removed the names of the individual respondents from the caption, consistent with the Board's precedent requiring individual respondents named in their official capacities to be removed from the complaint for the reason that suits against District officials in their official capacities should be treated as suits against the District. *See FOP/Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 59 D.C. Reg. 6579, Slip Op. No. 1118 at pp. 4-5, PERB Case No. 08-U-19 (2011). The D.C. Superior Court upheld the Board's dismissal of such respondents in *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. D.C. Public Employee Relations Board*, Civ. Case No. 2011 CA 007396 P(MPA) (D.C. Super. Ct. Jan 9, 2013).

The complaint alleges that on behalf of five of its members, including Daniels, FOP filed on January 11, 2008, an informal step 1 grievance with Inspector Brito concerning a new staff schedule that the Metropolitan Police Academy ("MPA") had unilaterally implemented. Following Inspector Brito's denial of the informal step 1 grievance, FOP appealed the denial by filing a formal step 1 grievance and then a formal step 2 grievance. On January 22, 2008, four (4) days after the filing of the formal step 1 grievance, Inspector Brito ordered Daniels to submit all leave requests with him, contrary to Department policy regarding leave requests. (Complaint ¶ 11). On January 22, 2008, FOP filed an informal grievance against that change, and another alleged act of retaliation followed. The alleged retaliation occurred after the Grievant investigated and reported on the illness and hospitalization of an MPA recruit. FOP alleges, "On February 1, 2008, despite handling the situation as prescribed by Department and MPA procedures, Sergeant Daniels was ordered by Captain Mark Carter and Inspector Brito to complete a PD119, explaining his response to the hospitalized recruit situation." (Complaint ¶ 15). PD119 is a "Complainant/Witness Statement." (Complaint Attachment 5). Also on February 1, 2008, FOP filed a formal step 1 grievance on Daniels's behalf regarding the change in leave policy. (Complaint ¶ 16 & Attachment 6). The complaint further alleges, "On February 12, 2008, Sergeant Daniels learned that he was the subject of a Department investigation into his handling of the hospitalized MPA recruit. . . ." (Complaint ¶ 17).

Complainant contends that the reprisals for the grievances violated D.C. Code § 1-617.04(a)(1) and (4). (Complaint ¶ 19). Complainant asserts, "the Respondent[ ] demonstrated its unlawful motivation by, among other things, taking reprisals against Sergeant Daniels despite his appropriate actions in connection with the timely handling of the hospitalized MPA recruit; its decision to implement an unreasonable policy for requesting leave against Sergeant Daniels in retaliation for filing a group grievance; and opening an investigation against Sergeant Daniels despite indisputable evidence that he followed all applicable Department procedures, clearly for engaging in union activities and asserting his union rights." (Complaint ¶ 21). As relief, the Complainant seeks a finding that the Respondent "engaged in an unfair labor practice in violation of D.C. Code § 1-617(a)(1) [*sic*] and (4);" an order that the Department cease investigating Daniels; notices of the violation posted in each Department building; and an award of costs and fees.

The Respondent's answer denied the alleged acts of retaliation except that it admitted that "Sergeant Daniels completed a PD 119 (Witness Statement) explaining his response to the hospitalized recruit situation." (Answer ¶ 15). The Respondent asserts that the Complainant failed to allege a *prima facie* case.

II. Discussion

Section 1-617.04(a)(1) of the D.C. Code prohibits "[i]nterfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter." Section 1-617.04(a)(4) prohibits "[d]ischarging 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." Filing a grievance constitutes the exercise of a right guaranteed by the subchapter ("CMPA") for purposes of section 1-617.04(a)(1) as well as the filing of a complaint for purposes of section 1-617.04(a)(4). *See Council of Sch. Officers, Local 4 v. D.C. Pub. Schs.*, 59 D.C. Reg. 3274, Slip Op. 803 at pp. 14-15, PERB Case No. 04-U-38 (2007).

To establish a *prima facie* case that the Department retaliated against the Grievant for engaging in the protected activity of filing grievances, the Complainant must show that (1) the Grievant engaged in the protected activity, (2) the Department knew about the Grievant's protected activity, (3) the Department exhibited anti-union or retaliatory animus, and (4) as a result, the Department took adverse employment actions against the Grievant. *See FOP/Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, Slip Op. No. 1391 at p. 24, PERB Case Nos. 09-U-52 and 09-U-53 (May 28, 2013). Citing *Rink v. D.C. Department of Health*, 52 D.C. Reg. 5174, Slip Op. No. 783, PERB Case No. 03-U-09 (2005), the Department contends that the Complainant had the burden of establishing a *prima facie* case by demonstrating that these elements occurred. "While the Department denies that there was any animus, the Complainant has failed to meet its burden by demonstrating that *any* action has been taken against Sergeant Daniels." (Answer at p. 4). The Department concludes, "Since Complainant has failed to allege a *prima facie* case of retaliation by demonstrating that any action had been taken against Sergeant Daniels at the time the Complaint was filed, Complainant has failed to meet its burden and the Complaint should be dismissed." (Answer at p. 5).

In *Rink* the Board was considering whether the complainant in that case had met her burden of proof *after* a hearing had been held and a report and recommendation had been submitted. A complainant is not required to demonstrate or prove its complaint at the pleading stage as long as the complaint asserts allegations that, if proven, would demonstrate a violation of the CMPA. *FOP/Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 60 D.C. Reg. 9245, Slip Op. No. 1392 at p. 4, PERB Case No. 11-U-25 (2013); *Hatton and FOP/Dep't of Corrs. Labor Comm.*, 47 D.C. Reg. 769, Slip Op. No. 451 at p. 6 n.7, 95-U-02 (1995).

Applying that test, the Board cannot say that the complaint fails to allege "that *any* action was taken against Sergeant Daniels." The complaint alleges that Daniels was the subject of a Department investigation. The Board has held that an investigation of an employee can be an adverse action giving rise to a claim of retaliation. *FOP/Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 59 D.C. Reg. 5461, Slip Op. No. 988 at p. 8, PERB Case No. 08-U-41 (2009). Although the Board has not previously ruled on a claim that merely changing a procedure for leave requests or requiring the completion of a witness statement is an adverse action, the Board has allowed a variety of claims of adverse action to reach a hearing, including a claim that an adverse action occurred where employees who failed to obtain certifications for their positions were required to use annual leave while awaiting transfer to positions that did not require certifications. *See AFGE, Local 631 v. D.C. Water & Sewer Auth.*, 51 D.C. Reg. 11379,

Slip Op. No. 734 at pp. 3, 6, PERB Case No. 03-U-52 (2004). Similarly, the U.S. Supreme Court has construed the "antiretaliation provision [of the National Labor Relations Act] to 'prohibi[t] a wide variety of employer conduct that is intended to restrain, or has the effect of restraining, employees in the exercise of protected activities'. . . ." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 66-67 (2006) (quoting *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983)).

Here, issues of fact exist concerning whether the actions of the Department constitute adverse employment actions and whether they were intended to restrain, or had the effect of restraining, the Grievant in the exercise of protected activities. Whether the Department's actions rise to the level of a violation of the CMPA is a matter best determined after the establishment of a factual record through an unfair labor practice hearing. *See Karim v. D.C. Pub. Schs.*, 59 D.C. Reg. 12655, Slip Op. No. 1310 at p. 6, PERB Case No. 10-U-17 (2012). Prior to the hearing, the Parties will participate in mandatory mediation, pursuant to Board Rule 558.4.

ORDER

IT IS HEREBY ORDERED THAT:

1. The unfair labor practice claim will be referred to a hearing examiner for an unfair labor practice hearing. That dispute will be first submitted to the Board's mediation program to allow the parties the opportunity to reach a settlement by negotiating with one another with the assistance of a Board appointed mediator.

2. 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.

July 29, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-U-26 is being transmitted via U.S. Mail to the following parties on this the 30th day of July, 2013.

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