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

Fraternal Order of Police/Metropolitan Police
Department Labor Committee,

Complainant,

v.

District of Columbia Metropolitan
Police Department,

and

Michael Anzallo, Assistant Chief for the
Metropolitan Police Department,

and

Christopher Lojacono, Commander for the
Metropolitan Police Department,

and

Paul Charity, Lieutenant for the
Metropolitan Police Department,

and

Cathy Lanier, Chief of the
Metropolitan Police Department,

Respondents.

PERB Case No. 09-U-44

Opinion No. 986

Motion for Preliminary Relief

DECISION AND ORDER

I. Statement of the Case:

On June 29, 2009, the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP," "Union" or "Complainant") filed a document styled "Unfair Labor Practice Complaint and Request for Preliminary Relief" against the District of Columbia Metropolitan Police Department ("MPD" or Respondents), Chief Cathy Lanier, Lieutenant Paul Charity, Commander Christopher Lojaco and Assistant Chief Michael Anzallo, (See Compl. at p. 4). The Complainant alleges that MPD has violated D.C. Code §1-617.04(a)¹ by: (1) "interfering, restraining, or coercing Chairman [Kristopher] Baumann's exercise of rights guaranteed by the [Comprehensive Merit Personnel Act]" (Compl. at p. 8); and (2) repudiating Article 9 of the parties' collective bargaining agreement ("CBA"). (See Compl. at p. 11).

FOP is requesting that the Board: (a) grant its request for preliminary relief; (b) find that the Respondents have committed an unfair labor practice; (c) order Respondents to cease and desist from interfering with Chairman Bauman and other FOP representatives' ability to perform their FOP union duties; (d) order Respondents to post a notice advising bargaining unit members that it violated the law; (e) order "Respondent MPD to impose discipline against MPD officials found to have engaged in unfair labor practices consistent with its disciplinary requirements"; and (f) grant its request for reasonable costs and fees. (See Compl. at pgs. 14-15).

On July 7, 2009, MPD filed a document styled "Respondent's Opposition to Complainant's Motion for Preliminary Relief" ("Opposition"). In addition, on July 14, 2009, MPD filed an answer to the unfair labor practice complaint. In their submissions MPD: (1) denies that it has violated the Comprehensive Merit Personnel Act ("CMPA"); and (2) requests that FOP's motion for preliminary relief ("Motion") be dismissed. (See Opposition at p. 6). FOP's Motion and MPD's Opposition are before the Board for disposition.

II. Discussion:

FOP claims that "[o]n Thursday, June 18, [2009], Chairman Baumann received an e-mail from Lieutenant Paul Charity of the Internal Affairs Division stating the following:

D.C. Code §1-617.04 provides in relevant part as follows:

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

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

Chairman Baumann, this is a follow-up from the detailed phone message left on your cell today.² You are directed to respond to the Internal Affairs Bureau at 51 N Street, N.E. at 0800 hours on Friday, June 19, 2009. You are the target of an investigation and upon your arrival ask for Lieutenant Dean Welch.

(Compl. at p. 5).

FOP states that Commander Christopher Lojacono and Lieutenant Dean Welch of the Internal Affairs Division, Director of Labor Relations Mark Viehmeyer, and General Counsel Terrance Ryan, were all copied on the e-mail. (See Compl. at p. 6).

The FOP states that it "is unaware of any occurrence in the past 25 years where an active [] FOP Chairman has been ordered to appear before Internal Affairs. In fact, the CBA provides a specific mechanism to allow [MPD] to raise questions regarding the Chairman's activities." (Compl. at p. 4). Specifically, FOP claims that "Article 9 of the CBA states unambiguously that reasonable inquiry can be made of the Labor Committee Chairman regarding Union business only through 'the Department's Labor Relations Representative.' CBA, Art 9 Sec 4(5). 'Labor Relations Representative' does not include officials assigned to the MPD's Internal Affairs Division. Instead, the MPD's designated Labor Relations Representative is Mark Viehmeyer, Acting Director of the MPD's Labor and Employee Relations Unit. Terrence Ryan, General Counsel for the MPD, also serves in this capacity." (Compl. at p. 5).

The FOP asserts that "[i]n addition to this clear language [of Article 9], the MPD has acknowledged and has utilized the practice of only contacting Chairman Baumann with regard to his activities through either Mr. Viehmeyer or Mr. Ryan. [FOP claims that] [i]n July 2008, the Department sought to make an inquiry into Chairman Baumann's activities on a specific date. Internal Affairs called Chairman Baumann, and he advised them of the provisions of Article 9 of the CBA. Internal Affairs then routed the request through Labor Relations . . ." (Compl. at p. 5).

"On June 19, 2009, Chairman Baumann reported to Internal Affairs for the interview. FOP contends that "[u]pon reporting to Internal Affairs, but prior to the interview, Chairman Baumann asked to speak with Lieutenant Charity, as it had been Lieutenant Charity who had ordered him to report to Internal Affairs. . . . Chairman Baumann asked Lieutenant Charity what his authority was for ordering Chairman Baumann to report to Internal Affairs in his official capacity as Chairman. Lieutenant Charity responded that he could order anyone to report to Internal Affairs who is needed in an investigation. [FOP states that] Chairman Baumann then

² FOP contends that on June 18, 2009, Lieutenant Charity left two voicemails with Chairman Baumann ordering him to report to Internal Affairs. (See Compl. at p. 6).

read Article 9 of the CBA to Lieutenant Charity and again asked what authority allowed him to circumvent the specific procedure set forth in Article 9 to make inquiry of Chairman Baumann. Lieutenant Charity informed Chairman Baumann that he had been ordered by Internal Affairs Command to order Chairman Baumann to report to Internal Affairs. [FOP asserts that] Chairman Baumann repeatedly asked who exactly in Internal Affairs Command had ordered Lieutenant Charity to order Chairman Baumann to report to Internal Affairs, however, Lieutenant Charity would not identify the Internal Affairs Command.” (Compl. at pgs. 6-7).

FOP states that “[a]fter Chairman Baumann repeated requests for the specific member of Internal Affairs Command who had ordered him to report to Internal Affairs, Lieutenant Charity told Chairman Baumann that Chairman Baumann could not speak to him or ask him certain questions because Lieutenant Charity was a Department official. [FOP claims that] Chairman Baumann explained that under the law, in his capacity as a union official, he had wide latitude in what he could say or ask in order to negotiate and protect the rights of union members. In response, Lieutenant Charity stated that as a Department Lieutenant, he had a wide number of actions he could take against Chairman Baumann for speaking to him, thus implicitly threatening discipline against Chairman Baumann. [FOP contends that] [w]hen asked to enumerate the actions he could take, Lieutenant Charity did not respond. Significantly, Chairman Baumann was reporting to Internal Affairs because he had been ordered to do so and was facing an Internal Affairs interrogation upon his arrival. Therefore, any requests for clarification made to Lieutenant Charity concerning the order to report to Internal Affairs were completely legitimate and warranted. . . . [FOP asserts that] Lieutenant Charity confirmed that it had been Commander Lojaco who had ordered him to order Chairman Baumann to report to Internal Affairs.” (Compl. at p. 7).

The FOP contends that by the conduct described above, the Respondents violated D.C. Code § 1-617.04 by: (1) “interfering, restraining, or coercing Chairman Baumann’s exercise of his rights guaranteed by the CMPA” (Compl. at p. 8); and (2) repudiating Article 9 of the parties’ CBA. (See Compl. at p. 11). “Specifically, [FOP asserts that]: (a) Chairman Baumann was engaged in protected union activities when Lieutenant Charity directly communicated with Chairman Baumann and Commander Lojaco ordered Lieutenant Charity to order Chairman Baumann to report to Internal Affairs; (b) Respondents knew of Chairman Baumann’s union activities when Lieutenant Charity directly communicated with Chairman Baumann and when commander Lojaco ordered Lieutenant Charity to order Chairman Baumann to report to Internal Affairs; (c) there was an anti-union animus by the Respondents as evidenced by the lack of respect for the collective bargaining rights of the Union and Chairman Baumann, and the Respondents’ complete failure to comply with Article 9. The Respondents’ Article 9 violations further allowed the MPD to use an Internal Affairs investigation to vent its animus towards, and retaliate against, the DCFOP and Chairman Baumann; and (d) Respondents interfered with, restrained, and coerced Chairman Baumann in the exercise of his rights guaranteed by the CMPA by directly communicating with him and by ordering him to report to Internal Affairs. Article 9 of the CBA exists to allow the Chairman to function without his functions being interfered with by Department officials and other employees. The process set out in Article 9 to

contact Chairman Baumann allows Chairman Baumann to perform his official duties without interference from the MPD. Therefore, by repeatedly violating Article 9 through Lieutenant Charity's direct communication with Chairman Baumann and Commander Lojacono's order to Lieutenant Charity to order Chairman Baumann to report to Internal Affairs, the Respondents have completely interfered with and restrained Chairman Baumann's ability to function as the DCFOP Chairman. [Furthermore, FOP argues that]the MPD's assertion that any employee has the ability to directly contact Chairman Baumann and order him to report to administrative interviews at any time and at any place (as was done in this case) would destroy Chairman Baumann's ability to function as the DCFOP Chairman and would result in Chairman Baumann missing or being removed from important union events, such arbitrations, meetings, PERB hearings, legislative hearings, and community speaking events." (Compl. at pgs. 8-9).

The FOP is requesting that the Board grant its request for preliminary relief. In support of its position, FOP asserts the following:

The above facts set forth that the Respondents interfered with and retaliated against Chairman Baumann for engaging in protected union activities and repudiated the CBA and mutually agreed past practices by engaging in improper direct communication with Chairman Baumann and by threatening discipline against Chairman Baumann based upon speeches made in his official capacity. First, the violation is clear-cut and flagrant because the Respondents knew that directly communicating with Chairman Baumann and ordering him to report to Internal Affairs violated Article 9 of the CBA and mutually agreed past practices. Significantly, these Article 9 violations interfered with Chairman Baumann's ability to function as the DCFOP Chairman. Moreover, Lieutenant Charity knew that restricting Chairman Baumann's speech and threatening discipline violated Chairman Baumann's rights under the CMPA and interfered with his ability to function as the DCFOP Chairman. Second, the effect of the interference and violations is widespread and will have a chilling effect on the DCFOP's membership as a whole. Lieutenant Charity's direct communications with Chairman Baumann and Commander Lojacono's order that Chairman Baumann report to Internal Affairs was intended to intimidate and retaliate against a union representative from engaging in protected union activity, as well as to interfere with Chairman Baumann's ability to function as the DCFOP Chairman. Moreover, the disciplinary threats made by Lieutenant Charity had and will have a chilling effect by intimidating union representatives from speaking in their official capacity for fear of disciplinary action. Third, the public interest is seriously affected because of the clear-cut, widespread effect of the unfair labor practices. The MPD's use of Internal Affairs investigations to vent its animus towards, and retaliate against, the DCFOP and Chairman Baumann is not in the public's best interest, nor is it in the public's best

interest to have the MPD repudiate the CBA provisions and mutually agreed past practices governing direct communications with the DCFOP Chairman. It is also not in the public's best interest for the Respondents to improperly restrict the speech of union officials and intimidate and threaten discipline against union officials for speaking in their official capacity. Fourth, the ultimate remedy afforded by the Board will be inadequate because the Respondents have already initiated an investigation of Chairman Baumann which will likely be concluded prior to the final decision by PERB in this matter. (Compl. at pgs. 13-14).

Board Rule 520.15 provides in pertinent part as follows:

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.

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 judgement 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 bas[is] 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, et al. v. FOP/DOC 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).

In its response to the Motion, the Respondents assert that the FOP's request for preliminary relief should be denied because FOP has failed to meet any of the elements necessary for obtaining preliminary relief. (*See* Opposition at pgs. 4-6). Furthermore, "the Respondent[s] dispute[] [the] Complainant's version of events and specifically dispute[] that the Internal Affairs investigation is connected to Officer Baumann's union activities. Instead, the Respondent[s] assert[] that its investigation of Officer Baumann is as an employee and police officer, which as his employer the Respondent[s] clearly [have] the right to conduct." (Opposition at p. 4). MPD requests that the Board: (1) find that it has not committed an unfair labor practice; and (2) deny FOP's request for preliminary relief. (*See* Answer at p. 6 and Opposition at p. 6).

After reviewing the parties' pleadings it is clear that the parties disagree on the facts in this case. On the record before us, establishing the existence of the alleged unfair labor practice violation turns essentially on making credibility determinations on the basis of conflicting allegations. We decline to do so on these pleadings alone. 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 Corporation*, 45 DCR 5067, Slip Op. No. 550, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

Furthermore, the FOP's claim that MPD's actions meet the criteria of Board Rule 520.15 is a repetition of the allegations contained in the Complaint. Even if the allegations are ultimately found to be valid, it does not appear that any of MPD's actions constitute clear-cut flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. MPD's actions presumably affect Chairman Baumann and other bargaining unit members. However, MPD's actions stem from a single action (or at least a single series of related actions), and do not appear to be part of a pattern of repeated and potentially illegal acts. While the CMLPA prohibits the District, its agents and 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 CMLPA. Finally, while some delay inevitably attends the carrying out of the Board's dispute resolution process, the FOP has 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 FOP has failed to provide evidence which demonstrates that the allegations, even if true, are such that 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 FOP following a full hearing.

For the reasons discussed above, we deny the FOP's request for preliminary relief. Also, the Board previously denied FOP's request for preliminary relief in PERB Case Nos. 09-U-41, 09-U-42 and 09-U-43 (See Slip Op. Nos. 972 at p.7, 974 at p.7 and 985 at p. 6). In addition, we consolidated PERB Case No. 09-U-41, PERB Case No. 09-U-42 and PERB Case No. 09-U-43 and referred the consolidated matter to a Hearing Examiner for disposition (see Slip Op. No. 985 at p. 7). The present case (PERB Case No. 09-U-44) involves the same parties and issues presented in PERB Case Nos. 09-U-41, 09-U-42 and 09-U-43. As a result, we: (a) are consolidating the instant case (PERB Case No. 09-U-44) with PERB Case No. 09-U-41, PERB Case No. 09-U-42 and PERB Case No. 09-U-43; and (b) direct the development of a factual record through an unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police/Metropolitan Police Department Labor Committee's Motion for Preliminary Relief is denied.
2. The present case (PERB Case No. 09-U-44) is consolidated with PERB Case Nos. 09-U-41, 09-U-42 and 09-U-43, and referred to a Hearing Examiner for development of a factual record through a consolidated unfair labor practice hearing.
3. The Board's Executive Director shall: (1) refer the consolidated matter to a Hearing Examiner for disposition; and (2) issue Notice of Consolidated Hearing.
4. 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 in PERB Case No. 09-U-44 was served via FAX and U.S. Mail to the following parties on this the 30th day of September, 2009.

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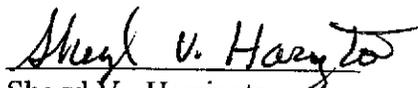
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