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 Nos. 11-U-35 and 11-U-44
v.	Opinion No. 1395
District of Columbia Metropolitan Police Department, et al.	
Respondents.	

DECISION AND ORDER

I. Statement of the Case

The above-captioned cases were brought by the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Complainant") in response to certain e-mails sent on the e-mail system of the District of Columbia Metropolitan Police Department ("MPD").

On May 11, 2011, FOP filed an unfair labor practice complaint, case number 11-U-35, ("Complaint") against the MPD, Officer Terry Whitfield, Officer Janice Olive, Officer Vernon Dallas, Agent Phineas Young, Agent William Asbury, and Chief Cathy Lanier ("Respondents"). The Complaint alleges that on or about March 15, 2011, MPD denied a request from FOP's chairman to use MPD's e-mail system to notify FOP's members of a meeting regarding a proposed dues increase. The next day MPD followed up its denial with an e-mail attaching a "Labor Relations Bulletin," which stated that Special Order 99-02 prohibited the use of MPD's e-mail system to communicate about union business including the vote on union dues. The Labor Relations Bulletin added, "If an official becomes aware of an alleged violation of [Special Order] 99-02, the official shall pull IS numbers and initiate an investigation." (Complaint ¶ 4).

The Complaint further alleges that in contravention of the Labor Relations Bulletin three (3) officers, Respondents Whitfield, Olive, and Dallas, sent through MPD's e-mail system an e-mail opposing the proposed dues increase. (Complaint ¶ 5 & Exhibit 4). Exhibit 4 of the Complaint is a copy of an e-mail chain in which Olive and then Dallas forwarded an anonymous

e-mail to MPD recipients on March 29, 2011. Exhibit 4 does not contain an e-mail sent by Officer Whitfield. The e-mail that Officer Olive and Officer Dallas forwarded says "SEE ATTACHMENT." A document critical of the proposed dues increase follows. The Complaint alleges, "The document contained false information about FOP internal operations and accused FOP leadership of misconduct. The document also encouraged FOP members, based on erroneous information, to vote against a dues assessment supported by the FOP leadership." (Complaint ¶ 5).

Among the recipients of the e-mails were Respondents Young and Asbury (Exhibit 4), who are agents of the Internal Affairs Division. (Complaint ¶ 7). FOP alleges that they did not initiate an investigation of the misuse of MPD's e-mail system as the Labor Relations Bulletin requires, nor did anyone else at MPD. (Complaint ¶¶ 6 & 7). In contrast, MPD previously took action against members of FOP for using MPD's e-mail system to communicate about union-related matters. (Complaint ¶ 8).

The Complaint characterizes Respondents Whitfield, Olive, Dallas, Young, Asbury, and Lanier as "responsible parties" and "agents and representatives of the District." (Complaint ¶ 10). The Complaint asserts that "the Respondents" permitted "the Respondents" (presumably different Respondents) to send an e-mail on MPD's e-mail system containing false information about FOP while at the same time preventing FOP from using MPD's e-mail system. Thereby the Respondents violated section 1-617.04(a)(1) of the D.C. Code "by interfering, restraining, coercing, or retaliating against the exercise of rights guaranteed to the FOP members by the CMPA" (Complaint ¶ 12), interfered with the existence or administration of the FOP in violation of section 1-617.04(a)(2) (Complaint ¶ 13), and failed to give FOP the exclusive recognition to which it is entitled. (Complaint ¶ 16).

Respondents MPD, Agent Young, Agent Asbury, and Chief Lanier timely answered the Complaint. Subsequently, FOP filed a "Line" dismissing Agent Young, Agent Asbury, and Chief Lanier as respondents. The remaining individually-named respondents, Officers Whitfield, Olive, and Dallas ("Officers"), filed a motion for extension of time to answer on June 8, 2011. The Complainant opposed the motion on the ground that it was filed beyond the time allowed by Board Rule 501.2. The Complainant moved for default and admission of material facts pursuant to Board Rule 520.7. The Officers filed an opposition to the Complainant's motion as well as an answer. In the answer the Officers denied that they were agents or representatives of the District within the meaning of section 1-617.04(a)(1) and asserted that as a result the Board lacked jurisdiction over them.

Admittedly in response to that answer, FOP, rather than amending its Complaint, filed on July 12, 2011, another complaint ("Second Complaint") against only the Officers, case number 11-U-44. The Second Complaint asserts that section 1-617.04(b)(1) "clearly provides that employees of the District are responsible for unfair labor practices and it is proper and appropriate to proceed against these individual respondents." (Second Complaint ¶ 5). FOP alleged that by sending the March 29, 2011, e-mail the Officers were "interfering, restraining, coercing, or retaliating against the exercise of rights guaranteed to the FOP members by the

CMPA" in violation of section 1-617.04(b). (Second Complaint ¶ 7). The Second Complaint prays for an order finding that the Officers committed an unfair labor practice in violation of section 1-617.04(b), ordering the Officers to cease and desist from retaliatory actions against FOP, compelling the Officers to post "no less than two (2) notices of their violations and PERB's order in each MPD building," ordering MPD to investigate the violations, and compelling the Officers to pay the Complainant's costs and fees. (Second Complaint ¶ 8).

FOP moved to consolidate case numbers 11-U-35 and 11-U-44. The Officers filed an answer in case number 11-U-44 and moved to dismiss the complaints ("Complaints") against them. The Complainant filed an opposition to the motion to dismiss ("Opposition").

The Complainant's motion to consolidate and motion for default and admission of material facts and the Officers' motion for extension of time and motion to dismiss are before the Board for disposition.

II. Discussion

A. Procedural Motions

As case numbers 11-U-35 and 11-U-44 involve common issues, we are consolidating these cases for purposes of our consideration and disposition of the motions. *See FOP/Dep't of Corrs. Membership Class Action v. FOP/Dep't of Corrs. Labor Comm.*, 59 D.C. Reg. 6155, Slip Op. No. 1019 at p. 2, PERB Case No. 10-S-05 (2010).

It is unnecessary to decide the Officers' motion for extension of time or the Complainant's motion for default and admission of material facts as this case can be decided on the face of the Complaints with all factual allegations in the Complaints taken as true. Accordingly, we pretermit the issues raised by those motions and proceed to consider the Officers' motion to dismiss.

B. Motion to Dismiss

Section 1-617.04(a) of the D.C. Code lists unfair labor practices that the "[t]he District, its agents and representatives" are prohibited from committing. Section 1-617.04(b) lists unfair labor practices that "[e]mployees, labor organizations, their agents, or representatives" are prohibited from committing. Both groups are prohibited from "[i]interfering with, restraining, or coercing" employees in the exercise of rights guaranteed by the Comprehensive Merit Personnel Act ("CMPA"). D.C. Code § 1-617.04(a)(1), (b)(1). In its Complaints and briefs, the Complainant adds "retaliating" to the statute's list. (*See e.g. supra* at pp. 2-3).

In their motion to dismiss, the Officers maintain that they violated neither section 1-617.04(a) nor section 1-617.04(b). The Officers deny that they are agents or representatives of the District. They do not deny that they are employees of the District. Neither the Officers nor the Complainant contend that the Officers were acting in their official capacities when they forwarded the e-mail regarding the proposed FOP dues increase. Respondent Whitfield denies

that he forwarded the e-mail at all. The Officers argue that the Complaints infringe their right to engage in union activity and their right to free speech and as a result should be dismissed.

While issues of fact—such as the alleged agency of the Officers—are contested, taking all of Complainant's allegations as true, the Board finds pursuant to Board Rule 520.10 that the allegations against the Officers do not constitute an unfair labor practice under either section 1-617.04(a) or section 1-617.04(b). Therefore, for the reasons that follow, we grant the motion to dismiss.

The Officers assert that an effort "to enforce an absolute one-party state within the union and suppress dissent" is barred in the private sector by the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 ("LMRDA"). (Mot. to Dismiss at p. 15). Section 101(a)(2) of the LMRDA provides for a right of union members in the private sector "to express any views arguments or opinions." 29 U.S.C. § 411(a)(2). The Supreme Court held that a union violated this provision when it removed an elected union official because he opposed a dues increase proposed by the union trustee. *Sheet Metal Workers Int'l Ass'n v. Lynn*, 488 U.S. 347 (1989). The Officers present an argument by analogy:

> If this case arose in the private sector, the FOP's prosecution of this ULP Complaint against Olive, Whitfield, and Dallas would amount to a violation of Title I of the LMRDA. Obviously, the case here is not governed by the LMRDA. Nevertheless, the Supreme Court's reasoning in *Lynn* is instructive in that it recognizes the protected status that union members' oppositional activity with respect to union dues is accorded.

(Mot. to Dismiss at p. 17).

In its Opposition, FOP denies that it violated rights protected by the LMRDA:

> [T]he LMR[D]A expressly permits the D.C. Police Union to take steps to protect itself from the actions of the Respondents. . . . *See* Labor Management Reporting and Disclosure Action [*sic*] § 101(a)(2) ("That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligation[s].").
>
> Further, although the Respondents are correct that they have the right to "meet and assemble freely with other members" and to "express any views, arguments, or opinions," such opinions must be presented "in a responsible manner consistent with good conscience in order to discuss factually and honestly the issues on which the membership must base its decisions." *Id.*

(Opposition at pp. 19-20). Ironically, FOP's representation that the LMRDA includes a requirement that opinions be presented "in a responsible manner consistent with good conscience in order to discuss factually and honestly the issues" is not factual. That language does not appear in the statute. In addition, this case does not involve the enforcement of FOP's rules or by-laws. Rather, the case involves proposed state action: the Complaints seek to have the Board enforce the CMPA against the Officers.

The Officers contend that their exercise of free speech cannot be the basis of an unfair labor practice claim under the CMPA. The Officers assert that they "had the right under [the] First and Fourteenth Amendments to the U.S. Constitution[1] to express their opposition to the FOP's dues increase." (Mot. to Dismiss at p. 14). The Officers note that in a number of defamation cases the Supreme Court recognized the protected character of speech in a labor context. (*Id.*) (citing *Farmer v. United Bhd. of Carpenters & Joiners, Local 25*, 430 U.S. 290, 305-6 (1977); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 282-83 (1974); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966)). FOP correctly replies that these defamation cases held that the National Labor Relations Act, rather than the First Amendment, preempted state defamation laws under the circumstances of those cases. Notwithstanding, the Officers presented those cases only as analogous support. "Just as such protected speech cannot form the basis of tort liability," the Officers reason, "it cannot be the basis for governmental regulatory action." (Mot. to Dismiss at p. 14). The Officers' authority for the latter proposition is *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

In *Gissel*, the Supreme Court discussed section 8(c) of the National Labor Relations Act, which provides, "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). The Court opined:

> [A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, § 8(c) merely implements the First Amendment by requiring that the expression of "any views, argument, or opinion" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of § 8(a)(1). Section 8(a)(1), in turn, prohibits interference, restraint or coercion of employees in the exercise of their right to self-organization.

Gissel, 395 U.S. at 617 (citation omitted). In construing "threat of reprisal or force," the Court was sensitive to the fact that an employer's threat can be implicit given "the economic dependence of the employees on their employers, and the necessary tendency of the former,

[1] Reference to the Fourteenth Amendment was unnecessary. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Parker v. District of Columbia*, 478 F.3d 370, 391 n.13 (D.C. Cir. 2007) ("[T]he District is constrained by the entire Bill of Rights, without need for the intermediary of incorporation.").

because of their relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Id.*

This Board has recognized the applicability of these authorities to cases arising under the CMPA:

> While there is no analogous section in the D.C. Code, the Supreme Court in NLRB v. Gissel Packing Co. noted that Section 8(c) of the NLRA is only a codification of the First Amendment right to free speech. Thus, the right exists independent of any statutory authority and is applicable in cases arising under the D.C. Code.

AFSCME Council 20 v. Gov't of D.C., 36 D.C. Reg. 427, Slip Op. No. 200 at p. 5 n.2, PERB Case No. 88-U-32 (1988) (citation omitted). *See also AFGE, Local 872 v. D.C. Dep't of Pub. Works*, 38 D.C. Reg. 1627, Slip Op. No. 265 at p. 8, PERB Case No. 89-U-11 (1990).

By *Gissel*'s logic, the Officers contend, "it would be improper for PERB to use its enforcement powers under the unfair labor practice provisions of D.C. Code 1-617.04 to penalize individual union members for their exercise of their right to free speech." (Mot. to Dismiss at p. 15). FOP claims that the Officers overstate the holding of *Gissel*, arguing that "[t]he Court in *Gissel* was specific that the employer's speech 'must be carefully phrased on the basis of *objective fact* to convey an employer's belief as to demonstrably probable consequences beyond his control.' [395 U.S.] at 618 (emphasis added)." (Opposition at pp. 17-18). Here FOP changed the subject, and thus the meaning, of the sentence it quoted from *Gissel*. FOP is correct that the Court was discussing *employer*'s speech, but it was discussing a particular type of employer's speech that could convey an implicit threat, namely, a prediction of the effects of unionization, which could imply a threat to close a plant. The Court's full explanation is as follows:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, *the prediction* must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.

395 U.S. at 618 (emphasis added). The present case involves neither speech by an employer nor a prediction as to the effects of unionization.

More broadly, the Complainant argues that as the e-mail contains "multiple knowingly false representations," it is afforded no constitutional protection. (Opposition at p. 18). The Complainant quotes *Garrison v. Louisiana*, where the Supreme Court said "the knowingly false statement and the statement made with reckless disregard of the truth, do not enjoy constitutional protection." 379 U.S. 64, 75 (1964). Notwithstanding, the Supreme Court has more recently said that the preceding quotation from *Garrison* and similar statements of the Court "all derived from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement" and do not establish a general rule that false speech is unprotected by the First Amendment. *United States v. Alvarez*, 132 S. Ct. 2537, 2545-47 (2012) (plurality opinion). Section 8(c) contains no exception for false speech. Rather, it expressly protects "noncoercive speech." *Brown v. United States*, 554 U.S. 60, 68, 74 (2008).

As noted, the right codified in section 8(c) applies to cases arising under the CMPA. The e-mail with its attachment was attached to both Complaints. A review of the e-mail and its attachment reveals that it contains no "threat of reprisal or force or promise of benefit." The Complainant does not contend otherwise. Therefore, this noncoercive e-mail cannot constitute or be evidence of an unfair labor practice. Although the Complainant may dispute the e-mail's contents and object to its tone, this Board recognizes that "the free discussion of labor related matters is essential in a modern society." *Forbes v. D.C. Dep't of Corrs.*, 37 D.C. Reg. 2570, Slip Op. No. 244 at p. 12, PERB Case Nos. 87-U-05 and 87-U-06 (1990).

In view of the foregoing, the Officers' motion to dismiss is granted.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complainant's motion to consolidate is granted.

2. The motion to dismiss filed by Respondents Whitfield, Olive, and Dallas is granted. PERB Case No. 11-U-44 is dismissed. Respondents Whitfield, Olive, and Dallas are dismissed as respondents from PERB Case No. 11-U-35.

3. The Board's Executive Director shall refer to mediation the remaining parties to PERB Case No. 11-U-35.

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.

July 1, 2013

CORRECTED CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 11-U-35 and 11-U-44 was transmitted via U.S. Mail and electronic mail to Anthony M. Conti, tony@lawcfl.com, 36 South Charles St., suite 2501, Baltimore, Maryland 21201, and Betty Grdina, bgrdinia@mooneygreen.com,1920 L St. NW, suite 400, Washington, D.C. 20036, on the 2d of July, 2013, and to Mark Viehmeyer, mark.veihmeyer@dc.gov, and Nicole L. Lynch, nicole.lynch@dc.gov, 300 Indiana Ave. NW, room 4126, Washington, DC 20001 on the 9th of July, 2013.

David McFadden
Attorney-Advisor