

March 22, 2010, the Hearing Examiner issued a Report and Recommendation (“Report”), recommending that the Board find that MPD violated the CMPA in Complaint 08-U-40 and recommended remedies, and that Complaint 08-U-63 be dismissed with prejudice. (Report at 28). The Parties filed Exceptions to the Hearing Examiner’s Report, as well as Oppositions to the other’s Exceptions.

II. Hearing Examiner’s Report and Recommendations

To determine whether MPD violated D.C. Code § 1-617.04(a)(1) by interfering, restraining, intimidating, or retaliating against an employee for engaging in a protected activity, the Hearing Examiner applied the test articulated by the National Labor Relations Board (“NLRB”) in *Wright Line v. Lamoureux*, 251 N.L.R.B. 1083, 1089 (1980), *enforced* 622 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), which was adopted by the Board in *Charles Bagenstose and Dr. Joseph Borowski v. District of Columbia Public Schools*, 35 D.C. Reg. 415, Slip Op. No. 270, PERB Case No. 88-U-33 and 88-U-34 (1991).

Further, the Hearing Examiner relied upon the burden-shifting, anti-union animus causation test that the Board has adopted in which “the moving or complaining party has the initial burden of establishing a *prima facie* case by showing that the union or other protected activity was a ‘motivating factor’ in the employer’s disputed action.” *American Federation of State, County and Municipal Employees, Local 2401, et al v. District of Columbia Department of Human Services*, 48 D.C. Reg. 3207, Slip Op. No. 644, PERB Case No. 98-U-05 (2001) (AFSCME). After a *prima facie* case for anti-union animus is established, the “burden then shifts to the employer to demonstrate that the same disputed action would have taken place notwithstanding the protected activity.” *Id.* The employer’s employment decision must be analyzed according to the totality of the circumstances, including the history of anti-union animus, the timing of the employment action, and disparate treatment. *Doctors Council of the District of Columbia v. D.C. Commission on Mental Health Services*, 47 D.C. Reg. 7568, Slip Op. No. 636, PERB Case No. 99-U-06 (2000).

A. 08-U-40 Complaint

In Complaint 08-U-40, the Hearing Examiner found that FOP alleged that “on April 19, 2008, the Respondents committed unfair labor practices (ULP) by interfering, restricting, intimidating and retaliating against Complainant’s Chief Shop Steward Timothy Finnegan while he was performing representational activities in violation of DC Code § 1-6717.04(a)(1).” (Report at 2).

The Hearing Examiner found the following relevant facts. On April 19, 2008, FOP Shop Steward Timothy Finnegan went to the Fifth District (5D) office to discuss with the Commander possible schedule changes, affecting bargaining unit members. (Report at 18). In the 5D sergeant’s office, “Finnegan approached Stroud and asked whether officers’ work schedules were going to be disrupted.” *Id.* The Hearing Examiner found that “[t]he record establishes that at all times during his conversation with Stroud, Finnegan was acting in his capacity as the FOP Chief Shop Steward.” (Report at 18-19). In addition, “both Stroud and Anderson testified that they knew Finnegan was the FOP’s 5D representative.” (Report at 19). Based on credibility

determinations of the witnesses at the hearing, the Hearing Examiner found that the statements made by Stroud were “intended to demean Finnegan in his representational capacity” and intended to “undermine the FOP’s representational status as well.” (Report at 20). Further, the Hearing Examiner found that “Stroud’s efforts to impose MPD’s rank structure on Finnegan, while Finnegan was acting in his capacity as FOP’s representative, constituted anti-union animus and further proof of Stroud’s continuing efforts to interfere with, restrain and coerce Finnegan in his FOP representational role.” (Report at 21). The Hearing Examiner found that “by dismissing Finnegan from the sergeants’ office both Stroud and Anderson purposely demeaned Finnegan in his FOP representational capacity to force him into the MPD police rank structure where he would be subject to their orders.” *Id.*

Based on these reasons, the Hearing Examiner concluded that “FOP made a *prima facie* showing that Finnegan’s protected conduct was the motivating factor in Stroud and Anderson’s retaliation against Finnegan...” *Id.* The burden then shifted to MPD to rebut that Lts. Stroud and Anderson would have acted the same in the absence of Finnegan’s protected activity. (Report 21-22). The Hearing Examiner found MPD’s argument that Lt. Stroud had a legitimate business related reason for ordering Finnegan to work was pretextual. (Report at 22). Based on the record, the Hearing Examiner found that FOP proved its burden in Complaint 08-U-40. *Id.*

B. Complaint 08-U-63

In Complaint 08-U-63, the Hearing Examiner found that FOP alleged that “the Respondents committed unfair labor practices by interfering, restricting, intimidating and retaliating against Complaint’s Chief Shop Steward Timothy Finnegan when Assistant Chief Peter Newsham, Internal Affairs Bureau, failed and refused to initiate an IAB investigation into the April 19, 2008 incident in violation of DC Code §1-617.04(a)(1).” (Report at 2).

According to the Hearing Examiner, “[t]he record establishes that on April 25, 2008, Delroy Burton, FOP Vice-Chairman, requested in writing that Peter Newsham, MPD’s Assistant Chief, Internal Affairs Bureau (IAB), investigate the incident at 5D between...Finnegan and Stroud.” (Report at 22). Further, “[t]he record establishes that on April 30, 2008, Newsham responded in writing” that IAB would not conduct an investigation into the incident, because the interaction did not reveal a specific violation and was not sufficient to initiate a misconduct investigation. *Id.* The Hearing Examiner found that even if the allegations in Complaint 08-U-63 were taken in the light most favorable to the Complainant, FOP failed to state grounds for relief under the CMPA. (Report at 23). In addition, the Hearing Examiner found that “FOP has not presented material evidence to support a finding of a violation of the CMPA” and “FOP has not proven a *prima facie* case.” *Id.* The Hearing Examiner concluded that FOP had not met its burden of proof in Complaint 08-U-63 and that it was without merit. *Id.*

C. Recommendations

In regards to Complaint 08-U-40, the Hearing Examiner recommended that MPD should be ordered to:

1. Cease and desist from interfering, restraining, or coercing the FOP in

the exercise of its rights guaranteed by § 1-617, *et seq.* by refusing to discuss working conditions with FOP representatives and refusing to treat FOP representatives as equals when they are acting in a representational capacity;

2. Post for 30 days a notice, where notices to employees are ordinarily posted in the work place, stating that the MPD has violated the provisions of DC Code § 1-617.04(a)(1) when Lieutenants Gregory Stroud and Judith Anderson refused to discuss working conditions with FOP representative Timothy Finnegan and refused to treat him as an equals (*sic*) when he was acting in a representational capacity;
3. Pay FOP's costs in the litigation of PERB Case Nos. 08-U-40 and 08-U-63;
4. Any other relief that the PERB deems appropriate.

(Report at 28). In addition, the Hearing Examiner recommended that Complaint 08-U-63 be dismissed with prejudice. *Id.*

III. Discussion

The Board will affirm a hearing examiner's findings if they are reasonable and supported by the record. See *American Federation of Government Employees, Local 872 v. D.C. Water and Sewer Authority*, Slip Op. No. 702, PERB Case No. 00-U-12 (March 14, 2003).

A. Respondent's Exceptions

Respondent filed Exceptions to the Hearing Examiner's Report ("Respondent's Exceptions") challenging: (1) the Board's jurisdiction to hear the Complaints; and (2) the recommended award. (Respondent's Exceptions at 3). The Complainant filed an Opposition to the Respondent's Exceptions ("Complainant's Opposition").

1. Jurisdiction

Before the Hearing Examiner, MPD argued that the Board did not have jurisdiction over the Complaints, because FOP cannot pursue the same complaint before the Board and through the grievance and arbitration process. (Report at 18). The Hearing Examiner found that FOP's allegations in Complaints 08-U-40 and 08-U-63 only asserted violations of the CMPA and not the collective bargaining agreement. *Id.* Further, the Hearing Examiner found that MPD's jurisdiction argument lacked merit. *Id.*

In order for the Board to have jurisdiction over an unfair labor practice complaint, the complaint must contain allegations, which proven, would establish a violation of the CMPA. See *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department*, Slip Op. No. 1131, PERB Case No. 09-U-59 (2011), *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-CTO*

and DC. Department of Public Works, 48 DCR 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994).

MPD, however, argues that the bases of the Complaints are contractual in nature and were pursued initially through the Parties' grievance process. (Respondent's Exceptions at 3-5). The Board "distinguishes between those obligations that are statutorily imposed under the CMPA and those that are contractually agreed upon between the parties." *American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks*, 50 D.C. Reg. 5049, Slip Op. No. 697, PERB Case No. 00-U-22 (2002) (citing *American Federation of State, County and Municipal Employees, Local 2921, v. District of Columbia Public Schools*, 42 D.C. Reg. 5685, Slip Op. No. 339, PERB Case No. 92-U-08 (1995)). Further, it is well established that the Board's "authority only extends to resolving statutorily based obligations under the CMPA." *Id.* In addition, the Board has held that it lacks jurisdiction over violations that are strictly contractual in nature. *See AFSCME*, Slip Op. No. 339. Therefore, the Board has consistently held that if allegations made in an unfair labor practice complaint concern statutory violations, then the Board has jurisdiction to decide the complaint. *See Fraternal Order of Police/Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department*, Slip Op. No. 1119, PERB Case No. 08-U-38 (2011).

In the instant case, neither Complaint asserts any contractual violation. In Complaint 08-U-40, FOP alleged that MPD committed an unfair labor practice by interfering with Chief Steward Finnegan's "right to perform Union functions free from intimidation." (Complaint 08-U-40 at 6). Further, FOP alleged that MPD declined FOP's request to conduct an investigation into Lieutenant Stroud's actions, and that MPD's inaction was to interfere, restrain, or coerce Officer Finnegan's exercise of his representational rights under the CMPA, in violation of D.C. Code § 1-617(a). (Complaint 08-U-63 at 5-6). The Complaints each set forth allegations that MPD interfered with, coerced or restrained employees in the exercise of their rights under the CMPA, which if proven true, would constitute a violation of D. C. Code § 1-617.04(a). Consequently, the Complaints contain sufficient allegations of violations of the CMPA to establish the Board's jurisdiction. Therefore, the Board has jurisdiction over the Complaints, and Respondent's Exceptions to the Hearing Examiner's determination of the Board's jurisdiction are denied.

2. Remedies

In its Exceptions, Respondent argues that the Hearing Examiner's recommended remedies are unsupported by the record, and "specifically objects to the Hearing Examiner's recommendation that Respondent pay the FOP's costs in the litigation of PERB Case Nos. 08-U-40 and 08-U-63." (Respondent's Exceptions at 6). Respondent argues that the factual predicate for awarding costs does not exist in this matter. (Respondent's Exceptions at 7).

The D.C. Code § 1-617.13(d) states: "The Board shall have the authority to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may determine." (2001 ed.). Further, the Board has stated,

First, any such award of costs necessarily assumes that the party to whom

the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are “reasonable” that may be ordered reimbursed...Last...such an award must be shown to be in the interest of justice.

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued... What we can say here is that among the situation in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive representative.

AFSCME, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue, 73 D.C. Reg. 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (2000).

In its Opposition, FOP argues that these three elements were satisfied. (Complainant's Opposition at 8). In the present case, FOP argues that the Hearing Examiner found that MPD intentionally interfered with FOP's Chief Shop Steward's right to engage in protected union activity in 08-U-40. *Id.* Second, FOP argues that only reasonable costs were awarded with the exclusion of attorney's fees based on the Board's precedent. *Id.* Third, FOP argues that the facts of the case demonstrate that an award of costs is in the interest of justice. *Id.*

In Complaint 08-U-40, the Hearing Examiner found that MPD's officials' actions were “an effort to demean Finnegan in his FOP representational capacity” and that Stroud's statement constituted anti-union animus. (Report at 20). Further, the Hearing Examiner found that MPD's asserted legitimate business related reason was pretextual. (Report at 22). An award of costs for Complaint 08-U-40 is consistent with the Board's criteria for an award of reasonable costs. Therefore, the Board adopts the Hearing Examiner's recommendation for an award to FOP for reasonable costs for Complaint 08-U-40.

In contrast, the Hearing Examiner did not find in favor of FOP in Complaint 08-U-63. (Report at 27). As stated above, the first requirement in the Board's standard for an award of reasonable costs is that “the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part.” *AFSCME, D.C. Council 20, Local 2776*, Slip Op. No. 245. As the Hearing Examiner found Complaint 08-U-63 was “without merit” and did not articulate any basis for awarding reasonable costs to FOP for Complaint 08-U-63, the Hearing Examiner's recommendation of an award to FOP for reasonable costs for Complaint 08-U-63 is not consistent with Board precedent. Therefore, the Board grants MPD's Exceptions to the Hearing Examiner's recommendation of an award to FOP for reasonable costs for Complaint 08-U-63.

B. Complainant's Exceptions

On May 11, 2009, FOP filed a Motion for Default and Admission of Material Facts ("Default Motion"). (Report at 25). FOP asserted in the Default Motion that "MPD had not answered FOP's Complaint in [PERB] Case 08-U-63 for the individually named Respondents," and based on Board Rule 520.7, the individually named Respondents admitted the material facts and waived a hearing. *Id.*

The Hearing Examiner determined that "a plain reading of the statute [D.C. Code § 1-617.04] does not establish the individual liability for unfair labor practices," however, "[t]he statutory language does establish the responsibility of the District of Columbia for violations of the CMPA section by its agents and representatives." (Report at 26). The Hearing Examiner denied FOP's Default Motion for lack of merit. *Id.*

FOP filed an Exception to the Hearing Examiner's conclusion. The Board finds the Hearing Examiner's interpretation of the CMPA is consistent with Board precedent. *See Fraternal Order of Police/Metropolitan Police Dep't Labor Comm. v. D.C. Metropolitan Police Dep't*, 59 D.C. Reg. 6579, Slip Op. No. 1118 at p. 4-5, PERB Case No. 08-U-19 (2011) ("Suits against District officials in their official capacities should be treated as suits against the District."). FOP's Exception is a mere disagreement with the Hearing Examiner's findings.³ Therefore, the Board adopts the Hearing Examiner's recommendation for the Default Motion.

In its Exceptions, regarding Complaint 08-U-63, FOP argues that MPD admitted that it did not initiate a misconduct investigation of Lieutenant Stroud's actions and that MPD's failure to perform an investigation constituted a violation of the CMPA. (Complainant's Exceptions at 9). FOP provides no basis for rejecting the Hearing Examiner's findings and conclusions that FOP did not meet its burden for stating grounds for relief under the CMPA in Complaint 08-U-63. Consequently, FOP's Exceptions are a mere disagreement with the Hearing Examiner's findings. The Board has held that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the findings where they are fully supported by the record. *See American Federation of Government Employees, Local 874 v. D.C. Department of Public Works*, 38 D.C. Reg. 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). Therefore, the Board denies FOP's Exceptions, and adopts the Hearing Examiner's recommendation that Complaint 08-U-63 be dismissed with prejudice.

IV. Conclusion

Regarding the Hearing Examiner's conclusion that MPD's actions in Complaint 08-U-40 constituted a violation of the CMPA and that FOP failed to meet its burden in Complaint 08-U-63, the Board finds that the Hearing Examiner's conclusions are reasonable, supported by the record, and consistent with the Board's precedent. The Board affirms the Hearing Examiner's remedy recommendations for Complaint 08-U-40. The Board, however, rejects the Hearing

³ PERB notes that on March 12, 2013, and subsequent to filing its Exceptions in this case, FOP filed a motion with PERB to dismiss the individually named respondents in this matter. PERB has now granted this motion and thus, FOP's arguments against the Hearing Examiner's findings in this regard have essentially been rendered moot.

Examiner's award to FOP for reasonable costs related to Complaint 08-U-63 as contrary to Board precedent, as discussed.

The Board denies MPD's Exceptions regarding the Board's jurisdiction over the Complaints and the Hearing Examiner's Recommendation that MPD pay FOP reasonable costs for Complaint 08-U-40. The Board grants MPD's Exceptions to the Hearing Examiner's recommendation that MPD pay reasonable costs to FOP for Complaint 08-U-63. The Board denies FOP's Exceptions.

ORDER

IT IS HEREBY ORDERED THAT:

1. PERB Case No. 08-U-63 is dismissed with prejudice.
2. MPD shall cease and desist from interfering, restraining, or coercing the FOP in the exercise of its rights guaranteed by D.C. Code § 1-617(1)(a) by refusing to discuss working conditions with FOP representatives and refusing to treat FOP representatives as equals when they are acting in a representational capacity.
3. MPD shall conspicuously post, within ten (10) days from the issuance of this Decision and Order, the attached Notice where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.
4. MPD shall notify the Public Employees Relations Board in writing within fourteen (14) days from the issuance of this Decision and Order that the Notice has been posted accordingly.
5. MPD will pay FOP's reasonable costs in the litigation of PERB Case No. 08-U-40.
6. 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.

March 14, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order and Notice was transmitted to the following parties on this the 15th day of March, 2013.

Mark Viehmeyer
Nicole L. Lynch
Metropolitan Police Department
300 Indiana Avenue, N.W., Room 4126
Washington, D.C. 20001

U.S. Mail

Anthony M. Conti
Daniel J. McCartin
Conti Fenn & Lawrence, LLC
36 South Charles Street, Suite 2501
Baltimore, M.D. 21201

U.S. Mail



Erica J. Balkum, Esq.
Attorney-Advisor
Public Employee Relations Board
1100 4th Street, SW
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Telephone: (202) 727-1822
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT ("MPD"), THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1369, PERB CASE NO. 08-U-40 (March 14, 2013).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered MPD to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) by the actions and conduct set forth in Slip Opinion No. 1369.

WE WILL cease and desist from interfering, restraining, or coercing employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act ("CMPA").

WE WILL NOT, in any like or related manner, interfere, restrain or coerce employees in their exercise of rights guaranteed by the Labor-Management subchapter of the CMPA.

D.C Metropolitan Police Department

Date: _____ By: _____

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 1100 4th Street, SW, Suite E630; Washington, D.C. 20024. Phone: (202) 727-1822.

BY NOTICE OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

March 14, 2013



Public
Employee
Relations
Board



1100 4th Street S.W.
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NOTICE

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WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered MPD to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) by the actions and conduct set forth in Slip Opinion No. 1369.

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BY NOTICE OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

March 14, 2013