

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

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In the Matter of:	)	
	)	
Greggory Pemberton	)	PERB Case No. 18-S-02
	)	
Complainant	)	Opinion No. 1712
	)	
v.	)	
	)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee	)	
	)	
Respondent	)	
_____	)	

**DECISION AND ORDER**

**I. Introduction**

Greggory Pemberton (Complainant) filed this standards of conduct complaint (Complaint) alleging that the Fraternal Order of Police/Metropolitan Police Department Labor Committee (Union) violated section 1-617.03(a)(1) and (2) of the Comprehensive Merit Personnel Act (CMPA).<sup>1</sup> A hearing was held on September 17 and October 23, 2018. The Hearing Examiner’s Report and Recommendation (Report) is before the Board for disposition

**II. Statement of the Case**

At the time the events giving rise to this case occurred, the Complainant held the position of Treasurer of the Union. Sergeant Matthew Mahl held the position of Chairman and Sergeant Stephen Bigelow held the position of Vice-Chairman.<sup>2</sup>

On May 23, 2016, the Executive Committee met to discuss legal contracts. By a vote of 3-2, it was agreed to enter into a three-year contract with the law firm of Pressler, Senftle & Wilhite, P.C. (Pressler firm). The Complainant opposed the contract with the Pressler firm and instead favored retaining the services of Conti, Fenn & Lawrence (Conti firm).<sup>3</sup>

<sup>1</sup> Complaint at 9.

<sup>2</sup> Report at 2.

<sup>3</sup> Report at 2.

On June 28, 2016, during an Executive Council meeting, the Complainant commented that he had shared privileged and confidential information regarding the Pressler legal contract with the Conti firm. Following the meeting, Chairman Mahl shared this news in an email to Metropolitan Police Department (MPD) Internal Affairs alleging a violation of federal law, specifically the Sherman Anti-Trust Act. Chairman Mahl did not inform the Complainant or other Union officials or chief stewards of his concern regarding a violation of law by the Complainant. He also did not inform them of his email to MPD Internal Affairs.<sup>4</sup>

Internal Affairs referred the matter to the Federal Bureau of Investigation (FBI), which later advised that this was not a violation of the Sherman Anti-Trust Act or any other federal law.<sup>5</sup> Chairman Mahl was informed of the FBI's response and MPD completed a Form 854, indicating the matter was closed.<sup>6</sup>

The Complainant learned of Chairman Mahl's allegations against him when he saw the Form 854. On October 31, 2017, at an Executive Council meeting, the Complainant expressed his disapproval of Chairman Mahl's conduct and made a motion to impeach Chairman Mahl pursuant to Article 7 of the Union bylaws. Chairman Mahl ruled the motion out of order.<sup>7</sup> Chairman Mahl stated that the provisions of Article 12 must be used to impeach any Executive Council member. Article 12 of the Union's bylaws details the process of impeachment which includes a formal written complaint by the person making the charge.<sup>8</sup> The Chairman then indicated that those in attendance could vote to overturn his ruling, which the majority of those in attendance did.<sup>9</sup> The Complainant then made a second motion to waive the 30-day requirement for a membership vote on the impeachment and to hold a vote at a previously scheduled membership meeting on December 20, 2017. The motion passed.<sup>10</sup>

On November 29, 2017, the Union Executive Council met and discussed the appropriate process for impeachment proceedings pursuant to the bylaws. Chairman Mahl explained that the motion for impeachment passed at the October 31, 2017, meeting was out of order and enquired how the Council wished to proceed.<sup>11</sup> The Council failed to pass any motions related to the impeachment vote. After this meeting, the Complainant spoke with Vice-Chairman Bigelow and offered to submit charges for impeachment pursuant to Article 12 to address the Council's concerns. Vice-Chairman Bigelow stated that he would not accept the charges.<sup>12</sup>

On December 20, 2017, during a general membership meeting, Vice-Chairman Bigelow again refused to accept impeachment charges pursuant to Article 12 even after Chairman Mahl told Vice-Chairman Bigelow to accept the charges.<sup>13</sup> Soon after the meeting, Vice-Chairman

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<sup>4</sup> Report at 3.

<sup>5</sup> Report at 4.

<sup>6</sup> Report at 4.

<sup>7</sup> Report at 4.

<sup>8</sup> Report at 5.

<sup>9</sup> Report at 5.

<sup>10</sup> Report at 6.

<sup>11</sup> Report at 6.

<sup>12</sup> Report at 6.

<sup>13</sup> Report at 6.

Bigelow spoke with the Complainant and indicated that he would accept the charges if an attorney said he should, but the Complainant stated that he would seek other redress.<sup>14</sup>

The Complainant alleges that the CMPA was violated when Chairman Mahl notified MPD that the Complainant may have violated the Sherman Anti-Trust Act and Chairman Mahl and Vice-Chairman Bigelow then deprived him of the opportunity to seek impeachment and removal of Chairman Mahl pursuant to the bylaws.

### **III. Hearing Examiner's Report and Recommendation**

#### **A. Findings**

The Hearing Examiner concluded that the Union violated section 1-617.03(a)(1) of the D.C. Official Code when it failed to provide the Complainant fair and equal treatment under the governing rules of the organization.<sup>15</sup> The Hearing Examiner also found that the motion to impeach Chairman Mahl was improper and, therefore, invalid.<sup>16</sup> The Hearing Examiner looked to the Union bylaws to conclude that certain due process protections of Article 12 are required in the Article 7 impeachment process. According to the Hearing Examiner, Chairman Mahl was correct when he determined that the motion was out of order.<sup>17</sup> The Hearing Examiner further found that Chairman Mahl was mistaken in suggesting the participants could vote to overrule that determination, which they did.

The Hearing Examiner found that the Complainant was deprived of fair and equal treatment under the bylaws in violation of the CMPA when Vice-Chairman Bigelow on two occasions refused Complainant's attempts to submit charges against Chairman Mahl pursuant to Articles 7 and 12.

#### **B. Recommendations**

The Hearing Examiner recommended that the Union cease and desist from failing to provide fair and equal treatment to all members under the governing rules of the organization. In order to cease and desist from denying fair and equal treatment to the Complainant, the Hearing Examiner recommended that the Union process his compliant against Chairman Mahl pursuant to Article 12 of the bylaws. Although Chairman Mahl no longer holds an office subject to impeachment under Article 12, disciplinary charges related to former Chairman Mahl's notification may be brought against him as a member of the Union per Article 12. Finally, the Hearing Examiner recommended that the Union post a notice for thirty (30) days stating that it has violated D.C. Official Code § 1-617.03(a)(1).

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<sup>14</sup> Report at 6.

<sup>15</sup> Report at 9.

<sup>16</sup> Report at 7.

<sup>17</sup> Report at 7.

#### **IV. Exceptions and Opposition to Exceptions**

The Union filed Exceptions to the Hearing Examiner's Report and Recommendation. The Union states that the Hearing Examiner erred by ignoring Article 14 of the bylaws which precludes the filing of this Complaint, and ignoring the fact that the Complainant never submitted an Article 12 charge to the Union. The Union urges the Board to reject the Hearing Examiner's findings regarding Article 12 as they are inconsistent with the hearing record, precluded by the bylaws, and do not constitute a violation of the CMPA.<sup>18</sup>

The Complainant filed an opposition to the Union's exceptions. The Complainant states that the Union's exceptions are simply rehashing arguments made during the hearing, and constitute a mere disagreement with the Hearing Examiner's findings and should be rejected.<sup>19</sup>

#### **V. Discussion**

The Board will affirm a Hearing Examiner's Report and Recommendation if the recommendations are reasonable, supported by the record, and consistent with Board precedent.<sup>20</sup> Pursuant to Board Rule 520.11, "[t]he party asserting a violation of the CMPA, shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." The Board has held that "issues of fact concerning the probative value of evidence and credibility are reserved to the Hearing Examiner."<sup>21</sup>

##### **A. Subject Matter Jurisdiction**

The Union argues that "the Complainant lacks subject matter jurisdiction" based on Article 14 of the bylaws.<sup>22</sup> Article 14 requires that a complaint first be submitted to the Union for action prior to any other action being brought against the Union.<sup>23</sup> According to the Union, the fact that the Complainant never submitted an Article 12 complaint precludes him from submitting a complaint to the Board.<sup>24</sup>

As the Superior Court has stated and the Board has agreed, D.C. Official Code section 1-605.02(9) grants the Board incontrovertible subject matter jurisdiction over standards of conduct complaints.<sup>25</sup> Furthermore, D.C. Official Code section 1-617.03(a)(1) and PERB Rule 544.2(a)

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<sup>18</sup> Respondent's Exceptions to Hearing Examiner's Report and Recommendation at 1.

<sup>19</sup> Opposition to Exceptions at 6.

<sup>20</sup> See *Am. Fed'n of Gov't Emp., Local 1403 v. D.C. Office of the Attorney General*, 59 D.C. Reg. 3511, Slip Op. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012).

<sup>21</sup> *Council of Sch. Officers, Local 4, Am. Fed'n of Sch. Adm'r v. D.C. Pub. Schs.*, 59 D.C. Reg. 6138, Slip Op. 1016 at 6, PERB Case No. 09-U-08 (2010).

<sup>22</sup> Respondent's Exceptions to Hearing Examiner's Report and Recommendation at 6.

<sup>23</sup> Respondent's Exceptions to Hearing Examiner's Report and Recommendation at 7.

<sup>24</sup> Respondent's Exceptions to Hearing Examiner's Report and Recommendation at 7.

<sup>25</sup> *Am. Fed'n of Gov't Emp, Nat'l Office v. D.C. Public Emp. Relations Bd.*, Case No. 2013 CA 000846 P(MPA) at p. 6; *Collins v. Am. Fed'n of Gov't Emp, Nat'l Office and Local 1975*, 63 D.C. Reg. 2102, Slip Op. 1557 at 4, PERB Case No. 10-S-10 (2016).

allow any individual to file a standards of conduct complaint with the Board if that individual has been aggrieved by a lack of fair and equal treatment under the governing rules of the organization.<sup>26</sup> The Union argues that the Complainant should have first submitted an Article 12 complaint to the Union prior to taking action with the Board; however as found by the Hearing Examiner, the Complainant attempted to file an Article 12 complaint with Vice-Chairman Bigelow on multiple occasions.<sup>27</sup> Since this is the basis of the allegation in this case, the Board finds that there is no jurisdictional issue with respect to this Complaint.

### **B. Article 12**

The Union argues that it never denied the Complainant fair and equal treatment because the Complainant never submitted an Article 12 complaint.<sup>28</sup> As the Hearing Examiner stated, the Union's refusal to accept the Article 12 complaint is the basis of the violation. The Hearing Examiner found that the Complainant attempted to submit an Article 12 complaint to the Vice-Chairman on two occasions but was denied that right. On a third occasion, the Vice-Chairman offered to accept a charge subject to advice from an attorney. This action of the Vice-Chairman constituted a lack of fair and equal treatment under the governing rules of the organization. The Board finds the Hearing Examiner's conclusion reasonable, supported by the record, and consistent with Board precedent.

## **VI. Conclusion**

Pursuant to Board Rule 520.14, the Board finds the Hearing Examiner's conclusions and recommendations to be reasonable, supported by the record, and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner's report and recommendation.

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. The Standard of Conduct Complaint is granted.
2. The Union shall cease and desist from failing to provide fair and equal treatment to all members under the governing rules of the organization, as codified under D.C. Official Code section 1-617.03(a)(1).
3. The Union shall cease and desist from denying fair and equal treatment to Complainant, Gregory Pemberton, by failing to process his complaint against former Chairman Mahl pursuant to Article 12 of the Union's bylaws. It is understood that while former Chairman Mahl no longer holds an office subject to impeachment pursuant to Article 7, disciplinary

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<sup>26</sup> D.C. Official Code § 1-617.03(a)(1); PERB Rule 544.2(a).

<sup>27</sup> Report at 6.

<sup>28</sup> Respondent's Exceptions to Hearing Examiner's Report and Recommendation at 7-8.

charges related to former Chairman Mahl's notification to Internal Affairs may be brought against former Chairman Mahl as a member of the Union pursuant to Article 12.

4. The Union shall conspicuously post for thirty (30) days, the attached Notice where notices to its members are normally posted.
5. The Union shall notify the Public Employee Relations Board in writing, within fourteen (14) days from the receipt of this Decision and Order that the Notice has been posted accordingly.
6. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**

By unanimous vote of Board Chairperson Charles Murphy and Board Members Ann Hoffman, Mary Anne Gibbons, Barbara Somson, and Douglas Warshof.

May 16, 2019

Washington, D.C.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 18-S-02, Op. No. 1712 was transmitted to the following parties on this the 22nd day of May, 2019.

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