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GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:)	
)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee,)	
)	PERB Case No. 09-U-12
Complainant,)	
)	Opinion No. 1123
v.)	
)	
District of Columbia Metropolitan Police Department, ¹)	Motion to Dismiss
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case

This case involves an Unfair Labor Practice Complaint ("Complaint") filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("Complainant" or "FOP") against the District of Columbia Metropolitan Police Department ("Respondent" or "MPD"). FOP alleges that MPD violated D.C. Code § 1-617.04(a) (1) of the Comprehensive Merit Personnel Act ("CMPA") by denying a bargaining unit member, Detective McConnell, union representation at an adverse action hearing. MPD filed an Answer denying the allegations and requesting that the Board dismiss the Complaint. In addition, MPD asserts that, other than the Agency itself, the Board does not have jurisdiction over the other named Respondents.

The Union's Complaint and MPD's Answer and motion to dismiss are before the Board for disposition.

¹ The Executive Director is administratively dismissing the names of individuals named in this matter pursuant to DCR-, Slip Op. No. 1118 at p. 5, PERB Case No. 08-U-19 (August 19, 2011).

II. Discussion

FOP asserts the following facts:

4. Cathy L. Lanier is the Department's Chief of Police.
5. Gregory Stroud is assigned to the Department's Fifth District within the Patrol Services Bureau and carries the rank of Lieutenant.
6. Kevin McConnell is a Detective assigned to the Department's Criminal Investigations Division.
7. Hiram Rosario is a member of the CBU and a union representative. Specifically, Hiram Rosario is the Chief Shop Steward of the Seventh District, the highest-ranking Union official at the Seventh District.
8. On Wednesday, December 17, 2008, at approximately 12:00 p.m., Detective McConnell received a telephone call indicating that he needed to report to the Office of Human Resources to receive an Adverse Action package.
9. Thereafter, Detective McConnell contacted Chief Shop Steward Hiram Rosario, and he accompanied Detective McConnell to the headquarters of the MPD where the Office of Human Resources is located.
10. Upon their arrival, Detective McConnell and Chief Shop Steward Hiram Rosario notified Officer Ava L. Cole that they were there. Officer Cole indicated that she was making copies, and that Lieutenant Gregory Stroud would meet with Detective McConnell and Chief Shop Steward Rosario shortly.
11. Subsequently, Detective McConnell and Chief Shop Steward Rosario were led to Lieutenant Stroud's office by Officer Cole. Once inside his office, Lieutenant Stroud advised Detective McConnell that he was being served with a Notice of Proposed Adverse Action package and that the Department was recommending that he be terminated.
12. While signing for receipt of the Notice of Proposed Adverse Action, with respect to his need for legal representation Lieutenant Stroud also made the following

statement to Detective McConnell: "you need to keep your options open, you should not use the FOP." Upon hearing this statement, Chief Shop Steward Hiram Rosario stepped in and informed Lieutenant Stroud that he did not have the right or the authority to make these comments. Chief Shop Steward Rosario also told Lieutenant Stroud that he should apologize to the FOP for his remarks.

13. Upon information and belief Officer Cole heard the entire conversation in Lieutenant Stroud's office involving Detective McConnell, Lieutenant Stroud and Chief Shop Steward Rosario.
14. Lieutenant Stroud's comments are a clear repudiation of the Union and an interference with Detective McConnell's right to seek legal assistance through the Union.

(Complaint at pgs. 3-4).

Based on the foregoing factual allegations, FOP argues that MPD violated D.C. Code § 1-617.04(a) (1) by interfering, restraining, or coercing Detective McConnell from exercising his rights under the CMPA. (See Complaint at p. 5). FOP contends that MPD:

committed an unfair labor practice (ULP) by repudiating and interfering with Detective McConnell's protected association rights. Specifically, D.C. Code section 1-617.06(a)(2) gives Detective McConnell the right: "[t]o form, join, or assist any labor organization" free from interference, restraint or coercion. Here, Lieutenant Stroud's comments to Detective McConnell evidence a clear repudiation of the Union and an explicit attempt to interfere and restrain Detective McConnell from exercising his right to have Union representation at his Adverse Action Hearing. As a result, the Department has committed an unfair labor practice by violating D.C. Code 1-617.04(a)(1). In view of the Department's unfair labor practices, Detective McConnell, the Union, and its membership are entitled to relief.

(Complaint at p. 5, enumeration deleted).

As a remedy, FOP requests that the Board: (1) find that MPD committed an unfair labor practice; (2) order MPD, Chief Lanier, and Lieutenant Stroud to cease and desist from engaging in an unfair labor practice; (3) direct MPD to post notices of their alleged violation; (4) direct MPD to provide a formal letter of apology to the FOP for its comments; (5) direct MPD to issue an order that Lieutenant Stroud be removed; (6) order MPD to provide training to all supervisors

on Union rights under the CMPA; and (7) pay FOP's costs associated with this proceeding. (See Complaint at pgs. 5-6).

MPD disputes FOP's allegations, asserting that it was either "without knowledge or information sufficient to form a belief as to the truth of the alleged facts" or by denying the FOP's factual allegations. (Answer at pgs. 2-3). Specifically, MPD "denies the allegation in paragraph 12 of the Complaint that Lieutenant Stroud advised Detective McConnell that he should not be represented by the FOP." (Answer at p. 3).

Motion to Dismiss

MPD requests that the Board dismiss FOP's Complaint: (1) as two Chief Lanier and Lieutenant Stroud as named Respondents; and (2) "on the basis that there is no evidence of the commission of an unfair labor practice...." (Answer at p. 3).

In regard to naming Chief Lanier and Lieutenant Stroud as Respondents in this matter, MPD asserts that D.C. Code § 1-617.04(a):

does not confer upon the Board jurisdiction over individuals whose actions fall within their roles as agents of the government. As a result, any claim of conduct performed within the course of their duties and that may rise to the level of an unfair labor practice must be filed against the agency the alleged offenders represent. To act otherwise would subject individuals to the Board's jurisdiction as private actors rather than government actors under § 1- 617.04(a). This section does not grant the Board such authority.

Without citing any specific authority, the Respondents claim that the Board lacks jurisdiction over the named Respondents and request that the Board "dismiss the named individuals". (Answer at pgs. 1-3). The language of D.C. Code §1-617.04(a) (1) (2001 ed.), clearly provides that "[t]he District, its agents and representatives are prohibited from: ... [i]nterfering, restraining or coercing any employees in the exercise of the rights guaranteed by this subchapter[.]" (Emphasis added). Therefore, the Board rejects this argument as a basis for dismissal of the Complaint.²

The Board has held that while a Complainant need not prove their case on the pleadings, they must plead or assert allegations that, if proven, would establish the alleged violations of the CMPA. See 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 see Gregory Miller v. American Federation of Government Employees, Local 631, AFL-CIO and D.C. Department of Public Works, 48 DCR 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994); See also Doctors' Council of District of

² (See n.1).

Columbia General Hospital v. District of Columbia General Hospital, 49 DCR 1137, Slip Op. No. 437, PERB Case No. 95-U-10 (1995). Furthermore, the Board views contested facts in the light most favorable to the Complainant in determining whether the Complaint gives rise to an unfair labor practice. See *Jo Anne G. Hicks v. District of Columbia Office of the Deputy Mayor for Finance, Office of the Controller and American Federation of State, County and Municipal Employees, District Council 20*, 40 DCR 1751, Slip Op. No. 303, PERB Case No. 91-U-17 (1992). Without the existence of such evidence, Respondent's actions cannot be found to constitute the asserted unfair labor practice. Therefore, a Complaint that fails to allege the existence of such evidence, does not present allegations sufficient to support the cause of action." *Goodine v. FOP/DOC Labor Committee*, 43 DCR 5163, Slip Op. No. 476 at p. 3, PERB Case No.96-U-16 (1996).

"The validation, i.e. proof of the alleged statutory violation is what proceedings before the Board are intended to determine." *Jackson and Brown v. American Federation of Government Employees, Local 2741, AFL-CIO*, 48 DCR 10959, Slip Op. No. 414 at p. 3, PERB Case No. 95-S-01 (1995).

In the present case, the parties' pleadings are in dispute regarding the alleged facts contained in the Complaint. Specifically, there is a dispute as to whether Lieutenant Stroud made a statement to Detective McConnell which interfered with his right to union representation.

Based upon the foregoing, FOP has alleged facts asserting that MPD interfered with an employee's right to the assistance of a union representative. These alleged facts, if proven, would constitute a violation of an employee's rights under D.C. Code § 1-617.04(a)(1). Moreover, Board Rule 520.10 - Board Decision on the Pleadings, provides that: "[i]f the investigation reveals that there is no issue of fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral argument." Consistent with that rule, we find that the circumstances presented do not warrant a decision on the pleadings. Here, issues of fact are present concerning whether MPD violated the CMPA by refusing an employee's request to privately consult his union representative. In addition, the issue of whether the Respondent's actions rise to the level of violations of the CMPA is a matter best determined after the establishment of a factual record, through an unfair labor practice hearing. See *Ellowese Barganier v. Fraternal Order of Police/Department of Corrections Labor Committee and District of Columbia Department of Corrections*, 45 DCR 4013, Slip Op. No. 542, PERB Case No. 98-S-03 (1998). Consequently, the MPD's request to dismiss the Complaint is denied. The Complaint, and its allegations against the Respondent, will continue to be processed through an unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Metropolitan Police Department's motion to dismiss is denied.
2. The Board's Executive Director shall refer the Fraternal Order of Police/Metropolitan Police Department Labor Committee's Unfair Labor Practice Complaint to a Hearing Examiner utilizing an expedited hearing schedule. Thus, the Hearing Examiner will issue the report and recommendation within twenty-one (21) days after the closing arguments or the submission of briefs. Exceptions are due within ten (10) days after service of the report and recommendation and oppositions to the exceptions are due within five (5) days after service of the exceptions.
4. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.
5. 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.

August 22, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.09-U-12 was transmitted via Fax and U.S. Mail to the following parties on this the 22nd day of August 2011.

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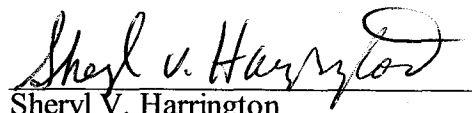
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