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

Fraternal Order of Police/Metropolitan Police Department Labor Committee,)	
)	
Complainant,)	PERB Case No. 09-U-41
)	
v.)	Opinion No. 972
)	
District of Columbia Department Metropolitan Police Department,)	Motion for Preliminary Relief
)	
and)	
)	
Terence Ryan, General Counsel, for the Metropolitan Police Department,)	
)	
and)	
)	
Cathy Lanier, Chief of the Metropolitan Police Department,)	
)	
Respondents.)	

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"). The Complainant alleges that MPD has violated D.C. Code §1-617.04(a)¹ by: (1) "interfering, restraining, or coercing Chairman [Kristopher]

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

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

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 pgs. 9-10).

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 violating the Comprehensive Merit Personnel Act ("CMPA"); (d) order Respondents to post a notice advising bargaining unit members that it violated the law; and (e) grant its request for reasonable costs and fees. (See Compl. at p. 13).

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 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:

On June 17, 2009, Kristopher Baumann, Chairman of the FOP, attended an arbitration being conducted at the MPD's headquarters. FOP claims that Mr. Baumann was "the sole witness on behalf of the [FOP [and that] [a]t the core of the arbitration was the FOP's assertion that the [MPD's] 'AHOD' initiative (an acronym for 'All Hands On Deck', . . .) was illegal and

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

(2) Dominating, interfering, or assisting in the formation, existence or administration of any labor organization, or contributing financial or other support to it, except that the District may permit employees to negotiate or confer with it during working hours without loss of time or pay;

* * *

(5) Refusing to bargain collectively in good faith with the exclusive representative.

in violation of, among other things, numerous collective bargaining provisions. The result of the arbitration may have [had] potentially profound impact upon AHOD, including, but not limited to, shutting down AHOD in its entirety and costing the MPD in excess of \$1 million dollars in compensation owed to the entire police force." (Compl. at pgs. 3-4).

FOP asserts that "[n]otwithstanding the MPD's clear knowledge of Chairman Baumann's whereabouts and purpose on June 17, 2009, and the fact that Chairman Baumann was testifying as the [FOP's sole witness in the arbitration against the MPD at MPD's headquarters, Chairman Baumann received an e-mail from Lieutenant Dean Welch of MPD's Internal Affairs Division on his Blackberry hand-held device during the arbitration requiring him to report to Internal Affairs Division for an administrative interview. . . [FOP argues that] [t]his request affected Chairman Baumann's ability to properly testify on behalf of the [FOP in rebuttal at the arbitration." (Compl. at p. 4).

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, Esq., General Counsel for the MPD, is Mr. Viehmeyer's supervisor." (Compl. at p. 4).

In addition, 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." (Compl. at p. 4).

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).

FOP contends that Chairman Baumann immediately forwarded "Lieutenant Welch's e-mail. . . to Mr. Viehmeyer and asked whether the Internal Affairs investigation was part of an on-going investigation into Chairman Baumann and whether the Department was repudiating Article 9 of the CBA. . . [FOP states that] [s]hortly thereafter, Mr. Viehmeyer responded: 'I have no idea what this is regarding, but I will check'." (Compl at p. 5).

The FOP states that Chairman Baumann subsequently left "repeated e-mails, [and] messages, and [made] a personal visit to. . .the Labor and Employee Relations Unit[.] [No one]

responded to any of Chairman Baumann's requests for clarification on the matter despite the fact that Article 9 of the CBA requires that all inquiries made of the [FOP Chairman be made through them." (Compl. at p. 6).

FOP states that "[o]n . . . June 18. . . Chairman Baumann received an e-mail from Lieutenant Paul Charity of the Internal Affairs Division ordering him to report to Internal Affairs [the following day]. . . Commander Christopher Lojacono, Mr. Viehmeyer, Mr. Ryan, and Lieutenant Welch were all [copied] on the e-mail [which, according to the FOP] indicat[es] [Lieutenant Charity's] understanding of Article 9 [as well as] Messrs. Viehmeyer's and Ryan's knowledge of the Article 9 repudiations." (Compl. at p. 6).

FOP argues that on "June 19, 2009, Chairman Baumann reported to Internal Affairs. At this time, Internal Affairs made it clear that Chairman Baumann was the target of their investigation. . . Chairman Baumann reminded Internal Affairs of the applicability of Article 9 of the CBA. However, [FOP contends that] Lieutenant Welch claimed he was unaware of Article 9 and any past practices of the Department or Internal Affairs regarding contacting the [FOP Chairman." (Compl. at p. 7)

The FOP asserts that "by failing to respond to Chairman Baumann's e-mails and messages and [by failing to] address the Article 9 repudiations, the Respondents made a pervasive unilateral change to [FOP bargaining unit employees' terms and conditions of employment on what was a settled area of the CBA. [Furthermore, FOP contends that] [t]he failure to respond to Chairman Baumann was in bad faith and is particularly acute in this instance because the pervasive unilateral change occurred in retaliation to Chairman Baumann's union activities, including testifying as the [FOP's sole witness in the AHOD arbitration. [In addition, FOP contends that it] did not waive any of its bargaining rights with respect to these changes to the terms and conditions of employment." (Compl. at p. 8). Also, FOP argues that the "Article 9 repudiations completely interfered with and restrained Chairman Baumann's ability to function as the FOP Chairman." (Compl. at p. 7).

The FOP contends that by the conduct described above MPD is in violation of the CMPA. (See Compl. at p. 8). Specifically, FOP asserts that the Respondents have violated D.C. Code § 1-617.04(a) by: (1) interfering, restraining, or coercing Chairman Kristopher Baumann's exercise of rights guaranteed by the CMPA; and (2) repudiating Article 9 of the parties' CBA. (See Compl. at pgs. 8-10).

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 implemented a unilateral change in the interpretation of Article 9 and thus repudiated the CBA and mutually agreed past practices. First, the violation is clear-cut and flagrant because the Respondents purposely ignored Chairman Baumann's e-mails and messages concerning the repudiations of Article 9 and because the pervasive unilateral change occurred in retaliation for Chairman Baumann's union activities, including testifying as the []FOP's sole witness in the AHOD arbitration. Moreover, by allowing the Article 9 repudiations the Respondents have completely interfered with and restrained Chairman Baumann's ability to function as the []FOP Chairman. Second, the effect of the violation is widespread because the unilateral change in the interpretation of Article 9 without bargaining will have a chilling effect for the []FOP, and any efforts by leadership to assert the rights of its members. Third, the public interest is seriously affected because of the clear-cut, widespread effect of the unfair labor practices. The Respondents' numerous failures to respond to Chairman Baumann's e-mails and messages concerning the Article 9 repudiations allowed the repudiations to occur and allowed the MPD to use an Internal Affairs investigation to vent its animus towards, and retaliate against, the []FOP and Chairman Baumann. It is against the public's best interest to have the MPD repudiate the CBA provisions and mutually agreed past practices governing direct communications with the []FOP Chairman. 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 p. 12).

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 p. 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. 10 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 6067, Slip Op. No. 559, 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 CMPA 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 CMPA. 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. In view of the above, we deny the FOP's Motion for Preliminary Relief.

For the reasons discussed above, we: (1) deny the FOP's request for preliminary relief; and (2) 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 Board's Executive Director shall refer the Complaint to a Hearing Examiner for disposition. Pursuant to Board Rule 550.4 the Notice of Hearing shall be issued fifteen (15) days prior to the date of the hearing.
3. 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 25, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.09-U-41 was transmitted via Fax and U.S. Mail to the following parties on this the 25th day of August 2009.

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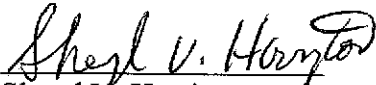
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