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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,)	
)	
Complainant,)	PERB Case No. 09-U-55
)	
v.)	Opinion No. 1558
)	
District of Columbia Metropolitan Police Department,)	
)	
Respondent.)	

DECISION AND ORDER

The instant case presents a claim of direct dealing, including polling of members, and a claim of repudiation of the collective bargaining agreement. As these claims are not supported by the evidence submitted, the case is dismissed.

I. Statement of the Case

A. Proceedings

On July 16, 2009, Complainant Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Union” or “FOP”) filed a complaint alleging that the Metropolitan Police Department (“MPD” or “Department”)¹ modified and restricted leave for eight weekends in 2009 to implement an initiative called All Hands on Deck (“AHOD”). FOP further alleged that after the announcement of the leave restrictions, MPD considered, and in some cases granted, leave that would not have been allowed under the leave restrictions. FOP asserted in the complaint that in so doing MPD engaged in the unfair labor practice of direct dealing with Union members and that MPD tried to induce Union members into waiving their rights under Article 24 of the collective bargaining agreement (“CBA”). FOP asserted that the direct negotiations constituted improper polling of union members and that MPD repudiated the

¹ On March 12, 2013, FOP dismissed two individually named respondents.

CBA. MPD filed an answer admitting certain allegations concerning the AHOD initiative, denying the commission of an unfair labor practice, and requesting dismissal of the complaint.

FOP applied for the issuance of a subpoena to MPD's custodian of records requiring the production of certain documents at a deposition. MPD moved to quash the subpoena. After a hearing was scheduled, counsel for MPD advised the Executive Director in a letter that the parties had reached an agreement on the production and exchange of exhibits and that MPD withdrew its motion to quash. The letter also advised that the parties had agreed that in lieu of a hearing the case should be decided on the pleadings. The letter stated, "Witness testimony is not required in this case as the pleadings and exhibits speak for themselves. As such and pursuant to PERB Rule 520.10, the parties request that the hearing in this matter . . . be cancelled and that the case be decided upon direct briefing to PERB. The parties have agreed to April 30, 2015, as the deadline to submit written briefs to PERB." The Executive Director cancelled the hearing and accepted the proposed due date for briefs. The Executive Director added that the parties should stipulate to the facts and to the authenticity and admissibility of the exhibits and that, if objections to the exhibits are raised, the hearing might be re-scheduled.

On the assigned date, both parties filed their briefs along with their exhibits. The parties did not stipulate to anything, but neither of them objected to any exhibit. FOP's unfair labor practice complaint is before the Board for disposition.

B. Facts

The facts established by the pleadings, having been alleged in the complaint and admitted in the answer, are as follows:

On January 7, 2009, Chief Cathy Lanier issued teletype 01-033-09 (the "January Teletype"), in which she issued an All Hands on Deck ("AHOD") initiative for calendar year 2009.² On March 5, 2009, Phase I of the AHOD initiative of the Teletype was modified.³ On March 30, 2009, FOP members were notified as to which officers would actually be working Phase I of the AHOD initiative.⁴ On May 12, 2009, FOP members were notified as to which officers would actually be working Phase II of the AHOD initiative.⁵

FOP filed a grievance and requested arbitration regarding the issuance of the January Teletype and the 2009 AHOD initiative. The arbitration took place June 17, 2009.⁶

The uncontested exhibits submitted by the parties establish the following additional facts:

² Complaint ¶ 3; Answer ¶ 3.

³ Complaint ¶ 5; Answer ¶ 5.

⁴ Complaint ¶ 6; Answer ¶ 6.

⁵ Complaint ¶ 7; Answer ¶ 7.

⁶ Complaint ¶¶ 8, 9; Answer ¶¶ 8, 9.

The March 30, 2009 and May 12, 2009 notifications regarding Phase I and Phase II, respectively, of the AHOD initiative stated, "Once finalized, no changes shall be made to these assignments without the approval of the Executive Officer, Executive Office of the Chief of Police."⁷

At the June 17, 2009 arbitration hearing, Assistant Chief Alfred Durham testified as follows:

So, whenever a member -- if Al Durham was assigned to a specialized unit and I had a graduation, that commanding officer or that supervisor would e-mail it to me and I would make that decision. And I have not since AHOD denied one person, sir, who had a legitimate -- and I'm talking about a family event they can show me they have tickets for an airplane, something like - airplane. I'm sorry -- a trip, a planned vacation, prior to even if that would have been the April instance, sir, that I have denied them. Never.

Q. You're saying this, "Once finalized, no changes shall be made without the approval of the Executive Officer," you're saying that's notifying the Department that there's a procedure in place where you can submit requests and ask for exceptions and present to you circumstances to get leave on these days?

A. Yes, sir. . . . As a matter of fact, I just received one yesterday for a detective whose son is going to try out to play football for Penn State. . . .

Q. Am I correct then that you're negotiating the terms of AHOD directly with members?

A. No. . . . What we're saying is hey, everybody's part of this plan. Again, teamwork is what this is all about, and an officer - trust me, I was an officer. I started from the ground, Sixth District, and when you got the support of your Sergeants, your Lieutenant, it motivates you to want to do better, sir.

Q. I'm just asking was the FOP included in these discussions.

A. No, they were not, sir.⁸

MPD produced e-mails involving requests for leave on days covered by AHOD assignments. In its brief, FOP accurately summarized the communications in the e-mails ("Communications") as follows:

[O]n June 16, 2009, as Assistant Chief Durham had testified, a D.C. Police Union member requested to be excused from AHOD to attend a recruitment football camp with his grandson at Penn State University. *See* June 16, 2009 email attached as Exhibit 8. Similarly, on May 21, 2009, Assistant Chief Durham approved administrative leave for two D.C. Police Union members who had requested to be excused from AHOD to attend training. *See* May 21, 2009 email, attached as Exhibit 9. On June 3, 2009, a D.C. Police Union member requested to be excused from AHOD to attend her daughter's

⁷ Complaint Ex. 4, 5; MPD Br. Ex. 3, 4.

⁸ FOP Br. Ex. 3 Tr. at 52-53.

dance performance in Canada. *See* June 3, 2009 email, attached as Exhibit 10. In response to the request, Inspector Sims replied: “Please forward a copy of the Canada itinerary, so it can be forwarded to the EOACOP [Assistant Chief Durham] for his approval and consideration.” *Id.* Similarly, on May 20, 2009, a D.C. Police Union member requested to be excused from AHOD to attend his son’s high school graduation, stating: “I am so proud that he was able to overcome this situation and wouldn’t want to miss it for the world.” *See* May 20, 2009 email, attached as Exhibit 11. In response, Captain Paul Shelton forwarded the request to Assistant Chief Rodney Parks, stating, “In light of the occasion, I concur and support the request.” *See id.* On May 27, 2009, a D.C. Police Union member requested to be excused from AHOD to attend his son’s high school graduation, stating as follows:

I am requesting leave for June 6, 2009. My one and ONLY son is graduating from high school on this day. This day is a very special day for me and him and I look forward to celebrating it with him. . . . I understand AHOD is scheduled during this period, however, this day is a very monumental day and only comes once. I also know that leave is not guaranteed, but it would be greatly appreciated if my request was granted.

See May 27, 2009 email, attached as Exhibit 12. In response, Assistant Chief Parks stated “Consideration. Worthy I believe of favorable thought.” *See id.*⁹

II. Analysis

FOP considers the foregoing Communications to be an unfair labor practice. FOP argues “MPD management instituted a new leave policy by directly negotiating individual exceptions to the AHOD work schedule with individual members of the D.C. Police Union.”¹⁰ The Communications, however, do not contain any negotiations. The AHOD initiative, which FOP contests in a *different* proceeding, led to certain assignments. The assignments and certain terms of the assignments were set forth in the March 30, 2009 and May 12, 2009 notifications. Those notifications stated, “Once finalized, no changes shall be made to these assignments without the approval of the Executive Officer, Executive Office of the Chief of Police.” In the Communications, which FOP contests in *this* proceeding, MPD did not negotiate with members on this policy. Instead MPD followed its policy without any suggestion that an alteration might be considered. In accordance with the policy, MPD received and considered requests for changes to assignments that were submitted to the Executive Officer, Executive Office of the Chief of Police.

⁹ FOP Br. 4-5.

¹⁰ FOP Br. 8.

The difference between this case and the Supreme Court's case of *Medo Photo Supply v. National Labor Relations Board*,¹¹ which FOP cites in its brief as precedent on direct dealing,¹² is that the latter case involved *dealing*. The employees in *Medo Photo Supply* made a proposal to abandon their union that "was contingent upon petitioner's willingness to give the desired wage increase."¹³ The present case, in contrast, does not involve a contingent proposal. It involves communication. Mere communication with membership does not violate the CMPA.¹⁴

Communications by employers that do not attempt to induce employees to take action against their union do not constitute direct dealing.¹⁵ FOP argues that the alleged direct dealing "improperly persuaded union members into believing that they could achieve their objectives by bypassing the D.C. Police Union and dealing directly with the MPD."¹⁶ The Communications could not reasonably be expected to induce employees into having such a belief. The Communications contain nothing that would persuade a member to change his view of the Union one way or the other. No one refers to FOP in the Communications. In particular, the officers responding to the requests say nothing about a member's support or lack of support for FOP in their evaluations of the requests (e.g., "In light of the occasion, I concur and support the request."¹⁷). The officers do not ask for anything in return for granting a request. The complaint alleges that by direct dealing with members in an effort to induce them to volunteer to change their schedule of days off, MPD attempted to induce union members into waiving their rights under Article 24 of the CBA.¹⁸ Article 24 concerns scheduling. In its brief, FOP presented no explanation, argument, or evidence that would connect the Communications with an inducement to waive any rights set forth in Article 24. Therefore, we find that the Communications do not attempt to induce employees to take action against FOP.

The Board has held that "[a]lleged examples of direct dealing must be examined in context to determine whether the agency intended to disparage or undermine the union's leadership."¹⁹ The context here is that no evidence was presented that the Union ever negotiated on behalf of individuals for leave on a particular day or played any role in leave requests. Article 15 of the CBA, entitled "Leave" does not refer to any such role nor does it make any provision for procedures for leave requests. It contains sections on "Funeral Leave" (section 1), "Leave for Convention and Union Functions" (section 2), "Leave for Membership Meetings" (section 3), sick leave (sections 4 and 5), and performance-of-duty injuries (section 6). Article 15 has no provisions on annual leave taken for personal reasons.²⁰ Rather than being a departure from the norm that could be seen as disparaging, the procedure followed here seems to be the ordinary procedure contemplated by the District Personnel Manual. As MPD points out in its brief, Title 6B-12, Section 1235.4 of the D.C. Municipal regulations provides that "[a]n employee is entitled to his or her annual leave, and the taking of annual leave for the

¹¹ 321 U.S. 678 (1949).

¹² FOP Br. 8.

¹³ 321 U.S. at 683.

¹⁴ *AFGE, Local 383 v. D.C. Dep't of Youth Rehab. Servs.*, 61 D.C. Reg. 1544, Slip Op. No. 1449 at 5, PERB Case No. 13-U-06 (2014).

¹⁵ *Id.*

¹⁶ FOP Br. 9-10.

¹⁷ FOP Br. Ex. 11.

¹⁸ Complaint ¶ 12.

¹⁹ *D.C. Dep't of Youth Rehab. Servs.*, Slip Op. No. 1449 at 5.

²⁰ FOP Complaint Ex. 1 at 16.

purposes set forth in subsection 1235.1 of this section should be encouraged, subject to scheduling approval by the agency head.” An intent to disparage or undermine union leadership cannot be gleaned from these facts in which the agency followed ordinary procedures called for in the District Personnel Manual and did not exclude the Union from a role it had previously played.

The complaint also alleged that MPD engaged in polling of its members, a type of direct dealing, and repudiated the contract. FOP’s brief contains no argument on those claims, and neither claim is supported by the evidence submitted. Accordingly, we deem those two claims to be abandoned.

In view of the above, the Board finds that MPD did not commit an unfair labor practice.

ORDER

IT IS HEREBY ORDERED THAT:

1. The complaint is dismissed with prejudice.
2. 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 Chairman Charles Murphy and Members Ann Hoffman, and Yvonne Dixon

December 17, 2015
Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Number 09-U-55 is being transmitted to the following parties on this the 31st day of December 2015.

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