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

Fraternal Order of Police/Metropolitan
Police Department Labor Committee,

Complainant,

v.

District of Columbia
Metropolitan Police Department,

and

Dean Welch, Lieutenant for the
Metropolitan Police Department,

and

Michael Anzallo, Assistant Chief for the
Metropolitan Police Department,

and

Christopher Lojacono, Commander for
the Metropolitan Police Department,

and

Cathy Lanier, Chief of the
Metropolitan Police Department,

Respondents.

PERB Case No. 09-U-43

Opinion No. 985

Motion for Preliminary Relief

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"), Chief Cathy Lanier, Lieutenant Dean Welch, Commander Christopher Lojaco and Assistant Chief Michael Anzallo. (See Compl. at p. 4) The Complainant alleges that MPD has violated D.C. Code 1-617.04(a) by: (1) "interfering, restraining, or coercing Chairman [Kristopher] Baumann's exercise of rights guaranteed by the [Comprehensive Merit Personnel Act]", (Compl. at p. 6); and (2) repudiating Article 9 of the parties' collective bargaining agreement ("CBA"). (See Compl. at pgs. 7-8).

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 interfering with Chairman Baumann's and other FOP representatives' ability to perform their FOP union duties; (d) order Respondents to post a notice advising bargaining unit members that it violated the law; (e) order Respondent MPD to impose discipline against MPD officials found to have engaged in unfair labor practices consistent with its disciplinary requirements; and (f) grant its request for reasonable costs and fees. (See Compl. at p. 10).

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 Comprehensive Merit Personnel Act ("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

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

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

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

[MPD's] "AHOD" initiative (an acronym for "All Hands On Deck"). . . was illegal and 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 p. 4).

FOP asserts that A[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 impacted Chairman Baumann's ability to testify on behalf of the [FOP in rebuttal at the arbitration. (Compl. at p. 5). Thus the timing and intent of Lieutenant Welch's e-mail was clearly to interfere with and retaliate against Chairman Baumann. (Compl. at p. 7). 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. 5).

FOP claims that Article 9 of the [parties'] 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, General Counsel for the MPD, also serves in this capacity. (Compl. at p. 5).

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 pgs. 5-6).

FOP argues that the MPD had no authority to unilaterally change an Article of the CBA that was settled between the parties. [Furthermore,] the MPD did not consult with the [FOP regarding these changes or discuss the changes whatsoever. The change was made in bad faith and represents a fundamental rejection of the CBA and mutually agreed past practices, as well as the union as a representative bargaining agent. By ignoring the CBA and all past practices, the actions constitute a repudiation of the CBA and as such, an unfair labor practice. (Compl. at p. 8).

The FOP contends that by the conduct described above, the Respondents violated D.C. Code ' 1-617.04 by: (1) "interfering, restraining, or coercing Chairman Baumann's exercise of his rights guaranteed by the CMPA." (Compl. at p. 6); 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 interfered with Chairman Baumann engaging in protected union activities and repudiated the CBA and mutually agreed past practices by engaging in improper direct communication with Chairman Baumann. First, the violation is clear-cut and flagrant because the Respondents knew that Chairman Baumann was engaged in a protected union activity - an arbitration challenging AHOD - when Lieutenant Welch sent the e-mail from Internal Affairs. . . . [T]he timing and intent of Lieutenant Welch's e-mail was clearly to interfere with and retaliate against Chairman Baumann. Moreover, the direct communication with Chairman Baumann is a clear cut violation of the CBA and mutually agreed past practices. Second, the effect of the violation is widespread because Lieutenant Welch's communication and actions will have a chilling effect on the []FOP's membership as a whole by discouraging and intimidating union representatives from participating and giving evidence in future arbitration proceedings. Lieutenant Welch's actions were intended to intimidate a union representative from engaging in protected union activity because Respondents knew that Chairman Baumann was engaged in a protected union activity when Lieutenant Welch sent the e-mail from Internal Affairs and Lieutenant Welch further knew that the direct communication with Chairman Baumann was a violation of the CBA. Third, the public interest is seriously affected because of the clear-cut, widespread effect of the unfair labor practices. The MPD's use of Internal Affairs investigations to vent its animus towards the []FOP and Chairman Baumann is not in the public's best interest, nor is it in 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 pgs. 9-10).

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 bases] 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 pgs. 4-6). 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. 6 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 5067, Slip Op. No. 550, 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.

For the reasons discussed above, we deny the FOP's request for preliminary relief. Also, the Board previously denied FOP's request for preliminary relief in PERB Case Nos. 09-U-41 (Slip Op. No. 972 at p.7) and 09-U-42 (Slip Op. No. 974 at p. 7). Those two cases (PERB Case Nos. 09-U-41 and 09-U-42) were consolidated and referred to a Hearing Examiner (see Slip Op. No. 974 at p. 7). The present case (PERB Case No. 09-U-43) involves the same parties and issues presented in PERB Case Nos. 09-U-41 and 09-U-42. As a result, we: (a) are consolidating the instant case (PERB Case No. 09-U-43) with PERB Case No. 09-U-41 and PERB Case No. 09-U-42; and (b) direct the development of a factual record through a consolidated 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.

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2. PERB Case Nos. 09-U-41, 09-U-42 and 09-U-43 are consolidated and referred to a Hearing Examiner.
3. The Board's Executive Director shall: (1) refer the consolidated matters to a Hearing Examiner for disposition; and (2) issue a Notice of Consolidated Hearing.
4. 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.

September 30, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision in PERB Case No. 09-U-43 was served via FAX and U.S. Mail to the following parties on this the 30th day of September, 2009.

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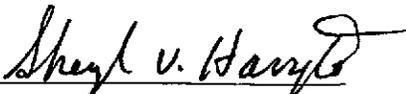
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