**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. 11-U-20 |
| | ) | Opinion No. 1563 |
| v. | ) | |
| District of Columbia Metropolitan Police Department, | ) | |
| Respondent. | ) | |

## DECISION AND ORDER

### I. Statement of the Case

The case before the Board, case number 11-U-20, was among four cases involving union requests for information that the Executive Director consolidated for hearing, namely case numbers 11-U-20, 12-U-05, 12-U-10, and 13-U-28. The Board decided all but the present case in *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department*, Slip Op. No. 1553, PERB Case Nos. 12-U-05, 12-U-10, and 13-U-28 (Oct. 29, 2015). Case number 11-U-20 is now before the Board for disposition.

The complaint filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP") in case number 11-U-20 names as respondents the Metropolitan Police Department ("MPD"), Commander Christopher LoJacono, Agent James McGuire, and Chief Cathy Lanier. FOP subsequently dismissed the individually-named respondents. The complaint alleges that FOP's executive steward, Delroy Burton, submitted to Commander LoJacono a request for documents pertaining to an investigation of the conduct of an Internal Affairs Division ("IAD") agent. The seventh item in the request for information ("RFI 7") asked for the policy that permits IAD agents to lie.[1] FOP alleges that MPD violated D.C. Official Code § 1-617.04(a) by retaliating against the union steward for engaging in protected activity and by "interfering, restraining or coercing Executive Steward Burton's and the DCFOP's rights

[1] Complaint ¶ 2.

guaranteed by the CMPA."[2] FOP alleges that MPD never responded to any of the requests for information in violation of D.C. Official Code § 1-617.04(a)(1) and (5).[3] The complaint also alleges that MPD violated D.C. Official Code § 1-617.04(a)(2) by interfering with the existence or administration of FOP.[4] FOP filed with the Board a request for a subpoena duces tecum, which MPD moved to quash. The case was referred to a hearing examiner.

Following a hearing held on December 12, 2014, and briefing by the parties, the hearing examiner submitted his Report and Recommendations on April 28, 2015. The hearing examiner found that the Union abandoned its section 1-617.04(a)(2) claim and that MPD committed unfair labor practices by failing to respond to RFI 7 and by retaliating against the union steward for submitting that request. MPD submitted exceptions to the Report and Recommendations, and FOP submitted an opposition to MPD's exceptions.

## II. Discussion

### A. Facts

On October 14, 2010, Delroy Burton delivered to IAD Commander Christopher LoJacono a request for information containing seven items. RFI 7 requested a "copy of the written IAD policy that permits its Agents to lie, be deceptive, trick, or mislead FOP members during Administrative Interviews; and the statutory authority that permits this activity."[5]

LoJacono testified that after Burton handed him the request for information he read through it while Burton was present and told Burton that RFI 7 was offensive and inflammatory.[6] Burton testified that LoJacono was visibly upset.[7] LoJacono testified, "I said something to the effect, . . . 'There's no IAD written policy. What are you talking about?'"[8] LoJacono questioned Burton on the source of his information that lying was permitted. Burton said that such was the testimony of IAD agents. LoJacono asked Burton to identify those agents. Burton would not identify them and was dismissed from LoJacono's office.[9]

LoJacono immediately assigned IAD Agent James McGuire to call Burton back into the IAD office for questioning. LoJacono testified that Burton would be coming in "as I guess a complainant in that he had knowledge of misconduct, potentially. But I had also told Sergeant McGuire that if he refused to answer his questions . . . 'I want[] you to order him to answer questions.' So at that point, if he refused, then he could potentially become a target."[10]

---

[2] Complaint ¶¶ 11, 14.
[3] Complaint ¶¶ 7, 13.
[4] Complaint ¶ 12.
[5] Report & Recommendations 3; FOP Ex. 1.
[6] Tr. 94-95.
[7] Tr. 26.
[8] Tr. 118.
[9] Tr. 94-95.
[10] Tr. 98.

Burton testified that, when he returned to his office from his meeting with LoJacono, "I was notified that I was being ordered to return to Internal Affairs Division with a union representative, because I was now the target of an investigation."[11] Burton then called a union attorney, the FOP chairman, and Mark Viehmeyer of MPD's Labor and Employment Relations Office.[12]

Within a half hour of ordering Sergeant McGuire to investigate, LoJacono received a telephone call from Viehmeyer and Terry Ryan, general counsel of MPD.[13] LoJacono testified,

> I was asked not to have him come in, something about, you know, "How about if he provides a statement, you can ask whatever your questions are through a statement, and we'll get a statement . . .," meaning Mr. Viehmeyer, ". . . we'll get a statement from Sergeant Burton. Would that satisfy the investigation?"[14]

On October 27, 2010, at Viehmeyer's request, Burton gave Viehmeyer a statement concerning the assertion that IAD agents use deception in administrative interviews. Burton asked Viehmeyer to report to the inspector general that what he alleged was a violation of the Whistleblower Protection Act.[15] Viehmeyer did so.[16] Burton never had to go back to IAD for the investigation.[17] No Incident Summary (IS) numbers were created for an investigation of Burton. MPD did not initiate an investigation of Burton's allegations regarding the use of lying by IAD agents during administrative investigations.[18]

### 1. Request for Information

FOP alleged and MPD admitted that MPD did not provide any information in response to the October 14, 2010 information request.[19]

The hearing examiner found that items 5 and 6 of the request for information were abandoned. Items 1, 2, 3, and 4 sought information related to the investigation of an IAD agent who was not in the bargaining unit. The hearing examiner stated that FOP would not normally be entitled to investigative reports on non-bargaining unit employees. FOP did not adduce facts supporting its need for information on this particular investigation. The investigator and the subject of the investigation were mentioned only in passing during the hearing.

RFI 7 requested a "copy of the written IAD policy that permits its Agents to lie, be deceptive, trick, or mislead FOP members during Administrative Interviews; and the statutory

[11] Tr. 27.
[12] Tr. 30.
[13] Tr. 97.
[14] Tr. 97.
[15] Report & Recommendations 6.
[16] Report & Recommendations 7.
[17] Tr. 59.
[18] Tr. 7.
[19] Complaint ¶ 7; Answer ¶ 7.

authority that permits this activity."[20] The hearing examiner found that the transcript of testimony in certain previous PERB cases "establishes that MPD's witnesses Lieutenant Dean Welch, IAD supervisor, and Assistant Chief-of-Police Michael Anzallo, Office of Professional Responsibility, testified in a manner so as to support the conclusion that [it is] permissible for IAD agents to lie during an administrative interview involving allegations of misconduct."[21] A policy permitting IAD agents to lie, in the hearing examiner's view, would pose a challenge and arguably a threat to FOP's representational role. For that reason, he found that the information requested by RFI 7 was relevant and necessary to that role and that MPD's failure to respond to the request was a violation of D.C. Official Code § 1-617.04(a)(1) and (5). He recommended that the request for a subpoena duces tecum be granted to the extent it calls for production of RFI 7. The hearing examiner found that FOP abandoned its claim that MPD violated D.C. Official Code § 1-617.04(a)(2). Neither party excepted to those findings and recommendations.

An agency has an obligation to furnish information a union requests that is both relevant and necessary to the union's role in processing of a grievance, an arbitration proceeding, or in collective bargaining. Failure to do so is an unfair labor practice.[22] The Board finds that the above findings and recommendations are reasonable, supported by the record, and consistent with Board precedent.

**2. Alleged Retaliation against FOP's Executive Steward**

**(a) The *Wright Line* Test**

FOP's complaint states that "the CMPA and PERB precedent forbid agencies, such as the MPD, from retaliating against employees for engaging in protected activity."[23] The complaint alleges that MPD "violated D.C. Code § 1-617.04(a) by taking reprisals against Executive Steward Burton, who is a member of DCFOP, as a result of his engaging in protected union activities."[24] Where a claim is made that an act of retaliation against an employee for protected union activity violates D.C. Official Code § 1-617.04(a)(1), (3), (4), or (5), PERB has applied the test articulated by the National Labor Relations Board in *Wright Line and Lamoureux*.[25] In this case, subsections (1) and (5) of section 1-617.04(a) apply. To establish a prima facie case under the *Wright Line* test, a complainant must show that the employee engaged in protected union activities, the agency knew about the employee's protected union activity, and as a result of anti-union animus or retaliatory animus the agency took adverse employment action against the

[20] Report & Recommendations 3.
[21] Report & Recommendations 22.
[22] *Washington Teachers' Union, Local No. 6 v. D.C. Pub. Sch.*, 61 D.C. Reg. 1537, Slip Op. 1448 at p. 4, PERB Case No. 04-U-25 (2014).
[23] Complaint ¶ 11.
[24] Complaint ¶ 14.
[25] 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 622 F.2d 899 (1st Cir. 1981). The U.S. Supreme Court has approved the *Wright Line* test. *Dir., Office of Workers' Comp., Dep't of Labor v. Collieries*, 512 U.S. 267, 278 (1994); *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397–98 (1983).

employee.[26] A complainant may present the motivation for the adverse action as either anti-union animus or an act of retaliation.[27]

Establishing a prima facie case creates a presumption that the unfair labor practice has been committed. The employer may rebut the presumption by proving an affirmative defense by a preponderance of the evidence. The elements of the affirmative defense are that the employer had a legitimate business reason for the adverse employment action and that it would have taken the employment action in the absence of protected union activity.[28] The complainant then has the burden of showing that the employer's claim was pretextual.

**(b) FOP's Prima Facie Case**

The hearing examiner found that the first two *Wright Line* elements as presented in this case were uncontested by the parties and established by the record. The record established (1) that Burton engaged in protected union activity generally through his representational role and specifically by submitting requests for information to LoJacono and (2) that LoJacono knew of Burton's protected union activity. Thus, the hearing examiner found that FOP proved those elements.[29] This finding is reasonable and supported by the record.

The hearing examiner found anti-union animus in LoJacono's demeanor, his hostile reaction to RFI 7, his immediate initiation of an investigation, and his resolve to order Burton to answer questions about RFI 7.[30]

Having anti-union animus by itself is not an unfair labor practice.[31] The union must prove that anti-union animus and/or retaliation was at least a motivating factor in a decision to take an adverse employment action.[32] In *Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Daniels) v. D.C. Metropolitan Police Department*,[33] the Board observed that it has "allowed a variety of claims of adverse action to reach a hearing, including a claim that an adverse action occurred where employees who failed to obtain certifications for

---

[26] *AFGE, Local 2978 v. Office of the Chief Med. Examiner*, 60 D.C. Reg. 2516, Slip Op. No. 1348 at p. 4, PERB Case No. 09-U-62 (2013).
[27] *AFSCME, Local 2401 v. D.C. Dep't of Human Servs.*, 48 D.C. Reg. 3207, Slip Op. No. 644 at p. 4, PERB Case No. 98-U-05 (2001) ("The Hearing Examiner noted that in order to prevail on a claim of retaliation for union activity, the Complainants must make a prima facie showing that the Respondent's decision was motivated, at least in part, by anti-union animus and/or was an act of retaliation for union activities."). The Supreme Court explained, "As we understand the [National Labor Relations] Board's decisions, they have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on anti-union animus—or as the Board now puts it, that the employee's protected conduct was a substantial or motivating factor in the adverse action." *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. at 401.
[28] *Office of the Chief Med. Examiner*, Slip Op. No. 1348 at 4; *Green v. D.C. Dep't Corrs.*, 41 D.C. Reg. 5991, Slip Op. No. 323 at 3, PERB Case No. 91-U-13 (1993) (supplemental decision and order).
[29] Report & Recommendations 23.
[30] Report & Recommendations 23-24.
[31] *See NLRB v. Collier*, 553 F.2d 425, 428 (5th Cir. 1977).
[32] *AFSCME, Local 2401 v. D.C. Dep't of Human Servs.*, 48 D.C. Reg. 3207, Slip Op. No. 644 at p. 4, PERB Case No. 98-U-05 (2001).
[33] 60 D.C. Reg. 12080, Slip Op. No. 1403, PERB Case No. 08-U-26 (2013).

their positions were required to use annual leave while awaiting transfer to positions that did not require certifications."[34] The Board quoted the U.S. Supreme Court's statement that, similarly, it had construed the "antiretaliation provision [of the National Labor Relations Act] to 'prohibi[t] a wide variety of employer conduct that is intended to restrain, or has the effect of restraining, employees in the exercise of protected activities'. . . ."[35]

The hearing examiner stated, "I find based on the totality of the record evidence and testimony that LoJacono assigned McGuire to target and investigate Burton in retaliation for the protected union activity of submitting RFI 7 to LoJacono for response. FOP has met its burden of proof to show a *prima facie* case of anti-union *animus* and retaliation."[36] Implicitly the hearing examiner recommended that the Board find that LoJacono's assignment to McGuire to target and investigate Burton was an adverse employment action. The Board finds that this was an adverse employment action and that it was made in retaliation for the protected activity of submitting an information request. Thus, the hearing examiner's finding that FOP showed a *prima facie* case is supported by the record.

**(c) MPD's Affirmative Defense**

The hearing examiner states, "MPD presented no material or credible evidence of a business reason for LoJacono and McGuire's actions or that they would have taken the same actions in the absence of Burton's union activity."[37] The hearing examiner's recommendation is reasonable, supported by the record and consistent with the Board's precedents. If LoJacono wanted further information from Burton, there were other means to obtain that information without initiating an IAD investigation of him. IAD investigates serious misconduct.[38]

**3. Alleged Interfering with, Restraining, or Coercing FOP's Executive Steward in the Exercise of Rights Guaranteed by the CMPA**

The complaint alleges, "Respondents violated D.C. Code § 1-617.04(a) by interfering, restraining or coercing Executive Steward Burton's and DCFOP's rights guaranteed by the CMPA." Although as written FOP's allegation is that Respondents interfered, restrained, or coerced rights (as opposed to individuals), FOP presumably is invoking section 1-617.04(a)(1) of the D.C. Official Code, which provides, "The District, its agents, and representatives are prohibited from: Interfering with, restraining, or coercing any employee in the exercise of rights guaranteed by this subchapter." As FOP points out in its post-hearing brief,[39] proof of motive is not required to establish a violation of section 1-617.04(a)(1).[40] The proper test is whether the

[34] *Id.* at 3 (citing *AFGE, Local 631 v. D.C. Water & Sewer Auth.*, 51 D.C. Reg. 11379, Slip Op. No. 734 at pp. 3, 6, PERB Case No. 03-U-52 (2004)).
[35] *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 66-67 (2006) (quoting *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983)).
[36] *Id.*
[37] *Id.*
[38] Tr. 28.
[39] FOP Post-Hearing Br. 24.
[40] *See AFGE, Local 631 v. D.C. Water & Sewer Auth.*, 52 D.C. Reg. 5148, Slip Op. No. 778 at 10-12, PERB Case No. 04-U-02 (2005).

conduct in question had a reasonable tendency in the totality of the circumstances to interfere with, restrain, or coerce the employee.[41]

The complaint alleges that MPD interfered with, restrained, and coerced Burton by ordering him "to report to IAD for questioning as the target of an investigation, during the work-day when he was performing his duties as Executive Steward of the DCFOP."[42] Those acts do have a reasonable tendency to interfere with, restrain, or coerce an employee. An IAD investigation is a serious matter. Burton testified that he felt intimidated by the IAD investigation and that he did not follow up on the information request because the investigation took him aback and he did not want to go through that experience again.[43] Burton's reaction was objectively reasonable under the circumstances.

Therefore, we find that MPD interfered with and restrained Burton in the exercise of the rights guaranteed by the CMPA in violation of section 1-617.04(a)(1).

## ORDER

**IT IS HEREBY ORDERED THAT:**

1. MPD shall cease and desist from refusing to bargain in good faith by failing to provide certain information requested by the Complainant in conjunction with the administration of the parties' collective bargaining agreement.

2. MPD shall furnish the Complainant with all documents, if any exist, that were requested in item 7 of its October 14, 2010 request for information within ten (10) days from the issuance of this Decision and Order.

3. MPD shall notify the Board of its compliance with paragraph 2 of this Order within ten (10) days from the issuance of this Decision and Order.

4. MPD, its agents, and its representatives shall cease and desist from violating D.C. Official Code § 1-617.04(a)(1) by interfering with, restraining, or coercing employees in the exercise of the rights guaranteed under the CMPA.

5. MPD shall conspicuously post where notices to employees are normally posted a notice that the Board will furnish to MPD. The notice shall be posted within ten (10) days from MPD's receipt of the notice and shall remain posted for thirty (30) consecutive days.

---

[41] *F.O.P./Metro. Police Dep't Labor Comm. v. Metro. Police Dep't*, 62 D.C. Reg. 5931, Slip Op. No. 1515 at 7, PERB Case No. 14-U-10 (2015); 1410 11-U-23, *F.O.P./Housing Auth. Labor Comm.*, 60 D.C. Reg. 12127, Slip Op. No. 1410 at 5, PERB Case No. 11-U-23 (2013).
[42] Complaint ¶ 12.
[43] Tr. 29, 33.

6. MPD shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from receipt of the notice that it has been posted accordingly.

7. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

**January 21, 2016**
**Washington, D.C.**

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case Number 11-U-20 is being transmitted to the following parties on this the 2d day of February 2016.

Anthony M. Conti
Daniel J. McCartin **via File&ServeXpress**
36 South Charles St., suite 2501
Baltimore, MD 21201

Mark Viehmeyer
Metropolitan Police Department **via File&ServeXpress**
300 Indiana Ave. NW, room 4126
Washington, DC 20001

/s/ Sheryl V. Harrington
Sheryl V. Harrington
Secretary