

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

In the Matter of:)

Fraternal Order of Police/Metropolitan Police)
Department Labor Committee,)

Complainant,)

v.)

District of Columbia Metropolitan Police)
Department,)

and)

Chief Cathy Lanier,)

Respondents.)

)

PERB Case No. 08-U-35

Opinion No. 1113

Motion to Dismiss

CORRECTED COPY

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 and Chief Cathy Lanier ("Respondents" or "MPD"). FOP alleges that MPD violated D.C. Code § 1-617.04(a)(1) and (5) of the Comprehensive Merit Personnel Act ("CMPA") by failing and refusing to bargain over the impacts and effects of the implementation of a new policy, without first bargaining in good faith with the Union. (See Complaint at p. 3).

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

II. Discussion

FOP asserts the following facts:

1. The Department is an agency of the District of Columbia that is responsible for protecting the citizenry and enforcing the laws, rules, and regulations of the District of Columbia.
2. The Union is the recognized exclusive representative of the Department's collective bargaining unit that is comprised of police officers.
3. Cathy L. Lanier is the Department's Chief of Police.
4. The Union and the Department entered into a Collective Bargaining Agreement (CBA) effective, FY 2004 through FY 2008.
5. On December 14, 2007, the Department unilaterally issued a Notice of Proposed Rulemaking in the District of Columbia Register (Volume 54, No. 50, p. 012043) setting forth its intent to amend Chapter 16, General Discipline and Grievances, of Title 6 of the District of Columbia Municipal Regulations.
6. In a letter dated January 11, 2008, Kristopher Baumann, Union Chairman, objected to the Department's attempt to unilaterally alter the terms of the CBA, and further expressed the Union's desire to engage in impact bargaining over the proposed changes.
7. The Department did not respond to the January 11, 2008 letter, and made no offer to bargain over the proposed changes to the Department's disciplinary policies.
8. On February 8, 2008, the Department's proposed rules to DCMR Title 6, Chapter 16 were certified as final. The final rulemaking action was published on February 22, 2008, in the District of Columbia Register. Vol. 55, No. 8, pp. 1775 *et seq.*

(Complaint at pgs. 3-4).

In addition to these alleged facts, FOP argues that:

The Department's February 22, 2008 Notice of Final Rulemaking amending DCMR Title 6, Chapter 16 altered material

terms of the parties' CBA. The Department committed an Unfair Labor Practice by unilaterally altering the terms of the CBA and refusing to bargain in good faith with a representative of the Union, as required by the parties' CBA and D.C. Code § 1-617.04(a)(5). In view of the Department's illegal actions, the Union, and its membership are entitled to relief.

(Complaint at p. 4).

As a remedy for the Respondents' alleged actions, FOP requests that the Board issue an order:

- a. Finding that the Department and Chief Lanier have engaged in an unfair labor practice in violation of D.C. Code §§ 1-617.04(a)(1) & (5);
- b. Ordering the Department and Chief Lanier to cease and desist from engaging in an unfair labor practice in violation of D.C. Code § 1-617.04(a)(1) & (5);
- c. Compelling the Department to conspicuously post no less than two (2) notices of their violations and the Board's Order in each Department building;
- d. Compelling the Department to renounce the recent amendments to DCMR Title 6, Chapter 16;
- e. Compelling the Department and Chief Lanier to pay the Union's costs and fees associated with the proceeding; and
- f. Ordering such other relief and remedies as the Board deems appropriate.

Respondents deny the allegations in the Complaint. Specifically, MPD asserts:

5. Respondent is without knowledge or information sufficient to form a belief as to whether the Department promulgated the Notice of Proposed Rulemaking as described in paragraph 5 of the Complaint. As a result, this allegation is denied.
6. Respondent denies the allegations of paragraph 6 of the Complaint in that FOP Chairman Kristopher Baumann wrote a letter dated January 11, 2008, to Brender Gregory, Director of the D.C. Department of Human Resources regarding the proposed rulemaking.

7. Respondent denies the allegations of paragraph 7 of the Complaint in that the January 11, 2008 letter was not directed to the Respondent.

8. Respondent is without knowledge or information sufficient to form a belief as to whether the Department promulgated the Notice of Final Rulemaking as described in paragraph 8 of the Complaint. As a result, this allegation is denied.

In addition, the Respondents assert the affirmative defense that The Board lacks jurisdiction over this matter:

Since the Complaint alleges unilateral changes to terms and conditions of employment covered by the parties' collective bargaining agreement the Board does not have jurisdiction over the Complaint

(Answer at p. 3).

Motion to Dismiss

MPD requests that the Board dismiss FOP's Complaint on the basis that there is no evidence of the commission of an unfair labor practice and because the Board lacks jurisdiction based upon the facts alleged in FOP's Complaint. (See Answer at p. 4).

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 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 JoAnne 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).

MPD is alleged to have violated the CMPA. In particular, FOP cites D.C. Code §1-617.04(a)(1) (2001 ed.), which 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[.]”¹ Also, D.C. Code § 1-617.04(a)(5) provides that “[r]efusing to bargain collectively in good faith with the exclusive representative” is a violation of the CMPA.² The Board finds that the Union has pled allegations that MPD violated the CMPA by refusing to bargain over the impacts and effects of the implementation of a new policy. The Union’s Complaint alleges violations of D.C. Code § 1-617.04(a)(1) and (5).

In the present case, it is clear that a factual dispute exists over whether MPD promulgated new rules and whether the parties communicated concerning the implementation of any alleged rules. Also, MPD’s argument that the Board lacks jurisdiction requires an analysis of these disputed facts. On the record before the Board, establishing the existence of the alleged unfair labor practice violations requires the evaluation of evidence and the resolution of conflicting allegations. The Board declines to do so at this time, based on these pleadings alone.

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. Specifically, the issue of whether the Respondents’ 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).

Whereas the Board finds that the Complainant has pled or asserted allegations that, if proven, would constitute a statutory violation. As a result, the Board denies MPD’s motion to dismiss. The Complaint, and its allegations against the Respondents, will continue to be processed through an unfair labor practice hearing.

¹ “Employee rights under this subchapter are prescribed under D.C. Code [§1-617.06(a) and (b) (2001ed.)] and consist of the following: (1) [t]o organize a labor organization free from interference, restraint or coercion; (2) [t]o form, join or assist any labor organization; (3) [t]o bargain collectively through a representative of their own choosing . . . ; [and] (4) [t]o present a grievance at any time to his or her employer without the intervention of a labor organization[.]” *American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks*, 45 DCR 5078, Slip Op. No. 553 at p. 2, PERB Case No. 98-U-03 (1998).

²The Board notes that pursuant to the CMPA, management has an obligation to bargain collectively in good faith and employees have the right “[t]o engage in collective bargaining concerning terms and conditions of employment, as may be appropriate under this law and rules and regulations, through a duly designated majority representative[.]” *American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2921 v. District of Columbia Public Schools*, 42 DCR 5685, Slip Op. 339 at p. 3, PERB Case No. 92-U-08 (1992). Also, D.C. Code § 1-617.04(a)(5) (2001) provides that “[t]he District, its agents and representatives are prohibited from...[r]efusing to bargain collectively in good faith with the exclusive representative.” Further, D.C. Code §1-617.04(a)(5) (2001ed.) protects and enforces, respectively, these employee rights and employer obligations by making their violation an unfair labor practice.

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 12, 2011

CERTIFICATE OF SERVICE

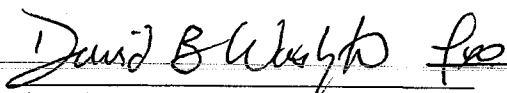
This is to certify that the attached Decision and the Board's Decision and Order in PERB Case No. 08-U-35 are being transmitted via Fax and U.S. Mail to the following parties on this the 12th day of August, 2011.

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