

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,)	PERB Case Nos. 08-U-22
)	
Complainant,)	
)	
v.)	Opinion No. 1534
)	
District of Columbia)	
Metropolitan Police Department,)	
)	
Respondent.)	
_____)	

DECISION AND ORDER

I. Statement of the Case

Complainant Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP") filed an unfair labor practice complaint alleging that Respondent Metropolitan Police Department ("MPD") violated D.C. Official Code § 1-617.04(a)(1) and § 1-617.06(a)(2) by prohibiting Officer Mark McConnell from attending a FOP Executive Council meeting and Officer Donald Leach II from attending and a contract negotiation team meeting. The Hearing Examiner found that, based on certain provisions in the parties' collective bargaining agreement, MPD did not commit an unfair labor practice and recommended that the Complaint be dismissed. However, PERB does not have the authority to interpret the parties' agreement in order to determine whether a statutory violation occurred. Since it is evident that such an interpretation would be required in this case, the Board finds that it lacks jurisdiction over this matter. Accordingly, the Board rejects the Hearing Examiner's findings, and dismisses FOP's Complaint on jurisdictional grounds.

II. Background

A. October 31, 2007 Incident

On October 31, 2007, Officer McConnell was assigned to a hospital detail guarding a prisoner.¹ Officer McConnell at that time was a First District Shop Steward for FOP.² On October 31, FOP's First District Chief Shop Steward was on leave, thus making Officer McConnell the acting Chief Shop Steward.³ During the 6:00 a.m. roll call on October 31, Officer McConnell approached his sergeant and asked if he could attend FOP's monthly Executive Council meeting later that day at 10:00 a.m. in the Chief Shop Steward's stead. The sergeant told Officer McConnell to ask the ranking lieutenant, who then conferred with the First District's watch commander and the First District's commanding officer. The watch commander and commanding officer agreed that Officer McConnell could not be excused from duty to attend FOP's Executive Council meeting because Patrol Service Area 101, to which Officer McConnell was assigned, was short-staffed that day.⁴

B. December 6, 2007 Incident

On December 6, 2007, Officer Leach checked in for roll call at 6:00 a.m.⁵ At that time, Officer Leach was the Sixth District Chief Shop Steward for FOP. At about 9:00 a.m. on December 6, Officer Leach approached a sergeant and notified him that he wanted to attend a FOP contract negotiating team meeting that day at 10:00 a.m. The sergeant instructed Officer Leach to take his request to the Sixth District's watch commander.⁶ The watch commander stated that he could not authorize Officer Leach's request to attend the meeting because the Sixth District was too busy that day, the District was short of manpower, and there were a lot of calls coming in.⁷

C. Complaint and Report and Recommendation

On February 27, 2008, FOP filed the instant Unfair Labor Practice Complaint alleging that MPD violated D.C. Official Code § 1-617.04(a)(1)⁸ and § 1-617.06(a)(2)⁹ when it did not allow the officers to attend the union's October 31, 2007 and December 6, 2007 meetings.

The matter was assigned to a Hearing Examiner, and hearings were held on December 4, 2008, May 7, 2009, and September 15, 2009. On May 11, 2010, the Hearing Examiner issued his Report and Recommendation finding that (1) "MPD, as an employer, was entitled to

¹ Hearing Examiner's Report and Recommendation (hereinafter "R&R") at 6.

² *Id.*

³ *Id.*

⁴ *Id.* at 6-7.

⁵ *Id.* at 8.

⁶ *Id.*

⁷ *Id.* at 9.

⁸ D.C. Official Code § 1-617.04(a)(1): "(a) The District, its agents, and representatives are prohibited from: (1) Interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter..."

⁹ D.C. Official Code § 1-617.06(a)(2): "(a) All employees shall have the right: ... (2) To form, join, or assist any labor organization or to refrain from such activity...."

promulgate and implement 'reasonable rules covering conduct of employees [during their working time]";¹⁰ (2) "the collective bargaining agreement, in Article 8, Section 1,¹¹ ... prohibited Leach and McConnell from attending Union meetings 'during employee working time";¹² (3) neither of the two officers qualified for official time under Article 9, Section 4¹³ of the collective bargaining agreement;¹⁴ (4) "MPD introduced considerable testimony and evidence to show the manpower levels of, and the tactical demands on, its First and Sixth Districts during the days involved in this case";¹⁵ (5) MPD did not take Officer McConnell's October 31, 2007 request "lightly," and conferred with three commanding officers in order to decide if he could be excused from his post that day;¹⁶ (6) on December 6, 2007, the Sixth District was understaffed, and there were a lot of 911 calls coming in;¹⁷ (7) MPD's "refusals to grant time off from work to attend Union meetings were exercises of management rights granted by Article 4¹⁸ of the collective bargaining agreement and codified by statute in D.C. Code § 1-617.08";¹⁹ and (8) the Department "acted out of concern for MPD's ability to carry out its mission," and was "not motivated by hostility toward the Union or the union activity of the two employees when it refused to excuse McConnell and Leach from their duties to attend Union meetings."²⁰ Accordingly, the Hearing Examiner concluded that MPD did not commit unfair labor practices as alleged, and recommended that FOP's Complaint be dismissed.²¹

¹⁰ (R&R at 11).

¹¹ Collective bargaining agreement, Article 8 – Union/Employee Responsibilities, Section 1: "Neither the Union nor any employee in the bargaining unit shall conduct Union business or carry on Union activities (soliciting members, distributing literature, attending Union meetings, etc.) during employee working time or on the Department's premises, except as provided for in Article 11. Distribution of literature or other contacts pertaining to Union business will be conducted during non-work time of both the Union representatives and members being contacted. There is to be no interference by members in a non-duty status with the other employees' performance of official duty during working hours."

¹² R&R at 11.

¹³ Collective bargaining agreement, Article 9 – Rights of Employees/Union Representatives, Section 4: "The Employer shall provide union stewards, employees and union officials with official time in the manner hereinafter described to receive, investigate, prepare and present grievances to management. ... (4) The designated Union representatives shall be granted official time within their regularly scheduled working hours as needed to attend meetings of Boards provided for in this Agreement to which they are appointed and to attend conferences with management...."

¹⁴ R&R at 11.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Collective bargaining agreement, Article 4 – Management Rights: "The Department shall retain the sole right, authority, and complete discretion to maintain the order and efficiency of the public service entrusted to it, and to operate and manage the affairs of the Metropolitan Police Department in all aspects including, but not limited to, all rights and authority held by the Department prior to the signing of this Agreement. Such management rights shall not be subject to the negotiated grievance procedure or arbitration. The Union recognizes that the following rights, when exercised in accordance with applicable laws, rules and regulations, which in no way are wholly inclusive, belong to the Department: 1. To direct employees of the Department; 2. To determine the... number ... of employees assigned, the work project, tour of duty, [or the] methods and processes by which such work is performed...."

¹⁹ R&R at 12.

²⁰ *Id.*

²¹ *Id.* at 12-13.

D. FOP's Exceptions to the Hearing Examiner's Report and Recommendation

On June 15, 2010, FOP filed two Exceptions to the Hearing Examiner's Report and Recommendation, each with numerous sub-arguments.²² First, FOP argued that "[t]he Hearing Examiner erred in his finding that neither McConnell nor Leach were entitled to Official Time, under the contract, to attend the meetings."²³ FOP asserted that (1) the Hearing Examiner's conclusion that Article 8, Section 1 of the collective bargaining agreement prohibited the officers from attending union meetings "during employee working time" is "untrue";²⁴ (2) MPD already conceded in its Post-Hearing Brief that the officers had the right to attend the meetings;²⁵ (3) Article 9, Section 4(4) of the collective bargaining agreement requires that "designated Union representatives shall be granted official time within their regularly scheduled working hours as needed to attend meetings of Boards provided for in this Agreement to which they are appointed...";²⁶ (4) the evidence shows that MPD did not dispute that Officers McConnell and Leach were "designated" by FOP to attend the respective meetings;²⁷ (5) the types of meetings in question are provided for in FOP's By-laws, which have been incorporated into the collective bargaining agreement by reference;²⁸ (6) FOP's then Chairman, Kristopher Baumann, testified that official time is routinely used for these types of meetings;²⁹ (7) there was no basis for the Hearing Examiner to conclude that the officers did not qualify for official time and that they did not have a right to be excused from work;³⁰ (8) the Hearing Examiner's application of the National Labor Relations Board's ("NLRB") balance between working time and management rights is irrelevant because the collective bargaining agreement allows official time to be used for these types of meetings;³¹ (9) the Hearing Examiner's reliance on *Payton Packing Company, Inc.*, 49 NLRB 828, 843 (1943) was misplaced because that case only applies to "undefined" union conduct, and using official time for these types of meetings was already "contemplated, negotiated, and agreed upon" by the parties in Article 9 of the collective bargaining agreement;³² and (10) the Hearing Examiner incorrectly reasoned that the officers needed to obtain MPD's "permission" to attend the meetings because it is well established between the parties that the officers only needed to "notify" MPD of their need to attend the meetings, not ask for permission.³³

FOP summarized its first exception, stating:

Given that Leach's right and McConnell's right to attend these union meetings is undeniable and safeguarded by the contract (to

²² (Exceptions at 7)

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 7-8.

²⁷ *Id.* at 8.

²⁸ *Id.* (citing Hearing Transcript at 28).

²⁹ *Id.* (citing Transcript at 25).

³⁰ *Id.* at 8-9.

³¹ *Id.* at 9.

³² *Id.*

³³ *Id.* (citing Transcript at 44, 121).

include the ability to do so on official time), absent grave and dire circumstances to befall MPD if it were to allow union leaders to attend a meeting, it is illegal for MPD to deny their right to attend. See *Quantum Electric, Inc.*, 341 NLRB 1270, 1279 (2004) (stating, “[t]here is no question that attending a union meeting is protected activity under the Act. If that were the disciplined employees’ sole conduct herein, it would be a foregone conclusion that Respondent’s disciplinary notices and termination for the activity were unlawful”).³⁴

FOP’s second exception argued that “[t]he Hearing Examiner erred in his finding that management’s rights trump Leach and McConnell’s right to attend union meetings.”³⁵ Specifically, FOP asserted that (1) MPD’s witnesses at the hearing admitted that they refused to allow the officers to attend the respective meetings;³⁶ (2) those refusals constituted interferences with rights protected by D.C. Official Code § 1-617.04(a)(1) and § 1-617.06(a)(2) and PERB precedent;³⁷ (3) the Hearing Examiner, without any evidentiary or legal support, accepted MPD’s “elaborate manpower defense which included a right to deny union participation as a management right”;³⁸ (4) the Hearing Examiner incorrectly concluded that Article 4’s language that “[t]he Department shall retain the sole right, authority, and complete discretion to maintain the order and efficiency of the public service entrusted to it, and to operate and manage the affairs of the [MPD] in all aspects...” justified MPD’s denial of the officers’ rights to attend the meetings;³⁹ (5) the Hearing Examiner was inconsistent in what he said at the hearing and what he found in his Report and Recommendation;⁴⁰ (6) Article 4 has a provision that requires MPD to adhere to the District’s laws, which the Hearing Examiner ignored when he found that management’s rights “trump the exercise of union activity” protected by D.C. Official Code § 1-617.04(a)(1), in violation of the NLRB’s holding in *Quantum Electric, supra*;⁴¹ and (7) the Hearing Examiner ignored “the great weight of evidence” that proved that there were no critical manpower shortages or designated crime emergencies on either October 31 or December 6, 2007, and that also proved the officers were not needed to maintain minimum staffing requirements.⁴²

FOP concluded its second exception, stating:

³⁴ *Id.* at 10.

³⁵ *Id.*

³⁶ *Id.* (citing Transcript at 146, 151-152, 328).

³⁷ *Id.* at 10-11 (citing *Am. Fed’n of Gov’t Emp., Local 2741 v. D.C. Dep’t of Parks and Recreation*, 50 D.C. Reg. 5049, Slip Op. No. 697 at n. 10, PERB Case No. 00-U-22 (2002) (finding that D.C. Official Code §§ 1-617.06(a)(2), (3), and (b) “protect employees in the exercise of their right to pursue a grievance”).

³⁸ *Id.* at 11.

³⁹ *Id.*

⁴⁰ *Id.* (citing Transcript at 91 (in which the Hearing Examiner stated that MPD would be in “trouble” if it did not have a “good and sufficient reason” for refusing to allow the officers to attend the meetings)).

⁴¹ *Id.*

⁴² *Id.* at 12-13

...[M]ost profoundly, [the Hearing Examiner's] endorsement of MPD's imaginary manpower shortage is frightening. Indeed, if this recommendation is accepted by the Board this would enable MPD (or any other agency) to prevent union business by simply asserting a "manpower shortage", even if it is illusory. Such a result cannot stand as it would erode decades of case law establishing that union members have the undisputed right to attend union meetings. To rule otherwise, would give MPD the keys to the kingdom on how to shut down the Union by preventing it from conducting union business. ...As such, it is self-evident that MPD's actions are illegal and the examiner's report and recommendation should be rejected by the Board.⁴³

E. MPD's Opposition to FOP's Exceptions

On July 19, 2010, MPD filed an Opposition to FOP's Exceptions, arguing that the Board should adopt the Hearing Examiner's Report and Recommendation because (1) FOP's exceptions are nothing more than disagreements with the Hearing Examiner's findings based on competing evidence and are therefore invalid;⁴⁴ (2) the Hearing Examiner's findings are all reasonable and supported by the record;⁴⁵ (3) the Hearing Examiner properly found that there is no inviolable right to attend union meetings during work hours;⁴⁶ and (4) the Hearing Examiner properly found that MPD's denial of the officers' requests to attend the meetings were not motivated by anti-union animus.⁴⁷ Alternatively, MPD argued that the Board should dismiss FOP's Complaint because FOP's allegations are purely contractual, and are therefore outside of PERB's jurisdiction.⁴⁸

The Hearing Examiner's Report and Recommendation, as well as FOP's Exceptions, are now before the Board for disposition.

III. Analysis

When a party files an unfair labor practice complaint, the Board conducts an investigation to determine, among other things, whether the allegations, if proven, could constitute a statutory violation of the Comprehensive Merit Personnel Act ("CMPA").⁴⁹ In the process of making this

⁴³ *Id.* at 14.

⁴⁴ (Opposition to Exceptions at 7-8) (citing *Fraternal Order of Police/Dep't of Corr. Labor Comm. v. D.C. Dep't of Corr.*, 52 D.C. Reg. 2496, Slip Op. No. 722 at p. 5, PERB Case Nos. 01-U-21, 01-U-28, & 01-U-32 (2003); and *Fraternal Order of Police/Dep't of Corr. Labor Comm. v. D.C. Dep't of Corr.*, 59 D.C. Reg. 3587, Slip Op. No. 888 at p. 6, PERB Case Nos. 03-U-15 & 04-U-03 (2009)).

⁴⁵ *Id.* at 8-16 (internal citations omitted).

⁴⁶ *Id.* at 16-17.

⁴⁷ *Id.* at 18.

⁴⁸ *Id.* at 18-20.

⁴⁹ See PERB Rule 520.8.

determination, the Board distinguishes between obligations that are imposed by the CMPA and those that are imposed by the parties' collective bargaining agreement.⁵⁰ Generally, the CMPA empowers the Board to resolve statutory violations, but not contractual violations.⁵¹ Notwithstanding, if the record demonstrates that an allegation concerns a statutory violation of the CMPA, then even if it also concerns a violation of the parties' contract, the Board still has jurisdiction over the statutory matter and can grant relief accordingly if the allegation is proven.⁵²

However, if the Board must interpret the parties' collective bargaining agreement in order to determine whether there has been a violation of the CMPA, then the Board does not have jurisdiction over the allegations and will defer the matter to the parties' negotiated grievance and arbitration process.⁵³

Here, in order to reach his conclusion that MPD did not commit unfair labor practices when it kept Officers McConnell and Leach from attending the union's meetings, the Hearing Examiner relied heavily upon his interpretation of Articles 4, 8, and 9 of the parties' collective bargaining agreement.⁵⁴ While the Board opines that the Hearing Examiner's interpretation of those articles was not unreasonable, it was an interpretation nonetheless and therefore outside the scope of his and PERB's jurisdiction.⁵⁵ Accordingly, the Board rejects the Hearing Examiner's findings and conclusions.⁵⁶

Upon reviewing the record as a whole, the Board finds that it is not possible to determine whether MPD violated the statute when it denied the officers' requests to attend the union's meetings without first drawing certain conclusions about what the parties intended or did not intend in Articles 8 and 9 of their collective bargaining agreement, and about how they intended to balance those Articles with MPD's management right to direct work in Article 4 if the three

⁵⁰ See *Fraternal Order of Police/Metropolitan Police Dep't Labor Comm. v. D.C. Metropolitan Police Dep't*, 60 D.C. Reg. 2585, Slip Op. No. 1360 at p. 5-6, PERB Case No. 12-U-31 (2013), *aff'd*, *Fraternal Order of Police/Metropolitan Police Dep't Labor Comm. v. D.C. Pub. Emp. Relations Bd.*, Case No. 2013 CA 001289 P(MPA) (D.C. Super. Ct. Aug. 18, 2014).

⁵¹ *FOP v. MPD*, Slip Op. No. 1360 at p. 5-6, PERB Case No. 12-U-31; *see also Fraternal Order of Police/Metropolitan Police Dep't Labor Comm. v. D.C. Metropolitan Police Dep't and Cathy Lanier*, 59 D.C. Reg. 5427, Slip Op. No. 984 at p. 7, PERB Case No. 08-U-09 (2009).

⁵² *Fraternal Order of Police/Metropolitan Police Dep't Labor Comm. v. D.C. Metropolitan Police Dep't*, 60 D.C. Reg. 9212, Slip Op. No. 1391 at p. 22, PERB Case Nos. 09-U-52 and 09-U-53 (2013), *aff'd*, *D.C. Metropolitan Police Dep't v. D.C. Public Emp. Relations Bd. and Fraternal Order of Police/Metropolitan Police Dep't Labor Comm.*, Case No. 2013 CA 004572 P(MPA) (D.C. Super. Ct. Jun. 13, 2014).

⁵³ *FOP v. MPD*, Slip Op. No. 1360 at p. 5-6, PERB Case No. 12-U-31.

⁵⁴ *See* (R&R at 10-13).

⁵⁵ *FOP v. MPD*, Slip Op. No. 1360 at p. 5-6, PERB Case No. 12-U-31.

⁵⁶ As a result of the Board's rejection of the Hearing Examiner's Report and Recommendation, it is not necessary to address FOP's Exceptions. However, the Board does note that FOP's Exceptions and MPD's Opposition to those Exceptions also relied heavily on their respective interpretations of Articles 4, 8, and 9 to support their opposing positions regarding the Hearing Examiner's Report and Recommendation. The Board finds that such simply gives additional credence to the Board's ultimate conclusion in this Decision and Order that finding a statutory violation in this matter would require an interpretation of the parties' contract, which, as has been noted, is outside of the Board's jurisdiction to do.

Articles ever came into conflict, as they did in this case.⁵⁷ Indeed, the parties' contract does not even provide a basic definition of the term, "official time," nor is there any statutory definition of the phrase in the CMPA. Further, since both parties offered very different understandings of the above provisions in their respective pleadings, it is apparent that even they do not agree on what the Articles mean. For example, FOP argued that it has been holding these types of meetings for years without any objection by MPD, and that because the officers were attending the meetings in the steads of union officials who would have normally been allowed to attend had they been at work on the days in question, MPD had no right under the contract to prohibit their attendance at the meetings. MPD, on the other hand, argued that the contract expressly prohibited the officers from being able to attend the union's internal meetings during their working hours.⁵⁸

Therefore, since even the parties dispute what the key Articles in their contract mean, and since FOP's alleged statutory violations cannot be evaluated or decided until it is determined how those Articles should be interpreted,⁵⁹ the Board finds, under its case law, that it lacks jurisdiction over this case.⁶⁰ Accordingly, the Board dismisses FOP's Complaint, and defers the matter to the parties' grievance and arbitration process.⁶¹

⁵⁷ Reasonably, in cases where the meaning of a relevant provision in the parties' collective bargaining agreement is clear on its face and undisputed by the parties, then the Board can rely on that unambiguous and stipulated meaning to determine whether the alleged statutory violation occurred. But that is not the case here. As previously mentioned, the parties in this matter have presented contrasting interpretations of the relevant contractual provisions. Therefore, in order to determine whether FOP's statutory allegations have any merit, the Board would have to decide which of the parties' different interpretations is correct. As has been noted, PERB does not have the authority to do that. Therefore, as PERB case law directs, the Board must defer this matter to the parties' negotiated grievance and arbitration process. *See FOP v. MPD*, Slip Op. No. 1360 at p. 5, PERB Case No. 12-U-31.

⁵⁸ *See* (R&R at 10-13); *see also* (FOP's Post-Hearing Brief at 8); *and* (Exceptions at 7-8).

⁵⁹ For instance, if Article 8, Section 1 in the parties' agreement prohibits FOP from conducting internal union business or activities (such as "attending Union meetings, etc.") during employee working time with no applicable exception in Article 9, Section 4, then it cannot be reasonably concluded that MPD committed an unfair labor practice in violation of the statute when it simply adhered to and/or enforced what the parties had already agreed to in the contract. *See FOP v. MPD*, Slip Op. No. 1360 at p. 5, PERB Case No. 12-U-31 (holding that "the Board lacks jurisdiction over an allegation in which the very act or conduct that gives rise to the allegation, despite being alleged in the Complaint as a violation of statute, was envisioned and expressly authorized by the parties' in the contract."). If, however, the parties did not intend for the provision in Articles 8 and 9 to prohibit the officers from attending the types of union meetings that are at issue in this case, then it is possible that MPD did interfere with the officers' rights to attend the meetings in violation of the statute. Therefore, since the ultimate outcome of the statutory question in this matter depends on how the parties' contract is interpreted, the Board must defer resolution of FOP's allegations to the parties' negotiated grievance and arbitration process.

⁶⁰ *FOP v. MPD*, Slip Op. No. 1360 at p. 5-6, PERB Case No. 12-U-31.

⁶¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT:

1. FOP's Complaint is Dismissed: and
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 Chairperson Charles Murphy, and Members Keith Washington, Ann Hoffman, and Yvonne Dixon.

August 20, 2015

Washington, D.C.

CORRECTED CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-U-22, Op. No. 1534 was sent by US Mail to the following parties on this the 24th day of August, 2015.

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