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,

Respondent.

PERB Case No. 08-U-19

Opinion No. **1118**

Motion for Reconsideration

Decision and Order

I. Statement of the Case

The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("Complainant" or "FOP") filed an Unfair Labor Practice complaint ("Complaint") alleging that the District of Columbia Metropolitan Police Department, *et al.*[1] ("Respondent" or "MPD") committed an unfair labor practice by making changes to the working conditions of its members in the canine unit, and altering the language of the collective bargaining agreement ("CBA"), without first bargaining in good faith with the Union. MPD filed an Answer denying any violation of the CMPA.

A hearing was held, and the Hearing Examiner found that the issue of scheduling was contained in the parties' collective bargaining agreement ("CBA"); therefore the Board has no jurisdiction over this portion of the Complaint. The Hearing Examiner also found that MPD

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[1] Although the Complainant named various individuals as Respondents in this Complaint, the Board has removed the names from the caption. (See p.5)

committed an unfair labor practice by refusing to engage in impact and effects bargaining upon request, over the impact and effects of the remaining effects of the Canine Handler Deployment Policy. The Hearing Examiner recommended that MPD: (1) cease and desist from implementing a new policy affecting bargaining unit employees after the FOP had requested impact and effects bargaining, (2) post a notice, and (3) pay FOP reasonable costs and attorney fees.

On October 22, 2008, MPD filed exceptions to the Hearing Examiner's finding that MPD's actions constituted an unfair labor practice and to her award of reasonable costs and attorney fees. In *FOP/MPD Labor Committee v. MPD*, Slip Op. No. 991, PERB Case No. 08-U-19 (September 30, 2009), the Board granted MPD's exceptions in part. The Board found that an unfair labor practice had been committed and ordered MPD to cease and desist from: (1) unilaterally implementing the Handler Deployment Policy, and (2) refusing to bargain with the Union. The Board ordered MPD to engage in impact and effects bargaining concerning the implementation of the Handler Deployment Policy, except as it relates to the scheduling of canine unit officers covered by Article 24 of the parties' collective bargaining agreement, and post a notice for 30 days admitting the violation. The Board granted MPD's exceptions regarding costs and attorney fees and denied FOP's request for costs and attorney fees.

On October 15, 2009, MPD filed a Motion for Reconsideration ("Motion") of the Board's Decision and Order in this matter. The FOP filed an Opposition to the Respondent's Motion. ("Opposition").

The Board's Decision and Order, MPD's Motion, and FOP's Opposition are before the Board for consideration.

II. The Respondents' Motion for Reconsideration and the Complainant's Opposition

The MPD asserts that the Board has no jurisdiction over matters that have been negotiated by the parties pursuant to the "covered by" doctrine. The MPD contends that: (1) "Article 24, [Section 1] of the parties' CBA [concerning scheduling, is] the basis of the unfair labor practice complaint" (Motion at p. 3); (2) the Hearing Examiner cites scheduling changes as the basis for [finding] that [the] Respondents engaged in an unfair labor practice" (Motion at p. 6); and (3) the other "working conditions cited by the Hearing Examiner . . . all relate to subjects covered by the parties' labor agreement." (Motion at p. 9). Also, MPD argues that the individually named Respondents are not proper parties to this case, and therefore, requests that the Board find dismiss their names from this matter. (Motion at p. 11). Finally, MPD contends that the Board improperly found that the required form of a demand for bargaining is a question of fact (Motion at p. 10) and requests that the Board find, as a matter of law, that the demand for bargaining in this matter was improper because it was not made to the Chief of Police and was not in writing. MPD requests that the Board dismiss this matter on those grounds.

If the Board does not dismiss this matter, MPD requests that "the Board ... amend the portion of its Order requiring the Respondents to engage in impact and effects bargaining over the Handler Deployment Policy, as it has been discontinued]." (Motion at pgs. 1 and 13). In sum, the Respondents request that the Board dismiss the Complaint and deny costs.

In its Opposition, FOP counters that MPD is merely challenging the Board's jurisdiction and the effectiveness of a verbal demand to bargain. (Opposition at p. 2). FOP asserts that the Board has already determined that "the Complaint, as it relates to [scheduling,] Article 24 of the parties' CBA, is not within the Board's jurisdiction, and is dismissed." (Opposition at p. 6). FOP cites the Hearing Examiner's reasoning for finding that the Canine Handler Deployment Policy expanded the handler's duties and responsibilities and negatively impacted their working conditions, at pages 4 and 11 of Slip Op. No. 991, PERB Case No. 08-U-19. (See Opposition at p. 7). FOP notes that MPD does not challenge the fact that the Union did request impact and effects bargaining over the implementation of the new canine deployment initiative, but rather, MPD merely challenges the method used. (See Opposition at p. 9).

III. Discussion

FOP named Chief Cathy Lanier and Commander James Crane as Respondents in this Complaint. In its Motion for Reconsideration, MPD demands that the Complaint, as it pertains to Chief Cathy Lanier and Commander James Crane as named Respondents, be dismissed. The matter was raised before the Hearing Examiner Hayes.[2] The Hearing Examiner made the following observation regarding this issue:

> MPD filed an answer to the complaint on February 27, 2008, arguing principally that this Board lacks jurisdiction to hear the complaint because the FOP alleges unilateral changes to the terms and conditions of employment covered by Article 24 of the parties' collective bargaining agreement and that there is no evidence that it committed an unfair labor practice. MPD also contends (Ans. at 1) that because the FOP names Chief of Police Cathy Lanier and Commander James Crane as co-respondents along with MPD, jurisdiction in this Board is lacking since D.C. Code § 1-617.04(a) (cited by the FOP) does not confer Board jurisdiction over individuals acting in their official capacities. However, MPD did not move for dismissal of the complaint as to Chief Lanier and/or Commander Crane (Tr. 4-6).

(R&R at p. 2).

[2] While this issue was raised in MPD's initial pleadings, it was not raised in MPD's exceptions. This may be due to the fact that the Hearing Examiner did not include the two names in the caption of the Report and Recommendation.

Hearing Examiner Hayes addressed the issue again, finding that the Board has jurisdiction over this matter, but making no definitive ruling as to the named Respondents. The Hearing Examiner stated as follows:

> As previously noted, MPD challenges the exercise of Board jurisdiction over a complaint in which District employees are named as individual defendants acting in their official capacities. While neither Chief Lanier nor Commander Crane may waive jurisdiction by failing to move for dismissal of the action as to them, since the Board has jurisdiction over an unfair labor practice complaint naming the offending agency as respondent, the Board's exercise of jurisdiction over this complaint is appropriate.

(R&R at p. 10, n. 4).

We note that in *American Federation of Government Employees, Local 1403 v. District of Columbia, et al.*, Case 2008-CA-8472 (July 21, 2009), a recent decision from the District of Columbia Superior Court, Judge Jeanette J. Clark observed that "the Court of Appeals has long established that "[p]ublic officers cannot be held liable for allegedly tortious acts where they are sued in their official capacities and the acts alleged could have been done only within the scope of their official duties." *Eskridge v. Jackson*, 401 A.2d 986, 989 n. 7 (D.C. 1979) (citation omitted). Recently, the United States District Court for the District of Columbia stated that "[c]laims brought against government employees in their official capacity are treated as claims against the employing government and serve no independent purpose when the government is also sued." *Hardy v. District of Columbia,* 601 F. Supp. 2d 182, *5 (D.D.C. 2009) (internal citations omitted)." Judge Clark further stated as follows:

> Moreover, the United States Supreme Court has characterized "official capacity suits" as "another way of pleading an action against an entity of which an officer is an agent." *Hafer v. Melo,* 502 U.S. 21, 25 (1991) (citing *Ky. v. Graham,* 473 U.S. 159,165 (1985)). The Supreme Court went on to state that "[a]s long as the government entity receives notice and an opportunity to respond, an official capacity suit is, in all respects other than name, to be treated as a suit against the entity.... It is *not* a suit against the official personally, for the real party in interest is the entity." *Ky.*, 473 U.S at 166 (citation omitted); *See also, Will v. Mich. Dep't of State Police,* 491 U.S. 58, 71 (1989). "This makes the addition of individually named defendants ... 'redundant and an inefficient use of judicial resources.'" *Jenkins v. Jackson,* 538 F. Supp. 2d 31, 33 (D.D.C. 2008) (citations omitted).

> Furthermore, "[w]here the suit has been filed against the employer ... and one or more employees ... the claims against the employees *merge* with the claim against the employer." *Cooke-Seals v. District of Columbia,* 973 F. Supp. 184, 187 (D.D.C. 1997) ("Because an official capacity suit against an individual is the functional equivalent of a suit against the employer, plaintiff's claims against the officers are redundant and an inefficient use of judicial resources.") Therefore, "[suits against state officials in their official capacity ... should be treated as suits against the State." *Hafer,* 502 U.S. at 25; *See Will,* 491 U.S. at 71.
>
> Given the fact that both Defendant Nickles, in his official capacity, and his employer, the District of Columbia, were sued, the claims against him should be treated as claims against the District of Columbia government. *See Hardy, supra,* at *5. Indeed, any alleged conduct on the part of Defendant Nickles was performed within the scope of his official duties as the Attorney General. *See Eskridge, supra.* Accordingly, Defendant Nickles is dismissed from the lawsuit.

The Board finds that Judge Clark's analysis in *American Federation of Government Employees, Local 1403 v. District of Columbia, et al.*, Case 2008-CA-8472 (July 21, 2009), is instructive and applies to the facts of the present case. D.C. Code § 1-617.04 provides that the "District, its agents, and representatives" are prohibited from engaging in unfair labor practices. Suits against the District officials in their official capacity should be treated as suits against the District. Therefore, we grant the Respondents' request to dismiss Chief Cathy Lanier and Commander James Crane as Respondents in this matter.[3]

With regard to the Respondents' allegation that the Board has no jurisdiction over this matter because the complaint is based on scheduling, we have previously rejected this argument. The Hearing Examiner explicitly found that the Board has no jurisdiction over the issue of scheduling because it is addressed in the collective bargaining agreement. However, the Hearing Examiner did find that other aspects of the Canine Handler Deployment Policy were subject to impact and effects bargaining. The MPD was exercising its right to assign work when it made the changes at issue here. The Hearing Examiner found that the assignment affected Canine Handlers by changing their reporting duty location, adding foot beats and increasing supervision, and thus, gave rise to impact and effects bargaining, upon request from the Union. We have adopted the Hearing Examiner's finding that FOP made a proper request to bargain over these matters and that MPD refused to bargain.

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[3] By removing these names from the caption, we are not reversing our ruling that the Board has jurisdiction over the Agency.

The Board has repeatedly held that a motion for reconsideration cannot be based upon mere disagreement with its initial decision. (See *AFGE Local 2725 v. District of Columbia Department of Consumer and Regulatory Affairs and Office of Labor Relations and Collective Bargaining,* _DCR_, Slip Op. No. 969, PERB Case No. 06-U-43 (2009); see *D.C. Department of Human Services and Fraternal Order of Police Department of Human Services Labor Committee*, 52 DCR 1623, Slip Op. No. 717, PERB Case Nos. 02-A-04 and 02-A-05 (2003); see *D.C. Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee (Shepherd),* 49 DCR 8960, Slip Op. No. 680, PERB Case No. 01-A-02 (2002); see *AFSCME Local 2095 and AFSCME NUHHCE and D.C. Commission on Mental Health Services*, 48 DCR 10978, Slip Op. No. 658, PERB Case No. 01-AC-01 (2001).

In addition, where the Board's decision was reasonable, supported by the record, and based on Board precedent, we find no basis for reversal of the Board's decision.

The Hearing Examiner found that the Board has no jurisdiction over scheduling, as it is a contractual matter. However, the assignment also affected Canine Handlers by changing their reporting duty location, adding foot beats, and increasing supervision. Therefore, MPD failed to bargain in good faith when it refused to bargain with the Union upon request.

Based on the above, we deny the Respondent's Motion.

ORDER

IT IS HEREBY ORDERED IT IS HEREBY ORDERED THAT:

1. The Motion for Reconsideration filed by the Metropolitan Police Department ("MPD") is granted in part and denied in part.

2. MPD's request to dismiss Chief Cathy Lanier and Commander James Crane as Respondents in this matter is granted.

3. MPD's request that we reverse the Hearing Examiner's finding that MPD committed an unfair labor practice by failing to engage in impact and effects bargaining is denied.

4. Pursuant to Board Rule 559.3, this Motion for Reconsideration is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

August 19, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-U-19 was transmitted via Fax and U.S. Mail to the following parties on this the 19th day of August 2011.

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Courtesy Copy:

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Metropolitan Police Department
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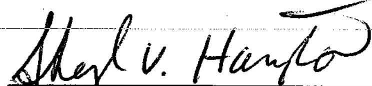
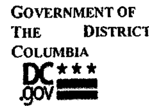
U.S. MAIL



Sheryl V. Harrington
Secretary

GOVERNMENT OF THE DISTRICT OF COLUMBIA



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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1118, PERB CASE NO. 08-U-19 (AUGUST 19, 2011).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by the actions and conduct set forth in Slip Opinion No. 1118.

WE WILL NOT, in any like or related manner: (1) interfere, restrain, coerce employees from exercising or pursuing their protected rights guaranteed by the Labor-Management Subchapter of the District of Columbia Comprehensive Merit Personnel Act.; or (2) refuse to bargain collectively in good faith with the exclusive representative of our employees.

District of Columbia Metropolitan Police Department

Date:_______________ By:________________________
Chief of Police

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is 1100 4th Street S.W., Suite E630, Washington, D.C. 20024. Phone: 202-727-1822.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

August 31, 2011