

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:)
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Fraternal Order of Police/Metropolitan Police)
Department Labor Committee,)
)
Complainant,)
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v.)
)
)
District of Columbia Metropolitan Police)
Department,)
)
and)
)
Chief Cathy Lanier,)
)
and)
)
Assistant Chief Peter Newsham,)
)
)
and)
)
Inspector Jacob Kishter,)
)
)
Respondents.)
)

PERB Case No. 09-U-37

Opinion No. 1116

Motion to Dismiss

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; Chief Cathy Lanier; Assistant Chief Peter Newsham; and Inspector Jacob Kishter ("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 refusing to provide information requested by Chief Shop Steward Michael Millett concerning an internal investigatory interview of a Union member.

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 District of Columbia Metropolitan Police 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 (CBU) comprised of police officers.
3. The Union and the Department entered into a Collective Bargaining Agreement (CBA) effective, FY 2004 through FY 2008. See Attachment 1.
4. Cathy L. Lanier is the Department's Chief of Police.
5. Peter Newsham is the Assistant Chief of Police assigned to the Department's Investigative Services Bureau. Assistant Chief Newsham reports to Chief Lanier.
6. Jacob Kishter is the Inspector assigned to the Department's Third District. On the dates of the events in dispute, Inspector Kishter was assigned to the Department's Internal Affairs Division (IAD).
7. Detective Michael Millett is a member of the CBU and is the Chief Shop Steward for the Special Operations Division (SOD). Detective Millett is a leading Union representative.
8. On February 10, 2009, the Department's Internal Affairs Division conducted an investigatory interview of Sergeant Irving Curry, a member of the Union. Sergeant Curry was represented by Detective Michael Millet at the interview. Prior to the commencement of questioning, Detective Millett requested specific information related to the Department's investigation of

Sergeant Curry. The Department, however, refused to provide the requested information of the interview.

9. On February 11, 2009, Detective Millett filed a formal request for information pursuant to D.C. Code 1-617.04(a)(5) and Article 10 of the CBA, in which he requested: 1) a copy of the tape recorded administrative interview of Sergeant Curry conducted on February 10, 2009, 2) documents regarding the issue of "good cause" for the removal of Detective Michael Millett as the Union representative for Sergeant Curry, and 3) documents regarding the standards and practices of IAD as it relates to the removal of Union representatives from administrative interviews.

10. The Department did not respond to the February 11, 2009 requests for information.

11. On February 24, 2009, Detective Millett made a second written request for a copy of the tape recorded February 6, 2009 IAD investigative interview.

12. In a letter dated March 11, 2009, Inspector Kishter denied Chief Shop Steward Millet's Information Request, stating that "[u]nder the [CBA] you have no entitlement to your taped interview since you were interviewed as a witness and the tape will not be relied upon in proposing action against you." See Attachment 4.

13. The requested information was, and remains necessary for the Union to conduct its business.

(Complaint at pgs. 2-5).

In addition to these alleged facts, FOP argues that:

[t]he Department is prohibited from refusing to provide relevant and necessary information to the Union. D.C. Code § 1-617.04(a)(1) and (5). See also Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department. Slip No. 835, PERB Case No. 06-U-10.

The Department committed an Unfair Labor Practice by refusing to provide the relevant and necessary information requested by

Chief Shop Steward Millett. In view of the Department's illegal action, Chief Shop Steward Millett, the Union, and its membership are entitled to relief.

(Complaint at p. 5).

As a remedy for the Respondents' alleged actions, FOP requests that the Board issue an order: (1) finding that the Respondents "have engaged in an unfair labor practice in violation of D.C. Code § 1-617.04(a)(1) and (5);" (2) "ordering the Respondents to cease and desist from engaging in an unfair labor practice in violation of D.C. Code § 1-617.04(a)(1) and (5); Compelling the Department to conspicuously post no less than two (2) notices of their violations and the Board's Order in each Department building; Compelling the [Respondents] to provide the requested information to Chief Shop Steward Millett; Compelling the [Respondents] to pay the Union's costs associated with the proceeding." (Complaint at pgs. 5-6).

MPD denies the allegations set forth in the Complaint. Respondent does admit that: (1) "on February 10, 2009, the Respondent conducted an interview of Sergeant Irving Curry, a member of the union, but denies that it was an investigatory interview." (Answer at p. 3); (2) "Detective Millett filed a Release of Information Request dated February 11, 2009." (Answer at p. 3); (3) "Detective Millett filed a Release of Information Request on February 24, 2009. (Answer at p. 3); and (4) "on March 11, 2009, Inspector Kishter denied Detective Millett's Request for Information." (Answer at p. 3). However, Respondent argues that the Board "should dismiss the Complaint on the basis that there is no evidence of the commission of an unfair labor practice." (Answer at p. 4).

Motion to Dismiss

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 24*, 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).

Based upon the foregoing, FOP has alleged facts asserting that MPD has refused a request for information necessary for providing assistance to a bargaining unit member. MPD disagrees with FOP's assertion that Sergeant Curry was subjected to an investigatory interview. However, these alleged facts, if proven, would constitute a violation of an employee's rights under D.C. Code § 1-617.04(a)(1). Moreover, 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. Here, issues of fact exist concerning whether MPD violated the CMPA by refusing the Union's request for information. The Board has previously held that materials and information relevant and necessary to its duty as a bargaining unit representative must be provided upon request. (See *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department*, ___ DCR ___, Slip Op. No. 835, PERB Case No. 06-U-10 (2006). In addition, the issue of whether the Respondent's 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). Consequently, the MPD's request to dismiss the Complaint is denied. The Complaint, and its allegations against the Respondents, will continue to be processed through an unfair labor practice hearing.

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 19, 2011

CERTIFICATE OF SERVICE

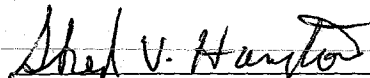
This is to certify that the attached Decision and the Board's Decision and Order in PERB Case No. 09-U-37 are being transmitted via Fax and U.S. Mail to the following parties on this the 19th day of August, 2011.

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