Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Harcourt Masi,	
Complainant,	PERB Case No. 09-U-25
v.	Opinion No. 1384
District of Columbia Department of Corrections,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

Complainant Harcourt Masi ("Complainant") filed the above-captioned unfair labor practice complaint ("Complaint) against Respondent District of Columbia Department of Corrections ("Respondent" or "Agency"), for an alleged violation of sections § 1-617.04(a)(2), (3), and (4) of the Comprehensive Merit Personnel Act ("CMPA")[1]. (Complaint at 5). Respondent filed an Answer ("Answer"), denying any violation of the CMPA and raised the following affirmative defenses:

> (1) Complainant fails to allege conduct that constitutes an unfair labor practice under §§ 1-617.04(a)(2), (3), and (4) of the D.C. Official Code (2001 ed., as amended). Complainant fails to allege that Respondent dominated, interfered with, or assisted in the formation, existence of administration of any labor organization, or contributed financial or other support to it, discriminated in regard to hiring against or took reprisals against Complainant as a result of his protected activity, that there was a nexus between his protected activity and Respondent's actions, that the Respondent

[1] In the Complaint, Complainant refers to "CMPA 1-618.4(a)(2)(3)(4)." The Board will assume that Complainant intended to refer the current D.C. Code § 1-617.04(a)(2), (3), and (4).

demonstrated anti-union animus and that he has suffered any harm as a result. As a result, the Complaint should be dismissed in its entirety, with prejudice.

(2) Complainant, through his collective bargaining representative, filed a grievance on November 21, 2008, under the provisions of the collective bargaining agreement between the parties, involving the same facts and circumstances. Said grievance is pending at the arbitration level (FMCS Case No. 090126-53289-A). Complainant has, therefore, admitted that his allegations regard contractual rather than statutory rights. PERB lacks jurisdiction to rule on allegations of violation of purely statutory rights.

(3) Complainant seeks a series of remedies that are inconsistent with each other, seeking simultaneously to be place[d][sic] on the promotion list, to be promoted, to be allowed to "re-take" the Phase III part of the test and to be promoted with a calculated score of zero for Phase III.

(Answer at 10-11). The issue before the Board is whether the Respondent violated D.C. Code § 1-617.04(a)(2), (3), or (5) by refusing to allow Complainant to take the third phase of a promotional exam after arriving late to the testing site. (Complaint at 5).

II. Discussion

A. Background

The parties agree that on November 1, 2008, Respondent issued an operations memorandum setting forth the upcoming promotion process for sergeants and lieutenants. (Complaint at 3; Answer at 3). Complainant took the Phase I written exam, scoring 98 out of 100 points. (Complaint at 3; Answer at 3). On the Phase II exam, Complainant scored 75 out of 100 points. (Complaint at 3-4; Answer at 3-4). The scores for the first two exams were averaged, and Complainant's resulting average score qualified him to advance to the Phase III exam. (Complaint at 4; Answer at 4-5). The Complainant alleges that he was placed on a "promotion list" with 63 other candidates, and that the Phase III exam served only to rank the candidates in order for promotion. (Complaint at 4). Respondent denies that the Complainant was placed on a "promotion list," and contends that the Complainant was placed on a list of candidates who passed both Phase I and Phase II of the promotional exam. (Answer at 4-5). Further, Respondent denies that the purpose of the Phase III exam was only "to rank the promotion candidates in order for promotion." (Answer at 5).

Department of Corrections Deputy Director Patricia Britton attended a meeting at Complainant's worksite, and informed the employees that there were more promotion candidates for sergeant than there were sergeant vacancies, and that sergeant candidates would have to undergo Phase III of the sergeant's promotional exam. (Complaint at 4; Answer at 5). Complainant was notified of the Phase III test date on the day prior to the Phase III exam.

(Complaint at 5; Answer at 5-6). Respondent asserts that participants in the Phase III exam were instructed to report to the testing facility "**promptly at 7:30 am**," and were informed that "[c]andidates arriving after the reporting examination time will not be allowed to take the examination. There will be **NO EXCEPTIONS**." (Answer at 5-6; Complaint Exhibit F, emphasis in original). Complainant arrived at the testing facility at 7:40 am, where he asserts other candidates were waiting in a conference room and no testing was in progress. (Complaint at 5). Respondent admits that the Complainant arrived at 7:40am, but denies that other candidates were waiting and no testing was in progress. (Answer at 6). At approximately 7:50 am, Deputy Director Britton instructed the Complainant to leave the conference room. (Complaint at 5; Answer at 6). Complainant alleges that Respondent removed his name from the "promotion ranking order disqualifying the complainant from being considered for future promotion as all of the other candidates." (Complaint at 5). Complainant states that this action is in violation of the CMPA. *Id.* Respondent contends that these allegations lack specificity sufficient for the Respondent to supply an answer, as the Complainant does not identify how, when, and under what circumstances his activities were statutorily protected. (Answer at 6).

Next, Complainant alleges that "Deputy Director Patricia Britton through her appointed managers directly or indirectly provided answers to the sergeant promotion exam on or before November 21, 2008 on the transport bus driven by Major Brown to the exam sight [sic], FOP/Labor Committee Chairperson filed a grievance against the agency's Deputy Director Patricia Britton on November 21, 2008." (Complaint at 8). Complainant asserts that Deputy Director Britton allowed sergeants who failed the lieutenant's exam to re-take the exam, in violation of the parties' CBA and D.C. personnel regulations. *Id.* Additionally, Complainant alleges that Deputy Director Britton permitted candidates who missed the Phase II exam to retake the exam at a later date, "but would not allow me to re-take the Phase III part of the exam because of her self made rule of no exceptions, which is a gross unfair labor practice." (Complaint at 8-9).

The Agency disputes each of these allegations, and asserts that the allegations are irrelevant and lack specificity sufficient for the Respondent to supply an answer. (Answer at 7-10). The Agency states that three candidates were permitted to take a revised Phase III exam on a subsequent date: one candidate who was late, but "for whom Management could not validate that he was timely and properly notified of the date and time of the Phase III portion of the exam; a candidate who was in the hospital; and a candidate who was on annual leave during the original Phase III exam. (Answer at 9).

B. Analysis

While a Complainant need not prove his case on the pleadings, he must plead or assert allegations that, if proven, would establish a statutory violation. *See Virginia Dade v. National Association of Government Employees, Local R3-06*, 46 D.C. Reg. 6876, Slip Op. No. 491 at p. 4, PERB Case No. 96-U-22 (1996); *Gregory Miller v. American Federation of Government Employees Local 631 v. D.C. Dep't of Public Works*, 48 D.C. Reg. 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994); *Goodine v. FOP/DOC Labor Committee*, 43 D.C. Reg. 5163, Slip Op. No. 476 at p.3, PERB Case No. 96-U-16 (1996). When considering the

pleading of a *pro se* complainant, the Board construes the claims liberally to determine whether a proper cause of action has been alleged and whether the complainant has requested proper relief. *See Osekre v. American Federation of State, County, and Municipal Employees Council 20, Local 2401*, 47 D.C. Reg. 7191, Slip Op. No. 623, PERB Case Nos. 99-U-15 and 99-S-04 (1998).

In the instant case, Complainant alleges that the Respondent violated the CMPA by refusing to allow him to take the Phase III promotional exam after arriving late, and by permitting other employees to take the Phase III exam after the initial testing date. (Complaint at 5-9). These allegations do not assert that the Agency's actions concerned the Complainant's exercise of his rights under the CMPA. Complainant has failed to assert allegations or evidence that would tie the Agency's actions to the asserted violation of D.C. Code § 1-617.04(a)(2), (3), and (4), or indeed any portion of D.C. Code § 1-617.04(a). D.C Code § 1-617.04(a) prohibits the D.C. government, its agents, and representatives from (1) interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by the CMPA; (2) dominating, interfering, or assisting in the formation, existence, or administration of any labor organization, or contributing financial or other support to it; (3) discriminating in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; (4) discharging or otherwise taking reprisal against an employee because he or she has signed or filed an affidavit, petition, or complaint or given any information or testimony; and (5) refusing to bargain collectively in good faith with the exclusive representative. The Complainant's allegation – that he was not allowed to take the Phase III promotional exam after arriving late – does not fall under any of the categories of prohibited actions in D.C. Code § 1-617.04(a).

There is no allegation of a nexus between the Agency's actions and the employee's exercise of his Section 1-617.01 rights. Therefore, the Complaint must be dismissed. *See American Federation of Government Employees, Local 2553 v. District of Columbia Water and Sewer Authority*, 59 D.C. Reg. 7300, Slip Op. No. 1252, PERB Case NO. 06-U-35 (2012).

ORDER

IT IS HEREBY ORDERED THAT:

1. Complainant Harcourt Masi's Unfair Labor Practice Complaint is dismissed.

2. 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.

May 1, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-U-25 was transmitted via U.S. Mail and e-mail, where available, to the following parties on this the 1st day of May, 2013.

Mr. William Montross, Esq.
Mr. Jonathan O'Neill, Esq.
OLRCB
441 4th St, NW
Suite 820 North
Washington, D.C. 20001
william.montross@dc.gov
jonathan.o'neill@dc.gov

U.S. Mail & E-MAIL

Mr. Harcourt Masi
1109 Chaplin St., SE
Washington, DC 20019

U.S. MAIL

E. E. Wilcox

Erin E. Wilcox, Esq.
Attorney-Advisor