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

In the Matter of:	)	
	)	PERB Case Nos. 09-U-41
	)	09-U-42
Fraternal Order of Police/Metropolitan	)	09-U-43
Police Department Labor Committee,	)	09-U-44
	)	10-U-01
Complainant,	)	10-U-14
	)	
v.	)	
	)	Opinion No. 1361
District of Columbia	)	
Metropolitan Police Department,	)	
	)	
Respondent.	)	

**DECISION AND ORDER**

**I. Statement of the Case**

On June 29, 2009, Complainant Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP” or “Complainant”) filed four pleadings styled “Unfair Labor Practice Complaint and Request for Preliminary Relief,” alleging violations of the Comprehensive Merit Personnel Act (“CMPA”) by Respondent District of Columbia Metropolitan Police Department (“MPD” or “Respondent”). The four unfair labor practice complaints were assigned the case numbers 09-U-41, 09-U-42, 09-U-43, and 09-U-44. On September 30, 2009, the Board issued decisions and orders in these four cases (slip opinions 972, 974, 985, and 986). In these decisions and orders, the Board denied FOP’s requests for preliminary relief, consolidated the four cases, and referred the cases to a hearing examiner. On November 23, 2009, PERB Case No. 10-U-01 was administratively consolidated with the other unfair labor practice complaints. On April 10, 2010, PERB Case No. 10-U-14 was administratively consolidated with the group.

Hearings in the consolidated cases were held on January 25-28, February 1-4, and February 23, 2010. The parties submitted post-hearing briefs, and on October 4, 2010, Hearing Examiner Sean Rogers issued a Report and Recommendation (“Report”). FOP and MPD filed exceptions to the Report (“FOP Exceptions” and “MPD Exceptions”), and FOP filed an Opposition to Respondent’s Exceptions (“FOP Opposition”). On January 30, 2013, FOP filed a

Line Withdrawing Complainant's Exceptions to Hearing Examiner's Report and Recommendations. The Report, MPD Exceptions, and FOP Opposition are now before the Board for disposition.

## II. Findings of Fact

The six unfair labor practice complaints arise from a common set of facts. (Report at 9). In his Report, the Hearing Examiner found the following facts.

On May 30, 2009, an MPD officer shot and wounded a suspect, who then barricaded himself into an apartment building. (Report at 9). Officers from the Seventh District, the Special Operations Division, and the Emergency Response Team ("ERT") responded to the barricade situation, and the ERT took command. *Id.* Throughout the incident, members of the ERT utilized radio communications to coordinate their actions. *Id.*

ERT Captain Jeffrey Herold assumed the role of Incident Commander, and ERT Lieutenant Scott Dignan assumed the role of Operations Section Chief. Herold was in command of the barricade situation, while Dignan was responsible for radio communication with the ERT team members at the barricade site, who would be responsible to taking the suspect into custody. *Id.* For radio communication purposes, Herold was designated as "ERT One," and Dignan was designated as "Command" or "ERT Two." *Id.* Two other ERT members, Sergeant Chambers and Sergeant Pope, were designated as "Alpha One" and "Delta One." *Id.*

Dignan and The Hearing Examiner found that a 14:33 minute recording of ERT radio communications among Pope and Dignan "reveals the following dialogues relevant to these cases:"

- 08:31: Command to Alpha One, be advised I'm being ordered to give you the go to deploy gas. Copy?
- 08:49: Alpha One to ERT Two, if you deploy that gas and we are not prepared for that, we are not prepared to [inaudible] just yet, please standby for just five more minutes.
- 09:00: [ERT Two] Copy, I just need communication from you because I'm getting, ah, issues down here, I just need you to keep me informed so I can inform them because, I'm getting – pressured.
- 09:13: [Alpha One] I understand ERT Two, 'cause I'm trying to put a couple of things in place here. If you can give me a couple of minutes, I'll be happy to brief you.

\* \* \*

09:40: Alpha One to ERT Two, would you let command know that we have been in contact with him again, and if they will please just give us a couple of minutes, I'm gonna try to resolve this...

09:50: [ERT Two]...I'll advise

\* \* \*

10:17: [Delta One replies to Charlie One]...also can you advise ERT One, Two, the Command and the Chief they're in a, ah, bad situation. I can see 'em from the front door here. So, if anything happens, they're in the line of fire.

10:37: [Charlie One] I'll tell them to move out of the way...

(Report at 10).

After the barricade incident was resolved, ERT members attended a debriefing by Lieutenant Dignan. *Id.* Officer Wendell Cunningham, an ERT sniper and FOP Vice Chairman, did not attend the debriefing. *Id.* Later, several bargaining unit ERT members who had been at the debriefing told Cunningham that Dignan said that the authorization to deploy gas at the barricade came from Mayor Fenty. (Report at 10-11). Cunningham testified that multiple bargaining unit ERT members told him they were concerned about the "pressure" to deploy gas and the high-ranking MPD officials who were in the line of fire at the scene of the barricade. (Report at 11).

Two days later, Cunningham met with FOP Chairman Kristopher Baumann, and suggested they look at the issues raised by the bargaining unit ERT members regarding the barricade situation. *Id.* Cunningham testified that he was responsible for overseeing the FOP Safety Committee, as well as FOP's other committees. *Id.* Baumann agreed that FOP should investigate the safety issues raised and told Cunningham "to see if we could get a copy of the tape" of the ERT radio communications. *Id.*

From his home e-mail account, Cunningham e-mailed a request for a recording of the barricade incident radio transmissions to the Office of Unified Communications ("OUC"). *Id.* Baumann instructed Cunningham to engage the FOP Safety Committee on the safety issues raised at the barricade. *Id.* OUC released a recording to Cunningham containing only the ERT side of the radio transmissions. (Report at 12). To pick up the recording from OUC, Cunningham signed and dated an OUC form that had been previously filled out for him by an OUC employee. *Id.*

On June 5, 2010, Baumann e-mailed portions of the recording to a reporter at the Washington Examiner. *Id.* The next day, Baumann e-mailed the same recording to a reporter at the Washington Post. *Id.* When MPD headquarters learned that the media had copies of the

recording, it assigned Internal Affairs Bureau (“IAB”) Lieutenant Dean Welch to investigate. (Report at 13).

At the start of Welch’s interview with Cunningham, Welch asked Cunningham to sign a confidentiality agreement stating, in pertinent part, that:

You are being interviewed in connection with a confidential investigation. Therefore, you are hereby ordered not to discuss the contents of this interview with anyone other than the persons present in the interview. The only exception to this order allows you to discuss the matter with an attorney, if you choose to do so. Further, you are hereby ordered NOT to divulge, to anyone other than the persons present in this interview (with the exception of your attorney) the contents of any material (written, tape recorded, or otherwise) provided to you in connection with this confidential investigation. You are hereby further advised that violations of this order may result in disciplinary action against you.

(Report at 13). Cunningham objected to the form’s confidentiality restrictions, and informed Welch that he would be speaking to Baumann about the interview. *Id.* According to Cunningham, Welch had Cunningham note his objection on the record, and the interview continued. *Id.* At a subsequent interview, Cunningham informed Welch that he had discussed the interview with Baumann and had showed Baumann the OUC form Cunningham had signed to receive the ERT recording. (Report at 14).

Based on Cunningham’s interviews, Welch e-mailed Baumann stating “I need you to contact me in reference to scheduling an interview concerning an administrative investigation I am conducting.” (Report at 15). Baumann received and read the e-mail during a break in an unrelated FOP grievance arbitration hearing, where he was testifying on behalf of FOP. *Id.*

While in the lobby waiting for his interview with Welch, Baumann had a conversation with IAB Lieutenant Paul Charity. *Id.* According to Baumann, he informed Charity that when Baumann was in his role as FOP Chairman, he could say and do things that he could not do as a regular MPD officer. (Report at 16). According to Charity, Baumann stated that he was immune from all MPD policy. *Id.* Charity left and Welch conducted the IAB interview. *Id.*

Baumann protested the timing of the IAB interview because it prevented him from attending the funeral of Stephen Johns, the security guard killed in the line-of-duty at the U.S. Holocaust Memorial Museum. (Report at 17). When Welch informed Baumann that the IAB interview involved the barricade incident, Baumann stated that he was not at the barricade, and that any questions Welch asked might involve his role as FOP Chairman and therefore violated Article 9<sup>1</sup> of the parties’ collective bargaining agreement (“CBA”). *Id.* Baumann asserted that

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<sup>1</sup> Article 9, Section 4 states:

5. The Labor Committee Chairman shall be entitled to use up to forty (40) hours each week for the purpose of carrying out his representational responsibilities under this Agreement and applicable law. The Labor Committee Chairman shall respond to inquiries by the Department’s

his knowledge of the barricade incident was related to his representational duties as FOP Chairman, and involved internal FOP issues. *Id.* Welch ended the interview and awaited instructions from his supervisors on whether he could question Baumann. (Report at 18).

At the second interview, Baumann asserted that he had a legal privilege that relieved him of the obligation to answer Welch's questions about his duties as FOP Chairman. *Id.* Further, Baumann stated that Article 9 of the parties' CBA prevented IAB from asking questions about his representational activities. *Id.* Welch insisted that Baumann must answer his questions based on MPD General Order 120.21, which provides for the removal of officers who fail to obey orders and directives of the Chief of Police. *Id.* Under protest, Baumann answered Welch's questions regarding how Baumann came into possession of the ERT recording and its release to the media. *Id.*

Welch forwarded his investigative report and recommendations to the Chief of Police. (Report at 14, 18). Welch recommended that MPD sustain the misconduct allegations that Cunningham obtained the ERT recording without proper authorization, and that Cunningham released confidential information from the IAB investigation to Baumann. (Report at 14). Further, Welch recommended sustaining a misconduct allegation that Cunningham's conduct was conduct unbecoming an officer, detrimental to good discipline, and would adversely affect Cunningham or MPD's ability to perform effectively. *Id.*

As a result, MPD served Cunningham with a proposed 5 day suspension for the charge of violating General Order 120.21 through "conduct unbecoming an officer." *Id.* The first specification of that charge asserted that Cunningham requested a copy of the ERT radio transmissions under false pretenses. *Id.* The second specification asserted that Cunningham violated the IAB interview confidentiality order by discussing the interview with Baumann and showing Baumann the OUC release form. MPD found Cunningham guilty of the charge and specifications, and sustained the 5 day suspension. *Id.* FOP appealed to the Chief of Police, who denied the appeal, but dismissed the second specification and reduced the discipline to a 3 day suspension. *Id.*

With regard to Baumann, Welch recommended sustaining the misconduct allegations that Baumann obtained the ERT recording without proper authorization. (Report at 18). Further, because Baumann released the recording to the media four days before beginning a FOP Safety Committee investigation, Welch found that the recording was provided to the media as a means to discredit MPD and its officials. *Id.* Additionally, Welch recommended sustaining a misconduct allegation that Baumann's conduct was conduct unbecoming an officer, detrimental to good discipline, and would adversely affect Baumann or MPD's ability to perform effectively. *Id.*

As a result, MPD served Baumann with a proposed 5 day suspension. *Id.* The first charge stated that Baumann violated General Order 120.21 through "failure to obey orders and directives." *Id.* The specification under that charge asserted that Baumann released a copy of

the ERT radio transmissions to the media without authorization. (Report at 19). The second charge stated that Baumann violated General Order 120.21 by failing to obey or observe the rules, regulations, and orders related to discipline and performance. *Id.* The specification under the second charge asserted that Baumann released the ERT recording to the media prior to initiating a safety investigation consistent with his role as FOP Chairman, and intended to discredit MPD. *Id.* MPD found Baumann guilty of the charges and specifications, and sustained the 5 day suspension. *Id.* The Chief of Police denied FOP's appeal, but dismissed the second charge and specification, and reduced the discipline to a 3 day suspension. *Id.*

The Hearing Examiner noted that as of October 2010, MPD had not imposed the 3 day suspensions on Baumann or Cunningham. *Id.*

### III. Hearing Examiner's Report and Recommendation

In his Report, the Hearing Examiner noted that the relevant facts, evidence, and testimony in the six unfair labor practice complaints are "very simple and clear," and that his Report would "focus only on the substantive, relevant facts, and material evidence and testimony while setting aside the meritless claims and arguments advanced by the parties." (Report at 20).

The Board will affirm a hearing examiner's findings of fact if they are reasonable, supported by the record, and consistent with Board precedent. *American Federation of Government Employees, Local 1403 v. D.C. Office of the Attorney General*, 59 D.C. Reg. 3511, Slip Op. No. 873 at p. 3; PERB Case Nos. 05-U-32 and 05-UC-01 (2011). Issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner. *Hatton v. Fraternal Order of Police/Dep't of Corrections Labor Committee*, 47 D.C. Reg. 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (1995).

#### A. PERB Case No. 09-U-41

In PERB Case No. 09-U-41, FOP asserted that MPD violated D.C. Code § 1-617.04(a) when it interfered with, restrained, intimidated, and retaliated against FOP Chairman Baumann by interrupting him with an e-mail from IAB while he was testifying in his representational capacity at an arbitration. (Report at 21). Further FOP alleged that this interruption constituted a repudiation of CBA Article 9. *Id.* Following MPD's decision to suspend Baumann for his alleged misconduct during the barricade incident, FOP amended its complaint in PERB Case No. 09-U-41 to allege a pattern of interference, retaliation, and coercion against Baumann and the FOP. *Id.*

MPD contended that FOP failed to establish a *prima facie* case of retaliation concerning Baumann's testimony at the arbitration and the IAB e-mail. (Report at 22). While MPD concedes that Baumann was engaged in protected activity while testifying at the arbitration, it alleges that FOP failed to prove that IAB, and specifically Welch, knew that Baumann was testifying, had a Blackberry, and would receive the IAB e-mail during the arbitration. *Id.* Further, MPD alleges that the relief for a unilateral change in a term or condition specifically covered by a CBA does not lie within PERB's statutory authority. (Report at 23). MPD states

that there is no evidence supporting the claim that MPD repudiated the CBA or that FOP demanded to bargain over any alleged unilateral change. *Id.*

Regarding Baumann's 3 day suspension, MPD alleges that even if Baumann were engaged in protected activity when releasing the ERT recording to the media, the discipline was for a legitimate business reason. *Id.* According to MPD, the ERT radio communications were secure, could not be intercepted, related to two on-going criminal investigations, and contained ERT tactical information which should not be publicly revealed. *Id.*

In his Report, the Hearing Examiner found no evidence to support FOP's allegation that MPD repudiated the CBA when it e-mailed Chairman Baumann with notice of the IAB interview. (Report at 24). Further, the Hearing Examiner determined that the parties' CBA was still in effect, and that FOP's initial Complaint in 09-U-41 alleges a violation of the CBA, not the CMPA. *Id.* Citing to *AFGE Local 2741 v. D.C. Dep't of Recreation and Parks*, 46 D.C. Reg. 6502, Slip Op. No. 588, PERB Case No. 98-U-15 (1999)<sup>2</sup>, the Hearing Examiner concluded that the Board lacks jurisdiction over alleged violations of a CBA. (Report at 24). Therefore, the Hearing Examiner granted MPD's Motion to Dismiss PERB Case No. 09-U-41. *Id.*

Next, the Hearing Examiner considered FOP's allegation in the amended complaint that MPD's disciplinary action against Chairman Baumann was motivated by anti-union animus and constituted retaliation, intimidation, or coercion in violation of D.C. Code § 1-617.04(a). (Report at 25). Applying the *Wright Line* test, the Hearing Examiner concluded that Chairman Baumann was at all times acting in his representational capacity as FOP Chairman, and that the timing of FOP Safety Committee investigation was irrelevant. (Report at 26). Further, the Hearing Examiner concluded that Baumann acted on workplace safety concerns raised by bargaining unit members, which are a condition of employment. *Id.* Based on these conclusions, the Hearing Examiner determined that Baumann's release of the ERT recordings to the media was protected activity and protected speech, and therefore FOP had proven a *prima facie* case that Baumann's discipline was based on anti-union animus and retaliation. (Report at 26-27).

Under *Wright Line*, the burden then shifted to MPD to prove that it would still have disciplined Baumann in the absence of the protected activity. (Report at 27). MPD advanced several justifications of its discipline of Baumann: that the ERT recording was obtained through deliberate subterfuge between Cunningham and Baumann; that the recording's release would have been blocked by the two ongoing criminal investigations of the barricade incident; and that the release of the recording was reckless because it contained secure ERT radio communications and confidential tactical information. (Report at 27-29).

The Hearing Examiner found no basis in the record for MPD's allegation that the ERT recording was obtained through deliberate subterfuge between Baumann and Cunningham. *Id.* Additionally, the Hearing Examiner rejected MPD's contention that Baumann's discipline was

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<sup>2</sup> In *AFGE Local 2741*, the Board held that "[w]here the parties have agreed to allow their negotiated agreement to establish the obligations that govern the very acts and conduct alleged in the complaint as statutory violations of the CMPA, the Board lacks jurisdiction over the complaint allegations."

justified because the recording's release would have been blocked by ongoing criminal investigations. *Id.* In support of this conclusion, the Hearing Examiner found that Welch's IAB investigation established that both investigators involved in the criminal investigations released the recordings to Cunningham. (Report at 27, *citing* Union Exhibit 19). Further, no witnesses confirmed MPD's allegation that the ERT recording contained secure or confidential tactical information. (Report at 26). The Hearing Examiner found it particularly compelling that "MPD could have called as witnesses, but did not call, the ERT Team members at the barricade who could have testified with particularity about confidential ERT tactical information on the recording." (Report at 28).

In addition to rejecting MPD's justification for Baumann's discipline, the Hearing Examiner further rejected the specifics of the disciplinary action. (Report at 29). In her appeal decision, Chief Lanier stated in part:

After a thorough review of the record, I have decided to deny your appeal. However, I have decided to dismiss the prejudicial conduct charge and reduce the penalty in this case to a three (3)-day suspension without pay.

(Report at 29). The Hearing Examiner concluded that the language of Chief Lanier's decision is "arguably double-talk," and "denies Baumann's appeal and yet, she dismisses the second charge without explanation." *Id.* Further, the Hearing Examiner found that "Lanier's dismissal of the second charge is an attempt to avoid the obvious interference into internal union business and to masks or deflect the intimidation and coercion for union activity which the entire disciplinary action represents." *Id.* Therefore, the Hearing Examiner concluded that as Baumann was engaged in protected activity and speech, MPD's discipline violates the CMPA and must be rescinded. *Id.*

MPD filed Exceptions to the Hearing Examiner's conclusion that the disciplinary action violated the CMPA, and FOP filed an Opposition to MPD's Exceptions on this point. This determination will be discussed below.

B. PERB Case No. 09-U-42

In PERB Case No. 09-U-42, FOP alleged that MPD violated D.C. Code § 1-617.04(a) by subjecting FOP officers to IAB interrogations. (Report at 30). The Hearing Examiner noted that in support of this contention, FOP asserted that Baumann's activities and speech are protected by the labor relations privileges reflected in the CMPA, and that the parties' CBA only permits inquiries by MPD's labor relations department, not IAB officers. *Id.* Further, FOP alleged that MPD violated the CMPA by scheduling Baumann's IAB interview so that he could not attend the funeral of Stephen Johns. (Report at 32).

In response, MPD stated that the IAB interviews were narrowly targeted to test FOP's claims about the FOP Safety Committee investigation, and that FOP failed to establish facts that MPD violated Baumann's rights under the CMPA. (Report at 31).

In his report, the Hearing Examiner dismissed FOP's allegation that the IAB interview was scheduled to conflict with the Stephen Johns funeral as "ungrounded in and unrelated to any legal theory in the record," as well as unsupported by record evidence or PERB precedent. (Report at 32). The Board agrees, and affirms this conclusion as reasonable and supported by the record.

The Hearing Examiner concluded that FOP's allegations in PERB Case No. 09-U-42 hinge on its interpretation of Article 9, Section 4, Paragraph 5 of the parties' CBA, which states that the FOP Chairman "shall be entitled to use up to forty (40) hours each week for the purpose of carrying out his representational responsibilities under this Agreement and applicable law," and that he:

shall respond to inquiries by the Department's Labor Relations Representatives regarding the type and number of representational activities engaged in for a particular period; such inquires to be reasonable in number and in nature.

(Report at 32). The Hearing Examiner concluded that the CBA is silent regarding Baumann's obligation to respond to IAB inquiries related to his performance of sworn police officer duties and responsibilities. (Report at 33). Further, the Hearing Examiner found that whether that silence establishes that Baumann "is subject to IAB orders to report for an interview and must respond to IAB investigators only as regards his sworn police officer duties and responsibilities is a matter of contract interpretation which is beyond the scope of the Hearing Examiner's jurisdiction." *Id.* Finally, the Hearing Examiner concluded that the record established that IAB did not engage in any conduct which violated Baumann's assertion of a labor relations privilege based on his role as FOP Chairman. (Report at 33). Therefore, the Hearing Examiner granted MPD's motion to dismiss the Complaint in PERB Case No. 09-U-43. (Report at 34).

The parties did not except to the Hearing Examiner's conclusion regarding Baumann's assertion of a labor relations privilege. The Board finds that the Hearing Examiner's findings are reasonable, supported by the record, and consistent with Board precedent. FOP's allegations in PERB Case No. 09-U-42 depend on an interpretation of the parties' CBA. Disputes concerning contract interpretation and alleged contract violations should be properly resolved through negotiated grievance procedures. *See American Federation of Government Employees v. D.C. Dep't of Corrections*, 48 D.C. Reg. 6549, Slip Op. No. 59 at p. 4, PERB Case No. 83-U-03 (1983). Further, the Board does not have the authority to interpret a CBA to determine the merits of a cause of action...that may be otherwise properly within its jurisdiction. *See American Federation of Government Employees, Local 2725 v. D.C. Housing Authority*, 46 D.C. Reg. 672, Slip Op. No. 488 at p. 2, PERB Case No. 96-U-19 (1996). Therefore, the Board affirms the Hearing Examiner's recommendation, and MPD's motion to dismiss is granted.

C. PERB Case No. 09-U-43

The Hearing Examiner found that PERB Case No. 09-U-43 involves the same facts described in PERB Case No. 09-U-41 relating to the IAB e-mail read by Chairman Baumann during a break in his testimony at the arbitration hearing. (Report at 34). Specifically, FOP asserts that Chairman Baumann was engaged in protected union activity while testifying at the arbitration, that MPD knew Baumann was testifying at the arbitration hearing when the IAB e-mail was sent, that the MPD e-mail showed express anti-union animus towards Baumann as an FOP witness at the hearing, and that MPD attempted to interfere with or restrain Baumann by initiating the IAB investigation while Baumann was the sole FOP witness at the arbitration hearing. *Id.*

In its Motion to Dismiss PERB Case No. 09-U-43, MPD asserted that this dispute should be resolved through the grievance arbitration procedure in the parties' CBA, and that PERB does not have jurisdiction. (Report at 34-35).

The Hearing Examiner concluded that FOP failed to meet its burden of proof to show that MPD violated the CMPA when Welch sent the IAB interview notification e-mail to Baumann. (Report at 35). The Hearing Examiner stated that while Baumann was unquestionably engaged in protected activity while testifying at the arbitration hearing, there was no evidence in the record to show that Welch knew Baumann was testifying at the arbitration hearing when the e-mail was sent, or knew that Baumann had a Blackberry and would check his e-mails during the hearing. *Id.* In support of his conclusion, the Hearing Examiner credited Welch's testimony on "how he came to send the June 17, 2009, e-mail to Baumann" as "credible, forthright, and candid," while FOP's allegations of Welch's motivation were "vague, speculative, and nothing more than inferences without support in the record." *Id.* The Hearing Examiner recommended that MPD's Motion to Dismiss PERB Case No. 09-U-43 be granted. (Report at 35).

Neither party filed exceptions to the Hearing Examiner's conclusions in PERB Case No. 09-U-43. The Board finds that the Hearing Examiner's findings are reasonable, supported by the record, and consistent with Board precedent. Issues of fact concerning the probative value of evidence and credibility resolutions are the province of the hearing examiner. *Hatton*, Slip Op. No. 451 at p.4. The Hearing Examiner's determination that no evidence existed to show Welch knew Baumann was testifying at the arbitration hearing when the e-mail was sent, or knew that Baumann had a Blackberry and would check his e-mails during the hearing was based upon the record and testimony from Welch. The Board will not question the Hearing Examiner's findings and credibility determinations. (Report at 35). Therefore, the Board affirms the Hearing Examiner's recommendation, and MPD's motion to dismiss is granted.

D. PERB Case No. 09-U-44

The facts of this complaint arise from Baumann's conversation with IAB Lieutenant Charity while waiting for his IAB interview with Welch. (Report at 36). In this Complaint, the Hearing Examiner summarized FOP's allegations as 1) MPD interfered, restrained, or coerced

Baumann by having Charity require Baumann to report to IAB for an interview with Welch; 2) MPD violated Baumann's CMPA rights through Charity's conversation with Baumann when he threatened to discipline Baumann, thereby chilling Baumann's exercised of his protected representational rights; and 3) MPD repudiated Article 9 of the parties' CBA through Charity's communication with Baumann. *Id.*

In his Report, the Hearing Examiner noted that Baumann and Charity's testimony regarding critical facts of their conversation varied significantly. (Report at 36). Specifically, both men testified that the other was "agitated" and that they were "calm." *Id.* The Hearing Examiner found that "the testimony of each witness on the other's affect is, for the most part, self-serving and, on balance, unreliable." *Id.* To determine if Charity's conduct violated the CMPA, the Hearing Examiner made a credibility determination concerning the witnesses' testimony about their conversation in the IAB waiting room. *Id.* The Hearing Examiner concluded that Baumann's demeanor while testifying about the conversation was "candid and wholly credible," while Charity was "guarded," "elliptical," and "vague." (Report at 37). Despite Charity's demeanor, the Hearing Examiner could not conclude that Charity was not credible, and on balance, the Hearing Examiner found that neither witness "testified with sufficient credible force and material weight to determine what each really said to the other." *Id.*

The Hearing Examiner concluded that regardless of the conversation between Baumann and Charity, MPD took no action against Baumann based on his statements. (Report at 37). Further, the conversation was not witnessed by any bargaining unit members, which would have established that Charity's alleged threats against Baumann constituted an attack on FOP's status as exclusive representative. *Id.* Ultimately, the Hearing Examiner found that FOP failed to prove that MPD violated the CMPA through Charity's conversation with Baumann in the IAB waiting room. (Report at 37-38).

Additionally, for the same reasons stated in his discussion of PERB Case No. 09-U-41, the Hearing Examiner rejected FOP's allegation that Charity's actions represented a repudiation of the CMPA. (Report at 38). Further, relying on his reasoning in PERB Case Nos. 09-U-41, 09-U-42, and 09-U-43, the Hearing Examiner found that PERB lacked jurisdiction over the alleged unfair labor practice violation because FOP alleges a CBA violation to be resolved by the CBA's grievance and arbitration procedures. *Id.* Therefore, the Hearing Examiner granted MPD's Motion to Dismiss PERB Case No. 09-U-44. *Id.*

Neither party filed exceptions to the Hearing Examiner's conclusions that Charity's actions did not repudiate the CMPA, or that PERB lacks jurisdiction because FOP alleges a violation of the parties' CBA. The Board finds that the Hearing Examiner's findings are reasonable, supported by the record, and consistent with Board precedent. Issues of fact concerning the probative value of evidence and credibility resolutions are the province of the hearing examiner. *Hatton*, Slip Op. No. 451 at p.4. The Hearing Examiner's determination that no evidence existed to show that Charity's statements to Baumann violated the CMPA was based upon the record and testimony from Charity and Baumann. The Board will not question the Hearing Examiner's findings and credibility determinations. (Report at 37-38).

Additionally, FOP's allegations in PERB Case No. 09-U-44 turn on an alleged violation of the parties' CBA. Disputes concerning alleged contract violations should be properly resolved through negotiated grievance procedures. *See American Federation of Government Employees, Slip Op. No. 59 at p. 4.* Further, the Board does not have the authority to interpret a CBA to determine the merits of a cause of action...that may be otherwise properly within its jurisdiction. *See American Federation of Government Employees, Local 2725, Slip Op. No. 488 at p. 2.* Therefore, the Board affirms the Hearing Examiner's recommendations, and MPD's motion to dismiss is granted.

E. PERB Case No. 10-U-01

In PERB Case No. 10-U-01, FOP alleged that MPD repudiated Article 17 of the parties' CBA and unilaterally altered the past practice regarding the Joint Safety Committee by failing to recognize the Joint Safety Committee, in violation of D.C. Code § 1-617.04(a). (Report at 38). The Hearing Examiner stated:

FOP bases this ULP on ¶ 9 of MPD's August 26, 2009 *Answer to FOP's July 24, 2009 Complaint* in Federal District Court for the District of Columbia (DCDC) concerning alleged MPD violations of the *DC Whistleblower Protection Act* and the *DC Police Investigations Concerning First Amendment Activities Act of 2004*.

(Report at 38). Paragraph 9 of MPD's *Answer to FOP's DCDC Complaint* states:

Defendants lack knowledge and information sufficient to admit or deny the existence of a FOP Safety Committee and the nature of its activities, if any. Defendant denies that any such FOP Safety Committee is a constituent part of the MPD Joint Safety Committee.

(Report at 39).

In its Motion to Dismiss PERB Case No. 10-U-01, MPD contended that the unfair labor practice complaint alleged a violation of CBA Article 17, which must be resolved through the CBA's grievance and arbitration procedure. (Report at 39).

In his Report, the Hearing Examiner concluded that while the plain language of the Complaint in PERB Case No. 10-U-01 asserts that MPD's actions allegedly constituted a breach of the CBA, FOP produced no evidence to support its claim. (Report at 39). Further, for the same reasons advanced in his consideration of PERB Case Nos. 09-U-41, 09-U-42, 09-U-43, and 09-U-44, the Hearing Examiner determined that the alleged unfair labor practice complaint alleged a violation of the parties' CBA, not the CMPA. *Id.* Therefore, the Hearing Examiner granted MPD's Motion to Dismiss PERB Case No. 10-U-01. *Id.*

The parties did not file exceptions to the Hearing Examiner's conclusions in PERB Case No. 10-U-01. The Board finds that the Hearing Examiner's findings are reasonable, supported by the record, and consistent with Board precedent. Issues of fact concerning the probative value of evidence and credibility resolutions are the province of the hearing examiner. *Hatton*, Slip Op. No. 451 at p.4. The Hearing Examiner's determination that FOP failed to produce evidence to support its unfair labor practice complaint was based on the record. (Report at 39). Additionally, FOP alleged a violation of Article 17 of the parties' CBA, which is beyond the scope of the Board's jurisdiction without evidence to support an unfair labor practice charge. *See American Federation of Government Employees*, Slip Op. No. 59 at p. 4. Therefore, the Hearing Examiner's recommendation is affirmed, and MPD's motion to dismiss is granted.

F. PERB Case No. 10-U-14

In PERB Case No. 10-U-14, FOP alleged that MPD interfered with, coerced, or restrained Vice Chairman Cunningham in the exercise of his CMPA rights by proposing discipline against him for communicating with Baumann regarding Cunningham's IAB interview, and that the proposed discipline was in retaliation for Cunningham's exercise of protected union activity and speech. (Report at 40).

The Hearing Examiner noted Cunningham's testimony that Welch did not advise him that he could not speak to Baumann. (Report at 40). Further, Cunningham testified that he was entitled to speak with Baumann about any topic touching on union functions, and that Cunningham discussed his IAB interview with Baumann and shared a copy of the OUC form Cunningham signed when acquiring the ERT recording. *Id.* Based upon the IAB investigation, MPD proposed a 5-day suspension for Cunningham for conduct unbecoming an officer, specifically for requesting the ERT recording under false pretenses, and sharing information from the IAB interview with Baumann. (Report at 40-41). Chief Lanier denied FOP's appeal of the suspension, but reduced the suspension to 3 days and dismissed the "sharing information" specification. (Report at 41).

In his Report, the Hearing Examiner stated that FOP did not include an argument in support of its allegations in PERB Case No. 10-U-14, "except the parenthetical number '(10-U-14)' beside the caption of FOP's argument in PERB Case No. 09-U-42." (Report at 41).

MPD alleged that it is clear IAB investigations are confidential, and interviews may not be discussed with anyone except union representatives and attorneys. *Id.* MPD maintained that FOP's attempt to cast Cunningham's actions as a union activity is disingenuous. *Id.* Further, MPD alleged that no unfair labor practice was committed because MPD never imposed the proposed suspension. *Id.* Finally, MPD contended that Baumann and Cunningham's actions in procuring the ERT transmission under false pretenses and releasing it to the media are not protected activities because both parties participated in the misconduct. *Id.*

In his findings in PERB Case No. 09-U-42, the Hearing Examiner determined that there is no credible evidence of subterfuge between Cunningham and Baumann in Cunningham's acquiring the ERT recording. (Report at 41). The Hearing Examiner reiterated this finding in

his consideration of 10-U-14, concluding that Cunningham acted alone in obtaining the ERT recording, and dismissing MPD's allegation of misconduct. (Report at 42).

Further, the Hearing Examiner determined that the IAB interview about Cunningham's discussions with Baumann about the barricade incident constituted interference, intimidation, and coercion in violation of the CMPA. *Id.* The Hearing Examiner concluded that IAB's confidentiality requirement violates D.C. Code § 1-617.04(a) because it interferes with internal union business, protected representational activities, and protected speech. (Report at 43). Additionally, "under the unique facts of this case," the Hearing Examiner found that MPD's discipline of Cunningham, based on the second specification of conduct unbecoming a police officer, constituted interference, intimidation, and coercion of Cunningham in the exercise of his CMPA rights. *Id.* As Chief Lanier's denial of Cunningham's appeal sustained this illegal discipline, the Hearing Examiner concluded that the disciplinary action must be withdrawn, and Cunningham made whole. (Report at 44).

MPD filed Exceptions to the Hearing Examiner's conclusion that the disciplinary action and Cunningham's questioning during the IAB interview violated the CMPA. FOP filed an Opposition to MPD's Exceptions on these points. These determinations will be discussed below.

G. Summary of Hearing Examiner's Recommendations

The Hearing Examiner recommended that:

1. MPD's Motion to Dismiss PERB Case No. 09-U-41 is granted, and FOP's ULP Complaint dismissed with prejudice as to FOP's claims in its initial Complaint that MPD repudiated Article 9 of the parties' CBA. FOP's claims in its Amended Complaint, that Baumann was disciplined in violation of the CMPA, is sustained.
2. MPD's Motion to Dismiss PERB Case No. 09-U-42 is granted, and FOP's ULP Complaint is dismissed with prejudice.
3. MPD's Motion to Dismiss PERB Case No. 09-U-43 is granted, and FOP's ULP Complaint is dismissed with prejudice.
4. MPD's Motion to Dismiss PERB Case No. 09-U-44 is granted, and FOP's ULP Complaint is dismissed with prejudice.
5. MPD's Motion to Dismiss PERB Case No. 10-U-01 is granted, and FOP's ULP Complaint is dismissed with prejudice.
6. FOP's ULP Complaint that Cunningham was disciplined in violation of the CMPA is sustained.

#### H. Recommended Remedies

In his Report, the Hearing Examiner noted that FOP's unfair labor practice complaints requested "many forms of relief as remedy for MPD's CMPA violations which are arguably extraordinary." (Report at 46). Examples of this "extraordinary" relief are "requests to impose discipline against MPD officials," and "orders to prohibit MPD officials from holding positions that would require contract or authority over FOP bargaining unit members." *Id.* The Hearing Examiner concluded that these requested remedies are "arguably specious," and rejected them as beyond the scope of PERB's jurisdiction. *Id.*

The Board upholds this conclusion as reasonable, supported by the record, and consistent with PERB precedent. The Board's remedial authority is provided under D.C. Code § 1-605.2(3) and D.C. Code § 1-617.13. Under D.C. Code § 1-605.2(3), the Board may "[d]ecide whether unfair labor practices have been committed and issue an appropriate remedial order. D.C. Code § 1-617.13 permits the Board to:

Withdraw or decertify recognition of a labor organization; direct a new representation election; recommend that disciplinary action be taken against an employee or group of employees by an appropriate agency head; reinstate, with or without back pay, or otherwise make whole, the employment or tenure of any employee, who the Board finds has suffered adverse economic effects in violation of this subchapter, through for adequate cause under the provisions of subchapter XVI-A of this subchapter; compel bargaining in good faith; compel a labor organization or the District to desist from conduct prohibited under this subchapter; or direct compliance with the provisions of this subchapter.

Additionally, the Board may order the payment of reasonable costs. D.C. Code § 1-617.13(a) and (c). The remedies requested by FOP clearly exceed the scope of the Board's remedial authority, and therefore must be denied.

The Hearing Examiner granted FOP's request for reasonable costs as in the interest of justice, finding that MPD's violations in PERB Case Nos. 09-U-41 and 10-U-14 were egregious, and that MPD officials knew or should have known that their actions violated the CMPA. (Report at 46).

The Board finds that the grant of reasonable costs is reasonable, supported by the record, and consistent with Board precedent. D.C. Code § 1-617.13(d) provides that "[t]he Board shall have the authority to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may determine." The Board addressed the criteria for determining whether costs should be awarded in *AFSCME, D.C. Council 20, Local 2776 v. District of Columbia Department of Finance and Revenue*, 73 D.C. Reg. 5658, Slip Op. No. 245 at pp. 4-5, PERB Case No. 98-U-02 (2000):

First, any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the fact of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed...Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice.

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued...What we can say here is that among the situation in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive representative.

The Hearing Examiner found that MPD's violations in PERB Case Nos. 09-U-41 and 10-U-14 were egregious, and that MPD officials knew or should have known that their actions violated the CMPA. (Report at 46). MPD's actions in this regard were wholly without merit in this regard, and an award of costs is in the interest of justice.

The Hearing Examiner denied FOP's request for attorney fees because PERB has no power to order the payment of such fees. (Report at 46). The Board affirms this conclusion as consistent with Board precedent. *American Federation of Government Employees, Local 631 v. D.C. Dep't of Public Works*, 59 D.C. Reg. 5981, Slip Op. No. 1001 at p. 2, PERB Case No. 05-U-43 (2009).

To remedy MPD's violations in PERB Case Nos. 09-U-41 and 10-U-14, the Hearing Examiner recommended that the Board order MPD to:

1. Cease and desist from interfering, restraining, or coercing FOP in the exercise of its rights guaranteed by D.C. Code § 1-617, et seq., by disciplining FOP officials for engaging in protected union representational activities and speech when they are acting in a representational capacity;
2. Immediately withdraw *in toto*, and with prejudice, the disciplinary action against FOP Chairman Kristopher Baumann, expunge all personnel records concerning the disciplinary action, and reimburse him for any lost salary and benefits;
3. Immediately withdraw *in toto*, and with prejudice as regards the second specification, the disciplinary action against FOP Vice Chairman Wendell

Cunningham, expunge all personnel records concerning the disciplinary action, and reimburse him for any lost salary and benefits;

4. Post for 30 days a notice, where notices to employees are ordinarily posted in the workplace, stating that the MPD has violated D.C. Code § 1-617.04(a)(1) when MPD Chief Cathy Lanier disciplined FOP Chairman Kristopher Baumann and FOP Vice Chairman Wendell Cunningham when they were engaged in protected union representational activities and speech;
5. Pay FOP's costs in the litigation of PERB Case Nos. 09-U-41, as regards the Amended Complaint, and 10-U-14; and
6. Any other relief that the Board deems appropriate.

(Report at 46-47). The Board finds that these proposed remedies are reasonable, supported by the record, and consistent with Board precedent. Therefore, these remedies are adopted by the Board.

#### **IV. Exceptions**

FOP and MPD filed exceptions to various parts of the Hearing Examiner's Report and Recommendation, and FOP filed an Opposition to MPD's Exceptions. FOP's Exceptions were subsequently withdrawn.

##### **A. MPD's Exceptions**

MPD filed exceptions to the Hearing Examiner's conclusion that there was no evidence of deliberate subterfuge by Baumann and Cunningham in securing the ERT recordings. (MPD Exceptions at 1). Further, MPD disputes the Hearing Examiner's finding that Cunningham was disciplined for his communication with Baumann regarding the IAB interview, and that the questioning of Cunningham at the IAB interview violated the CMPA. (MPD Exceptions at 1-2).

In his Report, the Hearing Examiner concluded that MPD's allegation that Cunningham and Baumann engaged in deliberate subterfuge when obtaining the ERT recording was "unsupported by any evidence in the record." (Report at 27). Additionally, the Hearing Examiner found that the recordings were not secure, and that there was no evidence to show that the recordings contained tactical information. *Id.* In their Exceptions, MPD asserts that these conclusions are directly contradicted by the evidence in the record. (MPD Exceptions at 3).

First, MPD asserts that although Baumann and Cunningham testified that they obtained the ERT recording to assist the FOP Safety Committee in performing its investigation, "the request was notably devoid of any such representations," and the request did not refer to union activity or FOP. (MPD Exceptions at 4). Further, Cunningham used his D.C. government e-mail address on the OUC request form, and the request was not made on FOP letterhead, "as such requests were usually made." *Id.* Cunningham signed the form "Wendell Cunningham of ERT,"

did not identify himself to OUC as an FOP official, and informed the officer in charge of the barricade criminal investigation that he requested the recording for training purposes. (MPD Exceptions at 5-6).

Next, MPD alleges that, contrary to the Hearing Examiner's conclusion, the ERT recording contained secure and confidential communications. (MPD Exceptions at 8). MPD asserts that ERT transmissions cannot be made or received using a typical police radio, and cites to testimony from Assistant Chief Durham, who demonstrated during the hearing that communications cannot be intercepted without the appropriate encryption device. *Id.* This asserting was supported by Chief Lanier, who testified that ERT communications were secure from interception by iPhone applications and could not be monitored by the general public. (MPD Exceptions at 9). Finally, MPD cites to testimony that provided examples of tactical transmissions on the ERT recording, particularly with regard to the use of mirrors and bean bag rounds. (MPD Exceptions at 10).

MPD goes on to allege that because Baumann and Cunningham engaged in subterfuge to obtain the ERT recording containing secure tactical communications, and released that recording to the media, the discipline imposed was appropriate. (MPD Exceptions at 11). MPD's Exceptions assert that the Hearing Examiner misconstrued the evidence in the record, and that his recommendation to rescind the disciplinary actions against Cunningham "goes beyond the issue before him." (MPD Exceptions at 12). Citing Chief Lanier's response to Cunningham's appeal of his 5 day suspension<sup>3</sup>, MPD states that it is clear that "none of the suspension time was related to Vice Chairman Cunningham's communications with Chairman Baumann." (MPD Exceptions at 13).

Additionally, MPD contends that the Hearing Examiner's consideration of allegations relating to the IAB confidentiality agreement and Cunningham's questioning at the IAB interview are unsupported and untimely. (MPD Exceptions at 13). MPD states that Cunningham's IAB interview took place on June 9, 2009, but PERB Case No. 10-U-14 was filed 225 days later, on January 20, 2010. (MPD Exceptions at 14). MPD cites to PERB Rule 520.4, which requires unfair labor practice complaints to be filed no later than 120 days after the date on which the alleged violations occur. *Id.*

Finally, MPD disputes the Hearing Examiner's finding that MPD committed an unfair labor practice by questioning Cunningham at the IAB interviews. (MPD Exceptions at 14). Specifically, MPD takes exception to the Hearing Examiner's conclusion that "MPD's IAB confidentiality requirement as to discussion between Cunningham and Baumann violates D.C.

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<sup>3</sup> MPD quotes the following from Chief Lanier's response to Cunningham's appeal:

If the true purpose for obtaining the tapes was for a Safety Committee investigation, you should have advised OUC and Investigator King of that fact, and done so in your official capacity as the FOP Vice Chairman, and not "Wendell Cunningham of ERT." Since you did not do this, a preponderance of the evidence suggests that you obtained the recording for the purpose of providing it to Officer Baumann.

(MPD Exceptions at 13; citing Union Exhibit 56).

Code § 1-617.04(a) because the confidentiality requirement interferes with and amounts to intimidation of internal union business, and protected representational activities and speech.” (MPD Exceptions at 14; citing Report at 43).

MPD alleges that there is no controlling case law or statutory authority to support the Hearing Examiner’s conclusion that there is a labor relations privilege. (MPD Exceptions at 14-15). Further, MPD contends that Cunningham did not object or assert any privilege with regard to the IAB questioning, and provided answers to all questions. (MPD Exceptions at 16).

#### B. FOP’s Opposition to MPD’s Exceptions

FOP opposes MPD’s Exceptions to the Hearing Examiner’s Report and Recommendation on the grounds that mere disagreement with the Hearing Examiner’s factual findings is not a valid reason to overturn his conclusions, and that the Hearing Examiner’s findings are supported by the record. (FOP Opposition at 2-3).

In support of its first contention, FOP states PERB precedent that a disagreement with a Hearing Examiner’s factual findings based on competing evidence is not a valid exception. (FOP Opposition at 3; *citing Hoggard v. District of Columbia Public Schools*, 46 D.C. Reg. 4837, Slip Op. No. 496, PERB Case No. 95-U-20 (1996)).

FOP cites numerous examples from the hearing transcript to support its contention that Baumann and Cunningham did not engage in subterfuge when requesting the ERT recording. (*See* FOP Opposition at 5-9). Additionally, FOP highlights testimony to further its allegation that the ERT recording was not secure or confidential, and that it did not contain tactical information. (*See* FOP Opposition at 9-13).

Next, FOP alleges that the discipline of Baumann and Cunningham was not appropriate, and that the Hearing Examiner’s rejection of the suspensions was supported by the record. (FOP Opposition at 14-16). Further, FOP addresses MPD’s allegation that PERB Case No. 10-U-14 was not timely filed by stating that this allegation was raised for the first time in MPD’s Exceptions and is therefore waived. (FOP Opposition at 16-17).

Finally, FOP contends that questioning Cunningham regarding representational activities at the IAB interview violated the labor relations privilege. (FOP Opposition at 18). FOP states that “while Hearing Examiner Rogers may not have cited case law in his Report explaining the labor relations privilege, Hearing Examiner Rogers was provided with extensive briefing on the labor relations privilege prior to issuing his report.” (FOP Opposition at 19). FOP cites to several cases from the New York Superior Court supporting its interpretation of the labor relations privilege. (*See* FOP Opposition at 18-19).

### C. Board's Ruling on FOP and MPD's Exceptions

MPD's exception to the Hearing Examiner's conclusion that there was no evidence of deliberate subterfuge by Baumann and Cunningham in securing the ERT recordings constitutes a disagreement with the Hearing Examiner's factual findings. The Board rejects challenges to a hearing examiner's findings based on competing evidence, the probative weight accorded evidence, and credibility determinations. *American Federation of Government Employees*, Slip Op. No. 588. In its Exceptions, MPD asks the Board to overturn the Hearing Examiner's conclusions based upon competing evidence. (See MPD Exceptions at 4-6). Therefore, this exception is denied.

In its Exceptions, MPD contends that the Hearing Examiner's consideration of allegations relating to the IAB confidentiality agreement and Cunningham's questioning at the IAB interview are unsupported and untimely. (MPD Exceptions at 13). In response, FOP alleges that MPD's allegation was not timely filed because it was raised for the first time in MPD's Exceptions and is therefore waived. (FOP Opposition at 16-17). It is a well-settled legal principle that a party may not raise an argument for the first time on appeal. See *Goodman v. D.C. Rental Housing Comm.*, 573 A.2d 1293, 1301 (D.C. 1990). MPD's timeliness argument may not be raised for the first time on appeal to this Board. See *Fraternal Order of Police/ Dep't of Corrections Labor Comm. v. D.C. Dep't of Corrections*, 59 D.C. Reg. 9795, Slip Op. No. 1271 at p 6-7, PERB Case No. 10-A-20 (2012). Therefore, this exception is denied.

Finally, MPD disputes the Hearing Examiner's finding that MPD committed an unfair labor practice by questioning Cunningham at the IAB interviews. (MPD Exceptions at 14). In support of this exception, MPD alleges that there is no controlling case law or statutory authority to support the Hearing Examiner's conclusion that there is a labor relations privilege. (MPD Exceptions at 14-15). Further, MPD contends that Cunningham did not object or assert any privilege with regard to the IAB questioning, and provided answers to all questions. (MPD Exceptions at 16).

In response, FOP asserts that "while Hearing Examiner Rogers may not have cited case law in his Report explaining the labor relations privilege, Hearing Examiner Rogers was provided with extensive briefing on the labor relations privilege prior to issuing his report." (FOP Opposition at 19).

In this exception, MPD asks the Board to overturn the Hearing Examiner's conclusions based upon competing evidence regarding Cunningham's conduct at the IAB hearing, and alternative case law. (See MPD Exceptions at 14-16). As stated *supra*, The Board rejects challenges to a hearing examiner's findings based on competing evidence, the probative weight accorded evidence, and credibility determinations. *American Federation of Government Employees*, Slip Op. No. 588. Therefore, this exception is denied.

### V. **Conclusion**

The Board adopts the Hearing Examiner's Report and Recommendation as reasonable, supported by the record, and consistent with Board precedent.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. MPD's Motion to Dismiss PERB Case No. 09-U-41 is granted, with the exception of the allegation that Baumann was disciplined in violation of the CMPA, which is sustained;
2. MPD's Motion to Dismiss PERB Case No. 09-U-42 is granted. FOP's ULP Complaint is dismissed with prejudice;
3. MPD's Motion to Dismiss PERB Case No. 09-U-43 is granted. FOP's ULP Complaint is dismissed with prejudice;
4. MPD's Motion to Dismiss PERB Case No. 09-U-44 is granted. FOP's ULP Complaint is dismissed with prejudice;
5. MPD's Motion to Dismiss PERB Case No. 10-U-01 is granted. FOP's ULP Complaint is dismissed with prejudice;
6. FOP's ULP Complaint in PERB Case No. 10-U-14 is sustained;
7. MPD will cease and desist from interfering, restraining, or coercing FOP in the exercise of its rights guaranteed by D.C. Code § 1-617, *et seq.*, by disciplining FOP officials for engaging in protected union representational activities and speech when they are acting in a representational capacity;
8. MPD will immediately withdraw *in toto*, and with prejudice, the disciplinary action against FOP Chairman Kristopher Baumann, expunge all personnel records concerning the disciplinary action, and reimburse him for any lost salary and benefits;
9. MPD will immediately withdraw *in toto*, and with prejudice as regards the second specification, the disciplinary action against FOP Vice Chairman Wendell Cunningham, expunge all personnel records concerning the disciplinary action, and reimburse him for any lost salary and benefits;
10. MPD shall conspicuously post within ten (10) days from the issuance of this Decision and Order the attached Notice where notices to bargaining unit members are normally posted. The Notice shall remain posted for thirty (30) consecutive days;

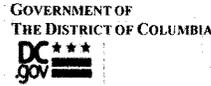
11. MPD shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order that the Notice has been posted accordingly;
12. MPD will pay FOP's costs in the litigation of PERB Case Nos. 09-U-41, as regards the Amended Complaint, and 10-U-14; and
13. 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.

January 31, 2013



Public  
Employee  
Relations  
Board



1100 4<sup>th</sup> Street S.W.  
Suite E630  
Washington, D.C. 20024  
Business: (202) 727-1822  
Fax: (202) 727-9116  
Email: [perb@dc.gov](mailto:perb@dc.gov)

# NOTICE

**TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT ("MPD"), 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. 1361, PERB CASE NOS. 09-U-41, 09-U-42, 09-U-43, 09-U-44, 10-U-01, AND 10-U-14 (JAN. 31, 2013)**

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

**WE WILL** cease and desist from violating D.C. Code § 1-617.04, et seq., by the actions and conduct set forth in Slip Opinion No. 1361.

**WE WILL** cease and desist from interfering, restraining, or coercing employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act ("CMPA").

**WE WILL NOT**, in any like or related manner, interfere, restrain or coerce employees in their exercise of rights guaranteed by the Labor-Management subchapter of the CMPA.

**WE WILL NOT**, in any like or related manner, discipline Fraternal Order of Police/Metropolitan Police Department Labor Committee officials for engaging in protected union representational activities and speech when they are acting in a representational capacity.

District of Columbia Metropolitan Police Department

Date: \_\_\_\_\_ By: \_\_\_\_\_

**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 4<sup>th</sup> Street, SW, Suite E630; Washington, D.C. 20024. Phone: (202) 727-1822.

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

February 4, 2013

**CERTIFICATE OF SERVICE**

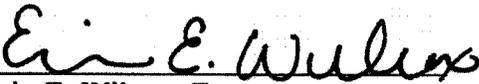
This is to certify that the attached Decision and Order in PERB Case No. 10-U-01, *et al.*, was transmitted via File & ServeXpress and e-mail to the following parties on this the 4<sup>th</sup> day of February, 2013.

Mr. Daniel McCartin, Esq.  
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