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

In the Matter of:)	
)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee,)	PERB Case No. 08-U-41
)	
Complainant,)	Opinion No. 1007
)	
v.)	
)	Motion for Reconsideration
District of Columbia, <i>et al</i> , ¹)	
)	
Respondents.)	
)	
)	

DECISION AND ORDER

I. Statement of the Case:

On September 30, 2009, the Board issued Slip Op. No. 988. In that Decision and Order the Board denied the District of Columbia Metropolitan Police Department’s (“Respondent” or “MPD”) (1) motion to dismiss the unfair labor practice complaint filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Complainant”, “FOP” or “Union”); and (2) motion for preliminary relief. (See Slip Op. No. 988 at p. 15). In addition, the Board referred the case to a Hearing Examiner to develop a factual record. On October 16, 2009, FOP filed a Motion for Reconsideration (“Motion”) of Slip Op. No. 988. In its Motion, FOP asserts

¹ The Complaint names the following parties as Respondents: District of Columbia Metropolitan Police Department; District of Columbia Office of the Attorney General; District of Columbia Office of Labor Relations and Collective Bargaining; Mayor Adrian Fenty; Chief Cathy L. Lanier Metropolitan Police Department; Attorney General Peter Nickles Office of the Attorney General; Director Natasha Campbell Office of Labor Relations and Collective Bargaining; General Counsel Terrence Ryan Office of the Attorney General; Supervisory Attorney Dean Aqui Office of Labor Relations and Collective Bargaining; Attorney Ivelisse Cruz Office of Labor Relations and Collective Bargaining; Attorney William Montross Office of Labor Relations and Collective Bargaining; Assistant Chief Winston Robinson Metropolitan Police Department; Assistant Chief Peter Newsham Metropolitan Police Department; Assistant Chief Joshua Ederheimer Metropolitan Police Department; Assistant Chief Alfred Durham Metropolitan Police Department; Assistant Chief Patrick Burke Metropolitan Police Department; Commander Jennifer Greene Metropolitan Police Department; Inspector Matthew Klein Metropolitan Police Department; and Lieutenant Linda Nischan Metropolitan Police Department.

that the Board failed to consider its motion to dismiss MPD's Cross-Complaint and Amended Cross-Complaint ("Cross-Complaint"). (See Motion at p. 1). As a result, FOP requests that the Board grant its Motion for Reconsideration so that it can rule on its motion to dismiss MPD's Cross-Complaint.

On October 30, 2009, MPD filed an Opposition to the Complainant's Motion for Reconsideration. In its submission, MPD concurs that the Board should grant FOP's Motion for Reconsideration, for the purpose of deciding FOP's motion to dismiss MPD's Cross-Complaint. However, in its Opposition, MPD requests that the Board deny FOP's motion to dismiss MPD's Cross-Complaint. (Opposition at p. 1).

The issues before the Board are whether to grant: (1) FOP's Motion for Reconsideration; and (2) FOP's motion to dismiss MPD's Cross-Complaint.

II. Discussion

Motion for Reconsideration

After FOP and MPD exchanged initial proposals for a successor agreement, FOP filed an unfair labor practice complaint alleging that MPD's proposals constituted a failure to bargain in good faith. (See Slip Op. No. 988 at p. 2). On June 2, 2008, MPD filed a Cross-Complaint alleging that FOP violated the Comprehensive Merit Protection Act ("CMPA") by failing to abide by the confidentiality provisions found in D.C. Code § 1-617.17 and in the parties' Ground Rules. On June 11, 2008, MPD filed an Amended Cross-Complaint. On February 25, 2009, FOP filed a motion to dismiss MPD's Cross-Complaint. MPD filed an Opposition to FOP's motion to dismiss on March 4, 2009.

In Slip Op. No. 988, the Board denied two preliminary motions made by MPD in this matter² and referred the case to a Hearing Examiner. FOP seeks a ruling concerning its February 25, 2009 motion to dismiss MPD's Cross-Complaint, and requests that the Board grant the motion. However, the Board did not rule on FOP's Motion to Dismiss MPD's Cross-Complaint. (See Slip Op. No. 988 at pgs. 16-17, PERB Case No. 08-U-41 (September 30, 2009)). This gave rise to FOP's Motion for Reconsideration in the present case.

A review of the language in Slip Op. No. 988 reveals that the Board acknowledged receipt of FOP's motion to dismiss; however, we did not issue a ruling concerning this motion. Therefore, we grant FOP's Motion for Reconsideration for the purpose of ruling on the motion to dismiss the Cross-Complaint.

² As stated above, on September 30, 2009, the Board issued Slip Op. No 988 denying MPD's: (1) motion to dismiss FOP's complaint and (2) motion for preliminary relief. On June 19, 2008, FOP filed an Answer to the Cross-Complaint and on June 26, 2008, FOP filed an Answer to the Amended Cross-Complaint.

Motion to Dismiss

The content of MPD's Cross-Complaint and Amended Cross-Complaint were noted in Slip Op. No. 988 at pages 9-12, as follows:³

In essence, [MPD's] Cross-Complaint argues that FOP violated the confidentiality requirements of the CMPA by disclosing the Respondents' "proposed affirmative changes" in its Complaint (PERB Case No. 08-U-41). [MPD] also allege[s] further violations of the confidentiality requirements of the CMPA, claiming that "on June 1, 2008, FOP issued a newsletter ... outlining substantive provisions of MPD's proposals titled 'Pay and Benefits,' 'Scheduling and Position Security,' 'On the Job Injuries,' 'Discipline,' and 'Representation and the Effective End of Your Union.'" (Cross-Complaint at p. 3). [MPD] also contend[s] that on "June 2, 2008, FOP caused the substance of MPD's proposals to be reported by several news outlets and posted on the internet." (Cross-Complaint at p. 3).

* * *

[MPD] argue[s] that "[t]he statutory mandate of D.C. Official Code § 1-617.12 bars the public from the bargaining process. Also, § 1-617.17(h) mandates that bargaining over compensation be kept confidential until a settlement is reached or impasse resolution proceedings have been concluded, i.e., in an interest arbitrator's award[.] [T]he [G]round [R]ules reemphasize the confidentiality of negotiations . . . by making all meetings "closed meetings" and all information shared therein confidential." (Cross-Complaint at pgs. 5-6). [MPD] argue[s] that FOP, through its Complaint and contact with the media, etc., has directly interfered with "management's right to confidential negotiations. Each publication constitutes a violation of D.C. Official Code at § 1-617.04(b)(1), an unfair labor practice." (Cross-Complaint at p. 6).

Consequently, [MPD] request[s] that the Board: (1) Seal FOP's Unfair Labor Practice Complaint and all subsequent proceedings in this and any related matter; (2) Order FOP to cease and desist from publicizing the content of MPD's proposals; (3) Order FOP to destroy all copies of the pleading in its possession; (4) Order FOP to recall all copies of the Complaint that were disseminated and

destroy them; (5) Issue an order barring from FOP's negotiating team any and all members found to have violated the confidentiality provisions of the law; (6) Rule that FOP is guilty of an unfair labor practice and order that FOP post a Notice to such effect wherever its members are located; (7) Order FOP to immediately notify each member of the bargaining unit, by first class mail, that it has violated the [CMPA]; (8) Order FOP to immediately notify each local media outlet that it has violated the [CMPA]; (9) Toll the time line for MPD to file an "Answer" to the Complaint until the Board rules on the Motion for Preliminary Relief. [sic] (10) Order a \$5,000 per day fine for every day that FOP has illegally made public management's proposals; and (11) Order any and all other appropriate sanctions and costs. (Cross-Complaint/Motion at pgs. 7-8).

FOP filed an Answer to the Cross-Complaint, in which it denied any violation of the CMPA. Specifically, FOP denied the allegations in paragraph 1 of the Cross-Complaint that "... [MPD] and FOP are engaged in negotiations for a successor collective bargaining agreement (CBA)." (See Answer to Amended Cross-Complaint ("Answer to AC/C" at p. 1; and Cross-Complaint at p. 1). FOP alleges that "FOP and OLRCB have merely exchanged initial proposals for a successor contract." (Answer to AC/C at p. 1). FOP further states that "[t]o date, the Parties have not yet begun negotiations, as no negotiation sessions have been held." (Answer to AC/C at p. 2). FOP admits that it has executed Groundrules for the negotiations with [MPD]. (See Answer to AC/C at p. 2). However, FOP denies that its exchange of proposals with [MPD] began negotiations between the parties. (See Answer to AC/C at p. 2). Moreover, FOP denies the allegations "that the information contained in the Parties' initial *proposals* is confidential." (See Answer to AC/C at pgs. 2-3, emphasis in original). FOP added that "[t]o date, negotiations have not yet begun, as no negotiating sessions have been held." (Answer to AC/C at p. 3).

FOP's Answer to the Cross-Complaint also presents the affirmative defenses that: (1) "[t]he [Respondents'] Unfair Labor Practice Cross Complaint should be dismissed because the matter is not properly before [the Board].; and (2) [t]he [Respondents'] Amended Unfair Labor Cross Complaint should be dismissed because the Board does not have jurisdiction to hear purely

contractual matters.” (Answer to the AC/C at pgs. 7-8). The Answer also requests the following remedies:

1. The Board should dismiss the Complainant’s Amended Cross Complaint on the basis that it lacks jurisdiction over this matter.
2. The Board should dismiss the Complainant’s [Amended] Cross Complaint on the basis that FOP has not committed an unfair labor practice.
3. The Board should dismiss the Complainant’s Amended Cross Complaint on the basis that OLRCB has failed to comply with PERB Rules.
4. The Board should dismiss the Complainant’s Amended Cross Complaint on the basis that there is no evidence of FOP’s commission of an unfair labor practice as stated above and, accordingly, deny the Complainant’s request that the Board seal FOP’s Unfair Labor Practice Complaint; deny Complainant’s request that the Board issue an order to cease and desist from publicizing the content of management’s proposals; deny Complainant’s request that FOP recall all copies of the Complaint disseminated and destroy all copies of the pleading in its possession; deny Complainant’s request [that the Board] bar from the Union’s negotiating team any member found to have violated the confidentiality provisions of the law; deny Complainant’s request that the Board find FOP guilty of an unfair labor practice; deny the Complainant’s request for FOP to notify its members and any media outlets; deny Complainant’s request to have the time line for answering FOP’s Complaint tolled; deny the Complainant’s request for [the Board] to issue an order fining FOP \$5,000 a day; and deny Complainant’s request for further sanctions. (Answer to AC/C at pgs. 7-8) (Emphasis added).

(Slip Op. No. 988 at pgs. 9-12).

In its Motion to Dismiss FOP claimed that the Board should dismiss MPD's Cross-Complaint on several grounds: (1) the Board's rules do not permit the filing of cross-complaints; (2) the filing of a cross-complaint allows a party to bypass the timeliness requirements set forth in Board rules for filing a complaint; and (3) MPD's filing did not provide information in compliance with Board Rules 520.4 and 501.8. (See Motion to Dismiss at pgs. 1-3).

In its Opposition to the Motion, MPD counters that its Cross-Complaint and Amended Cross-Complaint were timely filed. (See Opposition at pgs. 3-4). MPD asserts that the conduct cited as the basis of the Cross-Complaint occurred between May 30, 2008 and June 2, 2008. The Cross-Complaint was filed on June 11, 2008, and therefore was timely filed. Also, MPD disputes the contention that the Cross-Complaint was technically defective, as the Board did not require that it correct the deficient pleadings within ten (10) days, pursuant to Board rules. Furthermore, MPD asserts that there is nothing in the Board's rules prohibiting the filing of a cross-complaint. "[In] Board Rule 501.1, the Board contemplates that its rules 'shall be construed broadly to effectuate the purposes and provisions of the Comprehensive Merit Personnel Act ("CMPA").' To that end, the Board's purpose in effectuating the provision of the CMPA are served by allowing cross-complaints when they properly allege an unfair labor practice and when timely filed." (Opposition at p. 3).

Finally, MPD maintains that the allegations raised in the Cross-Complaint, if proven, would constitute a violation of the CMPA. Specifically, MPD alleges that FOP violated D.C. Code § 1-617.04(b)(1) by publicizing 27 of MPD's 31 proposals. MPD states that "D.C. Code § 1-617.12 bars the public from the bargaining process. Likewise, D.C. Code § 1-617.17(h) mandates that bargaining over compensation be kept confidential until a settlement is reached or impasse resolution proceedings have been concluded. FOP's repeated publications of MPD's proposals violated District law." (Opposition at p. 3). MPD also alleges that FOP's actions are in violation of the Ground Rules. Therefore, MPD argues that the Board should deny the remedy sought by the Union.

We note that nothing in the Board's rules prohibits the filing of a Cross-Complaint. The issue concerning the timeliness of MPD's filing under Board Rule 520.4, involves an issue of fact and turns essentially on making credibility determinations on the basis of conflicting factual claims. We decline to do so based on these pleadings alone. Also, the limited record before us does not provide a basis for making a determination concerning the timeliness issue. Therefore, the timeliness issue should be referred to a Hearing Examiner for development of a factual record through an unfair labor practice hearing.

FOP requests that the Board dismiss MPD's Cross-Complaint because the allegations were not set forth in numbered paragraphs⁴ and the names and addresses of the parties were

⁴ The Board was remiss in failing to inform MPD of this deficiency.

excluded from the pleading. However, the Board has held that "[our] Rules exist to establish and provide notice of a uniform and consistent process for proceeding in matters properly within our jurisdiction. In this regard, we do not interpret our rules in such a manner as to allow form to be elevated over the substantive objective for which the rule was intended." *D.C. General Hospital and Doctors Council of the District of Columbia General Hospital*, 46 DCR 8345, Slip Op. No. 493, PERB Case No. 96-A-08 (1996) and *District of Columbia Health and Hospitals Public Benefits Corporation/D.C. General Hospital and Doctors Council of D.C. General Hospital*, 47 DCR 7198, Slip Op. No. 629, PERB Case No. 00-A-03 (2000) (where the Board based the filing date in that case on the date of the receipt an unsigned arbitration award because basing the filing date upon receipt of a later signed and corrected award would elevate form over substance).

In the instant case, FOP's arguments concerning the numbering of paragraphs and omission of names and addresses amount to such an application of our Rules. Specifically, here, the Cross-Complaint pertains to the same parties named in FOP's Complaint in this matter. Therefore, the omitted names and addresses are referenced in FOP's Complaint. Thus, the omission does not prejudice FOP because FOP can easily cross-reference the omitted information. Also, MPD's failure to number the paragraphs in its Cross-Complaint is not a substantive error. In view of the above, we find that FOP is requesting that we interpret our rules in such a manner as to allow form to be elevated over the substantive objective for which the rule was intended. This we will not do. As a result, FOP's motion to dismiss MPD's Cross-Complaint for failure to comply with Board Rules 520.4 and 501.7, is denied. Based on the facts and the argument presented in this case, we will not dismiss the Cross-Complaint based on asserted procedural deficiency.

In the Cross-Complaint, MPD alleges that FOP violated the confidentiality requirements of the CMPA⁵ and the parties' Ground Rules by: (1) disclosing the Respondents' proposed affirmative changes in its Complaint before the Board in PERB Case No. 08-U-41; (2) issuing a newsletter "on June 1, 2008, ... outlining substantive provisions of MPD's proposals . . ." (Cross-Complaint at p. 3); and (3) on "June 2, 2008, caus[ing] the substance of MPD's proposals to be reported by several news outlets and posted on the internet." (Cross-Complaint at p. 3).

FOP's Answer to the Cross-Complaint presents several affirmative defenses including the following: (1) "[t]he [Respondents'] Unfair Labor Practice Cross Complaint should be dismissed because the matter is not properly before [the Board].; and (2) [t]he [Respondents'] Amended

⁵ MPD alleges a violation of D.C. Code § 1-617.12 which states in pertinent part: "[c]ollective bargaining sessions between the District and employee organization representatives shall not be open to the public."

MPD also alleges a violation of D.C. Code at § 1-617.17(h) which states in pertinent part that: "compensation negotiations pursuant to this section shall be confidential among the parties; All information concerning negotiations shall be considered confidential until impasse resolution proceedings have been concluded or upon settlement." (Cross-Complaint at p. 4).

Unfair Labor Cross Complaint should be dismissed because the Board does not have jurisdiction to hear purely contractual matters.” (Answer to the AC/C at pgs. 7-8).

MPD has stated that the Ground Rules between the parties prohibit the parties from breaching confidentiality during negotiations and that the Ground Rules incorporate the confidentiality provisions found in D.C. Code § 1-617.17. Therefore, the Board finds that the Cross-Complaint is based, at least in part, on alleged contractual violations. The Board has previously treated Ground Rules as contractual provisions. *AFGE, Local 2741 v. D.C. Dep't of Recreation and Parks*, Slip Op. No. 588 at p. 3, PERB Case No. 98-U-16 (1999). Furthermore, the Board has held that where 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 allegation. *Id. AFGE, Local 2741 v. D.C. Dep't of Recreation and Parks*, Slip Op. No. 588 at p. 4, PERB Case No. 98-U-16 (1999). Here, the very acts and conduct alleged in the Cross-Complaint as statutory violations of the CMPA, pertain to a provision in the parties' Ground Rules. Therefore, the issue of confidentiality is contained in a contractual agreement and the Board lacks jurisdiction over the complaint allegations.⁶ The Board has also held that: “If ... an interpretation of a contractual obligation is necessary and appropriate to a determination of whether or not a non-contractual, statutory violation has been committed”, the Board has deferred the contractual issue to the parties' grievance arbitration procedure.’ *AFSCME, D.C. Council 20, Local 2921 v. D.C. Public Schools*, 42 DCR 5685, Slip Op. No. 339 at n. 6, PERB Case No. 92-U-08 (1995). Therefore, the Cross-Complaint is not properly before the Board and must be dismissed.⁷

ORDER

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police/Metropolitan Police Department Labor Committee's Motion for Reconsideration is granted.
2. The Fraternal Order of Police/Metropolitan Police Department Labor Committee's Complainant's Motion to Dismiss the Cross-Complaint and Amended Cross-Complaint is granted for the reasons stated above.

⁶ MPD alleges a violation of D.C. Code § 1-617.04(b)(1). However, MPD has not shown how the acts alleged interfere with, coerce or restrain employees or the District “in the exercise of rights guaranteed by this subchapter”. D.C. Code § 1-617.04(b)(1). To the extent that MPD alleges a violation of D.C. Code § 1-617.17, we note that unfair labor practice violations are set forth in D.C. Code § 1-617.04.

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3. Consistent with our ruling in Slip Op. No. 988, 3, the Board's Executive Director shall refer the 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 exception 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 559.3, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

December 31, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-U-41 was transmitted via Fax and U.S. Mail to the following parties on this the 31st day of December 2009.

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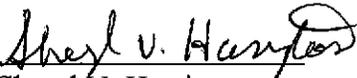
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