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

In the Matter of:	)	
	)	
Fraternal Order of Police/Metropolitan	)	PERB Case No. 11-U-50
Police Department Labor Committee,	)	
	)	Opinion No. 1506
Complainant,	)	
	)	
v.	)	
	)	
District of Columbia	)	Decision and Order
Metropolitan Police Department,	)	
	)	
Respondent.	)	
	)	
	)	
	)	

**DECISION AND ORDER**

**I. Statement of the Case**

On September 14, 2011, Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP”) filed an unfair labor practice complaint alleging that the Metropolitan Police Department (“MPD”)<sup>1</sup> violated D.C. Official Code § 1-617.04(a)(1) and (5) by refusing and/or failing to bargain in good faith regarding the impact and effects of certain proposed scheduling changes in MPD’s Crime Scene Search Unit and by engaging in direct dealing with FOP members when MPD sent the members an email on July 19, 2011, about the proposed changes.

The Board affirms the Hearing Examiner’s finding and recommendation that MPD did not violate the D.C. Official Code 1-617.04(a)(1) and (5) by refusing to bargain with FOP regarding the impact and effects of the schedule change, as the Hearing Examiner’s recommendation was reasonable, supported by the record, and consistent with the Board’s precedents established in *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia, et al.*, 59 D.C. Reg. 5485, Slip Op. No. 991, PERB Case No.

<sup>1</sup> On March 13, 2013, FOP withdrew its claims against three individually named respondents, citing *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Public Employee Relations Board*, Civ. Case No. 2011 CA 007396 P(MPA) (D.C. Super. Ct. Jan 9, 2013).

08-U-19 (2009) and *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia, et al.*, 59 D.C. Reg. 6579, Slip Op. No. 1118, PERB Case No. 08-U-19 (2011).<sup>2</sup> However, the Board further finds that its affirmation of the Hearing Examiner's recommendation is without precedential value and is limited to these parties and these issues, and that the related precedents established in Slip Op. Nos. 991 and 1118 are herein abandoned. In their place, the Board reaffirms its related holdings in *District of Columbia Nurses Association v. District of Columbia Department of Mental Health*, 59 D.C. Reg. 9763, Slip Op. No. 1259, PERB Case No. 12-U-14 (2012) and *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department*, 47 D.C. Reg. 1449, Slip Op. No. 607 at p. 3, PERB Case No. 99-U-44 (1999).

In regard to FOP's direct dealing allegation, the Board rejects the Hearing Examiner's findings and recommendation that MPD engaged in direct dealing when Commander Keith Williams met with the shop stewards because that allegation was not raised in FOP's Complaint. Additionally, the Board remands to the Hearing Examiner the unaddressed issue that was alleged in the Complaint of whether MPD violated D.C. Official Code § 1-617.04(a)(1) by engaging in direct dealing with Union members by contacting them directly by email on July 19, 2011, about the proposed schedule changes.

## II. Background

In 2011, the Crime Scene Search Unit experienced a shortage of technicians on weekends as each of the technicians "had either Saturday and Sunday or Sunday and Monday as their days off of duty."<sup>3</sup> On July 19, 2011, Commander George Kucik published a new scheduling plan that required employees with weekend days off to rotate their days off to either Tuesday and Wednesday or Wednesday and Thursday once every eight (8) weeks, effective August 28, 2011.<sup>4</sup> On the same day, Lieutenant Michelle Milam sent an email to the Crime Scene Search Unit employees requesting their preferences for days off and shifts.<sup>5</sup>

On July 22, 2011, FOP sent a letter to Chief of Police Cathy Lanier demanding impact and effects ("I&E") bargaining before implementation of the change.<sup>6</sup> Chief Lanier denied FOP's request for I&E bargaining citing Article 24<sup>7</sup> of the parties' collective bargaining agreement, stating it was within management's right to change schedules.<sup>8</sup>

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<sup>2</sup> See *American Federation of Government Employees, Local 872 v. District of Columbia Water and Sewer Authority*, 52 D.C. Reg. 2474, Slip Op. No. 702, PERB Case No. 00-U-12 (2003) (holding that the Board will affirm a Hearing Examiner's findings if the findings are reasonable, supported by the record, and consistent with Board precedent).

<sup>3</sup> (R&R at 4).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 4-5.

<sup>6</sup> *Id.* at 5.

<sup>7</sup> **Article 24: Scheduling**

**Section 1** – Each member of the Bargaining Unit will be assigned days off and tours of duty that are either fixed or rotated on a known regular schedule. Schedules shall be posted in a fixed and known location. Notice of any

On August 16, 2011, Cdr. Kucik's replacement, Cdr. Williams, met with the shop stewards and discussed, among other topics, the proposed scheduling change.<sup>9</sup> The shop stewards' asked Cdr. Williams not to implement the schedule change. Cdr. Williams later "issued a memorandum and sent an email informing the shop stewards and unit employees that the proposed change would not be implemented."<sup>10</sup>

On September 14, 2011, FOP filed its Complaint alleging that MPD committed unfair labor practices under D.C. Official Code § 1-617.04(a)(1) and (5) when it refused to bargain the impact and effects of its proposed scheduling changes, and when Lt. Milam sent the July 19<sup>th</sup> email announcing the change and asking Crime Scene Search Unit employees to state their preferences for days off and shifts.<sup>11</sup> MPD denied the allegations in its Answer.<sup>12</sup>

On July 9, 2013, the Hearing Examiner issued her Report and Recommendation, recommending that PERB dismiss the refusal to bargain allegation, but find that MPD had engaged in wrongful direct when Cdr. Williams met with the shop stewards.<sup>13</sup> MPD's exceptions challenged only the Hearing Examiner's finding that Cdr. Williams' meeting with the shop stewards constituted direct dealing. MPD argued that FOP never raised Cdr. Williams' meeting as an allegation of direct dealing in its Complaint, and thus it was improper for the Hearing Examiner to find that such constituted an unfair labor practice in her Report.<sup>14</sup>

## II. Analysis

### A. FOP's Refusal to Bargain Allegation is Dismissed Because All of the Potential Impacts and Effects FOP Identified Were Purely Related to Scheduling.

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changes to their days off or tours of duty shall be made fourteen (14) days in advance. If notice is not given of changes fourteen (14) days in advance the member shall be paid, at his or her option, overtime pay or compensatory time at the rate of time and one half, in accordance with the provisions of the Fair Labor Standards Act. The notice requirement is waived for those members assigned to the Executive Protection Unit and the Office of Professional Responsibility.

**Section 2** – The Chief or his/her designee may suspend Section 1 on a Department wide basis or in an operational unit for a declared emergency, for crime, for an unanticipated event.

**Section 3** – Changes in scheduled days off will not be used for discipline except as provided in Article 12, Section 13 of this Agreement.

**Section 4** – Shift changes during a scheduled period made voluntarily at the request of an officer and upon approval of the Employer shall not require additional compensation. (Complaint, Attachment 1).

<sup>8</sup> (R&R at 5).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 5-6.

<sup>12</sup> (Answer at 4-7). FOP later filed a Response to MPD's Answer contesting the arguments MPD raised in its Answer. (Response to Answer at 3).

<sup>13</sup> (R&R at 15-29).

<sup>14</sup> (Exceptions at 8-10). FOP filed an Opposition to MPD's Exceptions, to which MPD filed a Reply.

The Board will affirm a hearing examiner's findings and conclusions if the findings are reasonable, supported by the record, and consistent with PERB precedent.<sup>15</sup>

In this case, the Hearing Examiner recommended that PERB dismiss FOP's allegation that MPD wrongfully refused its request to bargain the impact and effects of its proposed schedule changes based on the Board's precedents established in *FOP v. MPD, supra*, Slip Op. Nos. 991 and 1118, PERB Case No. 08-U-19.<sup>16</sup> There, the Board found that MPD was not obligated to bargain the impacts and effects of a proposed schedule change in the Canine Unit that were purely related to scheduling. The Board reasoned that the topic of scheduling was covered by Article 24 of the parties' collective bargaining agreement and that purely scheduling-related disputes should therefore be resolved by the parties' negotiated grievance and arbitration process.<sup>17</sup> Notwithstanding, the Board also held that MPD was obligated to bargain any non-scheduling-related impacts and effects that resulted from the proposed schedule change, such as changes to reporting duty locations, additional foot beats, and/or increased supervision.<sup>18</sup> Accordingly, the Board found that MPD committed an unfair labor practice when it refused to bargain the non-scheduling-related impacts and effects of its proposed Canine Unit schedule changes.<sup>19</sup>

In this case, the Hearing Examiner found, based on the testimony of the witnesses and the evidence presented on the record, that all of the potential impacts and effects FOP identified were purely, "in and of themselves scheduling related matters," and that PERB therefore had no jurisdiction over them.<sup>20</sup> Specifically, the Hearing Examiner found that "the Union could not articulate potential impact or effects on working conditions not related to scheduling"; that "there was not sufficient credible probative testimony to show the employees' duties and responsibilities would change", and that "the evidence presented on the record does not provide a preponderance of evidence that there were conditions of employment or changes to duties and responsibilities that were not directly related to scheduling."<sup>21</sup> The Hearing Examiner, relying on *FOP v. MPD, supra*, Slip Op. Nos. 991 and 1118, PERB Case No. 08-U-19, concluded that MPD therefore had no obligation to bargain the impact and effects of its proposed schedule change. As a result, the Hearing Examiner recommended that PERB dismiss the allegation and defer resolution of FOP's concerns to the parties' negotiated grievance and arbitration procedures.<sup>22</sup>

The Board finds that the Hearing Examiner's conclusions are supported by the record. For example, the Hearing Examiner's overall finding that FOP could not identify any non-

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<sup>15</sup> *AFGE v. DC WASA, supra*, Slip Op. No. 702, PERB Case No. 00-U-12.

<sup>16</sup> (R&R at 20-21).

<sup>17</sup> *FOP v. MPD, supra*, Slip Op. No. 991 at ps. 10-11, 14-15, PERB Case No. 08-U-19; and *FOP v. MPD, supra*, Slip Op. No. 1118 at 1-2, 5-6, PERB Case No. 08-U-19.

<sup>18</sup> *FOP v. MPD, supra*, Slip Op. No. 1118 at p. 5, PERB Case No. 08-U-19.

<sup>19</sup> *FOP v. MPD, supra*, Slip Op. No. 991 at ps. 14-15, PERB Case No. 08-U-19.

<sup>20</sup> (R&R at 18-19).

<sup>21</sup> (R&R at 20-21).

<sup>22</sup> (R&R at 18-20).

scheduling related impacts and effects is supported by Chairman Kristopher Bauman's testimony that, "where the [impacts of MPD's proposal] go beyond scheduling, nobody can know".<sup>23</sup>

Furthermore, in regard to FOP's specific claim that bargaining unit members might have missed random drug tests resulting in adverse notes in their personnel files, the Board finds that the Hearing Examiner properly credited the testimony of management that in those instances, the time-keeping official would simply note in the record that the employee was not scheduled to work when the request was made.<sup>24</sup> The Board further finds that it was reasonable for the Hearing Examiner to conclude that FOP's concern was purely related to scheduling based on Cdr. Kucik's testimony that bargaining unit members can sometimes be called for a drug test on their current weekend days off, so the proposed schedule change would not have affected how the situation is currently handled.<sup>25</sup>

Concerning FOP's argument that MPD's proposal would have impacted bargaining unit members who attend regularly scheduled classes or trainings, the Board finds that the Hearing Examiner's conclusion that such was "related to direct scheduling issues ... as opposed to matters that changed duties or conditions of employment"<sup>26</sup> was supported by the record based on Cdr. Kucik's testimony that: (a) the rotated days off would have occurred only once every 8 weeks; (b) the members had been given an opportunity to select the days off they wanted; and (c) the specific days off would have been fixed and known well in advance in order to give members enough time to make any necessary personal adjustments.<sup>27</sup>

As for FOP's contention that MPD's proposal would have forced bargaining unit members to work seven (7) consecutive days in violation of D.C. Official Code § 1-612.01(a), the Hearing Examiner found that FOP's argument was merely a question of scheduling that should be resolved "pursuant to [the parties'] grievance procedure."<sup>28</sup> The Board finds that the Hearing Examiner's conclusion was supported by the record based on Cdr. Kucik's testimony that the proposed schedule would not have violated the statute because the consecutive days would have occurred over two separate work weeks.<sup>29</sup> Even if Cdr. Kucik's interpretation of the statute was inaccurate,<sup>30</sup> the Hearing Examiner's conclusion would still be reasonable based on the facts that 1) the number of days in a row an officer is required to work is, on its face, merely a scheduling issue, and 2) MPD's proposal was never implemented, so no violation of the statute under any possible interpretation ever actually occurred.<sup>31</sup>

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<sup>23</sup> See (Transcript at 39).

<sup>24</sup> (R&R at 18).

<sup>25</sup> See (Transcript at 78-80, 138-139).

<sup>26</sup> (R&R at 18).

<sup>27</sup> See (Transcript at 117-120, 135-137).

<sup>28</sup> (R&R at 19).

<sup>29</sup> See (Transcript at 95-96).

<sup>30</sup> The Board notes that it is not opining as to whether or not it agrees Cdr. Kucik's position that D.C. Official Code § 1-612.01(a) only applies if the seven consecutive (7) days occur in a single pay period. Rather, the Board merely highlights the statement to demonstrate that the record supported the Hearing Examiner's conclusion that, for the purposes of this case, FOP's concern was purely a question of scheduling.

<sup>31</sup> See (R&R at 20).

In sum, the relevant facts of *FOP v. MPD, supra*, Slip Op. Nos. 991 and 1118, PERB Case No. 08-U-19 are almost directly on point with those of this case. Witnesses for both FOP and MPD testified that each party recognized and accepted *FOP v. MPD, supra*, Slip Op. Nos. 991 and 1118, PERB Case No. 08-U-19 as having established PERB's current precedent on this issue.<sup>32</sup> Furthermore, neither party excepted to the Hearing Examiner's recommendation to dismiss FOP's allegation based the precedents established in *FOP v. MPD, supra*, Slip Op. Nos. 991 and 1118, PERB Case No. 08-U-19. Therefore, the Board finds that the Hearing Examiner's findings and recommendation based on *FOP v. MPD, supra*, Slip Op. Nos. 991 and 1118, PERB Case No. 08-U-19 were reasonable, supported by the record, and consistent with PERB precedent.<sup>33</sup>

The Board notes, however, that had FOP been able to identify any impacts and effects that were not purely related to scheduling, such as changes in reporting duty locations, additional foot beats, and/or increased supervision,<sup>34</sup> the Hearing Examiner and the Board would have found that MPD's refusal to bargain constituted an unfair labor practice under D.C. Official Code § 1-617.04(a)(1) and (5). But because FOP identified only scheduling related impacts and effects, neither the Hearing Examiner nor the Board could find, under the current precedent,<sup>35</sup> that any such a violation occurred. Accordingly, FOP's refusal to bargain allegation is dismissed with prejudice.

1. The Precedential Impact of the Board's Dismissal is Confined Solely to These Parties and Solely to the Facts of This Case.

Notwithstanding the Board's finding that the Hearing Examiner reasonably relied on and accurately applied to the facts of this case the precedents established in *FOP v. MPD, supra*, Slip Op. Nos. 991 and 1118, PERB Case No. 08-U-19 (pertaining to the duty to bargain scheduling changes under Article 24 of the parties' collective bargaining agreement), the Board hereby abandons those precedents and confines the precedential effect of its above finding to apply only to these parties and only to the facts of this case.<sup>36</sup>

In place of those abandoned precedents, the Board reaffirms its holding in *District of Columbia Nurses Association v. District of Columbia Department of Mental Health*, 59 D.C.

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<sup>32</sup> See (Transcript at 19-20, 27-31, 49-50, 76-78, 116-120).

<sup>33</sup> *AFGE v. DC WASA, supra*, Slip Op. No. 702, PERB Case No. 00-U-12.

<sup>34</sup> See *FOP v. MPD, supra*, Slip Op. No. 1118 at p. 5, PERB Case No. 08-U-19.

<sup>35</sup> *FOP v. MPD, supra*, Slip Op. Nos. 991 and 1118, PERB Case No. 08-U-19

<sup>36</sup> See *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 32 D.C. Reg. 547, Slip Op. No. 97 at p. 2, PERB Case No. 84-A-06 (1985) (in which the Board limited the precedential effect of its decision on future cases); see also *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 7, PERB Case No. 82-N-01 (1982) (in which the Board confined the precedential effect of part of its decision to specific parties); and *International Brotherhood of Police Officers and District of Columbia General Hospital Commission, et al.*, 29 D.C. Reg. 4376, Slip Op. No. 47, PERB Case No. 82-RC-09 (1982) (in which the Board confined the precedential effect of part of its decision to specific facts).

Reg. 9763, Slip Op. No. 1259, PERB Case No. 12-U-14 (2012) as the correct approach that should be applied going forward. Therein, the Board stated:

Tours of duty and work schedules are management rights under Section 1-617.8(a) of the Comprehensive Merit Personnel Act ("CMPA"). The Board has held that "an exercise of management rights does not relieve the employer of its obligation to bargain over impact and effects of, and procedures concerning, the implementation of [that right]." *International Brotherhood of Police Officers, Local 446 v. District of Columbia General Hospital*, 41 D.C. Reg. 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994). Unions enjoy the right to impact and effects bargaining concerning a management rights decision only if they make a timely request to bargain. *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43, PERB Case No. 82-N-01 (1982). [Simply notifying the agency of a tour of duty or work schedule change] does not relieve the agency of the requirement to enter into impact and effects bargaining when timely requested by the union.

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When a union requests impact and effects bargaining, the agency is required to bargain before implementing the change. *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department*, 47 D.C. Reg. 1449, Slip Op. No. 607 at p. 3, PERB Case No. 99-U-44 (1999).<sup>37</sup>

Additional guidance on the duty to engage in impact and effects bargaining can also be found in *IBPO, Local 446 v. DCGH, supra*, Slip Op. No. 312, PERB Case No. 91-U-06, wherein the Board noted that there is an important distinction "between [a union's] right to bargain over [an agency's] decision to implement new or change existing bargaining-unit working conditions, ... and [the union's] right (and [the agency's] obligation) to bargain over the effects or impact of that decision."<sup>38</sup> In that case, the agency argued that because it followed the collective bargaining agreement's requirements to notify and consult with the union prior to implementing a change, it did not have an obligation to respond to the union's later request to engage in impact and effects bargaining over that change. The Board found that even though the collective bargaining agreement was "clear and unmistakable" with regard to the agency's obligation to notify and consult with the union prior to implementing the change, the agreement was silent

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<sup>37</sup> *DCNA v. DMH, supra*, Slip Op. No. 1259 at ps. 2-3, PERB Case No. 12-U-14.

<sup>38</sup> See p. 4.

with regard to impact and effects bargaining. Therefore, the agency was still obligated to engage in impact and effects bargaining when such was duly requested by the union.<sup>39</sup>

In *FOP v. MPD, supra*, Slip Op. Nos. 991 and 1118, PERB Case No. 08-U-19, the Board erroneously evaluated MPD's right under Article 24 to make schedule changes as a waiver of its duty to bargain the impact and effects of those changes.<sup>40</sup> Instead, the Board should have evaluated MPD's management right to implement scheduling changes and its duty to bargain the impact and effects of those changes as two distinct issues.<sup>41</sup>

Therefore, from this point forward the Board directs that disputes of this nature should be evaluated in accordance with the applicable precedents articulated in *DCNA v. DMH, supra*, Slip Op. No. 1259 at ps. 2-3, PERB Case No. 12-U-14, *IBPO, Local 446 v. DCGH, supra*, Slip Op. No. 312, PERB Case No. 91-U-06, and other similar cases<sup>42</sup>, and not on the pertinent holdings in *FOP v. MPD, supra*, Slip Op. Nos. 991 and 1118, PERB Case No. 08-U-19, which the Board herein abandons.<sup>43</sup>

**B. The Hearing Examiner's Finding That MPD Engaged in Direct Dealing When Cdr. Williams Met With the Shop Stewards is Rejected Because That Specific Allegation Was Not Raised in FOP's Complaint**

The Board rejects the Hearing Examiner's finding that Cdr. Williams' August 19, 2011 meeting with the shop stewards constituted direct dealing in violation of D.C. Official Code §§ 1-617.04(a)(1) and (5) because that allegation was not raised in FOP's Complaint.<sup>44</sup>

The Board may not rule on allegations that are not properly before it.<sup>45</sup> PERB Rule 520.11 clearly states that the purpose of an evidentiary hearing "is to develop a full and factual

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<sup>39</sup> *Id.* at ps. 4-5.

<sup>40</sup> See *FOP v. MPD, supra*, Slip Op. No. 991 at ps. 10-11, 14-15, PERB Case No. 08-U-19; and *FOP v. MPD, supra*, Slip Op. No. 1118 at ps. 1-2, 5-6, PERB Case No. 08-U-19.

<sup>41</sup> See *DCNA v. DMH, supra*, Slip Op. No. 1259 at ps. 2-3, PERB Case No. 12-U-14; see also *IBPO, Local 446 v. DCGH, supra*, Slip Op. No. 312 at ps. 4-5, PERB Case No. 91-U-06; *American Federation of Government Employees, Local 1403 and District of Columbia Office of the Corporation Counsel*, Slip Op. No. 709 at p. 6, PERB Case No. 03-N-02 (July 25, 2003) (holding that generally, a management right does not relieve management of the duty to bargain over the impact and effects of, and procedures concerning, the exercise of management rights decisions); and *Washington Teacher's Union, Local 6 AFT, AFL-CIO v. District of Columbia Public Schools*, 61 D.C. Reg. 1537, Slip Op. No. 1448 at ps. 3-4, PERB Case No. 04-U-25 (2014) (holding that even though the employer agency was not required to bargain over its right to abolish bargaining unit positions, it was required to engage in impact and effects bargaining over the abolishment).

<sup>42</sup> i.e. *AFGE, Local 1403 and OCC, supra*, Slip Op. No. 709, PERB Case No. 03-N-02; and *WTU, Local 6 v. DCPS, supra*, Slip Op. No. 1448, PERB Case No. 04-U-25.

<sup>43</sup> *MPD and FOP, supra*, Slip Op. No. 97 at p. 2, PERB Case No. 84-A-06; *UDCFA/NEA and UDC, supra*, Slip Op. No. 43 at p. 7, PERB Case No. 82-N-01; and *IPBO and DC Gen. Hospital Comm., supra*, Slip Op. No. 47, PERB Case No. 82-RC-09.

<sup>44</sup> (R&R at 21-28).

<sup>45</sup> See *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, Slip Op. No. 1316 at ps. 5-6, PERB Case No. 09-U-50 (August 24, 2012) (holding that the Board may not rule on allegations that are not properly before it); *Fraternal Order of Police/Department of Corrections Labor Committee v. Department of Corrections*, 49 D.C. Reg. 8933, Slip Op. No. 679, PERB Case Nos.



record upon which the Board may make a decision” and that the “party asserting a violation of the CMPA shall have the burden of proving the allegations of the complaint by a preponderance of the evidence.”<sup>46</sup> Therefore, neither the hearing examiner nor the Board may determine the existence of an unfair labor practice where no unfair labor practice has been alleged.<sup>47</sup> Additionally, a hearing examiner cannot find a violation based on a set of facts that were not alleged in the complaint even if the violation has the same basic legal basis as an allegation that was raised in the complaint (i.e. direct dealing, failure to negotiate, bad faith, etc.).<sup>48</sup> Finally, when a complainant discovers, during the course of a proceeding, another possible violation based on the alleged facts, that party must either amend its complaint to include the newly discovered violation or file a new case in order for the Board to be able to consider that violation. If the complainant fails to do so, the Board cannot consider the new violation in its analysis and resolution of the case.<sup>49</sup>

In the instant case, the plain language of the Complaint demonstrates that FOP’s direct dealing allegation was focused on Cdr. Kucik’s publishing of the new scheduling plan on July 19, 2011, and Lt. Milam’s email from that same day that informed members of the new plan.<sup>50</sup> The Complaint does not include, reference, or raise Cdr. Williams August 19, 2011 meeting with the shop stewards as an allegation of direct dealing.<sup>51</sup> The Complaint does not name Cdr. Williams as an individual respondent and it does not mention Cdr. Williams’ meeting with the stewards in its “Factual Background” or “Analysis” sections.<sup>52</sup> Rather, the scope of FOP’s allegation is defined and limited by its statement that Chief Lanier, Cdr. Kucik, and Lt. Milam were the only “responsible parties” that had committed unfair labor practices under the alleged facts, and in its statement that by “distributing the electronic mail containing the new scheduling

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00-U-36 and 00-U-40 (May 17, 2002) (holding that a hearing examiner correctly did not render findings on an issue that was not raised in the amended complaint); and *Teamsters Local Unions 639 and 730 v. District of Columbia Board of Education*, 49 D.C. Reg. 803, Slip Op. No. 667 at f. 1, PERB Case No. 00-U-27 (October 15, 2001) (in which the Board did not consider the issue of attorneys’ fees and interest because those issues were not raised in the original complaint).

<sup>46</sup> (Emphasis added).

<sup>47</sup> *Id.*

<sup>48</sup> See *FOP v. MPD*, *supra*, Slip Op. No. 1005(b)\* at p. 5-8, PERB Case No. 09-U-50 (holding that even though FOP raised an allegation of direct dealing in its complaint based on one specific set of facts, the hearing examiner could not find another direct dealing violation based on another set of facts that were not alleged in the complaint).

\* (The Board notes for the reader that PERB issued two (2) slip opinions in PERB Case No. 09-U-50 under the number “1005”. The first was issued on December 29, 2009, in which the Board denied FOP’s request for preliminary relief and assigned the case to be heard by a hearing examiner. The Board has designated that opinion herein as “Slip Op. No. 1005(a).” The second was issued on December 23, 2011, in which the Board evaluated the hearing examiner’s Report and Recommendation as well as the parties’ exceptions. The Board has designated that opinion herein as “Slip Op. No. 1005(b)”).

<sup>49</sup> See *FOP v. MPD*, *supra*, Slip Op. No. 1316 at p. 5-8, PERB Case No. 09-U-50 (holding that when FOP discovered during the course of the hearing that MPD had not produced certain requested documents, FOP should have either amended its complaint to include the allegation or filed a new one, but because FOP failed to do so, it was an error for the Board to have sustained the hearing examiner’s finding that MPD committed an unfair labor practice when failed to produce the documents).

<sup>50</sup> See (Complaint at 3-6).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1, 3-6.

scheme, [MPD] went beyond mere information and opinion gathering concerning its operations, and instead negotiated and dealt directly with FOP members concerning conditions of employment.”<sup>53</sup>

FOP also did not identify Cdr. Williams’ meeting with the shop stewards as an allegation of direct dealing at the Hearing or in its Post-Hearing Brief. For instance, FOP’s opening statement at the Hearing identified Cdr. Kucik’s and Lt. Milam’s July 19, 2011 email as the Union’s only allegation of direct dealing.<sup>54</sup> Further, FOP’s Post-Hearing Brief only focused on the email, and did not raise any arguments that the Cdr. Williams’ meeting also constituted an allegation of direct dealing.<sup>55</sup> Indeed, the entire section of FOP’s Brief addressing its direct dealing allegation is titled: “The Department’s Memorandum Sent to the FOP Membership on July 19, 2011 Constitutes Illegal Direct Dealing.”<sup>56</sup>

Therefore, similar to the Board’s holdings in *FOP v. MPD*, *supra*, Slip Op. No. 1005(b), PERB Case No. 09-U-50 and *FOP v. MPD*, *supra*, Slip Op. No. 1316, PERB Case No. 09-U-50, FOP’s allegation of the general legal principle of direct dealing with regard to a different incident did not provide a sufficient basis for the Hearing Examiner to find that MPD engaged in direct dealing when Cdr. Williams met with the shop stewards.<sup>57</sup> As such, the Board finds that because Cdr. Williams’ meeting was not properly before the Board or the Hearing Examiner for resolution, the Hearing Examiner erred in finding that the incident constituted an unfair labor practice.<sup>58</sup>

Furthermore, PERB’s established case law negates the arguments FOP raised in its Opposition to Exceptions. While it is true that the Hearing Examiner must develop a full and factual record pursuant to PERB Rule 520.11, the Board held in *FOP v. MPD*, *supra*, Slip Op. No. 1316, PERB Case No. 09-U-50 that the hearing examiner is limited to an analysis of “the allegations of the complaint.”<sup>59</sup> FOP’s argument that denying hearing examiners the ability to find unfair labor practices based on facts not alleged in the complaint “would completely defeat the purpose of conducting a hearing, and render meaningless the factual record created in the process” fails because the Board also found in *FOP v. MPD*, *supra*, Slip Op. No. 1316, PERB Case No. 09-U-50 that the only way PERB can address violations discovered during a hearing is for the complainant to file a new complaint or amend its existing complaint to include the newly

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<sup>53</sup> *Id.* at 5 (emphasis added).

<sup>54</sup> (Transcript at 7).

<sup>55</sup> (Complainant’s Post-Hearing Brief at 10-15).

<sup>56</sup> *Id.* at 10.

<sup>57</sup> See Slip Op. No. 1005(b) at ps. 10-11; *and* Slip Op. No. 1316 at ps. 5-6.

<sup>58</sup> *Id.* Additionally, as a result of the Board’s finding that Cdr. Williams’ meeting was not properly before PERB or the Hearing Examiner for disposition, it is not necessary to address the Hearing Examiner’s reliance on Chairman Baumann’s testimony that the shop stewards were not authorized to bargain on behalf of the Union, or the Hearing Examiner’s reliance on various NLRB cases to support her conclusion that speaking with the Union’s shop stewards instead of the Union’s executive officers constituted direct dealing. Furthermore, the Board offers no opinion as to whether Cdr. Williams’ meeting with the shop stewards would have constituted direct dealing in violation of D.C. Official Code §§ 1-617.04(a)(1) or (5) had the issue been properly raised in FOP’s Complaint.

<sup>59</sup> See ps. 5-8.

discovered allegations.<sup>60</sup> Therefore, the potential illegality of Cdr. Williams' meeting was only rendered "meaningless" when FOP failed to amend its Complaint to include the meeting as a separate direct dealing allegation.<sup>61</sup>

While FOP argued that the Hearing Examiner's finding was valid because FOP had raised the "general" allegation of direct dealing in its Complaint, it is clear that paragraphs 8 and 9 of the Complaint focused only on MPD's July 19<sup>th</sup> email, and did not mention Cdr. Williams' meeting with the shop stewards.<sup>62</sup> As stated previously, a hearing examiner cannot find a violation based on a set of facts that were not alleged in the complaint even if the violation is based on the same basic legal principle as an allegation that was raised in the complaint.<sup>63</sup> Thus, the issue of whether Cdr. Williams meeting with the shop stewards constituted direct dealing was not before the Hearing Examiner for consideration because FOP did not raise that specific allegation in its Complaint.<sup>64</sup>

Next, contrary to FOP's assertion that MPD was not prejudiced by the Hearing Examiner's finding that Cdr. Williams' meeting with the shop stewards constituted direct dealing, the Board finds that MPD was prejudiced by the finding. In *District of Columbia Metropolitan Police Department v. Fraternal Order of Police / Metropolitan Police Department Labor Committee (on behalf of Charles Jacobs)*, 60 D.C. Reg. 3060, Slip Op. No. 1366, PERB Case No. 12-A-04 (2013), the Board upheld an arbitrator's finding that MPD prejudiced an officer when a disciplinary review panel found him guilty of an additional charge the panel had added after the hearing had been held because it denied the officer an opportunity to respond to the allegation and present evidence for his defense.<sup>65</sup> In this case, Cdr. Williams' meeting was not raised as an allegation at any stage of the process until the Hearing Examiner issued her Report and Recommendation, which effectively denied MPD any opportunity to answer the charge or raise a defense. Therefore, the Board finds that MPD was indeed prejudiced by the Hearing Examiner's finding.<sup>66</sup>

Additionally, the Board rejects FOP's assertion that Cdr. Williams' meeting with the shop stewards was not a collateral issue. If FOP had intended to raise the meeting as a central issue, it should have done so in its Complaint, at the Hearing, and in its Post-Hearing briefs. FOP did not do so. Therefore it cannot now reasonably argue that it had intended to focus on the meeting all along.<sup>67</sup>

Finally, the Board finds it is not necessary to address FOP's analysis in its Opposition to Exceptions that Cdr. Williams' meeting with the shop stewards did constitute an instance of

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<sup>60</sup> *Id.*; see also footnote 49 herein.

<sup>61</sup> *Id.*

<sup>62</sup> (Complaint at 5-6).

<sup>63</sup> *FOP v. MPD, supra*, Slip Op. No. 1005(b) at p. 5-8, PERB Case No. 09-U-50; see also footnote 48 herein.

<sup>64</sup> *Id.*

<sup>65</sup> See ps. 3, 9.

<sup>66</sup> *Id.*

<sup>67</sup> See *FOP v. MPD, supra*, Slip Op. No. 1005(b) at ps. 10-11, PERB Case No. 09-U-50; and *FOP v. MPD, supra*, Slip Op. No. 1316 at ps. 5-6, PERB Case No. 09-U-50.

direct dealing because, as already discussed, that allegation was not properly raised in FOP's Complaint, and is therefore outside of PERB's authority to consider.<sup>68</sup>

Based on the foregoing, the Board finds that MPD's Exceptions are not mere disagreements with the Hearing Examiner's conclusion that Cdr. Williams' meeting with the shop stewards constituted a direct dealing violation.<sup>69</sup> Accordingly, the Board rejects the Hearing Examiner's conclusion and recommendation.<sup>70</sup>

C. FOP's Direct Dealing Allegation Regarding MPD's July 19, 2011 Email is Remanded to the Hearing Examiner for Consideration If the Parties Cannot First Stipulate to a Settlement of the Issue.

The Hearing Examiner did not address FOP's allegation that MPD engaged in direct dealing in violation of D.C. Official Code §§ 1-617.04(a)(1) or (5) when it sent the July 19, 2011 email asking members to give their preferences for the rotated days off.<sup>71</sup>

The Board notes that although the Hearing Examiner correctly identified the July 19<sup>th</sup> email as the basis of FOP's direct dealing allegation, she failed to address or resolve that allegation in her analysis.<sup>72</sup> Notwithstanding, due to the considerable length of time that has passed since the incident, and due to the fact that the proposed schedule changes were never implemented, PERB's Executive Director (or her designee) shall hold an informal conference with the parties in accordance with PERB Rule 500.4 to determine whether this issue is still ripe and/or to discuss possibilities for settlement. If the issue cannot be resolved during said conference, then the allegation will be remanded to the Hearing Examiner to determine, based on PERB precedent and the established record, whether MPD's July 19, 2011 email constituted direct dealing in violation of D.C. Official Code §§ 1-617.04(a)(1) or (5), and to make appropriate recommendations.

D. Conclusion

Based on the foregoing, FOP's allegation that MPD failed to bargain in good faith when it refused to engage in impact and effects bargaining over its proposed schedule change is dismissed,<sup>73</sup> but the Board confines the precedential effect of that finding—which was based on *FOP v. MPD, supra*, Slip Op. Nos. 991 and 1118, PERB Case No. 08-U-19—to apply only to

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<sup>68</sup> *Id.*

<sup>69</sup> See (Exceptions to Hearing Examiner's Report and Recommendation); and *Hoggard v. District of Columbia Public Schools*, 46 D.C. Reg. 4837, Slip Op. No. 496 at p. 3, PERB Case No. 95-U-20 (1996).

<sup>70</sup> *Hoggard, supra*, Slip Op. No. 496 at p. 3, PERB Case No. 95-U-20.

<sup>71</sup> (R&R at 1, 21-28).

<sup>72</sup> *Id.*

<sup>73</sup> *AFGE v. DC WASA, supra*, Slip Op. No. 702, PERB Case No. 00-U-12 (finding that the Board will affirm a hearing examiner's findings and conclusions if the findings are reasonable, supported by the record, and consistent with PERB precedent).

these parties and only to the facts of this case.<sup>74</sup> From this point forward, the Board directs that disputes concerning an agency's duty to engage in impact and effects bargaining, when requested by a union in response to the agency exercising a management right, are to be evaluated in accordance with the applicable precedents articulated in *DCNA v. DMH, supra*, Slip Op. No. 1259 at ps. 2-3, PERB Case No. 12-U-14, *IBPO, Local 446 v. DCGH, supra*, Slip Op. No. 312, PERB Case No. 91-U-06, and other similar cases,<sup>75</sup> and not on the pertinent holdings in *FOP v. MPD, supra*, Slip Op. Nos. 991 and 1118, PERB Case No. 08-U-19, which the Board herein abandons.

Furthermore, the Hearing Examiner's finding that MPD engaged in direct dealing when MPD's Commander met with the FOP Shop Stewards is rejected, and FOP's direct dealing allegation concerning MPD's July 19, 2011 email is remanded to the Hearing Examiner for further analysis, provided the allegation cannot first be resolved by the parties in an informal conference with PERB's Executive Director or her designee, in accordance with this Decision and Order and PERB Rule 500.4.

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<sup>74</sup> *MPD and FOP, supra*, Slip Op. No. 97 at p. 2, PERB Case No. 84-A-06; *UDCFA/NEA and UDC, supra*, Slip Op. No. 43 at p. 7, PERB Case No. 82-N-01; and *IPBO and DC Gen. Hospital Comm., supra*, Slip Op. No. 47, PERB Case No. 82-RC-09.

<sup>75</sup> i.e. *AFGE, Local 1403 and OCC, supra*, Slip Op. No. 709, PERB Case No. 03-N-02; and *WTU, Local 6 v. DCPS, supra*, Slip Op. No. 1448, PERB Case No. 04-U-25.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. FOP's allegation that MPD failed to bargain in good faith when it refused to engage in impact and effects bargaining over its proposed schedule change in violation of D.C. Official Code §§ 1-617.04(a)(1) and (5) is dismissed with prejudice.
2. The Hearing Examiner's finding that the meeting MPD's Commander held with FOP's shop stewards constituted direct dealing in violation of D.C. Official Code §§ 1-617.04(a)(1) and (5) is rejected, as that incident was not alleged as a violation in FOP's Complaint.
3. PERB's Executive Director (or her designee) will hold an informal conference with the parties in accordance with this Decision and Order and PERB Rule 500.4 to determine whether FOP's allegation that MPD engaged in direct dealing when it sent its July 19, 2011 email to bargaining unit members is still ripe and/or to discuss possibilities for settlement. If the issue cannot be resolved *via* said conference, then the Board remands the allegation to the Hearing Examiner to determine, based on PERB precedent and the established record before her, whether MPD's July 19, 2011 email constituted direct dealing in violation of D.C. Official Code §§ 1-617.04(a)(1) and (5), and to make appropriate recommendations.
4. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**

By unanimous vote of Board Chairperson Charles Murphy, and Members Donald Wasserman and Keith Washington.

August 21, 2014

Washington, D.C.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 11-U-50, Opinion No. 1506 was transmitted *via* File & ServeXpress and Email to the following parties on this the 14<sup>th</sup> day of January, 2015.

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