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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,)	
)	
Complainant,)	PERB Case No. 08-U-41
)	
v.)	Opinion No. 1101
)	
District of Columbia, <i>et al</i> , ¹)	Second Motion for Reconsideration
)	
Respondents.)	CORRECTED COPY
)	

DECISION AND ORDER

I. Statement of the Case:

The instant matter stems from an unfair labor practice complaint filed on May 30, 2008, by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Complainant”, “FOP” or “Union”) against the District of Columbia, *et al*, (“Respondents” or “MPD”). The Complainant alleges that Respondents have violated D.C. Code § 1-617.01 and § 1-617.04(a)(1)-(5) by failing to bargain in good faith with the Complainant. (See Complaint at p. 16).

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.

The following is a chronology of the pleadings filed by the parties in this matter:

- (1) May 30, 2008, FOP files Unfair Labor Practice Complaint;
- (2) June 2, 2008, Respondents file Cross Complaint and Motion for Preliminary Relief;
- (3) June 5, 2008, Respondents file Motion for Temporary Restraining Order;
- (4) June 11, 2008, Respondents file Amended Cross Complaint and Motion for Preliminary Relief.
- (5) June 13, 2008, FOP files Opposition to the Motion for a Temporary Restraining Order;
- (6) June 16, 2008, Respondents file: (1) Answer to the FOP's Complaint; and (2) Motion to Dismiss all Respondents named in their Individual Capacity;
- (7) June 18, 2008, FOP files an Opposition to the Motion for Preliminary Relief;
- (8) June 19, 2008, FOP files Answer to the Respondents' Cross Complaint, including a motion to dismiss the Cross-Complaint;
- (9) June 26, 2008, FOP files Answer to the Respondents' Amended Cross Complaint, including a motion to dismiss the Amended Cross Complaint;
- (10) November 20, 2008, FOP files Request for Pre-Hearing Conference;
- (11) February 4, 2009, FOP files Motion Requesting an Order that the Burden of Proof be Shifted to Respondents with Respect to the FOP's Charge of Bad Faith Bargaining;
- (12) February 4, 2009, Respondents file Opposition to Complainant's Request to Shift the Burden of Proof;

- (13) February 25, 2009, Complainant's file Motion to Dismiss Respondent's Unfair Labor Practice Cross Complaint and Motion for Preliminary Relief, and Respondents' Amended Unfair Labor Practice Cross Complaint and Motion for Preliminary Relief;
- (14) March 4, 2009, Respondents file Opposition to Complainant's Motion to Dismiss Respondents' Unfair Labor Practice Cross Complaint and Motion for Preliminary Relief, and Respondents' Amended Unfair Labor Practice Cross Complaint and Motion for Preliminary Relief;
- (15) March 26, 2009, Parties' file Joint Request for Continuance of Hearing;
- (16) April 15-23, 2009, FOP files subpoena requests;
- (17) April 23, 2009, Parties request that PERB Case No. 08-U-41 be held in abeyance for 60-days to allow the D.C. Superior Court to rule on a case with Status Report due on June 22, 2009;
- (18) September 30, 2009, Board issues Decision and Order Slip Op. No. 988;
- (19) October 15, 2009, FOP files Motion for Reconsideration of the Board's Decision and Order of September 30, 2009;
- (20) October 29, 2009, Respondents file Opposition to Complainant's Motion for Reconsideration of the Board's Decision and Order of September 30, 2009;
- (21) December 31, 2009, Board issues Decision and Order Slip Op. No. 1007.
- (22) January 11, 2010, Respondents file Motion for Reconsideration of the Board's Decision and Order of December 31, 2009;

- (23) January 25, 2010, FOP files Opposition to Respondents' Motion for Reconsideration of the Board's Decision and Order of December 31, 2009.

As indicated above, the Board issued a decision and order on September 30, 2009, Slip Op. No. 988, that denied: (1) the Respondents' motion to dismiss the unfair labor practice complaint filed by the FOP; and (2) the Respondents' motion for preliminary relief. (See Slip Op. No. 988 at p. 15). In addition, the Board directed that the case be referred to a hearing examiner to develop a factual record.

On October 16, 2009, FOP filed a Motion for Reconsideration of Slip Op. No. 988. Specifically, the motion asserted that the Board's decision and order in Slip Op. No. 988 failed to address the Union's motions to dismiss the Respondents' Cross Complaint and Amended Cross Complaint. Among the allegations set forth in the Union's answers and motions, the Union claimed that the Respondents' complaints alleged violations of the parties' bargaining ground rules, and that because ground rules were akin to contractual provisions, that the Board lacked jurisdiction to hear the alleged contractual violations. (See Answer to Respondents' Unfair Labor Practice Cross Complaint at p. 5; and Answer to Amended Unfair Labor Practice Cross Complaint at pgs. 7-8).

On December 31, 2009, the Board issued Slip Opinion No. 1007, which granted the FOP's motion for reconsideration of Slip Opinion No. 988. The Board found that reconsideration was appropriate because FOP's motions to dismiss the Cross Complaint and Amended Cross Complaint had not been ruled on in Slip Op. No. 988.

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.

Slip Op. No. 1007 at p. 2.

In granting the motion for reconsideration of Slip Op. No. 988, the Board determined that the Respondents' Cross Complaint and Amended Cross Complaint alleged only contractual violations (*i.e.* the parties' ground rules) and failed to assert any facts establishing a statutory violation, or interference with, coercing or restraining of employees or the District in the exercise of their rights under the CMPA. (See Slip Op. No. 1007 at p. 8). As a result, the Board concluded that it lacked jurisdiction over the matters alleged in the Cross Complaint and Amended Cross Complaint and granted the Union's motions to dismiss the Cross Complaint and Amended Cross Complaint. (See Slip Op. No. 1007 at p. 8).

On January 11, 2010, Respondents filed the instant Motion for Reconsideration of the Board's Decision and Order of December 31, 2009 ("Motion"). The Union responded with an Opposition to the Respondents' Motion ("Opposition"). The Respondents' Motion and the Union's Opposition are before the Board for disposition.

II. Discussion

The matters raised in the Respondents' Cross Complaint and Amended Cross Complaint which are at issue in the instant Motion involve the Respondents' contention the Union's Complaint as well as other communications, breached ground rules and a statutory prohibition against disclosing information concerning confidential compensation negotiations.²

The FOP filed an Answer to both the Cross Complaint and Amended Cross Complaint, in which it denied any violation of the CMPA.

Motion for Reconsideration of Slip Op. No. 1007.

The Respondents' Cross Complaint and Amended Cross Complaint asserted that the FOP violated the confidentiality requirements of the CMPA by: (1) disclosing the Respondents' "proposed affirmative changes" in its Complaint (PERB Case No. 08-U-41); (2) issuing "a newsletter . . . outlining substantive provisions of [Respondents'] proposals titled 'Pay and Benefits,' 'Scheduling and Position Security,' 'On the Job Injuries,' 'Discipline,' and 'Representation and the Effective End of Your Union.'"; and (3) causing "the substance of [Respondents'] proposals to be reported by several news outlets and posted on the internet." (Cross Complaint at p. 3).

The Respondents argued 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, and the ground rules reemphasize the confidentiality of negotiations as outlined in referenced statutes by making all meetings "closed meetings" and all information shared therein confidential.

² The Respondents cite to D.C. Official 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." D.C. Code § 1-617.17(h), which provides that "[a]ll information concerning [compensation] negotiations shall be considered confidential until impasse resolution proceedings have been concluded or upon settlement. (See Cross Complaint at p. 4).

(Cross Complaint at pgs. 5-6).

The Respondents claimed that the FOP, through its Complaint and contact with the media, etc., directly interfered with “management’s right to confidential negotiations . . . [and that each] publication constitute[d] a violation of D.C. Official Code at § 1-617.04(b)(1), an unfair labor practice.” (Cross Complaint at p. 6).

In Slip Op. No. 1007, the Board addressed these allegations and found 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*, [46 DCR 6502,] 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.* at p. 4]. 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. 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.

(Slip Op. No. 1007 at p. 8).

In the present case, the Respondents’ Motion for Reconsideration merely asserts a disagreement with the Board’s determination that the Cross Complaint failed to allege an unfair labor practice within the meaning of D.C. Code § 1-617.04(a)(1) – (5). The Respondents repeat their argument that a violation of D.C. Code § 1-617.12 and § 1-617.17 should be deemed a “*per se* violation” of the CMPA. However, as noted in Slip Op. No. 1007, no factual allegations were made that the Union interfered with, coerced or restrained union members, or the District management, in the exercise of their rights.

The Board has repeatedly held that a motion for reconsideration cannot be based upon mere disagreement with its initial decision. (See *AFGE Local 2725 v. District of Columbia Department of Consumer and Regulatory Affairs and Office of Labor Relations and Collective Bargaining*, _DCR_, Slip Op. No. 969, PERB Case No. 06 U 43 (2009); see also *D.C. Department of Human Services and Fraternal Order of Police Department of Human Services Labor Committee*, 52 DCR 1623, Slip Op. No. 717, PERB Case Nos. 02-A-04 and 02-A-05 (2003); *D.C. Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee (Shepherd)*, 49 DCR 8960, Slip Op. No. 680, PERB Case No. 01 A 02 (2002); and *AFSCME Local 2095 and AFSCME NUHHCE and D.C. Commission on Mental Health Services*, 48 DCR 10978, Slip Op. No. 658, PERB Case No. 01-AC-01 (2001). Here, Respondents' argument that the Board erred in denying the Respondents' Cross Complaint is based on its reassertion that the violation of D.C. Code § 1-617.2 and § 1-617.17 be considered a "per se" violation of the CMPA, and presumably unfair labor practices in violation of D.C. Code § 1-617.04(a)(1)-(5). As stated above, no allegations were put forth that, if proven, would establish the alleged statutory violations. See *Virginia Dade v. National Association of Government Employees, Service Employees International Union, Local R3-06*, 46 DCR 6876, Slip Op. No. 491 at p. 4, PERB Case No. 96-U-22 (1996); and *Gregory Miller v. American Federation of Government Employees, Local 631, AFL-CIO and D.C. Department of Public Works*, 48 DCR 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994).

For the reasons discussed above, the Board denies the Respondents' Motion for Reconsideration.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Respondents' Motion for Reconsideration is denied.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

March 4, 2011

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 4th day of March 2011.

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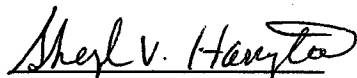
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