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

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In the Matter of:)	
)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee)	
)	PERB Case Nos. 11-U-35 and 11-U-38
Complainant,)	
)	
v.)	Opinion No. 1621
)	
District of Columbia Metropolitan Police Department.)	
)	
Respondent.)	
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DECISION AND ORDER

I. Statement of the Case

These two consolidated unfair labor practice cases concern the policy of the Metropolitan Police Department (“MPD”) on the use of its e-mail system for union business. Case No. 11-U-35 was filed May 11, 2011, and Case No. 11-U-38 was filed June 8, 2011. Upon review of the record and the arguments of counsel, the Board finds that the claims are strictly contractual and thus outside the Board’s jurisdiction.

FOP moved to consolidate Case Nos. 11-U-35 and 11-U-38. The Executive Director granted the motion and set the cases for hearing. On March 11, 2015, the cases came on for hearing before a hearing examiner appointed by the Executive Director.

At the opening of the hearing, the hearing examiner stated, “[I]t’s my understanding that today’s proceedings are limited to the dispute over a subpoena duces tecum, and then after the ruling in this matter, that the parties have agreed that the case will go straight away to the Board . . . and that you’re going to have a stipulation of facts, and that’s the proceeding.”¹ Counsel for FOP stated that the parties’ practice is to stipulate to facts that are admitted in the answer.² The parties stipulated at the hearing that “MPD requested IS numbers and initiated an administrative

¹ Tr. 3-4.

² Tr. 5.

investigation regarding the March 29, 2011, e-mail.”³ The hearing examiner resolved the subpoena dispute and closed the hearing. The parties subsequently submitted briefs to the Board.

II. Statement of Facts

In its answers, MPD admitted certain allegations of fact in the complaints. It denied FOP’s characterizations of statements in e-mails that were attached to the complaints as exhibits; in most cases it stated that the exhibit speaks for itself. Both complaints attached a collective bargaining agreement as Exhibit 1. MPD has stipulated that Exhibit 1 is an authentic copy of the collective bargaining agreement between MPD and FOP (“the CBA”).⁴ The undisputed facts of these cases are those that are established by stipulation or by the pleadings, either in admitted allegations or in uncontested exhibits to the complaints.

The events alleged and admitted in the pleadings of Case No. 11-U-38 occurred before those of Case No. 11-U-35. The undisputed facts are set forth in chronological order below.

A. Case No. 11-U-38

On March 15, 2011, Sgt. Yvonne Tidline sent an email to FOP members on the Department’s e-mail system containing the subject “Vote NO on Raising of Union Dues.” The e-mail stated:

As you have probably read or heard Chris Bauman and the Union are trying to double our union dues every pay period. This means instead of paying the \$18.73 per pay period it will be \$37.36. I don’t have any faith our union [*sic*] and I’m asking the question “What have you done for me lately?” He states it’s to continue the fight but what battles can he show that we’ve won? There will be a vote done by ballot that will take place from 0700-2000 hours on Tuesday, March 29, 2011 at the FOP located at 711 4th Street, NW. The vote will be to approve or disapprove the increase. PLEASE, PLEASE notify your officers and other members to respond and vote “NO” on a dues increase. Times are hard and I’m willing to admit my money is spoken for. I’m not willing to give any additional to something when I’m not getting a return on my investment. Pass this along.

³ Tr. 12-13.

⁴ E-mail from Nicole Lynch, counsel for MPD, to PERB and to Marc Wilhite, counsel for FOP, (Mar. 31, 2017, 10:37 EST).

On March 15, 2011, FOP Chairman Kristopher Baumann forwarded Sergeant Tidline's e-mail to the Acting Director of the MPD Labor and Employee Relations Unit, Mark Viehmeyer. In his e-mail to Mr. Viehmeyer, Mr. Baumann stated:

Please see the below email chain.

As you can imagine, the FOP has some serious concerns that; 1) a sergeant, acting in her official capacity, has ordered subordinates to forward an email regarding union matters; 2) that officials are engaged in email chains regarding union matters; 3) that District administrative personnel are disseminating this to all sergeants; and 4) the Department email system is being used to undermine the FOP.

The FOP's understanding of the Department's email policy, as expressed by Chief Lanier under oath at a PERB hearing, would prohibit all of these actions.

A couple of preliminary questions:

As of right now (11:45 a.m.), have any of the officials involved (e.g., Inspector Porter) notified anyone about this behavior, requested an investigation, or taken any action? If so, is there documentation?

On or about March 15, 2011, Mr. Viehmeyer responded to Chairman Baumann's request indicating that he had no knowledge as to whether any of the officials who received the email had taken any action and had no knowledge "as to what, if any, other emails related to the FOP are currently being disseminated." Finally, Mr. Viehmeyer stated that the Department had not authorized the emails and that the incidents would be investigated.

On March 15, 2011, FOP Chairman Baumann sent an e-mail to Mark Viehmeyer, stating

Pursuant to Article 11, Section 4 of the Collective Bargaining Agreement between the District of Columbia and the Fraternal Order of Police, Metropolitan Police Department Labor Committee (FOP), the FOP is requesting to send the below email, attachments, and future updates to all sworn users on the Department system (or, if the Department has the capability, just to members of the FOP). Given the use of the email system by supervisors and officials regarding this matter, the FOP believes it is necessary to

have access to its members in order to provide them with accurate, authorized information on this matter.

Given the issues involved, I would request a response by the close of business today. Thank you.

Kristopher Baumann
Chairman
Fraternal Order of Police . . .

All Fraternal Order of Police, Metropolitan Police Department Labor Committee members. Below and attached is information regarding a Special Membership Meeting. Please review the information and, if you have questions, contact your Chief Shop Steward or Executive Steward Delroy Burton. . . . Please remember that Department email is not to be used for union matters, so if you want to email, please Executive Steward Burton from a non-government email account Thank you.

LABOR COMMITTEE UPDATE
FRATERNAL ORDER OF POLICE.
METROPOLITAN POLICE DEPARTMENT LABOR
COMMITTEE

NOTICE OF A SPECIAL MEMBERSHIP MEETING

0700-2000 HOURS
TUESDAY, MARCH 29, 2011
FOP LODGE #1,711 FOURTH STREET. N.W.
VOTE ON A DUES ASSESSMENT

ANNOUNCEMENT

As a result of continuing and targeted attacks on the benefits, income, retirement, and rights of police officers in Washington, D.C., the Fraternal Order of Police, Metropolitan Police Department Labor Committee (FOP) is asking its members to increase the resources available to fight this assault on police officers and their families. A Special Membership Meeting of the FOP will take place on Tuesday, March 29, 2011, for the purpose of holding a ballot vote on the approval of a dues assessment.

Pursuant to the vote of the FOP membership at the September 28, 2010, General Membership Meeting, the vote will be done by ballot and take place from 0700 to 2000 hours on Tuesday, March 29, 2011, at the Fraternal Order of Police. District of Columbia Lodge # 1, located at 711 4th Street, N.W.

The vote will be to approve or disapprove a dues assessment equal to 1% of an entry level salary (an additional \$18.73 per pay period at the current salary rate).

DUES ASSESSMENT PROCESS

Article 3 of the By-Laws provides that the Executive Committee of the FOP shall have the right to assess the members on an equitable basis for a stated purpose and sum, provided that any such assessment is approved by a majority vote of the general membership at a special or general membership meeting with at least 250 members voting.

Pursuant to Article 3 of the By-Laws, on January 24, 2011, the Executive Committee of the FOP voted to institute a 1% dues assessment for a period of 3 years or until the By-Laws are amended. The purpose of the dues assessment is to fund FOP legal and political costs.

On January 25, 2011, the Executive Council voted to endorse the dues assessment.

If approved by the membership on March 29, 2011, the dues assessment will become effective April 10, 2011.

INFORMATION

The FOP has produced a memorandum explaining the reasons for the assessment. Please contact your Chief Shop Steward for a copy of the memo and/or any questions you may have. Members of the Executive Council will be available over the next weeks to meet and speak with you about the assessment and answer any questions you may have.

On March 15, 2011, Mr. Viehmeyer denied Chairman Baumann's request to send an e-mail on the Department's email system. When asked to provide his basis for the denial, Mr. Viehmeyer stated, "The request was denied because the message solely concerned internal union issues."

B. Case No. 11-U-35

The above request of Chairman Baumann and the denial of the request by Mr. Viehmeyer on March 15, 2011, were again alleged and admitted. On March 16, 2011, the MPD sent an e-mail on the Department's e-mail system containing the subject "Departmental Email System for Union Business."

Attached to the email was a Labor Relations Bulletin. The text of the bulletin was as follows:

ISSUES: The FOP has alleged that officials of the Department are utilizing the Department's email system to communicate union business in violation of Special Order 99-02.

EMAIL REGARDING UNION ACTIVITIES

Special Order 99-02 specifically prohibits the use of the Department's email system for notifications for union activities or union business.

DIRECTIONS

Officials shall not use the Department's email system, or allow subordinates to use the Department's email system, to comment, forward, or otherwise communicate about any union business or activities, including the upcoming vote to increase dues. If an official becomes aware of an alleged violation of SO 99-02, the official shall pull IS numbers and initiate an administrative investigation.

Note Commanding officers who receive a request from an authorized union representative pursuant to Article 11 Section 4 (Use of Department Facilities) of the FOP/MPD labor agreement to use Departmental mailboxes, teletype, or electronic mail, shall consult with Labor Relations prior to responding.

RESPONSIBILITY: Lieutenants and above

DOCUMENTS/RESOURCES RELATED TO THIS BULLETIN:

> Special Order 99-02

On March 29, 2011, Officers Terry Whitfield, Janice Olive, and Vernon Dallas sent an e-mail to FOP members and Internal Affairs Agents (employees that are not members of the Bargaining Unit or FOP) on the Department's email system containing the subject "MEMBERSHIP NEWS !!!!! (MUST READ)."

Internal Affairs Division Agents Phineas Young and William Asbury received this e-mail on or about March 29, 2011. They failed to request an investigation or to request IS numbers. MPD requested IS numbers and initiated an administrative investigation regarding the March 29, 2011 e-mail.

Exhibit 1 to the complaints is an authentic copy of the parties' CBA.

II. Discussion

To summarize the undisputed facts, Sergeant Tidline sent an e-mail on MPD's e-mail system opposing a proposed dues increase. Chairman Baumann's request that MPD allow him to use its e-mail system in response was denied because the proposed e-mail concerned internal union issues. MPD then promulgated through its e-mail system a restatement of its policy against employee use of MPD's e-mail system "for notifications for union activities and union business." Two weeks later, three officers used MPD's e-mail system to send to FOP members and Internal Affairs agents an e-mail containing the subject "MEMBERSHIP NEWS !!!!! (MUST READ)." MPD investigated that e-mail, but two Internal Affairs agents who received it did not.

A. Claims of FOP

Citing the National Labor Relations Board's decision in *Purple Communications, Inc. and Communications Workers*,⁵ FOP asserts in its brief that employees have a right to use their employer's e-mail system concerning union matters on non-working time absent a showing of special circumstances that justify specific restrictions. MPD's denial of that right to Chairman Baumann specifically and to FOP members generally constitutes three unfair labor practices. First, in violation of section 1-617.04(c)(1) the denial interfered with a right protected by the Comprehensive Merit Personnel Act ("CMPA"), namely, the right "to form, join, or assist" the union⁶ through communication. Second, MPD retaliated against Chairman Baumann and the FOP by denying Baumann's request. Third, in violation of section 1-617.04(a)(3) the denial interfered with the existence and administration of the union.

⁵ 361 N.L.R.B. No. 126 (2014).

⁶ D.C. Official Code § 1-617.06(a)(2).

B. Analysis

The second of the three claims does not state an unfair labor practice claim. An element of a claim of retaliation is an adverse employment action.⁷ No adverse employment action was taken against Baumann. Simply denying an employee's request is not an adverse employment action in retaliation for making the request.⁸

MPD argues in its brief that the Board has no jurisdiction to interpret contracts and no jurisdiction over contractual disputes. It asserts that this case is a contractual dispute because the gravamen of this case, the issue of FOP's ability to use departmental e-mail, was negotiated by the parties and is governed by the contract that resulted from their negotiations. The parties agreed to a contractual provision governing these issues, article 11, section 4 of the CBA, and Baumann invoked that provision in his request to MPD. MPD contends that this provision distinguishes the present case from *Purple Communications*.

MPD's identification in the CBA of a provision addressing the subject matter of the unfair labor practice allegations in this case does not end the inquiry. "Generally, the CMPA empowers the Board to resolve statutory violations, but not contractual violations. Notwithstanding, if the record demonstrates that an allegation concerns a statutory violation of the CMPA, then even if it also concerns a violation of the parties' contract, the Board still has jurisdiction over the statutory matter and can grant relief accordingly if the allegation is proven."⁹ In our opinion referring Case No. 11-U-38 to a hearing examiner, we stated:

Assuming without deciding that FOP had a statutory right under the circumstances of this case to use MPD's e-mail system, the Board observes that the contractual provision cited by MPD does not necessarily remove the alleged violation of that statutory right from the Board's jurisdiction. The contractual provision would remove the alleged violation of the statutory right from the Board's jurisdiction only if it contains a clear and unmistakable waiver with respect to that statutory right. *See AFGE Locals 872, 1975, & 2553 v. D.C. Dep't of Pub. Works*, 49 D.C. Reg. 1145, Slip Op. No. 439 at p. 2 n.2, PERB Case No. 94-U-02 (1995). The D.C. Superior Court recognized this principle in its decision cited by MPD. The court said that "a party to a collective bargaining

⁷ *F.O.P./Metro. Police Dep't Labor Comm. v. Metro. Police Dep't Labor Comm.*, 63 D.C. Reg. 4589, Slip Op No. 1563 at 4-5, PERB Case No. 11-U-20 (2016).

⁸ *See Solomon v. Vilsack*, 845 F. Supp. 2d 61, 76 (D.D.C. 2012) ("[T]he Court is not persuaded that Solomon can make out a retaliation claim on the theory that USDA retaliated against her for making accommodation requests by denying her accommodation requests."), *aff'd in part, rev'd in part on other grounds, and remanded*, 763 F.3d 1 (D.C. Cir. 2014). Moreover, some of the facts FOP presents in support of its assertion of anti-union animus are not in the record. Br. for FOP 14, 18.

⁹ *F.O.P./Metro. Police Dep't Labor Comm. v. Metro. Police Dep't Labor Comm.*, 62 D.C. Reg. 13348, Slip Op. No. 1534 at 7, PERB Case No. 08-U-22 (2015) (footnotes omitted).

agreement can waive a right that its members would have under the CMPA or another statute, although it must use clear and unmistakable language to do so.” *Gov’t of D.C. v. D.C. Pub. Employee Relations Bd.*, No. 2012 CA 005842P, slip op. at 6 (Super. Ct. June 10, 2013).

MPD has the burden of proving that FOP has clearly and unmistakably waived the asserted statutory right. *See AFGE, Local Union No. 3721 v. D.C. Fire Dep’t*, 39 D.C. Reg. 8599, Slip Op. No. 287 at p. 22, PERB Case No. 90-U-11 (1991). Allowing MPD the opportunity to meet its burden of proof at an unfair labor practice hearing is consistent with the Board’s practice in cases that present this issue. *See AFGE, Local 872 v. D.C. Water & Sewer Auth.*, 52 D.C. Reg. 2474, Slip Op. 702 at pp. 2-3, PERB Case No. 00-U-12 (2003); *AFGE Local Union No. 2725 v. D.C. Dep’t of Pub. & Assisted Hous.*, 43 D.C. Reg. 7019, Slip Op. No. 404 at p. 2 n.4, PERB Case No. 92-U-21 (1994); *Int’l Bhd. of Police Officers, Local 446 v. D.C. Gen. Hosp.*, 41 D.C. Reg. 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1992).¹⁰

Because of the procedure that the parties chose at the hearing (notwithstanding the Board’s directive), we do not have the benefit of a recommendation from the hearing examiner on the issue of waiver as we did in the cases cited in the preceding paragraph. The parties do not present arguments on that issue in their briefs either. Thus, our analysis is confined to the text of the contract. The Board has jurisdiction to determine whether a contract supersedes or waives a statutory right, but beyond that the Board lacks jurisdiction to resolve contractual disputes.¹¹

Article 11 of the CBA is entitled “Use of Department Facilities.” Section 4 of article 11 states, “With specific approval by the Commanding Officer, the Union may utilize Departmental mailboxes, teletype, and electronic mail.”¹² That language creates its own standard for FOP’s use of mailboxes, teletype, and e-mail, one that requires the approval of the Commanding Officer. Section 1 of article 11 subjects union requests for space for union meetings to the same requirement.

The parties also agreed to grievance procedures for resolving “an allegation that there has been a violation, misapplication or misinterpretation of the terms of this Agreement.”¹³ And the parties

¹⁰ *F.O.P./Metro. Police Dep’t Labor Comm. v. Metro. Police Dep’t*, 61 D.C. Reg. 9056, Slip Op. No. 1479 at 4, PERB Case No. 11-U-38 (2014).

¹¹ *AFGE Local Union No. 2725 v. D.C. Dep’t of Pub. & Assisted Hous.*, 43 D.C. Reg. 7019, Slip Op. No. 404 at 3 n.4, PERB Case No. 92-U-21 (1994).

¹² Ex. 1 to Compls. at p. 9.

¹³ Ex. 1 to Compls. at p. 20, art. 19(A).

further agreed that “arbitration is the method of resolving grievances which have not been satisfactorily resolved pursuant to the Grievance Procedure.”¹⁴

In its agreement to the terms by which it may use departmental e-mail and to the means of resolving disputes that arise under those terms, FOP has clearly and unmistakably waived any statutory right it may have to the use of departmental e-mail. Because the parties have agreed to a contractual standard for FOP’s usage of departmental e-mail, the Board expresses no opinion on the extent to which the CMPA grants employees a right to use the e-mail systems of their employers for union purposes.

As a result of the waiver, FOP’s objections to the denial of the use of departmental e-mail are strictly contractual claims. The courts have held that where a contract provides that an action may be taken with the consent of a party, a claim that consent was unreasonably withheld is a claim for breach of contract.¹⁵

Since no statutory basis exists for the Board to consider claims that are strictly contractual,¹⁶ the complaints in these consolidated cases are dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

1. The complaints in PERB Case Nos. 11-U-35 and 11-U-38 are dismissed with prejudice.
2. 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 Chairman Charles Murphy and Members Ann Hoffman and Douglas Warshof.

Washington, D.C.

April 13, 2017

¹⁴ Ex. 1 to Compls. at p. 24, art. 19(E)(1).

¹⁵ *Campbell v. Westdahl*, 715 P.2d 288, 291-94 (Ariz. App. 1985). See also *Thompson Trading, Ltd v. Allied Breweries Ltd.*, 748 F. Supp. 936, 940-42 (D.R.I. 1990); *Muñoz HNOS, S.A. v. Editorial Televisa Int’l, S.A.*, 121 So. 3d 100, 102 (Fla. App. 2013).

¹⁶ *F.O.P./Metro. Police Dep’t Labor Comm. v. Metro. Police Dep’t*, 46 D.C. Reg. 7605, Slip Op. No. 384 at 3, PERB Case No. 94-U-23 (1994).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in Case Nos. 11-U-35 and 11-U-38 was sent by File & ServeXpress to the following parties on this the 13th day of April 2017.

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