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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 Nos. 07-U-49, 08-U-13, and 08-U-16
)	
v.)	Opinion No. 1302
)	
District of Columbia Metropolitan Police Department,)	
)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

This case involves three consolidated Unfair Labor Practice Complaints (“Complaints”) filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Complainant”, “FOP” or “Union”) against the District of Columbia Metropolitan Police Department (“Respondent” or “MPD”). In each of the Complaints, the Union alleges that MPD violated D.C. Code § 1-617.04(a)(1) and (5)¹ of the Comprehensive Merit Personnel Act

¹ § 1-617.04. Unfair labor practices.

(a) The District, its agents, and representatives are prohibited from:

(1) Interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;

* * *

(5) Refusing to bargain collectively in good faith with the exclusive representative.

("CMPA") by failing to comply with, or respond to the Union's requests for information. The consolidated complaints are as follows:

PERB Case No. 07-U-49:

The Union contends that the District of Columbia Metropolitan Police Department ("Department") committed an Unfair Labor Practice by refusing to provide information requested by Officer Cunningham concerning the Department's disciplinary action against Sergeant Kimberly Taylor.

(Complaint/PERB Case No. 07-U-49 at p. 1).

PERB Case No. 08-U-13:

The Union contends that the District of Columbia Metropolitan Police Department ("Department") committed an Unfair Labor Practice by refusing to provide information requested by the Chairman of the Fraternal Order of Police, Kristopher K. Baumann, concerning a Departmental disciplinary matter.

(Complaint/PERB Case No. 08-U-13 at p. 1).

PERB Case No. 08-U-16:

The Union contends that the District of Columbia Metropolitan Police Department ("Department") committed an Unfair Labor Practice by failing to provide information concerning the administrative investigation relating to Lieutenant Robert Glover, and for failing to provide the requested information for the Department's written policy addressing waiver requests for shaving.

(Complaint/PERB Case No. 08-U-16 at p. 1).

The Respondent filed Answers to the Complaints ("Answers") alleging that because the Union's requests for information present a contractual dispute, the Public Employee Relations Board ("Board") lacks jurisdiction over the matters raised in the complaints. In addition, the Respondent contends that it did not commit an unfair labor practice by denying the Union's requests for information.²

² MPD asserted that its reasons for denying the requests for information were due to the privileged or confidential nature of the information requested. (See MPD's Answers to Complaints PERB Case Nos. 07-U-49, 08-U-13 and 08-U-16). In addition, MPD claimed that concerning the allegations in in PERB Case No. 08-U-16, that it did supply some of the requested information, and that there is no factual basis for the complaint. (See Answer to Complaint/ PERB Case No. 08-U-16 at p. 8).

Hearings were held in this matter on March 25, and May 19, 2008. In addition, the parties submitted post-hearing briefs. Hearing Examiner Sean Rogers issued his Report and Recommendation ("R&R") on October 24, 2008, concluding that the Board does have jurisdiction over the Union's Complaints and that MPD violated D.C. Code § 1-617.04(a)(1) and (5) of the CMPA by either refusing to comply with, or respond to, the Union's requests for information, except for certain information described in Complaint/PERB Case No. 08-U-16. (See R&R at p. 17). As a result, the Hearing Examiner recommended that MPD be ordered to cease and desist from refusing to comply with, or respond to, the Union's requests for information, and release the requested information to the Union. (See R&R at p. 25). The Hearing Examiner also recommended that MPD be ordered to post a notice of the violations. (See R&R at p. 25). Whereas the Hearing Examiner found no violation as to a portion of the requested information described in PERB Case No. 08-U-16, he recommended that this portion of PERB Case No. 08-U-16 be dismissed.

The Respondent filed Exceptions to the Hearing Examiner's R&R. The Complainant filed an Opposition to the Respondent's Exceptions. The Hearing Examiner's R&R, MPD's Exceptions and the Union's Opposition are before the Board for Disposition.

II. Background

The Hearing Examiner made the following factual findings regarding the Complaints:

A. Complaint/PERB Case No. 07-U-49

In June 2007, a First District gun inventory revealed that Sergeant Kimberly Taylor, while in a less-than-full duty status, had not turned in her service weapon to the station as required by MPD work rules. Moreover, Taylor was not carrying her service weapon while on duty. Assistant Chief Diane Groomes directed that Taylor turn in her service weapon before noon that day. Based on Taylor's apparent violation of MPD work rules, Groomes ordered a disciplinary investigation which was delegated to Lieutenant Barbara Hawkins. A June 4, 2007 first-draft of Hawkins' memorandum of investigation was submitted to Groomes on June 5, 2007. Hawkins recommended that Taylor be disciplined with a Derelictions Report (also known as a *PD 750* after the MPD form number). A *PD 750* is the lowest form of recorded MPD discipline and is also known as a "corrective action."

Groomes reviewed Hawkins' first-draft and she noted what she thought were deficiencies including: no statement from Groomes as the complainant; no indication of the location of Taylor's service weapon; and no explanation of why Taylor's

service weapon was at her home. Groomes noted that, while Hawkins' investigation identified two potential MPD General Order (GO) violations by Taylor, Hawkins addressed only one of the potential violations. In addition, despite the potential of two GO violations, Groomes noted, Hawkins recommended the lowest corrective action for Taylor, a *PD 750*. Groomes' notation on Hawkins' first-draft were marginal and handwritten. Groomes returned the marked up first-draft to Hawkins. Among Groomes' marginal, handwritten notations, she wrote that, based on the additional deficiencies and Taylor's supervisory position, Groomes thought that an *Official Reprimand*, a higher form of discipline than Hawkins' recommended *PD 750*, was appropriate. Groomes did not retain a copy of Hawkins' marked up first-draft.

The record suggests that Hawkins prepared at least two more drafts dated June 14 and 19, 2007, and there may have been more drafts. The existence of these earlier drafts was revealed within the date of the June 19, 2007 final-draft which noted: "Rvsd: June 14, 2007" and "Rvsd. June 19, 2007". Hawkins' final-draft incorporated Groomes' marginal, handwritten notes from the first-draft including the increase in recommended discipline for Taylor from a *PD 750*, the lowest level of recorded discipline, to an *Official Reprimand*, a higher level of discipline.

On June 20, 2007, Groomes signed off on the investigation and the *Official Reprimand* discipline, and transmitted the documents to her supervisor, Assistant Chief Brian Jordan. Jordan approved the disciplinary recommendation for Taylor to receive an *Official Reprimand*.

On July 5, 2007, pursuant to the Parties' collective bargaining agreement (CBA), Groomes conducted a disciplinary commander's resolution conference which constituted Taylor's appeal of the *Official Reprimand*. Taylor and FOP Vice Chairman Wendell Cunningham received a copy of the final investigative report with the revised date notations, and the recommendation for an *Official Reprimand*. Asserting FOP's rights under CBA, Article 10, Cunningham demanded that Groomes provide the FOP with the earlier drafts of the investigation. At [the] hearing, FOP witnesses testified that Groomes said the Union was not entitled to the documents, but the MPD argues that Groomes said she did not have the earlier drafts. The MPD asserts that Groomes said the FOP could obtain the documents from Hawkins.

On July 9, 2007, Cunningham submitted a written request for information (RFI) pursuant to CBA, Article 10 to Jordan for copies of Hawkins' earlier investigative report drafts. Specifically, Cunningham's RFI states, in pertinent part:

This letter serves as a formal request for documents and information in the possession, custody, or control of the Metropolitan Police Department (MPD). The Fraternal Order of Police, Metropolitan Police Department Labor Committee (FOP), is requesting the following documents.

The FOP/MPD Labor Committee is currently representing Sergeant Kimberly Taylor of I-D, for her Official Reprimand appeal to the Chief of Police. On Thursday July 5, 2007, at approximately 0945 hours, Sergeant Taylor, along with her Union representative Wendell Cunningham, met with Commander Diana Grooms in her office for a Commander Resolution Hearing. Sitting in, was Captain Jeff Brown. During our meeting, we noticed in the investigation write-up in two places, the paper work indicated the word, "revised." I then said to the Commander, "I noticed in the Investigation paper-work it indicates "revised" on June 14, 2007, and June 19, 2007; and I would like to see those revised documents and the document dated June 4th." She responded by stating, "no," because "we were not entitled to the documents." She went on to say that the "revised documents" are notes she wrote to Lieutenant Hawkins "suggesting her opinion," but it appears to us, that the notes were instructions on how to proceed with the investigation. The Commander did state, that at no time did she tell or suggest to Lieutenant Barbara Hawkins to her [sic] to change the investigation from a 750 to an Official Reprimand.

We believe that the Official Reprimand that Commander Grooms gave to Sergeant Taylor was too harsh. We also think she may have told the Lieutenant what she would like to see in her outcome of the investigation. In defending Sergeant Taylor, we strongly believe that these documents which Commander Diana Grooms has in her . . .

[possession] are critical evidence for exonerating Sergeant Taylor. We are requesting the document dated June 4th, 2007, and all "revised documents" June 14, 2007, June 19, 2007 and any other documents that Commander Grooms, Lieutenant Barbara Hawkins, and Captain Jeff Brown may have pertaining to this case, be made available to the FOP Union.

On or about July 12, 2007, Jordan denied the FOP's request for information. Jordan's denial letter states, in pertinent part:

... I hereby respectfully deny your request based on the following reasons:

1. The documents requested, although the documents may or may not exist, are notes or comments which are a part of the deliberative and pre-decisional process and are excluded from the final investigative package. All final documents that made up the final report on the incident were included in the package submitted to the Office of Professional Responsibility.

Despite MPD's denial of FOP's information request, FOP obtained the earlier drafts from sources which were not revealed at hearing. The FOP appealed Taylor's *Official Reprimand* to the Chief of Police. The Chief of Police granted the appeal and rescinded Taylor's *Official Reprimand*.

(R&R at pgs. 2-5) (citations to the transcript and exhibits deleted).

B. Complaint/PERB Case No. 08-U-13

The Union contends that the [MPD] committed an Unfair Labor Practice by refusing to provide information requested by the Chairman of the Fraternal Order of Police, Kristopher K. Baumann, concerning a Departmental disciplinary matter.

On September 11, 2007, FOP Chairman Baumann sent a RFI to Mark Viehmeyer, Director of the Metropolitan Police Department Labor and Employee Relations. The RFI was made pursuant to CBA, Article 10 and stated, in pertinent part:

The Fraternal Order of Police, Metropolitan Police Department Labor Committee (FOP), is requesting documents pursuant to Article 10 of the Collective Bargaining Agreement (Agreement) between the District of Columbia and the FOP, as information necessary for the proper administration of terms of the Agreement. Due to the failure of the Department to produce the below documents as attachments to the Notices of Proposed Adverse Action and the time issues involved (see below), I am sending this request directly to your office for response.

INFORMATION REQUESTED

1. Notes, written transcripts, and any tape recordings produced during interviews of Assistant Chief of Police Winston Robinson and Lieutenant Jude Waddy during the Department's investigation of their off-duty employment for a firm known as "Federal Management Systems" in the country of Guyana. Each official received unspecified disciplinary action in the matter. The DDRO/IS numbers in Assistant Chief Robinson's case are unknown, Lieutenant Waddy's case number is DDRO No. 609-06/1S# 06-001182.

2. The complete investigative packages, including all memorandum and attachments, for Assistant Chief of Police Robinson and Lieutenant Waddy.

* * *

On August 31, 2007, Sergeant Bertie Shields was served with a Notice of Proposed Adverse Action (DDRO Case No, 400-07/1S# 05001557) alleging similar misconduct.

Assistant Chief of Police Robinson and Lieutenant Waddy's administrative interviews are directly referenced in the Notices of Proposed Adverse Action for . . . [Shields] and are part of the Department's case against . . . [Shields]. They were not, however, produced by the Department as part of the disciplinary packages. Those interviews are

necessary for the FOP to assist the members in preparing their defenses.

The disciplinary packages of both Assistant Chief Robinson and Lieutenant Waddy are necessary for the FOP to properly determine the appropriate use of the *Douglas* Factors in this matter. The discipline issued to officials regarding the same set of facts is directly relevant to the discipline issued to members in the matter. In addition, the disciplinary packages of both Assistant Chief Robinson and Lieutenant Waddy are necessary in order for the FOP to ascertain if any other mitigating facts or exculpatory facts were revealed during those investigations.

Baumann never received a response from Viehmeyer.

(R&R at pgs. 5-6) (citations to the transcript and exhibits deleted).

C. Complaint/PERB Case No. 08-U-16

The Union contends that [MPD] committed an Unfair Labor Practice by failing to provide information concerning the administrative investigation relating to Lieutenant Robert Glover, and for failing to provide the requested information for the Department's written policy addressing waiver requests for shaving.

FOP's *Complaint 08-U-16* involves two separate and unrelated RFIs by FOP's Seventh District Shop Steward Hiram Rosario as follows:

First RFI, Complaint 08-U-16:

On September 21, 2007, Rosario sent an RFI to Ira Stohlman, Medical Director of the Police and Fire Clinic (PFC). The RFI stated, in pertinent part:

Pursuant to Article 10 of the Collective Bargaining Agreement (Agreement) between the government of the District of Columbia and the Fraternal Order of Police, Metropolitan Police Department Labor Committee (FOP), I am filing an Article 10 Request with regard to the listed information.

* * *

The specific information and documents sought:

- A. The FOP is seeking all documents and information relating to the Police and Fire Clinic's (PFC) Written Policy that requires MPD members seeking shaving waivers, wearing of the soft body armor on the outside, etc. to obtain a letter from their private doctors every six (6) months, while also having to respond to PFC every 6 months. This policy has also affected members who have existing medical conditions, even though there is no cure for these conditions.

Rosario's RFI was based on FOP's questions concerning the shaving waiver policy of the PFC regarding officers with the skin disease *pseudofolliculitis barbae* (PFB) and certain other diseases which require waivers of uniform appearance standards. The record established that, at certain levels, PFB is incurable except by growing a beard.

On October 11, 2007, Rosario sent Stohlman an e-mail "requesting for you to look into" Rosario's September 21, 2007 RFI. That day Stohlman responded,

I did respond to your Article 10 request, and forwarded the response (addressed to you) through Assistant Chief Shannon Cockett.

On October 17, 2007, Rosario sent Stohlman another e-mail asking him if he had "an update on my Article 10 request." Stohlman responded that day stating that he had,

sent a response to your Article 10 – I can leave a copy here at the Clinic for you to pick-up at your convenience, or mail a copy of what I sent to you *via* Assistant Chief Cockett's office.

Rosario responded by e-mail that day and told Stohlman to mail the RFI response to the FOP office.

Stohlman testified that he responded to Rosario's RFI by sending an October 4, 2007 memorandum through Assistant Chief Shannon P. Cockett, Office of Human Resources Management, with copies to Commander Jennifer Green and Mark Bramow. While the memorandum is initialed by Stohlman it is not initialed by Cockett. Rosario testified that he never received a response to the RFI. Stohlman testified that he made no effort to ensure that Rosario received the RFI response.

Finally, Rosario said that on April 24, 2008, he sent another RFI to Stohlman requesting the same information and documents as in his initial September 11, 2007 RFI. Rosario said he has not received a response to this RFI from Stohlman by mail.

Second RFI, Complaint 08-U-16:

This portion of the FOP's *Complaint 08-U-16* involves two RFI's. The initial RFI is dated August 28, 2007 and the second RFI, a revised, more narrowly drawn version of the first RFI, is dated September 19, 2008.

Turning to the RFI's first version that is the subject of *Complaint 08-U-16*, the record establishes that on August 28, 2007, Rosario's RFI, addressed to Assistant Chief William Ponton, Office of Professional Responsibility, stated, in pertinent part:

Pursuant to Article 10 of the Collective Bargaining Agreement (Agreement) between the government of the District of Columbia and the Fraternal Order of Police, Metropolitan Police Department Labor Committee (FOP), I am filing an Article 10 Request with regard to the listed information.

* * *

The specific information and documents sought:

- A. All documents relating to the Department's investigation into Lieutenant Robert T. Glover's conduct for his "Neglect to Make an Arrest for an Offense Committed in his presence (DC Code 5-115.03)."

Rosario's RFI explained that the FOP sought information and documents related to the investigation into the conduct of

Lieutenant Robert T. Glover for alleged neglect to make an arrest for an offense committed in his presence. The RFI sought information on behalf of Officer Michael Stevens. The FOP asserted that Glover witnessed Stevens allegedly using excessive force during an arrest. The FOP asserted that Glover filed a criminal complaint with the U.S. Attorney based on Stevens' alleged misconduct.

On September 11, 2007, Rosario received a letter from Acting-Assistant Chief Matthew Klein denying the RFI because:

this incident is a pending criminal matter under review by the United States Attorney's Office. The revelation of *any* investigatory information concerning this matter would interfere with the enforcement procedures (D.C. Code Section 2-534(a)(3)(A).) Therefore, your request for information and documents is denied. (Emphasis in original).

On September 19, 2007, following Klein's denial, Rosario revised his RFI and submitted to Klein the second RFI that is the subject of *Compliant 08-U-16*, stating, in pertinent part:

Apparently there was a misunderstanding as to the scope of my request. The FOP is seeking all documents and information related to IS numbers drawn for the incident and an update on the status of any administrative, not criminal, investigation relating to Lieutenant Robert Glover.

Rosario testified that he never received a response to this revised RFI.

(R&R at pgs. 6-9) (citations to the transcript and exhibits deleted).

III. The Hearing Examiner's Recommendations, MPD's Exceptions and FOP's Opposition.

Based on the pleadings, the record developed at the hearings and his consideration of the parties' post-hearing briefs, the Hearing Examiner concluded that: (1) the Board's jurisdiction extends to the Union's Complaints in this matter; (2) the Complainant met its burden of proving the allegations in its Complaints by a preponderance of the evidence, as required by Board Rule 520.11; and (3) that MPD has violated D.C. Code § 1-617.04(a)(1) and (5) by "refusing to provide information relevant and necessary to the Union's statutory roles as the exclusive

representative, except as regards MPD's refusal to provide to the FOP information requested on Lieutenant Robert Glover." (R&R at p. 17, and see R&R at p. 19).

A. The Board's Jurisdiction

In its Answers to the Union's Complaints and in its post-hearing brief, MPD contends that the Board lacks jurisdiction over the matters asserted in the Complaints. Specifically, MPD claims that the Union's requests for information are based on the language in Article 10 of the parties' CBA³. (See Respondent's Brief at p. 11). Therefore, the allegations in the Complaints involve a contractual violation and are not within the jurisdiction of the Board. (See Respondent's Brief at p. 11). Furthermore, MPD suggests that Article 10 of the parties' CBA, in conjunction with Article 19 of the parties' CBA (the grievance and arbitration provisions), demonstrate the parties' intention to resolve disputes concerning MPD's statutory obligation to provide requested information by the contractual procedures set out in the parties' CBA. (See Respondent's Brief at p. 11).

In resolving the issue of the Board's jurisdiction, the Hearing Examiner considered the Board's precedent concerning: (1) the obligation of an employer to provide information requested by an exclusive representative under the CMPA; and (2) the Board's distinction between those obligations that are strictly contractual, as opposed to obligations that are statutory without regard to the parties' collective bargaining agreement provisions. (See R&R at p. 17-18).

The Hearing Examiner observed that:

[t]he Board has developed well established precedent regarding an employer's obligation to provide information to the exclusive representative under the CMPA. (*University of the District of Columbia v. University of the District of Columbia Faculty Association*, 38 D.C. Reg. 2463, Slip Op. No. 272, PERB Case No. 90-U-10 (1991)(*Case 272*)). In addition, the Board has consistently followed United States Supreme Court precedent holding,

that an employer's duty to disclose "unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement."⁴ (*Fraternal Order of Police/Metropolitan Police Department Labor*

³ Article 10, Section 1 of the parties' CBA provides:

The parties shall make available to each other's duly designated representatives, upon reasonable request, any information, statistics and records relevant to negotiations or necessary for proper administration of this Agreement.

⁴ See *NLRB v. Acme Industrial Co.*, 385 U.S. 32, 36 (1967).

Committee v. District of Columbia Metropolitan Police Department, Opinion No. 835 at p. 9, PERB Case No. 06-U-10, (Case 835); citing *NLRB v. Acme Industrial Co.*, 385 US 32, p. 36 (1971)).

In addition, the Board has consistently held to the legal standard that,

[m]anagement's duty to furnish information relevant and necessary to a union's statutory role under the CMPA as the employees' exclusive representative is derived from (1) management's obligation to "bargain collectively in good faith" and (2) employees' right "[t]o engage in collective bargaining concerning terms and conditions of employment, as may be appropriate under this law and rules and regulations, through a duly designated majority representative[.]" See D.C. Code Sec. 1-617.01(b)(2) and (c). D.C. Code Sec. 1-617.04(a)(5) protects and enforces, respectively, these employees' rights and employer obligations by making their violation an unfair labor practice. (*American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2921 v. District of Columbia Public Schools*, [42 D.C. Reg. 5685, Slip Op. No. 339, PERB Case No. 92-U-08 (1992).]

(R&R at pgs. 17-18).

In light the above, the Hearing Examiner remarked that:

[t]he Board has applied this legal standard by differentiating between a union's [requests for information ("RFIs")] which are *strictly contractual*, as opposed to RFIs which are grounded in the CMPA, without regard to the Parties' collective bargaining agreement provisions. Specifically, the Board has held,

[i]n determining a violation of this obligation [to provide information requested by the union], the Board has always made a distinction between obligations that are statutorily imposed under the CMPA and those obligations that are contractually agreed-upon between the parties. "The CMPA provides for the resolution of the former", we have

stated, “while the parties have contractually provided for the resolution of the latter, *vis-a-vis*, the grievance and arbitration process contained in their collective bargaining agreement.” We have concluded, therefore, that *we lack jurisdiction over alleged violations that are strictly contractual in nature*. . . . We have reached this conclusion notwithstanding that fact that, absent coverage under provisions of an effective collective bargaining agreement, an unfair labor practice may otherwise lie under the CMLPA. (*Case 339*, p. 3-4). (Citations omitted and emphasis added).

(R&R at p. 18).

Based on the foregoing precedent⁵, the Hearing Examiner rejected MPD’s challenge to the Board’s jurisdiction. Specifically, The Hearing Examiner’s found that:

[w]hile CBA Article 10 describes the *mutual* obligation to exchange information, the contract provision’s mere existence does not remove from PERB’s jurisdiction the consideration of the FOP’s *Complaints* asserting breaches of MPD’s *statutory duty* to furnish relevant and necessary information under the CMLPA. Therefore, MPD’s challenge to the PERB’s jurisdiction over the FOP’s ULPs is without merit and the PERB has jurisdiction over the statutory violations the FOP asserts were committed by MPD in these three ULP cases.

Having determined that the Complaints are properly within the Board’s jurisdiction, the Hearing Examiner considered whether MPD’s failure to comply with the Union’s requests for information were in violation of MPD’s statutory obligations. However, before reviewing the Hearing Examiner’s conclusions and recommendations concerning merits of the Complaints, the Board will address MPD’s exceptions to the Hearing Examiner’s resolution of the jurisdictional issue.

MPD’s Exceptions

MPD makes an exception that “[the Hearing Examiner] erred in finding that the Board has jurisdiction over these consolidated matters.” (Exceptions at p. 5). Specifically, MPD “submits that [the Hearing Examiner] misinterpreted and misapplied [*AFSCME Local 2921 v. District of Columbia*, Slip Op. 339.] As a result, Respondent submits that [the Hearing Examiner’s] jurisdictional finding should be reversed, and the Complaints in this consolidated

⁵ In addition, the Hearing Examiner cites Board precedent in *American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks*, 46 D.C. Reg. 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1992).

matter should be dismissed.” (Exceptions at p. 5). MPD argues that the Board’s precedent, notably Slip Op. No. 339, provides that the Board has no jurisdiction over information requests made pursuant to a parties’ collective bargaining agreement. (See Exceptions at p. 5). As a result, MPD asserts that the Hearing Examiner “mis-cited the relevant Board holding from *AFSCME*, failed to recognize that the purported statutory basis for the complaint in *AFSCME* is identical to the purported statutory violation in this matter, and misinterprets the Board’s rationale for its holding.” (Exceptions at p. 7). In addition, MPD contends that the Hearing Examiner misapplied the Board’s holding in *AFGE v. DCDRP*, Slip Op. No. 588.⁶

The crux of MPD’s exception is that the Hearing Examiner should have interpreted Slip Op. Nos. 339 and 588 as providing that “if there is evidence that the parties have agreed to allow the negotiated agreement to govern the relevant conduct”, then the Board does not have jurisdiction over the matter.” (Exceptions at pgs. 9-10). As a result, MPD’s exception suggests that the Board does not have jurisdiction to resolve the Union’s Complaints because: (1) the Complaints involve disputes concerning MPD’s obligation to provide information; (2) Article 10 of the parties’ CBA concerns an obligation to provide information; and (3) Article 19 provides a grievance and arbitration procedure which could resolve disputes over the application or interpretation of Article 10.

MPD has correctly identified that the Board “distinguishes between those obligations that are statutorily imposed under the CMPA and those that are contractually agreed upon between the parties.” *American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks*, 50 D.C. Reg. 5049, Slip Op. No. 697, PERB Case No. 00-U-22 (2002) (citing *American Federation of State, County and Municipal Employees, Local 2921*, Slip Op. No. 339). In addition, it is well established that the Board’s “authority only extends to resolving statutorily based obligations under the CMPA.” *Id.*

However, the Board’s decision in Slip Op. No. 339 should be distinguished from the instant matter. In Slip Op. No. 339, the union alleged that DCPS’ failure to provide a Step 3 written decision within a reasonable period constituted an unfair labor practice. (Slip Op. No. 339 at p. 2). The Board found that the obligation to furnish the specific information requested was dictated by a provision of the collective bargaining agreement. The Board contrasted the contractual obligation to issue a Step 3 decision with the obligation of an agency to provide requested information necessary and relevant to a union in the preparation or processing of a grievance. (Slip Op. No. 339 at n. 5).

MPD’s exception suggests that the Board’s precedent holds that where the subject matter in the allegations of an unfair labor practice complaint is found to also be a subject matter

⁶ In Slip Op. No. 588, the Board addressed AFGE’s complaint alleging that DCDRP violated the CMPA by failing to adhere to the parties’ ground rules for negotiating a successor collective bargaining agreement. (See Slip Op. No. 588 at p. 1). The Board, following its holding in Slip Op. 339, found that because a resolution of the dispute AFGE’s complaint would require an interpretation of the parties’ ground rules (i.e. contractual interpretation), and that the Board lacked jurisdiction over the complaint. (See Slip Op. No. 588 at pgs. 3-4).

addressed by the parties' CBA⁷, then the Board's inquiry into the complaint must end, and the Board is prohibited from determining whether the allegations made in the complaint constitute a violation of the CMPA. To the contrary, the Board has consistently held that if allegations made in an unfair labor practice complaint *do*, in fact, concern statutory violations, as in the instant case,⁸ then "th[e] Board is empowered to decide whether [MPD] committed an unfair labor practice concerning the Union's document request, even though the document request was made . . . [pursuant to a contractual provision]. *American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks*, Slip Op. No. 697 at p. 6.

As stated above, the Board lacks jurisdiction over violations that are **strictly contractual** in nature. Quite simply, the Board's precedent requires an inquiry as to whether a complaint merely **pleads** a violation of the CMPA, but is in fact, only a contractual dispute. For example, if the record only supports a finding that the basis of the complaint **only** involves an alleged violation of a contractual provision, and resolution of the dispute requires an interpretation, or enforcement, of the disputed provision, the alleged violation is strictly contractual, and not within the Board's jurisdiction. *See American Federation of Government Employees, Local Union No. 3721 v. District of Columbia Fire Department*, 39 DCR 8599, Slip Op. No. 287 at n. 5, PERB Case No. 90-U-11 (1991).

Moreover, rather than decline jurisdiction, it has been the Board's longstanding precedent and policy to defer action on a complaint if: (1) the challenged conduct has also been asserted to violate the parties' collective bargaining agreement; and/or (2) where interpretation of the contractual provisions is necessary to the determination of whether a statutory violation has occurred. *See Council of School Officers, Local 4, American Federation of School Administrators v. District of Columbia Public Schools*, _ DCR _, Slip Op. No. 803, PERB Case No. 04-U-38 (2007).

In addition, the Board has stated that "recitation of a statutory right in the provisions of a collective bargaining agreement does not render a violation of that right a contractual matter outside the jurisdiction of the Board unless the agreement also contains a clear and unmistakable waiver with respect to that statutory right." *American Federation of Government Employees*,

⁷ In addition, there must be evidence that the parties' contracted for a means to resolve disputes over the application and interpretation of the provisions of the CBA.

⁸ Here, MPD's duty to furnish information relevant and necessary to the Union's statutory role under the CMPA as the employees' exclusive representative is derived from: (1) management's obligation to "bargain collectively in good faith"; and (2) employees' right "[t]o engage in collective bargaining concerning terms and conditions of employment, as may be appropriate under this law and rules and regulations, through a duly designated majority representative[.]", D.C. Code 1-617.05(a)(1) and (5); and *see International Brotherhood of Teamsters Locals 639 and 730 v. D.C. Public Schools*, 37 DCR 5993, Slip Op. No. 226, PERB Case No. 88-U-10 (1990); *Psychologists Union, Local 3758 of the D.C. Department of Health, 1199 National Union of Hospital and Health Care Employees, AFSCME v. D.C. Department of Mental Health*, 54 DCR 2644, Slip Op. No. 809, PERB Case No. 05-U-41 (2005); *University of the District of Columbia v. University of the District of Columbia Faculty Association*, 38 DCR 2463, Slip Op. No. 272, PERB Case No. 90-U-10 (1991); and *International Brotherhood of Teamsters, Locals 639 & 730 v. D.C. Public Schools*, 37 DCR 5993, Slip Op. No. 226, PERB Case No. 88-U-10 (1989).

Decision and Order

PERB Case Nos. 07-U-49, 08-U-13 and 08-U-16

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Locals 872, 1975 and 2553, Individually and on Behalf of the Consolidated Unit Represented by AFGE Locals 872, 1975, 2553 and 631 v. District of Columbia Department of Public Works, 49 DCR 1145, Slip Op. No. 439 at p. 2 n. 2, PERB Case No. 94-U-02 (1995); see also *National Association of Government Employees, Local R3-06 v. District of Columbia Water and Sewer Authority*, 47 DCR 7551, Slip Op. No. 635, PERB Case No. 99-U-04 (2000); and *Metropolitan Edison Co. v. National Labor Relations Board*, 460 U.S. 693, 705, 103 S. Ct. 1467, 1477 (1983), (the Supreme Court held that any waiver of a statutory right to bargain must be "clear and unmistakable"). It should also be noted that the unfair labor practice provisions of the CMPA do not contain language which categorically preclude the Board from exercising its jurisdiction over complaints if there is evidence the matter can be (or has been) raised under the grievance/arbitration provisions of the parties' collective bargaining agreement.⁹

⁹ Unlike the unfair labor practice provisions found in 5 U.S.C. § 7116, or the disciplinary grievances and appeals procedures set forth in D.C. Code § 1-616.52, a party alleging an unfair labor practice violation under D.C. Code § 1-617.04 is not required to choose between filing a complaint with the Board or pursuing a remedy under the parties' collective bargaining agreement. 5 U.S.C. § 7116 - unfair labor practices, specifically provides:

(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121 (e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

As to appeals before the Office of Employee Appeals, the CMPA contains specific provisions which require an employee/union to choose procedures either under the CMPA or under the parties' collective bargaining agreement, but not both. D.C. Code § 1-606.2, provides in pertinent part that:

(b) Any performance rating, grievance, adverse action or reduction-in-force review, which has been included within a collective bargaining agreement under the provisions of subchapter XVII of this chapter, shall not be subject to the provisions of this subchapter.

In addition, D.C. Code § 1-616.52 - Disciplinary grievances and appeals, specifically provides:

(e) Matters covered under this subchapter that also fall within the coverage of a negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either pursuant to § 1-606.03, or the negotiated grievance procedure, but not both.

(f) An employee shall be deemed to have exercised their option pursuant to subsection (e) of this section to raise a matter either under the applicable statutory procedures or under the negotiated grievance procedure at such time as the employee timely files an appeal under this section or timely files a grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, whichever event occurs first.

Under a strict interpretation of the CMPA, if the D.C. City Council had intended for the parties to a collective bargaining agreement to elect an exclusive mechanism for resolving disputes which allege an unfair labor practice violation, it would have included language similar to that contained in D.C. Code § 1-616.52 or the 5 U.S.C. § 7116. Specifically, this language would have expressly prohibited the Board from exercising jurisdiction or

Based upon the foregoing, it is clear that the Board's precedent and policy do not prohibit the Board from exercising its jurisdiction over a complaint merely because the alleged statutory violation could also be resolved by an application of the parties' CBA and grievance/arbitration procedure. Moreover, MPD's exception does not refute its statutory duty under the CMPA to furnish information relevant and necessary to the Union to fulfill its statutory role as the employees' exclusive representative. What MPD does dispute is whether it was obligated to furnish the information requested, or whether it satisfied the Union's requests. As a result, the Board finds MPD's application of the Board's precedent to the facts in this case represents a misunderstanding and misinterpretation of the Board's case law.

In addition, MPD's exception to the Hearing Examiner's determination of the Board's jurisdiction involves a disagreement with the Hearing Examiner's finding that, "[i]n the instant cases, there is no evidence that the parties have agreed that complaints of statutory CMPA violations are to be resolved pursuant to their collective bargaining agreement." (R&R at p. 19). The Board's precedent provides no basis for MPD's position that there are a "category" of cases upon which the Board has decided it has no jurisdiction. Instead, the Board's jurisdictional analysis requires an examination of the specific facts of each case. Furthermore, MPD's exception to the Hearing Examiner's jurisdictional conclusion relies on an argument insisting on an interpretation of Board precedent which is a repetition of the arguments considered and rejected by the Hearing Examiner.

Pursuant to D.C. Code § 1-605.02(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner. See *Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO/CLC v. District of Columbia Public Schools*, 43 D.C. Reg. 5585, Slip Op. No. 375 at p. 2, PERB Case No. 93-U-11 (1994). The Board finds that the Hearing Examiner's findings and conclusions are reasonable, supported by the record and consistent with Board precedent. Therefore, the Board: (1) adopts the Hearing Examiner's findings and conclusions that the Board has jurisdiction; and (2) rejects MPD's exception.

B. Merits of the Consolidated Complaints

PERB Case No. 07-U-49

The Hearing Examiner found:

FOP requested documents related to the investigation and discipline of Sergeant Kimberly Taylor prepared by Lieutenant Hawkins. The FOP was provided with Hawkins' final

instructed the parties it could only choose one forum for the resolution of disputes. No such language is present in this case.

investigative report at a July 5, 2007 disciplinary commander's resolution conference. The FOP determined that Hawkins had prepared at least two drafts of the final investigative report and on July 9, 2007, the Union specifically requested copies of Hawkins' June 14, 2007, and June 19, 2007 drafts. It is significant that the FOP specifically identified these documents and asserted that the Union needed the documents because Taylor was the subject of an MPD Official Reprimand.

(R&R at p. 20).

In response to the Union's request for the draft investigative reports, the Hearing Examiner found that the MPD's Assistant Chief of Police denied the request because:

The documents requested, although the documents may or may not exist, are notes or comments which are a part of the deliberative process and pre-decisional process and are excluded from the final investigation package. All final documents that made up the final report on this incident were included in the package submitted to the Office of Professional Responsibility.

(R&R at p. 20) (citation omitted).

The Hearing Examiner provided the following discussion of the deliberative process privilege:

The common-law predecisional process and deliberative process privileges are derivatives of executive privilege. The privileges may serve as the basis for an executive agency to assert an exception to the general rule strongly favoring public disclosure of, and free and open access to government documents.

(R&R at p. 20).

Based on this privilege, the Hearing Examiner reasoned that an agency may deny a request for a predecisional document; but that once a final decision is rendered, these documents are no longer predecisional. (See R&R at p. 20). As a result, the Hearing Examiner concluded that after MPD provided the Union with a final investigative report, the earlier drafts were no longer 'predecisional'. (See R&R at p. 20). Moreover, the Hearing Examiner explained that "[t]he deliberative process privilege is a qualified privilege. When an executive agency's denial of the release of information based on the deliberative process privilege is appealed, the appellate body must weigh the agency's need for confidentiality against the requestor's need for the requested information." (R&R at p. 20).

In addition, the Hearing Examiner found that:

Hawkins' drafts and final investigative report are not part of MPD's policy making process, but are purely her factual observations and interpretations of MPD's work rules. Moreover, the facts establish that Hawkins' final investigative report was released to the FOP, thereby waiving the privilege. Therefore, since the final investigative report was released to the FOP, it is not confidential and any existing drafts cannot be seriously argued to be confidential.

As to the alleged mootness of the Union's Complaint, the Hearing Examiner rejected MPD's contention that the Union's complaint is moot because the draft reports became available to the Union from other sources. The Hearing Examiner observed that Board precedent "establishes that a union need not look elsewhere when information it seeks is in the employer's possession. (*Psychologists Union, Local 3758 of the D.C. Department of Health, 1199 National Union of Hospital and Health Care Employees, American Federation of State, County and Municipal Employees, AFL-CIO v. District of Columbia Department of Health*, PERB Case No. 05-U-41, Slip Op. No. 809 (2005))." (See R&R at p. 20).

As a result, the Hearing Examiner determined that "MPD's assertion of the deliberative process privilege is without merit particularly since the facts establish that the documents the FOP requested were not confidential and the privilege was waived once the final investigative report was released to the FOP." (R&R at p. 21). In addition, the Hearing Examiner found that "[t]he record establishes, and the MPD does not contest, that the documents the FOP requested on July 9, 2007, were both relevant and necessary to the FOP's legitimate collective bargaining duties as the exclusive representative of the FOP bargaining unit. . . . For these reasons, Jordan's denial of FOP's request for information was without merit and a violation of DC Code § 1-617.04(a)(1) and (5)." (R&R at p. 21).

MPD's Exceptions to the Hearing Examiner's recommendation on the Merits of PERB Case No. 07-U-49

In its exceptions to the Hearing Examiner's recommendations concerning PERB Case No. 07-U-49, MPD reasserts its contentions that the draft investigative reports regarding Sgt. Taylor "were protected from disclosure by the deliberative process privilege, and that even if they were not, the union had obtained the information it was seeking, thus mooted the Complaint." (Exceptions at p. 10). In addition, MPD argues that "[Hearing] Examiner Rogers erred in dismissing Respondent's deliberative process privilege claim in PERB Case No. 07-U-49 (Request for Previous drafts of Investigative Reports)." (Exceptions at p. 10). MPD's exception centers on its assertion that the Hearing Examiner erred in finding that the draft investigative reports were "mere factual observations and not pre-decisional, and [that] his mischaracterization of Respondent's privilege claim as applying to the final investigative report . . . [requires] the Board [to] uphold its claim of deliberative process privilege as applied to Lieutenant Hawkins' draft investigative reports." (Exceptions at p. 12).

The Union opposes MPD's exception and argues that the record supports the Hearing Examiner's findings. Specifically, the Union contends that "the [deliberative process] privilege does not apply for two reasons: 1) Lieutenant Hawkins' drafts contain purely factual observations about Sergeant Taylor, and 2) The Department waived the privilege when it issued its final decision to Sergeant Taylor, imposing discipline." (Opposition to Exceptions at p. 10).

The Board observes that MPD's defense for denying the Union's request asserts that nondisclosure was justified under the deliberative process privilege. MPD states that this privilege is derived from D.C. Code § 2-534, Freedom of Information - Exemptions from disclosure¹⁰, and federal case law.¹¹ (See Respondent's Brief at pgs. 12).

¹⁰ D.C. Code § 2-534, provides, in pertinent part, that:

(a) The following matters may be exempt from disclosure under the provisions of this subchapter:

(2) Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;

(3) Investigatory records compiled for law-enforcement purposes, including the records of Council investigations and investigations conducted by the Office of Police Complaints, but only to the extent that the production of such records would:

(A) Interfere with:

(i) Enforcement proceedings;

(ii) Council investigations; or

(iii) Office of Police Complaints ongoing investigations;

(B) Deprive a person of a right to a fair trial or an impartial adjudication;

(C) Constitute an unwarranted invasion of personal privacy;

(D) Disclose the identity of a confidential source and, in the case of a record compiled by a law-enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(E) Disclose investigative techniques and procedures not generally known outside the government;

(4) Inter-agency or intra-agency memorandums or letters, including memorandums or letters generated or received by the staff or members of the Council, which would not be available by law to a party other than a public body in litigation with the public body.

(b) Any reasonably segregable portion of a public record shall be provided to any person requesting the record after deletion of those portions which may be withheld from disclosure pursuant to subsection (a) of this section. In each case, the justification for the deletion shall be explained fully in writing, and the extent of the deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (a) of this section under which the deletion is made. If technically feasible, the extent of the deletion and the specific exemptions shall be indicated at the place in the record where the deletion was made.

The Board has reviewed D.C. Code § 2-534 and the federal case law discussing the deliberative process privilege, which protects “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8, 121 S. Ct. 1060, 149 L.Ed.2d 87 (2001) (internal quotation marks omitted). For the deliberative process privilege to apply, the material must be “predecisional” and “deliberative.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

The Board has discussed the relevance of the Freedom of Information Act (“FOIA”) to a union’s request for information. In *University of the District of Columbia Faculty Association v. University of the District of Columbia*, 36 DCR 2469, Slip Op. No. 215, PERB Case No. 86-U-16 (1989), UDC raised as a defense to its failure to provide requested information to the Union that:

... the Freedom of Information Act, D.C. Code Section [2-534], maintaining that employee privacy interests outweighs “the public interest purpose of those seeking disclosure.” However, UDCFA is the exclusive bargaining representative and in accordance with D.C. Code Section 1-[617.11(a)] has the right to act for and represent the interests of the employees it represents.

The correct test rather is whether the information sought is relevant and necessary to the union’s legitimate collective bargaining functions and whether this need is outweighed by confidentiality concerns. *N.L.R.B. v. Acme Industries Co.*, 385 U.S. 432 (1967), is also afforded certified labor organizations under the CMPA.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from the Council of the District of Columbia. This section shall not operate to permit nondisclosure of information of which disclosure is authorized or mandated by other law.

(e) All exemptions available under this section shall apply to the Council as well as agencies of the District government. The deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege are incorporated under the inter-agency memoranda exemption listed in subsection (a)(4) of this section, and these privileges, among other privileges that may be found by the court, shall extend to any public body that is subject to this subchapter.

¹¹ MPD cites: *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975); *Russell v. Dept. of Air Force*, 682 F.2d 1045, 1048 (D.C. Cir 1982); *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir 1980); *Jordan v. Dept. of Justice*, 591 F.2d 753, 772-773 (D.C. Cir 1978) (en banc); *Petroleum Info. Corp. v. Dept. of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992); *Access Reports v. Dept. of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991); *National Assn. of Home Builders v. Norton*, 309 F.3d 26, 39 (D.C. Cir. 2002); *Dudman Communications Corp. v. Dept. of Air Force*, 815 F.2d 1565, 1567-1568 (D.C. Cir. 1987).

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Slip Op. No. 215 at p. 3. See also *District of Columbia Nurses Association v. The Mayor of the District of Columbia, and District of Columbia Health and Hospitals Public Benefit Corporation, District of Columbia General Hospital*, 45 D.C. Reg. 6736, Slip Op. No. 558 at pgs. 4-5, PERB Case Nos. 95-U-03, 97-U-16 and 97-U-28 (1998).

In the instant matter, "the information sought goes to the heart of the alleged . . . violation. Thus, the need of the Union for the information clearly outweighs the confidentiality concerns expressed by [MPD]." *Id.* Moreover, the Board has developed well established precedent regarding an employer's obligation to provide information to the exclusive representative under the CMPA. *University of the District of Columbia v. University of the District of Columbia Faculty Association*, Slip Op. No. 272, *supra*. In addition, the Board has followed United States Supreme Court precedent holding that the duty to bargain collectively includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 76 S. Ct. 753, 100 L.Ed. 1027; *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 87 S.Ct. 565, 17 L.Ed.2d 495. In light of the Board's precedent involving an agency's duty to disclose information, the key factual determination which this case requires is whether the draft investigative reports were necessary to enable the Union to fulfill its duty to represent the grievant. "Unwarranted and/or unjustified delays in the submission of pertinent information obviously frustrates the efficient functioning of grievance processing and such delay has been held to constitute a violation of the duty to bargain." *Pennco Inc.*, 212 NLRB 677, 678 (1974).

The Board finds MPD's exceptions to be a repetition of the arguments made before, and rejected by, the Hearing Examiner. The Hearing Examiner's findings that the draft investigative reports were no longer predecisional, as well as purely factual, are amply supported by the record. In addition, the Hearing Examiner's reasoning is clearly consistent with the case law discussed above. Thus, MPD's exception amounts to no more than a disagreement with the Hearing Examiner's findings of fact. This Board has held that a mere disagreement with the hearing examiner's findings is not grounds for reversal of the findings where they are fully supported by the record. See *Teamsters Local Unions 639 and 670, International Brotherhood of Teamsters, AFL-CIO v. District of Columbia Public Schools*, 54 D.C. Reg. 2609, Slip Op. No. 804, PERB Case No. 02-U-26 (2003); see also *American Federation of Government Employees, Local 874 v. D.C. Department of Public Works*, 38 D.C. Reg. 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). We have also rejected challenges to the Hearing Examiners findings based on: (1) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. See *American Federation of Government Employees, Local 2741 v. D.C. Department of Recreation and Parks*, 46 DCR 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999); see also *American Federation of Government Employees v. District of Columbia Water and Sewer Authority*, D.C. Reg. , Slip Op. 702, PERB Case No. 00-U-12 (2003). Similarly, we have held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Tracy Hatton v. FOP/DOC Labor Committee*, 47 D.C. Reg. 769, Slip Op No. 451 at p. 4, PERB Case No. 95-U-02 (1995). See also *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 35 D.C. Reg. 8594, Slip Op. No. 285,

PERB Case No. 86-U-16 (1992); *Charles Bagenstose et al. v. D.C. Public Schools*, 38 D.C. Reg. 4154, Slip Op. No. 270, PERB Case No. 88-U-34 (1991).

Whereas the Board finds that the Hearing Examiner's findings and conclusions are reasonable, supported by the record and consistent with Board precedent, the Board adopts the Hearing Examiner's findings and conclusions that MPD's assertion of the deliberative process privilege is without merit because the documents the Union requested were not protected by the deliberative process privilege. As a result, the Board adopts the Hearing Examiner's recommendation and rejects MPD's exception.

PERB Case No. 08-U-13

The Hearing Examiner found that:

The record establishes that on September 11, 2007, the FOP requested from MPD: notes; written transcripts; and any tape recordings of investigative interviews of Assistant Chief-of-Police Winston Robinson and Lieutenant Jude Waddy involving their off-duty employment with Federal Management Systems (FMS) in Guyana. (Jx 5). The FOP requested this information because on August 31, 2007, Sergeant Bertie Shields, a member of the FOP bargaining unit, was served with a Notice of Proposed Adverse Action alleging misconduct similar to Robinson and Waddy involving Shields' off-duty employment with FMS in Guyana. Uncontested testimony revealed that MPD was investigating Robinson, Waddy and Shields regarding the same incident of off-duty employment with FMS in Guyana. The FOP asserts that it needed the information to represent Shields properly in the proposed adverse action.

MPD never responded to FOP's September 11, 2007 RFI on Shields' behalf and the Union filed the instant ULP.

(R&R at p. 22).

The Hearing Examiner addressed MPD's confidentiality arguments and assertions that the information requested by the Union was exempt by DPM § 3112.14, and confidential under DPM § 3112.11. (R&R at p. 22). The Hearing Examiner found that:

DPM § 3112.11 provides that copies of reports of investigation shall be furnished the *subject* of an investigation or to his or her representative. These personnel regulations do not, and cannot, constrain FOP's statutory right to information necessary and relevant to the Union's role as the exclusive representative and duty to represent Shields in the instant case. Under the unique and

narrow circumstances of the incident giving rise to the investigations of Robinson, Waddy and Shields; Robinson and Waddy's investigative reports are necessary and relevant to FOP's representation of Shields and to the Union's role and duty as the exclusive representative.

MPD's confidentiality concerns can be resolved by requiring FOP to execute a protective order agreeing that the information MPD provides regarding Robinson and Waddy may only be used for the purpose of representing Shields in the proposed adverse action involving the same nucleus of operative facts.

For these reasons, MPD's denial of FOP's request for information is without merit and a violation of DC Code § 1-617.04(a)(1) and (5).

(R&R at p. 22).

MPD's Exceptions to the Hearing Examiner's recommendation on the Merits of PERB Case No. 08-U-13

MPD's exception in PERB Case No. 08-U-13 asserts that the Hearing Examiner erred in rejecting its confidentiality defense. In support of its exception, MPD repeats the arguments made in its brief and provided at the hearings. Specifically, MPD contends that by its understanding of the applicable statutes, regulations and Board precedent, the confidentiality exemption should apply to the administrative investigations of Assistant Chief Robinson and Lieutenant Waddy. (See Exceptions at p. 14).

The Board has held that an employer's claim of confidentiality or privacy will generally not stand scrutiny once information is proven to be both relevant and necessary to a union's legitimate collective bargaining functions. See *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). This determination is generally to be decided on a case by case basis and turns upon "the circumstances of the particular case." *NLRB v. Truitt Mfg. Co.*, 351 U.S. at 153, 76 S.Ct., at 756.

Staff finds that the Hearing Examiner's reasoning concerning the confidentiality of the administrative investigations is consistent with the Board's precedent and the federal case law discussed above. MPD's exceptions are merely a repetition of the arguments made before, and rejected by, the Hearing Examiner. Thus, MPD's exception amounts to no more than a disagreement with the Hearing Examiner's rationale. The Board finds that the Hearing Examiner's findings and conclusions, that MPD's assertion of the confidentiality privilege is without merit, are reasonable, supported by the record and consistent with Board precedent, the Hearing Examiner's findings and conclusions is adopted. As a result, the Board adopts the Hearing Examiner's recommendation and rejects MPD's exception.

PERB Case No. 08-U-16

The Hearing Examiner observed that the Complaint in PERB Case No. 08-U-16 “involves two separate and unrelated FOP RFIs.” (R&R at p. 23). In addition, the second request “involves an initial and then a revised [request for information], and only the revised [request] is material to the analysis of the FOP’s ULP charges against MPD.” (R&R at p. 23).

A. The First Request

As to the first request for information (“RFI No. 1”), the Hearing Examiner found that “the record establishes that on September 21, 2007, FOP representative Hiram Rosario requested from Ira Stohlman, Director of Medical Services, Police and Fire Clinic (PFC), all documents and information relating to the PFC’s written policy on shaving waivers and wearing soft body armor on the outside.” (R&R at p. 23). Based upon email communication between Director Stohlman and FOP Representative Rosario, the Hearing Examiner found that MPD Assistant Chief Cockett was supposed to provide a response to the Union’s request. However, the Union asserts that MPD’s Assistant Chief “failed, refused or prevented the delivery of Stohlman’s response to the FOP.” (R&R at p. 23).

The Hearing Examiner remarked that:

MPD does not challenge the relevance and necessity of the FOP’s RFI, but asserts that it responded to the Union’s request and that there is no testimony of a refusal to produce the requested policies. MPD does not challenge the relevance and necessity of the FOP’s RFI, but asserts that it responded to the Union’s request and that there is no testimony of a refusal to produce the requested policies. Citing PERB dicta¹², MPD asserts that, while not required, in the interest of labor relations, it might be better if Rosario requested the information a second time.

(R&R at p. 23) (citation omitted and footnote added).

Taking into consideration the testimony and evidence presented, the Hearing Examiner concluded that:

¹² The Hearing Examiner identified *IPPO, Local 446 v. District of Columbia General Hospital*, 39 DCR 9633, Slip Op. No. 322 at p. 4, PERB Case No. 91-U-14 (1992) and *AFGE, Local 631 v. D.C. Water and Sewer Authority*, 51 DC Reg. 4163, Slip Op. No. 730 at p. 2 n. 3, PERB Case No. 02-U-19 (2003) as the cases MPD cited.

MPD's defenses to the FOP's ULP . . . are without merit. The uncontested evidence establishes that . . . [Representative] Rosario requested the information at least three times and that neither he nor the FOP received a response. Under these facts, whether MPD refused to provide the requested information is immaterial. The salient fact proven in this record is that the MPD did not respond to the RFI at all.

For these reasons, MPD's failure to respond to FOP's request for information is a violation of DC Code § 1-617.04(a)(1) and (5).

(R&R at pgs. 23-24).

MPD's Exceptions to the Hearing Examiner's recommendation on the Merits of the First Request for Information in PERB Case No. 08-U-16

MPD's exception asserts that the Hearing Examiner "fail[ed] to address or even consider critical evidence [concerning the medical waivers] in [PERB] Case No. 08-U-16." (Exceptions at p. 14). This exception involves MPD's evaluation of the testimony and evidence provided concerning the Union's request for medical waiver information. (See Exceptions at pgs. 14-16). Specifically, MPD contends that the Hearing Examiner should have found, based on its view of the testimony and evidence, that a response to the Union's request was mailed.

Whereas MPD's arguments are factual in nature, they represent a mere disagreement with the Hearing Examiner's factual conclusions, and do not present a basis for reversing or modifying those conclusions. Moreover, the Board has stated that "[c]hallenges to evidentiary findings do not give rise to a proper exception where, as here, the record contains evidence supporting the Hearing Examiner's findings." *Hatton v. FOP/DOC Labor Committee*, 47 D.C. Reg. 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02. (1998). Also, see *American Federation of Government Employees, Local 872 v. D.C. Department of Public Works*, 38 D.C. Reg. 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-01, 89-U-16, 89-U-18 and 90-U-04 (1991). Because the Hearing Examiner fully considered all relevant issues of fact and law in his Report and Recommendation, the Board finds his ruling fully supported by the record. Also, the Board has "previously stated that the relative weight and veracity accorded both testimonial and documentary evidence are for the Hearing Examiner to decide . . ." *AFGE, Local 874 v. D.C. Department of Public Works*, 38 D.C. Reg. 6693, Slip Op. No. 266 at p. 3, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04(1991).

In light of the above, the Board finds the Hearing Examiner's findings on this matter are reasonable and supported by the record, and consistent with Board precedent. The Board also finds that MPD has not presented a viable defense for its refusal to provide the requested information and finds MPD's conduct to be a violation of D.C. Code § 1-617.04(a)(1) and (5). See *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 59 D.C. Reg. 3386, Slip Op. 835, *supra*. As a result,

the Board adopts the Hearing Examiner's finding and conclusions that MPD's failure to provide the requested information is without merit and in violation of the CMPA.

B. The Union's Second Request

As to the Union's second request for information, the Hearing Examiner observed that the Union:

sought information on behalf of Officer Michael Stevens, a member of the bargaining unit represented by FOP. The RFI sought information and documents related to the administrative investigation into the conduct of Lieutenant Robert T. Glover for alleged neglect to make an arrest for an offense committed in his presence. The FOP asserted that Glover witnessed Stevens allegedly using excessive force during an arrest.

(R&R at p. 24).

Taking into consideration the testimony and evidence provided by the parties concerning the facts in PERB Case No. 08-U-16, the Hearing Examiner found that:

it is difficult to determine the relationship between the information requested on Glover and the FOP's role in representing Stevens in a disciplinary action involving the use of excessive force. . . . [Moreover], there is no evidence that Glover was involved in the incident and there is insufficient evidence to establish that there was an administrative investigation involving Glover. The uncontested record only establishes that he reported the incident. Therefore, the Union's RFI appears to be more of a fishing expedition than a request for information that is relevant and necessary to the FOP's legitimate collective bargaining duties as the exclusive representative of the FOP bargaining unit.

(R&R at p. 24).

Based upon these findings, the Hearing Examiner concluded that although "MPD did not respond to the revised RFI, since the RFI sought information that was not proven to be relevant and necessary to the union's collective bargaining duties, the MPD conduct does not constitute a violation of DC Code § 1-617.04(a)(1) and (5). This portion of the FOP ULP must be dismissed with prejudice." (R&R at p. 24).

Neither FOP nor MPD took exception to the Hearing Examiner's finding on this issue. Nevertheless, after reviewing the pleadings and the record, the Board finds the Hearing Examiner's finding on this issue to be reasonable and supported by the record. As a result, the

Board adopts the Hearing Examiner's finding that MPD did not violate the CMPA as to this particular request.

C. Costs

The Complainant has requested that costs be awarded.¹³ D.C. Code § 1-617.13(d) provides that "[t]he Board shall have the authority to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may determine." Further, the Board has articulated the "interest of justice" criteria in *AFSCME, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue*, 73 DCR 5658, Slip Op. No. 245 at pgs. 4-5, PERB Case No. 98-U-02 (1990), in which the Board addressed the criteria for determining whether, under certain circumstances, a party can be awarded costs.

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

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

(emphasis in the original).

In the present case, it is clear that the Union made repeated requests for information, and that MPD did not comply with these requests. The Union has prevailed in each of the Complaints in this matter, except in regard to the second request at issue in PERB Case No. 08-U-16. Further, the Hearing Examiner found that MPD failed to provide evidence to substantiate its claim that the information requested by the Union was protected from disclosure as alleged in defenses. Consequently, the Hearing Examiner concluded that MPD's failure to provide the requested information was without merit. Having found the Hearing Examiner's findings and conclusions to be reasonable and supported by the record and consistent with the Board's

¹³ See the Union's Complaints, PERB Case No. 07-U-49 at p. 5, PERB Case No. 08-U-13 at p. 6, and PERB Case No. 08-U-16 at p. 8.

precedent, the Board grants the Union's reasonable costs in this case, except as to those costs associated with the Union's second request for information relating to Lt. Glover in PERB Case No. 08-U-16.

In summary, the Board adopts the Hearing Examiner's Report and Recommendation finding: (1) that the Board has jurisdiction to consider the unfair labor practice complaints in the instant matter; (2) MPD violated the CMPA as to PERB Case Nos. 07-U-49, 08-U-13 and 08-U-16, in part. In addition, the Board awards reasonable costs to the Complainant for these matters in which it was successful.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Unfair Labor Practice Complaint is granted;
2. The District of Columbia Metropolitan Police Department, its agents and representatives, shall cease and desist violating D.C. Code § 1-617.04(a)(1) and (5) by failing to supply documents requested by the Union which are relevant and necessary to fulfill its duty as exclusive bargaining unit representative.;
3. The District of Columbia Metropolitan Police Department shall conspicuously post within ten (10) days from the issuance of this Decision and Order the attached Notice where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.
4. Within fourteen (14) days from the date of this Decision and Order, the Metropolitan Police Department shall notify the Public Employee Relations Board in writing that the attached Notice has been posted accordingly.
5. The District of Columbia Metropolitan Police Department will pay the Fraternal Order of Police/Metropolitan Police Department Labor Committee's reasonable costs of litigating this matter.
6. Within fourteen (14) days from the issuance of this Decision and Order, the Complainant shall submit to the Public Employee Relations Board a written statement of actual costs incurred in processing this unfair labor practice complaint. The statement of costs shall be filed together with supporting documentation. The District of Columbia Metropolitan Police Department may file a response to the Complainant's statement of costs within fourteen (14) days from the service of the statement of costs upon it.
7. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

Decision and Order

PERB Case Nos. 07-U-49, 08-U-13 and 08-U-16

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

July 26, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 07-U-49, 08-U-13 and 08-U-16, Slip Opinion No. 1302 was transmitted via U.S. Mail and e-mail to the following parties on this the 1st day of August, 2012.

Mark Viehmeyer, Esq.
District of Columbia Metropolitan
Police Department
300 Indiana Ave., N.W.
Room 4126
Washington, D.C. 20001

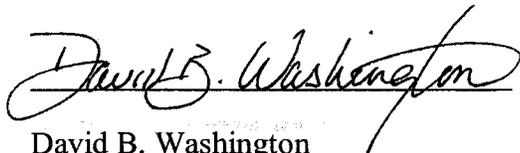
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT ("MPD"), THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1302, PERB CASE NOS. 07-U-49, 08-U-13 AND 08-U-16 (JULY 26, 2012)

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

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by the actions and conduct set forth in Slip Opinion No. 1302.

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

WE WILL cease and desist from discharging or otherwise taking reprisal against an employee because he or she has signed or filed an affidavit, petition, or complaint or given any information or testimony under the Labor-Managements subchapter of the CMPA;

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

District of Columbia
Metropolitan Police Department

Date: _____ By: _____

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 1100 4th Street, SW, Suite E630; Washington, D.C. 20024. Phone: (202) 727-1822.

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

July 26, 2012