

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:)	
)	
District of Columbia Metropolitan Police)	
Department, ¹)	
)	
Complainant,)	
)	PERB Case No. 09-U-48
v.)	
)	Opinion No. 1224
Fraternal Order of Police/Metropolitan Police)	
Department Labor Committee,)	Draft Motion to Dismiss
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case

This case involves an Unfair Labor Practice Complaint (“Complaint”) filed by the District of Columbia Metropolitan Police Department (“Complainant” or “MPD”) against the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Respondent” or “FOP”). MPD alleges that FOP committed an unfair labor practice by “bargaining in bad faith” when FOP filed a grievance for arbitration concerning the termination of a probationary employee, when probationary employees have no appeal rights. (Complaint at pgs. 1-5).

The Respondent filed an Answer to the Unfair Labor Practice Complaint (“Answer”), an Amended Answer to the Unfair Labor Practice Complaint (“Amended Answer”), and a Motion to Dismiss Unfair Labor Practice (“Motion”) alleging that: (1) there is no evidence of the commission of an unfair labor practice; (2) the Complaint was untimely filed; and, (3) the Board

¹ Additional respondent names have been removed from the caption in the instant matter pursuant to the Board’s decision in *Fraternal Order of Police/Metropolitan Police Department Labor Committee and Metropolitan Police Department, _DCR_, Slip Op. No. 1118 at p. 5, PERB Case No. 08-U-19 (August 19, 2011).*

lacks jurisdiction over contractual disputes. The Respondent requests that the Board award costs and attorney fees. (Answer at pgs. 5-6; Motion at pgs. 3-6).

MPD's Complaint and FOP's Answer and request to dismiss the case are before the Board for disposition.

II. Discussion

Unfair Labor Practice

MPD asserts the following pertinent facts:

8. On November 13, 2007, a probationary sworn member was appointed to the Metropolitan Police Department.
9. Pursuant to D.C. Official Code § 1-608.01(d) and as implemented through DPM § 813.2, sworn members of the Metropolitan Police Department are required to serve an 18-month probationary period.
10. On December 19, 2008, and within her 18-month probationary period, the probationary officer was served with a notice advising that she would be terminated effective that same day.
11. On January 5, 2009, the FOP filed a Step 2 written grievance regarding the probationary officer's termination.
12. The FOP's Step 2 grievance was denied by the Chief of Police on January 13, 2009.
13. In her denial, the Chief of Police noted that DPM § 814.3 provides that "A termination during a probationary period is not appealable or grievable" and that DPM § 1631(e), provides that "Termination or discipline of an employee serving a probationary period as provided in Chapter 8 of these regulations" is not grievable.
14. On February 4, 2009, the FOP submitted a demand for arbitration to the Chief of Police.
15. On February 11, 2009, the Chief of Police rejected the FOP's demand, again citing the applicable DPM provisions.
16. The Chief of Police further informed the FOP that if it did not withdraw its demand for arbitration, the Department would

pursue its legal options, including, but not limited to, the filing of an unfair labor practice complaint. The FOP has failed to withdraw its demand for arbitration regarding the termination of the probationary officer

(Complaint at pgs. 3-4).

Based on these factual allegations, MPD contends that FOP committed an Unfair Labor Practice in violation of "D.C. Official Code §1-617.04, [which] provides that it is an unfair labor practice for a labor organization to interfere with or restrain the District in its exercise of management rights or to refuse to bargain collectively in good faith." (Complaint at p. 4).

MPD asserts that pursuant to D.C. Official Code § 1-608.01(d) as implemented through DPM § 813.2, sworn members of the Metropolitan Police Department are required to serve an 18-month probationary period. The DPM provides both that "A termination during a probationary period is not appealable or grievable," and "[t]ermination or discipline of an employee serving a probationary period as provided in Chapter 8 of these regulations" cannot be grieved. See §§813.2 and 1631(e). Furthermore, Article 3 of the parties' CBA governs probationary officers and provides: "Officers serving a probationary period shall not be entitled by virtue of this Agreement to any rights and/or privileges that exceed or are in conflict with the provisions of the Comprehensive Merit Personnel Act, or any Departmental rules and regulations governing probationary employees." (Complaint at p. 4)

MPD contends that by invoking and not withdrawing the arbitration provision of the parties' CBA in this matter, the FOP has repudiated in bad faith Article 3 of the parties' CBA. Additionally, by invoking and not withdrawing the arbitration provision of the parties' CBA in this matter, the FOP has violated the express terms of the CMPA and the DPM and has interfered with management's right to terminate probationary employees without further appeal or arbitration. (Complaint at pgs. 4-5).

As a remedy for the Respondent's alleged actions, MPD requests that the Board issue an order:

- a. Finding that the Respondent has engaged in unfair labor practices in violation of D.C. Official Code § 1-617.04(b);
- b. Ordering the Respondent to cease and desist from violating the CBA, by the acts and conduct set forth in this unfair labor practice complaint;
- c. Compelling Respondent to withdraw this and all demands for arbitration involving discipline for probationary employees;
- d. Prohibiting Respondent from demanding arbitration involving discipline for probationary employees;

- e. Compelling the FOP to pay the Department's costs and fees associated with the proceeding;
- f. Compelling Respondent to conspicuously post notice of its violation in each building where its members are located; and
- g. Ordering such other relief and remedies as PERB deems appropriate.

(Complaint at p. 5).

In its Answer and Amended Answer, FOP requests that the Board dismiss the unfair labor practice complaint and award FOP costs and attorney fees. (See Amended Answer at p. 6).

In addition, FOP makes the following affirmative defenses:

1. As set forth more fully in the Respondent's Motion to Dismiss, the Complainant failed to comply with PERB Rule 520.4, and as such the claims are barred and should be dismissed.
2. As set forth more fully in the Respondent's Motion to Dismiss, the Board lacks jurisdiction over this matter, and as such the claims are barred and should be dismissed.
3. Respondent generally denies liability.
4. The ULP fails to state a claim upon which relief can be granted.
5. As set forth more fully in Respondent's Motion to Dismiss, the Complainant has waived some or all of the claims asserted, and as such the claims are barred and should be dismissed.
6. The Complainant and the relief requested violate PERB's rules, the Comprehensive Merit Protection Act, and are unconstitutional.

(Amended Answer at p. 6).

Motion to Dismiss

In addition, FOP filed a Motion to Dismiss the Unfair Labor Practice Complaint alleging as follows:

- a. The [Complaint] should be dismissed for failure to comply with [Board] Rule 520.4. PERB Rule 520.4 states: "Unfair labor practice Complaints shall be filed not later than 120 days after the date on which the alleged violations occurred." The MPD's ULP is based solely upon the allegation that the FOP made a bad faith demand for arbitration on February 4, 2009. Even if this were a legitimate [complaint], the MPD filed [it] on June 30, 2009, 146 days after February 4, 2009, thus 26 days late.... The alleged violation in this case is the FOP's allegedly improper demand for arbitration. The MPD was aware of the alleged harm on February 4, 2009, by virtue of the FOP's arbitration demand letter dated February 4, 2009. Therefore, the 120 days limitations period began to run on February 4, 2009, and the MPD is 26 days late.

- b. The [Complaint] should be dismissed as PERB is not the proper forum to decide issues of arbitrability. This [Complaint] presents a clear question of arbitrability, which is a decision that rests beyond PERB's jurisdiction. The FOP, in their grievance, and consequently in their demand for arbitration, is presenting a challenge to Chief Lanier and the MPD's violation of the 90-day rule under General Order 120.21 for taking disciplinary action against the recruit officer 124 days after the U.S. Attorney's Office dropped the charges against her. It is not a grievance or appeal as to the grounds of the termination, but instead is a grievance based on Chief Lanier's violation of General Order 120.21, which is a collateral matter to the actual termination.

Chief Lanier and the MPD maintain that this termination is not grievable or arbitrable, and as such they ask PERB to decide that the FOP made its demand for arbitration in bad faith. In order for PERB to decide this [matter], and whether the arbitration demand was made in bad faith, it must first decide whether a violation of the 90-day rule, under General Order 120.21, that affects a probationary officer is an arbitrable matter. This determination is beyond the scope of [the Board's] jurisdiction.

- c. The arbitrability of the grievance is an issue that must be resolved by the arbitrator in each matter, not PERB. The parties' collective bargaining agreement ("CBA") is clear that it is the arbitrator who has the power to decide on the arbitrability of each matter. Specifically Article 19(E)(3) of the CBA states:

If the Department believes the issue is not arbitrable and the Union disagrees or if agreement cannot be reached on a joint stipulation of the issue, each party shall submit its own statement of the issue to arbitration and the arbitrator will rule on the arbitrability as a threshold issue before proceeding to a hearing on the merits.

[[FOP states that the Board] has ruled as follows:

[T]he CMPA provides for resolution of [statutory unfair labor practice complaints] while the parties have contractually provided for the resolution of [contract disputes], *vis-a-vis*, the grievance and arbitration process contained in their collective bargaining agreement. [PERB has] concluded that it lacks jurisdiction over alleged violations that are strictly contractual in nature....Thus, PERB has directed the DCFOP to file grievances and arbitrations for alleged strictly contractual violations of the CBA. [No citation provided].

[The Board] has clearly stated that it lacks jurisdiction over violations that are strictly contractual in nature, and thus also must be regarded to lack jurisdiction to decide whether the strictly contractual violations are arbitrable.

- d. In light of the foregoing, [FOP requests that] the Board should:
1. Dismiss the ULP on the basis of: (a) the MPD's failure to comply with PERB Rule 520.4; and (b) PERB's lack of jurisdiction; and
 2. Compel the MPD to pay the FOP's costs and attorneys' fees associated with this proceeding.

(Motion at pgs. 3-6).

In its Opposition, MPD maintains that the Complaint is timely filed. MPD states as follows:

The Complaint in this case alleges that the FOP has acted in bad faith by demanding in bad faith arbitration for a terminated recruit officer in violation of the CMPA and the DPM. Since the FOP has failed to date to withdraw its demand for arbitration on behalf of this probationer, the FOP's violation is current and on-going. The violation continues each day that goes by without the FOP withdrawing its demand for arbitration in this case. As such, the Complaint in this case cannot be construed as untimely or in any way violating PERB Rule 520.4." (Opposition at p. 3).

Regarding FOP's contention that the Board has no jurisdiction over contractual disputes, MPD asserts that:

[T]he Complaint in this matter does not allege any contractual violations, but rather that the FOP has committed the statutory violation of demanding in bad faith arbitration for a terminated recruit officer in violation of the CMPA and DPM. This is a clear attempt to interfere with management's right to terminate probationary employees without further appeal or arbitration and as such constitutes a violation of D.C. Official Code § 1-617.04(b)(1). Moreover, the FOP's demand for arbitration constitutes a bad-faith repudiation of Article 3 of the parties' CBA. Since a union's refusal to bargain in good faith constitutes an unfair labor practice pursuant to D.C. Official Code § § 1-617.04(b)(3), and the Board has the authority to "[d]ecide whether unfair labor practices have been committed" the Department submits that this matter is properly before the Board. D.C. Official Code § 1-605.02. (Opposition at pgs. 3-4).

The Board finds that FOP committed an unfair labor practice, in violation of D.C. Code § 1-617.04(b). Respondent admits in its Amended Answer that DPM §§ 814.3 and 1631(e) both state that when a probationary employee is terminated, the decision is not grievable. See, Amended Answer at pg. 4. Therefore, the Respondent was aware that it did not have a right to demand arbitration when it filed its arbitration request. The filing of a frivolous or disingenuous action is an example of bad faith,² and, consequently, a violation of D.C. Code § 1-617.04(b)(1) and (3).³ Therefore, FOP committed an unfair labor practice in violation of the CMPA.

² See, *Cathedral Ave. Coop., Inc. v. Carter*, 947 A.2d 1143 (D.C. 2008); see also, *Ginsberg v. Granados*, 963 A.2d 1134 (D.C. 2009).

³ D.C. Code § 1-617.04(b) provides: Employees, labor organizations, their agents, or representatives are prohibited from:

- (1) Interfering with, restraining, or coercing any employees or the District in the exercise of rights guaranteed by this subchapter;
- (2) Causing or attempting to cause the District to discriminate against an employee in violation of § 1-617.06;
- (3) Refusing to bargain collectively in good faith with the District if it has been designated in accordance with this chapter as the exclusive representative of employees in an appropriate unit;

In addition, the Board dismisses the Respondent's Motion to Dismiss. The Board finds that FOP's contention that the Complaint was untimely filed is unfounded. As previously stated, the Union admits that probationary employees do not have the right to grieve their terminations. Thus, FOP's filing of an arbitration request for the termination of a probationary employee was improper, in bad faith, and an unfair labor practice. The Union's refusal to withdraw the request, despite having acknowledged that probationary employees do not have the right to grieve their terminations, is a continuing and ongoing unfair labor practice and an ongoing violation of D.C. Code § 1-617.04(b). Therefore, contrary to the Respondent's assertion,⁴ the latest date the limitations period can begin to run will not occur until the Respondent withdraws the request. Hence, the Complainant's action is timely.

Similarly, the Board finds that the Respondent's assertion that PERB does not have jurisdiction over the Complaint because it concerns contractual rights is meritless. A probationary employee does not have the right to file a termination grievance through contract or statute. See, DPM §§ 814.3 and 1631(e). FOP's filing of an arbitration request, and its subsequent refusal to withdraw the arbitration request is not a contractual right; it is a violation of D.C. Code § 1-617.04(b). Thus, the Complaint is firmly within the jurisdiction of the PERB.⁵

Therefore, the District of Columbia Metropolitan Police Department's Unfair Labor Practice is granted and the Fraternal Order of Police/Metropolitan Police Department Labor Committees' Motion to Dismiss is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Metropolitan Police Department's Unfair Labor Practice is granted.
2. The Fraternal Order of Police/Metropolitan Police Department Labor Committee's motion to dismiss is denied.

(4) Engaging in a strike, or any other form of unauthorized work stoppage or slowdown, or in the case of a labor organization, its agents, or representatives condoning any such activity by failing to take affirmative action to prevent or stop it; and

(5) Engaging in a strike or refusal to handle goods or perform services, or threatening, coercing or restraining any person with the object of forcing or requiring any person to cease, delay, or stop doing business with any other person or to force or to require an employer to recognize for recognition purposes a labor organization not recognized pursuant to the procedures set forth in § 1-617.06.

⁴ As previously stated, Respondent contends that: "Chief Lanier's letter demanding DCFOP's arbitration demand be withdrawn and threatening a ULP was dated February 10, 2009. The latest date that the limitations period could have conceivably begun to run was February 10, 2009." (Motion at pg. 4).

⁵ PERB Board Rule 520.1 provides: "The rules in this section detail the procedures for initiating, processing and resolving complaints that an employer, employee or a labor organization has committed or is committing an unfair labor practice in violation of D.C. Code Section [1-617.04]."

3. The Respondent is ordered to cease and desist from violating the parties' collective bargaining agreement, by the acts and conduct set forth in the unfair labor practice complaint.
4. The Respondent is ordered to withdraw the request for arbitration, as well as any other demands for arbitration involving discipline for probationary employees.
5. The Respondent shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice, where notices to employees are normally posted.
6. Within fourteen (14) days from the date of this Decision and Order, the Respondent shall notify the Public Employee Relations Board (PERB), in writing, that the attached Notice has been posted accordingly, and as to the steps it has taken to comply with paragraphs 3, 4, and 5 of this Order.
7. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

November 21, 2011

NOTICE

TO ALL MEMBERS OF THE FRATERNAL ORDER OF POLICE/METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AN DORDER IN SLIP OPINION NO. ____, PERB CASE NO. 09-U-48 (November 17, 2011)

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

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

WE WILL cease and desist from interfering with or restraining the District in its exercise of management rights or to refuse to bargain collectively in good faith.

District of Columbia Government Water and
Sewer Authority

Date: _____ By: _____
Director

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.
November 21, 2011

CERTIFICATE OF SERVICE

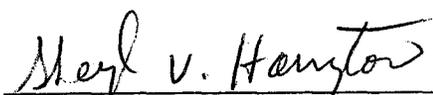
This is to certify that the attached Decision and Order in PERB Case No. 09-U-48 was transmitted via Fax and U.S. Mail to the following parties on this the 21st day of November 2011.

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