

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**

<p>In the Matter of:</p> <p>Fraternal Order of Police/ Metropolitan Police Department, Labor Committee</p> <p style="padding-left: 100px;">Complainant,</p> <p style="padding-left: 150px;">v.</p> <p>District of Columbia Metropolitan Police Department,</p> <p style="padding-left: 100px;">Respondent.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>PERB Case No. 09-U-37</p> <p>Opinion No. 1568</p>
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DECISION AND ORDER

I. Statement of the Case

On June 9, 2010, the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Complainant” or “FOP”) filed an Unfair Labor Practice Complaint (“Complaint”) against the Metropolitan Police Department (“MPD”),¹ alleging that MPD violated D.C. Official Code § 1-617.04(a)(1) and (5), by refusing to provide information requested by a union representative.²

MPD filed an Answer, requesting that the Board dismiss the Complaint; because (1) “Respondent has not committed an unfair labor practice, and (2) “there is no evidence of the

¹ The Executive Director has removed the name of an individual respondent from the caption, consistent with the Board’s precedent that suits against District officials in their official capacities should be treated as suits against the District. See *Fraternal Order of Police/Metropolitan Police Dep’t Labor Comm. v. D.C. Metropolitan Police Dep’t*, 59 D.C. Reg. 6579, Slip Op. No. 1118 at p. 4-5, PERB Case No. 08-U-19 (2011). The D.C. Superior Court upheld the Board’s dismissal of such respondents in *Fraternal Order of Police/Metropolitan Police Dep’t Labor Comm. v. D.C. Public Employee Relations Board*, Civ. Case No. 2011 CA 007396 P(MPA) (D.C. Super. Ct. Jan 9, 2013).

² Complaint at 4-5.

commission of an unfair labor practice....”³ In Opinion No. 1116, the Board denied MPD’s request to dismiss the Complaint, finding that material issues of fact existed concerning whether MPD committed an unfair labor practice.⁴ The Board referred the matter to an unfair labor practice hearing.

MPD filed a Motion for Reconsideration (“Motion”), which was opposed by FOP. An unfair labor practice hearing was scheduled without resolution of the Motion. Prior to the hearing, MPD filed an Amended Answer. A hearing was conducted and a Hearing Examiner’s Report and Recommendation (“Report and Recommendation”) was submitted to the Board. Following a hearing conducted on October 25, 2011, and briefing by the parties, the Hearing Examiner submitted her Report and Recommendation, finding that MPD had committed unfair labor practices in violation of D.C. Official Code § 1-617.04(a)(1) and (5). MPD submitted Exceptions to the Report and Recommendation, and FOP submitted an opposition to MPD’s Exceptions.

II. Hearing Examiner’s Report and Recommendations

A. Factual Background

The Hearing Examiner conducted a hearing and made the following factual determinations. On February 10, 2009, a bargaining unit employee appeared for an Internal Affairs Division (“IAD”) interview. FOP’s Chief Shop Steward for the Special Operations Division (“Chief Shop Steward”) represented the employee (“Employee”). At the beginning of the interview, the Chief Shop Steward requested more information about the allegations against the Employee. The interviewing agent responded that the allegation regarded “sexual harassment.”⁵ When the Chief Shop Steward asked for additional information about the allegation, the interviewing agent terminated the interview. As the interview ended, the interviewing agent told the Employee “to get another union steward” and replace the Chief Shop Steward as his representative.⁶

On February 11, 2009, the Chief Shop Steward requested the tape recording of the February 10, 2009 interview; “good cause documents,” relating to the issue of “good cause” for the removal of the Chief Shop Steward as the Employee’s representative; and “IAD Standards and Practices,” regarding the “removal of FOP Union representatives from administrative interviews” when attending in their representational capacities.⁷ The information request was titled “Release of Information request pursuant to Article 10 of the Collective Bargaining Agreement,” which was sent to the IAD Director.⁸ The information request stated that “the requested information was necessary for the proper administration of terms of the parties’

³ Answer at 4.

⁴ *FOP/MPD Labor Committee v. MPD*, 59 D.C. Reg. 6568, Slip Op. No. 1116 at 5, PERB Case No. 09-U-37 (2012).

⁵ Report and Recommendation at 3.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

collective bargaining agreement and that the request was being made pursuant to D.C. Official Code § 1-617.04(a)(5) as well as Article 10 of the parties' agreement."⁹

MPD denied FOP's information request. MPD asserted that FOP was entitled to the tape during an ongoing investigation, and that the tape would only be released after the end of the investigation, if the tape was relied upon for proposing action against a bargaining unit employee. MPD also responded that "good cause" removal of a representative was covered by the CBA and did not require MPD to provide the reason for "good cause."¹⁰ MPD asserted that the CBA does not guarantee that IAD standards and practices must be provided as related to removing FOP representatives from administrative interviews.

On February 24, 2009, the Chief Shop Steward sent an information request for a February 6, 2009 taped interview. The information request "stated documents were being requested pursuant to both D.C. Code § 1-617.04(a)(5)(CMPA) and Article 10 of the parties' collective bargaining agreement" and that the information was necessary for administration of the CBA.¹¹

MPD denied the February 24, 2009 information request, asserting that the contract barred disclosure of the tape, because the Chief Shop Steward was interviewed as a witness and that it would not be used for proposing action against him.¹²

The Hearing Examiner noted that the Union had a number of grievances concerning the interviewing agents in the February 6 and 10, 2009 interviews, prior to the Chief Shop Steward's removal as a representative.¹³ At the time of the hearing, the tape recorded interviews and requested documents had not been provided to FOP.¹⁴

B. Hearing Examiner's Recommendations

The Hearing Examiner found that the Board has subject matter jurisdiction over the Complaint, because the inclusion of Article 10 of the parties' CBA concerning information requests did not preclude a finding of a statutory violation of the CMPA. The Hearing Examiner rejected MPD's argument that the information was not "relevant and necessary" for either processing a grievance, engaging in or preparing for an arbitration hearing, or collective bargaining.¹⁵ The Hearing Examiner determined that FOP did not have to file a grievance in order to assert that the information was necessary and relevant, because FOP had a right to gather information to frame grievance issues and to determine the likelihood of success for a grievance.¹⁶ The Hearing Examiner found that FOP's information requests were relevant and necessary to collective bargaining.

⁹ *Id.*

¹⁰ Report and Recommendation at 4.

¹¹ *Id.*

¹² *Id.* at 5.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 28 – 30.

¹⁶ *Id.* at 29.

III. Analysis

A. Subject matter jurisdiction

MPD filed a Motion for Reconsideration, asserting that the Board does not have subject matter jurisdiction to consider the allegations in the Complaint, because provisions of the parties' CBA controls the information requests.¹⁷ MPD notes in its Motion that it did not file a Motion to Dismiss, and that the Board construed a portion of its Answer as a Motion to Dismiss.¹⁸ FOP opposed the Motion, asserting that information requests were not strictly contractual in nature.¹⁹ MPD requested in its Motion that its jurisdiction argument be considered by the Board. Additionally, in its Exceptions, MPD also excepted to the Hearing Examiner's findings on the issue of subject matter jurisdiction. The Board has held that a subject matter jurisdiction argument may be raised at any time.²⁰ Therefore, the Board will consider MPD's argument that the Board lacks subject matter jurisdiction, because the information requests were covered by the parties' collective bargaining agreement ("CBA").²¹

The Board has held that an agency has an obligation to furnish information that a union requests that is both relevant and necessary to the union's role in processing of a grievance, an arbitration proceeding, or in collective bargaining.²² Notwithstanding, the Board has held that it "distinguishes between those obligations that are statutorily imposed under the CMPA and those that are contractually agreed upon between the parties."²³ The Board's authority only extends to resolving statutorily based obligations under the CMPA.²⁴ The Board examines the particular record of a matter to determine if the facts concern a violation of the CMPA, notwithstanding the characterization of the dispute in the complaint or the parties' disagreement over the application of the collective bargaining agreement.²⁵

The answer to "the key question" of "whether an interpretation of a contractual obligation is necessary and appropriate to a determination of whether or not a non-contractual, statutory violation has been committed" depends upon the facts and circumstances of the individual case.²⁶ For example, the Board has held in document request cases that if the allegations made in the complaint concern statutory violations, the Board is empowered to decide whether a

¹⁷ Motion at 4 (citing Article 10 and 19 of the parties' CBA).

¹⁸ *Id.*

¹⁹ Opposition to Motion at 4.

²⁰ *Fraternal Order of Police/Metropolitan Police Dep't Labor Committee v. D.C Metropolitan Police Dep't*, 60 D.C. Reg. 5322, Slip Op. No. 1372 at p. 2-3, PERB Case No. 11-U-52 (2013). See also *Fraternal Order of Police/Metropolitan Police Dep't Labor Committee v. D.C Metropolitan Police Dep't*, Slip Op. No. 1391, PERB Case Nos. 09-U-41, et al. (2013).

²¹ Motion at 4-7.

²² *Washington Teachers' Union, Local No. 6 v. D.C. Pub. Sch.*, 61 D.C. Reg. 1537, Slip Op. No. 1448 at 4, PERB Case No. 04-U-25 (2014).

²³ *American Federation of State, County and Municipal Employees, D. C. Council 20, Local 2921, AFL-CIO v. District of Columbia Public Schools*, 42 D.C. Reg. 5685, Slip Op. No. 339, PERB Case No. 92-U-08 (1992).

²⁴ *Id.*

²⁵ *Id.*

response to a document request was an unfair labor practice, even though the document request was made pursuant to a contractual provision. Through this precedent, the Board examines each of the different types of requested information.²⁷

1. *Taped interviews*

FOP requested copies of tapes from the February 6 and February 11, 2009 interviews. MPD denied these requests, asserting that release of these tapes was governed by Article 13, Section 9 of the parties' CBA. Article 13, Section 9 states:

When, in the judgment of the Department, an administrative interview is to be recorded, all portions of the administrative interview shall be recorded with proper notations as to when rest breaks and off-the-record discussions began and ended.

If a recording device is used, a copy of the tape shall be made available to the Union at its request and at its expense if the copy is relied upon in proposing action against the member.

Before the Hearing Examiner, MPD asserted that this contract provision controls the information requests regarding the interview tapes.²⁸

The Hearing Examiner rejected MPD's arguments and found that the information was necessary and relevant to FOP's duties concerning administration of the contract and that MPD's denial of the requested tapes interfered with FOP's statutory rights.²⁹ The Hearing Examiner did not address MPD's argument that release of the interview tapes was governed by Article 13, Section 9 of the parties' CBA.

The Board has found that where the contract dictates the obligation to furnish a specific type of information in a particular manner, the information request is controlled by the contract.³⁰ In the present case, the parties' CBA dictates the handling of taped interviews. The Board would need to interpret the contract in order to determine whether the parties had agreed that MPD would only be obliged to provide the requested information in the circumstances set forth in the agreement. If the Board must interpret the parties' collective bargaining agreement in order to determine whether there has been a violation of the CMPA, then the Board does not

²⁷ The Board notes that MPD has asserted that the Board lacks jurisdiction over information requests, pursuant to Article 10 of its CBA. The Board has rejected that this provision governs all information requests between the parties. *See, e.g., FOP/MPD Labor Committee v. MPD*, Slip Op. No. 1302, PERB Case Nos. 07-U-49, 08-U-13, and 08-U-16 (2012).

²⁸ Report and Recommendation at 10, 19.

²⁹ *Id.* at 26-30.

³⁰ *See AFSCME, D.C. Council 20, Local 2921 v. District of Columbia Public Schools*, 42 D.C. Reg. 5685, Slip Op. No. 339 at p. 5, PERB Case No. 92-U-08 (1992)(The Board held that it did not have jurisdiction to consider a complaint regarding an agency's failure to provide the union with a step 3 grievance decision on the grounds that the obligation to furnish that information was dictated by the collective bargaining agreement.)

have jurisdiction over the allegations and will defer the matter to the parties' negotiated grievance and arbitration process.³¹

As stated above, the Hearing Examiner's analysis did not consider MPD's argument that Article 13, Section 9 of the parties' CBA controlled the release of information in this case. The Hearing Examiner rejected MPD's argument without discussion, and only considered whether the information request for the interview tapes was relevant and necessary to FOP's duties as exclusive representative.³² The Board finds that the request for the interview tapes is arguably controlled by Article 13, Section 9, and that the Hearing Examiner erred in failing to consider MPD's argument to that effect. As the Board does not have jurisdiction over those requests, the Board grants MPD's Motion and rejects the Hearing Examiner's conclusions regarding the information requests concerning the taped interviews. The Board dismisses this portion of the Complaint.

2. *Documents regarding "good cause" removal and IAD standards*

MPD argued before the Hearing Examiner that Article 13, Section 3(a) governs the request for documents related to the removal of a union representative from an administrative interview.³³ This provision states:

A member's Union representative may be present at all administrative interview sessions under this Article, but may not answer questions on behalf of the employee. The Department reserves the right to refuse a particular Union representative for good cause, and the member to be interviewed shall then name an alternate representative.

The Hearing Examiner found that these documents constituted information that MPD was statutorily required to provide, because FOP needed the information in determining whether there was a breach of the parties' contract and that no contract interpretation was required to determine if the Union was requesting the information pursuant to its rights under the CMPA.³⁴ Unlike the provision that involves the release of the interview tapes, this provision does not concern the disclosure of documents related to the issue of good cause for refusing a particular steward. The Board finds that it need not engage in contract interpretation to determine whether a statutory violation has occurred.³⁵ The Board finds that it has subject matter jurisdiction over the requests for documents regarding "good cause" removal of a union representative and IAD policies and standards.

³¹ *FOP/MPD Labor Committee v. MPD*, Slip Op. No. 1534, PERB Case No. 08-U-22 (2015).

³² Report and Recommendation at 21.

³³ *Id.* at 19.

³⁴ *Id.* at 22-23.

³⁵ *Id.*

B. Information is relevant and necessary

MPD argues that “the relevant case on this issue requires that the information be needed for either processing a grievance, an arbitration proceeding, or collective bargaining and not the generalized statement of ‘contract administration.’”³⁶ MPD asserts that the way in which FOP requested the information did not place MPD on notice that it was intended for grievance processing.³⁷ MPD disputes that FOP’s request for the documents as “information necessary for the proper administration of the Agreement” placed it on notice that the information was necessary for a grievance, arbitration, or collective bargaining.³⁸ Additionally, MPD asserts that FOP did not include in its ULP Complaint FOP’s justification for seeking the information.³⁹

Notwithstanding MPD’s Exceptions, FOP’s Complaint stated that “[t]he requested information was, and remains necessary for the Union to conduct its business.”⁴⁰ The Board finds that the Complaint put MPD on sufficient notice that FOP was asserting that MPD denied it relevant and necessary information for conducting its functions under D.C. Official Code § 1-617.04(a)(1) and (5).⁴¹

As for MPD’s claim that FOP did not adequately place MPD on notice concerning the requested information, the Hearing Examiner found that the February 11, 2009 information request “unequivocally stated the Union wanted to examine the records and policies affecting their members.”⁴² MPD’s arguments are factual in nature, and do not present a basis for reversing or modifying the Hearing Examiner’s conclusions.⁴³ The Board has stated, “Challenges to evidentiary findings do not give rise to a proper exception where, as here, the record contains evidence supporting the Hearing Examiner’s findings.”⁴⁴ 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. The Board has ‘previously stated that the relative weight and veracity accorded both testimonial and documentary evidence are for the Hearing Examiner to decide . . .’⁴⁵

The Hearing Examiner found that the information requested was relevant and necessary for the Union to evaluate whether a cause of action existed and whether sufficient facts existed to file a grievance.⁴⁶ Processing a grievance encompasses information gathering to determine how

³⁶ Exceptions at 11-12.

³⁷ *Id.* at 12.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Complaint at 5.

⁴¹ *See id.*

⁴² Report and Recommendation at 27.

⁴³ Slip Op. No. 1302.

⁴⁴ *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). *See also 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).

⁴⁵ *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).

⁴⁶ Report and Recommendation at 29.

to proceed with a potential grievance and the merits of that potential grievance and the extent to which the contract has been breached.⁴⁷ In the present case, FOP would be unable to determine whether the “good cause” provision of the parties’ CBA was being violated without the information requested.

The Board finds that the Hearing Examiner’s determination was reasonable, supported by the record, and consistent with Board precedent. The Board finds that MPD has not presented a viable defense for its refusal to provide the requested information concerning the denial of the requested steward and finds MPD’s conduct to be a violation of D.C. Official Code § 1-617.04(a)(1) and (5).⁴⁸ 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. The Board rejects MPD’s Exceptions for the documents related to the “good cause” removal of a union representative and IAD policies and standards.

IV. Conclusion

The Board finds that it does not have jurisdiction over the information request for the interview tapes. The Board adopts the findings and recommendations of the Hearing Examiner regarding the documents related to the “good cause” removal of a union representative and the policies and standards for removal by the IAD.

ORDER

IT IS HEREBY ORDERED THAT:

1. MPD’s Motion for Reconsideration is granted, in part, and denied, in part.
2. The Complaint is dismissed with prejudice with respect to the allegations related to the interview tapes.
3. FOP’s Complaint is granted for the allegations regarding the requested information concerning “good cause” removal of union representatives and IAD’s policies and standards for making those determinations.
4. MPD will cease and desist from violating D.C. Official Code §§ 1-617.04(a)(1) and (5) by refusing to respond to the Complainant’s February 11, 2009 information request, regarding the requested information concerning good cause removal of union representatives and IAD’s policies and standards for making those determinations.
5. MPD shall provide the requested information to the Complainant within fourteen (14) days from the issuance of this Decision and Order.

⁴⁷ See *Conrock Co. & Building Material & Dump Truck Drivers, Local 420, 263 NLRB 1293, 1294* (1982)(stating “It is well settled that an employer has an obligation, as part of its duty to bargain in good faith, to provide information needed by a union to enforce and administer a collective-bargaining agreement. An employer must furnish information that is of even probable or potential relevance to the union’s duties.”).

⁴⁸ 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, PERB Case No. 06-U-10 (2012).

6. MPD shall conspicuously post within fourteen (14) days from the issuance of this Decision and Order the attached Notice where notices to bargaining unit members are normally posted. The Notice shall remain posted for thirty (30) consecutive days.

7. MPD shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order that the information has been provided and Notice has been posted.

8. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy, Member Yvonne Dixon, Member Ann Hoffman, and Member Keith Washington.

Washington, D.C.

February 18, 2016

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-U-37 was served to the following parties via File & ServeXpress on this the 2nd day of March 2016. The Notice for posting was served via U.S. Mail.

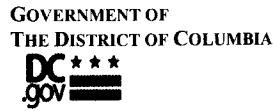
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, THIS NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN OPINION NO. 1568, PERB CASE NO. 09-U-37.

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

WE SHALL cease and desist from violating D.C. Official Code § 1-617.04(a) (1) and (5) by the actions and conduct set forth in Opinion No. 1568.

WE SHALL cease and desist from refusing to bargain in good faith by failing to provide certain information requested by the Fraternal Order of Police/Metropolitan Police Department Labor Committee in conjunction with the administration of the our collective bargaining agreement.

WE SHALL NOT, in any like or related manner (1) interfere with, restrain, coerce; or (2) take any reprisals against employees for exercising or pursuing their protected rights guaranteed by the Labor-Management Subchapter of the District of Columbia Comprehensive Merit Personnel Act.

District of Columbia Metropolitan Police Department

Date: _____ By: _____
Chief of Police or Designee

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

March 2, 2016