

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

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In the Matter of:)
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The Fraternal Order of Police,)
Metropolitan Police Department)
Labor Committee,)
)
Complainant,)
)
and)
)
The Metropolitan Police Department)
of the District of Columbia,)
)
Respondent.)
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PERB Case No. 84-U-01
Opinion No. 72

DECISION AND ORDER

On December 13, 1983 the Fraternal Order of Police Metropolitan Police Department Labor Committee (FOP), on behalf of Officer James Connelly, filed an "Unfair Labor Practice Complaint" (Complaint) with the District of Columbia Public Employee Relations Board (Board) against the Metropolitan Police Department (MPD). The Complaint alleges that MPD, through its agents, Inspector William Anastos and Lieutenant Robert Noyes, violated Sections 1704(a)(1), (2) and (3) of the District of Columbia Comprehensive Merit Personnel Act of 1978 (CMPA) (codified as D.C. Code Sections 1-618.4(a)(1), (2) and (3)) "... by interfering with and restraining Officer Connelly in the exercise of rights, ... by attempting to interfere with the operation of the FOP Labor Committee, and by discriminating against Officer Connelly in a condition of his employment in order to attempt to discourage participation and membership in the FOP."

On December 22, 1983, MPD filed its "Response" denying the FOP allegations and asserting that the issues raised are contractual issues more properly addressed through the grievance procedures of the negotiated Agreement.^{1/}

^{1/} Article 20 of the negotiated Agreement provides, among other things, that:

"The purpose of this grievance procedure is to establish effective machinery for the fair, expeditious and orderly adjustment of grievances. Only an allegation that there has been a violation, misapplication or misinterpretation of the terms of this Agreement shall constitute a grievance under the provisions of this grievance procedure."

The issue presented by the Complaint is whether or not MPD's investigation of Officer Connelly and of an FOP survey form posted on a departmental bulletin board constituted an unfair labor practice in violation of the CMPA. There is also the issue of whether or not this is a dispute subject to resolution through the negotiated grievance procedures to which the Board should properly defer.

Inspector Anastos is the Director of the MPD Communications Division where Officer Connelly has worked as a dispatcher since 1970. Lieutenant Noyes is Officer Connelly's immediate supervisor. On November 7, 1983, Inspector Anastos discovered an FOP survey form posted on the Communications Division's bulletin board. The form was apparently designed by the FOP's leadership to elicit membership input in preparation for the next round of negotiations with the MPD. The form was signed "Jim Connelly" of the "Communications Division". Because he felt the form violated the provisions of Article 12, Section 2 of the negotiated Agreement 2/, Inspector Anastos removed it and directed Lieutenant Noyes to conduct an investigation to determine whether or not the survey form had been improperly placed on the bulletin board in violation of provisions of the Agreement.

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Article 12, Section 2 of the Agreement provides, among other things, that:

"The Department agrees to furnish suitable space on Departmental bulletin boards for display of Union material. All notices posted by the Union shall be signed by a Union official. The contents of the material must be related to the activities of the labor organization concerned, and may not contain personal attacks. A copy of each notice shall be sent to the Department's Labor Relations Representative."

On November 8, 1983, Lieutenant Noyes took a statement from Officer Connelly as a part of his investigation. FOP contends that Officer Connelly requested to talk to an FOP steward prior to responding to questions, but that the request was denied by Lieutenant Noyes allegedly because the investigation was not being conducted for the purpose of determining whether or not to take adverse action against him. Officer Connelly was required to write a statement responding specifically to questions concerning whether or not he completed the form in question and whether or not he placed or caused the form to be placed on the bulletin board. Officer Connelly was also asked to include in his written statement a specific response to one of the "suggestions" in the survey form concerning training officers. Because of his response, which included an opinion concerning radio run slips, Inspector Anastos directed Lieutenant Noyes to take a second written statement from Officer Connelly on November 9, 1983. FOP contends, and MPD denies, that through these actions MPD "... interfered with and restrained Officer Connelly from the exercise of his right to participate in the collective bargaining process, and has discriminated against Officer Connelly in an effort to discourage membership and participation in the FOP." The MPD investigation did not reveal who placed the form on the bulletin board. No disciplinary action has been initiated against Officer Connelly.

There is a negotiated Agreement in effect between the FOP and the MPD dated May 5, 1983, approved by the Mayor on June 19, 1983, with an expiration date of September 30, 1984. The Agreement contains a grievance procedure with final and binding arbitration as the final step for resolving disputes arising under the Agreement. Id. The Agreement also contains a procedure for posting FOP materials on MPD bulletin boards. Id. The facts upon which this Complaint is based have not been the basis for complaints or grievances in any other proceedings including the contractual grievance procedure.

The actions complained of here are actions upon which there is direct contract language and procedures and the parties have agreed that disputes concerning the interpretation of such language or allegations of violations of such provisions are to be resolved by submission to the contractual grievance procedures. FOP has declined to do so despite the fact that MPD is willing not only to process such a grievance, but to waive the contractual time requirements to permit FOP to do so. The issue, therefore, becomes whether or not the Board should defer to the contractual process where the dispute being presented on statutory grounds can be properly resolved through the voluntary, contractual mechanism.

The Board is charged with effectuating the District of Columbia's stated policy that "... an effective collective bargaining process is in the general public interest and will improve the morale of public employees and the quality of service to the public." Section 1701 of the CMPA (codified as D.C. Code Section 1-618.1(a)). There is little doubt about the Board's authority to decide whether unfair labor practices, i.e., statutory, non-contractual violations, have been committed and to issue appropriate remedial orders. (See Section 502(e) of the CMPA; D.C. Code Section 1-605.2(3)). This Board's jurisdiction and authority is patterned after that of the National Labor Relations Board (NLRB) which, pursuant to the National Labor Relations Act, 29 U.S.C. Section 158(a) and (b), is authorized to investigate and determine whether employers, employees or labor organizations have engaged in certain prohibited practices. (Compare and contrast with Section 1704 of the CMPA; D.C. Code Section 1-618.4). It is well established that the NLRB is not required to exercise its jurisdiction whenever the opportunity arises but rather, may exercise discretion in recognition of its policies^{3/} and those of the federal courts^{4/} favoring the settlement of disputes arising out of collective bargaining agreements by procedures voluntarily established by the parties.

The NLRB's policy concerning deferral to arbitration is derived from a series of cases beginning with Spielberg Manufacturing Company^{5/} in which the NLRB held that it would defer to the contractual process where an arbitration award had already been issued prior to the filing of the unfair labor practice complaint if, (1) the statutory issues were presented and considered by the arbitrator, (2) the arbitration proceedings were fair and regular, (3) the arbitration proceedings were final and binding on the parties, and (4) the arbitration award is not repugnant to public policy.

^{3/} Dubo Manufacturing Corporation, 142 NLRB 47, LRRM 1070 (1963).

^{4/} Acme Industrial Company v. NLRB, U.S. Court of Appeals for the 7th Circuit, No. 15045, 60 LRRM 2220, (1965).

^{5/} Spielberg Manufacturing Company, 112 NLRB 1080, 36 LRRM 1152 (1955).

In Collyer Insulated Wire ^{6/} the NLRB announced that it would defer acting on an unfair labor practice complaint where no arbitration award has been issued if, (1) the parties have a stable collective bargaining relationship, (2) the respondent is willing to arbitrate, and (3) the disputes, both contractual and statutory, can be resolved by the arbitration process. In a recent decision (January 1984), the NLRB provided additional direction concerning the Spielberg requirement of a showing that the arbitrator specifically dealt with the unfair labor practice issues. In Olin Corporation ^{7/}, the NLRB held that it is not necessary to show that the arbitrator expressly considered the unfair labor practice issue if, (1) the contractual issue is factually parallel, and (2) if the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, in order for the NLRB to defer to the contractual arbitration award. In another recent decision (January 1984), the NLRB, in United Technologies Corporation ^{8/}, held that it would defer to arbitration where a pre-arbitration unfair labor practice complaint is filed alleging violations of individual as well as collective employee rights.

Consistent with the NLRB policy, the Wisconsin Employment Relations Commission has ruled that "... this Board may also exercise its discretion and decline to determine alleged violations which can be submitted to, and materially resolved and remedied in an arbitration procedure." ^{9/} Similarly, the New Jersey Public Employment Relations Commission has determined that "[u]nfair practice charges are deferred to arbitration by the Commission where it is reasonably probable that the issue underlying the alleged unfair practice will be resolved pursuant to the parties' contractual grievance procedure forum and the grievance procedure terminates in binding arbitration." ^{10/}

This Board has previously determined it appropriate, under certain circumstances, to allow the parties to proceed through their voluntary contractual dispute resolution machinery and that it will stay any action on the unfair labor practice complaint pending the outcome of the contractual proceedings. ^{11/}

^{6/} Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1937 (1971).

^{7/} Olin Corporation, 268 NLRB 86 (January 24, 1984).

^{8/} United Technologies Corporation, 268 NLRB 83 (January 24, 1984).

^{9/} International Union of Operating Engineers, Local No. 311 and Milwaukee Lodge No. 46 of the Benevolent and Protective Order of Elks of the United States, Decision No. 7753, Wisconsin Employment Relations Commission (1966).

^{10/} In re Board of Education of East Windsor, E.D. No. 766, INJPER 59 (1975).

^{11/} PERB Cases 80-U-05 and 81-A-01, Opinion No. 15 issued August 24, 1981.

Further, this Board specifically retained jurisdiction to review the outcome of the contractual dispute to determine whether it was consistent with provisions of the CMPA and to take appropriate action if warranted. In that instance, the statutory Complaint was filed with the Board and during its investigation of the Complaint, the Board became cognizant of the initiation by the Complainant of the contractual procedures based on identical facts.

The Board finds a similar procedure to be appropriate in this instance even though FOP has not initiated the contractual procedures available for resolving this dispute. In a case such as this, where the actions complained of relate specifically to provisions of the contract, interpretation of those provisions is both necessary and appropriate to a determination of whether or not a noncontractual, statutory violation has been committed. By deferring to the contractual procedures which end in final and binding arbitration, the parties are permitted to have their Agreement interpreted in the manner and forum they created for this very purpose.

Accordingly, the parties are directed to proceed through their contractual grievance procedure to arbitration for interpretation and resolution of applicable contract provisions and issues. The Board retains jurisdiction to consider this matter further upon a showing that; (a) the grievance procedures, including arbitration, have not been fair and regular; or (b) the grievance procedures, including arbitration, have ended in a result which is inconsistent with the policies of the CMPA. The Board considers the 120 day requirements of Section 1714 of the CMPA (D.C. Code Section 1-618.14) to be held in abeyance pending the outcome of the contractual grievance procedures.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
April 11, 1984