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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,)	
)	PERB Case No. 12-U-31
Complainant,)	
)	Opinion No. 1360
v.)	
)	
District of Columbia)	
Metropolitan Police Department,)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case

Complainant Fraternal Order of Police / Metropolitan Police Department Labor Committee, D.C. Police Union (“Complainant” or “FOP” or “Union”) filed an Unfair Labor Practice Complaint (“Complaint”) against the District of Columbia Metropolitan Police Department (“Respondent” or “MPD” or “Agency”), alleging MPD violated the Comprehensive Merit Personnel Act (“CMPA”), D.C. Code § 1-617.04(a)(1), by “denying [an officer] the right to have [a specific union representative] serve as his union representative during [an] investigatory interview, and by denying the D.C. Police Union the right to designate [the specific union representative] as [the officer’s] representative.” (Complaint at 6-7).

In its Answer, MPD denied FOP’s allegation, and raised an affirmative defense that the Public Employee Relations Board (“PERB” or “Board”) lacks jurisdiction over this matter because MPD’s actions were “covered by the parties’ collective bargaining agreement (“CBA”), and because the parties’ CBA “provides a grievance and arbitration procedure to resolve contractual disputes.” (Answer at 5). MPD argued that because “the Board’s precedent provides that the Board has no jurisdiction in such circumstances, the Board should dismiss the Complaint.” *Id.*

II. Background

On or about July 28, 2009, approximately three (3) years prior to events giving rise to FOP's Complaint, Chairman of the D.C. Police Union, Kristopher Baumann ("Chairman Baumann"), pursuant to Article 9 of the CBA, sent a letter to MPD Chief of Police, Cathy Lanier ("Chief Lanier"), which notified MPD that Sergeant Robert Merrick ("Sgt. Merrick") had been designated to be assigned to the FOP office as the "FOP Representative to the Office of Police Complaints" effective August 2, 2009. *Id.* at Exhibit #3. In the same letter, Chairman Baumann notified MPD that Sgt. Merrick was assigned currently but temporarily to MPD's Internal Affairs Division ("IAD"), and that he (Sgt. Merrick) was requesting the assignment to end effective August 2, 2009, because Sgt. Merrick would be returning to his status as a member of the bargaining unit on that date. *Id.*

Approximately five (5) months later, on or about December 28, 2009, FOP Executive Steward, Delroy Burton ("Mr. Burton"), sent an email to IAD's Commander Christopher LoJacono ("Cmdr. LoJacono"), in which he requested an updated list of IAD agents. *Id.*, Exhibit #4. On or about December 29, 2009, after receiving and reviewing an updated list that was sent to him from Lieutenant Silvia Hamelin ("Lt. Hamelin"), Mr. Burton emailed Lt. Hamelin and informed her that Sgt. Merrick was incorrectly listed as still being assigned to IAD. *Id.* Mr. Burton asked Lt. Hamelin to make the appropriate correction. *Id.* Lt. Hamelin replied that same day to Mr. Burton, stating she was aware that Sgt. Merrick was now with FOP. *Id.* Notwithstanding, she wrote that Sgt. Merrick had not been transferred out of IAD, and that she "should have made a notation that he is detailed out[.]" *Id.* In Mr. Burton's reply, he wrote that Sgt. Merrick "cannot be detailed from a position outside the bargaining unit (IAD) to a position within [the bargaining unit] (FOP)." Mr. Burton wrote further that Sgt. Merrick needed to be "transferred out of IAD, not detailed [out][.]" as "District of Columbia law prohibits IAD agents from being members of the union." *Id.* Lt. Hamelin's email reply to Mr. Burton was simply, "thank you." *Id.*

On April 5, 2012, pursuant to Article 9 of the CBA, Chairman Baumann sent correspondence to Chief Lanier which stated that Sgt. Merrick had again been designated to be assigned to the FOP office. *Id.*, Exhibit #5.

On July 17, 2012, Officer Stephen Ferris ("Officer Ferris"), a member of the bargaining unit as defined by the parties' CBA, reported to IAD to be interviewed pursuant to an administrative investigation. (Complaint at 2-3). Officer Ferris designated Sgt. Merrick to serve as his union representative during the interview. *Id.* at 1-2. After Officer Ferris was given a "Reverse-Garrity" warning by IAD agent, Leon Epps ("Agent Epps"), Sgt. Merrick and Officer Ferris reviewed a videotape relevant to the investigation. *Id.* at 3. After watching the videotape, Sgt. Merrick was informed by IAD Lieutenant, Felica Lucas ("Lt. Lucas"), that Cmdr. LoJacono "was refusing to allow him to represent Officer Ferris during the interview" because he ("Sgt.

Merrick”) was “still assigned to Internal Affairs.” *Id.* Shortly thereafter, Mr. Burton sent an email to then Acting Director of MPD’s Labor and Employee Relations Unit, Mark Viehmeyer (“Mr. Viehmeyer”), to seek a resolution. *Id.*, Exhibit #2. Mr. Viehmeyer’s email reply to Mr. Burton stated that Sgt. Merrick “will not be permitted to participate in the interview, or any interviews at internal affairs, since although he currently serves as the FOP’s OPC representative, he remains assigned to internal affairs.” Further, Mr. Viehmeyer stated that the Agency was “invoking its reserved right under Article 13, Section 3(a) [of the CBA] to refuse [Sgt. Merrick] as a particular representative in this interview,” and that Officer Ferris would be “afforded additional time, if needed, to identify a different representative.” *Id.*

III. Discussion

FOP contends that MPD violated D.C. Code § 1-617.04(a)(1) when it forbade Sgt. Merrick from representing Officer Ferris during an investigatory interview. (Complaint at 6-7). FOP avers that the CMPA grants District employees the right to be represented by the union during interviews when the employee reasonably fears that discipline may result from the meeting. *Id.* (citing *NLRB v. Weingarten*, 420 U.S. 251 (1975) (which held that an employer’s denial of an employee’s request for union representation during an interview that the employee reasonably thinks may result in disciplinary action constitutes an unfair labor practice)). Further, FOP cites *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department*, 59 D.C. Reg. 4548, Slip Op. No. 932, PERB Case No. 07-U-10 (2008) to support its position that any violation of the right to representation constitutes an unfair labor practice. FOP contends that Respondent did not have any legitimate basis to deny Officer Ferris the right to have Sgt. Merrick represent him in the investigatory interview, and asks the Board to order Respondent and its agents to “cease and desist from violating D.C. Code § 1-617.04(a)(1) by denying union members the representation during investigatory interviews in which the union member reasonably believes the interview may result in disciplinary action” and to “cease and desist from disallowing [Sgt.] Merrick from representing bargaining unit members in investigatory interviews conducted by [IAD].” *Id.* at 7.

Complainant cites D.C. Code § 1-617.06(a)(2), which grants all District employees the right to “form, join, or assist any labor organization or to refrain from such activity,” but does not allege a violation of that section.

Respondent denies that it violated D.C. Code § 1-617.04(a)(1) and raises the affirmative defense that the Board lacks jurisdiction over this matter because the event giving rise to the alleged violation and the procedure to resolve it are covered by the parties’ CBA. (Answer at 4-5). Respondent contends that Section 3(a) of Article 13 in the parties’ CBA “provides the basis

for the MPD to refuse a particular union representative to be present during an administrative interview.” *Id.* at 5. Respondent’s argument relies in part upon *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia, et al*, 59 D.C. Reg. 6039, Slip Op. No. 1007, PERB Case No. 08-U-41 (2009), in which the Board dismissed part of the FOP’s Complaint because the allegations raised therein were based on “contractual violations.” *Id.* at 8. Respondent contends that this case is similar to that case, in which the Board held, “where the parties have agreed to allow their negotiated agreement to establish the obligations that govern the very acts and conduct alleged in the complaint as statutory violations of the CMPA, the Board lacks jurisdiction over the complaint allegation.” (Answer at 6 (quoting *FOP/MPD Labor Committee v. D.C. et al, supra*, Slip Op. No. 1007 at p. 8, PERB Case No. 08-U-41) (Internal citations omitted)). Respondent notes that the Board further held that “if ... 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, the Board has deferred the contractual issue to the parties’ grievance arbitration procedure.” *Id.* Respondent argues that, in this case, MPD’s refusal to allow Sgt. Merrick to represent Officer Ferris in the investigatory interview on July 17, 2012, was permitted and covered by Section 3(a) of Article 13 of the parties’ CBA, covering “investigatory questioning,” which states: “[t]he Department reserves the right to refuse a particular Union representative for good cause, and the member to be interviewed shall then name an alternative representative.” (Answer at 6-7 (quoting Complaint, Exhibit 1, p. 14)). Respondent further contends that the question of whether “MPD properly refused to allow [Sgt.] Merrick to represent Officer Ferris at his administrative interview requires an interpretation of the parties’ contract,” and is therefore “outside of PERB’s jurisdiction.” (Answer at 7). Respondent asks that the Board dismiss the Complaint and deny Complainant’s prayers for relief. *Id.*

Complainant has not filed any additional pleadings responding to Respondent’s request for dismissal, and Respondent has likewise not filed any further pleadings in this matter. Therefore, the Complaint and Answer are before the Board for decision.

The Board agrees with the Respondent that it lacks jurisdiction over this matter because the very event giving rise to the complaint was expressly envisioned and authorized by the parties in their CBA, and because, in order to determine if a statutory violation occurred, the Board would need to interpret the parties’ CBA, which it does not have the authority to do.

Complainants must assert in the pleadings allegations that, if proven, would demonstrate a statutory violation of the CMPA. *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department and Cathy Lanier*, 59 D.C. Reg. 5427, Slip Op. No. 984 at p. 6, PERB Case No. 08-U-09 (2009) (citing *Virginia Dade v. National Association of Government Employees, Service Employees International Union, Local*

R3-06, 46 D.C. Reg. 6876, Slip Op. No. 491 at p. 4, PERB Case No. 96-U-22 (1996); and *District of Columbia Department of Public Works*, 48 D.C. Reg. 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994)).

In consideration of a motion to dismiss, the Board views the contested facts in the light most favorable to the Complainant to determine if the allegations may, if proven, constitute a violation of the CMPA, thus giving rise to an unfair labor practice. *Id.* (citing *Doctor's Council of District of Columbia General Hospital v. District of Columbia General Hospital*, 49 D.C. Reg. 1237, Slip Op. No. 437, PERB Case No. 95-U-10 (1995); and *JoAnne G. Hicks v. District of Columbia Office of the Deputy Mayor for Finance, Office of the Controller and American Federation of State, County and Municipal Employees, District Council 24*, 40 D.C. Reg. 1751, Slip Op. No. 303, PERB Case No. 91-U-17 (1992)). In the process of making this determination, however, the Board distinguishes between obligations that are imposed by the CMPA and those that are imposed by the parties' CBA. The CMPA empowers the Board to resolve statutory violations, but not contractual violations, for which a separate resolution process is set forth in accordance with the terms and provisions of the parties' contract (i.e. the established processes for grievances and/or arbitration). As a result, the Board does not have jurisdiction over matters in which only a contractual violation is alleged. *Id.* (citing *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 at p. 3, PERB Case No. 92-U-08 (1992)). See also, *Council of School Officers, Local 4, American Federation of School Administrators, AFL-CIO v. District of Columbia Public Schools*, 59 D.C. Reg. 6138, Slip Op. No. 1016 at p. 9, PERB Case No. 92-U-08 (2010); and *Carlton Butler, Iola Slappy, Julian Battle, Lawrence Benning, John Busby, Jr., Dancy Simpson and Andrea Byrd District of Columbia Department of Corrections and Anthony Williams, Mayor*, 49 D.C. Reg. 1152, Slip op. No. 673, PERB Case No. 02-U-02 (2001); and *American Federation of Government Employees, Local 2725, AFL-CIO v. District of Columbia Housing Authority*, 46 D.C. Reg. 6872, Slip Op. No. 488 at p. 2, PERB Case No. 96-U-19 (1996); and *Washington Teachers' Union. Local 6. American Federation of Teachers. AFL-CIO v. District of Columbia Public Schools*, 42 D.C. Reg. 5488, Slip Op. No. 337, PERB Case No. 92-U-18 (1992).

Additionally, the Board lacks jurisdiction over an allegation in which the very act or conduct that gives rise to the allegation, despite being alleged in the Complaint as a violation of statute, was envisioned and expressly authorized by the parties' in the contract. *FOP/MPD Labor Committee v. D.C. et al, supra*, Slip Op. No. 1007 at p. 8, PERB Case No. 08-U-41 (citing *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 at p. 4, PERB Case No. 98-U-16 (1999)). Furthermore, the Board lacks the authority to interpret the terms of a contract in order to determine if there has been a violation of a statute. *Council of School Officers v. D.C. Public*

Schools, supra, Slip Op. No. 1016 at p. 9, PERB Case No. 92-U-08. In such instances, the Board defers the resolution of the issues and the interpretation of contractual questions to the grievance and arbitration processes established in the parties' contract. *FOP/MPD Labor Committee v. D.C. et al, supra*, Slip Op. No. 1007 at p. 8, PERB Case No. 08-U-41 (citing *AFSCME, D.C. Council 20, Local 2921 v. D.C. Public Schools*, 42 D.C. Reg. 5685, Slip Op. No. 339 at n. 6, PERB Case No. 92-U-08 (1995)).

Here, Article 13, Section (a) of the parties' CBA expressly authorizes MPD to refuse any "particular" union representative during an investigative interview insofar as there is "good cause" for the refusal, and MPD then grants the bargaining unit member an opportunity to name an alternate representative. In the Complaint, FOP relies on several cases wherein it was held that not allowing a member to be accompanied by a union representative during an investigative interview constituted an unfair labor practice. (Complaint at 6-7 (citing *Weingarten*, 420 U.S. 251, *supra*; and *FOP v. MPD, supra*, Slip Op. No. 932, PERB Case No. 07-U-10)). In the Complaint, FOP asks the Board to order MPD to "cease and desist from violating [the CMPA] by denying union members representation during investigatory interviews in which the union member reasonably believes the interview may result in disciplinary action." (Complaint at 7). That is not what occurred in this instance. Officer Ferris was not denied the right of representation altogether, as was the case in the authority that FOP cites in its Complaint. Rather, MPD expressly invoked Article 13, Section (a) of the parties' CBA when it refused Sgt. Merrick as a "particular" representative in the interview. Then, in accordance with the procedure set forth in the contract, Officer Ferris was told that he would be afforded additional time, if necessary, to identify an alternative representative. (Complaint, Exhibit 1 at p. 14 and Exhibit 2). These facts are undisputed. Whether MPD had "good cause" to refuse Sgt. Merrick, on the other hand, is less clear. Certainly, MPD's complete failure to record Sgt. Merrick's reassignment out of IAD nearly three (3) years after Sgt. Merrick was appointed as a full time union representative, despite numerous opportunities and reminders to do so, borders on gross negligence and/or incompetence. MPD's reliance upon this failure to meet its "good cause" requirement is, in the Board's opinion, flimsy at best. Nevertheless, this lack of clarity only strengthens the Board's finding that it lacks jurisdiction in this matter. The Board does not have the authority to interpret what "good cause" in the parties' contract means in order to determine if there has been a violation of the statute. *Council of School Officers v. D.C. Public Schools, supra*, Slip Op. No. 1016 at p. 9, PERB Case No. 92-U-08. The Board therefore defers the resolution and interpretation of that contractual question to the grievance and arbitration processes set forth in the parties' contract. *FOP/MPD Labor Committee v. D.C. et al, supra*, Slip Op. No. 1007 at p. 8, PERB Case No. 08-U-41.

Reading the contested facts in the light most favorable to the Complainant does not change the fact that the very act that FOP alleges violated D.C. Code § 1-617.04(a)(1)—MPD's

refusal of Sgt. Merrick to act as Officer Ferris' particular union representative during an investigative interview—was a right that was envisioned, agreed upon, and expressly granted to MPD by the parties in their CBA. *Id.* Therefore, because the parties expressly granted this right to MPD in the contract, and because the allegations in FOP's Complaint turn on contractual issues and questions—namely, an interpretation of the term “good cause”—the Board finds that it lacks jurisdiction over this matter and defers the resolution of FOP's allegations to the grievance and arbitration procedures set forth in the parties' CBA.¹ *Id.* Therefore, the Complaint is dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police / Metropolitan Police Department Labor Committee, D.C. Police Union's Unfair Labor Practice Complaint is dismissed.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

January 31, 2013

¹ Despite the Board's finding in this matter that the contested issues are wholly contractual and that it therefore lacks jurisdiction to review them, the Board wishes to note that such should not be considered an endorsement of either MPD's negligence in this matter, or its reliance on that negligence as a way to justify its actions concerning Sgt. Merrick. Indeed, the Board is astonished by MPD's failure to update its records and reassign Sgt. Merrick out of IAD, despite Sgt. Merrick's and FOP's numerous diligent reminders to do so over the course of three (3) years. The Board suspects, if and when this issue is addressed by the parties' grievance and arbitration process, that the decision-makers involved will be as unimpressed as the Board was with MPD's lack of diligence concerning Sgt. Merrick's assignment status. If it has not already done so, the Board urges MPD to update its records and officially reassign Sgt. Merrick out of IAD. The Board further wishes to place the parties on notice that acting or behaving in a way that is grossly negligent or incompetent and then relying on that act or behavior to justify a course of action is not an advisable practice to adopt. Additionally, the Board strongly advises MPD and FOP to be more diligent in their respective record keeping now and in the future so that instances like the one alleged in this matter do not happen again.

CERTIFICATE OF SERVICE

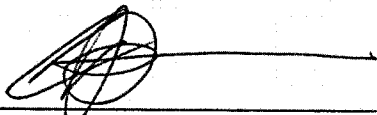
This is to certify that the attached Decision and Order in PERB Case No. 12-U-31, Slip Op. No. 1360, was transmitted via U.S. Mail and e-mail to the following parties on this the 4th day of February, 2013.

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