



the Board for disposition. The Board has considered all issues in this proceeding and determined that: 1) all issues herein are properly before the Board and are within the Board's jurisdiction; and 2) the acts and conduct alleged by FOP in its complaint(s) are remanded to the Hearing Examiner for findings and conclusions of law consistent with this Opinion.

## II. Discussion

### A. Hearing Examiner's Report and Recommendation

The Hearing Examiner noted that the consolidated complaints alleged that MPD failed to comply with FOP's information requests by failing to provide the requested information, directing FOP to submit its request to a different department, responding with only partial information, or failing to provide the requested information in a timely manner. (Report at 2). MPD's Answers to each complaint raised the defense that the Board lacks jurisdiction over the complaints because the issues are contractual, not statutory, and that even if the Board has jurisdictions, the cases should be dismissed because MPD responded appropriately to each information request. *Id.*

The Hearing Examiner determined that the consolidated cases posed two issues: (1) whether the Board has jurisdiction to consider complaints which allege violations of the parties' collective bargaining agreement ("CBA"); and (2) whether MPD violated the Comprehensive Merit Personnel Act by failing to respond appropriately to the information requests. (Report at 2).

After considering the evidence presented to her, the Hearing Examiner concluded that the Board was without jurisdiction to adjudicate the parties' disputes. (Report at 2). In support of her conclusion, the Hearing Examiner cited to three cases<sup>1</sup> which she summarized as holding that "where the parties have negotiated specific terms in their collective bargaining agreement, violations of those terms are not cognizable under the CMPA." (Report at 8-9). The Hearing Examiner found that the parties' CBA "leaves no doubt that FOP and MPD agreed to process alleged violations of their contract, including those involving Article 10 information requests, in accordance with the grievance-arbitration procedures spelled out in Article 19." (Report at 9).

### B. FOP's Exceptions

In its Exceptions, FOP contends that the Hearing Examiner contradicted established Board precedent when she concluded that the Board lacked jurisdiction to adjudicate FOP's unfair labor practice complaint. (Exceptions at 1). In support of its argument FOP cites to *FOP/MPD Labor*

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<sup>1</sup> *Washington Teachers Union, Local 6 v. D.C. Public Schools*, 42 D.C. Reg. 5488, Slip Op. No. 337, PERB Case No. 92-U-18 (1992) (complaint dismissed where claimed unilateral change in administrative leave procedure was covered by parties' collective bargaining agreement); *FOP/MPD Labor Committee v. MPD*, 39 D.C. Reg. 9617, Slip Op. No. 295, PERB Case No. 91-U-18 (1992) (Board lacked jurisdiction where claim alleged violation of addendum to parties' labor contract); *Carlease Madison Forbes v. Int'l Brotherhood of Teamsters, Local Union 1714*, 36 D.C. Reg. 7107, Slip Op. No. 229, PERB Case No. 88-U-20 (1989). (Report at 8) (parenthetical citations those of the Hearing Examiner).

*Committee v. MPD*, 59 D.C. Reg. 3386, Slip Op. No. 835, PERB Case No. 06-U-10 (2006), in which the Board found that MPD had committed an unfair labor practice by failing to furnish FOP copies of documents it had requested pursuant to the parties' CBA. (Exceptions at 13). FOP asserts that PERB Case No. 06-U-10 dealt with the same parties as the instant case, and the grievance at issue in that case was also generated from Article 19 of the parties' CBA. (Exceptions at 15). Additionally, because the Hearing Examiner wrongly concluded that the Board lacks jurisdiction over this matter, FOP also argues that the Hearing Examiner erred in failing to reach the merits of this case. (Exceptions at 16). Should she have done so, FOP contends that "it is self-evident that the merits demonstrate [MPD's] actions, or inaction, violated D.C. Code § 1-617.04(a)(1) and (5)." (Exceptions at 17).

C. MPD's Opposition to the Exceptions

In its Opposition to FOP's Exceptions, MPD asserts that the Hearing Examiner correctly concluded that the Board lacks jurisdiction over this dispute, and that even if the Board does have jurisdiction, MPD did not engage in unfair labor practices. (Opposition at 6, 11).

First, MPD notes that the parties negotiated and agreed upon terms governing requests for information, and memorialized those terms in Article 10 of the parties' CBA. (Opposition at 6). FOP's allegations in the consolidated complaints, and MPD's responses and defenses to those allegations, arose through the application and interpretation of Article 10. *Id.* Further, MPD contends that the Article 19 grievance and arbitration procedure provides an "appropriate and agreed-upon mechanism to resolve issues relating to application, interpretation, and implementation of CBA provisions." (Opposition at 7).

In support of its Oppositions, MPD cites to *AFSCME Local 2921 v. D.C. Public Schools*, 42 D.C. Reg. 5685, Slip Op. No. 339, PERB Case No. 92-U-08 (1995), which it argues is the appropriate precedent to be applied to the consolidated complaints. (Opposition at 7). In that case, the Board concluded that in cases where the dispute was explicitly addressed in the parties' CBA, the Board lacked jurisdiction. *Id.* MPD states that the Board distinguished the circumstances in *AFSCME Local 2921* from cases "where information was requested pursuant to the derivative CMPA authority." (Opposition at 8; citing *AFSCME Local 2921*, Slip Op. No. 339 at p. 5). Further, MPD disputes FOP's reliance on FOP/MPD Labor Committee, Slip Op. No. 835, because the parties in that matter did not raise the issue of whether the Board had jurisdiction over a contractual dispute, and thus the issue was not addressed in the Board's decision. *Id.* MPD alleges that the existence of both Article 10 and Article 19 bring the matter "squarely under the precedent established by *AFSCME Local 2921* and outside the line of cases cited by [FOP]." (Opposition at 9-11).

Finally, MPD contends that even if the Board has jurisdiction over the consolidated complaints, MPD did not engage in unfair labor practices by failing to provide the information requested by FOP. (Opposition at 11). For the reasons discussed below, the Board will refer these defenses to the Hearing Examiner for consideration.

D. MPD's Supplement to its Opposition

MPD filed a Supplement to its Opposition, asserting that the Board's decision in *FOP/MPD Labor Committee v. MPD*, 60 D.C. Reg. 9172, Slip Op. No. 1101, PERB Case No. 08-U-41 (2011), which was issued after the Opposition was filed, compels the Board to uphold the Hearing Examiner's recommended dismissal. (Supplement at 1).

MPD states that in that case, FOP filed a complaint alleging that MPD failed to bargain in good faith during negotiations over the parties' CBA. (Supplement at 3). MPD filed a cross-complaint and amended cross-complaint alleging that FOP violated the statutory confidentiality requirements of the CMPA, which had been incorporated into the bargaining ground rules. *Id.* FOP then filed a motion to dismiss the cross-complaint and amended cross-complaint, arguing that the pleadings alleged violations of the parties' bargaining ground rules, and that because the ground rules were akin to contractual provisions, the Board lacked jurisdiction over the pleadings. *Id.*

In its decision, the Board affirmed its earlier decision granting FOP's motion to dismiss, citing previous decisions holding "that 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 allegations." (Supplement at 4; citing *FOP/MPD Labor Committee*, Slip Op. No. 1101 at p. 6). MPD contends that the Board's holding in Slip Op. No. 1101 is directly on point in the instant case because the parties have mutually agreed to allow the CBA to establish MPD's obligations towards information requests, and because statutory rights are implicated. (Supplement at 4). MPD states that in 08-U-41, there was no CBA provision expressly addressing the confidentiality of negotiations, but in the present case, Article 10 expressly provides for information requests. *Id.*

E. FOP's Opposition to the Supplement

FOP opposed MPD's Supplement, stating that MPD lacks authority to submit the filing, and if it did, MPD's arguments regarding jurisdiction "are both defective and inconsistent with [MPD's] previous position." (Opposition to Supplement at 1). FOP alleges that while MPD filed its Supplement pursuant to Board Rule 556.3, that rule addresses the time period for filing exceptions to a report and recommendation, and is inapplicable to MPD's Supplement. (Opposition to Supplement at 2). While Rule 556.4 addresses the time period for filing an opposition to exceptions, FOP states that the rule does not contemplate a supplemental filing. *Id.* Because the Board's rules do not authorize a supplemental filing and MPD did not ask the Board for permission to file its Supplement, FOP contends that the Supplement should be stricken from the record. (Opposition to Supplement at 3).

Further, FOP argues that even if MPD's Supplement is properly before the Board, the Board's holding in *FOP/MPD Labor Committee*, Slip Op. No. 1101 was premised on the specific factual circumstances of the cross-complaint and amended cross-complaint filed in PERB Case No. 08-U-41. (Opposition to Supplement at 3). FOP also notes that the Board has determined

that it has jurisdiction over cases in which the CMPA overlaps with contractual provisions, and that the Board has found that it has jurisdiction over a grievance between parties that is “contractual.” (Opposition to Supplement at 3; citing *AFSCME Local 2921*, Slip Op. No. 339 at p. 3-4 and *FOP/MPD Labor Committee*, Slip Op. No. 835).

F. Analysis

The Board has consistently found that it is an unfair labor practice for an agency to withhold requested materials and information relevant and necessary to a union’s duty as a bargaining unit representative. *FOP/MPD Labor Committee v. MPD*, 59 D.C. Reg. 3386, Slip Op. No. 835, PERB Case No. 06-U-10 (2006); see also *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). An agency is obligated to furnish requested information that is both relevant and necessary to a union’s role in the processing of a grievance, and arbitration proceeding, or collective bargaining. See *id.*; see also *American Federation of Government Employees, Local 2741 v. D.C. Dep’t of Parks and Recreation*, 50 D.C. Reg. 5049, Slip Op. No. 697, PERB Case No. 00-U-22 (2002).

PERB caselaw is replete with unfair labor practice complaints filed by FOP, alleging that MPD failed to respond to requests for information filed pursuant to Article 10, thus violating D.C. Official Code § 1-617.04(a)(1) and (5). See, e.g., *FOP/MPD Labor Committee v. MPD*, 59 D.C. Reg. 11371, Slip Op. No. 1302, PERB Case Nos. 07-U-49, 08-U-13, and 08-U-16 (2012); *FOP/MPD Labor Committee v. MPD*, 60 D.C. Reg. 5337, Slip Op. No. 1374, PERB Case No. 06-U-41 (2013); *FOP/MPD Labor Committee v. MPD*, 59 D.C. Reg. 6781, Slip Op. No. 1131, PERB Case No. 09-U-59 (2011).

In the Report, the Hearing Examiner concluded that “where the parties have negotiated specific terms in their collective bargaining agreement, violations of those terms are not cognizable under the CMPA.” (Report at 8-9). However, this argument, particularly when applied to information requests made by FOP pursuant to Article 10 of the parties’ CBA, has been rejected by the Board. In *FOP/MPD Labor Committee*, Slip Op. No. 1302, a hearing examiner determined that the Board had jurisdiction over FOP’s unfair labor practice complaint alleging that MPD had failed to provide information requested pursuant to Article 10, stating 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 CMPA. 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.

*Id.* at 9. MPD excepted to this finding, alleging that in reaching her conclusion, the hearing examiner had misinterpreted and misapplied *AFSCME Local 2921*, Slip Op. No. 339. *Id.* The Board disagreed, noting that “[t]he 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.” *Id.* The Board further noted that MPD’s exception “suggest[ed] 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 and obligation to provide information; and (2) Article 19 provides a grievance and arbitration procedure which could resolve disputes over the application or interpretation of Article 10.” *Id.* MPD makes a nearly identical argument in its Opposition in the instant case. (Opposition at 9-11).

In *FOP/MPD Labor Committee*, Slip Op. No. 1302, the Board rejected MPD’s argument, stating that the decision in Slip Op. No. 339 is distinguishable:

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. 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.

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 addressed by the parties’ CBA, 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, then “the Board is empowered to decide whether [the respondent] committed an unfair labor practice concerning the union’s document request, even though the document request was made...[pursuant to a contractual provision].” *AFGE Local 2741*, Slip Op. No. 697 at p. 6.

*FOP/MPD Labor Committee*, Slip Op. No. 1302 at p. 10. Further, the Board has held 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.” *AFGE Locals 872, 1975, and 2553 v. Dep’t of Public Works*, 49 D.C. Reg. 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. D.C. Water and Sewer Authority*, 47 D.C. Reg. 7551, Slip Op. No. 635, PERB Case No. 99-U-04 (2000).

In *FOP/MPD Labor Committee*, Slip Op. No. 1302, the Board concluded that its “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,” and found that it had jurisdiction over the complaint. *Id.* at 11. In the instant case, the consolidated complaints contain allegations that, if proven, would concern violations of MPD’s statutory obligation to bargain in good faith, D.C. Official Code § 1-617.04(a)(5), and, derivatively, to refrain from interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by the CMPA<sup>2</sup>. Article 10 of the parties’ CBA does not contain a clear and unmistakable waiver with respect to the aforementioned statutory right. Therefore, the Hearing Examiner erred in determining the Board lacks jurisdiction over the consolidated complaints, and the Board will not adopt her recommendation.

With regard to MPD’s Supplement, while FOP is correct that the Board’s rules do not contemplate a supplemental filing, “the rules of the Board shall be construed broadly to effectuate the purposes and provisions of the CMPA.” Board Rule 501.1. However, the case highlighted in the Supplement, PERB Case No. 08-U-41, is not persuasive in the instant case, particularly when *FOP/MPD Labor Committee*, Slip Op. No. 1302 is directly on point. Unlike the instant case, the cross-complaint at issue in PERB Case No. 08-U-41 “alleged only contractual violations (i.e. the parties’ ground rules<sup>3</sup>) and failed to assert any facts establishing a statutory violation, or interference with, coercing or restraining of employees or the District in the exercise of their rights under the CMPA.” *FOP/MPD Labor Committee v. MPD*, 60 D.C. Reg. 9172, Slip Op. No. 1101 at p. 2, PERB Case No. 08-U-41 (2011). Further, the Board determined in PERB Case No. 08-U-41 that addressing the cross-complaint and amended cross-complaint would require interpretation of the parties’ ground rules<sup>4</sup>, while the instant case requires no interpretation of Article 10. *Id.* at 3.

As the findings and conclusions in the Hearing Examiner’s Report are not reasonable, supported by the record, and consistent with Board precedent, the matter will be remanded to the Hearing Examiner for further consideration consistent with this Decision and Order.

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<sup>2</sup> “[W]hen an agency has failed and refused, without a viable defense, to produce information that the union has requested, the agency resultantly fails to meet its statutory duty to bargain in good faith and has therefore violated D.C. Official Code § 1-617.04(a)1 and (5). In addition, a violation of the employer’s statutory duty to bargain [under D.C. Official Code § 1-617.04(a)1 and (5)] also constitutes derivatively a violation of the counterpart duty not to interfere with the employees’ statutory rights to organize a labor union free from interference, restrain, or coercion; to form, join, or assist any labor organization, or to refrain from such activity; and to bargain collectively through representatives of their own choosing found in D.C. Official Code § 1-617.04(a)(1).” *FOP/MPD Labor Committee*, Slip Op. No. 1374 at p. 10 (internal citations omitted).

<sup>3</sup> Ground rules are treated as contractual provisions. *AFGE Local 2741 v. Dep’t of Parks and Recreation*, 46 D.C. Reg. 6502, Slip Op. No. 588 at p. 2, PERB Case No. 98-U-16 (1999).

<sup>4</sup> “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 will defer the contractual issue to the parties’ grievance arbitration procedure. *AFSCME Local 2921*, Slip Op. No. 339 at n. 6.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. This case is remanded to Hearing Examiner Aline Pacht for consideration consistent with the Board's determination that it has jurisdiction to consider the allegations raised in the consolidated complaints.
2. 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.

By unanimous vote of Board Chairperson Charles Murphy, and Members Donald Wasserman and Keith Washington

September 25, 2014

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case Nos. 06-U-23, 07-U-11, 07-U-12, 07-U-16, and 07-U-30, Opinion No. 1490, was transmitted *via* US Mail and e-mail to the following parties on this the 30<sup>th</sup> day of September, 2014.

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