Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/Metropolitan Police Department Labor Committee,	
Complainant,	PERB Case Nos. 08-U-69, 09-U-01, 10-U-04, 10-U-05, 10-U-10, 10-U-28, and 10-U-29
	Opinion No. 1536
v.	
District of Columbia Metropolitan Police Department,	
Respondent.	

DECISION AND ORDER

Between August 7, 2008, and April 9, 2010, the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP") filed with the Board seven unfair labor practice complaints with overlapping allegations arising out of the efforts of the Metropolitan Police Department ("MPD" or "Respondent") to require FOP Chairman Kristopher Bauman ("the Chairman") and FOP Steward Delroy Burton ("the Steward") to attend in-service training.[1] The Executive Director consolidated the cases and assigned them to a hearing examiner.

Following a hearing held on December 4, 2014, and February 18, 2015, and briefing by the parties, the hearing examiner submitted a Report of Findings and Recommendations ("Report") on June 29, 2015. FOP filed exceptions to which MPD filed an opposition. The Report, the exceptions, and the opposition are before the Board for disposition. Except with regard to remedies, the Board finds the exceptions to be without merit and the Report to be reasonable, supported by the record, and consistent with Board precedent.

[1] The complaints were assigned case numbers 08-U-69, 09-U-01, 10-U-04, 10-U-05, 10-U-10, 10-U-28, and 10-U-29.

I. Hearing Examiner's Findings

The hearing examiner made findings on each of the cases and then recommended four orders for the Board to issue pertaining to all of them.

A. Case Number 08-U-69

In 2008, Lieutenant Linda S. Nischan of MPD's Office of Professional Responsibility investigated the Chairman's failure to complete professional development training in 2007. The final investigative report, issued July 7, 2008, found that MPD had not required previous FOP chairmen to attend in-service training. The final investigative report did not recommend that any discipline be taken against the Chairman but recommended that MPD establish a written directive about training for the Chairman going forward. Four days later, the acting director of labor relations issued to the Chairman a Performance Management System Documentation Form, PD Form 62E, ("PD 62E"), which stated, "By service of this PD 62E, you are directed to ensure that you satisfy all annual training requirements prior to the end of calendar year 2008."[2]

The hearing examiner found that the investigation was not conducted in reprisal for the Chairman's public criticism of the mayor and the chief of police ("the Chief") and did not interfere with, restrain, or coerce the Chairman with respect to his ability to exercise his protected rights. In view of the investigation's finding that previous chairmen were not required to attend in-service training, the hearing examiner found that the directive that the Chairman complete training in 2008 was a unilateral change in conditions of employment. He found MPD's failure to bargain in good faith over this change to be a violation. However, MPD did not refuse to bargain over the change because FOP had not demanded bargaining on the subject at the time the complaint was filed.[3] The Respondent's failure to bargain in good faith did not rise to the level of a repudiation of the contract.[4]

The hearing examiner also found that MPD committed an unfair labor practice by ignoring information requests the Chairman made during the investigation.

B. Case Number 09-U-01

Criticism of the mayor and the Chief by the Chairman was published in the media on May 4, 2008. FOP alleged that in reprisal for that criticism MPD issued to him a PD 62E, a non-appealable type of discipline.[5] As quoted above, the PD 62E instructed the Chairman to satisfy all training requirements by the end of 2008. FOP alleges that by issuing that order, MPD unilaterally changed conditions of employment without bargaining and repudiated the contract. FOP also alleges that new training and performance evaluation requirements imposed on FOP officials constituted improper surveillance of their conduct of union business.[6]

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[2] Report 5.
[3] Report 21-22.
[4] Report 22.
[5] Report 22.
[6] Report 22-24.

The hearing examiner rejected FOP's claim that the PD 62E was issued as reprisal for the Chairman's May 4, 2008 statements. Training was a concern of MPD's long before May 4, 2008. The PD 62E was issued more than two months after the Chairman's statements but just four days after the final investigative report. The hearing examiner stated that it was clearly a response to the final investigative report. The hearing examiner added that the "circumstances here do not support a finding that the issuance of the PD 62E was a disciplinary action." The hearing examiner also rejected the claim of surveillance as not within the scope of the complaint.

The Hearing Examiner found that the PD 62E's imposition of training requirements was a unilateral change in employment conditions and a failure to bargain in good faith but was not a repudiation of the contract.[7]

C. Case Numbers 10-U-04

In 2009, MPD investigated the failure of the Chairman and the Steward to complete professional development training in 2008. The Chairman submitted requests for information related to the investigation. He did not receive a response. The hearing examiner found that while FOP may not be entitled to answers to most of the questions the Chairman posed, MPD had an obligation to respond to the legitimate questions and to indicate the basis for its non-response to the others. He found that MPD's failure to provide a response was a violation of its duty to bargain in good faith.

D. Case Number 10-U-05

The Union alleges that MPD's 2009 investigation of the Chairman and the Steward violated their statutory rights by investigating their compliance with inapplicable requirements and by retaliating against them for their protected activity of sending a letter on behalf of FOP questioning the Chief's attendance at professional training in 2008. The hearing examiner found that the investigation was retaliatory.

E. Case Number 10-U-10

In case number 10-U-10, FOP alleges that MPD revoked the police powers of the Chairman and the Steward for non-compliance with training in 2009. The hearing examiner found that this action was (1) inconsistent with the past practice of not requiring full-time FOP officials to attend training and thus violated MPD's duty to bargain in good faith and (2) taken in reprisal against the Chairman and the Steward for their exercise of their rights under that past practice not to attend training.

[7] Report 25.

F. Case Numbers 10-U-10 and 10-U-28

In case numbers 10-U-10 and 10-U-28, FOP alleges that MPD committed an unfair labor practice when the Chief terminated ongoing impact-and-effects bargaining on various issues including training. The Chief stated that FOP did not seek to enter negotiations in good faith because it filed an unfair labor practice complaint on the eve of a bargaining session. The complaints in those cases also allege that on December 21, 2009, the Chairman and the Steward were given a memorandum instructing them to report for training on December 23, 2009.

The hearing examiner found that both actions were unfair labor practices. As to the termination of negotiations, he stated that filing an unfair labor practice was not an act of bad faith on the part of FOP. If MPD believed that further negotiations were useless, its options were to file an unfair labor practice complaint or to seek a declaration of an impasse.[8] MPD employed neither of those options. The hearing examiner found that the order to report for training made a change to a past practice without bargaining and that the short notice given the Chairman and the Steward was a serious interference with their activities.

G. Case Number 10-U-29

As in 2009 and 2008, in 2010 MPD investigated the failure of the Chairman and the Steward to attend training the previous year. On April 2, 2010, the Chairman requested information about the investigation.

The hearing examiner found that the investigation interfered with the protected rights of the Chairman and the Steward, was undertaken despite an extension during negotiations, and was taken in reprisal against the Chairman and the Steward for their exercise of their rights under that past practice not to attend training.

F. Remedies

The hearing examiner recommended that the Board issue an order directing MPD to:

> Cease and desist from interfering with, restraining, or coercing any FOP officials in the exercise of their protected rights;
>
> Cease and desist from taking retaliatory actions against any FOP officials;
>
> Expunge the negative items from Chairman Baumann's and Executive Steward Burton's personnel files related to their absence from 2007, 2008, or 2009 training, anything related to their having been placed on non-contact status, and anything related to the revocation of their police powers; and

[8] Report 30-31, 31 n.16 (citing Exhibit 43, interest arbitration award).

Pay the FOP's reasonable costs in these matters.[9]

II. Exceptions

FOP filed exceptions arguing that (1) the hearing examiner should not have admitted exhibits 43 and 44 into the record, (2) the Board should not adopt the hearing examiner's finding that the PD 62E was not a disciplinary action, and (3) the Board should clarify the remedies to include certain remedies omitted from the hearing examiner's recommendations.

MPD filed an opposition to FOP's exceptions. MPD did not file exceptions of its own.

III. Discussion

A. Admissibility of MPD Exhibits 43 and 44

FOP objects on procedural and substantive grounds to the hearing examiner's consideration of two exhibits offered by MPD, exhibits 43 and 44. The exhibits are, respectively, a February 3, 2014 impasse arbitration award and a November 24, 2014 order of the D.C. Superior Court upholding the impasse arbitration award.

Procedurally, FOP objects that the hearing examiner admitted the exhibits after the record closed[10] but supports that objection with an executive director's statement that a *party* cannot submit additional evidence after a hearing is closed.[11] In the present case, MPD did not submit additional evidence after the hearing closed. According to FOP, "During the hearing in this matter, the MPD attempted to introduce two exhibits into the record. . . ."[12] FOP objected to the exhibits. The hearing examiner did not rule on the objection during either of the two days of the hearing,[13] but in his Report he accepted them into the record.[14] FOP claims that MPD abandoned its effort to seek admission of the exhibits by not doing so when the matter reconvened for the second and final day of the hearing.[15] But there is no requirement that a party move for admission of its exhibits on each day of a hearing or trial and no rule prohibiting a hearing examiner from ruling on evidentiary objections in his report. FOP has not identified anything procedurally improper or even unusual in the admission of the exhibits.

Substantively, FOP has failed to show how it is prejudiced by the admission of the exhibits. The impasse arbitration award, evidenced by exhibits 43 and 44, added to the parties' labor

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[9] Report 36.
[10] Exceptions 10.
[11] *Durant v. Gov't of the District of Columbia Dep't of Corrs.*, Slip Op. No. 1315 at p. 1, PERB Case No. 09-U-15 (Apr. 24, 2012) (citing *Elliott v. D.C. Dep't of Corrs.*, Slip Op. 455 at 2, PERB Case No. 95-U-06 (1995) (holding that a request to reopen a hearing will be denied absent compelling reasons)).
[12] Exceptions 4.
[13] Report 12; Exceptions 4-5.
[14] Report 13.
[15] Exceptions 10.

agreement the requirement that "[a]ll members of the bargaining unit, with no exceptions, must satisfy all required training."[16]

The hearing examiner refers to the award in connection with two subjects. The first is MPD's termination of bargaining, which FOP challenged in case numbers 10-U-10 and 10-U-28. The hearing examiner uses exhibit 43 adversely to MPD in support of his finding that MPD had no legal authority to terminate bargaining. The hearing examiner contrasts that unlawful act with MPD's forgone legal options, one of which was to seek declaration of an impasse.[17] In a footnote the hearing examiner cites exhibit 43 in support of his finding that MPD did not seek declaration of an impasse: "The question of training requirements for full-time FOP officials was eventually resolved through interest arbitration in 2014 (RX43). The interest arbitration award indicates that there was no resort to impasse[] proceedings until 2013. . ."[18] In its exceptions, FOP makes clear that it does not consider the question of training requirements resolved, but the point the hearing examiner is making is that MPD did not resort to impasse proceedings during negotiations, a finding that does not prejudice FOP.

The hearing examiner also refers to the impasse arbitration award in connection with remedies. He begins his discussion of the arguments on remedies by stating that the outcome of the interest arbitration "does not diminish the fact or the seriousness of the unfair labor practices already committed; for such offenses remedial action is appropriate."[19] This statement is consistent with FOP's position that exhibits 43 and 44 are of no relevance "regarding whether MPD committed unfair labor practices in these consolidated matters."[20]

FOP claims that the hearing examiner "used Exhibits 43 and 44 to improperly limit the remedy."[21] The hearing examiner noted that in two prior cases the Board had ordered MPD to cease requiring the Chairman and the Steward to attend in-service training for the balance of the collective bargaining agreement without first negotiating with FOP. "In light of the fact that a new collective bargaining agreement is now in effect that requires the attendance of these officials at training, such a remedial action is not necessary," he stated.[22] Despite its claim that this is an improper limitation on remedies, FOP did not request in its post-hearing brief, and does not request in its exceptions, an order that MPD cease requiring the Chairman and the Steward to attend in-service training for the balance of the collective bargaining agreement without first negotiating with FOP. Because the hearing examiner used the exhibits to exclude a remedy that FOP does not request, FOP has not shown how it has been prejudiced nor has it shown how the remedy was improperly limited.

FOP asserts that the impasse arbitration award "is irrelevant and does nothing to expunge the effects of the unfair labor practices."[23] It is unclear whether FOP contends that the award is

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[16] Report 13.
[17] *Supra* p. 4.
[18] Report 31 n.16.
[19] Record 6.
[20] Exceptions 4, 9.
[21] Exceptions 6.
[22] Report 35.
[23] Exceptions 9.

irrelevant not only to unfair labor practice liability but also to the remedies that should be awarded. As noted, the hearing examiner agrees with FOP that the exhibits are irrelevant to the issue of whether MPD committed unfair labor practices in requiring training. Indeed, he found such unfair labor practices in all the cases in which the required training was alleged to be a statutory violation.[24] However, the hearing examiner manifestly found that the exhibits were of probative value to his consideration of remedies. Board Rule 550.16 requires the hearing examiner to "admit proffered evidence that is of probative value." The only exception the rule provides is for "[e]vidence that is cumulative or repetitious." Issues concerning the probative value of evidence are reserved for the hearing examiner.[25]

As MPD states in its opposition, "the Complainant's Exception only involves a disagreement with the Hearing Examiner's decision to admit these exhibits."[26] The disagreement relates to FOP's dissatisfaction with the outcome of the impasse arbitration rather than the outcome these consolidated cases.

B. Disciplinary Nature of the PD 62E

As discussed, *supra* page 3, the hearing examiner rejected FOP's claim that the PD 62E was retaliatory. He explained his reasons for doing so as follows:

> The argument that the issuance of the PD 62E to Bauman was in reprisal for his having publicly criticized the Mayor and the Chief of Police is not persuasive. As discussed above, the issue of attendance at training by full-time FOP officials had been a matter of concern for the MPD for some time, long preceding Bauman's May 4, 2008 public statements. The PD 62E was issued on July 11, more than two months after the public statements, and was clearly a response to the findings of Nischan's Final Investigative Report (CX17/RX4).[27]

The hearing examiner then went on to say

> The circumstances here do not support a finding that the issuance of the PD 62E was a disciplinary action. The Complainant misreads the court's findings in *Hawkins v. D.C.*[28] and, in general, places form over substance. In *Hawkins*, the court did not determine that a PD 62E was a form of discipline, but rather that the specific contents of the PD 62E issued to the plaintiff were disciplinary in nature.[29]

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[24] Namely, case numbers 08-U-69, 09-U-01, 10-U-05, 10-U-10, 10-U-28, and 10-U-10.
[25] *Hoggard v. D.C. Pub. Schs.*, 46 D.C. Reg. 4837, Slip Op. No. 496 at p. 3, PERB Case No. 95-U-20 (1996).
[26] Opposition p. 7.
[27] Report 24.
[28] 923 F. Supp. 2d 128 (D.D.C. 2013), *appeal dismissed*, No. 13-7125 (D.C. Cir. Jan. 21, 2014).
[29] Report 24.

FOP excepts to the finding that the PD 62E was not disciplinary, but FOP does not argue that the disciplinary nature of the PD 62E is an element of any unfair labor practice that it has alleged. An element of a *prima facie* case for retaliation against protected activities is that the employer took adverse employment actions against the employee. An adverse action does not have to be a disciplinary action.[30] For example, the hearing examiner found that the 2009 and 2010 investigations raised in case numbers 10-U-05 and 10-U-29, respectively, were retaliatory acts. The court in *Hawkins v. District of Columbia*, relied upon by FOP, noted that failing to hold a birthday party for a public employee or requiring additional hours of work to be considered for a promotion have been held to be adverse actions for purposes of the cause of action that was before the court, a First Amendment retaliation claim.[31] The court began its analysis of whether the plaintiff, Detective William Hawkins, prevailed on a First Amendment retaliation claim with the question of "whether the Government took a constitutionally significant 'adverse action' against Hawkins."[32] After considering the testimony on the PD 62E (or Documentation of Counseling) that MPD issued to Hawkins in that case, the court held that "[a]s a matter of law . . . the Documentation of Counseling constitutes an 'adverse action' for First Amendment purposes."[33]

In the present case, the hearing examiner did not make a finding on whether the PD 62E was an adverse action for purposes of the Comprehensive Merit Personnel Act. He did not need to do so because he found that another element of a *prima facie* case for retaliation against protected activities was absent, i.e., a nexus between the protected activity and the asserted retaliation.[34] Because that essential element is missing, characterizing the PD 62E as an adverse action, or a disciplinary action, would not lead to the conclusion that FOP proved a claim for reprisal for protected activities. FOP does not contend that a disciplinary action is an element of some other unfair labor practice that it made. Again, FOP has failed to show how it is prejudiced by the finding to which it excepts.

Even if FOP were prejudiced by that finding, its exception would be without merit. Contrary to FOP's assertions, neither *Hawkins* nor the Board's decision in *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department* ("Slip Op. No. 1391"),[35] compelled the hearing examiner to characterize the PD 62E as an adverse action or a disciplinary action. The court in *Hawkins* made a finding based upon testimony for purposes of a different, albeit analogous, cause of action. The court used the expression "as a matter of law" because of case law holding that for that cause of action the threshold question of whether the government took an adverse action against the plaintiff is question of law for the

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[30] *F.O.P./Metro. Police Dep't Labor Comm. (on behalf of Daniels) v. Metro. Police Dep't*, 60 D.C. Reg. 12080, Slip Op. No. 1403 at pp. 3-4, PERB Case No. 08-U-26 (2013).
[31] *Id.* (citing *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 n.8 (1990); *Tao v. Freeh*, 27 F.3d 635, 639 (D.C.Cir.1994)).
[32] 923 F. Supp. 2d at 137.
[33] *Id.* at 138.
[34] Report 24. *See Dupree v. F.O.P./Dep't of Corrs. Labor Comm.*, 46 D.C. Reg. 4034, Slip Op. 568 at p. 3, PERB Case Nos. 98-S-08 and 98-U-23 (1998).
[35] 60 D.C. Reg. 9212, Slip Op. No. 1391, PERB Case Nos. 09-U-52 and 09-U-53 (2013).

court.[36] FOP argues that the Board in Slip Op. No. 1391 determined that the PD 62E is a form of discipline and that this determination is precedent and the law of the case. The Board's finding in Slip Op. No. 1391 that "the Hearing Examiner did not err in equating PD 62E's with 'discipline'" is by its terms clearly not binding precedent that a PD 62E is always a form of discipline. It is not the law of the case either because Slip Op. No. 1391 is a different case. As FOP acknowledges, the doctrine of the law of the case posits that a decision should govern the same issues in later stages of the *same* case.[37]

C. Omitted Remedies

In its exception concerning remedies, FOP points out that although the hearing examiner found in many of the consolidated cases that MPD breached its duty to bargain in good faith and made unilateral changes in employment conditions without bargaining, he does not recommend that the Board order MPD to cease and desist from failing to bargain in good faith with FOP and to cease and desist from making unilateral changes to FOP members' conditions of employment without first bargaining with FOP. In addition, FOP notes that the hearing examiner did not require MPD to post a notice of its violations as is standard.

This exception has merit. Contrary to MPD's assertion in its opposition, a general order that MPD desist from failing to bargain in good faith and from making unilateral changes to conditions of employment without bargaining does not compel MPD to cease requiring whatever training is now called for in the parties' labor agreement. The omissions noted by FOP appear to be oversights. The hearing examiner's list of the remedies requested by FOP leaves out FOP's request for an order compelling MPD to conspicuously post no less than two notices of its violations and PERB's Order in each MPD building.[38]

IV. Conclusion

Based on the foregoing, the Board finds that the hearing examiner's findings are reasonable, supported by the record, and consistent with Board precedent. As a result, we adopt the hearing examiner's factual findings and ultimate determination that MPD committed the unfair labor practices discussed above in violation of D.C. Official Code § 1-617.04 (a)(1) and (5). With the preceding additions, we adopt the recommended remedies of the hearing examiner as set forth below in the order.

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[36] 923 F. Supp. 2d at 137 (citing *Tao v. Freeh*, 27 F.3d 635, 637 (D.C.Cir.1994) ("the requirement that Tao submit new lengthy promotion-application materials is sufficient, as a matter of law, to constitute an 'adverse action' for constitutional purposes")).

[37] Exceptions 11 (citing *Flanagan v. Wyndham Int'l, Inc.*, 231 F.R.D. 98, 103 n.2 (D.D.C. 1995)). For an application of the law of the case under the appropriate circumstances, *see D.C. Pub. Schs. v. Council of Sch. Officers, Local 4*, Slip Op. No. 1525 at 5, PERB Case No. 13-A-09 (June 25, 2015).

[38] Post-Hearing Br. for Complainant 103; Report 34.

ORDER

IT IS HEREBY ORDERED THAT:

1. MPD shall cease and desist from further interference with, coercion of, and retaliation against FOP officials for engaging in protected activities.

2. MPD shall expunge the negative items from Chairman Baumann's and Executive Steward Burton's personnel files related to their absence from 2007, 2008, or 2009 training, anything related to their having been placed on non-contact status, and anything related to the revocation of their police powers.

3. MPD shall cease and desist from failing to bargain in good faith with FOP and cease and desist from making unilateral changes to FOP members' conditions of employment without first bargaining with FOP.

4. MPD shall conspicuously post where notices to employees are normally posted within ten (10) days from the issuance of this Decision and Order a notice that the Board will furnish to MPD. The notice shall remain posted for thirty (30) consecutive days.

5. MPD shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from receipt of the notice that it has been posted accordingly.

6. MPD shall pay the FOP's reasonable costs in these matters

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.

August 20, 2015

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Numbers 08-U-69, 09-U-01, 10-U-04, 10-U-05, 10-U-10, 10-U-28, and 10-U-29 is being transmitted to the following parties on this the 25th day of August, 2015.

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