Government of the District of Columbia
Public Employee Relations Board

In the Matter of: Fraternal Order of Police / Metropolitan Police Department Labor Committee, Complainant, v. District of Columbia Office of Police Complaints, and Philip K. Eure, and Christian Klosner, Respondents.	PERB Case No. 12-U-16 **Administrative Dismissal** Opinion No. 1364

EXECUTIVE DIRECTOR'S ADMINISTRATIVE DISMISSAL

I. Statement of the Case

Complainant Fraternal Order of Police/Metropolitan Police Department Labor Committee ("Complainant" or "FOP" or "union") filed an Unfair Labor Practice Complaint ("Complaint") against the District of Columbia Office of Police Complaints ("OPC" or "Agency"), OPC Executive Director Philip K. Eure ("Director Eure"), and OPC Deputy Director Christian Klossner ("Deputy Director Klossner") (collectively "Respondents"), alleging Respondents violated the Comprehensive Merit Personnel Act ("CMPA"), D.C. Code § 1-617.04(a)(1), when they failed and refused to provide FOP with documents it had requested via an information

request (Complaint at 6). In addition, FOP alleged that Respondents "failed and refused to bargain in good faith," in violation of D.C. Code § 1-617.04(a)(5). *Id.*

In its Answer to Complaint ("Answer"), OPC denied FOP's allegations. (Answer at 1-3). In addition, OPC raised affirmative defenses that the Collective Bargaining Agreement ("CBA") between FOP and the District of Columbia Metropolitan Police Department ("MPD") to which FOP cited in its Complaint does not "include [the] Respondents." (Answer at 3). Therefore, OPC argued that "[t]here is no privity of contract between Complainant and Respondents," and hence, OPC was "legally incapable of violating the referenced Agreement." *Id.*

In conjunction with its Answer, OPC simultaneously filed a Motion to Dismiss Individual Respondents ("Motion to Dismiss"), contending that Director Eure and Deputy Director Klossner should be dismissed from the Complaint. *Id.* at 6. OPC contended that Deputy Director Klossner was acting in his official capacity when he responded to FOP's information request and that the Complaint against him should be dismissed because suits brought against District officers acting "in their official capacity should be treated as suits against the District." *Id.* at 4, 6 (quoting *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 59 D.C. Reg. 6579, Slip Op. No. 1118, PERB Case No. 08-U-19 (2011)). Furthermore, OPC argued that the Complaint against Director Eure should be dismissed because FOP did not aver an "allegation of any action taken by [Director] Eure" and that he "appear[ed] to have been named solely because he is the Director of the Agency." *Id.* at 4, 6.

FOP later filed an Opposition to Motion to Dismiss Individual Respondents ("Opposition to Motion to Dismiss"), in which it contended that the Director Eure and Deputy Director Klossner were "proper parties to this action and should not be dismissed." (Opposition to Motion to Dismiss at 1). Notwithstanding citing numerous older Board cases to support its contention, FOP recognized that "the Board has issued several recent orders confirming its position against naming individuals," and asked the Board to "reconsider its position." *Id.* at 4-5.

II. Background

On or about November 3, 2011, FOP, through its representative, Michael Millett ("Mr. Millett"), sent an information request to Director Eure of OPC, requesting information related to OPC's use of one-way mirrors during interviews with police officers. (Compliant, Exhibit #2). In the request, Mr. Millett stated that the request was being made pursuant to D.C. Code § 1-617.04(a)(5) and Article 10 of the Collective Bargaining Agreement ("CBA") between "the District of Colombia and the FOP." *Id.*

On or about November 14, 2011, OPC Deputy Director Klossner sent a written response to FOP denying the request for information. (Complaint, Exhibit #3). In the response, Mr. Klossner noted, "[FOP is] making these requests pursuant to D.C. Code § 1-617.04(a)(5), which prohibits the District from refusing to collectively bargain in good faith with its exclusive representative, and Article 10 of the [CBA] between [the Metropolitan Police Department ("MPD")] and FOP, which states: '[t]he parties shall make available to each other's duly designated representatives ... any information, statistics and records relevant to negotiations or necessary for proper administration of the terms of the [CBA].'" *Id.* In short, OPC stated that it was denying FOP's request for information because "there is no bargaining obligation between OPC and FOP," and therefore, "§ 1-617.04(a)(5) is not applicable." *Id.* Moreover, OPC contended, as it "is not a party to the CBA between MPD and FOP, it is not covered by the agreement" and "not subject to the CBA's processes." *Id.*

Thus, FOP filed a Complaint, arguing that D.C. Code § 1-617.04(a)(5) and its CBA with the MPD applies to all employees of the District of Colombia ("District") because "the applicable [CBA] is between the FOP and the [District], not just the [MPD]." (Complaint at 5). Further, FOP contended that "a clear reading of the [CMPA] reveals that the [District] is the employer of all its employees", and that therefore, "for the purposes of collective bargaining, the District is the employer." *Id.* FOP concluded that because OPC was "created by the D.C. Council (which also created MPD and the CMPA)," an "unfair labor practice [complaint] can properly be brought against the OPC for a determination as to whether they [*sic*] violated a statutory right." *Id.*

FOP further argued in the Complaint that D.C. Code § 1-617.04(a)(1) prohibits OPC from engaging in unfair labor practices. *Id.* FOP averred that subsection (a)(1) prohibits the District, its agents, and representatives from "[i]nterfering, restraining, or coercing any employee in the exercise of the rights guaranteed by [the CMPA]." *Id.* FOP's argument is that the "right to request information is a statutory right, not a contractual right, and OPC[,] as an agent or representative of the District, must provide the requested information in response" to its (FOP's) request. *Id.* at 6 (citing *American Federation of Government Employees, Local 2741 v. District of Colombia Parks and Recreation*, 50 D.C. Reg. 5049, Slip Op. No. 697, PERB Case No. 00-U-22 (2003), and *Calmat Co. and International Union of Operating Engineers, Local 12, AFL-CIO*, 331 NLRB 1084, 1094-1095 (2000) (internal citation omitted)). FOP contends that although its specific request for information "was made pursuant to D.C. Code § 1-617.04(a)(5) as well as Article 10 of the contract, the request was based upon a statutory right." *Id.* It reasoned that because District employees have a statutory right to file a grievance, they likewise have a statutory right "to gather information in support of [a grievance]." *Id.* at 6-7 (citing *AFGE v. DC Parks and Recreation, supra*, Slip Op. No. 697, PERB Case No 00-U-22).

Furthermore, FOP argued that statutory rights under the CMPA that are raised "in the context of the Union exercising its contractual rights" are "properly before the Board as an Unfair Labor Practice." *Id.* at 7 (quoting *AFGE v. DC Parks and Recreation, supra*, Slip Op. No. 697, PERB Case No 00-U-22).

FOP concludes in its Complaint that under D.C. Code § 1-617.04(a)(5), OPC and its agents committed an unfair labor practice when it failed and refused to provide FOP with the "relevant and necessary information" that it requested. *Id.* (citing *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 59 D.C. Reg. 3386, Slip Op. No. 835, PERB Case No. 06-U-10 (2006)). FOP argues that because "the manner in which investigatory interviews are conducted is germane to the CBA (Article 13) and bears directly on the potential discipline that an officer can receive due to an unfavorable OPC finding," and because OPC did not challenge the "relevance or necessity" of the information FOP requested, OPC was obligated under D.C. Code § 1-617.04(a)(5) to give FOP the information. *Id.* Hence, FOP asserts OPC committed an unfair labor practice in violation of the CMPA when it failed and refused to produce and provide the requested information. *Id.*

In its Answer, OPC rejects FOP's contention that FOP's CBA is binding upon OPC as an agent or representative of the District. (Answer at 1-2). OPC pointed to the express language in section 1 of the CBA's preamble, which states, "[t]his Collective Bargaining Agreement ... is entered into between the Metropolitan Police Department ... and the Fraternal Order of Police/Metropolitan Police Department Labor Committee," to refute FOP's argument. *Id.* (quoting Complaint, Exhibit #1 at 1). OPC reasons that because there was "no privity of contract between [FOP] and [OPC]", OPC was "legally incapable of violating the referenced Agreement." *Id.* at 3.

Further, OPC contends that even if the Board finds that OPC was subject to FOP's and MPD's CBA, the Board would not have jurisdiction to hear the case because FOP's allegations were strictly contractual in nature, and did not constitute violations of the CMPA. *Id.* at 4-5 (citing *Fraternal Order of Police v. District of Columbia Metropolitan Police Department*, 46 D.C. Reg. 7605, Slip Op. No. 384, PERB Case No. 94-U-23 (1999); *American Federation of State, County and Municipal Employees, Local 2921 v. District of Columbia Public Schools*, 42 D.C. Reg. 5685, Slip Op. No. 339, PERB Case No. 92-U-08 (1992); *Washington Teachers' Union, Local 6, American Federation of Teachers, AFL-CIO v. District of Colombia Public Schools*, 42 D.C. Reg. 5488, Slip Op. No. 337, PERB Case No. 92-U-18 (1995); and *American Federation of Government Employees, Local Union No. 3721 v. District of Columbia Fire*

Department, 39 D.C Reg. 8599 at 8603, Slip Op. No. 287 at p. 4, PERB Case No. 90-U-11 (1991)).

Additionally, OPC rejects FOP's arguments that OPC violated D.C. Code § 1-617.04(a)(5) when it refused to comply with FOP's information request. *Id.* at 5. OPC asserts that it could not have violated D.C. Code § 1-617.04(a)(5), which makes it an unfair labor practice to refuse "to bargain collectively in good faith with the exclusive representative," as OPC was "under no obligation to bargain with [FOP] because ... [OPC and its agents] are not signatories [to the CBA]," and there is no article of the CBA that obligates OPC to give information to FOP. *Id.*

In addition, OPC motioned the Board to dismiss FOP's complaint against Director Eure and Deputy Director Klossner. (Answer at 4, 6). As stated previously, OPC contended that Deputy Director Klossner was acting in his official capacity when he responded to FOP's information request and that the Complaint against him should be dismissed because suits brought against District officers acting "in their official capacity should be treated as suits against the District." *Id.* (quoting *FOP v. MPD, supra*, 59 D.C. Reg. 6579, Slip Op. No. 1118, PERB Case No. 08-U-19). Furthermore, OPC argued that the Complaint against Director Eure should be dismissed because FOP did not aver an "allegation of any action taken by [Director] Eure" and that he "appear[ed] to have been named solely because he is the Director of the Agency." *Id.*

Finally, OPC denies FOP's assertion that the requested information was "necessary" to FOP's ability to protect the interests of its members during OPC investigations. (Answer at 3).

In its Opposition to Motion to Dismiss, FOP contends that Director Eure and Deputy Director Klossner were "proper parties to this action and should not be dismissed." (Opposition to Motion to Dismiss at 1). FOP recognizes that "the Board has issued several recent orders confirming its position against naming individuals," but asks the Board to "reconsider its position." *Id.* at 4-5.

III. Analysis

A. Individual Respondents

The Board's position regarding the naming of individual respondents is clear. Suits against District officials in their official capacities should be treated as suits against the District. *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). Moreover, the D.C. Superior Court recently 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). *Nota bene*, FOP filed this action prior to the decisions in the aforementioned cases. Henceforth, however, FOP must not name individuals acting in their official capacities as respondents in actions it brings before the Board. Therefore, OPC's motion to dismiss Director Eure and Deputy Director Klossner from the Complaint is granted.

B. Standing

FOP claimed in its initial information request and in its Complaint that OPC had a duty under Article 10 of its CBA with MPD, and under D.C. Code § 1-617.04(a)(5) of the CMPA, to provide it with the information it requested.

1. Article 10 of the CBA

The PERB agrees with the Respondent that FOP does not have standing to bring what is essentially a breach of contract allegation against OPC under Article 10 of the CBA, as OPC is not a party to the CBA in question.

The parties to a contract can be reasonably determined by the expressed identification of the parties in the contract itself, when the body of the agreement consistently implies who the parties are, and by who signed and executed the contract. *YA Global Investments, L.P. v. Cliff*, 15 A.3d 857, 862 (N.J. Super. Ct. App. Div. 2011). What is more, non-parties owe no contractual duty to contracting parties. *Charlton v. Mond*, 987 A.2d 436, 441 (D.C. 2010) (citing *Aronoff v. Lenkin*, 618 A.2d 669, 684 (D.C. 1992)); see also *Fort Lincoln Civic Ass'n, Inc. v. For Lincoln New Town Corp.*, 944 A.2d 1055, 1063 (D.C. 2008) (holding that generally, a stranger to a contract may not bring a claim on the contract) (citing *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912), and *Chong Moe Dan v. Maryland Cas. Co. of Baltimore*, 93 A.2d 286, 288 (D.C. App. 1953) (holding that a person who is not a party to a contract or in privity with it has no standing to enforce the contract) (internal citation ommitted). Put simply, a third person or entity that is not expressly identified as a party in the contract, is not implied to be a party by the terms of the contract, and was not a signer or executor of the contract, owes no obligation to the parties of the contract and is not bound by the terms or requirements of the contract. *Id.* and *YA Global Investments, L.P. v. Cliff, supra.*

In the instant case, the title page of the CBA reads that it is the "Labor Agreement between the Government of the District of Colombia Metropolitan Police Department and the Fraternal Order of Police MPD Labor Committee." (Complaint, Exhibit #1). In addition, Article 1, Section 1 of the CBA states, "[t]his Collective Bargaining Agreement ... is entered into between the Metropolitan Police Department ... and the Fraternal Order of Police/Metropolitan Police Department ... Labor Committee." *Id.* Throughout the entire body of the agreement, MPD and FOP are the only two (2) parties upon which obligations and requirements are bestowed. Moreover, the CBA's signers were, "[f]or the District of Colombia Government", the Chief of Police, his Executive Assistant, and numerous other MPD staff members, and "[f]or the Fraternal Order of Police/Metropolitan Police Department Labor Committee", the FOP Chairman, the Vice-Chairman, and other FOP staff and negotiators. *Id.* Therefore, it is reasonable to determine that the only parties to the CBA in question are MPD and FOP. *YA Global Investments, L.P. v. Cliff, supra.* Furthermore, it is likewise reasonable to determine that OPC is not a party to the CBA between FOP and MPD as: 1) OPC is not identified in the CBA as a party; 1) OPC is not referred to in any of the CBA's terms; and 3) no representative from OPC signed or executed the CBA. *Id.*

In addition, the terms of a contract should be read and understood in accordance with the "plain meaning" of the words used. *Mittal Steel USA ISG, Inc. v. Bodman*, 435 F.Supp.2d 106, 108-09 (Dist. Court, Dist. of Columbia 2006) (citing *Lee v. Flintkote*, 593 F.2d 1275, 1280 (D.C. Cir. 1979)0. The plain meaning of a contract is determined by "the language used by the parties to express their agreement." *Id.* (quoting *WMATA v. Mergentime Corp.*, 626 F.2d 959, 961 (D.C. Cir. 1980)). A contract can only be considered ambiguous when its terms are "reasonably susceptible of different constructions or interpretations." *Id.* (quoting *1901 Wyoming Ave. Coop. Assoc. v. Lee*, 345 A.2d 456, 461 n. 7 (D.C. 1975)). Only if the contract is ambiguous may extrinsic evidence outside of the four (4) corners of the document be considered to clarify the intentions of the parties. *Id.* (citing *Consol. Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1546 (D.C. Cir. 1985)).

Erroneously, FOP claims that Article 10 of the CBA empowers it to seek and receive information from OPC. (Complaint at 3, 5-7, and Exhibit #2). Section 1 of Article 10 states, "*[t]he Parties* shall make available *to each other's* duly designated representatives, upon reasonable request, any information, statistics and records relevant to negotiations or necessary for proper administration of the terms of this Agreement." (Complaint, Exhibit #2 at 8) (emphases added). In the instant matter, "the Parties" and "to each other" are the legally operative terms. They plainly dictate, without ambiguity, that the obligation to exchange information only applies between MPD and FOP. *Mittal Steel USA ISG, Inc. v. Bodman. supra; Charlton v. Mond, supra*; and *YA Global Investments, L.P. v. Cliff, supra.* Furthermore, there is

nothing in the four (4) corners of Article 10 or the CBA to demonstrate that the CBA imposes any contractual requirement to request or disclose information on anyone who is not MPD or FOP. *Mittal Steel USA ISG, Inc. v. Bodman. supra*; and *Charlton v. Mond, supra.*

In its Complaint, FOP contends that its CBA is between it and the entire District of Colombia government, not just between it and MPD. (Complaint at 3, 5-7). However, such an argument cannot be squared with the CBA's plain and unambiguous identification of the parties, noted above, and therefore must fail. See *Mittal Steel USA ISG, Inc. v. Bodman. supra*; see also *American Federation of Government Employees, Local 2924 v. Federal Labor Relations Authority*, 470 F. 3d 375, 377 & 381 (D.C. Cir. 2006) (internal citations omitted). The only proper and legally sound reading of the CBA is that its terms only apply between FOP and MPD, not FOP and all other District agencies. *Mittal Steel USA ISG, Inc. v. Bodman. supra*; and *Charlton v. Mond, supra*; and *YA Global Investments, L.P. v. Cliff, supra.* To say otherwise would be to imply that a union's agreement with one (1) agency in the District is a binding contract upon all of the District's agencies. Simply put, at best, such an argument is unwarranted and ethereal. Basic contract law dictates that such is not the case. *Id.* OPC is not bound by the terms of the CBA between FOP and MPD any more than the Department of Health or some other non-party agency is. *Id.*

As such, FOP does not have standing under Article 10 of the CBA to bring an unfair labor practice complaint against OPC for failing to abide by the terms of the CBA between it (FOP) and MPD because, as reasoned herein, OPC is not a party to the CBA. *Id.* and *Chong Moe Dan v. Maryland Cas. Co. of Baltimore, supra.*

2. D.C. Code § 1-617.04(a)(5)

Likewise, FOP does not have standing to bring an unfair labor practice complaint against OPC under D.C. Code § 1-617.04(a)(5). D.C. Code § 1-617.04(a)(5) prohibits the District, its agents, and representatives from refusing to bargain collectively in good faith with the exclusive representative. Generally, agencies are obligated to provide documents in response to a request made by the union. *American Federation of Government Employees, Local 631 v. District of Columbia Water and Sewer Authority*, 59 D. C. Reg. 3948, Slip Op. No. 924 at p. 5-6, PERB Case No. 08-U-04 (2007) (citing *Teamsters, Local 639 and 730 v. District of Columbia Public Schools*, 37 D.C. Reg. 5993, Slip Op. No. 226, PERB Case No. 88-U-10 (1989) and *Psychologists Union, Local 3758 of the District of Columbia Department of Health, 1199 National Union of Hospital and Health Care Employees, American Federation of State County and Municipal Employees, AFL-CIO v. District of Columbia Department of Mental Health*, 54 D.C. Reg. 2644, Slip Op. No. 809, PERB Case No. 05-U-41 (2005). Moreover, the United

States Supreme Court has held that an employer's duty to disclose information "unquestionably extends beyond the period of *contract negotiations* and applies to labor-management relations *during the term of an agreement.*" *National Labor Review Board v. Acme Industrial Co.*, 385 U.S. 32, 36 (1967) (emphases added).

The object that establishes and defines the obligation to "bargain collectively"—and in this case, the authority to seek and receive information—is the collective bargaining agreement. The CBA cited and relied upon by FOP in its November 3, 2011, request for information and in its Complaint defines and establishes a right to seek and receive information between FOP and MPD, but it does not establish rights between FOP and OPC. Indeed, FOP and OPC have not engaged in any "contract negotiations" regarding information requests. *NLRB v. Acme Industrial, supra.* Likewise, FOP and OPC are not currently in the "term [(time period)] of an agreement" governing information requests. *Id.* As such, OPC was not obligated to "bargain collectively in good faith" with FOP and was not obligated to provide FOP with the information it requested under D.C. Code § 1-617.04(a)(5), as no collective bargaining agreement or requirement to bargain existed between FOP and OPC. *Id.*

Therefore, FOP lacks standing to allege under D.C. Code § 1-617.04(a)(5) that OPC failed to bargain with it in good faith.

C. Remaining Issues

Pursuant to the PERB's finding that FOP lacks standing, under the specific facts alleged, to bring an unfair labor practice against OPC under Article 10 of FOP's CBA with MPD or under D.C. Code § 1-617.04(a)(5), it is not necessary for the PERB to address FOP's contention that the information requested was necessary to its ability to represent its members, or OPC's argument that the Board lacks jurisdiction over this matter because the alleged violations were contractual rather than statutory.

D. Dismissal

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)).

When considering a dismissal, the PERB 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)).

Pursuant to its investigation, PERB finds, under the specific facts and legal authority cited by FOP in its November 3, 2001, information request and in its Compliant, FOP does not have standing to allege an unfair labor practice against OPC under Article 10 of FOP's CBA with MPD or under D.C. Code § 1-617.04(a)(5). Viewing the contested facts in the light most favorable to the Complainant still does not change the fact that Article 10 and D.C. Code § 1-617.04(a)(5) do not require OPC to provide FOP with the information it requested because there is no privity of contract between FOP and OPC to establish such an obligation. *FOP v. MPD*, *supra*, 59 D.C. Reg. 5427, Slip Op. No. 984 at p. 6, PERB Case No. 08-U-09. As such, FOP has not asserted any allegations that, even if proven, would demonstrate a statutory violation of the CMPA. *Id.* Therefore, in accordance with PERB Rules 520.8 and 500.4, this matter is administratively dismissed.[1]

February 19, 2013
Date

Ondray T. Harris
Executive Director

[1] The PERB notes that the information FOP seeks could be requested in accordance with the District of Columbia Freedom of Information Act (FOIA) (D.C. Code §§ 2-531 et seq.).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 12-U-16, Slip Op. No. 1364, was transmitted via File & ServeXpress and e-mail to the following parties on this the 19th day of February, 2013.

Marc L. Wilhite
Pressler & Senftle, P.C.
1432 K Street, N.W.
Washington, DC 20005
mwilhite@presslerpc.com

File & Serve and E-MAIL

Dean S. Aqui
DC OLRCB
441 4th St, N.W.
Suite 820 North
Washington, DC 20001
dean.aqui@dc.gov

File & Serve and E-MAIL

Colby J. Harmon, Esq.
Attorney-Advisor