Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

Government of the District of Columbia

Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police, District of Columbia Housing Authority Labor Committee,	PERB Case No. 11-U-23
Complainant,	Opinion No. 1107
v.	**Motion to Dismiss**
District of Columbia Housing Authority,	
Respondent.	

DECISION AND ORDER ON MOTION TO DISMISS

I. Statement of the Case

The Fraternal Order of Police/District of Columbia Housing Authority Labor Committee ("Complainant", "Union" or "FOP") filed the instant Unfair Labor Practice Complaint ("Complaint") against the District of Columbia Housing Authority ("Respondent", "DCHA" or "Agency"). The Complainant is alleging that the Respondent violated D.C. Code § 1-617.01 and § 1-617.04 of the Comprehensive Merit Personnel Act ("CMPA") due to Respondent's alleged statements to Union members. (See Complaint at p. 2).

DCHA filed an Answer to the Unfair Labor Practice Complaint ("Answer") denying any violation of the CMPA. DCHA denies the factual allegations that Mr. Sinclair made anti-union comments to Union members, and requests that the Board dismiss the Union's Complaint. (See Answer at p. 2). The Union's Complaint and DCHA's Answer and DCHA's Motion to Dismiss are before the Board for disposition.

II. Discussion

The Union alleges the following facts in support of its Complaint:

> 5. Paul Sinclair was a member of the Union until he was removed from the rolls on or about November 16, 2010. That action was taken because he had held the position of investigator which was not a position within the Union's certification.
>
> 6. On or about February 5, 2011, Management promoted Investigator Sinclair to the rank of sergeant. Shortly after his promotion to effect, Sgt. Sinclair approached at least one member of the Union and made derogatory comments about it and its current chairman, Yvonne Smith. Sgt. Sinclair also urged that at least one member undertake to oppose Chairman Smith in an effort to remove her from office.
>
> 7. The actions of Respondent, through its supervisor, are interfering with the Petitioner and its members in the exercise of their rights under D.C. Code §1-617.01, et seq., to discourage membership in and support of Petitioner's organization, all in violation of D.C. Code §1-617.04.

(Complaint at p. 2).

As a remedy, the Union asks that the Board order DCHA:

> a. To desist from violating the provisions of D.C. Code §1-617.04 and, specifically, from interfering with the exercise of Petitioner's rights, by falsely accusing it of failing to represent its members, by undermining its leadership, and by encouraging discord within its membership.
>
> b. To recommend disciplinary action against Sergeant Sinclair and any other supervisor found to have violated Petitioner's rights;
>
> c. To post a notice in a conspicuous location in the office of Respondent's chief executive officer and its chief of police admitting the violations herein alleged and stating that henceforth it will cease and desist said violations; and
>
> d. To pay petitioner's reasonable costs, including attorney's fees, in prosecuting this action.

(Complaint at pgs. 2-3).

DCHA denies any violation of the CMPA. In addition, DCHA asks that the Board dismiss the Union's Complaint. (See Answer at p. 3).

III. Motion to Dismiss

DCHA denies the factual allegations that Mr. Sinclair made anti-union comments to Union members and requests that the Board dismiss the Union's Complaint on this basis. (See Answer at p. 2).

The Board has held that while a Complainant need not prove their case on the pleadings, they must plead or assert allegations that, if proven, would establish the alleged violations of the CMPA. See *Virginia Dade v. National Association of Government Employees, Service Employees International Union, Local R3-06*, 46 DCR 6876, Slip Op. No. 491 at p. 4, PERB Case No. 96-U-22 (1996); and see *Gregory Miller v. American Federation of Government Employees, Local 631, AFL-CIO and D.C. Department of Public Works*, 48 DCR 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994); See also *Doctors' Council of District of Columbia General Hospital v. District of Columbia General Hospital*, 49 DCR 1137, Slip Op. No. 437, PERB Case No. 95-U-10 (1995). Furthermore, the Board views contested facts in the light most favorable to the Complainant in determining whether the Complaint gives rise to an unfair labor practice. See *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 20*, 40 DCR 1751, Slip Op. No. 303, PERB Case No. 91-U-17 (1992). Without the existence of such evidence, Respondent's actions cannot be found to constitute the asserted unfair labor practice. Therefore, a Complaint that fails to allege the existence of such evidence, does not present allegations sufficient to support the cause of action." *Goodine v. FOP/DOC Labor Committee*, 43 DCR 5163, Slip Op. No. 476 at p. 3, PERB Case No. 96-U-16 (1996).

The Union alleges that DCHA violated D.C. Code § 1-617.01of the CMPA, which states:

> (a) The District of Columbia government finds and declares that an effective collective bargaining process is in the general public interest and will improve the morale of public employees and the quality of service to the public.
>
> (b) Each employee of the District government has the right, freely and without fear of penalty or reprisal:
>
> (1) To form, join, and assist a labor organization or to refrain from this activity;
>
> (2) To engage in collective bargaining concerning terms and conditions of employment, as may be appropriate under this law and rules and regulations, through a duly designated majority representative; and

> (3) To be protected in the exercise of these rights.
>
> (c) The Mayor or appropriate personnel authority, including his or her or its duly designated representative(s), shall meet at reasonable times with exclusive representative(s) of bargaining unit employees to bargain collectively in good faith.
>
> (d) Subsection (b) of this section does not authorize participation in the management of a labor organization or activity as a representative of such an organization by a supervisor, or management official or by an employee when the participation or activity would result in a conflict of interest or otherwise be incompatible with law or with the official duties of the employee. Supervisor means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment. The definition of supervisor shall include an incumbent of a position which is classified at a level higher than it would have been had the incumbent not performed some or all of the above duties.

In addition, the Union contends that violations of the following provisions: (1) D.C. Code §1-617.04(a)(1) (2001 ed.), provides that "[t]he District, its agents and representatives are prohibited from: . . . [i]nterfering, restraining or coercing any employees in the exercise of the rights guaranteed by this subchapter[.]"[1]; (2) D.C. Code § 1-617.04(a)(3) provides that "[d]iscriminating in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization, except as otherwise provided in this chapter; and D.C. Code § 1-617.04(a)(5) provides that "[r]efusing to bargain collectively in good faith with the exclusive representative" is a violation of the CMPA.[2]

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1 "Employee rights under this subchapter are prescribed under D.C. Code [§1-617.06(a) and (b) (2001ed.)] and consist of the following: (1) [t]o organize a labor organization free from interference, restraint or coercion; (2) [t]o form, join or assist any labor organization; (3) [t]o bargain collectively through a representative of their own choosing . . .; [and] (4) [t]o present a grievance at any time to his or her employer without the intervention of a labor organization[.]" *American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks*, 45 DCR 5078, Slip Op. No. 553 at p. 2, PERB Case No. 98-U-03 (1998).

2 The Board notes that pursuant to the CMPA, management has an obligation to bargain collectively in good faith and employees have the right "[t]o engage in collective bargaining concerning terms and conditions of employment, as may be appropriate under this law and rules and regulations, through a duly designated majority representative[.]" *American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2921 v. District of Columbia Public Schools*, 42 DCR 5685, Slip Op. 339 at p. 3, PERB Case No. 92-U-08 (1992). Also, D.C. Code § 1-617.04(a)(5) (2001) provides that "[t]he District, its agents and representatives are prohibited from...[r]efusing to bargain collectively in good faith with the exclusive representative." Further, D.C. Code §1-

The Board has "held that derogatory remarks concerning a union representative's representation of bargaining unit employees, standing alone, do not constitute an abridgement of the representative's right to represent bargaining unit members." *Deborah Jones v. D.C. Dept of Corrections*, 32 DCR 1704, Slip Op. No. 100, PERB Case No. 84-U-14 (1985); and see *American Federation of Government Employees, Local 2741 v. District Of Columbia Department of Recreation and Parks*, 45 DCR 6722, Slip Op. No. 556, PERB Case No. 98-U-03 (1998). Furthermore, the Board has found "that [an agency] can be held responsible for the actions of an individual member . . . when those actions violate the CMPA. The intent of . . . the CMPA is to allow workers the freedom to exercise their collective bargaining rights. Whether the actions of an individual member can be imputed to [an agency] in any particular case depends on the circumstances." *American Federation of State, County and Municipal Employees, Council 20, Local 2093, AFL-CIO v. The District of Columbia Board of Education, and The International Brotherhood of Teamsters, Local Union Nos. 639 and 730*, 33 DCR 2380, Slip Op. No. 133, PERB Case No. 86-U-01 (1986). The Board cannot decide whether the remarks alleged in this case, standing alone, result in an unfair labor practice by the Agency.

In the present case, the parties are in dispute over the facts concerning Mr. Sinclair and his actions. Although not clearly stated, DCHA appears to disclaim that Mr. Sinclair made derogatory statements about the Union to union members, or that he was acting on behalf of DCHA. On the record before the Board, establishing the existence of the alleged unfair labor practice violations requires the evaluation of evidence and the resolution of conflicting allegations. The Board declines to do so at this time, based on these pleadings alone.

The Board finds that the Complainant has pled or asserted allegations that, if proven, would constitute a statutory violation. As a result, the Board denies MPD's motion to dismiss. The Complaint, and its allegations against the Respondents, will continue to be processed through an unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Housing Authority's motion to dismiss is denied.

2. The Board's Executive Director shall refer the Fraternal Order of Police/District of Columbia Housing Authority Labor Committee's Unfair Labor Practice Complaint to a Hearing Examiner utilizing an expedited hearing schedule. Thus, the Hearing Examiner will issue the report and recommendation within twenty-one (21) days after the closing arguments or the submission of briefs. Exceptions are due within ten (10) days after service of the report and recommendation and oppositions to the exceptions are due within five (5) days after service of the exceptions.

617.04(a)(5) (2001ed.) protects and enforces, respectively, these employee rights and employer obligations by making their violation an unfair labor practice.

4. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.

5. 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 5, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 11-U-23 was transmitted via Fax and U.S. Mail to the following parties on this the 5th day of August 2011.

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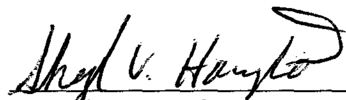

Sheryl V. Harrington
Secretary