

II. Discussion

A. Slip Opinion Number 1005

In Slip Op. No. 1005, the Board considered the Hearing Examiner's Report and Recommendation ("Report"), FOP's exceptions, MPD's exceptions, and MPD's Opposition to FOP's exceptions. (Slip Op. No. 1005 at 1). As the Board summarized:

This matter arises out of an e-mail sent by Chief of Police Cathy Lanier on May 21, 2009. On July 1, 2009, FOP filed an unfair labor practice complaint ("Complaint") alleging that Chief Lanier's communication constituted direct dealing, in violation of D.C. Code § 1-617.04(a)(1) and (5). The Complaint asserted that "MPD attempted to undermine FOP members' support for the Union and urge withdrawal of a Complaint and Request for Preliminary Relief in a separate case charging the MPD with a failure to bargain over, *inter alia*, the unilateral imposition of various requirements for the exams." In addition, the Complaint alleged that MPD "applied its e-mail distribution procedures in a manner that discriminated, interfered with and restrained the Union's protected rights." The Respondent filed a timely response, denying it violated the CMPA. On December 29, 2009, the Board directed that a hearing be held to develop a factual record and denied the Complainant's request for preliminary relief. On April 28, 2010, a hearing was held before Hearing Examiner Arline Pacht. On June 25, 2010, FOP and MPD submitted post-hearing briefs. On November 3, 2010, FOP moved to reopen the hearing and stay Hearing Examiner Pacht's decision so that the Union could introduce additional documents that came into its possession as the result of a separate Freedom of Information Act (FOIA) request. In addition, the Union sought sanctions against MPD, alleging that the documents should have been produced prior to the hearing. Respondent opposed the Motion to Reopen, arguing that the non-production of documents was unintentional. Moreover, Respondent opposed the production of an interoffice memorandum on the grounds of attorney-client privilege. On November 3, 2010, the Hearing Examiner granted FOP's motion, and, on February 26, 2011, the hearing was reopened. After testimony concerning the relevance of the documents, the parties submitted briefs. On August 28, 2011, the Hearing Examiner submitted her Report and Recommendations.

In her Report and Recommendations, the Hearing Examiner identified the issues as:

- 1) Did the MPD engage in direct dealing by:
 - a. Issuing an e-mail to all members of the police force which implied that the FOP had delayed the promotional process by filing a complaint and seeking preliminary relief from PERB in order to discredit the Union so as to discourage its members' support and thereby undermine the FOP's right to challenge the MPD's refusal to bargain in violation of Article 1.617.04(a)(1) and (5)?
 - b. Extending the dates required for exam eligibility in response to a written request made on behalf of 30 otherwise ineligible sergeants?
- 2) Was the FOP prevented from communicating with its members in response to Chief Lanier's May 21 message by the manner in which the MPD applied its orders governing use of the e-mail system in order to prevent the FOP from responding effectively to Chief Lanier's May 21 e-mail message?
- 3) Did the MPD purposefully withhold documents that were responsive to the FOP's subpoena in the above-captioned case, and if so, should fees and costs be assessed?

Slip Op. No. 1005 at 2-3 (internal citations omitted).

The Hearing Examiner found that the May 21, 2009, e-mail did not constitute direct dealing, but the change in exam eligibility dates did constitute direct dealing. (Report at 12). On the second issue, the Hearing Examiner found that FOP was "not prevented from utilizing the e-mail system effectively to respond to Chief Lanier's e-mail message." (Report at 17). Finally, the Hearing Examiner found that "although the MPD's response to the FOP's subpoena was far from adequate, the discovered materials that were admitted into evidence did not provide sufficient substance to the Union's cause" and no unfair labor practice was committed. (Report at 18).

FOP filed nine exceptions to the Report. Of the nine, the exception that concerns this Motion for Reconsideration is FOP's assertion that "MPD purposefully withheld relevant and responsive documents." (Report at 4). The Board found merit to this exception, stating that:

[t]he Board previously held that materials and information relevant and necessary to its duty as a bargaining unit representative must be provided upon request. See *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department*, __ D.C. Reg. __, Slip Op. No. 835, PERB Case No. 06-U-10 (March 28, 2006). The Board's precedent is that an agency is obligated to furnish requested information that is both relevant and necessary to a union's role in: (1) processing of a grievance; (2) an arbitration proceeding; or (3)

collective bargaining. See *Id.*; see also (citations omitted). The Hearing Examiner found that the materials were relevant and necessary and should have been produced when requested. Therefore, the Board finds that [MPD] violated the CMPA by failing to produce the materials.

Slip Op. No. 1005 at 10.

MPD submitted one exception to the Report: “[s]ince the Complaint in this matter did not allege that the Respondent committed direct dealing by unilaterally expanding the eligibility dates for the promotional examination, any determination regarding that allegation is extra-jurisdictional and cannot be used to sustain the Complaint.” (Respondent’s Exceptions at 4). In considering this exception, the Board found that “the Hearing Examiner erred in determining that it was an issue for evaluation” because “the Complainant never alleged Respondent engaged in direct dealing by expanding the eligibility dates for the promotional examination.” (Slip Op. No. 1005 at 10-11). The Board stated that:

Board Rule 520.11 describes the role of a hearing as establishing a full and factual record upon which the Board may make a decision concerning the allegations of a complaint. After reviewing the FOP’s unfair labor practice complaint, the Board finds that the Union failed to allege Respondent engaged in direct dealing by extending the dates in response to the sergeant’s e-mail. Rather, the Complaint focuses on Chief Lanier’s [May] 21, 2009, e-mail to the entire police force, including FOP members.

Slip Op. No. 1005 at 10.

B. MPD’s Motion for Reconsideration

The Board will not grant a motion for reconsideration that is based upon a “mere disagreement” with its initial decision. *E.g., University of the District of Columbia Faculty Association/NEA. v. University of the District of Columbia*, __ D.C. Reg. __, Slip Op. No. 1004 at p. 10, PERB Case No. 09-U-26 (Dec. 30, 2009).

In its Motion, MPD alleges that the Board erred in finding that MPD committed an unfair labor practice by failing to provide requested documents because the Complaint in the underlying matter does not make this allegation. (Motion at 4). In its Opposition, FOP contends that MPD “[has] cited only a mere disagreement with PERB’s order, alleging that an unfair labor practice finding is not appropriate because [MPD’s] failure to comply with the subpoena occurred after the Complaint was filed, and as a result, was not included in the Complaint.” (Opposition at 6).

As explained below, MPD's argument is not a "mere disagreement" with the Board's initial decision. To the contrary, the Motion raises a procedural issue which merits further review by the Board.

MPD alleges, and FOP does not dispute, that "all of the allegations contained in the Complaint, including the factual allegations and legal analysis, were based upon Chief Lanier's May 21, 2009, e-mail sent to the entire Department and the claim that this e-mail constituted direct dealing." (Motion at 4). Further, "[w]ith the exception of the first three introductory paragraphs regarding the parties and background, all of the factual paragraphs in the [C]omplaint specifically relate to Chief Lanier's May 21, 2009, e-mail." *Id.* This allegation is not surprising, given that the Complaint was filed in July 2009, and the responsive information uncovered by FOP's FOIA request was not discovered until July 2010. (Opposition at 3).

After the FOIA documents were discovered, FOP did not amend its Complaint to include a charge of withholding documents, nor did FOP file a new unfair labor practice complaint regarding MPD's failure to turn over all documents responsive to the FOP subpoena. Instead, FOP had the hearing record re-opened to introduce the additional documents in support of its case. (Report at 2). The Hearing Examiner found that "although the MPD's response to the FOP's subpoena was far from adequate, the discovered materials that were admitted into evidence did not provide sufficient substance to the Union's case." (Report at 18). Although the Hearing Examiner framed one of the issues before her as "[d]id the MPD purposefully withhold documents that were responsive to the FOP's subpoena in the above-captioned cases," she did not actually answer that issue. Instead, she found that "with but one exception involving Chief Lanier's altering the eligibility requirements for the examinations, I conclude that the FOP failed to [carry] its burden of proving that the Respondents violated [D.C. Code §§ 1-617.04(a)(1) and (5)]." (Report at 18).

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. *See, e.g., FOP/MPDLC v. MPD*, __ D.C. Reg. __, Slip Op. No. 835, PERB Case No. 06-U-10 (March 28, 2006); *Council of School Officers v. DC Public Schools*, __ D.C. Reg. __, Slip Op. No. 1257, PERB Case No. 11-U-28 (March 27, 2012); *FOP/MPDLC v. MPD*, __ D.C. Reg. __, Slip Op. No. 1131, PERB Case No. 09-U-59 (September 15, 2011).

Nevertheless, the Board may not rule on allegations that are not properly before it. *See, e.g., FOP/Dept. of Corrections Labor Committee v. Dept. of Corrections*, 49 D.C. Reg. 8933, Slip Op. No. 679, PERB Case Nos. 00-U-36 and 00-U-40 (May 17, 2002) (hearing examiner was correct in not making a finding on an issue not raised in the amended complaint); *Teamsters Local Unions 639 and 730 v. D.C. Board of Education*, 49 D.C. Reg. 803, Slip Op. No. 667 at FN 1, PERB Case No. 00-U-27 (October 15, 2001) (Board did not consider issue of attorneys' fees and interest because the issue was not raised in the original complaint). Board Rule 520.11 clearly states that the purpose of an evidentiary hearing "is to develop a full and factual record upon which the Board may make a decision. The party asserting a violation of the CMPA shall have the burden of proving **the allegations of the complaint** by a preponderance of the evidence." (emphasis added). The Hearing Examiner and the Board may not determine the

existence of an unfair labor practice where no unfair labor practice was alleged. Whether MPD committed an unfair labor practice by withholding relevant and responsive documents was an issue never placed before the Board in the Complaint. (Complaint at Although the Hearing Examiner proposed to take up the issue of purposefully withholding relevant documents in her Report, she never actually resolved that issue. Even if she had, it would have been improper because the issue was never alleged in the Complaint.

FOP contends that if the Board grants MPD's Motion, the Board "must provide for some other sanction against the Respondents as relief for the FOP." (Opposition at 5-6). There are several available courses of action when a party fails to comply with a subpoena. One option is Board Rule 552.5: "In the case of contumacy or failure to obey a subpoena issued, the Board, pursuant to D.C. Code § 1-605.2(16), may request enforcement of the subpoena in the Superior Court of the District of Columbia." Additionally, a party may request that the Hearing Examiner avail herself of any of the sanctions listed in Rules 550.17 and 550.18. Any allegation that MPD failed to comply with the subpoena should have been brought to the Board for enforcement, not raised as an exception to the Report. Upon discovering that MPD had not fully complied with the subpoena, FOP had multiple options: file a new unfair labor practice complaint, amend the existing Complaint, apply to the Hearing Examiner for sanctions, or apply to the Board for enforcement of the subpoena. FOP did none of these things, and the Board erred in failing to address this deficiency in Slip Op. No. 1005, and by granting FOP's exception.

In its Opposition, FOP asserts that if FOP files a "new and completely duplicative" unfair labor practice complaint with the Board, MPD may file a motion for sanctions similar to the one filed in PERB Case Nos. 12-E-01/08-U-19, where MPD alleged that FOP filed "'redundant' and 'duplicative pleadings' by filing a Petition for Enforcement which was purportedly 'a re-packaging of a previously filed unfair labor practice complaint.'" (Opposition at 6). If "FOP awaits a decision by PERB on the matter in this case, only to receive a ruling by PERB that an independent action was required, the MPD will assert that a subsequent filing is untimely." *Id.*

Notwithstanding FOP's frustration, it remains that multiple procedures exist for handling a party's failure to turn over relevant documents. The Board cannot validate actions brought outside these procedures. The Board acknowledged this later in Slip Op. No. 1005 on the issue of FOP's exception that MPD engaged in direct dealing by unilaterally expanding the eligibility dates for the promotional examination. In that instance:

the Board determines that the Hearing Examiner erred in determining that it was an issue for evaluation. Board Rule 520.11 describes the role of a hearing as establishing a full and factual record upon which the Board may make a decision concerning the allegations of the complaint. After reviewing the FOP's unfair labor practice complaint, the Board finds that the Union failed to allege Respondent engaged in direct dealing by extending the dates in response to the sergeant's e-mail. Rather, the Complaint focuses on Chief Lanier's [May] 21, 2009, e-mail to the entire police force, including FOP members.

* * *

Because the Complainant never alleged Respondent engaged in direct dealing by expanding the eligibility dates for the promotional examination, Hearing Examiner Pacht was mistaken in identifying the expansion as an issue to be addressed in her Report and Recommendations. Therefore, the Board declines to adopt Hearing Examiner Pacht's recommendation that Respondent violated the CMPA by expanding the eligibility dates for the examination.

Slip Op. No. 1005 at 10-11. The same reasoning applies to the issue of failure to fully respond to the subpoena: the Complainant never alleged that MPD purposefully withheld relevant and responsive documents, and that issue should not have been identified as an issue to be addressed by the Hearing Examiner or by the Board. Rule 520.11.

Therefore, MPD's Motion is granted and the Board's determination that MPD committed an unfair labor practice by failing to produce relevant and necessary documents is overturned.

III. Remedy

Ordinarily, a determination that an agency failed to turn over relevant documents to a collective bargaining agent would result in the finding of an unfair labor practice violation, a notice posting, and other appropriate relief. *See AFGC Local 631 v. WASA*, __ D.C. Reg. __, Slip Op. No. 924, PERB Case No. 08-U-04 (2007) (agency must turn over requested documents that are relevant and necessary to a legitimate collective bargaining function); *AFGC Local 2978 v. Dept. of Health*, __ D.C. Reg. __, Slip Op. No. 1275, PERB Case No. 11-U-21 (2012) (notice posting furthers the CMPA goal of protecting employee rights). In the instant matter, such a violation was not properly alleged, so no determination can be made. Any unfair labor practice complaint regarding this matter filed today would be untimely based on Board Rule 520.4, which requires unfair labor practice complaints to be filed no later than 120 days after the date on which the alleged violations occurred. Thus, no remedy is available.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Metropolitan Police Department's Motion for Reconsideration is granted.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

Decision and Order
PERB Case No. 09-U-50
Page 8 of 8

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

August 24, 2012.

CERTIFICATE OF SERVICE

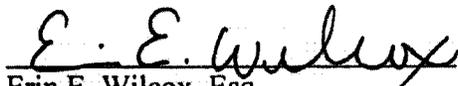
This is to certify that the attached Decision and Order in PERB Case No. 09-U-50 was transmitted via U.S. Mail and e-mail to the following parties on this the 24th day of August, 2012.

Mr. Anthony M. Conti, Esq.
Conti, Fenn & Lawrence, LLC
36 South Charles St.
Suite 2501
Baltimore, MD 21201
tony@lawcfl.com

U.S. MAIL and E-MAIL

Mr. Mark Viehmeyer, Esq.
Ms. Nicole Lynch, Esq.
Metropolitan Police Department
300 Indiana Ave, NW
Room 4126
Washington, D.C. 20001
mark.viehmeyer@dc.gov

U.S. MAIL and E-MAIL


Erin E. Wilcox, Esq.
Attorney-Advisor