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**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)
Metropolitan Police Department,)

and)

Cathy Lanier, Chief of Police for the)
Metropolitan Police Department,)

and)

Linda Nischan, Lieutenant for the)
Metropolitan Police Department,)

and)

Terrence Ryan, General Counsel for the)
Metropolitan Police Department,)

and)

Anna McClanahan, of the Metropolitan Police)
Department,)

Respondents.)

PERB Case Nos. 09-U-52
09-U-53

Opinion No. 1391

Decision and Order

DECISION AND ORDER

I. Statement of the Case

Complainant Fraternal Order of Police/Metropolitan Police Department Labor Committee, (“Complainant” or “FOP” or “Union”) filed two (2) Unfair Labor Practice Complaints (“Complaints”) (later consolidated) against the District of Columbia Metropolitan Police Department (“Respondent” or “MPD” or “Department”) and four (4) other individual respondents. FOP alleged that MPD and the individual respondents engaged in unfair labor practices when they restrained, coerced, and interfered with two (2) FOP representatives’ protected union activities by interfering with the representatives’ 40 hour-a-week union assignments, failing to bargain in good faith about changes to the terms and conditions of those assignments, requiring the two (2) representatives to participate in training that was not required, placing them on non-contact status and revoking their police powers when they failed to complete said training, and requiring them to complete the training in order to have their police powers reinstated. (Respondents’ Exceptions, at 2-3); and (Complainant’s Opposition, at 3-4).

FOP also filed Motions for Preliminary Relief and to consolidate the cases. See Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department, 59 D.C. Reg. 5957, Slip Op. No. 999, PERB Case 09-U-52 (2009); and Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department, 59 D.C. Reg. 5969, Slip Op. No. 1000, PERB Case 09-U-53 (2009). On or about December 23, 2009, the Board denied FOP’s Motions for Preliminary Relief, granted MPD’s Motions to Consolidate the cases, and referred the consolidated cases to Hearing Examiner for Disposition. *Id.*

The Hearing Examiner found in favor of FOP and recommended various orders. (Report, at 29-30). Thereafter, MPD filed Exceptions (“Respondents’ Exceptions”) to the Hearing Examiner’s findings, to which FOP filed an Opposition to those Exceptions (“Complainant’s Opposition”).

II. Background

Case 09-U-52 alleges that MPD violated D.C. Code §1-617.04(a)(1) by: 1) interfering, restraining, or coercing FOP Executive Steward Delroy Burton’s (“Steward Burton”) exercise of rights guaranteed by the Comprehensive Merit Personnel Act (“CMPA”); and 2) violating Article 12, section 14 of the parties’ collective bargaining agreement (“CBA”). (Complaint at p. 8-9, PERB Case No. 09-U-52). The Board provided a detailed summary of the specific

allegations in FOP's Complaint in Slip Opinion 999, in which the Board denied FOP's Motion for Preliminary Judgment. *Id.*, at 3-7.

Case 09-U-53 alleges that MPD violated D.C. Code §1-617.04(a)(1) by: 1) interfering, restraining, or coercing FOP Chairman Kristopher Baumann's ("Chairman Baumann") exercise of rights guaranteed by the CMPA; and 2) violating Article 12, section 14 of the parties' CBA. (Complaint at p. 8-9, PERB Case No. 09-U-53). The Board provided a detailed summary of the specific allegations in FOP's Complaint in Slip Opinion 1000, in which the Board denied FOP's Motion for Preliminary Judgment. *Id.*, at 3-6.

The Board, in Slip Opinions 999 and 1000, granted MPD's motions to consolidate the two (2) cases and referred the matter to a Hearing Examiner for disposition. *FOP v. MPD, supra*, Slip Op. No. 999 at p. 10, PERB Case 09-U-52; and *FOP v. MPD, supra*, Slip Op. No. 1000 at p. 10, PERB Case 09-U-53. The resulting Hearing was held at the PERB's offices on April 14, 2010. (Report, at 3). The Hearing Examiner issued her Report and Recommendations ("Report") on September 28, 2010. *Id.*, at 1 and 30.

A. The Hearing Examiner's Report

In the Report, the Hearing Examiner rejected MPD's argument that the CMPA does not give the PERB jurisdiction over individuals acting in their official capacity. (Report, at n. 2-4). The Hearing Examiner noted that D.C. Code §1-617.04(a) prohibits "not only the Department, but also its *agents and representatives*, from committing unfair labor practices." *Id.*, at n. 4 (emphasis in original). The Hearing Examiner reasoned that "[s]ince the individuals named as Respondents in the instant case clearly are agents or representatives of the Department, they are subject to the Board's jurisdiction." *Id.*

The Hearing Examiner then summarized the parties' arguments and the chronological record of events, after which she narrowed the issues of the cases down to two (2) "threshold" legal questions: 1) whether the PERB has jurisdiction over the cases, and 2) if so, whether MPD, motivated by anti-union animus, "retaliated against Steward Burton and Chairman Baumann for the [*sic*] union activism by placing them on no-contact status and revoking their police powers, thereby interfering, restraining or coercing them in the exercise of rights guaranteed them under [D.C. Code §1-617.04(a)(1)] of the CMPA." (Report, at 13).

Addressing the question of Jurisdiction, the Hearing Examiner rejected MPD's argument that the PERB lacks jurisdiction because FOP's allegations arose out of Articles 9 and 12 of the parties' CBA, and are therefore purely contractual. *Id.*, at 14. MPD argued that the PERB lacks jurisdiction to resolve the contractual cases "even when that same violation offends the

CMPA.” *Id.*, at 14. MPD relied on *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department, et al.*, 59 D.C. Reg. 6039, Slip Op. No. 1007 at p. 8, PERB Case No. 08-U-41 (2009), which holds that: 1) “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 allegation”; and 2) if the Board must interpret a contractual obligation in order to determine whether or not a non-contractual, statutory violation has been committed, the Board will defer the matter to the parties’ grievance and arbitration procedures. *Id.* MPD further reasoned “the PERB is without jurisdiction to consider this matter since [Articles 9 and 12] govern the ‘very acts and conduct alleged in the complaint.’” *Id.*

The Hearing Examiner found that PERB has jurisdiction over FOP’s allegations arising under Article 9 of the parties’ CBA. *Id.* The Hearing Examiner contended that “the terms of that provision are unambiguous and require no interpretation.” *Id.*; and *FOP v. MPD, supra*, Slip Op. No. 1007 at p. 8, PERB Case No. 08-U-41. In addition, the Hearing Examiner found that when MPD unilaterally began requiring officers assigned to full-time union positions to complete 32 in-service training hours each year, it violated an established past practice that exempted full-time union officers from said training. *Id.*, at 4-10, and 14-15 (citing *District Council 20, American Federation of State, County, and Municipal Employees, Locals 1200, 2776, 2401 and 2087 v. District of Columbia Government, et. al.*, 46 D.C. Reg. 6513, Slip Op. No. 590 at p. 9, PERB Case No. 97-U-15A (1999)). The Hearing Examiner reasoned that it is “well settled that a past practice becomes an unwritten term and condition of employment that is not [limited] by related statutory rights.” *Id.*, at 15 (citing *District Council 20, AFSCME, Locals 1200, 2776, 2401 and 2087 v. D.C. Gov’t, et. al., supra*, Slip Op. No. 590 at p. 9, PERB Case No. 97-U-15A). The Hearing Examiner contended that employers are obligated to “observe these unwritten terms” and that making “unilateral changes [to such terms ... violates the employer’s] duty to bargain, thereby constituting an unfair labor practice under the CMPA.” The Hearing Examiner concluded that, “[c]onsequently, the PERB retains jurisdiction over [FOP’s allegations under Article 9 of the parties’ CBA].” *Id.*

The Hearing Examiner found that PERB also has jurisdiction over FOP’s allegations arising under Article 12 despite the provisions of Article 4, which governs management rights. *Id.*, at 15-16. The Hearing Examiner stated that “the Department’s argument [that Article 4 empowers it to engage in the very acts alleged] does not address the pivotal issue in this case: that is, whether the Department’s primary motive in placing the Union leaders on non-contact status and revoking their police powers was to retaliate against them for their union activities.” *Id.* (citing *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657 at 665-66 (D.C. 1994) (holding that the PERB is the exclusive forum for claims of reprisal involving District of

Columbia government agencies). The Hearing Examiner reasoned that, “[g]iven this ruling, it follows that PERB retains jurisdiction over this matter.” *Id.*

MPD contended that “its management right to ‘direct employees of the agencies’ to ‘maintain efficiency of the District government operations entrusted to them’ is a reserved management right guaranteed both by [D.C. Code §1.617.08 (governing management rights)] and [Article 4 of the CBA].” *Id.* MPD cited a string of Federal Labor Management Relations Act (“FLRA”) cases in support of its positions. *Id.* The Hearing Examiner stated that because there is no PERB precedent on this question, she would “consider case law established by other labor authorities such as the FLRA.” *Id.*, at n. 17 (citing *District of Columbia Department of Consumer and Regulatory Affairs v. American Federation of Government Workers, Local 2725*, 59 D.C. Reg. 5392, Slip Op. No. 978 at p. 4, PERB Case 09-A-01 (2009) (internal citations omitted)).

The Hearing Examiner noted that the FLRA cases MPD cited instruct that “the assignment of job-related training during duty hours constitutes an assignment of work.” *Id.* (citing *National Treasury Employees Union and U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms*, 45 F.L.R.A. 339 at 357 (1992) (internal citations omitted)). The Hearing Examiner noted that MPD cited other cases “which provide that Union officials are not exempt from such training.” *Id.*, at 16-17 (citing *National Treasury Employees Union and Internal Revenue Service*, 17 F.L.R.A. 379 at 381 (1985) (internal citations omitted)). The Hearing Examiner stated that “FLRA precedent also supports the Department’s contention that the right to assign work encompasses decisions as to the type of training to be assigned and the frequency and duration of that training.” *Id.*, at 17 (citing *International Plate Printers, Die Stampers and Engravers Union of North America, AFL-CIO, Local 2 and Department of the Treasury, Bureau of Engraving and Printing, Washington D.C.*, 25 F.L.R.A. 113 at 127 (1987) (internal citations omitted)). Relying on these cases, the Hearing Examiner stated that MPD “correctly contend[s] that these precedents support its position that its General Order¹, supplemented by Teletypes setting the dates and topics [of classes] such as ASP/AED/CPR², to be covered in the 2008 trainings, constituted job-related training within the compass of its management rights mandate.” *Id.* MPD argued that, in light of these precedents, “placing Chairman Baumann and Steward Burton on non-contact status and revoking their [police powers were] not actions taken pursuant to Article 12, section 14 as the FOP contends,” but rather the actions were taken “in furtherance of [MPD’s] right to ensure that all employees, including FOP officials[,] attend mandatory in-service training.” *Id.*

¹ General Order 201.30, issued on July 27, 2001, requiring that sworn officers attend 40 hours (later reduced to 32) of mandatory yearly training. (Report, at 5).

² ASP = Extendable Baton; AED = Automated External Defibrillations; and CPR = Cardiopulmonary Resuscitation. (Report, at 6-7).

The Hearing Examiner stated that while “MPD clearly is on firm ground in maintaining that it is obligated to provide annual training for employees, ... neither [D.C. Code §5-107.02]³ nor the 2001 [General Order] mentions the type of program that should be offered nor where it could be taken.” *Id.* The Hearing Examiner argued that none of the cases MPD cited addressed “the precise problem here: that is, how to reconcile management’s non-negotiable right to require training for all employees with Article 9 stating unequivocally that the Union Chairman and his designee, the Steward, “shall be entitled to use up to ... 40 hours each week for the purpose of carrying out ... [their] representational responsibilities....” *Id.*, at 17-18 (emphases in original). The Hearing Examiner continued, “[n]or do the [cited cases] address the question of how to reconcile an agency’s ostensibly non-negotiable right to assign work (or to ‘direct employees as authorized by [D.C. Code §1-617.08]) with a past practice that exempts the Chairman and Executive Steward from attending in-service training.” *Id.* at 18.

The Hearing Examiner found that MPD was not entitled to invoke its management rights to justify its unilateral termination of bargaining discussions with FOP over these issues in December 2009. *Id.*, at 18-19. Relying on *District of Columbia Fire and Emergency Medical Services Department and American Federation of Government Employees, Local 3721*, 54 D.C. Reg. 3167, Slip Op. No. 874 at 8-9, PERB Case No. 06-N-01 (2007), in which “the Board offered [a] balanced synthesis⁴ of [the application of D.C. Code §1.617.08(a-1)]⁵ to management rights,” the Hearing Examiner reasoned that when MPD agreed to bargain with FOP over the implementation and effects of its mandatory in-service training program, and when it invited FOP to submit proposals, and finally when it submitted its own counter-proposal, “the Department waived its right to claim defend [sic] its termination of bargaining by asserting its management rights.” *Id.* The Hearing Examiner concluded that, “for all of [these] reasons ... the PERB has Jurisdiction over this matter.” *Id.*

Addressing the second “threshold” question of whether MPD, motivated by anti-union animus, retaliated against FOP by placing Steward Burton and Chairman Baumann on non-

³ “The Department shall implement a program of continuing education for its sworn members, which shall consist of a minimum of 32 hours of training each year.”

⁴ “[T]he Board makes the following observations regarding management rights under the 2005 amendment: (1) if management has waived a management right in the *past* (by bargaining over that right) this does not mean that it has waived that right (or any other management right) in any subsequent negotiations; (2) management may not repudiate any previous agreement concerning management rights during the term of the agreement; (3) nothing in the statute prevents management from bargaining over management rights listed in the statute if it so chooses; and (4) if management waives a management right currently by bargaining over it, this does not mean that it has waived that right (or any other management right) in future negotiations. The Board finds that D.C. Code §1-617.08(a-1) (Supp. 2005), as clarified by the legislative history, does nothing more than codify the Board’s prior holdings with respect to management rights’ permissive subjects of bargaining.” *D.C. Fire and Emergency Medical Services Dep’t and AFGE, Local 3721, supra*, Slip Op. No. 874 at 8-9, PERB Case No. 06-N-01.

⁵ “An act, exercise, or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section.”

contact status and revoking their police powers in violation of the CMPA, the Hearing Examiner applied the burden-shifting analysis adopted by the National Labor Relations Board in *Wright Line* and *Bernard R. Lamoureux*, 251 N.L.R.B. 150 (1980). *Id.*, at 19-20 (citing *Charles Bagenstone and Dr. Joseph Borowski v. District of Columbia Public Schools*, 38 D.C. Reg. 4154, Slip Op. No. 270 at p. 8, PERB Case Nos. 88-U-33 and 88-U-34 (1991)). The Hearing Examiner explained the test as follows:

In accordance with the *Wright Line* analytic framework, the Complainant bears the burden of presenting sufficient evidence to establish a *prima facie* case showing that the department knew of the Chairman's and Steward's protected union activities and that the Respondents were motivated by union animus to take retaliatory actions that adversely affected the FOP leaders. Once such evidence has been adduced, the burden shifts to the Respondents to demonstrate that its conduct has a legitimate purpose and that it would have treated the FOP Chairman and Executive Steward in the same manner even in the absence of their protected conduct. *Id.*, at 20.

Applying this test, the Hearing Examiner stated that FOP "clearly has no difficulty in showing that the Chairman and Steward were deeply engaged in union activities that were well known to the MPD's senior officials." *Id.* Furthermore, the Hearing Examiner found that "FOP also presented sufficient evidence of the Respondents' animus that allegedly led to a series of actions," which the Hearing Examiner summarized as: 1) MPD's issuance of a PD Form 62E ("PD 62E")⁶ to Chairman Baumann in 2008, despite the findings of MPD's own internal investigative reports⁷ which stated that the Chairman and Steward had not been required to attend in-training programs between 2000-2006, and which recommended that no action be taken against them; 2) MPD's unilateral imposition of a new "performance plan for Union personnel that required the FOP officials' attendance at all [in-service] training programs, obliged the Union to submit reports regarding the number of representational activities undertaken each week, authorized the Labor and Employment Relations Unit [{"LERU"}] to oversee the Union officials' compliance with the performance requirements" and eliminated "exceeds expectations" ratings from the plans, which ratings are often required for promotions; 3) MPD's denial of

⁶ Performance Management System Documentation Form, similar to a written warning.

⁷ Three (3) reports: the first was a Memorandum, dated July 7, 2008, from Lieutenant Linda S. Nischan to MPD General Counsel Terrence D. Ryan, containing MPD's Final Investigative Report concerning Chairman Baumann's failure to complete his 2007 annual in-service training requirements; the second was a Memorandum, dated November 5, 2009, from Lieutenant Linda S. Nischan to MPD General Counsel Terrence D. Ryan through MPD Acting Director Mark Viehmeyer, containing MPD's Final Investigative Report concerning Steward Burton's failure to attend the 2008 ASP/AED/CPR portions of MPD's in-service training program; and the third was a Memorandum, dated November 5, 2009, from Lieutenant Linda S. Nischan to MPD General Counsel Terrence D. Ryan through MPD Acting Director Mark Viehmeyer, containing MPD's Final Investigative Report concerning Chairman Baumann's failure to attend the 2008 ASP/AED/CPR portions of MPD's in-service training program.

certain union officials' 2009 requests for leaves of absence to attend "conferences where training programs pertinent to union responsibilities were offered" despite having approved similar requests previously; 4) MPD's unilateral termination of bargaining discussions with FOP when FOP filed an unfair labor practice complaint against MPD after the parties' first meeting on December 3, 2009; 5) MPD's filing of a complaint against FOP in June 2009 alleging that since 2006, Steward Burton and Chairman Baumann had engaged "in a pattern and practice of filing an excessive number of frivolous unfair labor practice complaints" against MPD; 6) MPD's finding that of the 136 officers who had not completed their 2008 in-service training requirements, only Steward Burton and Chairman Baumann had failed to complete their ASP/AED/CPR training requirements; 7) MPD's receipt of a request by FOP to investigate why Chief Cathy Lanier ("Chief Lanier") failed to attend a training program despite having previously registered for it; 8) MPD's decision, "without merit," to place only the Chairman and Steward on non-contact status and revoke their police powers for failing to complete the required ASP/AED/CPR trainings; and 9) MPD's revocation of a prior-granted authorization for Steward Burton and Chairman Baumann to address District 1 officers on a certain date after the Chairman and Steward informed MPD that they could not attend a training session being held on that same date; as well as the findings of MPD's internal investigative reports from November 5, 2009, which concluded that MPD was "not authorized to focus solely on the officers who failed to complete only the [ASP/AED/CPR] training requirements of the in-service training or [to] take the unprecedented action of placing them on non-contact status and revoking their police powers." *Id.*, at 21-22. Based on this summary, the Hearing Examiner concluded that FOP "presented sufficient evidence to support a *prima facie* case that the MPD was motivated by anti-union animus [and that it took] retaliatory actions against the FOP Chairman and Steward in reprisal for their union activism." *Id.*, at 22.

The Hearing Examiner rejected MPD's claim that requiring Steward Burton and Chairman Baumann to comply with newly-composed performance plans and having them report to the General Counsel of LERU were proactive exercises of MPD's management rights in accordance with Article 4 of the CBA. *Id.* The Hearing Examiner found that MPD failed to comply with Article 27, which "plainly states that 'the existing ... Performance Rating Plan shall remain in effect unless the Department provides the Union with notice of any proposed change(s).'" *Id.* The Hearing Examiner questioned MPD's decision to have LERU's General Counsel evaluate the Chairman and Steward because the General Counsel was someone who "was very likely to oppose the union in litigation." *Id.* Moreover, the Hearing Examiner found that conducting performance evaluations of officers assigned to full-time union positions is analogous to conducting "surveillance of their union duties," which is a "well-settled violation of [D.C. Code §1.617.04(a)]." *Id.*, at 22-23 (citing *Consolidated Edison Co. of New York, Inc. et al. v. National Labor Relations Board, et al.*, 305 U.S. 197 (1938)).

The Hearing Examiner found that MPD's focus "on records that identified only four [(4)] officers who had not attended training in three [(3)] specific areas in order to justify subjecting them to extraordinary disciplinary measures," and its decision to sanction only the Chairman and Steward provided sufficient cause to conclude that MPD's actions were motivated by an anti-union animus. *Id.*, at 23. The Hearing Examiner reasoned, "[t]here is no way to justify these actions other than to recognize that they were reprisals fueled by [anti-union] animus and intended to curtail the "Chairman's and Steward's protected rights." *Id.* Per the *Wright Line* test, the Hearing Examiner then shifted the burden to MPD to present legitimate business purposes for its actions. *Id.*

The Hearing Examiner conceded that MPD had a legitimate business purpose in requiring that its officers "receive training in programs that relate to the very duties they may be called upon to perform," but further noted that "neither [D.C. Code §5-107.02] nor the General Order mention the type of programs that should be given, nor when they should be taken." *Id.*, at 24.

The Hearing Examiner again noted that the FLRA cases MPD cited did not address how to reconcile management's right to assign work with the Chairman's and Steward's rights "to pursue their representational responsibilities for up to 40 hours each week." *Id.*, at 25. The Hearing Examiner noted that none of the cases MPD cited involved a past practice "that entitled union officials to decide when and if they would participate in such training." *Id.* The Hearing Examiner concluded that "the relevant facts recited in [the FLRA] cases [MPD cited] differ significantly from those in the instant case and therefore, are not persuasive." *Id.* The Hearing Examiner stated that while she believed MPD's interest in providing training to its police officers was "undoubtedly genuine," MPD's "professed need to include two [(2)] specific officers in a 3,500 police force in that training who are not directly involved in traditional police work would be more convincing if there was less evidence of an intent to retaliate against them for their aggressive defense of the FOP's protected rights". *Id.*

The Hearing Examiner rejected MPD's justifications for placing the Chairman and Steward on non-contact status and revoking their police powers stating that MPD's arguments were "lacking in merit." *Id.* The Hearing Examiner found that the paper trail presented by the parties at the hearing demonstrated MPD had a "keen interest in pinpointing the Chairman's and Steward's failure to attend training." *Id.* The Hearing Examiner found that of the 136 officers who had not completed their 2009 in-service training requirements, MPD "cherry-picked only those who had not attended ASP/AED/CPR training." *Id.* The Hearing Examiner found that it "was not coincidental that only [four (4)] names appeared on [that shorter "cherry-picked"] list—Chairman Baumann, Steward Burton[,] and two [(2)] others whose names were mistakenly on the list, but suffered no sanctions." *Id.*, at 25-26. In support of these findings, the Hearing Examiner relied on MPD's own internal investigative reports which found MPD had no authority to segregate the ASP/AED/CPR portions of the training requirements or to revoke the police

powers of the union leaders who failed to complete them, and that MPD acted “arbitrarily” when it did so. *Id.* Although MPD claimed that the decisions to discipline were made solely by Assistant Chief of Police, William Robinson (“A.C. Robinson”) and were not sanctioned by MPD management, the Hearing Examiner found that, “as a senior official with the MPD, A.C. Robinson’s actions are attributable to the Department.” *Id.*, at 23. Further, the Hearing Examiner found that because A.C. Robinson emailed an outline of his intended actions to Chief Lanier and other senior Department officials prior to implementing them, to which no Department officials voiced any objections, the Department could not reasonably claim it was not aware of the actions or that it did not sanction them. *Id.*, at 23 and 26.

The Hearing Examiner found that the acts of revoking the Chairman’s and Steward’s police powers and stripping them of their service weapons were unprecedented and unjustified. *Id.*, at 26-27. The Hearing Examiner noted that MPD Assistant Chief of Police Alfred Durham (“A.C. Durham”) testified that this instance “was the only time in his 21 years with the MPD that he knew of anyone who had their police powers revoked for failing to attend in-service training.” *Id.*, at 26. The Hearing Examiner noted that Article 12 of the parties’ CBA reserves the placing of officers on non-contact status “for those ‘pending investigation of the use of deadly force...’” and further provides that “when an officer is placed [on] non-contact status, he or she shall not automatically be forbidden to carry his authorized weapon unless one [(1)] of four [(4)] potentially threatening conditions was present.” *Id.*, at 26-27 (quoting Joint Exhibit 12). The Hearing Examiner found that Chairman and Steward “met none of these conditions” and that “MPD did not comply with the conditions that would justify appropriating the union officials’ service revolvers.” *Id.*, at 27. The Hearing Examiner found that MPD’s reliance on the internal security provisions of Article 4 rather than Article 12 to justify stripping the Chairman and Steward of their service weapons was “misplaced” because MPD failed to present any evidence “to suggest that Chairman Baumann and Steward Burton posed a threat of any kind.” *Id.* The Hearing Examiner contended that even if, *arguendo*, MPD had been justified in stripping the Chairman and Steward of their weapons, MPD still offered no “legitimate reason to explain the confiscation of the Chairman’s and Steward’s badges, identification cards and numeric plates on their caps.” *Id.*, at 27-28.

The Hearing Examiner rejected MPD’s argument that it had a right to direct the full-time union officials to attend training because MPD’s own internal investigative reports found that it had been MPD’s past practice to exempt the union officials from such training. *Id.*, at 28. The Hearing Examiner noted that the evidence showed that approximately 65 other officers had failed to complete their in-service training requirements, but none except the union officials were placed on non-contact status or subjected to the revocation of their police powers. *Id.* The Hearing Examiner noted that none of the MPD officials who testified could identify what in-service training classes had been attended or completed “by police lieutenants and other

management officials.” *Id.* Based on these findings, the Hearing Examiner concluded that the Chairman and Steward were “stigmatized for conduct that was ignored” in other officers and management officials. *Id.* The Hearing Examiner reasoned that MPD’s “disparate treatment of the FOP leaders undermines the Department’s claim that its actions were taken for legitimate reasons” and instead “compels the conclusion that the Department’s retaliatory treatment of the Chairman and Chief Steward was motivated by [anti-union] animus.” *Id.*

The Hearing Examiner concluded that, “[b]ased on the record as a whole, ...the predominant motive for the Respondents’ unprecedented and unilateral actions in its treatment of the Union officials [was to] retaliate for their assertive activism on behalf of the FOP and its members” and that MPD “would not have pursued the same course ... in the absence of the union activity.” *Id.* The Hearing Examiner found that FOP met its burden of proving, by a preponderance of the evidence, that the MPD “engaged in retaliatory conduct in an effort to interfere, restrain or coerce FOP Chairman Baumann and Executive Steward Burton in exercising their protected rights, thereby violating [CMPA section 1.617.04(a)].” *Id.*, at 29. The Hearing Examiner further found that by taking these “unprecedented, unilateral and unjustified actions against the Union’s elected leaders, Respondents sent an *in terrorem* [*sic*] message to the FOP members that the exercise of protected rights was disfavored and in this way, interfered, restrained and coerced them in violation of [CMPA section 1.617.04(a)].” *Id.* The Hearing Examiner noted that all of the findings in her report were “[b]ased on the entire record in this proceeding, including oral and documentary evidence, my observation of the witnesses’ demeanor[*sic*], and the parties’ able post-hearing briefs.” *Id.*, at 3.

The Hearing Examiner recommended that PERB order the MPD and its agents and representatives to: 1) cease and desist from interfering with, restraining or coercing Chairman Baumann and Steward Burton in the exercise of their protected rights; 2) cease and desist from taking retaliatory actions against Chairman Baumann and Steward Burton; 3) expunge the negative items from Chairman Baumann’s and Steward Burton’s personnel files related to their absence from the 2008 in-service training programs, as well as anything related to their having been placed on non-contact status and/or the revocation of their police powers; 4) cease requiring Chairman Baumann and Steward Burton to attend in-service training for the balance of the parties’ CBA without first bargaining with FOP about the implementation and effects of their attendance; 5) pay FOP’s reasonable costs associated with the consolidated proceeding; and 6) notify PERB of the steps it is taking to implement the Board’s order within thirty (30) days of receiving the Board’s order. *Id.*, at 29.

B. MPD's Exceptions

MPD challenged the Hearing Examiner's findings "that PERB has jurisdiction over the individual respondents, that PERB has jurisdiction over the consolidated complaints, that [FOP] made a *prima facie* case of retaliation, and her award of costs." (Respondents' Exceptions, at 1).

MPD argued that the PERB does not have jurisdiction over the individual respondents in these matters because "it is a basic tenet of agency law that the actions of an agent within the scope of his employment are imputed to the principal," and it is "redundant and unnecessary to also sue the individual agents in their official capacities." *Id.* (citing *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 37 D.C. Reg. 2704, Slip Op. No. 242 at p. 4, PERB Case No. 89-U-07 (1990)). MPD contended that because the Hearing Examiner found that the individual respondents "were acting as officials of the Metropolitan Police Department," the Hearing Examiner's finding should be rejected. *Id.*, at 4-5.

In response to the Hearing Examiner's finding that PERB has subject matter jurisdiction over these cases, MPD primarily took issue with the Hearing Examiner's findings that "the Department had waived its management right to direct employees to attend training and that the subject of these consolidated complaints was not covered by the parties' labor agreement." *Id.*, at 5.

MPD contended that it had the express right to operate the Department, direct its employees, and maintain the efficiency of the Department under both the CMPA and the CBA. *Id.* (citing D.C. Code §1-617.08 and Article 4 of the CBA). MPD noted that D.C. Code §1-617.08(a-1) emphasizes that an "act, exercise, or agreement of the respective personnel authorities shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a)." *Id.*

As it did at the Hearing, MPD relied on FLRA precedent to support its contentions that: 1) requiring the union officials to fulfill training requirements constituted an assignment of work in accordance with its non-negotiable management rights; 2) it was well within its rights to narrow the training requirements down to just the ASP/AED/CPR classes; and 3) as police officers first, the union officials were not exempt from such requirements. *Id.*, at 6-9 (citing *Nat'l Treasury Employees Union and ATF*, *supra*, 45 F.L.R.A. 339 at 357; *Int'l. Plate Printers, Die Stampers and Engravers Union and Dep't. of the Treasury, Bureau of Engraving and Printing*, *supra*, 25 F.L.R.A. 113 at 127; *Nat'l Treasury Employees Union and IRS*, *supra*, 17 F.L.R.A. 379 at 381); and *National Association of Agriculture Employees and United States Department of Agriculture, Animal and Plant Inspection Service, Washington, D.C.*, 48 F.L.R.A. 1323 at 1327 (1994) (internal citations omitted); see also D.C. Code §5-115.03; and 6A DCMR §

200.4 (“[m]embers of the force shall be held to be always on duty...; shall always be subject to orders from the proper authorities...; and [being] off duty shall not [...relieve] them from the responsibility of taking proper police action in any matter coming to their attention requiring that action”)). MPD reasoned that these precedents are “clear” and that “union officials cannot refuse to accept a work [or training] assignment” because the assignments stemmed from management’s non-negotiable rights regardless of FOP’s “demands for bargaining both proceeding and subsequent to the events in this case.” *Id.*, at 8.

MPD argued that the Hearing Examiner’s finding that MPD waived its right to assert its management rights when it agreed to engage in impact and effects bargaining was “wrong as a matter of law.” *Id.*, at 9-10. MPD reasoned that although it was “legally obligated to bargain the impact and effects of the exercise of a management right,” the “portion of [*D.C. Fire and Emergency Medical Services Dep’t. and AFGE, Local 3721, supra*, Slip Op. No. 874 at 8-9, PERB Case No. 06-N-01] cited by [the Hearing Examiner] had nothing to do with impact and effects bargaining [*sic*] but instead governs bargaining over substantive management rights.” *Id.*, at 10. MPD argued that “[t]his distinction is crucial since there is no evidence anywhere in the record... that the Department agreed to bargain over its substantive right to direct employees, including union officials, to attend statutorily-required training.” *Id.* MPD asserted that it agreed “to impact and effects bargaining *only*” and that it was careful not to engage in any discussions concerning its substantive rights to direct its employees. *Id.* (emphasis in original, internal citations omitted). MPD concluded that “[a]s such, [the Hearing Examiner’s] conclusion that the Department waived this management right must be rejected.” *Id.*, at 10-11.

MPD argued that PERB lacks jurisdiction over this matter because the allegations stem from Articles 9 and 12 of the parties’ CBA, and “[i]t is well settled that PERB does not have jurisdiction over alleged contractual violations, even if those contractual violations also constitute violations of the CMAA.” *Id.*, at 11 (citing *FOP v. MPD, et al., supra*, Slip Op. No. 1007 at p. 8, PERB Case No. 08-U-41). MPD contended that despite finding that the parties’ CBA was “unambiguous” and “required no interpretation[,]” the Hearing Examiner erroneously engaged in “extra-judicial interpretation[s]” of the contract to reach her conclusions. *Id.*, at 11-12.

MPD argued that the Hearing Examiner emphasized only the contractual provisions she found to be most relevant and ignored other parts that MPD contended were equally important. *Id.*, at 12. Specifically, MPD claimed that the Hearing Examiner focused on “shall be entitled” and “each week for” in Article 9, but ignored the “up to” clause that indicates the union officials might sometimes, as they did with their semi-annual firearms in-service training requirements, dedicate less than 40 hours a week to their union responsibilities and therefore have sufficient time to attend their other mandatory in-service training classes. *Id.* Similarly, MPD argued the Hearing Examiner “failed to mention the portion of [Article 12] that provides a member may

continue to carry his or her weapon ‘if he/she so requests.’” *Id.* MPD did not allege that the union officials made such requests, or that the requests would have been granted if they had. *Id.*, at 12-13. Rather, MPD contended that the Hearing Examiner erred when she failed to mention the existence of this provision in her findings and when she failed to discover whether the union officials had availed themselves of the option it afforded. *Id.* Further, MPD argued that the Hearing Examiner failed to consider two (2) of its exhibits⁸ showing its past treatment of other officers in similar situations. *Id.*, at 13.

MPD asserted that, based on these arguments, the Hearing Examiner’s “recommendation that the Board has jurisdiction over these matters and her interpretations of the parties’ CBA should be rejected.” *Id.*

In regard to the Hearing Examiner’s finding that FOP established a *prima facie* case of retaliation, MPD presented counterarguments to the nine (9) items the Hearing Examiner listed in her summary of the evidence FOP presented at the Hearing to demonstrate MPD’s history of animus against the union officials. *Id.*, at 13-16.

First, MPD contended that the Hearing Examiner erred because it issued a PD 62E only to Chairman Baumann, and not to Steward Burton as the Hearing Examiner stated. *Id.*, at 13-14. Furthermore, MPD asserted that the Hearing Examiner’s statement that the term “PD Form 62E” appears in the discipline section of the parties’ CBA was inaccurate and that the term does not appear anywhere in the CBA. *Id.*, at 14. As such, MPD asserted that issuing a PD 62E to Chairman Baumann for failing to complete his 2007 in-service training requirements was within its rights to manage employee performance, and that as such, “cannot constitute evidence of animus.” *Id.*

MPD contended that amending the union officials’ performance plans was within its management rights and therefore cannot be evidence of anti-union animus. *Id.* In regard to the Hearing Examiner’s statement that MPD’s denial of the union officials’ requests to attend a conference in 2009 constituted evidence of anti-union animus, MPD asserted that there was “no citation to any evidence in the record to support this conclusion,” and that “[w]ithout more information or analysis from the Examiner, this factor cannot be considered evidence of animus.” *Id.* Further, MPD averred that there was no basis for the Hearing Examiner to rely on MPD’s June 2009 Complaint against the FOP as evidence of animus because it was well within

⁸ Joint Exhibit 61 is a grievance filed by Officer Charles Fultz (“Officer Fultz”) on October 31, 2006, alleging that MPD violated Article 12 of the CBA when it stripped Officer Fultz of his service weapon when he was placed on non-contact status despite his request that he be allowed to retain it.

Joint Exhibit 62 is MPD’s response to Officer Fultz’s grievance, in which the department stated that it had no record of Officer Fultz’s request to retain his weapon while on non-contact status and that he should direct his request to the Chief of Police.

MPD's right to file the complaint, and because the facts and allegations of that case are not at issue in the instant matter. *Id.*, at 15.

MPD argued that the Hearing Examiner's reliance on events that occurred after the Complaints were filed should be rejected. *Id.*, at 14-16. For example, MPD argued that the Hearing Examiner's reliance on MPD's discontinuance of bargaining discussions in December 2009 should be rejected because "the referenced events occurred some [five (5)] months *after* the events giving rise to these consolidated cases, and therefore cannot be considered evidence of animus relevant to the events complained of in July 2009." *Id.*, at 14-15 (emphasis in original). Similarly, MPD stated that its withdrawal of the Chairman's and Steward's authorization to speak to District 1 officers on a certain date occurred in December 2009, and likewise cannot be considered evidence of animus relevant to the allegations raised in July 2009. *Id.*, at 16. MPD also urged PERB to reject the Hearing Examiner's reliance on MPD's investigative reports, which found fault in MPD's actions concerning the Chairman and Steward, on the basis that the reports were issued after the filing of FOP's Complaints and "cannot retroactively be applied as evidence of animus." *Id.*

MPD argued that the Hearing Examiner "provides no analysis or explanation as to why the Department's decision to revoke the police powers of the only two [(2)] members on the entire Department who failed to complete the [ASP/AED/CPR] training[s] by the deadline constitutes evidence of animus." *Id.*, at 15. MPD objected to the Hearing Examiner's reliance on Steward Burton's letter asking MPD to investigate why Chief Lanier failed to attend a training class because "she again provides no explanation of the relevance of this letter or how Executive Steward Burton's decision to deliver this letter to Lieutenant Nischan had any bearing whatsoever on animus." *Id.*

In regard to the Hearing Examiner's reliance on MPD's revocation of the Chairman's and Steward's police powers as evidences of animus, MPD argued that "[revoking] a member's police powers is well within management's right and whether or not it was done for improper reasons is the ultimate issue in the case and cannot be characterized as evidence of animus." *Id.*, at 15-16. Based on all of these reasons, MPD asserted that the Hearing Examiner's finding that FOP established a *prima facie* case of retaliation should be rejected. *Id.*, at 16.

Last, MPD excepted to the Hearing Examiner's recommendation to award costs and argued that the Hearing Examiner's findings failed to establish that MPD's claims or positions were "wholly without merit" and "undertaken in bad faith" such that it was in the "interest of justice" to award costs, as required by *AFSCME, District of Columbia Council 20, Local 2776 v. District of Columbia Department of Finance and Revenue*, 37 D.C. Reg. 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). *Id.*, at 16-17.

C. FOP's Response to MPD's Exceptions

In its opposition brief to MPD's exceptions, FOP urged PERB to sustain the Hearing Examiner's finding that PERB has jurisdiction over the individually named Respondents. (Complainant's Opposition, at 4-6) (citing *FOP v. MPD*, *supra*, Slip Op. No. 1007 at p. 8, PERB Case No. 08-U-41; and *Fraternal Order of Police/Metropolitan Police Department Labor Committee, et al. v. District of Columbia Metropolitan Police Department, et al.*, 32 D.C. Reg. 4530, Slip Op. No. 116, PERB Case No. 84-U-02 (1985)).

FOP argued that the Hearing Examiner's waiver analysis under *D.C. Fire and Emergency Medical Services Dep't. and AFGE, Local 3721*, *supra*, Slip Op. No. 874 at 8-9, PERB Case No. 06-N-01 was distinguishable from the cases cited by MPD because it did not constitute a finding of an unfair labor practice, but was instead applied to reject MPD's defenses, and "to support [the Hearing Examiner's] conclusion that ... there was retaliatory interference [under the *Wright Line* framework]." *Id.*, at 6-7. FOP noted that MPD conceded it had an obligation to engage in impact and effects bargaining, and asserted the Hearing Examiner properly found that MPD did not fulfill that obligation. *Id.*

In response to MPD's assertion that it did not waive its substantive right to direct the union officials to participate in specific trainings, FOP contended the Hearing Examiner correctly found that when MPD invited FOP to submit proposals and then presented a counterproposal, it began the bargaining process and was thereafter required to continue in that process in good faith. *Id.*, at 12. As a result, MPD could not then in good faith unilaterally terminate the bargaining process by asserting its management rights. *Id.* (citing *D.C. Fire and Emergency Medical Services Dep't. and AFGE*, *supra*, Slip Op. No. 874, PERB Case No. 06-N-01). In addition, FOP argued it was "not material" that the bargaining in question was impact and effects bargaining as opposed to bargaining over substantive rights. *Id.*, at 12, and 15-17.

FOP asserted that the non-binding FLRA cases MPD cited did not support its positions. *Id.*, at 7-8. FOP further stated that the record and PERB precedent support the Hearing Examiner's finding that MPD improperly violated an established past practice when it directed the Chairman and Steward to complete their in-service training requirements. *Id.*, at 8-10, and 13-15 (citing Hearing Transcript, at 26-28, 89, 92-93, 97-98, and 174-175).

Further, FOP argued that MPD's reliance on D.C. Code §5-107.02 was misplaced because said statute does not specifically direct how the training is to be completed and does not mandate enforcement. *Id.*, at 10-11. Further, FOP contended that MPD did not comply with the statute for approximately five (5) to six (6) years after it was enacted and the classes MPD offered were not uniform and varied from year to year. *Id.* FOP reasoned that MPD's assertion that the Chairman and Steward are police officers first and therefore must complete all of their

in-service training requirements “is not even supported by the MPD’s actual implementation of its training requirements and demonstrates the arbitrary nature in which the MPD has imposed training requirements on FOP leadership as an act of interference and retaliation, rather than a properly executed management right.” *Id.*, at 11.

FOP asserted that MPD’s argument that the parties’ CBA empowered MPD to engage in the very acts and conduct alleged in the Complaints as violations of the CMPA was misplaced. *Id.*, at 17-18 (citing *FOP v. MPD, supra*, Slip Op. No. 1007, PERB Case No. 08-U-41). FOP averred that the CBA did not empower MPD to engage in the alleged “conduct” of deliberately interfering with the union officials’ protected representational rights by requiring them to participate in training and then subjecting them to unprecedented discipline and retaliation for failing to complete that training, all of which the Hearing Examiner found were improper. *Id.* FOP argued that MPD’s assertion that the Hearing Examiner improperly “interpreted” the parties CBA to justify her conclusions was improper because the Hearing Examiner only looked to the provisions to determine if MPD’s conduct could be justified by the CBA, not to determine if MPD committed a statutory violation. *Id.*, at 18.

Next, FOP argued that the Board should uphold the Hearing Examiner’s finding that FOP established a *prima facie* case of retaliation. *Id.*, at 19. FOP asserted that MPD’s exceptions were nothing than mere “disagreements” with the Hearing Examiner’s findings that were “amply supported by the record.” *Id.*, at 19-20.

In regard to MPD’s contention that the Hearing Examiner erred in stating that PD 62E’s had been issued to the both the Chairman and Steward, FOP averred that on page 6 of the Report, the Hearing Examiner correctly stated that only Chairman Baumann received the PD 62E. *Id.*, at 20. In response to MPD’s argument that the Hearing Examiner erred in equating PD 62E’s with “discipline,” FOP noted MPD’s concession during the Hearing that “it attaches PD 62E forms to later investigations, and thus it serves as a precursor to discipline.” *Id.* (citing Hearing Transcript, at 212-214). FOP noted that the Hearing Examiner made it clear that she only cited this occurrence “to provide context and insight into MPD’s subsequent actions against the Chairman and Steward.” *Id.*, at 20-21 (quoting Report, at f. 21).

In regard to the Hearing Examiner’s reliance on MPD’s issuance of amended performance plans to the Chairman and Steward as evidence of animus, FOP reiterated that the plans were amended unilaterally and without bargaining input from FOP, in violation of an established past practice. *Id.*, at 21. FOP noted that because the amended plans were only issued to members assigned to union leadership positions, the Hearing Examiner’s reliance on such as evidence of animus was proper. *Id.*

In response to MPD's contention that there was nothing in the record to support the Hearing Examiner's reliance on MPD's denial of the Chairman's and Steward's requests to attend a conference as evidence of animus, FOP conceded that Hearing Examiner misunderstood that MPD did not deny the union leaders' requests to attend the conference, but rather refused to count the conference as a substitute for attending in-service training. *Id.*, at 21-22. FOP stated that, based on past practice, the union officials considered the conference to be "approved training" that "counted toward any training requirement"—an assumption FOP said was affirmed by A.C. Durham's testimony that attending the conference could satisfy certain training requirements if approved. *Id.*, at 22 (citing Hearing Transcript, at 208-209). FOP contended that despite the Hearing Examiner's "imprecise wording," "a review of the record demonstrates the obvious nature of the finding and the evidence in support of the finding." *Id.*

In response to MPD's argument that the Hearing Examiner could not rely on MPD's withdrawal from bargaining discussions in December 2009 as evidence of animus because it occurred after the Complaints were filed, FOP averred that the Hearing Examiner properly relied on the withdrawal as a "continuation" of MPD's failure to bargain in good faith. *Id.*, at 22-23. Moreover, FOP contended that evidence of MPD's withdrawal was "presented at the hearing without objection by the Respondents and that it had asked MPD to bargain over this issue in October 2008, well before the Complaints were filed. *Id.* (citing Hearing Transcript, at 27-28).

In regard to MPD's arguments that the Hearing Examiner erred in relying on other evidence and events that occurred or became available after the initial Complaints were filed, FOP likewise averred that the Hearing Examiner was justified in weighing these items as evidences of MPD's continued anti-union animus. *Id.*, at 24-25.

In response to MPD's argument that the Hearing Examiner wrongly relied on MPD's June 2009 unfair labor practice complaint against FOP as evidence of animus, FOP contended that "[t]he Hearing Examiner can take administrative notice of the complaint and its facial invalidity and frivolous nature." *Id.*, at 23. FOP argued that that complaint itself was "a transparent attempt to suppress the FOP's exercise of its statutory rights rather than a legitimate exercise of a statutory right." *Id.*

In response to MPD's assertion that the Hearing Officer failed to show how revoking the Chairman's and Steward's police powers constituted evidence of animus, FOP argued that the Hearing Examiner presented more than enough reasoning and evidence to support her conclusions. *Id.*, at 23. FOP asserted the Hearing Examiner properly reasoned that it was suspicious that out of 136 officers who failed to complete their training requirements, only the Chairman and Steward "were investigated, placed on non-contact status, and [had their] police powers revoked." *Id.* FOP noted that the Hearing Examiner properly relied on MPD's own internal investigative reports, which found that "there was no basis for [A.C. Robinson's]

decision to segregate the [ASP/AED/CPR requirements] from the rest of the 2008 PDT requirements, or his decision to [investigate and revoke the police powers of] members who failed to attend the [ASP/AED/CPR] portion of the training.” *Id.* (quoting FOP Joint Exhibit 43 at p. 16). FOP stated that all of this evidences “of [anti-union] animus is in the record and supports the Hearing Examiner’s findings.” *Id.*

In response to MPD’s contention that the Hearing Examiner failed to explain how FOP’s request to have MPD investigate Chief Lanier’s training records was relevant to the question of animus, FOP stated it was the timing that was suspicious because MPD launched its investigation of the Chairman and Steward shortly after FOP requested the investigation. *Id.*, at 23-24. FOP argued that evidence of this suspicious timing was presented at the hearing and in the post-hearing briefs and “is directly relevant and supportive of retaliation and animus under the [*Wright Line*] case framework.” *Id.* (citing Hearing Transcript, at 40-41; and Joint Exhibit 23).

Addressing MPD’s argument that placing the Chairman and Steward on non-contact status and revoking their police powers when they failed to complete their in-service training requirements were appropriate exercises of its non-negotiable police powers, FOP countered that the parties’ CBA provides that MPD can only take these actions under certain circumstances. *Id.*, at 24. FOP asserted that:

Specifically, to place a member on non-contact status, one of the following must have occurred: (1) the member being indicted by a Grand Jury; (2) the member being found guilty by a trial board and recommended for termination; (3) the Board of Surgeons recommending the revocation due to mental illness, and emotional or psychological condition, or physical disability; or (4) suspension of a member for a reason of alleged activities carrying demonstrated or potential threat to public safety or disciplinary suspensions. *Id.* (citing FOP Joint Exhibit 1; and Hearing Transcript, at 43).

FOP argued that “[i]t was plainly obvious from the evidence presented that none of these factors applied and that the MPD was acting outside its authority in placing Chairman Baumann and Executive Steward Burton on non-contact status....” *Id.*

Finally, FOP argued that the Hearing Examiner’s award of costs⁹ should be upheld because “Respondents failed to prevail on any issue and as such their defense is wholly without merit...” given the Hearing Examiner’s finding that MPD “failed to present a legitimate reason

⁹ FOP asserts that its reasonable costs in these matters total \$946.30, which includes \$501.40 for transcripts, and \$444.90 in filing and service fees. (Complainant’s Opposition, at 25).

to justify sanctioning Chairman Baumann and Chief Steward Burton for abstaining from in-service training.” *Id.*, at 25-26.

III. Discussion

The Board will affirm a Hearing Examiner's findings if the findings are reasonable, supported by the record, and consistent with Board precedent. *See American Federation of Government Employees, Local 872 v. District of Columbia Water and Sewer Authority*, __ D.C. Reg. ___, Slip Op. No. 702, PERB Case No. 00-U-12 (2003) and *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 59 D.C. Reg. 11371, Slip Op. No. 1302 at 18, PERB Case Nos. 07-U-49, 08-U-13, 08-U-16 (2012). Determinations concerning the admissibility, relevance, and weight of evidence are reserved to the Hearing Examiner. *Hoggard v. District of Columbia Public Schools*, 46 D.C. Reg. 4837, Slip Op. No. 496 at 3, PERB Case No. 95-U-20 (1996) (citing *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 39 D.C. Reg. 6238, Slip Op. No. 285, PERB Case No. 86-U-16 (1992); and *Charles Bagenstose, et al. v. District of Columbia Public Schools*, 38 D.C. Reg. 4154, Slip Op. No. 270, PERB Case Nos. 88-U-33 and 88-U-34 (1991)). Merely disagreeing with a Hearing Examiner's findings and/or challenging the Examiner's findings with competing evidence do not constitute proper exceptions if the record contains evidence supporting the Hearing Examiner's conclusions. *Id.* (citing *Clarence Mack v. District of Columbia Department of Corrections*, 43 D.C. Reg. 5136, Slip Op. No. 467, PERB Case No. 95-U-14 (1996) and *American Federation of Government Employees, Local 872 v. District of Columbia Department of Public Works*, 38 D.C. Reg. 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991)).

Based on the foregoing, the Board adopts the Hearing Examiner's Report in part and rejects it in part, as detailed below.

A. Jurisdiction over Individual Respondents

The Board's position regarding the naming of individual respondents is clear. Suits against District officials acting in their official capacities should be treated as suits against the District. *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 at p. 4-5, PERB Case No. 08-U-19 (2011). The D.C. Superior Court recently upheld the Board's dismissal of such respondents in *Fraternal Order of Police/Metropolitan Police Department*

Labor Committee v. District of Columbia Public Employee Relations Board, Civ. Case No. 2011 CA 007396 P(MPA) (D.C. Super. Ct. Jan 9, 2013). While the Board recognizes that the FOP filed these actions prior to the decisions in the aforementioned cases, it has long been a basic tenet of agency law that the actions of an agent acting within the scope of his or her employment are imputed to his principal. *FOP v. MPD, supra*, Slip Op. No. 242 at p. 4, PERB Case No. 89-U-07. It is clear the Hearing Examiner understood this principle based on her finding that, “[a]s a senior official with the MPD, [A.C. Robinson’s decisions and actions concerning the Chairman and Steward] are attributable to the Department.” (Report, at 23).

Because the Hearing Examiner’s finding regarding the individually named Respondents was not reasonable, supported by the record, or consistent with Board precedent, the Board rejects that finding. *AFGE, Local 872 v. D.C. WASA, supra*, Slip Op. No. 702, PERB Case No. 00-U-12; and *FOP v. MPD, supra*, Slip Op. No. 1302 at 18, PERB Case Nos. 07-U-49, 08-U-13, 08-U-16. The individually named Respondents are therefore hereby dismissed from the Complaints. *Id.*

B. Subject Matter Jurisdiction

The Board “distinguishes between those obligations that are statutorily imposed under the CMPA and those that are contractually agreed upon between the parties.” *American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks*, 50 D.C. Reg. 5049, Slip Op. No. 697, PERB Case No. 00-U-22 (2002) (citing *American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2921, AFL-CIO v. District of Columbia Public Schools*, 42 D.C. Reg. 5685, Slip Op. No. 339, PERB Case No. 92-U-08 (1992)). In instances 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. *FOP v. MPD, et al., supra*, Slip Op. No. 1007 at p. 8, PERB Case No. 08-U-41. Furthermore, if the Board must interpret a contractual obligation in order to determine whether or not a non-contractual, statutory violation has been committed, the Board will defer the matter to the parties’ grievance and arbitration procedures. *Id.* In making these determinations, the Board examines the record of the particular matter to determine if the facts concern a violation of the CMPA, notwithstanding the characterization of the dispute in the complaint or the parties’ disagreement over the application of the CBA. *American Federation of Government Employees, Local Union No. 3721 v. District of Columbia Fire Department*, 39 D.C. Reg. 8599, Slip Op. No. 287 at n. 5, PERB Case No. 90-U-11 (1991).

The Board rejects the assertion MPD made at the Hearing and in its Exceptions that “[i]t is well settled that PERB does not have jurisdiction over alleged contractual violations, *even if those contractual violations also constitute violations of the CMPA.*” (Report, at 14; and Respondents’ Exceptions, at 11) (emphasis added). Indeed, if the record demonstrates that the allegations *do*, in fact, concern violations of the CMPA, then the Board unquestionably has jurisdiction over those allegations. *AFGE, Local 2741 v. D.C. Dep’t of Recreation and Parks, supra*, Slip Op. No. 697 at p. 6, PERB Case No. 00-U-22.

Here, the Board finds that the Hearing Examiner’s conclusion that the PERB has jurisdiction over FOP’s allegations arising under Article 9 was proper. (Report, at 14-15). The Board agrees with the Hearing Examiner’s conclusion that the provision entitling the Chairman and Steward to dedicate up to 40 hours a week to their representational duties was “unambiguous” and “required no interpretation.” *Id.*, at 14. Furthermore, the record—particularly MPD’s internal investigative reports—supports the Hearing Examiner’s finding that a past practice had been established that exempted the Chairman and Steward from the Department’s annual training requirements. *Id.*, at 4-10, 14-15. As an unwritten term and condition of the union officials’ employment, MPD was required to observe this past practice and could not make unilateral changes to it without first engaging in the bargaining process. *Id.* It follows therefore that the Hearing Examiner’s conclusion that MPD’s failure to honor these written and unwritten terms constituted violations of the CMPA that PERB has jurisdiction to adjudicate, was reasonable, supported by the record, and consistent with Board precedent. *AFGE, Local 872 v. D.C. WASA, supra*, Slip Op. No. 702, PERB Case No. 00-U-12.

Similarly, the Board finds that the Hearing Examiner properly rejected MPD’s arguments that the PERB lacks jurisdiction over FOP’s allegations arising under Article 12. (Report, at 15-19, and 26-27). The Board agrees with FOP that the Hearing Examiner’s waiver analysis was not in error. (Complainant’s Opposition, at 12). In its Exceptions, MPD asserted that the Hearing Examiner found MPD had waived its substantive right to assign work or direct employees to training. (Respondent’s Exceptions, at 10). However, that is not what the Hearing Examiner said. (Report, at 16-17). Indeed, the Hearing Examiner expressly stated that MPD was on “firm ground” in its assertions that assigning work and training were valid exercises of the Department’s “non-negotiable management rights.” *Id.* However, the Hearing Examiner reasoned that, under *D.C. Fire and Emergency Medical Services Dep’t. and AFGE, Local 3721, supra*, Slip Op. No. 874 at 8-9, PERB Case No. 06-N-01, MPD could not invoke its management rights to justify its unilateral termination of impact and effects bargaining once it engaged in that process. *Id.*, at 18-19. The Board agrees with FOP that when MPD invited FOP to submit proposals and then presented a counterproposal, it began the bargaining process and was thereafter required to continue in that process in good faith. (Complainant’s Opposition, at 12).

The Board further agrees with FOP that it was “not material” that the bargaining in question was impact and effects bargaining as opposed to bargaining over substantive rights. *Id.*, at 12, and 15-17.

In addition, the Board agrees with the Hearing Examiner that although MPD had the authority under its management rights to direct work and training, that could not overcome the facts that 1) neither D.C. Code § 5-107.02 nor the General Order specified the types of programs that should be offered or where they could be taken; 2) none of the authority MPD cited explained how to reconcile management’s right to assign work with the CBA’s provision entitling the union officials to dedicate up to 40 hours a week to their union responsibilities, or how to reconcile management’s rights with an established past practice exempting the union officials from having to complete the employer’s annual training requirements; 3) “the PERB is the only forum in which claims of reprisal involving District of Columbia government agencies can be resolved”; and 4) the disciplinary sanctions MPD issued against the Chairman and Steward were “unprecedented and unjustified” and therefore violated the CMPA. *Id.*, at 15-19, and 26-27.

In addition, the Board rejects MPD’s argument that the Hearing Examiner extra-judicially interpreted the CBA in order to reach her conclusions. (Respondents’ Exceptions, at 11-13). As stated previously, issues concerning the value of evidence in a case are reserved to the Hearing Examiner. *Hoggard, supra*. Merely disagreeing with a Hearing Examiner’s findings and/or challenging the Examiner’s findings with competing evidence do not constitute proper exceptions if the record contains evidence supporting the Hearing Examiner’s conclusions. *Id.* Here, the Hearing Examiner’s conclusions regarding PERB’s subject-matter jurisdiction in these cases were supported by the record and consistent with Board precedent. (See Report, at 15-19, and 26-27). MPD’s assertions that the Hearing Examiner erroneously emphasized some parts of Articles 9 and 12, but ignored others, constituted nothing more than “competing evidence” and were therefore not proper exceptions. *Hoggard, supra*.

Lastly, the Board rejects MPD’s argument that Joint Exhibits 61 and 62 show its past treatment of other officers in “similar situations.” (Respondents’ Exceptions, at 13). While the Exhibits show that MPD had placed one (1) officer on non-contact status, revoked his police powers, and stripped him of his service weapon, the Exhibits do not indicate that the reason for said sanctions was because the officer had failed to complete his in-service training requirements. (Joint Exhibits 61 and 62). Rather, the officer’s only concern in filing the Grievance was that MPD wrongly stripped him of his service weapon despite his request that he be allowed to retain it while on non-contact status. *Id.* It is telling that the officer did not question whether it was proper for the Department to place him on non-contact status. *Id.* As such, the Board finds that MPD’s Exhibits did not present a “similar situation” to the facts of the instant cases and that, as a result, the Hearing Examiner did not err in rejecting them.

All other arguments raised by MPD in its Exceptions concerning the question of jurisdiction were repeats of the same contentions it raised in the Hearing and were therefore not proper exceptions. *AFGE, Local 872 v. D.C. WASA, supra*, Slip Op. No. 702, PERB Case No. 00-U-12; *FOP v. MPD, supra*, Slip Op. No. 1302 at 18, PERB Case Nos. 07-U-49, 08-U-13, 08-U-16; and *Hoggard, supra*.

The Board finds that the Hearing Examiner's conclusion that the PERB has subject-matter jurisdiction over these cases was reasonable, supported by the record, and consistent with Board precedent. *Id.* The Board therefore adopts said conclusion. *Id.*

C. Retaliation

To establish a *prima facie* case of retaliation, FOP must have shown that 1) the Chairman and Steward engaged in protected union activities; 2) MPD knew about the Chairman's and Steward's protected union activities; 3) MPD exhibited anti-union animus or retaliatory animus; and 4) as a result, MPD took adverse employment actions against the Chairman and Steward. *American Federation of Government Employees, Local 2978 v. District of Columbia Office of the Chief Medical Examiner*, 60 D.C. Reg. 5801, Slip Op. No. 1348 (Amended) at p. 4, PERB Case No. 09-U-62 (2013) (citing *Doctors Council of the District of Columbia v. District of Columbia Commission on Mental Health Services*, 47 D.C. Reg. 7568, Slip Op. No. 636 at p. 3, PERB Case No. 99-U-06 (2000); and *District of Columbia Nurses Association v. District of Columbia Health and Hospitals Public Benefit Corporation*, 46 D.C. Reg. 6271, Slip Op. No. 583, PERB Case No. 98-U-07 (1999)). Furthermore, MPD's employment decisions must have been analyzed according to the totality of the circumstances, including the history of anti-union animus, the timing of the employment action, and disparate treatment. *Id.*

The Board finds that the Hearing Examiner's conclusion that the Chairman and Steward had been "deeply engaged" in protected union activities "that were well known to the MPD's senior officials" was adequately supported by the record and not generally disputed by MPD. (Report, at 20 and 22); and *AFGE, Local 2978 v. D.C. Office of the Chief Medical Examiner, supra*, Slip Op. No. 1348 (Amended) at p. 4, PERB Case No. 09-U-62. The Hearing Examiner's findings that FOP had "presented sufficient evidence" to demonstrate a history of MPD's anti-union animus and that "MPD was motivated by anti-union animus [when it took] retaliatory actions against the FOP Chairman and Chief Steward in reprisal for the union activism" were, in the totality of the circumstances, likewise adequately supported by the record. *Id.*; and *AFGE, Local 872 v. D.C. WASA, supra*, Slip Op. No. 702, PERB Case No. 00-U-12.

The Board generally rejects MPD's itemized Exceptions to the Hearing Examiner's summary of FOP's arguments demonstrating MPD's history of animus against the union. (Respondents' Exceptions, at 13-16).

Specifically, the Board rejects MPD's contention that the Hearing Examiner erred in relying on MPD's issuance of a PD Form 62E to the Chairman as evidence of animus because, while the Hearing Examiner did erringly note in the analysis section of her Report that PD Form 62E's were issued to both the Chairman and Steward, she correctly noted in the findings section of the Report that the Form was issued only to the Chairman. (Report, at 6 and 20). Further, the Board finds that the Hearing Examiner did not err in equating PD 62E's with "discipline" because the record demonstrates that MPD conceded "it attaches PD 62 E forms to later investigations, and thus it serves as a precursor to discipline." (Complainant's Opposition, at 20) (citing Hearing Transcript, at 212-214). The Board notes that the Hearing Examiner made it clear that she only mentioned this occurrence "to provide context and insight into MPD's subsequent actions against the Chairman and Steward." *Id.*, at 20-21 (quoting Report, at f. 21).

The Board finds that the Hearing Examiner properly relied on MPD's issuance of amended performance plans to the Chairman and Steward as evidence of animus because the record demonstrated that despite Article 27's express provision that "the existing ... Performance Rating Plan shall remain in effect unless the Department provides the Union with notice of any proposed change(s)," MPD unilaterally changed the plans without first notifying the union of the changes or engaging in the bargaining process, and then only issued the altered plans to members in union leadership positions. (Report, at 21); and (Complainant's Opposition, at 20).

In regard to MPD's contention that there was nothing in the record to support the Hearing Examiner's statement that MPD denied the Chairman's and Steward's requests to attend a conference, the Board agrees that the Hearing Examiner's statement was in error because the union officials' requests were not denied. (Complainant's Opposition, at 22). Rather, MPD refused to apply the union officials' attendance at the conference toward the fulfillment of their annual training requirements. *Id.* (citing Hearing Transcript, 208-209). Notwithstanding, the Board finds that this error is not fatal to the Hearing Examiner's overall finding that, under the totality of the circumstances, the record demonstrated MPD's history of animus against the union officials. *AFGE, Local 2978 v. D.C. Office of the Chief Medical Examiner, supra*, Slip Op. No. 1348 (Amended) at p. 4, PERB Case No. 09-U-62.

The Board finds that the Hearing Examiner's reliance on MPD's withdrawal from bargaining discussions in December 2009, MPD's withdrawal of the Chairman's and Steward's authorizations to speak to District 1 officers, and MPD's internal investigative reports as evidence of animus was proper despite the fact that each occurred or came to light after the

Complaints had been filed. (See Report, at 21; and Respondents' Exceptions, at 14-15). Issues concerning the value of evidence are reserved to the Hearing Examiner. *Hoggard, supra*. The Hearing Examiner here rightly considered evidence across a broad spectrum of time in her analysis of whether a history of animus existed because none of these events or items, in themselves, were held as statutory violations, but simply demonstrations of MPD's ongoing animus against FOP. *Id.* Additionally, the record shows that evidence of these events and items were "presented at the hearing without objection by the Respondents." (Complainant's Opposition, at 22-23) (citing Hearing Transcript, at 27-28).

The Board rejects MPD's argument that the Hearing Examiner erred when she relied on MPD's filing of an unfair labor practice complaint against FOP in June 2009 as evidence of animus. (Respondents' Exceptions, at 15). Again, issues concerning the value of evidence are reserved to the Hearing Examiner. *Hoggard, supra*. Here, the Hearing Examiner did not state that MPD was prohibited from filing the Complaint, but rather that such was simply another example of MPD's animus against FOP. (Complainant's Opposition, at 23)

The Board rejects MPD's assertion that the Hearing Examiner failed to provide any analysis or explanation as to why its decision to revoke the police powers of only the union officers constituted evidence of animus. (Respondents' Exceptions, at 15). Indeed, based on 1) the Hearing Examiner's reasoning that, of the 136 officers who failed to complete their training requirements, only the Chairman and Steward "were investigated, placed on non-contact status, and [had their] police powers revoked," 2) the Hearing Examiner's reliance on the findings of MPD's own internal investigative reports, which found that "there was no basis for A.C. Robinson's decision to segregate the [ASP/AED/CPR requirements] out of the rest of the 2008 PDT requirements, or his decision to [investigate and revoke the police powers of] members who failed to attend the [ASP/AED/CPR] portion of the training....," and 3) the Hearing Examiner's numerous findings that MPD never addressed in its Exceptions, the Board finds that the Hearing Examiner provided more than enough analysis and explanation to support her conclusions. (Complainant's Opposition, at 23) (citing Joint Exhibit 43 at p. 16); and (Report, at 22-28).

The Board rejects MPD's exception to the relevance of FOP's request that MPD investigate Chief Lanier's training records. (Respondents' Exceptions, at 15). The Board agrees with FOP that this claim speaks to the timing requirement under the *Wright Line* test because the record shows that MPD launched its investigation of the Chairman and Steward shortly after FOP delivered its request. (Complainant's Opposition, at 23-24) (citing Hearing Transcript, at 40-41; and Joint Exhibit 23).

Lastly, the Board rejects MPD's argument that its actions against the Chairman and Steward were appropriate exercises of its non-negotiable management rights. (Respondents' Exceptions, at 15-16). The Board rejects this exception as nothing more than a mere

disagreement with the Hearing Examiner's findings. *Hoggard, supra*. Furthermore, the Board agrees with the Hearing Examiner and FOP that "it was plainly obvious from the evidence presented [at the Hearing] that none of [the CBA's justifications for revoking an officer's police powers and/or stripping him of his service weapon] applied [to the Chairman and Steward in this instance] and that the MPD was acting outside its authority...." (Report, at 26-29); and (Complainant's Opposition, at 24) (citing Joint Exhibit 1; and Hearing Transcript, at 43).

MPD did not present any other arguments beyond those addressed herein in its Exceptions to counter the Hearing Examiner's finding that it failed to present any legitimate reasons under *Wright Line*'s burden shifting framework to justify its actions and/or legitimately explain why only the union officials were placed on non-contact status, had their police powers revoked, and were stripped of their service weapons and badges. (Respondents' Exceptions, at 16).

Therefore, the Board finds that the Hearing Examiner's conclusions, in accordance with the *Wright Line* framework, that MPD violated D.C. Code §1.617.04(a) by engaging "in retaliatory conduct in an effort to interfere, restrain or coerce FOP Chairman Baumann and Executive Steward Burton in [the exercise] of their protected rights," and by sending an *in terrorem* message to the FOP members "that the exercise of protected rights was disfavored," were reasonable, supported by the record, and consistent with Board precedent. (Report, at 29); and *AFGE, Local 872 v. D.C. WASA, supra*, Slip Op. No. 702, PERB Case No. 00-U-12. The Board therefore adopts said conclusions except where noted herein.

IV. Remedy

The Hearing Examiner recommended that PERB order the MPD and its agents and representatives to: 1) cease and desist from interfering with, restraining or coercing Chairman Baumann and Steward Burton in the exercise of their protected rights; 2) cease and desist from taking retaliatory actions against Chairman Baumann and Steward Burton; 3) expunge the negative items from Chairman Baumann's and Steward Burton's personnel files related to their absence from the 2008 in-service training programs, as well as anything related to their having been placed on non-contact status and/or the revocation of their police powers; 4) cease requiring Chairman Baumann and Steward Burton to attend in-service training for the balance of the parties' CBA without first bargaining with FOP about the implementation and effects of their attendance; 5) pay FOP's reasonable costs associated with the consolidated proceeding; and 6) notify PERB of the steps it is taking to implement the Board's order within thirty (30) days of receiving the Board's order. (Report, at 29).

The Board finds it reasonable to order MPD to 1) cease and desist from interfering with, restraining or coercing any union officials in the exercise of their protected rights; 2) cease and desist from taking retaliatory actions against any union officials; 3) expunge the negative items from Chairman Baumann's and Steward Burton's personnel files related to their absence from the 2008 in-service training programs, as well as anything related to their having been placed on non-contact status and/or the revocation of their police powers; 4) cease requiring the FOP Chairman and Steward to attend in-service training for the balance of the parties' CBA without first bargaining with FOP about the implementation and effects of said attendance; and 5) notify PERB of the steps it is taking to implement the Board's order within thirty (30) days of the service of said order.

In addition, the Board rejects MPD's exception to the Hearing Examiner's recommendation that FOP be awarded its reasonable costs in these matters. (Respondents' Exceptions, at 16-17).

D.C. Code § 1-617.13 authorizes the Board "to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may determine." The circumstances under which the Board warrants an award of costs were articulated in *AFSCME, D.C. Council 20, Local 2776 v. D.C. Dep't of Finance and Revenue, supra*, Slip Op. No. 245 at p. 4-5, PERB Case No. 89-U-02, in which the Board stated:

[A]ny such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed . . . Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice.

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued . . . What we can say here is that among the situations in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive bargaining representative.

MPD argued that the Hearing Examiner failed to establish that its positions were "wholly without merit" and "undertaken in bad faith" such that it was in the "interest of justice" to award costs. (Respondents' Exceptions, at 16-17) (citing *AFSCME, D.C. Council 20, Local 2776 v.*

D.C. Dep't of Finance and Revenue, supra, Slip Op. No. 245 at p. 4-5, PERB Case No. 89-U-02). The Board disagrees. The Hearing Examiner found that MPD's revocation of the Chairman's and Steward's police powers and its confiscation of their service weapons were "unprecedented and unjustified." (Report, at 26-27). In addition, the Hearing Examiner noted that MPD's "explanations for taking these actions were without merit." *Id.*, at 21, and 25. The Hearing Examiner further found that taking these actions constituted "retaliatory conduct in an effort to interfere, restrain or coerce FOP Chairman Baumann and Executive Steward Burton in [the exercise] of their protected rights," and sent an *in terrorem* message to the FOP members "that the exercise of protected rights was disfavored," in violation of D.C. Code § 1-617.04(a). Each of these is consistent with the showing of "an interest of justice" as outlined in *AFSCME, D.C. Council 20, Local 2776 v. D.C. Dep't of Finance and Revenue, supra*, Slip Op. No. 245 at p. 4-5, PERB Case No. 89-U-02. Therefore, the Board finds that the Hearing Examiner's recommendation to award costs was reasonable, supported by the record, and consistent with Board precedent. *AFGE, Local 872 v. D.C. WASA, supra*, Slip Op. No. 702, PERB Case No. 00-U-12. Therefore, FOP should be awarded its reasonable costs in these matters.

Last, the Board notes that the Hearing Examiner did not recommend that MPD post a notice acknowledging its violations of the CMPA, as detailed herein, though FOP requested such a remedy in both of its Complaints. The Board finds it reasonable to order MPD to post notices acknowledging its violations of the CMPA. When a violation of the CMPA has been found, the Board's order is intended to have a "therapeutic as well as a remedial effect" and is further to provide for the "protection of rights and obligations." *American Federation of Government Employees, Local 2725 v. District of Columbia Department of Health*, Slip Op. No. 1003 at p. 5, PERB Case 09-U-65 (2009) (quoting *National Association of Government Employees, Local R3-06 v. District of Columbia Water and Sewer Authority* 47 D.C. Reg. 7551, Slip Op. No. 635 at p. 15-16, PERB Case No. 99-U-04 (2000)). It is this end, the protection of employees' rights, that "underlies [the Board's] remedy requiring the posting of a notice to all employees" that details the violations that were committed and the remedies afforded as a result of those violations. *Id.* (quoting *Charles Bagenstose v. District of Columbia Public Schools*, 41 D.C. Reg. 1493, Slip Op. No. 283 at p. 3, PERB Case No. 88-U-33 (1991)). Posting a notice will enable bargaining unit employees to know that their rights under the CMPA are fully protected. *Id.* It will likewise discourage the Agency from committing any future violations. *Id.*

ORDER

IT IS HEREBY ORDERED THAT:

1. The individually named Respondents, Cathy Lanier, Linda Nischan, Terrence Ryan, and Anna McClanahan, are hereby dismissed from the Complaints.
2. The District of Columbia Metropolitan Police Department (“Respondent” or “MPD” or “Agency”) shall cease and desist from interfering with, restraining or coercing any union officials in the exercise of their protected rights.
3. MPD shall cease and desist from taking retaliatory actions against any union officials.
4. MPD shall expunge the negative items from Chairman Baumann’s and Steward Burton’s personnel files related to their absence from the 2008 in-service training programs, as well as anything related to their having been placed on non-contact status and/or the revocation of their police powers.
5. MPD shall cease requiring the FOP Chairman and Steward to attend in-service training for the balance of the parties’ CBA without first bargaining with FOP about the implementation and effects of said attendance.
6. MPD shall pay FOP’s reasonable costs in these matters.
7. If MPD has any cause to dispute FOP’s assertion that \$946.30 is the total amount of its reasonable costs in these matters, then MPD shall, within fourteen (14) days of the service of this order, submit to the Public Employee Relations Board (“PERB” or “Board”) a written statement detailing its reasons for said dispute. Said statement shall be filed along with any and all supporting documentation. FOP may file with PERB a response to MPD’s statement within fourteen (14) days of the service of said statement.
8. MPD shall conspicuously post, within ten (10) days of the service of this Decision and Order, two (2) copies of the attached Notice in every MPD facility where notices to bargaining-unit employees are customarily posted. Said Notices shall remain posted for thirty (30) consecutive days.
9. Within fourteen (14) days of the service of this Decision and Order, MPD shall notify the Board, in writing, that the Notice has been posted as ordered.

Decision and Order

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10. Within thirty (30) days of the service of this Decision and Order, MPD shall notify the PERB of the steps it is taking to implement this Order.
11. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

May 28, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 09-U-52 and 09-U-53, Slip Op. No. 1391, was transmitted via U.S. Mail and e-mail to the following parties on this the 4th day of June, 2013.

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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT ("MPD"), THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1391, PERB CASE NOS. 09-U-52 and 09-U-53 (May 28, 2013).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered MPD to post this notice.

THE MPD violated D.C. Code § 1-617.04(a) by engaging in retaliatory conduct in an effort to interfere, restrain or coerce the FOP Chairman and Executive Steward in the exercise of their protected rights, and, in so doing, interfered, restrained and coerced FOP's members by sending an *in terrorem* message that the exercise of protected rights was disfavored.

District of Columbia Metropolitan Police Department

Date: _____ By: _____

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, located at: 1100 4th Street, SW, Suite E630; Washington, D.C. 20024, Telephone: (202) 727-1822.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

May 28, 2013