

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

**Government of the District of Columbia
Public Employee Relations Board**

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In the Matter of:)	
)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee)	
Complainant,)	PERB Case No. 11-U-24
)	
v.)	Opinion No. 1585
)	
District of Columbia Metropolitan Police Department)	
)	
Respondent.)	
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DECISION AND ORDER

On March 1, 2011, Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP” or “Complainant”) filed an unfair labor practice complaint (“Complaint”) alleging that the District of Columbia Metropolitan Police Department, Chief of Police Cathy L. Lanier and Inspector Michael Eldridge (“Respondent” or “MPD”) violated D.C. Official Code §§ 1-617.04(a)(1) and (5) of the Comprehensive Merit Personnel Act (“CMPA”) by failing to comply with FOP’s request for relevant and necessary information to represent an officer before an MPD Adverse Action Panel Hearing.

MPD filed an Answer denying the allegations and requesting that the Board dismiss the Complaint. In PERB Slip Op. No. 1114, dated August 15, 2011, the Board denied MPD’s motion to dismiss and ordered an expedited hearing.¹ A hearing was held before Hearing Examiner Gloria Johnson on October 25 and November 18, 2011. The Hearing Examiner’s Report and Recommendation was filed on July 18, 2013. The Respondent filed Exceptions to the Hearing Examiner’s Report and Recommendation on August 8, 2013, and the Complainant filed a timely Opposition to Respondent’s Exceptions on August 22, 2013. For reasons stated herein, the Board adopts the Hearing Examiner’s Report and Recommendation that the Respondent committed an unfair labor practice (“ULP”) in violation of DC Official Code § 1-617.04(a)(1).

¹ By Decision and Order dated October 7, 2011, PERB denied MPD’s motion for reconsideration.

I. Statement of the Case

FOP member Micheaux Bishop received a letter of proposed termination, dated May 14, 2010. On November 3, 2010, FOP sent a letter to MPD requesting production of specified documents and items to be used in the defense of Officer Bishop at MPD's Adverse Action Panel Hearing ("Panel"). The request for production of documents specifically asked for:

- 1) A clean and un-redacted copy of the transcribed statement of the Complainant.
- 2) A clean and un-redacted copy of the transcribed statement of Tya Ransom.
- 3) A complete and un-redacted copy of the audio recording of Complainant's March 3, 2010 interview with Internal Affairs.
- 4) A complete and un-redacted copy of the audio recording of the November 3, 2009 interview of Sgt. Michael Coligan.
- 5) Complete and un-redacted copies of all email correspondence from October 11, 2009 to the present and continuing, between Cherita Whiting² and
 - a. Chief of Police Cathy Lanier;
 - b. Assistant Chief of Police Diane Groomes; and Assistant Chief of Police Michael Anzallo.

That request was subsequently denied. MPD's Adverse Action Panel ("Panel") moved forward and conducted a hearing on November 10, 2010, that continued on December 21, 2010. At its conclusion, the Adverse Action Panel issued a verdict which found Officer Bishop guilty of all three charges.³ A final notice of adverse action dated February 14, 2011 stated that the Panel unanimously found Officer Bishop guilty of all three charges and specifications, and that her removal from the Metropolitan Police Force would become effective March 25, 2011. On March 4, 2011, Officer Bishop filed an appeal with Chief Lanier. That appeal was subsequently denied.

On March 1, 2011, FOP filed this unfair labor practice complaint alleging that MPD refused to provide relevant and necessary information requested by FOP in connection with the representation of Officer Bishop before a MPD Adverse Action hearing.

² Whiting initiated the investigation into Bishop's behavior by an email to Chief Lanier that disclosed Bishop's relationship with an indicted drug trafficker. Whiting verbally requested that she remain anonymous throughout the Adverse Action process. However, after her identity was mistakenly disclosed to Bishop, Whiting voluntarily testified before the Adverse Action panel and released MPD from the confidentiality agreement.

³ The Panel recommended discharge for Charge No. 1 ("Conduct unbecoming an officer..." i.e. maintaining a close interpersonal relationship with an individual who was under federal indictment for the distribution of illegal drugs.). The Panel also found Officer Bishop guilty of charge No. 2 (disclosing the name of a complainant who wished to remain anonymous to non-law enforcement persons), and recommended that Officer Bishop be suspended for 10 days. Finally, the panel found Officer Bishop guilty of charge No. 3 specification No. 1 ("Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Officer to, or in the presence of, any superior officer, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing."), and determined that she should be terminated for this offense.

II. Hearing Examiner's Recommendation

A. Jurisdiction over individuals

MPD argued that Chief Lanier and Inspector Eldridge should not have been named as respondents because any acts they committed in this case were done in their official capacity. The Hearing Examiner found there was nothing presented on the record to merit the imposition of individual liability on Chief Lanier and/or Inspector Eldridge. She concluded there was no “preponderance of evidence presented on the record for the Examiner to find personal or individual acts on the parts of Chief Lanier or Inspector Eldridge that rose to the level of violations of the statute.”⁴

B. Subject matter jurisdiction

The Hearing Examiner observed that MPD raised the same jurisdictional arguments at the hearing and in its post hearing brief that PERB lacked jurisdiction and should defer to Article 10 of the collective bargaining agreement (“CBA”) that describes how matters relating to requests for release of information should be handled. The Hearing Examiner stated that PERB “distinguishes between those obligations that are statutorily imposed under the CMPA and those that are contractually agreed upon between the parties.”⁵ The Hearing Examiner concluded that the Board previously decided that it has jurisdiction in this case and MPD did not present any new arguments or information not previously considered by the Board during its deliberations over MPD’s Answer/Motion to Dismiss and Motion to Reconsider.⁶

C. Unfair Labor Practice

The Hearing Examiner found that the information requested by FOP was relevant and necessary to FOP being able “to fairly and adequately represent the employee-member.”⁷ The Respondent argued that FOP’s justification for the requested information does not meet the 3-pronged standard required to sustain an unfair labor practice complaint, namely that the requested information will be used (1) to process a grievance, (2) in an arbitration proceeding, or (3) to engage in collective bargaining.⁸ Respondent stated, “In this case a grievance had not been filed, the parties were not engaged in arbitration and the parties were not at the table negotiating an agreement.”⁹

⁴ HE R&R at 28-29, 43.

⁵ *Am. Fed’n of Gov’t Employees, Local 2741 v. Dist. of Columbia Dep’t of Recreation and Parks*, 50 D.C. Reg. 5049, Slip Op. No. 697, PERB Case No. 00-U-22 (2002).

⁶ HE R&R p.30. See *Fraternal Order of Police/Metro. Police Dep’t Labor Committee v. Dist. of Columbia Metro. Police Dep’t*, 59 D.C. Reg. 6552 (2012), Slip Op. No. 1114, PERB Case No. 11-U-24 (Motion to Dismiss) (August 15, 2011) and Slip Op. No. 1114, PERB Case No. 11-U-24 (Motion for Reconsideration) (October 7, 2011).

⁷ HE R&R at 32.

⁸ MPD cited *Fraternal Order of Police/Metro. Police Dep’t Labor Committee v. Dist. of Columbia Metro. Police Dep’t*, 59 D.C. Reg. 6781 (2012), Slip Op. No. 1131, PERB Case No. 09-U-59 (2011).

⁹ HE R&R at 31.

MPD asserted also that the Board lacks jurisdiction over this matter because this is a contractual issue. The Hearing Examiner cited *Fraternal Order of Police/Metro. Police Dep't Labor Committee v. Dist. of Columbia Metro. Police Dep't*,¹⁰ for its analysis of whether an allegation is contractual in nature. The Hearing Examiner concluded that this matter can be resolved under the CMPA so the Board has jurisdiction to hear it.

The crux of MPD's initial refusal to provide FOP with the requested unredacted information about the investigation of Officer Bishop was that the complaining witness, Cherita Whiting, had verbally requested anonymity in the Adverse Action process. She was acquainted with the target of the investigation and her boyfriend and family members and was concerned about retribution. However, after Ms. Whiting learned that her identity had been mistakenly disclosed to Officer Bishop, Whiting voluntarily testified at Officer Bishop's Adverse Action hearing and released MPD from the confidentiality agreement. Although FOP again requested the information after Whiting testified, it was more than a year before FOP received any of the requested information. The Hearing Examiner found that all items requested by FOP were necessary and relevant to mount Officer Bishop's defense, and it was an unfair labor practice to deny access to each of the five specific requests for information after Cherita Whiting testified on November 10, 2010.¹¹

MPD argued, further, that the instant dispute about the release of requested information is contractual and not statutory. If that argument were to prevail then the Board would not have jurisdiction to hear this controversy because PERB does not have jurisdiction to interpret collective bargaining agreements between agencies and unions.¹² The Hearing Examiner concluded that, "This is not a matter of contract. Rather it is a matter that violates the Comprehensive Merit Personnel Act, D.C. [Official] Code § 1-617.04(a), which prohibits the District of Columbia, its agents and representatives from interfering, restraining, or coercing any employee in the exercise of rights guaranteed to them under the CMPA, as well as refusing to bargain collectively in good faith with the recognized exclusive representative."¹³

III. Analysis

A. Jurisdiction over individuals

Concerning the naming of individual officials in the complaint, we reach the same conclusion as the Hearing Examiner regarding the imposition of individual liability on Chief

¹⁰ 59 D.C. Reg. 6552 (2012), Slip Op. No. 1114 (Motion to Dismiss), PERB Case No. 11-U-24 (August 15, 2011). In that case, the Board looked to whether the record supports a finding that the alleged violation is contractual in nature by considering if the dispute is (1) restricted to facts involving a dispute over whether a party complied with a contractual obligation, (2) resolution of the dispute requires an interpretation of those contractual obligations, and (3) no dispute can be resolved under the CMPA. See also *Am. Fed'n of Gov't Employees, Local No. 3721 v. Dist. of Columbia Fire Dep't* 39 D.C. Reg. 8599, Slip Op. No. 287 at 5, PERB Case No. 90-U-11 (1991).

¹¹ HE R&R at p. 37.

¹² It has long been established by the Board that the CMPA contains no provision that a breach of the CBA by the employer or the union is an unfair labor practice. *Carlease Madison Forbes v. Teamsters, Local Union 1714 and Teamsters Joint Council 55*, 36 D.C. Reg 7097, Slip Op. No. 205 at p. 3, PERB Case No. 87-U-11 (October 9, 1991). See also, *Am. Fed'n of Gov't Employees, Local Union 3721 v. D.C. Fire Dep't*, 39 D.C. Reg. 8599 (1992), Slip Op. No. 287, PERB Case No. 90-U-11 (October 9, 1991).

¹³ HE R&R at p. 30.

Lanier and/or Inspector Eldridge but for a different reason. We do not need to weigh the evidence to determine that the two individuals have not violated the statute. The Board has consistently held that suits against District officials in their official capacities are treated as suits against the District and individual respondents named in their official capacities should be removed from the complaint.¹⁴ Therefore, we grant the Respondents' request to dismiss Chief Cathy Lanier and Inspector Michael Eldridge as Respondents in this matter, and reaffirm the Executive Director's administrative dismissal regarding individuals named in the complaint.¹⁵

B. Subject matter jurisdiction

The Respondent contends that PERB lacks jurisdiction to consider this matter because it is an issue of contract interpretation and not of statute. The Board "distinguishes between those obligations that are statutorily imposed under the CMPA and those that are contractually agreed upon between the parties."¹⁶

PERB has jurisdiction where the matter is not purely contractual and may concern a violation of the CMPA. PERB looks to whether the dispute supports a finding that the alleged violation is (a) restricted to facts involving a dispute over whether a party complied with a contractual obligation; (b) resolution of the dispute requires an interpretation of those contractual obligations; and (c) the dispute cannot be resolved under the CMPA.¹⁷ If all three prongs of this test are resolved in the affirmative, the dispute will be considered contractual.

Considering the record of this case, the Board determines that the matter is not purely contractual and concerns a violation of the CMPA. First, the case does not involve a dispute over the terms of the parties' CBA but rather whether MPD refused to provide FOP with requested necessary and relevant information. Second, the Board is not required to interpret the parties' CBA to resolve the dispute. The Board may resolve the dispute based upon its interpretation of D.C. Code § 1-617.04(a)(1) and (5), and case law. As we stated in this case previously, "the Board has consistently held that if allegations made in an unfair labor practice complaint do, in fact, concern statutory violations, as in the instant case, then the Board is empowered to decide whether MPD committed an unfair labor practice concerning the Union's

¹⁴ *Fraternal Order of Police/Metro. Police Dep't Labor Committee v. Metro. Police Dep't*, 60 D.C. Reg. 12080 (2013), Slip Op. No. 1403 at 1, PERB Case No. 08-U-26 (July 29, 2013). See also, *Fraternal Order of Police/Metro. Police Dep't Labor Committee v. Metro. Police Dep't*, 59 D.C. Reg. 6579 (2012), Slip Op. No. 1118 at p. 4-5, PERB Case No. 08-U-19 (August 19, 2011).

¹⁵ *Fraternal Order of Police/Metro. Police Dep't Labor Committee v. Dist. of Columbia Metro. Police Dep't*, Slip Op. No. 1114 p.1 n.1, PERB Case No. 11-U-24 (Motion for Reconsideration, October 7, 2011). By removing these names from the caption, we are not reversing our ruling that the Board has jurisdiction over MPD.

¹⁶ *Am. Fed'n of Gov't Employees, Local 2741 v. Dist. of Columbia Dep't of Recreation and Parks*, 50 D.C. Reg. 5049, Slip Op. No. 697, PERB Case No. OO-U-22 (November 26, 2002) citing *Am. Fed'n of State, County and Mun. Employees, D.C. Council 20, Local 2921*, v. D.C. Pub. Sch., 42 D.C. Reg. 5685 (1995), Slip Op. No. 339, PERB Case No. 92-U-08 (December 4, 1992).

¹⁷ *Am. Fed'n of Gov't Employees, Local Union No. 3721 v. Dist. of Columbia Fire Dep't*, 39 D.C. Reg. 8599, Slip Op. No. 287, PERB Case No. 90-U-11 (1991).

document request, even though the document request was made ... pursuant to a contractual provision.”¹⁸

C. Unfair Labor Practice

To establish an unfair labor practice under D.C. Official Code §§ 1-617.04 (a)(1) and (5), the Complainant must prove by a preponderance of evidence that the Respondent interfered with, restrained or coerced an employee in the exercise of rights guaranteed by this subsection, or that the Respondent refused to bargain in good faith with the union. Relying on *Fraternal Order of Police/Metro. Police Dep't Labor Committee v. Dist. of Columbia Metro. Police Dep't*, MPD argued that FOP was not processing a grievance, engaged in an arbitration proceeding or negotiating a collective bargaining agreement and therefore, FOP was not entitled to the requested information.¹⁹ We agree with the Hearing Examiner that MPD's narrow view of this test is not consistent with Board or court decisions about this issue. The Hearing Examiner distinguished that case because there, the Board found that FOP did not make any allegations that, if proven, could establish a violation of the CMPA.²⁰ As previously stated, the Hearing Examiner in this case found that information requested by FOP was relevant and necessary to its role as the exclusive representative to fairly and adequately represent its employee-member²¹. In *DC Nurses Association v. DC Dep't of Mental Health*,²² the Board made it clear that a union's role in “collective bargaining” means more than negotiating a collective bargaining agreement. In that case, the Board found that the requested information, relating to retroactive pay increases, was relevant and necessary “to a legitimate collective bargaining function to be performed by the union.”²³ Moreover, the United States Supreme Court has held that an employer's duty to disclose information “unquestionably extends beyond the period of contract negotiation and applies to labor-management relations during the term of the agreement.”²⁴ Thus, contrary to MPD's assertion, we agree with the findings of the Hearing Examiner that FOP's request was for relevant and necessary information in furtherance of its collective bargaining responsibilities.

IV. Remedy

We agree with the Hearing Examiner that the complaint should be sustained. FOP asks that MPD be ordered to cease and desist from interfering, restraining, or coercing the FOP in the exercise of its rights guaranteed by CMPA § 1-617.04(a)(1) and (5) by failing or refusing to provide FOP with information relevant and necessary to FOP's collective bargaining duties; to immediately release all the information requested by the FOP in this matter; and, to

¹⁸ *Fraternal Order of Police/Metro. Police Dep't Labor Committee v. Dist. of Columbia Metro. Police Dep't*, Slip Op. No. 1114, PERB Case No. 11-U-24 (Motion for Reconsideration, October 7, 2011).

¹⁹ *Id.*

²⁰ *Id.*

²¹ HE R&R at 32.

²² 59 DC Reg. 15187 (2012), Slip Op. No. 1336 at p.3, PERB Case No. 09-U-07 (October 19, 2012).

²³ *Id.*

²⁴ *NLRB v. Acme Industrial Co.*, 385 US 432, 436 (1967).

conspicuously post no less than two (2) notices of their violations and the Board's Order in each building of the department.

V. Conclusion

We conclude that MPD did violate D.C. Official Code §§ 1-617.04 (a)(1) and (5) of the Comprehensive Merit Personnel Act. The unfair labor practice complaint is upheld. However, the Complaint against Chief Cathy Lanier and Inspector Michael Eldridge is dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

1. Complainant's unfair labor practice complaint is upheld.
2. The District of Columbia Metropolitan Police Department's request to dismiss Chief Cathy Lanier and Inspector Michael Eldridge as Respondents in this matter is granted.
3. The District of Columbia Metropolitan Police Department shall deliver to the Fraternal Order of Police/Metropolitan Police Department Labor Committee, within fourteen (14) days of the date of issuance of this Order, the information FOP requested.
4. The District of Columbia Metropolitan Police Department shall conspicuously post where notices to employees are normally post two (2) notices that the Board will furnish to MPD in each of the department's buildings. The notice shall be posted within fourteen (14) days from MPD's receipt of the notice and shall remain posted for thirty (30) consecutive days.
5. Within fourteen (14) days from the date of the receipt of the notice, MPD shall notify the Public Employee Relations Board in writing that the attached notice has been posted accordingly and on what date they were posted.
6. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy, Member Yvonne Dixon, Member Ann Hoffman, Member Barbara Somson, and Member Douglas Warshof.

Washington, D.C.

June 14, 2016

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 11-U-24, Opinion No. 1585, was served by File & ServXpress on the following parties on this the 30th day of June, 2016.

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/s/ Sheryl Harrington

PERB



Public
Employee
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GOVERNMENT OF
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, 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. 1585, PERB CASE NO. 11-U-24 (June 30, 2016).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law in the manners alleged in PERB Case No. 11-U-24, and has ordered MPD to post this Notice.

WE WILL cease and desist from violating D.C. Official Code §§ 1-617.04(a)(1) and (5) in the manners stated in Slip Opinion No.1585, including not bargaining in good faith by refusing or failing to provide relevant and necessary information that is requested by the exclusive representative, the Fraternal Order of Police/Metropolitan Police Department Labor Committee.

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 MPD's compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board by U.S. Mail at 1100 4th Street, SW, Suite E630; Washington, D.C. 20024, or by phone at (202) 727-1822.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD