

On February 2, 2018, the MdTA Police issued a personnel order regarding a promotional exam for corporals that was held on March 3, 2018. In this order, the officers who signed up for the exam were specially assigned to the exam site for that date. The order also stated that at the conclusion of the exam, the officers would return to their regular detachments to complete their shifts.

There is currently an ongoing dispute between the MdTA Police employer and MdTA FOP 34 regarding what happens with officers assigned to the site of a promotional exam. This dispute has resulted in an October 23, 2017 side letter (“side letter”) that addresses the issue. On February 10, 2018, the FOP 34 president contacted the MdTA and stated that the requirement that after the March 3, 2018 exam officers return to their regular detachments, was in violation of past historical practices and also in violation of the October 23, 2017 side letter.

Based on the letter from the FOP 34 president, the MdTA Executive Officer amended the February 2, 2018 personnel order. This amendment did not include the requirement that officers return to their detachments to finish their shifts after the promotional exam was completed. The amended order did note that the day would be an eight hour day consistent with how the MdTA conducts in services.

On the exam date, March 3, 2018, at the conclusion of the exam, officers were told to take a break for lunch and then to return for a class on Ethics in Law Enforcement. On March 8, 2018, the FOP 34 filed a grievance that in not releasing the officers sitting for the exam when the exam was over, the MdTA had violated the side letter of October 23, 2017. Further, the grievance relayed statements allegedly made by Major Lyles in the course of the examination ending and during the ethics class. In response to the grievance, the MdTA agreed to provide five additional hours of leave to compensate for the hours the officers were required to remain at the examination site, and said that it would investigate Major Lyles’ statements.

During a meeting about the grievance filed by the FOP 34, the MdTA asked for the identity of the people who would substantiate the allegations against Major Lyles. FOP 34 provided the names of four individuals who would do so. An electronic mail message was sent to the four individuals indicating that since the President of the FOP 34 lodge was not present at the examination, first-hand accounts of Major Lyles’ misconduct would be need to be provided by the filing of individual complaints. This message further ordered the officers not to discuss the allegations with anyone else until notified by the Lieutenant Colonel.

Disputed Items

Based on reviewing the petition and the motion to dismiss, it appears that the following items are in dispute:

1. There are differing interpretations of the Side Letter on Special Assignments held by FOP 34 and the MdTA.

2. Any statements made by Major Lyles in the course of the exam administration and in conducting the ethics class after the exam.

Petitioner's Position/Information

FOP 34 presented the events that took place surrounding the exam administered on March 3, 2018, and in addition described various statements made by Major Lyles regarding the reasons why the officers were required to return after the exam was finished to take the ethics class. The FOP 34 alleges that the following statements were made to the officers by Major Lyles:

“Does anyone know why we’re here? We received grief about going back to your detachments from the FOP so we’re going to be here for the next 3 ½ hours to make sure it’s an 8 hour day.”

“This class is happening due to the direct result of consulting with your FOP.”

“...if you don’t want to participate in the class, we’ll just do it in the painful way.” (following this statement, it was alleged that Major Lyles “singled out each officer in the class to force each of them to answer each and every question.” (petition, statement of facts, p. 4).

Presenting the preceding events that took place surrounding the administration of the promotional exam, as well as the statements made by Major Lyles, the FOP 34 argues that the State Personnel & Pensions Article at Section 3-306(a)(1) has been violated in the following ways:

1. Requiring the officers to remain for an additional five hours after the exam to participate in an impromptu ethics class was in retaliation against the FOP 34’s insistence that the collectively bargained agreement on special assignments be met.
2. Requiring that the officers stay for five hours plus take an ethics class placed an additional term and condition of employment on the officers, so as to discourage membership in the FOP 34.
3. Singling out the officers who complained about Major Lyles’ statements on the exam date and requiring them to be willing to make a complaint in order to have the FOP 34’s allegations regarding Major Lyles investigated, is not appropriate because the MdTA has no rule or regulation requiring first-hand accounts, but even if it did, since two of the four officers singled out were FOP 34 officers, the FOP 34 did have first-hand knowledge of Major Lyles’ misconduct.
4. Singling out the officers who spoke to the FOP 34 about the events surrounding the exam rather than speaking to all the officers who were present that day as witnesses, is an effort to

discourage those who engage in protected union activity.

5. The Lieutenant Colonel's order that the four officers not discuss the allegations with anyone else is the "equivalent of" (petition, statement of facts, p. 7) ordering them not to "engage in concerted activity with their bargaining representative."

6. MdTA has not made efforts to preserve testimony of the four named officers, and has not contacted the full group of officers present for the exam, and has stated that it intends to take no further action against Major Lyles.

Respondents' Position/Information

The MdTA has filed a motion to dismiss this complaint for the following reasons/arguments:

1. The MdTA argues that it has not violated State Personnel & Pensions Article Section 3-306(a)(1) due to the fact that the MdTA and the FOP 34 have been discussing a requirement for officers to remain after completing a promotional exam as part of their ongoing discussions on the Side Letter. Further, requiring the officers to stay at the promotional exam was consistent with how in service training is conducted. Finally, the officers were provided extra administrative leave time to compensate them for their time spent at the ethics training after the promotional exam was concluded. For these reasons, the MdTA argues that the charge of violating Section 3-306(a)(1) should be dismissed or deemed moot.

2. The MdTA argues that it has not violated State Personnel & Pensions Article Section 3-306(a)(4) because assignments for a promotional examination has been specifically addressed in the Side Letter, so the MdTA argues that it did not impose an additional term or condition of employment. The MdTA notes that it recognized the confusion based on the Personnel Order, and therefore offered additional leave to compensate for the time spent after the examination. As for the statements alleged to have been made by Major Lyles, the MdTA argues that they do not rise to the level of an unfair labor practice, as she was responding to questions asked by the officers—she did not bring up the topic or begin the conversation, and her comments referenced recent discussions between the parties regarding the Personnel Order. The MdTA argues that Major Lyles' comments cannot be construed as having discriminated in a term or condition of employment or encouraged or discouraged union membership. Finally, the MdTA argues that the manner in which Major Lyles conducted the class was not an unfair labor practice, as she is a certified instructor with specifically prepared materials to present, and followed certain accepted criteria in how she ran the class, rotating questions around the room, and not, as the FOP 34 argues, singling out members of the union in order to act in a discriminatory manner.

3. The MdTA argues that it has not violated State Personnel & Pensions Article Section 3-306(a)(1) when Lt. Colonel Ruff requested the names of the officers that overheard Major Lyles' alleged comments. The MdTA notes that the FOP 34 voluntarily provided the names of these officers to the MdTA, and the MdTA alleges that the FOP 34 only started to

complain about having done this when the outcome of the Commander's Inquiry was not to their liking. The MdTA argues that seeking the names of the officers was done only to expedite the inquiry—rather than interviewing all of the officers (over seventy) taking the exam, the MdTA sought the officers that heard the alleged statements made by Major Lyle. The MdTA argues that this was not an attempt to interfere, restrain, or coerce these employees in the exercise of their rights under the Collective Bargaining Law.

4. The MdTA argues that it has not violated State Personnel & Pensions Article Section 3-306(a)(1) when Lt. Colonel Ruff ordered officers to not discuss the investigation of Major Lyles' alleged comments as part of the Commander's Inquiry. The MdTA argues that it is a recognized practice to order officers participating in an investigation that may lead to discipline of officers, to not discuss the investigation. The MdTA argues that FOP 34 members were not prohibited from discussing union business, but that the order was a standard one, issued to protect the investigation.

Petitioner's Opposition to Respondent's Motion to Dismiss

Noting at the outset that its complaint should be viewed in the light most favorable to the complainant, the FOP 34 argues that in its Motion to Dismiss, the MdTA only disputes the complaint by asserting its own version of the facts, it cites no authority in support of its position. The FOP 34 argues that the SLRB should deny the Motion to Dismiss because the FOP 34 complaint alleges sufficient facts to entitle it to relief. Simply because the MdTA is offering alternative facts or interpretations, does not entitle it to a dismissal in this matter.

The FOP 34 argues in favor of not granting the Motion to Dismiss as, unlike in other SLRB matters in which the Board has granted motions to dismiss due to a failure to state a claim under Board law and regulations, this complaint is timely brought by state employees alleging facts that arguably state an unfair labor practice under Section 3-306 of the State Personnel & Pensions Article.

The FOP 34 argues that the SLRB's history of dismissing matters or granting motions to dismiss has primarily been on procedural grounds such as lack of jurisdiction or timeliness. Further, the FOP 34 argues that since the SLRB has not regularly granted or considered motions to dismiss in cases where a complaint alleging violations of specific sections of Section 3-306 of the State Personnel & Pensions Article has been timely filed by appropriate parties, the SLRB has not developed a standard of review in such cases. However, notes the FOP 34, in previous cases, the SLRB has recognized the National Labor Relations Board (NLRB) as precedential and persuasive authority. Therefore, the standards of review of the NLRB in considering motions to dismiss should be taken as persuasive and precedential here as well. The FOP 34 cites various NLRB and SLRB cases to support this argument.

Regarding the mootness argument made by the MdTA, the FOP 34 notes that although the SLRB may not have discussed or defined a standard for when an unfair labor practice becomes moot, the Public School Labor Relations Board (PSLRB) has done so within its case law (*Howard County Education Association v. Board of Education, SV 2015-07*), saying

that a case may be moot when there is no existing controversy between the parties for which an effective relief may be fashioned. The FOP 34 argues that following this standard should prevent dismissal of this matter, as there is an active controversy and there are multiple means of relief found in SLRB regulations that would be appropriate here. The FOP 34 argues that providing leave to employees to compensate for the time spent after the promotional examination, as the MdTA has done, does not serve to make this complaint moot, as there are other and, it argues, more appropriate, remedies available. The FOP 34 cites COMAR 14.32.05.02L (“cease and desist order” and “communicating directly with employees”), as well as SLRB Case No. 12-U-03 (AFSCME v. Calvert County), in which the Board ordered notice posting as a remedy.

The FOP 34 argues that MdTA’s motion to dismiss should not prevail against the claim, under SPP 3-306(a), that requiring officers to sit through the ethics class was in retaliation for protected union activity. The FOP 34 cites multiple NLRB cases in which claims considering union animus were processed and heard. Applying the facts of the current matter, the FOP 34 argues that the facts the union has presented do give a valid claim of retaliation that should not be dismissed only because the MdTA gives an alternative narrative, or an alternative reason based on which the ethics class was required. Further, the FOP 34 argues that despite the MdTA assertion that the officers should have expected to remain present after the promotional exam, does not serve to negate a claim of retaliation. Regarding MdTA’s argument that since Major Lyles’ comments referenced discussions the parties recently had about the Side Order, her comments cannot be construed as retaliatory, the FOP 34 states that it wasn’t merely Major Lyles’ comments that were discriminatory, but her actions were at issue because she required only those officers who were assigned to the promotional exam to sit for the additional five hours of ethics class. Coupled with her comments about receiving grief from the FOP, the FOP 34 argues that this demonstrates a violation and should not be dismissed.

The FOP 34 reiterates its arguments from the original charge that the MdTA has committed an unfair labor practice violation by requiring that the officers involved with the ethics class and witnesses to Lyles’ alleged behavior and comments, make individual complaints before the MdTA would investigate the Fop 34’s grievance of March 8, 2018. Again, the FOP 34 argues that in its Motion to Dismiss, the MdTA offers alternative facts regarding whether it intended to interfere or restrain the officers, and that merely offering alternative facts should be rejected by the SLRB as a means of dismissing the matter.

The MdTA argues in its Motion to Dismiss that the names of the individual officers were voluntarily given by the FOP 34, so there is no basis for an interference charge here. However, the FOP 34 argues that there is a difference between the MdTA wanting to interview the officers as witnesses to Lyles’ behavior and asking or requiring the officers to file a complaint in order to move forward with the investigation, and therefore the charge should not be dismissed. Moreover, the FOP 34 states, contrary to the Motion to Dismiss, which argues that the FOP 34 didn’t complain about the interviewing of the officers until after learning the outcome of the investigation of the grievance, that less than one week after the communication was sent about interviewing the officers, and before the investigation was complete, the FOP 34 expressed concern over the investigation. Indeed, the FOP 34 points

out that the MdTA stated that the email sent to the individual officers “could have been worded differently” (Response to Motion to Dismiss, p. 13) and that the officers that are coming forward were not required to file a complaint.

The FOP 34 states that the MdTA’s provision of different facts to answer the charge is not an appropriate argument to support a Motion to Dismiss, and nor is the MdTA’s argument that it had no intention of interfering with employee rights. The FOP 34 argues that the State Personnel & Pensions Article at 3-306(a)(1) has no motive requirement, so the MdTA’s intention does not matter. The FOP 34 also applies this intention issue to its charge that the MdTA attempted to prohibit union members from discussing FOP 34 business during the investigation.

Analysis

In this matter, the FOP 34 has appropriately filed charges that the MdTA has violated SPP Sections 3-306(a). The FOP 34 has supported its charges with a narrative of events that are alleged to have taken place, as well as various documents that may support those allegations. Further, the FOP 34 makes the argument that in its review, the SLRB should view the facts in the most favorable light to the petitioner—i.e., that any alternative factual interpretations provided by the MdTA should not serve to dismiss the matter. In its response and Motion to Dismiss, the MdTA provides alternative information disputing some of the FOP 34 claims, as well as noting that in its communications with the FOP 34, it did not intend to interfere or restrict employees in joining or conversing with the union.

COMAR §14.32.05.02G – H authorizes various actions undertaken by the Executive Director regarding unfair labor practices filed before the SLRB. Under these sections, the Executive Director shall, subject to SLRB review, consider properly filed complaints, and investigate the facts. Further, the Executive Director should recommend SLRB dismissal of the matter if a petitioner fails to state an actionable claim under SPP Sections 3-101 through 3—602, or appropriate COMAR regulations; or determines that the SLRB has no jurisdiction over the claims presented. Regarding these COMAR provisions, this matter was properly filed with appropriate service to the respondents, and FOP 34 has alleged violations of statutory provisions committed by a state employer over which the SLRB has jurisdiction.

COMAR 14.32.05.02H authorizes the Executive Director to set forth a written report as to whether probable cause exists to believe that the unfair labor practice has occurred. In this matter, the FOP 34 alleges that based on alleged behavior and circumstances surrounding a promotional examination, an unfair labor practice has occurred. The FOP 34 has provided sufficient information to establish probable cause that an unfair labor practice has occurred.

Recommendation

Based on the evaluation of the evidence gathered during the course of this investigation, and discussed in the above analysis, the Executive Director finds and recommends that FOP 34 has appropriately filed an unfair labor practice violation before the SLRB, and that probable cause exists such that the alleged violation should move forward for further SLRB

review. Further, the Executive Director recommends that this matter should be addressed in a hearing before the SLRB or through a delegation to the Office of Administrative Hearings in a manner and scope that the SLRB deems appropriate.

Pursuant to SLRB Regulations at COMAR §14.32.05.02G - H, this report will be sent to the full membership of the SLRB as well as to the parties. Any party aggrieved by the Executive Director's Report and Recommended Determinations is permitted to request reconsideration by the full board **no later than fifteen days** after the issuance of this report.

Erica L. Snipes

Erica L. Snipes, Executive Director
State Labor Relations Board

10/24/18

Date