GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	:	
ONE HUNDRED AND NINETEEN MEMBERS OF THE FRATERNAL ORDER OF POLICE/ MPD LABOR COMMITTEE,	:	
Complainants,	:	
	:	PERB Case No.: 22-S-01
v.	:	
FRATERNAL ORDER OF POLICE METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE,	:	
Respondents.	:	

COMPLAINANTS' POST-HEARING BRIEF

Complainants through their counsel, HANNON LAW GROUP, LLP, present their Post-Hearing Brief for consideration by the Hearing Examiner Earl E. Shamwell, Jr.

STATEMENT OF THE FACTS

On July 16, 1999, the Council for the District of Columbia passed the "Lateral Appointment of Law Enforcement Officers ["LEOs"] Emergency Amendment Act of 1999" ["Lateral Appointment Act"] permitting LEOs with previous years of experience from other jurisdictions to apply as sworn officers with the Metropolitan Police Department. The purpose of the Act was to resolve the serious shortage of officers in the District of Columbia. The Act promised these LEOs they would receive credit for their prior service for certain leave benefits and they would receive credit for their prior credited service by payment of a defined amount into the Police Officers and Firefighters Retirement Fund ["Retirement Fund"]. Comps. Ex. 7 at 5.

The District of Columbia, however, failed to implement procedures to ensure both the seniority rights afforded the recruits and payment of the pension contribution for prior service into the Retirement Fund administered by the D.C. Retirement Board ["DCRB"].

Upon passage of the Lateral Appointment Act, MPD established a recruitment team which scoured the country to retain experienced LEOs. Recruiters visited potential hires, and interviewed them repeatedly. These recruitment efforts included negotiations over starting salary in which MPD recruiters routinely upped the ante because of the emergency. In addition, recruiters would negotiate over how many of the recruits prior service would be credited. For example, Officer William Parr was contacted by MPD recruiter Lt. Matielo in 2001 after the 9/11 attack. Lt. Matielo told then Sgt. Parr that Parr could transfer his pension by paying 8% per year of Parr's starting salary for the number of years to be credited. MPD offered to certify 16 of Sgt. Parr's prior 20-years of service. When Sgt. Parr started with MPD, however, Lt. Matielo told Parr he was unable to pay into his retirement because they were "still crunching the numbers." Tr. III at 8-13. Office David Terestre was recruited with the same promise regarding buying his prior years' service. Tr. III at 167. When he inquired about retiring, he was told to buy back his prior service would cost $417,000. Tr. III at 171, 183. He was forced to retire in 2020, and paid $198,252 to buy back only 4 years and 9 months of his prior service instead of the ten years promised. Tr. III at 192-93; Comps. Ex. 38. Terestre is now 63 years-old with a family, and may have to sell his house. Tr. III at 196. Their experiences were the result of MPD's failure to set up a mechanism for recruit buy-in and to contribute the MPD share pursuant to the Lateral Appointment Act.

The recruits as a matter of course became members of the Union, formally identified as the Fraternal Order of Police Metropolitan Police Department Labor Committee ["the Union"].

Soon after being hired, the early recruits – such as Parr and Terestre – discovered that their seniority rights and pension rights under the Lateral Appointment Act were not being honored by MPD and the DCRB. These officers ["MPD Laterals" or "Laterals"], questioned both MPD officials and DCRB personnel to seek a remedy. When none was forthcoming, they remonstrated with their Union to take action to protect the rights promised them under the Lateral Appointment Act. The Union was as slow to respond as was MPD and the DCRB. For the Lateral Officers, hundreds of thousands of dollars were at stake.

Finally, on July 17, 2005, Union Chief Shop Steward Kristopher K. Baumann sent a Memorandum to MPD Ass't. Chief Crockett reporting that police officers/Union members who were hired under the Lateral Appointment Act were not receiving proper credit for leave based on their prior service. In addition, the MPD Laterals were unable to deposit to the Fund the amount of their prior years pension to be credited to the Fund under the Lateral Appointment Act. In addition, Baumann reported, by way of example, that Officer Michael Swand and Sgt. Perry Hoak had been informed that no process had been established by either MPD or the Fund to comply with the Lateral Appointment Act. Comps. Ex. 7 at 3-4.[1]

On August 26, 2005, Ass't. Chief Crockett responded in a letter to Union Chairman Gregory I. Greene purporting to correct the problem for crediting prior service toward leave. In addition, Ass't. Chief Crockett acknowledged that the Lateral Appointment Act permits the MPD Laterals to "buy" into the Retirement Fund. She confirmed that the D.C. Retirement Board which manages the Retirement Fund had no mechanism in place to enable the MPD Laterals to pay in for their prior service. Ass't Chief Crockett indicated that she would respond again once

[1] Officer Baumann had a law degree, and would soon become Chairman of the Union.

meetings between MPD and the Retirement Board to work out the retirement fund issue were completed. Comps. Ex. 7 at 9-10.

At the beginning of 2006, Baumann was elected Chairman of the Union. With no response from MPD or DCRB as promised by Ass't Chief Crockett, on May 16, 2006, Baumann sent a letter to Crockett complaining that no action had been taken by MPD since her letter of almost a year prior. Comps. Ex. 7 at 2. That same day, Baumann forwarded his letter to Crockett to the Union Chief Shop Stewards. Baumann reported to them that "This is obviously a very big issue for lateral police officers, so please ensure that all laterals in your elements are updated." Comps. Ex. 7 at 1.

On December 21, 2006, the DCRB finally made a presentation to the MPD Laterals regarding their promised pension contributions under the Lateral Appointment Act. Sherry Summa reported the good news and the bad news. "Your time counts up front, but the bad news is it's not funded." Hoak Test., Tr. III at 249; Comps. Ex. 16. Ms. Summa directed them to talk with MPD Human Resources.

The problem continued to remain unresolved. On October 11, 2007, the Committee on Public Safety and the Judiciary for the Council of the District of Columbia held a hearing on a bill to provide enhanced retirement benefits to MPD Chief Cathy L. Lanier. In frustration at the inaction of MPD, DCRB and his Union, Sgt. Perry Hoak and others appeared before the Committee to report that the Council's enactment of the Lateral Appointment Act of 1999 had still not been implemented and funded. Sgt. Perry testified, in part, as follows:

> For over seven years, lateral police officers like me have been without the opportunity to buy into the retirement system, despite the existence of a law requiring that opportunity.
>
> This [problem] became very clear on April 10, 2007 when a member of my Lateral Class 2002-1 gave his life for the District of Columbia. Officer Wayne C.

> Pitt lost his life in the Line of Duty on that day. Officer Pitt had come to the Metropolitan Police Department as a Lateral Officer from the Durham Police Department after 20 years of service. It was Officer Pitt's intention to purchase some of his time that he had from his previous department. That never happened because of the District of Columbia's unwillingness to live up to their obligation to its Lateral Police Officers.
>
> Officer Pitt's family is now receiving a benefit from the DC Retirement Board based on five years of service, not the Twenty Five they should be receiving.

Comps. Ex. 10; Tr. III at 306-307.[2]

Nothing was done by DCRB or the Union to address this tragedy for Officer Pitt and the blatant disregard for the statutory rights of the MPD Laterals. Not until sometime in 2010 did the MPD Laterals receive computations regarding the cost for them to purchase credit for their pensions. However, the figures provided by the DCRB required the MPD Laterals to pay in the value of their pension at the time of hire plus the amount by which the pension would have grown from their date of service to the present ["the Delta"].

MPD Laterals were receiving letters from the DCRB calculating their buy in costs to receive the credit for their previous law enforcement time. The sums were in the hundreds of thousands of dollars. DCRB reported that if a Lateral could not pay the large lump sum all at once, then they were given the opportunity to pay installments with interest. These calculations were "two or three times their salaries or more and [ ] only allow them a month to buy back their time[.]" Comps. Ex. 23 at 5.

On January 10, 2011, the Union finally invoked arbitration with MPD over the failure to implement the promises contained in the Lateral Appointment Act of 1999. Comps. Ex. 11 and 23 at 4. However, the arbitration demand remained in limbo because Union leadership was

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[2] See the Memorial for Officer Pitt at https://mpdc.dc.gov/page/memorial-wayne-c-pitt.

ignoring the demands of the relatively small number of MPD Laterals and prioritizing other matters. Tr. I at 215-219. For some Laterals, they also felt some animosity from Union officials who had been with MPD their entire careers. The Union's neglect of the Laterals' circumstance continued for over five years, during which time some MPD Laterals retired without receiving the benefits of the 1999 Lateral Appointment Act.

Finally, at the beginning of 2016, Officer Stephen Bigelow was elected Chairman of the Union.[3] Chairman Bigelow revived the Union's pursuit of the grievance on behalf of the MPD Laterals. Bigelow believed that the Union had been dismissive and had not been truthful in responding to the Laterals requests. Tr. II at 250-251. Bigelow explained in his testimony that the Union had left the Laterals' grievance "in the queue" and it had "pretty much died in the queue." Tr. II at 251. He was very concerned about the time schedule because he was aware that Laterals were retiring and losing the benefit of the Lateral Appointment Act. Tr. II at 254. "I thought it was a disservice to these members and a failure on the Union's part." Tr. II at 255. "[I] thought that the response of the Union was inadequate over all those - - over that decade." Tr. II at 261.

At his direction, then-counsel for the Union Marc L Wilhite of Pressler, Sentfle & Wilhite, PC, held a meeting with the MPD Laterals on June 17, 2016 at the MPD Police Academy.[4] The purpose of the meeting was to determine whether to proceed with a traditional arbitration of the MPD Laterals grievance, or submit the issue to a Claims Panel. The consensus

[3] Bigelow is now a Lieutenant with the Metropolitan Police Department.

[4] Pressler, Sentfle & Wilhite started representing the Union as general counsel in 2007. Tr. I at 47. However, they were later discharged in favor of Conti Fenn, LLC. The Wilhite firm was costing the Union a million dollars a year. Tr. II at 294.

from the meeting was to have a second meeting, at which Mr. Wilhite would present the pros and cons of either choice. Tr. I at 142-147; Comps. Ex. 21 [Admission Denied].[5]

The second meeting took place on November 17, 2016. Mr. Wilhite testified that as counsel to the Union handling the MPD Laterals grievance, "We simply want[ed] to ensure that the will of the officers is respected in whatever decision that is reached." Tr. I at 146. However, this was the last time that Mr. Wilhite met personally with any of the MPD Laterals "to ensure that the will of the officers is respected", even though he continued to represent their interests up to and including today. Tr. 156-169. Chairman Bigelow also explained at the hearing that "they've been waiting all this time to get their day in court, and they haven't got it. And I think it's only appropriate that they have a say in their own future. . . . I thought that was a reasonable and prudent choice." Tr. II at 258.

Initially then, Mr. Wilhite and the Union respected the wishes of the MPD Laterals and went forward with a formal arbitration on behalf of the Union and the MPD Laterals. Hearings took place on December 5, 2017, and January 16, 2018. Comps. Ex. 23 at 4. These arbitration hearings took place 18 years after enactment of the 1999 Lateral Appointment Act, 12 years after

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[5] We are referencing some exhibits which were ruled inadmissible by the Hearing Examiner. The transcript of the four days of the hearing before the Hearing Examiner is replete with objections by Counsel for the Union to both testimony and exhibits of Complainants which were often granted by the Hearing Examiner. Complainants contend that the process violated PERB Rule 544.8:

> The Board or its designated representative shall investigate each complaint. The investigation may include an investigatory conference with the parties. The parties shall submit to the Board or its designated representative evidence relevant to the complaint. Such evidence may include affidavits or other documents, and any other material matter.

Clearly, an "investigation" does not contemplate application of strict rules of evidence. Complainants are asserting these errors in the hearing in order to protect their right to file exceptions to the Hearing Examiner's Report, if necessary, under PERB Rule 544.13.

Baumann as Chief Shop Steward raised the issue with MPD, and 7 years after the grievance was filed. Many Laterals had retired without benefit of the Lateral Appointment Act pension promise.

Arbitrator David P. Clarke issued his decision on July 13, 2018. Comps. Ex. 23. Arb. Clarke ruled that the MPD Laterals would be permitted to purchase their prior service at the amount it would have cost them on the date of hire. MPD would be responsible for "the Delta" between that amount and the amount to which it would have grown since the date of hire. Arb. Clarke directed the parties to agree on the method and rate by which "the Delta" would be calculated. He retained jurisdiction for sixty-days to complete the process. Comps. Ex. 23. The Arbitration Award ordered MPD to comply with the Award in Three Parts:

> (1) Identify the Lateral Officers hired between the operational date of the Act in 2000 and December 6, 2010, and inform the Union of the amount of prior law enforcement time the Department recognized for each of them when they were hired.
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> (2) With respect to each of the Lateral Officers, provide the Union with the amount that each could have paid into D.C.'s retirement fund resulting from crediting their prior service, during the month of the year that they were hired by the Department. *To be clear, this amount is not the present value of the original purchase price, but the original purchase price at the time the Lateral Officers were hired.* ·
>
> (3) Seek agreement with the Union on the method and rate by which the Lateral Officers' lost opportunity to purchase years of service will be calculated. If an agreement is reached, provide each Lateral Officer with a calculation of the amount that they may elect to deposit into D.C. 's retirement fund, based on the amount they would have paid when they were hired.

Comps. Ex. 23 at 26 (emphasis supplied).

Chairman Bigelow, who attended the arbitration hearings, as well as the MPD Laterals were ecstatic about the outcome. They had no doubt as to the meaning of the decision: their only obligation was to pay into the Retirement Fund the amount they would have paid on their date of

hire. Tr. II at 268; Tr. III at 179. Pemberton testified that he believes he understands the meaning of the Arbitration Award as well. Tr. II at 62. However, he could not say whether he had that understanding when he first read it, as "I had not consulted with counsel" and "the answer would be a little more nuanced." Tr. II at 68.

Complainants' Exhibit 32 is an email trail for a group email among the MPD Laterals and certain Union officials. On November 21, 2018, Chairman Bigelow emailed the group reporting that an accountant needed to be hired to determine the cost for the Laterals to purchase their time, and management will pay the Delta. Comps. Ex. 32 at 19. On February 24, 2019, Chairman Bigelow then reported that DCRB required an actuary study which would cost $30,000. In frustration, Bigelow reported to the MPD Laterals "They are either going to comply or not. If they refuse the next step will be an Order to Enforce in PERB. PERB would take MPD to Superior Court to enforce the Arbitrators Ruling" *Id.* at 21; Tr. IV at 84-85, 91.

Chairman Bigelow, as well as the MPD Laterals, had become frustrated with Mr. Wilhite's inaction and unavailability. And Chairman Bigelow had decided to discharge the Wilhite firm as general counsel to the Union. However, on May 22, 2019, Bigelow reported to the MPD Laterals that the Union would retain Wilhite to enforce the arbitration decision through PERB and the Superior Court. *Id.* at 21. On July 23, 2019, Bigelow reported that the MPD actuary study was in progress and would determine the amount each MPD Lateral would be required to pay into the Retirement Fund, as well as the Delta owed by MPD. *Id.* at 22.

The MPD actuary report was finally sent to Chairman Bigelow, and on August 6, 2019, Chairman Bigelow distributed it to the Laterals. As Bigelow feared, and as Mr. Wilhite confirmed at the hearing, the actuary report was incomplete and not in compliance with Arb. Clarke's decision. *Id.* at 23. The report immediately generated frustrated emails and calls from

the Laterals. Mr. Wilhite at the hearing admitted that this actuary report amounted to a violation of the Arbitration Award by MPD. Pemberton testified at the hearing that not even Part 2 of the Arbitration Award has been completed. Tr. II at 184. Because of this, Chairman Bigelow told Mr. Wilhite to move quickly "because the clock's ticking." Tr. II at 272. Chairman Bigelow also did not trust MPD.

> [T]hey appeal everything to the maximum extent possible. They don't act in good faith, from my experience. They drag, stall, delay, and they will continue to delay until they don't have any more delays or anymore appeals. That's how they operate. I have no faith in their ability to try to negotiate in good faith.

Tr. II at 274-275. Officer Jody Shegan said MPD's strategy historically is "to carry it out as long as they can and then eventually we'll have to retire, and they won't have to pay any awards for the difference. Absolutely. Appeal. Appeal. Appeal." Tr. III at 100-101.

MPD's failure to comply with the directives of Arb. Clarke and Mr. Wilhite's refusal to aggressively pursue enforcement of the arbitration award through PERB and the Superior Court continued to frustrate Chairman Bigelow and MPD Laterals. Tr. IV at 24. Bigelow directed Mr. Wilhite to proceed with an enforcement action against MPD; however, Mr. Wilhite advised against it. Tr. II at 281. On September 9, 2019, Bigelow emailed the Laterals, reporting the following:

> I believe the actuary study is wrong, it appears that the actuary was given inflated starting salary numbers. It also appears that they charged interest on our members, this portion was suppose [*sic*] to be paid by management. We asked management to give us the actual actuary study and they claimed the retirement board wouldn't give it to them. We contacted the arbitrator and management finally agreed to give us the work ups on each member. Marc Wilhite has a conference call on Sept. 11, 2019 with Mark Viehmeyer [MPD General Counsel] and the arbitrator. He is still representing us. The arbitrator still has jurisdiction or he wouldn't be participating in the conference call.
>
> Our top priority is making sure that the department pays what they owe, and doesn't try to dump that responsibility on you all. Since day one I have been honest with you all and have done everything in my power to hold management

> accountable for the false promises they made to you all. I hope at this point I have earned some level of trust with you all based on my actions.
>
> We are coming to the end of this process and management is going to fight us. But they did not appeal the arbitrators ruling, so that severely limits the amount of delay and stall tactics they can use. Unfortunately there are people who will try to exploit managements non-compliance to try to get you all to lose faith that I am doing everything in my power to help you. I am still fighting for you all, and I am determined to see this fight to the end.

Id. at 14.

The purpose of this email, in part, was to counteract exploitation of MPD's delay going into the election cycle for Union officers. Predictably, Officer Greggory Pemberton running for Union Chairman against Bigelow stepped into the lurch with campaign literature criticizing the slow pace of resolving the MPD Laterals grievance, and posting to members in a slick campaign circular a complex strategy to bring the matter to conclusion. Comps. Ex. 29. Pemberton already knew when he was running that the Laterals were frustrated. Tr. II at 50. However, at the time he put out his slick brochure with a solution to the arbitration issue, Pemberton did not really understand what the Three Part Arbitration Award meant "with any level of certainty." Tr. II at 70-71, 73-75.

Unfortunately, Pemberton won. As new Chairman of the Union, Pemberton has done none of the things he promised. Instead, he continued with Mr. Wilhite as counsel on the matter; however, Pemberton appears to have taken over from Mr. Wilhite, personally engaging with the Arbitrator, retaining an actuary for the Union, and negotiating with Mark Viehmeyer, General Counsel for MPD. On the other hand, during the election period, Bigelow believed only the hardest of tactics would prevail. "I don't ever expect MPD to take the proper view, and I always expected that we would have to litigate it to the furthest extent to get them to be in compliance. That's been their track record." Tr. II at 288-289. Bigelow had lost faith in Mr. Wilhite,

and so had the committee Bigelow established among the Laterals. But before the Union could take action to remove Mr. Wilhite, the elections occurred. Tr. II at 292-293.

Chairman Bigelow and the MPD Laterals were very clear upon their first reading of Arb. Clarke's decision: the Laterals need only pay in the amount of their prior years' pension at the cost on the date of their hire; MPD is required to pay the Delta for the growth since their date of hire because MPD had failed to implement payment procedures for the initial amount upon enactment of the Lateral Appointment Act and misled the Laterals.

Pemberton, however, appeared to believe that the decision and order of the Arbitrator was far more complicated. Therefore, he engaged three lawyers to prepare opinion letters on the meaning of Arb. Clarke's decision. Comps. Ex. 30, 31, and 34. On May 26, 2020, as the clock continued to tick without any results, Pemberton reported his plan to the Laterals:

> I wanted to give everyone a brief update on what's going on with the lateral grievance. I really wanted to have some answers for everyone by the end of April, but for obvious reasons, there have been some delays.
>
> * * * *
>
> In order to complete this first phase, we have tasked three separate law firms with all of this. The first firm is Pressler & Sentfle, the firm that originally handled the grievance and the hearing. The second is Conti & Fenn, LLC, another of our contracted firms that has inherent knowledge of our organization and MPD. The third firm is a group of independent, out-of-state specialists in "creditable service" that have decades of experience in handling these matters, specifically from the perspective of pension systems.
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> * * * *
>
> The idea is that once everyone understands the factual position we're in from an accurate legal standpoint, we can make educated decisions on how to proceed.

Comps. Ex. 32. The MPD Laterals who had followed the process since their hiring were astonished. What was it that Pemberton did not understand? Pemberton's process delayed advancement of the Laterals' case even more, as the last opinion letter from an attorney in

California was not received until June 3, 2020. Comps. Ex. 34. Not until September 10, 2020, did Pemberton even meet with the Laterals whose frustration continued to grow as nothing had been accomplished in over a year after Arb. Clarke's decision. Even in that event, Pemberton sent the announcement of the meeting to only a handful of Laterals, and limited the meeting to only 10-15 because of COVID limitations on attendance. He did not suggest an on-line meeting so that all might attend. Comps. Ex. 40.

At the September 10 meeting, Pemberton distributed the three opinion letters to the attendees. Mr. Wilhite was not present, nor any other attorney to comment on Pemberton's plans. At this meeting, as Pemberton testified in the hearing, he told the Laterals what he thinks is the meaning of the Arbitration Award:

> And, ultimately, what I wanted them to understand was that what the award was saying is that the arbitrator was pointing to a DC Code statute, Title 1, Section 610, which talks about creditable service for prior law enforcement. And it talks about how members can buy that service.
>
> And the way that they buy that services that they have to purchase not only the employee portion, which is what is commonly referred to as the 8 percent, but also the employer portion, which is a significantly larger percent, which is almost twice that, which is about 16 percent and that that total is more like 15 a 24 percent.
>
> Well, that's not a very specific number because it does require actuarial calculations among other things, that I wanted them to understand that some of these prior ideas, as you've articulated just recently, were incorrect. And then I wanted them to understand what the arbitrator was awarding based on the statute. That was one of the main takeaways I wanted them to have.

Arb. Tr. II at 107-108. Pemberton's lay and uncounseled interpretation of the Arbitration Award presented at the September 10, 2020, meeting is one of the reasons that the MPD Laterals have brought this Standard of Conduct Complaint. Pemberton adopted an interpretation of the D.C. Code into the Arbitration Award to require the Laterals to pay MPD's share of their prior service. This analysis is not only legally flawed, but also a direct conflict with the best interests

of the Laterals. Furthermore, it conflicts with the analysis provided by the Union's own attorney Mr. Wilhite. Tr. IV at 52; Comps. Ex. 30. ("Arbitrator Clark makes it clear that he is not ordering MPD to pay any portion of the calculated purchase price *at the time of hire* for each member. . . . In our opinion, 'the gap' cost in order for the DCRB to be fully funded to the present day, will need to be paid by either MPD in particular or DC Government in general.").

The Laterals were also clear on the meaning of the Award. For example, Officer Jody Shegan testified that the Arbitration Award requires that "I would pay my contribution, MPD would pay their contribution. . . . Now, our attorney, Mr. Wilhite, and Chairman Pemberton interpreted that I pay my eight percent and then MPD's 16 percent." Tr. III at 113. Pemberton has taken a clear order permitting the Laterals to contribute their prior pensions to the Retirement Fund at the value when they were hired and converted it into a requirement that they pay both their own contribution and that of MPD. Tr. II at 189. Pemberton explained in the hearing that his opinion is based, somehow, on statutory interpretation of D.C. Code Section 1-610.76. Tr. II at 115-121, 143-144, 166-167, 172, 176-177, 182.

Consequently, after the meeting Pemberton held on September 10, Sgt. Perry Hoak on September 29, 2020, sent the following email to Pemberton, emphasizing the need to have opinions from lawyers:

> The purpose of this email is to request a meeting with yourself, along with the other Members of your Leadership Team and the Legal Team that you have assembled, to represent ALL of the MEMBERS represented in aforementioned Grievance.
>
> While your information session on September 10, 2020 was very informing, this matter needs to be moved forward in an expeditious manner. We have members that are being giving astronomical figures to purchase their retirement years of service.

> With respect to the three Legal Memo's you have obtained in this matter, there [*sic*] are all nice. But until someone with the authority to order the parties to work through the issues nothing is going to happen.
>
> The actuary study you are going to fund is a nice gesture, we still have no guarantee that it's going to be accepted on this issue, or if the City is even going to cooperate to complete it.
>
> We the aggrieved respectfully request a meeting with you and your Leadership Team, along with the selected Legal Team, that has been selected to represent us through the final stages and steps to resolve this issue.

Comps. Ex. 48 at 2. Pemberton responded obtusely: "Can you help me understand what it is you would like to cover in this meeting?" *Id.*

Given Pemberton's response and refusal to identify the "Legal Team" for the Laterals, on October 26, 2020, Sgt. Hoak on behalf of the Laterals wrote to Pemberton requesting that the Union retain HANNON LAW GROUP, LLP, to take over the arbitration. Comps. Ex. 60. The same day, HANNON LAW GROUP wrote to the Labor Committee offering to represent the Union for $175 an hour, with a promise that it would bring a fee petition upon success in the arbitration. In that event, the Union would receive a reimbursement of all fees paid. Comps. Ex. 61. On November 6, 2020, HANNON LAW GROUP received a letter from Conti Fenn, LLC, rejecting the offer and demanding that HANNON LAW GROUP no longer communicate directly with Pemberton. Resp. Ex. 3. The letter warned that a complaint to PERB by the Laterals is "baseless."

On November 24, 2020, MPD Lateral Officer and Union Chief Steward Jody Shegan appeared at the Union's Executive Council meeting. Officer Shegan made a motion to replace the Wilhite firm on the arbitration with HANNON LAW GROUP. Pemberton summarily ruled him out of order, on the grounds that Officer Shegan had a conflict of interest because he is in the Lateral class, and because the motion relates to expenditure of Union funds. Resp. Ex. 26.

This conduct by Pemberton violates the By Laws of the Union, which is required to operate under Robert's Rules of Order. Comps. Ex. 1 at 4.4. Pemberton testified that this requirement is actually observed in the breach. Tr. II at 23. Pemberton is also not a stranger to the Laterals' dispute since he has been an officer with the Union since 2014. Tr. II at 48.

On February 5, 2021, Pemberton sent a letter to the Laterals purporting to update them on the arbitration. Despite the arbitration decision having been issued over three-years earlier, Pemberton reported that the Union had hired its own actuary in October of the previous year. However, MPD and DCRB were not providing the necessary underlying information to the Union actuary. Pemberton reported that the Union had decided to resort to a subpoena to obtain the information, which was not signed by the Arbitrator until February 22, 2021. Comps. Ex. 85. Pemberton could not report any light at the end of the tunnel. Comps. Ex. 70. MPD General Counsel Mark Viehmeyer made it clear to Mr. Wilhite that neither MPD nor DCRB would cooperate in implementing the Three Part order of Arb. Clarke. Tr. I at 75. Mr. Wilhite also reported that MPD believed it had already complied with the 2018 Arbitration Award, even though there was still no mechanism in place for MPD Laterals to pay into the Retirement Fund their prior pension amounts. Tr. I at 76. Mr. Wilhite explained "that process does take time and this situation involves many people and there are many moving parts." Tr. I at 83. He added, "it's not a simplistic award." Tr. I at 85.

On September 30, 2021, HANNON LAW GROUP wrote to Wilhite and offered to serve as co-counsel on the arbitration matter, at no cost to the Union. Comps. Ex. 75. Wilhite responded, in part, as follows:

> The Union does not anticipate a need for co-counsel at this time. Our actuaries are finalizing their report now and we believe a resolution is coming in the near term.

> I will be in touch soon to provide you with an additional update regarding the Milliman actuarial report as soon as I receive it.

Comps. Ex. 76. The Millman actuarial report when completed was never provided to HANNON LAW GROUP, as implied by Mr. Wilhite's response. Even today, the Milliman report – paid for with Union funds – has not been provided to HANNON LAW GROUP or to any Lateral. Tr. II at 129-130; Tr. III at 93-96; Tr. III at 281.[6] And to make matters worse, Pemberton is currently in negotiations with MPD over how the Milliman figures should or need to be adjusted. Tr. II at 141-142. The Hearing Examiner declined to order the Union to produce the report.

On October 28, 2021, the MPD Laterals filed their Standard of Conduct Complaint which is the subject of this proceeding. Comps. Ex. 77. There is still no resolution of the MPD Laterals grievance 23 years after the Lateral Appointment Act was passed by the Council, 11 years after the grievance was filed, and over 4 years after the Arbitration Award was issued. Tr. I at 62-63.

Among the concerns of the Laterals expressed repeatedly to the Union and Mr. Wilhite was that many Laterals were forced to retire without receiving the benefit of the Arbitration Award. An example was the family of Officer Pitt who was killed in the line of duty. During this hearing, Mr. Wilhite was asked what he had done to protect the retirement benefits of those Laterals who were forced to retire without the pensions promised to them by the Lateral

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[6] The Milliman Report is uniquely in the possession of the Union. The Union has not provided it to the Laterals or submitted it in evidence at the hearing. Therefore, the Hearing Examiner should draw an adverse inference from the failure to produce the Milliman Report. That is, the report is not favorable to the position of the MPD Laterals and, instead, endorses Pemberton's position that the Laterals must pay both their share of their prior pension amount as well as the MPD share. Mr. Pemberton claims it is privileged (Tr. II at 139); however, it was provided to Mark Viehmeyer of MPD. It could have and should have been produced to the Laterals and HANNON LAW GROUP, even if it required issuance of a protective order. *Bogosian v. All Am. Concessions*, No. 06-CV-1633 RRM RML, 2011 WL 4460362, at *7 (E.D.N.Y. Sept. 26, 2011).

Appointment Act. Mr. Wilhite purported not to know that such circumstances occurred. Tr. I at 90-91. When asked if he had presented any argument or evidence to the Arbitrator to protect MPD Laterals who had already retired, the Hearing Examiner sustained an objection from counsel for the Union, and Mr. Wilhite was not permitted to answer. Tr. I at 96-103. Then Mr. Wilhite seemed to change his mind, and in response to a question from the Hearing Examiner claimed that the Arbitration Award *would apply* to retired or retiring Laterals. Tr. I at 106. Mr. Wilhite also acknowledged that the money involved in the dispute is in the millions, although for some reason he never calculated the amount. Tr. I at 107-110.

Pemberton, on the other hand, was well aware that retiring Laterals were losing their promised pensions even before he was elected Chairman. Tr. II at 51-52, 54, 196-198. When asked what he had done as Chairman to protect the pension rights of the retirees, Pemberton claimed the following:

> Any possible remedy that we achieved through the litigation would be retroactive and would benefit them regardless of their affiliation with the Department.

Tr. II at 55, 198. Pemberton denied having received a legal opinion justifying this statement, relying on his "common experience". *Id*. However, his "common experience" involved an officer who won a back pay award, which is governed by the CBA and has nothing to do with the DCRB and the Retirement Fund rules. *Id.* The DCRB, as Mark Viehmeyer made clear, is not part of the arbitration and MPD has no power over it. When pressed on this opinion regarding retroactivity, Pemberton and his counsel Mr. Conti both refused to commit to guarantee to every MPD Lateral that any award would be retroactive after they retire without benefit of the 1999 Lateral Appointment Act retirement benefits: "I can't put the Union on the hook to pay for their retirement." Tr. II at 199-201.

Mr. Wilhite's blasé attitude about the retiring Laterals contrasts with the experience of Officer William Parr. Parr joined with 20-years prior service in Bladensburg. He was credited with 16-years' service for his MPD retirement. He was forced to retire in 2019 under a new law requiring officers to retire at the age of 64. Parr spoke with Union officer Medgar Webster to find out whether he would receive the benefit of the Arbitration Award after he retires. Parr never heard back from Webster. Tr. III at 19. Chairman Bigelow tried to help. Finally Parr went to the DCRB. He was told by the Director that his retirement under the Lateral Appointment Act was unfunded. Instead of receiving the opportunity to purchase 16 years of retirement at 8% of his salary per year, Officer Parr was only able to afford to pay for an additional 5 years of service for $170,000. To purchase his entire 16 years would have cost roughly $500,000. Tr. III at 22-26. Officer Parr did not believe Pemberton's promise that the Arbitration Award when final would apply to him. He testified that once you retire with DCRB, "You can't go back and add into the retirement." Tr. III at 28. Parr has taken another job to cover what DCRB is not paying him in retirement. Tr. III at 30.

Similarly, Officer Shegan testified that it he were permitted to purchase his Lateral time under his understanding of the Arbitration Award, he would already have retired. As he testified:

> [I]t's disappointing that it seems like this grievance, since the award, the can's been kicked down the road. There is no -- the Union is not doing anything quickly, in my opinion. You know, I heard testimony about Step 3, and the attorney representing us doesn't even have an opinion in reference to Step 3. So this is the attorney that I complained about and he doesn't have an opinion on what he thinks is best for the laterals. Or an opinion on what Step 3 is, and I never heard of Step 3 until this testimony. So we're going to wait to have this actuary study reviewed by the Retirement Board or MPD, by that time this actuary study is going to be too old to be even used in my understanding. But I guess that's to see if the calculations are correct. And then we're going to go to Step 3 and argue that.

Arb. Tr. III at 99-100.

Similarly, David Terestre was forced to retire in 2020 without the benefit of the promises contained in the Lateral Appointment Act. As he testified, the Union failed to protect the retirement benefits of every MPD Lateral officer who has retired since the Act was passed. Tr. III at 211.

Mr. Wilhite was questioned extensively why he and the Union had not been more aggressive in pursuing the Arbitration Award. After several years of agitation by MPD Laterals with the Union leadership for assistance, the grievance was not filed until January of 2011. Yet, it did not proceed to arbitration until November of 2017. Mr. Wilhite explained that during that time period, the Union leadership did not select the MPD Laterals grievance to proceed to arbitration in favor of other grievances. Not until the election of Stephen Bigelow as Chairman did the Union give it priority. Tr. I at 215-219.

At the hearing, Mr. Wilhite justified the delay in enforcing the Arbitration Award. He testified that he and counsel for MPD were working together and with the Arbitrator in an attempt to agree on an actuarial calculation that comports with the Arbitration Award. However, at the same time, Mr. Wilhite opined that MPD's initial response to the Three Part order in the Arbitration Award did not comply with the language of the Award. Tr. I at 116, 234-235, 313. And Mr. Wilhite admitted that even at the time of his testimony, MPD still had not complied with Part 3 of the Award requiring MPD to calculate the Delta. Tr. I at 117. MPD is "stonewalling" the Union, admitted Mr. Wilhite. Tr. I at 240.

Even though MPD had failed to comply with the order of the Award, Mr. Wilhite testified that he considered it premature to go to PERB for enforcement of the Arbitration Award. Tr. I at 121-122. This is true even though Mr. Wilhite immediately recognized that

MPD's report of the contribution numbers for the Laterals provided in August of 2019 was inflated. Tr. I at 123. This is true even though Mr. Wilhite learned that Mr. Viehmeyer on behalf of MPD refused to assist in providing the Union with the underlying data for its own report. Tr. I at 125. This is true even though Mr. Wilhite knew that MPD had not actually complied with Part 3 of the award as of the time of the hearing. Tr. I at 127-128. In other words, Mr. Wilhite has no idea when or whether MPD will comply with the Arbitration Award requiring it to fund the Delta for the MPD Laterals in amounts in the millions.

Mr. Wilhite's attitude is contrary to the best interests of the MPD Laterals. Officer Jody Shegan was asked to be the chair of the MPD Laterals committee. Mr. Wilhite refused to take his calls, until Chairman Bigelow authorized it. When Shegan finally spoke to Mr. Wilhite, he said "[W]hat direction are we going with this grievance. . . . [W]hat are we doing, you know. Let's quit stalling." Tr. III at 71. Mr. Wilhite told him he and Mark Viehmeyer for MPD were preparing a joint letter to obtain information from the DCRB. Mr. Wilhite said he would give DCRB 60 days to produce the information. After 70 days passed, Officer Shegan called Mr. Wilhite. Mr. Wilhite "acted like he didn't know what I was talking about." Officer Shegan reminded him of their prior conversation, and Mr. Wilhite denied ever having such a conversation. Officer Shegan called him a liar, and Mr. Wilhite eventually hung up. Tr. III at 71-72. Chairman Bigelow gave Officer Shegan authority to fire Wilhite. As Officer Shegan was in the process of hiring a new attorney, the plan was upended by the election of Pemberton. Tr. III at 73-75. When Pemberton asked Officer Shegan to continue on the Laterals committee, Pemberton called Wilhite an "ambulance chaser." Tr. III at 74.

This concerned Officer Shegan because the Arbitration Award meant hundreds of thousands of dollars to him, and Pemberton's casual opinion did not give him much confidence.

Tr. III at 76. Pemberton testified that the decision to retain counsel is exclusively vested in the Executive Council. Because of his MPD job requirements, Officer Shegan was unable to continue on the Laterals committee. For this reason, Officer Shegan made a motion to replace Mr. Wilhite as counsel for the arbitration with HANNON LAW GROUP at an Executive Council meeting on November 24, 2020. Despite knowing Mr. Wilhite had been incompetent, Pemberton ruled Shegan out of order. Tr. III at 78-81; Resp. Ex. 26. Officer Shegan also testified that Pemberton had a conflict of interest as a paid member of the DCRB. Under Pemberton's interpretation of the Arbitration Award, MPD would be relieved of the obligation of putting millions of dollars into the Retirement Fund for the MPD Laterals prior service. Tr. III at 84-86.

Chairman Bigelow expected Pemberton to fire Mr. Wilhite. The Laterals were putting pressure on Bigelow to fire Mr. Wilhite. After the Wilhite firm was discharged as general counsel "the work product changed . . . and the lateral committee . . . felt that his work product had changed and slowed down considerably." Tr. IV at 9-10. After Pemberton took office as Chairman, a Union meeting was held at the 4th District. According to Bigelow at the meeting

> [Pemberton] stated that he didn't think that the Pressler Law Firm, specifically Mr. Wilhite, was the best attorney to handle it [the arbitration], and that he would use and hire the best attorneys that money could buy to come to a conclusion with the lateral position, and he had made statements that I overheard where he called Mr. Wilhite an ambulance chaser.

Tr. IV at 10. Bigelow "absolutely" did not expect Pemberton to keep Mr. Wilhite. *Id.* "I honestly thought he was going to use Mr. Conti." Tr. IV at 10-11.

In response to Mr. Viehmeyer's refusal to provide the underlying data for the MPD report of officer contributions, Mr. Wilhite obtained a subpoena for those records to be served on DCRB on February 22, 2021, over three-years after the Arbitration Award. Comps. Ex. 85; Tr. I

at 133-134. The day after the Arbitrator signed the subpoena, HANNON LAW GROUP on behalf of 115 MPD Lateral officers sent a letter to Mr. Wilhite asking: "What is the long game? As I discussed with you, the strategy should be to obtain an enforceable order from the arbitrator as soon as possible." Comps. Ex. 72. Mr. Wilhite refused to consider the HANNON LAW GROUP letter as a request on behalf of the MPD Laterals to proceed immediately to obtain an enforceable order through PERB and the Superior Court. Tr. I at 170-175. Mr. Wilhite also testified that the Union has not sought an enforceable order even though counsel for MPD, Mr. Viehmeyer, has never agreed that under Part 3, MPD would pay the Delta to support the promise of full pensions made in the 1999 legislation. Tr. I at 197-197. Nothing is happening, and neither Mr. Wilhite nor Pemberton can explain why. If the future is "speculative", as the Hearing Examiner has suggested, there is no future and no coherent plan to protect the MPD Laterals who continue to retire every day without the benefit of the pensions promised them in the 1999 Lateral Appointment Act. The "future" of the arbitration will rely on Pemberton's view that the MPD Laterals must pay MPD's 16% portion of their prior service, a position which conflicts with the Arbitration Award's language and the best interests of the MPD Laterals as we discuss in detail in Section 4 below.

The failure of the Union to aggressively prosecute the Laterals grievance is also exemplified by the experience of Sgt. Perry Hoak. Sgt. Hoak joined MPD under the Lateral Appointment Act in 2002. Under the Lateral Appointment Act, Sgt. Hoak anticipated being able to retire 5 years ago. He was unable to do so because the Lateral Appointment Act pay-in process still has not been implemented. He is 60 years old, and must retire at age 64. He understood that his hiring by MPD was back-dated to 1992, which would have made his payment

for his prior law enforcement service cost him 7% of each year credited. Tr. III at 242. Not so, according to Pemberton. Sgt. Hoak must pay MPD's share.

Sgt. Hoak was one of the first Laterals to complain about the failure of the City to pay his benefits based on his prior service and failure to enact a mechanism for him to buy his prior retirement years. He testified that the first issue was voluntarily resolved by MPD's former General Counsel. Tr. III at 245-246. With respect to the retirement pay issue, Sgt. Hoak testified at the arbitration hearings in 2017 and 2018 with Mr. Wilhite representing the Union. Sgt. Hoak had spear-headed agitation with the Union from shortly after he was hired in 2002 to advance the ball on implementing the 1999 Lateral Appointment Act. When the Arbitration Award was issued by Arb. Clarke in July of 2018, Mr. Wilhite called Sgt. Hoak and was ecstatic about the victory. Tr. III at 255. Now Mr. Wilhite's effort to describe the Arbitration Award at the hearing is nothing but gobbledygook.

Sgt. Hoak had been working on this issue for almost 15 years. After receipt of the Arbitration Award he testified:

> I've expressed my opinion the whole time through that we need to take this through to completion because the DC Government isn't going to ante up anything until somebody with a black robe and a gavel tells them to do it. . . . I was told, you know, like Mr. Shamwell keeps saying he doesn't want ancient history. The bottom line is all of this is what's gotten us to today, the feet dragging.

Tr. III at 267. Sgt. Hoak asked Pemberton at the September 2020 meeting after Pemberton was elected Chairman why no attorneys were present at the meeting. Tr. III at 271.
On numerous occasions, Pemberton had said to Sgt. Hoak and to several other persons that Mr. Wilhite was an ambulance chaser. Tr. III at 272. At that meeting in September, Pemberton also told them that the Laterals would have to pay MPD's portion of their prior service. That was a shock to Sgt. Hoak. Tr. III at 273-274. As the Arbitration Award made clear to Sgt. Hoak, the

MPD Laterals were not to be penalized for the City's failure to implement the retirement payment process. Tr. III at 275.

Sgt. Hoak was asked why he did not go to Mr. Wilhite to pursue the proper numbers. In response, Sgt. Hoak testified:

> The sad truth is the Hearing Examiner for the last couple of days has been saying he wanted to hear from aggrieved persons and all this stuff. It's a pretty sad state of affair that we had to go and obtain the services of Mr. Hannon because we knew we're not being fairly represented.

Tr. III at 284.[7] In particular, Sgt. Hoak was entirely unwilling to allow Pemberton and the Union to proceed in the arbitration conceding that he and the other MPD Laterals are required to pay both their own portion of their prior retirement service as well as MPD's. Tr. III at 297. He is also of the view that Mr. Wilhite does not know what he is doing. Tr. III at 299. Sgt. Hoak also does not believe that the "DC Government is going to . . . ante up for the guys that are here, let alone the ones that are gone." Tr. III at 300.

At the conclusion of the hearing, counsel for Complainants sought to cross-examine Pemberton on the calculations contained in the Milliman actuarial report. The Hearing Examiner precluded the questioning, and because the Hearing Examiner would not order the Union to produce the Milliman report, there is no evidence whether the Milliman calculations comply with the language of the Arbitration Award.

In addition, counsel for Complainants sought to utilize a demonstrative exhibit on cross-examination of Pemberton to probe Pemberton's position on whether the Union-proposed calculations comply with the Arbitration Award. Again, the Hearing Examiner precluded this

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[7] Sgt. Hoak testified that until the Laterals hired HANNON LAW GROUP, they had made internal complaints about the handling of their grievance within the Union, but they were ignored. Arb. Tr. III at 315.

cross-examination *in limine.* Tr. IV at 261-283. Counsel for Complainants put a proffer of the cross-examination on the record. Tr. IV at 283-289. Complainants Exhibit D attached to this brief contains the calculations which the Complainants contend correspond with the language of the Arbitration Award. In addition, counsel for Complainants offered Exhibit D through the testimony of Sgt. Perry Hoak in their rebuttal case. Once again, the Hearing Examiner precluded the testimony *in limine.* Tr. IV at 301.

The strategy of the City is clear: the longer the arbitration proceeds, the less it will need to pay out in pensions under the 1999 Lateral Appointment Act as the Lateral Officers will retire or die. Chairman Pemberton has fallen into the City's strategy to the detriment of the Laterals in the Union.

ARGUMENT

The Hearing Examiner reserved for decision whether the Standard of Conduct Complaint is timely filed under PERB Rule 544.4

TIMING OF THE COMPLAINT

The Standard of Conduct Complaint ["SOCC"] filed by the Laterals alleges that the Union is incompetently conducting the pending grievance, captioned *Fraternal Order of Police/MPD Labor Committee v. D.C. Metropolitan Police Department*, FMCS No. 12-02108-T ["the Grievance"], contrary to the best interests of the Laterals. The Union filed a Motion to Dismiss on the grounds that a laundry list of contentions contained in the SOCC are out of time under PERB Rule 544.4. The MPD Laterals filed an opposition, contending the SOCC is timely because the conduct of the Union is ongoing. On March 10, 2022, the Hearing Examiner issued an Order concluding as follows:

> As to the complaint allegations concerning the Respondent's purported unlawful rejection of the Hannon Firm's proposal to represent the 119

> complainants as co-counsel, I would find and conclude that this aspect of the Complaint is untimely filed, and will be dismissed.
>
> As to the remaining allegations, I believe that a factual record is required, and that a hearing therefore is necessary.

During the hearing, however, the Hearing Examiner did not allow the Laterals to make a complete factual record of their position that the Standard of Conduct violation by the Union is ongoing. In other words, the Hearing Examiner accepted the objections of the Union to any evidence of misconduct prior to 120 days before the filing of the SOCC. This limitation was error, and in contravention of the Hearing Examiner's order.

Nevertheless, the Laterals believe that sufficient evidence was presented or proffered from which the Hearing Examiner should conclude that the violation by the Union is ongoing, and meets the standard recognized in *Neill v. District of Columbia Public Employee Relations Board*, 234 A.3d 177, 185 (D.C. 2020) (*quoting Taylor v. FDIC*, 132 F.3d 753, 765 (D.C. Cir. 1997)). *See also Neill v. FOP/MPD Labor Committee*, Slip Op. No. 1647 at 6, PERB Case No. 10-S-04 (2017).

Also as alleged in the Complaint, the Union's violation is ongoing because Pemberton is still responsible for the Laterals issue despite his conflict of interest. In addition, on September 10, 2020, Pemberton announced an interpretation of the Arbitration Award which conflicts with the language of the Arbitration Award and is directly contrary to the interests of the Laterals. Since the filing of the SOCC, the evidence also indicates that Pemberton has willfully withheld from the Laterals a document called the Milliman report. This report was obtained and paid for by the Union. The Milliman report apparently follows Pemberton's flawed interpretation of the Arbitration Award which would require the Laterals to pay MPD's share of their prior credited years of service.

Taylor v. FDIC upon which the continuing violation theory recognized by the Court of Appeals in *Neill v. District of Columbia Public Employee Relations Board*, defines a continuing violation as "one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period." 132 F.3d 765 (quoting *Dasgupta v. University of Wisconsin Board of Regents,* 121 F.3d 1138, 1139 (7th Cir.1997). In this case, the damage alleged in the SOCC -- that the Union is incompetently managing the Grievance -- has yet to occur because the grievance is still ongoing. The date of damage is ordinarily the date upon which an action is deemed to accrue for limitations purposes. In these circumstances, the concept of a continuing violation tolling the time to bring a standard of conduct claim makes sense; otherwise, a Union member actively participating in a grievance must continuously decide whether to bring a standard of conduct complaint while the grievance is ongoing or be barred from bringing the complaint. *See, e.g*., *Adkins v. International Union of Elec., Radio & Machinists*, 769 F.2d 330, 336 (6th Cir. 1985); *Frandsen v. Brotherhood of Ry., Airline and S.S. Clerks*, 782 F.2d 674, 681 (7th Cir. 1986).

In this manner, the pendency of the Grievance is analogous to the pendency of a lawsuit wherein the plaintiff is concerned that his attorney is engaged in malpractice. In the District of Columbia, the statute of limitations on a suit against the attorney for malpractice does not begin so long as the attorney-client relationship continues in prosecution of the suit. *Beach TV Properties, Inc. v. Solomon*, 306 F.Supp.3d 70, 85 (D.D.C. 2018).

For these reasons, PERB and the D.C. Court of Appeals leaves open the argument that the 120 time limit of PERB Rule 544.4 does not even begin in these circumstances so long as the Union is continuing to represent the employees, albeit incompetently and negligently.

THE UNION HAS VIOLATED THE STANDARDS OF CONDUCT

The Standards of Conduct with which the Union must comply are set forth in D.C. Code Section 1-618.3(a):

> (1) The maintenance of democratic provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to fair and equal treatment under the governing rules of the organization, and to fair process in disciplinary proceedings;
>
> (2) The exclusion from office in the organization of any person identified with corrupt influences;
>
> (3) The prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members;
>
> (4) Fair elections; and
>
> (5) The maintenance of fiscal integrity in the conduct of the affairs of the organization, including provision for accounting and financial controls and regular financial reports or summaries to be made available to members.

D.C. Code § 1–617.03(a)(1)–(5). *See also* PERB Rule 544.2(a)–(e).

The Board must determine whether the Union's actions in representing Respondents have been conducted in good faith, motivated "by honesty of purpose." *See Alesia Hamilton v. American Federation of State, County and Municipal Employees, District Council 20*, 63 D.C. Reg. 4598, Slip Opinion No. 1564 at 3, PERB Case No. 16-S-01 (2016) ("The Board analyzes this test by determining whether the Union engaged in any conduct that was arbitrary, discriminatory, or in bad faith, or was based on considerations that are irrelevant, invidious or unfair"); *see also Stanley O. Roberts v. American Federation of Government Employees, Local 2725*, 36 D.C. Reg. 1590, Slip Op. No. 203 at 3, PERB Case No. 88-S-01 (1989).

Complainants contend that Respondents have violated a union's typical "wide discretion to act in what they perceive to be their members' best interests." *See Ford Motor Co.*

v. Huffman, 345 U.S. 330, 337-38 (1953). While an employee does not have an absolute right to have his Union take a grievance to arbitration, the Union may not arbitrarily ignore a meritorious grievance or prosecute it in a perfunctory manner. *Board of Trustees, University of Dist. of Columbia v. Myers*, 652 A.2d 642, 646 (D.C. 1995). A Union violates the duty of fair representation by prosecuting a pending grievance in a perfunctory, arbitrary and capricious manner or in bad faith. William J. Velton, 15 Am. Jur. Proof of Facts 2d 65 at § 11 (July 2022).

1. The Union Wrongfully Delayed Prosecution of the Grievance.

The guesstimate of the number of MPD Laterals adversely affected by the City's failure to implement the promises contained in the 1999 Lateral Appointment Act is 150. Because of the amount of money involved, the Union had an obligation to proceed expeditiously to bring a competent grievance on behalf of the Laterals in a timely fashion. No doubt because the number of Laterals was only a small percentage of the Union membership -- well in excess of 3,000 -- there is no doubt that the failure to bring the grievance in a timely manner was arbitrary, capricious and in bad faith. Chairman Bigelow said so himself.

While Union officials periodically wrote letters or memoranda expressing their concern about the circumstances, they did nothing to force the hand of MPD and the City by filing a grievance. The matter percolated for 10 years before a grievance was filed on January 10, 2011. Before that the Union leadership was well aware of the grievous impact their failure to prosecute the grievance was having through the agitations of Sgt. Perry Hoak and others. On December 21, 2006, Union leaders learned from DCRB that the Laterals' years of service counted up front, but the promise was not funded. How could the Union sit by and not bring this matter to a grievance, a million dollar case that had existed since 1999? Officer William C. Pitt died in the line of duty on April 6, 2007. His family did not receive the pension he was promised as a

Lateral recruit. On October 11, 2007, Sgt. Hoak and others presented their case to the Committee on Public Safety and the Judiciary of the Council when the Council considered a retirement package for former Chief Cathy L. Lanier. While the council members were in support of the Laterals, the Union did nothing.

Those Lateral officers who approached DCRB about retirement were given exorbitant sums in the thousands of dollars for them to buy back their retirement. These officers were losing the growth of the retirement that would have occurred had the City implement the pay-in from the Lateral Appointment Act promptly. Instead, by the inaction of the Union in bringing a grievance, the cost of MPD and the City covering the growth from the date of service to the present would not have grown to insurmountable numbers. The longer the Union delayed, the more expensive it would be for the City to fund the retirement. The Hearing Examiner should not be surprised that since the grievance is now 22 years down-the-road from the date of the Lateral Appointment Act, MPD is dragging its feet, delaying, delaying, delaying while the Union – through its Chairman Pemberton – is trying to "negotiate" with MPD's General Counsel.

Evidence of bad faith exists in the mere passage of time. In addition, when Lieutenant Stephen Bigelow became Chairman, he considered the prior conduct of the Union "dismissive" and the statements of the Union to the Laterals "had not been truthful." Only through his leadership did this matter get to a hearing in December of 2017 and January of 2018. The Arbitration Award was issued in July of 2018, and Chairman Bigelow remonstrated with Mr. Wilhite to seek enforcement of the Arbitration Award through PERB and the Superior Court. He urged this strategy because he knew MPD always played the long game, and that would particularly be true where the money at stake was in the millions. But Mr. Wilhite would not work the case because his firm had been discharged as general counsel to the Union in favor of

Conti Fenn, LLC. Chairman Bigelow noted that since Mr. Wilhite was only being paid $300 an hour the quality of his work deteriorated; whereas, before his firm was discharged the Union had paid them a million dollars a year.

Upon his taking over the chairmanship of the Union, Pemberton found the Arbitration Award incomprehensible so he wasted six months paying three law firms to prepare opinions on what it means. His explanation for not taking the Arbitration Award to PERB and the Superior Court for enforcement is that he is negotiating with MPD's General Counsel towards a resolution of Step 2 of the Arbitration Award. And what Pemberton calls Step 3 of the Award has yet to be addressed. During the last three years of Pemberton's chairmanship, the case is no closer to resolution than it was in July of 2018. Laterals continue to retire without their promised benefits. There is no evidence that a final Award will be retroactive, other than Pemberton's opinion which is not endorsed by an attorney, nor anything in the Arbitration Award. This is evidenced by Pemberton's refusal to ante up for the Laterals retirement if his opinion is wrong, and Conti Fenn, LLP, on the record confirming that the Union would make no such guarantee. Were Pemberton correct, the DCRB would have advised retiring Laterals of this prospect. That did not occur, and their elections are final.

The bad faith of the Union is evident from the lip service paid by Mr. Wilhite and Pemberton to conduct the grievance according to the will and desires of the Laterals. They both indicated early in the process their intention to communicate regularly with the Laterals and act in their best interest. That policy did not last long. Once the Arbitration Award was rendered in July of 2018, and Pemberton succeeded to the Chairman's position these types of communications ended. For example, at his first meeting with the Laterals on September 10, 2020, Pemberton told them their contribution to the Retirement Fund for their credited service

would be 8% for their own contribution plus 24% representing MPD's share. This was contrary to the Laterals understanding of the Arbitration Award, as well as the language of the award. This was also just Pemberton's personal opinion, as no attorney was present at that meeting. Once the Laterals obtained the assistance of HANNON LAW GROUP, Pemberton shut the door and instructed Conti Fenn, LLC, to act as a buffer between HANNON LAW GROUP and Pemberton.

Nothing in the 22 year history of the Union's failure to deal with this issue falls within the "wide discretion to act in what they perceive to be their members' best interests." The Hearing Examiner may be tempted to accept Pemberton's assurances that the dispute between him and the Laterals will be resolved by the Arbitrator, and the resolution of this SOCC is nothing more than a dispute about strategy. The Hearing Examiner should make no mistake about the following: (1) the longer the arbitration proceeds the more Laterals lose out on the Arbitration Award that was achieved by Chairman Bigelow; and (2) whenever the arbitration is complete, it will be based on Pemberton's personal and grossly distorted opinion – unsupported by an opinion of counsel – that the Arbitration Award requires the Laterals to pay MPD's approximately 16% of their prior service. And Pemberton seems not to care. We discuss this further below in Section 3.

2. The Union Relied Upon Incompetent Counsel.

Chairman Pemberton told anyone who was in hearing distance that he thought Mr. Wilhite was an incompetent attorney, calling him an ambulance chaser. Everyone who heard this, including Bigelow, assumed that Pemberton would fire Mr. Wilhite in favor of the new general counsel for the Union, Conti Fenn, LLC. But Pemberton kept Mr. Wilhite on, apparently for several reasons: (1) Mr. Wilhite was cheaper than Conti Fenn, LLC; (2)

Pemberton really believed an attorney was unnecessary to proceed with the arbitration because all that was left was negotiating over the numbers; and, (3) spending Union funds to enforce the Arbitration Award through PERB and Superior Court would cost the Union attorney's fees which Pemberton did not want to spend. And why did Pemberton not instruct Mr. Wilhite to file a fee petition for the interim Arbitration Award Mr. Wilhite obtained for the Laterals? This would have recovered tens of thousands of dollars for the Union coffers.

There is simply no justification for Pemberton keeping Mr. Wilhite on the arbitration case. It was a truly arbitrary and capricious decision made in bad faith. Where the leadership of the Union states unequivocally that an attorney is incompetent, that is a statement against interest. And how does Pemberton defend his violation of Roberts' Rules of Order to arbitrarily rule out of order Officer Jody Shegan's motion to replace Mr. Wilhite with HANNON LAW GROUP. The point is not so much the choice of a law firm to replace Mr. Wilhite, as it is the necessarily the choice itself to replace Mr. Wilhite. This is a violation of the democratic process, which also points up Pemberton's disregard for the best interests of the Laterals.

3. The Chairman Ignored the Damage to Retiring Laterals.

Pemberton basically admits that he did nothing to protect the retirement of the MPD Laterals who were leaving MPD on his watch without the benefit of the Lateral Appointment Act. The Hearing Examiner heard from Officers Parr and Terestre who were unable to purchase their prior service due to DCRB's refusal to comply with the Lateral Appointment Act. The work of a police officer is unappreciated, and these and other Laterals who have retired, now face the despondency of not having the retirement they were promised. Imagine their family's disappointment and the officers' feelings of helplessness. The Hearing Examiner needs to be

cognizant of the fact that as Union members, these officers have given up the right to seek recourse against the City through their own efforts. By virtue of the Collective Bargaining Agreement, they are beholden to the elected officers of the Union to protect their rights. Would the Hearing Examiner be satisfied having Pemberton decide such an issue for him?

Pemberton testified he was not really aware of how many Laterals were so affected. That is the height of bad faith, and his uncounseled assurances are evidence of his arrogance: his opinion is based on his personal "common experience" for which Pemberton has no need of an opinion from a competent attorney.

4. Pemberton is Promoting a False Reading of the Arbitration Award Which Requires the Laterals to Pay MPD's 16% Share of Their Prior Service.

Pemberton testified to his interpretation of the Arbitration Award. He testified in his opinion that the Arbitration Award required the MPD Laterals to put in their own 8% contribution for years of credited service *plus* MPD's share which could range around 16%, depending on the actuary. Tr. II at 107. Pemberton explained that in his opinion, this reading of the Arbitration Award was predicated on applying D.C. Code Section 1-610.76 to calculation of the pay in amount. This is the message that Pemberton gave to the MPD Laterals on September 10, 2020. And, this is the opinion that he and Milliman will be forwarding to MPD General Counsel Viehmeyer in the arbitration proceeding. Should this opinion continue to be the position of the Union, it will cost the Laterals upwards of triple what they would pay under the actual language of the Arbitration Award.

This opinion is easily shown to be false. The relevant language of the Arbitration Award to be interpreted is the following:

> (2) With respect to each of the Lateral Officers, provide the Union with the amount that each could have paid into D.C.'s retirement fund resulting from crediting their prior service, during the month of the year that they were hired by

> the Department. To be clear, this amount is not the present value of the original purchase price, but the original purchase price at the time the Lateral Officers were hired.

Comps. Ex. 23 at 26.

D.C. Code Section 1-610.76 from the Lateral Appointment Act, upon which Pemberton relies for his wrong-headed opinion, states as follows:

> In computing length of service of a retiring lateral law enforcement officer hired pursuant to § 1-610.72, credit shall be granted for prior law enforcement service outside the Metropolitan Police Department *only* if the lateral law enforcement officer has deposited to the credit of the Police Officers' and Firefighters' Retirement Fund an amount that is equal to *the dollar increase in the present value of future benefits which results from crediting the prior service*. The calculation of the present value of future benefits shall be based on the actuarial assumptions and methods used to calculate the present value of future benefits from§ l-907.03(a)(3)(B) for the applicable fiscal year. *Upon separation from District law enforcement duty for reasons other than retirement, any law enforcement officer who purchased prior service credit shall receive that purchase amount along with any interest credited on the amount.* Any law enforcement officer that withdraws the purchase amount and is later reinstated shall not be entitled to this prior service credit until the purchase amount plus interest is again deposited.

(Emphasis supplied).

The italicized language does not support Pemberton's interpretation of the Arbitration Award. Under the language of the Arbitration Award and application of Section 1-610.76, the result is the following: the Lateral Officer must pay his/her own contribution [assumed to be 8%] of the starting salary for each year of credited service at the time of hire. In addition, pursuant to the italicized language from Section 1-610.76, the officer must put in another amount equal to *the dollar increase in the present value of future benefits which results from crediting the prior service*. In other words, the Lateral Officer must pay the interest that would have accrued from their own contribution since the date of hire. This is what the Arbitrator meant when he said: "with that original purchase amount adjusted to the current day at a rate that is fair to the

Grievants." Comps. Ex. 23 at 25. This reading of Section 1-601.76 is confirmed by the language in the second italicized section. If a Lateral Officer leaves MPD for any reason other than retirement, Officer is entitled to receive back from the Retirement Fund the purchase amount contributed plus all accrued interest. That means the purchase amount for a Lateral Officer *cannot include MPD's share.*

Pemberton's computation of 8% plus MPD's 16% is not supported by the language of either the Arbitration Award or Section 1-610.76 or their interaction as he argues. No attorney has expressed a similar view as Pemberton.

The proper calculation is reflected in Comps. Demonstrative Exhibit D [Not Admitted] which is attached as Exhibit D to this brief. The purpose of producing the Exhibit here is illustrative.

The Exhibit assumes a starting salary of $55,356 at date of hire and 10 years creditable service. Since an actuarial calculation must be done, the cost of prior service is based on a hypothetical Year One salary of $35,000 growing annually to the $55,356 level for Year Eleven. The calculation assumes an 8% annual contribution on that year's salary, plus an assumed rate of 8% on the accumulating interest to represent growth. Under this demonstration of how the language of the Arbitration Award works, this hypothetical Lateral Officer would be required to contribute $58,166 under the Lateral Appointment Act to purchase prior creditable service. Under the Arbitration Award, MPD would be required to fund the Delta or "gap" for the growth of $58,166 from the date of hire to the date of retirement. This is so because, as the Arbitrator noted, MPD failed to carry out its obligations promptly under the Lateral Appointment Act, and the tool to conduct such calculations was not made available until 2010. Comps. Ex. 23 at 25.

CONCLUSION

The Union as a Respondent in this matter is responsible for everything that has occurred since 1999 when the Lateral Appointment Act was passed by the Council. Greggory Pemberton in his personal capacity is responsible for everything the Union did and did not do since he was elected Chairman, and any future consequences of his misconduct.

The duty of fair representation applied in this case as soon as the Union learned of the failure of MPD to honor the promises contained in the Lateral Appointment Act. Thereafter, once the Union undertook to act on behalf of the Laterals, the duty of fair representation applied as well. The conduct of the Union and its agents was worse than perfunctory. The Union and Pemberton engaged in conduct that was arbitrary, discriminatory, in bad faith, and based on considerations that are irrelevant, invidious or unfair.

WHEREFORE, as a remedy, Complainants request that the Hearing Examiner recommend the following to the Board:

1. Appoint an independent representative for the Union to direct the arbitration;
2. Direct the independent representative to immediately seek a stay in the arbitration;
3. Direct the independent representative to appoint new counsel to represent the Union in the Grievance;
4. Direct the independent representative to conduct an investigation to determine the losses suffered by MPD Laterals who have retired; and,
5. Direct the Union to pay the losses for all MPD Laterals who have retired, consistent with the final decision of the Arbitrator in *Fraternal Order of*

Police/MPD Labor Committee v. D.C. Metropolitan Police Department, FMCS No. 12-02108-T; and,

6. Award Complainants the costs and attorneys' fees of this action.

Date: August 1, 2022

Respectfully submitted,

HANNON LAW GROUP, LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Post-Hearing Brief was sent though CaseFileExpress's service system and by E-Mail to all parties listed below on Monday, August 1, 2022:

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EXHIBIT D

Complainants' Exhibit D

CALCULATION PURSUANT TO ARBITRATOR'S DECISION

(2) With respect to each of the Lateral Officers, provide the Union with the amount that each could have paid into D.C.'s retirement fund resulting from crediting their prior service, during the month of the year that they were hired by the Department. To be clear, this amount is not the present value of the original purchase price, but the original purchase price at the time the Lateral Officers were hired.

In computing length of service of a retiring lateral law enforcement officer hired pursuant to § 1-610.72, credit shall be granted for prior law enforcement service outside the Metropolitan Police Department *only* if the lateral law enforcement officer has deposited to the credit of the Police Officers' and Firefighters' Retirement Fund an amount that is equal to the dollar increase in the present value of future benefits which results from crediting the prior service. The calculation of the present value of future benefits shall be based on the actuarial assumptions and methods used to calculate the present value of future benefits from§ l-907.03(a)(3)(B) for the applicable fiscal year. Upon separation from District law enforcement duty for reasons other than retirement, any law enforcement officer who purchased prior service credit shall receive that purchase amount along with any interest credited on the amount. Any law enforcement officer that withdraws the purchase amount and is later reinstated shall not be entitled to this prior service credit until the purchase amount plus interest is again deposited.

55,356 Starting salary at Start; 10 years credit

YEAR	SALARY	Balance Forward	8% Employee Cont. of Salary	Interest at 8% on Bal. + 8%	Total Balance of Pension
1	35,000		2,800	224	3,024
2	37.000	3,024	2,960	478.72	6,462.72
3	39,000	6,462.72	3,120	766.62	19,349,33
4	41,000	19,349.33	3,280	1,810.35	23,434.68
5	43,000	23,434,68	3,440	2,149.97	29,024.65
6	45,000	29,024.65	3,600	2,609.97	35,234.62
7	47,000	35,234.62	3,760	3,119,56	42,114.19
8	49,000	42,114.19	3,920	3,682.74	49,716.93
9	51,000	49,716.93	4,080	4,303.73	58,100.66
10	53,000	58,100.66	4,240	4,987.25	67,327.91
11	55,356				