

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

FRATERNAL ORDER OF POLICE *
METROPOLITAN POLICE *
DEPARTMENT LABOR COMMITTEE, *
D.C. POLICE UNION, *

Plaintiff, *

v. *

THE DISTRICT OF COLUMBIA, *et al.* *

Defendants. *

Case Number: 2020 CA 003492 B
Judge William M. Jackson

Next Event: Initial Scheduling Conference
November 6, 2020

* * * * *

REPLY IN SUPPORT OF
EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

The Plaintiff, Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union (“D.C. Police Union”), by and through its undersigned counsel, hereby submits this Reply in Support of its Emergency Motion for a Temporary Restraining Order against the District of Columbia (“District”) and Muriel Bowser, in her official capacity as Mayor of the District of Columbia (“Mayor Bowser”) (collectively, the “Defendants”).

A. The D.C. Police Union has Standing

In its Opposition, the Defendants make a factual attack on the Complaint to contend that the D.C. Police Union lacks standing in this matter. In such circumstances, the Court of Appeals has held that the facts of the complaint must be accepted as true and construed in favor of the complaining party and the trial court is permitted to “conduct an independent review of the evidence submitted by the parties, including affidavits, to resolve factual disputes concerning whether subject-matter jurisdiction exists.” *UMC Development, LLC v. District of Columbia,*

120 A.3d 37, 43 (2015). As set forth in the attached Affidavits from D.C. Police Union Chairman Gregory Pemberton and Dr. Beverly Anderson, the D.C. Police Union has standing in this matter.

1. The D.C. Police has Organizational Standing

The D.C. Police Union has organizational standing to file the lawsuit in this matter and seek a temporary restraining order. The release of body worn camera footage involving serious use of force and officer involved deaths will cause a concrete and demonstrable injury to the D.C. Police Union's activities that will cause a drain on its resources sufficient to establish standing in this case. The Court of Appeals has held that diverting of resources is sufficient to confer standing. *See Equal Rights Center v. Properties International*, 110 A.3d 599, 605 (2015). As set forth in the attached Affidavit from Chairman Pemberton, the release of body-worn camera footage within five days of a serious use of force incident or officer-involved death will cause the D.C. Police Union to expend more resources in publicly defending its members who were involved in the serious use of force incident or officer-involved death. *See Exhibit 1* at ¶ 6.

The release of body-worn camera footage within five days of a serious use of force incident or officer-involved death will also result in immediate violations of the disciplinary guidelines contained in the Collective Bargaining Agreement ("CBA") between the D.C. Police Union and the Metropolitan Police Department. For example, Article 12, Section 1(2) requires as follows:

Any employee who is engaged in either investigating or proposing corrective or adverse action on behalf of management shall maintain the appropriate confidentiality of an investigation.

Body-worn camera footage is often the key piece of evidence in MPD disciplinary investigations. The release of body-worn camera footage within five days of a serious use of

force incident or officer-involved death will occur during any MPD investigation concerning the incident, thereby eliminating the confidentiality of investigation and the evidence contained in the investigation. The D.C. Police Union will expend additional resources to pursue grievances based upon public release of these materials, the adverse effect it will have on pending investigations, and the due process violations that will result through the grievance process for violations of Article 12, Section 1(2) and other provisions in the CBA caused by the release of the body-worn camera footage. The negative disciplinary consequences that result from the release of body-worn camera footage within five days of a serious use of force incident or officer-involved death will further cause the D.C. Police Union to expend more resources asserting challenges to the proposed discipline of its members and unfair labor practices before the Public Employee Relations Board. *See Exhibit 1 at ¶ 7.* As such, the D.C. Police Union has established injury and a consequent drain to its resources sufficient to establish organization standing. The Court of Appeals has held that diverting of resources is sufficient to confer standing. *See Equal Rights Center v. Properties International*, 110 A.3d 599, 605 (2015).

B. The D.C. Police Union has Associational Standing

The D.C. Police Union has associational standing to file the lawsuit in this matter and seek a temporary restraining order. In their Opposition, the Defendants have contended that the threat of personal injury to D.C. Police Union members is too speculative to confer standing or demonstrate irreparable harm. *See Opposition at 12-14.* This argument is directly contradicted by the MPD's explicit recognition of the significant threat of personal harm caused by the release of the body worn-camera footage at issue in this case. Specifically, on July 22, 2020, MPD Chief Peter Newsham informed Chairman Pemberton that the MPD was contacting each of the officers involved in officer involved deaths whose body-worn camera footage was going to be

publicly released pursuant to the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020. Subsequently, the officers involved in officer involved deaths whose body-worn camera footage was going to be publicly released were contacted by a member of the MPD's Intelligence Branch, such as Lieutenant Shane Lamond. Notably, the MPD's Intelligence Branch is tasked with assessing and investigating threats made against government officials. When the officers were contacted by the Intelligence Branch, they were asked several questions to assess the threat level posed against the member through the release of the footage such as: whether the member had an alarm system on their home, whether their home was equipped with cameras, and whether they wanted the MPD to reach out to local law enforcement in the jurisdiction of their personal residence to have local law enforcement increase patrol of their neighborhood during the days surrounding the release of the footage. Several of the officers involved accepted the MPD's offer to contact local law enforcement and have local law enforcement increase the patrol in their neighborhoods in the days surrounding the release of the footage. *See Exhibit 1* at ¶ 4. Thus, the MPD has conceded that the release of the body-worn camera footage will result in a risk of significant bodily harm to D.C. Police Union members that is far from speculative.

In addition, Dr. Beverly Anderson is the Clinical Director of the Metropolitan Police Employee Assistance Program ("MPEAP"), which provides confidential counseling services to Metropolitan Police Department officers and their family members. *See Exhibit 2* at ¶ 2. Prior to the recent release of body-worn camera footage involving officer-involved death, the MPD's Chief Operating Officer Leann Turner contacted Dr. Anderson and advised her that Chief of Police Peter Newsham wanted to ensure that every officer was contacted prior to the release of the body-worn camera footage. COO Turner requested that Dr. Anderson contact every officer

involved in officer-involved deaths so they would not be blindsided by the release of the body-worn camera footage. *See* Exhibit 2 at ¶ 3.

Dr. Anderson contacted all of the officers involved in incidents involving officer-involved deaths to advise them of the new law and to advise them that the body-worn camera footage and their names would be publicly released and to remind them of available MPEAP services. *See* Exhibit 2 at ¶ 4. Dr. Anderson has also stated that public release of body-worn camera footage depicting a death in which an officer is involved can inflict serious psychological trauma on the officer and their families. *See* Exhibit 2 at ¶ 5. Moreover, in the early days following a serious use of force incident or incident concerning an officer involved death, officers are particularly vulnerable to psychological harm, which would be exacerbated by the public release of the body-worn camera footage of the incident. *See* Exhibit 2 at ¶ 6. The Court of Appeals has held that “psychological harm” satisfies the irreparable harm element for granting an injunction. *District of Columbia v. Reid*, 104 A.3d 859, 866 (2014). Thus, far from speculative harm, the D.C. Police Union has set forth specific and concrete irreparable physical and psychological harm that will result if a temporary restraining order is not granted.

The D.C. Court of Appeals has held that “[a]n organization has standing to sue when one of its members has standing.” *Speyer v. Barry*, 588 A.2d 1147, 1160 n. 25 (D.C.1991). In *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977), the Supreme Court set forth the following standard for establishing associational standing:

“[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”

Id. at 343.

The D.C. Police meets standard to establish associational standing in this case. First, members of the D.C. Police Union have standing to sue to prevent the release of the body-worn camera footage involving officer-involved death and, contrary to the Defendants' arguments, the injunctive relief is not moot. Specifically, in the Declaration attached to the Defendants' Opposition, Assistant Chief Wilfredo Manlapaz stated that on August 12, 2020, the next of kin of one of the decedent's involved in an officer-related death who previously did not want the body-worn camera released has now changed her mind and has requested the release the body-worn camera footage. *See* Manlapaz Declaration at ¶ 7. According to Assistant Chief Manlapaz, the MPD "expects to release that footage Friday, August 14, 2020." *Id.* at ¶ 8. The officer involved in this incident is a member of the D.C. Police Union and has standing to bring suit to seek an injunction to prevent the release of the body-worn camera footage to protect his privacy, safety, and psychological well being. Thus, the request for injunctive relief is not moot and is necessary to prevent the irreparable harm that will result from the imminent release of body-worn camera footage.

In addition, each of the Metropolitan Police Department officers listed in the July 31, 2020 letter from Deputy Mayor Kevin Donahue to Councilmember Charles Allen as the officer involved in the fatal incident is a current D.C. Police Union member or was a D.C. Police Union member at the time of the incident. The most recent fatal incident referenced in Deputy Mayor Donahue's letter occurred on July 24, 2020. The officer involved in that incident is a current member of the D.C. Police Union and that incident is currently under investigation by the MPD's Internal Affairs Division and the MPD's Major Crash Investigations Unit. These investigations could result in disciplinary action being taken against the member involved. *See Exhibit 1* at ¶

3. Therefore, the D.C. Police Union has standing to prevent the release of the body-worn camera footage at least during the pendency of the investigation that could result in workplace discipline.

In addition, the release of body-worn camera footage within five days of a serious use of force incident or officer-involved death will result in the public disclosure of the identities of witnesses to the incident. This public disclosure of witness identities will make it more difficult for Detectives (who are D.C. Police Union members) to secure witness cooperation. This will have the negative consequence of making it more difficult for the Detectives to solve crimes, which will in turn negatively affect each of the Detectives' closure rates. A low closure rate has negative career consequences for Detectives and has been used by the MPD as a basis to transfer or discipline members. The D.C. Police Union has expended resources in the past to challenge improper transfers of Detectives based on a low-closure rate, and this will continue and increase in the future as a result of the release of body-worn camera footage within five days of a serious use of force incident or officer-involved death. *See Exhibit 1* at ¶ 8. Therefore, the D.C. Police Union has standing to prevent the release of the body-worn camera footage, which will negatively impact the careers of its members.

The D.C. Police Union clearly meets the second prong of the standard for establishing associational standing. The D.C. Police Union is the exclusive representative of all police officers, sergeants, investigators, detectives, and detective sergeants of the D.C. Metropolitan Police Department and is comprised of approximately 3,600 members. *See Verified Complaint* at ¶ 1. In this matter, The D.C. Police Union is seeking declaratory and injunctive relief to protect the privacy and safety rights of its members, which is an interest that is germane to the D.C. Police Union's purpose. Indeed, when considering associational standing for labor unions to bring suit on behalf of its members, the Supreme Court has held that "there is little question

that the interests that the [union] seeks to protect in this suit are ‘germane to the organization’s purpose.’” *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 286 (1986).

When considering the third prong of the standard for associational standing, the Supreme Court has stated that “once an association has satisfied *Hunt*’s first and second prongs assuring adversarial vigor in pursuing a claim for which member Article III standing exists, it is difficult to see a constitutional necessity for anything more.” *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 556 (1996). As such, the Court considers the relief sought in the lawsuit when considering the third prong:

(W)hether an association has standing to invoke the court’s remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.

Hunt v. Washington State Apple Advert. Comm’n, 432 U.S. 333, 343 (1977) (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975)). In this matter, the D.C. Police Union has sought declaratory and injunctive relief, which, if granted will inure to the benefit of its members by protecting the privacy and safety rights of its members. Thus, the relief sought in this case is the exact form of relief that has been sought in all cases in which the Supreme Court has previously recognized associational standing.

C. D.C. Police Union Members Have an Adequate Privacy Interest in Enjoining the Release of the Body-Worn Camera Footage and Their Names

In their Opposition, the Defendants contend that the D.C. Police Union has not identified an adequate privacy interest for its members. *See* Opposition at 15-16. However, the D.C. Court of Appeals has recognized that “MPD employees have a cognizable privacy interest in the

nondisclosure of their names and other identifying information.” *District of Columbia v. Fraternal Order of Police*, 75 A.3d 259, 268 (2013). The Court of Appeals has further held as follows:


[T]here is no dispute that police officers subject to departmental disciplinary proceedings have far more than a *de minimis* privacy interest in not being publicly identified. The propriety of redactions reasonably necessary to ensure their anonymity is not in doubt. “[E]ven with names redacted,” the disclosure of other personal information may result in an invasion of their privacy because individuals “can often be identified through other, disclosed information” and the “later recognition of identifying details.

Fraternal Order of Police, Metro. Police Labor Comm. v. D.C., 124 A.3d 69, 77 (D.C. 2015),

As such, the D.C. Police Union has identified a legitimate, recognized privacy interest in this matter.

Therefore, the D.C. Police Union respectfully requests that the Court grant its Emergency Motion for Temporary Restraining Order.

Respectfully submitted,



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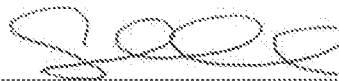
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August, 2020, I caused the foregoing to be served upon the following individuals via electronic mail:

Conrad Risher
Honey Morton
Office of Attorney General
for the District of Columbia
441 4th Street, N.W.
Suite 630 South
Washington, DC 20001

Counsel for Defendants



Anthony M. Conti (D.C. Bar No. 479152)

Exhibit

1

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

FRATERNAL ORDER OF POLICE
METROPOLITAN POLICE
DEPARTMENT LABOR COMMITTEE,
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AFFIDAVIT OF GREGGORY PEMBERTON

I, Gregory Pemberton, depose and state as follows:

1. I am familiar with the facts set forth herein, am over the age of eighteen, and if called and sworn as a witness, could and would testify competently and from personal knowledge as to the following matters.

2. I am the Chairman of the Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union (“D.C. Police Union”). The D.C. Police Union is the exclusive representative of all police officers, sergeants, investigators, detectives, and detective sergeants of the D.C. Metropolitan Police Department (“MPD”) and is comprised of approximately 3,600 members.

3. I have reviewed the July 31, 2020 letter from Deputy Mayor Kevin Donahue to Councilmember Charles Allen. I have confirmed that each of the Metropolitan Police Department officers listed as the officer involved in the fatal incident is a current D.C. Police Union member or was a D.C. Police Union member at the time of the incident. The most recent

fatal incident referenced in Deputy Mayor Donahue's letter occurred on July 24, 2020. The officer involved in that incident is a current member of the D.C. Police Union. That incident is currently under investigation by the MPD's Internal Affairs Division and the MPD's Major Crash Investigations Unit. These investigations could result in disciplinary action being taken against the member involved.

4. On July 22, 2020, MPD Chief Peter Newsham informed me that the MPD was contacting each of the officers involved in officer involved deaths whose body-worn camera footage was going to be publicly released pursuant to the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020. Subsequently, the officers involved in officer involved deaths whose body-worn camera footage was going to be publicly released were contacted by a member of the MPD's Intelligence Branch, such as Lieutenant Shane Lamond. Notably, the MPD's Intelligence Branch is tasked with assessing and investigating threats made against government officials. When the officers were contacted by the Intelligence Branch, they were asked several questions to assess the threat level posed against the member through the release of the footage such as: whether the member had an alarm system on their home, whether their home was equipped with cameras, and whether they wanted the MPD to reach out to local law enforcement in the jurisdiction of their personal residence to have local law enforcement increase patrol of their neighborhood during the days surrounding the release of the footage. Several of the officers involved accepted the MPD's offer to contact local law enforcement and local law enforcement increased the patrolling in their neighborhoods in the days surrounding the release of the footage.

5. In addition, Dr. Beverly Anderson, Clinical Director of the Metropolitan Police Employee Assistance Program ("MPEAP") contacted the officers involved to inform them of the

psychological counseling services and therapy that the MPEAP offers to MPD officers who have been involved in officer involved deaths.

6. The release of body-worn camera footage within five days of a serious use of force incident or officer-involved death will cause the D.C. Police Union to expend more resources in publicly defending its members who were involved in the serious use of force incident or officer-involved death.

7. The release of body-worn camera footage within five days of a serious use of force incident or officer-involved death will result in immediate violations of the disciplinary guidelines contained in the Collective Bargaining Agreement (“CBA”) between the D.C. Police Union and the Metropolitan Police Department. For example, Article 12, Section 1(2) requires as follows:

Any employee who is engaged in either investigating or proposing corrective or adverse action on behalf of management shall maintain the appropriate confidentiality of an investigation.

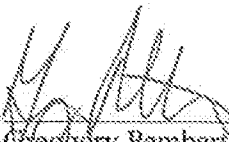
Body-worn camera footage is often the key piece of evidence in MPD disciplinary investigations. The release of body-worn camera footage within five days of a serious use of force incident or officer-involved death will occur during any MPD investigation concerning the incident, thereby eliminating the confidentiality of investigation and the evidence contained in the investigation. The D.C. Police Union will expend additional resources to pursue grievances based upon public release of these materials, the adverse effect it will have on pending investigations, and the due process violations that will result through the grievance process for violations of Article 12, Section 1(2) and other provisions in the CBA caused by the release of the body-worn camera footage. The negative disciplinary consequences that result from the release of body-worn camera footage within five days of a serious use of force incident or

officer-involved death will further cause the D.C. Police Union to expend more resources asserting challenges to the proposed discipline of its members and unfair labor practices before the Public Employee Relations Board.

8. The release of body-worn camera footage within five days of a serious use of force incident or officer-involved death will result in the public disclosure of the identities of witnesses to the incident. This public disclosure of witness identities will make it more difficult for Detectives (who are D.C. Police Union members) to secure witness cooperation. This will have the negative consequence of making it more difficult for the Detectives to solve crimes, which will in turn negatively affect each of the Detectives' closure rates. A low closure rate has negative career consequences for Detectives and has been used by the MPD as a basis to transfer or discipline members. The D.C. Police Union has expended resources in the past to challenge improper transfers of Detectives based on a low-closure rate, and this will continue and increase in the future as a result of the release of body-worn camera footage within five days of a serious use of force incident or officer-involved death.

* * *

I solemnly affirm under the penalties of perjury and under oath that the contents of the foregoing Affidavit are true and correct to the best of my knowledge, information, and belief.



Gregory Pemberton
Chairman, D.C. Police Union

Date: 8/13/20

Exhibit

2

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

FRATERNAL ORDER OF POLICE *
METROPOLITAN POLICE *
DEPARTMENT LABOR COMMITTEE, *
D.C. POLICE UNION, *

Plaintiff,

v.

THE DISTRICT OF COLUMBIA, *et al.*

Defendants.

Case Number: 2020 CA 003492 B
Judge William M. Jackson

Next Event: Initial Scheduling Conference
November 6, 2020

* * * * *

AFFIDAVIT OF DR. BEVERLY ANDERSON

I, Beverly Anderson, depose and state as follows:

1. I am familiar with the facts set forth herein, am over the age of eighteen, and if called and sworn as a witness, could and would testify competently and from personal knowledge as to the following matters.

2. I am the Clinical Director of the Metropolitan Police Employee Assistance Program (“MPEAP”), which provides confidential counseling services to Metropolitan Police Department officers and their family members. I hold Masters Degrees in clinical psychology and counselor education and PhDs in counseling psychology and clinical psychology. I specialize in police trauma psychology and regularly provide counseling services to police officers, including those involved in serious use of force incidents.

3. Prior to the recent release of body-worn camera footage involving officer-involved death required by the recent legislation passed by the D.C. Council, the Metropolitan Police Department’s Chief Operating Officer Leann Turner contacted me and advised me that

Chief of Police Peter Newsham wanted to ensure that every officer was contacted prior to the release of the body-worn camera footage. COO Turner requested that I contact every officer involved in officer-involved deaths so they would not be blindsided by the release of the body-worn camera footage.

4. I contacted all of the officers involved in incidents involving officer-involved deaths to advise them of the new law and to advise them that the body-worn camera footage and their names would be publicly released and to remind them of available MPEAP services.

5. Public release of body-worn camera footage depicting a death in which an officer is involved can inflict serious psychological trauma on the officer and their families.

6. In the early days following a serious use of force incident or incident concerning an officer involved death, officers are particularly vulnerable to psychological harm, which would be exacerbated by the public release of the body-worn camera footage of the incident.

* * *

I solemnly affirm under the penalties of perjury and under oath that the contents of the foregoing Affidavit are true and correct to the best of my knowledge, information, and belief.

/s/ Dr. Beverly Anderson
Dr. Beverly Anderson

Date: August 13, 2020