GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of	)	
	)	
Samantha Brown	)	
	)	
Complainant	)	
	)	
v.	)	PERB Case No. 22-U-16
	)	
District of Columbia Public Schools	)	Opinion No. 1877
	)	
Respondent	)	
	)	

DECISION AND ORDER

I. Statement of the Case

On July 7, 2022, Samantha Brown (Complainant) filed an unfair labor practice complaint (Complaint) against the District of Columbia Public Schools (DCPS). The Complaint alleges, in pertinent part, that DCPS violated section 1-617.04(a)(1), (2), (3), and (4) of the Comprehensive Merit Personnel Act (CMPA)[1] by retaliating against the Complainant for exercising her duties as a Washington Teachers' Union (WTU) representative.[2] On July 20, 2022, DCPS filed an Answer and Affirmative Defenses (Answer) denying the allegations, asserting affirmative defenses and requesting dismissal of the Complaint. On December 21, 2023, the Board remanded the case back to the Hearing Examiner for clarification.[3]

Upon consideration of the Hearing Examiner's Reports and Recommendations, applicable law, and the record presented by the parties, the Board rejects the Hearing Examiner's recommendations and finds that DCPS committed an unfair labor practice.

II. Factual Background

The Complainant is a teacher at Calvin Coolidge High School (Coolidge).[4] Since 2019, the Complainant has served in multiple advocacy roles, including as a WTU Executive Board

[1] The Complaint also alleges violations of D.C. Official Code § 1-617.04(b)(1) and (2). Complaint at 2. However, D.C. Official Code § 1-617.04(b) concerns unfair labor practices committed by employees, labor organizations, their agents, or representatives; Sec. 1-617.04(b) is irrelevant to the claims alleged in the Complaint against DCPS, and the citation to this section of the CMPA is presumed an error by the *pro se* Complainant.
[2] Complaint at 3.
[3] *Samantha Brown v. DCPS*, Slip Op. No. 1854, PERB Case No. 22-U-16 (2024).
[4] Report at 1.

Representative and Building Representative.[5] In these roles, the Complainant has served as a member of the WTU contract negotiations team,[6] investigated Coolidge's compliance with the Individuals with Disabilities Education Act (IDEA) and investigated accounting irregularities in the Coolidge Student Activities Fund (SAF).[7] Over the course of the 2021-2022 school year, the Complainant successfully pursued grievances related to notice of work requirements and instructional materials, violation of the rights of special education teachers, and noncompliance with Coolidge's budget process. The Complainant advanced grievances through the DCPS chancellor's office.

On or about September 8, 2021, the Complainant requested leave for a negotiations meeting scheduled for September 9, 2021.[8] The Principal emailed the Complainant at 7:29 AM on September 9, 2021, and denied the leave request, asserting that the Complainant was no longer a member of the WTU negotiations team according to the communications from DCPS.[9] At 7:49 AM on September 9, 2021, the Complainant replied to the Principal's email, thanking her for the information.[10] Thereafter, the Complainant reported to work.[11] Although the Complainant reported to work, the Principal incorrectly maintained that the Complainant was absent without excuse.[12]

On or about May 10, 2022, the Complainant announced that WTU would be holding its internal union elections. Approximately two days later, the Principal sent two emails to Coolidge

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[5] Report at 1. The Complainant states that she has served as a WTU Executive Board member since 2019 and as the WTU Building Representative for Coolidge since 2021. May 23, 2023 Tr. 48:13-15.
[6] May 23, 2023 Tr. 91:1-3.
[7] Complaint Ex. 1 at 2. On January 9, 2021, the Complainant emailed the Principal requesting that the Principal comply with the parties' CBA and Memoranda of Agreement (MOA) requirements to include the Complainant, as a SCAC representative, in certain meetings and discussions. The Complainant alleged in the email that the Principal had stated that she did not care about an MOA and had prevented the Complainant from speaking at a meeting the day before. The Complainant began requesting financial information regarding SAF account irregularities in September 2021. On March 22, 2022, the Complainant filed a grievance with the Principal on behalf of Coolidge Special Education teachers. On April 4, 2022, the Complainant requested a financial audit. On April 13, 2022, the Complainant filed a grievance with the DCPS Office of Labor Management and Employee Relations (LMER) regarding the SAF accounting irregularities. On April 26, 2022, the Complainant filed a grievance with LMER asserting retaliation, discrimination and discipline against her by the Principal and requested informal mediation. On June 23, 2022, the Complainant again filed a complaint with LMER alleging retaliation and asserting that her attempt to address the issue through informal mediation, as provided for by the parties' CBA, had been denied. On November 3, 2022, the Complainant filed a complaint with OSSE regarding Coolidge's IDEA compliance. On December 22, 2022, OSSE determined that DCPS had failed to provide Individualized Education Programs (IEPs) or properly place students according to their needs and therefore found that DCPS had not complied with the requirements of IDEA. OSSE ordered DCPS to take corrective action to come into compliance with IDEA. On February 10, 2023, the OCOO found that all of the Complainant's allegations regarding SAF account irregularities were substantiated or partially substantiated.
[8] DCPS Hearing Ex. B at 7.
[9] DCPS Hearing Ex. B at 7.
[10] Complaint Ex. 13.
[11] *See* Complaint Ex. 1. *See also* Complaint Ex. 17; June 9, 2023 Tr. 78:2-80:5. The Principal testified that spaces on the sign-in sheet where teachers had not signed in on time would be highlighted to demark absences, June 9, 2023 Tr. 78:15-19, and that the presence of both a highlight and the Complainant's name suggested that the Complainant signed in late. June 9, 2023 Tr. 79:21-80-5.
[12] Report at 6. *See also* June 9, 2023 Tr. 85:1-5.

staff regarding leave requests, morning sign-ins and the tours of duty for employees in WTU and American Federation of Government Employees' bargaining units.[13]

On May 26, 2022, the day of the WTU elections,[14] the Coolidge Principal conducted an in-class observation of the Complainant's teaching as part of the Complainant's 2021-2022 Performance Evaluation.[15] Thereafter, the Principal issued the Complainant's final 2021-2022 Performance Evaluation.[16] The Complainant received a rating of "effective" after twenty (20) points were deducted in total.[17] The Principal admitted that the reduction of the Complainant's Performance Evaluation was based, in part, on the incorrect assertion that the Complainant had an unexcused absence on September 9, 2021.[18]

III. Procedural History

The Complaint alleged that DCPS reduced the Complainant's Performance Evaluation scores in retaliation for her exercising her duties as a representative of WTU by "exposing wrongdoings."[19] The Complaint further alleged that DCPS: (1) discriminated against the Complainant because of her status as a union member and officer and carrying out of her duties as a union officer; (2) used false information to lower her Performance Evaluation score; (3) created a hostile work environment, including a significant increase in assigned teaching preps and the removal of an AP literature class from the Complainant's schedule, in retaliation against the Complainant's reports of wrongdoing by Coolidge and its staff;[20] and (4) failed to comply with the requirement of the parties' collective bargaining agreement (CBA) to provide informal mediation once requested by the Complainant.[21]

DCPS asserted in its Answer that: (1) the Complainant had failed to state a claim for which relief can be granted;[22] (2) that the Board lacks jurisdiction over the Complainant's claims, which would require the Board to interpret the parties' CBA; (3) that the Complainant had committed a prior breach by failing to comply with the CBA's procedural requirements; and (4) that the Complainant failed to comply with a condition precedent to the claims.[23] DCPS argued in its Motion to Dismiss that the Complainant did not have standing to bring a claim under D.C. Official Code § 1-617.04(a)(5) because she is a DCPS employee and WTU Building Representative, not

[13] Complaint Exs. 22a and 22b.
[14] June 9, 2023 Tr. 43:4-6.
[15] May 23, 2023 Tr. 215:1-6.
[16] Report at 4.
[17] DCPS Post-Hearing Brief at 5. *See also* May 23, 2023 Tr. 227:7-11. While the Complainant received deductions to her Performance Evaluations totaling forty (40) points, deductions cap at 20 points per evaluation cycle. DCPS Post-Hearing Brief at 5. *See also* May 23, 2023 Tr. 152:17-20.
[18] Report at 5. The Principal also deducted points from the Complainant's Performance Evaluation based on a formal in-class observation, as well as alleged violations of Analyze Existing Data and Individualized Education Program policies and procedures and "incidents of disrespect" involving parents, students and staff. DCPS Post-Hearing Brief at 2.
[19] Report at 1.
[20] Report at 8.
[21] Report at 2.
[22] Answer at 6.
[23] Answer at 9.

the recognized bargaining representative for WTU.[24] DCPS further argued that the Complainant's claims regarding mediation were unrelated to a refusal to bargain in good faith.[25]

A hearing was held on the matter. On August 3, 2023, the Hearing Examiner issued a Report and Recommendations (Report).[26] The Hearing Examiner found that: (1) the Complainant failed to show that her Performance Evaluation was the result of retaliation or anti-union discrimination; and (2) the Complainant failed to pursue available remedies under the parties' CBA and that "there is no basis within the subject [CBA], D.C. Code or PERB Rules for [the Complainant] to seek initial relief from PERB rather than through the [CBA]."[27] The Hearing Examiner recommended that the Board dismiss the Complaint "as being without evidentiary or legal foundation."[28]

On October 12, 2023, the Hearing Examiner issued a Supplemental Report and Recommendation (Supplemental Report).[29] The Hearing Examiner analyzed the Complainant's submissions regarding complaints she had filed regarding Coolidge's Student Activities Fund (SAF) ledger irregularities and alleged violations of the Individuals with Disabilities Education Act (IDEA).[30] The Hearing Examiner noted the absence of a direct finding of "fraud or dishonesty on part of Coolidge High School Principal or Officials" in the DCPS Office of the Chief Operating Officer (OCOO) memorandum addressing the Complainant's allegations regarding the SAF account.[31] The Hearing Examiner further noted that the Office of the State Superintendent of Education (OSSE) found that DCPS had violated IDEA and ordered DCPS to institute corrective actions in order to comply with IDEA requirements.[32] The Hearing Examiner again found that the Complainant failed to sustain her burden of proof that the Principal had retaliated against her as a

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[24] Hearing Examiner's Decision on Motion to Dismiss Complaint (MTD Report) at 1-2.
[25] MTD Report at 3.
[26] The Hearing Examiner simultaneously filed a response denying DCPS's June 29, 2023 Motion to Dismiss. The Hearing Examiner found that the Complainant as a WTU building representative had standing to assert a claim of retaliation, discrimination or discipline based on the performance of union duties. MTD Report at 3. The Hearing Examiner further found that the Complainant would have the right to relief under D.C. Official Code § 1-617.04 if the evidence supported a claim that DCPS refused to engage in mediation as "part of an effort to retaliate, discriminate or otherwise take reprisal against an employee because he or she has exercised any right under [D.C. Official Code § 1-617.04] or under the Collective Bargaining Agreement." MTD Report at 3. The Hearing Examiner concluded that he must deny the Motion to Dismiss because it sought to dismiss sections of the Complaint based solely on the pleadings. MTD Report at 3. The Hearing Examiner further noted that the Board might consider the Motion to Dismiss moot in light of the recommendations in his Report. MTD Report at 3.
[27] Report at 7.
[28] Report at 10.
[29] On July 18, 2023, DCPS had filed a motion for extension of time for its post-hearing brief, citing a delay in receipt of requested hearing transcripts. The Board granted the motion, extending the deadline for filing post-hearing briefs for both parties to August 16, 2023. The Hearing Examiner, unaware of the extension, filed his original Report prior to the extended deadline for post-hearing briefs. On August 7, 2023, the Complainant filed exceptions to the Report (August 7 Exceptions). On August 15, 2023, DCPS filed an opposition to the August 7 Exceptions (August 15 Opposition). On August 25, 2023, the Complainant filed a response to the August 15 Opposition. The Board reopened the post-hearing briefing period on August 25, 2023, setting a new deadline of September 8, 2023, and directing the Hearing Examiner to take any post-hearing briefs filed into consideration. Both parties submitted post-hearing briefs on September 8, 2023.
[30] Supplemental Report at 2-3.
[31] Supplemental Report at 3. The Hearing Examiner refers to these findings as made by the Office of the Chief Financial Officer, but the memorandum comes from OCOO staff on OCOO letterhead. Complaint Exh. 28 at 1.
[32] Supplemental Report at 3. *See also* Complaint Ex. 28.

result of these complaints.[33] The Hearing Examiner recommended that the Board dismiss the Complaint.[34] The Complainant filed exceptions to the Supplemental Report (Supplemental Exceptions). DCPS filed an opposition to the Supplemental Exceptions (Supplemental Opposition).

On December 21, 2023, the Board remanded the case back to the Hearing Examiner.[35] The Board ordered the Hearing Examiner to: (1) clarify the weight accorded to credibility findings and other evidence in reaching his decision; and (2) explain his analysis of the burden-shifting standard from *Wright Line* as applied to the facts of this case, including, particularly, the analysis of evidence presented by the Complainant.[36] On January 22, 2024, the Hearing Examiner issued a Remand Report and Recommendations (Remand Report).[37] The Complainant filed exceptions to the Remand Report (Remand Exceptions). DCPS filed an opposition to the Remand Exceptions (Remand Opposition).

IV. Hearing Examiner's Remand Report and Recommendations

The Hearing Examiner affirmed his conclusion that the evidence did not support a finding that DCPS acted out of anti-union animus or retaliation for the Complainant's union activities or advocacy.[38] The Hearing Examiner stated that no direct or circumstantial evidence was introduced that established anti-union animus on the part of the Principal or other DCPS personnel.[39] The Hearing Examiner acknowledged such evidence "may be hard to come by,"[40] but asserted that "here, there was no written documentation, report of an oral statement or a witness to support a finding that either [the Principal] or any supervisor at DCPS had expressed hostility to [the Complainant or] the Washington Teacher's [sic] Union because of any protected union activity."[41] The Hearing Examiner reasoned that, if a climate of anti-union bias existed at Coolidge, a witness from WTU would have come forward to support the Complainant's allegations, stating that "[n]one did so."[42]

The Hearing Examiner reviewed his credibility determinations regarding DCPS witnesses.[43] The Hearing Examiner credited the testimony of DCPS witnesses—the Administrative Officer, the Principal and the Instructional Superintendent—as, respectively, "familiar with the issue of whether [the Complainant] was absent from duty, without excuse, on September 9, 2021,"[44] lacking anything "incredible or anti-union,"[45] and impressive regarding the level of "detailed knowledge of all aspects of teacher evaluations conducted within [DCPS]."[46]

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[33] Supplemental Report at 3.
[34] Supplemental Report at 4.
[35] *Samantha Brown v. DCPS*, Slip Op. No. 1854.
[36] *Samantha Brown v. DCPS*, Slip Op. No. 1854 at 1.
[37] The Remand Report was issued to the parties on February 1, 2024.
[38] Remand Report at 3.
[39] Remand Report at 3.
[40] Remand Report at 3.
[41] Remand Report at 3. The Board notes that the Hearing Examiner did not discuss the Complainant's witness—another member of WTU and teacher at Coolidge—nor the Complainant's asserted circumstantial evidence. Remand Report at 3.
[42] Remand Report at 3.
[43] Remand Report at 4-5.
[44] Remand Report at 4.
[45] Remand Report at 4.
[46] Remand Report at 5.

The Hearing Examiner relied on the Principal's acknowledgment in her hearing testimony about the possibility that "a mistake was made in charging [the Complainant] with being absent on September 9, 2021"[47] and assertion that the Complainant could have filed a Chancellor's Appeal to correct the "mistake."[48] The Hearing Examiner noted his confidence that if the Instructional Superintendent "found any inappropriate conduct or evaluation of [the Complainant] on the part of [the Principal], she would have taken action concerning the same."[49]

The Hearing Examiner reviewed the burden-shifting standard from *Wright Line*.[50] The Hearing Examiner noted that both *Wright Line* and *Kava Holdings, LLC v. NLRB* involved egregious anti-union conduct.[51] The Hearing Examiner further noted the failure of the managers in *Wright Line* to make any genuine effort to investigate the reason behind the terminated employee's whereabouts in constructing the employer's pretextual reason for discharging the employee, as well as the employer's failure to warn or reprimand the employee before discharging him for a "trivial first offense."[52] The Hearing Examiner discussed the significant anti-union animus evidenced in *Kava Holdings*, where an employer refused to rehire 152 union employees, despite the employees' qualifications for the positions, refused to recognize the exclusive bargaining representative, and made "various unilateral changes in the bargaining unit's terms and conditions of employment."[53]

In the instant case, the Hearing Examiner found that the Complainant failed to establish the requisite *prima facie* case that protected union conduct was a motivating or substantial factor "in any decision by [DCPS] of which she complains in this matter."[54] The Hearing Examiner held that a preponderance of the documentary evidence and DCPS witness testimony showed that the Principal based the Complainant's Performance Evaluation on genuine performance concerns and a good faith belief that the Complainant had an unexcused absence on September 9, 2021.[55] The Hearing Examiner noted both that the Principal did not initiate any of the complaints of disrespect against the Complainant and that the grievances the Complainant filed in her role as a WTU representative lacked evidence showing that the Principal was directly involved or that Coolidge failed to correct issues of noncompliance.[56] The Hearing Examiner concluded that "the record in this matter is bereft of any credible evidence that Respondent's evaluation of [the Complainant's] performance…was motivated or impacted by any unfair labor practice"[57] and recommended that the Board dismiss the Complaint.[58]

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[47] Remand Report at 4. In the initial Report, the Hearing Examiner found that DCPS's decision to deduct ten (10) points from the Complainant's Performance Evaluation based on the alleged unexcused absence was erroneous, but in good faith and likely as a result of miscommunication. Report at 6.
[48] Remand Report at 5.
[49] Remand Report at 6.
[50] Remand Report at 6.
[51] Remand Report at 6.
[52] Remand Report at 7-8.
[53] Remand Report at 8 (citing *Kava Holdings, LLC v. NLRV*, 85 F.4 479, 485 (9th Cir. 2023).
[54] Remand Report at 9.
[55] Remand Report at 9.
[56] Remand Report at 9-10.
[57] Remand Report at 11.
[58] Remand Report at 11.

V. Discussion

Under Board Rule 550.1, the party with the burden of proof must carry that burden by a preponderance of the evidence.[59] The Board has held that "the Hearing Examiner is the designated agent of the Board empowered to make findings, conclusions and recommendations … consistent with the Board's statutory authority under the CMPA."[60] The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the hearing examiners.[61] However, the Board "maintains the authority to review and affirmatively decide to accept or reject the findings and conclusions contained in the hearing examiner's Report and Recommendations."[62] The Board will not adopt a Hearing Examiner's Report and Recommendations if it is unreasonable, unsupported by the record, or inconsistent with Board precedent.[63] While the Board places great weight on hearing examiners' credibility determinations, the question of where it is appropriate to overturn such credibility determinations is a novel issue before the Board. The Board has held that it will sometimes look to National Labor Relations Board (NLRB) precedent for guidance when relevant, primarily when the Board's own case law is silent on a particular issue.[64]

The Board has adopted the NLRB's *Wright Line* test for complainants alleging that an employee's protected union activity was the motivating factor for an adverse action.[65] Under *Wright Line*, in order to establish a *prima facie* case of retaliation for union activity, a complainant must show that: (1) an employee engaged in protected union activity; (2) the employer knew about the employee's protected union activity; (3) the employer had anti-union animus or retaliatory animus; and (4) the employer took an adverse employment action against the employee as a result.[66] The Complainant excepted, in pertinent part, to: (1) the Hearing Examiner's assertion that no direct or circumstantial evidence was introduced to establish anti-union animus by DCPS;[67] (2) the Hearing Examiner's assertion that the Complainant could have filed a Chancellor's Appeal;[68] (3) the Hearing Examiner's crediting of DCPS witness testimony despite inaccuracies

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[59] *See* Board Rule 550.1; *see also WTU, Local 6, AFT, AFL-CIO v. DCPS*, 68 D.C. Reg. 6745, Slip Op. No. 1792 at 3, PERB Case No. 20-U-29 (2021).
[60] *UDC Faculty Ass'n/NEA v. UDC*, 39 D.C. Reg. 8594, Slip Op. No. 285 at 8, PERB Case No. 86-U-16 (1992).
[61] *WTU, Local 6 v. DCPS*, 65 D.C. Reg. 7474, Slip Op. No. 1668 at 5, PERB Case No. 15-U-28 (2018).
[62] *Patricia Bush and Nathan Pugh v. DOC Employees, Local 1417, a/w Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and DOC*, 46 D.C. Reg. 9387, Slip Op. No. 367 at 3 (1999)(dismissing complaint as untimely despite respondent's failure to except to hearing examiner's finding that complaint was timely filed).
[63] *See Darlene Bryant, et al. v. FOP/DOC Labor Comm.*, Slip Op. No. 1850 at 7, PERB Case No. 22-S-05 (2023) (holding that findings by the Hearing Examiner which were contradicted by the evidentiary record were unreasonable and unsupported by the record); *see also AFGE, Local 1403 v. DOH*, 66 D.C. Reg. 8011, Slip Op. No. 1709 at 5-6, PERB Case No. 18-U-02 (2019) (holding that the hearing examiner's finding that the agency's performance review calibration process was a negotiable subject that made material,, substantive changes to the parties' CBA was unsupported by the record and inconsistent with Board precedent); *U.S. Dep't of the Air Force Randolph Air Force Base San Antonio, Texas and AGE, Local 1840*, 65 FLRA 61, 61 (2010) (holding that the Federal Labor Relations Authority reviews judges' factual findings and credibility determinations using a preponderance of the evidence standard).
[64] *FOP/MPD Labor Comm. v. MPD*, Slip Op. No. 1526 at 8, PERB Case Nos. 06-U-23, et al. (2015).
[65] *AFGE, Local 2978 v. OCME*, Slip Op. No. 1457 at 4.
[66] *Id*.
[67] Remand Exceptions at 1-2.
[68] Remand Exceptions at 2-3.

regarding the Chancellor's Appeal process;[69] (4) the Hearing Examiner's crediting of the Instructional Superintendent's testimony regarding conducting a mediation between the Complainant and DCPS;[70] (5) the Hearing Examiner's failure to address the Complainant's allegations regarding DCPS' failure to engage in informal mediation with the Complainant until after she filed a complaint with OSSE;[71] (6) the harmful repercussions that a decision in favor of DCPS in this case would effectuate;[72] and (7) the Hearing Examiner's *Wright Line* analysis.[73] DCPS argued in its Remand Opposition that: (1) the Hearing Examiner's findings are reasonable and supported by the record;[74] (2) the Complainant's Remand Exceptions constitute only mere disagreement with the Hearing Examiner's factual findings;[75] (3) the Complainant's Remand Exceptions constitute mere repetition of properly rejected arguments;[76] and (4) the Complainant's Remand Exceptions constituted invalid objections to Hearing Examiner's credibility determinations.[77] DCPS further argued that the Hearing Examiner's factual findings were reasonable and supported by the record.[78]

In the instant case, the Hearing Examiner identified *Wright Line* as the proper framework for considering the applicable facts and the parties' arguments.[79] However, the Hearing Examiner failed to apply the elements of *Wright Line* correctly in finding that the Complainant failed to establish a *prima facie* case of discrimination in violation of the CMPA. The Hearing Examiner erred in finding that the Complainant did not meet her evidentiary burden for the anti-union animus element of *Wright Line*.[80] The Report only minimally acknowledged that the Complainant had a witness testify to similar treatment by the Coolidge administration.[81] The Hearing Examiner dismissed or ignored the Complainant's evidence regarding the timing of her union activities and the Coolidge administration's actions.[82] The Complainant filed multiple building grievances and requests for financial audits shortly before receiving her April 7, 2022 Performance Evaluation.[83] The Hearing Examiner erroneously focused on the results of the investigations of these grievances, the fact that Coolidge came into compliance in policies and practices implicated in some of the

[69] Remand Exceptions at 3.
[70] Remand Exceptions at 3-4.
[71] Remand Exceptions at 4-5.
[72] Remand Exceptions at 5.
[73] Remand Exceptions at 5-6.
[74] Remand Opposition at 1.
[75] Remand Opposition at 3.
[76] Remand Opposition at 4.
[77] Remand Opposition at 5.
[78] Supplemental Opposition at 4-5.
[79] *See Wright Line, Inc. v. Lamoureux*, 251 NLRB 1083 (1980).
[80] Report at 9. The Hearing Examiner asserted that "[n]o credible evidence was adduced at hearings that [the Principal] engaged in retaliation, discrimination or adverse action against [the Complainant] due to any union association, advocacy, complaint or other actions by [the Complainant] in her capacity as WTU Board of Representative [sic] or Executive Board Member." Report at 9. At remand, the Hearing Examiner reiterated that "[n]o direct or circumstantial evidence was introduced at Hearing to establish anti-union *animus* (emphasis original) on the part of Coolidge High School Supervisor or personnel of the District of Columbia Public Schools…here, there was no written documentation, report of an oral statement or a witness to support a finding that either [the Principal] or any supervisor at DCPS had expressed hostility to [the Complainant or] the Washington Teacher's [sic] Union because of any protected union activity." Remand Report at 3.
[81] Report at 8.
[82] Supplemental Report at 3-4.
[83] Complaint Ex. 3; Complaint Ex. 4; Complaint Ex. 24; *See also* Complaint at 7-8; Supplemental Report at 2-3.

grievances, and the lack of specific findings against the Coolidge Principal.[84] None of these issues are relevant to whether a complainant has established a *prima facie* case of retaliation under the *Wright Line* test, which requires only that the complainant shows that an employee engaged in protected union activity and that the employer knew about the employee's protected union activity.[85] A finding of anti-union animus against an employee under *Wright Line* is not dependent upon the level of success of that employee's union advocacy.[86]

The Principal's evaluation of the Complainant further displayed DCPS's anti-union animus, particularly the Principal's treatment of the Complainant throughout the dispute regarding an unexcused absence erroneously attributed to the Complainant. The Principal believed that the Complainant had missed work on September 9, 2021, specifically to represent WTU in collective bargaining negotiations.[87] The Principal issued a warning to the Complainant to report to work because of the Principal's understanding that the Complainant was no longer a member of the WTU negotiations team.[88] Not only did the Principal fail to conduct any investigation into whether the Complainant was actually absent on September 9, 2021, before downgrading the Complainant's Performance Evaluation, but also the Principal failed to restore points to the Complainant's Performance Evaluation when clear evidence was presented that the Complainant reported to work that day.[89] Further, DCPS delayed engaging in the CBA-authorized mediation that the Complainant requested in order to address errors in her Performance Evaluation that the Complainant considered discriminatory.[90] In direct contravention of precedent under *Wright Line* that an employer's failure to investigate incidents prior to imposing discipline, the Hearing Examiner placed the burden on the Complainant to prove the falsity of the charge of an unexcused absence.[91] Moreover, the Principal's poor rating of the Complainant's classroom performance where the Principal observed less than half of the evaluated class further shows anti-union animus.[92] Given the replete evidence of anti-union animus by the Principal, DCPS had the burden to show that it would have taken the same action against the Complainant in the absence of her protected union activity.[93]

Further, the Hearing Examiner's findings regarding the availability of other avenues for appeal to the Complainant are unreasonable and unsupported by the record.[94] DCPS's witnesses' testimony regarding the Complainant's ability to submit a Chancellor's Appeal is directly contradicted by the IMPACT Guidebook, which states, "[i]f you receive a final IMPACT rating of

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[84] Remand Report at 10-11; *See also* Supplemental Report at 2-3.
[85] *AFGE, Local 2978 v. OCME*, Slip Op. No. 1457 at 4.
[86] *See Wright Line, Inc. v. Lamoureux*, 251 NLRB 1083 (1980).
[87] June 9, 2023 Tr. 77:15-21.
[88] Complaint Ex. 13.
[89] June 9, 2023 Tr. 81:15-82:12; 87:15-17.
[90] May 23, 2023 Tr. 206:15-21.
[91] Report at 6; Remand Report at 4-5.
[92] June 9, 2023 Tr. 35:10-36:6.
[93] *AFGE, Local 2978 v. OCME*, Slip Op. No. 1457 at 4.
[94] *See, AFGE, Local 1403 v. D.C. Dep't of Health*, 66 D.C. Reg. 8011, Slip Op. No. 1709 at 5-6, PERB Case No. 18-U-02 (2019) (holding that the hearing examiner's finding that the agency's performance review calibration process was a negotiable subject that made material, substantive changes to the parties' collective bargaining agreement was unsupported by the record and inconsistent with Board precedent). *See also, U.S. Dep't of the Air Force Randolph Air Force Base San Antonio, Texas and AFGE, Local 1840*, 65 FLRA 61, 61 (2010) (holding that the Federal Labor Relations Authority reviews judges' factual findings and credibility determinations using a preponderance of the evidence standard).

Ineffective, Minimally Effective, or Developing and you would like to appeal your rating, you may file a formal appeal to the Chancellor (emphasis added)."[95] While multiple witnesses for DCPS stated that the Complainant could have utilized the Chancellor's Appeal,[96] the same witnesses' testimony also indicated knowledge of the actual metrics required in order to do so.[97] DCPS's witnesses also contradicted each other as to whether DCPS teachers use a Chancellor's Appeal to appeal performance evaluations based on procedural or substantive grounds.[98] The parties' CBA cites to 5 DCMR § 1306.8, which states that "[e]mployees shall have the right to appeal below average or unsatisfactory performance evaluations.[99]

The Hearing Examiner's assertions that the Complainant failed to seek initial relief as provided by the parties' CBA and that the Complainant did not have a basis for seeking initial relief with the Board are also unreasonable, unsupported by the record, and inconsistent with Board precedent.[100] The Board has clearly held that its own rules governing unfair labor practice claims do not require complainants to exhaust administrative remedies in order to seek relief from the Board.[101] Further, the Hearing Examiner failed to acknowledge that the Complainant attempted to invoke informal mediation as allowed for in the section of the parties' CBA on which he relied.[102] The Complainant requested informal mediation and reached out multiple times to follow up.[103] According to DCPS's witness testimony, the requested informal mediation did not occur until August 18 or 19, 2022, and only after the Complainant requested relief from the Board.[104] The Complainant was either ineligible for or denied, through delay of process, any initial relief processes available through the CBA rather than the Board.

The Hearing Examiner's findings regarding DCPS employees' determination that the Complainant had an unexcused absence on September 9, 2021, are unreasonable and unsupported by the record. While the Principal did, at one point, testify that considering the Complainant absent that day might have been a mistake,[105] DCPS's witnesses' testimony—including additional

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[95] IMPACT Guidebook at 55.
[96] May 23, 2023 Tr. 156:3-8; 188:13-190:5; 202:18-20; June 9, 2023 Tr. 27:2-17; 28:8-13; 29:5-20; 85:11-20; 87:15-17; 95:4-6.
[97] May 23, 2023 Tr. 158:21-159:4; 200:14-17.
[98] May 23, 2023 Tr. 188:1-17; June 9, 2023 Tr. 27:10-17.
[99] *Collective Bargaining Agreement between the Washington Teachers' Union, Local #6 of the American Federation of Teachers and the District of Columbia Public Schools* (2016-2019) at 50.
[100] Report at 6-7 (citing *Collective Bargaining Agreement between the Washington Teachers' Union, Local #6 of the American Federation of Teachers and the District of Columbia Public Schools* (2016-2019), Sec. 3.3). *See AFGE, Local 1403 v. DOH*, 66 D.C. Reg. 8011, Slip Op. No. 1709 at 5-6, PERB Case No. 18-U-02 (2019) (holding that the hearing examiner's finding that the agency's performance review calibration process was a negotiable subject that made material, substantive changes to the parties' collective bargaining agreement was unsupported by the record and inconsistent with Board precedent). *See also, Darlene Bryant, et al. v. FOP/DOC Labor Comm.*, Slip Op. No. 1850 at 7; *U.S. Dep't of the Air Force Randolph Air Force Base San Antonio, Texas and AFGE, Local 1840*, 65 FLRA 61, 61 (2010) (holding that the Federal Labor Relations Authority reviews judges' factual findings and credibility determinations using a preponderance of the evidence standard).
[101] *See FOP/MPD Labor Comm. V. MPD*, 61 D.C. Reg. 5627, Slip Op. No. 1465 at 4, PERB Case No. 08-U-14 (2014).
[102] Complaint at 11 (citing Complaint Ex. 2). *See Collective Bargaining Agreement Between the Washington Teachers Union, Local #6, of the American Federation of Teachers and the District of Columbia Public Schools*, Art. 3 Fair Practices. Sec. 3 Informal Mediation for WTU Building Representatives and Principals.
[103] Complaint at 11 (citing Complaint Ex. 2).
[104] May 23, 2023 Transcript 166:10-14; 206:15-21.
[105] June 9, 2023 Transcript 85:1-5.

testimony by the Principal—contained significant inconsistencies and gaps, as well as continual claims that the Complainant had, in fact, been absent.[106] DCPS relied on an attendance sign-in sheet highlighted to indicate teachers who failed to sign in, but that included the Complainant's signature on that date—possibly after the time that the entry was highlighted[107]—and an email from the Principal to the Complainant at 7:29 a.m. on September 9, 2021, emphasizing that the Complainant must report on time for her full tour of duty.[108] However, the Complainant's submission of the same email included her response to the Principal on the same day at 7:50 a.m. affirming the Complainant's receipt of the Principal's instructions.[109] The Complainant also submitted into evidence an email summary of a meeting including both the Complainant and the Principal later in the morning on September 9, 2021,[110] and an in-class recording of her teaching on the afternoon of September 9, 2021.[111] The Principal, when asked why she had not investigated the alleged unexcused absence or utilized progressive discipline in addressing it, testified that:

> …for attendance, there may have been an error made. The fact of the matter was that when [the Administrative Officer] received the phone call from [the Complainant], or the text message – I can't speak to which one – saying that she wasn't going to come in, it would have been an egregious, dishonest act, because in good faith for the last three years, [the Complainant] had never been questioned about needing a sub. I just previously received an email either the day before or that day, stating [the Complainant] was no longer required to participate. So, with that act being there, I moved to the minus-ten-point deduction. If there was a mistake, what I'm saying is that through the Chancellor Appeal, it would have been corrected.[112]

The Principal asserted that the Complainant's request for an unexcused absence was "an egregious, dishonest act" that justified the removal of ten points from the Complainant's evaluation but did not warrant any follow-up—either investigatory to see if the Complainant did, in fact, report to work or disciplinary to advise the Complainant not to repeat the behavior—until seven months later.[113]

The Principal further testified that her working relationship with the Complainant was contentious to the point that the Principal did not engage with the Complainant more than necessary or respond to the Complainant's emails, including emails that indicated that the Complainant was actually at work on the day of the alleged unexcused absence.[114] However, the Principal still conducted the Complainant's in-class observation and was responsible for the Complainant's Performance Evaluation.[115] Further, despite the Principal's admission at the hearing that removing points from the Complainant's Performance Evaluation might have been a

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[106] May 23, 2023 Transcript 123:11-127-15; 159:9-22; June 9, 2023 Transcript 84:1-11.
[107] *See* June 9, 2023 Tr. 78:20-79:10.
[108] DCPS Hearing Ex. B at 2.
[109] Complaint Ex. 13.
[110] Complaint Ex. 17.
[111] Complaint Ex. 1.[111] The Complainant further noted that her paycheck for the relevant pay period reflected that she was paid for working on the date of the alleged unexcused absence, rather than having to use paid or unpaid leave. Complainant Post-Hearing Brief at 6, 8.
[112] June 9, 2023 Tr. 94:13-95:6.
[113] June 9, 2023 Tr. 97:2-17.
[114] June 9, 2023 Tr. 103:16-104:15.
[115] Report at 8. *See also* June 9, 2023 Tr. 8:5-9:2; 10:7-8.

"mistake," the record contains no indication that the Principal or DCPS have taken action to correct the Complainant's Performance Evaluation to no longer reflect that "mistake."[116] Even after the Principal's testimony regarding the "mistake," DCPS's post-hearing pleadings reflect that DCPS continues to treat the alleged unexcused absence as fact.[117] The Hearing Examiner's continuing reliance on the assertion that DCPS attributed an unexcused absence to the Complainant as a "mistake"[118] despite DCPS's repudiation of the possibility of a "mistake" in its post-hearing pleadings is unreasonable, unsupported by the record, and inconsistent with Board precedent.

The question of overturning a Hearing Examiner's credibility determinations is a novel issue before the Board. NLRB case law provides guidance as to where a reviewing body may appropriately overturn a fact-finder's credibility determinations. The NLRB has held that, despite the unique perspective fact-finders gain from the opportunity to observe witnesses' demeanor,[119] a fact-finder's credibility determinations can be disturbed, stating:

> The record as a whole, including the weight of the evidence, the inherent probabilities, and the reasonable inferences to be drawn therefrom, must be assessed in reaching the result in a case. Moreover, where an administrative law judge's credibility resolutions are not based on demeanor analyses, the Board is as fully capable of analyzing the record as the administrative law judge. Further, to the extent that credibility resolutions are based on demeanor, that factor is significantly diminished where the clear preponderance of the evidence convinces us such resolutions are incorrect.[120]

The Hearing Examiner here ignored contradictions in the testimony between DCPS witnesses—despite crediting both witnesses—as well as contradictions between those witnesses and the documentary evidence to which those witnesses specifically referred. The Hearing Examiner

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[116] Opposition to Remand Exceptions at 4. *See also* June 9, 2023 Tr. 85:16-20; 87:15-17.
[117] "Ten points were deducted for an unexcused absence on September 9, 2021." DCPS Post-Hearing Brief at 2. "Ms. Martin thoroughly explained that Complainant received a 10-point deduction on Complainant's evaluation for an unexcused absence on September 9, 2021." DCPS Post-Hearing Brief at 4-5. "Points were deducted from Complainant's performance due to an unexcused absence on September 9, 2021 that Complainant disputes." DCPS Opposition to Exceptions. "More specifically, Complainant argues that she provided an email as evidence to serve as a timestamp to prove that both her and Principal Bright met the morning of September 9, 2021." DCPS Opposition to Exceptions at 6. "In short, Complainant's email that she used as evidence to support her position related to the unexcused absence on September 9, 2021 competes with the testimony of DCPS witnesses." DCPS Opposition to Exceptions at 7. DCPS's refusal to acknowledge or correct the error of the Complainant's Performance Evaluation reflecting false accusations of an unexcused absence or "an egregious, dishonest act," or acknowledge the Complainant's other evidence of her attendance to her work duties on September 9, 2021—including a recording of her classroom teaching that day—further indicate DCPS's hostility toward the Complainant.
[118] Report at 9. Remand Report at 5.
[119] *See Delores Vance v. Nat'l Labor Rel. Bd.*, 71 F.3d 486, 491-92 (4th Cir. 1995)(finding that while the NLRB attaches great weight to fact-finders' credibility findings when based on demeanor, it will overrule fact-finders demeanor-based credibility determinations where a clear preponderance of all relevant evidence convinces the NLRB that the fact-finder's resolution was incorrect).
[120] *Herbert F. Darling, Inc. and Robert T. Ewing*, 267 NLRB 476, 477 (1983). The NLRB further stated that "[n]otwithstanding the Administrative Law Judge's reference at the outset of his Decision to the demeanor of the witnesses, it is clear from the Decision itself that the Administrative Law Judge's credibility resolutions are not based specifically on demeanor, but rather are premised on an analysis of the facts and the logical inferences to be drawn therefrom, and we are therefore as able to decide issues of credibility as he. As indicated, we cannot agree with his analysis of the facts, and thus we cannot accept his credibility resolutions." *Id.* at 478.

inextricably wove those errors into his analysis of the Complainant's alleged failure to avail herself of appeal processes authorized by the parties' collective bargaining agreement, as well as into his errors of law suggesting that the Complainant was required to exhaust administrative avenues of appeal before seeking justice through the Board. The Hearing Examiner's crediting of incorrect statements by witnesses and inaccurate assessments of the processes available to the Complainant appears to have led to his premature curtailing of his *Wright Line* analysis without properly addressing all elements of the test. The Hearing Examiner did not conduct a full *Wright Line* analysis in the original Report, but merely found that "[n]o credible evidence was adduced at hearings that [the Principal] engaged in retaliation, discrimination or adverse action against [the Complainant] due to any union association, advocacy, complaint or other actions."[121] The Supplemental Report did not address the Complainant's Supplemental Exceptions identifying factual errors regarding the availability of a Chancellor's Appeal.[122] The Remand Report later reiterated the errors regarding the Chancellor's Appeal.[123] In light of the impact of the Hearing Examiner's factual errors as well as the resultant errors of law, the Board is compelled to reject the Hearing Examiner's credibility determinations.

The Board's own analysis of the record shows that DCPS's actions clearly created a material risk of chilling protected union activity and interfering with, restraining, or coercing District employees in the exercise of the rights guaranteed by the CMPA. DCPS's hostility toward union activity in its communications in general as well as specific actions against the Complainant risk chilling all DCPS employees against exercising their protected union rights; therefore, DCPS has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by the CMPA in violation of D.C. Official Code § 1-617.04(a)(1). Further, the record clearly shows that the Coolidge administration's actions regarding the Complainant were motivated by anti-union animus. DCPS's demonstrable hostility toward union advocacy or activity certainly constitutes employer "'conduct [that] may reasonably tend to coerce or intimidate' employees from exercising'" protected rights.[124] DCPS's deduction of points from the Complainant's Performance Evaluation for an alleged unexcused absence without any effort to investigate that absence—despite significant evidence contradicting the allegation of absence—constitutes retaliation as proscribed by D.C. Official Code § 1-617.04(a)(4).[125] However, the record does not

[121] Report at 9.
[122] Supplemental Exceptions at 2.
[123] Remand Report at 5.
[124] *N.L.R.B. v. Air Contact Transport Inc.*, 403 F.3d 206, 212 (2005).
[125] *See IBT Local 730 v. DCPS*, 43 D.C. Reg. 5585, Slip Op. No. 375 at 3, PERB Case No. 93-U-11 (1996)(finding that DCPS committed an unfair labor practice by reassigning an employee and downgrading the employee's annual performance rating in retaliation for filing a grievance). The Board notes that the changes in the Complainant's teaching schedule to increase her overall courseload and remove the Advanced Placement Literature class do not necessarily rise to the level of adverse action under the circumstances of the instant case. However, DCPS's only example for a similarly situated teacher was both also a WTU representative and specifically requested the courseload he received, June 9, 2023 Tr. 68:5-17. The Hearing Examiner did not thoroughly investigate or address the Complainant's allegations regarding courseload changes or DCPS's other deductions from the Complainant's Performance Evaluation for alleged violations of DCPS policies and procedures or "incidents of disrespect" involving parents, students and staff. However, the color of anti-union animus has effectively tainted the entirety of the Principal's evaluation of the Complainant and, therefore, the Board finds cause to restore all points deducted from the Complainant's 2021-2022 Performance Evaluation, *infra*, in order to ensure that the Complainant is made whole for DCPS's retaliation against her.

support a finding of a violation of D.C. Official Code § 1-617.04(a)(3), which requires "'tangible consequences' on the 'terms and conditions' of employment."[126]

VI. Conclusion

The Hearing Examiner's findings and recommendations are unreasonable, unsupported by the record, and inconsistent with Board precedent. Therefore, the Board rejects the Hearing Examiner's findings, conclusions, and recommendations and finds that DCPS committed an unfair labor practice in violation of D.C. Official Code § 1-617.04(a)(1) by coercing, interfering and restraining the Complainant in exercising protected union rights.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Public Schools shall cease and desist from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by D.C. Official Code § 1-617.04(a)(1) by retaliating against employees for engaging in protected activity;

2. The District of Columbia Public Schools shall cease and desist from discharging or otherwise taking reprisal against any employees because they have signed or filed an affidavit, petition, or complaint or given any information or testimony under D.C. Official Code § 1-617.04(a)(4);

3. The District of Columbia Public Schools shall make whole the Complainant, Samantha Brown, by: (1) adjusting the Complainant's 2021-2022 Commitment to the School Community and Core Professionalism Cycle 1 evaluation to include the wrongfully removed forty (40) points; and (2) removing the 2021-2022 Cycle 3 classroom observation score of 2.7;

4. The District of Columbia Public Schools shall, within ten (10) days of the issuance of this Decision and Order, post at its facilities copies of the attached Notice, marked "Appendix A," both electronically and on all bulletin boards where notices to bargaining unit employees are posted for thirty (30) days;

5. The District of Columbia Public Schools shall notify the Board of the posting of the Notices within fourteen (14) days of the issuance of this Decision and Order; and

6. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

[126] *N.L.R.B. v. Air Contact Transport Inc.*, 403 F.3d 206, 212 (4th Cir. 2005). While both the Complainant and DCPS noted the potential for a lowered Performance Evaluation score to lead to further decreases of Performance Evaluation scores and, eventually, other adverse actions such as a step hold on a teacher's pay, May 23, 2023 Tr. 171:6-10, the Complainant has not alleged that she has experienced any loss of pay, step hold or similar monetary impacts at this time.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons and Peter Winkler.

June 26, 2024

Washington, D.C.

Appendix A

NOTICE

TO ALL EMPLOYEES AND LABOR ORGANIZATIONS ASSOCIATED WITH THE PERFORMANCE OF WORK AT THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS: THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO THE DECISION AND ORDER IN PERB CASE NO. 22-U-16.

The D.C. Public Employees Relations Board has found that we violated the Comprehensive Management Personnel Act and has ordered us to post, distribute, and obey this notice.

DISTRICT OF COLUMBIA LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union.

Choose a representative to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected rights.

WE WILL NOT interfere with, restrain, or coerce employees in their rights guaranteed under D.C. Official Code § 1-617.04.

WE WILL NOT discharge or otherwise take reprisal against an employee because he or she has signed or filed an affidavit, petition, or complaint or given any information or testimony under D.C. Official Code § 1-617.04.

WE WILL NOT retaliate against employees for protected activity, including but not limited to: serving as and/or fulfilling the duties of union representatives; or filing grievances in relation to employees' union rights and/or compliance with District law.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS, Employer

Date:_____By_____

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

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

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board reconsider its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.