GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: Charles Bagenstose, Complainant, and Dr. Joseph Borowski, Complainant, v. District of Columbia Public Schools, Respondent.	PERB Case Nos. 88-U-33 and 88-U-34 Opinion No. 270

DECISION AND ORDER

On September 28, 1988, Charles Bagenstose, a mathematics teacher employed by D.C. Public Schools (DCPS) at its School Without Walls (SWW) filed a Complaint (PERB Case No. 88-U-33), pro se, with the Public Employee Relations Board (Board) alleging that DCPS had engaged in unfair labor practices in violation of D.C. Code Section 1-618.4(a)(1),(3) and (4) of the Comprehensive Merit Personnel Act (CMPA). Specifically, Bagenstose alleged in his Complaint that DCPS had threatened to transfer him from SWW in retaliation for performing duties as a union representative and eventually did transfer him, evidencing further retaliation for his union-related activities.

On September 30, 1988, Dr. Joseph Borowski, also a DCPS mathematics teacher at SWW, filed a Complaint (PERB Case No. 88-U-34), pro se, which similarly charged DCPS with engaging in unfair labor practices in violation of D.C. Code Section 1-618.4(a)(1),(3) and (4) by allegedly transferring him, involuntarily, for his participation in a grievance proceeding involving Complainant Bagenstose.

It is undisputed that at all times relevant to this proceeding, both Bagenstose and Borowski were members of a bargaining unit represented exclusively by the Washington Teachers' Union, Local 6 (WTU), and that related grievances had been filed by both Complainants and were pending at the time the Complaints were filed.

DCPS timely filed Answers to the Complaints on October 17 and 18, 1988, denying the commission of any unfair labor practices. DCPS asserted that the Complaints essentially allege violations of the collective bargaining agreement between DCPS and WTU, and that these matters were appropriate for resolution through the grievance-arbitration procedures under the parties' agreement. DCPS further contended that since the Complaints failed to present even a colorable claim that the CMPA had been violated, there was no need for the Board to retain jurisdiction over the Complaints pending the exhaustion of the related grievance proceedings and that both Complaints should be summarily dismissed.

On February 9, 1989, the Board issued two separate Orders holding these cases in abeyance pending the outcome of the underlying grievances. [1]/ Upon the conclusion of the grievance proceedings, the Board conducted a preliminary investigation of the allegations in both Complaints by issuing interrogatories directed to the Complainants. The responses to the Interrogatories raised several credibility issues indicating to the Board that a hearing on these matters was warranted. Therefore, on April 4, 1991, the Board consolidated the Complaints for hearing and referred them to a Hearing Examiner, who heard both matters on May 16 and 17, and June 20 and 27, 1990. [2]/

In a Report and Recommendations submitted to the Board on October 16, 1990, the Hearing Examiner recommended that the Board dismiss all of the allegations set forth in the Borowski Complaint, having found no merit in his contentions that the

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[1]/ Charles Bagenstose v. D.C. Public Schools, 36 DCR 1598, Slip Op. No. 206, PERB Case No. 88-U-33 (1989) and Dr. Joseph Borowski v. D.C. Public Schools, 36 DCR 1599, Slip Op. No. 207, PERB Case No. 88-U-34 (1989). Complainant Borowski's grievance resulted in an arbitration award denying the grievance, which was issued on August 1, 1989. Shortly thereafter, WTU withdrew the Bagenstose grievance from arbitration.

[2]/ Complainant Bagenstose initially objected to the consolidation of these matters. The Hearing Examiner declined to rule upon the objection in light of the Board's prior ruling consolidating these proceedings. We find no merit in Complainant Bagenstose's objection to the consolidation of these proceedings. In our review of the record, it appears that both Complainants were provided with ample opportunity to present independent evidence in support of their respective claims, which involved similar factual and legal issues and implicated the same witnesses and agency representatives.

involuntary transfer and conditional performance rating were motivated by Borowski's union activities. With respect to the Bagenstose Complaint, however, the Hearing Examiner found that DCPS' officials did violate D.C. Code Sec. 1-618.4(a)(1) and (4) by threatening to transfer Complainant Bagenstose, and eventually doing so, based on his participation in activities protected by the CMPA. The Examiner rejected Bagenstose's claim of discrimination and thus recommended the dismissal of his D.C. Code Sec. 1-618.4(a)(3) claim.

Exceptions to the Hearing Examiner's findings and conclusions were filed by both Complainants and the Respondent. We find no merit in any of these Exceptions, which are more fully discussed below, and adopt the Hearing Examiner's findings, conclusions and recommendations to the extent consistent with this Opinion.

I. The Borowski Complaint

The pertinent facts in this proceeding pertaining to the Complaint filed by Borowski and, as found by the Hearing Examiner, are as follows. The School Without Walls, where both Complainants were employed in the Mathematics Department prior to their involuntary transfers in 1988, is a "small, non-traditional, community-based high school" with a mission to provide an alternative academic curricula to that of the more traditionally structured high school. (H.E. Rpt. p.7) Dr. Wilma Bonner served as the principal at SWW from August, 1986 until September, 1989. During the 1986-87 school year, Complainant Borowski's performance appraisal indicated needed improvement in his teaching. Under the "Teacher Appraisal Process" (TAP), a negotiated provision of the collective bargaining agreement between WTU and DCPS then in effect, the teacher support process was invoked for the purpose of developing a plan of assistance for Dr. Borowski. Complainant Bagenstose was designated as Dr. Borowski's faculty support person under the TAP program. The support team, however, was unable to reach an agreement on a plan of assistance.

There was testimony by Dr. Bonner, that "she was concerned over the lack of progress in the SWW Mathematics Department in 'becoming more alternative'..." (H.E. Rpt. at 11). Dr. Bonner further testified that on the basis of her observations of Dr. Borowski's class he did not involve students in the learning process and therefore was unable to effectively utilize the two and one-half hour classes at SWW. Based upon these observations, Dr. Bonner again invoked the teacher support process in 1988. This time, a plan of assistance for Dr. Borowski was ultimately developed by Dr. Bonner, Mr. Bagenstose and another SWW Mathematics instructor, Mr. Gordon Lewis. According to Dr.

Bonner, Dr. Borowski's performance was observed on four occasions following the implementation of a plan of assistance. His overall performance evaluation, nonetheless, was only "conditional," or less than "satisfactory" (Tr. 500-501)

Both Borowski and Bagenstose testified that Dr. Bonner's plan of assistance for Dr. Borowski was not supportive, but rather dictatorial, and, coupled with her attempts to interrupt his classes, represented a pattern of harassment. Borowski conceded, however, that although he had been instructed by Dr. Bonner to develop internships, he had failed to do so, contending that the development of mathematics internships was difficult. Moreover, Dr. Borowski asserted that the instructors who replaced both Borowski and Bagenstose following their involuntary transfers, were untenured, inexperienced teachers, who were subjected to different, and lower, standards than Complainants and not required to develop as many internships. (Tr. 321-322).

With respect to his allegations that his protected concerted activities were the bases for his involuntary transfer, Borowski testified that he was transferred after he testified in Bagenstose's behalf at a grievance hearing, and that the transfer occurred almost immediately following a hearing of his own grievance against Dr. Bonner in August of 1988. (Tr. 353). The Bagenstose grievance, which concerned the issuance of a reprimand by Bonner, was ultimately sustained. Although the Hearing Examiner in the instant case found that no direct evidence was adduced at the Hearing as to Dr. Bonner's reaction following the grievance award, Borowski asserted that Dr. Bonner never forgave him when she lost the case. (Tr. 327-328).

The Hearing Examiner found that Dr. Bonner had made several requests to her superiors to transfer Dr. Borowski beginning in June, 1988 and pursuant to Article IV(B)(1) of the collective bargaining agreement between WTU and DCPS, [3]/ based upon his failure to develop internships and to conduct his classes. As Dr. Bonner had requested, the transfer was granted effective September 9, 1988.

Borowski filed separate grievances protesting his conditional performance evaluation and his involuntary transfer from

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[3]/ That provision states, in relevant part:

"Involuntary transfers for the demonstrated good of the system shall be made only after consultation and discussion with the teacher involved. * * * A teacher who is involuntarily transferred shall be given two (2) weeks notice... . The notice of transfer shall contain the reason therefore."

SWW. In an arbitration proceeding concerning the transfer grievance, the Arbitrator concluded that Borowski's transfer was for the demonstrated good of the system in accordance with the contract between DCPS and WTU. The Hearing Examiner, in concluding that the Arbitration Award was dispositive of the involuntary transfer issue, stated the following:

> The action protested in the grievance is the same as that presented here. The issue presented - whether the transfer was for the demonstrated good of the system - overlaps substantially with the issue raised herein. Arbitrator Feigenbaum stated that the contractual language "pertains to the system's legitimate and non-disciplinary business reasons" and that "[A]n involuntary transfer can be said to be made for the good of the system if it is made for a reason which demonstrably aids the system in meeting its mission and goals." Feigenbaum Award (Bor. R/I, Doc. 2) at pp. 28-29. A clear inference from the Arbitrator's language interpreting the Agreement is that a transfer which was pretextual, for disciplinary reasons, based on invidious discrimination, or in retaliation for the exercise of protected rights would not be for the "demonstrated good of the system." To hold otherwise with respect to protected rights would be to allow under the terms of the Agreement actions which are prohibited by CMPA. Such an intent cannot reasonably be inferred.
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> A comparison of the records of the arbitration proceeding and that of the instant proceeding reveals that the evidence presented herein is substantially the same as evidence presented in the arbitration proceeding.
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> The record in this proceeding and the opinion in the Feigenbaum Award clearly establish that Dr. Bonner regarded Dr. Borowski as not committed to the SWW philosophy and unresponsive to her requests to carry out her vision of the program. Dr. Borowski did not conceal his lack of trust in and respect for her internship-based program, either during the course of his service at SWW or in the unfair labor practice hearing. The proposition advanced by Dr. Borowski and Mr. Bagenstose that mathematics cannot be properly

> taught through internships in the absence of classroom instruction in the basics is certainly not unreasonable on its face. However, such program determinations are for the Administration; and it is not the role of hearing examiners in unfair labor practice proceedings to substitute their judgment for that of line managers, in the absence of evidence that the program determinations themselves are pretextual. (H.E. Rpt. at pp. 48, 49 and 51).

In his recommendation that the Board defer to the Arbitral Award denying Borowski's grievance, the Hearing Examiner urges that since the grievance and the Complaint are based on identical facts and no new evidence or arguments were presented in the Hearing before him, the Board should defer to the Arbitrator's credibility determinations and findings. [4]/ Moreover, the Hearing Examiner found that the Arbitration Award "sufficiently addresse[d] the issues...[was] fair, based on an adequate factual record, and not contrary to the purpose of [the] CMPA. "(H.E. Rpt. at p. 54).

Based on his findings and credibility determinations, the Hearing Examiner rejected the remaining contentions advanced by Borowski concerning his transfer and performance appraisal and recommended that Borowski's claim of discriminatory treatment, alleging violations of D.C. Code Sec. 1-618.4(a)(1) and (3) be dismissed. He similarly found that DCPS' actions toward the Complainant were based upon legitimate reasons and were not motivated by reprisal; therefore rejecting Borowski's D.C. Code Sec. 1-618.4(a)(4) claims.

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[4]/ The Hearing Examiner noted that Dr. Borowski's second grievance, concerning the conditional rating assigned to his performance evaluation, was withdrawn by the Union after the award denying the grievance, stemming from Borowski's transfer, was rendered.

Despite the lack of an arbitral determination regarding the conditional rating, the Hearing Examiner concluded that he was not persuaded that any of Borowski's protected activities (i.e., Borowski's testimony at the Bagenstose grievance hearing) was the basis for Dr. Bonner's assessment that Borowski was ineffective in teaching his 2 1/2 hour classes, which resulted in the conditional rating. The Hearing Examiner found the connection between the "action and protected rights [was] simply too attenuated." (H.E. Rpt. at 56)

Complainant Borowski excepted to certain factual findings in the Hearing Examiners Report, none of which are well-taken, and are discussed in footnote 5 below. [5]/

II. The Bagenstose Complaint

With respect to the alleged unfair labor practices alleged by Complainant Bagenstose in PERB Case No. 88-U-33, the Hearing Examiner found that DCPS violated D.C. Code Sec. 1-618.4(a)(1) and (4); however, allegations with respect to violations of D.C. Code Sec. 1-618.4(a)(3) should be dismissed. The Hearing Examiner based his recommendations on the following findings of fact and conclusions.

As to the Section 1-618.4(a)(1) and (3) violations, the Hearing Examiner concluded that the record did not support the allegations that DCPS' threat of transfer and subsequent transfer of Bagenstose (who was a Building Union Representative) were motivated by activities protected by Section 1-618.4(a)(3). Rather, the Hearing Examiner concluded that these actions taken by the school principal were motivated solely by conduct protected by D.C. Code Sec. 1-618.4(a)(4).

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[5]/ Complainant Borowski raises essentially two exceptions to the Hearing Examiner's findings. The first of which takes issue with the Hearing Examiner's finding that the Complainant had failed to persuade him that a relaxation of the requirements applied to the teachers that replaced Borowski and Bagenstose constituted evidence of discrimination in violation of the CMPA's unfair labor practice provisions. Secondly, Borowski also contends that the Hearing Examiner found that Bagenstose had been threatened by Dr. Bonner with an involuntary transfer but that Borowski had not, despite the fact that there was no independent corroborative evidence of either threat.

In response to both Exceptions, the Board concludes that Complainant Borowski merely disagrees with the credibility determinations that were reached by the Hearing Examiner. As we have held in previous opinions, the Hearing Examiner is authorized and in the best position, to assess the veracity of a witness' testimony and other evidence presented during the proceeding. Cf., American Federation of State, County and Municipal Employees, District Council 20, Local 2776, AFL-CIO v. Dept. of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245 at footnote 1, PERB Case No. 89-U-02 (1990); American Federation of Government Employees, Local 872 v. Dept. of Public Works, ____DCR____, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991).

The Hearing Examiner concluded, based on his crediting of Bagenstose's testimony, that DCPS had committed an independent violation of Section 1-618.4(a)(1) by the school principal's threat to involuntarily transfer Bagenstose if he assisted Dr. Borowski in a grievance proceeding concerning Borowski's transfer. It was further found by the Examiner that the evidence supported that Complainant Bagenstose's subsequent involuntary transfer was motivated by his activities of representing and providing testimony on behalf of Dr. Borowski and successfully pursuing his own grievance against the school principal. The Examiner found that all of these activities are protected by the CMPA. He therefore concluded that the involuntary transfer was retaliatory, in violation of D.C. Code Sec. 1-618.4(a)(4). Having concluded that Bagenstose had established a prima facie case, of retaliation, the Hearing Examiner further concluded that, notwithstanding evidence of legitimate policy and personnel considerations for management's decision, DCPS had not met the burden of establishing that the transfer would have occurred absent Complainant Bagenstose's protected activity. [6]/

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[6]/ Having found that DCPS' action of transferring Complainant Bagenstose was based, in part, upon improper motives, i.e., the Complainant's protected activities, the Hearing Examiner applied the analysis enunciated in Wright Line, Inc., 250 NLRB 1083 (1980), enf'd 662, F.2d 899 (1st Cir. 1981), cert. denied, 455 US 989 (1982), holding essentially that where dual motives exist, prohibited and non-prohibited, a "mix-motive" analysis is employed requiring the Complainant to establish a prima facie case that the protected conduct was the motivating factor in the Respondent's decision.

DCPS' Exceptions in this regard consist of essentially seven objections. The first objects to the Hearing Examiner's finding that DCPS violated D.C. Code Section 1-618.4(a)(1) by its June 23, 1988 alleged threat to transfer Bagenstose based only on the testimony of Complainant Bagenstose and his supervisor, Principal Dr. Bonner. DCPS further contends that this finding was not based on credibility but the application of a subjective standard that Bagenstose "believed" he was threatened. We know of no rule or law that requires findings of facts to be based on something more than the reconciliation of the testimony of two witnesses. Reference to Bagenstose's belief that he was threatened was merely a part of the Hearing Examiner's analysis and reasoning in making his credibility determination. As the Hearing Examiner stated in his conclusion, "[h]is [, i.e., Bagenstose's] testimony has the ring of truth; and the immediate issuance of Dr. Bonner's request for transfer certainly suggest that something unexplained in her testimony - happened in the conversation." (R&R at p. 62). The second objection makes the rather frivolous contention that Board

(footnote 6 Cont'd)
Rule 520.11, which requires that complainants meet their burden of proving the allegations by a preponderance of the evidence, was not met since the Hearing Examiner was persuaded by only a "small" preponderance of the evidence. A preponderance of the evidence by definition does not mandate a particular quantum of evidence; it merely establishes a threshold requirement. Conformance with Rule 520.11 does not turn on the quantum of evidence achieved beyond this threshold.

DCPS' remaining exceptions dispute (1) the Hearing Examiner's conclusion that "legitimate program objectives of the system can be separated, in the case of Dr. Bonner's decision to transfer Mr. Bagenstose, from the desire and objective to silence him in the exercise of protected concerted rights" and (2) that Complainant established a prima facie case that protected activity was the motivating factor in DCPS' decision to transfer Complainant Bagenstose. With respect to the former, DCPS merely disagrees with the relative weight accorded record evidence and, consequently, the conclusion reached by the Examiner with respect to DCPS' "mixed motive" in transferring Complainant Bagenstose. We find no basis for disturbing the meticulous treatment of the evidence by the Hearing Examiner throughout his 76-page R&R in support of his findings of facts and conclusions in this regard. Two of DCPS' exceptions concerning the establishment of a prima facie case disputes findings that Complainant Bagenstose's selection as Union Building Representative and his participation in the Teacher Appraisal Process Program as Dr. Borowski's support person was connected to his transfer. Our discussion in the text of the decision obviates the need for further consideration of issues raised by these objections herein.

With respect to the remainder of these exceptions, DCPS contends that anti-Union animus against Complainant Bagenstose cannot be attributed to his testimony on behalf of Dr. Borowski at his August 2, 1988 grievance hearing since (1) this occurred after Bagenstose's transfer was initiated by memo dated June 23, 1988 and (2) Complainant did not testify as a union official on behalf of Dr. Borowski. Nothing under Section 1-618.4(a)(4) requires employees engaged in the activities listed thereunder to have done so in the capacity of an agent or representative of a union. With respect to timing, DCPS ignores the fact that the Examiner credited Complainant Bagenstose's account of his June 23, 1988 telephone conversation with Dr. Bonner, wherein she threatened to also transfer Bagenstose if he assisted Dr. Borowski in contesting his transfer. Complainant Bagenstose's August 2, 1988 testimony on behalf of Dr. Borowski merely provided the basis upon which Dr. Bonner had previously threatened to transfer Bagenstose.

On November 13, 1990, DCPS timely filed Exceptions to the Hearing Examiner's R&R along with a supporting memorandum. On this same date, Exceptions to the Hearing Examiner's R&R were also filed by Complainants Borowski and Bagenstose.

DCPS' Exceptions -- totaling 47 in number -- takes issue with every factual finding in support of the Hearing Examiner's conclusion that DCPS violated D.C. Code Section 1-618.4(a)(1) and (4) with respect to Complainant Bagenstose. From a review of its supporting memorandum, however, DCPS' exceptions are marshalled under two basic contentions: (1) Complainant Bagenstose provided insufficient evidence to establish that DCPS violated D.C. Code Sections 1-618.4(a)(1) and (4) and (2); assuming, arguendo, that Complainant Bagenstose had engaged in activity protected under the CMPA, this activity was not the motivating factor for DCPS' decision to transfer Complainant Bagenstose.

In the main, DCPS's exceptions raise no more than disputes over evidence in support of factual findings and credibility determinations specifically considered and rejected by the Hearing Examiner with respect to Complainant Bagenstose in PERB Case No. 88-U-33. As stated previously, such matters are for the Examiner to decide.

However, notwithstanding our adoption of the Hearing Examiner's recommendation that Respondent DCPS be found to have committed unfair labor practices in violation of D.C. Code Sec. 1-618.4(a)(1) and (4), certain findings by the Hearing Examiner warrant our attention.

Under D.C. Code Sec. 1-618.4(a)(4) "[t]he District, its agents and representatives are prohibited from [d]ischarging or otherwise taking reprisal against an employee because he or she signed or filed an affidavit, petition or complaint or given any information or testimony under this chapter [, i.e., the CMPA.]" In support of his conclusion that DCPS had violated this provision, the Examiner found that DCPS' transfer of Bagenstose was motivated by the Complainant's activities, which the Hearing Examiner concluded were protected by Section 1-618.4(a)(4). This activity consisted of the following: (1) the "pursuit of a

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(footnote 6 Cont'd)
Finally, DCPS quarrels with the Hearing Examiner's finding, based on the evidence presented, that Bagenstose's pursuit of a grievance against Dr. Bonner concerning a reprimand was a motivating factor in her decision to transfer him. The Examiner dealt carefully and thoroughly with this issue and the supporting evidence, respectively, and we adopt his reasoning and conclusions at pp. 66 - 67 of the R&R.

grievance [against his supervisor; and (2)] his assistance to and testimony on behalf of Dr. Borowski in the latter's grievance[; (3)] his support of and advocacy for Dr. Borowski in the teacher support process[; and (4)] his selection as Union Building Representative." (R&R at p. 64).

For reasons discussed below and at note #9, we cannot conclude that Complainant Bagenstose's activities in his role throughout the teacher support process to be protected under D.C. Code Sec. 1-618.4(a)(1) or (4). Furthermore, we do not find based on the record in this proceeding that Complainant Bagenstose's selection as Union Building Representative was established as a motivating factor in DCPS' decision to transfer him. Despite the fact that Bagenstose's selection as Union Building Representative in June, 1988 enabled him to officially act on behalf of Dr. Borowski in processing his grievance, there is no evidence that Bagenstose's selection or acquired status as a Union Building Representative, itself, served to motivate DCPS' (vis-a-vis Dr. Bonner) decision to involuntarily transfer Bagenstose. We find no basis under these facts for concluding that there was a nexus between Complainant's selection as a union representative and DCPS' decision to transfer him. [7]/

With respect to Complainant Bagenstose's role in the Teacher Support Process, under the Teacher Appraisal Process (TAP) Program as Dr. Borowski's support person designee, we find the record does not establish that participation in or the objectives of the Teacher Support Process constitute activity protected under Section 1-618.4(a)(4). Section 1-618.4(a)(4) expressly and specifically protects employees who engage in any of the listed activities therein when it is pursuant to matters under the CMPA. The TAP program is a teacher performance evaluation and support system that was established and exists independent of the statutory protections accorded by the CMPA. It is incorporated by reference in the parties' collective bargaining agreement (Article XVII) and violations of the program may be challenged through the parties' grievance procedures.

A distinction must be made between Bagenstose's role as Dr. Borowski's support person under the TAP Teacher Support Process and his assistance to and testimony on behalf of Dr. Borowski during the processing of Dr. Borowski's grievance concerning his evaluation under the TAP Program (which we find to be protected

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[7]/ Moreover, DCPS disputes, and the record is inconclusive, that Complainant's assistance to Dr. Borowski was in his capacity as Union Building Representative.

by Section 1-618.4(a)(4)). [8]/ The evidence does not establish that the Teacher Support Process or the TAP program in general entails as part of the program that the role of a designated support person also includes providing assistance to the supportee should that program be challenged through a grievance or some form of complaint. We cannot find, therefore, on this record, Bagenstose's participation in the Teacher Support Process under the TAP Program to be, in and of itself, activity protected under Section 1-618.4(a)(1) and (4). [9]/

With the foregoing exceptions, we adopt the Hearing Examiner's findings and conclusions in support of his recommendations that the Complaint in PERB Case No. 88-U-34 be dismissed in its entirety for failure to prove the alleged violations and that DCPS be found to have violated D.C. Code Section 1-618.4(a)(1) and (4) in PERB Case No. 88-U-33. [10]/

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint in PERB Case No. 88-U-34 is dismissed for failure to prove the alleged violations.

2. The District of Columbia Public Schools (DCPS) shall cease and desist from transferring or otherwise taking reprisals against Complainant Bagenstose in violation of D.C. Code Sections 1-618.4(a)(1) and (4) for pursuing an action protected by the Comprehensive Merit Personnel Act (CMPA).

3. DCPS shall (a) rescind the September 9, 1988 transfer of Complainant Bagenstose and (b) make him whole in accordance with law for any benefits lost due to his transfer.

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[8]/ The filing of grievances is provided under the CMPA as a protected employee right, under D.C. Code Section 1-618.6(b).

[9]/ The Hearing Examiner throughout his Report and Recommendation referred to Complainant Bagenstose's assistance on behalf of Dr. Borowski in the TAP program as protected "concerted activity." Under the National Labor Relations Act employers that "interfere with, restrain, or coerce employees" who engage in "concerted activities for the purpose of... mutual aid or protection" is recognized as an unfair labor practice. (See Sections 7 and 8(a)(1) of the NLRA). There is no corresponding language under the CMPA with respect to employee rights concerning concerted activity by employees for mutual aid and protection.

[10]/ Member Kohn concurs in the results of this Opinion.

4. DCPS shall purge Complainant Bagenstose's personnel records of any documentation that may exist concerning the stated reasons for his September 9, 1988 transfer.

5. DCPS shall cease and desist from threatening to transfer Complainant Bagenstose in violation of D.C. Code Section 1-618.4(a)(1).

6. DCPS shall return Charles Bagenstose to his former position at the School Without Walls at the earliest practicable date but not later than the start of the 1991-92 Academic School Year.

7. DCPS shall not in any like or related manner interfere with Complainant Bagenstose's rights guaranteed him by the CMPA.

8. DCPS shall, within ten (10) days from the service of this Decision and Order, post the attached Notice conspicuously on all bulletin boards where notices to bargaining-unit employees (of which Complainant is a member) are customarily posted, for thirty (30) consecutive days.

9. DCPS shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order, that the Notice has been posted accordingly.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

June 6, 1991

PERB Public Employee Relations Board

Government of the District of Columbia

415 Twelfth Street, N.W.
Washington, D.C. 20004
[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS, SCHOOL WITHOUT WALLS, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE GOVERNMENT OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 270, PERB CASE NO. 88-U-33 (June 6, 1991).

WE HEREBY NOTIFY our employees that the Government of the District of Columbia Public Employee Relations Board had found that we violated the law and has ordered us to post this notice.

WE WILL rescind the September 9, 1988, transfer of Charles Bagenstose and otherwise make him whole in accordance with law for any benefits lost due to his transfer.

WE WILL cease and desist from threatening to transfer or otherwise taking reprisals against Charles Bagenstose for pursuing an action protected by the Comprehensive Merit Personnel Act (CMPA).

WE WILL return Charles Bagenstose to his former position at the School Without Walls at the earliest practicable date, but not later than the beginning of the 1991-1992 academic school year.

WE WILL purge any and all of our personnel records or other documentation stating the reasons for the transfer of Charles Bagenstose.

WE WILL NOT in any like or related manner interfere with the rights guaranteed Charles Bagenstose by the CMPA.

District of Columbia
Public Schools

Date:_____ **By:**_____
Superintendent

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 the Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 415-12th Street, N.W. Room 309, Washington, D.C. 20004. Phone 727-1822