GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: Charles Bagenstose, Complainant, v. District of Columbia Public Schools, Respondent.	PERB Case Nos. 88-U-33 Opinion No. 283 (Motion for Reconsideration)

DECISION AND ORDER [1]/

On July 5, 1991, District of Columbia Public Schools (DCPS) filed a Motion for Reconsideration in the above-captioned unfair labor practice proceeding requesting that the Public Employee Relations Board (Board) modify, consistent with law, the ordered remedy. DCPS requests modification of a Decision and Order issued by the Board on June 6, 1991, Slip Opinion No. 270, [2]/ which, inter alia, ordered DCPS to (1) "(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" and (2) "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." Id., Slip Op. at 13. Complainant Bagenstose timely filed a response to the Motion opposing any reconsideration by the Board of its Order. For the following reasons we deny DCPS' Motion for Reconsideration.

DCPS asserts that "requiring DCPS to specifically return Complainant Bagenstose to the School Without Walls adversely

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[1]/ Members Kohn and Danowitz did not participate in the discussion or decision on the Motion for Reconsideration.

[2]/ Charles Bagenstose and Dr. Joseph Borowski v. District of Columbia Public Schools, 38 DCR 4154, Slip Op. No. 270, PERB Case Nos. 88-U-33 and 88-U-34 (1991). Although these cases were consolidated for purposes of a hearing and the Board's subsequent Decision and Order, only the Board's remedy ordered in PERB Case No. 88-U-33 are relevant to DCPS' Motion for Reconsideration.

impacts [sic] the instructional program which is based on alternative approaches within an environment which utilizes the city as a classroom." (Motion at 2.) DCPS' first ground for modification of our Order merely reasserts arguments concerning evidence previously advanced by DCPS and considered by the Hearing Examiner and the Board. Specifically, DCPS states that at the School Without Walls "every educational discipline including ... the Math Department, were (sic) required to develop internships utilizing the city as a classroom." (Motion at 2.) DCPS contends that "Complainant never developed any internships" and "completely ignored th[is] essential factor...." Furthermore, DCPS asserts that "[t]he administration reached this conclusion after reviewing [Complainant's] performance, classroom schedule for internship development, and the actual non-existence of internships developed for the school year." DCPS' argument completely ignores our adoption of the Hearing Examiner's finding 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." Id., Slip Op. at 8. We find no basis not previously considered and rejected for modifying our Order on this ground.

Next, DCPS argues that "to order Complainant's return specifically to [the] School Without Walls would prevent the school board from assessing his performance record and reaching a decision on the basis of that record." (Motion at 5.) In support of this proposition, DCPS cites the U.S. Supreme Court's decision in Mt. Healthy City School District of Board of Education v. Doyle, 429 U.S. 274 (1977), which addressed the constitutional ramifications of a dual motive decision not to rehire a teacher. The Court ruled that the "constitutional principle at stake would be sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." Id. at 285. The Court further stated in pertinent part that:

> "[a] borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision." Id. at 285-286.

DCPS suggests that the Court's rationale concerning how a constitutional right can be adequately protected in a dual motive adverse-employment-action context can also be applied to the protection of employee rights under the CMPA. Contrary to the rationale in Mt. Healthy City School District, our Order, DCPS argues, prevents it from placing Complainant "in no worse a position than if he had not engaged in the [protected] conduct" based on DCPS' assessment of Complainant's performance record. DCPS' argument, again, is premised upon evidence presented at hearing which it asserts "establishes that the Complainant would have been transferred from [the] School Without Walls because he strongly dissented from the administration's educational policy in actual practice and in theory." (Motion at 5.) As we noted with respect to DCPS' first argument, the evidence established that the Complainant would not have been transferred at that time absent his protected activity. [3]/ Thus, the situation addressed by the Court in Mt. Healthy, where "the protected conduct ma[de] the employer more certain" of its decision, does not exist here, where DCPS' decision was found to be "motivated solely by conduct protected by D.C. Code Sec. 1-618.4(a)(4)." (Emphasis added.) Bagenstose et al. v. DCPS, supra, Slip Op. at 7.

Moreover, the overriding purpose and policy of relief afforded under the CMPA for unfair labor practices which violate employee rights is the protection of rights that inure to all employees as opposed to individual Constitutional rights, i.e., free speech under the First Amendment, addressed by the Court in Mt. Healthy. By not returning an employee who has been illegally transferred to his previous position, the CMPA's purpose and policy of guaranteeing the rights of all employees is undermined. By placing Bagenstose in an employment situation other than where the violation occurred, the status quo would not be restored and employees most aware of DCPS' violative conduct, and thereby affected by it, would not know that exercising their rights under the CMPA is indeed fully protected. It is the furtherance of this end, i.e., the protection of employee rights, that DCPS' Motion, if granted, would not serve. This same purpose and policy underlies our remedy requiring the posting of a notice to all employees concerning the violations found and the

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[3]/ DCPS was afforded at the hearing a full opportunity to establish its case in this regard. Our Decision and Order specifically dealt with the proper analysis employed by the Hearing Examiner when a dual motive exists as enunciated in Wright Line, Inc., 250 NLRB 1083 (1980), enf'd 602 F.2d 899 (1st. Cir. 1981), cert. denied, 455 U.S. 989 (1982). Bagenstose et al. v. DCPS, supra, Slip Op. at fn. 6.

relief afforded, notwithstanding the fact that all employees may not have been directly affected. [4]/

In short, DCPS is not prevented by our Order from assessing Complainant's performance and reaching a decision on the basis of his performance record. Rather, DCPS is precluded from making a decision concerning Complainant which is motivated by conduct proscribed by D.C. Code Sec. 1-618.4(a)(4) and (1).

DCPS' final argument in support of its Motion is also premised on its assertion that DCPS "would have taken the same action against Complainant in the absence of his performance of duties as a union representative." (Motion at 6.) For the reasons discussed previously, we find no basis for granting DCPS' Motion on this ground, which merely reasserts arguments previously considered and rejected by the Hearing Examiner and by the Board. Moreover, we specifically found that "[d]espite the fact that Bagenstose's selection as a Union Building representative in June, 1988 enabled him to officially act on behalf of Dr. Borowski in processing his grievance there [was] no evidence that Bagenstose's selection or acquired status as a Union Representative, itself, served to motivate DCPS' [] decision to involuntarily transfer Bagenstose." Bagenstose et al. v. DCPS, supra, Slip Op. at 11. Thus, the basis for finding the Sec. 1-618.4(a)(4) and (1) violation did not include Complainant's role as a union representative.

Accordingly, in view of the foregoing, DCPS provides no basis for us to revisit our Opinion on the grounds asserted.

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[4]/ We further note that although, as in Mt. Healthy, there was "evidence of legitimate policy and personnel considerations for management's decision...", Bagenstose et. al v. DCPS, supra, Slip Op. at 8, applying the Mt. Healthy rationale to these facts is, nevertheless, inappropriate. /Pursuant to D.C. Code Sec. 1-618.13 (a), the purpose of our Order is to, inter alia, make the Complainant whole for the violative conduct found. DCPS does not indicate nor are we aware how Complainant can be made whole for an illegal transfer by placing the employee, absent his consent, anywhere other than the particular employment situation from which he was transferred.

ORDER

IT IS HEREBY ORDERED THAT:

For the foregoing reasons, the Motion for Reconsideration is denied.

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

September 18, 1991

CERTIFICATE OF SERVICE

I hereby certify that the attached Decision and Order (Motion for Reconsideration) in PERB Case No. 88-U-33 was hand-delivered, sent via facsimile transmission and/or mailed (U.S. Mail) to the following parties on this 18th day of September 1991:

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