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**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of	)	
	)	
Fraternal Order of Police/	)	
District of Columbia Housing	)	
Authority Labor Committee,	)	
	)	PERB Case No. 05-U-20
Complainant,	)	
	)	
v.	)	Opinion No. 853
	)	
District of Columbia	)	
Housing Authority,	)	
	)	
Respondent.	)	

**DECISION AND ORDER**

**I. Statement of the Case:**

On January 7, 2005, the Fraternal Order of Police/District of Columbia Housing Authority Labor Committee ("Complainant", "Union" or "FOP") filed an unfair labor practice complaint ("Complaint") against the District of Columbia Housing Authority ("Respondent" or "DCHA"). The Complainant asserts th Sergeant at the Respondent and Sergeant Tyrone S. Poole violated D.C. Code § 1-617.04(a) by: (1) interfering with the Complainant in the exercise of its rights under the Comprehensive Merit Personnel Act ("CMPA"); and (2) taking reprisals against Special Police Officer Yvonne R. Smith ("SPO Smith"), FOP Chairperson, for her part in filing PERB Case No. 03-U-40. (See Complaint at p. 3) As a remedy, the Complainant requests that the Board order the Respondent to: (a) cease and desist from violating D.C. Code § 1-617.04; (b) discipline Sergeant Poole; (c) post a notice; (d) restore eight (8) hours of sick leave to Yvonne Smith; (e) review Yvonne Smith's last performance evaluation; and (f) pay the Complainant's costs, including attorney fees. (See Complaint at p. 3).

On January 27, 2005, the Respondent filed an Answer denying the allegations. In addition, the Respondent asserted that some of the acts alleged were untimely filed. On this basis the Respondent requested that the Complaint be dismissed. (See Answer at pgs. 5-6).

A hearing was held in this matter on October 28, 2005. In his Report and Recommendation (R&R), the Hearing Examiner concluded that the Respondent violated the CMPA. As a result, the Hearing Examiner is recommending that the Board order DCHA, among other things, to cease and desist from violating the CMPA and to post a notice. In addition, the Hearing Examiner recommends that "the Board should grant [any] other relief it deems appropriate." (R&R at p. 12).

DCHA did not file exceptions to the Hearing Examiner's R&R. However, the FOP filed Exceptions to the Hearing Examiner's recommended remedy. Specifically, FOP is requesting that the Board direct the Respondent to: (1) take corrective action against Sergeant Tyrone Poole; and (2) pay the Complainant's reasonable costs and attorney fees. (See Exceptions at p. 1).

The Hearing Examiner's R&R and the Complainant's exceptions are before the Board for disposition.

## II. BACKGROUND

The Hearing Examiner noted that DCHA is an independent agency of the District of Columbia government and provides housing for low income residents. Pursuant to the United States Housing Act of 1937, 42 USC § 1401, *et seq.*, the DCHA administers two programs: public housing; and the Housing Choice Voucher Program. Furthermore, the Hearing Examiner indicated that DCHA has its own Police Department. Relying on D.C. Code § 1-617.01, *et seq.*, the Hearing Examiner concluded that the DCHA and its Police Department are subject to the labor-management relations provisions of CMPA. (See R&R at p. 2).

The FOP is the exclusive representative of DCHA employees in a bargaining unit consisting of special police officers, police officers and senior police officers. (See R&R at p. 2) During calendar year 2002, the parties negotiated an initial collective bargaining agreement. Special Police Officer (SPO) Yvonne Smith represented the FOP in the negotiations. When SPO Smith became FOP Chairperson, she filed an unfair labor practice complaint against her supervisor, Sergeant Tyrone Poole ("Sgt. Poole" or "Poole"). That complaint was assigned PERB Case No. 03-U-40.<sup>1</sup> In that case, FOP asserted that Sgt. Poole discouraged support of and membership in the FOP by falsely accusing the FOP of failing to represent its members. (See R&R at p. 3). On August 4, 2003, the parties settled PERB Case No. 03-U-40. Pursuant to the terms of the settlement agreement, on

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<sup>1</sup>*FOP/DCHA Labor Committee v. District of Columbia Housing Authority*, PERB Case No. 03-U-40, which involved the same parties in this matter.

September 23, 2003, Sgt. Poole was given a letter of counseling.<sup>2</sup> However, Sgt. Poole refused to sign the letter to acknowledge receipt. In addition, as part of the settlement, DCHA published a memorandum stating that DCHA, and not the FOP, had decided to eliminate roll call at headquarters. As a result of eliminating roll call at headquarters, supervisors were required to pick up daily activity reports from the officers at each post. Further, it eliminated the need for employees to drive their privately-owned vehicles to headquarters in order to deliver their activity reports after roll-call.<sup>3</sup> (See R&R at p. 4).

The FOP claims that Sgt. Poole subsequently has taken reprisal and has harassed SPO Smith as a result of the settlement agreement. The FOP asserts that “[Sgt.] Poole lowered [SPO] Smith’s annual evaluations because of her union activities [preventing her from receiving a performance bonus pursuant to the collective bargaining agreement.] [SPO] Smith had repeated conversations with [Sgt.] Poole concerning her performance evaluations and the time she was away from police duties on union business. . . . During the week of September 15, 2004, [Sgt.] Poole told [SPO] Smith she would never get an ‘excellent’ annual performance rating because of the time she devoted to union duties.” (Tr. 56-57, R&R at p. 4). [Also,] [t]he FOP claims that “[Sgt.] Poole lowered [SPO] Smith’s annual evaluations because of her union activities. [In addition,] [t]he FOP [contends that Sgt.] Poole lowered [SPO] Smith’s rating to ‘satisfactory’ to prevent her from receiving a performance bonus pursuant to the parties’ collective bargaining agreement (CBA). [Furthermore,] the FOP argues that Sgt. Poole denigrated [SPO] Smith’s relationship with Deputy-Chief Millhouse, DCHA labor relations representative. He chastised [SPO] Smith for taking time off to perform union duties and referred to Millhouse as her ‘Daddy’ because he was the DCHA representative that she met with regularly regarding union matters.” (See R&R at p. 4)

In January 7, 2005, the FOP filed this Complaint asserting as follows: “[after] the parties . . . settled [PERB] Case No. 03-U-40 . . . [Sgt.] Tyrone Poole has continued to make false accusations against [SPO] Yvonne Smith, has refused to undertake a fair and objective performance evaluation of [SPO] Smith, and has harassed and demeaned [SPO] Smith in front of co-workers, other

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<sup>2</sup>The letter of counseling was dated July 2, 2003.

<sup>3</sup>Roll call was held daily at DCHA headquarters. It was the practice for police officers to turn in the previous day’s activity reports from their posts after roll call at headquarters. They then drove to their posts at another location. The FOP attempted to negotiate compensation for police officers who drove their privately-owned vehicles from headquarters to their posts. During the negotiations, DCHA discontinued daily roll call at headquarters. As a result, after November 20, 2002, police officers reported directly to their posts. According to the FOP, this created more work for sergeants, including Sgt. Poole, because the sergeants had to drive to each post to pick up daily activity reports from the previous day. The FOP claims that this change was a direct result of the FOP’s effort to negotiate compensation for police officers who drove privately-owned vehicles from headquarters to their posts after roll call. (See R&R at p. 4-5).

supervisors and others. . . . [The FOP asserts that Sgt. Poole's actions] included, but [were] not limited to: [1] harassing [FOP's] chair[person,] on December 8, 2004 concerning her uniform [and] his own failure to pick up paperwork on a timely basis[,] using threatening gestures and language [when] making false allegations against her; [2] harassing [SPO Smith,] [FOP's] chair[person,] about her work status on October 16, [2004] and forcing her to remain on sick leave; [3] harassing and demeaning [SPO Smith] on September 17, 2004, in front of [] supervisors following an official meeting with [the] Respondent's officials; [4] falsely accusing [SPO Smith] of failing to perform her duties on or about September 1; and [5] informing [SPO Smith] that he would never give her an excellent performance evaluation." (Complaint at pgs. 2-3) The FOP maintains that the DCHA has engaged in conduct which constitutes an unfair labor practice by interfering with the rights guaranteed by the CMPA and by taking reprisals against FOP's Chairperson in violation of § 1-617.04(a) and requested the remedies set forth above. (See Complaint at pgs. 3-4).

In its Answer, the Respondent denies that it has violated D.C. Code § 1-617.04. Also, the Respondent maintains that the incidents noted by the FOP involve ordinary, day-to-day interactions between SPO Smith and Sgt. Poole and do not rise to the level of an unfair labor practice. In addition, the Respondent asserts that the FOP has failed to prove that there is a nexus between these incidents and the Union's claim of retaliation for filing an unfair labor practice charge in PERB Case No. 03-U-40 and the resulting settlement. (See Answer at p. 2) Specifically, the Respondent contends that during the alleged incidents, Sgt. Poole never mentioned: (1) the union; (2) Smith's position as the FOP chairperson; or (3) the previous unfair labor practice complaint in PERB Case No. 03-U-40 or the settlement. Furthermore, the Respondent asserts that "to the extent the events alleged occurred more than 120 days prior to the filing of this complaint they are time barred by [Board] rule 520.4". (See Answer at p. 6)

### III. The Hearing Examiner's Report

Based on the pleadings, the record developed at the hearing and the parties' post-hearing briefs, the Hearing Examiner identified two issues for resolution. These issues, his finding and recommendations, and FOP's exceptions, are as follows:

#### 1. *Whether FOP's Complaint was timely filed.*

As a preliminary matter, the Hearing Examiner considered the Respondent's claim that the allegations concerning Sgt. Poole's evaluation of SPO Smith are outside the statutory limits for filing a complaint. The Hearing Examiner noted that Board Rule 520.4 provides that "[u]nfair labor practice complaints shall be filed not later than 120 days after the date on which the alleged violations occurred." Also, he indicated that the time limits for filing an unfair labor practice complaint are jurisdictional and mandatory. Citing *Hoggard v. Public Employee Relations Board*, 655 A.2d 320 (D.C. 1995); *Parker, Guess, Hubbard and Rope v. American Federation of Teachers and*

*Washington Teachers' Union, Local 6*, Slip Opinion No. 764, PERB Case No. 03-U-30. Therefore, the time limit for filing a complaint cannot be waived. The Hearing Examiner determined that the portion of the Complaint pertaining to the evaluation of SPO Smith is outside the statutory limits for filing a complaint. Nevertheless, the Hearing Examiner found that these incidents may be considered as evidence of alleged violations occurring within the 120-day period. (See R&R at p. 6). The parties did not file exceptions to this ruling. However, the Board will review the record to determine if this ruling is reasonable, based on the record and consistent with Board precedent.

This Board has held that the deadline date for filing a complaint is "120 days after the date Petitioner admits he [or she] actually became aware of the event giving rise to [the] complaint allegations." *Hoggard v. DCPS and AFSCME, Council 20, Local 1959*, 43 DCR 1297, Slip Op. No. 352 at p. 3, PERB Case No. 93-U-10 (1993). See also, *American Federation of Government Employees, Local 2725, AFL-CIO v. District of Columbia Housing Authority*, 46 DCR 119, Slip Op. No. 509, PERB Case No. 97-U-07 (1997). Also, the Board has noted that "the time for filing a complaint with the Board concerning [] alleged violations [which may provide for] . . . statutory causes of action, commence when the basis of those violation occurred. . . . However, proof of the occurrence of an alleged statutory violation is not necessary to commence the time limit for initiation of a cause of action before the Board. The validation, i.e., proof, of the alleged statutory violation is what proceedings before the Board are intended to determine." *Jackson and Brown v. American Federation of Government Employees, Local 2741, AFL-CIO*, 48 DCR 10959, Slip Op. No. 4414 at p. 3, PERB Case No. 95-S-01 (1995).

In the present case, FOP asserts that in June 2003 and June 2004, Sgt. Poole lowered SPO Smith's annual evaluations, preventing her from receiving a performance bonus pursuant to the collective bargaining agreement. (See Complaint at p. 4) Pursuant to Board Rule 520.4, the FOP was required to file a Complaint against the Respondent within 120 days of the June 2003 and June 2004 annual evaluations. However, the Complaint in this matter which contains allegations concerning the June 2003 and June 2004 annual evaluations was not filed until January 7, 2005. The January 7, 2005 filing occurred more than eighteen (18) months after the June 2003 evaluation and six (6) months after the June 2004 annual evaluation. In light of the above, FOP's allegations regarding the June 2003 and June 2004 annual evaluations clearly exceed the 120-day requirement in Board Rule 520.4.

Board Rules governing the initiation of actions before the Board are jurisdictional and mandatory. As such, they provide the Board with no discretion or exception for extending the deadline for initiating an action. See, *Public Employee Relations Board*, 655 A.2d 320, 323 (DC 1995). Moreover, the Board has held that a Complainant's "ignorance of Board Rules governing [the Board's] jurisdiction over [unfair labor practice] complaints provides no exception to [the Board's] jurisdictional time limit for filing a complaint." *Jackson and Brown v. American Federation of Government Employees, Local 2741, AFL-CIO*, 48 DCR 10959, Slip Op. No. 414 at p. 3, PERB

Case No. 95-S-01 (1995). For the reasons noted above, the Board cannot extend the time for filing an unfair labor practice complaint. As a result, we adopt the Hearing Examiner's finding that the portion of the Complaint concerning the June 2003 and June 2004 annual evaluations is time-barred.

Having adopted the Hearing Examiner's finding that the allegations concerning the annual evaluations are time barred, we turn to the Hearing Examiner's finding that, nonetheless, these allegations may be considered as supporting evidence for alleged violations occurring within the 120-day filing period. (See R&R at p. 6). With respect to the allegations that are time-barred, we note that we have previously considered this issue and have held that "neither Board Rules nor the CMPA preclude the consideration of such allegations as evidence of [other] alleged violations occurring within 120 days of their filing." *Georgia Mae Green v. D.C. Department of Corrections*, 41 DCR 5991, Slip Op. No. 323 at f. 3, PERB Case No. 91-U-13 (1992), Supplemental Decision and Order (1993), citing *Lodge 1424, Machinists v. NLRB*, 362 U.S. 411 (1960) and *Mechanics Laundry & Supply, Inc.*, 240 NLRB 302 (1979). Consistent with our ruling in *Green v. Dept of Corrections*, we find that the Hearing Examiner's reliance on the evidence concerning the annual performance evaluations - as supporting evidence regarding other assertions of violations occurring within the 120-day jurisdictional period, is reasonable, supported by the record and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's findings in this regard.<sup>4</sup>

2. *Whether DCHA violated D.C. Code § 1-617.04(a).*

Having resolved the issue of timeliness, the Hearing Examiner focused on the merits of FOP's allegations. The Hearing Examiner noted that employees of the District of Columbia have the right to form, join and assist a union or to refrain from such activity.<sup>5</sup> Further, he indicated that the District, its agents and representatives are prohibited from interfering, restraining or coercing any employee in the exercise of the employee's rights guaranteed by the CMPA.<sup>6</sup> Also, he noted that the

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<sup>4</sup>As will be discussed below, the Hearing Examiner relied on this evidence when he found that four (4) incidents, which form the basis of the FOP's complaint, represent a pattern of harassment which is supported by earlier conflicts between *Smith and Poole*. (See R&R at P. 11)

<sup>5</sup>D.C. Code § 1-617.01 (b) provides in pertinent part as follows: "Each employee of the District government has the right, freely and without fear of penalty or reprisal: (1) To form, join, and assist a labor organization or to refrain from this activity. . ."

<sup>6</sup>D.C. Code § 1-617.04, "Unfair labor practices", states at subsection (a) as follows:  
"The District, its agents, and representatives are prohibited from:

(1) Interfering, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;

CMPA expressly protects the collective bargaining rights of all employees.<sup>7</sup> He further noted that the Board rules establish that the Complainant has the burden of proving unfair labor practice allegations by a preponderance of the evidence.<sup>8</sup>

The Hearing Examiner indicated that in order to prove that DCHA violated D.C. Code § 1-617.04(a) by taking reprisals against SPO Smith as a result of the settlement of PERB Case No. 03-U-40, the Complainant must show that: (1) SPO Smith engaged in protected union activities; (2) DCHA knew of the activities; (3) there was anti-union animus by DCHA; and (4) DCHA subsequently took reprisal against Smith. Citing, *Farmer Brothers Co.*, 303 NLRB 638 (1991); *D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corporation, D.C. General Hospital*, 46 DCR 6271, Slip Op. No. 583, PERB Case No. 988-U-07 (1999). (See R&R at p. 7).

The Hearing Examiner noted that “[d]etermining a Respondent’s motivation when the Complainant alleges discrimination based on union activity and anti-union animus is difficult. Therefore, a careful analysis must be conducted to ascertain if the stated reason is pretextual. As a result, the employment decision must be analyzed according to the ‘totality of the circumstances’[.] [R]elevant factors include a history of anti-union animus, the timing of the action, and disparate

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(4) Discharging or otherwise taking reprisal against an employee because he or she has signed or filed an affidavit, petition or complaint or given any information or testimony under this subchapter.”

<sup>7</sup>See D.C. Code § 1-617.06. Employee rights.

(a) All employees shall have the right:

- (1) To organize a labor organization free from interference, restrain, or coercion;
- (2) To form, join, or assist any labor organization or to refrain from such activity; and
- (3) To bargain collectively through representatives of their own choosing as provided by this subchapter.

<sup>8</sup>Board Rule 520.11 provides, in part, as follows: “The party asserting a violation of the CMPA, shall have the burden of proving the allegations of the complaint by a preponderance of the evidence.”

treatment.<sup>9</sup> . . . [The Hearing Examiner noted that] the Respondent need only rebut the presumption created by the Complainant's *prima facie* showing and need not prove that a[n] [unfair labor practice] did not occur."<sup>10</sup> (R&R at pgs. 7-8).

At the hearing, the Respondent did not deny a September 15, 2004 interchange between Sgt. Poole and SPO Smith. However, the Respondent maintained that SPO Smith was disrespectful by refusing to telephone her post to locate her daily report for the previous day and therefore Poole wagged his forefinger at her as he spoke. Also, the Respondent asserted that Sgt. Poole denied a September 17, 2004 incident involving a 15-minute countdown for SPO Smith to return to her post. Alternatively, the Respondent argued that, even if the September 17 incident occurred as alleged, there is no nexus between the incident and SPO Smith's leadership of the FOP. (See R&R at pgs. 5-6) In addition, the Respondent claimed that an October 16, 2004 incident concerning SPO Smith's return from sick leave without a doctor's note, resulted when Sgt. Poole enforced a sick leave practice that had long been followed. However, because the parties' collective bargaining agreement had changed the practice, a doctor's note was no longer required. As a result, DCHA contended that it made the appropriate adjustments to Smith's sick leave balance and no grievance was filed. (See R&R at p. 6) Furthermore, the Respondent asserted that a December 8, 2004 incident where Sgt. Poole allegedly harassed SPO Smith over a wet neck tie, was nothing other than Sgt. Poole discussing the wearing of a complete uniform.

The Respondent maintained that Poole never mentioned SPO Smith's FOP leadership position. Therefore, the Respondent concluded that there was no nexus between this ordinary supervisor-employee interaction and interference with the union or its chairperson. The Respondent further argued that Sgt. Poole denied making the statement that he would never give SPO Smith an excellent evaluation. (See R&R at p. 6) Finally, at the hearing, DCHA Chief-of-Police Chief William L. Pittman testified regarding Sgt. Poole's refusal to sign the letter of counseling on September 23, 2003, that resulted from the settlement in PERB Case No. 03-U 40. Chief Pittman testified that he could not explain why Sgt. Poole, a "good supervisor" who would be aware that signing the letter of counseling "noted only its receipt", did not sign it. (Tr. 139-140).

The Respondent denied violating the CMPA and requested as a remedy that the Board order FOP to pay reasonable costs. (See Answer at p. 6).

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<sup>9</sup>See *Doctors Council of the District of Columbia and Dr. Henry Skopek v. District of Columbia Commission on Mental Health Services*, Slip Op. No. 636, PERB Case No. 99-U-06 (2000).

<sup>10</sup>See *Georgia Mae Green v. District of Columbia Department of Corrections*, 41 DCR 5991, PERB Slip Op. No. 323, Case No. 91-U-13 (1992), Supplemental Order (1993).

The Hearing Examiner determined that the outcome of this case rests on the credibility of the witnesses. (See R&R at p. 9). Based on the demeanor of the witnesses and other relevant factors, the Hearing Examiner concluded that "[SPO] Smith [was] a credible witness and her testimony establishe[d] that [Sgt.] Poole acted unprofessionally in the incidents forming the basis of the FOP's [unfair labor practice] complaint. [The Hearing Examiner determined that Sgt.] Poole's pattern of behavior toward SPO Smith demonstrated a lack of respect for Smith not only as an employee, but also as the FOP Chair[person].

[The Hearing Examiner also concluded that SPO] Smith's testimony establishe[d] that [Sgt.] Poole was abusive and hostile toward her in the security booth on September 15, 2004. [The Hearing Examiner] [was] convinced that [on September 17, 2004, Sgt. Poole] conducted a 15 minute countdown for [SPO] Smith to return to her post from DCHA headquarters. . . . [Regarding] the October 16, 2004 incident involving [Sgt.] Poole's [alleged] inappropriate demand for a doctor's note from Smith, [the Hearing Examiner noted that] DCHA and [Sgt.] Poole admitted [that] he was wrong to have done so. [The Hearing Examiner also indicated that Sgt.] Poole's testimony and [his] explanation [that he was confused] over the DCHA policy regarding doctor's notes was evasive at times. Further, [Sgt. Poole's testimony] demonstrated that he was ignorant of the requirements of the parties' collective bargaining agreement despite the fact that the agreement had been in place for two years. [In addition, the Hearing Examiner found that SPO] Smith testified credibly regarding the December 8, 2004 incident [regarding Sgt.] Poole's insistence that she wear a wet uniform neck tie. Finally, [the Hearing Examiner noted that [Sgt.] Poole d[id] not deny shaking his finger at Smith." (R&R pgs. 9-10) Having made these findings, the Hearing Examiner found that these four (4) incidents which form the basis of FOP's complaint, represent a pattern of harassment which is supported by earlier conflicts between Smith and Poole. (See R&R p. 11).

Next, the Hearing Examiner addressed whether Sgt. Poole was motivated by anti-union animus and took reprisals against SPO Smith: (1) for her union activity, or, (2) as a result of the letter of counseling (issued to him pursuant to the settlement of PERB Case No. 03-U-40) which he refused to sign on September 23, 2003. (See R&R at p. 9) The Hearing Examiner determined that Sgt. Poole's motivation is revealed by his reaction to the letter of counseling. The Hearing Examiner reasoned that the settlement of PERB Case No. 03-U-40 and Sgt. Poole's refusal to sign the ensuing counseling letter is not evidence of DCHA's violation of D.C. Code § 1-617.04(a) in the instant case. However, Sgt. Poole's refusal to sign the counseling letter supports an inference as to his state of mind.<sup>11</sup> The inference is that he did not accept DCHA's conclusion that he had violated the parties'

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<sup>11</sup>The July 2, 2003 Documentation of Counseling states, in pertinent part:

In March 2003, Special Police Officer Catina Schanck complained to you regarding being held over because her radio had to be picked up from the post. You inferred that it was the FOP Union's fault that she was being held

collective bargaining agreement and that he would seek reprisals against SPO Smith in her capacity as FOP chairperson. The Hearing Examiner found that this inference is supported by Chief Pitman's testimony. Specifically, the Chief testified that he could not explain why Poole, a "good supervisor" who would have knowledge that signing a letter of counseling acknowledged only its receipt, did not sign the letter of counseling. (See Tr. 139-140) Furthermore, the Hearing Examiner noted that Poole never explained why he refused to sign the letter of counseling. (See R&R at pgs. 10-11)

In particular, the Hearing Examiner found that the record established the existence of a suspiciously altered June 2003 annual performance evaluation for SPO Smith from Sgt. Poole. Sergeant Poole could not satisfactorily explain the alteration of the document which resulted in Smith's evaluation being lowered from "excellent" to "satisfactory". The Hearing Examiner determined that although these earlier incidents are outside the Board's 120 day jurisdictional period, "the annual performance evaluations may be considered as evidence supporting the FOP's assertions of violations occurring within the 120-day jurisdictional period." (R&R at p. 9) As a result, he concluded that Sgt. Poole's harassing conduct toward Smith was motivated by anti-union animus and constituted reprisal for the settlement agreement in PERB Case No. 03-U-40 in violation of D.C. Code § 1-617.04. (See R&R at pgs. 11-12).

No exceptions were filed regarding the Hearing Examiner's conclusion that the DCHA violated the CMPA. Nonetheless, pursuant to D.C. Code § 1-610.2(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner. See *Teamsters Local Union No. 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO/CLC v. District of Columbia Public Schools*, 43 DCR 5585, Slip Op. No. 375, PERB Case No. 93-U-11 (1994). We find that the Hearing Examiner's findings and conclusions are reasonable, supported by the record and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's findings and conclusion that the Respondent has engaged in the conduct alleged and thus violated D.C. Code §1-617.04(a).<sup>12</sup>

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over. You admitted to making such a statement. Your comment and action during this conversation are in violation of the provisions of the Master Agreement between the FOP and DCHA. You are ordered not to make anymore statements that are, or could be perceived to be in violation of the agreement between the FOP and DCHA.

The facts set forth above indicate that you are not meeting the required standards of your position in this instance. Failure on your part to bring this aspect of your performance up to a satisfactory level shall result [in] disciplinary action being taken against you.

<sup>12</sup>Specifically, based on the allegations contained in the Complaint, the arguments of the parties and the Hearing Examiner's R&R, we find that the Respondent violated D.C. Code § 1-617.04(a)(1) and

#### IV. Remedy

Since we have adopted the Hearing Examiner's findings that DCHA violated the CMPA, we now turn to the issue of what is the appropriate remedy in this case.

As a remedy, both parties requested that the Board order the other party to pay reasonable costs. Also, the FOP requested that the Board order the Respondent to: (1) restore eight (8) hours of sick to SPO Smith; (2) cease and desist from violating the CMPA; (3) order the Respondent to discipline Sgt. Poole; (4) review Yvonne Smith's last performance evaluation; (5) post a notice; and (6) pay attorney fees. (See Complaint at p. 5).

The Hearing Examiner has recommended that DCHA be ordered to: (1) restore eight (8) hours of sick leave to SPO Smith; (2) cease and desist from violating employees's rights under the CMPA; and (3) post a notice to all employees. However, the Hearing Examiner denied FOP's request for reasonable costs and attorney fees. (See R&R at p. 12). In addition, he denied the request to order DCHA to discipline Sgt. Poole.

As stated above, we have adopted the Hearing Examiner's findings and conclusions that the Respondent violated the CMPA by violating the rights of SPO Smith's rights under D.C. Code § 1-617.04(a)(1) and (4). Therefore, we find that restoring eight (8) hours of sick leave to SPO Smith's leave balance will make her whole. We find this remedy to be reasonable, supported by the evidence and consistent with Board precedent. Also, we adopt the Hearing Examiner's recommendation that DCHA cease and desist from violating the CMPA.<sup>13</sup>

"With regard to the remedy of posting a notice to employees, we recognize that when a violation is found, the Board's order is intended to have therapeutic as well as remedial effect. Moreover, the overriding purpose and policy of the relief afforded under the CMPA for unfair labor practices is the protection of rights and obligations." *National Association of Government Employees, Local R3-06 v. D.C. WASA*, 47 DCR 7551, Slip Op. No. 635 at pgs. 15-16, PERB Case No. 99-U-04 (2000). As a result, we adopt the Hearing Examiner's recommended remedy and direct DCHA to post a notice to all employees concerning the violations found and the relief afforded. Therefore, bargaining unit employees who are most aware of DCHA's conduct and are affected by it, would know that DCHA has been directed to comply with the CMPA. "Also, a

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(4).

<sup>13</sup>Furthermore, as stated previously, the unfair labor practice allegations pertaining to the June 2003 and June 2004 performance evaluations was not timely filed and cannot be considered here, except as supporting evidence for alleged violations within the 120-day filing period. Therefore, no remedy may be granted concerning the allegation pertaining to performance evaluations.

notice posting requirement, serves as a strong warning against future violations.” *Wendell Cunningham v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 49 DCR 7773, Slip Op. No. 682 at p. 10, PERB Case Nos. 01-U-04 & 01-U-S-01 (2002). In light of the above, we believe that the Hearing Examiner’s suggested remedy of posting a notice is appropriate.

With respect to FOP’s request for attorney fees, the Hearing Examiner noted that the Board lacks the authority to award attorney fees. Citing *AFSCME District Council 20, Locals 1959 and 2921 v. D.C. Public Schools and D.C. Government*, Slip Op. No. 796 at p.5, PERB Case No. 05-U-06 (2005). Therefore, he denied the request for attorney fees. Also, the Hearing Examiner observed that the Board will assess reasonable costs if required in the interest of justice based on an evaluation of the facts in each case. Citing *Milton v. D.C. Water and Sewer Authority*, 47 DCR 1443, Slip Op. No. 622 at p. 5, PERB Case No. 98-U-24 and 98-U-28 (2000). Further, the Hearing Examiner noted that the Board has long held that absent evidence of bad faith in filing a unfair labor practice complaint, it will not impose the sanction of costs.<sup>14</sup> The Hearing Examiner found no evidence that the Respondent acted in bad faith. Therefore, he concluded that the awarding of costs would not be in the interest of justice and denied the Complainant’s request for costs. (See R&R at p. 12).

The Complainant filed exceptions stating that the Hearing Examiner should have recommended that Sgt. Poole be disciplined because he has previously violated employees’ rights under the CMPA. Also, FOP asserts that attorney fees and costs should be granted in the interest of justice. The Respondent did not file exceptions.

We note that in his R&R, the Hearing Examiner did not address the Complainant’s request that Sgt. Poole be disciplined. We believe that the failure of the Hearing Examiner to address this issue may have been an oversight on his part. Therefore, we will address the issue. The Complainant argues that the Board should order DCHA to discipline Sgt. Poole because he has previously violated the CMPA. However, the Complainant has failed to provide any legal authority in support of this proposition. Moreover, the allegations concerning Sgt. Poole’s conduct in PERB Case No. 03-U-40, were settled by the parties. Therefore, this Board has made no prior determinations concerning Sgt. Poole’s conduct. Thus, we believe that FOP is requesting that we adopt FOP’s remedy without providing sufficient evidence or legal support. As a result, we conclude that this exception lacks merit.

Next, the Complainant takes exception to the Hearing Examiner’s denial of its request for attorney fees. “The Board has held that D.C. Code § 1-61[7].13 which expressly permits the Board

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<sup>14</sup>See *Forbes v. Teamsters Local 1714*, 36 DCR 7107, Slip Op. No. 229 at p. 4, PERB Case No. 88-U-20 (1989).

to require the payment of reasonable costs incurred by a party, does not include attorney fees. Nor are we properly authorized to provide attorney fees elsewhere in the Code.” *Tracy Hutton and Fraternal Order of Police Department of Corrections Labor Committee*, 47 DCR 769, Slip Op. No. 451 at p. 8, PERB Case No. 95-U-02 (1995). See also, *International Brotherhood of Police Officers, Local 1446, AFL-CIO v. District of Columbia General Hospital*, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992); and, *University of the District of Columbia Faculty Association NEA v. University of the District of Columbia*, 38 DCR 2463, Slip Op. No. 272, PERB Case No. 91-U-10 (1991). In light of the above, we adopt the Hearing Examiner’s determination that attorney fees be denied.

Finally, the Complainant takes exception to the Hearing Examiner’s denial of reasonable costs. Therefore, pursuant to D.C. Code §1-617.13(d), we will consider whether the Complainant should be awarded reasonable costs in this case. The Board first addressed the circumstances under which the awarding of costs to a party may be warranted in *AFSCME, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue*, 37 DCR 5658, Slip Op. No. 245 at pgs. 5-6, PERB Case No. 89-U-02 (1990). In that case, the Board concluded that it could, under certain circumstances, award reasonable costs. In that case, we noted as follows:

First, any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are “reasonable” that may be ordered reimbursed. . . . Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice.

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued. . . . What we can say here is that among the situations in which such an award *is* appropriate are those in which the losing party’s claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonable foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive representative.

We note that in the present case, the Hearing Examiner found that the allegations concerning the June 2003 and June 2004 annual evaluations were time-barred. As a result, it cannot be said that the Respondent’s claim or position concerning these allegations was “wholly without merit”. Furthermore, the Hearing Examiner determined that the Respondent did not act

in bad faith. In light of the above, we find that an award of costs is not in the interest of justice. As a result, we adopt the Hearing Examiner's recommendation that the request for costs should be denied.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The District of Columbia Housing Authority ("DCHA") its agents and representatives shall cease and desist from violating D.C. Code § 1-617.04(a)(1) by interfering, restraining, or coercing employees in the exercise of the rights guaranteed by D.C. Code § 1-617.04(a)(1).
2. DCHA its agents and representatives shall cease and desist from violating D.C. Code § 1-617.04(a)(4) by taking reprisals against Yvonne Smith because she has signed or filed an affidavit, petition, or complaint or given any information or testimony under D.C. Code § 1-617.04(a)(4).
3. DCHA its agents and representatives shall immediately restore eight (8) hours of sick leave to Yvonne Smith's leave balance.<sup>15</sup>
4. DCHA shall post conspicuously within ten (10) days from the service of this Decision and Order the attached Notice where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.
5. DCHA shall notify the Public Employee Relations Board ("Board"), in writing within fourteen (14) days from the date of this Decision and Order that the Notice has been posted accordingly. In addition, DCHA shall notify the Board of the steps it has taken to comply with the directives in paragraphs 3 and 4 of this Order.
6. Pursuant to Board Rule 559.1, and for purposes of D.C. Code § 1-617.13(c), this Decision and Order is effective and final upon issuance.

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

September 28, 2006

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<sup>15</sup>DCHA asserted that this has already been done. However, DCHA has not provided any evidence to support this claim. Thus, if DCHA has restored the eight (8) hours of leave, they should submit proof. If this has not been done, then DCHA is directed to do so.

**CERTIFICATE OF SERVICE**

**CORRECTED**

This is to certify that the attached Decision and Order in PERB Case No. 05-U-20 was transmitted via Fax and U.S. Mail to the following parties on this the 28<sup>th</sup> day of September 2006.

William Jepsen, Esq.  
FOP/DCHA Labor Committee  
1711 Stratton Road  
Crofton, MD 21114

**FAX & U.S. MAIL**

Hans Frolicher, IV, Esq.  
Office of General Counsel  
District of Columbia Housing Authority  
1122 North Capitol Street, N.E.  
Suite 210  
Washington, D.C. 20002

**FAX & U.S. MAIL**

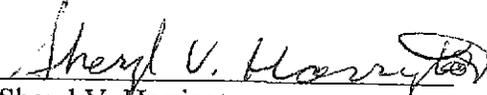
**Courtesy Copies:**

Sean Rogers, Hearing Examiner  
20555 September Point Lane  
P.O. Box 1327  
Leonardtown, MD 20650

**U.S. MAIL**

Michael Kelly  
Chief Executive Officer  
D.C. Housing Authority  
1133 North Capitol Street, N.E.  
Washington, D.C. 20002

**U.S. MAIL**

  
Sheryl V. Harrington  
Secretary



Public  
Employee  
Relations  
Board

Government of the  
District of Columbia

717 14<sup>th</sup> Street, N.W.  
Suite 1150  
Washington, D.C. 20005

[202] 727-1822/23  
Fax: [202] 727-9116



# NOTICE

**TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA HOUSING AUTHORITY, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OP. NO. 853, PERB CASE NO. 05-U-20 (SEPTEMBER 28, 2006).**

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

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (4) by the acts and conduct set forth in Slip Opinion No. 853.

WE WILL cease and desist from taking reprisal against Yvonne Smith for engaging in protected activities.

WE WILL NOT, in any like or related manner interfere, restrain or coerce employees in their exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act.

District of Columbia Housing Authority

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Director

**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 compliance with any of its provisions, they may directly contact the Public Employee Relations Board, whose address is: 717 14<sup>th</sup> Street, N.W., Suite 1150, Washington, D.C. 20005. Phone: (202) 727-1822.

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

September 28, 2006