GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the matter of	)	
	)	
American Federation of State, County and Municipal Employees, District Council 20, Local 2743	)	
	)	
Complainant	)	
	)	
v.	)	**PERB Case No. 23-U-06**
	)	
District of Columbia Department Of Insurance, Securities and Banking	)	**Opinion No. 1864**
	)	
Respondent	)	
	)	

DECISION AND ORDER

I. Statement of the Case

On March 30, 2023, the American Federation of State, County and Municipal Employees, District Council 20, Local 2743 (Union) filed an amended unfair labor practice complaint (Complaint) pursuant to section 1-617.04(a)(4) of the Comprehensive Merit Personnel Act (CMPA).[1] The Union alleged that the D.C. Department of Insurance, Securities and Banking (DISB) retaliated against the Union Vice President (Complainant) for protected activity by refusing to award a Performance Allowance for the Fiscal Year 2022 Performance Management Period (FY22).[2] On March 30, 2023, DISB filed an answer, affirmative defenses and motion to dismiss (Answer) denying the allegations and requesting dismissal of the Complaint.[3]

On September 20, 2023, PERB held a hearing on the matter. On January 2, 2024, the Hearing Examiner issued a report and recommendations (Report). DISB filed exceptions to the report (Exceptions). The Union filed an opposition to the Exceptions (Opposition).

Upon consideration of the Hearing Examiner's Report and Recommendations (Report), applicable law and the record presented by the parties, the Board finds that DISB committed an unfair labor practice by retaliating against the Complainant for his protected activity.

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[1] *See* D.C. Official Code §§ 1-617.04(a)(4). The Union filed its original complaint on March 16, 2023.
[2] Complaint at 4.
[3] The PERB Executive Director denied the motion to dismiss on May 19, 2023, and ordered the case to go to hearing.

II. Hearing Examiner's Report and Recommendations

A. Hearing Examiner's Factual Findings

The Complainant is a known union advocate. In March, 2022, the Complainant filed a prior unfair labor practice complaint against DISB that alleged retaliation against the Complainant by improperly investigating a workplace harassment complaint.[4] The Complainant, in his capacity as Union Vice President, testified at a DISB Performance Oversight Hearing on February 9, 2022.[5] His testimony included a statement that the Union sought "greater telework flexibility" and "adherence to CDC protocols [on COVID-19]."[6] The Complainant, again in his capacity as Union Vice President,[7] testified at a DISB Budget Oversight Hearing on March 21, 2022, advocating for the appropriation of funds for Quality Salary increases for employees in the Union's bargaining unit at DISB.[8]

On June 21, 2022, the Complainant's former direct supervisor, Debbra Wadley (Wadley), e-mailed the Complainant his "mid-year review," which highly praised the Complainant's performance.[9] On or around August 1, 2022, Wadley was terminated by DISB.[10] Wadley had not provided an official Performance Review to the Complainant prior to her termination.[11] After Wadley's termination, Compliance Analysis Director Philip Edmonds (Edmonds) became the Complainant's supervisor.[12]

Sometime in October, 2022, the Complainant received a preliminary FY22 Performance Evaluation document.[13] On October 28, 2022, the Complainant submitted a memorandum to Edmonds requesting a reevaluation "concerning cited performance level ratings" (Memorandum).[14] The Complainant stated that the Memorandum constituted a request for a Performance Allowance of seven (7) percent[15] as defined by the District Performance Manual (DPM) Chapter 11B-59, and further requested that any denial of a Performance Allowance be included in his personnel file along with a written rationale for the denial.[16] On November 4, 2022, the Complainant e-mailed a document styled Performance Allowance Request Memorandum to DISB Commissioner Karima Woods (Woods), DISB Chief of Policy and Administration Katrice

[4] Report at 2. The Board dismissed that complaint. Report at 2 (citing *Arthur Slade, Vice President of AFSCME, Local 2743 v. DISB*, 70 D.C. Reg. 1840, Slip Op. No. 1828, PERB Case No. 21-U-17 (2023).
[5] Report at 3.
[6] Report at 3.
[7] Complainant Ex. 10 (March 21, 2022 DISB Budget Oversight Hearing Testimony) at 1.
[8] Report at 3.
[9] Report at 3.
[10] Union Post-Hearing Brief at 2.
[11] Report at 6.
[12] Report at 5.
[13] Complainant Oct. 28, 2022 E-mail to Edmonds; Complainant Annual Performance Document (incl. in Complainant Hearing Ex. 5).
[14] Report at 3. The Complainant testified that he had a disagreement with his Performance Evaluation by Edmonds, who had only supervised the Complainant for "approximately eight weeks out of the FY22 performance cycle" after the Complainant's previous supervisor left DISB. Report at 5.
[15] Report at 16.
[16] Report at 3.

Purdie (Purdie), and Shipp, among others, reiterating his request for a rationale for denying his requested Performance Allowance and highlighting his high key performance indicators.[17]

On November 22, 2022, the Complainant filed a grievance (Grievance) at steps 1 and 2 regarding DISB's failure to grant him a Performance Evaluation, alleging that DISB had violated D.C. Official Code § 1.617.04 and Article 23 of the parties' collective bargaining agreement (CBA).[18] The Complainant moved the Grievance to step 3 on December 5, 2022.[19] On December 19, 2022, Shipp responded via letter asserting that the Grievance was deficient and therefore not in line with the requirements of the parties' CBA.[20] Shipp further asserted that the step 3 Grievance was both untimely, as the Complainant had not met "settlement effort" requirements of the CBA, and "not ripe and moot," as the Complainant's FY22 Performance Evaluation had not been finalized.[21] Shipp stated that the Complainant had ten (10) days to correct the asserted deficiencies.[22] On January 11, 2023, the Complainant moved the Grievance to step 4 and requested arbitration.[23] On January 18, 2023, DISB denied the Grievance as untimely and vague. Moreover, DISB held that the grievance did not arise out of the parties' CBA, and that "the subject matter of performance allowance is non-arbitrable."[24]

On August 9, 2022, the Union submitted an affidavit by Wadley (Affidavit) to the Hearing Examiner for PERB Case No. 21-U-17 for an August 10, 2022 hearing.[25] The parties in the instant case stipulated into evidence Wadley's August 9, 2022 Affidavit.[26] In the Affidavit, Wadley stated that when she assumed this supervisory position, the DISB Deputy Commissioner, Sharon Shipp (Shipp), told Wadley that the Complainant and another employee, a Union Steward, spent too much "Agency time" having union-related conversations.[27] Shipp instructed Wadley to discuss the issue with the Complainant.[28] On March 25, 2019, Shipp told Wadley that Shipp and then-Commissioner of DISB, Stephen Taylor (Taylor), "were tired of [the Complainant] and that he has to go,"[29] and instructed Wadley to tell the Complainant that "if he is going to leave his desk for more than 10 [] minutes he must report that to Wadley."[30] Shipp further instructed Wadley that if the Complainant asked where that directive came from to say that "it was from the [C]ommissioner and Shipp."[31] Wadley instead informed her entire team of the new rule, after which the Complainant e-mailed Taylor, Shipp and Wadley about the new rule—Taylor replied denying his

[17] Report at 4.
[18] Report at 4.
[19] Report at 4.
[20] Report at 4.
[21] Report at 4.
[22] Report at 4.
[23] Report at 4.
[24] Report at 4.
[25] Report at 2 (*see also* 21-U-17 August 10, 2022 Transcript 8:2-6).
[26] Report at 2.
[27] Report at 3 (citing Affidavit).
[28] Report at 3 (citing Affidavit).
[29] Report at 3 (citing Affidavit).
[30] Report at 3 (citing Affidavit).
[31] Report at 3 (citing Affidavit).

involvement in instituting the rule.[32] Wadley also attested that the Complainant was a "top producer" and "subject matter expert" who "exceed[ed] his performance goals annually" and that his union activities had not had a negative impact on his performance as a DISB employee.[33]

B. Hearing Examiner's Recommendations

The Hearing Examiner determined that the issue was whether DISB and its agents violated D.C. Official Code § 1-617.04(a)(4) by retaliating against the Complainant for participation in union activities by not rewarding him a performance allowance despite the Complainant's exceptionally high performance as determined by DISB's key performance indicators.[34] The Union argued that DISB retaliated against the Complainant for protected union activity by failing to award a Performance Allowance to the Complainant.[35] The Union further argued that Chapter 14 of the DPM mandated the awarding of a Performance Allowance to the Complainant by DISB.[36]

The Hearing Examiner applied the *Wright Line* test to the facts according to the record in this case.[37] 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.[38]

The Hearing Examiner found that the Complainant—Vice President of the Union—engaged in union activity protected by the CMPA and that DISB management clearly knew of the Complainant's protected activity, including testimony "on behalf of the Union" at public hearings regarding "matters affecting employees in the bargaining unit" and filing a previous unfair labor practice complaint with the Board in March 2022.[39] The Hearing Examiner further found that DISB management had expressed anti-union and/or retaliatory animus, as evidenced in the Affidavit, when management representatives stated that the Complainant had "too many Union related conversations on Agency time,"[40] that management was "tired of" the Complainant and that the Complainant "has to go," and by specifically tailoring a 10-minute rule regarding the Complainant's time away from his desk and then recanting that rule after the Complainant's direct

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[32] Report at 3 (citing Affidavit).
[33] Report at 3 (citing Affidavit).
[34] Report at 1-2. DISB stated that the primary issue in the case is "whether the Agency violated D.C. Official Code § 1-617.04(a)(4) by not granting the performance allowance." DISB Post-Hearing Brief at 1.
[35] Complaint at 4.
[36] Report at 9 (citing District Personnel Manual § 1402.3, which states "[t]he performance management program implemented by this chapter shall accomplish all of the following…(e) Recognize employees' accomplishments and identify employees' deficiencies so that appropriate rewards or assistance can be provided."
[37] Report at 10 (citing *Wright Line, Inc. v. Lamoureux*, 251 NLRB 1083, 1089 (1980)).
[38] *AFGE, Local 2978 v. OCME*, 61 D.C. Reg. 4267, Slip Op. No. 1457 at 4, PERB Case No. 09-U-62 (2014).
[39] Report at 13. The Hearing Examiner made note of his reliance on evidence received through an affidavit by a witness not subject to cross-examination and addressed: (1) his own weighing of the witness' credibility; (2) the opportunities DISB had to object to the introduction of the Affidavit; and (3) the relative flexibility of the Board's rules regarding the submission of evidence. Report at 14, 2.
[40] Report at 13.

supervisor applied the rule to her entire team.[41] The Hearing Examiner noted that the timing of DISB's denial supported a finding of animus toward the Complainant's protected union activity and colored DISB's "actions, or inactions."[42]

DISB argued that the Board lacks jurisdiction to decide issues regarding an agency's administration of the performance management system, which includes the granting of Performance Allowances.[43] DISB further argued that: (1) the Complainant's request to his direct supervisor was not part of the proper procedure for receiving a Performance Allowance; (2) Performance Allowances are discretionary and are not automatically granted even when an employee meets the required performance ratings;[44] and (3) as no other bargaining unit employees received a Performance Allowance during the relevant time period, DISB had not treated the Complainant disparately.[45] DPM cited Chapter 11 of the DPM to further its assertion that the awarding of Performance Allowances is discretionary.[46]

The Hearing Examiner rejected DISB's defense that the Complainant's request for a Performance Allowance did not constitute the proper procedure for receiving such a bonus, noting that DISB had failed to follow proper procedure in refusing the Complainant's request.[47] The Hearing Examiner found that the Complainant's request, which also included a request for an explanation if DISB denied his request for a Performance Allowance, constituted a request for review of performance ratings as governed by the District of Columbia Municipal Regulations (DCMR) § 6-B.[48] The Hearing Examiner noted that the Complainant's initial October 28 and November 4, 2022 requests were not in the form of a grievance, but that, despite DISB's argument that the Complainant should have filed such requests with the RCC, DISB did not inform the Complainant of the need to file with the RCC, nor did DISB forward the requests to an RCC itself.[49] The Hearing Examiner noted that Purdie's testimony for DISB contradicted its own defense—and the cited DCMR procedures—in claiming that there is no procedure for appealing management's decision not to recommend an employee for a Performance Allowance.[50] The

[41] Report at 14.
[42] Report at 14.
[43] Answer at 3.
[44] Report at 5-6.
[45] Report at 10.
[46] Report at 9 (citing District Personnel Manual § 1144.3, which states "[a] performance award may be granted only when the employee's performance rating assigned for the most recent rating period prior to the granting of an incentive is either "Substantially Exceeds Expectations" or better, "Exceeds Expectations" or better, or "Excellent" or better, as applicable."
[47] Report at 14.
[48] Report at 14. 6-B DCMR 1415.2 states that "Employees' requests for review of performance ratings shall be handled at the hiring agency level by the person(s) or entity designated by the agency head to handle such matters. Subordinate agencies must establish an internal Reconsideration and Resolution Committee (RRC) to formally review overall performance ratings of *Inadequate Performer* (Level 1) and *Marginal Performer* (Level 2) when an employee requests a review. The RRC shall also conduct a paper review, as defined in Section 1499 of this chapter, of overall ratings of *Valued Performer* (Level 3), and *Highly Effective Performer* (Level 4) when an employee requests a review."
[49] Report at 14.
[50] Report at 14.

Hearing Examiner concluded that DISB's failure to follow the procedures it cited in its own defense showed that defense to be pretextual.[51]

The Hearing Examiner further noted that DISB responded to the Complainant's filed grievance multiple times asserting that the grievance was: (1) untimely; (2) not ripe; and (3) not arbitrable.[52] The Hearing Examiner concluded that DISB demonstrated an intent not to arbitrate the underlying dispute, despite requesting that the Board defer the matter to the grievance and arbitration procedures of the parties' CBA.[53] The Hearing Examiner rejected DISB's jurisdictional arguments regarding both the parties' grievance and arbitration procedures and deferral to an RRC, concluding that the determination whether DISB retaliated against the Complainant for protected union activity falls within the Board's jurisdiction.[54]

The Hearing Examiner also rejected DISB's argument regarding management's discretion whether to recommend employees for Performance Allowances.[55] The Hearing Examiner noted that testimony by DISB management did not provide any explanation for refusing to recommend the Complainant for a Performance Allowance.[56] While the Hearing Examiner declined to resolve the parties' dispute on whether or not recommending a qualified employee for a Performance Allowance is discretionary under the DPM,[57] he concluded that any such discretion still does not allow an agency to refuse to recommend an employee for a Performance Allowance *for retaliatory reasons*.[58] The Hearing Examiner stated that the Complainant's request for a seven (7) percent Performance Allowance was appropriate under the cited regulations, which allow for Performance Allowances up to ten (10) percent.[59] The Hearing Examiner asserted that ordering DISB to present the Complainant's request for a Performance Allowance to Human Resources would not be appropriate, as DISB's unfair labor practices would taint such a presentation and because implementation of a Performance Allowance for the Complainant had "already been inappropriately delayed."[60] As such, the Hearing Examiner recommended that the Board order DISB to implement a 7% Performance Allowance for the Complainant for fiscal year 2022, including interest from when such a bonus customarily would have been paid.[61]

III. Discussion

This dispute arises from DISB's failure to address the Complainant's request for a Performance Allowance of seven (7) percent or explain its decision not to recommend the

[51] Report at 14-15.
[52] Report at 15.
[53] Report at 15.
[54] Report at 15.
[55] Report at 16.
[56] Report at 16.
[57] The Hearing Examiner asserted that the question of whether an agency "may" or "shall" recommend an employee to receive a Performance Allowance when that employee meets DPM requirements is not the issue before the Hearing Examiner in this case. Report at 16.
[58] Report at 16.
[59] Report at 16.
[60] Report at 16.
[61] Report at 16.

Complainant for the requested Performance Allowance. While DISB did not reiterate its jurisdictional arguments in its Exceptions, the Board notes that the Hearing Examiner correctly concluded that PERB has jurisdiction over unfair labor practice claims alleging retaliation for protected union activity under the CMPA.[62] Furthermore, the Board has 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.[63]

The Board will adopt a Hearing Examiner's Report & Recommendations if it is reasonable, supported by the record, and consistent with PERB precedent.[64] The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner."[65] An argument previously made, considered, and rejected does not constitute a proper exception, if the record contains evidence supporting the Hearing Examiner's conclusions.[66] Board Rule 550.14 states that "[a]ll objections to evidence must be raised before the hearing examiner. Any objection not made before the hearing examiner is waived unless the failure to make such objection is excused by the Board because of extraordinary circumstances."[67]

The Board has adopted the National Labor Relations Board's *Wright Line* test for complainants alleging that an employee's protected union activity was the motivating factor for an adverse action.[68] 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.[69]

DISB argues in its Exceptions that the Hearing Examiner erred in concluding that DISB did not provide an affirmative defense to the Union's *prima facie* case of retaliation.[70] DISB notes the Hearing Examiner's reliance on the Affidavit by Wadley, who "the Hearing Examiner, himself,

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[62] *Ferguson v. DCCFSA*, Slip Op. No. 1419 at 60 D.C. Reg. 13738, PERB Case No. 09-U-19 (2013). *See also AFSCME, District Council 20 and Local 2091 v. DPW*, 61 D.C. Reg. 1561, Slip Op. No. 1450 at 3, PERB Case No. 14-U-03 (2014) (holding that if the record of a case indicates that the allegations concern violations of the CMPA, then the Board has jurisdiction over those allegations and can grant relief accordingly if the allegations are proven).
[63] *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).
[64] *AFGE, Local 2978 v. OCME*, Slip Op. No. 1457 at 6-7.
[65] *Bernard Bryan, et al. v. FOP/DOC Labor Committee, et al.*, 67 D.C. Reg. 8546, Slip Op. No. 1750 at 5, PERB Case No. 19-S-02 (2020).
[66] *FOP/MPD Labor Comm. V. MPD*, 62 D.C. Reg 11756, Slip Op. No. 1521 at 10, 12, PERB Case Nos. 07-U-40, et al. (2015) (dismissing MPD's exceptions as repetition of arguments, testimony and evidence considered and rejected by the hearing examiner). *See also DHS v. AFSCME, District Council 20*, Local 2401, Slip Op. No. 1845 at 9, PERB Case No. 23-A-04 (2023) (holding that an argument previously made, considered, and rejected is a "mere disagreement" with the initial decision); *AFSCME, District Council 20, Local 2087 v. UDC*, 67 D.C. Reg. 8903, Slip Op. No. 1751 at 4, PERB Case No. 18-U-03 (2020) (holding that mere disagreements with a hearing examiner's findings or challenges to the hearing examiner's findings with competing evidence do not constitute proper exceptions).
[67] Board Rule 550.14.
[68] *AFGE, Local 2978 v. OCME*, Slip Op. No. 1457 at 4.
[69] *AFGE, Local 2978 v. OCME*, Slip Op. No. 1457 at 4.
[70] Exceptions at 2.

acknowledged…[was not] available for cross-examination."[71] DISB asserts that the Union admitted that the Complainant was not recommended for a performance bonus, and that the Complainant was not eligible under the DISB procedures.[72] DISB reiterated its argument that DISB's lack of recommendations for Performance Allowance for other employees shows that DISB would have made the same decision not to recommend the Complainant for a Performance Allowance even in the absence of his protected union activity.[73] DISB further argues that the Hearing Examiner failed to address a dispositive issue by declining to resolve whether the "shall" language of Chapter 14 of the DPM or the "may" language of Chapter 11 of the DPM is controlling regarding recommending employees for Performance Allowances.[74]

The Union argues that DISB allowed the admittance of the Affidavit into evidence at hearing without objection.[75] The Union further argues that DISB had notice and opportunity to request Wadley appear at hearing to testify or to request Shipp appear to dispute the assertions in the Affidavit.[76] The Union notes the Hearing Examiner's finding that DISB failed to prove its affirmative defense with a preponderance of the evidence and asserts that DISB failed to comply with the Hearing Examiner's instructions at a July 18, 2023 pre-hearing conference to provide a written explanation for its denial of a recommendation for a Performance Allowance for the Complainant.[77] Finally, the Union argues that DISB's second exception is moot.[78]

As noted by DISB in its Exceptions, the Hearing Examiner thoroughly addressed the factors he weighed in considering the Affidavit and Wadley's overall credibility.[79] The Hearing Examiner noted evidence in the record that bolstered Wadley's credibility and supported her claims, including DISB's opening statement at hearing.[80] Furthermore, the Union correctly argues that DISB declined to object to the introduction of the Affidavit into evidence,[81] therefore waiving any objection to that evidence.[82]

Further, the Hearing Examiner examined and rejected DISB's affirmative defense in a thorough *Wright Line* analysis, emphasizing not only Wadley's credibility, but also the inconsistencies between DISB's actions, or lack thereof, and failure to follow proper procedures as compared to its procedural defenses.[83] The Hearing Examiner reasonably concluded that once the burden of proof shifted to DISB to establish a non-retaliatory reason for its denial of a

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[71] Exceptions at 3.
[72] Exceptions at 3.
[73] Exceptions at 5.
[74] Exceptions at 5.
[75] Opposition at 4.
[76] Opposition at 4.
[77] Opposition at 5-6. The Union also asserts that DISB's witness testimony "provided inconsistencies regarding…Edmonds being [the Complainant's] immediate supervisor…for the entire fiscal year of 2022." Opposition at 6-9.
[78] Opposition at 10.
[79] Report at 14.
[80] Report at 14.
[81] September 20, 2023 Hearing Tr. 13:13-14-5.
[82] *See* Board Rule 550.14. DISB has not argued that there are any extraordinary circumstances to mitigate its failure to object to the introduction of the Affidavit into evidence during the hearing.
[83] Report at 14-15.

Performance Allowance to the Complainant, DISB failed to prove any such non-pretextual reason with a preponderance of the evidence.[84]

DISB's argument that the Union "admitted" that the Complainant was not eligible for a Performance Allowance is a semantic dispute of the Hearing Examiner's findings regarding the procedure for receiving a Performance Allowance and the lack of evidence to support DISB's refusal to recommend the Complainant for a Performance Allowance or to explain that refusal. Even if an agency is not required to recommend a qualified employee who requests a Performance Allowance, such a request by an employee does not violate any of the DPM or DCMR rules and regulations regarding Performance Allowances. DISB could have chosen to act on that request by beginning the process for recommending an employee for a Performance Allowance if the agency had been inclined to do so.

DISB argues in its Exceptions that the Union failed to prove any anti-union animus towards the Complainant because DISB did not award any performance allowances to any bargaining unit members. The Hearing Examiner examined DISB employee performance statistics that showed the Complainant "led his unit in production and funds recovered."[85] The Complainant's exceptional performance and active request for a Performance Allowance establish that the Complainant is not similarly situated to all other employees who were not recommended for a Performance Allowance—employees who may or may not have made similar requests and who necessarily could not share the Complainant's position as the agency's "top performer." Further, DISB's decision not to recommend any bargaining unit employees for a Performance Allowance does not explain or justify DISB's failure to follow proper procedures for the Complainant's request to review his performance evaluation. DISB's Exception to the Hearing Examiner's finding of animus is a mere disagreement with the Hearing Examiner's findings.

Finally, the Hearing Examiner correctly concluded that the question of whether the DPM mandates the recommendation of qualified employees for Performance Allowances is neither dispositive nor relevant to the determination of this case.[86] Even if DISB had discretion whether to recommend the Complainant for a Performance Allowances, such discretion would not support the denial of a Performance Allowance in retaliation for protected union activity in violation of the CMPA,[87] nor explain DISB's failure to properly follow the procedures and regulations it raised in its own defense.

The Hearing Examiner's findings and recommendations are reasonable, supported by the record, and consistent with PERB precedent. Therefore, the Board adopts the Hearing Examiner's findings, conclusions, and recommendations. As such, the Board finds that DISB committed an

[84] Report at 15-16.
[85] Report at 15.
[86] Report at 16.
[87] *See IBT Local 730 v. DCPS*, 43 D.C. Reg. 5585, Slip Op. No. 375 at 3, PERB Cas 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).

unfair labor practice in violation of D.C. Official Code § 1-617.04(a)(1) and (4) by retaliating against the Complainant for protected union activity.[88]

IV. Conclusion

The Board finds that DISB committed an unfair labor practice when it refused to recommend the Complainant for a Performance Allowance in retaliation for the Complainant's protected union activity. Therefore, the Complaint is granted.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Insurance, Securities and Banking 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)

2. The District of Columbia Department of Insurance, Securities and Banking 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;

3. The District of Columbia Department of Insurance, Securities and Banking shall make whole the Complainant, Arthur Slade, by paying the Complainant the requested seven (7) percent Performance Allowance bonus for Fiscal Year 2022 and four (4) percent interest from the date the Performance Allowance bonus should have been paid to the date of payment, as directed by the procedures of the District Personnel Manual, the District of Columbia Municipal Regulations, and any other applicable statutes or regulations;

4. The District of Columbia Department of Insurance, Securities and Banking 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 Department of Insurance, Securities and Banking 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.

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[88] While the Complaint only alleged a violation of D.C. Official Code § 1-617.04(a)(4), retaliation against an employee for protected union activity is a derivative violation of D.C. Official Code § 1-617.04(a)(1). *See FOP/MPD Labor Comm. (on behalf of Sergeant Andrew J. Daniels) v. MPD*, 60 D.C. Reg. 12080, Slip Op. No. 1403 at 2-3, PERB Case No. 08-U-26 (2013) (finding that complaint alleging retaliation for filing a grievance against an agency constituted a claim under D.C. Official Code § 1-617.04(a)(1) and (4).

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.

March 21, 2024.

Washington, D.C.

Appendix A

NOTICE

TO ALL EMPLOYEES AND LABOR ORGANIZATIONS ASSOCIATED WITH THE PERFORMANCE OF WORK AT THE DISTRICT OF COLUMBIA DEPARTMENT OF INSURANCE, SECURITIES AND BANKING: THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO THE DECISION AND ORDER IN PERB CASE NO. 23-U-06.

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 discriminate in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

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: testimony on behalf of a labor organization in public forums; filing unfair labor practice charges against the Department of Insurance, Securities and Banking; and/or participating in Public Employee Relations Board investigations, hearings, or other proceedings.

WE WILL make whole, including interest, the Complainant, Vice President of American Federation of State, County, and Municipal Employees, Local 2743, for our refusal to provide the Complainant with a Performance Allowance for Fiscal Year 2022 in retaliation for protected union activity.

DISTRICT OF COLUMBIA DEPARTMENT OF INSURANCE, SECURITIES AND BANKING, 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.