

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any formal errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

In the Matter of:)	
)	
FRATERNAL ORDER OF POLICE/ DEPARTMENT OF CORRECTIONS LABOR COMMITTEE, (On behalf of Georgia Green, William Dupree and Earnest Durant),)	PERB Case Nos. 01-U-16 Opinion No. 698
)	
Complainant,)	
)	
v.)	
)	
DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,)	
)	
Respondent.)	
)	

Decision and Order

This matter involves an Unfair Labor Practice Complaint filed by the Fraternal Order of Police/Department of Corrections Labor Committee ("Complainant", "Union", or "FOP") against the District of Columbia Department of Corrections ("Respondent", "DOC", "Agency"). FOP filed this Complaint on behalf of Georgia Green, William Dupree and Earnest Durant based on separate allegations raised by the parties. On behalf of Georgia Green, FOP alleges that DOC committed an unfair labor practice by wrongfully proposing a suspension action against her. On behalf of William Dupree and Earnest Durant, FOP alleges that DOC committed unfair labor practices against them by: (1) attempting to reduce their outstanding performance ratings in their criminal investigator positions to excellent ratings and (2) removing their fire arms and assigning them to administrative duties. FOP claims that the factual record in this case supports a conclusion that the Respondent violated D.C. Code §1-617.04 (a)(1)(3) and (4) (2001 ed.)¹ by the acts alleged above.

¹Prior codification at D.C. Code §1-618.4(a)(1),(3) and (4) (1981 ed.).

Respondent denies the allegations. In addition, Respondent asserts that the Complaint should be dismissed with prejudice because neither of the individuals represented by FOP has demonstrated any link between his or her union activities and the actions taken by the Respondent. Furthermore, DOC contends that it acted pursuant to a reasonably held good faith belief regarding the individual Complainant's conduct. Finally, DOC claims that it would have taken the challenged actions regardless of their union affiliation, consistent with the management rights provided in D.C. Code §1-617.18(a)(1)-(6)(2001 ed.).²

A hearing was held. The Hearing Examiner found that the Respondent did *not* violate D.C. Code §1-617.04(a)(1),(3) and (4) (2001 ed.) by proposing to suspend Georgia Green or by attempting to reduce the performance ratings of William Dupree and Earnest Durant.³ However,

²Prior codification at D. C. Code §1-618.8 (a)(1)-(6)(1981 ed.).

³In both cases, the Hearing Examiner determined that the Green, Dupree and Durant did not meet their burden of showing a nexus between the Respondent's actions and their individual union activities. As a result, the Hearing Examiner recommended that both of these complaint allegations be dismissed. The Complainant filed Exceptions concerning the Hearing Examiner's finding on both of these issues. Specifically, the Complainant claims that the Hearing Examiner erred in his findings because, *inter alia*, "the entire record in this case supports the Complainant's allegations." (Complainant's Exceptions at p.3).

As it relates to Green's suspension, the Complainant argues that the record showed that this disciplinary proposal was unfounded from its inception and that the Agency's action was the result of Green's involvement as an employee representative in the Bessye Neal, et al. v. D.C. Department of Corrections, et al. case. The Bessye Neal, et al. v. D.C. Department of Corrections, et al. case held, *inter alia*, that the Respondent cannot make changes in the terms and conditions of employment of members of this protected class without first obtaining the approval of the Special Master. (R & R at p. 2). In addition, Green claims that her involvement in Public Employee Relations Board cases was well-known to DOC officials and prompted the Agency's actions against her. (Complainant's Exceptions at p. 10).

Concerning Dupree and Durant's performance appraisal allegation, the Union claims that the Agency's reliance on the District Personnel Manual's requirement that employees be in their positions for one year before being eligible to receive an outstanding rating was unfounded. In addition, the Union claims that the actions taken against Durant and Dupree were, *inter alia*, directed to coerce Dupree and Durant, and all other bargaining unit employees, in light of impending reduction-in-force actions at DOC.

This Board has found that in order to sustain an unfair labor practice claim based on anti-

the Hearing Examiner determined that the Respondent violated D.C. Code §1-617.04 (2001 ed.) by removing firearms from Complainants Dupree and Durant and assigning them to administrative duties. Both parties filed Exceptions concerning the Hearing Examiner's findings. The Hearing Examiner's Report and Recommendation and the parties' Exceptions are before the Board for disposition. The one allegation in which the Hearing Examiner found a violation will be discussed in more detail in the following paragraphs.

The substance of the allegation for which the Hearing Examiner found a violation of D.C. Code §1-617.04 (2001 ed.) concerned the Agency's decision to take the William Dupree and Earnest Durant's weapons. The Agency claims that William Dupree and Earnest Durant exhibited threatening behavior in the presence of two management personnel, Clydie Smith, Executive Assistant to the Director and Pamela Chisholm, while discussing labor-management issues. The Agency claims because of this threatening conduct, they took steps to get the permission of the Special Master to have Dupree and Durant's weapons removed and to have them assigned to administrative duties while the matter was being investigated. Furthermore, the Agency contends that the rise in workplace violence prompted them to take this action against Dupree and Durant. Dupree and Durant deny that they exhibited threatening behavior toward Chisholm or Smith.

As noted earlier, the Hearing Examiner found that the evidence shows that DOC committed a violation of D.C. Code §1-617.04(a)(1)(2001 ed.) when it removed weapons from Dupree and Durant and placed them on administrative duty. In reaching this finding, the Hearing Examiner observed that both Dupree and Durant were clearly engaged in protected activity when

union animus, a Complainant must prove that the Agency's actions were motivated by the Complainant's lawful union activity. Doctors Council of the District of Columbia and Skopek v. D.C. Commission on Mental Health Services, 47 DCR 7568, Slip Op. No. 636, PERB Case No. 99-U-06 (2000). In the present case, as in the Skopek case, the Hearing Examiner found that the individuals represented by the Complainant failed to make this showing. Based on our review of the record in the present case, we conclude that the Hearing Examiner's findings are reasonable and supported by the record. Therefore, we find that the Union's Exceptions amount to no more than a disagreement with the Hearing Examiner's findings of fact. This Board has held that mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's findings where the findings are fully supported by the record. American Federation of Government Employees, Local 872 v. D. C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). The Board has also rejected challenges to the Hearing Examiner's findings based on: (1) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. American Federation of Government Employees, Local 2741 v. D. C. Department of Recreation and Parks, 46 DCR 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999). In view of the above, we find that the Complainant's Exceptions lack merit. Therefore, we dismiss the allegations pertaining to Green's suspension and Durant and Dupree's performance appraisals.

they went to the Grimke Building because they went there in their capacity as union officials, to complain to management about what they regarded as a unilateral change in working conditions, i.e., the change in parking arrangements. He further concluded that there was no dispute over whether the decision to remove firearms from Dupree and Durant was a direct consequence of their behavior exhibited in their capacities as union officials.

The Hearing Examiner identified the relevant issue as being *whether the behavior exhibited by Dupree and Durant was so extreme as to deprive them of the protections of D.C. Code 1-617.04(a)*(2001 ed.)⁴. The Hearing Examiner first determined that the evidence did not support a finding that Durant's behavior was in any way aggressive or hostile. He considered the fact that there was conflicting testimony between management's witnesses on whether Durant exhibited threatening behavior. Only Chisholm suggested that Durant was hostile. By contrast, the evidence seemed to suggest that he was essentially uninvolved. On this basis, the Hearing Examiner concluded that the evidence suggested that Durant's behavior was not hostile or aggressive at all. Furthermore, he noted that the Agency's own internal investigation reached this same conclusion.

As the evidence relates to Dupree, the Hearing Examiner determined that even though evidence suggests that Dupree was not nearly as calm and respectful toward Chisholm as he remembers himself to have been, "Chisholm's testimony that she felt seriously threatened by Dupree was not credible." (R & R at p. 16). The Hearing Examiner considered the fact that Chisholm did not raise the issue of threats by Dupree and Durant with anyone else in the immediate aftermath of the episode, even though she did report a verbal confrontation to the Executive Director via e-mail. The Hearing Examiner determined that the mention of a verbal confrontation did not imply that this confrontation had been loud, much less threatening.

In determining that the record did not support a finding that management was threatened by Dupree and Durant's behavior, the Hearing Examiner highlighted the fact that it took nearly a week to remove the weapons. The Hearing Examiner did not "find it credible that the personnel management protections afforded Dupree and Durant through the *Neal* case demanded such a delay in the face of a perceived serious threat." (R & R at p. 16). Furthermore, the Hearing Examiner observed that even if we accept Chisholm's description of Dupree's behavior as "loud and boisterous", or even rude and disrespectful, as the Respondent's investigator concluded, we must examine whether such activity exhibited by him in his capacity as a union official is nevertheless protected. The Hearing Examiner indicated that this Board has not previously ruled on this issue. As a result, he noted that where the Board has no precedent on an issue, it looks to National Labor Relations Board (NLRB) precedent for guidance. The Hearing Examiner stated that the NLRB has held that the purposes of the National Labor Relations Act (NLRA) require that management sometimes tolerate behavior exhibited in the course of exercising protected

⁴Prior Codification at D.C. Code §1-618.4(a) (1981 ed.).

rights that it might not otherwise tolerate. The behavior that management might be required to tolerate is broad, but not infinite. The Hearing Examiner relied on Union Fork and Hoe Co. for the standard on what conduct is egregious enough to deprive union officials of their protection. 241 NLRB 907 (1979). In Union Fork and Hoe Co., the NLRB held that the line is drawn in those flagrant cases where the misconduct is so violent or is of such a character as to render the employee unfit for further service. Id. In view of the above, the Hearing Examiner concluded that “nothing... beyond the conclusory statements of Smith and Chisholm, supports a conclusion that Dupree’s behavior exceeded the accepted norms of the labor-management relationship.” 241 NLRB 907, 908 (1979) (R & R at p.17). Therefore, he found that Dupree’s conduct was still protected and that DOC committed a violation of D.C. Code §1-617.04(a)(1)(2001ed.)⁵. However, he did *not* find violations of D.C. Code 1-617.04(a)(3) or (4)(2001 ed.)⁶.

Both parties filed Exceptions concerning the Hearing Examiner’s finding on this issue. In its Exceptions, the Agency asserts that the Hearing Examiner erred in finding that DOC violated the CMPA by removing Dupree and Durant’s weapons. Specifically, DOC disagrees with the factual findings and the weight the Hearing Examiner gave certain evidence. In addition, the Agency cites the Occupational Safety Health Act’s (OSHA) workplace safety rules for the proposition that it is the Employer’s duty to keep the workplace safe, and although there may not have been a threat this time, there could have been. (Respondent’s Exceptions at p. 13). Therefore, the Agency asserts that it did what any reasonable employer would have done by “taking precautionary measures.” (Respondent’s Exceptions at p. 14). In its Exceptions, the Complainants contend that the Hearing Examiner erred in failing to find violations of D.C. Code §1-617.04(a)(3) or (4) (2001 ed.). However, FOP also asserts that the record supports the Hearing Examiner’s findings that DOC violated D.C. Code §1-617.04(a)(1)(2001ed.).

Notwithstanding the Exceptions raised by both parties, the Board finds that the Hearing Examiner’s findings are reasonable and supported by the record. In addition, we find that the Agency’s Exceptions amount to a mere disagreement with the Hearing Examiner’s findings. As stated earlier, a mere disagreement with the Hearing Examiner’s findings is *not* grounds for reversal of the Hearing Examiner’s findings where the findings are fully supported by the record. American Federation of Government Employees, Local 872 v. D. C. Department of Public

⁵Prior codification at D.C. Code §1-617.04(a)(1)(1981 ed.).

⁶The Hearing Examiner stated that there was no showing that Respondent’s action was intended to discourage, or actually had the effect of discouraging membership in the Labor Committee; both Dupree and Durant continued to serve in their union capacities... Similarly, the Hearing Examiner did not find that the Respondent’s action was in reprisal for either Dupree or Durant having “signed or filed an affidavit, petition or complaint or given any information or testimony under this sub chapter.” (R & R at p.17).

Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). Furthermore, where the Hearing Examiner's Report and Recommendation is supported by record evidence, exceptions challenging those findings lack merit. American Federation of Government Employees, Local 2725 v. District of Columbia Housing Authority, 45 DCR 4022, Slip Op. No. 544, PERB Case No. 97-U-07 (1998). We, therefore, adopt the Hearing Examiner's finding that DOC violated the CMPA by taking Dupree and Durant's weapons and giving them administrative duties.

Since we have adopted the Hearing Examiner's finding that DOC violated the CMPA, we now turn to the issue of what is the appropriate remedy. As a remedy, the Hearing Examiner recommended that the Respondent be ordered to: (1) cease and desist from violating Dupree and Durant's right to engage in protected activity; (2) pay Dupree and Durant's costs to the extent such costs are reasonable and associated with the charge concerning the removal of weapons; and (3) make Dupree and Durant whole, for economic losses, if any, suffered as a consequence of the Respondent's violation of their rights.⁷ Finally, the Hearing Examiner concluded that attorney fees cannot be awarded because the Board lacks authority under D.C. Code §1-617.13⁸ (2001 ed.) to award such fees. International Brotherhood of Police Officers v. D.C. General Hospital, 39 DCR 9633, Slip Op. No. 322 at page 6, footnote 6, PERB Case No. 91-U-14 (1992).

Both parties filed Exceptions concerning the Hearing Examiner's recommended remedy. FOP's Exceptions simply reiterate its claim that the Hearing Examiner should have found CMPA violations for the other allegations concerning Green's suspension and Dupree and Durant's performance appraisals. On this basis, the Complainant asserts that it should be awarded costs, attorney fees and other appropriate remedies for those other allegations. The Respondent's Exceptions assert that the "make whole" remedy for Dupree and Durant is not valid, since they suffered no losses while they were given administrative duties during the internal investigation.

When a violation is found, the Board's order is intended to have therapeutic as well as remedial effect. AFSCME Local 2401 and Neal v. D.C. Department of Human Services, 48 DCR 3207, Slip Op. No. 644, and PERB Case No. 98-U-05 (2001); D.C. Code §1-605.02(3) and 1-617.13 (a) (2001 ed.). Moreover, the overriding purpose of relief afforded under the CMPA for unfair labor practices is the protection of rights and obligations. Id. We believe that the Hearing Examiner's recommended remedy will achieve the goals of the Board's remedies, as outlined in the CMPA and the above mentioned Board precedent. As a result, we adopt the Hearing

⁷Although the most immediate remedy sought by FOP when this Complaint was filed—restoration of weapons to Dupree and Durant—is now *moot*, the Hearing Examiner found that the other remedies noted above were appropriate. The remedy is moot because both Dupree and Durant later had their weapons restored.

⁸Prior codification at D.C. Code §1-617.13 (1981 ed.).

Examiner's recommended remedy, with one caveat.

On the issue of the "make whole" remedy, it is unclear what losses Dupree and Durant suffered during the time period when their weapons were taken pending the Agency's investigation. The Agency argues that there were no losses since the employees were given administrative duties during this period. The Union argues that Dupree and Durant did suffer losses and that a make whole remedy is appropriate.

Without knowing what the actual losses were, it is difficult for the Board to fashion an appropriate "make whole" remedy in this case. Therefore, we are requesting that FOP submit to the Board a list of any losses that Dupree and Durant incurred during the time period that their weapons were taken. At that point, the Board will be better able to decide whether a "make whole" remedy is appropriate. If the Complainant can demonstrate any losses for which Dupree and Durant should be made whole, the Hearing Examiner's recommended remedy will be adopted in its entirety and without reservation. If not, then the Hearing Examiner's remedy will be modified to exclude the "make whole" order.

Pursuant to D.C. Code §1-605.02(3)(2001 ed.) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and for the reasons discussed above, we adopt the Hearing Examiner's findings and recommended remedy.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Corrections (DOC), its agents and representatives shall cease and desist from violating William Dupree and Earnest Durant's employee rights under D.C. Code §1-617.04(a)(1) (2001 ed.) by the acts and conduct set forth in this Opinion.
2. DOC, its agents and representatives shall cease and desist from interfering with, restraining or coercing the Complainant's members in the exercise of their rights under the Comprehensive Merit Personnel Act (CMPA) in any like or related manner.
3. DOC shall make Dupree and Durant whole for economic losses, if any, suffered as a result of Respondent's violations of their rights pursuant to paragraph 6 of this Order.

4. DOC shall post conspicuously within ten (10) days from the service of this Opinion the attached Notice, admitting the above noted violations, where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.
5. DOC shall notify the Public Employee Relations Board (PERB), in writing, within fourteen (14) days from the date of this Order that the Notice has been posted, accordingly.
6. The Complainant shall submit to the Board, within (14) days from the date of this Order, a statement of actual losses incurred during the period that William Dupree and Earnest Durant's weapons were removed and they were placed on administrative duty pending an internal investigation by DOC. The statement of losses shall be filed together with any supporting documentation. DOC may file a response to the statement within (14) days from service of the statement upon it.
7. The Complainant shall submit to the Board, within (14) days from the date of this Order, a statement of actual costs incurred in processing this action, as it relates to the William Dupree and Earnest Durant's weapon removal allegation. The statement of costs shall be filed together with any supporting documentation. DOC may file a response to the statement within (14) days from service of the statement upon it.
8. DOC shall pay Complainant's costs, to the extent that such costs are reasonable and associated with the charge concerning the removal of weapons.
9. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

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

January 14, 2003



Public
Employee
Relations
Board

Government of the
District of Columbia



717 14th Street, N.W.
Suite 1150
Washington, D.C. 20005

[202] 727-1822/23
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS (DOC), THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 698, PERB CASE NO. 01-U-16 (January 14, 2003).

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 William Dupree and Earnest Durant's employee rights under D.C. Code §1-617.04(a)(1)(2001 ed.) by the acts and conduct set forth in Slip Opinion No. 698.

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 CMPA.

District of Columbia Department of Corrections

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 an questions concerning the Notice or compliance with any of its provisions, they may communication directly with the Public Employees Relations Board, whose address is: 717 14th Street, N.W., 11th Floor Washington, D.C. 20005. Phone: (202) 727-1822.

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

January 14, 2003