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

In the matter of)	
)	
Samantha Brown)	
)	
Complainant)	
)	
v.)	PERB Case No. 22-U-16
)	
District of Columbia Public Schools)	Opinion No. 1889
)	
Respondent)	Motion for Reconsideration
)	

DECISION AND ORDER

I. Statement of the Case

On July 18, 2024, the District of Columbia Public Schools (DCPS) filed a motion for reconsideration (Motion) of the Board’s decision in Opinion No. 1877. DCPS requests that the Board reconsider its decision finding that DCPS committed an unfair labor practice by retaliating against a DCPS teacher (Complainant) for exercising her duties as a Washington Teachers’ Union (WTU) representative.¹ The Complainant did not file an opposition.

For the reasons discussed herein, the Motion for Reconsideration is denied.

II. Background

In Opinion No. 1877, the Board considered the Complainant’s unfair labor practice complaint against DCPS.² The Complainant alleged that DCPS retaliated against her for exercising her duties as a representative of WTU by, in pertinent part: (1) reducing her 2021-2022 IMPACT ratings and scores (Performance Evaluation) based on false information; (2) creating a hostile environment by significantly increasing the Complainant’s assigned teaching preps and removing an AP literature class from her teaching schedule; and (3) failing to comply with the requirement of the parties’ collective bargaining agreement (CBA) to provide informal mediation once requested by the Complainant.³

¹ Complaint at 3.

² *Samantha Brown v. DCPS*, Slip Op. No. 1877, PERB Case No. 22-U-16 (2024).

³ Complaint at 3-4.

A hearing was held on the matter. On August 3, 2023, the Hearing Examiner issued a Report and Recommendations (Report). The Hearing Examiner recommended that the Board dismiss the Complaint.⁴ On September 8, 2023, the parties submitted post-hearing briefs.⁵ On October 12, 2023, the Hearing Examiner issued a Supplemental Report and Recommendation (Supplemental Report) and, taking the parties' post-hearing briefs into consideration, again recommended that the Board dismiss the Complaint.⁶ On December 21, 2023, the Board remanded the case back to the Hearing Examiner.⁷ On January 22, 2024, the Hearing Examiner issued a Remand Report and Recommendations (Remand Report) recommending dismissal of the Complaint.⁸ The Complainant filed exceptions to the Remand Report (Remand Exceptions). DCPS filed an opposition to the Remand Exceptions (Remand Opposition).

The Board rejected the Hearing Examiner's Report and Recommendations and held that DCPS violated D.C. Official Code §§ 1-617.04(a)(1) and (4) by retaliating against the Complainant.⁹ The Board ordered DCPS, in pertinent part, to make the Complainant whole by adjusting the Complainant's 2021-2022 Cycle 1 Commitment to the School Community and Core Professionalism evaluation to include the wrongfully removed forty (40) points and removing the 2021-2022 Cycle 3 classroom observation score of 2.7.¹⁰

III. Discussion

DCPS seeks reconsideration of the Board's decision in Opinion No. 1877 on the grounds that the decision: (1) failed to address DCPS's arguments regarding alleged violations of D.C. Official Code § 1-617.04(a)(2);¹¹ (2) failed to address DCPS's arguments regarding its legitimate reasons for the Performance Evaluation scores given to the Complainant;¹² (3) was untimely issued and, therefore, required application of the *JBG Properties* balancing test;¹³ (4) violated District legal precedent by overturning the Hearing Examiner's credibility determinations;¹⁴ and (5) awarded a remedy unsupported by both the evidentiary record and DCPS policy.¹⁵

⁴ Report at 10.

⁵ The Hearing Examiner had erroneously filed the original Report prior to a new deadline for briefs after PERB granted DCPS's motion for an extension of time for post-hearing briefs.

⁶ Supplemental Report at 3.

⁷ *Samantha Brown v. DCPS*, Slip Op. No. 1854 at 1, PERB Case No. 22-U-16 (2024) (ordering Hearing Examiner to: (1) clarify the weight accorded to credibility findings and other evidence in reaching his decision; and (2) explain his analysis of the burden-shifting standard from *Wright Line* as applied to the facts of this case, including, particularly, the analysis of evidence presented by the Complainant).

⁸ The Remand Report was issued to the parties on February 1, 2024.

⁹ *Samantha Brown v. DCPS*, Slip Op. No. 1877 at 14. While the Complaint also alleged violations of D.C. Official Code §§ 1-617.04(a)(2) and (3), the Board did not find that the Complainant's allegations supported those claims.

¹⁰ *Samantha Brown v. DCPS*, Slip Op. No. 1854 at 14. While the false information the Complainant alleged contributed to the removal of only ten (10) points from the Complainant's evaluation, the Board found that DCPS's anti-union animus had effectively tainted the entirety of the Complainant's 2021-2022 evaluation process. *Samantha Brown v. DCPS*, Slip Op. No. 1854 at 13 (fn. 125).

¹¹ Motion at 4-5.

¹² Motion at 6.

¹³ Motion at 7-8 (citing *JBG Properties v. D.C. Office of Human Rights*, 364 A.2d 1183, 1187 (1976)).

¹⁴ Motion at 9-17.

¹⁵ Motion at 17-19. DCPS asserts that the Board's standard of review for motions for reconsideration is unclear. Motion at 3 (fn. 1). DCPS notes that there are Board cases stating, respectively, that: (1) "a motion for reconsideration cannot survive if the 'arguments raised by the appellant]' in its Motion for Reconsideration were

A. The decision did not fail to address DCPS's arguments regarding asserted violations of D.C. Official Code § 1-617.04(a)(2).

DCPS argues that Opinion No. 1877 violated D.C. Court of Appeals precedent¹⁶ by failing to address its arguments regarding the Complainant's assertion of a violation of D.C. Official Code § 1-617.04(a)(2), which prohibits District agencies from "[d]ominating, interfering, or assisting in the formation, existence or administration of any labor organization."¹⁷ DCPS's argument is unavailing. The Board focused primarily on the parties' arguments in the Remand Exceptions and Remand Opposition, which did not raise any arguments regarding the claim of a violation of D.C. Official Code § 1-617.04(a)(2).¹⁸ The Board need not address every argument dismissed by a hearing examiner when the parties themselves do not find that argument to merit an exception.¹⁹ The Board only granted the Complainant's claims regarding D.C. Official Code § 1-617.04(a)(1) and (4), thereby implicitly denying the claim regarding D.C. Official Code § 1-617.04(a)(2).²⁰

made, considered, and rejected" (citing *DOC v. FOP/DOC Labor Comm.*, 60 D.C. Reg. 15972, Slip Op. No. 1381 at 4, PERB Case No. 10-A-14(a) (2013)); (2) the Board "will not consider new arguments that are raised in the motion for reconsideration" (citing *Kenneth Johnson v. D.C. Government and MPD*, 63 D.C. Reg. 6485, Slip Op. No. 1567 at 3, PERB Case No. 15-U-40 (2016)); (3) the Board rejected a motion for reconsideration because of the absence of any new arguments raised by the moving party (citing *AFGE, Local 631 v. OLRCB, et al.*, 67 D.C. Reg. 8901, Slip Op. No. 1747, PERB Case No. 20-U-23(MFR) (2020)); and (4) the moving party "cannot use a motion for reconsideration to raise new arguments" and that "a motion for reconsideration is not a proper forum for the Board to entertain new arguments" (citing *DGS v. AFGE, Locals 631, 2741 and 3444, AFSCME, Local 2091, and Teamsters Locals 639 and 730*, 63 D.C. Reg. 12567, Slip Op. No. 1589 at 3, PERB Case No. 14-UM-02(a) (2016)). However, DCPS has conflated multiple standards of review addressing different issues. The Board has held that arguments in motions for reconsideration that were made, considered, and rejected by the initial decision constitute mere disagreement with the Board's determination, which cannot on its own provide a basis for a motion for reconsideration. *See, e.g., DOC v. FOP/DOC Labor Comm.*, Slip Op. No. 1381 at 4. Neither will the Board consider arguments raised or evidence presented for the first time in a motion for reconsideration. *See, e.g., DGS v. AFGE, Locals 631, 2741 and 3444, AFSCME, Local 2091, and Teamsters Locals 639 and 730*, Slip Op. No. 1589 at 2. These are not contradictory standards, but rather two complementary grounds for dismissal of a motion for reconsideration. The Board has also articulated a standard for the grounds for successfully moving for reconsideration of a decision: that the moving party must provide authority which compels reversal of the Board's decision. *See AFGE, Local 631 v. WASA*, Slip Op. No. 1867, PERB Case No. 24-I-02 (2024) (holding that union's assertion that proposal withdrawn by agency after declaration of impasse involved a mandatory subject of bargaining compelled reversal of administrative dismissal of the complaint); *See also AFSCME, District Council 20 v. OSSE*, 65 D.C. Reg. 11554, Slip Op. No. 1679 at 3, PERB Case No. 17-N-04(a) (2018) (denying motion for reconsideration for failure to assert any legal grounds that compelled reversal of administrative dismissal).

¹⁶ *D.C. Metro. Police Dep't v. D.C. Pub. Empl. Rels. Bd.*, 282 A.3d 598, 605 (D.C. 2022) (remanding arbitration review request to PERB for further explanation of the Board's decision not to set aside an arbitration award as against public policy).

¹⁷ Motion at 4 (citing D.C. Official Code § 1-617.04(a)(2)).

¹⁸ *Samantha Brown v. DCPS*, Slip Op. No. 1877 at 7-8.

¹⁹ *See D.C. Metro. Police Dep't v. D.C. Pub. Empl. Rels. Bd.* at 603. The Court of Appeals stated that "[a]n agency decision, however, must 'state the basis of its ruling in sufficient detail and be fully and clearly explained, so as to allow for meaningful judicial review of and deference to the agency's decision.'" It does not follow that the Board must address every sentence pled or even every argument made by both parties. The Board certainly provided sufficient detail of its analysis of the arguments and portions of the evidentiary record relevant to its conclusions in Opinion No. 1877, contrary to its decision at issue in *D.C. Metro. Police Dep't v. D.C. Pub. Empl. Rels. Bd.*, where the Board did not address all material, substantive arguments in an agency's arbitration review request. *Id.* at 605-606.

²⁰ *But see Torney v. United States*, 300 A.3d 760, 769 (D.C. 2023) (finding that trial court implicitly denied appellant's request to strike witness testimony). The Board further notes that the Complainant—as the party in need

However, for the purpose of clarity, the Board reaffirms here that the Complainant's claim of a violation of D.C. Official Code § 1-617.04(a)(2) is denied.

B. The decision did not fail to address DCPS's arguments regarding its alleged non-discriminatory reasons for the Complainant's Performance Evaluation scores.

DCPS argues that the Board also failed to address the asserted non-discriminatory reasons for the Complainant's Performance Evaluation scores.²¹ DCPS asserts that Opinion No. 1877 did not discuss DCPS's testimony or arguments regarding its alleged reasons for the Complainant's 2021-2022 Cycle 1 Commitment to the School Community or Cycle 2 classroom observation ratings and scores.²² On the contrary, Opinion No. 1877 clearly addressed and rejected these arguments, noting that: (1) several of DCPS's assertions regarding its reasons for deducting from the Complainant's 2021-2022 evaluation were not adequately addressed in the evidentiary record as a whole; and (2) that the evidentiary record *did* show evidence of clear anti-union animus to the extent that the Board considered the entirety of the Principal's evaluation of the Complainant tainted by that animus.²³ Therefore, DCPS's argument regarding its asserted reasons for the Complainant's evaluation scores constitutes an argument previously made, considered and rejected by the Board.

C. DCPS waived any arguments regarding the decision's untimeliness requiring application of the *JBG Properties* balancing test.

DCPS argues that the Board untimely issued Opinion No. 1877 in violation of D.C. Official Code § 1-617.14 and Court of Appeals precedence under *JBG Properties*. D.C. Official Code § 1-617.14 states that “[a]ll decisions of the Board shall be rendered within a reasonable period of time, and in no event later than 120 days after the matter is submitted or referred to it for a decision.”²⁴ The Court of Appeals has held that the Board's 120-day rule is directory rather than mandatory.²⁵ DCPS asserts that, under *JBG Properties*, where an agency fails to meet its statutory deadline, it is required to apply the *JBG Properties* balancing test to determine: (1) potential and actual prejudice to the losing party; and (2) public and private interests in allowing the agency to proceed past the time limit.²⁶

DCPS's argument regarding timeliness was not raised before the Hearing Examiner or the Board prior to the issuance of Opinion No. 1877; therefore, DCPS has waived this argument.²⁷

of clarity regarding the denial of her claim of a violation of D.C. Official Code § 1-617.04(a)(2)—would be the party with standing to appeal Opinion No. 1877 under the precedent set by *D.C. Metro. Police Dep't v. D.C. Pub. Empl. Rels. Bd. Id.* at 603.

²¹ Motion at 6.

²² Motion at 6.

²³ *Samantha Brown v. DCPS*, Slip Op. No. 1877 at 13 (fn. 125).

²⁴ D.C. Official Code § 1-617.14.

²⁵ *Brown v. D.C. Pub. Empl. Rels. Bd.*, 19 A.3d 351, 357 (D.C. 2011).

²⁶ *JBG Properties* at 1187. DCPS initially cites to a requirement in *JBG Properties* that “a reviewing court must determine ‘whether the agency’s delay caused sufficient prejudice to appellant to outweigh the normally prevailing interest in allowing the agency to act after the expiration of the time limit.’” Motion at 7. DCPS later asserts that the Board itself was required to conduct the *JBG Properties* balancing test. Motion at 8.

²⁷ See, e.g., *MPD v. FOP/MPD Labor Comm.*, Slip No. 1882 at 2, PERB Case No. 24-A-05 (2024) (holding that the parties' arguments not part of the full record before the Board in the original decision were not properly before the Board and were therefore excluded from consideration).

DCPS has had ample opportunity to argue before both the Hearing Examiner and the Board that the instant case had extended beyond the statutory time limit, including in post-hearing briefing, in exceptions to any of the Hearing Examiner's Reports, or in a separate motion to the Board at any point after the asserted expiration of a time limit.²⁸

D. Overturning the Hearing Examiner's credibility determinations is not in conflict with District precedent.

DCPS argues that the Board's decision to overturn the Hearing Examiner's credibility findings violates District law.²⁹ As DCPS notes in its Motion, the D.C. Court of Appeals has held that "[a]lmost without exception, '[t]he determination of credibility is for the finder of fact, and is entitled to substantial deference.'"³⁰ (emphasis added) The instant case is that exception. While the Board noted that it has not previously needed to overturn a hearing examiner's credibility determinations, the Board has previously held that it will sometimes look to National Labor Relations Board (NLRB) precedent for guidance when relevant, primarily when the Board's own case law is silent on a particular issue.³¹ In resolving the instant Complaint, the Board reviewed the NLRB's case law regarding the appropriateness of overturning a fact-finder's credibility determinations, even those based on demeanor, "where the clear preponderance of the evidence convinces us such resolutions are incorrect."³² The NLRB further held that "we cannot agree with [the fact-finder's] analysis of the facts, and thus we cannot accept his credibility resolutions."³³

The Board thoroughly reviewed and analyzed the Hearing Examiner's credibility resolutions in the instant case and determined that the clear preponderance of the evidence weighed against the Hearing Examiner's conclusions.³⁴ The Board found that the record presented by both parties showed clear anti-union animus and retaliatory intent in DCPS's evaluation of the Complainant and that the Hearing Examiner ignored significant contradictions in the evidence and

²⁸ DCPS further asserts that: (1) it relied on the Hearing Examiner's Reports, which were favorable to DCPS's arguments and (2) the ordered remedy of altering performance evaluation scores from 2022 is severely prejudicial to DCPS. Motion at 8. These arguments are unavailing. Hearing examiners' reports and recommendations are not final, binding decisions, as the Board will review a hearing examiner's report and recommendation to ensure it is reasonable, supported by the record, and consistent with Board precedent, even in the absence of exceptions contesting the report. But see *Anitha L. Davis v. AFSCME, Local 2921, District Council 20, and AFSCME Int'l*, Slip Op. No. 1633 at 3 (2017) (noting that the Board will adopt a hearing examiner's recommendations of it finds that the hearing examiner's analysis, reasoning and conclusions are rational and persuasive, upon full review of the record, "whether exceptions have been filed or not."). Further, the Board finds DCPS's argument regarding administrative burden unconvincing. The Board has previously ordered the purging of retaliatory evaluations and related personnel records in a case that spanned two academic years. See *IBT Local 730 v. DCPS*, 43 D.C. Reg. 5585, Slip Op. No. 375 at 3, PERB Cas No. 93-U-11 (1996) (ordering DCPS to rescind an employee's reassignment and reinstate him to his former position at Coolidge High School, purge his personnel records of any documentation of the asserted reasons for his reassignment, purge his satisfactory annual performance evaluation rating, and make him whole for lost compensation or benefits after determining that DCPS reassigned the employee and downgrading his's annual performance rating in retaliation for filing a grievance). The Board will address DCPS's argument that complying with the ordered remedy is an impossibility, *infra*.

²⁹ Motion at 9-17.

³⁰ Motion at 9 (citing *Slater-El v. United States*, 142 A.3d 530, 538039 (D.C. 2016); *Bouknight v. United States*, 867 A.2d 245, 251 (D.C. 2005)).

³¹ *FOP/MPD Labor Comm. v. MPD*, Slip Op. No. 1526 at 8, PERB Case Nos. 06-U-23, et al. (2015).

³² *Samantha Brown v. DCPS*, Opinion No. 1877 at 12 (citing *Herbert F. Darling, Inc. and Robert T. Ewing*, 267 NLRB 476, 477 (1983)); see also *Delores Vance v. Nat'l Labor Rel. Bd.*, 71 F.3d 486, 491-92 (4th Cir. 1995).

³³ *Herbert F. Darling, Inc.* at 478.

³⁴ *Samantha Brown v. DCPS*, Opinion No. 1877 at 12-13.

testimony he credited.³⁵ As District case law clearly contemplates the need for exceptions to the deference typically given to fact-finders' credibility resolutions, DCPS's argument to the contrary does not compel the Board to reverse its decision in Opinion No. 1877.

E. The Board will modify the ordered remedy to ensure enforceability.

DCPS argues that the remedy is unsupported by both the record and DCPS policy, as an unexcused late arrival would have received the same deduction as an unexcused absence.³⁶ However, as noted, *supra*, and in Opinion No. 1877, the entirety of the Complainant's 2021-2022 Performance Evaluation's scoring was tainted by the anti-union animus present in DCPS's investigation—or lack thereof—of whether either an absence or a late arrival had occurred and overall treatment of the Complainant's effectuation of her duties as a union representative.³⁷ As noted, *supra*, the Board has previously ordered DCPS to alter personnel records regarding a complainant's performance evaluation.³⁸

DCPS's argument regarding the ordered remedy does not provide adequate grounds to compel the reversal of Opinion No. 1877. However, the Board recognizes that DCPS cannot restore more points to the Complainant's Performance Evaluation than were deducted.³⁹ The intended purpose of the ordered remedy in the instant case is to make the Complainant whole with respect to the inappropriate and tainted Performance Evaluation. Therefore, the Board hereby amends its ordered remedy in Opinion No. 1877 to order DCPS to adjust the Complainant's 2021-2022 Performance Evaluation by removing all deductions made to the Cycle 1 Commitment to the School Community and Core Professionalism ratings and scores, totaling forty (40) points and the Cycle 3 classroom observation score of 2.7 from the Complainant's personnel records.

IV. Conclusion

The Board finds no grounds to overturn the decision in Opinion No. 1877. Therefore, the Motion for Reconsideration is denied.

³⁵ *Samantha Brown v. DCPS*, Opinion No. 1877 at 12-14.

³⁶ Motion at 17.

³⁷ *Samantha Brown v. DCPS*, Slip Op. No. 1877 at 9, 13 (fn. 125). The Board stated that it interpreted the evidence as indicating, at most, that the Complainant arrived late on the date of the alleged unexcused absence. *Samantha Brown v. DCPS*, Slip Op. No. 1877 at 2 (fn. 11). However, the material fact is that DCPS does not know when the Complainant reported for work that day—because DCPS assumed the Complainant was absent rather than conducting any investigation *at all* and did not raise the alleged unexcused absence with the Complainant until deducting points from her Performance Evaluation months later. *Samantha Brown v. DCPS*, Slip Op. No. 1877 at 11. The NLRB has held that failure to conduct a meaningful investigation can constitute circumstantial evidence of anti-union animus. *See Intertape Polymer Corp. and Local 1149 International Union, United Automobile, Aerospace, and Agricultural Workers of America (UAW), AFL-CIO*, 372 NLRB 133 at 6-7 (2023).

³⁸ *IBT Local 730 v. DCPS*, Slip Op. No. 375 at 3.

³⁹ Motion at 18.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Motion for Reconsideration is denied;
2. The third order of Opinion No. 1877 is amended to order that: the District of Columbia Public Schools shall make whole the Complainant, Samantha Brown, by removing all deductions made to the 2021-2022 Cycle 1 Commitment to the School Community and Core Professionalism ratings and scores, totaling forty (40) points, and the Cycle 3 classroom observation score of 2.7 from the Complainant's personnel records; and
3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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.

October 17, 2024.

Washington, D.C.