

On November 8, 2006, a letter of complaint was submitted on behalf of Sergeants Culver, Jackson, and Sanders to Assistant Chief of Police William Ponton of the Department's Office of Professional Responsibility concerning various procedural errors in the corrective actions arising from Departmental General Orders and the Collective Bargaining Agreement between the Union and the Department.

On November 9, 2006, Sergeants Culver, Jackson, and Sanders appealed their respective corrective actions to Assistant Chief Newsham.

On November 13, 2006 Assistant Chief Newsham responded by ordering Commander Burton to rescind the corrective actions.

Assistant Chief Newsham also ordered the investigation reopened to ensure the correct disciplinary procedures were followed.

On November 27, 2006, Sergeants Culver, Jackson, and Sanders were issued corrective actions, a PD 750, for dereliction of duty.

The corrective actions issued November 27, 2006, relied upon the same facts and incidents that were cited in the rescinded corrective actions issued on October 19 and 24, 2006.

(Complaint ¶¶6-12) (citations to attachments omitted).

The Complaint asserts that "[t]he Department committed an Unfair Labor Practice by retaliating against Sergeants Culver, Jackson, and Sanders for appealing their disciplinary actions when it reopened and subsequently imposed the same corrective action that had already been issued and rescinded." (Complaint ¶ 15).

The case was referred to a Hearing Examiner, who held a hearing and issued a Report and Recommendation ("Report") in which he found that an unfair labor practice had not been proven. The Union did not file exceptions. The Hearing Examiner's Report is before the Board for disposition.

II. Background

In September 2006, Hilton Burton, commander of the Department's Fourth District, learned of three problems at the Fourth District station. First, fuel keys normally kept at the station under the control of the desk sergeants were missing. Second, Commander Burton noticed on two occasions that no citizen complaint forms were on the counter, although they were supposed to be available there at all times. Third, he observed that a secured door that leads into the station was taped so that it would not be secure. (Tr. at pp. 262-68; Complainant's Post-Hearing Brief Ex. 7 at p. 31). Commander Burton directed that these improprieties be investigated. Sgt. Christopher Avery investigated and prepared dereliction reports (form PD

750) and letters of prejudice for Commander Burton to sign. (Tr. at pp. 222-24). On October 19, 2006, Commander Burton issued dereliction reports (form PD 750) for the missing fuel keys and letters of prejudice for the missing complaint forms to three desk sergeants, Leah Culver, Rhonda Jackson, and Angela Sanders ("Grievants"). On October 24, Commander Burton issued official reprimands to the Grievants for allowing the security door to remain taped and thus unsecured. (Complaint Ex. 1).

On October 24, Fourth District Shop Steward Charlie Poole participated in a commander's conference on the disciplinary actions. Commander Burton testified that Officer Poole objected at the conference that the discipline had been imposed without investigation. Commander Burton further testified that he told Poole in response that the corrective actions would be rescinded and an investigation conducted. (Tr. at pp. 270-71).

Officer Poole filed with Assistant Chief Peter Newsham grievances dated November 7, 2006, on behalf of the Grievants. The grievances asserted:

On October 31, 2006 [Grievants] filed an article 10 (Release of Information) in an effort to appeal the three forms of corrective actions [they] received on or about October 24, 2006. Officer Charlie Poole, Fraternal Order of Police Representative, for [Grievants] requested all relevant documentation as it pertains to those administrative investigations. When Officer Poole made the request he advised Lieutenant Selika Brooks the reason the investigative package was needed, she replied that the corrective actions would be removed from [their] personnel files and that a letter be drafted in accordance with the Collective Bargaining Agreement.

Later on November 3, 2006 Commander Hilton Burton advised Officer Charlie Poole that he would be removing the corrective actions, which had already been served, from [Grievants'] personnel file[s]. Commander Burton further stated that he would be initiating an administrative investigation and drawing IS numbers even though the discipline had been served.

(Complaint, Ex. 3). The grievances cited collective bargaining agreement ("CBA") provisions prohibiting reprisals against employees exercising rights under the CBA and providing that discipline may be imposed only for cause. The grievances alleged that after the investigative packages were requested, "Commander Hilton Burton initiated an administrative investigation based upon the fact [the Grievants] invoked [their] rights under the Collective Bargaining Agreement." (Complaint Ex. 3). The grievances requested that the administrative investigation be ended and that all references to the corrective actions be removed from the Grievants' personnel files. *Id.*

Assistant Chief Newsham granted the grievances and ordered Commander Burton to destroy all copies of the October 19 and October 24 corrective actions. *Id.* Assistant Chief

Newsham testified at the hearing that he found that the objection that there had been no investigation was reasonable and directed that there be an investigation of the misconduct. He further testified that the alleged misconduct by the Grievants should be investigated because, if the misconduct had occurred, it should be corrected and that it was his understanding that Officer Poole agreed with proceeding in that manner. (Tr. at pp. 87-88, 107).

On November 16, 2006 the Union submitted a request dated November 8, 2006, that the Office of Professional Responsibility conduct an internal investigation of the corrective actions imposed by Commander Burton. (Complainant's Post-Hearing Brief Ex. 7 at p. 5; Complaint Ex. 2)

After further investigation of the charges against the Grievants, Commander Burton reissued the dereliction reports for the missing fuel keys on November 27. (Tr. at pp. 274-76; Complaint Ex. 4). Additionally, on December 13 he reissued the letter of prejudice for the missing complaint forms (Tr. at pp. 80 & 277). The reprimands for the unsecured security door were not reissued. (Report at p. 2).

The Union did not file a grievance appealing the re-imposition of the corrective actions. It filed the instant unfair labor practice complaint on March 26, 2007.

II. Discussion

The Union's argument in its post-hearing brief is under two headings. Under the first heading, the Union argues the Grievants were subjected to retaliation, and under the second heading the Union argues that the Grievants were subjected to double jeopardy.

A. Retaliation

The first heading of the argument section of the Union's brief is: "The Department Has Committed an Unfair Labor Practice By Reissuing Discipline In Retaliation to the Desk Sergeants' Grievances." (Complainant's Post-Hearing Brief at p. 8). Concerning the elements of an unfair labor practice claim for retaliation, the Hearing Examiner noted, "As the Complainant states (and the Respondent agrees), the PERB precedent for a prima facie case against the Respondent for retaliation entails proof of: 1) the existence of protected activity, 2) employer knowledge of such activity, 3) anti-union animus and/or an act of retaliation for union activities, and 4) a nexus concerning the timing of the events." (Report at p. 3). Two protected activities are asserted in Complainant's Post-Hearing Brief, the Union's request for an internal investigation and the grievances.

1. The Internal Investigation

With regard to the internal investigation, the Complainant argues:

[T]he timing of when the Commander approved certain discipline clearly strengthens the Union's position that he retaliated against the Desk Sergeants. Commander Burton appeared for an interview at OIA on December 14, 2006, where he was questioned about his

actions concerning the discipline he issued for Desk Sergeants Jackson, Culver and Sanders. [Union Exhibit 7] at 30-35. Only five (5) days later, on December 19, 2006, Commander Burton officially approved the reissuance of discipline against the desk sergeants in retaliation to the OPC forms investigation. See Union Exhibit 2, p. 1. As such, the anti-union elements and timing elements have easily been established in this case.

(Complainants' Post-Hearing Brief at pp. 14-15).

Notwithstanding this argument, the Union neither pleaded nor proved that the reissuance of the discipline for the complaint forms came after Commander Burton learned of the investigation. The complaint has no allegation regarding the reissuance of corrective action for the complaint forms. The only act that the complaint alleges is retaliatory—and the only act the complaint seeks to have rescinded—is the November 27 reissuance of the corrective action regarding the fuel keys. (Complaint ¶¶ 11, 12, 16(b)). Further, at the hearing the Union did not prove that discipline for the complaint forms was issued on December 19 but rather on December 13, before Commander Burton's interview. (Tr. at p. 80). Complainant's Exhibit 2, which the Complainant cites in support of the December 19 date, is a memorandum dated *October* 19, 2006 regarding the original letter of prejudice. (Tr. at p. 23). The Hearing Examiner concluded: "Commander Burton became aware that the FOP had filed a complaint against him with Internal Affairs on December 14, 2006. Commander Burton had re-issued the desk sergeants' discipline for . . . the missing OPC complaint forms on December 13, 2006—thus, again, time-wise, he could not have been reacting in retaliation because of the complaint against him at Internal Affairs." (Report at p. 4). Therefore, the Complainant did not establish a nexus concerning the timing of the internal investigation and the reissuance of corrective action for the complaint forms.

2. Grievances

With regard to the Complainant's claim of retaliation based on the filing of the grievances, it is undisputed that the filing of the grievances was a protected activity. (Report at p. 3). Commander Burton decided to conduct a formal investigation *before* the grievances were filed (*Id.* at p. 4; Tr. at p. 271; Complaint, Ex. 3), but Commander Burton and Assistant Chief Newsham knew the Grievants had filed grievances before the reissuance of the corrective actions (Report at p. 3; Tr. at pp. 88, 106-7, & 279). As the first, second, and fourth elements of Complainants' *prima facie* case were met, the question of whether the reissuance of the corrective actions was a retaliation for the filing of the grievances turns on the application of the test formulated by *Wright Line and Lamoreux*, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), and adopted by this Board: "[T]he moving or complaining party has the initial burden of establishing a *prima facie* case by showing that the union or other protected

activity was a 'motivating factor' in the employer's disputed action. That accomplished, the burden then shifts to the employer to demonstrate that the same disputed action would have taken place notwithstanding the protected activity." *AFSCME, Local 2401 v. D.C. Dep't of Human Servs.*, 48 D.C. Reg. 3207, Slip Op. No. 644 at pp. 5-6, PERB Case No. 98-U-05 (2001) (See Report at p. 3).

The Union maintains that an analysis of "the totality of the circumstances," and of two circumstances in particular, demonstrates that the grievances were a motivating factor in the reissuance of the discipline.

As the first circumstance, the Union claimed that Assistant Chief Newsham did not have authority to open an investigation after discipline had been rescinded. In support of this claim, the Union points out that Sgt. Delroy Burton testified that this case was the only time in his experience when a disciplinary matter "proceed[ed] to another phase of discipline" after a grievance remedy had been granted. (Complainant's Post-Hearing Brief at p. 11; Tr. at pp. 169-70).

Sgt. Burton acknowledged, however, "my experience with union matters is not extensive." (Tr. at p. 171). Although he may not have had experience with such a procedure, it is by no means unknown in employment law for an agency recognizing that a disciplinary action has a procedural defect² to rescind the disciplinary action, correct the deficiency, and re-impose the same discipline for the same offense. See *Jenkins v. Macy*, 357 F.2d 62, 66-67 (8th Cir. 1966); *Kaye v. Bd. of Trs. of San Diego Pub. Law Library*, 101 Cal. Rptr. 3d 456, 460 (Cal. App. 2009); *City of Bettendorf v. Kelling*, 465 N.W.2d 299, 301 (Iowa App. 1990) ("[T]he City had the right, once it discovered procedural errors in the implementation of its discipline, to withdraw its discipline without prejudicing its right to reevaluate and, if it deemed necessary, to reissue the discipline."); *Usun v. LSU Health Sciences Center Med. Center of La. at New Orleans*, 845 So. 2d 491, 496 (La. App. 2003) ("If a termination is reversed or rescinded due to procedural defects, the employer can re-use the same conduct to support a subsequent termination."); *D.C. Dep't of Consumer & Regulatory Affairs v. AFGE, Local 2725*, Slip Op. No. 1249 at p. 2; PERB Case No. 10-A-06 (Mar. 27, 2012). The witness's unfamiliarity with such procedures is not evidence for a lack of authority on the part of Assistant Chief Newsham.

The Union's other argument for the assistant chief's lack of authority is a mischaracterization of his testimony as precluding an investigation in this situation. The Union asserts, "Assistant Chief Newsham also testified that absent the occurrence of newly discovered evidence, the Department's investigation should, in fact, precede the issuance of discipline. [Tr.]

² The Complainant concedes that the Respondent was curing a procedural defect in the discipline of the Grievants. (Complainant's Post-Hearing Brief at p. 18).

at 118.” (Complainant’s Post-Hearing Brief at p.11). The Union argues that, notwithstanding Newsham’s testimony that absent newly discovered evidence investigation should precede discipline, “he personally ordered that an investigation be conducted after the fact.” (*Id.*) The testimony the Union cites was not nearly as restrictive as the Union characterizes it. Assistant Chief Newsham was only giving an example of a circumstance when an investigation may be reopened.³ Moreover, Assistant Chief Newsham’s testimony reflects that his actions were taken so that an investigation would precede discipline. He testified: “I think it’s not fair to give discipline without investigation, so that’s what I was trying to ensure, that the investigation was done.” (Tr. at p. 118). As the Complaint itself puts it, “Assistant Chief Newsham . . . ordered Commander Burton to rescind the corrective actions. Assistant Chief Newsham also ordered the investigation reopened to ensure the correct disciplinary procedures were followed.” (Complaint ¶¶ 10 & 11).

The second circumstance allegedly demonstrating that the grievances were a motivating factor is the sparse investigation done after the rescission of the disciplinary actions. The Hearing Examiner, considering the totality of the circumstances, found otherwise: “The Hearing Examiner, on the totality of the circumstances, cannot find that the Complainant has met the burden of proving that Respondent acted to retaliate against the desk sergeants because they had engaged in protected activity.” (Report at p. 3). Based on a review of the record and a consideration of the Union’s arguments in this regard, the Board finds the Hearing Examiner’s conclusion reasonable and supported by the record. Therefore, the Union failed to establish a *prima facie* case of retaliation.

B. Double Jeopardy

Following its presentation of the retaliation argument discussed above, Complainant’s Post-Hearing Brief presents a second argument under the heading “The Department Has Interfered with Certain Union Member’s Rights By Conducting an Investigation After Discipline Had Already Been Issued in Violation of the Protection Against Double Jeopardy.” (Complainant’s Post-Hearing Brief at p.15).

The D.C. Court of Appeals has explained how the expression “double jeopardy” from constitutional and criminal law⁴ has been used in the context of cases such as the case at bar:

³ “HEARING EXAMINER: Okay, let me clarify the answer. The answer is that an investigation should, in all cases, precede the issuance of discipline, and that if an investigation has been held and discipline is issued, then there’s no grounds for another investigation. Is that accurate?”

“THE WITNESS: Well, I would say, you know, there’s probably some circumstances under which you may want to reopen an investigation, if we get some additional evidence that was not -- you were not able to get back at the time the investigation was done.” (Tr. at p. 118).

⁴ “. . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .” U.S. Const. amend. V.

“The term ‘double jeopardy’ is used by the parties and the agency to describe the administrative law principle that precludes an agency from taking any adverse action against an employee who has previously been disciplined or subjected to some adverse action for the same incident. *See Adamek v. United States Postal Service*, 11 MSPB 482, 13 M.S.P.R. 224, 226 (1982). There is no contention that the double jeopardy provision in the United States Constitution applies in employee discipline matters.” *Office of D.C. Controller v. Frost*, 638 A.2d 657, 664 n.13 (D.C. 1994). If the Union is contending that the U.S. Constitution applies in employee discipline matters, as its brief at times seems to suggest, then the Board has no jurisdiction over this claim. *Hunter v. AFSCME, Dist. Council 20, Local 2087*, 59 D.C. Reg. 3983, Slip Op. No. 1201 at p. 3, 05-U-22 (2011).

In addition to the Constitution, the Union also seems to base its double jeopardy claim on the CBA: “Here, the double jeopardy principle is crystallized in the parties’ fundamental fairness guarantee of the collective bargaining agreement, which incorporates the . . . D.C. Code provision that requires discipline to be imposed only for cause. *See* D.C. Code § 1-616.51. . . .” (Complainant’s Post-Hearing Brief at p.16). An alleged violation of the CBA does not state an unfair labor practice prohibited by the Comprehensive Merit Personnel Act. *F.O.P./Metro. Police Dep’t Labor Comm. v. D.C. Metro. Police Dep’t*, 46 D.C. Reg. 7605, Slip Op. No. 384 at p. 3, PERB Case No. 94-U-23 (1994).

The novel question of whether this alleged violation of the CBA (double jeopardy) also constitutes an unfair labor practice in violation of the Comprehensive Merit Personnel Act was neither argued in the Complainant’s brief nor presented by the facts of the case. The Hearing Examiner found “that the second discipline was the only final discipline that was ever imposed in this case.” (Report at p. 5). This finding is reasonable and supported by the record.

Therefore, the Board adopts the recommendation of the Hearing Examiner “that the Complainant has not proven that the Respondent committed an Unfair Labor Practice on the facts in this case.”

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint is dismissed.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

January 31, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 07-U-27 is being transmitted via U.S. Mail to the following parties on this the 1st day of February, 2013.



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