GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
American Federation of Government Employees, Local 2725, AFL-CIO,	
Complainant,	**PERB Case No. 97-U-07**
	Opinion No. 544
v.	
District of Columbia Housing Authority,	
Respondent.	

DECISION AND ORDER [1]/

The background and issues underlying this case are set out by the Hearing Examiner in her Report and Recommendation.[2]/ The Hearing Examiner found that the Complainant American Federation of Government Employees (AFGE), Local 2725, AFL-CIO, did not meet its burden of proof that Respondent District of Columbia Housing Authority (DCHA) committed unfair labor practices proscribed by the Comprehensive Merit Personnel Act, as codified under D.C. Code § 1-618.4(a)(1), (3) and (4). The Complainants had charged that DCHA included certain bargaining unit employees in its reduction-in-force (RIF) because they either filed a grievance, sought union representation or testified in a grievance/arbitration proceeding.

Based on her findings and conclusions, the Hearing Examiner recommended that the Complaint be dismissed in its entirety. On December 24, 1997, AFGE filed Exceptions to the Hearing Examiner's Report and Recommendation.

The Complainant's Exceptions are actually its assessment of the evidence to support conclusions it believes should be drawn. Such exceptions merely disagree with the probative value and

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[1]/ Member Leroy Clark did not participate in the discussion and decision of this case.

[2]/ The Hearing Examiner's Report and Recommendation is attached as an appendix to this Opinion.

significance the Hearing Examiner accorded certain evidence over other evidence in order to support her conclusions. Based on its assessment of the evidence, the Complainant also takes issue with the Hearing Examiner's conclusion that the union failed to meet its burden of proof.[3]/ The Hearing Examiner's conclusions,

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[3]/ In assessing whether a Complainant has met its burden of proof in an dual motive case, such as the instant case, the Board has adopted the two-part test of Wright Line to determine the existence of a violation. The Wright Line standard was developed as a rule for allocating the burdens of proof to determine the existence of an unfair labor practice violation where mixed or dual motives exist, i.e., prohibited and non-prohibited, for actions taken by employers against their employees. See, Wright Line, Inc., 250 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 US 989 (1982). The Board adopted this approach in Charles Bagenstose and Dr. Joseph Borowski v. District of Columbia Public Schools, 35 DCR 415, Slip Op. No. 270, PERB Case No. 88-U-33 and 88-U-34 (1991)

Under the Wright Line analysis, the Board has observed as follows:

> ... the Complainant's "prima facie showing creates a kind of presumption that the unfair labor practice has been committed." Id. at 905. Once the showing is made the burden shifts to the employer to produce evidence of a non-prohibited reason for the action against the employee. This burden however, does not place on the employer the onus of proving that the unfair labor practice did not occur. Rather, the employer's burden is limited to a rebuttal of the presumption created by the complainant's prima facie showing. The First Circuit in Wright Line articulated this standard as "producing evidence to balance, not [necessarily] to outweigh, the evidence produced by the general counsel." Id.
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> Green v. D.C. Dept. of Corrections, 41 DCR 5991, 5993, Slip Op. No. 323, at p. 3, PERB Case No. 91-U-13 (Supp. Dec.) (1994).

Here, the Hearing Examiner found that the evidence presented by AFGE did not even establish a prima facie case that DCHA's decision to (1) include the alleged discriminatees in the reduction in force and (2) not provide them with an opportunity to be retained was motivated by reasons proscribed under the asserted unfair labor practice. Thus, the Complainant failed to present

(continued...)

however, are supported by evidence contained in the record. The evidence supporting Complainant's contentions, while also part of the record, was considered and found insufficient and/or unpersuasive to the Hearing Examiner.

Challenges to a Hearing Examiner's findings based on competing evidence do not give rise to a proper exception where, as here, the record contains evidence supporting the Hearing Examiner's conclusion. See, Clarence Mack v. D.C. Dept. of Corrections, Slip Op. No. 467, PERB Case No. 95-U-14 (1996) and American Federation of Government Employees, Local 872 v. D.C. Dept. of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Cases Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). Issues concerning the probative value of evidence are reserved to the Hearing Examiner. See, e.g., University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia, 39 DCR 6238, Slip Op. No. 285, PERB Case No. 86-U-16 (1992) and Charles Bagenstose, et al. v. D.C. Public Schools, 38 DCR 4154, Slip Op. No. 270, PERB Cases Nos. 88-U-33 and 88-U-34 (1991). Therefore, we reject Complainant's Exceptions.

Pursuant to D.C. Code § 1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings and conclusions of the Hearing Examiner and find them to be reasonable and supported by the record. We therefore adopt the recommendation of the Hearing Examiner that the Complaint be dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

The Complaint is dismissed.

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

March 12, 1998

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[3](...continued)
sufficient evidence of a violation to shift to DCHA a burden of establishing its legitimate reason. Complainant's exceptions merely disagrees with the Hearing Examiner's findings in this regard. As discussed in the text, disagreement with a hearing examiner's findings of fact based on the probative value of the evidence is not a basis for an exception.

CERTIFICATE OF SERVICE

This is to certified that the attached Decision and Order in PERB Case No. 97-U-07 faxed, hand-delivered and/or mailed (U.S. Mail) to the following parties on this the 12th day of March, 1998.

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