Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 2978,	
Complainant,	PERB Case No. 09-U-62
	Opinion No. 1348
v.	**AMENDED**
District of Columbia Office of the Chief Medical Examiner,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

On September 10, 2009, the American Federation of Government Employees, Local 2978 ("Complainant" or "Union") filed an Unfair Labor Practice Complaint ("Complaint") against the District of Columbia Office of the Chief Medical Examiner ("Respondent" or "Agency"), alleging violations of the Comprehensive Merit Personnel Act ("CMPA"), D.C. Code § 1-617.04(a)(1),(3), and (5). (Complaint at 3). Respondent filed an Answer to the Unfair Labor Practice Complaint ("Answer"), denying the alleged violations of D.C. Code § 1-617.04(a)(1), (3), and (5). (Answer at 5).

On October 1, 2009, the Union filed a Motion for Preliminary Relief ("Motion"), seeking an order requiring the Agency to delay its reduction-in-force ("RIF") of employee Muhammad Abdul-Saboor ("Grievant"). (Motion at 1). The Board denied the Motion and referred the Complaint to a Hearing Examiner for disposition. (Slip Opinion No. 1112).

A hearing was held on September 8, 2011. Both parties filed post-hearing briefs. On December 22, 2011, Hearing Examiner Gloria Johnson issued a Report and Recommendation ("Report") in which she found that the Agency violated D.C. Code § 1-617.04(a)(1), (3), and (5) by retaliatory conduct resulting in the termination of the Grievant. (Report at 38). The hearing

examiner recommended the Agency post notices, and retained jurisdiction for sixty days for the parties to propose make-whole remedies. *Id.*

The Agency filed Exceptions with the Board ("Exceptions"), alleging that the hearing examiner "overlooked critical evidence of Respondent's legitimate business reason for reducing its workforce," specifically the budgetary restraints imposed on the Agency at the time of the RIF. (Exceptions at 2). The Union filed an opposition to the Exceptions ("Opposition"), maintaining that the Exceptions "amount to nothing more than disagreement with the hearing examiner's factual conclusions, and not how she came to that conclusion." (Opposition at 6).

The hearing examiner's Report is before the Board for disposition.

II. Background

The hearing examiner found the following facts:

> Grievant was the only employee member of AFGE Local 2978 employed at the Agency. On November 19, 2008, Grievant received an admonition for allegedly refusing to drive a friend of the Chief Medical Examiner to Walter Reed Hospital after this friend gave a lecture to Agency staff.
>
> On March 19, 2009, the Grievant and his union representative met with his first line supervisor, Management Services Officer Peggy Fogg (in person), and Chief of Staff Beverly Fields (telephonically).
>
> Both the Grievant and his representative maintain that the purpose of the meeting was to attempt to, *inter alia*, informally resolve a grievance and discuss issues regarding a grievance alleging Grievant was working outside of his position description.
>
> An e-mail from Beverly Fields to Union Local President Robert Mayfield dated April 9, 2009, confirms that there was a discussion of the grievance on March 19. It states in relevant part "...the agency responded only on the date the grievance was filed (March 19, 2009), stating that the grievance was untimely and relief requested was denied. The Union clearly understood the oral response as you, Mr. Mayfield, stated that based on our response, you would take the matter to arbitration."
>
> Ms. Fields also stated in an e-mail that "[d]uring the [March 19th] discussion, you stated that the employee had a grievance regarding working outside of his position description. I informed you orally at that time that any grievance regarding this issue was

untimely...[t]he agency's oral response during the March 19, 2009, meeting was a denial of the grievance itself."

Joint Exhibit 1 bears a date stamp March 19, 2009, and is directed to Peggy J. Fogg. It purports to be a step one grievance challenging both the issuance of an illegal admonition as well as the requirement that the Grievant work outside his position description in violation of the collective bargaining agreement.

On April 13, 2009, [the Agency] denied the grievance as untimely. On April 23, 2009, [the Union] filed an amended grievance.

By letter dated May 21, 2009, Chief Medical Examiner Pierre-Louis denied Grievant's grievance as flawed, untimely, and without merit.

By notice dated August 28, 2009, [Grievant] was advised that effective September 30, 2009, he would be separated from service as Fleet Management Specialist CS-2101-07, pursuant to a reduction in force in the competitive area of Office of the Chief Medical Examiner, competitive level DS-2101-07-01-N.

Grievant's August 28, 2009, RIF notice, singed by Chief Medical Examiner Marie-Lydia Y. Pierre-Louis, M.D., indicated it was delivered by Peggy Fogg to the employee, who purportedly refused to sign.

On September 10, 2009, Local 2978 filed an unfair labor practice complaint challenging the reduction in force as retaliation for the Grievant having engaged in the protected act of filing and pursuing a grievance, and subsequent statements made in a March 19, 2009, meeting with Agency managers, Grievant, and his union representative, Robert Mayfield, who also serves as President of AFGE Local 2978.

On September 10, 2009, the Union filed an unfair labor practice complaint. On September 30, 2009, the Agency answered the complaint and denied the allegations.

(Report 2-5).

III. Discussion

A. Alleged Retaliation

The hearing examiner determined that the dispositive issues are: (1) Did the Agency engage in an unfair labor practice in violation of D.C. Code § 1-617.04(a)(1),(3), and (5) by interfering, restraining, intimidating, or retaliating against the Grievant for having engaged in protected activity; (2) Is the Agency insulated from liability by its articulated legitimate business reason for imposing its RIF of the Grievant's position, because it would have taken the employment action anyways, regardless of the protected union activity; (3) If not, what is the appropriate remedy?

The Board will affirm a hearing examiner's findings if they are reasonable and supported by the record. *See American Federation of Government Employees, Local 872 v. D.C. Water and Sewer Authority*, Slip Op. No. 702, PERB Case No. 00-U-12 (March 14, 2003).

To determine whether the Agency violated D.C. Code § 1-617.04(a)(1), (3), or (5) by interfering, restraining, intimidating, or retaliating against an employee for engaging in a protected activity, the hearing examiner applied the test articulated by the National Labor Relations Board ("NLRB") in *Wright Line v. Lamoureux*, 251 N.L.R.B. 1083, 1089 (1980), *enforced* 622 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).[1] Under *Wright Line*, a complainant has the burden to establish a *prima facie* showing that an employee's protected union activity was the motivating factor in the employer's decision to discharge him. *Id.* at 1090. To establish a *prima facie* case of a violation, the union must show that the employee (1) engaged in protected union activity; (2) the employer knew about the employee's protected union activity; (3) there was anti-union animus or retaliatory animus by the employer; and (4) as a result, the employer took an adverse employment action against the employee. *Doctors Council of the District of Columbia v. D.C. Commission on Mental Health Services*, 47 D.C. Reg. 7568, Slip Op. No. 636 at p. 3, PERB Case No. 99-U-06 (2000); *see also D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corporation,* 46 D.C. Reg. 6271, Slip Op. No. 583, PERB Case No. 98-U-07 (1999). The employer's employment decision must be analyzed according to the totality of the circumstances, including the history of anti-union animus, the timing of the employment action, and disparate treatment. *Doctors Council*, Slip Op. No. 636 at 3.

If the complaint establishes a *prima facie* case of a violation, the employer may rebut the inference by establishing, by a preponderance of the evidence, that the employment action would have occurred regardless of the protected union activity. *Wright Line*, 251 N.L.R.B. at 1089. The employer must show that it had a legitimate business reason for the employment action, and that it would have initiated the employment action even in the absence of protected union activity. *Wright Line*, 251 N.L.R.B. at 1089; *D.C. Nurses Association*, Slip Op. No. 583.

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[1] The Board has previously adopted the NLRB's reasoning in *Wright Line. See Bagenstose v. D.C. Public Schools*, 38 D.C. Reg. 4154, Slip Op. No. 270, PERB Case Nos. 88-U-33 and 88-U-34 (1991); *Ware v. D.C. Department of Consumer and Regulatory Affairs*, 46 D.C. Reg. 3367, Slip Op. No. 571, PERB Case No. 96-U-21 (1998).

The hearing examiner concluded that the Grievant was engaged in protected union activity when he pursued a grievance against the Agency for requiring him to perform work outside of his job description, and that the Agency was aware of this protected union activity. (Report at 18). The filing of a grievance is a protected activity under the CMPA. *See Teamsters Local Union No. 739 v. D.C. Public Schools*, 43 D.C. Reg. 5585, Slip Op No. 375 at pgs. 3-4, PERB Case No. 93-U-11 (1996). At the hearing, Agency chief of staff Beverly Fields testified that there was no discussion of the grievance at the March 19 meeting. (Report at 18-19). The hearing examiner did not find this testimony credible, particularly because it conflicted with written evidence showing that the grievance was brought up at the meeting. (Report at 18-19).

It is the function of the hearing examiner to determine issues of credibility. *Doctors Council*, Slip Op. No. 636 at p. 4. The Board finds that these findings are reasonable and supported by the record. Therefore, these conclusions are affirmed.

Next, the hearing examiner concluded that anti-union animus and retaliatory animus existed on the part of the Agency. (Report at 20-27). The hearing examiner determined that Ms. Fields' statement "well, we will just have to RIF him" was "intentional, threatening, [and] meant to discourage." (Report at 20). Further, she found that "telling an employee who is embroiled in a grievance meeting...that if he continues to pursue his anti-driving grievance he may lose his job, supports the reasonable interpretation that he has received a threat, discouragement from moving forward, or [an] intimidating statement." (Report at 22). Additionally, the hearing examiner concluded that the statements made at the March 19 meeting were made to interfere, restrain, and coerce the Grievant in the exercise of his rights under D.C. Code § 1-617.06. (Report at 26).

In reaching her conclusion on this point, the hearing examiner made credibility determinations and assessed the evidence presented to her. *Doctors Council*, Slip Op. No. 636 at p. 4. The Board finds that this finding is reasonable and supported by the record. Therefore, the conclusion is affirmed.

The hearing examiner concluded that the Grievant was terminated as a part of the RIF because of the Agency's anti-union animus and retaliatory animus. (Report at 31). In support of this conclusion the hearing examiner noted that Ms. Fields made her threat to the Grievant in March, and "the Agency appears to have made its decision quickly thereafter, having notified [the Grievant] in August." *Id.* The hearing examiner found "such a short time between threat and the RIF action demonstrates the necessary timing for a *prima facie* case of retaliation." *Id.* Additionally, the hearing examiner states that she was "struck by the lack of credibility and disregard for the truth shown before her at the hearing" in regards to Ms. Fields' statements, which, "considered with the other reported matters supports the contention that a violation occurred." (Report at 35).

In its Exceptions, the Agency alleges that the hearing examiner's analysis "is not supported by sound reasoning because she uses the third element of Wright Line (whether there is anti-union animus) to support the fourth element of Wright Line (that the anti-union animus was the basis for the subsequent employment action). (Exceptions at 7). The Agency states that:

> The [hearing examiner] claimed that "here there is no legitimate business reason for the statements made in the March 19 meeting..." (Report at 28). The hearing examiner found that the statement regarding whether the [Grievant] was properly represented by the [Union], and the statement that if he pursues this grievance he will be riffed, as the business reason. The [hearing examiner] committed a critical error in her analysis by stating that there was no legitimate business reason for the March 19 statement. The fourth element of *Wright Line* relates to whether [the Agency] had a legitimate business reason for taking the employment action. In this case, whether there was a legitimate business reason to make statements at the March 19 meeting. By merging the two steps, the [hearing examiner] did not address each element of the law. The law requires that a subsequent employment action occur as a result of the protected activity. The statements were not the employment action taken by the Agency. The RIF was. Hence, an analysis of why Respondent engaged in a RIF is critical. The failure of the [hearing examiner] to analyze the Respondent's legitimate business reason renders the [Report] unsupported by reasoning or the record.

(Exceptions at 7-8). Further, the Agency alleges that the hearing examiner did not consider "critical evidence of the Respondent's legitimate business reason for engaging in the reduction in force." (Exceptions at 3). Specifically, the Agency contends that the following evidence was omitted from the Report's factual record:

1. On June 25, 2009, a second gap closing measure was imposed on [the Agency] by the City Administrator. (Ex. 1).
2. [The Agency] had one week to cut its budget by another 10 percent (Tr. At 136, 211; Ex. 1).
3. In the first round of budget cuts, [the Agency] had eliminated all vacant positions.
4. The second round of budget cuts forced [the Agency] to cut nonessential employees. (Tr. At 212).
5. Prior to the second gap closing measure, [the Agency] had no intention of conducting a RIF or of eliminating [the Grievant's] position. (Tr. at 212).

(Exceptions at 4). In addition, the Agency alleges that the hearing examiner failed to analyze the burden-shifting paradigm of the *Wright Line* test by ignoring the Agency's legitimate business justification for the RIF. (Exceptions at 7). The employment action must be analyzed according to the totality of the circumstances, which in the instant case require the hearing examiner to examine the economic conditions at the time of the RIF. (Exceptions at 10).

In its Opposition, the Union states that the Hearing Examiner "carefully analyze[d] the whole of the evidence of how [the Grievant] was identified to be separated in reaching the conclusion, not that [the Agency] was constrained from running a RIF, but that the [Agency] had an unlawful motive in selecting [the Grievant] to be RIF-ed." (Opposition at 5). Further, the Union contends that the Hearing Examiner focused on the statements made at the March 19 meeting as a violation of the CMPA and as evidence of animus which, "along with a number of other factors," demonstrated that the Agency's business reason was pretextual. *Id.* The Union states that "[t]here is no authority or rationale to support the [Agency's] argument that a RIF is a special kind of business justification that if performed according to its procedural rules excuses what would otherwise be an unlawful separation of an employee." (Opposition at 5-6).

In *Wright Line*, the NLRB formulated a causation test to determine violations of the National Labor Relations Act turning on employer motivation:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Wright Line, 251 NLRB at 1089. The Board has adopted the *Wright Line* test, stating that "under the burden shifting analysis, the Union carries the initial burden of setting forth a *prima facie* case. Once a *prima facie* showing is established, the burden will shift to the employer to demonstrate that the same action (the employee's termination) would have taken place even in the absence of the protected conduct or activity." *AFGE, Local 2978 v. D.C. Department of Health*, Slip Op. No. 1256 at p. 5, PERB Case No. 08-U-47 (March 27, 2012). Relevant factors in determination the employer's motivation include a history of anti-union animus, the timing of the action, and disparate treatment. *Doctors Council*, Slip Op. No. 636 at p. 3.

In the instant case, the Hearing Examiner's reasoning for her conclusion that the Agency's legitimate business reason was pretextual is unclear. The Report states that "there is no legitimate business reason for the statements made in the March 19 grievance meeting – no way to take back the chilling effect and potential loss of confidence those illegal statements made on March 19." (Report at 28). While the March 19 statements represent a separate unfair labor practice violation (see below), the issue in the *Wright* Line burden-shifting analysis is whether the Agency demonstrated a legitimate business reason for the *employment action. See, e.g., Rodriguez v. D.C. Metropolitan Police Department*, Slip Op. No. 954, PERB Case No. 06-U-38 (July 8, 2010); *Fraternal Order of Police/Department of Corrections Labor Committee v. D.C. Department of Corrections*, Slip Op. No. 888, PERB Case Nos. 03-U-15 and 04-U-03 (September 30, 2009).

The Board has found that a complainant's *prima facie* showing creates "a kind of presumption that the unfair labor practice has been committed," and that "[o]nce 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." Instead, "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 [complainant].'" *Fraternal Order of Police/Department of Corrections Labor Committee*, Slip Op. No. 888 at p. 4. The Hearing Examiner found, and the Board affirms, that the Union made a *prima facie* showing that the Grievant's RIF was the result of anti-union and retaliatory animus. The burden then shifted to the Agency, which produced evidence that although anti-union and retaliatory animus existed, the Grievant was RIFed for economic reasons. It was then up to the Hearing Examiner to analyze the evidence of the Agency's legitimate business reason to determine if it balanced the *prima facie* showing.

Instead, the Report includes no analysis of the Agency's evidence of its legitimate business reason for taking the employment action against the Grievant. (Report at 29). In a paragraph titled "Legitimate Business Reason," the Hearing Examiner states that "there is no legitimate business reason for the statements made in the March 19 grievance meeting," (Report at 28), while under a paragraph titled "Motivation and Pretext," she states that "[i]n the instant case, there is no legitimate reason for the statements made – and once uttered, no way to take back the chilling effect and potential loss of confidence." (Report at 37). The March 19 statements can be used to show anti-union animus and support an allegation of intimidation and undermining the Union, but do not replace an analysis of the Agency's proffered legitimate business reason.

Similarly, the discussions on pages 28-37 of the Report represent at "totality of the circumstances" analysis purporting to support the Hearing Examiner's determination that the Agency did not successfully meet the *prima facie* case of retaliation. The Hearing Examiner examines the issue of the Agency's motivation for RIFing the Grievant and determines that the stated reasons are pretextual, but without first analyzing the legitimate business reason for the RIF, the Report is incomplete. As written, the Board cannot affirm this portion of the Report as reasonable and supported by the record. The Board remands this portion of the Report back to the Hearing Examiner for an analysis of the Agency's legitimate business purpose.

B. Alleged Intimidation and Undermining of the Union

In addition to her finding that the Grievant was RIFed in retaliation for filing a grievance, the Hearing Examiner concluded that the Agency violated the CMPA by making threatening statements at the March 19 meeting which had a "chilling effect" and created a "potential loss of confidence" in the Union's ability to represent its members. (Report at 28). Specifically, the statement that the Grievant would be RIFed for pursuing his grievance, and the statement questioning whether the Union was the proper union to represent the Grievant, were construed as threats intended to intimidate the Grievant and undermine the Union. (Report at 24).

The Agency does not except to this determination, other than to state that the analysis of the March 19 statements do not pertain to the burden shifting paradigm of the *Wright Line* test.

(Exceptions at 8). In its Opposition, the Union alleges that the Agency's "exceptions muddle the Hearing Examiner's retaliation findings with her findings that [the Agency] also violated the CMPA by undermining the Union and threatening and coercing [the Grievant]." (Opposition at 7).

The Board finds that the Hearing Examiner's conclusion that the Agency violated the CMPA by making threatening the Grievant and undermining the Union is reasonable and supported by the record. Therefore, this finding is affirmed.

In conclusion, the Hearing Examiner's conclusions as to the first three elements of the *Wright Line* test are affirmed. The Board is unable to affirm the Hearing Examiner's conclusion regarding the fourth element of the *Wright Line* test due to an incomplete analysis. The Hearing Examiner's conclusion that the Agency violated the CMPA by threatening the Grievant and undermining the Union is affirmed.

ORDER

1. The Hearing Examiner's Report and Recommendation is affirmed in part.

2. The District of Columbia Office of the Chief Medical Examiner shall cease and desist from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by D.C. Code § 617.04(a)(1), (3), and (5) by threatening employees with termination for pursuing grievances or undermining an exclusive representative.

3. The District of Columbia Office of the Chief Medical Examiner shall conspicuously post, within ten (10) days from the issuance of this Decision and Order, the attached Notice where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.

4. The District of Columbia Office of the Chief Medical Examiner shall notify the Public Employee Relations Board in writing within fourteen (14) days from the issuance of this Decision and Order that the Notice has been posted accordingly.

5. The issue of whether the District of Columbia Office of the Chief Medical Examiner presented sufficient evidence of a legitimate business reason for the employment action against the Grievant is remanded to the Hearing Examiner for analysis and a further Report and Recommendation. If there was a legitimate reason for the employment action, the Hearing Examiner will make a determination as to the fourth element of *Wright Line* to the case at hand.

6. 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 2, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached AMENDED Decision and Order in PERB Case No. 09-U-62 was transmitted via U.S. Mail and e-mail to the following parties on this the 9th day of January, 2013.

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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA OFFICE OF THE CHIEF MEDICAL EXAMINER ("OCME"), 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. 1348, PERB CASE NO. 09-U-62 (January 2, 2013).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered OCME to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1), (3), and (5) by the actions and conduct set forth in Slip Opinion No. 1348.

WE WILL cease and desist from interfering with, restraining, or coercing employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act ("CMPA") by threatening employees with termination for pursuing grievances or undermining an exclusive representative.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce employees in their exercise of rights guaranteed by the Labor-Management subchapter of the CMPA.

District of Columbia Office of the Chief Medial Examiner

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 compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 1100 4th Street, SW, Suite E630; Washington, D.C. 20024. Phone: (202) 727-1822.

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

January 25, 2013