

**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 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:	)	
	)	
Hina L. Rodriguez,	)	
	)	
Complainant,	)	PERB Case No. 06-U-38
	)	
v.	)	
	)	Slip Op. No. 906
District of Columbia Metropolitan Police	)	
Department,	)	
	)	
Respondent.	)	
	)	

**DECISION AND ORDER**

**I. Statement of the Case**

Hina L. Rodriguez ("Complainant"), a police officer, filed an unfair labor practice complaint ("Complaint") alleging that the Metropolitan Police Department ("MPD" or "Respondent") violated D.C. Code § 1-617.04(a)(1) and (4) and D.C. Code § 1-617.06 by: (1) discriminating against her with regard to hiring or tenure of employment; and (2) unlawfully transferring her from her position in retaliation for filing a grievance. (See Compl. at p. 2). The Complainant requests that the Board find that MPD violated the Comprehensive Merit Personnel Act ("CMPA") and award the Complainant reasonable costs and attorney fees. MPD filed an Answer denying the allegations.

A hearing was held and the Hearing Examiner issued a Report and Recommendation ("R&R") recommending that the Complaint be dismissed. The Complainant filed Exceptions and Amended Exceptions. In response, MPD filed an Opposition.

The Hearing Examiner's R&R, the Complainant's Exceptions and Amended Exceptions and MPD's Opposition are before the Board for disposition.

**II. Background**

The Complainant is an officer employed by MPD. In December 2000 she was detailed from the Seventh District to the Major Narcotics Branch, now the Narcotics and Special Investigations

Division ("NSID"). Specifically, she was assigned as an acting Investigator/Detective in the Financial Investigation Unit/Asset Forfeiture Division ("FIU/AFD"). In FIU/AFD, the Complainant performed administrative duties such as working on asset forfeitures, seizure of money connected to narcotics and guns, and initiating warrants for bank accounts. She continued to encumber a position in the Seventh District while performing her detail. In 2002, the Complainant's superiors encouraged her to apply for a transfer to an officer position in the Strike Force, within the same command as FIU/AFD, as a personnel mechanism to facilitate her continued detail in the FIU/AFD. The Complainant applied for the Strike Force officer position in 2002 only for the purpose of being transferred into NSID and thus continue her work in the FIU/AFD. (See R&R at p. 3).

In August 2005, a new commander, Commander Thomas McGuire, was assigned to NSID. He found serious problems with the unit, including personnel working out of classification. (See R&R at p. 4). He instructed his five (5) lieutenants to determine how officers had come to work in detective positions. (See R&R at p. 4). The inquiry revealed that officers were performing detective work and detectives were performing officer work. Commander McGuire concluded that organizational restructuring was needed to properly match personnel assignments with their job descriptions. (See R&R at p. 4, 11).

On October 20, 2005, the Complainant filed a group grievance with the Chief of Police alleging a violation of the collective bargaining agreement Article 26 - "Temporary Details and Acting Pay". (R&R at p. -). The grievants were officers seeking detective's contractual rate of pay for performing detective duties for over 90 days. In January 2006, the Complainant was reassigned within FIU/AFD to work in the Strike Force. As a result of her reassignment, the Complainant filed the Complaint in the present case. (See R&R at p. 10).

### **III. Hearing Examiner's Report and Recommendation, Complainant's Exceptions and Amended Exceptions and MPD's Opposition**

Based on the pleadings, the record developed at the hearing and the parties' post-hearing briefs, the Hearing Examiner identified several issues for resolution. These issues, his findings and recommendations and the Complainant's Exceptions and Amended Exception and MPD's Opposition are as follows:

#### *I. Does the Board have jurisdiction over this matter?*

Citing *Fraternal Order of Police v. Office of Police Complaints*, PERB Case No. 06-U-27, MPD argued that this matter should be dismissed because it does not allege an unfair labor practice, but rather, raises a matter that involves a contractual right under the parties' collective bargaining agreement ("CBA"). The Complainant countered that this matter implicates rights under the CMPA, alleging that her reassignment was in retaliation for exercising her right to file a grievance.

The Hearing Examiner noted that the case cited by MPD, PERB Case No. 06-U-27, involved an unfair labor practice complaint filed by a police officer who claimed that an internal investigation had been conducted in a manner that violated his rights under the parties' CBA. (See R&R at pgs. 5-6). That complaint was administratively dismissed by the Board's Executive Director. Citing Board precedent the Executive Director determined that the Board lacked jurisdiction under the CMPA to address violations of the parties' CBA. In the present case, the Hearing Examiner determined that unlike PERB Case No. 06-U-27, this matter does not involve an alleged violation of the parties' CBA. He identified the issue in this matter as: "whether MPD's decision to reassign the Complainant from her job in the Asset Forfeiture Unit to the Strike Force was taken as an act of retaliation for her filing a grievance." (R&R at p. 6). Thus, the Hearing Examiner found that the Complainant clearly articulated a statutory claim under the CMPA, rather than a contractual claim. He concluded, therefore, that the Board has jurisdiction over the dispute. (See R&R at p. 6). No exceptions were filed concerning this finding.

The Board observed in *American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2921 v. District of Columbia Public Schools*, 42 DCR 5658, Slip Op. No. 339 at p. 3, PERB Case No. 92-U-08 (1995) that it "has always made a distinction between obligations that are statutorily imposed under the CMPA and those obligations that are contractually agreed-upon between the parties. . . . [T]he CMPA provides for the resolution of the former, . . . while the parties have contractually provided for the resolution of the latter, vis-a-vis, the grievance and arbitration process contained in their collective bargaining agreement. In view of the above, [the Board has] concluded, that [it] lack[s] jurisdiction over alleged violations that are strictly contractual in nature."<sup>1</sup>

In the present case, the allegation involves an employee's right to file a grievance. We have found that the filing of a grievance is protected activity under the CMPA. See *Teamsters Local Union No. 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO/CLC v. District of Columbia Public Schools*, 43 DCR 5585, Slip Op. No. 375 at pgs. 3-4, PERB Case No. 93-U-11 (1996), citing *Charles Bagenstose and Dr. Joseph Borowski v. District of Columbia Public Schools*, 38 DCR 4154, Slip Op. No. 270 at pgs. 7-12, PERB Case No. 88-U-33 and 88-U-34 (1991). We find that the Complainant's claim involves an alleged statutory violation and not a contractual violation. Therefore, the Board has jurisdiction over the Complainant's allegation that her reassignment was in retaliation for filing a grievance. In light of the above, we adopt the Hearing Examiner's finding that we have jurisdiction over this Complaint.

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<sup>1</sup>See also, *Georgia Mae Green v. District of Columbia Department of Corrections*, 37 DCR 8086, Slip Op. No. 257 at p. 4, PERB Case No. 89-U-10 (1990) and *American Federation of Government Employees, Local Union No. 3721 v. D.C. Fire Department*, 29 DCR 8599, Slip Op. No. 287 at p. 4, PERB Case No. 90-U-11 (1991).

2. *Did Respondent Metropolitan Police Department unlawfully violate the CMPA when it reassigned Complainant from her position in the Asset Forfeiture Unit to the Strike Force?*

The Hearing Examiner found that when Commander McGuire arrived at the NSID, he instructed his lieutenants to identify any personnel working outside of their job classifications and reassign them to their appropriate position. Pursuant to Commander McGuire's instructions, in January 2006, Lieutenant Nunnaly, the Complainant's supervisor, advised the Complainant that she would be reassigned within NSID from the Asset Forfeiture Division (a detective position) to the Strike Force (an officer position). In response, the Complainant informed Lieutenant Nunnaly that she had been permanently assigned to FIU/AFD. Lieutenant Nunnaly asked for the vacancy announcement that the Complainant believed would support her claim that she was permanently assigned to FIU/AFD. However, the search revealed that the Complainant had been detailed, not permanently assigned, to FIU/AFD. (See R&R at p. 4). Furthermore, the Complainant had applied for a position as an officer within NSID. Therefore, the Complainant was assigned to an officer position in the Strike Force in January 2006 (See R&R at pgs. 4, 10). The Hearing Examiner found that the Complainant was upset and believed that she was being transferred because she had filed a grievance. (R&R at pgs. 4, 10).

In analyzing whether the Complainant's reassignment was in retaliation for her filing a grievance, the Hearing Examiner acknowledged that MPD has a management right to reassign employees. (See R&R at pgs. 6, 7 and 12). He further stated that "while MPD has the general right under the CMPA and the collective bargaining agreement to assign its employees, it would be an unlawful [practice] for the Department to reassign Complainant in retaliation for engaging in protected conduct, e.g., filing a grievance under the collective bargaining agreement. The [Board] has held that the filing of grievances under the collective bargaining agreement constitutes protected activity." Citing *inter alia*, *Doctors Council of the District of Columbia v. D.C. Commission on Mental Health Services*, 43 DCR 5585, Slip Op. No. 636 at p. 3, PERB Case No. 99-U-06 (2000); *Wright Line*, 251 NLRB 1083 (1980, enf'd. 662 F.2d 889 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982)). (R&R at pgs. 8-9).

In order to establish that MPD retaliated against her for filing a grievance, the Hearing Examiner stated that the Complainant must show that: (1) she engaged in protected union activity; (2) the agency knew of the activity; (3) there was animus by the agency; and (4) the agency took action against her."<sup>2</sup> (R&R at p. 9). The Hearing Examiner noted that: "[i]t is uncontested that Complainant participated in a [g]roup [g]rievance in October 2005 [and] was reassigned to the Strike Force in January 2006, which the Complainant viewed as adverse and retaliatory." (R&R at p. 10).

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<sup>2</sup>Citing also *Teamsters Local Union No. 730 v D.C. Public Schools*, 43 DCR 5585, Slip Op. No. 375, PERB Case No. 93-U-11 (1994); *Charles Bagenstose and Dr. Joseph Borowski v. D.C. Public Schools*, 38 DCR 4154, Slip Op. No. 270, PERB Case No. 88-U-33 (1991).

Relying on *Doctors Council of the District of Columbia v. D.C. Commission on Mental Health Services*, 47 DCR 7568, Slip Op. No. 636 at p. 3, PERB Case No. 99-U-06 (2000), the Hearing Examiner determined that the "Complainant . . . has shown that she engaged in protected union activity and the Department 'took action' 'against' her, meeting elements 1 and 4 of her burden of proof under *Doctors Council*."<sup>3</sup> (R&R at p. 10).

The Hearing Examiner noted that in order to prevail on a claim of retaliation for protected activity, the Complainant must demonstrate "that the Department knew of her protected activity and acted out of animus toward her because of it." (R&R at p. 11). With regard to the third element, "knowledge", the Hearing Examiner found that Commander McGuire, who claimed full responsibility for ordering the Complainant's reassignment, had no knowledge that Hina Rodriguez had filed a grievance. (See R&R at pgs. 10-11). Therefore, the Hearing Examiner concluded that the Complainant had "failed to show the individual responsible for the involuntary reassignment had knowledge of her protected conduct. [The Hearing Examiner further found that the] Complainant's failure to produce persuasive evidence showing [that] the persons responsible for her reassignment knew of her protected activity [was] fatal to her complaint." (R&R at p. 11).

Regarding the issue of animus, the Hearing Examiner concluded as follows:

[T]here is no persuasive evidence that the Department had animus toward the members of the [g]roup [g]rievance, including the Complainant. The evidence most favorable to Complainant is only inferential at best, and largely relies on the temporal proximity between the filing of the [g]roup [g]rievance and the reassignment. It appears all or most members of the [g]roup [g]rievance (including Complainant) were reassigned in January 2006, about 2-3 months after filing their grievance seeking higher pay. As noted in [*American Gardens Management Co.*, 338 NLRB 644, 645 (2002),<sup>4</sup>] temporal proximity between protected conduct and action which a complainant views as adverse may be sufficient to infer retaliatory motive. In this instance, however, it is apparent the moving force behind Complainant's reassignment (and the apparent reassignment of her co-

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<sup>3</sup>*Doctors' Council of the District of Columbia v. D.C. Commission on Mental Health Services*, 47 DCR 7568, Slip Op. No. 636 at p. 3, PERB Case No. 99-U-06 (2000).

<sup>4</sup>The Hearing Examiner cited *La Gloria Oil*, 337 NLRB 1120 (2002) enfd. Mem. 71 Fed. App. (5<sup>th</sup> Cir. 2003) (Table), in footnote number 1 of his R&R for the proposition that "where an adverse action occurs shortly after an employee has engaged in protected activity, the NLRB has held that an inference of unlawful motive is raised." (See R&R, n. 1, p. 10).

grievants) was the arrival of a new leader in the Division, Commander McGuire, in August 2005. . . . According to Commander McGuire, his directive to move staff into positions appropriate to their job classification (officers into officer positions, detectives into detective positions, etc.) applied across the Division. Even Complainant conceded that other staff within the Division who were *not* participants in the [g]roup [g]rievance were moved as part of the realignment. Tr. 56. To the extent most other members of the [g]roup [g]rievance were 'swept up' in the reassignments (Tr. 54-55), this is hardly surprising, inasmuch as the crux of their grievance alleged they were performing work out of their job classification and therefore were entitled to additional compensation.

(R&R at p. 11).

Moreover, the Hearing Examiner found that "Commander McGuire's decision to assign officers to perform work within their job classification fell within management's reserved rights under the labor agreement, and was not discriminatory." (R&R at p. 12). The Hearing Examiner determined that "[n]o evidence was produced by Complainant to rebut the Department's non-discriminatory explanation for its action or demonstrate it is pretextual." (R&R at pgs. 11-12). He concluded, therefore, that the Complainant did not demonstrate that the reassignment was unlawful and recommended that the unfair labor practice complaint be dismissed. (See R&R at p. 13).

### 3. *Exceptions*

The Complainant takes exception to the Hearing Examiners finding that MPD had no knowledge of her filing a grievance and that there was no evidence of animus by MPD against the Complainant. Specifically, the Complainant takes exception to the Hearing Examiner's finding that Commander McGuire had no knowledge that she filed a grievance. In support of this claim, the Complainant asserts that there was evidence in the record, not relied upon by the Hearing Examiner, that Lieutenant Nunnally discussed with two officers, Officer Pena and Detective Gerrish, that the Complainant was going to be moved from her unit because she had participated in the grievance process. (See Exceptions at p. 15). The Complainant further contends that "there is also circumstantial evidence which demonstrates the obvious nature of the actions that took place in this matter by Respondent." (Exceptions at p. 2, Amended Exceptions at pgs. 6-13). Additionally, the Complainant argues that it was illogical for the MPD to remove her from her unit and place her in an assignment where she had no experience. (Exceptions at p. 6). In support of this argument, the Complainant maintains that the following set of facts show that her transfer was retaliatory: (1) "the strange procedures used by the Department in intentionally not notifying the Complainant about her reassignment" (Exceptions at p. 10); (2) she received no response from upper level management to her letter requesting a written explanation for her "transfer" (Exceptions at p. 10); and (3) MPD had asserted that the Complainant's reassignment was based on the needs and demands of the Agency as

assessed by Commander McGuire, but these needs were never explained. (See Exceptions at p. 11). The Complainant requests that the Board either reverse the Hearing Examiner's findings or, in the alternative, remand the case for additional investigation and hearing. (See Exceptions at p. 1). The Complainant also requests oral argument before the Board. (See Exceptions at p. 14).

MPD counters in its Opposition that the Complainant never applied for an investigator/detective position. (See Opposition at p. 13). Also, MPD contends that there is no requirement to give a written explanation for a reassignment that is within the same division. (See Opposition at pgs. 6, 13-14). Furthermore, MPD claims that the "evidence supports [its] position that Officer Rodriguez' assignment to the Strike Force, the position for which she applied and was selected, was based upon Commander McGuire's decision to place members in their appropriate positions and not because of any act of reprisal or retaliation for filing a grievance." (Opposition at p. 9). The Respondent maintains that Commander McGuire exercised a management right to reassign employees when he ordered that staff be moved into positions appropriate to their job classification. Finally, MPD asserts that the evidence does not support the Complainant's argument that MPD retaliated against her by changing her assignment for filing or participating in the filing of a grievance. (See Opposition at p. 9).

As previously noted, the Complainant challenges the Hearing Examiner's findings that Commander McGuire had no knowledge of her filing a grievance when he ordered her reassignment. (See Exceptions at pgs. 5, 11-12; Amended Exceptions at pgs. 1, 4, 9-10). She also takes exception to the Hearing Examiner's findings concerning the testimony of Officer Pena and Detective Gerrish and Lieutenant Nunnally. (See Exceptions at p. 13; Amended Exceptions at pgs. 18-20). The Complainant would have us adopt her interpretation of the witnesses' testimony and the Hearing Examiner's findings on the elements of knowledge and animus. However, this Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Tracy Hatton v. FOP/DOC Labor Committee*, 47 DCR 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (1995). Furthermore, challenges to a hearing examiner's findings, "based on competing evidence" do not give rise to a legitimate exception. *Ware v. D.C. Dep't of Consumer and Regulatory Affairs*, 46 DCR 3367, PERB Slip Op. No. 571 at p. 3, PERB Case No. 96-U-21 (1998). Therefore, the Complainant's disagreement with the Hearing Examiner's findings is not a sufficient basis for setting aside his findings. The Complainant has not shown that Commander McGuire was aware that she had filed a grievance. We adopt the Hearing Examiner's findings that Commander McGuire first asked his lieutenants to move the staff into positions appropriate to their job classifications when he first arrived at the NSID and that he had no knowledge that the Complainant had filed a grievance when he ordered the reassignment of personnel to their appropriate job descriptions. (See R&R at pgs. 4, 10-11).

The Complainant also argues that there is "evidence in the record not relied upon by the Hearing Examiner" to support her allegation that MPD violated the CMPA. (Amended Exceptions at pgs. 7-11). We have held that 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*, 43 DCR 5136, 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 No. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). Thus, we conclude that the Hearing Examiner's finding that the Complainant's reassignment was not retaliatory in nature, is reasonable and supported by the record.

The Complainant's other exceptions center on the Hearing Examiner's findings pertaining to the MPD's motivation in ordering her reassignment. The Board has acknowledged that "[d]etermining motivation is difficult. Therefore a careful analysis must be conducted to ascertain if the stated reason for the reassignment is pretextual. The employment decision must be analyzed according to the 'totality of the circumstances'. Relevant factors include a history of anti-union animus, the timing of the action, and disparate treatment." *Doctors Council of the District of Columbia v. D.C. Commission on Mental Health Services*, 47 DCR 7568, Slip Op. No. 636 at p. 3, PERB Case No. 99-U-06 (2000), citing *NLRB v. Nueva*, 761 F.2d 961, 965 (4<sup>th</sup> Cir. 1985)." (R&R at p. 9). We note that the Hearing Examiner determined as follows: "Although the temporal proximity between the grievance and the reassignment reasonably may have caused Complainant to suspect the two events were linked [the filing of the grievance and her reassignment], . . . no evidence was produced by Complainant to rebut [MPD's] non-discriminatory explanation for its action or demonstrate that it was pretextual." (R&R at pgs. 11-12). Further, the Hearing Examiner found no evidence of animus toward the Complainant. (See R&R at p. 11). Also, he determined that the reassignments were made division-wide and included officers who had not filed a grievance. (See R&R at p. 11). This does not support a finding of disparate treatment by MPD. In view of the above, we adopt the Hearing Examiner's finding that the Complainant has not shown that MPD's motivation was pretextual. Rather, the reassignment was for a legitimate business reason.

Under *Wright Line*, 251 NLRB 1083 (1980, enf'd. 662 F.2d 889 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982), the moving or complaining party has the initial burden of establishing a *prima facie* case by showing that the union activity or other protected activity was a "motivating factor" in the employer's disputed action. That accomplished, the burden shifts to the employer to demonstrate that the same disputed action would have taken place notwithstanding the protected activity. In considering whether the Complainant made a *prima facie* case, the Hearing Examiner determined that the Complainant failed to show that the person who ordered the reassignment knew that she filed a grievance. The Hearing Examiner found this to be fatal to the Complainant's position, as the motivation for ordering the reassignment could not have been retaliation for filing the grievance.

Furthermore, the Hearing Examiner found that the Respondent's actions were based on a legitimate management right to reassign employees who were working outside of their position descriptions. This supports our conclusion that, under the circumstances of this case, the same disputed action would have taken place notwithstanding the protected activity.

Other than the Complainant's disagreement with the credibility findings of the Hearing Examiner, her exceptions merely repeated arguments concerning MPD's alleged knowledge of her protected activity and the motivation for her reassignment. These arguments were presented to and rejected by the Hearing Examiner. The Board has held that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the findings where they are fully supported by the record. *See, American Federation of Government Employees, Local 874 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). A review of the record reveals that the Hearing Examiner's determinations that the Complainant has not demonstrated that the reassignment was unlawful and that the unfair labor practice complaint should be dismissed are reasonable, and supported by the evidence and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's finding that the Respondent was exercising a legitimate statutory management right under the CMPA at D.C. Code § 1-617.08.

Pursuant to D.C. Code § 1-605.02(3) and Board Rule 520.14, we find that the Hearing Examiner's findings and conclusions are reasonable, supported by the record and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's recommendation that: (1) there has been no violation of the CMPA; and (2) the complaint should be dismissed in its entirety.

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. The Hearing Examiner's findings and recommendations are adopted. The unfair labor practice complaint is dismissed.
2. Pursuant to Board Rule 559.1, this decision is final upon issuance.

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

January 30, 2008

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 06-U-38 was transmitted via Fax and U.S. Mail to the following parties on this the 30<sup>th</sup> day of January 2008.

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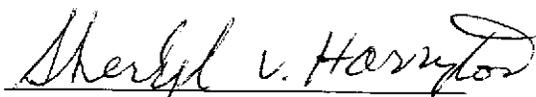
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