

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 formal 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:)	
)	
Barbara J. Milton,)	
)	
Complainant,)	
)	
v.)	PERB Case No. 98-U-28
)	Opinion No. 574
District of Columbia Water and Sewer Authority,)	MOTION FOR RECONSIDERATION
)	
Respondent.)	
)	
)	
)	

DECISION AND ORDER

On October 20, 1998, the Board, upon consideration of alleged violations of the Comprehensive Merit Personnel Act's (CMPA) unfair labor practice provision, issued a Decision and Order (Slip Opinion No. 566) in the above-captioned case granting the Complainant's request for preliminary relief against the District of Columbia Water and Sewer Authority (WASA or Respondent). The preliminary relief: (1) ordered WASA to immediately rescind the Complainant's detail/transfer and return the Complainant to the Construction Management Branch; (2) enjoined WASA from withdrawing any reasonable accommodation previously made for the Complainant and from requesting additional documentation from the Complainant to justify such reasonable accommodation; and (3) ordered WASA to cease and desist from violating the CMPA or taking any retaliatory action or reprisals against the Complainant for acts or conduct arising out of PERB Case Nos. 98-U-24 and 98-U-28.

On October 30, 1998, the Complainant filed a Petition for Enforcement pursuant to Board Rule 560.^{1/} On November 3, 1998, the

^{1/} In light of the fact that the Respondent filed the instant Motion for Reconsideration, it is not necessary at this
(continued...)

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Respondent filed a "Motion for Reconsideration" and a "Response to the Complainant's Motion for Enforcement of PERB Slip Op. No. 566." Respondent's Motion for Reconsideration requests that the Board vacate its Order granting preliminary relief. On November 9, 1998, the Complainant filed a Response to the Respondent's Motion for Reconsideration.

WASA's Motion relies mainly on the first-time affidavit of Mr. Leonard Benson and related evidence to support its contention that it did not violate the CMPA when it transferred the Complainant and denied her training request.^{2/} Specifically, WASA contends for the first time that "[c]ontrary to the initial Decision and Order issued by PERB on October 20, 1998, . . . [the Complainant's] transfer was only due to a business necessity exacerbated by the Complainant's personality conflict with her supervisor." (Emphasis added.) Resp.'s Brief at p. 7. Also, WASA claims that the "reasonable accommodation" granted to the Complainant "was not a 'reasonable accommodation' in the A[mericans with] D[isabilities] A[ct] sense; . . . [but] merely a staffing accommodation that worked to the benefit of all parties." Resp.'s Brief at p. 16. In addition, WASA asserts that the Complainant's training request could not be considered on Mr. Benson's return from vacation due to other pressing agency business which he had to attend to.^{3/} Affid. at para. 10.

We take seriously any allegations concerning retaliation. In granting preliminary relief we found that "by predicating Complainant's transfer on her filing an unfair labor practice complaint, WASA's conduct [was] 'clear cut and flagrant'." Slip Op. No. 566 at p.4. We found critical a WASA memorandum recommending Complainant's transfer because she filed an unfair labor practice complaint. Also, we found that by denying the Complainant's

¹(...continued)
time to rule on the Complainant's motion.

^{2/} Leonard Benson is employed by WASA and serves as the Director of the Department of Engineering and Technical Services.

³ Mr. Benson indicated in his affidavit that even if he had known of the Complainant's training request on the day he returned from vacation there would not have been sufficient time to process the training request because training requests take about thirty days to process. Affid. at para. 10.

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training request after Mr. Benson's scheduled return, there was reasonable cause to believe that WASA's denial of the Complainant's training request constituted further retaliation against the Complainant for filing her unfair labor practice complaint. Slip Op. No. 566 at p. 4.

Finally, we found that by implementing its decision to detail/transfer the Complainant -- conduct which we [found took] away a reasonable accommodation that was previously made for the Complainant in order to accommodate her claimed disability⁴/ -- WASA [had] interfered with the Board's processes and rendered inadequate, under the circumstances, the Board's ultimate remedial authority." Slip Op. No. 566 at p. 4-5.

Therefore, we concluded that under the facts of this case, "the alleged violation and its impact satisfied two of the disjunctive criteria proscribed by Board Rule 520.15 for which preliminary relief may be accorded. Id. Also, we concluded that "the remedial purposes of Board Rule 520.15 [would] be served by pendente lite relief for the Complainant, who (in the instant case) would otherwise lose a reasonable accommodation previously made for her, pending the full extent of the Board's processes before relief is ordered." Id.

The affidavit presented by WASA is at odds with the memorandum recommending transfer. This post-hoc rationalization, coming as it does only after we granted preliminary relief, raises credibility questions and must be tested in a hearing. In view of the above, WASA's request that we vacate our Order granting interim preliminary relief is denied. However, since our Order is interim and preliminary in nature, any evidence the parties now wish to offer may be properly presented at the hearing that we also directed in our earlier Order (Slip Op. No. 566) granting preliminary relief.⁵

⁴/ We find that it does not matter whether the accommodation was mandated by the ADA. Once WASA makes an accommodation it can't withdraw it because the Complainant filed an unfair labor practice complaint.

⁵ Two days of hearings have already taken place. Additional hearing dates are scheduled for January 4-6, 1999.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Respondent's Motion for Reconsideration of the Board's Decision and Order in Opinion 566 is denied.
2. The District of Columbia Water and Sewer Authority shall immediately rescind the Complainant's August 24, 1998 detail/transfer to the Utility Inspection Branch and return the Complainant to her position in the Construction Management Branch pending our determination in PERB Case Nos. 98-U-24 and 98-U-28.
3. The District of Columbia Water and Sewer Authority, its agents and representatives shall continue to be enjoined from: (a) withdrawing any reasonable accommodation previously made for the Complainant and agreed to; and (b) requesting additional documentation from the Complainant to justify any reasonable accommodation previously agreed to.
4. The District of Columbia Water and Sewer Authority, its agents and representatives shall cease and desist from violating (1) the Comprehensive Merit Personnel Act or (2) taking any retaliatory action or reprisals against the Complainant for acts or conduct arising out of PERB Case Nos. 98-U-24 and 98-U-28.
5. The District of Columbia Water and Sewer Authority shall notify the Public Employee Relations Board, in writing, within ten (10) days from the issuance of this Decision and Order, that it is complying with the terms of this Order.
6. Following the hearing in PERB Case Nos. 98-U-24 and 98-U-28, the designated hearing examiner shall submit a report and recommendation to the Board not later than twenty (21) days following the conclusion of closing arguments (in lieu of post-hearing briefs).
7. Parties may file exceptions and briefs in support of the exceptions not later than seven (7) days after service of the hearing examiner's report and recommendation. A response or

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opposition to exceptions may be filed not later than five (5)
days after service of the exceptions.

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

December 14, 1998

CERTIFICATE OF SERVICE

This is to certify that the attached corrected Decision And Order on Request For Preliminary Relief in PERB Case No. 98-U-28 was sent via facsimile and/or mailed (U.S. Mail) to the following parties on the 14th day of December 1998.

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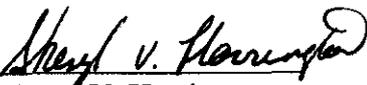
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