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GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:)	
)	
Teamsters, Local Union No. 1714,)	
a/w International Brotherhood of)	
Teamsters, Chauffeurs, Warehousemen,)	
and Helpers of America, AFL-CIO,)	PERB Case No. 92-U-09
)	Opinion No. 360
Complainant,)	
)	
v.)	
)	
District of Columbia)	
Department of Corrections,)	
)	
Respondent.)	

DECISION AND ORDER

On March 10, 1992, Teamsters Local Union No. 1714, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO (Teamsters) filed an Unfair Labor Practice Complaint (Complaint) with the Public Employee Relations Board (Board). The Complainant charged that the D.C. Department of Corrections (DOC) violated the Comprehensive Merit Personnel Act (CMPA), D.C. Code Sec. 1-618.4(a)(1) and (2). Specifically, the Teamsters' Complaint, as subsequently amended at a Board hearing in this proceeding, alleged that DOC threatened and interfered with Teamsters' representatives in violation of D.C. Code Sec. 1-618.4(a)(1). The Teamsters further alleged that DOC permitted and encouraged the solicitation, during working hours, of employees by a rival labor organization in violation of D.C. Code Sec. 1-618.4(a)(2). ^{1/} DOC, in its Answer, generally

^{1/} Complainant Teamsters was certified as the exclusive bargaining representative for a wall-to-wall unit of employees at DOC in District of Columbia Department of Corrections, and Teamsters Local Nos. 1714 and 246 a/w International Brotherhood

(continued...)

denied the commission of any unfair labor practice.^{2/}

By Notice dated October 7, 1992, the Board ordered that a hearing be conducted before a duly-designated hearing examiner. A hearing was held on October 30 and November 6, 1992.

In a Report and Recommendation issued on May 14, 1993, (a copy of which is appended to this Opinion as Appendix A)^{3/}, the Hearing Examiner concluded that Respondents violated D.C. Code

^{1/}(...continued)
of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
PERB Case No. 84-R-09, Certification No. 33 (Amended April 15,
1987).

(FOP), had sought recognition as the exclusive representative of the unit of employees represented by the Teamsters in a Petition filed March 16, 1992. See, Fraternal Order of Police/Department of Corrections Labor Committee and D.C. Department of Corrections and Teamsters Local Nos. 1714 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, CLC, _____, DCR _____, Slip Op. No. 327, PERB Case No. 92-R-05 (1992). The Board ultimately dismissed FOP's Petition, having found a contract bar based on the collective bargaining agreement between DOC and the Teamsters.

^{2/} On April 30, 1992, the Board issued an Order, Opinion No. 311, denying DOC's request, in its Answer, that the allegations contained in the Complaint be dismissed as vague or otherwise not in conformance with the Board's Rules for filing complaints. In that Order, the Board also denied, as premature, the Teamsters' request, based on the Complaint allegations, that the Board hold in abeyance the processing of PERB Case No. 91-R-03. That case concerned a then pending representation petition filed by the International Union of Police Associations. The Petition in that case was dismissed by the Board based on the same contract bar found in PERB Case No. 92-R-05. (See n. 1.) D.C. Corrections Employees Union, International Union of Police Associations, Local 1990, AFL-CIO and D.C. Department of Corrections and Teamsters Local Union No. 1714 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, CLC, _____ DCR _____, Slip Op. No. 326, PERB Case No. 91-R-03 (1992).

^{3/} The period of time between the hearing and issuance of the Hearing Examiner's Report and Recommendation was prolonged by several extension-of-time requests made by both of the parties' representatives.

Sec. 1-618.4(a)(1) by interfering with the performance of a bargaining unit employee's representational duties as Vice President of Teamsters Local No. 1714.^{4/} The Hearing Examiner, however, recommended the dismissal of the alleged violation of D.C. Code Sec. 1-618.4(a)(2).^{5/}

This matter is now before the Board on exceptions and oppositions from both parties to the Hearing Examiner's Report and Recommendations. The history and background of the case are set out in the Hearing Examiner's Report, a copy of which is appended to this Opinion.

After reviewing the entire record the Board finds no merit in any of the exceptions. We find the Hearing Examiner's conclusions supported by the evidence and adopt her findings of fact, conclusions of law and recommendations to the extent consistent with this decision and order as set forth below.

The Office of Labor Relations and Collective Bargaining (OLRCB), on behalf of DOC, has excepted to the Hearing Examiner's findings of fact and, on that basis, her conclusion of law that

^{4/} Specifically, the Hearing Examiner found DOC violated D.C. Code Sec. 1-618.4(a)(1) by denying Vice President Smith access to its facility to participate on a hiring panel and threatening him with retaliation for attempting to exercise his representational rights. By such acts and conduct, the Hearing Examiner found that DOC interfered with Smith's right to form, join or assist a labor organization pursuant to D.C. Code Sec. 1-618.6(a)(2). As to a separate incident, the Hearing Examiner recommended dismissing another alleged violation of D.C. Code Sec. 1-618.4(a)(1), a statement made to a union steward by a DOC manager during a grievance meeting. The Hearing Examiner concluded that the manager's statement that he would throw the steward out of his office when he insisted on remaining to discuss an unscheduled grievance did not, under the circumstances, constitute interference, restraint or coercion of employee rights. The Teamsters expressly declined to except to this conclusion by the Hearing Examiner, and given the fact-based nature of the conclusion, we defer to and adopt the Hearing Examiner's finding and conclusion.

^{5/} The Hearing Examiner concluded that DOC's (1) inability to completely stop on-site solicitation and employees' open display of support for a rival union and (2) knowledge of employee use of DOC's file cabinet on the premises to store rival union literature "fail[ed] to demonstrate that DOC assisted or supported the [rival union] in violation of Section 1-618.4(a)(2) of the CMPA." (R&R at 18.)

DOC interfered with a Teamsters' Local Union officer, in the performance of his representation duties, in violation of D.C. Code Sec. 1-618.4(a)(1); OLRCB's exceptions merely disagree with the weight and veracity attributed to and assessments made by the Examiner with respect to certain evidence. We have held on numerous occasions that the Hearing Examiner is authorized and in the best position to decide such evidentiary matters. See, e.g., Charles Bagenstose, et al. v. District of Columbia Public Schools, 38 DCR 4154, Slip Op. No. 270, PERB Case Nos. 88-U-33 and 88-U-34 (1991). Our review of the record reveals that the Hearing Examiner's findings of fact are supported by the evidence and are sufficient to constitute a violation of D.C. Code Sec. 1-618.4(a)(1). We therefore deny, in their entirety, OLRCB's exceptions to the Hearing Examiner's Report and Recommendation.

The Teamsters' exceptions also take issue with the findings of fact supporting the Hearing Examiner's conclusion of law that DOC did not violate D.C. Code Sec. 1-618.4(a)(1) and (2) by contributing financial or other support to the rival labor organization. We find no merit to these exceptions for the reasons stated above with respect to OLRCB's exceptions. However, certain arguments advanced by the Teamsters suggest the need for some discussion of what constitutes a violation of D.C. Code Sec. 1-618.4(a)(2).

D.C. Code Sec. 1-618.4(a)(2) proscribes, as an unfair labor practice, the following conduct:

(a) The District, its agents and representatives are prohibited from:

(2) Dominating, interfering or assisting in the formation, existence or administration of any labor organization, or contributing financial or other support to [any labor organization], except the District may permit employees to negotiate or confer with it during working hours without loss of time or pay; (emphasis added.)

This statutory provision parallels Section 8(a)(2) of the National Labor Relations Act (NLRA).^{6/} As the Fifth Circuit

^{6/} Section 8(a)(2) of the NLRA provides:

Sec.8.(a) It shall be an unfair labor practice for an employer--

Court of Appeals has observed, the right that this provision of the NLRA serves to protect "is that of guaranteeing complete and unhampered freedom of choice to the employees in the selection of a bargaining representative, either for or against the proposition or as between competing unions." NLRB v. Keller Ladders Southern, Inc., 405 F.2d 663, 667 (5th Cir. 1968). The Court held that "[s]o long as the acts of cooperation do not interfere with the freedom of choice of the employees, there is no violation of the [NLRA]." Id. This principle applies equally to allegations of non-enforcement of lawful restrictions on the exercise of employee rights. Davis Supermarkets, 306 NLRB No. 86 (1992). We find the intent, purpose and scope of the CMPA, generally, and D.C. Code Sec. 1-618.4(a)(2), specifically, consistent with these observations and objectives.^{7/} Thus, a violation of this statutory provision by any of the acts delineated thereunder must include a finding that the proscribed act resulted in the unlawful effect of abridging employees' rights guaranteed by the Labor-Management subchapter of the CMPA. Cf., NLRB v. Keller Ladders Southern, Inc., 405 F.2d 663 (1968).

The Teamsters except to the Hearing Examiner's factual analysis in finding no violation of Section 1-618.4(a)(2) by DOC.^{8/} Citing NLRB v. Vernitron Electric Components, 548 F. 2d

^{6/}(...continued)

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it ... ; (emphasis added.)

^{7/} It is a long established practice of the Board to turn to and follow analogous cases in the private sector decided by the National Labor Relations Board (NLRB), especially with respect to NLRB cases addressing provisions of the NLRA which we find virtually identical to the statutory provision in issue under the CMPA. See, e.g., Fraternal Order of Police, Metropolitan Police Department Labor Committee and International Association of Firefighters, Local 36 v. D.C. Office of Labor Relations and Collective Bargaining, 31 DCR 6208, Slip Op. No. 94, PERB Case Nos. 84-U-15 and 85-U-01 (1984)(finding such a parallel between Section 8(a)(5) of the NLRA and D.C. Code Sec. 1-618.4(a)(5) of the CMPA).

^{8/} The Teamsters contend that by following NLRB v. Homemaker Shops, Inc., 724 F.2d 535 (6th Cir. 1989), the "Hearing Examiner applied the wrong legal standard in determining whether the Department's actions" established a violation of D.C. Code Sec. 1-618.4(a)(2). (Teamsters' Excep. at 8.) The Teamsters
(continued...)

24, 26 (1st Cir. 1977), the Teamsters contend that the Hearing Examiner's determination should have been based on "the totality of the employer's conduct to determine whether the 'natural tendency of [the employer's support] would be to inhibit employees in their choice of bargaining representative.'" (Teamsters' Excep. at 9.) The record reflects, however, that upon a review of "the totality of the facts" the Hearing Examiner found no evidence that DOC's actions "deprived DOC's employees of their freedom of choice or that DOC's actions were intended 'to interfere with, restrain or coerce employees in the free exercise of their right to choose or change their bargaining representative.'" ^{9/} (R&R at 18.)

While there is some evidence that DOC's efforts to conform employees' organizing and campaign activity, on behalf of FOP, to existing rules or contractual restrictions may have been lax, mere permissiveness toward union activities in the workplace does

⁸(...continued)

argue that Homemaker concerned alleged "unlawful domination" by the employer and was therefore inapplicable to the instant allegations concerning, inter alia, unlawful contribution of financial or other support to FOP by DOC. While the alleged conduct in Homemaker included the unlawful domination of the union by the employer, the standard used to determine whether the conduct was unlawful "turn[ed] on whether the employees are in fact being deprived of their freedom of choice." Id. at 545. (R&R at 17.) Indeed, as discussed in the text, this unlawful effect is the general standard for determining whether any of the delineated proscribed acts or conduct under Section 1-618.4(a)(2) constitute a violation. It has been held that the acts or conduct alone do not constitute per se violations of Section 8(a)(2) of the NLRA in the absence of interference, restraint or coercion with respect to employees' rights. See, e.g., Kimbrell v. NLRB, 290 F.2d 799 (1961); Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165 (7th Cir. 1955) and Wayside Press, Inc. v. NLRB, 206 NLRB 862 (9th Cir. 1953). Thus, the Hearing Examiner's use of this parallel standard under the NLRA to determine whether alleged contributions or other support to FOP by DOC was a violation of Section 1-618.4(a)(2) did not, by analogy, constitute error.

^{9/} The Hearing Examiner, in making this conclusion quoted from Lake City Foundry Co. v. NLRB, 432 F.2d 1162, 1178 (7th Cir. 1970) (employer's permissive use by union of premises to hold its meetings when no evidence that outside union would have been treated differently held not to be unlawful assistance in violation of 8(a)(2) of the NLRA).

not constitute unlawful assistance or support.^{10/} There was no evidence that DOC's permissive attitude with respect to FOP or its employee supporters represented a divergence from its practice in responding to such employee activity on behalf of other Unions. ^{11/} American Federation of Government Employees, Local 2978 v. Department of Human Services, et al., 36 DCR 226, Slip Op. No. 183 at n. 1, PERB Case No. 87-U-14 (1989). Cf., Redway Carriers, 274 NLRB No. 198 (1985); Midway Clover Farm

^{10/} This conclusion applies equally to the Hearing Examiner's finding that the DOC knew or should have known that an employee maintained in a supervisor's office, to which she was assigned, a file cabinet containing FOP materials. The Hearing Examiner suggests in the alternative that this may be a de minimis violation. We find under the facts and circumstances of this case, that the continued uninterrupted use of a file cabinet by a former Teamsters' shop steward to store another labor organization's organizing and campaign materials does not constitute unlawful support or contribution by DOC to that labor organization nor is it otherwise a violation of D.C. Code Sec. 1-618.4(a)(1) and (2). In the absence of evidence that the employee was an agent of DOC or that such use of file cabinet reflected favorable treatment by DOC of FOP or its employee supporters, such tacitly permitted use by DOC of its equipment does not constitute support to a labor organization violative of the employee rights preserved by D.C. Code Sec. 1-618.4(a)(2). Cf., Kimbrell v. NLRB, 290 F.2d 799 (1961); NAB Construction Corporation, 258 NLRB No. 90 (1981) and Hesson Corp., 175 NLRB No. 15 (1969).

^{11/} The Hearing Examiner found that there was no evidence that DOC condoned or encouraged the open solicitation of employees by FOP supporters while denying the Teamsters such an opportunity. On the contrary, the evidence establishes that DOC issued memoranda and oral warnings to FOP employees who solicited employees or wore FOP jackets and/or hats while on duty in violation of the parties' collective bargaining agreement. (R&R at 13 and 15-18). The fact that DOC's enforcement was not as vigorous or effective as it might have been does not itself signify unlawful assistance by the employer.

There does not have to be evidence of uneven enforcement or favorable treatment to establish a violation of this nature. However, in the absence of such evidence, more is needed than evidence of the employer's lax enforcement of its rules. There is no evidence that the alleged violative acts or omissions by DOC, its agents or representatives were based on any demands or concessions by DOC, FOP or FOP supporters. Cf., NLRB v. Valentine Sugar, Inc., 211 F.2d 317 (5th Cir. 1954).

Market, 175 NLRB No. 151 (1969) and Mace Food Stores, Inc., 167 NLRB No. 60 (1967). Compare, Monfort of Colorado, 284 NLRB No. 143 (1987)(unlawful assistance to union found where, among other things, employer offered bonuses to employees for not supporting rival union and permitted inside union access to employer premises for organizing purposes while denying same to rival union). See also, Raley's Inc., 256 NLRB No. 155 (1981). The CMPA imposes no obligation upon an employer to exclude all union activity so long as the action(s) taken by the employer does not favor one union over another.

We therefore find that the Hearing Examiner properly concluded that DOC's actions did not constitute a violation of D.C. Code Sec. 1-618.4(a)(2) or (1) with respect to "contributing financial or other support" to "any labor organization", e.g., FOP or FOP supporters. Cf., NLRB v. Keller Ladders Southern, Inc., 405 F.2d 663 and Nestle Company, 248 NLRB No. 146 (1980). The Teamsters' exceptions are therefore denied.

In view of the above, we find the Exceptions filed by both DOC and the Teamsters to be without merit. We find the evidence supports the Hearing Examiner's findings, conclusions and recommendations that DOC violated D.C. Code Sec. 1-618.4(a)(1) by interfering, as alleged, with a Teamsters Local Union officer in the performance of his representational duties under the CMPA. We further adopt the Hearing Examiner's findings in support of her recommendation that all remaining allegations that DOC violated D.C. Code Sec. 1-618.4(a)(1) and (2) be dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Department of Corrections (DOC), its agents and representatives shall cease and desist from interfering, restraining or coercing its employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act (CMPA) by refusing to permit an employee, in his or her capacity as a Teamsters' Local Union officer from entering its premises to assist employees' certified exclusive representative, Teamsters Local Union No. 1714, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Teamsters Local Union No.1714).
2. DOC, its agents and representatives shall cease and desist from interfering, restraining or coercing its employees by threatening employees with retaliation for exercising rights guaranteed by the Labor-Management subchapter of the CMPA to

assist employees' certified exclusive representative, Teamsters Local Union No. 1714.

3. The Department of Corrections, its agents and representatives shall cease and desist from interfering, restraining or coercing, in any like or related manner, employees represented by Teamsters Local Union No. 1714, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO (Teamsters) in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act.

4. The remaining Complaint allegations that DOC violated D.C. Code Sec. 1-618.4(a)(2) and (1) are dismissed.

5. DOC shall, within ten (10) days from the service of this Decision and Order, post the attached Notice, dated and signed, conspicuously on all bulletin boards where notices to these bargaining-unit employees are customarily posted, for thirty (30) consecutive days.

6. DOC 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.

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

September 21, 1993



Public
Employee
Relations
Board

Government of the
District of Columbia

415 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 727-1822/23



NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, 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. 360, PERB CASE NO. 92-U-09 (September 21, 1993).

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

WE WILL cease and desist from interfering, restraining or coercing employees by refusing to allow employees in their capacities as officers of Teamsters Local Union No. 1714 a/w International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers, of America AFL-CIO (Teamsters) to enter Department of Corrections premises to exercise rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act (CMPA).

WE WILL cease and desist from interfering, restraining or coercing employees by threatening them with retaliation for exercising rights guaranteed by the Labor-Management subchapter of the CMPA.

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

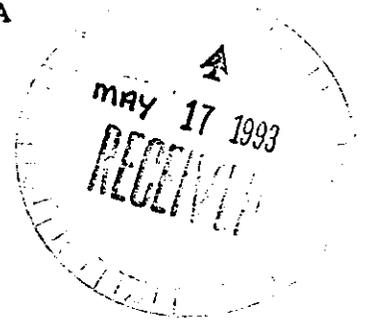
Department of Corrections

Date: _____ By: _____
Director

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 the Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 415-12th Street, N.W. Room 309, Washington, D.C. 20004. Phone: 727-1822.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD



In the Matter of:

International Brotherhood
Teamsters, Local 1714

Complainant

v.

District of Columbia
Department of Corrections

Respondent.

PERB Case No. 92-U-09

REPORT AND RECOMMENDATION

I. Statement of the Case

This case comes before the Public Employee Relations Board ("Board"), pursuant to the District of Columbia Comprehensive Merit Personnel Act of 1978, ("the Act" or the "CMPA"), D.C. Code Sections 1-601.1 et seq. (1981), on an Unfair Labor Practice Complaint filed by the Teamsters Local Union No. 1714, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO, ("Teamsters") on March 10, 1992.

The Complaint alleges, as amended at the hearing without objection, that the D.C. Department of Corrections ("DOC" of "Department") threatened the Teamsters' shop steward, interfered with other union officials, "permitted and encouraged" the solicitation of employees for a rival labor organization during working hours and in work areas, assisted the rival labor organization by permitting its supporters to use a DOC room and equipment and by allowing the rival labor organization's supporters to wear jackets and hats displaying the rival labor organization's insignia, in violation of the D.C. Code Sections 1-618(a)(1) and (2). Complainant ("Comp.") Exhibit ("Exh.") #5.

A hearing was held on October 30, and November 6, 1992, at which time both parties were afforded full opportunity to offer evidence, to examine and cross-examine witnesses and to present oral argument. Both parties filed post-hearing briefs by March 29, 1992.

II. Background

The Teamsters were certified as the exclusive bargaining representatives of a bargaining unit of employees in District of Columbia Department of Corrections and Teamsters Local Union No.

1714 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of American and Teamsters Local No. 246 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, PERB Case No. 84-R-09, Certification No. 33 (Amended as of April 15, 1987). The unit is described as follows:

All employees of the D.C. Department of Corrections excluding managerial employees, confidential employees, supervisors, temporary employees, physicians, dentists and podiatrists, institutional residents (inmates) employed by the Department, or any employees employed in personnel work in other than a purely clerical capacity and employees engaged in administering provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978.¹

On February 27, 1991, D.C. Corrections Employees Union, International Union of Police Associations, Local 1990, AFL-CIO ("IUPA") filed a Recognition Petition with the Board seeking to represent employees in the above unit. The Petition was accompanied by a showing of interest meeting the requirements of Board Rule 502.2.² On March 16, 1992, the Fraternal Order of Police/Department of Corrections Labor Committee ("FOP") also filed a Recognition Petition with the Board seeking to represent the above unit, attaching thereto a showing of interest meeting the requirements of Board Rule 502.2.³ The Board ruled in 2 decisions dated September 24, 1992 that the collective bargaining agreement between the Teamsters and Department constituted a bar to an election. Accordingly, the Board dismissed both petitions.⁴

The Teamsters allege that the DOC's unlawful conduct occurred during the pendency of these petitions up to and including the period immediately preceding the hearing.

^{1/} The exclusions of the bargaining unit appear as amended by Doctors' Council of the District of Columbia and the District of Columbia Government (Department of Corrections and Department of Human Services), PERB Case No. 84-R-12, Certification No. 4 (1987).

^{2/} D.C. Corrections Employees Union, International Union, International Union of Police Associations, Local 1990, AFL-CIO and D.C. Department of Corrections, PERB Case No. 91-R-03, Opinion No. 326 (Sept. 24, 1992).

^{3/} Fraternal Order of Police/Department of Corrections Labor Committee and District of Columbia Department of Corrections, PERB Case No. 92-R-05, Opinion No. 327 (Sept. 24, 1992).

^{4/} See footnotes #2 and #3.

III. Statement of the Evidence

A. Incident Between Chief Shop Steward Hanna and Captain Webb

Sergeant Hanna testified that he was in Captain Webb's office on February 3, 1992, concerning a grievance filed on Sergeant Dickerson's behalf and that Captain Webb appeared to become angry about something Sergeant Hanna had said. Upon completing that case, Hanna testified that he began discussing with Captain Webb another adverse action when Webb stated that he was not going to deal with that matter. According to Sergeant Hanna's unrefuted testimony, Captain Webb became "hostile." Captain Webb told Sergeant Hanna to get out of his office.

Sergeant Hanna also testified that he responded by stating that he was not going to leave Captain Webb's office until after he asked him a question and after Captain Webb answered this question. At that point, Captain Webb told Sergeant Dickerson to leave because he was going to throw Sergeant Hanna out of his office. Sergeant Hanna replied to Captain Webb, "Well Captain, I think you should give me a little bit more respect and answer my question." Transcript (Tr.) 38. Captain Webb then advised Sergeant Hanna that he was going to physically throw him out of his office. Sergeant Hanna responded by stating that he did not think that Captain Webb would throw him out of his office. Captain Webb stood up from behind his desk, and opened the door, and asked Sergeant Dickerson to leave. Then Captain Webb went back and sat down at his desk and began yelling at Sergeant Hanna telling him that he was not a good representative and that people do not want him to represent them.

Captain Webb did not testify and Hanna's testimony went undisputed. While Ralph Green, Assistant Administrator for Operations at the D. C. Detention Facility, testified that he was advised of this incident by Hanna and that Hanna could have been charged when he refused to comply with Captain Webb's request to leave his office, Green proffered no testimony as to what happened between Hanna and Webb in Webb's office on February 4, 1992.

B. Denial of Vice President Smith's Entry into the D.C. Detention Facility to Conduct Union Business

In a letter dated January 7, 1992 from Teamsters' Secretary Treasurer and Principal Executive Officer William Dupree to DOC's Labor Relations Officer Mark Levitt, DOC was advised that Vice President Larry Smith will be serving as an Assistant Business Agent pending the approval of his leave without pay request. Comp. Exh. #12. The letter was posted on the bulletin board at the jail in January, 1992. Tr. 75. Smith unrefutedly testified that he had been in the D.C. Detention Facility several times prior to February 6, 1992 for union business. Tr. 67.

When Smith reported to the facility on February 6, 1992 in order to participate on a hiring panel on behalf of the Teamsters he was, however, denied entry. Tr. 60. Using the telephone at the staff entrance, Smith testified that he called Administrator David Roach, but he was not in his office. Tr. 60. Smith then called Teamsters Business Agent Earnest Durant. As Smith was on the telephone with Durant, Captain Webb and Captain Vera Brummell came out of the control room and escorted Smith out of the building. Tr. 61. When Smith asked why he was being escorted out of the building, Webb stated, "Well because I said that you're not going to be allowed." Id.

Once outside the D.C. Jail, Smith called the Union office again and then Mark Levitt's office. Smith testified that while calling Mark Levitt's office, 3 police cars pulled up to him. One officer approached Smith and advised him that officials at the D.C. Jail wanted him removed from the facility. The officer asked Smith if he had a reason to be there. Smith showed the officer his identification and his badge. Shortly thereafter, Captain Webb exited the facility waving papers, showing it to the police supervisor. At the same time, Lieutenant Washington approached following Captain Webb. Lieutenant Washington was directed to escort Smith to see Green.

According to the unrefuted testimony of Smith, Captain Webb came up behind him as he was checking into the building and called Smith a "fat faggot." Smith said, excuse me?" Captain Webb said, "you heard me." Smith testified that Captain Webb entered the elevator with him and rode the elevator to the basement. Id. As Captain Webb exited, he held the door open and said, "I don't like you. I don't want you here. You're nothing but a fat faggot. I'm going to get you." Smith responded by saying, "Thank you. Have a nice day and I love you." Id.

Smith further testified that he later saw Green who was surprised to hear that he had been escorted out the building. Id. Smith did not testify as to what was discussed between himself and Green. Smith testified that he had to be escorted around the building by Business Representative Earnest Durant for about a week. After that time, he moved around the facility without an escort. Smith testified that he had no prior confrontation with Captain Webb and that he has no idea why he was not permitted into the facility on the subject date.

There is no testimony in the record disputing Smith's claim that he was denied entry into the building so that he could conduct Teamster business. Green testified that he had Smith ejected from the D.C. Jail that day because 1) the Teamsters did not formally advise DOC as to the Teamsters' stewards; 2) there was a lot of internal friction with the Teamsters and; 3) Smith had a confrontation with Captain Webb the day before. Tr. 168-70. Green testified that he was advised that Smith went to

Captain Webb's office to put him in his place. Green indicated that he was called to the scene and he asked Smith to leave the facility.

As a result of this confrontation, Green concluded that Smith was crazy or something was wrong with him. Tr. 88-89. Green stated that Captain Webb was so much bigger than Smith that he had to be crazy to approach Captain Webb in that manner. Id. Green testified that before he denied Smith entry into the facility on February 6, 1992 he made no attempt to determine whether Smith had authorization to enter the building and even if Smith had authorization, he was not going to permit Smith to enter the building because of the confrontation between Smith and Captain Webb. It was also Green's testimony that anyone who causes him problems in "[his] facility" will be put out because he does not have time for the trouble. Tr. 187. He indicated that he has some of the most dangerous inmates in the world in the jail and he did not have time for union business_or no other business. He only had time to detain inmates and to save the lives of his staff. Tr. 187. Green further testified that once he resolved the disagreement between Captain Webb and Smith, Smith was permitted to enter the facility.

**C. Solicitation For A Rival Labor Organization
During Working Hours In Work Areas And the
Wearing of Jackets and Hats of that Organization**

Hanna testified that sometime around February of 1992 he observed on several occasions Officer Nathan Pugh walking around all day doing nothing but carrying a briefcase which contained FOP literature, applications, stickers and other insignia and wearing a FOP jacket. Tr. 19. Hanna testified that he and Pugh were assigned to the same 7:30 a.m. to 4:00 p.m. shift and that Pugh never received an assignment during roll call. According to Hanna, this allowed Pugh to walk around and solicit FOP membership. Tr. 33. While Hanna could not identify a supervisor who may have witnessed Pugh's activities, he testified that a supervisor had to have witnessed Pugh. Tr. 21. Hanna further testified that on February 20, 1992, as employees were changing shifts, he observed Officer Pugh on the elevator handing out FOP applications and talking freely about bringing FOP hats and jackets for those who were interested in joining the FOP. Tr. 19. Pugh also advised employees that FOP was taking over. Tr. 25-26. Hanna testified that this was not the first occasion he had seen Pugh soliciting for FOP membership. However, on February 24, 1992 he filed a grievance. Hanna testified that he never received a response from DOC on the grievance.

Again, Hanna testified that on February 24, 1992, he observed Pugh at approximately 7:25 a.m. displaying and wearing FOP logo hats, jackets and pins and was handing out FOP applications at the staff entrance. Tr. 27. Inasmuch as the

shift commander and three (3) lieutenants were present at roll call, a supervisor had to witness Pugh's wearing of FOP apparel at roll call, Hanna testified. Tr. 51-52. Hanna further contends that he filed a grievance on this incident, but that this grievance went unanswered as well.

It was also Hanna's testimony that he observed Pugh on March 2, 1992 wearing a FOP jacket and hat at roll call in the front row of the assembly. Hanna indicated that although Pugh wore the FOP jacket and hat in full view of attending supervisors, none of the supervisors instructed him to remove the items.⁵

In addition, Hanna testified that he observed Pugh wearing a FOP jacket in the dining area during lunch time. Also, Hanna testified that when he would appear at Captain Webb's office to represent an employee that he would be advised that the employee had sought other representation. Hanna testified further that he would then look into Captain Webb's office and observe Pugh sitting there wearing a FOP jacket. When Hanna questioned Captain Webb about Pugh representing members of the Teamsters, Captain Webb indicated that under the parties' collective bargaining agreement, it is the employee's choice as to whom he/she wants to represent him/her.

On other occasions, Hanna testified that he observed Officer Ellowese Barganier at the staff entrance wearing a FOP jacket as she patted down entering staff in the presence of a supervisor.⁶ Tr. 29. Hanna did not identify the supervisor. However, according to Hanna, because of the support FOP had on the midnight shift, supervisors had to be aware of Barganier's solicitation.

Hanna testified also that he was advised by the midnight shift Shop Steward that Barganier was allowed to solicit FOP membership at roll call. Tr. 14. Hanna indicated that he immediately discussed the matter with Captain Carter, who admitted that Barganier spoke at roll call but that he did not know what she was going to say. Tr. 14. Carter indicated to

^{5/} Hanna again filed a grievance alleging that DOC failed to take action against Pugh for not being in proper uniform. In the grievance, the Union asserted that Pugh did not have a post assignment which allowed him to continue his activities.

^{6/} Officer Barganier is a former shop steward of the Teamsters.

Hanna that he stopped her midway but that she continued to speak. Tr. 14.⁷

In a letter dated March 1, 1992 from Lieutenant Edward Mundy to Mark Levitt, Barganier was advised that she was being "ordered not to express or forward any personal, or former business pertaining to any UNION matter during your official business hours". In a letter dated March 4, 1992, counsel for FOP advised DOC that this letter constituted an illegal gag order and an unfair labor practice. Counsel for FOP advised that a petition for recognition on behalf of FOP would be filed shortly and that continued mistreatment of FOP supporters would result in the filing of unfair labor practice charges. In response, Levitt advised counsel for FOP in a letter dated March 10, 1992 that no one would be permitted to conduct union business during duty time in work areas and that Barganier may do so during her non-duty time with employees who are also on non-duty time. As to wearing FOP apparel, Levitt indicated that employees may only wear such clothing to and from work but may not wear FOP jackets or hats at roll call.

Hanna testified that while Pugh and Barganier continued to wear FOP hats and jackets and to solicit employees to become FOP members, they wore the jackets and hats towards the end of their shift and were careful not to solicit in front of Hanna. Nevertheless, the Teamsters filed grievances on July 23 and 24, 1992, as a result of observing several employees wearing FOP jackets prior to, during and after roll call.

Tyrone Posey, Document Examiner at the D.C. Detention Facility and Shop Steward for the Teamsters, testified that he works from 7:15 a.m. to 3:45 p.m. and that he has witnessed employees wearing FOP jackets throughout the facility throughout the day. Posey testified that the practice is prevalent in the D.C. Jail and appears to be condoned by supervisors. He testified that the first time he witnessed the wearing of FOP jackets was about a year ago and the last time he witnessed the wearing of FOP jackets was the last time he was in the facility on October 26, 1992. Posey further testified that he witnessed employees being solicited to become FOP members. He indicated that this has occurred in the dining room among other places. Employees wearing FOP jackets and soliciting membership for FOP

^{7/} A grievance was again filed on Barganier's speaking at roll call. However, in a response to the Teamsters' grievance dated February 17, 1992, Administrator Roach advised the Teamsters that in accordance with an agreement with them Barganier was allowed to speak on behalf of the Teamsters at roll call and that DOC was not made aware that she did not continue to have such authorization. In addition, Roach indicated that she did not mention another union during her talk. Comp. Exh. #7.

included Barganier and Pugh. There were others, Posey testified, but he could not recall their names. Posey also testified that he observed Pugh representing employees during their adverse action cases, which appeared to be condoned by supervisors. All of this has occurred during the period of April, 1992 through October 26, 1992. Posey did not know the last time he had seen Pugh wear a FOP jacket.

William Daniel, a Corporal assigned to the D.C. Detention Facility, testified that he has observed Barganier wearing a FOP jacket at the staff entrance patting down employees in August, 1992. He also testified that he has witnessed several employees wearing FOP caps on the midnight shift at roll call sometime in September of 1992 while he was addressing the roll call. Although he did not report the wearing of caps to management, Daniel testified that supervisor Lieutenants Mundy, Jackson and Dalton were present. In addition, Daniel testified that he was approached by Pugh as he was leaving the facility about filling out a petition for membership with the FOP. He indicated that the solicitation occurred in the building but no supervisor was present.

Business Representative Earnest Durant testified that he has been to the D.C. Detention Facility on a daily basis since June 29, 1992 and has observed employees wearing FOP jackets or hats since that time until the present. Durant testified that he spoke at roll call on Monday, October 31, 1992 and that he observed several employees assigned to the midnight shift wearing either FOP hats or jackets. It was also Durant's testimony that he has observed Barganier and other employees on the midnight shift wearing FOP jackets or hats. He also witnessed Barganier and another employee on the midnight shift at the staff entrance wearing FOP jackets. Tr. 92. Durant also stated that he has observed employees of the outside perimeter patrol wearing FOP jackets while in uniform driving up to the D.C. Detention Facility. Tr. 94. There was also an occasion where corrections employees were seen on television wearing FOP jackets following a shooting at the facility. Tr. 94-95. Employees were parading in front of the camera showing their FOP jackets, Durant testified. TR. 94.

Green testified that he has observed employees wearing FOP jackets and hats in the facility. However, employees were advised in memorandum and orally that wearing of FOP apparel on duty would not be tolerated and that DOC took appropriate action against Pugh for wearing a FOP jacket and hat. Green proffered as evidence a memorandum from Captain Brummell to Administrator Roach advising him that Pugh appeared at roll call in the FOP items and that she had him to remove the items and store them in the Operation Commander's Office until the close of business. Respondent ("Resp.") Exhibit ("Exh.") #4. Green also referred to a hand written note signed by Pugh indicating that Brummell

instructed him to take off the FOP jacket and hat. Resp. Exh. #3. Green also proffered a memorandum dated March 20, 1992 to Pugh advising him as to when and where he could wear FOP jackets and hats. Resp. Exh. #9. Green also submitted memoranda dated August 3, 1992 and August 11, 1992 wherein employees were reminded that they could wear FOP jackets only to and from work and that they are expected to be in full uniform, including name tags, badges authorized hats and insignia, at roll call. Comp. Exh. #15 and Resp. Exh. #10.

Green also cites 2 incidents in which employees were cited for failure to be in uniform. On July, 1992, it was recommended that Corporal Darryl Butler be cited for insubordination for failure to be in compliance with regulations governing uniforms. He was wearing a blue sweater jacket and not displaying his name tag or badge. Resp. Exh. #8. In October, 1992, Officer Lisa Battle was issued an official reprimand for insubordination when she refused to remove her hat because her hair was not combed. Resp. Exh. #13.

Although neither memorandum describing the events surrounding the action taken indicates that the employees were wearing FOP apparel, Green testified that he was advised that the hat Sergeant Battle was wearing had a FOP insignia on it. Because she refused to remove the hat, she was disciplined, Green testified. As to employees wearing FOP jackets before the camera, Green testified that the employees were not in the facility. Green testified that Roach instructed him not to allow the cameras in the facility. In addition, Green testified that Barganier was warned in writing that she was not to discuss any union matter during her hours of work or to employees during their work hours. Green testified that this was in response to Barganier speaking at roll call in March, 1992.

D. FOP Use of a DOC Room and Equipment At Floor Control One in the Central Detention Facility

Hanna testified that Shop Steward Jackson advised him that there was a FOP file cabinet in the floor control room, the post to which Barganier is assigned. Hanna testified that he went to the room and observed a typewriter, a computer and a file cabinet with FOP literature and memoranda on the top. There was a big chain from the top of the cabinet to the bottom which secured the cabinet with a lock.

Nevertheless, Hanna stated that he pulled a drawer halfway open and pulled out a few things. The items included Petition for Election cards, Petitions for Certification Election, Authorization or Cancellation of Voluntary Deduction For Payment of Employee Organization Dues Card, numerous pieces of FOP literature and copies of the Teamsters grievances on the wearing of FOP jackets and hats and the solicitation of employees by FOP

supporters. Comp. Exh. #13a - 13n. Hanna testified that the file cabinet had Barganier's name and either the D.C. Government or D.C. Corrections on it, which was very unusual. He acknowledged, however, that Barganier was a former Teamster shop steward and that he has no idea how the file cabinet got into the Floor Control Room. The typewriter in the room was the same typewriter DOC had throughout the facility. Hanna testified that the floor control room was the supervisors' office and thus they had to be aware of the FOP material in the room.

Business Representative Earnest Durant testified that he was in the floor control room on 3 occasions. The first time was in July, 1992 at which time he saw a file cabinet, which had FOP and IUPA material inside and on top of the file cabinet and FOP jackets and hats in the bottom drawer. There was also some material in a small tray. The second time was in August, 1992. Durant did not state exactly when he went to the room the third time but he indicated that when he went he saw an abundant amount of materials. In addition, during one visit he saw copies of Teamsters' grievances concerning FOP activities in abundance as well.

Green testified that Barganier was an elderly woman who was 70 years old and that she was on limited duty. Green indicated that Barganier was assigned to the floor control room when they have a sufficient complement of employees because of her limitations. When there was not a sufficient complement of employees, Barganier was assigned to the staff entrance. Green testified that all of the floor control rooms have file cabinets and typewriters. He further testified that the FOP never approached management and requested a file cabinet or typewriter, although DOC has furnished a room and various equipment to the Teamsters when requested. It was Green's testimony that he had the shift supervisor investigate whether there was FOP material in the floor control room. Tr. 195.

IV. The Parties' Contentions

A. The Teamsters' Position

The Teamsters argue that DOC violated Section 1-618.4(a)(1) of the D.C. Code when Webb threatened and harassed Hanna because he raised a second grievance at the February 6 meeting and interfered with, threatened and harassed Smith in the performance of his duties as a Teamsters' representative. According to the Teamsters, there was no explanation for the disparaging remarks Webb made to Smith and Webb's threat that he would get Smith.

The Teamsters further argue that DOC assisted the FOP by allowing its supporters to solicit FOP membership in work areas during working time in February and March, 1992. It is also the Teamsters' argument that DOC permitted FOP supporters to wear FOP

jackets in violation of the established dress code. The favorable treatment of FOP supporters with respect to solicitation and the dress code violates Section 1-618.4(a)(1) and (2) of the CMPA.⁸ In addition, it argues that DOC violated Section 1-618.4(a)(2) when it permitted FOP supporters to use floor control one at the Central Detention Facility as a headquarters for soliciting support for FOP.

The Teamsters assert that the Department should be ordered to cease and desist from this activity immediately and to post the appropriate notices throughout its facilities.

B. The Department's Position

The Department argues that there is nothing in the record that can be construed as interfering with protected activity of Hanna. It asserts that Webb was not prepared to discuss the unscheduled case and that Webb did nothing physical to Hanna.

With regard to the incident between Webb and Smith, the Department argues that it was unclear about Smith's role with the Teamsters and until Green received clarification from the Union regarding Smith's role, Smith was not permitted in the facility. The Department contends that the Union's letter to Levitt stating that Smith will be serving as an Assistant Business Agent, spoke to the future, which did not clearly establish Smith's right to be on the premises.

The Department further argues that the Teamsters have failed to meet its burden of establishing that the Department engaged in wrongdoing with regard to Pugh and Barganier's activities. Specifically, the Department maintains that there is no affirmative evidence that the Department violated the CMPA. The Department contends that it adhered to the policy of exclusive recognition of the Teamsters and that it took action when it had knowledge of violations of its policy prohibiting solicitation while on duty and its policy that only uniforms may be worn on the premises of the detention facility. Moreover, the Teamsters presented no evidence that the Department provided FOP office space or equipment. Conversely, the Department had provided Teamsters with office space and equipment.

The Department asserts that the Complaint should be dismissed.

⁸/ Article 7.3 of the parties' collective bargaining agreement prohibits the solicitation of employees on employer's time. Such activity shall be conducted during non-duty time.

V. Findings of Fact

Based on a review of the entire record, including testimony and exhibits, I make the following findings:

1. Captain Webb threatened to physically throw Sergeant Hanna out of his office when

Sergeant Hanna was attempting to discuss a potential grievance.
2. Smith was denied entry into the D.C. Jail to perform legitimate Teamsters business. Green had Smith ejected from the jail. Tr. 172. The record fails to establish that the Teamsters failed to properly notify the Department of its representative or that the Department had a reasonable basis to conclude that Smith was a trouble maker, or was crazy, or would have interfered with the operations of the jail, as claimed.
3. There is no evidence in the record to support Green's claim that he denied Smith entry into the jail because he concluded that Smith was crazy and would interfere with the operations of the jail. There is no evidence in the record to demonstrate that Smith would have been disruptive once inside the jail. While DOC relies on the events that occurred the day before to support this conclusion, there is no evidence that Smith was disruptive the day before when he allegedly had a confrontation with Captain Webb. There is no evidence that the alleged confrontation with Smith interfered with the operations or was disruptive. There is no testimony that Smith was boisterous or loud. There is simply no support for the contention that Smith would be disruptive.
4. Green's testimony that he concluded that Smith was crazy because he approached a person who was bigger than him is not credible. It is not reasonable to conclude that Smith must be crazy simply because he approached, or confronted, a man who is bigger. Moreover, there is no evidence that Green attempted to call the Teamsters' office and advise anyone that Smith would not be allowed to enter the facility because of his conduct the day before. Rather, I find that DOC's reasons are pretextual and substantially deficient.

5. Webb threatened Smith once he was inside the facility. Webb told Smith, "I don't like you. I don't want you here. You're nothing but a fat faggot. I'm going to get you."
6. In February and March, 1992 Barganier and Pugh solicited employees for FOP membership during work hours and in work areas.
7. The Department attempted to stop the solicitation by FOP supporters on the premises of the D.C. Jail by memoranda and oral warnings.
8. The record establishes that FOP jackets and hats were worn in the D.C. Detention Facility during working hours and in work areas during the period of February, 1992 through October, 1992.
9. The Department attempted to stop the wearing of FOP jackets and hats by ordering employees not to wear FOP jackets and hats in memorandum and oral warnings to offending employees.
10. The Department knew or should have known that Barganier maintained a FOP file cabinet in the floor control room on the first floor, which contained FOP literature, among other items.
11. The record fails to establish that Barganier was using a DOC typewriter or computer for the preparation of FOP material.

VI. Conclusions of Law

A. Interfering, Restraining or Coercing Employees in the Exercise of Section 1-618.6 Rights

The Act prohibits District of Columbia agencies, its agents and representatives, from interfering, restraining or coercing employees in the exercise of their right to form, join or assist any labor organization or to refrain from such activity.⁹ Such

⁹/ Section 1-618.4(a)(1) of the Act provides as follows:

(a) The District, its agents and representatives are prohibited from:

(1) Interfering, restraining or coercing any employees in the exercise of the rights guaranteed by this Subchapter[.]

conduct by an agency constitutes an unfair labor practice in violation of Section 1-618(a)(1) of the Act.

For the reasons discussed below, the record fails to demonstrate that Webb's conduct towards Hanna on February 3, 1992 constitutes an unfair labor practice in violation of Section 1-618.4(a)(1) of the Act. Although Hanna was engaging in protected activity when discussing a potential grievance with Webb, the record does not demonstrate that Webb interfered with Hanna's right to form, join or assist a labor organization when he threatened to physically throw Hanna out of his office.¹⁰ The record reveals that the discussion concerning Dickerson's grievance was completed and that Hanna had attempted to initiate another discussion on a potential grievance that was not scheduled to be addressed at that time. As the matter was not scheduled to be addressed at that time, Webb's refusal to discuss Hanna's concern and his request to Hanna to leave his office was not improper.

While threats of bodily harm may interfere with a shop steward's rights under the CMPA, I find that Webb's statement to Hanna that he was going to physically throw him out of his office was not a threat of bodily harm. Under the facts and circumstances of this case, there were no threats, implied or otherwise, by Webb that he was going to harm or hurt Hanna. Nor can Webb's statement be found to constitute abusive language or a threat of violence. In addition, there is nothing in the record to indicate that Hanna was intimidated by Webb's claim to throw Hanna out of his office and, in fact, from Hanna's testimony the record establishes that Webb sat down behind his desk shortly after making the statement. Thus, immediately after making the statement it became apparent that Webb was not going to throw Hanna out of the office. Moreover, Webb's critical statements as to Hanna's representation cannot be considered unlawful. While Webb's statements were not consistent with sound labor relations

Section 1-618.6(a)(2) states:

(a) All employees shall have the right:

* * * * *

(2) To form, join or assist any labor organization or to refrain from such activity.

^{10/} The Board has ruled that the filing of a grievance is a protected activity under the CMPA. Barenstose v. D.C. Public Schools, PERB Case Nos. 88-U-33 and 88-U-34, Opinion No. 270 (1991).

policy, these statements do not constitute an unfair labor practice under the facts and circumstances of this case.

The record demonstrates, however, that the refusal to permit Vice President Smith into the facility on February 6, 1992 interfered with Smith's right to form, join or assist a labor organization. The record reveals that Smith was entering the facility to participate in a hiring panel as a representative of the Teamsters and that DOC denied him access for no legitimate reason. As a result of DOC's actions, Smith was prevented from participating on the hiring panel, thereby interfering with his rights under Section 1-618.6 of the D.C. Code.

In addition, the record demonstrates that Webb threatened Smith once he was inside the facility. As previously found, Webb told Smith, "I don't like you. I don't want you here. You're nothing but a fat faggot. I'm going to get you." This statement is a thinly veiled threat of retaliation for Smith's participation in his representation duties, a protected activity. Thus, Webb's statement interfered with Smith's right to form, join or assist a labor organization in violation of Section 1-618.4(a)(1) of the CMPA.

B. Assisting in the Administration of the FOP or Contributing Financial or Other Support to FOP

Section 1-618.4(a)(2) of the Act prohibits D.C. agencies, its agents and representatives, from "dominating, interfering or assisting in the formation, existence or administration of any labor organization, or contributing financial or other support to it[.]" For the reasons stated below, I find that the record fails to establish that DOC assisted or contributed support to FOP in violation of Section 1-618.4(a)(2) of the D.C. Code.

The record is undisputed that Barganier and Pugh solicited DOC employees for FOP membership during working hours in work areas in the D.C. Detention Facility in February and March, 1992. However, the record also establishes that DOC management did not condone the solicitation. This is evident by the correspondence to Barganier, dated March 1, 1992, which ordered her to refrain from discussing union related matters during her tour of duty and a letter from Levitt to FOP's counsel, advising him that the Teamsters were the exclusive representative and that DOC intended to afford the Teamsters all the rights they enjoyed by contract. Comp. Exh. #14. In addition, Levitt made it clear that there should be no solicitation for FOP membership on DOC's time or premises. Id. Hanna himself testified that after the letter from Levitt Barganier and Pugh no longer openly solicited for FOP membership.

With regard to the wearing of FOP jackets and hats, the record also fails to demonstrate that DOC management condoned

this conduct. In addition to Levitt's letter to FOP counsel advising him that employees were only permitted to wear the jacket of their choice to and from work and to their lockers, there were several memorandums to employees, particularly to Pugh, instructing employees not to wear FOP jackets and hats inside the facility, other than to the locker room. See Resp. Ex. 4, 7, and 10 and C. Ex. 15. In addition, on March 2, 1992, Lieutenant Brummell instructed Pugh to remove his FOP jacket and hat and to place them in the office until the end of his shift. Brummell ordered Pugh not to bring FOP materials into the building again. Resp. Exh. 4. Hanna testified that the wearing of FOP jackets and hats by Barganier and Pugh was limited once Levitt issued his letter prohibiting the wearing of those items.

The record does reveal, however, that if DOC management did not know that Barganier maintained a FOP file cabinet in the floor control room on the first floor, it should have known. While there is no evidence that DOC provided the file Cabinet for the purpose of maintaining materials of the FOP, it was obvious to all who entered the floor control room on the first floor that such materials were being stored in that room. Nonetheless, I do not find that use of a file cabinet in a room in the D.C. Detention Facility constitutes assisting a labor organization within the meaning of Section 1-681.4(a)(2). Moreover, there is no evidence that Bargainer was using DOC typewriters or computers for the preparation of FOP materials, as alleged.

Although the Board has not had the occasion to address the specific allegations in the instant case, guidance can be acquired from the United States Supreme Court, federal courts and the National Labor Relations Board ("NLRB" or "Labor Board"). In International Association of Machinists, Tool and Die Makers Lodge No. 35 v. N.L.R.B., 311 U.S. 729 (1940), the Supreme Court, in finding that the employer violated Section 8(a)(2) of the National Labor Relations Act, as amended, ruled that

Known hostility to one union and clear discrimination against it may indeed make seemingly trivial intimations of preference for another union powerful assistance for it. Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure. The freedom of activity permitted one group and the close surveillance given another may be more powerful support for the former than campaign utterance.

311 U.S. at 78. In making such a ruling, the Court was concerned with the employer's open hostility to the rival union and its cooperation with the company union; the offer by the employer of a good rating if an employee joined the company union; threats of loss of employment to those who did not sign up with the company

union; the freedom afforded the company union to solicit employees while denying solicitation by the rival union; and the fact that five rival union officials were discharged because of their union activity.

These facts are not present in the instant case. Contrary to the Teamsters' assertion, DOC did not provide favorable treatment to the FOP. Neither Unions were permitted to openly solicit for membership. Although the evidence indicated that FOP supporters were soliciting FOP membership, management took action to stop such activity. DOC did not provide favorable treatment by allowing FOP supporters to wear union clothing. Moreover, there is no evidence of any threat of loss of employment or an indication by the Department as its preference for representation.

In National Labor Relations Board v. Homemaker Shops, Inc., 724 F.2d 535 (6th Cir. 1989), the U.S. Court of Appeals ruled that the mere providing of coffee and a meeting room for a labor organization does not constitute unlawful assistance.¹¹ The court ruled that in order to establish that an employer unlawfully assisted a union under section 8(a)(2), a provision significantly similar to 1-618.4(a)(2), the Labor Board "must prove that the employer's assistance is actually creating Company control over the Union[.]"¹² Thus, the court ruled that "the test of whether there is unlawful domination or assistance by the employer is a subjective one, turning on whether the employees are in fact being deprived of their freedom of choice." 724 F.2d at 545.

The NLRB also ruled in Coamo Knitting Mills, 150 N.L.R.B. 579 (1964), that "the use of company time and property does not, per se, establish unlawful support and assistance. Rather, each case must be decided on the totality of its facts." 150 N.L.R.B. at 582. In that case, the NLRB ruled that inasmuch as the use of a company room involved a few employees after working hours the violation was de minimis.

¹¹/ See Barthelemy v. Airlines Pilots Association, 897 F.2d 999 (9th Cir. 1990); N.L.R.B. v. Basf Wyandotte Corp., 798 F.2d 849 (5th Cir. 1986); Lawson v. N.L.R.B., 753 F.2d 471 (6th Cir. 1985); Lake City Foundation Company v. N.L.R.B., 432 F.2d 1162 (7th Cir. 1970); Modern Plastic Corporation v. N.L.R.B., 379 F.2d 201 (6th Cir. 1967).

¹²/ Section 8(a)(2) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(2) makes it "an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

When considering the totality of the facts in the instant case, the DOC management made attempts to stop the solicitation of FOP members during working hours and on the premises; DOC attempted to stop the wearing of FOP jackets and hats in the facility during work hours; DOC did not make threats of loss of employment and did not state its preference of unions; DOC did not provide favorable treatment to the FOP; and the use of the file cabinet was at most: a de minimis violation, the record fails to demonstrate that DOC assisted or supported FOP in violation of Section 1-618.4(a)(2) of the CMPA.¹³ There is no evidence or indication that the Department's actions constituted control over the FOP, deprived DOC employees of their freedom of choice or that DOC's actions were intended "to interfere with, restrain or coerce employees in the free exercise of their right to choose or change their bargaining representative." See, Lake City Foundry Company, 432 F.2d at 1178.¹⁴

For the reasons set forth above, I find that DOC did not violate Section 1-618.4(a)(2) of the D.C. Code.

VII. Recommendation

1) That the Unfair Labor Practice Complaint be SUSTAINED in part, i.e. with respect to the allegation that DOC interfered with a union official in the performance of his representation duties in violation of Section 1-618.4(a)(1). All remaining allegations in the Unfair Labor Practice Complaint should be DISMISSED.

2) That the Board issue an appropriate remedial order for the violation of the CMPA referenced above.

Respectfully Submitted,



Susan Berk

Dated: May 14, 1993

^{13/} I find that the use of the file cabinet under the facts and circumstances of this case, does not constitute assistance under Section 1-618.4(a)(2). However, even assuming that it is a violation of the CMPA, the violation was de minimis.

^{14/} The Department's actions show, if anything, a lack of control over FOP's actions.