GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of	)	
	)	
American Federation of Government Employees, Local 1975	)	
	)	
Complainant	)	
	)	
v.	)	PERB Case No. 23-U-11
	)	
District of Columbia Department of Public Works	)	Opinion No. 1885
	)	
Respondent	)	
	)	

DECISION AND ORDER

I. Statement of the Case

On July 22, 2023, the American Federation of Government Employees, Local 1975 (AFGE) filed an unfair labor practice complaint (Complaint) pursuant to sections 1-617.04(a)(1) and (2) of the Comprehensive Merit Personnel Act (CMPA).[1] The Union alleges that the D.C. Department of Public Works (DPW) violated the CMPA by revoking the approved official time[2] of two union officers (Complainants).[3] On August 9, 2023, DPW filed an answer, affirmative defenses and motion to dismiss (Answer) denying the allegations and requesting dismissal of the Complaint.[4]

On January 31, 2024, PERB held a hearing on the matter. On April 26, 2024, the Hearing Examiner issued a report and recommendations (Report). DPW filed exceptions to the report (Exceptions). AFGE did not file an opposition to the Exceptions.

---

[1] D.C. Official Code §§ 1-617.04(a)(1) and (2).

[2] Throughout the pleadings and the evidentiary record in the instant case, the Complainants' leave requests are referred to as requests for "official time" and/or "administrative leave." The parties' collective bargaining agreement (CBA) describes "official time" as administrative leave taken by bargaining unit employee representatives on behalf of other employees or the Union pursuant to representational rights under the terms of this Agreement" and lists examples of "representational functions" that constitute "authorized activities" for which "a reasonable amount of official time will be authorized, upon advance request by the Union." Respondent Hearing Ex. A at 15, *Collective Bargaining Agreement Between the District of Columbia Government Departments of: Public Works, Transportation, Motor Vehicles and The Taxicab Commission and American Federation of Government Employees, Local 1975* (Nov. 2007 – Sept. 2010), Art. 8, Sec. F.

[3] Complaint at 2.

[4] The Hearing Examiner concluded that by ordering a hearing in the instant case, the PERB Executive Director had implicitly denied DPW's motion to dismiss. Report at 16.

Upon consideration of the Hearing Examiner's Report and Recommendations (Report), applicable law, and the record presented by the parties, the Board finds that DPW committed an unfair labor practice by interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by the CMPA in violation of D.C. Official Code § 1-617.04(a)(1).

II. Hearing Examiner's Report and Recommendations

A. Factual Findings

The Hearing Examiner made the following factual findings. On May 3, 2023, the Interim President of Local 1975 (President) sent a letter to multiple District agencies, including DPW, requesting official time for union officers to attend the 2023 Political Action, Organizing, Representation and Training Conference (P.O.R.T. Conference).[5] The President requested leave for the Local 1975 Executive Vice President, Vice President, and Treasurer from DPW.[6] The union officers submitted requests directly to their supervisors using "Official Time Report" forms included in the parties' CBA.[7] The union officers' supervisors initially approved these leave requests and granted the Local 1975 officers official time.[8]

On June 9, 2023, the day before Local 1975's Executive Vice President and Vice President were scheduled to travel to the P.O.R.T. Conference, DPW's General Counsel rescinded approval of the Executive Vice President and Vice Presidents' official time without explanation.[9] DPW's General Counsel did not rescind approval of the Treasurer's official time.[10]

On July 11, 2023, the Vice President emailed DPW's General Counsel requesting an explanation for the revocation of "official time."[11] That same day, the General Counsel explained that she intended to email a denial of the request for official time on May 22, 2023, but inadvertently left the email in her "draft box" without sending it.[12] Further, the General Counsel did not realize that she had not successfully emailed her reply until the Vice President called her on June 9, 2023.[13] The General Counsel included the content of her "draft" email in her reply.[14]

The General Counsel resolved that, as DPW had already provided each of the union officials with forty (40) hours of administrative leave for an AFGE conference in March, DPW

---

[5] Report at 2.
[6] Report at 2.
[7] Report at 6, 9.
[8] Report at 2.
[9] Report at 2.
[10] Report at 3.
[11] Report at 2. The P.O.R.T. Conference, hosted by AFGE District 14 in San Juan, Puerto Rico, went from June 12 to June 16, 2023. Report at 2.
[12] Report at 2.
[13] Report at 2. The General Counsel testified that she did not realize the draft email had not been sent until she received calls from the Grievants roughly two (2) days before the P.O.R.T. Conference. Report at 5. The General Counsel separately testified that she had saved the draft email within her draft box because she "didn't want anyone to think that there was some ulterior motive or I was doing something to negatively impact anyone." Report at 7.
[14] Report at 2. The General Counsel's purported draft email stated that she was responding to the President's request for administrative leave on behalf of the Director, that DPW had already provided forty (40) hours of administrative leave for each of the union officials included in the request in March, 2023, and that the Director was willing to approve annual leave for these union officials to attend the P.O.R.T. Conference rather than administrative leave. Report at 3.

would not approve "official time" for the P.O.R.T. Conference.[15] The General Counsel asserted that the Grievants failed to identify a CBA provision authorizing attendance at the P.O.R.T. Conference on June 9, 2023.[16]

The Executive Vice President argued that the CBA did not limit how much official time a union official used for training.[17] The Executive Vice President further asserted that the General Counsel approved the Treasurer's official time despite telling the Grievants that they could not use annual leave for the P.O.R.T. Conference.[18] The Executive Vice President stated that she did not believe the General Counsel's "draft email" explanation, which she asserted was a justification for the General Counsel's "inappropriate denial of our union official time for training" and "clear retaliation."[19]

Continuing the July 11 email exchange, the General Counsel claimed that any failure to revoke the Treasurer's official time for the P.O.R.T. Conference was an error that would be corrected.[20] The General Counsel stated that "[t]his will be my last email regarding this matter" and reasserted that DPW had "generously" approved official time for the March conference "despite it not being listed as one of the approved events in the contract."[21] The Executive Vice President then reiterated that the General Counsel had allowed the Treasurer to use official time while revoking official time for the officers who handle employee representation issues.[22] She stated, "The official time forms speak for themselves. This was clear retaliation…and we will not tolerate it" and asserted that "this matter will be addressed at all levels and channels."[23] AFGE filed a grievance under the parties' CBA regarding the revocation of the Grievants' official time on July 14, 2023.[24]

Prior to the May 3 request, DPW approved official time for the same three Local 1975 officers for a March 2023 shop steward training.[25] The DPW General Counsel testified that DPW approved that leave even though the parties' CBA did not require doing so.[26] The General Counsel testified that the shop steward training differed from the P.O.R.T. Conference because, based on a provided syllabus, the former taught "how to conduct interviews and investigations about *Weingarten* and things of that nature."[27] The General Counsel further testified that the P.O.R.T. Conference syllabus included "a myriad of activities that didn't necessarily apply to our shop stewards."[28] However, the General Counsel received the P.O.R.T. Conference syllabus after she instructed the Grievants' supervisors to revoke the Grievants' official time.[29] The General Counsel

[15] Report at 3.
[16] Report at 3.
[17] Report at 3.
[18] Report at 3.
[19] Report at 3.
[20] Report at 3.
[21] Report at 3; *See also* Respondent Hearing Ex. E at 12.
[22] Report at 3.
[23] Report at 3-4.
[24] Report at 4.
[25] Report at 4.
[26] Report at 4.
[27] Report at 4.
[28] Report at 5.
[29] Report at 5. DPW received the P.O.R.T. Conference syllabus from AFGE by request during the Hearing Examiner's investigation into the instant case. Report at 6.

further testified that DPW's concern regarding the P.O.R.T. Conference was the amount of time the Grievants spent away from the office and finding replacement parking officers to fill in for the Grievants' ticket-writing duties on their respective beats.[30] The General Counsel had reviewed the Grievants' Official Time Reports, which showed that in FY23, the Executive Vice President had accrued 680 hours of official time and the Vice President had accrued 269 hours of official time.[31] The General Counsel noted that DPW had been willing to provide annual leave, but not official time, for the Grievants' attendance at the P.O.R.T. Conference.[32] The General Counsel asserted that there were differences between "administrative leave" and "official time" in both authorized usage and the processes for approving each type of leave.[33] The General Counsel further asserted that the Grievants had submitted their July 14 grievance to the DPW director rather than to their respective direct supervisors, in violation of the CBA's grievance procedures.[34]

B. Issues and Recommendations

The Hearing Examiner determined that the issues were the allegations of the Complaint, which asserted that DPW violated the CMPA by "interfering with an employee in the exercise of rights guaranteed by [D.C. Official Code § 1-617.04(a)(1)] by preventing the use of official time for a valid purpose" and by "interfering in the existence and administration of Local 1975 by attempting to prevent Executive Board members from attending training even through [sic] such attendance is guaranteed by the applicable CBA."[35]

The Hearing Examiner rejected DPW's jurisdictional argument that the parties' CBA mandated the deferral of the instant case to the parties' bargained-for grievance and arbitration procedures.[36] The Hearing Examiner noted that the parties' CBA specifically provided that "[a]lleged violations or misapplication of any law … are not subject to this grievance procedure and should be handled exclusively by the appropriate administrative agency or body having jurisdiction over such issues."[37] The Hearing Examiner found that the incorporation of language from the CMPA and prohibition of retaliation did not remove the Board's jurisdiction to adjudicate alleged unfair labor practices.[38] The Hearing Examiner determined that it was unnecessary to

[30] Report at 4.
[31] Report at 6. The General Counsel had not reviewed the Treasurer's Official Time Report but noted that the Treasurer used less official time than the Grievants. Report at 6. The General Counsel testified that she had not reviewed the Grievants' Official Time Reports prior to revoking their official time for the P.O.R.T. Conference. Report at 6.
[32] Report at 4.
[33] Report at 5. The General Counsel stated that administrative leave is discretionary and granted by DPW for activities that don't qualify for official time. Report at 5. The General Counsel further stated that direct supervisors can approve official time, but not administrative leave and that, while the Grievants' supervisors *did* approve official time in this instance, the P.O.R.T. Conference did not "comport with the requirements of the contract as official time." Report at 5.
[34] Report at 6.
[35] Report at 1-2 (quoting Complaint at 3). DPW asserted that the issues are: (1) "Did DPW violate DC Code § 1-617.04(a)(1) or DC Code § 1-617.04(a)(2) when it denied the employees request for administrative leave to attend the P.O.R.T. Conference;" and (2) "Does the PERB have the jurisdiction to rule on the Union's grievance." DPW Post-Hearing Brief at 3.
[36] Report at 19.
[37] Report at 19.
[38] Report at 19.

decide a contractual dispute in order to resolve the unfair labor practice issue in this case regarding disparate treatment based on protected union activity.[39]

The Hearing Examiner found that AFGE had demonstrated a *prima facie* case of retaliation under *Wright Line*.[40] The Hearing Examiner noted that DPW placed into evidence the number of hours the Complainants had engaged in grievance and representational functions as union officials, showing that DPW management, including the General Counsel, were aware of the Complainants' union activity.[41] The Hearing Examiner determined that the General Counsel's testimony that the reason for the denial of the Complainants' leave was a concern regarding finding replacement ticket takers, while not including that reason in either her draft email or her July email exchanges with the Complainants, constituted a shift in DPW's defense of its actions and, therefore, an element of a finding of pretext.[42] The Hearing Examiner found that the lack of evidence in the record indicating DPW had either consulted with the Complainants' supervisors regarding concerns over finding coverage for the Complainants or taken action to correct the "mistake" further undermined DPW's proffered explanations for revoking the Complainants' leave.[43] The Hearing Examiner concluded that DPW's "defense is premised on two claimed errors, as well as a shifting [and] unsubstantiated justification,"[44] and determined that DPW had not rebutted AFGE's *prima facie* claim of retaliation.[45] The Hearing Examiner therefore found that DPW's revocation of the Complainants' approved official time in retaliation for performing their representational duties as union officers constituted an unfair labor practice in violation of D.C. Official Code 1-617.04(a)(1).[46] However, the Hearing Examiner determined that AFGE had not articulated a theory or factual basis to find that DPW had violated D.C. Official Code 1-617.04(a)(2).[47]

III. Discussion

This dispute arises from DPW's revocation of approved official time leave for two union representatives. The Board distinguishes between obligations that are statutorily imposed under

---

[39] Report at 19.
[40] Report at 17.
[41] Report at 17. The Hearing Examiner further noted that DPW did not enter the Treasurer's official time records nor did the General Counsel review those records, although the General Counsel testified that she was aware that the Treasurer, who did not fulfil the same representational functions as the Complainants, would have used less official time overall. Report at 17. Paired with DPW's revocation of the Complainants' approved official time but not the Treasurer's, the Hearing Examiner found that "constitute[d] clear evidence of disparate treatment, and … strong evidence of animus." Report at 18.
[42] Report at 18. The Hearing Examiner noted that the General Counsel's "actions or inaction, in sending the May 22 email, allowed [the Complainants] very little notice that they were being denied their official time request," considering the Complainants were only informed of the denial the day before they were scheduled to leave for the P.O.R.T. Conference. Report at 18.
[43] Report at 18-19. The Hearing Examiner further found suspect DPW's claim that it only inadvertently allowed the Treasurer to take official time for the P.O.R.T. Conference because the General Counsel had raised concerns about the Complainants' use of official time for the March training as well because of their overall number of official time hours used—but, again, not the Treasurer's use of official time—before ultimately granting those requests after receiving a curriculum for that training. Report at 18-19 (fn 4).
[44] Report at 19.
[45] Report at 19.
[46] Report at 19.
[47] Report at 20. The Hearing Examiner recommended dismissing AFGE's claim of a violation of D.C. Official Code 1-617.04(a)(2) and rejecting AFGE's request for costs. Report at 20.

the CMPA and those that are contractually agreed upon between the parties.[48] A violation that is solely contractual is not properly before the Board, but a contractual violation will be deemed an unfair labor practice if a complainant can establish that it also violates the CMPA.[49]

The Board will adopt a Hearing Examiner's Report & Recommendations if it is reasonable, supported by the record, and consistent with PERB precedent.[50] The Board has held that issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the hearing examiner.[51] An argument previously made, considered, and rejected does not constitute a proper exception, if the record contains evidence supporting the hearing examiner's conclusions.[52]

The Board has adopted the National Labor Relations Board's *Wright Line* test for complainants alleging retaliation by management for an employee's protected union activity.[53] Under *Wright Line*, in order to establish a *prima facie* case of retaliation for union activity, a complainant must show that: (1) an employee engaged in protected union activity; (2) the employer knew about the employee's protected union activity; (3) the employer had anti-union animus or retaliatory animus; and (4) the employer took an adverse employment action against the employee as a result.[54] The Board has held that a claim alleging a violation of D.C. Official Code § 1-617.04(a)(1) does not require the adverse action taken to be materially adverse regarding an employee's terms and conditions of employment.[55] The Board will look to whether the action taken by an employer tends to coerce *vel non*, rather than the label placed on that action.[56]

DPW argues in its Exceptions that the Hearing Examiner erred in concluding that: (1) the Board has jurisdiction over the instant case; (2) AFGE made a *prima facie* showing of retaliation;

---

[48] *AFGE, Local 2978 v. D.C. Dep't of Health*, 67 D.C. Reg. 12198, Slip Op. No. 1757 at 2, PERB Case No. 20-U-02 (2020) (citing *AFGE, Local 2741 v. D.C. Dep't of Parks and Rec.*, 50 D.C. Reg. 5049, Slip Op. No. 697 at , PERB Case No. 00-U-22 (2003).

[49] *AFGE, Local 2978 v. D.C. Dep't of Health*, Slip Op. No. 1757 at 2-3 (citing *UDC Faculty Assoc./NEA v. UDC*, 60 D.C. Reg. 2536, PERB Case No. 07-U-52 (2013).

[50] *AFGE, Local 2978 v. OCME*, 61 D.C. Reg. 4267, Slip Op. No. 1457 at 6-7, PERB Case No. 09-U-62(a) (2014).

[51] *Bernard Bryan, et al. v. FOP/DOC Labor Comm., et al.*, 67 D.C. Reg. 8546, Slip Op. No. 1750 at 5, PERB Case No. 19-S-02 (2020).

[52] *AFSCME, District Council 20, Local 2743 v. DISB*, Slip Op. No. 1864 at 7, PERB Case No. 23-U-06 (2024) (citing *6 FOP/MPD Labor Comm. V. MPD*, 62 D.C. Reg 11756, Slip Op. No. 1521 at 10, 12, PERB Case Nos. 07-U-40, et al. (2015) (dismissing MPD's exceptions as repetition of arguments, testimony and evidence considered and rejected by the hearing examiner). *See also DHS v. AFSCME, District Council 20, Local 2401*, Slip Op. No. 1845 at 9, PERB Case No. 23-A-04 (2023) (holding that an argument previously made, considered, and rejected is a "mere disagreement" with the initial decision); *AFSCME, District Council 20, Local 2087 v. UDC*, 67 D.C. Reg. 8903, Slip Op. No. 1751 at 4, PERB Case No. 18-U-03 (2020) (holding that mere disagreements with a hearing examiner's findings or challenges to the hearing examiner's findings with competing evidence do not constitute proper exceptions).

[53] *AFGE, Local 2978 v. OCME*, Slip Op. No. 1457 at 4.

[54] *Id.*

[55] *Cf. Samantha Brown v. DCPS, Slip Op. No.* 1877 at 13-14 (finding that DCPS committed an unfair labor practice in violation of D.C. Official Code §§ 1-617.04(a)(1) and (4) by downgrading the employee's performance evaluation in retaliation for fulfilling her duties as a union representative, but dismissing claim of violation of D.C. Official Code § 1-617.04(a)(3) because the latter section requires "tangible consequences" on the "terms and conditions" of employment in order to find a violation).

[56] *N.L.R.B. v. Air Contact Transp. Inc.*, 403 F.3d 206, 213 (4th Cir. 2005) (citing *Fairfield Community Hosp.,* 311 N.L.R.B. 401, 405 (1993) (holding that a report from the employer to the employee that did not create or threaten discipline was coercive in violation of § 8(a)(1),but did not violate § 8(a)(3) because it did not affect the terms or conditions of employment)).

(3) DPW took adverse action against the Complainants, including by showing preferential treatment to the Treasurer; and (4) DPW's utilization of multiple defenses constitutes an element for a finding of pretext.[57]

a. Jurisdiction

DPW asserts that AFGE's claims require interpretation of the parties' CBA regarding the use of administrative leave or "official time" by union officials, and therefore the Board does not have jurisdiction over the instant Complaint.[58] In determining jurisdiction in a case involving contractual claims, the Board looks to:

> whether the record supports a finding that the alleged violation is: (1) restricted to facts involving a dispute over whether a party complied with a contractual obligation; (2) resolution of the dispute requires an interpretation of those contractual obligations; and (3) no dispute can be resolved under the CMPA.[59]

The Board has held that "[i]f the record demonstrates that an allegation concerns a statutory violation of the CMPA, then even if it also concerns a violation of the parties' contract, the Board still has jurisdiction over the statutory matter and can grant relief accordingly."[60] The Hearing Examiner noted that he "did not need to resolve [the] parties [sic] contractual dispute as to whether the P.O.R.T. conference constituted official time as defined by the CBA" in order to address the asserted violations of the CMPA.[61] Separate from any question regarding management's

---

[57] Exceptions at 1.
[58] Exceptions at 8-10.
[59] *FOP/MPD Labor Comm. v. MPD*, 60 D.C. Reg. 12058, Slip Op. No. 1400 at 7, PERB Case No. 11-U-01 (2013) (citing *AFGE, Local 3721 v. D.C. Fire Dep't*, 39 D.C. Reg. 8599, Slip Op. No. 287 at fn. 5, PERB Case No. 90-U-11 (1991)).
[60] *Rayshawn Douglas v. DCHA*, 64 D.C. Reg. 9301, Slip Op. No. 1632 at 4, PERB Case No. 15-U-32 (2017) (citing *FOP/MPD Labor Comm. v. MPD*, 62 D.C. Reg. 13348, Slip Op. No. 1534, PERB Case No. 08-U-22 (2015)).
[61] Report at 19. The Hearing Examiner further noted that while DPW witness testimony asserted that these are two distinct types of leave requests, Report at 19-20 (fn 5), the parties' Collective Bargaining Agreement refers to official time as "administrative leave" within the section describing "Official Time for Representational Activities." Report at 20 (fn 5) (citing Respondent Hearing Ex. A at 15). Article 8, Section F of the parties' CBA states, in pertinent part:

> For the purpose of this Article, "representational functions" means those authorized activities undertaken by bargaining unit employee representatives on behalf of other employees or the Union pursuant to representational rights under the terms of this Agreement. Employees required to appear at meetings and conferences at the request of the District or U.S. Government, or management officials, or pursuant to a request from the D.C. Council, D.C. Office of Human Resources, the Office of Personnel Management or the U.S. Congress, shall not be charged annual leave for such purposes and shall be provided administrative leave to the extent consistent with law and regulation. … Additional examples of activities for which a reasonable amount of official time will be authorized, upon advance request by the Union:
>
> a. Assist employees in the preparation and/or presentation of grievances, complaints or appeals;
> b. Grievance meetings, administrative hearings and arbitration hearings;
> c. Disciplinary or adverse action proceedings;
> d. Labor Negotiations as a representative of the employee;
> e. Attendance at an examination of an employee who reasonably believes he or she may be the subject of a disciplinary or adverse action;

discretion to approve or deny leave or any limitations on the use of "official time" by the parties' CBA, management may not exercise such discretion for retaliatory reasons.[62] As found by the Hearing Examiner, the Board need not to resolve any contractual dispute in order to determine whether DPW violated the CMPA.

b. AFGE's showing of retaliation

DPW excepts to the Hearing Examiner's determination that AFGE met the evidentiary burden for a *prima facie* case of retaliation under *Wright Line*.[63] DPW argues that the time sheets it submitted into evidence demonstrate the agency's lack of union animus because they show that DPW has granted official time to the impacted union officials in the past.[64] DPW asserts that its failure to revoke the Treasurer's approved leave while revoking the other union officials' approved leave was a mistake.[65] The Hearing Examiner carefully considered and rejected DPW's "mistake" explanation.[66] The Hearing Examiner noted that: (1) DPW has previously raised the issue of granting official time to the Vice President and the Executive Vice President due to their comparatively higher hours of official time for representational functions while not raising that issue for the Treasurer;[67] (2) that DPW had not taken action to correct the "mistake" regarding the Treasurer's unrevoked leave, despite asserting that it would do so;[68] and (3) that DPW had made no effort to seek alternate coverage for the Complainants' duties or investigate whether the Complainants' supervisors—who approved the Complainants' leave requests—shared the

---

f. Attendance at board and other committee meetings on which the Union representatives are authorized membership by the Employer or the Agreement;
g. Attendance at meetings between the Employer and the Union;
h. Attendance at Agency/Department recognized/sponsored activities to which the Union has been invited;
i. Attendance at meetings between the Union and bargaining unit employees regarding the terms of working conditions and conditions of employment; and
j. Other joint labor/management activities benefiting both labor and management.

2. Official time shall not include the time spent on internal Union business, including, but not limited to:

k. Attending Union meetings regarding internal Union business;
l. Soliciting members;
m. Collecting dues;
n. Posting notices of union meetings;
o. Carrying out elections;
p. Preparing and distributing internal Union newsletters or other such internal documents; [sic]

Respondent Hearing Ex. A. at 15-16.

[62] *AFSCME, District Council 20, Local 2743 v. DISB*, Slip Op. No. 1864 at 9, PERB Case No. 23-U-06 (2024) (citing *IBT, Local 730 v. DCPS*, 43 D.C. Reg. 5585, Slip Op. No. 375 at 3, PERB Case No. 93-U-11 (1996) (finding that DCPS committed an unfair labor practice by reassigning an employee and downgrading the employee's annual performance rating in retaliation for filing a grievance)).

[63] Exceptions at 3.

[64] Exceptions at 4. DPW notes that it did not submit the Treasurer's time sheet into evidence because the Treasurer is not a complainant in the instant case. Exceptions at 4.

[65] Exceptions at 8.

[66] Report at 18-19.

[67] Report at 18-19 (fn 4).

[68] Report at 19.

agency's concerns regarding coverage.[69] The Hearing Examiner found a pattern of DPW raising concerns with the Complainants' use of official time—which necessarily included more time used for representational functions—while not raising the same concerns regarding the Treasurer's use of official time.[70] DPW's exception constitutes a challenge to the Hearing Examiner's interpretation of the evidence, which does not constitute a proper exception.[71] While DPW submitted the Complainants' official time hours in support of a particular argument, the Hearing Examiner's interpretation and application of that evidence is reasonable, supported by the record as a whole, and consistent with PERB precedent.

c. Adverse action

DPW further excepts to the Hearing Examiner's determinations that AFGE met the fourth prong of *Wright Line* regarding the occurrence of an adverse action and that the Treasurer received disparate, preferential treatment by the agency.[72] DPW argues that the revocation of the Complainants' approved leave does not constitute an adverse action because: (1) it did not create materially adverse consequences to the Complainants' terms, conditions, or privileges of employment; and (2) the agency has discretion whether to grant administrative leave or official time.[73]

The Board has found that similar actions taken against employees in retaliation for union activity met the requirements of *Wright Line*.[74] Here DPW exercised its discretion over whether to approve individual requests for official leave in retaliation for protected union activity in violation of the CMPA.[75] The last-minute denial of leave resulted in the unexpected loss of annual leave for the Complainants.[76] The Hearing Examiner reasonably found that DPW's actions were materially adverse.[77] Further, although the Hearing Examiner properly concluded that DPW's

---

[69] Report at 19.
[70] Report at 19.
[71] *See AFSCME, District Council 20, Local 2087 v. UDC*, 67 D.C. Reg. 8903, Slip Op. No. 1751 at 4, PERB Case No. 18-U-03 (2020) (holding that mere disagreements with a hearing examiner's findings or challenges to the hearing examiner's findings with competing evidence do not constitute proper exceptions).
[72] Exceptions at 5-6.
[73] Exceptions at 5-6.
[74] *See AFSCME, District Council 20, Local 2743 v. DISB*, Slip Op. No. 1864 at 9; *See also Samantha Brown v. DCPS*, Slip Op. No. 1877 at 13-14, PERB Case No. 22-U-16 (2024).
[75] *See AFSCME, District Council 20, Local 2743 v. DISB*, Slip Op. No. 1864 at 9 (finding that agency committed an unfair labor practice by refusing to recommend an employee for a performance allowance bonus in retaliation for protected union activity, regardless of whether decisions to recommend employees for such bonuses are otherwise discretionary); *See also IBT, Local 730 v. DCPS*, Slip Op. No. 375 at 3; *Samantha Brown v. DCPS*, Slip Op. No. 1877 at 13.
[76] *See The Am. Nat'l Red Cross, Great Lakes Blood Services Region & Mid-Michigan Chapter & Local 459, Office & Prof'l Employees Int'l Union, AFL-CIO & Local 580*, 364 N.L.R.B. 1390 (2016) (finding that annual leave was an accrued benefit under the parties' CBA and that employer committed unfair labor practice by denying previously approved annual leave of employees who participated in a strike).
[77] *Cf. Propp v. Counterpart Intern.*, 39 A.3d 859, 863-64 (D.C. 2012) (holding that what constitutes an "adverse action" includes "actions taken by employers which 'a reasonable employee would have found … materially adverse, which … might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'") (quoting *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 at 77-78, 126 S.Ct. 2405, 165 L. Ed. 2d 345 (2006); *See also FOP/MPD Labor Comm. (on behalf of Sergeant Andrew J. Daniels) v. MPD*, 60 D.C. Reg. 12080, Slip Op. No. 1403 at 3, PERB Case No. 08-U-26 (2013); *IBT, Local 730 v. DCPS*, Slip Op. No. 375 at 3; *AFSCME, District Council 20, Local 2743 v. DISB*, Slip Op. No. 1864 at 9; *Samantha Brown v. DCPS*, Slip Op. No. 1877 at 13.

actions would constitute adverse action under the Board's adoption of *Wright Line*, a finding of adverse action is unnecessary to sustain the claim that DPW's retaliatory actions were coercive and in violation employee rights protected under D.C. Official Code § 1-617.04(a)(1).[78] Rather, AFGE needed only to show that DPW's conduct had the reasonably foreseeable consequence of interfering with, restraining or coercing its employees in the exercise of rights protected by the CMPA.[79] The Hearing Examiner's finding that DPW's revocation of the Complainants' official time served to coerce, restrain, and interfere with their exercise of rights protected by D.C. Official Code § 1-617.04(a)(1) is reasonable, supported by the record, and consistent with PERB precedent.

DPW also argues that the Hearing Examiner erroneously created an argument regarding preferential treatment toward the Treasurer for AFGE.[80] DPW asserts that AFGE did not raise the argument of the Treasurer receiving preferential treatment by management in any pleadings or testimony.[81] DPW further asserts that it had legitimate reasons to review and submit only the Grievants' official time records into evidence, which the Hearing Examiner assertedly converted into evidence of disparate treatment.[82] DPW's argument is unavailing. As with DPW's shifting defenses, *infra*, the Hearing Examiner pointed to multiple examples of DPW's differing treatment between the Grievants and the Treasurer. The Hearing Examiner noted that DPW had previously expressed concerns regarding the Grievants' official time hours—which were necessarily higher because of their representational duties—while expressing no similar concern regarding the Treasurer.[83] The Hearing Examiner further noted that, despite claiming all three employees' official time for the P.O.R.T. Conference would be revoked, DPW did not revoke the Treasurer's official time.[84] The Hearing Examiner considered and rejected DPW's claim that its disparate treatment of the Treasurer was mere inadvertent error.[85] The Hearing Examiner does not create arguments on AFGE's behalf by interpreting the evidence before him.[86] Mere disagreement with the Hearing Examiner's findings and conclusions based on the evidence—regardless of which party submitted that evidence—does not constitute a proper exception.[87] The Hearing Examiner's

---

[78] *See FOP/MPD Labor Comm. v. MPD*, 63 D.C. Reg. 4589, Slip Op. No. 1563 at , PERB Case No. 11-U-20 (2016) (holding that the proper test for violations of D.C. Official Code § 1-617.04(a)(1) is whether the conduct in question had a reasonable tendency in the totality of the circumstances to interfere with, restrain, or coerce employees in the exercise of protected rights) (citing *FOP/MPD Labor Comm. v. MPD*, 62 D.C. Reg. 5931, Slip Op. No. 1515 at 7, PERB Case No. 14-U-10 (2015); *FOP/DCHA Labor Comm. v. DCHA*, 60 D.C. Reg. 12127, Slip Op. No. 1410 at 5, PERB Case No. 11-U-23 (2013)); *See also AFGE, Local 631 v. WASA*, 52 D.C. Reg. 5148, Slip Op. No. 778 at 10-12, PERB Case No. 04-U-02 (2005) (rejecting WASA's exception that the hearing examiner did not cite any tangible employment actions taken by the agency against any employees nor any intent by the agency to encourage or discourage membership in any labor organization, but rather relied on her finding that WASA's conduct "had the reasonably foreseeable consequence of interfering with, restraining or coercing its employees in exercising their rights protected by the CMPA.").
[79] *AFGE, Local 631 v. WASA*, Slip Op. No. 778 at 10-12.
[80] Exceptions at 7.
[81] Exceptions at 7. DPW similarly argued that AFGE failed to meet its burden of proof or prosecute its claim by choosing not to introduce new evidence or present witnesses at the hearing. DPW Post-Hearing Brief at 4.
[82] Exceptions at 7.
[83] Report at 19 (fn 4).
[84] Report at 18.
[85] Report at 19.
[86] Further, AFGE clearly raised the issue of the alleged preferential treatment of the Treasurer in correspondence submitted as evidence by DPW. *See* Respondent Hearing Ex. E at 8.
[87] *AFSCME, District Council 20, Local 2743 v. DISB*, Slip Op. No. 1864 at 7 (citing *FOP/MPD Labor Comm. v. MPD*, 62 D.C. Reg. 11756, Slip Op. No. 1521 at 10, 12, PERB Case Nos. 07-U-40, et al. (2015); *DHS v. AFSCME,*

determinations were reasonable and supported by the full evidentiary record as provided by both parties.

d. DPW's shifting defenses

DPW also excepts to the Hearing Examiner's determination that the agency's "shifting of defenses is an element for finding pretext."[88] DPW argues that a shifting explanation does not alone support a finding of pretext.[89] DPW further argues that courts distinguish between shifting defenses that show pretext and supplementary reasons for an adverse action that do not conflict with the original explanation provided, but merely provide additional information.[90] In the instant case, the Hearing Examiner provided multiple justifications for his ultimate conclusion that DPW's defenses were pretextual.[91] The Hearing Examiner's analysis of DPW's defenses shows that those explanations do, in fact, conflict with each other, as the record lacks any indication that DPW shared its concerns with the Complainants' supervisors, who had already approved the requested leave.[92] The Hearing Examiner reasonably concluded that once the burden of proof shifted to DPW to establish a non-retaliatory reason for its revocation of the Complainants' approved leave, DPW failed to prove any such non-pretextual reason with a preponderance of the evidence.[93]

IV. Conclusion

The Hearing Examiner's findings and recommendations are reasonable, supported by the record, and consistent with PERB precedent. Therefore, the Board adopts the Hearing Examiner's findings, conclusions and recommendations, including the Hearing Examiner's recommended make-whole remedy of restoring all annual leave that the Complainants had to use as a result of DPW's revocation of their official time for attending the P.O.R.T. Conference.[94] The Board finds that DPW committed an unfair labor practice by interfering with, restraining, or coercing

---

District Council 20, Local 2401, Slip Op. No. 1845 at 9, PERB Case No. 23-A-04 (2023); *AFSCME, District Council 20, Local 2087 v. UDC*, 67 D.C. Reg. 8903, Slip Op. No. 1751 at 4, PERB Case No. 18-U-03 (2020)).

[88] Exceptions at 11.

[89] Exceptions at 11.

[90] Exceptions at 12.

[91] Report at 18-19. The Hearing Examiner noted that DPW's "defense is premised on two claimed errors, as well as a shifting [and] unsubstantiated justification." Report at 19. The Hearing Examiner further noted that not only was the explanation of concern over coverage of the Grievants' work load a novel defense that hadn't been raised prior to the hearing, but also that the General Counsel had never raised that concern with the Complainants' supervisors, who would have known whether the Complainants' absence would create a staffing issue. Report at 19. The Hearing Examiner also noted that finding replacements for the Complainants "apparently was not a concern of their immediate supervisor [sic], who had previously approved their request for official time." Report at 19.

[92] *E.E.O.C. v. Sears Roebuck and Co.*, 243 F.3d 846, 853 (4th Cir. 2001)(finding that the employer offering different justifications at different times for its decision not to hire the plaintiff was "in and of itself, probative of pretext."); *See also Geleta v. Gray*, 645 F.3d 408, 413-414 (D.C. Cir. 2011)(holding that a jury could reasonably infer pretext from the employer proffering different reasons for transferring the plaintiff at deposition and in briefs to the court); *But see Thomas v. Securiguard Incorporation*, CV 18-0125 (ABJ), 2019 WL 13160062 at 4 (D.D.C. Nov. 20, 2019)(holding that the rationales for her termination that the plaintiff alleged conflict were not actually inconsistent); *Deus v. AARP Services, Inc.*, 2022 WL 22716554 at 8 (D.C. Super. Ct. June 28, 2022)(holding that courts question an employer's stated reason for an adverse action where there is evidence of "shifting explanations of the … decision.");

[93] Report at 19.

[94] AFGE also requested as relief, in part, that the Board order DPW to pay "all costs associated with Local 1975's prosecution of this charge." Complaint at 4. The Hearing Examiner rejected AFGE's request for an award of costs. Report at 20. The Board adopts the Hearing Examiner's rejection of the payment of costs in this case.

employees in the exercise of their rights in violation of D.C. Official Code § 1-617.04(a)(1) when it revoked the Complainants' approved leave in retaliation for protected union activity. Conversely, AFGE did not present facts or arguments that support its claim of a violation of D.C. Official Code § 1-617.04(a)(2). Therefore, the Complaint is granted in part and dismissed in part.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Public Works shall cease and desist from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by D.C. Official Code 1-617.04(a)(1);

2. The District of Columbia Department of Public Works shall make whole the Complainants, Tameka Garner-Barry and Michelle Thomas, by restoring all annual leave that the Complainants were required to use in order to attend the 2023 Political Action, Organizing, Representation and Training Conference, and notifying the Complainants in writing once their annual leave has been restored;

3. The District of Columbia Department of Public Works shall, within ten (10) days of the issuance of this Decision and Order, post at its facilities copies of the attached Notice, marked "Appendix A," both electronically and on all bulletin boards where notices to bargaining unit employees are posted for thirty (30) days;

4. The District of Columbia Department of Public Works shall notify the Board of the posting of the Notices within fourteen (14) days of the issuance of this Decision and Order; and

5. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons and Peter Winkler.

August 20, 2024

Washington, D.C.

Appendix A

NOTICE

TO ALL EMPLOYEES AND LABOR ORGANIZATIONS ASSOCIATED WITH THE PERFORMANCE OF WORK AT THE DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS: THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO THE DECISION AND ORDER IN PERB CASE NO. 23-U-11.

The Public Employees Relations Board has found that we violated the Comprehensive Merit Personnel Act and has ordered us to post, distribute, and obey this notice.

DISTRICT OF COLUMBIA LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union.

Choose a representative to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected rights.

WE WILL CEASE AND DESIST from interfering with, restraining, or coercing employees in their rights guaranteed under D.C. Official Code § 1-617.04.

WE WILL NOT retaliate against employees for protected activity, including but not limited to: serving as and/or fulfilling the duties of union representatives; or filing grievances in relation to employees' union rights and/or compliance with District law.

WE WILL NOT engage in any like or related conduct in violation of D.C. Official Code § 1-617.04.

WE WILL make whole the Complainants, Executive Vice President and Vice President of American Federation of State, County, and Municipal Employees, Local 1975, by restoring all annual leave that the Complainants were required to use as a result of our revocation of their approved official time.

DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS, Employer

Date:_____By_____

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or the Department's compliance with any of its provisions, they may communicate directly with the D.C. Public Employee Relations Board by U.S. Mail at 1100 4th Street, SW, Suite E630: Washington, D.C. 20024, or by phone at (202) 727-1822.

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board reconsider its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.