

**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)	
)	
Monica Martinez)	
)	
Complainant)	PERB Case No. 19-U-01
)	
v.)	Opinion No. 1733
)	
District of Columbia)	
Public Schools)	
)	
Respondent)	

DECISION AND ORDER

I. Statement of the Case

On October 12, 2018, Complainant Monica Martinez, *pro se* (Complainant), filed the instant unfair labor practice complaint (Complaint)¹ against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS violated the Comprehensive Merit Personnel Act (CMPA), D.C. Official Code § 1-617.04(a)(3) and (4). The Complaint alleged that DCPS exceeded Complainant from Complainant’s teaching position in retaliation for having sought the intervention of Washington Teachers’ Union (WTU) in a complaint about Complainant’s job duties.² On November 5, 2018, DCPS filed an Answer arguing that Complainant failed to allege any unfair labor practice.³ DCPS also asserted that the Complaint was untimely filed and that PERB lacked jurisdiction over the allegations in the Complaint.⁴

A hearing was held on July 25, 2019. The parties submitted post-hearing briefs. On November 12, 2019, the Hearing Examiner issued a Report of Findings and Recommendations (Report). The parties did not file exceptions.

As discussed more fully below, the Board finds that the Hearing Examiner’s conclusions are reasonable, supported by the record, and consistent with Board precedent. Therefore, the

¹ The Complaint alleged violations of D.C. Official Code § 1-617.04(a)(1) and (3); however, the Hearing Examiner determined that the allegations in the Complaint were violations of D.C. Official Code §1-617.04(a)(3) and (4).

² Report at 1. In the Complaint, Complainant referenced an earlier unfair labor practice complaint filed against DCPS in PERB Case No. 15-U-29; however, Complainant did not allege in this Complaint that Complainant’s position was exceeded in retaliation for having filed the earlier unfair labor practice complaint.

³ Resp’t Answer at 4-10.

⁴ Resp’t Answer at 4-10.

Board adopts the recommendations of the Hearing Examiner that DCPS did not violate D.C. Official Code § 1-617.04(a)(3) and (4) and dismisses the Complaint in its entirety.

II. The Hearing Examiner's Report and Recommendations

A. Factual Determinations

Complainant began teaching at DCPS in 1992.⁵ At the time of the events leading to the instant complaint, Complainant taught English Language Arts to grades 7 and 8 at Wheatley Education Campus.⁶ In February 2018, Complainant reported on a Mid-Year Teacher Assessment Strategy Reflection Sheet that Complainant “would like less breakfast duty.”⁷ On March 1, 2018, Complainant again requested an exemption from breakfast monitoring duty in an email to Complainant’s principal, Dr. Shenora Plenty.⁸ On March 6, 2018, in an email to Complainant and several other teachers, Dr. Plenty responded that their breakfast duty was reduced to once a week.⁹ Shortly thereafter, Complainant contacted WTU Vice President Jacqueline Pogue-Lyons regarding breakfast monitoring duties.¹⁰ According to Complainant, Pogue-Lyons spoke to Dr. Plenty, but Dr. Plenty would not make any more exemptions.¹¹ Complainant did not file a grievance over Dr. Plenty’s refusal to exempt Complainant from breakfast monitoring duties.

On May 14, 2018, Dr. Plenty told Complainant that Complainant’s English Language Arts position was being excessed from the school’s budget.¹² The same day, Complainant requested that WTU file a grievance on Complainant’s behalf.¹³ In a letter dated May 16, 2018, Complainant received an official notification that Complainant’s position was being excessed effective June 15, 2018.¹⁴ The letter noted that Complainant’s excessed status would be rescinded if a vacancy for the Teacher-Reading position occurred prior to June 15, 2018.¹⁵ On June 15, 2018, Complainant’s position was excessed.¹⁶

At the hearing, Complainant testified that she went to sixteen (16) interviews at twelve (12) schools during May, June, and July 2018 in an attempt to find another permanent English position; none of these interviews led to an offer.¹⁷

⁵ Hr’g Exam’r R. & R. at 1.

⁶ Hr’g Exam’r R. & R. at 2.

⁷ Hr’g Exam’r R. & R. at 2.

⁸ Hr’g Exam’r R. & R. at 2.

⁹ Hr’g Exam’r Rep. at 2.

¹⁰ Hr’g Exam’r R. & R. at 2.

¹¹ Hr’g Exam’r R. & R. at 2.

¹² Hr’g Exam’r R. & R. at 3.

¹³ Hr’g Exam’r R. & R. at 2. On June 4, 2018, WTU filed a Step 1, Stage 3 grievance over Complainant’s excessing. (Compl., Ex. 2; Resp’t Answer, Ex. 2) At the time of the hearing, resolution of Complainant’s grievance was pending.

¹⁴ Hr’g Exam’r R. & R. at 3.

¹⁵ Hr’g Exam’r R. & R. at 3.

¹⁶ Compl., Ex. 1.

¹⁷ Hr’g Exam’r R. & R. at 4.

B. Issues and Recommendations

The Hearing Examiner determined that the issues for resolving Complainant's allegations were the following: "(1) Was the Complaint timely filed? (2) If the Complaint was timely filed, did the Respondent commit an unfair labor practice? If so, what should be the remedy?"¹⁸ The Hearing Examiner's conclusions and recommendations are discussed below in the order addressed in the Report.

The Hearing Examiner concluded that the Complaint was timely filed. The Hearing Examiner reasoned that Complainant's position was not exceeded until June 15, 2018.¹⁹ The Hearing Examiner found that the Complaint's filing date of October 12, 2018, was within 120 days of June 15, 2018, and therefore, timely.²⁰

The Hearing Examiner concluded that Complainant did not prove the allegation that DCPS exceeded Complainant's teaching position in violation of the CMPA. First, the Hearing Examiner addressed Respondent's argument that the Board lacked jurisdiction over the allegations in the Complaint. The Hearing Examiner noted that it would be a violation of D.C. Official Code § 1-617.04(a)(4) for DCPS' excessing action "to have been informed by illegal retaliatory intent."²¹ The Hearing Examiner stated that the instant Complaint alleged DCPS exceeded Complainant's position in retaliation for seeking representation by WTU.²² Thus, the Hearing Examiner concluded that the allegations in the Complaint are within the jurisdiction of the Board.²³

Second, the Hearing Examiner evaluated Complainant's substantive allegations that DCPS retaliated against Complainant for exercising a statutorily protected right.²⁴ The Hearing Examiner found no basis to conclude that DCPS had animus against Complainant as a result of having filed PERB Case No. 15-U-29. The Hearing Examiner considered Complainant's March 1, 2018, email to Dr. Plenty to be relieved of breakfast duties as an interaction with DCPS management that may have led to animus against Complainant.²⁵ The Hearing Examiner reviewed the correspondence and did not find any basis to conclude that the request created animus against Complainant.²⁶ The Hearing Examiner also determined that the record did not support Complainant's contention that DCPS Human Resources personnel prevented Complainant from obtaining a position at another school.²⁷ Therefore, the Hearing Examiner recommended that the Complaint be dismissed.

¹⁸ Hr'g Exam'r R. & R. at 4.

¹⁹ Hr'g Exam'r R. & R. at 6.

²⁰ Hr'g Exam'r R. & R. at 6.

²¹ Hr'g Exam'r R. & R. at 8-9.

²² Hr'g Exam'r R. & R. at 9.

²³ Hr'g Exam'r R. & R. at 9; *Rayshawn Douglas v. D.C. Housing Auth.*, 64 D.C. Reg. 9301, Slip Op. No. 1623 at 2. PERB Case No. 15-U-32 (2017).

²⁴ *Wright Line v. Lamoureux*, 251 NLRB 1083 (1980).

²⁵ Hr'g Exam'r Rep. at 10.

²⁶ Hr'g Exam'r R. & R. at 10.

²⁷ Hr'g Exam'r R. & R. at 11.

III. Discussion

The Board will affirm a hearing examiner's findings and recommendations when they are reasonable, supported by the record, and consistent with Board precedent.²⁸ When considering the pleadings of a *pro se* complainant, the Board construes the claims liberally to determine whether a proper cause of action has been alleged and whether the complainant has requested proper relief.²⁹

A. Timeliness

The Hearing Examiner recommended that the Board find that the Complaint was timely filed, in accordance with PERB Rule 520.4. The Board has held that PERB Rule 520.4 requires unfair labor practice complaints be filed within one hundred twenty (120) days of when the complainant first knew or should have known of the acts giving rise to the alleged violation.³⁰ The Hearing Examiner explained that, while Complainant was first aware of DCPS' intent to excess Complainant's position on May 14, 2018, the act was not effective until June 15, 2018.³¹ The Hearing Examiner noted that the excessing of Complainant's position was contingent on a vacancy for the Teacher-Reading position by the effective date.³² The Hearing Examiner found that the Complaint's filing date of October 12, 2018, was within one hundred twenty (120) days of June 15, 2018, and therefore, timely. The Board agrees with the Hearing Examiner's determination that Complainant's cause of action arose on June 15, 2018, after a vacancy for the Teacher-Reading position did not occur and the excessing action was effective. The Board finds that the Hearing Examiner's findings and conclusions are reasonable, supported by the record, and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner's conclusion that the Complaint was timely filed.

B. Jurisdiction

The Hearing Examiner determined that the Board has jurisdiction to resolve the allegations in the Complaint. The Board has held that if the Board must interpret the parties' collective bargaining agreement in order to determine whether there has been a violation of the CMPA, then the Board does not have jurisdiction over the allegations and will defer the matter to the parties' negotiated grievance and arbitration process.³³ The Board finds that the instant Complaint does not involve the application of the parties' collective bargaining agreement. Complainant alleged that DCPS retaliated against Complainant for seeking WTU's representation in her effort to be relieved of breakfast duty. The Board has held that D.C. Official Code § 1-617.04(a)(4) "expressly and specifically protects employees who engage in any of the

²⁸ *American Fed'n of Gov't Emp., Local 872 v. D.C. Water and Sewer Auth.*, 52 D.C. Reg. 2474, Slip Op. No. 702, PERB Case No. 00-U-12 (2003).

²⁹ *Allen v. Bd. Of Trustees of UDC*, 60 D.C. Reg. 13713, Slip Op. No. 1416 at 2, PERB Case No. 11-U-45 (2013).

³⁰ *Pitt v. D.C. Dep't of Corr.*, 59 D.C. Reg. 5554, Slip Op. No. 998 at p. 5, PERB Case No. 09-U-06 (2009).

³¹ Hr'g Exam'r R. & R. at 6.

³² Hr'g Exam'r R. & R. at 6.

³³ *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. Metro. Police Dep't*, 62 D.C. Reg. 13348, Slip Op. No. 1534, PERB Case No. 08-U-22 (2015).

listed activities therein when it is pursuant to matters under the CMPA.”³⁴ An employee’s right to representation by a labor organization is protected by the statute.³⁵ The Board finds that the Hearing Examiner’s findings and conclusions are reasonable, supported by the record, and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner’s conclusion that PERB has jurisdiction over the allegation in the Complaint.

C. Unfair Labor Practice Allegations

The Board adopts the Hearing Examiner’s findings and conclusions that Complainant did not prove the allegation that DCPS exceeded Complainant’s teaching position in violation of the D.C. Official Code § 1-617.04(a)(3) and (4).³⁶ Pursuant to Board Rule 520.11, Complainant is required to prove, by a preponderance of evidence, that DCPS committed unfair labor practices in violation of the CMPA.³⁷ D.C. Official Code § 1-617.04(a)(3) and (4), in pertinent part, prohibits the District from discriminating in regard to tenure of employment to discourage membership in any labor organization and discharging or otherwise taking reprisal against an employee because they have filed a complaint. The Board has adopted the analysis set forth by the National Labor Relations Board in *Wright Line v. Lamoureux*,³⁸ that a complaint is required to establish a *prima facie* case by showing that the complainant’s exercise of a protected right was a “motivating factor” in the employer’s disputed action.³⁹ Under *Wright Line*, a *prima facie* case may be established by a showing that the complainant (1) engaged in protected union activity; (2) the employer knew about the employee’s protected union activity; (3) there was anti-union animus or retaliatory animus by the employer; and (4) as a result, the employer took an adverse employment action against the employee.⁴⁰

Complainant alleged the protected activity that triggered the decision to excess Complainant was Complainant’s efforts, through WTU’s representation concerning Complainant’s breakfast duties.⁴¹ The Hearing Examiner found that Complainant’s March 1,

³⁴ *Council of Sch. Officers, Local 4 v. D.C. Pub. Sch.*, 59 D.C. Reg. 3274, Slip Op. No. 803 at 10, PERB Case No. 04-U-38 (2007).

³⁵ *Fraternal Order of Police/Metro. Police Dep’t Labor Comm v. D.C. Metro. Police Dep.t*, 59 D.C. Reg. 4948, Slip Op No. 932, PERB Case No. 07-U-10 (2008).

³⁶ D.C. Official Code § 1-617.04(a)(3) and (4): “The District, its agents, and representatives are prohibited from: (3) Discriminating in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ; (4) Discharging or otherwise taking reprisal against an employee because he or she has signed or filed an affidavit, petition, or complaint or given any information or testimony under this subchapter. . . .”

³⁷ PERB Rule 520.11.

³⁸ *Wright Line v. Lamoureux*, 251 NLRB 1083 (1980).

³⁹ *Bagenstose v. D.C. Pub. Sch.*, 38 D.C. Reg. 4155, Slip Op. No. 270, PERB Case No. 88-U-33 and 88-U-34 (1991).

⁴⁰ Hr’g Exam’r Rep. at 9; *Doctors Council of D.C. v. D.C. Commission on Mental Health Services*, 47 D.C. Reg. 7568, Slip Op. No. 636 at 3, PERB Case No. 99-U-06 (2000); *see also D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corp.*, 46 D.C. Reg. 6271, Slip Op. No. 583, PERB Case No. 98-U-07 (1999).

⁴¹ The Complainant made reference in the Complaint and in Complainant’s post-hearing brief that Complainant previously filed PERB Case No. 15-U-29 against DCPS; however, Complainant did not allege that DCPS exceeded Complainant’s position in retaliation for having previously filed a complaint addressed in PERB Case No. 15-U-29. Further, Complainant did not present evidence of this allegation either at the hearing or in Complainant’s post-hearing brief. Therefore, the Board will not address this allegation in its analysis.

2018, email to Dr. Plenty regarding Complainant's breakfast duties was not a protected activity under the CMPA. Reviewing the Complainant's allegation that DCPS retaliated against Complainant for seeking WTU's representation for her breakfast duty issues, the Hearing Examiner found that WTU Vice-President Pogue-Lyons' conversation with Dr. Plenty on Complainant's behalf established that a management official was aware of Complainant's concerns and actions; however, the Hearing Examiner found that Complainant failed to establish that WTU's representation created animus by DCPS against Complainant. The Hearing Examiner found nothing in the record indicated how WTU presented Complainant's request to Dr. Plenty, nor how Dr. Plenty reacted to the request.⁴² Further, the Hearing Examiner noted that actual notice of the excessing of Complainant's position was signed by Julie Johnson, Interim Chief of Talent and Culture, not by Dr. Plenty.⁴³

Similarly, Complainant's contention that DCPS Human Resources personnel prevented Complainant from obtaining a position at another school is not supported by the record. Nothing in the record showed that officials at other schools knew about Complainant's requests to be relieved of breakfast duty or that Human Resources personnel were involved in the interviewing process.

The Board finds that the Hearing Examiner's conclusion that Complainant did not prove the allegation that DCPS exceeded Complainant's teaching position in violation of the CMPA is reasonable, supported by the record, and consistent with Board precedent. Therefore, the Board concludes that the Complainant did not establish a *prima facie* case for retaliation under *Wright Line*.

IV. Conclusion

The Board has reviewed and adopted the findings, conclusions, and recommendations of the Hearing Examiner, and finds that DCPS did not violate D.C. Official Code § 1-617.04(a)(3) and (4). Therefore, the Complaint is dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. This Complaint be dismissed.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

⁴² Hr'g Exam'r R. & R. at 11.

⁴³ Hr'g Exam'r R. & R. at 11.

Decision and Order
PERB Case No. 19-U-01
Page 7

By unanimous vote of Board Chairperson Charles Murphy and Board Members Mary Anne Gibbons, Ann Hoffman, Barbara Somson, and Douglas Warshof.

January 16, 2020

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 19-U-01, Opinion No. 1733 was sent by File and ServeXpress and U.S. Mail to the following parties on this 27th day of January, 2020.

Monica Martinez
4818 Chevy Chase Drive #303
Chevy Chase, MD 20815

Stephanie T. Maltz, Esq.
Office of Labor Relations and
Collective Bargaining
441 4th Street, NW, Suite 820 North
Washington, D.C. 20001

/s/ Alexis Anderson, Esq.
Attorney Advisor