GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: Georgia Mae Green, Complainant, and District of Columbia Department of Corrections, Respondent.	PERB Case No. 89-U-10 Opinion No. 257

DECISION AND ORDER

On June 5, 1989, Georgia Mae Green (Complainant), an employee of the D.C. Department of Corrections (DOC) filed an Unfair Labor Practice Complaint with the District of Columbia Public Employee Relations Board (Board). The Complaint, as amended, alleged that DOC unlawfully discriminated against the Complainant and otherwise violated the Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Code Sections 1-618.4(a)(1),(2), (3),(4), and (5) by denying her request for a representative at a meeting with her supervisor; by promulgating a new accountability log sign-in/sign-out procedure; by charging the Complainant with AWOL and by proposing an adverse action against her following her refusal to comply with the directives of the new procedure. [1]/

In Respondent's Answers to the Unfair Labor Practice Complaint and its Amendments, DOC denied that it had unlawfully discriminated against the Complainant. In response to the Complainant's allegation that she was denied representation during a meeting with her supervisor, DOC asserted that since the meeting was not investigatory in nature, the Complainant was not entitled to representation. Moreover, the Complainant, according to DOC, did not request a representative or the time to acquire one. DOC contended that it was within its rights to implement the new sign-in/sign-out procedure. Furthermore, DOC argued that the adverse actions taken or proposed against the Complainant for refusing to comply with the new procedure were for just cause, and her union status or activities were never considered. DOC requested that the Board dismiss the amended Complaint on the basis that it does not fall within the scope of the enumerated unfair labor practices under D.C. Code Section 1-618.4(a).

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[1]/ These allegations are the summation of a Complaint amended three times by the Complainant on July 6, August 21, and September 6, 1989.

The Board referred the Complaint and its Amendments to a Hearing Examiner, who heard the matter on March 12 and 13, 1990. The Hearing Examiner's Report and Recommendation was received by the Board on June 25, 1990. [2]/

The issues in this case as raised before and addressed by the Hearing Examiner in his report can be stated as follows:

1. Whether DOC violated the Complainant's statutory rights under the CMPA to union representation when a DOC management official elected to have another employee witness Complainant's receipt of documents charging her with insubordination.

2. Whether DOC by establishing and enforcing the provisions of a new accountability sign-in/sign-out log without bargaining with the exclusive bargaining representative violated D.C. Code Section 1-618.4(a)(5).

3. Whether certain actions taken by DOC with respect to the Complainant were acts of discrimination and reprisal for having exercised rights afforded employees under the CMPA in violation of D.C. Code Section 1-618.4(a)(3) and (4).

4. Whether the AWOL charge and the proposed suspension by DOC against the Complainant for her having left work early on August 23, 1989, were acts of reprisals for filing the Complaint and its Amendments in violation of D.C. Code Section 1-618.4(a)(1) and (4).

The Hearing Examiner concluded that the evidence presented did not support findings that DOC had engaged in prohibited conduct with respect to the alleged violations of the Complainant's rights under the CMPA as set forth under issues 1, 2, and 3 above. The Hearing Examiner did conclude, however, that DOC's 4-hour AWOL charge and its proposed 10-day suspension following Complainant's early departure from work for health reasons on August 23, 1989, constituted reprisals against her for having filed the second amendment to the Complaint on August 21, 1989, in violation of D.C. Code Section 1-618.4(a)(1) and (4). The Hearing Examiner based his conclusion largely on (1) his decision not to credit certain testimony by the DOC management official who took the adverse actions against Complainant; (2) his finding that DOC's decision to charge the Complainant with AWOL was made either the same day or the day after it had

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[2]/ A copy of the Report may be obtained at the offices of the Board.

received notice that the management official who took the AWOL action had been named as a Respondent in this proceeding; (3) his findings that the AWOL charge deviated from the prior practice of the Complainant's supervisors; (4) the apparent conflicts between a section of the District Personnel Manual which provides for the approval of leave under the circumstances Complainant took it and the reasons offered by the management official for his refusal to approve Complainant's leave request [3]/; and (5) his conclusion that the proposed 10-day suspension was severe in relation to the infraction.

On July 13, 1990, Complainant timely filed Exceptions to the Hearing Examiner's Report and Recommendation. No Exceptions were filed by the Respondent. Complainant excepts to the Hearing Examiner's factual findings in support of his conclusion that DOC did not violate the CMPA with respect to issues 1, 2 and 3 above. We have considered the Complainant's exceptions and have found no basis for rejecting the findings of the Hearing Examiner which are fully supported by the record. Complainant's Exceptions raise no more than factual issues which were considered and specifically rejected in the Hearing Examiner's Report and Recommendation.

The Board, after reviewing the record, adopts the findings of fact and conclusions of law set forth in the Hearing Examiner's Report and Recommendation with the following exceptions.

On page 51 of his Report, the Examiner concluded [4]/ that DOC's August 23, 1989 AWOL charge and its proposed 10-day suspension of Complainant for the alleged AWOL violated not only D.C. Code Section 1-618.4(a)(1) and (4), but also its subsection (3). There is nothing in the record to support a violation of subsection (3), which prohibits discrimination to "encourage or discourage membership in any labor organization...", and the Examiner's discussion of the evidence at pages 45-50 makes clear that he found no such evidence but only "that AWOL charge and suspension was a pretext for Mr. Bragg's desire to punish Ms. Green for her having filed the Second and Third Amendments to the Complaint in this case." (Report p. 48) Accordingly, we dismiss the allegation of a violation of D.C. Code Section 1-618.4(a)(3).

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[3]/ See, DPM Chapter 12, Volume III, Part III, Subpart 4.9(I)(3).

[4] Although the first paragraph on page 51 referred to above appears under the heading "Order", that text explicitly contains a legal conclusion. The Examiner's recommended order is contained only in the following two paragraphs of page 51 of the Report and Recommendation.

Second, the Examiner reached conclusions as to certain claims in the Complaint that DOC's conduct violated the collective bargaining contract between the Complainant's union and DOC as well as the CMPA. The Examiner correctly noted in his Report that the Board (and therefore he, as its Examiner) is without jurisdiction to rule on contract breach claims as such. We therefore do not adopt his conclusions on these allegations of contract breach but instead dismiss them for want of jurisdiction.

All of the allegations of the Complaint, other than the specific matters dealt with in the two preceding paragraphs, we find the Hearing Examiner's analysis, reasoning and conclusions to be thorough, rational and persuasive. We therefore adopt them in their entirety.

ORDER

IT IS HEREBY ORDERED THAT:

(1) DOC shall cease and desist from disciplining or otherwise taking reprisals against Complainant in violation of D.C. Code Section 1-618.4(a)(1) and (4) for pursuing an action under the CMPA;

(2) DOC shall (a) rescind the August 23, 1989 AWOL charge to the Complainant; (b) restore the 4 hours of leave taken on August 13, 1989 to Complainant's available annual leave and (c) and otherwise make her whole in accordance with law for any benefits lost due to that denial of annual leave.

(3) DOC shall withdraw the proposal to suspend the Complainant and purge Complainant's personnel records of any record or documentation that may exist concerning adverse action taken or proposed regarding Complainant's early departure from work on August 23, 1989.

(4) DOC shall not in any like or related manner interfere with the Complainant's rights guaranteed her by the Comprehensive Merit Personnel Act.

(5) DOC shall post conspicuously within ten (10) days from the service of this Opinion the attached Notice at the affected employee work site for thirty (30) consecutive days;

(6) DOC shall notify the Public Employee Relations Board, in writing, within fourteen (14) days of this Order that the Notices have been posted accordingly.

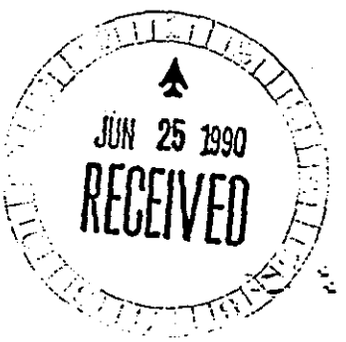
BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

October 9, 1990

Appendix 1

GOVERNMENT OF THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEE RELATIONS BOARD



In the Matter of:

GEORGIA MAE GREEN, COMPLAINANT v. DAVID D. ROACH, Administrator for Central Facility, D.C. Department of Corrections, et al., RESPONDENTS	Case No. 89-U-10

Before: Ira F. Jaffe, Esq., Hearing Examiner

APPEARANCES:

For the Complainant:

Georgia Mae Green, Esq.
(Pro Se)

For the Respondents:

Agnes M. Alexander, Esq.
(Labor Relations Officer, OLRCB)

BACKGROUND

On June 5, 1989, the Complainant, Georgia Mae Green, Esq., a Paralegal Specialist at the District of Columbia Department of Corrections Central Facility in Lorton, Virginia, filed an Unfair Labor Practice Complaint alleging that David D. Roach, then Administrator for the Central Facility, violated the District of Columbia Government Comprehensive Merit Personnel Act of 1978 as a result of:

1) his having directed her to follow new accountability log sign-in and sign-out procedures, and 2) his having directed an employee not of Ms. Green's choosing to witness her receipt of May 1, 1989 written charges of insubordination. The insubordination charges were the result of her deliberate and repeated refusals to have followed those revised sign-in and sign-out procedures. Ms. Green further alleges that the implementation of the new procedures without prior bargaining with the Union violated the Department's statutory obligation to bargain in good faith and this breach of the obligation to bargain in good faith rendered those new procedures a nullity and excused her obligation to follow any directives of supervision to comply with those new procedures. Ms. Green maintained that the actions of Mr. Roach in requiring that someone not of her own choosing witness her receipt of documents interfered with and violated her right to union representation as well as her contractual right to privacy when receiving discipline.

The Department denied all of these allegations, but asserted alternatively that: 1) even if the factual allegations made by Ms. Green were true, none of the charges would have merit; and 2) Ms. Green lacked standing to even maintain that the Department violated its obligation to bargain in good faith with IBT, Local 1714.

The remainder of the Background section will be divided into the following areas: 1) The New Accountability Log Procedures; 2) The Events of April 17, 1989; 3) The Events

of May 2, 1989; 4) The Proposal to Suspend Ms. Green; 5) The First Amendment to the Complaint; 6) The August 8, 1989 Official Reprimand; 7) The Second Amendment to the Complaint; 8) The AWOL Charges; 9) The Third Amendment to the Complaint; 10) The Ten Day Suspension Proposal for the August 23rd AWOL; and 11) Other Evidence Related to the Reprisal Claims of Ms. Green.

1) The New Accountability Log Procedures

Prior to the issuance of Operations Memorandum #5 on February 20, 1989 by then Director Halem H. Williams, Jr., employees were required to sign-in and sign-out only at the main checkpoint as they entered and left the institution. There were concerns that this procedure did not provide the Department with sufficient ability to determine where personnel were at all times. Specifically, the testimony of Mr. Roach and of Ronald McClain, Acting Chief, Office of Policy and Procedure, set forth in some detail the reasons why the Department believed it prudent from the vantage point of inmate security and employee safety to also require a more accurate indication of when employees have left their normal work areas, as well as the authority of Mr. Williams and Mr. Roach to have changed the sign-in/sign-out procedures.

On March 15, 1989, Mr. Roach issued a memorandum to all Central Facility employees appending a copy of Operations Memorandum #5, and requiring among other things that employees who leave the institution must have authorization to do so and must sign in and out, noting the time of those entries and departures, and that a log sheet reflecting when

employees are on non-paid break/lunch time should be established. That memorandum finished with the statement that "Compliance is mandatory and your cooperation is appreciated by this authority."

On March 21, 1989, Eddie Kornegay, then Trustee and currently President, IBT, Local 1714, wrote to Mr. Williams challenging Operations Memorandum #5 to the extent that it would confine employees to the institution during their lunch breaks and seeking that employees be paid for all periods that they are so confined. On March 31, 1989, Mr. Williams issued a memorandum clarifying that it was never his intention to confine employees during unpaid lunch periods, but only "to ensure that all persons assigned to an institution which houses inmates are accounted for, and are accessible in the event of an unforeseen emergency." An April 3, 1989 letter from Mr. Williams to Mr. Kornegay further confirmed that intention and interpretation of the Operations Memorandum. No additional information appears in the record as to any formal Union protest of Operations Memorandum #5 or the creation of accountability logs at Central Facility or elsewhere.

2) The Events of April 17, 1989

Ms. Green, however, was not signing in and out on the accountability log as required by Mr. Roach's March 15th memorandum. On April 17, 1989, Mr. Roach saw Ms. Green about to leave the building for lunch and instructed her to sign out on the accountability log as required by his

March 15th memorandum and by Operations Memorandum #5. Ms. Green began to argue with Mr. Roach, maintaining that the new requirement was in violation of the Agreement, improperly imposed a new working condition, violated Departmental procedures, and in her view violated her rights by requiring her to sign in and sign out more than once.

During their conversation, Mr. Roach stated that his actions were supported by Operations Memorandum #5. When Ms. Green denied having seen that document, the first page of that memorandum was located and shown to her. The argument continued, with Ms. Green stating that she would sign in and out at the main check point, but that signing in and out twice would violate her rights and change her working conditions. Mr. Roach, citing the need to know where people are working in a secure institution, continued to insist that Ms. Green sign in and out both on the accountability log and at the main check point.

Later on the afternoon of April 17, 1989, Mr. Roach had his secretary, Connie Bullock look in Ms. Green's "in" box to see if she could locate the copy of his March 15th memorandum and the attached copy of Operations Memorandum #5. (Ms. Bullock has since married and her last name has changed to Johnson. In view of the continued reference in the record by both Parties to Ms. Johnson as Ms. Bullock, the Hearing Examiner will also do so herein to avoid confusion.) Ms. Bullock located a copy of Mr. Roach's one month old March 15th accountability log memorandum in Ms. Green's "in" box. Ms. Bullock further noted that none of the other

documents that she observed in Ms. Green's "in" box were of similar vintage.

Despite claiming during their April 17th discussion that she had not previously seen Mr. Roach's memorandum or Operations Memorandum #5, Ms. Green admitted at the hearing in this case that she understood that Mr. Roach was talking about a sign-in and sign-out accountability log sheet maintained at his desk when he ordered her to comply with sign in and out procedures. Further, the fact that Ms. Green was able to immediately articulate a number of legal objections to that Operations Memorandum, including a claim factually that it was adopted without first bargaining with IBT, Local 1714, suggest that regardless of whether or not she had actually seen her copy of those memoranda she was familiar with their issuance and content even prior to April 17, 1989.

As noted earlier, Ms. Green took it upon herself to refuse to comply with that directive on the basis of her own conclusion that the directive of Mr. Roach was an improper unilateral change in working conditions without prior bargaining in violation of both the CMPA and the Agreement between the Department and IBT Local 1714.

3) The Events of May 2, 1989

Even after being instructed on April 17th to sign the accountability log in the Administrator's office, Ms. Green continued in her refusal to obey that order. Mr. Roach prepared a memorandum, dated May 1, 1989, which was served

upon Ms. Green on May 2, 1989, and which charged her with insubordination for her refusal to comply with his direct order to sign the accountability log.

A second memorandum dated May 1, 1989 scheduling an Adverse Action interview was prepared by Mr. Roach and served upon Ms. Green. The Adverse Action interview memorandum had typed lines at the bottom for the employee's signature and the signature of a witness. Ms. Green refused to sign for receipt of the memoranda.

As was his usual practice, Mr. Roach asked Ms. Bullock to telephone Ms. Green to come to his office to receive the charge and adverse action interview memoranda. Mr. Roach also asked Ms. Bullock to telephone Darryl Jones, a Shop Steward, to witness the service of the charges upon Ms. Green. When Mr. Jones arrived, Ms. Green directed him to leave, stated that she did not want him to be her representative, and complained that Mr. Roach had interfered with her rights to select her own representative by summoning Mr. Jones without her request or approval.

Mr. Jones knew that he had been summoned to witness giving charges to Ms. Green and also knew that he had been selected due to his status as a Shop Steward. Mr. Jones indicated that he has often served in that role and had never been directed to leave by an employee in the past. Mr. Roach directed Mr. Jones to remain despite Ms. Green's protestations, but Ms. Green shoved Mr. Jones towards the door whereupon he left.

[Later, after the incident was finished, Mr. Roach

called Mr. Jones back to his office and instructed him that should the situation ever arise again, he (Jones) was obligated to follow the orders of a supervisor (Roach) when directed clearly to remain.]

Staff Assistant Marilyn McMillan then arrived at Mr. Roach's office (apparently on her own) and offered "to represent" Ms. Green. Ms. Green told Ms. McMillan that, as a member of management, she could not represent her. Ms. Green testified that Mr. Roach also directed Ms. McMillan to remain to witness the service of the charges. Mr. Roach denied having so directed Ms. McMillan. Ms. McMillan testified simply that she left because the discussion was heated and she hoped that it would cool down after she left. In any event, there was no dispute that Ms. McMillan left Mr. Roach's office after Ms. Green requested that she do so.

Finally, Mr. Roach summoned Ms. Bullock into the office to serve as a witness. Ms. Green continued to insist loudly that Ms. Bullock leave. Mr. Roach again directed Ms. Bullock to remain. She did so and witnessed the service of the two memoranda upon Ms. Green.

Ms. Green alleged in the Complaint that Mr. Roach interfered with her right to select her Union representative and further that Mr. Roach's actions violated her "right" to receive personnel charges in private. Mr. Roach testified that his practice was to have a witness present in order to witness employee receipt of personnel documents of this

type, and that he selected Mr. Jones because of his Union Steward status and also because he was known by Mr. Roach to be a truthful individual.

The record was clear that no questioning or interrogation of Ms. Green was attempted during the May 2, 1989 interview. Nor did Ms. Green voluntarily discuss the situation which led to the filing of charges of insubordination. There also is no dispute that Ms. Green never requested Union representation during the meeting. Rather, she appears simply to have challenged Mr. Roach's efforts to have someone not of her choosing present to serve as a witness to her receipt of the charges. Mr. Roach testified that, if Ms. Green had requested the presence of someone specific, then he would have adjourned the meeting to have that individual present. As just noted, however, no such request was made by Ms. Green.

In fact, a May 5, 1989 investigatory interview meeting on the insubordination charge was scheduled on May 2, 1989. At that time, Ms. Green was advised that she had a right to have a union representative present at the May 5th interview. Ms. Green, however, elected not to appear at the May 5th interview.

4) The Proposal to Suspend Ms. Green

On June 1, 1989, Ms. Green served copies of the Complaint upon Mr. Roach and filed it by mail with the PERB. The PERB received its copy of the Complaint on June 5, 1989. Mr. Williams received his copy of the Complaint on June 7, 1989. The record did not clearly indicate the date upon

which Mr. Roach received his copy of the Complaint.

On June 15, 1989, Mr. Roach issued to Ms. Green a letter, dated June 8, 1989, proposing that she be suspended for forty-five (45) days as a result of her insubordination. Mr. Roach requested Ms. Bullock to be present to witness Ms. Green's receipt from him of that proposal notice. As on May 2, 1989, there was no conversation between Mr. Roach and Ms. Green relative to the basis for the insubordination charge or the proposal to suspend her. No interrogation took place and Ms. Green did not volunteer any information. No Union representative was requested by Ms. Green and none was provided by Mr. Roach following Ms. Green's conduct the prior month when he had asked Mr. Jones to be present at the service of the charges.

5) The First Amendment to the Complaint

Mr. Roach's actions in summoning Ms. Bullock to witness her receipt of the June 8, 1989 proposal letter (which Ms. Green again refused to sign as having received) led to the filing by Ms. Green of an Amended Complaint, which was received by the PERB and Mr. Roach on July 7, 1989. The claims of violation mirrored those of the original Complaint with the addition for the first time in the Amended Complaint of a claim that Ms. Green was being discriminated against as a result of her prior service as a Union Steward and First Vice-President when AFGE Local 1550 was the exclusive bargaining representative at the Central Facility. This claim of reprisal later was expanded to include reprisal

for having filed the instant Complaint and Amendments, and reprisal for her having successfully challenged her 1980 removal before the Merit Systems Protection Board.

6) The August 8, 1989 Official Reprimand

Ms. Green responded to the suspension proposal. On July 21, 1989, Robert J. Delmore, Chief, Program Planning, and the individual appointed in the proposal to serve as the Disinterested Designee, filed a report with Walter B. Ridley, Acting Director of the Department, and the Deciding Official. Mr. Delmore's report urged rescinding the proposed suspension in its entirety. The stated basis for Mr. Delmore's recommendation was his conclusion that the directive given to Ms. Green was in violation of Article 34, Section 4 of the Agreement between the Department and IBT, Local 1714, and thus was invalid and his alternate conclusion that the procedure with which Ms. Green was directed to comply "was flawed" because it imposed conditions upon employees which could not be consistently enforced and which were, in Mr. Delmore's view, not consistent with the purposes stated for the changed procedures.

James W. Bragg, who became Acting Administrator of the Central Facility in late June, 1989, was sent a copy of this memorandum, which also mentioned that Ms. Green had a Complaint pending before the PERB and claimed that Mr. Roach had "continued to harass her by flaunting his authority in the present (sic) of other employees." Mr. Delmore noted, however that the content of the Complaint was "separate from the content of the charge" and could not be used in

Ms. Green's defense.

On July 26, 1989, Benny O. Hodges, Acting Associate Director for Administration, wrote a memorandum to Mr. Ridley urging that the recommendation of Mr. Delmore be rejected, but recommending that the penalty proposed was overly severe. Ms. Green conceded that, pursuant to the District Personnel Manual, Mr. Ridley enjoyed the discretion to accept or not to accept the recommendations of the Disinterested Designee.

Mr. Ridley rejected the recommendation of Mr. Delmore. On August 2, 1989, Mr. Ridley sent a memorandum to Rachel Montford, Assistant Director of Personnel, finding that the charge of insubordination be sustained, but that the proposed suspension be mitigated to an official written reprimand.

On August 14, 1989, the Department of Personnel completed the draft of the decision letter to Ms. Green. That letter was given to Ms. Green on the afternoon of August 21, 1989, by Mr. Bragg who elected to witness himself the delivery of the letter of reprimand (for which Ms. Green again refused to acknowledge receipt in writing) simply by marking the time of service -- 2:45 p.m. on August 21, 1989 -- on a file copy of the letter of reprimand.

7) The Second Amendment to the Complaint

On August 21, 1989, Ms. Green also filed a Second Amendment to the Complaint alleging that an August 10, 1989 conversation that she had with Mr. Bragg violated her rights

under the CMPA. According to Ms. Green, Mr. Bragg reminded her that she was going to have to start signing in because the Inspector General's office was investigating time and attendance at the minimum security facility, that she replied that he (Bragg) was not the PERB, to which Mr. Bragg stated "what if you lose your case?," to which she replied that she would "just lose it."

Mr. Bragg recalled the August 10th conversation, but denied that he made the statement attributed to him by Ms. Green regarding what would happen if she lost her case. Mr. Bragg testified that Ms. Green was not signing in and out as required and that, accordingly, in early August, 1989, he spoke to her explaining that she was required to follow the current requirements, which included signing an accountability log in the Administrator's office. Mr. Bragg initially testified that there was no mention of the PERB during that discussion, but later in his testimony recalled that Ms. Green had stated to him that he "was not the PERB."

The Second Amendment, which was filed by mail by Ms. Green on August 21, 1989, also referenced a claim of reprisal for having filed the PERB Complaint and also claimed that the Department has engaged in a pattern of verbal and physical abuse, change in job classification, and constant harassment "for the exercise of employee rights."

Mr. Bragg recalled seeing a copy of the Second Amendment a "day or two" after his receipt of Mr. Ridgley's decision letter. Thus, Mr. Bragg's testimony would suggest that he received his copy of the Second Amendment on either

August 22 or 23, 1989. (The copies of the certificates of service for that Second Amendment revealed that the return receipt for Mr. Bragg was undated, but that the postmark on the receipt which was mailed back to Ms. Green for his copy read August 23, 1989.) Mr. Bragg recalled having seen the Second Amendment prior to deciding on the afternoon of August 23, 1989 for reasons set forth in the next few paragraphs to charge Ms. Green with being Absent Without Leave (AWOL) for four hours that afternoon.

8) The AWOL Charges

Ms. Green left work early on the afternoon of August 23, 1989. Prior to leaving work, as was her custom, she left a leave slip on the Administrator's desk. She had not received approval from Mr. Bragg, who was out of the building and unavailable. Nor had Ms. Green attempted to obtain permission from Joyce Jones, then Assistant Administrator at Central Facility, and the person who served as Acting Administrator during Mr. Bragg's absence.

Ms. Jones acknowledged that during the period she had supervised Ms. Green there were other instances in which Ms. Green had submitted leave slips and left work prior to getting them approved. In each of those prior cases, the leave requested was approved and there was no attempt to treat Ms. Green as AWOL. When asked why Ms. Green was treated differently in regard to the August 23rd absence than she had in regard to similar prior absences, Ms. Jones replied that while it may have been an accepted practice of

hers to allow leaving early with the submission of leave slips even without obtaining explicit prior approval, it was not the practice of Mr. Bragg for whom she was acting for on August 23rd and 24th. Ms. Jones also testified that this was the first case to her knowledge in which a request for annual leave had been denied and the employee charged with AWOL for failure to have obtained advance permission for absence due to sickness.

The Application for Leave which Ms. Green left with Ms. Bullock for the Administrator requested Annual Leave for the period of 4 hours and stated as a reason the fact that there was no air conditioning. There was no dispute that, on August 23, 1989, the air conditioning system at Central Facility was not functional; that there were some fans operating, but that it still was warm in the offices; and that the outside temperature that day was in the low 90s.

Prior to her leaving work on August 23rd, Ms. Green spoke with Ms. Bullock. After asking to speak to Mr. Bragg and learning that he was not available, Ms. Green told Ms. Bullock that she had to leave work early due to the heat and the lack of air conditioning, lest she get ill as had happened on April 17, 1989. She also asked Ms. Bullock to give that message to Mr. Bragg. Ms. Bullock did so. (On April 17, 1989, the same date that she had the argument with Mr. Roach which led to the charge of insubordination discussed earlier, Ms. Green had returned to work from lunch after mailing her tax return and become faint. After being seen at the infirmary, she was sent home, where she remained for several

days. The Department ultimately made arrangements to drive Ms. Green's car from the institution to her home.)

Ms. Green further testified that on at least one other occasion during Mr. Bragg's tenure as Administrator, in July, 1989, she had gotten ill and left early, leaving simply a leave slip and not obtaining prior approval to do so from Mr. Bragg or any other supervisor.

Mr. Bragg testified that he returned to the office at about 3:00 p.m. on August 23, 1989, at which time he saw the leave request slip and learned for the first time that Ms. Green had left for the day. Mr. Bragg stated that he decided to charge Ms. Green with AWOL for two reasons: 1) she had not obtained his permission in advance to take annual leave that afternoon; and 2) although it was a warm day and uncomfortable without air conditioning, it was not sufficiently hot in his judgment to warrant leaving work early. It was unclear from the record if Mr. Bragg was familiar with Ms. Green's claimed extreme sensitivity to the heat or the fact that she had previously left work early without being charged AWOL to escape the heat.

Mr. Bragg also noted that it was his practice to issue a Notice of Intention to Charge an employee with AWOL where he believed it might be warranted and then to rescind that Notice if, after further investigation and discussion, he was persuaded that the absence without leave "was not intentional." Mr. Bragg did not explain, however, why he concluded that Ms. Green's AWOL was "intentional." Mr. Bragg

admitted that, in his opinion, Ms. Green is a responsible person who is not in the habit of walking off the job.

In any event, following his review of the situation on the afternoon of August 23rd, Mr. Bragg spoke with Ms. Jones and instructed her to notify Ms. Green the next day that she (Green) was to be charged with AWOL for the four hours of work missed that afternoon.

Towards the end of the workday on August 24, 1989, Ms. Green was called into the office and Ms. Jones issued her a Notice of Intention to Charge her with AWOL for the four hour absence from work the prior afternoon. Ms. Jones testified that the sole reason for the action was Ms. Green's absence "without prior approval." Ms. Jones asked Ms. Bullock to attend the meeting for the sole purpose of witnessing the receipt of the Notice by Ms. Green, who again declined to sign for the receipt of the Notice. As in the prior situations, no questions were asked of Ms. Green and she did not volunteer any information relative to the charge. Ms. Green did not request Union representation and none was automatically provided by the Department.

Ms. Green complained about not only the substance of the notice, but the time of day when it was delivered to her (about 4:00 p.m.). Ms. Jones testified that she had other matters to perform earlier in the day which were of higher priority.

When Ms. Green received the August 24th notice of intention to charge her with being AWOL, she filed a grievance on August 30, 1989 challenging the AWOL charge as

in violation of the Agreement between the Department and IBT Local 1714. Her August 30, 1989 grievance was accompanied by a 4 page typewritten narrative covering the events of August 23 and 24, 1989, two prior occasions where Ms. Green was required to leave early due to excess heat, and various Departmental and District policies relative to administrative leave, annual leave, and working conditions.

Although no documentation as to the intermediate steps of this grievance was introduced, it appears from a March 12, 1990 letter appended to the Department's post-hearing brief, that this grievance was withdrawn by the Union on that date.

9) The Third Amendment to the Complaint

On September 1, 1989, Ms. Green filed a Third Amendment to the Complaint in this case. The copy of the Third Amendment received by the PERB was date stamped September 6, 1989. The Third Amendment protested the following actions by the Department: 1) the decision by Mr. Bragg to have Ms. Green work with Ms. Jones despite their prior documented problems working with one another; 2) the fact that the decision on the official reprimand for insubordination, was issued more than forty-five (45) days after the charges were filed; 3) the fact that Mr. Ridley rejected Mr. Delmore's recommendation to dismiss the charge in its entirety; 4) the fact that she was charged with AWOL on August 23rd and was not informed of the matter until late in the afternoon of August 24th; and 5) the action of Ms. Jones in calling in Ms. Bullock to witness the receipt by Ms. Green of certain

memoranda related to the AWOL charge and the scheduling of a corrective/adverse action interview. Additionally, Ms. Green alleged that these actions were evidence of continuing reprisal for resort to the PERB processes and for engaging in prior protected activities over the years.

10) The Ten Day Suspension Proposal for the August 23rd AWOL

Mr. Bragg also stated the reasons that he decided to recommend that Ms. Green receive a ten (10) day suspension for her AWOL. Mr. Bragg testified that he was influenced by the fact that Ms. Green had received a forty-five day suspension proposal for her prior offense and this was the second offense within the year, so he believed that time on the street was warranted. The record reveals, however, that even as of the date that the AWOL charge was lodged the forty-five day suspension proposal had been withdrawn by the Department and mitigated to a written warning. The Penalty Guide contained in the District Personnel Manual provides a penalty of: 1) a Reprimand for a first offense of "Absence from assigned duty location during duty hours without permission and without reasonable cause after warning" (numbered infraction 19 -- "Lack of dependability") (an infraction which was not cited in the charge letter) and 2) a Reprimand to Suspension for 15 days for a period of absence from duty without permission which was charged to AWOL and which is less than 10 consecutive workdays (numbered infraction 9.b. "Inexcusable absence without leave" and which was the infraction cited in the charge letter).

Further, a September 8, 1989 memorandum from Mr. Bragg to Jane Treadwell, Chief, Employee Relations, D.C. Office of Personnel, states his reasons for recommending that Ms. Green be issued a ten day suspension. That memorandum states that the reason for the AWOL was Ms. Green's failure to have contacted and received permission from him personally prior to her leaving work that afternoon. No mention is made of the inadequacy of the reason for Ms. Green's early departure. In terms of the proposed penalty, Mr. Bragg cited the earlier reprimand of Ms. Green for insubordination and her failure to appear for the corrective/adverse action interview scheduled with him on September 6, 1989.

On November 6, 1989, Ms. Green was served with a copy of an October 27, 1989 letter which formally proposed that she receive a ten day suspension for her AWOL of August 23, 1989. That letter cites only the lack of advance approval by Mr. Bragg as the reason for the AWOL charge. The failure to appear at the adverse action interview was noted in the proposal letter and the prior official reprimand was noted and "taken under consideration" in arriving at the proposal (i.e., in selecting the proposed penalty).

Ms. Green made an oral and written reply to the proposal on November 17, 1989. To date, no final action has been taken on the proposed suspension. Ms. Green noted the requirement contained in Section 1-617.3, Procedures and appeals, which apply to adverse actions, and District Personnel Manual Section 1614.9, which applies to both

corrective and adverse actions, that a final written decision on the answer to charges be issued within 45 calendar days of the date that charges have been preferred. In fact, Ms. Green introduced a copy of a letter from the Department Director James F. Palmer, dated June 27, 1986, advising her that a letter of reprimand was rescinded solely on grounds of untimely issuance in excess of the 45 day period set forth in the DPM. The 45 day period in the case of the August 23, 1989 AWOL would have lapsed on or about October 8, 1989. Ms. Green further admitted, however, that she was aware that, over the years, the Department has failed to meet the 45 day time period in making a final decision regarding adverse and corrective action in many other cases and that such failures are continuing to date. In a number of those cases, Ms. Green was further aware that the disciplinary action ultimately imposed was not rescinded by the Department on procedural grounds.

11) Other Evidence Related to Ms. Green's Charges of Reprisal

a) The Change in Position Description

In regard to her reprisal claim, Ms. Green also introduced copies of the position descriptions for her former job of Legal Liaison Specialist and her current job of Paralegal Specialist. That change in position description took place in early 1986. Ms. Green alleged that the change in position harmed her in that there is no additional promotion potential in her current job. She further claimed that the change in position description was part of an ongoing pattern of discrimination against her. In a July 29,

1988 letter to the MSPB, Ms. Green requested that the MSPB reopen its case regarding her 1980 RIF on grounds that her reclassification and other actions constituted reprisal. In that letter, Ms. Green alleged that she was promoted to the Grade 12 level in 1986, following a request to have her job audited, but was not told of the position reclassification until March, 1988. No evidence was introduced relative to the action, if any, of the MSPB on Ms. Green's request.

b) The 1980 Removal and MSPB Decision

Ms. Green also introduced copies of a decision of the Merit Systems Protection Board in Docket No. DC03518010154 (decided May 7, 1981) in which the MSPB found that Ms. Green had been selected for RIF action because she had filed grievances and EEO complaints of discrimination on the basis of race and/or sex. Having upheld Ms. Green's claim that she was singled out for RIF in reprisal for these activities, the MSPB vacated the RIF and ordered the Department to reinstate Ms. Green.

c) Problems Working with Ms. Jones

In regard to the claim of reprisal and harassment, Ms. Green also introduced documentation regarding problems in mid-1988 which she had experienced with Ms. Jones. According to those documents, Ms. Green claimed to have been abused verbally and physically by Ms. Jones. Ms. Jones denied any abuse. Upon investigation of the matter by higher level individuals within the Department, it was determined to issue a letter of official counseling to Ms. Jones and to remove Ms. Green from Ms. Jones' supervision. Ms. Green was

required, over her objections, to work with Ms. Jones following the period that Mr. Bragg became Administrator. Mr. Bragg testified that he made the decision to have those two employees work together not because of a desire to harass Ms. Green, but because of his belief that two mature professionals should be able to work with one another to accomplish their work assignments and the fact that the needs of the program were best served by having Ms. Jones and Ms. Green work together on the particular project. The documents which Ms. Green also introduced revealed that she had made similar complaints about Ms. Jones in mid-1986, and also has lodged complaints in the past about being harassed and treated unfairly by Mr. Roach and by other Administrators. Ms. Green and Ms. Jones also both testified regarding those matters at the hearings in this case.

d) Ms. Green's Former Union Activities

Ms. Green testified that, when she served as an AFGE Local 1550 representative, she had represented employees who challenged a number of actions by Mr. Roach, when he was a Major. Ms. Green also recalled that she had authored a cartoon in the AFGE Local 1550 newsletter which had been critical of and ridiculed Mr. Roach.

CONTENTIONS OF THE COMPLAINANT

The evidence established that the Department interfered with Ms. Green's contractual right to select her own Union representative in violation of Section 1.618.4 of the CMPA. Essentially, by summoning Mr. Jones, Ms. McMillan, and

finally Ms. Bullock without her permission, Mr. Roach (and later Mr. Bragg and Ms. Jones) selected her representative for her, thus interfering with the internal functioning of the Union. Additionally, this action violated Article 3, Sections 3, 4, and 5, of the Agreement between Local 1714 and the Department.

The actions of Mr. Roach in establishing new sign-in/sign-out log procedures also constituted a clear change in working conditions. The unilateral promulgation of this requirement violated the Department's obligation to bargain in good faith and thus unlawfully changed Ms. Green's working conditions. As an unlawful change, Ms. Green was within her rights in refusing to obey that unlawful directive and the Department's actions in disciplining her for her refusal to obey that directive also violated the CMPA.

Additionally, the treatment of Ms. Green by the Department over the years and including specifically the events which prompted the filing of the Complaint and Amendments thereto, establish a pattern of unlawful reprisal in violation of the CMPA. The protected activities engaged in by Ms. Green included the following: 1) successfully challenging her own prior RIF before the MSPB; 2) her activities as a Shop Steward and First Vice-President of AFGE Local 1550; 3) her successful challenge to being abused by Ms. Jones in 1986 and again in 1988; and 4) her filing the instant Complaint and Amendments with the PERB.

The proof that the Department engaged in acts of reprisal against Ms. Green for these activities may be found in the following actions taken against Ms. Green due to her engaging in these activities: 1) arbitrarily and capriciously changing her job classification so as to limit her promotion potential; 2) reassigning her to require that she work with Ms. Jones -- a supervisor who had subjected her to verbal and physical abuse in the past on more than one occasion; 3) disciplining her for failure to adhere to an unlawful work rule while there was a challenge to the legitimacy of that rule pending before the PERB; 4) issuing her discipline for her "insubordination" despite a) the lapse of the statutory and regulatory time limits in which to impose discipline (a breach which, in the past, had led to the vacating of disciplinary action) and b) the rejection in violation of the DPR of the recommendation of the Disinterested Designee; 5) her being treated as AWOL on August 23, 1989, despite the prior acceptance of similar reasons for partial day absence and despite the showing of good cause for her absence from work that afternoon; and 6) the Department's actions in proposing that she be suspended for ten days and then holding that proposal in limbo and "over the head" of Ms. Green for many months, again violating the statutory and regulatory time limits on the imposition of disciplinary action.

For all of these reasons, it is requested that the Complaint and the Amendments be sustained in their entirety and that the Board grant the relief sought therein.

CONTENTIONS OF THE DEPARTMENT

The Complaint in this case is both factually and legally deficient and must be dismissed in its entirety.

First, there are several procedural reasons why large portions of the Complaint and the Amendments must be dismissed.

Ms. Green's claim that the Department's institution of the accountability logs at the Administrator's office violated the requirement to bargain in good faith, it is well established that the decision to assert such an allegation belongs to the exclusive representative, not to individual unit employees. The obligation on the part of the Department is to bargain, upon request, with the exclusive representative. If the Union is content with the newly promulgated directive, then Ms. Green is bound by that determination.

The PERB case law follows this general approach. In PERB Case No. 89-U-01, Opinion No. 221 (Russell, et al., and D.C. Department of Human Services), the PERB held that an individual employee lacked standing to complain that a newly implemented change in working conditions violated the duty to bargain in good faith imposed by Section 1-618.4(a)(5) of the CMPA. The PERB in that Opinion noted that the obligation to bargain is one which runs to the Union itself, not to the unit employees individually, and that it would be inappropriate to permit "an individual employee [to] carry on litigation as an unauthorized surrogate for a union."

Decision at 3, quoting from Hanlon v. FLRA, 859 F.2d 971 (D.C. Cir. 1988).

Moreover, in this case, it is clear that the actions of the Department did not violate its obligation to bargain in good faith. The changes in accountability log were reasonable and well within management's rights to make. Upon request, the matter was discussed with the Union and a clarifying memorandum was issued which met with the approval of the Union. Ms. Green attempted to argue with Mr. Roach, and later at the hearings in this case, that her views as to whether the new log was appropriate should prevail. Quite simply, Ms. Green was not privileged to resort to self-help by insubordinately refusing to follow the directives of Mr. Roach, whether those directives were correct or not. Nor was she entitled to a personal justification for those new orders. The evidence clearly revealed that she understood the orders, but intentionally refused to follow those orders. She was not privileged to do so, but rather was obligated to obey the order and then grieve or otherwise challenge the order administratively. See Finlay Brothers Company, Inc., 282 NLRB 737 (1987) (upholding discharge of employee for refusal to wear uniforms, as required; dismissing Complaint that he was discharged for attempting to persuade other employees to support his protest of that requirement; further dismissing allegation that company's refusal to rehire employee was due to his having filed charges with the NLRB). Moreover, in this case, the order given by Mr. Roach was proper.

The claim that the Department violated Ms. Green's right to union representation also must be rejected. The Department did not breach any statutory "Weingarten" right of Ms. Green's to union representation. First, there was no request by her to have a union representative present. Second, there was no investigatory interview. All that was involved in each of these instances was a witnessing of the service of notice of charges. Third, even if there were a statutory right to union representation involved, the decision by Mr. Roach to summon Mr. Jones rather than some other Union steward or official did not violate Ms. Green's statutory rights. See Roadway Express, Inc., 246 NLRB No. 180, 103 LRRM 1050 (1979) (employer could insist that employee leave the shop floor and go into office with supervisor without shop steward, even where employee requested a steward, where no investigatory interview was to be conducted; employer was even justified in suspending employee for four hours when he would not comply with the directive to go into the office; the fact that employee was not assured in advance that no such interview would take place was found not to be an adequate defense and the charges were dismissed; Board discussing its prior decision in Coca-Cola Bottling Company of Los Angeles, 227 NLRB 1276 (1977) wherein an employee was called into the office when the regular steward was on vacation, was subjected to an investigatory interview, and given a disciplinary notice which he refused to sign; the Board in discussing Coca-Cola

said that the prior decision upheld a finding of no violation of the Act where an alternate representative was known to have been available, but was not requested by the employee).

To the extent that Ms. Green's union representation claim stems from the collective bargaining agreement and not the CMPA, it also must be dismissed. Procedurally, as noted below, violations of the Agreement are not per se unfair labor practice charges. Additionally, to the extent that resolution of the unfair labor practice charge is dependent upon an interpretation of the underlying contractual provisions, the Board has repeatedly held the processing of the unfair labor practice in abeyance, pending the outcome of processing under the negotiated grievance and arbitration provisions, with only limited potential review of the outcome of that process. See PERB Case No. 84-U-01, Opinion No. 72 (Fraternal Order of Police and Metropolitan Police Department) (MPD offered to waive time limitations and to process a grievance on question of whether challenged bulletin board notice violated contractual provisions regarding posting of particular materials on bulletin boards and whether individual officer's rights to union representation or to refrain from having union activities interfered with were violated; Board concluded that deferral of the ULP Complaint was proper pending outcome of the arbitration process with limited, Spielberg type review thereafter; both Parties were directed by the Board to proceed through the grievance and arbitration process despite the failure of the

FOP to have grieved the matter previously); PERB Case No. 83-U-03, Opinion No. 59 (AFGE Local 1550 and D.C. Department of Corrections) (dismissing Complaint that Department violated the CMPA by treating various grievances as abandoned or resolved pursuant to its interpretation of the terms of the contractual grievance procedure; finding that any dispute related solely to contractual and not statutory rights); and PERB Case No. 87-U-11, Opinion No. 205 (Forbes and IBT, Local 1714 and Joint Council 55) (dismissing ULP Complaint alleging that Union's breach of collective bargaining agreement also constituted an unfair labor practice under the CMPA; concluding that "whether such acts [the distribution of various union literature during roll call"] do in fact violate the collective bargaining agreement is a matter not within our jurisdiction"; Board further stating that "Under the CMPA, breach of a contract does not constitute a per se statutory violation"; also rejecting allegation that the presence of union representatives at roll call interfered, coerced or restrained employees in the exercise of their CMPA guaranteed rights).

Should the Board consider the claims of contractual breach for some reason, however, it is clear it is not a violation of the Agreement for management to summon an employee to witness Ms. Green's receipt of documents. The provisions Ms. Green alleges were violated were Article 3, Sections 3, 4 and 5. Article 3, Section 23, simply permits employees to handle their own grievances alone or with

personally selected representatives. None of these situations were yet grievances. This provision is thus inapplicable. Article 3, Section 4, simply provides that employees within the unit enjoy the protections of the agreement. There is no dispute that Ms. Green is in the bargaining unit and no showing of contractual breach has been shown. Article 3, Section 5, provides that supervisors will not discriminate against employees or interfere in the selection of their representatives for the purposes of collective bargaining, prosecution of grievances, or labor management cooperation; none of those activities were being pursued by Ms. Green. Further, the testimony of Mr. Roach and Mr. Jones evidenced a clear past practice of summoning stewards by management to witness the delivery of documents to employees.

The final series of allegations made by Ms. Green relate to her claim that she was the victim of reprisals from Mr. Roach, Ms. Jones, and Mr. Bragg, among others, following her filing the instant Complaint. This allegation must also be dismissed by the PERB, but on the grounds that Ms. Green has failed to satisfy her burden of proving such conduct in this case.

First, there was no showing that Mr. Roach or Mr. Bragg, harbored any anti-union animus or animus towards Ms. Green as a result of her union activities years earlier. Mr. Roach had been Ms. Green's supervisor for several years and there was no evidence that he undertook any prior actions against her allegedly in reprisal for those earlier

activities. Mr. Bragg was not even familiar with Ms. Green or her work history prior to becoming Administrator on June 18, 1989.

Ms. Green was reprimanded, as noted earlier, for legitimate and lawful reasons. In fact, under the circumstances, the issuance of only an official reprimand was lenient and well within the range permitted by the Table of Penalties. As Ms. Green conceded at the hearing in this case, the Deciding Official was not obligated to accept the recommendation of the Disinterested Designee.

Mr. Bragg's directive to Ms. Green on or about August 10, 1989 to follow the sign-in/sign-out accountability log procedures also was proper and cannot form the basis of a reprisal claim. Although Mr. Bragg denies having made the statement "what if you lose your case?" to Ms. Green, the fact remains that such a statement, even if uttered, would not violate the CMPA. The reminder was made because of Ms. Green's continued refusal to obey directives, even after being disciplined for her insubordinate failure to do so.

Charging Ms. Green with AWOL for the afternoon of August 23, 1989, also was proper and did not violate the CMPA.

The record failed to reflect that Ms. Green had previously left Central without obtaining prior approval. Her testimony that, on several prior occasions, she handed a leave slip to Ms. Jones, who accepted the slip without further discussion, did not excuse her absence on August

23rd. Ms. Green left work on August 23rd without approaching Ms. Jones at all. Mr. Bragg was not engaged in any reprisal against Ms. Green. He simply was following his practice (and official District policy) by treating time for which an employee left without obtaining prior approval as an unexcused period of absence from work for which he would not approve annual leave.

Mr. Bragg further explained that, he directed to have Ms. Jones issue to Ms. Green the AWOL notice with the belief that, during the interview process, Ms. Green would have the opportunity to personally explain to him the circumstances of her leaving work early. Ms. Green, however, opted to ignore that process and did not keep a scheduled interview appointment.

Ms. Green grieved that AWOL charge through the grievance procedure. The Union withdrew the matter from arbitration on March 12, 1990. The Board should defer to that decision and dismiss this aspect of the Complaint.

Finally, Ms. Green dredged up several old complaints and claimed that they proved a pattern of reprisal against her. Such stale matters are beyond the Board's jurisdiction and, in any event, did not prove any intention on the part of the Department to harass or discriminate against Ms. Green. The actions of Mr. Bragg in early August, 1989 in assigning Ms. Green to work with Ms. Jones was also made for legitimate programmatic reasons and cannot be found improper. The claim of improper job reclassification was known to Ms. Green as far back as at least 1988 and was not challenged.

The District Personnel Regulations set forth a procedure for challenging job reclassification actions. If Ms. Green desired to challenge her reclassification, she should have pursued that claim at the time.

For all these reasons, the reprisal claim too must be dismissed and the Complaint and Amendments dismissed in their entirety.

DISCUSSION AND OPINION

1) The Alleged Violation of the Right to Union Representation of Her Own Choosing

The first question presented is whether the Department violated Ms. Green's statutory rights to union representation when it elected to have another employee witness her receipt of various documents. I am persuaded that the Department's actions were lawful and cannot be found to have violated the CMPA.

I have reached this conclusion for several reasons. First, it is well established that no violation of an employee's "Weingarten" rights to union representation can be found absent: 1) an investigatory interview and 2) a denial of an employee request to be afforded such representation. None of the situations at issue in this case involved investigatory interviews. To the contrary, no questions were posed by the Department to Ms. Green at those meetings, whose sole purpose was to serve upon Ms. Green various documents, and Ms. Green did not voluntarily engage in any explanations or discussions as to the documents or the

events which led to their issuance. Additionally, while Ms. Green stated her desire that the witnesses selected by the Department not be present, there was no request that any Union representative be summoned to any of these meetings.

Ms. Green's claim that some of the meetings took place too late in the day to make such a request is rejected. It should be noted that Ms. Green made no such requests during those meetings which took place early in the workday. Further, Ms. Green provided no explanation for her failure to have requested such representation and requested a postponement of the meeting until such time as her requested representative could have been present. Although the Department was not required by the CMPA to defer matters pending the arrival of Ms. Green's personal choice of representative, the fact remains that Mr. Roach indicated his willingness to have done so if such a request had been made. No basis exists on this record to discredit his testimony in that regard.

The decision to have individuals witness the receipt of various types of personnel documents is one within the discretion of the Department. The need for a witness procedure is particularly great where, as in Ms. Green's case, the employee receiving the documents refused to sign for their service. Nothing in the CMPA restricts this type of process.

Ms. Green's claims that the Department's actions violated her contractual rights to union representation and to privacy also are rejected. First, the PERB decisions are

clear that individual claims of contractual breach should be deferred pending resolution in the negotiated grievance and arbitration process. The Department has asserted since its first Answer in this case that these issues should be resolved in the negotiated grievance and arbitration procedure. Accordingly, it would appear that the Hearing Examiner is without authority to resolve these contractual claims.

It should be noted, however, that the record in this case makes clear that Ms. Green's contractual arguments in this regard are wholly without merit. There is a long standing past practice of the Department summoning witnesses in cases of service of various types of personnel and disciplinary documents. Mr. Jones acknowledged that practice. Nothing in Article 3, Sections 3, 4, and 5, or in Article 11, Sections 3, 4, and 5, preclude the Department's actions in this case. To the contrary, the provisions of Article 11, Sections 4 and 5 make clear that the negotiated right to be informed of the right to Union representation and to receive such representation was not violated by the Department. Ms. Jones' claimed right of privacy also appears nowhere in the agreement. Nothing in the actions of Mr. Roach, Mr. Bragg, or Ms. Jones involved a reprimand of Ms. Green in a manner which subjected her to embarrassment in front of other employees or the public.

Finally, to the extent that Mr. Roach and Mr. Bragg may have departed from the usual practice of calling a Shop

Steward to witness the service of documents, that deviation was the result of Ms. Green's own loud objections to Shop Steward Jones being called into the office to serve as a witness. Ms. Green thus is estopped by her own conduct from questioning the fact that the individuals who served as witnesses to her receipt of charges, proposals to discipline, adverse/corrective action interview notices, and final decision letters, were not also Shop Stewards.

For all these reasons, the allegations of the Complaint and Amendments relating to the Department's calling in persons, over Ms. Green's objection, to witness her receipt of various documents are rejected in their entirety.

2) The Resort to Self-Help and the Refusal to Bargain Allegations

Ms. Green's allegation that the decision by the Department to establish an accountability sign-in/sign-out log in the Central Facility Administrator's office violated the obligation to bargain in good faith pursuant to Section 1.618.4(a)(5) of the CMPA is rejected. Again, I have reached this conclusion for several reasons.

First, pursuant to the PERB decisions, Ms. Green lacked standing to protest any refusal by the Department to bargain in good faith prior to implementing that sign-in/sign-out log. The right to require bargaining in good faith prior to unilateral mid-term changes belongs exclusively in the certified bargaining representative. In this case, that representative is IBT Local 1714.

Secondly, there was no failure to bargain in good

faith. The Department enjoyed the right to make changes of this type, subject to its obligation to bargain upon request with the Union and subject to further possible challenge pursuant to the negotiated grievance procedure. The Union received notice of Operations Memorandum #5 and sought that certain matters be clarified by the Department. The Department acceded to this Union request and then Director Williams issued a clarification memorandum. The Union apparently was satisfied with that clarification because the record fails to reveal that any further bargaining was requested or any challenge initiated under the Agreement to the propriety of the Operations Memorandum. Thus, even if Ms. Green had standing to assert a claim of refusal to bargain in good faith, such a claim would not have been proved in this case.

Third, even if one assumed arguendo that there was a refusal to bargain in good faith, Ms. Green was not statutorily entitled to resort to self-help, declare the directive unlawful, and refuse to follow the directives of the Administrator. None of the narrow exceptions to the "obey and grieve" doctrine were shown to have been present in this case. Ms. Green's testimony, as well as much of the Complaint and Amendments in this case, appears based upon her misunderstanding of her role as an employee -- while she is permitted to question and grieve or otherwise challenge administratively the legitimacy of a directive, she remains obligated to obey those directives pending a determination which actually voids those work orders. Nothing in the CMPA

appears to modify this well-established approach. To do otherwise would be to invite anarchy in the work place and possibly even invite activity which would arguably violate the limitations on self-help contained in Section 1-618.4(b)(4) of the CMPA. Further, it is inconceivable that Ms. Green, an attorney and prior Union official, was unaware of the "obey and grieve" doctrine.

This ban on self-help also applied to Ms. Green's actions in attempting to instruct employees who were directed by Mr. Roach to come into his office and witness her receipt of documents to disobey those supervisory orders and to leave the office.

Fourth, the fact that Mr. Delmore in his July 21, 1989 memorandum apparently shared Ms. Green's views as to the need for the accountability log does not change any of these conclusions. The Department demonstrated ample business justification on this record for the changes challenged herein by Ms. Green. Whether such business justification was shown or not, however, is irrelevant. The Department was not obligated to demonstrate any reason in support of the change in sign-in and sign-out procedures in order to expect that its employees would obey those new directives. Ms. Green remained bound to obey those changed sign-in/sign-out procedures pending resolution of her administrative challenge to those work orders.

3) The Claims of Discrimination and Reprisal

There is no doubt that Ms. Green's prior work record

established that she has been active in various types of protected concerted activities throughout her tenure at the Department. Further, her demeanor leaves little doubt that she may have annoyed a number of supervisors and administrators while pursuing her complaints (whether on behalf of herself or others). These facts, however, are not sufficient, standing alone, to prove that the actions undertaken by the Department against Ms. Green were acts of reprisal, either for filing the Complaint and Amendments in violation of Section 1.618.4(a)(4) or for having engaged in other protected concerted activity in violation of Section 1.618.4(a)(1) and (3) of the CMPA. After careful review of the facts surrounding each of the various alleged acts of discrimination or reprisal, I am persuaded that with the exception of the August 23, 1989 AWOL charge and the resulting proposal to suspend Ms. Green for 10 days, none of the discrimination or reprisal claims have merit. The reasons for these conclusions follows.

a) The 1986 or 1988 Change in Job Classification

The claim that the change in Ms. Green's job classification was accomplished in reprisal for her union activities while a Steward and officer of AFGE Local 1550 and/or because of her having prevailed years earlier in a challenge of her RIF before the MSPB must be rejected for several reasons. First, the claim does not appear to be timely. See PERB Rules and Regulations Section 103.1. Ms. Green clearly was aware of the matter as early as March, 1988. She wrote to the MSPB in July, 1988 attempting to

reopen her case to challenge that change in job classification. That July, 1988 letter represented that Ms. Green first learned of her 1986 job reclassification in March, 1988. Even if one accepts that representation as accurate, the fact remains that the Amendment to the Complaint challenging that action did not take place until close to one and one-half years later.

Second, even if timely, there was no persuasive showing on this record that the Department's decision to change her job classification (which was prompted by Ms. Green's request that her duties be audited) was done for other than legitimate, non-discriminatory reasons or violated any provision of law, rule or regulation.

For both these reasons, this claim is rejected.

b) The May 2, 1989 Charges and the Official Reprimand for Insubordination

As noted earlier, I am persuaded that Ms. Green knowingly refused to follow the directive that she sign-in and sign-out on the accountability log maintained in the Administrator's office and that her reasons for refusing to obey those directives were not valid. Accordingly, the record in this case supports the Department's charge that Ms. Green was insubordinate.

The actions of the Department appear to be not only for cause, but lenient under the circumstances. Mr. Roach was confronted with repeated refusals by a subordinate, Ms. Green, to follow his directives. Ms. Green chose to voice her insubordination publicly, thus exacerbating its severity

by undermining Mr. Roach's own supervisory authority. Under the circumstances, the decision by Mr. Roach to issue Ms. Green formal charges of insubordination and to recommend that she receive a 45 day suspension appears reasonable and was not shown to have been motivated, in whole or in part, by an intention to discriminate against her due to her pursuit of prior concerted activities or due to her filing the instant Complaint or any Amendment thereto.

The claim that Mr. Roach was upset with Ms. Green due to some alleged union activity undertaken several years earlier was simply not persuasive. The timing and nature of that union activity, as well as Mr. Roach's treatment of Ms. Green in the intervening years, persuade me that no inference of animus on the part of Mr. Roach towards Ms. Green is appropriate in this case.

The decision by Mr. Ridley (who was not shown to possess any animus towards Ms. Green) not to follow the recommendation of Mr. Delmore also was proper and cannot be found to be an act of discrimination or reprisal. The conclusion that Ms. Green was insubordinate was well supported by the undisputed facts. The penalty selected, as noted above, was a lenient one under the circumstances. The selection of a lenient penalty further undermines Ms. Green's claim that the Official Reprimand issued to her was discriminatory or an act of reprisal.

Mr. Ridley was not obligated by the DPR to follow the recommendation of Mr. Delmore. Although Ms. Green argued to

the contrary in her post-hearing brief, she conceded at the hearing in this case the discretion of Mr. Ridley to reach a different conclusion. The language of the DPR also supports Mr. Ridley's discretion in this regard.

The claim that the Department's delay in reaching a final decision on the discipline constituted evidence of discrimination or reprisal must also be rejected. While the record revealed that the Department did not comply with the statutory and regulatory 45 day time limits, the record further revealed that the Department has failed to meet that time limit in numerous other cases and has nonetheless imposed adverse/corrective action where deemed appropriate. The issue presented to the Board herein is not whether the Official Reprimand may have been procedurally deficient; rather, the only issue within the Board's jurisdiction is whether the issuance of the Official Reprimand was violative of Section 1-618.4(a)(1), (3), or (4) of the CMPA. Given the fact that Ms. Green was treated similarly to many other unit employees in regard to the time that the final decision issued on her Official Reprimand, this claim of a violation of the CMPA is rejected.

For all these reasons, those claims of the Complaint and the Amendments thereto which are grounded in Ms. Green's discipline for insubordination are rejected in their entirety.

c) The Requirement that Ms. Green Work Directly with Ms. Jones

Mr. Bragg was within his rights in directing that Ms. Green work with Ms. Jones on or about August 11, 1989. The

prior incidents between those two women, which took place in mid-1986 and mid-1988, may well have suggested a heightened risk of conflict between Ms. Jones and Ms. Green. Both witnesses appeared to the Hearing Examiner to be strong willed, obviously disliked the other individual, and appeared likely to become recalcitrant if she believed that the other was acting improperly.

Nevertheless, Mr. Bragg reasonably concluded that the particular assignment in question would be best accomplished utilizing the professional talents of both Ms. Jones and Ms. Green. Further, Mr. Bragg had not experienced first-hand the conflict between Ms. Jones and Ms. Green and credibly testified that he told both employees that they were professionals and expected to work with one another on this project. The record did not reveal that this work assignment decision was motivated, in whole or in part, by any desire to discriminate against or punish Ms. Green for any prior concerted protected activities, including her filing of the instant Complaint or its Amendments.

For all these reasons, this allegation of violation of the CMPA also is denied.

d) The August 10, 1989 Remarks of Mr. Bragg

Ms. Green further alleged that Mr. Bragg's comments in regard to the pending Complaint before the Board and his direction that she sign-in and sign-out on the accountability log in his office violated the CMPA. This allegation, too, is rejected for several reasons.

First, the statement to Ms. Green that she was

obligated to obey the sign-in and sign-out directives during the period prior to the PERB having ruled in her favor was not a violation of the CMPA. As noted earlier, she was obligated at all times to obey the directive to sign-in and sign-out on the accountability log pending a ruling on her challenge to that directive.

Second, Mr. Bragg's reference to the PERB Complaint does not appear to have been violative of the CMPA. The statement, even if uttered in the form reported by Ms. Green, did not constitute a threat or otherwise interfere, restrain, or coerce Ms. Green in regard to the exercise of her rights under the CMPA.

e) The AWOL Charge for August 23, 1989 and the Related Ten Day Suspension Proposal

The final allegation of discrimination and/or reprisal focused upon the decision of the Department, through Mr. Bragg and Ms. Jones, to charge Ms. Green with four hours of AWOL for the afternoon of August 23, 1989 and to propose that she be suspended for 10 days for that AWOL.

After careful review of the entire record, I am persuaded that this allegation of Ms. Green's has merit. Again, I have reached this conclusion for several reasons.

First, the decision by the Department to charge Ms. Green with AWOL deviated from the prior practices of Ms. Jones and Mr. Bragg. Ms. Jones admitted that, in similar circumstances, she had approved leave request slips left by Ms. Green for her without prior discussion and oral approval of the reasons for the absence. Ms. Green attempted to

speak with Mr. Bragg prior to leaving on August 23rd, but he was not in the facility. Given this prior practice, Ms. Green was not required to seek out Ms. Jones, who was acting in Mr. Bragg's stead, to obtain oral approval of her leave request.

The record thus clearly revealed that Ms. Green attempted all of the advance notice that was reasonable under the circumstances and was acting in a manner which the prior actions of the Department would have suggested was appropriate.

Second, the claim that Mr. Bragg had a different prior practice is not persuasive. Ms. Green testified credibly that she had left a slip for Mr. Bragg on at least one prior occasion in July, 1989, requesting annual leave to cover her leaving early due to illness and that the prior leave request had been approved despite her failure to have obtained oral approval in advance from Mr. Bragg for that leave. The Department did not introduce persuasive evidence rebutting that claim of Ms. Green.

Third, the testimony of Mr. Bragg regarding his decision to treat Ms. Green's partial day absence as AWOL was not credible. At the arbitration hearing, Mr. Bragg testified that he charged Ms. Green with AWOL with the understanding that she could then provide him with an explanation during the interview process as to why her AWOL was "not intentional." The evidence which was known to Mr. Bragg on the afternoon of August 23rd, however, made clear

beyond question that Ms. Green's absence was for reasons of sensitivity to the heat and was "not intentional." It is unclear what else he would have learned from Ms. Green which would have demonstrated that she left work for compelling reasons.

Moreover, both Ms. Bullock and Ms. Jones knew of Ms. Green's prior problems at work when forced to work under conditions of extreme heat. Her abnormal sensitivities in this regard were known to the Department and to those persons with whom Mr. Bragg spoke prior to deciding to charge Ms. Green with AWOL on August 23rd.

Mr. Bragg never claimed ignorance of Ms. Green's sensitivity. Even if he was ignorant at that time, however, it is difficult to understand why when that became known to him (as it did when he received a copy of Ms. Green's grievance and her Third Amendment to the Complaint), he continued to pursue the matter by proposing that she receive a ten day suspension.

Mr. Bragg's actions further must be viewed in light of the fact that his refusal to approve her leave request also would appear to violate the applicable provisions of the District Personnel Manual, which state that employees should be granted annual leave in all cases of personal emergency unless there is sound reason to believe that the request was made in bad faith or that the employee's presence is essential to maintain minimum public services in the support of public health, life or property and the employee has been so notified. Neither of these conditions was shown

to exist. Section 10.6.E. of Subpart 10, Excused Absences, of the DPM further supports granting sick leave to employees who become sick and incapacitated for duty due to the heat. Thus, even if Mr. Bragg believed that the weather and building conditions were not sufficient to warrant his early dismissal of the entire group of employees working in the building, no reason existed for questioning the legitimacy of Ms. Green's stated need to leave work early on August 23rd for health reasons.

The record also revealed that the decision to charge Ms. Green AWOL was made on the same day (or perhaps the day after) Mr. Bragg received notice that he had been named as a Respondent in this proceeding by Ms. Green and that Mr. Bragg recommended within a day or two of his receipt of the Third Amendment that Ms. Green be issued a ten day suspension.

When the record evidence in regard to the AWOL and suspension proposal is viewed in its totality, I am persuaded that the AWOL charge and suspension was a pretext for Mr. Bragg's desire to punish Ms. Green for her having filed the Second and Third Amendments to the Complaint in this case. This conclusion is affected by the following: 1) my determination that Mr. Bragg's testimony as to the reasons for his actions was not credible; 2) the timing of the AWOL charge which immediately followed Mr. Bragg's receipt of the Second Amendment; 3) the fact that the Department's actions in this regard represented an

unexplained deviation from the way that other prior situations involving Ms. Green and other situations involving other employees have been handled; 4) the apparent conflict between Mr. Bragg's actions and the applicable provisions of the DPM and the Department's own Orders; and 5) the severity of Mr. Bragg's proposal regarding Ms. Green's suspension, which suggests clearly that he was motivated in large part by animus towards her. Stated somewhat differently, I am persuaded that "but for" Ms. Green's filing the Second Amendment to the Complaint in this case she would never have been charged with AWOL by Mr. Bragg.

The fact that Ms. Green also grieved that denial and that the Union withdrew the claim short of arbitration does not, in my view, preclude the Board from appropriately remedying the violation of the CMPA in this case. This is not a situation wherein there was an arbitral determination which the Board should pay substantial deference. What appears on the record simply is a withdrawal of a grievance prior to resorting to the delay and expense of arbitration which challenged only a loss of pay of four hours. There was no indication on this record that the Union acceded to the correctness of the Department's actions or that the claim that the AWOL charge was issued in reprisal for resort to the Board's processes was even discussed during the grievance procedure.

In sum, the decision to charge Ms. Green four hours of AWOL was violative of the CMPA. The Department is directed

to vacate that AWOL, convert the four hours in question to annual leave, and to make Ms. Green whole in accordance with law.

Although no action has yet been taken on the pending suspension proposal, the Department also must be ordered to withdraw that proposal. Although it is indeed possible that the Deciding Official could have rescinded the proposal on his/her own for other reasons, the fact remains that once the AWOL charge falls as violative of the CMPA, the resulting proposal to discipline Ms. Green for that AWOL also must be withdrawn.

Finally, no reason has been shown herein to modify the Board's usual custom of requiring that the Department post an appropriate Notice in cases of this type. The wording of the Notice is set forth as an attachment to this Opinion.

ORDER

For the reasons set forth in the foregoing Opinion, the allegations of the Complaint and the First, Second, and Third Amendments thereto, are denied in their entirety, with the exception of the challenge to the imposition of the August 23, 1989 AWOL charge and the proposal to suspend the Complainant for 10 days as a result of that AWOL which have been found to have been imposed upon the Complainant in violation of Section 1-618.4(a)(1), (3), and (4) of the CMPA.

The Department is directed to rescind the August 23, 1989 AWOL notice, to make Ms. Green appropriately whole by granting retroactively her request for annual leave on that date, and otherwise make her whole in accordance with law for any benefits lost due to that denial of annual leave. Further, the Department is directed to withdraw the pending proposal to suspend Ms. Green for 10 days due to that improper charge of AWOL for August 23, 1989.

Finally, the Department is required to post the Notice appended to this Opinion for a period of sixty (60) days in a conspicuous place at the Central Facility where employee notices are normally posted.

June 25, 1990

Ira F. Jaffe
Hearing Examiner

GOVERNMENT OF THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEE RELATIONS BOARD

NOTICE

The District of Columbia Department of Corrections is ordered to cease and desist from any acts of discrimination or reprisal against Georgia Mae Green, Esq., for her resort to the Complaint processes of the Public Employee Relations Board pursuant to the Comprehensive Merit Personnel Act of 1978, including but not limited to applying different criteria to her for the purpose of granting or denying requests for annual leave to leave work early due to claimed illness and to proposing that Ms. Green receive adverse/corrective action for absence without leave.

The District of Columbia Department of Corrections is further ordered to cease and desist from violating the CMPA in any like or related manner.

_____

Date: _____