

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:)

Teamsters Local Union No. 730)
a/w International Brotherhood)
of Teamsters, Chauffeurs,)
Warehousemen and Helpers of)
America, AFL-CIO/CLC,)

Complainants,)

v.)

District of Columbia)
Public Schools,)

Respondent.)

PERB Case No. 93-U-11
Opinion No. 375

DECISION AND ORDER

On March 10, 1993, Teamsters Local Union No. 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO/CLC (Teamsters) filed an Unfair Labor Practice Complaint with the Public Employee Relations Board (Board) charging that the Respondent District of Columbia Public Schools (DCPS) had violated the Comprehensive Merit Personnel Act (CMPA), D.C. Code Sec. 1-618.4(a)(1),(3) and (5). The Teamsters allege that DCPS discriminated against a bargaining-unit employee, Curtis Downs, because of his union activity by reassigning the employee in retaliation for filing a grievance. (Compl. at 3.) Teamsters further alleged that DCPS refused to provide information it requested concerning Downs' grievance. DCPS' acts, the Teamsters contend, interfered with, restrained and coerced Downs' rights guaranteed under the CMPA and constituted a refusal to bargain in good faith. Id.

DCPS, by Answer filed on March 29, 1993, admitted that it had reassigned the employee but denied that its action was in response to Downs' filing a grievance. DCPS also denied that it had refused to provide the Teamsters' agent with requested information. Consequently, DCPS asserted that the Teamsters' contentions fail to present a claim in violation of D.C. Code Sec. 1-618.4(a)(1),(3) and (5).

On July 27, 1993, the Teamsters filed an amended Complaint. The amended Complaint added that the "satisfactory" rating Downs received in his annual performance evaluation was also in retaliation for his filing a grievance and constitutes

discrimination against the employee because of his union activity.

DCPS filed an Answer to the amended Complaint on August 12, 1993, denying that it had committed any unfair labor practice by rating Downs satisfactory on his annual performance evaluation. DCPS further contended that the new allegation contained in the amendment to the Complaint is untimely since the employee received his performance rating on March 18, 1993, and the amended Complaint was filed on July 27, 1993.

By Notice dated July 29, 1993, the Board referred this matter to a hearing examiner who heard the case August 17, 1993.^{1/} In a Report and Recommendation submitted to the Board on October 28, 1993 (a copy of which may be review or obtained at the office of the Board), the Hearing Examiner made the following findings of fact and conclusions of law.

The Hearing Examiner found that "DCPS reassigned its employee ... because he filed a grievance concerning overtime..." (R&R at 19.) He further found that the allegation contained in the amended Complaint was not time-barred by Board Rule 520.4. With respect to the amended allegation, the Hearing Examiner found that "DCPS [also] downgraded [the employee's] annual performance rating because he filed [the same] grievance concerning overtime." Id. By these actions, the Hearing Examiner concluded, DCPS violated D.C. Code Sec. 1-618.4(a)(1) and (3). Finally, the Hearing Examiner found that DCPS did not refuse to furnish requested documents to the Teamsters and, therefore, did not, as alleged, violate D.C. Code Sec. 1-618.4(a)(1) and (5). No exceptions were filed by either party to the findings, conclusions and recommendations made by the Hearing Examiner in his Report.

Pursuant to D.C. Code Sec. 1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and the entire record. The Board hereby adopts the Hearing Examiner's finding and conclusion that the allegation contained in the amended Complaint is timely for the reasons contained in his Report.^{2/} We also

^{1/} The original scheduled hearing date was postponed when the Respondent's unopposed Motion to Postpone Unfair Labor Practice Complaint Hearing was granted.

^{2/} The Hearing Examiner found that DCPS gave the performance evaluation in question to this employee on March 18, 1993. The amended Complaint, alleging this act as an additional violation, was filed on July 27, 1993, 141 days after the alleged violation

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adopt the Examiner's conclusion that the evidence did not support a finding that DCPS violated D.C. Code Sec. 1-618.4(a)(1) and (5), by its refusal to furnish requested information to the Teamsters.

With respect to the alleged violations of D.C. Code Sec. 1-618.4(a)(1) and (3), the Board adopts the Hearing Examiner's findings that DCPS reassigned its employee and downgraded his annual performance rating because he filed a grievance concerning his denial of overtime. We must reject, however, the Hearing Examiner's conclusion of law that DCPS' retaliation against its employee for engaging in such activity, i.e., filing or pursuing a grievance, constitutes a violation of Sec. 1-618.4(a)(3).

Under D.C. Code Sec. 1-618.4(a)(3), the discriminatory act by a District government agency with respect to an employee's term or condition of employment must be motivated by an intent "to encourage or discourage membership in any labor organization". A review of the record and the Hearing Examiner's findings of fact reveals that his conclusion that DCPS' actions constituted a violation of D.C. Code Sec. 1-618.4(a)(1) and (3) is based solely on his finding that DCPS' retaliatory actions against its employee was based on the employee's filing of a grievance. The Hearing Examiner correctly notes that we have previously held that such activity is an employee right and is protected under the CMPA from retaliation by a District government agency. See, Charles Bagenstose and Dr. Joseph Borowski v. D. C. Public Schools, 38 DCR 4154, Slip Op. No. 270, PERB Case No. 88-U-33 and 88-U-34 (1991). In Bagenstose, however, we specifically adopted the hearing examiner's conclusion that retaliations or reprisals by a District government agency that are motivated by an employee engaging in such protected activity is proscribed by Section 1-

occurred. DCPS contended that this was an independent alleged violation which occurred beyond the 90 days prior to its filing with the Board as required by Board Rule 520.(a). Applying principles employed by the National Labor Relations Board, the Hearing Examiner concluded that a timely-filed complaint may be amended to include additional allegations which, if filed for the first time, would be untimely, if the allegations "are related to those alleged in the charge and [] grew out of them when the proceeding is pending before the Board." N.L.R.B. v. Fant Milling Co., 360 U.S. 301, 307 (1959). (R&R at 15.) The initial Complaint, filed on March 10, 1993, was pending before the Board when the additional allegation occurred. We, hereby, adopt this approach in making determinations concerning the timeliness of amendments to complaint and, for the reasons stated in his Report, the Hearing Examiner's conclusion that the amendment was related to and grew out of the allegations in the initial Complaint.

618.4(a)(4) and not Section 1-618.4(a)(3)^{3/} of the D.C. Code. Id.

Therefore, while DCPS' actions, nevertheless, constitute an unfair labor practice under the CMPA, the evidence establishes that DCPS did not violate D.C. Code Sec. 1-618.4(a)(3) but rather Sec. 1-618.(a)(4).^{4/} Notwithstanding this correction, we adopt the Hearing Examiner's conclusion that by these same actions, DCPS has interfered with, restrained and coerced employees in the exercise of their rights in violation of D.C. Code Sec. 1-618.4(a)(1). Id.

With respect to all other findings, conclusions and recommendations, we find the Hearing Examiner's analysis and reasoning to be thorough, well-reasoned and persuasive. We therefore adopt them in their entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. The allegation that the District of Columbia Public Schools (DCPS) refused to furnish Teamsters Local Union No. 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO/CLC (Teamsters) with requested information to assist a bargaining-unit employee in the processing of his grievance in violation of the Comprehensive Merit Personnel Act (CMPA), D.C. Code Sec. 1-618.4(a)(1) and (5)

^{3/} D.C. Code Sec. 1-618.4(a)(4) provides:

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

(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 chapter[, i.e., the CMPA]

D.C. Code Sec. 1-618.6(b), which set forth employee rights under the CMPA, expressly refers to grievances as "complaints".

^{4/} Since the Complaint and amendment to the Complaint specifically pleaded the allegedly unlawful actions and conduct by DCPS which constituted the basis of the unfair labor practice found, we find the fundamental principles of due process afforded DCPS fairly met with respect to adequate notice and a hearing on the evidence. See, Opp Cotton Mills, Inc. v. Wage and Hour Division of Dept. of Labor, 312 U.S. 657 (1941).

is dismissed.

2. DCPS shall cease and desist from transferring or otherwise taking reprisals against its employees in violation of D.C. Code Sections 1-618.4(a)(1) and (4) for pursuing an action protected by the CMPA.

3. DCPS shall (a) rescind the February 9, 1993 reassignment of its employee Curtis Downs and (b) make him whole in accordance with law for any compensation or benefits lost due to his reassignment.

4. DCPS shall purge Downs' personnel records of any documentation that may exist concerning the stated reasons for his February 9, 1993 reassignment.

5. DCPS shall cease and desist from threatening to reassign Downs in violation of D.C. Code Section 1-618.4(a)(1).

6. DCPS shall return Downs to his former position at Coolidge High School at the earliest practicable date but not later than the start of the 1994-95 Academic School Year.

7. DCPS shall (a) purge Downs' personnel records of the any documentation of the satisfactory annual performance evaluation rating for the period April 1, 1992 to March 31, 1993, and replace it with a rating of excellent and (b) make him whole in accordance with law for any compensation or benefits lost due to his satisfactory annual performance rating.

8. DCPS shall not in any like or related manner interfere with employees' rights guaranteed by the CMPA.

9. DCPS shall, within ten (10) days from the service of this Decision and Order, post the attached Notice conspicuously on all bulletin boards where notices to bargaining-unit employees (of which Complainant is a member) are customarily posted, for thirty (30) consecutive days.

10. DCPS shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order, that the Notice has been posted accordingly.

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

January 12, 1994