

timely filed its Opposition to those exceptions. 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. ^{2/} Complainant's exceptions

^{2/} Complainant also excepts to the Board's sending to the Hearing Examiner and his acceptance of an amendment to Respondent's post-hearing brief. The amendment consisted of the addition of an arbitration award in a proceeding involving these same parties and some of the conduct at issue here, but in a different legal context. Reference was made to the arbitration proceeding in Respondent's initial post-hearing brief but the award had not yet been issued at the time the brief was filed. Complainant argues that receiving this award into the record violates Board Rule 501.12, "in that the representative of record was not served nor aware of the motion." (Union's Exceptions, p.2) Furthermore, the receipt of this additional evidence on October 11, 1990, was 6 days after the October 5, 1990 extended due date for submission of briefs agreed to by the parties and approved by the Board. Moreover, says Complainant, though PERB rules require a written ruling on a motion, no such ruling was made by the Board here.

We agree with the Complainant that Board Rule 501.12 requires that "[i]f a party is represented by an attorney or other representative," that attorney or other representative must be served if a document is to be acceptable for PERB filing. If there is any ambiguity in the Rule's statement that in such a situation service on the representative "shall be sufficient," we hereby make explicit our reading of that rule and our purpose in adopting it as embodying the normal understanding that where a party is represented, service upon that party requires service upon the representative, which is both necessary and sufficient.

Since we base our ruling here primarily upon PERB Rule 501.12, we merely note that even had the request to amend been properly served, since it sought to supplement the record after the record was formally closed, it should have been presented to the Board for a formal ruling as to whether it should be treated as a motion to reopen the record and if so, whether it could properly be forwarded to the Hearing Examiner.

As noted, the amended brief was sent to the Hearing Examiner by PERB and the Hearing Examiner included the Arbitration decision in the record over the Complainant's objection. Again, we consider this to have been error.

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address no more than issues of fact with respect to the relative weight attributed to certain evidence in support of the Hearing Examiner's conclusion that no unfair labor practice had been committed by Respondent. The Hearing Examiner fully considered and rejected these issues of fact in his Report and Recommendations in reaching this conclusion of law which we find fully supported by the record. We have previously stated that the relative weight and veracity accorded both testimonial and documentary evidence are for the Hearing Examiner to decide. See American Federation of State, County and Municipal Employees, District Council 20, Local 2776, AFL-CIO v. District of Columbia Department of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990).

The Board, after reviewing the record, adopts the findings of fact and conclusions of law set forth in the Hearing

(footnote 2 Cont'd)

However, the question before us now is not simply whether there were errors, which we conclude there were, but also whether those errors prejudiced the Complainant. We conclude that the answer to this question is "no." While the Examiner referred to the Arbitration decision, noting the facts of the grievance proceeding (R&R at 13) and the Arbitrator's finding as to the reason for the grievant's suspension (id at 20), we think it clear from the Examiner's decision that he came to his decision independently on the basis of the record made before him. Having found that the reason for the suspension was the grievant's behavior in which "[she] persisted...knowing that it could result in discipline," the Examiner concluded, "[t]hat is the reason for the suspension, not retaliation." (id.) Only after this statement did the Examiner add that the "same" finding was made by the Arbitrator (id.)

Considering the Examiner's examination of the issues and conclusions therein in light of the record made before him, we do not find a basis for the Complainant's contention that the Examiner "based his decision" on the Arbitrator's determinations.

Finally, the Complainant objects to the Arbitrator Award's untimely inclusion here for the reason that a request for review of that award is pending before the Board. Our ruling here, dismissing these Complaints will not preclude Board review upon a timely request for review of that Award should such review be warranted under the statutory standard. No outcome of such a review could require a different result here because the decision here rests upon an independent basis.

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Examiner's Report and Recommendations. ^{3/} We find the analysis,

^{3/} Respondent, in its Answer to the Unfair Labor Practice Complaint in PERB Case No. 90-U-04, requested "that the Complaint be dismissed or, in the alternative, be held in abeyance pending the outcome of grievance proceedings that have been filed by the Complainant under the provisions of the [parties'] collective bargaining agreement". The Board considered but did not grant this request; instead, the case was sent to hearing with the others. After concluding that the Complainant had failed to establish a statutory violation in PERB Case No. 90-U-04 (see R&R at 20-21), the Hearing Examiner suggested that the Board consider adoption of the National Labor Relations Board (NLRB) deferral policy enunciated in Collyer Insulated Wire, 192 NLRB 837 (1971) or in the alternative, the policy articulated in Dubo Manufacturing Corp., 142 NLRB 431 (1963).

The Board has an established policy of deferring to parties' grievance-arbitration procedures in cases where grievances and statutory complaints involve similar allegations and factual issues. See, Local 2093, District Council 20, American Federation of State, County and Municipal Employees, AFL-CIO and District of Columbia Board of Education, Slip Op. No. 10, PERB Case No. 80-U-05 (1981).

We have also specifically examined and adopted deferral-policy criteria developed by the NLRB in Spielberg Manufacturing Company, 112 NLRB 1080 (1955), Dubo Manufacturing Corp., supra., Collyer Insulated Wire, supra., and their progeny in Fraternal Order of Police, Metropolitan Police Dept. Labor Committee and the Metropolitan Police Dept., 31 DCR 2204, Slip Op. No. 72, PERB Case No. 84-U-01 (1984). In FOP, we stated (Slip Op. at 6) that where "the actions complained of relate specifically to provisions of the contract" and the interpretation of those [contractual] provisions is both necessary and appropriate to a determination of whether or not a noncontractual, statutory violation has been committed deferral is appropriate. We have further observed that where the "remedy [resulting from the grievance-arbitration proceeding] might also cure the statutory violation, it makes sense for the Board to stay its proceedings pending the outcome in terms of the policy of the CMPA." American Federation of Government Employees, Local 1000 and the District of Columbia Office of Labor Relations and Collective Bargaining, 33 DCR 7330, Slip Op. No. 146 at p.2, PERB Case No. 86-U-05 (1986).

Here, however, the arbitration proceeding to which Respondent requested deferral concerns only one of the actions alleged as a

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reasoning and conclusions contained therein with respect to the alleged unfair labor practice violations to be rational and persuasive.

ORDER

IT IS HEREBY ORDERED THAT:

The Complaints are dismissed, no unfair labor practices having been established.

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

March 28, 1991

(footnote 3 Cont'd)

statutory violation in PERB Case No. 90-U-04, i.e., the suspension of an employee-union official. The Complaint in that case alleged as additional unfair labor practices actions which were not before the arbitrator. Moreover, allegations contained in paragraph 3 of the Complaint were asserted as related to statutory violations alleged in PERB Case Nos. 89-U-15 and 89-U-18 which were also consolidated for hearing.

The decision to hold an unfair labor practice proceeding before the Board in abeyance pending the outcome of the parties' resort to their grievance-arbitration procedures is one of policy. As such it turns upon the posture as well as the issues of each case. It is clear that deferral here would have been inappropriate given (1) the lack of complete symmetry between the issues raised in PERB Case No. 90-U-04 and the matter before the arbitrator and (2) the interrelationship between the issues contained PERB Case No. 90-U-04 and two of the other cases consolidated for hearing.

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

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In the Matter of *

DEPARTMENT OF PUBLIC WORKS, GOVERNMENT *
OF THE DISTRICT OF COLUMBIA *

and *

AMERICAN FEDERATION OF GOVERNMENT *
EMPLOYEES, Local 872 *

Cases Nos. 89-U-15,
89-U-16, 89-U-18,
and 90-U-04

REPORT AND RECOMMENDATIONS

BACKGROUND

This case involves four Unfair Labor Practice [ULP] complaints. Their essence is as follows:

89-U-15 - Jocelynn Johnson, a shop steward, filed three grievances against the Department of Public Works [DPW] in May and June 1989. In June and early July 1989, the Union filed three Unfair Labor Practice charges against DPW, all involving Ms. Johnson. On July 10, Betty Schaefer, Ms. Johnson's Acting Branch Chief sent her a letter stating it was a letter of direction concerning Ms. Johnson's duties. The letter was an admonishment and directive concerning Ms. Johnson's Union activities. It threatened discipline if Ms. Johnson did not adhere to the directive. The Union charges violations of D.C. Law 2-139, §§1- 618.4 a (3) and (4).

89-U-16 - On May 11, 1989, Ms. Johnson met with Rosie Jenkins, her Acting Supervisor, and Ms. Schaefer, and was informed by them that there were problems caused by her Union activities, that her work was not getting done on time, and that there were excessive telephone calls for Union activity. On June 16 she received her annual performance rating, with an evaluation of Satisfactory. In the two prior years she had been rated Outstanding and Excellent, respectively. While discussing the rating, Ms. Jenkins

made reference to her meetings and her supervisors stated that she had changed and they wanted the old JJ (Ms. Johnson) back. The Union charges violations of §§1-618.4 a (1), (2), and (3).

89-U-18 - At a meeting attended by representatives of labor and management on March 23, 1989, it was agreed that Ms. Johnson would be permitted a specific time daily to perform her shop steward responsibilities, with the specific time to be worked out with her immediate supervisors. On March 24, Mss. Johnson, Jenkins, and Schaefer settled on the hours of 2-4 p.m, daily. Ms. Johnson adhered to this arrangement for five months. On August 21, Ms. Schaefer interrupted Ms. Johnson twice when she was preparing a grievance and threatened her that she would not do Union work anymore when something happened to her. The next day, Ms. Schaefer charged her with inexcused absence from duty based on the incident of August 21. The Union charges violations of §§1-618.4 a (1), (2), (3), and (4).

90-U-04 - On August 9, 1989, a suspension of 15 days was proposed for Ms. Johnson, based on her Union activities. Specification 1 of the proposal directly relates to the charges in case nos. 89-U-15 and 89-U-18. Despite the fact that the Disinterested Designee recommended that the charges be dismissed, a suspension was upheld, but lessened to 10 days. The Union charges violations of §§1-618.4 a (3) and (4).

Hearing was held on July 18, 19, and 27, and August 9. The Employer filed a post-hearing brief and an amendment to the brief. Based on the evidence in the record, the positions argued by the parties, and my observation of witnesses while testifying, I make the following findings and recommendations.

FINDINGS OF FACT

At the center of these charges is Jocelynn Johnson, a Public Utility Specialist, DS-1130-09, in DPW. She had been a shop steward since 1987. There was a change in Union administration in January 1989 when Harvey Roach became president. He characterized his predecessor as passive, and said that the Union under his administration was more active in exercising its rights.

Also in January 1989, Ms. Johnson assumed the position of executive vice-president in addition to her shop steward duties. Both Mr. Roach and Ms. Johnson work for the Water and Sewer Utility Administration, but in two different buildings. During the period covered by these charges, essentially 1989, Ms. Johnson's immediate supervisor and branch chief were Rosie Jenkins and Betty Schaefer, respectively.

Prior to becoming executive vice-president, Ms. Johnson's relationship with Mss. Jenkins and Schaefer was very good. In fact, she considered them her friends. She performed her shop steward duties without incident, including doing the necessary paperwork at her desk.

The situation changed with her enhanced Union status. She became involved in a much greater amount of Union activities and was required to attend many meetings of various types. Also, there were not many shop stewards at the time, Ms. Johnson was acting for the chief steward, who had been injured, and employees who had problems would often call either Mr. Roach or Ms. Johnson.

The parties distinguish between the use of administrative leave and official time for Union activity. Administrative leave is for matters such as meetings which typically call for leaving the workplace, and it requires the permission of the Bureau Chief or higher. Official time is for working with employees with problems and grievances, and it is approved by the steward's supervisor.

There was concern within management about the amount of time being used by Ms. Johnson on Union activities and there were a series of meetings in March 1989 about this. At least one of the meetings con-

governed her use of administrative leave. The record shows that there was one instance of a management failure to approve administrative leave for Ms. Johnson, but this was satisfactorily resolved at one of the meetings. Otherwise there was no contention that she did not properly request or receive administrative leave.

The problems about the proper use of time for Union activities concerned official time, essentially for shop steward work. There was confused and conflicting testimony from many witnesses about what was said and agreed to at the March 1989 meetings concerning Ms. Johnson's use of official time. A number of Union witnesses testified to their understanding that it was agreed that she could have two hours per day for Union business. The time selected was 2-4 p.m. because that was the slowest time of day. Ms. Johnson posted a notice on the bulletin board, addressed to all employees which stated that, effective immediately, she would be available to discuss employee concerns from 2-4 p.m., Monday to Friday. [Union Exhibit (U Ex.) 7]. The notice attracted unfavorable management attention and, at another meeting, it was agreed that the memo would be revised to delete mention of Monday to Friday. However, it was understood that while the memo would be reworded, the intent was still the same, that is, that Ms. Johnson would have this time available on a daily basis. [Transcript (Tr.), pp. 93-96, 105, 106, 152-156.] Ms. Johnson then reissued the memo on March 30, this time with no mention of Monday through Friday. [Hearing Examiner Exhibit (HE Ex.) 3.]

The management testimony is not entirely clear as to whether there originally was an understanding that Ms. Johnson could have two hours

set aside each day for Union business. However, once she posted the March 28 notice, there was management agreement that this was excessive. There were attempts made, through a number of meetings and memos to have Ms. Johnson understand that she could have time to see employees at 2-4 p.m., on an as needed basis, and that when she needed time she would inform her supervisor, who would try to accommodate her.

[Tr., pp. 43-45, 71, 266-268, 272-5.]

On March 31, James E. Dennis, who was the Acting Bureau Chief, and who had participated in one or more of the meetings, sent Ms. Johnson a memo stating that her request for two hours per day was excessive, and he suggested that she schedule one afternoon, 2-4 p.m. for Union business. [There is no record of any request from Ms. Johnson, and she testified she never received the memo and did not see it until it was attached to management's reply to No. 89-U-18. She said that if she had seen it she would have replied to it. Tr., pp. 398, 642, 643.]

On April 5, he sent her another memorandum which stated:

Reference is made to your memorandum of March 28, 1989, subject: "Official 'Shop' Hours". I have reviewed the Collective Bargaining Agreement - AFGE and find that your memorandum is not in keeping with the rights provided you, as Shop Steward, under that agreement. Additionally, you failed to seek and/or obtain authorization from either your supervisor or me prior to issuing and posting the subject memorandum.

Therefore, you are instructed to immediately rescind your memorandum of March 28, 1989. You are further instructed to remove or cause to be removed all posted copies from each and every ... bulletin Board. ... Additionally, you are directed, in the future, to seek authorization prior to leaving your assignments to conduct official union business and to discuss with your supervisor any changes in your work schedule, prior to transmitting such changes to other personnel in this Bureau. [U Ex. 7.]

The pertinent provisions of the agreement [U Ex. 33], are:

ARTICLE 8, Use of Official Time

SECTION A. Reasonable time is authorized for local Union officers and stewards to carry out contractual responsibilities which occur on their regularly scheduled duty tours. Such responsibilities may include:

1. Reasonable time to receive, investigate and present grievances. ...

ARTICLE 9, Union Representation

Section D. Stewards shall obtain permission from their supervisors when they desire to leave work assignments to properly and expeditiously carry out their duties in connection with the Collective Bargaining Agreement. ...

The Union replied to Mr. Dennis on April 14. [U Ex. 27.] The gist of the reply was that:

- the April 5 memo had failed to indicate specifically how Ms. Johnson's memo of March 28 had violated the labor agreement;
- on March 23 and 24, Mr. Dennis had agreed to two hours daily for Ms. Johnson to perform Union business, and that Mss. Jenkins and Schaefer had then agreed to 2-4 p.m. daily at a meeting with Ms. Johnson on March 27;
- Ms. Johnson posted the March 28 memo after she told Castina Kennedy [Ms. Johnson's division chief] of the above arrangement and told her that she would be issuing a notice to employees about her availability. Then, on March 29, there was another meeting at which it was decided that a revised notice, without mention of Monday to Friday, should be posted. Later, through Ms. Kennedy, Mr. Dennis advised Ms. Johnson not to post the revised memo and that there would be another meeting on the subject; and
- Ms. Johnson always sought permission to leave her assignments to conduct Union business and that she also logs in and out on the sign-in log.

Mr. Roach regarded Mr. Dennis' memo as management talking out of both sides of its mouth, first agreeing to something and then harrassing Ms. Johnson about it. The Union had agreed to 2-4 p.m. on a daily basis, because, at the time, it had considered it as being "reasonable

time" as provided for in the agreement. The 2-4 period was an accommodation to management because it was the slack part of the workday. Both he and Ms. Johnson felt the memo addressed all the issues that had been raised by Mr. Dennis and considered the matter closed. There was no response from management and this was taken as an indication that it had no problem with the points made by the Union. [Tr., pp. 161-164, 167, 408, 409.]

In her testimony, Ms. Johnson stated she understood that she could have 2-4 p.m. for meeting with employees on an as needed basis. In fact, she did not use that time period every day, and even when she did use the time it was not always for the whole period. She understood that she needed permission for meetings outside the workplace, or to use time other than 2-4, which she did. However, she felt that the March meetings had modified Article 9, §D, of the Agreement with respect to meeting with employees at the workplace between 2-4 p.m., and that she had blanket authority to do so without the need for further supervisory approval. Mss. Schaefer and Jenkins agreed she did not use every day, but almost every day, and considered this an abuse. [Tr., pp. 404, 405, 411, 489, 493, 496, 610-612, 617-620, 751, 852.]

As could be expected, these differing understandings led to conflict. On May 31, Mss. Schaefer and Jenkins met with Ms. Johnson. They informed her she could no longer do Union typing during work hours; that she could continue to meet with employees between 2-4 p.m., when needed; but that she should get their permission first. She could not get up and sign out without permission. [U Ex. 7; Tr., pp. 851, 852.]

Ms. Johnson wrote to Ms. Schaefer the next day, June 1, summing up her understanding of the restrictions placed on her: that is, that she was not to do anymore typing for the Union on work time; that while she could use the period 2-4 p.m. to meet with employees, she should inform either Ms. Schaefer or Ms. Jenkins, and they would arrange for a meeting; and that these orders and restrictions had come from Ms. Kennedy and Mr. Dennis. Ms. Johnson asked that the restrictions be put in writing and stated that until she received "a clear understanding and clarification" in writing, she would take what had been told her at the meeting "under advisement". She closed by stating that in any future meetings concerning her Union functions, she should be advised in advance so she could secure Union representation. [U Ex. 7.]

Ms. Johnson testified that Ms. Schaefer called her into her office after receipt of the June 1 letter and the only problem she had was with the word "arrange" and asked that she delete it. Ms. Johnson told her that was the word she had heard and that Ms. Schaefer could clarify what she had meant in writing. Ms. Johnson was concerned that the instructions given her at the meeting amounted to management dictating of how she would perform her duties as a shop steward. [Tr., pp. 437-439, 517-519.]

Ms. Johnson testified that she never received a response to her June 1 letter, and she continued as before, except that she no longer used the typewriter. Ms. Schaefer testified, however, that the letter of direction, dated July 10, that she sent Ms. Johnson [U Ex. 7] was her reply. The point she wished to make in the letter was that Ms. Johnson had to follow the procedures in the contract when she did Union

business, and that she was not free to just get up from her desk and go. [Tr., pp. 519-524, 689-691.]

The July 10 letter stated it was about the performance of Ms. Johnson's duties, but it actually concerned her Union work. It referred to Articles 8 and 9 of the contract and informed her that she would have to request, in advance, time for Union activity; that such activity would have to be performed away from her workstation; and that she could not use government materials and equipment. Her attention was directed to Mr. Dennis' memo of April 5, and she was warned that failure to abide with these requirements would result in discipline.

Despite this, and based on her view of her rights, Ms. Johnson only requested permission when she left the building or when she would see an employee at times other than from 2-4 p.m. If she was doing Union work in the building during that time, she would merely so indicate on the log sheets maintained in the office. [Tr., pp. 419, 489, 691.]

There were also problems concerning Ms. Johnson's work performance. On March 17, Ms. Schaefer found incorrect zip codes on 20 of 24 letters Ms. Johnson turned in for typing and signature. When she said she was sorry and that this was a human error, Ms. Schaefer replied that one or two could be an error, but that 20 out of 24 was deliberate. Later that month, two letters Ms. Johnson had done had been sent out and were returned with incorrect zip codes. As a result, Ms. Schaefer issued a letter of caution on April 5. On June 15 she was given another letter of caution concerning work she had been assigned but not completed in a timely fashion. Ms. Johnson replied in writing on June 19. She commented about the specifics in the letter, and said

that she regarded the letter as part of a pattern of harassment, retaliation, and threats. She also received a letter on August 18 saying her work performance over the past three months had been unsatisfactory. Ms. Johnson conceded at the hearing that she had made some errors, but said that Ms. Schaefer was "nitpicking" and had made false accusations about some of the errors. [Management Exhibits (M Exs.) 4, 6, 7; U Exs. 29a, 30; Tr., pp. 484-488, 701, 702.]

Both Ms. Schaefer and Ms. Jenkins felt that Ms. Johnson's work performance began to deteriorate in the latter part of 1988 and worsened in January 1989. Their specific concern was that she was not performing the work assigned her. At first they took no formal action and just spoke to Ms. Johnson, hoping that the problem would work itself out. [Tr., pp. 701, 855, 879, 880, 884, 892.]

Ms. Johnson's performance appraisal for the period April 1, 1988, to March 31, 1989, was issued in mid-June. Her rating was Satisfactory. The Comments section of the appraisal stated that her work had dropped to Satisfactory because of a lack of job interest. Ms. Johnson testified that when she met with Mss. Schaefer and Jenkins to discuss the appraisal, there was no discussion of her work. Instead, they told her she had been a good employee in the past and "they wanted the old JJ back". They said she had lost interest in her job and when she asked what they meant, they mentioned her meetings, which she interpreted to mean her Union meetings. Her previous ratings had been Excellent (July 31, 1988, to October 31, 1988) and Outstanding (April 1, 1987, to March 31, 1988). [U Exs. 16, 17; Tr., pp. 478-481, 539-541.]

Ms. Jenkins was the rating official. She testified that she and Ms. Schaefer had constantly talked to Ms. Johnson about her declining work performance. She would say she would do better but never did. Ms. Jenkins decided on a Satisfactory rating because of Ms. Johnson's "continuous failure" to do her work assignments. It got to the point where Ms. Johnson would send Ms. Jenkins notes, sometimes two pages long, about the assignment given her, instead of using the time to do the work. Ms. Jenkins stated that the essence of the problem was her going off on Union business during the 2-4 p.m. period without permission. The time spent on authorized Union business was not as frequent and not as much of a problem. She denied having said anything to Ms. Johnson at the performance appraisal meeting about her Union meetings and said she was not expected to do as much work as if she were not spending time on Union business. [Tr., pp. 857, 858, 888, 895-898, 903, 905.]

Another point of friction was Ms. Johnson's use of the telephone for Union business. She had been allowed to use the phone from 1987 on, but was told not to do so any longer. She was told the phone calls interfered with her work and that they were considered personal business. Ms. Johnson testified it was not possible for her to stop using the phone for Union business and she did not. Ms. Schaefer denied forbidding Ms. Johnson to use the phone. She did tell her she spent too much time on the phone on Union business and that she should try to lessen it. [Tr., pp. 452-454, 510-513, 721.]

There were other incidents not germane to these charges, and the bad feeling built up on both sides. The Union filed grievances and ULP

charges, and, based on Ms. Schaefer's recommendation, Ms. Kennedy proposed on September 22 that Ms. Johnson be suspended for 15 days for "Insubordination; to wit: Failure or refusal to comply with written instructions or direct orders by a supervisor." [U Exs. 7 and 18.]

There were two specifications. The first stated that Ms. Johnson had signed out for Union business, without permission, on seven dates in June and July, despite Mr. Dennis' memo of April 5 and her May 31 meeting with Mss. Schaefer and Jenkins. It also referred to the fact that Ms. Johnson's letter of June 1 had said she would take under advisement the matters discussed in the May 31 meeting. Ms. Kennedy concluded that the actions covered by both specifications constituted insubordination.

The second specification involved an incident on June 8. Ms. Schaefer called Ms. Johnson into her office and Ms. Johnson asked if it was for a meeting. Ms. Schaefer said it was for a meeting about her work. Ms. Johnson felt that her meetings with Ms. Schaefer were adversarial and she wanted a Union representative. According to Ms. Johnson, Ms. Schaefer told her she could use Deborah Lawrence, the Union secretary who worked in the same building. However, Ms. Lawrence was not a steward, and Ms. Johnson wanted a representative of her choosing, Mr. Roach. Ms. Schaefer said she suggested Ms. Lawrence, because sometimes Mr. Roach could not be available for days. She also stated that Ms. Lawrence represented employees in grievance and discipline matters. Ms. Johnson refused to meet without a representative and left the office. A meeting was not held until about one week later. [Tr., pp. 587-589, 654, 801, 812-816]

The matter went to a disinterested designee who found neither specification supported, and he recommended that the charge be dismissed. The deciding official, however, found the charge supported. In consideration of the fact that Ms. Johnson might have misunderstood or misinterpreted the purpose of the May 31 meeting, he reduced the suspension to 10 days. [HE Ex. 4; M Ex. 14.] The suspension was grieved and, on October 2, 1990, Arbitrator Herbert Bernhardt upheld a suspension, but reduced it to five days. [See attachment to Amendment to Employer's Post-Hearing Brief, October 11, 1990.]

Another point of contention between Ms. Schaefer and Ms. Johnson was the latter's use of 2-4 time for Union business, other than for meeting with employees, on worktime and at her worksite. Ms. Schaefer felt that Ms. Johnson had no right to the time or the use of her worksite for such work as writing up grievances. When she saw her doing so at her desk she told her to stop. Ms. Johnson appears to have understood the problem to be merely the matter of location, and after the July 10 letter, she would go to an empty office in the area or in an adjoining copying room which employees also used as a lunchroom. [Tr., pp., 458-463, 527-529, 752, 753.]

On August 21 there was an incident between Mss. Schaefer and Johnson in this regard. According to Ms. Johnson, she was preparing a grievance in an empty office when Ms. Schaefer told her to return to her desk. She replied she was on Union time and that if she could not work in that room she would move. Ms. Schaefer said "When something happens to you, you won't be doing Union work anymore". Ms. Johnson went to the lunchroom and Ms. Schaefer followed her and continued to

argue with her. When she told Ms. Schaefer that she was preparing a grievance, the latter repeated her statement about something happening to her and not doing Union work anymore. The next day Ms. Johnson received a memorandum charging her with an inexcused absence from duty. She was not disciplined for this, nor charged with leave or AWOL. [M Ex. 10; Tr., pp. 463, 482, 483, 700, 777.]

Ms. Schaefer stated that she had spoken earlier to Ms. Johnson about this problem on a few occasions. Based on their previous good relationship, she had hoped that by speaking to her and taking no further action, the situation could be straightened out. However, Ms. Johnson's reply had been, "You do what you have to do and I'll do what I have to do". On August 21, when she found Ms. Johnson doing Union work she told her she had to go back to her desk and do her regular duties. She did say something to the effect that if Ms. Johnson continued, something would happen. Her meaning was that the situation could not go on with her speaking to Ms. Johnson and Ms. Johnson not listening to her. [Tr., pp., 694, 695, 731.]

DISCUSSION AND CONCLUSIONS OF LAW

No. 89-U-15. The evidence will not support the Union's charge that the July 10 letter of direction was in violation of D.C. Law 2-139, §§1-618.4 a (3) and (4). The record in this case documents an unhappy story of a steadily worsening relationship between the parties. The letter of direction was not retaliation for grievances and ULP charges filed by the Union, but was the result of the poor relationship, and

of Ms. Johnson's refusal to obey orders which deviated from her understanding of what had been agreed to at the March 1989 meetings.

While there was a great deal of testimony about whether or not management and Union had agreed to official time for 2-4 p.m. Monday through Friday, the record establishes that while she used such time often, she did not use it every day. That is not the issue. What is at issue is whether she was required to seek supervisory permission to meet with employees at the workplace between 2-4 p.m.

Ms. Johnson contended that she did not need such permission because blanket permission had been granted in the March meetings. The agreement reached had modified Article 9, §D, of the labor contract so that she was free to meet with employees at the workplace so long as she did so between 2-4 p.m.

This view cannot be supported. Article 42, §C, of the Agreement specifically states that "... if the parties mutually agree in writing ... that modifications to the Agreement are necessary, they may modify it". There is no evidence of a written agreement to modify the contract. Further, whatever it was that was agreed to orally during the March meetings, it soon became apparent that the agreement had become unstuck. Ms. Johnson stated that she never received the March 31 memo from Mr. Dennis. However, there is no dispute about her receipt of his April 5 memo. It clearly stated that she needed permission in order to leave her work assignments to do Union business.

Both Mr. Roach and Ms. Johnson testified that they felt that the Union's April 14 memo had clarified the situation, and the fact that

there was no management response indicated to them that management accepted their view of the matter. That would be a reasonable assumption if that had been the end of the matter, but it was not. The message of April 5 with respect to needing supervisory permission was repeated in the May 31 meeting.

Ms. Johnson felt that the restrictions imposed on May 31 constituted management telling her how to perform her shop steward duties. However, as she pointed out in her letter to Ms. Schaefer of June 1, she was told that the restrictions came from Ms. Kennedy and Mr. Dennis. Instead of obeying the directives given her, or attempting to resolve or protest them through the procedures available to her, she demanded "a clear understanding and clarification" in writing, said she would keep "under advisement" what had been told her, and continued to act contrary to what had been conveyed to her by the April 5 memo and the May 31 meeting.

The problem was not that she lacked a clear understanding of what was being demanded of her. Rather, it was that these restrictions conflicted with her understanding of the previous arrangement and she refused to comply. As a shop steward and Union officer, Ms. Johnson was certainly aware of the industrial relations rule that, except for special circumstances not here present, one obeys supervisory directives first, and protests thereafter.

Her failure to comply with the directions given her resulted in the July 10 letter of direction. It specified the limits imposed on her in connection with the performance of Union work during working hours and warned of possible discipline for failure to abide by those re-

restrictions. It spelled out what was required of her in areas that had been the source of conflict, and constituted a warning, short of discipline, of what could happen if the situation was not resolved. It was not retaliation for having filed grievances and ULP complaints.

No. 89-U-16. This charge concerns two matters: the alleged restrictions placed on Ms. Johnson's phone usage for Union matters, and the performance appraisal given her for the period April 1, 1988, through March 31, 1989.

I credit Ms. Schaefer's denial that she did not forbid Ms. Johnson to use the phone for Union business, but that she tried to get her to lessen the amount of time because she saw it as interfering with her work. The contract calls for a reasonable, not an unlimited, amount of time for shop steward work. Ms. Schaefer asked Ms. Johnson to lessen the time spent on the telephone on Union activities; she did not threaten her, or punish her, even though Ms. Johnson testified that she continued to make and receive Union calls. I find no interference, restraint, or coercion with respect to Ms. Johnson's protected rights.

A comparison of Ms. Johnson's earlier appraisals shows a drop in her performance which began before 1989 and her greater involvement in Union activities. Her overall rating for April 1, 1987, to March 31, 1988, was Outstanding. She was rated Excellent on one factor, Quantity, and Outstanding on four others, Quality, Work Habits, Personal Relations, and Adaptability. She received an overall rating of Excellent in a quarterly appraisal for the period July 31 to October 31, 1988. The reason for the lower rating was the factor Quantity. In-

stead of Excellent, she was rated Satisfactory, due to a lower rating in the subfactor Amount of Work. The other four factors were all marked Outstanding. The record provides no explanation for the lower rating in Quantity.

The appraisal in dispute, April 1, 1988, to March 31, 1989, is significantly lower than the two previous ones. It has an Unsatisfactory for Quantity, two Satisfactories for Work Habits and Personal Relations, and two Excellents for Quality and Adaptability, for an overall rating of Satisfactory.

There was considerable evidence in the record concerning perceived deficiencies in Ms. Johnson's work, but a great deal of it concerns work performed after the end of the appraisal period. That is immaterial. Only work done during the appraisal period may be used for the rating appropriate to that period. The only specific instance of deficient work during the rating period which is cited in the record is in Ms. Schaefer's April 5 memo, the incorrect zip codes. That is covered by the factor of Quality, and her rating in that area dropped from Outstanding to Excellent.

I credit Ms. Johnson's testimony that, when she discussed the appraisal with Mss. Schaefer and Jenkins, the discussion centered on her attitude, perceived lack of interest in her job, and of her Union activity. I disagree that none of this concerned the work itself. Her attitude and job interest are directly related to her work, as is the matter of the amount of time devoted to work.

Ms. Jenkins was the rating official. She testified credibly that she did not expect Ms. Johnson to perform as much work as she would have if she had not spent authorized time on Union business. The use of authorized time [essentially administrative leave for meetings outside the building] was not the main problem as far as Ms. Johnson's performance was concerned. What was the problem was her constant use of unauthorized time during the 2-4 p.m. period.

It would be improper to approve leave for Union business, and then hold the use of that leave against an employee in the performance appraisal process. I am satisfied, based on the record, that that is not what happened. Instead, the lowered evaluation on Quantity, from Satisfactory to Unsatisfactory, was based on Ms. Johnson's use of unauthorized time on Union business and her consequent inability to get assigned work done on time.

I find no violations of §§1-618.4 a (1), (2), or (3).

No. 89-U-18. By the time of the August 21 confrontation, matters had sunk to a low ebb. Ms. Schaefer had recommended to Ms. Kennedy on August 9 that Ms. Johnson be suspended. In addition, Ms. Schaefer felt that Ms. Johnson was improperly doing paperwork at her desk that related to Union activity, while Ms. Johnson seem to have understood that the objection was not to the work, but where she performed it.

There was no evidence offered as to whether Ms. Schaefer was correct in her assessment that Ms. Johnson could not prepare grievances on worktime. The contract is not specific on the point. However, even if one assumes she was wrong, Article 9, §D still applied. Because of

her view that the March 1989 meetings modified that provision, Ms. Johnson did not seek permission for use of this time.

Ms. Johnson took what Ms. Schaefer said as a threat. Under the circumstances, however, I credit that what Ms. Schaefer meant was that this situation could not go on, and that Ms. Johnson could not continue to do Union work for which permission had not been granted. The fact is that Ms. Johnson was not disciplined for the incident (it is not cited in the proposal letter), nor was she charged leave or AWOL.

I find no violation of §§1-618.4 a (1), (2), (3), or (4).

No. 90-U-04. The first specification in the letter proposing suspension concerns the use of worktime, without permission, for Union business, at a time when Ms. Johnson was aware of the management view that Article 9, §D applied. In line with the reasons discussed above in connection with No. 89-U-15, I find no retaliation by the agency, and no violations of §§1-618.4 a (3) or (4).

Ms. Johnson persisted in her behavior knowing that it could result in discipline. The July 10 memo made that plain. That is the reason for the suspension, not retaliation. This same finding was made by Arbitrator Bernhardt. I have included his decision in the record, over the Union's objection, because it is relevant, it was not available to the parties, at the time of the hearing, and its inclusion in the record did not delay this Report and Recommendation.

The second specification concerns the June 8 meeting which Ms. Johnson left because she did not wish to be represented by Ms. Lawrence, as Ms. Schaefer had suggested. Employees have the right to a Union rep-

representative in certain situations, but not necessarily at every meeting with supervision. There is nothing in the record to indicate that the meeting in question was one which triggered Ms. Johnson's right to be represented. Absent such a showing, there is no support for the Union's claim of violations of §§1-618.4 a (3) or (4).

There is one final point to be made regarding No. 90-U-04. The fact that the Union had filed a grievance over the suspension, in addition to filing this complaint, was brought to PERB's attention by management. It asked, in its reply to the complaint, that action be held in abeyance pending the outcome of the grievance process. However, PERB accepted the complaint for hearing.

In the private sector, the National Labor Relations Board [NLRB] adopted what has become known as the Collyer doctrine. [Collyer Insulated Wire, 192 NLRB 837 (1971).] In that case, the NLRB ruled that it would defer action on cases which could be resolved under the parties' grievance/arbitration process. The NLRB retains jurisdiction to consider motions claiming that the process was not fair and regular, or that the result reached was repugnant to the Act.

I recommend that PERB consider adoption of this doctrine. Such a rule would have avoided duplicative hearings and expense for the parties in this case. The matter of whether Ms. Johnson's suspension was retaliation for Union activities was specifically presented to Arbitrator Bernhardt, and he ruled on that issue.

If the Board declines to adopt Collyer as such, I recommend that it consider Dubo Manufacturing Corp., 142 NLRB 431 (1963). Under the

rule of that case, the NLRB defers action in cases which are already in the grievance/arbitration process.

RECOMMENDATION

That all four complaints be denied.

Charles Feigenbaum
Charles Feigenbaum

11/21/90
Date