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

In the Matter of:)	
)	
Bernice Rink,)	
)	
Complainant,)	PERB Case No. 03-U-09
v.)	
)	Opinion No. 783
)	
District of Columbia Department of Health,)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

I. Statement of the Case:

Bernice Rink ("Complainant") filed an unfair labor practice complaint against the District of Columbia Department of Human Services ("Respondent" or "DHS"). The Complainant alleges that DHS violated the Comprehensive Merit Personnel Act when it terminated her from her position as a Social Service Representative. The Respondent filed an answer denying all of the allegations.

This matter was referred to a Hearing Examiner. The Hearing Examiner issued a Report and Recommendation ("R & R") in which he recommends that the complaint be dismissed. The Complainant filed exceptions to the Hearing Examiner's R & R. The Hearing Examiner's R & R and the Complainant's exceptions are before the Board for disposition.

II. Background:

The Complainant was a clerical assistant with the Department of Employment Services. On or about January 13, 2002, the Complainant accepted a position as a Social Service Representative with DHS. (R & R at p. 5) She was assigned to DHS' Income Maintenance Administration located at the Eckington Service Center. The Complainant asserts that she was a career service employee who had satisfactorily completed her one-year probationary period. Therefore, the Complainant

contends that she was not required to serve another probationary period. However, the Respondent claims that pursuant to applicable District of Columbia personnel rules, the DHS position was a career appointment requiring the Complainant to serve a 12-month probationary period. (R & R at p. 5).¹

From January 14, 2002 through July 15, 2002, the Complainant was assigned to a DHS work unit supervised by Shirley Porter, Social Service Representative Supervisor. (R & R at p. 5). During her first six months with DHS, the Complainant received initial training on DHS policy and procedures, and missed some work as a result of an off-duty automobile accident. (R & R at p. 5). "The Complainant's time away from her duties, as the result of the initial training and the accident, was taken into consideration by DHS during this first six-months of her one-year probationary evaluation period." (R & R at p. 5). On April 14, 2002 and July 15, 2002, Ms. Porter evaluated the Complainant's work performance. Each time, Ms. Porter recommended that the Complainant be retained. (R & R at p. 5).

On July 16, 2003, Diana Dupree, Section Supervisor, transferred the Complainant to another work unit under the supervision of La Shune Mitchell-Knight, Social Service Representative Supervisor. Ms. Dupree testified that Ms. Porter had five workers under her supervision while Ms. Mitchell-Knight had three. As a result, Ms. Dupree moved the Complainant to Ms. Mitchell-Knight's unit to correct the shortage of staff in Mitchell-Knight's unit. (R & R at p. 6).

The Complainant contends that prior to her transfer she requested two days of leave. The Complainant claims that Ms. Porter (the Complainant's previous supervisor), approved her leave request. After the transfer, the Complainant did not report for work on the two approved leave dates. However, Mitchell-Knight, her new supervisor, was unaware of the pre-approved leave. Consequently, Mitchell-Knight placed the Complainant in an AWOL status for the two days she took off. (R & R at p. 6). On September 20, 2002, the Complainant filed a grievance over Mitchell-Knight's decision to place her on AWOL. On October 10, 2002, Mitchell-Knight completed a third evaluation of the Complainant and recommended termination. (R & R at p. 6). On October 18, 2002, Mitchell-Knight responded to the Complainant's grievance and rescinded the AWOL. In addition, Ms. Mitchell-Knight restored two days to the Complainant's annual leave. (R & R at p. 6).

On November 21, 2002, Sharon Cooper-DeLoatch, Deputy Administrator for Program

¹ The issue of whether the Complainant should or should not have been a probationary employee is not within the Board's jurisdiction. Personnel issues such as this are usually handled by the District of Columbia Office of Employee Appeals (OEA). Also, it should be noted that the Complainant did file an appeal with OEA. In the Matter of Bernice V. Rink v. Department of Human Services, OEA concluded that the Complainant "was to serve a one-year probationary period." As a result, OEA declined jurisdiction over her appeal of the Respondent's removal action based on her probationary status. See, In the Matter of Bernice V. Rink v. Department of Human Services, OEA Matter No. 1601-0025-03 at pgs. 3-4, (June 30, 2003).

Operations, notified the Complainant in writing that she was being terminated from her DHS position effective November 29, 2002. (R & R at p. 6)

The Complainant contends that she was terminated from her position as a result of her union activity and/or reprisal for filing a grievance against her supervisor in clear violation of D.C. Code §§ 1-617.01 (b)² and 1-617.04(a). As a result, the Complainant filed an unfair labor practice. In her Complaint, Ms. Rink is requesting that: (1) she be reinstated to the position of Social Service Representative; (2) she be awarded back pay; (3) her personnel records be modified accordingly; (4) she be free from reprisal; (5) management be trained to be sensitive to the rights of employees to pursue union activities; (6) she be awarded whatever sum the Board deems appropriate for mental anguish and defamation of character; and (7) the Respondent be directed to pay attorney fees.

The Respondent denies that it has committed an unfair labor practice. In addition, the Respondent argues that the statutory rights under the Comprehensive Merit Personnel Act (CMPA) do not accrue to probationary employees. As a result, the Respondent requests that the Complaint be dismissed.

The Hearing Examiner noted that D.C. Code § 1-617.04 prohibits the District, its agents and representatives from "[i]nterfering, restraining or coercing any employees in the exercise of rights guaranteed by this subchapter." Furthermore, he observed that the CMPA expressly protects the fundamental collective bargaining rights of "all employees."³ As a result, the Hearing Examiner found that the "plain language of D.C. Code § 1-617.01, et seq., protects 'each', 'any': and 'all employees' without limitation as to their probationary status." (R & R at p. 12). In addition, he indicated that

² D. C. Code § 1-617.01(b) provides in pertinent part as follows:

* * *

(b) Each employee of the District government has the right, freely and without fear of penalty or reprisal:

(1) To form, join and assist a labor organization or to refrain from this activity;

* * *

(3) To be protected in the exercise of these rights.

³ § 1-617.06. **Employee rights.**

(a) all employees shall have the right:

(1) To organize a labor organization free from interference, restraint, or coercion;

(2) To form, join, or assist any labor organization or to refrain from such activity;
and

(3) To bargain collectively through representatives of their own choosing provided by this subchapter.

Board case law has established that the “[Board] has jurisdiction over [unfair labor practice complaints] filed by probationary employees.”⁴ Id.

The Hearing Examiner determined that “the Respondent’s claim that a probationary employee’s right to file an unfair labor practice complaint is circumscribed and limited by personnel regulations and personnel manual instructions, is without merit and without support in the law or [Board] precedent.” Id. In addition, he observed that this claim is a restatement of the Respondent’s Motion to Dismiss which was denied as a threshold matter at the hearing.

Concerning the substantive claims, the Hearing Examiner noted that the Complainant has the burden of proving her unfair labor practice allegations by a preponderance of evidence.⁵ The Hearing Examiner indicated that the Complainant has alleged that she was terminated as a result of her union activity and/or reprisal for filing a grievance against her supervisor, Mitchell-Knight. The Hearing Examiner noted that these allegations, if proven, constitute violations of D.C. Code §§ 1-617.01; 1-617.04(a)(1) and 1-617.06. He observed that in order to sustain a claim of retaliation for union activity the Complainant must demonstrate a link between her protected activity and the Respondent’s termination action.⁶ The Hearing Examiner noted that to show a retaliatory discharge, the Complainant must prove that: (1) she engaged in protected union activity; (2) the Respondent knew of the activity; (3) there was animus by the Respondent; and (4) the Respondent subsequently took the termination action. The Hearing Examiner acknowledged that determining the Respondent’s motivation is difficult. As a result, the Respondent’s termination decision must be analyzed based on the totality of the circumstances. Furthermore, the Respondent need only rebut the presumption created by the Complainant’s prima facie showing and need not prove that an unfair labor practice did not occur.⁷

After reviewing the evidence, the Hearing Examiner concluded that the Complainant failed to meet her burden of proof that the Respondent committed an unfair labor practice by terminating her. Specifically, the Hearing Examiner indicated that the evidence establishes that during the Complainant’s first six months at DHS she was supervised by Ms. Porter who twice recommended that the Complainant be retained. However, he noted that the record also reveals that for much of this

⁴ See, Doctors Council of the District of Columbia and Dr. Henry Skopek v. D.C. Commission on Mental Health Services, 47 DCR 7568, Slip Op. No. 636, Perb Case No. 99-U-06 (2000).

⁵ See, Board Rule 520.11

⁶ See, Butler v. District of Columbia Department of Corrections, 49 DCR 1152, Slip Op. No. 672, PERB Case No. 02-U-02 (2002).

⁷ See, Georgia Mae Green, Esq. v. District of Columbia Department of Corrections, 41 DCR 5991, Slip Op. No. 323, PERB Case No. (91-U-13).

time the Complainant was in training or recovering from an automobile accident. After about seven months at DHS, the Complainant was transferred to a new unit under the supervision of Mitchell-Knight. The Hearing Examiner found that the evidence revealed that the transfer was to balance out the staff in two work units and not motivated by anti-union animus. The Hearing Examiner observed that during the third quarter of the Complainant's probationary year, Mitchell-Knight determined that the Complainant was unable to meet the performance demands of her position. As a result, Mitchell-Knight recommended that the Complainant be terminated. The recommendation was adopted by DHS and the Complainant was terminated on November 29, 2002. The Hearing Examiner acknowledged that Mitchell-Knight's recommendation followed a grievance filed by the Complainant asserting that she was improperly placed in an AWOL status by Mitchell-Knight. In addition, he observed that the grievance was resolved in the Complainant's favor after she was notified of her termination. However, the Hearing Examiner found that the termination was not in retaliation.

The Hearing Examiner determined that at about the same time as her transfer to Mitchell-Knight's unit, the evidence established that the Complainant became active in the union and attended at least one shop steward's training class. The Complainant testified that Berhan Kahsay-Jones, who was two levels of supervision above Mitchell-Knight, made derogatory, anti-union statements about the union's worth in the work place and about the value of the Complainant's involvement in the union. Berhan Kahsay-Jones testified that she did not make the statements. The Hearing Examiner pointed out that only Berhan Kahsay-Jones testified that she knew of the Complainant's union activities. He noted that all other DHS Management officials testified that they were unaware that the Complainant was active in the union. In addition, the Hearing Examiner observed that the testimony of Deborah Courtney, AFSCME Local 2401 President, supports the Respondent's assertion that there was and is a harmonious relationship between DHS and the union. (R & R at p. 13)

The Hearing Examiner indicated that Mitchell-Knight testified that she recommended the Complainant's termination based on her insubordination and poor work performance, including the inability of the Complainant to adequately maintain more than 50 of 350 assigned cases. He found that her testimony, when considered in relation to the testimony of the other Respondent witnesses, particularly Berhan Kahsay-Jones and Deborah Courtney, supports the conclusion that the Complainant was terminated based on her performance and not in retaliation for filing the AWOL grievance or for union activity. (R & R at p. 13) He noted that "assuming arguendo that Berhan Kahsay-Jones' statements were made as the Complainant says, the remarks were not coercive, but casual in nature and do not constitute proof of anti-union animus on the part of the Respondent. He opined that the "remarks, even if made as the Complainant says, are not coercive of the Complainant's protected rights either." (R & R at pgs. 12-13)

In view of his findings, the Hearing Examiner recommends that the Complaint be dismissed. The Complainant presented numerous exceptions to the Hearing Examiner's Report and Recommendations. Essentially, the Complainant contends that the Hearing Examiner overlooked several pieces of critical evidence and ignored convincing testimony. (Complainant's Exceptions at pgs. 3-4) Specifically, the Complainant asserts that the Hearing Examiner erred in his conclusion that

only one manager at DHS knew that the Complainant was active in the union. Also, the Complainant argues that the Hearing Examiner failed to find that the timing of her termination indicated anti-union animus. Additionally, the Complainant claims that the Hearing Examiner was biased because he knew Mary Leary, Director of the Office Labor Relations and Collective Bargaining. The remainder of the Complainant's exceptions dispute the Hearing Examiner's finding that DHS had a reasonable basis for terminating her.

In the present case, the Complainant has the burden of establishing that the Respondent's decision to terminate her was the result of the Respondent's anti-union animus or retaliation against the Complainant for her union activities. To prove the claim of retaliatory discharge for union activities, the Complainant must show that she engaged in protected union activities; that DHS knew of the activities; that there was animus by DHS; and that DHS subsequently took adverse action against the Complainant. See, Farmer Bros. Co., 303 NLRB 638 (1991); and D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corporation, D.C. General Hospital, 46 DCR 6271, Slip Op. No. 583, PERB Case No. 98-U-07 (1999). The Board has observed that determining motivation is difficult. Therefore, a careful analysis must be conducted to ascertain if the stated reason is pretextual. The Board has noted that employment decisions must be analyzed according to the "totality of the circumstances";⁸ relevant factors include a history of anti-union animus, the timing of the action, and disparate treatment. We believe that the Hearing Examiner used the proper standard when determining if DHS committed an unfair labor practice.

The Hearing Examiner concluded that the Complainant presented sufficient evidence to establish that the Complainant received partial training as a shop steward. (R & R at p. 7). However, the Hearing Examiner found that only one manager at DHS knew of the Complainant's involvement with the union. In addition, the Hearing Examiner determined that the Complainant failed to show any anti-union animus on the part of DHS. In her exceptions, the Complainant claims that anti-union animus is evident in that she never received any warning from Ms. Mitchell-Knight concerning her job performance. (Complainant's Exceptions at p. 3) We believe that this fact alone cannot support a claim of retaliation, particularly when the Complainant has failed to show any consistent history of animus towards the union. See, Holiday Inn East, 1281 NLRB 573 (1986).

A review of the record reveals that the Complainant's exceptions amount to no more than a disagreement with the Hearing Examiner's findings of fact. Specifically, the Complainant argues that the Hearing Examiner erred by giving more weight to the testimony of some witnesses and by ignoring testimony that was favorable to the Complainant. This Board has determined that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's finding where the findings are fully supported by the record. See, American Federation of Government Employees, Local 874 v. D.C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). We have also held that "issues of fact concerning

⁸ See, Skopek, supra., and NLRB v. Nueva, 761 F.2d 961, 965 (4th Cir. 1985).

the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner.” Tracey Hatton v. FOP/DOC Labor Committee, 47 DCR 769, Slip Op. No. 451, at p. 4, PERB Case No. 95-U-02 (1995). Also, see University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia, 39 DCR 6238, Slip Op. No. 285, PERB Case No. 86-U-16 (1992) and Charles Bagenstone, et al. v. D.C. Public Schools, 38 DCR 4154, Slip Op. No. 270, PERB Case Nos. 88-U-34 (1991). In the present case, the Hearing Examiner acknowledged that during Ms. Rink’s first six months of employment she was supervised by Ms. Porter who twice recommended that the Complainant be retained. (R & R at p. 13) Nonetheless, he concluded that the Complainant failed to meet her burden. This is precisely the function of the Hearing Examiner; to determine issues of credibility and to judge the sufficiency of the evidence.

Pursuant to D. C. Code § 1-605.02(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. As a result, we adopt the Hearing Examiner’s findings and conclusions that DHS did not violate the Comprehensive Merit Personnel Act.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The Complainant’s unfair labor practice complaint is dismissed.
- (2) Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

April 21, 2005

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 03-U-09 was transmitted via Fax and U.S. Mail to the following parties on this the 21st day of April 2005.

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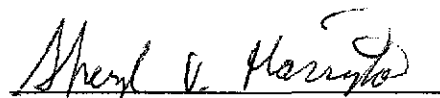
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