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

In the Matter of:)	
)	
Earnest Durant, Jr.,)	
)	
Complainant,)	PERB Case Nos. 07-U-43 and 08-U-57
)	
v.)	Opinion No. 1286
)	
Government of the District of Columbia)	
Department of Corrections,)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

I. Statement of the Case and Background:

On June 27, 2007, Earnest Durant, Jr. ("Complainant") filed an unfair labor practice complaint and a motion for preliminary relief against the District of Columbia Department of Corrections ("DOC"). On July 3, 2007, the Complainant filed an amended unfair labor practice complaint and a motion for preliminary relief. The Complainant provided the following summary of charges against DOC:

[That DOC] interfered with, retaliated, restrained, discriminated and coerced complainant, a bargaining unit employee in exercising of rights guaranteed under D.C. Code 1-617.6, in regard to the terms and conditions of employment of complainant in order to discourage membership in the FOP/DOC Labor Committee, to discourage FOP/DOC Labor Committee bargaining unit members from seeking assistance from complainant and engaged in other reprisal actions against complainant.

. . . respondents refused, restricted or failed without reason or just cause, (1) to restore complainant to full duties and responsibilities as a criminal investigator with the DOC Warrant Squad following reinstatement on April 17, 2007 to employment with the District Government, DC DOC following a determination by the United States Office of Personnel of his ineligibility for law enforcement retirement when he was involuntarily separated through retirement on December 31, 2006, (2) by refusing to authorize complainant's participation with the US Marshal's Joint Fugitive Task therefore denying complainant necessary training, administrative support and assistance to adequately perform his duties and responsibilities, (3) by refusing to provide information under the freedom of information act (FOIA) relating to a pending PERB unfair labor practice complaint is a party to, (4) by creating an alleged double standard solely against complainant concerning an alleged involvement in an incident on June 13, 2007, (5) by being directed to surrender his department issued weapon, badge, identification card, weapons authorization card, keys and other department issued equipment, forcefully escorting complainant from his place of employment, the Metropolitan Police Department Headquarters and placing complainant on forced administrative leave on June 14, 2007 without any probable cause and allegedly pending an investigation, (6) prohibiting complainant from entering any Department of Corrections facility without prior approval from a Department of Corrections Official with knowledge that complainant had previously represented and are currently representing individual DC DOC employees in unfair labor practice complaints now before PERB against the DC DOC and other standards of conduct complaints before PERB, severely restricting and or denying access to those he is representing, and, (7) alluding in a verbal statement made to complainant on June 13, 2007 by Supervisory Criminal Investigator Wanda Patton that he "has not or must learn to separate his departmental duties and responsibilities from that off the union".

(Complaint at pgs. 2-3).

The Complainant argues that by this conduct DOC has violated the Comprehensive Merit Personnel Act ("CMPA"), as codified under D.C. Code § 1 -617.04 (a) (1), (3) and (4). The Complainant requested that the Board: (1) grant his request for preliminary relief; (2) order DOC to cease and desist from violating the CMPA; (3) order DOC to rescind their decision placing Complainant on administrative leave; and (4) order DOC to pay attorney's fees and reasonable costs.

On August 28, 2007, the Public Employee Relations Board (PERB) issued a *subpoena duces tecum* on behalf of Complainant for information in relation to PERB Case No. 07-U-43.

On August 31, 2007, Respondent filed an Amended Motion to Quash with respect to the information requested, arguing that the information requested was not relevant.

Prior to these pleadings, on August 1, 2007, the Complainant filed a second unfair labor practice complaint, which the Board docketed as PERB Case No. 08-U-57. The Complainant requested that the Board consolidate the August 1 Complaint with PERB Case No. 07-U-43. The reason provided for the request asserts:

in that the issues are similar including respondent's continued and gross misconduct, which includes but not limited to prejudicing complainants classification appeal by continued taking reprisals against complainant, deliberately refusing to provide information necessary for complainant's complaint, deliberating providing fraudulent and misleading information under a pretext to discredit and undermine complainants and complainant's classification appeal, continued abuse of authority with intentions of compromising, interfering and restraining complainant in regards to his rights guaranteed and a continued, willful, deliberate disregard and refusal to adhere to the standards outlined in the "Position Classification Standard for General Investigating/Criminal Investigating Series, GS-1810-GS 1811, Grade Level Guide for Classifying Investigator Positions, GS 1810/11 (TS 8 February 1972)" United States Office of Personnel (OPM) and District of Columbia Government, "District Personnel Manual, (DPM) Chapter 11 (A) Section 1110.4". Which constitutes a continued violation of the procedures outlined in Article 20, Section 4 of the current collective bargaining agreement between the Fraternal Order of Police Department of Corrections Labor Committee and the Department of Corrections and of the D.C. Code Section 1-617.04 (a),(l),(3), and (4) and (b) 1.

The specific allegations in complaint docketed as PERB Case No. 08-U-57 concern allegations that DOC acted in a retaliatory manner concerning his request for a promotion and the grievances associated with the request for a promotion.

DOC filed answers to both complaints, denying the allegations. In addition, DOC filed an opposition to the motion for preliminary relief ("Motion") requesting that the Board dismiss the Motion associated with PERB Case No. 07-U-43. On September 17, 2007, the Board issued Slip Opinion No. 914, denying the Motion for Preliminary Relief. The Board also granted the Complainant's request for consolidation of PERB Case Nos. 07-U-43 and 08-U-57. In October 2008, Respondent filed a Motion to Dismiss the Complaint in Part. The consolidated complaints were then scheduled for development of the record through an unfair labor practice hearing. A hearing was held in this matter on July 30, August 21, September 26 and October 23, 2008.

On the July 30, 2008 hearing date, the Hearing Examiner granted Respondent's motion to dismiss allegations in the Amended Complaint bearing on the Complainant's request for

documents pursuant to the Freedom of Information Act and issuance of a temporary restraining order directed to the D.C. Human Resources Department (DHR). In addition, the Hearing Examiner granted the Respondent's motion to dismiss allegations in the Amended Complaint bearing on the Complainant's request for documents pursuant to the Freedom of Information Act and issuance of a temporary restraining order directed to the D.C. Human Resources Department (DHR).

On February 24, 2009, the Hearing Examiner issued her Report and Recommendation (R&R). Complainant filed Exceptions to the R&R on April 6, 2009. Respondent filed an opposition to the Complainant's Exceptions.

II. Background

The Complaint asserts that at times pertinent to the allegations set forth in the complaints that the Complainant was engaged in activities pursuant to his role as a bargaining unit representative. In addition, the Hearing Examiner made the following recommended findings of fact concerning the PERB Case No. 07-U-43:

In 1983, Officer Durant, began his career with the DOC as a corrections officer at the then central prison facility in Lorton, Virginia. Throughout most of his years with the DOC, he was actively engaged in union activities beginning with his assignment as a full-time representative for Teamsters Local Union on an authorized leave of absence from September 1984 to January 1994.

In January 1994, Officer Durant resumed his duties as a correctional officer at the Lorton prison. Thereafter as one of a group of plaintiffs in *Neale et al. v. Director, Department of Corrections*, Civil Action No. 93-2420, U.S. District Court for the District of Columbia (1995), a case in which the Court found that the DOC had committed civil rights violations, Officer Durant was promoted to the position of Criminal Investigator at grade 1811-09 step 5. In 1999, a court-appointed master in *Neale*, ordered Officer Durant's promotion to DS 1811-11. Since that date, he has served as one of three criminal investigators with the Office of Internal Affairs Warrant Apprehension Team, (OIA Warrant Squad), headquartered at 300 Indiana Avenue NW, until he was posted to the Office of Community Corrections in the Grimke Building at 1623 Vermont Avenue NW. In addition to the three Warrant Squad officers, Officer Wanda Patten has supervised the three investigators assigned two Internal Affairs since 2004.

As a Warrant Squad investigator, Officer Durant's duties involved locating and apprehending escapees from half-way houses and the D.C. Jail. After receiving information about an absconder, Warrant Squad officers would obtain an arrest warrant signed by a

U.S. attorney or a District of Columbia Superior Court judge and then search for and arrest the fugitive. In addition, they testified in grand jury, preliminary hearings and court trials. Internal Affairs investigators were tasked with investigating claims of misconduct, malfeasance or illegal activity by DOC employees. Consequently, they often worked with undercover agents. Given the sensitive nature of the work performed by OIA investigators, signs were posted at various places throughout their offices announced that the area was restricted and that only authorized personnel were permitted entry.

2. Officer Durant's Union Activities

In several instances, Officer Durant's extensive involvement in union activities resulted in findings of discrimination and retaliation by a U.S. District Court and D.C. PERB. For example, in 2003, Officer Durant and fellow police officer, Ernest Green were the prevailing parties in *Fraternal Order of Police v. DOC*, Slip Op. No. 698, PERB Case No. 01-U-16 (2003). The record in that case establishes that Officer Durant was required to surrender his weapon and assigned to administrative duties following an encounter with DOC officials that occurred while he was challenging a unilateral change in working conditions. The Respondent was ordered to cease and desist from violating Officer Durant's and [Green's] protected rights. As previously mentioned, he was promoted in rank as a remedy in the *Neale* case. Another matter is pending a final decision in a case before the PERB.

3. Denial of Complainant's Reinstatement to CARTF

In 2006, Officer Durant was notified of his mandatory retirement. However, in early April he was advised that his retirement was disallowed by the U.S. Office of Personnel Management and he was instructed to return to his position on the Warrant Squad as of April 17, 2007. On his return, Ms. Patten assured the Complainant that he would be wholly restored to his former duties, including a detail to CARTF, a group composed of investigators from various federal, state and local jurisdictions who, under the leadership of the U.S. Marshalls Office, joined forces to apprehend violent fugitives. However, without explanation, Officer Durant was not invited to rejoin CARTF although his deputation to CARTF was supposed to be effective through August 31, 2007. The Complainant contends that the DOC's failure to restore him to the Task Force was in reprisal for his Union activities.

Ms. Patten disclaimed any responsibility for Officer Durant's exclusion from CARTF's failure to reinstate him. To the contrary, she testified that she assumed he would rejoin the Task Force and therefore, telephoned James Werking, the Regional Task Force Supervisor, to tell him that the Complainant would be returning to work. Mr. Werking recalled that when Ms. Patten asked him to reinstate Officer Durant, he told her he was unwilling to do so. He testified that although supervisors at various government agencies may recommend employees to serve on the Task Force, he has sole discretion to decide who will be accepted or retained.

In the months following his 2007 reinstatement, three of Officer Durant's fellow Union members asked him to represent them in cases they initiated against the DOC and the Union's Labor Committee led by FOP's Chairperson Ms. Nila Ritenour.

4. Union President's Letter to OIA Supervisor

On April 30, Officer Durant hand delivered a letter to Ms. Ritenour's office in which he requested an opportunity to review the Union's financial records. The following day, Ms. Ritenour faxed a message under the subject heading, "Questionable Union Activity" to Supervisor Patton asking whether Officer Durant was on duty at the time he delivered his memo to her and whether he had violated Departmental policy by signing his attached request as a Warrant Squad Criminal Investigator. Ms. Ritenour then added that:

....Mr. Durant is one of our most litigious members. Our...Public Employee's Relations Board...has dozens of cases and motions initiated by this person. His return from retirement...means another prolonged campaign against whoever is running our Labor Committee.... (The letter is inappropriate and indicates) the beginning of a new campaign by him to smear and slander innocent, hard-working correctional employees.

In responding to Ms. Ritenour, Ms. Patten suggested that Officer Durant probably delivered the memo during his lunch break, but indicated that she would speak to him about it. Soon thereafter, Ms. Patten called Officer Durant into her office, gave him a copy of Ms. Ritenour's memo and on asking him about it, confirmed her assumption that he had delivered it during his lunch break.

On May 9, Officer Durant represented fellow police officer Percy Finch at an administrative investigation conducted by Ms. Patten to

examine an allegation that he was arrested and convicted on two misdemeanor charges. If the allegation was true, it could have jeopardized his pending promotion. When Finch convinced Ms. Patten that [he] had been found not guilty, she assured him that she would endorse his promotion. Several days thereafter, Ms. Patten told Officer Durant that he would have to let her know in advance if he intended to take time off when representing other employees.

5. The June 13th Incident and Subsequent Investigation

The Complainant's and Ms. Patten's accounts of the June 13 incident are relatively consistent. However, their views as to the importance and possible consequences of those facts vary greatly. Officer Durant testified that he left the OIA office to attend a union meeting at approximately 6:45 pm on June 13, and on the way, encountered Officer Tyrone Jenkins, (Jenkins), a fellow DOC employee who worked at the D.C. jail. Jenkins told Officer Durant that he needed to copy a document quickly for use in a case pending before the D.C. PERB. When Officer Durant offered to reproduce the paper on his office copier, both men went to OIA headquarters and, according to Officer Durant, entered the offices through a door leading to a common area where the copier was located.

Ms. Patten testified that she was in her office when she was startled to hear sounds within the OIA quarters. Believing that she was the only person present at that time, she asked a maintenance person to accompany her when she walked to the common room to determine who was there. At first she observed an unidentified man walking through the Internal Affairs section of the Office, but soon thereafter realized that it was DOC Officer Tyrone Jenkins but asked him to leave in keeping with office policy limiting admission to the OIA only to authorized persons. She also found Officer Durant using the copier. When he explained that he was copying a PERB complaint, she admonished him, stating that he knew he was not supposed to reproduce personal material on a government machine nor bring an unauthorized individual into the office. Ms. Patten ordered Jenkins to leave. Officer Durant apologized both for using the copier and bringing Jenkins into the facility. He and Officer Jenkins then left for the Union meeting.

Ms. Patten telephoned DOC Director Devon Brown that same evening to report her encounter with Officers Durant and Jenkins. The next day, Major Elbert White delivered a memorandum from Director Brown to Officer Durant that stated: "Effective today... June 14 you are placed on administrative leave pending an investigation." The memo also informed Officer Durant that while

on administrative leave, he was to contact Ms. Patten daily and was prohibited from entering any DOC facility without obtaining official approval. Officer Durant then had to surrender his weapon and badge to Major White who escorted him out of the premises in order to reclaim a DOC vest he left in his vehicle. Patton denied knowing that Director Brown would place Officer Durant on administrative leave until the next day when Major White delivered the Director's memo.

Subsequently, Deputy Warden Stanley Waldren was assigned to investigate the June 13 incident and interviewed Officers Durant, Jenkins and White in person and Ms. Patten by phone on July 6. A summary of these interviews and the Investigator's conclusions and recommendations appears in his Final Investigatory Report dated July 30. During his interview with the Investigator, Officer Durant maintained that the common room where the copier was located was not considered a sensitive area. He also stated that since Jenkins, a DOC employee, was accompanying him, he was authorized to be in the common area. Moreover, he claimed that staff members, including Supervisor Patten, had family members visit the office occasionally. He further asserted that the PERB complaint he had copied was an official government document since it was to be used in a pending case. However, he acknowledged apologizing to Ms. Patten, promising that his actions would not be repeated.¹

Officer Durant's testimony about this incident is consistent with the account that appears in Waldren's investigative report with one exception: he alleged in the Amended Complaint and testified that before he and Officer Jenkins left, Ms. Patten advised him that he "must learn to separate his department duties and responsibilities from that of the Union."

Ms. Patten's account of the June 13 episode does not vary widely from the Complainant's, but she viewed those facts from a different perspective. Furthermore, she denied having said anything to the Complainant about separating his official duties from those of the union. She stated that she thought she was alone in her office when she heard a door closing elsewhere in the OIA offices. Startled, Ms. Patten asked a maintenance employee who

¹ The Hearing Examiner found that Officer Durant testified that he telephoned Director Brown and several other officials on June 14 to find out why he was placed on administrative leave, but failed to receive an answer. However, during his interview with Mr. Waldren, the Complainant received a copy of a June 18 memorandum from Ms. Patten to Director Brown in which she charged him with the unauthorized use of an office Xerox machine and admittance of an unauthorized person to OIA.

was nearby to accompany her as she walked to the rear of the OIA offices to investigate. There, she saw Officer Durant using the copier in the common area, with another unidentified man standing nearby. Ms. Patten testified that she was concerned about the need to maintain security in the OIA offices for several reasons including the need to protect the identity of undercover police agents engaged in sensitive investigations who often came there, and to prevent access to confidential information that was stored in a bank of filing cabinets near the copier and in the investigators' computers. Ms. Patten confirmed that she admonished Officer Durant for his inappropriate actions but acknowledged that he apologized for his mistakes and assured her it would not happen again. However, she firmly denied ever telling him to separate his departmental and Union duties.

In concluding his report, Mr. Waldren explained that the purposes of his investigation were first, to establish the facts; second, to determine if Officer Durant's actions on June 13 violated policy and third, to assess whether Officer Durant's actions "were egregious and blatant to an extraordinary degree that warranted the status of administrative leave being imposed."

Mr. Waldren answered the first two questions easily, finding that the facts were clear and that Officer Durant's actions violated specific policies.²

As for the third question, Mr. Waldren observed that "The act of placing an employee on administrative leave insinuates that the employee is an immediate danger/detriment to the agency." (*Id.*) He then wrote that [t]he preponderance of the evidence does not support placing him on administrative leave). (emphasis supplied).³ In support of this conclusion, he stated that "according

² The Hearing Examiner also noted that in a March 2001 Open Letter, former DOC Director Odie Washington admonished all employees that "No material other than official agency correspondence should be transmitted or copied from any government equipment (fax, Xerox, computer). In addition, the following provision appeared in a hand book entitled "Basic Regulations for All Employees": Chapter I, Sec. 1.6: "Government Property:

Employees shall not convert government property to their personal use or for personal comfort, nor take or carry away any item of government property from the institutions." *Id.* Attachment 5. Further, Article 8, Section 3 of the parties' collective bargaining agreement states: "Under no circumstances will department manpower or supplies be utilized in support of or for Union business. *Id.*

³ In addition, the Hearing Examiner found that "Mr. Waldren claimed that the word "not", emphasized above, was an inadvertent typographical error. "Based on my observation of the witness' demeanor, including his obvious discomfort when testifying about this alleged typographical mistake, the conclusion is inescapable that his testimony

to other employees assigned to the area who wished to remain anonymous, Mr. Durant's actions were commonplace." JX1 at 6.⁴ Therefore, he found that the facts overwhelmingly suggest that these actions had become the normal practice of the office. Other employees occasionally copied personal papers as well as allowed family members and friends access to the office. *Id.*

In what he referred to as "rather compelling observation": Mr. Waldren wrote: "when approached by Ms. Patten, Mr. Durant was forthcoming and cooperative as he stated exactly what he was copying and after she informed him that he was in violation of policy, he apologized and stated that it would not happen again." *Id.*

Mr. Waldren concluded that placing Officer Durant on administrative leave was unwarranted and that punitive action should not be taken against him. Nevertheless, he found that "there is no trust in his ability [to] execute his assigned duties" and "a lack of confidence in his working relationship...justified or unjustified..." *Id.* at 7. Accordingly he recommended that "it would facilitate a more conducive and suitable working relationship if Mr. Durant were placed in another work area." *Id.* Mr. Waldren disclosed that Ms. Patten told him she did not trust Officer Durant but denied that she had recommended his assignment to another post. However, Ms. Patton acknowledged that she contacted Director Brown to suggest transferring the Complainant to the Community Corrections Office (CCO) located in Departmental headquarters at the Grimke Building.

6. Other Alleged Reprisals

a. Assignment to the Grimke Building

Given Investigator Waldren's conclusion that no discipline should be imposed, Director Brown notified Officer Durant by memo dated August 10 that he should return to work on August 13. However, rather than returning to the OIA headquarters at 300

in this regard cannot be credited. Moreover, if the word "not" was omitted, the syntax of the sentence would be awkward and at odds with his observations in paragraphs (2) and (3) of his report."

⁴ The Hearing Examiner also noted that "When questioned about the "anonymous witnesses", Mr. Waldren stated that Officer Durant was the only person he interviewed who told him that others often used the copier for personal purposes and that persons other than police investigators were not uncommon visitors to the OIA office. Mr. Waldren was unable to explain why he stated that Officer Durant, who was central to the investigation, was the "anonymous witnesses." He finally claimed that the reference to anonymous witnesses was another typographical error. It is an understatement to say that the Deputy Warden was not a credible witness."

Indiana Avenue N.W., he was instructed to report to the Records Office at the D.C Jail. As instructed, the Complainant arrived at his newly-assigned duty station on the given date, only to find that the Records Office supervisor had no notice that he would be detailed there, and had no space for him. A few hours later, Ms. Patten informed him that he was reassigned him to the Community Corrections Office (CCO) at Department headquarters in the Grimke Building located at 1923 Vermont Avenue N.W. On his arrival, Lieutenant Valerie Brown, then Chief of the CCO, told the Complainant she just had been instructed to assign him to a desk. Officer Durant was the sole Warrant Squad investigator assigned to the CCO site while his fellow investigators remained at the OIA offices on Indiana Avenue as did Ms. Patten who continued to supervise him from a distance.

According to Officer Durant, his relative isolation at the Grimke Building hindered his ability to perform his duties efficiently. For example, he had to arrange to use a government vehicle to travel from the Grimke Building to the Superior Court on a daily basis in order to obtain warrants, or testify in various proceedings there. While stationed at the OIA office at 300 Indiana Avenue, he walked less than half a block to the Court, at 500 Indiana Avenue NW. In addition, as Ms. Patten testified, Warrant Squad officers were required to work in pairs when carrying out an investigation. This meant that whenever Officer Durant was working on a case in the community, he first had to drive to 300 Indiana Avenue to pick up a partner, or alternatively, be picked up by a colleague who drove from 300 Indiana Avenue to the Grimke Building.

Ms. Patten testified that Director Brown initially instructed her to assign Officer Durant to the D.C. Jail Records Office when his administrative leave ended. However, she did think this assignment would use the Complainant's time effectively and, therefore, obtained the Director's consent to reassign him to the CCO. In justifying this choice, Ms. Patten testified that since Officer Durant no longer spent the first part of his day working for the CARTF, he would be in a better position to gather information about the latest escapees if he was stationed at the CCO. Officer Durant contacted Ms. Patten on April 17 and May 5, 2008 to question this assignment, contending that it severely limited his ability to perform his duties efficiently, particularly after the retirement of the other two Warrant Squad officers. He received no reply for according to Ms. Patten, she could not divulge her intent to return him to the OIA headquarters until she succeeded in implementing an expansion plan designed to accommodate new investigators.

However, Officer Durant was still stationed at the Grimke Building as of September 26, 2008, the day he testified in the instant case.

b. Admonishments and Evaluations

The Complainant alleges and the DOC denies that Ms. Patten issued Officer Durant a written admonition on April 8, 2009, in reprisal for his Union activity. The circumstances that precipitated the admonition follow.

In late afternoon on March 29, 2009, a hand-cuffed prisoner assaulted 2 police officers who were escorting him to the D.C. Jail, and fled. Ms. Patten telephoned Officer Durant at approximately 9:52 p.m. that evening to obtain his assistance in recapturing the escapee. Unable to reach him, she left a message asking that he contact her as soon as possible. Officer Durant did not return Ms. Patten's call until shortly after 7:00 a.m. the next morning. He then joined in a successful manhunt and escorted the prisoner to the D. C. Jail.

Subsequently, Ms. Patten issued a written admonition to Officer Durant for his failure to respond in a timely manner to her urgent phone calls. She was particularly peeved at his lack of diligence on this occasion, for on the morning of the escape, she had warned him to be especially vigilant since the other two warrant squad investigators had just retired.

On April 8, 2008, Ms. Patten orally counseled Officer Durant, and not for the first time, to discontinue using his personal vehicle while conducting official Warrant Squad business and instead, use only departmental vehicles. Durant testified that he used his own car on that occasion because he intended to drive to his home in Virginia after completing a task at the Court.

As Durant's supervisor, Patten was charged with preparing his annual evaluation report. For the period extending from March 2006 through April 2007, she gave Officer Durant an excellent rating on his annual evaluation report. However, the following year, she ranked Officer Durant as satisfactory on his performance report. She explained that this lower ranking was due to his failure to promptly respond to her urgent telephone message regarding an escaped prisoner.

Believing that the lower ranking was undeserved, Officer Durant apparently attributed her less complimentary evaluation as another instance of retaliatory treatment.

III. Discussion

Hearing Examiner's Report and Recommendation

PERB Case No. 07-U-43

The Hearing Examiner summarized the Amended Complaint in PERB Case No. 07-U-43 as alleging that the Respondent violated D.C. Code 1. 617.04 (a), (1), (3), (4) and (b) (1) by taking the following actions against Officer Durant without just cause and in retaliation for his union activities:

- (a) placing him on paid administrative leave pending an investigation of an incident that occurred on June 13, requiring him to vacate his office, retrieving government property in his possession and denying him access to all DOC facilities pending the outcome of an internal investigation of an incident that occurred on June 13; (b) assigning him to a work station other than his previous place of employment when he returned to work on August 13 following the cancellation of his administrative leave, (c) denying him reinstatement to a multi-agency taskforce under the aegis of the U.S. Marshall's Service in April, 2007, and (d) lowering his rating on a 2007-2008 performance evaluation report.

The Hearing Examiner identified the issues in PERB Case No. 07-U-43 as: (1) whether the Respondent discriminated, coerced or retaliated against the Complainant for engaging in union activities in violation of D.C. Code 1. 617 (a) (1), (3) and 4) by:

- A. placing the Complainant on administrative leave, reclaiming his DOC equipment and denying him access to its facilities on June 14 without authorization pending an internal investigation of his presence after hours in OIA quarters with an unidentified person, use of a DOC-OIA copier for a non-departmental purpose, and bringing an unauthorized person into OIA quarters.
- B. assigning the Complainant to a work station at the Grimke Building rather than returning him to OIA headquarters;
- C. failing to reinstate the Complainant to the Capital Area Regional Task Force after he returned to work in April, 2007; issuing Officer Durant a written admonition and downgrading his performance rating from excellent in the

April 2006 to March 2007 reporting period to satisfactory for the April 2007 to March, 2008 period, and

- D. lowering his evaluation rating from excellent in 2007 to satisfactory in 2008.

(R&R at pgs. 10-11).

The Hearing Examiner made the following legal conclusions and recommendations:

- A. The Respondent neither discriminated nor retaliated against the Complainant by placing him on administrative leave, reclaiming DOC equipment in his possession, and proscribing his entry to DOC facilities pending an investigation of his actions on the night of June 13.

(R&R at p. 11).

In making this determination, the Hearing Examiner relied on the two-part burden-shifting analysis PERB has adopted announced in *Wright Line Inc.*, 251 NLRB 1083 (1980), *enfd.* 662 F. 2 d 899, 905 (1981), cert denied, 455 U.S. 989 (1982) *See, Charles Bagenstose and Dr. Joseph Borowski v. District of Columbia Public Schools*, 35 DCR 415, Slip Op. No. 270, PERB Case No. 88-I-33 and 88-U-34 (1991). After assessing the evidence presented, the Hearing Examiner concluded that the Respondent had presented a legitimate motive for its actions.

- B. The Complainant failed to establish that the Respondent discriminated or retaliated against him by interfering with or denying his reinstatement to the Capital Area Regional Task Force.

(R&R at p. 15).

Specifically, the Hearing Examiner found that "DOC was not responsible for Officer Durant's exclusion from the Task Force." (R&R at p. 15).

- C. The Respondent did not retaliate against Officer Durant by evaluating him as "satisfactory" on his 2007-2008 Performance Report.

(R&R at p. 15).

The Hearing Examiner found that the record evidence established that Officer Durant evaluations were justified. Thus, the Hearing Examiner rejected this allegation. (R&R at p. 15).

- D. The Respondent failed to provide a valid justification for reassigning the Complainant to another DOC facility.

(R&R at p. 16).

As to the Complainant's reassignment and relocation to the Grimke Building, the Hearing Examiner concluded that: (1) the Respondent failed to provide any sound business reason for the Complainant's transfer; (2) that the reasons stated for the transfer were pretextual; and (3) that the transfer was in retaliation for the Complaint filed in PERB Case No. 07-U-43. (R&R at pgs. 16-18). Specifically, the Hearing Examiner found that Officer Durant's supervisor, Ms. Patten transferred Officer Durant to the Grimke Building, "both to keep him at bay and retaliate for having filed a complaint accusing her of committing unfair labor practices by retaliating against him. In so doing, the Respondent, through its agent, violated D.C. Code Sec. 1.617. 04 (a)(1) and (4)." (R&R at p. 18).

PERB Case No. 08-U-57

In response to the Complaint, DOC filed Motion to Dismiss In Part. The Motion asserted that the Complaint be dismissed on two grounds. "[F]irst, Respondent contends that the Complaint was untimely in as much as it was not filed within the 120 day period following the date the unlawful conduct was alleged to have occurred as required by PERB Rule Section 520.4. Second, the Respondent submits that the Complaint fails to state a claim for which relief can be granted since Officer Durant was seeking a position reclassification, a remedy that was alleged to be solely within the authority of the DHR. Consequently, the DOC asserted that it was powerless to grant the requested relief." (R&R at p. 18).

The Hearing Examiner's recommendation granted the Motion on the basis that the Complaint in PERB Case No. 08-U-57 failed to state to a claim. However, the Hearing Examiner's recommendation was not based on the reasons asserted in the Motion. Instead, the Hearing Examiner concluded that the allegations in the PERB Case No. 08-U-57 were based on alleged contractual violations, not statutory violations under the jurisdiction of the Board.

The Hearing Examiner described Officer Durant's argument in PERB Case No. 08-U-57 as contending that:

"his position should be classified with the same grade level progression as Internal Affairs investigators whose pay grade peaks at grade 12. The Complaint alleges that the Respondent discriminated against Officer Durant by failing to equalize his pay grade with that of the Internal Affairs investigators.

The Complaint also alleges that the Respondent interfered with Officer Durant's right to process his classification appeal by incorrectly insisting that he had to submit a specific written form to his supervisor to initiate a desk audit as required by DPM Article 11.

(R&R at p. 19).

The Complainant's allegations were determined to be based upon an assertion that DOC "insistence on a written request for a desk audit constitutes a breach of Article 20, Section 4 of the collective bargaining agreement."⁵ (R&R at p. 19). The Hearing Examiner analyzed this argument, reasoning that the Board:

has consistently ruled that complaints alleging a breach of a collective bargaining agreement does not present a claim cognizable as a statutory violation of the CMPA. As the Board explained in *Carlease Madison Forbes v. Teamsters Local 1714 and Teamsters Joint Council 55*, 36 D.C. Reg. 7097, Slip Op. No. 205, PERB Case No. 87-U-11 (1989):

While some state and local laws make the breach of a collective bargaining agreement by an employer or union an unfair labor practice, the CMPA contains no such provision, nor do we find such a necessary connection implicit in the Act. Under the CMPA, breach of a contract does not constitute a *per se* statutory violation.

. . . Having found that the complaint in the instant case alleges a violation of the FOP-DOC collective bargaining agreement, I conclude, in accordance with the precedents cited above, that I am without jurisdiction to resolve the issue posed in Case No. 08-U-57. Therefore, the Respondent's motion to dismiss the consolidated case in part is granted.

(R&R at pgs. 19-20).

Based upon the foregoing, the Hearing Examiner made the following conclusions of law and recommendations:

Conclusions of Law

1. The D.C. Department of Corrections violated D.C. Code Sec.617.04 (a) (1) and (4) by resigning Officer Ernest Durant to

⁵ Article 20, Section 4 of the parties' collective bargaining agreement states in relevant part that:

An employee may request a review of his...position classification. Such request will be submitted orally to the appropriate supervisor who will meet with the employee.. .to discuss the matter and the circumstances leading up to the request.... If the matter is not resolved, the employee may file a request for review through the appropriate servicing personnel classification unit.

the Community Corrections Office at the Grimke Building to retaliate for his having filed a complaint with the D.C. Public Employees Relations Board alleging that the DOC had engaged in various unfair labor practices.

2. The D.C. Department of Corrections did not violate the Comprehensive Merit Employment Act (CMPA) by placing Officer Durant on paid administrative leave, retrieving DOC equipment and property in his possession and barring his admission to any DOC facility pending an investigation of his actions on the evening of June 13, 2007.

3. The DOC did not violate the CMPA by rating his performance satisfactory during the annual evaluation period from April 1, 2007 to March 31, 2008.

4. The DOC was not responsible for the Capital Area Regional Task Force's decision to deny Officer Durant reinstatement in April 2007.

5. The D.C. PERB does not have jurisdiction under the CMPA to proceed with a hearing in the Amended Consolidated Case No. 08-U-57 in as much as the Complaint in that case alleged a breach of the collective bargaining agreement between the DOC and FOP.

(R&R at pgs. 20-21).

Recommended Remedy

1. The Department of Corrections shall reassign Officer Durant to the Office of Internal Affairs where the Warrant Squad is headquartered.

2. The Department of Corrections shall cease and desist from any act of reprisal against Officer Ernest Durant by use of the complaint processes of the [DOC].

3. The Department of Corrections shall cease and desist from engaging in any Unfair labor practices that are like or related to those that committed in this case.

4. The Department of Corrections shall post a notice for sixty (60) days in all conspicuous places where such notices typically are posted, advising all its employees that it violated the Comprehensive Employee Merit Protection Act by retaliating

against Officer Earnest Durant in violation of D.C. Code 617.04 (a) (1) and (4) by transferring him from the Office of Internal Affairs to the Office of Community Connections in reprisal for having filed a complaint with the D.C. Public Employees Relations Board alleging that the DOC committed various unfair labor practices.

(R&R at p. 21).

Respondent's Exceptions and the Board's Analysis

The Complainant's first exception maintains that the Hearing Examiner failed to make any findings or conclusions concerning whether Respondent "willfully engaged in an unfair labor practice in violation of D.C. Code Section 1-617.04 (a), (1) and (5) by repeated refusals without cause, justification or reason, to timely produce subpoenaed documents deemed relevant, necessary and critical for complainant to properly and effectively challenge the multitude of actions taken against him." (Exceptions at p. 2).

The Board finds that this exception simply represents a disagreement with the Hearing Examiner's assessment of the evidence presented in this matter. The Board has held that "issues of fact concerning 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); *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 Bagenstose, et al. v. D.C. Public Schools*, 38 DCR 4154, Slip Op. No. 270, PERB Case No's 88-U-33 and 88-U-34 (1991). This is precisely the function of the Hearing Examiner; to determine issues of credibility and to judge the sufficiency of the evidence. In the instant matter, the Board finds that the Hearing Examiner's well-articulated analysis, findings and recommendations clearly demonstrate careful and thorough consideration of all the evidence presented.

Moreover, the argument made in support of this exception was considered and rejected by the Hearing Examiner. A review of the record reveals that the Hearing Examiner's determination that regarding the probative value of the requested documents is reasonable and supported by the evidence. Therefore, this argument is not a proper exception to the Hearing Examiner's R&R. See *Hina L. Rodriguez v. District of Columbia Metropolitan Police Department*, __ D.C.R. ___, Slip Op. No. 954, PERB Case No. 06-U-38 (2010).

This exception also represents a mere disagreement with the Hearing Examiner's findings. As stated above, this Board has determined a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner where, as here, the findings are fully supported by the record. See *AFGE, Local 874 v. D.C. Dept. Of Public Works*, 38 D.C.R 6693, Slip Op. No. 266, PERB Case No. 89-U-15, 89-U-18 and 90-U-04 (1991).

The Complainant's second exception concerns the Hearing Examiner's "decision to "quash the subpoena" of the Complainant's receipt of the "Metropolitan Police Department,

Special Operations Command Center (SOCC) Surveillance tapes and allied documents into the alleged incident of June 13, 2007 based upon the Hearing Examiner's . . . determination, upon review of the videotape that it was illegible, therefore, insufficient to make any determination of complainant's actions of June 13, 2007." (Exceptions at p. 6).

A review of the record relating to PERB Case 08-U-57 does not support the Complainant's exception. There is no indication that the Complainant made an objection to the Hearing Examiner's decision not to compel the Respondent to provide the Complainant with surveillance tapes prior to the filing of his Exceptions. As a result, the Board rejects this argument as an improper exception to the Hearing Examiner's recommendations.

The third exception to the Hearing Examiner's Report and Recommendation asserts that the Hearing Examiner's finding concerning the denial of the Complainant's reinstatement to the CARTF. (Exceptions at p. 10). The Complainant contends that the Hearing Examiner erred in finding that "neither party questioned CARTF Supervisory Inspector James Werkin concerning his reasoning for rejecting Criminal Investigator Earnest Durant return to the CARTF.

The Board finds that this exception, like those exceptions proceeding it, only presents a disagreement with the Hearing Examiner's findings of fact. The Board finds that the Hearing Examiner's findings are amply supported by the record evidence. Therefore, this exception is also rejected.

The Complainant's fourth exception contends that the Hearing Examiner erred in finding that "the decision to place Officer Durant on administrative leave did not subject the Complainant to discipline different than that imposed on other employees, union and non-union alike." (Exceptions at p. 11). The crux of this argument alleges that the Hearing Examiner should have found that DOC actions were directed at bargaining unit members, making DOC's actions an unfair labor practice.

This argument, however, is clearly a disagreement with the Hearing Examiner's evaluation of the record evidence. To the contrary, the Board finds sufficient evidence to support the Hearing Examiner's findings. In addition, the Hearing Examiner's findings are well reasoned and formulated. As stated above, a disagreement with a hearing examiner's findings and conclusions, where supported by the record, does not establish an appropriate exception to the report and recommendation. *Rodriguez*, Slip Op. No. 954. The Board, therefore, finds that the Complainant's contention is not a proper exception.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complainant, Earnest Durant's Complaint is granted in part, and denied in part.
2. The District of Columbia Department of Corrections (DOC) shall reassign Officer Durant to the Office of Internal Affairs where the Warrant Squad is headquartered.

3. DOC, its agents and representatives, shall cease and desist from violating D.C. Code § 1-617.04 (a)(1) and (4) by the acts and conduct set forth in this Opinion.
4. 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.

May 30, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order and Notice in PERB Case Nos. 07-U-43 and 08-U-57, Slip Opinion No. 1286 was transmitted via U.S. Mail and e-mail to the following parties on this the 27th day of June, 2012.

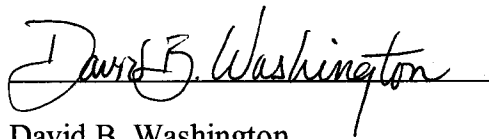
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A handwritten signature in cursive script that reads "David B. Washington". The signature is written in black ink and is positioned above the printed name and title.

David B. Washington
Attorney-Advisor

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS ("DOC"), THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1286, PERB CASE NOS. 07-U-43 AND 08-U-57 (May 30, 2012)

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered Department of Corrections to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (4) by the actions and conduct set forth in Slip Opinion No. 1286.

WE WILL cease and desist from interfering, restraining, or coercing employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act ("CMPA").

WE WILL cease and desist from 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 the Labor-Managements subchapter of the CMPA;

WE WILL NOT, in any like or related manner, retaliate, interfere, restrain or coerce employees in their exercise of rights guaranteed by the Labor-Management subchapter of the CMPA.

District of Columbia Department of Corrections

Date: _____ By: _____

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 1100 4th Street, SW, Suite E630; Washington, D.C. 20024. Phone: (202) 727-1822.

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