

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

In the Matter of:	)	
	)	
Fraternal Order of Police/Department of Corrections Labor Committee,	)	
	)	
Complainant,	)	PERB Case No. 08-U-20
	)	
v.	)	Opinion No. 1296
	)	
District of Columbia Department of Corrections,	)	
	)	
	)	
Respondent.	)	
	)	

**DECISION AND ORDER**

**I. Statement of the Case:**

The Fraternal Order of Police/Department of Corrections Labor Committee (“FOP” or “Complainant”), filed an Unfair Labor Practice Complaint (“Complaint”) and a Motion for Preliminary Relief (“Motion”) on behalf of Yamica Drayton against the District of Columbia Department of Corrections. (Complaint at 1). The Complainant alleges that the District of Columbia Department of Corrections (“DOC” or “Respondents”), violated D.C. Code §1-617.04(a)(1), (3), and (4)<sup>1</sup> by “interfering with, restraining and coercing Union members in

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<sup>1</sup> D.C. Code §1-617.04 provides in relevant part as follows:

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

- (1) Interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;
- (3) Discriminating in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization, except as otherwise provided in this chapter;

exercising their rights under the CBA.” (Complaint at 7). Specifically, FOP asserts that “DOC violated DC law by discriminating against Ms. Drayton by reassigning her immediately after she testified for the union and retaliating against her by terminating her [employment with DOC] as a direct result of her appearance [as a witness in an October 24, 2007, unfair labor practice hearing] ... These actions were compounded by the Agency’s attempts to cover up its actions by punishing additional Union members in a similar manner shortly thereafter.” (Complaint at 7-8).

DOC filed its Answer (“Answer”) and Opposition to Motion for Preliminary Injunctive Relief (“Opposition”), disputing all allegations of retaliation. (Opposition at 6). The Agency contends that changing Ms. Drayton’s shift and terminating her employment with DOC were based on legitimate business considerations that were unrelated to her union involvement. (Opposition at 7).

On August 31, 2009, the Public Employee Relations Board (“Board”) issued an Order denying FOP’s Motion and referred the Complaint to a Hearing Examiner. (Slip Op. No. 971). On September 29, 2009, and October 2, 2009, Hearing Examiner Gloria Johnson heard the matter. On January 29, 2010, the Hearing Examiner submitted her Report and Recommendation (“Report”). Complainant filed a Post-Hearing Brief (“Complainant’s Brief”), and the Respondents filed a Post-Hearing Brief (“Respondents’ Brief”).

In Complainant’s Brief, FOP asserts that “[t]he Agency engaged in retaliatory conduct.” (Complainant’s Brief at 22). FOP “request[s] that the Board find the Agency has committed Unfair Labor Practices in violation of D.C. law.” (Complainant’s Brief at 22). In addition, FOP asks that DOC reinstate Ms. Drayton with full back pay and benefits, that the Board issue orders to compel the Respondents to desist from prohibited conduct, and that the Board issue a cease and desist order to stop DOC from denying dues paying union members from availing themselves of their legal rights under the CBA. (Complainant’s Brief at 23). FOP requests that the Board order DOC to reinstate any other DOC employees who were issued shift changes or terminated as a result of any testimony given in the hearing. Furthermore, FOP asks that the Board prohibit DOC from exercising any additional shift changes until Impact and Effects Bargaining can take place between the Union and the Agency. *Id.* Lastly, the Complainant asks that the Respondents pay all applicable costs and legal fees in connection with this matter. (Report at 24).

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- (4) Discharging or otherwise taking reprisal against an employee because he or she has signed or filed an affidavit, petition, or complaint or given any information or testimony under this subchapter.

In Respondents' Brief, DOC argues, "[t]he Union simply has not proven that retaliation was the motivating factor behind Ms. Drayton's shift rotation and termination." (Respondents' Brief at 14). Therefore, DOC requests that the Board find that DOC did not commit an unfair labor practice and dismiss FOP's Complaint in its entirety. (Respondents' Brief at 15).

The issue before the Board is whether the Agency committed an unfair labor practice by retaliating against Ms. Drayton when it changed her shift and subsequently terminated her employment in violation of D.C. Code §1-617.04(a)(1), (3), and (4).

## II. Discussion:

### A. Background

The Hearing Examiner found that Yamica Drayton began her employment with DOC on February 22, 2005, as a clerk in Deputy Britton's office. (Report at 3). Ms. Drayton worked in the mailroom for approximately two days and then she moved to Ms. Britton's office and assisted with clerical duties. *Id.* At the time of her termination, Ms. Drayton was employed at the D.C. Jail as a Legal Instruments Examiner, and was assigned to the 7:30 a.m. to 4:00 p.m. shift in the DOC's Records Department. (Report at 4). In September 2007, Ms. Ritenour, Chairperson for the FOP/DOC Labor Committee, asked Ms. Drayton if she would like to become a union shop steward, and Ms. Drayton accepted this position. *Id.*

On October 22, 2007, Ms. Drayton was served with a subpoena to appear as a witness for the FOP/DOC Labor Committee in an October 24, 2007, hearing for PERB Case No. 06-U-50. That same day, Ms. Drayton provided her supervisor, Ms. Brown, with a copy of her subpoena. *Id.* Additionally, on October 24, 2007, Ms. Drayton appeared as a witness for the FOP/DOC Labor Committee for a hearing in PERB Case No. 06-U-50. (Record at 4). At the hearing, Ms. Drayton testified about various practices the DOC Records Department conducted. Another attendee at the hearing was Mr. Staten, a former DOC employee. (Report at 14). Mr. Staten took extensive notes and briefed Director Brown, Ms. Murphy, and Ms. Britton regarding Ms. Drayton's testimony. (Report at 15).

On October 25, 2007, Ms. Drayton returned to work, where her supervisor handed her an envelope containing two documents. One document was a memorandum that advised Ms. Drayton that on November 4, 2007, she would be reassigned to work shift one (1) from 11:30 p.m. to 8 a.m. The second document advised Ms. Drayton that she was placed on leave without pay ("LWOP"). (Report at 4).

On October 26, 2007, Ms. Drayton returned to the hearing and appeared before the Board to inform the Hearing Examiner that DOC reassigned her to shift one (1) immediately upon her return to work. (Report at 4). Ms. Drayton informed the Hearing Examiner for PERB Case No. 06-U-50 that, no other employees in the Records Department were being reassigned to a shift rotation, and she considered the shift change retaliation for her testimony in the hearing. *Id.* The union challenged Ms. Drayton's upcoming November 4, 2007, shift change, alleging the Agency violated the requirement that the union must receive prior notice of proposed shift changes prior to the occurrence. *Id.* In response to the union's challenge, DOC postponed Ms. Drayton's proposed shift change, but it rescheduled the shift change to shift one (1) for December 16, 2007. *Id.* at 5. Notwithstanding, before the shift change became effective, DOC terminated Ms. Drayton's employment for misconduct. *Id.*

On November 28, 2007, Ms. Drayton was involved in a verbal altercation with her supervisor, Doretta Brown. During this altercation, Ms. Drayton used profane language in the workplace and refused a direct order from Ms. Brown. (Report at 5).

Ms. Brown reported the incident to Deputy Warden for Programs, Brenda Ward. (Report at 5). Through the chain of command, Ms. Ward notified Director Brown concerning the incident. Ms. Ward placed Ms. Drayton on administrative leave pending a decision by Director Brown. (Report at 5). Director Brown sanctioned Ms. Drayton's termination because "[Ms. Drayton] had engaged in some very egregious misconduct, insubordination to her supervisor in the presence of other employees, to the point where there was gross disrespect and a refusal to perform duties." (Report at 19).

**B. Relevant Code Sections**

Pursuant to D.C. Code §1-614.04(a), to prove a claim of retaliation, a Complainant must make a *prima facie* showing that the Respondent made a decision motivated by anti-union animus or was retaliating against an employee for engaging in union activities. Pursuant to *AFSCME Local 2401 and Neal v. D.C. Department of Human Services*, 48 D.C. Reg. 3207, Slip Op. No. 644 at 4, PERB Case No. 98-U-05 (2001), to establish a *prima facie* case, a Complainant must show four elements: (1) the employee was involved in a protected activity; (2) the employer had knowledge of that activity; (3) the agency exhibited anti-union animus; and (4) the employer took action against the employee as a direct result of the employee's participation in the protected activity.

C. Shift Change

The Hearing Examiner found that “the union successfully met its burden of establishing a *prima facie* case of reprisal regarding Ms. Drayton’s selection for rotation or transfer from shift two (7:30 a.m. to 4:00 p.m.) to shift one (11:30 p.m. to 8 a.m.),” and the shift change was retaliatory. (Report at 12 and 20). The Hearing Examiner arrived at this conclusion by applying the four elements necessary to establish a *prima facie* case. The Board finds that the record and witness testimony supports the Hearing Examiner’s conclusion that Ms. Drayton’s shift change was retaliatory.

In reviewing Hearing Examiner’s Reports and Recommendations, the Board asks whether the Hearing Examiner’s Report and Recommendation is “reasonable, supported by the record, and consistent with Board precedent.” *American Federation of Government Employees, Local 1403 v. District of Columbia Office of the Attorney General*, 2011 WL 5436470, Slip Op. No. 873 at 3, PERB Case No. 05-U-32 and 05-UC-01 (2011). In this case, pursuant to Board Rule 520.14, the Board adopts the Hearing Examiner’s report and recommendation because it is reasonable, based on the record, and consistent with Board precedent.

**1. Protected activity**

The Hearing examiner concluded that Ms. Drayton was involved in protected activity, stating that it is “[un]refuted that Ms. Drayton engaged in union activities” because Ms. Drayton testified in the hearing in her capacity as a union steward. (Report at 12).

**2. Employer Knowledge**

The Hearing Examiner found that “the second prong of a *prima facie* case is successfully met,” as the agency knew that Ms. Drayton was involved in union activities. *Id.* There was evidence that Ms. Brown, a supervisor, had even commented to others about Ms. Drayton’s skill as a shop steward. (Report at 12). The Hearing Examiner concluded that “Ms. Drayton provided a copy of her subpoena to her supervisor and had to get clearance from supervision or management to be away from her duty station in order to attend the hearing.” *Id.* Therefore, Ms. Brown was fully aware that Ms. Drayton was testifying in PERB Case No. 06-U-50 in her official capacity as a union shop steward. *Id.*

**3. Anti-union Animus**

Additionally, the Hearing Examiner determined that the Union proved by a preponderance of the evidence that the agency showed anti-union animus. (Report at 12). The

Hearing Examiner “[found] there are simply too many inconsistencies in Respondent’s accounts” and that Ms. Drayton’s supervisors’ gave unreliable and incongruent accounts about DOC’s process for determining shift changes. (Report at 14). The Hearing Examiner found that “[t]here is a credibility question raised when Ms. Souverain testified on the record that the supervisors including Doretta Brown participated in the decision regarding the October 2007 rotation of Ms. Drayton [sic] and subsequently Doretta Brown testified she had nothing to do with the decision.” *Id.*

The Hearing Examiner concluded that “Ms. Britton’s conversation with Gloria Jackson [Ms. Drayton’s grandmother and Ms. Britton’s personal friend] is not insignificant.” (Report at 14). During a phone call with Gloria Jackson, Ms. Britton indicated that she was upset and disturbed by Ms. Drayton’s involvement in the union. *Id.* The Hearing Examiner finds “that Ms. Britton had taken a personal interest in Ms. Drayton; a granddaughter of a personal friend; and expressed dissatisfaction when she openly participated in the union.” *Id.* [sic]

As stated, Mr. Staten attended the hearing where Ms. Drayton testified, and he briefed Ms. Britton and others about Ms. Drayton’s testimony. (Report at 15). Notwithstanding, Ms. Britton denied attending this briefing session. (Report at 14). The Hearing Examiner determined that Mr. Staten was a more credible witness because he is no longer employed by the agency and because “the Hearing Examiner had an opportunity to examine the witnesses’ countenance, demeanor, expressions and interrelationship with each other.” (Report at 13, 15). These facts led to the Hearing Examiner’s conclusion that the agency had an anti-union animus at the time of Ms. Drayton’s shift change.

#### 4. Timing

Finally, the Hearing Examiner concluded that the timing of the shift change was not a coincidence. (Report at 15). Ms. Drayton received notice of the shift change the day after she testified in the hearing. The agency was fully aware that Ms. Drayton was testifying in her official capacity as a member of the union. What is more, Mr. Staten briefed them about the content of that testimony. *Id.* The Hearing Examiner found that an unfair labor practice of retaliatory assignment of shift rotations did occur “[g]iven the totality of the circumstances with the after hearing briefings, the alleged coincidental shift rotation and the inconsistencies in management’s accounts as to who was actually responsible for selecting the employees for shift rotations and on what basis.” *Id.* The Board concludes that the Hearing Examiner’s finding that DOC terminated Ms. Drayton’s employment because of her involvement in protected activities is reasonable, based on the record, and consistent with Board precedent.

Based on these findings, the Hearing Examiner recommended that the Board find that the agency did commit an unfair labor practice against Ms. Drayton, as the shift change was retaliatory conduct prohibited by D.C. Code §1-617.04(1), (3), and (4). (Report at 20). Additionally, the Hearing Examiner recommended that the Board issue an order compelling the Respondents to cease and desist from prohibited retaliatory conduct pursuant to D.C. Code §1-617.13(a), as well as any other remedy it deems appropriate. *Id.*

The Board determines that the Hearing Examiner's conclusions that DOC assigned Ms. Drayton a new shift in retaliation for her testimony at the hearing for PERB Case No. 06-U-50 is reasonable, based on the record, and consistent with Board precedent.

#### D. Termination

The Hearing Examiner found "there is no preponderance of the evidence in the record showing Ms. Drayton's discharge was retaliatory or based on her prior union activity." (Report at 17). The Hearing Examiner arrived at this conclusion by examining the four elements necessary to establish a *prima facie* case: protected activity, employer knowledge, anti-union animus, and timing. *Id.* Although the union successfully alleged that Ms. Drayton was involved in protected activity and that her employer was aware of that activity, the Hearing Examiner finds that "with respect to the termination, there is no showing of the third prong which is required to establish a *prima facie* case of retaliatory termination." *Id.* The Hearing Examiner's conclusion that Ms. Drayton's termination of employment was not retaliatory is supported by the record and witness testimony. The Board adopts the Hearing Examiner's report and recommendation, as her analysis is reasonable, supported by the record, and consistent with Board precedent.

##### 1. **Protected activity**

First, the Hearing Examiner concluded that Ms. Drayton was involved in protected activity. (Report at 12). The Hearing Examiner found that it is "unrefuted that Ms. Drayton engaged in union activities" because Ms. Drayton was a union steward at the time the shift change occurred. *Id.*

##### 2. **Employer Knowledge**

Second, the Hearing Examiner determined that the agency knew that Ms. Drayton was involved in union activities. (Report at 12). The Hearing Examiner found that Ms. Brown, one of Ms. Drayton's supervisors, had commented to others about Ms. Drayton's skill as a shop steward. *Id.* Ms. Brown was also aware of Ms. Drayton's participation in the hearing because

“Ms. Drayton provided a copy of her subpoena to her supervisor and had to get clearance from supervision or management to be away from her duty station in order to attend the hearing.” *Id.*

### 3. Anti-union Animus

Third, the Hearing Examiner found that “the union has not presented evidence of anti-union animus by the agency in the events surrounding Ms. Drayton’s termination [of employment], nor have they shown that her termination was a matter of reprisal.” (Report at 18). Ms. Drayton admitted on the record that her supervisor Ms. Doretta Brown approached her with an assignment. (Report at 16). Moreover, Ms. Drayton admitted that she did not comply with this request and disobeyed Ms. Brown’s direct order. When Ms. Brown approached Ms. Drayton a second time to inquire about the status of the assignment, Ms. Drayton lost her temper and engaged in a verbal altercation with Ms. Brown. (Report at 17). The Hearing Examiner concluded that Ms. Drayton “admitted she not only blew up, but she used profanity while addressing her duly authorized supervisor in an explosive manner about the fact that the supervisor had given her a direct order to perform work within the confines of her prescribed job description.” (Report at 18).

Following the incident, Ms. Brown placed Ms. Drayton on administrative leave and informed Ms. Ward (Ms. Brown’s supervisor). Director Brown terminated Ms. Drayton’s employment because of insubordination and because her behavior was “particularly unacceptable in a correctional environment . . . where [Ms. Drayton is] charged with protecting the public.” (Report at 18). The Hearing Examiner concluded that DOC did not terminate Ms. Drayton’s employment because of an anti-union animus nor does the record support finding that the DOC had an anti-union animus at the time of Ms. Drayton’s termination. *Id.*

### 4. Timing

Lastly, the Hearing Examiner found that the timing of Ms. Drayton’s termination was not directly related to Ms. Drayton’s union activities. (Report at 17). The Hearing Examiner determined that “[w]hen Ms. Drayton cursed her supervisor, because she did not like her tone or disregard as to what aspect of her job function should be prioritized that day, she was not engaging in a protected union activity.” (Report at 19). Considering the verbal altercation Ms. Drayton engaged in with her boss, the Hearing Examiner concluded that “[s]he aided in her own demise,” and that the Agency “produced evidence to show there was a legitimate non-retaliatory business reason for terminating Ms. Drayton.” (Report at 18). The Board concludes that the Hearing Examiner’s findings that DOC did not terminate Ms. Drayton’s employment in retaliation for her testimony at the hearing for PERB Case No. 06-U-50 are reasonable, based on the record, and consistent with Board precedent.



The Hearing Examiner recommended that the Board find that there was no retaliatory termination and that the agency's conduct did not violate D.C. Code §1-617(4). (Report at 19 and 20).

Pursuant to Rule 550.21 the Board may adopt the recommendation of the Hearing Examiner to the extent that the record supports the recommendation. The Board concludes that the Hearing Examiner's findings that DOC assigned Ms. Drayton a new shift directly after her testimony in the hearing for PERB Case No. 06-U-50 in retaliation for her testimony are reasonable, based on the record, and consistent with Board precedent. The Board determines that the Hearing Examiner's findings that the DOC terminated Ms. Drayton's employment for reasonable grounds not in violation of the statute are reasonable, based on the record, and consistent with Board precedent.

E. Remedy

The Complainant's request for attorney fees is denied, as this Board has held that D.C. Code §1-617.13 does not authorize the Board to award attorney fees. *Washington Teachers' Union, Local #6, American Federation of Teachers, AFL-CIO v. District of Columbia Public Schools*, 2006 WL 6847417, Slip Op. No. 848 at 4, PERB Case No. 05-U-18 (2006).

The Complainant's request for reasonable costs is denied. In *AFSCME, D.C. Council 20, Local 2776 v. D.C. Dept. of Finance and Revenue*, 37 D.C. Reg. 5658, Slip Op. No. 245 at 5, PERB Case No. 89-U-02 (1990), the Board concluded that under certain circumstances they may award reasonable costs. The Board explained the three circumstances that warrant an award of reasonable costs. *Id.* First, "any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part." *Id.* Second, "it is clear on the face of the statute that it is only those costs that are 'reasonable' that may be ordered reimbursed." *Id.* Third, "and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice." *Id.*

The Board further explains what characteristics of a case warrant a finding that an award of costs will be in the interest of justice. *Id.* An award is appropriate when "the losing party's claim or position was wholly without merit," when "the successfully challenged action was undertaken in bad faith," and when "a reasonably foreseeable result of the successfully challenged action is the undermining of the union among the employees for whom it is the exclusive bargaining representative." *Id.*

The Board finds that no characteristics of this case warrant a finding that an award of costs will be in the interest of justice. The losing party's claim was not "wholly without merit." There is no evidence of bad faith on the part of either party, and the union is not undermined among the employees for whom it is the exclusive bargaining representative. Therefore, the Board denies the Complainant's requests for reasonable costs.

THEREFORE, the Board shall adopt the Hearing Examiner's recommendation in full.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. Pursuant to DC Code §1-617.13(a), DOC, its agents and representatives shall cease and desist from prohibited retaliatory conduct.
2. FOP's request for Ms. Drayton's reinstatement with back pay is denied.
3. The record and Hearing Examiner's Report and Recommendation present no evidence of other DOC employees who were assigned shift rotations or terminated in retaliation for participating in protection union activity. Therefore, FOP's request for other employees affected to be reinstated and given back pay is denied.
4. DOC shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice where notices to bargaining-unit employees are customarily posted. The Notice shall remain posted for thirty (30) consecutive days.
5. Within fourteen (14) days from the issuance of this Decision and Order, DOC shall notify the Public Employee Relations Board ("Board"), in writing, that the Notice has been posted accordingly.
6. FOP's request for all applicable costs and legal fees in connection with this matter is denied.
7. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

July 26, 2011



Public  
Employee  
Relations  
Board



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# 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 OPINION NO. 1296, PERB CASE NO. 08-U-20 (July 26, 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), (3) and (4) by the actions and conduct set forth in Opinion No. 1296.

**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 4<sup>th</sup> Street, SW, Suite E630; Washington, D.C. 20024. Phone: (202) 727-1822.

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

July 26, 2012

**CERTIFICATE OF SERVICE**

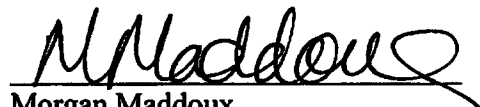
This is to certify that the attached Decision and Order in PERB Case No. 08-U-20 was transmitted via U.S. Mail and e-mail to the following parties on this the 26th day of July, 2012.

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