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

In the Matter of:)	
)	
American Federation of)	
Government Employees, Local 2978,)	
)	PERB Case No. 09-U-62
Complainant,)	
)	Opinion No. 1457
v.)	
)	
District of Columbia Office of)	
the Chief Medical Examiner,)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case

The instant case arises from an Unfair Labor Practice Complaint (“Complaint”) filed by the American Federation of Government Employees (“Complainant” or “Union”) against the D.C. Office of the Chief Medical Examiner (“Respondent” or “Agency”) for alleged violations of D.C. Official Code § 1-617.04(a)(1), (3), and (5) of the Comprehensive Merit Personnel Act (“CMPA”). A hearing was held on September 8, 2011, and in her subsequent Report and Recommendation (“Report”), Hearing Examiner Gloria Johnson determined that the Agency violated D.C. Official Code § 1-617.04(a)(1), (3), and (5) by retaliatory conduct resulting in the termination of the Grievant. (Report at 38). In Slip Op. No. 1348, the Board affirmed the Report in part, and remanded to the Hearing Examiner the question of whether the Agency presented sufficient evidence of a legitimate business reason for the employment action against Grievant Muhammad Abdul-Saboor (“Grievant”). Slip Op. No. 1348 at p. 7-9.

The Hearing Examiner issued a Report and Recommendation on remand (“Remand Report”), finding that the Agency violated D.C. Official Code § 1-617.04(a)(1), (3), and (5) by retaliatory conduct resulting in the Grievant’s termination, and that the Agency lacked a legitimate business reason for terminating the Grievant. (Remand Report at 20-21). On August 22, 2013, the Respondent filed exceptions to the Remand Report (“Remand Exceptions”), contending that the Hearing Examiner’s conclusions were irrational and unsupported by the

record. (Remand Exceptions at 4). The Union opposed the Agency's exceptions ("Remand Opposition"), calling the Agency exceptions "nothing more than argument that the Hearing Examiner should have interpreted the [Agency's] evidence differently and more favorably to the Agency." (Remand Opposition at 2).

The Remand Report, Remand Exceptions, and Remand Opposition are before the Board for disposition.

II. PROCEDURAL HISTORY

A. Slip Op. No. 1348

As stated by the Board in Slip Op. No. 1348, the Hearing Examiner found the following facts in her Report:

Grievant was the only employee member of AFGE Local 2978 employed at the Agency. On November 19, 2008, Grievant received an admonition for allegedly refusing to drive a friend of the Chief Medical Examiner to Walter Reed Hospital after this friend gave a lecture to Agency staff.

On March 19, 2009, the Grievant and his union representative met with his first line supervisor, Management Services Officer Peggy Fogg (in person), and Chief of Staff Beverly Fields (telephonically).

Both the Grievant and his representative maintain that the purpose of the meeting was to attempt to, *inter alia*, informally resolve a grievance and discuss issues regarding a grievance alleging Grievant was working outside of his position description.

An e-mail from Beverly Fields to Union Local President Robert Mayfield dated April 9, 2009, confirms that there was a discussion of the grievance on March 19. It states in relevant part "...the agency responded only on the date the grievance was filed (March 19, 2009), stating that the grievance was untimely and relief requested was denied. The Union clearly understood the oral response as you, Mr. Mayfield, stated that based on our response, you would take the matter to arbitration."

Ms. Fields also stated in an e-mail that "[d]uring the [March 19th] discussion, you stated that the employee had a grievance regarding working outside of his position description. I informed you orally at that time that any grievance regarding this issue was

untimely...[t]he agency's oral response during the March 19, 2009, meeting was a denial of the grievance itself."

Joint Exhibit 1 bears a date stamp March 19, 2009, and is directed to Peggy J. Fogg. It purports to be a step one grievance challenging both the issuance of an illegal admonition as well as the requirement that the Grievant work outside his position description in violation of the collective bargaining agreement.

On April 13, 2009, [the Agency] denied the grievance as untimely. On April 23, 2009, [the Union] filed an amended grievance.

By letter dated May 21, 2009, Chief Medical Examiner Pierre-Louis denied Grievant's grievance as flawed, untimely, and without merit.

By notice dated August 28, 2009, [Grievant] was advised that effective September 30, 2009, he would be separated from service as Fleet Management Specialist CS-2101-07, pursuant to a reduction in force in the competitive area of Office of the Chief Medical Examiner, competitive level DS-2101-07-01-N.

Grievant's August 28, 2009, RIF notice, signed by Chief Medical Examiner Marie-Lydia Y. Pierre-Louis, M.D., indicated it was delivered by Peggy Fogg to the employee, who purportedly refused to sign.

On September 10, 2009, Local 2978 filed an unfair labor practice complaint challenging the reduction in force as retaliation for the Grievant having engaged in the protected act of filing and pursuing a grievance, and subsequent statements made in a March 19, 2009, meeting with Agency managers, Grievant, and his union representative, Robert Mayfield, who also serves as President of AFGE Local 2978.

On September 10, 2009, the Union filed an unfair labor practice complaint. On September 30, 2009, the Agency answered the complaint and denied the allegations.

(Slip Op. No. 1348 at p. 2-3; citing Report at 2-5). In her Report, the Hearing Examiner determined that the dispositive issues were: (1) did the Agency engage in an unfair labor practice in violation of D.C. Official Code § 1-617.04(a)(1),(3), and (5) by interfering, restraining, intimidating, or retaliating against the Grievant for having engaged in protected activity; (2) is the Agency insulated from liability by its articulated legitimate business reason for imposing its RIF of the Grievant's position, because it would have taken the employment action anyways,

regardless of the protected union activity; (3) if not, what is the appropriate remedy? (Slip Op. No. 1348 at p. 4).

The Board noted that to determine whether the Agency violated D.C. Official Code § 1-617.04(a)(1), (3), or (5) by interfering, restraining, intimidating, or retaliating against an employee for engaging in a protected activity, the hearing examiner applied the test articulated by the National Labor Relations Board (“NLRB”) in *Wright Line, Inc. v. Lamoureux*, 251 N.L.R.B. 1083, 1089 (1980), *enforced* 622 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).¹ Under *Wright Line*, a complainant has the burden to establish a *prima facie* showing that an employee’s protected union activity was the motivating factor in the employer’s decision to discharge him. *Id.* at 1090. To establish a *prima facie* case of a violation, the union must show that the employee (1) engaged in protected union activity; (2) the employer knew about the employee’s protected union activity; (3) there was anti-union animus or retaliatory animus by the employer; and (4) as a result, the employer took an adverse employment action against the employee. *Doctors Council of the District of Columbia v. D.C. Commission on Mental Health Services*, 47 D.C. Reg. 7568, Slip Op. No. 636 at p. 3, PERB Case No. 99-U-06 (2000); *see also D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corporation*, 46 D.C. Reg. 6271, Slip Op. No. 583, PERB Case No. 98-U-07 (1999). The employer’s employment decision must be analyzed according to the totality of the circumstances, including the history of anti-union animus, the timing of the employment action, and disparate treatment. *Doctors Council*, Slip Op. No. 636 at 3.

If the complaint establishes a *prima facie* case of a violation, the employer may rebut the inference by establishing, by a preponderance of the evidence, that the employment action would have occurred regardless of the protected union activity. *Wright Line*, 251 N.L.R.B. at 1089. The employer must show that it had a legitimate business reason for the employment action, and that it would have initiated the employment action even in the absence of protected union activity. *Wright Line*, 251 N.L.R.B. at 1089; *D.C. Nurses Association*, Slip Op. No. 583.

The Board affirmed the Hearing Examiner’s conclusions that: (1) the Grievant was engaged in protected union activity when he pursued a grievance against the Agency for requiring him to perform work outside of his job description; (2) the Agency was aware of this protected union activity; and (3) anti-union animus and retaliatory animus existed on the part of the Agency. (Slip Op. No. 1348 at p. 5). However, the Board stopped short of affirming the Hearing Examiner’s conclusion that the Agency’s anti-union animus was the basis for RIF-ing the Grievant because it found that the Hearing Examiner’s reasoning for her conclusion that the Agency’s legitimate business reason was pretextual was unclear. *Id.* at 7-8. The Report stated that “there is no legitimate business reason for the statements made in the March 19 grievance meeting – no way to take back the chilling effect and potential loss of confidence those illegal statements made on March 19.” *Id.*; citing Report at 28. While the March 19 statements

¹ The Board has previously adopted the NLRB’s reasoning in *Wright Line*. See *Bagenstose v. D.C. Public Schools*, 38 D.C. Reg. 4154, Slip Op. No. 270, PERB Case Nos. 88-U-33 and 88-U-34 (1991); *Ware v. D.C. Department of Consumer and Regulatory Affairs*, 46 D.C. Reg. 3367, Slip Op. No. 571, PERB Case No. 96-U-21 (1998).

represent a separate unfair labor practice violation of intimidation and undermining the Union², the issue in the *Wright Line* burden-shifting analysis is whether the Agency demonstrated a legitimate business reason for the employment action (i.e.: the RIF). *Id.*; citing *Rodriguez v. D.C. Metropolitan Police Department*, Slip Op. No. 954, PERB Case No. 06-U-38 (July 8, 2010); *Fraternal Order of Police/Department of Corrections Labor Committee v. D.C. Department of Corrections*, Slip Op. No. 888, PERB Case Nos. 03-U-15 and 04-U-03 (September 30, 2009).

In Slip Op. No. 1348, the Board affirmed the Hearing Examiner's determination that the Union made a *prima facie* showing that the Grievant's RIF was the result of anti-union and retaliatory animus. *Id.* at p. 8. However, the Board noted that the burden then shifted to the Agency, which produced evidence that although anti-union and retaliatory animus existed, the Grievant was RIF-ed for economic reasons, and that it was then up to the Hearing Examiner to analyze the evidence of the Agency's legitimate business reason to determine if it balanced the Union's *prima facie* showing. *Id.* The Board found that the Hearing Examiner's Report included no analysis of the Agency's evidence of its legitimate business reason for taking the employment action against the Grievant, and remanded that question back to the Hearing Examiner. *Id.*

B. Remand Report

In the Remand Report, the Hearing Examiner considers the Agency's allegation that its legitimate business reason for including the Grievant as part of the RIF was "budgetary restraints." (Remand Report at 6). The Hearing Examiner notes the Agency's contention that she omitted certain pieces of evidence from her factual findings, and failed to consider "critical evidence" regarding the Agency's legitimate business reasons for the RIF. *Id.* The omitted evidence was:

- (1) On June 25, 2009, a second gap closing measure was imposed;
- (2) [The Agency] had one week to cut its budget by another 10%;
- (3) In the first round of budget cuts, [the Agency] had eliminated all vacant positions;
- (4) In round two the Agency was forced to cut nonessential employees; and
- (5) Prior to the imposition of round two, the Agency had no intention of conducting a RIF or eliminating [the Grievant's] position.

Id. The Hearing Examiner contended that "irrespective of the fact that a detailed discussion (focusing on each of the five (5) above enumerated items) was not set forth evaluating each one individually," she did consider each of the Agency's allegations. *Id.*

The Hearing Examiner first considered Agency Exhibit 1, which was a series of e-mails introduced at the hearing to show that the Agency was notified of a need to further reduce its

² In Slip Op. No. 1348 the Board concluded that the Agency violated the CMPA by making statements that threatened and undermined the Union. *Id.* at 8-9. The Agency did not contest this determination in its Exceptions or Remand Exceptions.

budget. (Remand Report at 7). The Hearing Examiner “did not assign substantial weight to the Agency’s evidence or elevate the information contained in this exhibit to the level that merited their being considered as one or more of her findings of fact.” *Id.* The Hearing Examiner goes on to state that when Agency Exhibit 1, which she describes as a “string of unauthenticated emails commencing June 2009” and “introduced to show [the Agency] was notified in June 2009 to make an addition 10% cut to fill the gap in 2010,” was accepted into evidence, she admitted it over the Union’s objection that it was “double hearsay.” *Id.* The Hearing Examiner notes that she:

explained on the record that she had decided to admit the hearsay evidence (string of emails) for whatever limited value she deemed appropriate to assign it during her evaluation; regarding whether there was a violation of the statute. At no time did the Examiner state she accepted the document for the truth of the hearsay information stated therein; nor did she infer or assert that she considered Agency Exhibit 1 to have a sufficiently high level of competence so as to merit it being considered to contain competent substantiated statements that she would adopt as a finding of fact.

(Remand Report at 8). In addition to the e-mails in Agency Exhibit 1, the Hearing Examiner considered the testimony of two Agency managers “who not only were directly involved in making the RIF decision; but also had interacted in a non-neutral, challenged manner with the Grievant and/or his Union.” *Id.* The Hearing Examiner concluded that the e-mails in Agency Exhibit 1 and the testimony were “not corroborated or substantiated by any credible, neutral, independent source,” and that she found them not to be credible. *Id.* Further, the Hearing Examiner noted that no “substantiating budget or financial information was authenticated and entered in evidence at the hearing.” (Remand Report at 8-9).

Next, the Hearing Examiner discussed her evaluation of the direct testimony of the Agency’s director, Dr. Pierre-Louis, that she had initially tried to eliminate vacant positions, but the second “gap closing measure” had required her to include the Grievant and three other positions in the RIF, and that prior to the second “gap closing measure” there had been no intention to RIF the Grievant’s position. (Remand Report at 9). The Hearing Examiner concluded that “it was not substantiated on the record that the Agency only had one week to cut the budget by ten (10%) percent,” and that the Agency failed to submit into evidence “signed authenticated notices” advising them of the need to further reduce its budget, “nor documents made in the normal course of business, i.e., substantiated for example by testimony of the keeper of the record or the generator of the correspondence/reduction notice.” (Remand Report at 9-10). Further, the Hearing Examiner found that there was “no corroborating testimony from a person who issued the alleged, ‘cut the budget in one week notice.’” (Remand Report at 10). The Hearing Examiner went on to conclude that she considered the Agency’s legitimate business reason, but did not adopt it “as an authenticated finding of fact” because “[n]o one who generated that order or imposed such a requirement on the Agency (to cut the budget further in one week) was called to testify at the hearing,” “[n]o signed authenticated document was submitted in the record from such a person in the Mayor’s Office or Budget Office,” “[b]udget

information was marked as Agency Exhibit 4, but not admitted into evidence,” and that the only evidence of the Agency’s budget was the “bare assertions of the proponents of the challenged act; *i.e.*, the two people who actively made the decision to RIF the Grievant.” *Id.*

The Hearing Examiner then moved to her consideration of the burden shifting portion of the *Wright Line* test. (Remand Report at 11). The Hearing Examiner stated that she considered and evaluated the Agency’s legitimate business reason, as set forth in both documentary and testimonial evidence, and noted that it was required to balance, not outweigh, the Union’s *prima facie* case of retaliation. (Remand Report at 13-14). The Hearing Examiner concluded that the Agency’s legitimate business reason does not balance the Union’s *prima facie* case because the Agency “did not produce credible substantiated evidence to balance the evidence submitted by the Union.” (Remand Report at 14). Instead, the Hearing Examiner found that “the preponderance of the evidence shows that the Grievant’s position was targeted by the RIF,” as shown by “attempts to make good on a threat” to the Grievant, that the Agency Director was “angered and embarrassed” when the Grievant would not drive her friend to Walter Reed Hospital, and when an Agency supervisor was “disrespectful of the Union” on the March 19 phone call. (Remand Report at 15-16).

In a section entitled “No Prior History of Problems,” the Hearing Examiner discussed the Agency’s contention (presumably in its exceptions to her original Report and Recommendation, as this allegation was not raised in the Agency’s Remand Exceptions), that there was no history of prior anti-union animus. (Remand Report at 16). The Hearing Examiner states that she had the opportunity to “observe the parties’ demeanor and evaluate their overall responses, reactions and retractions,” and that she found that “the reported events were sufficient to override the purported business related reason for [the Grievant’s] removal from [Agency] rolls.” (Remand Report at 17). The Hearing Examiner goes on to state that the totality of the circumstances:

provides substantial evidence that Ms. Fields threatened to RIF [the Grievant], if he insisted on pursuing his grievance, wherein he legitimately challenged a condition of his employment, *i.e.* being asked to chauffeur bodies that were not deceased. Statutory rights were violated when she not only threatened to RIF him, but also when he encountered discouragement precipitated by Ms. Field’s having challenged (in his presence) the representational authority of the certified exclusive Union. The Examiner found there was clearly an atmosphere of not only disrespect for the Union (which represented only one employee within the Agency’s walls), but also there was anti-union animus that provided the foundation for the Agency’s action. This was not confined to two isolated matters. Rather, it permeated the events challenged in the complaint and apparently continued beyond the March 19 meeting and August 28, 2009 RIF notice, to also encompass the matter of [the Agency’s] reported failure to notify the Union before issuing the notice to the Local 2978 member-employee of the imminent RIF.

(Remand Report at 18). The Hearing Examiner went on to state that she agreed with the Union's contention that the Agency's "failure to notify Local 2978 – as opposed to the Union's notice coming (to the Union) from the employee-member serves to erode the perception of the Union's effectiveness and discourages Union membership," as well as making the Union appear ineffective. *Id.*

In the next section of the Remand Report, titled "Audit Evidence," the Hearing Examiner disagrees with the Agency's argument that its request for an audit nullifies the Union's assertion that the RIF was motivated by the filing of the grievance. (Remand Report at 18). However, she noted that her conclusion "does not evaluate whether the RIF was properly conducted, or whether the audit cancellation was connected to the challenged RIF decision," but is mentioned "to provide insight into the totality of the circumstances." (Remand Report at 19).

Finally, in a section entitled "Motivation and Pretext," the Hearing Examiner states:

The Board has acknowledged that the determination regarding motivation is indeed a difficult task. However, based on the totality of the circumstances and for reasons set forth above, the Examiner finds [the Agency's] stated business related reasons for the Grievant's termination/RIF were not sufficient to balance the scale; i.e., did not "balance" the Union's *prima facie* showing. The Hearing Examiner finds that there is no showing on the record that this particular position would have had to be cut; absent Grievant's protected Union activity. As the Union points out – [the Agency's Director] admittedly had recently engaged in aggressive efforts to secure this newly reclassified position and have [the Grievant] return to the Agency. It is unlikely that within such a short period of time, the duties diminished to 50% of his assigned tasks in a newly reclassified position description. The timing is suspect. His refusal to act as her personal chauffeur and his challenge regarding this duty by filing a grievance, precipitated the problem. The momentum shifted with the March 19 grievance meeting. The Agency manager's credibility problem also is placed on the scales during the Hearing Examiner's evaluation of its articulated business reason(s) for [the Grievant's] termination. There was substantial evidence to show his selection for the reduction in force was a violation of the CMPA.

(Remand Report at 19-20). As such, the Hearing Examiner concluded that the Agency's legitimate business reason did not balance the Union's *prima facie* case, and that the Agency violated the CMPA by threatening the Grievant with termination and undermining the Union in his presence. (Remand Report at 20-21).

C. Agency's Remand Exceptions

In its Remand Exceptions, the Agency contends that the Hearing Examiner's finding that "it was not substantiated on the record that the Agency only had one week to cut the budget by ten percent" should be rejected, and that the Hearing Examiner's finding that the Agency lacked a legitimate business reason for the RIF "because the evidence submitted was unauthenticated" is irrational and unsupported by the evidence of this case. (Remand Exceptions at 4). The Agency asserts that it submitted documentary and testimonial evidence clearly showing that the Agency, along with several other District agencies, was required to cut its budget by ten percent within one week. *Id.* In support of this allegation, the Agency notes that its evidence of budgetary constraints consisted of an e-mail, documents from the Office of the Mayor approving the RIF, and testimony from the Agency's Chief of Staff and Director. *Id.* The June 25, 2009, e-mail was sent to all agency directors from the Office of the City Administrator, and directed the agency directors "to identify 10 percent cut for FY 2010 by next Tuesday," and that the proposed reductions were due by June 30, 2009." *Id;* citing Remand Exceptions Ex. 1. While the Hearing Examiner determined that the e-mail was not authenticated, the Agency contends that the e-mail was authenticated by the Agency director, who testified that she received the e-mail and had firsthand knowledge that the e-mail was what it purported to be. (Remand Exceptions at 5).³ The Agency states that the Union did not present any evidence challenging that the Agency had until June 30 to reduce its budget, nor does the record contain contradictory evidence, and thus the Agency's e-mail evidence is undisputed. *Id.*

The Agency contends that "[i]n the face of clear and undisputed evidence, the Hearing Examiner clings to her determination that the Agency did not have to cut its budget," and as such, "did not have a legitimate business purpose for engaging in a RIF." (Remand Exceptions at 5-6). The Agency finds the Hearing Examiner's conclusion questionable "because, according to her, she admitted evidence into the record that is unauthenticated." (Remand Exceptions at 6). The Agency notes that at the hearing, the Union's attorney stated "I don't have any dispute about [the e-mail's] authenticity," and questions why the Hearing Examiner disputed the authenticity of the e-mail when the Union did not. *Id;* citing Tr. 42.

As for the Hearing Examiner's assertion that information on the Agency's budget was never admitted into evidence at the hearing and caused the Hearing Examiner to discount the Agency's evidence of its budgetary constraints, the Agency points to a statement by the Hearing Examiner at the hearing that:

³ In support of its contention that the e-mail was authenticated, the Agency cites to Federal Rule of Evidence 901, which states in relevant part:

- (a) To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that *the item is what the proponent claims it is*.
- (b) Examples. The following are examples... of evidence that satisfies the requirement: (1) *Testimony of a Witness with Knowledge*. Testimony that an item is what it is claimed to be.

(Remand Exceptions at 5) (emphasis in original).

It's highly unlikely that I'm going to look at a lot of information about why there was a RIF. It's highly unlikely that I'm going to look at a lot of information about the financial aspects or the personnel aspects of a RIF. I have to look at a certain amount of it because of the fact that the alleged violation happened when someone was exercising their right to be represented in a grievance related procedure in which they indicate in their complaint that the threat was I will RIF you... And I understand that your legitimate defense is you're articulating a nondiscriminatory or non-violating reason why he was; and to that extent, I must allow the agency to defend itself but I am not going to get reams of paper about your budget and all of this. I will take an overview of information. So that's why I am allowing you to do that.

(Remand Exceptions at 6-7; citing Tr. 114-115). The Agency asserts that the Hearing Examiner “cannot rely upon the fact that other evidence was not submitted into the record when she stated that she would not read or consider it,” and notes that the budget information was a public document that could be accessed online. (Remand Exceptions at 7).

Additionally, the Agency alleges that during the hearing, as it sought to establish evidence of its budgetary constraints, the Hearing Examiner stated “I have to...allow some information in because they’re going to beat the bull on the head with all kinds of information to show that it was legitimate. We spend more time arguing about not letting them in and then having the *arbitrator not look at it* than to just let them put it in *and not have the arbitrator look at it*. Either way, I don’t look at it. So, let’s go; let’s move.” (Remand Exceptions at 6, n. 2; citing Tr. at 113) (emphasis added by Respondent). The Agency contends that these statements indicate bias and a lack of objectivity by the Hearing Examiner, and that the Hearing Examiner admitted evidence into the record which she knew she would not consider. (Remand Exceptions at 6, n. 2). The Agency “reasserts its claim that it did not get a fair hearing,” and references its exceptions to the original Report⁴. *Id.*

The Agency further alleges that the Hearing Examiner’s reliance on the Union’s objection to the e-mails as hearsay should not be dispositive because the e-mail speaks for itself. (Remand Exceptions at 7). The Agency asserts that the Union’s objection does not make the evidence unauthenticated or competing, and that the Agency presented unopposed testimonial evidence regarding the e-mail and other budgetary mandates. *Id.* The Agency states that the

⁴ In footnote 5 of its exceptions to the original Report, the Agency stated:

It should go without saying that the Respondent is entitled to a fair hearing. The purpose of the hearing and the R&R is to present an objective set of facts and recommendations for the Board to consider. Under the above facts, it is difficult to ignore the appearance of an unusually strong tendency of the R&R to favor [the Union’s] position. The decision is so slanted that critical facts were ignored and not even considered in the R&R. Not to mention, the [Hearing Examiner’s] assertion that this case is a *pro se* violation of the § 1-617.04(a)(1) of the CMPA. This is a legal fiction as no such violation exists.

evidence showing it was required to cut another ten percent of its budget is “critical” and “undisputed” evidence, and that to find otherwise “eliminates the Agency’s legitimate business reason for engaging in the RIF.” *Id.* The Agency asserts that the Hearing Examiner’s findings are contrary to the evidence in the record and she failed to sufficiently analyze the evidence of a legitimate business reason for the employment action against the Grievant. (Remand Exceptions at 7-8).

D. Union’s Remand Opposition

In its Remand Opposition, the Union characterizes the Agency’s Remand Exceptions as “nothing more than argument that the Hearing Examiner should have interpreted the [Agency’s] evidence differently and more favorably to the Agency.” (Remand Opposition at 2). The Union states that the Agency points to nothing in the hearing transcript showing that it preserved its objections for review by the Board, and that “on the penultimate question of its motive simply repeats that it did not act unlawfully despite the Hearing Examiner specifically found shows otherwise, evidence that the [Agency] does not contest and in some case concedes.” *Id.* The Union contends that even if the Hearing Examiner had given credence to the Agency’s evidence regarding the budget cuts, “it has no effect on the question of why the [Agency] decided to address the budget cut by running a RIF in which it selected [the Grievant] for separation.” *Id.*

First, the Union contends that the Hearing Examiner properly concluded that the motivation behind the RIF was unlawful retaliation against the Grievant for exercising his right to raise complaints about his working conditions through the grievance procedure. (Remand Opposition at 5). The Union asserts that the Agency’s evidence regarding its legitimate business reason “shows only that the [Agency] had a budget to meet and was asked by the Mayor to develop steps the Agency could take to stay within its budget,” and that the evidence “did not require a RIF, nor did it require that a RIF be run immediately.” *Id.* Further, the Union contends that the “evidence which the Hearing Examiner revisits and on which the [Agency] bases its Exceptions does not speak in any way to who and how the critical decision – the one which the Union contends and the Hearing Examiner concludes was made for an unlawful reason – was made.” (Remand Opposition at 6). As such, the Union urges the Board to defer to the Hearing Examiner’s “lengthy review of the full record evidence” that led to her conclusion that the Agency violated the CMPA. *Id.*

The Union asserts that it is clear from the Agency’s evidence that the decision of how to meet the budgetary constraints, particularly the decision to do so through Grievant’s RIF, were made by the Agency Director and her chief of staff “just after the Chief of Staff explicitly threatened [the Grievant] with a RIF if he filed a grievance.” (Remand Opposition at 7). The Union states that the Hearing Examiner does not question the reality of the budgetary constraints, but rather that the Agency was “directed by the Mayor or had no other option than to run a RIF,” and specifically to RIF the Grievant. *Id.* The Union asserts that the Hearing Examiner properly found that the evidence of the budget cuts alone is not enough to explain why the Agency ran a RIF and selected the Grievant to be separated, and that “[r]eams of documents showing budget cuts and constraints do not prove that a RIF was directed and dictated from outside the [Agency], or that it was the [Agency’s] only option.” *Id.* The Union finds no reason to question the

Hearing Examiner's disbelief that notwithstanding the budget constraints faced by the Agency, the Agency had no choice but to RIF the Grievant. (Remand Opposition at 8).

Additionally, the Union asks the Board to bear in mind that in its Remand Exceptions, the Agency "concedes that it unlawfully threatened and coerced [the Grievant] and the Union with a RIF in the face-to-face exchanges with the [Agency's] Chief of Staff shortly before the RIF was ordered by the [Agency's Director]." (Remand Opposition at 8). The Union notes that these acts were particularly convincing to the Hearing Examiner, and that the Hearing Examiner noted evidence that the Agency Director admitted at the hearing that she had personally lobbied for the creation of the Grievant's position two years prior, and "the palpable anger of the [Agency's Director] towards [the Grievant] over him asking for directions one time when he was driving the [Director's] friend, and her sense that the [Director] became vindictive after that." (Remand Opposition at 8-9). The Union states that the Hearing Examiner also noted her "unfavorable sense of the testimony" of the Chief of Staff when she "tried to dodge on the stand" that she had threatened the Grievant if he persisted in complaining about his working conditions. (Remand Opposition at 9). The Union contends that this evidence is more relevant and probative of the Agency's motivation for the RIF of the Grievant than the Agency's evidence of its budgetary constraints. *Id.*

Finally, the Union asserts that it is aware of no basis for the Agency's claim of bias on the part of the Hearing Examiner, and assures the Board that it neither saw nor is aware of any evidence of this bias. (Remand Opposition at 10).

III. Discussion

A. Standard of Review

The Board will adopt the findings and conclusions of a hearing examiner so long as they are reasonable, supported by the record, and consistent with Board precedent. See *Fraternal Order of Police/Metropolitan Police Dep't Labor Committee v. D.C. Metropolitan Police Dep't*, 59 D.C. Reg. 11371, Slip Op. No. 1302 at p. 18, PERB Case Nos. 07-U-09, 08-U-13, and 08-U-16 (2012). Determinations concerning the admissibility, relevance, and weight of evidence are reserved to the hearing examiner. *Hoggard v. D.C. Public Schools*, 46 D.C. Reg. 4837, Slip Op. No. 496 at p. 3, PERB Case No. 95-U-20 (1996).

B. Allegations of Hearing Examiner Bias

Board Rule 557.1 provides: "A hearing examiner...shall withdraw from proceedings whenever that person has a conflict of interest." The Agency asserts that the Hearing Examiner exhibited bias and a lack of objectivity during the unfair labor practice hearing, evidenced by certain statements from the Hearing Examiner, as well as allegations from its original Exceptions that the original Report showed an "unusually strong tendency" to favor the Union's position, and was "so slanted that critical facts were ignored and not even considered" in the original Report. (Remand Exceptions at 6-7; Exceptions at 7, fn. 5).

Here, the Respondent has not alleged that the Hearing Examiner had a conflict of interest, nor was a motion to disqualify the Hearing Examiner brought during or after the unfair labor practice hearing. The mere assertion that the Hearing Examiner expressed or implied hostility to the Agency's position is insufficient to disqualify her as the Hearing Examiner, or to sustain an allegation of bias. *See American Federation of Government Employees, Local 631 v. D.C. Office of Zoning, et al.*, Slip Op. No. 1103 at p. 4-6, PERB Case Nos. 04-UM-01 an 04-UM-02 (March 16, 2011). Likewise, none of the examples cited by the Agency establish that the Hearing Examiner's temperament or opinions expressed during the hearing or in her Report precluded the Agency from being afforded a fair hearing. *See District of Columbia Nurses Ass'n v. District of Columbia Health and Hospitals Public Benefit Corp.*, 46 D.C. Reg. 245, Slip Op. No. 560 at p. 1, fn. 2, PERB Case No. 97-U-16 (1998); *see also Pratt v. D.C. Dep't of Administrative Services*, 43 D.C. Reg. 1490, Slip Op. No. 457, PERB Case No. 95-U-06 (1995) (A party is not deprived of a fundamentally fair hearing, nor is an entire decision tainted, when each party has been provided an adequate opportunity to present its evidence and arguments.). Therefore, the Agency's allegations of Hearing Examiner bias are dismissed.

C. Wright Line's Burden-Shifting Analysis

In Slip Op. No. 1348, the Board agreed with the Hearing Examiner that the Union made a *prima facie* showing that the Grievant's RIF was the result of anti-union and retaliatory animus. (Slip Op. No. 1348 at p. 8). Specifically, the Board found that the Union showed that the Grievant engaged in protected union activity, the Agency was aware of the Grievant's protected union activity, there was anti-union animus or retaliatory animus by the Agency, and as a result, the Agency took an adverse employment action against the Grievant. *Id.* at p. 4.

Once the Union established a *prima facie* case of retaliation, the burden shifted to the employer to rebut the inference of retaliation by showing, by a preponderance of the evidence, that the RIF would have occurred regardless of the protected union activity. *Id.* The Board noted that based upon its precedent, "the burden shifts to the employer to produce evidence of a non-prohibited reason for the action against the employee. This burden, however, does not place on the employer the onus of proving that the unfair labor practice did not occur." *Id.* at 7-8; citing *FOP/DOC Labor Committee*, Slip Op. No. 888 at p. 4. It was the responsibility of the Hearing Examiner to analyze the evidence of the Agency's legitimate business reason to determine if the Agency produced evidence "to balance, not [necessarily] to outweigh, the evidence" presented by the Union. Slip Op. No. 1348 at p. 8; citing *FOP/DOC Labor Committee*, Slip Op. No. 888 at p. 4.

The Hearing Examiner states that she examined the evidence submitted by the Agency regarding the budgetary concerns necessitating the RIF of the Grievant ("Agency Exhibit 1"). (Remand Report at 7-11). According to the Hearing Examiner, this evidence consisted of "a series of emails introduced to show [the Agency] was notified of the need to further reduce its budget; to fill the gap in 2010." (Remand Report at 7). The Hearing Examiner noted that she admitted the evidence over the Union's repeated objections that the e-mails constituted "double hearsay," but that "[a]t no time did the Examiner state she accepted the document for the truth of the hearsay information stated therein; nor did she infer or assert that she considered Agency

Exhibit 1 to have a sufficiently high level of competence so as to merit it being considered to contain competent substantiated statements that she would adopt as a finding of fact.” (Remand Report at 7-8). In addition to Agency Exhibit 1, the Hearing Examiner considered the testimony of two Agency managers whom she described as individuals who “not only were directly involved in making the RIF decision[,] but also had interacted in a non-neutral, challenged manner with the Grievant and/or his Union.” (Remand Report at 8). The Hearing Examiner concluded that the testimony and Agency Exhibit 1 was not corroborated or substantiated by any credible, neutral, or independent source, and that she did not assign substantial weight to the evidence. *Id.* She also found it noteworthy that the Agency did not introduce substantiating budget or financial information into evidence at the hearing. (Remand Report at 8-9).

In the instant case, the Agency disagrees with the Hearing Examiner’s decision to discount the probative value of the evidence in Agency Exhibit 1, and her finding that the testimony of the Agency officials regarding the Agency’s legitimate business reason was not credible. (Remand Exceptions at 7-8). A hearing examiner has the authority to determine the probative value of evidence and draw reasonable inferences from that evidence. *See Hoggard*, Slip Op. No. 496 at p. 3 (Issues concerning the probative value of evidence are reserved to the Hearing Examiner.); *see also Hatton v. Fraternal Order of Police/Dep’t of Corrections Labor Committee*, 47 D.C. Reg. 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (1995). The Board routinely rejects challenges to a hearing examiner’s findings based on competing evidence, the probative weight accorded to evidence, and credibility resolutions. *See Fraternal Order of Police/Metropolitan Police Dep’t Labor Committee v. D.C. Metropolitan Police Dep’t*, 59 D.C. Reg. 11371, PERB Case Nos. 07-U-49, 08-U-13, and 08-U-16 (2012); *see also American Federation of Government Employees, Local 2741 v. D.C. Dep’t of Recreation and Parks*, 46 D.C. Reg. 6502, Slip Op. No. 558, PERB Case No. 98-U-16 (1999). The Hearing Examiner determined that the Agency’s evidence on its legitimate business reason was not “credible substantiated evidence that merited the Examiner elevating it to a level that she was constrained to assign substantial weight and adopt as her own finding of fact.” (Remand Report at 8). Pursuant to the precedent cited above, the Agency’s challenge to the Hearing Examiner’s findings based on the probative weight of evidence and credibility resolutions must be rejected.

Additionally, the Agency challenges the Hearing Examiner’s determination that the e-mails comprising Agency Exhibit 1 were unauthenticated. (Remand Exceptions at 4-6). Board Rule 550.16 states: “In all hearings before Hearing Examiners, strict compliance with the rules of evidence applied by the courts shall not be required. The Hearing Examiner shall admit and consider proffered evidence that possesses probative value. Evidence that is cumulative or repetitious may be excluded.” The Board affords hearing examiners “many powers and much latitude” to conduct hearings, and that latitude extends to the rules of evidence during an unfair labor practice hearing. *See International Association of Firefighters, Local 36 v. D.C. Dep’t of Fire and Emergency Medical Services*, 50 D.C. Reg. 5041, Slip Op. No. 696 at p. 2, fn. 9, PERB Case No. 00-U-28 (2002). Consistent with this latitude, the Board will not second-guess the Hearing Examiner’s finding that the e-mails in Agency Exhibit 1 were unauthenticated.

Finally, the Agency contends that the Hearing Examiner cannot rely upon the fact that evidence of the Agency’s budget was not submitted into the record when she stated during the

hearing that she would not consider or read it. (Remand Exceptions at 6-7). At the hearing, the Hearing Examiner stated:

It's highly unlikely that I'm going to look at a lot of information about why there was a RIF. It's highly unlikely that I'm going to look at a lot of information about the financial aspects or the personnel aspects of a RIF. I have to look at a certain amount of it because of the fact that the alleged violation happened when someone was exercising their right to be represented in a grievance related procedure in which they indicate in their complaint that the threat was I will RIF you... And I understand that your legitimate defense is you're articulating a nondiscriminatory or non-violating reason why he was; and to that extent, I must allow the agency to defend itself but I am not going to get reams of paper about your budget and all of this. I will take an overview of information. So that's why I am allowing you to do that.

(Tr. 114-115). Despite the Hearing Examiner's implication that to do so would be futile, there is no evidence in the transcript that the Agency attempted to admit evidence of its budget into the record, or that the Hearing Examiner refused to accept such a proffer. Accordingly, the Board must deny this exception.

Based upon her evaluation of the Agency's evidence and testimony regarding its legitimate business reason for the Grievant's RIF, the Hearing Examiner determined that the Agency's evidence failed to balance the Union's *prima facie* showing. (Remand Report at 12-16). Examining the motivation of the Agency officials involved in the case, the Hearing Examiner determined that the preponderance of the evidence showed that the Grievant's position was targeted, and that the Agency's actions illustrated anti-union animus which "permeated the events challenged in the complaint and apparently continued beyond the March 19 meeting and August 28, 2009, RIF notice." (Remand Report at 15, 18). After examining the relationship between the Grievant and the Agency officials involved in the RIF, as well as the timing of the RIF, the Hearing Examiner concluded that the Agency had failed to prove that the Grievant's position had to be cut, absent the Grievant's protected union activity. (Remand Report at 19-20). The Board finds that the Hearing Examiner's conclusions are reasonable, supported by the record, and consistent with Board precedent. See *Wright Line*, 251 N.L.R.B. at 1089; *D.C. Nurses Association*, Slip Op. No. 583 at 1; *Doctors Council*, Slip Op. No. 636 at 3.

D. Remedy

The Hearing Examiner recommended that the Board find that the Agency violated D.C. Official Code § 1-617.04(a)(1), (3), or (5) by interfering, restraining, intimidating, or retaliating against an employee for engaging in a protected activity, and ordered a notice posting. (Remand Report at 21). The Board adopts this recommendation. The Hearing Examiner notes that because the Grievant's position was eliminated, she "is not certain to what position [the Grievant] can be placed, if any, for a make whole remedy," and recommended that the parties

submit written proposed remedies. *Id.* Accordingly, the parties will brief the question of an appropriate make whole remedy within thirty (30) days of the issuance of this Decision and Order. The Board will then issue a supplemental ruling on the matter of an appropriate make whole remedy.

ORDER

1. The Hearing Examiner's Remand Report and Recommendation is affirmed.
2. The District of Columbia Office of the Chief Medical Examiner shall cease and desist from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by D.C. Official Code § 617.04(a)(1), (3), and (5) by retaliating against employees for engaging in protected activity.
3. The District of Columbia Office of the Chief Medical Examiner shall conspicuously post, within ten (10) days from the issuance of this Decision and Order, the attached Notice where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.
4. The District of Columbia Office of the Chief Medical Examiner shall notify the Public Employee Relations Board in writing within fourteen (14) days from the issuance of this Decision and Order that the Notice has been posted accordingly.
5. The parties will submit simultaneous briefs addressing an appropriate make whole remedy. The briefs must be filed no later than 11:59 p.m. on May 2, 2014, via the Board's File & ServeXpress electronic filing system.
6. 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 2, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-U-62 was transmitted to the following parties on this the 2nd day of April, 2014.

Ms. Melinda K. Holmes, Esq.
O'Donnell, Schwartz & Anderson, PC
1300 L St., NW
Ste. 1200
Washington, DC 20005

FILE & SERVEXPRESS

Ms. Repunzelle Johnson, Esq.
Mr. Michael Levy, Esq.
DC OLRCB
441 4th St., NW
Ste. 820 North
Washington, D.C. 20001

FILE & SERVEXPRESS

Ms. Gloria Johnson, Esq.
1399 Mercantile Ln.
Suite 139
Largo, Maryland 20774
glaw75@aol.com

E-MAIL

/s/ Erin E. Wilcox

Erin E. Wilcox, Esq.
Attorney-Advisor



Public
Employee
Relations
Board

GOVERNMENT OF
THE DISTRICT OF COLUMBIA


1100 4th Street S.W.
Suite E630
Washington, D.C. 20024
Business: (202) 727-1822
Fax: (202) 727-9116
Email: perb@dc.gov

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA OFFICE OF THE CHIEF MEDICAL EXAMINER ("OCME"), 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. 1457, PERB CASE NO. 09-U-62 (April 2, 2014).

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

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1), (3), and (5) by the actions and conduct set forth in Slip Opinion No. 1457.

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

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

District of Columbia Office of the Chief Medical Examiner

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.

April 2, 2014