GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the matter of	)	
	)	
American Federation of State, County and Municipal Employees, District Council 20, Local 2743	)	
	)	
Complainant	)	
	)	
v.	)	**PERB Case No. 23-U-06**
	)	
District of Columbia Department of Insurance, Securities and Banking	)	**Opinion No. 1876**
	)	**Motion for Reconsideration**
Respondent	)	
	)	

DECISION AND ORDER

I. Statement of the Case

On April 5, 2024, the Department of Insurance, Securities and Banking (DISB) filed a motion for reconsideration (Motion) of the Board's decision in Opinion No. 1864. DISB requests that the Board reconsider its decision finding that DISB committed an unfair labor practice by denying a performance allowance for retaliatory reasons. The American Federation of State, County and Municipal Employees, Local 2743 (AFSCME) filed an opposition to the Motion (Opposition).

For the reasons discussed herein, the Motion for Reconsideration is denied.

II. Background

In Opinion No. 1864, the Board considered AFSCME's unfair labor practice complaint against DISB.[1] AFSCME alleged that DISB committed an unfair labor practice in violation of the Comprehensive Merit Personnel Act (CMPA) by refusing to recommend the Grievant for a Performance Allowance in retaliation for the Grievant's protected union activity.[2]

[1] *AFCSME, District Council 20, Local 2743 v. DISB*, Slip Op. No. 1864, PERB Case No. 23-U-06 (2024).
[2] Complaint at 4.

A hearing was held on the matter. The Board adopted the Hearing Examiner's Report and Recommendations[3] and held that DISB violated D.C. Official Code §§ 1-617.04(a)(1) and (4) by refusing to recommend the Grievant for a Performance Allowance for retaliatory reasons.[4] The Board ordered DISB, in pertinent part, to make the Complainant whole by paying the requested seven (7) percent Performance Allowance bonus for Fiscal Year 2022 and four (4) percent interest from the date the bonus should have been paid to the date of payment, as directed by the procedures of the District Personnel Manual (DPM), the DCMR, and any other applicable statutes or regulations.[5]

III. Discussion

DISB seeks reconsideration of the Board's decision in Opinion No. 1864 on the grounds that: (1) the ordered remedy is contrary to law; and (2) the Board erred in finding that AFSCME met its burden under the *Wright Line* test.[6]

DISB argues that: (1) the Board's ordered remedy violates the Bonus Pay and Special Awards Pay Act of 2016 (BPSA), which prohibits the use of funds to support the categories of bonus pay or special awards pay outside of statutory exceptions under the BPSA;[7] (2) that the Hearing Examiner's recommended remedy is not supported by the evidentiary record, and therefore the Board's adoption of that remedy was *ultra vires* and contrary to law;[8] (3) that the Hearing Examiner erred in concluding that AFSCME met the final element of the *Wright Line* test;[9] (4) that the Board violated District of Columbia Court of Appeals precedent by failing to include a rationale for holding that AFSCME met that element of the *Wright Line* test;[10] (5) that the refusal to recommend the Complainant for a Performance Allowance cannot be considered an adverse action because DISB does not have the legal authority to grant bonuses;[11] and (6) the failure to pay a bonus cannot be considered an adverse action.[12]

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[3] DISB filed exceptions to the Report, challenging the Hearing Examiner's finding that the agency failed to provide an affirmative defense to AFSCME's prima facie case of retaliation. Exceptions at 1. DISB further excepted to the Hearing Examiner's determination that he need not decide the issue of whether the "shall" language of Chapter 14 of the District of Columbia Municipal Regulations (DCMR) or the "may" language of Chapter 11 of the DCMR is controlling regarding agencies' discretion to recommend qualified employees for Performance Allowances. Exceptions at 1. However, DISB has not challenged that finding in its Motion.

[4] *AFSCME, District Council 20, Local 2743 v. DISB*, Slip Op. No. 1864 at 10. While the Complaint only alleged a violation of D.C. Official Code § 1-617.04(a)(4), retaliation against an employee for protected union activity is a derivative violation of D.C. Official Code § 1-617.04(a)(1). *See FOP/MPD Labor Comm. (on behalf of Sergeant Andrew J. Daniels) v. MPD*, 60 D.C. Reg. 12080, Slip Op. No. 1403 at 2-3, PERB Case No. 08-U-26 (2013)(finding that complaint alleging retaliation for filing a grievance against an agency constituted a claim under D.C. Official Code § 1-617.04(a)(1) and (4)).

[5] *AFSCME, District Council 20, Local 2743 v. DISB*, Slip Op. No. 1864 at 10.

[6] Motion at 1.

[7] Motion at 3.

[8] Motion at 5.

[9] Motion at 5.

[10] Motion at 5-8.

[11] Motion at 6.

[12] Motion at 7 (citing *Palermo v. Clinton*, 437 F. App'x 508 (7th Cir. 2011); *Miller v. Am. Fam. Mut. Ins. Co.*, 203 F.3d 997, 1006 (7th Cir. 2000); *Bill Chan, Plaintiff, v. PNC Bank, National Association*, No. 1:21-CV-00938, 2024 WL 1328610, at 5 (N.D. Ohio Mar. 28, 2024)). DISB also cites *Ebanks v. Neiman Marcus Grp., Inc.*, 414 F. Supp. 2d 320, 331 (S.D.N.Y. 2006)(holding that "[d]enial of a raise or merit bonus where one is warranted constitutes an adverse job action."). However, the court's holding in *Ebanks* directly conflicts with DISB's argument.

Each argument presented by DISB in its Motion presents a new argument not previously pressed before the hearing examiner or the Board. The Board rejects new arguments that could have been but were not presented to the Hearing Examiner as having been waived.[13]

A. The Board's award of a make-whole remedy including the requested Performance Allowance is not contrary to law.

DISB argues that the Board's ordered remedy violates the Bonus Pay and Special Awards Pay Act of 2016 (BPSA), which provides that "[u[nless authorized pursuant to this subchapter, **no funds shall be used** [emphasis original] to support the categories of bonus pay or special awards pay."[14] DISB asserts that it does not have authority to grant bonuses, nor does it meet any of the exceptions in D.C. Official Code § 1-551.06.[15] As noted by DISB, the BPSA allows the use of funds for bonus pay or special awards pay where an "agency has established a District of Columbia Human Resources…approved Performance Based Rewards Program…[or] the bonus is used for one of the enumerated exceptions in D.C. Code § 1-551.06."[16]

DISB's argument is unavailing, as it has been waived.[17] Notwithstanding, while DISB may require the District of Columbia Human Resources' (DCHR) approval for individual Performance Allowances, it is clear that DISB is part of an established Performance Based Rewards Program, as shown by DISB's extensive testimony regarding the typical procedure the agency uses to recommend its employees for Performance Allowances with DCHR.[18] DISB's purely semantic argument relies on the fact that DCHR must sign off and approve Performance Allowances at a particular stage of the process in order to suggest that DISB lacks authority to provide the ordered relief. DISB's assertion that it *cannot* pay bonuses contradicts its own testimony and the central argument it originally made before the Hearing Examiner, namely that the agency has complete discretion as to whether to exercise its management right to recommend employees for Performance Allowances.[19]

DISB further argues, without basis, that this alleged violation of the BPSA renders the Hearing Examiner's recommendation as not supported by the record in this case.[20] DISB has misinterpreted the meaning of the requirement that a hearing examiner's recommendations be supported by the record. The Board will affirm a hearing examiner's recommendations that are supported by the evidentiary record; that is, the Board will affirm a hearing examiner's findings of

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[13] *See Hamilton v. AFSCME, District Council 20* 63 D.C. Reg. 4598, Slip Op. No. 1564 at 3, PERB Case No. 16-S-01 (2016); *See also Jones-Patterson v. SEIU*, 62 D.C. Reg. 16471, Slip Op. No. 1546 at 3, PERB Case No. 14-S-06 (2015).
[14] Motion at 3 (citing D.C. Official Code § 1-551.02(a)).
[15] Motion at 4.
[16] Motion at 3.
[17] DISB failed to present its argument to the Hearing Examiner in its pleadings, testimony at hearing, to the Board in its Exceptions, or at any point prior to the Motion; therefore, it has waived this argument. (see citation)
[18] Report at 5-6, 9-10; *See also* DISB Post-Hearing Brief at 2, 4 (stating that "[t]he agency retains discretion about whether it grants a performance allowance;" "[t]he decision to grant the allowance is still up to the Agency's sole discretion.").
[19] DISB Post-Hearing Brief at 2, 4; *See also* Sept. 20, 2023 Tr. 38:10-16.
[20] Motion at 4.

fact and conclusions of law where those findings and conclusions have *evidentiary* support.[21] The Hearing Examiner here clearly and thoroughly analyzed the evidence and arguments presented to him by both parties and made recommendations supported by his analysis.

B. The Board did not err in finding that AFSCME met the elements of *Wright Line*.

DISB argues that the Board erred in finding that AFSCME met all elements of the *Wright Line* test.[22] DISB asserts both that the Board did not explain its reasoning regarding the fourth prong of the *Wright Line* test in sufficient detail and that because DISB does not have the authority to grant bonuses, the refusal to grant a bonus to the Complainant cannot constitute an adverse action.[23]

As noted, *supra*, DISB has waived the argument that it does not have the authority to award bonuses. Similarly, DISB has also waived the argument that its "refusal" to pay a bonus to the Complainant does not constitute an adverse action. While DISB did raise arguments regarding the *Wright Line* test before the Hearing Examiner and in its Exceptions, nowhere did DISB raise the argument that its refusal to pay a bonus to the Complainant did not constitute an adverse action. DISB had—and took—many opportunities to argue the ways that AFSCME failed to meet its evidentiary burden under *Wright Line*, and never argued that AFSCME had not asserted the requisite adverse action prior to this Motion.

In any event, the Complainant met all elements of *Wright Line*. The Board considered and adopted the Hearing Examiner's *Wright Line* analysis, which addressed the elements of *Wright Line* in detail.[24] The Board's adoption of the Hearing Examiner's recommendation that DISB violated the CMPA by refusing to recommend the Complainant for a Performance Allowance in retaliation for protected union activity necessarily implies that the Board held that such refusal was an adverse action.[25] Board precedent supports the finding that the denial of a discretionary bonus is an adverse action.[26]

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[21] *But see Darlene Bryant, et al. v. FOP/DOC Labor Comm.*, Slip Op. No. 1850 at 7, PERB Case No. 22-S-05 (2023) (declining to adopt the hearing examiner's factual determinations regarding FOP's legal fees, as those findings were unreasonable and unsupported by the evidentiary record).
[22] Motion at 5.
[23] Motion at 5-6.
[24] Report at 13-15.
[25] *FOP/MPD Labor Comm. v. MPD*, 63 D.C. Reg. 4589, Slip Op. No. 1563 at 6, PERB Case No. 11-U-20 (2016)(holding that investigating an employee immediately after that employee exercised protected union rights as a union official qualified as an adverse action).
[26] *See IBT Local 730 v. DCPS*, 43 D.C. Reg. 5585, Slip Op. No. 375 at 3-4, PERB Case No. 93-U-11 (1996)(finding that DCPS committed an unfair labor practice by reassigning an employee and downgrading the employee's annual performance rating to "satisfactory" in retaliation for filing a grievance); *See also FOP/MPD Labor Comm. (on behalf of Sergeant Andrew J. Daniels) v. MPD*, 60 D.C. Reg. 12080, Slip Op. No. 1403 at 3, PERB Case No. 08-U-26 (2013); *Sampay v. American University*, 294 A.3d 106, 116 (D.C. 2023)(holding that actions that a reasonable employee would find the challenged action materially adverse are adverse action, and therefore may dissuade reasonable workers from making or supporting a charge of discrimination)(citing *Propp v. Counterpart Intern.*, 39 A.3d 859, 863-64 (D.C. 2012)).

IV. Conclusion

The Board finds that DISB's Motion consists solely of new arguments that could have been but were not presented to the Hearing Examiner, and therefore have been waived by DISB. Therefore, the Motion for Reconsideration is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Motion for Reconsideration is Denied.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons and Peter Winkler.

June 26, 2024.

Washington, D.C.

APPEAL RIGHTS

A final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.