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

In the Matter of:	)	
	)	
Rayshawn Douglas	)	PERB Case No. 15-U-32
	)	
Complainant,	)	
	)	Opinion No. 1632
v.	)	
	)	
District of Columbia	)	
Housing Authority,	)	
	)	
Respondent.	)	
	)	

**DECISION AND ORDER**

**I. Introduction**

On July 17, 2015, Rayshawn Douglas (“Ms. Douglas”) filed an unfair labor practice complaint (“Complaint”). The Complaint alleged that the District of Columbia Housing Authority (“DCHA”) discriminated against her in violation of section 1-617.04(a)(1), (3) and (4) of the D.C. Official Code (“CMPA”), because she engaged in protected union activity. On August 17, 2015, DCHA filed a Motion to Dismiss. The matter was sent to a hearing and the Hearing Examiner’s Report and Recommendation (“Report and Recommendation”) is before the Board for disposition. No exceptions were filed in this case.

For the reasons stated herein, the Board adopts the Hearing Examiner’s Report and Recommendations and the Complaint is dismissed with prejudice.

**II. Statement of the Case**

In August of 2011, Ms. Douglas, a Staff Assistant with DCHA, received an 11-day disciplinary suspension.<sup>1</sup> After filing a grievance, she was subsequently reimbursed for wages lost due to the suspension.<sup>2</sup> While there is some discrepancy regarding the dates of reimbursement, it is uncontested that Ms. Douglas was reimbursed for most, if not all, of the 11 days of wages due to the suspension.

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<sup>1</sup> Report and Recommendations at 2.

<sup>2</sup> Report and Recommendations at 2-3.

On March 19, 2015, DCHA notified Ms. Douglas that she was being disciplined again.<sup>3</sup> As a result, she served a 14-day suspension and then filed a grievance regarding the disciplinary action. After a review and investigation, DCHA reduced the discipline to a two day suspension and reimbursed Ms. Douglas for 12 days of lost wages due to the suspension.<sup>4</sup>

In this case, Complainant asserts that the 2015 suspension was in retaliation for her exercise of her rights under the grievance procedure in connection with the 2011 suspension.

### **III. Hearing Examiner's Report and Recommendation**

#### **A. Factual Findings**

The threshold issue determined by the Hearing Examiner was whether PERB has substantive jurisdiction over the claims made by Ms. Douglas. DCHA claimed that the allegations fell outside the Board's authority under the CMPA and as a result should be dismissed. DCHA cited numerous cases which state that the Board is empowered to resolve statutory violations but not contractual violations such as a collective-bargaining agreement ("CBA").<sup>5</sup> The Hearing Examiner found that the Board does have jurisdiction over the claims at issue because the issues in this case do not revolve around competing CBA interpretations.<sup>6</sup>

The Hearing Examiner went on to explain that in order for Ms. Douglas to succeed on her claim of retaliation, she must show that the 2011 disciplinary action was at least a motivating factor in DCHA's decision to discipline her again in 2015.<sup>7</sup> The Hearing Examiner stated that a successful retaliation claim would find remedies unavailable in a contract action.<sup>8</sup>

The Hearing Examiner next determined whether the claim established a prima facie case for retaliation.<sup>9</sup> In order to determine whether the disciplinary action was in retaliation for engaging in protected union activity, the Board has adopted the test formulated by the NLRB case *Wright Line and Lamoreux*.<sup>10</sup> The *Wright Line* test states that in order to establish a prima facie case the complainant must show that the employee engaged in protected union activities, the agency knew about the employee's protected union activities, and as a result of anti-union animus or retaliatory animus, the agency took adverse employment action against the employee.<sup>11</sup> The complaining party has the initial burden of establishing a prima facie case by showing that the union or other protected activity was a motivating factor in the employer's

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<sup>3</sup> Report and Recommendations at 2.

<sup>4</sup> Report and Recommendations at 2.

<sup>5</sup> Report and Recommendations at 4.

<sup>6</sup> Report and Recommendations at 4.

<sup>7</sup> Report and Recommendations at 4.

<sup>8</sup> Report and Recommendations at 4.

<sup>9</sup> Report and Recommendations at 4.

<sup>10</sup> 251 N.L.R.B. 1083, 1089 (1980), enforced, 622 F.2d 899 (1<sup>st</sup> Cir. 1981); See also *Fraternal Order of Police/D.C. Metro. Police Dep't Labor Comms. v. D.C. Metro. Police Dep't*, 63 D.C. Reg. 4589, PERB Case No. 11-U-20 (2016).

<sup>11</sup> *Fraternal Order of Police/D.C. Metro. Police Dep't Labor Comms. v. D.C. Metro. Police Dep't*, 63 D.C. Reg. 4589, PERB Case No. 11-U-20 (2016).

disputed action. The burden then shifts to the employer to demonstrate that the same disputed action would have taken place notwithstanding the protected activity.<sup>12</sup>

It is uncontested that Ms. Douglas engaged in protected union activities.<sup>13</sup> The agency was aware that Ms. Douglas engaged in protected union activity because she made use of DCHA's grievance procedure for protesting a disciplinary action.<sup>14</sup> However, the Hearing Examiner found that the claim failed the *Wright Line* test because Ms. Douglas was not able to show any evidence of anti-union animus.<sup>15</sup> In fact, the Hearing Examiner states that Ms. Douglas offered "not a scintilla of evidence sufficient to establish a prima facie case of retaliation."<sup>16</sup> Without establishing anti-union animus, it cannot be a motivating factor of the adverse employment action.<sup>17</sup> According to the Hearing Examiner, there was no evidence of a connection between the disciplinary action and anti-union animus.<sup>18</sup> Without a connection between anti-union animus and DCHA's actions, the Complaint did not present a prima facie case of retaliation.

#### B. Recommendations

The Hearing Examiner found that, while the Board did have jurisdiction over this case, the Complainant failed to establish a prima facie case for anti-union retaliation.<sup>19</sup> The Report and Recommendations concluded that the motion to dismiss should be granted and the case be dismissed with prejudice.<sup>20</sup>

#### IV. Discussion

The Board will affirm a Hearing Examiner's findings if the findings are reasonable, supported by the record, and consistent with Board precedent.<sup>21</sup> Issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner.<sup>22</sup> Mere disagreements with the Hearing Examiner's findings and/or challenging the Hearing Examiner's findings with competing evidence do not constitute proper exceptions if the record

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<sup>12</sup> *AFSCME, Local 2401 v. D.C. Dep't of Human Servs.*, 48 D.C. Reg. 3207, Slip Op. No. 644 at pp. 5-6, PERB Case No. 98-U-05 (2001).

<sup>13</sup> Report and Recommendations at 5.

<sup>14</sup> It should be noted that Ms. Douglas' supervisor, Keisha Williams, was not her supervisor at the time of the 2011 disciplinary action and stated during the hearing that she was not aware of the previous disciplinary action until these proceedings began.

<sup>15</sup> Report and Recommendations at 5.

<sup>16</sup> Report and Recommendations at 5.

<sup>17</sup> Report and Recommendations at 5.

<sup>18</sup> Report and Recommendations at 5.

<sup>19</sup> Report and Recommendations at 6.

<sup>20</sup> Report and Recommendations at 6.

<sup>21</sup> See *Am. Fed'n of Gov't Emp., Local 872 v. D.C. Water and Sewer Auth.*, 52 D.C. Reg. 474, Slip Op. No. 702, PERB Case No. 00-U-12 (2003).

<sup>22</sup> *Fraternal Order of Police/D.C. Metro. Police Dep't Labor Comms. v. D.C. Metro. Police Dep't*, 62 D.C. Reg. 3544 Op. No. 1506, PERB Case No. 11-U-50(a) (2015).

contains evidence supporting the Hearing Examiner's conclusions.<sup>23</sup> Neither party filed exceptions to the Hearing Examiner's Report; however, DCHA submitted a post hearing brief to the Arbitrator on February 19, 2017.<sup>24</sup>

#### A. Jurisdiction

DCHA requests the Board grant its motion to dismiss as the case is not within the Board's jurisdiction.<sup>25</sup> DCHA argues that the Complaint requires the Board to replace the negotiated grievance and arbitration process between AFGE 2725 and DCHA.<sup>26</sup> According to DCHA, in order to adjudicate this Complaint, the Board will have to interpret the parties' CBA. The CBA contains procedures for an employee to advance a grievance to arbitration without the union's involvement. Ms. Douglas failed to follow these procedures and now the Board must stand in the place of the arbitrator.<sup>27</sup> DCHA states that the Board does not have jurisdiction over this case and the matter should be dismissed with prejudice.

The Board rejects DCHA's assertion that the Board does not have jurisdiction. The CMPA empowers the Board to resolve statutory violations, but not contractual violations. DCHA relies on PERB Case No. 08-U-22 which states, "[I]f the record demonstrates that an allegation concerns a statutory violation of the CMPA, then even if it also concerns a violation of the parties' contract, the Board still has jurisdiction over the statutory matter and can grant relief accordingly if the allegation is proven."<sup>28</sup> The Board does not have jurisdiction if it must interpret the parties' CBA in order to determine if there has been a violation of the CMPA. The Complaint in this case asks the Board to determine whether there has been a violation of the CMPA based on retaliation for protected union activity. Regardless of the CBA, the CMPA provides a remedy for such a violation. If the record demonstrates that the allegations do concern violations of the CMPA, then the Board unquestionably has jurisdiction over those allegations.<sup>29</sup>

#### B. Prima Facie Case of Retaliation

If the Board declines to grant the motion to dismiss for lack of jurisdiction, DCHA requests the Board dismiss the case for failure to meet the burden of proof to establish an unfair labor practice.<sup>30</sup> DCHA states that Ms. Douglas failed to provide sufficient evidence to support her claim that there was anti-union animus or retaliatory animus by the agency. DCHA presented evidence at the hearing to show that the discipline was not because of any union activity but rather because Ms. Douglas disregarded orders from her superiors and failed to

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<sup>23</sup> *Sinobia Brinkley v. Fraternal Order of Police/Metro. Police Dep't Labor Comms., District 20, Local 2087*, 60 D.C. Reg. 17387, Slip Op. No. 1446, PERB Case No. 10-U-12 (2013).

<sup>24</sup> Report and Recommendations at 2

<sup>25</sup> DCHA Post-Hearing Br. 4.

<sup>26</sup> DCHA Post-Hearing Br. 5.

<sup>27</sup> DCHA Post-Hearing Br. 6.

<sup>28</sup> *Fraternal Order of Police/D.C. Metro. Police Dep't Labor Comms. v. D.C. Metro. Police Dep't*, 62 D.C. Reg. 13348, Slip Op. No. 1534 at 7, PERB Case No. 08-U-22 (2015).

<sup>29</sup> *Fraternal Order of Police/D.C. Metro. Police Dep't Labor Comms. v. D.C. Metro. Police Dep't*, 60 D.C. Reg. 9212, Slip Op. No. 1391, PERB Case Nos. 09-U-52 and 09-U-53(2013).

<sup>30</sup> DCHA Post-Hearing Br. 6.

complete assignments in a timely manner.<sup>31</sup> If the Board does not dismiss this case for a lack of jurisdiction, DCHA requests the Board dismiss this case for failing to show a violation of the CMPA.<sup>32</sup>

The Hearing Examiner found that Ms. Douglas failed to meet her burden under the *Wright Line* test. Ms. Douglas, the complaining party, must show that anti-union animus and/or retaliation was at least a motivating factor in a decision to take adverse employment action.<sup>33</sup> According to the Hearing Examiner, Ms. Douglas did not meet the required burden of proof to show a prima facie case of anti-union animus and retaliation. As stated earlier, issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner. A review of the record reveals that the Hearing Examiner's findings and conclusion are reasonable, supported by the record and consistent with Board precedent.

## **V. Conclusion**

No exceptions were filed to the Hearing Examiner's recommendation that the Complaint be dismissed. Pursuant to Board Rule 520.14, the Board finds the Hearing Examiner's conclusions and recommendations reasonable, supported by the record and consistent with Board precedent. Accordingly, the Board adopts the Hearing Examiner's Report and the Complaint is dismissed.

## **ORDER**

### **IT IS HEREBY ORDERED THAT:**

1. Rayshawn Douglas' Unfair Labor Practice Complaint is dismissed with prejudice.
2. Pursuant to Board Rule 559, this Decision and Order shall become final thirty (30) days after issuance unless a party files a motion for reconsideration or the Board reopens the case within fourteen (14) days after issuance of the Decision and Order.

### **BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**

By unanimous vote of Board Members Douglas Warshof, Barbara Somson and Mary Anne Gibbons.

July 27, 2017

Washington, D.C.

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<sup>31</sup> DCHA Post-Hearing Br. 8.

<sup>32</sup> DCHA Post-Hearing Br. 8.

<sup>33</sup> *Id.*

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 15-U-32, Op. No. 1632 is being transmitted to the following parties on this the 31<sup>st</sup> day of July 2017.

Rayshawn Douglas  
1330 Dillon Court  
Capital Heights, MD 20743

**via U.S. Mail**

Kaitlyn Girard, Esq.  
Office of the General Counsel  
District of Columbia Housing Authority  
1133 North Capital Street, NE  
Suite 210  
Washington, D.C. 20002

**via File&ServeXpress**

/s/ Merlin George  
PERB