GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
Valerie A. Ware,	
Complainant,	**PERB Case No. 96-U-21**
v.	**Opinion No. 571**
District of Columbia Department of Consumer and Regulatory Affairs,	
Respondent.	

DECISION AND ORDER

The background and issues underlying this case are set out by the Hearing Examiner in his Report and Recommendation.[1]/ The Hearing Examiner found that the Complainant Valerie A. Ware, a supervisory employee, is protected under the Comprehensive Merit Personnel Acts' (CMPA) unfair labor practice section, as prescribed under D.C. Code § 1-618.4(a)(4). However, the Hearing Examiner found that the Complainant did not meet her burden of proof that her employing agency, Respondent District of Columbia Department of Consumer and Regulatory Affairs (DCRA), violated D.C. Code § 1-618.4(a)(4). The Complainant had charged that DCRA detailed her to another division of DCRA because she filed a grievance against her supervisor.

Based on his findings and conclusions, the Hearing Examiner recommended that the Complaint be dismissed in its entirety. On July 20, 1998, the Complainant filed Exceptions to the Hearing Examiner's Report and Recommendation to which DCRA filed an Opposition.

The Complainant's Exceptions are actually her assessment of the evidence to support conclusions she believes the Hearing Examiner should have drawn. Based on her assessment of the

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[1]/ The Hearing Examiner's Report and Recommendation is attached as an appendix to this Opinion.

evidence, the Complainant also takes issue with the Hearing Examiner's conclusion that she failed to meet her burden of proof. The Hearing Examiner's conclusions, however, are supported by evidence contained in the record. The evidence supporting Complainant's contentions, while also part of the record, was considered and found insufficient and/or unpersuasive to sustain the prima facie showing of a violation.

Here, the Hearing Examiner found that the evidence presented by the Complainant "just barely" established a rebuttal presumption that her detail by DCRA was motivated by reasons proscribed under D.C. Code Sec. 1-618.4(a)(4), e.g., filing a grievance. (R&R at 11.) However, the Hearing Examiner concluded that the presumption was rebutted by evidence that the grievance merely served as a vehicle for identifying a solution, i.e., separating the two employees, to resolve "a long-standing and apparently intractable problem", i.e., animosity, between the Complainant and her supervisor. (R&R at 14.) The Hearing Examiner concluded that the Respondent's decision to "move the Complainant rather than her supervisor is a substantive management judgement, based on its assessment of its own needs... ." Thus, the Respondent met its burden of establishing its legitimate reason that the detail would have occurred notwithstanding the Complainant's filing of the grievance against her supervisor. Once the burden is shifted to the employer, "the employer's burden is limited to a rebuttal of the presumption created by the complainant's prima facie showing" not "of proving that the unfair labor practice did not occur." Green v. D.C. Dept. of Corrections, 41 DCR 5991, 5993, supra.[2]/

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[2]/ In assessing whether a Complainant has met its burden of proof in an dual motive case, such as the instant case, the Board has adopted the two-part test of Wright Line to determine the existence of a violation. The Wright Line standard was developed as a rule for allocating the burdens of proof to determine the existence of an unfair labor practice violation where mixed or dual motives exist, i.e., prohibited and non-prohibited, for actions taken by employers against their employees. See, Wright Line, Inc., 250 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 US 989 (1982). The Board adopted this approach in Charles Bagenstose and Dr. Joseph Borowski v. District of Columbia Public Schools, 35 DCR 415, Slip Op. No. 270, PERB Case No. 88-U-33 and 88-U-34 (1991).

Under the Wright Line analysis, the Board has observed as follows:

> ... the Complainant's "prima facie showing creates a kind

(continued...)

Complainant's exceptions merely disagrees with the Hearing Examiner's findings in this regard based on the probative value she has accorded certain evidence.

Challenges to a Hearing Examiner's findings based on competing evidence do not give rise to a proper exception where, as here, the record contains evidence supporting the Hearing Examiner's conclusion. See, Clarence Mack v. D.C. Dept. of Corrections, Slip Op. No. 467, PERB Case No. 95-U-14 (1996) and American Federation of Government Employees, Local 872 v. D.C. Dept. of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Cases Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). Issues concerning the probative value of evidence are reserved to the Hearing Examiner. See, e.g., University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia, 39 DCR 6238, Slip Op. No. 285, PERB Case No. 86-U-16 (1992) and Charles Bagenstose, et al. v. D.C. Public Schools, 38 DCR 4154, Slip Op. No. 270, PERB Case Nos. 88-U-33 and 88-U-34 (1991). Therefore, we find no basis for the Complainant's Exceptions.

Pursuant to D.C. Code § 1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings and conclusions of the Hearing Examiner and find them to be reasonable and supported by the record. We therefore adopt the recommendation of the Hearing Examiner that the Complaint be dismissed.

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[2](...continued)
of presumption that the unfair labor practice has been committed." [Wright Line, Inc., 250 NLRB 1083 (1980), enf'd. 662 F.2d 899,] at 905. Once the showing is made 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. Rather, the employer's burden is limited to a rebuttal of the presumption created by the complainant's prima facie showing. The First Circuit in Wright Line articulated this standard as "producing evidence to balance, not [necessarily] to outweigh, the evidence produced by the general counsel." Id.

Green v. D.C. Dept. of Corrections, 41 DCR 5991, 5993, Slip Op. No. 323, at p. 3, PERB Case No. 91-U-13 (Supp. Dec.)(1994).

ORDER

IT IS HEREBY ORDERED THAT:

The Complaint is dismissed.

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

November 10, 1998

CERTIFICATE OF SERVICE

This is to certified that the attached Decision and Order in PERB Case No. 96-U-21 faxed, hand-delivered and/or mailed (U.S. Mail) to the following parties on this the 10th day of November, 1998.

Lathal Ponder, Jr., Esq. — U.S. MAIL
Law Office of Squire Padgett
1835 K Street, N.W.
Suite 900
Washington, D.C. 20006

Dean S. Aqui, Deputy Director — U.S. MAIL
Office of Labor Relations and
Collective Bargaining
441 4th Street, N.W., Ste. 200S
Washington, D.C. 20001

Coutesy Copies

Barry E. Shapiro — U.S. Mail
Hearing Examiner
8404 Queen Annes Drive
Silver Spring, MD 20910

Namsoo M. Dunbar
Deputy Executive Director