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

_____)	
In the Matter of:)	
)	
Federation of Administrative Law Judges)	
International Federation of)	
Professional and Technical Engineers)	PERB Case No. 17-U-31
)	
Petitioner)	Opinion No. 1719
)	
v.)	
)	
Office of Administrative Hearings)	
)	
Respondent)	
_____)	

DECISION AND ORDER

I. Introduction

On July 6, 2017, the Federation of Administrative Law Judges – D.C., International Federation of Professional and Technical Engineers (Union) filed this unfair labor practice complaint (Complaint) against the Office of Administrative Hearings (Agency). The Complaint alleges that the Agency violated section 1-617.04(a)(1) and (3) of the D.C. Official Code.¹ The matter was sent to a hearing, and the Hearing Examiner’s Report and Recommendation (Report) is before the Board for disposition. The Union filed exceptions to the Report, and the Agency filed an opposition to the Union’s exceptions.

The Board finds the Hearing Examiner’s Report and Recommendation reasonable, supported by the record, and consistent with Board precedent. The Board agrees that the Chief Administrative Law Judge’s negative recommendation did not violate the Comprehensive Merit Personnel Act (CMPA). However, based on a separate incident, the Agency did interfere with, restrain, and coerce Judge Jesse Goode in the exercise of rights guaranteed by the CMPA in violation of D.C. Official Code section 1-617.04(a)(1).

¹ Complaint at 1.

II. Statement of the Case

On June 20, 2005, Jesse Goode (Judge Goode) began working as an administrative law judge (ALJ) for the Agency. Judge Goode was a leading union organizer of ALJs and was elected as the first union President on December 15, 2014.²

On December 9, 2016, Chief Administrative Law Judge Eugene Adams (Chief Judge Adams) announced to Agency staff that he had created a new position called the Principal Administrative Law Judge (PALJ) for Information Systems and Technology and placed Judge Ann Yahner in the position.³ Judge Goode and other union officers informed Chief Judge Adams that they believe the unilateral creation of this new position violated their collective bargaining agreement (CBA). On December 15, 2016, a meeting took place between the Union and the Agency including Chief Judge Adams, the Agency General Counsel Vanessa Natale (Ms. Natale), Judge Goode, and other union officials. At this meeting, Chief Judge Adams apologized for his oversight and pledged to correct it.⁴ On December 16, 2016, Chief Judge Adams wrote to all Agency personnel stating that he did not comply with the CBA in his unilateral creation of the position, that he rescinded his decision until further notice, and the Union would be permitted to make suggested changes to Chief Judge Adams' proposal for the new position.⁵

On December 13, 2016, Judge Goode submitted to the Agency's Commission on Selection and Tenure for Administrative Law Judges (COST) his request for reappointment as an ALJ for a six-year term.⁶ Only the COST has the authority to appoint or reappoint an ALJ.⁷ As part of the reappointment process, the COST published a notice in the District of Columbia Register soliciting views of litigants, attorneys, and members of the public on whether Judge Goode should be reappointed.⁸ The Chief Judge has the sole and exclusive authority to prepare a record of an ALJ's performance with regard to the judge's efficiency, efficacy, and quality of performance over the period of his appointment.⁹ The COST members give significant weight to the recommendation of the Chief Judge, unless they find that the recommendation is not based on substantial evidence.¹⁰

In response to the notice of Judge Goode's reappointment, the COST received twenty responses. Out of the twenty, thirteen were favorable and seven were in opposition to Judge Goode's reappointment. The unfavorable responses were critical of Judge Goode's temperament,

² Report at 3.

³ Report at 4.

⁴ Report at 5.

⁵ Report at 5.

⁶ Report at 3.

⁷ 6-B DCMR § 3705.20.

⁸ Report at 3.

⁹ D.C. Official Code § 2-1831.10(b).

¹⁰ Report at 3.

interaction with coworkers, and inappropriate treatment of staff.¹¹ Based on the seriousness of the allegations, Chief Judge Adams instructed Ms. Natale to initiate an investigation.¹²

On March 22, 2017, Ms. Natale met with Judge Goode to speak to him about the negative reviews he received regarding his reappointment.¹³ The Union alleges that, during this meeting, Ms. Natale directly threatened Judge Goode with a negative reappointment recommendation unless he convinced the Union to withdraw its objection to Chief Judge Adams's creation of the PALJ position and the appointment of Judge Yahner to the position.¹⁴ Both Judge Goode and Ms. Natale testified that neither one of them mentioned this meeting to Chief Judge Adams.¹⁵ Ms. Natale denied telling Judge Goode that the Union should fall in line or that she would derail his reappointment.¹⁶

On April 5, 2017, the Union responded to Chief Judge Adams stating that, though it agreed that there is a need to improve the use of technology, specifically the electronic case management system, the Union does not believe the creation of the PALJ position is the best way to address these issues.

On April 12, 2017, Chief Judge Adams met with Judge Goode to discuss the investigation regarding his reappointment. Judge Goode agreed to allow Assistant General Counsel Shawn Nolan to conduct the investigation.¹⁷ On June 7, 2017, Chief Judge Adams advised Judge Goode via email of his decision not to recommend his reappointment. On June 20, 2017, Chief Judge Adams submitted a formal statement to the COST that reviewed the investigation and the reasons he could not support the reappointment of Judge Goode.¹⁸

III. Hearing Examiner's Report and Recommendation

The issues before the Hearing Examiner were whether the Agency (1) committed unfair labor practices by interfering, restraining, and coercing Judge Goode in the exercise of his rights in violation of D.C. Official Code 1-617.04(a)(1); and (2) discriminated regarding tenure or terms and conditions of employment against Judge Goode to discourage membership in a labor organization in violation of 1-617.04(a)(3).¹⁹

A. March 22, 2017 meeting between Ms. Natale and Judge Goode

The Hearing Examiner found that the Agency violated section 1-617.04(a)(1) of the D.C. Official Code. According to the Hearing Examiner, the discussion and statements of Ms. Natale during the March 22, 2017, meeting directly interfered with and coerced Judge Goode in the

¹¹ Report at 3.

¹² Report at 11.

¹³ Report at 7.

¹⁴ Report at 7.

¹⁵ Report at 8.

¹⁶ Report at 8-9.

¹⁷ Report at 11.

¹⁸ Report at 4.

¹⁹ Report at 1.

exercise of rights guaranteed under the CMPA.²⁰ The Hearing Examiner made this determination based on the evidence presented and the testimony of various parties during the hearing.

Judge Goode notified Judge Wanda Tucker and Judge William England about the March 22, 2017 conversation with Ms. Natale. Both Judge Tucker and Judge England testified at the hearing that Judge Goode spoke with them shortly after the meeting. Judge Tucker testified that Judge Goode told her that Ms. Natale had stated that she would push for Judge Goode's reappointment in return for the Union's support for the creation of the new PALJ position and that Ms. Natale would use her good relationship with the COST Chair to push for his reappointment.²¹ Judge England, as well as IFPTE International Secretary-Treasurer Paul Shearson, testified that they advised Judge Goode to memorialize the conversation.²²

The Hearing Examiner found the testimony of Judge Goode, Judge Tucker, Judge England, and Mr. Shearson to be consistent with the memorialized statements prepared by Judge Goode on March 22, 2017. The Hearing Examiner notes that Judge Goode's statements were prepared before Chief Judge Adams' unfavorable recommendation of Judge Goode in June 2017.²³ Based on the evidence and testimony, the Hearing Examiner found that it was reasonable to conclude that Ms. Natale did make these statements during the meeting and therefore interfered with, restrained, and coerced Judge Goode in the exercise of rights guaranteed in the CMPA in violation of D.C. Official Code 1-617.04(a)(1).²⁴

B. Chief Judge Adams' negative recommendation

The Union argued that, because the Union refused to withdraw its opposition to the creation of the new PALJ position and the appointment of Judge Yahner, Chief Judge Adams refused to support the reappointment of Judge Goode.²⁵ This conduct, according to the Union, is a violation of section 1-617.04(a)(3). The Hearing Examiner rejected this argument and found no violation of section 1-617.04(a)(1) or (3) regarding Chief Judge Adams actions.

Based on the record, the Hearing Examiner found that the Union did not meet its burden of establishing that antiunion sentiment was a substantial or motivating factor in Chief Judge Adams' decision not to recommend Judge Goode's reappointment.²⁶ The Hearing Examiner noted examples of the cordial relationship between the Union and Chief Judge Adams. For example, the Union did not file a grievance against Chief Judge Adams when he first created the PALJ position for Judge Yahner. Instead, a meeting was held and Chief Judge Adams rescinded his decision and even allowed the Union to make changes to his letter rescinding the decision.²⁷ Furthermore, the record shows that Chief Judge Adams and the Union have addressed multiple

²⁰ Report at 9.

²¹ Report at 9.

²² Report at 9.

²³ Report at 10.

²⁴ Report at 10.

²⁵ Report at 10.

²⁶ Report at 14.

²⁷ Report at 14.

issues in a collaborative fashion such as negotiating their initial CBA.²⁸ Finally, the Hearing Examiner notes that Chief Judge Adams was not aware of the March 22, 2017 conversation between Judge Goode and Ms. Natale.

The Hearing Examiner concluded that, in the absence of antiunion animus, there cannot be a violation of 1-617.04(a)(1) or (3) as alleged by the Union.

IV. Exceptions to Hearing Examiner's Report

The Union filed exceptions to the Hearing Examiner's Report and Recommendation as well as a motion for a full PERB hearing pursuant to PERB Rule 556.5.²⁹ According to the Union, the Hearing Examiner erred by not finding that the Agency engaged in retaliatory, anti-union animus based on the following actions: the decision to conduct an investigation into the complaints against Judge Goode, the delay in launching the investigation, and the lack of a fair investigation.³⁰ The Union also states that the Hearing Examiner erred by not finding that the Agency took adverse employment action against Judge Goode because of his protected union activities.³¹ Finally, the Union also states that the Hearing Examiner rejected well established PERB and National Labor Relations Board precedents by finding that the Union did not establish a *prima facie* case and by not shifting the burden of proof to the Agency to demonstrate that it would have taken adverse employment action against Judge Goode notwithstanding the protected activity.³²

The Agency did not file exceptions to the Hearing Examiner's Report and Recommendation, but it did file an Opposition to the Union's Exceptions.³³ According to the Agency, the Union's exceptions are identical to the arguments presented in its post-hearing brief, which were considered and rejected by the Hearing Examiner.³⁴ The Agency also states that the Union presented only a mere disagreement with the Hearing Examiner's interpretation of the evidence.

V. Motion to Reopen and Supplement the Record

On May 10, 2019, the Union filed a Motion to Reopen and Supplement the Record with Points and Authorities (Motion). On May 16, 2019, the Board voted to remand this matter to the Hearing Examiner to determine whether to grant or deny the Motion. If the Motion was granted, the Board instructed the Hearing Examiner to determine whether and how the supplemental information would change his Report.

²⁸ Report at 14.

²⁹ The motion for a full PERB hearing is denied. As there is no new evidence or changes to this case since the hearing, oral arguments before the Board would not be useful.

³⁰ Exceptions at 1.

³¹ Exceptions at 2.

³² Exceptions at 2.

³³ As part of the Agency's Opposition to the Union's Exception, the Agency requested the Board strike the portion of the Union's Exceptions that exceeds 20 pages based on PERB Rule 501.9. This request is denied and the Union's entire filing will be considered. Accepting the totality of the Union's Exceptions does not prejudice either party.

³⁴ Opposition at 3.

The Motion asserts that the Agency failed to provide a transcript from a meeting the COST held on June 29, 2017. According to the Union, the transcript shows that the COST and Chief Judge Adams acknowledge that their efforts to unseat Judge Goode were union busting.³⁵

The Hearing Examiner found that the Union's assertion is not supported by the transcript. A COST member raised the issue of union busting so the Agency could not be accused of such conduct.³⁶ The Hearing Examiner further notes that this member is one out of three voting COST members who unanimously declined to reappoint Judge Goode.³⁷ The Hearing Examiner also notes that the Union's request for documents in its subpoenas to the Agency and to the COST members did not address transcripts. Therefore, the Hearing Examiner found that the Motion should be denied and there are no changes to his Report.

VI. Discussion

The Board will affirm a Hearing Examiner's Report and Recommendation if the recommendations are reasonable, supported by the record, and consistent with Board precedent.³⁸ Pursuant to Board Rule 520.11, "the party asserting a violation of the CMPA shall have the burden of proving the allegations of the complaint by a preponderance of the evidence."

A. March 22, 2017 meeting between Ms. Natale and Judge Goode

The Agency argued in its post-hearing brief that a reasonable person could not have drawn a coercive inference from Ms. Natale's statements during her conversation with Judge Goode on March 22, 2017.³⁹ The Agency points to Ms. Natale and Judge Goode's established friendship, the fact that Ms. Natale and Judge Goode regularly spoke to each other in a direct style of communication, and Ms. Natale's explicit statement that she was advising him as a friend. The Agency further states that Judge Goode is not a credible witness.⁴⁰

The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner."⁴¹ The Hearing Examiner reasonably found that Ms. Natale's statements were in violation of section 1-617.04(a)(1) based on the testimony of various individuals as well as the record. A mere disagreement with the Hearing Examiner's findings is not a basis for a reversal of findings that are fully supported by

³⁵ Order Denying the Complainant's Motion to Reopen and Supplement the Record at 2.

³⁶ Order at 4.

³⁷ Order at 4.

³⁸ See *Am. Fed'n of Gov't Emp., Local 1403 v. D.C. Office of the Attorney General*, 59 D.C. Reg. 3511, Slip Op. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012).

³⁹ Agency's Post Hearing Brief at 8.

⁴⁰ Agency's Post Hearing Brief at 8.

⁴¹ *Council of Sch. Officers, Local 4, Am. Fed'n of Sch. Adm'r v. D.C. Pub. Schs.*, 59 D.C. Reg. 6138, Slip Op. 1016 at 6, PERB Case No. 09-U-08 (2010).

the record.⁴² The Board finds the Hearing Examiner's conclusion reasonable, supported by the record, and consistent with Board precedent.

B. Chief Judge Adams' negative recommendation

To establish a *prima facie* case of retaliation, the Union must have shown that (1) Judge Goode engaged in protected union activities; (2) the Agency knew about Judge Goode's protected union activities; (3) the Agency exhibited anti-union animus or retaliatory animus; and (4) as a result, the Agency took adverse employment action against Judge Goode.⁴³ Furthermore, the Agency's employment decision must have been analyzed according to the totality of the circumstances, including the history of anti-union animus, the timing of the employment action, and disparate treatment.⁴⁴ Establishing a *prima facie* case creates a presumption that an unfair labor practice has been committed. The employer may rebut the presumption by proving an affirmative defense by a preponderance of the evidence.⁴⁵

In this case the Hearing Examiner found that the Union failed to meet its burden of establishing a *prima facie* case that anti-union animus was a substantial or motivating factor in the decision not to recommend reappointment of Judge Goode.⁴⁶ The Hearing Examiner based this conclusion on the record, including Chief Judge Adams' relationship with the Union, his relationship with Judge Goode, and the timeline of events. As stated earlier, "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner."⁴⁷ The Board finds the Hearing Examiner's conclusion reasonable, supported by the record, and consistent with Board precedent.

VII. Conclusion

Pursuant to Board Rule 520.14, the Board finds the Hearing Examiner's conclusions and recommendations to be reasonable, supported by the record, and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner's report and recommendation.

⁴² See, *American Federation of Government Employees, Local 874 v. D.C. Department of Public Works*, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991)

⁴³ *American Federation of Government Employees, Local 2978 v. District of Columbia Office of the Chief Medical Examiner*, 60 D.C. Reg. 5801, Slip Op. No. 1348 (Amended) at p. 4, PERB Case No. 09-U-62 (2013) (citing *Doctors Council of the District of Columbia v. District of Columbia Commission on Mental Health Services*, 47 D.C. Reg. 7568, Slip Op. No. 636 at p. 3, PERB Case No. 99-U-06 (2000); and *District of Columbia Nurses Association v. District of Columbia Health and Hospitals Public Benefit Corporation*, 46 D.C. Reg. 6271, Slip Op. No. 583, PERB Case No. 98-U-07 (1999)).

⁴⁴ *Id.*

⁴⁵ *Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 63 D.C. Reg. 4589, Slip Op. No. 1563, PERB Case No. 11-U-20 (2016).

⁴⁶ Report at 14-15.

⁴⁷ *Council of Sch. Officers, Local 4, Am. Fed'n of Sch. Adm'r v. D.C. Pub. Schs.*, 59 D.C. Reg. 6138, Slip Op. 1016 at 6, PERB Case No. 09-U-08 (2010).

ORDER

IT IS HEREBY ORDERED THAT:

1. The Hearing Examiner's Report and Recommendation is adopted.
2. The Office of Administrative Hearings shall cease and desist from interfering with, restraining, or coercing an Administrative Law Judge in the exercise of the rights guaranteed him under D.C. Code § 1-617.04(a)(1).
3. The Office of Administrative Hearings shall post at its facilities in Washington, D.C. copies of the attached notice. Copies of the notice shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means.
4. The Office of Administrative Hearings shall file with the Board a sworn certification of a responsible official attesting to the steps the Respondent has taken to comply
5. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy and Board Members Mary Anne Gibbons and Douglas Warshof.

July 17, 2019

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 17-U-31, Op. No. 1719 was sent by File and ServeXpress to the following parties on this the 24th day of July, 2019.

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