

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:	)	
Georgia Mae Green,	)	
Complainant,	)	
and	)	PERB Case No. 91-U-13
District of Columbia	)	Opinion No. 323
Department of Corrections,	)	
Respondent.	)	

DECISION AND ORDER

On June 11, 1991, Georgia Mae Green (Complainant), a D.C. Government employee <sup>1/</sup>, filed an Unfair Labor Practice with the Public Employee Relations Board (Board). The Complaint, as amended on June 28, 1992, alleged that certain named officials of the Department of Corrections (DOC) and her immediate supervisor unlawfully discriminated against the Complainant by taking reprisals against her in "retaliation for her persistence in pursuing those rights guaranteed her by [D.C. Code] Section 1-618.4(a)(1) and (4)" of the Comprehensive Merit Personnel Act (CMPA). <sup>2/</sup> (Amend. Compl. at 5.)

On July 15, 1991, the Office of Labor Relations and Collective Bargaining (OLRCB), on behalf of DOC, filed an Answer

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<sup>1/</sup> A dispute exists as to whether the Complainant remains an employee of DOC as a result of her transfer from DOC's Central Facility at Lorton to the Correctional Litigation Section. We agree, however, with the Hearing Examiner's observation that "the resolution of that dispute is not...germane to the issue at hand." (R&R at 10.)

<sup>2/</sup> Specifically, the reprisals allegedly consisted of: (1) hostile remarks by Complainant's supervisor toward her concerning DOC's posting of a Notice issued by the Board in a related case involving these same parties, Georgia Mae Green v. District of Columbia Department of Corrections, 37 DCR 8086, Slip Op. No. 257, PERB Case No. 89-U-10 (1990); (2) transferring Complainant (see n.1 supra) because she filed a grievance concerning office smoking; and (3) management's hostile treatment of Complainant resulting from a grievance Complainant filed over her transfer, including failing to respond, or to respond timely to the grievance.

to Unfair Labor Practice as Amended (Answer), denying that DOC had committed any unfair labor practices. OLR CB further asserts that allegations as they relate to incidents occurring more than 120 days prior to the June 11, 1991 filing date should be dismissed pursuant to Board Rule 520.4(b) <sup>3/</sup>

The Board referred the Complaint and its Amendments to a Hearing Examiner, who heard the matter on November 18, 1991 and January 15, 1992. The Hearing Examiner's Report and Recommendation was received by the Board on May 7, 1992. A detailed discussion of the evidence presented in support of the Hearing Examiner's findings and conclusions are contained in the Report and Recommendation, a copy of which is attached hereto as Appendix 1.

The issues in this case, as set forth by the Hearing Examiner in his Report and Recommendation, are as follows:

1. Was the reassignment of the Complainant from the Central Facility to the Correctional Litigation Section in retaliation for the Complainant's filing a complaint in PERB Case No. 89-U-19?
2. Is the opening of the Complainant's mail containing grievance responses and other personal communications a violation of Complainant's rights under CMPA as an unlawful reprisal?
3. Was the conduct of [DOC's Deputy Director]

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<sup>3/</sup> OLR CB refers to Complainant's allegations of incidents of verbal harassments by her supervisor as reprisals for filing a complaint in PERB Case No. 89-U-10. These episodes allegedly took place on January 8 and 15, 1991. Complainant's receipt of a memorandum on January 25, 1991, which informed her of her disputed transfer is also included among those allegations OLR CB asserts is time-barred by Board Rule 520.4(b). With respect to these allegations, we adopt the ruling of the Hearing Examiner that these claims are time-barred from consideration by the Board as unfair labor practice violations since the Complaint allegations were not filed within 120 days after the incidents occurred. However, as the Hearing Examiner observed, neither Board Rules nor the CMPA preclude the consideration of such allegations as evidence of alleged violations occurring within 120 days of their filing. Cf., Lodge 1424, Machinists v. NLRB, 362 U.S. 411 (1960) and Mechanics, Laundry & Supply, Inc., 240 NLRB 302 (1979).

toward the Complainant retaliation for her filing a grievance protesting her reassignment?

The Hearing Examiner concluded that the evidence presented did not establish that DOC's actions, as described under issues 2 and 3 above, constituted reprisals that were motivated by protected activities engaged in by Complainant, in violation of D.C. Code Sec. 1-618.4(a)(4). With respect to issue 1, the Hearing Examiner, crediting DOC witnesses' account of what had occurred, concluded that DOC made the decision to reassign Complainant "sometime around the middle of 1990 (approximately a year and a half prior to the hearing)." (R&R at 13.) Based on this conclusion, the Hearing Examiner ruled that "the Complainant ha[d] failed to produce a preponderance of evidence showing an impermissible motive played a part in that personnel action." id.

On May 26, 1992, Complainant timely filed Exceptions to the Hearing Examiner's Report and Recommendation. There was no Opposition to Complainant's Exceptions filed on behalf of DOC. Complainant excepts to the Hearing Examiner's factual findings in support of his conclusions that DOC did not violate the CMPA, as alleged, based on the evidence presented at hearing. Complainant also contends the Hearing Examiner disregarded certain allegations.

We have considered the Complainant's exceptions and have found no basis for rejecting the findings made by the Hearing Examiner, which are fully supported by the record. Complainant's Exceptions raise no more than factual issues which were considered and specifically rejected in the Hearing Examiner's Report and Recommendation. With respect to all but one allegation (which we discuss below), we find no merit to Complainant's exception that certain Complaint allegations were disregarded by the Hearing Examiner.

The Board, after reviewing the record, adopts the findings of fact and conclusions of law to the extent addressed by the Hearing Examiner in his Report and Recommendation. For the reasons discussed below, however, we remand the case to the Hearing Examiner for the limited purpose of making further findings, conclusions and recommendations with respect to certain allegations not specifically addressed in his Report and Recommendation.

In addressing issue 1 above, the Hearing Examiner found that, notwithstanding a January 24, 1991 memorandum from DOC

informing Complainant of its decision to reassign her effective February 11, 1990, DOC's decision to reassign Complainant was actually made "sometime around the middle of 1990 (approximately a year and a half prior to the hearing)." (R&R at 13) The Hearing Examiner's conclusion that DOC's decision to transfer Complainant was not motivated by Complainant's protected activity was based in part upon this finding. The only "hearing" that occurred 1 1/2 years after "the middle of 1990" was the hearing in this proceeding, which took place on November 18, 1991, and January 15, 1992. The allegations, as addressed by the parties in the pleadings <sup>4/</sup> and framed by the Hearing Examiner, however, presents the claim that DOC's decision to reassign or transfer Complainant was motivated by her activities in pursuing her unfair labor practice complaint in PERB Case No. 89-U-10. The Hearing Examiner makes no findings with respect to this issue, i.e., the correlation, if any, between the bases for DOC's decision to reassign Complainant and Complainant's efforts in pursuing PERB Case No. 89-U-10. <sup>5/</sup> If, upon addressing this

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<sup>4/</sup> See Amended Complaint at 5, para. 10 and Answer at 4, para. 8.

<sup>5/</sup> Complainant filed her unfair labor practice complaint in PERB Case No. 89-U-10 on June 5, 1989. The hearing was held on March 12, 1990, and a Report and Recommendation issued on June 25, 1990, finding DOC had violated D.C. Code Sec. 1-618.4(a)(1) and (4) by certain acts of reprisals. The Hearing Examiner in the instant proceeding credited the testimony of DOC's Deputy Director that the decision to transfer Complainant was made "sometime around the middle of 1990". On October 9, 1990, the Board issued its Decision and Order (see n. 1 supra) adopting with certain exceptions the Hearing Examiner's Report and Recommendation finding D.C. Code Sec. 1-618.4(a)(1) and (4) violations. Although the Hearing Examiner made findings in the instant proceeding that DOC had informed Complainant on January 25, 1991 of its decision to reassign her and implemented that decision on February 11, 1991, testimony by DOC's Deputy Director reveals that "[t]here is no set procedure" for when staff is actually reassigned either before or after the "staffing authority", i.e., the review and decision making process of DOC's Human Resources Management Committee. (Tr. at 305.) Furthermore, the Hearing Examiner made findings that DOC's decision-making body, the Human Resources Management Committee, consisted of, inter alia, DOC's four Associate Directors including the Associate Director for Institutions. The Associate Director for Institutions was found to have been "aware of the previous unfair labor practice complaint filed by Complainant and received directions to post the Notice [in (continued...)]

issue, the Hearing Examiner finds on the strength of the existing record that a prima facie case exists with respect to the alleged violations of D.C. Code Sec. 1-618.4(a)(4) and (1), the Hearing Examiner is instructed to apply the analysis enunciated in Wright Line, Inc., 250 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 US 989 (1982), to determine, notwithstanding his existing findings of legitimate personnel considerations for DOC's decision, whether or not protected conduct was the motivating factor in DOC's eventual reassignment of Complainant. See, Charles Bagenstose and Dr. Joseph Borowski v. District of Columbia Public Schools, 38 DCR 4155, Slip Op. No. 270, PERB Case No. 88-U-33 and 88-U-34 (1991).

Notwithstanding the issue discussed above, we find the Hearing Examiner's analysis, reasoning and conclusions on all of the other allegations in the Complaint to be thorough, reasonable and persuasive. We therefore adopt them in their entirety. With respect to issue No. 1 discussed above, we direct the Hearing Examiner, in accordance with this Decision and Order, to consider the existing record and make findings, conclusions and a recommendation. We shall thereafter, review the Hearing Examiner's Supplemental Report and Recommendation, and any exceptions filed to this Report.

ORDER

IT IS HEREBY ORDERED THAT:

1. Complaint allegations with respect to issues 2 and 3 as set forth in this Decision and Order are hereby dismissed.
2. With respect to Complaint allegations related to issue 1 as set forth in this Decision and Order, the case is remanded to the Hearing Examiner, with instructions to act in accordance with this Decision and Order.

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<sup>5</sup>(...continued)  
89-U-10.]" (R&R at 12.) The Associate Director was also the supervisor of Complainant's supervisor, the subject of one of Complainant's unfair labor practice allegations. As we previously noted (see n.3), such evidence may be considered, notwithstanding the time limits of Board Rule 520.4(b), to support a timely allegation, i.e., the actual reassignment of the Complainant on February 11, 1991.

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BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

October 27, 1992

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
PUBLIC EMPLOYEE RELATIONS BOARD

In The Matter of:	)	
	)	
Georgia Mae Green, Esq.	)	
	)	
Complainant,	)	PERB Case No. 91-U-13
	)	Opinion No. 323
	)	(Supplemental Decision
	)	and Order)
v.	)	
	)	
District of Columbia	)	
Department of Corrections,	)	<b>FOR PUBLICATION</b>
	)	
Respondent.	)	
	)	

SUPPLEMENTAL DECISION AND ORDER

On October 27, 1992, the Public Employee Relations Board (Board) issued a Decision and Order in the above-captioned proceeding, dismissing two of the three Complaint allegations and remanding the third to the Hearing Examiner who presided in the hearing of this Complaint, with instructions to issue a Supplemental Report and Recommendation.<sup>1/</sup> We further stated that we would review the Hearing Examiner's Supplemental Report and Recommendation and any exceptions filed to that Report. The Supplemental Report and Recommendation was received by the Board on December 1, 1992. A detailed discussion of the evidence in support of the Hearing Examiner's further findings and conclusions are contained in the Supplemental Report and Recommendation, a copy of which is attached hereto as Appendix 1.

The single issue remanded to the Hearing Examiner, which alleged a violation of D.C. Code Sec. 1-618.4(a)(4), was the following:

Was the reassignment of the Complainant from the Central Facility to the Correctional Litigation Section in retaliation for the Complainant's filing a complaint in PERB Case No. 89-U-10?

We instructed the Hearing Examiner on remand to apply the analysis articulated in Wright Line, Inc., 250 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 US 989

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<sup>1/</sup> The relevant background and history of the case is set forth in our initial Decision and Order.

(1982) (hereinafter Wright Line), to determine on the strength of the existing evidence whether (1) Complainant had established that protected activity motivated her reassignment, and (2) if so, whether Respondent established that its reassignment of Complainant rested on legitimate considerations.

The Hearing Examiner found no "direct evidence" to support a prima facie showing of this alleged violation. Notwithstanding this conclusion, the Hearing Examiner proceeded to find that the existing evidence presented by the Respondent Department of Corrections (DOC) was "sufficient to meet the burden imposed on employers in Wright Line...", i.e., that "the reassignment [of Complainant] was made for staffing needs and would have occurred absent the protected activity." (SR&R at 8.) The Hearing Examiner further found that the Complainant "did not introduce any evidence which would suggest that DOC's explanation was a pretext." (SR&R at 9.) In view of these findings the Hearing Examiner concluded that the Complainant had failed to prove by a preponderance of the evidence that "but for her protected activity she would not have been reassigned from the Central Facility to the Correctional Litigation Section" and, therefore, recommended that the remaining Complaint allegation be dismissed.

On December 29, 1992, Complainant timely filed Exceptions to the Hearing Examiner's Supplemental Report and Recommendation. No Exceptions to the Report or Opposition to Complainant's Exceptions were filed by the Respondent. Complainant, once again, excepts to the Hearing Examiner's factual findings in support of his conclusions that (1) DOC's decision to reassign Complainant was not motivated by protected activity and (2) the evidence produced by DOC established that Complainant was reassigned to address staffing needs and that the reassignment of Complainant would have occurred absent any protected activity.

We have considered the Complainant's exceptions and find, with respect to the first exception that, for the reasons discussed below, it has some merit.<sup>2/</sup> We find no basis, however, for rejecting the Hearing Examiner's findings and conclusions with respect to Complainant's second exception which are fully supported by the record.

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<sup>2/</sup> Much of what Complainant cites in support of her first exception, however, are factual issues that were specifically considered and rejected by the Hearing Examiner in the findings and conclusions of his initial Report. Those findings and conclusions were expressly adopted in our initial Decision and Order. We find no basis for altering our ruling with respect to those findings and conclusions in this supplemental proceeding.

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), the Board expressly adopted the approach used by the National Labor Relations Board (NLRB) in Wright Line to determine an unfair labor practice violation under the National Labor Relations Act as appropriate for determinations of similar unfair labor practice violations under the Comprehensive Merit Personnel Act, D.C. Code Sec. 1-618.4(a)(4). 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.

Under the Wright Line analysis, the Complainant's "prima facie showing creates a kind of presumption that the unfair labor practice has been committed." Id. 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.

The conflicting interpretations among the U.S. Courts of Appeal, regarding the burdens of proof in cases arising under the Wright Line standard, were addressed by the Supreme Court in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) (hereinafter Transportation Management Corp.) Clarifying the First Circuit's description in Wright Line, the Supreme Court, consistent with NLRB policy, recognized the employer's burden to present an affirmative defense. Thus, an employer can only avoid the finding of a violation by carrying the burden of proof that its action, with respect to the employee, even absent the protected activity, would have still taken place based on other legitimate or non-prohibited action considerations. As an affirmative defense, the employer is charged with the burden of persuasion as well as production with respect to proving the defense. Thus, although the employer has the burden to produce evidence of non-prohibited motives for its actions, that counters the evidence produced by the employee to establish a prima facie showing of a violation, the employer must also meet its burden of persuasion, i.e., establish the affirmative defense by a preponderance of that evidence. Concomitantly, the ultimate burden of persuasion that the prohibited motive actually served as the motivating basis for the employer's action always remains with the employee.

Here, the Hearing Examiner found that there was not sufficient "direct evidence" of a prima facie showing that DOC's decision to reassign Complainant was motivated by Complainant's protected activity under D.C. Code Sec. 1-618.4(a)(4). We disagree with the Examiner's finding that the evidence was inadequate to establish a prima facie showing of the alleged unfair labor practice violation. Although the evidence of a prohibited motive by DOC is largely circumstantial, we conclude, contrary to the Hearing Examiner, that there is sufficient evidence to establish a prima facie showing, and thereby a presumption, that the alleged unfair labor practice had occurred.<sup>3/</sup> As such, a Wright Line analysis of the evidence was required to ultimately determine the existence of a violation. We therefore reject the Hearing Examiner's implication to the contrary on both of these findings and sustain Complainant's exception.

Complainant's second exception objects to the Hearing Examiner's ultimate finding that DOC produced the evidence to show that the reassignment of Complainant was made for non-prohibitive reasons and would have occurred absent the protected activity.<sup>4/</sup> The Hearing Examiner based his finding on his

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<sup>3/</sup> For instance, the evidence reveals, inter alia, that although DOC eliminated and reallocated Complainant's position, to conform with changed staffing alignments, approximately 6 months before the Complainant was actually reassigned, this action was taken about the time the Report and Recommendation in PERB Case No. 89-U-10 (finding a violation by DOC) was issued, i.e., June 25, 1990. (Tr. at 304; compl. Exh. No. 6.) The evidence further showed that for unexplained reasons DOC did not actually decide to reassign Complainant, pursuant to its mid-1990 elimination and reallocation of Complainant's position, until January 25, 1991, shortly after hostile episodes, according to Complainant's testimony, between the Complainant and her supervisor. (Tr. at 201.) The Complainant had alleged that these episodes were motivated by the remedial relief ordered in PERB Case No. 89-U-10. This relief included the posting of a Notice to Employees by DOC between October 26 and November 26, 1990, which, inter alia, addressed violative conduct by Complainant's supervisor. Finally, although the record reflects that Complainant's reassignment did not result in a reduction in grade or compensation, her reassignment to the Correctional Litigation Section detached Complainant from DOC and placed her under the jurisdiction of the D.C. Office of the Corporation Counsel. (Tr. at 172.)

<sup>4/</sup> Notwithstanding the Hearing Examiner's conclusion that the "direct evidence" did not support a prima facie showing of a violation, as previously noted, the Hearing Examiner nevertheless  
(continued...)

conclusion that DOC had satisfied the Wright Line burden of proof rule of "producing evidence to balance, not to outweigh, the evidence produced by the [Complainant]." (SR&R at 9.) As discussed above, in Transportation Management Corporation, the Supreme Court made clear that the burden was an affirmative defense. Under this defense, DOC must not only produce evidence of its affirmative defense that meets Complainant's evidence of a prima facie showing of a violation, but must also establish that affirmative defense by a preponderance of the evidence produced. We believe the Hearing Examiner's Supplemental Report and Recommendation fails to specifically address this additional requirement.

Notwithstanding this omission, the Hearing Examiner, did make a finding that "Complainant did not introduce any evidence which would suggest that DOC's explanation was a pretext." <sup>4/</sup> (SR&R at 9.) Based on this finding, which is supported by the record, we can conclude that DOC established its affirmative defense by a preponderance of the evidence.

Complainant's objections to the Hearing Examiner's findings supporting DOC's affirmative defense, however, are no more than disputes over that evidence based on credibility and probative value determinations. As we have ruled on numerous occasions, the weight and the veracity accorded evidence is for the Hearing Examiner to decide. See, e.g., Charles Bagenstose et al. v. DCPS, 38 DCR at 415. We find no basis for rejecting the Hearing Examiner's ultimate findings and conclusions with respect to DOC's evidence of a non-prohibitive motive for its decision to reassign Complainant.

To the extent consistent with our discussion above, we adopt the Hearing Examiner's supplemental findings, conclusions and recommendation that the remaining Complaint allegation be

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<sup>4</sup>(...continued)  
proceeded to employ the Wright Line standard.

<sup>5/</sup> As an affirmative defense, once established, Complainant could have presented additional evidence to rebut DOC's evidence of a non-prohibited motive. Evidence that DOC's non-prohibited motive was pretextual was one means by which Complainant could have attempted to meet her burden of proving by a preponderance of the evidence that her reassignment was motivated by her protected activity. As discussed in the text, the burden of persuasion remained with the Complainant to prove that her protected activity motivated DOC's decision to reassign her. The Hearing Examiner found that the Complainant did not introduce any further evidence rebutting DOC's affirmative defense. (SR&R at 9.)

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dismissed on the basis that Complainant did not meet her burden of establishing by a preponderance of the evidence that DOC's reassignment of Complainant was motivated by reasons prohibited under D.C. Code Sec. 1-618.4(a)(4).

**ORDER**

**IT IS HEREBY ORDERED THAT:**

The remaining Complaint allegation is dismissed.

**By Order of the Public Employee Relations Board**

Washington, D.C.  
February 8, 1993