Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee (on behalf of Sergeant Andrew J. Daniels),	)	
Complainant,	)	PERB Case No. 08-U-26
	)	Opinion No. 1510
v.	)	
District of Columbia Metropolitan Police Department,	)	
Respondent.	)	

DECISION AND ORDER

I. Statement of the Case

Before the Board is an unfair labor practice complaint ("Complaint") that was filed on March 10, 2008, by the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP") on behalf of Sergeant Andrew J. Daniels ("Daniels" or "Grievant") against the Metropolitan Police Department ("MPD"), alleging that MPD violated D.C. Official Code sections 1-617.04(a) (1) and (4) by retaliating against Daniels for protected activity. Specifically, the Complaint states that on January 7, 2008, MPD unilaterally implemented a new schedule for the staff of the Metropolitan Police Academy ("Academy" or "MPA"). On January 11, 2008, FOP filed on behalf of five of its members, including Daniels, an informal step 1 grievance with Inspector Victor Brito ("Brito") concerning the new schedule. Following Brito's denial of the informal step 1 grievance, FOP appealed the denial by filing a formal step 1 grievance and then a formal step 2 grievance. On January 22, 2008, four days after the filing of the formal step 1 grievance, Brito ordered Daniels to submit all leave requests with him, contrary to the departmental policy regarding leave requests. (Complaint ¶ 11.) On January 22, 2008, FOP filed a step 1 grievance "based on Inspector Brito's retaliatory conduct against Sergeant Daniels." (Complaint ¶ 12).

On January 31, 2008, Daniels investigated and reported on the illness and hospitalization of an Academy recruit. FOP alleges, "On February 1, 2008, despite handling the situation as prescribed by Department and MPA procedures, Sergeant Daniels was ordered by Captain Mark Carter and Inspector Brito to complete a PD119, explaining his response to the hospitalized recruit situation." (Complaint ¶ 15). PD119 is a "Complainant/Witness Statement." (Complaint Attachment 5). Also on February 1, 2008, FOP filed a formal step 1 grievance on Daniels's behalf regarding the change in leave policy. (Complaint ¶ 16 & Attachment 6). The Complaint further alleges, "On February 12, 2008, Sergeant Daniels learned that he was the subject of a Department investigation into his handling of the hospitalized MPA recruit. . . ." (Complaint ¶ 17). On February 13, 2008, FOP filed a step 2 grievance regarding the requirement that Daniels submit his leave requests to Brito. (Complaint ¶ 18 & Attachment 7.)

Following its allegation of the foregoing facts, the Complaint asserts under the heading "Analysis" that MPD committed an unfair labor practice "by disciplining and taking reprisals against Sergeant Daniels as a result of his asserting his union rights." (Complaint ¶ 19.) And in paragraph 23, the Complaint states, "Accordingly, the Department . . . engaged in unfair labor practices by disciplining Sergeant Daniels in retaliation for engaging in union activity. . . ."

In its answer, MPD denied the allegations and asserted that the Complaint should be dismissed as FOP had "failed to allege a *prima facie* case of retaliation by demonstrating that any action had been taken against Sergeant Daniels at the time the Complaint was filed." (Answer p. 5.) In a prior ruling, the Board disagreed, stating that the Complaint only had to allege, as opposed to demonstrate, a *prima facie* case and the Board could not say that the Complaint had failed to allege that any action had been taken against Daniels. The Board noted the alleged investigation of Daniels and other directives allegedly made to him. *FOP/Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't (on behalf of Daniels)*, 60 D.C. Reg. 12080, Slip No. 1403 at p. 3, PERB Case No. 08-U-26 (2013). Finding issues of fact "concerning whether the actions of the Department constitute adverse employment actions and whether they were intended to restrain, or had the effect of restraining, the Grievant in the exercise of protected activities," the Board referred the case to a hearing examiner. *Id.* at 4.

After holding a hearing on July 31, 2014, the Hearing Examiner issued a Report and Recommendation in which he found that MPD took reprisal against Daniels for protected activities in violation of sections 1-617.01(a)(1) and (4) of the D.C. Official Code and recommended certain remedies.[1] The Hearing Examiner's Report and Recommendation, FOP's exceptions, MPD's exceptions, and FOP's opposition to MPD's exceptions are before the Board for disposition.

[1] In view of this recommendation, which we adopt, a motion to compel production of additional documents filed by FOP two months after the hearing is moot and accordingly is denied.

II. Hearing Examiner's Report and Recommendation

A. Facts

The Hearing Examiner found the following facts.

After Inspector Brito became director of the Academy in September 2007, he observed that a number of employees with a tour of duty from 5:30 a.m. to 2:00 p.m. would leave after lunch between 1:00 and 1:30 p.m. Some of them were leaving to work overtime assignments for Photo Radar from 2-10 p.m., either at the site across town where officers were trained to use radar or, after completion of training, in Photo Radar vehicles around the city. In a November 21, 2007 e-mail, Brito presented the issue to Assistant Chief Joshua Ederheimer and stated that as a result of his observation he had issued orders on leave and work hours. The e-mail concludes, "The main reason I'm writing this is informational because I know stones will be thrown and I wanted to make you aware. Additionally, I met with Shop Steward Mullians [*sic*] prior to informing MPA of these orders and he overwhelming supports and understands these issues." (Report & Recommendation 4.) Shop Steward Mullins testified that Brito's claim that he had Mullins's support was not accurate. (Report & Recommendation 4.)

Brito issued a work order prohibiting the staff from reporting to work earlier than 6:30 a.m. That starting time corresponded to the 6:30 a.m. to 3:00 p.m. hours of the recruits at the Academy. Daniels, an instructor at the Academy, asked his supervisors to allow him to continue to work a 5:30 a.m. to 2:00 p.m. tour of duty. They refused. On January 7, 2008, Daniels made the same request at a meeting with Brito and three other officers. Brito testified that Daniels explained that the tour of duty he was seeking would allow him to pick up his children after school. Brito further testified that he had a copy of Daniels's Time and Attendance Court Information System ("TACIS") report showing Daniels worked an average of two days a week at Photo Radar. Brito testified that he asked Daniels whether he had to pick up his children or work Photo Radar. Daniels replied that he needed to do both. Brito testified that he thought Daniels was being disingenuous. (Report & Recommendation 5-6.) The Hearing Examiner added, "The record establishes that the TACIS report is dated January 11, 2008, four days after Brito's meeting with Daniels." (Report & Recommendation 6.) Brito denied Daniels's request.

On January 18, 2008, the Union filed on behalf of Daniels and four others a step 1 grievance regarding the schedule change. Daniels continued to work at Photo Radar, taking an hour of leave and arriving one hour late. He submitted his leave requests to his supervisor until he was told to submit them to Brito. In his testimony, Brito denied that he had told anyone that Daniels would be required to submit leave requests directly to him. (Report & Recommendation 7.) On February 1, 2008, FOP filed on behalf of Daniels a step 1 grievance regarding the alleged change in leave policy. The day before that step 1 grievance was filed, FOP filed a step 2 grievance regarding the schedule change.

At the same time, a separate controversy arose out of the hospitalization of an Academy recruit. On January 30, 2008, a recruit referred to in the Report and Recommendation as H. was admitted to a hospital with complications of Crohn's disease. Daniels was informed of the

hospitalization by a recruit class leader the following morning, Thursday, January 31, 2008. Daniels requested that the recruit class leader obtain information and report back. Daniels testified that after roll call that morning he informed his supervisor, Lt. Tommie Hayes, of H.'s hospitalization. Later that morning, Hayes ordered Daniels to teach a class as a substitute for an instructor who was on sick leave. Upon returning to his office after the class that afternoon, Daniels found a note on his desk from the recruit class leader reporting on H. and his improvement. (Tr. 37.) Daniels relayed the information he had on H. in an e-mail to Hayes with a copy to Brito. At 3:09 p.m., Brito e-mailed in response, "Sgt. Daniels when did we know about this? And was notification made thru your chain of command?" Since Daniels had left for the day, he did not respond to Brito until the next morning, February 1, 2008 at 6:14 a.m. Daniels replied then that he had made notification through his chain of command and that he had learned of the situation Thursday morning.

At a meeting with Daniels on February 1, 2008, Hayes decided that on Monday, February 4, 2008, H. should attend a class on driver training rather than go to the Police and Fire Clinic. At Hayes's instruction, Daniels notified H. that he was to attend the class. (Report & Recommendation 8.)

On February 1, 2008, Brito instructed Hayes to have Daniels complete a Complainant/Witness Statement, a departmental form called PD 119, and to conduct an investigation of Daniels's alleged failure to notify the chain of command of H.'s hospitalization. (Report & Recommendation 8-9.) As with most MPD internal affairs investigations, Hayes contacted the Internal Affairs Division, which generated an IS number. (Report & Recommendation 9.) On February 29, 2008, a "Commander's Resolution Conference" was held pursuant to General Order 120.21. Although General Order 120.21 and the parties' collective bargaining agreement require the commanding officer or director to attempt to resolve a disciplinary matter at a Commanders' Resolution Conference, no resolution or settlement discussions took place at the conference. (Report & Recommendation 10, 25.) Instead, Daniels was given a copy of Hayes's investigative report to which was attached an unsigned letter of prejudice dated February 29, 2008. The investigative report was "poorly prepared with errors in form and substance" largely because Daniels was not interviewed during the investigation. (Report & Recommendation 24.) The letter of prejudice states two charges. The first is Daniels's alleged failure to properly notify his supervisor and the director of the Academy of H.'s hospitalization. The second charge is that Daniels ordered H. to report to a class rather than the clinic. (Report & Recommendation 10-11.)

B. Hearing Examiner's Conclusions of Law

The Hearing Examiner considered as a "threshold" matter MPD's objection that the letter of prejudice should not be considered because it is not mentioned in the Complaint. Rule 520.3(d), MPD pointed out, requires a "clear and complete statement of the facts constituting the alleged unfair labor practice, including date, time and place of occurrence of each particular act alleged, and the manner in which D.C. Code Section 1-618.4 of the CMPA is alleged to have been violated." The Hearing Examiner asserted that the purpose of Rule 520.3(d) is to give the Respondent notice of the alleged claims to permit a response and eliminate unfair surprise at a

hearing. (Report & Recommendation 17.) The Hearing Examiner found such notice in paragraph 23 of the Complaint, which alleges that MPD committed an unfair labor practice by disciplining Daniels. The Hearing Examiner concluded that MPD's objection was without merit and that "the PERB has jurisdiction to hear and decide FOP's allegation that the Letter of Prejudice constituted retaliation in violation of the CMPA." (Report & Recommendation 18.)

The Hearing Examiner observed that the Board analyzes unfair labor practice claims of retaliation for protected union activity using a test established by *Wright Line v. Lamoureux*, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 622 F.2d 899 (1st Cir. 1981). "In this case," the Hearing Examiner wrote, "the *Wright Line* test requires FOP to show that: Daniels engaged in protected union activities; MPD knew of his protected union activities; there was *animus* by the MPD; and MPD retaliated against Daniels." (Report & Recommendation 18.)

The Hearing Examiner found that Daniels engaged in protected activities by filing grievances, which MPD necessarily knew of. The Hearing Examiner found evidence establishing anti-union animus. In Brito's e-mail to his superior regarding the schedule change, Brito predicted that "stones will be thrown." His testimony at the hearing reflected an adversarial view of collective bargaining and management to the point of describing it as a "contact sport." The Hearing Examiner stated that Brito appeared to have fabricated his claim that Shop Steward Mullins overwhelmingly supported the schedule change as well as his testimony that he confronted Daniels with his TACIS report at their January 7, 2008 meeting. (The TACIS report was dated January 11, 2008.) The Hearing Examiner found Brito's demeanor throughout his testimony on the schedule change to be defensive as he recalled his contacts with the FOP organizationally. Finally, the Hearing Examiner found Brito's assignment of Hayes to investigate and prepare a disciplinary recommendation to be a violation of General Order 120.23's prohibition of investigations being conducted by a member with a conflict of interest. The Hearing Examiner concluded that "the totality of the record facts, circumstances and evidence establish that Brito's conduct toward and actions taken against Daniels were motivated by anti-union *animus*." (Report & Recommendation 20.)

The Hearing Examiner determined that MPD took adverse actions against Daniels shortly after Daniels filed the grievances. Those adverse actions were: a request that Daniels complete a PD 119, Hayes' investigation of Daniels, the letter of prejudice, and the Commander's Resolution Conference, at which no attempt at resolution was made. These actions were, the Hearing Examiner wrote, "links in a chain of retaliation against Daniels proven by the totality of facts and circumstances meeting all four prongs of the *Wright Line* test." (Report & Recommendation 26.) Conversely, the Hearing Examiner was not persuaded that Brito imposed a special leave policy on Daniels.

As FOP had made a *prima facie* case, the burden of production shifted to MPD to demonstrate that it had a legitimate business reason for its actions and that it would have initiated them in the absence of protected union activity.[2] The Hearing Examiner found that MPD

[2] *AFGE Local 2978 v. Office of the Chief Med. Examiner*, 60 D.C. Reg. 2516, Slip Op. No. 1348 at p. 4, PERB Case No. 09-U-62 (2013).

produced no material evidence or testimony to meet this burden. (Report & Recommendation 26.) Therefore, the Hearing Examiner concluded that "Brito took retaliatory disciplinary action against Daniels for filing two grievances thereby interfering with, restraining and coercing Daniels in the exercise of his rights under § 1-617.06(a)(2) . . . in violation of § 1-617.04(a)(1) and (4)." (Report & Recommendation 26.)

As to remedies for the violation, the Hearing Examiner recommended that the Board order MPD to cease and desist from further interference with and retaliation against protected activities and to post two notices of its violation. He also stated that FOP presented no evidence in support of its claim that costs and fees were warranted.

III. Exceptions

Both parties filed exceptions. FOP takes exception to the Hearing Examiner's rejection of one of the adverse actions that FOP alleged MPD had imposed on Daniels. Specifically, FOP excepts to the Hearing Examiner's finding against it regarding the allegation that the MPD, through Brito, created a special leave policy for Daniels. MPD did not file an opposition to FOP's exceptions.

MPD raises exceptions related to the Hearing Examiner's findings of animus and retaliatory adverse actions. Regarding animus, MPD contends that Shop Steward Mullins's testimony does not support the Hearing Examiner's conclusion that Brito fabricated his assertion of Mullins's overwhelming support of the schedule change. MPD also objects to the Report and Recommendation's failure to address MPD's evidence that there was no anti-union animus.

Regarding adverse actions, MPD notes that the Complaint contains no factual allegation or legal argument concerning the letter of prejudice issued to Daniels. MPD contends that there is no authority under the Board's rules to sustain a violation not alleged in a complaint. As the Complaint did not include any allegation regarding the letter of prejudice, MPD concludes that it cannot be a basis for an unfair labor practice finding.

FOP filed an opposition to MPD's exceptions. FOP asserted that MPD's arguments regarding animus were disagreements with the Hearing Examiner about either the credibility or the interpretation of testimony. FOP agreed with the Hearing Examiner that the letter of prejudice is encompassed within the Complaint's allegation that MPD committed an unfair labor practice by disciplining Daniels. FOP argues that it timely filed its Complaint after the first act of reprisal as required by *FOP/Metropolitan Police Department Labor Committee v. Metropolitan Police Department*, 61 D.C. Reg. 8019, Slip Op. No. 1397, PERB Case Nos. 09-U-41, 09-U-42, 09-U-43, 09-U-44, 10-U-01, and 10-U-14, *granting reconsideration of* 60 D.C. Reg. 2283, Slip Op. No. 1361 (2013). FOP added that even without consideration of the letter of prejudice, MPD clearly retaliated against Daniels by investigating him, obtaining IS numbers, and ordering him to complete a PD 119, as the Hearing Examiner found.

IV. Discussion

A. FOP's Exception

Regarding the alleged special leave policy, the Hearing Examiner made the following findings:

> The distilled essence of the evidence is that Daniels testified he was told by someone, likely Hayes, that Brito imposed a special leave policy for him alone and Brito testified he did not impose a special leave policy for Daniels. On this record, I am not persuaded Brito imposed a special leave policy for Daniels. Therefore, I find that FOP's allegation of a special leave policy is without merit.

(Report & Recommendation 22.) FOP disagrees with the way the Hearing Examiner resolved the conflict between the testimony of Brito and of Daniels, asserting, "Brito's testimony and representations 'appear[ed] fabricated and unreliable and not credible.' *See* Hearing Examiner's Report at p. 22. Without Brito's testimony, Daniels testimony regarding the special leave policy is uncontested." (FOP's Exceptions 6.)

FOP cannot simply eliminate Brito's entire testimony. The Hearing Examiner did not say that all of Brito's testimony and representations appeared fabricated, unreliable, and not credible. The Hearing Examiner's statement at page 22 of the Report, which FOP only partially quotes, makes clear that what seemed to the Hearing Examiner to be fabricated, unreliable, and not credible was Brito's testimony on his meeting with Daniels.[3] The Hearing Examiner had an opportunity to observe these witnesses as they testified. The Board defers to a hearing examiner's resolution of conflicts between the testimonies of witnesses where, as here, the hearing examiner's findings are reasonable, supported by the record, and consistent with Board precedent. *FOP/D.C. Hous. Auth. Labor Comm. v. D.C. Hous. Auth.*, 60 D.C. Reg. 12127, Slip Op. No. 1410 at pp. 3-4, PERB Case No. 11-U-23 (2013). As in *D.C. Housing Authority*, the Hearing Examiner in the present case reasonably concluded that he could accept part of a witness's testimony even if he discredited other parts. *See id.* at 3. Therefore, FOP has presented no grounds for reversal of the Hearing Examiner's finding regarding the alleged special leave policy.

B. MPD's Exceptions

As the Hearing Examiner noted, FOP has the initial burden of establishing a *prima facie* case under the test the Board has adopted from *Wright Line v. Lamoureux*, 251 N.LR.B. 1083, 1089 (1980), *enforced*, 622 F.2d 899 (1st Cir. 1981). The test has four elements: (1) the employee engaged in protected union activity; (2) the employer knew about the employee's

[3] "Brito's testimony on this meeting, Daniels first direct effort to remain on the 5:30 a.m. to 2:00 p.m. tour of duty, appears fabricated and unreliable and not credible." (Report & Recommendation 19.)

protected union activity; (3) the employer exhibited anti-union animus; and (4) as a result, the employer took an adverse employment action against the employee. *AFGE, Local 2978 v. D.C. Office of the Chief Med. Exam'r*, 60 D.C. Reg. 2516, Slip Op. No. 1348 at p. 4, PERB Case No. 09-U-62 (2013). The Hearing Examiner found all four elements present. MPD's exceptions put at issue two of the elements—anti-union animus and adverse action taken against the employee.

1. Anti-Union Animus

MPD raises a number of evidentiary objections to the Hearing Examiner's findings related to anti-union animus. Its first objection is to the Hearing Examiner's findings regarding a statement Brito made in an e-mail to his superior on the schedule change. Brito stated that Shop Steward Mullins "overwhelming [*sic*] supports and understand these issues." The Report states, "Mullins testified that Brito's statement of Mullins['s] overwhelming support of the changes to the . . . work hours was not 'accurate.'" (Report & Recommendation 4.) MPD responds that "[i]t is clear from the transcript that while Shop Steward Mullins did not agree with the word 'overwhelming,' he did not disavow the remaining portion that he 'supports and understands these issues.'" (Exceptions 14.)

Here MPD is merely proposing a paraphrase of the Report's interpretation of the testimony. Regarding Brito's assertion, Mullins testified, "It's not accurate—not the word overwhelmingly." (Tr. 172.) That being the case, the Hearing Examiner was correct in saying that Brito's assessment of Mullins's support was not accurate. The Hearing Examiner did not assert that Brito's statement was false in every particular. He could have specified where the inaccuracy lay, but a request for that kind of editing is not a proper exception.[4]

MPD contends that the Hearing Examiner failed to consider evidence that union and management had a good relationship at the Academy. Challenging a hearing examiner's findings with competing evidence does not constitute a proper exception if the record contains evidence supporting the hearing examiner's conclusions. *FOP/Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 60 D.C. Reg. 9212, Slip Op. No. 1391 at 20, PERB Case Nos. 09-U-52 and 09-U-53 (2013). In addition, MPD contends that the Report and Recommendation does not address its arguments regarding the credibility of Daniels. This exception is also without merit. The Hearing Examiner noted MPD's arguments concerning Daniels's credibility (Report & Recommendation 17) and credited Daniels's testimony. Credibility resolutions are reserved to the Hearing Examiner. *D.C. Nurses Ass'n v. D.C. Dep't of Youth Rehab. Servs.*, 61 D.C. Reg. 1566, Slip Op. No. 1451 at 4, PERB Case No. 10-U-35 (2013).

[4] *See Rodriguez v. D.C. Metro. Police Dep't*, Slip Op. No. 906 at p. 7, PERB Case No. 06-U-38 (Jan. 30, 2008) ("The Complainant would have us adopt her interpretation of the witnesses' testimony and the Hearing Examiner's findings on the elements of knowledge and animus. However, the Board has held that 'issues of fact concerning the probative value of evidence and credibility resolution are attributed to the Hearing Examiner.'" (quoting *Hattan and FOP Dep't of Corr. Labor Comm.*, 47 D.C. Reg. 769, Slip Op. No. 451 at pp. 3-4, PERB Case No. 95-U-02 (1995))).

MPD's final exception regarding animus consists of unfounded objections to the Hearing Examiner's determination that Lt. Hayes had a conflict of interest that should have prevented him from being assigned to investigate Daniels. MPD asserts that "[t]he hearing examiner's finding that a conflict of interest existed based upon Sergeant Daniels' February 1, 2008 email response to Inspector Brito stating that 'notification was made thru my chain of command' is also not supported by the record." (MPD's Exceptions 17.) To the contrary, the record does support that finding as Daniels testified that he told Hayes of H.'s hospitalization after roll call the same morning that Daniels learned of the hospitalization. (Tr. 34-36.) The Hearing Examiner characterizes this testimony as unrebutted and unchallenged. (Report & Recommendation 20.) MPD objects that it rebutted this testimony by pointing out that Daniels did not include in his PD 119 the claim that he informed Hayes after roll call. Nonetheless, Daniels's testimony was unrebutted in that Hayes did not testify at all, and Hayes is the only one other than Daniels who would have had personal knowledge that Daniels did not inform him when Daniels claimed to have. A hearing examiner has the authority to determine the probative value of evidence and to draw reasonable inferences from that evidence. *AFSCME Dist. Council 20, Local 2921 v. D.C. Pub. Schs.*, 60 D.C. Reg. 2602, Slip Op. 1363 at p. 5, PERB Case No. 10-U-49 (2013). The Hearing Examiner was not required to draw an inference from the absence of an assertion in the PD 119.

2. Adverse Action Taken against the Employee

MPD argues in its exceptions that one of the adverse actions found to be retaliatory by the Hearing Examiner, issuance of the letter of prejudice, was not pleaded in the Complaint and consequently may not be a basis for a finding of an unfair labor practice. Board Rule 520.3 requires that an unfair labor practice complaint contain a "clear and complete statement of the facts constituting the alleged unfair labor practice, including date, time and place of occurrence of each particular act alleged. . . ." The letter of prejudice was not alleged in that manner, or at all, MPD asserts. Rule 520.11 provides, "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." Citing *FOP/Metropolitan Police Department Labor Committee v. Metropolitan Police Department*,[5] MPD argues that these rules make clear that a complainant is limited to proving what he alleged and that the Board may not sustain a violation not alleged in an unfair labor practice complaint. (MPD's Exceptions 10-11.)

As the Board stated in its earlier opinion in this case, a "complainant is not required to demonstrate or prove its complaint at the pleading stage as long as the complaint asserts allegations that, if proven, would demonstrate a violation of the CMPA." *FOP/Metro. Police Dep't Labor Comm. (on behalf of Daniels) v. D.C. Metro. Police Dep't*, 60 D.C. Reg. 12080, Slip No. 1403 at p. 3, PERB Case No. 08-U-26 (2013). Thus, the Complaint did not have to *prove* that a letter of prejudice was issued in retaliation for protected activity, but it did have to make that allegation. MPD asserts that the Complaint failed to do so. MPD excepts to the

[5] 59 D.C. Reg. 6029, Slip Op. No. 1005, PERB Case No. 09-U-50 (2009), *reconsideration denied*, 61 D.C. Reg. 8003, Slip Op. No. 1316 (2012).

Hearing Examiner's finding that FOP's allegation in paragraph 23 of the Complaint "that the MPD engaged in a an unfair labor practice by ***disciplining*** Daniels . . . makes a clear and complete statement of the facts constituting the unfair labor practice. This [is] the case because the record developed at hearing establishes that on February 29, 2008 Brito disciplined Daniels with a Letter of Prejudice based on Hayes' investigation." (Report & Recommendation 17.)

Paragraph 23 of the Complaint falls under the Complaint's heading of "Analysis," which follows the Complaint's previous heading, "Facts." Under the latter heading, FOP presents its allegations of fact, which do not include an allegation of a letter of prejudice. MPD quite reasonably states that where the Complaint refers to disciplining Daniels in paragraph 23 as well as paragraph 19, "the Complaint is asserting that the *investigation* that was undertaken of Sergeant Daniels as described in paragraph 17 constituted 'discipline.'" (MPD's Exceptions 9.)

It was not sufficient under Rule 520.3 to use the word "disciplining" as a placeholder for any act of discipline that FOP might later seek to prove at the hearing. Rule 520.3(d) requires a complainant to allege the "date, time, and place of occurrence of each particular act alleged." The Hearing Examiner stated that the purpose of this rule is to provide the respondent with notice of the alleged claims so as to permit a response and eliminate unfair surprise at the hearing. MPD counters that PERB Rules and decisions have not applied "notice pleading." (MPD's Exceptions 9.) Setting aside whether the Hearing Examiner correctly stated the purpose of the rule, the question is, did FOP comply with the rule? With respect to the letter of prejudice, FOP did not. The letter of prejudice is not one of the "particular act[s] alleged." The Board has not allowed matters that were not alleged in a complaint to be litigated as if they were. In accordance with the Board's precedent, the letter of prejudice was "never placed before the Board in the Complaint" and as a result "should not have been identified as an issue to be addressed by the Hearing Examiner or by the Board." *FOP/Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 61 D.C. Reg. 8003, Slip Op. No. 1316 at pp. 6, 7, PERB Case No. 09-U-50 (2012) (citing Rule 520.11). *See also Allison v. FOP/Dep't of Corr. Labor Comm.*, 61 D.C. Reg. 9085, Slip Op. No. 1482 at p. 2, PERB Case No. 14-S-04 (2014) (noting that the complaint was not amended to include allegations regarding an election that occurred after the complaint was filed); *Soc. Sec. Admin. Office of Disability Adjudication & Review and Ass'n of Admin. Law Judges*, 66 F.L.R.A. 787, 790 (2012) (upholding judge's finding that consideration of agency's failure to send an authorized representative to negotiations was unnecessary because that issue was not raised in the complaint).

In *District of Columbia Nurses Association v. Mayor of the District of Columbia*,[6] the Board deferred to a hearing examiner's recommendation that a charge be considered notwithstanding the complaint's error in citing a statute where testimony and evidence on the statutory charge were presented without objection. The present case is very different. The Complaint's omission was substantive, and at the hearing MPD repeatedly raised objections to the consideration of the letter based on that omission, as FOP acknowledged in its post-hearing brief. (FOP Post-Hearing Brief 26; *see also* Tr. 55-58, 92-93.)

[6] 45 D.C. Reg. 6736, Slip Op. No. 558 at 3, PERB Case No. 97-U-16 (1998).

In its opposition to the exceptions, FOP contended that it could not delay filing its Complaint until Daniels was served with the letter of prejudice. FOP argues that the Board's strict application of the 120-day filing period in *FOP/Metropolitan Police Department Labor Committee v. Metropolitan Police Department*[7] compelled FOP to file its Complaint promptly after the first act of reprisal. In that case, the Board held that a complaint regarding a disciplinary reprisal was untimely because the discipline stemmed from an internal affairs interview that the hearing examiner had found to be a violation of the CMPA.[8] The unfair labor practice complaint had been filed more than 120 days after the internal affairs interview and therefore was held to be untimely.[9] Notwithstanding, FOP acknowledges that the letter of prejudice is dated February 29, 2008, which is before the complaint was filed on March 10, 2008. (Opp'n to Exceptions 7.) FOP asserts that "MPD, however, failed to serve Sergeant Daniels with the letter of prejudice until April 1, 2008" and argues that "[t]he MPD should not be able to attempt to circumvent a claim of retaliation by withholding evidence until after the period of filing a PERB Complaint has expired." (Opp'n to Exceptions 7.) FOP's contention regarding service is contrary to the Hearing Examiner's factual finding, which is that "the record establishes that while Daniels signed for the Letter of Prejudice on April 1, 2008, it was issued to Daniels by Brito on February 29, 2008." (Report & Recommendation 10.)

Even if Daniels had to be formally served with a signed copy of the letter for it to be actionable, the date of that formal service was only 60 days after the first alleged act of retaliation, and, in addition, nothing prevented FOP from amending its Complaint to allege that the investigation led to a retaliatory letter of prejudice. That was the procedure followed in *AFGE, Local 1403 v. D.C. Office of the Attorney General*, 59 D.C. Reg. 4557, Slip Op. No. 935, PERB Case No. 06-U-01 (2008), in which the union amended its original complaint alleging retaliation to include a letter of admonition issued after the union had filed its original complaint. *Id.* at 5 n.1.

Thus, MPD is correct that the letter of prejudice cannot be a basis for a determination that an unfair labor practice occurred. However, it does not follow from that conclusion that the Complaint should be dismissed, as MPD proposes. (MPD's Exceptions 8.) The letter of prejudice aside, there were other adverse actions that supported the Hearing Examiner's determination that an unfair labor practice occurred. FOP alleged and proved other adverse actions taken against Daniels that were "links in a chain of retaliation" (Report & Recommendation 26), namely, requiring Daniels to complete a witness statement and investigating Daniels. (Report & Recommendation 22-26.)

In addition, excluding the letter of prejudice from the list of retaliatory adverse actions does not call into question the Hearing Examiner's recommended remedy. In cases where a complainant has pleaded and proved that an adverse personnel action was retaliatory, the Board has ordered that the complainant's personnel records be purged of any documentation of the action. *Bagentose v. D.C. Pub. Schs.*, 38 D.C. Reg. 4154, Slip Op. No. 270 at p. 13, PERB Case

[7] 61 D.C. Reg. 8019, Slip Op. No. 1397, PERB Case Nos. 09-U-41, 09-U-42, 09-U-43, 09-U-44, 10-U-01, and 10-U-14 (2013), *granting reconsideration of* 60 D.C. Reg. 2283, Slip Op. No. 1361 (2013).
[8] Slip Op. No. 1397 at 4; Slip Op. No. 1361 at 14.
[9] Slip Op. No. 1397 at 5.

Nos. 88-U-33 and 88-U-34 (1991); *Green v. D.C. Dep't of Corr.*, 37 D.C. Reg. 8086, Slip Op. No. 257 at p. 4, PERB Case No. 89-U-10 (1990). In the present case, the Hearing Examiner did not recommend such a remedy, and the Board need not consider adding it.

Therefore, upon review of the record, the Board hereby adopts the Hearing Examiner's rational and persuasive finding that the Respondent has violated D.C. Code § 1-617.04(a) (1) and (4) by taking adverse action against Daniels for filing two grievances, thereby restraining and coercing Daniels in the exercise of his rights under D.C. Official Code § 1-617.06(a) (2) and taking reprisal action against him in violation of D.C. Official Code § 1-617.04(a) (1) and (4). In addition, we adopt the Hearing Examiner's recommendation for a remedy requiring a notice posting and a cease and desist order.

ORDER

IT IS HEREBY ORDERED THAT:

1. MPD shall cease and desist from further interference with and retaliation against the Grievant and other members of the bargaining unit for engaging in protected activities.

2. MPD shall conspicuously post within ten (10) days from the issuance of this Decision and Order no less than two copies of the attached notice where notices to employees are normally posted. The notice shall remain posted for thirty (30) consecutive days.

3. Respondent shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order that the notices have been posted accordingly.

4. 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 Chairman Charles Murphy and Members Donald Wasserman, Keith Washington, Ann Hoffman, and Yvonne Dixon

Washington, D.C.

March 19, 2015

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-U-26 is being transmitted to the following parties on this the 25th day of March, 2015.

Anthony M. Conti
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/s/ David S. McFadden
David S. McFadden
Attorney-Advisor