DISTRICT OF COLUMBIA COMMISSION ON HUMAN RIGHTS

In the Matter of:

HARRY RAGER

Complainant,

v.

Docket Number 01-051-P (CN)
Final Decision and Order

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES

Respondent.

_____/

BEFORE

Commissioner Deborah Wood Dorsey
Commissioner Nimesh M. Patel
Commissioner Michael D. Woodard

Hearing Examiner Dianne S. Harris

For the Complainant

Jewell T. Little, Esquire
District of Columbia Office of Human Rights
441 4th Street, N.W., Suite 570 North
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For the Respondent

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Joseph F. Henderson, Esquire
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SUMMARY OF PROCEEDINGS

On March 21, 2001, Harry Rager (hereafter the "Complainant") filed the Complaint of Discrimination with the District of Columbia Office of Human Rights (hereafter "OHR") under The District of Columbia Human Rights Act of 1977, District of Columbia Code § 2-1401 (2001 Edition) et seq. Complainant charged his former employer, the American Federation of Government Employees (hereafter the "Respondent") retaliated against him for testifying on behalf of a black co-worker at an arbitration hearing where Respondent was charged with discrimination on the basis of race.

OHR investigated the allegations and issued a Letter of Determination dated April 19, 2004. The issues presented to OHR were:

1. Whether Complainant was subjected to unlawful retaliation when the Respondent suspended him for ten (10) days on June 15, 2000 after the Complainant testified in an arbitration hearing on March 16, 2000?

2. Whether Complainant was subjected to unlawful retaliation when Respondent terminated his employment effective March 16, 2001 after Complainant signed his name to a letter of complaint directed to Respondent's vice-president on December 12, 2000?

OHR found probable cause that Complainant was subjected to unlawful retaliation when Respondent suspended him for ten (10) days on June 15, 2000 after Complainant testified on behalf of a black co-worker in an arbitration hearing held on March 16, 2000. As to the second issue of retaliation, OHR

dismissed the Complainant's second complaint on the grounds the Complainant and the Respondent submitted to arbitration concerning his dismissal and on October 29, 2001 the Arbitration Board awarded him all back pay, benefits, and other entitlements with interest. Respondent also was ordered to permit Complainant to return to work. Attempts by OHR to conciliate the case failed and the matter was certified to the District of Columbia Commission on Human Rights (hereafter "Commission") on October 5, 2004.

On February 14, 2006 a status conference was held with the parties. A full-evidentiary hearing was conducted on October 3 and 4, 2006 where both parties submitted documentary evidence and testimony before Hearing Examiner Dianne S. Harris. The Hearing Examiner issued a Proposed Decision and Order in the case dated May 7, 2007 finding the Complainant had been unlawfully retaliated against by the Respondent when they suspended him for ten days after he had testified at an arbitration hearing on behalf of a black co-worker concerning disparate treatment between black and white employees. The Respondent filed Exceptions to the Proposed Decision and Order. Complainant filed an Opposition to the Exceptions. Respondent filed a Reply to the Complainant's Opposition. After reviewing these Submissions the Commission responds to the Respondent's Exceptions as follows.

Exception #1 states the Complainant had unsuccessfully challenged Mr. Schlein in the election for National Vice-President for the 14th District Office. In the spring of 1999, the Complainant sought and received leave for thirty days

without pay from his position with Respondent to campaign and run for the office of National Vice-President, a position his supervisor held. (Transcript page 341.)

The Commission finds that the facts listed in Exception #1 while certainly supported by the record are not relevant to the issue at hand, whether or not the Respondent retaliated against the Complainant for testifying on behalf of a co-worker in a race discrimination case.

Exception #2 says, "The Complainant was not shy in publishing his open hostility to NVP Schlein. The Hearing Examiner found: "During office staff meetings it was common for shouting matches and name calling to take place. Mr. Schlein was called a 'liar' and 'incompetent' by employees under his supervision on occasion." Proposed Decision page 8.

The Commission does not find that the Complainant openly published his hostility toward Mr. Schlein. There is no evidence in the record to support such a finding and it is further noted that Respondent does not cite a page in the hearing transcript or offer a document to substantiate this claim. Although it was established by the record that there were shouting matches and name calling that took place in the staff meetings, no particular conversations were recounted nor was there substantial evidence as to the identity of the parties who did the shouting and name-calling. Nonetheless Exception #2 is not relevant to the issue before the Commission because the Complainant was not suspended for shouting and name-calling in a staff meeting..

Exception #3 "The office secretary, Anna Leone, offered un-rebutted testimony

that the Complainant had 'no respect' to his supervisor at these meetings, the likes of which she had never witnessed in her 30 years of employment at AFGE. Transcript page 282 and 301."

The Commission finds that Exception #3 is not relevant to the issue of whether the Respondent retaliated against the Complainant when he was suspended for ten days following his testimony at a co-worker's arbitration hearing concerning racial discrimination in the workplace.

Exception #4 states "The long history of employment disputes between NVP Schlein and Complainant came to a head in the first six weeks beginning in the second month of 2000. On February 4, 2000, Complainant was given an assignment by his supervisor, David Schlein, to prepare a letter for one of the local unions within the 14th District. The Complainant refused to do this assignment. He was shortly thereafter again directed to complete it. ('This is not an option,' Complainant's Exhibit #1). Soon thereafter, on March 2, 2000, Complainant and co-worker Nate Nelson engaged Mr. Schlein in a workplace disruptive confrontation and called him 'a well-known racist'. Two weeks later, on March 16, 2000, Complainant testified at an arbitration hearing concerning allegations of racial discrimination that were brought against Mr. Schlein by Mr. Nelson. At that time, he testified under oath that he continued to refuse to complete the assignment given to him by his supervisor. Proposed Decision page 8."

Exception #4 is inaccurate in its statement that the disputes between Mr. Schlein and the Complainant came to a head six weeks into February 2000. The evidence clearly reflects no disciplinary action or written warning was issued to the Complainant until

June of 2000, four months after the Complainant informed his supervisor he would not carry out the task assigned. Transcript page 292 line 2 to 8 and 395 line 9 to 22**.** In fact nothing further was done by the Respondent following the Complainant's refusal to carry out the assignment on February 8, 2000 until March 17, 2000, the day after he testified on behalf of a black co-worker at an arbitration hearing on the employee's charges of discrimination on the basis of race. At the arbitration hearing the Complainant described the disparate treatment shown by the Respondent toward him and his black co-worker for similar offenses and gave as an example the February 4, 2000 memorandum Mr. Schlein had issued him, noting his refusal to carry out the assignment had not resulted in any disciplinary action being taken. Transcript 249 line 12 to 18. Shirlee M. Taylor, the Respondent's Human Resources Administrator was present at the arbitration hearing and issued a memorandum to the Union President, Bobby L. Harnage the very next day informing him of the nature of Complainant's testimony at the arbitration hearing. Mr. Harnage then sent a memorandum dated March 28, 2000 to Mr. Schlien inquiring if the Complainant's testimony at the arbitration hearing indicating he had refused to carry out an assignment issued by Mr. Schlein with no disciplinary action being taken was accurate and if so, to provide an explanation. Complainant's Exhibit #5.

Exception #5 states that the "Complainant and co-worker engaged Schlein in a disruptive workplace confrontation and called him a well-known racist."

The evidence supports a finding that the Complainant was asked to accompany Mr. Nelson, a co-worker and serve as his union representative to ask for a letter from Ms. Leone and the Complainant agreed. Transcript page 120 line 4 to 8, page 125 line 3 to 7

and page 209 line 11 to 15. When they arrived at Ms. Leone's office they found her meeting with Mr. Schlein. Transcript page 286 line 9 to 11. Upon learning of the reason for Mr. Nelson's visit to Ms. Leone's office, Mr. Schlein directed Mr. Nelson to his office where an argument ensued between the two men. Transcript page 329 line 19 to page 330 line 2. The Complainant was not involved in the confrontation. The only statement the Complainant made during the course of the exchange between Nelson and Schlein was to respond to Mr. Nelson's declaration that Mr. Schlein was a racist by stating in a normal tone of voice, "Lets go. You know he is a racist. Everyone knows he is a racist." Transcript page 115 line 1 to 3, page 126 line 7 to 9 and page 129 line 16 to 21.

Exception #6 states that the "Hearing Examiner found that the 10-day suspension imposed upon the Complainant for his continued refusal to complete an assignment made by his supervisor and for his participation in the workplace disruption (where he referred to NVP Schlein as a 'well known racist') was unlawful reprisal for his protected testimony at the prior arbitration hearing."

Based on the evidence in the record the Commission makes an additional finding that the real reason the Respondent suspended the Complainant for ten days was to retaliate against him for his testifying at the arbitration hearing for Mr. Nelson, his co-worker. Transcript pages 35 line 21 to page 36 line 10, page 235 line 5 to 20, page 344 line 11 to 18, page 248 line 21 to page 249 line 5, page 250 line 13 to 15, page 394 line 13 to 21 and Complainant's Exhibit #4 and #5 and Respondent's Exhibit #4

Exception #7 states, "It is important to note here that the person who published

the information about the Complainant was someone whom "everybody [knew was] a racist. Proposed Decision page 7. The Complainant himself repeatedly acknowledged this. Moreover, even Mr. Schlein's staff regularly referred to Mr. Schlein (to his face) as a 'liar' and as 'incompetent'. Proposed Decision page 8."

The Respondent has misconstrued the findings of facts referred to in their Exception #7. The finding was not that Mr. Schlein was a racist or that everyone knew he was a racist. The finding was that the Complainant made a statement "Everybody knows that he is a racist." to Mr. Nelson in his supervisor's presence on March 1, 2000. Transcript page 115 line 1 to 3, page 126 line 7 to 9 and page 129 line 5 to 8.

Secondly Exception #7 misconstrues the findings of fact by stating, "Moreover, even Mr. Schlein's staff regularly referred to Mr. Schlein (to his face) as a "liar" and as "incompetent." The finding states, "On occasion at these sessions Mr. Schlein was called a 'liar' and incompetent' by employees under his supervision."

Exception #8 states "Thus it is hard to imagine that much embarrassment, humiliation and indignity would flow from publication that a 'racist, incompetent liar.' had suspended the Complainant. Indeed, it is more likely that it was a badge of honor to the Complainant and his like-minded co-workers."

This statement is purely conjecture on the part of the Respondent and there is no evidence in the record to support a finding that the Complainant's suspension was considered a badge of honor by either him or his co-workers.

Exception # 9 states, "It is also true that Mr. Schlein and the Complainant were

long-time adversaries in the union and employment context. Their disputes were frequent, loud and public. Indeed, shortly before the incident of early 2000, the Complainant had unsuccessfully challenged Mr. Schlein as a candidate for election for National Vice-President. It is hard to imagine that opposing candidates to elected office could really embarrass the other, as almost anything they say about the other is tainted as political exaggeration."

There is no evidence to support a finding that the Complainant and Mr. Schlein were long-time adversaries. The fact that they opposed one another in an election for the position of National Vice-President one year prior to the incidents that gives rise to to this cause of action is not relevant to the issue at hand, whether the Complainant was retaliated against by the Respondent for testifying at an arbitration hearing involving the issue of discrimination on the basis of race.

Exception # 10 states, "However, given that the Complainant refused to perform the tasks Mr. Schlein had assigned him Mr. Schlein (his supervisor) had no choice but to follow this path and do it himself."

The evidence supports a finding that the Complainant refused to carry out eight to nine tasks prior to the letter writing assignment of February 4, 2000. Transcript page 35 line 21 to page 36 line 10, page 235 line 5 to 20 and page 344 line 11 to 18. Following that incident there is nothing in the record to substantiate the Respondent's claim that Mr. Schlein's direct communication with the local unions was due to the Complainant's refusal to carry out assignments. The exception is found to be conjecture.

Exception # 11 states, "Thus Mr. Schlein had an obligation to communicate with

these union members. This is especially true as the Complainant was more than a potential political opponent for the elected office of National Vice President, and could exploit the notion the union members were not well served by Mr. Schlein when it was really the Complainant's own refusal to act."

This statement is found to be purely conjecture, not based on any evidence in the record and irrelevant to the issue before the Commission.

FINDINGS OF FACT:

1. Complainant was employed by the Respondent, a union that represents government employees, for nearly 26 years in the capacity of National Representative (hereafter NR). (Transcript page 26 line 19 to page 27 line 5.)

2. Complainant's duties as a NR included training local union officers and representing union members in arbitration hearings, grievance proceedings at the lower level, appeals before the Merit System Protection Board, Unfair Labor Practice complaints and pay and work conditions negotiations. (Transcript page 27 line 6 through page 28 line 9.)

3. National Vice-President David Schlein was the Complainant's immediate supervisor at the time of his 10-day suspension. (Transcript page 324 line 8 through 19.)

4. The Complainant and Mr. Schlein are white males (Judicial Notice).

5. Mr. Schlein's duties included supervising the locals in the 14th District which includes the Washington Metropolitan area and Europe. He was a representative on the National Executive Council and supervised the staff of the 14th District office which included National Representatives and support staff. (Transcript page 324 lines 8 to 19.)

6. The office of National Vice President is an elected position. (Transcript page 134 line 5 to 14.)

7. In the year 2000, there were three NRs working in the 14th District Office in addition to the Complainant. They were Kofi Boakye, Hugh Hassan and Nathaniel Nelson. (Transcript page 284 line 1 to 12.)

8. The Complainant and his immediate supervisor had a contentious relationship. (Transcript page 82 line 22 through page 83 line 8.) The Complainant considered Mr. Schlein to be a "lousy supervisor". (Transcript page 123 line 16 to 17.)

9. Mr. Schlein assigned the Complainant to investigate a complaint made by James Seawright, then president of Respondent's Local 1000, concerning the misappropriation of union funds during an election the local had held. (Transcript page 38 line 17 to page 39 line 4.)

10. The Respondent's policy for handling such complaints is for the National Vice-President to submit a request to the Respondent's Office of General Counsel for review. (Transcript page 39 line 5 to 11.)

11. In compliance with the assignment on February 3, 2000 the Complainant sent a memorandum to Mr. Schlein recommending that either he or the General Counsel for the union issue a letter to the election chairperson of Local 1000 demanding restitution of the election funds. (Complainant's Exhibit #1.)

12. Mr. Schlein responded to Complainant's memorandum by writing on the document "To Harry – OK – Draft a letter for my signature." which he dated

February 4, 2000. The Complainant wrote under this notation “I don’t draft letters for you.” and dated his reply February 8, 2000. Mr. Schlein wrote beneath the Complainant’s response, “This is not an option – it is an assignment – Do it.” and dated his remarks February 9, 2000. (Complainant’s Exhibit #1.)

13. The Complainant did not write the letter as requested. (Transcript page 30 line 12 to 14.)The basis for his refusal was that he had never been asked, prior to February 4, 2000 to write a letter for a National Vice-President in his nearly 26 years of tenure with the Respondent and that the task was not listed in his job description and not a part of his work-related duties as a NR. (Transcript page 41 line 4 to 15.)

14. Mr. Schlein never imposed a deadline for the Complainant to complete the letter nor did he ever issue any verbal or written warnings to the Complainant advising him that he would disciplined if the task was not completed. (Transcript page 36 line 11 to 12 and page 205 line 13 to 18.) When asked why he never set a deadline for the completion of the task, Mr. Schlein stated he did not believe it was necessary. (Transcript page 350 line 7 to 8.) The NVP did state he had an expectation that the assignment be done within one to two weeks, but this expectation was never communicated to the Complainant either verbally or in writing. (Transcript page 349 line 3 to 11.)

15. Prior to this incident, the Complainant had refused to do at least eight or nine assignments Mr. Schlein had given him that he deemed outside the scope of his job description and he was never disciplined for his refusal to carry these tasks. (Transcript page 35 line 21 to page 36 line 10, page 235 line 5 to 20 and page 344 line 11 to 18).

16. It was common knowledge among the 14th District staff that Complainant had been directed to write the letter, that he had refused to comply with order and that no disciplinary was being taken against him for his refusal.(Transcript page 194 line 12 to 16.)

17. Mr. Schlein testified that if the assignment he had given the Complainant were "highly important" that disciplinary action should have taken place right away. He noted in the Complainant's case he believed one more warning after his first order was warranted before issuing a suspension. (Transcript page 381 line 21 to page 382 line 10.) He further noted that the assignment was not high priority. (Transcript page 349 line 20 to 21.)

18. Complainant believed Mr. Schlein was a racist and had shown disparate treatment toward Mr. Nelson, a black co-worker. (Transcript page 31 line 2 to 7.) Mr. Hassan, a white male and a co-worker, also considered Mr. Schlein to be biased toward employees who were black and testified that he personally observed him discipline Mr. Nelson for actions he and the Complainant were not punished for. (Transcript page 180 line 16 to page 181 line 3 and page 208 line 20 to 209 line 6.) Additionally Mr Hassan noted that Mr. Schlein denied Mr. Nelson's request for business cards, letterhead stationary and training while his white counterparts' requests for these items were routinely granted. (Transcript page 34 1ine 1 to 19.)

19. On the evening of March 1, 2000, Mr. Schlein found a letter on the office fax machine that was on Respondent's letterhead and had been written by Mr. Nelson concerning a matter that Mr. Schlein did not consider to be job-related.

(Transcript page 326 line 18 to page 327 line 8.)

20. The morning of March 3, 2000 at approximately 9:15 a.m. Mr. Schlein confronted Mr. Nelson about the document he had found, informing him the use of the National Office letterhead in such a manner was inappropriate and that he was prohibited from using official stationary for his personal use in the future. (Transcript page 327 line 11 to 16 and page 328 line 4 to 9 and Complaint's Exhibit #6).

21. A short time thereafter Mr. Schlein met with Anna Leone, his Administrative Assistant in her office. (Transcript page 328 line 15 to page 329 line 3.) Ms. Leone had typed the letter in question for Mr. Nelson. (Transcript page 286 line 5 to 8.)

22. Following his exchange with Mr. Schlein, Mr. Nelson had gone looking for his shop steward, Hugh Hassan. When he was unable to locate Mr. Hassan, he asked the Complainant to serve as his union representative and accompany him to Ms. Leone's office to retrieve the letter. Complainant agreed. (Transcript page 120 line 4 to 8, page 125 line 3 to 7 and page 209 line 11 to 15.)

23. At about 9:35 a.m. Mr. Nelson knocked on Ms. Leone's office door while Mr. Schlein and Ms. Leone were still meeting in her office and asked for the return of the letter. Complainant was standing behind Mr. Nelson, who is taller and wider in stature than he. Mr. Schlein's view of the Complainant was blocked by Mr. Nelson until later in the conversation. (Judicial notice that Mr. Nelson is taller and wider in stature than the Complainant, Transcript page 286 lines 9 to 11, page 329 line 5 to 10 and Complainant's Exhibit #6.)

24. Mr. Schlein informed Mr. Nelson that he could have a copy of the letter,

but not the original document and invited him to come next door to his office to get a copy. (Transcript page 329 line 12 to 19 and page 287 line 14 to 17.)

25. Mr. Nelson insisted he be given the original letter and Mr. Schlein refused to comply with his demand. (Transcript page 287 line 19 to 22.) An argument ensued, both men raised their voices. Mr. Nelson called Mr. Schlein a racist and Mr. Schlein asked him to leave his office. (Transcript page 329 line 19 to 330 line 2.)

26. Complainant commented in normal tone of voice to Mr. Nelson, “Lets go. You know he is a racist. Everybody knows he is a racist.” At that point Mr. Schlein became aware of the Complainant’s presence. Both the Complainant and Mr. Nelson then left Mr. Schlein’s office. (Transcript page 115 line 1 to 3, page 126 line 7 to 9 and page 129 line 5 to 8.)

27. This incident was not an unusual occurrence in the 14th District Office at that time. During office staff meetings it was common for shouting matches and name calling to take place. On occasion at these sessions Mr. Schlein was called a “liar” and “incompetent” by employees under his supervision. Prior to the June 15, 2000, no disciplinary action was taken against any employees who engaged in this form of behavior. Mr. Schlein acknowledged that there had been a least two staff meetings where there had been disruptive and loud exchanges (Transcript page 292 line 2 to 8 and 395 line 9 to 22.)

28. On March 16 an arbitration hearing was held concerning the allegations of racial discrimination that were brought against Mr. Schlein by Mr. Nelson. The

Complainant was a witness for Mr. Nelson at this proceeding. The Complainant recounted how his treatment as a white employee working under Mr. Schlein's supervision differed significantly from the manner in which Mr. Nelson was treated by their supervisor. To further demonstrate these dissimilarities Complainant cited the assignment he had received from Mr. Schlein on February 4, 2000 and how after he had refused to carry out the task no disciplinary action was taken against him. (Transcript page 35 line 17 to page 36 line 4.) Complainant presented the memorandum he had submitted to his supervisor dated February 3, 2000 with the subsequent notations he and Mr. Schlein had made on it as evidence at the hearing. (Transcript page 93 line 12 to 15 and page 256 line 8 to 10 and Respondent's Exhibit #7.)

29. Mr. Nelson won his arbitration hearing. (Transcript page 186 line 4 to 5.)

30. The atmosphere in the 14th District office changed drastically following the Complainant testifying at Mr. Nelson's arbitration hearing. Mr. Schlein stopped holding staff meetings. (Transcript page 186 line 1 to 6.) Mr. Schlein began to closely scrutinize the Complainant's work and question him in detail about his assignments, both practices he had never engaged in prior to March 16, 2000. (Transcript page 46 line 22 and Complainant's Exhibit #2.) He also began giving the Complainant other NRs' work assignments to do. (Transcript page 210 line 11 to line 17.)

31. Mr. Schlein also began coming into Complainant's office without a given reason, staring at him wordlessly and leaving abruptly without explanation. (Transcription page 51 line 8 to line 11.)

32. Shirlee M. Taylor is the Human Resources Administrator for Respondent, a position she has held for ten years. (Transcript page 248 line 10 to 13.) Her job duties entail preparing personnel actions, administering the employees' 401 K plan, participating in contract negotiations, acting as an advisor in arbitrations and counseling employees on employment matters. (Transcript page 249 line 12 to 18.)

33. Ms. Taylor was present during Mr. Nelson's arbitration hearing on March 16, 2000 and heard the Complainant's testimony at that proceeding. (Transcript page 248 line 21 to page 249 line 5 and page 250 line 13 to 15.) The day after the arbitration hearing Ms. Taylor issued a memorandum to Bobby L. Harnage, Sr., National President for the Respondent informing him that the Complainant had testified at the arbitration hearing for Mr. Nelson he had been instructed by Mr. Schlein to write a letter on February 4, 2000 which he had refused to do and no disciplinary action had been taken against him.(Complainant's Exhibit #4.)

34. On March 23, 2000, Mr. Schlein , testified he issued a verbal request to the Complainant to write the letter he had requested him to write on February 4, 2000. (Transcript page 350 line 15 to 18.) The Hearing Examiner does not find the testimony reliable for the following reasons. The witness later contradicted himself during cross-examination by saying he issued a second letter to the Complainant concerning the assignment and as was his practice checked with the Complainant periodically to see if the task had been completed. When asked about the contradiction he said the request was verbal and said he had only spoken to the Complainant once. When asked what the Complainant's response was to his request he said he could not recall. If the Complainant

had refused the request again then the question would be why didn't Mr. Schlein follow the procedure he said was appropriate and take immediate disciplinary action at that time. If the Complainant had responded by agreeing to complete the task after refusing to do so initially this, this would constitute a new and significant development is the matter and would certainly have been remembered.

35. On March 28, 2000 Mr. Harnage sent a memorandum to Mr. Schlein indicating that it had been brought to his attention that the Complainant had refused to carry out assignments given by Mr. Schlein without any consequences thus far. In closing he asked Mr. Schlein if this information was true and if so to provide an explanation. (Complainant's Exhibit #5.)

36. After the March 28th memorandum was issued, Mr. Harnage and Mr. Schlein had a discussion where the NVP advised his superior that he was aware of the situation and that he was dealing with it. (Transcript 394 line 13 to 21.)

37. On April 19, 2000 Mr. Schlein sent the Complainant a memorandum questioning his work assignments and vouchers. Complainant's Exhibit #2. No mention was made of the February 4, 2000 assignment in this memorandum. Mr. Schlein had never questioned the Complainant's performance or vouchers, prior to the Complainant's testimony at Mr. Nelson's arbitration hearing. (Transcript page 351 line 2 to line 10.)

38. On May 2, 2000 Mr. Schlein sent a written recommendation to Mr. Harnage requesting that he suspend the Complainant for 10 days: five days for insubordination (refusal to write the letter he had instructed him to prepare on

February 4, 2000) and another 5 days for inappropriate behavior pertaining to the incident that took place on March 2, 2000. The suspension was without pay. (Respondent's Exhibit #4). Mr. Schlein made the decision to suspend the Complainant one week before issuing the written recommendation after consulting with "others". (Transcript page 385 line 20 to 386 line 10).

39. Mr. Harnage responded to Mr. Schlein's recommendation by issuing the Complainant a 10-day suspension on June 15, 2000 for the charges set forth in the Mr. Schlein's Recommendation letter dated May 2, 2000. Complainant was subsequently suspended for 10 days without pay. (Respondent Exhibit # 4.) Mr. Nelson was also suspended on June 15, 2000 for 5 days for the March 2, 2000 incident. (Complainant Exhibit #6.)

40. Although there were nine to ten other episodes of Complainant's refusal to carry out assignments, the only incident he was suspended for was the one he testified about at Mr. Nelson's arbitration hearing on March 16, 2000. (Transcript page 214 line 19 to page 215 line 7.)

41. Until June 15, 2000, the Complainant had never been disciplined in his nearly 26 years of employment with the Respondent. (Transcript page 35 line 21 to page 36 line 10.)

42. Based on the evidence in the record the Commission makes an additional finding that the real reason the Respondent suspended the Complainant for 10 days was in retaliation for his testifying at the arbitration hearing for Mr. Nelson. (Transcript pages 35 line 21 to page 36 line 10, page 235 line 5 to 20, page 344

line 11 to 18, page 248 line 21 to page 249 line 5, page 250 line 13 to 15, page 394 line 13 to 21, page and Complainant's Exhibit #4 and #5 and Respondent's Exhibit #4.)

43. Upon his return to work following the 10-day suspension, the Complainant continued to work for the employer until March 5, 2001 when he was terminated by Mr. Schlein along with the three other NRs in his office.[1] Respondent's Exhibit #7. Complainant went through arbitration and was reinstated to his former job. (Transcript page 122 line 14 to 16.)

44. It was the standard practice of the Respondent that if an employee engaged in an infraction that warranted disciplinary action, the supervisor of the employee would issue a corrective action within a few days of the incident. (Transcript page 167 line 16 to 19 and page 170 line 15 to 19.)

45. The assignment for which the Complainant was suspended was never completed. (Transcript page 30 line 12 to 20.)

46. Mr. Schlein publicly embarrassed and humiliated the Complainant by publishing news of his suspension to members of the union which was against union policy and undermined his credibility as a National Representative. (Transcript page 216 line 18 to page 217 line 16.) He also experienced embarrassment and humiliation before his family and his community for his suspension and his family suffered embarrassment and humiliation as a result of the Complainant's suspension. (Transcript page 433 line 1 to 13.)

[1] OHR's Letter of Determination indicates that the Complainant was reinstated to his position of National Representative with the Respondent on October 29, 2001after winning an arbitration hearing where he was awarded back pay, all benefits and other entitlements with interest.

47. Following the suspension the Complainant was repeatedly asked by Mr. Schlein to write letters for his supervisor even though this task was not a part of his job description. (Transcript page 207 line 2 to line 7.) Mr. Schlein also began setting unreasonable deadlines on the assignments he gave to Complainant. (Transcript page 213 line 1 to 17.)

48. Mr. Schlein began to go outside the chain of command and talk directly with the union leaders and members of the locals assigned to the Complainant for representation further undermining his professional credibility and ability to carry out his job. (Transcript page 59 line 11 to 20.)

49. Respondent offered a buyout to its employees on January 28, 2002 to avoid layoffs of its workers. (Respondent's Exhibit #9)

50. On February 13, 2002 the Complainant submitted his notice of retirement to the Respondent effective March 1, 2002. (Respondent's Exhibit #11.) Respondent accepted the Complainant's notice of retirement in a letter dated February 15, 2002 and signed by Bobby L. Harnage, Sr., National President. (Respondent's Exhibit #12.)

51. Complainant accepted a buyout where he would receive 20% of his salary after taxes and his retirement would be paid to him in a lump sum of approximately $300,000.00 in exchange of foregoing a monthly pension and health insurance, dental, vision and life insurance coverage. (Respondent's Exhibit #14. Transcript page 100 line 15 to page 101 line 13.)

52. Based on the acceptance of employer's buyout offer the Complainant's

employment with the Respondent ended effective February 28, 2002. (Respondent's Exhibit #14.)

53. At the time Complainant made his decision to resign he felt pressured to do so. He believed that the Respondent was trying to force him out of his position and if he did not leave voluntarily he would be fired as he had been the previous year. (Transcript page 158 line 1 to 4.) Respondent's offer of a buyout did not influence his decision to resign. Complainant loved the work he was doing and he had no plans to retire until he was 70 years old. (Transcript page 431 line 19 to page 432 line 4 and page 438 line 11 to page 439 line 7.) Prior to his suspension the Complainant enjoyed a reputation as a highly respected senior National Representative with years of experience and a record of outstanding and dedicated service to the union. Following his suspension up until the time of his separation from employment he became a persona non grata. His immediate supervisor continued to ask him to carry out duties outside his job description and to do assignments within an unreasonable timeframe. (Transcript page 44 line 16 to page 45 line 4, page 359 line 19 to 20, page 433 line 1 to 16, page 435 line 12 to 13 and page 438 line 11 to 3.) Complainant was 62 years old at the time of his resignation. (Transcript page 99 line 16 to 22.)

54. It is determined that the Respondent's retaliation against the Complainant continued from the date of his 10-day suspension until the date of his termination on March 5, 2001.

ISSUE BEFORE THE HEARING EXAMINER:

Whether the Complainant was subjected to unlawful retaliation when Respondent suspended him for ten (10) days on June 15, 2000 after Complainant testified in an arbitration hearing on March 16, 2000?

CONCLUSIONS OF LAW

The District of Columbia Human Rights Act, District of Columbia Code § 2-1402.61 (a) (2001 Edition) states, "It shall be an unlawful discriminatory practice to coerce, threaten, retaliate against, or interfere with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected under this chapter."

Pursuant to the District of Columbia Human Rights Act, District of Columbia Code § 2-1402.11 (a) (2001 Edition), "It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race . . . (1) By an employer – To fail or refuse to hire, or to discharge, any individual ; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee or as an applicant for employment;"

In analyzing retaliation cases brought under the Human Rights Act, the Commission on Human Rights and the District of Columbia Court of Appeals

follow the legal framework set out by the United States Supreme Court in reviewing cases filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq* *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 802, 36 L.Ed. 668, 93 S. Ct. 1817 (1973), *Atlantic Richfield Company v. District of Columbia Commission on Human Rights,* 515 A.2d 1095 (D.C. 1986) and *Wisconsin Avenue Nursing Home v. District of Columbia Commission on Human Rights,* 527 A.2d 287 (D.C. 1987). The burden of proof begins with the Complainant , who must prove by a preponderance of the evidence a prima facie case of retaliation. If the prima facie case is met there is a presumption of retaliation and the burden shifts to the Respondent to articulate a legitimate, non-discriminatory reason for the action taken. Should the Respondent meet its burden of showing a legitimate, non-discriminatory reason for their behavior the presumption is removed and the Complainant must prove by a preponderance of the evidence that the legitimate reason was not the real basis for the action, but merely a pretext for retaliation. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The elements necessary to establish a prima facie case of retaliation are set forth in the District of Columbia Court of Appeals decision in *Arthur Young v. Vernell M. Sutherland,* 631 A.2d 354, 368 (D.C. 1993). The Court held ". . . a a plaintiff must show: (1) that he or she engaged in an activity protected by the statute; (2) that the employer engaged in conduct having an 'adverse impact' on the plaintiff ; and (3) that this conduct was causally related to the plaintiff's exercise of protected rights."

The United States Supreme Court ruled in *Burlington Northern & Santa Fe Railway Company v. White,* 2006 U.S. LEXIS 4895 (2006), ". . . the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[2]

In the decision of *Mitchell v. Baldrige,* 245 U.S. App. D.C. 60, 66, 759 F.2d 80, 86 (1985) held that ". . .the causal connection . . . may be established by showing that the employer had knowledge of the employee's protected activity and that the adverse personnel action took place shortly after that activity."

Once the employee has established a prima facie case of retaliation the burden shifts to the employer to present a legitimate non-retaliatory business reason for the contested action. See *Goos v. National Association of Realtors,* 715 F. Supp. 2, 3 (D.D.C. 1989). If the employer is able to establish a legitimate, non-discriminatory reason for the employment action the burden shifts back to the Complainant to prove that the Respondent's justification for its action was not its true reason but was in fact merely a pretext to disguise discriminatory practice." *Atlantic Richfield, supra* at 1100.

On March 16, 2000 the Complainant testified on behalf of a black co-worker

[2] In making this decision, the United States Supreme Court adopted a more liberal view of what may be considered retaliation. The same view that has been the law for sometime in the District of Columbia Circuit Court.

(Nathaniel Nelson) at his arbitration hearing concerning the disparate treatment Mr. Nelson received from Mr. Schlein, their immediate supervisor based on his race. He illustrated his testimony with examples of how Mr. Schlein had disciplined Mr. Nelson, a black man for matters he had not disciplined the Complainant (a white man) for including his refusal to write a letter Mr. Schlein had directed him to do a month earlier. Complainant has established the first element in a prima facie case of retaliation, engaging in a protected activity.

The very next day the Respondent took action through Ms. Shirlee M. Taylor, its Human Resources Administrator, who had participated in the arbitration hearing. On March 17, 2000 Ms. Taylor sent a memorandum to the union's National President Bobby L. Harnage, Sr. informing him of the nature of Complainant's testimony at Mr. Nelson's arbitration hearing that previous day, particularly his statement he had refused to carry out Mr. Schlein's instruction on February 4, 2000 to write a letter and that no corrective action had been taken. A week and a half later Mr. Harnage sent a letter to Mr. Schlein inquiring as to whether the Complainant's testimony at the March 16, 2000 arbitration hearing was correct in that he had been give a assignment by Mr. Schlein, that he had refused to carry out and that no disciplinary action had been taken. A month later Mr. Schlein requested that Mr. Harnage suspend the Complainant for refusal to write the letter he had directed him to on February 4, 2000 and inappropriate conduct stemming from the incident that occurred March 2, 2000. On June 15, 2000 Complainant was suspended for 10 days without pay. Complainant has established the second element of the prima facie case of retaliation, that the employer caused him adverse action,

suspending him 10 days without pay.

There is a strong casual connection between the Complainant's testifying at the arbitration hearing and his suspension by the Respondent. It is clear, but for the memorandum sent by Ms. Taylor to Mr. Harnage the Complainant's suspension would not have taken place. Complainant had been issued no verbal or written warnings for either his February 8th refusal to write the letter or for his calling his supervisor a racist on March 2, 2000. Claimant had engaged in similar conduct prior to these occurrences, as the record reflects, with no action being taken. The Complainant has met the third element in the prima facie case of retaliation, that the adverse action was casually related to his exercise of his protected rights.

The Respondent argues that they had a legitimate non-retaliatory basis for suspending the Complainant due to "his flagrant act of insubordination" on February 8, 2000 and "acts of disrespectful, disruptive and inappropriate behavior" on March 2, 2000. The Commission concurs that these cited reasons constitute legitimate non-retaliatory reasons for suspending the Complainant.

It is also determined that the Complainant has established that these reasons were pretext and not the real basis for his suspension. Complainant has provided undisputed testimony that on at least eight occasions prior to February 8, 2000 he had refused to do assignments Mr. Schlein had given him without any disciplinary action being taken. On February 8, 2000 he refused to comply with his supervisor's request to write a letter and no action was taken until after the Complainant testifies at a black co-worker's arbitration hearing concerning the disparate treatment shown

shown to the employee by the Respondent on the basis of race. The day after the Complainant testified at the arbitration hearing the Respondent's Human Resources Administrator reported the content of his testimony to the National President. The National President then relays the information to Mr. Schlein in a letter dated March 28 and requests an explanation. On May 2, 2000 Mr. Schlein requests the National President suspend the claimant for 10 days without pay. It is duly noted that the Complainant never carried out the assignment even upon his return from suspension nor was the task completed by any one else as of the date of the hearing.

The Complainant was also suspended for the March 2nd incident where he called his supervisor a racist. Following this event Mr. Schlein took no action in this matter until after Complainant testified on March 16th. Additionally the record reflects that the parties had a long history of confrontational meetings where raised voices and name calling were not uncommon and no disciplinary action was taken by the Respondent for this conduct. Mr. Lyons' testimony is found to be highly credible that the Respondent usually disciplines employees within a few days to a week from when the alleged infraction has occurred. In this case the Respondent did not take disciplinary action against the Complainant until at least three months after the acts of alleged misconduct took place and after he had engaged in the protected activity.

CONCLUSION

Based on the foregoing, the Commission finds that the Complainant was unlawfully retaliated against by the Respondent when they suspended him for 10 days after he had testified at an arbitration hearing on behalf of a black co-worker alleging racial

discrimination practiced by the Respondent against him and other black employees. This retaliation did not end with the 10 day suspension, but continued on after the 10 days had expired and the Complainant had returned to work up to the time he filed his Complaint with OHR that gives rise to the foregoing action. The Respondent published the fact that the Complainant had been suspended for 10 days to the Complainant's co-workers and the union members he represented causing the him professional embarrassment and humiliation as well as damage his professional reputation and credibility as a National Representative. His immediate family members were embarrassed and humiliated by the suspension as well. Mr. Sclein started to undermine the Complainant's ability to do his work by breaking the chain of command and going directly to the union leaders and members of locals the Complainant was assigned to represent and interacting with them directly. He began to give Complainant assignments with unreasonable deadlines and the duties of other NRs. Mr. Schlein also began to intensely scrutinize the Complainant's work and question him about his duties on a level of intensity he had never done before engaged in. On occasion he would enter the Complainant's office stare at him wordlessly and walk out.

DAMAGES

When a Respondent has been found to have engaged in a discriminatory practice, which is unlawful under the Human Rights Act of 1977, the Commission is charged with the responsibility of issuing a decision and order requiring the respondent to:

" . . . Cease and desist from such unlawful discriminatory practice, and to

take affirmative action . . . [and order] the payment of compensatory damages to the person aggrieved by such practice; the payment of reasonable attorney fees; and the payment of hearing costs . . .” §2-1203.13 of the District of Columbia Official Code.

Section 1403.13 of the District of Columbia Official Code authorizes the Commission to develop guidelines with respect to damages and attorney fees. The most recent guidelines were promulgated by the Commission on March 19, 1999 as the “District of Columbia Commission on Human Rights Guidelines for Payment of Compensatory Damages, Civil Penalties and Attorney’s Fees Under the Human Rights Act of 1977”, which can be found at Title 46 District of Columbia Register page 2804 (March 19, 1999).

According to §201.1 of the Guidelines:

> Every prevailing complainant shall be entitled to damages equal to all income that would have been received from an employer or any other source of income, whether or not that employer or source of income is respondent hereunder, absent the unlawful discriminatory acts or practices of the respondent during the period of violation.

§201.2 of the Guidelines states:

> Included therein shall be income for overtime work that would have been available to the complainant under normal work conditions and work routine, on an estimated basis, during the period of violation.

§201.3 states:

> This category shall also include the monetary equivalent of all sick leave, annual leave, retirement benefits, annuities, health benefits and every other normal and usual employee benefit lost during the period of violation as a result of the unlawful discriminatory act or practices of the respondent.

§211.1 of the Guidelines state:

> The natural and unavoidable consequences of any unlawful discriminatory act or practice are personal embarrassment, humiliation and indignity and the prevailing complainant shall be entitled to such damages as proved by competent evidence as defined in § 213.

§211.2 of the Guidelines states:

> In awarding damages for embarrassment, humiliation or indignity; the Commission shall consider whether the unlawful discriminatory acts or practices were accompanied by aggravating factors including, but not limited to any of the following:
>
> (a) Untrue derogatory statements by the respondent regarding the complainant;
>
> (b) Demotion or termination of the complainant
>
> (c) Racial, ethnic, religious, sexual or other epithets regarding the Complainant;
>
> (d) Occurrence of the unlawful discriminatory acts or practices of the respondent, or within knowledge of the awardee's family, friends, peers or acquaintances; and
>
> (e) Willful, recklessness or repetition of the unlawful discriminatory acts or practices of the respondent to the extent that they constituted harassment or caused unusual inconvenience.

LOST INCOME AND EMPLOYEE BENEFITS

1. The Complainant is found to be entitled to compensatory damages for lost income, sick leave, annual leave, retirement benefits, annuities and health benefits that he lost as a result of being suspended without pay for two weeks. The District of Columbia Municipal Regulation Title 4 § 201.1 (1995) says,

> "Every prevailing complainant shall be entitled to damages equal to all income that would have been received from an employer . . ."

The Respondent is ordered to review the Complainant's pay records in order to properly calculate the amount of money owed for the period of time in question.

EMBARRASSMENT AND HUMILIATION AND INDIGNITY

2. It is further determined the Complainant is entitled to an award of $50,000.00 for embarrassment, humiliation and indignity that he suffered as a result of Mr. Schlein publishing his suspension to other union members. Pursuant to the District of Columbia Municipal Regulation Title 4 § 211.2 (d) (1995) awards can be made for embarrassment, humiliation and indignity as well as the embarrassment, humiliation and embarrassment his family endured as a result of the retaliation.

The record will reflect that the Complainant was a National Representative of nearly 26 years with the Respondent and had an untarnished personnel record with no history of previous disciplinary action. He was considered a Senior National Representative because of his experience and knowledge of the field and highly regarded by his peers and the union members he represented. Mr. Schlein willfully and recklessly published his suspension to other union members in violation of union policy which cast the Complainant in a negative light to the same union members he represented in his position as National Representative and severely damaged his reputation as a union representative.

After the suspension Mr. Schlein began breaking the established chain of command and going directly to union members concerning matters that the Complainant had jurisdiction over which caused him further humiliation,

embarrassment and indignity. This form of retaliation went on well beyond the 10 days of the suspension. It is determined that from the date of the suspension to March 5, 2001 when he was terminated and filed the foregoing Complaint, a period of nine months, the Complainant underwent a continuous and relentless form of retaliation from the Respondent.

The Respondent vigorously opposes the award of $50,000.00 in compensatory damages to the Complainant on the grounds that the amount did not comply with the guidelines set forth in the guidelines for damages under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq* cases. The distinction that needs to be made here is that this cause of action was filed under the District of Columbia Human Rights Act of 1977 and the guidelines that apply in accessing damages are different from Title VII cases. Therefore the Respondent's argument that the EEOC case law should hold sway is inaccurate. There are caps for damages under 42 U.S.C. § 2000 (e)5(g) while there are no such restrictions under the District of Columbia Human Rights Act.

The applicable case law in this jurisdiction clearly supports a finding of damages in the amount awarded of $50,000.00. The award includes not only the wrongful 10-day of the Complainant, but also involves the hostile work environment the Complainant was subjected to after he returned from his suspension and that lasted for nine months up until his dismissal on March 16, 2001. In the decisions of *Lively v. FlexiblePackaging Association*, 830 A.2d 874. 889, 892 (D.C. 2003) and *Psychiatric Institute of Washington v. District of Columbia Commission on Human*

Rights, 871 A.2d 1146 (D.C. 2004) the court ruled "A hostile work environment claim by its very nature . . involves repeated conduct . . .based on the cumulative effect of individual acts; . . ."

The Commission is required to examine the totality of the circumstances, including the " the amount and nature of the conduct, the plaintiff's response to such conduct, and the relationship between the harassing party and the plaintiff." *Daka, Inc. v. Breiner*, 711 A.2d 86, 93 (D.C. 1984) *(Daka I)* quoting *Howard University v. Best,* 484 A.2d 958, 980 – 981 (D.C. 1984). In both the *Psychiatric Institute of Washington, supra* and *Joel Truitt Management v. District of Columbia Commission on Human Rights* , 646 A.2d the court found that an award of compensatory damages for the Complainant must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In the first case the Complainant was awarded $50,000.00 for embarrassment, humiliation and indignity that occurred over a period of months. In the second case the Complainant was awarded $35,000.00 for a one time incident of embarrassment, humiliation and indignity. These findings would support a finding that the award granted the Complainant of $50,000.00 was within the range of what is considered reasonable and in accordance with the law.

ATTORNEY'S FEES

The Complainant was represented by Agency-appointed counsel and therefore did not have attorney fees.

REASONABLE EXPENSES

Respondent is ordered to pay the District of Columbia Commission of Human

Rights $2,207.70 for court reporting and transcribing services of the hearing held October 3 and 4, 2006.

ORDER

1. That the Respondent shall cease and desist from engaging in retaliation against its employees for exercising their rights protected under the District of Columbia Human Rights Act as amended.

2. That the Respondent shall pay Complainant income, sick leave, annual leave, retirement benefits, annuities and health benefits that was lost during his two week suspension without pay and the Respondent will be responsible for calculating the amount owed.

3. The Respondent shall pay Complainant $50,000.00 for his humiliation, embarrassment and indignity.

4. That the Respondent shall pay the Commission for its cost of court reporting and transcribing services in the amount of $2,207.70.

So ordered on February 12, 2008.

Commissioner Deborah Wood Dorsey
Commissioner Nimesh M. Patel
Commissioner Michael D. Woodard