OFFICE OF COMPLIANCE
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Washington, DC 20540-1999

UNITED STATES CAPITOL POLICE BOARD,	)	
Respondent,	)	
v.	)	**Case No. LMR-CA-0037**
FRATERNAL ORDER OF POLICE, UNITED STATES CAPITOL POLICE LABOR COMMITTEE	)	**Date: June 11, 2002**
Charging Party.	)	

Before the Board of Directors: Susan S. Robfogel, Chair; Barbara L. Camens, Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.

DECISION AND REMAND ORDER OF THE BOARD OF DIRECTORS

I. Statement of the Case

This unfair labor practice case is before the Board on exceptions to the attached Hearing Officer's Decision filed by the General Counsel. The Respondent filed an opposition to the exceptions. The central issue is whether the Respondent violated the Congressional Accountability Act[1] ("the Statute") by suspending a bargaining unit employee for five days because he successfully had grieved an earlier disciplinary action. While we adopt the Hearing Officer's factual findings as summarized below, we disagree with his interpretation and application of the controlling evidentiary burdens. Accordingly, we shall remand the matter to the hearing officer for such further proceedings as is directed in this decision.

[1]Sections 7116(a)(1) & (2) of the Federal Labor-Management Relations Statute, 5 U.S.C. §7116(a)(1)&(2); as applied by section 220(a) of the Congressional Accountability Act, 2 U.S.C. §1351(a).

II. Hearing Officer's Decision

A. Discrimination Issue

In June 2000, on-duty Capitol Police Officers, Franklin Jones and Leon Myers, engaged in a brief verbal and physical confrontation at the entrance of the Russell Senate Office Building, Jones' post of duty. Whereupon, the Lieutenant William Perkins, acting on behalf of the Command Staff, directed Sergeants Thomas Finkle and David Miller to investigate the incident. During the several day investigation Lieutenant Perkins individually approached Sergeants Finkle and Miller and told them in plain terms that Officer Jones previously had evaded discipline through the negotiated grievance process [in 1999] and he should not "get away with [the current] one". Lieutenant Perkins attempted to show the investigators documentation from Officer Jones' prior disciplinary case, that had been resolved by his 1999 grievance, but they refused to view it.

Once Sergeants Finkle and Miller completed their report of investigation, they submitted it to their supervisor, Lieutenant Perkins, for his review. Their draft report concluded that Officer Jones and Detective Myers each claimed that the other had initiated the physical contact and that they had acted in self-defense; that Detective Myers struck Officer Jones on the chin with a closed fist; and that there was sufficient evidence to sustain the charge of Conduct Unbecoming against both Myers and Jones. Lieutenant Perkins marked up the draft report to add an additional charge only against Jones, *Neglect of Duty*.[2] Sergeants Finkle and Miller disagreed with the change and removed Perkins' entry. Perkins signed off on the original report and it was sent forward to the Command Staff. At that point the Internal Affairs Division ("IAD") conducted an additional investigation and administered a polygraph examination to Jones and Myers to assess responsibility for the initiation of the affray. The polygraph results disclosed deception on the part of both examinees. Consequently, IAD issued its report recommending that one allegation of *Conduct Unbecoming* be sustained against both Jones and Myers.

In February 2001, separate internal Disciplinary Review Boards ("DRB") were conducted into the charges that Jones and Myers had engaged in conduct unbecoming an officer. Inspector Larry Thompson was Presiding Officer at both hearings, but the other four Board members were not the same individuals at both hearings.[3] While each case was prosecuted by Respondent's attorney Benjamin, Jones and Myers were represented by different counsel and the Hearing

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[2]Lieutenant Perkins testified that Jones' *neglect of duty* consisted of him repeatedly telephoning another Capitol Police location, although he knew that the intended recipient of his calls was on break. [Hr. Tr. pp. 118-119].

[3]The record does not identify the eight members who served on those two DRB's, except for Inspector Mark Herbst, whom one witness recalled serving on Officer Jones' DRB. [Hr. Tr. p. 144].

Officer concluded "there was also some differences between the two hearings as to the witnesses called and evidence presented".[4]

Officer Jones' s case was heard first and that DRB found him guilty by a vote of 3-2. He was assessed a five day suspension. Officer Myers' DRB found him not guilty.[5]

Presiding Officer Thompson testified that neither DRB considered testimony or documents provided by Lieutenant Perkins and that he had no communication with Perkins concerning the matters before the DRB's. [6]

The Hearing Officer analyzed the discrimination issue by employing the Federal Labor Relations Authority precedent for mixed motive[7] employment actions. Letterkenny Army Depot, 35 FLRA 113 (1990). While the Hearing Officer found that Officer Jones had engaged in protected activity in filing an earlier grievance, he concluded that the record contained insufficient evidence to demonstrate that Jones' protected activity was a motivating factor for his five-day suspension imposed by the DRB. The Hearing Officer emphasized that the record did not affirmatively establish that Lieutenant Perkins had communicated his animus against Jones to the DRB members, and he was not disposed to infer that the DRB possessed or acted upon that knowledge or animus. The Hearing Officer also declined to infer discrimination based upon the disparity of treatment between Jones and Myers, by finding "[T]he different conclusions of the two DRBs are more readily explained by the variables that existed in the two cases than by an inference of improper motivation." [8]

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[4]Except for a single witness, who testified at one hearing and not the other, neither the Hearing Officer's decision nor the record qualitatively disclose what those differences were.

[5]Inspector [DRB Chair] Thompson believes that the DRB's should have found both officers guilty. [Hr. Tr. pp. 190-193]. Deputy Chief James P. Rohan, who had a review function regarding disciplinary process, testified that it was *obvious, without any question at all*, that both officers were guilty of Conduct Unbecoming, and that proposed five-day suspension was *incredibly light*. Rohan concluded that guilt under The Conduct Unbecoming charge was manifest irrespective of which person had started the fight. He affirmed that proof identifying the initial aggressor would have warranted an additional charge against that employee.[Hr. TR. pp. 169-171].

[6]At that time Thompson knew both Myers and Jones and was familiar with their reputations on the force. According to Thompson, no one told him that either person was a troublemaker. [Hr. TR. p. 192]. The record does not disclose whether Thompson or the DRB members were aware of Jones' 1999 disciplinary grievance; nor does it identify Respondent's official(s) whose action was contested by that grievance.

[7]These are discrimination cases where the evidence demonstrates that an employer had both a discriminatory and nondiscriminatory motivation for its action.

[8]The Hearing Officer cited the following differences: counsel for Jones and Myers, DRB composition, witnesses, and the potentiality of different testimonial performance by Jones and

B. Coercive Statement Issue

Paragraph 13 of the Third Amended Complaint alleges that Lieutenant Perkins had conversations with Sergeants Finkle and Miller[9] during which Perkins sought to target Officer Jones for disciplinary action because of Jones' earlier successful grievance. In addition, the General Counsel introduced hearing testimony of bargaining unit employee Officer Lucas that Sergeants Finkle and Miller later informed him of Perkins' attempts to influence their investigation into Jones' conduct.[10] The General Counsel did not allege this conversation with the bargaining unit employee in any complaint, nor did he submit it was in issue at any time during the hearing. The General Counsel first raised that allegation of an independent violation in his post-hearing brief.

The Hearing Officer declined to decide the lawfulness of the conversation between the Sergeants and Officer Lucas because it was neither alleged in the complaint nor raised at the hearing so as to inform Respondent that it was an issue, and the underlying facts were not fully litigated at the hearing.

III. Positions of the Parties

The General Counsel contends that the Hearing Officer erred by not determining that he had made out a *prima facie* case of discrimination under Letterkenny, *supra*. The General Counsel further contends that after he demonstrated that Lieutenant Perkins, a management operative in the disciplinary process, bore an unlawful animus against Officer Jones, it was not incumbent upon him to prove with direct evidence that Perkins had expressed his animus to officials operating at later stages of the disciplinary process. Finally, the General Counsel argues that the unalleged coercive statement should be considered on its merits because the complaint provided the Respondent with adequate notice of the "matters of fact and law asserted".

The Respondent advocates the inferences and conclusions of the Hearing Officer. Respondent submits that Lieutenant Perkins was unsuccessful in prejudicing the investigation of Sergeants Finkle and Miller against Jones, and that the record does not disclose that the DRB's were aware of Perkins' animus or of Jones' prior grievance. Respondent argues that the coercive statement

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Myers.

[9]The complaint alleged, and the Respondent admitted, that Sergeants Finkle and Myers are supervisors within the meaning of the Statute.

[10]The Hearing Officer noted Lucas' testimony that this conversation(s) took place in the November or early December, 2000 time period. Sergeants Finkle and Miller related that Lieutenant Perkins, apparently based upon material kept in a private file indicating that Jones was a *union troublemaker* because he previously had grieved successfully, solicited the Sergeants to target Jones as the instigator of the incident between Jones and Perkins.

issue was not alleged in any of the complaints, nor was it raised or litigated at the hearing. Respondent submits that it was taken by surprise when the General Counsel surfaced the allegation in his post-hearing brief and that had it been apprised earlier it would have prepared a focused defense and examination for witnesses Lucas, Finkle and Myers.

IV. Analysis and Conclusions

A. Evidentiary Burdens

Under Wright Line, 251 NLRB 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), *cert denied*, 455 U.S. 989 (1982), approved by the Supreme Court in NLRB v. Transportation Management Corporation., 462 U.S. 393, 402-03 (1983), the NLRB required its General Counsel to "make a *prima facie* showing sufficient to support the inference that protected [i.e. union-related] conduct was a motivating factor in the employer's decision" to take adverse action. Wright Line, 251 NLRB at 1089. The Courts have been critical of that *prima facie case* formulation, borrowed from civil rights Title VII discrimination law, and instead have indicated that the General Counsel's burden is to prove by a preponderance of the evidence that anti-union animus was a substantial motivation or factor in an employer's decision to discipline an employee. *Director, Office of Workers' Compensation v. Greenwich Collieries*, 512 U.S. 267 (1994); *Valmont Industries, Inc. v. National Labor Relations Board*, 244 F.3d 454 (5th Cir. 2001); *Sheehan, et al. v. Department of the Navy*, 240 F.3d 1009 (Fed. Cir. 2001); *NLRB v. CWI of Maryland*, 127 F.3d 319 (4th Cir. 1997); *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334 (D.C. Cir. 1995); and *Holo-Krome Co. v. NLRB,* 954 F.2d 108 (2d Cir. 1992).

The Federal Labor Relations Authority adopted the Wright Line doctrine. Letterkenny Army Depot, 35 FLRA 113 (1990). We now do so, but, in accord with the aforementioned judicial precedent, we prescribe a preponderance of evidence standard for the General Counsel to establish a rebuttable presumption of discrimination in mixed motive cases arising under 5 U.S.C. §7116(a)(1) & (2), as applied by section 220(a) of the Congressional Accountability Act, 2 U.S.C. §1351(a). If the General Counsel succeeds in that showing, the burden of persuasion then shifts to the employer to rebut the presumption by establishing, through a preponderance of the evidence, that it would have taken the same action even absent the employee's protected activity.

B. Respondent's Discipline of Officer Jones

A supervisor's statement displaying animus towards an employee for engaging in protected activity may establish that a disciplinary action was motivated in part by that protected activity. This is particularly true where the declarant supervisor had any role in the complained of action. Tic-The Industrial Company Southeast, Inc. v. National Labor Relations Board, 126 F.3d 334, 338 (D.C. Cir. 1997); Tualatin Elec. Inc., 319 NLRB 1237, 1239 (1995); and Ultrasystems W. Constructors, Inc., 310 NLRB 545 (1993). The Federal Labor Relations Authority has found prior protected activity to have at least partially motivated a complained of action where an involved supervisor made comments connecting the action with the protected activity. U.S. Department of Agriculture, U.S. Forest Service, 49 FLRA 1020, 1024, 1032-33 (1994); Department of the Air Force, Ogden Air Logistics Center, 35 FLRA 891, 900 (1990); and March Air Force Base, 27 FLRA 279, 283-85 (1987).

The Hearing Officer found that Lieutenant Perkins urged his investigating subordinates to make a tight case against Officer Jones because Jones the year previously had escaped discipline by filing a successful grievance. Perkins also engaged in an unsuccessful attempt to add a charge of "neglect of duty" solely against Jones. Significantly, Perkins did not address his attention toward Detective Myers, who, according to the investigation reports and the hearing testimony of high Respondent officials Thompson and Ruhan, was just as guilty of misconduct as was Jones. The only apparent distinction between those individuals' circumstances was Jones' protected prior grievance activity.

Our unease with the Hearing Officer's analysis concerns his apportionment of the burdens of persuasion in this matter. Had the Hearing Officer found that the General Counsel established that Jones' suspension was partially motivated by his protected activity, under Letterkenny, the burden of persuasion would have shifted to the Respondent to prove, by a preponderance of the evidence, that it would have suspended Jones irrespective of his protected activity. We believe that the Hearing Officer misapplied Letterkenny to his findings of fact in not concluding that the General Counsel had proved, by a preponderance of the evidence, that Respondent's discipline of Jones was at least partially motivated by his prior protected activity.

In this case, there is evidence of animus coupled with that of disparate treatment. Lieutenant Perkins, a high ranking official of Respondent, wanted to treat Jones more severely than Myers because Jones had exercised his statutorily protected grievance rights. Perkins attempted to influence the investigatory process to that goal. In the end, Jones was disciplined and Myers was not. This case is made more difficult by the fact that the discipline of Jones and Myers was not ultimately determined by Perkins or his own superiors but by the DRB's. Neither party, nor our own research, disclosed precedent addressing the application of Wright Line or Letterkenny in such circumstances.

The Hearing Officer's approach to the problem was to require direct evidence linking the animus

to the disparate treatment, e.g., that Perkins actually influenced the DRB's to treat Jones more harshly than Myers, to prove practical motivation on account of protected activity. Such direct evidence is virtually never available in discrimination cases and, therefore, the Wright Line/Letterkenny paradigm provides for such proof through circumstantial evidence. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966); *Montgomery Ward & Co.,* 316 NLRB 1248 (1995), enf'd 97 F.3d 1448 (4th Cir. 1996). Knowledge of protected activity by the employer's disciplinary decision-makers may be inferred from such factors as: (1) the timing of the alleged discriminatory action; (2) the respondent's general knowledge of union activities; (3) respondent's animus; and (4) disparate treatment. *Id*. While the fact finder may not mechanically impute the knowledge of a lower-level supervisor to the decision-making supervisor, adequate circumstantial evidence does permit such conclusions. *Poly-America, Inc. v. NLRB*, 260 F.3d 465, at 490 (5th Cir. 2001).

In our view, the evidence of Perkins' animus and the disparity in the discipline imposed upon Jones and Myers warrants a finding that the General Counsel met its burden of establishing by a preponderance of the evidence that Jones' prior protected activity was a substantial motivation or factor in Respondent's decision to discipline him. Further, the record does not allow us to modify that view based on the role played by the DRB's. While the DRB's operate as an administrative tribunal in Respondent's disciplinary matters, they are comprised of members of Respondent's workforce. We cannot discern from the record the extent to which the DRB's act independently of the Respondent's command staff. Therefore, we find that the role of the DRB's is best considered as part of Respondent's burden of establishing, by a preponderance of the evidence, that it would have reached the same result irrespective of Jones' prior grievance activity. [11] Viewing Respondent's demonstrated animus in concert with the Respondent's disparate treatment of Jones and Myers warrants, in our view, that the Respondent bear the burden of persuasion, by a preponderance of the evidence, of demonstrating that its ultimate decision-makers would have reached the same result irrespective of Jones' prior grievance activity. [12]

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[11]The Hearing Officer required direct evidence that those involved in the disciplinary process after the investigators, Sergeants Finkle and Miller, were aware of Perkins' concerns. The Hearing Officer saw the General Counsel as asking him to draw inference upon inference to establish the existence of a nexus between evidence of motivation and the discipline imposed upon Jones: i.e., the DRB knew of Perkins' hostility and Jones' past grievance; and the DRB would be punitive against Jones because of it. [*H.O. Decis.* p. 15].

[12]The Hearing Officer approached this issue when considering the disparity in treatment when Respondent disciplined Jones but not Myers. The Hearing Officer was persuaded that the difference in results was more likely attributable to non-discriminatory variables: i.e., the hearings were before separate boards with different employee counsel; some difference in witness complement in each proceeding; credibility issues, principally who initiated the altercation; and the two investigative reports were subject to different interpretations. [H.O. Dec. p. 15]. This does not take into account the uncontroverted testimony of Respondent's Deputy Chief Ruhan that both Jones and Myers were guilty of "Conduct Unbecoming" regardless which

We believe that the precedential nature of this decision and the paucity of hearing record evidence in this case, warrant the exercise of our discretion, pursuant to Section 406(e) of the Congressional Accountability Act and Section 8.01(d) of the Office's Procedural Rules, to remand the matter to the Hearing Officer for further proceedings consistent with this decision.[13]

The Hearing Officer, in his sound discretion, shall reopen[14] the record to receive evidence addressing the issue of whether Respondent would have disciplined Jones notwithstanding his protected grievance-filing activity. Such evidence may encompass, but is not limited to, the following areas:

1. Any material qualitative and/or quantitative difference in the testimonial and documentary evidence presented at both hearings.
2. The independence of the two DRB's that heard the cases against Jones and Myers.
3. Whether any DRB members knew of Jones' grievance and/or of Perkins' or any other Respondent official's animus against Jones.
4. Respondent's recent DRB history disclosing the conviction rate for personnel charged with *Conduct Unbecoming*, particularly for those cases involving physical altercations between two or more police officers.

C. Coercive Statement

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officer was the initial aggressor. [Hr. TR. p. 171]; and of Inspector Thompson that no report of investigation was introduced into evidence in either case, only a summary. [Hr. TR. p.183-184]. Morever, as we have stated, it is the Respondent's burden to prove that Jones' disciplinary hearing and decision were non-discriminatory.

[13]Chair Robfogel and Member Wallace would remand the matter to the Hearing Officer because of this decision's precedential importance and the conspicuous absence of sufficient record evidence for the Board to render informed findings under the mixed motives test enunciated in Section IV. A. *supra*. However, they do not concur in the majority's finding that the General Counsel already proved, by a preponderance of the evidence, that Jones' prior protected activity was a substantial motivation or factor in the Respondent's decision to discipline him.

[14]Member Camens concurs in the majority's factual analysis and its conclusion that the General Counsel has proven by a preponderance of the evidence that Jones' protected activity was a substantial motivation or factor in Respondent's decision to discipline him. She also concurs in the majority's remand action. However, she would confine to the existing record the Hearing Officer's re-examination whether the Respondent proved, by a preponderance of the evidence, that it would have disciplined Jones, notwithstanding his prior protected activity. To permit the Respondent to submit additional record evidence to justify its disparate treatment of Myers and Jones would, in her view, undermine the controlling evidentiary burdens and, in particular, the burden shifting paradigm imposed by Letterkenny.

The Office of Compliance's Procedural Rules at *§5.01 (d)* accord a Hearing Officer discretion to permit complaint amendments subject to the following conditions: "that all parties to the proceeding have adequate notice to prepare to meet the new allegations; that the amendments, as appropriate, . . . relate to the charge(s) investigated . . . by the General Counsel; and that permitting such amendments will not unduly prejudice the rights of the employing office, the labor organization, or other parties, unduly delay the completion of the hearing, or otherwise interfere with or impede the proceedings".

The Federal Labor Relations Authority held that where a complaint is silent or ambiguous about specific issues that are later raised at a hearing, it may still consider and dispose of those issues if the record shows that they were fully and fairly litigated. Bureau of Prisons Office of Internal Affairs, 52 FLRA 421 (1996); U.S. Department of Labor, 51 FLRA 462 (1995). When a complaint is ambiguous and the record does not clearly show that the respondent otherwise understood (or should have understood) what was in dispute, fairness requires that any doubts about due process be resolved in favor of the respondent. American Federation of Government Employees, Local 2501, 51 FLRA 1657, 1660-64 (1996).

We believe that the Hearing Officer properly exercised his discretion in deciding, on due process grounds, that he should not consider the lawfulness of the comments of Sergeants Finkle and Miller to bargaining unit employee Lucas. That conversation was neither alleged in original or amended complaints nor was it advanced by the General Counsel at the hearing as an independent violation. Only in the General Counsel's post-hearing brief did he first seek an unfair labor practice finding regarding that conversation.

While the Complaints did allege the antecedent conversation between Sergeants Finkle and Miller and Lieutenant Perkins, which the Sergeants later conveyed to Lucas, that allegation related solely to proof of discrimination rather than to an unlawful coercive statement. Accordingly, the Respondent had no reason, until receiving the General Counsel's post-hearing brief, to feel it had to defend itself from an independent unfair labor practice allegation. Consequently, the Respondent did not, for good reason, fully litigate that matter at the hearing.

Accordingly, we affirm the Hearing Officer's decision in this respect.

ORDER

Pursuant to Section 406(e) of the Congressional Accountability Act, and Section 8.01(e) of the Office's Procedural Rules, this matter is remanded to the Hearing Officer, to reopen the record consistent with this decision, and upon closing the record to render a supplemental decision to the Board.

SERVICE SHEET

I certify that I have served a copy of the Decision of the Board of Directors by facsimile and first class mail, postage prepaid, on the parties listed below.

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DATED THIS 11 day of June, 2002 at Washington, D.C.

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La Shean Kelly
Secretary to the Board of Directors
Office of Compliance