

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

In the Matter of:)	
)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee,)	
)	
Complainant,)	
)	PERB Case No. 07-U-10
v.)	
)	Opinion No. 932
)	
District of Columbia Metropolitan Police Department,)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

I. Statement of the Case

This case involves an Unfair Labor Practice Complaint (“Complaint”) filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Complainant” or “FOP”) against the District of Columbia Metropolitan Police Department (“Respondent” or “MPD”). FOP alleges that MPD violated D.C. Code § 1-617.04(a)(1) of the Comprehensive Merit Personnel Act (“CMPA”) by denying bargaining unit members¹ union representation during questioning by MPD’s Office of Internal Affairs (“OIA”). MPD filed an Answer denying the allegations and contending that the police officers were not entitled to union representation on the ground that the OIA investigation was *not* administrative.

A hearing was held in this matter on June 28, 2007. Hearing Examiner Leonard M. Wagman issued his Report and Recommendation (“R&R”) on August 28, 2007. In his R&R, the Hearing Examiner concluded that MPD did not violate the CMPA because the police officers were not entitled to union representation during criminal exploratory questioning. The Hearing Examiner recommended that the Board dismiss the Complaint.

¹ Specifically, the affected bargaining unit members described in the Complaint were First District Police Officers Phuson Nguyen, Richard Mazloom, Amy Oliva, Keri Long and Richmond Phillips.

FOP filed exceptions ("Exceptions") to the Hearing Examiner's R&R. MPD filed a Response to FOP's Exceptions. The Hearing Examiner's Report and Recommendation, FOP's Exceptions and MPD's Response are before the Board for disposition.

II. Background

Agent Guillermo Rivera of the OIA, was investigating a complaint against a police officer who had allegedly confined and handcuffed a civilian to a patrol wagon for over two hours. (See R&R at p. 3). The civilian told Agent Rivera that the officer had been rough with him and had attempted to extort money from him. (See R&R at p. 3). Agent Rivera was able to identify the officer and other police officers who may have witnessed the incident. Agent Rivera directed First District Police Officers Phuson Nguyen, Richard Mazloom, Amy Oliva, Keri Long and Richmond Phillips to appear at OIA's office for interviews on or about July 31, 2006. In anticipation that they might be the subject of a disciplinary investigation, the officers asked the FOP's shop steward for the First District, Officer Decutiis, to provide representation at the interviews. (See R&R at pgs. 3 and 6).

The parties' Collective Bargaining Agreement ("CBA"), Article 13 - Investigatory Questioning - describes three types of formal questioning conducted by MPD; administrative interview; criminal interview; and interrogation. Article 13 describes administrative interview as "[f]ormal official questioning conducted by the Department to question an employee about an administrative matter." Article 13 defines criminal interview as "[f]ormal official questioning conducted by the Department about a criminal matter, where the member has not been identified as a target." Article 13 defines interrogation as "[f]ormal official questioning conducted by the Department of a member who has been, or may be, identified as a target of a criminal investigation." Article 13 permits a FOP representative to be present at all administrative interviews, but not at criminal interviews or interrogations.

Officer Decutiis met the officers at the OIA office. The first scheduled interview was with Officer Mazloom. When it was time for the first interview, Officer Decutiis identified himself as a FOP representative for Officer Mazloom. (See R&R at pgs 3-4). Agent Rivera informed Officer Decutiis that the officer was not entitled to union representation and that he would explain why during the interview. (See R&R at p. 4). The interview proceeded without Officer Decutiis. During the interview, Agent Rivera explained to Officer Mazloom that he was conducting a criminal investigation and was attempting to determine if Officer Mazloom was a potential witness. (See R&R at p. 4). During the questioning, Agent Rivera determined that Officer Mazloom did not possess any information that aided his investigation. (See R&R at p. 4). The interview with Officer Mazloom concluded and Agent Rivera began to call another officer for an interview. Officer Decutiis intervened again, and insisted he be present for the next interview. Agent Rivera rejected Officer Decutiis' request and would not discuss the nature of the interview with either Officer Decutiis or another FOP official, Kristopher

Baumann. Again, Agent Rivera explained that each officer would be informed of the nature of the questioning during the interview. (See R&R at p. 4). During the interviews, Agent Rivera informed the officers that they were not the target of the criminal investigation. (See R&R at pgs. 4-5).

At the unfair labor practice hearing, the FOP argued that MPD violated D.C. Code § 1-617.04(a)(1)² of the CMPA by refusing to permit Officer Decutiis to represent the police officers involved in this case during the interviews which took place on July 31, 2006. (See R&R at p. 5). FOP claimed that Board precedent provides that an officer is entitled to union representation when there is a reasonable belief that discipline may result from an interview.³ (See R&R at p. 5). FOP asked that the Hearing Examiner apply the reasoning of the United States Supreme Court in *National Labor Relations Board v. Weingarten*, 420 U.S. 251, 262 (1975):

that Sections 7 and 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. Sections 157 and 158(a)(1), guarantee and protect the right of an employee to the presence of "a union representative at an investigatory interview in which the risk of discipline reasonably inheres"

MPD countered that the evidence fails to show that the officers to be interviewed by Agent Rivera on July 31st had a reasonable belief that the questioning would lead to disciplinary action against them. (See R&R at p. 5).

III. Hearing Examiner's Report and Recommendation, FOP's Exceptions and MPD's Opposition.

Based on the pleadings, the record developed at the hearing and the parties' post hearing briefs, the Hearing Examiner identified two issues for resolution. These issues, his findings and recommendations are as follows:

The Hearing Examiner considered the application of the *Weingarten* standard to the present case. The Hearing Examiner found that the officers "fear[ed] that they might be involved in an administrative investigation which might impact adversely upon their employment . . . [and] asked Shop Stewart Decutiis to be with them." (R&R at p. 6). However, the Hearing Examiner also found that at the inception of each of the officers'

² D.C. Code § 1-617.04(a)(1) provides in part that:

(a) The District, its agents, and representatives are prohibited from:

(1) Interfering, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;

³ See *D.C. Nurses Assoc. v. D.C. Health and Hospitals Public Benefit Corp.*, 45 DCR 6736, Slip Op. No. 558, PERB Case Nos. 95-U-03, 97-U-16 and 97-U-28 (1998).

interviews, he or she had been informed that they were not the target of a criminal investigation and, therefore, had no reasonable belief that discipline would result from being questioned. (See R&R at pgs. 5-6). In addition, the Hearing Examiner found that the officers in this case were not given any reason to believe that the interviews were administrative in nature. (See R&R at pgs. 5-6). The Hearing Examiner also pointed out that Agent Rivera had informed each of the officers during the interview that the questioning was not administrative, but concerned a criminal investigation. (See R&R at p. 5). Based on these findings the Hearing Examiner concluded that the officers were not entitled to union representation during the interviews. (See R&R at p. 6). The Hearing Examiner also concluded that MPD had not interfered with, restrained or coerced any of the officers in the exercise of their right to union representation protected by the CMPA. The Hearing Examiner recommended that the Complaint be dismissed.

1. Union Representation

FOP's first exception to the Hearing Examiner's R&R states that "[t]he Hearing Examiner Failed to Correctly Apply His Findings of Fact to the *Weingarten* Standard." (Exceptions at p. 8). FOP argues that despite the fact that the Hearing Examiner found that the officers feared the interview might result in discipline, he failed to reach the conclusion required by *Weingarten*. (See Exceptions at p. 9). FOP asserts that the *Weingarten* standard allows for union representation at the time it is requested, and its denial cannot be cured after the interview has commenced. (See Exceptions at p. 10).

In its second exception, FOP argues that "[t]he Hearing Examiner Failed to Recognize that the Union Representative was Needed During the Interview Because the Nature of the Investigation Was Not Conveyed Before the Interview Began." (Exception at pgs. 8 and 11). FOP contends that even if the investigation was criminal in nature, the officers should have been allowed union representation until the officers were informed of the nature of the interview.

MPD counters that the Hearing Examiner properly applied *Weingarten* to the facts of this case. (See Opposition at p. 6). In support of its argument, MPD cites to the Hearing Examiner's finding that none of the officers had a reason to believe that discipline could result from the interviews. (See Opposition at p. 6). MPD contends that the record reasonably supports the Hearing Examiner's finding. (See Opposition at p. 7). Consequently, MPD asserts that there was no *Weingarten* violation. (See Opposition pgs. 7-8).

In *NLRB v. Weingarten*, the United States Supreme Court upheld the NLRB's determination that an employee has a right to union representation during an investigatory interview that the employee reasonably fears might result in discipline. The NLRB had held that an employer "interfered with, restrained and coerced the individual right of an employee 'to engage in . . . concerted activities for . . . mutual aid and protection . . .'" in situations where the employee requests representation . . . as a

condition of participation in an interview . . . where the employee reasonably believes the investigation will result in disciplinary action.” *Id* at p. 257.⁴

Like the NLRA, the CMPA at D.C. Code § 1-617.04(a)(1), also prohibits the District, its agents and representatives from interfering with, restraining or coercing any employee in the exercise of their rights. This Board has recognized a right to union representation during a disciplinary interview in accordance with the standards set forth in *Weingarten*. In *D.C. Nurses, supra*, the Board recognized the right to union representation during a disciplinary interview. In that case, we found the agency interfered with, restrained and coerced the employee by threatening discipline for requesting union representation.

Here, the Hearing Examiner first found that the officers feared that the interview may result in disciplinary action and therefore requested union representation. These findings are amply supported by the record. The Hearing Examiner found that it was only *after* the officers were denied representation that they were informed that they were not the subject of the investigation. This finding is also supported by the record. Faced with these facts, the Hearing Examiner concluded that the denial of representation was cured. (See R&R at p. 6).

The Board rejects the Hearing Examiner’s recommendation that the officers’ right to union representation was cured when the officers were informed that they were not the target of the investigation. The right to representation attaches when an employee reasonably fears discipline might arise from an interview and requests representation. By denying union representation at that point, the Board concludes that MPD’s actions constitute a violation of D.C. Code § 1-617.04(a)(1).

2. The Parties’ CBA

In its opposition, MPD further claims that FOP’s allegations concern a violation of the parties’ CBA and, therefore, the Board lacks jurisdiction.⁵ MPD asserts that Article 13 of the parties’ CBA, rather than the CMPA, establishes an employee’s right to representation during investigatory questioning. (See Opposition at p. 8). MPD argues that the parties’ CBA provides a grievance and arbitration mechanism as the exclusive remedy for contract violations.⁶ (See Opposition at p. 8). MPD asserts that even if the

⁴ Citing National Labor Relations Act (“NLRA”), 29 U.S.C. §§ 157 and 158(a)(1).

⁵ In support of this position MPD cites *AFSCME Local 2921 v. District of Columbia Public Schools*, 42 DCR 5685, Slip Op. No. 339, PERB Case No. 92-U-08 (1992); *Butler, Slappy, Battle, Benning, Busby, Simpson, and Byrd v. District of Columbia Department of Corrections and Anthony Williams*, 49 DCR 1152, Slip Op. No. 673, PERB Case No. 02-U-02 (2002). The Board held in these cases that it (and therefore the Hearing Examiner) is without jurisdiction to rule on whether an agency’s conduct constitutes a violation of its contractual obligations.

⁶ See Article 19 of the parties’ CBA which provides details on the grievance and arbitration procedures.

Board has jurisdiction over this matter, Agent Rivera acted in accordance with the parties' CBA by informing the officers at the interview of the nature of the investigation and that they were not the target of the investigation. In addition, MPD states that Agent Rivera's refusal to permit the union members to attend the interview is consistent with Article 13, Section 3(b) of the parties' CBA, which prohibits union representation during a criminal interview. (See Opposition at p. 9).

As stated above, the CMPA at D.C. Code § 1-617.04(a)(1), prohibits the District, its agents and representatives from interfering with, restraining or coercing any employee in the exercise of their rights. D.C. Code 1-617.04(a)(5) protects and enforces, respectively, these employee rights and employer obligations by making their violation an unfair labor practice. However, "[i]n determining a violation of this obligation, the Board has always made a distinction between obligations that are statutorily imposed under the CMPA and those obligations that are contractually agreed-upon between the parties. The CMPA provides for the resolution of the former, [the Board has] stated, while the parties have contractually provided for the resolution of the latter, vis-à-vis, the grievance and arbitration process contained in their collective bargaining agreement. [The Board has] concluded, therefore that they lack jurisdiction over alleged violations that are strictly contractual in nature." *American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2921 v. District of Columbia Public Schools*, supra at p. 3. See also, *Washington Teachers' Union, Local 6, American Federation of Teachers, AFL-CIO v. District of Columbia Public Schools*, 42 DCR 5488, Slip Op. No. 337, PERB Case No. 92-U-18 (1992); *AFSCME Local 2921 v. District of Columbia Public Schools*, 42 DCR 5685, Slip Op. No. 339, PERB Case No. 92-U-08 (1992); *Butler, Slappy, Battle, Benning, Busby, Simpson, and Byrd v. District of Columbia Department of Corrections and Anthony Williams*, 49 DCR 1152, Slip Op. No. 673, PERB Case No. 02-U-02 (2002).

In the present case, the Board has found nothing in the record which indicates that the Union is asserting a contractual violation as the basis for its Complaint. Furthermore, although the Hearing Examiner makes reference to Article 13 of the parties' CBA, he makes no finding that the Union's allegations are premised on a violation of the parties' CBA. The Board believes that the obligations in the instant case are statutory in nature, particularly the question of whether the employees had a right to representation under D.C. Code § 1-617.04(a)(1). Consequently, the Board rejects MPD's claim that the Board lacks jurisdiction over the matter. MPD's claim that Agent Rivera acted in accordance with the CBA is also rejected. Whether Agent Rivera believed he was acting in accordance with the CBA does not relieve MPD of its statutory obligations.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Metropolitan Police Department ("MPD") its agents and representatives shall cease and desist from violating D.C. Code § 1-617.04(a)(1) of the Comprehensive Merit Personnel Act ("CMPA") by interfering with,

- restraining, or coercing employees in the exercise of the rights guaranteed under the CMPA.
2. MPD, its agents and representatives shall cease and from violating D.C. Code § 1-617.04(a)(4) by denying union members representation by the union during an investigatory interview in which the union member reasonably believes the interview may result in disciplinary action or any other protected activity under D.C. Code § 1-617.04(a)(4).
 3. MPD shall conspicuously post within ten (10) days from service of this Decision and Order the attached Notice where notices to employees are normally posted. The Notices shall remain posted for thirty (30) consecutive days.
 4. MPD shall notify the Public Employee Relations Board ("Board"), in writing within fourteen (14) days from the date of this Decision and Order that the Notice has been posted accordingly.
 5. Pursuant to Board Rule 559.1, and for purposes of D.C. Code § 1-617.13(c), this Decision and Order is effective and final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

February 20, 2008

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 07-U-10 was transmitted via Fax and U.S. Mail to the following parties on this the 20th day of February 2008.

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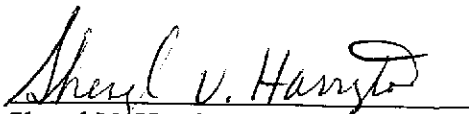
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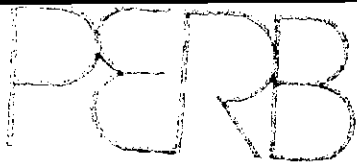
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT. THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD, PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 932, PERB CASE NO. 07-U-10 (FEBRUARY 20, 2008).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) by the action and conduct set forth in Slip Opinion No. 932.

WE WILL cease and desist from refusing to bargain in good faith with the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union"), by denying union members representation by the union during an investigatory interview in which the union member reasonably believes the interview may result in disciplinary action or any other protected activity under D.C. Code § 1-617.04(a)(4).

WE WILL NOT, in any like or related manner interfere, restrain or coerce, employees in their exercise of rights guaranteed by Subchapter XVII-Labor-Management Relations, of the District of Columbia Comprehensive Merit Personnel Act.

District of Columbia Metropolitan Police Department

Date: _____

By: _____
Chief of Police

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 717 14th Street, N.W. Suite 1150, Washington, D.C. 20005. Phone: (202)727-1822. Fax: (202) 727- 9116.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.
February 20, 2008