Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of State, County and Municipal Employees, Local 2743	
Complainant	PERB Case Nos. 24-U-12 & 24-U-15
v.	Opinion No. 1916
District of Columbia Department of Insurance, Securities and Banking	CORRECTED
Respondent	

DECISION AND ORDER

I. Statement of the Case

On January 10, 2024, the American Federation of State, County and Municipal Employees, Local 2743 (AFSCME) filed an unfair labor practice complaint (24-U-12 Complaint) against the District of Columbia Department of Insurance, Securities and Banking (DISB) asserting that DISB violated §§ 1-617.04(a)(1-5) of the Comprehensive Merit Personnel Act (CMPA) by investigating and disciplining an employee (Complainant), the AFSCME Vice-President, in violation of his right to union representation and in retaliation for protected union activity.[1] On February 1, 2024, AFSCME filed an unfair labor practice complaint (24-U-15 Complaint) against DISB asserting that DISB violated D.C. Official Code § 1-617.04(a)(4) by suspending the Complainant for nine (9) days without pay in retaliation for protected union activity.[2] On January 24, 2024 and February 20, 2024, DISB filed an answer to each Complaint (24-U-12 Answer and 24-U-15 Answer, respectively). On April 19, 2024, on a motion from DISB, PERB consolidated the two cases under PERB Case No. 24-U-12.[3]

On July 22, 2024, PERB held a hearing on this matter. On September 20, 2024, the Hearing Examiner issued a report and recommendations (Report) finding that DISB had not committed any unfair labor practices under the CMPA.[4] On October 7, 2024, AFSCME filed exceptions to the

[1] 24-U-12 Complaint at 2-5 (citing D.C. Official Code § 1-617.04(a)(1-5)).
[2] 24-U-15 Complaint at 4 (citing D.C. Official Code § 1-617.04(a)(4)).
[3] AFSCME opposed the motion for consolidation.
[4] Report at 17.

Report (Exceptions).[5] On October 21, 2024, DISB filed an opposition to AFSCME's Exceptions (Opposition to Exceptions).

On January 16, 2025, the Board remanded the case back to the Hearing Examiner.[6] The Board ordered the Hearing Examiner to explain his analysis of the burden-shifting standard from *Wright Line* as applied to the facts of the instant case, including, particularly, the analysis of evidence presented by the Complainant.[7] On February 11, 2025, the Hearing Examiner issued a Remand Report and Recommendations (Remand Report). The Complainant filed exceptions to the Remand Report (Remand Exceptions). DISB filed an opposition to the Remand Exceptions (Remand Opposition).

Upon consideration of the Hearing Examiner's Reports and Recommendations, applicable law, and the record presented by the parties, the Board adopts the Remand Report and Recommendations in its entirety and dismisses the Complaints.

I. Factual Background

DISB's mission involves cultivating a regulatory environment that protects District consumers, attracts and retains financial services firms to the District, and provides financing for small businesses in the District.[8] The Complainant works as an Insurance Operations Specialist within the Consumer Services Division, which is within the Compliance and Analysis Division (CAD), at DISB.[9] As the AFSCME Vice-President, the Complainant has repeatedly engaged in protected union activity, including bargaining with and filing PERB complaints against DISB management.[10] In 2021, the Complainant was investigated and cleared in a workplace bullying allegation against him.[11] In September 2021, the District installed security cameras at DISB, including one near the Complainant's cubicle.[12] The Complainant then placed a GoPro camera

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[5] The Exceptions included a request for oral argument before the Board. Exceptions at 1, 19. The Board has determined, *infra*, that AFSCME's arguments in exception lack merit and that the Board requires no further information from the parties in order to render a decision; therefore, AFSCME's request for oral argument is denied.
[6] *AFSCME, Local 2743 v. DISB*, Slip Op. No. 1903, PERB Case Nos. 24-U-12 & 24-U-15 (2025).
[7] *Id*. at 2.
[8] Report at 3.
[9] Report at 3-4.
[10] Report at 4, 7-8. The Hearing Examiner noted the Complainant's participation in impact and effects (I&E) bargaining, his testimony before the District of Columbia Council in 2022, his filing of grievances through 2024, and his filing of a civil lawsuit against DISB. Report at 8. The Hearing Examiner further noted the Complainant's testimony that his previous supervisor had made a written statement to the effect that the Deputy Commissioner who oversees CAD (CAD Deputy Commissioner) had told that supervisor that the Complainant filed too many grievances and needed to be dealt with. Report at 8. The Board notes that the Hearing Examiner at times misattributed the CAD Deputy Commissioner's statements to the Complainant's former supervisor in both Reports; however, the context and cited evidence make clear that the Hearing Examiner intended to refer to the CAD Deputy Commissioner.
[11] Report at 7 (citing, *generally*, AFSCME Ex. 27, February 4, 2021 DISB Workplace Bullying and Harassment Response; AFSCME Ex. 28, May 27, 2021 Bullying and Harassment Complaint Closeout Memorandum; AFSCME Ex. 32, May 4, 2021 Bullying Investigative Report (redacted). The Hearing Officer in the workplace bullying and harassment complaint determined that the record in that case did not substantiate the allegations of the complaint. May 4, 2021 Bullying Investigative Report (redacted) at 7.
[12] Report at 7-8.

(GoPro) at his own cubicle.[13] The Complainant's former supervisor recalled seeing the Complainant's GoPro "affixed to [the Complainant's] nameplate located on top of his cubicle" as early as October, 2021.[14]

On August 10, 2023, the Complainant emailed his current supervisor stating that he was not comfortable with one-on-one meetings in her office "due to false and meritless allegations presented against his character and professionalism in the workplace,"[15] and that he was available by telephone and/or Microsoft Teams for communication, which he preferred in order to document communications.[16] On August 10, 2023, the Complainant informed his current supervisor of the presence of the GoPro at his workstation.[17] On September 10, 2023, the Complainant testified and represented AFSCME at a hearing for PERB Case No. 23-U-06, in which the Board ultimately found that DISB had committed an unfair labor practice against the Complainant.[18] During a November 7, 2023, CAD unit meeting, the supervisor advised that, as a management directive, "there will be no recording of team meetings"[19] out of concern regarding the unit's discussion of proprietary and/or confidential information.[20] The Complainant stated that he was entitled as a participant to record the meeting due to the District's one-party consent laws.[21] The supervisor observed the Complainant recording the meeting on his cellular phone and instructed him to stop recording or leave the meeting.[22] The Complainant refused to stop recording until he received the instruction to do so from the supervisor in an email.[23] Witnesses described the Complainant's conduct as "disrespectful, defiant, and unprofessional," and as "another attempt to 'embarrass and dress down the manager.'"[24] After the supervisor wrote and sent an email during the meeting reiterating the instruction to stop recording, the Complainant turned off his cellular phone.[25]

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[13] AFSCME Post-Hearing Brief at 8.
[14] Report at 6. The Complainant's former supervisor noted that the Complainant explained that "the camera served the purpose of capturing any potential retaliatory incidents, potentially deterring further harassment and bullying complaints … and ensured the consistency of facts." Report at 6. The former supervisor further noted that the GoPro's presence "did not raise concerns to her, as the agency had previously installed a camera above [the Complainant's] cubicle." Report at 6. The former supervisor recalled that, "[t]o the best of her knowledge, the camera remained attached to [the Complainant's] computer until the last date of [her] employment in August 2022." Report at 6.
[15] Report at 4. Early in 2021, the Agency investigated a claim made against the Complainant by a coworker alleging workplace bullying and harassment. Report at 7. The hearing officer for that claim found that the allegations were not substantiated and closed the investigation without taking any disciplinary action against the Complainant. Report at 7. The Complainant also represented that he utilized the GoPro because of the "misrepresentation(s) of the fact(s) surrounding my alleged misconduct while employed at DISB in recent months." AFSCME Ex. 14, Notice of Proposed Adverse Action at 3.
[16] Report at 4.
[17] Report at 10.
[18] Report at 7.
[19] AFSCME Ex. 11, Verbal Counseling Memorandum at 1.
[20] Report at 4.
[21] Report at 9.
[22] Verbal Counseling Memorandum at 1.
[23] Verbal Counseling Memorandum at 1.
[24] Verbal Counseling Memorandum at 1.
[25] Verbal Counseling Memorandum at 2.

On November 15, 2023, the Complainant exchanged emails with DISB's legal representative regarding AFSCME's demand for I&E bargaining.[26] On November 21, 2023, DISB scheduled a same-day meeting with the Complainant to discuss his November 7, 2023 conduct.[27] The Complainant asserted that they would need to reschedule the meeting because he had not received enough notice to bring a union representative.[28] DISB management informed the Complainant that the meeting was to "inform [him] of [his] improper conduct," not to conduct an investigatory interview and, therefore, *Weingarten*[29] rights did not apply.[30] Management further notified the Complainant that failure to attend the meeting would constitute insubordination and would be subject to discipline.[31] The Complainant again refused to attend the meeting, which ultimately did not take place.[32] That same day, the CAD Director issued a written verbal counseling (Verbal Counseling) for insubordination to the Complainant.[33] The Verbal Counseling stated that if the Complainant's conduct during the November 7, 2023 meeting, as "memorialized in th[at] document," did not improve, DISB would take "stronger action, including suspension without pay."[34] The Verbal Counseling cited violations of Sections 1607.2(a)(16) and 1607.2(d)(2) of the District Personnel Manual (DPM).[35] The CAD Director transmitted the Verbal Counseling to the Complainant in an email, noting that the Verbal Counseling would be retained for "a period of no less than two (2) years."[36]

On December 12, 2023, the CAD Director, while at the Complainant's workstation, questioned the Complainant regarding the GoPro.[37] The CAD Director asked about the GoPro's audio and video recording capabilities, when the Complainant turned the GoPro on and off, and why the Complainant utilized the GoPro.[38] The Complainant informed the CAD Director that the GoPro could record both audio and video and that he turned it on and off at the beginning and end of his tour of duty each day.[39] On December 14, 2023, the CAD Director instructed the Complainant to remove the GoPro based on concerns regarding "safeguarding sensitive financial

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[26] AFSCME Ex. 9, November 15, 2023 I&E Email Exchange at 1-6.
[27] Report at 4; *see also* AFSCME Ex. 10, November 21, 2023, Verbal Counseling Meeting Email Exchange at 1-4; DISB Ex. 10, November 21, 2023 Verbal Counseling Meeting Email Exchange at 2-4.
[28] Report at 4.
[29] *NLRB v. Weingarten*, 420 U.S. 251 (1975) (holding that employer's denial of an employee's request to have a union representative present at an investigatory interview the employee reasonably expected would lead to discipline constituted an unfair labor practice).
[30] Report at 4.
[31] Report at 4.
[32] Report at 4.
[33] Report at 4.
[34] Report at 5.
[35] Report at 5. Under DPM § 1607.2(a)(16), "Use of abusive, offensive, unprofessional, distracting, or otherwise unacceptable language, gestures, or other conduct; quarreling; creating a disturbance or disruption; or inappropriate horseplay" is prohibited. Under DPM § 1607.2(d)(2), "Deliberate or malicious refusal to comply with proper supervisory instructions" is prohibited.
[36] Report at 4-5; *see also* DISB Ex. 8, November 22, 2023 Verbal Counseling Email; DISB Ex. 9, Verbal Counseling Memorandum.
[37] Report at 10. The Hearing Examiner inadvertently refers to the CAD Director by the supervisor's name multiple times here, but it is clear from the cited excerpts of the hearing transcript that the Hearing Examiner intended to refer to the CAD Director.
[38] Report at 10.
[39] Report at 10.

information and personally identifiable information.[40] The Complainant refused to remove the GoPro from his workstation.[41] The Complainant expressed that his goal was to protect himself from "false and meritless allegations of workplace bullying as well as the misrepresentation(s) of the fact(s) surrounding [his] alleged misconduct,"[42] and asserted that he did not use the GoPro to record privileged and/or confidential information. The Complainant noted that he did not recall "having received written notification of [any DISB recording policy]."[43]

On December 15, 2023, the Complainant emailed the District of Columbia Deputy Mayor (Deputy Mayor), Human Resources Director (DCHR Director), the DISB Commissioner, and several other DISB and AFSCME officials.[44] The Complainant stated that he was "uncomfortable working with [his supervisor] based upon documented aggressive, combative and unprofessional conduct that ha[d] been displayed since being employed at DISB (Late July 2023) and culminat[ed] with the events of November 21, 2023."[45] The CAD Director asserted that "it was unprofessional and inappropriate for [the Complainant] to go outside of the chain of command and include officials who have no awareness of the issues,"[46] The CAD Director further asserted that the Complainant's "practice of demanding the presence of others as a condition of [his] attendance at meetings [wa]s also unprofessional."[47]

On December 28, 2023, the CAD Director issued a written proposed suspension of nine (9) days (Proposed Suspension).[48] The Proposed Suspension included three (3) charges of: (1) "[d]eliberate or malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions;" (2) "[u]nauthorized disclosure or use of (or failure to safeguard) information protected by statute or regulation or other official, sensitive, or confidential information;" and (3) "[c]onduct prejudicial to the District of Columbia government: Use of abusive, offensive, unprofessional, distracting, or otherwise unacceptable language, gestures, or other conduct; quarreling; creating a disturbance or disruption; or inappropriate horseplay."[49] The Proposed Suspension listed the CAD Deputy Commissioner as the deciding official.[50] On December 29, 2023, the AFSCME President sent an email requesting a change in the deciding official, noting that the Complainant had filed a lawsuit against DISB that named the current deciding official.[51] DISB complied with the President's request, changing the deciding official to a different DISB Deputy Commissioner (Deciding Official) and notifying the President of the change.[52]

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[40] Report at 10.
[41] Report at 10.
[42] AFSCME Ex. 13, December 14, 2023 GoPro Removal Email Exchange at 1.
[43] December 14, 2023 GoPro Removal Email Exchange at 1.
[44] AFSCME Ex. 16, Final Notice of Suspension at 5.
[45] Final Notice of Suspension at 5.
[46] Final Notice of Suspension at 5-6.
[47] Final Notice of Suspension at 6.
[48] Report at 5.
[49] Report at 5-6.
[50] AFSCME Ex. 14, Notice of Proposed Suspension at 5.
[51] Report at 6.
[52] Report at 6.

On January 29, 2024, the Deciding Official issued her final decision, upholding the first and third charges against the Complainant and concluding that a suspension of nine (9) days was appropriate.[53] The Complainant's dates of suspension were February 1 through February 13, 2024.[54] On February 5, 2024, the DISB Commissioner denied AFSCME's step 4 grievance contesting the suspension.[55]

II. Hearing Examiner's Reports and Recommendations

In the original Report, the Hearing Examiner considered the following issues:

> Whether the Respondent implemented the nine-day suspension of [the Complainant] in retaliation (reprisal) for his protected Union activities?
>
> Did the Respondent fail to provide [the Complainant] with his Weingarten rights for a Union representative when [the Complainant] was asked to attend a meeting on November 21, 2023, or during a meeting on December 14, 2023, with [the CAD Director]?[56]

The Hearing Examiner outlined the four elements required to trigger statutory *Weingarten* rights: (1) the meeting at issue must be an examination of a bargaining unit employee by management; (2) the examination must be in connection with an investigation; (3) the employee must reasonably believe that the examination may result in disciplinary action; and (4) the employee must request union representation.[57]

The Hearing Examiner reviewed and applied the elements of *Weingarten*[58] regarding both the November 21, 2023 proposed meeting and the December 12, 2023 conversation between the Complainant and the CAD Director, concluding that DISB did not violate the Complainant's

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[53] Report at 6. The Deciding Official rejected the second charge, determining that, while the CAD Director acted reasonably within his authority in ordering the Complainant to remove the GoPro to safeguard confidential or sensitive information, the CAD Director had the burden of showing an actual disclosure or failure to safeguard such information in order to sustain a charge of a violation of DPM § 1607.2(a)(10). Final Notice of Suspension at 5. The Deciding Official noted that the Complainant's email including the Deputy Mayor and DCHR Director was inconsistent with "the District's well established grievance process," "maligned [the supervisor's] professional reputation and character to the Agency's leadership and senior officials in the District Government," and "served only one purpose—to disparage" the supervisor in the eyes of high-ranking District government officials. Final Notice of Suspension at 6. Neither party introduced that email into evidence in the instant case; however, the Final Notice of Suspension stated that the email read: "Good morning all, please be advised that I am uncomfortable working with [supervisor] based upon documented aggressive, combative and unprofessional conduct that has been displayed since [her] being employed at DISB (Late [sic] July 2023) and culminating with the events of November 21, 2023." Final Notice of Suspension at 5.

[54] Final Notice of Suspension at 1.

[55] Report at 6.

[56] Report at 2-3.

[57] Report at 11-12 (citing *Dep't of the Interior and AFGE, Local 1911*, 68 FLRA 178, 181 (2015)).

[58] *Weingarten*, 420 U.S. 251 at 257.

Weingarten rights in either instance.[59] The Hearing Examiner found that the November 21, 2023 meeting never occurred and determined that AFSCME failed to establish the first or second elements of *Weingarten*.[60] The Hearing Examiner further determined that, to the extent that AFSCME alleged that DISB violated the parties' collective bargaining agreement (CBA) concerning *Weingarten* rights, the Board lacked jurisdiction to address AFSCME's allegations.[61]

Regarding the December 12, 2023 conversation, the Hearing Examiner found that, as the Complainant did not request union representation, he did not need to address the other elements of *Weingarten*.[62] The Hearing Examiner noted that *Weingarten* does not apply to run-of-the-mill conversations between a manager and an employee, as well as that the Complainant's eventual suspension was based on his repeated refusal to obey supervisory instructions, rather than the information obtained by the CAD Director during the December 12, 2023 conversation.[63]

In the Remand Report, the Hearing Examiner addressed AFSCME's allegations that DISB retaliated against the Complainant by suspending him without pay for nine (9) days.[64] The Hearing Examiner reviewed the *Wright Line*[65] test and concluded that AFSCME failed to meet its burden under the requirements of that test.[66] The Hearing Examiner determined that AFSCME made a successful showing of a *prima facie* case of retaliation under *Wright Line*.[67] However, the Hearing Examiner further determined that DISB had rebutted AFSCME's *prima facie* case of retaliation by providing a legitimate business reason for its adverse action against the Complainant.[68]

As such, the Hearing Examiner concluded that DISB did not commit any unfair labor practice violations in the instant case.[69]

III. Discussion

The Board will adopt a Hearing Examiner's Report & Recommendations if it is reasonable, supported by the record, and consistent with PERB precedent.[70] The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the

[59] Report at 11-15. As the Board did not address the *Weingarten* analysis in its remand order in Opinion 1903, the Hearing Examiner incorporated his original findings into the Remand Report. Remand Report at 2 (citing *AFSCME, Local 2743 v. DISB*, Slip Op. No. 1903).
[60] Report at 12.
[61] Report at 13.
[62] Report at 14.
[63] Report at 14.
[64] Report at 15.
[65] *Wright Line, Inc. v. Lamoureux*, 251 NLRB 1083, 1089 (1980).
[66] Report at 15.
[67] The Hearing Examiner reviewed and incorporated his findings on the elements for a *prima facie* case of retaliation under *Wright Line* into the Remand Report. Remand Report at 6-8. The Board notes that the Hearing Examiner at times cited *Wright Line* as "Wright-Line," "Wright-Patterson," or "Wright-Pattern"—however, the context of each citation makes clear that the Hearing Examiner intended to refer to *Wright Line*.
[68] Remand Report at 8-11.
[69] Report at 17.
[70] *AFGE, Local 2978 v. OCME*, 61 D.C. Reg. 4267, Slip Op. No. 1457 at 6-7, PERB Case No. 09-U-62 (2014).

Hearing Examiner."[71] An argument previously made, considered, and rejected does not constitute a proper exception, if the record contains evidence supporting the hearing examiner's conclusions.[72] The Board has held that it will sometimes look to National Labor Relations Board (NLRB) or Federal Labor Relations Authority (FLRA) precedent for guidance when relevant, primarily when the Board's own case law is silent on a particular issue.[73]

AFSCME argues in its Exceptions that: (1) the Complainant's GoPro and cellular phone recordings did not actually capture any sensitive information;[74] (2) the Hearing Examiner failed to address that DISB does not have a recording policy in place, instead relying on "the verbal Management directive issued to [the Complainant];"[75] (3) the Complainant complied with the policy upon receipt of a written request in writing prior to the discussion of any allegedly sensitive information;[76] (4) the Hearing Examiner failed to address the "aggressive and unprofessional conduct of [the supervisor];"[77] (5) the CAD Director conducted his "investigation" of the Complainant contrary to established policy from the DPM;[78] (6) the Complainant reasonably feared the short-notice November 21, 2023 meeting would result in disciplinary action based on DISB's past actions against him; (7) the Hearing Examiner failed to acknowledge that the meeting didn't take place *because* the Complainant invoked his *Weingarten* rights;[79] (8) since his hiring, the CAD Director had been aware of the Complainant's GoPro;[80] (9) DISB did not treat the GoPro as a disciplinary issue until the supervisor was hired;[81] and (10) that the Board has jurisdiction over "the enforcement of *Weingarten* by Union employees … as the Respondent has deliberately chosen to ignore the executed Collective Bargaining Agreement,"[82] noting that AFSCME is "at an impasse within the acknowledgment of the grievance(s) and/or arbitration request(s) forwarded to the Respondent."[83]

AFSCME argues in its Remand Exceptions that: (1) the Remand Report did not include the entire factual record; (2) the Hearing Examiner's *Wright Line* analysis on remand was deficient; and (3) the Hearing Examiner's acknowledgment of the Complainant's "fine performance record"

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[71] *Bernard Bryan, et al. v. FOP/DOC Labor Committee, et al.*, 67 D.C. Reg. 8546, Slip Op. No. 1750 at 5, PERB Case No. 19-S-02 (2020).
[72] *See, e.g., FOP/MPD Labor Comm. v. MPD*, 62 D.C. Reg. 11756, Slip Op. No. 1521 at 10, 12, PERB Case Nos. 07-U-40, et al. (2015) (dismissing MPD's exceptions as repetition of arguments, testimony and evidence considered and rejected by the hearing examiner); *DHS v. AFSCME, District Council 20, Local 2401*, Slip Op. No. 1845 at 9, PERB Case No. 23-A-04 (2023) (holding that an argument previously made, considered, and rejected is a "mere disagreement" with the initial decision); *AFSCME, District Council 20, Local 2087 v. UDC*, 67 D.C. Reg. 8903, Slip Op. No. 1751 at 4, PERB Case No. 18-U-03 (2020) (holding that mere disagreements with a hearing examiner's findings or challenges to a hearing examiner's findings with competing evidence do not constitute proper exceptions).
[73] *FOP/MPD Labor Comm. v. MPD*, Slip Op. No. 1526 at 8, PERB Case Nos. 06-U-23, et al. (2015).
[74] Exceptions at 2-4.
[75] Exceptions at 4.
[76] Exceptions at 4.
[77] Exceptions at 6.
[78] Exceptions at 7.
[79] Exceptions at 9.
[80] Exceptions at 10.
[81] Exceptions at 12.
[82] Exceptions at 16.
[83] Exceptions at 16.

while still finding the Complainant's conduct unprofessional demonstrates "a potential bias by the Hearing Examiner in favor of the Respondent's representative(s) and/or agent(s) without considering all factual facets" of the case.[84]

A. DISB did not violate the Complainant's *Weingarten* Rights.

AFSCME's *Weingarten* arguments are unavailing. All of AFSCME's Exceptions regarding *Weingarten* constitute arguments previously made, considered, and rejected by the Hearing Examiner, who thoroughly analyzed and addressed the extensive record presented by both parties. In accordance with the standards set forth in *Weingarten*, the Board has recognized a right to union representation during disciplinary interviews under D.C. Official Code § 1-617.04(a)(1).[85] Under *Weingarten*, an employee's right to union representation during an investigatory interview is triggered only when the requisite elements are present,[86] which include the employee's reasonable belief that the investigation will result in disciplinary action"[87] and the employee's request for union representation.[88] The Board has held that, if *Weingarten* applies, then an employee has a right to have a union representative attend investigatory interviews.[89]

The Hearing Examiner analyzed whether *Weingarten* applied to the proposed November 21, 2023 Verbal Counseling meeting and the December 12, 2023 conversation between the Complainant and the CAD Director, and found that in both cases, AFSCME had failed to meet all four *Weingarten* elements.[90] The Hearing Examiner found that the Verbal Counseling meeting, which ultimately did not occur, did not constitute an investigatory interview because management informed the Complainant that the meeting was not investigatory, but rather a Verbal Counseling to discuss the Complainant's behavior and management's expectations going forward.[91] The Board concludes this finding is reasonable, supported by the record, and consistent with PERB precedent.[92] Regarding the December 12, 2023 conversation, the Hearing Examiner found that: (1) the Complainant never requested union representation; (2) the Complainant's suspension was not based on information gleaned from that conversation, but rather his repeated refusal to obey

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[84] Remand Exceptions at 1-8.
[85] *AFSCME, Local 2401 v. OAG*, 71 D.C. Reg. 793, Slip Op. No. 1855 at 6, PERB Case No. 23-U-02 (2023) (citing *FOP/MPD Labor Committee v. MPD*, 60 D.C. Reg. 10839, Slip Op. No. 1399 at 5, PERB Case No. 06-U-34 (2013); *D.C. Nurses Assoc. v. D.C. Health and Hospitals Public Benefit Corp.*, 45 D.C. Reg. 6736, Slip Op. No. 558 at 2-3, PERB Case Nos. 95-U-03, 97-U-16 and 97-U-28 (1998)).
[86] *See Dep't of the Interior and AFGE, Local 1911*, 68 FLRA 178, 181 (2015).
[87] *D.C. Nurses Assn. v. D.C. DYRS*, 61 D.C. Reg. 1566, Slip Op. No. 1451 at 4-5, PERB Case No. 10-U-35 (2013).
[88] *See FOP/DOC Labor Comm. v. MPD*, 60 D.C. Reg. 9181, Slip Op. No. 1378 at 3, PERB Case No. 10-U-21 (2013) (holding that the *Weingarten* right to union representation arises in situations where an employee requests representation, and is limited to situations where the employee reasonably believes the investigation will result in disciplinary action).
[89] *See FOP/DOC Labor Comm. v. MPD*, Slip Op. No. 1378 at 3.
[90] Report at 12-15.
[91] Report at 12-13.
[92] *See Dep't of the Air Force, 2750th Air Base Wing HQ, Air Force Logistics Command, Wright Patterson AFB and AFGE, Local 1138*, 9 FLRA 871, 882 (1982) (holding that meetings with an employee were not "examinations," as the employee was simply being informed of a decision already reached by the employer).

supervisory instructions; and (3) *Weingarten* does not apply to "ordinary run of the mill [*sic*] conversations between management and employees."[93] These findings are also reasonable, supported by the record, and consistent with PERB precedent. In the instant case, the Complainant did not request union representation prior to or during any investigatory interviews.[94] Therefore, the Board finds that he did not trigger the application of *Weingarten* rights. Further, DISB had no statutory obligation to advise the Complainant of any applicable *Weingarten* rights.[95] Accordingly, the Board concludes that DISB did not commit any unfair labor practices with respect to the disciplined employees' *Weingarten* rights.

The Hearing Examiner declined to address AFSCME's allegation that DISB violated the parties' CBA with respect to *Weingarten* rights, and did not evaluate whether the Verbal Counseling constituted discipline under the parties' CBA.[96] In determining jurisdiction in a case involving contractual claims, the Board looks to:

> whether the record supports a finding that the alleged violation: (1) is restricted to facts involving a dispute over whether a party complied with a contractual obligation; (2) resolution of the dispute requires an interpretation of those contractual obligations; and (3) no dispute can be resolved under the CMPA.[97]

The Board has held that if the record demonstrates that an allegation concerns a statutory violation of the CMPA, then even if it also concerns a violation of the parties' contract, the Board has jurisdiction over the statutory matter and can grant appropriate relief.[98] While the instant case involves claims of contractual violations, the Hearing Examiner has dismissed those claims in line with PERB precedent, and the Board likewise declines to address any remaining claims regarding violations of the parties' CBA. Similarly, the Board need not address whether the Verbal Counseling constituted discipline under the parties' CBA, as the proposed meeting to discuss the Verbal Counseling did not constitute an investigatory interview and, therefore, would not have implicated the Complainant's *Weingarten* rights.

The Board has adopted the National Labor Relations Board's *Wright Line* test for complainants alleging retaliation by management for an employee's protected union activity.[99] Under *Wright Line*, in order to establish a *prima facie* case of retaliation for union activity, a complainant must show that: (1) an employee engaged in protected union activity; (2) the employer

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[93] Report at 14.
[94] Report at 12-15.
[95] *See AFSCME, Local 2743 v. DOB*, Slip Op. No. 1894 at , PERB Case Nos. 24-U-05, 24-U-06 and 24-U-08 (2024) (affirming hearing examiner's recommendations to dismiss *Weingarten* claims because the disciplined employees did not request union representation and noting that employers do not have an obligation to inform employees of a right to union representation); *see also Norfolk Naval Shipyard and FEMTC*, 35 FLRA 1069, 1073-78 (1980).
[96] Report at 13-14.
[97] *FOP/MPD Labor Comm. v. MPD*, 60 D.C. Reg. 12058, Slip Op. No. 1400 at 7, PERB Case No. 11-U-01 (2013) (citing *AFGE, Local 3721 v. D.C. Fire Dep't*, 39 D.C. Reg. 8599, Slip Op. No. 287 at fn. 5, PERB Case No. 90-U-11 (1991)).
[98] *Rayshawn Douglas v. DCHA*, 64 D.C. Reg. 9301, Slip Op. No. 1632 at 4, PERB Case No. 15-U-32 (2017) (citing *FOP/MPD Labor Comm. v. MPD*, 62 D.C. Reg. 13348, Slip Op. No. 1534, PERB Case No. 08-U-22 (2015)).
[99] *AFGE, Local 2978 v. OCME*, Slip Op. No. 1457 at 4.

knew about the employee's protected union activity; (3) the employer had anti-union animus or retaliatory animus; and (4) the employer took an adverse employment action against the employee as a result.[100]

The Hearing Examiner found that AFSCME did not meet its burden under *Wright Line*.[101] Although the Hearing Examiner determined that AFSCME made a showing of a *prima facie* case of retaliation under *Wright Line*, he concluded that AFSCME failed to rebut DISB's evidence demonstrating that the agency would have taken the same adverse action against the Complainant in the absence of his protected activity.[102] The Hearing Examiner concluded that DISB had successfully rebutted any *prima facie* case of retaliation with its showing of a legitimate business reason for the disciplinary action taken.[103] While noting that the Complainant had engaged in protected activity during a period proximate to his suspension,[104] the Hearing Examiner ultimately found that the Complainant's "union activities are not a shield for legitimate disciplinary action."[105] The Hearing Examiner's reapplication of *Wright Line*, as well as the resulting conclusions, are reasonable, supported by the record, and consistent with PERB precedent.

B. DISB did not retaliate against the Complainant in enforcing its no-recording policy.

In its initial Exceptions, AFSCME argued that: (1) the Hearing Examiner did not acknowledge AFSCME's evidence of retaliation and/or reprisal by DISB management against the Complainant;[106] (2) the Hearing Examiner relied on DISB's legitimate business reasons for barring the GoPro while discounting how long the GoPro had been allowed and the timing of the recording policy change coinciding with the Complainant recording "the unprofessional conduct" of the

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[100] *Id.*

[101] Remand Report at 6-11. The Hearing Examiner originally found that AFSCME met the first three elements of *Wright Line*—that the Complainant engaged in protected activity, that DISB knew about the Complainant's protected activity, and that DISB had shown anti-union animus—but concluded that AFSCME had failed to show a nexus between DISB's anti-union animus and the adverse action taken against the Complainant. Report at 15-16. However, the NLRB has held that requiring the "identification of a causal nexus as a separate element … is superfluous." *Intertape Polymer Corp.*, 372 NLRB 133 at 9 (2023) (citing *Tschiggfrie Properties*, 368 NLRB 120 at 7 (2019)). Rather than requiring a showing of a causal nexus, once a complainant successfully makes a *prima facie* case of retaliation "sufficient to support the inference that protected conduct was a 'motivating factor'" in the adverse action, *Id.* at 7, the burden under the *Wright Line* framework shifts to the employer to demonstrate that it would have taken the same adverse action against the employee even in the absence of protected activity. *Id.* While the Hearing Examiner's original analysis of the first three elements of AFSCME's *prima facie* case of retaliation—which he incorporated into the adopted Remand Report, Remand Report at 6-8—was sound, he then placed a disproportionate burden on AFSCME in requiring a showing of a causal nexus even after finding that AFSCME satisfied the requirements for a *prima facie* case of retaliation. Report at 16. The Board remanded the instant case to the Hearing Examiner to reapply the elements of *Wright Line* under the proper burden-shifting framework. *AFSCME, Local 2743 v. DISB*, Slip Op. No. 1903 at 2.

[102] Remand Report at 8-9.

[103] Remand Report at 11.

[104] Remand Report at 4.

[105] Remand Report at 9.

[106] Exceptions at 12.

supervisor;[107] (3) DISB failed to provide evidence that the GoPro was used for any purpose except to record the Complainant's interactions with management for his own protection;[108] (4) AFSCME presented more contemporaneous protected union activity beyond the Complainant's 2022 testimony before the D.C. Council;[109] and (5) the supervisor's assignment of cases to the Complainant during his suspension without pay violated U.S. labor laws.[110] In its Remand Exceptions, AFSCME similarly argues that the Hearing Examiner did not address the entire factual record and that the Hearing Examiner's legal analysis was deficient.[111] AFSCME further asserts that the Hearing Examiner exhibited potential bias toward DISB.[112]

AFSCME's arguments regarding retaliation are unavailing. The majority of AFSCME's Exceptions regarding dismissal of its retaliation claims constitute arguments previously made, considered, and rejected by the Hearing Examiner.[113] The Board does not require hearing examiners to directly and exhaustively address every piece of evidence submitted to the record by parties.[114] In finding that AFSMCE had met its burden regarding the first element of *Wright Line*, the Hearing Examiner clearly considered not only the Complainant's 2022 testimony, but also the Complainant's recent cases before PERB and his participation in grievances and negotiations.[115] AFSCME argued before the Hearing Examiner that the supervisor's "unprofessional conduct" justified the Complainant's use of recording devices,[116] which the Hearing Examiner weighed

[107] Exceptions at 13.
[108] Exceptions at 13-14.
[109] Exceptions at 14.
[110] Exceptions at 16.
[111] Remand Exceptions at 1, 4.
[112] Remand Exceptions at 7-8. The Board places the utmost importance on the impartiality of its hearing examiners and considers seriously any allegations of bias toward a party. However, AFSCME has not provided any compelling evidence to indicate the Hearing Examiner in the instant case acted prejudicially toward either party. *See Yonah Bromberg Gaber, et. al v. AFSCME, Local 1808*, 71 D.C. Reg. 7883, Slip Op. No. 1870 at 6-7, PERB Case No. 23-S-03 (2024) (holding that the Board will find that a Hearing Examiner exhibited bias only where the Hearing Examiner's temperament or opinions expressed during the hearing exceeded the authority accorded him or precluded [a party] from being afforded a fair hearing) (citing *D.C. Nurses Ass'n v. D.C. Health and Hospitals Public Benefit Corp., D.C. General Hospital*, 46 D.C. Reg. 245, Slip Op. No. 560 at 2-3, fn. 2, PERB Case No. 97-U-16 (1999)); *see also AFGE, AFL-CIO, Local 631 v. D.C. Office of Zoning, D.C. Office of Property Management, D.C. Office of Planning, DPW, Energy Office*, Slip Op. No. 1103 at 7-8, fn. 5, PERB Case No. 04-UM-01 (2011) (finding that the Board may adopt the recommendation of a hearing examiner to the extent it is supported by the record and rejecting motion to disqualify a hearing examiner for the mere assertion that the hearing examiner expressed hostility or indicated that there was insufficient proof to establish a certain outcome).
[113] In light of DISB's previous retaliatory actions against the Complainant, *AFSCME, District Council 20, Local 2743 v. DISB*, Slip Op. No. 1864, the Board emphasizes that circumstantial evidence, including the timing of adverse actions with respect to a grievant's protected activity, can support a finding of retaliation under *Wright Line*. *Intertape Polymer Corp.*, 372 NLRB 133 (2023). Nevertheless, in the instant case, AFSCME did not present sufficient evidence to show that DISB created or enforced any recording policy in retaliation for the Complainant's protected activity.
[114] *C.f. Samantha Brown v. DCPS*, Slip Op. No. 1889 at 3, PERB Case No. 22-U-16(MFR) (2024) (holding that the Board need not address every argument dismissed by a hearing examiner); *see also FOP/MPD Labor Comm. (on behalf of Officer Timothy Harris) v. MPD*, 59 D.C. Reg. 11329, Slip Op. No. 1295 at 6, PERB Case No. 09-A-11 (2012) (citing *DOC v. FOP/DOC Labor Comm.*, 54 D.C. Reg. 2706, Slip Op. No. 825 at 8, PERB Case No. 04-A-14 (2006)).
[115] Report at 15-16.
[116] AFSCME Post-Hearing Brief at 24.

against DISB's allegations of the Complainant's unprofessional, insubordinate conduct and DISB's goal of safeguarding sensitive, confidential information.[117] The evidentiary record submitted by both parties clearly shows that the supervisor notified the Complainant, upon his inquiry, that she had worked the cases assigned to him during his suspension to ensure the cases remained in compliance with DISB's standard operating procedures until he returned and could "handle the resolution per the current SOPs guidelines."[118]

AFSCME's evidence that DISB had previously known about the GoPro without taking disciplinary action or instructing the Complainant to remove it is not dispositive to DISB's asserted legitimate business reason for objecting to the Complainant's recordings. AFSCME relies on NLRB case law to argue that employees have a right to record interactions with their employers, as well as to argue the timing of management's requests that the Complainant stop recording in the workplace is suspect.[119] Notwithstanding that the Hearing Examiner considered and rejected this argument,[120] the instant case is distinguishable from the cited NLRB case law. In the cited case, the employer raised terminated employees' violations of a pre-existing no-recording policy to argue against having to reinstate the employees after the NLRB found that the employees had been terminated for engaging in protected union activity.[121] The NLRB found that, while the employer had been aware of the employees' recordings in violation of company policy, it did not rely on that conduct in discharging the employees or otherwise assert that the employees would have been discharged for violating the no-recording policy even absent ample protected union activity.[122] By contrast, in the instant case, DISB repeatedly informed the Complainant that his insubordination and refusal to comply with management instructions regarding his recordings in the workplace were the reasons for the Verbal Counseling and suspension.[123]

Further, AFSCME noted in its own post-hearing brief that the supervisor inquired with human resources regarding the recording of meetings and was advised that, since DISB did not have a specific policy, it was a management directive.[124] The record reflects that the Complainant

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[117] Remand Report at 10-11. The Hearing Examiner credited the supervisor's testimony regarding the Complainant's "disrespect toward her," Remand Report at 10, attempt to intimidate her, Remand Report at 10; *see also* Final Notice of Suspension at 7, and sending of an unprofessional email concerning the supervisor to high-ranking District government officials not involved in the grievance or disciplinary process. Remand Report at 10-11; *see also* Final Notice of Suspension at 5-7.
[118] Report at 6; *see also* AFSCME Ex. 17, February 14, 2024 Work Assignment Email Exchange at 1-2; DISB Ex. 6, February 14, 2024 Work Assignment Email Exchange at 1.
[119] Exceptions at 17.
[120] Report at 6 (fn. 3).
[121] *Starbucks Coffee Co.*, 372 NLRB 50 at 1, 4-6. The employer further argued that the employees' recording of management officials without consent violated Pennsylvania's Wiretapping and Electronic Surveillance statute, making their reinstatement "unconscionable." *Id.* at 5. The NLRB found that enforcement of the privacy concerns implicated by the state no-recording law was preempted by the NLRA. *Id.* at 7 (citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). In the instant case, DISB has raised privacy concerns regarding the nature of the work done by the agency. Report at 15-16.
[122] *Id.* at 6. The NLRB noted that whether an employee who makes an audio or video recording in the workplace is engaged in protected union activity depends on the facts and circumstances of the particular case. *Id.*
[123] Report at 4-5; *see also* Verbal Counseling Memorandum at 1-4.
[124] AFSCME Post-Hearing Brief at 8.

simply refused to comply with the supervisor's verbal instructions until he received them in an email.[125] Similarly, the Complainant refused to comply with the CAD Director's instruction to remove the GoPro.[126] The supervisor's recording policy being "new" does not invalidate that policy nor the legitimate business reasons given by DISB to rebut any *prima facie* case of retaliation by AFSCME. Further, it is plausible that the Complainant's new supervisor realized allowing the Complainant's recordings to continue would create significant confidentiality concerns.[127] *Wright Line* does not require DISB to definitively prove that the Complainant's recordings did, in fact, result in a breach of confidentiality in order to demonstrate a legitimate business interest in safeguarding the sensitive information the agency handles in effectuating its mission.

The Board closely examines DISB's reliance on the Complainant communicating "outside of the chain of command"[128] and including officials with no awareness of the issues[129] in both the Proposed and Final Notices of Proposed Adverse Action.[130] While CBAs between District agencies and labor organizations representing District employees generally have grievance procedures, the existence of such procedures does not inherently limit employees' access to elected or appointed District government officials—nor does it limit employees' access to PERB.[131] However, protections on public employees' speech do have some limitations. In order to garner First Amendment protection, a public employee's speech generally must address matters of public concern rather than a personal grievance.[132] And while protected union activity may qualify as a matter of public concern under some circumstances, those circumstances are not present here.[133] The email to high-ranking District government officials in the instant case relates to an individual employee's complaint about a manager, rather than a matter of collective bargaining or other larger union business.

The Hearing Examiner considered AFSCME's arguments regarding recording policies and reasonably concluded that DISB had rebutted the allegations of retaliation by providing a compelling legitimate business reason for its updated policy and for disciplining the Complainant when he refused to comply with specific, nonburdensome instructions to stop recording.

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[125] Report at 9.
[126] Report at 14.
[127] Report at 8.
[128] Final Notice of Suspension at 5-6.
[129] Final Notice of Suspension at 6.
[130] AFSCME Ex. 14, Notice of Proposed 9-Day Suspension at 4; Final Notice of Suspension at 6-7.
[131] *Samantha Brown v. DCPS*, 71 D.C. Reg. 10666, Slip Op. No. 1877 at 10, PERB Case No. 22-U-16 (2024) (citing *FOP/MPD Labor Comm. v. MPD*, 61 D.C. Reg. 5627, Slip Op. No. 1465 at 4, PERB Case No. 08-U-14 (2014).
[132] *See Connick v. Myers*, 461 U.S. 138, 148-149 (1983) (finding that employer's termination of an employee shortly after she distributed a questionnaire regarding employer policies and employee morale did not constitute a matter of public concern).
[133] *But cf. City of Madison, Joint School Dist. No. 8 v. Wisc. Empl. Rel. Comm.*, 429 U.S. 167, 176 (Dec. 8, 1976) (holding that state labor board ruling prohibiting school board from permitting nonunion employees to appear and speak at school board meetings constituted an indirect, but effective, prohibition on such individuals from communicating with their government that would have a substantial impact upon virtually all communication between teachers and the school board).

IV. Conclusion

The Board finds that the Hearing Examiner's determinations regarding AFSCME's failure to meet its burden of proof are reasonable, supported by the record, and consistent with PERB precedent. Therefore, the Board denies AFSCME's requests for relief and dismisses the Complaints against DISB.

ORDER

IT IS HEREBY ORDERED THAT:

1. This matter is dismissed in its entirety; and

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser and Peter Winkler.

April 17, 2025

Washington, D.C.

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board reconsider its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision file an appeal.