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

In the Matter of:)	
)	
Vice Chairman Tyrone Jenkins and Stephanie McKinnon)	
)	
Complainants)	
)	PERB Case No. 15-U-31
v.)	
)	Opinion No. 1652
Department of Corrections)	
)	
Respondent)	
)	

DECISION AND ORDER

This case was initiated July 2, 2015, and came on for hearing before a hearing examiner on February 22, 2017. The Hearing Examiner’s report and recommendations and exceptions thereto are before the Board for disposition. The Hearing Examiner recommended that one of the charges of unfair labor practices against respondent Department of Corrections (“the Department”) should be dismissed but that the other pending charges should be sustained. We adopt the Hearing Examiner’s recommendation that we sustain the charge that the Department committed unfair labor practices by threatening to reprimand and then reprimanding Complainant Tyrone Jenkins, ordering him to leave a roll call, and issuing to him a notice of proposed suspension. The two remaining allegations of unfair labor practices are dismissed.

I. Statement of the Case

A. Pleadings

1. Original Complaint

During the relevant period, Tyrone Jenkins and Stephanie McKinnon (“Complainants”) were uniformed correctional officers at a jail operated by the Department, and Jenkins was also the vice chairman of the Fraternal Order of Police/D.C. Department of Corrections Labor Committee. On July 2, 2015, the Complainants filed *pro se* an unfair labor practice complaint (“Complaint”) “against the D.C. Department of Corrections . . . and its Agents and

Representatives, including but not limited to Mayor Mariel [sic] Bowser. Director Thomas Faust. Deputy Director Toni Perry. Warden William Smith. Deputy Warden Lennard Johnson. Deputy Warden Sylvia Lane; Kevin Hargrave, Major of Operations shift three; Joseph Pettiford, Major Kevin Hargrave.”¹

The caption of the Complaint had a different list of respondents:

Mariel Bowser Mayor City of Washington D.C.
Director DOC Thomas Faust, Deputy Director Toni Perry
Warden William Smith, Deputy Warden Lennard Johnson
Deputy Warden Sylvia Lane, Major Kevin Hargrave
Major Joseph Pettiford, Lt. William Thomas

The Complaint referred to several exhibits but did not attach them. It contained a certificate of service certifying service upon “Director Thomas Faust, D.C. Department of Corrections.” On September 3, 2015, the Board’s Executive Director sent respondent Faust a letter allowing him to file an answer no later than September 23, 2015.

On September 4, 2015, the individually named respondents jointly filed an answer to the Complaint. Their answer denied commission of unlawful activity and raised affirmative defenses. In addition the answer contained a “motion craving oyer,” which requested the Board to compel production of the exhibits the Complaint cited but did not attach.²

On September 22, 2015, the Executive Director sent the Complainants a letter informing them of certain deficiencies in their Complaint and directing the Complainants to cure them:

Upon review, it appears that your complaint is against the Department of Corrections and others. However, your caption does not indicate that the Department of Corrections is a party to the matter.

Please submit an amended complaint no later than October 13, 2015 that reflects the Department of Corrections as a party, along with a new certificate of service showing that all parties were served with the amended complaint with attachments.

2. Amended Complaint

On October 13, 2015, the Complainants filed an “Amended Unfair Labor Practice Complaint” (“Amended Complaint”), which added the D.C. Department of Corrections to the list of respondents in the caption. The certificate of service certified service upon “DC Department of Corrections, Director Thomas Faust.”

¹ Complaint ¶ 1.

² The answer also contained a motion for enlargement of time that was mooted by the Executive Director’s letter of September 3, 2015, and the subsequent amendment of the complaint.

The Amended Complaint did not change the allegations of the original Complaint. Those allegations are that the respondents committed unfair labor practices in connection with a March 13, 2015 meeting McKinnon had with Warden Smith at which Jenkins represented McKinnon; a March 19, 2015 meeting involving Warden Smith and Jenkins; and an April 2, 2015 roll call that Jenkins attended in his capacity as vice chairman of the union.

a. Meetings of March 13 and March 19

Regarding the March 13, 2015 meeting, the Amended Complaint alleges that Warden Smith brought McKinnon in to interview her about her noncompliance with an order to close and lock feeding slots at the jail. Smith said this is not a disciplinary investigation and no disciplinary action will be brought against McKinnon. At the start of the meeting, Smith allegedly stared at McKinnon and told her to unzip her sweater.³ Jenkins objected that this instruction was not a lawful order. The warden told Jenkins he was giving inappropriate advice. “The interview continued with Warden Smith repeatedly battering her with the same questions over and over again.”⁴ The Amended Complaint alleges that Smith’s actions on March 13, 2015, violate section 1-617.04(a)(1), (3), and (5) of the D.C. Official Code.⁵

The Amended Complaint alleges Smith requested to meet with Jenkins again to chastise him for his “inappropriate advice.” On March 19, 2015, Smith met with Jenkins and two others and told Jenkins that he was not going to discipline McKinnon, but because of Jenkins’s advice that McKinnon not open up her sweater, she would be suspended for nine days for insubordination and Jenkins would be reprimanded for his inappropriate advice.⁶ Smith said, “I felt that Sgt. Jenkins did not let me teach her a lesson. She didn’t learn anything.”⁷ McKinnon received a letter proposing to suspend her for nine days without pay for insubordination for refusing to close and lock feeding slots at the jail. McKinnon contested the proposed suspension with the deciding official, Major Pettiford. Major Pettiford sustained the charges but reduced the suspension to three days. He “was influenced by Warden Smith’s ‘bad faith’ comments and opinions during the non-disciplinary investigation held on March 13, 2015.”⁸ On or about March 22, 2015, Jenkins received a letter of reprimand from Smith dated March 18, 2015.⁹

The Amended Complaint alleges that the respondents violated section 1-617.04(a)(1), (3), and (5) of the D.C. Official Code in a variety of respects, which may be summarized as follows: Although inmates sexually harassed McKinnon, Warden Smith and Major Pettiford were “indifferent to her sex” and engaged in bad faith and discriminatory practices against her as a female employee regarding her rights to be provided with a safe working condition. Smith

³ Am. Compl. ¶ 8.

⁴ Am. Compl. ¶ 9.

⁵ Am. Compl. ¶ 9.

⁶ Am. Compl. ¶ 10.

⁷ Am. Compl. ¶ 10.

⁸ Am. Compl. ¶ 11.

⁹ Am. Compl. ¶ 10.

issued a letter of reprimand to Jenkins for protecting McKinnon's *Weingarten* rights. Smith acted in bad faith by suspending McKinnon after telling the complainants the interview was non-disciplinary. Smith failed to provide all material facts of the violation to the union. The disciplinary procedure employed was inconsistent with due process and article 11 of the collective bargaining agreement.

b. Roll Call April 2, 2015

Regarding the April 2, 2015 roll call, the Amended Complaint alleges that Paulette Johnson, the Department's labor relations liaison, invited Jenkins to give the union's point of view on pre-shift roll-call overtime compensation when personnel officials were to visit the jail on April 2, 2015. On that date Ms. Johnson along with the personnel director and Warden Smith attended the 7:30 a.m. second shift roll call. Jenkins was unable to attend that roll call. Jenkins was informed that personnel would be attending the third shift roll call at 3:30 p.m. and wanted him there to represent the employees on that shift. Jenkins stood in line with the rank and file employees as the roll call began. Major Kevin Hargrave ordered Jenkins to leave the roll call. After the two debated whether Jenkins had any business being at the roll call, Major Hargrave physically threw Jenkins out of the room, injuring him.

Jenkins made several requests to the Director of the Department, Thomas Faust, to have the Office of Investigatory Services investigate what Jenkins considered aggravated assault on a union official. Director Faust did not respond. The EEO coordinator was the only one who responded to Jenkins and investigated the incident. The Amended Complaint alleges that Major Hargrave learned of the EEO investigation and obtained copies of its reports. On April 20, 2015, Jenkins received advance notice of a proposed suspension alleging insubordination at the April 2 roll call. Through her signed statement regarding the incident, Paulette Johnson "participated in a cover up" along with other respondents. There has been a pattern and practice of activities to undermine the vice chairman's influence with the union membership. The Amended Complaint alleges that the respondents thereby violated section 1-617.04(a)(1), (3), and (5) of the D.C. Official Code.

The Amended Complaint requests that the Board find that respondents' conduct constitutes an unfair labor practice in violation of section 1-617.04 of the D.C. Official Code, order the respondents to cease and desist from such conduct, rescind the suspension, recommend that the Mayor remove Major Kevin Hargrave and Warden William Smith for their misconduct, sanction all the respondents under the DPM, and award to the complainants damages, costs, and attorneys' fees.

3. Responsive Pleading

After the Complainants filed their Amended Complaint, the individual respondents filed a responsive pleading. The pleading stated, "The individually-named Respondents, through the Office of Labor Relations and Collective Bargaining (OLRCB) file the following Motion to Dismiss, Motion Craving Oyer, Motion for Sanctions, Answer, and Affirmative Defenses

pursuant to Public Employee Relations Board (PERB) Rules 520 and 553.” The motion to dismiss argued that the amended complaint did not reflect the Department as a party in accordance with the Executive Director’s order. Instead, the individual respondents argued, the caption of the amended complaint was nearly identical to the caption of the original. The motion craving over asserted that the exhibits attached to the Amended Complaint and identified as Exhibits A through G do not correspond to the descriptions of exhibits (a) through (g) in the Amended Complaint. The individual respondents “crave over” for each exhibit—(a) through (g)—cited in the Amended Complaint. The motion for sanctions argued that Complainants’ repeated demand for attorney’s fees when the Complainants were not represented by an attorney warranted dismissal of the case or at least denial of all requested relief. Finally, the individual respondents raised the following affirmative defenses: (1) Complainants lack standing to assert a violation of section 1-617.04(a)(5); (2) the Complaint fails to state an actionable claim under section 1-617.04(a)(3); and (3) the Board lacks jurisdiction to grant Complainants’ requests for attorneys’ fees, compensatory damages, or discipline of employees.

4. Partial Dismissal by the Executive Director

In a July 15, 2016 letter to the parties, the Executive Director addressed the issues raised in the responsive pleading. She stated that the Amended Complaint reflects that the Department is a respondent. However, the certificate of service reflected service only upon the Department and Director Thomas Faust. The Executive Director dismissed all respondents other than those two from the Amended Complaint for noncompliance with PERB Rule 501.12. Respondent Faust was also dismissed, consistent with the Board’s precedent that suits against District officials in their official capacities should be treated as suits against the District.¹⁰

The Executive Director found merit in the defenses raised against the claim that the respondents violated section 1-617.04(a)(3) and (5) of the D.C. Official Code. Section 1-617.04(a)(3) prohibits discrimination to encourage or discourage membership in a labor organization. The Amended Complaint does not allege that type of discrimination but only sex discrimination, which the Board does not have authority to investigate.¹¹ Section 1-617.04(a)(5) prohibits refusing to bargain in good faith with the exclusive representative. Only the exclusive representative has standing to assert a violation of section 1-617.04(a)(5).¹² Accordingly, the Executive Director dismissed Complainants’ section 1-617.04 (a) (3) and (5) claims.

Turning to the procedural motions, the Executive Director stated that even if one were to assume that common law procedures apply to the Board, the motion craving over would have to be denied. Citing *Smithson v. Stanton*,¹³ the Executive Director observed that at common law in the District of Columbia, over can only be had of deeds, probates, letters of administration, and

¹⁰ *F.O.P./Metro. Police Dep’t Labor Comm. v. Metro. Police Dep’t*, 60 D.C. Reg. 9212, Slip Op. No. 1391 at 20, PERB Case Nos. 09-U-52 and 09-U-53 (2013).

¹¹ *White v. D.C. Dep’t of Corr.*, 49 D.C. Reg. 8973, Slip Op. No. 686 at 3, PERB Case No. 02-U-15 (2002).

¹² *Gardner v. D.C. Pub. Sch.*, 49 D.C. Reg. 7763, Slip Op. No. 677 at 2, PERB Case Nos. 02-S-01 and 02-U-04 (2002).

¹³ 7 D.C. (2 Mackey) 6, 9-10 (1869).

other similar documents under seal of which a proffer has been made. None of the exhibits cited in the Amended Complaint are of that nature. The Executive Director added that the proper procedures for obtaining documents from an opponent are found in PERB Rule 522. The motion for sanctions was also denied as being unsupported. The Executive Director's decision became final because neither party moved for reconsideration of it.¹⁴

B. Hearing

A hearing was held on February 22, 2017, concerning the remaining claims, i.e., the section 1-617.04(a)(1) claims against the remaining respondent, the Department. Upon the opening of the hearing, the Hearing Examiner encouraged the parties to settle their disputes, and he discussed settlement with them. The parties then privately discussed settlement further with each other.¹⁵ These discussions led to a confidential agreement between the Department and Complainant McKinnon whereby McKinnon would withdraw her complaint in exchange for an action to be performed by the Department in the future. The Hearing Examiner explained to McKinnon, who was not represented by counsel, that if she were not given the benefit of the agreement she would have the right to reinstate her claim.¹⁶

The Hearing Examiner then conducted a hearing at which Jenkins represented himself and testified. Paulette Johnson, the Department's labor liaison, testified on behalf of the Department. Both parties submitted exhibits as well as post-hearing briefs.

C. Report and Recommendation

On April 28, 2017, the Hearing Examiner submitted his Report and Recommendation ("Report"). In the Report, the Hearing Examiner summarized the testimony and the parties' contentions, and he discussed the legal principles and issues pertaining to the case. The Hearing Examiner noted that the Comprehensive Merit Personnel Act ("CMPA") makes "[i]nterfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter" an unfair labor practice.¹⁷ The Board has held that the appropriate test for that unfair labor practice is whether the conduct in question had a reasonable tendency in the totality of the circumstances to interfere, restrain, or coerce the employee in the exercise of rights guaranteed by the CMPA.¹⁸ The Hearing Examiner stated that under the National Labor Relations Act the test does not turn on the employer's motive or intent or whether the coercive action succeeded.¹⁹

¹⁴ PERB R. 500.4.

¹⁵ Tr. 11-12.

¹⁶ Tr. 14-15.

¹⁷ D.C. Official Code § 1-617.04(a)(1).

¹⁸ Report 13 (citing *F.O.P./Hous. Auth. Labor Comm. v. Hous. Auth.*, 60 D.C. Reg. 12127, Slip Op. No. 1410, PERB Case No. 11-U-23 (2013)).

¹⁹ Report 13.

Following the U.S. Supreme Court's holding in *National Labor Relations Board v. Weingarten*,²⁰ the Board has held that a bargaining unit employee has a right to the active assistance of a union representative when the employee reasonably fears that discipline might arise from an interview and the employee requests representation. The Hearing Examiner stressed that the employee has a right to *active* representation at the interview.²¹ An employer may not silence the union representative or prevent him from conferring with the employee.²² The Hearing Examiner stated that "if the employer acts so as to deny the union representative the active participation in the interview consistent with Weingarten standards, the employer may violate the CMPA by interfering with the representative's rights as an employee, and undermining his role as a union representative of the employee in question."²³ The NLRB has held that serving as a *Weingarten* representative is protected union activity.²⁴

The Hearing Examiner applied these principles to the incidents involved in the case. He began his discussion of the March 13, 2015 meeting by stating, "First, while the March 13 interview was not in the strictest sense investigatory or disciplinary, Johnson testified that DOC is 'lenient' in terms of allowing a union representative to participate in interviews of employees for other reasons, here 'fact finding.' Accordingly in my view the meeting implicated Weingarten standards."²⁵ However, the Hearing Examiner found that *Weingarten* standards, though implicated, were not violated: "[W]hile Smith and Jenkins may have been at odds regarding the nature of Jenkins' representation, I cannot conclude that the Respondent violated Jenkins rights as a union representative."²⁶

The March 19, 2015 meeting, in contrast, did result in violation of the CMPA: "In my view this is simply clearly a case of interference, restraint and coercion proscribed by the Act, and to a certainty was designed to undermine Jenkins as a union representative."²⁷

Two aspects of the March 18, 2015 memorandum led the Hearing Examiner to conclude that it too was an interference with, restraint, and coercion of Jenkins's rights as an employee and as a union representative. The first was its date—March 18, 2015—which was five days after the March 13 meeting and around the time Jenkins was called into Smith's office and orally reprimanded about the propriety of his representation of McKinnon. The second aspect was the content of the memorandum. It states that employees are required to obey orders of their chain of command and must not knowingly withhold information concerning violations of laws and

²⁰ 420 U.S. 251 (1975).

²¹ Report 14-15 (citing *Nurses Ass'n and Dep't of Youth & Rehab. Servs.*, 59 D.C. Reg. 12638, Slip Op. No. 1304 at 4, PERB Case No. 10-U-35 (2012)).

²² Report 14 (citing *FOP/MPD Labor Comm. v. MPD*, 60 D.C. Reg. 10839, Slip Op. No. 1399 at 5-6, PERB Case No. 06-U-34 (2013)).

²³ Report 15.

²⁴ Report 14 (citing *Murtis Taylor Human Servs. Sys.*, 360 N.L.R.B. No. 66 (2014); *Corr. Corp. of Am.*, 347 N.L.R.B. 632, 636 (2006)).

²⁵ Report 20.

²⁶ Report 20.

²⁷ Report 20.

regulations. To the Department's argument that the memorandum was not a reprimand as defined in the District Personnel Manual, the Hearing Examiner replied,

[A] violation of the CMPA does not of necessity depend on form, it is the substance of the act that controls. In that regard, I cannot ignore the genesis of the issuance of the memo—Smith's disagreement with Jenkins representation of McKinnon and the March 19 meeting. These all form the circumstantial backdrop to the violation. In my view, the memorandum by implication is accusatory, threatening to Jenkins as a union representative. Moreover, the memorandum's being solely circulated to Respondent's managers tends to undermine not only Jenkins as a representative, but the Union itself.²⁸

The next incident the Report discussed was the roll call of April 2, 2015. According to the Hearing Examiner, Jenkins testified that he filed complaints against Warden Smith a few days before April 2.²⁹ He attended the roll call to hear management's presentation on an overtime issue. The Hearing Examiner found that Jenkins was ordered out of the roll. The Hearing Examiner concluded that the order was unjustified: "[T]he Respondent has not offered any justification for his being ordered out of the roll call despite Johnson's testimony that he was rightfully in attendance. The Respondent merely contends that [the Complainant] was insubordinate for resisting Hargrave's order to exit the roll call."³⁰

The Hearing Examiner apparently also found that Jenkins was physically removed from roll call. The removal, along with the order, was also found to be an unfair labor practice: "Hargrave's part in the physical removal of Jenkins before the assembled unit members undermined not only Jenkins as a union representative, but the union itself as the employees' representative. I would conclude that in ordering Jenkins to leave the roll call, and removing him the Respondent violated the CMPA."³¹

The Hearing Examiner said that it was undisputed that the Department suspended Jenkins for five days for his insubordination in disobeying the order to leave roll call. In addition, the Department's witness did not dispute Jenkins's authorization to attend the roll call. "Yet," the Hearing Examiner wrote, "she stated that the Respondent was correct in suspending him for refusing to leave a meeting he was authorized to attend."³² The Hearing Examiner determined that suspending Jenkins for five days for insubordination violated the CMPA.³³

²⁸ Report 21.

²⁹ Report 21.

³⁰ Report 22.

³¹ Report 22.

³² Report 22.

³³ Report 22.

The Hearing Examiner concluded in summary that the Department engaged in conduct that in violation of section 1-617.04(a)(1) interfered with, restrained, and coerced Jenkins in the exercise of rights guaranteed by section 1-617.06(a)(2) in the following ways:

1. By informing an employee, Tyrone Jenkins, that he had given another employee inappropriate advice at a Weingarten interview of the employee;
2. By informing an employee, Tyrone Jenkins, that the interviewed employee was going to be suspended because of the advice Jenkins had given the interviewee;
3. By informing an employee, Tyrone Jenkins, that Jenkins was going to be reprimanded for giving inappropriate advice at a Weingarten interview;
4. By issuing a memorandum to an employee, Tyrone Jenkins, implying that he had violated certain policies of the Respondent in representing an employee at a Weingarten interview;
5. By ordering an employee, Tyrone Jenkins, to exit a roll call meeting of unit employees, and forcibly removing him from the meeting that he was authorized in his representational capacity to attend;
6. By suspending an employee, Tyrone Jenkins, for five (5) days for purported insubordination for refusing an order to exit a roll call meeting of unit employees.³⁴

The Hearing Examiner then set forth a recommended order that ordered the Department to cease and desist from the foregoing violations, post a notice of the violations, and to make Jenkins whole for the unlawful suspension.³⁵

The Department filed exceptions to the Report on May 12, 2017. Jenkins did not file an opposition or exceptions of his own.

³⁴ Report 23.

³⁵ Report 23-24.

II. Discussion

A. Preliminary Matters

As noted above, OLRCB filed an answer on behalf of “[t]he individually-named Respondents,” all of whom have now been dismissed. OLRCB has not filed an answer on behalf of the one respondent remaining in the case—the Department. Nonetheless, counsel from OLRCB appeared without objection at the hearing, expressly representing the Department,³⁶ and subsequently filed a post-hearing brief and exceptions on behalf of the Department, also without objection. Therefore, we find that any claim of default for failure to answer was waived when the Complainant proceeded without objection to a hearing on the merits.³⁷

The Department’s failure to answer does affect its first exception, however. The Department’s first exception objects that the Amended Complaint is untimely. The Department argues that the Amended Complaint must be treated as an original complaint because it was not amended in either of the ways permitted by Rule 520.4. It was neither “amended as a matter of course prior to the filing of an answer” nor was it “amended by motion.” The Amended Complaint was filed October 13, 2015. The violations that it alleges occurred more than 120 days earlier, from March 13, 2015, to April 2, 2015. The Department asserts that as a result the Amended Complaint was filed beyond the 120-day deadline provided in Rule 520.4. The Department requests “that the PERB dismiss the Amended Complaint as untimely and beyond the PERB’s jurisdiction.”³⁸

The Department did not raise this issue until after the hearing, when it asserted the untimeliness of the Amended Complaint in a footnote of its post-hearing brief to the Hearing Examiner. The answer of the dismissed, individual respondents did not raise untimeliness as an affirmative defense. And, as discussed, the Department did not file an answer at all. Rule 520.6 provides that an answer to an unfair labor practice complaint “shall also include a statement of any affirmative defenses.” The question arises whether the Department waived the affirmative defense of untimeliness by failing to raise it in an answer.

Following the lead of the U.S. Supreme Court, the D.C. Court of Appeals has reconsidered and reversed its prior position that administrative filing deadlines are mandatory and jurisdictional.³⁹ The posture of the present case—in which respondents filed pleadings and motions, participated in a hearing, and only later claimed that the case was untimely—illustrates one of the reasons the Supreme Court has criticized characterizing procedural rules as jurisdictional: “Objections to a tribunal’s jurisdiction can be raised at any time. . . . Tardy jurisdictional objections can therefore result in a waste of adjudicatory resources and can

³⁶ Tr. 6

³⁷ See *Keister v. McDavid*, 76 A.2d 776, 778 (D.C. 1950); *Micelli v. Moore*, 499 So. 2d 1298, 1299 (La. App. 1986).

³⁸ Exceptions 3.

³⁹ See *Hoggard v. D.C. Pub. Emp. Relations Bd.*, 655 A.2d 320, 323 (D.C. 1995) (“[T]ime limits for filing appeals with administrative adjudicative agencies . . . are mandatory and jurisdictional.”) (quoting *D.C. Pub. Emp. Relations Bd. v. D.C. Metro. Police Dep’t*, 593 A.2d 641, 643 (D.C. 1991)).

disturbingly disarm litigants.”⁴⁰ The Supreme Court has said that the label “jurisdictional” should be restricted to rules that delineate the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) within a tribunal’s authority, as opposed to “claim-processing rules.”⁴¹ In *Dolan v. United States*,⁴² the Court explained that by “claim-processing rules” it means “rules that do not limit a court’s jurisdiction, but rather regulate the timing of motions or claims brought before the court. Unless a party points out to the court that another litigant has missed such a deadline, the party forfeits the deadline’s protection.”⁴³

The D.C. Court of Appeals adopted this distinction in *Smith v. United States*⁴⁴ and *Gatewood v. D.C. Water and Sewer Authority*⁴⁵ and applied it to Superior Court Criminal Rule 35(b)’s deadline for moving to reduce a sentence and to the Water and Sewer Authority’s deadline for filing a petition for review, respectively. The court held that both rules were claim-processing, not jurisdictional.⁴⁶ In 2014 in *Neill v. District of Columbia Public Employee Relations Board*,⁴⁷ the court put the Board on notice that these precedents apply to its rules as well:

Recent authority calls into question whether the PERB’s filing deadlines are in fact jurisdictional. *See Gatewood v. District of Columbia Water & Sewer Auth.*, 82 A.3d 41, 45–49 (D.C.2013) (holding that an agency filing deadline set forth in a regulation as a “rule of administrative convenience” is not jurisdictional). However, assuming the FOP properly raised the 120–day deadline, the correctness of the PERB’s dismissal may not turn on whether the deadline is jurisdictional.⁴⁸

The court also said in *Neill* that claim-processing rules may be relaxed or waived.⁴⁹

The Court of Appeals subsequently stated in *Mathis v. District of Columbia Housing Authority*,⁵⁰ that filing deadlines are “quintessential claim-processing rules.”⁵¹ A deadline is not jurisdictional, the court held, unless it is found in a statute and the legislature has clearly stated that the deadline is to have jurisdictional consequences.⁵² In *Poth v. United States*,⁵³ the court

⁴⁰ *Sibelius v. Auburn Regional Med. Center*, 568 U.S. 145, 153 (2013).

⁴¹ *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

⁴² 560 U.S. 605 (2010).

⁴³ *Id.* at 610.

⁴⁴ 984 A.2d 196 (D.C. 2009).

⁴⁵ 82 A.3d 41 (D.C. 2013).

⁴⁶ *Smith*, 984 A.2d at 201; *Gatewood*, 83 A.3d at 49.

⁴⁷ 93 A.3d 229 (2014).

⁴⁸ *Id.* at 232 n.5.

⁴⁹ *Id.* at 238.

⁵⁰ 124 A.3d 1089 (2015).

⁵¹ *Id.* at 1102 (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)).

⁵² *Id.* at 1101-3.

⁵³ 150 A.3d 784 (D.C. 2016).

held that Superior Court Criminal Rule 33's time limit on a motion for a new trial was not jurisdictional because it lacked a statutory basis.⁵⁴

The 120-day time limit raised by the Department is not in the CMPA, nor is it in any other statute: it is in Rule 520.4, a rule adopted by the Board. In view of the unequivocal controlling authority discussed above, we overrule our prior holdings that filing deadlines established by the Board's rules are mandatory and jurisdictional. Those rules are claim-processing rules and the deadlines they set are waivable.

An answer to an unfair labor practice complaint must state the respondent's affirmative defenses.⁵⁵ By failing to file a timely answer, the Department waived its affirmative defenses,⁵⁶ including its defense of untimeliness. Consequently, there is no need to analyze the Department's defense that the Amended Complaint was untimely. The Hearing Examiner properly disregarded it. It is sufficient to add that had the Department raised this claim in an answer, the result would have been the same because the Department's argument is without merit.⁵⁷

B. The Merits of the Case

1. The Department's Exceptions

The Department has presented five exceptions on the merits of the case. They concern the the lawfulness of the Department's treatment of Jenkins during and after the March 13 and 19 meetings and the lawfulness of the Department's treatment of Jenkins during and after the April 2, 2015 roll call. The exceptions are: (1) The Hearing Examiner's finding that the March 13, 2015 "meeting implicated Weingarten standards" is inconsistent with PERB precedent. (2) The Hearing Examiner's finding that the Department's issuance of a March 18, 2015 memorandum was influenced by later events occurring on March 19, 2015 is factually impossible and thus unreasonable. (3) The Hearing Examiner erroneously concluded that the Department "has not offered any justification for [Jenkins] being ordered out of the roll call." (4) The Hearing Examiner's conclusion that ordering Jenkins to exit the roll call was an unfair labor practice is nullified by his failure to analyze the order using the *Wright Line* standard. (5) The Hearing Examiner failed to apply PERB precedent before determining that the Complainant's suspension was unlawful.

⁵⁴ *Id.* at 788.

⁵⁵ PERB R. 520.6.

⁵⁶ See *Council of Sch. Officers, Local 4 v. DCPS*, 59 D.C. Reg. 3274, Slip Op. 803 at 15, PERB Case No. 04-U-38 (2007).

⁵⁷ See *D.C. Metro. Police Dep't v. D.C. Pub. Emp. Relations Bd.*, C.A No. 98-MPA-16 (D.C. Super. Ct. Apr. 13, 1999) (reversing the Board's holding that the opportunity Rule 501.13 provides to cure a deficient pleading cannot extend the period of time to initiate a cause of action); *FOP/MPD Labor Comm. v. MPD*, 52 D.C. Reg. 2517, Slip Op. No. 736 at n.12, PERB Case No. 02-U-14 (2004) ("Consistent with the D.C. Superior Court's Decision in *D.C. Metropolitan Police Department v. D.C. Public Employee Relations Board*, once a deficiency is cured in a filing, the document's official filing date is its original filing date. CA No. 98-MPA-16 (1999).")

2. Meetings of March 13 and March 19

a. Testimony Regarding the Meetings

After Jenkins was put under oath, the Hearing Examiner asked him if he drafted the Amended Complaint. Jenkins replied that he did, together with McKinnon.⁵⁸ The Hearing Examiner asked Jenkins if he would ratify the statements in the Amended Complaint as his testimony, and Jenkins said he would.⁵⁹ The Hearing Examiner then asked him a second time:

So you would be willing to ratify and adopt, as your testimony or part of your testimony here today, the contents of your Amended Complaint?

THE WITNESS: Yes, sir.⁶⁰

When asked if he had anything to add to what was stated in the Amended Complaint, Jenkins stated that he did not.⁶¹ Counsel for the Department did not object to any of these questions. After that, Jenkins testified on cross examination and on further examination by the Hearing Examiner.

The Hearing Examiner asserted in his Report that having Jenkins adopt the Amended Complaint as part of his testimony “was appropriate because so much of his Amended Complaint which he had a hand in drafting was testimonial in nature.” The Hearing Examiner stated that in his Report he would use the words aver and averment “to describe Jenkins’ complaint-based testimony as opposed to his hearing testimony.”⁶² Nevertheless, the Report frequently says “Jenkins testified” or “Jenkins stated” when referring to allegations that are in the Amended Complaint only. The Department does not object in its exceptions to the manner in which the Report uses the allegations of the Amended Complaint.

The Board does not encourage this procedure. It has been said that pleadings have no probative force or evidentiary value even when admitted without objection.⁶³ However, in this case, where a *pro se* complainant adopted under oath without objection a detailed complaint that he and his co-complainant drafted and was thereafter cross examined, the Board will accept the Hearing Examiner’s unopposed recommendation that we regard the statements in the Amended Complaint as part of the evidentiary record of the case and as probative.

⁵⁸ Tr. 20:12-22.

⁵⁹ Tr. 21:1-5.

⁶⁰ Tr. 22:1-5.

⁶¹ Tr. 22:6-23:10.

⁶² Report 4.

⁶³ *Red Henry Painting Co. v. Bank of N. Tex.*, 521 S.W.2d 339, 343 (Tex. Civ. App. 1975).

b. Exceptions Regarding the Meetings

In exception 2, the Department objects to the Hearing Examiner's assertion that the March 13 meeting "implicated *Weingarten* standards." This assertion, according to the Department, conflicts with the Hearing Examiner's recognition that the testimony showed the meeting was neither investigatory nor disciplinary.⁶⁴ In addition, the Department asserts that no questioning took place before Warden Smith told Jenkins that he had given inappropriate advice.⁶⁵ The Department asks the Board to reject the Hearing Examiner's conclusion that the meeting implicated *Weingarten* standards and to reject as well "three related legal conclusions that the Department violated the law." The related legal conclusions are that the Department violated the law by (1) telling Jenkins (at the March 19 meeting) that he had given inappropriate advice, (2) telling him (at the March 19 meeting) that he would be reprimanded for the inappropriate advice, and (3) issuing a memorandum to him on March 18 implying that he had violated policies.⁶⁶ Exception 3 adds that the Hearing Examiner erred when he stated that the "genesis" of the memorandum was "Smith's disagreement with Jenkins' representation of McKinnon and the March 19 meeting." The Department states that it is impossible for a meeting on March 19 to be the genesis of a memorandum from the day before.

The Department's request that the Board reject the finding that the meeting implicated *Weingarten* actually supports the Hearing Examiner's recommendation that the Board dismiss the claim that Smith's actions on March 13 violated the CMPA. The Hearing Examiner proceeded as if *Weingarten* applied but averred that "while Smith and Jenkins may have been at odds regarding the nature of Jenkins' represent[ation], I cannot conclude that the Respondent violated Jenkins rights as a union representative."⁶⁷ The Board concurs that Jenkins did not prove that Smith interfered with Jenkins's representation of McKinnon at the meeting. Whether *Weingarten* applied or not, there was no unfair labor practice.

Even if *Weingarten* did not apply to the March 13 meeting, the Board need not reject the Hearing Examiner's related conclusions as the Department requests. "[T]he protected nature of a union steward's conduct is not entirely dependent on whether the employees involved were entitled, under *Weingarten*, to request union representation."⁶⁸ It does not follow from the non-*Weingarten* nature of a meeting attended by a union representative that nothing management does to the union representative as a result of the meeting can be an unfair labor practice. Representing McKinnon at the March 13 meeting was protected activity.⁶⁹ In violation of section 1-617.04(a)(1), Smith interfered with and restrained Jenkins in carrying out that protected activity by calling Jenkins in for a second meeting to complain again about his advice and to tell him that he would be reprimanded for it.

⁶⁴ Report 20.

⁶⁵ Exceptions 4-5.

⁶⁶ Exceptions 5.

⁶⁷ Report 20.

⁶⁸ *U.S. Postal Serv. v. Moore*, 252 N.L.R.B. 624, 624 n.2 (1980), *enforcement denied*, 671 F.2d 503 (9th Cir. 1981).

⁶⁹ D.C. Official Code § 1-617.06(a)(2).

The March 18, 2015 memorandum was introduced into evidence and was the subject of testimony. The Department argues, with some logic, that the March 19 meeting could not be the “genesis” of a memorandum dated the day before. Setting aside then any connection between the memorandum and the March 19 meeting, we find that the Hearing Examiner’s determination that the memorandum “by implication is accusatory and threatening to Jenkins as a union representative” is supported by the record. The record supports the Hearing Examiner’s findings on both the timing and the content of the memorandum. As to the timing, the memorandum is dated March 18, 2015.⁷⁰ This is five days after Jenkins, McKinnon, and Smith had their meeting on March 13.⁷¹ Jenkins attended the meeting in a representational capacity.⁷² Jenkins testified that at the meeting he advised McKinnon not to do anything that she felt was inappropriate.⁷³

The memorandum is directed to Jenkins from Warden Smith with copies to Jenkins’s superiors: “Deputy Wardens, Majors, Shift Commanders.” As the Hearing Examiner said, the content of the memorandum matters, not its form. The content of the memorandum is a list of rules on chain of command and ethics juxtaposed with the menacing subject line “Appropriate Advice When Representing an Employee.” Despite that title, nothing in the body of the memorandum directly deals with appropriate advice. The combination of the title with the body of the memorandum implies that somehow Jenkins’s advice to McKinnon violated rules of ethics and the chain of command without saying how. Jenkins testified, “[I]t’s a slander on my character as a Union rep and violated my position as the vice chair. . . . It’s just a list of policies, but it’s accusing me of being dishonest.”⁷⁴ Jenkins also testified that he was concerned about the memorandum’s effect on his future job prospects.⁷⁵

We concur with the Hearing Examiner’s conclusion that by issuing the memorandum the Department violated section 1-617.04(a)(1). That conclusion is reasonable, supported by the record, and consistent with Board precedent.

3. Roll Call of April 2, 2015

The Amended Complaint alleges three unlawful actions by the Department in connection with the April 2 roll call: ordering Jenkins to exit the roll call, physically removing him, and proposing to suspend him on the ground that he complied only after repeated orders to leave.⁷⁶

⁷⁰ Complainant’s Ex. B.

⁷¹ Am. Compl. ¶ 8, Answer to Am. Compl. ¶ 8.

⁷² Tr. 30-33.

⁷³ Tr. 39.

⁷⁴ Tr. 67:8-16.

⁷⁵ Tr. 40:5-8.

⁷⁶ Am. Compl. ¶¶ 18, 19.

a. Order to Exit Roll Call

The Department's fourth and fifth exceptions concern the order to exit the roll call. The fourth exception argues that the record does not support the Hearing Examiner's conclusion that the Department offered no justification for the order. To the contrary, the Department asserts, "Ms. Johnson testified that the Complainant's disruption, and nothing else, caused the Department to order the Complainant's removal from roll call."⁷⁷ On the basis of that justification, the Department contends in its fifth exception that the Hearing Examiner's failure to conduct a *Wright Line* analysis nullifies his conclusion that ordering Jenkins to exit roll call was a violation.⁷⁸ The Department quotes one of the Board's cases, where we said:

In assessing whether a Complainant has met its burden of proof in a[] dual motive case, such as the instant case, the Board has adopted the two-part test of Wright Line to determine the existence of a violation. The Wright Line standard was developed as a rule for allocating the burdens of proof to determine the existence of an unfair labor practice violation where mixed or dual motives exist, i.e., prohibited and non-prohibited, for actions taken by employers against their employees.⁷⁹

The Department asserts that this is a dual motive case because it put on evidence that its motive was Jenkins's disruption whereas Jenkins "suggested, and the Hearing Examiner found, that the Department removed the Complainant because of union activity."⁸⁰ The Department stated that the Hearing Examiner "was obligated to analyze the parties' arguments under [*Wright Line*'s] burden-shifting paradigm."⁸¹

Those two exceptions are unfounded because the Department did not put on evidence that disruption by Jenkins was a justification or motive for ordering Jenkins to leave roll call. Johnson's testimony was that Jenkins was asked to step out of the roll call and *then* he became disruptive.⁸² The Hearing Examiner pointed out this distinction: "The Respondent merely contends that [the Complainant] was insubordinate for *resisting* Hargrave's order to exit the roll call."⁸³ If the Hearing Examiner found that the Department removed the Complainant because of union activity, he did not say so. He simply said that the removal was "unjustified."⁸⁴ The Hearing Examiner was not obligated to view the order to exit roll call as a dual motive issue.

⁷⁷ Exceptions 6-7.

⁷⁸ Exceptions 7

⁷⁹ *AFGE, Local 2725 v. Hous. Auth.*, 45 D.C. Reg. 4022, PERB Case No. 544 at 2 n.3, PERB Case No. 97-U-07 (1998).

⁸⁰ Exceptions 8.

⁸¹ Exceptions 8.

⁸² Tr. 76-77.

⁸³ Report 22 (emphasis added).

⁸⁴ Report 22.

Another reason *Wright Line*⁸⁵ does not apply is that ordering Jenkins to leave the room was not an adverse employment action. The *Wright Line* test is “generally not used in cases in which the employee or union has not alleged adverse employment action, but instead simply claims that the employer’s conduct tended to interfere with, restrain, or coerce employees in the exercise of protected rights.”⁸⁶ Accordingly, in this instance “[t]he proper test then is whether the conduct in question had a reasonable tendency in the totality of the circumstances to interfere with, restrain, or coerce the employee.”⁸⁷ Proof of motive is not required.⁸⁸

The Hearing Examiner concluded that “ordering Jenkins out of the roll call constitutes a violation of the CMPA.”⁸⁹ The record supports this conclusion. Jenkins testified that he came to the roll call on union business. He testified that he was there as vice chairman of the union to hear a presentation from personnel officers,⁹⁰ and the Department’s witness, one of the personnel officers, agreed.⁹¹ Jenkins was ordered to leave the roll call.⁹² This order prevented Jenkins from performing the function he intended to perform there as union vice chairman. The Board concurs with the Hearing Examiner’s conclusion that by ordering Jenkins to exit a roll call meeting of unit employees the Department interfered with Jenkins’s right to assist a labor organization⁹³ and thereby violated section 1-617.04(a)(1).⁹⁴ That conclusion is reasonable, supported by the record, and consistent with Board precedent.

b. Physical Removal

The evidence regarding the actions taken by the Department’s employees to remove Jenkins from the room after he was ordered to leave is conflicting. In his testimony about the roll call incident, Jenkins related a version of that incident that differed from the version in the Amended Complaint, and he expressly denied facts stated in the Amended Complaint’s version. The Amended Complaint alleges that Major Hargrave ordered Jenkins to get out of roll call and that someone then pushed Jenkins out the roll call room’s door and into the hall with so much force that Jenkins “landed about three feet into the hallway.”⁹⁵ But Jenkins testified, “I left roll call, came out in the hall way. . . . So he didn’t order me to come out of roll call. He ordered me that I can’t go back in roll call.”⁹⁶ Jenkins testified that it was when he was out in the hallway

⁸⁵ 250 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

⁸⁶ *AFSCME, AFL-CIO, Council 4, Local 2405 v. City of Norwalk*, 113 A.3d 430, 439 (Conn. App. 2015).

⁸⁷ *FOP/MPD Labor Comm. v. MPD*, 63 D.C. Reg. 4589, Slip Op. No. 1563 at 6-7, PERB Case No. 11-U-20 (2016).

⁸⁸ *Id.* at 6.

⁸⁹ Report 22.

⁹⁰ Tr. 43, 47-49, 57, 60.

⁹¹ Tr. 75.

⁹² Tr. 44, 55, 76; Complaint’s Ex. D, F (employee reports of significant incident/extraordinary circumstances); Complainant’s Ex. G (notice of proposed suspension of Jenkins).

⁹³ D.C. Official Code § 1-617.06(a)(2).

⁹⁴ Report 22-23.

⁹⁵ Am. Complaint 12.

⁹⁶ Tr. 42-43. *See also* Tr. 63:9-11.

that someone pushed him.⁹⁷ He twice denied that this conflict occurred in roll call as alleged in the Amended Complaint.⁹⁸ There are also divergent versions of the incident in Johnson's testimony,⁹⁹ her incident report,¹⁰⁰ the other incident reports,¹⁰¹ and the proposed suspension.¹⁰² Jenkins did not sustain his burden of proof that the Department violated the CMPA by physically removing him from the roll call room.

c. Proposed Suspension of Jenkins

The Amended Complaint alleges that Jenkins received advance written notice of a proposed suspension.¹⁰³ The record reflects that the Department proposed suspending Jenkins for insubordination, the specification being that after Major Hargrave ordered Jenkins to leave the roll call, Jenkins argued with Hargrave and only complied after repeated orders.¹⁰⁴ A proposed suspension can interfere with, coerce, or restrain an employee in the exercise of rights protected by the CMPA.¹⁰⁵ We find that the proposed suspension in question restrained Jenkins in his protected right to assist a labor organization.

The Department contends that because of Jenkins's disruptive behavior and refusal to obey Hargrave's order to leave the roll call, the Department was justified in suspending him for insubordination. Again using a *Wright Line* argument, the Department in its sixth exception objects to the Hearing Examiner's finding that the suspension was an unfair labor practice. Citing the elements of a complainant's *prima facie* case under the mixed-motive analysis, the Department points out that in finding the suspension to be an unfair labor practice, the Hearing Examiner made no factual finding or legal conclusion on one of the elements of a *prima facie* case, namely, anti-union or retaliatory animus.¹⁰⁶ For that reason, the Department claims that the Hearing Examiner's conclusion was unlawful, unsupported by the facts, and inconsistent with the Board's precedent.¹⁰⁷

This *Wright Line* argument fails as well because the *Wright Line* test does not apply to Jenkins's proposed suspension:

⁹⁷ Jenkins testified that he was going to go to the warden's office. As he was about to do so, Major Hargrave grabbed his arm and twisted it. Another person came from behind and pushed him into the wall of the hallway. Tr. 44, 55-56, 69.

⁹⁸ "We wasn't in roll call, we was in the hallway." Tr. 44. "It was in the hallway, not roll call." Tr. 56.

⁹⁹ Tr. 76-77, 83.

¹⁰⁰ Complainant's Ex. F.

¹⁰¹ Complainant's Ex. D.

¹⁰² Complainant's Ex. G.

¹⁰³ Am. Compl. ¶ 19.

¹⁰⁴ Complainant's Ex. G.

¹⁰⁵ *MPD v. FOP/MPD Labor Comm.*, 62 D.C. Reg. 14601, Slip Op. No. 1533 at 2 n.4, PERB Case No. 10-U-14 (2015).

¹⁰⁶ Exceptions 9 (citing *FOP/MPD Labor Comm. v. MPD*, 60 D.C. Reg. 12080, Slip Op. No. 1403 at 2, PERB Case No. 08-U-26 (2013)).

¹⁰⁷ Exceptions 9.

[T]he Wright Line standard does not apply where, as here, there is no dispute that the employer took action against the employee for conduct that occurred while the employee was engaged in protected activity. When an employee is disciplined or discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious or opprobrious to remove it from the protection of the Act.¹⁰⁸

The Board considered such a fact pattern *Fraternal Order of Police/Department of Corrections Labor Committee (on behalf of Green, Dupree, and Durant) v. Department of Corrections*,¹⁰⁹ where the Department of Corrections removed service weapons from two employees who were union officials, William Dupree and Earnest Durant, for their threatening behavior while discussing labor-management issues.¹¹⁰ The hearing examiner's report and recommendation in the case, which the Board adopted, determined that the two employees were engaged in protected union activity at the time, namely, complaining to management about what they regarded as a unilateral change in working conditions.¹¹¹ The Board said that the hearing examiner "identified the relevant issue as being *whether the behavior exhibited by Dupree and Durant was so extreme as to deprive them of the protections of D.C. Code 1-617.04(a)* (2001 ed.)."¹¹² As the Board had not adopted a test for evaluating whether an employee's behavior cost him the protection of the CMPA, the hearing examiner borrowed one from a 1979 National Labor Relations Board case, which was whether the misconduct is so violent or of such character as to render the employee unfit for further service.¹¹³

The National Labor Relations Board's test has evolved since then. In *Consumer Power Co. and Michigan State Utility Workers Council*,¹¹⁴ the NLRB held that when an employee is disciplined for conduct that is part of the "res gestae of protected concerted activities," the relevant question is "whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further services."¹¹⁵

Instructively, the Federal Labor Relations Authority applied a similar test to analogous facts in *U.S. Air Force Logistics Command, Tinker Air Force Base and AFGE Local 916*.¹¹⁶ In that case, the grievant, a union official, was confronted by his supervisors while he was attempting to serve copies of unfair labor practice charges on the respondents to the charges. The supervisors questioned what he was doing. When he refused to leave the area, he was detained

¹⁰⁸ *Harbor Rail Servs. Co. and Schultz*, No. 25-CA-174952, slip op. at 15, 2017 WL 1548283 (N.L.R.B. Div. of Judges Apr. 28, 2017) (citation omitted), *adopted*, 2017 WL 2544505 (N.L.R.B. June 9, 2017).

¹⁰⁹ 50 D.C. Reg. 5059, Slip Op. No. 698, PERB Case No. 01-U-16 (2003).

¹¹⁰ *Id.* at 3.

¹¹¹ *Id.* at 3-4.

¹¹² *Id.* at 4.

¹¹³ *Id.* 4-5 (citing *Union Fork & Hoe Co. and McKinney*, 241 N.L.R.B. 907, 908 (1979)).

¹¹⁴ 282 N.L.R.B. 130, 132 (1986)

¹¹⁵ *Id.* at 132.

¹¹⁶ 34 F.L.R.A. 385 (1990).

and security police were called to remove him. When a security police officer arrived, the grievant explained that he was lawfully acting on behalf of the exclusive representative and refused to comply with the officer's instruction to leave the area. After a second officer arrived, the grievant agreed to leave. Management proposed to reprimand the grievant. He then filed a grievance opposing the proposed reprimand. An arbitrator's award held that the grievant attempted to invoke self-help rather than comply with a clear order and comply later. The award held that the reprimand was just and proper.¹¹⁷

On appeal, the FLRA found that because the grievant failed to comply with a clear order, his refusal to leave was insubordination. Nonetheless, the FLRA held that the award was contrary to the statutory right of employees to engage in union activity without fear of penalty or reprisal:

Because the grievant was disciplined for activities he performed on behalf of the Union, the issue is not merely whether the grievant was insubordinate. It must be determined whether the grievant's actions constituted flagrant misconduct: whether the actions were "of such an outrageous and insubordinate nature to remove them from the protection of the Statute[.]" Federal Aviation Administration, St. Louis Tower, Bridgeton, Missouri, 6 FLRA 678, 687 (1981).

In our view, the grievant's actions were not of such an outrageous and insubordinate nature so as to remove him from the protection of the Statute. The grievant explained to the supervisors and security officers who questioned him that he was engaged in serving unfair labor practice charges, an activity protected by the Statute. There is no basis in the record on which to conclude that the grievant was impolite, antagonistic, or disrespectful in his refusal to leave the work area. Although we do not condone the grievant's conduct, we are not persuaded that the grievant's refusal to immediately obey the order to depart was so insubordinate as to constitute flagrant misconduct.¹¹⁸

In the present case, Jenkins was similarly insubordinate in initially refusing an order to leave the area. The Department bears the burden of persuasion on the issue of whether Jenkins's insubordinate actions were so extreme, egregious, or outrageous as to deprive them of the protections of the CMPA.¹¹⁹ In this regard, the Department's witness testified:

[Major Hargrave] asked him several times to step out. . . . Mr. Johnson kept asking why, why, why. . . . And at one point, we

¹¹⁷ *Id.* at 386-87.

¹¹⁸ *Id.* at 390 (citation omitted).

¹¹⁹ See *Caterpillar Tractor Co. v. Wagner*, 276 N.L.R.B. 1323, 1332 (1985).

stopped the presentation because there was a disruption of roll call. And two officers, I believe it was Ms. Wanda Watkins-Pitt and Mr. Barnes, held Mr. Jenkins by the arm and walked him out.¹²⁰

The notice of proposed suspension written by Major Hargrave states,

I summoned you to exit the roll call and you stated, “Why, I have a right to address the staff”. I then ordered you to leave the roll call and that you would not be allowed to address the 4:00 to 12:00 shift staff without the pre-approval of the Shift Commander. You continued to argue with me as I held the door open, and you only complied after repeated orders given by me.¹²¹

Like the FLRA, we do not condone Jenkins’s failure to obey an order promptly, although the order in question, it must be pointed out, was an unfair labor practice. Jenkins’s response in asking why, asserting his right to be at the roll call, and not leaving until after repeated orders was at least civil. It was certainly not profane, and it was not extreme, egregious, or outrageous. The Department did not sustain its burden of persuasion on this point. As a result, we find that issuing a proposed suspension for Jenkins’s conduct while engaged in protected activity was an unfair labor practice.

ORDER

IT IS HEREBY ORDERED THAT:

1. By agreement of the parties, the complaint of Stephanie McKinnon is dismissed without prejudice.
2. The Department shall cease and desist from interfering with, restraining, or coercing Tyrone Jenkins in the exercise of his rights guaranteed by the Comprehensive Merit Personnel Act.
3. The Department shall cease and desist from informing Jenkins that he will be reprimanded for giving advice to an employee that he represented as vice chairman of the Union.
4. The Department shall cease and desist from issuing a memorandum to Jenkins implying that he had violated certain policies in representing an employee at an interview. The Department shall remove from Jenkins’s personnel file any copy of the March 18, 2015 memorandum that the Department issued to Jenkins.

¹²⁰ Tr. 76-77.

¹²¹ Complainant’s Ex. G.

5. The Department shall cease and desist from ordering Jenkins and other similarly situated employees to exit roll call meetings of unit employees that he and they are authorized to attend.
6. The Department shall cease and desist from proposing to suspend Jenkins for his acts and omissions on April 2, 2015, and from taking any steps to implement the proposed suspension.
7. The Department shall purge from its records, including Jenkins's personnel file, all references of record to a suspension of Jenkins for his acts and omissions on April 2, 2015.
8. The Department shall rescind the said suspension and make Jenkins whole in accordance with applicable law for any benefits lost due to the suspension.
9. The Department shall conspicuously post where notices to employees are normally posted two (2) notices that the Board will furnish to the Department in each of the Department's buildings, specifically including the D.C. Jail. The notice shall be posted within fourteen (14) days from Department's receipt of the notice and shall remain posted for thirty (30) consecutive days.
10. Within thirty (30) days of the issuance of this order, the Department shall advise the Board of the actions that have been taken to implement this order.
11. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy, Members Ann Hoffman, Barbara Somson, Douglas Warshof, and Mary Anne Gibbons
Washington, D.C.

January 18, 2018

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 15-U-31 is being transmitted by File & ServeXpress to the following parties on this the 31st day of January 2018.

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