

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

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

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| In the Matter of: |) | |
| |) | |
| Fraternal Order of Police/Metropolitan Police Department Labor Committee, |) | |
| |) | |
| Complainant, |) | PERB Case No. 10-U-21 |
| |) | |
| v. |) | Opinion No. 1378 |
| |) | |
| District of Columbia |) | |
| Metropolitan Police Department ¹ , |) | |
| |) | |
| Respondent. |) | |

DECISION AND ORDER

I. Statement of the Case

Complainant Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP” or “Complainant”) filed the above-captioned Unfair Labor Practice Complaint (“Complaint”), against Respondent District of Columbia Metropolitan Police Department (“MPD” or “Respondent”) for alleged violations of section 1-617.04(a)(1) of the Comprehensive Merit Protection Act (“CMPA”). Respondent filed an Answer (“Answer”), denying that it violated the CMPA, and requesting that the Board dismiss the Complaint. (Answer at 6).

¹ FOP lists Chief Cathy Lanier, Commander George Kucik, Inspector Jacob Kischter, Lieutenant Moses Vines, and Manager David Jackson as respondents in this Complaint. The Executive Director has removed the names of the individual respondents from the caption, consistent with the Board’s precedent requiring individual respondents named in their official capacities to be removed from the complaint for the reason that suits against District officials in their official capacities should be treated as suits against the District. See *Fraternal Order of Police/Metropolitan Police Dep’t Labor Comm. v. D.C. Metropolitan Police Dep’t*, 59 D.C. Reg. 6579, Slip Op. No. 1118 at p. 4-5, PERB Case No. 08-U-19 (2011). The D.C. Superior Court upheld the Board’s dismissal of such respondents in *Fraternal Order of Police/Metropolitan Police Dep’t Labor Comm. v. D.C. Public Employee Relations Board*, Civ. Case No. 2011 CA 007396 P(MPA) (D.C. Super. Ct. Jan 9, 2013).

II. Discussion

A. Background

FOP alleges that on November 18, 2009, FOP Chief Shop Steward Hiram Rosario was contacted by Officer Arturo Balcazar, a member of the FOP bargaining unit. (Complaint at 4-5). Officer Balcazar informed Rosario that a "Question and Answer" session was scheduled to take place regarding possible allegations against Balcazar. (Complaint at 5). MPD characterizes the meeting as a "meeting with community members." (Answer at 3). Chief Shop Steward Rosario arrived at the meeting location and found that Officer Balcazar was already in the Third District's Lieutenant's office with Commander George Kucik. (Complaint at 5; Answer at 3). Commander Kucik informed Chief Shop Steward Rosario that he could not attend the meeting "because the Metropolitan Police Department was not conducting an investigation." (Complaint at 5). MPD admits that Commander Kucik informed Chief Shop Steward Rosario that he "would not be allowed into a meeting with community members," and that he informed Chief Shop Steward Rosario that there was no investigation of Officer Balcazar, but it denies that Chief Shop Steward Rosario was provided with this information immediately upon his entry into the Third District's Lieutenant's office. (Answer at 3). Chief Shop Steward Rosario responded that an investigation was already underway into the allegations involving Officer Balcazar, given the presence of Third District officials, and that any "Question and Answer" session could become part of the investigation against Officer Balcazar at any time. (Complaint at 5). Commander Kucik again told Chief Shop Steward Rosario that he could not participate, and stated that he could "just file a grievance." (Complaint at 6; Answer at 4).

Chief Shop Steward Rosario attempted to speak privately with Officer Balcazar, but was interrupted shortly thereafter by Commander Kucik. (Complaint at 6). MPD denies this assertion. (Answer at 4). Chief Shop Steward Rosario advised Commander Kucik of Officer Balcazar's *Weingarten* rights, specifically that Officer Balcazar had the right to call a union representative, and that Chief Shop Steward Rosario was Officer Balcazar's representative. (Complaint at 6; Answer at 4). Nonetheless, Chief Shop Steward Rosario was not permitted to be present during the meeting. (Complaint at 6; Answer at 4).

B. Analysis

FOP alleges that MPD violated the CMPA by threatening and intimidating Officer Balcazar when he requested to speak with his union representative, and by refusing to allow him to fully consult with his union representative prior to being interviewed. (Complaint at 7). FOP contends that the Board has recognized that the CMPA provides a right to union representation in accordance with the standards set forth in *NLRB v. Weingarten*, 420 U.S. 251, 262 (1975), and that *Weingarten* guarantees employees the right to fully consult with their representative prior to the interview, as well as the right to representation during the interview. (Complaint at 7). FOP asserts that the brief consultation between Officer Balcazar and Chief Shop Steward Rosario does not cure the alleged unfair labor practice, as the Board has held that "once an employee's rights are denied, the violation has occurred and the violation is not dismissed or cured because

remedial action is taken.” (Complaint at 7; citing *Fraternal Order of Police/Metropolitan Police Dep’t Labor Committee v. D.C. Metropolitan Police Dep’t*, 59 D.C. Reg. 4548, Slip Op. No. 932 at p. 5, PERB Case No. 07-U-10(2008)).

In *Weingarten*, the U.S. Supreme Court upheld the National Labor Relations Board’s determination that an employee has a right to union representation during an investigatory interview that the employee reasonably fears may result in discipline. 420 U.S. at 257. The denial of this right “has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the [National Labor Relations Act].” *Id.* 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. *Id.*

Like the National Labor Relations Act, the CMPA prohibits the District, its agents, and representatives from interfering with, restraining, or coercing any employee in the exercise of their rights under D.C. Code § 1-617.01(b). See D.C. Code § 1-617.04(a)(1). The Board recognizes a right to union representation during a disciplinary interview in accordance with the standards set forth in *Weingarten*. See *D.C. Nurses Association v. D.C. Dep’t of Youth Rehabilitation Services*, 59 D.C. Reg. 12638, Slip Op. No. 1304 at p. 2, PERB Case No. 10-U-35 (2012); *D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corp.*, 45 D.C. Reg. 6736, Slip Op. No. 558, PERB Case Nos. 95-U-03, 97-U-16, and 97-U-28 (1998). Further, the Board has agreed with the Federal Labor Relations Authority that “for the right to representation to be meaningful, the representative must have freedom to assist, and consult with, the affected employee.” *D.C. Nurses Association*, Slip Op. No. 1304 at p. 2 (quoting *Department of Veterans Affairs, Veterans Affairs Medical Center, Jackson, Mississippi*, 48 FLRA 787, 799 (1993)).

In the instant case, Chief Shop Steward Rosario attempted to attend the meeting as Office Balcazar’s union representative. (Complaint at 5). The parties disagree on the type of meeting that was held: FOP calls the meeting a “question and answer” session regarding potential allegations against Officer Balcazar, while MPD describes the meeting as a “meeting with community members.” (Complaint at 5; Answer at 3).

The right to representation attaches when an employee reasonably fears discipline might arise from an interview and requests representation. *Fraternal Order of Police/Metropolitan Police Dep’t Labor Committee v. D.C. Metropolitan Police Dep’t*, 59 D.C. Reg. 4548, Slip Op. No. 932 at p. 4, PERB Case No. 07-U-10 (2008). Whether the employee’s fear of discipline is reasonable is measured by objective standards under all of the circumstances present. *Quality Mfg. Company and Upper South Dep’t, Int’l Ladies’ Garment Workers’ Union*, 195 NLRB 197, 198 fn. 3 (1972). In regards to Officer Balcazar’s beliefs about the purpose of the meeting, the Complaint alleges only that Officer Balcazar told Chief Shop Steward Rosario that a “‘Question and Answer’ session was going to take place regarding possible allegations against Officer Balcazar.” (Complaint at 5). Chief Shop Steward Rosario believed that an investigation was underway due to the presence of officials from the Third District, and that the “question and answer” session could become part of an investigation against Officer Balcazar. *Id.* MPD

contends, and FOP admits, that Commander Kucik stated there was no investigation of Officer Balcazar. (Complaint at 5; Answer at 3). MPD calls the meeting in the Third District Lieutenant's Office a "meeting with community members," but does not elaborate on the meaning of this phrase. (Answer at 3). The parties disagree about whether an investigation of Officer Balcazar was underway at the time of the meeting. (Complaint at 5; Answer at 3). Without more information about the facts and circumstances surrounding the meeting, the Board cannot determine whether MPD violated Officer Balcazar's *Weingarten* rights by refusing to allow Chief Shop Steward Rosario to participate in the meeting as Officer Balcazar's union representative, and by interfering with Chief Shop Steward Rosario's consultation with Officer Balcazar at the meeting.

The issue of whether MPD's actions rise to the level of a violation of the CMPA is a matter best determined after the establishment of a factual record through an unfair labor practice hearing. See *Bargainer v. Fraternal Order of Police/Dep't of Corrections Labor Committee and D.C. Dep't of Corrections*, 45 D.C. Reg. 4013, Slip Op. No. 542, PERB Case No. 98-S-03 (1998). The Board finds that FOP has pled or asserted allegations that, if proven, would constitute a statutory violation. Therefore, the Complaint will continue to be processed through an unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Board's Executive Director shall refer the Fraternal Order of Police/Metropolitan Police Department Labor Committee's Complaint to a hearing examiner.
2. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.
3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

May 28, 2013

AMENDED CERTIFICATE OF SERVICE

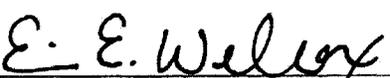
This is to certify that the attached Decision and Order in PERB Case No. 10-U-21 was transmitted via U.S. Mail and e-mail to the following parties on this the 3rd day of June, 2013.

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