



## II. Discussion

FOP asserts the following facts:

12. On May 7, 2008, at approximately 1400 hours, Sergeant Jeffrey Tolliver of the Second District was notified by Lieutenant Ralph Neal of the Second District that he had an interview at 1500 hours at the Internal Affairs Division (IAD).
13. Sergeant Tolliver notified the Union and requested that Union representation be present with him.
14. Union Representative Jeffrey Newbold responded to IAD to meet with Sergeant Tolliver.
15. Sergeants Newbold and Tolliver met Agents Daniel Harrington and James McGuire at the front entrance of the IAD waiting area.
16. Agent Harrington then stated "let's go over here" (meaning the interviewing rooms).
17. Sergeant Tolliver asked "can I have a few minutes to speak with my union rep". Agent Harrington refused and told Sergeant Tolliver, in a harsh tone, that he could speak with his representative once they were in the interview room.
18. The interview rooms at IAD are monitored through audio and video recording devices.
19. Sergeant Tolliver then requested that he be allowed to speak to his Union representative in the hallway.
20. As a result of his request, Agent Harrington asked Sergeant Tolliver if he was refusing to participate in the interview.
21. Sergeant Tolliver stated "no, I am not refusing, but I want to talk to my union rep first".
22. Union Representative Newbold then requested that they be allowed to speak privately prior to going into the interview room.

23. Agent Harrington, now visibly angry and emotional, stated that they could only talk to him "in there" (pointing to the interview room).
24. Union representative Newbold informed the Agents that Sergeant Tolliver had the right to talk with his representative prior to the interview.
25. Agent McGuire then stated "that is it, we're done."
26. Union Representative Newbold again informed both Agents that Sergeant Tolliver was not refusing to be interviewed, but only wanted to speak to his representative first.
27. Union Representative Newbold informed Agent McGuire that he needed to speak with a supervisor. Agent McGuire then stated, "I am an Agent". Union Representative Newbold again asked to speak with an Agent supervisor.
28. Both Agents went back into their office area. Agent McGuire ordered Sergeant Tolliver and Union Representative Newbold to wait there and not to leave. Both Agents returned shortly and Agent Harrington stated that the Captain was tied up right now.
29. Agent Harrington then stated to Sergeant Tolliver in a demeaning tone of voice, if you are refusing to go to the interview room you will be discipline for that too.
30. Sergeant Tolliver again explained to Agent Harrington that he was not refusing to go to the interview room, but wanted to speak with his union representative first.
31. Union Representative Newbold then informed the Agents that if the Captain was busy that he needed to speak with the Inspector.
32. At that point, Captain Ralph Mclean came out of the office area and spoke with Union Representative Newbold. Captain Mclean indicated that Sergeant Tolliver could speak with Union Representative Newbold in the bathroom for ten minutes prior to the interview commencing.

33. After conferring with Union Representative Newbold for about five minutes, Sergeant Tolliver went inside the interview room. Agent Harrington asked Sergeant Tolliver approximately three questions. Sergeant Tolliver answered all of the questions and the interview was concluded.

(Complaint at pgs. 5-7).

FOP contends that MPD violated the CMPA by: (1) "threatening and intimidating Sergeant Tolliver when he requested to speak with his Union representative"; and (2) "refusing to allow him to consult with his union representative prior to being interviewed." (Complaint at p. 8). Moreover, FOP contends that the MPD's actions violate recognized *Weingarten* rights to representation. (See Complaint at pgs. 8-9).

MPD disputes FOP's allegations, asserting that it was either "without knowledge or information sufficient to form a belief as to the truth of the alleged facts" or by denying the FOP's factual allegations. (Answer at pgs. 3-5).

#### **Motion to Dismiss**

MPD requested that the Board dismiss FOP's Complaint "on the basis that there is no evidence of the commission of an unfair labor practice . . ." (Answer at p. 6).

The Board has held that while a Complainant need not prove their case on the pleadings, they must plead or assert allegations that, if proven, would establish the alleged violations of the CMPA. See *Virginia Dade v. National Association of Government Employees, Service Employees International Union, Local R3-06*, 46 DCR 6876, Slip Op. No. 491 at p. 4, PERB Case No. 96-U-22 (1996); and see *Gregory Miller v. American Federation of Government Employees, Local 631, AFL-CIO and D.C. Department of Public Works*, 48 DCR 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994); See also *Doctors' Council of District of Columbia General Hospital v. District of Columbia General Hospital*, 49 DCR 1137, Slip Op. No. 437, PERB Case No. 95-U-10 (1995). Furthermore, the Board views contested facts in the light most favorable to the Complainant in determining whether the Complaint gives rise to an unfair labor practice. See *JoAnne G. Hicks v. District of Columbia Office of the Deputy Mayor for Finance, Office of the Controller and American Federation of State, County and Municipal Employees, District Council 20*, 40 DCR 1751, Slip Op. No. 303, PERB Case No. 91-U-17 (1992). Without the existence of such evidence, Respondent's actions cannot be found to constitute the asserted unfair labor practice. Therefore, a Complaint that fails to allege the existence of such evidence, does not present allegations sufficient to support the cause of action." *Goodine v. FOP/DOC Labor Committee*, 43 DCR 5163, Slip Op. No. 476 at p. 3, PERB Case No. 96-U-16 (1996).

"The validation, *i.e.* proof, of the alleged statutory violation is what proceedings before the Board are intended to determine." *Jackson and Brown v. American Federation of*

*Government Employees, Local 2741, AFL-CIO, 48 DCR 10959, Slip Op. No. 414 at p. 3, PERB Case No. 95-S-01 (1995).*

In the instant case, the parties' pleadings are in dispute regarding the alleged facts contained in the Complaint. Specifically, there is a dispute as to whether MPD's agents denied Sergeant Tolliver's request for a consultation with his union representative prior to entering the investigatory interview.

This Board has previously considered the question of whether an agency has an obligation to allow an employee's request for union representation during an interview. In *NLRB v. Weingarten*, 420 U.S. 251, 88 LRRM 2689 (1975), the United States Supreme Court upheld the NLRB's determination that an employee has a right to union representation during an investigatory interview that the employee reasonably fears might result in discipline. The NLRB held that an employer "interfered with, restrained and coerced the individual right of an employee 'to engage in . . . concerted activities for . . . mutual aid and protection . . . .' in situations where the employee requests representation . . . as a condition of participation in an interview . . . where the employee reasonably believes the investigation will result in disciplinary action." *Id* at p. 257.<sup>2</sup>

Like the NLRA, the CMPA at D.C. Code § 1-617.04(a)(1), prohibits the District, its agents and representatives from interfering with, restraining or coercing any employee in the exercise of their rights. This Board has recognized a right to union representation during a disciplinary interview in accordance with the standards set forth in *Weingarten*. In *D.C. Nurses Assoc. v. D.C. Health and Hospitals Public Benefit Corp.*, 45 DCR 6736, Slip Op. No. 558, PERB Case Nos. 95-U-03, 97-U-16 and 97-U-28 (1998), the Board recognized the right to union representation during a disciplinary interview. In that case, the hearing examiner had found that the agency violated the *Weingarten* rights of two bargaining unit employees when the agency threatened to discipline one of the employees when she requested union representation by the other union officer. *Id* at p. 2. The agency argued that *Weingarten* was not violated because the employee's supervisor did not interview the employee after refusing her request for representation. The Board disagreed with the agency's argument and found that the fact the agency did not proceed with the interview after the employee invoked *Weingarten* was not relevant to finding that the agency interfered with, restrained and coerced the employee in the exercise of recognized rights under the CMPA. *Id*.

The Board has not specifically ruled on whether a bargaining unit member has a right to confer privately with a union representative. Where the Board has no set precedent on an issue, it looks to precedent set by other labor relations authorities, such as the National Labor Relations Board and the Federal Labor Relations Authority. See *Forbes v. IBT, Local 1714*, 36 DCR 7107, Slip Op. No. 229, PERB Case No. 88-U-20 (1989); and see *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District Of Columbia Metropolitan Police Department*, 48 DCR 8530, Slip Op. No. 649, PERB Case No. 99-U-27 (2001).

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<sup>2</sup> Citing National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 157 and 158(a)(1).

The CMPA contains no mention of an employee's right to confer privately with a union representative, either with or without the investigator present, during a *Weingarten* examination. Therefore, if such a right exists, it must logically exist as a consequence of the basic right to union representation that D.C. Code § 1-617.04(a)(1) does guarantee. "[T]he [FLRA] has consistently held that the purposes underlying the recognition of *Weingarten* "can be achieved only by allowing a union representative to take an active role in assisting a unit employee in presenting facts in his or her defense." *Headquarters, National Aeronautics and Space Administration*, 50 FLRA 601, 607 (1995) Furthermore, a union representative's right to take an "active role" includes not only the right to assist the employee in presenting facts but also the right to consult with the employee: "We have long held that for the right to representation to be meaningful, the representative must have freedom to assist, and consult with, the affected employee." *Department of Veterans Affairs, Veterans Affairs Medical Center, Jackson, Mississippi*, 48 FLRA 787, 799 (1993). See also *U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas*, 42 FLRA 834, 840 (1990).

Based upon the foregoing, FOP has alleged facts asserting that MPD interfered with an employee's right to the assistance of a union representative. If proven, these alleged facts would constitute a violation of an employee's rights under D.C. Code § 1-617.04(a)(1). Moreover, Board Rule 520.10 - Board Decision on the Pleadings, provides that: "[i]f the investigation reveals that there is no issue of fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral argument." Consistent with that rule, we find that the circumstances presented do not warrant a decision on the pleadings. Here, issues of fact are present concerning whether MPD violated the CMPA by refusing an employee's request to privately consult his union representative. In addition, the issue of whether the Respondent's actions rise to the level of violations of the CMPA is a matter best determined after the establishment of a factual record, through an unfair labor practice hearing. See *Ellowese Barganier v. Fraternal Order of Police/Department of Corrections Labor Committee and District of Columbia Department of Corrections*, 45 DCR 4013, Slip Op. No. 542, PERB Case No. 98-S-03 (1998). Consequently, in Slip Opinion 1119, the Board denied the MPD's request to dismiss the Complaint. The Board concluded that the Complaint, and its allegations against the Respondent, will continue to be processed through an unfair labor practice hearing.

### **Motion for Reconsideration**

MPD requests reconsideration for Slip Opinion No. 1119 and asserts that the Board lacks jurisdiction because Article 13 of the parties' CBA contains language covering the rights of employees during investigatory interviews. The Board "distinguishes between those obligations that are statutorily imposed under the CMPA and those that are contractually agreed upon between the parties." *American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks*, 50 DCR 5049, Slip Op. No. 697, PERB Case No. 00-U-22 (2002) (citing *American Federation of State, County and Municipal Employees, Local 2921*, Slip Op. No. 339). In addition, it is well established that the Board's "authority only extends to resolving statutorily based obligations under the CMPA." *Id.*

As stated above, the Board has held that it lacks jurisdiction over violations that are strictly contractual in nature. See, *AFSCME*, Slip Op. No. 339. Quite simply, the Board's precedent requires an inquiry as to whether a complaint merely pleads a violation of the CMPA, but is in fact, only a contractual dispute. For example, if the record only supports a finding that the basis of the complaint only involves an alleged violation of a contractual provision, and resolution of the dispute requires an interpretation, or enforcement, of the disputed provision, the alleged violation is strictly contractual, and not within the Board's jurisdiction. See *American Federation of Government Employees, Local Union No. 3721 v. District of Columbia Fire Department*, 39 DCR 8599, Slip Op. No. 287 at n.5, PERB Case No. 90-U-11 (1991).

Nonetheless, MPD contends that under the Board's precedent, where the subject matter in the allegations of an unfair labor practice complaint is found to also be a subject matter addressed by the parties' CBA<sup>3</sup>, then the Board's inquiry into the complaint must end, and the Board is prohibited from determining whether the allegation made in the complaint constitute a violation of the CMPA. To the contrary, the Board has consistently held that if allegations made in an unfair labor practice complaint *do*, in fact, concern statutory violations, as in the instance case, then "the[e] Board is empowered to decide whether [MPD] committed an unfair labor practice concerning the Union's assertion of its *Weingarten* rights, even if the request was made...[pursuant to a contractual provision]." *Id.* at p. 6.

In this case, MPD does not dispute it has a statutory obligation. The Board's findings and conclusions in Slip Opinion No. 1119 are reasonable, supported by the record, and consistent with Board precedent. Therefore, the Board denies MPD's Motion and the matter will continue to be processed through a hearing procedure.

### ORDER

#### **IT IS HEREBY ORDERED THAT:**

1. The District of Columbia Metropolitan Police Department's motion to dismiss is denied.
2. The Board's Executive Director shall refer the Fraternal Order of Police/Metropolitan Police Department Labor Committee's Unfair Labor Practice Complaint to a Hearing Examiner utilizing an expedited hearing schedule. Thus, the Hearing Examiner will issue the report and recommendation within twenty-one (21) days after the closing arguments or the submission of briefs. Exceptions are due within ten (10) days after service of the report and recommendation and oppositions to the exceptions are due within five (5) days after service of the exceptions.
3. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.
4. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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<sup>3</sup> In addition, there must be evidence that the parties contracted for a means to resolve disputes over the application and interpretation of the provisions of the CBA.

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

October 7, 2011

**CERTIFICATE OF SERVICE**

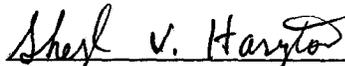
This is to certify that the attached Decision and Order in PERB Case No. 08-U-38 was transmitted via Fax and U.S. Mail to the following parties on this the 7<sup>th</sup> day of October 2011.

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