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

In the Matter of:)	
)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee,)	
)	
Complainant,)	PERB Case No. 06-U-24, 06-U-25, 06-U-26 and 06-U-28
)	
v.)	Slip Opinion No. 994
)	
District of Columbia Office of Police Complaints,)	
)	
Respondent.)	
)	
)	

I. Statement of the Case:

This matter involves four unfair labor practice complaints (“Complaints”) filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP”, “Union” or “Complainant”) against the District of Columbia Office of Police Complaints (“OPC” or “Respondent”). The cases were consolidated by the Board’s Executive Director and referred to a Hearing Examiner. In these consolidated complaints, “Complainant asserts two categories of violations by Respondent: allegations that Respondent violated various provisions of the Labor Agreement and thereby repudiated it; and allegations that Respondents violated police officers’ *Weingarten* Rights.” (Footnote omitted) (Hearing Examiner’s Report and Recommendation at p. 5).¹

¹ See *NLRB v. Weingarten*, 420 U.S. 251 (1975).

There were several hearing dates in this matter.² In his Report and Recommendation (“R&R”), the Hearing Examiner determined that:

- (1) “[The] Complainant has not shown that Respondent repudiated a collective bargaining agreement”;
- (2) “[The] Complainant has not shown that Respondent violated any employee’s *Weingarten* rights”;
- (3) “The four unfair labor practice complaints should be dismissed in their entirety, with prejudice”; and
- (4) “The parties’ respective motions for award of costs should be denied.”

(R&R at p. 2).

The Complainant and Respondent filed exceptions to the Hearing Examiner’s R&R (“Complainant’s Exceptions” and “Respondent’s Exceptions”). The Complainant filed an opposition to the Respondent’s Exceptions (“Complainant’s Opposition”). The Hearing Examiner’s R&R, the Complainant’s and Respondent’s Exceptions and the Complainant’s Response are before the Board for disposition.

II. Hearing Examiner’s Report and Recommendation

The Hearing Examiner found that the four complaints were based upon the following facts:

Complainant represents certain employees in the District of Columbia Metropolitan Police Department (MPD), primarily police officers through the rank of sergeant (See PERB Certification No. 10, February 18, 1982; PERB Case No. 81-R-05). At the time of the incidents giving rise to these consolidated unfair labor practice complaints, there existed a “Labor Agreement between the Government of the District of Columbia Metropolitan Police Department and the Fraternal Order of Police MPD Labor Committee”, effective FY2004-FY2008 (Labor Agreement).

Respondent, the Office of Police Complaints (OPC), is a District agency established by D.C. Law 12-208 (March 26, 1999) (codified at DCC §§ 5-1101 et seq.). The purpose of this law is “to establish an effective, efficient, and fair system of independent review of citizen complaints against police officers in the District of Columbia” (DCC §5-1102). A five member Police Complaints Board,

² The Hearing was held on: November 13 and 14 2007; December 18, 2007; January 22 and 23, 2008; and April 10, 2008.

one of whom is a member of the MPD and four persons who have no current affiliation with a law enforcement agency, are appointed by the Mayor, subject to confirmation by the Council, for staggered three year terms. The Mayor designates the chairperson, and may remove a member for cause (DC §5-1104).

(R&R at p. 2) (Footnote omitted).

The Hearing Examiner indicated that he reviewed the investigatory procedures of OPC as authorized under D.C. Code § 5-1106 to D.C. Code § 5- 1114. "Of particular relevance to the to these unfair labor practice complaints are the procedures used by OPC investigators when interviewing police officers in connection with citizen complaints." (R&R at p. 3). Specifically, the Hearing Examiner noted that a police officer who is the subject of the citizen complaint under investigation is entitled to representation. The Respondent's Investigation Manual, 300.18(b)(1) Personal representative, states:

Under the MPD FOP Labor Agreement (See Appendix K3), the subject officer is authorized to have a representative present during the interview. This representative may be an attorney, or, as in most cases, a union representative from the Fraternal Order of Police (FOP). The interview may be delayed up to two hours to allow the subject officer to obtain the assistance of a union representative. (CX6 Bates Nos. 944-945).

(R&R at p. 4).

Furthermore, the Hearing Examiner noted that pursuant to the Manual, 300.18(c)(1):

While the witness officer is not entitled to the presence of an attorney or other union representative, the investigator will allow a representative to be present during the interview. However, the two hour delay does not apply in this instance. (CX6 at Bates No. 945).

(R&R at p. 4).

The Hearing Examiner also stated that appended to the Investigation Manual is a *Garrity* Notice³, which:

advises the officer being questioned that he is "entitled to all the rights and privileges guaranteed by the laws of the District of Columbia and the Constitution of the United States, and the union contract between the Fraternal Order of Police and the District of Columbia, including the right not to be compelled to incriminate [him]self" (CX77; replaces CX6 at Bates No. 949)."

³ *Garrity v. New Jersey*, 385 U.S. 493 (1966), holding that an employee may be compelled to give statements under threat of discipline or discharge, but such statements cannot be used in a criminal prosecution of the individual.

(R&R at p. 5).

The Hearing Examiner found that the unfair labor practice complaints in this matter allege:

that Respondent violated various provisions of the Labor Agreement and thereby repudiated it; and [allege that the] Respondent violated police officers' *Weingarten* rights. The provisions of the Labor Agreement at issue are located in Article 13, Investigatory Questioning, which states in pertinent part:

Section 1

The efficiency of the service of the Department, including internal security practices and the obligation of members to respond to questioning shall be governed by existing Departmental policies and procedures unless abridged by this Agreement.

Section 2

Types of questioning:

(a) Administrative Interview – Formal official questioning conducted by the Department to question an employee about an administrative matter.

Section 3

Where (1) an employee can reasonably expect discipline to result from an investigatory interview, or (2) the employee is the target of an administrative investigation conducted by the Employer, at the request of the employee, questioning shall be delayed for no longer than two (2) hours in order to give the employee an opportunity to consult with a Union representative. The two-hour limit will be strictly adhered to unless management agrees that the issue is sufficiently complex and therefore requires additional time for preparation. Where management agrees that additional time should be granted such additional time will not exceed four (4) hours. The Department shall not intentionally mislead a member or Union representative as to the purpose of the questioning.

(a) A member's Union representative may be present at all administrative interview sessions under this Article, but may not answer questions on behalf of the employee. The Department reserves the right to refuse a particular Union representative for good cause, and the member to be interviewed shall then name an alternative representative.

Section 4

1. Prior to the commencement of any interview or interrogation, members shall be informed of the type of investigation being conducted (criminal or administrative).

2. Prior to the commencement of any administrative interview, criminal interview or interrogation, a member shall be informed of:

(a) Whether the member is a target of the investigation, if known at the time.

(c) The name of the Departmental official conducting the interview. . . .

(d) The names of the persons present.

(g) Management's failure to abide by the procedures listed in paragraphs a-f will not be a bar to the processing of a case or the imposition of corrective or adverse action, including termination. This does not preclude the Union from including such failure in the defense of a member.

(R&R at pgs. 5-7).

The Hearing Examiner's factual determinations regarding the Newbold/Hemphill Incident.

The Hearing Examiner found that "[o]n November 14, 2005, Officer Jeffrey Newbold was at Respondent's offices, serving as representative for Officer Patrick Hemphill, who was being interviewed by OPC in connection with a citizen complaint. According to Newbold's testimony, Hemphill was not the target of the OPC investigation." (R&R at p. 8) (Footnote omitted). During the investigation, a disagreement arose between Officer Newbold and the OPC investigators Day and Rowan. Specifically, after Day finished questioning Hemphill, Rowan began asking questions. Officer Newbold asserted that only one investigator may ask the officer questions. (See R&R at p. 8). Officer Newbold told Officer Hemphill not to answer additional questions posed by Rowan. (See R&R at p. 8). After Hemphill indicated he preferred to be questioned by only one investigator, Day ordered Officer Newbold to leave the interview. (See R&R at p. 8). Officer Newbold refused, indicating he would not leave until he was "sure Hemphill understood his rights." (R&R at p. 8). Ultimately, Officer Newbold was informed that "he was being relieved of his duties as union representative because he had disrupted the

interview, and would be barred from representing FOP/MPDDLC members in the future. Hemphill agreed to questioning without union representation.” (R&R at p. 8).

The Hearing Examiner’s factual determinations regarding the Carter/Cunningham Incident.

The Hearing Examiner found that “[on] January 30, 2006, Officer Richard Carter, represented by Officer Wendell Cunningham, was being interviewed by OPC Investigators Kevin Smith and Alan Peyrouton.” (R&R at p. 9) (Footnote omitted). The Hearing Examiner also found that Carter was, according to Respondent, the target of the investigation. (See R&R at p. 9). During the interview Officer Cunningham objected to the relevance of a question concerning whether Officer Carter had prior police experience and had a disagreement with both investigators as well as Chief investigator Stoddard. (See R&R at p. 9). When Cunningham and Carter objected to Chief Stoddard asking whether Carter had prior police experience, Chief Stoddard removed Cunningham and informed Carter he could get another representative. (See R&R at p. 9).

The Hearing Examiner’s factual determinations regarding the Carter/Rosario Incident.

The Hearing Examiner reviewed the alleged facts concerning the events which occurred after Officer Cunningham was removed from the interview. The Hearing Examiner made the following determination:

Officer Hiram Rosario was called to represent Carter. As it was his first time at OPC’s new offices, Rosario asked about the glass on the wall of the interview room, apparently a two-way mirror. He testified that he did not get a satisfactory answer to his question about who might be behind the two-way mirror. He also asked about a device in the ceiling, and was told by Investigator Peyrouton that it was a smoke detector. Rosario believed that it was more likely a microphone or camera. He wrote a memorandum to FOP/MPDLC Chairman Bauman on February 21, 2006, summarizing the incident.

Rosario was back at OPC’s offices on February 7, 2006, to represent another officer (neither the officer’s name nor whether he was a target or a witness is in the record). He asked again about the device in the ceiling and was told by an OPC investigator that it was a microphone. He referred to his previous visit, when he was told it was a smoke detector. At this point, Chief Investigator Stoddard entered the interview room. Rosario said he assumed Stoddard had been watching and listening to the activity in the interview room through the two-way mirror. Stoddard confirmed that the device in the ceiling was a microphone. Rosario told Stoddard that if the interview was being recorded the member was entitled to a copy of the tape, and that if the member was not told about the existence of such a tape that it would probably violate District and Federal law.

Stoddard told Rosario he was no longer welcome to represent FOP/MPDLC members.

(R&R at pgs 9-10) (Footnote omitted).

Based upon these incidents, the Hearing Examiner summarized the unfair labor practice complaints as follows:

March 14, 2006 (PERB Case No. 06-U-24): Complainant presented factual allegations with respect to the November 14, 2005 incident, and charge that Respondent had committed unfair labor practices by insisting on using more than one investigator to ask questions of the officer being interviewed over the objections of union representative Newbold, and by removing Newbold from the interview, in violation of Weingarten.

(R&R at p. 10) (Citations omitted).

March 21, 2006 (PERB Case No. 06-U-25): Complainant referred back to OPC Executive Director Eure's 2004 letter stating that the Labor Agreement may not apply to OPC, stated that no one from Deputy Mayor Kellem's office had ever responded to the question of whether the Labor Agreement applied to OPC, and claimed that Eure had stated on March 16, 2006, that the Labor Agreement did not apply. Complainant presented an affidavit from Officer Rosario that Eure had made the latter remarks; Respondent did not address this claim in its answer. Based on these factual allegations, Complainant charged that Respondent had repudiated the Labor Agreement by insisting that police officers sign paraphrased written statement, by refusing to identify persons behind the two-way mirror, and by asking questions outside the scope of the citizen complaint under investigation.

(R&R at p. 10) (Citations and footnote omitted).

March 23, 2006 (PERB Case No. 06-U-26): Complainant presented factual allegations with respect to the events of January 30, 2006, and February 7, 2006. Complainant charged that Respondent had repudiated the Labor Agreement by failing to identify persons present for the interviews, asking questions beyond the scope of the complaint under investigation, and intentionally misrepresenting whether an interview was being recorded.

(R&R at p. 10).

March 24, 2006 (PERB Case No. 06-U-27): Complainant presented factual allegations with respect to an incident that occurred on January 19, 2006. PERB's Executive Director dismissed the complaint administratively on May 18, 2006, for failure to state a basis for a claim under the [Comprehensive Personnel Merit Act, D.C. Code § 1-6. ("CMPA")]: "Your allegation concerning OPC's failure to

comply with Article 13 of the parties' CBA, presents an issue of contract interpretation. . . . [A]ny allegation concerning a party's failure to comply with the terms of the parties' CBA, presents an issue that is not statutorily based, but one of contract interpretation. Furthermore, the Board has noted that "[u]nder the CMPA, a breach of contract does not constitute a per se statutory violation."

(R&R at pgs. 10-11) (Citations and footnote omitted).

March 24, 2006 (PERB Case No. 067-U-28): Complainant presented factual allegations with respect to the incident of January 30, 2006. Complainant charged that Respondent had committed unfair labor practices by repudiating the Labor Agreement and improperly removing union representative Cunningham from the interview.

(R&R at p. 11) (Citations omitted).

After considering the issues presented by the parties, the Hearing Examiner determined the issues to be:

"(1) Did Respondent, by its statements and actions, repudiate the Labor Agreement? If so, what is the appropriate remedy?" and

(2) "Did Respondent, on November 14, 2005, January 30, 2006, and/or February 7, 2006, violate the *Weingarten* rights of MPD police officers represented by Complainant? If so, what is an appropriate remedy?"

(R&R at p. 12).

The Hearing Examiner considered the arguments presented by the parties. In his R&R, he summarized the Complainant's position:

PERB has jurisdiction to determine whether an agency can be found to be a party to a collective bargaining agreement even if it did not sign that agreement. Complainant point[ed] to PERB's decision in *American Federation of State, County and Municipal Employees v. District of Columbia Government*, Case no. 97-U-15A, Opin No. 590 (1999), in which PERB found that the office of the Chief Financial Officer (OCFO) was bound by the terms of a collective bargaining agreement originally negotiated between a bargaining unit represented by AFSCME within the Office of Controller that was later transferred to the OCFO.

(R&R at p. 13).

In addition, the Complainant contended that "members of the bargaining unit represented by Complainant are protected by the *Weingarten* right that PERB has found to be implied in the

CMPA when they are subject to interviews conducted by Respondent. . . . Furthermore, Complainant note[d], police officers interviewed by Respondent have a reasonable belief that the questioning may lead to discipline, either for the underlying incident being investigated or for alleged failure to cooperate with the investigation.” (R&R at p. 13). “[W]hen Respondent threatens discipline against police officers, it is invoking the authority of the District and MPD, not its own authority, and thus creates a *Weingarten* situation.” (R&R at p. 13). The Complainant also claimed that “Respondent and Complainant had a mutually agreeable past practice of permitting union representation of all interviews conducted by Respondent. Complainant note[d] that in PERB Case No. 97-U-15A, PERB held that *Weingarten* rights can be extended by mutually agreeable past practice.” (R&R at p. 13).

The Complainant addressed the factual allegations raised in the complaints such as the Respondent’s alleged infringements on police officers’ *Weingarten* rights by expelling union representatives and using disguised listening devices. (See R&R at pgs. 13-14). In addition, FOP “points to case law that recognizes not only the right of a union representative to be present at investigative interviews, but allows that representative to participate in the interview. (*N.L.R.B. v. Southwestern Bell Telephone Co.*, 730 F.2d 166, 172 (5th Cir., 1984), such as by requesting clarification of questions (*N.L.R.B. v. Texaco, Inc.*, 659 F.2d 124, 126-127 (9th Cir. 1981); *N.L.R.B. v. Southwestern Bell Telephone Co.*, 251 N.L.R.B. 612, 613 (1980)). In Complainant’s view, Respondent violated police officer’s *Weingarten* rights by refusing to allow union representatives to take an active role during investigative interviews.” (R&R at p. 14).

Furthermore, Complainant asserted that “the terms of the Labor Agreement establish that Respondent is bound by its terms: it was signed by MPD representatives “FOR THE DISTRICT OF COLUMBIA GOVERNMENT”, and ratified by the Mayor on behalf of the District. “Like all contracts, therefore, the CBA binds the District and all of its agents and representatives acting on the District’s behalf.” (C/PHB at 19).” (R&R at p. 14). The Complainant also pointed to PERB precedent which it claims “makes clear that non-signatory District agencies are bound by collective bargaining agreement entered into by other District agencies. Complainant points to the decision in *American Federation of State, County and Municipal Employees v. Office of the Controller*, PERB Case No. 96-U-01, Opin. No. 503 (1996), where PERB held that the Office of the Chief Financial Officer was bound by collective bargaining agreements between employees and other district agencies prior to transfer of those employees to the newly-created OCFO.” (R&R at p. 16).

The Hearing Examiner summarized the Complainant’s argument and request for remedies as follows:

Because Respondent’s purpose is to investigate claims of police misconduct, Complainant states, it makes logical sense that the investigatory guidelines found in Article 13 of the Labor Agreement are the only portions of the Labor Agreement that apply to Respondent. Complainant notes that PERB has held that a party’s refusal to implement a viable collective bargaining agreement is an unfair labor practice, and argues that Respondent’s explicit statements that the

Labor Agreement did not apply to its investigations, its insistence on allowing two of its investigators to ask questions during interviews of police officers notwithstanding the one-questioner provision of Article 13, the use of a two-way mirror during interviews, asking questions outside the scope of the citizen complaint being investigated, and requiring police officers to sign written statements prepared by Respondent's investigators, all constitute express repudiation of the Labor Agreement.

As remedies, Complainant requests the following:

- A finding that police officers represented by Complainant are entitled to Weingarten rights during administrative interviews conducted by Respondent;
- A finding that the Labor Agreement applies to Respondent, and that officers represented by Complainant are entitled to their rights under Article 13 during interviews conducted by Respondent;
- A finding that Respondent committed unfair labor practices in violation of DCC §1-617.04(a)(1) and (5);
- An order that Respondent cease and desist from interfering with, restraining, or coercing police officers represented by Complainant in the exercise of their rights guaranteed by the Labor Agreement and by the CMPA;
- An order that Respondent cease and desist from refusing to inform police officers of the names of persons present at administrative interviews, including those present behind two-way mirrors;
- An order that Respondent cease and desist from requiring that police officers sign under oath paraphrased statements prepared by Respondent's investigators;
- An order that Respondent cease and desist from requiring police officers to answer questions by its investigators that are beyond the scope of the citizen complaint being investigated;
- An order that Respondent conspicuously post no fewer than two notices of their violations and PERB's Order in each of Respondent's buildings and each MPD building;

- An order directing Respondent to pay Claimant's costs and fees associated with these unfair labor practice proceedings; and
- Any other relief deemed appropriate.

(R&R at pgs. 17-18).

At the hearing, the Respondent argued "that PERB lacks jurisdiction to determine whether a party has agreed to be bound by the terms of a collective bargaining agreement. [D.C. Code] §1-605.02 gives PERB a number of explicit authorities . . . , but no provision of the CMPA gives it the authority to determine such matters as contract formation, contract interpretation, or breach of contract."⁴ (R&R at p. 18). In addition, the Respondent contends that "[a]djudication of the several unfair labor practice complaints at issue here . . . would necessarily involve interpretation of Respondent's administrative practices and the nature of procedural protections afforded to police officers. PERB, Respondent argues, lacks the authority to make such interpretations." (R&R at p. 19). The Respondent also argued that it is not a party bound by the Labor Agreement, and therefore cannot be deemed to have repudiated it. There is, Respondent asserts, no credible evidence that Respondent had a bargaining relationship with Complainant, or had otherwise agreed to be bound by the terms of the Labor Agreement. (R&R at p. 19).

The Respondent also asserted that:

no operation of law can support a finding that OPC is bound by the terms of the Labor Agreement. It points to case law of the NLRB examining the question of whether separate business entities constitute a single employer: interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control (*HydroLines, Inc. et al. and Local 333, United Marine Division, International Longshoremen's Association*, 305 N.L.R.B. 416, 417 (1991)). While NLRB does not consider any one factor to be controlling, and not all factors need be present, it does regard the first three factors, particularly the issue of centralization of labor relations, to be most significant. Under these principles, Respondent argues, it cannot be held that OPC and the MPD are a single employer: there is no interrelation of operations or management between the two entities, and they operate under different statutes to achieve different purposes. OPC's primary role, in fact, is to provide independent review of police activities in order to reduce community tensions (DCC §5-1101).

⁴ The Hearing Examiner noted that the Respondent cited PERB cases *Green v. D. C. Department of Corrections*, Case No. 89-U-10, Opin. No. 257 (1990), and *American Federation of Government Employees, Local 2725 v. District of Columbia Housing Authority*, Case No. 96-U-19, Opin. No. 488 (1999), in support of this position.

Further, OPC does not report to the MPD. The presence of a single MPD representative on the Police Complaints Board that oversees OPC is insufficient to establish that there is an interrelation of operations between MPD and OPC. Most importantly, there is no interrelation of personnel functions.

(R&R at pgs 20-21).

The Hearing Examiner also noted that Respondent's position, as argued at the hearing, made allegations that:

PERB precedent erroneously holds that the CMPA affords *Weingarten* rights to employees. In three decisions in which it summarily concluded that the CMPA provides the right to union representation in certain investigative interviews (starting with *Green v. D. C. Department of Corrections*, Case No. 89-U-10, Opin. No. 257 (1990)), PERB did not identify the particular statutory provision of the CMPA that implied this right. Respondent notes that the Supreme Court's decision upholding the NLRB's finding that such a right was implicit in the National Labor Relations Act was based on the language of §7 that employees have the right to engage in concerted activity for the purposes of collective bargaining *or other mutual aid or protection*. The phrase "mutual aid or protection", Respondent notes, is not found in the enumerated rights of employees under DCC §1-617.06 or of labor organizations under DCC §1-617-11, or anywhere else in the CMPA. "PERB, therefore, should review and reverse its position that *Weingarten* rights are supported by the CMPA."

(R&R at p. 21).

Furthermore, the Respondent argued that the Complainant had "failed to establish that subject officers' *Weingarten* rights were violated during OPC investigative interviews and that *Weingarten* does not address or govern such matters as the recording of interviews, the individuals present at the interviews, or the scope of the questions that may be asked (*Weingarten*, 420 U.S. 251)." (R&R at p. 22). The Respondent also noted that the Complainant did not argue that its members were denied representation during interviews, but that the investigatory interviews were not conducted consistent with the procedures of Article 13 of the Labor Agreement. Citing Board case law, the Respondent asserted that "[s]uch allegations do not rise to the level of unfair labor practices; they are mere allegations of contract violations (*Fraternal Order of Police v. D. C. Metropolitan Police Department*, PERB Case No. 94-U-23, Opin. No. 384 (1999))." (R&R at p. 22).

The Hearing Examiner's Analysis and Recommendations

The Hearing Examiner determined that the consolidated complaints and the Respondent's opposition presented three issues:

Did Respondent, by its statements and actions, repudiate the Labor Agreement? If so, what is an appropriate remedy?

The Hearing Examiner found the threshold question posed by the parties to be: "Who are the parties to the Labor Agreement?" (R&R at p. 25). Further, the Hearing Examiner, having determined that the parties to the Labor agreement are the District of Columbia and the FOP/MPDLC, observed that the appropriate question is "not *who* the parties to this collective bargaining agreement are, but *what* those parties have committed themselves to." (R&R at p. 26). The Hearing Examiner rejected the Complainant's reliance on *AFSCME v. District of Columbia Govt.*, 97-U-15A in support of its contention that the OPC could be bound to the terms of the Labor Agreement. (See R&R at p. 26). The Hearing Examiner found that in that case, "[the Board] . . . did not make a determination that an agency other than the one that originally signed the collective bargaining agreement was party to it. . . . [Instead, the Board] found simply that an existing collective bargaining relationship survived the transfer of the employees in an existing bargaining unit from one personnel authority to another." (R&R at p. 26). In the present case, the Hearing Examiner found that there had "been no transfer of either employees or personnel authority. The employees represented by Complainant were, at the time the Labor Agreement was negotiated, as well as at the time the incidents giving rise to these unfair labor practice complaints took place, in a bargaining unit within the MPD. The bargaining unit is not now, and has never been, within OPC, and there is certainly no showing that Respondent is a "personnel authority" with respect to the employees represented by Complainant." (R&R at p. 26).

Moreover, the Hearing Examiner concluded that "[t]he question of whether Respondent had an obligation, one that it allegedly repudiated, to abide by the terms of the Labor Agreement is not answered by finding that Respondent is a party to the Labor Agreement, but by examining the commitments made by the parties to the Labor Agreement, commitments that are determined by reading the text of the agreement itself. That agreement must, in turn, be read in accordance with applicable law. Reading and interpreting the Labor Agreement, however, is not a matter that is within PERB's jurisdiction." (R&R at p. 27). The Hearing Examiner stated that the Board: (1) "has long held that disputes concerning contract interpretation, including allegations that the contract has been violated, should be settled through the grievance procedure."⁵; and (2)

⁵ In support of this finding the Hearing Examiner cited *American Federation of Government Employees and the District of Columbia Department of Corrections*, 48 DCR 6549, Slip Op. No. 59 at p. 4, PERB Case No. 83-U-03,

the Board "has found that it does not have authority to interpret a collective bargaining agreement to determine the merits of a cause of action, such as an allegation of failure to bargain in good faith, that may otherwise properly be within [the Board's] jurisdiction." (R&R at pgs. 27-28).⁶ In this case, the Hearing Examiner concluded that the allegations raised in the unfair labor practice complaints require an interpretation of the CBA, specifically Article 13 of the CBA, and "should be answered in the first instance through the grievance and arbitration procedure of the Labor Agreement." (R&R at p. 29). Consequently, the Hearing Examiner found that the Complainant has not shown that the Respondent committed an unfair labor practice by repudiating the Labor Agreement." (R&R at p. 29).

Did Respondent violate Weingarten rights of Complainant's members?

The Hearing Examiner found that, for purposes of the CMPA, the Board has "clearly [held] that the *Weingarten* right exists."⁷ Next, the Hearing Examiner determined whether there "[c]an be a *Weingarten* right when an employee of one District agency is interviewed by officials or representatives of another District agency?" (R&R at p. 29). The Hearing Examiner found that:

[t]he labor-management relations provisions of the CMPA make it an unfair labor practice for "[t]he District, its agents, and representatives" to interfere with, restrain, or coerce "any employee in the exercise of the rights guaranteed by this subchapter" (DCC §1-617.04(a)(1)). The basic *Weingarten* right is a statutory right, not a contractual right, and Respondent, as an agent or representative of the District, must honor it. The question of the applicability of more expansive, related rights, such as those contained in Article 13, Section 3, of the Labor Agreement, is a separate one, and is not implicated in these unfair labor practice complaints. (R&R at p. 31).

The Hearing Examiner concluded that the interviews of the police officers which are the subject of the unfair labor practice complaints conducted by OPC "are clearly investigatory interviews within the meaning of the *Weingarten* right. In those situations in which the officer being interviewed has been told that he is the subject of the investigation, his belief that the

(1983): "disputes concerning contract interpretation and alleged contract violations should be properly resolved through negotiated grievance procedures."

⁶ The Hearing Examiner also cited *American Federation of Government Employees, Local 2725, AFL-CIO v. District of Columbia Housing Authority*, 46 DCR 672, Slip Op. No. 488 at p. 2, PERB Case No. 96-U-19 (1996).

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

interview may lead to discipline is entirely reasonable, and he is entitled to union representation if he requests it. However, when a police officer is called to an interview by OPC as a witness to a citizen complaint, he has no reason to expect to be disciplined in connection with that complaint. Of course, if at some point the officer were to become a target, he would have to be so advised by OPC and he could then invoke his *Weingarten* right to representation. I find no merit in the suggestion that because a witness officer may be disciplined for failing to cooperate with the OPC investigation he is in all cases entitled to *Weingarten* rights. Any discipline that results from such failure to cooperate is because of that failure, not because of any information gathered through the interview.” (R&R at p. 32). In view of the above, the Hearing Examiner determined that in PERB Case Nos. 06-U-24 and 06-U-26, the police officers, although afforded union representation, had no right to union representation under *Weingarten*. (See R&R at p. 32). Whereas, the officer in PERB Case No. 06-U-28 was the target of an investigation, but was provided representation, there was no *Weingarten* violation. (See R&R at p. 32).

The next question considered by the Hearing Examiner was whether “the removal of union representatives from interviews conducted by OPC violate *Weingarten*?” (R&R at p. 32). In the case of the incident of January 30, 2006, the Hearing Examiner found that Officer “Cunningham acted outside the bounds of permissible behavior for a union representative when he attempted to prevent OPC investigators from asking questions of Officer Carter that, in his judgment, were outside the scope of the citizen complaint at issue.” The Hearing Examiner noted that the objections posed by Officer Cunningham were contractual and that “the proper forum for a grievance confrontation. Any arguments that a question is beyond the scope of the complaint being investigated gets to the protocols and procedures of OPC under its governing statute, and PERB has no jurisdiction to entertain them. OPC did not violate *Weingarten* when it excluded Cunningham from the interview.” (R&R at pgs. 33-34).

Furthermore, the Hearing Examiner determined that since the officers being interviewed in the incidents on November 14, 2005, or February 7, 2006, were not the targets of OPC investigations, they had no right under *Weingarten* to union representation. (See R&R at p. 34). Specifically, the Hearing Examiner notes that:

[a]ccordingly, OPC’s ejection of the union representatives on those dates did not violate *Weingarten*. Even if, for the sake of argument, the officers being interviewed on those dates were entitled to union representation, the ejection of the union representatives was permissible under *Weingarten* for reasons similar to those that justified the ejection of Cunningham on November 14, 2005. The fact that they may not have actually raised their voices or become particularly combative does not mitigate a finding that their attempt to prevent questioning of the officers they represented was disruptive to the legitimate process of the investigatory interview. (R&R at p. 34).

Motions for Costs

The last issue addressed in the Report and Recommendation concerned a request by: (1) Complainant for reimbursement of costs incurred in responding to a motion to dismiss filed by Respondent; and (2) Respondent for reimbursement of costs incurred in responding to a motion to compel discovery filed by Complainant. (See R&R at p. 34).⁸ The Hearing Examiner examined the parties' requests in light of Board precedent. Specifically, the Hearing Examiner took notice of the Board's decision in *AFSCME, District Council 20, Local 2776, AFL-CIO v. D. C. Department of Finance and Revenue*, 36 DCR 5658, Slip Op. No. 245 at p. 5, PERB Case No. 89-U-02 (1989).

In order for an award of costs to be justified, PERB stated, several criteria must be met. The party to whom the payment is to be made must have been successful in at least a significant part of the case, and the requested costs must be reasonable. "Last, and this of course is the nub of the matter, we believe such an award must be shown to be in the interest of justice."

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued. We do not believe it possible to elaborate in any one case a complete set of rules or earmarks to govern all cases, nor would it be wise to rule out such awards in circumstances that we cannot now foresee. What we can say here is that among the situations in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive bargaining representative.

PERB has considered requests for costs in numerous cases, but always, as best I can determine, in connection with an entire case, not in connection with individual motions presented in the course of a particular case. While I do not believe a blanket rule precluding the award of costs in connection with the outcome of motions, rather than the outcome of the underlying case (usually

⁸ Under D.C. Code §1-617.13(d), the Board has "the authority to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may determine.

unfair labor practice complaints) would be a good idea, **I do not find that the interest of justice would be served by an award of fees to either party here.**

(R&R at pgs 37-38) (Emphasis added and citations omitted).

Therefore, the Hearing Examiner recommended that both of the parties' requests for costs be denied.

At the conclusion of his analysis and discussion, the Hearing Examiner made the following findings and recommendations:

- 1) Complainant has not shown that Respondent repudiated a collective bargaining agreement.
- 2) Complainant has not shown that Respondent violated any employee's *Weingarten* rights.
- 3) The four unfair labor practice complaints should be dismissed in their entirety, with prejudice. [And]
- 4) The parties' respective motions for award of costs should be denied.

(R&R at p. 40).

VII. Complainant's Exceptions

The Complainant's exceptions present a mixture of disputes with the Hearing Examiner's factual findings and his discussion of the arguments presented at the hearing and in its post-hearing brief. The Complainant claims that the Hearing Examiner's R&R "wrongly concludes that OPC did not commit unfair labor practices, and the Report misconstrues and misapplies the CMPA and Board precedent. The Complainant states that the R&R is in error by ignoring the testimonial and documentary evidence presented at the hearings and conclusively established that the CBA applies to OPC and that OPC committed multiple unfair labor practices by repudiating the CBA and mutually agreeable past practices and violating FOP Members' *Weingarten* rights." (Complainant's Exceptions at p. 2). FOP asserts that it has seven specific exceptions to the Report, and makes the following factual and legal conclusions:

- (1) The CBA applies to OPC;
- (2) OPC Committed an unfair labor practice by expressly repudiating the CBA;
- (3) FOP and OPC had established mutually agreed past practices;

(4) OPC committed unfair labor practices by expressly repudiating the FOP/OPC mutually agreed past practice;

(5) FOP Members are entitled to *Weingarten* rights during all OPC investigatory interviews in which they are questioned (not just when designated as targets”);

(6) OPC violated *Weingarten* by ejecting FOP Shop Stewards who properly invoked Members’ rights under the CBA and/or mutually agreed past practices; and

(7) FOP is entitled to costs incurred in responding to OPC’s frivolous Motion to Dismiss.

(Complainant’s Exceptions at p. 2).

First, the Complainant requests that the Board reconsider testimonial evidence presented at the hearings. (See Complainant’s Exceptions at pgs. 3-23). Specifically, the Complainant argues that the Hearing Examiner erroneously failed to reach the conclusion that the CBA applies to OPC as a representative of the District of Columbia. (See Complainant’s Exceptions at p. 23). In support of this argument, the Complainant asserts that “the Report’s recommendation to grieve the CBA’s application to OPC ignores evidence presented during the hearing.” (Complainant’s Exceptions at p. 23).

In addition, the Complainant reasserts its argument that the Board’s holdings in *American Federation of State County and Municipal Employee, District Council 20, Local 1200 v. District of Columbia, Office of the Controller, Division of Financial Management*, 46 DCR 41, Slip Op. 503, PERB Case 96-UC-01 (1996) and *District Council 20, American Federation of State County and Municipal Employee, District Council 20, Local 1200, 2776, 2401 and 2087 v. District of Columbia, et al.*, 46 DCR 6513, Slip Op. No. 590, PERB Case No. 97-U-15A (1999), support its contention that a collective bargaining agreement can be binding on a non-signatory to the agreement. (See Complainant’s Exceptions at p. 24 and pgs 41-43).

The Complainant also contends that the Hearing Examiner’s R&R “failed to acknowledge that the CBA expressly references OPC as follows:

The employer shall provide up to forty hours of official time each week for one Bargaining Unit member as permanently designated by the Chairman, to receive, investigate, prepare for and represent members in any meetings, conferences, or similar event of a member required to appear before or on behalf of the Office of Police Complaints.

CBA Art. 9, § 8, ¶ 4.” (Complainant’s Exceptions at pgs. 24-25).

In addition, the Complainant's Exceptions assert that the Hearing Examiner "fail[ed] to analyze (and fails in many cases to even mention) key witness testimony and documentary evidence demonstrating that the CBA applies to OPC." (Complainant's Exceptions at p. 27). Further objections to the Hearing Examiner's findings state that that the R&R "ignores overwhelming evidence of the mutually agreeable past practice that OPC abide by the CBA." (Complainant's Exceptions at p. 35).

The Complainant also maintains that an analogy can be drawn from the NLRB's cases concerning "double-breasting" as a basis for the application of the CBA to OPC. (See Complainant's Exceptions at pgs. 44-46).⁹ "Double breasting" is a term that has been utilized by the NLRB, and means that one employer acts as the alter ego of another employer. No contention is made that the Hearing Examiner erred in consideration of this argument. Instead, the Complainant reasserts the argument made to the Hearing Examiner that the relationship between OPC and MPD is analogous to a "double-breasted operation" which can occur "when owners of one company that is a party to a labor agreement, own a second company that is non-union." (Complainant's Exceptions at p. 44, citing *A. Darlano & Sons, Inc. v. District Council of Painters No. 33*, 869 F. 2d 514, 517 (1989)). A similar relationship, the Complainant contends, exists between MPD and OPC and binds OPC to the CBA between MPD and the Complainant. (See Complainant's Exceptions pgs. 44-46).

The Complainant makes an exception to the Hearing Examiner's R&R alleging that the findings at page 27 of the R&R "presents a slippery slope argument that the Board cannot interpret the CBA to determine what applies to OPC and whether OPC has committed an unfair labor practice." (Complainant's Exceptions at p. 46, footnote omitted). The Report and Recommendation states:

It is clear that the principal aspects of the Labor Agreement that are of interest to Complainant are those that involve interviews of

⁹ Complainant sites for support and example, *A. Darlano & Sons, Inc. v. District Council of Painters No. 33*, 869 F. 2d 514 (1989); *Carpenters Local Union No. 1478 v. Stevens*, 743 F. 2d 1271 (9th Cir. 1984) (unions have used unfair labor complaints to address the issue of double-breasting and when labor agreements should extend to the non-union side of a business with union and non-union entities. The case was a review of an arbitration award that conflicted with the NLRB's findings that the companies were not alter egos or joint companies. The parties in the case were a concrete construction company and a local union); *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F. 3d 1465 (1995) (the cases lists the factors considered as a part of the single employer test. Case involved a plumbing company and local union alleging that owner breached collective bargaining agreement based on theory that an agreement between union and union firm covered nonunion firm because it was an alter ego of the union firm.); and *South Prairie Construction Company v. Local 627, International Union of Operating Engineers*, 425 U.S. 800 (1976). Complainant alleges that analogous National Labor Relations Board cases should lead PERB to employ the single employer test, developed by the NLRB to the instant case.

officers in connection with investigations into citizen complaints. However, the logic of Complainant's reasoning is not limited to this aspect of the Labor Agreement. To take a trivial example: Article 11, Section 2, of the Labor Agreement provides that "The Department agrees to furnish suitable space on Departmental bulletin boards for display of Union materials." Under Complainant's understanding of the fact that it is the District of Columbia that is party to the Labor Agreement (as the employer), all obligations of the employer fall on all representatives of the employer, including OPC. By this logic, OPC is obliged to provide bulletin board space to the FOP/MPDLC (and, in fact, so would the Department of Finance and Revenue, as well as all other District agencies). While there appears to be no theoretical reason the Mayor could not provide such an arrangement in the Labor Agreement (leaving aside the question of whether the Mayor has administrative control over OPC), such an interpretation ought to be made only after a careful reading of the language of the Agreement itself. The fact that the District of Columbia is party to the Agreement does not by itself mean that all definitions, provisions, and requirements of a particular collective bargaining agreement are automatically transmuted or otherwise modified or redefined to fit the organizational arrangements or circumstances of agencies other than the one that employees the affected employees.

(R&R at p. 27). The Complainant contends that this finding "[i]nstead of addressing the facts presented by FOP . . . picked an obscure requirement under the CBA in an attempt to show one potential effect of applying the CBA indiscriminately to OPC. . . . The Board does not need to engage in contract interpretation to resolve this issue, as Article 13 is appropriately the only provision of the CBA that applies to OPC." (Complainant's Exceptions at p. 47).

The Complainant also argues that the "Report ignores facts concerning express repudiation." (Complainant's exception at p. 47). In support of this exception, the Complainant asserts that the evidence presented at the hearing established that "OPC expressly repudiated the CBA by explicitly and repeatedly stating to FOP Members and Shop Stewards that FOP Members are not entitled to their CBA rights during OPC investigatory interviews. Specifically, the Complainant points to incidents such as: (1) "[t]wo questioners during administrative interviews"; (2) the use of a two way mirror during interviews; (3) "questions outside the scope" of the citizen complaint; and (4) requiring the "Members [to] sign under oath paraphrased