Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of State, County and Municipal Employees, Local 2401	
Complainant	PERB Case No. 23-U-02
	Opinion No. 1855
v.	
District of Columbia Office of the Attorney General	
Respondent	

DECISION AND ORDER

I. Statement of the Case

On October 26, 2022, the American Federation of State, County and Municipal Employees, Local 2401 (Union), filed an unfair labor practice complaint (Complaint) against the Office of the Attorney General for the District of Columbia (OAG). The Complaint alleges that OAG interfered with, restrained, and coerced employees in the exercise of their right to Union representation during performance improvement plan (PIP) meetings and refused to bargain in good faith with the Union, in violation of the Comprehensive Merit Personnel Act (CMPA).[1] On November 9, 2022, OAG filed an Answer to the Complaint. A hearing was held on the matter, after which the Hearing Examiner issued a Report and Recommendations (Report). OAG filed Exceptions to the Report. The Union filed a brief in Opposition to OAG's exceptions.

For the reasons stated herein, the Board adopts the Hearing Examiner's finding that OAG committed an unfair labor practice, in violation of D.C. Official Code § 1-617.04(a)(1) by interfering with the employee's right to Union assistance during performance improvement plan meetings with OAG. The Board rejects the recommended reinstatement remedy and instead imposes a cease-and-desist order.

[1] Complaint at 3.

II. Hearing Examiner's Report and Recommendations

A. Factual Findings

The Hearing Examiner made the following factual findings. The Union represents the support staff in the Child Support Enforcement Division.[2]

Prior to June 2022, Union representatives were allowed to participate in PIP meetings alongside the employee.[3] Thereafter, however, OAG changed its policy by disallowing the Union attendance and participation at PIP meetings and restricting Union representatives to observing only.[4]

The Union filed its Complaint on behalf of six bargaining unit members placed on PIPs between May and December 2022, challenging OAG's conduct after the policy change.[5] Of the claims related to six bargaining unit members, only two, Employee Robinson and Employee Boykin, were deemed timely.

Employee Robinson (Robinson) started working for OAG in 2005 as a paralegal in the Interstate Enforcement Unit.[6] Robinson was transferred to the OAG Legal Section in 2019.[7] OAG placed Robinson on a 60-day PIP from May 23 to July 22, 2022.[8]

Robinson testified that weekly PIP meetings were typically attended by him, OAG managers, and a Union representative.[9] Robinson testified that he responded to questions from OAG management officials that were "contentious, scathing, disrespectful and toxic."[10] Robinson testified that being placed on PIP "was the beginning of the end as far as [his] career was concerned," and "would eventually come to [his] being terminated."[11] On August 5, 2022, Robinson received an Advanced Written Notice of Proposed Adverse Action from OAG, proposing his removal for failing "to meet the requirement of the PIP." On October 6, 2022, Robinson received a Final Decision sustaining his removal.[12]

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[2] Report at 3.
[3] Report at 3, 6.
[4] Report at 7.
[5] Report at 3. At hearing, OAG raised the jurisdictional defense that any of the Union's claims asserting CMPA violation for conduct occurring prior to June 28, 2022—120 days before the filing of the Complaint on October 26, 2022—are untimely. In response to OAG's jurisdictional defense, the Union limited its case at hearing to events that occurred after June 28, 2022. Accordingly, the Hearing Examiner's scope of review of the case was limited to allegations within that timeframe.
[6] Report at 4.
[7] Report at 4.
[8] Report at 4.
[9] Report at 4.
[10] Report at 5.
[11] Report at 22.
[12] Report at 5.

Employee Boykin (Boykin) worked as a Paralegal at OAG, and was similarly placed on a PIP.[13] Boykin did not testify at the hearing.[14] The record of Boykin's removal pursuant to the PIP process parallels Robinson's removal.[15] On September 9, 2022, Boykin received an Advanced Written Notice of Proposed Adverse Action from OAG, proposing his removal for failing "to meet the requirement of the PIP."[16] On November 10, 2022, Boykin received a Final Decision on Advanced Written Notice of Proposed Adverse Action, sustaining his removal.[17]

B. Issues and Recommendations

1. Employee Rights to Union Representation under *Weingarten*

The Hearing Examiner discussed *National Labor Relations Board v. Weingarten*, a U.S. Supreme Court decision upholding the NLRB's determination that an employee has a right to union representation during an investigatory interview that the employee reasonably fears may result in discipline.[18] The Supreme Court held that the denial of this right "has a reasonable tendency to interfere with, restrain, and coerce employees in violation of [the NLRA]."[19]

The Hearing Examiner found that Robinson had a right to Union representation at his weekly PIP meetings with OAG management.[20] The Hearing Examiner noted that the OAG policy on PIPs clearly identified removal as one possible outcome of the PIP process for an employee.[21] The Hearing Examiner cited Robinson's testimony at the hearing that he feared being placed on a PIP would eventually result in his termination.[22] The Hearing Examiner also found that OAG management's questioning of Robinson "was, at times, contentious and deeply detailed" during Robinson's weekly PIP meetings.[23] The Hearing Examiner further found that, despite OAG's testimony to the contrary, Robinson's responses during his PIP meetings formed part of the basis for his removal.[24] For these reasons, the Hearing Examiner determined that Robinson held an objectively reasonable belief that the weekly PIP meetings might result in his removal.[25]

The Hearing Examiner declined to make a recommendation on Boykin's right to Union representation at his weekly PIP meetings.[26] The Hearing Examiner noted that Boykin did not

[13] Report at 6.
[14] Report at 6.
[15] Report at 6.
[16] Report at 6.
[17] Report at 6.
[18] 420 U.S. 251, 257 (1975).
[19] *Id.*
[20] Report at 22.
[21] Report at 22.
[22] Report at 22.
[23] Report at 22.
[24] Report at 22.
[25] Report at 22.
[26] Report at 22.

testify at hearing.[27] In the absence of Boykin's testimony, the Hearing Examiner found the record insufficient to objectively analyze whether Boykin held a reasonable belief that the PIP meetings might result in his removal.[28] Therefore, the Hearing Examiner determined that the Union has not met its burden of proof to show that OAG's weekly meetings with Boykin were in violation of the CMPA.[29] As such, the Hearing Examiner found that the Union's charge as to Boykin must be dismissed.[30]

2. OAG's Conduct during PIP Meetings

The Hearing Examiner held that OAG unilaterally implemented meeting ground rules that silenced the Union's speech and participation in PIP meetings, in violation of D.C. Official Code §§ 1-617.04(a)(1) and (5).[31] The Hearing Examiner found that it was the longstanding practice of the Parties that Union representatives attended weekly PIP meetings and took an active role in assisting the affected employees.[32] However, the Hearing Examiner noted that OAG unilaterally changed the existing practice in June 2022 by imposing meeting ground rules that limited the Union's participation in weekly PIP meetings to the virtual meeting chat box or to communication offline after the meetings' conclusion.[33]

The Hearing Examiner found that OAG presented no credible evidence that Union representatives at the weekly PIP meetings were uncivil or disruptive.[34] The Hearing Examiner found unpersuasive OAG's testimony that meeting ground rules were implemented to provide "some level of decorum, . . . civility . . . and structure in the PIP."[35] The Hearing Examiner noted that Board precedent regarding communications between union and management representatives has long held that disagreement with management is not in and of itself disruptive.[36] The Hearing Examiner determined that OAG found the "level of decorum" unacceptable because the Union representative disagreed with Management's interpretation of the employee's prior week performance.[37]

The Hearing Examiner further found that unilaterally implemented ground rules were not an appropriate remedy for the Union's alleged incivility or disruption.[38] The Hearing Examiner noted that OAG's right and appropriate remedy for uncivil or disruptive Union behavior at the

[27] Report at 22.
[28] Report at 22.
[29] Report at 22.
[30] Report at 22-23.
[31] Report at 23.
[32] Report at 23.
[33] Report at 23.
[34] Report at 23.
[35] Report at 23 (citing Tr. 218-19).
[36] Report at 23.
[37] Report at 23.
[38] Report at 24.

weekly PIP meetings was to end the meeting.[39] The Hearing Examiner determined that (1) OAG's unilateral implementation of ground rules during PIP meetings violated Robinson's *Weingarten* rights and improperly silenced the Union's speech and participation, in violation of D.C. Official Code § 1-617.04(a)(1) and (5);[40] (2) the silencing of Union's representatives at Robinson's weekly PIP meeting in violation of his *Weingarten* rights was a direct and proximate cause of Robinson's termination;[41] and (3) OAG's unilateral change in personnel policies and practices violated the Union's right to notice and the opportunity to bargain the change under the CMPA.[42]

3. **Remedy**

The Hearing Examiner found that the silencing of Union representatives at Robinson's weekly PIP meetings was a direct and proximate cause of Robinson's termination.[43] For this reason, the Hearing Examiner recommended that Robinson be reinstated and made whole.[44]

IV. Discussion

Pursuant to Board Rule 550.1, the Complainant has the burden of proving by a preponderance of evidence that the Respondent committed an unfair labor practice in violation of the CMPA.[45] The Board will affirm a hearing examiner's findings and recommendations if they are reasonable, supported by the record, and consistent with Board precedent.[46] Issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the hearing examiner.[47] Mere disagreements with a hearing examiner's findings or challenging the examiner's findings with competing evidence do not constitute proper exceptions if the record contains evidence supporting the hearing examiner's conclusions.[48]

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[39] Report at 24.
[40] Report at 23, 24.
[41] Report at 24.
[42] Report at 24.
[43] Report at 24.
[44] Report at 24.
[45] *See* Board Rule 550.1; *see also DCPS v. WTU Local 6*, 68 D.C. Reg. 6745, Slip Op. No. 1792, PERB Case No. 20-U-29 (2021); *NAGE v. D.C. Dep't of Forensic Sciences,* 68 D.C. Reg. 5067, Slip Op. No. 1782, PERB Case No. 20-U-08 (2021).
[46] *WTU, Local 6 v. DCPS*, 65 D.C. Reg. 7474, Slip Op. No. 1668 at 6, PERB Case No. 15-U-28 (2018); *see also AFGE, Local 1403 v. D.C. OAG*, 59 D.C. Reg. 3511, Slip Op. No. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012).
[47] AFGE, Local 631 v. OLRCB, 68 D.C. Reg. 2979, Slip Op. No. 1768 at 4, PERB Case No. 20-U-23 (2021); AFSCME, Local 2087 v. UDC, 67 D.C. Reg. 8903, Slip Op. No. 1751 at 4, PERB Case No. 18-U-03 (2020); Council of Sch. Officers, Local 4 v. DCPS, 59 D.C. Reg. 6138, Slip Op. No. 1016 at 6, PERB Case No. 09-U-08 (2010); Hatton v. FOP/DOC Labor Comm., 47 D.C. Reg. 769, Slip Op. No. 451 at 4, PERB Case No. 95-U-02 (1995).
[48] *Hoggard v. DCPS*, 46 D.C. Reg. 4837, Slip Op. No. 496 at p. 3, PERB Case No. 95-U-20 (1999).

A. OAG violated Robinson's *Weingarten* right to Union representation under the CMPA

OAG argues that PIP meetings are not held for the purpose of subjecting employees to investigative questioning about past conduct; rather, they are held to discuss prospective performance expectations and areas for improvement.[49] The Union does not argue that placing an employee on a PIP itself is disciplinary in nature. Instead, the Union argues that PIP meetings are not necessarily mere performance discussions, because the failure to pass a PIP can lead to disciplinary action. The Union argues that the circumstances of the PIP meetings determine whether the meetings are disciplinary interviews under *Weingarten* standards.

In accordance with the standards set forth in *Weingarten*, the Board has recognized a right to union representation during disciplinary interviews under D.C. Official Code § 1-617.04(a)(1) of the CMPA.[50] As the Union notes in its post hearing brief, "[i]f *Weingarten* rights are not triggered by the PIP meetings, then allowing the union representative to attend would be a courtesy. But if *Weingarten* applies, then the employee has a right to have a union representative attend and play an active role in representing the employee."[51] The Board has held that a finding of a *Weingarten* violation requires that the "employee reasonably believes the investigation will result in disciplinary action."[52] Whether the employee's fear of discipline is reasonable is measured by objective standards under all of the circumstances present.[53]

The Hearing Examiner found that Robinson was objectively entitled to Union representation during the interview because of a reasonable apprehension of disciplinary action.[54] OAG takes exception to the Hearing Examiner's conclusion that OAG violated Robinson's *Weingarten* rights.[55] OAG challenges the Hearing Examiner's finding that the Agency's PIP

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[49] OAG's Post Hearing Brief at 1-2.
[50] *See FOP/MPD Labor Committee v. MPD*, Slip Op. No. 1399 at 5, PERB Case No. 06-U-34 (2013); *D.C. Nurses Assoc. v. D.C. Health and Hospitals Public Benefit Corp.*, Slip Op. No. 558, PERB Case Nos. 95-U-03, 97-U-16 and 97-U-28 (1998).
[51] Union's Post Hearing Brief at 12.
[52] *D.C. Nurses Assn. v. D.C. Dept. of Youth Rehab. Servs*., 61 D.C. Reg. 1566, Slip Op. No. 1451 at 4-5, PERB Case No. 10-U-35 (2013); *FOP/DOC Labor Committee v. MPD*, Slip Op. No. 1378, PERB Case No. 10-U-21 (2013).
[53] *FOP/DOC Labor Committee v. MPD*, Slip Op. No. 1378 at 3.
[54] Report at 22.
[55] OAG Exceptions Brief at 2. OAG takes exception for the following six reasons: "First, the Hearing Examiner ignores the fact that *Weingarten* is triggered during an 'investigative interview,' not just any interview. Second, the Hearing Examiner's finding that PERB precedent directly controls the outcome of this case and thus PERB … need not use federal authority as guidance is wrong. Third, the fact that Robinson responded to questions about his incomplete assignments or workload backlog does not turn a performance meeting into an investigative interview. Fourth, the Hearing Examiner ignores the substantial objective evidence that Robinson's subjective fear that he would be disciplined was unreasonable. Fifth, the Hearing Examiner evidentiary ruling against OAG, that OAG could not introduce detailed evidence on Local 2401's disruptive conduct because it was irrelevant[,] then subsequent finding that OAG failed to introduce evidence on this very fact, significantly prejudiced OAG's ability to [show that] Local 2401's disruptive behavior justified OAG's response. Sixth, the Hearing Examiner's conclusion that OAG's sensible limitations on how Local 2401 should communicate during virtual PIP progress meetings was not the proper remedy to Local 2401's disruptive conduct is inconsistent with PERB precedent." OAG Exceptions Brief at 2.

meetings with Robinson were "investigatory interviews," to which *Weingarten* rights attach.[56] OAG further challenges the Hearing Examiner's findings of fact and credibility resolutions regarding the Parties' conduct during the PIP meetings.[57]

The record reflects that the Hearing Examiner properly considered and rejected OAG's argument that the Agency's weekly PIP meetings with Robinson were not investigatory in nature.[58] Similarly, the record shows that the Hearing Examiner considered and rejected OAG's claims of disruptive conduct by the Union, and OAG's defense of its conduct at the PIP meetings.[59] Therefore, OAG's exception amounts to a mere disagreement with the Hearing Examiner.

OAG also takes exception to three findings of fact in the Report that the Hearing Examiner concluded to be undisputed.[60] However OAG has not shown that the facts in dispute were material to the Hearing Examiner's conclusions.

B. OAG's violation of Robinson's *Weingarten* rights was not the direct and proximate cause of his termination

The Hearing Examiner found that the silencing of Union representatives at Robinson's weekly PIP meetings in violation of his *Weingarten* rights was a direct and proximate cause of Robinson's termination.[61] Based on this finding, the Hearing Examiner found that Robinson must be reinstated and made whole.[62] OAG takes exception to the Hearing Examiner's conclusion that OAG's *Weingarten* violation was the direct and proximate cause of Robinson's termination or that reinstatement is warranted.[63] OAG has met its burden to show that the Hearing Examiner's determination on this issue was unreasonable.

The CMPA confers upon the Board the remedial authority to "reinstate with or without back pay, or otherwise make whole the employment or tenure of any employee, who the Board finds has suffered adverse economic effects" in violation of the Labor-Management Relations subchapter of the CMPA.[64] While the Board has awarded traditional cease and desist orders as a remedy for established *Weingarten* violations in the past, it has not previously articulated how it evaluates appropriate remedial relief for *Weingarten* violations under the CMPA.

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[56] OAG Exceptions Brief at 2.
[57] OAG Exceptions Brief at 2.
[58] Report at 16-17.
[59] Report at 23-24.
[60] OAG Exceptions Brief at 27.
[61] Report at 24.
[62] Report at 24.
[63] OAG Exceptions Brief at 19.
[64] *AFGE, Local 2978 v. DOH*, 61 D.C. Reg. 2739, Slip Op. No. 1454 at 3, PERB Case No. 08-U-47(a) (2014); *see* D.C. Code § 1-617.13(a).

The Board adopts the following burden shifting test[65] to determine the appropriate remedy for alleged *Weingarten* violations.[66] Initially, the Board determines whether a complainant has made a *prima facie* showing that a respondent conducted an investigatory interview in violation of *Weingarten* and that the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview. In the face of such a showing, the burden shifts to the respondent. In order to negate the *prima facie* showing of the appropriateness of a make-whole remedy, the respondent must demonstrate that its decision to discipline the employee in question was not based on information obtained at the unlawful interview. Where the respondent meets this heavy burden, a make-whole remedy will not be ordered. Instead, the Board will provide a traditional cease-and-desist order in remedy of the violation.

Applying the foregoing analysis to the instant case, the Board finds that the Union has made a *prima facie* showing of an investigatory interview in violation of *Weingarten*, and that Robinson was disciplined for the conduct which was the subject of the unlawful interview. However, OAG has met the heavy burden to negate such showing by demonstrating that its decision to discipline Robinson was not based on information it obtained at the unlawful interview.

OAG argues that the administrative record contains abundant evidence that the direct and proximate cause of Robinson's termination was his underperformance.[67] OAG notes that, during the PIP period, Robinson "continued to fail to perform the duties expected of his position, including late submissions, incomplete submissions, submissions inconsistent with standard operating procedures, not gathering required documents, conducting interviews late or not at all, and lack of communication."[68] OAG argues that the record before the Hearing Examiner shows that "any *Weingarten* violation" was not the cause of Robinson's termination.[69] OAG argues that the Hearing Examiner failed to consider abundant evidence in the record about the reason Robinson failed his PIP.[70]

The Advance Written Notice of Proposed Adverse Action notified Robinson that, despite receiving refresher training and on-going coaching, Robinson "consistently demonstrated [his] inability to complete [his] work, to follow the Standard Operating Procedures or to timely submit [his] work" for the duration of the PIP.[71] At the conclusion of the PIP, Robison "had not

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[65] *Pennsylvania v. Pennsylvania Labor Relations Board*, 768 A.2d 1201, 1206 (2001) (citing *Kraft Foods, Inc*., 251 NLRB 598 (1980) overruled by *Taracorp Industries*, 273 NLRB 221 (1984)).
[66] The Board considered and declined to follow the NLRB's *Taracorp Industries*, 273 NLRB 221 (1984), decision. In *Taracorp*, the NLRB interpreted its enabling statute to limit the type of relief that it can provide for *Weingarten* violations. However, the CMPA provides the Board with broad remedial powers for reinstatement. The Board is not required to follow the NLRB and finds that the balancing test enunciated in *Kraft Foods* more appropriate for determining remedies to *Weingarten* violations under the CMPA.
[67] OAG's Exceptions Brief at 21.
[68] OAG's Exceptions at 21.
[69] OAG's Exceptions at 21.
[70] OAG Exceptions Brief at 20.
[71] Union's Exhibit 5 at 20.

successfully demonstrated [his] ability to perform any of the Core Competencies or SMART Goals [for his] PIP."[72] The Report and Recommendations issued by the independent Hearing Officer assigned to Robinson's adverse action case "found the PIP clear, complete, and well supported."[73]

The record reflects that the Hearing Examiner only refers to an admission from Robinson that he was "unable to complete the work performed by a Paralegal Specialist" as information obtained from the investigatory interview. The Hearing Examiner's determination of the direct and proximate cause of Robinson's termination on this basis was not reasonable. OAG has shown that OAG's decision to discipline Robinson was not based on his admission but rather his underperformance. Therefore, the Board rejects the recommended make-whole remedy and instead issues a cease-and-desist order for the violation.

V. Conclusion

The Board adopts the Hearing Examiner's recommendation that OAG committed an unfair labor practice in violation of D.C. Official Code § 1-617.04(a)(1).[74]

ORDER

IT IS HEREBY ORDERED THAT:

1. The D.C. Office of the Attorney General shall cease and desist from interfering with, restraining or coercing in any like or related manner, employees represented by the American Federation of State, County and Municipal Employees, District Council 20, Local 2401 (AFSCME) in the exercise of rights guaranteed by the Comprehensive Merit Personnel Act (CMPA), D.C. Official Code § 1-617.04(a)(1);

2. The D.C. Office of the Attorney General shall cease and desist from denying or limiting employees' Weingarten rights in interviews with OAG management when the employee reasonably believes that the interview might result in discipline and requests AFSCME representation;

3. The D.C. Office of the Attorney General shall cease and desist from silencing Union representatives in Weingarten interviews or denying employees the right to actively receive assistance and to consult with their representative;

[72] Union's Exhibit 5 at 20.
[73] Union's Exhibit 5 at 16.
[74] The Board limits its decision to finding OAG committed an unfair labor practice under D.C. Official Code § 1-617.04(a)(1).

4. The D.C. Office of the Attorney General shall within ten (10) days of issuance of this Decision and Order post a Notice electronically and on all bulletin boards where notices to bargaining unit employees are normally posted for thirty (30) days;

5. The D.C. Office of the Attorney General shall notify the Board of the posting within fourteen (14) days after issuance of the Decision and Order requiring posting; and

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

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons, and Peter Winkler.

December 21, 2023

Washington, D.C.

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration within fourteen (14) days, requesting the Board to reconsider its decision. Additionally, a final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provide thirty (30) days after a Board decision is issued to file an appeal.