

The collective-bargaining agreement's Article 13, entitled "Investigatory Questioning" described three types of formal questioning conducted by MPD; administrative interview, criminal interview, and interrogation. Article 13 defines an administrative interview as: "Formal official questioning conducted by the Department to question an employee about an administrative matter." The same article defines a criminal interview as: "Formal official questioning conducted by the Department to question an employee about a criminal matter, where the member has not been identified as a target." The final classification of questioning is interrogation which Article 13 defines as: "Formal official questioning conducted by the Department of a member who has been, or may be, identified as a target of a criminal investigation." Article 13 also permits an FOP representative to be present at all administrative interviews. However, the same article declares: "In no event may a Union representative be present during any criminal interview or interrogation."

In late July 2006, OIA received a complaint regarding a police officer assigned to MPD's First District. The report of the complaint recited that the police officer had confined a handcuffed individual to a police patrol wagon for about two hours. The complainant also asserted that the officer grabbed him, was rough with him, and slammed him against a car. The complainant also asserted that the police officer handcuffed him too tightly and had attempted to extort \$50 from the complainant in exchange for release from custody. . . .

Agent Rivera . . . formally interviewed the complainant. . . . [Rivera] visit[ed] the First District and obtain[ed] a list of the names of those of its police officers, who were on duty at the time of the incident described in the complainant's statement to Rivera.

According to Agent Rivera's credited testimony, on July 31 he telephoned Sgt. Dukes, at the First District and informed him of the criminal investigation and the list of the First District officers, who were to be interviewed about the alleged incident. . . .

Officer Deciuitis¹ arrived at OIA's office in time to greet Officer Mazloom, the first of the five officers to arrive for the interviews. Approximately ten minutes after Officer Mazloom arrived in the

¹ FOP's shop steward for the First District

OIA's waiting area, Agent Rivera appeared and invited him into the interview room. At this point, Officer Deciutiis intervened and identified himself as an FOP representative for Mazloom. Rivera stated that Mazloom was not entitled to FOP representation and that he would explain why to Mazloom in the interview room. Rivera did not inform any of the First District officers of the nature of the investigation and the purpose of their interviews, respectively, until each entered the interview room. . . .

Before the interview began, Agent Rivera told Officer Mazloom to relax, that "this is a criminal investigation. . . ." Continuing, Rivera told Mazloom: "You're just a potential witness in this case, I'm trying to determine if, at all you have any information that could help me to investigate this. . . ." Rivera also explained that Mazloom was not entitled to FOP representation at this interview because it was a criminal case and that he would be entitled to such representation in administrative investigations. . . .

I also find from [Rivera's] testimony that he conducted the interviews of all the other First District officers who reported to OIA's office on that day in the same manner he employed in interviewing Officer Mazloom.

(Report and Recommendation 2-5.)

In his analysis and conclusions, the Hearing Examiner observed that the National Labor Relations Act "guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres," *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 262 (1975), and that the Board had recognized that right under the Comprehensive Merit Personnel Act ("CMPA"). (Report and Recommendation 5) (citing *D.C. Nurses Ass'n v. D.C. Health & Hosps. Pub. Benefit Corp.*, 45 D.C. Reg. 6736, Slip Op. No. 558, PERB Case Nos. 97-U-16, 97-U-26 (1998)). The Hearing Examiner found that a risk of discipline did not reasonably inhere in the interviews in question:

Fearing that they might be involved in an administrative investigation which might impact adversely upon their employment, they had asked Shop Steward Deciutiis to be with them. However, at that point, Rivera made clear to each officer that he or she was involved in a criminal investigation, and that he or she was not a target of the investigation. Thus, did Rivera lay to rest any reason for each interviewee's uncertainty about possible harm to their respective jobs as MPD officers.

(Report and Recommendation 6.) The Hearing Examiner concluded that FOP did not show that the officers were entitled to union representation during their interviews and recommended dismissal of the complaint. (*Id.*)

The Board rejected the Hearing Examiner's recommendation for the reason that Agent Rivera did not tell the officers that they were not targets of the investigation until after their request for representation, based upon a reasonable fear of discipline, had been denied. "The right to representation attaches when an employee reasonably fears discipline might arise from an interview and requests representation. By denying union representation at that point, the Board concludes that MPD's actions constitute a violation of D.C. Code § 1-617.04(a)(1)." *F.O.P./Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 59 D.C. Reg. 4548, Slip Op. No. 932 at p. 5, PERB Case No. 07-U-10 (2008). The Board summarily denied MPD's motion for reconsideration. *F.O.P./Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 59 D.C. Reg. 9817, Slip Op. No. 1283, PERB Case No. 07-U-10 (2008).

On judicial review, the Superior Court noted that a party to a collective bargaining agreement can waive a statutory right through clear and unmistakable language in the agreement. *Gov't of D.C. v. D.C. Pub. Employee Relations Bd.*, No. 2012 CA 005842P, slip op. at 6 (Super. Ct. June 10, 2013). Federal courts have indicated that *Weingarten* rights are subject to modification or clarification through the collective bargaining process. *Id.* at 7 (citing *U.S. Nuclear Regulatory Comm'n v. Fed. Labor Relations Auth.*, 25 F.3d 229, 230 (4th Cir. 1994)). The Superior Court observed that modification of *Weingarten* rights is reasonable in the context of criminal law enforcement and held that FOP agreed to modify *Weingarten* rights in its collective bargaining agreement. *Gov't of D.C. v. D.C. Pub. Employee Relations Bd.*, slip op. at 7. In article 13, section 3(b) of the collective bargaining agreement, which states that "[i]n no event may a Union representative be present during any criminal interview or interrogation," FOP waived any right of its members under the CMLPA to have a union representative present during criminal interviews of its members.²

The Superior Court stated that neither the Board nor FOP disputed that Agent Rivera questioned the officers about a criminal matter. *Id.* at 8. That the interviews were criminal not administrative was decisive, yet neither the Hearing Examiner nor the Board considered this issue, the court averred. The court stated:

PERB did not consider whether § 3(b) categorically excludes union representatives from criminal interviews, regardless of whether the officer reasonably fears criminal prosecution and related discipline as a result of the interview.

² "Interestingly enough," FOP acknowledges in its post-hearing brief, "this provision in the contract is a significant curtailment of employee rights enumerated by the Supreme Court in *Weingarten*." (Complainant's Post-Hearing Brief 10.)

PERB's only discussion of the jurisdictional issue was that "In the present case, the Board has found nothing in the record which indicates that the Union is asserting a contractual violation as the basis for its complaint." PERB Decision at 6. That is correct, but PERB's precedent makes clear that the key question is whether "an interpretation of a contractual obligation is necessary and appropriate to a determination of whether or not a non-contractual, statutory violation has been committed."

Id. at 9 (quoting *F.O.P./Metro. Police Dep't Labor Comm. v. District of Columbia*, 59 D.C. Reg. 6039, Slip Op. No. 1007 at p. 8, PERB Case No. 08-U-41(2009)).

The answer to "the key question" of "whether an interpretation of a contractual obligation is necessary and appropriate to a determination of whether or not a non-contractual, statutory violation has been committed" depends upon the facts and circumstances of the individual case. For example, the Board has held in document request cases that if the allegations made in the complaint concern statutory violations, the Board is empowered to decide whether a response to a document request was an unfair labor practice, even though the document request was made pursuant to a contractual provision. *F.O.P./Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 60 D.C. Reg. 5337, Slip Op. No. 1374 at p. 10, PERB Case No. 06-U-41 (2013); *F.O.P./Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 59 D.C. Reg. 11371, Slip Op. No. 1302 at p. 16, PERB Case Nos. 07-U-49, 08-U-13, and 08-U-16 (2012). However, in *AFSCME, D.C. Council 20, Local 2921 v. District of Columbia Public Schools*, 42 D.C. Reg. 5685, Slip Op. No. 339 at p. 5, PERB Case No. 92-U-08 (1992), the Board held that it did not have jurisdiction to consider a complaint regarding an agency's failure to provide the union with a step 3 grievance decision on the ground that the obligation to furnish that information was dictated by the collective bargaining agreement.

In *F.O.P./Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department*, 60 D.C. Reg. 2585, Slip Op. No. 1360, PERB Case No. 12-U-31 (2013), *aff'd*, *F.O.P./Metropolitan Police Department Labor Committee v. D.C. Public Employee Relations Board*, No. 2013 CA 001289P (Super. Ct. Apr. 18, 2014), MPD refused to allow the union representative designated by an interviewee to be present during an administrative interview. MPD relied upon article 13, section 3(a) of the collective bargaining agreement, which allows MPD to refuse a particular union representative for good cause. The Board held that "it lacks jurisdiction over this matter because the very event giving rise to the complaint was expressly envisioned and authorized by the parties in their CBA, and because, in order to determine if a statutory violation occurred, the Board would need to interpret the parties' CBA, which it does not have the authority to do." *Id.* at p. 5.

That is not the situation in the present case. The issue here is that the Agency denied a union representative to be present for an interview it had *not yet characterized*, making it impossible for the interviewee and the Union representative to know which if any provision of the collective bargaining agreement applied. If the interviewee at that point could reasonably fear discipline arising from the interview, he had a *statutory* right to representation.

In the present case, the Superior Court found that PERB had an “obligation to defer to the grievance procedure to resolve what is at bottom a contractual dispute about whether a union representative had a right to attend criminal interviews.” *Gov’t of D.C. v. D.C. Pub. Employee Relations Bd.*, slip op. at 10. Any argument FOP might have suggesting that article 13, section 3(b) of the collective bargaining agreement did not exclude union representation in this case, the court asserted, would be for an arbitrator to consider. The court reversed the Board’s decision and remanded the case for proceedings not inconsistent with the order.

In view of the holding and order of the Superior Court, we dismiss FOP’s complaint and vacate Slip Opinion No. 932. Were the same facts involving a denial of union representation without contemporaneous disclosure of the nature of the interview to be presented to the Board in the future, we may not follow the decision of the Superior Court in this case.

ORDER

IT IS HEREBY ORDERED THAT:

1. The complaint is dismissed.
2. The Order in Opinion No. 932 is vacated.
3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy and Members Donald Wasserman and Ann Hoffman

Washington, D.C.

June 9, 2014

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CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 07-U-10 is being transmitted via U.S. Mail to the following parties on this the 24th day of June, 2014.

Marc L. Wilhite
Pressler & Senftle P.C.
1432 K St. NW, 12th Floor
Washington, DC 20005

VIA U.S. MAIL

Mark Viehmeyer
Metropolitan Police Department
300 Indiana Ave. NW, room 4126
Washington, DC 20001

VIA U.S. MAIL

/s/ Yvonne P. Waller

Yvonne P. Waller
Administrative Officer