Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Nurses Association,	
Petitioner,	
	PERB Case No. 10-U-35
and	
	Slip Opinion No. 1304
Department of Youth Rehabilitation Services,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

On May 18, 2012, the District of Columbia Nurses Association ("Complainant," "Union" or "DCNA") filed an unfair labor practice complaint ("Complaint") against the Department of Youth Rehabilitation Services ("Respondent," "Agency" or "DYRS"). The Union alleges that Respondent violated the Comprehensive Merit Personnel Act (CMPA) D.C. Code §1-618.4(a)(1)[1] and denied a bargaining unit member her *Weingarten* rights.[2]

Respondent filed an Answer ("Answer") on June 7, 2010.

The Union's Complaint and the Respondent's Answer are before the Board for disposition.

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[1] While Complainant alleges a violation of D.C. Code 1-618.04(a)(1), the Board more properly identifies the relevant statute as D.C. Code 1-617.04(a)(1) which provides that, "(a) The District, its agents, and representatives are prohibited from: (1) Interfering with, restraining or coercing any employee in the exercise of the rights guaranteed by this subchapter."

[2] See *National Labor Relations Board v. Weingarten,* 420 U.S. 251 (1975), which holds that it is a constitutional violation to deprive unions from providing assistance to members who are being subjected to disciplinary interviews.

II. Discussion

The Complainant alleges the following facts:

> 4. On or about May 12, 2010, DYRS managerial employees, Ms. Kathy Ohler and Ms. Halima Goodwin, ordered Ms. Khadejah Viera-Johnson into Ms. Ohler's office for a disciplinary matter.
>
> 5. The purpose of this meeting described in paragraph 4 above was to mete out discipline to Ms. Viera-Johnson. Specifically, management attempted to serve on Ms. Viera- Johnson a letter of counseling for alleged time and attendance issues and to discuss the alleged offenses.
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> 6. Ms. Johnson requested union representation at such meeting.
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> 7. In response to the request for union representation, Ms. Goodwin stated the following (or words to that effect): Ms. Viera-Johnson would not dictate who was entitled to be at the meeting; that the meeting would go forth; and the letter of counseling would be placed in Ms. Viera-Johnson's official personnel file.

(See Complaint at p.2).

Complainant seeks the following: that the Agency cease and desist from denying bargaining unit employees their *Weingarten* rights; that the Agency rescind the disciplinary action given to Ms. Viera-Johnson; that the Agency take appropriate disciplinary action against Ms. Goodwin and Ms. Ohler; that the Agency issue a formal apology to DCNA and to Ms. Viera-Johnson; and that the Agency post appropriate notice of the violation. (See Complaint at p. 3).

Respondent denies the allegations. Specifically, Respondent denies that on May 12, 2010, DYRS ordered bargaining unit member Ms. Viera-Johnson to attend a disciplinary meeting and DYRS denies that it refused Ms. Viera-Johnson's request for union representation. (See Answer at pgs.2-4)

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 present case, the parties' pleadings are in dispute regarding the alleged facts contained in the Complaint. Specifically, there is a dispute as to whether DYRS' agents denied Ms. Viera-Johnson's request for union representative during what Complainant perceived to be a disciplinary meeting.

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 had 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.

Like the NLRA, the CMPA at D.C. Code § 1-617.04(a)(1), also 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 a 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 CMPA contains no mention of an employee's right to union representation during a meeting with the unit member's supervisors. 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, the DCNA has alleged facts asserting that DYRS interfered with an employee's right to the assistance of a union representative. Respondent denies these allegations. The facts that DCNA alleges, if proven, 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, the Board finds that the circumstances presented do not warrant a decision on the pleadings. Here, issues of fact are present concerning whether DCNA violated the CMPA by refusing an employee's right to the assistance of a 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). The Complaint, and its allegations against the Respondent, will continue to be processed through an unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Board's Executive Director shall refer the District of Columbia Nurses Association's Complaint to a Hearing Examiner.

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

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

August 3, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-U-35 was transmitted via U.S. Mail and e-mail to the following parties on this the 3rd day of August, 2012.

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