Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
American Federation of State, County and Municipal Employees, Local 2743	)	
Complainant	)	PERB Case Nos. 24-U-05, 24-U-06, 24-U-08
v.	)	Opinion No. 1894
District of Columbia Department of Buildings	)	
Respondent[1]	)	

DECISION AND ORDER

I. Statement of the Case

On November 30, 2023, the American Federation of State, County and Municipal Employees, Local 2743 (AFSCME) filed an unfair labor practice complaint (24-U-05 Complaint) against the District of Columbia Department of Buildings (DOB) asserting that DOB violated the Comprehensive Merit Personnel Act (CMPA) by failing to respond sufficiently to a request for information.[2] On December 12, 2023, AFSCME filed an unfair labor practice complaint (24-U-06 Complaint) against DOB asserting that DOB violated D.C. Official Code § 1-617.04(a)(1) and (2) by failing to respond sufficiently to a request for information.[3] On January 3, 2024, AFSCME filed an unfair labor practice complaint (24-U-08 Complaint) against DOB asserting that DOB violated D.C. Official Code § 1-617.04(a)(1) and (2) by failing to respond sufficiently to a request for information.[4] On December 20, 2023, December 26, 2023, and January 17, 2024, DOB filed answers to each complaint respectively (24-U-05 Answer, 24-U-06 Answer and 24-U-08 Answer). On January 3, 2024, PERB consolidated PERB Case Nos. 24-U-05 and 24-U-06. On January 22, 2024, PERB consolidated PERB Case No. 24-U-08 with the consolidated cases under PERB Case

[1] AFSCME named a DOB management employee (Supervisor) who supervised two disciplined employees as a respondent in PERB Case No. 24-U-06. *See, generally*, 24-U-06 Complaint. On April 8, 2024, DOB filed a motion to remove the Supervisor as a respondent. AFSCME did not oppose DOB's motion. On April 24, 2024, PERB granted DOB's motion and removed the Supervisor as a respondent.
[2] 24-U-05 Complaint at 2 (citing D.C. Official Code § 1-617.04(a)(1) and (2)).
[3] 24-U-06 Complaint at 2-3 (citing D.C. Official Code § 1-617.04(a)(1) and (2)).
[4] 24-U-08 Complaint at 2-3 (citing D.C. Official Code § 1-617.04(a)(1) and (2)).

No. 24-U-05. On March 29, 2023, DOB filed a motion to dismiss asserting that it had produced all information that it could in response to AFSCME's requests for information and, therefore, the Complaints were moot.[5]

On June 4 and June 13, 2024, PERB held a hearing on the matter. On August 26, 2024, the Hearing Examiner issued a report and recommendations (Report) finding that DOB had not committed any unfair labor practices which merited relief under the CMPA.[6] Neither party filed exceptions to the Report.

Upon consideration of the Hearing Examiner's Report and Recommendations, applicable law, and the record presented by the parties, the Board adopts the Hearing Examiner's Report and Recommendation and dismisses the Complaints.

I. Hearing Examiner's Report and Recommendations

A. Hearing Examiner's Factual Findings

The Hearing Examiner made the following factual findings. On November 2, 2023, AFSCME transmitted a request for information regarding the verbal counseling of a bargaining unit employee to DOB and unilaterally set a deadline of November 28, 2023, for DOB's response (November 2 RFI).[7] On November 17, 2023, AFSCME requested information regarding the termination of a bargaining unit employee, as well as the names of all AFSCME employees separated from DOB after working for the Supervisor.[8] AFSCME asserted a deadline of December 1, 2023, for DOB to provide information on these separated bargaining unit members.[9] On November 20, 2023, AFSCME transmitted a request for information regarding the terminated employee (November 20 RFI).[10] Neither party disputed that this employee was terminated while still in probationary status.[11] AFSCME requested information regarding this termination multiple times between November 20 and December 10, 2023.[12] On December 6, 2023, DOB provided AFSCME with the names of its bargaining unit employees who had been supervised by the Supervisor and separated from employment with the agency since January 2020.[13] The Hearing Examiner noted that DOB ultimately provided the majority of the information requested, aside from information that the agency was not obligated to furnish to AFSCME.[14]

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[5] Motion to Dismiss at 1. The Hearing Examiner denied the motion to dismiss at hearing. Report at 6.
[6] Report at 13.
[7] Report at 1. AFSCME filed a step one grievance regarding the verbal counseling—which AFSCME alleged was untimely issued, 24-U-05 Complaint at 2—on the same day. Report at 1.
[8] Report at 7. AFSCME further requested the names of all American Federation of Government Employees, Local 2725 (AFGE) employees separated from DOB after working for the Supervisor. Report at 7.
[9] Report at 7.
[10] Report at 2.
[11] Report at 3.
[12] Report at 2. AFSCME requested copies of the terminated employee's performance plan and evaluations as well as the name of the person who recommended the employee's termination. 24-U-06 Complaint at 2.
[13] Report at 7. DOB asserted that AFSCME was not entitled to similar information regarding AFGE bargaining unit members. Report at 7.
[14] Report at

B. Hearing Examiner's Recommendations

The Hearing Examiner considered the following issues:

> Did the Respondent refuse to provide information to the Union? Did the Respondent fail to provide information to the Union in a timely manner? Did the Respondent fail to provide two bargaining unit employees with their Weingarten rights for a Union representative?[15]

The Hearing Examiner noted that PERB precedent requires agencies to provide information requested by a union which is relevant and necessary for collective bargaining and places the burden on agencies to show substantial countervailing concerns which outweigh the duty to disclose such information.[16] The Hearing Examiner reviewed National Labor Relations Board (NLRB) precedent regarding a union requesting information not pertaining to its own bargaining unit members, finding that there was no presumption that such information is necessary to a union's representation of its own bargaining unit employees.[17] The Hearing Examiner further reviewed Federal Labor Relations Authority (FLRA) precedent requiring a union to provide an agency with a particularized need for information or data requested.[18] The Hearing Examiner concluded that, at the time of the relevant requests for information, AFSCME did not provide any rationale or particularized need to DOB as to the need for information regarding other bargaining units and, therefore, AFSCME failed to meet its burden to show DOB that the requested information was relevant and necessary to AFSCME's representation of its own bargaining unit members.[19]

The Hearing Examiner rejected AFSCME's argument that DOB had failed to fully respond to AFSCME's other requests for information.[20] The Hearing Examiner determined that, despite DOB providing further information at hearing, DOB had not failed to fully respond to AFSCME's requests.[21] The Hearing Examiner noted that the timeliness of management's response to a request for information is circumstantial.[22] The Hearing Examiner further noted DOB's responsiveness to AFSCME throughout the time period between AFSCME's initial requests and DOB's furnishing of the requested information, as well as the fact that DOB provided the requested information within three weeks of the requests.[23] The Hearing Examiner stated, "The CMPA allows the parties to negotiate to define the time periods for information request responses. Absent such a negotiated provision in the parties' [collective bargaining agreement (CBA)], the Union's request for the

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[15] Report at 2-3. The Hearing Examiner noted that AFSCME had raised additional statutory violations but did not present evidence on those violations and that, therefore, he would not address those additional violations further in the Report. Report at 6. The Hearing Examiner further noted that he did not need to address DOB's assertion that it did not exist as an independent entity until 2021. Report at 11.
[16] Report at 6.
[17] Report at 7 (citing *Pittson Coal Group v. United Mine Workers of America, District 28*, 334 NLRB 690, 697 (2001)).
[18] Report at 8 (citing *NLRB v. FLRA*, 952 F.2d 523, 532 (D.C. Cir. 1992)).
[19] Report at 8.
[20] Report at 8.
[21] Report at 8.
[22] Report at 9 (citing *DOJ and AFGE, Local 2001*, 64 FLRA 106, 110 (2009)).
[23] Report at 9.

Respondent to provide the information on a defined date…is simply a request."[24] The Hearing Examiner further stated that management "is allowed a reasonable time to respond to an information request"[25] and that DOB's failure to respond to the requests within the two (2) week deadline requested by AFSCME did not constitute a refusal to provide information.[26]

The Hearing Examiner noted concern with DOB's response time of nearly three (3) months to provide AFSCME with the paperwork given to the terminated probationary bargaining unit employee at the time of her termination.[27] However, the Hearing Examiner found that DOB's response time did not violate the CMPA under the circumstances because: (1) AFSCME's request that the information be supplied by a specific date merely invites compliance when the parties have not negotiated a defined time period for responding to information requests; (2) DOB did provide AFSCME with partial responses to its requests within two weeks; (3) AFSCME did not articulate a particularized need for the information requested to DOB; and (4) the termination of probationary employees "is normally not a grievable matter."[28] The Hearing Examiner concluded that AFSCME failed to show that DOB had not adequately responded to the requests for information.[29]

The Hearing Examiner reviewed employees' statutory right to union representation during investigatory interviews under *Weingarten*.[30] The Hearing Examiner found that the requisite elements for triggering *Weingarten* rights were not present in the discussions between the Supervisor and either of the disciplined employees in the instant case.[31] The Hearing Examiner noted that unions do not have an institutional right to attend *Weingarten* meetings where the interviewed employee has not requested the presence of a union representative and found that neither employee in the instant case requested union representation.[32] The Hearing Examiner further noted that management does not have an obligation to advise employees of their *Weingarten* rights.[33] The Hearing Examiner rejected AFSCME's argument that the Supervisor surreptitiously conducted *Weingarten* investigations with employees who believed that "they were having casual conversations."[34] The Hearing Examiner found that AFSCME failed to show that the issued verbal counseling constituted discipline according to the parties' CBA.[35] The Hearing Examiner further found that AFSCME failed to present evidence that DOB conducted an investigatory interview of the terminated probationary employee at all.[36] The Hearing Examiner found that PERB lacked jurisdiction to address AFSCME's allegations that DOB violated *Weingarten* requirements from the parties' CBA, which would need to be resolved by the

[24] Report at 9.
[25] Report at 9.
[26] Report at 9. However, the Hearing Examiner also noted concern with DOB's method for handling various requests for information as risking providing information to unions in an untimely manner. Report at 10.
[27] Report at 10.
[28] Report at 11.
[29] Report at 11.
[30] Report at 11 (citing *NLRB v. Weingarten*, 420 U.S. 251, 257 (1975)).
[31] Report at 11.
[32] Report at 12.
[33] Report at 12.
[34] Report at 12.
[35] Report at 12.
[36] Report at 13.

grievance and arbitration procedure set forth by the CBA.[37] The Hearing Examiner determined that DOB did not violate the requirements of *Weingarten*.

The Hearing Examiner concluded that DOB did not commit any unfair labor practice violations in the instant case that merited relief.[38]

II. Discussion

This dispute arises from several requests for information by AFSCME regarding employees disciplined by DOB. AFSCME argues that DOB failed to fully respond to the requests for information.[39] AFSCME further argues that DOB violated disciplined employees' *Weingarten* rights in the process of disciplining the employees.[40] DOB argues that it responded to AFSCME's requests for information.[41] DOB further argues that it did not have access to the information that it did not provide.[42]

The Board will adopt a Hearing Examiner's Report & Recommendations if it is reasonable, supported by the record, and consistent with PERB precedent.[43] The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner."[44] Board Rule 550.14 states that "[a]ll objections to evidence must be raised before the hearing examiner. Any objection not made before the hearing examiner is waived unless the failure to make such objection is excused by the Board because of extraordinary circumstances."[45] The Board has held that it will sometimes look to National Labor Relations Board (NLRB) or Federal Labor Relations Authority (FLRA) precedent for guidance when relevant, primarily when the Board's own case law is silent on a particular issue.[46]

An agency has an obligation to furnish information a union requests that is both relevant and necessary to the union's role in processing a grievance, in pursuing an arbitration

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[37] Report at 13.
[38] Report at 13.
[39] 24-U-05 Complaint at 2; 24-U-06 Complaint at 3; 24-U-08 Complaint at 2-3. AFSCME asserts that "[i]t is axiomatic, that failure to produce records based on a Union's Request for Information…amounts to an unfair labor practice," Complainant's Post-Hearing Brief at 3, and that "[f]ailing to provide complete responses amounts to no response at all." Complainant's Post-Hearing Brief at 4.
[40] 24-U-05 Complaint at 2, Complainant's Post-Hearing Brief at 9. AFSCME asserts that the instant case presents an issue of first impression regarding a manager surreptitiously conducting investigatory interviews in order to avoid alerting the employee subject of the investigation and, therefore, violating the spirit of the requirements of *Weingarten*. Complainant's Post-Hearing Brief at 9-11.
[41] 24-U-05 Answer at 1-2; 24-U-06 Answer at 1-2.
[42] 24-U-08 Answer at 2.
[43] *AFGE, Local 2978 v. OCME*, 61 D.C. Reg. 4267, Slip Op. No. 1457 at 6-7, PERB Case No. 09-U-62 (2014).
[44] *Bernard Bryan, et al. v. FOP/DOC Labor Committee, et al.*, 67 D.C. Reg. 8546, Slip Op. No. 1750 at 5, PERB Case No. 19-S-02 (2020).
[45] Board Rule 550.14.
[46] *Samantha Brown v. DCPS*, Slip Op. No. 1889 at 5, PERB Case No. 22-U-16(MFR) (2024) (citing *FOP/MPD Labor Comm. v. MPD*, 63 D.C. Reg. 6457, Slip Op. No. 1526 at 8, PERB Case Nos. 06-U-23, et al. (2015)).

proceeding, or in collective bargaining.[47] The Board has previously rejected a union's request for information requested for the purpose of comparing disciplinary incidents.[48] The NLRB has held that a union's request for information not related to that union's bargaining unit members or operations and data outside of that union's purview, the union has the burden to establish the relevancy of such information.[49] Further, the FLRA has held that a union must provide management with an explanation of how requested information relates to the union's representational duties.[50] As noted by the Hearing Examiner, AFSCME did not provide DOB with a particularized need for the comparative information regarding employees represented by another labor organization when making that request.[51]

DOB provided AFSCME with all of the requested information—aside from information related to employee members of a separate bargaining unit—albeit after the deadlines unilaterally set by AFSCME at the time of its requests. Where parties have not negotiated a defined time period for responses to requests for information in their CBA, a union's imposition of a deadline for an agency's response is merely a request that does not mandate what constitutes a reasonable response time by the agency.[52] As with the FLRA, the Board considers the timeliness of an agency's response to a request for information to be circumstantial.[53] The Board has previously rejected arguments that an agency's failure to respond to a request for information within a matter of weeks, or even months, constituted a refusal to provide the requested information.[54] Here, DOB provided the majority of the information that it was obligated to supply to AFSCME within three weeks.[55] DOB provided the last of the information responsive to AFSCME's requests within three months.[56] While the Board shares the Hearing Examiner's concerns regarding DOB's timeframe for fully responding to AFSCME's requests, the Board also adopts the Hearing Examiner's finding that under the circumstances of the instant case, that

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[47] *FOP/MPD Labor Comm. v. MPD*, 62 D.C. Reg. 16524, Slip Op. No. 1553 at 2, PERB Case Nos. 12-U-05, 12-U-10 and 13-U-28 (2015).
[48] *FOP/MPD Labor Comm. v. MPD*, Slip Op. No. 1553 at 7.
[49] *Pittson Coal Group v. United Mine Workers of America, District 28*, 334 NLRB 690, 697 (2001).
[50] *NLRB v. FLRA*, 952 F.2d 523, 532 (D.C. Cir. 1992).
[51] Report at 8.
[52] *See FOP/MPD Labor Comm. v. MPD*, 63 D.C. Reg. 6457, Slip Op. No. 1526 at 9, PERB Case No. 06-U-23a (2016) (holding that although the agency missed the ten-day deadline set by the union for responses to a request for information, the agency's delay in providing the requested information to union was not unreasonable and therefore did not constitute an unfair labor practice).
[53] *See DOJ and AFGE, Local 2001*, 64 FLRA 106, 110 (2009) (holding that, considering agency's need to review information requests "encrusted with boilerplate" and formulate a legally sufficient response, a three-week delay in responding to union's request for information was not unreasonable).
[54] *See, e.g., American Federation of Government Employees, Local Union Nos. 631, 872, 1972 and 2553 v. DPW*, 49 D.C. Reg. 1145, Slip Op. No. 439 at 1-2, 36, PERB Case No. 94-U-02 (2002) (adopting a hearing examiner's report and recommendations rejecting union's claim that failure to provide requested information within one or two weeks constituted an unfair labor practice); *AFGE, Local 2741 v. DGS*, 65 D.C. Reg. 2098, Slip Op. No. 1646 at 3, PERB Case No. 16-U-19 (2018) (holding that an agency's two and a half month delay in responding to a request for information was not unreasonable under the circumstances of that case).
[55] Report at 9.
[56] Report at 10.

delay did not rise to the level of an unfair labor practice regarding DOB's failure to respond to AFSCME's requests for information.[57]

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).[58] The Board has held that, if *Weingarten* applies, then an employee has a right to have a union representative attend investigatory interviews.[59] The Board has further held that a finding of a *Weingarten* violation requires that the "employee reasonably believes the investigation will result in disciplinary action"[60] and that the employee request union representation.[61] In the instant case, neither disciplined employee requested union representation prior to or during any investigatory interviews. Therefore, neither employee triggered the application of their *Weingarten* rights.[62] Accordingly, DOB did not commit any unfair labor practices with respect to the disciplined employees' *Weingarten* rights.

III. Conclusion

The Board finds that the Hearing Examiner's determinations regarding AFSCME's failure to meet its burden of proof are reasonable, supported by the record, and consistent with PERB precedent.[63] Therefore, the Board denies AFSCME's requests for relief and dismisses the Complaints against DOB.

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[57] Report at 10-11. The Hearing Examiner noted that: (1) DOB provided a partial response to AFSCME's request regarding the terminated probationary employee within two weeks; (2) as the termination of a probationary employee generally is not grievable, AFSCME had failed to provide DOB with the relevancy or a particularized need for the information requested; and (3) the parties' CBA does not define a reasonable time period for responses to information requests. Report at 11.

[58] *AFSCME, Local 2401 v. OAG*, 71 D.C. Reg. 793, Slip Op. No. 1855 at 6, PERB Case No. 23-U-02 (2023) (citing *FOP/MPD Labor Committee v. MPD*, 60 D.C. Reg. 10839, 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.*, 45 D.C. Reg. 6736, Slip Op. No. 558 at 2-3, PERB Case Nos. 95-U-03, 97-U-16 and 97-U-28 (1998)).

[59] *See FOP/DOC Labor Comm. v. MPD*, 60 D.C. Reg. 9181, Slip Op. No. 1378 at 3, PERB Case No. 10-U-21 (2013) (holding that the *Weingarten* right to union representation arises in situations where an employee requests representation, and is limited to situations where the employee reasonably believes the investigation will result in disciplinary action).

[60] *D.C. Nurses Assn. v. D.C. DYRS*, 61 D.C. Reg. 1566, Slip Op. No. 1451 at 4-5, PERB Case No. 10-U-35 (2013).

[61] *See FOP/DOC Labor Comm. v. MPD*, Slip Op. No. 1378 at 3.

[62] The Board need not reach the issue of whether a probationary employee may exercise *Weingarten* rights in the instant case, as the terminated probationary employee did not request union representation.

[63] As neither party filed exceptions to the Report, the parties have waived the right to challenge the Hearing Examiner's findings or recommendations.

ORDER

IT IS HEREBY ORDERED THAT:

1. This matter is dismissed in its entirety; and

2. 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 Mary Anne Gibbons and Peter Winkler.

December 19, 2024

Washington, D.C.

APPEAL RIGHTS

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration, requesting the Board 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 provides 30 days after a decision file an appeal.