Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Nurses Association	
Complainant,	PERB Case No. 10-U-35
v.	Opinion No. 1451
District of Columbia Department of Youth Rehabilitation Services,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

On May 27, 2010, the District of Columbia Nurses Association ("DCNA" or "Union") filed an Unfair Labor Practice Complaint ("Complaint") against Department of Youth Rehabilitation Services ("DYRS" or "Agency"). On June 7, 2010, DYRS filed an Answer to the Unfair Labor Practice Complaint ("Answer").

On August 3, 2012, the Board referred the matter to a Hearing Examiner for development of a factual record through an unfair labor practice hearing. *D.C. Nurses Association v. D.C. Dep't of Youth Rehabilitation Services*, Slip Op. No. 1304, PERB Case No. 10-U-35 (2012).

On November 19, 2012, a hearing was conducted before Hearing Examiner Lois Hochhauser ("Hearing Examiner"). Both parties submitted post-hearing briefs. On July 17, 2013, the Hearing Examiner issued a Report and Recommendation ("Report"). No Exceptions were filed.

II. Hearing Examiner's Report and Recommendation

The Hearing Examiner found that the Complainant alleged that Respondent "committed an unfair labor practice (ULP) by meeting with Khadejah Viera-Johnson (Ms. Viera herein) a bargaining unit member, to 'mete out discipline' without the requested union representative." (Report at 1). The Respondent answered "denying the charge, contending that the meeting was

not disciplinary but was held to 'present [Ms. Viera] with the letter of counseling on her time and attendance.'" *Id.*

The Hearing Examiner found the following undisputed facts:

1. Complainant is a labor organization within the meaning of District of Columbia Code Section 1-617.03 (2001 ed.). Pursuant to PERB Case No. 87-R-12, Cert. No. 43 (September 14, 1987) it is the exclusive collective bargaining representative of non-managerial and non-supervisory registered nurses employed by Respondent.

2. Respondent is the District of Columbia Government agency which administers detention, commitment and aftercare services for youth held in its facilities or residing in the District of Columbia. It is an agency defined by District of Columbia Code, Section 1-617.01 (2001 ed.)

3. Khadejah Viera-Johnson was a bargaining unit member and employed by Respondent as a registered nurse during the time pertinent to this matter. Her mother, Sharon Payne, was President of the bargaining unit at DYRS during this time period.

4. Halina Goodwin became Ms. Viera's supervisor in approximately May 2009. Difficulties developed in the relationship between Ms. Viera and Ms. Goodwin. In November 2009, DCNA and DYRS officials met to see if those problems could be resolved, but their efforts were unsuccessful.

5. In May 2009, Agency informed Ms. Viera that her performance was excellent. This evaluation was completed by Ms. Viera's former supervisor.

6. In approximately November 2009, Ms. Goodwin rated Ms. Viera's performance as "marginal."

7. In April 2010, Ms. Goodwin informed Ms. Viera that she was going to issue a Letter of Counseling to Ms. Viera based on tardiness. Ms. Viera denied she had been tardy. A meeting was initially scheduled on April 27, 2010 during which Ms. Goodwin intended to present the Letter to Ms. Viera. However, Ms. Viera stated she wanted to have a union representative present. The meeting was rescheduled for April 30, 2010 to allow her to obtain representation. The meeting did not take place on April 30, 2010.

8. On May 12, 2010, Catherine Ohler, Human Resources Specialist, and Ms. Goodwin directed Ms. Viera to attend a meeting. At the meeting, Ms. Goodwin gave her the Letter of Counseling.

(Report at 2-3).

DCNA argued that "DYRS committed an unfair labor practice in this matter by holding a meeting with Ms. Viera on May 12, 2010 despite her request that no meeting be held unless a union representative was present." (Report at 4). DCNA asserted that Ms. Viera was entitled to a union representative, because Ms. Viera had "formalized written comments about harassing and intimidating behavior towards her," because Ms. Viera's performance rating was downgraded, and because Respondent engaged in discussion about the alleged misconduct. *Id.*

DYRS argued that "Ms. Viera was not entitled to union representation because the May 12 meeting was not disciplinary, but rather was limited to giving her the Letter of Counseling, and instructing her about her tardiness." *Id.* DYRS asserted that "it 'clearly and overtly told [Ms. Viera] that this was not a corrective or adverse action meeting.'" *Id.*

Ms. Ohler testified "that a Letter of Counseling is neither an adverse action nor a corrective action, but rather is 'informational' or 'counseling,'" and that corrective action ranges from a reprimand to less than a ten-day suspension, and that an adverse action is a ten-day suspension to removal. *Id.* Ms. Ohler stated the meeting was delayed for three days to allow Ms. Viera to have a union representative as a "courtesy." (Report at 5).

The Hearing Examiner found that "[t]he evidence did not establish that Ms. Goodwin attempted to elicit information from Ms. Viera" at the meeting. (Report at 7). The Hearing Examiner found that "DCNA did not meet its burden of proof that the May 12 meeting was disciplinary or investigatory." *Id.* The Hearing Examiner found that "[t]he evidence did not establish that any expectation that the meeting was disciplinary or investigatory in nature was not reasonable." *Id.* The Hearing Examiner further found that "DCNA did not meet its burden of proof that it was reasonable for Ms. Viera to expect the meeting was disciplinary or investigatory." *Id.*

The Hearing Examiner concluded that DCNA did not meet its burden of proof, and recommended the Board dismiss the Complaint. (Report at 8).

III. Discussion

No Exceptions were filed by the Parties. "Whether exceptions have been filed or not, the Board will adopt the hearing examiner's recommendation if it finds, upon full review of the record, that the hearing examiner's 'analysis, reasoning and conclusions' are 'rational and persuasive.'" *Council of School Officers, Local 4, American Federation of School Administrators v. D.C. Public Schools*, 59 D.C. Reg. 6138, Slip Op. No. 1016 at p. 6, PERB Case No. 09-U-08 (2010) (quoting *D.C. Nurses Association and D.C. Department of Human Services*, 32 D.C. Reg. 3355, Slip Op. No. 112, PERB Case No. 84-U-08 (1985)).

The Board determines whether the Hearing Examiner's Report and Recommendation is "reasonable, supported by the record, and consistent with Board precedent." *American Federation of Government Employees, Local 1403 v. District of Columbia Office of the Attorney General*, 59 D.C. Reg. 3511, Slip Op. No. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012).

Pursuant to Board Rule 520.11, "[t]he party asserting a violation of the CMPA, shall have the burden of proving the allegations of the complaint by a preponderance of the evidence."

In reaching her conclusions, the Hearing Examiner applied *Weingarten* and PERB's subsequent interpretative rulings. (Report at 6) (citing *D.C. Nurses Assoc. v. D.C. Health and Hospitals Public Benefit Corp.*, 45 D.C. Reg. 6736, Slip Op. No. 558, PERB Case Nos. 95-U-03, 97-U-16 and 97-U-28 (1998)).

Like the National Labor Relations Act, the CMPA at D.C. Code § 1-617.04(a)(1) 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. D.C. Nurses Assoc. v. D.C. Health and Hospitals Public Benefit Corp.*, 45 D.C. Reg. 6736, Slip Op. No. 558, PERB Case Nos. 95-U-03, 97-U-16 and 97-U-28 (1998) (recognizing the right to union representation during a disciplinary interview); *see also D.C. Nurses Assoc. and D.C. Dept. of Youth & Rehabilitation Serv.*, 59 D.C. Reg. 12638, Slip Op. No. 1304, PERB Case No. 10-U-35 (2012). The Board has stated: "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." *Fraternal Order of Police/Metropolitan Police Dep't v. D.C Metropolitan Police Dep't*, 60 D.C. Reg. 9181, Slip Op. No. 1378, PERB Case No. 10-U-21 (2013).

The Hearing Examiner assessed the credibility of the witnesses and the probative value of the evidence. The Hearing Examiner found that Ms. Viera's May 12, 2010, meeting was not disciplinary or investigatory in nature. (Report at 7). Additionally, the Hearing Examiner found that the meeting was only to present Ms. Viera with a Letter of Counseling, and that Ms. Viera did not have a reasonable expectation that the meeting was disciplinary or investigatory." *Id.*

The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Tracy Hatton v. FOP/DOC Labor Committee*, 47 D.C. Reg. 769, Slip Op No. 451 at p. 4, PERB Case No. 95-U-02 (1995). The Board will affirm a hearing examiner's findings if they are reasonable and supported by the record. *See American Federation of Government Employees, Local 872 v. D.C. Water and Sewer Authority*, Slip Op. No. 702, PERB Case No. 00-U-12 (2003). The Board finds the Hearing Examiner's findings and conclusions are reasonable, based on the record, and consistent with PERB case law.

IV. Conclusion

Pursuant to D.C. Code § 1-605.02(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions, and recommendations of the Hearing Examiner and the entire record. The Hearing Examiner's found that DCNA did not meet its burden of proof that the May 12, 2010, meeting was not disciplinary or investigatory, based on testimony and the evidence presented, and she further found that the meeting was held only to present Ms. Viera with a Letter of Counseling and not to discuss discipline. (Report at 6-7). In addition, the Hearing Examiner

found based on the record before her, that Ms. Viera knew in advance that the nature of the meeting was to be presented with the Letter of Counseling, as determined by the Hearing Examiner through Ms. Viera's testimony, and that Ms. Viera did not have a reasonable expectation that the meeting would result in discipline. *Id.* (citing Tr. 36). The Board has reviewed the record relied upon by the Hearing Examiner and finds that the Hearing Examiner's findings are reasonable.

The Hearing Examiner recommended that the Complaint be dismissed. In particular, as stated above, the Hearing Examiner found that the Complainant did not meet its burden of proof by a preponderance of the evidence that the May 12, 2010, meeting was disciplinary or investigatory, and further found that Ms. Viera did not have a reasonable expectation that discipline would result from the meeting. *Id.* The Board has held that a finding of a *Weingarten* violation requires that the "employee reasonably believes the investigation will result in disciplinary action." *Fraternal Order of Police/Metropolitan Police Dep't v. D.C Metropolitan Police Dep't*, Slip Op. No. 1378, PERB Case No. 10-U-21 (2013). The Board finds that the Hearing Examiner's conclusions are consisted with Board precedent. *See Fraternal Order of Police/Metropolitan Police Dep't v. D.C. Metropolitan Police Dep't*, 60 D.C. Reg. 9181, Slip Op. No. 1378, PERB Case No. 10-U-21 (2013).

A review of the record reveals that the Hearing Examiner's findings and conclusions are supported by evidence, are reasonable, and are consistent with Board precedent. Accordingly, pursuant to Rule 520.14, we adopt the Hearing Examiner's findings and recommendations and affirm the Hearing Examiner's recommended remedies. Therefore, the Board dismisses the Complaint with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint is dismissed with prejudice.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEES RELATIONS BOARD

Washington, D.C.

October 31, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-U-35 was transmitted to the following Parties on this the 27th day of January, 2014:

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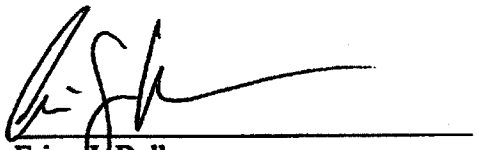

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