

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)	
)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee)	
Complainant,)	PERB Case No. 06-U-34
v.)	Opinion No. 1399
)	
District of Columbia Metropolitan Police Department)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case

On April 27, 2006, the Fraternal Order of Police/Metropolitan Police Department Labor Committee (“FOP” or “Union”) filed an Unfair Labor Practice Complaint (“Complaint”) and a Request for Preliminary Relief,¹ alleging that the Metropolitan Police Department (“MPD” or “Agency”)² violated D.C. Code § 1-617.04(a)(1) of the Comprehensive Merit Personnel Act (“CMPA”) by refusing to permit a union representative to speak at a Commander’s Resolution Conference. On May 12, 2006, MPD filed a Response to Unfair Labor Practice Complaint and

¹ FOP’s Request for Preliminary Relief is rendered moot by issuance of the Board’s Decision and Order.

² The Acting Executive Director has removed the name of an individual respondent from the caption, consistent with the Board’s precedent requiring individual respondents named in their official capacities to be removed from the complaint for the reason that suits against District officials in their official capacities should be treated as suits against the District. See *Fraternal Order of Police/Metropolitan Police Dep’t Labor Comm. v. D.C. Metropolitan Police Dep’t*, 59 D.C. Reg. 6579, Slip Op. No. 1118 at p. 4-5, PERB Case No. 08-U-19 (2011). The D.C. Superior Court upheld the Board’s dismissal of such respondents in *Fraternal Order of Police/Metropolitan Police Dep’t Labor Comm. v. D.C. Public Employee Relations Board*, Civ. Case No. 2011 CA 007396 P(MPA) (D.C. Super. Ct. Jan 9, 2013). The Union filed the instant Complaint before those cases were decided, but the Board puts the Union on notice that henceforth it must not name individual respondents in their official capacities in actions it brings before the Board.

Request for Preliminary Relief and Prayer for Final Relief (“Answer”).

On September 30, 2008, a hearing was held before Hearing Examiner Sean J. Rodgers (“Hearing Examiner”). On February 6, 2009, the Hearing Examiner issued a Report and Recommendation (“Report”). Prior to issuance of the Report, the Parties filed post-hearing briefs with the Hearing Examiner. (Report at 2). The Board received no Exceptions to the Hearing Examiner’s Report from the Parties. The Hearing Examiner’s Report and Recommendation is before the Board for disposition.

II. Hearing Examiner’s Report and Recommendation

A. Hearing Examiner’s relevant factual findings

On April 23, 2005, Detective Metivier and Sergeant Hoop (collectively the “Officers”) were investigating a robbery. (Report at 2). In the course of their investigation, the Officers followed up on a lead at a Washington, D.C. area apartment building. *Id.* “Outside the building, the [O]fficers told the building manager that they wanted to enter the building.” *Id.* The building manager indicated to the Officers that he believed that he was not authorized to allow the Officers entry into the building. *Id.* As the Officers entered the building, they engaged in a conversation with the building manager. *Id.* When the Officers did not find the suspect, they left the building. *Id.* A second conversation occurred between the Officers and the building manager. *Id.*

Subsequently, arising from the two conversations with the Officers, the building manager filed a complaint with the District of Columbia Office Police Complaint (“OPC”), “alleging that the [O]fficers had ‘harassed him and used language or engaged in conduct toward him that was insulting, demeaning, or humiliating.’” (Report at 3). On December 23, 2005, OPC conducted an evidentiary hearing. *Id.* On February 9, 2006, “OPC sustained the charges of harassment and use of profane language against Metivier, and sustained the charge of harassment against Hoop.” *Id.*

Pursuant to the Parties’ collective bargaining agreement (“CBA”), on March 31, 2006, the Officers appeared in a Commander’s Resolution Conference (“CRC”) before Inspector Deirdre Porter (“Inspector Porter”), Director, Disciplinary Review Office (DDRO). (Report at 4-5). At the CRC, Kristopher Baumann, then FOP 7D Chief Shop Steward, appeared as the Officers’ representative. (Report at 3). The events at the CRC formed the basis of FOP’s Complaint, which are discussed below. *Id.*

B. The Hearing Examiner’s findings and conclusions

1. Application of *Weingarten* rights to the CRC

FOP contended that *N.L.R.B. v. Weingarten*, 420 U.S. 251 (1975) (*Weingarten*) and PERB precedent protected the Officers’ right to a union representative during an “investigatory/disciplinary interview.” (Report at 11). MPD argued that *Weingarten* rights are inapplicable to CRC’s and that the investigation into the Officers had concluded prior to the

CRC. (Report at 13). MPD claimed:

OPC conducted the investigative interviews of Hoop and Metivier and held a hearing into the matter. OPC issued findings of fact and recommendations sustaining the allegations and recommending that discipline be imposed on Metivier and Hoop by MPD. By the time the matter reached Porter, it was a forgone conclusion that OPC's disciplinary recommendation was going to be meted out.

Id. MPD contended that the CRC is a creation of the CBA, and that three conditions exist before the CRC is held: "the investigation must be complete; a determination that discipline will be imposed has been made; and the discipline to be imposed will [be] a 10-day suspension or less." *Id.* MPD averred that "nothing said in [a Commander's Resolution] Conference can alter the investigation or the proposed penalty," and consequently, the CRC is more "settlement negotiations" than an investigatory interview. *Id.* MPD concluded that *Weingarten* rights only attach to investigatory interviews, and therefore, would not attach to the CRC. *Id.*

The Hearing Examiner in his determination of whether *Weingarten* rights attached to the CRC examined the language of the CBA and PERB precedent. (Report at 17). Based on the record before him, the Hearing Examiner found that the CRC is "an employer-investigatory interview[,] which an employee would reasonably believe might result in disciplinary action." (Report at 18). The Hearing Examiner concluded that "an employee's demand for union representation at the [Commander's Resolution] Conference is protected concerted activity under the CMPA." *Id.* Therefore, the Hearing Examiner determined that MPD's assertion that *Weingarten* was inapplicable to the CRC was without merit. *Id.*

2. Violations of *Weingarten* rights and remedies

As *Weingarten* rights attached to the CRC, the Hearing Examiner found that the FOP representative Kristopher Baumann was entitled to "all the rights established by the subsequent interpretive precedents of *Weingarten*." (Report at 15). "Specifically in this case, Baumann was entitled to 'to take an active role in assisting the employee to present facts.'" *Id.* (quoting *NLRB v. Texaco, Inc.*, 659 F.2d 124, 126 (9th Cir. 1981)). Based on witness testimony and the record, the Hearing Examiner determined that the Union proved its burden by a preponderance of the evidence that MPD had committed three unfair labor practices in violation of D.C. Code § 1-617.04(a)(1). (Report at 15).

The first violation that the Hearing Examiner found was that "[Inspector] Porter did not allow Baumann, who was acting as the FOP's and the [O]fficers' representative, to speak on an issue he reasonably believed related to the [O]fficers' due process rights." (Report at 19). "Since she [Inspector Porter] prevented the FOP representative from speaking at a disciplinary interview from the very beginning of the CRC in front of bargaining unit employees, her actions constituted an attempt to undermine the representational status of the certified exclusive representative and a violation of D.C. Code § 1-617.04(a)(1)." *Id.*

The second violation that the Hearing Examiner found occurred when Inspector Porter told Kristopher Baumann that he could not speak at the CRC. (Report at 20). The Hearing Examiner determined that Inspector Porter's "actions to silence Baumann constitute[d] another violation of the employees' *Weingarten* rights and another attempt to undermine the representational status of the FOP, and another violation of D.C. Code § 1-617.04(a)(1)." *Id.*

The Hearing Examiner found a third violation when "[Inspector] Porter refused to allow [Kristopher] Baumann to meet and confer with Metivier and Hoop after she told him he could not speak." *Id.* The Hearing Examiner found that MPD's argument that "[Inspector] Porter acted consistent with her obligations under *Weingarten* is without merit." *Id.* In light of the "unique circumstances" in which Inspector Porter interrupted and silenced Baumann in violation of D.C. Code § 1-617.04(a)(1), the Hearing Examiner decided that "[Inspector] Porter's [subsequent] denial of Baumann's request to meet with Metivier and Hoops was a further violation of their *Weingarten* rights and the CMPA." *Id.*

Based on the record and witness testimony, the Hearing Examiner found that "MPD violated Metivier and Hoop's *Weingarten* rights at the March 31, 2006, CRC and her conduct also constituted an effort to undermine the representational status of the FOP in violation of D.C. Code § 1-617.04(a)(1)." (Report at 21).

The Hearing Examiner recommended that MPD should be ordered to:

1. Cease and desist from interfering, restraining, or coercing the FOP in the exercise of its rights guaranteed by § 1-617, *et seq.* by denying bargaining unit employees *Weingarten* representation rights, interrupting and silencing their FOP representative and denying the employee a private conversation with their union representative at Commander's Resolution Conferences;
2. Post for 30 days a notice, where notices to employees are ordinarily posted in the work place, stating that the MPD has violated the provisions of D.C. Code § 1-617.04(a)(1) by: denying bargaining unit employees *Weingarten* rights; interrupting and silencing their FOP representative; and denying the employees a private conversation with their union representative at the March 31, 2006, Commander's Resolution Conference of Detective Metivier and Sergeant Hoop;
3. Any other relief that PERB deems appropriate.

(Report at 21).

III. Discussion

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). Therefore, the Board will adopt a Hearing Examiner's recommendation if it finds that, upon review of the record, the Hearing Examiner's analysis, reasoning, and conclusions are rational, reasonable, persuasive, and supported by the record. *See 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); *D.C. Nurses Association and D.C. Health & Hospitals Public Benefit Corporation*, 46 D.C. Reg. 6271, Slip Op. No. 583, PERB Case No. 98-U-02 (1999).

In reaching his conclusions, the Hearing Examiner applied *Weingarten* and PERB's subsequent interpretative rulings. (Report at 17) (citing *D.C. Nurses Assoc. v. D.C. Health and Hospitals Public Benefit Corp.*, 45 D.C. Reg., Slip Op. No. 558, PERB Case No. 97-U-16 (1998); *Georgia Mae Green v. D.C. Dept. of Corrections*, 37 D.C. Reg. 8086, Slip Op. No. 257, PERB Case No. 89-U-10 (1990)).

Like the National Labor Relations Act, 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*. *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).

In the present case, the Hearing Examiner found that Inspector Porter denied FOP's representative from participating in the Officers' disciplinary interview, and silenced the FOP's representative during the Officers' disciplinary interview. (Report at 19-20). The Hearing Examiner concluded that MPD denied the Officers their *Weingarten* rights, by preventing the FOP representative from taking an active role in the disciplinary interview. *Id.* The Board has 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." *D.C. Nurses Assoc. and D.C. Dept. of Youth & Rehabilitation Serv.*, 59 D.C. Reg. 12638, Slip Op. No. 1304 at p. 4, PERB Case No. 10-U-35 (2012) (quoting *Headquarters, National Aeronautics and Space Administration*, 50 FLRA 601, 607 (1995)). The Hearing Examiner's determination that MPD committed unfair labor practices when the FOP's representative was prevented from taking an active role by Inspector Porter's actions is reasonable.

For the third violation, the Hearing Examiner found another unfair labor practice when the FOP representative was denied the ability to confer with the Officers after Inspector Porter had interrupted and silenced the FOP representative, during the disciplinary interview. (Report

at 20). 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." *D. C. Nurses Assoc.*, Slip Op. No. 1304 at p. 4 (quoting *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)). Consequently, the Hearing Examiner's determination that MPD committed an unfair labor practice by denying the Officers an opportunity to confer with their FOP representative during the disciplinary interview is reasonable.

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. 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.

ORDER

IT IS HEREBY ORDERED THAT:

1. MPD shall cease and desist from interfering, restraining, or coercing the FOP in the exercise of its rights guaranteed by § 1-617, *et seq.* by denying bargaining unit employees *Weingarten* representation rights, interrupting and silencing their FOP representative, and denying the employee a private conversation with their union representative at Commander's Resolution Conferences.
2. MPD shall conspicuously post, within ten (10) days from the issuance of this Decision and Order, the attached Notice where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.
3. MPD shall notify the Public Employees Relations Board in writing within fourteen (14) days from the issuance of this Decision and Order that the Notice has been posted accordingly.
4. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

July 1, 2013

CERTIFICATE OF SERVICE

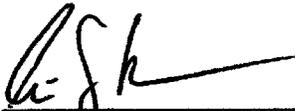
This is to certify that the attached Decision and Order for PERB Case No. 06-U-34 was transmitted to the following parties via U.S. Mail on this the 2nd day of July, 2013.

Mark Viehmeyer
Metropolitan Police Department
300 Indiana Ave., N.W., Suite 4126
Washington, D.C. 20001

U.S. Mail

Marc L. Wilhite
Pressler & Senftle, P.C.
1432 K Street, N.W.
Twelfth Floor
Washington, D.C. 20005

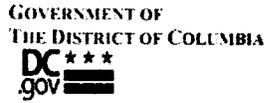
U.S. Mail



Erica J. Balkum
Attorney-Advisor
Public Employee Relations Board
1100 4th Street, S.W.
Suite E630
Washington, D.C. 20024
Telephone: (202) 727-1822
Facsimile: (202) 727-9116



Public
Employee
Relations
Board



1100 4th Street S.W.
Suite E630
Washington, D.C. 20024
Business: (202) 727-1822
Fax: (202) 727-9116
Email: perb@dc.gov

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT (“MPD”), THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1399, PERB CASE NO. 06-U-34.

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered MPD to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) by the actions and conduct set forth in Slip Opinion No. 1399.

WE WILL cease and desist from interfering, restraining, or coercing employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act (“CMPA”).

WE WILL NOT, in any like or related manner, interfere, restrain or coerce employees in their exercise of rights guaranteed by the Labor-Management subchapter of the CMPA.

D.C. Metropolitan Police Department

Date: _____ By: _____

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 1100 4th Street, SW, Suite E630; Washington, D.C. 20024. Phone: (202) 727-1822.

BY NOTICE OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

July 1, 2013