DC 37, Local 1549, 3 OCB2d 2 (BCB 2010)

(IP) (Docket No. BCB-2717-08).

Summary of Decision*:** The Union claimed that the City and the NYPD violated a Union member's *Weingarten* rights and retaliated against the member in violation of NYCCBL § 12-306(a)(1) and (3) when supervisors questioned the member about whether she had followed proper procedures when requesting leave to attend a Union meeting, continued questioning the member after the member requested Union representation, confiscated the member's identification card when the member refused to continue without Union representation, and suspended the member. The City argued that the Union member did not have a reasonable fear of discipline and, therefore, no right to Union representation at the meeting. Further, the NYPD's actions were not motivated by any Union activity but by the member's refusal to follow orders and her discourtesy, including slamming a door on a lieutenant. The Board found that the NYPD did not retaliate against the Union member but that two of the five charges levied against the Union member stemmed from her reasonable invocation of a request for Union representation and ordered those two charges expunged. Accordingly, the petition is granted, in part, and denied, in part. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
and its affiliate LOCAL 1549,

Petitioners,

-and-

THE CITY OF NEW YORK and
THE NEW YORK CITY POLICE DEPARTMENT

Respondents.

DECISION AND ORDER

On August 26, 2008, District Council 37, AFSCME, AFL-CIO and its affiliate, Local 1549,

(collectively, "Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Police Department ("NYPD"). The Union alleges that the City and the NYPD violated a Union member's *Weingarten* rights and retaliated against the member in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (3) when NYPD officers questioned the member about whether she had followed proper procedures when requesting leave to attend a Union meeting, continued questioning the member after the member requested Union representation, confiscated the member's identification card when the member refused to continue without Union representation, and suspended the member. The City argues that the Union member did not have a reasonable fear of discipline and, therefore, no right to Union representation and that the NYPD's actions were not motivated by any Union activity but by the Union member's refusal to follow orders and her discourtesy, including slamming a door on a lieutenant. The Board finds that the NYPD did not retaliate against the Union member but that it violated the Union member's *Weingarten* rights because the member had a reasonable belief that discipline could result, her request for Union representation was denied, and the member was disciplined, in part, for her attempts to secure Union representation. The Board finds that two of the five charges levied against the Union member stem from the violation of the member's *Weingarten* rights and order that those two charges be expunged. Accordingly, the petition is granted, in part, and denied, in part.

BACKGROUND

The Trial Examiner held two days of hearing and found that the totality of the record established the relevant background facts to be as follows.

Brief Overview

Lauretta Humphrey is a Police Administrative Aide ("PAA") assigned to the Payroll Office of the 102nd Precinct. On May 9, 2008, Humphrey was placed on a 30-day pre-hearing suspension without pay for, earlier that day, refusing to follow the orders of, and discourtesy to, Lieutenant Christine Barone, the Operations Coordinator for the 102nd Precinct. As Operations Coordinator, Lieutenant Barone was responsible for monitoring leaves of absence and, on May 9, inquired into whether Humphrey had followed proper procedures in securing time off to attend a Union meeting on May 8. On April 30, 2008, Humphrey, who had been a shop steward and remained active in the Union, submitted an Assignment Change Request form and a Leave of Absence Report form to secure time off in order to attend a lunchtime Union meeting on May 8. On the Assignment Change Request form, Humphrey described the reason for the request simply as "Union Meeting." (City Ex. 4). However, on the Leave of Absence Report form, Humphrey described the reason for the request as "Union Meeting MEO." (City Ex. 3). Mayoral Executive Order No 75 ("EO 75") sets the guidelines for granting paid release time for attending to union business and is administered by NYPD's Office of Labor Relations ("NYPD OLR").[1] Humphrey did not submit any forms to NYPD OLR. Rather, she submitted these forms to her supervisors, who approved Humphrey taking "lost time," that is, unpaid leave, to attend the Union meeting and not paid release time. Humphrey's work schedule for May 8 was adjusted to minimize the amount of unpaid time she would have to take to attend the meeting.

[1] EO 75 is entitled "Time Spent on the Conduct of Labor Relations Between the City and Its Employees and on Union Activity." (City Ex. 1). The Union states that MEO, as used by Humphrey, stood for EO 75. (Union Brief at 2).

On May 9, 2008, Lieutenant Barone inquired into Humphrey's use of the term MEO on her Leave of Absence Report form. The first conversation on May 9 with Humphrey occurred in the Payroll Office in front of a co-worker. For the second conversation, Lieutenant Barone summoned Humphrey into her office where Lieutenant Jason Huerta, the Integrity Control Officer for the 102nd Precinct, was waiting.[2] As the Integrity Control Officer, Lieutenant Huerta's responsibilities include "oversee[ing] all members of the command [] to make sure that they are all abiding by the rules and regulations of the [NYPD,] to conduct internal investigations and to basically maintain discipline in the command." (Tr. 142-143). Humphrey requested Union representation and refused to answer Lieutenant Barone's questions, remaining silent. Lieutenant Barone then demanded Humphrey's identification card, which Humphrey gave her. Humphrey then returned to the Payroll Office.

The lieutenants conferred with the commanding officer of the 102nd Precinct, Captain Charles McEvoy, who determined that Humphrey should receive a command discipline for discourtesy.[3] Lieutenant Barone then went to the Payroll Office and instructed Humphrey to come into her office. Humphrey was on the phone with her Union representative, informed Lieutenant Barone that she would have to wait until she finished her call with the Union representative, and, allegedly, slammed the door on Lieutenant Barone.

Lieutenant Barone returned to her office and, after a few minutes, during which Humphrey failed to appear at her office, contacted Captain McEvoy, who determined that Humphrey should be

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[2] Prior to the issuance of this decision, Lieutenant Huerta was promoted to Captain. As his title at all times relevant to the instant matter was Lieutenant, he is referred to as such herein.

[3] Prior to the issuance of this decision, Captain McEvoy was promoted to Detective Inspector. As his title at all times relevant to the instant matter was Captain, he is referred to as such herein.

suspended. Later that day, after receiving approval for his suspension request, Captain McEvoy, with Lieutenant Huerta, suspended Humphrey. Three Charges and Specifications regarding the May 9, 2008, incident were issued to Humphrey on May 15, 2008. On June 17, 2008, the Charges and Specifications were amended to include two new specifications alleging that Humphrey was discourteous to Lieutenant Barone on May 2, 2008.

Events of May 1 and 2, 2008

Only Humphrey testified as to the events of May 1 and 2; Lieutenant Barone was not asked by either party about them. On Thursday, May 1,the day after Humphrey requested leave, Humphrey complained to her immediate supervisor about photos a police officer temporarily posted in the Payroll Office had displayed of his girlfriend that Humphrey found to be inappropriate. Humphrey's immediate supervisor told her to bring the matter up with the police officer who posted the pictures. Instead, Humphrey complained to Lieutenant Huerta, the only other supervisor on duty at the time, who instructed the owner of the photographs to remove them.[4]

On Friday, May 2, the officer who had posted the photographs confronted Humphrey about her complaint to Lieutenant Huerta, resulting in "a heated argument," during which Lieutenant Barone arrived. According to Humphrey, Lieutenant Barone told her she "was a trouble maker" and that "[i]f [she] didn't like it here, [she] could get out." (Tr. 15). Further, Lieutenant Barone "started yelling and screaming, saying she was going to do all these terrible things to [Humphrey]." (*Id.*).[5]

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[4] Lieutenant Huerta was not asked by either party about these events but noted that, as the Integrity Control Officer, he had "frequent contact with the civilian staff. . . . [who] would often come to [him] with issues that need resolving." (Tr. 143).

[5] Specifically, Humphrey testified that Lieutenant Barone said: "I am going to throw you in the 124 room" and "I am going to psych you." (Tr. 15). Humphrey explained that the "124 room" was the "complaint room. . . . the bottom of the barrel for PAAs" and that "to pysch you" meant that

Humphrey testified that she responded: "If the civilian population in the 102nd Precinct was treated with respect, I would not have a problem here at all." (Tr. 45).[6]

Captain McEvoy referred to the events of May 2 in his May 9 report regarding his suspension of Humphrey: "It should be noted that [] Humphrey was insubordinate with Lt. Barone on Friday, May 2, 2008 and [] Humphrey was issued a command discipline for that violation." (Union Ex. 1, ¶ 9). However, there is no record of Humphrey actually being issued a command discipline for the May 2 incident.[7]

Events of May 9, 2008

Sometime between 1:45 p.m. and 2:30 p.m. on May 9, Lieutenant Barone went to the Payroll Office and, in front of a co-worker, PAA Kesia Arvin, asked Humphrey if she was excused for her leave the day before. Humphrey responded that she believed that she was but would look into it. Humphrey recalls stating that she informed Lieutenant Barone that she "was MEO . . . to go to the Union meeting." (Tr. 20).

Lieutenant Barone testified that she was unfamiliar with the term "MEO" and that, after she left Humphrey, she contacted the supervisor who had approved Humphrey's leave, who explained that Humphrey had filed the paperwork for, and received, unpaid time off to attend the May 8 Union

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"she was going to send me to some psychiatric evaluation." (Tr. 16; 46). Humphrey was not transferred or subject to a psychiatric evaluation by Lieutenant Barone.

[6] Immediately following Humphrey's confrontation with Lieutenant Barone, Humphrey called her Union representative and the Office of Equal Employment Opportunity because she "thought that [she] was being retaliated against by the Lieutenant [Barone]." (Tr. 18).

[7] Captain McEvoy testified that the mention of the command discipline in the memorandum was based solely on Lieutenant Barone's representation to him on May 9 and that he had not, at the time he drafted the memorandum, seen any command discipline.

meeting, not paid release time under EO 75. The supervisor further informed Lieutenant Barone that she had changed Humphrey's tour on May 8 to minimize the amount of unpaid time Humphrey would have to take. Lieutenant Barone also contacted NYPD OLR, which confirmed that there was no record of Humphrey being approved for release time pursuant to EO 75.

Lieutenant Huerta testified that Humphrey had also informed him that she was "taking MEO 75 leave for a Union meeting" and that, like Lieutenant Barone, he was unfamiliar with the term MEO, so he too contacted the supervisor who approved Humphrey's leave and was similarly informed that Humphrey's leave was unpaid time off, not paid release time under EO 75. (Tr. 144). Lieutenant Huerta then went to Lieutenant Barone's office and informed her of his findings .

Lieutenant Huerta testified that he "[t]hought it kind of odd that [] Humphrey would go to the Operations Coordinator and [him] and announce she was taking a certain type of leave and not take it."; for him "[i]t was a matter of curiosity." (Tr. 146). Lieutenant Barone suggested that they ask Humphrey why she had told them she was taking one kind of leave–"MEO"–when she was actually taking another–unpaid time. Lieutenant Barone wanted to make sure "Humphrey knew that the time was being taken out of her own time." (Tr. 165). Lieutenant Barone explained that she "had never dealt with this before. I hadn't even heard about a MEO 75 until that day. I only took over the position in February. I just wanted to clear it up." (Tr. 167). However, Lieutenant Barone admitted that she never explained to Humphrey her reason for calling Humphrey into her office.[8]

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[8] On cross, Lieutenant Barone was asked why she chose to question Humphrey about why she requested MEO leave, as opposed to simply informing Humphrey that the time she took off to attend the Union meeting was lost time taken as unpaid leave and not paid release time under EO 75. Lieutenant Barone responded that she "wanted to clear up why she would think she was approved under MEO 75, and why she would tell me she was approved under MEO 75, and why she would put it on her [Leave of Absence Request form]." (Tr. 177)

Approximately 20 minutes after the first conversation, with Lieutenant Huerta still in her office, Lieutenant Barone called Humphrey into her office. It is undisputed that Lieutenant Barone asked Humphrey, in sum and substance, "[w]hy did you tell me you were approved under MEO 75" when she had taken unpaid time. (Tr. 165). It is also undisputed that Humphrey did not answer the question, but instead requested Union representation. It is further undisputed that both lieutenants told Humphrey that she was not entitled to Union representation, that Lieutenant Barone continued to question Humphrey, and that, other than requesting Union representation, Humphrey remained silent and did not respond at all Lieutenant Barone's questions.

The manner in which the lieutenants informed Humphrey that she did not have a right to Union representation is in dispute. Humphrey testified that Lieutenant Barone told her that "[y]ou don't have any rights. Isn't that right, Lieutenant Huerta"; to which Lieutenant Huerta stated "[t]hat is absolutely right." (Tr. 24-25). Arvin, who was across the hallway in the Payroll Office, corroborates Humphrey's recollection, testifying that she heard Lieutenant Barone state"[y]ou don't have any rights. [] isn't that right, Lou?" and that she "'heard a male say, 'That is correct.'" (Tr. 84).

Lieutenant Barone testified that she informed Humphrey that she did not need a Union representative because she was "not in trouble." (Tr. 165). Lieutenant Huerta testified that he told Humphrey that she was "not entitled to Union representation" because "[i]t is just a question." (Tr. 149). Lieutenant Huerta explained the basis of his opinion that Humphrey was not entitled to union representation:

> The only time you are entitled to Union representation is during an interrogation, and this wasn't an interrogation. It was just a question. [] I believe that everyone in the department knows that interrogations, specifically described by our patrol guide, there is usually a case folder and there is an attorney. As an [Integrity Control Officer], I

> ask dozen of people dozens of questions throughout the day. It definitely was not an interrogation.

(Tr. 149) (intervening question omitted).

It is undisputed that Lieutenant Barone continued to question Humphrey. The record is not clear how many times Humphrey responded to Lieutenant Barone's questions by requesting Union representation, or how many questions she refused to answer (*i.e.*, remained silent). Lieutenant Barone testified that she explicitly asked Humphrey "[a]re you refusing to answer my question?" Humphrey did not respond. Lieutenant Huerta described Humphrey's demeanor: "Humphrey just kind of looked up at the ceiling and smiled." (Tr. 148).

Humphrey explained that she remained silent because she "thought [that she] had answered [Lieutenant Barone's] questions. I did not know how to answer Lieutenant Barone. I just didn't know how to answer her anymore." (Tr. 32-33). It is undisputed that, in response to Humphrey's silence, Lieutenant Barone demanded Humphrey's identification card. Humphrey testified that she knew that "when they confiscate your ID card, they are looking to suspend you." (Tr. 25). Humphrey retrieved her identification card from the Payroll Office, gave it to Lieutenant Barone, and returned to the Payroll Office, ending the second exchange of May 9.

The parties disagree as to the tone of the above questioning, with Humphrey testifying that Lieutenant Barone "was hostile to me. She had . . . approached me in an intimidating way from the beginning." (Tr. 53). Arvin, who heard the meeting, corroborates Humphrey's characterization, describing Lieutenant Barone's tone as "angry." (Tr. 82). Lieutenant Huerta testified that he did not believe the questioning was hostile, that "[i]t only turned out that way, because [Humphrey] refused to answer the question, which I had never seen before." (Tr. 156).

After receiving Humphrey's identification card, the lieutenants went to Captain McEvoy to inform him of Humphrey's behavior. Lieutenant Huerta explained that, while they knew the refusal "to obey a lawful order [] is cause for must suspend according to the control guide," they went to Captain McEvoy because they were unsure if Humphrey's refusal to answer necessitated formal discipline. (Tr. 152-153).[9] The lieutenants did not inform Captain McEvoy that Humphrey had requested Union representation. Captain McEvoy determined that Humphrey's behavior did not warrant formal discipline and instructed Lieutenant Barone to instead issue Humphrey a command discipline for discourtesy to a superior. The NYPD does not consider a command discipline to constitute formal discipline. Captain McEvoy also instructed Lieutenant Barone to return Humphrey's identification card.

Humphrey testified that, after handing over her identification card and returning to the Payroll Office, she informed Arvin that she believed that she would be suspended and then called the Union. It is undisputed that, while Humphrey was on the phone, Lieutenant Barone opened the door to the Payroll Office, and, from the hallway, requested that Humphrey go to her office. Humphrey testified that she responded: "I will be right in. I am on the phone with the Union." (Tr. 26). Arvin testified that Humphrey told Lieutenant Barone she "will come after I get off the phone with my union rep."

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[9] Lieutenant Huerta testified:

> If someone refuses to obey a lawful order, that is cause for must suspend according to the control guide. We directed [Humphrey] to answer a question. We didn't know if that qualified [as] one of those situations where she had to be suspended, because she is refusing to obey a lawful order.

(Tr. 152-153).

(Tr. 86).

According to Lieutenant Barone, she asked Humphrey into her office because she did not want to issue Humphrey the command discipline "in a hallway . . . where anybody could come by. . . . [as] it was a private matter." (Tr. 171). Lieutenant Barone testified that, in response to her request to see Humphrey in her office, Humphrey "slammed the door." (Tr. 169). Lieutenant Huerta testified that, after Lieutenant Barone told Humphrey to come to her office, he witnessed the Payroll Office door slam shut: "Around that time the door slammed shut. I don't know if we were facing the door or just turning around, but it slammed shut. We were kind of surprised about that." (Tr. 150-151).

Humphrey emphatically denies slamming the door on Lieutenant Barone. Humphrey testified that Lieutenant Barone and she "both closed the door at the same time actually, because her hand was on the handle on the outside of the door, and my hand was on the handle on the inside of the door." (Tr. 28). Arvin testified that she witnessed Humphrey close the door and that Humphrey did not slam the door.

The parties disagree whether Humphrey went to Lieutenant Barone's office as ordered. Humphrey testified that she concluded her phone conversation with her Union representative, who advised her to return to Lieutenant Barone's office, and knocked on Lieutenant Barone's door. According to Humphrey, Lieutenant Barone did not open the door, but inquired who it was. Humphrey identified herself, and Lieutenant Barone said she would "be with you in a minute." (Tr. 29). Humphrey waited, and then returned to the Payroll Office without seeing Lieutenant Barone.[10]

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[10] Arvin left the Payroll Office prior to Humphrey concluding her phone conversation and, therefore, had no knowledge of whether Humphrey went to Lieutenant Barone's office.

Both lieutenants testified that, after the alleged slamming of the door, they returned to Lieutenant Barone's office and waited for Humphrey. Lieutenant Barone stated that Humphrey had "[a]bsolutely not" gone to her office and had not knocked on her door; and explicitly denied that she told Humphrey that she would be with Humphrey in a minute. (Tr. 180). Lieutenant Barone testified that she "waited for about a minute to see if [] Humphrey was going to come . . . into my office" and, when Humphrey did not appear, she called Captain McEvoy to appraise him of the situation. (Tr. 169). Lieutenant Huerta testified Lieutenant Barone "waited a couple of minutes" before calling Captain McEvoy.

Captain McEvoy testified that only "a minute or two" after the lieutenants had left his office with instructions to give Humphrey a command discipline, he received a call from Lieutenant Barone informing him that, after she asked Humphrey to step into her office right away, Humphrey "reached over and just slammed the door on Lieutenant Barone." (Tr. 119). Captain McEvoy immediately went to Lieutenant Barone's office and noticed that she was upset. Then he went across the hall to the Payroll Office, found the door locked, knocked, and the door was immediately opened by Humphrey, who was standing in front of her desk with the phone at her ear. Captain McEvoy testified he asked Humphrey: "Didn't Lieutenant Barone just instruct you to step into her office? I need you to step into her office right now." (Tr. 120). According to Captain McEvoy, Humphrey responded: "You will have to wait. I am on a very important phone call with my Union about this harassment." (Tr. 120). Lieutenant Huerta testified that he heard Captain McEvoy instruct Humphrey to go to Lieutenant Barone's office and heard Humphrey say: "I am on the phone with my Union about this harassment." (Tr. 151). Lieutenant Barone testified that she heard Humphrey reply: "When I am done. I am on a very important phone call right now with my Union over this

harassment." (Tr. 170).

Humphrey's version is slightly different. She testified that, after returning to the Payroll Office, she again called the Union. About twenty minutes later, while she was on the phone with her Union representative, Captain McEvoy came to the Payroll Office and instructed Humphrey: "I want to see you in my office." (Tr. 30). Humphrey responded: "I am on the phone with the rep. I will be right down." (Tr. 31). According to Humphrey, Captain McEvoy responded: "When you finish, come down." (Tr. 31).

Captain McEvoy testified that, after the above conversation, he "knew it was grounds for suspension." (Tr. 121). Captain McEvoy entered Lieutenant Barone's office, waited a few minutes, and then directed the lieutenants to his office where he called the Deputy Chief, to whom he explained the situation and received authorization to suspend Humphrey based on her "[r]efusing to obey the order of a ranking supervisor." (Tr. 121). Captain McEvoy testified that, while Humphrey's response to him was a factor in deciding to suspend Humphrey, he "had just gone on the immediate refusal of Lieutenant Barone['s order]." (Tr. 122).

Within an hour of receiving authorization to suspend Humphrey, Captain McEvoy called her to his office. Lieutenant Huerta was also present in his capacity as the Integrity Control Officer. When Humphrey arrived, she asked if she could have a witness, and Captain McEvoy said she could. Humphrey left and returned in a few minutes with Arvin. Captain McEvoy then instructed Humphrey that she was suspended. Humphrey asked why, and Captain McEvoy responded: "For refusing a lawful order of a ranking supervisor." (Tr. 123-124). Captain McEvoy testified that Humphrey "laughed, and then departed [his] office." (Tr. 124). Humphrey returned to Captain McEvoy's office about 30 minutes later to ask if she needed to fill out a Leave of Absence Report

form, and Captain McEvoy informed her she did not because "[a]s of 16:45 hours [she was] suspended from duty." (Tr. 124).

Humphrey testified that, after she finished the phone call with her Union representative, she went to Captain McEvoy's office. Upon seeing that another officer was also in Captain McEvoy's office, Humphrey stated "I need a witness," left, and went to get Arvin. (Tr. 31). Humphrey returned to Captain McEvoy's office with Arvin and, before she could sit down, Captain McEvoy informed her that she was suspended "[f]or slamming the door in Lieutenant Barone's face." (Tr. 32). Humphrey described herself as "extremely" surprised "[b]ecause it never happened." (Tr. 32). Arvin testified that Humphrey "was in shock. Her mouth was wide open and she was in shock." (Tr. 87-88).

On May 9, after suspending Humphrey, Captain McEvoy drafted a report summarizing the events of May 9. Captain McEvoy interviewed Lieutenants Barone and Huerta but stated that he did not interview Arvin regarding the events of May 9 because, until these proceedings, he "never had any knowledge if she was witness or was present for anything that had transpired." (Tr. 141). Captian McEvoy also testified that Lieutenant Barone did not inform him that Humphrey had requested union representation. The report, which is consistent with his testimony, and that of Lieutenants Barone and Huerta, concludes: "It has been determined by the undersigned that the suspension of [] Humphrey was warranted for refusing the lawful order of a ranking supervisor. When Lt. Barone had asked [] Humphrey to step into her office [] Humphrey immediately slammed the Payroll Office door and never departed." (Union Ex. 1, ¶ 9). The report also states: "It should be noted that [] Humphrey was insubordinate with Lt. Barone on Friday, May 2, 2008 and [] Humphrey was issued a command discipline for that violation." (Union Ex. 1, ¶ 9).

Three Charges and Specifications were drafted by the NYPD advocate and signed by Captain McEvoy on May 15, 2008, all relating to the events of May 9; the first was for failing to follow Lieutenant Barone's order; the second for slamming the door; and the third for being discourteous to Captain McEvoy for telling him he would have to wait. The charges read, in pertinent part:

> 1. Said [PAA] Lauretta Humphrey . . . having been directed by [NYPD] Lieutenant Christina Barone [] to come to her office, did fail and neglect to comply with said order. . . .
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> 2. Said [PAA] Lauretta Humphrey . . . was discourteous to [NYPD] Lieutenant Christina Barone [] in that said [PAA] slammed a door closed while Lieutenant Barone was speaking to her. . . .
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> 3. Said [PAA] Lauretta Humphrey . . . was discourteous to [NYPD] Captain Charles McEvoy [] in that said [PAA] stated in sum and substance "you'll have to wait, I am on a very important phone call with my union about this harassment." . . .

(City Ex. 5). On June 17, 2008, the Charges and Specifications against Humphrey were amended to add two new charges alleging that Humphrey was discourteous and insubordinate to Lieutenant Barone on May 2, 2008. The new charges read, in pertinent part:

> 4. Said [PAA] Lauretta Humphrey . . . on or about May 2, 2008, was discourteous and insubordinate to Lieutenant Christina Barone in that when asked to step out of Lieutenant Barone's Office, she stated, in sum and substance, "You better be asking me because I don't have to do what you tell me to do." . . .
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> 5. Said [PAA] Lauretta Humphrey . . . on or about May 2, 2008, was discourteous to Lieutenant Christina Barone in that she said to Lieutenant Barone, in sum and substance, while raising her voice, "I'm staying here to make your life miserable", and "I can open up my big fat mouth and say whatever I want to say." . . .

(Union Ex. 2). The record does not indicate the source of the quotes in the amended charges.

In its Answer, the City states Humphrey has not filed a grievance regarding the Charges and Specifications but, on May 1, 2008, Humphrey filed an "unrelated EEO complaint." (City Ans. fn. 3). Under NYPD policy, the grievance step process is deferred until the EEO complaint is resolved.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the Respondents violated NYCCBL § 12-306(a)(1) by continuing to question Humphrey after she requested Union representation.[11] The Board has recognized that *Weingarten* rights exists in the NYCCBL, which have also been codified in Article 14 of the Civil Service Law ("Taylor Law").[12] Humphrey reasonably believed that Lieutenant Barone's questioning could lead to discipline for allegedly falsely filling out forms and requested Union representation. Lieutenant Barone continued to question Humphrey, violating NYCCBL § 12-306(a)(1).

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[11] NYCCBL § 12-306(a)(1) provides, in pertinent part, that "[i]t shall be an improper practice for a public employer or its agents . . . to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter."

NYCCBL § 12-305 provides, in pertinent part, that "[p]ublic employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities."

[12] Section 209-a(1)(g) of the Taylor Law provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents deliberately . . . to fail to permit . . . a public employee the right, upon the employee's demand, to representation by a representative of the employee organization . . . [if] it reasonably appears that he or she may be the subject of a potential disciplinary action.

The Union also argues that the "door slamming allegation is nothing short of a pretext for improperly motivated retaliation." (Union Brief at 22). The NYPD intended to suspend Humphrey at the time her identification card was confiscated, which occurred the day after Humphrey attended a Union meeting and immediately after her superior questioned her about her use of release time to attend the Union meeting. The NYPD was clearly aware of Humphrey's Union activity and her suspension was motivated by that Union activity. In suspending Humphrey due to her Union activities, Respondents violated NYCCBL § 12-306(a)(3).[13] Further, in violating NYCCBL § 12-306(a)(3), Respondents derivatively violated NYCCBL § 12-306(a)(1). While the Union does not explicitly address the Amended Charges, it does assert that "[b]ut for the denial of Ms. Humphrey's right to union representation, none of the acts that followed would have occurred," and suggests that such causation is sufficient grounds for the Board's quashing of the Amended Charges. (Union Brief at 23).

The Union requests that the Board declare that the NYPD interfered with, restrained or coerced Humphrey in the exercise of her rights; order that the Respondents expunge Humphrey's disciplinary record and restore the 30-day pre-hearing suspension without pay; order the posting of notices; and order any other relief the Board deems proper.

City's Position

The City argues that Humphrey's grievance should not be heard as an improper practice charge, because Civil Service Law ("CSL") §75(2), which concerns the removal and other

[13] NYCCBL § 12-306(a)(3) provides, in pertinent part: "It shall be an improper practice for a public employer or its agents . . . to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization."

disciplinary proceedings for civil service employees, "provides Petitioner with a more appropriate forum to address its allegations." (Ans. ¶ 45). The provisions of CSL §75(2) "indicate that Petitioner has another forum to pursue allegations that Humphrey was entitled to union representation." (Ans. ¶ 46). The City argues that Humphrey's claim "can be presented before the New York City Office of Administrative Trials and Hearings." (Ans. ¶ 46).

The City argues that it has not violated either NYCCBL § 12-306(a)(1) or (3) as Humphrey had no right to Union representation because she did not possess a reasonable belief that she could be subject to discipline. The Board has "used restraint in defining just what facts give rise to a reasonable belief that discipline can occur," favorably citing decisions of the National Labor Relations Board ("NLRB") holding that the right of representation does not apply to the giving of instructions, training, and corrections of work techniques. (City Brief at 5). The interchanges at issue are not the type of corrective interview between an employee and supervisor that gives rise to a reasonable concern of discipline, but were "casual, unscheduled, . . . brief, informal, and run-of-the mill type of interaction . . . that the Board has suggested do not trigger a right to representation." (Ans. ¶ 66). The interchanges concerned whether Humphrey had properly filled out some paperwork and "contain[ed] none of the . . . indicia that would lead a reasonable person to the conclusion that discipline would result in the course of the meeting." (City Brief at 6). To find that such "could cause an employee to reasonably believe that she or he may become the subject of a potential disciplinary action, then nearly *any* conversation between a supervisor and an employee has that potential. Such a low standard would contradict the Board's previous determination[s]." (Ans. ¶ 68) (emphasis in original).

As for the claim of retaliation, the City admits that it was aware of Humphrey's Union

activity, but the Union has provided nothing but speculative and conclusory allegations about the NYPD's motivation. No causal link has been shown between Humphrey's Union activity and her suspension, and anti-union animus cannot be established merely by the proximity in time of the Union meeting to her suspension. The City notes that Humphrey's leave request was granted. Further, the City has demonstrated that the NYPD had legitimate business reasons for its actions–Humphrey's misconduct. Humphrey's refusal to answer the questions of a superior was insubordination, and she showed extreme discourtesy. Humphrey's actions would have resulted in suspension even if she had not asked for representation and even if Lieutenant Barone harbored anti-union animus.

DISCUSSION

Weingarten

On the facts of the instant case, this Board finds that the NYPD violated Humphrey's right to Union representation, known colloquially as *Weingarten* rights. In *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 257 (1975), the United States Supreme Court held that the National Labor Relations Act accords private sector employees the right to refuse to submit to an employer's investigatory interview without the presence of a union representative if the employee reasonably believes that the interview could result in disciplinary measures, and the employee requests such representation. In *New York City Transit Authority*, 35 PERB ¶ 3029 (2002), *aff'd*, 27 A.D.3d 11 (2d Dept. 2005), *rev'd*, 8 N.Y.3d 226 (2007), the New York State Public Employee Relations Board ("PERB") adopted the *Weingarten* rationale and recognized that "there is no clearer expression of participation in an employee organization than the request for union representation at an investigatory interview

which may result in discipline." *Id.* at 3081. PERP found in the Taylor Law the right of an employee to a union representative at a meeting where the employee reasonably believes that the interview could result in disciplinary measures. This Board adopted PERB's rationale and recognized *Weingarten* rights under the NYCCBL in *Assistant Deputy Wardens' Association*, 71 OCB 9 (BCB 2003).

However, in *New York City Transit Authority v. Public Employment Relations Board*, 8 N.Y.3d 226 (2007) ("*NYCTA*"), the Court of Appeals ruled that the Taylor Law did not provide for *Weingarten* rights, prompting the New York State Legislature to amend the Taylor Law to overrule *NYCTA* by adding subsection (g) to § 209-a(1) ("2007 Amendment")."[14] *See DC 37, Local 375*, 2 OCB2d 26, at 13 (BCB 2009); *see also Village of Tarrytown*, 40 PERB ¶ 3024 (2007) ("the Senate sponsor's memorandum in support of the [2007 A]mendment states that it was specifically aimed

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[14] Section 209-a(1)(g) provides that it shall be an improper practice:

> to fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization, or the designee of such organization, which has been certified or recognized under this article when at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action. If representation is requested, and the employee is a potential target of disciplinary action at the time of questioning, a reasonable period of time shall be afforded to the employee to obtain such representation. It shall be an affirmative defense to any improper practice charge under paragraph (g) of this subdivision that the employee has the right, pursuant to statute, interest arbitration award, collectively negotiated agreement, policy or practice, to present to a hearing officer or arbitrator evidence of the employer's failure to provide representation and to obtain exclusion of the resulting evidence upon demonstration of such failure. Nothing in this section shall grant an employee any right to representation by the representative of an employee organization in any criminal investigation.

at overturning *NYCTA*.") (citing Bill Jacket, L 2007, c 244).[15] We construe our law in accordance with the public policy clearly enunciated by the Legislature with the 2007 Amendment that public employees should have *Weingarten* rights. *See DC 37, Local 375*, 2 OCB2d 26, at 14; *see*, *e.g.*, *Patrolmen's Benevolent Assn. v. Pub. Employ. Relations Bd.*, 6 N.Y.3d 563, 575 (2006) (favorably quoting *City of New York v. MacDonald*, 201 A.D.2d 258, 259 (1st Dept. 1994), that "legislation 'discloses a legislative intent and public policy'").

The 2007 Amendment provides that it shall be an improper practice "to fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization, . . . at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action." CSL § 209-a(1)(g). The 2007 Amendment further provides that "[if] representation is requested, and the employee is a potential target of disciplinary action at the time of questioning, a reasonable period of time shall be afforded to the employee to obtain such representation." (*Id.*).[16]

On the facts the instant case, this Board finds that the NYPD violated Humphrey's right to

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[15] In *Village of Tarrytown*, the Tarrytown Patrolmen's Benevolent Association, Inc., argued that the 2007 Amendment overturned *Patrolmen's Benevolent Association of the City of New York v. Public Employment Relations Board*, 6 N.Y.3d 563 (2006) ("*NYCPBA*"), which held that a local law vesting authority related to police discipline to a village board of trustees made employee representation at the interrogation of an employee a prohibited subject of bargaining. PERB explicitly rejected this argument, holding that the "2007 [A]mendment . . . was solely aimed at overturning the Court's decision in *NYCTA* and not the *NYCPBA* decsion."). 40 PERB ¶ 3024.

[16] We note that CSL §75(2), cited by the City, similarly requires that "[i]f representation is requested a reasonable period of time shall be afforded to obtain such representation." As to the City's argument that this matter best be decided in another forum under CSL §75(2), we note that the Board has "exclusive, non-delegable jurisdiction to hear improper labor practice claims" arising under the NYCCBL, as mandated by CSL § 205(5)(d). *Patrolmen's Benevolent Assn. v. City of New York*, 293 A.D.2d 253 (1st Dept. 2002); *see also Uniformed Firefighters Assn. v. City of New York*, 79 N.Y.2d 236, 239 (1992); NYCCBL § 12-309(a)(4).

Union representation. It is undisputed that Humphrey requested Union representation and that the NYPD refused her request. It is also undisputed that Humphrey never consented to continue without representation; that the questioning of Humphrey continued immediately after she had requested Union representation; that Humphrey remained silent in the face of the questioning; and that, in response to Humphrey's silence, her identification card was requested, indicating, in her opinion, that she would be suspended.

The issue before us, therefore, is whether, from an objective standard, at the time Humphrey requested Union representation, she reasonably believed that the meeting with herself and Lieutenants Barone and Huerta "could have resulted in discipline." *DC 37, Local 1113*, 77 OCB 25, at 11 (BCB 2006) (citing *Consol. Edison Co. of New York, Inc.*, 323 NLRB 910, 910 (1997); *Transit Workers Union, Local 100*, 36 PERB ¶ 3049 (2003); *Am. Fedn. of Govt. Empl., Local 2544 v. Fed. Labor Relations Auth.*, 779 F.2d 719, 724 (D.C. Cir. 1985)). In the instant matter, we find that Humphrey had a reasonable belief that discipline could have resulted from her May 9, 2008, meeting with Lieutenants Barone and Huerta.

The following facts critical to our understanding of the reasonableness of Humphrey's belief that the meeting could result in discipline are undisputed. Humphrey was called into a superior's office and, upon entering the office, she realized that a second superior–whose responsibilities include disciplining employees–was present, and she was then questioned as to why she undertook a particular action. *See DC 37, Local 375*, 2 OCB2d 26, at 16 (meeting with more than one superior supports a reasonable belief that discipline could result); *see also J. Weingarten, Inc.*, 420 U.S. at 262-3 (describing inequity of "[r]equiring lone employee" to be interviewed). Lieutenant Barone testified that she did not intend to discipline Humphrey when she first called her into her office.

However, Lieutenant Barone also testified that she believed disciplinary meetings should be conducted in private in her office. Thus, the second meeting stands in contrast with the first, on the same subject matter, which occurred less than a half an hour before in the Payroll Officer in front of co-workers.[17]

We have also recognized that prior confrontations between an employee and her supervisors can support a finding that the employee's belief that subsequent questioning could lead to discipline was reasonable. *See DC 37, Local 1113*, 77 OCB 25, at 11 (citing and explaining *Assistant Deputy Wardens' Assn.*, 71 OCB 9; *Burton*, 77 OCB 15 (BCB 2006); *Consol. Edison Co. of New York, Inc.*, 323 NLRB 910; and *New York City Transit Auth.*, 35 PERB ¶ 3029). In the instant case, it is undisputed that on May 2, 2008, Humphrey had a confrontation with Lieutenant Barone. Humphrey's undisputed version of the May 2 confrontation was that Lieutenant Barone was "yelling and screaming" and threatened Humphrey with a psychiatric evaluation and the worst work assignments. (Tr. 15).

The City's reliance on *Edwards*, 1 OCB2d 22 (BCB 2007), is unpersuasive. The City cites *Edwards* as holding that the petitioner did not have a reasonable belief that discipline would result from a meeting because the petitioner "had been involved in a disciplinary meeting earlier in the day, which arguably dealt with the issue at hand [and] [s]econd, the content of the meeting for which

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[17] We need not determine whether discipline, as used in the *Weingarten* context, would include a command discipline, as the issue before us is the reasonableness of the employee's belief that discipline could have resulted, not whether the employer actually intended to discipline the employee. *See DC 37, Local 375*, 2 OCB2d 26, at 16 ("That the . . . conference did not lead to discipline is not determinative; the issue is whether [petitioner] reasonably believed that it could have."); *see also State of New York (Department Of Correctional Services)*, 42 PERB ¶ 4552 (ALJ 2009) (explaining scope of discipline under NLRB and PERB case law and the 2007 Amendment and finding that it "encompass a range of adverse employment actions" and is not "tied to the existence of contractual or statutory disciplinary procedures.").

representation was denied dealt with [petitioner's] charges against a co-worker, not [petitioner's] conduct." (City Brief at 7) (citing *Edwards*, 1 OCB2d 22, at 20). Neither prong of the *Edwards* rationale, however, applies to the instant case. Humphrey, Arvin, and Lieutenant Barone all testified that the initial meeting, far from resolving the matter, left the issue open, with Humphrey stating that she would look into it. (*See* Tr. 22; 82; & 63). Humphrey, Arvin, Lieutenant Huerta, and Lieutenant Barone all testified that the meeting in which Humphrey requested Union representation concerned her conduct, specifically why she had indicated MEO on her Leave Request Form. (*See* Tr. 23; 82; 148; & 165).

We find, under the circumstances of the instant case, that Humphrey's belief that she may be subject to discipline was objectively reasonable and that, therefore, the NYPD violated the NYCCBL which requires, upon the valid invocation of the right to union representation, that the employee either cease questioning or grant the request for union representation. *DC 37, Local 1113*, 77 OCB 25, at 12.[18] We also note that the 2007 Amendment explicitly requires that the employee be afforded "a reasonable period of time . . . to obtain such representation." CSL § 209-a(1)(g). In the instant case, however, it is undisputed that no time was afforded Humphrey between her request for Union representation and Lieutenant Barone's continuing to question her; that only minutes elapsed between Lieutenant Barone ordering Humphrey into her office the second time and her calling Captain McEvoy to report Humphrey's failure to follow that order; and that only minutes elapsed between Captain McEvoy ordering Humphrey into Lieutenant Barone's office and his returning to his office.

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[18] Alternatively, the employer can offer the employee the choice between continuing the meeting unaccompanied by a union representative or having no meeting at all. *DC 37, Local 1113*, 77 OCB 25, at 10-13.

As for remedy, the Union requests that the Board order that the Respondents expunge Humphrey's disciplinary record and rescind the 30-day pre-hearing suspension without pay. We order two of the five charges that stem directly from the NYPD's violation of Humphrey's *Weingarten* rights expunged.

The first three charges concern events that happened in quick succession, and the first and third arise from and are inextricably linked with Humphrey's denied request for Union representation. The first charge concerns Humphrey's alleged failure to abide by the order to go to Lieutenant Barone's office; the third charge concerned Humphrey's alleged discourtesy to Captain McEvoy by saying "you'll have to wait, I am on a very important phone call with my union about this harassment." (City Ex. 5). Lieutenant Barone's order, which was to allow her to return Humphrey's identification card and give her a command discipline in private, was a continuation of the meeting approximately 20 minutes earlier, in which Humphrey requested Union representation and was ordered to surrender her identification card. It is undisputed that Lieutenant Barone was aware that Humphrey was on the phone with her Union representative and that Lieutenant Barone only "waited for about a minute" before concluding Humphrey would not abide by her order. (Tr. 169). The 2007 Amendment explicitly requires that "a reasonable period of time shall be afforded to the employee to obtain such representation." CSL § 209-a(1)(g). The statement constituting the third charge was made only minutes later and was itself a continuation of the events that began when Humphrey's request for Union representation was denied. Humphrey's alleged failure to abide by the order is inextricably linked to the invocation of her right to Union representation.

However, we find that the second charge–the alleged slamming of the door–cannot be said to stem from Humphrey's invocation of her *Weingarten* rights. The denial of union representation

does not immunize an employee's independently improper conduct in response to the denial. *Taracorp Industries, A Division of Taracorp Inc. and Fred Elmore*, 273 NLRB 221 (1984) (make whole remedy only appropriate where discipline stems from protected activity; even in case of a clear *Weingarten* violation, make whole remedy denied where discipline imposed was for cause and not the invocation of *Weingarten* rights); *N.L.R.B. v. U.S. Postal Service*, 689 F.2d 835. 839 (9th Cir. 1982) ("even if the [employer] had violated [petitioner's] *Weingarten* rights, [petitioner] would not necessarily be immune from appropriate discipline."). We find that Lieutenants Barone and Huerta may have well believed that Hunphrey slammed the door. As such, we do not find the second charge to have been brought in a fabricated or pretextual manner to conceal anti-union animus, nor to be so inextricably intertwined with the *Weingarten* violation as to render such charges void *ab initio*, and, accordingly, do not order its expungement. *See Civ. Serv. Empl. Union v. Pub. Empl. Relations Bd*., 180 Misc.2d 869, 871 (Sup. Ct. Alb. Co. 1999) ("Taylor Law . . . may include, but does not mandate, 'make whole' relief."); *see generally Boyd v. Constantine*, 81 N.Y.3d 189, 195-196 (1993)(balancing test applied to suppression remedy by administrative agency; where deterrence interest not served, such remedy is not appropriate).

We do not decide whether Humphrey actually slammed the door, or was discourteous; those questions remain for the disciplinary hearing to determine. *See DC 37*, 1 OCB2d 6, at 33 ("there is no basis to order rescission and expungement of the overall disciplinary penalty imposed" where "OATH had proper jurisdiction over the disciplinary matter before it."). We do note that the alleged door slamming followed closely on the heels of a *Weingarten* violation. While the intention of the lieutenants may have been to de-escalate the situation, such that the lieutenants' second summoning of Humphrey was not intended as a continuation of the initial *Weingarten* violation, she had no way

of knowing that intent, and, of course, the lieutenants did interrupt Humphrey's telephone call to her Union. Rather, in view of this interruption, and since her identification card had already been confiscated as a precursor to discipline, Humphrey reasonably believed that she was facing suspension and, possibly, further adverse action when she was ordered, for a second time, to immediately return to Lieutenant Barone's office. The record is clear that in response to that order, Humphrey first informed the lieutenants that she was consulting with her Union representative and then closed the door, allegedly in a discourteous manner that the lieutenants describe a s slamming.

Similarly, we do not order the fourth and fifth charges, concerning the events of May 2, 2008, expunged. As the genesis of those charges pre-date the request for Union representation, they cannot be said to stem from denial thereof. *See DEA*, 79 OCB 40, at 22 (BCB 2007) (adverse actions that antedated the protected activity "cannot be persuasively shown to have been retaliatory in nature"); *see*, *e.g.*, *City Empl. Union, Local 237*, 69 OCB 12, at 8 (BCB 2002). Further, it is undisputed that when Captain McEvoy referred to the May 2 events in his May 9 memorandum, he was unaware, at that time, that Humphrey had invoked her *Weingarten* rights.

As we are only ordering two of the five charges expunged, we do not order the revocation of the pre-hearing suspension. *See DC 37, Local 1113*, 77 OCB 25, at 12 (make-whole remedy is not available where discipline was not solely for the invocation of one's *Weingarten* rights); *DeCharbert*, 47 OCB 17, at 8 (BCB 1991) ("if the employer is able to demonstrate that the [discipline] was based on good cause established by facts independent of the interview, the [discipline] stands."); *see also DC 37*, 1 OCB2d 6, at 33 (BCB 2008) (rescission and expungement of charges not shown to be tainted by anti-union animus not warranted where such charges properly before factfinder with jurisdiction; finding that such charges unrelated to breach of NYCCBL

sufficient to remove charges from Board's jurisdiction) (citing *City of New York v. McDonald*, 239 A.D.2d 274 (1st Dept. 1997)); *Civ. Serv. Empl. Union*, 180 Misc.2d at 871 (where penalty stems in part from employee's intentional conduct, "personal relief is inappropriate and unnecessary to accomplish the Taylor Law's goals").

Retaliation

We now turn to whether the NYPD engaged in retaliatory conduct. As we have expunged charges 1 and 3, we need not discuss further whether such charges were, independently, retaliation for Humphrey's invocation of her *Weingarten* rights. Whether the remaining Charges and Specifications, including the 30-day pre-hearing suspension itself, were imposed in violation of NYCCBL § 12-306(a)(1) and (3), rests on the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by this Board in *Bowman*, 39 OCB 51 (BCB 1987). To establish a claim of retaliation, a petitioner must demonstrate that:

> 1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
>
> 2. the employee's union activity was a motivating factor in the employer's decision.

Id. at 18-19; *see also DEA*, 2 OCB2d 21, at 11-12 (BCB 2009). The second prong, motivation, "typically . . . is proven through the use of circumstantial evidence, absent an outright admission." *DC 37*, 1 OCB2d 5, at 65; *see also Burton*, 77 OCB 15, at 26. However, a "petitioner must offer more than speculative or conclusory allegations." *SBA*, 75 OCB 22, at 22 (BCB 2005). "If the petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* case, 'the employer may attempt to refute petitioner's showing on one or both elements or demonstrate that

legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct.'" *DEA*, 2 OCB2d 21, at 12 (quoting *Local 371, SSEU*, 1 OCB2d 25, at 16 (BCB 2008)).

It is undisputed that Lieutenants Barone and Huerta were aware of Humphrey's involvement in the Union, and, while Captain McEvoy was unaware that Humphrey had earlier requested Union representation, he was aware that she was talking with her Union when he ordered her to Lieutenant Barone's office. Therefore, the first prong is satisfied.

However, the record does not support the inference that the remaining Charges and Specifications or Humphrey's pre-hearing suspension were motivated by her Union activity. The record is devoid of anything implying that Captain McEvoy or his superiors–the decision makers and signers of the Charges and Specifications–were motivated by Humphrey's Union activity. Indeed, the record is clear that at the time he decided to suspend Humphrey, Captain McEvoy was unaware of her request for Union representation. We further note that Humphrey had no difficulty in securing time off to attend the Union meeting, and that her schedule was modified to facilitate her attendance.

Humphrey testified extensively as to her May 2 confrontations with Lieutenant Barone. However, overall her testimony established a personality conflict between herself and Lieutenant Barone, and such "does not constitute improper motivation under the NYCCBL, as defined by this Board's case law." *Edwards*, 1 OCB2d 22, at 18 (citing *Warlick*, 29 OCB 1, at 3 & 7 (BCB 1982); *Hale*, 37 OCB 8, at 6 (BCB 1986)); *see also Norwich City School Dist.*, 26 PERB ¶ 4533 (1993) (union's charge of retaliation was dismissed where evidence showed that employer was motivated by employee's insubordinate conduct in context of personality conflict with a supervisor). Indeed, Humphrey does not allege that her actions of May 1 and 2 constituted union activity, and her counsel

represented that her testimony regarding these events was offered to "demonstrate that Ms. Humphrey had a reasonable belief that a discussion with Lieutenant Barone may lead to discipline." (Tr. 13-14). Humphrey has not argued that the act of amending the charges in and of itself was retaliatory, and, as the record is devoid of explanation as to how and why the Charges and Specifications were amended, we have no basis for finding that action to be retaliatory.[19]

Humphrey's Union activity is the predicate and the substance of the first and third charge, and the basis for our jurisdiction to quash them. However, as one of the three charges from which the 30-day pre-hearing suspension stems has been found to be separate from the *Weingarten* violation, and not motivated by retaliation for protected activity, the propriety of that suspension turns upon the disposition of that charge, and of the remaining charges. We note that the disciplinary process is structured to address these very concerns which can be more properly resolved in that forum.[20]

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[19] The Dissent argues that Humphrey had refuted the Amended Charges. Humphrey, however, was not questioned about the Amended Charges, which were not introduced into evidence by the Union until after all witnesses had testified, nor has Humphrey ever admitted or denied making the statements attributed to her in the Amended Charges.

[20] Further, we note that the uncontested testimony of both Captain McEvoy and Lieutenant Heurta is that the failure to follow orders "is cause for must suspend according to the control guide." (Tr. 153). Therefore, the City has established a legitimate business reason for the pre-hearing suspension, assuming, *arguendo*, Humphrey's Union activity was also a motivating factor. *See DEA*, 2 OCB2d 21, at 15 (no retaliation found where "suspension is more closely linked to strict compliance with NYPD policy rather than anti-union animus."); *see also Local 768, DC 37*, 63 OCB 15 (BCB 1999).

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition, Docket No. BCB-2717-08, filed by District Council 37, Local 1549, AFSCME, AFL-CIO, against the New York City Police Department be, and the same hereby is, granted, in part, as it relates to the violation of Police Administrative Aide Lauretta Humphrey's *Weingarten* rights on May 9, 2008, in that Humphrey's reasonable request for union representation was denied; and it is further

ORDERED, that the New York City Police Department expunge the first and third Specification of the Charges and Specifications levied against Police Administrative Aide Lauretta Humphrey on May 15, 2008, and amended on June 17, 2008; that it expunge from Humphrey's personnel file any disciplinary memorandum based upon the before-mentioned Specifications; and that it rescind any disciplinary measure levied against Humphrey based upon, and to the extent it is limited to, the before-mentioned Specifications; and it is further

ORDERED, that the New York City Police Department cease and desist from interfering with employees' right to request union representation during investigatory interviews that they reasonably believe may lead to their discipline; and it is further

ORDERED, that the improper practice petition, Docket No. BCB-2717-08, filed by District Council 37, Local 1549, AFSCME, AFL-CIO, against the New York City Police Department be, and the same hereby is, denied, in part, as it relates to all other claims contained therein; and it is further

ORDERED, that the New York City Police Department post notices indicating its violation of the New York City Collective Bargaining Law in the instant matter by interfering with employees'

right to request union representation during investigatory interviews that they reasonably believe may lead to their discipline.

Dated: January 25, 2010
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

I concur, in part, and dissent, in part.

CHARLES G. MOERDLER
MEMBER

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW YORK CITY COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 3 OCB2d 2 (BCB 2010), determining an improper practice petition between District Council 37, Local 1549, AFSCME, AFL-CIO, and the City of New York and the New York City Police Department.

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby:

ORDERED, that the improper practice petition, Docket No. BCB-2717-08, filed by District Council 37, Local 1549, AFSCME, AFL-CIO, against the New York City Police Department be, and the same hereby is, granted, in part, as it relates to the violation of Police Administrative Aide Lauretta Humphrey's *Weingarten* rights on May 9, 2008, in that Humphrey's reasonable request for union representation was denied; and it is further

ORDERED, that the New York City Police Department expunge the first and third Specification of the Charges and Specifications levied against Police Administrative Aide Lauretta Humphrey on May 15, 2008, and amended on June 17, 2008; that it expunge from Humphrey's personnel file any disciplinary memorandum based upon to the before-mentioned Specifications; and that it rescind any disciplinary measure levied against Humphrey based upon, and to the extent it is limited to, the before-mentioned Specifications; and it is further

ORDERED, that the New York City Police Department cease and desist from interfering with employees' right to request union representation during investigatory interviews that they reasonably believe may lead to their discipline; and it is further

ORDERED, that the improper practice petition, Docket No. BCB-2717-08, filed by District Council 37, Local 1549, AFSCME, AFL-CIO, against the New York City Police Department be, and the same hereby is, denied, in part, as it relates to all other claims contained therein; and it is further ORDERED, that the New York City Police Department post notices indicating its violation of the New York City Collective Bargaining Law in the instant matter by interfering with employees' right to request union representation during investigatory interviews that they reasonably believe may lead to their discipline.

The New York City Police Department
(Department)

Dated: _____ (Posted By)

(Title)

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

Matter of Improper Practice Petition Between
District Council 37, Local 1549, AFSCME, AFL-CIO and City of New York and the Police Department of the City of New York
(BCB-2717-08)

Opinion of Member Charles G. Moerdler, Concurring in Part and Dissenting in Part

The majority grants in part the Petition herein, holding that the *Weingarten* rights of Police Administrative Aide Lauretta Humphrey ("Humphrey" or "Ms. Humphrey") were denied on May 9, 2008 and directs that the New York City Police Department (a) expunge the first and third Specifications of the Charges against Ms. Humphrey, (b) cease and desist from interfering with employees' *Weingarten* rights and (c) post specified notices indicating its violation in this matter. I concur in that determination.

However, the majority also holds that (i) the second Specification of Charge does not warrant expungement and (ii) the belated additional Specifications of Charge (sometimes the Amended Charge") cobbled together *more than a month after* the initial charges and relating to asserted events occurring fully one week *prior to* the events that led to the first set of Charges should be referred to the "disciplinary process," notwithstanding the explicit and correct finding by the majority that "[t]he record is devoid of explanation as to why the Charges and Specifications were amended…."

Concisely put, the record compels the conclusion that the Charges and Specifications as a whole and most particularly those concocted in the amendment offend the olfactory senses. They should all be expunged and I dissent to the extent that that compelled result did not obtain.

A.
The Additional Specifications of Charges

1. The Amended Charges. The Amended Specifications and Charges relate to events supposedly occurring on May 2, 2008.[1] On May 1, Ms. Humphrey, a Union activist and former Shop Steward (e.g., Tr. 12), was told by a fellow employee that she had observed three posted

[1] The parties called the following five witnesses in the following order: PAA Lauretta Humphrey (Tr. 4-77); Kesia Arvin (apparently also a PAA)(Tr. 21-97); Captain (now Deputy Inspector) Charles McEvoy (Tr. 111-141); Lieutenant (now Captain) Jason Huerta (Tr. 141-160); and Lieutenant Christina Barone (Tr. 160-182). During the relevant period, all of the witnesses were employed by the New York City Police Department and were assigned to the 102nd Precinct. References preceded by "Tr." are to pages of the transcript of the hearing before this Board's hearing officer.

photographs of "a female in a provocative pose" clad in scanty and suggestive attire. (Tr. 13). Ms. Humphrey confirmed the claim, recognized the subject of photographs to be the girlfriend of a Police Officer assigned to that precinct and asked her supervisor to have the Police Officer remove those photographs. (Id). On May 2 Ms. Humphrey's "was met at the payroll door" by the Police Officer, who commented on Ms. Humphrey's complaint. A "heated argument" ensued between Ms. Humphrey's and the Police Officer. (Tr. 14). Lieutenant Barone came on the scene, stepped between Ms. Humphrey's and the Police Officer, told the later to go to Lieutenant Barone's office and then turned to Ms. Humphrey's, stating that she was a "troublemaker," that if she "didn't like it here, [she] should get out" and added " I am going to psych you." (Tr. 14-15). According to Ms. Humphrey's *unrebutted* testimony Lieutenant Barone then said

> She was going to do all these terrible things. She just started yelling and screaming, saying she was going to do all these terrible things to me.

(Tr. 15). Following that encounter, Ms. Humphrey's notified her union representative and "just went sick." (Tr. 16).[2]

Notwithstanding the foregoing *unrebutted* version of the May 2 events, the majority declines to dismiss Amended Charges asserting:

> 4. Said [PAA] Lauretta Humphrey … on or about May 2, 2008 was discourteous and insubordinate to Lieutenant Christina Barone in that when asked to step out of Lieutenant Barone's office, she stated, in sum and substance, "You better be asking me because I don't have to do what you tell me to do." …
>
> 5. Said [PAA] Lauretta Humphrey … on or about May 2, 2008, was discourteous to Lieutenant Christina Barone in that she said to Lieutenant Barone, in sum and substance, while raising her voice, "I'm staying here to make your life miserable," and "I can open up my big fat mouth and say whatever I want to say." …

(Union Exhibit 2).

[2] Cross examination did not alter Ms. Humphrey's above-noted testimony in any material respect (see, Tr. 38-49).

Notably, the majority acknowledges that "[t]he record does not indicate the source of the quotes in the amended charges." Indeed, there is not a scintilla of probative evidence in this record that demonstrates that any aspect of the foregoing assertions in the Amended Charges are factually founded.

The circumstances surrounding the filing of those Amended Charges are instructive.

* The first set of Charges issued May 15, 2008. They relate to events occurring on *May 9, 2008*.
* One month *after* those Charges were filed, viz., on *June 17, 2008*, the Police Department decided to amend the May 15, 2008 Charges to add the above-quoted further Charges based on the asserted events of *May 2, 2008*.
* The record reflects, without dispute, that the May 2 events were known to and recorded by the relevant Police Department official (Precinct Commander Captain McEvoy) *prior to* the date on which the initial (May 15) Charges were filed. Indeed the May 2 events were specifically referred to by Captain McEvoy in the formal report that led to Ms. Humphrey's suspension on May 9 by Captain McEvoy and then to the initial (May 15) Charges.

Thus, the May 2 assertions and the notion that they amounted to a chargeable occurrence were certainly known to the Police Department on *May 15* at the time the first set of Charges were filed. Notably, the May 2 claims were excluded from the formal charges on May 15. Only on June 17, 2008-- some six weeks following the May 2 events, were the Charges belatedly amended to now include the May 2 events.

The testimony of Captain McEvoy concerning the May 2 events as constituting a valid basis for complaint is also illuminating. At pages 136-138 of the Transcript there appear the following questions of Captain McEvoy and his answers thereto:

Q. Isn't it true that PAA Humphrey was not issued a command discipline on May 2, 2008?
A. That I don't recall.
Q. If a command discipline had been issued on May 2, 2008, wouldn't you have been notified?

A. I would have been notified sometime thereafter. Most likely while I was adjudicating it.
Q. Do you recall ever adjudicating the command discipline for that alleged violation in this case?
A. That PAA Humphrey was issued on May 2nd?
Q. Yes.
A. I don't recall it, no.
Q. Did you ask Lieutenant Barone for a copy of a command discipline?
A. For the one that was issued on May 2nd?
Q. Yes.
A. I don't recall.
Q. TRIAL EXAMINER: My question is: this information [in Captain McEvoy's May 9 report] that a command discipline was issued [against Humphrey], do you recall where you got that information from?
THE WITNESS [Captain McEvoy]: Lieutenant Barone."

Certainly, there is nothing in this record that evidences that Captain McEvoy was personally knowledgeable as to either the events of May 2 or whether command discipline had actually been invoked with respect thereto.

Significantly, when Lieutenant Barone later testified (weeks later) as the final testimonial witness she made absolutely no mention of any command discipline having issued on May 2, or of having so advised Captain McEvoy on either May 2 or May 9, or even that anything untoward had occurred on May 2. Instead, she left standing the gapping void in the City's case as to whether any objectionable conduct at all had in fact occurred on the part of Ms. Humphrey on May 2 and, if so, exactly what it was. In sum, the central witness who could have supported the Amended Charges chose to stand mute on the events of May 2. By contrast, Ms. Humphrey *unrebutted* testimony, noted above, negates the claims advanced in the Amended Charges.[3]

[3] The majority implies (see Majority Opinion p. 5) that some significance should attach to the fact that Ms. Humphrey's counsel chose not to question Lieutenant Barone about the May 2 events *after Lieutenant Barone chose to stand mute about them*. When the proponent of a version of critical facts chooses not to testify as to those essential facts and they are directly within that party's sphere of knowledge, cross examination that could reopen that door is, at best, foolhardy. Indeed, where there is no other evidence in the record to support the claim and its proponent chooses to stand mute, cross examination that would reopen the door would be most unwise. That is especially true where that party (here Lieutenant Barone) is the person in the best position to attest to the facts underlying her claim (that she supposedly was treated in a discourteous fashion). Since counsel for the City deliberately chose not to question Lieutenant Barone about the May 2 events-and there not being a scintilla of other probative evidence to support any claims against Humphrey pertaining thereto - it is readily understandable why competent counsel for Humphrey quite correctly chose to leave unfilled that gapping void in the proof.

Importantly, the majority correctly and significantly notes "[t]he record is devoid of explanation as to why the Charges and Specifications were amended…[to resurrect the May 2 events].." The only explanation that can fairly be inferred is that the Department was determined to lard it on; to increase (for whatever reason) the pressure on Humphrey. To say that that does not evidence retaliation is sophistry.

2. Retaliation. During the pertinent period and events Lieutenant Barone was, according to her testimony, intensely focused on Ms. Humphrey's role as a Union activist. Thus, in the course of Lieutenant Barone's testimony concerning her version of the May 9 encounter, she was asked why she did not simply "just end the conversation [concerning Humphrey's assertion that her prior absence -the asserted focus of Lieutenant Barone's questioning -- was excused]…" Lieutenant Barone's answer was:

> A. I was asking her a question, so I wanted her to answer me. I wanted to know why she thought -I wanted to clear up why she thought -*because she is a Shop Steward in the precinct*, so I wanted to clear up why she would think she was approved [to take leave time to attend a Union meeting] under MEO 75 …." (Tr. 176-177) (Emphasis added).

And again:

> A. *She is a Shop Steward. She is always going to Union meetings*; and she acts like she knows. … (Tr. 175; see also Tr.179-180)(Emphasis added).

And yet again,

> THE WITNESS: I assumed she went to Union meetings before. She has been a Shop Steward a long time. … (Tr. 179-180)

Lieutenant Barone's evident focus on Ms. Humphrey's Union activities and role suggests on this record an inference of anti-Union bias.

Discussion of the Charges, at least insofar as they rest on the May 2 events (and in my view the Charges as a whole turn on at least the "climate" created by those events) could end here. However, it has been suggested that further factual analysis is warranted.

2. The Record Negates The Claims. The May 2 Charges are based solely on the assertions of Lieutenant Barone, who, studiously omitted to give any sworn testimony thereon to this Board's hearing examiner. Thus, the City called Lieutenant Barone as its final witness. Counsel for the City, if not Lieutenant Barone, certainly knew at that point what testimony had been elicited from Ms. Humphrey when, as the very first witness, she had testified some six weeks previously. See, discussion, *supra*. However, counsel for the City then chose to avoid any questioning at all touching upon the events of May 2. See, Tr. 160-182. Ms. Humphrey's counsel, obviously aware of the gaping hole that the City chose to leave in its proofs on this record, determined to let that void stand by limiting cross examination to the issues addressed on direct (basically the May 9 events), a sound litigation stratagem. (See fn. 3, *supra*).

Ms. Humphrey, a Union activist and former Shop Steward, testified as the opening witness on July 29, 2009. She directly disputed each of the relevant facts that form the basis for the Charges respecting the May 2 events. (See, e.g., Tr. 12-16).[4] She testified that, upon the complaint of another Police Administrative Assistant, she had complained about an inappropriate posting of several photographs in the Precinct House portraying a Police Officer's girl friend in suggestive attire and provocative pose (Tr. 13, 38-39). In the midst of an ensuing "heated argument" with that Officer, Lieutenant Barone entered the arena, attacked Humphrey as a "Troublemaker" and started "yelling and screaming, saying she was going to do all these terrible things to [Humphrey]" (See Tr. 15)

[4] The majority stresses that the Amended Charges were served after the testimonial record was concluded (See, Majority Op. fn. 19). If anything that belated action serves only to emphasize the highly questionable nature of the Amendment. Ms. Humphreys had in her testimony squarely refuted the essential factual underpinnings of the Amendment. Lieutenant Barone, who (some weeks later) followed Ms. Humphrey's to the stand, studiously chose to stand mute as to the May 2 events and neither explicitly nor implicitly contradicted Ms. Humphrey's version of the facts. That the NYPD on this record nonetheless chose to press charges that it knew or should have known lacked factual predicate is extremely troublesome.

Lieutenant Barone was the final witness, testifying on September 3, 2009, some six weeks following Ms. Humphrey's testimony. Lieutenant Barone did not contradict Ms. Humphrey's testimony (indeed she did not give one word of testimony) concerning the events of May 2 that form the basis for the belated Amended Charges.

In sum, not a scintilla of evidence has been adduced that would support the Amended Charges by the one person who could give such testimony. Thus, when the opportunity was presented to support or in some way credit those Charges by the one person who could do so, she chose to stand mute (indeed, her counsel shied away that subject [5]). The Amended Charges thus are reduced to empty rhetoric.

One cannot help but conclude in reading this record that on May 2 Lieutenant Barone viewed and treated Ms. Humphrey in a hostile fashion, apparently equating Union activism in advancing a complaint concerning lascivious pictures posted in the Precinct Station House with being a "Troublemaker" (Tr. 13)[6] . It is fair to conclude that what ensued, including the events of May 9, grew out of that troublesome hostility on the part of Lieutenant Barone toward Ms. Humphrey and Lieutenant Barone's undisputed threat to do "terrible things" to Ms. Humphrey (Tr. 15). On these facts alone -not one of which is disputed in the record - the Amended Charges simply cannot stand and must be dismissed.

B.

The majority holds that the first and third Charges of the initial Specification of Charges must be dismissed and expunged because they stem from Ms. Humphrey's invocation of her

[5] Ms. Humphrey's counsel, quite correctly, thus saw no purpose to be served in filing a critical evidentiary void. See, fn. 3, supra.

[6] As previously noted, this Board sits, much as an appellate tribunal, to render a decision based on a "cold record." It did not hear or see any of the witnesses. The Board thus is limited to the testimonial evidence of the five witnesses as set forth in the transcript, plus whatever probative evidence can somehow be gleaned from the exhibits. And, if Ms. Humphrey, chooses to seek judicial review (See CPLR 7804(g)), the reviewing court will be in the same position as this body to read the transcript and judge for itself whether the facts, as recounted herein, and the inferences necessarily to be drawn therefrom, are aptly stated.

Weingarten rights. I agree.[7] However, the majority fails to make that same finding with respect to the second Charge or a finding that it was part and parcel of (quite deliberate and ill-motivated) retaliation. Since the record compels a contrary conclusion to that advanced by the majority, I disagree and dissent.

Initially, it is well to view the May 9 events from the standpoint of Lieutenant Huerta, the Precinct's Integrity Officer and a witness to some of the events that occurred on May 9. He characterized the questioning by Lieutenant Barone of Ms. Humphrey as having been pursued by Lieutenant Barone "just out of curiosity" (Tr. 155-156). The underlying issue Lieutenant Barone sought to probe was whether Ms. Humphrey's absence was one taken under Mayoral Executive Order 75 (to attend to Union matters) or as regular leave chargeable to Ms. Humphrey. (See, Tr. 146). Once it became clear to Lieutenant Huerta that, whatever the technical basis, the absence was authorized, Lieutenant Huerta counseled Lieutenant Barone to disregard the issue. (Id.). However, Lieutenant Barone persisted. (Tr. 146-148), which of itself raises questions and concerns. Ms. Humphrey, according to Lieutenant Huerta (Tr. 148), then invoked her *Weingarten* rights.[8] Both Lieutenant Barone and Lieutenant questioned Ms. Humphrey's entitlement to invoke such rights. (Tr. 149). When Ms. Humphrey declined to further respond to that line of questioning, Lieutenant Barone demanded that Ms. Humphrey surrender her police identification card, which demand Ms. Humphrey promptly complied with (Tr. 150).[9] After turning over her identification card Ms. Humphrey went to her room and Lieutenants Barone and Huerta went to see Captain McEvoy (Id.). The door-slamming incident, which forms the basis for this Charge, followed these events, specifically the invocation of *Weingarten* rights. To suggest, as the majority does, that these events are not related is as lacking in logic as it is in merit.[10]

NOTICE

[7] The majority opinion sets forth at pages 19-21 the relevant authorities respecting the genesis and application of *Weingarten* rights. Repetition or restatement serves no useful purpose.

[8] It merits note that Lieutenant Huerta testified that, while "I don't believe that [the questioning of Ms. Humphrey's] was hostile, *I believe that PA Humphrey may have perceived it that way.*" (Tr. 158).

[9] Captain McEvoy then directed Lieutenant Barone to return Ms. Humphrey's identification card and proceed, instead, by invoking command discipline. (Tr.150)

[10] Indeed, one cannot help but view the events at issue here as part and parcel of a continuing saga in which the invocation of *Weingarten* rights by a civilian employee of the Police Department were cavalierly dismissed by the police "brass."

The Charge turns upon a claim by Lieutenant Barone that Ms Humphrey was discourteous to her and slammed a door in the Lieutenant's face following the foregoing events.

Ms. Humphrey testified that she ended the exchange with Lieutenant Barone by stating that "she was going to call her Union rep" and that she then commenced doing so. (Tr. 84-85). While Ms. Humphrey was on the telephone, Lieutenant Barone summoned Ms. Humphrey to her office and Ms. Humphrey is said to have responded that she would do so "after I get off with my Union rep." (Tr. 85-86). Lieutenant Barone left and the door closed behind her (Tr. 86).

Lieutenant Huerta was unable to testify that Ms. Humphrey "slammed a door closed while Lieutenant Barone was speaking with her," as here is Charged. Instead, he was not even sure whether Lieutenant Barone and he were even facing the door when it slammed shut, much less that Lieutenant was then speaking with Ms. Humphrey or that Ms. Humphrey slammed it shut. (Tr. 150-151).

Kesia Arvin, a witness not shown to either lack credibility or to have an interest, testified that Ms. Humphrey, who was one the telephone with her Union representative, simply shut the door, but that she did not slam it shut nor did its closing make any noise. (Tr. 86-87). Notably Ms. Arvin was asked the following question and gave the following answer concerning the allegation that Ms. Humphrey slammed the door:

> Q. Do you recall who shut the door?
> A. Ms. Humphrey.
> Q. Did the door make a loud noise?
> A. No.
> Q. Did Ms. Humphrey slam the door?
> A. No. (Tr. 87).
> Q. What happened after that?
> A. I left to give Ms. Humphrey privacy for her call. …
> (Id.).

Importantly, the record reflects that there were four witnesses to the alleged door slamming incident and the attendant circumstances: Lieutenants Barone and Huerta, Ms. Humphrey and Kesia Arvin.

As noted, Lieutenant Huerta did not testify that Ms. Humphrey slammed the door while Lieutenant Barone was speaking to her, as charged. (Tr. 150-151). He was not even sure whether Lieutenant Barone and he were even facing the door at that time, much less that Lieutenant was then speaking with Ms. Humphrey. (Id.).

The record is utterly devoid of any claim, let alone proof, that Ms. Arvin had an axe to grind. (See, Tr. 89-97)[11] . As Ms. Arvin's above quoted testimony reveals, she disputed the claim that the door was even slammed shut. (Id.).

Interest could, obviously, be ascribed to the other two witnesses (Ms. Humphrey and Lieutenant Barone), whose testimony sharply differed,[12] except that they agree that Ms. Humphrey was at the time on the telephone seeking the advice of her Union representative as authorized by Weingarten. Importantly, the unchallenged testimony on this record is that that Lieutenant Barone had at least one week previously (on May 2) promised to do "terrible things" to Ms. Humphrey (an assertion, which as previously noted, Lieutenant Barone had an opportunity to deny before the Hearing Examiner but chose to let stand unchallenged).

It merits note that Captain McEvoy, in investigating the door slamming - alleged discourtesy claim shortly after the supposed event, did not ask Ms. Arvin a single question concerning the incident and, relying solely on Lieutenant Barone's account, suspended Ms. Humphrey. (Tr. 95-96, 122).

Notably, Captain McEvoy acknowledged that Ms. Humphrey was still on the telephone with her Union representative when he went into Ms. Humphrey's office, asked her to go to Lieutenant Barone's office and was told that Ms. Humphrey wanted to conclude the call to her Union representative before complying. (Tr. 120). According to Captain McEvoy, that refusal to immediately comply convinced him that suspension was in order. (Tr. 120-121). Thus, Captain McEvoy testified that after Ms. Humphrey told him she wanted to finish speaking with her Union representative before going to Lieutenant Barone's office:

> A. I immediately walked down the stairs to my office. I knew it was grounds for suspension I immediately got authorization from my Borough Commander … and he authorized suspension." (Tr. 121).[13]

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[11] The record does reflect that Ms. Arvin, when asked on cross whether she and Ms. Humphrey were "friends," responded "I would say so." (Tr. 97).

[12] Ms. Humphrey testified that both she and Lieutenant Barone had their hands on the door handle at the time it closed. (Tr. 28). Lieutenant Barone testified that Ms. Humphrey "took her arm and slammed the door." (Tr. 169).

[13] The majority agrees (Majority Opinion p. 28) that at the time Captain McEvoy ordered Ms. Humphrey's suspension he was "unaware" that she had previously requested Union representation. (See, Tr. 128-129). Significantly, according to Captain McEvoy, Lieutenant Barone never mentioned that to

To maintain on this record -as the majority does -that the Charge was not connected to the assertion of *Weingarten* rights is plainly wrong. As noted above, Ms. Humphrey had asserted her Weingarten rights prior to the discussion that culminated in the asserted door incident. Lieutenant Barone Ms. Humphrey was trying to communicate with her Union representative and obtain counsel. Each of the witnesses acknowledged that fact. (See, e.g., Tr. 72-73, 85-86, 120, 151, 168). Because she opted to do so, rather than to forego her rights in favor of providing instant response, Captain McEvoy suspended her. That was the purport of the Captain's above-quoted testimony. [14]

To require, as the majority would have it, that Ms. Humphrey go through a ritualistic disciplinary process where the record so clearly evidences that the Charges are unsupported by probative evidence and lack merit is simply wrong and wholly unjustified. Just as the first and third Charges were properly found to be predicated upon the wrongful attempt to deprive Ms. Humphrey of her Weingarten rights or in retaliation for her exercise thereof, so too the second Charge fails. It should be dismissed and expunged.

In my view, this record compels the conclusion that the Specification of Charges against Ms. Humphrey are devoid of merit, should be dismissed and expunged and the posting directed by the majority should be expanded accordingly.

January 4, 2010

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Charles G. Moerdler

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him. (Id.). Neither did Lieutenant Barone mention to Captain McEvoy that in fact Ms. Humphrey had gone to Lieutenant Barone's office, as requested. (Tr. 129-130). Yet, the supposed refusal to do so was, according to Captain McEvoy, the basis for his suspension. (Tr. 130).

[14] Additionally, as noted under Point A. there can be no doubt at all that the Charges as a whole, including Charge 2, were the product of retaliation.