

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of
BOARD OF TRUSTEES
OF THE UNIVERSITY OF
MASSACHUSETTS-AMHERST

and

AFSCME COUNCIL 93, AFL-CIO

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Case No. SUP-10-5601

Date Issued: June 27, 2014

Board Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Appearances:

Joseph W. Ambash, Esq. - Representing the Board of Trustees of
the University of Massachusetts-Amherst

Karen Clemens, Esq. - Representing AFSCME, Council 93,

CERB DECISION ON APPEAL

SUMMARY

1 This matter comes before the Commonwealth Employment Relations Board
2 (Board) on timely cross-appeals of a Hearing Officer decision issued on August 14,
3 2013. The Board of Trustees of the University of Massachusetts-Amherst (University or
4 Employer) appeals from the Hearing Officer's conclusion that it independently violated
5 Section 10(a)(1) of M.G.L. c. 150E (the Law) when it denied a bargaining unit member's
6 request for union representation at a meeting that the Hearing Officer found was

1 investigatory in nature and which the bargaining unit member reasonably believed might
2 result in discipline. The University also appeals from the Hearing Officer's conclusion
3 that it violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it
4 unilaterally changed a past practice of advising bargaining unit members about their
5 right to have a union representative present at a meeting at which "Weingarten" rights
6 attached. The Union filed a timely cross-appeal with respect to the remedy only,
7 specifically, the Hearing Officer's refusal to reinstate the bargaining unit member, who
8 was terminated after the interview for repeated workplace misconduct, including
9 "verbally abusive and disrespectful" behavior during the interview. Both parties filed
10 responses to each other's appeals.

11 Although the Hearing Officer found that the conduct for which the University
12 terminated the bargaining unit member occurred during the unlawful interview, she
13 found no link between any information that the University obtained from the bargaining
14 unit member relating to the subject matter of the interview and its reasons for
15 discharging her. In the absence of such link, she declined to order reinstatement on the
16 grounds that such an order would indicate that any conduct, no matter how egregious,
17 must be absolved if it occurs during an unlawful interview. For similar reasons, the
18 Hearing Officer declined to order reinstatement as a remedy for the Section 10(a)(5)
19 violation. Upon review of the record on appeal, the Board upholds the Hearing Officer
20 on the merits of both counts of the Complaint, but overturns her decision not to order a
21 make-whole remedy.

22

1 Facts

2 The University challenges only one of the Hearing Officer's findings, which we
3 address in the Opinion section below. After a thorough review of the record, we adopt
4 the Hearing Officer's findings and reiterate those facts necessary to an understanding of
5 our Opinion. Further reference may be made to the facts set out in the Hearing Officer's
6 decision, reported at 40 MLC 48 (2013) and attached to this decision.

7 Opinion¹

8 Count I - Weingarten Violation

9 In NLRB v. Weingarten, 420 U.S. 251 (1975), the Supreme Court held that the
10 National Labor Relations Act, 29 U.S.C. Sec. 151 et. seq., gives employees the right to
11 be accompanied by a union representative at an investigatory interview by the employer
12 that the employee reasonably believes may result in discipline. The Board has adopted
13 the Weingarten rule and has, with judicial approval, applied it in analogous cases
14 involving Section 2 of the Law. Massachusetts Correction Officers Federated Union v.
15 Labor Relations Commission, 424 Mass. 191 (1997) (citing Commonwealth of
16 Massachusetts, 9 MLC 1567, 1571, SUP-2665 (January 11, 1983); City of Fitchburg, 8
17 MLC 1907, 1909, MUP-4600 (March 9, 1982), Commonwealth of Massachusetts, 4
18 MLC 1415, 1418, SUP-2067 (March 9, 1977)).

19 The issue before the Hearing Officer on Count I was whether the University
20 unlawfully denied bargaining unit member Carol Taylor (Taylor) union representation
21 during the January 30, 2010 meeting between Taylor and Marcie Gallo O'Connell (Gallo
22 O'Connell), a night manager at the Blue Wall cafeteria where Taylor was a culinary

¹ The Board's jurisdiction is not contested.

1 worker. Referencing the general principles set forth in NLRB v. Weingarten, described
2 above, the Hearing Officer found a violation because she found: 1) the meeting was
3 investigatory in nature; 2) Taylor made a valid request for union representation; and 3)
4 Taylor reasonably expected that the interview could result in discipline.

5 In determining that Taylor reasonably believed the meeting would result in
6 discipline, the Hearing Officer relied on the following four factors: 1) that Taylor knew
7 the reason for the meeting before Gallo O'Connell approached her; 2) Gallo O'Connell's
8 presence in the cafeteria when she was not scheduled to work was "atypical"; 3)
9 Taylor's disciplinary history regarding negative interactions with other employees; and
10 4) a recent incident with Jonathan Ortiz (Ortiz), another cafeteria worker.²

11 On appeal, the University claims that the Hearing Officer's conclusion that Taylor
12 reasonably expected that the interview could result in discipline is contradicted by the
13 evidence and inconsistent with a proper application of the reasonable person standard.
14 We disagree.

15 Relying on Cape Cod Regional Technical High School District Committee (Cape
16 Cod Tech), 28 MLC 332, MUP-2541 (May 15, 2002), the Employer first reiterates the
17 argument it made to the Hearing Officer, that Taylor's belief that discipline would result
18 from her meeting with Gallo O'Connell was not reasonable because Taylor refused to
19 speak with Gallo O'Connell before she even knew what Gallo O'Connell wanted to talk

² The Hearing Officer's findings reflect that around a week before, Taylor had been involved in incident with Ortiz that caused Ortiz to complain to Gallo O'Connell that Taylor had treated him disrespectfully and that Taylor had ordered him to do certain tasks, even though Patricia Woods (Woods) was his supervisor. Gallo O'Connell came to the Blue Wall on a Saturday morning to meet with Taylor and Ortiz about Ortiz's complaints.

1 to her about. Id. (finding unreasonable a teacher's belief that a private meeting with the
2 principal might lead to discipline where the teacher did not ask about the purpose of the
3 meeting and no other factors suggested the meeting would be disciplinary). The
4 Hearing Officer rejected this argument, finding that when Gallo O'Connell first came to
5 the cafeteria, Patricia Woods (Woods), Taylor's immediate supervisor, went over to
6 Taylor and told her that Gallo O'Connell wanted to talk to her about Ortiz. The
7 University claims this finding is inaccurate because, although Woods testified that she
8 told Taylor that Gallo O'Connell wanted to talk to her, she never testified that she told
9 her why. During the hearing, however, Woods was never specifically questioned
10 whether she told Taylor why Gallo O'Connell wanted to speak with her or whether she
11 mentioned Ortiz. Taylor's testimony that Woods told her that Gallo O'Connell wanted to
12 talk to her about Ortiz is, therefore, unrefuted. Taylor's testimony is further supported
13 by Woods' testimony that Woods knew the reason for Gallo O'Connell's visit because
14 Gallo O'Connell had previously told her. There is, therefore, no basis in the record to
15 overturn the Hearing Officer's finding on this point.

16 Based on these facts, the Hearing Officer properly distinguished Cape Cod Tech,
17 and relied on Taylor's knowledge about why Gallo O'Connell wanted to speak with her
18 as one basis for her conclusion that Taylor reasonably believed that discipline could
19 result from the meeting. In any event, there is no dispute that as soon as Gallo
20 O'Connell approached Taylor, she told Taylor about Ortiz's claim that he had a
21 personality conflict with Taylor and that she would like to meet with both of them to try
22 and resolve it. When Taylor told Gallo O'Connell that she was not her boss, and had no
23 business speaking to her about Ortiz, Gallo O'Connell responded that she wanted to

1 speak with Taylor to hear her side of the story. Taylor requested union representation
2 immediately thereafter.

3 On this same point, the University argues that even if Taylor knew why Gallo
4 O'Connell wanted to speak with her, it was not reasonable for her to believe that the
5 meeting could result in discipline. The University points to Taylor's testimony about a
6 previous conversation she had with David Eichstaedt (Eichstaedt), who is the
7 University's head of retail dining services and Gallo O'Connell's supervisor. Taylor
8 testified that, in that conversation, Eichstaedt elicited her opinion as to whether Ortiz
9 had difficulty taking directions from women. Claiming that this meeting had taken place
10 just a few weeks earlier, the University argues that, but for Taylor's viewing her meeting
11 with Gallo O'Connell through a "lens" of "irrational fear of discipline" by management, it
12 was "just as likely" that O'Connell wanted to talk to her about the same issue. However,
13 as the Union points out and the hearing record reflects, the meeting with Eichstaedt
14 occurred the previous semester, not just a few weeks earlier. Moreover, unlike Gallo
15 O'Connell's meeting, there is no evidence that Eichstaedt's conversation about Ortiz
16 stemmed out of a specific and recent encounter that Taylor had with Ortiz. The earlier
17 incident is, therefore, distinguishable and the University's argument is not persuasive.

18 The University further contends that, in determining that Taylor reasonably
19 believed that discipline could result from her meeting with Gallo O'Connell, the Hearing
20 Officer improperly relied on Taylor's testimony that she believed that the University had
21 previously disciplined her for even minor matters and that the University wanted to get
22 rid of her because she would not retire. The University claims that the Hearing Officer

1 relied on Taylor's "subjective paranoia" instead of applying the objective reasonable
2 person standard required by the Law. We disagree.

3 In determining the reasonableness of any employee's belief that discipline will
4 occur in the Weingarten context, the test is whether a reasonable person in the
5 employee's situation would have believed that adverse action would follow. City of
6 Peabody, 25 MLC 191, 192-193, MUP-9861 (May 21, 1999). Here, although the
7 Hearing Officer's facts included some of Taylor's beliefs as to the University's treatment
8 of her, she did not rely on those beliefs when concluding that Taylor reasonably
9 believed that the meeting would result in discipline. Instead, she relied on the four
10 factors set forth above. With regard to Taylor's past disciplinary history, it is reasonable
11 to assume that a person with a past disciplinary history, particularly one involving
12 negative interactions with other employees, would view a supervisor's request to talk
13 about a recent incident with another employee differently than an employee with no
14 disciplinary history at all.³ It was appropriate, therefore, for the Hearing Officer to take
15 Taylor's past disciplinary history into account when determining whether a similarly-
16 situated employee would have reasonably believed that Gallo O'Connell's request to get
17 her side of the story about the incident with Ortiz could result in discipline.

18 The University also claims that the inferences that the Hearing Officer drew from
19 Gallo O'Connell's presence at the Blue Wall on her day off were unwarranted, because
20 her off-duty presence demonstrates that Gallo O'Connell could not have been there to
21 conduct a formal investigation and because, in any event, Taylor testified that she did
22 not believe that Gallo O'Connell had any supervisory authority over her. However, the

³ Taylor's termination letter reflects that the University had disciplined her on five separate occasions for "verbally abusive" behavior towards other employees.

1 test does not require that an investigation be “formal” in order for an employee to
2 reasonably conclude that discipline could result from the information elicited at the
3 meeting. Further, once Taylor asked for a union representative, Gallo O’Connell
4 insisted that Taylor speak with her or “we will take it further.” Although Taylor may have
5 testified that Gallo O’Connell did not supervise her, a similarly-situated person would, at
6 a minimum, have reason to believe that Gallo O’Connell believed that she had
7 supervisory authority over Taylor, and that she was willing to exercise it if necessary.

8 For all the above reasons and those stated in the Hearing Officer’s decision, we
9 affirm the Hearing Officer’s conclusion that Taylor reasonably believed that discipline
10 would result from her meeting with Gallo O’Connell and that the University violated
11 Section 10(a)(1) of the Law when it did not grant Taylor’s request for representation or
12 discontinue the meeting.

13 Count II Section 10(a)(5) – Unilateral Change

14 The Hearing Officer held that the University violated Section 10(a)(5) and,
15 derivatively, Section 10(a)(1) of the Law by unilaterally changing its disciplinary
16 procedure and the role played by union representatives in that procedure when Gallo
17 O’Connell did not notify Taylor of her Weingarten protections at the January 30, 2010
18 meeting. This holding was premised on the Hearing Officer’s findings that, in 2001 or
19 2004, the Union proposed a contract provision that would have accorded unit members
20 contractual rights that exceeded their Weingarten rights. The parties ultimately agreed
21 to the following provision that appeared in the CBA that was in effect when Gallo
22 O’Connell met with Taylor in June 2010:

23

1 Article 29, Section 4
2

3 The Union shall receive a concurrent notice of all disciplinary charges, hearings
4 and decisions. When an investigation may lead to the discipline of an employee,
5 the supervisor shall advise the employee that s/he may be accompanied by a
6 Union representative.

7 The Hearing Officer found that pursuant to this provision, the parties agreed that
8 supervisors must advise unit members of the availability of their Weingarten rights in
9 those situations where unit members would be eligible to exercise those rights, i.e.,
10 when bargaining unit members reasonably believe that an investigatory interview would
11 result in discipline. The Hearing Officer further found that, since negotiating this
12 provision, the University's supervisors had a practice of advising unit members to have
13 an AFSCME representative at investigatory interviews that unit members reasonably
14 could believe might result in discipline. The Hearing Officer concluded that the
15 University violated this past practice when Gallo O'Connell failed to notify Taylor of her
16 right to have a union representative at the January 10 meeting.

17 The Employer argues that this finding misconstrues Article 29's language by
18 making the employer's notice to the employee turn on what the employee reasonably
19 believes, rather than the supervisor's purpose for the meeting. However, the Hearing
20 Officer's finding was not strictly based on the CBA provision – it was also based on
21 testimony regarding bargaining history, which the Employer quotes in its post-hearing
22 brief and which is fully consistent with the Hearing Officer's conclusion that the provision
23 required employers to give notice to employees under circumstances that would trigger
24 Weingarten rights, i.e., a bargaining unit member's reasonable belief that an
25 investigatory interview will result in discipline. The Employer argues that this
26 interpretation is erroneous because it imposes an "impossible burden" on supervisors

1 by requiring them to speculate when an employee might reasonably believe that
2 interview could result in discipline. In reality, however, this “burden” is not very different
3 from the situation a supervisor is placed in when an employee makes a request for
4 union representation in the absence of a contract provision. In both cases, the
5 supervisor must consider whether, under all the attendant circumstances, it is
6 reasonable for the employee to believe that information obtained at the interview could
7 result in discipline. We are, therefore, unpersuaded that the Hearing Officer’s finding of
8 this past practice is erroneous.

9 The University also argues that, pursuant to Article 29, an employer has two
10 choices – it can either give advance notice to employees of their right to union
11 representation, thereby allowing the employer to use information obtained at the
12 interview to discipline them, or forego advance notice and be precluded from using any
13 such information to discipline the employee. Based on this interpretation, the University
14 argues that because the University elected not to provide advance notice, the
15 discussion that followed was not “part of an investigation that may lead to discipline”
16 The University thus claims that it did not change a past practice when it failed to advise
17 Taylor of her right to have a union representative present at her meeting with Gallo
18 O’Connell. In making this argument, the University relies heavily on In re Grievance of
19 Vermont State Employees’ Association (VSEA), 179 Vt. 228, 231-232 (2005), a
20 Vermont Supreme Court decision upholding the Vermont Labor Relations Board’s (VLB)

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1 denial of a grievance over a similar, but not identical, provision.⁴

2 We reject this argument for several reasons. First, it was not made to the
3 Hearing Officer and thus is not properly raised for the first time on appeal. See
4 Anderson v. Commonwealth Employment Relations Board, 73 Mass. App. Ct. 908, 909
5 n. 7 (2009) (citing McCormick v. Labor Relations Commission, 412 Mass. 164, 170
6 (1992)) (noting Board's policy of not considering argument raised for first time on review
7 and refusing to consider same argument raised on appeal). Rather, in its post-hearing
8 brief, the University argued that there had been no change in an established practice
9 because the nature of the meeting did not require the University to tell Taylor that she
10 had the right to have union representation under the contract, and because Gallo
11 O'Connell, as a "low-level manager," did not have the authority to unilaterally alter the
12 University's practices. The Hearing Officer addressed and rejected both of these
13 arguments in her decision and we find no error in her conclusions.

14 Even if we were to consider the newly-raised argument, it lacks merit. Again, in
15 determining whether the Law was violated here, the Hearing Officer appropriately
16 focused on whether there had been a change in the past practice and not on whether
17 the particular contract provision had been violated.⁵ The Hearing Officer's
18 characterization of the past practice is supported by the record. The Vermont Supreme

⁴ While both provisions require the employer to notify employees of their right to have a union representative present at an interview that may lead to discipline, the provision in the VSEA's collective bargaining agreement further states that, "The notification requirement shall not apply to the informal initial inquiry of the employee by his or her supervisor without knowledge or reason to believe that discipline of the employee was a likely possibility."

⁵ The Section 10(a)(5) count of the complaint alleges an unlawful unilateral change, not a repudiation of the CBA.

1 Court's decision is therefore distinguishable because it arose out of a grievance heard
2 by the Vermont Labor Relations Board (VLB) under the parties' contract, and not out of
3 an unfair labor practice charge alleging an unlawful unilateral change in a past practice.⁶

4 Remedy

5 Having affirmed the Hearing Officer's conclusions regarding the merits of the
6 case, we turn to the Union's appeal from the Hearing Officer's decision not to order a
7 make-whole remedy, i.e., not to reinstate and make Taylor whole for economic losses
8 she suffered as a result of her termination. We begin by briefly summarizing the events
9 that occurred in the wake of the unlawful interview.⁷

10 The record indicates that Gallo O'Connell summarized her view of what had
11 happened at the unlawful interview two days after the interview, on February 2, 2010, in
12 an email she sent to Eichstaedt and Kevin Wissmann (Wissmann), the University's
13 Manager for Auxiliary Services' Human Resources and Organization Development.
14 That same day, the University notified Francis Martin, the Union president, about the
15 interaction between Taylor and Gallo O'Connell, and subsequently scheduled a "due
16 process/Loudermill" meeting for Taylor.

17 On February 11, 2010, the University sent Taylor a letter terminating her
18 employment for "repeated inappropriate workplace conduct, most recently when you
19 engaged in verbally abusive behavior and disrespectful behavior towards [Gallo

⁶ We take administrative notice that, under Vermont's State Employees Labor Relations Act, the Vermont Labor Relations Board is authorized to "hear and make a final determination on the grievances of all employees who are eligible to appeal grievances to the board." 3 V.S.A. §926.

⁷ We do not repeat the Hearing Officer's findings regarding this meeting, which are unchallenged and contained in the Hearing Officer's opinion appended hereto.

1 O'Connell] and caused disruption in the workplace during your shift on Saturday,
2 January 30, 2010.”⁸ The letter stated that at the January 30, 2010 interview, Taylor was
3 “loud,” had “failed to show respect” to Gallo O'Connell and had refused to follow her
4 directions, including leaving the location Gallo O'Connell had chosen to conduct a
5 meeting by trying to include more employees in the process.” The letter further stated
6 that termination was required because Taylor had “over a lengthy period of time been
7 unable to conform [her] workplace conduct to minimum standards of civility and [had]
8 repeatedly been abusive to co-workers and supervisors.” The letter recited four prior
9 instances of either written warnings or suspensions that Taylor had received from 2004-
10 2009 for “verbally abusive behavior” towards other employees. The most recent
11 discipline was a February 6, 2009 “final warning and written notice” to Taylor.

12 In declining to reinstate Taylor, the Hearing Officer relied on two Board decisions
13 addressing the issue of a make-whole remedy for Weingarten violations,
14 Commonwealth of Massachusetts and AFSCME Council 93, 8 MLC 1287, SUP-2443
15 (August 20, 1981) (Commonwealth I) and Commission of Administration and Finance
16 and Alliance, AFSCME/SEIU Local 509, 18 MLC 1020, SUP-3319 (August 8, 1991)
17 (Commonwealth II). In Commonwealth I, the Board, on appeal of a hearing officer
18 decision, ordered the employer to rescind the discipline it had imposed on an employee
19 whose Weingarten rights had been denied because the Board found that the various
20 disciplinary actions taken by the Commonwealth were “inextricably linked” to the
21 interview at which the request for union representation was unlawfully denied. 8 MLC at
22 1290.

⁸ The letter further indicated that Martin had given Taylor prior notice of the charges against her and Martin was present at the due process meeting.

1 In Commonwealth II, the Board did not order a make whole remedy when an
2 employee was terminated for failure to meet performance expectations following an
3 unlawful Weingarten interview. 18 MLC at 1021-1023. In that case, the charging party
4 appealed the Hearing Officer's determination that her discharge was not based on any
5 information obtained during the interview, arguing that the employer's decision was
6 improperly based on an offensive remark the employee made at the unlawful interview.
7 Id. In upholding the Hearing Officer, the Board first found that the union had met its
8 initial burden of proving that the employee had been subject to an unlawful Weingarten
9 interview. The Board then shifted the burden of proof to the employer to show that the
10 "flawed interview played no part in [the] subsequent termination." The Board explained
11 that "should it be found that the disciplinary action taken. . . was linked to information
12 obtained at the interview at which [the] request for a Union representative was denied,
13 the appropriate remedy would be to return [the employee] to the status she enjoyed
14 prior to the Commonwealth's violation of the Law." Id. at 1022. The Board agreed with
15 the Hearing Officer that the termination was based on the employee's poor performance
16 record and had not been based on the employee's offensive remark. Thus,
17 distinguishing Commonwealth I, the Board found no "nexus between the denial of union
18 representation at the interview and the termination decision." Id.

19 The Board then shifted the burden back to the union to show that "but for" the
20 "conduct or information" obtained at the interview, the employee would not have been
21 terminated. Id. The Board concluded that that employee did not meet this burden
22 because the evidence amply supported the hearing officer's conclusion that the

1 employee was discharged because of her failure to meet performance standards and
2 the decision was not influenced by the employee's outburst at the interview. Id.

3 Here, in applying the tests set forth in both of these cases, the Hearing Officer
4 found that, as in Commonwealth II, Taylor was not terminated based on information she
5 provided at the interview regarding the subject matter of the interview, her recent
6 encounter with Ortiz, but rather, for inappropriate workplace conduct, including what the
7 employer found to be verbally abusive and disrespectful behavior towards Gallo
8 O'Connell. The Hearing Officer thus concluded that the University had met its burden
9 under Commonwealth I and Commonwealth II of showing that the discharge was not
10 linked to any information obtained at the interview, and, further, that the Union had not
11 met its burden under Commonwealth II of showing that "but for" the information that the
12 University obtained at the interview the University would not have terminated her.
13 Although conceding that an argument could be made that Taylor might have been
14 protected from discipline if she had had union representation, the Hearing Officer
15 nevertheless declined to reinstate Taylor in the absence of any showing that the
16 University had terminated her based on information obtained during the interview that
17 was the subject matter of the investigation. The Hearing Officer reasoned that ordering
18 reinstatement under these circumstances would indicate that *any* conduct at an unlawful
19 interview would be excused if it occurred during an otherwise unlawful interview.⁹

⁹ The Hearing Officer declined to award a make-whole remedy for the Section 10(a)(5) violation on similar grounds. Having determined that Taylor's discharge was not directly linked to information that the University obtained from her during the interview, she declined to find that the discharge was a direct result of the University's unlawful change. The Union does not appeal from this aspect of the Hearing Officer's remedy.

1 On appeal, the Union argues that the Hearing Officer misapplied the appropriate
2 legal standard because, under the standards as applied in Commonwealth I, there is a
3 direct link between the unlawful interview and Taylor's termination. The Union similarly
4 argues that, under the test as applied in Commonwealth II, but for the illegal
5 investigatory meeting where Taylor engaged in the behavior that caused her
6 termination, the University would not have terminated her. The Union argues that to
7 uphold Taylor's termination under these circumstances would be inconsistent with
8 controlling Law and the policies underlying Weingarten protections. In its response to
9 the Union's appeal, the University urges us to uphold the remedy and to reject the
10 Union's argument, which it characterizes as stating that an employee must receive
11 complete immunity for misconduct – no matter how egregious – after an employer
12 continues an investigatory interview without Weingarten representation.

13 Our holding today strikes a balance between both arguments. We agree with the
14 Union that when determining whether to reinstate an employee who has been
15 disciplined or terminated after an unlawful disciplinary interview, the Board considers
16 not only whether the employer relied on information obtained as part of the unlawful
17 interview, as the Hearing Officer stated, but also whether there was a nexus between
18 the employee's termination and the employee's "*conduct* or information obtained at the
19 interview." Commonwealth II, 18 MLC at 1022. (emphasis added).

20 In this case, the University's dismissal letter clearly states that Taylor was fired
21 for a cumulative record of "inappropriate workplace conduct, most recently when you
22 engaged in verbally abusive behavior and disrespectful behavior toward Marcie Gallo
23 O'Connell, a Retail Food Services Night Manager, and caused a disruption in the

1 workplace during your shift on Saturday January 30, 2010.” Thus, unlike the situation in
2 Commonwealth II, the triggering event for this termination was Taylor’s conduct at the
3 unlawful interview. We are therefore, unable to conclude, as the Board did in
4 Commonwealth II, that a make-whole remedy is not called for because “had there been
5 no unlawful investigatory interview, [Taylor] would still have been terminated.” Id.

6 Nevertheless, as the Hearing Officer suggested, a strict application of the
7 Commonwealth I and II causal nexus tests would mean that any behavior, no matter
8 how egregious, would be excused if it took place during an unlawful Weingarten
9 interview. As the Employer argues, this is justifiable concern. We note that even in
10 cases where it is alleged that an employee has been disciplined for engaging in
11 protected concerted activity, the Board considers whether the employee’s behavior has
12 lost its protected status because it is, among other things, egregious, disruptive,
13 physically intimidating or indefensibly disloyal.¹⁰ See, e.g., Bristol County Sheriff’s
14 Office, 33 MLC 107, 108-109, MUP-03-3900 (January 3, 2007) (citing Town of Bolton,
15 32 MLC 13, 18, MUP-01-3255 (June 27, 2005); City of Boston, 7 MLC 1216, 1226,
16 MUP-3480 (August 21, 1980)(further citing Harwich School Committee, 2 MLC 1095,
17 1100, MUP-720 (August 26, 1975).

18 Therefore, in determining the appropriateness of a make-whole remedy in cases
19 like this one, where a direct link is established between an employee’s intemperate

¹⁰ We note that there is no allegation before us that Taylor was discharged for asserting her Weingarten rights. Nor do we reach the issue of whether an employee’s conduct at a Weingarten interview, other than asserting Weingarten rights, constitutes concerted behavior protected under Section 2 of the Law. However, the balancing test used in the cases that consider whether an employee’s behavior has lost its protected status provides a useful framework for determining the propriety of a make-whole remedy under the unique circumstances of this case.

1 conduct at an unlawful interview and the discipline imposed, (but where there is no
2 allegation that the employee was disciplined for asserting Weingarten rights), the Board
3 (or a hearing officer in the first instance) should undertake further analysis to determine
4 whether the employee's behavior did, indeed, warrant the discipline imposed, even
5 though it occurred in the context of the unlawful interview.¹¹ Any such inquiry should
6 consider the context in which the behavior took place by balancing the extent to which
7 the behavior that formed the basis for the discipline was caused or provoked by the
8 employer's unfair labor practice, against the right of the employer not to be subjected to
9 egregious, insubordinate, or profane remarks that disrupt the employer's business or
10 demean workers or supervisors. See, e.g., Plymouth Police Brotherhood v. Labor
11 Relations Commission, 417 Mass. 435, 441 (1994) (citing City of Boston, 6 MLC 1096,
12 1097, MUP-2878 (May 23, 1979)) (setting forth balancing test, generally, for determining
13 when employee's conduct loses protected status); Newton School Committee, 6 MLC
14 1701, 1705, MUP-3416 (January 9, 1980) (permitting "some leeway for impulsive
15 behavior which must be balanced, against the employer's right to maintain order and
16 respect"); Town of Westborough, 5 MLC 1116, MUP-2867 (June 30, 1978) (acting in an
17 intemperate manner, if provoked into doing so, does not necessarily caused concerted
18 activity to lose its protected status).

¹¹ The Hearing Officer expressly made no findings as to whether Taylor's conduct was egregious or whether just cause existed for the discipline.

1 Applying this test to the undisputed facts of this case,¹² we note first that the
2 conduct occurred during an unlawful Weingarten interview that Taylor was pressured
3 into attending under Gallo-Connell's threat to "take it further." Second, Taylor's initial
4 outburst, branding Gallo-Connell as a "nobody and a nothing," occurred behind closed
5 doors and in the immediate aftermath of the supervisor's threat and the denial of
6 Weingarten protections. Third, even though Taylor attempted to leave the interview,
7 she did so at least partly in an attempt to get Woods' corroboration about her views on
8 Ortiz, who was the subject of the interview. In any event, Taylor returned to the office
9 when asked to do so.

10 Given that many of Taylor's remarks and conduct were linked to Gallo O'Connell
11 compelling her to attend an unlawful interview under threat of discipline, we balance
12 these concerns against the employer's rights set forth above. In this regard, we find no
13 facts that suggest that Taylor's conduct, raised voice or inflamed rhetoric, while far from
14 exemplary, were accompanied by profanity, were indefensibly disloyal or were in any
15 way physically threatening. What's more, we find it significant that most of the
16 exchange and conduct for which Taylor was punished occurred in the privacy of an
17 office and not in front of other employees, supervisors or customers.

18 We therefore find that, on balance, the University's interests in a non-disruptive
19 and orderly work atmosphere were not substantively compromised when weighed
20 against the fact that Taylor made these remarks after being forced to attend an
21 interview that she reasonably believed would result in discipline without her union

¹² See Plaza Auto Center, Inc. and Nick Aguirre, 360 NLRB No. 117, slip op. at 5 (May 28, 2014) (nature of employee outburst not properly considered a credibility determination made by ALJ).

1 representative present. While we acknowledge that Taylor's prior disciplinary record
2 played a role in the level of discipline imposed, there is no question that her conduct at
3 the unlawful interview was the triggering event for that discipline. Because we have
4 found that, on balance, the University's decision to impose discipline for this event was
5 not warranted, we conclude that the appropriate remedy for the Weingarten violation
6 includes ordering the University to offer to reinstate Taylor and to make her whole for all
7 losses suffered as a result of being terminated.¹³

8 Conclusion

9 Based on the record and for the reasons stated above, the Board affirms the
10 Hearing Officer's conclusion that the University independently violated Section 10(a)(1)
11 of the Law by denying her request for Union representation. We further affirm the
12 Hearing Officer's conclusion that the University violated Section 10(a)(5) and,
13 derivatively, Section 10(a)(1) of the Law by unilaterally changing the past practice of
14 advising bargaining unit members of their right to have a union representative present at
15 an investigatory interview that they reasonably believe might result in disciplinary action
16 against them. We reverse the Hearing Officer's remedy for the Section 10(a)(1)
17 violation for the reasons set forth above.

18 ORDER

19
20 WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the
21 University shall:

22 1. Cease and desist from:

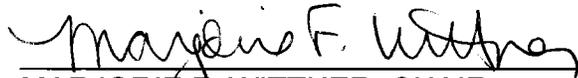
¹³ Having determined that a make-whole remedy is appropriate to remedy the Section 10(a)(1) violation, we do not address the Union's alternative argument that Taylor was acting as her own Union advocate. We also need not address the unappealed issue of the appropriate remedy for the Section 10(a)(5) violation.

- 1
2 a) Failing to honor the rights of an employee who requests union
3 representation at a meeting that is investigatory in nature and
4 where the employee reasonably believes that the meeting could
5 result in the employee's discipline.
6
7 b) Failing and refusing to bargain in good faith with the Union by
8 unilaterally changing a past practice whereby the University
9 advised unit members of their right to have union representation at
10 a meeting that is investigatory in nature and where the employee
11 could reasonably believe that the meeting could result in the
12 discipline of the unit member.
13
14 c) In any like manner, interfering with, restraining and coercing its
15 employees in any rights guaranteed under the Law.
16
17 2. Take the following action that will effectuate the purposes of the Law:
18
19 a) Restore the prior practice of advising unit members of their right to
20 have union representation at a meeting that is investigatory in
21 nature and where the employee could reasonably believe that the
22 meeting could result in the employee's discipline.
23
24 b) Upon request, bargain to resolution or impasse before changing the
25 practice of advising unit members of their right to have union
26 representation at a meeting that is investigatory in nature and
27 where the unit member could reasonably believe that the meeting
28 could result in the employee's discipline.
29
30 c) Immediately offer to reinstate Taylor to her former position and
31 make her whole for any loss of wages suffered her termination, plus
32 interest on any sums owing at the rate specified in M.G.L. c. 231,
33 section 6I, compounded quarterly.
34
35 d) Post immediately in all conspicuous places where members of the
36 Union's bargaining unit usually congregate, or where notices are
37 usually posted, including electronically, if the University customarily
38 communicates with these unit members via intranet or email and
39 display for a period of thirty (30) days thereafter, signed copies of
40 the attached Notice to Employees.
41
42 e) Notify the DLR in writing of steps taken to comply with this decision
43 within ten (10) days of receipt of this decision.

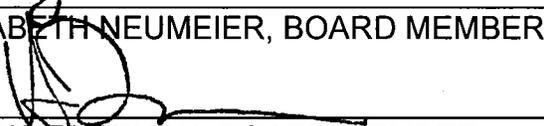
44

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD


MARJORIE F. WITTNER, CHAIR


ELIZABETH NEUMEIER, BOARD MEMBER


HARRIS FREEMAN, BOARD MEMBER

APPEAL RIGHTS

Pursuant to the Supreme Judicial Court's decision in Quincy City Hospital v. Labor Relations Commission, 400 Mass. 745 (1987), this determination is a final order within the meaning of M.G.L. c. 150E, § 11. Any party aggrieved by a final order of the Board may institute proceedings for judicial review in the Appeals Court pursuant to M.G.L. c.150E, §11. **To claim such an appeal, the appealing party must file a Notice of Appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision.** No Notice of Appeal need be filed with the Appeals Court.



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

The Commonwealth Employment Relations Board has held that the Board of Trustees of the University of Massachusetts-Amherst (University) independently violated Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to honor a bargaining unit member's request for union representation at a meeting that was investigatory in nature, and where she reasonably believed might result in her discipline. The Board has also held that the University violated Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law by unilaterally changing a past practice of advising bargaining unit members of their right to have union representation at meetings that were investigatory in nature, and where unit members reasonably could believe might result in disciplinary actions against them.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights:

to engage in self-organization to form, join or assist any union; to bargain collectively through representatives of their own choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all of the above.

WE WILL NOT interfere with the rights of employees who request union representation at meetings that are investigatory in nature, and where employees reasonably believe might result in disciplinary actions against them.

WE WILL NOT fail and refuse to bargain in good faith with AFSCME by unilaterally changing a past practice whereby the University advised unit members of their right to have union representation at meetings that were investigatory in nature, and where unit members reasonably could believe might result in disciplinary actions against them.

WE WILL take the following affirmative action to effectuate the purposes of the Law:

1. Restore the prior practice of advising unit members of their right to have union representation at meetings that are investigatory in nature, and where unit members reasonably could believe might result in disciplinary actions against them.
2. Bargain to resolution or impasse before changing the practice of advising unit members of their right to have union representation at meetings that are investigatory in nature, and where unit members reasonably could believe might result in disciplinary actions against them.
3. Immediately offer to reinstate Taylor to her former position and make her whole for any loss of wages suffered as a result of her termination, plus interest on any sums owing at the rate specified in M.G.L. c 231, section 6I, compounded quarterly.

Board of Trustees of the University
of Massachusetts-Amherst

Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, 19 Staniford Street, 1st Floor, Boston, MA 02114 (Telephone: (617) 626-7132).

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

BOARD OF TRUSTEES
OF THE UNIVERSITY
OF MASSACHUSETTS-AMHERST

and

AFSCME, COUNCIL 93

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Case No. SUP-10-5601

Date Issued: August 14, 2013

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Joseph W. Ambash, Esq. - Representing the Board of Trustees
David Strock, Esq. - of the University of Massachusetts-Amherst

Maureen Medeiros, Esq. - AFSCME, Council 93
Joseph L. DeLorey, Esq.

HEARING OFFICER DECISION

SUMMARY

1 The issue in this case is whether the Board of Trustees of the University of
2 Massachusetts-Amherst (University) independently violated Section 10(a)(1) of the Law
3 by failing to honor Carol Taylor’s (Taylor) request for union representation at a meeting
4 that was investigatory in nature, and where she reasonably believed might result in her
5 discipline. The University also allegedly violated Section 10(a)(5) and, derivatively,
6 Section 10(a)(1) of the Law by unilaterally changing a past practice of advising
7 bargaining unit members about their right to have a union representative present at an

1 investigatory interview and where they reasonably could believe might result in
2 disciplinary actions against them. I find that the University violated the Law in the
3 manner alleged.

STATEMENT OF THE CASE

4 On July 28, 2010, AFSCME, Council 93 (AFSCME or the Union) filed a charge of
5 prohibited practice with the Department of Labor Relations (DLR) in Case No. SUP-10-
6 5601, alleging that the University had violated Sections 10(a)(1), (3),¹ and (5) of the
7 Law. A DLR hearing officer conducted an investigation of the matter on December 7,
8 2010. On December 14, 2010, the investigator issued a two-count complaint. Count I
9 alleged that the University independently violated Section 10(a)(1) of the Law by
10 preventing unit member Carol Taylor (Taylor) from consulting with her Union
11 representative at an investigatory meeting that Taylor reasonably believed could lead to
12 discipline. Count II of the Complaint² alleged that the University violated Section
13 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally changing a
14 practice of advising bargaining unit members of their right to have a union
15 representative present during an investigation that may lead to discipline. The
16 University filed an answer to the Complaint on January 14, 2011.

17 I conducted a hearing on March 19, 2012 and March 29, 2012. On March 19,
18 2012, before any witnesses testified, I allowed the parties' joint motion to sequester all
19 witnesses prior to giving testimony, except Taylor and Donald Teres, the University's

¹ The Union subsequently withdrew the Section 10(a)(3) allegation.

² Although Count II of the Complaint contains a reference to Article 28 of the parties' collective bargaining agreement, the parties stipulated that the correct reference should be to Article 29 of the collective bargaining agreement.

1 Labor Relations Assistant. Both parties had an opportunity to be heard, to examine
2 witnesses and to introduce evidence. The parties submitted their post-hearing briefs
3 postmarked on June 14, 2012. Upon review of the entire record, including my
4 observation of the demeanor of the witnesses, I make the following findings of fact and
5 render the following decision.

6 FINDINGS OF FACT³

7 AFSCME is the exclusive bargaining representative for certain service,
8 maintenance, agricultural and food service employees at the University. The Union and
9 the University are parties to a collective bargaining agreement that, by its terms, was in
10 effect from July 1, 2009 through June 30, 2012 (2009-2012 Agreement). Article 29,
11 Section 4 of the 2009-2012 Agreement states:

12 The Union shall receive a concurrent notice of all disciplinary charges,
13 hearings and decisions. When an investigation may lead to the discipline
14 of an employee, the supervisor shall advise the employee that s/he may
15 be accompanied by a Union representative.

16
17 AFSCME and the University agreed to the language in Article 29, Section 4 in either
18 2001 or 2004 during successor contract negotiations. The Union initially proposed
19 broader language that would have accorded unit members contractual rights that
20 exceeded their so-called Weingarten rights, i.e. the right to have union representation at
21 meetings, which were investigatory in nature that unit members reasonably believed
22 might result in disciplinary action against them. The parties ultimately agreed upon the
23 language referenced above. Pursuant to Article 29, Section 4, the parties agreed that
24 supervisors must advise unit members of the availability of their Weingarten rights in
25 those situations where unit members would be eligible to exercise those rights.

³ The DLR'S jurisdiction in this matter is uncontested.

1 Thereafter, the University's supervisors had a practice of advising unit members of their
2 right to have an AFSCME representative at investigatory interviews that unit members
3 reasonably could believe might result in discipline.⁴

4 Carol Taylor

5 Taylor had worked for the University in Dining Services since 1997 and had been
6 the Union's chief steward for Dining Services for approximately twelve years. In
7 January 2010, Taylor was a culinary worker at the Blue Wall Cafeteria⁵ (Blue Wall), a
8 retail eatery that is open to the public, at the University's Campus Center. She worked
9 Wednesdays through Sundays from 8 AM to 4 PM. Her direct supervisor was Patricia
10 Woods (Woods), who also was a member of AFSCME's bargaining unit. Taylor was of
11 the opinion that in the past the University had disciplined her for even minor matters.
12 She also believed that the University wanted to get rid of her because she would not
13 retire.

14 January 30, 2010

15 On Saturday, January 30, 2010, Taylor began work at the Blue Wall at 8 AM.
16 The cafeteria was not busy.⁶ Her primary job duty that day was to work as a cashier,

⁴ AFSCME local president Francis Martin referenced several grievances that the Union filed between 2001 and January 2010 protesting the University's alleged failure to adhere to the language contained in Article 29, Section 4. However, the record contains no detailed information about those grievances, other than the unit members allegedly worked in the University's Physical Plant. I decline to make findings of fact about those grievances because I do not have sufficient specific information in the record about them.

⁵ The parties interchangeably refer to the eatery as both the Blue Wall Cafeteria and the Blue Wall Café. For the purposes of this decision, I have used the term cafeteria.

⁶ The record does not reveal how many, if any, customers were present at the Blue Wall that day.

1 but she also packaged cookies and pastries for individual retail sale and restocked the
2 refrigerators as needed. At some point between 8 AM and 9 AM, Marcie Gallo
3 O'Connell (Gallo O'Connell),⁷ who was a night manager at the Blue Wall, arrived at the
4 cafeteria. Because Gallo O'Connell's regular work schedule was Monday through
5 Friday, 5:00 PM until 11PM or 12 midnight, she usually was not present at the Blue Wall
6 on Saturday mornings. Gallo O'Connell had come to the Blue Wall in order to meet with
7 Taylor and another employee, Jonathan Ortiz (Ortiz), concerning complaints that Ortiz
8 had made about Taylor, including complaints about an incident that had occurred a
9 week earlier.⁸ Specifically, Ortiz⁹ had complained to Gallo O'Connell that Taylor had
10 treated him disrespectfully, and that Taylor had ordered him to do certain tasks, even
11 though Woods was the supervisor.¹⁰ Gallo O'Connell believed that Saturday morning,
12 when the Blue Wall usually had fewer customers and when both Taylor and Ortiz
13 worked, would be an appropriate time to meet with them.

14 Gallo O'Connell previously had informed her supervisor David Eichstaedt
15 (Eichstaedt), the University's head of retail dining services, that she wanted to speak
16 with Taylor and Ortiz, and he had given his approval. Additionally, she had asked the

⁷ Gallo O'Connell worked as a retail manager at the University from November 2009 to February 2011. The University classified her as an "'03 employee," which meant that she was a full-time, temporary employee who received no benefits from the University and was not a member of any bargaining unit.

⁸ Gallo O'Connell did not intend to discipline Taylor when she came to the Blue Wall.

⁹ Ortiz was an '03 employee, whose work schedule overlapped for at least three hours per day with Gallo O'Connell's work schedule.

¹⁰ Taylor previously had worked as a temporary supervisor in the fall of 2009.

1 retail chef Richard Callender (Callender)¹¹ for his opinion on whether she should meet
2 with Taylor and Ortiz.¹² Gallo O'Connell characterized her role in the meeting as
3 facilitating a discussion between Taylor and Ortiz. Callender opined that if Gallo
4 O'Connell wanted to meet with Taylor and Ortiz, she should go ahead and do so.¹³

5 When Gallo O'Connell arrived at the Blue Wall, she initially approached Woods
6 near the pizza station and asked to speak with Taylor. Woods went over to Taylor, who
7 was packaging cookies at a table near the cash registers, and stated that Gallo
8 O'Connell wanted to speak with her about Ortiz.¹⁴ Taylor informed Woods that she
9 would not speak with Gallo O'Connell unless her Union representative was present.
10 Gallo O'Connell then came over to Taylor, and Woods moved away.¹⁵ Gallo O'Connell
11 told Taylor about Ortiz's claim that he had a personality conflict with Taylor. Gallo
12 O'Connell also stated that she wanted to meet with both of them to try and resolve the

¹¹ Callender was an AFSCME unit member and Ortiz's direct supervisor.

¹² When Ortiz complained to Callender about Taylor, Callender raised the issue with Gallo O'Connell. Callender believed that Gallo O'Connell, who held the higher ranking position of manager, should solve the problem.

¹³ Callender, had previously met with employees, including Woods and Ortiz, to try and resolve personality conflicts. Woods did not request Union representation at that meeting.

¹⁴ Although Gallo O'Connell denied informing anyone but Eichstaedt and Callender that she planned to meet with Taylor and Ortiz on Saturday, I credit Woods' testimony on this point. Woods' testimony was consistent with the testimony of Harvinder Kaur, a night supervisor, who credibly testified that Gallo O'Connell told her several days before that Gallo O'Connell intended to come to the Blue Wall on Saturday to meet with Taylor and Ortiz, because they had a personality conflict.

¹⁵ Although Gallo O'Connell claimed that Taylor approached her, I credit Taylor's testimony that Gallo O'Connell came over to her, because it is consistent with Woods' testimony on this point.

1 conflict. Taylor responded negatively by stating that Gallo O'Connell was not her boss¹⁶
2 and had no business speaking with her about Ortiz. Gallo O'Connell responded that
3 she wanted to speak to Taylor and hear her side of the story. Taylor then replied that
4 she wanted Union representation and that she only would talk with Eichstaedt and
5 Union local president Francis Martin (Martin), who also worked in the University's Dining
6 Services.¹⁷ Gallo O'Connell responded: "You will have a conversation with me now or
7 we will take it further."¹⁸ Taylor then agreed to go in the back and speak with Gallo
8 O'Connell, which Taylor believed was the only way to get Gallo O'Connell to leave her
9 alone.

¹⁶ Taylor as chief steward previously had told Woods that '03 employees could not discipline unit members. However, Taylor also claimed at hearing that she was aware of instances in which '03 employees had disciplined unit members.

¹⁷ I credit Taylor's testimony that she informed Gallo O'Connell that she wanted Union representation. Conversely, Gallo O'Connell testified that Taylor never made such a request. However, it is highly likely that Taylor, who was a chief steward, was admittedly mistrustful of the University and had received prior discipline, requested Union representation. It is also consistent with her earlier statement to Woods that she wanted Union representation, when Woods told her that Gallo O'Connell wanted to speak to her about Ortiz.

I specifically decline to find, as the University requests, that Gallo O'Connell did not hear Taylor make such a request. Gallo O'Connell never indicated that she could not hear Taylor, who talked very loudly during their meeting.

¹⁸ Gallo O'Connell denied that she told Taylor that: "You will have a conversation with me or we will take it further." Instead, Gallo O'Connell testified that she continued to tell Taylor that she wanted to hear Taylor's side of the story. I credit Taylor's testimony on this point because it is unlikely that Taylor, who was suspicious of Gallo O'Connell's appearance at the Blue Wall that morning, subsequently would speak with Gallo-O'Connell simply because Gallo O'Connell told her that she wanted to hear Taylor's side of the story.

1 Gallo O'Connell then brought Taylor into Callender's office and shut the door.¹⁹
2 Taylor immediately began to loudly protest Gallo O'Connell's use of Callender's office
3 by telling Gallo O'Connell that she was "a nobody and a nothing" and that she had no
4 right to use Callender's office. Taylor insisted that she and Gallo O'Connell move to
5 another office. Gallo O'Connell replied that Callender's office was where she was going
6 to speak with Taylor, that Taylor needed to speak with her calmly and respectfully, and
7 that she did not meet with Taylor in order to have Taylor call her a nobody and a
8 nothing.

9 Gallo O'Connell and Taylor then began to talk about Ortiz and the alleged
10 incident that caused Ortiz to claim that Taylor treated him disrespectfully and that
11 Woods, not Taylor, should be giving him directives. Gallo O'Connell first inquired
12 whether Taylor had given Ortiz an order. Gallo O'Connell then asked Taylor for her side
13 of the story, and Taylor gave her version of events. She also referenced certain
14 instances where she contended that Ortiz had been disrespectful to her. Gallo
15 O'Connell then reiterated that Ortiz felt that Taylor treated him disrespectfully and that if
16 Taylor needed Ortiz to do something, she should ask politely and say thank you. Taylor
17 pointed at Gallo O'Connell and told Gallo O'Connell that "she was just like everyone
18 else." Taylor then opened the office door and started to walk out. She also began to
19 tell Gallo O'Connell about an instance where she believed Ortiz lied to her about the
20 location of a box of chicken fingers. Taylor then headed towards the front area of the
21 Blue Wall to find Woods to corroborate her claim about the chicken fingers. Gallo

¹⁹ No one else was present in Callender's office.

1 O'Connell followed her and told her that the issue with the chicken fingers was
2 unimportant and that they should continue the discussion in Callender's office.

3 Gallo O'Connell and Taylor returned to Callender's office and began to talk
4 about Ortiz. Taylor insisted that Gallo O'Connell was taking Ortiz's side in the matter,
5 and Gallo O'Connell perceived Ortiz as being disrespectful towards her. She informed
6 Taylor that if Taylor did not want to talk with her and resolve the conflict with Ortiz, she
7 could talk to somebody else. Taylor replied that she welcomed speaking with
8 Eichstaedt. Gallo O'Connell responded that you are welcome to go and speak with him.
9 Gallo O'Connell and Taylor then left Callender's office.

10 At the doorway between the back and front area of the Blue Wall, Taylor disputed
11 Gallo O'Connell's assertion that she acted disrespectfully towards her. Taylor claimed
12 that she always spoke in a loud tone, but Gallo O'Connell told her that she could control
13 her tone. Taylor again started to speak negatively about Ortiz, and Gallo O'Connell told
14 her that the information was not relevant to the discussion. Taylor then called Gallo
15 O'Connell a racist, because Gallo O'Connell was taking Ortiz's side. Gallo O'Connell
16 told Taylor that if she had a claim of discrimination, she could file it but otherwise it was
17 an offensive phrase to throw around. Taylor then apologized and stated that she meant
18 to say biased. Gallo O'Connell then informed Taylor that Woods was the supervisor,
19 that Woods should give directions to Ortiz, and that Taylor also needed to be respectful
20 in her dealings with Ortiz. Taylor acknowledged that Woods was the supervisor and the

1 conversation ended.²⁰ During the conversation, Gallo O'Connell never informed Taylor
2 about her Weingarten rights or offered to delay the meeting so that Taylor could obtain
3 a Union representative.

4 Gallo O'Connell then went and spoke briefly to Ortiz. She then left the Blue Wall.
5 Taylor returned to her post at the cash registers at the front end of the Blue Wall. Taylor
6 was crying and asked to go home. Woods asked Taylor to stay, because Woods was
7 shorthanded. Ultimately, Taylor completed her shift that day.

8 On Monday, February 2, 2010, Gallo O'Connell gave Eichstaedt a two and one-
9 half page letter²¹ (February 2, 2010 letter) that she had drafted describing her
10 interactions with Taylor at the Blue Wall on January 30, 2010.²² She also sent a copy of
11 the letter via email to Kevin Wissmann (Wissmann), the University's Manager for
12 Auxiliary Services' Human Resources and Organizational Development. In the last full
13 paragraph of the February 2, 2010 letter, Gallo O'Connell stated:

14 The whole time I was talking to Carol [Taylor]... she displayed numerous
15 examples of blatant disrespect for me as both a manager here, and as a
16 person. Getting into my face and yelling loudly and repeatedly that 'I'm
17 nothing' is the obvious example of this disrespect. She also had no
18 respect for her co-workers or any customers who had to be subjected to
19 her behavior. At one point she also accused me of racial discrimination.

²⁰ Gallo O'Connell indicated that the meeting lasted twenty to twenty-five minutes, while Taylor indicated that the meeting lasted two to three minutes. Based on the facts before me, I find Gallo O'Connell's estimate of the length of the meeting to be too long, while I find Taylor's estimate of the length of the meeting to be too short. Thus, I decline to adopt either witnesses' testimony on this point and do not make a finding as to the length of the meeting.

²¹ Gallo O'Connell addressed the letter "To Whom It May Concern."

²² Gallo O'Connell drafted the letter because: a) the meeting with Taylor had upset her; and b) Ortiz's problem with Taylor still remained unresolved. Further, Gallo O'Connell wanted to notify Eichstaedt and Weismann that Taylor had acted inappropriately in the workplace, including around customers.

1 The accusation, though it didn't even make sense under the
2 circumstances, was offensive.

3
4 On or about that date, the University notified Martin of the January 30, 2010 interaction
5 between Taylor and Gallo O'Connell and subsequently scheduled a due
6 process/Loudermill meeting for Taylor. On February 11, 2010, the University sent
7 Taylor a letter (February 11, 2010 letter) terminating her employment. The February
8 11, 2010 letter stated in pertinent part:

9 This letter is to inform you that you have been terminated from the service
10 of the University effective February 11, 2010 due to repeated inappropriate
11 workplace conduct, most recently when you engaged in verbally abusive
12 behavior and disrespectful behavior towards Marcie Gallo O'Connell, a
13 Retail Food Services Night Manager, and caused a disruption in the
14 workplace during your shift on Saturday, January 30, 2010.

15
16 On February 8, 2010 you and your Union representatives attended a due
17 process/Loudermill meeting at which you were given a chance to describe
18 your version of the events of January 30th. You were given prior notice of
19 the charges against you. In addition, I met with other persons familiar with
20 the incidents at issue in order to fully investigate what occurred on January
21 30, 2010. Based on what I learned at the due process meeting and
22 through my investigation and after considering your length of service and
23 work record I have determined that termination is the only action left to the
24 employer as you have over a lengthy period of time been unable to
25 conform your workplace conducts to minimum standards of civility and you
26 have repeatedly been abusive to co-workers and supervisors.

27
28 Specifically I find that on January 30, 2010 Marcie Gallo O'Connell came to
29 your work site to try to resolve a work place relationship problem you were
30 having with another employee. You were loud, you failed to show respect
31 for her and you refused to follow her directions. You have an obligation to
32 cooperate with a supervisor in their directions to you in the workplace. You
33 repeatedly ignored Ms. Gallo O'Connell's direction and left the location she
34 had chosen to conduct a meeting trying to include more employees in the
35 process.

36
37 I would note that you have been given verbal and written warnings, as well
38 as being suspended in an unsuccessful attempt to correct your workplace
39 conduct. Specifically, you received the following discipline for similar
40 conduct on the following occasions:

1 March 4, 2004-Written warning for verbally abusive behavior towards
2 another employee, Meg Page.

3
4 November 21, 2005-One day suspension letter for verbally abusive
5 behavior toward another employee, Meg Page.

6
7 October 12, 2006-Three day suspension letter for verbally abusive
8 behavior toward another employee, Amanda Pipczynski.

9
10 May 31, 2007-Ten day suspension letter for verbally abusive behavior
11 toward another employee, Teri Martinbeault.

12
13 February 6, 2009-Formal written warning and final notice regarding your
14 conduct as an employee due to verbally abusive behavior towards David
15 Eichstaedt on December 22, 2008.

16
17 In the hearing on 2/08/10 your union representatives stated that there were
18 procedural issues involved in this situation. I have reviewed these
19 allegations and found them to be unsubstantiated. The meeting of January
20 30 was in no respect disciplinary. The matter became a subject of possible
21 discipline only after it was reported to Ms. Gallo O'Connell's manager and
22 your conduct was reviewed in light of your work record. Disciplinary action
23 is now being taken following an investigation and a hearing at which you
24 and your Union representatives were given a full opportunity to respond to
25 the charges against you. After considering your response and the
26 apparent misconduct, I have decided that a termination is warranted.

27
28 Attached is information for you regarding your benefits and retirement. A
29 pamphlet entitled, "How to File for Unemployment Insurance Benefits" is
30 including in the mailing.

31 Opinion

32 Count I-Alleged Weingarten Violation

33 In determining whether an employer has unlawfully denied union representation
34 to an employee during an investigatory interview in violation of Section 10(a)(1) of the
35 Law, the Commonwealth Employee Relations Board (CERB) has been guided by the
36 general principles enunciated in NLRB v. Weingarten, 420 U.S. 251 (1975). Suffolk
37 County Sheriff's Department, 28 MLC 253, 259 (2002). For an employee to be entitled
38 to union representation, the meeting must be investigatory in nature. Commonwealth of

1 Massachusetts, 8 MLC 1287, 1289 (1991). The right to union representation arises
2 when the employee reasonably believes that the investigatory meeting will result in
3 discipline and the employee makes a valid request for union representation.
4 Commonwealth of Massachusetts, 22 MLC 1741, 1747 (1996). Once an employee
5 makes a valid request for union representation, the employer is permitted one of three
6 options: 1) grant the request, 2) discontinue the interview; or 3) offer the employee the
7 choice of continuing the interview or having no interview at all. Commonwealth of
8 Massachusetts, 10 MLC 1156, 1061 (1983) (finding that the employer sufficiently
9 explained the options to an employee).

10 Nature of the Meeting

11 I turn first to consider whether the January 30, 2010 meeting between Taylor and
12 Gallo O'Connell was investigatory in nature. It is well established that not every
13 meeting that an employer has with an employee is an investigatory interview. See
14 Commonwealth of Massachusetts, 26 MLC 139, 141 (2000) (meeting where the
15 employer's sole purpose is to inform an employee of, or to impose previously
16 determined discipline and no investigation is involved triggers no right to union
17 representation). A meeting is investigatory when the employer's purpose is to
18 investigate the conduct of an employee and the interview is convened to elicit
19 information from the employee or to support a further decision to impose discipline. See
20 Id. Here, the University contends that the meeting between Taylor and Gallo O'Connell
21 was not investigatory in nature. Rather, Gallo O'Connell's intent was to mediate the
22 personality conflict between Taylor and Ortiz in the same manner that Callender, the
23 retail chef, previously had met with employees to resolve their disputes. The University

1 maintains that the Dining Services' alleged practice of informally mediating employee
2 personality conflicts relegates the meeting between Taylor and Gallo O'Connell to a run
3 of the mill shop floor conversation not subject to Weingarten protections.

4 However, the facts before me show that Gallo O'Connell did not come to the Blue
5 Wall on Saturday morning, at a time when she usually was off-duty, to have a run-of-the
6 mill shop floor conversation with Taylor. See NLRB v. Weingarten, 420 U.S. at 262-263
7 (describing the giving of instructions or training or needed corrections of work
8 techniques as examples of shop floor conversations that did not trigger Weingarten
9 protections). When Gallo O'Connell told Taylor that she wanted to hear Taylor's side of
10 the story about the recent incident with Ortiz, Gallo O'Connell was having the meeting
11 with Taylor in order to elicit information from her. They discussed the alleged incident
12 that prompted Ortiz's complaint. Gallo O'Connell asked questions, and Taylor gave her
13 version of events. Thus, I conclude that the meeting between Taylor and Gallo
14 O'Connell was investigatory in nature.

15 Reasonableness of Taylor's Belief that Meeting Could Result in Disciplinary Action

16 To determine reasonableness, the standard is not Taylor's subjective belief but
17 whether a reasonable person in the employee's situation would have believed adverse
18 action would follow. Commonwealth of Massachusetts, 8 MLC at 1289. Here, the
19 University contends that Taylor's belief was not reasonable but instead was colored by
20 her distrust of the University's motives and her erroneous opinion that prior discipline
21 that she had received resulted from conversations with her supervisors. In support of its
22 argument, the University points out that that Taylor refused to speak with Gallo
23 O'Connell before Gallo O'Connell even had an opportunity to tell Taylor the reason why

1 she wanted to speak with her. Relying on Cape Cod Regional Technical High School
2 District Committee (Cape Cod Tech), 28 MLC 332, (2002), the University argues that
3 Taylor's could not have reasonably believed that a meeting with Gallo O'Connell could
4 lead to discipline when she did not even know the intended subject matter of the
5 meeting. Cape Cod Regional Technical School District Committee, 28 MLC at 337
6 (finding unreasonable a teacher's belief that a private meeting with the principal might
7 lead to discipline where the teacher did not ask about the purpose of the meeting and
8 no other factors suggested the meeting would be disciplinary). However, the
9 University's reliance on the Cape Cod Tech case is misplaced, because Taylor was
10 aware of Gallo O'Connell's intended topic of conversation, as Woods had told her.
11 Woods went over to Taylor and told her that Gallo O'Connell wanted to speak with her
12 about Ortiz.

13 Also, the University relies upon the fact that Woods previously did not request
14 Union representation when she participated in a mediation with Callender, to further
15 support its argument that Taylor's belief was unreasonable. As a preliminary matter,
16 because Gallo O'Connell actually did not conduct a mediation but instead spoke with
17 Taylor individually to elicit her side of the story, a comparison with Woods' mediation is
18 inapposite. Furthermore, the record before me does not show that Woods' employment
19 situation and the circumstances surrounding her mediation were the same as Taylor's
20 employment situation and the circumstances surrounding the January 30, 2010
21 meeting. Woods has been a supervisor since 2004, and the record before me does not
22 contain any disciplinary history for her. Taylor previously had received progressive
23 discipline each year from 2004 to 2007 as well as in 2009 for what the University termed

1 “verbally abusive behavior” towards other employees. Woods regularly worked with
2 Callender, who also was a bargaining unit member, while Taylor customarily did not
3 work with Gallo O’Connell, who was a night manager and non-unit member.

4 The circumstances surrounding the January 30, 2010 meeting also were out of
5 the ordinary. Gallo O’Connell showed up at the Blue Wall, even though she was not
6 scheduled to work. Gallo O’Connell wanted to speak with Taylor about Ortiz. Taylor
7 had been involved in an incident with Ortiz several days earlier. Given Gallo
8 O’Connell’s atypical presence at the Blue Wall on January 30, 2010, Taylor’s
9 disciplinary history involving negative interactions with other employees, and the recent
10 incident with Ortiz, a reasonable person would have believed, as Taylor did, that
11 discipline might result from the meeting with Gallo O’Connell. See generally Suffolk
12 County Sheriff’s Department, 28 MLC at 260 (despite employer’s assurances that it was
13 not looking to discipline anyone, employee’s belief that discipline could result was
14 reasonable given the nature of the supervisor’s questions).

15 Request for Union Representation

16 An employer has no obligation to provide a union representative at an
17 investigatory interview that the employee reasonably believes might result in discipline
18 absent a valid request by the employee. See Town of Hudson, 29 MLC 52 (2002), aff’d
19 69 Mass. App. Ct. 549 (2007). The CERB does not require the request to be in a
20 particular form, so long as it is sufficient to place the employer on notice that
21 representation is desired. See Suffolk County Sheriff’s Department, 39 MLC 143, 146
22 (2012) (not requiring specific or magic words to invoke Weingarten rights). As
23 discussed supra, I credited Taylor’s testimony that she had made a request for Union

1 representation. The University, in its post-hearing brief, argues that even if I were to
2 find that Taylor made such a request, Gallo O'Connell did not hear the request and
3 thus, no valid request was made. A review of the hearing record does not support the
4 University's argument. Gallo O'Connell flatly denied that Taylor made a request for
5 Union representation. Further, she never indicated that she could not hear Taylor
6 during their conversation. In fact, she commented how loudly Taylor spoke during the
7 conversation, and the University's February 11, 2010 letter noted that Taylor had been
8 loud at the January 30, 2010 meeting.

9 In light of the request for Union representation, the University had an obligation to
10 either stay the meeting or offer Taylor either a meeting without a union representative or
11 no meeting at all. Here, Gallo O'Connell offered Taylor none of those three choices.
12 Instead, Gallo O'Connell did not grant Taylor's representation request and did not
13 discontinue the investigatory meeting. Accordingly, I find that the University violated
14 Section 10(a)(1) of the Law by failing to meet its obligation triggered by Taylor's request
15 for Union representation at the January 20, 2010 meeting.

16 Alleged Unilateral Change

17 A public employer violates Section 10(a)(5) of the Law when it implements a
18 change in a mandatory subject of bargaining without first providing the employees'
19 exclusive collective bargaining representative with prior notice and an opportunity to
20 bargain to resolution or impasse. School Committee of Newton v. Labor Relations
21 Commission, 338 Mass. 557 (1983). The duty to bargain extends to both conditions of
22 employment that are established through past practice as well as conditions of
23 employment that are established through a collective bargaining agreement.

1 Commonwealth of Massachusetts, 27 MLC 1, 5 (2000); City of Gloucester, 26 MLC 128,
2 129 (2000); City of Boston, 16 MLC 1429, 1434 (1989); Town of Wilmington, 9 MLC
3 1694, 1697 (1983). To establish a unilateral change violation, the charging party must
4 show that: 1) the employer altered an existing practice or instituted a new one; 2) the
5 change affected a mandatory subject of bargaining; and 3) the change was established
6 without prior notice or an opportunity to bargain. Commonwealth of Massachusetts, 20
7 MLC 1545, 1552 (1984); City of Boston, 20 MLC 1603, 1607 (1994). To determine
8 whether a practice exists, the CERB analyzes the combination of facts upon which the
9 alleged practice is predicated, including whether the practice has occurred with
10 regularity over a sufficient period of time so that it is reasonable to expect that the
11 practice will continue. Swansea Water District, 28 MLC 244, 245 (2002);
12 Commonwealth of Massachusetts, 23 MLC 171, 172 (1997); Town of Chatham, 21 MLC
13 1526, 1531 (1995). A condition of employment may be found despite sporadic or
14 infrequent activity where a consistent practice that applies to rare circumstances is
15 followed each time that the circumstances preceding the practice recurs.
16 Commonwealth of Massachusetts, 23 MLC at 72.

17 The facts before me show that the University had a practice, as embodied in the
18 language of Article 29, Section 4 of the 2009-2012 Agreement, of advising unit
19 members of their right to union representation at investigatory interviews that unit
20 members reasonably could believe might result in discipline, i.e. their Weingarten rights.
21 I turn now to consider whether there has been a change in that past practice. For the
22 reasons discussed above, I have found that the January 30, 2010 meeting between
23 Taylor and Gallo O'Connell triggered Taylor's Weingarten rights. It is also

1 uncontroverted that Gallo O'Connell did not inform Taylor that she had a right to union
2 representation at the January 30, 2010 meeting. Although not conceding that Taylor
3 was entitled to invoke her Weingarten rights at the January 30, 2010 meeting, the
4 University also maintains that Gallo O'Connell, whom it characterizes as a low-level
5 supervisor, did not have the authority to alter the University's practices. The CERB
6 previously has found that the authority to act for and to speak on behalf of an employer
7 is governed by the principles of agency, and may be actual, implied or apparent. Town
8 of Chelmsford, 8 MLC 1913, 1916 (1982), aff'd sub nom., 15 Mass. App. Ct. 1107
9 (1983). As a night manager, Gallo O'Connell was a supervisor and as a supervisor was
10 an agent of the employer. See Town of Chelmsford, 8 MLC at 1917 (presuming that
11 supervisors are acting and speaking for the employer). Additionally, she received, in
12 advance, Eichstaedt's approval to meet with Taylor. Most importantly, when the
13 University became aware of the events surrounding the January 30, 2010 meeting, the
14 University did not disavow Gallo O'Connell's actions, even in light of the Union's protest
15 over those actions.

16 Section 6 of the Law requires public employers and employee organizations to
17 negotiate in good faith about wages, hours, standards of productivity of productivity and
18 performance, and any other terms and conditions of employment. Turning to decisions
19 of the National Labor Relations Board (NLRB) for further guidance,²³ it is well settled
20 under NLRB case precedent that disciplinary procedures and the role played by union
21 representatives in them are mandatory subjects of bargaining. See Washoe Medical

²³ The decisions of the NLRB and the federal courts provide useful guidance in interpreting state law. See Greater New Bedford Infant Toddler Center, 12 MLC 1131, 1155, n. 42, aff'd 13 MLC 1620 (1987).

1 Center, Inv., 337 NLRB 202, 205 (2001). Upon reviewing the facts before me, I
2 conclude that the University changed the disciplinary procedure and the role played by
3 union representatives in that procedure when Gallo O'Connell did not notify Taylor of
4 her Weingarten protections at the January 30, 2010 meeting. Furthermore, the
5 University did not provide the Union with notice or an opportunity to bargain to
6 resolution or impasse over that change. Accordingly, the University violated Section
7 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally ceasing to have a
8 supervisor notify a bargaining unit member of her Weingarten rights at an investigatory
9 interview that the employee reasonably believed could result in discipline.

10 Remedy

11
12 Section 11 of the Law grants the CERB broad authority to fashion appropriate
13 orders to remedy unlawful conduct. Labor Relations Commission v. City of Everett, 7
14 Mass. App. Ct. 826 (1979); Millis School Committee, 23 MLC 99 (1996). Turning first to
15 Count I, the Weingarten violation, the Union argues that I should award Taylor a make-
16 whole remedy, which includes overturning her February 11, 2010 termination, removing
17 any reference to that disciplinary action from her personnel file, and full back pay.

18 The CERB has indicated that a make-whole remedy is appropriate where there is
19 a direct or inextricable link between the unlawful interview and the subsequent
20 discipline. Commonwealth of Massachusetts, 8 MLC 1287, 1290 (1981) (directly linking
21 employer's discussions of its expectations of employee at unlawful interview with
22 subsequent termination over employee's alleged failure to meet those expectations as
23 well as other conduct). To determine the appropriate remedy for a Weingarten violation,
24 the CERB shifts the burden of proof to the University to show that its decision to

1 discipline the employee was not based on information obtained at the unlawful
2 interview. Commonwealth of Massachusetts, 18 MLC 1020, 1022 (1991). Here, Gallo
3 O'Connell wanted to meet with Taylor in order to hear Taylor's side of the story about
4 the personality conflict with Ortiz, including about an incident that took place the week
5 before. In response to Gallo O'Connell's questions, Taylor gave her version of events.
6 However, Taylor's personality conflict with Ortiz and the incident of the prior week were
7 not the reasons that the University discharged her. A plain reading of the University's
8 February 11, 2010 letter reveals that the cause for Taylor's discharge was repeated
9 inappropriate workplace conduct, including verbally abusive and disrespectful behavior
10 towards Gallo O'Connell. Thus, the University has met its burden to show that Taylor's
11 discharge is not linked to any information that the University obtained from her at the
12 interview. Compare Commonwealth of Massachusetts, 18 MLC at 1022 (declining to
13 order a rescission of the employee's termination and payment of back pay where
14 employer terminated employee for pre-existing performance issues rather than because
15 of information obtained as part of an unlawful interview) with Commonwealth of
16 Massachusetts, 8 MLC at 1290 (ordering a rescission of a demotion because of
17 information obtained at an unlawful interview). Additionally, the Union cannot meet its
18 burden of showing that "but for" the information that the University obtained at the
19 unlawful interview, the University would not have terminated Taylor. See
20 Commonwealth of Massachusetts, 18 MLC at 1022.

21 I am cognizant that that the presence of a union representative may aid an
22 employee, who is fearful or inarticulate, to raise certain facts during an investigation.
23 See NLRB. V. Weingarten, 420 U.S. at 262-263. Further, it is undisputed that the

1 conduct for which the University disciplined Taylor, her behavior towards Gallo
2 O'Connell, arose during the unlawful interview. An argument can be made that the
3 presence of a union representative at the January 30, 2010 interview might have
4 protected Taylor from discipline by providing guidance to her and by acting as a buffer
5 between Taylor and Gallo O'Connell, such that the conduct, which was the cause for
6 Taylor's discharge, would not have taken place. Compare Commonwealth of
7 Massachusetts, 18 MLC at 1822 (considering but rejecting as irrelevant in that particular
8 case whether employee's remarks might have been tempered by the presence of a
9 union representative). However, a reinstatement order, in the absence of any showing
10 that the University obtained information from Taylor that was the subject matter of the
11 interview and for which the University subsequently discharged her, would indicate that
12 any conduct, no matter how egregious,²⁴ must be absolved if it occurred during an
13 unlawful interview. I have found no precedential authority imposing such a blanket rule,
14 and I decline to find one here. Accordingly, I do not order a make-whole remedy for
15 Taylor for the Weingarten violation and instead order the University to post a notice of
16 its violation.²⁵

17 Next, I turn to consider the appropriate remedy for Count II, the unilateral change
18 violation. The traditional make whole remedy in unilateral change cases includes an
19 order that the status quo ante be restored until the employer has fulfilled its bargaining
20 obligation, City of Newton, 16 MLC 1036, 1044 (1989); Newton School Committee, 5

²⁴ I make no finding as to whether or not Taylor's conduct was egregious or whether just cause existed for her discipline.

²⁵ I also note that there is no allegation before me that the University discharged Taylor in retaliation for exercising her Weingarten rights.

1 MLC 1016, 1027 (1982), enf'd sub nom. School Committee of Newton v. Labor
2 Relations Commission, 388 Mass. 557 (1983), and that employees who have sustained
3 any economic loss of wages or benefits as a direct result of the unlawful unilateral
4 change be reimbursed for those losses. City of Gardner, 10 MLC 1218, 1223 (1983);
5 Commonwealth of Massachusetts, 27 MLC 1, 5 (2000). Therefore, to determine
6 Taylor's eligibility for back pay pursuant to Count II, I must consider whether Taylor
7 sustained an economic loss, as a direct result of the University's failure to advise her of
8 her Weingarten rights at an investigatory interview, which Taylor reasonably could have
9 believed might lead to discipline. Having determined above that Taylor's discharge was
10 not directly linked to any information that the University obtained from Taylor during the
11 unlawful interview, I also decline to find that her discharge was a direct result of the
12 University's unilateral change. Further, I note that Taylor, on her own volition, invoked
13 her Weingarten rights. Therefore, I decline to order the University to compensate
14 Taylor for her lost wages.

15 CONCLUSION

16 Based on the record and for the reasons stated above, I conclude that the
17 University independently violated Section 10(a)(1) of the Law by failing to honor Taylor's
18 request for union representation at an investigatory interview that she reasonably
19 believed could result in her discipline. Also, I conclude that the University violated
20 Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally changing a
21 past practice of advising bargaining unit members of their right to have a union
22 representative present at an investigatory interview, and where they reasonably could
23 believe might result in disciplinary actions against them.

ORDER

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the

University shall:

3. Cease and desist from:

- d) Failing to honor the rights of an employee who requests union representation at a meeting that is investigatory in nature and where the employee reasonably believes that the meeting could result in the employee's discipline.
- e) Failing and refusing to bargain in good faith with the Union by unilaterally changing a past practice whereby the University advised unit members of their right to have union representation at a meeting that is investigatory in nature and where the employee could reasonably believe that the meeting could result in the discipline of the unit member.
- f) In any like manner, interfering with, restraining and coercing its employees in any rights guaranteed under the Law.

4. Take the following action that will effectuate the purposes of the Law:

- a) Restore the prior practice of advising unit members of their right to have union representation at a meeting that is investigatory in nature and where the employee could reasonably believe that the meeting could result in the employee's discipline.
- b) Bargain to resolution or impasse before changing the practice of advising unit members of their right to have union representation at a meeting that is investigatory in nature and where the unit member could reasonably believe that the meeting could result in the employee's discipline.
- c) Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the University customarily communicates with these unit members via intranet or email and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

