GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

Legal Counsel Division

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK-PRODUCT

MEMORANDUM

TO: **Darrin Sobin**
Director of Government Ethics
Board of Ethics and Government Accountability

FROM: **Janet M. Robins**
Deputy Attorney General
Legal Counsel Division

DATE: **June 14, 2013**

SUBJECT: **To what extent is the Board of Ethics and Government Accountability required to extend special privileges when it questions members of the Fraternal Order of Police bargaining unit?**
(AL-13-370)

This responds to your email request that we advise you whether, when you question members of the Fraternal Order of Police ("FOP") bargaining unit (bargaining unit members), you must give them special treatment that you do not give to other employees, and whether the Board of Ethics and Accountability ("BEGA") may enter into a special agreement with the FOP regarding these rights and protection.

The FOP proposed that you enter into a Memorandum of Understanding ("proposed MOU") (copy attached) requiring BEGA to provide members with: (i) the same benefits before they are questioned by BEGA that they have, pursuant to a collective bargaining agreement ("CBA"), before they are questioned by the Metropolitan Police Department ("MPD"); (ii) the right, established in *National Labor Relations Board v. Weingarten*, 420 U.S. 251 (1975) *("Weingarten")*, to union representation when they are questioned during an investigation that they believe will lead to discipline; (iii) the right to be represented by an attorney or union representative during adversarial hearings or formal investigations; (iv) appropriate confidentiality regarding an investigation; and (v) written notice of BEGA's findings after any preliminary investigation, and at least seven days before initiating a formal investigation. In addition, the proposed MOU would provide that discipline, defined to include any action taken by BEGA, may only be imposed for cause, and that bargaining unit employees shall have the right to contest such "disciplinary action" through the grievance procedures established in the CBA, or by appealing to Superior Court.

In his June 3, 2006 letter to you, the FOP's chairman clarified that that this proposal was actually a request to bargain over how BEGA will operate when dealing with members. This request stated that because BEGA "may impose penalties on employees (in addition to civil penalties) such as remedial

actions in accordance with the Comprehensive Merit Personnel Act, public censures, nonpublic informal admonitions, probationary periods, and negotiated disputes. These changes and others constitute changes in working conditions." The FOP believes that BEGA is required to bargain over how to implement this ostensible change in working conditions.

We disagree with the FOP. The Council enacted the Government Ethics Act,[1] which created BEGA, in order to establish a *comprehensive* code of conduct for all employees to be applied uniformly and enforced independently.[2] Acceding to the FOP's demands would undermine the independence that the Council provided to BEGA, and would undermine the purposes for which BEGA was created. We do not believe that the FOP has a legal right to any of the special treatment that it seeks. Specifically, in our view, BEGA's activities do not constitute a change in working conditions triggering any obligation to bargain, BEGA is not required to provide the same protection to bargaining unit members that the CBA requires MPD to provide, the *Weingarten* right to representation does not apply when BEGA questions a bargaining unit member in connection with its enforcement activities, and the FOP's other requests are contrary to the Government Ethics Act and implementing regulations, and should be rejected.

I. BEGA's enforcement of a properly enacted ethics law is not a change in working conditions and bargaining is not required

The Comprehensive Merit Personnel Act ("CMPA")[3] provides that the District shall have a labor-management relations program that includes "[t]he right of employees to participate through their duly-designed exclusive representative in collective bargaining concerning terms and conditions of employment as may be appropriate[.]"[4] This right to bargain also "requires that an employer afford its employees' collective bargaining representative an opportunity to bargain before changing an established past practice affecting the terms and conditions of employment."[5] "A matter is considered a term and condition of employment if it settles an aspect of the employer-employee relationship."[6] Matters found to constitute a term or condition of employment include changes in benefits, such as the shutdown of a day care center,[7] a redistribution in workloads,[8] and disciplinary matters.[9] BEGA's enforcement of a properly enacted ethics law does not constitute a change in employment conditions.

The FOP says that the Ethics Act authorizes BEGA to take "remedial actions in accordance with the [CMPA.]" The FOP is apparently arguing that this constitutes a change in the disciplinary process that should be the subject of bargaining. But the FOP is wrong; BEGA has no disciplinary authority. In fact, the Government Ethics Act says the opposite.[10] It provides that **"[i]in addition to** any civil penalty imposed under this title, a violation of the Code of Conduct may result in the following: (A) Remedial

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[1] Effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 *et seq.* (2012 Supp.)).
[2] Council of the District of Columbia Comm. on Gov't Operations, Report on Bill 19-511 (2011), at 2-3 and 12-13 (emphasis added).
[3] Effective March 3, 1979 (D.C. Law 2-139; D.C. Code § 1-601.01) (2006 Repl.).
[4] *Id.*, § 1702, D.C. Code § 1-617.02 (a)(4).
[5] *American Federation of Government Employees, Local 383 v. District of Columbia Mental Retardation and Developmental Disabilities Administration,* 59 DCR 4584, Slip Op. No. 938, PERB Case No. 07-U-03 (2011) (citations and internal quotations omitted).
[6] *First Nat'l Maint. Corp.v Nat'l Labor Rel'ns Board,* 452 U.S. 666, 676 (1981).
[7] *Nat'l Fed'n. Of Fed. Emp.s Local 1422 v. Fed. Labor Rel'ns Auth.*, 369 F.3d 548, 554 (D.C. Cir. 2004).
[8] *Oregon State Police Officers' Ass'n v. State,* 240 Or. App. 419, 421 (Or. Ct. App. 2011).
[9] *Denver Firefighters Local No. 858, IAFF v. Denver*, 292 P.3d 1101 (Colo. App. 2012).
[10] Board of Ethics and Government Accountability Temporary Amendment Act of 2013, effective May 18, 2013 ("Temporary Act") § 2 (D.C. Law 20-3; amending D.C. Official Code § 1-1162.21).

action in accordance with the Merit Personnel Act[.]"[11] The CMPA identifies who may take or order remedial action and under what circumstances. None of the references in the CMPA to remedial action refer to BEGA in any way.[12] Nor does the CMPA give BEGA any role in imposing discipline other than remedial actions. While BEGA may recommend that an employee who fails to comply with a request for information be disciplined,[13] that recommendation goes to the employee's supervisor. There is no requirement that the supervisor take any action and BEGA's actions do not constitute discipline.

None of the actions that BEGA may take could be considered a condition of employment on any other basis either. The Government Ethics Act authorizes BEGA (or the Government Ethics Director) to impose civil penalties, issue a censure or a nonpublic informal admonition for minor violations, impose a period of probation which, if successfully completed, may result in expungement of the violation, or negotiate a disposition of a matter.[14] These actions are all part of the enforcement scheme for a validly enacted ethics law. They do not alter or affect the employer-employee relationship, the way that work is done, the benefits provided to an employee, or any term or condition of employment. Because BEGA's activities do no not create a change in working conditions for bargaining unit members, BEGA is not required to bargain with the FOP.

II. BEGA is not required to extend special privileges to bargaining unit members under the CBA

In January, 2005, representatives of MPD and the FOP entered into a CBA. The agreement states that it is for fiscal years 2004-2008, but it remains in effect. That agreement includes both compensation provisions (e.g., Articles 35 through 39, setting out wage increases and pay differentials and allowances) and non-compensation provisions, including Article 13, which sets out special procedures that must be followed when a bargaining unit member is interviewed or interrogated.

The FOP asked that you agree to the following:

> Prior to the commencement of any investigatory interview of a bargaining unit employee as part of a preliminary or formal investigation, the employee has the same rights afforded to him or her pursuant to the terms of the Collective Bargaining Agreement for investigatory interviews/questioning conducted by the Metropolitan Police Department.

Proposed MOU, § II, B. You asked whether the CBA applies to BEGA. The District's Office of Labor Relations and Collective Bargaining has consistently opposed the FOP's view that the CBA applies to agencies other than MPD. Our views are set out below.

(1) <u>The working conditions provisions in the CBA do not apply to the District as a whole</u>

The CMPA does not address this issue directly. Several provisions refer to the Mayor's or the District's role (rather than an agency's) in negotiating and approving CBAs. For example, the CMPA provides that

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[11] D.C. Official Code § 1-1162.21(a)(4).

[12] *See, e.g.*, D.C. Official Code § 1-616.52 (the Office of Employee Appeals), § 1-605.02 (the Public Employee Relations Board), § 1-620.04 (the Mayor, with respect to health and safety matters), § 1-615.52 (supervisors), and § 1-623.13 (retirement fund trustees).

[13] 3 DCMR 5303.3.

[14] D.C. Official Code § 1-1162.21.

"the Mayor or appropriate personnel authority, [15] including his or her duly designated representatives" shall bargain over the terms of a CBA,[16] "[c]ollective bargaining sessions between the District and [labor] representatives shall not be open to the public,"[17] and collective bargaining agreements are "subject to the approval of the Mayor or his or her designee[.]"[18] These references to the Mayor and the District, rather than to an agency or agency head, suggest that a CBA binds the District.

But one important provision suggests that noncompensation agreements are negotiated by and for the employing agency rather than the government as a whole. The CMPA provides that for bargaining regarding compensation, "[n]o subordinate agency shall negotiate a collective bargaining agreement."[19] This prevents one agency from negotiating an agreement that would wreak havoc on the District's budget. However, there is no restriction on the authority of subordinate agencies to negotiate non-compensation agreements, leaving MPD and other agencies free to negotiate those agreements. The fact that the Council did not prohibit individual agencies from negotiating working conditions agreements suggests that the Council was not concerned that those agreements could have a similar adverse effect on the government as a whole, presumably because working conditions were viewed as an agency rather than a District-wide issue.

This argument is complicated by the fact that the CBA with the FOP contains both compensation and noncompensation provisions. BEGA could argue that, consistent with the CMPA, the CBA's noncompensation provisions bind only MPD, while the compensation provisions bind the District, but a reviewing body might be reluctant to draw this line and hold that different rules apply for different parts of the CBA.

There is no controlling precedent, and the relevant precedents do not provide much guidance on this question. Several administrative decisions and one Superior Court decision address whether the CBA is binding on agencies other than MPD, with mixed results. These decisions stem from FOP's claim that the Office of Police Complaints ("OPC") (which is not a part of MPD) is bound by the CBA. In the first,[20] an arbitrator ruled that OPC had conceded that the CBA applied to it and thus had to comply with the CBA, and that OPC had to provide *Weingarten* rights (discussed below) when it questioned members.[21] The District appealed this decision to PERB which, apparently, dismissed the case as moot[22], notwithstanding the District's statement to PERB that the matter was unresolved and remained active and open.[23] In the second, while PERB concluded that the District (and not simply MPD) was a party to the CBA, it dismissed MPD's claim on jurisdictional grounds.[24] The decision was appealed first to Superior Court and then to the Court of Appeals. The Court of Appeals remanded the case to Superior Court where the order was vacated and the case dismissed for lack of jurisdiction.[25] In a third case, the FOP filed an

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[15] The Mayor is the personnel authority for MPD. D.C. Code § 1-604.06(b).
[16] D.C. Code § 1-617.01c).
[17] D.C. Code § 1-617.12.
[18] CMPA, § 1715, D.C. Code § 1-617.15 (a).
[19] *Id.*, § 1113, D.C. Code § 1-617.17(b) (2012 Supp.).
[20] *Fraternal Order of Police and Metropolitan Police Department,* FMCS No. 09-52649 (Rogers, Arb.), PERB Case No. 10-A-05 (2009).
[21] *Id.* at 30.
[22] Statement of PERB assistant during May 31, 2013 telephone conversation with Assistant Attorney General Katherine Kelley
[23] Letter from Mark Viehmeyer, Acting Director, MPD Office of Labor and Employee Relations, to Mr. Ondray Harris, August 8, 2012.
[24] *Fraternal Order of Police v District of Columbia Office of Police Complaints,* PERB Case 6-U-24, 25 and 26 59 DCR 5510, 5533 ("PERB II").
[25] *D.C. Office of Police Complaints v. PERB,* No. CAP8122-09 (D.C. Aug. 12, 2011).

information request with OPC. PERB's executive director concluded that the CBA did not apply to OPC and that OPC had no collective bargaining-related obligations to the FOP.[26]

(2) Regardless of whether the CBA binds the District, the terms at issue are binding only on MPD

The hearing examiner in one of the PERB cases, after concluding that the District was a party to the Labor Agreement, then said that the more important question is

> not who the parties to this collective bargaining agreement are, but what those parties have committed themselves to. . . . The question of whether [the District] had an obligation . . . to abide by the terms of the Labor agreement is not answered by finding that [it] is a party to the Labor agreement, but by examining the commitments made by the parties to the Labor Agreement, commitments that are determined by reading the text of the agreement itself.[27]

Even if the CBA applies to the District as a whole, rather than only to MPD, the text of the CBA makes clear that the commitments made in the CBA regarding interviews and questioning apply only to MPD, and not to any other agency.

The first sentence in the CBA says:

> This Collective Bargaining Agreement (this Agreement) is entered into between the Metropolitan Police Department (the Department or the Employer) and the Fraternal Order of Police/Metropolitan Police Department (FOP/MPD) Labor Committee . . . .

CBA, Article 1, § 1 (emphasis added). Throughout the CBA there are references to the obligations of Department and to the Employer. There are also references to "the Parties", which is not defined but which, in this context, can only reasonably be read to refer to the identified entities entering into the CBA, *i.e.,* MPD and the union.

The FOP's proposed MOU, § 2.B, states that "[p]rior to the commencement of any investigatory interview of a bargaining unit employee as part of a preliminary or formal investigation, the employee has the same rights as afforded to him or her pursuant to the [CBA] for investigatory interviews/questioning conducted by MPD." In this language, FOP concedes that the relevant provisions of the CBA apply to questioning conducted by MPD. The specific terms of the CBA are clear on this point. The provisions in the CBA concerning investigations and interviews are set out in Article 13, "Investigatory Questioning." It identifies the following as "types of questioning":

> *(a)* Administrative Interview- Formal official questioning *conducted by the Department* to question an employee about an administrative matter.
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> (b) Criminal Interview- Formal official questioning *conducted by*

[26] *Fraternal Order of Police/Metropolitan Police Dep't v. District of Columbia Office of Police Complaints*, PERB Case No. 12-U-16 (Feb. 19, 2013).

[27] PERB II, 59 DCR 5522-23.

> *the Department* to questioning an employee about a criminal matter, where the member has not been identified as a target.
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> (c) Interrogation- Formal official questioning *conducted by the Department* of a member who has been, or may be, identified as a target of a criminal investigation.[28]

Every type of questioning contemplated by the CBA is a form of questioning by the Department, *i.e.,* MPD. Therefore, it appears that the parties intended that each provision in Article 13 of the CBA relating to questioning would apply only to questioning by MPD. Also, the FOP asked that BEGA only follow the provisions in the CBA that apply "prior to the commencement" of an investigatory interview. Those specific sections (discussed below) clearly apply only to MPD.

Section 3

Section 3 gives employees different rights during different types of questioning. It gives employees the right to confer with a union representative before being questioned and to have that representative present during questioning when an employee "can reasonably expect discipline to result from an investigatory interview[.]"[29] Because only MPD may discipline an employee, an employee cannot reasonably expect discipline to result from any interview conducted by another agency, including BEGA which, as we noted earlier, cannot discipline anyone. Therefore the condition triggering the application of this provision is not met. Also, this provision applies only during certain "investigatory interview[s]." Article 13 defines 3 types of questioning: administrative interviews, criminal interviews, and interrogation. The phrase "investigatory interview," in this context, can be reasonably be read to be a combined reference to both administrative and criminal interviews. These types of interviews are defined as questioning conducted by the Department and thus this provision does not apply to BEGA. In addition section 3 of the CBA provides rights when an employee is the target of an administrative investigation "conducted by the Employer."[30] The first sentence in the CBA provides that "Employer" refers to MPD; therefore this provision only applies to MPD. Finally, section 3(a) states that a union representative may be present at all administrative interviews. As already noted, the phrase "administrative interview" refers only to certain questioning by MPD and does not apply to any other agency.

Section 4

Paragraph 1 provides that before any interview or interrogation, members shall be notified whether the investigation is criminal or administrative. The reference to "interview or interrogation" suggests that it is intended to apply to the two types of interviews and the interrogation defined in Article 13, § 2, *i.e.,* questioning by MPD. In addition, the benefit sought, identification of whether the investigation underlying the questioning is criminal or administrative, could only apply to an agency that conducts criminal investigations, *i.e.,* MPD. Because BEGA does not have any criminal enforcement authority, it cannot conduct criminal investigations, and this provision does not apply to BEGA.

Paragraph 2's lead-in language says that it only applies to actions taken before "any administrative interview, criminal interview, or interrogation[.]" Because these terms are specifically defined to refer to questioning by MPD, they do not apply to any other agency.

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[28] CBA, Article 13, § 2 (emphasis added).
[29] *Id.*
[30] CBA, Article 13, § 2, lead-in paragraph.

Section 8

If a member is being questioned in connection with a violation of criminal law, this section requires the employee to be notified if he or she is being questioned as a principal. BEGA has no authority to punish violations of criminal law. And in criminal law, the term "principal" is used to distinguish someone principally responsible for committing a crime from another who aided or abetting in that act.[31] BEGA makes no such distinction and this section cannot apply to it.

III. BEGA is not required to extend the "*Weingarten*" right to members

In *Weingarten,* the Supreme Court held that federal employees had a right to have a union representative present at an investigatory interview which the employee reasonably believed might result in disciplinary action (the "*Weingarten* right").[32] The Court found that this was consistent with the employee's right under federal law to engage in activity protected under labor law.[33] PERB has held that while the CMPA does not expressly set out the *Weingarten* right, this right exists as a consequence of the basic right to union representation set out in the CMPA.[34]

We have not found any case requiring an agency to provide the *Weingarten* right when that agency, while conducting an investigation that is separate from the disciplinary process, questions an employee in another agency. Applying the *Weingarten* right in this manner would be an extraordinary and, we believe, unprecedented, extension of that right that would have adverse consequences on important government activities. For example, if MPD detectives were investigating a fight among District government employees, they would want to interview various employees. Those interviews could lead to a criminal conviction for assault. But under the FOP's theory, because the facts prompting the investigation could also lead to disciplinary action, those employees who feared disciplinary action would be entitled to insist on union representation while being questioned by MPD. This would unduly hamper MPD. Similarly, requiring BEGA to allow employees to have union representation when being questioned would hamper its activities.

This adverse result can be avoided if, in applying the *Weingarten* right, the government distinguishes between instances where it is acting as an employer (when the right attaches) and instances where it is acting in another capacity, such as implementing and enforcing a government-wide program to increase compliance with ethics laws. A PERB hearing examiner noted a similar distinction, stating that the *Weingarten* right did not apply in the context of the "government-citizen relationship" (as contrasted with the employer-employee relationship). This distinction between government acting as employer and the government acting as sovereign has been recognized by the courts in other contexts.[35]

Here, when BEGA questions a government employee in connection with an ethics investigation, it is acting as a sovereign government rather than as employer. It is fulfilling its own mission, to administer and enforce the District's ethics laws. It operates separate and apart from MPD. The MPD is not a party

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[31] *See, e.g., Hairston v. United States,* 908 A.2d 1195, 1198 (D.C. 2006).
[32] 420 U.S.252-53.
[33] *Id.* at 260.
[34] *See, e.g., District of Columbia Nurses Assoc. v. Dep't of Youth and Rehabilitative Services,* 59 DCR 12638, Slip Op. 1304, PERB Case No. 10-U-35 (2012).
[35] *See Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 599 (2008) (employment case recognizing the constitutional difference in government "dealings with citizen employees" as compared to when government "brings its sovereign power to bear on citizens at large"); *United States v. Camacho*, 413 F.3d 985 (9th Cir. 2005) (following other Circuits and holding that when an entity of the federal government acts as an employer in disciplining a government employee, that government entity is not the federal sovereign vindicating the criminal law of the United States, for purpose of the Double Jeopardy Clause).

to BEGA's actions. If BEGA finds that someone has committed an ethics violation, BEGA may impose a variety of sanctions, none of which require any MPD action. Because BEGA is not acting as an employer when it conducts an investigation, *Weingarten* should not apply.[36]

IV. Additional FOP requests

The FOP's Proposed MOU asks for other special benefits. Those requests are addressed below.

1. Appropriate Confidentiality

The FOP asked that BEGA agree that any of its employees involved in an investigation "shall maintain the appropriate confidentiality of an investigation." Proposed MOU, § II-A. The Government Ethics Act already establishes the confidentiality standard that BEGA must satisfy. It states:

> The identity of an individual who is the subject of [a] preliminary investigation shall not be disclosed without the individual's consent unless or until the Ethics Board has found reason to believe that the individual has committed a violation and the Ethics Board finds that disclosure would not harm the investigation.[37]

The FOP cannot require that the BEGA amend these statutory requirements through an internal agreement to apply a different standard to its bargaining unit members.

2. Advance notice

The FOP proposes that after a preliminary investigation and before initiating any formal investigation, the BEGA Director will provide a written notice of BEGA's findings to the bargaining unit members, at least seven business days before initiating a formal investigation. Proposed MOU, § II-D. However, the Government Ethics Act already sets out what must be done to initiate a formal investigation. An investigation may be triggered upon receipt of a written complaint or a finding of fraud, waste, abuse, or a Code of Conduct violation by the District Auditor of the Inspector General, or an appropriate finding of liability by a court. Within 14 days after initiating the formal investigation, the Director of Government Ethics must present evidence to BEGA. Then BEGA may decide whether to proceed.[38] The FOP may not insist that BEGA alter this statutorily prescribed process by giving its bargaining unit members a special advance warning before an investigation begins. This would run contrary to the statute, give FOP bargaining unit members a special privilege not extended to other employees, and, to the extent that an advance warning would give an employee a chance to alter evidence or confer with potential witnesses, undermine the integrity of BEGA's process.

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[36] After *Weingarten* was decided, a federal law was enacted making clear that the *Weingarten* right only applied when an employee was being questioned by his or her employer. It gave an employee in an agency the right to union representation when being questioned by a representative of the agency in an investigation that the employee reasonably thought would lead to discipline. 5 U.S.C. § 7114(a)(2)(B). The District could also argue that because the local right to union representation is not specifically set out in District law, we should look to federal law to establish the parameters of the right, and that this same limit applies to the right of District employees to union representation when being questioned.

[37] D.C. Official Code § 1-1162.12(d) (2012 Supp.). See also 3 DCMR § 5302.7, reiterating this standard, and 3 DCMR § 5302.8, which provides that, "Notwithstanding § 5302.7, the Board may, in its discretion, publicly disclose the existence of any investigation."

[38] D.C. Code Official Code § 1-1162.13.

3. Right to counsel

The FOP's proposed MOU would give its bargaining unit employees the right to be represented by a lawyer or FOP representative during any adversarial hearings or formal investigations conducted by BEGA.[39] Again, the Government Ethics Act authorized BEGA to issue rules governing its hearing process.[40] BEGA did so, providing among other things that in a proceeding before BEGA, a person may appear on his or her own behalf or be represented by any person authorized to do so.[41] The FOP has no right to interfere with BEGA's statutory authority to establish how to conduct its operations, or to require BEGA to provide a different (and here, lesser) right to assistance for its members.

4. Disciplinary provisions

The FOP proposes that any action taken by BEGA be considered discipline, and that "[c]onsistent with the [CBA] and [CMPA]" discipline may only be imposed for cause.[42] It also proposes that bargaining unit members have the right to contest such action through the grievance procedures set out in the CBA or by appealing a BEGA order to Superior Court.[43] For the purpose of determining what specific rights would apply, civil penalties, probation, suspensions, and removals or reductions in pay or rank would be treated as "adverse" actions, and censures, non-public informal admonitions, reprimands, and letters of prejudice would be considered "corrective" actions.

This proposal reflects the FOP's confusion about BEGA's role. BEGA cannot order that an employee be suspended, removed, that his or her pay or rank be reduced, or that an employee receive a letter of reprimand or a letter of prejudice. As to the other sanctions that may be imposed, the Government Ethics Act sets out the process that must be followed. BEGA is required to conduct an open and adversarial hearing, conducted in accordance with the District's Administrative Procedures Act, where the Director of Government Ethics presents evidence.[44] The hearing process must be conducted consistent with BEGA's rules, which provide for notice and an opportunity to be heard. They also address evidence standards, rules of pleading; discovery; and the applicable burden of proof.[45] This is the process that applies to everyone charged with a code of conduct violation.

The FOP has no right to claim that another process, different from the one authorized by the Government Ethics Act as developed in the implementing regulations, should apply to its bargaining unit members. This would violate the Government Ethics Act and provide for unwarranted special treatment for its members.

V. BEGA is not authorized to enter into a special arrangement with a private party regarding its enforcement actions

The duties and powers of BEGA are spelled out in the Government Ethics Act. They include enforcement of the Code of Conduct, appointing a Director of Government Ethics, making recommendations, holding meetings, selecting a Director of Government Ethics, preparing a budget, deciding whether to issue

[39] Proposed MOU. § II, E.
[40] D.C. Code § 1-1162.09.
[41] 3 DCMR 5503.1 and 5503.2.
[42] Proposed MOU. § II, F.
[43] Proposed MOU. § II, G.
[44] D.C. Official Code § 1-1162.14.
[45] *See generally,* 3 DCMR Ch. 55.

subpoenas, conducting hearings, and deciding matters.[46] Nothing in the law authorizes BEGA to enter into a separate arrangement with a union to provide special treatment to members of that union's bargaining unit.

VI. Conclusion

In our view, BEGA's actions to implement the Government Ethics Act do not constitute a change in working conditions requiring it to bargain with the FOP. The CBA provisions that the union asks that BEGA apply are, by their terms, only applicable to MPD, and BEGA should not agree to the FOP's request. The *Weingarten* right to union representation does not apply where, as here, an agency carrying out its legitimate enforcement responsibilities, interviews an employee in another agency. The other special benefits sought by the FOP are different from the provisions in the Government Ethics Act and its implementing regulations applicable to everyone else. The FOP should not be given this special treatment. And finally, BEGA's authority does not include the ability to enter into a special agreement with a union to provide special treatment to its bargaining unit members.

If you have any questions, please contact Assistant Attorney General Katherine Kelley, Legal Counsel Division, at 202-724-5533, or me at 202-724-5524.

JMR/kvk

[46] D.C. Official Code §§ 1-1162.02, 1-1162.04, 1-1162.06, 1-1162.07, 1-1162.13, 1-1162.14, and 1-1162.15.