UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HPC INDUSTRIAL GROUP, LLC,
FORMERLY KNOWN AS HYDROCHEM
INDUSTRIAL CLEANING LLC

Respondent

and **Case 07-CA-308650**

MARLON HEMMINGWAY, an Individual

Charging Party

SUPPLEMENTAL BRIEF OF THE COUNSEL FOR THE GENERAL COUNSEL

To the Honorable Arthur J. Amchan, Administrative Law Judge

Amanda P. Flores
Patricia Fedewa
Counsel for the General Counsel
National Labor Relations Board
Region 7 – Detroit Regional Office
477 Michigan Avenue, Room 05-200
Detroit, MI 48226
Telephone: (313) 335-8039; (313) 335-8053
Facsimile: (313) 226-2090
E-Mail: Amanda.Flores@nlrb.gov
Patricia.Fedewa@nlrb.gov

This case was heard on April 15, 2026, in Detroit, Michigan by Administrative Law Judge Arthur J. Amchan (ALJ Amchan). Parties submitted post-hearing briefs on May 27, 2026. On June 1, 2026, ALJ Amchan issued Invitation to File Supplemental Briefs "on the issues of contract coverage/clear and unmistakable waiver and retroactivity." Specifically, ALJ Amchan invited the parties to address the issues of how the timing of the subject collective-bargaining agreement, drug and alcohol policy, and the Charging Party's grievance fit into the framework of contract coverage, clear and unmistakable waiver, and retroactivity. Counsel for the General Counsel, Amanda P. Flores and Patricia Fedewa, respectfully submit this Supplemental Brief in response to ALJ Amchan's Invitation.

I. FACTS

A. Bargaining History of the Respondent and Union

In 2021, Respondent and Local 600, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (Union) negotiated and entered into a collective-bargaining agreement ("CBA"). (GC 3).[1] The CBA is effective from August 1, 2021 through July 31, 2026. (GC 3). Also in 2021, Respondent and the Union negotiated a drug and alcohol policy. (R 2). The policy is unpublished and not distributed to employees; employees are subject to the terms of the policy. (Tr. 75). The drug and alcohol policy is not referenced in the CBA.

[1] The cover page of the CBA states that it is between Respondent and "United Automobile, Aerospace and Agriculture Implementation Workers of America (UAW) Local 600," but Local 600 is not referenced again in the CBA. Article 1 of the CBA states that "This agreement is entered into by and between HydrochemPSC, which performs Janitorial and cleaning services at Ford Dearborn Truck, 3001 Miller Rd., Dearborn, MI 48121 for Ford Motor Company and the United Automobile, Aerospace, and Agriculture Implementation Workers of America (UAW), International Union. It is unclear whether Local 600 is the servicing representative or contracting party in the collective-bargaining relationship between Respondent and the Union.

B. Charging Party Marlon Hemmingway's Grievance

The Charging Party was terminated on August 3, 2022. (GC 5.) On August 4, 2022, the Union filed a grievance challenging the termination. (R 3.) On September 19, 2022, the Union withdrew the grievance without advancing it to arbitration. (R 4.)

II. ARGUMENT

A. The Clear and Unmistakable Waiver Standard as Reinstated in *Endurance* Applies in this Case.

In order for the Board to find a waiver of the Union's right to bargain, any such waiver must be clear and unmistakable. *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141 (2024). The Board returned to this longstanding standard for waiver in 2024 following a brief departure from 2019 to 2024 to a contract coverage standard for waiver as set forth in *MV Transportation, Inc.*, 368 NLRB No. 66, (2019).[2] Although it left the question of retroactivity for a future determination, the Board has acknowledged that its usual practice is to apply new standards retroactively to all pending cases. *Endurance*, 373 NLRB at 21; *MV Transportation*, 368 NLRB slip op. at 18, citing *SNE Enterprises*, 344 NLRB 673, 673 (2005). Indeed, the default is to apply a change in law retroactively, as long as doing so does not result in manifest injustice. *MV Transportation*, 368 NLRB at slip op. at 18. To determine whether retroactivity may cause manifest injustice, the Board considers the parties' reliance on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any other particular injustice arising from retroactive application. *Ibid*.

[2] The General Counsel intends to urge the Board to overturn *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141 (2024), and return to the contract-coverage standard articulated in *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), when assessing whether unilateral changes are privileged by a collective-bargaining agreement.

Under the standard set forth in *Endurance*, a union's waiver of an employee's individual statutory rights must be "explicitly stated" and "clear and unmistakable." 373 NLRB, slip op. at 11. Here, the Union did not waive *Weingarten* rights for the following reasons: the parties' CBA and drug and alcohol policy are silent on the issue of *Weingarten* rights in the context of post-accident drug testing (see, CGC Brief to ALJ at 14), and communications concerning the grievance do not contain any language indicating that the Union intended to waive the Charging Party's *Weingarten* rights (*Id*. at 15, Respondent Exhibits 3 and 4). A waiver was never explicitly stated between the parties at any point in collective bargaining or in the processing of the Charging Party's grievance. Therefore, because there was no clear and unmistakable waiver of the Charging Party's *Weingarten* rights, Respondent violated the Act when it denied the Charging Party's request for union representation and terminated his employment for making that request.

Counsel for the General Counsel asserts that *Endurance* should apply retroactively in this case in conformance with longstanding Board practice and because retroactive application would not result in manifest injustice. Although the facts of the instant case pre-date *Endurance,* Counsel for the General Counsel asserts that current Board law under *Endurance* requires application of the clear and unmistakable waiver standard. Although Respondent may argue that it relied on the pre-*Endurance* contract coverage standard when negotiating both the CBA and drug and alcohol policy with the Union, the record is absent of any evidence to support this position. Further, the effect of retroactivity on accomplishment of the purposes of the Act far outweighs whatever reliance Respondent may claim to have had on the pre-*Endurance* contract coverage standard. The clear and unmistakable waiver standard is "firmly grounded in the policy of the National Labor Relations Act promoting collective bargaining." *Provena Hospitals*, 350 NLRB 808, 811 (2007). Before it was overturned in 2019 by *MV Transportation*, it was the

standard for many years, since at least 1949, and upheld on numerous occasions by U.S. appellate courts as well as the Supreme Court. *Endurance*, 373 NLRB slip op. at 2, fn. 4. Unlike the clear and unmistakable waiver standard, the contract coverage standard "exacerbates the difficulties associated with collective-bargaining by encouraging employers to insist on the broadest possible language, while unions necessarily feel constrained to insist on exacting specificity lest they be held to have bargained away their statutory rights." *Endurance*, *Id*., slip op. at 20.

Finally, there is no particular injustice that would arise from retroactive application. It would not cause any injustice for Respondent and the Union to clarify to the bargaining unit that *Weingarten* rights apply in the context of post-accident testing, nor would it cause any injustice for Respondent to allow a representative of the Union to be present at a post-accident drug test the next time an employee requests one.

The Board's failure to apply *Endurance* retroactively to all pending cases has the potential to cause instability in labor relations, promote unnecessary litigation, and incentivize "exaggerated assertions of reliance as a legal stratagem." *Endurance*, *Id.*, slip op. at 21, fn. 78. Creating instability in labor relations is against the purpose of the Act, which is to promote collective bargaining between unions and employers. As such, this case should serve as the vehicle to affirm that *Endurance* replies retroactively to all cases pending before the Board.

B. Even if the Contract Coverage Standard Applies, the Union Still Did Not Waive *Weingarten* Rights for Post-accident Testing under that Standard.

Assuming arguendo that the contract coverage standard applies, Counsel for the General Counsel asserts that the Union has not waived its employees' *Weingarten* rights.

1. *The Plain Language of the Parties' Collective Bargaining Agreement Does Not Permit Respondent to Deny* Weingarten *Rights in Any Context Where They May Arise.*

To determine whether an employer's unilateral action is permitted under the contract coverage standard, the Board first examines whether that action was within the scope of contractual language granting the employer the right to act unilaterally. *MV Transportation*, 368 NLRB slip op. at 2. The contract need not specifically mention the managerial decision at issue to cover it. *Wilkes-Barre Hospital Co. v. NLRB*, 857 F.3d 364, 377 (D.C. Cir. 2017). However, there must at least be a substantially clear relationship between the contract language and the unilateral action taken by the employer. *Metro Health, Inc.*, 372 NLRB No. 149, slip op. at 5 (2023).

Respondent points out that the parties negotiated a comprehensive drug and alcohol testing policy that addresses the circumstances at issue in this case. (Respondent Brief to ALJ at 13). However, the parties agreeing to a drug and alcohol policy does not mean that *Weingarten* rights were waived simply because they were not mentioned. There is no plain language in the parties' CBA nor in the drug and alcohol policy that permits Respondent to deny an employee's *Weingarten* rights, which are guaranteed under the Act. Furthermore, there is no substantially clear relationship between any language in the parties' agreements and Respondent's denial of the Charging Party's *Weingarten* rights.

2. *The Union Did Not Clearly and Unmistakably Waive its Right to Bargain Over* Weingarten *Rights in any Disciplinary Context, so a Finding that It Waived Hemmingway's Weingarten Rights is Improper.*

If the plain language of the CBA does not grant the employer the right to act unilaterally, the Board applies the waiver analysis. *MV Transportation*, 368 NLRB slip op. at 2. Under this analysis, if an employer's action has materially, substantially, and significantly changed a term or condition of employment constituting a mandatory subject of bargaining, the employer has violated the Act unless the union clearly and unmistakably waived its right to bargain over the

change. *Ibid*. To determine whether a clear and unmistakable waiver exists, the Board looks at contractual language, bargaining history, and past practice. *Id*. at 5.

Here, a wholesale denial of *Weingarten* rights in the context of post-accident drug testing is a material, substantial, and significant change in a term or condition of employment that constitutes a mandatory subject of bargaining. *A-1 Fire Protection, Inc.*, 250 NLRB 217, 219 (1980) (finding a presumption that employees and unions have not abandoned rights guaranteed them in the Act in their collective-bargaining agreements, and that the presumption is rebutted "only by evidence establishing that a statutory right has been clearly and unmistakably relinquished"). *Weingarten* rights are statutory rights guaranteed by the Act, and there is nothing in the language of the CBA, or the parties' bargaining history or past practice to show that a waiver of those rights was ever contemplated.

While Respondent argues that the drug and alcohol policy's silence regarding union representation in the context of post-accident testing shows that contractual language and bargaining history constitute a waiver, such silence should not imply that the parties waived employees' *Weingarten* rights during post-accident drug tests. Rather, such a finding would mean that *Weingarten* rights are waived in other potentially disciplinary contexts simply because the parties did not specifically address them during bargaining. To infer that a statutory right has been waived because collectively bargained policies and the bargaining history are silent sets a dangerous precedent.

Respondent's assertion that past practice supports a waiver is misguided. In this regard, for the purpose of finding a clear and unmistakable waiver, a party contending that an employment condition is a past practice has the burden of proof to show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice

to continue or reoccur on a regular and consistent basis. *Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds*, 372 NLRB No. 46, slip op. at 6 (2023). Here, Respondent cannot say that the Union waived its right to be present at post-accident drug tests simply because no employee has ever requested a union representative at a post-accident drug test before. Even if post-accident drug tests (or any drug test for that matter) without union representation are a regular occurrence, there is nothing in the record to suggest that employees should reasonably expect to have a request for union representation at post-accident drug tests denied. Moreover, Respondent maintains a drug and alcohol policy that is unpublished and not even distributed to employees, who have no way of knowing what is included or excluded in the policy and what the past practice may be.

3. The Union's Conduct in the Processing of the Charging Party's Grievance was not a Waiver of His Weingarten *Rights.*

Respondent points out that the Union did not allege a *Weingarten* violation in the grievance it filed on the Charging Party's behalf. This silence, according to Respondent, supports a finding that the Union waived the Charging Party's *Weingarten* rights. Because the Union failed to raise Hemmingway's *Weingarten* rights in the grievance itself, the argument goes, this purportedly serves as a confirmation that no such right was understood to exist under the parties' agreement. (see, Respondent Brief to ALJ at 17). Respondent also asserts that under *Prudential Insurance Co.*, 275 NLRB 208, 209 (1985), the Union's acceptance of the grievance's disposition demonstrates that the Union "did not regard post-accident testing as implicating an enforceable representation right under the parties' agreement." (see, Respondent Brief to ALJ at 15-16).

Counsel for the General Counsel reiterates its position that the Union possesses a wide range of discretion in processing grievances. (See, CGC Brief to ALJ at 15). There is an infinite

number of lawful reasons that the Union could have relied upon to decide not to pursue the Charging Party's grievance to arbitration, and, moreover, the record does not reflect the Union's reasoning for its conduct. Inferring a waiver from the Union's silence here is akin to inferring a waiver from the parties' silence during collective bargaining regarding *Weingarten* rights in post-accident testing. Such an inference in both circumstances is impermissible and contrary to the purposes of the Act.

Furthermore, the waiver standard applied in *Prudential Insurance Co*., 275 NLRB 208, 209 (1985), was clear and unmistakable. There is no clear and unmistakable waiver here, whether for post-accident drug tests in general, or specifically for the Charging Party. Should the contract coverage standard apply, there likewise cannot be a finding of waiver in the Union's processing of the Charing Party's grievance. There is nothing in the language of the CBA or drug and alcohol policy that suggests that *Weingarten* rights may be waived for individuals based on the disposition of a grievance. Because *Weingarten* rights involve an employee engaging in protected activity, they are held by individual employees, not by unions, and it is individual employees who assert them. *Alan Ritchey, Inc.*, 359 NLRB 396, 402 (2012). Thus, the Union's failure to advance the argument that *Weingarten* rights were implicated in the Charging Party's termination is immaterial as to whether a *Weingarten* violation actually occurred. The Union's actions are also immaterial as to whether the parties intended there to be a waiver of other employees' *Weingarten* rights in other circumstances. Additionally, the contract coverage standard deals with whether a union waived its right to bargain over a given subject, which permits an employer to take unilateral action. It does not consider or address whether a union may have waived any bargaining unit member's rights in its processing of an individual grievance. See, *Bakery, Confectionery, Tobacco Workers & Grain Millers International Union,*

Local No. 37, 372 NLRB No. 17, slip op. at 8, fn. 19 (2022) ("The 'contract coverage' standard applies in certain circumstances to determine whether an employer has violated Sec. 8(a)(5) by making unilateral changes," and further, "[MV Transportation] solely address[es] those cases in which an employer defends against an 8(a)(5) unilateral-change allegation by asserting that contractual language privileged it to make the disputed change without further bargaining"). As such, the contract coverage standard cannot be used to demonstrate that the Union waived the Charging Party's *Weingarten* rights.

III. CONCLUSION

The clear and unmistakable waiver standard governs this case in conformity with the Board's standard practice of applying new precedent retroactively. Under this standard, the Union did not clearly and unmistakably waive the *Weingarten* rights of the Charging Party, or any other bargaining member, in the context of post-accident drug testing. Assuming arguendo, that the contract coverage standard applies, Counsel for the General Counsel asserts that there is nothing in the parties' contractual language, bargaining history, or past practice to demonstrate that the Union waived the bargaining unit employees' *Weingarten* rights in any disciplinary context. The Union's conduct in processing the Charging Party's grievance likewise does not amount to a waiver because it is not clear and unmistakable, nor can it be governed by the contract coverage standard. Counsel for the General Counsel respectfully requests that the ALJ retroactively apply the clear and unmistakable waiver standard to the facts of this case. Alternatively, Counsel for the General Counsel requests a finding that the pre-*Endurance* contract coverage waiver standard does not support a finding of waiver.

Dated at Detroit, Michigan this 15th day of June, 2026.

Respectfully Submitted,

/s/ Amanda P. Flores
Amanda P. Flores
/s/ Patricia Fedewa
Patricia Fedewa

Counsel for the General Counsel
National Labor Relations Board
Region 7 – Detroit Regional Office
477 Michigan Avenue, Room 05-200
Detroit, MI 48226
Telephone: (313) 335-8039; (313) 355-8053
Facsimile: (313) 226-2090
E-Mail: Amanda.Flores@nlrb.gov
Patricia.Fedewa@nlrb.gov

CERTIFICATE OF SERVICE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on June 15, 2026, I served the Counsel for the General Counsel's Supplemental Brief to the Administrative Law Judge by Electronic Mail, upon the following persons, addressed to them at the following addresses:

Jenn Betts, Attorney
Ogletree Deakins
Email: jenn.betts@ogletree.com

Marlon Hemmingway
Email: marlonhemmingway@yahoo.com

June 15, 2026
Date

Amanda P. Flores
Name

/s/ Amanda P. Flores
Signature