P.E.R.C. NO. 83-138

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STONY BROOK REGIONAL SEWERAGE
AUTHORITY,

Respondent,

-and-

Docket No. CO-82-275-130

LOCAL 172, HEAVY AND GENERAL
LABORERS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Stony Brook Regional Sewerage Authority did not violate subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it suspended and subsequently terminated a lead foreman. The Commission concluded that the employee did not have a reasonable belief that a conference with the plant superintendent might result in discipline and was not entitled to insist upon having a union representative at that conference.

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LOCAL 172, HEAVY AND GENERAL LABORERS,

Charging Party.

Appearances:
For the Respondent, Levy, Levy & Albert, Esqs.
(Philip A. Levy, of Counsel)

For the Charging Party, Zazzali, Zazzali & Kroll, Esqs.
(Albert G. Kroll, of Counsel)

DECISION AND ORDER

On April 22, 1982, Local 172, Heavy and General Laborers ("Local 172") filed an unfair practice charge against the Stony Brook Regional Sewerage Authority ("Authority") with the Public Employment Relations Commission. The charge alleges that the Authority violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et. seq. ("Act"), specifically subsections 5.4(a)(1) and (3),[1/] when it suspended, and subsequently terminated, John Perna for exercising his right to a representative at an interview concerning discipline.[2/]

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the act; and (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

2/ The charge also alleges that this discharge was the culmination of a pattern of harassment of Perna since he became a shop steward. The record is devoid of evidence that prior disciplinary actions taken against Perna were motivated by his union activity.

On May 21, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On June 7, 1982, the Authority submitted an Answer, which incorporated previously filed statements of position and asserted that it terminated Perna for his insubordination.

On July 21, 1982, Commission Hearing Examiner Joan Kane Josephson conducted a hearing. The parties examined witnesses, presented evidence, and argued orally. Both parties waived their right to file post-hearing briefs.

On December 6, 1982, the Hearing Examiner issued her report and recommendations, H.E. No. 83-18, 8 NJPER ___ (¶_____ 1982 (copy attached). She concuded that Local 172 had not proved by a preponderance of the evidence that the Authority suspended and terminated Perna because he insisted upon his right to representation at a disciplinary interview. She recommended that the Complaint be dismissed.

Neither party has filed Exceptions.

We have reviewed the Hearing Examiner's findings of fact (Slip Opinion at pp. 2-5). They are supported by substantial evidence. We adopt and incorporate them here.

In In re East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part, rev'd in part App. Div. Docket No. A-280-79 (6/18/80), we held that an employer interferes with the exercise of rights protected by the Act and therefore violates §5.4(a)(1) when it denies an employee's request for union representation at an interview which the employee could reasonably believe might result in discipline. We relied upon NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975)

("Weingarten"), where the United States Supreme Court endorsed an identical rule of law, and Red Bank Regional Ed. Assn. v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J.122 (1978), where the New Jersey Supreme Court held that §5.3 of the Act guarantees employees the right to have grievances presented by the majority representative. Since East Brunswick, the Commission has applied the Weingarten rule in cases where the facts indicate an objectively reasonable belief that an interview may result in discipline. In re Camden County Vocational Technical School, P.E.R.C. No. 82-16, 7 NJPER 466 (¶12206 1981); In re County of Cape May, P.E.R.C. No. 82-2, 7 NJPER 432 (¶12192 1981); In re Township of East Brunswick, P.E.R.C. No. 83-16, 8 NJPER 479 (¶13224 1982). See also R. Jacobs, Weingarten Rights in the Public Sector, New Jersey Law Journal, p. 1 (Dec. 9, 1982).

A substantial body of case law concerning the nature and extent of Weingarten rights has developed in the private sector. We believe it is appropriate to look to these cases for initial guidance since the underlying Weingarten right is identical in both the private sector and the New Jersey public sector. Lullo v. Intl. Assn. of Firefighters, 55 N.J. 409, 424 (1970); Galloway Twp. Bd. of Ed. v. Galloway Twp. Assn. of Ed. Secs, 78 N.J. 1, 9 (1978).

Under the Weingarten rule, an employee may not be disciplined for refusing to participate without representation in an interview which he reasonably believes may result in disciplinary consequences. ILGWU v. Quality Mfg. Co., 420 U.S. 276, 88 LRRM 2698 (1975); Newton Sheet Metal, Inc., __ F.2d __, 101 LRRM 2422

(8th Cir. 1979) and Glomac Plastics, Inc., 234 NLRB No. 199, 97 LRRM 1441 (1978). Moreover, the employer may not threaten an employee who refuses to attend such an interview alone with a charge of insubordination. Good Samaritan Nursing Home, 250 NLRB No. 30, 104 LRRM 1390 (1980). Further, Weingarten rights exist whether the employee requesting representation is a shop steward himself or the would-be representative is to serve solely as a witness. Illinois Bell Tel. Co., 251 NLRB No. 128, 105 LRRM 1236 (1980); Good Samaritan Nursing Home, Inc., supra; Keystone Steel & Wire, 217 NLRB 995, 89 LRRM 1192 (1975); Consolidated Freightways Corp., 264 NLRB No. 76, 111 LRRM 1289 (1982); Materials Research Corp., 262 NLRB No. 122, 110 LRRM 1401 (1982).[3/]

In cases where a meeting is called solely to inform an employee of a disciplinary decision already made, Weingarten rights do not attach. If, however, the purpose of the meeting is

3/ We believe that requesting the presence of a "witness" during a Weingarten interview is tantamount to requesting a representative. As the Board recognized in Materials Research Corp., supra, at p. 1405, "...[s]ince a purpose underlying Weingarten is to prevent an employer from overpowering a lone employee, the presence of a coworker, even if that individual does nothing more that act as a witness, still effectuates that purpose, just as the presence of a union representative." We disagree with the Hearing Examiner's conclusion (Slip Opinion p. 6, n. 6) that an employee does not properly invoke his Weingarten rights by asking only for a "witness" instead of asking for a representative who would participate more forcefully. That an employee may have greater rights to representation does not mean he should be penalized for asking for a lesser right to which he is also entitled.

to supplement the investigation in order to support a decision not already made, Weingarten rights do attach. Baton Rouge Water Works, 246 NLRB No. 161, 103 LRRM 1056 (1979); Tokheim Corp., 265 NLRB No. 210, 112 LRRM 1058 (1982).

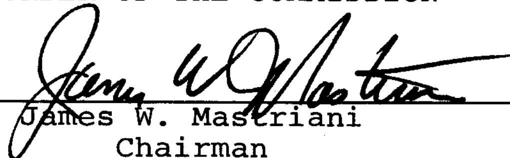
Before Weingarten rights are triggered, an employee must have a reasonable basis for fearing that discipline might be administered against him. The reasonableness of a belief that discipline might be taken is determined by an objective standard and on a case-by-case and fact-by-fact basis. Brown v. Connolly, 237 NLRB 271, 98 LRRM 1572 (1970). See also L. Silverman and M. Soltis, Weingarten: An Old Trumpet Plays the Labor Circuit, Labor Law Journal, p. 725 (Nov. 1981).

In the instant case, the crucial question is whether, under all the circumstances, an employee in Perna's situation could have had a reasonable belief that the second conference might result in discipline. Based upon our review of the record, we answer this question negatively. Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Suskin, Butch, Newbaker and Hartnett voted for this decision. Commissioners Hipp and Graves voted against this decision.

DATED: Trenton, New Jersey
April 19, 1983
ISSUED: April 20, 1983

H. E. No. 83-18

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STONY BROOK REGIONAL SEWERAGE
AUTHORITY,

Respondent,

-and-

Docket No. CO-82-275-130

LOCAL 172, HEAVY AND GENERAL
LABORERS,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Authority did not violate subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act in two meetings that occurred between the Respondent's Plant Superintendent and the charging party. The charging party alleged he was unlawfully denied the presence of a union representative during a meeting with his employer. The Hearing Examiner found that the employee could not have reasonably believed disciplinary action would have resulted from the first meeting and that neither meeting was an investigatory investigation where the employer ascertained information upon which to base disciplinary action. She also found that the charging party did not prove by a preponderance of the evidence that the charging party was disciplined for requesting what he termed as a "witness" to be present.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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Appearances:

For the Respondent
Levy, Levy & Albert, Esqs.
(Philip A. Levy, Esq.)

For the Charging Party
Zazzali, Zazzali & Kroll, Esqs.
(Albert G. Kroll, Esq.)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An unfair practice charge was filed with the Public Employment Relations Commission (the "Commission") on April 22, 1982, by Local 172, Heavy and General Laborers (the "Charging Party" or "Local 172") alleging that the Stony Brook Regional Sewerage Authority (the "Respondent" or the "Authority") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). It is alleged that John Perna who was represented by Local 172 was discharged for asserting the right to a union representative during a grievance conference concerning discipline. The Charging Party

contends that the Respondent's conduct violated N.J.S.A. 34:13A-5.4 (a)(1) and (3). [1/] The Authority responds that Perna was disciplined for refusing to follow the orders of a supervisor and for insubordination.

It appearing that the allegations of the unfair practice charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on May 21, 1982. A hearing was held on July 21, 1982 at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The transcript of the proceedings were received by the Commission on August 10, 1982. Neither party filed a post-hearing brief.

Findings of Fact

The Stony Brook Regional Sewerage Authority is a public employer within the meaning of the Act and is subject to its provisions. Local 172, Heavy and General Laborers is a public employee representative within the meaning of the Act and is subject to its provisions. John Perna, at the time the event occurred about which the charge was filed, was a public employee within the meaning of the Act and subject to its provisions. He was a "lead operator" or "lead man" [2/] for the Authority. He was a member of the bargaining unit represented by Local 172 and had been the shop steward for

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

2/ As lead operator or man Perna was in charge of two to four other employees and in charge of the plant on his shift (Tr. 6).

Local 172 for nine months. Perna had been employed by the Authority from October 3, 1977 to March 5, 1982.

On March 5, 1982 Perna requested a meeting with the Authority's plant superintendent, Alex R. Lukacs, to discuss a grievance Perna had filed. Perna had previously been suspended for two days and he had filed the grievance hoping to have the suspension rescinded.

Perna went to Lukacs' office at approximately 9:30 a.m. accompanied by another employee, Stephen Maybury, a plant operator who was working with Perna, who was the lead operator that day. Lukacs asked Maybury what he wanted and Perna responded, "This is my witness." (Tr. 9 and 19) Perna testified that he wanted a witness present because he found out that "they were tape recording our conversations without us knowing about it." (Tr. 8)

Lukacs told Perna he first wanted to talk to him alone and then Maybury could come back and Lukacs would meet with both of them, but Perna refused to meet alone with Lukacs. Lukacs then told Perna that since he had a ten o'clock meeting, he did not have sufficient time to meet with them at that time. Lukacs indicated he would meet with both men later and said that he too would want a witness and Perna left. (Tr. 9)

As soon as they left Lukacs' office, Lukacs checked with Arnold Mitnoul, Perna's supervisor and Bob Markowitch, the shift supervisor, and ascertained that neither had given Perna permission to take Maybury off the job to accompany him to see Lukacs. Lukacs also contacted the Authority's Executive Director, Arthur King, to ascertain whether, through union negotiations or any other type

union meeting, Perna had received permission to take a man off the job to accompany him to Lukacs' office. No such permission had been granted.

Lukacs then called Perna over the plant public address system and told Perna to come to his office alone. (Tr. 20) In the interim, Richard Wilson, the plant maintenance supervisor, had entered Lukacs' office. Perna came to Lukacs' office with Maybury who remained at the doorway. It was then about 9:45 a.m. Lukacs told Maybury to leave and Perna to sit down. Perna told Maybury not to leave. (Tr. 15) Perna told Lukacs he would not talk to him without a witness present. [3/] Lukacs told Perna he wanted to discuss a "non-grievance subject," (Tr. 22) but Perna refused to meet unless he could have his witness present. Lukacs again ordered Perna to sit down and Maybury to leave. As the two men were arguing Wilson left Lukacs' office. Perna then told Lukacs he wanted to call his union representative. (Tr. 11, 22) Lukacs ordered Perna to go to the plant locker room, punch out and leave the plant site. (Tr. 23, 11) Perna left Lukacs' office and called his union representative, Frank Perro. By 10:00 a.m. Perro had called Lukacs. Lukacs explained to Perro what had happened and Lukacs agreed to see Perro to discuss the incident.

By letter dated March 8, 1982 (J-2 in Evid.), Executive Director King informed Perna that he was being terminated after an investigation and review of his personnel file following his March 5

3/ Tr. 10, 22. Perna testified at the hearing that the reason he took Maybury with him the second time was that he felt he might be disciplined in view of what had happened. He told Lukacs in his office that he wanted Maybury present as his witness as he had at the first meeting.

suspension without pay for insubordination. 4/

The Issue

Did the Respondent Authority violate subsections (a)(1) and (3) of the Act in the meetings between Plant Superintendent Alex R. Lukacs and John Perna?

Discussion and Analysis

An employee has the right to representation as a condition to participation in an investigatory interview which the employee reasonably believes may result in disciplinary action. N.L.R.B. v. Weingarten, 420 U.S. 251, 88 LRRM 2689 (1975); East Brunswick Bd/Ed, P.E.R.C. No. 81-31, 5 NJPER 398 (¶10206 1979); Camden County Vocational Technical School, P.E.R.C. No. 82-16, 7 NJPER 466 (¶12806 1981); Twp. of East Brunswick, P.E.R.C. No. 83-16, 8 NJPER 479 (¶13224 1982). An employee is not entitled to representation, however, at every meeting with the employer.

Perna requested the first meeting with Lukacs. He was requesting that a previously imposed disciplinary action be rescinded. It would be difficult to conclude that Perna could have reasonably believed that any kind of discipline would have resulted from the first meeting. 5/ The right of representation arises to

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4/ According to this notice Perna had received five warnings, two suspensions and one written reprimand in the preceding seven months. The charge alleges that Perna's discharge was the culmination of a pattern of harassment since Perna had become shop steward. No evidence was offered concerning this allegation.

5/ The NLRB has held that the reasonableness of the fear of discipline is to be measured by objective and not subjective standards, which should be analyzed on a case-by-case basis. Some of the factors to be considered in the analysis are: events leading up to the interview, company representatives present, opening words at the interview. Brown & Connolly, Inc., 237 N.L.R.B. No. 48 (1978), 98 LRRM 1572. The Commission is to look to the federal model for guidance. Lullo v. Int'l Assn. of Firefighters 55 N.J. 409, 424 (1970) and Galloway Twp. Bd/Ed v. Galloway Twp. Assn. of Ed. Secs., 78 N.J. 1, 9 (1978).

protect and assist the employee when the purpose of the interview is to obtain facts to support disciplinary action. (Alfred M. Lewis Inc. v. N.L.R.B., 587 F. 2d 403, 410; 99 LRRM. 284 (9th Cir. 1978). Perna insisted that he be allowed to have a "witness" present. 6/

Immediately after the first meeting Lukacs conducted an independent investigation of the circumstances surrounding Maybury's leaving his work station. Lukacs questioned all the supervisory personnel at the plant and ascertained that Perna had taken Maybury out of the plant without obtaining any authorization to do so. Lukacs ordered Perna to return to his office alone. Perna again took Maybury with him. Lukacs had indicated that he would meet with Perna and his witness later in the day to discuss the grievance.

The timing of events persuades me that Lukacs called Perna to his office because he had taken Maybury away from his work station without permission. If Perna was being called to Lukacs' office to inform him of a disciplinary decision Lukacs had made based on his independent investigation, rather than to conduct an investigatory interview, no Weingarten rights would have arisen. Baton Rouge Water Works, 246 NLRB 161, 103 LRRM 1056 (1979). If Lukacs had conducted an investigatory interview at that point, Perna would have been entitled to Weingarten representation.

6/ While the representative need not necessariy be a shop steward or union official, (Illinois Bell Telephone, 251 N.L.R.B. No. 128 (1980)) I am not convinced that Perna's request to have a "witness" present is tantamount to requesting a representative present during an interview. The right arises because the employee is entitled to the assistance of a representative during a Weingarten interview not merely a "silent observer." Texaco, 251 N.L.R.B. No. 63 (1980), 105 LRRM 1239; Southwestern Bell Telephone, 251 N.L.R.B. No. 61, 105 LRRM 1239 (1981); Pacific Telephone & Telegraph, 246 N.L.R.B. No. 163 (1979), 103 LRRM 1070. "The representative is present to assist the employee," even though the employer may "insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation," Weingarten, supra, 420 U.S. at 260.

The men argued briefly over Maybury's presence, Perna then indicated he wanted to call his union representative, and Lukacs terminated the interview. The entire matter was completed in about 15 minutes. 7/ No information was ascertained at either meeting upon which Lukacs based a disciplinary decision. Perna called his union representative who immediately got in touch with Lukacs. Lukacs discussed the matter with union representative Perro immediately after the incident occurred and agreed to meet with the union representative concerning the matter.

Since Lukacs had indicated to Perna that he was willing to meet with Perna and a witness later that day, I have not been convinced by a preponderance of the evidence that Lukacs acted as he did because Perna insisted on having a witness present during his discussions with Lukacs. There was no unwillingness on Lukacs' part to meet with the union representative.

Based on the above, the undersigned does not conclude that the Charging Party was improperly denied the assistance of a union representative at an investigatory interview or that he was disciplined for asserting the right to have a representative at an interview.

7/ The Board has also held that if an employee requests representation during a Weingarten investigation, the employer may stop the investigation and inform the employee of the discipline. Amoco Oil Co., 238 N.L.R.B. 551, 99 LRRM 1350 (1978). See also N.L.R.B. v. Potter Electrical Signal Co. 600 F.2d 120, 101 LRRM 2378 (1979). The employer was found to have violated 8(a)(1) of the N.L.R.A. in refusing to allow the union representative at an investigative interview, but the employee discharges were upheld because the court found they were discharged for fighting and not as a result of information gathered at a tainted interview. See also, New England Tel. & Telegraph Co., 95 LRRM 1530 (1977) (no violation of right to representation in discharge of worker where employer ceased contact with worker after he requested representation).

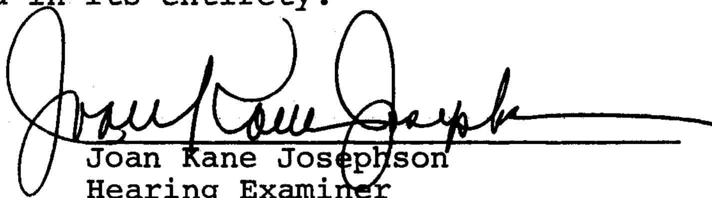
Upon the foregoing, and upon the entire record, the Hearing Examiner makes the following

Conclusions of Law

The Respondent Authority did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) in the meetings between Plant Superintendent Alex R. Lukacs and John Perna.

Recommendations

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Joan Kane Josephson
Hearing Examiner

Dated: December 6, 1982
Trenton, New Jersey