

D.U.P. NO. 2023-10

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION  
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

NORTH PLAINFIELD BOARD OF  
EDUCATION,

Respondent,

-and-

Docket No. CO-2022-110

NORTH PLAINFIELD EDUCATION  
ASSOCIATION,

Charging Party.

**SYNOPSIS**

The Director of Unfair Practices partially dismisses an unfair practice charge filed by the North Plainfield Education Association ("Association") against the North Plainfield Board of Education ("Board"). The charge alleged that the District violated N.J.S.A. 34:13A-5.4a(1) when it deprived unit members of "Weingarten" representation during three separate meetings with Board officials. The Director dismissed the charge with respect to two of the described meetings, because Weingarten rights do not usually apply to discussions of employee performance, and because the charge failed to allege all the elements necessary to establish a violation. The Director issued a complaint with respect to a third meeting, finding that the District unlawfully conditioned the union representative's attendance at the meeting on the representative's silence.

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Appearances:

For the Respondent,  
Cornell, Merlino, McKeever & Osborne, LLC, attorneys  
(Dennis McKeever, of counsel)

For the Charging Party,  
Oxfeld Cohen, P.C., attorneys  
(William P. Hannan, of counsel)

**PARTIAL REFUSAL TO ISSUE COMPLAINT**

On November 12, 2021, the North Plainfield Education Association (Association) filed an unfair practice charge against the North Plainfield Board of Education (Board). The charge alleges that on two separate occasions during the fall semester of the 2021/2022 school year, Association representatives were asked to attend meetings by, with, and about Association members, but were informed that they could only take notes and were not allowed to speak. On a third occasion that semester, it is alleged that an Association member asked her assigned school's

principal if she would need a representative for a scheduled meeting and was informed that she did not. The Association claims that these actions by the Board violated section 5.4a(1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.3 et seq.<sup>1/</sup> (Act) because it denied employees of their rights under N.L.R.B. v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975). The Respondent claims that the Association fails to establish any violation of an employee's Weingarten rights and requests that the charge be dismissed.

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute unfair practices on the part of the respondent. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I will decline to issue a complaint. N.J.A.C. 19:14-2.3.

I find the following facts.

The Association is the majority representative of all non-supervisory certificated and support personnel employed by the Board.

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<sup>1/</sup> This provision prohibits public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

On September 10, 2021, a meeting took place to discuss a professional improvement plan (PIP) for unit employee "I.M."<sup>2/</sup>, a counselor at the high school. Attending the meeting were I.M., Association President Theresa Fuller (Fuller), Principal Jerard Stephenson (Stephenson), and I.M.'s supervisor, Ms. Fields. The Association contends that, at the beginning of the meeting, Fuller was told that she was not allowed to speak and could only take notes. The Board claims that Fuller was asked not to interrupt, but only after she had repeatedly done so during the meeting.

On September 24, 2021, a meeting was held to discuss appropriate student-teacher relationships with unit employee "J.P.." Attending the meeting with J.P. were Middle School Principal Robert Lake (Lake) and Association representative Laurel Hanns (Hanns). The Association contends that, at the outset of the meeting, Lake told Hanns that she was not allowed to speak and could only take notes. The Board contends that Hanns was told that she was not allowed to answer questions for J.P., after she had interrupted the meeting repeatedly.

On or about October 4, 2021, unit employee "A.V." was asked to attend a meeting with Principal Lake and Assistant Principal John Lucas. After receiving notice of the meeting, A.V. asked

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<sup>2/</sup> The Association has elected to identify certain unit employees by their initials rather than their full names.

Lake what the meeting concerned, and Lake told her not to worry and that they would discuss it at the meeting the following day. The Association maintains that A.V. asked if she would need a representative and was told that she did not. The Board maintains that A.V. never inquired about a representative.

### **ANALYSIS**

An employee has a right to union representation at an investigatory interview that the employee reasonably believes could lead to discipline. NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975), adopted East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part. part NJPER Supp.2d 78 (¶61 App. Div. 1980). The Supreme Court in Weingarten wrote:

The union representative . . . is safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. [88 LRRM at 2692].

Under Commission precedent, a specific showing is required to establish a violation of an employee's Weingarten rights. The charging party must show that the meeting was investigatory; that the employee reasonably believed that discipline might result; that the employee requested representation; and that the employer denied the request and proceeded with the meeting. State of New Jersey (Division of State Police), P.E.R.C. No. 93-20, 18 NJPER

471 (¶23212 1992). The reasonableness of the employee's belief that discipline may result from the interview is measured by objective standards under the circumstances of each case. Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984); State of New Jersey/Kupersmit, D.U.P. No. 91-2, 16 NJPER 421 (¶21177 1990). The charging party bears the burden of proving that an employee is entitled to a Weingarten representative.

The charge alleges that the meeting for I.M. concerned a performance improvement plan. Although adverse consequences may result from continued negative evaluations, the Commission has determined that Weingarten rights do not typically attach to evaluative conferences. In State of New Jersey, D.U.P. No. 97-15, 22 NJPER 339 (¶27176 1996), the Charging Party contended her Weingarten rights had been violated when she was denied permission to have a shop steward present during a conference about her performance. The Director determined that the conference about the member's performance was not an investigatory meeting from which discipline could be anticipated, and therefore, that no Weingarten violation had occurred.

In this case, as in State of New Jersey, no facts indicate that the meeting concerning I.M.'s performance was an investigatory meeting from which discipline could be reasonably anticipated. The performance improvement plan for I.M. covers

the period from September 1, 2021 to June 30, 2022. It is not objectively reasonable to expect discipline to result from a performance improvement plan meeting only ten days into a ten month performance improvement period. Further, there is no allegation that discipline did, in fact, result from I.M.'s meeting, or from any other meeting specified in the charge. Since the Association acknowledges that the meeting for unit member I.M. concerned only I.M.'s performance (and that performance was to be assessed prospectively), Weingarten does not attach and no violation can be found.

Turning to the meeting for bargaining unit member J.P., it is undisputed that J.P. attended the meeting accompanied by an Association representative. The charge alleges that J.P.'s Weingarten rights were nonetheless violated when, at the beginning of the meeting, the Principal told representative Hanns that she could not speak during the meeting and was only allowed to take notes.<sup>3/</sup> Unlike I.M.'s meeting that concerned a performance improvement plan, J.P.'s meeting concerned an alleged failure to engage in appropriate student-teacher relationships. The charge characterizes J.P.'s meeting with Principal Lake as

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<sup>3/</sup> The charge makes similar allegations concerning the meeting for I.M.. While I.M. was accompanied by Association President Fuller, the Board allegedly told Fuller she could not speak during the meeting and could only take notes. However, as noted above, I.M.'s meeting concerned a performance improvement plan, and Weingarten does not normally apply to such discussions of employee performance.

"investigatory," and further notes that "[b]oth J.P. and Ms. Hanns believed that disciplinary action could be taken against J.P. as a result of the meeting . . . ."

The Commission has found that an employer may not condition a union representative's attendance at an interview upon the representative's silence. State of New Jersey (Dept. of Treasury), P.E.R.C. No. 2001-51, 27 NJPER 167, 174 (¶32056 2001). In so holding, the Commission relied on a case arising before the National Labor Relations Board (NLRB), NLRB v. Texaco, 659 f.2d 124 (9<sup>th</sup> cir., 1981) (Texaco). In that case, in advance of an investigatory interview, a company supervisor informed a union representative that he could attend the meeting only as a silent observer. Texaco, Inc., 251 N.L.R.B. 633, 634 (1980). The supervisor also stated that if the union representative attempted to talk, he would be asked to leave the meeting. Id. The supervisor repeated this instruction at the outset of the meeting, secured an admission from the employee during the meeting, and imposed discipline as a result. Id. The Ninth Circuit held that "[i]n refusing to permit the representative to speak, and relegating him to the role of a passive observer, the respondent did not afford the employee the representation to which he was entitled." 659 F.2d at 126-27.

Accepting the Association's allegation as true, the employer, as in Texaco, required J.P.'s union representative to



act as a silent observer during a meeting that could have reasonably led to discipline. In light of the Commission's decision in State of New Jersey (Dept. of Treasury), the Association has alleged that J.P. was deprived of representational rights guaranteed under Weingarten, and therefore, a complaint will issue on the section 5.4a (1) allegation with respect to J.P.'s meeting.

Turning to the meeting concerning unit member A.V., I cannot find that the Association has alleged a violation of the Act because there is no allegation that A.V. requested and was denied union representation. In Monmouth Cty. Probation Dept., P.E.R.C. No. 91-121, 17 NJPER 348 (¶22157 1991), the Commission dismissed an unfair practice charge alleging that the employer violated a probation officer's Weingarten rights during an interview about the officer making false statements on his application for the position. The Commission found:

. . . The charging party failed to prove that the employer violated his right to union representation. The charging party did not show that he requested union representation and was denied that right. Nor did he show that his January 20, 1989 meeting with the chief was investigatory. Id.

The Association alleges that prior to the meeting, A.V. asked Lake if she needed a Union representative and was told that she did not. The Board disputes this. However, even assuming that the Association is correct, as in Monmouth Cty. Probation

Dept., no facts suggest that A.V. ever requested union representation during or in advance of the interview, or that such a request was denied. Therefore, I dismiss the allegation of a section 5.4a (1) violation with respect to A.V.'s meeting.

For these reasons, I find that the Charging Party has set forth facts sufficient to warrant the issuance of a complaint on allegations that the Board unlawfully violated employees' Weingarten rights during the meeting with bargaining unit member J.P.. I decline to issue a complaint concerning the meetings with unit members I.M. and A.V.. N.J.A.C. 19:14-2.3.

/s/Jonathan Roth  
Jonathan Roth  
Director of Unfair Practices

Dated: September 20, 2022  
Trenton, New Jersey

**This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.**

**Any appeal is due by September 30, 2022.**