

L.D. NO. 93-2

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION  
LITIGATION ALTERNATIVE PROGRAM

In the Matter of

BOROUGH OF FAIR LAWN,

Public Employer,

-and-

Docket No. CO-93-169

FAIR LAWN PBA LOCAL NO. 67,

Charging Party.

Appearances:

For the Public Employer  
DeMaria, Ellis, Hunt, Salsberg & Friedman, attorneys  
(Mark A. Tabakin, of counsel)

For the Charging Party  
Loccke & Correia, attorneys  
(Michael J. Rappa, of counsel)

DECISION

Fair Lawn PBA Local 67 brought an unfair practice charge against the Borough of Fair Lawn before the Public Employment Relations Commission. The PBA represents patrolmen in the Fair Lawn Police Department.

The PBA alleges that on or about May 24, 1992 Officer Evangelista, a member of the Department, "was interviewed as part of an investigation and was denied his request for a Union representative. As a result of information derived from the interview, Officer Evangelista was suspended without pay for one day. The actions of the Employer in denying an Employee the right

to have a Union representative present during an investigatory interview where he reasonable believes that discipline will be issued is in contravention of the legal principles annunciated in NLRB v. Weingarten, by the United State Supreme Court."

The Borough denies that Officer Evangelista's Weingarten rights were denied.

The Borough and PBA have agreed to submit this matter to the Commission's Litigation Alternative Program. I conducted a hearing on January 7, 1993 and make the following determinations.

Patrolman Evangelista was on duty Sunday, May 24, 1992. Lt. Sudol told Evangelista that he would have to march in the Borough's Memorial Day Parade on the following day. He was to march in a long sleeve shirt. Evangelista believed that Sudol was kidding and did not take him seriously. Evangelista testified that Sudol and he bantered about this more than once on Sunday.

The following day, Monday, Evangelista was ordered by Sudol to march in the parade that day. Evangelista, believing that Sudol was kidding the day before, did not have a long sleeve uniform shirt. He was told to go home and get one. Evangelista did so and marched in the parade. Sudol wrote up Evangelista and recommended that he be disciplined for his conduct.

On Wednesday, May 27, Lieutenant Marshall informed Evangelista that he wanted to meet with him concerning Monday's event. Evangelista asked a PBA delegate, Patrolman Annazone, to accompany him to the meeting. When Evangelista entered Marshall's

office, Annazone stood in the doorway. Marshall said to Annazone "you can go." Marshall testified that he did not consider his statement to Annazone an order. Annazone left and Marshall asked Evangelista about the events on Sunday and Monday. Evangelista participated in the interview. After the interview, Marshall recommended to Captain Freitag that Evangelista receive a two-day suspension for his conduct.

On May 31, Captain Freitag met directly with Sudol and Evangelista. Evangelista had a PBA representative with him at this meeting. Freitag conducted his own investigatory interview and subsequently Freitag imposed a one-day suspension on Evangelista.

The Commission recognizes the right of an employee to union representation if the employee reasonably believes that an interview with the employer may lead to discipline. Camden County Vocational-Technical Schools, P.E.R.C. No. 82-16, 7 NJPER 466 (¶12206 1981); 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. Dkt. No. A-280-79 (6/18/80). These cases adopt the principles of NLRB v. Weingarten, 420 U.S. 251, 95 S. Ct. 959, 88 LRRM 2689 (1975).

It is not disputed that there were 2 separate investigatory interviews, one with Marshall and the other with Freitag.

At the first interview, Evangelista never expressly asked for union representation. However, Evangelista brought his union delegate, Annazone, to that meeting and I find that Annazone's presence effectively constituted a request for representation. When

Marshall saw Annazone standing in the doorway, he stated "you can go." Although this was not expressed as an order, given the quasi-military nature of a police force and Marshall's superior rank, it was reasonable for Annazone and Evangelista to infer that Marshall was telling Annazone he could not be present during the interview. Although Marshall testified that his statement was not meant to be an order, Marshall's unstated subjective intention is not controlling.<sup>1/</sup>

Once Marshall told Annazone to go, he had two valid options.

1. dispense with the interview or
2. offer Evangelista the choice of continuing the interview on his own or have no interview at all and run the risk of not stating his version of the incident with Sudol. See Roadway Express, 246 NLRB 1127, 103 LRRM 1050 (1975).

It was not permissible under Weingarten for Marshall to continue the interview as he did. I find Marshall's conduct was violative of the Act and any discipline flowing from that interview is improper.

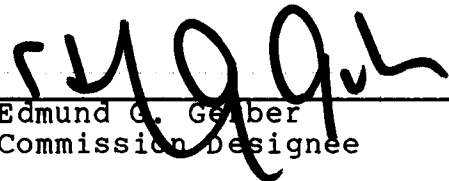
However, Freitag conducted the second interview and Evangelista had union representation at that interview. Freitag did not rely on Marshall's findings and independently found that Evangelista should be disciplined, but only with a one-day

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<sup>1/</sup> Rather, Weingarten requires that one use an objective standard in making a determination.

suspension, not two days as recommended by Marshall. Freitag's conduct and the discipline he imposed on Evangelista are appropriate and are not violative of the Act.

Accordingly, I do not believe that any meaningful remedy is appropriate here. The improper action of Marshall was cured by Freitag's subsequent, independent interview. Kraft Foods, Inc. 251 NLRB 598, 105 LRRM 1233 (1980). Freitag imposed discipline on the basis of his own proper interview - not on Marshall's. Although Marshall's interview is a violation of N.J.S.A. 34:13A-5.4(a)(1) of the Act this violation is technical and does not warrant a remedy. The imposition of a one day suspension on Evangelista by Freitag does not violate the Act and will not be disturbed.

  
Edmund G. Geber  
Commission Designee

DATED: January 15, 1993  
Trenton, New Jersey