H.E NO. 2003-016

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

In the Matters of

STATE OF NEW JERSEY
(JUVENILE JUSTICE COMMISSION),
RESPONDENT,
-and-
JOHN GRAHAM,
CHARGING PARTY.

Docket No. CI-H-2002-26

STATE OF NEW JERSEY
(JUVENILE JUSTICE COMMISSION),
RESPONDENT,
-and-
DEXTER CLIMESON,

CHARGING PARTY.

Docket No. CI-H-2002-27

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the State of New Jersey, Juvenile Justice Commission violated the New Jersey Employer-Employee Relations Act by denying certain officers their right to union representation at investigatory interviews they believed could reasonably lead to discipline. The Hearing Examiner resolved a factual dispute finding that the respective employees did ask for representation.

The Hearing Examiner further found, however, that the State demonstrated that evidence obtained outside the interviews was the basis for the imposition of discipline. Consequently, a reinstatement/back pay remedy was not appropriate. A cease a desist order and a notice was recommended.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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CHARGING PARTY.

Appearances:

For the RESPONDENT,
Peter Harvey, Acting Attorney General of New Jersey
(Sally Ann Fields, Sr. Deputy Attorney General, of counsel)

For the CHARGING PARTY,
Loccke & Correia, P.A.
(Merick H. Limsky, Esq., of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 21, 2001, unfair practice charges were filed on behalf of John Graham and Dexter Climeson (Charging Parties), respectively, with the New Jersey Public Employment Relations

Commission (Commission) alleging that the State of New Jersey, Juvenile Justice Commission (State or Juvenile Justice) violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a(1), (3) and (5).[1/] The charges allege that the State violated the Act by denying Graham's and Climeson's respective requests for Weingarten[2/] (union) representation on June 24, 2001, at separate investigatory interviews which subsequently led to their discipline. Graham was suspended for six months; Climeson was terminated. The Charging Parties seek reinstatement with back pay and all other entitlements, and other relief.

A Consolidated Complaint and Notice of Hearing was issued on July 12, 2002 (C-1). The State relied upon its April 11, 2002 statement of position (C-2A) as its Answer, denying any violation of the Act and arguing that neither Graham nor Climeson requested

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1/ These provisions 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 this 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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ In NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975), the United States Supreme Court established the rule that employees were entitled to union representation during certain investigatory interviews.

a union representative at their respective interviews; and, that even if they had requested a representative, the discipline imposed was not based upon information gathered in either interview. The State's Answer includes a departmental decision (C-2B), recommending that Climeson be suspended indefinitely, pending the processing of criminal charges.

The Complaint issued on July 12, 2002, and the hearing was conducted on October 1 and 2, 2002, as originally scheduled.[3/] Post hearing briefs were received by January 24, 2003, and reply briefs were received by February 7, 2003.[4/]

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. Graham and Climeson were senior correction officers at the New Jersey Training School for Boys in Jamesburg, New Jersey. They worked together the evening of June 22, 2001 at which time an incident occurred. It was alleged that Climeson assaulted inmates Kearney and Berrios and that Graham witnessed the assaults but took no action to stop Climeson. On June 23, 2001, they were called to attend an interview with internal affairs

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3/ The transcripts will be referred to as 1T (October 1) and 2T (October 2), respectively.

4/ Climeson sent an e-mail to the Governor's office regarding this matter on November 4, 2002, which was referred to the Commission for response. The Director of Unfair Practices responded to that e-mail by letter of November 19, 2002, notifying him that briefs were not due until January 2003.

investigators. Graham was not initially told the subject of the interview, nor did he ask, but Graham knew something had occurred the night before, and that Climeson was also called to be interviewed at which point Graham surmised the subject of the interview (1T49-1T50). Climeson was not initially told why he was summoned to an interview, but an internal affairs investigator incidentally told him that he was the target of a criminal investigation (1T83, 1T114).

2. Graham and Climeson reported for their interviews on the morning of June 24, 2001. Graham arrived first. He went to Center Control (the communications area), asked Lt. Stellman to contact his union's institutional vice-president (PBA Local 367), senior corrections officer Donald Grigg, who accompanied Graham to the internal affairs ("IA") unit (1T20-1T22). On their way to the IA unit, Grigg advised Graham what to expect when they arrived (1T56, 2T32-2T33). IA Investigator Wimson Crespo met them at the entrance to the IA unit at about 9:00 a.m. (1T157-1T158, 2T6, J-3).

Crespo knew that Grigg was a union representative (1T188). He testified that he advised Graham, in Grigg's presence, that he was conducting a criminal investigation into allegations that inmates Kearney and Berrios had been assaulted. Crespo testified that neither Graham nor Grigg responded to him or asked him any questions after he gave Graham the advisement, and that Grigg

then told Graham he would wait outside. I infer that Grigg meant and was understood to have said that he would wait fo Graham outside the IA office until the interview concluded. Crespo further testified that if either Graham or Grigg had said Graham wanted Grigg to accompany him during the interview he would have called his chief for advice on how to proceed (1T158-1T163).

Neither Graham nor Grigg agreed with Crespo's testimony of what occurred upon their arrival at the IA unit. Graham testified that Crespo asked Grigg "what he was doing here" and Grigg replied he was "here as a representative" for Graham. Graham said Crespo replied that Grigg wasn't allowed in because the interview concerned a criminal investigation. Graham responded (to Crespo) that he wanted Grigg to attend the interview, prompting Crespo to reply that [he could not have him there since the interview might be a criminal investigation] at which point Grigg said he'd meet Graham outside (1T22-1T23, 1T60-1T63, 1T66). Neither Graham nor Grigg asked Crespo to check with his superiors about Grigg accompanying Graham, nor did Graham or Grigg have anything in writing showing Graham asked for his union representative (1T64).

Grigg testified that when he and Graham arrived at the IA unit, Crespo informed them that he was conducting a criminal investigation; that Graham was implicated in the investigation; and while looking at Grigg, Crespo said that as a union

representative and not a lawyer Grigg was not allowed into the room (2T23, 2T28). Grigg testified that Graham replied several times that he wanted his union representative present, that Grigg was there to be his witness, and that each time Crespo responded that Grigg wasn't authorized to come in with Graham because it was a criminal investigation (2T7, 2T23-2T25, 2T29). Grigg did not say anything to Crespo, nor did he ask him to call his supervisor (2T24-2T25). He waited outside the IA room for Graham, whose meeting with Crespo lasted about one hour (2T11).

I credit Graham's and Grigg's version of the encounter with Crespo. Crespo acknowledged that Grigg accompanied Graham to the IA unit and he knew Grigg was a union representative. I infer that Crespo knew that Grigg was there to represent Graham, i.e., to accompany him into the interview; it makes little sense that Graham would have remained silent when Crespo said that the interview concerned a criminal investigation. Graham asked Stellman to call for the union representative, demonstrating that he wanted to be represented at the IA meeting. Accordingly, I credit Graham's and Grigg's testimony that Graham told Crespo he wanted his representative to accompany him to the interview.

3. Graham and Crespo were joined in the IA investigation by Investigator Diane Cameron, who primarily took notes of the session and did not witness the initial encounter with Grigg

(1T214-1T216). Graham was given his Miranda[5/] rights which he promptly waived (J-3, 1T24).

Cameron's notes were compiled into a report of the interview and attached to Graham's Miranda waiver all of which is part of J-3. The substance of Graham's interview was to deny that he observed Climeson striking any inmates, or that he saw anything improper concerning Climeson and the inmates (1T76). But the report also notes that Graham admitted "catnapping" while on duty the night of the incident which, if true, could explain why Graham would not have seen Climeson's interaction with inmates.

Graham testified that he did not catnap on duty the night of the incident and initially denied making that admission to Crespo and Cameron (1T36, 1T74). Upon further examination, Graham testified that he did not recall using that word ("catnap") (1T74), and when asked, "Well, you don't recall or you didn't use it, which is it?" he responded:

> To the best of my recollection, I do not recall using that word (1T74-1T75).

Graham's testimony is equivocal and unreliable. Cameron testified that while Graham made no admissions during the interview, he did make the catnapping remark and I credit her testimony (1T219).

5/ In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court established the constitutional principal of the right to counsel when questioning might lead to criminal prosecution.

Cameron also testified that at the conclusion of the interview she reviewed her notes with Graham to verify their accuracy (1T220). She explained that Graham wanted to correct her notes which at first indicated that he was away from Cottage Seven three to four hours. Graham told her that he was away 35 minutes. Cameron included the correction in J-3.

Graham denied reviewing Cameron's notes, and testified that several remarks in J-3, including the catnap remark, were inaccurate (1T26-1T38). But on cross-examination, he admitted: 1) Cameron did a "recap" with him at the end of the interview, reviewing the items he had been asked about; and 2) he told Cameron he had been gone only 35 minutes and not three to four hours, the correction of which was noted in J-3 (1T44, 1T46). I credit Graham's admissions, but not his denials; thus, I credit Cameron's testimony that she reviewed her notes with Graham; that he admitted catnapping and tacitly approved the remainder of J-3 by not noting other changes. Graham's interview ended at approximately 10:00 a.m. (J-3).

4. Climeson testified that when he arrived for his interview he went to Center Control at about 10:00 a.m. and asked Lt. Stellman to contact Grigg. Climeson said Grigg met him at Center and they walked together to IA, but they did not engage in any discussions en route (1T83-1T84, 1T102-1T103, 1T105-1T106).

Climeson testified that upon their arrival at the door to the IA unit, Grigg was one step in front of him when Crespo opened the door and blocked their entry. Climeson said Crespo told him that he was the target of a criminal investigation and that Grigg could not be there with him. Climeson testified that he replied he needed Grigg there as his union representative, and Crespo told him he could not have him there. Climeson further testified that he asked for his union representative three times and Crespo said no three times, at which time Grigg stepped back and said he would wait outside (1T84-1T85, 1T110-1T115). Climeson did not put his request for representation in writing, nor did he or Grigg ask Crespo to check with his supervisor about excluding Climeson's representative. Grigg did not ask Crespo for time to consult with Climeson (1T115-1T116).

Grigg had trouble recalling whether he met Climeson or Graham first (2T5, 2T11, 2T15, 2T30), but J-3 shows Graham's interview occurred around 9:00 a.m., and J-4 shows Climeson's began at about 10:11 a.m., I rely on the exhibits to prove the times and order of the interviews. Grigg testified that the interviews occurred close together or back to back with little gap in between or he would have had to report back to his position (2T11, 2T17). I credit that testimony from which I find that Grigg did not report back to his work station between the two morning interviews.

Grigg further testified that he had received a telephone call from Lt. Stellman early on June 24th telling him that IA wanted to interview Graham and Climeson and he was being released so he could go to IA with them (2T5, 2T7-2T8, 2T15). I credit that testimony. Grigg was certain that he met Climeson downstairs in front of the IA building, not at Center Control, and equally positive that he had a discussion with Climeson at the bottom of the stairs leading to the IA unit in which he offered suggestions to him about the upcoming interview; his right to representation; and his (Grigg's) own rights as a union representative (2T8, 2T14, 2T35-2T36).

Grigg testified that when he and Climeson reached the door of the IA unit; they were stopped by Crespo who engaged them in the same conversation that he had had with he (Grigg) and Graham (2T8, 2T12). Grigg also testified Crespo informed them that he (Grigg) did not need to be present; that it was a criminal investigation and he (Grigg) was not authorized to be there (2T8, 2T10, 2T28-2T30). Grigg said Climeson replied that he wanted his representative to attend; that Crespo denied the request and that he (Grigg) decided to wait outside the room for Climeson (2T9, 2T30). Climeson did not ask for more time to talk to Grigg about the interview, nor did Grigg make a written report noting he was denied entry with Climeson (2T16, 2T19-2T21). On cross-examination, Grigg was asked if he appeared with Climeson because

he already knew from the previous interview that the matter was "criminal" and he would be denied admission. Grigg conceded that he knew he might not be allowed in, but he testified emphatically that he was there (2T17, 2T31). I credit that testimony.

Crespo testified that Climeson reported for the interview alone (1T171-1T172, 1T195). He testified that he advised Climeson that he was the target of a criminal investigation regarding allegations by inmates Kearney and Berrios, and that Climeson said nothing, and never asked for a union representative (1T171-1T174, 1T176). Crespo said he never denied a request by Climeson (or Graham) for a union representative because no request was made (1T173).

When asked on direct-examination if he had ever denied an employee's request for a union representative to be present at an interview, Crespo testified:

> Absolutely not. I'm very cautious about that. And if they don't come with a rep and they need one, they're told from the beginning they're a target. They do need a representative for any of the administrative cases I work on. So that was never, never denied. [1T186]

Even if I credit that remark it referred to "administrative cases," the Graham and Climeson cases were not administrative investigations, they were criminal investigations (1T198), and Crespo testified that in criminal investigations he advises officers of their Miranda rights but does not remind them of

their Weingarten rights (1T205). He conceded he did not inform Climeson of his right to a union representative (1T198). Crespo also testified that when the Division of Criminal Justice (rather than the IA unit) conducted criminal investigations it did not permit union representation of unit employees interviewed during criminal investigations (1T206). I credit Crespo's testimony about only advising employees of their Miranda rights during criminal investigations, and that the Criminal Justice Division denied Weingarten rights in criminal investigations.

Having considered testimony by Grigg and Crespo, I credit Grigg's testimony regarding where he met Climeson, what he said to him, and his description of their encounter with Crespo. Grigg's testimony was more reliable than Climeson's and Crespo's. The evidence shows that Graham's interview ended at 10:00 a.m. and Climeson's began at 10:11 a.m (J-3, J-4). It made little sense for Grigg to have returned to his work location in light of Lt. Stellman's remark to him that IA wanted to interview both Graham and Climeson. Knowing (on June 24th) that Climeson's interview was to follow Graham's, I find that Grigg waited for Climeson to join him at IA rather than return to Center or his work location. It seems normal that they would have a discussion upon meeting regarding the upcoming event as Grigg credibly testified.

Having found Grigg accompanied Climeson to IA, I credit Grigg's testimony that Crespo sought to dissuade him from attending the interview, and that Climeson asked for union representation. Crespo had testified that Grigg was not with Climeson. In the written decision upholding Climeson's eventual discipline (J-2), however, the hearing officer held:

> Under cross-examination, Mr. Crespo was asked if the Union was kept out when Climeson was interviewed. Mr. Crespo responded affirmatively. [J-2 p. 19.]

During his cross examination at this hearing Crespo was shown the above finding and asked if it was inaccurate. His response and the subsequent exchange follows:

> Q. . . .is it your opinion that that is an inaccurate statement of what occurred at the disciplinary hearing?
>
> A. No. What I am saying concerning this is - I am not sure exactly what the question was that was asked this day because I'm really pretty sure that this doesn't represent the exact question that was asked. I don't know what question - what the question was that day.
>
> Q. You do not recall whether or not a Union rep was kept out of the disciplinary hearing?
>
> A. I can't remember whether it was asked or not, so I couldn't say either way.
>
> Q. So, then you don't remember responding affirmatively as is stated in that opinion?
>
> A. Again, I don't remember the question. [1T197]

Crespo's answers were more evasive than responsive. When asked whether the question was inaccurate he first said no, then said he could not recall the actual question. The hearing officer's finding, however, was clear, Crespo was asked if the union was kept out of Climeson's interview. When asked if he remembered responding affirmatively to that question Crespo again said he did not remember the question, but he did not deny that he responded affirmatively to the above question. I find that Crespo's evasiveness was not a denial of the hearing officers finding. I infer it indirectly confirmed that finding, and conclude Crespo kept Grigg out of Climeson's IA interview. I therefore particularly credit Grigg that Climeson asked for his union representative, which Crespo denied.

5. Climeson entered the interview room with Crespo and Grigg waited outside (1T85, 1T117, 2T30). Investigator Cameron was in the room to take notes (1T85). Climeson was advised of the charges against him, informed of his Miranda rights and he signed a Miranda waiver form at 10:11 a.m. (1T87-1T88, 1T117-1T119, J-4). After signing the waiver but apparently before any questioning began, Climeson was reminded that he could terminate the interview at any time and get an attorney. Climeson immediately asserted his right to counsel, the interview was terminated and Climeson left the room (1T88, 1T117-1T119, 1T124-1T125, 1T176). Climeson drove home and called Crespo/Cameron

back about 50 minutes later telling them he wanted to return for the interview. He made no mention of bringing an attorney (1T126-1T128, 1T176-1T179).

Climeson returned for his IA interview because he thought he was required to be at the interview and would have been suspended for not appearing (1T89). He returned to the interview alone. He returned without a union representative because he earlier had been denied that request. Climeson did not tell Crespo or Cameron that he returned alone because they had denied his request nor did he renew his original request for representation (1T89, 1T129-1T131, 1T179, 1T184, 1T228-1T229). Climeson believed he had the option or right to leave the interview when he was not afforded union representation (1T89-1T90).

Climeson's interview resumed at 12:29 p.m. He was again apprised of his Miranda rights and signed a second Miranda waiver form (J-4, 1T180-1T182). Climeson was asked about the incident regarding inmates Berrios and Kearney and if he knew how they were injured. Climeson did not make any admissions in the interview (1T183, 1T229). He essentially denied striking the inmates (1T135), and no admissions were apparent in the statement of the interview prepared by Investigator Cameron (J-4). The statement noted Climeson's response to the question: how did inmate Kearney sustain injuries", he (Climeson) reportedly

answered: "He [Kearney] could of self-inflicted himself" (J-4 p.3).

Climeson testified that he did not make the "self-inflicted" remark. He testified that he said he did not know how the marks got on the inmates. He also testified that neither investigator reviewed Cameron's notes of the interview with him (1T133-1T135). Both Crespo and Cameron testified that Climeson made the "self-inflicted" remark regarding the inmates, and that Cameron reviewed her interview notes with Climeson and he (Climeson) did not indicate that anything was wrong or inaccurate (1T183-1T185; 1T229-1T232). I credit Cameron and Crespo (particularly Cameron) that Climeson uttered the "self-inflicted" remark and reviewed Cameron's notes. Consequently, I find that the information in J-4 is accurate.

6. Crespo and Cameron conducted a thorough investigation of the incident involving Kearney and Berrios. They interviewed Kearney, Berrios, other inmates and custody staff members and prepared an Investigation Summary Report of the incident (J-5). The report notes that the victims and several witnesses accused Climeson of striking both inmates, and it placed Graham at the scene observing the incident but taking no action (J-5, p.3-p.5). Although the report noted some consistency between the Graham and Climeson statements and other statements, it noted inconsistencies as well. The report concluded that the

allegations against Climeson and Graham were substantiated. Crespo testified that Climeson's interview statement was not used to substantiate the allegations (1T201). I credit that portion of Crespo's testimony. Climeson was suspended and a criminal complaint was issued against him.

As a result of the Crespo/Cameron investigation, Graham was charged with conduct unbecoming a public employee; neglect of duty resulting in injury to persons; and failure to report injury and abuse to inmates. Climeson was charged with physical/mental abuse of an inmate; inappropriate physical contact or mistreatment of an inmate; conduct unbecoming a public employee; negligence in performing his duty resulting in injury to persons; and failure to report injury or abuse involving inmates.

On October 31, 2001, a department level disciplinary hearing was held regarding Climeson before Hearing Officer A. Robert King who issued a report (C-2B) keeping Climeson on indefinite suspension pending disposition of the criminal complaint.

On November 13, 2001, Hearing Officer Ruth Burkley issued a decision (J-1) from Graham's hearing on major discipline. She found that Graham witnessed Climeson hitting inmate Kearney and that he took no action to stop or report the assault. She recommended that the neglect of duty and conduct unbecoming charges be sustained for Graham's failure to stop or report the assault, and she recommended a six month suspension.

In J-1, Burkley concluded that in addition to Kearney, eight other inmates stated that Graham was present in the dormitory and watched the assault [on Kearney], and that six of those witnesses said Graham did not attempt to stop the assault (J-1, p.37). The exhibits that management entered at the disciplinary hearing show that Inmates Hoffman (M22), Pirozzi (M23), Earley (M24), Niece (M25), Pellittier (M26), Michael (M27), and Berrios (M29), all stated that Graham witnessed Climeson's assault on Kearney but took no action.

In her decision, Hearing Officer Burkley referred to Graham's "catnapping confession" as neglect of duty. She wrote:

> By his own admission (M10) SCO Graham admitted to neglect of duty. He confessed to catnapping. Sleeping while on duty is an egregious offense in a custody environment because negligence in performing duty can result in injury to inmates. [J-1 p.39]

But Burkley did not rely on Climeson's catnapping remark as proof of his neglect of duty in the Kearney incident. Rather, she found that the neglect of duty that lead to his suspension was his failure to stop or report Climeson's assault of Kearney. She concluded:

> The seriousness of SCO Graham's neglect of duty both during and immediately after the assault on Inmate Kearney warrants major disciplinary action. At any time during or after the assault SCO Graham could have intervened, obtained medical attention or reported the assault to his superior officer. Yet, he did none of these custody duties.

> Juvenile inmates entrusted in his care endured bodily harm as he observed his peer's destructive behavior. [J-1 p.40]

Consequently, I find Burkley's recommendation of discipline for Graham was based on her reliance upon statements of several inmates that they observed Graham see and not stop Climeson's beating of Kearney and not from any information Graham provided in his interview with Crespo/Cameron.

7. Climeson was tried in Monroe Township Municipal Court on a disorderly person's charge for his assault on Kearney. He was acquitted on February 26, 2002 (1T185-1T186, J-2 p.30).

On or about July 25, 2002, Hearing Officer A. Robert King issued a decision (J-2) from Climeson's hearing on major discipline. He found that Climeson struck inmates Kearney and Berrios and failed to report the incident. He recommended that all of the charges against Climeson be sustained and, therefore, recommended his termination.

J-2 showed that in addition to the statements by Kearney and Berrios implicating Climeson, Inmates Robbins (M10), Robinson (M18), Hanuszak (M22), Boston (M24), Niece (M25), Pellittier (M26) and Boler (M27) gave statements they saw Climeson strike Kearney and/or Berrios. The hearing officer credited those statements, and in combination with medical reports on Kearney's injuries, she concluded that the charges against Climeson should

be sustained (J-2, p.31). The hearing officer did not rely on the statement provided by Climeson to Crespo/Cameron.

ANALYSIS

In Weingarten, the United States Supreme Court established an employee's right to union representation at investigatory interviews which the employee reasonably believes might lead to discipline. The right belongs to the employee, not necessarily the union representative. Weingarten, Id. at 257; In re University of Medicine and Dentistry of New Jersey, 144 N.J. 511, 526 (1996).

In order for the Weingarten right to attach the employee must first request representation. Second, the interview must be investigatory, and there must be a reasonable basis for a belief that the interview may result in discipline. Third, the right may not interfere with legitimate employer prerogatives, and fourth, the employer has no duty to bargain with a representative, nor may the representative obstruct the employer's right to conduct the interview, 420 U.S. at 256-260, 88 LRRM at 2691-2692.

The Commission adopted the Weingarten rule in East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398, 399 (¶10206 1979), aff'd in part, rev'd n part, NJPER Supp.2d 78 (¶61 App. Div.

1980), and it was later approved by the New Jersey Supreme Court in UMDNJ and CIR, 144 N.J. 511 (1996).

The primary issue in this case is whether Graham and Climeson were denied their right to a union representative in their respective interviews with Crespo and Cameron. In order to decide that issue I must first find whether Graham and Climeson met the above Weingarten conditions.

The record shows that the interviews of Graham and Climeson were investigatory in nature. Both men knew prior to their respective interviews that their conduct vis-a-vis certain inmates was being investigated. Consequently, it was reasonable for each employee to believe that the interviews could lead to their discipline. No evidence suggests that union representation at their interviews would have interfered with employer prerogatives or would have obstructed the employer's right to conduct the interviews. The primary disputed fact in this case is whether Graham and Climeson asked for union representation.

Graham and Grigg testified that Graham asked for representation, Climeson and Grigg testified that Climeson asked for representation, but Crespo testified that neither employee asked for such representation. Primarily relying on Grigg's testimony I found that Graham and Climeson asked for union representation which Crespo denied.

In its post-hearing brief, the State argued that Grigg's testimony was at times inconsistent and, therefore, unreliable. The State also (and predictably) lauded Crespo's testimony but did not address the hearing officer's finding in J-2. I found Crespo's testimony reliable in several respects, but on the issue of whether Graham and Climeson requested union representation I found Grigg's testimony the most reliable for the following reasons.

First, Lt. Stellman told Grigg on June 24 that he was needed to represent both Graham and Climeson.

Second, Crespo conceded that Grigg appeared with Graham for his (Graham's) interview and he (Crespo) knew Grigg was the Union's representative. I did not credit Crespo's testimony that both Graham and Grigg remained silent about Grigg's presence, particularly when, as I have found, Crespo questioned the purpose of Grigg's presence.

Third, since there was only eleven minutes between the end of Graham's interview and the commencement of Climeson's first interview session, it supports Grigg's testimony that the interviews occurred close together or back to back. Thus, it makes sense that Grigg would not have returned to his work location and that he waited for Climeson near the entrance to the IA section.

Fourth, the interviews involving Graham and Climeson concerned a criminal not an administrative investigation. Crespo informed both Graham and Climeson that he was conducting a criminal investigation, and Crespo conceded he does not remind employees of their Weingarten rights in criminal investigations and did not remind Graham and Climeson.

The record shows that Crespo was primarily concerned with Mirandizing Graham and Climeson and had commensurately little concern for their Weingarten rights. I am not suggesting that Crespo/Cameron were required to read or give Graham/Climeson their Weingarten rights as they must with Miranda, but an employee (in a criminal investigation) is entitled to both an attorney under Miranda, and a union representative under Weingarten. Miranda protections are not necessarily greater than those in Weingarten (except in any criminal prosecution), and one does not substitute for the other. See New Jersey Department of Human Services, P.E.R.C. No. 89-16, 14 NJPER 563 (¶19236 1988), adopting H.E. No. 88-55, 14 NJPER 374, 378 (¶19146 1988); U.S. Postal Service, 241 N.L.R.B. 141, 151-152, 100 LRRM 1520 (1979).

Fifth, the State's own hearing officer in J-2, Climeson's major disciplinary hearing, found that Crespo kept the union out of Climeson's interview.

Sixth, Crespo's evasive response to the accuracy of the hearing officer's finding in J-2 made it impossible for me to

rely on his testimony regarding Climeson's request for representation.

In its post-hearing brief, the State argued that even if Climeson requested union representation preceding his first interview session, his failure to request it before his second interview session coupled with his admission that he knew he could leave that interview, operated as a waiver of his right to union representation. I disagree.

In Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984), the Commission held:

> Once the employee makes the request for representation, the employer has three options: (1) granting the employee's request for union representation; (2) discontinuing the interview; or (3) offering the employee a choice of continuing the interview unrepresented or having no interview. Weingarten, 88 LRRM at 2691, Mobil Oil Corp., 196 NLRB 1052, 80 LRRM 1188 (1972). There is no waiver of rights unless the requesting employee voluntarily agrees to remain unrepresented after being presented with these options or is otherwise made aware of the choices. Pacific Te. And Tel. Co. V. NLRB, 711 F.2d 134, 113 LRRM 3529, 3530-3531 (9th Cir. 1983).

Climeson believed he had the option or right to leave the interview, but also felt obligated to return to the IA office under a perceived threat of suspension; and that he arrived without a representative at the second session because he had been informed he couldn't have a representative at the first session. Considering these facts, I do not believe that Climeson

"voluntarily agreed to remain unrepresented". Rather, I believe he felt obligated to appear without representation. He had already asked for representation earlier that day and it was denied. Consequently, in this situation Climeson's decision to return for a second interview without Grigg did not constitute a waiver of his right to union representation.

Based upon the above findings and analysis, I conclude that the Juvenile Justice Commission violated 5.4a(1) of the Act for denying representation to both employees. However, the facts did not support a 5.4a(3) or (5) violation. I recommend those allegations be dismissed.

Ancillary Legal Arguments

In addition to the arguments it made to support a violation based upon the facts of this case, the Charging Party argued for an expansion of the Weingarten rights. It sought, for example, that union representatives be entitled to participate in all internal affairs interviews even without a specific employees' request for representation.

In its reply brief, the State opposed any expansion of Weingarten rights, making several specific arguments, and generally relying on New Jersey Department of Law and Public Safety, Division of State Police, P.E.R.C. No. 2002-8, 27 NJPER 332 (¶32119 2001), adopting H.E. No. 2000-9, 26 NJPER 330 (¶31135 2000), in which the Commission agreed with one of my legal

conclusions and held ". . . that the right of a witness to a Weingarten representative must be decided on the facts of each case." 27 NJPER at 335 adopting 26 NJPER at 345.

Having analyzed the facts of this case and decided that the State unlawfully denied a Weingarten representative for both Graham and Climeson, it is unnecessary for me to consider any of the Charging Party's ancillary legal arguments to decide this case. Those arguments are more appropriately addressed in cases raising factual issues that more closely present a need to resolve those arguments.

Remedy

The Charging Party seeks reinstatement for Climeson and back pay for both Climeson and Graham. Such relief is unwarranted in this case. A cease and desist order is the appropriate remedy.

In Dover Municipal Utilities Authority, the Commission noted the NLRB's test in Kraft Food Inc., 251 NLRB 598, 105 LRRM 1233 (1980) for determining whether a Weingarten violation justifies reinstatement and back pay. Kraft held:

> Initially, we determine whether the General Counsel has made a prima facie showing that a make-whole remedy such as reinstatement, backpay, and expungement of all disciplinary records is warranted. The General Counsel can make this showing by proving that respondent conducted an investigatory interview in violation of Weingarten and that the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview.

> In the face of a such a showing, the burden shifts to the respondent. Thus, in order to negate the prima facie showing of the appropriateness of a make-whole remedy, the respondent must demonstrate that its decision to discipline the employee in question was not based on information obtained at the unlawful interview. Where the respondent meets its burden, a make-whole remedy will not be ordered. Instead, we will provide our traditional cease-and-desist order in remedy of the 8(a)(1) violation.

See also Jackson Township, H.E. No. 88-49, 14 NJPER 293 (¶19109 1988), adopted by P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988).

In Taracorp Industries, 273 NLRB 221, 117 LRRM 1497 (1984), the NLRB overruled Kraft Food concerning its reinstatement and backpay test, concluding that it had no authority to order so broad a remedy for Weingarten violations unless the discipline was itself in retaliation for exercising Weingarten rights. In Page Litho Inc., 313 NLRB No. 158, 146 LRRM 1106 (1994), the NLRB explained its holding in Taracorp, stating:

> . . . the employer's violation of an employee's Weingarten rights did not automatically entitle the employee to reinstatement where there was not a sufficient nexus between the unfair labor practice-denial of representation at an investigatory interview-and the reason for the employee's discharge-perceived misconduct. . . .
> [146 LRRM at 1107]

Without recommending which test the Commission should endorse, I find that even under the Kraft test, the State has met

its burden of proof that its decision to discipline Climeson and Graham was not based upon information obtained during their respective interviews. The evidence conclusively shows that the hearing officer decisions resulting in Climeson's termination and Graham's suspension were based upon the independently obtained statements/evidence provided by numerous inmates who said they saw Climeson beat inmates Kearney and Berrios and saw Graham observe at least one of those beatings and that he took no action.

The hearing officers credited those statements, and their written decisions show that discipline of Climeson and Graham was based on evidence obtained outside their interviews. I have no authority to question the hearing officer decisions and Climeson's acquittal of criminal violations it not relevant here. In accordance with Kraft, therefore, the only appropriate remedy for the Weingarten violation here is a cease and desist order.

Accordingly, based on the above findings and analysis, I make the following:

Conclusions of Law

The Juvenile Justice Commission violated 5.4a(1) of the Act by denying officers Graham and Climeson union representation at their respective investigatory interviews on June 24, 2001.

RECOMMENDED ORDER

I recommend the Commission **ORDER** the Juvenile Justice Commission:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to provide union representation, upon request, to employees John Graham and Dexter Climeson who reasonably believed they might be subject to discipline as a result of investigatory interviews conducted as part of an investigation into inmate abuse.

B. Take the following action:

1. Refrain from denying union representation to employees whose circumstances meet the Weingarten requirements, whether or not an interview concerns a criminal or administrative investigation, and even if employees are given their Miranda rights.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that

such notices are not altered, defaced or covered by other materials.

3. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

C. I further recommend all other allegations be dismissed.

Arnold H. Zudick
Senior Hearing Examiner

DATED: March 11, 2003
Trenton, New Jersey

RECOMMENDED

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to provide union representation, upon request, to employees John Graham and Dexter Climeson who reasonably believed they might be subject to discipline as a result of investigatory interviews conducted as part of an investigation into inmate abuse.

WE WILL not deny union representation to employees whose circumstances meet the Weingarten requirements whether or not an interview concerns a criminal or administrative investigation, and even if employees are given their Miranda rights.

Docket No. CI-H-2002-26 & 27

State of NJ (Juvenile Justice Comm.)
(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutifve days from the date of posting, and must not be altere, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commision, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"