

H.E. NO. 2016-16

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

In the Matter of

IRVINGTON BOARD OF EDUCATION,

Respondent,

-and-

IRVINGTON EDUCATION ASSOCIATION,

Docket No. CO-2014-181

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that a Complaint on an unfair practice charge alleging that a unit employee was denied a requested, named representative at an investigatory interview, triggering the employee's right under NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), be dismissed. The charge alleged that the public employer violated section 5.4a(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq.

The Hearing Examiner determined that the employee lawfully sought representation at an investigatory interview that she reasonably believed may lead to discipline. Under the facts of the case, the Hearing Examiner determined that the requested representative was not available and that the only available representative was provided at the interview. Anheuser-Busch, Inc. v. NLRB, 338 F.3d 267, 172 LRRM 3214 (4th Cir. 2003), cert. den. 541 U.S. 973, 174 LRRM 2736 (2004). It was also determined that the employer representative conducting the interview did not learn that the representative was a witness to the event that prompted the interview until the interview(s) were partially completed. Finally, the Hearing Examiner determined that the discipline imposed on the employee was not the result of information gathered during the investigatory interview.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that 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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Appearances:

For the Respondent
Hunt, Hamlin & Ridley, attorneys
(Kara Beaufort, of counsel)

For the Charging Party
Oxfeld Cohen, attorneys
(Gail Oxfeld Kanef, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 10, 2014, Irvington Education Association (Association) filed an unfair practice charge against Irvington Board of Education (Board). The charge alleges that on September 5, 2013, unit employee Sundra Murray requested and was denied a named Association representative in a meeting regarding "disciplinary allegations against her" with building Principal Cheryl Chester, who claimed that the person requested was not a representative. Chester allegedly called another Association representative, who declined because, ". . . that individual was present at the event in question." Chester allegedly refused to

postpone the meeting and refused Murray a representative, resulting in a one-day suspension with pay, issued by Board Superintendent Neely Hackett. The Board's conduct allegedly violates section 5.4a(1) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

The Association seeks expungement of the one-day suspension notice from Murray's personnel file and a reprimand of Chester for denying Murray an Association representative.

On January 14, 2015, a Complaint and Notice of Hearing issued. On February 27, 2015, the Board filed an Answer, denying numerous allegations and denying that it violated the Act. On May 28, 2015, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by September 25, 2015.

Upon the record, I make the following:

FINDINGS OF FACT

1. Sundra Murray is a special education teacher employed by the Board since September, 2007 and included in the collective negotiations unit of certificated employees represented by the

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."

Association (T15). In the 2013-2014 school year, Murray was assigned to University Middle School, the Principal of which was Cheryl Chester (T16, 118).

Jennifer White is a special education "inclusion" teacher employed by the Board since 2005 and included in the collective negotiations unit represented by the Association (T42). In the 2013-2014 school year, White was assigned to University Middle School (T42).

On September 5, 2013, the first school day for students that year, Murray and White had a verbal altercation at about 7:30 a.m. in a University Middle School classroom (T44). The only other witness to the incident was Ann Digiore, a guidance counselor, unit employee and Association building representative assigned to University Middle School (T77, 78, 107, 140). Digiore had been an Association building representative at University Middle School in the 2012-2013 school year (T73). Murray and White knew that Digiore was an Association building representative (T19, 73).

2. Soon after the altercation, White emailed Principal Chester, advising her of the incident in unspecified detail (1T44). Chester did not read the email and later that morning, White personally spoke to Chester about the altercation in the principal's office (T45, 53, 119-120). White did not tell Chester the precise threat Murray allegedly spoke that morning,

nor did she tell the Principal that Digiore (or anyone else) witnessed the altercation (T126-127).

3. Chester testified that White first spoke with her (privately) about the incident between 10:30 a.m. and 11 a.m. on September 5, 2013 (T132). She testified:

Ms. [White] never left my office. She proceeded to tell me - you know, make accusations towards Ms. Murray. So I asked that we stop for a minute, and if it was okay for me to invite Ms. Murray because it was a one-sided story. [T133]

Chester's recollection of the time of her first meeting with Murray and White is in the context of her memory of having asked them in that meeting whether they ". . . had taken lunch or what time they were planning to take lunch," together with her memory of Murray's reply that she preferred, ". . . to take her lunch now" and that White was agreeable to proceed with the meeting (T122, 134-135).

White testified that she told Chester about the incident before the Principal called Murray to her office (T46, 53). She also corroborated that she did not return to her classroom after speaking with Chester, but ". . . went somewhere else" (T54). White testified however, that Chester conducted an initial meeting with her and Murray between 8:30 a.m. and 9 a.m. (T45, 52).

White testified that she spoke first in that meeting (among her, Murray and Chester), and, ". . . started telling what

happened. When Chester went to ask Ms. Murray what happened during the day, [Murray] realized it wasn't about caseloads and said she wanted union representation" (T46). White testified that Murray asked for Association representative Digiore and that Chester "dismissed the meeting until we could get her" (T47).

White continued:

We went on break. I believe Murray took her prep period, took her lunch. And we were just waiting to be called back down to the office. [T47]

White's testimony about the time of the first meeting [8:30 am to 9 am] cannot be reconciled with her testimony that Murray "took her lunch" while she returned to her office before reconvening with Digiore present. I find that even if a meeting among Chester, White and Murray was convened between 8:30 am and 9 am on September 5, 2013, it was brief and of indeterminate or inconsequential substance. I find that a meeting among the three was convened or reconvened later that morning, so as to render corroborated testimonies about stopping for or taking "lunch" both sensible and credible.

Murray was asked (for the first time) on cross-examination, ". . . how many meetings were called to order by Ms. Chester [on September 5, 2013] that you attended?" This brief colloquy ensued:

A. One.

Q. There was only one meeting?

A. From what I can recall, yes.

[T29]

Murray testified that the meeting among she, White and Chester commenced at or around the "first [school] bell," about 8:25 to 8:30 a.m. (T30). She testified that (after Chester asked some questions of her, prompting her request for a union representative) Chester walked out of the conference room and asked a secretary, ". . . to call a union rep"; returned and the three were joined by Digiore, ". . . shortly" (T17-18). Murray did not testify that Chester either inquired about "taking lunch" or that any discussion ensued in the meeting(s) about any attendee taking lunch.

Digiore testified that on September 5, 2013, Chester or her secretary summoned her to one meeting at which she joined Chester, Murray and White (T81-82, 91, 92). Digiore was available to attend that meeting, as she is available, ". . . nine out of ten times" when she is called to the main office (T107-108). Digiore testified that in that "very short meeting," Murray mentioned a need for or interest in eating lunch (T97). I credit her testimony.

All witnesses except Murray credibly corroborated that one meeting included Chester's and/or Murray's stated reference to or discussion of a "break" for lunch. Murray's testimony about the one and only meeting among her, Chester, White and Digiore,

commencing at about 8:30 a.m., omits any statement or indication (by reasonable inference based on her recollection of events and conversations) that its length could have been sufficiently prolonged to reasonably accommodate an interruption or cessation for "lunch" (if one assumes that in a school where the "first bell" sounds at about 8:30 a.m., a scheduled school lunch period would likely not commence before 10 a.m.). I do not credit Murray's testimony that the only meeting she attended that day was continuous from 8:25 a.m. or 8:30 a.m.

4. Murray testified that upon her arriving at the conference room where Chester and White were seated, this conversation ensued:

Chester: Ms. Murray, do you have a problem?

Murray: No.

Chester: Are you sure you don't have a problem?

Murray: No. Can you call Ms. Hoffleur-Matteur into the room? I need to have a union rep.

Chester: Hoffleur-Matteur is not a union rep.

Murray: I'm most certain she is a union rep.

Chester: No, she's not but I will call a union rep. for you, Ms. Murray.

[T17-18]

Murray testified that White confirmed in the meeting that Hoffleur-Matteur is an Association representative (T33). Murray testified that Chester walked out of the conference room,

approached a secretary and asked that ". . . a union rep [be called]. Shortly, Ms. Digiore walked into the conference room" (T18).

Murray testified that soon after Digiore joined the meeting and White began recounting that morning's altercation, Digiore announced: "I don't feel comfortable here because I was a witness to the incident" (T19). She testified that Digiore was "dismissed [by Chester]," meaning that she walked out of the room. Murray testified that after Digiore departed, White continued her "story" during and after which Chester asked her [Murray], "Did you do these things?" "Is this true?;" "Do you have anything to say?;" "Did you ball up your fist at Ms. [White]?;" She also testified that Chester said:

And if you have anything to say, you need to say it right now because this is the time to say it. Because if this comes back up, then it's not going to come out like this the next time. So you need to say what you want to say. [T20]

I do not credit Murray's testimony regarding her reported discussion and argument with Chester about Hoffleur-Matteur (see finding no. 5). I also do not find that Chester threatened Murray if she refused to tell her version of events (see finding no. 5). Finally, I do not credit Murray's testimony about the timing of Digiore's stated objection to participating in the meeting and her testimony about Chester's questions to her after

Digiore was "dismissed" from the meeting (see finding nos. 6 and 7).

5. White testified that in a second meeting that took place in a conference room sometime between 11:30 a.m. and 12 p.m. that day, she "started telling what happened [regarding the altercation] [and] when Chester asked Murray for her explanation, Murray said, ". . . she wanted union representation" (T46, 57).

White testified:

Ms. Chester asked -- because this is Ms. Chester's second day in our building -- who the union reps were. And Ms. Murray responded that Ms. Digiore was a union rep. in the building. [T46]

White testified that Chester, ". . . dismissed the meeting until we could get [Digiore]," during which Murray, ". . . took her prep period, took her lunch" and she [White] returned, ". . . upstairs to [her] office to continue setting up for the year" (T47).

White testified that she could not recall ". . . with one-hundred per cent accuracy" what Principal Chester asked of Murray in the [second] meeting, though she denied that Chester asked Murray if she ". . . had a problem" or threatened Murray with "grave" consequences if she didn't tell her version of the incident (T67-68). In cross-examination testimony, Chester denied saying to Murray that if she refused to provide her

"story" at that moment, the consequences would be worse for her later on (T138-139).

Chester testified that in a "short" meeting among herself, Murray and White, she heard both teachers' accusations about the other and their "threats." Chester called that meeting to an abrupt end because she ". . . [couldn't] figure out what exactly happened and the statements [they're] making seem[ed] very, very inappropriate that may lead to some type of administrative discipline. So I said we will have a union representative" (T122). I do not credit Chester's last-quoted sentence to mean that she, unsolicited, stopped the meeting to call an Association representative. Murray asked for a representative; I infer that the quoted sentence reflects Chester's concurrence that a representative was needed.

Chester conceded in her direct examination that she did not know the names of the Association representatives assigned to University Middle School (on her second day as Principal of the school) and that Murray and White told her those names (T46, T123-124, 137). Chester testified that Murray mentioned that Hoffleur-Matteur was an Association representative and that she replied that Hoffleur-Matteur, ". . . was not in the building because she was in a workshop [i.e., 'next door . . . in a Read 180 training' T124, 137]. I said, 'Dr Zalin is not here [absent for a religious holiday] and we have Ms. Digiore and [Murray]

said, O.K.'" (T123, T125). "Dr. Zalin" was not otherwise identified as an Association representative in this case.

White corroborated in her testimony that Chester asked, ". . . who the union reps were and Murray responded that Ms. Digiore was a union rep in the building" (T46). White testified that Murray did not ask to be represented by Hoffleur-Matteur, while conceding that she knew that Hoffleur-Matteur was an Association representative (T55, 56-57, 68). White did not testify that Chester said in that meeting (or at any time) that Hoffleur-Matteur was not an Association representative. I credit Murray's and Chester's testimonies that Murray said that she wished to be represented by Hoffleur-Matteur. No evidence was proffered to rebut Chester's testimony that she replied that Hoffleur-Matteur was in a training session that day and unavailable; or to show that Hoffleur-Matteur was available; or not in a training session; or in a training session from which Hoffleur-Matteur's absence could have been easily remedied; or working in University Middle School on September 5, 2013. Accordingly, I credit Chester's testimony.

I find it reasonable that on the second day of school that year that also was Chester's second day (ever) as Principal of the school, Chester would not know the names of the Association building representatives and would have to inquire of their names, if an appropriate need arose, as it did. Under this

circumstance, I find it unlikely that Chester would dispute that Hoffleur-Matteur was an Association representative. I also find it reasonable that Chester would know that one of her certificated staff - Hoffleur-Matteur - was in a training session in another building that day and that she would unhesistantly report that fact when Murray mentioned or requested Hoffleur-Matteur as an Association representative. (I infer that a teacher's absence on the second school day of the year -- and the first with students attending -- would be noteworthy). Finally, I infer that Digiore was identified that day as the only immediately available Association representative assigned to University Middle School and that neither Murray nor White voiced a concern of her having witnessed the altercation before Chester summoned her to the office. I credit Chester's and White's testimonies. I do not credit Murray's testimony and do not find as a fact that Chester stated or argued that Hoffleur-Matteur was not an Association representative.

6. When Digiore was summoned by Chester to a meeting in the late morning or early afternoon of September 5, 2013, she assumed that the Principal wanted to hear her "eyewitness" account of that morning's verbal altercation between Murray and White (T82, 92).

Chester testified that in advance of that meeting, she fortuitously saw Digiore in the school hallway and told her:

"There's a situation that I feel a representative is needed between the two teachers" (T129, 140). I infer that Chester identified Murray and White. Digiore was not asked on direct or cross-examination if she spoke with Chester in advance of the meeting she attended. She testified that when she walked into the room [i.e., the meeting], she believed that she would participate as an eyewitness to the incident (T92). This cross-examination question and answer ensued:

Q. So at no time did you think you were a union representative there for Ms. Murray?

A. In my head? No. [T92-93]

Digiore's quoted reply does not rebut Chester's testimony that she told Digiore her intended purpose at the upcoming meeting, i.e., that she was to act as an Association representative. Digiore's testimony reveals her belief at that time that she would serve as a witness to the altercation. Digiore soon elaborated in another answer: "As I understood it, I was in the room -- and I think Ms. Murray wanted me in the room; [she] thought I could be an eyewitness to corroborate her side of the story" (T93).

Digiore and Murray had not spoken to one another about the incident after it occurred (T99). Digiore received text messages from Murray that morning asking the Association representative, ". . . to go outside and talk to her outside," to which she did

not reply (T99-100). Digiore admitted on direct examination by Board Counsel that she and Murray had a "friendly" relationship, ". . . a little bit more than professional . . . and Murray [had] revealed some facts about her personal life" (T79-80). Digiore did not speak "as often" with White (T80). I infer that Digiore's belief that Murray "wanted [her] in the conference room" was grounded upon her "friendly" relationship with Murray and intimated or presaged by Murray's text messages.

7. Chester, White and Murray were seated in the conference room when DiGiore arrived (T92). At the outset, no one objected to Digiore's presence (T88, 130). Chester began the meeting by asking White and Murray for "statements" or narratives about that morning's altercation between them (T49, 109, 131, 137-138).

White testified that Chester asked her to speak first and she complied. White testified that Chester asked Murray questions about her (White's) narrative and that Murray, ". . . denied the situation, as if it hadn't happened" (T49). I credit White's testimony and infer that Chester asked follow-up questions of Murray substantially similar to the questions Murray testified that Chester asked of her after Digiore was "dismissed" from the meeting (see finding no. 8).

Digiore testified that ". . . everyone was told to give their story. I went last" (T82, 85). She testified equivocally that Murray spoke first, though she could not recall what she

[Murray] said. Digiore soon conceded in that cross-examination that, ". . . it's possible" that Murray did not provide a statement (T85-86). Digiore credibly testified that White then told her version of the altercation (T86, 95). Chester testified that she first asked Murray to provide her version of events and the teacher complied. Chester testified that she next asked White for her version and she complied (T137-138). Chester denied in her testimony that she asked questions of either teacher (T138). For the reasons set forth above, I do not credit Chester's denial.

White testified that in listening to Murray's denials of her factual recitation (as reflected in Murray's answers to Chester's follow-up questions) she, ". . . realized that Ms. Digiore wasn't saying anything" and she announced (in the meeting): "Ms. Digiore was in the room" (T49). I infer that White's interjection meant and was understood to mean that Digiore was a witness to the altercation. I also infer that White's frustration with Murray's denials and/or her version of the incident prompted White to call for corroboration of her own version of events from the only other witness to the altercation. I credit White's testimony, which was corroborated by Chester in her direct and cross-examinations (T131, 141).

Chester looked at Digiore and asked, "You were in the room?" to which Digiore nodded her head in confirmation (T49, 131).

Chester asked Digiore: "What did you see?" (T49, 89). Digiore answered: "I don't feel comfortable because even though I'm a union representative, in this circumstance I was an eyewitness" (T49, 89). (I do not credit Chester's testimony that she declared that the meeting was over immediately after Digiore confirmed that she witnessed the incident (T131, 139)).

Chester promptly dismissed the meeting or declared that it must stop and ordered White, Murray and Digiore to write their own "statements" of the incident and provide them to her later that afternoon (T50, 90, 111, 131, 142-143). White and Digiore testified that Chester did not ask any attendee questions after she ended the meeting (T51, 90, 115-116). Chester corroborated their testimonies (T131-132). (I have not credited Murray's testimony that Chester asked her questions about the altercation after Digiore was "dismissed" from the meeting. See finding no. 4). In her cross-examination testimony by Association Counsel, Digiore ". . . [couldn't] remember" if she walked out of the room first. Immediately asked, "So, did Ms. Murray leave first?," she answered: "Since she was seated by the door she probably did leave first. But I don't remember exactly. But you know, the table goes from the front of the room to the back of the room, and I was in the back of the room" (T96-97). Digiore's testimony about the table's placement and her position at the table was unrebutted and corroborated to a reasonable extent by Chester

(T130). I credit that testimony and infer that Murray walked out of the conference room before Digiore. All attendees dispersed (T51, 89-91, 111-112).

8. In the afternoon on September 5, 2013, Chester called Board Superintendent Neely Hackett and informed her that, ". . . there had been a problem with two teachers; that she had a meeting and there was an issue with the union representative being a witness" (T147). Chester told Hackett that she had instructed all ". . . [to] put the chain of events in writing" and that ". . . she was waiting for [written] statements" (T142, 147). Hackett instructed Chester to send the reports to her promptly (T148). At unspecified times that afternoon, Murray, White and Digiore issued written "statements" to Chester (T21, 51, 90). Hackett in turn received the reports, read them and ". . . made [her] decision" (T148). Hackett testified that her decision was based on the [written] statements (T149). I credit her unrebutted testimony.

9. On October 3, 2013, Hackett issued a written disciplinary notice to Murray, advising that she had been accused of "gross unprofessionalism and threatening a co-worker. . . ." The notice advises of Murray's expulsion from school premises until the next day (CP-1, T146-147). The document was placed in Murray's personnel file (T23).

ANALYSIS

The United States and New Jersey Supreme Courts agree that an employee has a right to request a union representative's assistance during an investigatory interview that the employee reasonably believes may lead to discipline. NLRB v Weingarten, Inc., 420 U.S. 251 (1975); UMDNJ and CIR, 144 N.J. 511 (1996). Our Commission first 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 in part, NJPER Supp.2d 78 (¶61 App. Div. 1980). It has more recently been affirmed in State of New Jersey (Dept. of Corrections), P.E.R.C. No. 2013-16, 39 NJPER 175 (¶53 2012).

A public employer is obligated to provide a Weingarten representative to a unit employee under certain conditions. First, the employee who is to be interviewed must request representation. Second, the interview must be investigatory and as a corollary, there must be a reasonable belief that the investigatory interview may result in discipline. The test for reasonableness is objective, not subjective, which focuses on the employee's or employer's state of mind. See Lennox Industries, Inc. v. NLRB, 637 F.2d 340 (5th Cir. 1981) (Weingarten requires showing both that an interview was investigatory and that an employee could reasonably fear discipline as a result).

Third, the right to representation may not interfere with legitimate employer prerogatives. For example, the employer may choose not to interview the employee if he or she insists upon union representation; the employee must then choose between having an interview unaccompanied by a representative or having no interview. Fourth, although the employer cannot compel a representative's silence during an interview, it does not have a duty to bargain with the representative. The representative may assist the employee and attempt to clarify facts, but may not obstruct the employer's right to conduct the interview. State of New Jersey (Dept. of Corrections), 39 NJPER at 177-178.

On September 5, 2013, unit employee Murray was summoned to meeting(s) initiated and conducted by Principal Chester at which she heard and was asked about circumstances of a verbal altercation (that included threatened violence) earlier that day in which she was reportedly an active participant. Under any case witness version of these facts, one must find that Murray's request of Chester for an Association representative in that investigatory interview was based upon a reasonable belief that the interview could result in her discipline.

The Association contends that an employee lawfully seeking a Weingarten representative ". . . maintains the right to select the representative of his or her choosing as long as that representative is reasonably available," citing Annheuser-Busch,

Inc. v. NLRB, 338 F.3d 267, 172 LRRM 3214 (4th Cir. 2003), cert. den., 541 U.S. 973, 174 LRRM 2736 (2004), in the absence of an analogous Commission precedent (brief at 6-7). See Lullo v. Int'l Ass'n of Fire Fighters, Local 1066, 55 N.J. 409 (1970) (the experiences and adjudications under the National Labor Relations Act should be a guide in the public sector). The Association argues that Principal Chester was obligated, ". . . to at least attempt to have Ms. Hoffleur-Matteur present, even if it meant adjourning the meeting for a time" (brief at 8). I disagree.

The Court in Anheuser-Busch considered at length the issue of whether an employee is entitled to choose his or her Weingarten representative. Id., 172 LRRM 3219-3223. In the facts, the union had designated two shop stewards in the employee's department to serve as employee representatives. When the employee requested representative "A," no representative was present at the site of the proposed interview. Representative "B" was in another part of the brewery and was summoned on the radio. Representative "A" was at lunch but on previous occasions he had shortened those breaks in order to represent employees. His lunch break would have been completed within fifteen minutes of the outset of the interview. The Court affirmed both the administrative law judge's determination that at the time of the initial request for representation, "A" was not "less available" than "B" to represent the employee, and the ALJ's ruling that the

employer should have given the employee access to "A," the representative of his choice.

The Court also traced the decisional history [omitted here] of the NLRB's "Representation Rule," i.e., the right to specify the union Weingarten representative of one's choice, concluding:

[B]y 1992, the [NLRB] had taken a firm position that absent special circumstances (i.e., the requested union representative is unavailable) the choice as to who will represent an employee during an investigatory interview resides with the union and the employee, not the employer. [Id., 172 LRRM 3222]

Even if I credited Murray's testimony that Chester commenced a meeting by asking her if she ". . . had a problem," (see finding no. 4) and by denying that Hoffleur-Matteur was an Association representative (even if Chester didn't know, or knew that she was an Association representative), those facts would not demonstrate Hoffleur-Matteur's availability. Unlike the facts in Anheuser-Busch, nothing was proffered in this case to indicate that Hoffleur-Matteur was on a contemporaneous "break"; or away only briefly from University Middle School; or otherwise in a position to elect to serve as a Weingarten representative. No evidence rebuts Chester's testimony that Hoffleur-Matteur that day was attending a specified training in a nearby building (see finding no. 5). Granting Murray the benefit of her (not-credited) testimony, I find that Chester prevaricated to Murray about Hoffleur-Matteur's status as an Association representative

in order to prevent an interruption of Hoffleur-Matteur's training session. Even under these circumstances, I find that Hoffleur-Matteur was unavailable to act as Murray's Weingarten representative. Considering that Digiore was the only identified, present and immediately available Association representative assigned to University Middle School, I find that Chester's selection of Digiore was appropriate and reasonable because Digiore had not yet been identified as a witness to the altercation. I also observe that although Chester might have postponed the interview until Hoffleur-Matteur became available, she was not obligated to do so because Digiore was immediately available. See Williams Pipeline Co., 315 NLRB 3, 147 LRRM 1168 (1994); LIR-USA Manufacturing Co., 306 NLRB 298, 140 LRRM 1180 (1992).

Murray's testimony, standing alone, establishes that Chester promptly stopped the meeting or interview and walked out of the conference room to arrange for Digiore to be summoned to the interview. In Digiore's presence, White told her version of the altercation and said in frustration, that Digiore had witnessed the event (see finding no. 7). Chester immediately asked Digiore for her version and the Association representative balked. Principal Chester promptly ended the meeting or interview and directed all attendees to write and submit their versions of the altercation to her that afternoon. I find that Digiore's role as

Association representative and evident discomfort in that situation helped make her a reliable witness in the hearing. I credited her testimony that Chester did not ask Murray questions after the meeting was adjourned (see finding no. 7).

Superintendent Hackett considered only all three written reports of the altercation in deciding Murray's penalty. The Board's action was based upon facts that were untainted by any alleged Weingarten violation.

Accordingly, I recommend that the Complaint be dismissed.

/s/Jonathan Roth

Jonathan Roth
Hearing Examiner

DATED: January 29, 2016
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman 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. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by February 8, 2016.