

P.E.R.C. NO. 93-20

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY  
(DIVISION OF STATE POLICE),

Respondent,

-and-

Docket No. CO-H-91-287

STATE TROOPERS FRATERNAL  
ASSOCIATION OF NEW JERSEY,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the State Troopers Fraternal Association of New Jersey. The charge alleged that the State employer had denied two employees their right to union representation during investigatory interviews. The Commission finds with respect to the first employee that the employer properly terminated the interview after the employee refused to answer any questions without a representative; and with respect to the second employee that he had been told he was no longer the target of an investigation and thus had no reasonable basis to fear that the interview might result in discipline.

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STATE TROOPERS FRATERNAL  
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Charging Party.

Appearances:

For the Respondent, Robert J. Del Tufo, Attorney General  
(Melvin Mounts, Deputy Attorney General)

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

DECISION AND ORDER

On April 22, 1991, the State Troopers Fraternal Association of New Jersey ("STFA") filed an unfair practice charge against the State of New Jersey (Division of State Police). The STFA alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), (5) and (7),<sup>1/</sup> by denying two employees their right to union representation during investigatory interviews.

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<sup>1/</sup> These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to

On July 2, 1991, a Complaint and Notice of Hearing issued. On July 17, the employer filed its Answer denying that it had violated the Act and asserting that neither trooper was entitled to union representation under the circumstances of their respective interviews.

On September 23 and 24, 1991, Hearing Examiner Susan A. Weinberg conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs and replies by February 10, 1992. Hearing Examiner Weinberg resigned from the Commission's staff and pursuant to N.J.A.C. 19:14-6.4, this matter was reassigned to Hearing Examiner Susan Wood Osborn for a report and recommended decision.

On May 20, 1992, Hearing Examiner Osborn recommended dismissing the Complaint. H.E. No. 92-33, 18 NJPER \_\_\_\_ (¶\_\_\_\_ 1992). She found that when one trooper invoked his right to remain silent under Miranda v. Arizona, 384 U.S. 436 (1966), the employer lawfully ended the interview. She found that the other trooper's meeting with a deputy attorney general was not an investigatory

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(Footnote Continued From Previous Page)

1/ 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. (7) Violating any of the rules and regulations established by the commission."

interview and, accordingly, no statutory right to union representation attached.

On June 17, 1992, after an extension of time, the employer filed exceptions. It claims that in a criminal investigation where there are constitutional rights to legal counsel and to remain silent, we do not have jurisdiction to enhance those constitutional rights by affording the criminal suspect the right to also have a union representative present. The employer incorporates its post-hearing brief and urges that, because this case will be looked to for guidance in the future, we examine our jurisdiction.

On June 22, 1992, after an extension of time, the STFA filed exceptions. It claims that the employer violated the Act in the first case because the interview did not end when the employee invoked his right to remain silent. It claims that the employer violated the Act in the second case because the employee had a reasonable belief that he could have been disciplined as a result of the interview.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-11) are accurate. We incorporate them.

An employee has a right to union representation at any 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 App. Div. Dkt. No. A-280-79 (6/18/80). The Supreme Court in Weingarten stated that:

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.

To establish a violation of an employee's Weingarten rights, the charging party must show that the interview was investigatory, the employee reasonably believed that discipline might result, the employee requested representation, and the employer denied the request and proceeded with the interview.

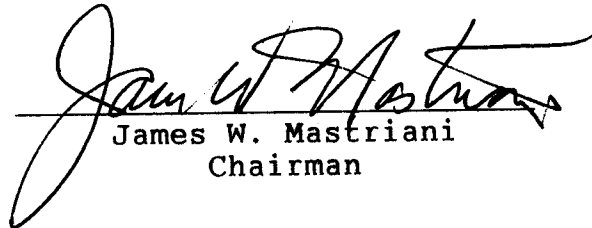
We agree with the Hearing Examiner that the employer did not violate the employees' Weingarten rights in either instance. In the first case, the employee asked for a union representative, he was read his Miranda rights, and his representative was then told to leave. The employee did not ask for an attorney, but refused to answer questions without a union representative present. The investigator then told him that since he had refused to answer questions, the matter would be forwarded to the Attorney General. Under Weingarten, once an employee requests a union representative, the employer is permitted three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice of continuing the interview without a representative or having no interview at all. United States Postal Service, 241 N.L.R.B. No. 18, 100 LRRM 1520 (1979). Here, after the employee refused to answer any questions without a representative, the employer terminated the interview. In the second case, the employee had previously been informed that he was no longer the target of the investigation. At the interview, he was informed that he was being

interviewed as a witness. We agree with the Hearing Examiner that the employee had no reasonable basis to fear that the interview might result in disciplinary action. Having found that the employer did not violate either employee's Weingarten rights, we dismiss the Complaint.<sup>2/</sup>

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: September 24, 1992  
Trenton, New Jersey  
ISSUED: September 25, 1992

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<sup>2/</sup> Given this disposition of the case, we decline to address the general issue of whether Weingarten rights may be invoked by a trooper during a criminal investigation. We addressed a similar issue in State of New Jersey (Dept. of Human Services), P.E.R.C. No. 89-16, 14 NJPER 563 (¶19236 1988), where the employer had announced but not yet enforced a firm prohibition against the contents of criminal investigation reports being considered in disciplinary proceedings. We do not comment on that case's applicability here.

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

In the Matter of

STATE OF NEW JERSEY,  
DIVISION OF STATE POLICE,

Respondent,

-and-

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STATE TROOPERS FRATERNAL ASSOCIATION  
OF NEW JERSEY,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the New Jersey Division of State Police did not violate the New Jersey Employer-Employee Relations Act when it denied certain employees' requests for union representation during interviews.

In the first instance, the Hearing Examiner rejects the State's argument that the trooper was not entitled to union representation under Weingarten because the investigatory interview concerned charges that were potentially criminal in nature. The Hearing Examiner concluded that the trooper was entitled to a Weingarten representative even though he was given his Miranda rights to an attorney. However, when the trooper invoked his right to remain silent, the employer lawfully ended the interview. Accordingly, the Hearing Examiner finds that under State of N.J. (Dept. of Human Services), P.E.R.C. No. No. 89-16, 14 NJPER 563 (¶19236 1988), no violation occurred.

The Hearing Examiner finds that, in the second instance, the trooper's meeting with a deputy attorney general did not constitute an "investigatory interview" under Weingarten. Since the employee was interviewed only as a witness in preparation for another trooper's disciplinary hearing, the employee was not in reasonable fear of discipline and no Weingarten rights attach.

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

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For the Respondent,  
Robert DelTufo, Attorney General  
(Melvin Mounts, Deputy Attorney General)

For the Charging Party  
Loccke & Correia, Attorneys  
(Michael Rappa, of counsel)

HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION

On April 22, 1991, the State Troopers Fraternal Association of New Jersey (STFA) filed an Unfair Practice Charge with the Public Employment Relations Commission (Commission) alleging that the State of New Jersey, Division of State Police ("State" or "Division") violated subsections 5.4(a)(1), (2), (3), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.



(Act)<sup>1/</sup> by denying employees their Weingarten<sup>2/</sup> right to union representation during investigatory interviews. The STFA specifically charged that during an investigatory interview with a Division Internal Affairs officer, Trooper Jack Suarez' request for union representation was denied. STFA further charged that at an interview with Deputy Attorney General Croce on April 9, 1991, Trooper Raymond Villahermosa's request for union representation was denied.

A Complaint and Notice of Hearing issued on July 2, 1991. The State filed an Answer on July 17, 1991 denying that that it violated the Act by depriving any trooper's of his Weingarten rights. The State asserts that neither trooper was entitled to union representation under the circumstances of their respective interviews. The State contends that Trooper Suarez' interview was

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<sup>1/</sup> These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (7) Violating any of the rules and regulations established by the commission."

<sup>2/</sup> NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975).

part of an investigation for potential criminal charges, not administrative discipline, and that he was given his Miranda<sup>3/</sup> rights and made no statement. The State asserts that Trooper Villahermosa was interviewed as a witness for an administrative hearing concerning another trooper, and therefore was not entitled to representation.

On September 23 and 24, 1991, Hearing Examiner Susan Weinberg conducted a hearing at which the parties examined witnesses and presented evidence.<sup>4/</sup> The parties filed post-hearing briefs by January 17, 1992. The State filed a reply brief on February 10, 1992. Thereafter, Hearing Examiner Weinberg resigned from the Commission's staff, and pursuant to N.J.A.C. 19:14-6.4, this matter was then reassigned to me for a report and recommended decision.

Based upon the entire record I make the following:

FINDINGS OF FACT

1. The State and STFA are parties to a collective negotiations agreement (R-11) covering the period July 1, 1987 through June 30, 1990. At the time of these events, the parties were in the process of negotiating a successor agreement and the expired contract remained in effect.

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<sup>3/</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

<sup>4/</sup> The transcripts of the September 23 hearing will be referred to as "1T-" the transcript of the September 24 hearing will be referred to as "2T-." The State's exhibits will be referred to as "R-".

R-11 provides at Article XIII, Internal Investigation Procedure, at Section C, in relevant part:

- (6) Before any questioning takes place, the Trooper shall be apprised of the following:
  - (a) Identity of the officer in charge of the investigation and the identity of the officer conducting the questioning, including ranks, names and assignments. Also, the identity of all persons present during questioning.
  - (b) Nature of the investigation, including any allegation and/or any violation of rules, regulations and orders involved.
  - (c) If applicable, names(s) of the complainant and/or witness, in writing. The addresses of complainants and/or witnesses need not be disclosed.
  - (d) Whether the Trooper is involved in the investigation as a principal or as a witness at that time.
  - (e) Upon being advised of the above, the Trooper shall so acknowledge on the appropriate form.
  - (8) It shall be the duty of each Trooper of the Division of State Police to answer pertinent questions regarding any matter which is the subject of investigation. (emphasis added).

2. In 1989, STFA filed two unfair practice charges against the State alleging certain violations of troopers' Weingarten rights. Those charges resulted in a settlement agreement executed on November 28, 1989, in which the parties agreed:

That pursuant to the U S. Supreme Court's decision in Weingarten, the State agrees that an employee who reasonably believes that an investigatory interview may lead to discipline is

entitled to request and have a union representative present during the interview.

2. Upon the request of an employee being interviewed, the State will allow the attendance of a union representative according to normal procedure.

3. The union representative and principal employee shall be informed of the nature of the interview and be given the opportunity for a pre-interview conference.

4. At the commencement of the interview the union representative shall sign the principal acknowledgement form which is attached hereto and made a part hereof.

5. During the interview the union representative will have the rights as stated in the principal acknowledgement form.

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Attached to the settlement agreement was a "Weingarten Representative Acknowledgement" form, on which the STFA Representative affirms his presence at an investigation interview and his right to consult with the principal employee prior to and during the interview.

3. The Division's Internal Affairs Bureau typically conducts investigatory interviews which result in administrative discipline (1T33). Internal Affairs has developed two forms for use during its investigatory interviews of troopers: a Principal Acknowledgement form (R-10) and a Witness Acknowledgement form (R-9). R-10 is an acknowledgement of the trooper's rights under the above-cited section of the State/STFA collective agreement relating to internal investigations. The form lists those rights verbatim

from R-11, article XIII, Section 6. In addition, the trooper acknowledges that he has been informed that he is principal in the investigation and that all of the rights, as identified above, have been granted (R-10).

The Witness Acknowledgement form (R-9) simply states that the trooper acknowledges that he has been informed that, at this time, he is a witness in an internal investigation.

Jack Suarez

4. The Internal Affairs Bureau assigned Detective Sergeant Mull to conduct a criminal investigation concerning a complaint that Trooper Jack Suarez falsified a police report. Mull notified Suarez that he was the subject of an internal investigation and ordered him to appear for an investigatory interview on November 2, 1990. Suarez asked the STFA for union representation at the interview and was accompanied at the interview by STFA Representative David Jones.

5. After consulting with his superiors, Mull refused to permit Jones to remain for the interview. Mull told Jones the charges were criminal, not administrative, and that he intended to give Suarez his Miranda rights to have an attorney present. Jones objected and suggested that the STFA would file an unfair practice charge if Suarez was denied his right to a union representative (1T30-1T31).

6. Mull then brought Suarez into the room. Mull told Suarez that an investigation was being conducted based upon a complaint about falsified police reports. Mull asked Suarez to sign

a "Principal Acknowledgement" form (as described above), which indicated that he was a principal in an investigation and that disciplinary action could result from the investigation. As Suarez signed the form, he asked to have his union representative present for the interview. Suarez was then read his Miranda rights and signed a Miranda acknowledgement (R-1). Mull then told Jones to leave. Jones left. (1T12-1T14)

7. Suarez believed the interview could result in discipline. He did not ask for an attorney, but refused to speak without a union representative present (1T27). Mull then told Suarez that since he was refusing to answer questions, the matter would be forwarded to the Attorney General's Office to decide if Suarez should be charged criminally. Mull explained to Suarez that, if the Attorney General's office decided not to charge him criminally, then the matter would be returned to Internal Affairs for administrative charges and Mull would call Suarez back for an interview on administrative charges. Mull asked Suarez no further questions and the meeting ended. (1T21-1T22).

8. Thereafter, the Attorney General's office determined not to charge Suarez criminally and it returned the matter to the Division to proceed with administrative charges.

Mull interviewed Suarez on the administrative charges on December 13, 1991. Suarez was permitted have his STFA representative present for the entire interview. Suarez and his STFA representative were permitted to see the letter of citizen's

complaint and consult privately before the interview (1T24). With his STFA representative present, Suarez fully participated in the interview and answered questions concerning the allegations against him (1T25). Suarez has since been advised in writing that he is being charged with a summary court martial and would be given a seven-day suspension if he pled guilty. The matter is still pending (1T15).

9. According to Mull, the purpose of the initial interview was to ascertain if there were any criminal and/or administrative violations. Mull explained that an employee could be charged administratively on the basis of statements made at the initial interview (1T104). Mull specifically testified that if the officer chooses not to exercise his Miranda right to remain silent, the Division would not need to conduct a separate interview if the employee were to be charged administratively (1T107; 1T110).

#### Rey Villahermosa

10. In April, 1990, Internal Affairs Lieutenant Walter Jensen investigated an incident concerning an arrest warrant involving Trooper John Day and Trooper Rey Villahermosa (2T19). On April 12, 1990, Jensen interviewed Villahermosa. STFA representative Lennon attended this interview as Villahermosa's Weingarten representative (R-4; 2T19-2T20). Jensen forwarded the completed investigation report, including a list of the allegations and his conclusions based upon his investigation, to Internal Affairs (2T25-26; 2T28-29). Internal Affairs reviewed the matter and determined that the investigation was complete (2T23-2T24; 2T29).

Jensen was then instructed by the Major's office to contact Day, Villahermosa, and the complainant to advise them of the outcome of the completed investigation (2T20-2T21). Jensen telephoned Villahermosa at the Edison Station and told him the investigation was completed, and no further action would be taken against him. Villahermosa thanked him and the conversation ended (2T22). Jensen also told the complainant that no further action would be taken against Villahermosa but that Day would possibly face disciplinary charges. (2T22). Mull documented these calls in an October 12, 1990, confirming memorandum to Major Trocchia, the Internal Affairs Staff Supervisor (R-6).<sup>5/</sup>

11. Sergeant Roy VanTassel is an officer with the Internal Affairs Bureau. Deputy Attorney General Croce was preparing the State's summary discipline case against John Day. On Croce's instructions, VanTassel contacted the State's witnesses, including Villahermosa, to arrange for Croce to meet with them individually (1T112). He called Villahermosa on April 2, 1991 and instructed him to report to the Internal Affairs Office for an interview by the Deputy Attorney General preparing the State's case against Day.

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<sup>5/</sup> When Villahermosa was asked on cross-examination whether he was ever advised that no further action would be taken against him concerning this incident, he replied "I don't recall. No, sir." He later stated that he had not been so advised. (1T59). He testified that "he did not recall" being told by Jensen that no further action would be taken against him. (1T60). Because of Villahermosa's inconsistent and sketchy recollection of Jensen's call, I credit Jensen's testimony, which is also consistent with documentation (R-6).



(1T113-1T114; 1T121; R-8).<sup>6/</sup> Believing he may still be subject to disciplinary charges, Villahermosa contacted the Association office and requested representation at the meeting (1T46; 1T54-1T56).

12. On April 9, 1991, Villahermosa reported to Internal Affairs as instructed. Trooper Lennon, an STFA representative, also appeared (1T114). Villahermosa was then told that he would be speaking with a deputy attorney general (1T48). Speaking to Lennon separately outside the room, VanTassel told Lennon that Villahermosa was not being investigated; rather, Croce was going to interview Villahermosa as a potential witness concerning Day's hearing, and that union representation was unnecessary. (1T79; 1T81-1T82; 1T85; 2T25)

At some point, Villahermosa requested union representation.<sup>7/</sup> Lennon told Villahermosa that he would not be permitted to stay and Lennon then left. (1T48; 1T66; 1T78; 1T86; 2T18)

13. During the meeting between Croce and Villahermosa, VanTassel stayed in the room (2T24). Croce advised Villahermosa that he was preparing for a summary disciplinary hearing against Day, and wanted to go over some facts relative to that case. Although Villahermosa was not asked to sign a witness acknowledgment

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<sup>6/</sup> Villahermosa testified that he did not recall who told him to report to Internal Affairs or if he was told why (1T54).

<sup>7/</sup> VanTassel testified that Villahermosa did not ask for a union representative. However, VanTassel was not in the room the entire time. Accordingly, I credit Villahermosa.

form,<sup>8/</sup> Croce told Villahermosa that he may be called to testify against Day (1T124; 1T116).<sup>9/</sup> Croce asked him several questions about the incident, primarily about Day's actions (1T69; 1T73; 2T25). Villahermosa subsequently testified at Day's summary discipline hearing (1T74; 1T133, 1T134).

#### ANALYSIS

In East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part App. Div. Dkt. No. A-280-79 (6/18/80), the Commission adopted the federal model under NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975) ("Weingarten") to determine whether an employer has interfered with an employee's right to union representation during a disciplinary interview.

Under Weingarten, an individual employee has a right to union representation at any investigatory interview that the employee reasonably believes could lead to discipline. The employer's denial of that right violates subsection 5.4(a)(1) of the Act. See Tp. of Old Bridge, P.E.R.C. No. 90-102, 16 NJPER 307 (¶21127 1990), appl pending App. Div. Dkt. No. A-5353-89T2; State of N. J. (Dept. of Human Services), P.E.R.C. No. 89-16, 14 NJPER 563 (¶19236 1988), adopting H.E. No. 88-55, 14 NJPER 374 (¶19146

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<sup>8/</sup> VanTassel stated the witness form is used for investigations. According to VanTassel, Villahermosa was not given a witness acknowledgement form because this was not an investigation. By this point, the investigation was already completed (2T26).

<sup>9/</sup> Villahermosa testified that he did not recall being told he may be called as a witness against Day (1T66). Accordingly, I base this finding on VanTassel's testimony.

1988)("Human Services"); Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988), adopting H.E. No. 88-49, 14 NJPER 293, 304, 305 (¶19109 1988); Dover Municipal Utilities Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984)(10 NJPER at 339, 340); Stony Brook Sewage Authority, P.E.R.C. No. 83-138, 9 NJPER 280, 281 (¶14129 1983); East Brunswick Tp., P.E.R.C. No. 83-16, 8 NJPER 479 (¶13224 1982), adopting H.E. No. 82-59, 8 NJPER 400 (¶13183 1982); Camden County Vo-Tech School, P.E.R.C. No. 82-16, 7 NJPER 466 (¶12206 1981); and Cape May County, P.E.R.C. No. 82-2, 7 NJPER 432 (¶12192 1981). To prove a Weingarten violation the charging party must show that (a) the employer conducted an investigatory interview (b) during which the employee reasonably believed that discipline might result; (c) the employee requested union representation; and (d) the employer denied the request for union representation and proceeded with the interview.

#### Jack Suarez

I find that the interview with Suarez was an investigatory interview, he was reasonably in fear of discipline, and that he clearly requested union representation. The State argues that because Suarez was being investigated for possible criminal charges, the interview was part of a criminal investigation, not an administrative investigation. The NLRB has concluded that the criminal nature of the alleged employee conduct under investigation is not in itself sufficient to insulate an interview from Weingarten protections, citing U.S. Postal Service , 241 NLRB 141, 100 LRRM

1520 (1979). In Postal Service, the NLRB affirmed the right to union representation for an employee interviewed by Postal Service inspectors and ultimately disciplined based on evidence obtained as a result of the criminal investigation.

The interview here was conducted by the Division's Internal Affairs Bureau personnel. This Bureau is routinely responsible for investigating trooper misconduct. Their investigations often lead to troopers' discipline. Suarez was told the nature of the allegations against him concerned false police reports, and he signed a Principal Acknowledgement form which indicates discipline could result from the investigation. These facts clearly establish a basis for Suarez' reasonable fear that discipline could result from the interview.

Suarez made a request for union representation and it was denied. He was told that under his Miranda rights, he had the right to an attorney and he had the right to remain silent. He choose to remain silent.

The State argues that because he was given his Miranda rights to an attorney, he did not also have the right to union representation. The Commission previously addressed this issue in Human Services. There, the Commission found that not all police interviews (involving possible criminal charges) trigger the right to union representation. The Commission stated,

Where the information gathered during a criminal investigation cannot be used to impose or sustain disciplinary determinations, the interview is sufficiently separate from any disciplinary

proceeding to dispel any reasonable fear of discipline.

But the Commission found there that the power of the police to also conduct administrative investigations, the possibility that the employee's interview responses on the criminal charges might be repeated in disciplinary proceedings if the criminal case gets closed, and the absence of any assurance that no discipline could flow from the interview, leads to the conclusion that the employee reasonably feared discipline and was entitled to union representation.

Here, at the time of the initial interview, no decision had yet been made as to whether Suarez would be charged criminally or administratively. The Internal Affairs Bureau conducts trooper investigations for both criminal and administrative charges. It was only after Suarez declined to answer questions that Mull explained that a separate administrative investigation would have to be conducted if the Attorney General's office did not press criminal charges. Mull admitted that if Suarez had chosen not invoke his Miranda right to remain silent and had answered questions, he might have been charged administratively and a separate interview would not necessarily have to be conducted. In essence, had Suarez subjected himself to the interview, his responses could have formed the basis of administrative charges and discipline could have resulted. For this reason, I find that Suarez was entitled to union representation under Weingarten during this interview.

However, because Suarez choose to invoke his Miranda right to remain silent, the interview ended at that point. It could be argued that, because the Division would have continued with the interview but for Suarez' unwillingness to answer questions, it violated the Act. That is, the employee's action should not act as an antidote for the employer's violation.

The Commission previously decided in Human Services, in a factual situation parallel to this one, that no violation will be found if the employer ends the interview when the employee invokes his Miranda right to silence. In Human Services, as in this case, the employee was told the subject of his interview and read his Miranda warnings. He exercised his right not to answer questions. The police then properly ended the questioning. The Commission found, in agreement with the hearing examiner and overruling exceptions, that under Weingarten, once an employee makes a valid request for union representation, the employer is permitted to discontinue the interview without liability. See also, Amoco Oil Co., 238 NLRB No. 84, 99 LRRM 1250 (1978). For this reason, I am constrained to follow Human Services and find that the State committed no violation with regard to Suarez' interview.

#### Rey Villahermosa

With regard to the Deputy Attorney General's interview with Villahermosa, I find that this interview was not an "investigatory interview" to which the employee's Weingarten rights might attach. The investigation was already completed and Mull so advised

Villahermosa earlier by telephone. The Deputy Attorney General was interviewing Villahermosa as a witness in preparation for Day's disciplinary hearing. Even if Villahermosa came to the interview in fear of discipline, that fear was dispelled when Croce opened the meeting by announcing that Villahermosa was being interviewed as a witness. Therefore, there is no objective basis to conclude that Villahermosa was in reasonable fear of discipline, and the Division was not required to permit him union representation under the circumstances here.

Sometimes, however, an interview which does not begin as an investigatory interview becomes one mid-stream. In Jackson Twp., P.E.R.C. 88-124, 14 NJPER 405 (¶19160 1988), the employer began an interview with an employee who was to be a witness in the investigation of another employee. However, as a result of the employee's response to one of the questions during the interview, he became a target of the investigation. At that point, the character of the interview changed. The Commission found that the employer could not lawfully continue the interview without granting the employee's earlier request for Weingarten representation. The employer's failure to do so would taint any evidence obtained from the interview for use in supporting disciplinary charges.

In this matter, STFA argues that the State violated the Act even though Villahermosa was only interviewed as a witness, because his responses could have caused him to become a target of the investigation again. That did not happen here, however. Had the

nature of this interview so changed, then Villahermosa's Weingarten rights would be invoked, and the Division could not lawfully have continued the interview without granting the trooper's earlier request for union representation.

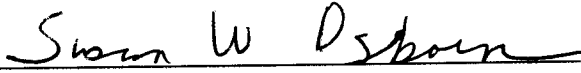
CONCLUSIONS

I recommend that the Commission find that the State Division of State Police did not violate 5.4(a)(1) of the Act by denying Troopers Suarez and Villahermosa union representation under the facts presented herein.

No facts were presented which show any violation of 5.4(a)(2), (3), (5) or (7) of the Act.

RECOMMENDATIONS

I recommend that the Commission dismiss the Complaint.

  
Susan Wood Osborn  
Hearing Examiner

Dated: May 20, 1992  
Trenton, New Jersey