

H.E. NO. 2000-7

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

In the Matter of

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES,

Respondent,

-and-

Docket No. CO-H-98-195

CWA LOCAL 1040, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, John J. Farmer, Jr., Attorney General
(Stephan M. Schwartz, Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys
(James M. Cooney, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 1, 1997 and April 2, 1998, the Communications Workers of America, Local 1040, AFL-CIO, filed an unfair practice charge and amended charge against the State of New Jersey, Department of Human Services. The amended charge alleges that the State violated section 5.4a(1) and (3)^{1/} of the New Jersey

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,

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Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it denied an employee's request to have a union representative present during a disciplinary meeting. The amended charge alleges that on November 7, 1997, Head Nurse Dennis Hlavaty, a member of CWA's Primary Level Supervisory negotiations unit, and an employee of the State working at Hagedorn Geropsychiatric Hospital, was called to a meeting with Philomena Gruppo, the Director of Nursing at Hagedorn. The charge alleges that Gruppo questioned Hlavaty about and accused him of committing several medication errors. The charge further alleges that Hlavaty then requested that the union's chief shop steward be called to the meeting; that the chief steward was then unavailable; that Gruppo continued to question Hlavaty and refused to recess the meeting until the chief steward could be present; and that on November 7, 1997, Gruppo gave Hlavaty a memorandum criticizing Hlavaty's performance. The charge also alleges that on March 19, 1998, Gruppo gave Hlavaty a second memo critical of his performance wherein she referenced the November 7, 1997 meeting in which Hlavaty had been denied his Weingarten rights.

A Complaint and Notice of Hearing was issued on June 19, 1998.

1/ Footnote Continued From Previous Page

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."

On June 30, 1998, the State filed an Answer. The State admits that Hlavaty met with Gruppo on November 7, 1997; that Gruppo gave Hlavaty a memo critical of his performance in dispensing medications; and that Hlavaty filed a grievance on November 20, 1997 contesting the November 7, 1997 memo criticizing his performance and Gruppo's refusal to allow Hlavaty a union representative during the November 7, 1997 meeting. However, the State denies that the November 7, 1997 meeting was a disciplinary or investigatory meeting; denies that Hlavaty was disciplined for any matter discussed at the November 7, 1997 meeting; and denies that it refused to allow Hlavaty union representation during the November 7, 1997 meeting. The State asserts that the purpose of the November 7, 1997 meeting was instructional and denies that its conduct violated section 5.4a(1) and (3) of the Act.

I conducted a hearing on October 20, 1998 at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by February 16, 1999.

Based upon the entire record, I make the following:

FINDINGS OF FACT

(1) The State of New Jersey is a public employer within the meaning of the New Jersey Employer-Employee Relations Act. Hagedorn Geropsychiatric Hospital is operated by the State of New Jersey Department of Human Services. Hagedorn has approximately 230 mostly long-term psychiatric patients. There are three

nursing shifts daily. Approximately 40 nurses work on the day shift; fewer nurses work on each of the other shifts (T7-T10).^{2/}

(2) Hlavaty has been employed at Hagedorn since September 1993 (T9). Hlavaty worked the night shift from September 1993 through September 1997; he was transferred to the day shift in September 1997 (T12). In 1997, Hlavaty was a Head Nurse and R.N. His duties included: (1) giving medication to patients; (2) recording data on various patient charts (medications, physicians' orders, etc.); (3) periodically checking on patients; and (4) supervising subordinate staff members (T10-T11).

(3) CWA is the statutory majority representative of a State-wide negotiations unit of first-level supervisory employees employed by the State of New Jersey.

(4) Hlavaty became a shop steward for CWA in April 1997. In that capacity, he informed unit employees about various employment issues and rights. During his tenure as a shop steward, Hlavaty never filed a grievance on behalf of any unit member other than himself (T11-T12).

(5) Hlavaty took a medical leave of absence due to stress, from approximately March 12, 1997 through August 31, 1997. When he returned to work, he was put on the day shift as a

^{2/} "T" represents the transcript of the hearing, followed by the page number. "C" represents Commission exhibits; and "CP" represents charging party exhibits.

floater. Hlavaty found this schedule to be difficult because he was never able to become comfortable with one work unit (T28-T30).

(6) Hlavaty's day-shift supervisors are Gerri Cook and Karen Artz. Philomena Gruppo is the Director of Nursing. Prior to November 1997, Hlavaty had little interaction with Gruppo.

The November 7, 1997 Meeting

(7) At 1:30 p.m. on November 7, 1997, while working the day shift, Hlavaty received a call from Gruppo's secretary, Peggy Dorion. She told him to come to Gruppo's office at 2:30 p.m. for a meeting. Hlavaty asked Dorion what the meeting was about; Dorion replied she didn't know (T14-T15).

(8) At that point, he had a feeling that this meeting was not going to be a positive experience -- because generally, he felt being called to the Nursing Director's office was usually not to get good news and specifically, because earlier in the year, he had been involved in a staff meeting where other staff members had (orally) attacked him (T15-T17). Although Gruppo had not been involved in that meeting, Hlavaty believed she had "allowed" the unwarranted attacks to occur (T17).

(9) Hlavaty had been in employee conferences before -- in January 1997, Night Supervisor Ellie Gallagher called Hlavaty and told him she wanted to meet to review several procedures with him. At the meeting, she showed Hlavaty a document which described several instances where he did not follow proper

procedures, and it set forth proposed corrective actions (T21-T22). Although he was not disciplined as a result of the January 1997 meeting, when he received his PAR a month later, Gallagher referenced several documents, including the Employee Conference Note from the January 29, 1997 conference (T21-T24). CP-2 is the Employee Conference Note which relates back to the January 29, 1997 meeting; it was mailed to Hlavaty sometime after the January 29, 1997 meeting. Hlavaty had refused to sign or review that Employee Conference Note as he had requested that Shop Steward Flo Kitner be present before he would sign.^{3/} He subsequently grieved the Employee Conferences and several other issues. With regard to the January 29, 1997 Employee Conferences, his grievance claimed that Supervisor Gallagher was harassing him and had inappropriately counselled him in a non-private setting (T24-T27).

(10) Despite his anxiety about the pending 2:30 p.m., November 7, 1997 meeting, Hlavaty did not attempt to contact a union representative during the hour preceding the meeting. Nor did he request a union representative when the meeting with Gruppo actually began and she presented him with CP-1 (T80-T81). Even halfway through this five-to-ten minute meeting with Gruppo, despite his assessment that this situation might be problematic,

^{3/} Hlavaty was called to another employee conference around this time (January 29, 1997); however, he misplaced the Employee Conference Note from the second conference.

Hlavaty still did not request that a union representative be called to the meeting (T82-T83).

(11) Gruppo does not usually participate in employee conferences; she does so when there have been a number of repeated issues and/or where she feels a situation needs her intervention (T87-T89). Her decision to conference Hlavaty was prompted by a series of recurrent problems (involving the transcription of various physicians' orders and the administration of medication) that had been noted by several of Hlavaty's supervisors over a period of time (T88-T90).

(12) Gruppo prepared for the November 7 Hlavaty conference by reviewing various documents about Hlavaty's performance prepared by his supervisors. She prepared CP-1 in advance of the conference and planned in advance the course she intended to follow to address Hlavaty's performance issues (T88-T90, T91-T92, T112-T113). At the conference, she did not ask Hlavaty whether he agreed with the observations or the corrective actions which had been formulated; she asked only if he was aware of the performance issues identified (T110-T114).

(13) The meeting took place in a training room next to the Nursing Office in the Administration Building. Gruppo and Hlavaty met alone, starting at 2:30 p.m. (T17-T18). Before the start of the meeting, Gruppo gave Hlavaty a copy of CP-1, a

document entitled Employee Conference Note.^{4/} He kept it through the conference (T49, T90). Gruppo told Hlavaty she wanted to review with him the various points indicated on CP-1 and how they intended to resolve them (T91). CP-1 documents by inference various performance errors made by Hlavaty; it notes that Hlavaty needs to take corrective action concerning various work responsibilities and it sets forth an affirmative plan.

(14) At the November 7 conference, Gruppo reviewed with Hlavaty the various errors in Hlavaty's performance which were documented in CP-1 -- records transcription errors, inadequate follow-up on patient medical orders, not properly observing patients taking medication, and incorrectly handling medication (T30-T31, T49, T51-T60, T92-T96).^{5/}

(15) At the November 7 conference, Gruppo's focus was on the incorrect administration of medication and the incorrect transcription of medication orders (T115-T116). Several weeks prior to the November 7 conference, Nurse Supervisor Corey told Hlavaty he was not monitoring his patients closely enough while giving medication. Hlavaty felt he had been sufficiently

^{4/} An Employee Conference Note is the documentation of a meeting between a supervisor and an employee. It is not, per se, a disciplinary document. Rather, it is used to instruct employees and/or correct their professional performance (T87, T101).

^{5/} The transcription error cited in CP-1 was Hlavaty's failure to record a physician's medication order for 60mg of Nafaro onto a patient's Medication Administration Record (T51).

monitoring patients. The day after their initial conversation, Corey observed Hlavaty again not properly monitoring a patient while giving medication. Corey documented this observation and forwarded it to Gruppo (T114-T117).

(16) After Gruppo reviewed CP-1 with Hlavaty, she asked him to sign it (T83, T96). Gruppo specifically testified that she did not ask Hlavaty whether he agreed with the assessment of problems or the corrective actions outlined on CP-1. I credit that testimony (T110-T114).^{6/}

(17) Hlavaty then said he felt this was "bogus" and refused to sign CP-1 without union shop steward Flo Kitner being present (T95-T96).^{7/}

(18) Hlavaty asserted that he "disagreed" with CP-1. He argued to Gruppo that while she had cited him for what he

^{6/} Gruppo's testimony about how she approached the November 7 Hlavaty conference was consistent with her general explanation of employee conferences -- that the purpose of a conference was to identify a performance error to an employee and indicate how to correct it. That she prepared CP-1 in advance of the conference is also consistent with her treatment of the conference as a tool for instruction, not as an investigatory or disciplinary forum. Accordingly, Gruppo's statement that she asked very few questions at the conference and that she asked only whether Hlavaty recollected the various events is consistent with what she viewed as the objective of an employee conference.

^{7/} Hlavaty wanted a shop steward present in order to get advice and to ensure that he did not overlook anything before signing CP-1 which could result in discipline (T34-T35).

considered to be minor issues, she had failed to criticize other employees for more serious performance errors (T30-T32).^{8/}

(19) Gruppo then checked the work schedule, and found Kitner was not then working. She told Hlavaty that Julie Whitford (whom Gruppo then thought to be a shop steward) was working and offered that he could have her present. Hlavaty responded that he wanted only Kitner (T33-T34, T96-T97).

(20) Hlavaty refused Whitford because she had been a steward for three weeks or so and then resigned. On November 7, 1997, Whitford was no longer a shop steward, a fact concerning which Gruppo was unaware (T34). Gruppo said it was up to Hlavaty as to whether or not to sign (T97).

(21) The November 7, 1997 meeting lasted between five and ten minutes (T36, T49, T90). After Hlavaty said he would sign the note only if Kitner was present, Gruppo said nothing more (T36). The meeting then ended (T40-T41). Hlavaty left CP-1 in the conference room (T50). Immediately after the conference ended, Gruppo wrote on CP-1 that the conference note was reviewed with Hlavaty but he refused to sign it without his union representative being present and she initialed that statement. She then mailed Hlavaty a copy of CP-1 (T95-T97, T117).

^{8/} Although Hlavaty says he "disagreed" with Gruppo's assertions in CP-1 regarding performance errors he had made, he concedes the occurrences (T41, T66). Rather, his "disagreement" goes to his contention that Gruppo cited him for such performance issues and that she did not cite other employees for similar issues.

(22) Gruppo was not disrespectful to Hlavaty during the November 7 conference, did not threaten him with discipline and did not make any anti-union remarks (T71-T73).

(23) CP-1, Section III, Recommendations of Supervisor, enumerates seven retraining instructions for Hlavaty to complete -- supervisor was to review medical order transcription procedures with Hlavaty; Hlavaty was to view a video on medication administration; pharmacist was to observe Hlavaty giving medication to patients; supervisors were to review Hlavaty's transcriptions with him (for three weeks); and finally, his supervisors were to randomly review Hlavaty's transcriptions (for several months) (T52-T60, T92-T94). Gruppo's objective was to correct Hlavaty's errors by insuring that he reviewed and knew proper transcription and medication procedures.

(24) As a result of the November 1997 employee conference, Hlavaty was required to participate in refresher training sessions. These sessions were conducted periodically, over a period of months, by his immediate supervisors, Cook and Artz. Hlavaty considered this "retraining" to be harassment (T44-T46).

(25) In the aftermath of the November 1997 conference, the reports which Gruppo received from Hlavaty's supervisors were variable -- some weeks he performed well; other weeks, not well (T95, T111).

The last instructional procedure uncovered many errors by Hlavaty (T60-T62). From January 29 to March 17, 1998, his supervisors found and listed 15 separate errors during the random checks (T60-T61).

(26) Between November 7, 1997 and January 29, 1998, Hlavaty had several employee conferences about recurrent errors. No discipline resulted from the conferences. His supervisors simply counselled him about how to correct his professional performance (T62-T63).

(27) During the period just prior and subsequent to November 7, 1997, Hlavaty was under great stress from problems both at work and at home. He was taking medication regularly (T61-T63).

(28) On December 24, 1997, Hlavaty met with Gruppo about an incident between Hlavaty and another nurse (Porter). Gruppo took a statement from Hlavaty about the incident (T76).

(29) Subsequent to the November 7 conference, Hlavaty was meeting with his supervisors regularly (T45-T46, T58-T63, T94-T96, T98, T119). Gruppo periodically met with his supervisors to ensure that he was progressing through the recommendations on CP-1 (T97-T98). Through the end of December 1997, Gruppo was not considering disciplining Hlavaty (T97-T98). Gruppo does not consider CP-1 to be disciplinary. No discipline was given for the November 7 conference incident because, at that time, Gruppo did not perceive it to be part of an ongoing sequence of performance

errors by an employee who had been counseled. Further, Gruppo notes that discipline is not generally meted out for every medication/transcription error. The objective of an employee conference, the conference note and the reactive procedure set forth in the note is to correct the error and move on (T100-T101).

Gruppo considers the November 7 conference note and even the March 17, 1998 written warning to be corrective measures and not discipline, per se (T100-T102, T119).

However, Gruppo acknowledged that the information discussed in an employee conference and contained in a conference note itself can sometimes become part of a disciplinary record (T109-T111).

The March 17, 1998 Written Warning

(30) On March 17, 1998, Gruppo and Ruth Lowe-Surge, the Hagedorn Nurse Administrator and Gruppo's supervisor, issued a written warning to Hlavaty (CP-6). CP-6 was issued for two specific performance errors by Hlavaty: a February 4, 1998 medication order transcription error and a February 5, 1998 medication storage error. These were cited as ". . . serious mistakes due to carelessness but not resulting in danger to person or property" (CP-6).

CP-6 makes unspecific references to two prior mistakes of similar nature to those cited in CP-6: The transcription error was termed the second such error within the past four months; the

storage error was termed the second such error in the last two months. The reference to the second medication transcription error in four months refers back to the transcription error cited in CP-1 (T100).

(31) One of the specific errors cited in CP-6 was another medication transcription error -- Hlavaty had noted on the patient's record the discontinuation of a doctor's order for 1mg Ativan and a new order for .5mg Ativan; however, CP-6 indicates he failed to document the new order on the patient's Medication Administration Record (T98-T99). CP-6 also noted that Hlavaty had incorrectly stored an insulin bottle in a cabinet instead of in a refrigerator (T99-T100).

(32) Hlavaty contends he was disciplined -- though the issuance of the written warning -- as a result of the November 7, 1997 Employee Conference, wherein he contends he was denied a union representative. Hlavaty argues that the reference to the "second transcription error in the last four months" refers to the October 28, 1997 transcription error for which he was conferenced on November 7, 1997, because he notes that between November 7, 1997 and March 17, 1998 he had not been called to any other employee conferences (T40-T43).^{9/}

^{9/} While Hlavaty is correct in his assertion that the reference in CP-6 to "the second transcription error in four months" refers to the October 28, 1997 transcription error for which

(33) On March 17, 1998, Hlavaty was called to the Nursing Office and met with Gruppo and Lowe-Surge. They gave him CP-6. He asked to have Kitner at the meeting. Kitner was not working on that day so the meeting was rescheduled for March 19, 1998, the next time that Kitner would be working (T44-T45).

(34) No suspension or other discipline was issued to Hlavaty as a result of the March 17 (and 19), 1998 written warning (T66-T68).

ANALYSIS & CONCLUSIONS OF LAW

In E. Brunswick Bd. of Ed. and E. Brunswick Ed. Ass'n, P.E.R.C. No. 81-123, 7 NJPER 242 (¶12109 1981), aff'd in pt., rev'd in pt., NJPER Supp.2d 115 (¶97 App. Div. 1982), the Commission held that an employer interfered with the exercise of rights protected by the Act in violation of subsection 5.4a(1) when it denied an employee's request for union representation at an investigatory interview which the employee reasonably believed could result in discipline. The Commission based its holding on two cases: NLRB v. Weingarten, 420 U.S. 251, 88 LRRM 2689 (1975), where the U.S. Supreme Court held that an employee has a right to

9/ Footnote Continued From Previous Page

he was conferenced on November 7, 1997, his assertion that he was not conferenced between November 7, 1997 and March 17, 1998 is incorrect. He was conferenced several times; not all of these conferences resulted in the issuance of employee conference notes (T57-T63).

union representation at any investigatory interview which the employee reasonably believes could lead to discipline of the employee; and Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 151 N.J. Super. 435 (App. Div. 1977), aff'd 78 N.J. 122 (1978), where the New Jersey Supreme Court held that section 5.3 of the Act guarantees employees the right to have grievances presented by the majority representative. The Commission's adoption of the Weingarten rule was specifically affirmed by the New Jersey Supreme Court in UMDNJ and CIR, P.E.R.C. No. 93-114, 19 NJPER 342 (¶24155 1993), recon. granted P.E.R.C. No. 94-60, 20 NJPER 45 (¶25014 1994), aff'd 21 NJPER 319 (¶26203 App. Div. 1995), aff'd 144 N.J. 511 (1996).

To establish a violation of an employee's Weingarten rights, Charging Party must demonstrate that: (1) an employee was directed to and did attend an interview/conference conducted by supervisory or managerial employees; (2) the interview/conference was, in fact, investigatory; (3) the employee reasonably believed that adverse consequences/discipline might result from this investigatory interview; (4) before or during the interview, the employee requested the presence of a union representative at the interview; (5) the employer denied the employee's request for a union representative; (6) the employer did not then offer the employee the choice to either stop the interview or continue the interview without a union representative; and (7) the employer continued the interview.

In this matter, Charging Party's case lacks several of the elements required for a Weingarten violation. Hlavaty was directed to and did attend a conference with supervisory employee Gruppo. However, the conference was not investigatory. Although Hlavaty did not have a positive feeling about being called to a meeting at the Nursing Director's office, his belief that discipline might result from this meeting developed toward the end of the conference. Toward the end of the meeting, Hlavaty requested the presence of his union representative. Nursing Director Gruppo did not deny the request for a union representative; rather, she tried to help secure a union representative for Hlavaty. Gruppo ended the interview when Hlavaty's requested union representative could not be found at the workplace.

The November 7, 1997 conference between Hlavaty and Gruppo was not investigatory. Gruppo did not convene the meeting to question Hlavaty about an event or set of events which, depending on her evaluation of them, could have resulted in discipline to Hlavaty. The events at the focus of the conference were performance errors which Hlavaty's supervisors had observed Hlavaty making and had documented to Gruppo. Thus, the documented errors were occurrences about which no inquiry or investigation was contemplated or necessary. Gruppo had prepared CP-1, the Employee Conference Note, in advance of the November 7 meeting. She treated the meeting as a counselling session, not a

disciplinary matter. Through at least December 1997, Gruppo was not thinking in terms of disciplining Hlavaty.

Hlavaty did not question that the CP-1 events occurred. Rather, he believed that (a) they were small, inconsequential, errors -- no one was hurt -- and (b) that he was being singled out as one among many employees for making these minor errors.^{10/} However, the purpose of the conference was not to determine that these events took place, but rather to note to Hlavaty that he made the various mistakes and to show him or instruct him in the proper performance methodology. The purpose of the conference was instructional. The fact that this event (November 7 conference) was later cited in a written reprimand -- after a series of such events had occurred -- does not make the original conference retroactively disciplinary.

^{10/} There is no factual basis in the record for Hlavaty's assertion that he was generally being singled-out by all of his various supervisors for making these types of errors (medication/medical orders transcription errors and errors in the handling of medication).

Further, Hlavaty's assertion that the errors were small or inconsequential is belied by the elaborate transcription protocol in effect at Hagedorn. There was a standard operating procedure in place at Hagedorn of triple-checking the transcription of medical orders and medication orders. This is a redundant and labor-intensive process. Its presence indicates that the employer was substantially concerned with avoiding such mistakes as the triple-check would eliminate. The determination of the level of seriousness of such transcription errors is a judgment which is uniquely for the employer/institution to make. Hlavaty's contention that these were errors of little consequence or significance is belied by these procedures (T31-T34, T103-T110).

Although adverse consequences may eventually flow from continuing negative evaluations of an employee, Weingarten rights do not ordinarily attach to evaluative conferences. In State of New Jersey, D.U.P. No. 97-15, 22 NJPER 339 (¶27176 1996), the Charging Party contended her Weingarten rights had been violated when she was denied permission to have her Shop Steward present in a conference about her performance. The Director concluded that an employee is entitled to have a union representative present only at a conference convened for the purpose of investigating employee actions that might constitute a basis for discipline against the employee. Because this conference involved a discussion of Charging Party's performance, not an investigatory meeting from which discipline could be anticipated, the Director concluded no Weingarten right attached and therefore no unfair practice occurred.^{11/}

^{11/} Cf., Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984), where the Commission concluded that the employer violated subsection 5.4a(1) when it discharged an employee after an investigatory interview in which the employee's requests for the presence of a union representative were denied. In Dover, no pre-meeting decision about whether to discipline the employee had been made; the purpose of the meeting was to investigate whether discipline against the employee was warranted. Citing Baton Rouge Waterworks, 246 NLRB 995, 103 LLRM 1056 (1979), the Commission noted that Weingarten rights do not attach where a meeting is called solely to inform an employee of an already made disciplinary determination. Dover, 10 NJPER at 340, n. 27. See also, UMDNJ and CIR, P.E.R.C. No. 93-114, 19 NJPER 342 (¶24155 1993), recon. granted P.E.R.C. No. 94-60, 20 NJPER 45 (¶25014 1994), aff'd 21 NJPER 319 (¶26203 App. Div. 1995), aff'd 144 N.J. 511 (1996) and John E. Runnels Hospital, 11 NJPER 147 (¶16064 1985).

In this matter, the November 7 conference with Gruppo was not investigatory. Accordingly, no Weingarten right attached.

However, even assuming that the November 7 conference was investigatory, Gruppo did not deny Hlavaty's request for the presence of a union representative. Hlavaty did not request a union representative until the conference was all but over -- when Gruppo asked him to sign the employee conference note. When Hlavaty replied he would sign it only if Chief Shop Steward Flo Kitner was present, Gruppo tried to locate Kitner but found it was her day off. Gruppo offered to call another employee (Whitford) to the office, whom she thought was a union representative; Hlavaty declined and said only Kitner would do. At that point Gruppo terminated the meeting. Thus, from the point in the meeting when Hlavaty requested a union representative to the end of the meeting, all that occurred was an attempt to secure a union representative; that attempt being unsuccessful, Gruppo terminated the meeting.

In State of N.J. (Dept. of Human Services), P.E.R.C. No. 90-47, 16 NJPER 4 (¶21003 1989), the Charging Party contended the Respondent violated the Act when a departmental hearing officer told a disciplined employee that a union business manager could not represent him at his termination hearing, allegedly because the business manager was obstreperous at the hearing.

The Commission stated:

We need not decide here whether the business manager's conduct was obstreperous or simply

vigorous. In either event, we are convinced that the departmental hearing officer went too far when she denied the employee the right to any union representation. Even if the representative's conduct was unacceptable, she should have afforded the employee the option of choosing a replacement representative. Cf. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed. 78 N.J. 122 (1978).

We are also convinced that the hearing officer's conduct did not violate Weingarten. Since East Brunswick, we have applied the Weingarten rule in cases where the employee (1) requests a representative and (2) has a reasonable belief, measured by objective standards, that the interview may result in discipline. Once an employee requests representation, the employer must grant that request or discontinue the interview. Dover Municipal Utilities Auth. P.E.R.C. No. 84-132, 10 NJPER 33 (¶15157 1984); see also Amoco Oil Co., 238 NLRB No. 84, 99 LRRM 1250 (1978); State of New Jersey (Dept. of Human Services), P.E.R.C. No. 89-16, 14 NJPER 563 (¶19236 1988). Assuming this employee was entitled to a union representative under Weingarten, the departmental hearing officer did not continue with the "interview" after the employee indicated he would not proceed without a representative. Thus, we reject Local 195's Weingarten analysis and its request for back pay.

[State of N.J., 16 NJPER at 5]

See State of N.J. (Division of State Police), P.E.R.C. No. 93-20, 18 NJPER 471 (¶3212 1992). (In an investigatory interview, after being read his Miranda rights, state police officer refused to answer interviewer's questions without presence of union representative; interviewer declined request and terminated interview; because interview ended just after employer denied request for Weingarten representative, Commission found no violation). See also Tp. of Hillsborough, D.U.P. No. 98-34, 24 NJPER 253 (¶29120 1998)

(Commission dismissed charge alleging township violated police officer's right to union representative during investigatory interview by giving employee only three hours' notice of interview; Commission found that because township offered to delay interview so that appropriate representation could be obtained, there was no Weingarten violation.)

Accordingly, even assuming that the November 7 conference was investigatory, because Gruppo ended the conference after they could not locate Hlavaty's union representative, I find that no Weingarten violation occurred.

Based upon the above findings and analysis, I find that the State did not deny Hlavaty the right to a union representative. Since no Weingarten violation occurred in connection with the November 7, 1997 conference, the reference in the March 17, 1998 written warning to one of the events conferenced on November 7 was therefore, not a violation of Hlavaty's protected rights. Further, the evidence does not support the finding of a section 5.4a(3) violation, -- that is, that Hlavaty was disciplined due to his protected activity.^{12/} Thus, both the section 5.4a(1) and a(3) allegations should be dismissed.

^{12/} Although the charge lists an a(3) violation, that issue was not litigated and was not argued/briefed by the Charging Party.

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.

Charles A. Tadduni
Hearing Examiner

DATED: March 29, 2000
Trenton, New Jersey