D.U.P. NO. 99-21

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

NEW JERSEY STATE JUDICIARY,

Respondent,

-and- Docket No. CO-99-253

NEW JERSEY AFL-CIO COUNCIL OF AFFILIATED UNIONS,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a Complaint where an employee's asserted Weingarten rights, NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975), to union representation never attached during a meeting with the employee's supervisor. Applying the objective standard and criteria in Weingarten, the Director determined that a reasonable person could not have believed that the meeting at issue constituted an investigatory interview which would have triggered Weingarten rights. Additionally, having determined that no Weingarten right ever attached, the Director found that the employee was not engaged in protected activity and therefore, the employer's suspension of the employee for insubordination and conduct unbecoming an employee was not in retaliation for exercise of protected activity.

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Appearances:

For the Respondent,
John J. Farmer, Jr., Attorney General
(Michael L. Diller, Deputy Attorney General)

For the Charging Party,
Kathleen A. King, Staff Representative

REFUSAL TO ISSUE COMPLAINT

On February 2, 1999, the New Jersey AFL-CIO Council of Affiliated Unions (Council) filed an unfair practice charge with the Public Employment Relations Commission (Commission) against the New Jersey Judiciary, Middlesex County Visinage (Judiciary). The charge alleges that the Judiciary violated 5.4a(1), (3) and (5)[1/] of the

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this

Footnote Continued on Next Page

New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) when it violated Joan Peterson's Weingarten[2/] rights by suspending her for eight days when she requested to have a shop steward present at a September 11, 1998 meeting with her supervisor.

The Judiciary maintains that the circumstances presented in this case do not invoke a Weingarten right. It further argues that Peterson's suspension was based on her refusal to attend the September 11, 1998 meeting with her supervisor, not because she attempted to exercise any asserted Weingarten rights. It asks that the charge be dismissed.

The Commission has authority to issue a Complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the Complaint issuance standard has not been met, I may decline to issue a Complaint. N.J.A.C. 19:14-2.3. In correspondence dated June 2, 1999, I advised the parties that I was not inclined to issue a complaint in this matter and set forth the basis upon which I arrived at that

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1/ Footnote Continued From Previous Page

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

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

conclusion. I provided the parties with an opportunity to respond. Neither party filed a response. Based upon the following, I find the complaint issuance standard has not been met.

On or about September 10, 1998, employee Peterson submitted a request for a leave of absence to her supervisor, Charles Hager. On September 11, 1998, Hager asked Peterson to come to his office to discuss her leave request. Upon approaching Hager's office, Peterson noticed a second management representative present in the office. At that point, Peterson told Hager she wanted a shop steward present for the meeting. Peterson wanted a representative present because during the past year, Hager had periodically summoned Peterson to his office and those meetings occasionally became adversarial. Hager allegedly threatened discipline during some of those previous meetings.

However, on this occasion, Hager told Peterson that she did not need a steward present, as the meeting was "non-disciplinary" and pertained only to her leave request. Notwithstanding Hager's statement, Peterson left to go find a shop steward instead of going into Hager's office for the meeting. Upon obtaining a steward, some one-half to one hour later, Peterson returned to Hager's office, where he was waiting. The meeting then took place with Peterson's steward present. The meeting involved only Peterson's leave request, which was granted. There was no disciplinary action as a result of the leave request.

Also at the meeting, Hager informed Peterson that he would pursue disciplinary action because Peterson had failed to come to his office for the meeting when requested. On October 27, 1998, Peterson was notified that she would be suspended for eight days for "insubordination" and "conduct unbecoming an employee" based upon her failure to report to Hager's office when requested to do so.

The Council acknowledges that Hager consistently afforded Peterson union representation during previous meetings whenever the meeting evolved into an investigatory interview which Peterson reasonably believed might have resulted in discipline.

ANALYSIS

In NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975), the U.S. Supreme Court held that a private sector employee is entitled to have a union representative present at an investigatory interview which the employee reasonably believes may result in discipline. In East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part, rev'd in part, NJPER Supp.2d 78 (¶61 App. Div. 1980), Weingarten was specifically adopted by the Commission. For Weingarten rights to attach, there must be (a) an investigatory interview, (b) a reasonable apprehension by the employee that discipline may result, and (c) a request for union representation prior to or during the interview by the employee. See D'Arrigo v. N.J. State Board of Mediation, 228 N.J. Super. 189 (App. Div. 1988), rev'd 119 N.J. 74 (1990); State of N. J. (Dept. of Human Services), H.E. No. 88-55, 14 NJPER 374

(¶19146 1988), adopted P.E.R.C. No. 89-16, 14 NJPER 563 (¶19236 1988); Jackson Tp., H.E. No. 88-49, 14 NJPER 293 (¶19109 1988), adopted P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988); Dover Municipal Util. Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984)("Dover"); Stony Brook Sewage Auth., P.E.R.C. No. 83-138, 9 NJPER 280 (¶14129 1983); East Brunswick Tp., H.E. No. 82-59, 8 NJPER 400 (¶13183 1982), adopted P.E.R.C. No. 83-16, 8 NJPER 479 (¶13224 1982); Camden Cty. Voc-Tech School, P.E.R.C. No. 82-16, 7 NJPER 466 (¶12206 1981); and Cape May Cty., P.E.R.C. No. 82-2, 7 NJPER 432 (¶12192 1981)("Cape May"). The reasonableness of the employee's belief that discipline may result from the interview is measured by objective standards under the circumstances of each case. Dover; Cape May.

The Council asserts that because Hager had a history over the past year of calling Peterson into his office for unspecified reasons and then threatening discipline during those meetings, she reasonably believed that the September 11, 1998 meeting might also result in discipline. Therefore, the Council asserts, Peterson attempted to exercise her Weingarten rights for the September 11 meeting.

However, as set forth in the charge, the stated purpose of the meeting was to discuss Peterson's leave of absence request which she submitted one day earlier. When Peterson informed Hager that she wanted a shop steward present, Hager made it clear that she did not need a shop steward inasmuch as the meeting was not disciplinary

in nature. Peterson then chose not to attend the meeting with Hager and instead sought a union steward who eventually attended the meeting with Peterson and Hager.

To establish that she reasonably believed that the September 11 meeting was investigatory and might lead to discipline, Peterson relies on previous meetings with Hager where the character of the meetings changed mid-stream from discussions to investigatory interviews. This asserted history, however, cannot support a reasonable belief that the meeting in this case was investigatory. It is undisputed that Hager made it clear from the outset that the September 11 meeting would not deal with any disciplinary matter. It is also undisputed that whenever any of the previous meetings evolved into an investigatory interview, Hager consistently granted Peterson's request for a shop steward to be present. There is no assertion that the same procedure would not have been followed on September 11, should the meeting have turned investigatory in nature and raised the potential of discipline.

Thus, it does not appear that, applying objective standards, a reasonable person could believe that the September 11, 1998 meeting constituted an investigatory interview which could result in discipline. Where there is no investigatory interview, there can be no Weingarten violation, and I decline to issue a Complaint. See N.J. State (Div. of Taxation)(Kupersmit), D.U.P. No. 91-2, 16 NJPER 421 (¶21177 1990).

Finally, because of Peterson's failure to go to Hager's office until she found a shop steward to accompany her, at no time was she without union representation during the meeting. It is undisputed that the topic discussed was Peterson's September 10 leave request. No investigatory interview took place during the meeting and the leave was granted.

The Council alleges that Peterson's subsequent eight-day suspension was in retaliation for the exercise of her right to have a shop steward at the September 11 meeting, and thus violated 5.4a(1) and (3) of the Act. Having determined herein that no Weingarten right ever attached, I find that Peterson was not engaged in protected activity under the Act (i.e., exercise of Weingarten rights) and, therefore, the eight-day suspension was not in retaliation for exercise of protected activity, and no complaint can issue on the alleged violations of 5.4a(3) and, derivatively (1). No facts have been presented which would support a violation of 5.4a(5).3/

Based upon all of the above, I find that the Commission's complaint issuance standard has not been met.

3/ Peterson is not precluded from appealing whether the employer had just cause to impose the discipline under her collective agreement or other applicable disciplinary appeal procedure.

4/ N.J.A.C. 19:14-2.3.

ORDER

The unfair practice charge is dismissed.[4/]

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Stuart Reichman, Director

DATED: June 24, 1999
Trenton, New Jersey