

D.U.P. No. 2009-5

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

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

JOSE DENOYS,

Docket No. CI-2009-006

Charging Party,

-and-

FRATERNAL ORDER OF POLICE,  
LODGE 12,

Intervenor.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Jose Denoys. Denoys alleges that he was denied Weingarten representation when the City required that his Weingarten representative be from his majority representative. The Director refused to issue a complaint because Weingarten representatives are protecting the interests of the entire bargaining unit and only the majority representative is statutorily empowered for this responsibility.

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Appearances:

For the Respondent,  
Julien X. Neals, Corporation Counsel  
(Madge Buckle, of counsel)

For the Charging Party,  
Zazzali, Fagella, Nowak, Kleinbaum & Friedman,  
attorneys  
(Paul L. Kleinbaum, of counsel)

For the Intervenor,  
Markowitz & Richman, attorneys  
(Stephen Richman, of counsel)

REFUSAL TO ISSUE COMPLAINT

On August 18, 2008, Jose Denoys filed an unfair practice charge against his employer, the City of Newark (City). Denoys alleges that on or about May 22, 2008, the City violated section

5.4a(1)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq., (Act) by denying him a Weingarten representative affiliated with Policeman's Benevolent Association, Local 3 (PBA), a minority organization, and instead permitted him to be represented by his majority representative, Fraternal Order of Police, Lodge 12 (FOP).

The City denies violating the Act. It contends that only the majority representative can assist an employee during an interview that triggers Weingarten rights; that it offered Denoys an FOP representative, which he refused; and that it met its Weingarten obligation.

The FOP seeks dismissal of the charge. It asserts that as the exclusive majority representative of Newark police officers, including Denoys, it alone has the duty and authority to represent the interests of the entire negotiations unit. Those interests are manifestly apparent in a Weingarten setting.

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

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<sup>1/</sup> This provision prohibits 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."

standard has not been met, I may decline to issue a complaint.

N.J.A.C. 19:14-2.3. On January 14, 2009, I wrote a letter to the parties, advising that I was not inclined to issue a complaint in this matter and setting forth the reasons for that conclusion. The parties were provided an opportunity to respond. Denoys submitted a response, contending that the City has permitted PBA members to serve as Weingarten representatives in the past without objection. I find the following facts.

On or about May 22, 2008, the internal affairs division of the City's police department summoned police officer and unit employee Denoys for an investigatory interview concerning a civilian complaint about another officer. Denoys was advised that the interview may result in discipline and that he could be accompanied by a representative. Denoys, who is in a unit represented by the FOP but is a member of the PBA, requested PBA delegate Antonio Barbosa to serve as his Weingarten representative during the interview. The parties do not agree whether Barbosa attended the interview or whether PBA members were permitted to serve as Weingarten representatives in the past. The parties agree that the City denied Denoys a PBA delegate as his representative and permitted him to be represented by an FOP delegate, instead. Denoys elected to continue the interview without representation.

Analysis

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. This principle was established in the private sector by NLRB v. Weingarten, 420 U.S. 251 (1975), and is known as a Weingarten right. Weingarten was adopted 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). If an employee requests and is entitled to a Weingarten representative, the employer must allow representation, discontinue the interview, or offer the employee the choice of continuing the interview unrepresented or having no interview. State of New Jersey (Dept. of Public Safety), P.E.R.C. No. 2002-8, 27 NJPER 332, 335 (¶32119 2001); Dover Municipal Utilities Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984).

Denoy's was apparently permitted a representative from the majority organization, which he refused, and elected to continue the interview unrepresented. This circumstance does not violate any Weingarten principle. Denoy's contends that Weingarten does not permit the City to force him to use a representative from the majority organization because Weingarten extends a right to the individual employee, not the union.

The Court in Weingarten wrote: "[t]he union representative . . . is safeguarding not only the particular employee's interests, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not impose punishments unjustly." NLRB v. Weingarten, 420 U.S. at 260. N.J.S.A. 34:13A-5.3 provides in pertinent part:

Representatives designated or selected by public employees for the purposes of collective negotiation . . . shall be the exclusive representative for collective negotiation concerning the terms and conditions of employment of the employees in such unit.

The Commission has consistently stressed that this exclusivity principle is a "cornerstone of the Act's structure for regulating the relationship between public employers and public employees." Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984); Matawan-Aberdeen Reg. Teach. Ass'n and Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed., P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989); Mt. Olive Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER 34, 36 (¶15020 1983); New Jersey Dept. of Law & Public Safety, I.R. No. 83-2, 8 NJPER 425, 427 (¶13197 1982); see generally, Lullo v. International Association of Firefighters, 55 N.J. 409 (1970). Although the right to Weingarten representation runs to the individual employee, it is the majority representative - - through its authorized designee or representative - - that protects the rights of the entire

bargaining unit. The majority representative is the only organization statutorily empowered for this responsibility. Therefore, any factual discrepancy regarding PBA members serving as Weingarten representatives in the past or during the interview at issue is immaterial.

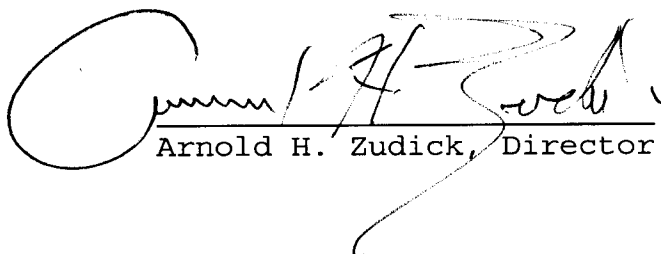
The City did not violate the Act by denying Denoys a PBA delegate as a Weingarten representative and permitting him to call upon an FOP delegate. Denoys elected to continue the interview without representation, which does not violate his Weingarten rights.

Newark's actions under these facts are not an unfair practice. Accordingly, I dismiss the charge.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR  
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: February 11, 2009  
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by February 23, 2009.