I.R. NO. 99-17

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF UNION,

Respondent,

-and- Docket No. CO-99-297

UNION COUNTY PBA LOCAL 199,

Charging Party.

SYNOPSIS

Union County PBA Local 199 sought to restrain Union County from denying unit members their choice of representative during interviews conducted as part of an internal affairs investigation. The Commission Designee, relying on National Labor Relations Board cases, noted that under certain circumstances, which may exist here, an employer need not postpone an investigatory interview because a specific representative is unavailable. Consequently, the Commission Designee found that PBA Local 199 did not demonstrate that it has a substantial likelihood of prevailing in a final Commission decision and denied interim relief.

I.R. NO. 99-17

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF UNION,

Respondent,

-and- Docket No. CO-99-297

UNION COUNTY PBA LOCAL 199,

Charging Party.

Appearances:

For the Respondent,
DeMaria, Ellis & Bauch, attorneys
(Kathryn V. Hatfield, of counsel)

For the Charging Party,
Klausner, Hunter & Rosenberg, attorneys
(Stephen B. Hunter, of counsel)

INTERLOCUTORY DECISION

On March 15, 1999, Union County PBA Local 199 (PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the County of Union (County) committed an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The PBA alleges that the County violated N.J.S.A. 34:13A-5.4a(1) and (5).[1/] The unfair practice charge was accompanied by an

---

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

Footnote Continued on Next Page

application for interim relief. On March 16, 1999, an order to show cause was executed and a return date was set for April 8, 1999. The parties submitted briefs, affidavits and exhibits in accordance with Commission rules and argued orally on the return date.

Charging party's unfair practice charge contains two counts. Count 1 alleges that the County violated the Act by unilaterally altering an established practice which provides for the local PBA president to be granted full release time to conduct Association business.2/ Count 2 of the charge asserts that the County violated the Act when it denied unit members their choice of representatives during interviews conducted as part of an internal affairs investigation. The PBA contends that prior to February 24, 1999, consistent with the established practice, County officials permitted unit members to select a PBA representative of their choice, whenever they were required to be interviewed as part of any internal affairs investigation. The PBA asserts that on or about February 24, 1999, approximately 30 unit members were interviewed by

---

1/ Footnote Continued From Previous Page

restraining or coercing 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."

2/ On the return date, the parties executed a settlement agreement concerning Count 1 of the charge prior to opening the record for oral argument.

internal affairs representatives regarding a purported incident involving the PBA president. Apparently a dispute arose concerning the County's claim that the current PBA president criticized management of the Union County Division of Correctional Services regarding personnel and labor relations policies that had recently been instituted. It appears that the president asserted that such policies were in violation of contractual provisions and past practices. The PBA claims that approximately 13 of the correction officers summoned to the February 24, 1999 meetings requested that State PBA Delegate Peter Femia be present during the course of any interviews. The PBA asserts that the correction officers who requested Femia were advised by County representatives that only correction officer Joseph Cascarelli could serve in this representational capacity and their requests for Femia were denied. The PBA contends that the employees summoned to the investigatory interview proceeded under the reasonable belief that discipline could result. The PBA argues that each unit member has the right to designated any PBA representative s/he chooses.

The County does not dispute that on or about February 24, 1999, an internal affairs investigation concerning the PBA president was initiated and numerous correction officers were interviewed. Further, the County does not dispute that a number of the interviewed officers requested that Femia be present during the sessions with the internal affairs officers.

The County asserts that there are two jail facilities: the old jail and the new jail. Apparently, the jail facilities are across the street from each other. The County contends that Femia was on duty at the new jail facility while the internal affairs investigation took place at the old jail facility. The County claims that the parties have agreed to designate one PBA representative on each shift in each jail facility to handle Association business which may arise during working hours, which includes internal investigation interviews. The County argues that the parties' most recent collective agreement, Article 26, Section 4, specifically addresses the issue of PBA representative identification. The parties do not appear to dispute that Article 26, Section 4, states:

> PBA shift representation
>
> The Union may designate one Correction Officer per shift as the Shift Representative and that officer will be afforded reasonable amounts of release time to attend to PBA business/committee reports and other related Union Business as needed, without loss of regular straight time pay.

The County contends that in accordance with this provision in the collective agreement, the PBA has provided the County with a list of its designated shift representatives who are authorized to handle union business during specific shifts. The County argues that by removing Femia from his post at the new jail to attend interviews conducted at the old jail, custodial operations would be disrupted. The County argues that since the limited number of

relief personnel working at the new jail facility were already assigned in various capacities, Femia was not available to be released at the time the internal affairs interviews were being conducted at the old jail facility. The County further claims it acted in compliance with the collective agreement by allowing the Association representative at the old jail facility previously designated by the PBA for the shift in question to attend the interviews and represent unit members.

The PBA contends that Article 26, Section 4, does not relate to restrictions on the employees' right to select the representative of their choice.3/ The PBA also argues that Femia could have been relieved to attend the interviews and was available for that purpose.

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126,

---

3/ The PBA contends that if Article 26, Section 4 were read to preclude an employee from exercising his/her right to select a particular representative, that provision must be found to be unenforceable as a matter of law. However, the PBA cites no authority in support of that proposition and I make no finding with respect to the PBA's argument in this interim relief proceeding.

132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

The parties dispute the meaning and application of Article 26, Section 4, set forth in the collective agreement. If the County is correct in its interpretation of that provision, it may be able to require employees to be represented by the representatives previously designated by the PBA pursuant to the terms of that provision. If the County is correct in its assessment that its actions are in accord with the collective agreement it will not have committed an unfair practice even if such actions are at variance with prior practice. Passaic Cty Reg. Bd. of Ed., P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990); Randolph Tp. Bd. of Ed., P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980). The resolution of this factual dispute is appropriately obtained in a plenary hearing and not through the processing of an application for interim relief.

The PBA argues that in a Weingarten context, employees are entitled to be represented by the PBA representative of their choice as a matter of law. In E. Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶0206 1979), aff'd in pt., rev'd in pt., NJPER Supp.2d 78 (¶61 App. Div. 1980), the Commission adopted the holding in NLRB v. Weingarten, 429 U.S. 251 (1975). Case research has failed to disclose, nor have the parties cited to me, any Commission cases which hold that the individual employee holds the right as a matter

of law to select a specific union representative. In a non-Weingarten context, the Director of Unfair Practices found that although an employee requested a union representative, the union does not breach its duty of fair representation when it refused to represent him. See CWA (McDevitt), D.U.P. No. 94-24, 20 NJPER 114 (¶25058 1994).

The Commission and the New Jersey Supreme Court have held that the experiences and adjudications under the federal LMRA are appropriate guides in determining unfair practice cases because the language, content and purposes of the Act and the LMRA are substantially the same. In re Bridgewater Tp., 95 N.J. 235, 240-241 (1984); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n. of Educ. Sec., 78 N.J. 1, 9 (1978); Lullo v. IAFF, 55 N.J. 409,429 (1970). The National Labor Relations Board (Board) has held that an employer violates the LMRA by denying an employee's request for representation by a particular union representative at an investigatory interview which could have resulted in the discipline of the employee. The Board held that the individual union representative requested by the employee was available and had experience in handling investigatory interviews. The employer acted unlawfully by limiting the employee to the selection of three other union representatives preferred by the employer. Consolidation Coal Co., 307 NLRB 976, 140 LRRM 1248 (1992). However, the Board has also held that Weingarten does not require an employer to postpone an investigatory interview because the specific union representative

requested by the employee is unavailable. See Williams Pipeline Co, 315 NLRB 1, 147 LRRM 1168 (1994); Pacific Gas and Electric Co., 253 NLRB 1143, 106 LRRM 1077 (1981); Coca-Cola Bottling Co. of Los Angeles, 227 NLRB 1276, 94 LRRM 1200 (1977). In Pacific Gas & Electric, the NLRB stated:

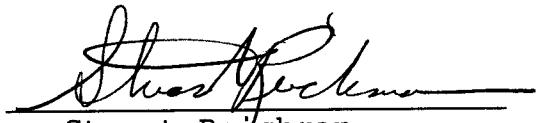
> The Supreme Court in Weingarten neither stated nor suggested that an employee's interests can only be safe guarded by the presence of a specific representative sought by the employee. To the contrary, the focus of the decision is on the employee's right to the presence of a union representative designated by the union to represent all employees. [Pacific Gas & Electric Co., 106 LRRM at 1078. Emphasis in original.]

In this case, a dispute exists regarding whether Femia was "available" to participate in the investigatory interview which was conducted in the old jail. Additionally, there also exists a dispute concerning the meaning and application of Article 26, Section 4 of the collective agreement. In effect, the County argues that by mutual agreement Cascarelli serves as the Association representative designated by the PBA to represent old jail employees during the shift at issue here. I make no finding in this proceeding with respect to the County's arguments. Clearly, the issues disputed here are appropriately resolved in a plenary unfair practice hearing or through the parties grievance procedure, as appropriate. However, I conclude that in light of the factual disputes which are determinative of the outcome of the unfair practice charge, the PBA has not demonstrated that it has a substantial likelihood of prevailing in a final Commission decision

on its legal and factual allegations. Consequently, without satisfying that element of the test required to obtain interim relief, I am constrained to deny the PBA's application.

ORDER

PBA Local 199's application for interim relief is denied. This case will proceed through the normal unfair practice processing mechanism.



Stuart Reichman
Commission Designee

DATED: April 14, 1999
Trenton, New Jersey