P.E.R.C. NO. 2001-51

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of	:	
	:	
STATE OF NEW JERSEY	:	
(DEPARTMENT OF TREASURY),	:	
Respondent,	:	
-and-	:	PERC Docket No. CO-H-95-71
	:	OAL Docket No. PRC 10935-99S
COMMUNICATIONS WORKERS OF	:	(REMAND PRC 8187-95)
OF AMERICA, AFL-CIO,	:	
Charging Party.	:	
	:	
GEORGE GLOVER,	:	
Appellant,	:	
v.	:	OAL Docket No. CSV 10708-94
STATE OF NEW JERSEY	:	
(DEPARTMENT OF TREASURY),	:	
	:	
Respondent.	:	

SYNOPSIS

The Public Employment Relations Commission, under a predominant interest order, concludes that, with the exception of his initial participation in a July 19 interview, George C. Glover was not engaged in protected activity on July 18 and 19, 1994. An initial decision and a supplemental initial decision were issued by an Administrative Law Judge on a consolidated appeal before the Merit System Board filed by Glover and an unfair practice charge filed with the Commission by the Communications Workers of America, AFL-CIO. The charge alleged that Glover's suspension and termination violated the New Jersey Employer-Employee Relations Act. CWA asserts that Glover was suspended and terminated in retaliation for his efforts as a shop steward. In the unfair practice charge portion, the ALJ found that CWA had not shown that Glover's activity was protected and dismissed the charge. The Commission concludes that Glover's activity on July 18, 1994 was unprotected. The Commission further concludes that Glover's initial involvement in a July 19 discussion was protected, but that his representation became unprotected when he obstructed management's right to conduct an investigatory interview. While Glover's initial involvement was a partial motivating factor for his termination, the Commission states that this one factor appears to be an unsubstantial consideration when compared to the gravity of Glover's misconduct on July 18 and several other cited incidents. The Commission leaves it to the Merit System Board to determine whether Glover would have been terminated in any event based on legitimate business reasons and his unprotected activity. The Commission concludes that that determination involves an assessment of all the numerous specifications against Glover and is beyond the Commission's authority under the predominant interest order. The Commission enters no order and transfers the case to the Merit System Board.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

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

For the Charging Party, Weissman & Mintz, attorneys (Steven P. Weissman, of counsel)

DECISION

On July 21, 1994, George C. Glover, a senior stock clerk employed by the State of New Jersey (Department of Treasury), was suspended for alleged unbecoming conduct, neglect of duty, failure to follow procedures, insubordination, and inhibiting the ability

of a supervisor and manager to carry out their duties. On July 26, Glover received a Preliminary Notice of Disciplinary Action specifying eight incidents of alleged misconduct dating back to March 23, 1994. The notice was later amended to allege an April 15, 1994 incident as well and to change the date of an alleged incident from July 20 to July 21, 1994. Based on these charges, Glover was terminated effective July 22, 1994.

Glover appealed his termination to the Merit System Board (MSB). The matter was transmitted to the Office of Administrative Law (OAL) as a contested case.

On September 13, 1994, the Communications Workers of America, AFL-CIO filed an unfair practice charge alleging that Glover's suspension and termination violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4(a)(1), (3) and (5).[1/] CWA asserts that Glover was suspended and terminated in retaliation for his efforts as a shop steward to represent Don Williams in work-related disputes with his supervisors on July 18, 19 and 20, 1994.

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 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."

On January 3, 1995, a Complaint and Notice of Hearing was issued. The Answer asserts that Glover was not acting as a shop steward on July 18, 19 or 20; and even if he was, his actions exceeded a steward's proper role. The Answer also asserts that the suspension and termination were motivated and warranted by an accumulation of events evidencing Glover's disruptiveness.

The MSB and the Commission issued a joint decision and order consolidating the matters for a hearing and an initial decision by an Administrative Law Judge (ALJ). P.E.R.C. No. 96-13, 21 NJPER 292 (¶26185 1995). The order specified that the Commission would review the record and the initial decision first to determine whether Glover had engaged in protected activity under its Act and whether such activity was a substantial or motivating factor in his suspension and termination; the MSB would then review the record to determine whether the suspension and termination were for legitimate business reasons and were otherwise warranted under merit system law. The order further provided that, if appropriate, the matter would be returned to the Commission to consider specialized relief under its Act.

ALJ Joseph Lavery conducted 21 days of hearing starting on December 5, 1995 and ending on August 4, 1997. Fifteen employer witnesses and two CWA witnesses testified and over 80 exhibits were introduced. Post-hearing briefs were submitted and the record was closed on March 2, 1998. The initial decision ("ID") was issued on October 8, 1998.

In the MSB portion of the decision, the ALJ found that the employer proved each specification by a preponderance of the evidence. He affirmed the termination. In the unfair practice portion, the ALJ found that CWA had not shown that Glover's activity was protected under NLRB v. Weingarten Inc., 420 U.S. 251, 88 LRRM 2689 (1975), or that the suspension and termination were motivated by hostility towards protected activity under In re Bridgewater Tp., 95 N.J. 235 (1984). The ALJ dismissed the charge.

The ALJ limited his consideration of the unfair practice charge to the events of July 18, 19 and 20, 1994 (ID32-ID33), dates specified in CWA's charge as involving Glover's conduct as a shop steward.[2/] He found that Glover was not engaged in protected activity on July 18 or 19. In particular, he found no evidence that: (1) a disciplinary investigation had begun before the July 18 or 19 incidents; (2) Williams had requested Glover to represent him; or (3) the questioning by Williams' supervisors constituted pre-disciplinary investigations (ID41-ID42). He further found that even if initially protected, Glover's conduct on July 18 and 19 lost its protection when it exceeded the bounds of allowable advocacy (ID43-ID45).

On January 4, 1999, CWA filed exceptions. It raised several points, including allegedly contradictory testimony between the employer's witnesses as to Glover's conduct on July 18

2/ The ALJ did not consider the events of July 13, 1994 since the charge did not address that date (ID36).

and 19, and allegedly contradictory testimony between these witnesses and Williams. Additionally, CWA asserted that the ALJ did not consider tape-recordings and transcripts of the discussion between Glover, Williams, and supervisor James Lamont on July 19.

On March 26, 1999, the employer urged us and the MSB to adopt the initial decision. Asserting that the alleged factual discrepancies were immaterial and the tape-recordings were unreliable, it stressed that Glover's conduct on each date was either unprotected when it began or lost its protection as tensions escalated.

On May 18, 1999, the employer filed a copy of the findings of an investigation by the Division of Civil Rights (DCR) on Glover's complaint that his termination was racially discriminatory. The Director of DCR found no probable cause to credit Glover's allegations.

On July 21, 1999, CWA reiterated the points in its exceptions.3/

On December 17, 1999, we remanded the case to the ALJ for a supplemental report. P.E.R.C. No. 2000-52, 26 NJPER 70 (¶31025 1999). We asked the ALJ to analyze in detail three matters: (1) the contents and credibility of Williams' testimony, especially insofar as this testimony concerns any requests for Glover's

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3/ Our consideration of this case was delayed until we received all the transcripts from the OAL. There was also a delay in transmitting the initial decision to us.

assistance; (2) the contents and significance of the memorandum (P-1) prepared by supervisor Patricia DeMarie on July 18, especially insofar as this memorandum conflicts with or corroborates the testimony of other witnesses; and (3) the contents and reliability of the tape-recordings (P-14 and P-18) and transcripts (P-19 and R-51) of the July 19 discussion, especially insofar as these tape-recordings and transcripts conflict with or corroborate the testimony of Lamont and Williams concerning Glover's demeanor and actions.

On December 6, 2000, the ALJ issued his decision on remand ("RD").[4/] He analyzed the three areas and readopted his initial findings and recommendation that the charge be dismissed.

Findings of Fact

CWA's exceptions challenge the ALJ's findings concerning the July 18 and 19 incidents and assert that Glover would not have been discharged but for these incidents. Our procedure for considering the ALJ's findings on each incident will be to reproduce his findings and then to consider whether these findings

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4/ We had directed that this decision be issued within 45 days, but we contemplated that extensions could be secured. However, OAL rules specify that a remanded case is treated as a new case so OAL set a submission date of June 15, 2000. More time was then required for briefs and consideration of an evidentiary question. The parties and the ALJ resolved that question in an agreement memorialized in letters from the parties' attorneys to our General Counsel. The last of these letters was received on October 31, 2000.

should be adopted, modified, or rejected in light of our review of the record and the parties' exceptions and responses. We must keep in mind that the ALJ found management's witnesses to be "universally credible in their demeanors, and in their versions of what occurred" (ID32). He also found that "the contents of Williams' testimony remains unpersuasive" (RD16). Finally, he drew an inference against Glover for failing to testify. Given those credibility determinations and the adverse inference, we must accept the testimony of management officials over any conflicting testimony of Williams and we cannot credit Williams' testimony on its own merits. But we must still try to resolve any conflicts in the accounts of management officials and any inconsistencies raised by the exhibits. In doing so, we understand that when several witnesses testify, variances in accounts are not unusual and do not necessarily impugn the honesty of a witness.

Background

Don Williams is a senior clerk in the copy request unit of the Division of Taxation. He works in the Document Control Center (DCC); his work station and other clerks' stations are located in an open environment. DCC employees and tax auditors can see and hear events within this open environment.

Williams' immediate supervisor is Dorothy Sackett, a senior clerk. Other management officials are: Patricia DeMarie,

head clerk and supervisor of the corporate business section; Mary Jackson, supervisor of the scanning room in the Image Processing Center; James Lamont, supervisor of Records Management at DCC; and Jenifer Osborn, acting chief of Management Services. Osborn works in another building.

George Glover was a senior stock clerk. He was also a CWA shop steward.

The July 18 Incident

In July 1994, Williams was assigned to work for Sackett as a clerk in the copy request unit. His duties included processing taxpayer requests for copies of their returns. Williams would prepare a green out-card and give that card to employees in the appropriate section -- e.g. corporate, personal, property, or auto -- for them to pull the return.

Sackett was on vacation during the week of July 11. A dispute arose over whether Williams had to pull a return when employees in the corporate tax section were busy. Sackett had not yet prepared his PAR so Williams maintained that he was not required to pull the return. The dispute was unresolved as of July 18.

On the morning of July 18, Williams brought an out-card to DeMarie and requested that her section pull the return. Saying that her section was swamped, DeMarie directed him to pull the return. Williams refused. DeMarie told Jackson; Jackson was in

charge of Records Management because Lamont was absent. Jackson called Osborn who came to DCC to discuss this refusal with Williams.

At about 3:20 p.m., Osborn, DeMarie, and Jackson went to Williams' work station. Sackett went back to her desk; she did not participate in the meeting but did overhear the discussion.

In the ID, the ALJ made 20 findings about what happened next (ID8-ID10). We reproduce them:

> 1. When Jenifer Osborn appeared at Mr. Williams' desk, she attempted to discuss with him the reason for his decision not to pull the return.
>
> 2. Uninvited by Mr. Williams, appellant appeared from nearby and advised Mr. Williams not to answer Ms. Osborn, asserting that she was not his boss and that anything Mr. Williams said would be used against him.
>
> 3. Appellant's tone of participation escalated in hostility, and his efforts to prevent Mr. Williams from responding increased with loud voice, and hostile demeanor.
>
> 4. Ms. Osborn, while talking to Mr. Williams and attempting to maintain his attention and concentration, moved her hand at waist level or below without turning to appellant who was behind her. The gesture indicated that she was attempting to speak to Mr. Williams, and did not wish to have appellant continue his interruption.
>
> 5. In response, appellant loudly commanded "Get your finger out of my face!" to Ms. Osborn. Appellant did this repeatedly in a declamatory, exaggerated fashion designed to be heard and attended to by all those in the surrounding open environment.
>
> 6. Appellant then brought himself directly in front of Ms. Osborn, six to eight inches from

her face, yelling the same command. The tone of appellant was threatening, angry, and meant to be intimidating.

7. Ms. Osborn, now frightened, and aware of appellant's past threatening behavior, backed up.

8. Ms. Osborn told appellant that she was not putting her hand near his face, and that he should stop interrupting.

9. Ms. Osborn again turned to Mr. Williams and told him that he must either answer her questions, or pull the return.

10. Mr. Williams, confused by the tumult, walked away, with the small group following him.

11. Ms. Osborn told Mr. Williams that he must comply with her request to answer or act, rather than walk away, or be considered insubordinate.

12. Appellant, still inserting himself in the attempted conversation, then changed his direction to Mr. Williams, saying "if you pull the return, the witch will get on her broom and she'll fly away."

13. Appellant then said "We'll deal with her ... I'll take care of her later and it won't be through Treasury." Appellant shouted this direction, and leaning into Ms. Osborn's face, said, "She knows what I mean by that."

14. Then appellant placed himself between Ms. Osborn and Mr. Williams repeating the foregoing threat directly in her face in a fashion that was intended to be personal, as his body language demonstrated.

15. Ms. Osborn stepped back, again frightened, and aware of appellant's threat said, "George, this has nothing to do with you."

16. Appellant then moved close into Ms. Osborn and with threatening tone and aggressive and intimidating demeanor said, "Oh yes it does! It has everything to do with [you] and it's always been between me and you!"

> 17. Ms. Osborn then followed Mr. Williams to get away from appellant, and tried to get Mr. Williams to respond, but without success.
>
> 18. Because Mr. Williams was largely unresponsive and upset, Ms. Osborn sent him home.
>
> 19. Throughout this confrontation, appellant maintained an angry and loud demeanor, shouting in threatening and demanding fashion, taking control of the encounter, and disrupting any effort by Ms. Osborn to interact with Mr. Williams.
>
> 20. During this time, the entire work force had stopped their activities, including the auditors located on a raised level who did not work for DCC, and were watching the dispute as it unfolded in front of them. [Record citations and footnotes deleted]

In his remand decision, the ALJ readopted these findings and recommended an additional finding: Neither Williams nor Glover asked that the escalating event be moved to a nearby conference room, known as "the fish bowl" (RD16).

CWA asks us to add to ID finding 1 that DeMarie and Jackson had pencils and pens in their hands when they approached Williams. We decline to do so because the ALJ did not credit Williams' testimony. Osborn had the out-card in her hand.

We next consider ID finding 2. There are three questions concerning this finding. Did Williams invite Glover to participate? Was Glover at Williams' desk when Osborn arrived? And when did Williams interject himself into the discussion?

Did Williams invite Glover to participate? Given the ALJ's credibility determinations, we find that Williams did not

tell management officials that he wanted Glover's representation. Nor did Glover tell them that Williams had asked for his representation. We add, however, that after Williams refused to pull the return on the morning of July 18, he went to talk with Glover, returned to his desk, and told Sackett he was not going to pull the return because that duty was not in his job specifications. We base this addition on DeMarie's contemporaneous written account (P-2) and her consistent testimony (4T130), both uncontradicted (3T24-3T25). We decline to make any other additions based on Williams' discredited testimony.

Was Glover at Williams' desk when Osborn arrived? The ALJ's findings conflict. ID finding 2 states that after the conversation began, Glover appeared from nearby while page 11 of the RD credits DeMarie's account (P-1) and testimony (4T44) that Glover was already at Williams' station when Osborn arrived. Osborn disagreed with DeMarie (3T27-3T28), as did Williams himself and other management witnesses (6T73). Everyone, however, seems to agree that Glover was near the desk if not at it. We need not resolve this conflict because it is not critical.

When did Glover intervene? According to Osborn, Glover almost immediately shouted to Williams not to talk to her (2T14-2T16; 3T29). According to DeMarie's contemporaneous account (P-1), Glover did not intervene until after Osborn had asked Williams why he wouldn't pull the return and what his job title was. After Williams answered these questions, Glover instructed

Williams to "watch what he said because it could be used against him." According to DeMarie's direct testimony, however, Williams answered the question about his job title, but could not answer the question about the refusal to pull the return because Glover "butted in" at that point, "hogged" the conversation, and did not let Williams speak (4T45-4T46). On cross-examination, however, DeMarie testified that Glover did not get involved until after Osborn asked why he would not pull the return and Williams responded it wasn't in his job specifications (4T92). Jackson testified that after Osborn began talking with Williams, Glover came "storming over and took over the situation, and told Williams not to talk to Osborn because she wasn't his boss." (9T93). Michael Ennis, a records clerk, testified that Glover became involved after Williams kept saying he would not pull the return (6T74, 6T107-6T108). Given the conflicting testimony, we cannot pinpoint the moment when Glover intervened. We simply find that he did so soon after the conversation began.

CWA would reformulate ID finding 4 to state that Osborn stuck her hand out towards Glover in an attempt to silence him. It would also add that Osborn told Glover to "be quiet" and that the discussion "had nothing to do with him." We accept the ALJ's finding about Osborn's hand gesture indicating that she wanted Glover to stop interrupting her. We add this description from DeMarie's written account (P-1):

> Jenifer turned to George and calmly told him to 'please, be quiet, that she was not talking to

> him and the discussion had nothing to do with him.' As Jenifer was talking to Don, her hand was behind her trying to quiet George, who was very persistent in dominating the entire conversation.

DeMarie's testimony confirmed this description (4T94).

CWA contests ID findings 6, 14 and 16 to the extent that they state Glover brought himself within 6-8 inches from Osborn's face. CWA relies on DeMarie's testimony describing the distance between Osborn and Glover as about the same distance as between herself and the ALJ while she was testifying -- later stipulated to be about four feet (4T98-4T100). We decline to displace the ALJ's findings; they are based on specific and credited testimony by Osborn (2T19, 2T26) and Jackson (9T95). We also note that on direct examination, DeMarie testified that Glover was closer than the judge was to her, "within, probably, one foot" (4T50).

We add to ID finding 12 that Glover called Osborn a racist. DeMarie so recorded (P-1) and testified (4T97-4T98). Osborn did not hear Glover use this epithet, but she assumed he did given DeMarie's proximity to him (3T47-3T48). CWA asks us to add that Glover repeatedly told Williams to pull the return. We will do so, based on DeMarie's written account (P-1) and uncontradicted testimony, but this did not happen until near the end of the confrontation (4T96, 4T131-4T132). Earlier, Glover repeatedly told Williams not to answer any questions.

ID finding 20 states that this dispute was overheard by the entire work force, including the auditors, and that work

stopped. CWA asks us to find that Glover had suggested moving the discussion to a conference room, but the ALJ discredited Williams' testimony on that point. Neither management officials nor Glover tried to move the confrontation to a private location.

July 19 Incident

Returning to work on July 19, Lamont learned of the encounter the day before. Sackett asked Lamont to consider disciplining Williams and told him "something had to be done" (4T155). Lamont then went to Williams' station to find out why he would not obey the directive. He did not intend to discipline Williams at that point (8T97). After the conversation began, Williams began taping it.

In the ID, the ALJ made seven findings about what happened next. We reproduce them:

> 1. On July 18, when Mr. Lamont was questioning Mr. Williams about the previous day's incident, appellant, without invitation, appeared and intervened.
>
> 2. Appellant would not allow the conversation between Mr. Lamont as supervisor of Mr. Williams [and Mr. Williams] to proceed.
>
> 3. Mr. Lamont directed appellant to return to his station. Appellant refused, indicating he was "chief shop steward" and should be involved in everything.
>
> 4. Appellant then engaged in a conversation with Mr. Williams, telling him that he did not have to listen to Mr. Lamont, and excluded Mr. Lamont from the conversation despite his presence as supervisor.

> 5. Mr. Lamont then left saying, "When you are done with the theatrics, I'll return."
>
> 6. When Mr. Lamont returned after appellant left Mr. Williams' station, appellant returned again, directing Mr. Williams not to respond to his supervisor, Mr. Lamont. Mr. Lamont then, deciding that further efforts would be useless, left finally.
>
> 7. Appellant overpowered Mr. Lamont verbally in both incidents, taking over the conversation in raised voice, and escalating the event to the point where other employees stopped their work to observe what was occurring from their places within the open environment of DCC. [Record citations and footnotes omitted]

In the remand decision, the ALJ found that before the onset of the confrontation with Lamont, Glover came over on his own and asked Williams if he wanted union representation; Williams responded "Yep." (RD16). The ALJ also found that Lamont ordered Glover to return to his work station.

Williams' tape recording (P-18) of the July 19 encounter was admitted into evidence. Both parties prepared transcripts; the employer's transcript (R-51) is more accurate (19T6). This transcript, however, does not capture everything that was said -- the recorder was switched on and off and sometimes voices are inaudible. We will reproduce R-51 and then review the testimony concerning statements not in the transcript and other details.

The Transcript (R-51)

Page 1

1 D. SACKETT: Look go to talk to Jim. Don't talk to me about it.

(Audible clicking sound)

D. WILLIAMS: I want my PAR. I want my PAR done now.

J. LAMONT: O'kay, well we're going to work on it.

(Audible clicking sound)

D. WILLIAMS: She told me, she told me, she told me.

J. LAMONT: You understand? If you're recording me, you're doing something illegal.

D. WILLIAMS: I am not doing nothing illegal.

J. LAMONT: That is illegal.

D. WILLIAMS: It is not illegal.

J. LAMONT: Understand that.

D. WILLIAMS: It is not illegal.

J. LAMONT: Yes, it is, because it is unbeknownst to me.

D. WILLIAMS: George, is this illegal?

G. GLOVER: Is what illegal?

J. LAMONT: You're recording me? You're, you're like recording me?

D. WILLIAMS: No, this is Don Williams recording, not his recording.

J. LAMONT: That's great. Okay, I'm telling you.

D. WILLIAMS: No, I'm telling you.

J. LAMONT: to shut it off.

Page 2

D. WILLIAMS: No, I'm telling you. No, I'm not shutting it off, because I just want to find out what is going on.

J. LAMONT: Alright, this is insubordination if you're not

4 going to pull this, do you understand?

5 D. WILLIAMS: I went through this yesterday.

6 J. LAMONT: Do you understand?

7 D. WILLIAMS: I asked her a question.

8 J. LAMONT: I am advising you.

9 D. WILLIAMS: I asked her a question. Now she say she doesn't

10 have a PAR for me. I asked her could I have my

11 PAR. Now, you discussed right back there in the scanning room.

12 J. LAMONT: Will you sit down.

13 G. GLOVER: Do you have a PAR, Don?

14 D. WILLIAMS: I don't have a PAR. He discussed it in the scanning room.

15 G. GLOVER: Why doesn't Don have a PAR?

16 D. WILLIAMS: That Dottie Sackett is my immediate supervisor and

17 I report to her for anything.

18 G. GLOVER: The PAR is supposed to be done between you and

19 your immediate supervisor.

20 D. WILLIAMS: Right, then that's what I

21 G. GLOVER: (Inaudible)

22 D. WILLIAMS: explained to her. Now she saying

Page 3

1 G. GLOVER: (Inaudible)

2 J. LAMONT: I was talking to him.

3 G. GLOVER: I was talking to him, too.

4 J. LAMONT: I was talking to him.

G. GLOVER: (Inaudible)

J. LAMONT: He and I were having a conversation.

D. WILLIAMS: That she can't do my PAR because she has to wait until Mary Jackson and it wasn't told to me.

G. GLOVER: Mary Jackson's not supposed to do your PAR.

D. WILLIAMS: I explained that to her because this is what

G. GLOVER: It's supposed to be between you and your immediate supervisor and mutually agreed upon.

D. WILLIAMS: It was her (inaudible) between me

J. LAMONT: When you guys are done then I'll have a conversation with him. Okay? So go ahead, do, I know you got to do the little thing there. So go ahead.

(Audible clicking sound)

G. GLOVER: I'm not doing anything with you Jim.

D. WILLIAMS: Because you agreed um

G. GLOVER: (Inaudible) backed me into it Okay

(Audible clicking sound)

G. GLOVER: All you want to do now is just have your PAR done.

Page 4

D. WILLIAMS: That's all I want.

G. GLOVER: If you need assistance, just call me, I am right here.

(Audible clicking sound)

D. WILLIAMS: I want to know, I want to know why I am not sitting down with somebody doing my PAR? Why I am not

sitting down with my immediate supervisor.

J. LAMONT: You need to pull this return right now OKAY.

D. WILLIAMS: I don't have, I don't, I want to know my job assignments. She say she don't have any job duties for me. No job assignment, that's what she told me.

J. LAMONT: Did you sit down and go over briefly with him what we're [d]oing

D. WILLIAMS: Nope.

D. SACKETT: Joann did while I was away.

J. LAMONT: OK. Do you

D. SACKETT: Yeah, but you know what it is.

J. LAMONT: So you were trained, you have an idea what we're

D. WILLIAMS: I was told--I was told--Jim, the only thing I am asking you to do is do my PAR.

J. LAMONT: Okay, fine. I am asking you, are you going to pull this return or not?

D. WILLIAMS: Well, I don't have no job assignment.

Page 5

G. GLOVER: (Inaudible)

D. WILLIAMS: So, how are you [g]oing to assign me for something to do if I don't have a job assignment?

J. LAMONT: Excuse me, do you have something you want to say to me, George Glover? If not, why don't you go back to your work station. Really you're disrupting

this--this (audible sound) you just got up and came over like you do all the time.

(Audible sound)

G. GLOVER: Do you, do you need a union rep?

D. WILLIAMS: Yep.

J. LAMONT: For what? For me to have a talk with. You always, you always do that. You always do that.

D. WILLIAMS: Well, Jim, the only thing I'm asking, when you, when you, when you called me back there in the scanning room.

J. LAMONT: On your own you got up and came over here and if you are going to put it on tape, put that on tape. You got up on your own because you heard something.

G. GLOVER: Yes, I did. I came over here to ask, came over here to ask

D. WILLIAMS: Put it right there.

J. LAMONT: Like you always do. Are you going to pull this return, yes or no?

D. WILLIAMS: Jim, I want, I'm asking to have my PAR done.

Page 6

G. GLOVER: (Inaudible) actually racism in this Department in this section always

G. GLOVER: Um, can I ask you a question, can I ask you a question?

D. WILLIAMS: Yeah.

G. GLOVER: Do, um the ind, the person whose job you're filling, did they, did they do the pulling or the

refiling?

D. WILLIAMS: Nobody did no pulling in that section.

G. GLOVER: In this section, in the past three days right?

D. WILLIAMS: Lisa Palmari didn't do no pulling, Janet Fuller didn't do no pulling and Jane--

(Audible clicking sound)

G. GLOVER: (Inaudible)

D. WILLIAMS: Yup, Yup, they don't want me to say nothing, huh

(Audible clicking sound)

(End of tape recording)

We now examine the statements not contained in the transcript and other details.

Lamont was not present when Sackett told Williams to talk to Lamont (19T51-19T52). Lamont then approached Williams' station and found him alone. Noticing the recorder, Lamont asked if he was being taped, a question that was not recorded (19T11).

When the conversation began, Glover was at his own station, facing away from Williams and Lamont (19T12). That station is in the cluster next to Williams' cluster (19T45). Glover became involved when Lamont accused Williams of recording him illegally and Williams asked Glover if taping the conversation was illegal (19T12, 19T53, 19T61).

The conversation proceeded. According to Lamont, while Williams was saying he had asked Sackett for his PAR (R-51, page 2, lines 10-11), Glover was telling Williams he did not have to

listen to Lamont or answer his questions (19T13). That interruption caused Lamont to turn to Glover and say: "Will you sit down" (R-51, page 2, line 12). Glover did not do so (19T13-19T14); he and Williams kept talking. According to Lamont, where R-51 states that Glover's comments are inaudible (R-51, page 3, line 1), Glover continued to advise Williams that he didn't have to speak with Lamont or listen to him (19T15). Lamont then told Glover that Lamont was talking to Williams, trying to inform Glover that the conversation didn't concern him (19T15). Glover responded that Williams had asked for him to be there and Lamont said he had not heard Williams ask for Glover (19T15-19T16).

Lamont then said: "When you guys are done then I'll have a conversation with him. Okay? So go ahead, do, I know you got to do the little thing here. So go ahead." (R-51, page 3, lines 14-16). He went to his office to call Osborn (19T17). He was not present for the conversation transcribed at R-51, page 3, line 18 through page 4, line 2.

Before returning to Williams' station, Lamont waited for Glover to return to his own station (19T18). Upon returning, Lamont asked Williams again if he was going to pull the return as he had been asked to do -- that question was not recorded (19T19-19T20). Lamont, Williams, and Sackett talked about Williams' assignments and training and Glover then began talking as well. According to Lamont, where R-51 again states that Glover's comments were inaudible (R-51, page 5, line 1), Glover

continued to tell Williams "he didn't have to pull the return, wasn't in his job specs, things of that nature" (19T22).

At that point, Glover was standing near his own chair, perhaps 10 feet away (19T23). Lamont then said: "Excuse me, do you have something you want to say to me, George Glover? If not, why don't you go back to your work station" (R-51, page 5, lines 4-5). According to Lamont, he told Glover to return to his work several times (19T24).

The transcript at this point indicates that sounds were audible, but does not describe those sounds (R-51, page 5, lines 6 and 8). Lamont told Glover that he had come over on his own and Glover responded that Williams had asked him to. Lamont said he didn't hear Williams make that request (19T24) or recall Glover asking Williams if he needed a union rep and Williams responding "Yep." (19T25; R-51, page 5, lines 9-10). He did tell Glover several times to return to his seat, but Glover continued to talk to Williams (19T25).

Lamont again asked Williams if he was going to pull the return. Williams repeated that he was asking to have his PAR done (R-51, page 5, lines 20-22). Lamont then said "we were working on it" -- that statement was not recorded (19T27-19T28).

Lamont left. According to him, Glover was still telling Williams that he didn't have to listen or pull the return

(19T28).[5/] Lamont was not present for any of the remaining conversation (R-51, page 6,lines 1-15) and did not hear Glover mention racism (19T28).

We now review the ALJ's findings in light of the foregoing review of record and other evidence.

We reject ID finding 1. The date should be July 19, not July 18. Further, Glover did not become involved until Lamont accused Williams of illegally recording the conversation. Williams then asked Glover if the recording was illegal. Thus, Williams proposed Glover's participation. As Lamont acknowledged, Glover later stated that Williams had requested his presence (4T153; 19T15-19T16) and Williams did not disagree (8T66).

We modify ID finding 2. Glover intervened in the conversation, but the conversation did proceed. However, Glover inhibited the discussion by telling Williams he didn't have to listen to Lamont or answer his questions.

We accept ID finding 3. The transcript does not indicate that Lamont directly ordered Glover to return to his station. Nor is a direct order mentioned in Lamont's account, written that same day (P-3) and described by Lamont as complete and accurate (8T45-8T46). Nevertheless, the tape recording was not a complete recording of the encounter and Lamont testified that he gave an

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5/ At an earlier hearing, Lamont did not recall Glover telling Williams not to pull the return, although Glover did tell Williams he didn't have to talk to Lamont (8T75-8T76).

order that was not recorded. Sackett also testified that Lamont told Glover to "please go back to work." The ALJ credited their testimony. We cannot displace these credibility determinations without a more solid basis for doing so. Based on R-51 and Lamont's testimony, it appears that the return-to-work orders most likely came in the second part of the conversation, after Lamont had returned to Williams' station (19T23-19T24).

ID finding 3 also states that Glover said that he was the chief shop steward and should be involved in everything. Lamont so testified (7T16), consistent with his written account (P-3). The transcript, however, does not record such a statement and Lamont did not identify that statement as missing when asked to review the transcript and supply missing statements. We will nevertheless accept this part of the finding because the ALJ credited this testimony. It is not a critical finding; Lamont already knew that Glover was a shop steward.

We accept ID finding 4 in part and modify it in part. Lamont testified that Glover told Williams several times that he didn't have to listen to Lamont. Sackett testified that Glover told Williams at least once that he didn't have to talk to Lamont (4T156-4T157). The transcript does not reflect such comments, but it is incomplete and the ALJ credited Lamont and Sackett. Glover was apparently several feet away during the first part of the conversation and his voice may not have been loud enough to have been recorded. We modify the finding that Glover "excluded" Lamont from the conversation. It appears that Glover and Williams

did discuss the PAR and that Glover clarified that Williams' immediate supervisor was supposed to do his PAR. Lamont stood by and then said he would let the conversation go ahead because "I know you got to do the little thing here."

ID finding 5 states that when Lamont left, he stated: "When you are done with the theatrics, I'll return." Lamont so testified (7T17), consistent with his written account (P-3). The transcript, however, does not record such a statement and Lamont did not identify that statement as missing when asked to review the transcript and supply missing statements. We will nevertheless accept the finding because the ALJ credited this testimony. This finding is not a critical one.

We accept ID finding 6. The ALJ credited Lamont's testimony that Glover told Williams he didn't have to listen or talk to Lamont. We add that after Lamont returned, Glover came over to Williams' station. Lamont complained that Glover had disrupted the conversation and asked him to go back to his station. Glover then asked Williams if he needed a union representative and Williams responded: "Yep." Lamont then complained that Glover always intruded into his talks with employees and Glover conceded that he had come over to Williams' station on his own (R-51, page 5, lines 4-20). We clarify that Glover's concession applies to the second part of the conversation with Lamont, which began after Lamont returned from his office, and not to the first part of that conversation, which began with the question of the legality of recording the conversation.

We accept ID finding 7. The finding tracks Lamont's direct testimony (7T18), credited by the ALJ. While Glover's voice on the tape (P-18) does not sound overpowering or louder than Lamont's voice, he was farther from the recorder so his voice may have been louder than it sounds on tape. We also accept the finding that DCC employees stopped working to observe the encounter (7T18).

We reject the ALJ's finding in the remand decision that before the confrontation began, Glover proposed his own participation and Williams acquiesced. In rejecting ID finding 1, we explained that Glover became involved after Williams asked him if recording the discussion was illegal. The ALJ's characterization is a more accurate description of the second part of the conversation, after Lamont returned.

July 20

On July 20, Lamont sought to meet with Williams, Sackett and DeMarie to discuss work flow and Williams' PAR. The meeting was cancelled when Williams refused to attend without Glover. In its unfair practice charge, CWA asserted that Glover was terminated in retaliation for trying to represent Williams on July 20. The Department of Personnel specifications listed the July 20 incident as a cause for discipline, but was amended to change the date to July 21. The ALJ found that management legally excluded Glover from this planned meeting.

CWA's exceptions do not contest the ALJ's findings concerning July 20 (ID39-ID40) or argue that the termination was motivated by protected activity on that date. We accept the ALJ's findings and do not consider further the events of July 20.6/

Analysis

George Glover was a shop steward responsible for representing employees at the DCC consistent with the Employer-Employee Relations Act, N.J.S.A. 34:13 A-1 et seq. ("Act"). He was also a State employee responsible for doing his job and behaving appropriately in the workplace.

6/ CWA excepts to the ALJ's findings concerning a July 13, 1994 incident involving the denial of Williams' request for a furlough day. We decline to consider that exception. The unfair practice charge does not allege that the employer retaliated against Glover for protected activity on July 13. The predominant interest determination and order was based on the charge (excluding the July 13 incident) and the specifications before the MSB (including the July 13 incident) and thus did not contemplate that we would review the July 13 events. Finally, the employer did not address the issue of protected activity on that date in its post-hearing brief, and the ALJ did not consider that issue in his decisions. We accordingly decline to find that the July 13 incident has been fairly and fully litigated before us. We leave it to the MSB to determine what happened on that date and how the incident bears on Glover's termination. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 98-126, 24 NJPER 225 (¶29106 1998). We likewise decline to consider CWA's arguments concerning the settlement of a preliminary notice of discipline issued to Glover in October 1992.

This case requires us to locate the line between a union representative's protected representational activity and an employee's unprotected workplace misconduct. We will examine the different types of representation and the accompanying rights and limits. We will then assess Glover's representation and conduct on July 18 and 19, 1994.

Representational Activities

The Act entitles public employees to "form, join and assist any employee organization or to refrain from any such activity." N.J.S.A. 34:13A-5.3. Employees are also entitled to choose a majority representative to negotiate for them over new or successor contracts, proposed new rules or modifications of existing rules, grievances, disciplinary disputes, and other terms and conditions of employment. Id. An employer commits an unfair practice if it interferes with, restrains, or coerces employees in the exercise of these rights or if it discriminates against employees to discourage them from exercising these rights. N.J.S.A. 34:13A-5.4a(1) and (3).

The Act's rights and unfair practice provisions are modelled upon the National Labor Relations Act, 29 U.S.C. §141 et seq. See Bridgewater Tp. at 240; Lullo v. IAFF, 55 N.J. 409, 424 (1970). Our case law tracks private sector case law in determining what representational activities are protected and what conduct is unprotected.

Case law has centered on three types of representation: at the negotiations table, in grievance discussions, and in investigatory interviews. Given the facts of this case, we will focus on the right to representation in investigatory interviews, but we will first discuss the right to representation in negotiations and grievance discussions. The different settings result in different levels of protection for representational conduct and different lines for determining when protected representation crosses over into unprotected misconduct.

Negotiations and Grievances

In negotiations and grievance discussions, management officials and union representatives meet as equals and exchange views freely and frankly. See, e.g., Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 74 LRRM 2855 (5th Cir. 1970); NLRB v. Southwestern Bell Telephone Co., 694 F.2d 974, 112 LRRM 2526 (5th Cir. 1982); Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979); City of Asbury Park, P.E.R.C. No. 80-24, 5 NJPER 389 (¶10199 1979). Passions may run high and epithets and accusations may ensue so courts have refused to impose a "rigid standard of proper and civilized behavior" on participants and have allowed leeway for adversarial and impulsive behavior. Crown Central, 74 LRRM at 2860. See also United States Postal Service, 251 NLRB No. 33, 105 LRRM 1033 (1980), aff'd 652

F.2d 409, 107 LRRM 3249 (5th Cir. 1981); American Telephone & Telegraph Co. v. NLRB, 521 F.2d 1159, 89 LRRM 3140 (2d Cir. 1975); Hawaiian Hauling Services, Ltd. v. NLRB, 545 F.2d 674, 93 LRRM 2952 (9th Cir. 1976); Union Fork & Hoe Co., 241 NLRB No. 140, 101 LRRM 1014 (1979). An employer may criticize a representative's conduct at such meetings, but it may not discipline the representative as an employee when that conduct is unrelated to job performance. Black Horse Pike.

Despite the equality of participants in negotiations and grievance settings and despite the leeway allowed for impulsive and adversarial behavior, representational conduct may lose its statutory protection if it indefensibly threatens workplace discipline, order, and respect. See, e.g., NLRB v. Thor Power Tool Co. 351 F.2d 584, 60 LRRM 2237 (7th Cir. 1965); AT&T, 571 F.2d at 1161; Felix Industries Inc. v. NLRB, 331 NLRB No. 12, 164 LRRM 1137 (2000); Paper Board Cores, Inc., 292 NLRB No. 107, 131 LRRM 1644 (1989); Atlantic Steel Co., 245 NLRB No. 107, 102 LRRM 1247, 1249 (1979). See generally Hardin, The Developing Labor Law, 150-151 (3d ed. 1992). To determine whether conduct is indefensible in the context of the dispute involved, it is necessary to balance the employees' heavily protected right to representation in negotiations and grievance dicussions against the employer's right to maintain workplace discipline. Southwestern Bell; AT&T. The NLRB considers several factors: (1) the place of the discussion; (2) the subject of the discussion;

(3) the nature of the employee's outburst; and (4) whether the outburst was provoked by an unfair labor practice. Atlantic Steel Co.; Felix Industries.

Two of our cases illustrate the wide latitude granted employees when negotiating contracts or pressing grievances. In Hamilton Tp. Bd. of Ed., an employee was threatened with discipline as a result of his angry conduct at a grievance meeting. The employee struck the table and moved around the small room, shouting in what some believed was an intimidating fashion. We nevertheless found that his conduct was protected. Relying on Crown Central, we accepted the principle that "wide latitude in terms of offensive speech and conduct, must be allowed in the context of grievance proceedings to insure the efficacy of this process." 5 NJPER at 116.

Similarly, in Asbury Park, we held that a union president's angry confrontation with the city manager was protected. The president ran into the manager one evening and tried to arrange a meeting to discuss complaints. The encounter became a shouting match. In holding that the City unlawfully suspended the employee for insubordination, we emphasized that the employee's behavior, while loud, was not violent or threatening. While the manager could direct the president to contact him during work hours, he could not punish the employee for what was

initially protected activity and for the same conduct as the manager himself engaged in.7/

To summarize, when acting as agents of the majority representative in negotiating contracts or pressing grievances, union representatives meet as equals with their management counterparts. They enjoy a wide latitude of speech and conduct as advocates and adversaries before their activity will be considered so indefensible as to lose the Act's protection.

Investigatory Interviews

The United States and New Jersey Supreme Courts agree that an employee has a right to request and receive a union representative's assistance during an investigatory interview that the employee reasonably believes may lead to discipline. Weingarten; Matter of Univ. of Medicine and Dentistry of New Jersey, 144 N.J. 511 (1996) ("UMDNJ"). The representative's role in such a setting, however, is not an adversarial one; the

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7/ We have also considered situations where employees were disciplined for making disrespectful or disruptive comments in workplace settings (as opposed to negotiations and grievances discussions) and where the employees were speaking for themselves rather than as agents of the majority representative. In that context, we have upheld discipline for conduct similar to or less extreme than in Hamilton or Asbury Park. See City of East Orange, P.E.R.C. No. 84-80, 10 NJPER 28 (¶15017 1983); Atlantic Cty. Judiciary, P.E.R.C. No. 93-52, 19 NJPER 55 (¶24025 1992), aff'd 21 NJPER 321 (¶26206 App. Div. 1994). Cf. Boaz Spinning Co. v. NLRB, 395 F.2d 512, 68 LRRM 2393 (5th Cir. 1968) (employee legally disciplined for flagrant insubordination in disrupting employer's campaign speech).

latitude granted for perceived misconduct is thus narrower than in the negotiations and grievances settings. We will trace both the contours of the Weingarten right and the limits placed on Weingarten representatives. UMDNJ embraced the Weingarten principles and limits.

Under Weingarten, an employee may demand union representation at an investigatory interview that he or she reasonably fears may result in discipline. An employee cannot be punished for requesting representation and a union representative cannot be punished for seeking to provide requested representation. See e.g., ILGWU v. Quality Mfg. Co., 420 U.S. 276, 88 LRRM 2698 (1975); Cape May Cty., P.E.R.C. No. 82-2, 7 NJPER 432 (¶12192 1981). Weingarten, however, placed several limits on the right to representation, limits we now review.

First, an employer need not inform an employee of the Weingarten right. The employee must request representation. Absent a request, there will be no violation. Monmouth Cty. Probation Dept., P.E.R.C. No. 91-121, 17 NJPER 348 (¶22157 1991).

Second, the interview must be investigatory and the employee must reasonably believe that discipline may result. The test for ascertaining whether a reasonable belief exists is an objective one, not a subjective one focussing on the employee's or employer's state of mind. Weingarten, 88 LRRM at 2691; Dover Municipal Utilities Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1989); Stony Brook Reg. Sewerage Auth., P.E.R.C. No.

83-138, 9 NJPER 280 (¶14129 1983). The Weingarten right does not attach if a meeting is called solely to announce a disciplinary action. Baton Rouge Water Works Co., 246 NLRB No. 161, 103 LRRM 1056 (1979); UMDNJ at 529; John E. Runnells Hosp., P.E.R.C. No. 85-91, 11 NJPER 147 (¶16064 1985). Nor does it attach to run-of-the-mill, shop-floor conversations -- for example, giving instructions, training employees, or correcting techniques. General Electric Co., 240 NLRB No. 66, 100 LRRM 1248 (1979).

Third, the right to representation may not interfere with legitimate employer prerogatives. One such prerogative is to decide not to interview the employee at all if the employee insists upon representation; the employee must then choose between having an interview unaccompanied by a representative or having no interview. State of New Jersey (State Police), P.E.R.C. No. 93-20, 18 NJPER 471 (¶23212 1992).

Fourth, the employer has no duty to bargain with a representative attending the interview. The Weingarten Court elaborated:

> The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation. [88 LRRM at 2692].

See also UMDNJ at 535. The Weingarten setting does not place the union representative in equal control of the interview or permit

the representative to turn an investigatory interview into an adversarial contest.

An employer cannot condition a union representative's attendance at an interview upon the representative's silence. NLRB v. Texaco, Inc., 659 F.2d 124, 108 LRRM 2850 (9th Cir. 1981); Talsol Corp., 317 NLRB No. 49, 151 LRRM 1097, 1102 (1995), enforced 155 F.3d 785, 159 LRRM 2193 (6th Cir. 1998). A shop steward may help an employee clarify an account; object to harassing, confusing, or misleading questions; and suggest additional witnesses. One court, however, has held that an employer may insist on hearing an employee's account first, so long as it then allows the representative to make any additions, suggestions, or clarifications. Southwestern Bell Tel. Co. v. NLRB, 667 F.2d 470, 109 LRRM 2602 (5th Cir. 1982).

While a union representative cannot be silenced, management commands the time, place, and manner of the interview. United States Postal Service v. NLRB, 969 F.2d 1064, 140 LRRM 2639 (D.C. Cir. 1992). A representative may not turn an interview into an adversarial confrontation obstructing the employer's right to conduct the interview. Two cases illustrate that limit on Weingarten conduct. The first one is New Jersey Bell Telephone Co., 308 NLRB No. 32, 141 LRRM 1017 (1992), cited by UMDNJ with approval for the proposition that the employer runs the interview and may expel a representative who interferes with the questioning. Id. at 535. See also Hexter, The Developing Labor Law, 73-74 (3d. ed. 1999 Supp.).

In New Jersey Bell, an employee -- Ehlers -- was interviewed during the investigation of the ransacking of a supervisor's office and the rigging of a ladder to fall on that supervisor. A union representative -- Huber -- attended the interview. Ehlers answered one round of questions vaguely and inconclusively. When the questions were repeated, Huber interrupted and Ehlers refused to answer them. Huber was then directed to leave the interview; when he refused, the employer summoned the police to arrest him.

The NLRB held that Huber's representation became unprotected when he advised Ehlers to answer questions only once and prevented management from repeating its questions. Stating that a careful balance must be drawn between an employer's right to interview its employees personally and the union representative's role at such interviews, it drew the balance in the employer's favor. It reasoned that allowing a representative to prevent an employer from repeating questions would turn an investigatory interview into an adversarial forum and interfere with the employer's ability to investigate misconduct. It noted that repeating or rephrasing questions is a common technique, especially given unresponsive answers. By his improper advice and persistent objections and interruptions, Huber forfeited his right to act as Ehlers' representative.

In Yellow Freight System, 317 NLRB No. 15,149 LRRM 1327 (1995), an employee was interviewed in a coaching session, part of

a pre-progressive discipline system. The Administrative Law Judge found that the steward disrupted the interview by abusive and insulting interruptions; grossly demeaning a supervisor's managerial status in front of an employee and a manager; pounding the desk and shouting obscenities; falsely calling the supervisor a liar; and refusing to leave the office. Concluding that the session was essentially a Weingarten-type interview, the judge held that the steward had impermissibly turned the session into an adversarial confrontation and could be disciplined. The NLRB agreed. See also Mead Corp., 331 NLRB No. 66, 2000 NLRB Lexis 393 (2000); cf. Climax Molybdenum Co. v. NLRB, 584 F.2d 360, 99 LRRM 2471 (10th Cir. 1978) (union policy of advising employees not to cooperate or provide information impermissibly defeats purpose of interview).

To summarize, when acting as agents of the majority representative in investigatory interviews, union representatives are limited to assisting the employee rather than bargaining with the employer. Their representation cannot obstruct the employer's right to conduct such interviews.

The Events of July 18 and 19

July 18

Under all the circumstances, we conclude that Glover's conduct on July 18 was unprotected. Osborn was not told that

Williams wanted Glover to serve as his representative so Weingarten did not provide a basis for Glover's intervention into her discussion with Williams. Even if Williams had requested representation and even if the interview was considered to be investigatory, Glover would have lost the Act's protection by confronting and threatening Osborn and preventing her from interviewing Williams. Glover told Williams not to cooperate; called Osborn a witch and a racist; got within inches of her face; threatened to "take care of her later"; shouted; and disrupted all efforts by Osborn to interact with Williams. By turning the interview between Osborn and Williams into a confrontation between Osborn and himself, Glover caused the work force to stop working and watch the standoff. Such abusive conduct is unprotected. New Jersey Bell; cf. Crown Central (assailing management official on shop floor where he stood as symbol of company authority would not be protected); Asbury Park (employee cannot use position as union representative to undermine managerial or supervisory authority).

CWA asserts that even if Weingarten does not apply, Glover's conduct on July 18 can still be found to be protected. We will assume that the types of representation we have discussed do not exhaust the universe of permissible representational activities and that shop stewards have roles to play in addressing other situations that may arise in the workplace. Cf. Dreis & Kramp Mfg. Co. v. NLRB, 544 F.2d 320, 93 LRRM 2739 (7th Cir. 1976) (NLRA's protection not confined to formal grievance proceeding and

extends to group activity seeking to enforce provisions of collective bargaining agreement and protect employee safety). We will carefully consider the circumstances of each such situation and the arguments presented to us in any future case. Nevertheless, in this case we cannot imagine a representational context that would permit Glover to intervene in this workplace dispute in the hostile way he did.

July 19

Under all the circumstances, we conclude that Glover's initial representation at the July 19 meeting was protected under Weingarten. However, we also conclude that Glover's activity lost its protection because he turned the interview into an adversarial confrontation and prevented Lamont from questioning Williams.

The first question in applying Weingarten is whether Williams requested Glover's representation in Lamont's presence. He did. Williams requested Glover's assistance at the outset of the conversation, after Lamont accused him of illegally recording that discussion. Glover had not left his work station at that point. Later in the conversation, Glover asked Williams if he wanted his representation and Williams said yes. Glover also stated that Williams had asked him to be there, a statement that Williams did not deny. United States Postal Service, 138 LRRM 1339 (Member Raudabaugh infers that employee requested Weingarten representative based on representative's statement that request was made and employee's silence).

The next question is whether Williams could have reasonably believed that the July 19 interview could result in discipline. The ALJ found in the remand decision that such a belief was reasonable. We agree. Williams had already refused to pull the return several times and Osborn -- Lamont's supervisor -- had sent him home the day before. Compare Circuit-Wise, Inc., 308 NLRB 1091, 142 LRRM 1308 (1992) (employee reasonably feared being disciplined where he did not follow work assignment the day before and alleged non-disciplinary nature of meeting was not made known to him); Bergen Cty. Prosecutor's Office, P.E.R.C. No. 83-130, 9 NJPER 264 (¶14121 1993) (given events on Friday, employee could reasonably believe that discipline might result from Monday morning meeting). Based on the July 18 confrontation, Sackett told Lamont he should consider disciplining Williams and something had to be done. While Lamont was not intending to discipline Williams when the conversation began, he was trying to find out why Williams had not obeyed the directive to pull the return and he told Williams early on in the July 19 discussion that he would be guilty of insubordination if he did not do so. Further, Lamont had just accused Williams of illegally taping him and had ordered him to shut the recorder off, an order Williams promptly disobeyed. At the time he asked for Glover's assistance, Williams could reasonably have believed that his conversation with Lamont could result in discipline.

The next question is whether the July 19 meeting between Lamont and Williams should be viewed as an investigatory interview. That question is interrelated with the question of whether Williams could reasonably believe that the interview could lead to discipline. Given the circumstances recounted in the preceding paragraph, we find that an investigatory interview occurred. This was not a meeting where Lamont was simply announcing a pre-determined decision to discipline Williams. It was rather a meeting where he was trying to find out why Williams would not carry out an order to perform an assignment -- why Williams in effect was persisting in an insubordinate act. Lamont's superior, Osborn, had already ordered Williams to pull the return so this interview was not merely a question of making sure Williams understood a work assignment.

Having found that Williams requested Glover's representation; that Williams reasonably believed that the interview could result in discipline; and that the interview was an investigatory one; we conclude that Glover's initial involvement was protected under Weingarten. We now ask whether Glover's ensuing representation crossed the line between permissible assistance and impermissible adversarial confrontation. We conclude that it did and that Glover's conduct thereby lost the Act's protection.

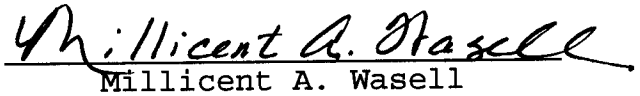
Given the ALJ's credibility determinations and Glover's failure to testify on his own behalf, we have accepted the ALJ's findings establishing that Glover improperly obstructed Lamont's attempts to interview Williams. Glover repeatedly told Williams that he did not have to listen to Lamont, answer his questions, or carry out his orders. His interruptions also made it difficult, if not impossible, for Lamont to continue his conversation with Williams and justified Lamont in seeking to end Glover's participation. The confrontation also distracted other employees. Glover's conduct was more restrained than his egregious behavior the day before, but given the limits on a shop steward's Weingarten role, his interference with Lamont's questioning was unprotected.

Under the predominant interest order, our first assignment is to conclude whether Glover engaged in protected activity under the Act on July 18, 19, and 20. With the exception of his initial involvement in the July 19 interview, we conclude that he did not. Under the predominant interest order, our second assignment is to determine whether any protected activity on these dates was a substantial or motivating factor in Glover's termination. Part of one specification cited Glover's abandonment of his work station on July 19, so we conclude that Glover's initial involvement in the July 19 discussion was a partial motivating factor for his termination. This one factor appears to be an unsubstantial consideration when compared to the gravity of

Glover's misconduct on July 18 and the number of other incidents cited, but we leave it to the MSB to determine whether Glover would have been terminated in any event based on legitimate business reasons and his unprotected activity. That determination involves an assessment of all the specifications against Glover and is beyond our authority under the predominant interest order.

If the MSB determines that Glover would have been discharged based on his unprotected conduct and the employer's business reasons, we will dismiss the Complaint. If the MSB determines that Glover would not have been discharged based on legitimate reasons, the case should be transferred back to us and we will consider whether specialized relief is warranted under our Act. We enter no order at this juncture and will simply transmit the case to the MSB for its deliberations.

BY THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. Commissioners Buchanan and Madonna opposed.

DATED: March 29, 2001
Trenton, New Jersey
ISSUED: March 30, 2001