

P.E.R.C. NO. 88-100

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON, YOUTH HOUSE,

Respondent,

-and-

Docket No. CO-H-87-310

DISTRICT 1199J, NUHHE,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by District 1199J, NUHHE against the County of Hudson, Youth House. The charge alleged the County violated the New Jersey Employer-Employee Relations Act when it allegedly denied an employee representation by District 1199J at a disciplinary interview and a departmental hearing. The Commission, in agreement with a Hearing Examiner, finds that the employee voluntarily waived his right to District 1199J's representation.

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DISTRICT 1199J, NUHHE,

Charging Party.

Appearances:

For the Respondent, Murray & Murray, Esqs.
(Nancy J. Kaloud, of counsel)

For the Charging Party, Oxfeld, Cohen, Blunda, Friedman,
Levine & Brooks, Esqs. (Reba Carmel, of counsel)

DECISION AND ORDER

On April 27, 1987, District 1199J, NUHHE ("District 1199") filed an unfair practice charge against the County of Hudson, Youth House ("County"). The charge alleged that the County violated subsections 5.4(a)(1), (2), (3), (4) and (5),^{1/} of the New Jersey

1/ These subsections 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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."

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it allegedly denied Pedro Crespo, a Youth House juvenile officer, representation by District 1199J at a disciplinary interview and a departmental hearing. District 1199J also alleged that the County did not notify District 1199J of these proceedings.

On July 20, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The County filed an Answer asserting that Crespo signed a statement waiving his right to union representation.

On September 23 and October 21, 1987, Hearing Examiner Richard C. Gwin conducted a hearing. The parties examined witnesses and introduced exhibits. The Hearing Examiner granted a motion to dismiss the allegations that subsections 5.4(a)(2) and (4) had been violated. The parties filed post-hearing briefs by February 16, 1988.

On March 1, 1988, the Hearing Examiner recommended dismissal of the Complaint. H.E. No. 88-41, NJPER (¶ 1988. He found that Crespo had waived union representation and that he had not been coerced into doing so.

District 1199J has filed exceptions. It contends that the employer's agents coerced Crespo into waiving union representation by suggesting that if he did so his disciplinary penalty would be less stringent.

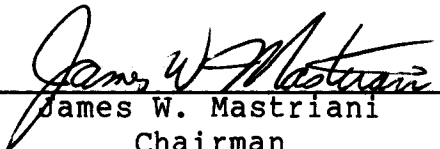
We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-11) are thorough and accurate. We adopt and incorporate them. We specifically accept his findings crediting the testimony of County witnesses.

Given these findings, we agree that Crespo voluntarily waived his right to District 1199J's representation. Crespo's belief that he may have been treated more leniently if he waived union representation and pled guilty was not illegally induced by any statements or conduct of the employer's agents. We therefore dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
April 27, 1988
ISSUED: April 28, 1988

H.E. NO. 88-41

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

In the Matter of

County of Hudson, Youth House

Respondent,

-and-

Docket No. CO-H-87-310

District 1199J, NUHHE,

Charging Party.

Appearances:

For the Respondent Murray & Murray, Esqs.
(Nancy J. Kaloud, of counsel)

For the Charging Party, Oxfeld, Cohen, Blunda,
Friedman, Levine & Brooks, Esqs. (Reba Carmel, of
counsel)

HEARING EXAMINER'S REPORT AND
RECOMMENDED DECISION

On April 27, 1987, District 1199J, NUHHE ("District 1199J") filed an unfair practice charge alleging that Hudson County Youth House ("County") violated subsections 5.4(a) (1), (2), (3), (4) and (5)^{1/} of the New Jersey Employer-Employee

^{1/} These subsections 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; (2) Dominating or interfering with the formation, existence or administration of

Footnote Continued on Next Page

Relations Act, N.J.S.A. 34:13A-1 et. seq. ("Act"). District 1199J alleged that the County unlawfully denied Pedro Crespo union representation when it reprimanded him on January 15, 1987 and at a departmental hearing on January 28. District 1199J also alleged that the County did not notify the union about the hearing.

On July 20, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On August 6, 1987, the County filed an Answer denying that it committed an unfair practice and asserting that Crespo signed a written statement on January 15, 1987 waiving his right to District 1199J's representation.

I conducted a hearing on September 23 and October 21, 1987. The parties examined witnesses and introduced exhibits. At the conclusion of District 1199J's case, the County moved to dismiss the 5.4(a)(2) and (4) allegations. Concluding that District 1199J had failed to present a scintilla of evidence to

1/ Footnote Continued From Previous Page

any employee organization; (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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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."

support an inference^{2/} that the County violated those subsections, I granted the motion. The parties waived oral argument and, after a long delay in receiving transcripts, filed briefs by February 16, 1988. Based on the entire record I make the following:

FINDINGS OF FACT

1. The County is a public employer within the meaning of the Act and subject to its provisions.
2. District 1199J is an employee organization within the meaning of the Act and subject to its provisions.
3. Pedro Crespo is a public employee within the meaning of the Act, is employed by the County at its Youth House as a juvenile officer and is represented in collective negotiations by District 1199J.
4. The parties' collective agreement provides that employees represented by District 1199J shall not be disciplined except for just cause and that grievances must be presented within 15 days (R-1, R-5).^{3/}
5. Crespo was scheduled to work the midnight shift at the Youth House on December 20, 1986. On December 19, 1986, in

^{2/} See Dolson v. Anastasia, 55 N.J. 2 (1969).

^{3/} District 1199J introduced a copy of a printed document as the parties' collective negotiations agreement (CP-4). The County has not signed the document and does not recognize it as the parties' contract. The parties' agreement consists of a contract between the County and District 1199J's predecessor, as amended by memoranda of agreement (R-1 through R-6).

the midafternoon, he picked up an overtime check at the Youth House. Early that evening he called in sick. That night he attended a Youth House Christmas party. Also in attendance was Don Daly, the Youth House chief supervisor.

6. When Crespo returned to work, he was directed by Robert Lorfink, a midnight shift supervisor, to prepare an incident report because he did not submit a doctor's excuse for his absence. On December 22, 1986, Crespo wrote a report stating that, "I P. Crespo was told by supervisor Lorfink to bring a doctor's slip and I told him that the reason I didn't have it was because the doctor did not come, but I will have it" (R-10). On the night of his return to work Crespo also had a brief conversation with Salvatore Palumbo, another midnight shift supervisor. Palumbo said to Crespo "you know, it is kind of stupid of you to call off sick and then go to one of the Christmas parties." Crespo agreed (TB51).^{4/}

7. On December 24, 1986, at approximately 12:20 a.m., Lorfink prepared an incident report (R-11). The report states that on December 22, 1986, chief supervisor Daly told him that Crespo attended the Christmas party, that Crespo called in sick on the 19th and 20th and that Crespo did not obtain a doctor's excuse. Lorfink also reported that he intended to prepare a preliminary notice of disciplinary action.

^{4/} "TB" refers to the transcript of October 21, and "TA" to September 23, 1987.

8. Approximately seven hours after Lorfink completed R-11, Crespo prepared two additional incident reports. In one he stated that he left his doctor's note in a jacket at his house (R-12). In the other he stated that a fever prevented him from reporting to work but that later he felt better and attended the Christmas party. He concluded, "I know that I was wrong and it will never happen again." In a postscript he added that he "would like to see Mr. Spirko" (R-8).

9. Apparently after Lorfink wrote R-11 but before Crespo wrote R-8 and R-12, Lorfink and Crespo had a conversation (TB64, 65). Lorfink told Crespo that he would be charged (TA12). They did not discuss Crespo's right to union representation: Crespo did not request it and Lorfink neither discouraged him from obtaining it nor suggested he would be treated more leniently without it (TA32; TB62, TB67, TB68). Their testimony about this conversation differs on one point: Crespo claims that Lorfink told him to talk to William Spirko, the Youth House director, and "let him know [you] made a mistake and maybe things might be light on [you]." (TA12). Lorfink denies telling Crespo to admit his wrongdoing to Spirko or that by doing so he would be treated leniently (TB68).

10. Approximately one week after his discussion with Lorfink, Crespo met with Spirko. At this meeting Crespo admitted that he had been wrong to attend the Christmas party after calling in sick. He apologized and assured Spirko that he would

never do it again. Spirko told Crespo that he would have to be disciplined. Crespo said he realized that. He knew he would be discussing some type of disciplinary action when he met with Spirko. He also knew "when [he] did what [he] did [that he] was going to get disciplinary action against [him] anyway" (TA13). In their conversation Crespo told Spirko that he did not want District 1199J to represent him in the disciplinary proceeding.^{5/} Spirko told Crespo to think it over and added that if Crespo did decide to waive his right to union representation he would have to do it in writing.

11. After his meeting with Crespo, Spirko told Palumbo, Crespo's supervisor, to see Crespo about the waiver. On January 15, 1987, Palumbo met Crespo and asked him if he still intended to waive his right to union representation. When Crespo replied that he did, Palumbo told him to put his request in writing. On January 15, 1987, Crespo wrote an incident report stating "I J.O. Crespo will not have 1199 represent me at my hearing on 1/28/87" (CP-1).

Crespo claims that during their conversation Palumbo gave him the impression that if Crespo waived union

^{5/} Crespo could not remember whether he discussed his waiver of union representation at this or a later meeting with Spirko. The only other time that he met with Spirko about the incident was at the hearing conducted on January 28, 1987. Crespo did remember that he made the statement to Spirko before he wrote CP-1 (see finding 11, infra). He must have made this statement at his first meeting with Spirko because he wrote his waiver almost two weeks before the hearing.

representation his discipline might be lighter. Crespo's testimony on direct examination about his conversation with Palumbo echoes that of his conversation with Lorfink: "He just told me that even though...I was wrong, just tell the truth" (TA14). When asked if Palumbo said anything else, Crespo testified that:

He told me: "you know that you were wrong, you messed up." I said, "yes. I know that." And he told me, "you know you're going to get -- be brought up on charges." I told him I [knew]. And after that, I can't exactly remember what happened after that. He did talk to me, told me I was going to get disciplinary action. That's about what he told me at that point (TA15).

When asked if Palumbo indicated what discipline he might receive, Crespo replied that Palumbo "just told me to talk to Mr. Spirko...he just said: 'you talk to Spirko' and he did not exactly say -- but it might be easier on you." Id.

On cross examination Crespo describes his conversation with Palumbo a little differently:

...Supervisor Palumbo told me, not in so many words, but he more like hinted to me, don't even bother calling the union. Just take the three days or take what he's going to give you. Which at the time I didn't know what was going to be given to me.

He just told me to just go in there, admit that you are guilty, which I already admitted anyway, admit your guilt and it might go easy on you. You don't need the union for this (TA37).

When I asked Crespo to state exactly what Palumbo said to him, Crespo testified:

He told me -- he told me: "write the incident report saying that you waive your rights to have your union present. It might be -- I'm quite sure it might be easy on you" (TA37, 38).

Palumbo describes their conversation as follows:

I said "Mr. Spirko told me to ask you if you want to waive the union at your hearing." And he said, "Yes I do." I said, "Then give it to me in writing." And, I left it like that (TB57).

I credit Palumbo's testimony about the conversation.

When the inconsistencies in Crespo's testimony are removed, his description of the conversation mirrors Palumbo's. On direct Crespo testifies that Palumbo told him, "you know that you were wrong," "you know you're going to...be brought up on charges" and "you talk to Spirko." Crespo qualifies his testimony by stating that he could not remember exactly what happened after Palumbo told him that he would be brought up on charges and that Palumbo "did not exactly say" that he may be treated leniently if he talked to Spirko. On cross examination Crespo changed his testimony, stating that Palumbo "hinted" that he should admit his guilt and "not even bother calling the union.... You don't need the union for this." When asked to state exactly what Palumbo said, Crespo testified that Palumbo told him to write the waiver and things "might be easy." But Crespo had already testified that Palumbo "did not exactly say that "it might be easier." Further, Crespo concedes that Palumbo did not tell him not to go

to the union or that if he did his discipline would be more severe.^{6/}

When Crespo was asked to what extent his conversation with Palumbo discouraged him from going to the union, he replied "a little bit" (TA47). The main reason he did not seek 1199J's representation was that he knew that he was wrong and he wanted to get it over with (TA48). I do not suggest that Crespo was lying when he testified about his feelings during his conversation with Palumbo. I believe that Crespo felt that he had been wrong to attend the Christmas party and that he wanted to get the matter over with without involving 1199J. I believe also that Crespo brought these feelings to his conversations with Palumbo and Lorfink. While Palumbo did not discourage Crespo's decision to waive representaton, neither did he encourage it.

12. On January 28, 1987, Crespo met with Palumbo and Spirko. Spirko read the charges against Crespo and asked him how he pled. Crespo pled guilty and stated he had nothing to add. Spirko told Crespo that he would contact him within ten days about the discipline.

^{6/} Crespo's testimony on redirect does little to clarify his conversations with Palumbo or Lorfink:

Q: When you spoke to Officer Palumbo...how did discussions about the union come up?

A: I can't exactly remember. It was months ago. But I know it came up.

Q: Did he raise it?

A: I can't remember.

Q: Did Mr. Lorfink ever raise union representation to you?

A: No. [TA47].

13. Sometime after his hearing and on or before February 10, 1987, Crespo was told that he would receive a three-day suspension. It appears that Palumbo told him in the Youth House kitchen while Crespo was on a break (TA43). Crespo did not request union representation when he discussed his discipline with Palumbo. When asked why, he replied, "I felt that I was already wrong, I felt if I brought the union in it might have cost me more, so I said: forget the union" (TA26, 27). When asked why he thought "bringing in the union" would "cost him more," Crespo explained, "I felt like that because, one, I knew I was wrong, and, two, I felt it might have brought -- it might have brought on more paperwork and stuff. So I just did not bother calling the union. And from what went through my mind at that point I just said, I'll take the three days" (TA27).

Spirko and Harry Untereiner, the Youth House assistant superintendent, decided that Crespo should be given the option to select holidays, vacation days or compensatory time on which to serve his suspension because Crespo had admitted his guilt and been cooperative. On February 10, 1987, Crespo prepared an incident report requesting that his suspension be credited to Washington's Birthday, Lincoln's Birthday and one vacation day (R-9). Martin Luther King Day, on which he had worked but for which he had not been paid, was later substituted for the vacation day. On February 19, 1987, Untereiner prepared a final notice of disciplinary action, a CS-31B, memorializing Crespo's suspension (CP-2; TA24-26, TA39-41; TB12).

14. The Christmas party incident was not the first time that Crespo had been disciplined; District 1199J had previously represented him in a grievance. Based on this experience, Crespo knew even before his conversation with Lorfink that he was entitled to 1199J's representation (TA29). When asked if he had a reason to feel differently about his right to union representation for the Christmas party incident, he explained "I felt that since I was wrong...I didn't go to the union" (TA46).

15. Typically when a Youth House employee is written up on a preliminary notice of discipline (CS 31A), Untereiner sends a copy of the form to District 1199J. Howard Moore was the District 1199J representative responsible for Youth House employees. He had recently taken over the position at the time of the Christmas party incident. Neither Mr. Moore nor any other District 1199J officer or representative received a copy of Crespo's CS 31A (R-7). Untereiner does not know if he sent a copy to the union. He can think of no reason other than oversight that R-7 was not given to District 1199J. Moore was unaware of the Crespo incident until he received the final notice of disciplinary action (CP-2) in late February 1987. Untereiner had mailed Moore CP-2.

ANALYSIS

District 1199J alleges in its unfair practice charge that the County unlawfully: 1) denied Crespo union representation on January 15, 1987; 2) denied Crespo union representation

at the departmental hearing held January 28, 1987; and 3) failed to notify the union about the departmental hearing.

In East Brunswick Bd. of Ed. P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd. in pertinent part, App. Div. Dkt. No. A-280-79 (6/18/80), the Commission held that an employee is entitled to the presence of a union representative at an investigatory interview when the employee has a reasonable fear that he may be disciplined as a result of the interview. The Commission relied on NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975), where the United States Supreme Court endorsed an identical rule of law, and Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 NJ 122 (1978), where the New Jersey Supreme Court held that section 5.3 of the Act guarantees employees the right to have grievances presented by the majority representative. Since East Brunswick, the Commission has been guided by private sector cases charting the development of the Weingarten right. Stoney Brook Reg. Sewerage Auth., P.E.R.C. No. 83-138, 9 NJPER 280 (¶14129 1983).

The employee's right to the presence of a union representative attaches where he or she reasonably fears that discipline may result from the meeting and requests representation. The reasonableness of a belief that discipline might be taken is determined by an objective standard on a case-by-case basis. Brown v. Connolly, 237 NLRB 271, 98 LRRM 1572 (1970); Stoney Brook. Since the right only attaches upon the employee's

request, the employee's silence can be an effective waiver. Prudential Insurance Co. of America v. NLRB, 661 F. 2d 398 (5th Cir. 1981). There can be no voluntary waiver, however, when the employee is threatened for insisting on union representation. Southwestern Bell Telephone, 227 NLRB 1223 (1977). When an employer calls a meeting solely to inform an employee of a disciplinary decision already made, Weingarten rights do not attach. Baton Rouge Water Works, 246 NLRB 161, 103 LRRM 1056 (1979).

The Weingarten right belongs to the employee and may not be invoked by the employee representative. In Weingarten the Court explained that the employee must request representation but "may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative." 420 U.S. 251, 257, 88 LRRM 2689, 2691. Relying on this language in Weingarten, the NLRB explained in Appalachian Power, 253 NLRB No. 135, 106 LRRM 1041:

"The reason for vesting the choice with the employee is clear. As the Court explained in Weingarten, it is the individual employee who has an immediate stake in the outcome of the disciplinary process for it is his job security which may be jeopardized in any confrontation with management...Therefore it should be the employee's right to determine whether or not he wishes union assistance to protect his employment interests...If...the right to be present at a disciplinary interview could be asserted by the union representative, the employee no longer would have the choice of deciding whether the presence of the representative was more or

less advantageous to his interest. 106 LRRM 1041, [citations omitted; See also Camden Co. Vo-Tech. Sch. Bd. of Ed., P.E.R.C. No. 82-16, 7 NJPER 466 (¶12206 1981)].

District 1199J claims that Crespo was denied representation on January 15, 1987, when he met with Palumbo and at the departmental hearing on January 28, 1987. Crespo knew that discipline could result from the meetings and that he was entitled to the presence of an 1199J representative. He did not request representation; rather, he specifically told Spirko prior to the meetings that he wanted to waive it. He was not coerced, intimidated or threatened into waiving his right. He decided, for his own reasons, that he wanted to proceed without 1199J's assistance (See findings 11, 12 and 14 supra.). Based on Crespo's voluntary waiver, I conclude that the County did not violate subsection 5.4(a)(1) by denying him the presence of a union representative at the two meetings.

Crespo's Weingarten rights were also implicated in his meetings with Lorfink when Crespo returned to work and with Spirko approximately one week later. Crespo reasonably knew that discipline could result from the meetings and that he was entitled to an 1199J representative. He did not ask for representation. His waiver was not coerced (See findings 9, 10, 11 and 14). I find no violation.

District 1199J argues that this case involves more than Crespo's Weingarten rights. The union asserts that the County's

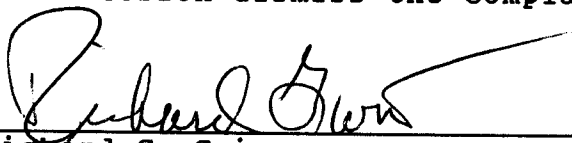
conduct "defies the legislatively articulated right to have the public employee's grievances presented by his majority representative," and that the County has interfered with the union's "unfettered right to initiate a contractual grievance procedure" (District 1199J's brief at 13, 20). The union even argues that this is not a "Weingarten" case because: (1) the County coerced Crespo's waiver; and (2) Crespo "fully believed that he would be disciplined for his acts of December 19." District 1199J seems to be arguing that the County violated subsection 5.4(a)(1) and (5) by preventing the union access to the grievance procedure and dealing directly with Crespo about his discipline. (See District 1199J's brief at 18-20).

Crespo's right to exclusive representation by his union applies both to disciplinary interviews and to grievance processing. Those two processes are different. This is not a case about grievances. This is a case about Crespo's right to 1199J's representation when he met with his supervisors about his absence, which is defined by East Brunswick and cases following Weingarten and its progeny. The issues of Crespo's belief that he would be disciplined and the voluntariness of his waiver fall within the Weingarten analysis. They do not, as the union suggests, require that the County's conduct be scrutinized differently. What District 1199J overlooks is Crespo's "guaranteed right...to participate in an interview unaccompanied by his union representative." 420 U.S. 251, 257, 77 LRRM 2689.

2691. District 1199J, in effect, seeks to invoke Crespo's Weingarten right. The Weingarten right, however, belongs to the employee, not the employee representative. Camden Co. Vo-Tech Sch. Bd. of Ed.; Weingarten; Appalachian Power. The County did not deny the union's access to the grievance procedure; Crespo denied the union's presence at his disciplinary interviews. When Palumbo told Crespo of the three-day suspension, the discipline had been decided and Crespo's Weingarten right did not attach. Baton Rouge. The union was notified of the suspension and could have exercised its right to file a grievance on Crespo's behalf. Crespo also could have filed a grievance on his own behalf. Neither Crespo nor the union did so. There is no evidence that the County refused to accept a grievance from District 1199J or coerced Crespo in his decision not to file one (see finding 12). I conclude that the County did not violate subsection 5.4(a)(1) or (5).

District 1199J also alleged that the County violated subsection 5.4(a)(3). The union presented no evidence that the County's conduct was responsive to Crespo's protected activity. I therefore recommend dismissal of the Subsection 5.4(a)(3) allegations. In re Bridgewater, 95 N.J. 235 (1984).

I recommend that the Commission dismiss the Complaint.


Richard C. Gwin
Hearing Examiner

Date:

March 1, 1988
Trenton, New Jersey