P.E.R.C. NO. 2013-16

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS,

Respondent,

-and- Docket No. CO-2010-124

PBA LOCAL 105 and
STACY GRANT,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's recommendation finding that the State of New Jersey, Department of Corrections violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(a)(1) when it refused to allow a Senior Correction Officer the opportunity to speak with or be represented by a PBA representative prior to writing a report required by a superior officer. On the unique facts of this case, the Commission finds that the officer was entitled to a Weingarten representative during an investigatory interview.

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, Jeffrey S. Chiesa, Attorney General (Julie D. Barnes, Deputy Attorney General)

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

DECISION

On October 13, 2009, PBA Local 105 filed an unfair practice charge against the State of New Jersey, Department of Corrections. The charge alleges that the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1) and (3)[1/] when it refused to allow Senior Correction Officer

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. . . . [and](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."

Stacy Grant the opportunity to speak with or be represented by a PBA representative prior to writing a report required by a superior officer.

On August 12, 2010, a Complaint and Notice of Hearing was issued. On August 26, 2010 the State filed its Answer generally denying that its actions violated the Act. On April 5, 2011, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses, introduced exhibits, and argued orally. Post-hearing brief were simultaneously filed on June 10, 2011.

On December 2, 2011, the Hearing Examiner issued his report and recommended decision. H.E. No. 2012-5, 38 NJPER 312 (¶105 2012). The Hearing Examiner found that based upon the unique factual circumstances of this case, the State of New Jersey, Department of Corrections denied Officer Grant his Weingarten[2/] right in violation of 5.4a(1) of the Act. The Hearing Examiner recommended that the disciplinary action that was wrongfully imposed on Grant be rescinded and that the State post a notice of the violation.

On December 30, 2011, after an extension of time, the State filed exceptions to the Hearing Examiner's decision. It claims that the Hearing Examiner erred in finding that the Weingarten right to union representation during an investigatory interview

2/ NLRB v. Weingarten, 420 U.S. 251 (1975).

was triggered, and accordingly, no unfair practice occurred.

On January 20, 2012, the PBA filed a response requesting that we affirm the decision as the Hearing Examiner's findings of fact are undisputed and the decision is a clear and straightforward application of the law under Weingarten. The PBA did not except to the Hearing Examiner's dismissal of the a(3) allegation.

We have reviewed the record. After consideration of the State's exceptions and the PBA's responses, we find that the State violated the Act when it denied Grant's request for a union representative prior to filing a report. We also find that this case falls on its specific facts. We adopt and incorporate the Hearing Examiner's findings of fact and will summarize them below as they are central to our legal conclusion. (H.E. at 3-10).

On May 24, 2009, Grant worked as a general assignment officer at the Northern Regional Unit in Kearny, New Jersey. Grant relieved other officers for breaks, oversaw yard movements of inmates, and otherwise performed whatever assignment given to him by a supervisor. Upon Grant's arrival for the start of his shift on May 24, he noticed Lieutenant Michael Morris and Investigator Randy Valentin in the Central Control Unit reviewing video recordings made by security cameras on May 23. Morris was the lieutenant assigned to the Northern Regional Unit and supervised Grant. Grant knew that Valentin was an internal

affairs investigator. Grant observed Morris and Valentin reviewing the video recordings of the yard where inmates are allowed to spend time. Grant never inquired into the reason Morris and Valentin were reviewing the May 23 yard recordings.

Morris watched the video tapes with Valentin. Morris noticed two officers in the yard with the inmates between 11 and 11:15 a.m. on the tape. Except for unusual situations, it was improper for staff and inmates to be in the yard at the same time. Valentin never told Morris that he had any interest in the fact that staff and inmates were in the yard together. Valentin never disclosed to Morris the reason he was viewing the recordings. Morris noticed that Grant was one of the officers in the yard. After Valentin had finished reviewing the recordings, Morris contacted Grant and directed him to report to the supervisor's office where Morris was stationed.

Grant reported to the supervisor's office as directed. Morris was located at his desk and Valentin was seated at another desk, using the telephone. Valentin concluded his telephone conversation as Morris began to speak to Grant but never said anything during the time Grant was in the office. Morris asked Grant to write a report concerning his actions between 11:00 a.m. and 11:15 a.m. on May 23, 2009. Grant asked Morris if he was under investigation. Morris' only response was to again direct Grant to write a report. Grant told Morris that he felt as if he

were a target of an investigation and wanted to talk to his union representative. Grant believed that he was a target of an investigation because it was unusual to be asked to write a report for an incident occurring the prior day, and given the presence of an internal affairs investigator. Incident reports were customarily written on the same day as the occurrence of the "unusual incident".

Morris reiterated his directive to Grant to write a report several times. Morris told Grant that he was not entitled to a union representative. Morris believed that only those employees who were the targets of an investigation were entitled to union representatives and he did not perceive his directive requiring Grant to write a report as constituting an investigation.

Grant left the supervisor's office and went to the lobby in order to contact a union representative. Grant told Morris that he would write the report after speaking with a union representative. It took Grant between 15 and 20 minutes to write the report. Grant submitted the report to Morris approximately 55 minutes after Morris' initial directive to write a report.

Morris never learned of the reason why Internal Affairs Investigator Valentin wanted to look at the video recordings from May 23, 2009. But for the happenstance that Valentin asked to view the video recording of May 23, and Morris decided to watch it, Morris' directive to Grant to write a report was wholly

unrelated to Valentin's purposes and was solely based on what Morris observed as he watched the recording. Morris never disclosed to Grant the reason why he asked Grant to write the report. Morris knew that Grant could be in violation of certain rules and regulations which could subject Grant to disciplinary action. Morris knew at the time he asked Grant to write the report that custody staff were not supposed to be in the yard at the same time as the inmates, however, also knew that there were situations where officers could legitimately be in the yard with inmates.

Morris denied Grant's repeated requests for a union representative based on Morris' determination that Grant was not a target of an investigation at the time that he asked Grant to write the report and, consequently, in Morris' view, Grant's Weingarten rights had not attached. The Department of Corrections, Human resources Bulletin 84-27, sets forth the Department's policy on Weingarten rights. The policy, in relevant part, provides the following:

> 1. If the individual conducting the investigation knows, or has reason to believe that discipline may result from an interview with an employee, the employee must be advised. The employee must also be advised of the right to have union representation during such interviews. The employee may forego the guaranteed right and if preferred, participate in an interview unaccompanied by union representation. If the employee elects to participate without union representation the individual conducting the investigation

> must have the employee sign a "Weingarten Administrative Rights" waiver form. . . .
>
> 2. The employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action. This right does not apply to counseling or supervisor/employee conferences.
>
> 3. There is no right to have a union representative present during an interview when an employee is a "witness only." It should be noted, however, should the individual conducting the investigation become aware that the employee may be subject to disciplinary action as a result of the information provided, the interview must be stopped and the individual provided with an opportunity to obtain union representation.
>
> 4. Exercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify its refusal to allow union representation and despite refusal, the employer is free to carry on his investigation without interviewing the employee.
>
> 5. The employer has no duty to negotiate with any union representative who may be permitted to attend the investigatory interview. The union representative is present to assist the employee and may attempt to clarify the facts or make suggestions. The employer is free to insist on only hearing the employee's own account of the matter under investigation.

At no time did either Morris or Valentin ask Grant questions concerning what occurred between 11:00 and 11:15 a.m. on May 23, 2009.

On June 2, 2009, Lieutenant Beaver was assigned to investigate the events which occurred on May 24, involving Morris' order directing Grant to submit a report. During that investigation, Grant was advised that his Weingarten rights attached and was allowed to have a PBA representative. At the conclusion of Beaver's investigation, Grant was disciplined. On June 18, Grant was served with a Preliminary Notice of Disciplinary Action. The specifications on the notice pertained to Morris' multiple directives to Grant to write a report regarding the yard incident and Grant's delay in submitting the report until he first spoke with a PBA representative. The disciplinary penalty sought to be imposed was a 60-day suspension. Grant appealed the 60-day suspension and after a departmental hearing, the penalty was reduced to a 3 day suspension.

On July 6, 2009, Grant was given another Preliminary Notice of Disciplinary Action calling for a 180-day suspension. Apparently, as the result of the investigation into Grant's presence in the yard with residents as revealed in the May 23, video recording, it was alleged in the July 6 disciplinary notice that Grant did not secure a door which ultimately allowed a resident to gain access to an area to which the resident was not permitted. It was alleged that Grant failed to report the breach and intentionally made a false statement to investigators. The

discovery of the resident in a prohibited area arose out of a separate investigation that was conducted as a consequence of the initial viewing of the video recording but was unrelated to the delayed report submission. Thus, the July 6 disciplinary action arose from a subsequent, independent investigation which does not fall within the claim asserted in this charge that Grant's Weingarten rights were violated.

Weingarten Principles

The United States and New Jersey Supreme Courts agree that an employee has a right to request a union representative's assistance during an investigatory interview that an employee reasonably believes may lead to discipline. The Weingarten rule was adopted by us in East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398, 399 (¶10206 1979), aff'd in part, rev'd in part, NJPER Supp.2d 78 (¶61 App. Div. 1980), and approved by our Supreme Court in UMDNJ and CIR, 144 N.J. 511 (1996). The courts' decisions, however, also place conditions on the exercise of the Weingarten right. See e.g., State of New Jersey (Dept. of Treasury), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001); State of New Jersey (Dept. of Human Services), P.E.R.C. No. 2001-52, 27 NJPER 177 (¶32057 2001).

Under Weingarten, an employee may demand union representation at an investigatory interview given a reasonable belief that the interview could result in discipline. However,

the Weingarten right will not apply if the following conditions for its exercise are not met.

First, the employee who is to be interviewed must request representation. Absent a request, there will be no violation.

Second, the interview must be investigatory. For example, the Weingarten right does not attach to a meeting called solely to announce a disciplinary action or to such business-related conversations as giving instructions, training employees, or correcting techniques. A corollary to this second condition is that there must be a reasonable basis for a belief that the investigatory interview may result in discipline. The test for ascertaining whether a reasonable belief exists is an objective one, not a subjective one focusing on the employee's or employer's state of mind. See Lennox Industries, Inc. v. NLRB, 637 F.2d 340 (5th Cir. 1981) (Weingarten requires showing both that an interview was investigatory and that an employee could reasonably fear discipline as a result).

Third, the right to representation may not interfere with legitimate employer prerogatives. One such prerogative is to decide not to interview an 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.

Fourth, while the employer cannot compel a representative to remain silent during an interview, it does not have a duty to bargain with the representative. A representative may assist the employee and attempt to clarify the facts, but may not obstruct the employer's right to conduct that interview or turn it into an adversarial contest.

The Weingarten right and its conditions are essentially the same in the New Jersey public sector as in the private sector. However, the nature of an employer's governmental business may be relevant to answering such questions as whether an interview is an investigatory one or whether an employee had a reasonable belief that discipline might result from an interview. For example, in UMDNJ, our Supreme Court considered how the Weingarten rule applies to teaching hospital interns who are both employees and students. The Court held that the Weingarten right does apply to internal investigations of interns, but terminates once it becomes clear that the proceedings are based solely on academic and medical concerns. Id. at 537. The Court reasoned that allowing Weingarten representation when such concerns were at stake would unduly interfere with the university's interest in academic freedom.

In analyzing how Weingarten applies in this case, we must take into account the nature of the superior and subordinate

officer relationship in the para-military organization of the Department of Corrections.

The State argues that the Hearing Officer erred in finding that the elements for a Weingarten violation were present as an interview was not conducted and an investigation was not officially opened until two weeks later. It further contends that an objective person could not reasonable believe that discipline would flow from Morris' directive to Grant to write a report.

The Hearing Examiner found a Weingarten violation stating that the case rises and falls on the particular facts presented. He found that the fact that Morris ordered Grant to write a report regarding his whereabouts the day prior rather than engage in back-and-forth questions, did not change the character of their interaction into something other than an "interview" for purposes of Weingarten analysis. The Hearing Examiner noted that under normal circumstances, where an employee is called into a supervisor's office and directed to write a report, Weingarten rights are not likely to attach. Distinguishing this case from the normal course, the Hearing Examiner wrote:

> Grant reasonably believed that adverse consequences or discipline could occur as the result of what he might write in his report, and I have found here that the report is tantamount to an interview. When Grant arrived for work at the Northern Regional Unit on the morning of May 24, he saw his supervisor and an internal affairs

> investigator looking at a video recording. Not long after Grant saw Morris and Valentin watching the recordings, Grant is called by his supervisor and directed to report to his office. Upon Grant's arrival, Grant sees that the internal affairs investigator is present. Then Morris tells Grant to write a report detailing his actions during a specific period of time the prior day. Grant knew that incident reports are normally written soon after an incident occurs, usually on the same day. Consequently, even though the internal affairs investigator's presence was completely unrelated to Grant and his actions on May 23, I find that a reasonable person, given these unique circumstances, would objectively conclude that Grant had reason to believe that adverse consequences might occur as the result of the report. The fact that Morris never believed that his directive to Grant to write a report constituted and "investigation" is irrelevant. A supervisor's subjective perception is not one of the Weingarten elements. Morris never offered Grant the option not to write a report (i.e., discontinue the interview) nor did Grant agree to write a report anyway, knowing that he had no union representative. For these reasons, I find that in this case, when Morris ordered Grant to write a report pertaining to Grant's actions on May 23, Grant's Weingarten rights attached at that point and he was entitled to the benefit of a union representative. I find that Grant's Weingarten rights were violated.
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> [H.E. at 16-17].

We reject the State's exceptions and adopt the Hearing Examiner's report and recommended decision. While we do not believe a Weingarten representative is statutorily required when a superior officer requests that a subordinate officer write a report, we find that the rule is not absolute. The Hearing

Examiner properly concluded on these particular facts and the record supports that a Weingarten violation occurred.

ORDER

The State of New Jersey Department of Corrections is **ORDERED** to:

A. Cease and desist from interfering with, restraining or coercing Senior Correction Officer Stacy Grant in his exercise of the rights guaranteed to him by the Act, particularly by denying him his Weingarten rights in violation of N.J.S.A. 34:13A-5.4a(1).

B. Take this action:

1. Rescind the disciplinary action which was wrongfully imposed upon Grant, reflected in the June 18, 2009 Preliminary Notice of Disciplinary Action, for failing to immediately write a report as directed by his supervisor.

2. Rescind the pending 3-day suspension issued in accordance with the disciplinary action taken against Grant as reflected in the Preliminary Notice of Disciplinary Action dated June 18, 2009.

3. Post in all places where notices to employees are customarily posted copies of the attached notice marked as Appendix "A." Copies of such on forms to be provided by the Commission, will be posted immediately upon receipt thereof and after being signed by the Respondent's authorized representative,

will be maintained by it for at lest sixty (60) consecutive days. Reasonable steps will be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials; and,

4. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this Order.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson, Jones and Voos voted in favor of this decision. None opposed. Commissioner Wall recused himself. Commissioner Bonanni was not present.

ISSUED: September 27, 2012

Trenton, New Jersey

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing Senior Correction Officer Stacy Grant in his exercise of the rights guaranteed to him by the Act, particularly by denying him his Weingarten rights in violation of N.J.S.A. 34:13A-5.4a(1).

WE WILL rescind the disciplinary action which was wrongfully imposed upon Grant, reflected in the June 18, 2009 Preliminary Notice of Disciplinary Action, for failing to immediately write a report as directed by his supervisor.

WE WILL rescind the pending 3-day suspension issued in accordance with the disciplinary action taken against Grant as reflected in the Preliminary Notice of Disciplinary Action dated June 18, 2009.

Docket No. CO-2010-124 STATE OF NEW JERSEY (CORRECTIONS)
(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"