P.E.R.C. NO. 2002-8

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF STATE POLICE,

Respondent,

-and-

Docket No. CO-H-98-401

STATE TROOPERS FRATERNAL ASSOCIATION,

Charging Party.

STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF STATE POLICE,

Respondent,

-and-

Docket No. CO-H-98-413

STATE TROOPERS NCO ASSOCIATION,

Charging Party.

STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF STATE POLICE,

Respondent,

-and-

Docket No. CO-H-99-109

STATE TROOPERS FRATERNAL ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the State of New Jersey, Department of Law and Public Safety, Division

of State Police, violated the New Jersey Employer-Employee Relations Act, when if refused to provide a union representative, upon request, to employees who could have reasonably believed that they might be subject to discipline as a result of interviews conducted as part of an EEO investigation covering periods when they had supervisory responsibilities.

The Commission separately finds that the employer did not violate the Act when it denied a representative to an employee who was interviewed as part of a licensing investigation of alleged citizen misconduct, and not as part of an investigatory interview of alleged employee misconduct. The Complaints were based on unfair practice charges filed by the State Troopers Fraternal Association and the State Troopers NCO Association.

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 (Sally Ann Fields, Senior Deputy Attorney General, of counsel)

For the Charging Parties, Loccke & Correia, P.A., attorneys (Charles J. Sciarra, of counsel)

DECISION

On May 11 and 15, 1998, the State Troopers Fraternal Association and the State Troopers NCO Association filed unfair practice charges (CO-98-401 and CO-98-413, respectively) against the State of New Jersey, Department of Law and Public Safety, Division of State Police. The charges allege that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and (5)[1/] and N.J.S.A. 34:13A-21,[2/] by refusing to allow Trooper Joseph Farro and Sergeant Steven Brook to have a union representative with them during interviews they reasonably believed could lead to discipline. The charges also allege that, during interest arbitration, the employer engaged in union discrimination and repudiated established terms and conditions of employment. The

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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; [and] (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ This provision states: "During the pendency of proceedings before the [interest] arbitrator, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other...."

unions sought an order prohibiting the employer from changing an alleged practice of permitting union representation for unit members who reasonably believe they may be subject to discipline.

On June 9, 1998, the STFA and NCO filed amended charges containing essentially the same allegations set forth in the original charges.

On October 15, 1998, a consolidated Complaint and Notice of Hearing issued.

On November 5, 1998, the employer filed an Answer. It admitted that Farro and Brook requested union representation and that the requests were denied. It asserted that it had a legitimate justification for each denial and that it did not change terms and conditions of employment.

On October 16, 1998, the STFA filed another unfair practice charge (CO-99-109). That charge alleges that the employer violated the Act by denying union representation to Detective Robert Walker during an interview that he reasonably believed could lead to discipline. The STFA sought the same remedy, but also sought to suppress any information obtained in the meeting from being considered in any disciplinary action.

On January 5, 1999, a Complaint and Notice of Hearing on the new charge issued. On April 11, the employer filed an Answer admitting that Walker's representative asked to be present at the meeting and that the request was denied. The employer denied violating the Act and raised affirmative defenses similar to those in the other cases.

On April 12 1999, Hearing Examiner Arnold H. Zudick consolidated the two Complaints and began the hearing. Four other days of hearing ensued, ending on June 18, 1999. The parties examined witnesses and introduced exhibits, and the Hearing Examiner denied motions for dismissal and summary judgment. The parties also filed post-hearing briefs.

On April 27, 2000, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 2000-9, 26 NJPER 330 (¶31135 2000). He reviewed the principle entitling an employee to union representation during an investigatory interview that the employee reasonably believes may result in discipline. That principle was established in the private sector in NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), and is known as the Weingarten rule. 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).

Applying Weingarten, the Hearing Examiner found that Farro and Brook requested union representation during investigatory interviews, but concluded that they did not have reasonable grounds to believe that their interviews could result in discipline. Both were concerned that they had been summoned to an interview that was part of an internal investigation by the employer's Equal Employment Opportunity/Affirmative Action Bureau (EEO/AA), but neither thought he had done anything wrong. Finding

no reasonable belief that the interviews might lead to discipline, the Hearing Examiner recommended dismissing those allegations.

The Hearing Examiner also recommended dismissing the allegations concerning Walker. Walker was interviewed as part of a licensing investigation concerning possible citizen misconduct. The Hearing Examiner concluded that this meeting was not an investigatory interview as contemplated by Weingarten because Walker's superior officers were simply seeking the name of a source from him rather than investigating his own behavior.

The Hearing Examiner also found that there was no practice of allowing union representation whenever a trooper stated a belief that he or she might be subject to discipline. Nor was there a policy or practice of telling a witness, as opposed to a principal, the nature of a complaint or the name of a complainant.

Finally, the Hearing Examiner found no evidence of a contractual repudiation and stated that any alleged contractual violation could be contested through the grievance procedure.

On July 24, 2000, the charging parties filed exceptions. They argue that the Hearing Examiner erred in: finding that the employer did not have a practice of telling a witness the name of the complainant and the nature of the complaint; placing too high a burden on the employee regarding a reasonable belief that he or she might be subject to discipline; finding that the Walker meeting was not an investigatory interview under Weingarten;

crediting the employer's witnesses over the charging parties' witnesses; and dismissing the remaining aspects of the Complaint. The charging parties also requested oral argument.

On September 27, 2000, the employer filed its answering brief. It asks that the exceptions be disregarded because they do not specify each challenged question of procedure, fact, law or policy. See N.J.A.C. 19:14-7.3(b). It further argues that since the employer identified the complainant to Farro and Brook, it is irrelevant whether there was a practice of telling witnesses the identity of the complainant. Concerning its denial of Weingarten representation to Farro, Brook, and Walker, it asks us to accept the Hearing Examiner's findings and credibility determinations.

On April 26, 2001, we heard oral argument. At our request, the parties also submitted statements of position regarding an Appellate Division decision issued two days earlier. In re Carroll, 339 N.J. Super. 429 (App. Div. 2001).

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. at 6-49), with the minor modifications discussed in the next two paragraphs. We specifically reject the charging parties' contentions that the Hearing Examiner's findings were not objective and that his credibility determinations should not be accepted. The Hearing Examiner saw and heard the witnesses and was in a better position than we are to determine whether one witness was more credible than another. Clowes v. Terminix Intern., Inc., 109 N.J. 575, 587-588 (1988).

We modify finding 3 to the extent it analyzes Lieutenant McCabe's testimony about the meaning of the contract and the SOP provisions requiring the employer to identify the name of the complainant before any questioning. These documents apply to internal investigations of suspected employee misconduct, like the investigation of the EEO complaint that led to Farro and Brook being interviewed and unlike the external investigation that led to Walker being interviewed. Farro and Brook were told the name of the complainant and the nature of the complaint before they were interviewed so we need not decide whether the employer was contractually required to disclose that information in all witness interviews.

We supplement finding 11. Farro explained why he was concerned about an interview that would cover his entire career:

> A.[In] twelve years I have been in a lot of capacities including an acting squad leader, or assistant squad leader.
>
> Someone came forward and said I witnessed something; I have to be concerned about it because if you witness something and don't do something about it then there is a problem, then there can be disciplinary action, so sure I was concerned about it. [3T114]

We supplement finding 15. The Hearing Examiner credited testimony of Walter Butz, Chief of the Intelligence Bureau, concerning a conversation he had with David Jones, STFA representative, in which Jones assured Butz that Walker would disclose the name of his source and Butz assured Jones and Walker

that Walker would not be investigated or disciplined for refusing to disclose the source earlier. We quote two portions of Butz's testimony. The first portion is this:

> A. [Jones] said, "he is going to give you the source of the information."
>
> I said, "that's all we are looking for who the source is."
>
> And I believe at that point he says, "as long as there is not going to be an internal investigation he is going to tell you the source."
>
> I said, "Dave, there has never been an internal investigation, what we are looking for is who the source is."
>
> He said, "okay, in that case he is going to tell you." [3T26-3T27]

The second portion is this:

> Q What did David Jones say to you with respect to an internal investigation pre-meeting?
>
> A That...he will tell you who the source is as long as there won't be an internal investigation.
>
> Q What did you say in response?
>
> A I said, "Dave, all we have been doing is trying to find out who the source is", inferring there isn't going to be an internal investigation.
>
> Q Did you make any promises about an internal investigation?
>
> A I never used the word "promise." I just said "that's all we have been trying to find out who the source is. We are not looking to institute an internal investigation." [5T39]

Based on this testimony and other credited testimony (4T132-4T134), we find that the sole purpose of the meeting with Butz was to find out Walker's source so that the licensing investigation could continue and that Butz assured Walker that he would not be disciplined for not having disclosed that source earlier.

We reject the respondent's request that we disregard the charging parties' exceptions. They are specific enough to allow us to analyze the issues raised. We turn now to a discussion of the Weingarten principles and how they apply to the principal/witness distinction drawn by the employer, the internal race-discrimination investigation involving Brook and Farro, and the external licensing investigation involving Walker.

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. NLRB v. Weingarten; UMDNJ and CIR. The courts' decisions, however, also place conditions on the exercise of the Weingarten right. In two recent decisions, we traced both the contours of the Weingarten right and the conditions placed on the exercise of that right. 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). We will summarize that discussion and refer the reader to those cases for elaboration and citations.

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 focussing 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 State Police operations and be alert to any special needs employees may have for Weingarten representation and any special interests the employer may have in

conducting its governmental operations. In State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993), our Supreme Court viewed the State Police as a unique, quasi-military institution, distinguishable from all other local police forces and state agencies by virtue of a statutory scheme designed "to give the Superintendent [of the State Police] a great deal of flexibility and reasonably unrestricted control in his preliminary evaluation of the members of the State Police force." Id. at 415, quoting from Dunbar v. Kelly, 114 N.J. Super. 450, 453 (App. Div. 1971), certif. den. 59 N.J. 528 (1971). Further, in holding that the discipline amendment did not apply to troopers, the Court observed that their discipline "implicates not only the proper conduct of those engaged in the most significant aspects of law enforcement, involving the public safety and the apprehension of dangerous criminals, but also the overall effectiveness, performance standards and morale of the State Police." Id. at 416-417.

We now apply the Weingarten principles to the principal/witness distinction, the Farro and Brook interviews, and the Walker interview.

The Principal/Witness Distinction

The parties' contracts and the employer's standard operating procedures address internal investigations of officers suspected of violating a rule or regulation or accused of other wrongdoing. The contracts and procedures recognize that an officer may be interviewed in one of two capacities: as a

principal or a witness. The principal is the officer who is the target of the investigation. A witness is an officer who is being questioned about a complaint or incident involving another employee's suspected wrongdoing. The contracts and SOP make clear that a principal is entitled to a Weingarten representative. A question presented in this case is when, if ever, a witness is entitled to a Weingarten representative.

The charging parties assert that officers interviewed as witnesses during an internal affairs or EEO investigation have contractual rights to be told the identity of the complainant and the nature of the complaint and to request and have a Weingarten representative. We need not resolve these contractual questions since Brook and Farro were told the name of the complainant and the nature of the complaint before the questioning started. Thus, no factual dispute requires us to decide whether the identity of a complainant or the nature of the complaint must be disclosed. Further, the contractual issues raised are not so easy to resolve as to warrant finding a bad faith repudiation rather than a mere breach of contract issue. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

While we do not believe that a Weingarten representative is statutorily required in every witness interview, we also reject the employer's point of view that a Weingarten representative is never required in any witness interview. The Hearing Examiner properly concluded that the right of a witness to a Weingarten

representative must be decided on the facts of each case. That is clearly the approach in the federal sector and should be the approach in the New Jersey public sector as well. See AFGE, Local 2544 v. FLRA, 779 F.2d 719 (D.C. Cir. 1985); IRS v. FLRA, 671 F.2d 560 (D.C. Cir. 1982); cf. In re Carroll (even though granted use immunity in connection with criminal investigation, sheriff's officer should have been allowed to consult with attorney and union representative about internal investigation interview). We thus turn to the facts of the Brook and Farro interviews to see whether union representation was warranted in their situations.

Brook and Farro

Brook and Farro were interviewed as witnesses during an internal investigation of a complaint of racial discrimination by an unnamed trooper or troopers against officer Wendell Davis. It is undisputed that their interviews were investigatory under Weingarten. The Hearing Examiner found that they met all requirements for having a Weingarten representative at these investigatory interviews except one -- they did not have a reasonable belief that discipline might result from these interviews. Under all the circumstances, we hold that the reasonable belief standard has been met.

We deem it very significant that Farro and Brook were interviewed as part of an internal investigation of a complaint of racial discrimination. The public has a compelling interest in a workplace free of racial and sexual discrimination. Garfinkel v.

Morristown Obstetrics & Gynecological Ass'n., ___ N.J. ___ (2001); New Jersey Turnpike Auth. v. New Jersey Turnpike Supervisors Ass'n, 143 N.J. 185 (1996). Management must provide such a workplace and ensure that its supervisors are committed to that goal. As stated in Taylor v. Metzger, 152 N.J. 490, 503-504 (1998):

> A supervisor has a unique role in shaping the work environment. Part of a supervisor's responsibilities is the duty to prevent, avoid, and rectify invidious harassment in the workplace.... An employer has a clear duty not only to take strong and aggressive measures to prevent invidious harassment, but also to correct and remediate promptly such conduct when it occurs.

Management will be liable if its supervisors tolerate racial discrimination and are not disciplined for letting it occur. See Payton v. New Jersey Turnpike Auth., 148 N.J. 524 (1997); Lehman v. Toys 'R' Us Inc., 132 N.J. 587 (1993). And a supervisor is liable to discipline if he or she witnessed an incident of racial discrimination and did not correct or report it. Compare INS v. FLRA, 671 F.2d 560 (D.C. Cir 1982) (witness entitled to Weingarten representative in interview concerning alleged misconduct of patrol agents since witness could be disciplined if he failed to report misconduct).

Farro had been an acting squad leader. He was told that the investigation would cover "the last 12 years" -- that is, going back to 1986. According to Farro, "a lot of flags went up" given the wide-open scope of the investigation. He was worried

because if someone came forward and said he had witnessed a racial incident, he could be disciplined for not doing something about it. Brook was a superior officer; he too was worried about the scope of the investigation since he was given no information about what events or time period it would cover. Brook and Farro were told only the name of the complainant and even that information was not disclosed until immediately before their interviews. While their interrogator may have known that the investigation would center on a specific incident, no limiting information was passed on to Farro and Brook to dissipate their understandable worries about such free-ranging interviews. From an objective point of view, an officer in their shoes had reason to believe that the interviews could potentially lead to discipline given their supervisory duties. The line between being a "principal" and being a "witness" is thin indeed when a supervisor is interviewed as a "witness" about an unreported incident of racial discrimination.

It is true that Farro and Brook did not believe that they had done anything wrong and did not tell their interviewer that they thought they could be disciplined. However, the Weingarten right is not limited to wrongdoers or conditioned upon an admission of possible guilt and a union representative's assistance may be especially helpful to an innocent employee seeking to present his or her side of a story or to clarify any confusion. Indeed, Weingarten itself involved an employee who was

innocent of the charge being investigated. Conditioning the right to representation upon the employee's belief in his or her guilt would make a request itself an admission of wrongdoing rather than simply the invocation of a procedural right to assistance. That's too steep a price to pay for exercising the right. Instead, the relevant inquiry is whether an employee in the position of Farro and Brook had a reasonable basis, from an objective perspective, for fearing the possibility of being disciplined -- rightly or wrongly -- as a result of the interview. Under all the circumstances presented, the answer is yes. Dover Municipal Utilities Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984).

At oral argument, the respondent asserted that allowing Weingarten representation for Farro and Brook would result in the untenable conclusion that all witnesses in every investigation would have a right to union representation (T40). That is not so. Our holdings concerning Farro and Brook, on the one hand, and Walker, on the other, are grounded in an application of traditional Weingarten principles to the specific facts and credibility determinations presented in each context.

In sum, the charging parties have proven that all the Weingarten standards have been met with respect to the Farro and Brook interviews, including the requirement that there be a reasonable basis for believing that an interview may result in discipline. The facts persuade us, given the supervisory roles of Farro and Brook and the open-ended scope of the investigation,

that such a reasonable basis existed. We therefore hold that the employer violated the Weingarten rule when it did not grant the requests of Farro and Brook for union representation at their internal EEO interviews.

Walker

The Farro and Brook interviews present the "classic Weingarten problem" (T32) since they were part of an internal investigation centered on alleged employee misconduct. Both parties accepted that the interviews were investigatory under Weingarten. Although they disagreed about whether a reasonable fear of discipline existed. With respect to the Walker interview, by contrast, the parties vigorously dispute whether the interview was an investigatory one under Weingarten.

Unlike Farro and Brook, Walker was not interviewed as part of an internal investigation of alleged employee misconduct. Instead, he was interviewed as part of a licensing investigation of alleged citizen misconduct, specifically an investigation by the Casino Intelligence Unit of a rumor that a corporate executive had been seen with the daughter of a organized crime figure at the Foxwood Casino. If verified, the sighting could have hurt the corporation's ability to obtain a casino license.

The normal business of the State Police generally, and the Casino Intelligence Unit specifically, is to conduct such investigations. Considering all the facts of this case, the Hearing Examiner concluded that the interview was part of and

limited to the employer's normal investigative business rather than an investigation of suspected employee misconduct. Given the Hearing Examiner's findings of fact and especially given his credibility determinations, we agree. We summarize the facts before explaining our reasoning.

During his investigation of the rumor, Lieutenant David Grusemeyer learned that Walker, a subordinate, had information about the rumor. Grusemeyer questioned Walker and Walker told him that a friend of his who worked on the Foxwood Casino floor had told him about the sighting. Grusemeyer asked Walker to name his source, but Walker refused. He did not believe Grusemeyer was ordering him to tell so he did not.

Grusemeyer reported this conversation to his supervisors and was instructed to interview Walker again. Grusemeyer again told Walker he had to disclose his friend's name and Walker again refused.

Grusemeyer reported back to his superiors, including Butz, the Chief of the Intelligence Bureau. It was decided that Butz and Grusemeyer would meet with Walker and Butz would order Walker to reveal the name of his source.

When Walker learned about the meeting, he called Butz and asked him what the meeting was about and whether he was being accused of leaking information. Butz responded that he was just trying to find out Walker's source. Walker then said he was worried that if he disclosed that name, his friend might lose his job.

Walker then contacted the STFA which assigned Detective David Jones to represent him. Jones told Walker he had an obligation to reveal his source to the officers in his chain of command -- Grusemeyer and Butz. Butz also contacted the Internal Affairs Bureau and confirmed that he would be on firm ground if he ordered Walker to disclose his source.

Jones accompanied Walker to his meeting with Butz and told Butz that he was there at Walker's request to be his Weingarten representative. Butz explained that the meeting was part of an criminal investigation, not an internal affairs investigation; that he was seeking to discover Walker's source only; and that Walker was not entitled to representation. Butz said he contacted headquarters and his superiors confirmed that union representation was not warranted. Jones agreed that Walker was obligated to reveal his source and assured Butz that he would do so, but Jones still wanted to be there to hear the questions and answers.

When Jones continued to argue, Butz offered to arrange a telephone conference with Jones and Leon Brozowski of Internal Affairs so Brozowski could tell Jones why he could not attend the interview. Jones declined this offer, saying it was not necessary because Walker would tell the name of the source as long as there was no internal investigation. Butz assured Jones that he simply wanted the name of Walker's source so that the licensing investigation could be pursued and that Walker would not be

investigated or disciplined because he had not disclosed his source earlier. Jones left.

Since the meeting was not part of an internal affairs investigation, Walker was not asked to sign a principal or witness form. Before Butz could issue an order or even ask a question, Walker named his source -- a retired State Police Captain who works for another casino -- and explained why he had made up a story about a friend working for the Foxwood Casino.

Surprised by Walker's statement, Butz immediately stopped the meeting. He then told Walker to get Jones back in the room since his having lied about his source before could lead to an internal investigation. Jones came back in.

The question is whether the employer violated the Act when it denied Walker a union representative when the meeting with Butz began. Under all the circumstances, our answer is no.

The employer emphasizes that the State Police was conducting a licensing investigation as part of its normal operations. To further that external investigation, it had an undisputed right to order Walker to disclose his source. It had a further right to have that order issued by the Chief of the Intelligence Bureau. We agree with these observations and add that they sharply distinguish the Walker situation from the classic Weingarten situation such as that presented by the Farro and Brook interviews. Nevertheless, consistent with our earlier analysis of the principal/witness distinction, we reject any per

se rule that would deny Weingarten representation during every interview conducted as part of an externally-focused investigation. Instead, we will consider all the facts in each case to see if, from an objective perspective, the interview involves an investigation of employee misconduct.

We begin with what was alleged, but not proven in this case. Before the Hearing Examiner, the charging parties tried to prove certain allegations which would have made this case very different if they had been accepted. For example, Walker testified that at his first meeting with Grusemeyer, Grusemeyer told him that someone would either lose his job or go to jail and that this threat led him to seek union representation. Walker also testified that he told Butz that "I know something is going to be coming down the road." Had these been the facts proven, we most likely would have held that Walker was entitled to representation. But the Hearing Examiner found, and we have no basis for disagreeing, that the charging party did not carry its burden of proving these assertions. We therefore must disregard this testimony.

We also note that at oral argument the charging parties relied on certain other testimony which could have been relevant to determining whether this interview was an investigatory one under Weingarten despite being part of an external investigation. For example, it was asserted that Walker told Grusemeyer "time and time again, I have a disciplinary problem here" and that Walker directed Grusemeyer's attention to a problem with "perks or

something with regard to comps or something like that going on in AC." It was also asserted that Walker told his superior officers that disclosing his source was "going to create problems for him" (T24-T25). However, the Hearing Examiner made credibility determinations and did not accept that testimony. We therefore disregard it also.

The salient facts of this case, as found by the Hearing Examiner and supported by the record, are these. Butz had no intention of disciplining Walker for not having disclosed his source earlier and gave an assurance that Walker would not be disciplined for that reason -- Butz's sole purpose was to obtain Walker's source so the investigation could proceed. Compare East Brunswick (sole purpose of interview was to arrange schedule for recouping overpayments, not to investigate why employee cashed checks); contrast Lennox (interview focussed on past work deficiencies and altercation with supervisor). Butz was assured that Walker would disclose his source. Neither Walker nor Jones gave him any pre-interview basis for believing that, once the source was disclosed, any complications might arise that could lead to discipline. At the moment the meeting began, there was no objective basis for characterizing the meeting as an investigatory interview rather than a licensing investigation. The moment it became clear that the meeting had potential disciplinary ramifications, Butz stopped it until Walker could call his Weingarten representative back into the room. We believe that

Butz acted properly both in initially denying Weingarten representation and in subsequently granting it.

We note two particular aspects of the Walker situation. First, having a Weingarten representative present at the beginning of the interview would not have changed the fact that Butz had a right to order Walker to disclose his source and Walker had a duty to obey. A union representative could not have counselled Walker to refuse to disclose the information or prevented him from getting into trouble once he did so. Second, the employer did not have the normal prerogative recognized by Weingarten of choosing not to have the interview if it did not want to allow union representation, but still wanted to secure the information sought. The only way to have Walker disclose Walker's source was to meet with Walker.

We also note that Butz's asking the Internal Affairs Unit to confirm his right to order Walker to disclose his source does not suggest that the interview was focussed on Walker's past conduct -- instead, it underlines Butz's consistent and clear intent to secure the information needed to investigate the casino/organized crime rumor. Finally, that a labor relations officer called Butz is irrelevant since it was the STFA that sought that unit's involvement. Indeed, Butz assured the officer that there was no internal affairs investigation going on and that he was simply pursuing the licensing investigation.

At oral argument, the charging parties asked us to focus our analysis on the result of the Walker interview -- that he was "disciplined" -- and to rule that representation must be provided at the outset of an interview whenever the interview itself ends in an employee being subject to discipline. The record does not make clear whether or how Walker was disciplined. Even if we assume he was, that fact alone would not necessarily establish that the employer violated the Act by denying him union representative during his interview. It would still need to be shown that an objective basis for Weingarten representation existed at the time the interview began. As we have said, we do not believe, given the facts, that such an objective basis existed. Only Walker knew that he might be in trouble once he disclosed his source; he had not shared that concern with either his superior officers or his union representative. If we were to find a right to union representation based on Walker's subjective and secret knowledge, we would effectively require an employer conducting externally-focused investigations to grant union representation whenever requested or risk unfair practice liability based on a later disclosure of unknown information.

In sum, the parties dispute whether the interview was an investigatory one under Weingarten. Given the Hearing Examiner's credibility determinations, the facts do not persuade us that the meeting with Walker met that standard. We therefore hold that the

employer did not violate the Weingarten rule when it did not grant Walker's request for union representation at his meeting with Butz.

Finally, in the absence of specific charging party exceptions, we dismiss the remaining allegations in the Complaints. To remedy the violation we have found, we issue the following order.

ORDER

The State of New Jersey, Department of Law and Public Safety, Division of State Police is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to provide a union representative, upon request, to employees who could reasonably believe that they might be subject to discipline as a result of interviews conducted as part of an EEO investigation covering periods when they had supervisory responsibilities.

Take this action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

The remaining allegations in the Complaints are dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: July 26, 2001
Trenton, New Jersey
ISSUED: July 27, 2001

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 employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to provide a union representative, upon request, to employees who could reasonably believe that they might be subject to discipline as a result of interviews conducted as part of an EEO investigation covering periods when they had supervisory responsibilities.

CO-H-98-401
CO-H-98-413
Docket No.

STATE OF NEW JERSEY
DEPT. OF LAW & PUBLIC SAFETY
DIVISION OF STATE POLICE
(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"

d:\percdocs\notice 10/93

H.E. NO. 2000-9

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

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF STATE POLICE,
Respondent,
-and-
Docket No. CO-H-98-401

STATE TROOPERS FRATERNAL ASSOCIATION,

Charging Party.

STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF STATE POLICE,
Respondent,
-and-
Docket No. CO-H-98-413

STATE TROOPERS NCO ASSOCIATION,

Charging Party.

STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF STATE POLICE,
Respondent,
-and-
Docket No. CO-H-99-109

STATE TROOPERS FRATERNAL ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the State of New Jersey did not violate the New Jersey Employer-Employee Relations Act by refusing to allow certain troopers to be accompanied by a union representative at certain meetings because one or more of the Weingarten standards was not met in each case. The Hearing Examiner also concluded that the State did not more generally violate the Act by the way it administers its procedures to allow for union representation.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2000-9

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

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF STATE POLICE,

Respondent,

-and-

Docket No. CO-H-98-401

STATE TROOPERS FRATERNAL ASSOCIATION,

Charging Party.

STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF STATE POLICE,

Respondent,

-and-

Docket No. CO-H-98-413

STATE TROOPERS NCO ASSOCIATION,

Charging Party.

STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF STATE POLICE,

Respondent,

-and-

Docket No. CO-H-99-109

STATE TROOPERS FRATERNAL ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, John J. Farmer, Jr., Attorney General (Sally Ann Fields, Senior Deputy Attorney General)

For the Charging Parties, Loccke & Correia, P.A., attorneys (Charles J. Sciarra, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

Unfair practice charges were filed with the Public Employment Relations Commission alleging that the State of New

Jersey, Department of Law and Public Safety, Division of State Police (State) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3), (5) and 34:13A-21[1/] primarily by refusing to allow specific state police officers to have a union representative with them during certain meetings.

Nearly identical charges were filed against the State by the State Troopers Fraternal Association (STFA) on May 11, 1998 (CO-98-401) (C-1A--C-1C), and by the State Troopers NCO Association (NCO) on May 15, 1998 (CO-98-413) (C-1D--C-1E). The unions allege that the State engaged in union discrimination and repudiated established terms and conditions of employment by

---

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. (21) During the pendency of proceedings before the arbitrator, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other, any change in or of the public employer or employee representative notwithstanding; but a party may so consent without prejudice to his rights or position under this supplementary act."

refusing to allow respective union representatives to attend separate investigatory interviews of Trooper Joseph Farro and Sergeant Steven Brook on February 25, 1998 arising from an EEO (Equal Employment Opportunity) complaint filed by another trooper alleging harassment by members of the state police.

The unfair practice charges also more specifically allege that the parties were engaged in interest arbitration contemporaneous with the events leading to the charges; that Sergeant Brook and Trooper Farro had requested a union representative to accompany them in their interviews; that a practice existed between the parties in which a trooper who believed he/she might be subject to discipline was provided the opportunity to have a union representative; that both Brook and Farro had a reasonable belief they could be subject to discipline; and, that the State's conduct discriminated against the union and repudiated established terms and conditions of employment.

The Unions seek an order prohibiting the State from changing the alleged practice of permitting union representation for members who reasonably believe they may be subject to discipline and, requiring the State to cease and desist from unilaterally changing a term and condition of employment.

On June 9, 1998, the STFA and NCO jointly filed an amendment (C-2) to their respective charges. The amendment contained the same allegations set forth in the original charges and requested the same relief.

A Consolidated Complaint and Notice of Hearing was issued in these matters on October 15, 1998 (C-1).

The State filed an Answer to the consolidated complaint on November 5, 1998 (C-3). It admitted that the collective agreements between the State and the unions expired on June 30, 1996; that it was in interest arbitration with the STFA; that both Farro and Brook had requested union representation for the interviews on February 25, 1998 but that those requests were denied; that a "principal" in an internal investigation is entitled to union representation; and that procedural guidelines for internal investigations are set forth in the Standing Operating Procedure. The State denied violating the Act or changing terms and conditions of employment. The State asserted affirmative defenses including that it had legitimate governmental and business justification for its actions; and, that it did not change terms and conditions of employment.

On October 16, 1998, the STFA filed another unfair practice charge against the State (CO-99-109) (C-4A--C-4C), alleging that the State violated the Act by denying union representation to detective Robert Walker at a meeting he was expected to attend with his superiors. The STFA repeated many of the allegations raised in the original charges, and also alleged that the meeting with Walker was an interview regarding allegations of misuse of confidential information by members of the State Police; that Walker requested union representation

because he had a reasonable belief he might be subject to discipline, and that the request was denied at least in part because he was told that he was only being interviewed as a "witness"; that Walker's superiors said that if he gave them the information they sought there would be no problem, but after providing the information he was notified that disciplinary charges would be filed against him; that in the past when a trooper stated that he believed he might be subject to disciplinary action he was provided the opportunity for union representation; and, that the State's conduct discriminated against the union and repudiated established terms and conditions of employment.

The STFA seeks much the same remedy here as it did in the previous charges, but also sought to suppress any information obtained in the meeting from being considered in any action against detective Walker.

A Complaint and Notice of Hearing was issued regarding CO-99-109 on January 5, 1999 (C-4). The State filed an Answer to that complaint on April 11, 1999 (C-5). The State repeated certain admissions contained in C-3, and also admitted that Walker's union representative requested to be present at the meeting but that the request was denied. The State denied violating the Act, and specifically denied changing any terms and conditions of employment. The State raised the same affirmative defenses here as it did in C-3.

The complaint in CO-99-109 was scheduled for hearing with the consolidated complaint in CO-98-401 and CO-98-413. Hearings were held on April 12, 14, 19 and June 16 and 18, 1999.2/ At hearing on April 12, I consolidated CO-99-109 with the other two matters (1T10-1T15).

At the conclusion of the Charging Parties' case on April 19, 1999, the State moved to dismiss. That motion was denied (3T253-3T265). On June 7, 1999, the State filed a formal "motion for summary judgment" seeking dismissal of the complaints. The unions opposed the motion. I treated that motion as a motion to dismiss, which was denied by letter of June 11, 1999.

Both parties filed post-hearing briefs by October 1, 1999. The State filed a reply-brief on October 22, 1999.

Based upon the entire record, I make the following:

FINDINGS OF FACT

Background: "Principal/Witness" Distinction and Practice

1. The State was a party to separate collective agreements with the NCO (J-1) and the STFA (J-2), which were effective from July 1, 1993 - June 30, 1996. Both unions were in interest arbitration in 1998 (1T26). The collective agreements contain similar internal investigation procedure clauses (J-1, Art. 17; J-2, Art. 13).

2/ The transcripts will be referred to as 1T, 2T, 3T, 4T and 5T, respectively.

Both articles were established to provide procedures to be followed when an officer is questioned in connection with a State Police investigation (Article 17 Section A.; Article 13, Section A). Section C of Articles 17 and 13, respectively, provide that before an employee is ordered to respond to a complaint, he shall be advised of the specific nature of the complaint, and the time period it covers. The pertinent part of the "Mechanics" section of each article (Article 17, Section E; Article 13, Section C) requires that certain information be provided to the officer prior to any questioning.

J-1, Article 17, Section E3 provides:

> Before any questioning takes place, the employee shall be advised of the subject of investigation in writing and be apprised of the following:
>
> a. Identity of the officer in charge of the investigation and the identity of the officer conducting the interrogation, including ranks, names and assignments. Also, the identity of all persons present during interrogation.
>
> b. Any allegation and/or any violation of rules, regulations and orders involved.
>
> c. If applicable, name(s) of the complainant and/or witness, in writing. The addresses of the complainants and/or witnesses need not be disclosed.
>
> d. Whether the employee is involved in the investigation as a principal or as a witness at that time.

J-2, Article 13, Section C6 provides:

> Before any questioning takes place, the Trooper shall be apprised of the following:

a. Identity of the officer in charge of the investigation and the identity of the officer conducting the questioning, including ranks, names and assignments. Also, the identity of all persons present during questioning.

b. Nature of the investigation, including any allegation and/or any violation of rules, regulations and orders involved.

c. If applicable, name(s) of the complainant and/or witness, in writing. The addresses of complainants and/or witnesses need not be disclosed.

d. Whether the Trooper is involved in the investigation as a principal or as a witness at that time.

e. Upon being advised of the above, the Trooper shall so acknowledge on the appropriate form.

A principal is an employee who has been identified as the subject of an investigation for violation of rules or regulations and/or having been accused of some wrongdoing by a member of the public. A witness is an employee who is being questioned about a complaint or incident presumably involving another employee and has not (at that moment) been labeled the subject of the investigation nor identified as violating rules and regulations (1T46-1T47).

2. On or about March 15, 1996, the State Police adopted a standing operating procedure, SOP B10 (CP-3), covering internal investigation procedures. The procedure began with the following paragraph:

> Pursuant to the authority vested in the Superintendent, this order establishes the internal investigation procedures to be followed when a sworn member of the Division is questioned in connection with a State Police internal investigation.

Some of the terms in SOP B10 resembles terms in the internal investigation procedure articles in J-1 and J-2. Paragraphs C and D of the Mechanics section (Section III) of the SOP provide:

> C. Before any questions take place, the member shall be apprised of the following:
>
> 1. Identity of the officer in charge of the investigation and the identity of the officer conducting the interview, including ranks, names and assignments. Also, the identity of all persons present during the interview.
>
> 2. Nature of the investigation, including any allegation and/or any violations of rules, regulations, and/or orders involved.
>
> 3. If applicable, name(s) of the complainant and/or witness, in writing. The addresses and telephone numbers of complainants and/or witnesses need not be disclosed.
>
> 4. Whether the member is involved in the investigation as a principal or as a witness at that time.
>
> D. The member has the right to request and have present a representative of his/her labor bargaining unit during questioning. If the interview involves a criminal matter and the member is advised of the Miranda Warning, the bargaining unit representative must leave after the Miranda Warning is read to the member.

Section J of the SOP concerns the conduct of internal investigations and includes the following language in J.1.b.

> Acknowledgment Forms, SP 605 Principal Acknowledgment (Annex C), SP 605A Witness Acknowledgment (Annex D), SP 605B Weingarten Acknowledgment (Annex E), and SP 605C Miranda Warning (Annex F) will be used.

Prior to the start of an interview, a principal is asked to sign a principal acknowledgement form and a witness is asked to sign a witness acknowledgement form.

The Principal Acknowledgment Form (R-4) states:

I, _____, a sworn member of the Division of State Police, Department of Law and Public Safety, State of New Jersey, do hereby acknowledge that I have been informed by _____, of my rights according to Standing Operating Procedure B-10 and all Agreements in effect between the State of New Jersey and the bargaining Units of the Sworn Members of the Division relating to Internal Investigations, which are:

(1) To be advised of the specific nature of the complaint and the time period involved if possible.

(2) To be shown a copy of the letter or complaint (if any) and be given an opportunity to analyze it before being required to submit a Special Report.

(3) The questioning shall be conducted at a reasonable hour in a non-coercive manner, without threat or promise of reward and when on duty. If the urgency of the investigation requires that I be questioned while on duty leave, such time will be recorded and treated as hours worked.

(4) The questioning shall be conducted at a location designated by the investigating officer, usually at the headquarters or substation to which I am assigned.

(5) Before any questioning takes place, I have been apprised of the following:

a. Identity of the officer in charge of the investigation and the identity of the officer conducting the questioning, including ranks, names, and assignments. Also, the identity of all persons present during questioning.

b. Nature of the investigation, including any allegation and/or any violation of rules, regulations and orders involved.

c. If applicable, name(s) of the complainant and/or witness, in writing. The addresses of complainants and/or witnesses need not be disclosed.

d. I am involved in the investigation as a principal.

(6) The questioning shall be of a reasonable duration and rest periods allowed. Time shall be provided for personal necessities, meals, and telephone calls as are reasonably necessary.

(7) I have a right to have a representative of my bargaining unit present during questioning. If the interview involves a criminal matter and I am advised of the Miranda Warning, the bargaining unit representative must leave after the Miranda Warning is read to me, I have signed my acknowledgment and responded.

I acknowledge that all of the above rights have been granted to me.

The Witness Acknowledgment Form (R-2) states:

I, _____, a sworn member of the Division of State Police, do hereby acknowledge that I have been informed by _____, that I am a witness in an Internal Investigation. I acknowledge my responsibility to answer truthfully all questions regarding any matter which is the subject of investigation.

3. Lieutenant Edward McCabe is the Assistant Bureau Chief for the Equal Employment Opportunity Affirmative Action Bureau (EEO/AA) of the State Police. Prior to working in the EEO/AA Bureau, McCabe worked in the Internal Affairs Bureau (5T94-5T95). While assigned to the IA Bureau, McCabe was a member of the committee that created SOP B10 (5T14). McCabe explained that use of the word "member" in SOP B10 Section III C referred to a "principal". He noted that the policy was that principals would get all the rights afforded them in the principal acknowledgment form, and witnesses would get all of the rights on the witness acknowledgment form (5T124-5T125). McCabe explained that the first

sentence of SOP B10, Section III C3 ("If applicable, name(s)...) did not require witnesses to be informed of a complainant's name. McCabe said witnesses will be told about the nature of an investigation, but cannot always be told about the complainants (5T125-5T127). McCabe testified in pertinent part:

> We don't always advise the witness what the complaint is or who the complainant is. I can't even think of an instance where that has happened, but I know that it could. There could be confidential information that we can't release to all of the witnesses. (5T125)

In its post hearing brief, the Charging Party interpreted the sentence "I can't even think of an instance where that has happened" to mean he (McCabe) could not think of an instance when a witness was not told about the complainant. I do not agree with that interpretation.

I find that the beginning of the second sentence in that testimony referred back to the preceeding sentence, meaning McCabe could not think of an instance where a witness was advised about the complainant, he (McCabe) just knew it could happen, meaning a witness could be advised about a complainant.

Detective Sergeant Marshall Brown, McCabe's subordinate in the EEO/AA Bureau (4T6) also understood SOP B10, Section III C3 to apply to principals, not witnesses, meaning he (Brown) did not need to inform witnesses who filed a complaint (4T61-4T62).

I credit McCabe and Brown regarding the meaning of SOP B10 Section III C3 and how it applied. The meaning of the word "member" was not otherwise defined in the SOP and there was no evidence

contradicting McCabe and Brown's explanation. Thus, I find the language in SOP B10 does not automatically entitle witnesses to be told the name of a complainant.

On cross-examination, McCabe was asked to review the language in J-2, Article 13 Section C6 (which is similar to SOP B10 Section III C3) and the following exchange ensued:

> Q. Having read this, having read J-2, page 21, "Mechanics" and having read SOP B-10, is it not accurate that a witness is entitled to know the name of the complainant as per the contract and the policy?
>
> A. I don't think so.
>
> I mean I think if we did that there would be no way to protect anonymous complainants.
>
> I can't remember a single instance when that was not done.
>
> Q. What?
>
> A. When we haven't told the witness what the allegations were or the complainant was.
>
> Q. You have never told a witness --
>
> MS. FIELDS: He misheard the witness (5T128-5T129).

In its post hearing brief, the Charging Party cited only the following lines from the transcript:

> A. I can't remember a single instance when that was not done.
>
> Q. What?
>
> A. When we haven't told the witness what the allegations were or the complainant was. (5T128).

The Charging Party concluded that McCabe meant that he could not recall a single instance when a witness was not told about the complainant.

Considering McCabe's testimony in its complete context, I disagree with Charging Party's ascribed meaning of his testimony. The fully cited portion of McCabe's testimony begins with a question--whether a witness was entitled to know the name of a complainant. McCabe replied he didn't think so--meaning he did not think a witness was entitled to know the name of a complainant. Then he explained that if we did--meaning if we did tell a witness the name of a complainant, there would be no way to protect anonymous complainants. McCabe was explaining the basis for not telling witnesses the names of complainants.

Then, without another question being posed, McCabe added, "I can't remember a single instance when that was not done", i.e., he could not think of a single instance when that--and by "that" McCabe meant the practice of not telling a witness the name of a complainant--was not done. That last answer by McCabe referred back to the question which he had already answered in the negative, that he did not think a witness was entitled to know the complainant. His answer was consistent with his earlier testimony about who the word "member" referred to in SOP B10 (5T124), and consistent with his testimony that they do not always advise witnesses what the complaint is or who the complainant is (5T125).

The next question to McCabe was "what", which referred back to what was meant by "when that was not done" in the preceeding answer. McCabe's response was really a continuation of his previous answer "when we haven't told the witness what the allegations were or the complainant was" meaning he defined "that" as being we have not told the witness what the allegations were etc. Consequently, I conclude it was not the State's practice to tell witnesses the name of a complainant.

4. In 1989, the STFA filed unfair practice charges against the State, Docket Nos. CO-90-41 and CO-90-94, alleging that the State violated the Act by refusing to allow union representation at certain employee interviews. Those charges were settled and withdrawn in accordance with a memorandum of agreement providing (C-1C):

> In resolution of the above matters the parties agree:
>
> 1. That pursuant to the U.S. Supreme Court's decision in Weingarten, the State agrees that an employee who reasonably believes that an investigatory interview may lead to discipline is entitled to request and have a union representative present during the interview.
>
> 2. Upon the request of an employee in No. 1 above being interviewed, the State will allow the attendance of a union representative according to normal procedure.
>
> 3. The union representative and principal employee shall be informed of the nature of the interview and be given the opportunity for a pre-interview conference.
>
> 4. At the commencement of the interview the union representative shall sign the principal

> acknowledgment form which is attached hereto and made a part hereof.
>
> 5. During the interview the union representative will have the rights as stated in the principal acknowledgment form.
>
> 6. None of the information derived from the interviews conducted resulted in charges in CO-H-90-41 and CO-90-94 will be used in further proceedings.
>
> 7. Upon the signing of this Agreement the State Troopers Fraternal Association agrees that the charges in CO-H-90-41 and CO-90-94 are withdrawn.

The NCO was not a party to C-1C (1T93). Paragraphs 3, 4 and 5 of C-1C specifically concerned employees who were principals, not witnesses (1T97-1T98).

I find that the language in C-1C standing alone did not establish that a practice existed to allow union representation for officers who stated they believed they may be subject to disciplinary action when they were not otherwise named as principals, and there was no other evidence presented to establish such a practice.

5. It has been the State's practice to allow a union representative to attend an investigatory interview with employees identified as principals, but not for those employees only identified as witnesses (1T47-1T48). When a union representative attends an interview session with an employee, the representative is generally obligated to keep the subject of the interview confidential. There was no evidence that such confidentiality was ever breached (1T34-1T36; 1T45).

Although an employee may be questioned initially as a witness, there is no guarantee that the interview will not lead to discipline (1T46-1T47). Employees called as witnesses have been disciplined for their answers (1T49-1T51).

Sometimes an employee who is being interviewed as a witness regarding a particular matter becomes a principal in that matter based upon information elicited during questioning (1T68; 1T118-1T119). The investigator usually stops the questioning and informs the employee that he/she is now a principal. The employee is then permitted to have a union representative present during the remaining interview (1T118-1T120).

Sometimes, however, the questioning of an employee as a witness spins-off into inquiries of that same employee as a principal concerning a related or (often) unrelated matter (2T83; 4T51-4T53). A "spin-off" is the term used to define an investigation of an employee as a principal regarding a particular matter that began during the questioning of the same employee as a witness regarding a related or unrelated matter (2T23; 2T84; 4T53).

6. The record includes numerous examples of such spin-offs. In 1996 or 1997, Trooper Gutter was serving as a union representative in an interview of another trooper when he (Gutter) realized he may have been involved as a witness in that matter. He was subsequently interviewed as a witness to that matter, and later received a written reprimand. Although Gutter had requested and was denied a union representative during his own interview as a witness,

the record does not conclusively show whether he was disciplined for anything he said as a witness (1T110-1T116).

On an unspecified date, Trooper Guilfoy was interviewed as a witness regarding an EEO/AA complaint filed by another trooper against his former squad leader. During the interview, Guilfoy admitted that he played a practical joke on the EEO/AA complainant; the investigator subsequently notified Guilfoy that he had become a principal in that complaint (2T14-2T18). No evidence shows that Guilfoy requested a union representative before or during the interview or that he was denied a representative; no action was taken against him, and no evidence suggests that Guilfoy believed he might be subject to discipline (2T56-2T59).

Trooper Sanchez was once interviewed as a witness regarding another trooper's summons to a motorist. The investigation "spun-off" into an investigation of Sanchez resulting in his receiving a written reprimand for not relaying certain information to the Division (2T20-2T23). Sanchez had not asked for a union representative, and no evidence suggests that he believed discipline might result from the interview (2T63-2T66).

Trooper Nelson was interviewed as a witness regarding another trooper's arrest of a motorist. Nelson answered the station telephone when the arresting trooper called-in the arrest. While Nelson was being questioned as a witness, the audio tape of the telephone call was played and he was asked if he had logged the call. Nelson explained that he had not logged the call, and the

investigator promptly informed him that he had now become a principal in the investigation for failing to log the call (2T25-2T30). There was no evidence that Nelson requested a union representative or that one was denied to him, or that he had an expectation of discipline, or that he was, in fact, disciplined over the incident (2T68-2T70).

Trooper Crawford was in the Newark station one evening when a particular prisoner was being processed. Subsequently, an investigation was conducted into how the prisoner was handled and Crawford was interviewed as a witness. After that the investigation continued during an 8 or 9 year legal process. Crawford was made a principal in the investigation and became the subject of a general disciplinary hearing (2T31-2T32; 2T42-2T51). There was no evidence that Crawford was disciplined for anything he said as a witness or that he was denied a union representative when he was questioned as a principal (2T52).

Sergeant Fred Cager was interviewed as a principal during an internal affairs investigation and was accompanied by his union representative. Cager was subsequently told that he would be interviewed as a witness in another investigation related indirectly to the earlier investigation. Cager asked for a union representative, and was immediately informed that he was converted to a principal and was thus allowed to have a representative with him. Cager was never interviewed as a witness without a representative (2T78-2T81; 2T97-2T108).

Sgt. Richard Schmidt was interviewed as a witness regarding the issuance of summonses. Subsequently, he was notified he would be interviewed as a principal in the same matter. Schmidt had not asked for a union representative when he was a witness, nor was there evidence he believed he might be subject to discipline. Schmidt was allowed to have his union representative with him when he was questioned as a principal (2T85-2T87 2T109-2T113).

Sgt. Steven Scowcroft was interviewed as a witness regarding a motorist's complaint about another trooper. He did not request a union representative. After the investigation, Scowcroft was reprimanded for failing to have the motorist sign in at the station (2T87-2T88).

Sgt. Mazakien was interviewed as a witness in an investigation about a particular trooper's failure to report to a pistol shoot before returning to work. Mazakien was subsequently made a principal in that investigation and was reprimanded, but the reprimand was rescinded during the processing of a grievance. Mazakien had not asked for a union representative when he was interviewed as a witness (2T93).

In the spring of 1989, Sgt. Johnny Hannigan was interviewed as a witness in an investigation over a trooper's allegation that he (the trooper) had delivered certain evidence to the State police laboratory (2T131-2T132). Hannigan had not asked for a union representative, nor did he believe that discipline would result from the interview (2T121). In the fall of 1989, Hannigan was told he

had become a principal in the same investigation. He did not ask for a union representative after becoming a principal (2T126). In 1990, Hannigan was reprimanded over the incident (2T122).

Trooper Edward Centnar was interviewed as a witness in an investigation about another trooper driving an unauthorized person in a troop car (2T141-2T142). Centnar was subsequently interviewed as a principal regarding his off duty job at the WIZ electronic store (5T101, R-5).

Farro CO-98-401 and Brook CO-99-413

7. Sgt. Marshall Brown is a detective in the EEO/AA unit and responsible for investigating allegations and/or complaints of harassment and/or hostile environment regarding the State Police (4T7-4T8). In that role he often conducts investigatory interviews of State Police officers. He is familiar with spin-off investigations which he describes as:

> ...you are proceeding in one area of an investigation, and during the course of that investigation you find out there was an infraction of a rule or regulation, and then the investigation spins or turns in that area. [4T53].

When asked: "Can't that be an admission of guilt by a witness?" Brown said, "Possibly, yes." (4T53).

In February 1998, Brown was investigating a complaint filed by Trooper Wendell Davis regarding racial discrimination and disparate treatment (4T26). As part of that investigation it was suggested to Brown that Trooper Joseph Farro and Sgt. Steven Brook

may have witnessed an incident related to the Davis complaint (4T8). As a result, Brown telephoned both Farro and Brook to arrange a date for an interview.

Brown told both officers who he was and that he wanted to interview each man as a witness in reference to an EEO/AA investigation. He did not tell them the name of the complainant at that time or any other information about the interview. He told them he would tell them more before the interview (3T70, 3T73; 3T170-3T171; 4T13-4T16, 4T71-4T72). The interviews of both men were arranged for the night of February 25, 1998, at the Woodstown Station.

After talking to Brown, Farro telephoned his union representative, Trooper John Redkoles, told him about the interview and asked Redkoles to represent him when he met with Brown. Farro wanted representation because he did not know what the interview was about (3T71-3T73; 3T131-3T132).

Like Farro, Brook, after talking to Brown, telephoned his union representative, Det. Sgt. Dennis Hallion, told him about the interview and that he had not been told about the reason or nature of the investigation, and he asked Hallion if he (Brook) should have representation (3T172; 3T190, 3T217-3T218). Brook did not know why he was to be interviewed (3T182, 3T185). He wanted representation because he did not know what was going on, and was concerned that since he could be a witness or become a principal there was "a possibility" of disciplinary action against him (3T172). He also

expressed at hearing that since he didn't know anything about the investigation he was concerned about the scope of it, what it concerned, what he would be asked, and the time period it covered (3T183-3T184). As Brook explained, Hallion felt he (Hallion) should go to the interview with Brook (3T174).

About two days after Brown called Brook and Farro, Sgt. Hallion telephoned Brown and asked if a union representative could be present during the interviews. Brown said no, because they were only being interviewed as witnesses, but he (Brown) offered to discuss it with his superior, Capt. Blaker. Blaker told Brown that union representatives are not permitted in witness interviews, but that they could be present during the preliminaries before the interview began (4T17-4T20; 5T147).

On February 23, 1998, after talking with Brook about his upcoming interview with Brown, Hallion telephoned Lt. Jack Gearron of the EEO/AA unit and inquired whether he (Hallion) could attend the interview with Brook as his union representative. Gearron told Hallion that a union representative would not be allowed to attend with Brook because he (Brook) was only being questioned as a witness (3T219).

Shortly before February 25, Hallion spoke to Redkoles about the upcoming interview. They mostly discussed the logistics of when and where the interviews would be held, but also discussed the

applicability of Weingarten,[3/] and that the investigation probably involved a complaint of racial discrimination (3T154-3T158; 3T234-3T238).

8. Prior to February 25, 1998, neither Farro nor Brook knew what the interview was about or what they would be asked (3T92, 3T185). Brown did not want to tell them the name of the complainant before the interview (4T15, 4T71-4T72).

When Brown arrived at the Woodstown Station on the evening of February 25, he met first with Hallion and Redkoles. Hallion asked if a union representative could be present for the interviews. Brown explained that his supervisor, Capt. Blaker, had determined that a union representative could not be present during the actual interview, but would be allowed during the preliminary stages of the interviews. Hallion asked if Brown could include in his report that a union representative was requested but was denied, and Brown said he would make note of it, but had to clear that request with Capt. Blaker (4T22-4T23). Brown discussed the matter with Capt. Blaker, and told him that a Weingarten representative had been requested for both Brook and Farro (5T136).

During the discussion with Brown, Hallion and/or Redkoles explained they wanted to be present during the interviews because

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3/ The reference to Weingarten refers to the decision of the United States Supreme Court in NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975), which provided employees in the private sector with the right to have a union representative with them at certain investigatory interviews.

Brook and Farro were concerned because they had no idea what they would be asked. But neither Hallion nor Redkoles told Brown that Brook or Farro thought they had done something wrong, or that either of them (Brook and Farro) had a reasonable belief that they could or would be disciplined as a result of information not yet given in the interview (4T23-4T24).

9. Farro's interview was scheduled first. Redkoles escorted Farro into the interview room (3T74). Brown knew that Farro wanted Redkoles to be his union representative during the interview (3T74, 3T135-3T137). Brown informed them that Farro was not entitled to a union representative because he was only a witness (3T74-3T75, 3T135-3T137, 3T164).4/

Brown then explained that the complaint under investigation was filed by Trooper Wendell Davis alleging racial discrimination, disparate treatment and hostile work environment (3T102-3T103, 3T137, 4T26). Farro was told he would only be interviewed as a

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4/ Brown testified that prior to Farro's interview neither Redkoles nor Farro personally asked him whether Redkoles could stay in the interview as Farro's union representative (4T25, 4T28). Farro and Redkoles said Farro did ask that question (3T74-3T75, 3T135-3T137, 3T164). Generally, I found Brown to be a trustworthy, indeed honest, witness. On this point I think his testimony is misleading. Brown had spoken to Redkoles (and Hallion) after he (Brown) arrived at the station. Brown knew Redkoles was there to represent Farro (4T24) and he asked Redkoles to leave the interview room after explaining that Farro could have representation if he became a principal. Based on those facts it is immaterial whether Farro asked Brown if Redkoles could be his representative, because at the very least, Brown already knew that Redkoles was there as Farro's representative (4T23).

witness in that matter, but Brown also said he could foresee Farro becoming a principal only if he made an admission of guilt, at which time Brown would terminate the interview and allow Farro to obtain union representation. Brown further explained that Farro could become a principal if Brown later learned that he (Farro) had lied during the interview, at which time another interview would be scheduled and Farro would be entitled to union representation (3T76, 3T103-3T104, 3T137; 4T26). Farro was asked to and did sign a witness acknowledgment form (R-2).

After Brown had given Farro (and Redkoles) all of the above advisements, Farro did not ask for more time to consult with Redkoles prior to the interview, he did not express to Brown that he thought he could be disciplined as a result of information that may be gathered during the interview, and he did not express that he may have done something wrong (3T126, 3T163, 3T166, 4T28-4T29).

After the advisements, Brown asked Redkoles to leave the room and the interview began (4T27). During the interview Farro never asked Brown if they could take a break to allow Farro to consult with his union representative (3T125). The interview lasted about forty minutes but did not produce any information to assist the investigation (4T30). Farro has not been disciplined as a result of any information gathered in the interview (3T87-3T88, 3T115, 3T141, 4T41).

10. Prior to meeting with Brown on February 25, Farro knew that the interview would concern EEO/AA issues and the Department's

policy against discrimination and hostile work environment, but he did not believe he did anything in violation of that policy (3T98, 3T101, 3T113-3T114). He planned to tell the truth during the interview (3T91).

But despite believing--in his own mind--that he did nothing wrong Farro expressed concern about the upcoming interview because he did not know who or what the interview was about (3T98, 3T101). The following questions and answers on cross-examination show Farro's explanation and level of concern:

> Q. Was the thing that concerned you about the interview that you didn't know what would be asked?
>
> A. I was concerned because I wasn't told, made aware of what the interview was about.
>
> Q. Was there anything other than your lack of knowledge of the subject of the interview that gave you reason to be concerned?
>
> A. Okay, I was concerned, I guess concerned is the word, it was the first time I was ever contacted by anyone from the EEO/AA office, that made me concerned and that I wasn't--in combination with not being told what it was about is why I was concerned.
>
> Q. That's the most you can tell us as to anything in particular that gave you reason for concern before the interview occurred?
>
> A. Before the interview occurred, yes. [3T93]

Farro was asked about his pre-interview discussion with Redkoles:

> Q. Were there any other concerns that you had that you related to Redkoles in that conversation with him?
>
> A. There was a concern of not knowing what I

should be concerned about is basically, I wasn't told what this interview was about.

Q. You were concerned about your concern?

A. Sure. That might sound crazy but I don't know how else to tell it to you, ma'am.

Q. And you knew at that point that you had done nothing wrong, correct?

A. Concerning what?

Q. Concerning the area of the EEO/AA.

A. Not in my mind, no.
[3T113-3T114]

On direct examination, Farro was asked whether he had believed that he might be subject to discipline as a result of the interview and he responded, "yes", pinpointing the moment when Sgt. Brown explained that if he (Farro) became a principal the interview would be stopped (3T76-3T77). But Farro never told Brown that he thought he could be disciplined as a result of the interview (3T126, 4T28-4T29). Then Farro explained he became concerned again when Redkoles left the room. He said.

> When Trooper Redkoles left the room and the interview started, I became concerned again, I haven't been involved in a lot of internal investigations and this was my first EEO/AA investigation of any type that I was ever involved in, which is unfamiliar territory anyway.
>
> However, when I learned from Sergeant Brown the scope of what this investigation was, a lot of flags went up because he mentioned a time frame that started when I first got in the New Jersey State Police in 1986.
>
> At the time of the interview he said, 'This is going to concern events over the last twelve years.'

> I told Sergeant Brown then, I said, 'Sir, I am going to let you know twelve years ago I was a recruit at Bridgeton Station, 'just so he knew how much time I had in.
>
> He said, 'This is concerning events over the last twelve years.'
>
> That in itself really had me concerned about what possibly could be asked or what could I possibly have witnessed, and who actually came forth and said I was a witness, what is it I supposedly witnessed? I was very concerned. [3T77-3T78]

11. Brook's interview began much the same as Farro's. Hallion escorted Brook into the interview room (3T221-3T222). Brown testified that while in the interview room neither Brook nor Hallion asked him if Brook could have his union representative present with him during the interview (4T35-4T36). Hallion testified that after entering the interview room Brook did ask Brown if Hallion could stay as his union representative (3T222-3T223).

Whether or not Brook personally asked Brown in the interview room on February 25 if Hallion could represent him, I find that Brown knew that night that both Brook and Hallion wanted Hallion to be Brook's union representative in the interview. Prior to February 25 Hallion had spoken to both Sgt. Brown and Lt. Gearron about providing union representation for Brook (3T219; 4T17-4T20), and prior to entering the interview room on February 25 Hallion personally renewed his request to Brown to provide union representation for Brook (4T22-4T24). Hallion spoke to Capt. Blaker subsequent to Brook's interview and Blaker assured Hallion that he (Blaker) would make a written note that Weingarten representation

had been requested and denied. Blaker forgot to include that note in his report of this matter (R-6; 5T141, 5T143, 5T146).

In an exchange of questions and answers on direct examination Brown acknowledged that Hallion (and Redkoles at least by inference) had requested to be Brook's (and Farro's) union representative during the interview(s).

> A. He then asked me again about a Weingarten rep being present during the interview.
>
> I told him that according to Captain Blaker that a Weingarten rep cannot be present during the actual interview.
>
> However, they would be allowed during the preliminary stages of that interview.
>
> Dennis said at that time, 'Could you put in your report that a Union rep was requested and that you denied it?'
>
> I said, 'Dennis I will make a note of that.' [4T22]
>
> Q. In that discussion with Dennis Hallion and Trooper Redkoles, did either Hallion or Redkoles give you any more information as to why they wanted to be present as a Weingarten representative in your interviews with Brook and Farro?
>
> A. Only that Steven Brook and Joe Farro were concerned because they had no idea of where or what I was going to ask them, and that was it. [4T23]
>
> Q. Did Dennion Hallion or Trooper Redkoles ask you any questions at all as to why you were not going to allow either one to be present as a Weingarten representative in the interviews which were about to take place?
>
> A. No, they didn't ask me because I had already told them that it wasn't allowed by my orders from Captain Blaker. [4T24]

Once in the interview room, Brown gave Brook the same advisements he had given Farro and Redkoles. He told him that Wendell Davis was the complainant in the EEO matter, that Brook was only being called as a witness, but that if he became a principal he would be allowed to have his union representative attend the interview (3T210-3T211; 4T35-4T36, 4T50-4T51). Brook also signed a witness acknowledgment form (3T210; 4T38-4T39; R-3). Hallion was only present when Brown told Brook that he was only being interviewed as a witness and that Wendell Davis was the complainant in the EEO matter (3T242-3T244).

After the initial advisements but before Hallion left the interview room neither he nor Brook asked for more time to consult each other about the upcoming interview (3T212, 3T241-3T242; 4T38). After all the advisements were given Brook did not ask Brown if Hallion could be present during the interview, and he (Brook) did not need more time to consult with Hallion (3T212-3T213). Prior to the interview neither Hallion nor Brook told Brown that Brook thought he did something wrong or that he thought he could be disciplined as a result of the interview (4T36-4T37).

Brook's interview with Brown lasted approximately twenty-three minutes but did not produce any information to assist the investigation (4T39-4T40). Brook did not ask to consult with Hallion during the interview (3T214). Brook has not been disciplined as a result of any information gathered in the interview (3T183; 4T41).

12. Like Farro, Brook knew before February 25 that the interview with Brown would concern an EEO matter, but he had no idea what the investigation would cover (3T185-3T186). Although he intended to tell the truth (3T183), Brook was concerned because he was unaware of the time frame and scope of the investigation, what it would concern and its impact on his record (3T183-3T184).

Because of his concern, Brook telephoned Hallion and asked whether he (Brook) should have representation. Hallion suggested that he should be represented (3T192).

Nevertheless, since he had no idea why he was being interviewed, Brook said that prior to February 25, 1998, he did not form a reasonable belief he could be disciplined (3T182).

Brook and Farro discussed the potential basis for the interviews prior to February 25. Neither of them believed they did anything wrong, and they felt they had nothing to hide (3T203-3T204). Brook didn't tell Hallion he had done anything wrong (3T227).

Just prior to the start of his interview Brook did not tell Brown that he thought he could be disciplined based upon any information he was about to give (2T214). After learning that Wendell Davis was the complainant, Brook was not concerned because he did nothing wrong regarding Davis (3T197), and during the interview he did not tell Brown that he thought he could be disciplined as a result of his answers (3T214).

The Walker Case CO-99-109

13. Lt. David Grusemeyer is the State Police Supervisor at the Casino Intelligence Unit in Absecon, New Jersey, which is responsible for collecting intelligence regarding criminal and regulatory matters involving the casino industry, and the New Jersey Division of Gaming Enforcement, which licenses casinos and their employees in New Jersey (4T75-4T76). On Wednesday morning, April 15, 1998, Grusemeyer received a telephone call from Anthony Restuccia, the Chief of Investigations for the New Jersey Division of Gaming Enforcement. Restuccia's office had apparently received information from outside sources that Victor Cruse, an executive in the Mirage Corporation which was seeking a New Jersey gaming license, and Vanessa Natale, daughter of Ralph Natale, a known organized crime figure in Philadelphia, were seen together at the Foxwood Casino in Connecticut. If the sighting could be verified, it could affect Mirage's ability to get or hold a gaming license. Restuccia apparently believed Grusemeyer's office was aware of the sighting and he wanted more information (4T79-4T82; CP-4).

Grusemeyer had no knowledge of the alleged Foxwood sighting. He informed his superiors of the situation and launched an investigation within his unit to determine if anyone could confirm the sighting (4T85-4T86). The following day, Thursday, April 16, Grusemeyer was making telephone calls in a common area at his station regarding the alleged Foxwood sighting and Detective Paul Kures in his unit overheard him mention the name Cruse. Kures

told Grusemeyer that Monday of that week he answered a telephone call from Detective Robert Walker, (assigned to the Casino Intelligence Unit) who mentioned Cruse's name and then asked to speak to Detective Jack O'Hara (4T87-4T89).5/ Detectives Walker and O'Hara were assigned to Grusemeyer's intelligence unit, but in April 1998, and for several months prior thereto, Walker had been out on sick leave and during that time was not assigned to any cases or authorized to conduct official business (4T77-4T79).

After talking with Kures, Grusemeyer questioned O'Hara about the telephone call from Walker. On Tuesday, April 14, Walker had asked O'Hara to telephone the Foxwood Casino and see if he could find out whether Cruse was there three to four weeks earlier with Natale, or with the daughter of another reputed organized crime figure, Nicky Scarfo. O'Hara told Grusemeyer he contacted Jack Lutie, Foxwood's Director of Surveillance, and asked him to check if there were any record of Cruse and Natale or Scarfo at their casino. That same day or the following day (probably Wednesday of that week) Lutie informed O'Hara he could find no record of a Cruse/Natale or Scarfo presence. O'Hara informed Walker of the results of Lutie's investigation (4T89-4T91). Grusemeyer asked O'Hara if he knew where Walker got the information about a Cruse/Natale sighting. O'Hara said he wasn't sure, but he thought

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5/ According to CP-4, Grusemeyer's report of the Walker incident, Walker's call to Kures was Tuesday, April 14, not Monday, April 13.

it was from a friend of Walker's who worked at the Foxwood Casino (4T91).

After talking with O'Hara, Grusemeyer, early Thursday afternoon, telephoned Walker and asked him to come into the station to talk about the Cruse/Natale information. Grusemeyer told Walker that he (Grusemeyer) was being pressured by Gaming Enforcement to find out what happened (4T93-4T95).6/

Walker met with Grusemeyer and O'Hara that afternoon. Grusemeyer asked Walker to explain what happened. Grusemeyer testified that Walker said he (Walker) received a telephone call from a friend of his at Foxwood, someone who worked on the casino floor. Walker apparently told Grusemeyer that his friend spotted Cruse with a female that someone else told his friend was the daughter of a reputed mobster from Philadelphia, but Walker did not say it was Vanessa Natale (4T98). Grusemeyer sought more information and asked Walker to name his source. Walker told him it was not a source, it was a friend. Grusemeyer explained to Walker why he needed to know his friend's name and asked Walker several times to tell him who it was, but other than saying it was a friend, Walker consistently refused to tell Grusemeyer his friend's name

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6/ Walker testified that Grusemeyer did not tell him why he (Grusemeyer) wanted to talk to him (2T183, 2T214). But I credit Grusemeyer's testimony. He knew Walker was taking painkillers and that it was a chore for him to drive to the station. Under those circumstances, I believe he would have told him why it was important for him (Walker) to come into the station.

(4T100-4T106). Grusemeyer asked Walker if he could contact his friend but Walker said he did not have a telephone number (4T107). Walker did not believe Grusemeyer was ordering him to reveal his source, thus, he opted not to tell him (2T218-2T21). Walker was asked about his meeting with Grusemeyer that day and he testified only that Grusemeyer asked him a series of questions and he answered them (2T183-2T184). There was no evidence that Walker asked for a union representative at any point before or during the questioning by Grusemeyer. Since there was no evidence rebutting Grusemeyer's account of what Walker said at that first meeting, I credit Grusemeyer's testimony.

Walker testified that at that Thursday meeting Grusemeyer said he was looking into the Cruse-Natale information and that someone would either lose their job or go to jail over the matter (2T184). Grusemeyer denied making such a remark (4T109). Both Grusemeyer and Walker seemed reliable on this point, thus, their testimony about whether Grusemeyer made the "jail" remark is in equipoise.

14. On Friday morning, April 17, the day after meeting with Walker, Grusemeyer met with his superiors, Lt. Colonel Dunlop and Major McPartland regarding the Walker, Cruse-Natale matter. Grusemeyer told them what had occurred and Dunlop instructed him to interview Walker and O'Hara, and to give him a report on Monday, April 20 (4T110). According to Grusemeyer's April 27, 1998 report of this matter (CP-4), "The purpose of the interviews was to attempt

to get more details about the Cruse sighting at Foxwood so the incident could be investigated fully, and if confirmed, provide the information to DGE for their licensing investigation of the Mirage Corporation." This was not an interview regarding Walker's behavior. Grusemeyer arranged another meeting with Walker for later that afternoon. During that second meeting with Walker, Grusemeyer told him (Walker) he had to tell him (Grusemeyer) the name of his friend in Foxwood, but Walker refused. Grusemeyer repeatedly asked for his friend's name but Walker would not disclose it (4T111-4T114). Walker did not ask for a union representative before or during that meeting, and he never told Grusemeyer he believed he could or would be disciplined based upon any of Grusemeyer's questions (2T243).

On Monday, Grusemeyer reported back to McPartland and Captain Walter Butz, Chief of the Intelligence Bureau. It was decided at that meeting that Butz and Grusemeyer would meet with Walker, and Butz would order Walker to reveal the name of his source (4T118-4T120). Grusemeyer was directed to let Walker know Butz was coming to meet with him (4T122). A third meeting with Walker was scheduled for Tuesday, April 21.

When Walker arrived for the Tuesday meeting he learned that the meeting was cancelled that day, but was rescheduled for the following day, Wednesday, April 22, and that Butz would be coming to order him to reveal his source. Later that day, Tuesday, Walker telephoned Butz to discuss the situation. Walker testified that he

asked Butz what the upcoming interview was all about: that he told Butz of his concern that disclosure could jeopardize his source's job; and that he offered to answer any question Butz had, specifically including the name of his source right then over the telephone. Walker said he did not ask Butz if he (Walker) was the subject of an internal investigation (2T227-2T232).

Butz testified that Walker asked what this was all about, whether he (Walker) was being accused of leaking information, and whether there was an internal investigation on him about leaking information. Butz said he responded that they were just trying to find out the name of his source. Butz testified that Walker raised a concern about his source loosing his job, but denied that Walker offered to tell him the name of the source over the telephone. Butz explained that had Walker volunteered the name there would have been no need for the meeting the following day (5T18-5T20). I credit Butz's testimony. Given the level of importance attached to the source's identity in the casino investigation, I cannot imagine that Butz would have turned down an offer to find out the source and avoid the meeting set for the following day.

After speaking with Butz, Walker telephoned the STFA seeking union representation for his meeting with Butz and Grusemeyer. Walker thought it was unusual for a captain to come down from Trenton to question a detective (2T198-2T199), but he said he sought representation because of Grusemeyer's alleged "jail" remark, and because of a conversation he had a year earlier with his

former supervisor, Lt. James Mulholland about remarks allegedly made against him (Walker) by Frank Catania, the Director of Gaming Enforcement, and because of alleged requests, two years earlier from now retired Detective Robert Kirvay, to lie about certain former members of the State Police (2T234-2T238). But no evidence suggests that Walker ever told Grusemeyer or Butz that these were the reasons he wanted a union representative, and there was no evidence Grusemeyer and Butz had any knowledge of such information.

The STFA assigned Detective David Jones to represent Walker. Jones called Walker on Tuesday and Walker told him about his discussions with Grusemeyer and the alleged "jail" comment he made. The two men agreed to meet the following morning to further discuss the matter and then drive to the meeting together (2T186, 2T239; 3T6). After talking to Walker, Jones telephoned Butz's office and left a message for him. He then notified the labor relations office of the State Police that Walker had requested a union representative for the Wednesday meeting, and he (Jones) asked the labor relations office to notify Butz of the request for representation. Jones contacted the labor relations office again later that day and was told that Butz had been notified (3T6-3T8; 5T21).

15. Walker met Jones at the Absecon station on Wednesday morning and told him he thought Butz and Grusemeyer were going to question him about "certain things", and he wanted Jones to be present as a witness so it would not be his word against two people

(2T187, 2T239). Walker did not tell Jones about the nature of the investigation (2T239), which I presume means he did not tell Jones about the Cruse/Natale matter, but he (Walker) apparently did tell Jones that a couple weeks earlier he had been requested to reveal the name of a source in an investigation and was now concerned he would be ordered to reveal that information, and that based upon Grusemeyer's alleged "jail" remark he (Walker) thought it may lead to his discipline (3T9-3T10). There is no evidence, however, that Walker told Jones that he had already told Grusemeyer that his source was someone working on the floor of the Foxwood Casino. Jones advised Walker to invoke his union representation rights (2T187; 3T37), and that he (Walker) had an obligation to reveal the source information to the superior officers in his chain of command in this case Grusemeyer and Butz (2T187; 3T10, 3T21, 3T40).

Walker never claimed or said to Jones that he was the subject of an internal investigation (3T47), he didn't tell Jones that he (Walker) had called and spoken with Capt. Butz (3T63), and Walker did not tell Jones that he (Walker) had volunteered to tell Butz the name of his source (3T65-3T66). After meeting at the Absecon Station, Walker and Jones drove together to the Casino Intelligence Office for the meeting with Butz and Grusemeyer.

When they arrived at the casino office Butz asked Jones why he was there and Jones explained he was there at Walker's request to be his Weingarten representative. Butz explained that the meeting was not an internal investigation, it was a criminal investigation,

and they were seeking the source of certain information. Jones responded that as a Weingarten representative he was entitled to be there, but Butz explained that the criminal investigation precluded him from being there (3T11; 4T22). Walker testified that upon arriving at the office he and Jones had a conversation with Butz and that he (Walker) informed Butz that he wanted his Weingarten representative during the interview, and that Butz said due to the nature of the interview he could not have a representative (2T188). Butz testified that when Walker and Jones arrived Walker never said a word (5T22), and Grusemeyer did not hear Walker ask for a Weingarten representative.

On direct examination, Jones, in response to a question about how often Walker asked him (Jones) to be present at the meeting testified, "the day before" which I find meant Tuesday, April 21 when they spoke on the phone, "the morning that we met" which I find refers to their discussion that morning prior to arriving at the casino office, "and in front of Lt. Grusemeyer and Capt. Butz who were meeting in a room...." (3T11), which occurred after the initial encounter upon entering the building. Since Jones did not believe Walker requested his Weingarten representative of Butz and Grusemeyer until they were in the meeting room (Grusemeyer's office), Jones's testimony supports Butz's testimony that Walker did not request a Weingarten representative at least at their initial encounter upon entering the building.

After the initial encounter, the four men entered Grusemeyer's office. Jones reiterated he was there to represent Walker because the meeting they were going to have could lead to an internal investigation. Butz indicated that this was not a Weingarten matter because this was not an internal investigation which according to Jones would fit the Division's definition of a principal or a witness, and, as Butz said, because no 251 form--an internal investigation complaint--had been filed regarding Walker (3T12-3T13; 5T23-5T24).

Jones also said that once in Grusemeyer's office Walker requested Jones serve as is Weingarten representative (3T13). Grusemeyer and Butz said Walker never personally asked either of them if Jones could be present in the meeting as his Weingarten representative (4T134; 5T29-5T30). While a dispute exists over whether Walker asked Grusemeyer and Butz if Jones could be his union representative, I find that Grusemeyer and Butz knew that Jones was there to represent Walker, and since Walker was present when Jones informed Grusemeyer and Butz of his (Jones) role, I infer that they knew that Walker wanted Jones to represent him. In his report of the Walker incident, Grusemeyer plainly noted that Jones arrived at the Casino Intelligence office on April 22 "acting as Walker's Weingarten representative...." (CP-4).

After those initial remarks in the meeting room, and with Jones still insisting that he should attend the meeting as Walker's union representative, Butz decided to contact headquarters regarding

Jones's request (3T16; 5T24). Butz directed Jones and Walker to leave the office while he contacted his superiors. Twenty minutes later Walker and Jones were invited back into the room and Butz informed them that Jones would not be allowed to stay. Jones continued to try and persuade Butz to allow him to stay. Grusemeyer pointed out that this was an in-house problem--meaning Walker was responsible for giving the information to his superior (3T21). Jones agreed and said Walker would reveal the information but he (Jones) still wanted to be there to hear the questions and answers. Jones asked Butz to consider his request and Jones and Walker left the office again so Butz could make a second phone call to Division Headquarters (5T24). After only five minutes they were called back to the office and told Jones could not stay.

After Butz made the two telephone calls and told Jones he could not stay in the meeting room, Jones continued to argue his point. Butz, therefore, offered to arrange a telephone conference call with himself, Jones and Leon Brozowski of Internal Affairs so that Leon could personally tell Jones why he was not allowed in the room. Jones declined the conference call offer saying it would not be necessary because Walker would tell them the name of the source as long as there was no internal investigation (4T132-4T133; 5T25-5T26, 5T39). While Butz made no promises, he said "...all we have been doing is trying to find out who the source is", which he (Butz) said was: "inferring there isn't going to be an internal investigation" (5T39, see also 5T26-5T27, 5T68, 2T191). At that point Jones left the room.

Jones vigorously denied that Butz offered to have a conference call with the Internal Affairs Bureau regarding the Weingarten issue (3T37-3T39). Walker testified that Butz never made that offer, but he (Walker) also said he could not hear the whole conversation (2T242-2T243). Since Walker acknowledged he could not hear the entire conversation his testimony on this issue is not reliable. Both Butz and Grusemeyer were consistently reliable witnesses and clear on this point (4T132-4T133; 5T25-5T26), thus, I credit their testimony.

16. Walker was not given or asked to sign a principal or witness acknowledgment form before talking to Butz and Grusemeyer (3T68). Neither Butz nor Grusemeyer were from internal affairs. They were not conducting an internal investigation of Walker or his conduct. They were Walker's superiors in the Casino Investigations Unit and they were merely conducting a criminal investigation into the alleged Cruse-Natale sighting as part of their regular duties and were simply seeking the source of Walker's information to confirm the sighting (2T240; 5T20-5T22, 5T26-5T27, 5T36, 5T53, 5T59-T60). Butz did not intend to write-up Walker for originally failing to give Grusemeyer the source information (5T56, 5T90-5T91), and before the meeting Butz had no intention of disciplining Walker (T36). At that point Butz had no information or belief that Walker had done anything wrong (5T36-5T37).

Walker testified, however, that prior to talking alone with them he told Butz (not Grusemeyer) that "I know something is going

to be coming down the road", which he (Walker) thought was the same as telling Butz he (Walker) had a reasonable belief that he would be disciplined (2T243). But both Grusemeyer and Butz testified that prior to meeting with just Walker, neither Jones nor Walker told them that Walker had done something wrong and he was concerned about that, or that Walker had lied to Lt. Grusemeyer about the source information or that Walker had a fear of being disciplined as a result of the upcoming meeting with them (4T134-4T135,; 5T30-5T31; CP-4). I credit their testimony. Grusemeyer and Butz had been sequestered yet their testimony was the same on this point. Jones did not offer testimony contradicting their testimony, and generally I found Butz and Grusemeyer more reliable than Walker. Even if Walker made the "I know something is going to be coming down the road" statement, I do not infer that Butz could reasonably conclude therefrom that Walker believed he could be disciplined.

After Jones left the room Walker did not raise any question about Jones's absence or presence (4T177). Before Butz said anything to Walker about naming his source, Walker began talking (4T139-4T140, 4T172; 5T32; CP-4). Walker testified that Butz spoke first and asked him to name the source of the information (2T244-2T245), but I found Butz and Grusemeyer more reliable and credit their testimony.

Walker began his explanation by saying he did not want to start any problems. He said he was going through this because Bob Kirvay (a retired State Police Detective) was bashing his (Walker's)

name saying he (Walker) was leaking information and taking "comps" (gratuities) in Atlantic City. Walker further explained that his source was Joe Guzzardo (a retired State Police Captain who now works for the Trump Organization), and he (Walker) "fabricated the story about the casino" because if he had told them (Grusemeyer and Butz) it was Guzzardo that might have confirmed allegations made by Kirvay (4T136-4T140, 4T168; 5T27-5T28; CP-4).

Both Grusemeyer and Butz were surprised by Walker's remarks. Prior to Walker's statements neither Grusemeyer nor Butz had any information that Walker was accused of leaking information or taking comps from casinos (4T181-4T183; 5T35). Prior to that meeting, neither Jones nor Walker had told Butz that Walker was concerned about "comps" (5T35-5T36).

Butz abruptly stopped the meeting after Walker made his statement (4T141; 5T28, 5T33), and said:

> Bob, you gave me false information you lied. I don't know if this can go to an internal, but it is false and misleading information. Better get Dave [Jones] back in the room. [5T28].

Butz's statement that Walker gave false information refers to the information Walker gave Grusemeyer when they first met regarding this matter on Thursday, April 16 that his source was someone on the floor of Foxwood Casino, when it was really Guzzardo from New Jersey (5T33, 5T58).

When Jones came back into the room Butz explained that Walker had given the name of the source but had lied about the earlier information he had given to Grusemeyer and that he informed

his superiors and that an internal may be issued. Jones told Butz "you said there wouldn't be an internal" (5T67) and informed him he (Jones) would file an unfair practice charge (2T191-2T192; 3T26-3T27; 5T28-5T29, 5T67).7/

A day or two later Butz issued a 251 complaint against Walker, naming him the principal based on "questionable conduct" for giving false information to Grusemeyer (3T27-3T28; 5T37, 5T92). In May 1998 Walker transferred from the Absecon intelligence unit to the Berlin intelligence unit, and sometime later to the Camden intelligence unit (2T197). The record does not show whether Walker requested or objected to those transfers. Investigatory interviews with Walker as a principal accompanied by a Weingarten representative were held on that 251 complaint in August 1998 and again about 5 months later, and Walker also appeared before a State grand jury in February 1999 where he was asked questions regarding what transpired in April 1998. Walker was transferred back to uniform the day after his grand jury appearance (2T198). The record does not show whether that transfer was related to the facts of this case. The results of the August internal investigation of the 251 complaint against Walker, and of his grand jury appearance and any discipline therefrom were pending when this hearing concluded (2T192-2T198; 3T28-3T30).

7/ Jones and Walker testified that Butz immediately told them a 251 would issue, Butz testified a decision was not made on that until a day or two later. Both parties might have perceived it as they testified, but the difference is immaterial.

17. As part of his job as a detective in the casino intelligence unit it was not unusual for Walker, or other detectives in the unit and their superiors, to assist the FBI in related investigations concerning the casino industry. Apparently, prior to his extended sick leave Walker was assisting/sharing information with the FBI regarding an investigation involving elected officials in New Jersey (2T199). In some information sharing situations, the FBI has a document known as a 6(e) letter which lists a number of people who are privy to information derived as a result of a Federal criminal investigation and which may have been and/or may be presented to a Federal grand jury. The people on the list may not disclose or discuss the information with anyone not on the list (4T84; 5T6, 5T9). Walker, Grusemeyer, Butz and McPartland were all on the 6(e) list regarding the investigation of New Jersey officials (4T115; 5T61, 5T63). O'Hara was not on the 6(e) letter (4T115; 5T63), nor was there any evidence Jones was on that letter.

Although he was on sick leave Walker was still being consulted by the FBI regarding the 6(e) investigation (4T206-4T207, 4T211).

In his conversations with Grusemeyer regarding the alleged Cruse sighting and his source of that information Walker did not say it had anything to do with the 6(e) investigation (4T114) and he did not raise that issue in his meeting with Grusemeyer and Butz on April 22 (4T172-4T173). But one reason Butz did not want Jones at that meeting was because he thought it might involve 6(e)

information (5T62). The information Walker gave them at that meeting was similar to, but not the same as, information they had received a year and a half ago as part of the 6(e) investigation (5T62-5T65).

ANALYSIS

The Supreme Court in Weingarten established the principle that private sector employees are entitled to union representation in investigatory interviews which the employee reasonably believes may result in discipline. Access to the new right required that: a) the employee request representation, b) the employee must reasonably believe the investigation will result in disciplinary action, c) the exercise of the right must not interfere with legitimate employer prerogatives, and d) the employer had no duty to bargain with a union representative permitted to attend such investigatory interviews. Weingarten, 220 U.S. at 256-260, 88 LRRM at 2691-2692. The Court noted that "reasonable belief" must be measured by an objective standard (88 LRRM at 2691), and it described the boundaries to a representative's participation in such an interview:

> 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 having the employee's own account of the matter under investigation.
> [88 LRRM at 2692]

The Commission first adopted the Weingarten standards for the New Jersey public sector in East Brunswick Bd. 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). It held that an employee is entitled, upon request, to union representation in an investigatory interview where the employee has reasonable grounds to believe that the investigation will result in discipline. In East Brunswick, employee Smith was injured on the job, requiring him to be out for nearly 8 months. The Board paid Smith his regular salary during his convalescense and filed for workers compensation reimbursement for itself. The workers compensation check was mistakenly sent to Smith rather than the Board. Smith, believing the check was his, cashed it. Subsequently, Smith was told that he could not receive his next paycheck until he met with the assistant superintendent to arrange a repayment schedule to cover the cashed check. Smith appeared at the meeting with his union president, but the president was told it was not a grievance matter and was prohibited from attending. During the meeting a reimbursement schedule was agreed upon.

Applying the Weingarten principles, the Commission found that Smith reasonably believed he faced discipline for cashing the check, and that the meeting was an investigatory interview, and held that the Board violated the Act. The Appellate Division also applied the Weingarten principles and while conceeding Smith may have had a reasonable belief that he faced discipline, it

nevertheless concluded that the meeting was not an investigatory interview and it reversed the Commission decision. The Appellate Division explained that the meeting was held for the sole purpose of arranging a repayment plan and that there was no evidence that the Board was seriously considering disciplinary action. NJPER Supp.2d at 80.

The Commission has applied Weingarten in many cases; see, Atlantic City Bd. Ed., P.E.R.C. No. 98-119, 24 NJPER 209 (¶29099 1998); Essex County, P.E.R.C. No. 95-21, 20 NJPER 385 (¶25195 1994); UMDNJ and CIR, P.E.R.C. No. 93-114, 19 NJPER 342 (¶24155 1993), recon. granted P.E.R.C. No. 94-60, 20 NJPER 45 (¶25014 1994), aff'd 21 NJPER 319 (¶26203 App. Div. 1995), aff'd 144 N.J. 511 (1996); New Jersey State Police, P.E.R.C. No. 93-20, 18 NJPER 471 (¶23212 1992); New Jersey Department of Human Services, P.E.R.C. No. 90-47, 16 NJPER 4 (¶21003 1989). In UMDNJ and CIR, the New Jersey Supreme Court approved the Commission's adoption of the Weingarten principles and of its use of objective standards in deciding whether an employee has a reasonable belief that the investigation will result in discipline. Id. at 144 N.J. 528, 529.

Applying the Weingarten, UMDNJ and CIR principles, I find that the primary issue for examination in these cases is whether Farro and Brook had a reasonable expectation they would be disciplined. I believe that the other Weingarten principles were easily met. The meetings with Brown were clearly investigatory interviews, and despite the State's contrary argument, I find that

Brown knew, primarily through Redkoles and Hallion, that Farro and Brook wanted to be represented by them in their respective interviews. I do not believe the Weingarten principles were implemented with the intent to arbitrarily deny employee rights, (i.e., your representative told us he/she was there to represent you, but you (the employee) did not, therefore, you are not entitled to representation). Rather, I believe the employee request requirement in Weingarten was primarily intended to make sure the employer interviewer had notice that the employee wanted representation. That notice, I believe, can come from the employee or the union representative on his/her behalf. But here I do not even need to reach a decision on that legal point.

The State's answer admits that both Farro and Brook requested representation. Both Redkoles and Hallion accompanied Farro and Brook, respectively, into their meetings with Brown and heard Brown give certain advisements, all of which demonstrated his understanding that Redkoles and Hallion were there to represent Farro and Brook. Finally, Blaker's testimony that Brown told him that a Weingarten representative had been requested for Farro and Brook demonstrates, along with the above facts, that union representation had been requested for Farro and Brook in satisfaction of the Weingarten standard.

The result is not the same, however, for the reasonable belief of discipline requirement. This record does not objectively establish that either Farro or Brook had reasonable grounds to

believe that their interviews would result in discipline. The record shows they were both "concerned" about the investigation. It would be reasonable for anyone in similar circumstances to be concerned. But a general sense of concern is not the same as a belief based upon particular facts, that the interview may result in discipline; neither Farro nor Brook had such belief.

Farro said he had concern over not knowing what it was all about, concern over what he should be concerned about, and pointedly testified, "I guess concerned is the word", not a belief of discipline, just concern. But, despite his concern, Farro did not believe he violated departmental policy or did anything wrong regarding the Davis EEO/AA matter, and did not express to Brown that he thought he could be disciplined as a result of the interview. That combination of facts demonstrates to me that Farro did not believe he would be disciplined.

Similarly, Brook conceded in his testimony that prior to meeting with Brown, he was concerned because he was unaware what the investigation was about but did not believe at that time that he would be disciplined. After learning about the Davis complaint Brook felt he had done nothing wrong and had nothing to hide. Brook never told Hallion or Brown that he thought he could be disciplined based upon information given at the interview. These facts demonstrate that Brook had not formed the belief he would be disciplined.

Based upon the above analysis the Farro and Brook cases should be dismissed.

The Walker Case

In this case, the State argued that the STFA failed to prove any of the Weingarten elements; the request for representation, the presence of a reasonable belief that discipline would result, or that the meeting was an investigatory interview. Although I disagree with the State on the first two elements, I agree with it regarding the third.

My holding on the request for representation element here is similar to my holding on that issue in the Farro/Brook cases. The State admitted in its answer and post-hearing brief that Jones requested to represent Walker at his meeting with Butz and Grusemeyer. In addition, I found that Jones told Butz and Grusemeyer that Walker asked him (Jones) to be his Weingarten representative. Jones's request to Butz and Grusemeyer was made in Walker's presence and on his behalf and neither Butz nor Grusemeyer demonstrated any doubt over whether Walker wanted Jones to be his representative. In fact, Grusemeyer in CP-4 wrote that Jones was acting as Walker's Weingarten representative. Finally, when Butz realized Walker had lied to Grusemeyer he stopped the meeting and called Jones back in as Walker's representative. Based upon these circumstances, I conclude that Walker's obligation to request representation was met.

The State's argument that Walker had not formed a reasonable belief he could be disciplined is--at best--reaching. It claims that Walker could not rely on a threatening remark attributed

to Grusemeyer because Grusemeyer denied making the remark; that Walker did not tell Butz or Grusemeyer he thought he could be disciplined; and apparently, that Walker should not benefit from having made a false statement to Grusemeyer (about the location of his source) which was voluntarily made several days before the April 22 meeting and prior to requesting union representation.

As found earlier, the alleged threat by Grusemeyer was not proved. Even if it were, I need not rely on it to find that Walker had a reasonable belief he would be disciplined. The standard is whether it is objectively reasonable for the employee (Walker) to believe that the investigation will result in disciplinary action, not whether the interviewer(s) (Grusemeyer and Butz) had such a reasonable belief. Walker obviously knew he lied to Grusemeyer and that he was going to tell them the truth at the April 22 meeting. Under those circumstances, it was more than reasonable for him to believe he might be disciplined. The State's argument that I should not consider Walker's misleading remark to Grusemeyer in determining whether he (Walker) had formed a reasonable belief of discipline is misplaced. It is not my role in this case to judge whether Walker's original explanation to Grusemeyer was right or wrong or whether he should be punished for the remark. Nor am I condoning Walker's conduct; I am merely considering the facts that formed the basis for Walker's belief of discipline, and I find, notwithstanding any other facts, that Walker's earlier intentional misrepresentation to Grusemeyer was sufficient for him to believe he would be

disciplined. I have not found nor been provided with any cases which suggest that a trier of fact may, or should not consider an employee's prior misrepresentations in deciding whether he/she had a reasonable belief that discipline would result. Consequently, I find that the Charging Party satisfied this Weingarten principle.

Despite having met the above two Weingarten principles, I find that this record does not demonstrate that the April 22 meeting was an investigatory interview as contemplated by Weingarten, UMDNJ and CIR and their progeny. I realize that the April 22 meeting was in a generic sense, investigatory and an interview, and that Butz and Grusemeyer were certainly conducting an investigation of the Mirage Casino license and needed a name from Walker for that investigation. Grusemeyer even referred to the meeting as an interview in his report (CP-4). But the investigation was not about Walker or his conduct; it was not an investigation by internal affairs or EEO/AA; and it was not an investigation arising from the filing of an outside complaint against Walker or an internal 251 charge, and discipline was not being considered.

The State Police Casino Intelligence Unit was conducting an investigation into the gaming license of the Mirage Casino on behalf of the Division of Gaming Enforcement. As a member of the intelligence unit, Walker was obligated, as Jones even acknowledged, to regularly pass along casino-related intelligence information he obtained to his superior officers in the chain of command in his unit, especially including Grusemeyer. Grusemeyer was obligated to

pass such information along to his superior, Capt. Butz. The record shows that Walker and Jones knew that Butz and Grusemeyer were seeking only the name of Walker's source to the Cruse sighting, which he was obligated to provide. Butz and Grusemeyer were not conducting an internal investigation into Walker's conduct, or into the conduct of any other employee. As soon as Walker told Butz and Grusemeyer the identity of his source they realized he had misled them and Butz abruptly stopped the meeting and called Jones back to the room. Subsequently, an investigatory interview into Walker's conduct was held and Walker was allowed to have a union representative at that time.

The STFA relied upon Bergen Co. Prosecutors Office, P.E.R.C. No. 83-130, 9 NJPER 264 (¶14121 1983); and, South Jersey Port Corp., H.E. No. 98-8. 23 NJPER 555 (¶28277 1997) to support its contention that the April 22 meeting was an investigatory interview. In Bergen Prosecutor, a support staff employee was unhappy over her evaluation, she filed a grievance and wrote a letter protesting the evaluation. On the day she wrote the letter (a Friday) she was reported absent from her desk for an hour. She was called into the First Assistant's office to discuss the day's events. The employee came to the meeting with her union representative but no meeting was held because the First Assistant refused to meet with the union representative. The following Monday the Prosecutor called the employee into a meeting to discuss her behavior. The employee asked for her union representative, but the

Prosecutor said no. During the interview, the employee was told she was disruptive. A verbal altercation occurred and the employee was terminated. The Monday meeting was an investigatory interview since it directly involved a discussion of the employee's behavior. The Commission found that the employees representation rights were violated.

In South Jersey an employee involved in organizing activity had also been selling fireworks to other employees. He was called into a meeting at which his sale of fireworks was discussed. Since he failed to request a union representative he was not protected by Weingarten, but the meeting was an investigatory interview because it directly involved a discussion of the employees conduct.

The meetings in Bergen Prosecutor and South Jersey were investigatory interviews because they concerned the affected employees' behavior. Here, however, the April 22 meeting did not involve Walker's behavior, it only sought the name of his source. I believe that the holdings in East Brunswick, NJPER Supp.2d 78; Essex County, P.E.R.C. No. 95-21, 20 NJPER 385 (¶25195 1994); New Jersey State Judiciary, D.U.P. No. 99-21, 25 NJPER 320 (¶30137 1999); and State of N.J. (Div. of Taxation), D.U.P. No. 91-2, 16 NJPER 421 (¶21177 1990), and dicta in Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403, 99 LRRM 2841 (9th Cir. 1978) are more relevant.

In East Brunswick, the Appellate Division explained that the meeting was held for a limited purpose, i.e., arranging a repayment plan, which did not involve reviewing or investigating the

employee's behavior, and that the employer was not considering disciplinary action at the time. Similarly, the meeting in this case was for the limited purpose of obtaining the name of Walker's source, not to review or investigate his behavior, and Butz and Grusemeyer were not contemplating disciplinary action.

In Essex County, a meeting was held to discuss a security guard's job duties because a dispute arose over whether he also had some clerical duties. The guard asked for his union representative which was refused because the meeting was not disciplinary. The guard acknowledged that the meeting had nothing to do with discipline and that his supervisor was just going over his job duties. Subsequent to the meeting, the guard was terminated. The Commission found that Weingarten did not apply because the meeting was not aimed at investigating whether to discipline the guard.8/ Similarly, here the April 22 meeting was not intended for and had nothing to do with discipline; it was just to obtain Walker's source.

In New Jersey State Judiciary, an employee filed for a leave of absence and was called into her supervisor's office to discuss the request. The employee wanted her union representative to come with her because the employee had had some adversarial meetings with her supervisor, but the supervisor told her this was a

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8/ The Commission found a violation of 5.4a(3), however, because the guard was terminated for asking for his union representative.

non-disciplinary meeting about her leave request. The employee refused to meet without a representative which she subsequently obtained. The employee was disciplined for refusing to meet with her supervisor without a representative about her leave request.

The Director found that Weingarten did not apply because the meeting about the employee's leave of absence was not an investigatory interview. Here too, Walker's meeting with Butz and Grusemeyer was merely administrative, to obtain the name of his source, not to investigate his actions.

In State of N.J. (Div. of Taxation), an employee was directed to meet with supervisors regarding his work on a particular file. The employee wanted his union representative to accompany him, but the supervisor told the employee and his representative that the meeting concerned work performance. The employee then met with the supervisors without a representative. The Director found that the meeting was not an investigatory interview; that no investigation was being conducted. Similarly, no investigation into Walker's behavior was actually being conducted by Butz and Grusemeyer.

Finally, some of the language in Alfred M. Lewis, Inc. v. NLRB is instructive here. The Court said in pertinent part:

> It should be acknowledged that a supervisory interview in which the employee is questioned or instructed about work performance inevitably carries with it the threat that if the employee cannot or will not comply with a directive, discharge or discipline may follow; but that latent threat, without more, does not invoke the right to the assistance of a union

> representative. The right of representation arises when a significant purpose of the interview is to obtain facts to support disciplinary action that is probable or that is being seriously considered. (Emphasis added.) [99 LRRM at 2845].9/

Here, Walker was to be questioned only about the name of his source. Although any refusal to provide it to Butz/Grusemeyer could have resulted in discipline, the purpose of the meeting was not to obtain facts to support disciplinary action. Discipline was not even being considered. Neither Butz nor Grusemeyer had any reason to believe the meeting would result in discipline. Consequently, this was not an investigatory interview.

One of the proof problems for the STFA in this case is that before the April 22 meeting neither Butz nor Grusemeyer had any reason to believe that Walker had done anything wrong. They were not suggesting any action against Walker for not earlier telling Grusemeyer the name of his source. That is why Butz said no discipline could result from their meeting. Apparently Walker did not tell Jones that days earlier he had misled Grusemeyer about the location of his source. Thus, it was up to Walker to tell Butz and Grusemeyer that the reason he wanted his union representative at the meeting was because he knew that the information he was about to give them could or would result in his discipline. Under these circumstances, while it was possible to conclude that Walker had a

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9/ See also, NLRB v. Certified Grocers of California, 587 F.2d 449, 100 LRRM 3029, 3030 (9th Cir. 1978).

reasonable belief the meeting might result in his discipline, it was not reasonable to conclude that Butz and Grusemeyer had any basis for reaching the same belief. In fact, the record shows they had no intent to discipline Walker.

While I am not suggesting that Weingarten actually requires the employee to tell the interviewer that he believes his answers may lead to discipline, it could make the difference in convincing the interviewer that the meeting may turn to an examination of the employee's conduct. Here, the character of the meeting may have been different if Walker made such a statement to Butz and Grusemeyer. This record, however, only supports a finding that the meeting was to obtain the name of Walker's source, not to investigate his behavior or consider discipline.

Finally, Butz's statement to Jones/Walker that the meeting would not result in discipline cannot be relied upon by the STFA as a guarantee against discipline, nor was it otherwise a violation of the Act. If anything, I find that the assurance by Butz supports the evidence that Butz had no expectation the matter could lead to discipline and that he had no intent to discipline. Although the remark was intended to encourage Walker, Walker was nevertheless obligated to give Butz/Grusemeyer the name of his source as part of his regular job performance duties in a casino investigation matter. Thus, while I believe Butz made the remark in earnest, the State cannot be bound to that remark particularly in view of Walker's misrepresentation.

For the above reasons, the Walker complaint should be dismissed.

The "Principal/Witness" Issue

Through the presentation of the "background" evidence, the charging parties sought to prove that the State has been violating the Act by the process it uses to conduct internal invstigations, and how it treats unit members during such investigations. In their post-hearing brief, the charging parties alleged three specific violations of the Act under the background discussion. First, by not informing Farro and Brook about the nature of the complaint and complainant the State allegedly violated the Act by repudiating the first paragraph of C-1C the 1989 memorandum of agreement between the STFA and the State. Second, the State violated the Act by allegedly unilaterally amending Article 13 of J-2 (STFA) when the Mechanics provision was allegedly not followed during successor negotiations. Third, the State apparently violated the Act by allegedly violating a past practice, and by the application of its principle/witness distinction.

I will discuss the third allegation first. It has several elements. The Charging Party began by apparently alleging a change in past practice. In its brief, it referred to the following specific allegation raised in each charge:

> In past practice, when a trooper stated that he believed he might be subject to disciplinary action, he was provided the opportunity to be represented by a Weingarten representative.

If the Charging Party means that a practice existed to allow a union representative whenever a trooper stated a belief he/she might be subject to discipline and the State now has unilaterally changed that practice, I find that allegation lacks merit. There was no such open-ended practice. It was limitd to employees who had been designated as principals.

The Charging Party seemed to rely upon what it claimed was language in the 1996 version of SOP B10 to prove the above statement. In each of its charges it states: "Section D, Paragraph 1, Page 13 [of SOP B10] is clear" then it includes the following quote:

> Any member who reasonably believes that the investigation may result in disciplinary action against a member is entitled upon request of the member, to have an association representative accompany the member to the interview.

Standing Operating Procedure B10 admitted in this case as CP-3 was effective March 15, 1996 and contains 6, not 13 pages. There is no Section D, Paragraph 1, nor is the above-cited language contained anywhere in CP-3.10/ The closest language in CP-3 to the above-cited language appears in Part III, Section D, the Mechanics Section of CP-3 which states:

> The member has the right to request and have present a representative of his/her labor bargaining unit during questioning.

10/ A note on the front of CP-3 shows that a prior SOP B10 dated 7/1/90 was being rescinded by CP-3. The reference in the charge to Section D, Paragraph 1, Page 13 may have come from the rescinded document which is not part of this record.

Lt. McCabe said the word "member" referred to principals. In its brief, the Charging Party argued that I should disregard McCabe's testimony but offered no compelling reason why. No contrary evidence was provided, and the word "member" is not otherwise defined in CP-3. When language in a document such as CP-3 is not clear on its face parol evidence can be relied upon to discern meaning. City of Newark, P.E.R.C. No. 94-118, 20 NJPER 276 (¶25140 1994); Hillside Bd. Ed., P.E.R.C. No. 89-57, 15 NJPER 13 (¶20004 1988); State of New Jersey, 11 NJPER 723 (¶16254 1985). Thus, I credited McCabe's testimony and found that the above SOP B10 lanuage refers to principals, it was not necessarly intended for witnesses.

Similarly, even if the language cited by the unions in their charges was the operative language, since the word "member" refers to principals, then that language would also establish that only principals have been allowed a representative upon request.

The record shows that the practice that has existed since at least 1989 is that employees identified as principals in an investigatory interview are afforded union representation upon request. Employees identified as witnesses in such interviews are not afforded the same opportunity unless they are converted into a principal either because of a spin-off investigation or because of answers they gave in the original investigation for which they were initially called as a witness. The State has not deviated from that practice, to my knowledge, thus, the Charging Party's allegation of a change in practice should be dismissed.

The Charging Party, however, raised what I consider to be a legitimate concern over the State's use of the "principal/witness" designations. The State's use of that practice has the potential of resulting in more rather than fewer Weingarten violations. But the Union's argument that the entire practice should be scrapped as inherently violative of the Act is too broad. The determination of a Weingarten violation is fact-intensive and primarily made on a case by case basis. The State's designation of an employee as a witness or principal is not the deciding factor in determining an employee's Weingarten rights.

The Charging Party made the following argument in its post-hearing brief:

> The rights vested in Weingarten are individual rights of union members. It is based upon their own reasonable belief that they might be subject to discipline. It is not based upon the delineation by the Employer of a particular status with regard to a particular interviewee.

I agree with the Charging Party's statements in the first and third sentences,[11/] but its statement in the second sentence is misleading at best, or simply wrong.

The Weingarten, UMDNJ and CIR rights are clearly individually based. But the language in Charging Party's second sentence that the decision on whether an employee had a reasonable

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11/ I qualify my agreement with the statement in the Charging Party's first sentence. It would be more accurate to say that the rights vested by Weingarten are individual rights of unit members. One need not be a full dues paying union member to avail him/herself of the Weingarten rights.

belief of discipline is based upon his "own" belief is inaccurate. It suggests a subjective standard. But both Weingarten and East Brunswick apply an objective standard. In Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984) the Commission wrote:

> The reasonableness of an employee's belief is measured by objective standards, under all the circumstances of each case. [10 NJPER at 339]

Although an employee may say and subjectively believe he/she may be subject to discipline, does not necessarily make that belief reasonable based upon an objective analysis of all the circumstances. The employer initially decides whether an employee's belief is reasonable. But even if it is, the other Weingarten standards must still be met before an employee is legally entitled to a union representative.

The focus of the Charging Party's concern is best expressed by its third sentence, that the determination of Weingarten rights is not based upon the employer's delineation of an employee's status in an interview. I find that the State's designation of a trooper as a witness rather than a principal does not mean the employee is unentitled to union representation. If the Weingarten standards are met for an employee designated only as a witness, that employee is still entitled to such representation.

The Charging Party is correct that Weingarten, East Brunswick and UMDNJ and CIR do not authorize a principal/witness distinction. But the distinction is not prohibited, either. While

I think it makes sense to allow union representation merely upon the appropriate request, essentially, the burden rests with the employer to allow union representation when all the Weingarten standards are met. If the employer makes the wrong choice it may commit a violation and lose any right to issue discipline on the gathered information. A case by case analysis is necessary in order to determine whether Weingarten rights attach.

Finally, I note that the eleven examples the Charging Party presented (Gutter, Guilfoy, Sanchez, etc.) do not establish that the use of the principal/witness procedure, or even spin-off situations were per se violations of the Act. In each case, Weingarten standards must be met. Employees or their representatives on their behalf must clearly request union representation, employees must objectively have a reasonable expectation of discipline, and it must be an investigatory interview. If an interview spins-off into a potential disciplinary matter or proceeds that way naturally, and the witness asks for a representative and the interviewer stops the interview to allow a representative, no violation may occur. If the witness, now converted to principal for whatever reason, does not ask for a representative, then no Weingarten right attaches. It did not appear that any of the eleven examples would have violated the Act.

The Charging Party's first and second background arguments also lack merit. The State did not repudiate C-1C or the parties contracts by not telling Farro and Brook about the complaint and

complainant when Brown first told them they would be witnesses, nor did it "amend" Article 13 of J-2 during negotiations for a successor agreement.

In its post-hearing brief, the Charging Party argued that upon a finding that Walker and/or Brook and/or Farro reasonably believed the investigatory interview might lead to discipline, the State would also have violated the Act because C-1C would have been repudiated. That argument is not persuasive for several reasons. First, there was no finding that Farro and Brook could reasonably have believed they would be disciplined. They did not believe they did anything wrong and I found they had no reasonable expectation of discipline. Their "concern" did not satisfy the Weingarten standards.

Second, while I found that it was reasonable for Walker to believe he might be disciplined, his meeting was not an investigatory interview, there was no 251 form, no complaint, and no complainant. But to the extent there was an obligation to advise him of the nature of the meeting, Butz and Grusemeyer did that by telling Walker at the time he was notified about the meeting that he would be ordered to tell them the name of his source.

Third, the language in C-1C did not give employees more rights than those provided by Weingarten. In fact, in its post-hearing brief, the Charging Party contends that the first paragraph of C-1C essentially restated the Weingarten principles. I agree. The pertinent part of C-1C said:

> The State agrees that an employee who reasonably believes that an investigatory interview may lead to discipline is entitled to request and have union representation....

Three Weingarten standards must be met for C-1C to be activated, the request, the investigatory interview, and reasonable expectation. If the Charging Party is arguing that the reasonable belief language in C-1C is based upon a subjective determination--that is, only upon the employees' personal belief--it is mistaken. Both the courts and the Commission have held that reasonable belief is based upon an objective determination. A case by case analysis is needed to make that determination.

Here, the three above Weingarten standards were not met in the Farro, Brook or Walker cases. Thus, none of those employees were entitled to representation pursuant to C-1C, and C-1C itself was not repudiated.

Fourth, in Finding of Fact. No. 2, I found that neither CP-3 (SOP B10) nor J-2 Article 13 required the State to tell a witness the nature of a complaint or the name of a complainant, and that no such practice existed. CP-3 was designed to apply to principals, and J-2 (after stating that troopers shall be apprised of the following), stated in pertinent part:

> If applicable, name(s) of the complainant and/or witnesses...

The phrase "if applicable" is subject to interpretation, but is nevertheless, a qualifier to telling someone the name of a complainant. I believe it means that telling an employee the name

of a complainant is not automatic. It appears to be reserved for principals. Nevertheless, Brown did tell Farro and Brook the name of the complainant and nature of the complaint--not when he first told them about the interview--but certainly prior to the start of the actual interview. To the extent CP-3 and/or J-2 required the State to give that information to witnesses, the State met the requirement by telling them the information prior to the start of the interview. Nothing in CP-3 and J-2 suggests when Brown would have had to tell them that information. Walker, of course, was told about the nature of his meeting from the start.

Fifth, since I find no evidence of repudiation in this case then to the extent the Charging Party believes that the State has violated language in C-1C or Article 13, it should pursue those matters through its grievance procedure, not throuh an unfair practice charge. State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

Finally, there was no evidence that Article 13 was not followed or was in some way "amended". Therefore, I do not find the State changed a practice or contractual requirement during negotiations for a successor agreement.

Accordingly, based upon the above facts and analysis, I make the following:

CONCLUSION OF LAW

The State did not violate any provision of the Act by refusing to allow employees Farro, Brook and Walker to be accompanied by a union representative at their respective meetings, or by using a principal/witness designation for the conduct of investigatory interviews.

RECOMMENDATION

I recommend the complaints be dismissed.

Arnold H. Zudick
Senior Hearing Examiner

Dated: April 27, 2000
Trenton, New Jersey