# State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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| INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 394<br><br>Complainant<br><br>v.<br><br>CITY OF MANCHESTER, POLICE DEPARTMENT<br><br>Respondent | CASE NO. P-0706:22<br><br>DECISION NO. 92-73 |

## APPEARANCES

Representing I.B.P.O., Local 394:

James T. Masteralexis, Esq., Counsel

Representing City of Manchester:

David Hodgen, Chief Negotiator

Also appearing:

Edward J. Kelley, I.B.P.O.
Virginia Farland, I.B.P.O.
James Winn, I.B.P.O.
Donald Vandal, Manchester Police Dept.
Peter R. Favreau, Manchester Police Dept.

## BACKGROUND

On January 10, 1991, the International Brotherhood of Police Officers (IBPO), Local 394 (Union) filed unfair labor practice (ulp) charges against the City of Manchester (City) alleging violations of RSA 273-A:5 I (a) relative to the manner in which certain alleged employee rights under the doctrine of N.L.R.B. v. Weingarten, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed. 2d 171 (1975), were handled or controlled by the City. The City answered by filing of January 25, 1991. After the parties sought and obtained continuances of hearing dates on April 30, 1991, June 18, 1991 and

September 10, 1991, the case was again set for hearing and heard by the Board on February 27, 1992 and April 1, 1992. Notwithstanding multiple reasons asserted for the discharge of the affected employee, the parties stipulated that these proceedings would be limited the discharged employees' alleged insubordination on August 10, 1991 relative to the manner in which Weingartens rights were or were not accorded to her. The issue may be further refined as to whether an employee under internal administrative investigation may request union representation of choice, if reasonably available, or if the presence of any union officer or steward, even if unsatisfactory to the employee being investigated, satisfies any requirement of representation.

## FINDINGS OF FACT

1. The City of Manchester (City) is a public employer of all full-time police officers, police women, humane officers and parking control officers who are members of the bargaining unit, per RSA 273-A:1, X.

2. I.B.P.O., Local 394 is the duly certified bargaining agent of employees employed by the City's police department in the positions noted, above.

3. For all times pertinent to these proceedings, the City and the Union were parties to a collective bargaining agreement (CBA) for the period of June 1, 1988 to June 30, 1991. That CBA contains articles, among others, pertaining to "Employees' Rights" and "Grievance Procedures." In addition thereto, there is a Standard Operating Procedure (SOP), promulgated by management, pertaining to internal administrative investigations. The disclaimer form relating to such investigations contains a "Reverse Garrity" warning and a statement that "you will be allowed union representation during this interview." Union Ex. No. 2 and City Ex. No. 2.

4. On August 10, 1990 a member of the bargaining unit was arrested for possession of a narcotic drug and brought to the police station. By 6:45 p.m. on that date, the employee had been given both Miranda and "Reverse Garrity" rights prior to the commencement of questioning involving criminal and administrative matters, respectively.

5. Commensurate with the "Reverse Garrity" rights, the employee was offered "union representation" for the upcoming administrative interview by Captain Donald

Vandal. The employee responded by requesting such representation whereupon Vandal left the interview and contacted the officer in charge to determine if any union representation (officers or stewards) were working. He was advised two were and asked that one of them, Officer James Winn, a steward, be sent to the interview room.

6. James Winn learned of the employee's arrest at 5:30 p.m. and called, Local President Edward Kelley to advise him about it. Kelley told Winn to call him when the employee was brought to the interrogation area for questioning. Winn went to supper at Pizza Express where he received a radio transmission to come to the Detective Division at the police station to meet with Vandal for purposes which were not disclosed in that transmission.

7. At the station sometime after 6:45 p.m. and before 7:25 p.m., Vandal advised Winn of the nature of the administrative (non-criminal) investigation and that the employee had requested union representation. Winn met with the employee but did not "feel comfortable" about representing the employee as he had received no specialized training in this area. When he learned that the employee had requested union representation by Kelley (who had attended a specific training course in this area the previous April), Winn asked to leave the interview area and the employee "for a cigarette" so he might call Kelley who, along with Chief Steward Greg Murphy, was equipped with a beeper in order to address such incidents. Union Exhibits 4 and 5.

8. Winn had not previously handled an internal affairs investigation; Kelley had. Winn told Vandal that he was "uncomfortable" about attempting to represent the employee because of his lack of specialty training.

9. Kelley was paged at 7:25 p.m. by his roommate and advised "the station" was looking for him. Kelley returned to call to the station within ten minutes of Winn's attempting to reach him during the "cigarette break" but, during that time, the administrative interview had been terminated by Vandal and the employee had been returned to the booking area. Kelley contacted Vandal by phone in the booking area two to three minutes after the employee had been returned to the cell block.

Kelley attempted to discuss Weingarten principles with Vandal; Vandal terminated that conversation to return to on-going homicide and drug investigations.

10. After the employee's arrest and being given "Reverse Garrity" warnings but before Kelley spoke with Vandal by telephone, Vandal met with the employee and learned of the employee's desire for union representation. The employee's various requests for representation took several forms, namely (1) a request for union representation, (2) a request for a union attorney, and (3) a request for Kelley, by name. Vandal told the employee that there was no entitlement to counsel in an administrative investigation and that there was no entitlement to a specific union representative. When Kelley asked Vandal if the employee had asked for him specifically, Vandal responded affirmatively but also said there was no entitlement to a specific union representative.

11. The employee told Vandal "quite a few times" that she wanted Kelley to be the union representative, that he had represented her before, that he was knowledgeable about her case history, and that she would answer questions (administrative inquiries) if he were present. The employee did not want Winn to be the union representative because he was unaware of her prior history and "didn't have the knowledge... to know what was going on."

12. After Winn returned to the interrogation area and met with the employee for approximately ten more minutes, Vandal interrupted their meeting, told them they had had enough time to confer, and that the administrative interview must proceed. The employee declined to proceed without Kelley notwithstanding direction to do so found in the "Reverse Garrity" warnings, Union Ex. No.2 and City Ex. No. 2. The employee was subsequently cited for insubordination. That incident of insubordination was one of three reasons given for the employee's discharge on August 15, 1990 (City Ex. No. 7).

## DECISION AND ORDER

The Union brought this case under N.L.R.B. v. Weingarten, supra, notwithstanding that this Board had addressed a similar issue in Laconia Education Assn., Decision No. 79-20, August 23, 1979. In Laconia, we addressed the issue of a local union president being able to be present when two unit members met with

management (a principal) relative to the adjustment of grievances or "disturbing situations" at a given school. When the two unit members invited the local president to participate in the meeting and management (the building principal) learned of that invitation, the principal objected to his presence. In that case we found "that the teachers are in fact entitled to representation by anyone of their choice at meetings." Noting differences in circumstances and urgency, we affirm that general principle by our decision in this case.

The City, citing, to Pacific Gas & Electric, Case 31-CA-7973-1 (1981) and to Roadway Express, ____ N.L.R.B. ____, 103 LRRM 1050 (1979) which, in turn, cites Coca-Cola, 227 N.L.R.B. 1276, 94 LRRM 1200 (1977) would have us adopt a policy that "nowhere in Weingarten does the Court state or suggest that an employee's interest can be safeguarded by the presence of a specific representative sought by the employee, as opposed to being accompanied by any union representative. While we are sensitive to an employees' right to have a union representative present during an investigatory interview which the employee reasonably believes portends discipline, we also recognize that the exercise of that right is not without limitation." (Emphasis in original) We accept the second sentence of that proposition to the extent that such interviews should not and cannot be delayed to the degree that they impair the mandated functions of the employer (police department). On the other hand, the interview in question in this case was of an administrative nature which does not contemplate or require the degree of urgency or need for spontaneous reaction frequently found in criminal investigations, as vividly described by Captain Vandal.

Under the fact situation of this case, we do not accept automatically and completely the Roadway motion relative to a specific union representative. Throughout the fabric of Roadway, Coca Cola and related cases there runs a thread of competency and reasonableness. In Coca-Cola, the requested shop steward was off premises, on vacation, and not scheduled to return until the next business day, a Monday. Both the employee and the supervisor in Coca-Cola were aware of the union representative's non-availability and vacation status, unlike Kelley's pager status in this case. In Roadway, one of the reasons the employee was asked to report to the office was to separate him from other employees. "[A]n employer does not first have to assure an employee that his union representative will be present for the interview in order to induce that employee to leave the plant floor.....[H]e may not refuse to report to the office as directed." 103 LRRM 1051. The arrested employee in this case was already separated from fellow employees, in custody, and have been given Miranda warnings. There was no immediate need to separate her from fellow employees or from an actual or potential disturbance. Notably, Roadway, cites to

Weingarten, saying "[O]nce an employee makes a valid request for union representation, the employer is granted one of three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice of continuing the interview unaccompanied by a union representative or having no interview at all." 103 LRRM 1052, General Electric, 100 LRRM 1248 (1979) and United States Postal Service, 100 LRRM 1520 (1979). We believe these alternatives to have been appropriate for this case. Thus, the imposition of discipline (City Ex. No. 7) for electing "no interview at all" was inappropriate given the availability of Kelley by pager and a "reasonableness" standard noted above.

Turning to the concept of competency, also noted, above, we find that the employee's union representative must be sufficiently skilled so that the employee's procedural rights are not prejudiced. The dissenting minority in Coca-Cola noted, "It is because employees are not skilled in the niceties of procedure that they need help." In Pacific Gas & Electric, a majority of the NLRB found that "a duly designated union representative was ready, willing, able and present." Steward Winn's comments and conduct on August 10, 1990 reflect only one of these, i.e., being present. "An employee's right of prior consultation with his union representative to insure knowledgeable and effective representation...arises only after [a] request by either [an] employee or his union for presence of [a] union representative." (Emphasis added) Gulf Oil Corp. N.L.R.B. Case No. 8-CA-11646 (1978). Representation must be by a local union representative, not merely another unit member, suggesting the need for a certain level of experience and competence. Detroit Edison Co., N.L.R.B. Case No. 7-CA-14826 (1978). "It is well established that, in absence of special circumstances, an employer does not have a right of choice either affirmative or negative as to who is to represent employees for any of the purposes of collective bargaining." Oates Bros., Inc., 135 N.L.R.B. 1295, 1297 (1962) and National Can Corp., 200 N.L.R.B. 1116, 1123 (1972). Essentially, this is exactly what happened when Vandal did not allow sufficient time for Kelley to respond and/or was unwilling to reopen his administrative interview some two to three minutes after the employee had been returned to the cell block, those two or three minutes being well within the time Vandal was prepared to devote to the administrative interview had the employee elected to proceed with Winn present and/or without Kelley. Likewise, Vandal's termination of the employee's meeting with Winn some ten minutes after the "cigarette break" detracted from the requirement and expectation that sufficient time be devoted to that process so that the consultation might be "meaningful," implying a need for knowledgeable and effective communication between employee and representative. See Pacific Tel & Tel. 110 LRRM 1411 (1982) discussing disclosure requirements so that such consultations might be meaningful and effective.

Based on Laconia, supra, and the line of cases cited herein we adopt the three Weingarten options cited above and determine that a reasonable attempt must be made to contact and have available a union representative of the employee's choice if that representative is reasonably available, with "reasonably available" meaning that the representative is capable of presenting himself without unreasonably delaying the employer's administrative interview and without impeding the employer's ability to fulfill its mandated governmental function, namely, the operation of a police department. In this case, the reasonable attempt was not made, Kelley appears to have been reasonably available, and there was insufficient showing that Kelley's involvement would have resulted in an unreasonable delay of the administrative interview.

Accordingly, we find that:

1. The conduct complained of violated RSA 273-A:5 I (a) and was an unfair labor practice as defined therein.

2. The City must:

   (a) CEASE and DESIST from failing to permit circumstance where representation of choice might be obtained consistent with the standards set forth herein, and

   (b) delete any and all references to insubordination as currently found as Item 2 of City Exhibit No. 7.

3. The employee's terminated status remains unchanged notwithstanding Item 2 (b), above.

So ordered.

Signed this 4th day of May, 1992.

JACK BUCKLEY
Alternate Chairman

By unanimous vote. Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting.