OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
----------x
In the Matter of the Improper Practice Proceeding

-between-

ASSISTANT DEPUTY WARDENS/
DEPUTY WARDENS ASSOCIATION
and DEPUTY WARDEN JANE GIBSON,

Petitioners,

Decision No. B-9- 2003
Docket No. BCB-2269-02

-and-

CITY OF NEW YORK and DEPARTMENT
OF CORRECTION,

Respondents.
----------x

DECISION AND ORDER

On February 27, 2002, the Assistant Deputy Wardens/Deputy Wardens Association ("Union") and Deputy Warden Jane Gibson ("Gibson") filed a verified improper practice petition alleging that the City of New York and the Department of Correction ("City" or "DOC") violated the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The Union claims that DOC denied Gibson's request for union representation during a "Corrective Interview" and forced her to sign, under duress, a disciplinary document which had inaccuracies concerning her alleged misconduct. The City responds that Gibson was not entitled to union representation during the interview and that, in any event, DOC did not interfere with her right to such representation. This Board holds that an employee's request for union representation during an investigatory interview which the employee

reasonably believes may result in disciplinary action is a protected activity under the NYCCBL. Accordingly, the Union's petition is granted.

BACKGROUND

Jane Gibson is a Warden, Level II, in DOC, with the "in-house" title of Deputy Warden. Her civil service title is Assistant Deputy Warden. Gibson is assigned to the Manhattan Detention Complex.

On October 29, 2001, Warden Clayton Eastmond held a meeting with Gibson and Security Deputy Warden Miguel Western to discuss, among other things, sanitation problems at the Manhattan Detention Complex and the cells in the Manhattan Court. Gibson stated that the problems were due to a shortage of inmate workers. Eastmond told Gibson that this was not a legitimate excuse and questioned her attempts to get inmate workers or other DOC personnel to obtain the necessary supplies and services. Gibson stated that she was "tired of getting beat up, I am going home." The Union claims Gibson also stated that she was not feeling well; Gibson had recently donated part of her liver. The City states that at no time during the meeting did Gibson mention she was ill. It is undisputed that Gibson left the meeting before it was concluded and prior to the end of her shift. According to the Union, Gibson went to a physician where she was diagnosed with a migraine headache.

By memo dated October 29, 2001, Eastmond requested that Gibson be suspended and demoted for her conduct. By DOC Teletype Order dated October 30, 2001, Gibson was suspended without pay, pending disposition of disciplinary charges.

On November 1, 2001, Union President, Sidney Schwartzbaum called Eastmond

regarding Gibson. The parties dispute the substance of the conversation.

According to the Union, also on November 1, Gibson, along with Union Vice-President, Vincent Caputo, met Anthony Serra, Chief of Custody Management and Borough Facilities. Gibson explained that on October 29, 2001, she had walked out of Eastmond's office and did not return because she was ill. At the meeting, the parties did not discuss the possibility of a Corrective Interview. The City, however, claims that this meeting took place on November 7. The City states that Serra told Gibson that she had abandoned her post and disobeyed an order but he believed that she was a good Deputy Warden and that the Corrective Interview was a counseling session about her unacceptable behavior.

It is undisputed that on November 1, Gibson spoke with Eastmond. The Union claims that Eastmond advised Gibson that he was initiating charges and specifications for her improper conduct and was requesting that she be given a five or ten day suspension. However, the City alleges that Gibson apologized to Eastmond and that he advised her that she would be given a Corrective Interview when she returned to duty.

Pursuant to DOC Teletype Order dated November 5, 2001, Gibson's suspension was converted to one with pay. Eastmond contacted Gibson and informed her to report to duty that day. When Gibson returned, she was instructed to go to Eastmond's office, where he gave her a document entitled, "Corrective Interview." This document sets forth Eastmond's version of the October 29, 2001, meeting and states that on November 1, 2001, Gibson apologized to Eastmond and that he informed her she would be suspended and given a Corrective Interview upon her return. In the document, Gibson was charged with violating DOC rules, including failing to report to her post as scheduled, leaving her post without permission, and disobeying a supervisor.

The document states that if Gibson is found guilty of these offenses, she could be dismissed or suffer such other punishment as DOC may direct. Eastmond recommended a five day suspension and a demotion to Gibson's civil service title if her negative conduct continued.

The Union claims that Gibson complained that the Corrective Interview was not in the standard form because it was more like a disciplinary action. Gibson also complained that the contents and tone of the document were too harsh. Both parties agree that Gibson stated that she would not sign and validate the document without union representation. The City denies the Union's claim that Eastmond informed Gibson that a refusal to sign the document would result in her immediate suspension and demotion in rank to Assistant Deputy Warden – a $20,000 reduction in her compensation.

Furthermore, according to the Union, Eastmond stated that he would call Serra, pretend that Gibson had not seen the Corrective Interview, and ask Serra if the document was acceptable and appropriate. Eastmond had the Corrective Interview faxed to Serra, who then stated that the document was fine and that Gibson must sign it. On the other hand, the City claims that Eastmond called Serra and informed him that Gibson had requested union representation. Serra told Eastmond that since the Corrective Interview was not a formal disciplinary procedure, Gibson was not entitled to such representation; furthermore, the Corrective Interview was an alternative favorable to Gibson, for her insubordination could have resulted in her reassignment to Assistant Deputy Warden. After the conversation, Eastmond informed Gibson of Serra's comments. Gibson then asked to speak directly with Serra. The Union alleges, and the City denies, that Serra advised Gibson that her refusal to sign the Corrective Interview would result forthwith in her demotion and resuspension. Gibson told Serra that the Corrective Interview was

replete with inaccuracies and that she could not sign it without union representation.

It is undisputed that some time during the interview, Eastmond allowed Gibson to call the Union outside his presence. According to the Union, Gibson left a message for Peter Panagi, the Deputy Warden Association's Executive Board Representative. Gibson again told Eastmond that she wanted union representation. According to the Union, Gibson received a call from Panagi who advised her to sign the Corrective Interview and include "a caveat." While she was waiting for him to call back with further explanation of what to write, Schwartzbaum called and spoke to Gibson. It is undisputed that Eastmond then spoke to Schwartzbaum and read him the Corrective Interview over the phone. The City alleges, and the Union denies, that Eastmond told Schwartzbaum that the Corrective Interview was merely a counseling session. The Union states that after speaking with Eastmond, Schwartzbaum advised Gibson to sign the document and the Union would pursue the matter in another venue. Gibson signed the Corrective Interview and inserted that she was ill at the time and in need of medical attention due to a recent liver donation. Gibson also wrote that it was not her intention to be disrespectful to her supervisors. Gibson then returned to duty. According to the Union, the interview commenced at 11:30 a.m. and ended at 2:00 p.m.

On February 27, 2002, the Union filed the instant petition requesting that DOC cease and desist from interfering with the Union's right to represent members during disciplinary meetings. The Union also requests that DOC avoid any adverse disciplinary action against Gibson because of its refusal to permit her union representation and post notices that it violated Petitioners' rights.

On May 15, 2002, the Director of DOC Labor Relations, sent Serra a memorandum

stating that the Corrective Interview "contains certain statements that are not pertinent to a non-disciplinary interview." The Director recommended that the Corrective Interview and the Teleype Order suspending Gibson without pay be rescinded in its entirety and removed from her personnel file. These documents were subsequently removed from Gibson's file.

On May 21, 2002, the City filed its Answer and the Union's Reply followed on July 17, 2002. The parties were then given the opportunity to file briefs on whether, under the NYCCBL, a City employee has the right to union representation during an investigatory interview which may reasonably lead to discipline. The pleadings were complete on November 15, 2002.

POSITIONS OF THE PARTIES

Union's Position

The Union claims that the City violated NYCCBL §12-306(a)(1), (2), and (3)[1] when DOC denied Gibson union representation during the Corrective Interview and ordered her to sign the document under duress and threats of demotion and resuspension. The Union recognizes the City's right to discipline its employees for misconduct but claims that DOC interfered with and coerced a public employee in the exercise of her rights guaranteed under the NYCCBL and

[1] NYCCBL § 12-306(a) provides in pertinent part that it shall be an improper practice for a public employer or its agents:

> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
> (2) to dominate or interfere with the formation or administration of any public employee organization;
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization. . . .

discriminated against Gibson for purposes of discouraging her participation in lawful activities.

The Union urges this Board to adopt the rationale of *NLRB v. Weingarten*, 420 U.S. 251 (1975), as the Public Employment Relations Board ("PERB") has recently done in *New York City Transit Authority*, 35 PERB ¶ 3029 (2002), *appeal pending*, and hold that a City employee has the right to union representation during a disciplinary interview.

In reply to the City's answer, the Union argues that this issue has not been rendered moot by DOC's decision to expunge the disciplinary documents from Gibson's personnel file and not to punish Gibson for her conduct on October 29, 2001. Moreover, contrary to the City's claims, the Corrective Interview was in the nature of an investigatory interview, which triggered the right to union representation.

City's Position

First, the City argues that the petition is moot because the Corrective Interview was removed from Gibson's personnel file and her suspension was converted to one with pay. Since the actions complained of in the petition have been cured, there is no longer a live controversy to be remedied. Second, DOC's decision to issue a Corrective Interview to an employee who engages in misconduct falls within management's rights under NYCCBL § 12-306(b).[2] DOC's determination to discipline Gibson was motivated by her misconduct and not anti-union animus, and the Union has failed to state a claim under the NYCCBL. Third, this Board has rejected the position that public employees are entitled to union representation during an interview which

[2] NYCCBL §12-307(b) grants the employer the right "to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees. . . ; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . ."

may reasonably lead to discipline. Moreover, this was not an investigatory interview but merely a counseling session which did not trigger the right to union representation. In any event, DOC did not prevent Gibson from speaking to the Union prior to her signing the Corrective Interview, and by allowing her speak to Schwartzbaum prior to signing the document, DOC did not coerce her or deny her request for union representation.

DISCUSSION

As a threshold matter, the City claims that the Union's petition is moot because the disciplinary documents were removed from Gibson's personnel file after the petition was filed and her suspension was converted to one with pay. We reject this argument.

In *Cotov*, Decision No. B-16-94, the employer argued that an improper practice petition alleging anti-union animus was moot because the complaining employees no longer worked for the City. We stated that an "improper practice proceeding does not become moot merely because the acts alleged to have been committed in violation of the law have ceased. The question of a remedy for a prior violation of law and the matter of deterring future violations remain open to consideration." *Id.* at 20. In *Sferrazza*, Decision No. B-56-91 at 7, a *pro se* petitioner alleged that the union had denied her the right to become a union member. As in *Cotov*, we found that the petition was not moot merely because her application for union membership had been accepted after the petition was filed. *See also Price*, Decision No B-32-91 at 9; *Cosentino*, Decision No. B-44-82 at 11.

While this Board agrees that DOC's remedial actions may have eliminated any harm to Gibson, we find that the underlying controversy, which could affect the entire bargaining unit, is

not moot.

The City maintains that under the NYCCBL, City employees are not entitled to union representation during an investigatory interview – the gravamen of the Union's complaint. As the Union has pointed out, PERB has recently found that public employees have the right to union representation during an investigatory interview which may reasonably lead to discipline. However, our case law holds otherwise. Since this issue will likely arise again in the future, we consider it ripe for review.

In *NLRB v. Weingarten,* 420 U.S. 251, the United States Supreme Court held that the National Labor Relations Act ("Act") accords private sector employees the right to refuse to submit to an employer's interview without the presence of a union representative if the employee reasonably believes that the interview could result in disciplinary measures. In reaching that conclusion, the Court focused on language in § 7 of the Act, which provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The Court found that the action of an employee in seeking to have the assistance of his union representative at a "confrontation" with his employer clearly falls within the literal wording of § 7's guarantee of the right of employees to act in concert for mutual aid and protection. The Court stated:

> This is true even though the employee alone may have an immediate stake in the outcome; he seeks "aid or protection" against a perceived threat to his employment security. The union representative whose participation he seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment

> unjustly. (Citation omitted.) The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview.

NLRB v. Weingarten, 420 U.S. at 260-61.

The Court also found that an employee's right to the presence of a union representative at an investigatory interview arises only when the employee requests such representation. *Id*. at 257. In *Axelson, Inc.*, 285 NLRB 49 (1987), the National Labor Relations Board ("NLRB) stated:

> Under *Weingarten*, once an employee makes such a valid request for union representation, the employer is permitted one of three options: (1) grant the request, (2) discontinue the interview, or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. Under no circumstances may the employer continue the interview without granting the employee union representation, unless the employee voluntarily agrees to remain unrepresented after having been presented by the employer with the choices mentioned in option (3) above or if the employee is otherwise aware of those choices.

Id. at 52; *see also U. S. Postal Service*, 241 NLRB 141 (1979).

Over the years, this Board has determined that City employees do not enjoy *Weingarten* rights. In *DeChabert,* Decision No. B-17-91, we held that requesting union representation during an investigatory interview which may lead to discipline is not a protected activity under the NYCCBL. *See also Mellor*, Decision No. B-43-91. We based our decision upon the absence of the phrase "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" from the NYCCBL and upon decisions of PERB and the New York State courts which addressed the issue. We noted that these decisions strongly suggested

that public sector employees did not enjoy *Weingarten* rights.[3]

In 1993, approximately two years after this Board issued *DeChabert,* New York Civil Service Law ("CSL") § 75(2) was amended to provide for union representation during a disciplinary interview.[4] In *Local 1182, Communications Workers of America*, Decision No. B-14-95, the union claimed that the City violated NYCCBL § 12-306 when it questioned an employee regarding corruption without notifying him of his right to union representation during such questioning. The Board reaffirmed *DeChabert* and found that although requesting union representation during an investigatory interview which may reasonably lead to discipline is a protected activity under CSL § 75(2), the employer did not commit an improper practice under the NYCCBL.

In *Local 1182, Communications Workers of America*, Decision No. B-8-96, we again rejected a union's request to overturn *DeChabert,* this time based on PERB hearing officers' decisions granting *Weingarten* rights.[5] The Board noted that the PERB Board had spoken on the

---

[3] The Board noted the significance of *City of New York Department of Investigation,* 9 PERB ¶ 3047 (1976), *aff'd sub nom*. *Sperling v. Helsby*, 60 A.D.2d 559, 400 N.Y.S.2d 821 (1st Dep't 1977) (PERB Board, in dicta, "disassociated" itself from the Administrative Law Judge's determination [9 PERB ¶ 4530], that *Weingarten* rights apply to public employees).

[4] CSL § 75(2) provides: "An employee who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization. . . ."

[5] Over the years, some PERB hearing officers have found *Weingarten* rights in the Taylor Law. *See New York City Transit. Auth.*, 30 PERB ¶ 4655 (1997), *rev'd on other grounds*, 31 PERB ¶ 3024 (1998); *City Sch. Dist. of City of Buffalo*, 28 PERB ¶ 4582 (1995); *Gates-Chili Cent. Sch. Dist.*, 25 PERB ¶ 4683 (1992). Others have not. *See City of Watervliet*, 32 PERB ¶ 4592 (1999); *New York City Transit Auth.*, 28 PERB ¶ 4597 (1995); *Depew Union Free Sch. Dist.*, 21 PERB ¶ 4558, *aff'd on other grounds*, 21 PERB ¶ 3043 (1988); *New York City Trans. Auth.*, 19 PERB ¶ 4618 (1986).

Weingarten issue on only one occasion when, in dicta, it "disassociated" itself from a hearing officer decision granting those rights. We stated that "[u]nder these circumstances, our decision on the issue must stand unless and until PERB revisits the issue." *Id*. at 9.

Recently, in *New York City Transit Authority*, 35 PERB ¶ 3029, PERB directly reached the issue whether *Weingarten* applies to public employees covered by the New York Civil Service Law, Article 14, ("Taylor Law"), the New York State equivalent to the Act. PERB concluded that a public employee has the right to union representation during an investigatory interview that the employee reasonably believes will lead to discipline.

In reaching this conclusion, PERB considered the *Weingarten* Court's reasoning that:

> . . . it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview that may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self- protection, against possible adverse employer action.

New York City Transit Authority, 35 PERB ¶ 3029, at 4, *citing NLRB v. Weingarten,* 420 U.S. at 257. PERB observed that the Court's emphasis was on the concerted nature of the request for union assistance and that no greater emphasis was placed on the words "mutual aid or protection" than on the words "concerted activity." PERB interpreted § 202 of the Taylor Law, which provides that public employees "have the right to form, join and participate in, or refrain from forming, joining or participating in, an employee organization of their own choosing" and found that the absence of the Act's identical § 7 language did not compel a conclusion that *Weingarten* was inapplicable. PERB stated: "there is no clearer expression of participation in an employee organization than the request for union representation at an investigatory interview which may

result in discipline, such as an employee's suspension, loss of pay or termination." 35 PERB ¶ 3029 at 4. Accordingly, PERB concluded that public employees have *Weingarten* rights.[6]

As a prerequisite for finding a violation of the NYCCBL, we must first determine whether the union activity which is the target of the alleged improper practice enjoys statutory protection. *Local 1182, Communications Workers of America*, Decision No. B-14-95 at 8. Section 12-305 of the NYCCBL provides, in relevant part, that public employees have "the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities." This language is substantially similar to the language in § 202 of the Taylor Law. For the same reasons articulated by PERB in *New York City Transit Authority*, *supra*, we now conclude that City employees also have the right to union representation during an investigatory interview which may reasonably lead to discipline. To the extent that other Board decisions differ from this finding, they are overruled.

In the instant case, we are unpersuaded by the City's claim that Gibson's Corrective Interview was merely a "counseling session" to instruct her on "proper work technique." On October 30, 2001, Gibson was suspended without pay for an unspecified period, pending disposition of disciplinary charges. Even though Gibson's suspension was converted to one with pay, the document entitled "Corrective Interview," which Eastmond gave to her upon return to duty, set forth Eastmond's version of the events of October 29, 2001, charged her with violating

---

[6] PERB, like the Board in *Local 1182, Communications Workers of America*, Decision No. B-14-95, also found that CSL § 75 rights according public employees union representation at certain investigatory interviews are independent from the rights in the Taylor Law. *New York City Transit Authority*, 35 PERB ¶ 3029 at 6.

specific DOC rules, and stated that if found guilty, she could be dismissed or punished. Both Eastmond and Serra asked Gibson to sign, and thereby verify, the contents in the document. Whether the Union's allegation that they told her that a refusal to sign would result in her resuspension and demotion need not be determined since the Corrective Interview itself provided "if this negative conduct continues or poor work attitude arises again you will be restored to your civil service rank of Assistant Deputy Warden." In fact, DOC's Director of Labor Relations subsequently noted that the Corrective Interview "contains certain statements that are not pertinent to a non-disciplinary interview" and recommended that it be removed from Gibson's personnel file. We find that this interview, which lasted intermittently for almost three hours, was one which Gibson may have reasonably believed would lead to discipline. Although Eastmond did not interrogate Gibson concerning her version of the events of October 29, 2001, he did more than just counsel her or notify her of the discipline being imposed. In the confines of his office, Eastmond directed Gibson to confirm specific factual allegations of workplace misconduct which may have led to her termination. In addition, her failure to cooperate and sign the Corrective Interview may have been construed as negative conduct, therefore leading to Gibson's demotion.

We are also unpersuaded by the City's claim that by allowing Gibson to speak to Schwartzbaum on the telephone prior to signing the Corrective Interview, DOC did not deny her request for union representation. It is undisputed that Gibson told Eastmond that she would not sign the document without union representation. Eastmond did not advise Gibson that DOC would either grant the request, discontinue the interview, or offer her the choice of continuing the interview unaccompanied by a union representative or of having no interview at all and thereby

dispensing with any benefits that the interview may have conferred on her. Eastmond simply told her that she was not entitled to such representation. Even though Gibson was ultimately allowed to consult with the Union by telephone, we find that this option is not one of the three options an employer is required to offer once an employee requests union representation. *See Axelson, Inc.*, 285 NLRB at 53. The *Weingarten* Court, recognizing the need of an employee to have a union representative physically present during an investigatory interview with an employer, stated:

> Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management." (Citation omitted.)

NLRB v. Weingarten, 420 U.S. at 262-63. Accordingly, we grant the Union's petition on the grounds that DOC's continuation of the Corrective Interview over Gibson's clear request for union representation was in violation of the NYCCBL.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition filed by the Assistant Deputy Wardens/Deputy Wardens Association docketed as BCB-2269-02 be, and the same hereby is granted; it is further

ORDERED, that the Department of Corrections cease and desist from interfering with employees' right to request union representation during investigatory interviews which may reasonably lead to their discipline.

Dated: February 26, 2003
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

RICHARD A. WILSKER
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER