DC 37, CSTG, L.375, 79 OCB 1 (BCB 2007)

[Decision No. B-01-2007] (IP) (Docket No. BCB-2558-06), appeal pending.

Summary of Decision: Petitioner alleged that DEP violated the NYCCBL when it served disciplinary charges on three unit members after engaging in conduct which allegedly prevented them from requesting Union representation at meetings with supervisors in which discussions about job performance took place. The City claimed that the unit members were not entitled to Union representation because these members did not affirmatively request Union representation. The Board dismissed Petitioner's claim that DEP engaged in coercive conduct against the three unit members. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

DISTRICT COUNCIL 37, CIVIL SERVICE TECHNICAL GUILD, LOCAL 375,

Petitioner,

-and-

THE CITY OF NEW YORK OFFICE OF LABOR RELATIONS and THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

DECISION AND ORDER

On June 29, 2006, the Civil Service Technical Guild, Local 375, of District Council 37, American Federation of State County and Municipal Employees, ("Union"), filed a verified improper practice petition against the City of New York Office of Labor Relations and the New York City

Department of Environmental Protection ("City" or "DEP") alleging that DEP violated New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1). Petitioner claims that DEP denied Union representation to three unit members at certain meetings with DEP management and engaged in coercive conduct to prevent them from requesting Union representation. The City maintains that Petitioner failed to articulate *prima facie* claims because these three employees were not entitled to Union representation at these meetings and that DEP, based upon these employees' alleged misconduct, has demonstrated legitimate business reasons for its actions. We find no violation of the NYCCBL. Accordingly, the petition is dismissed.

BACKGROUND

The Trial Examiner found that the totality of the record established the relevant background facts to be as follows:

Distribution Field Operations ("DFO") is a unit within DEP's Division of Drinking Water Quality Control ("Division"). DFO employees routinely collect water samples from more than 300 locations throughout New York City for testing to assure proper chlorine and pH levels in the public drinking water supply. At the beginning and end of the day, as well as at times during the day, when samples are measured, tests are performed on the sampling equipment to assure proper calibration.

DFO's field staff consists of 12 employees who are responsible for conducting the water tests. Among them are Mahmmet Siddik Kagzi and Vantzeti Vassilev, who are Assistant Chemists, and Zhiping He, who is a Water Ecologist. Employees in these titles perform comparable functions. The titles are represented by the Union.

In February 2006, DFO Chief Lin Lu found inconsistencies in the data submitted by a member not at issue in this case. Around the same time, Lin conducted a review of other employees' data and found irregularities in readings taken by Kagzi, Vassilev, and He. On March 1, 2006, Lin issued a memorandum to Kagzi, Vassilev, and He noting the problematic data and asking each to explain the reasons for the specified "shortcomings." That same day, Lu met with each of the Union members. The Union asserts that Lu told each that he wanted to discuss the lab's functioning to straighten out any problems. The Union asserts that the meetings occurred within an hour of distribution of Lu's memos. The City generally denies these assertions. In addition to Lu, also attending at each of these meetings were the DFO Supervisor, his Deputy and his Assistant Field Supervisors. The Union asserts that each employee was asked technical questions about his individual work in previous months, not "simple information inquiries." The Union also asserts that the questioning took the form of accusations and were posed in the manner of an interrogation, such as "Isn't it true that you . . . ?" The Union asserts further that Lu recorded the responses to the supervisors' questions and that Lu took notes throughout each meeting. The City generally denies the Union's characterization of the meetings, each of which, the City states, lasted from 20 to 30 minutes.

The Union states that none of the employees was informed that the meetings were investigatory interviews that could lead to disciplinary action. The City states that none of the supervisors indicated to Kagzi, Vassilev, and He before their respective meetings that they could not consult with Union representatives. The City also states that neither the supervisors nor the employees spoke about Union representation either before or during the meetings. It is undisputed that at no time during their separate meetings did Kagzi, Vassilev, or He invoke their right to Union

representation. However, the Union asserts that Kagzi, Vassilev, and He were unaware, going into the interviews, that the statements they would make in response to supervisors' questions would be used as the basis for disciplinary action. The Union also asserts that the manner in which the interviews were conducted – allegedly accusatory questioning, for instance – was such that it inhibited Kagzi, Vassilev, and He from asserting any legal right they may have had to Union representation.

On March 3, 2006, Lu informed the First Deputy Chief of the Division that field staff members had failed to follow standard operating procedures, and at the request of the First Deputy Chief, Lu prepared a report on March 6 of the matter. On March 8, Kagzi, Vassilev, and He were served with disciplinary charges in connection with their alleged failure to follow standard operating procedures. Each served a 30-day suspension.

On May 24, 2006, Kagzi, Vassilev, and He each attended his own respective informal conference on the charges. Each was represented by a Union grievance representative. At the conclusion of each conference, the conference holder upheld the disciplinary charges against Kagzi, Vassilev, and He and recommended the discharge of each. Each was informed that he could appeal the determination under Civil Service Law or under the parties' contractual grievance procedure. Kagzi, Vassilev, and He were not terminated but rather remain employed by DEP.

Petitioner requests that the recommendation of the penalty of termination be rescinded. In the alternative, the Union asks that DEP be prevented from using any statements obtained in the March 1 meetings to support the agency's disciplinary charges against Kagzi, Vassilev, and He.

POSITION OF THE PARTIES

Petitioner's Position

Petitioner contends that, with respect to Kagzi, Vassilev, and He each, DEP's denial of the right to Union representation at case conferences violates NYCCBL § 12-306(a)(1) because each was entitled to representation at the meetings with management because, had he realized that the meetings would be investigatory in nature leading to possible discipline, he would have invoked his right to representation, *i.e.*, *Weingarten* rights, under the circumstances. Neither Kagzi, Vassilev, nor He knew prior to their respective supervisory conferences that they would be subject to interrogation concerning job performance in a fashion that could lead to discipline. The accusatory interrogation which Kagzi, Vassilev, and He allegedly experienced during each of their respective supervisory conferences prevented them from affirmatively asserting *Weingarten* rights to either go forward with the meeting in the company of a Union representative or to quit the conference until a Union representative could be present. DEP's denial of representation violated these rights. DEP then used whatever admissions were elicited as the basis for the recommendation of employment termination.

City's Position

While acknowledging that employees of the City of New York have rights under *Weingarten*, the City contends that the facts presented in the instant case do not implicate *Weingarten* rights. The supervisory case conferences to which DEP officials called Kagzi, Vassilev, and He were "scheduled for the purpose of counseling the employees on proper technique" to be used when conducting certain water quality tests and were called to address a work performance problem of each employee at issue in this case but were not "investigatory" in nature. The City points

to the Union's admission that all of the factual allegations establish as an objective matter that there was no basis for believing that the supervisory conferences could result in discipline. Moreover, the City disputes the Union's suggestion that Kagzi, Vassilev, and He were coerced to make incriminating statements which were later used to formulate disciplinary charges against them. They undisputedly failed to ask for Union representation before or during their respective supervisory conferences and failed to tell supervisors that they wanted to discontinue the meeting without representation. The Union has failed to link any allegation of conduct by supervisors to the exercise of any protected right of the employees on whose behalf the Union has filed the instant petition. Since *Weingarten* rights are an affirmative right requiring an employee to assert it and since Kagzi, Vassilev, and He failed to affirmatively request Union representation or a postponement of the conference until Union representation could be obtained, the Union has failed to state a *prima facie* claim that any *Weingarten* rights were violated or that DEP violated any section of the NYCCBL for that matter.

DISCUSSION

In this case, we are asked to determine whether DEP interfered with the right of Kagzi, Vassilev, and He to Union representation at supervisory conferences which resulted in disciplinary charges against them. Because this Board finds that Kagzi, Vassilev, and He did not affirmatively assert their right to Union representation at the meetings at issue, we find that DEP did not violate the *Weingarten* rights of Kagzi, Vassilev, and He, and we deny the Union's petition in its entirety.

In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257 (1975), 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 investigatory interview without the presence of a union representative if the employee reasonably believes that the interview could result in disciplinary measures, and the employee requests such representation. *See also, Axelson, Inc.*, 285 NLRB 49, 53 (1987). 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. *Weingarten, Inc.*, 420 U.S. 251, 257.

The New York State Public Employee Relations Board ("PERB") adopted the *Weingarten* rationale and recognized the right of an employee to a union representative at a meeting where the employee reasonably believes that the interview could result in disciplinary measures. *See New York City Transit Authority*, 35 PERB ¶ 3029 (2002), *aff'd*, Index No. 45830/02, 2005 N.Y. App. Div. LEXIS 14882 (2nd Dep't Dec. 27, 2005) ("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"). Subsequently, this Board adopted PERB's recognition of *Weingarten* rights for public sector employees, thus affording such rights to employees of the City of New York using the same analysis as that adopted by PERB and the NLRB. *See Assistant Deputy Wardens' Ass'n*, Decision No. B-9-2003 at 13.

Thus, an employee may invoke *Weingarten* protections when he or she has a reasonable belief that an investigatory meeting may result in discipline. When examining this issue, NLRB, PERB and the courts have applied an objective test, that is, examining all the external evidence, and excluding an individual employee's subjective or idiosyncratic feelings. *Consolidated Edison Co. of New York, Inc.*, 323 NLRB 910, 910 (1997); see also *Transit Workers Union, Local 100*, 36 PERB

¶ 3049 (2003); *American Fed'n of Gov't Employees, Local 2544 v. Federal Labor Relations Authority*, 779 F.2d 719, 724 (D.C. Cir. 1985).

In our seminal case regarding *Weingarten* rights, *Assistant Deputy Wardens' Ass'n*, Decision No. B-9-2003, we also applied an objective standard, finding that the invocation of rights was appropriate where an employee was required to attend a follow-up meeting regarding her job performance after leaving a prior meeting. This Board found that the employee had a reasonable belief that disciplinary repercussions could arise out of the second meeting because her failure to cooperate at the first meeting may have been construed as negative conduct, therefore leading to disciplinary consequences. *Id*. at 14; *see McAlpine*, Decision No. B-25-2006 at 12 (employee's belief that discipline could have resulted from either of two scheduled supervisory meetings was reasonable because she had previously been cited by supervision for conduct at issue); *see also Burton*, Decision No. B-15-2006 (employee's belief that discipline could occur during his case conference was reasonable because he previously had been disciplined as a result of his actions at a prior case conference); *Consolidated Edison Co. of New York, Inc.*, 323 NLRB 910, 916 (an employee had a reasonable belief that discipline could result from a meeting because he failed to perform assigned tasks which constituted a disciplinable offense); *New York City Transit Authority*, 35 PERB ¶ 3029, 3082 (employee had a reasonable belief that discipline would arise from a closed-door meeting because the employee's alleged comment constituted workplace misconduct that could have resulted in discipline).

In the instant matter, it is not clear whether Kagzi, Vassilev, and He had any reasonable basis to believe, in advance, that discipline would result from the March 1, 2006, meeting to which each was summoned. It is more likely that such a reasonable basis for belief might have arisen during the

course of their individual meetings. However, we need not determine whether circumstances created a reasonable basis for such a belief; the employees' failure to assert their *Weingarten* rights or, in any way, to request Union representation is fatal to the Union's claim.

As the Supreme Court held in *Weingarten*, "the right [to representation] arises only in situations where the employee requests representation. In other words, the employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative." 420 U.S. at 257; *Sanchez v. Dankert*, 169 L.R.R.M. 2870 at 26-27 (S.D.N.Y. 2002) This is consistent with our holdings on the subject as well. *See Assistant Deputy Wardens' Ass'n,* Decision No. B-9-2003 at 10; *McAlpine*, Decision No. B-25-2006 at 10; *Burton*, Decision No. B-15-2006 at 16. Thus, the invocation of the right is a necessary precondition to its application in both the public and private sectors. *New York City Transit Authority*, 35 PERB ¶ 3029 at 3082, *Consolidated Edison Co. of New York, Inc.*, 323 NLRB at 916.

We hold, consistent with the Supreme Court, the NLRB and PERB, that the duty on the part of management to allow union representation does not arise until the right to such representation is invoked by the employee, even where the employee entertains a reasonable belief that disciplinary action may ensue as a result of the supervisory conference which he or she is called to attend. Again, failure to request representation is fatal to a claim that *Weingarten* rights have been violated by requiring that employee to attend without the representation.

Since the Union does not dispute that Kagzi, Vassilev, and He did not request Union representation, we hold that DEP did not violate the *Weingarten* rights of Kagzi, Vassilev, and He. As the Union has alleged no factual basis for any independent interference or coercion claim in violation of NYCCBL § 12-306(a)(1), we deny the instant petition in its entirety.

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 District Council 37, Civil Service Technical Guild, Local 375, docketed as BCB-2558-06 be, and the same hereby is denied in its entirety.

Dated: January 23, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER