United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE. February 28, 1995

TO : Louis J. D'Amico, Regional Director
Region 5

FROM : Robert E. Allen, Associate General Counsel
Division of Advice

SUBJECT: National Rehabilitation Hospital
Case 5-CA-24870

506-4033-3000
512-5072-2400

This Section 8(a)(1) and (5) case is submitted for advice as to: (1) whether the Employer violated the Act under NLRB v. J. Weingarten, Inc.,[1] by refusing an employees' request to have a Union representative present during an investigatory interview in a situation where the Union has been certified, but the employees have not elected local Union officers nor has the Union designated an on site representative; (2) whether, if the employee was entitled to a Union representative at this meeting, then when the Employer discharged the employee wholly for the employee's conduct during this investigatory meeting, did the Employer further violate Section 8(a)(1) by terminating the employee for an incident that may not have occurred had the Employer not violated the employee's Weingarten rights; (3) if complaint is warranted, what is the appropriate remedy.

FACTS

On January 6, 1994[2], the National Union of Hospital and Health Care Employees, SEIU, AFL-CIO (Union) was certified as the exclusive representative in Case 5-RC-13953. The parties have not successfully executed a contract and the Union has not appointed a shop steward or other official representative at the National Rehabilitation Hospital (Employer). Exs. 6 & 7(C) was employed as a Rehabilitation Nursing Technician from March 1986 to July 12, 1994. He was identified as a lead union adherent by the head nurse. The head nurse told the assistant head nurse that Exs. 6 & 7(C) , Exs. 6 & 7(C) and Exs. 6 & 7(C) were strongly

---

[1] 429 US 251 (1975).

[2] All dates are in 1994, unless otherwise indicated.

in favor of the Union. The head nurse also told the assistant head nurse that the Hospital did not intend on giving them a contract and that she would see to it that Exs. 6 & 7(C), Exs. 6 & 7(C) and Exs. 6 & 7(C) paid for their activity.

In May registered nurse Exs. 6 & 7(C) reported that Exs. 6 & 7(C) had been challenging her with regard to the assignments that she gave him. Exs. 6 & 7(C) said that she would try to work out the problems with him by herself. She then met with him and told him that a patient had complained about his treatment. After this initial discussion with Exs. 6 & 7(C), Exs. 6 & 7(C) informed the charge nurse every time she had a problem with Exs. 6 & 7(C). Finally, Exs. 6 & 7(C) asked the head nurse to intervene.

On July 12, the head nurse called Exs. 6 & 7(C) into her office. Exs. 6 & 7(C), the assistant head nurse and a head nurse in training were already in the head nurse's office when Exs. 6 & 7(C) arrived. Exs. 6 & 7(C) requested a union representative when he first entered the office, stating that he did not feel right being in there without his union representative. The head nurse denied his request saying that he did not need one and they did not have a ratified contract or Union representatives. Exs. 6 & 7(C) then requested that either Exs. 6 & 7(C) Ball or Exs. 6 & 7(C) come in with him as his witnesses. The head nurse told him that he did not need them in there then and told him that this was a private meeting and they just wanted to talk to him.

The head nurse then stated in the meeting that she had a list of complaints that the registered nurse brought against him and told him that he and the nurse would, in turn, be able to respond. After the head nurse listed the complaints, Exs. 6 & 7(C) became irate, stood and, in a raised voice, told the nurse that she was a damn liar. The head nurse told him to sit down and she continued talking. Exs. 6 & 7(C) jumped up again and called the nurse a liar while pointing his finger in front of her face. He repeated this behavior 3 or 4 times and then the head nurse told him that she would not continue the meeting unless he controlled his temper. The head nurse told him that if he raised his voice again she would have to send him home. Exs. 6 & 7(C) said that would be fine because he was really upset and they were not getting anything accomplished.

Exs. 6 & 7(C) went to the door and called out to two of his colleagues, Exs. 6 & 7(C) and Exs. 6 & 7(C), to try to get them to come into the office. The head nurse told him that if they came in, the meeting would be over. Exs. 6 & 7(C) said that was fine and he would like to go home. The head nurse agreed that he should leave. Exs. 6 & 7(C) left the office, he went to the front desk of that station and began telling his

coworkers what happened and the registered nurse's accusations. The registered nurse was standing there at this time. The head nurse told Exs. 6 & 7(C) to leave the building. Exs. 6 & 7(C) was suspended after this meeting and he was terminated on July 14. The Employer contends that Exs. 6 & 7(C) was terminated wholly because of his threatening conduct during the meeting, which qualified as unacceptable behavior under the Employer's rules and regulations.

ACTION

We conclude that a Section 8(a)(1) complaint should issue, absent settlement, for the reasons set forth below.

The Supreme Court, in Weingarten, supra, at 256, held that the right to have a union representative present at a disciplinary/investigatory interview is a Section 7 right of employees "to act in concert for mutual aid and protection." The presence of a union representative serves to safeguard not only the particular employee's interest, but also those of the entire bargaining unit against an employer's imposing punishment unjustly. In order to secure the right to consult a union representative, an employee must have a reasonable basis to believe that discipline may result from the investigation being conducted, and the employee must request union representation. Id. at 257. The Weingarten right includes the right to consult with a union representative prior to the investigatory interview.[3] A union or an employee may waive the employee's Weingarten rights. However, any waiver of Weingarten rights must be clearly and unmistakably made.[4]

When an employer takes disciplinary action against an employee for the conduct which was the subject of the investigation, and not for his invoking Weingarten rights, the disciplinary action does not itself violate Section 8(a)(1), even when the employee's Weingarten rights were violated.[5] However, an employer may violate the Act by disciplining the employee if the employee's invocation of Weingarten rights was a factor in the disciplinary action. If so found, the burden is placed on the employer to prove

---

[3] Climax Molybdenum Co., 227 NLRB 1189 (1977).

[4] New Jersey Bell Telephone Company, 300 NLRB 42, 49 (1991), Prudential Insurance Company, 275 NLRB 208 (1985), U.S. Postal Service, 256 NLRB 78, 80-81 (1981).

[5] Taracorp Inc., 273 NLRB 221, 223 fn. 12; L.A. Water Treatment, 263 NLRB 244, 246 (1982).

that it would have instituted the disciplinary action in the absence of the employee's invocation of Weingarten rights.[6]

In the instant case, we conclude that the Employer violated Section 8(a)(1) of the Act by denying the discriminatee his Weingarten rights. First, we conclude that the discriminatee had a reasonable belief that the interview would result in discipline. In this regard, we note that Exs. 6 & 7(C) had been having disagreements with the registered nurse and Exs. 6 & 7(C) was called into the office of the head nurse with the assistant head nurse and registered in attendance. In addition, at the beginning of this meeting, Exs. 6 & 7(C) was not assured by the Employer that discipline would not be imposed. Further, the head nurse began the meeting by telling Exs. 6 & 7(C) that the registered nurse's complaints against him would be presented and that he could respond to them. Under these circumstances, we conclude that it was reasonable for Exs. 6 & 7(C) to believe that the purpose of this meeting was to take disciplinary action against him.[7]

Exs. 6 & 7(C) asked that a Union representative be present and the Employer denied Exs. 6 & 7(C) request. The lack of an appointed shop steward or other Union official does not waive the employee's right to the Section 7 protections established under Weingarten. When Exs. 6 & 7(C) requested a Union representative, the Employer had the responsibility of contacting, or allowing Exs. 6 & 7(C) to contact, the Union to determine the Union's choice of a representative for Weingarten purposes during this interim period in the parties' collective bargaining relationship. Therefore, after Exs. 6 & 7(C) request for Union representation, the burden shifted to the Employer to give the Union an opportunity to determine their choice of a temporary representative for Exs. 6 & 7(C) end the interview, or give the employee the option of continuing without the representative. By forcing Exs. 6 & 7(C) to continue the interview without the benefit of a Union

---

[6] Safeway Stores, Inc., supra; (1991); T.N.T. Red Star Express, Inc., 299 NLRB 894, 895, fn. 6 (1990).

[7] Northwest Engineering Co., 265 NLRB 190 (1982), is distinguishable from the instant case in that there the purpose of the meeting was not investigatory, rather the employer merely reviewed the company's rules and regulations with the employees. In the instant case, the employee entered the interview and observed the registered nurse with whom he had been having conflicts. In addition, the Employer told Davis that the registered nurse's complaints against him would be presented and that he could respond to them.

representative the Employer violated Section 8(a)(1) of the Act.[8]

Second, we conclude that the Employer violated Section 8(a)(1) of the Act by disciplining Exs. 6 & 7(C) for conduct during the interview. Exs. 6 & 7(C) agitation during the interview was the direct result of the Employer's denying Exs. 6 & 7(C) Union representation. Thus, when the Employer discharged Exs. 6 & 7(C), the Employer was disciplining Exs. 6 & 7(C) for conduct that flowed directly from Exs. 6 & 7(C) assertion of his Weingarten right and the Employer's unlawful conduct. Therefore, the Employer

---

[8] The Board's decisions in Coca Cola Bottling Co., 227 NLRB 1276 (1977) and Meharry Medical College, 236 NLRB 1396 (1978) do not require a contrary result. In Coca Cola Bottling Co., the Board held that the employer did not violate the employee's Weingarten right, because the employer was willing to grant the employee's request for union representation except that the particular union representative requested was unavailable. The Board noted that the union representative's unavailability was known to both the employer and the employee who made the request. The Board held that Weingarten does not require an employer to postpone an interview, because a particular union representative is unavailable. In the instant case, the issue is not whether an employee has a right to request a particular Union representative. Rather, the Employer categorically refused to allow any Union representative to be present during the interview. In Meharry Medical College, the Board affirmed the ALJ's conclusion that an employee's Weingarten right had not been violated when the employee had an opportunity to consult with the union's attorney prior to undergoing a medical evaluation and time was of the essence in determining his fitness for duty that day. The ALJ concluded that the employer's requirement that the employee submit to a medical evaluation to determine his continued fitness for employment was reasonable, that the employee had an opportunity to consult with union counsel by telephone, and that the employer did not have to wait until a union representative could be physically present. The ALJ noted that requirement of the physical examination would be moot if the employer had to wait for a union representative. In the instant case, Exs. 6 & 7(C) was denied an opportunity to consult with anyone during or prior to the interview with the Employer. Moreover, the Employer has demonstrated no special necessity to immediately conduct the interview without giving the Union an opportunity to provide a Weingarten representative. Therefore, the Board's decisions in Coca Cola Bottling Co. and Meharry Medical College are distinguishable from the instant case.

violated Section 8(a)(1) of the Act by disciplining Davis for his conduct during the interview.

Third, we conclude that, as a remedy, the Employer must reinstate Exs. 6 & 7(C) to his former position. In Taracorp Industries[9], the Board expressly overruled its earlier decision in Kraft Foods[10], which had approved of make-whole remedies for Weingarten violations when an employee was disciplined for conduct which was the subject of the unlawful investigatory interview. In overruling Kraft Foods and its progeny, the Board in Taracorp held that in situations where an employee is disciplined for cause, a make-whole remedy is unavailable despite the Weingarten violation, since make-whole relief in such a context would run "contrary to the remedial restriction contained in Section 10(c)," and "independent of those restrictions, constitutes bad policy."[11]

In the instant case, the Employer discharged the discriminatee for conduct engaged in during the unlawfully conducted interview. The employee's conduct of losing his temper upon being accused of improper conduct was the direct result of the Employer's having violated Exs. 6 & 7(C) Weingarten right. This is just the sort of situation that might have been avoided if the employee had been represented at the Weingarten interview. We conclude, therefore, that the employee was not discharged for cause, but was discharged

---

[9] 273 NLRB 221 (1984).

[10] 251 NLRB 598 (1980).

[11] Id., at 221-222. However, the Board in Taracorp continued to adhere to the principle that make-whole remedy would be appropriate in a Weingarten context "if, and only if, an employee is disciplined or discharged for asserting the right to representation." Id at fn. 12.

for conduct proximately caused by the Employer's denying the employee Union representation. Accordingly, the Region should seek a reinstatement and back pay remedy in this case.[12]

R.E.A.

[12] The Board's decision in Massillon Community Hospital, 282 NLRB 675 (1987), is distinguishable from the instant case. In that case, the Board affirmed the ALJ's finding that the employer violated the employee's Weingarten right by denying the employee the right to have his union steward present during an investigatory interview. However, the Board denied the ALJ's reinstatement remedy, because of the employee's insubordination prior to the Weingarten interview. In that case, the employee disregarded a direct order by his supervisor to only take 30 minutes for lunch. Instead, the employee took an extended lunch by calling in sick without a doctor's excuse. The employer then discharged the employee for calling in sick without a doctor's excuse. The Board held that such insubordination made the employee unfit for reinstatement under Taracorp. The instant case is distinguishable from Massillon in that here the Employer is arguing that the employee is unfit for reinstatement, solely because of conduct that took place during the investigatory interview. In this regard, we note that the meeting did not result in the disclosure of information, such as prior breaches of lawful company rules, that would justify the Employer in terminating the employee. As noted above, the employee's excitement and agitation during the interview was proximately caused by the Employer's unlawfully denying the employee his Weingarten rights. To deny the employee reinstatement in this case would enable the Employer to benefit from the fruits of his unlawful conduct. Therefore, we conclude that Massillon does not preclude the General Counsel from seeking a reinstatement remedy in this case.