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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges

RALPHS GROCERY COMPANY

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 324

Case No. 21-CA-039867

**CHARGING PARTY'S
POST-TRIAL BRIEF**

Before the Honorable Jeffrey
Wedekind, Associate Chief
Administrative Law Judge

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I. INTRODUCTION

This post-hearing brief is filed on behalf of the charging party, United Food and Commercial Workers Union, Local 324, United Food and Commercial Workers International Union (“Local 324” or the “Union”) in support of its position that Ralphs Grocery Company (“Ralphs” or the “Respondent”) violated Sections 8(a)(1) and (3) of the National Labor Relations Act by denying employee Vittorio Razi the right to speak with his union representative prior to submitting to a drug and alcohol test, and by firing him for insubordination for insisting on his rights, in violation of the principles established in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

Razi worked for Ralphs Grocery Company for nearly 24 years. He was the produce manager at Ralphs Store #748 in Irvine, California. One day, after an especially grueling weekend of overtime shifts and in the midst of attempting to complete a rush job, Razi was summoned to store director Julie Henselman’s office, questioned about drug and alcohol use, and asked to submit to a drug and alcohol test. Razi did not refuse to take the test outright, but requested to speak with his union representative before agreeing to take it. Razi wanted to ask his representative whether the store director had the right to compel him to take the test, which in his view was unprecedented.

The store director initially denied his request then relented to allow him to make a brief phone call. When Razi could not immediately reach his union representative, however, he was summoned back to the manager’s office and summarily suspended and then terminated for insubordination because he continued to refuse to take the test until he could speak to a union representative. The entire encounter – from the initial meeting

to Razi's suspension – took less than 45 minutes.

By denying Razi the right to speak with his union representative prior to taking a drug and alcohol test, Ralphs violated Sections 8(a)(1) and (3). Under Board precedent, including *Safeway Stores, Inc.*, 303 NLRB 989 (1991) and *System 99*, 289 NLRB 723, n.2 (1988), employees who are targets of non-random investigations into drug and alcohol use have the right to consult with union representatives before submitting to such tests, which constitute investigatory interviews into the employee's alleged drug and alcohol use. Ralphs unlawfully continued with the investigatory interview and unlawfully terminated Razi for refusing to submit to the test before consulting the Union.

In deciding this case, the Board need not decide the question left unanswered by *Safeway* and *System 99*: whether random, non-targeted drug testing is covered by *Weingarten*. That is not this case. This case involves an investigatory drug test designed to ascertain whether Razi was under the influence of drugs or alcohol based on prior suspicion. Under such circumstances, *Weingarten* affords employees the right to consult with their union representative, a right that was denied Razi by Respondent.

II. PROCEDURAL HISTORY

The Union filed its charge on July 1, 2011. On August 19, 2011, the matter was administratively deferred to the parties' grievance-arbitration procedure under *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp.*, 268 NLRB 557 (1984). The case was submitted to arbitration, and the arbitration hearing was held on February 1, 2012. On May 5, 2012, Arbitrator Charles Askin issued his opinion and award.

The arbitrator concluded that Razi's rights under *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), were not violated because the meeting at which the store director repeatedly asked the employee to submit to a drug and alcohol test did not constitute an "investigatory interview" under *Weingarten*. The arbitrator analyzed *Safeway Stores, Inc.*, 303 NLRB 989 (1991) and *System 99*, 289 NLRB 723 (1988), but did not address the Board's conclusion in *System 99* that asking an employee to submit to a drug test is inherently "confrontative" and calls for an answer "fraught with significance," implicating the employee's right under *Weingarten* to representation prior to deciding whether to submit to the screening. *System 99*, 289 NLRB at 726.

Instead, the arbitrator found that the purpose of the meeting was *not* "to gather independent, additional evidence" about whether the employee was intoxicated or under the influence of drugs, despite the fact that test was requested for precisely that reason. The arbitrator also decided that the meeting did not constitute an investigatory interview because the decision to *test* Razi (not discipline him) had already been made, ignoring the investigatory nature of the test itself or its connection with the investigation into possible drug use. Finally, the arbitrator treated the meeting in Henselman's office and the drug test as three conceptually distinct events: the period before Razi left to make the phone call, Razi's return to the meeting, and the off-site drug test. In the arbitrator's mind, each meeting required a separate *Weingarten* analysis.

The General Counsel elected not to defer to the arbitrator's award under *Collyer* and *United Technologies Corp.* because, in the General Counsel's view, the decision is palpably wrong.

On March 28, 2013, the parties stipulated to submit this case utilizing the record from the arbitration hearing under Section 102.35(a)(9) of the Board's Rules and Regulations.

III. STATEMENT OF FACTS

A. Background

Vittorio Razi was hired by Ralphs on August 24, 1987. Tr. at 191:23-24 (Razi).¹ From 2003 until he was terminated in 2011, Razi worked as a produce manager at Ralphs Store 748 in Irvine, California. Tr. at 191:25-192:6 (Razi).

During his nearly 24 years at Ralphs, Razi's disciplinary history was nearly spotless. He had four disciplinary memos in his file, and none were related to drug or alcohol use or insubordination of any kind. Tr. at 248:4-24 (Razi). By all accounts, Razi was a dedicated employee who was, in the words of co-manager Ed Maier, "good with customers; actually outstanding," had a lot of "good qualities" and was an "outgoing person" who liked to "interact with people." Tr. at 33:8-11 (Maier). Julie Henselman, the store manager, commented that Razi is a "nice guy" with a "big heart" and was "very customer service-oriented." Tr. at 66:18-22 (Henselman).

Razi was known for idiosyncratic behavior, though it never interfered with his work. Henselman commented that Razi was "a little on the paranoid side" and that he "tends to get irritated." Tr. at 66:20-22; 68:2-5. As the arbitrator noted during the

¹ Citations to "Tr." are to the transcript of the February 1, 2012, arbitration hearing. "JX" refers to Joint Exhibits at the hearing. "EX" refers to employer exhibits. "UX" refers to union exhibits.

hearing, multiple witnesses who were asked to describe Razi's personality paused, then smiled before answering. Tr. at 133:1-6. Witnesses described Razi as "a character" (Tr. at 47:23-48:2 (Maier)); "hyper, very hyper" (Tr. at 133:20-25 (Rodriguez)); "jittery" (Tr. at 166:7-11 (Terranova)); "paranoid" (*Id.*), "not a normal person" (*Id.*); a "fruit loop" (Tr. at 184:13-15 (Wykert)); and a "little goofy" (*Id.*). There is no indication, however, that any of Razi's idiosyncrasies interfered with his ability to do his job, or that Razi was anything other than an excellent employee. Co-manager Ed Maier testified that he was "genuinely serious about his job" and "always gave an effort." Tr. at 48:18-22 (Maier). Store Manager Julie Henselman remarked that Razi was "very customer service-oriented." Tr. at 66:20-22 (Henselman).

B. Woodworking and Schedule Prior to May 18, 2011

In addition to his normal job duties, Razi was a woodworker on his off-hours, and did woodworking jobs for Ralphps, both at Ralphps Store #748 and at other stores. Tr. at 194:23-195:1 (Razi). Razi constructed wet racks and slants, which are used to display produce for sale at the store. Tr. at 194:1-195:1 (Razi); UX10. Razi did this work in his home garage, then assembled the wet racks and slants at the store. Tr. at 201:11-20 (Razi).

On Thursday, May 12, 2011, Jim Keisling, Ralphps's Produce Supervisor, and Kathy Rickelman, Ralphps's District Manager, visited Store #748. Tr. at 205:13-206:2 (Razi). Keisling was concerned that the store was not ready for key retailing, and had many requests for woodworking improvements, including putting borders on the base of tables; refurbishment of the wet rack; and setting some racks at an angle. Tr. at 205:20-

206:15; 207:10-19 (Razi). Julie Henselman was present for the conversation about refurbishment with Jim Kiesling and Kathy Rickelman. Tr. at 206:22-207:6 (Razi).

In response to Kiesling's request, Razi told Henselman that he would have to put in hours at home to get all of the work done. Tr. at 207:21-208:4 (Razi). Razi assumed that Kiesling would be returning the next week to check to see whether the work had been done. Tr. at 208:5-7 (Razi). To assist Razi, Henselman assigned two extra crewmembers to help him with the cleaning aspect of the retailing project. Tr. at 208:8-209:6 (Razi).

On the weekend before the incident leading to Razi's termination, Razi worked on Saturday, May 14, 2011, and Sunday, May 15, 2011. On Saturday, Razi worked at the store preparing to install the new tables. Tr. at 209:16-20 (Razi). Razi's time sheet indicates that he worked 8.1 hours on Saturday. UX 3. On Sunday, Razi did the work in the store. He brought his own tools to the store, and set up shop in an open area in the back of the store, where he cut pieces of wood, covered them in tar wrap, and installed the shelves. Tr. at 210:2-21 (Razi). Razi's time sheet indicates that he worked 11.5 hours on Sunday, beginning at 6:05 a.m. and ending at 5:35 p.m. UX 3.

Razi also worked on Monday, May 16, 2011, just 6.5 hours after he left work on Sunday. Razi began his Monday shift at 12:03 a.m. and ended at 5:00 p.m., with two breaks during the shift. He worked at total of 14.4 hours on Monday, May 16, bringing the total hours worked over three days to over 34 on-the-clock hours, not counting the work he did at home. UX 3; Tr. at 124:3-10 (Edwards).

During the first part of his extended Monday shift, Razi was assisted by the two

crewmembers assigned by Henselman, and they cleaned the wet rack while the store was closed. Tr. at 212:14-19 (Razi). After the store opened, Henselman enlisted Razi to help with inventory. Tr. at 213:9-11 (Razi). Razi told Henselman that he could barely complete the job and was “exhausted” and “dozing off.” Tr. at 213:24-214:19 (Razi). Henselman advised Razi to assign the task to a co-worker, but the co-worker was new and couldn’t do the job on his own. *Id.* The inventory report shows that Razi completed the inventory at approximately 10:23 a.m.,² despite his fatigue. UX 4. After completing the inventory, Razi left the store around 10:30 a.m. to collect his tools and took a short nap. He returned to the store at approximately 11:30 a.m. and worked until 1:15 p.m. doing an inventory recount at the request of Henselman. Tr. at 215:12-216:3 (Razi). Razi described that day as a “nightmare.” Tr. at 213:10-12 (Razi).

On Tuesday, May 17, 2011, Razi did not work at the store, but he continued his woodworking project. He also made several calls to the store regarding a phone order. Tr. at 216:19-217:5 (Razi). At one point on May 17, 2011, he drove to the store to take a woodworking measurement. Tr. at 217:19-24 (Razi). At 9:30 or 10:00 p.m., he started woodworking and continued until 2:00 or 2:30 a.m. the next day. Tr. at 218:9-17 (Razi). He worked late because he thought Jim Kiesling might return to the store on Wednesday. Tr. at 218:18-24 (Razi).

² UX 4 does not match the punch record from UX 3, which shows that Razi clocked out at 10:10 a.m. It is not clear why Razi’s punch time is earlier than the time he ran the report, but the discrepancy is immaterial to the case.

C. The Morning of May 18, 2011

After his busy weekend and due to his late night on Tuesday, Razi only slept a few hours before beginning his regular shift on Wednesday, May 18, at 5:02 a.m. Tr. at 219:6-11; UX 3. Razi testified that he thought about calling in sick due to fatigue, but decided to come to work anyway because the only other employee in the department was new. Tr. at 219:12-17 (Razi).³

The first person Razi encountered at work that day was Joe Terranova. Terranova testified that Razi seemed “like his normal self, except he was tired.” Tr. at 166:25-167:3 (Terranova). Terranova told Razi that management was concerned about his overtime. Tr. at 220:24-221:4 (Razi).

Razi also encountered Donny Wilson and Cara Fonda, two coworkers, that morning at the front of the store. Wilson testified that he was having a conversation with Fonda when Razi approached. Razi said something about management talking about him regarding his overtime. Tr. at 141:16-22 (Wilson); UX 7 (Wilson statement reflecting that Razi “came up and interrupted our conversation and asked us why management was making a big deal about his overtime.”). Razi asked Wilson to ring him up for a soda. When Razi attempted to use his ATM card to pay for the purchase, he had to run it

³ Henselman could not remember any details of Razi’s shift schedule around May 18, 2011, what he was doing on those days, or even whether he was doing woodworking at the store during that week. Tr. at 77:23-78:1 (woodworking); 78:13-24 (shift schedule); 79:17-80:9 (store inventory) (Henselman). However, Henselman testified that Razi had, on at least one other occasion, complained of being tired but had declined to take time off. Tr. at 78:25-79:11 (Henselman). Despite this, Henselman testified that she did not consider whether fatigue was a possible reason for Razi’s erratic behavior. Tr. at 44:21-45:3 (Henselman).

through several times to make it work. Tr. at 140:13-19 (Wilson). An error code was generated and it took Razi several tries to resolve it. Tr. at 143:5-10 (Wilson). Razi told Wilson at the time that he was using a new ATM card. Tr. at 140:20-21 (Wilson); UX 7. At the arbitration, Razi displayed two ATM cards, which the arbitrator noted looked “reasonably similar...in terms of color.” Tr. at 223:12-13. Razi explained that he had just received a new ATM card from an account he opened on April 29, 2011, and that it was the second time he had used the card. Tr. at 221:24-11 (Razi). He was entering the wrong PIN. *Id.*

Wilson testified that Razi was acting a “little strange” but he did not mention it to anyone until he was approached later by Henselman. Tr. at 140:22-141:4 (Wilson). Fonda’s statement mentions that Razi said to her that morning that he was making mistakes because those were the “kind of things he does when he is tired.” UX 8.

D. The Meeting in the Store Manager’s Office

Henselman testified that she had received reports from multiple witnesses that Razi was behaving strangely that morning. She testified that her suspicions began when Wilson approached her to discuss the ATM incident, and that she subsequently approached other witnesses.⁴ Tr. at 68:17-22 (Henselman). Her goal in interviewing witnesses was because she suspected Razi was under the influence of drugs or alcohol.

⁴ This is contrary to Wilson’s testimony that he did not approach anyone and did not mention the ATM incident to anyone until *he* was approached by Henselman, and even then, did not explain why he thought Razi was acting strangely. Tr. at 140:22-141:4 (Wilson).

Tr. at 69:5-13 (Henselman).

One witness she interviewed, Lauren Ogle, the bookkeeper, did not testify at the hearing. However, Ogle provided two written statements to Henselman. The first statement, which is handwritten, states that Razi's speech was "mildly impaired" that morning. UX 1. The second statement, which is typed, states that Razi's speech was "notabl[y] slurred." UX 2. The second statement states that Ogle asked Razi whether he was tired, and that, later that morning (presumably after being asked to take a drug test), Razi told Ogle that management thought he had been taking drugs or drinking, but that he thought it was a "joke" because he had been working "22 of the last 27 hours." *Id.* Ogle also mentioned that Razi called her the incorrect name three times – all variations of Lauren. *Id.*⁵

After conducting interviews with Razi's coworkers, Henselman summoned Razi to her office at approximately 9:15 a.m. Tr. at 47:2-6 (Maier). When he arrived, Maier and Henselman were present. Tr. at 224:2-6 (Razi). Razi testified that Henselman asked him whether he "did drugs" and whether he was "on drugs." Tr. at 224:7-15 (Razi). Both Maier and Henselman admitted that the discussion was part of an "investigation;" however, Maier did not recall that Henselman asked Razi any questions. Tr. at 37:22-25; 38:15-39:4 (Maier); 86:22-25 (Henselman). They told him that he needed to go take a

⁵ Ogle did not testify at the arbitration hearing, and therefore her statement that Razi called her three different names was not subject to cross-examination as to, for example, whether this was Razi's common practice.

drug test, and that if he failed to take it, it would be considered an automatic positive result and lead to his termination. Tr. at 59:19-60:8 (Henselman).

Razi told Henselman that he “couldn’t believe it” and that he was “insulted.” *Id.* He testified that he had never before heard of anyone being asked to take a drug test at Ralphs Store 748. Tr. at 225:23-25 (Razi).⁶ He asked Henselman whether he could talk to his union representative or a lawyer. Tr. at 60:23-61:7 (Henselman). Henselman told Razi that he didn’t have the right to talk to either, but that she would allow him to make a phone call. *Id.*⁷

E. Attempt to Call Union Representative

Razi left the room and went downstairs to make his phone call. At 9:33 a.m., he called Linda Martinez, his union representative. Tr. at 225:14-17 (Razi). Martinez did not answer the phone, and Razi left a message asking her to call him. Tr. at 227:10-16 (Razi). He also called the shop steward, Fred Johnson, who advised him to wait to take the test until he could reach Martinez. Tr. at 227:17-228:18 (Razi). Fred Johnson is not an employee of the union. *Id.*

A few minutes later, Razi received a call on his cell phone from Maria Rodriguez,

⁶ Henselman testified that she had never before asked an employee at Store 748 to submit to a drug or alcohol test. Tr. at 97:1-21 (Henselman).

⁷ Maier’s, Henselman’s, and Razi’s recollections of this meeting are slightly different. Maier recalls that Henselman told Razi that he could call his union representative. Tr. at 28:4-23 (Maier). However, both Henselman and Razi recalled that Henselman let Razi make a phone call, but that there was no discussion about who he was calling. Tr. at 60:20-61:7 (Henselman); 225:2-13 (Razi). Both Henselman and Razi recalled that Henselman told Razi that he did not have the right to speak with a union representative. *Id.*

the store's front end manager, who had been asked by Henselman to track down Razi. Tr. at 127:6-17 (Rodriguez). Rodriguez told Razi that Henselman wanted him to come back to her office. *Id.* Razi told Rodriguez that it was about to be the fifth hour since his shift began, and that he needed to punch out, or else he would incur a lunch punch violation. Tr. at 127:19-22 (Rodriguez). Razi punched out, then returned to Henselman's office, where Henselman punched Razi back in. Tr. at 128:3-130:2 (Rodriguez).

F. Continuation of the Meeting in the Store Manager's Office

The meeting resumed. Razi told Henselman that he had been unable to reach Martinez. Tr. at 230:14-231:2 (Razi). Henselman continued to insist that Razi was required to take the test, even if he had not had a chance to speak with a union representative. *Id.* Razi did not refuse to accompany Maier to the testing center, but he said he would not take the test once he got there without first speaking to Martinez. Tr. at 39:5-13 (Maier).

At some point during this conversation, Henselman called Ralphs's Senior Labor Relations Representative Bill Edwards. Henselman told Edwards that Razi was refusing to take the test and that he was unable to get in touch with his union representative. Tr. at 94:6-16 (Henselman). Edwards told Henselman to terminate Razi because of his refusal to take the test. Tr. at 95:21-96:1 (Henselman). Henselman and Maier told Razi that he was suspended pending further investigation and Maier escorted him from the store. Tr. at 30:23-31:6; 40:13-16 (Maier). Razi was told that he was not supposed to come back to the store again for any reason while the investigation was pending. Tr. at 40:17-41:1 (Maier). Razi left the store at approximately 10:00 a.m., approximately 45 minutes after

he was first told to go to Henselman's office. Tr. at 47:2-6 (Maier).

Razi began driving towards San Clemente, where he lives. Tr. at 234:3-9 (Razi). While en route, at approximately 10:30 a.m., Martinez returned Razi's call. Martinez advised Razi to take the drug and alcohol test. Tr. at 233:13-19 (Razi). Razi decided to seek out the District Manager and offer to submit to the drug and alcohol test. Tr. at 236:18-21 (Razi). Razi continued to the San Clemente store and sought out the District Manager, Gabe Navarette. When he arrived, Navarette was in the back of the store on the phone, and told Razi that he had to leave. Tr. at 235:11-23 (Razi). Razi waited at the front of the store until Navarette emerged and was again told to leave and to call his union representative. Tr. at 236:8-17 (Razi).

G. The Next Day

Razi was asked to return to the store to pick up his check for five additional hours of woodwork on Thursday, May 19. Tr. at 237:13-18 (Razi). Razi picked up his check and Henselman informed him that he was being terminated. Tr. at 238:9-20 (Razi). Razi offered to take a drug test, but Henselman told him that it was too late. *Id.* Because the amount of the check was wrong, Razi refused the check. Tr. at 238:24-239:8 (Razi). Razi asked for copies of video records that he believed would show that he was not under the influence of drugs or alcohol the previous day. Tr. at 152:25-153:9 (Haynes). Ralphs Store 748's District Loss Prevention Nick Haynes, who was present for the meeting, refused to provide the video records. *Id.* On the way out of the store, Haynes testified that Razi asked him, "What would you have done if I'd have brought my shotgun to this meeting?" Tr. at 153:10-15 (Haynes). Haynes told him it would have been a mistake.

Id. Haynes called Labor Relations and was told to file a police report, which he did. Tr. at 154:7-19 (Haynes). Haynes testified that he did not take the comment as a threat; he interpreted it as just another odd comment from Razi. Tr. at 156:17-157:9 (Haynes). Haynes testified that during the years he has known Razi, Razi has a tendency to make odd comments. *Id.* After interviewing Haynes, the police did not act on the report any further or interview Razi. UX 12. Razi does not own a shotgun or any other weapons registered with the police. *Id.* at p.2.

IV. ARGUMENT

A. Ralphs violated Razi’s *Weingarten* rights by refusing to allow him to speak with his union representative prior to submitting to the drug and alcohol test.

In *NLRB v. J. Weingarten, Inc.*, the Supreme Court held that individual employees have a right to union representation at an investigatory interview that the employee reasonably believes may result in adverse action. 420 U.S. 251, 256 (1975). The Court held that, “[r]equiring 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.’” *Id.* at 262 (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965)). The Court further explained that it is often useful to both employee and employer to have union involvement at the first stage rather than after the adverse action has already been taken, at which point the employer may “be more concerned with justifying his actions than re-examining them.” *Id.* at 263.

The “contours and limits” of the *Weingarten* right, have been defined by the NLRB as follows:

- The right does not attach to run-of-the-mill shop floor conversations such as the giving of instructions or training or correction of work techniques because “in such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview.” *Id.* at 257-258 (quoting *Quality Mfg. Co.*, 195 NLRB 197, 199 (1972)).
- The employee must reasonably believe that adverse action may result from the interview. *Id.* at 256-57.
- The right arises only where the employee requests representation. *Id.*
- The right does not attach to situations where the adverse decision has already been made. *Id.*

Further, an employee has the right to consult in advance with a designated union representative prior to participating in an investigatory interview which the employee reasonably believes might result in discipline. The Board has held that the right to consult in advance stems from *Weingarten*. See *Climax Molybdenum Co.*, 227 NLRB 1189 (1977), *enf. denied* 584 F.2d 360 (10th Cir. 1978), *Pacific Telephone & Telegraph Co.*, 262 NLRB 1048, 1049 fn. 11 (1982), *enfd.* 711 F.2d 134 (9th Cir. 1983); *Postal Service*, 303 NLRB 463, 469 (1991). As the Ninth Circuit put it in *Pacific Telephone*, “[t]he Board's order that failure to provide such information and grant [] pre-interview conferences constituted unfair labor practices is as permissible a construction of § 7 as was the construction upheld in *Weingarten*. Without such information and such conference, the ability of the union representative effectively to give the aid and protection sought by the employee would be seriously diminished.” *Pacific Telephone*, 711 F.2d 134, 137 (9th Cir. 1983).

Local 324 contends that Ralphs violated Section 8(a)(1) of the National Labor Relations Act by denying Razi his statutory right to consult with his union representative before submitting to the drug and alcohol test.

1. *Weingarten* rights extend to drug and alcohol testing connected with an investigatory interview.

While there is some question under NLRB precedent whether *Weingarten* rights extend to *random, non-investigatory* drug and alcohol testing, the Board has made clear that *targeted, investigatory* drug testing falls within the scope of *Weingarten*. As the Board stated in *Safeway Stores, Inc.*, 303 NLRB 989 (1991), a drug test, “standing alone,” might not constitute an investigatory interview under *Weingarten*. A random drug test, *without* prior suspicion of drug or alcohol use, might also constitute a non-investigatory interview, although the Board need not decide that question in this case. But where the drug test is “part of an inquiry” into a specific employee’s misconduct, an employee has *Weingarten* rights. *Id.*

This facts in this case are remarkably similar to those in *System 99*, 289 NLRB 723 (1988). In *System 99*, a manager suspected that an employee was under the influence of alcohol after the employee arrived at work. *Id.* at 724. The manager conferred with the assistant vice president, and together they summoned the employee to the manager’s office with the intention of asking him to submit to a sobriety test. *Id.* The employer’s practice was to treat a refusal to take a requested test as presumptive evidence of intoxication warranting termination. *Id.* The employer did not believe it would be able to sustain a discharge decision based solely on witnesses to the employee’s impaired

behavior; the employer believed that to sustain a discharge it needed either (1) a positive result on a sobriety test, or (2) the presumption that the employee was intoxicated because he refused to submit to it. *Id.*

When asked to take the test, the employee dodged the issue and ultimately did not take the test. *Id.* at 724-25. The employee stated that he wanted to talk to the chief union steward, but the manager refused to allow it because he “didn’t...know when [the union steward] would be in” and he believed that allowing the employee to confer with the steward wouldn’t change the result. *Id.* at 725. After the employee continued to refuse the test, he was discharged. *Id.*

The Board upheld the ALJ’s conclusion that the employer violated 8(a)(1) and, specifically, that the meeting constituted an “investigatory interview” within the purview of *Weingarten*. *Id.*, n.2. The ALJ found that the employer’s “attempts to get [the employee] to answer the question whether he would take the sobriety test” called for an answer that was “fraught with significance.” *Id.* at 726. The meeting was “confrontative in character, and [the employee’s] refusal to accept the invitation to take the sobriety test would be an ‘admission’ for disciplinary purposes equal in strength to an employee’s outright admission of misconduct in a meeting called to investigate whether the employee had engaged in misconduct.” *Id.* at 726-27.

2. The meeting in Henselman’s office was investigatory.

As noted above, *System 99* is remarkably similar to this case. Henselman’s purpose in summoning Razi to her office was, by Henselman’s own admission, to *find out* whether Razi was under the influence of drugs or alcohol. Tr. at 86:15-25

(Henselman). It was part of an overall investigation into whether Razi was using drugs or alcohol. *Id.* It was not random nor was it targeted at employees other than Razi. *Id.* Maier recalled that he was acting as an “observer,” and that “based on the observations, that was what was discussed.” Tr. at 38:3-10 (Maier). Henselman suspected that Razi was under the influence of drugs or alcohol before summoning him to her office. Tr. at 69:5-9 (Henselman).

An “investigatory interview” took place when Razi was summoned to Henselman’s office because the purpose of the meeting was “confrontative” and intended, like the interview in *System 99*, to get Razi to submit to a drug and alcohol screening that would constitute an “admission” for disciplinary purposes. Just as in *System 99*, the employer did not have reasonable cause to discharge Razi for his allegedly erratic behavior alone; it sought conclusive, scientific proof of drug or alcohol use to justify termination.

The conclusion that the interview was investigatory is reinforced by Razi’s testimony that Henselman asked him questions during the interview about drug and alcohol use. Tr. at 224:7-15 (Razi). While Maier did not recall whether they two of them asked Razi any questions, Henselman admitted that “*one of the questions* I asked him when we were up there was, was he fully compensated for [his woodworking]...”, *implying that other questions were asked.* Tr. at 37:22-25 (Maier); 78:4-6 (Henselman) (emphasis added).

To the extent the ALJ believes that the meeting should be analyzed as two separate meetings – one before and one after Razi’s attempt to reach Martinez – *both* were

investigatory. Razi testified that after he returned from downstairs, Henselman continued to ask him whether he would submit to the test. Tr. at 262:7-10 (Razi); 268:10-23 (Razi). Though during the second meeting, Henselman did not ask Razi any questions about his conduct or drug use, even the question, “[w]ill you take a drug test?” is investigatory under Board precedent because Razi’s choice to comply, or not, was “fraught with significance.” *System 99*, 289 NLRB at 726.

Because the interview was investigatory, Razi was within his rights to ask for union representation, and his request was a valid exercise of his *Weingarten* rights.

3. The other *Weingarten* factors are met.

Having established that the meeting was investigatory, there is no dispute that the other *Weingarten* elements are met. First, Razi reasonably believed that the meeting could result in discipline, which, in fact, it did. Both Maier and Henselman clearly told Razi multiple times that refusal to take the test could be considered an automatic positive result and would lead to discipline. Tr. at 59:19-60:8 (Henselman). Razi understood that his decision to refuse to take the test could lead to discipline. Tr. at 265:8-20 (Razi). This element of *Weingarten* is met. *Weingarten*, 420 U.S. at 256-57.

There is also no dispute that Razi clearly requested to speak with his union representative. Henselman testified that Razi asked to speak with his union representative and to have the union representative present, and that she denied his request. Tr. at 60:23-24; 87:24-88:3 (Henselman). This element of *Weingarten* is met.

There is also no dispute that Ralphs had not yet decided whether to terminate Razi for drugs or alcohol abuse when he was summoned to Henselman’s office. In fact, the

decision to terminate Razi was not based on drug or alcohol abuse; it was based on insubordination for refusing to take the test itself. EX 3. Henselman testified that after Razi returned to the office and continued to refuse to take the test, she called Edwards on the phone and asked, “He’s refusing to take the test. What do I do?” Tr. at 63:3-16 (Henselman). Edwards told her to “term him.” Tr. at 92:13-16 (Henselman). This element of *Weingarten* is met.

Because all elements of *Weingarten* are met, Ralphs’s decision to terminate Razi for refusing to submit to the screening without consulting his union representative violated his *Weingarten* rights.

4. Martinez, not a union steward, was the appropriate union representative for purposes of *Weingarten*.

Ralphs may argue that because Martinez was not immediately available, Razi should have selected a union steward – not a union representative – to accompany him. For example, Razi spoke with Maria Rodriguez, the store’s front-end manager, during the meeting’s interlude. Rodriguez is a union steward. Tr. at 260:1-4 (Razi). Joe Terranova is also a union steward, although he had left the store by the time of the meeting. Tr. at 258:7-12 (Razi).

The Board has held that “[t]he selection of an employee’s representative belongs to the employee and the union, in the absence of extenuating circumstances, and as long as the selected representative is available at the time of the meeting.” *Barnard College*, 340 NLRB 934, 935 (2003). The Board has held that a delay of 15 minutes does not put any undue burden on the employer. *Anheuser-Busch*, 337 NLRB 3 (2001). However, a

delay of three days justifies an employer's refusal to allow an employee to select a particular union representative. *Coca-Cola Bottling Co. of LA*, 227 NLRB 1276 (1977).

Here, the evidence does not support the conclusion that either Terranova (had he been present) or Rodriguez were trained or capable of functioning as Razi's *Weingarten* representative. At the arbitration, UFCW Local 324 Grievance Director Chuck Adinolfi testified that Local 324 does not train union stewards to assist employees in investigatory interviews. Tr. at 277:7-14 (Adinolfi). Local 324 trains stewards to accompany an employee to an interview, evaluate the situation, and call a union representative if necessary if the employee exercises her *Weingarten* right. Tr. at 278:2-6; 279:14-23 (Adinolfi). Adinolfi testified that, in general, stewards are trained that *Weingarten* situations are "above their pay grade." *Id.* Local 324 does not permit stewards to act as union representatives – it wants "the union representative there." Tr. at 271:22-24 (Adinolfi).

Rodriguez was particularly unsuitable for the task because she was functioning as a front-end manager on the day of the incident. Tr. at 126:14-15 (Rodriguez). Rodriguez took instructions from Henselman to track down Razi and ask him to return to the meeting. In addition, Ralphs contends that one of the reasons it terminated Razi was insubordination because he refused to comply with *Rodriguez's* instruction not to clock out. EX 3. An individual giving orders and instructions to an employee should not also be the *Weingarten* representative for an employee at risk of discharge for failure to comply with those instructions and orders.

Moreover, even assuming that the union stewards could have served as adequate

representatives, Ralphs made no effort to bring them to the meeting. The reason is simple: Henselman was completely unaware of Razi's *Weingarten* right to contact his union representative. Tr. at 60:23-61:2 (Henselman). Even though Martinez was not immediately available, Ralphs could have called Local 324 to find out whether any other representatives were on duty. Ralphs did not, and there is no indication that Henselman, Maier, or Edwards took heed of Razi's *Weingarten* rights at all before making the decision to suspend and ultimately terminate him.

Ralphs never afforded Razi sufficient time to reach a union representative other than Martinez. Henselman gave Razi less than 10 minutes to try to reach a representative. Tr. at 228:19-21 (Razi). Razi placed his first call at 9:33 a.m. and was contacted by Rodriguez and told to return to the office at 9:36 or 9:38 a.m. Tr. at 229:4-11 (Razi). And it was less than 30 minutes later – at 10:00 a.m. – when Razi was suspended. This was not sufficient time for Razi to contact a union representative. Razi testified that, despite this, he called Fred Johnson, the retired shop steward, and asked him what to do. Tr. at 227:17-228:21 (Razi). Johnson said he had never heard of Ralphs asking employees to take drug or alcohol tests, but deferred to Martinez. *Id.*

5. Any testing delay would have been minor.

Ralphs may argue that any delay in testing Razi would have diluted the results of the test or made them less scientifically accurate. However, there is no evidence that this is the case. Any testing delay would have been minor, and Razi had already been at work for hours by the time he was summoned to Henselman's office. Allowing Razi a few extra minutes to contact his representative would not have resulted in meaningful delay.

It is also notable that Razi *offered to go* with Maier to the testing center, although he said he would not take the test once he got there without speaking to Martinez first. Tr. at 39:5-13 (Maier); UX 5. In the time it would have taken Maier and Razi to get to the testing center, Razi would likely have reached Martinez or another union representative, and the test might not have been delayed at all. But by the time Martinez returned Razi's call less than an hour later and advised him to take the drug test, Razi had already been suspended.

Furthermore, there is no evidence that Razi's *purpose* in calling Martinez was to delay the drug and alcohol screening, a factor that was also relevant in *System 99*. Instead, Razi sought the advice of his union representative because he did not believe Ralphs had the right to test him at all. In his experience, drug and alcohol testing was unprecedented. Razi's question to Martinez was *whether Ralphs was allowed to test him and whether he should submit*; a question a steward could not answer. Tr. at 228:3-11 (Razi). Razi was also worried about the accuracy of the test. He told Henselman that the test could produce a positive result even if he hadn't been using drugs or if he had been using legal drugs. UX 5 ("What if I was at a party and someone was smoking pot and I was standing close enough to inhale it second-hand? Wouldn't that give a positive result? He also asked, "What if I was taking Vicodin or Zanax (sic)?").

Drug testing – even for "reasonable cause" – is rare or nonexistent at Ralphs Store #748. Henselman had never before asked anyone at the store to take a drug test. Tr. at 97:10-21 (Henselman). Razi testified that former shop steward Fred Johnson had "never heard of such a thing." Tr. at 228:6-9 (Razi). Razi testified that in his 24 years, he had

“never head of that...” Tr. at 226:8-16 (Razi). Henselman’s decision to test Razi for drugs or alcohol was unprecedented. As a result, Razi did not trust Henselman’s motives in asking him to take the test, and felt insulted that he was being accused of drug addiction – another reason why he wanted to speak with a union representative. Tr. at 152:5-20 (Haynes). Razi did not know whether Ralphs had the right to test him, and merely sought the guidance of his union representative before submitting. In fact, once it became clear to him that he was about to be terminated, he attempted to take the test, and even sought out the district manager, Gabe Navarette, to offer to submit to the drug and alcohol test. Tr. at 236:18-21 (Razi). If Razi had been under the influence of drugs or alcohol, he would not have put himself in a position to be inspected, up close and in person, by Ralphs’s district manager.

B. Evidence regarding Razi’s behavior after May 18 is irrelevant.

Respondent may argue that Razi’s erratic behavior and “threatening” statement on the day he was terminated, May 19, 2011, justifies discharge. Ralphs’s witness Nick Haynes testified at the arbitration hearing that when Razi returned to the store, he made an offhand comment, “What would you have done if I’d have brought my shotgun to this meeting?” Tr. at 153:10-15 (Haynes).

Razi disputes that he made such a statement, but even if he did, the statement was harmless. Haynes testified on cross-examination that Razi had a tendency to say odd things from time to time, and he took the shotgun comment as just another odd comment. Tr. at 157:4-9 (Haynes). Haynes was not threatened by Razi, and in fact, asked him to return to the store the next day to pick up his check. Tr. at 156:17-157:25; 157:21-158:9

(Haynes). The police became involved only because Haynes informed labor relations about the comment, and instructed him to file a police report. Tr. at 154:7-19 (Haynes). The police interviewed Haynes, Henselman, and Maier, and checked to see whether Razi had any registered weapons. UX 12. He did not. *Id.* Nothing further came of the incident.

The incident is irrelevant to the issue of discharge or Razi's *Weingarten* rights. Haynes's testimony also provides further evidence that Razi's refusal to take the drug test until he had a chance to speak with his union representative was innocent and not for the purpose of masking some drug-related issue. Razi asked Haynes to review and preserve video footage that would have helped him show that he was not behaving inappropriately on May 18. Tr. at 152:25-153:9 (Haynes). He also offered to take the drug test again on May 19. Tr. at 152:3-9 (Haynes).

C. Deferral to the arbitrator's decision is unwarranted.

On August 19, 2011, this matter was administratively deferred to the parties' grievance-arbitration procedure under *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp.*, 268 NLRB 557 (1984).

The arbitrator concluded that the employee's rights under *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), were not violated because a meeting at which the employer repeatedly asked the employee to submit to a drug and alcohol test did not constitute an "investigatory interview" under *Weingarten*. The arbitrator analyzed two NLRB cases, *Safeway Stores, Inc.*, 303 NLRB 989 (1991) and *System 99*, 289 NLRB 723 (1988), but did not address the Board's conclusion in *System 99* that asking an employee to submit to

a drug test is inherently “confrontative” and calls for an answer “fraught with significance,” implicating the employee’s right under *Weingarten* to representation before deciding whether to submit to the screening. *System 99*, 289 NLRB at 726. Instead, the arbitrator found that the purpose of the meeting was *not* “to gather independent, additional evidence” about whether the employee was intoxicated or under the influence of drugs, despite the fact that test was ordered for precisely that reason.

Despite the clear holding of *System 99*, the arbitrator concluded that the meeting was not “investigatory” because Razi was not summoned to the meeting for any reason other than to inform him that he would be required to submit to a drug screening. Arbitrator’s Decision and Award at p.20:1-5. But the arbitrator did not consider that the drug screening would *itself* be used to generate additional evidence about the employee’s possible drug or alcohol use: evidence which could support employer discipline. As a result, the meeting was investigatory because it was part of the employer’s process of gathering additional evidence to determine whether the employee was under the influence of alcohol or drugs. The meeting was “confrontative in character.” The employee’s decision about whether to submit to the screening was “fraught with significance” and the employee’s request for union representation in making that decision therefore implicates *Weingarten*. The arbitrator did not consider this point in making his decision.

Instead, the arbitrator distinguished *System 99* because the employee in that case was not fired for insubordination; the failure to submit to the test was treated as an admission that he was intoxicated. *System 99*, 289 NLRB at 726. The arbitrator reasoned, therefore, that because Ralphs terminated Razi for insubordination, not drug

use, Razi was not entitled to *Weingarten* rights and the interview was not “investigative.” Arbitrator’s Decision and Award at p.23. While it is true that the employee in *System 99* was not terminated for insubordination, the distinction has no effect on the application of *Weingarten*. Just as in *System 99*, Ralphs needed additional evidence beyond what the store director had observed in order to sustain a discharge. The store manager requested that Razi submit to a drug and alcohol screening for the purpose of obtaining such evidence, and did not allow Razi time to speak with a union representative prior to making the decision to submit to the request. Those facts are indistinguishable from *System 99*, and the Board’s reasoning in that case applies with equal force here.

Moreover, Razi did nothing more than attempt to exercise his right to speak with his union representative and was terminated for that very reason. Razi even offered to go to the testing site with Ralphs’ assistant manager but told the store manager that he would not take the test until he had a chance to discuss it with the union representative. He was willing to comply with every employer directive except that he submit to the screening *without* speaking to a union representative.

The principle enunciated in *System 99* is simple: “Where...an employee is advised by his employer - and therefore he "reasonably believe[s]" - that he may be disciplined if he refuses to submit to a proposed set of tests, there appears to be no reason for concluding that he should not be entitled to the services of representative before deciding what he will do.” *System 99*, 289 NLRB at 727. That is precisely what happened in this case.

The arbitrator’s conclusion is not supported by decisions of the Board and is

inconsistent with the Act. The arbitrator did not adequately consider the employee's statutory rights under *Weingarten* and failed to apply the principles set forth in *System 99*. As a result, the decision is "palpably wrong." See GC Memorandum 11-05 (Jan. 20, 2011). Accordingly, the Board should not defer to the arbitrator's decision under the standard set forth in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984).

V. CONCLUSION

For the foregoing reasons, the unfair labor practice charge should be sustained and Respondent should be ordered to remedy its unlawful conduct. Respondent should be ordered to (1) reinstate Razi, (2) pay full backpay, including benefits and pension fund contributions to the Union, (3) pay attorneys' fees to the Union for the cost of the arbitration, and (4) pay the arbitrator and court reporter's fee for the arbitration. The Board has ruled that reinstatement is an appropriate remedy for a *Weingarten* violation "if, but only if, an employee is discharged or disciplined for asserting the right to representation." *Taracorp Indus.*, 273 NLRB 221, 222 n.8 (1984). That is the case here: Razi was discharged for "insubordination" as the direct result of asserting his *Weingarten* right.

Backpay and reinstatement are also appropriate when an employee is terminated for having engaged in union activities, also the case here. See generally NLRB Compliance Manual ¶¶ 10527.1 (reinstatement) and 10530.1 (back pay). Payment of attorneys' fees and arbitrator and court reporter costs and fees is also appropriate because, but for Respondent's unlawful termination in violation of *Weingarten*, the Union would

not have had to incur these fees and costs. The collective bargaining agreement between Respondent and the Union provides that the losing party in an arbitration proceeding must bear the costs of the arbitration, which the union did. JX 1 at p. 45. Because the arbitrator's decision was palpably wrong, the Board should order reimbursement of those costs and fees to the Union.

DATED: April 23, 2013

GILBERT & SACKMAN
A LAW CORPORATION

By  _____
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STATEMENT OF SERVICE

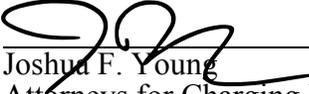
I hereby certify that a copy of Charging Party's Post-Trial Brief was submitted by e-filing to the Division of Judges of the National Labor Relations Board on April 23, 2013.

The following parties were served with a copy of said documents by electronic mail on April 23, 2013:

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