

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 01**

BENTLEY UNIVERSITY

and

BENTLEY UNIVERSITY PUBLIC  
SAFETY ASSOCIATION

CASE 01-CA-111570

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF  
TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE  
ADMINISTRATIVE LAW JUDGE**

**I. INTRODUCTION**

This case was heard by Administrative Law Judge Joel P. Biblowitz (herein the ALJ) at Boston, Massachusetts on February 19, 2014. Judge Biblowitz issued his Decision on March 25, 2014, finding that Respondent violated Section 8(a)(1) of the Act by denying Maria Canino union representation at an investigatory meeting conducted on August 15, 2013, at which time she reasonably believed that discipline could result from that meeting. Respondent filed Exceptions and a Brief in Support of Exceptions with the Board on April 22, 2014. Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Counsel for the General Counsel files this Answering Brief to Respondent's Exceptions and Brief in Support of Exceptions as follows:

**II. COUNSEL FOR THE GENERAL COUNSEL'S  
RESPONSE TO RESPONDENT'S EXCEPTIONS 3, 4, 7, 9, 10:**

3. The ALJ's discounting of the statement in Echevarria's email to Canino stating that "he was satisfied that they had addressed the issue" on grounds that this statement is relevant to the University's position that it did not contemplate disciplining Canino and that Canino had no reason to believe that she would be subject to discipline.

4. The ALJ's finding that "Canino could reasonably have believed that this August 15 meeting might result in some form of discipline and therefore she was entitled to Union representation at the meeting on the grounds that there is no objective evidence to support this conclusion.
7. The ALJ's determination that "although Williams credibly testified that the August 15 meeting was just for clarification of the communication issue, and that discipline was never considered, that is not dispositive.." on the grounds that the facts support a contrary determination.
9. The ALJ's conclusion of law that "by denying Maria Canino Union representation at an investigatory meeting conducted on August 15, at which time she could reasonably believe that discipline could result from the meeting, the Respondent violated Section 8(a)(1) of the Act" on the grounds that the facts and the law do not support this conclusion.
10. The ALJ's failure to find, based on sufficient testimony in the record, that the August 15 meeting was neither investigatory nor disciplinary in nature and, thus, Canino was not entitled to Union representation during that meeting.

These findings and conclusions are well supported by the documentary and testimonial evidence, and by applicable Board law. *NLRB v. J. Weingarten Inc.*, 420 U.S. 251 (1975), holds that an employee has a Section 7 right to a union representative in investigatory interviews which the employee reasonably believes will result in discipline when the employee requests representation.

A. The August 15, 2013 Interview was Investigatory in Nature

- (i) *Weingarten* rights will apply generally to an interview where an employer investigates an employee's alleged misconduct, such as an altercation with another employee.

See *Potter Electric Signal Co.*, 237 NLRB 1289 (1978), enfd. in relevant part 600 F. 2d 120 (8<sup>th</sup> Cir. 1979), where a *Weingarten* violation was found when employees were interviewed following a fight between employees.

The e-mails which were sent between Lieutenant Williams and Sergeant Echevarria on June 28 and July 4 clearly indicate that Respondent was beginning an investigation into alleged misconduct of Officer Canino. (T. 80; R. Ex. 1).<sup>1</sup> The e-mail written by Echevarria on June 28 contains a Subject line: "Employee Issues" and the sergeant clearly states, "I want to write this email to the chain of command, to make you aware of some issues of insubordination that I am experiencing with Officer Maria Canino;" "Maria gave me an attitude saying that if she had to go home at 11:00 a.m. she would not come back for her 3-11 shift;" "I stated to Maria that it looked to me like she was making decisions on her own that should be made by a supervisor;" she "went on arguing that other sergeants would allow the officers to stay the whole shift;" "she appeared to be complaining into her phone;" and "stated to me, sarcastically that she told dispatch to make sure she is put out at 11 a.m. and I will see you at 3:00, I mean 2:45 for roll call." (R. Ex. 1). He concludes with the statement: "I then told Maria that it was very difficult for me to approach her most of the time because she always gives an attitude right off the bat and [she] often talks in an accusatory tone," and "I then contacted Lt. Williams *to determine how to proceed from here.*" (T. 80). (Emphasis added).

Lieutenant Williams' response to the sergeant on July 2 stated, "in order to look into the situation" he had contacted him about what had occurred on Friday, June 28, and "I need you to follow-up on the e-mail that I sent to you. Please take care of this when you are back on duty. *And once you have done that we will move to the next step.*" (Emphasis added) (T. 82). Lieutenant Williams testified that he later asked the

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<sup>1</sup> Herein, T. refers to transcript page numbers; R. Ex. to Respondent exhibits; and G.C to General Counsel exhibits.

sergeant for some clarifying information and when he received it, decided to speak with Officer Canino about it. (T. 72).

The one-on-one meeting between Lieutenant Williams and Officer Canino that took place on July 10, commenced with Williams asking Canino what happened relative to a “fight” she had had with Sergeant Echevarria. (T. 20). He told her that Echevarria had spoken to him about their disagreement or argument on June 28 and that the sergeant was very upset and frustrated by it. (T. 20). He asked her that day what had happened during the incident and suggested to Canino that she go speak with the sergeant the following day to let him know they had talked, which she agreed to do. (T. 21). It is obvious that Williams, the supervisory officer, was investigating what had occurred between Canino and Echevarria on June 28.

- (ii) *Weingarten* rights apply at an interview where a final decision has not yet been made by the Employer concerning whether discipline will issue.

See *Beverly Farm Foundation*, 323 NLRB 787 at 794 (1997), where an employer unlawfully denied an employee’s *Weingarten* rights when the employee requested representation and the discipline to be imposed was not pre-determined because an internal review committee, whose members were authorized to investigate violations of an abuse and neglect policy, could question the employee about the incident and the employee could present his version of the events.

An investigatory interview provides an employee who is suspected of wrongdoing with the opportunity to tell his or her side of the story before a disciplinary decision is made. *Storer Communications of Jefferson County, Inc.*, 292 NLRB 894, 897 (1989).

The August 15 meeting commenced with Lieutenant Williams asking Sergeant Echevarria to speak about his issues with Canino. Instead, Echevarria asked Canino to speak first and to revisit the entire June 28 incident to give her side of the story. (T. 59). She did so and the sergeant essentially agreed with her version of the facts as to what happened that day, but also pointed out that he felt she was making decisions only sergeants should make. (T. 59). Both Canino and Echevarria spoke back and forth, giving their version of events for about 45 minutes in total. (T. 35). Clearly, the committee of three superior officers was gathering information from Canino as to what she had said and done on June 28. The fact that Echevarria and Canino agreed about the facts of the underlying incident, does not change the fact that they disagreed about what she should have done differently that day, and that her conduct was being subjected to scrutiny by them. (T. 65). As the meeting ended, Williams made it clear that the department was expecting her conduct to improve, i.e., by telling her that when a sergeant or a supervisor told her to do something; she needed to do it. (T. 35).

The physical set-up of the August 15 meeting in the roll call room where the attendees all sat around a long rectangular table and where Lieutenant Williams pulled out a note book and pen, even though he may not have actually taken any notes (T. 43, 63, 76-77), do not change the nature of the investigatory meeting whose purpose was clearly to “put any and all issues on the table,” as Sergeant Echevarria had informed Canino in his August 5 e-mail. (T. 30; GC Ex. 2-4).

All of these facts point to the conclusion that the interview on August 15 was investigatory in nature.

**III. COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S EXCEPTIONS 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10:**

1. The ALJ's factual finding that in early August Maria Canino sent Officer Kevin McDonnell a copy of emails between her and her supervisor, Sergeant Carmelo Echevarria, on the grounds that it is contrary to the record testimony.
2. The ALJ's finding that "although that should have settled the matter, Echevarria sent an email on the following day stating that he was concerned 'at the way you were answering my questions' and wanted to follow up and to 'make sure that...you also understand how to address a supervisor'....on the grounds there is no evidence to support the ALJ's finding that the discussion between Echevarria and Canino should have "settled the matter", and further, that the ALJ misinterpreted Echevarria's email.
3. See above.
4. See above.
5. The ALJ's determination that "if Echevarria wanted to have a meeting simply to address obvious issues, the appropriate manner of doing so would be for the two of them to meet again" on the grounds that there is no support for the Judge's conclusion that the only appropriate manner to address any outstanding issue was a meeting between Echevarria and Canino.
6. The ALJ's determination that "adding Williams and Flint to the meeting gave Canino reasonable cause to believe that it could result in discipline" on the grounds that the facts do not support this determination.
7. See above.
8. The ALJ's determination that "by denying Canino active representation at the August 15 meeting, the Respondent violated Section 8(a) (1) of the Act" on the grounds that the facts do not support this determination.
9. See above.

10. See above.<sup>2</sup>

The record evidence amply supports the Judge's conclusions and factual determinations.

- A. Officer Canino had a reasonable belief that the August 15 investigatory interview might result in disciplinary action being taken against her.

*Weingarten* rights apply when an employee's request for representation is based on a reasonable belief, in light of all the circumstances, that discipline may ensue. Reasonable grounds for fearing disciplinary action are measured by objective standards, under all the circumstances of the case.

In *Weingarten*, the Supreme Court approved the Board's statement in *Quality Manufacturing*, 195 NLRB 197, 198 (1972), that "reasonable grounds" for fearing disciplinary action will be measured by objective standards under all the circumstances of the case and rejected any rule requiring a probe of the employee's subjective motivations. See also, *Consolidated Edison Co.*, 323 NLRB 910 (1972); *Roy H. Park Broadcasting*, 255 NLRB 229, 232 (1981).

Officer Canino had many reasons to believe that the August 15 meeting could result in discipline being issued to her. Both the content and the tone of the two e-mails that Sergeant Echevarria had sent to her on July 11 and July 14 indicated that he was not happy with her and that he still had issues surrounding her conduct. His first e-mail dated July 11, contained the problematic language: "regarding the conversation that you and I had last week, where I became concerned at the way you were answering my

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<sup>2</sup> Respondent has argued in its Brief in Support of its Exceptions that these numbered Exceptions 3, 4, 7, 9, 10, are applicable to both the issue of whether the meeting was investigatory in nature and to the issue of whether Canino had a reasonable belief from an objective standpoint that discipline might result from the August 15 meeting, so they are duplicated here as well in Counsel for the General Counsel's response.

questions and therefore, I wanted to follow up on this to make sure that, not only we are understanding each other, but that you also understand how to address your supervisor..." (T. 24; GC Ex. 2-1). Upon reading the e-mail, Canino did not understand why it had been sent, she thought the issue had already been taken care of. (T. 25). When she responded back to him that she didn't understand why he had sent this e-mail; that she disagreed with his statement that the issue of "how to address your supervisor" had been dealt with in prior meetings with him and the lieutenant, and Canino asked for clarification. He responded via e-mail again. His second e-mail dated July 14, sounded even more ominous: "We need to meet again, you, me and the Lieutenants. I'll be more clear next time because *there are obvious issues that need to be addressed* and I want to do this in person." (T. 28; GC Ex. 2-3) (Emphasis added). Not only that, it was copied to both Lieutenant Williams, Echevarria's supervisor, and Lieutenant Flint, Canino's shift supervisor. When Canino read that e-mail, she immediately thought she had made Echevarria angry by responding to his first e-mail. (T. 29).

Canino had never received anything like this e-mail in the past and she didn't agree with its content. Nor did she want it to be used against her in the event another issue was to arise in the future. (T. 26). She had never received any discipline from the department in the past and had never seen anything like the sergeant's e-mail sent to any other employee. (T. 26-27). Her knowledge of the department's discipline policies was that "they would usually hold meetings or send out an e-mail" to employees. (T. 27).

When Sergeant Echevarria then sent her a follow-up e-mail on August 5, in which he asked her to meet with him, and Lieutenants Williams and Flint, in the roll call room on August 15 at 3 p.m., in order to “put any and all issues on the table then,” alarms went off. (T. 30; GC Ex. 2-4). Canino immediately asked Union President McDonnell to attend this meeting with her. (T. 30). She had never been asked to attend a meeting with two lieutenants and a sergeant before. They are the only two lieutenants in the Department; they report directly to the Chief and, in effect, are the second level of command. Because it included both lieutenants and the sergeant, she thought there might be some kind of discipline issued against her. (T. 32). Canino based this conclusion also upon the fact that the original incident had occurred back on June 28 and they still wanted to meet with her about it almost two months later. (T. 33).

When Officer McDonnell read the July 11 e-mail (GC Ex. 2-1) from Sergeant Echevarria to Canino, he thought it was a “confirmation of conversation” e-mail, which is a level of discipline.<sup>3</sup> (T. 54). He has never seen any other “confirmation of conversation” e-mails or letters issued to other employees, but had heard about them from other officers in the department. (T. 54).

Union President McDonnell recalled the meeting of August 15 as a very formal closed door meeting in the roll call room. (T. 58). Lieutenant Flint came in an hour before his regularly scheduled shift and Sergeant Echevarria stayed an hour later after his shift ended, just to attend this meeting. (T. 58). McDonnell also had never before been asked to participate in a meeting with three superior officers to speak with an employee about their conduct. (T. 56). McDonnell was not aware of other employees

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<sup>3</sup>The fact that the ALJ found that McDonnell read these e-mails in early August vs. August 27<sup>th</sup> which is the date on which the e-mail was forwarded to him, and which he testified he read them, [Exception 1.] has no bearing on the material issues in this case.

being summoned to a meeting about their conduct 10 days in advance in order to meet with more than two supervisory officers. (T. 56). McDonnell had never been asked to attend such a meeting. McDonnell himself was asked to come and talk about his own job performance one time with two supervisors, Flint and Echevarria, in the lieutenant's office before the Union was elected. No advance notice was given. (T. 56).

Even Lieutenant Williams acknowledged it is the practice of the department that when a supervisory officer has an issue with a subordinate officer they will often follow-up by e-mail to any discussions they've had to confirm what was discussed between the officer and supervisor. Some of those cases involve employee performance or conduct. (T. 83). The department keeps copies of the confirmations of conduct in the employee's personnel file; sometimes in the sergeant's own files rather than the lieutenants' or the chief's. (T. 83). If there is an issue later on, then the supervisor has the e-mails available to him in the file to refer to at performance review time or for future discipline. (T. 84).

All the circumstances of the meeting: the required attendance of Canino with multiple high level supervisors, scheduled 10 days in advance, in a special meeting room, after several e-mails and conversations with Sergeant Echevarria and Lieutenant Williams, which had obviously still not resolved the issue of her conduct on June 28, are all indicators to any reasonable person that they could be subject to discipline as a result of that meeting.

The Board has often found *Weingarten* to be applicable where there exists a history of prior discipline or negative feedback. See, for example, *Circuit-Wise, Inc.*, 308 NLRB 1091, 1109 (1992), where the Board held that an employee reasonably

feared that discipline could result in view of a prior warning and confrontation with his supervisor over a work assignment and also held that if the meeting was purely informational, the employer had no valid reason not to inform the employee of that fact. See also *VanTran Electric Corp.*, 218 NLRB 43 (1975), where the employee had a history of reprimands and confrontations with supervisors; *Lennox Industries, Inc.*, 244 NLRB 607, 608 (1979), *enfd.* 637 F. 2d 340 (5<sup>th</sup> Cir. 1981) (employee entertained a reasonable fear of discipline in view of supervisor's prior remarks to him that he needed to acquire greater speed and the job he was doing was "not going to make it.")

While Canino had not been issued any discipline prior to the June 28 incident, she had a reasonable belief that the July 11 e-mail re: "Our conversation" from Sergeant Echevarria was comparable to what other departmental employees referred to as a confirmation of conversation email and considered to be a lower level of discipline. (T. 54). At a minimum, it would have been documentation for the sergeant's file that he could rely on if any future disciplinary issues arose. (T. 84). When the e-mail exchange escalated to the call to attend the August 15 group meeting over the June 28 incident, this would have appeared to any reasonable employee to be more serious in nature than Canino had originally believed. Clearly, from Echevarria's own rendition of the incident to Lieutenant Williams, Canino's conduct was less than acceptable, as evidenced by the terms "insubordinate, argumentative and sarcastic" which he used to describe her behavior of June 28. (R. Ex. 1). His concerns with her manner on "how to address her supervisors" were clearly laid out in the July 11 e-mail that he sent to her. (GC Ex. 2-1). Any reasonable employee would have concluded that discipline was a possible outcome of this pre-planned meeting.

Finally, it is ludicrous to argue, as does Respondent, that Officer Canino, in sending her July 14 e-mail to Sergeant Echevarria, requested to have a second meeting with him and/or the two lieutenants in order to further discuss her June 28 conduct. Her July 14 e-mail to the sergeant was simply an earnest request for clarification of what he was referring to when he said that they had discussed the issue of the way she was addressing her supervisor. To her recollection, that topic had not been discussed with her by either Lieutenant Williams or Echevarria, at any time up to that point. A request for clarification is not a request for an investigatory interview. In reality, what reasonable subordinate officer would ask to meet with the second level of command within the department in order to press her direct supervisor into taking a stand about his apparent dissatisfaction with her conduct?

- B. Canino's *Weingarten* right to have a union representative provide effective assistance and counsel to her during the August 15 investigatory interview was violated when Lieutenant Williams ordered Officer McDonnell to remain silent during the meeting.

The role of the Union representative is to provide assistance and counsel to an employee who is being interrogated. *Weingarten*, 420 U.S. at 262-263. An employer has a right to regulate a representative's role only to ensure the reasonable prevention of confrontation with the statutory representative. *Texaco, Inc.*, 251 NLRB 633, 636 (1980), enfd. 659 F. 2d 124 (9<sup>th</sup> Cir. 1981). It is well established that an employer may not totally silence a union representative during an investigatory interview. *Southwestern Bell Telephone Co.*, 251 NLRB 612, 613 (1980), enfd. denied 667 F. 2d 470, 474 (5<sup>TH</sup> Cir. 1982) (union representative has no right to collective-bargaining or adversarial confrontation, but cannot be ordered to remain silent.)

Both Officer Canino and Officer McDonnell clearly testified that when Sergeant Echevarria said near the beginning of the meeting that Canino was frustrating to work with, and that she made decisions that she was not supposed to be making, Officer McDonnell asked him what were the decisions she was making that she was not supposed to be making. (T. 34, 59). McDonnell was attempting to get clarification from Echevarria on what he thought was a general statement. (T. 59). McDonnell was immediately told by Lieutenant Williams that he was not to speak, that he was only a witness. (T. 35, 59). McDonnell next asked Williams if he was ordering him not to speak, and Williams replied yes, he was. (T. 59). Williams himself admits that when McDonnell tried to say something at the meeting, that he told him he was there only as an observer and he was not to participate in the meeting. (T. 78).

Even though McDonnell offered to explain to Williams the case law that he was relying on in asserting his right to participate in this meeting, Williams refused to acknowledge his role. (T. 60). After another 45 minutes of arguing back and forth, Canino asked if they could all just agree to disagree; that she felt nothing was being accomplished by the constant back and forth between her version and Echevarria's version of the June 28 incident. (T. 35). Williams then asked Echevarria if he was satisfied the situation had been resolved and Echevarria answered that he was. (T. 60). At that point, again attempting to gain some clarity regarding Respondent's intentions, McDonnell asked the supervisory officers if this would be the end of any further talk or e-mails. This time, he was told again by both Williams and Echevarria that he was not allowed to speak. (T. 60). Williams then told him that they had not invited him to this meeting, that his role was to sit there and not actively participate, and that he was

present only as a courtesy. (T. 60). McDonnell responded that he felt he was allowed to speak as the union representative but was again told by Echevarria that if he had a problem with their stand, then he should go talk to the Chief about it. (T. 45). No one ever responded to his question as to what would be happening to Canino next. (T. 45). This would have been a perfect opportunity for the Employer to inform Canino, since they had not before, that they considered the matter closed and that they had decided there would be no ensuing discipline, but, again, they failed to do so. (T. 36, 60).

It is clear that the permissible extent of participation by a representative lies somewhere between mandatory silence and adversarial confrontation. *New Jersey Bell Telephone*, 308 NLRB 277 at 279 (1992). Here, McDonnell was completely silenced by Respondent at the August 15 meeting. In doing so, Respondent effectively denied Officer Canino's right to assistance and counsel by her union representative.

#### **IV. COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S EXCEPTIONS 11, 12 AND 13:**

11. The ALJ's failure to consider the relevance of testimony that at the time of August 15 meeting the police officers' union had only been in place for a little over a month.
12. The ALJ's failure to assess responsibility of the Union's president who did not raise the issue of whether the August 15 meeting could result in discipline, despite his understanding of Weingarten principles.
13. The AJL's failure to find that the issue in this case is diminimis and, thus, no remedy is warranted.

The fact that the police officers' union had only been certified for a little over a month when the meeting occurred does not support Respondent's apparent argument that this should somehow excuse its agents from complying with the federal law. If anything, it makes it even more compelling that the newly recognized labor organization

be allowed to exercise its representational duties on behalf of the newly formed bargaining unit without interference from the Respondent. Violation of an employee's *Weingarten* rights is never de minimis and it shows a lack of respect for the Act by the Respondent's claim that it is a mere "trifle" here. It is also immaterial that no discipline was ultimately issued to Canino. See *New York Telephone Co.*, 219 NLRB 679 (1975).

Nor may Respondent shift to the employee or the union representative the burden of actively inquiring whether discipline was "in its mind" during the six-week period between the June incident and the August 15 meeting in order to excuse its failure to abide by its obligation to afford its employee her lawful union representation. While it is true that neither Canino nor McDonnell directly asked Respondent if it was considering discipline during that time, Respondent could have just as easily spelled out for Canino that it didn't believe that her conduct warranted any discipline and that the meetings they were holding with her to discuss it would not result in any. Yet it failed to do so. (T. 36). Moreover, when McDonnell attempted to find out what Respondent's intentions were at the August 15 meeting, his questions were met with rebukes and Respondent never responded to them. (T. 60).

**V. COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S EXCEPTIONS 14 AND 15:**

14. The proposed remedy which is premised on erroneous finding that the University violated Section 8(a)(1) of the Act by refusing to allow Officer McDonnell to participate in a non-disciplinary meeting for the reasons set forth in the exceptions above.
15. The recommended Order, including the Appendix, which is premised on an erroneous finding that the University violated Section 8(a)(1) of the Act.

As set out above, the Judge's finding that Respondent violated section 8(a)(1) of the Act by refusing to allow Officer McDonnell to participate in an investigatory meeting which Officer Canino reasonably believed could result in discipline is well supported by the record evidence. Therefore, both the proposed remedy and recommended Order, including the appendix, are appropriate and should be adopted.

**VI. CONCLUSION**

For all the above reasons, the rulings, findings and conclusions of the Administrative Law Judge should be affirmed.

Dated: May 6, 2014

Respectfully submitted,

A handwritten signature in black ink that reads "Karen E. Hickey". The signature is written in a cursive style and is positioned above a horizontal line.

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## CERTIFICATE OF SERVICE

I, Mary H. Harrington, do certify that I have this day served by electronic mail copies of Counsel For The General Counsel's Answering Brief To Respondent's Exceptions To The Decision Of The Administrative Law Judge to the parties listed below:

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