

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

**HRHH GAMING SENIOR MEZZ, LLC  
d/b/a HARD ROCK HOTEL & CASINO**

**28-CA-183553**

**and**

**GENERAL TEAMSTERS, AIRLINE, AEROSPACE  
AND ALLIED EMPLOYEES, WAREHOUSEMEN,  
DRIVERS, CONSTRUCTION, ROCK AND SAND,  
LOCAL 986, affiliated with INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS**

*Larry A. Smith, Esq.*, for the General Counsel.

*David B. Dornak, Esq. (Fisher & Phillips, LLP)*,  
for the Respondent.

*Debra S. Goldberg, Esq. (Weinberg,  
Roger & Rosenfeld)* for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case on January 24, 2017, in Las Vegas, Nevada. Based on a charge and amended charge filed by General Teamsters, Aerospace and Allied Employees, Warehousemen, Drivers, Construction, Rock and Sand, Local 986, affiliated with International Brotherhood of Teamsters (Local 986, the Union or Charging Party), the Regional Director for Region 28 issued a consolidated complaint on April 29, 2016 (the complaint). The General Counsel alleges that Respondent HRHH Gaming Senior Mezz, LLC d/b/a Hard Rock Hotel & Casino (Respondent or HRHH) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by denying an employee's request to be accompanied by a union representative at a peer-review proceeding regarding his discharge. Respondent denies committing the unfair labor practice alleged.<sup>1</sup>

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<sup>1</sup> This allegation is set forth at paragraphs 5(k) through 5(m) of the complaint; prior to hearing, the General Counsel severed all other substantive allegations from the complaint, as reflected by the single case number remaining in the caption of this decision.

At trial, all parties were afforded the right to call, examine and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file post-hearing briefs. Post-hearing briefs were filed timely by the General Counsel and Respondent and have been carefully considered.<sup>2</sup>

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## I. FACTS

Until 2016, discriminatee Dean Varos (Varos)<sup>3</sup> worked as a valet attendant at Respondent’s Las Vegas, Nevada hotel and casino, where he was represented by Local 986. This case concerns Varos’ request that a Local 986 representative be present while he was questioned at a “Board of Review” hearing regarding a workplace accident relied on by Respondent to discharge him.

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### *A. Varos’ Workplace Accident and Respondent’s Response*

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On May 14, 2016,<sup>4</sup> Varos damaged a customer vehicle. After a brief suspension and drug test, Respondent returned him to work as it further investigated the accident. During the next 2 weeks, a number of meetings and/or conversations took place between management officials and Local 986 Representative Tamura Jamison (Jamison) regarding Varos. On May 31, Varos and Jamison met with Respondent officials, including Director of Human Resources Charles Flieger (Flieger) and Assistant Director Ruth Vasquez (Vasquez), for what Flieger characterized as a “due process meeting,” during which the accident and potential forms of discipline were discussed. (Tr. 34, 36–37, 40, 45–46; R. Exh. 9)

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Following this meeting, Respondent determined that Varos should be discharged. According to Flieger, he and at least one other HRHH representative met with Varos on June 7 to “review the Company’s decision...to terminate his employment.” According to Flieger’s un rebutted testimony, Jamison was invited to attend this meeting, but declined. (Tr. 28) Following the June 7 meeting, Flieger “terminated” Varos’ employment in Respondent’s HRIS<sup>5</sup> computer database, which effectively ended his workers’ compensation and insurance coverage. He also signed a “separation form” for Varos, which led to his status in the payroll system being changed.<sup>6</sup>

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<sup>2</sup> Abbreviations used in this decision are as follows: “Tr.” for transcript; “GC Exh.” for General Counsel’s Exhibit; “R. Exh.” for Respondent’s Exhibit; “GC Br.” for the General Counsel’s post-hearing brief and “R. Br.” for Respondent’s post-hearing brief.

<sup>3</sup> Throughout the record, Varos’ name is misspelled as “Verez.” The record is hereby amended to correct these misspellings.

<sup>4</sup> All dates herein refer to 2016, unless otherwise noted.

<sup>5</sup> “HRIS” stands for Human Resource Information System, a form of information technology that, inter alia, allows employers to store employee data, manage payrolls and administer benefits. See [https://en.wikipedia.org/wiki/Human\\_resource\\_management\\_system](https://en.wikipedia.org/wiki/Human_resource_management_system)

<sup>6</sup> According to Respondent, it provided Varos with a “benefits package” at this time, and Flieger also “reviewed and discussed COBRA documents, unemployment compensation and benefit options” him (R. Br. at 8) However, although Flieger did testify these were typically the steps that took place following Respondent informing an employee of his discharge, he did not confirm that this took place in Varos’ case. (See Tr. 28)

*B. Respondent’s Board of Review Process*

Pursuant to HRHH internal policies,<sup>7</sup> Respondent’s actions entitled Varos to request a “Board of Review” (BOR) proceeding. The BOR process involves a hearing on the merits of a given discipline before a panel of three hourly employees (one from within and two from outside the aggrieved employee’s department), as well as two managers from outside the employee’s own department. According to Respondent’s internal training materials, the BOR “functions as a ‘checks and balance’ process for [employees] who feel they were issued corrective action or separated unfairly.” A typical BOR hearing involves the presentation of documentary and testimonial evidence by HRHH and the aggrieved employee. This is followed by questions put to either or both parties by the BOR members, and the presentation of closing arguments. The proceeding is then closed, at which time the BOR panel member deliberate and ultimately cast secret ballots to determine the outcome.

A BOR may vote to sustain, reverse or reduce discipline. In the case of discharge, the panel may also vote to award reinstatement and backpay. According to Flieger, an employee reinstated as a result of a BOR proceeding would have their status reinstated in Respondent’s HRIS database for purposes of payroll, benefits and workers compensation. A BOR panel makes a recommendation only, which may be overturned by Respondent’s Chief Operating Officer; however, this has not occurred for at least 4 years. (Tr. 17, 20, 24, 30–31, 44–45; R. Exh. 1–3, 5–7)

*C. Varos’ Board of Review Process*

Following the June 7 meeting, Varos timely requested a BOR review of his discharge; his BOR hearing was held several months later. (Tr. 51) Varos’ request for union representation arose in the course of scheduling that hearing. Specifically, on Saturday, September 3, Flieger emailed Varos as follows:

I’d like to conduct the BOR process in the next few days. I have set aside time on Tuesday, Wednesday, and Thursday.

If you aren’t able to attend a BOR on those days I’m afraid I’ll have to close your request. Please let me know which day will work best.

(GC Exh. 2(b)) The following afternoon, Varos responded that he would be available Tuesday afternoon, adding:

A couple questions:

1. Will there still be someone there from classic valet on the BOR Board as previously discussed
2. Other than the HR representative, Board of review members and myself, who else will be sitting in on the proceedings ?

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<sup>7</sup> No collective-bargaining agreement or grievance and arbitration procedure exists between the parties. (Tr. 54)

3. If their [sic] are other observers to be sitting in on the proceedings, will a representative from the Teamsters Union be allowed to sit it also.

5 Id. The BOR did not go forward on Tuesday, however. Instead, at 10:37 a.m. that day, Flieger begged off, asking “can we schedule for Wednesday?” He then replied to Varos’ inquiries in order:

1. We will schedule a representative from your Department.
- 10 2. Aside from those mentioned, there will be someone present taking notes.
3. A representative from Teamsters will not be permitted to sit in.

(GC Exh. 2(a)) Approximately 3 hours later, Varos responded, “I figured it wouldn’t happen today! Tomarrow [sic] as close to 4 would be fine.” Id.

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Varos’ BOR was held at 3 p.m. on Wednesday, September 7. Counsel for the General Counsel failed to present Varos—or any other individual present during the interview in question—as a witness, but instead relies on Respondent’s official minutes of the proceeding. These minutes indicate that the proceeding adhered to the standard BOR format, including Varos being questioned by members of the BOR panel, as well as HRHH’s representative at the BOR, Assistant Director Vasquez. Subjects on which Varos was questioned included:

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- the scope of his job duties as a valet attendant;
- his awareness of HRHH “guidelines” for inspecting work areas;
- 25 • any vehicle warning or alert he received prior to the May 14 accident; and
- whether another individual should be held responsible for the accident.

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(GC Exh. 3; Tr. 15) There is no indication that, at any time prior to or during the BOR hearing, Varos reiterated his September 4 request for union representation during this questioning.<sup>8</sup> According to Respondent’s records, the BOR panel voted to uphold Varos’ discharge. (GC Exh. 3)

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## II. ANALYSIS

It is well settled that Section 7 guarantees an employee the right (generally referred to as a “Weingarten right”) to be accompanied and assisted by a union representative at an “investigatory” interview, which is one the employee reasonably believes may result in disciplinary action. *NLRB v. Weingarten*, 420 U.S. 251, 260 (1975). *Weingarten* rights, however, are designed leave intact “legitimate employer prerogatives,” and an employee that requests a representative is not guaranteed the approval of his request. Id. at 258. Instead, an employer is free to deny the request and proceed with its investigation, leaving the employee “the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one.” Id. (citing *Mobil Oil Corp.*, 196 NLRB 1052, 1052 (1972)).

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<sup>8</sup> According to the meeting notes, Varos made only one reference to being represented by Local 986: asked whether HRHH had notified him in writing of a change in work rules, he responded, “No. Only verbal. We are Union and policies need to be posted.” (G.C. Exh. 3(f))

Significant to this case, an employee who weighs these two options and *voluntarily* submits to an interview unaccompanied will be found to have waived his *Weingarten* rights. See, e.g., *Seattle-First National Bank*, 268 NLRB 1479 (1984). Waiver will not be found, however, where it results from employer conduct aimed to “dissuade an employee from remaining firm in his request,” such as suggesting that maintaining the request will result in the involvement of “higher management” and more harsh disciplinary consequences. *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977). What follows is an application of these principles to the instant case:

*A. Varos’ September 7 BOR was “Investigatory” and Triggered Weingarten Rights*

Respondent argues that Varos was not entitled to a *Weingarten* representative on September 7, because the BOR was not “investigatory” in nature, in that an employee in Varos’ position would not reasonably believe—based on objective standards—that it might result in disciplinary action. *NLRB v. Weingarten*, 420 U.S. at 257, fn.5. I disagree.

It is certainly true that an employee is not entitled to union representation at every meeting regarding discipline. *Weingarten* rights are afforded to employees facing the possibility of involuntary adverse action; thus, an employee who voluntarily resigns is not entitled to representation at a meeting to present a request for reinstatement. *Polson Industries*, 242 NLRB 1210 (1979). Moreover, for the rights to attach, discipline must ‘hang in the balance’; if the employee’s disciplinary outcome is not dependent on the interview in question, there is no right to a representative. *Baton Rouge Water Works, Co.*, 246 NLRB 995, 997 (1979) (no right to representative at meeting “held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision”). Conversely, an employee remains entitled to a representative—even after the employer has engaged its disciplinary processes—until the point at which that discipline becomes final. *PPG Industries, Inc.*, 251 NLRB 1146, 1146, fn.2 (1980) (*Weingarten* applicable where employer “did not reach a final, binding decision concerning specific discipline prior to” the meeting in question).

Where an employer’s disciplinary actions are not final and binding until after they are reviewed by a designated body that reviews the case for discipline, deliberates and affirms the decision, that body’s proceedings constitute will be deemed “investigatory” for purposes of the *Weingarten* doctrine. *Henry Ford Health System*, 320 NLRB 1153, 1155 (1996); see also *Midwest Division–MMC, LLC*, 363 NLRB No. 193 (2015). Such is the case even where the review is not automatic, but is initiated by the aggrieved employee. See, e.g., *Washoe Medical Center, Inc.*, 348 NLRB 361, 361–362 (2006). As the Board has noted, it is irrelevant under such an analysis whether the reviewing body in question lacks the ability to *increase* the discipline in question; the fact that the reviewing body’s determination is a necessary prerequisite to *any* discipline suffices as reasonable grounds for the employee to believe that its proceedings may result in discipline. *Henry Ford Health System*, 320 NLRB at 1155, fn.5.

Applying these standards to Varos’ September 7 BOR produces but one conclusion: he was entitled to union representation. Unlike an employee who had voluntarily resigned, Varos faced discharge. Moreover, the conduct of Varos’ BOR—which followed the standard format for such meetings—clearly involved more than merely informing him of a prior, unilateral decision to discharge him. Per Respondent’s established policy, the meeting was held to have his case heard, deliberated and adjudicated before his status was finally resolved. Because his

employment status was in limbo at the time of the meeting—as reflected by the BOR’s authority to recommend his reinstatement—Varos was entitled to a *Weingarten* representative.

*B. Varos Properly Invoked his Weingarten Rights*

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Once it is established that a particular interview confers *Weingarten* rights, the next question is whether such rights were validly invoked. As the Board has made clear, an employee’s request for representation need not amount to an explicit demand, but must only be sufficient to put the employer on notice of the employee’s desire for union representation. For example, the request can be phrased as a question, such as in *Southwestern Bell Telephone Co.*, 227 NLRB at 1227 (*Weingarten* rights triggered where one employee asked supervisor whether they “should obtain union representation” and another employee stated, “I would like to have someone there that could explain to me what was happening”).

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In this case, Varos made his request for a Local 986 representative amply clear by directly asking Flieger whether “a representative from the Teamsters Union” would be allowed to attend the BOR hearing. As such, I find that he properly invoked his *Weingarten* rights.

*C. Varos Waived his Right to Representation by Participating in the September 7 BOR*

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Respondent contends that, to the extent that Varos’ BOR implicated *Weingarten* rights, he waived those rights by voluntarily proceeding with the September 7 meeting without union representation. I agree.

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As noted supra, an employee’s *Weingarten* right, once asserted, is hers to waive; this occurs most often where, as here, the employer denies the employee’s request, forcing the employee to choose between: (a) continuing the interview unaccompanied, thereby waiving her right to representation; or (b) preserving her right to representation by foregoing the interview. As discussed, an employee who—in the absence of intimidation or dissuasion by the employer—chooses the former option will be found to have voluntarily relinquished the right to representation. See, e.g., *Seattle-First National Bank*, supra.

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Such is the case here. Upon receiving Varos’ request for representation, Flieger denied that request, thereby forcing Varos either to proceed without representation or abandon his BOR.

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There is no indication in the record, nor does the General Counsel argue, that, prior to presenting Varos with these alternatives, Flieger (or any other representative of Respondent) took any action to encourage Varos to waive his rights by attending. Under such circumstances, I find that, although he clearly could have refused, Varos voluntarily chose to attend the BOR in an attempt to regain his employment. As such, Respondent, by conducting the BOR, operated within the parameters of the Board’s *Weingarten* doctrine. *Id.* at 1481.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>9</sup>

ORDER

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It is recommended that the complaint be dismissed in its entirety.

10 Dated: Washington, D.C. April 21, 2017



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Mara-Louise Anzalone  
Administrative Law Judge

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<sup>9</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.