

97-011

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

STATE EMPLOYMENT RELATIONS BOARD,

Complainant,

v.

CITY OF CLEVELAND,

Respondent.

CASE NO. 96-ULP-04-0254

OPINION

POHLER, Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complainant") from exceptions to a Hearing Officer's Proposed Order issued December 9, 1996. For the reasons below, we find that the City of Cleveland ("City") violated O.R.C. §§ 4117.11(A)(1), but not (A)(3), by refusing to grant an employee's request for union representation under circumstances in which he was entitled to union representation and by then forcing that employee to continue with an investigatory interview without union representation under threat of discipline for insubordination. We also find that the City did not violate O.R.C. §§ 4117.11(A)(1) and (A)(8) when investigators threatened representatives of Cleveland Association of Rescue Employees, Communications Workers of America, Local 4550 ("CARE") with arrest if they attempted to represent employees who the union representatives knew were not entitled to representation during an investigation.

I. BACKGROUND¹

CARE is the exclusive bargaining representative for a bargaining unit of full-time emergency medical technicians and emergency medical dispatchers employed by the City's Division of Emergency Medical Services ("EMS"). The City is party to a collective bargaining agreement with CARE from April 1, 1995 through March 31, 1998. The Professional Conduct and Internal Review Unit ("PCIR") within the

¹Finding of Fact ("F.F.") Nos. 1-5, 7, 9, 11, 13-14, 16-20, and 22; Transcript ("Tr.") 236 and 336.

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City's Division of Police is responsible for investigating allegations of improper police conduct and acted at all relevant times as a representative of the City.

The PCIR was investigating Police Officer Debra Simmons' account of an alleged car accident on April 11, 1996, involving the Mayor's Chief of Staff, LaVonne Sheffield Turner. Police Officer Simmons alleged that Ms. Turner caused the accident and berated and threatened her with the loss of her job when Police Officer Simmons responded to the accident. Her report indicated that EMS Unit No. 14 (EMS-14) had transported a young, black female to a local hospital and described the two paramedics assigned to EMS-14 that night. Police Officer Simmons' report appeared to contain some factual errors; for example, the description of the paramedics did not match the paramedics working EMS-14 that night.

The EMS Commissioner, Bruce Shade, in compliance with a request of PCIR on the night of April 17, 1996, ordered 18 EMS units to PCIR's office to fill out questionnaires and have their pictures taken. The questionnaire was addressed to "Bruce R. Shade, Commissioner, Division of EMS" from "Lieutenant Henry A. Tekancic, Cleveland Police Department, Officer In Charge, Professional Conduct/Internal Review Unit." The subject of the memorandum was "Possible response to requests for service on April 11, 1996, to the area of E. 173 St. and Harvard Av." The memorandum had four questions about whether the employee or the employee's partner responded to calls in the subject area and whether they treated a juvenile black female. The questionnaire had a place for the employee's personal information and signature and as well as the supervisor's signature.

CARE's President, Mark Kempe, objected to Commissioner Shade's order. Commissioner Shade told Mr. Kempe that the investigation centered on Officer Simmons and the gaps in her story. Commissioner Shade also told Mr. Kempe that this was neither a criminal nor a disciplinary investigation of any EMS employee and no EMS employees were the focus of the investigation. Later the same evening, Edward Eckart, the Executive Administrator to the Safety Director, told Mr. Kempe that no EMS employees were under suspicion and that this was not an investigation that triggered union representation; however, this information was never related to those EMS employees to be interviewed.

The CARE representative at the PCIR's office, Mark Reilly, was not permitted to consult with bargaining-unit members. When he asked the investigators if employees who answered the questions wrong could be held accountable, no one could give him an answer. Mr. Reilly's supervisor, Bruce Campbell, warned him that if he advised employees not to cooperate with the investigation he was to be taken out of PCIR; if he refused to leave, then he would be subject to arrest for obstruction of justice. Mr. Campbell also told Mr. Reilly that any

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employees who did not cooperate with PCIR would be brought up departmentally for insubordination. Mr. Reilly sat in the PCIR office adjacent to the desk with the questionnaires and remained silent until he left a couple of hours later. Two employees asked him what to do, but Mr. Reilly informed them that he could not talk to them.

Wayne Lach was one of the employees assigned to EMS-14 on the night of the alleged accident. For that reason, PCIR investigators focused on him. Sergeant Smrdel tried to contact him through a message in his home mailbox and another message from Mr. Lach's partner, Derrick White. After consulting with CARE Vice-president Bobby Laux, who informed Mr. Lach that he did not have to respond to PCIR without a subpoena, Mr. Lach ignored both messages. On the evening of April 17, 1996, Messrs. Lach and White were ordered by their supervisor, Mark McKenney, to go to PCIR. When they arrived, Sergeant Smrdel first berated Mr. White for failing to give Mr. Lach the message. After Mr. White said that he did give him the message, Sergeant Smrdel asked Mr. Lach why he did not respond. When Mr. Lach mentioned that he called his union representative, Mr. McKenney took him into another room.

Although Commissioner Shade had told Mr. Kempe that this was neither a criminal nor a disciplinary investigation of any EMS employee and that no EMS employees were the focus of the investigation, Mr. McKenney did not tell Mr. Lach that he was not being investigated. Mr. McKenney told Mr. Lach not to worry about union representation because it was not a criminal investigation; Mr. McKenney did not tell Mr. Lach what the interview concerned or why it was being conducted. Mr. McKenney said that they just needed employees to answer the questionnaire. Mr. McKenney also mentioned that Mr. Reilly had been threatened by PCIR with arrest for obstruction of justice and that the Safety Director ordered employees to comply with the questioning and that it was not worth being thrown in jail over a piece of paper. Mr. Lach, concerned about it being an internal investigation, asked Mr. McKenney if he should have his union attorney with him, and Mr. McKenney told him it was not necessary.

Although Mr. Lach feared that his participation in the investigation might lead to discipline, he complied with PCIR's requests and had his picture taken and answered the questionnaire. Before Mr. Lach left, Sergeant Smrdel told him that they needed him to come in again the next morning to answer more detailed questions since he had been identified as being on EMS-14 on April 11. The record does not indicate that Mr. White requested union representation at any time during this meeting.

Before leaving for PCIR the next morning, Mr. Lach called Mark Kempe to ask him what he should do. Mr. Kempe told Mr. Lach to stop the questioning anytime he became uncomfortable and ask for the union attorney. At PCIR, Mr. Lach did not ask for a union representative because he thought it was clear from the prior evening's dialogue that the request would be denied. He feared discipline

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because it was never explained to him who the investigators were targeting. His concern focused on the media attention centered around the case and the involvement of Cleveland's mayor, who made public statements about the incident. He felt that he had to be careful about what he said to avoid something coming back to be used against him as a tool to make him a scapegoat.

The PCIR investigators believed that Mr. Lach and his partner on that night, Jonathan Goldberg, had not been at the alleged accident scene. They took a statement from Mr. Lach and had him listen to an audio tape. PCIR asked Mr. Lach if he could identify the voice on the tape; Mr. Lach could not. Before Mr. Lach signed his statement, he was told that a videotape recorded the accident, it would show who was at the scene, and it would indicate if his statement was truthful.

During the initial investigation, another EMS employee, Kevin Coleman, was on vacation and, consequently, was ordered 1½ weeks later to report to PCIR with his partner, Sam Latif Ali. They were not told why they had to report to PCIR, although they had heard some rumors from the other employees. When they arrived at PCIR, Mr. Ali asked for a union representative. Sergeant Candaliera, one of the PCIR investigators, waving the pictures of the other EMS employees, told Mr. Ali: "The Union has nothing to do with this * * * all these people in these pictures here came down here without asking for no [sic] Union representation, why have you got to come down here and give us a problem? * * * If you want to keep complaining about the Union, then you'll be brought up on charges[.]" Messrs. Coleman and Ali then completed the questionnaire and had their pictures taken. Mr. Coleman did not request a union representative after observing the response to Mr. Ali's request for union representation.

No charges were filed against EMS employees stemming from this investigation. Commissioner Shade indicated that if wrongdoing — such as failing to record the alleged accident in the log — had arisen from the investigation, then EMS would initiate its own investigation into the affair and then the employee could be subject to discipline. If that had been the case, according to Commissioner Shade, the City would have notified CARE, and the employee would have been afforded representation as provided by the collective bargaining agreement. If the PCIR discovered criminal acts by the employees, it would not submit them to superiors in other city divisions, but would include them in a report for prosecutorial review. If the prosecutor decided to seek an indictment against the employee and the employee was subsequently convicted, then that employee would be terminated from City employment.

II. DISCUSSION

A. The City Violated O.R.C. § 4117.11(A)(1), But Not O.R.C. § 4117.11(A)(3), When It Denied Union Representation To An Employee Who Was Entitled To Representation

O.R.C. § 4117.03(A)(3) guarantees public employees the right to "representation by an employee organization." In *In re Davenport*, SERB 95-023 at 3-156 (12-29-95), SERB adopted the standard in *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 88 L.R.R.M. 2689 (1975) ("*Weingarten*") and held:

We believe that *Weingarten* provides the proper balance between the public employer's need to manage and the public employees' rights in O.R.C. § 4117.03(A)(2) to engage in concerted activities for mutual aid and protection. Therefore, we specifically find that, upon an employee's request, representation by an employee organization is required at investigatory interviews which the employee reasonably believes could lead to discipline (the *Weingarten* standard) and at grievance meetings.

The Complainant has the burden of demonstrating by a preponderance of the evidence that an unfair labor practice has been committed. O.R.C. § 4117.12(B)(3). The complaint alleges that the City violated O.R.C. §§ 4117.11(A)(1) and (A)(3), which state in pertinent part:

- (A) It is an unfair labor practice for a public employer, its agents, or representatives to:
 - (1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117 of the Revised Code[.]
 - ***
 - (3) Discriminate in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117. of the Revised Code[.]

1. The City Did Violate O.R.C. § 4117.11(A)(1)

To establish an O.R.C. § 4117.11(A)(1) violation for the denial of the right to representation, four elements must be proven: (1) that the interview was investigatory, (2) that the employee requested the presence of a union representative and that such request was denied, (3) that the employee reasonably believed that the interview might result in disciplinary action, and (4) that subsequent to the employer's denial of representation, the employer compelled the employee to continue with the interview.²

² See also *Cook County Sheriff*, 5 PERI ¶ 3001 (IL LLRB 1988); *Round Lake Area Schools District 116*, 8 PERI ¶ 1064 (IL ELRB Executive Director's Decision, 1992).

a. The interviews were investigatory

A meeting is investigatory if its purpose is to elicit information pertaining to the conduct of the employee being interviewed. An investigatory interview can occur where information is requested orally or in written form.³ In the present case, the PCIR was meeting with the EMS employees concerning their on-duty acts on a particular evening. The questionnaire that the EMS employees were ordered to fill out was investigatory in nature. Thus, the first element was met.

b. Only Messrs. Lach and Ali requested representation

The right of representation is an individual right; it must be asserted individually. The employee must request representation, not the union. A blanket request is not adequate.⁴ A request for representation need not be a formal request, but merely enough to put the employer on notice that the employee desires representation. An inquiry by an employee as to whether he should obtain union representation is sufficient to put the employer on notice that it was the employee's desire to have representation.⁵ Conversely, telling the union that employees were not the subject of an investigation is not adequate; the employer must tell the individual employee.

³ See, e.g., *City of Reading*, 26 PPER ¶ 26172 (PA LRB 1995).

⁴ See, e.g., *Appalachian Power Co.*, 253 NLRB No. 135, 106 L.R.R.M. 1041 (1980).

⁵ See, e.g., *Southwestern Bell Telephone Co. v. Communications Workers of America*, 227 N.L.R.B. 1223, 94 L.R.R.M. 1305 (1977) (*"Southwestern Bell I"*).

On April 17, 1996, Wayne Lach made a request for union representation. When he asked his supervisor if he should have his union attorney with him, he sufficiently notified the City that he desired union representation. Upon his arrival with Kevin Coleman, Sam Latif Ali made a request to Sergeant Candaliera for a union representative. Mr. Coleman witnessed the exchange between Mr. Ali and Sergeant Candaliera. Mr. Coleman did not make a request for representation.⁶ The employee must request representation, not the union.⁷ Even though he witnessed the outburst by Sergeant Candaliera when Mr. Ali made his request, if Mr. Coleman wanted to exercise his right of representation, he was obligated to request the representation. Thus, the second element was proven only as to Messrs. Lach and Ali.

c. Only Messrs. Lach and Goldberg had a reasonable belief that discipline may be imposed

The PCIR does not have the authority to discipline EMS Division employees. However, the City's witnesses conceded that information gleaned from PCIR's investigation would be turned over for a prosecutor's review, if criminal charges were contemplated, or could have been revealed to superiors at EMS. While it may not be PCIR's practice to turn information over to superiors in another City department, had the PCIR discovered that EMS-14 had been involved in a "cover-up," the superiors at EMS would have learned of that information. The City did not rebut this point. The PCIR conducted an investigation involving bargaining-unit members on three separate occasions: the evening of April 17, 1996; the following day with Wayne Lach; and a week or so later when Mr. Coleman, who was on vacation on April 17, 1996, was called in with his partner, Mr. Ali.

⁶Tr. 236.

⁷See, e.g., *Appalachian Power Co., supra*.

The right to representation arises "when a significant purpose of the interview is to obtain facts to support disciplinary action that is probable or that is being seriously considered," combined with employees' knowledge of that purpose; without some statement of purpose, "the atmosphere of intimidation and uncertainty was heightened and the justification for the fear that the interview would be used * * * for disciplinary purposes was increased."⁸ Mr. Lach testified that as soon as he mentioned a union representative, he was asked to step into a small office where he was told by his supervisor not to worry about a union representative. But he persisted, later saying that he felt he should talk to the union's attorney given the fact that this was an internal investigation. When Mr. McKenney told Mr. Lach that it was not a criminal investigation, this statement, while accurate, was not fully responsive to the question. Conspicuously absent from this response was any assurance that Mr. Lach was not a target of an internal administrative investigation or that discipline was not being contemplated against him. Even conceding that the purpose of the meeting may not have been to target Mr. Lach, the City's crucial mistake through the chain of command was in failing to communicate that fact to Mr. Lach.

Whether an individual had a reasonable belief must be determined using an objective basis. Under these facts, Messrs. Lach and Goldberg each could reasonably believe that the interview might result in disciplinary action because they were in EMS-14 on the night of the alleged incident; when interviewed, they were *not* told that they were not the subject of the investigatory interview; they were ordered by their supervisor to attend the investigatory interview; and they had an objective basis for the belief that their supervisor was being provided copies of their written responses because the questionnaire indicated that it was to be sent to Commissioner Shade. It is irrelevant that no discipline actually resulted if the employee possessed the requisite reasonable belief that discipline might result.⁹ The City did not adequately rebut the assertion that the information was shared with Messrs. Lach's and Goldberg's supervisors. Thus, the third element was proven as to both Messrs. Lach and Goldberg.

The record does not support a finding that any of the other EMS employees had a reasonable belief that discipline might be imposed. CARE contends that Messrs. Ali and Coleman met the description of the employees in EMS-14 on the night of the incident. However, since the record does not show that Messrs. Ali and Coleman knew that they met the description of the EMS-14 employees, they could not have a reasonable belief that they were the subject of the investigation.

As discussed above, Jonathon Goldberg had a reasonable belief. But the record does not show that he requested union

⁸ See, e.g., *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 410, 99 L.R.R.M. 2841, 2845 (9th Cir. 1978).

⁹ See, e.g., *Rock-Tenn Co. v. United Paper Workers Int'l Union, Local 907*, 315 N.L.R.B. 670, 148 L.R.R.M. 1148 (1994).

representation. As a result, he was not denied representation.

d. The City compelled Mr. Lach to continue with the interview

Mr. Lach's inquiries into the propriety of obtaining union representation were met by his supervisor with comments that CARE was not involved and that it was not worth spending the night in jail. Mr. McKenney admitted that he told Mr. Lach that if he did not answer the questions, he would be disciplined.¹⁰ As the National Labor Relations Board has held:

Weingarten does not require that after having made his request, an employee must remain adamant in the face of predictions of dire ultimate consequences. The Employer's threat that the exercise of the right to representation would lead to more severe discipline or that the employees' fate would be in more capricious and hostile hands is no less interference and restraint than an outright denial of his right.¹¹

The record demonstrates that Mr. Lach complied with the PCIR's requests to go forward with the interview and have his picture taken. He also answered the questionnaire. Thus, the fourth element was met as to Mr. Lach.

By refusing to grant an employee's request for union representation under circumstances in which he was entitled to union representation, and by then forcing that employee to continue with the investigatory interview without union representation under threat of discipline for insubordination, the City violated O.R.C. § 4117.11(A)(1) by denying a public employee the union representation that the individual was entitled to under O.R.C. § 4117.03(A)(3).

2. *The Role Of The Union Representative*

¹⁰Tr. 336.

¹¹*Southwestern Bell I, supra* at 1223, 94 L.R.R.M. at 1305.

In *Weingarten*, the U.S. Supreme Court intended to strike a balance between an employer's legitimate prerogative to investigate employee conduct through personal interviews and the statutory representative's role during such interviews. "The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested * * * in hearing the employee's own account[.]"¹²

The role of the statutory representative is to provide "assistance" and "counsel" to the employee.¹³ The union representative is a witness to the proceedings, thereby ensuring that prior procedures are followed by the employer. The union representative may assist the employee in providing information. The union representative can bring out extenuating factors that the employee may be unaware of by helping the fearful or inarticulate employee respond to requests for information. The employee has the right to confer with the union representative before the actual encounter.¹⁴ The employee does not have a right to have a union representative question the employee directly in an investigatory interview conducted by the employer; however, when the union representative is permitted to elicit facts in a private conversation with the employee and then present those favorable facts to the employer, the union representative is not silenced.¹⁵

¹² *Id.* at 260, 88 L.R.R.M. at 2692.

¹³ *Southwestern Bell Telephone Co. v. Communications Workers of America, Local 12222*, 251 N.L.R.B. 612, 105 L.R.R.M. 1246 (1980), *enforcement denied*, 667 F.2d 470, 109 L.R.R.M. 2602 (5th Cir. 1982) ("*Southwestern Bell II*").

¹⁴ *See, e.g., City of Fort Lauderdale*, 12 FPER ¶ 17167 at p. 375 (FL PERC 1986).

¹⁵ *Mass. Correction Officers Federated Union v. Labor Relations Commission*, 675 N.E.2d 379 (Sup. Jud. Ct. 1997).

The union representative's role does not include telling an employee not to answer questions. Although the union representative should be afforded some opportunity to participate, the employer also has a right to receive answers to its questions without interruption. After all, an investigatory interview should not be an "adversarial confrontation" between the employer and the union.¹⁶ Where a union has a policy or practice of routinely telling employees to refuse to cooperate with an investigation, an employer may be privileged to forbid the prior consultation with a union representative otherwise permitted by *Weingarten*.¹⁷

3. *The City Did Not Violate O.R.C. § 4117.11(A)(3)*

In *State Emp. Relations Bd. v. Adena Local School Dist. Bd. of Edn.*, 66 Ohio St.3d 485, Syllabus 2, 1993 SERB 4-43 (1993), the Ohio Supreme Court articulated the test to be applied by SERB in determining whether an employer has discriminated against a public employee on the basis of protected activity under O.R.C. § 4117.11(A)(3):

Under the "in part" test to determine the actual motivation of an employer charged with an unfair labor practice, the proponent of the charge has the initial burden of showing that the action by the employer was taken to discriminate against the employee for the exercise of rights protected by R.C. Chapter 4117. Where the proponent meets this burden, a prima facie case is created which raises a presumption of antiunion animus. The employer is then given an opportunity to present evidence that its actions were the result of other conduct by the employee not related to protected activity, to rebut the presumption. The State Employment Relations Board then determines, by a preponderance of the evidence, whether an unfair labor practice has occurred.

Acknowledging that the new standard mandates that SERB focus on the public employer's motive, SERB applied the *Adena* standard in *In re Ft. Frye Local School Dist Bd of Ed*, SERB 94-016 (10-14-94), and held that a prima facie case of discrimination under O.R.C. § 4117.11(A)(3) requires that the Complainant establish the following elements: (1) that the employee at issue is a public employee and was employed at relevant times by the employer; (2) that he or she engaged in concerted, protected activity under O.R.C. Chapter 4117, which fact was either known to the employer or suspected by the employer; and (3) that the employer took adverse action against the employee under circumstances that, if left unrebutted by other evidence, could lead to a reasonable inference that the employer's actions were related to the employee's exercise of concerted, protected activity under O.R.C. Chapter 4117.

¹⁶ See, e.g., *City of Oak Park*, 9 MPER ¶ 27006 (MI 1995) citing with approval *Southwestern Bell II*.

¹⁷ *U.S. Postal Service v. American Postal Workers Union East Bay Area Local*, 303 N.L.R.B. 463, 138 L.R.R.M. 1339 (1991).

The first two elements were proven. At all relevant times, Wayne Lach was a public employee who was engaged in a protected activity under O.R.C. Chapter 4117, *i.e.*, requesting union representation. But the third element was not proven because the City took no adverse action against Mr. Lach related to his exercise of O.R.C. Chapter 4117 rights. There were threats of discipline for insubordination to the employee. This conduct may violate O.R.C. § 4117.11(A)(1), but threats alone cannot constitute an O.R.C. § 4117.11(A)(3) violation where no adverse action is taken.¹⁸ Therefore, a prima facie case was not proven, and O.R.C. § 4117.11(A)(3) was not violated.

B. The City Did Not Violate O.R.C. §§ 4117.11(A)(1) and (A)(8) When Investigators Threatened Union Representatives With Arrest If They Attempted To Represent Employees Who The Union Representatives Knew Were Not Entitled To Representation

The complaint also alleges that the City violated O.R.C. §§ 4117.11(A)(1) and (A)(8), which state in pertinent part:

(A) It is an unfair labor practice for a public employer, its agents, or representatives to:

(1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117 of the Revised Code[.]

(8) Cause or attempt to cause an employee organization, its agents, or representatives to violate division (B) of this section [*i.e.*, commit an unfair labor practice].

¹⁸ *In re SERB v. Springfield Local School Dist. Bd. of Ed.*, SERB 97-007 (5-1-97).

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Where an employee is entitled to union representation, the employer may not silence the representative or relegate the representative to the role of a passive observer. Representation is not limited to mere presence, but includes some degree of participation.¹⁹ Moreover, an employer that threatens to discipline or discharge a union representative for attempting to represent employees under *Weingarten* violates the law.²⁰

It is contended that CARE had a duty during the course of these investigatory interviews, under O.R.C. § 4117.11(B)(6), to represent any bargaining-unit member who requested union representation and who may have reasonably feared discipline and that CARE abandoned any efforts to represent its members during this investigation because of the City's threats to Messrs. Reilly and Kempe. This argument ignores the facts in evidence. On the night of April 17, 1996, after Commissioner Shade ordered 18 EMS units to PCIR's office to fill out questionnaires and have their pictures taken, he told CARE's President, Mark Kempe, that the investigation centered on Officer Simmons and the gaps in her story. Commissioner Shade also told Mr. Kempe that this was neither a criminal nor a disciplinary investigation of any EMS employee and no EMS employees were the focus of the investigation. Later the same evening, Mr. Kempe was told by a representative of the Safety Director that no EMS employees were under suspicion and that this was not an investigation that triggered union representation.²¹

¹⁹ *NLRB v. Texaco Inc.*, 659 F.2d 124, 108 L.R.R.M. 2850 (9th Cir. 1981); *New Jersey Bell Telephone Co. v. Local 827, IBEW*, 308 N.L.R.B. 277, 141 L.R.R.M. 1017 (1992); *Greyhound Lines Inc. v. Lehman*, 273 N.L.R.B. 1443, 118 L.R.R.M. 1199 (1985).

²⁰ *Quality Mfg. Co. v. Upper South Dept., ILGWU*, 195 N.L.R.B. 197, 79 L.R.R.M. 1269 (1972); *Good Hope Refineries Inc. v. Oil, Chemical and Atomic Workers International Union, Local 4-447*, 245 N.L.R.B. 380, 102 L.R.R.M. 1302 (1979), enforced 620 F.2d 57, 104 L.R.R.M. 2883 (5th Cir. 1980) (*Good Hope Refineries*).

²¹ F.F. No. 9.

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When conducting an investigation, a public employer is faced with two separate and distinct concerns: addressing the collective rights of the employees through their exclusive representative and the individual right of representation. In the present case, the City fulfilled its obligations to the employees collectively through the exclusive representative when it gave the union representatives the necessary information for CARE to carry out its duty of fair representation. The City communicated to the union representatives that these employees were not the focus of the investigation. In fact, they communicated this information twice, once by Commissioner Shade and once by Executive Assistant Eckart. Based upon these statements, the union representatives knew that the EMS employees being interviewed were not being investigated and, therefore, would not have a reasonable fear of discipline. Thus, the union representatives knew the employees were not entitled to union representation at these interviews.²² At this point, CARE had fulfilled its duty under O.R.C. § 4117.11(B)(6). Accordingly, the City could not — and did not — violate O.R.C. § 4117.11(A)(B) by causing or attempting to cause CARE to fail to represent bargaining-unit members.

III. CONCLUSION

For the reasons above, we find that the City violated O.R.C. §§ 4117.11(A)(1), but not (A)(3), by refusing to grant Wayne Lach's request for union representation in an interview conducted under circumstances in which he was entitled to union representation and by then forcing him to continue with the interview without union representation under threat of discipline for insubordination. We also find that the City did not violate O.R.C. §§ 4117.11(A)(1) and (A)(B) when investigators threatened union representatives with arrest if they attempted to represent employees who the union representatives knew were not entitled to representation during an investigation.

McGee, Vice Chairman, concurs; Mason, Board Member, concurs in part and dissents in part in a separate opinion.

²²But the statements to the union representatives did not meet the City's responsibility to Mr. Lach. Because the City did not communicate this necessary information (*i.e.*, that *he* was not being investigated) to him, it interfered with, restrained, or coerced him in the exercise of his right of representation — a right that only Mr. Lach could exercise.