

97-017

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-09-0522

OPINION

POHLER, Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complainant") on exceptions and responses to exceptions to the Hearing Officer's Proposed Order issued June 11, 1997. For the reasons below, we find that the City of Cleveland ("City") violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(8), but not (A)(3), by limiting the participation by representatives of Cleveland Association of Rescue Employees, Communications Workers of America, Local 4550 ("CARE") during an investigatory meeting.

I. BACKGROUND<sup>1</sup>

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.

Margaret Shaffalo, Christine Panzero, and Denise McNamara are EMS employees and bargaining-unit members represented by CARE. Ms. McNamara is a Crew Chief at the Radio Emergency Dispatch Center, which receives 911 calls. Although still in the

---

<sup>1</sup>Finding of Fact ("F.F.") Nos. 2-8, 10-16, 18, and 20-22.

OPINION

Case No. 96-ULP-09-0522

Page 2 of 10

bargaining unit, she serves in a quasi-supervisory role over approximately nine dispatchers per shift. Ms. McNamara is responsible for the acts and conduct of her subordinates, including Ms. Shaffalo, when they work the same shift. Ms. McNamara's responsibilities include assuring that the 911 lines are open and calls are promptly answered.

A City police officer, Nick Vukmire, was criminally charged with domestic abuse against Ms. Shaffalo after she contacted the City's Internal Affairs division and reported his alleged threats on her life. He was tried and acquitted of the criminal charges. Despite his acquittal, the City conducted an administrative investigation into whether Officer Vukmire violated the Rules of the Department of Public Service, Division of Police, thereby warranting discipline.

On or around July 9, 1996, William Denihan, the City's Director of Public Safety, issued subpoenas to Ms. Shaffalo, Ms. Panzero, and Ms. McNamara to appear at a pre-disciplinary hearing for Officer Vukmire to be held on July 10, 1996. The hearing, originally scheduled for July 10, 1996, was continued and went forward on September 6, 1996, and October 18, 1996. All witnesses appeared at the hearing after receiving subpoenas.

On September 6, 1996, Ms. Shaffalo, Ms. Panzero, and Ms. McNamara requested CARE representation. During the September 6, 1996 hearing, when asked if she wished to make a statement, Ms. McNamara said, "Yes, I want my union representative with me." The City's policy was to insist that CARE reduce to writing and justify its request to represent employees called as witnesses in disciplinary hearings. Neither CARE, Ms. Panzero, Ms. Shaffalo, nor Ms. McNamara submitted such a written statement.

Karen GleskeBell, at all times the First Vice-President of CARE, and a CARE official who acted as a union representative, also requested to represent the three CARE members at the hearing. Ms. GleskeBell spoke with Thomas Corrigan, a City assistant law director, for the first time on September 6, 1996. Mr. Corrigan initially informed Ms. GleskeBell that she could not be present during the questioning of Ms. Panzero or Ms. McNamara and that she could be present for Ms. Shaffalo's interview, but Ms. GleskeBell could not ask any questions. Later on that same day, Mr. Corrigan reversed his position as to Ms. Panzero and allowed Ms. GleskeBell to be present during her questioning due to his belief that she may be subject to discipline. Mr. Corrigan further informed Ms. GleskeBell that "it wasn't their [CARE's] hearing," that "they [CARE] weren't participants in the hearing," and that "the union was not a participant." While Mr. Corrigan allowed Ms. GleskeBell to "attend" the hearing, she was not allowed to speak during the questioning of Ms. Panzero and Ms. Shaffalo. Ms. Shaffalo was stopped by the City's representatives when she attempted to consult Ms. GleskeBell during her questioning.

While Ms. Shaffalo's direct examination was completed on September 6, 1996, the hearing and her cross-examination were continued to October 18, 1996. Both Ms. GleskeBell and Susannah Muskovitz, an attorney representing CARE, attended the October 18 hearing to represent Ms. Shaffalo. Before the hearing, Mr. Corrigan told Ms. Muskovitz that she could be present for the hearing, but she would not participate in the hearing. During the hearing, there was an exchange between Director Denihan, Mr. Corrigan, and Ms. Muskovitz concerning a line of questioning. After the discussion, it was agreed that Ms. Muskovitz could participate in those areas where Ms. Shaffalo might implicate herself or where the questions might implicate her either administratively or criminally. Ms. Muskovitz was provided with copies of all exhibits introduced during the October 18, 1996 hearing. At the end of the hearing, Mr. Denihan told Ms. Muskovitz and Ms. Shaffalo that he believed Ms. Shaffalo may have violated certain rules and regulations with respect to certain telephone conversations. He referred the matter to the EMS Commissioner for investigation. On November 12, 1996, Ms. Shaffalo was provided a pre-disciplinary hearing regarding the telephone calls and was represented by CARE; she was later suspended for one day.

## II. DISCUSSION

The Complaint in this case alleges that when the City limited the CARE representatives' participation during the investigatory hearings and when the City denied a CARE member's request for union representation during the investigatory hearing, it violated O.R.C. §§ 4117.11(A)(1), (A)(3), and (A)(8), which provide 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 [O.R.C.] Chapter 4117[;]
  - \*\*\*
  - (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[;]
  - \*\*\*
  - (8) Cause or attempt to cause an employee organization, its agents, or representatives to violate division (B) of this section.

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) ("*Davenport*"), 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.

A. *The City Violated O.R.C. §§ 4117.11(A)(1) and (A)(8), But Not O.R.C. § 4117.11(A)(3), When It Limited Union Representation for Employees Who Were Entitled to Representation*

The Board first applied its *Davenport* decision in *In re City of Cleveland*, SERB 97-011 (6-30-97) ("*Cleveland*"). In *Cleveland*, the Board held that an O.R.C. § 4117.11(A)(1) violation for the denial of the right to representation is established when four elements are proven: (1) that the interview was investigatory; (2) that the employee requested the presence of a union representative and the request was denied; (3) that the employee reasonably believed that the interview might result in discipline; and (4) that after the employer's denial of representation, the employer compelled the employee to continue with the interview.

Under *Cleveland*, a meeting is investigatory if its purpose is to elicit information pertaining to the conduct of the employee being interviewed. In the present case, like in *Cleveland*, although Ms. Shaffalo, Ms. Panzero, and Ms. McNamara were not the subject of the investigation, the questioning focused specifically on their conduct and their acts while on the job. Consequently, the interviews of these employees were investigatory for purposes of their *Weingarten* rights. Thus, the first element, the investigatory interview, is present.

The employees requested union representation; this fact has never been in dispute. The parties stipulated that on September 6, 1996, all three above-mentioned employees requested a union representative and that Ms. GleskeBell requested to represent them at the hearing. Consequently, the second element, the request for representation by the employees involved, is present.

As we stated in *Cleveland*, an employee's reasonable belief that discipline may be imposed as a result of the interview will be measured by an objective standard: whether a reasonable person would believe that discipline may be imposed on the employee involved as a result of the interview. The record in this case reveals a City rule that in order to obtain union representation the involved employees were required to explain to the City why they believe that discipline may result from the meeting. Ms. Shaffalo and Ms. Panzero complied and made verbal statements to the Assistant Law Director explaining their reasons for believing that discipline may result from their testimony. The record shows that, after discussing with the two employees their reasons for union representation, Mr. Corrigan believed

OPINION

Case No. 96-ULP-09-0522

Page 5 of 10

that both employees may be disciplined as a result of the investigation; as a result, he agreed to allow Ms. Shaffalo and Ms. Panzero union representation in the investigatory interviews.<sup>2</sup> This clearly satisfies the objective standard required. If the Assistant Law Director — who is familiar with the City's laws and work rules, who is aware of what the investigation is about, and who is an adversary party representing the City's interests — indicated that Ms. Shaffalo and Ms. Panzero may be investigated and disciplined as a result of their testimony in the hearing, then clearly an objective basis existed for these employees' reasonable belief that discipline may result from their testimony. Hence, as far as Ms. Shaffalo and Ms. Panzero are concerned, the third element is present.

The situation regarding Ms. McNamara is different. Ms. McNamara did not explain to Mr. Corrigan why she believed she might be disciplined as a result of her testimony. But such disclosure is not a precondition for union representation rights. The right of representation becomes meaningless if employees are required to disclose to their employer any possible wrongdoings they might have committed as a condition to receiving union representation in the event that those wrongdoings are disclosed. The logic behind this rule is circular. The employee's right to request representation as a condition for participating in an investigatory interview is limited to situations where the employee reasonably believes the investigation will result in discipline, but this right is not and cannot be conditioned on the employee's disclosure to the employer of any possible wrongdoing the employee reasonably believes might be revealed in the interview.

---

<sup>2</sup> See CARE Exhibit 4, ¶¶ 5 and 6, which is an affidavit of Thomas Corrigan, Assistant Law Director in the City of Cleveland's Law Department. *See also* Transcript ("T."), pages 217, 218, and 222.

OPINION

Case No. 96-ULP-09-0522

Page 6 of 10

Although Ms. McNamara did not have to disclose to the City any infractions she was afraid might come to light in the investigation in order to secure union representation, the Complainant had the burden to show that Ms. McNamara met the objective standard. The record in this case does not reflect that Ms. McNamara experienced anything more than some general apprehension, unspecified anxiety, and a feeling of insecurity because the employees she had been supervising were being questioned, and that she lacked confidence as to whether she did the right thing in her supervisory capacity. Such general and unspecified concerns cannot substantiate reasonable belief by objective standards that discipline might result from the investigatory interview. If that was the case, then any investigatory interview would automatically satisfy the "reasonable belief" element in the *Weingarten* rights and the standard would be subjective. An employee could always argue that any time the employer questions an employee about work performance there is a "threat" of discipline. A "latent threat, without more, does not invoke the right to the assistance of a union representative."<sup>3</sup> Consequently, we find that while Ms. Shaffalo and Ms. Panzero had a reasonable belief that discipline could be imposed, Ms. McNamara did not have a reasonable belief.

The parties do not dispute that the City permitted Ms. GleskeBell, a CARE representative, to be present during the questioning of Ms. Panzero and Ms. Shaffalo. The issue is the level of participation that should have been afforded to Ms. GleskeBell in this particular instance. The record shows that at the September 6, 1996 hearing, Ms. GleskeBell was told that she might be present in the interview with the two employees but that she could not ask any questions, make any comments, or interject at all. She was told that the extent of her participation at the hearing was limited to being an observer.<sup>4</sup> Indeed, Ms. Shaffalo was stopped by the City's representatives when she attempted to consult with Ms. GleskeBell during the course of her questioning. Ms. GleskeBell was advised by Mr. Corrigan that during the questioning of Ms. Panzero and Ms. Shaffalo she could "whisper" any concerns she had into the Police Chief's counsel's ear. Ms. GleskeBell disagreed with this arrangement, but the hearing went forward.

---

<sup>3</sup>*Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 410, 99 L.R.R.M. 2841, 2845 (9th Cir. 1978).

<sup>4</sup>T. 122-125.

OPINION

Case No. 96-ULP-09-0522

Page 7 of 10

In *Cleveland*, we said that the statutory representative's role is to provide "assistance" and "counsel" to the employee, but the representative may not transform the interview into an adversary contest or a collective bargaining confrontation. We also said that while the employer has a right to receive answers to its questions, the union representative should be afforded some opportunity to participate.

Where an employee is entitled to union representation, the employer may not silence the representative or relegate the representative to being a passive observer. Representation is not limited to mere presence; it includes some degree of participation.<sup>5</sup> At a minimum, the representative should be permitted to ask questions at some point to clarify the employee's answers and to register objections to questions; but, as we said in *Cleveland*, the representative cannot tell the employee to refuse to answer questions during an investigation. Thus, while participation might assume various forms and various degrees, ordering the union representative to keep silent during the interview is not evidence of any degree of participation and, as such, cannot constitute meaningful representation. Consequently, we find that the City violated O.R.C. § 4117.11(A)(1) when it did not allow Ms. Shaffalo and Ms. Panzero meaningful representation and when the City denied them their *Weingarten* rights. Since we found that Ms. McNamara did not have a reasonable belief that discipline could occur, we find that the City did not violate O.R.C. § 4117.11(A)(1) as to her.

We further find that the City violated O.R.C. § 4117.11(A)(B) by ordering the union representative to keep silent during the investigatory interview. When the City unlawfully limited the union representative's participation, it caused or attempted to cause CARE to violate its duty of fair representation under O.R.C. § 4117.11(B)(6).<sup>6</sup> The limits placed upon the CARE representative could expose CARE to allegations that it violated O.R.C. § 4117.11(B)(6).

The City did not violate O.R.C. 4117.11(A)(8) with respect to the questioning of Ms. Shaffalo on October 18, 1996. CARE's legal counsel was present, was provided with copies of exhibits during the hearing, and, after a brief exchange in which the procedural "ground rules" were established, was permitted to register objections if she thought Ms. Shaffalo's administrative rights might be jeopardized.

---

<sup>5</sup> *NLRB v. Texaco Inc.*, 659 F.2d 124, 108 L.R.R.M. 2850 (9th Cir. 1981); *Greyhound Lines, Inc. v. Lehman*, 273 N.L.R.B. 1443, 118 L.R.R.M. 1199 (1985); *New Jersey Bell Telephone Co. v. Local 827, IBEW*, 308 N.L.R.B. 277, 141 L.R.R.M. 1017 (1992); *Redwood Community College District*, 8 PERC ¶ 15170 (CA Ct. App. 1984); *Hillsborough Community College*, 15 FPER ¶ 20062 (FL PERC 1989); *City of Detroit (Recreation Dept.)*, 3 MPER ¶ 21077 (MI ERC 1990).

<sup>6</sup> O.R.C. § 4117.11(B)(6) states that it is an unfair labor practice for an employee organization, its agents, or representatives to fail to fairly represent all public employees in a bargaining unit.

In summary, Ms. Shaffalo and Ms. Panzero were entitled to union representation during their interviews. When the City substantially restricted their representative's participation on September 6, 1996, the City denied the employees meaningful representation.

As a result, the City violated O.R.C. §§ 4117.11(A)(1) and (A)(8). Ms. McNamara did not meet all of the criteria under *Cleveland*; thus, the City did not violate O.R.C. §§ 4117.11(A)(1) or (A)(8) when it denied her union representation at the hearing.

**B. 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, 498, 1993 SERB 4-43, 4-50 (1993) ("*Adena*"), the Ohio Supreme Court articulated the test for determining whether O.R.C. § 4117.11(A)(3) was violated. The test involves a three-step process. Under the first step, the Complainant has the initial burden of showing that the employer's acts were taken to discriminate against the employee for the exercise of rights protected by O.R.C. Chapter 4117. Where the Complainant meets this burden, it establishes a prima facie case, which raises a "presumption" of anti-union animus.

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 acts were related to the employee's exercise of concerted, protected activity under O.R.C. Chapter 4117.

The first two elements were proven in this case. At all relevant times, Ms. Panzero, Ms. Shaffalo, and Ms. McNamara were public employees who were engaged individually 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 any of these individuals related to their exercise of O.R.C. Chapter 4117 rights. Although Ms. Shaffalo later was suspended for one day due to her acts arising out of the facts being investigated, the record does not establish that the discipline was a result of her attempt to exercise rights guaranteed in O.R.C. Chapter 4117.

OPINION

Case No. 96-ULP-09-0522

Page 9 of 10

and not otherwise without a legitimate basis.<sup>7</sup> There is insufficient evidence to support the claim that the City was motivated to deny or limit the employees' representation due to anti-union animus. The evidence supports the conclusion that the City was simply mistaken as to what rights the employees had under *Weingarten*. Therefore, a prima facie case was not proven, and O.R.C. § 4117.11(A)(3) was not violated.

III. CONCLUSION

For the reasons above, we find that the City of Cleveland violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(8), but not (A)(3), by limiting the participation by representatives of Cleveland Association of Rescue Employees, Communications Workers of America, Local 4550 appearing on behalf of Ms. Panzero and Ms. Shaffalo during an investigatory meeting. The City of Cleveland did not violate Ohio Revised Code §§ 4117.11(A)(1), (A)(3), or (A)(8) when it did not allow Ms. McNamara union representation at her interview.

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

---

<sup>7</sup> See, e.g., *Taracorp Industries*, 273 N.L.R.B. No. 54, 117 L.R.R.M. 1497 (1984); *NLRB v. Southwestern Bell Telephone Co.*, 730 F.2d 166, 116 L.R.R.M. 2211 (5th Cir. 1984); *Greyhound Lines, Inc. v. Lehman*, *supra*.