date that the Respondents unilaterally increased prescription drug co-payments. The Union asserts that filing a charge prior to this date would have been premature. The Union argues that because it filed its charges within six months of the date of the unilateral change, the charges are timely filed.

A respondent may raise timeliness as a defense to a charge of prohibited practice by way of a motion to dismiss filed prior to a hearing on the Commission's complaint. *See*, *e.g.*, *Town of Middleboro*, 19 MLC 1200 (1992). As the Union correctly notes, the Commission will not deem an employer to have waived a timeliness defense by failing to raise it during the Commission's investigation of the charge. Therefore, we do not agree with the Union that a pre-hearing motion to dismiss is an inappropriate vehicle through which the Commission may consider a timeliness defense.

Further, we are unpersuaded by the Union's argument that the period of limitations began to run on July 1, 2001, the date the Respondents increased prescription drug co-payments. It is well-established that the six-month limitations period begins to run when the party adversely affected receives actual or constructive notice of the conduct alleged to be an unfair labor practice. *Wakefield School Committee*, 27 MLC 9 (2000); *City of Boston*, 10 MLC 1120 (1983). Here, the Town sent a notice and newsletter to all insurance participants on May 8, 2001 that announced and clearly outlined the change in prescription drug co-payments. We conclude that on this date the Union knew or should have known of the alleged violation, and thus it was on May 8, 2001 that the Commission's six-month statute of limitations began to run.

## Conclusion

For the reasons set forth above, the Employer's motion to dismiss is allowed, and the complaint of prohibited practice dated June 6, 2002 is hereby dismissed on the ground that the conduct on which the Commission based that complaint occurred more than six months before the Union filed its prohibited practice charge with the Commission.

SO ORDERED.

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In the Matter of TOWN OF HUDSON

and

INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 363

Case No. MUP-2425

***65.91 request for representation at disciplinary interview***

*September 19, 2002*
*Helen A. Moreschi, Chairwoman*
*Mark A. Preble, Commissioner*
*Peter G. Torkildsen, Commissioner*

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|---|---|
| *Michael Halpin, Esq.* | *Representing the IBPO* |
| *Kimberly Rozak, Esq.* | *Representing the Town of Hudson* |
| *Robert Hennigan, Esq.* | *Special Counsel representing the Town of Hudson* |

**DECISION**[1]

## Statement of the Case

The International Brotherhood of Police Officers, Local 363 (the Union) filed a charge of prohibited practice with the Labor Relations Commission (the Commission) on July 1, 1999, alleging that the Town of Hudson (the Town) had engaged in a prohibited practice within the meaning of Sections 10(a)(1) and 10(a)(3) of M.G.L. c. 150E (the Law). Following an investigation, the Commission dismissed the Union's charge on May 23, 2000. On June 6, 2000, the Union sought reconsideration of the Commission's dismissal pursuant to Section 15.03 of the Commission's Rules. Upon reconsideration, the Commission issued a complaint of prohibited practice on November 28, 2000. The complaint alleged that the Town had violated Section 10(a)(1) of the Law by preventing Jose Chaves, (Chaves) a patrol officer employed by the Town, from having a Union representative present at an investigation that Chaves could have reasonably believed would lead to discipline.[2] The Town filed an answer on December 8, 2000.

On March 7, 2001, Hearing Officer Betty Eng conducted a hearing at which both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. Prior to the hearing, the parties agreed that the stenographic transcript would be designated as the official record pursuant to Section 13.11 of the Commission's Rules. The Union and the Town filed post-hearing briefs on May 11, 2001, and May 8, 2001, respectively. The Union and the Town challenged portions of the Hearing Officer's Recommended Findings of Fact. The Town additionally challenged several of the Union's challenges to the Recommended Findings of Fact. After re-

1. Pursuant to 456 CMR 13.02(1), the Commission has designated this case as one in which the Commission shall issue a decision in the first instance.

2. The Commission dismissed the allegation that the Town had violated Section 10(a)(3) of the Law by suspending Chaves for testifying at an arbitration hearing.

viewing those challenges and the record, we adopt the Hearing Officer's Recommended Findings of Fact, as modified where noted, and summarize the relevant portions below.

FACTS[3]

*Stipulations*

1. On or about January 12, 1999, the Town and Chaves met for a meeting that was investigatory in nature.

*Findings of Fact*

The Union is the exclusive collective bargaining representative for a bargaining unit of police sergeants and patrol officers employed by the Town in its police department (Police Department). Chaves is a bargaining unit member employed by the Town as a patrol officer in its Police Department. Sergeant Michael Burks (Burks) is Chaves' supervisor and was assigned to conduct an internal departmental investigation concerning Chaves. In a letter from Burks dated January 4, 1999, Chaves was notified of the following:

> You are the subject of an internal investigation where you allegedly made disparaging remarks toward certain supervisory personnel on the 3-11 shift on November 20, 1998. I would like to interview you regarding this matter on January 12 or 13, 1999 at 4:30 p.m. at the Hudson Police station in the Sergeants office. Please advise me which date you would like to meet with me.

After receiving notice of the investigatory interview, Chaves contacted the Union's Worcester office and spoke to Bernard Loughane (Loughane), the Union's national representative for the Worcester area.[4] Chaves requested that a Union representative from the Worcester office accompany him to the January 12, 1999 investigatory interview. Chaves did not specifically request that a Union attorney represent him at the upcoming investigatory interview and believed that Loughane would be handling the matter himself. Because Loughane had a scheduling conflict, he asked Marc Terry (Terry), then legal counsel for the Union, to accompany Chaves to the investigatory interview in his place.

Because Chaves and Burks worked the same shift, they discussed Chaves' upcoming January 12, 1999 investigatory interview on several occasions at the police station. Chaves and Burks disagreed over who would be an appropriate union representative at the January investigatory interview. Chaves contended that he could have a union representative who was an attorney. Burks' position was that Chaves could have a union representative of his choosing at the January investigatory interview as long as the union representative was not an attorney.[5]

On January 12, 1999, at approximately 4:30p.m., Chaves and Terry arrived at the Town police station for Chaves' investigatory interview. Burks and Lieutenant David French (French) were already in the squad room when Terry and Chaves arrived.[6] Burks did not allow Terry to accompany Chaves into the investigatory interview room or to represent Chaves at the investigatory interview because Terry was an attorney. Burks refused to address Terry directly and spoke through Chaves when communicating with Terry. Terry asked Burks what would happen if Chaves refused to participate in the investigatory interview. Burks told Terry that if Chaves did not agree to voluntarily attend the investigatory interview, he would have to order Chaves into the investigatory interview.[7]

Terry advised Chaves to enter the room, to participate in the investigatory interview with Burks, and to answer truthfully. Terry also advised Chaves not to worry too much about what he (Chaves) said because the information that would be gathered at that investigatory interview could not be used as a basis of discipline against him because Burks had denied Chaves his *Weingarten*[8] rights.[9] Terry advised Chaves to participate in the investigatory interview because Terry believed that Chaves had no choice but to participate in the interview, and because Terry was aware of the fact that a police officer could be disciplined for refusing an order of a supe-

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3. The Commission's jurisdiction is uncontested.

4. Loughane was specifically assigned to represent the bargaining unit of patrol officers and sergeants in the Hudson Police Department.

5. Burks believed that Chaves could have union representation at the internal investigation, but could not have an attorney represent him because the January 12, 1999 interview did not involve criminal matters.

The Union challenged the Hearing Officer's characterization of Burks' testimony, arguing that Burks never testified that Chaves could not be represented by an attorney because the January 12, 1999 interview did not concern criminal matters. Instead, the Union asserted that Burks testified that he believed that an attorney could not act as a union representative under any circumstances. However, we find that this finding is not supported by the record and decline to modify the Hearing Officer's findings on this point.

The Union also requested a finding that Burks interfered with Chaves' right to Union representation; however because this finding is a legal conclusion, we decline to amend the facts as requested by the Union.

6. French was in the squad room for unrelated reasons involving scheduling overtime and did not participate in the January 12, 1999 investigatory interview.

7. The Hearing Officer credited the testimony of Terry and Burks in finding that Burks did not order Chaves into the interview room, and in finding that Burks would have ordered Chaves into the interview room if he had not voluntarily entered the interview room. The Union argues that the Hearing Officer improperly credited the testimony of Terry and Burks. However, the Commission will not disturb a hearing officer's credibility determinations absent a clear preponderance of all relevant evidence that the resolutions are incorrect. *New England Water Resource Professionals*, 25 MLC 135, 136 n. 6 (1999) citing *City of Somerville*, 23 MLC 11, 12 n.8 (1996); See generally, *Vinal* v. *Contributory Retirement Appeal Board*, 13 Mass. App. Ct. 85 (1982) citing *Selectmen of Dartmouth* v. *Third District Court of Bristol*, 359 Mass. 400, 403 (1971). Here, the record supports the Hearing Officer's findings and we decline to modify the facts as requested by the Union.

8. A Weingarten interview is an investigatory meeting between an employer and an employee where the employee has a reasonable belief that discipline may result from the meeting. See *Commonwealth of Massachusetts*, 26 MLC 139 (2000) citing *NLRB* v. *Weingarten*, 420 U.S. 251 (1975).

9. The Hearing Officer also found that the record did not support a finding that Burks threatened to discipline Chaves if he refused to participate in the investigatory interview, and found that Terry and Chaves both believed that Chaves could be subject to discipline if he refused to go into the interview room.

The Union challenged these findings on the basis that the Hearing Officer made this determination without finding that Burks interfered with Chaves' right to union representation. However, as discussed above in footnote 5, this request is founded in legal argument and we decline to modify the facts as requested.

rior officer.[10] Chaves did not request an alternate Union representative because he believed that he should be able to be represented by Terry.[11] Chaves believed that if he did not enter the interview room, he would be disciplined.[12] Chaves entered the interview room and participated in the January 12, 1999 investigatory interview.[13]

As a full-time Hudson police officer since 1988, French has been principally responsible for approximately eight (8) internal affairs investigations. French allowed a union representative to be present during each of those eight investigatory interviews. Following Chaves' January 12, 1999 investigatory interview, French was the primary investigating officer for an internal affairs investigation involving Chaves.[14] French interviewed Chaves twice in the course of that internal affairs investigation.[15] French permitted a Union attorney to accompany Chaves into those two investigatory interviews because Chaves' post-January 1999 internal investigation involved criminal charges.[16] Town counsel also attended the investigatory interviews that French conducted with Chaves and Union counsel. French did not permit union attorneys to attend the other internal investigations that he conducted for the Police Department because those investigations did not involve criminal charges against the subject of the investigation.[17]

OPINION

In determining whether an employer has unlawfully denied union representation to an employee during an investigatory interview, the Commission has been guided by the general principles enunciated in *NLRB* v. *Weingarten*, 420 U.S. 251 (1975); *Commonwealth of Massachusetts*, 22 MLC 1741, 1747 (1996); *Commonwealth of Massachusetts*, 4 MLC 1415, 1418 (1977). The Commission has applied the *Weingarten* rule in cases involving G. L. c. 150E, Section 2. *See Commonwealth of Massachusetts*, 9 MLC 1567 (1983); *Commonwealth of Massachusetts,* 4 MLC 1415 (1977). General Laws c. 150E, Section 2, provides, "[e]mployees shall have the right of self-organization and the right . . . to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion."

A public employer that denies an employee the right to union representation at an investigatory interview the employee reasonably believes will result in discipline interferes with the employee's Section 2 rights in violation of Section 10(a)(1) of the Law. *Commonwealth of Massachusetts*, 26 MLC 139, 141 (2000) *citing Commonwealth of Massachusetts*, 9 MLC 1567, 1569 (1983). The right to union representation arises when the employee reasonably believes that the investigation will result in discipline and the em-

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10. Although neither party requested this finding, we have included these facts because they more accurately reflect the record and are material to the instant dispute.

11. The Union argued that the Hearing Officer failed to find that there were no other individuals available or whom Chaves requested to act as his union representative. However, while the record does not support a finding that there were no other individuals available to represent Chaves, the record does support a finding that Chaves did not seek alternate representation because he believed that Terry could represent him. Therefore, we have supplemented the facts accordingly.

12. The Union challenged the Hearing Officer's finding that Chaves participated in the interview without addressing any facts that led to his decision to participate in the interview. Because we find that this fact is supported by the record and is relevant to the instant dispute, we have supplemented the facts accordingly.

13. The record does not reflect what, if any, discipline Chaves received following the investigatory interview with Burks.

14. The record does not reference specific dates when French conducted the investigatory interviews involving Chaves.

15. The Town argued that the Hearing Officer erred in finding that there were two (2) internal affairs investigations involving Chaves after the January 12, 1999 investigation. The Town requested that the findings be amended to reflect that after January 12, 1999, French conducted one internal affairs investigation of Chaves with two interviews. We find that the record supports this finding and have modified the facts accordingly.

16. This investigation also involved non-criminal allegations against Chaves. The record indicates that in the first interview, French questioned Chaves on his alleged criminal conduct. At the second interview, French discussed the non-criminal allegations with Chaves. The record does not establish whether French also questioned Chaves concerning his alleged criminal conduct at the second interview.

The Town challenged the Hearing Officer's finding in footnote 10 of the Recommended Findings of Fact in which she found that French questioned Chaves on his alleged non-criminal conduct in the first interview. The Town asserts that the record establishes that French questioned Chaves on his alleged criminal conduct in the first interview. We agree with the Town's request and have amended this footnote accordingly. However, contrary to the Town's assertion, the record does not establish that the second interview encompassed both criminal and non-criminal allegations. Therefore, we have modified this footnote to more accurately reflect the record with regard to French's second interview of Chaves.

The Union requested a finding that the post-January 12, 1999 investigation involved non-criminal allegations as well as criminal allegations. However, the Hearing Officer did find that the post-January 1999 investigatory interviews involved non-criminal allegations, and our modification of this footnote does not change this finding.

17. French testified that to his knowledge, Chaves was the only employee to have requested, and to have been denied, union representation by an attorney in a non-criminal investigation. French was unaware of whether other officers had requested or had been represented by an attorney concerning non-criminal allegations. The record is otherwise silent as to whether other Town police officers had requested or been represented by a union attorney acting as his or her union representative at an internal investigation.

Both the Union and the Respondent challenged the Hearing Officer's finding in footnote 11 of the Recommended Findings of Fact, that "[t]he record is not clear if any other Town police officers had asked that a union attorney act as his or her representative at an internal investigatory interview." The Union asserted that Chaves was the only person who sought representation by a union attorney and was denied that right by the Town. The Town argued that based on the record, it was not possible to conclude that Chaves was the only officer to have made a request for a union attorney at an investigatory interview because neither party introduced evidence that any other police officer of the Town's police department asked to have a union attorney act as his or her union representative at an investigatory interview. After reviewing the record, we agree with the Town's request and have amended this footnote accordingly.

The Union also asserted that the Hearing Officer erroneously concluded that French did not permit attorneys to attend investigations because they did not involve criminal allegations, and that this conclusion inappropriately suggests the existence of a past practice, when French testified that he had no knowledge of any other person requesting union representation from an attorney. However, we find that the Hearing Officer's finding is supported by the record, and we decline to amend the facts as requested by the Union.

The Union additionally argued that the Hearing Officer failed to find that there was no evidence in the record that, prior to January 1999, the Town had ever established different standards regarding union representation for members facing criminal and non-criminal internal affairs investigations. However, we find that these facts are not material to this case.

ployee makes a valid request for union representation. *Commonwealth of Massachusetts*, 22 MLC at 1747, *citing Commonwealth of Massachusetts*, 4 MLC at 1417-1418. An interview is investigatory in nature if the employer's purpose is to investigate the conduct of an employee and the interview is convened to elicit information from the employee or to support a further decision to impose discipline. *Commonwealth of Massachusetts*, 26 MLC at 141, *citing Baton Rouge Water Works*, 103 LRRM 1056, 1058 (1979); *Commonwealth of Massachusetts*, 8 MLC 1287, 1289 (1981). An interview is investigatory if a reasonable person in the employee's situation would have believed that adverse action would follow. *Commonwealth of Massachusetts*, 8 MLC at 1289.

Here, the parties stipulated that the meeting involving Chaves on January 12, 1999 was investigatory in nature. Further, we find that the meeting was investigatory in nature because it was reasonable for Chaves to believe that discipline could result from an interview in which he was questioned about his alleged misconduct toward a supervisor. Thus, we find that Chaves had a right to union representation at the January 12, 1999 interview.

The issue before us is whether the Town violated Section 10(a)(1) of the Law by refusing to allow Chaves to be represented by a Union attorney at his investigatory interview. The Union argues that the Town unlawfully interfered with Chaves' right to have union representation when it prohibited Terry from representing Chaves at the January 12, 1999 interview. The Town, on the other hand, argues that an employee is not entitled to representation by legal counsel in an investigatory interview under *NLRB* v. *Weingarten*, 420 U.S. 251 (1975) and its progeny.

Although no Commission cases appear to discuss directly whether an employee's right to union representation necessarily extends to a union attorney under Chapter 150E, we consider several decisions of the National Labor Relations Board (NLRB or Board) as well as federal decisions to decide whether Chaves was entitled to be represented by Terry, a Union attorney, at the investigatory interview.

Generally, the right to union representation includes the right not only to have union agents, but also fellow employees or witnesses. *Illinois Bell Telephone Co*., 251 NLRB 932 (1980); *Anchortank, Inc*., 239 NLRB 430 (1978); *Glomac Plastics*, 234 NLRB 1309 (1978); *Ohio Masonic Home*, 251 NLRB 606 (1980). In two decisions, however, the Board has found that the right to union representation does not extend to outside counsel or to an employee's personal attorney. *See Montgomery Ward & Co. Inc.*, 269 NLRB 904 (1984); *Consolidated Casinos Corp*., 266 NLRB 988 (1983). In *Montgomery Ward & Co. Inc.*, the employer questioned an employee about her involvement in an alleged theft from one of the employer's stores. Toward the end of the interview, an interrogator from the interview picked up the telephone to make a call. At that point the employee asked, "Am I going to jail, do I need a lawyer?" One of the interrogators, having already obtained the employee's written statement admitting to the theft as well as a promissory note to reimburse the store, informed her that she was not going to jail and that she did not need a lawyer. A manager then entered the interview room and asked the clerk if her statement were true. When the employee answered affirmatively, the employer terminated her for theft.

In deciding that the request for outside counsel during the interview was not a valid request for union representation under *Weingarten*,[18] the ALJ reasoned that,

> [t]he basic difficulty with this contention is that, as pointed out by the Supreme Court in *Weingarten*, the right to union representation is based on the employee statutory right under Section 7 of the Act to engage in concerted activities with other employees. Exercise of such a right does not appear to extend to an outside professional such as a lawyer uninvolved in the employer-employee relationship.

*Id*. at 911.

In *Consolidated Casinos Corp*., 266 NLRB 988 (1983), the employer conducted pre-polygraph interviews and polygraph examinations with several employees concerning alleged theft from the employer's casino. Many of the employees requested the presence of a representative, an attorney, or both, at the interview and/or the polygraph examination. The employer denied all of the employees' requests for representation. In deciding that a request for an attorney did not constitute a valid request for representation under *Weingarten*, the Board affirmed the decision of the ALJ, rejecting the proposition that an employee may request the presence of any person, including his personal lawyer, and thus invoke *Weingarten* rights. *Id.* at 1008. The ALJ reasoned that,

> [t]he analytical concept of "mutual aid and assistance" has been held to apply to the situation where one individual helps another in order to increase the likelihood he will later obtain assistance when he is in need. Such mutual aid is useful and necessary in cases where employees act to achieve "solidarity" . . . . Similarly, an employee who requests the presence of a co-worker or a union representative at a disciplinary meeting is also clearly acting in this spirit of mutual aid and protection. All will stand together. An employee who requests the presence of his *personal lawyer*, however, is not invoking the support of the lawyer as part of a common cause with others. The lawyer is for his personal assistance. . . . The employee is therefore seeking personal assistance for his cause and no other. Such activity is not for mutual aid or protection . . . . Such a request is therefore not protected under the Act. Accordingly, I do not find a request for the presence of one's *personal lawyer* raises *Weingarten* rights.

*Id*. (Emphasis supplied).

Although raised by the General Counsel in *Consolidated Casinos*, the ALJ refrained from deciding the issue of whether an employee's request for a union attorney constituted a valid request for union representation.[19] *Id.* at 1011. Because the ALJ found that the employee had also made a valid request for a fellow employee to be present at the interview, the ALJ decided that it was unnecessary to reach the issue of the whether the employee's request for a

18. The Board overturned the ALJ's decision that the employer violated the employee's Weingarten rights because of the pressure applied by the employer in the interview and because the employee became confused.

19. In *Consolidated Casinos*, 266 NLRB at 1010-1011, the General Counsel argued that the union attorney was a one-man labor organization entitled to the same considerations as a representative of a traditional labor organization.

union attorney was a valid request for union assistance under *Weingarten*. *Id.*

In support of its argument that an employee's request for a Union attorney is a valid request for union representation in an investigatory interview, the Union cites *Federal Prison System, Federal Correction Institution*, 25 F.L.R.A. 210 (1987). In that case, the union hired outside counsel for the purpose of representing several of its members in an administrative investigation conducted by the employer. The union had decided to utilize outside counsel to represent the employees because several of its own union representatives were disqualified from acting as representatives as they were also being questioned as part of the investigation. Prior to the interviews, the employer informed the attorney hired by the union that it would not allow attorneys to represent the employees because the investigation concerned an administrative matter, and there was no foreseeable criminal prosecution of the employees. The employer did, however, allow the employees to be represented by other union representatives.

Nevertheless, the Federal Labor Relations Authority (Authority) affirmed the ALJ's finding that the employer had violated Section 7114(a)(2)(B)[20] of the Federal Service Labor-Management Relations Statute (FSLMRS)[21] by interfering with the right of the union to have an attorney as its representative at an investigatory interview. *Id.* at 212.

After carefully considering the cases cited by the parties in support of their arguments,[22] we conclude that Chaves was entitled to be represented by a Union attorney at the January 12, 1999 meeting. The Town admits that it denied Chaves representation at the interview because Terry was an attorney, relying on *Montgomery Ward*, *supra*. However, that case, as discussed more thoroughly above, involves an employee's request for representation in an investigatory interview by an outside attorney uninvolved in the employer-employee relationship. In the present case, however, Chaves did not request to be represented by his personal attorney or outside counsel uninvolved in the employer-employee relationship. Instead, Chaves requested to be represented in an investigatory interview by an attorney assigned from his own Union. Under these circumstances, therefore, Terry cannot reasonably be characterized as an outside professional "uninvolved in the employer-employee relationship." *Compare Montgomery Ward & Co. Inc.*, 269 NLRB at 911. Nor was Terry present at the investigatory interview solely to protect Chaves' "personal interests." *Compare Consolidated Casinos Corp*., 266 NLRB at 1008. Instead, Terry's role at the interview as a Union attorney was to safeguard the interests of Chaves, the Union, and its members. Therefore, for purposes of representation at a *Weingarten* interview, we see no distinction between representation by a union representative or business agent and representation by a union attorney.

Finally, it is necessary to point out that other than the Town's assertion, established through the testimony of Burks and French, that the Town did not allow a bargaining unit member to be represented by a Union attorney in an internal affairs interview if no criminal allegations were involved, the Town has failed to articulate any special circumstances to demonstrate why Terry's status as an attorney should bar him from acting as Chaves' Union representative at the January 12, 1999 interview. As the Board held in *Oates Bros., Inc.*, 135 NLRB 1295, 1297 (1962), "in the absence of special circumstances, an employer does not have a right of choice either affirmative or negative as to who is to represent employees for any of the purposes of collective bargaining," *citing NLRB* v. *Roscoe Skipper, Inc*., 213 F. 2d 793 (C.A. 5) (other citations omitted).

In *Oates Bros*., the Board held that the employer violated Section 8(a)(5) and (1) of the NLRA by failing to bargain collectively in good faith by insisting that the appointment of a shop steward be subject to its approval. *Id.* at 1297. In *New Jersey Bell Telephone Company*, 308 NLRB 277, 308 (1992), the ALJ extended the holding in *Oates Bros., Inc.*, to a *Weingarten* context. In *New Jersey Bell Telephone Company*, the employer had refused to allow a union steward to represent a bargaining unit member because of the steward's earlier disruptive behavior while representing another employee in a previous related investigatory interview. The ALJ found that the employer violated Section 8(a)(1) of the Act by interfering with the Union's right to designate its representatives. *Id.* at 308. Although the Board ultimately decided that the employer had acted lawfully by refusing to allow the disruptive union steward to represent the employee in the investigatory interview, finding that the union steward had exceeded the permissible role of a *Weingarten* representative in the previous interview, the Board did not disturb the principle that "the decision as to who will serve (as union representative) is properly decided by the union officials, unless the employer can establish special circumstances that would warrant precluding one of the two officials from serving as representative." *Id.* at 282.

We find that the principle articulated in *New Jersey Bell Telephone Company*, applies equally to the present case. Here, the Town has failed to demonstrate any showing of special circumstances that would otherwise allow it to exclude Terry from acting

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20. Section 7114 of the FSLMRS addresses union representation at investigatory interviews. Part (a)(2) of that Section provides: [a]n exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at:

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if:

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

21. 5 U.S.C. §§ 7101-7135 (1978).

22. However, with respect to our consideration of the FLRA's Federal Prision System decision, we note that there are material differences between an employee's right to union representation under the principle of mutual aid and protection embodied in *Weingarten* and its progeny, and the union's statutory right to be present at investigatory interviews under the FSLMRS.

as a Union representative for Chaves. Accordingly, we find that by precluding Terry from acting as a Union representative in Chaves' January 12, 1999 investigatory interview, the Town violated the Law.

The Town additionally argues that Chaves had no right to insist on being represented by Terry at the interview, relying on *Roadway Express, Inc*., 246 NLRB 1127 (1979), and *Pacific Gas & Electric Co.*, 253 NLRB 1143 (1981) for the proposition that an employee does not have the right to insist on representation by a *specific* union representative at an investigatory interview. However, those cases can be distinguished from the present matter. In both *Roadway Express, Inc*., 246 NLRB at 1129, and *Pacific Gas & Electric Co.*, 253 NLRB at 1143, the Board held that when a union representative is available to represent an employee in an investigatory interview, an employee is not entitled to insist on representation by a union representative who is not on the employer's premises or who is otherwise unavailable. Here, however, Terry was ready, willing, and able to represent Chaves in the investigatory interview at the appointed time and place.

Lastly, the Town argues that even if Chaves had validly invoked his *Weingarten* rights, he waived those rights by voluntarily submitting to the interview. The Board has found that a claim of waiver may not lightly be invoked, and when such a claim is made, the burden is upon the one asserting it to establish that a waiver has in fact occurred. *Illinois Telephone Company*, 251 NLRB 932, 938, 105 LRRM 1236 (1980). Waiver of one's *Weingarten* rights must be clear and unambiguous. *Southwestern Bell Telephone Company*, 227 NLRB 1223, 94 LRRM 1305 (1977); *Illinois Telephone Company*, *supra*. *See also*, *Commonwealth of Massachusetts*, 8 MLC 1287, 1290 (1981). However, for the following reasons, we do not find that Chaves voluntarily waived his right to union representation.

Once an employee has made a valid request for Union representation, the employer must offer the employee the following options: 1) grant the request; 2) discontinue the interview; or 3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. *United States Postal Service*, 241 NLRB 141, 100 LRRM 1520 (1979) and cases cited therein; *Commonwealth of Massachusetts*, 10 MLC 1156, 1161 (1983). Further, under no circumstances may the employer continue the interview without granting the employee union representation, unless the employee voluntarily agrees to remain unrepresented after having been presented with the choices mentioned (above) or if the employee is otherwise aware of those choices. *United States Postal Service*, 241 NLRB at 141.

Here, Burks offered Chaves none of the choices articulated in *United States Postal Service*. Moreover, the record establishes that when Terry asked Burks what would happen if Chaves refused to participate in the interview, Burks replied that if Chaves did not agree to voluntarily attend the investigatory interview, he would have to order him into the interview. Chaves testified that he believed that if he refused to go into the interview room, he would be disciplined. Those facts do not illustrate that Chaves clearly and unambiguously waived his *Weingarten* rights. We will not find a voluntary waiver of *Weingarten* rights where the facts demonstrate that an employee would ultimately be ordered into an investigatory interview after he or she was denied union representation following a valid invocation of *Weingarten* rights. We conclude, therefore, that Chaves did not voluntarily waive his *Weingarten* rights.

## CONCLUSION

Accordingly, for all of the above reasons, we conclude that the Town violated Section 10(a)(1) of the Law by refusing to allow Chaves to be represented by a Union attorney at an investigatory interview.

## ORDER

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Town of Hudson shall:

1. Cease and desist from interfering with the rights of its employees to request Union representation, including representation by a Union attorney, at investigatory interviews when the employee reasonably believes that the investigatory interview will result in discipline.

2. Cease and desist in any like manner from interfering with, restraining and coercing its employees in the exercise of their rights under the Law.

3. Take the following affirmative action which will effectuate the policies of the Law:

a) Sign and post the attached Notice to Employees in all places where employees usually congregate and where notices to employees are usually posted, and leave it posted for a period of thirty (30) consecutive days; and

b) Notify the Commission, in writing, within thirty (30) days of receipt of this Decision of the steps taken to comply with this order.

SO ORDERED.

### NOTICE TO EMPLOYEES

The Massachusetts Labor Relations Commission has ruled that the Town of Hudson has violated Section 10(a)(1) of Massachusetts General Laws Chapter 150E by denying an employee representation by a union attorney at an investigatory interview. In compliance with the Labor Relations Commission's order,

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Chapter 150E.

WE WILL honor our employees' valid requests for union representation, including requests for an available union attorney, at investigatory interviews that employees reasonably believe will result in discipline.

[signed]
For the Town of Hudson

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