In the Matter of SUFFOLK COUNTY SHERIFF'S DEPARTMENT

and

AFSCME COUNCIL 93, AFL-CIO

Case No. MUP-06-4774

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

82.1 ***affirmative action***

November 29, 2012
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Ellen M. Caulo, Esq. *Representing the Employer*
Joseph L. DeLorey, Esq. *Representing the Union*

DECISION ON APPEAL OF HEARING OFFICER DECISION

Summary

At issue is the Suffolk County Sheriff's Department's (Employer or Sheriff's Department) appeal of an April 27, 2012 decision [39 MLC 256] of a Department of Labor Relations (DLR) hearing officer who determined that the Sheriff's Department violated Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by interfering with an employee exercising his Weingarten rights. After the submission of certain stipulated facts and a full hearing, the Hearing Officer issued a decision finding that Deputy Superintendent Stephen Jacobs (Jacobs) conducted an investigatory interview with Correctional Officer Christopher Blaney (Blaney) on August 9, 2006 during which Jacobs prevented Blaney from consulting with his Union representatives before answering a question that the employee reasonably believed could have led to disciplinary action in violation of employee rights first established by *NLRB* v. *Weingarten*, 402 U.S. 251 (1975), and as adopted and interpreted by the Commonwealth Employment Relations Board (Board). *See*, *e.g.*, *Town of Hudson*, 29 MLC 52 (2002), *aff'd* 69 Mass. App. Ct. 549 (2007).

The Sheriff's Department filed a timely request for review of the Hearing Officer's decision pursuant to DLR Rule 456 CMR 13.02(1)(j). After reviewing the record on appeal, and for the reasons set forth below, we find that Sheriff's Department's arguments do not have merit and affirm the Hearing Officer's decision in its entirety.

Facts

We begin with a summary of the stipulated facts set forth in the Hearing Officer's decision and present the additional factual findings of the Hearing Officer relevant to the issues on appeal.

Stipulated Facts

AFSCME Council 93, AFL-CIO (Union) through Local 419, is the collective bargaining representative for correction officers holding the rank of officer, corporal, sergeant and lieutenant employed by the Suffolk County House of Correction (HOC). On August 5, 2006, HOC lieutenants Sylvia Thomas (Thomas) and Kelly Torrejon (Torrejon) toured unit 1-4-2 where Blaney and Officer James Tobin (Tobin) were assigned. During this tour, Thomas observed a portable DVD player in the Disciplinary Board Room. Torrejon and Thomas went to a supervisor's office where Thomas called the 1-4-2 unit and spoke with Tobin, informing him that Thomas had observed a portable DVD player in the Disciplinary Board Room. Torrejon then instructed Tobin and Blaney to submit reports about the presence of the DVD player. Thomas and Torrejon also wrote reports of this incident and submitted them to Captain Ronald Wong (Wong). Their reports conveyed that Blaney and Tobin had denied any knowledge of a DVD player. Wong reviewed all the reports and referred the matter to the HOC Superintendent's office.

On August 7, 2006, Captain Julius submitted a report to HOC Superintendent Gerard Horgan (Horgan). This report stated that Julius, two months earlier, had observed Blaney in possession of a portable DVD player in the 1-4-2 unit while on duty. Julius at that time informed Blaney that it was unacceptable to have a DVD player while on duty and ordered him not to bring it into the HOC again.

Also on August 7, 2006, Blaney and his Union representative, Officer Tom Flynn (Flynn), met with Horgan. During that meeting, Blaney denied that he had a DVD player while on duty in the 1-4-2 unit on August 5, 2006. The next day, Jacobs ordered Blaney and Tobin to submit addendums to their already-submitted reports responding to a series of written questions. Blaney and Tobin were ordered to answer five questions regarding the DVD incident. A sixth question - #4 on Blaney's list of questions - was only asked of Blaney: "Have you ever had a DVD player in the Institution? If yes, When? Where?"

Blaney consulted with Flynn to prepare his response to the six questions, in particular question # 4. Flynn advised Blaney not to answer question #4. Blaney submitted his handwritten addendum on August 8, 2006 and, based on Flynn's advice, he did not answer question #4. Tobin answered the five questions in his handwritten addendum that same day.

The next day, August 9, Flynn left a voice message for Horgan stating that he had advised Blaney not to answer question #4 until the Union was satisfied as to the reason why it was being asked. On August 9, Blaney, accompanied by Flynn and the Union president, Michael Simpson, met with Jacobs in the Deputy Superintendent's office concerning Blaney's failure to complete his addendum report as instructed. Jacobs informed Blaney that he was required to answer all the questions. After some further conversation, Jacobs informed Blaney that he was suspended for refusing to comply with an order and ordered him to leave the institution.

Hearing Officer's Findings of Fact

The Hearing Officer made additional findings regarding the events that occurred on August 5, 7, 8 and 9, 2006, which are not challenged[1] and which we summarize below.

August 5, 2006

Blaney contacted Flynn, who represented and advised bargaining unit members in disciplinary matters about the DVD incident. Flynn advised Blaney to write the report.

The August 7, 2006 meeting

Flynn requested the August 7 meeting with Blaney and Horgan. The discussion at this meeting included the August 5 DVD incident as well as other issues raised in Thomas' report regarding unsecured keys and unit lighting. Blaney stated that Thomas had it in for him and that he did not have a DVD player on August 5. Horgan said there were additional questions for Blaney that would be conveyed by Wong, the shift commander. Before the meeting concluded, Horgan told Flynn and Blaney that he could not give "any assurances about what is going to happen, but the best thing is to answer the questions honestly and completely."

At Horgan's request, Jacobs wrote five questions for Blaney and Tobin requesting additional information about the August 5 DVD incident. But after Horgan learned from Julius on August 7 about the DVD incident two months prior, Horgan and Jacobs added the additional written question, #4, asking whether Blaney had previously had a DVD player in the HOC.

August 8, 2006

After being presented with the addendum report questions, Blaney contacted Flynn and said to the Union representative that he did not understand why he was being asked question #4. However, Blaney did not tell Flynn about Julius observing him with a DVD player two months prior. The Hearing Officer found that Flynn told Blaney not to answer question #4 until Flynn could clarify with Wong "what our concerns were with that question." Next, Flynn spoke to Wong, expressing concerns about why Blaney was being asked question #4 and to inform Wong that Blaney would be submitting an incomplete addendum while Flynn determined the background and foundation for question #4. Wong did not tell Flynn that Blaney had to answer question #4. There is nothing in the record indicating that Wong reported his conversation with Flynn to either Horgan or Jacobs. After Jacobs received reports from Tobin and Blaney, he asked Horgan if he could meet with those officers the next day.

August 9, 2006

The August 9 voicemail message that Flynn left for Horgan stated that Flynn was upset that Blaney had to answer an additional question, that he believed there was unequal imposition of discipline, and that the lieutenant [Thomas] who reported Blaney had a radio in her office.

When Blaney's 3:00 p.m. shift started, he was ordered to report to Jacobs' office. Flynn and Union president, Michael Simpson (Simpson), also attended this meeting. Jacobs' purpose for meeting with Blaney was "[t]o give him one last chance to answer the question and find out why he did not answer the question" and "to get that question answered."[2] Jacobs was loud and aggressive during the meeting, which was extremely brief.[3]

Jacobs began the meeting by berating Blaney for submitting an incomplete addendum and for lying to Lieutenant Torrejon in his initial report. At this point, Flynn intervened and told Jacobs that the report was in compliance with policy because Flynn had received permission from Wong to delay answering question #4. Jacobs ignored Flynn and told Blaney that he was ordering him to answer the question he had failed to answer in writing. Blaney stated that he was not familiar with a court of law. Jacobs responded that Blaney was not in court, but at the HOC. Blaney said that he did not understand Jacobs' tone and that he was just trying to get clarification on the question he was being asked to answer and that he deferred to his Union representatives and his attorney.[4] Blaney pointed to Flynn and Simpson when he said that he deferred to his Union representatives. Jacobs cut Blaney off and said no clarification was needed and that he was being ordered to answer the question. Once again pointing to Flynn and Simpson, Blaney responded that, because of the way Jacobs was acting and speaking, he deferred to his Union representatives.

At this point, Jacobs suspended Blaney, stating "get the f**k out of my office, leave the property, you are on suspension right now." The suspension was for refusing a direct order and insubordination.

After Blaney left, Simpson and Flynn attempted to find out why Blaney had been suspended. The Union representatives told Jacobs that they objected to his question as unfair and that they wanted to speak to the Superintendent. Flynn also informed Jacobs that he had advised Blaney not to answer question #4 until the Union could speak with the Superintendent. They did not get an answer from Jacobs before they left the meeting. Next, Simpson went to Horgan's office where Simpson learned for the first time that, two months earlier, Julius had observed Blaney with a DVD player in June and had told him not to bring a DVD player into the

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1. The introduction to the Employer's Supplementary Statement states that the Hearing Officer's factual determinations are not supported by the record evidence. The Employer does not, however, specifically challenge any of the Hearing Officer's additional findings. Rather, in the "Argument" section of its Supplementary Statement, the Sheriff's Department argues that the Hearing Officer "erroneously characterized the August 9 meeting as an investigatory interview" and "erroneously determined" that Blaney's statement that he "deferred" to his union representatives was a request to consult with his Union representatives. We address both arguments in the Opinion portion of this decision.

2. Tobin was also asked to report to the August 9th meeting. The record, however, does not indicate whether he attended that meeting. The Hearing Officer found that there was no evidence regarding Jacobs' purpose for requesting a meeting with Tobin.

3. The Hearing Officer was faced with conflicting testimony about Jacobs' demeanor and what was said during this meeting. After weighing this testimony, she ultimately found that Jacobs was loud and aggressive based on testimony from Flynn and Simpson.

4. Blaney did not have an attorney at the meeting.

HOC. Simpson also heard the voicemail that Flynn had left for Horgan. Flynn also learned of Julius' report about the DVD player sometime after he left the meeting with Jacobs.

Blaney's Termination

A letter dated September 13, 2006 from the Employer provided Blaney with four reasons for his termination: possession of a DVD player in the HOC; submission of a misleading, incorrect or false report; giving false statements during an investigation; and failure to obey lawful oral or written orders of a supervisor.

On May 15, 2009, an arbitrator issued an award finding just cause for Blaney's termination. The award did not address whether Blaney failed to obey Jacobs' order during the investigatory process because the arbitrator was convinced that Blaney had filed a false report about whether there was a DVD in the Disciplinary Board Room on August 5, 2006.

Opinion[5]

At issue are the contours of an employee's Weingarten rights under the Law, i.e., the right to have union representation at an investigatory interview that the employee reasonably believes will result in discipline. See *Massachusetts Correctional Officers Federated Union* v. *Labor Relations Commission*, 424 Mass. 191, 193 (1997) (rights set forth in *NLRB* v. *Weingarten*, 402 U.S. 251 (1975), are protected under the panoply of rights established by Chapter 150E, §2 of the Law); *accord Town of Hudson*, 29 MLC 52 (2002), *aff'd* 69 Mass. App. Ct. 549 (2007); *Suffolk County Sheriff's Department*, 28 MLC 253, 259 (2002).

The Sheriff's Department presents two arguments for reversing the Hearing Officer's decision that Blaney's Weingarten rights were violated. First, it contends that the evidence in the record did not permit the Hearing Officer to find that the August 9, 2006 meeting was the type of meeting that triggers the invocation of Weingarten rights. Second, the Sheriff's Department argues that Blaney's statement, "I'm going to defer to my Union representatives and my attorney," was not a request to consult with his Union representatives. Thus, absent such a request, the Sheriff's Department contends that Blaney had no right to union representation pursuant to the Weingarten doctrine. As explained below, based on the stipulated record and the additional factual findings of the Hearing Officer, including justifiable inferences and determinations regarding the credibility of witnesses, we disagree with both of the Employer's arguments.

We begin with the issue of whether the August 9 meeting convened by Deputy Superintendent Jacobs meets the requirements of being an investigatory interview that the employee reasonably believes will result in discipline. *See*, *e.g.*, *Town of Hudson*, 29 MLC at 54. In essence, the Sheriff's Department contends that the sole purpose of the meeting was disciplinary, i.e., to order Blaney to answer question #4, and that it was not part of the investigation into whether he possessed a portable DVD player on August 5. This argument rests on a crabbed interpretation of what constitutes an investigatory meeting and ignores dispositive, uncontested factual findings in the Hearing Officer's decision.

A meeting is investigatory in nature when the employer's purpose is to investigate the conduct of an employee and convenes an interview to elicit information from the employee or to support a further decision to impose discipline. *See Commonwealth of Massachusetts*, 26 MLC 139, 141 (2000). We would ignore the realities of the workplace if we were to turn a blind eye to the fact that the August 9 meeting occurred as part of an ongoing investigation into Blaney's alleged workplace misconduct. That is, the record indicates that the August 9 meeting belonged to a continuum of actions that occurred as part of the Sheriff's Department information gathering to determine whether Blaney would be disciplined. Indeed, prior to the August 9 meeting, Horgan indicated that the investigation was ongoing when he expressly stated to Blaney that he could not give him any assurances about what would happen and that he should answer the questions completely and honestly. Jacobs' testimony also indicates that the meeting was not simply to order Blaney to answer question #4, but also to "find out why he did not answer the question" about whether he had previously brought a DVD player to work.

Given this testimony, the Hearing Officer correctly concluded that the August 9 meeting was part of the investigation because the Employer acknowledged that the purpose of directing Blaney to come to Jacobs' office on August 9 was to ascertain why Blaney had not answered question # 4 and to get Blaney to answer that question. As such, we have no reason to disagree with the Hearing Officer's rejection of the Sheriff's Department's argument that Jacobs' interaction with Blaney during this meeting was merely a run-of-the-mill shop-floor conversation not subject to Weingarten protections. Moreover, given the Hearing Officer's finding that the August 9 meeting occurred as part of the investigation into Blaney's conduct on August 5, we find no merit to the Employer's argument that the Hearing Officer erred when she found that it was reasonable for Blaney to believe that the August 9 meeting could result in discipline. Accordingly, we reject the Sheriff's Department's effort to characterize the meeting as being convened solely for the purpose of "advising an employee of his obligation to comply with a lawful order."

Furthermore, even if a meeting between an employer and employee is convened for the purpose of discipline, such a meeting will trigger Weingarten protections if the employer engages in conduct "beyond merely informing the employee of a previously made disciplinary decision." *Baton Rouge Water Works*, 246 NLRB 995, 997 (1979). *See also In re Henry Ford Health System*, 320 NLRB 1153, 1154-1155 (1996) (employer proceedings seeking facts or evidence to support its actions continue to be investigatory until final and binding disciplinary decision is made). Thus, even if Jacobs had determined prior to the meeting that he would discipline Blaney for a refusal to complete the addendum, his inquiries at the meeting were, as the Hearing Officer found, to investigate Blaney's conduct and to elicit information from him that shed light on the August 5 events. *Cf. Commonwealth of Massa-*

5. The Board's jurisdiction is not contested.

chusetts, 26 MLC 218, 219 (2000) (right to representation under Weingarten does not extend to those meetings where the *sole purpose* is the imposition of predetermined discipline) (emphasis added); *accord Texaco, Inc.*, 251 NLRB 633, 636-637 (1980). For all the above stated reasons, we reject the Sheriff's Department's effort to place the August 9 meeting outside the reach of the Weingarten rule.

We also reject the Employer's contention that it did not violate Blaney's Weingarten rights because Blaney, by his words and actions, did not invoke his right to union representation during the August 9 meeting. In this regard, the Employer calls into question the Hearing Officer's finding that Blaney's Weingarten rights were violated and, related to this, her reliance on *United States Postal Service*, 351 NLRB 1226 (2007), for the proposition that Weingarten rights are violated when an employer prevents a union representative from immediately clarifying a question posed to an employee during an investigatory interview.

In *United States Postal Service*, the NLRB held that a union representative may intervene in the course of an investigatory interview to protect an employee from answering a "loaded" question. 351 NLRB at 1226. The NLRB explained that its holding was consistent with the foundational principle of the Weingarten rule, which has always included the right to invoke union representation "when it is most useful to both employee and employer." *Id.* at 1227 (quoting *Weingarten*, 420 U.S. at 262). The NLRB further explained that the moment of maximum usefulness may arrive even in the middle of the employer's questioning. *Id.*

The Hearing Officer's reliance on *United States Postal Service* was completely in line with the Board's prior rulings. The Board has held that the right to union representation during an investigatory meeting is premised on two principles. First, it is premised on the right of individual employees to seek union assistance and that the decision to seek union involvement rests with the individual employee. *See Commonwealth of Massachusetts*, 9 MLC 1567, 1571 (1983). Second, if the employee invokes his right to have a union representative present, that representative's task is to "?clarify the facts,' to 'elicit favorable facts,' and to otherwise assist an employee 'who may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors.'" *Id.* (quoting *Weingarten*, 402 U.S. at 259).

Based on these Weingarten principles, we find ample support in this record to conclude that Blaney asked Flynn for assistance and to clarify the facts at issue. The Hearing Officer found that Jacobs was loud and aggressive, that Flynn intervened to inform Jacobs of facts he was not aware of, that Blaney was waiting to answer until the Union received a clarification as to why Question #4 was being asked, and that Wong was already informed of this fact. The Hearing Officer also determined that after Jacobs ordered Blaney to answer, Blaney requested clarification and stated that he was deferring to his Union representatives, gesturing to Flynn and Simpson. At this point, Jacobs suspended Blaney and ended the meeting. We find no reason to disturb the Hearing Officer's credibility determinations and inferences drawn from hearing testimony, which led her to conclude that Blaney's words and body language were a clear request for Union assistance in answering the Sheriff's Department's query at a crucial point in the interview. *See United Postal Service*, 351 NLRB at 1226-1227. We also agree with the Hearing Officer that nothing in our Law requires that an employee use certain specific or magic words to invoke Weingarten rights and that the determination must be contextual and fact-specific.

Alternatively, the Sheriff Department contends that other facts in the record establish that Blaney could not have been requesting his Union's assistance when he stated that he deferred to his Union representatives. The Employer argues that because Blaney was a military veteran and a seasoned correction officer he would not be "put on the spot," "flounder," be unsure of the meeting's protocol, or be intimidated by Jacobs' aggressive tone. The Hearing Officer drew reasonable inferences from the uncontested hearing testimony and made detailed assessments of witness demeanor and credibility. The Sheriff's Department's sheer speculation as to the effect that Blaney's military and employment background might have on his reaction to a workplace investigatory meeting that could lead to discipline or dismissal provides an insufficient basis to disturb the Hearing Officer's conclusion that Blaney made a plea for union assistance at a critical and highly-charged part of the interview. *Vinal* v. *Contributory Retirement Board*, 13 Mass. App. Ct. 85 (1982).[6]

We therefore affirm the Hearing Officer's ultimate conclusion that the Sheriff's Department's response to Blaney's invocation of his Weingarten rights violated Section 10(a)(1) of the Law, even though the Employer permitted Blaney to have union assistance and to consult with the Union prior to the meeting. In this regard, we adopt the reasoning set forth in *Commonwealth of Pennsylvania v Pennsylvania Labor Relations Board*, 826 A. 2d 932, 935 173 LRRM 2019 (Pa. Commw. Ct. 2003), a case cited by the Hearing Officer for the proposition that an employer commits an unfair labor practice when it does not permit an employee to consult with a union representative prior to answering a question that could lead to discipline during an investigatory interview, even if the employer permits the union representative to speak at other points during the interview. This instructive case is consistent with Board precedent, which holds that an employer may not relegate a union representative to the role of a passive observer or preclude the union representative from assisting the employee or clarifying the facts in an investigatory interview that may lead to discipline. *See*, *e.g.*, *Massachusetts Correction Officers Federated Union* v. *Labor Relations Commission*, 424 Mass. at 194 (NLRB citations omitted). We find that under this standard, when Blaney requested clarification and, pointing to Flynn and Simpson, stated for a second time that he was deferring to his Union representatives, Jacobs

6. Blaney did not testify at the hearing. The Hearing Officer's finding that Blaney invoked his Weingarten rights was premised on the testimony of other witnesses who were present at the August 9 meeting.

deprived Blaney of the opportunity for union assistance and summarily suspended him in violation of the Law.

Conclusion

Based on the record and for the reasons stated above, the Board concludes that the Sheriff's Department violated Section 10(a)(1) of the Law when on August 9, 2006, it prevented Blaney from consulting with his Union representatives before answering Jacobs' question during an investigatory interview and thereby precluded Blaney's Union representatives from participating at a pivotal point of the investigatory interview.

Remedy

We affirm the Hearing Officer's remedial order in its entirety, which did not include a make-whole remedy because Blaney's termination was pursuant to an arbitrator's ruling that did not implicate or adjudicate the facts or legal issues in dispute at the DLR hearing.

ORDER

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Employer shall:

1. Cease and desist from interfering with the right of its employee who requests union representation at a meeting with the Employer where the employee reasonably believes that the meeting may result in disciplinary action against him.

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

3. Take the following action that will effectuate the purposes of the Law.

> a) Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, *including electronically*, if the Employer customarily communicates with these unit members via intranet or email and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.
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> b) Notify the DLR in writing of the steps taken to comply with this decision within ten (10) days of receipt of this decision.

SO ORDERED.

APPEAL RIGHTS

Pursuant to the Supreme Judicial Court's decision in *Quincy City Hospital* v. *Labor Relations Commission*, 400 Mass. 745 (1987), this determination is a final order within the meaning of MGL c. 150E, § 11. Any party aggrieved by a final order of the Board may institute proceedings for judicial review in the Appeals Court pursuant to MGL c.150E, §11. **To claim such an appeal, the appealing party must file a Notice of Appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision.** No Notice of Appeal need be filed with the Appeals Court.

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

COMMONWEALTH EMPLOYMENT RELATIONS BOARD

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board of the Massachusetts Department of Labor Relations has held that the Suffolk County Sheriff's Department (Employer) has violated Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by not affording union representation to an employee who requested union representation at a meeting that the employee reasonably believed could result in disciplinary action against him.

Section 2 of the Law gives public employees the following rights:

> to engage in self-organization; to form, join or assist any union; to bargain collectively through representatives of their own choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all of the above.

The Employer hereby assures its employees that:

WE WILL honor our employees' requests for union representation during investigatory interviews which may result in disciplinary action.

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

[signed]
Suffolk County Sheriff's Department

Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

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