

COMMONWEALTH OF MASSACHUSETTS, COMMISSIONER OF ADMINISTRATION AND FINANCE, AND
LOCAL 509, SEIU, AFL-CIO, SUP-2665 (1/11/83).

(60 Prohibited Practices by Employer)
65.91 request for representation at disciplinary interview

Commissioners participating:

Paul T. Edgar, Chairman
Joan G. Dolan, Commissioner

Appearances:

Peter Lyons, Esq.	- Representing the Commonwealth of Massachusetts
David Rome, Esq.	- Representing Local 509, SEIU, AFL-CIO

DECISION

Statement of the Case

This case presents the question of whether a public employer must honor a request by a union to attend a pre-disciplinary investigatory interview absent a request by an involved employee for union assistance. For the reasons stated herein we find that there is no statutory right to participate in such interviews.

On June 22, 1982, Local 509, SEIU, AFL-CIO (the Union) filed a charge with the Labor Relations Commission (Commission) alleging that the Commonwealth of Massachusetts, acting through the Commissioner of Administration and Finance (the Commonwealth) had violated Sections 10(a)(1), (2), (3) and (5) of General Laws Chapter 150E (the Law) by denying Union representation to employees under investigation by the Bureau of Special Investigation (BSI), an entity whose purpose is the investigation of complaints of fraudulent claims within the Department of Public Welfare and the Department of Social Services.

On July 29, 1982, the Commission issued a Complaint of Prohibited Practice alleging that the Commonwealth had violated Section 10(a)(1) of the Law by denying a blanket request made by the Union to attend all investigatory meetings of the BSI involving members of the bargaining unit. The Commission dismissed all other aspects of the charge. The Commonwealth filed an answer to the Complaint admitting the majority of the factual allegations of the Complaint, but denying that the investigations conducted by the BSI are such that an employee might reasonably believe discipline might result therefrom and also denying the legal conclusions of the Complaint.

On September 23, 1982, a formal hearing was held before Timothy Buckalew, a hearing officer of the Commission. All parties were present and were afforded full opportunity to be heard, to cross-examine witnesses, and to otherwise present evidence relevant to this dispute. At the close of the Union's case, the Commonwealth moved to dismiss on the grounds that the Union had failed to state a claim under the Law. The Commonwealth did not file a brief in support of its motion, but relies on the argument made at the hearing. The Union submitted a brief which has been duly considered along



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with the entire record in reaching this decision.

Findings of Fact¹

Since sometime in early Spring 1982,² the Bureau of Special Investigations (BSI) has been conducting investigations in the Department of Public Welfare. On occasion this has entailed investigation of individual employees in the Department, including employees in the unit represented by the Union.³

John Quinn, a food stamp supervisor in the Department of Public Welfare, testified on behalf of the Union as to the nature and form of the investigations. Quinn was asked one morning to report to a downtown state office building. He did and was met by two investigators for the BSI. The investigators questioned Quinn about alleged fraud in his current office. He did not then, or subsequently, request a union representative. Quinn testified that he was questioned briefly and then sent back to work with the message that other employees in the office would be contacted by BSI agents. Quinn returned to his office and told Ann Bray, a Union field representative, of his encounter.

On April 16, Bray wrote James Scanlon, Jr., Director of the BSI, and asked that in the future the Union be given notice of BSI investigations and be afforded an opportunity to be present.

On April 22 Scanlon replied in the following letter addressed to John Templeton, president of the Union.

Dear Mr. Templeton:

In reply to your letter of April 16, 1982, I will repeat what I told you during our telephone conversation. This Bureau is not a part of nor an agent of the Department of Public Welfare but is an investigative, law enforcement agency of the State of Massachusetts within the Secretariat of Administration and Finance.

This Bureau has no intention to deny or abridge any contract, statutory or constitutional rights of members of Local 509. However, criminal investigations conducted by this Bureau are not governed by Chapter 150E of the Massachusetts General Laws nor union contract. Local 509 members would not be entitled to union representation nor union notice if they were being investigated by a local police department, the state police, the Attorney General nor the Bureau of Special Investigations.

¹The jurisdiction of the Commission to hear this dispute is not challenged by either party.

²All dates are 1982 unless otherwise stated.

³The Bureau of Special Investigations is an agency of the Commonwealth
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Bray pursued the matter to other levels of the Commonwealth's managerial hierarchy and contacted Kevin Preston, Assistant Director of the Office of Employee Relations. She demanded again the right to have a Union representative at future BSI investigations.

On June 8, Preston denied the request on the grounds that:

"I have been advised by counsel that such meetings do not fall within the scope of the Weingarten rule and that the determination as to whether to allow union representation by non-attorneys at such meetings is therefore within the sole discretion of the BSI."

Past investigations have resulted in discipline and discharge of members of the bargaining unit, and that possibility is well known among employees in the Department of Public Welfare and Department of Social Services.

Opinion

Section 2 of the Law guarantees public employees the right to engage in lawful concerted activity for the purposes of collective bargaining or "other mutual aid or protection."

Drawing on the precedent of the U.S. Supreme Court in NLRB v. Weingarten, 420 U.S. 251, 99 LRRM 2689 (1975) we have held that Section Two establishes an employee right to request union representation at investigatory interviews which the employee reasonably believes might result in discipline. Commonwealth of Massachusetts and AFSCME, Council 93, 8 MLC 1289 (1981), Commonwealth of Massachusetts, 4 MLC 1415 (1977).

We have not before considered the question of whether a union enjoys a right to participate in such interviews regardless of whether an employee seeks union involvement.

Based on the City of Fitchburg and Stephen Dodge, 8 MLC 1907 (H.O. 1982), the Union claims an independent statutory right to attend investigatory interviews stemming from its role in protecting the interests of the entire bargaining unit by "exercising vigilance to make certain the employer does not initiate or continue a practice of imposing punishment unjustly," 8 MLC at 1911, quoting U.S. Postal Service, 241 NLRB 141, 100 LRRM 1520 (1979). By denying the Union's demand to attend the BSI

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established pursuant to Chapter 7, Section 30R, charged with the investigation of fraudulent claims or wrongful receipt under programs of the Department of Public Welfare and Department of Social Services. It does not have independent prosecutorial authority, but instead must direct cases to the office of the Attorney General or offices of district attorneys for disposition. M.G.L. Chapter 7, Section 30T, (5).



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investigations, it is argued, the Commonwealth interfered with the rights of each involved employee.

The Commonwealth on its behalf urges dismissal on two grounds. First, the Union allegedly does not have a right to be present at investigatory interviews absent a request by an investigatee. Second, BSI investigations are "criminal" investigations that are not conducted by an agency under the authority of the employer and are not the sort of investigations warranting the normal protections of the Law.

While we agree in general with the Union's assessment of the necessary and salutary function it performs in safeguarding individual as well as bargaining unit interests at investigatory confrontations, we do not find that this interest gives the statutory bargaining representative an independent statutory right to be involved in every investigation regardless of whether its help has been sought.

We therefore dismiss the complaint for the reasons stated below.⁴

Our decision to dismiss is grounded in the first instance on our understanding of the "contours and limits" of the employee's right of representation, as set forth in our cases and as originally propounded in the Weingarten decision.

In Weingarten the Court agreed with the National Labor Relations Board (Board) in Quality Manufacturing Co., 195 NLRB 195, 79 LRRM 1269 (1972), confirming the right to have representation while recognizing that employees' rights were subject to certain restrictions. "The right inheres in the guarantee of the right of employees to act in concert for mutual aid and protection," and arises "only in situations where the employee requests representation" (emphasis added) 420 U.S. at 257, 88 LRRM 2691. An employer's denial of a request for union assistance at a compulsory investigatory meeting constitutes "a dilution of the employee's right to act collectively to protect his job interests," Mobile Oil Corp., 196 NLRB at 1052, 80 LRRM at 119, and therefore has a reasonable tendency to interfere with, restrain and coerce employees in the exercise of their rights.

While we do not feel that the language quoted above from Weingarten explicitly forecloses union involvement, it is clear to us that the focus of the Court and Board is on the rights of individual employees to seek union assistance and on the benefits employees may derive from the support which may be rendered by the union. For that reason, the decision to seek union involvement rests with the individual employees, who may forego his guaranteed right and participate in an interview unassisted, 420 U.S. 257, 88 LRRM 2691.

⁴ In light of our decision to dismiss on the basis of the failure of any involved employee to request union aid, we do not at this time address the soundness of the Commonwealth's arguments concerning its alleged lack of authority over the Bureau of Special Investigations.



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Where no employee has asserted the right to union help, the employer's conduct in proceeding with an investigation cannot constitute interference. That is because the employer's wrong lies in denying the employee's request for help and not in merely conducting an investigation. When, as here, the record discloses no interest in union involvement on the part of any employee under investigation by the BSI, there can be no interference in the assertion of an employee right and hence no violation of the Law.

Our conclusion that the Union's interest in participating in investigations is derivative of the right of the individual employee, and dependent on the assertion of that right by the individual, is bolstered by the limited nature of a union's function at such meetings. The task of the union representative 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." 402 U.S. at 259, 88 LRRM 2693. The employer need not bargain with the union representative at an investigatory interview; neither may the union representative interfere with legitimate employer prerogatives by virtue of its participation. 402 U.S. at 258, 259, 88 LRRM 2693, 2693. (See also, Climax Molybdenum Corp., 584 F.2d 360 (10th Cir., 1978) 99 LRRM 2471, the Union was criticized for obstructing employer investigation by counseling employees to remain silent.) Moreover, the interests asserted by the Union in the welfare of the entire bargaining unit will be adequately protected by insuring that the Union's status as exclusive bargaining representative will be recognized and respected in any subsequent grievance meetings that may occur should the employer take disciplinary action against an employee. Worcester School Committee, 2 MLC 1283 (1976), Lawrence School Committee, 3 MLC 1364.

The cases cited by the Union in support of its position do not persuade us to accept the contrary conclusion. The hearing officer's decision in City of Fitchburg and Stephen Dodge, *supra*, holding that the rendition of Miranda warnings to an employee did not constitute a substitute for Weingarten rights, is inapposite to this case. The decisions of the National Labor Relations Board in Amax, Inc., 227 NLRB 1189, 94 LRRM 1177 (1977), and Volkswagen of America, 261 NLRB No. 36, 110 LRRM 1068 (1982) are equally irrelevant. We note that the Board's order in Amax, Inc., was refused enforcement by the 10th Circuit Court of Appeals in Climax Molybdenum Corp. v. NLRB, *supra*, on the ground, *inter alia*, that "...the right to union representation at the investigatory interview ripens only if the employee involved in the investigation has made his own prior request for such representation." (emphasis in original decision) 99 LRRM at 2474. The Board has subsequently adopted the position of the Climax court in Appalachian Power Co., 253 NLRB 931, 106 LRRM 1041 (1980), and dismissed an alleged violation of Weingarten rights where a union steward, but not an involved employee, made the request for participation. 253 NLRB at 933. Finally, the Union's reliance on Volkswagen of America, *supra*, is misplaced. That case involves the unilateral elimination of a practice of allowing union stewards to attend all investigations whether requested or not. There is no evidence of any such past practice here.

The weight on the authority supports our conclusion that, without a request by an involved employee, the Union does not have statutory rights under Section Two



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of the Law to participate in investigatory meetings. Since no employee facing such an investigation asked for Union assistance here, we must, and hereby do, DISMISS the Complaint.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN

JOAN G. DOLAN, COMMISSIONER

