

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>COMMUNICATIONS WORKERS OF AMERICA,</b>	:	
<b>LOCAL 13101,</b>	:	
	:	
Charging Party,	:	
	:	<b><u>ULP No. 12-01-848</u></b>
v.	:	
	:	<b>Decision on the Merits</b>
<b>STATE OF DELAWARE, DEPARTMENT OF</b>	:	
<b>SAFETY AND HOMELAND SECURITY,</b>	:	
<b>DIVISION OF STATE POLICE,</b>	:	
	:	
Respondent.	:	

**Appearances**

*James Hummell, Executive President, CWA Local 13101, for Charging Party*

*Monica Gonzalez-Gillespie, Director, SLREP, for DSHS/DSP*

**BACKGROUND**

The State of Delaware (State) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (“PERA”). The Department of Safety and Homeland Security (DSHS) is an agency of the State in which the Division of State Police (DSP) is organizationally located.

The Communication Workers of America (CWA) is an employee organization within the meaning of §1302(i) of the PERA. Its affiliated Local 13101 is the exclusive bargaining representative of the unit of Non-Uniformed Support Staff employed by DSHS/DSP (excluding supervisory and confidential employees) within the meaning of

§1302(j) of the Act. PERB Cert. 05-04-475. It also represents a bargaining unit of telecommunication employees.<sup>1</sup>

On January 25, 2012, CWA filed an unfair labor practice charge (Charge) with the Public Employment Relations Board (PERB) alleging conduct by the State in violation of 19 Del.C. §1307(a)(1) and (a)(5).<sup>2</sup> CWA alleges that on or about January 11, 2012, DSP representatives “interfered with, restrained or coerced” non-uniformed Employees Hirsch and Kelley<sup>3</sup> by denying requested union representation during interviews which reasonably could have been expected to result in discipline and by discriminating against such individual with respect to her employment status.

On or about February 10, 2012, the State filed its Answer denying the assertions contained in the Charge.

A Probable Cause Determination was issued on March 7, 2012, which found probable cause to believe a violation of 19 Del.C. §1307(a)(1) and/or (a)(5), as alleged, may have occurred.

A public hearing was convened on May 22, 2012 for the purpose of receiving evidence. By agreement of the parties, the hearing was suspended and the further processing of the charge was held in abeyance pending the completion of a criminal prosecution which was in progress.

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<sup>1</sup> It is unclear from the pleadings to which of these two units the employees involved in this matter belong.

<sup>2</sup> 19 Del.C. §1307. Unfair Labor Practices

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
  - (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
  - (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

<sup>3</sup> The Charge originally asserted there were two employees who were involved.

On or about March 11, 2013, CWA Local 13101 advised PERB that the criminal prosecution was complete and requested the hearing be rescheduled. The hearing was reconvened on May 7, 2013. During the hearing, CWA Local 13101 amended its charge, limiting the issue to the events of Wednesday, January 11, 2012 as they relate only to Employee Kelley.

During the hearing, the parties entered testimony and documentary evidence into the record. The record closed following receipt of written argument. This decision results from the record created by the parties.

### **FACTS**

The following facts are derived from the testimony and documentary evidence contained in the record created by the parties.

On the morning of January 11, 2012, two employees (Employee Hirsch and Employee Kelley) reported to work at the State Bureau of Identification in Dover. Both were members of the bargaining unit represented by CWA Local 13101.

Upon arrival, Employee Hirsch was escorted directly to a conference room by Sgt. Gygrynuk who was the lead investigator in a criminal investigation involving the two employees. Sgt. Gygrynuk read Employee Hirsch his Miranda rights and then asked him if he wished to make a statement concerning a work event which occurred on December 24, 2011. Employee Hirsch agreed to give a statement in response to Sgt. Gygrynuk's questions. Following the interview, Sgt. Gygrynuk left Employee Hirsch in the conference room and went to the nearby office of Captain Sapp, who he informed of the results of the interview. Sgt. Gygrynuk then returned to the conference room and escorted Employee Hirsch to the lunch room where he was asked to remain until Sgt.

Gygrynuk returned.

At some point during Employee Hirsch's interview, Employee Kelley reported to the work place for her regular duties. As she entered the work site through the rear door, she was met by Captain Sapp, who escorted her directly to the lunch room and asked her to wait there until Sgt. Gygrynuk could speak with her. Employee Kelley testified she asked Capt. Sapp why Sgt. Gygrynuk wanted to speak with her and asked whether she needed to have her union representative (who she identified by name) present. Employee Kelley testified she did not receive a response to her question, that it was "kind of like skipped over." *TR p. 6*. She testified when she asked Capt. Sapp again later whether this was a "union matter", he responded "it was above the Union; the Union had nothing to do with it." *TR p. 7*. She also testified Capt. Sapp advised her she needed a lawyer before she needed a union representative.

Capt. Sapp escorted Employee Kelley into a conference room where Sgt. Gygrynuk was waiting. He asked her if she knew why she was there. When she responded that she did not, he told her he was conducting a criminal investigation. He then read her the *Miranda* warning<sup>4</sup> and she asked whether she needed a lawyer. Sgt. Gygrynuk advised her that he could not answer that question, at which point she declined to make a statement. The interview was concluded at that time.

Sgt. Gygrynuk left Employee Kelley in the conference room and again went to Capt. Sapp's office, where he reported she had invoked her Miranda rights and declined to make a statement. Capt. Sapp testified he then called Executive Staff and related that

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<sup>4</sup> The *Miranda* warning is part of a preventive criminal procedure rule that law enforcement is required to administer to protect an individual who is in police custody and subject to direct questioning from a violation of his or her constitutional Fifth Amendment right against compelled self-incrimination. *Miranda v. Arizona*, 384 U.S. 456 (1966). The U.S. Supreme Court held: "...The person in custody must, prior to interrogation, be clearly informed that he/she has the right to remain silent, and that anything the person says will be used against that person in court; the person must be clearly informed that he/she has the right to consult with an attorney and to have that attorney present during questioning, and that, if he/she is indigent, an attorney will be provided at no cost to represent him/her."

one of the interviewees had given a statement (providing a summary of the statement) and that one had declined to give a statement. He was instructed to deliver suspension with pay notices to both employees. He provided the following notice to Employee Kelley:

**Notification of Suspension**

As a result of an ongoing criminal investigation, you have been ordered suspended with pay and benefits from the Division of State Police.

You are hereby advised of the following restrictions

Beginning: **January 11, 2012** Ending: **Until Further Notice**

1. You are to turn in your Divisional identification and SBI building access key card.
2. You are not to operate any Delaware State Police vehicle.
3. You are not to engage in any activity related to, or representing, the Delaware State Police.
4. If during this suspension period you are summoned to court or any hearing related to your previous duty assignment, you are to notify the SBI administration immediately.
5. If you currently have any pending investigation or matters needing immediate attention, or if you become aware of any, you are to advise the SBI administration immediately.
6. While under suspension, you will not access NCIC, CJIS, LEISS, any Divisional computer program or Divisional computer for **ANY REASON WHATSOEVER**.

Capt. Sapp testified he signed the suspension notice after Employee Kelley signed the document. He further testified that when Employee Kelley asked him about union representation at the time he delivered the suspension notice, he advised her she needed a lawyer rather than the union. *TR p. 37*. Employee Kelley was then escorted off the work site.

## ISSUE

WHETHER THE STATE, BY AND THROUGH ITS ACTIONS CONCERNING UNION REPRESENTATION OF BARGAINING UNIT EMPLOYEES INVOLVED IN A CRIMINAL INVESTIGATION WHICH RESULTED IN DISCIPLINE, VIOLATED 19 DEL.C. §1307 (a)(1), and/or (a)(5) AS ALLEGED.

## PRINCIPAL POSITIONS OF THE PARTIES

### CWA Local 13101:

The CWA asserts it is an unfair labor practice under the PERA for a public employer to interfere with, restrain or coerce an employee in the exercise of her rights, including the right to have union representation present during an investigatory interview. This right to representation is part of an employee's right to engage in protected, concerted activity, consistent with the rights established by the U.S. Supreme Court in *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 99 LRRM 2689 (1975).

The CWA asserts Employee Kelley testified she had no idea what was going on when she reported to work on January 11, 2012 or why she was escorted to a waiting area by Captain Sapp to wait to be interviewed by Sgt. Gygrynuik. She testified she asked Capt. Sapp whether she needed her union representative, to which she recalls he responded, "this is beyond the union," and later advised her she needed to get a lawyer.

The CWA argues that while Capt. Sapp and Sgt. Gygrynuik are very competent police officers and are very capable in conducting criminal investigations, their testimony demonstrates a fundamental lack of understanding of the *Weingarten* rights of represented employees during an investigatory interview. Their singular focus on gathering evidence concerning workplace conduct for a potential criminal prosecution deprived the employee of her rights under the PERA. Capt. Sapp and Sgt. Gygrynuik

should have been aware that they were also conducting a disciplinary investigation; because they were not, Employee Kelley's request for union representation was either misunderstood or ignored.

Because Employee Kelley's right to union representation was ignored and/or disregarded by Capt. Sapp and Sgt. Gygyryuk, she was improperly suspended. For these reasons, the CWA requests the employee be reinstated<sup>5</sup> with full back pay for all time lost.

State of Delaware, DSHS/DSP:

The State argues that in order to prevail in its claim, the CWA must establish the employee requested union representation before or during the investigatory interview from a manager who was in a position to evaluate the request and that the supervisor then denied the request and continued with the interview. The State asserts credible evidence fails to support the union's assertion that the employee made any request for union representation. It also denies DSP interfered with Employee Kelley's request or denied her any rights under the PERA.

The State requests the Charge be dismissed on its merits.

**DISCUSSION**

The Delaware Public Employment Relations Board adopted the standards set forth by the United States Supreme Court in *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 88 LRRM 2689 (1975) in *Poli v. DTC*, ULP 09-06-669, VII PERB 4395, 4399 (Order of Dismissal, 2009); *affirmed* VII PERB 4523 (2010). In *Weingarten*, the Court carefully

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<sup>5</sup> Although it was not part of the record created in this matter, one must presume (based on CWA's requested remedy) that Employee Kelley was ultimately released from service as a result of this incident.

and clearly set forth its logic for affirming the NLRB's identification and protection of a statutory right to union representation upon request during an investigatory interview:

The Board's construction of §7<sup>6</sup> creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline was announced in [*the NLRB's*] Decision and Order of January 28, 1972, in *Quality Manufacturing Co.*, 195 NLRB 195, 79 LRRM 1269 (*further citations omitted*). In its opinions in that case and in *Mobil Oil Corp.* 196 NLRB 1052, 80 LRRM 1188, decided May 12, 1972, three months later, the Board shaped the contours and limits of the statutory right.

*First*, the right inheres in §7's guarantee of the right of employees to act in concert for mutual aid and protection. In *Mobil Oil*, the Board stated:

“An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for ‘mutual aid and protection.’ The denial of this right has a reasonable tendency to interfere with, restrain and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action.” 196 NLRB, *supra*, at 1052.

*Second*, the right arises only in situations where the employee requests representation. In other words, the employee may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative.

*Third*, the employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action. Thus the Board stated in *Quality*:

“We would not apply the rule to such run-of-the-mill shop-

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<sup>6</sup> Section 7 of the National Labor Relations Act (NLRA), Rights of Employees, essentially parallels §1303, Public Employee Rights, of Delaware's PERA, including the protected right of covered employees to engage in concerted activities for purposes of mutual aid and protection.



floor conversation as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative.” 195 NLRB, *supra*, at 199.

*Fourth*, exercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one. As stated in *Mobil Oil*:

“The employer may, if he wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources.” 196 NLRB, *supra*, at 1052.

“This seems to us to be the only course consistent with all of the provisions of our Act. It permits the employer to reject a collective course in situations such as investigative interviews where a collective course is not required but protects the employee’s right to be protection by his chosen agents. Participation in the interview is then voluntary, and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is afforded the safeguard of his representative’s presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on the basis of whatever information he had and without such additional facts as might have been gleaned through the interview.” 195 NLRB, *supra*, at 198-199.

*Fifth*, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview. The Board said in *Mobil*, “we are not giving the Union

any particular rights with respect to the predisciplinary discussions which it otherwise was not able to secure during collective bargaining negotiations.” 196 NLRB, supra, at 1052, n. 3. The Board thus adhered to its decisions distinguishing between disciplinary and investigatory interviews, imposing a mandatory affirmative obligation to meet with the union representative only in the case of the disciplinary interview. *Texaco Inc.*, 168 NLRB 361 (1967); *Chevron Oil Co.*, 198 NLRB 574 (1967); *Jacobe-Pearson Ford*, 172 NLRB 594 (1968). The employer has no duty to bargain with a union representative at an investigatory interview. “The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee’s own account of the matter under investigation.”

Once an employee makes a valid request for union representation, the employer is permitted one of three options under *Weingarten*: (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. “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 by the employer with the choices mentioned in option (3) above or if the employee is otherwise aware of those choices.” *United States Postal Service*, 13-CA-16195-P, 241 NLRB 18 (NLRB, 1979)

There has been a plethora of cases decided under the NLRA and state laws which refine, extend and apply the *Weingarten* principles to various situations and circumstances. The fundamental principles, however, have not been substantially modified and the original premises are sufficient for understanding the facts in the present matter.

As in any charge alleging an employer’s failure to allow an employee her right to union representation, this determination is fact-bound. In this case, there were credible

witnesses who gave conflicting testimony. Those conflicts were primarily related to recollection of whether Employee Kelley specifically and/or repeatedly requested union representation. Truth is always subject to human perception and recollections often vary. As a trier of fact, my conclusions reflect what most likely occurred based on my review of the evidence presented by these parties.

The interview conducted by Sgt. Gygrynuke had the potential to result in a disciplinary action (i.e., suspension pending termination), and in fact, did result in a disciplinary action. Although both Capt. Sapp and Sgt. Gygrynuke testified Sgt. Gygrynuke was only conducting a criminal investigation, as managers and supervisors, they should have been aware that the information garnered in the interviews would be used in making a disciplinary decision. Capt. Sapp testified that following completion of the interviews and his discussions with Sgt. Gygrynuke, he made a phone call to the State Police Executive Staff, during which he summarized the outcomes of the interviews. He was then instructed to print suspension notices and to deliver them to the employees, before having them escorted off the work site. The suspension notice specifically states the disciplinary action was taken “as a result of an on-going criminal investigation.”

*Union Exhibit 1.*

These circumstances clearly meet the standard for application of the *Weingarten* principles because the incident involved an investigatory interview of a bargaining unit employee by the employer which had a reasonable probability of resulting in disciplinary action.

Employee Kelley testified she had no idea why she was detained when she arrived at work on January 11, 2012, and then escorted to an interview with Sgt. Gygrynuke. She testified she was concerned and asked Capt. Sapp whether she needed to have her union

representative present. Capt. Sapp denies she requested union representation prior to the interview but admitted to telling her at some point that she needed a lawyer before she worried about the union because she was the target of a criminal investigation.

The recollections of the witnesses concerning any discussion of union representation were not crystal clear nearly eighteen (18) months after the incident. Employee Kelley testified she made an inquiry as to whether she needed her union representative first to Capt. Sapp when she was detained in the lunch room and then again when she was in the conference room where she recalled that both Capt. Sapp and Sgt. Gygyryuk were present. The State's witnesses did not recall being in the conference room at the same time, and Sgt. Gygyryuk did not recall Employee Kelley referring to union representation at any time in his presence. Capt. Sapp did recall a conversation with Employee Kelley in which he admittedly advised her she needed a lawyer before she would need her union, but he recalls that the conversation occurred after the interview.

Based on a careful consideration of the testimony of these witnesses, I conclude that Employee Kelley did inquire of Capt. Sapp as to whether she needed a union representative when she questioned why she was being asked to wait in the lunch room. I credit her testimony that Capt. Sapp did not respond directly to her initial request and that it was "kind of skipped over." The evidence also supports the conclusion that Capt. Sapp believed the criminal investigation was a matter to which she should attend and for which legal representation was necessary. He admittedly advised her of his opinion. I have no doubt this advice was offered in good faith and that he did not consider that the investigatory interview was also part of a disciplinary process.

It is clear from the record that neither Capt. Sapp nor Sgt. Gygyryuk was aware of his *Weingarten* obligations in conducting an investigatory interview which could

reasonably result in disciplinary action being taken against a represented employee. There are no magic words which an employee must voice to invoke her rights to union representation. Under the circumstances of this case, Employee Kelley's inquiry as to whether she should have her union representative present (who she identified by name) should have triggered Capt. Sapp to either go over the *Weingarten* options with Employee Kelley or contact his human resource office to receive counsel on this matter. As previously stated, the options available to Capt. Sapp were either to: (1) to grant Employee Kelley's request and wait for a union representative to be present before proceeding with the interview; (2) to cancel the interview; or (3) to offer Employee Kelley the choice between continuing the interview unaccompanied by a union representative or having no interview at all. Once the request for union representation was made, Employee Kelley had to explicitly waive her right to that representation and voluntarily agree to proceed without a union representative before Sgt. Gygyryuk could initiate the investigatory interview.

For this reason, the State is found to have violated Employee Kelley's right to union representation during the course of an investigatory interview and to have acted in violation of 19 Del.C. §1307(a)(1), as alleged. The State is directed to provide copies of this decision and training to its supervisors and managers concerning the rights of represented employees during investigatory interviews which may reasonably result in disciplinary action and the options which must be presented to those employees upon a request for union representation.

Finally, no evidence was presented to support the conclusion that the employer violated 19 Del.C. §1307(a)(5). Consequently, that portion of the Charge is dismissed in its entirety.

## CONCLUSIONS OF LAW

1. The State of Delaware is a public employer within the meaning of 19 Del.C. §1302(p). The Department of Safety and Homeland Security (DSHS) is an agency of the State of Delaware in which the Division of State Police is organizationally located.
2. The Communication Workers of America (CWA), Local 13101, is the exclusive bargaining representative of civilian DSHS/DSP employees, within the meaning of 19 Del.C. §1302(j).
3. By ignoring a bargaining unit employee's request for a union representative prior to an investigatory interview which the employee reasonably believed could result in disciplinary action, the State violated the employee's protected right to engage in concerted activity for purposes of mutual aid and protection, and 19 Del.C. §1307(a)(1).
4. The record is insufficient to conclude that the State also violated its duty to bargain in good faith and 19 Del.C. §1307(a)(5); consequently that portion of the Charge is dismissed.

**WHEREFORE**, THE STATE OF DELAWARE, DEPARTMENT OF SAFETY AND HOMELAND SECURITY, DIVISION OF STATE POLICE, IS HEREBY ORDERED TO TAKE THE FOLLOWING AFFIRMATIVE STEPS:

- A) Cease and desist from:
  - a. Requiring any employee to take part in an investigatory interview without union representation if such representation has been requested by the employee and she reasonably fears that the interview will lead to disciplinary action against her.
  - b. In any like or related manner interfering with, restraining and/or coercing employees in the rights guaranteed them by §1303 of the Public Employment Relations Act. 19 Del.C. Chapter 13
- B) Take the following affirmative action which is necessary to effectuate the

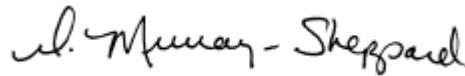
policies of the PERA:

- a. Immediately post copies of the attached Notice of Determination in all areas where notices affecting employees in the bargaining unit represented by CWA Local 13101 are normally posted throughout the Department and in its administrative offices. These Notices must remain posted for at least 30 days in order to provide notice to all affected employees of the decision in this matter.
- b. Provide a copy of this decision and appropriate training to all supervisors and managers of represented employees within the Department of Safety and Homeland Security concerning the protected right of represented employees to request union representation in any investigatory interview which the employee reasonably believes may result in disciplinary action of that employee, consistent with those rights as defined by the United States Supreme Court in *NLRB v. Weingarten* ( 420 U.S. 251 (1975)) and as specifically adopted in this decision.

C) Notify the Public Employment Relations Board in writing within sixty (60) calendar days of this decision of the steps taken to comply with this Order.

**IT IS SO ORDERED.**

DATE: September 13, 2013



DEBORAH L. MURRAY-SHEPPARD  
Executive Director  
Del. Public Employment Relations Bd.