

message: the recipient's presence was requested at 8:30 a.m. the next morning (April 10) for a meeting regarding a potential insubordination issue. Id.

Petrozzi replied the next morning at 7:26 a.m. that she was off and would not be able to attend the meeting; shortly thereafter, Attorney Piccirilli replied that the meeting had to take place and explained that it required a Union representative for the employee concerned. Id. Just a few minutes later, Lyman also replied that she was unavailable at 8:30 a.m., but could make a 10:30 a.m. meeting. Attorney Piccirilli stood fast on his demand for a representative at 8:30 a.m. Id.

Appellant called this 8:30 a.m. meeting because of a workplace dispute between a supervisor, Kathleen Fagan (Fagan), and Rose Marie Coates (Coates), who was employed by Appellant as a Receptionist and Acting Housing Specialist for approximately three years. Id. Coates was not informed of the contemplated meeting until she arrived at work on the morning of April 10 and was confronted by Attorney Piccirilli. Id. She asked Attorney Piccirilli if the meeting could lead to discipline. Id. Upon his affirmative response, she requested Lyman as her Union representative. Id. at 3.

Attorney Piccirilli, aware of Lyman's inability to attend the meeting at 8:30 a.m., rejected her request. Id. He told Coates that he had arranged for Shawn Riley (Riley), the Union President, to attend instead. Id. Riley did not, however, show up for the meeting; instead, Attorney Piccirilli directed another employee and Union member, Andrew Nestor (Nestor), to attend the meeting. Id. Nestor is neither a Union representative nor an officer. Id. Coates reiterated her desire to have Lyman serve as her Union representative. Id. Before she could complete her reiteration of her rights, though,

Attorney Piccirilli informed her that she was suspended, with further information regarding discipline to follow by letter. Id.

The Union then filed an unfair labor practice charge with the Labor Board. Following briefing and a hearing, the Labor Board concluded that Coates was a member of the bargaining unit represented by the Union, that a valid collective bargaining agreement was in place, and that Coates's Weingarten¹ rights were violated by Attorney Piccirilli's actions on behalf of Appellant. Id. at 14. It held that Appellant committed unfair labor practices in violation of §§ 28-7-13(3) and 28-7-13(10) by: (1) refusing to allow Coates adequate representation at the meeting she reasonably believed could lead to discipline; (2) interfering with the Union's administration by dictating the presence of another employee who was not a Union representative or officer; and (3) when it suspended Coates in response to her asserting her Weingarten rights. Appellant takes issue with all these conclusions.

II

Standard of Review

The State Labor Relations Act vests jurisdiction to hear appeals from contested cases decided by the Labor Board in the Superior Court. Sec. 28-7-29. Review proceeds according to the Administrative Procedures Act, G.L. 1956 § 42-35-15(g), under which the Court may:

“affirm the decision of the agency or remand the case for further proceedings, or . . . reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

¹ See NLRB v. J. Weingarten, Inc., 420 U.S. 251, 256-59, 260-63 (1975).

- “(1) In violation of constitutional or statutory provisions;
- “(2) In excess of the statutory authority of the agency;
- “(3) Made upon unlawful procedure;
- “(4) Affected by other error or law;
- “(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- “(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”
Town of Burrillville v. R.I. State Labor Relations Bd., 921 A.2d 113, 118 (R.I. 2007) (quoting § 42-35-15(g)).

““The Superior Court’s review of an administrative decision is limited to a determination of whether or not legally competent evidence exists in the record to support the agency’s decision.”” Id. (quoting Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan, 755 A.2d 799, 804-05 (R.I. 2000). “Legally competent evidence (sometimes referred to as “substantial evidence”) has been defined as ‘relevant evidence that a reasonable mind might accept as adequate to support a conclusion[; it] means an amount more than a scintilla but less than a preponderance.’” Id. (quoting Ctr. for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 684 (R.I. 1998) (internal quotation marks omitted)). The Court must defer to the agency’s resolution of factual questions. State, Dep’t of Envtl. Mgmt. v. State, Labor Relations Bd., 799 A.2d 274, 277 (R.I. 2002).

III

Analysis

Appellant presents three arguments to the Court. First, it argues that Coates's position never accreted² to the bargaining unit in question. Next, it argues that there is in fact no collective bargaining agreement in existence between the parties. Finally, it contends that the Labor Board erred both in concluding that an interview took place and that Coates's Weingarten rights were violated.

A

Accretion of Coates's Position

Accusing the Labor Board of a "rather incredible dodge," Appellant contends that it erred in concluding that Coates's position had accreted to the bargaining unit represented by the Union. Appellant's Br., 5. It argues that because the Labor Board has promulgated rules regarding the accretion of positions to bargaining units, there can be no other manner in which a position may be accreted. Id. at 4. Citing Macera v. Cerra, 789 A.2d 890 (R.I. 2002), Appellant urges the Court to also conclude that Coates was a managerial employee that cannot be part of the Union. Id.

These arguments make little sense. The record discloses that the parties' collective bargaining agreement contains a recognition clause, which states, "The bargaining unit consists of all [Housing] Authority employees excluding the Executive Director[,] Assistant Director, and part-time employees who work less than twenty (20) hours per week." Union's Ex. 1, Agreement Between West Warwick Housing Authority

² Accretion, in the labor law context, is the addition of a new employee or employees to an existing bargaining unit without holding an election. 48 Am. Jur. 2d Labor and Labor Relations § 891.

and Rhode Island Council 94, AFSCME, AFL-CIO on Behalf of West Warwick Housing Authority Employees, Local 2045 (hereinafter, the CBA), Art. 1.2, at 1. The Labor Board's rules do not require a formal petition for accretion: "Either a union or an employer may, at any time, file a request to add or 'accrete' a position(s) to an existing bargaining unit." Rhode Island State Labor Board General Rules & Regulations § 8.04.1 (emphasis added). And the case to which Appellant cites for the rigorous review applied to petitions for accretion reveals that such stringent review is applied "absent some action on the part of the employer." R.I. Pub. Telecomms. Auth. v. R.I. State Labor Relations Bd., 650 A.2d 479, 486 (R.I. 1994). The Court also notes that the record reflects—quite clearly, in fact—that Appellant treated Coates as part of the Union throughout her employment. It stopped doing so only when haled before the Labor Board. Far more than a scintilla of evidence underpins the Labor Board's conclusion that Coates's position had been accreted to the bargaining unit with Appellant's consent.

There is nothing in the Labor Board's rules that requires a petition to accrete a position. Voluntary accretion by employer action would therefore be entirely permissible, as the Labor Board held below. Additionally, if the cited provision of the CBA is in force, there has clearly been recognition of Coates's position as within the bargaining unit—hence, employer action.

B

The Existence of a Collective Bargaining Agreement

Appellant asks the Court to reverse the Labor Board on the grounds that the CBA's enforcement was conditioned upon ratification by the Department of Housing and Urban Development (HUD)—a condition never satisfied, according to Appellant. This

argument too can be disposed of quickly. Appellant would appropriately bear the burden of proof of facts on which it bases its defense. Appellant did not present any evidence at the hearing indicating that HUD rejected or otherwise failed to ratify the CBA. In the absence of any evidence presented by Appellant in support of its non-ratification theory, it would have been error for the Labor Board to conclude as Appellants urged them to. Town of Burrillville, 921 A.2d at 118 (quoting Johnston Ambulatory Surgical Assocs., 755 A.2d at 804-05).

C

Coates's Weingarten Rights

Weingarten rights are those rights afforded to a union employee confronted with an employer's request for an investigatory interview that may lead to discipline. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 259, 260-61 (1975). If an employer makes a request for an investigatory interview that an employee reasonably believes may result in adverse effects on their employment, or the terms and conditions thereof, the union employee can make a clear request for union representation. See id. at 257. Once such a request is made, an employer has three permissible choices of conduct: (1) they can wait for a union representative to arrive then continue the meeting; (2) they can choose not to have the interview; (3) they can inform the employee that the interview will only proceed without union representation and the employee can choose to immediately end the interview. See id. at 258-59.

Appellant claims that the Labor Board erred in determining that a Weingarten violation occurred. It claims that an interview was neither contemplated nor conducted,

that Coates had no right to insist on any particular union representative, and that discipline remains appropriate for Coates.

First, the question of whether the April 10, 2015 meeting was called as an investigatory meeting which Coates reasonably believed could lead to discipline is a question of fact. Such questions are committed to the Labor Board's discretion. State, Dep't of Env'tl. Mgmt., 799 A.2d at 277. The Court must, it appears, reiterate that it is not in a position to question the Labor Board's resolution of factual questions if they are supported by substantial evidence. Town of Burrillville, 921 A.2d at 118 (quoting Johnston Ambulatory Surgical Assocs., 755 A.2d at 804-05). Here, the Labor Board's conclusions are amply supported by substantial evidence in the record. The email correspondence and, notably, Attorney Piccirilli's own affirmative answer to Coates's inquiry about whether the meeting could lead to discipline more than suffice to enable the Labor Board to conclude as it did.

Second, it is not true that a union member has no ability to choose their union representative. Although Coca-Cola Bottling Co. of Los Angeles, 227 N.L.R.B. 1276 (1977) and Pacific Gas & Electric Co., 253 N.L.R.B. 1143 (1981) impose limitations on an employee's right to insist on an obviously unavailable union representative, they do not bar an employee from choosing a union representative who is reasonably available. Anheuser-Busch, Inc. v. NLRB, 338 F.3d 267, 277 (4th Cir. 2003) (affirming Anheuser-Busch, Inc., 337 N.L.R.B. 3 (2001)). See also Consol. Coal Co., Robinson Run Mine No. 95, 307 N.L.R.B. 976 (1992); GHR Energy Corp., 294 N.L.R.B. 1011 (1989). Upon determining that an investigatory interview was about to take place, Coates requested Lyman as her representative; as the email correspondence reflects, Attorney Piccirilli was

quite aware that Lyman could be present in just two hours for a meeting. The Court cannot say that this amount of time is unreasonable as a matter of law, and Coates was entitled to choose Lyman under these circumstances.

Finally, it is true that nothing stops Appellant from disciplining Coates for the previous conduct it has already determined merits action. Nothing in Weingarten prohibits this, and the Labor Board's decision is in accord. But Appellant nonetheless violated Coates's Weingarten rights. Those rights attach at the moment an employee reasonably believes an interview will lead to discipline and requests a union representative. Those circumstances were present here; once Coates requested Lyman, Appellant had the three options of Weingarten. Haling Nestor in as Coates's representative is not one of the avenues Weingarten allows an employer to travel upon. The Labor Board's conclusion that Appellant violated Coates's labor rights is correct.

IV

Conclusion

For the foregoing reasons, the decision and order of the Labor Board is affirmed.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: West Warwick Housing Authority v. Rhode
Island State Labor Relations Board

CASE NO: KC-2015-1242

COURT: Kent County Superior Court

DATE DECISION FILED: August 23, 2016

JUSTICE/MAGISTRATE: Gallo, J.

ATTORNEYS:

For Plaintiff: Gregory P. Piccirilli, Esq.

For Defendant: Margaret L. Hogan, Esq.