STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. SUPERIOR COURT

WARWICK SCHOOL COMMITTEE	:	
	:	
VS.	:	M.P. NO. 13058
	:	
STATE LABOR RELATIONS BOARD	:	

D E C I S I O N

GRANDE, J. This case is before the Court on an appeal from a Decision and Order of the State Labor Relations Board. The issue is whether certain custodial employees in the Warwick school system were entitled to have a representative from their labor union present when the employees were called in for interviews with management and allegedly feared that disciplinary action might result. Five employees were involved in the present controversy.

The Warwick Independent School Employees Union is a labor organization which engages in collective bargaining and deals with employee grievances. It is the sole and exclusive bargaining agent for all non-teaching personnel, excluding supervisors, employed by the Warwick School Department. The Warwick School Committee is a municipal corporation, duly organized under the laws of Rhode Island, charged with the management of that city's schools.

For brevity, the Warwick Independent School Employees Union will be designated as the Union, the Warwick School Committee will be referred to as the Employer, and the State Labor Relations Board will be called the Board.

On May 11, 1978, the Union filed an unfair labor charge against the Employer. The Board conducted an informal hearing on June 26, 1978 and issued a Complaint against the Employer alleging that the latter had denied union representation to employees who were the subject of interviews which the employees reasonably believed would result in disciplinary action. The Employer's Answer to the Complaint contained the usual admission and denials, but it also alleged that the employees were improperly joined

in the single Complaint and requested that the Board dismiss the Complaint. Rule 20 of the Rules of Civil Procedure states that "persons may join in one action as plaintiffs if they assert any right to relief . . . arising out of the same . . . series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action." The Board held a hearing and found on January 13, 1979 that there was "no merit" to the Employer's allegation of improper joinder. Decision and Order, p. 2. This issue has not been raised by the parties on appeal to this Court and the Court deems the issue waived. The Board then found as a "conclusion of law" that

> ". . .the failure of the Warwick School Committee to permit union representation, when requested by the employee involved, at interviews or investigations under such circumstances or situations that the employee reasonably believes the investigation or interview will result in disciplinary action, is an act prohibited within the meaning and language of the Rhode Island State Labor Relations Act and is an unfair labor practice." Decision and Order, p. 7.

The Board also ordered

> "that the Warwick School Committee, upon request of the employee involved for union representation, in all matters in which the

> employee could reasonably believe that the interview or investigation will result in disciplinary action, must permit the employee to be afforded union representation." Decision and Order, pp. 7-8.

The standard of review for this case is set out in R.I. General Laws § 42-35-15, the Administrative Procedures Act, which empowers this Court to reverse or modify the Board's Decision and Order if it is affected by error of law or is clearly erroneous in view of the reliable and probative evidence. The Act reads, in relevant part:

> 42-35-15. Judicial review of contested cases. -- (a) Any person who has exhausted all administrative remedies available to him within the agency, and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter . . .
>
> (f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
>
> (g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(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 of 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.

The Board was correct in determining that an employee has a right to have union representation at an interview which the employee reasonably believes would result in disciplinary action. This right is derived from R.I. General Laws § 28-7-12, which states that "(e)mployees shall have the right . . . to engage in concerted activities, for . . . mutual aid or protection . . ."

To conclude that this right is found in the statute requires application of a three-step process.

In its entirety § 28-7-12 reads:

Rights of employees. -- Employees shall have the right of self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion

> from any source; but nothing contained in this chapter shall be interpreted to prohibit employees and employers from conferring with each other at any time, provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this section.

Rhode Island General Laws § 28-7-13 defines an "unfair labor practice" as including a violation of employee rights granted by § 28-7-12. The statute reads, in relevant part:

> Unfair labor practices. -- It shall be an unfair labor practice for an employer:
>
> .
>
> .
>
> .
>
> (10) To do any acts . . . which interfere with, restrain or coerce employees in the exercise of the rights guaranteed by § 28-7-12.

As Justice Kelleher noted in Belanger v. Matteson, 115 R.I. 332, 346 A.2d 124 (1975), "(O)ur Legislature has created a structure of labor regulations which parallels in many significant respects the federal scheme." Id. at 338, 129. The truth of this observation is apparent from a reading of the parallel provisions of the National Labor Relations Act. Section 7, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a)(1), 29 U.S.C. § 158 (a)(1), provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."

In Rhode Island it has been the practice of the courts, when interpreting a statute patterned after the National Labor Relations Act, to look to federal case law for guidance. See, e.g., North Kingstown v. North Kingstown Teachers Association, 110 R.I. 698, 297 A.2d 342 (1972); Barrington School Committee v. Rhode Island State Labor Relations Board, R.I. , 388 A.2d 1369 (1978); Belanger v. Matteson, supra.

National Labor Relations Board v. J. Weingarten, Inc., 88 L.R.R.M. 2689, 420 U.S. 251, 43 L.Ed. 2d 171, 95 S.Ct. 959 (1975), held that an employer violated § 8(a)(1) of the

National Labor Relations Act because it interferred with, restrained, and coerced the individual right of an employee, protected by § 7, "to engage in . . . concerted activities for . . . mutual aid or protection . . . ," when it denied the employee's request for the presence of her union representative at the investigating interview that the employee reasonably believed would result in disciplinary action. In reaching this decision the United States Supreme Court rejected the view of dissenting Justice Powell that such an interview is not "concerted activity" within the intendment of the Act. See, 420 U.S. at 270. Reasonableness is to be measured by objective standards in all the circumstances of the case. The rule does not require a probe of an employee's subjective motivations. Weingarten, supra, note 5, 420 U.S. at 257.

In reaching its Decision and Order, the Board in the case at bar used this three-step process of (1) comparing the state statute to the federal statute, (2) consulting federal case interpretations of identically worded federal statutes, and (3) applying the appropriate case law to the facts of the controversy being decided.

The Employer presents two arguments in urging the Court to overturn the Decision and Order of the Board.

First, it argues that Weingarten is not controlling as the standard of review. Second, it argues that, even if Weingarten is used to interpret state law, it can be distinguished factually from the present controversy. These arguments will be considered in more detail.

With regard to the first argument, the Employer states in its brief

> . . . the State Labor Relations Board proceeded on the assumption that the holding in National Labor Relations Board v. Weingarten, Inc., 420 U.S. 251 (1975) is automatically binding in the instant case. Not only does this conclusion disregard that State Boards are free to interpret their own state statutes pertaining to labor legislation, but likewise totally disregards that the legislation being interpreted by the National Labor Relations Board [in Weingarten] is inapplicable to municipalities. Brief of Warwick School Committee, pp. 13-14.

The Employer is technically correct in its assertion that state boards, in the absence of applicable state court precedent, are free to interpret their own state statutes. Weingarten interpreted federal legislation. The statute involved here, R.I. General Laws § 28-7-12, is identical to the federal statute. Whether or not the Board, or even this Court, is bound to use federal case law interpretations of a federal statute which parallels a state statute is not really in issue here.

As was noted earlier in this opinion, Rhode Island courts traditionally have resorted to federal interpretations of state statutes patterned after federal legislation. Whether or not the Board was bound to follow Weingarten is not significant to this case; what is important is that the Board's use of Weingarten cannot be considered erroneous. Furthermore, after arguing that Weingarten is not binding here, the Employer suggests no reason why the Weingarten interpretation of the statutory language should not be used.

The Employer's second argument is that even if Weingarten were adopted as the correct interpretation of the statutory language in R.I. General Laws § 28-7-12, the employees involved did not have a "reasonable" fear of disciplinary action and therefore, even under the Weingarten test, the employees were not entitled to union representation. The fear was not reasonable, the Employer argues, because the persons conducting the interviews did not have the authority to fire the employees.

> . . . Suffice it to say that the uncontradicted testimony is that neither Mr. Zannini nor Mr. Knox have the authority to hire, fire or otherwise discipline employees. At best, they could only make recommendations to Dr. Venditto. Dr. Venditto unequivocably stated that in no instance has an interview been conducted or a recommendation made at a lower level and action

taken without a further interview at his level . . . Brief of Warwick School Committee, p. 15.

Mr. Zannini is the Director of Buildings and Grounds and Mr. Knox is the Supervisor of Custodians. Dr. Venditto, the man who indisputably has disciplinary authority, is the Assistant Superintendent for Personnel and Labor Relations. In Weingarten the employee was interviewed by a manager who apparently had the authority to fire her on the spot if the results of interview were not satisfactory to him.

> ". . .(H)ad respondent been satisfied, based on its investigatory interview, that Collins was guilty of dishonesty, Collins could have been discharged without further notice. That she might reasonably believe that the interview might result in disciplinary action is thus clear." Weingarten, note 5, 420 U.S. at 258.

The issue thus becomes whether union representation must be allowed at lower supervisory levels when the meeting or investigation appears to be of a disciplinary nature. The Board felt that the inability of Mr. Zannini and Mr. Knox to fire an employee made no difference, and this Court agrees. Nothing in the record indicates that the employees involved were aware that Mr. Zannini and Mr. Knox could not fire them. If the employees reasonably believed that these men could fire them, this alone would make their fear of disciplinary action reasonable. More

importantly, however, reversing the Board's decision would enable employers to evade the mandate of Weingarten simply by seeing that disciplinary interviews are conducted by interviewers who have no authority to fire. The interviewers would then report back to the employer, who would then do the firing on the basis of the interviewer's report. In the present controversy Mr. Zannini testified before the Board that he did not have the authority to fire but that he had on occasion "recommended discipline." Record, pp. 7-8. Both the Board and this Court feel that this power to recommend discipline makes the employee's fear of disciplinary action a reasonable fear. This Court does not believe that "reasonableness" hinges on whether the interviewer actually has the authority to fire an employee on the spot. The possibility of less immediate disciplinary action may in many instances be enough to make the employee's fear a reasonable fear.

The Employer also argues that if union representation is allowed in this type of situation, the union representative does not have a right to speak. This issue is distinct from the issue of whether a union steward should be allowed to attend and is not now before the Court. Since the issue is so closely related and so important now that the right to have

a union steward present is clearly established, however, the Court will comment on it briefly. The United States Supreme Court stated in Weingarten:

> The employer has no duty to bargain with the 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." Brief for Petitioner 22. Id., 420 U.S. at 260.

The language of Justice Brennan's opinion is clear; and this Court will not speak further on the purpose or usefulness of a silent union representative.

The Decision and Order of the State Labor Relations Board is hereby affirmed. Counsel will prepare and submit an order in conformity with this decision.