

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

LAKE ELSINORE TEACHERS ASSOCIATION,
CTA/NEA,

Charging Party,

v.

LAKE ELSINORE UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. LA-CE-4545-E

PERB Decision No. 1648

June 23, 2004

Appearances: Joseph R. Colton, Attorney, for Lake Elsinore Teachers Association, CTA/NEA; Atkinson, Andelson, Loya, Ruud & Romo by John W. Dietrich, Attorney, for Lake Elsinore Unified School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Lake Elsinore Teachers Association, CTA/NEA (Association) of a Board agent's partial dismissal of its unfair practice charge. In its charge, the Association alleged that the Lake Elsinore Unified School District (District) denied teacher Darla Ausman (Ausman) rights to union representation during an investigatory interview in violation of the Educational Employment Relations Act (EERA)¹ sections 3543.1(a) and 3543.5(a) and (b). The Board agent dismissed this allegation.

¹EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

BACKGROUND

In relevant part, the charge, as amended, alleged that in or around December 2002, Ausman, a teacher at Butterfield Elementary School (Butterfield) informed coworker Christine Mann (Mann) of a comment made by another teacher, Cheri Smith (Smith) pertaining to anonymous and demeaning notes and pranks, which had the effect of victimizing Mann. The Association contends that the District had been aware of Mann's victimization and that Mann feared for her safety.

On or around February 11, 2003, Ausman received a message from the Butterfield principal requesting that she attend a meeting with Keith McCarthy (McCarthy), District assistant superintendent, the next day at 2:30 p.m. to discuss a complaint filed by Mann against Smith. The message explicitly stated that the meeting did not involve a disciplinary or union issue but that the District just wanted Ausman's input.

On February 12, 2003, Ausman met with McCarthy and Sukhi Sandhu (Sandhu), the District's attorney, who was investigating Mann's complaint. Notwithstanding the District's assurances, believing the meeting might lead to discipline, Ausman requested union representation. The District denied her request and directed her to speak to Sandhu. The Association alleged that Ausman's request continued throughout the meeting. During the interview, Sandhu questioned Ausman about her knowledge of the interaction between the other two teachers. It is alleged that Sandhu intimidated Ausman by arguing with and berating her. During the interview, Sandhu became aware that Ausman had become the target of the investigation but did not permit Ausman the right to representation. The Association contends that Ausman has denied that the District offered her the opportunity to obtain representation at the time the focus of the interview turned toward her.

On April 21, 2003, Ausman was disciplined and received a counseling memorandum resulting from the February meeting with Sandhu.

The Association asserts that its right to be present at the February 12, 2003 meeting falls under Redwoods Community College Dist. v. Public Employment Relations Bd. (1984) 159 Cal.App.3d. 617 [205 Cal.Rptr. 523] (Redwoods), which extended the union's right to represent employees in meetings with employers beyond traditional Weingarten² rights, i.e., the right to represent employees in their "professional and employment relationships with public school employers for issues not necessarily leading to discipline." (EERA sec. 3540; Regents of the University of California v. PERB (1985) 168 Cal.App.3d. 937 [214 Cal.Rptr. 698]; Sierra Joint Community College District (1983) PERB Decision No. 345.) In this case, Ausman was meeting with an upper level administrator and the District lawyer in a matter that involved the employment relations of the subject teacher and other teachers represented by the Association. Regardless of Weingarten, the Association had the right to represent Ausman at the meeting.

The District filed a response to the unfair practice charge. In its response, the District alleges that the charge lacks specificity. (PERB Reg. 32615³; United Teachers – Los Angeles (Wylar) (1993) PERB Decision No. 970; Covina-Valley Unified School District (1993) PERB Decision No. 985.) The District states that Mann filed a harassment complaint against Smith in which Mann alleges that several items had been anonymously placed in her mailbox and that these items caused her distress. Based on comments by Ausman, Mann believed that Smith

²National Labor Relations Board v. Weingarten (1975) 420 U.S. 251 [88 LRRM 2689] (Weingarten).

³PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

had placed the items in her box and that her personal safety was in jeopardy from Smith. Sandhu interviewed Mann, Ausman and other individuals to investigate Ausman's claim. In contrast to Ausman, when Smith was interviewed, she was notified that she was entitled to have a union representative since discipline might result from the interview.

The District denied Ausman's request for union representation at the beginning of the interview because at that time there was no disciplinary action being considered against her. Initially, the purpose of the interview was to find out what Ausman knew about the alleged threat to Mann by Smith. At that time, the District alleges that Ausman was given the opportunity to cease the discussion and have union representation present for the remainder of the interview. She declined the offer. At the end of the interview, Ausman stated that she should not have shared anything with Mann since her comments needlessly caused Mann concern.

BOARD AGENT'S PARTIAL DISMISSAL

The warning letter acknowledged the parties' factual dispute regarding whether, during the February 12 interview when the investigation turned to Ausman's conduct, the District offered Ausman the right to obtain representation but Ausman declined the offer. That after her initial request, Ausman did not again request representation for the remainder of the meeting, is not in dispute. The warning letter, in part, advised the Association that the District did not violate Ausman's Weingarten rights.

The Board agent dismissed the allegation that Ausman was unlawfully denied representation during the February 12 meeting both because the circumstances did not meet the elements of the Weingarten rule, as adopted by the Board in Rio Hondo Community College District (1982) PERB Decision No. 260 (Rio Hondo), and, in the absence of a reasonable fear of discipline under Redwoods, "highly unusual circumstances" did not exist. The Board agent

reasoned that the initial request for representation was denied because the meeting began with no expectation that discipline would result. As the meeting progressed, the Board agent found that it became clear that discipline was a possibility but Ausman did not revive her request. Citing State of California (Department of Forestry) (1988) PERB Decision No. 690-S (Forestry), the Board agent stated that an employer's obligation to permit representation is not triggered until the employee requests representation and the employer has no obligation to inform the employee of the right. The Board agent thus concluded that Ausman's failure to request representation once the meeting began to focus on her conduct defeated this allegation.

The Board agent further found the Association's allegation that Ausman reasonably believed that the meeting might lead to discipline alleges a legal conclusion not supported by facts and so does not state a prima facie case.

DISCUSSION

Under the Weingarten rule, adopted by the Board in Rio Hondo, the charging party must show that: (a) the employee requested representation, (b) for an investigatory meeting, (c) which the employee reasonably believed might result in disciplinary action, and (d) the employer denied the request. In highly unusual circumstances, there may be the right to union representation absent the employee's reasonable belief in disciplinary action. (Redwoods.)

In State of California (Department of Parks and Recreation) (1990) PERB Decision No. 810-S (DPRI) and State of California (Department of Parks and Recreation) (1990) PERB Decision No. 810a-S (DPRII), the Board found a right to representation in circumstances similar to the case before us. In that case, Robert Murphy (Murphy), a park ranger, requested representation in a meeting between himself and district Superintendent William Fait (Fait). Fait declined representation stating that the interview would not result in disciplinary action. Murphy then telephoned his union representative who in turn called Fait. Fait told the union

representative that the interview was to discuss a citation issued by Murphy and that no formal action would result from the interview. Immediately before the interview, Murphy again requested representation, which Fait again denied. Murphy was initially allowed to tape record the meeting but was ordered to turn it off before the interview concluded. After the recorder was turned off, Fait asked questions about other citizen complaints against Murphy. Soon after, Murphy received a written counseling memo signed by Fait, stating in part that:

No further action regarding this complaint is planned. If similar complaints are received regarding improper conduct on your part and after investigation judged to be valid within the next 12 months, this memorandum may be made an attachment to such corrective or adverse action as may be deemed necessary.

Under these circumstances, the Board found a violation of Murphy's Weingarten rights, i.e., that the Department of Parks and Recreation interfered with Murphy's rights under the Ralph C. Dills Act (Dills Act).⁴ (DPRI, p. 4, warning letter, p.1; DPRII, p. 4, fn. 3.)

In this case, Ausman requested union representation at the outset of the meeting, was denied union representation based on the District's statement that the meeting was not an investigatory interview; however, the discussion during the meeting resulted in a disciplinary memo being placed in Ausman's file. The District argues that Ausman could not have reasonably believed that discipline would result from the interview at the time she requested representation. We disagree. Given the highly charged atmosphere surrounding the public victimization of Mann and the formal nature of the investigation, it was reasonable for Ausman to believe that discipline could result from the interview. That belief was compounded by the alleged hostile demeanor toward Ausman displayed by Sandhu, the District's attorney who

⁴The Dills Act is codified at Government Code section 3512, et seq. The parties' collective bargaining agreement contained a "no reprisal" provision and a grievance procedure culminating in binding arbitration. The Board thus deferred this aspect of the charge to arbitration.

conducted the interview. That belief was also validated by the resulting discipline imposed upon Ausman.

In Rio Hondo, citing Baton Rouge Water Works Company (1979) 246 NLRB 995 [103 LRRM 1056], the Board explained that the right to representation in investigatory interviews attaches whether or not the interview is labeled as such:

‘...Indeed, if the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, the full panoply of protections accorded the employee under Weingarten may be applicable. . . .’

In this respect, we find that the facts surrounding Ausman’s interview to be analogous to those in Redwoods. In Redwoods, the court found that the employee was entitled to union representation because of the unusual facts in that case. Doris Hughey (Hughey), the employee, had previously requested that the college dean review an unfavorable performance evaluation by her supervisor. Hughey later resolved the problem with her supervisor and withdrew her request to the dean. However, the dean insisted on continuing with the interview. Hughey requested union representation. The meeting convened with the union representative present. The dean directed the union representative not to participate in the meeting since there were no disciplinary overtones, but only a factfinding matter regarding her evaluation. During the interview, each item on the evaluation was discussed. The union representative made a comment and the dean cut him off mid-sentence. Soon after the meeting, the dean issued a memo expressing concern both with Hughey’s and her supervisor’s performance; the memo was placed in Hughey’s personnel file. The court found a violation of Hughey’s right to representation in that:

Hughey was required to participate in an interview which she no longer sought, before a high-level District administrator, and to respond to questions concerning her work performance. For all [the dean’s] assurances to the contrary, his inquiry amounted to an assessment of what Hughey had considered a negative

personnel review. Unquestionably the interview was investigatory and relatively formal. The atmosphere was intimidating, and [the dean's] attitude toward [the union representative] could only have made it more so. Hughey's concerns were implicit in her request for union representation at the interview. Parenthetically, her concerns were in significant measure borne out when, as a consequence of the interview, a memorandum containing negative reflections on Hughey's performance was placed in her personnel file. In these unusual circumstances Hughey was entitled to representation which she did not receive, and CSEA was denied its right to represent her. (Redwoods, at p. 625, emphasis added.)

In this case, the circumstances are very similar to the facts in Redwoods. Ausman sought union representation at the outset of the meeting and was denied that representation; the interview was formal and was conducted by the District's attorney; the District's attorney exhibited a hostile demeanor toward Ausman; the interview involved investigation of a harassment claim against an employee, albeit not initially Ausman; and the discussion at the interview resulted in disciplinary action being taken against Ausman.

However, regardless of whether the discipline element existed at the onset of the meeting, the District may not discipline Ausman after assuring her that no discipline would result from the interview. Citing Forestry, the Board agent opined that the District had no duty to inform Ausman of her right to representation. While it is true that the employer is not required to inform an employee of her Weingarten rights, once the employee has made a request for representation during an interview and the employer refuses the request, stating that no discipline would result from the interview, then the employer may not impose discipline as a result of the interview. (See DPRI, DPRII, and Redwoods.) Otherwise an employee must repeatedly ask for representation or place herself in the difficult situation in which the union's

ability to represent her is weakened.⁵ Such a consequence does not serve the Supreme Court's purpose in Weingarten:

A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors [R]espondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined. At that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than reexamining them. (Weingarten, at pp. 262-264.)

In light of the above, we find that the District denied Ausman's rights under EERA section 3543.5(a) and concomitantly denied the Association its right to represent Ausman under EERA section 3543.5(b).

ORDER

The Board REVERSES the Board agent's partial dismissal in Case No. LA-CE-4545-E and REMANDS this case to the Office of the General Counsel consistent with this Decision.

Member Neima joined in this Decision.

Chairman Duncan's dissent begins on page 10.

⁵Compare with Fremont Union High School District (1983) PERB Decision No. 301, in which an employee complained about the district's computation of her sick leave. The district gave her the opportunity to audit her sick leave records under the observation of her supervisor. The employee requested union representation but the request was denied. The Board deemed the audit meeting to be a precursor to the grievance procedure and found that the employee was denied the right to representation. Although the employee did not renew her request for representation during the audit meeting, the Board opined that there was no reason to believe that the request would not be denied and that a new request would thus be futile. The Board found therefore that the employee did not waive her right to representation by not renewing her request for representation.

DUNCAN, Chairman, dissenting: I respectfully dissent. From all the information Darla Ausman (Ausman) received from the Lake Elsinore Unified School District (District) prior to meeting with the District lawyer (and even at the time she requested representation before the meeting began) there was nothing contemplated by the District in regard to discipline of Ausman. The reason the Board agent dismissed the Weingarten¹ claim was because a prima facie case was not made as to that claim. This was a partial dismissal and the Board agent issued a complaint related to the other charges.

Even after the warning letter from the Board agent, Ausman did not state in her facts any reasons why she thought she would face discipline at or following that meeting.

The test to determine whether a prima facie case has been set out includes the element that at the time the employee requests representation she must, “reasonably believe the meeting might lead to discipline.” (Rio Hondo Community College District (1982) PERB Decision No. 260.)

Without facts to show why she reasonably believed that she could face discipline she has not met all of the elements of the test. Further, in stating a prima facie case, the charging party must state the “who, what, when, where and how” of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Speculating after review of the disciplinary letter is inappropriate. Because she did not plead her case with the necessary specificity on this charge it should be dismissed.

¹National Labor Relations Board v. Weingarten (1975) 420 U.S. 251 [88 LRRM 2689] (Weingarten).

When the tone of the meeting with the District lawyer changed, Ausman did not make a new request for representation. I agree with the Board agent that it was Ausman's responsibility to make that request. When the denial of representation was issued by the District there was no thought that the meeting could lead to discipline towards Ausman. Only Ausman would have known if there were reasons, then unknown to the District, that it might.

Ausman chose not to plead facts to support her position. As the majority correctly noted, the facts pled are taken at face value and assumed to be true. However, the legal conclusions are not, as the Board agent indicated. Issuing a complaint in these circumstances is based on speculation as to what Ausman was thinking when she requested representation before the meeting and why she did not later request it during the meeting. To me, the question to be addressed is not, "How many times do you have to ask for representation?" but rather "What do you have to include to state a prima facie case?" The Board agent advised Ausman of the need for additional facts (contrary to what she says in her appeal of the Board agent's dismissal). Ausman chose not to provide them. Because of her choice I believe the partial dismissal was appropriate and the complaint that issued is on the only issues appropriate to proceed in this case.

Because a complaint already issued related to the Lake Elsinore Teachers Association, CTA/NEA's right to represent Ausman, I believe it is unnecessary and inappropriate to address that issue here.