P.E.R.C. NO. 89-16

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and- Docket No. CO-H-87-307

IFPTE, LOCAL 195,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the State of New Jersey (Department of Human Services) violated the New Jersey Employer-Employee Relations Act when it denied union representation to an employee interviewed by Department of Human Services police where the employee had a reasonable basis to believe the information gathered at the interview was available for purposes of administrative discipline.

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Appearances:

For the Respondent, Cary Edwards, Attorney General
(Michael L. Diller, Deputy Attorney General)

For the Charging Party, Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, Esqs. (Arnold S. Cohen, of counsel)

DECISION AND ORDER

On April 24 and July 7, 1987, IFPTE, Local 195 ("Local 195") filed an unfair practice charge and amended charge against the State of New Jersey (Department of Human Services) ("State"). The charge, as amended, alleges that the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), (4) and (5),[1/] when

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of

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it denied the requests of two employees, Raymond Acevedo and Derrick Jones, for union representation during interviews conducted by Department of Human Services ("DHS") police.

On July 15, 1987, a Complaint and Notice of Hearing issued. The State filed an Answer admitting that the employees requested but were denied union representation. It asserts, however, that the employees were not entitled to representation because the interviews were conducted by department police as part of criminal investigations rather than by the administration as part of employment-related investigations. It further asserts that the federal and State constitutions and public policy preclude interposing a union representative in criminal investigations and that the matter is moot because no discipline resulted.

On September 16, October 14 and November 16, 1987, Hearing Examiner Ira W. Mintz conducted a hearing. The parties waived oral argument but filed post-hearing briefs. The State, with Local 195's consent, was permitted to supplement the record with three documents. On March 7, 1988, the State filed a reply brief.

1/ Footnote Continued From Previous Page

employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act, and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

On May 11, 1988, the Hearing Examiner issued his report. H.E. No. 88-55, 14 NJPER ___ (¶_____ 1988). With respect to the Acevedo interview, he recommended dismissal of the pertinent allegations because once Acevedo asked for union representation the investigating officers legally discontinued the interview. With respect to the Jones interview, the Hearing Examiner concluded that Jones could have reasonably believed the interview might result in discipline and that the State thus violated subsection 5.4(a)(1) when it denied his request for union representation. The Hearing Examiner concluded generally that DHS police interviews would not trigger the right to union representation when information gathered during an announced criminal investigation could not be used for disciplinary purposes, but found that the line between criminal investigations and administrative disciplinary actions had been blurred in this instance. He finally found that the State had not repudiated a contractual provision on union representation during interrogations.

Both parties filed exceptions. Local 195 asserts that the Hearing Examiner erred in dismissing the Acevedo allegation, not finding a repudiation, and concluding that all DHS police interviews do not trigger the right to request union representation. The State asserts that the Hearing Examiner erred in holding that it had not preserved the distinction between criminal and administrative

investigations in Jones' case and in suggesting that police must announce the nature of their questioning.[2/]

We have reviewed the record. The Hearing Examiner's findings of fact are thorough and generally accurate. We incorporate them[3/] with these additions and modifications.

We add to finding no. 2 that police officer Desmarias testified that a police interview is different from an interrogation. The former seeks information and witnesses, the latter focusses on the suspect being questioned. Jones was interviewed as a potential witness, not a suspect, and thus was not given Miranda warnings.

2/ The State, however, is nevertheless going to instruct DHS police to make such announcements.

3/ We specifically adopt the finding, based on Chief Brennan's testimony, that if a criminal case is closed and there is no indication a crime has been committed, then information gathered during the investigation can be disclosed at an administrative hearing. The State asserts that Chief Brennan and other witnesses distinguished between testifying about personal observations and testifying about police investigatory interviews and concluded that the latter type of testimony would never be available. If that is true, then the wall between criminal investigations and administrative proceedings would be intact and no right to representation would arise. But on this record we cannot read Chief Brennan's testimony that way. He testified that after a criminal case is closed, an officer subpoenaed to testify at an administrative hearing can review his investigative notes and reports and then testify from memory about what was reported on them (TB155; TB158). We also note in this regard that this testimony is consistent with the second paragraph of special order #27, although it is inconsistent with the third paragraph of that order. Special order #1 is not inconsistent with the Chief's testimony because it applies only to pending criminal cases.

Desmarias wore his police uniform and interviewed Jones in police headquarters. After introducing himself, Desmarias informed Jones that a couple of clients had reported the loss of personal property at Cottage 17 and that Jones was a potential witness because he had been working there on the days the losses occurred. After denying Jones union representation, Desmarias verified that Jones had been working at Cottage 17 those days and then asked Jones in what parts of the building he had been in and if he had seen anything unusual or anyone hanging out near the men's sleeping areas. Jones responded that he had been throughout most of the building while doing his job, but had not noticed anything or anyone unusual. The questioning then ended.

We first consider whether Acevedo was entitled to union representation. For the reasons given by the Hearing Examiner (p. 19), we conclude he was not.

We next consider whether the State repudiated its contractual pledges concerning union representation. Even assuming that the denial of union representation to Jones was illegal, we agree with the Hearing Examiner (p. 22) that repudiation was not established. We do not consider whether the contract was in fact violated when Jones did not receive representation. State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

We next consider whether all DHS police interviews trigger the right to union representation. We agree with the Hearing Examiner (p. 21) that they do not. Where the information gathered during a criminal investigation cannot be used to impose or sustain disciplinary determinations, the interview is sufficiently separate

from any disciplinary proceeding to dispel any reasonable fear of discipline.[4/] While criminal convictions may lead to the loss of employment, N.J.S.A. 2C:5-1(a), our case law establishes that public employees should be treated the same and not better than other New Jersey citizens during criminal investigations. Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16037 1985).

We next consider whether Jones was entitled to union representation during his interview with police officer Desmarias. Under the particular circumstances of this case, we conclude he was. It appears that the State intends to enforce a firm prohibition against the contents of criminal investigation reports being considered in disciplinary proceedings. But on this record we cannot say that this firm prohibition existed. Instead an employee being questioned about thefts in areas where he worked could reasonably fear that his responses might be repeated, if the criminal case had been closed, in disciplinary proceedings. Given the gap for closed criminal cases in the otherwise firm wall, and absent an assurance that no discipline would flow from the interview, Jones could have reasonably feared he might be disciplined. See, e.g., Lennox Inds., Inc., 244 NLRB No. 88, 102 LRRM 1298 (1979), enf'd 637 F.2d 340, 106 LRRM 2607 (5th Cir. 1981), cert. den., 452 U.S. 963 (1981). An employee in Jones' situation could have been especially concerned given the simultaneous

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4/ We do not require an "announcement" that the investigation is criminal rather than disciplinary. But the presence or absence of an announcement may bear on whether an employee reasonably feared discipline in a particular case.

administrative and police investigations, the power of the police officers to conduct administrative investigations, and the absence of any clear statements separating these investigations.

We finally consider the remedy. No discipline flowed from this interview. The proper remedy is an order requiring the employer to refrain from further violations.

We have found a violation and established guidelines for future situations such as these. We believe these actions sufficient to reduce the potential for future violations.

ORDER

The State of New Jersey (Department of Human Services) is ordered to cease and desist from:

Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by denying union representation to employees interviewed by Department of Human Services police where the employees have a reasonable basis to believe the information gathered at the interviews is available for purposes of administrative discipline.

The State should notify the Chairman of the Commission within twenty (20) days of receipt what steps it has taken to comply herewith.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Wenzler, Bertolino, Reid, Smith and Johnson voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
August 12, 1988
ISSUED: August 15, 1988

H.E. NO. 88-55

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and- Docket No. CO-H-87-307

IFPTE, LOCAL 195,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the State of New Jersey (Department of Human Services) violated subsection 5.4(a)(1) of the New Jersey Employer-Employee Relations Act by denying union representation to an employee interviewed by the Department of Human Services police where the employee requested representation and had a reasonable basis to believe the information gathered at the interview would be available for purposes of administrative discipline.

The Hearing Examiner further recommends that the Commission find that the State did not violate the Act when the Human Services police interviewed a second employee because the police ended the interview after the employee requested representation.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 88-55

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

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Appearances:

For the Respondent, Cary Edwards, Attorney General (Michael L. Diller, Deputy Attorney General)

For the Charging Party, Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, Esqs. (Arnold S. Cohen, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On April 24 and July 7, 1987, IFPTE, Local 195 ("Local 195") filed an unfair practice charge and amended charge against the State of New Jersey (Department of Human Services) ("State"). Local 195 alleges the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), (4) and (5),[1/] and

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

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the parties' contract when it denied two employees union representation during interviews conducted by Department of Human Services police.

On July 15, 1987, a Complaint and Notice of Hearing issued.

On July 28, 1987, the State filed its Answer admitting the employees were denied union representation but denying it violated the Act. The State claims the interrogations were for criminal, not disciplinary purposes, and did not trigger a right to union representation. It further claims that public policy and the United States and New Jersey Constitutions preclude the

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1/ Footnote Continued From Previous Page

rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act, and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

interposition of a union representative in criminal investigations. Finally, the State claims the matter is moot because no discipline was imposed.

On September 16, October 14 and November 16, 1987, I conducted a hearing. The parties waived oral argument, but filed post-hearing briefs.[2/] On March 7, 1988, the State filed a reply.

Upon the entire record I make the following:

FINDINGS OF FACT

1. On March 19, 1987, a shipment of food was delivered by truck to the Veterans' home in Paramus, New Jersey. During a department heads' meeting, food service supervisor Donald Yennello mentioned that two boxes of prunes and one box of raisins were missing from the shipment. Sergeant David Brown of the Human Services police, who regularly attended the weekly meetings, stated that he should be the one to investigate (TB14-TB16; TB42-TB46).[3/] Brown assigned police officer Willie A. Terry to begin an investigation. Terry interviewed Richard O'Brien, the assistant store room clerk, and Jim Benton, who accompanied driver

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2/ With its brief, the State moved to supplement the record with three documents. On February 29, 1988, Local 195 consented. I grant the State's motion and admit the documents as follows: R-8 is Administrative Order 1:50 dated December 28, 1983. R-9 is an accompanying memorandum. R-10 is a Supplementary Investigation Report dated April 10, 1987.

3/ TA refers to the transcript of September 16; TB to October 14; TC to November 16. In TC, the attorneys' names were transposed.

Raymond Acevedo when the pickup and delivery were made (R-2; TB55; TB68; TB84-TB88). Terry became unavailable and Brown continued the investigation (TB22).

On April 7, 1987, Brown called Acevedo's supervisor, Andrew Suzs, and asked him to send Acevedo to Brown's office (TB46). Brown asked Sergeant Kleso, a trained police officer from a Human Services facility at Totowa, to accompany him during Acevedo's interview (TB17). The other Paramus officers had not yet been to the police academy (TB18). Acevedo was unloading a truck when Suzs told him to report to the police department upstairs (TA24). Acevedo reported to Brown who stated that he and Kleso had to question him in another room (TA28). In that room, Brown and Kleso asked Acevedo to give a statement about the missing food (TA29; TA48-TA52; TB18-TB19; TB48; TB66-TB67). They then asked Acevedo to sign statements acknowledging that his Miranda[4/] rights had been read to him and waiving his right to counsel. Acevedo signed the first part of the card acknowledging that he had been read his Miranda rights, but refused to waive his right to counsel (R-6; TA30; TA51-TA52; TB66). Acevedo stated he first wanted to speak to his union or a lawyer (R-3; TA29-TA32; TA50-TA51; TB18-TB19; TB47; TB66-TB67; TB72-TB75). Kleso told Acevedo to get back to them when he got his lawyer or talked to his union (TB19). Acevedo then left (TA32). At a later date, Brown again asked Acevedo for a statement

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4/ Miranda v. Arizona, 384 U.S. 436 (1966)

(TB19-TB20). Acevedo told Brown that a union lawyer had taken care of things, but Acevedo eventually gave a statement without any representation (R-4; TB19-TB20). He stated that when they picked up the food, they returned directly to the Veterans' Home and he was sent home before unloading the truck. He indicated that it was possible they did not load the missing items onto the truck (R-4). No criminal charges were brought against Acevedo. That investigation is at a standstill (TB29).

Employee Relations Officer Frank Yarrish was told by executive assistant Joseph Romano that some cases of food were missing and that an investigation was being conducted. Specifically, Romano mentioned that the maintenance department was looking into it (TB88-TB91). Yarrish asked Acevedo's supervisor if he had investigated. The supervisor responded that after speaking to the two employees on the truck, he concluded there were no grounds for any administrative action (TB91). The supervisor also indicated that the Human Services police were investigating (TB92). Yarrish contacted the police who indicated they had no grounds for any criminal charges. He did not ask about the details of their investigation (TB92). No administrative charges were brought against Acevedo or anyone else concerning this incident (TB94).

The police had not previously given Yarrish any information about their criminal investigations. They typically would provide only copies of criminal complaints. In one of two other incidents

of simultaneous administrative and police investigations during Yarrish's tenure, the police indicated that a complaint had been filed but Yarrish did not ask the police about their investigation. In the second incident, three employees were charged with assault. Yarrish was informed of the incident by the administration, but did not ask the police for their report or conclusions about the incident. He asked and was told that the police were going to charge the employees (TB99-TB102). Yarrish believed he could subpoena police officers to attend departmental hearings but that they would provide only information gathered in the course of their routine security checks (TB104-TB105). Yarrish never used police officers to testify in disciplinary proceedings in the year he was at Paramus. He has provided the police with information from his administrative investigations that he thought might help them prepare criminal complaints (TB95).

Human Services police have police authority within the facilities of State institutions. At Paramus, the police office is located in the general office area (R-1). In the security room, there are desks for an officer and for the institution's telephone operator (TB12). Police unlock doors and distribute vehicle keys to employees (TB13-TB14).

2. Derrick Jones is employed at Marlboro Psychiatric Hospital as a senior building maintenance worker. On April 9, 1987, Jones was cleaning a cottage and noticed he was late for his

2:00 p.m. break. He took his break from 2:05 until 2:20. His foreman asked why he was sitting at that time and reported him to supervisor Cleveland Watson. Watson questioned Jones and told him to report to the hospital building to take a test (TA65-TA66; TC5). He told Jones he smelled something. Jones said he smelled something too and refused to take any test. Watson then told Jones he was suspended with pay until a preliminary hearing and that he should report to employee relations officer Elizabeth Blackwell (TA65-TA71). Jones instead telephoned his union representative, John Stark (TA68). A supervisor answering the telephone told Jones that Blackwell was not in that day (TA70). Stark also was not in, so Jones spoke to Nicholas Tzanakis, the union's Marlboro chapter vice-president. Tzanakis told Jones to come to his office. By that time, it was Jones' quitting time.

The next morning, Jones reported to Blackwell. She told him not to worry about the test and to report to work (TA72-TA73). The policy was for doctors, not supervisors to decide when tests were appropriate (TC5). When Jones returned from lunch at 12:30 p.m. and was signing in at the housekeeping office, Watson told him to wait (TA73-TA74). Not knowing why he had to wait, Jones called Tzanakis who said he would be right over (TA77). When Tzanakis arrived, Watson told him "they were having an investigation because a client had said that [Jones]...had sold some marijuana to him and not to tell Derrick nothing" (TA121-TA122). Watson said that both

personnel and the police were investigating (TB136), and that he had "talked to Miss Blackwell and one Detective from the Police Department..." (TA122). Tzanakis returned to his workplace and called the union office in East Brunswick to explain the situation. While Tzanakis was gone, three Human Services police officers entered the housekeeping office. Sergeant Luann Aquila met with Watson. After the officers left, Watson told Jones to report next door to the police headquarters (TA77-TA80). The housekeeping office and police headquarters share a building.

Jones went next door and was interviewed by Human Services police officer Barry Desmarias about a theft of patients' property (TB116-TB117). Jones was not given a Miranda warning because Desmarias felt he was "more so a potential witness rather than a suspect at that time" (TB122). Jones requested a union representative and Desmarias told him he was not entitled to one during a police interview (TB123). When Jones tried to call his union representative by dialing a four digit number within the hospital, Desmarias told him to hang up. When Jones did not, Desmarias pushed down the receiver button (TB123). Jones then answered some questions (TB124). When Desmarias saw the interview was not providing him with any useful information, he ended it. No charges were brought and neither Desmarias nor Aquila discussed the case with anyone outside the police chain of command. Desmarias believed, from his training, that union representatives were not permitted to be present during police interviews (TB132).

After the police interview, Jones returned to Watson who stated he had nothing to do with it and that Jones should go and see Blackwell (TA85). When Tzanakis returned to housekeeping, Jones had already left. Tzanakis joined Jones at the personnel office where Blackwell informed them that Jones was suspended with pay and that there would be a Loudermill[5/] hearing (TA127-TA128; TC9). At the hearing, Blackwell gave Jones a Preliminary Notice of Disciplinary Action charging him with sale or possession of alcoholic beverages or controlled dangerous substances while on State property and engaging in financial transactions with patients (CP-1). The charges were based on a April 9, 1987 statement given by a patient to the residential coordinator. Staff members had talked to some patients about missing money and one patient said that Jones had sold him fake marijuana cigarettes. The patient knew Jones by another name, but was sure he was the one that had sold him tea cigarettes (TC8). Blackwell did not know at that time that the police were conducting an investigation. The police were not involved in the suspension decision (TC10).[6/]

5/ Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 (1985).

6/ Jones testified the police told him he was suspected of selling a fake marijuana cigarette to a client. Jones claimed he told the police he did not have to answer any questions because he was alone. He also testified the officers gave him a Miranda card (TA83) and that he told them he already knew his rights and did not read the card.

Aquila, Desmarias and the State's documents indicated that the

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After his April 15, 1987 Loudermill hearing, Jones was suspended without pay. No police officer was present and Tzanakis did not see any police documents (TA140). At the next hearing a few months later, Jones was reinstated with some backpay through a settlement (TA64-TA88). No criminal charges were ever brought against Jones for this incident (TA107).

3. On January 1, 1984, Department of Human Services Commissioner George Albanese issued an administrative order consolidating all police within the Department of Human Services under the chief of police and security (R-8). Police officers at the institutions had previously reported to the superintendents of the institutions or the state police depending on the type of institution. The order states that the person in charge of each

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6/ Footnote Continued From Previous Page

police investigation involved the theft of money, not the marijuana incident. They also indicated Jones was not read his Miranda rights. I credit the State's factual account because the contemporaneous documentary evidence supports the finding that the police investigation involved the theft, while the administrative investigation involved the marijuana. Jones could very easily have been confused because the investigations were simultaneous; Jones met with Watson, the police and Blackwell on the same day, and both incidents apparently involved the same clients, cottages and time period.

facility and police personnel shall alert each other to criminal acts, violations of the law, or suspicious acts or incidents that may infringe upon the orderly and proper administration of the facility.

Human Services Police Chief Raymond Brennan decides what information is available to the administration (TB143). If an administrative hearing is being conducted by the institution and a police officer is subpoenaed, the officer can testify, but cannot divulge any information about an active criminal investigation (TB144).

4. On November 4, 1983, then Chief of Human Services Police Angelo Ferrara issued a special order barring the release of any information about confessions, admissions, or statements given or withheld by the accused. An officer may announce without further comment that the accused denied the charges (R-7).

On October 12, 1984, Ferrara issued Special Order #27 (R-7). It states that no police reports will be released to institutional administrative officials to be used in any disciplinary administrative action. It permits administrative use, through subpoena process, of testimony from a police officer who can rely on his investigatory notes and reports. It also requires that investigations leading to criminal action and administrative disciplinary action be separate. The police may not be part of the administrative process.

Detective Sergeant Kleso has testified at Human Services departmental hearings about his investigations (TB78). He described his testimony as follows: "we would say on so-and-so date we arrested mister so-and-so committing whatever crime he has committed over there; and just like that" (TB78). He would "not really" explain the circumstances of his investigation because he was not allowed to (TB78).

5. Investigative reports cover criminal matters. Human Services police use the uniform crime reporting system and adhere to procedures requiring confidentiality to all except officers of the court, other police agencies, the attorney general or the prosecutor (TB145). Brennan did not know if, before 1984, information gathered by police officers would be handed over to the facility head (TB150).

If a criminal investigation ends with no indication that a crime was committed and the case is closed, that information, not the report, can be divulged at an administrative hearing (TB157).

6. Operational reports cover noncriminal activities such as walk-away patients or employees found to be in unauthorized places. Information about the employees' whereabouts would be made available to the institution. If an officer assisted in subduing an unruly patient and an employee was charged with noncriminal patient abuse, information about the incident would be made available to the institution. Also, information related to the operational (noncriminal) aspects of the police officer's functions

can be testified to at administrative hearings (TB144). Union representation is permitted during operational investigations (TB162-TB163)

7. Article VIII(M)(1) of the parties' July 1, 1986 to June 30, 1989 agreement provides, in part:

> Where an employee is interrogated during the course of an investigation and when there is reasonable likelihood that the individual being questioned may have formal charges preferred against him, the nature of those contemplated charges shall be made known to the employee who shall then, if he so requests, be entitled to a representative of the union, only as a witness or as an advisor, during subsequent interrogation concerning the charge provided that the interrogation process shall not be delayed and/or the requirement to expedite any official duty not be impaired.

ANALYSIS

In East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in pert. part App. Div. Dkt. No. A-280-79 (6/18/80), the Commission adopted the rule, developed by the National Labor Relations Board, affording employees the right to union representation at any investigatory interview that the employee reasonably believes could lead to discipline. See N.L.R.B. v. Weingarten, Inc., 420 U.S. 251 (1975).

The Court in East Brunswick stated:

> Although Weingarten involved the interpretation of the National Labor Relations Act (NLRA), 61 Stat. 136, 29 U.S.C.A. §141 et seq., the sections of the federal statute construed by the United States Supreme Court are almost identical to those enacted by our Legislature. Lullo v. Intern. Assoc. of Fire Fighters, 55 N.J. 409, 429 (1970). This similarity is not a coincidence since our Legislature used the federal

> scheme as a model in enacting the provisions of our statute. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n. of Ed. Sec., 78 N.J. 1, 9 (1978); Lullo, above, 55 N.J. at 424. Consequently, the experience and adjudications under the NLRA are appropriate guides for interpreting the unfair practice provisions of the New Jersey public employment statutory scheme. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25, 46 (1978); Lullo, above, 55 N.J. at 424.
>
> Weingarten recognizes that requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the NLRA was designed to eliminate and bars recourse to the safeguards the act provides "to redress the perceived imbalance...between labor and management." Weingarten, 420 U.S. at 262. Deferring representation until the employee has filed a formal grievance challenging the employer's determination of guilty and subsequent disciplinary action would not be a viable alternative. At that point, it becomes increasingly difficult for the employee to vindicate himself and the employer is more concerned with justifying his actions rather than reexamining them. Representation is needed at the meeting since the employee may be too fearful or inarticulate to present his version of the matter. Union representation at this stage is not only safeguarding the employee's interest but also the interest of the entire bargaining unit by making certain that the employer does not initiate or continue a practice of imposing punishment unjustly. Weingarten, 420 U.S. at 260-264. [Slip opinion at 6-8]

Since East Brunswick, the Commission has applied the Weingarten rule in cases where an employee requested representation and reasonably believed that the investigatory interview might result in discipline. Dover Municipal Utilities Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984); Stony Brook Sewerage Auth., P.E.R.C. No. 83-138, 9 NJPER 280 (¶14129 1983); East Brunswick Tp., P.E.R.C. No. 83-16, 8 NJPER 479 (¶13224 1982); Cape May Cty.,

P.E.R.C. No. 82-2, 7 NJPER 432 (¶12192 1981); Camden Vo-Tech. School, P.E.R.C. No. 82-16, 7 NJPER 466 (¶12206 1981); see also, Procopio, A Weingarten Update, 1986 Lab. L.J. 340.

Local 195 argues that because the Human Services police department is an arm of the Department of Human Services, the police are under the same legal obligations regarding the right to union representation as other Human Services supervisory employees. It relies on section 5.3 of the Act, Article I, paragraph 19 of the New Jersey Constitution and private and other public sector caselaw.

The State concedes that the NLRB has concluded that the criminal nature of the alleged employee conduct under investigation is not in itself sufficient to insulate an interview from Weingarten protections, citing U.S. Postal Service , 241 N.L.R.B. 141, 100 LRRM 1520 (1979).7/ It maintains, however, that Weingarten rights are statutory, not constitutional, and that the Commission has no jurisdiction to enforce constitutional rights. It further maintains the Commission has no jurisdiction to order police to permit union representatives at their interviews. It argues that police perform their duties of enforcing the State's criminal laws in a capacity separate and above their administrative roles as public employees attached to the Department of Human

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7/ In fact, Weingarten itself involved a grocery store employee accused of fraudulently underpaying for groceries and eating lunches at a store facility without paying for them.

Services. The State contends that if a public employer uses police gathered information to discipline, the employer, not the police agency, runs the risk of violating the Act, no matter what the relationship between the police and the employer. The State argues that, as a general matter, the interjection of unqualified union representatives into criminal investigatory questioning presents the specter of tremendous harm to the union and the employee. Finally, the State argues the sole question is whether it used the investigative reports to discipline either Acevedo or Jones and that the evidence is clear that it did not.

The State concedes that both Acevedo and Jones requested representation during their respective interviews by Human Services police. Under the Weingarten test, the remaining question is whether the employees had a reasonable fear the interviews might result in discipline.

A reasonable fear of discipline can exist even where the investigation is criminal. In Postal Service, the NLRB affirmed the right to union representation for an employee interviewed by Postal Service inspectors and ultimately disciplined based on evidence obtained as a result of the criminal investigation. It found the employee had requested a representative and had a reasonable fear the interview might result in discipline. It also addressed many of the arguments raised here:

> [The Postal Service contends that] if an employee is afforded the right to have a union

> representative present during a criminal investigation conducted by postal inspectors, there might exist a significant interference with "legitimate employer prerogatives," in having the federal laws dealing with postal offenses properly investigated. Although we are not unmindful of the serious nature of the offenses which the Postal Inspection Service is charged with investigating, the fact remains that in the instant case, the Respondent administratively disciplined 43 security police officers...and in each case the discipline was based on evidence obtained as a result of the criminal investigation conducted by the Postal Inspection Service. The only employee who was accorded a separate administrative investigation was Jenkins, but,...the "letter of warning" issued to Jenkins was based on evidence derived from the criminal investigation. Thus, were we to accept the Respondent's argument that "legitimate employer prerogatives" and the public safety require the exclusion of all union representatives from criminal investigations conducted by the Postal Inspection Service, while at the same time permit the Respondent to administratively discipline employees based on the fruits of such criminal investigations, we would in effect be nullifying the Weingarten rights of any Postal Service employee who might be administratively disciplined as the result of a criminal investigation. Such an outcome is clearly repugnant to the historical development by the Board of the principle, approved by the Supreme Court in Weingarten, that Section 7 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. [100 LRRM at 1521]

Accordingly, the employee was entitled to both an attorney under Miranda, and a union representative under Weingarten. The Administrative Law Judge distinguished both the origins and purposes of the two rights.

> Weingarten rights are statutory rights created by the NLRA with respect to possible adverse action relating to employment, not with respect to possible criminal liability, and do not have as

> their sole purpose the protection of the individual employee who seeks representation. Rather, Weingarten contemplates that the union representative will safeguard "not only the particular employee's interest but also the interest in the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing a punishment unjustly."
>
> * * *
>
> On the other hand, Miranda rights are aspects of the rights to counsel and against self-incrimination which the Constitution affords to individuals as such in connection with criminal investigations.
>
> * * *
>
> Nor can it be said that the Miranda protections are in all respects "greater" than the Weingarten protections. While an attorney would likely be more familiar than a union representative with the employee's rights under the criminal law, a union representative would likely be more familiar with the employee's bargaining agreement rights regarding the uniform allowance, retention of his job, and the disciplinary and grievance-arbitration procedure. [241 N.L.R.B. at 151-152; citations omitted]

The logic of Postal Service applies here. If employees reasonably fear they can be disciplined as a result of criminal investigations, then employees subject to such interviews and their unions should be entitled to Weingarten protections.[8/] To allow otherwise would be repugnant to the purposes of the Act. See AFSCME, Council 61 and State of Iowa, PERB Case No. 2891 (2/26/85) (Weingarten rights apply during course of criminal investigation if the employee reasonably feels that disciplinary action could be taken).

8/ This is not a case where the police are not employees of the same public employer, but nonetheless provide information to the employer.

Acevedo was told the subject of his interview and read his Miranda warnings. He refused to speak to the police without legal or union representation. The police then properly ended the questioning. They told him to get back to them when he had contacted a lawyer or his union. Under Weingarten, once an employee makes a valid request for union representation, the employer is permitted to discontinue the interview without liability. Amoco Oil Co., 238 N.L.R.B. No. 84, 99 LRRM 1250 (1978). Acevedo ultimately gave a statement but was not forced to do so without representation. No information gathered by the police was turned over to the administration. The administration conducted its own limited investigation and took no disciplinary action. Accordingly, I recommend the Commission dismiss the allegation relating to Acevedo.

Jones, on the other hand, was interviewed and never told the investigation was criminal. In fact, he was a potential witness, not a criminal suspect. Under the particular facts of this incident, I find that Jones was entitled to union representation.

Human Services police differ from traditional police in that they have both police and non-police functions. They conduct criminal and administrative investigations. In addition to alleged criminal conduct, they investigate possible breaches of administrative rules and regulations. The results of the administrative investigations can be the basis for employee discipline.

Desmarias characterized his meeting with Jones as an interview, not an interrogation. Jones was not under arrest and was not a suspect. Unlike Acevedo, he was not read his Miranda rights which, although not extinguishing his Weingarten rights, would have put him on notice of the criminal nature of the investigation. See United States Postal Service.[9/] The State may have already decided that discipline would not result from the police's theft investigation, as opposed to the administration's marijuana investigation. But it took no action to dispel Jones' apprehension by advising him that no disciplinary action would flow from the interview. See, e.g., Lennox Indus., Inc., 244 N.L.R.B. No. 88, 102 LRRM 1298 (1979), enf'd 637 F.2d 340, 106 LRRM 2607 (5th Cir. 1981). Even Watson confused the respective roles the police and administration were playing in the two investigations. He assumed and told Tzanakis that both personnel and the police were interviewing Jones about the marijuana incident.

Finally, this incident must be examined in light of Chief Brennan's testimony that if a criminal case is closed and there is no indication that a crime was committed, information gathered during the investigation could be divulged at an administrative

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9/ In Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 16086 (¶16087 1985), the Commission found that police officers could not negotiate for greater protections as citizens during criminal investigations than those accorded other citizens. It distinguished investigations which may lead to criminal charges from those that may lead to internal disciplinary charges. It did not, however, address the issue, raised here, of interviews that could lead to either or both. Also, it only addressed contractual, not statutory rights.

hearing. That practice muddies the clear line separating administrative and criminal investigations. It also appears to conflict with the special order mandating that the investigations leading to criminal action or administrative disciplinary action must be "separate and distinct" investigations where the police are not a part of the administrative process.

All these factors lead me to conclude that Jones could have reasonably feared discipline. Accordingly, I recommend that the Commission find that the State violated subsection 5.4(a)(1) of the Act when a Human Services police officer continued to interview Jones about a theft of client money after Jones requested union representation.10/

I am not finding, however, that all Human Service police interviews trigger the right to union representation. Where the information gathered during an announced criminal investigation cannot be used for disciplinary purposes, the interview is sufficiently separate, even though conducted by employees of the same employer, to dispel any reasonable fear of discipline.

10/ I specifically reject the State's argument that the Commission has no jurisdiction to order police to permit union representatives to be present during police interviews or interrogations. The State's reliance on Fare V. Michael C., 442 U.S. 707 (1979) is misplaced. That case holds that a request for a probation officer is not a per se invocation of Fifth Amendment rights under Miranda, not that police may deny the statutorily required right to union representation at interviews that have an employment nexus.

Local 195 also argues that the State repudiated Article VIII(M)(1) of the parties' agreement. That article provides protections that track the Weingarten protections provided by the Act. The State has argued that criminal investigations and administrative investigations are separate and that all Weingarten and contractual rights during administrative investigations will be observed. I have found that the State's action in the Jones incident departed from the articulated policy of separate investigations. That conduct, while it may have violated the contract, is not a repudiation of the agreement.

Local 195 also argues that the State's conduct violated Article I, paragraph 19 of the New Jersey Constitution. The right to representation at an investigatory interview is a statutory right designed to "redress the perceived imbalance...between labor and management." East Brunswick, App. Div. Slip opinion at 7, citing Weingarten, 420 U.S. at 262. Such interviews involve neither grievances nor negotiations. Union representation in such interviews is not constitutionally protected.

Local 195 has failed to prove that the State's action violated subsections 5.4(a)(2), (3), (4) or (5) and I recommend those allegations be dismissed.

RECOMMENDED ORDER

I recommend that the Commission order:

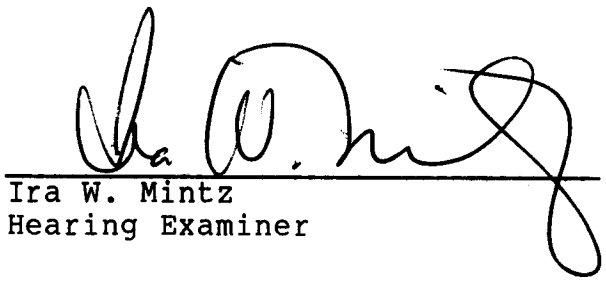
A. The State of New Jersey (Department of Human Services) to cease and desist from interfering with, restraining or

coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by denying union representation to employees interviewed by Department of Human Services police where the employees have a reasonable basis to believe the information gathered at the interviews is available for purposes of administrative discipline.

B. The State take the following affirmative action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.



Ira W. Mintz
Hearing Examiner

Dated: May 11, 1988
Trenton, New Jersey

Appendix "A"
Recommended Notice

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by denying union representation to employees interviewed by Department of Human Services police where the employees have a reasonable basis to believe the information gathered at the interviews is available for purposes of administrative discipline.

Docket No. CO-H-87-307

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
(Public Employer)

Dated _____

By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.