

NEW YORK CITY TRANSIT AUTHORITY v. PUBLIC EMPLOYMENT RELATIONS BOARD

New York Court of Appeals, 2007
8 N.Y.3d 226, 864 N.E.2d 56

SMITH, J.

The National Labor Relations Act (NLRA), as interpreted in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975), gives to an employee of a firm subject to the NLRA the right to have a union representative present with the employee at an investigatory interview, if the employee reasonably believes that the interview might result in disciplinary action—a so-called “*Weingarten* right.” We hold today that the Taylor Law does not give a *Weingarten* right to New York public employees.

Facts and Procedural History

This case arises out of the New York City Transit Authority's interview of one of its employees, Igor Komarnitskiy. The Authority was informed that Komarnitskiy, a car inspector, had become angry when asked to show a pass before entering a train yard and that, in objecting to the request, he had used a racial slur in referring to employees he thought were treated less strictly. The Authority asked Komarnitskiy for a written response to the allegation, and Komarnitskiy provided one that he had prepared with the help of a representative of the Transport Workers Union (TWU). The Authority, suspicious that the TWU representative had influenced or dictated the content of the response, ordered Komarnitskiy to come to a supervisor's office to prepare a new response, and refused to allow TWU representatives to come with him.

The TWU filed an improper practice charge against the Authority, claiming that it had violated Komarnitskiy's *Weingarten* right. The Public Employment Relations Board (PERB) upheld the charge, and the Authority brought this CPLR article 78 proceeding against PERB and the TWU, asking that PERB's decision be annulled. The Supreme Court dismissed the proceeding, and the Appellate Division affirmed. We granted leave to appeal, and now reverse.

Discussion

* * *

Civil Service Law § 202 provides: “Public employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing.”

This statutory language is in some ways similar to, but in more relevant ways different from, that of the statute interpreted in *Weingarten*, section 7 of the NLRA (29 USC § 157). Section 7 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 * * *”

While some of the rights given by section 7 (“to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing”) have close counterparts in section 202 (“to form, join and participate in * * * any employee organization of their own choosing”), those are not the rights that the Supreme Court relied on in *Weingarten*. Rather, *Weingarten* upheld the NLRB's decision that the right to “engage in * * * concerted activities for the purpose of * * * mutual aid or protection” included a right to have union representatives present at disciplinary interviews (420 U.S. at 260, 95 S.Ct. 959). Since the “mutual aid or protection” language is absent from section 202, *Weingarten* does not support a holding that section 202 creates a *Weingarten* right. * * *

PERB and the TWU argue that a *Weingarten* right may be inferred from section 202's provision for “the right to * * * participate in” labor unions. The right to union representation at disciplinary interviews, however, is not inherent in the right to participate in a union. Of course, employees may seek such a right of representation in collective bargaining; in doing so, they are protected by the Taylor Law's provision, in Civil Service Law § 203, that they “shall have the right * * * to negotiate collectively with their public employers in the determination of their terms and conditions of employment.” But nothing in the text of the Taylor Law suggests that a *Weingarten* right is given by the statute itself.

The text and legislative history of a later-enacted statute strongly support our conclusion that the Taylor Law does not confer a *Weingarten* right. In 1993, 26 years after the Taylor Law's enactment, and 18 years after *Weingarten*, the Legislature amended Civil Service Law § 75(2) – which applies to many, though not all, of the public employees protected by the Taylor Law – to add the following language:

An employee who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization under article fourteen of this chapter and shall be notified in advance, in writing, of such right. If representation is requested a reasonable period of time shall be afforded to obtain such representation. If the employee is unable to obtain representation within a reasonable period of time the employer has the right to then question the employee. A hearing officer under this section shall have the power to find that a reasonable period of time was or was not afforded. In the event the hearing officer finds that a reasonable period of time was not afforded then any and all statements obtained from said questioning as well as any evidence or information obtained as a result of said questioning shall be excluded, provided, however, that this subdivision shall not modify or replace any written collective agreement between a public employer and employee organization negotiated pursuant to

article fourteen of this chapter.” (L. 1993, ch. 279, § 1.)

Section 75(2) gives the employees to which it applies a kind of *Weingarten* right, but one different from the right that PERB and the TWU ask us to find in the Taylor Law. Under section 75(2), a violation of a *Weingarten* right results not in an improper practice proceeding before PERB, but in the exclusion from a disciplinary hearing of statements made at the interview and evidence obtained as a result. And the *Weingarten* right created by section 75(2), unlike the right given by the Taylor Law to “participate in ... employee organization[s],” may be surrendered in collective bargaining. It would have made no sense to create the section 75(2) version of the *Weingarten* right if a more robust version of that right already existed under the Taylor Law.

The history of the 1993 legislation shows clearly that its supporters did not believe that any *Weingarten* right existed in New York law before 1993. The supporting memorandum of the Senate sponsor of the 1993 legislation says: “New York State public employees do not have the same protection enjoyed by private sector employees during interviews and discussions by their employers,” and goes on to defend the idea of creating such a right with language taken from the Supreme Court's *Weingarten* decision (Senate Introducer Mem. in Support, Bill Jacket, L. 1993, ch. 279, at 22). A letter from a supporter of the legislation, the president of a civil service union, similarly notes that, under existing law, New York public employees lack the protections enjoyed by private sector employees, and adds: “This protection has been affirmed by the United States Supreme Court in *NLRB v. Weingarten*. * * *” (Letter from Joseph E. McDermott, President of Civ. Serv. Empls. Assn., Mar. 29, 1993, Bill Jacket, L. 1993, ch. 279, at 49; *see also* Letter from Stanley Hill, Exec. Director, Am. Fedn. of St. County & Mun. Empls., AFL-CIO, Dist. Council 37, July 13, 1993, Bill Jacket, L. 1993, ch. 279, at 59). We see no basis for concluding that the supporters of the 1993 legislation misunderstood the existing law, and were wasting their time in changing it.

Accordingly, the order of the Appellate Division should be reversed, with costs, the petition granted, PERB's determination of October 2, 2002 annulled, and the improper practice charge dismissed.

KAYE, C.J., dissenting

In 1967, the New York State Legislature enacted the Public Employees' Fair Employment Act (Civil Service Law, art. 14, § 200 *et seq.*, popularly known as the Taylor Law [L. 1967, ch. 392, § 2]), explicitly to promote harmonious labor relations in the public sector. Today's decision will, I fear, foster dissonance.

The Public Employment Relations Board (PERB) determined that permitting an employee to have a union representative at an interview which the employee reasonably fears may result in discipline is a right granted under the Taylor Law. Construing the statute *de novo* (assuming that is the proper standard), I agree with PERB that the fundamental right to participate in a union – as the Legislature intended – includes the right to a union representative's attendance at a precharge interview, and I would affirm the orders of the trial court and the Appellate Division so holding.

* * *

In *Weingarten* the United States Supreme Court upheld a National Labor Relations Board (NLRB) determination that an employee in the private sector has a right “to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline” (*id.* at 256, 95 S.Ct. 959, 43 L.Ed.2d 171). The case involved a lunch counter worker accused of stealing. When a store manager and security agent questioned her, she was denied her request to have the presence of her union representative at the interview. Bursting into tears, she explained that she had thought she was permitted to eat lunch without paying, and the manager pressed her to sign a statement; but the manager later learned that a different branch of the store where she had recently worked did have the “free lunch” policy.

The Court in *Weingarten*, upholding the finding that the employer had committed an unfair labor practice, based its determination that employees may be represented at an interview that could lead to discipline on language in National Labor Relations Act § 7 that “ ‘[e]mployees shall have the right ... to engage in ... concerted activities for the purpose of ... mutual aid or protection.’ ” * * * The Court also based its rationale on the policies underlying the statute:

Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the [National Labor Relations] Act was designed to eliminate, and bars recourse to the safeguards the Act provided ‘to redress the perceived imbalance of economic power between labor and management’ (*id.* at 262, 95 S.Ct. 959 [citation omitted]).

The Supreme Court emphasized the benefits to employers as well as employees: “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. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.”

A court must give effect to the intention of the Legislature by considering, first, the language in “its natural and most obvious sense,” then “the general spirit and purpose underlying its enactment” and, later, extrinsic evidence, such as legislative history. The majority today reverses PERB's determination essentially because the words, “concerted activities for the purpose of * * * mutual aid or protection” are not found in the Taylor Law. That section 202 of the Taylor Law omits these words, however, does not contravene an interpretation that the word “participate” in its “natural signification” in the Taylor Law manifests a legislative intent to allow public employees the right to union representation at an investigatory interview when the employee seeks that representation.

Section 200 of the Taylor Law states its underlying purpose:

The legislature of the state of New York declares that it is the public policy of the state and

the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. These policies are best effectuated by (a) granting to public employees the right of organization and representation
* * *

Issues concerning union representation on disciplinary matters for bargaining unit members are part of the employment relationship in the public sector. Thus, a proper interpretation of the Taylor Law is that it incorporates the right to have representation relating to informal investigations of employee conduct – a construction that is not negated by the existence of a statute that addresses formal disciplinary actions in Civil Service Law § 75. To “participate” means to take part in something, usually in common with others. Seeking advice from a union representative when a bargaining unit member is most vulnerable certainly is encompassed in the plain language of “participate.”

As noted above, the underlying purposes of the Taylor Law are to promote cooperation and to assure “the orderly and uninterrupted operations and functions of government”-in other words, to prevent strikes. In 1969 – two years after the original law was passed and six years before *Weingarten* was decided-a panel led by George W. Taylor, after whom the law was named, issued a report (*see* New York [State] Governor's Committee on Public Employee Relations. Recommendations for current legislative action with respect to the Taylor Law [1969] [Report]). The Report emphasized the need to use impasse panels and other deterrents – such as fines and imprisonment – in order to prevent illegal strikes. Section 209-a was added in 1969 (L. 1969, ch. 24, § 7). Thus, at the same time that the Legislature added the section delineating improper practices to ensure that employers would adhere to the statute as a whole, the Legislature also included section 209-a (3) (now subd [6]), which provides: “In applying this section, fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent.”

The thrust of this section is to reinforce the point that public employees in the state do not have the same right to strike as those employees covered by the NLRA – not that state employees do not have the same rights to participate in union activity. Indeed, it is likely that the main reason that section 202 does not include the words, “mutual aid or protection” is to bar strikes – and section 209-a (6) was meant to reinforce that point.

* * *

While the comparison between the Taylor Law and the NLRA * * *highlighted the differences between an “employee organization” as defined in section 201 of the Taylor Law and an unorganized group of individuals, here public and private employees represented by a union are in essentially the same position – seeking to participate in a protected union activity of getting advice from a union representative when discipline is an issue. I take guidance from the *Weingarten*

decision that representation in the circumstances of an employee's reasonable fear that an investigatory interview may result in discipline is consistent with the “most fundamental purposes” of the Taylor Law .

* * *

Moreover, the 1993 amendments in Civil Service Law § 75 do not foreclose a finding of a *Weingarten* right in the Taylor Law. The underlying policies of the Taylor Law and section 75 address different issues. It is possible, for example, for an employee to be terminated following a section 75 hearing, but then be reinstated after PERB finds that the employer committed an improper practice – perhaps discrimination or retaliation. Section 75 sets forth procedures for imposing discipline in accordance with due process. Section 75(2) provides that an employee has a right to representation at the time of questioning and “shall be notified in advance, in writing, of such right.” Section 75(2) also provides for a representative when an employee has already been charged with a disciplinary infraction. The rationale for ensuring that an employer does not “interfere” with a bargaining unit member's representation before the formal filing of charges is to attempt to balance the equities between the power of the employer and the vulnerability of the employee. Deferring representation makes it “increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished” That the Legislature chose to add a right to section 75 that an employee be represented is by no means dispositive that the right to have representation upon request at an investigatory interview is excluded in the Taylor Law.

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Notes

1 In *Dutchess Community College*, 17 PERB 3093 (1984), *rev'd*, 128 Misc.2d 628, 490 N.Y.S.2d 705 (Supt. Ct. Dutchess Cnty.), *rev'd sub nom Rosen v. PERB*, 125 A.D.2d 657, 510 N.Y.S.2d 180 (2d Dep't 1986), *aff'd*, 72 N.Y.2d 42, 526 N.E.2d 25 (1988), the New York PERB, affirmed by the New York courts, held that a group of teachers were not protected when they voiced concerns to management over salaries, classroom size and course load. PERB reasoned that although their conduct was concerted and for mutual aid and protection, it was not participating in an employee organization. Why might a state limit protection to participation in union-related activity, rather than concerted activity generally?

2. Unlike the private sector, most public sector employees are protected by civil service and tenure statutes that contain procedures governing lengthy suspensions and dismissals. Should the presence of such procedures mitigate against applying *Weingarten* in the public sector? The Pennsylvania Labor Relations Board rejected such an argument and applied *Weingarten* in *Township of Shaler*, 11 Pa. P.E.R. ¶ 11347 (Pa.LRB. 1980).

3. In *Commonwealth v. Pennsylvania Labor Relations Board*, 916 A.2d 541 (Penn. 2007), the Pennsylvania Supreme Court affirmed the holding in *Shaler*, and also held that the right to union

representation in an investigatory interview belongs to the employee rather than the union. Consequently, the court held, the employee is entitled to the union representative of his or her choice, provided that the chosen representative is available.

4. If *Weingarten* applies in the public sector, may a union waive the right in a collective bargaining agreement? If so, what language is necessary to waive the right? See *Ehlers v. Jackson County Sheriff's Merit Commission*, 183 Ill.2d 83, 231 Ill.Dec. 932, 697 N.E.2d 717 (1998).

5. Some activities are literally concerted and for mutual aid and protection but, nevertheless, for policy reasons the law does not protect them. For example, employees who assault an abusive supervisor would be acting in concert and for mutual aid and protection but would not be protected against employer discipline or discharge. In the private sector, certain acts of disloyalty, such as disparagement of the employer's products or services, are not protected, even where undertaken to pressure the employer during collective bargaining. See *NLRB v. Electrical Workers Local 1299 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464, 74 S.Ct.172, 98 L.Ed.195 (1953). Should similar disloyal conduct be unprotected in the public sector? What type of conduct by public sector employees should not be protected as a matter of policy? What impact, if any, does the First Amendment have on your answer?