

Case CVIII
No. 21910 PP(S)-47
Decision No. 15716-C

that they had earlier problems with Wianecki coming without notice,
that he had not given the contractual 24 hour notice and that if
Council 24 representatives were present for a meeting, equal levels
of management should be present in the form of labor relations
specialists; that Complainant Cantwell confirmed that he wanted
Wianecki to represent him during the meeting, that Mixdorf informed
Wianecki that he would not be allowed to be present during the
meeting but that Gallagher, as the local steward, would be allowed
to represent Complainant Cantwell; that Mixdorf was acting on the
basis of instructions received from Don Foley, Employment Relations
Specialist, Department of Health and Social Services, State of
Wisconsin, that Complainant Cantwell did not want to attend the
meeting unless Wianecki was present; that after further discussion
Wianecki, Gallagher and Complainant Cantwell left Mixdorf's office;
and that later that morning Complainant Cantwell received the
following letter: (Emphasis supplied to added language.)

"Dear Mr. Cantwell:

This letter is your notification of termination from probationary
employment at the Ethan Allen School effective Monday, August 30,
1976.

The reasons are as follows: Since your employment on June 29, 1976,
you have not benefited from the training that has been made available
to you by your supervisors and fellow Youth Counselors. You have
exhibited a quick temper with the youth and staff, obscene language
in giving instructions to the youth, and, as a trainee, resisted
the counsel of fellow staff and supervisors.

Your failure to meet your 10:00 a.m. appointment on Monday,
August 30, 1976, with your representative, Mr. Gallagher, is
considered your response to our letter of intention for termination
on August 27, 1976.

Yours very truly,

Roland C. Hershman /s/
Roland C. Hershman
Superintendent"

C. That the Examiner's Findings of Fact are further modified by
adding the following:

6. That at all times material herein, the Complainant Union and
the Respondent were parties to a collective bargaining agreement,
which contained the following pertinent provisions:

Article II

Recognition and Union Security

Section 11 - Visitations

24 The Employer agrees that non-employee officers
and representatives of the WSEU or of the International
Union shall be admitted to the premises of the Employer
during workshop hours upon advance notice (24 hours, if
possible) to the appropriate Employer representative.
Such visitations shall be for the purpose of ascertaining
whether or not this Agreement is being observed by the
parties and for the adjustment of grievances ...

. . .

Article IV

Grievance Procedure

. . .

Section 6 - Number of Representatives and Jurisdictions

49 Council 24 shall designate a total of up to 750 grievance representatives who are members of the bargaining units for the bargaining units.

. . .

Section 9 - Discipline

61 The parties recognize the authority of the Employer to suspend, demote, discharge or take other appropriate disciplinary action against employees for just cause. An employee who alleges that such action was not based on just cause may appeal a demotion, suspension, discharge, or written reprimand taken by the Employer beginning with the Third Step of the grievance procedure except that written reprimands shall begin with the First Step of the grievance procedure.

62 An employee shall be entitled to the presence of a designated grievance representative at an investigatory interview (including informal counseling) if he/she requests one and if the employee has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

63 If any discipline is taken against an Employee, both the Employee and Union will receive copies of this disciplinary action.

. . .

Section 10 - Exclusion of Probationary Employees


64 Notwithstanding Section 9 above, the retention or release of probationary employees shall not be subject to the grievance procedure except those probationary employees who are released must be advised in writing of the reasons for the release and do, at the discretion of the Personnel Board, have the right to a hearing before the Personnel Board.

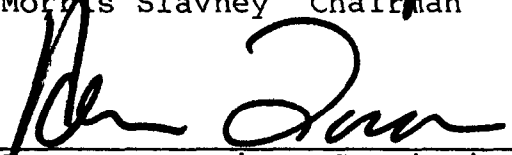
D. That the balance of the Examiner's Findings of Fact are hereby affirmed.

E. That the Examiner's Conclusion of Law and Order are hereby affirmed.

Given under our hands and seal at the
City of Madison, Wisconsin this 31st
day of October, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Morris Slavney Chairman


Herman Torosian, Commissioner


Gary L. Covelli, Commissioner

MEMORANDUM ACCOMPANYING ORDER REVISING
EXAMINER'S FINDINGS OF FACT, AND AFFIRMING
CONCLUSIONS OF LAW AND ORDER

The Pleadings

Terrance P. Cantwell, a probationary employee employed by the State in its Department of Health and Social Services, and Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, jointly filed a complaint, alleging that the State had committed unfair labor practices within the meaning of Sections 111.84(1) (a) and (b) of the State Employment Labor Relations Act by denying Cantwell the right to be represented by a Union representative of his own choice at a scheduled interview with Cantwell's supervisors, wherein Cantwell would be given the opportunity to respond to reasons given by his supervisors against Cantwell's possible termination. The complaint, although signed by an attorney, was not verified.

In its answer the State, among other things, denied that its agents had committed any unfair labor practices, and further alleged that no valid complaint had been filed, due to lack of verification, that Cantwell was a probationary employee and therefore the contractual grievance procedure was not applicable, and further that Cantwell had a right to a discretionary review with respect to his termination, that the interview was cancelled as a result of Cantwell's insistence that he be represented by an agent of the Union other than the designated grievance representative as provided in the collective bargaining agreement, which resulted in the cancellation of the interview.

Prior to the hearing before the Examiner Counsel for the complainants filed a motion requesting permission to amend the complaint to include a proper verification, and such a motion was filed at the commencement of the hearing before the Examiner.

The Examiner's Decision

The facts as found by the Examiner are not in dispute. Cantwell, a probationary employee employed as Youth Counselor I at the Ethan Allen School by the Department of Health and Social Services of the State of Wisconsin, on August 27, 1976 received a letter from his supervisor to the effect that he was being considered for termination for stated reasons. The letter set up an appointment for Cantwell to meet with his supervisors at a set time and place to respond, and said letter also set forth that Cantwell could "bring representation".

A Union representative, other than the designated grievance representative, was requested by Cantwell to attend the scheduled interview. The State supervisors involved refused to conduct the interview with such Union representative present. Cantwell was given a letter of termination on the same day.

The Examiner concluded to exercise jurisdiction in the matter since the complaint was properly amended to include the verification. He further concluded that the State did not commit any unfair labor practices, since the State properly gave Cantwell the choice of having the interview without the Union representative of his own choosing or not having said interview. In reaching said conclusion the Examiner relied on the decision of the U.S. Supreme Court in NLRB v. Weingarten, Inc. 420 U.S. 251, 88LRM 2689 (1975), as well as the Commission's decision in Waukesha County (14662-B) 3/78.

The Petition for Review

In their petition for review the Complainants urge the Commission to reverse the Examiner's Conclusions of Law, contending, in effect, that the cancellation of the interview meeting denied Cantwell the right to be represented by a representative of his own choosing, that such "right" is consistent with the law and labor policy, that the meeting was not cancelled for legitimate reasons, and that the fact such scheduled interview was voluntary did not create to the right of the State to be arbitrary.

The State Respondent would have the Commission affirm the Examiner.

Discussion

While the petition for review requests the Commission to reverse all of the Examiner's Conclusions of Law, it is obvious that the Complainants do not seek a reversal of the Examiner's Conclusion that the complaint was properly verified by motion. Otherwise Complainants would not have argued for reversal on the merits of the complaint.

The Complainant Union argues that although the State has the right to refuse to hold an investigatory interview if the employee desires his union representative to be present, the State cannot condition the holding of the interview based on the union representative selected by the employee. The Complainant takes exception to the Examiner's reliance on Waukesha County. Based on the above-mentioned cases, the Examiner concluded that even if a right to representation existed, the State, by giving Cantwell a choice between a meeting without the union representative of his choosing and no meeting at all, required a finding of no interference under SELRA.

The Complainant Union contends that Cantwell had a fundamental right to select the representative to accompany him at the investigatory interview and therefore, the State did not have a legitimate employer prerogative to condition the interview on a certain representative being present. However, what the Union has failed to consider is the specific language and procedure which the parties negotiated regarding union representation and investigatory interviews.

The State, through the testimony of Mixdorf, explains that the reasons for refusing Wianecki the opportunity to participate in the interview was pursuant to the collective bargaining agreement. 1/ Mixdorf testified that he was ordered by Foley (Employment Relations Specialist for Department of Health and Social Services) not to allow Wianecki to participate in the meeting because of earlier problems the State had with Wianecki visiting the institution in his Representative capacity without the 24 hour notice and that when higher levels of union representatives were present that the State's labor relations specialists should also be involved. Mixdorf was willing to meet with the designated grievance representative (Gallagher), but Cantwell refused to so meet.

The collective bargaining agreement provides that "an employee shall be entitled to the presence of a designated representative at an investigatory interview." Wianecki was not the designated grievance

1/ See Transcript, pp. 15-16.

representative. The agreement also provides for visitations by officers and representatives of the Union, who are not employees of the State. However, said officers and representatives must give at least 24 hours advance notice to the appropriate State representative before having the right to be admitted to the premises of the State during working hours. Although Wianecki could have given a 24 hour advance notice, he failed to give such notice.

We agree with the Examiner that his reliance in the decision of the U.S. Supreme Court in Weingarten, and on our decision in Waukesha County are supportive of his decision. In Weingarten, the Court stated that the right to union representation at an investigatory interview "may not interfere with legitimate employer prerogatives" and "the employer has no obligation to justify his refusal to allow union representation". In this matter the state denied Cantwell's request to permit Wianecki to be present at the meeting since the pertinent provisions of the collective bargaining agreement were not complied with; namely, (1) Wianecki was not the designated grievance representative, and (2) Wianecki did not give the 24 hour advance notice of his intended visitation. Obviously, it is a "legitimate employer prerogative" to adhere to the provisions of the collective bargaining agreement and thereby maintain the underlying reasons for the provisions involved--an efficient and orderly operation.

Dated at Madison, Wisconsin the 31st day of October, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Gary L. Covelli
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