Lewis Public Transportation Benefit Area, Decision 9275 (PECB, 2006)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED TRANSIT UNION, LOCAL 1384	)	
Complainant,	)	CASE 19257-U-05-4890
vs.	)	DECISION 9275 - PECB
LEWIS PUBLIC TRANSIT BENEFIT AREA, dba TWIN TRANSIT	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

Schroeter Goldmark & Bender, by *Martin Garfinkel*, Attorney at Law, for the union.

Brian M. Baker, Inc., P.C., by *Brian Baker*, Attorney at Law, for the employer.

On March 8, 2005, the Amalgamated Transit Union, Local 1384 (union), filed an unfair labor practice complaint against Lewis Public Transportation Benefit Area, dba Twin Transit (employer) charging employer interference with employee rights in violation of RCW 41.56.140(1). A preliminary ruling was issued on May 3, 2005, and an answer was received May 23, 2005. A hearing was held before Examiner Christy L. Yoshitomi, on August 30, 2005, and simultaneous briefs were submitted on November 1, 2005.

Issues Presented

1) Did the employer violate RCW 41.56.140(1) by not observing Darlene Lusk-Denman's (hereinafter referred to as Lusk) Weingarten rights at a "screening" meeting on January 25, 2005?

a) Was the meeting on January 25, 2005, within the purview of the Weingarten doctrine?

b) Did Lusk waive her Weingarten right by not asking for a representative?

2) Did the employer violate RCW 41.56.140(1) by not observing David Strickler's Weingarten rights at a "screening" meeting on January 20, 2005?

a) Was the meeting on January 20, 2005, within the purview of the Weingarten doctrine?

b) Did Strickler waive his Weingarten right by not asking for a representative?

3) If the employer did violate RCW 41.56.140(1) on January 25, 2005, or January 20, 2005, what is the appropriate remedy?

Based on the arguments and evidence submitted by the parties, the Examiner rules that the employer did violate RCW 41.56.140(1) on January 25, 2005, by violating Lusk's rights. The alleged RCW 41.56.140(1) violation, concerning Strickler, on January 20, 2005, is dismissed.

ISSUE 1: Did the employer violate RCW 41.56.140(1) by not observing Lusk's Weingarten rights at a "screening" meeting on January 25, 2005?

On Saturday January 22, 2005, Lusk, a bus driver for the employer, received a customer complaint in her mailbox from Cathy Whitney, the operations assistant. Attached to the complaint was a response form for Lusk to complete as well as a note directing Lusk to meet

Whitney the following Tuesday. Lusk completed the response to the complaint and returned it to the office mailbox on Sunday. During the time between receiving the complaint and her meeting with Whitney on Tuesday, Lusk spoke with David Strickler, her union representative, and asked him to represent her at Tuesday's meeting.

On Tuesday, January 25, 2005, about an hour prior the meeting, Lusk conferred with Strickler and Shawn Clark, assistant shop steward for the union, in the break room. When Whitney came into the break room to fetch Lusk for their meeting, Strickler explained to Whitney that Lusk wanted to invoke her Weingarten right and he was there to represent her in the meeting.[1] Conversation occurred between Strickler and Whitney regarding Lusk's need for union representation and the question arose as to whether this meeting could result in discipline. Whitney responded that the meeting would not result in discipline because she does not have disciplinary authority but she would check with Ernie Graichen, operations director, since he would also be involved. At that time, Whitney asked Graichen if the meeting would result in discipline. Graichen stated it would not result in discipline because it is a "screening" meeting. Whitney immediately relayed this information back to Lusk, Strickler, and Clark. At this point, Strickler asked Lusk if she "felt okay with going in by [her]self" and Lusk responded affirmatively. Lusk, without representation, then entered the "screening" meeting with Graichen and Whitney.

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[1] There was contradicting testimony regarding whether Strickler mentioned Weingarten rights to Whitney or not. The Examiner finds that he did mention Weingarten rights to Whitney based on similar testimony provided by Lusk, Strickler and Clark.

Was the "screening" meeting between Lusk, Graichen and Whitney within the purview of the Weingarten doctrine?

In *National Labor Relations Board v. Weingarten, Inc.*, 420 U.S. 251 (1975), the United States Supreme Court ruled that an employer commits an interference unfair labor practice under the National Labor Relations Act if it denies an employee's request for union representation at an investigatory interview which the employee reasonably believed might result in disciplinary action. The principles enunciated in Weingarten have been embraced by the Public Employment Relations Commission in its administration of the fundamentally similar provisions of Chapter 41.56 RCW. *Okanogan County,* 2252-A (PECB, 1986).

The Weingarten doctrine does not apply to all meetings and, therefore, the employer is free at any time to explain and inform an employee as to the disciplinary rules and work place expectations. *Northwest Engineering Company,* 265 NLRB 190 (1982). However, an employer may not use such a meeting to disguise what would otherwise be an investigatory or disciplinary interview at which the protections of Weingarten would apply. An investigatory interview is one in which the employer elicits a response(s) from the employee which could enable the employer to build a case against the employee resulting in discipline at some future time. *Lennox Industries, Inc.*, 637 f.2d 340 (1981). Thus, a meeting in which information is gathered from an employee that could eventually lead to discipline, comes under the purview of the Weingarten doctrine. To conduct a meeting outside the parameters of Weingarten, the employer must limit the meeting's scope to informing the employee of a previously made disciplinary decision. "[I]f 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." *Baton Rouge Water Works Company*, 246 NLRB 995 (1979).

In the "screening" meeting that occurred on January 25, 2005, Whitney and Graichen acquired facts from Lusk about a customer complaint which was raised against her on January 21, 2005.[2] Although Lusk was not disciplined as a direct result from this particular meeting, the information acquired from this meeting led to an "investigatory" meeting and future discipline. Had Graichen not acquired the information sought in the initial "screening" meeting with Lusk, he would not have pursued the following "investigatory" meeting and eventually disciplined her, in part, as a result of her responses at the January 25, 2005, meeting. The information acquired in the initial "screening" meeting, although indirectly, eventually led to discipline. It is apparent that the "screening" meeting was for all intents and purposes an investigatory meeting and comes under the purview of Weingarten.

Did Lusk waive her right to representation by not asking for a representative?

According to the Weingarten doctrine, an employee has the right to union representation for mutual aid and protection. However, an employee is entitled to representation only when the employee has a reasonable belief that discipline may result from the meeting. If the employee believes that discipline may result from the meeting, the employee must request representation in order to be protected under Weingarten. At the time a valid request is made for representation, the employer has three options: 1) grant the request; 2) dispense with or discontinue the meeting; or 3) offer the employee the choice of continuing the interview unaccompanied by a union representative or having no interview at all, which would deprive them of any benefits that may result from the interview.

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[2] The complaint was raised against her on January 21, 2005, but Lusk did not receive the complaint until January 22, 2005.

In this case, Lusk had reasonable belief that discipline may result from the meeting. Although Lusk had never been disciplined previously, she recently had a discussion with her employer regarding a customer complaint received prior to January 21, 2005. In that meeting, she was informed by Graichen that she was to change her attitude or it would lead to discipline. Therefore, she had a reasonable belief of potential discipline when she was informed of the "screening" meeting on January 25, 2005, with Whitney.

Lusk had an understanding of the purpose of the meeting before arriving on January 25, and had reason to believe that discipline could result. As a result of this, she requested representation by her steward, David Strickler. Strickler, on behalf of Lusk, explained to Whitney he was there to invoke Lusk's Weingarten rights. Because Lusk was standing next to Strickler at the time he mentioned Weingarten rights to Whitney, it would have been a futile attempt for Lusk to reassert her request to have Strickler present at the meeting. It was apparent that Whitney understood Lusk wanted representation at the meeting.

At the point where Strickler explained Lusk was invoking her Weingarten rights and that is why he was present, the employer had the opportunity to pursue one of the three options mentioned above. Instead of picking one of these options, however, the employer provided Lusk and Strickler with a false assurance that there would be no need to enter the "screening" meeting with representation. Although the employer may not have had intent at that time to discipline or thought it could result in discipline, the situation was ripe for Weingarten as the employee had reasonable belief that discipline could result and it was an investigatory meeting. Lusk was further protected under Weingarten after the valid request for representation was made. Assuring the employee no discipline would

result from the meeting was misleading to both the employee and the union representative, since it eventually led to discipline. Therefore, Lusk did not waive her right to representation when agreeing to enter the meeting after the employer provided her a false assurance of security.

The employer violated RCW 41.56.140(1), by denying the employee right to representation in the "screening" meeting on January 25, 2005.

ISSUE 2: Did the employer violate RCW 41.56.140(1) by not observing David Strickler's Weingarten rights at a "screening" meeting on January 20, 2005?

On January 19, 2005, while on route, David Strickler, a bus driver for the employer, received a call over the radio from Cathy Whitney, operations assistant. He called her back by telephone and spoke with her regarding a customer complaint. Whitney gave Strickler direction regarding the customer and further told Strickler to meet her in her office the following day before his route to discuss the incident. Prior to his shift on January 20, 2005, Strickler reported to Whitney's office.

Contradictory testimony between Strickler and Whitney pose an issue as to what actually happened upon Strickler's arrival at Whitney's office. According to Strickler, he claims that upon entering the meeting with Whitney he stated he wanted to invoke his Weingarten rights. However, his later testimony states he "tried to declare that [he] wanted to invoke [his] Weingarten rights." In yet further testimony, Strickler states "I tried to invoke the Weingarten rights and I said is there any possibility there will be discipline." Based on this testimony in concert with Whitney's testimony provided, I find that Strickler did not specifically

state "I want my Weingarten rights," but rather asked if the meeting would result in discipline believing that this was a way to invoke his Weingarten rights.

In response to Strickler's question as to whether or not the "screening" meeting would result in discipline, Whitney claims she responded to Strickler's question by stating "[t]here's no meeting that he will ever have with me that will involve discipline or result in discipline because I have no authority in that regard." After further questioning by Strickler if the meeting could ever lead to discipline, she responded that she "can't answer that" explaining that Graichen will determine how to proceed next. After this explanation, Whitney assured him that "there's at no time you will ever receive discipline in a meeting with me."

Strickler's recollection of events differ significantly from that of Whitney's. Strickler testified that after he asked if the meeting would result in discipline, Whitney responded with a solid "no." He repeatedly stated she provided no further explanation of the process or any understanding to the effect that she has no authority to discipline.

Based on testimony provided by Shawn Clark,[3] assistant shop steward, and Whitney's similar response in Lusk's dispute,[4] I credit Whitney's claim that she did explain to him that no meeting with her would result in discipline. This further credits her testimony that she did explain to Strickler the procedure of the

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[3] Clark recalled Whitney having a "spiel" that she would give to employees before the "screening" meeting. In this "spiel" she would indicate that she does not handle discipline, but Graichen does.

[4] In Lusk's case, Whitney provided explanation indicating she did not have the authority to discipline.

complaint and her lack of knowledge as to how Graichen would be handling the next step after the initial "screening" meeting.

Was the "screening" meeting between Strickler and Whitney on January 20, 2005, within the purview of Weingarten?

Whitney testified that because Strickler did not fill out the response form to the customer complaint filed on January 19, 2005, she would "interview him verbally and then [she] would write up what he said." In explaining how she conducts the "screening" meeting, Whitney stated that she "screens the facts" and "gathers the employee's statement and his side of the facts." If there appears to be a discrepancy between the facts received by the employee and the customer complaint, she will "attempt to get what could be the discrepancy." The information gathered here is used to help Graichen in determining whether there is any substance to the complaint. If Graichen believes that there is substance to the complaint, he will then conduct an "investigatory" interview.

Again, there is no question that the meeting which occurred on January 20, 2005, between Strickler and Whitney was under the purview of Weingarten. It is apparent the "screening" meeting is an investigatory meeting used to gather facts which could lead to the employee's discipline at a future point in time.

Did Strickler waive his Weingarten right by not asking for a representative?

As previously mentioned, the Weingarten right arises only in situations where the employee has reason to believe the meeting could result in discipline and requests representation. An employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union

representative." *Weingarten*, 240 U.S. at 257. To trigger the Weingarten right the employer needs to have sufficient notice of the employee's desire for union representation. *Consolidated Edison Co. of New York*, 323 NLRB 910 (1997). In *Southwestern Bell Telephone Company*, 338 NLRB 552 (2002), an employee's question of "Would it be okay to have a Union steward present?" and the request of someone to be present at a meeting to explain what was happening both sufficiently invoked the Weingarten right. In *Bodolay Packaging Machinery*, 263 NLRB 320 (1982), the Weingarten right was triggered by the employee asking whether he needed a witness. In *AK Tube LLC.*, 2004 WL 2996728 (2004), it was found that asking if a union representative was needed did invoke the weingarten right. The Board has found other phrases such as: "I need a Union Steward"; "Do I need anybody here with me?"; "Do I need a shop steward?"; "You know I need a union rep.", as sufficient to trigger Weingarten. These phrases provide apparent notice to the employer that the employee wants representation or accompaniment at the meeting.

In this situation, Strickler was aware that potential discipline could result from the "screening" meeting. Not only had Whitney provided the explanation as described above as to how the customer complaints were handled, he had himself been through the process before and knew that Graichen may call him in for a further "investigatory" meeting which could lead to discipline. Therefore, the situation was ripe for Weingarten as Strickler could have reasonable belief that discipline may result from the "screening" meeting and the meeting itself was investigatory. However, Strickler failed to make an adequate request for representation.

Strickler made no mention of wanting representation or accompaniment at the meeting. At no time prior to or after the explanation from Whitney that the meeting with her would not result

in discipline, but that Graichen would determine how to proceed next, did Strickler request for another person to join him at the meeting. Had Strickler provided the employer with the understanding that he wanted representation at any point in time, the employer would have had the three options as discussed in Lusk's analysis above. In this situation, when Strickler asked if the meeting could result in discipline, the employer had no obligation to ask Strickler if he would like to have a union representative present or anyone else present to assist him at the meeting. It is the duty of the employee to request representation. I do not find that the mere question of "will this meeting result in discipline" as one sufficient enough to invoke the employee's Weingarten right.

Although the situation on January 20, 2005, was ripe for Weingarten, Strickler failed to make a request for representation at the meeting and therefore was not protected under the Weingarten Doctrine. The alleged violation of RCW 41.56140(1) on January 20, 2005, is dismissed.

Issue 3: If the employer did violate RCW 41.56.140(1) on January 20, 2005, or January 25, 2005, what is the appropriate remedy?

The appropriate remedy for a violation of Weingarten rights varies according to the circumstances. A cease-and-desist order and posting/reading of notices is appropriate in every case. A make-whole remedy may also be appropriate, but only where discipline results from information unlawfully attained. *Washington State Patrol*, Decision 4040 (PECB, 1992). Attorney's fees have been awarded as an extraordinary remedy where the evidence showed repeated violations by the same employer. *City of Seattle*, Decision 3593-A (PECB, 1989).

The written warning Lusk received was based on a culmination of issues. However, the issue at hand, where information was gathered illegally, was what led the employer to discipline Lusk by written warning. Although this warning was a culmination of issues which led to the written warning, the illegal information obtained was what produced the written warning. Had the illegal information not been obtained on January 25, 2005, the written warning would have not been produced. Therefore, a make-whole remedy is applicable in this case.

FINDINGS OF FACT

1. Lewis Public Transit Benefit Area, dba Twin Transit is a public employer within the meaning of 41.56 RCW.

2. Amalgamated Transit Union, Local 1384, a bargaining representative within the meaning of 41.56 RCW is the exclusive bargaining representative of transit operators employed by the Lewis Public Transit Benefit Area.

3. Darlene Lusk-Denman, a public employee within the meaning of 41.56 RCW, is employed as a transit operator at Lewis Public Transit Benefit Area.

4. On January 22, 2005, Lusk received notice of a "screening" meeting to take place on January 25, 2005, with the employer. Lusk had reason to believe that the meeting could result in discipline and requested the participation of her union representative.

5. Prior to the "screening" meeting on January 25, 2005, Lusk, through her union representative, asserted her Weingarten rights to the operations assistant, who was a participant of

the "screening" meeting. In response, the employer provided both Lusk and her union representative with the assurance that no union representative was needed at the "screening" meeting. The employer did not grant the request for representation, dispense with the meeting, nor offer the employee the choice of continuing the interview unaccompanied by a union representative or having no interview at all.

6. Lusk participated in the "screening" meeting on January 25, 2005, with Cathy Whitney, operations assistant, and Ernie Graichen, operations director, after being assured no discipline would result.

7. The "screening" meeting on January 25, 2005, was an investigatory meeting and falls under the purview of the Weingarten doctrine.

8. On February 8, 2005, Lusk was disciplined, in part, from the information gathered by the employer in the meeting described in Finding of Fact 7.

9. David Strickler, a public employee within the meaning of 41.56 RCW, is employed as a transit operator at Lewis Public Transit Benefit Area.

10. On January 19, 2005, Strickler was notified of a "screening" meeting between the operations assistant and himself the following day.

11. On January 20, 2005, Strickler reported to the "screening" meeting with the operations assistant. Strickler inquired if the meeting would result in discipline. The operations assistant provided explanation that the meeting would not

involve discipline. She further explained that she did not know how the operations director would handle the complaint once he received the information.

12. Strickler could have reason to believe that discipline could result from the "screening" meeting, however, he continued to participate in the meeting.

13. The "screening" meeting on January 20, 2005, was an investigatory meeting and falls under the purview of the Weingarten doctrine.

14. Strickler did not request union representation prior to or during the meeting on January 20, 2005.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in the matter pursuant to Chapter 41.56 RCW.

2. The employer interfered with the rights of Darlene Lusk-Denman as described in Findings of Fact four through eight in violation of RCW 41.56.140(1).

3. The employer did not interfere with the rights of David Strickler and violate RCW 41.56.140(1) by its conduct in Findings of Fact nine through fifteen.

ORDER

Lewis Public Transit Benefit Area, dba Twin Transit, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Refusing employees union representation, upon their request, in investigatory interviews where the employee reasonably fears that discipline could result; and

   b. Relying, in any manner, upon the information obtained illegally for future discipline of Darlene Lusk-Denman.

   c. Interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under by the laws of the state of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

   a. Expunge the February 8, 2005, written warning from Darlene Lusk-Denman's employment record.

   a. Post copies of the notice attached to this order in conspicuous places on the employer's premises where notices to all bargaining unit members are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

   g. Read the notice attached to this order into the record at a regular public meeting of the Twin Transit Board of Directors of the Lewis Public Transit Benefit Area, dba Twin Transit and permanently append a copy of the notice

to the official minutes of the meeting where the notice is read as required by this paragraph.

h. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice attached to this order.

i. Notify the Compliance Officer of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Compliance Officer with a signed copy of the notice attached to this order.

ISSUED at Olympia, Washington, this 10th day of April, 2006.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

CHRISTY YOSHITOMI, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT WE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS, AND ORDERED US TO POST THIS NOTICE TO EMPLOYEES:

WE UNLAWFULLY conducted and obtained information from Darlene Lusk-Denman at an investigatory interview after she had made a proper request for representation.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL expunge the February 8, 2005, written warning from Darlene Lusk-Denman's employment record.

WE WILL allow employees union representation, upon their request, in investigatory interviews where the employee reasonably fears that discipline could result

WE WILL NOT rely, in any manner, upon the information illegally obtained for future discipline of Darlene Lusk-Denman.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington, including the right to have union representation at investigatory interview, once a timely request has been made by the employee.

DATED: _____ LEWIS PUBLIC TRANSIT BENEFIT AREA, dba TWIN TRANSIT

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days, and must not be altered or covered by any other material. Questions about this notice or compliance with the Commission's order may be directed to the Public Employment Relations Commission (PERC), 112 Henry Street NE, PO Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 570-7300. The full decision will be published on PERC's web site, www.perc.wa.gov.