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BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

DEC 6 2004

MICHAEL S. RICHIE
CLERK

CITY OF DEL CITY, OKLAHOMA,)

Plaintiff/Appellant,)

vs.)

No. 99,339

PUBLIC EMPLOYEES RELATIONS)

BOARD and FRATERNAL ORDER)

OF POLICE, LODGE 114,)

Defendants/Appellees.)

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE CAROLYN R. RICKS, JUDGE

REVERSED AND REMANDED

Tony G. Puckett,
Beauchamp M. Patterson,
McAFEE & TAFT, P.C.,
Oklahoma City, Oklahoma,
and
Jack Fried,
City Attorney,
CITY OF DEL CITY,
Del City, Oklahoma,

For Plaintiff/Appellant,

James Patrick Hunt,
JAMES R. MOORE
& ASSOCIATES, P.C.,
Oklahoma City, Oklahoma,

For Defendants/Appellees.

Opinion by Kenneth L. Buettner, Presiding Judge:

¶1 Plaintiff/Appellant City of Del City, Oklahoma (City) appeals from the district court's order affirming a cease and desist order issued by the Oklahoma Public Employees Relations Board (PERB). In its order, the PERB ruled City committed an unfair labor practice when it failed to give a three-part warning to police detective Robert Magni during a grievance investigation.¹ The PERB also found that City committed an unfair labor practice when it prohibited Magni's union representative from assisting Magni during an investigatory process and when it required the union representative to remain silent during questioning of Magni.² On appeal, City asserts that the PERB erred as a matter of law by misapplying and misinterpreting *Johnnie's Poultry*, *Bill Scott Oldsmobile*, and *Weingarten*. After reviewing the record and

¹ The warning at issue was established in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied on other grounds, 344 F.2d 617 (8th Cir. 1965) and *Bill Scott Oldsmobile*, 282 NLRB 1073 (1987): The "employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis,...." 146 NLRB at 775.

² The PERB cited *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975) as authority for this finding.

applicable authority, we find the PERB order is clearly erroneous and contrary to law. We therefore reverse the district court's order and remand with instructions to vacate the PERB's cease and desist order.

¶2 Magni directed a complaint May 2, 2000 to City's Chief of Police (Chief Taylor). Magni alleged his supervisors, Sergeant Harrison and Lieutenant Suit, removed and destroyed Magni's personal property.³ Chief Taylor met with FOP president James Cummings May 3, 2000. Cummings communicated a "step 1" grievance based on the FOP's claim that the bulletin board was an FOP bulletin board and the removal of the article from the bulletin board violated the collective bargaining agreement (CBA).⁴

¶3 Chief Taylor discussed the matter with Suit and Harrison, and they requested a Board of Inquiry be convened to investigate Magni's allegations. Chief Taylor discussed the incident and the grievance with Magni May 22, 2000. The FOP formally advanced a "step 2" grievance to Chief Taylor May 25, 2000.

³ There was conflicting testimony as to the nature of the personal property at issue. Magni testified that his supervisors removed and destroyed a newspaper article, about two other Fraternal Order of Police (FOP) lodges, from a bulletin board. Chief Taylor testified that Magni had complained that the supervisors removed and destroyed the bulletin board, which Magni had purchased.

⁴ Under the CBA, a grievance is first discussed between the employee and a supervisor (step 1). If the grievance remains unresolved, the grievance is submitted in writing (step 2).

¶4 The Board of Inquiry convened June 22, 2000. Chief Taylor ordered Magni and others to appear. Magni appeared with Loren Gibson as his union representative. The Board of Inquiry informed Magni that questions would be directed to him, and that his union representative would be allowed to speak on the record after direct questioning had concluded, but the representative would not be allowed to talk or object while the Board questioned Magni. Gibson informed the Board of Inquiry that an Unfair Labor Practice Charge, No. 369, had been filed that morning. Charge No. 369 alleged that the City had committed an unfair labor practice by threatening to remove the FOP bulletin board from the detective division, and by removing information posted on the FOP bulletin board. Gibson objected to the Board of Inquiry's investigation of the bulletin board incident because it was the subject of an unfair labor practice charge. Gibson also demanded that the Board of Inquiry give Magni the three-part *Johnnie's Poultry* warning. In response to this demand, the Board of Inquiry adjourned and rescheduled the inquiry to July 6, 2000.

¶5 Magni and Gibson appeared at the July 6, 2000 Board of Inquiry. The Board informed those present that the proceeding was to investigate Suit and Harrison. Gibson again requested that the Board give Magni the *Johnnie's Poultry* warning. The Board declined to give the warning. The Board indicated it wanted to ask questions and receive answers directly from Magni, on a voluntary basis, without

interference from Gibson. Gibson responded that under *Weingarten*, he was permitted to speak during the interview.

¶6 The Board of Inquiry then gave Magni a document describing his *Garrity* rights.⁵ Because *Garrity* only applies if Magni is ordered to testify, Gibson asked the Board whether it was ordering Magni to testify or whether Magni's participation was

⁵ In *Garrity v. State of New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), police officers were compelled, under threat of termination, to answer questions regarding their involvement in alleged misconduct. The United States Supreme Court held that the officers' statements, "obtained under threat of removal from office," could not be used against them in a subsequent criminal proceeding. 385 U.S. at 500, 87 S.Ct. at 620. The document the Board of Inquiry provided to Magni in this proceeding stated:

Since this investigation involves allegations of violations of department professional standards, you are ordered to answer the questions of this board of inquiry, which has been established by the Chief of Police for the purpose of investigation, and you may be ordered by the board to make written reports or statements.

Failure to obey this order to cooperate with this administrative investigation may result in disciplinary action, which may include termination.

You are hereby advised of your "Garrity" rights.

You are being questioned as part of an official investigation of the Del City Police Department. As a condition of employment, you will be asked questions specifically directed and narrowly related to the performance of your official duties or fitness for office.

You are entitled to all of the rights and privileges guaranteed by the laws and Constitution of Oklahoma and the Constitution of the United States, including the right not to be compelled to incriminate yourself.

You will be allowed to have a union representative, a supervisor or other personal representative with you in the room during any interview concerning allegations of misconduct.

The representative shall be limited to acting as an observer of the interview, except where the interview focuses on, or leads to, evidence of criminal activity by you. In that case your attorney may advise and confer with you during the interview.

Your statements and any information provided by you or any evidence obtained by reason of such statements cannot be used against you in any subsequent criminal proceeding. Your statements may only be used against you should a subsequent administrative action be commenced.

You may refuse to answer questions relating to the performance of your official duties or fitness for duty; however, you may be subject to disciplinary action which could include job termination.

voluntary. The Board of Inquiry responded that Magni's participation was voluntary, but directed Gibson to remain silent. After a heated exchange between Gibson and a member of the Board of Inquiry, the Board instructed Gibson and Magni to leave the inquiry. The Board of Inquiry then continued to question other employees.⁶

¶7 The FOP filed a second Unfair Labor Practices Charge, No. 370, against City July 11, 2000. Charge No. 370 is the subject of this case. In Charge No. 370, the FOP alleged as unfair labor practices: 1) City conducting the Board of Inquiry without giving Magni the *Johnnie's Poultry* warning, 2) City requesting Magni respond to the Board of Inquiry's questions without assistance from his representative, and 3) the Board of Inquiry excusing Magni and his representative from the inquiry when it became apparent Magni was not going to answer any questions except through his union representative. The PERB entered its Findings of Fact, Conclusions of Law, and Cease and Desist Order December 29, 2001. The PERB found in favor of FOP on all the issues in Charge No. 370.

¶8 City sought review of the order in the district court. Following the district court's Order affirming the PERB decision, City filed this appeal. Because City appeals under the Administrative Procedures Act, 75 O.S.2001 §318, this court's

⁶ Sometime after the July 6, 2000 inquiry, Chief Taylor recommended that Magni be terminated for lying about the grievance. The city manager declined to follow the recommendation, and the record reveals no reprisals or negative employment actions were taken against Magni.

review is limited to the record made before the PERB. 75 O.S.2001 §321. “Appellate courts review the entire record made before an administrative agency acting in its adjudicatory capacity to determine whether the findings and conclusions set forth in the agency order are supported by substantial evidence.” *City of Hugo v. State, ex rel. Public Employees Relations Board*, 1994 OK 134, 886 P.2d 485, 490. Additionally, as explained in *City of Hugo*:

Substantial evidence is more than a scintilla of evidence. It possesses something of substance and of relevant consequence that induces conviction and may lead reasonable people to fairly differ on whether it establishes a case. In determining whether an administrative agency’s findings and conclusions are supported by substantial evidence, the reviewing court will consider all the evidence including that which fairly detracts from its weight. However, great weight is accorded the expertise of an administrative agency. On review, a presumption of validity attaches to the exercise of expertise. An appellate court may not substitute its judgment for that of an agency, particularly in the area of expertise which the agency supervises.

Id. at 490 (footnotes omitted). “If the facts determined by the administrative agency are supported by substantial evidence, and the order is otherwise free of error, the decision of the agency must be affirmed.” *Tulsa Area Hosp. Council, Inc. v. Oral Roberts Univ.*, 1981 OK 29, 626 P.2d 316, 320 (footnote omitted). Accordingly, reversal is only appropriate if this court finds: 1) that the PERB made its decision in

excess of statutory authority or jurisdiction, 2) that the agency's order was based on an error of law, or 3) that the agency's findings are "clearly erroneous in view of the reliable, material, probative, substantial competent evidence" in the record. 75 O.S.2001 §322; see also *City of Tulsa v. State, ex rel. Public Employees Relations Board*, 1998 OK 92, 967 P.2d 1214, 1219.

¶9 City first asserts the PERB erred as a matter of law when it misapplied and misinterpreted *Johnnie's Poultry* and *Bill Scott Oldsmobile*. Since *Johnnie's Poultry*, the NLRB has required employers to administer three warnings to each employee that the employer interviews as part of preparing the employer's defense to an unfair labor practice charge. The so-called *Johnnie's Poultry* warnings include: 1) communicating to the employee the purpose of the questioning, 2) assuring the employee that no reprisal will take place, and 3) obtaining the employee's participation on a voluntary basis. 146 NLRB at 775. *Bill Scott Oldsmobile* also involved an employer's preparation for defending against an unfair labor practice charge. In that case, the NLRB ruled the employer was required to give the *Johnnie's Poultry* warnings before the employer's attorney deposed employees in preparing the employer's defense. 282 NLRB at 1075.

¶10 City argues the three-part *Johnnie's Poultry* warning was not required in this case because City was not conducting the inquiry in preparation for an unfair labor

practice defense, but was only interviewing Magni regarding his grievance against other officers. We agree. The record reveals City sought to question Magni as part of an investigation of conduct by Harrison and Suit. Although the bulletin board incident was the basis of an unfair labor practice charge filed the same day the Board of Inquiry convened, the Board of Inquiry's questioning of Magni was not done as part of City's preparation of a defense to the unfair labor practice charge. A Board of Inquiry questioning Magni as part of an internal investigation of Magni's grievance against other officers is not the coercive situation the *Johnnie's Poultry* warnings were intended to remedy.

¶11 We also agree with City that the PERB order impermissibly extends the requirement to give the *Johnnie's Poultry* warnings to every internal administrative review. The plain language of *Bill Scott Oldsmobile* shows that these warnings are only required when employees are questioned in preparation for trial:

In the 21 years since that decision's issuance, the *Johnnie's Poultry* requirements have proved effective as a prophylactic measure to temper the coerciveness of such interviews while permitting employers considerable latitude to question employees in preparation for trial. The safeguards are not unduly onerous or hampering and provide employers with clear guidance on how to avoid unfair labor practice liability in pursuing the legitimate interest of preparing an unfair labor practice defense.

FOP's decision to file an unfair labor practice charge the morning that the Board of

Inquiry met did not convert City's investigation of Magni's grievance, by means of a Board of Inquiry, into preparation of City's defense to the unfair labor practice charge. The circumstance involved in this appeal, questioning of an employee in a Board of Inquiry proceeding, is not one requiring the *Johnnie's Poultry* warnings and we find the PERB erred as a matter of law in holding that City committed an unfair labor practice in refusing to give the warnings under these facts.⁷

¶12 City next argues the PERB erred in its application of *Weingarten, supra*. In *Weingarten*, the United States Supreme Court held that at his request, an employee member of a collective bargaining unit is entitled to have a union representative present when the employee is questioned in an investigatory interview, but only if the employee reasonably believes the interview may lead to disciplinary measures. *Id.*, 420 U.S. at 257; 95 S.Ct. at 963. *Weingarten* further held, however, that an employer is also free to refuse to allow the union representative to attend the investigatory interview, so long as the employee is then free not to participate in the interview. *Id.*, 420 U.S. at 258, 95 S.Ct. at 964. Lastly, the employer is not required to negotiate with the union representative who assists an employee in an investigatory interview. *Id.*, 420 U.S. at, 95 S.Ct. at 259 965.

⁷ And, as will be discussed below, the *Johnnie's Poultry* warnings are inconsistent with the *Garrity* warning, which City gave Magni at the Board of Inquiry proceedings.

¶13 City contends that *Weingarten* only allows the presence of the union representative at the interview, but it does not permit the representative to actively participate in the interview. The parties dispute whether Magni's representative was denied the opportunity to assist him at the hearing due to limitations the Board of Inquiry may have imposed on when the representative could speak. However, we need not decide this issue because of our holding below.

¶14 City also contends it did not violate *Weingarten* because the record does not support a finding that Magni had an objectively reasonable belief that the interview would lead to disciplinary action against him. We disagree with City on this contention. As noted earlier, the Board of Inquiry refused to give the *Johnnie's Poultry* warnings to Magni, and instead delivered the *Garrity* rights warnings. The *Johnnie's Poultry* warnings and *Garrity* rights warnings are designed for different purposes and different proceedings, and it would not be reasonable to give both because they are contradictory. Indeed, the *Johnnie's Poultry* warnings, that participation is voluntary and no reprisals are possible, expressly differ from the *Garrity* warnings that the testimony, as well as the refusal to testify, may be the subject of disciplinary action against the employee. Despite City's specious claim that Magni did not have an objectively reasonable belief that the interview could lead to disciplinary action, Magni was entitled to have a union representative present under

Weingarten because he was affirmatively told that his answers could lead to disciplinary action.

¶15 Nevertheless, we agree with City's assertion that no *Weingarten* violation occurred in this case because after Magni demanded to have his union representative present, City terminated the interview. Under *Weingarten*, once an employee makes a valid request to have a union representative present in an investigatory interview, the employer may elect to grant the request, discontinue the interview, or offer the employee the choice to continue the interview unaccompanied by a union representative or have no interview at all and have the matter determined without input from the employee. 420 U.S. at 258, 95 S.Ct. at 964. Here, Magni gave no testimony before the Board of Inquiry. He was not compelled to answer questions without his representative present, and he was not disciplined for refusing to answer questions without assistance from his representative. Accordingly, the record fails to show a violation of *Weingarten*. This holding is consistent with the PERB's previous construction of *Weingarten*. See *IAFF Local 1628 v. City of Shawnee*, PERB Case No. 00220 (1990). Because City acted within the dictates of *Weingarten* when it terminated Magni's interview after Magni elected not to speak without his representative's participation, we find the PERB erred in concluding City committed an unfair labor practice when it refused to allow Magni's union representative to

.. ..
speak during the interview.

¶16 We find the PERB's order is clearly erroneous and contrary to law. We therefore REVERSE and REMAND for an order vacating the PERB's order in this case.

HANSEN, J. (sitting by designation), and ADAMS, J., concur.