United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: February 6, 2015

TO: Daniel L. Hubbel, Regional Director
Region 14

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Southwestern Bell Telephone Company
Case 14-CA-141000

506-4033-3000
512-5072-2400

The Region submitted this case for advice concerning whether the Employer violated Section 8(a)(1) when, as part of a disciplinary investigation, it searched a company vehicle without a Union representative present after the Employee had requested, and been provided, a representative for a prior investigatory interview. We conclude that the Employer did not violate Section 8(a)(1) because the search did not qualify as an investigatory interview under *Weingarten*.[1] Accordingly, the Region should dismiss the complaint, absent withdrawal.

FACTS

Southwestern Bell Telephone Company ("the Employer") and Communications Workers of America Local 6380 ("the Union") have a long-standing bargaining relationship. Their current collective bargaining agreement is effective from April 7, 2013 to April 8, 2017. The Employee whose *Weingarten* rights are at issue here works as a technician out of the Employer's Basehor, Kansas facility.

On September 12, 2014,[2] the Employer found a small bag of marijuana underneath empty chairs where the Employee and a co-worker had recently been sitting. On that same day, the Employer began investigating the matter and individually interviewed the Employee and her co-worker. During the Employee's interview, she requested the presence of a Union representative and the Employer granted that request.

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[1] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[2] All dates hereinafter refer to 2014, unless stated otherwise.

After this initial interview, the Employee went to lunch with her two Union representatives. While she was at lunch, the Employer searched the company vehicle used by the Employee. The Employer did not notify the Employee or the Union representatives of its intent to search the vehicle, and none of them were present for the search. During the search, the Employer found a CD case that contained music CDs and pornographic DVDs. Nothing related to marijuana was found.

After the search, the Employer called the Employee into a second interview, with her Union representatives present. During the interview, the Employee admitted that the CD case found in the car belonged to her, but denied knowing it had pornographic DVDs in it. The Employer proceeded to suspend the Employee on the suspicion that she had possessed illegal drugs on the Employer's property. The Employer later determined that it had insufficient evidence to discipline the Employee for illegal drug possession and returned her to work with backpay on October 23.

When the Employee returned to work, the Employer issued her a disciplinary written reminder, the first step in the Employer's progressive disciplinary procedure, for the possession of the pornographic DVDs. The Union filed a grievance regarding the Employee's discipline, but has not filed a grievance over the absence of a Union representative during the company vehicle search.

ACTION

We conclude that the Employer did not violate Section 8(a)(1) by searching the company vehicle without affording the Employee her *Weingarten* rights because the search did not qualify as an investigatory interview under *Weingarten*.

In *Weingarten*, the Supreme Court held that employees in a unionized workplace may request the presence of a union representative at an investigatory interview that the employee reasonably believes may result in disciplinary action.[3] The *Weingarten* right only applies to fact-finding interviews as opposed to shop floor conversations involving the giving of instructions or training,[4] or announcements of predetermined discipline.[5] Generally, to secure the right to consult a union representative, an employee must reasonably believe that the investigation at issue will result in disciplinary action and then affirmatively request union representation.[6] Neither the

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[3] *Weingarten*, 420 U.S. at 256.

[4] *Id.* at 257-258, *citing Quality Mfg. Co.*, 195 NLRB 197, 199 (1972).

[5] *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979).

[6] *Weingarten*, 420 U.S. at 257.

employee's subjective beliefs nor the employer's actual intent regarding the imposition of discipline are material.[7] After an employee makes a valid request for union representation, the employer must either grant the request, give the employee the option to continue with no witness or forego the interview altogether, or end the interview.[8]

An employer is engaged in an investigatory interview for the purposes of *Weingarten* when the employer confronts an employee and asks her to answer questions related to a disciplinary investigation.[9] In such circumstances, an employee "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors[,]"and "a knowledgeable union representative" can provide much needed assistance.[10] Accordingly, the employee's Section 7 rights to mutual aid and protection require that, upon request, the employee be afforded the assistance of a union representative at an investigatory interview.[11]

An employer's questions qualify as an investigatory interview even when they are merely implicit. Thus, in *System 99*, the Board held that an employer's request that an employee submit to a sobriety test was an investigative interview under *Weingarten.*[12] The ALJ, affirmed by the Board, reasoned that, by requesting that the

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[7] *Id.* at 257 n.5 (specifically rejecting any rule that required probing an employee's subjective motivations); *Consolidated Edison Co. of New York*, 323 NLRB 910, 910 (1997) ("[I]t is no answer to this allegation of a *Weingarten* violation that the Respondent's supervisors were only engaged in fact finding, or that they had no intention of imposing discipline ... at the time of the interview. Neither of those conditions is inconsistent with [the employee's] reasonable belief that discipline could result").

[8] *YRC Freight*, 360 NLRB No. 90, slip op. at 2 (Apr. 30, 2014), *citing Weingarten*, 420 U.S. at 258-259; *New Jersey Bell Telephone Co.,* 300 NLRB 42, 49 (1990), *enforced,* 936 F.2d 144 (3d Cir. 1991).

[9] *Weingarten,* 420 U.S. at 260, 262-263. *See also United States Postal Service*, 252 NLRB 61, 61 (1980) (physical examination by a doctor did not give rise to a *Weingarten* right because it was not calculated to form the basis for discipline, there were no questions of an investigative nature, and it did not involve a "confrontation" between the employee and employer).

[10] *Weingarten*, 420 U.S. at 263.

[11] *Id.* at 260-61.

[12] 289 NLRB 723, 723 n.2 (1988).

employee take a sobriety test, the employer asked the implicit question: "Will you submit to a sobriety test?"[13] Because this implicit question was related to a disciplinary investigation, the employee had a *Weingarten* right to consult with a union representative before deciding how to respond.[14] The Board, however, has expressly declined to pass on the question of whether a drug test "standing alone," which is arguably analogous to a search, constitutes an investigatory interview under *Weingarten.*[15]

Here, there is no question that the Employer's interactions with the Employee before and after the vehicle search were investigatory interviews under *Weingarten.* The Employee requested Union representation for those interviews, and the Employer granted it. The only question, then, is whether the vehicle search itself should be considered a continuation of the prior investigatory interview under *Weingarten* and, if so, given the Employee's prior request for Union representation, the execution of the search without a Union representative present violated the Employee's *Weingarten* rights.

We conclude that the Employer's search of a company-owned vehicle was not in itself an investigatory interview, and was not a "continuation" of the prior investigatory interview.[16] When the Employer searched the company vehicle, it did not engage in a confrontation with the Employee and did not ask the Employee any questions, even implicitly. Instead, the Employee was not present for the search, was not asked to aid the search, and was not even aware the search was taking place. Because the Employer asked nothing of the Employee, the Employee had no need for a Union representative's assistance. And when the Employer followed up with an investigatory interview regarding the results of its search, it honored the Employee's

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[13] *Id.* at 726.

[14] *Id.* at 727 (employer made clear that refusal to submit to test would lead to discharge). *See also Ralph's Grocery Co.*, 361 NLRB No. 9, slip op. at 1 (July 31, 2014) (employer violated *Weingarten* when it disciplined an employee who refused to take a drug test without representation); *Safeway Stores*, 303 NLRB 989, 989 (1991) (same); *Cingular Wireless, LLC*, Case 16-CA-24795, Advice Memorandum at 4 (Aug. 7, 2006) (concluding that employer unlawfully denied a request for a union representative by an employee who was told to hand over his cell phone to be searched or face discharge for insubordination).

[15] *Safeway Stores,* 303 NLRB at 889.

[16] *Compare Cingular Wireless, LLC*, Case 16-CA-24795, Advice Memorandum at 4 (Aug. 7, 2006) (cell phone search conducted during the investigatory interview was considered to be part of that interview even though no explicit questions were being asked of the employee).

request for a union representative. In these circumstances, we conclude that the Employer did not violate Section 8(a)(1).

Accordingly, the Region should dismiss the complaint, absent withdrawal.[17]

/s/
B.J.K.

[17] The Region also requested advice concerning the remedy and the appropriateness of pre-arbitral deferral in this case. Because we have determined that the Employer's conduct did not violate the Act, we do not need to reach these questions.