

VERMONT LABOR RELATIONS BOARD

VERMONT STATE COLLEGES STAFF	)	
FEDERATION, AFT LOCAL 4023,	)	
AFL-CIO	)	
	)	DOCKET NO. 92-40
v.	)	
	)	
VERMONT STATE COLLEGES	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 18, 1992, the Vermont State Colleges Staff Federation, AFT Local 4023, AFL-CIO ("Federation") filed an unfair labor practice charge with the Vermont Labor Relations Board. Therein, the Federation alleged that the Vermont State Colleges ("Colleges") violated 3 VSA §903(a) and §961(1) when Johnson State College security officer Gary Ackerson was called by his supervisor, Daniel Cotter, to an investigatory interview/meeting and was not afforded the right to have a Federation representative present during this meeting after he requested that one be present. The charge alleged:

Mr. Ackerson believed the meeting to be an investigatory interview with the possibility of a disciplinary action and/or adverse consequences resulting. Mr. Cotter was questioning Mr. Ackerson about a sexual harassment case in which a charge had been filed against Mr. Ackerson and was currently under investigation by Johnson State College. Mr. Ackerson's attitude at work was also part of the questioning. Mr. Ackerson clearly stated to Mr. Cotter that he wanted a witness to be present during the questioning... This request was denied and the interview continued.

The Labor Relations Board issued an unfair labor practice complaint on March 5, 1993. A hearing was conducted by Board Members Charles McHugh, Chairman; Catherine Frank and Louis

Toepfer on April 8, 1993 in the Board hearing room in Montpelier. American Federation of Teachers Representative Shawn Flood represented the Federation. Attorney Kimberly Rozak represented the Colleges.

The Colleges filed a brief on April 26, 1993. The Federation filed a brief on April 27, 1993.

#### FINDINGS OF FACT

1. Daniel Cotter is Director of Security at Johnson State College. He has held this position since January, 1991. He lives in an apartment on the campus of the College. At all times relevant, Gary Ackerson and Michael Laflin were security officers at the College.

2. During the Spring of 1992, Ackerson was under investigation for a sexual harassment complaint which had been made against him by a student. On July 6, 1992, College President Robert Hahn, issued a memorandum to Ackerson, entitled "Resolution of Sexual Harassment Complaint". Cotter hand-delivered the memorandum to Ackerson on July 6 or 7. The memorandum provided in pertinent part:

Following our meeting on this matter, I have decided that your interactions with Ms. Desotelle have not constituted a violation of VSC Policy 311. I do, however, find that on several occasions you have conducted yourself in an unprofessional manner.

Specifically, you were warned by your supervisor at least twice to refrain from having any contact with Ms. Desotelle. You failed to heed those warnings. Also, your conversation in the library with JSC student Brian DeBritta on April 30, concerning Ms. Desotelle, was unprofessional in its manner and content. . .

Thus, you are hereby reprimanded for such unprofessional conduct. You are further warned that any other unprofessional conduct, or any other violation of VSC or JSC policies, procedures, rules or regulations, will result in further discipline up to and including dismissal.

Finally, for the record, I want to make it very clear to you that the College will investigate sexual harassment and other complaints whenever they are made. As President, I am committed to pursuing any sexual harassment complaint thoroughly, and I am committed to a serious review and appropriate response whenever there is an expression of fear for safety by a student and/or an employee.

This reprimand will become part of your personnel file.

(Federation Exhibit 2)

3. Ackerson and Laflin worked the midnight to 8:00 a.m. shift on July 11, 1992. Shortly after midnight, Cotter met with Laflin in Cotter's apartment. On occasion, Cotter met with security officers in his apartment to discuss business because he works days and the officers work nights.

4. After meeting with Laflin, Cotter met with Ackerson in Cotter's apartment. When Ackerson arrived at Cotter's apartment, Cotter began discussing with Ackerson the need for extra patrolling on campus due to the anticipated influx of students and other persons because of the Reggae Festival in Johnson that weekend. Shortly after beginning this discussion, Cotter noticed that Ackerson seemed upset, and asked him what was bothering him. Ackerson then, in an agitated manner, began complaining about his treatment by College officials in connection with the sexual harassment complaint which had been brought against him. Ackerson continued to talk about the sexual harassment issue at length in an agitated manner. Cotter became upset, and then he and Ackerson engaged in heated discussion. Ackerson then told Cotter

that he wanted Laflin present at the meeting. Cotter denied that request. Ackerson then left the meeting. At no point during the meeting did Cotter indicate to Ackerson that further disciplinary action was being considered against him for the sexual harassment issue, or that disciplinary action was contemplated on any issue. Also, Cotter did not attempt to question Ackerson on the sexual harassment issue.

#### OPINION

The Federation contends that the Colleges committed an unfair labor practice by denying Gary Ackerson the right to have union representation during his July 11, 1992, meeting with his supervisor, Daniel Cotter. The Federation alleges that the Colleges thereby prevented Ackerson from exercising a right established by the US Supreme Court in NLRB v. Weingarten, 420 US 251 (1975).

In Weingarten, the Court held that an employee's right to engage in "concerted activities for... mutual aid or protection" under Section 7 of the National Labor Relations Act, 29 USC §157, included the right to union representation at an investigatory interview which may lead to discipline against the employee. Id. at 256-57. The Court recognized that the employee's right was subject to certain limitations. First, the right arises "only in situations where the employee requests representation". Id. at 257. Second, the employee's right to request representation as a condition to participation in the interview "is limited to situations where the employee reasonably believes the

investigation will result in disciplinary action". Id. at 257-58. Reasonable belief is "measured... by objective standards under all the circumstances of the case", rather than by the subjective reaction of the employee. Id. at 257, n. 5. Third, the employer may carry on its inquiry without interviewing the employee, thus leaving the employee "the choice between having an interview unaccompanied by (his or her) representative, or having no interview and foregoing any benefits that might be derived from one". Id. at 258-59. Fourth, the employer has no duty to bargain with any union representative who attends the investigatory interview. Id. at 259-60.

We concur with the Federation that the Weingarten rights apply to cases like this filed under the State Employees Labor Relations Act, 3 VSA §901 et seq. ("SELRA"). SELRA, like the NLRA, protects employees' rights to "engage in concerted activities for... mutual aid or protection". 3 VSA §903(a). Resort to Federal precedent is appropriate in construing statutory provisions which reflect similar provisions in the NLRA. Burlington Firefighters Association v. City of Burlington, 142 Vt. 433, 435 (1983). Here, the relevant provisions of SELRA and NLRA are identical, and we thus conclude that Weingarten rights apply under SELRA.

In applying Weingarten here, we conclude that no unfair labor practice was committed by the Colleges. This is because Ackerson had no reasonable belief that his July 11 meeting would result in disciplinary action. The Federation alleges that Ackerson had a reasonable belief that disciplinary action would

result due to Cotter questioning Ackerson about the sexual harassment complaint filed against Ackerson and questioning Ackerson about his attitude.

However, the Colleges had completed their investigation by the time of the July 11 meeting with respect to the sexual harassment complaint. This is indicated by President Hahn's July 6 memorandum to Ackerson informing him that he was not found to have committed sexual harassment in violation of College policies, but that he was being issued a written reprimand for unprofessional conduct during the course of the investigation of the sexual harassment complaint. Also, Ackerson, not Cotter, brought up the sexual harassment issue during the July 11 meeting. Further, Cotter never indicated to Ackerson that further discipline was being considered with respect to the sexual harassment issue or any issue, and did not seek to question Ackerson on the sexual harassment issue. Finally, there is insufficient specific evidence before us by which we can conclude that any discussion between Cotter and Ackerson on Ackerson's attitude reasonably could have been construed by Ackerson as potentially resulting in disciplinary action.

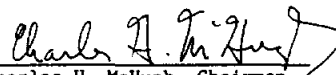
Under these circumstances, we conclude that Ackerson did not have a reasonable belief that the July 11 meeting would result in disciplinary action against him. Cotter was not investigating any matter that could lead to disciplinary action against Ackerson. Thus, Ackerson did not have a right to union representation at this meeting, and the Colleges did not commit an unfair labor practice by denying him such representation at the meeting.

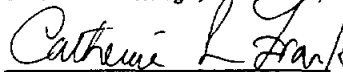
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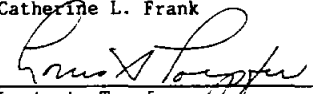
NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the unfair labor practice charge filed by the Vermont State Colleges Staff Federation, AFT Local 4023, AFL-CIO, against the Vermont State Colleges in this matter is DISMISSED.

Dated this 1st day of July, 1993, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Charles H. McHugh, Chairman

  
Catherine L. Frank

  
Louis A. Toepfer