STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF

CITY OF NEW HAVEN

-AND-

NEW HAVEN FIREFIGHTERS,
LOCAL 825

DECISION NO. 4720

MARCH 20, 2014

Case No. MPP-29,920

A P P E A R A N C E S:

Attorney Scott B. Nabel
for the City

Attorney Eric W. Chester
for the Union

DECISION AND ORDER

On August 3, 2012, New Haven Firefighters, Local 825 (the Union) filed a complaint with the Connecticut State Board of Labor Relations (the Labor Board) alleging that the City of New Haven (the City) violated the Municipal Employee Relations Act (MERA or the Act) by restricting communications between members of the bargaining unit and the Union.

After the requisite preliminary steps had been taken, the parties entered into a partial stipulation of facts and exhibits and the matter came before the Labor Board for a hearing on April 29, 2013. All parties appeared, were represented and were allowed to introduce evidence, examine and cross-examine witnesses, and make argument. The parties filed post-hearing briefs the last of which was received on June 18, 2013. Based on the entire record before us, we make the following findings of fact and conclusions of law and we issue the following order.

FINDINGS OF FACT

1, The City is a municipal employer within the meaning of the Act.

2. The Union is an employee organization pursuant to the Act and at all material times has been the recognized bargaining representative for all the uniformed and investigatory positions within the City's Department of Fire Service (Fire Service or department), except that of Fire Chief and Department Executive Officer. (Ex. 4).

3. The City and the Union are parties to a collective bargaining agreement (Ex. 4) with effective dates of July 1, 2006 to June 30, 2011 which, at all times relevant hereto, has been in effect by operation of law.[1]

4. The City hired Patrick Egan (Egan) as a firefighter in March of 1995 and from September 2000 to August, 2010, Egan served as Union president. In September, 2010, Egan was promoted to Assistant Chief of Administration, a position outside the bargaining unit and was succeeded as Union president by James Kottage, a Fire Service lieutenant.

5. Kottage considers Egan to be a harsh administrator and relations between the Union and the City has been strained since Egan's promotion.

6. At some point during the last quarter of 2011, Egan received a document[2] generated by Lieutenant Gary Cole (Cole) that stated that a copy of the said document had been sent to the Union. Egan told the Deputy Chiefs and Battalion Chiefs to inform all personnel that copies of correspondence directed to the Chief's office was not to be given to agencies or individuals outside the department.[3]

7. In response to an order from a supervisor, on or about April 12, 2012, Cole wrote a report concerning an incident in which Cole had posted information on Facebook referencing a certain fire call for service. The report stated that Cole had sent the Union a copy of the report.

8. Upon receipt of the report, Kottage spoke to Cole and discussed the incident and potential discipline. The following day Cole and Kottage attended a scheduled meeting with Fire Chief Grant and Egan concerning the Facebook posting. At the conclusion of the meeting Cole received an informal reprimand.

9. In response to Cole's April 12, 2012 report, Egan instructed the Deputy Chiefs and Battalion Chiefs during a regular chief's meeting on the morning of April 30, 2012, to inform all personnel that copies of documents destined for the Chief's office were not to be given to agencies or persons outside the department, including the Union.

---

[1] Conn. Gen. Stat. § 7-475 provides, in relevant part:

> In the event an agreement expires before a new agreement has been approved by the municipal employer and the employee organization, the terms of the expired agreement shall remain in effect until such time as a new agreement is reached and approved . . .

[2] The record is silent as to the nature or substance of this document.

[3] The record is silent as to whether personnel were so notified in 2011.

10. During the afternoon of April 30, 2012, Battalion Chief Richard Rife (Rife) met with Lombard Station personnel, including Kottage, and stated that copies of responses to the Chief's requests for information were not to be sent to the Union. The following day Kottage confirmed that the same directive was given to personnel at two other department facilities.

11. Prior to the imposition of discipline, the effected employee is often required to attend a meeting at the Chief's office to answer questions and to proffer defenses. Since Egan's promotion, employees and the Union have been afforded minimal advance notice of such meetings.

12. At all times relevant hereto, there has existed a Fire Service policy regarding distribution of information outside the department.

CONCLUSIONS OF LAW

1. It is a violation of the Act for an employer to fail or refuse to provide an employee with union representation upon request during an investigatory interview that the employee reasonably believes may result in discipline.

2. Mandatory submission of a written statement concerning matters which an employee reasonably believes may result in discipline is an investigatory interview which entitles the employee to union representation.

3. The City violated the Act when it issued a directive restraining valid exercise of the right to union representation during investigations of potential employee misconduct.

DISCUSSION

In this case the Union contends that the City violated Section 7-470(a)(1) and (2)[4] when Egan ordered all members of the bargaining unit to refrain from sending the Union copies of written communications to the Chief. Specifically, the Union alleges that Egan's directive restrains exercise of protected rights and constitutes illegal retaliation and discrimination.

The City responds that Egan's directive does not interfere with Union requests for information relevant to collective bargaining and notes that there is no alleged failure to comply with a valid information request at issue in this case. In short, the City argues it is entitled to receive an express information request which it can assess for lack of relevance or any other

---

[4]Conn. Gen. Stat. § 7-470(a)(1) and (2) state:

> (a) Municipal employers or their representatives or agents are prohibited from: (1) Interfering, restraining or coercing employees in the exercise of the rights guaranteed in section 7-468; (2) dominating or interfering with the formation, existence or administration of any employee organization;

Conn. Gen. Stat. § 7-468(a) states in relevant part:

> (a) Employees shall have, and shall be protected in the exercise of, the right . . . collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from actual interference, restraint or coercion.

valid defense to production and that Cole's actions improperly bypassed this process. Since we find on the basis of the record before us that Egan's order interferes with employee ***Weingarten*** rights, we conclude that relief is warranted.

At the outset we dismiss the Union's claims under Section 7-470(a)(2) of the Act. This provision is concerned with circumstances where an employer inserts itself into the structure or operation of what purports to be a labor organization, thereby creating a so-called "company union." ***New Fairfield Board of Education***, Decision No. 3327 (1995). The Union has not offered any argument in support of such a claim in its brief and since the record is devoid of evidence material to such issue we dismiss the Union's claim under that section.

While we agree with the Union that Section 7-470(a)(1) is the primary provision of the Act at issue, we do not employ the test derived from ***Wright Line***, 251 NLRB 1083, *enfd*, 622 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 US. 989 (1982), given the facts of this case. A ***Wright Line*** analysis is appropriate where claims of employer discrimination or retaliation in response to protected activity are involved and there is nothing in the record before us to support a claim that the City engaged in such conduct.[5] *See e.g.*, ***City of Bristol***, Decision No. 4626 (2012), ***Hartford Board of Education***, Decision No. 4544 (2011); ***Town of Greenwich***, Decision No. 2257 (1983); *dismissal of appeal aff'd*, 8 Conn. App. 57 (1986); ***Connecticut Yankee Catering***, 1601 (1977). It is well established, however, that in protecting "concerted activities for the purpose of . . . mutual aid or protection . . ." Section 7-468 establishes employee ***Weingarten*** rights which are involved in this case and enforceable through Section 7-470(a)(1). *See* ***Trumbull Board of Education,*** Decision No. 1635 (1978)(*adopting* ***NLRB v. Weingarten***, 420 U.S. 251 (1975)).[6]

> It is well settled that an employee is entitled to union representation at an investigatory interview called by the employer where the employee reasonably believes that the interview will result in disciplinary action or jeopardy to the employee's job security and where the employee has requested representation. The employer may refuse to permit union representation by either ending the interview or making continuation purely voluntary on the part of the employee. This is the rule enunciated in ***NLRB v. Weingarten, Inc***. 420 U.S. 251 (1975) and adopted by this Board under our labor statutes including MERA. ***City of Stamford,*** Decision No. 2476 (1986); ***State DOC,*** Decision No. 3631 (1998) and cases cited therein.

Town of Wallingford, Decision No. 4163 p. 3 (2006).

Requiring submission of a written statement by an employee suspected of misconduct is fundamentally no different than a face-to-face investigatory interview. An employer should not be able to deny employees their ***Weingarten*** rights merely because it has chosen to require that they produce written statements instead of, or in addition to, submitting to oral interviews. Our conclusion that a compelled written statement in this context constitutes an investigatory interview is consistent with the policies articulated by the Supreme Court in ***Weingarten*** as employees have the same need for a supportive witness and assistance communicating relevant

[5] No adverse actions were taken against Cole for sending materials to the Union.

[6] Where the language of state and federal labor statutes is the same, "judicial interpretation frequently accorded the federal act is of great assistance and persuasive force in the interpretation of our own acts." ***West Hartford Education Association v. DeCourcy***, 162 Conn. 566, 579 (1972) (citations omitted); *compare* §§ 7-470(a)(1) and 7-468 *with* 29 U.S.C. §§ 158(a)(1) and 29 U.S.C. 157.

facts and extenuating circumstances as during oral interrogation. *Id*, 420 U.S. at 262-263. Nor does application of ***Weingarten*** in this case break new ground[7] given our past recognition of entitlement to union representation in the drug-testing context. ***City of Bridgeport***, Decision No. 4693 (2014); ***City of New Haven***, Decision No. 2554-A p. 21 (1987).

We have no difficulty finding that delivery of Cole's April 12, 2012 statement to the Union was protected under ***Weingarten***. There existed a reasonable basis for Cole to believe that discipline could result given the existence of a department policy addressing dissemination of information outside the department and the order to provide the Chief's office with a written statement concerning his Facebook posting. Cole's request for representation is evidenced by his conveyance of his statement to the Union, his subsequent consultation with Kottage, and by Kottage's presence at the meeting with Egan and Chief Grant. Lastly, the City does not claim, nor do we find, that the meeting was solely for the purpose of informing Cole of a previously made discipline decision. Cole was subject to further questioning on the substance of his statement and Kottage raised similar past conduct by other employees as a defense. In short, we find that the directive to write a statement and to attend a meeting at the Chief's office gave notice of investigatory interviews which triggered Cole's ***Weingarten*** rights. *See* ***State of Connecticut, Department of Children and Families***, Decision No. 4529 (2011); ***City of Stamford***, Decision No. 2476 (1986); ***State of Connecticut, Department of Correction***, Decision No. 3631(1998).

The City readily admits that Egan's directive of April 30, 2012, was a response to Cole sending the Union a copy of his statement and was intended to prevent such employee action in the future. Since we find Cole's action was protected under ***Weingarten***, we also find that Egan's directive is a continuing violation of the Act to the extent it prohibits delivery of similar[8] statements to the Union.

The City asserts its willingness to comply with Union requests for relevant information and argues that Egan's directive does not interfere with such requests. Furthermore, the City claims, the Union's direct receipt of the materials denies the City an opportunity to refuse production for valid reasons. This argument, however, confuses the statutory rights at issue in this case and the applicable standards for assessing violations of these rights.

An employee's right to representation in the investigatory context is separate and distinct from the Union's right to information in subsequent disciplinary proceedings. The former turns on the existence of an objectively reasonable belief that discipline may ensue whereas the latter requires a showing of relevance through the pendency of such proceedings. *See, e.g.*, ***State of Connecticut, Judicial Branch***, Decision No. 4667 (2013); ***State of Connecticut, Department of Children and Families***, *supra*. In short, Cole's right to have Kottage review his written statement and accompany him to the meeting at the Chief's office is considered "concerted

---

[7] While the NLRB has declined to squarely address the right to union representation when submitting a written statement in an investigation of employee misconduct, our counterparts in Pennsylvania and New Jersey agree the right exists. *Compare* ***Wynn Las Vegas***, 358 NLRB No. 80 n. 1 (2012); ***Penn. State Corrections Officers Assoc. v. Pennsylvania Dept. of Correction, Pennsylvania Labor Relations Board***, No. PERA-C-13-29-E (1/10/2014); ***State of New Jersey, Department of Corrections***, New Jersey Public Employment Relations Commission, No. 2013-16, 39 NJPER 175 (¶53 2012).

[8] Delivery of materials to the Union that are not similar are not protected under ***Weingarten*** and risk discipline for insubordination. *See e.g.*, ***Bridgeport Hospital***, 265 NLRB 421 (1982).

activit[y] for the purpose of . . . mutual aid or protection" even though City representatives had no duty to bargain with Kottage while questioning Cole. ***NLRB v Weingarten***, *supra*, 420 U.S. at 260. Since the City requested Cole's statement, it cannot now complain that Kottage had access to the information in the statement any more than it could complain that Kottage was privy to Cole's responses to questions posed at the meeting at the Chief's office.

ORDER

By virtue of and pursuant to the power vested in the Connecticut State Board of Labor Relations by the Municipal Employee Relations Act, it is hereby

ORDERED, that the City of New Haven

I. Cease and desist from restricting or prohibiting any member of the bargaining unit from providing the Union with a copy of the member's written statement compelled by the City concerning matters in which the employee reasonably believes may result in the imposition of discipline upon such employee.

II. Take the following affirmative action which we find will effectuate the purposes of the Act:

A. Inform all members of the bargaining unit of the substance of paragraph I above in the manner commonly used for notice of directives of general application.

B. Post immediately and leave posted for a period of sixty (60) consecutive days from the date of posting, in a conspicuous place where the employees of the bargaining unit customarily assemble, a copy of the Decision and Order in its entirety.

C. Notify the Connecticut State Board of Labor Relations at its office in the Labor Department, 38 Wolcott Hill Road, Wethersfield, Connecticut within thirty (30) days of receipt of this Decision and Order of the steps taken by the City of New Haven to comply herewith.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

Patricia V. Low
Patricia V. Low
Chairman

Wendella Ault Battey
Wendella Ault Battey
Board Member

Barbara J. Collins
Barbara J. Collins
Board Member

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed postage prepaid this 20th day of March, 2014 to the following:

Attorney Scott B. Nabel
City of New Haven, City Hall — RRR
165 Church Street, 3rd Floor
New Haven, CT 06510

Attorney Eric Chester
Ferguson & Doyle, P.C. — RRR
35 Marshall Road
Rocky Hill, CT 06067

_____
Harry B. Elliott, Jr., General Counsel
CONNECTICUT STATE BOARD OF LABOR RELATIONS