



New York State Correctional Officers & Police Benevolent Association, Inc.

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August 27, 2009

Fellow NYSCOPBA Members,

It is with great pleasure that I report we received a favorable decision in a milestone improper practice case regarding the representation of probationary employees during employer questioning. This is the first case on this subject matter since the enactment of the new section of the *Taylor Law* in 2007. The importance of this decision cannot be emphasized enough because it provides more members with union representation at times when they need it most.

Background of the Law

As reported previously in *The Independent*, as of July 18, 2007, the *Taylor Law* (also known as the *Public Employees Fair Employment Act*) was amended to provide representational rights to public sector employees whenever one is questioned by his or her employer under circumstances where it reasonably appears that the employee may be subject to potential disciplinary action. These rights are sometimes referred to as *Weingarten* rights because of a United States Supreme Court case called *NLRB v. Weingarten* which held that a private sector employee protected by the *National Labor Relations Act* had a statutory right to refuse to submit to an interview without union representation that he reasonably feared would result in discipline. 420 U.S. 251 (1975). In 2007, the Legislature, with NYSCOPBA's support, amended the *Taylor Law* and created a new improper employer practice, found at *Civil Service Law (CSL)* Section 209-a.1(g).

Probationary employees' representational rights have been the subject of ongoing disputes between NYSCOPBA and the State. NYSCOPBA's position has always been that the 2007 amendment to the *Taylor Law* clearly provided probationary employees with the right to union representation during interrogations. The State, however, took a contrary position.

The Recent Decision

NYSCOPBA has filed with the New York State Public Employment Relations Board (PERB) numerous improper practice charges relating to the denial of union representation to probationary members. The first PERB decision was received yesterday in Case No. U-28160. The Administrative Law Judge (ALJ) found that the State violated the *Taylor Law*, *CSL* Sections 209-a.1(a) and (g), when it refused to allow a NYSCOPBA representative to be present when investigators from the Department of Correctional Services (DOCS), Office of the Inspector General (IG), questioned a probationary corrections officer on January 28, 2008. Investigators from DOCS, IG, went to Great Meadow Correctional Facility following an inmate's suicide attempt to question staff about the suicide attempt and the subsequent death of the inmate. The probationary corrections officer, the only officer on the inmate's unit at the time, was denied his request for union representation during the interrogation.

In finding that the State violated the law, the Judge held, in part, that, "...the disciplinary references in § 209-a.1(g) encompass a range of adverse employment actions, including removal from one's job, based on misconduct or incompetence." This means that discipline in the new law includes adverse employment actions against employees in their probationary status. Also, the Judge found that on January 28, 2008, at the time of the probationary corrections officer's questioning, it reasonably appeared that his job was potentially in jeopardy. **The Judge ordered, among other things, that the State allow probationary unit employees NYSCOPBA representation, at their request, when they are questioned by the State and at the time of questioning it reasonably appears that they may be the subjects of potential disciplinary action.**

This precedential case, after a lengthy and hard-fought battle, allows members in their probationary status to have union representation in situations where DOCS had previously refused to give it to them. Members have undoubtedly gained a valuable benefit. We fully expect that the State will appeal the decision by filing exceptions with PERB. If the State decides to appeal this decision, PERB's rules require that it do so within fifteen working days after receipt of the decision. I am posting, here, a copy of this important decision for your review.

In Unity,

A handwritten signature in black ink, appearing to read 'Donn Rowe', with a stylized flourish at the end.

Donn Rowe
President

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**NEW YORK STATE CORRECTIONAL OFFICERS
AND POLICE BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

CASE NO. U-28160

- and -

**STATE OF NEW YORK (DEPARTMENT OF
CORRECTIONAL SERVICES),**

Respondent.

**SHEEHAN, GREENE, CARRAWAY, GOLDBERMAN & JACQUES, LLP
(WILLIAM P. GOLDBERMAN of counsel), for Charging Party**

**MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (GARY SIMPSON of
counsel), for Respondent**

DECISION OF ADMINISTRATIVE LAW JUDGE

On February 8, 2008, the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) filed with PERB an improper practice charge alleging that the State of New York (Department of Correctional Services) (State) violated §§209-a.1(a), (c) and (g) of the Public Employees' Fair Employment Act (Act) when it refused a probationary unit member's request for NYSCOPBA representation at a meeting with investigators from the Department of Correctional Services' (DOCS) Office of the Inspector General which he was ordered to attend. The State filed an answer denying that its refusal violated the Act. It asserts that the meeting was "to compile facts", not to attach blame and that "there was no reason to believe that any

employee may be the subject of disciplinary action,” pointing out that one of the investigators stated at the meeting that whether the employee “was a potential subject for discipline was premature given the status of the investigation at that time”. The State also relies in its answer on two provisions of the parties’ collective bargaining agreement: Paragraph G of its “Bill of Rights” and Article 8, entitled “Discipline”. As to the former, the State asserts that its investigators “conducted an interview” not an “interrogation” and that only an interrogation includes union representation. As to the latter, the State asserts that probationary employees “are not subject to discipline”. As affirmative defenses, the State asserts that “at the time of questioning...it did not reasonably appear that [the at-issue employee] might be the subject of a potential disciplinary action”, that the at-issue employee “was not the subject of potential disciplinary action at the time he was interviewed because [the State] did not possess sufficient facts with which to identify a target for discipline”, and that NYSCOPBA waived any right of the at-issue employee to representation by failing to include him “among the unit members given rights” in the parties’ collectively negotiated agreement at paragraph G and in Article 8, paragraph G requiring, in order for an employee to be eligible for representation, that “it must be ‘contemplated that such employee will be served a notice of discipline pursuant to Article 8[.]’¹.”

A hearing was held on August 14, 2008 at which both parties were represented by counsel. Both parties have filed briefs.

¹The State also raised as an affirmative defense that its actions were not motivated by union animus. However, NYSCOPBA neither claims nor presented evidence to support a claim that the State’s refusal of representation was motivated by union animus.

FACTS

Jason Chagnon, the corrections officer who requested the at-issue representation, and Scott Bishop, the NYSCOPBA chief sector steward who initially accompanied him to the meeting, testified on behalf of NYSCOPBA. Jonathan Nocera, one of the two investigators from DOCS' Office of the Inspector General who met with Chagnon, Daniel Martuscello III, DOCS' director of human resources, and Peter Brown, DOCS' director of labor relations, testified on behalf of the State.

On January 28, 2008, an inmate attempted suicide on the cell block of the Great Meadow correctional facility that Chagnon was patrolling alone. Chagnon was relieved from duty and directed to write down what had occurred. The memorandum which he wrote to the superintendent of the facility includes descriptions of his actions during the incident. Soon thereafter, he was questioned by facility supervisors² and then, again following orders, appeared for a meeting with Nocera and an investigator named Grant.

Bishop accompanied Chagnon to the latter meeting. Nocera, upon learning Chagnon's seniority date at the outset of the meeting, informed them that Chagnon was not entitled to NYSCOPBA representation there. Nocera testified that the reason for the denial was that Chagnon was a probationary employee and, as such, not subject to discipline under the parties' collective bargaining agreement. A brief discussion ensued between Nocera and Bishop in Chagnon's presence, during which Bishop expressed his disagreement; Nocera then made an unsuccessful attempt to contact his supervisor

²There is no claim regarding representation during that questioning.

The only supervisor present whom Chagnon could identify during his testimony was a Sergeant Costin.

for confirmation. According to Chagnon's testimony, upon returning to the room with Bishop, he informed Nocera that he wanted his "union representation".³ No other witness testified to this statement. The questioning of Chagnon proceeded without Bishop or any other NYSCOPBA representative present.

According to Bishop's testimony, during the discussion between Nocera and Bishop, Nocera answered in the affirmative Bishop's inquiries as to whether Chagnon was "the target of his investigation"⁴ and "could possibly face disciplinary action because of it".⁵ Chagnon's testimony corroborates Bishop's on this point. Nocera, however, testified that, in response to Bishop's inquiry regarding discipline, he replied that he "couldn't make that determination. It's not my decision."⁶

Nocera described Chagnon in his testimony as the only "immediate witness"⁷ to the incident, the "first one at the cell,"⁸ and, on cross-examination, the officer responsible for the area and the inmates within that area, corroborating Chagnon's testimony. Nocera, describing the portion of the meeting outside Bishop's presence, testified that he began by referring to the report Chagnon had written after the incident: "I'm going to be speaking to you today about what you've documented here, your

³*Id.* at p.24.

⁴Transcript, at p.66.

⁵*Id.*

⁶*Id.* at p.115.

⁷*Id.* at p.123.

⁸*Id.*

account of the incident...."⁹ He then, according to his testimony, based his "line of questions"¹⁰ on what Chagnon had written. While he testified "No" when asked whether he "question[ed Chagnon] about his conduct,"¹¹ he then testified that he "questioned...Chagnon on the memorandum that he submitted...to [the] [s]uperintendent...and since he was the first individual on the scene, his description of the events as they occurred". On cross-examination, Chagnon, asked if the questions "were about"¹² the suicide attempt, answered in the affirmative. He was not asked and did not provide further specifics regarding the questioning. It is undisputed that, during the one-half hour of questioning, Nocera never accused Chagnon of doing anything wrong.

Nocera testified without dispute that the Inspector General's office investigates "cases where there's possible misconduct on the part of staff or administrative or law violating by staff and inmates,"¹³ including suicides and attempted suicides. Here, he "interviewed all staff to put the facts together"¹⁴ so that he could "determine what happened."¹⁵ With the exception of the nonunit nurse, the other four to five employees

⁹*Id.* at p.116.

¹⁰*Id.*

¹¹*Id.* at 109.

¹²*Id.* at p.50.

¹³*Id.* at p.104.

¹⁴*Id.* at p.131.

¹⁵*Id.*

questioned regarding the incident were permanent employees within the bargaining unit represented by NYSCOPBA and were allowed NYSCOPBA representation. According to Nocera, the "nature of the incident"¹⁶ called for "immediate fact gathering".¹⁷ While he normally views a tape of the area involved prior to questioning, here the tape of the cell block was unavailable until the next day because:

[t]here was an issue with the tape. Somebody was busy. They couldn't make it. There was some reason why we didn't have a copy of the tape.¹⁸

He answered in the affirmative when asked whether this made the gathering of facts "more urgent".¹⁹ Contrasting the questioning as to this incident with an "interrogation", Nocera testified that interrogations take place at "Building 2 in Albany"²⁰ with a stenographer present. In addition, he testified that, unlike in "a preliminary fact gathering,"²¹ in an interrogation "information would be leading toward the issuance of a [n]otice of [d]iscipline".²²

On February 15, 2008, Chagnon was placed on paid administrative leave by memorandum from the superintendent of the facility. Martuscello, whose office

¹⁶*Id.* at p.107.

¹⁷*Id.*

¹⁸*Id.* at p. 135.

¹⁹*Id.* He did not explain why, if fact gathering was urgent, no one was made available to produce the tape.

²⁰*Id.* at p.107.

²¹*Id.* at p.106.

²²*Id.*

reviewed Chagnon's situation to determine the appropriate employer response, testified that, pending a "full, thorough review",²³ the determination to place Chagnon on leave was based on what he viewed on the cell block tape and the fact that Chagnon was a probationary employee. The intent was that the leave last "until we could make a determination of exactly what had transpired and if any action needed to be taken...."²⁴ In early March, Nocera estimated, he issued a report on the incident and the response to it. On March 22, 2008, Chagnon had a "formal counseling session" and received a counseling memorandum regarding the incident from a lieutenant at the facility. No further action was taken *vis-a-vis* Chagnon.

At the time of the at-issue questioning, the State and NYSCOPBA were parties to a collective bargaining agreement which had expired in 2007. Paragraph G of the "Bill of Rights" therein states:

An employee shall be entitled to Union representation at an interrogation if it is contemplated that such employee will be served a notice of discipline pursuant to Article 8 of this Agreement. Such employee shall not be required to sign any statement arising out of such interrogation.

Article 8 of said agreement is entitled "Discipline". It provides, at §8.1:

Exclusive Procedure

Discipline shall be imposed on employees otherwise subject to the provisions of Sections 75 and 76 of the Civil Service Law only pursuant to this Article, and the procedure and remedies herein provided shall apply in lieu of the procedure and remedies prescribed by such sections of the Civil Service Law which shall not apply to employees.

²³*Id.* at p.152.

²⁴*Id.* at p.146.

Among Martuscello's duties is the review of probationary employees' job performance, including issues of misconduct. According to Martuscello, his review is solely to assess the probationary employee's suitability to continue in State employment, and his determinations, including those ending a probationary employee's employment, are solely to effectuate his suitability assessments. Martuscello termed the ending of a probationary employee's employment a "probationary removal from service,"²⁵ denying that it was a "termination," a term he considered appropriately used only in conjunction with "the disciplinary process which is [Civil Service Law §]75, which probationers are not subject to".²⁶ Martuscello described the probationary period as the employer's "time to evaluate an employee"²⁷ and "probationary removal" as "the final and most critical stage in the examination and selection process".²⁸ During his 12 years as a DOCS employee, Martuscello has never suspended a probationary employee and he is not aware of any probationary employee disciplined pursuant to the contract.

Brown's duties include, in his words, "administration of [DOCS] disciplinary program in accordance with various [collective bargaining agreements]"²⁹ and do not encompass probationary employees at all. Brown testified that he thought that his office

²⁵*Id.* at p.147.

²⁶*Id.*

²⁷*Id.* at 143.

²⁸*Id.*

²⁹*Id.* at p.162.

was "initially...asked to reaffirm [its] position"³⁰ that probationary employees are not entitled to union representation during such questioning as Chagnon experienced. It responded that probationary employees are not eligible for "contractual representation".³¹ He explained on the record that that is because his office "can't discipline them...can't issue them a Notice of Discipline".³² Neither Brown nor his office had any further involvement with Chagnon's situation.

The *Official Compilation of Codes, Rules and Regulations of the State of New York* states, under its Rules for the Classified Service at 4 NYCRR 4.5(j):

Removal during probationary term. Nothing contained in this section shall be construed to limit or otherwise affect the authority of an appointing authority, at any time during the probationary term, to remove a probationer for incompetency or misconduct, under section 75 of the Civil Service Law or an agreement negotiated between the State and an employee organization pursuant to article 14 of such law.

The Act states, at §209-a.1, that "[i]t shall be an improper practice for a public employer or its agents deliberately":

(g) to fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization, or the designee of such organization, which has been certified or recognized under this article when at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action. If representation is requested, and the employee is a potential target of disciplinary action at the time of questioning, a reasonable period of time shall be afforded to the employee to obtain such representation. It shall be an affirmative defense to any improper practice charge under paragraph (g) of this subdivision that the employee has the right, pursuant

³⁰*Id.* at p.164. No date for this inquiry appears on the record.

³¹*Id.* at pp.164-165.

³²*Id.* at p.165.

to statute, interest arbitration award, collectively negotiated agreement, policy or practice, to present to a hearing officer or arbitrator evidence of the employer's failure to provide representation and to obtain exclusion of the resulting evidence upon demonstration of such failure. Nothing in this section shall grant an employee any right to representation by the representative of an employee organization in any criminal investigation.

Section 209-a.1(g) of the Act, above, was effective on July 18, 2007.³³

DISCUSSION

The §209-a.1(c) allegation is dismissed at the outset. The record is devoid of evidence that the State acted with a motive which was discriminatory under the Act. Nor is there claim or record evidence that the State took any action against Chagnon because he requested NYSCOPBA representation, the only action of his here arguably protected by the Act.

As succinctly explained by Chief Justice Kaye in her dissent in *New York City Transit Authority v. PERB*,³⁴ in considering a statute effect is given to the intention of the Legislature:

by considering, first, the language in "its natural and most obvious sense", then "the general spirit and purpose underlying its enactment" and, later, extrinsic evidence, such as legislative history[.]³⁵

What is clear from the language of the statute is that §209-a.1(g) applies to all public employees within a bargaining unit, as that is stated at its outset: "to fail to permit or refuse to afford a *public employee* the right...to representation by a representative of

³³L 2007, ch 244, §1(1).

³⁴8 NY3d 226, at 236, 40 PERB ¶7001, at 7005 (2007).

³⁵Citing to *McKinney's Cons Laws of NY*, Book 1, Statutes, §§94, 96, 120, and *Majewski v Broadalbin-Perth Cent Sch Dist*, 91 NY2d 577, at 583 (1998).

the employee organization, which has been certified or recognized..." (emphasis added). This is also in accord with the rest of the protections guaranteed by §209-a.1 of the Act, which do not distinguish between classes of employees within bargaining units.³⁶ Therefore, all employees in the bargaining unit represented by NYSCOPBA are granted the protection of §209-a.1(g), if they find themselves in the circumstances described in the remainder of the subsection.

§209-a.1(g) describes those circumstances as follows: "[w]hen at the time of questioning by the employer...it reasonably appears that [a public employee] may be the subject of a potential disciplinary action" and "[i]f...the employee is a potential target of disciplinary action at the time of questioning". While the State argues that the references to discipline are limited to either the party's contractual disciplinary procedures or Civil Service Law §75, there is nothing natural or obvious to that reading of the statute. At the same time, no other definition is any more assured by the face of the statute alone.

Section 209-a.1(g) was created and approved to negate the Court of Appeals' holding in *New York City Transit Authority v. PERB*,³⁷ which reversed PERB's

³⁶While it is unnecessary to rely on outside sources on this point, I note, apropos the discussion *infra*, that under the National Labor Relations Act, representation rights during employer questioning do not exclude probationary employees. See, e.g., *NLRB v Columbia University*, 541 F2d 922, 93 LRRM 2085 (2d Cir 1976); *Beverly Farm Foundation, Inc. v AFSCME, Council 31, AFL-CIO*, 1996 WL 33321475, enforced, 323 NLRB 787, 157 LRRM 1175 (1997). In fact, at various times, private sector nonunit, at-will employees have been accorded such representation rights. The present denial of such rights under the National Labor Relations Act is based not on the employees' at-will status but on their nonunit status. See *IBM Corp*, 341 NLRB 1288, 175 LRRM 1537 (2004).

³⁷*Supra* note 34.

determination,³⁸ affirmed by the Appellate Division,³⁹ that public employees have what are commonly referred to as *Weingarten* rights, so denominated based on the seminal United States Supreme Court case in the private sector⁴⁰ establishing an employee's right, upon request, to be represented by the bargaining agent⁴¹ when the employee reasonably believes that the employer's questions might result in disciplinary action against her or him. The governor, in his approval memorandum,⁴² stated that he was "following the position previously adopted by the Public Employment Relations Board...and the United States Supreme Court..."; the sponsoring memorandum states as its purpose the extension of *Weingarten* rights to public employees and cites the Court of Appeals decision as contrary authority:

This legislation extends to public employees the rights of employees under the National Labor Relations Act ..., as interpreted by the United States Supreme Court in *NLRB v. Weingarten*, 420 U.S. 251 (1975) and many, but not all public employees under different provisions of state law.

A recent New York State Court of Appeals decision (**In the Matter of New York City Transit Authority v. New York State Public Employment Relations Board**)...ruled that public sector employees do not have the same rights as public (sic) sector workers when facing possible disciplinary action, a so-called "Weingarten right". The Court of Appeals said a 1975 U.S. Supreme Court decision giving private sector employees

³⁸*New York City Transit Auth.*, 35 PERB ¶13029 (2002).

³⁹27 AD3d 11, 38 PERB ¶17019 (2d Dept 2005).

⁴⁰*NLRB v J. Weingarten, Inc.*, 420 US 251, 88 LRRM 2689 (1975).

⁴¹Regarding nonunit employees' fluctuating right under the National Labor Relations Act to have representation, see note 36, *supra*. PERB has never addressed this issue and it is not raised by the instant case.

⁴²Governor's Mem approving L 2007, ch 244, 2007 McKinney's Session Laws of NY, at 1497.

the right to have union assistance during “investigatory interviews” does not apply to public employees in New York State because of differences between the NLRB (sic) and New York’s Taylor Law. (Emphasis in original.)⁴³

It is therefore apparent that §209-a.1(g) of the Act was intended to extend to public employees the rights created by *Weingarten*. In addition, the governor’s memorandum states an intention to make statutory the rights set forth in PERB’s decision in *New York City Transit Authority, supra*,⁴⁴ analogizing them to those in *Weingarten*.

While those rights are expressed in terms of the potential for discipline or disciplinary action, the *Weingarten* decision also refers to the potential for an “adverse...affect... [on] continued employment or even...working conditions”,⁴⁵ “a perceived threat to...employment security”,⁴⁶ an “adverse impact”.⁴⁷ As a further example, *NLRB v Columbia University*,⁴⁸ one of its progeny, refers to “disciplinary

⁴³Sponsor’s Mem, L 2007, ch 244, 2007 McKinney’s Session Laws of NY, at 1760. This language also appears in a June 26, 2007 letter from Peter J. Abbate, Jr., an assembly sponsor of the bill, to the governor, with the relevant exception that the word “private”, not “public”, modifies the second appearance of the words “sector workers”.

⁴⁴See also *Tarrytown PBA, Inc.*, 40 PERB ¶3024, at 3104 (2007): “In light of the text and legislative history..., we believe that [§209-a.1(g)] was...aimed at overturning the Court’s decision in” *New York City Transit Auth, supra* note 34.

⁴⁵*NLRB v J. Weingarten, Inc., supra*, at 259 and 2692, quoting *Quality Mfg Co*, 195 NLRB 197, at 198-199, 79 LRRM 1269, at 1271 (1972), *enforcement denied in part*, *NLRB v Quality Mfg Co*, 481 F2d 1018, 83 LRRM 2817 (4th Cir 1973), *revd*, *International Ladies Garment Workers Union, Upper South Dept, AFL-CIO v Quality Mfg Co*, 420 US 276, 88 LRRM 2698 (1975).

⁴⁶At 260 and 2692.

⁴⁷At 258 and 2691, quoting *Quality Mfg. Co., supra*, at 199 and 1271.

⁴⁸*Supra* note 36.

action, or...jeopardizing the employee's job",⁴⁹ and employee activity "which could warrant...subsequent dismissal";⁵⁰ *Mobil Oil Corporation*,⁵¹ the case which, along with *Quality Mfg. Co., supra*, preceded *Weingarten*, served as a building block to it and is quoted with approval in it, refers to the right to representation at an interview which "may put [the employee's] job security in jeopardy".^{52 53}

This is in basic conformity with the Board's decision in *New York City Transit Authority*,⁵⁴ which quotes with approval the National Labor Relations Board's decision in *United States Postal Service*:⁵⁵ "the use of the term "discipline" in the industrial context normally means a punishment or penalty which is imposed upon an employee for violation of an employer's policy, practice, or plant rules".⁵⁶ The Board also held that an employee's fear of discipline was reasonable "if the interview is calculated to form the basis for taking discipline or other job-affecting actions...because of past misconduct' or

⁴⁹ At 929 and 2089.

⁵⁰ At 930 and 2090.

⁵¹ 196 NLRB 1052, 80 LRRM 1188 (1972), *enforcement denied*, 482 F2d 842, 83 LRRM 2823 (CA 7, 1973).

⁵² At 1052 and 1191.

⁵³ See also Christine Neylon O'Brien, The NLRB Waffling on Weingarten Rights, 37 Loy U Chi LJ 111, 117 n32 (Fall 2005), defining "disciplinary action" as "any change that would adversely impact the employee's working conditions or continued employment".

⁵⁴ 36 PERB ¶13049 (2003), *confirmed sub nom. Transport Workers Union of America, Local 100, AFL-CIO v New York State Pub Emp Rel Bd*, 24 AD3d 224, 38 PERB ¶17018 (1st Dept 2005).

⁵⁵ 252 NLRB 61, at 64 (1980).

⁵⁶ *New York City Transit Auth, supra*, at 3143.

incompetence".⁵⁷ It is also in conformity with the Board's *New York City Transit Authority* decision referred to in the governor's memorandum approving §209-a.1(g); that decision refers to "discipline, such as...suspension, loss of pay or termination".⁵⁸

Therefore, I find that the disciplinary references in §209-a.1(g) encompass a range of adverse employment actions, including removal from one's job, based on misconduct or incompetence. There is no evidence that they are tied to the existence of contractual or statutory disciplinary procedures. In the latter regard, in addition to the above, PERB, in finding the right to representation under the Act in *New York City Transit Authority*, expressly held that the rights and obligations of the Act in this area are independent of those set forth in CSL §75. Further, the caveat written into §209-a.1(g) provides employers with a defense to improper practice charges under that subsection if employees have access to disciplinary procedures where the refusal of representation can be raised and the admissibility of evidence related thereto can be decided. It is the remaining public employees within bargaining units who benefit from §209-a.1(g) –

⁵⁷At 3143-44, again quoting, in part, *United States Postal Service, supra*. See also *County of Ulster and Ulster County Sheriff*, 39 PERB ¶3013, at 3045 (2006). In *PBA of the New York State Troopers, Inc. v New York State Pub Emp Rel Bd*, 40 PERB ¶7003 (2007), the New York State Supreme Court defined discipline as "correction, chastisement, punishment, penalty" [quoting *Black's Law Dictionary* 464 (6th ed 1990)]...such as the decision to terminate...." CSL §75 itself, relied on, in part, by the State here, defines, at §1, discipline thereunder as "[r]emoval and other disciplinary action" and the grounds therefor as "incompetency or misconduct".

⁵⁸At 3081.

those who do not have available to them such disciplinary procedures. This includes probationary employees.⁵⁹

Martuscello's description of the purpose of DOCS' probationary period, his role in it, and the accepted definition of "probation"⁶⁰ do not dictate a contrary result. As stated *infra*, the presence of a bargaining agent representative during the at-issue questioning does not prevent the employer from assessing the probationary employee or deciding

⁵⁹Based on this determination, I need not decide the uses to which the results of an employer's questioning could be put in making or supporting disciplinary decisions once a probationary employee has achieved permanent status. See *Lennox Industries v NLRB*, 637 F2d 340, at 344, 106 LRRM 2607, at 2610 (5th Cir 1981):

Information could be elicited at that interview which might enable the employer to build a case against the employee, culminating in discipline at some later date.

* * *

We break no new ground, but merely restate the words of Weingarten in holding that where an interview is designed to elicit information which might reasonably result in discipline – either immediately or at some time in the future – a union representative is required if the employee so requests.

But see Northwest Engineering Co, 265 NLRB 190, at 191, 111 LRRM 1481, at 1482 (1982) ("Weingarten, however, is not concerned with employees having reason to believe that discipline will be imposed for future offenses; it relates to past conduct for which employees fear the imposition of current sanctions").

⁶⁰See *Bd of Educ, Central Sch Dist No 1 of the Town of Grand Island, Erie County, New York*, 64 Misc2d 473, at 476-477, 3 PERB ¶7011, at 7067 (1970), *revd on other grounds*, 37 AD2d 493, 4 PERB ¶7016 (1971), *affd*, 32 NY2d 660, 6 PERB ¶7004 (1973):

Probation means "a testing or trial, as of a person's character; his ability to meet certain requirements, or his fitness for a position." (Webster's New 20th Cent. Dict., 2nd Ed.),

a definition which remains essentially unchanged. See, e.g., *Merriam-Webster Online*, with definitions taken from *Merriam-Webster's Collegiate Dictionary*, 11th Ed (2003).

what action to take based on its assessment nor does it require the employer to negotiate regarding these matters.

There are, as relevant here, two limitations on the right to representation raised in the governor's approval memorandum which do not appear in *Weingarten*. An employer's defense to an improper practice charge has been referred to, as it appears in the statute, above.⁶¹ The other is described in the governor's memorandum as follows:

Some employers state that this right should attach only when there is a potential for discipline, not whenever the employee believes this to be the case. I agree – but the bill simply does not state that the employee's subjective views should determine the right to representation. It creates an objective standard: there must "reasonably appear" to be a potential for discipline before the right attaches. The bill does *not* state that the right attaches when it reasonably appears *to the employee* that there is a potential for discipline, and thus, this objection simply does not survive scrutiny. For the same reason, the bill does not – as some fear – give the employee the right to refuse to answer questions based on his or her particular view that discipline might be imposed. (Emphasis in original.)

While it is unclear whether the governor believed that these two limitations existed in the *Weingarten* case, he nonetheless interpreted the legislation as including them. The existence of these intended limitations, one of which is express in §209-a.1(g), further

⁶¹It appears in the governor's memorandum as follows:

[T]his bill does not give an employee "two bites at the apple" – i.e., allow the employee to argue for exclusion of evidence based on the violation of a right to representation in an internal disciplinary proceeding, and then again before PERB. Indeed, the bill was amended at my insistence to eliminate that problem, by making it a defense to an improper practice charge before PERB when the employer has a policy or practice of allowing an employee to demonstrate a violation of this right before an arbitrator or hearing officer. Thus, so long as an employee is provided with the chance to prove that his right was violated, and to exclude evidence if it has been, there can be no improper practice charge.

supports the above determinations on the scope of that subdivision, as they evidence that no further limitations on the right of bargaining unit employees to be represented as set forth in *Weingarten* and its progeny were intended.^{62 63}

On the facts of the instant case, I find that at the time of Chagnon's questioning it reasonably appeared that his job was potentially in jeopardy. That the investigator could not, upon inquiry, assure him to the contrary,⁶⁴ that he was being questioned by an outside investigator,⁶⁵ that among the investigator's functions is investigating employee wrongdoing, and that the permanent employees being similarly questioned were afforded representation support this finding. The State's argument that it was merely fact finding is rejected as a defense;⁶⁶ even if it could constitute a defense, it would not here, as the investigator, by his own testimony, notified Chagnon and Bishop

⁶²In explaining these limitations, the governor's approval memorandum expressly addresses objections on these issues received by the executive office, which are reflected in various of the memoranda and letters submitted in response to the legislation then before the governor. While the Governor's Office of Employee Relations raised the right of probationary employees under the subsection in its July 13, 2007 memorandum objecting to the legislation, the governor's approval memorandum does not address that issue.

⁶³Regarding the manner in which §209-a.1(g) should be interpreted, see also *Tarrytown PBA, Inc., supra*: "the amendment, as remedial legislation, is entitled to a liberal construction with respect to the representational rights protected...."

⁶⁴Based on my holding herein, I need not resolve the discrepancy between the testimony of Nocera, on the one hand, and Bishop and Chagnon, on the other, as to what Nocera stated at the meeting regarding discipline.

⁶⁵*NLRB v J. Weingarten, Inc., supra*, note 10.

⁶⁶See, e.g., *Southwestern Bell Telephone Co*, 338 NLRB 552 (2002); *Consolidated Edison of New York, Inc.*, 323 NLRB 910 (1997); *Lennox Industries v NLRB, supra*.

not that there would be no discipline but that the decision on discipline would be made later by someone else.⁶⁷

The State's reliance on Article 1, §10 of the federal Constitution, the aforementioned provisions of the parties' collectively negotiated agreement, and Civil Service Law §63 and 4 NYCRR 4.5 is misplaced, as §209-a.1(g) does not conflict with any of their terms. That probationary employees have a statutory right to representation during certain questioning by the employer does not impair provisions of an agreement providing such right to permanent employees.⁶⁸ Nor do such contractual provisions on permanent employees evidence waiver as to probationary employees.⁶⁹ Neither the framework nor the express provisions of Civil Service Law §63 and/or 4 NYCRR 4.5 demonstrate that probationary employees are prohibited from receiving representation at questioning to which §63 and Rule 4.5 do not even refer.⁷⁰

⁶⁷The State in its answer also makes this point, asserting, as set forth *supra*, that Chagnon "was not the subject of potential disciplinary action at the time he was interviewed because [it] did not possess sufficient facts with which to identify a target for discipline". See, e.g., *Alfred M. Lewis, Inc. v NLRB*, 587 F2d 403, at 411, 99 LRRM 2841, at 2846 (9th Cir 1978): "it is the presence of an investigatory element which gives rise to the right".

⁶⁸Even if contractual impairment was demonstrated, it would not be substantial and, therefore, would not violate the federal Constitution's Contracts Clause. See, e.g., *Buffalo Teachers Fedn v Tobe*, 39 PERB ¶7524 (2d Cir 2006).

⁶⁹Also, as §209-a.1(g) was enacted subsequent to the execution of the parties' agreement, no waiver would be evidenced on this record.

⁷⁰Therefore, I need not address the effect of a rule or regulation in the face of a statutory right. On that point, see, e.g., *Newark Valley Cent Sch Dist*, 24 PERB ¶4540, note 9, *affd*, 24 PERB ¶3037 (1991), *revd*, *Newark Valley Cent Sch Dist v New York State Pub Emp Rel Bd*, 25 PERB ¶7001 (1992), *revd*, 189 AD2d 229, 26 PERB ¶7005 (1993), *confd*, 83 NY2d 315, 27 PERB ¶7002 (1994).

The State's claim that the record does not evidence a request for representation is rejected. Chagnon expressly requested NYSCOPBA representation when he returned to the room to recommence the questioning, at which time his request was denied.⁷¹

Finally, I note that the right to representation at these interviews does not prevent an employer from terminating an employee or require that it negotiate such a decision or related decisions with the bargaining agent, either through the representative present or otherwise. I note what has been noted in both public and private sector decisions on this right – that the presence of a bargaining agent's representative can be a benefit for all parties.⁷²

⁷¹Therefore, I need not consider the effects of Chagnon's appearance for questioning accompanied by Bishop in his role as NYSCOPBA steward, his initial questioning in the company of Bishop, and that he was party to the disagreement between Bishop and Nocera regarding his entitlement to representation, not regarding NYSCOPBA's right to attend.

⁷²*NLRB v J. Weingarten, Inc.*, *supra*, at 262-263 and 2693.

In describing one of the employer's defenses, the court in *Weingarten* referred to the filing of a formal grievance by the disciplined employee and explained the reduced value of bargaining agent representation at that point; succeeding cases have sometimes referred to the avoidance of formal grievances as a benefit of *Weingarten* rights. These references do not indicate that the avoidance of grievances is the only basis for such rights, but that it can be one benefit, as the discussions in *Weingarten*, including that set forth above, and its progeny make clear. Further, whether probationary employees can bring grievances will depend on the circumstances at and surrounding each questioning and the various terms of parties' collectively negotiated agreements. Regarding other legal forums available for probationary employee challenges and under what circumstances, see, e.g., Act, §§209-a.1(a) and (c), *County of Wyoming*, 34 PERB ¶3042 (2001); and *Bd of Educ, Central Sch Dist No 1 of the Town of Grand Island, Erie County, New York*, 37 AD2d 493, 4 PERB ¶7016 (1971), *affd*, 32 NY2d 660, 6 PERB ¶7004 (1973); *Ward v Metropolitan Transp Auth*, 2009 NY Slip Op 05973 (2d Dept July 21, 2009).

A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.

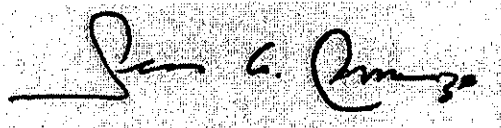
Based on the above, I find that the State violated §§209-a.1(a) and (g) of the Act when it refused to allow the NYSCOPBA representative of probationary corrections officer Chagnon to remain at his questioning by investigators from DOCS' Office of the Inspector General following an inmate's suicide attempt on January 28, 2008.

IT IS, THEREFORE, ORDERED that the State:

1. allow probationary unit employees NYSCOPBA representation, at their request, when they are questioned by the State and at the time of questioning it reasonably appears that they may be the subjects of potential disciplinary action;
2. immediately remove and destroy all documents maintained in DOCS' files, including corrections officer Chagnon's personnel file, relating to the portion of the interview conducted without corrections officer Chagnon's NYSCOPBA representative present, including the parts of the report of investigator Nocera relating to said portion;
3. reconsider the counseling and suspension with pay received by corrections officer Chagnon without reference to said portion;
4. not use any information received from corrections officer Chagnon during the portion of the interview conducted without his NYSCOPBA representative present; and

5. sign and post notice in the form attached at all locations where it posts written communications to unit employees.

Dated at Albany, New York
this 19th day of August, 2009

A handwritten signature in black ink, appearing to read "Susan A. Comenzo", is written over a light gray, textured rectangular background.

Susan A. Comenzo
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the State of New York (Department of Correctional Services) in the unit represented by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) that the State of New York (Department of Correctional Services) will:

1. allow probationary unit employees NYSCOPBA representation, at their request, when they are questioned by the State and at the time of questioning it reasonably appears that they may be the subjects of potential disciplinary action;
2. immediately remove and destroy all documents maintained in DOCS' files, including corrections officer Chagnon's personnel file, relating to the portion of the interview conducted without corrections officer Chagnon's NYSCOPBA representative present, including the parts of the report of investigator Nocera relating to said portion;
3. reconsider the counseling and suspension with pay received by corrections officer Chagnon without reference to said portion;
4. not use any information received from corrections officer Chagnon during the portion of the interview conducted without his NYSCOPBA representative present.

Dated

By
on behalf of State of New York
(Department of Correctional Services)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.