

**Seattle-First National Bank and Helene Aliff and Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO. Cases 19-CA-11034, 19-CA-11049, 19-CA-11213, and 19-CA-11555**

29 February 1984

## DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER

On 13 February 1980 Administrative Law Judge Jay R. Pollack issued the attached decision. The Charging Party Union filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a brief in support and reply to the Union's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

## ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

<sup>1</sup> In adopting the dismissal of the complaint herein, Chairman Dotson finds it unnecessary to pass on the judge's discussion of *Polson Industries*, 242 NLRB 1210 (1979).

In agreeing with the judge's recommendation to dismiss the complaint allegations in their entirety, Member Hunter notes that in his view no *Weingarten* rights apply absent a finding that the individual who invokes such rights enjoys employee status at the time.

## DECISION

### STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: This case was tried before me in Seattle, Washington, on December 13, 1979. The charge in Case 19-CA-11034 was filed by Helene Aliff on January 11, 1979. The charges in Case 19-CA-1049, 19-CA-11213, and 19-CA-11555 were filed respectively on January 19, March 15, and July 9, 1979, by Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO, herein called the Union. A complaint was issued in Case 19-CA-11034 on April 16, 1979, a consolidated complaint issued in Cases 19-CA-11049 and 19-CA-11213, on June 26, 1979, and a second order consolidating cases, consolidated complaint and notice of hearing issued on September 21, 1979. The consolidated complaint alleges that Seattle-First National Bank, herein called the Re-

spondent or the Bank, violated Section 8(a)(1) of the National Labor Relations Act, as amended.

### Issues

The primary issues are:

Whether the Respondent violated Section 8(a)(1) of the Act by refusing to allow employees Helene Aliff, Dorice Lindsay, Peggy Loyd, and Grace Clark to have union representation, pursuant to their requests, at individual interviews which said employees reasonably believed would result in disciplinary action against them, and by thereafter continuing to conduct the interviews with them in the absence of a union representative.<sup>1</sup>

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, Charging Parties, and the Respondent.

On the entire record of the case, and from my observations of the witnesses and their demeanor, I make the following

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE RESPONDENT

The Respondent is a national banking association headquartered in Seattle and engaged in commercial banking at numerous locations in the State of Washington. During the past 12 months, a representative period, the Respondent has provided services in excess of \$50,000 directly to customers outside the State of Washington.

The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. Background

In 1969, Firstbank Independent Employees' Association (FIEA) was certified the exclusive bargaining representative of the Respondent's employees in the State of Washington.<sup>2</sup> The most recent contract between the Respondent and FIEA was effective from August 1, 1974, through July 31, 1977. The negotiations for a succeeding contract were the subject of unfair labor practice charges

<sup>1</sup> On December 27, 1979, counsel for the General Counsel moved to withdraw those allegations of the complaint pertaining to Case 19-CA-11034 (Helene Aliff) and Case 19-CA-11555 (Dorice Lindsay). The motion was joined by the Respondent and opposed by counsel for the Charging Parties.

<sup>2</sup> The appropriate unit within the meaning of Sec. 9(b) of the Act is: All employees employed by Respondent in the State of Washington, excluding officers, management trainees, professional employees, confidential employees, and supervisors and guards as defined in the Act.

in *Seattle-First National Bank*, 241 NLRB 753 (1979). In its April 5, 1979, Decision and Order, the Board found that the Respondent violated Section 8(a)(5) and (1) and ordered the Respondent to bargain in good faith with the Union.

Also, on April 5, 1979, the Board issued its Decision and Amendment of Certification in *Seattle-First National Bank*, 241 NLRB 751 (1979), in which it amended the certification to the name of the certified bargaining representative "First Independent Employees Association" to "Financial Institution Employees of America, Local 1182, chartered by Retail Clerks International Union, AFL-CIO."

The Respondent seeking to obtain review of the Amendment to Certification refused to bargain and on September 28, 1979, the Board issued its Decision and Order in *Seattle-First National Bank*, 245 NLRB 700 (1979). The Board Order required, inter alia, the Respondent to cease and desist from refusing to bargain collectively with the Union.<sup>3</sup>

At the time of the instant hearing, the matters reported at 241 NLRB 753 and 245 NLRB 700 were the subject of further proceedings in the United States Court of Appeals for the Ninth Circuit.

#### B. *The Alleged Weingarten Violation Regarding Peggy Loyd*

##### 1. Facts

Peggy Loyd was first employed by the Respondent in 1971. She was most recently employed at the Respondent's head office branch in Seattle, Washington, as a general clerk, until her termination on March 15, 1979. Beginning in October 1978, Loyd's supervisor, Craig Thomsen, determined that Loyd was not keeping up with her work and that Loyd's absenteeism problems were affecting her performance on the job.

Thomsen, no longer employed by the Respondent, credibly testified<sup>4</sup> that on November 15, 1978, he advised Loyd that she would be given a written warning for unsatisfactory work performance. This meeting was also attended by Thomsen's supervisor, John Stewart, vice president of operations personnel. Both Thomsen and Stewart testified that Loyd made no request for representation at this meeting and I find that no such request was made. At the meeting Thomsen discussed with Loyd his problems with her work performance and absenteeism and strongly encouraged Loyd to see a bank counselor about her personal problems.

While Loyd was meeting with Thomsen and Stewart, other bank employees discovered a mistake made by Loyd which subjected the bank to a serious potential loss. When notified of Loyd's error, Thomsen deter-

mined that more serious discipline was necessitated. Thomsen decided to place Loyd on probation but first checked this procedure with Stewart and the Bank's labor relations department. That same afternoon, November 15, Thomsen and Carol Bowers, then training for a supervisory position, met with Loyd to place her on disciplinary probation. It is undisputed that at this meeting Thomsen carefully explained the terms of Loyd's probation.

Loyd, although conceding that she had personal problems at the times material herein and that she had so many meetings that she could not distinctly remember any specific meeting, insisted that she requested representation at the probation meeting and that Thomsen said, "[Representation] wasn't necessary." Thomsen and Bowers denied that any request for representation was made. Moreover, Thomsen's account of this meeting in Loyd's personnel file, entered the following morning, makes no mention of a request for or denial of representation. While Thomsen's notations were not intended to be a verbatim account of the meeting, they do include some of Loyd's statements at the meeting. Thomsen credibly testified that if any request for representation had been made he would have noted it in his account of the meeting in Loyd's personnel file. Based on my observations of the witness' demeanor, and the corroboration of the personnel file, I credit Thomsen's testimony and find that no request for representation or denial of such request was made at this meeting.

Loyd further testified that she requested representation at the March 15, 1979 meeting at which she was terminated.<sup>5</sup> Loyd testified that she was called into a meeting with Carol Bowers and Margaret Chandler (who had replaced Thomsen as supervisor) and told that she was terminated. Loyd asked for representation and Bowers said "[she] would have to cancel the meeting." At that time the meeting ended. The facts of this meeting are not in dispute.

##### 2. Conclusions

The thrust of the General Counsel's case is that the Respondent violated Section 8(a)(1) by denying Loyd's request for union representation at the interview which she reasonably believed might result in discipline. However, I have found no factual basis for such contention. The employee's right to representation arises only in situations where the employee requests representation. *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975). Loyd made no such request at the meeting when she was placed on probation. When Loyd requested representation at the termination interview, the Respondent simply terminated the meeting. The General Counsel apparently concedes the Respondent did not violate the Act by such conduct. See, e.g., *Western Electric Co.*, 205 NLRB 195 fn. 1 (1973); *Roadway Express*, 246 NLRB 1127 (1979).

<sup>3</sup> The Board granted a motion to amend the name of the Union to reflect the current name of the International Union, i.e., United Food and Commercial Workers International Union, AFL-CIO.

<sup>4</sup> Thomsen was a more impressive witness than Loyd. A review of the transcript confirms such a conclusion. Loyd first testified that Stewart was present at the meeting at which she was placed on probation. However, when recalled on rebuttal Loyd conceded that she had personal problems in October or November 1978 and could not specifically remember any meeting. Where there is any conflict in their testimony, I credit Thomsen over Loyd.

<sup>5</sup> The complaint does not allege a violation with respect to the conduct of this meeting. However, the complaint does claim that the Respondent violated Sec. 8(a)(1) by alleging that Loyd's probation was based on a meeting in which representation was unlawfully denied and by further alleging that Loyd's termination was based on such unlawful probation. As discussed herein, I find no factual basis for such allegations.

C. *The Alleged Weingarten Violation Regarding Grace Clark*

1. Facts

Clark was employed by the Respondent from 1950 to 1966 and more recently from 1971 until November 14, 1978. Clark was terminated on November 14, 1978, by Branch Manager Dennis Knapp. Clark sought to have her termination and pretermination disciplinary action reviewed by using the Bank's internal review procedure.

A review committee meeting was scheduled for January 9, 1979. On or about January 5, Clark telephoned Rita Hansen, personnel officer, and asked if she could have representation. Hansen asked who Clark had in mind and Clark answered "Jerry Ard from the Union." When Clark was told she could not have a representative from the Union, she asked for her attorney. Hansen said she would have to let Clark know and a few days later called to say that Clark could not have an attorney but could bring a current bank employee with her.

The January 9 review committee meeting was canceled due to Clark's illness. Clark did not have her meeting with the review committee until July 26, 1979. On July 1, Clark called Hansen about the upcoming meeting and asked if she could have representation. Hansen answered that Clark could not have representation.

On January 26, Clark went to the hearing with Ellen Smith Caldwell, a bank employee who was on vacation. Hansen and James Versoi, the bank's vice president of personnel and manpower planning, told Clark that she could use Caldwell as a witness but "if you want a representative, then there is no hearing." Clark agreed to have the hearing. The committee meeting was attended by Clark, Versoi, Hansen, and three bank employees. In addition to calling Caldwell as a witness, Clark was given an opportunity to argue against the disciplinary action taken against her. On August 11, Clark received a letter informing her that the review committee had unanimously denied her request for relief.

2. Conclusions

The first issue to be addressed is whether *Weingarten* applies to a former employee's request for representation at a meeting to review a termination decision. In *Polson Industries*, 242 NLRB 1210 fn. 2 (1979), the Board adopted the Administrative Law Judge's finding that an employee was not entitled to have a representative during the interviews conducted by the employer after the employee's resignation, solely on the finding that the employee was not an employee of the employer at that time. The facts of *Polson* show that the employee in question had quit his employment prior to the interview at issue. The General Counsel argues that *Polson* is distinguishable on the ground that, prior to the decision of the internal review committee, Clark's termination was not yet final. It appears that the internal review committee does more than merely rubber stamp terminations and that Clark could reasonably believe that her employment status could be affected; i.e., the termination rescinded. It would seem that the same justification for representation exists here as exists where an employee reasonably ex-

pects disciplinary action. An employee seeking to have a discharge reviewed would have a reasonable basis for seeking the assistance of her representative. Thus, I would find *Weingarten* rights apply in this instance.

However, in the instant case, it is undisputed that Respondent gave Clark the option of having a hearing with no representation or no hearing at all. Such action does not violate an employee's rights under *Weingarten*.

In *Weingarten*, the Supreme Court stated (420 U.S. at 258-259):

[E]xercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one. As stated in *Mobil Oil* [196 NLRB at 1052]:

The employer may, if he wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit from the interview. The employer would then be free to act on the basis of information obtained from other sources.

In *Roadway Express*, 246 NLRB 1127, 1129 (1979), the Board has recently stated:

Under *Weingarten*, once an employee makes a valid request for union representation, the employer is permitted one of three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice of continuing the interview unaccompanied by a union representative or having no interview at all.

In short, I find Clark wanted to invoke the internal review procedure in an attempt to regain her employment. She could have refused to enter the meeting without representation but chose otherwise. Thus, I find the Respondent's actions to be within the guidelines of *Weingarten* and recommend that the allegations of the complaint with respect to Clark be dismissed.

D. *The Alleged Weingarten Violation Regarding Dorice Lindsay*

1. Facts

Dorice Lindsay was employed by the Respondent from September 1969 until June 1979. Lindsay was employed as an installment clerk at the installment center of the Respondent's Vancouver, Washington branch. Lindsay was placed on probation in April 1977, due to unsatisfactory work performance. After being placed on pro-

bation, Lindsay contacted a union representative, Lucille Ward; who advised Lindsay to ask for a representative at any further disciplinary meeting.

Lindsay testified that on June 1, 1979, Gayle Slocum, Lindsay's supervisor, asked Lindsay to come into the office of Grant Pavolka, manager of the installment center. Lindsay asked if "it was disciplinary" and Slocum answered, "yes." Lindsay asked if Pavolka would be present.

Slocum denied that any request for representation was made. However, Slocum's "Memorandum for Personnel File" states:

Dorice approached me at approximately 2:45, asking if there would only be two people at the meeting. I explained, again, that Grant, she and I would total three in attendance. She still could not comprehend, so I told her once more who would be in Grants [sic] office at 3:00. Dorice still appeared to be confused.

I credit Lindsay's version of the conversation. I view Slocum's memorandum as as self-serving account of Lindsay's request for an uninterested third party. The meeting held in Pavolka's office was attended by Lindsay, Slocum, and Pavolka. Slocum handed Lindsay a termination letter and asked her to read it. Lindsay questioned Slocum about the termination and about compensation for leave and sick leave. Lindsay became upset and the meeting ended shortly thereafter. No request for representation was made at the meeting.

## 2. Conclusions

Contrary to the Charging Parties, the General Counsel and the Respondent argue that this matter is controlled by the Board's recent decision in *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979). In that case the Board held that, under the Supreme Court's decision in *Weingarten*, an employee has no Section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision.

It is undisputed that the decision to terminate had been made and the termination letter prepared, prior to the meeting with Lindsay. It appears the sole purpose of this meeting was to inform Lindsay of the decision to terminate her. I do not find any evidence that the Bank engaged in any conduct beyond informing Lindsay of the termination decision. I do not believe that answering Lindsay's questions about the termination and compensation would convert the meeting to an interview at which *Weingarten* would apply.<sup>6</sup> I therefore grant the motion to withdraw the allegations of the complaint with respect to Lindsay.

<sup>6</sup> Based on my finding that *Weingarten* did not apply to this interview, I need not reach the issue of whether Lindsay's request for "an uninterested third party" was a request for representation under *Weingarten*.

## E. The Alleged Weingarten Violation in Regard to Helene Aliff

### 1. Facts

Helene Aliff was employed by the Respondent from August 1977 until December 29, 1978, at the Respondent's Lakewood Branch in Tacoma, Washington. On December 22, 1978, a shortage was discovered. The next workday, December 25, Aliff discussed the shortage with Hilda Tangorra, the Respondent's assistant manager at the Lakewood branch. Tangorra informed Aliff that the shortage would be posted on the employee's record.

On December 27, 1978, Aliff, after being informed that a meeting to discuss the shortage would be held, asked Tangorra if she needed a lawyer. Tangorra answered that all Aliff needed was a witness. Aliff asked if she could have a coworker but Tangorra answered that she could only have someone from the Bank's regional office. After some discussions, Tangorra suggested Maxine Johnson, a southwest regional supervisor, be present. Aliff reluctantly agreed.

At 4 o'clock on December 29, 1978, Aliff met with Tangorra and Johnson. Tangorra gave Aliff her termination letter. Tangorra told Aliff that the shortage had caused much overtime. Aliff argued that was not true. Aliff became upset and Johnson suggested that Aliff and Johnson continue the conversation with Tangorra. Thus, Tangorra left the room. Aliff told Johnson why she thought the termination unfair and Johnson expressed some sympathy but indicated that she did not think anything could be done. There was no request for representation at the meeting.

### 2. Conclusion

Contrary to the Charging Parties, the General Counsel and the Respondent argue that this matter is also controlled by *Baton Rouge Water Works*, supra. It is undisputed that the decision to terminate Aliff had been made prior to the meeting on December 29. The sole purpose of the meeting was to inform Aliff of her termination. I do not believe that the discussion between Tangorra and Aliff would convert the meeting to an interview at which *Weingarten* would apply.<sup>7</sup> I therefore grant the motion to withdraw the allegation of the complaint with respect to Aliff.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

### ORDER<sup>8</sup>

The complaint is dismissed in its entirety.

<sup>7</sup> Based on my finding that *Weingarten* did not apply to this interview, I need not reach the issue of whether Aliff's request for a "co-worker" was a request for representation under *Weingarten*.

<sup>8</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.