

**Henry Ford Health System and Michigan Association of Police-911.** Case 7-CA-33785

April 17, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

Upon a charge filed on October 1, 1992, by Michigan Association of Police-911, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on October 30, 1992, and a consolidated amended complaint on September 22, 1993, and December 2, 1993. On March 3, 1994, the Regional Director for Region 7 issued an order severing the instant case, Case 7-CA-33785, from the consolidated complaint. The complaint alleges, in pertinent part, that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act by failing and refusing to allow employee Jonathan Malhalab to have union representation at a hearing before the Respondent's Grievance Council at which Malhalab was contesting his termination. On December 12, 1994, the parties filed with the Board a stipulation of facts and joint motion to transfer the case to the Board. The motion was granted on April 26, 1995. The General Counsel, the Charging Party, and the Respondent subsequently filed briefs.

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

On the basis of the entire record in this case, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Henry Ford Health System is a corporation with an office and facility in Detroit, Michigan, engaged in the operation of an acute medical care hospital and related medical services. Annually, the Respondent derives gross revenues in excess of \$500,000 in the course and conduct of its operations, and purchases health products and other supplies valued in excess of \$50,000, which are transported and delivered to the Respondent's facilities directly from points outside the State of Michigan. The Respondent admits, and we find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulated, and we find, that the Michigan Association of Police-911 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Factual Background*

The Respondent established a Grievance Council (the Council) in the early 1970s, composed of 30 non-supervisory employees, all of whom are elected by the Respondent's nonsupervisory employees through annual elections. Each member of the Council serves for a 2-year term on a staggered basis, with one member elected chairperson. A member of the Respondent's Employee Relations staff is appointed by the Respondent as the Council's advisor, and is responsible for providing Council members with advice and ensuring that the Council complies with the Respondent's policies and procedures. Twelve members of the Council, including the chairperson, are chosen by lot to hear each case. Council members may not serve on a panel if a conflict of interest exists, e.g., if the grievant is working in the same department as the member.

Any nonsupervisory, nonprobationary employee may appeal disciplinary actions such as written warnings, suspensions, or terminations to the Council, which has been granted final authority by the Respondent to uphold, modify (but not to increase), or to set aside the challenged disciplinary action.<sup>1</sup> Pursuant to procedures established by the Respondent, Council hearings are conducted in a formal manner, with ex parte contacts prohibited. Members of a grievance panel receive a packet of information from the Respondent's Human Resources department containing the employee's written grievance and all responses to the grievance by the Respondent or the grievant. The grievant also receives a copy of this packet.

At the hearing, the grievant and supervisor involved in the discipline appear at the same time, state their respective positions and respond to questions from members of the Council panel. The grievant and supervisor may not pose questions to each other. The grievant may call witnesses after giving the Human Resources department at least 48 hours' advance notice, but the witnesses are questioned by the Council panel privately, outside the presence of the grievant or the supervisor. Likewise, the grievant's department head also may appear privately and answer questions. The proceedings of the Council are confidential and disclosure to individuals who are not Council members is prohibited. The Respondent's written rules also provide that employees appearing before the Council may not be accompanied by any representative, either employee or nonemployee.

<sup>1</sup> This is the final step in the Respondent's grievance procedure, which begins with consideration of a grievance by the aggrieved employee's manager, followed by an appeal to a representative of the Human Resources department.

After the Council panel hears all the testimony and discusses the evidence presented, the members vote by secret ballot to sustain, modify,<sup>2</sup> or reject the challenged discipline. All employee members of the Council panel vote except the chairperson, who votes only in case of a tie. The Council advisor is present throughout the proceeding but is not permitted to vote. A majority vote determines the disposition of the grievance.<sup>3</sup> Once rendered, decisions of the Council are considered final and binding by the Respondent. In light of the Council's authority to resolve employee grievances, the parties have stipulated that the members of the Council are agents of the Respondent within the meaning of Section 2(13) of the Act.

On August 24, 1990, the Board certified the Union as the exclusive representative, for purposes of collective bargaining, of an appropriate unit of guards employed by the Respondent at its Detroit, Michigan facility. The Board reaffirmed this certification in its decision in *Children's Hospital of Michigan*, 317 NLRB 580 (1995), on remand from *NLRB v. Children's Hospital of Michigan*, 6 F.3d 1147 (6th Cir. 1993). Accordingly, we find that at all times material to this case, the Union was the exclusive representative for purposes of collective bargaining of unit employees.

On about July 7, 1992, the Respondent terminated unit employee Jonathan Malhalab. Malhalab appealed his termination to the Council and, on about September 25, 1992, notified the Respondent that he wished to be represented by the Union at his hearing before the Council. This request was denied by the Respondent. The Council then proceeded to hear Malhalab's grievance.

#### B. Contentions of the Parties

The General Counsel contends that the proceedings before the Council constituted investigatory meetings with management, in that the procedure calls for taking testimony from the grievant and offering him a chance to explain his actions prior to a final decision on the grievant's fate. In this regard, the General Counsel asserts that the disciplinary action appealed from is not final until the Council acts pursuant to the Respondent's own rules of procedure. As such, the fact that the Council reviews the disciplinary actions after they are announced, and cannot increase the discipline levied by the Respondent, does not deprive the proceedings of their investigatory nature. The General Counsel maintains that by denying Malhalab's request for rep-

<sup>2</sup>The Council can modify disciplinary measures previously taken by the Respondent upon the recommendation of the Grievance Council Advisor.

<sup>3</sup>If the Council panel votes to overturn the discipline completely, the advisor may propose that the discipline be lessened in severity instead. The Council is required to vote on that proposal using the same procedure outlined above. However, if the panel adheres to its earlier vote to overturn the discipline entirely, that vote stands.

resentation at this proceeding, the Respondent violated Section 8(a)(1) of the Act. The General Counsel also asserts that the Respondent's exclusion of the Union from a grievance adjustment meeting involving a unit employee violates Section 8(a)(5), inasmuch as the Respondent is thereby insisting on dealing directly with the employee and depriving the Union of any role in the process.

The Respondent, in contrast, asserts that the Council hearings are not investigatory interviews because the members of the Council are not supervisors and "management" is not allowed to ask questions of a grievant at the hearing. The Respondent states that the hearings are conducted only after "management" has imposed discipline against the employee, and that the Council has no power to increase the discipline already meted out by the Respondent. Under these circumstances, the Respondent asserts that no "disciplinary action" can result from a Council hearing; instead the "only power retained by the Grievance Council is to abolish or at most reduce prior discipline on an employee."<sup>4</sup>

#### C. Discussion

It is well settled that an employee has a Section 7 right to request union representation at an investigatory interview where the employee reasonably believes that the investigation will result in disciplinary action. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). For the reasons that follow, we find that *Weingarten* is applicable in this case.

Contrary to the Respondent, it is evident that the proceedings before the grievance committee are "investigatory" in nature. Thus, the Respondent's procedures contemplate the taking of testimony from a grievant and other witnesses and the review of documents and other evidence. The members of the Council then deliberate and reach a decision. In light of the stipulation that the Council was an agent of the Respondent for purposes of grievance adjustment, and that the Respondent deemed the Council's decisions final and binding on it, we find that the Council's proceedings constituted an investigatory interview by the Respondent for the purposes of the Board's *Weingarten* doctrine.

We find that the Council proceedings remain investigatory even though they are held only after the Respondent has announced the discipline it intends to impose. The Board has held that *Weingarten* rights are not applicable to a meeting with the employer "held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision." *Baton Rouge Water Works*, 246 NLRB 995, 997 (1979). However, the Board has also held that

<sup>4</sup>Although the Respondent "request[ed] that the instant complaint be dismissed in its entirety," it did not address the Sec. 8(a)(5) allegation in its brief.

when an employer “inform[s] the employee of a disciplinary action and then seek[s] facts or evidence in support of that action . . . the employee’s right to union representation would attach.” *Id.* See also *PPG Industries*, 251 NLRB 1146 fn. 2 (1980) (*Weingarten* applicable where, as here, employer “did not reach a final, binding decision concerning specific discipline prior to” the meeting in question). Because the Respondent’s disciplinary actions are not final and binding until after they are reviewed by the Council, we find that the Council’s proceedings are investigatory and thus subject to the Board’s *Weingarten* rule.<sup>5</sup> Accordingly, we find that by denying Mahalab’s request for representation at the Council’s proceeding, the Respondent violated Section 8(a)(1) of the Act.

Finally, we agree with the General Counsel that the Respondent has violated Section 8(a)(5) by applying its rule barring representatives at Council hearings to the Union. Pursuant to Section 9(a) of the Act, the Union has the right to be present at all grievance adjustment meetings between the Respondent and unit employees. Because the Council is stipulated to be the Respondent’s agent for purposes of grievance adjustment, we find that Council hearings constitute grievance adjustment meetings. Accordingly, the Respondent’s refusal to allow the Union to be present at the hearing violated Section 8(a)(5) of the Act. *Chevron Oil Co.*, 168 NLRB 574 (1967).<sup>6</sup>

<sup>5</sup>Likewise, because the disciplinary action is not final until it is reviewed by the Council, it is irrelevant to our disposition of this case that the Council may not increase discipline beyond the level proposed by the Respondent. A grievant has reasonable grounds to believe that discipline will result from a Council hearing because, under the Respondent’s procedures, no final, binding discipline is imposed until the Council has acted.

*Polson Industries*, 242 NLRB 1210 (1979), cited by the Respondent, is distinguishable from the present case. In *Polson Industries*, the Board found that, once an employee had voluntarily terminated his employment, he was not entitled to union representation at a meeting to consider his pleas for reinstatement. In this case, Mahalab remained an employee, for purposes of his *Weingarten* rights, at least until his status was finally determined by the Council.

<sup>6</sup>Member Cohen notes that the Respondent seeks dismissal of the 8(a)(1) and 8(a)(5) allegations. He agrees with his colleagues that the proceedings before the Council were in the nature of a management investigation into whether discipline should be imposed. Accordingly, the refusal to permit union representation violated Sec. 8(a)(1) under *Weingarten*. However, given this conclusion, Member Cohen has serious reservations concerning whether the conduct also violated Sec. 8(a)(5). That is, in light of the proposition that the Council was investigating the issue of whether discipline should be imposed, it is difficult to say that the Council was simultaneously considering the issue of whether discipline was appropriate. Indeed, my colleagues concede that the Council determines “what discipline, if any, should be imposed.” A true grievance committee reviews the propriety of discipline that *has been imposed*. Since it is the latter issue that ordinarily gives rise to 8(a)(5) rights, it is not clear that such rights were infringed upon in this case. Member Cohen does not pass on the 8(a)(5) issue. In this regard, he notes that a remedy

## ORDER

The National Labor Relations Board orders that the Respondent, Henry Ford Health System, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the following actions necessary to effectuate the purposes of the Act.

1. Cease and desist from

(a) Denying unit employees’ requests to be represented by a union representative during an investigatory interview, including hearings before the Grievance Council, in which employees have reason to believe that disciplinary action would be taken against them.

(b) Failing and refusing to consult with the Union concerning the adjustment of grievances of bargaining unit employees before the Grievance Council.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the purposes of the Act.

(a) Rescind the provisions of its Employee Handbook that prohibit unit employees from being represented by the Union at hearings before the Grievance Council.

(b) Post at Respondent’s facility in Detroit, Michigan, copies of the attached notice marked “Appendix.”<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

for an (a)(5) violation would not add materially to the remedy for the 8(a)(1) violation.

Because the parties’ stipulation specifically provides that the Council has the final authority to “uphold, modify, or set aside the challenged disciplinary action,” we do not agree with Member Cohen that the Council here was not “considering the issue of whether discipline was appropriate.” We believe that on these facts the Council proceedings encompassed both an inquiry into the facts and a determination of what discipline, if any, should be imposed. Accordingly, we do not share our colleague’s reservations.

<sup>7</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

## APPENDIX

NOTICE TO EMPLOYEES  
 POSTED BY ORDER OF THE  
 NATIONAL LABOR RELATIONS BOARD  
 An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To chose not to engage in any of these protected concerted activities.

WE WILL NOT deny requests by bargaining unit employees to be represented by a union representative during an investigatory interview, including hearings before the Grievance Council, in which you have reason to believe that disciplinary action will be taken against you. The bargaining unit is:

All full-time and regular part-time guards as defined in the Act employed at our facilities located at 2799 West Grand Boulevard, Detroit, Michigan, 48202; Henry Ford Medical Center-Fairlaine,

19401 Hubbard Drive, Dearborn, Michigan, 48126; Henry Ford Medical Center-West Bloomfield, 6777 West Maple Road, West Bloomfield, Michigan, 48322; Henry Ford Medical Center-Lakeside, 14500 Hall Road, Sterling Heights, Michigan, 48080; Henry Ford Medical Center-Sterling Heights, 3058 Metropolitan Parkway, Georgetown Medical-Dental Building, Sterling Heights, Michigan, 48310; Henry Ford New Center Pavilion, 2921 West Grand Boulevard, Detroit, Michigan, 48202; Henry Ford Medical Center-Senior Center, 2395 West Grand Boulevard, Detroit, Michigan, 48202; and Henry Ford Medical Center-Troy, 2825 Livernois, Troy, Michigan, 48083; but excluding all access control monitors and supervisors as defined in the Act, and all other employees.

WE WILL NOT fail and refuse to consult with the Union concerning the adjustment of grievances of bargaining unit employees before the Grievance Council.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the provisions of our Employee Handbook that prohibit unit employees from being represented by the Union at hearings before the Grievance Council.

HENRY FORD HEALTH SYSTEM