

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

Lourdes Perez

AFSCME COUNCIL 18, ON BEHALF OF
DANIEL NOGALES,

Appellant,

v.

CV-2013-2891

CITY OF ALBUQUERQUE, PARKS
AND RECREATION DEPARTMENT,

and

THE CITY OF ALBUQUERQUE
PERSONNEL BOARD,

Appellees.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes to the Court's attention as a result of AFSCME Council 18's (the "Union") appeal, on behalf of Daniel Nogales, of the decision of the City of Albuquerque Personnel Board (the "Personnel Board"). The Personnel Board adopted the Recommendation of the Hearing Officer, upholding the termination of Nogales from the City of Albuquerque Parks and Recreation Department. The Court has reviewed the record and the pleadings and **AFFIRMS** the decision of the Personnel Board for the reasons that follow.

I. BACKGROUND

Nogales worked as a Parks Maintenance Worker III for the City of Albuquerque Parks and Recreation Department ("Department"). [Tr. 18:17-23] As a park maintenance worker, Nogales maintained City medians by cutting weeds, raking leaves, pruning plants, and removing trash, among other things. [Tr. 18:4-16] While Nogales' duties did not involve working with City irrigation, on October 7, 2011, Nogales requisitioned irrigation parts from a City tool

storage shed with an approximate value of \$946. [RP 7; *see* Tr. 19:15 – 20:5, 231:23 – 232:10, 247:18-21] After finding out that Nogales requisitioned irrigation parts, the Assistant Superintendent of the Department, met with Nogales, his immediate supervisor, and two City irrigation specialists. [Tr. 22:2-25] The Department’s position is that the purpose of the meeting was to locate the irrigation parts. [Tr. 28:3-8, 48:21 – 49:8, 199:3-6]

According to Nogales, he requested to have a union representative present at the meeting but was not afforded one. [Tr. 242:3-23] It is undisputed that at the meeting, Nogales was questioned about the irrigation parts, and he contended that he obtained the parts at the request of the two City irrigation specialists. [See *e.g.* 242:24 – 243:21] The irrigation specialists both denied that they requested the irrigation parts. [*Id.*; Tr. 98:4-10] It is also undisputed that Nogales informed his superiors at that meeting that the irrigation parts were in his truck. [Tr. 24:2-11; 250:5-22] However, days later when the parts were still unaccounted for, Nogales claimed that the parts were not in his truck but that he dropped them off at a City tool crib. [Tr. 25:12-19, 250:5-22] Nogales’ explanation for the conflicting information was that he forgot that he dropped the parts off at the tool crib and later remembered after a co-worker who was with him the day in question, reminded him. [Tr. 250:5-22] In any event, the irrigation parts were never accounted for or recovered and the Department later called the Albuquerque Police Department (APD) to report the missing parts. [Tr. 27:11-16]

According to Nogales, when APD arrived several days later to make a report on the missing irrigation parts, he again asked for union representation and was again denied representation. [Tr. 246:4-21] Nogales declined to make a statement to APD. [*Id.*] The City later launched a formal investigation, hiring Robert Caswell Investigations (“RCI”) to investigate

the matter. [Tr. 113:13-17, 114:17-21] When Nogales was interviewed as part of the RCI investigation, he was accompanied by a union representative. [Tr. 124:19-24]

After the investigation, a predetermination hearing was held before the Superintendent of the Department, which resulted in Nogales' termination. [Tr. 147:12-16, 158:9-11, 159:2-8] The Personnel Board then heard the case and held an evidentiary hearing to determine if there was just cause for Nogales termination. [RP 006-11] Based on the facts established at the hearing and as summarized above, the Personnel Board determined that the Department had just cause to terminate Nogales. [*Id.*] The Personnel Board specifically concluded that Nogales violated several provisions of City personnel rules and regulations including provisions that prohibit employees from making false statements and that provide that employees are responsible for preventing loss and misuse of city property, including City tools and equipment. [*Id.*] The Union then filed this appeal of behalf of Nogales.

II. STANDARD OF REVIEW

Rule 1-074(R) NMRA provides that the district court shall apply the following standards of review:

- (1) whether the agency acted fraudulently, arbitrarily or capriciously;
- (2) whether based upon the whole record on appeal, the decision of the agency is not supported by substantial evidence;
- (3) whether the action of the agency was outside the scope of authority of the agency; or
- (4) whether the action of the agency was otherwise not in accordance with law.

III. DISCUSSION

The Union makes two arguments on appeal: (1) Nogales' termination is contrary to law, because he was denied his right to union representation during the investigative process, contrary to *NLRB v. J. Weingarten, Inc.* ("*Weingarten*"), 420 U.S. 251 (1975); and (2) the Personnel Board's decision is not supported by substantial evidence.

Weingarten Rights

In *Weingarten*, the U.S. Supreme Court held that it was a violation of the National Labor Relations Act for an employer to deny an employee's request that a union representative be present at an "investigatory interview," which the employee reasonably believed might result in discipline. 420 U.S. at 256-57. The limitations of what is now known as "*Weingarten* rights" are that the "right arises only in situations where the employee requests representation" and "where the employee reasonably believes the investigation will result in disciplinary action." *Id.* at 257. In addition, the employee's exercise of the right may not interfere with "legitimate employee prerogatives." *Id.* at 258. For example, once *Weingarten* rights are invoked the employer may decline to continue the interview and opt to conduct its investigation using information gathered from other sources. *Id.* at 258-59.

As a preliminary matter, the City¹ argues that *Weingarten's* application is limited to private sector employees and that the Personnel Board does not have jurisdiction over the issue. As to *Weingarten's* application to public employees such as Nogales, it is unquestionable that *Weingarten* specifically addressed a private sector employee who was covered under the National Labor Relations Act ("NLRA"). However, it is well established that "much of the language in the [New Mexico Public Employee Bargaining Act ("PEBA"), NMSA 1978, Sections 10-7E-1 through 10-7E-26 (2003, as amended through 2005)], was derived from the National Labor Relations Act." *Regents of Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶ 18, 125 N.M. 401, 962 P.2d 1236. Thus, "absent cogent reasons to the contrary, [the courts] should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, long-

¹ The Court refers to the Appellees, the City of Albuquerque Parks and Recreation Department and the City of Albuquerque Personnel Board, generally as the "City."

standing interpretation of the NLRA at the time the PEBA was enacted.” *Id.* Other than contending that *Weingarten* only applies to private sector employees, the City has not explained why the PEBA should not be interpreted in the same way as the NLRA was interpreted in *Weingarten* or otherwise substantiated its argument. Overall, the Court is not convinced that the PEBA does not encompass *Weingarten* rights.

The Court is also not convinced that the Personnel Board did not have jurisdiction to address the *Weingarten* dispute. The City’s argument is that the dispute over *Weingarten* rights is a dispute concerning a “prohibited practice” under the PEBA, and the City’s Labor-Management Relations Board has jurisdiction over “prohibited practice” complaints. Indeed, if *Weingarten* rights are encompassed under the PEBA, then the dispute likely concerns a “prohibited practice,” namely the prohibition of a public employer from interfering with a public employee in the exercise of such a right. *See* § 10-7E-19(B). Typically, such disputes would be heard by a local labor board such as the City’s Labor-Management Relations Board. *See* § 10-7E-11. However, in this case, the Union argues and cites authority for the proposition that a *Weingarten* violation can affect imposed discipline. Thus, consideration of *Weingarten* and the effect of a *Weingarten* violation on any imposed discipline, was highly relevant to the Personnel Board.

As to the merits of a *Weingarten* violation, it appears that Nogales appropriately invoked his right to a union representative at the initial meeting called by the Assistant Superintendent, and the City denied his request. The Union also contends that Nogales was entitled to union representation when APD sought to interview him. However, it is clear that *Weingarten* applies in employment settings and not to law enforcement in its investigation of potential crimes. The City argues that no violation occurred at its initial meeting with Nogales because at that point,

the City had not launched a formal investigation and because from its perspective, the purpose of the meeting was to locate the missing irrigation parts. The right is not triggered, however, when a formal investigation is commenced nor is the analysis based on the employer's perspective of the meeting. Rather, the right is triggered if it is reasonable for the employee to believe that the interview might result in discipline, and the employee requests union representation. In this case, it was reasonable for Nogales to believe that the meeting, attended by his immediate supervisor and the Assistant Superintendent, may have resulted in discipline. While the City contends that it was only interested in locating the missing irrigation parts, it was reasonable for Nogales to believe that if he did not satisfy the City's request to locate the missing parts, the City would pursue some form of discipline. Nogales therefore properly invoked his right to have a union representative present pursuant to *Weingarten*.

The Union contends that the Court has discretion to grant "make-whole" relief, indicating that the Court can reverse Nogales' termination on the basis of a *Weingarten* violation. The authorities the City cites in support provide that such "make-whole" relief is only appropriate when termination is based solely on the information obtained at the improper interview. *See e.g. Duryea Borough Police Dept. v. Pa. Labor Relations Bd.*, 862 A.2d 122, 126 (Pa.Commw.Ct 2004). In this case, however, Nogales termination was not based solely on the information obtained from the initial interview in question. Rather, a formal investigation was launched, a predetermination hearing was held before the Superintendent of the Department, and most important, the hearing before the Personnel Board was held to establish the facts. Thus, despite what appears to be a *Weingarten* violation, Nogales' termination was not based solely on the information obtained during the initial interview.

Substantial Evidence

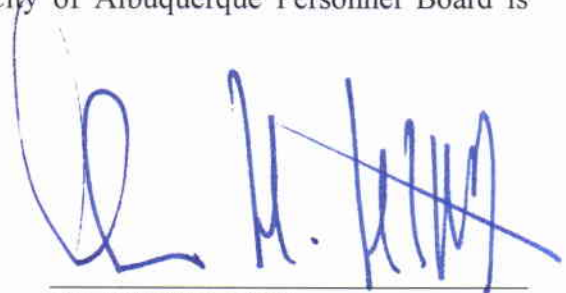
Finally, the Union argues that the Personnel Board's decision is not supported by substantial evidence. "An administrative decision will be upheld if the reviewing court is satisfied that there is substantial evidence in the record as a whole to support the agency's decision and that the evidence in the record demonstrates that the decision is reasonable." *Skowronski v. New Mexico Pub. Educ. Dep't*, 2013-NMCA-034, ¶ 47, 298 P.3d 469.

The Court finds, based on its review of the whole record, that there is substantial evidence to support to Personnel Board's decision that the City had just cause to terminate Nogales as a result of his improper requisitioning of irrigation parts. Notably, Nogales himself testified that he obtained the irrigation parts, could later not account for them, and gave conflicting accounts of where the parts were. While Nogales explained that he requisitioned the parts on behalf of other irrigation workers, it is undisputed that the irrigation workers denied having any involvement. The Union highlights other conflicting testimony in the record and also emphasizes that one of the irrigation workers was also later investigated for theft. The Union claims that based on this, a reasonable interpretation would be that the irrigation worker asked Nogales to requisition the parts for his own gain. While the Court acknowledges that in some instances there is conflicting testimony and that there is evidence in Nogales' favor, such evidence does not render the Personnel Board's decision unreasonable. *See Skowronski*, 2013-NMCA-034, ¶ 47 ("[T]he possibility of drawing inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.") (internal quotation marks and citation omitted). Here, on balance, the Personnel Board's decision was reasonable.

IV. CONCLUSION

Based on the foregoing, the decision of the City of Albuquerque Personnel Board is hereby **AFFIRMED**.

IT IS SO ORDERED.



**ALAN MALOTT
DISTRICT COURT JUDGE**

10/11/13

I swear or affirm that the foregoing document was submitted for e-filing the 11th day of October, 2013

