JD(SF)–18–18
Portland, OR

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FRED MEYER STORES, INC.

and Case 19–CA–206136

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 555

Kristin White & J. Dwight Tom, Esqs., for the General Counsel.
Daniel R. Barnhart, Esq. (Bullard Law), for the Respondent Company.
John S. Bishop, II, Esq. (McKanna Bishop Joffe, LLP), for the Charging Party Union.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. This is another case involving the right of employees suspected of drug or alcohol use to consult with their union representative on request before being interviewed or tested by their employer. The Board first recognized the right 30 years ago, based on the similar and well-established *Weingarten* rights afforded represented employees suspected of workplace misconduct generally,[1] and most recently reaffirmed it in two cases decided in 2014 and 2015.[2] The General Counsel alleges that managers at a local Fred Meyer Store nevertheless violated that right in March 2017 when they denied an employee's request for a union representative before submitting to a drug/alcohol investigatory interview and test, proceeded with the interview despite his request, and suspended and subsequently terminated him because he refused to take the test without a union representative.[3]

As discussed below, however, the factual record fails to support these allegations. Rather, as indicated by the Company, a preponderance of the credible evidence indicates that the employee was allowed a reasonable time to try and contact a union representative, but that he nevertheless failed to call an available union representative. Thus, under prevailing Board law,

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[1] See *System 99*, 289 NLRB 723 (1988), citing *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), which upheld the Board's determination that employers are required under the National Labor Relations Act to allow a represented employee on request to have a union representative present at an investigatory interview that the employee reasonably believes might result in discipline.

[2] *Ralphs Grocery Co*., 361 NLRB 80 (2014); and *Manhattan Beer Distributors LLC*, 362 NLRB No. 192 (2015), enfd. mem. 670 Fed. Appx. 33 (2d Cir. 2016).

[3] The complaint issued December 28, 2017, the hearing was held on April 3–5, 2018, and the General Counsel and the Company subsequently filed briefs on June 11. On June 12, the General Counsel filed a motion to strike the Company's posthearing brief because it was electronically misfiled with the Regional Office rather than the Judges Division and was not correctly efiled and served until the following morning. Consistent with Board precedent (e.g., *Eldeco, Inc*., 336 NLRB 899, 900 (2001)), the motion was denied by order dated June 15.

the managers lawfully interviewed him, required him to submit to a drug/alcohol test, and suspended and discharged him for refusing to take the test without a union representative.[4]

THE RELEVANT FACTS[5]

It was Sunday evening, March 26, 2017, at the Company's largest store in Portland, Oregon. Sean Findon, an assistant store manager for merchandising, was the sole manager on duty, in charge of the store until it closed. At about 7:30 p.m., his phone began to ring. Patricia Chavarria, the employee in charge of the front end, and Shawn Mentzer, a loss prevention officer, were calling to report that one of the cashiers, Jason Thomas, was suspected of drinking alcohol. Specifically, they reported that two customers and a checker had complained of smelling alcohol on Thomas's breath. Chavarria said she had smelled alcohol too.[6]

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[4] The Board's jurisdiction is uncontested and established by the record. The Union filed a contractual grievance contesting the discharge in early April 2017, which remains pending (GC Exh 2; Tr. 40–41). However, no party contends that the unfair labor practice allegations should be deferred to the contractual grievance-arbitration procedure.

[5] Citations to the record are included to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp*., 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); *New Breed Leasing Corp. v. NLRB,* 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997); and *NLRB v. Heath TEC Division,* 566 F.2d 1367, 1370 (9th Cir.), cert. denied 439 U.S. 832 (1978).

[6] Findon testified that Chavarria also reported that she could see that something was wrong with Thomas, and that the checker told her Thomas was not functioning at his station properly (Tr. 417–418). However, this testimony appears to be a recent embellishment. The Company's videotape of the March 26 investigatory interview (R. Exh. 17) reveals no obvious or apparent signs that Thomas's motor skills were impaired in any way. Further, Findon did not mention Thomas's behavior in either his contemporaneous interview notes on March 26 or the subsequent statement he prepared for the Company's corporate HR office on October 24, 2017. See CP Exh. 1, pp. 2–3 ("Facts and/or behavior observed that precipitated this interview" and "Other important information"); and GC Exh. 6. Nor did Lydia Mangum, the HR manager/ assistant manager at the store who made the decision to suspend and discharge Thomas following Findon's oral and written reports, either in her April 2017 summary to the Company's labor relations specialist (R. Exh. 27), or in her testimony at the April 2018 hearing. Moreover, Findon's testimony was not corroborated by Chavarria, whom the Company did not call to testify. Although the complaint does not allege that Chavarria was a company supervisor or agent, she was clearly more than a mere disinterested employee bystander. As indicated above, she had reported the matter to Findon in the first place, including not only the complaints of others, but also her own personal observation that he smelled of alcohol. In these circumstances, she would reasonably be expected to favor the Company regarding the matter. Thus, the Company's unexplained failure to call her warrants an adverse inference that she would not have corroborated Findon's testimony, either that she observed something wrong with Thomas's behavior or that she reported that to Findon. See *Equinox Holding, Inc*., 364 NLRB No. 103,

Although Findon had been a company manager for 20–25 years, he had never conducted a drug and alcohol investigation before. Further, he had only just started working at the Portland store a few days earlier, knew nothing about Thomas, and there were no human resources (HR) personnel on duty to assist him. The HR Manager, Lydia Mangum, was off duty. So he discussed the matter with Mentzer and another loss prevention officer, Dylan Burroughs, and the three of them together decided to contact Chavarria and have her immediately bring Thomas to the loss prevention office. They knew that Thomas would be clocking out in about 15 minutes (his shift was from 10:45 am–7:45 pm), and that if he wasn't brought in before that, the Company would lose the chance to perform a drug/alcohol test.[7]

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slip op. at 1 n. 1 (2016) (employer's failure to call the employees who allegedly reported the purported objectionable preelection conduct to the manager warranted an adverse inference); and *Desert Springs Hospital*, 363 NLRB No. 185, slip op. at 6 (2016) (employer's failure to call an employee warranted an adverse inference where the employee's purported complaint to management was one of the reasons the alleged discriminatee was terminated).

[7] Findon testified that Mentzer also reported that he and Burroughs had investigated and discovered two beer cans, one empty and the other half full and still chilled, in the unassigned/unlocked locker immediately above Thomas's locker. Findon testified that Mentzer and Burroughs took him to the locker to see the beer cans himself before bringing Thomas to the office. However, this appears to be another post-grievance embellishment. As with Chavarria's purported observations of Thomas's behavior, there is no mention of the open beer cans in Findon's March 26 notes or his October 24 HR statement. Nor was any photographic evidence offered into evidence. It is highly unlikely that none of the three—not Findon or loss prevention officers Mentzer and Burroughs—would have taken a cell-phone picture of the open beer cans (which would also normally show the date and time). And Findon admitted that he never told Thomas about the beer cans or asked him about them at the interview (Tr. 337).

Further, Findon's testimony about observing the open beer cans was not corroborated by Mentzer or Burroughs, who were not called to testify. Like Chavarria, Mentzer and Burroughs would reasonably be expected to favor the Company in this matter. Although the Company's answer denies that they were its agents, and Findon testified that neither had any authority or responsibility to investigate the reports or assist with the interview (Tr. 384, 386, 398), the record clearly establishes otherwise. As its name suggests, the store's loss prevention office primarily investigates merchandise or property damage, misuse, or theft by customers and employees (R. Exh. 5, p. 38). But it also partners with and assists managers and supervisors in investigating reports of suspected or observed employee drug or alcohol use. See the Company's Corporate Policy Handbook, R. Exh. 7, pp. 10 and 12, steps 1 and 5 (stating that the manager or supervisor in such circumstances should "partner" with the store director, another manager, or loss prevention and ask for assistance in confronting the employee, and have loss prevention conduct a search of the employee's personal property). And, as indicated above, Mentzer and Burroughs directly participated in the decision to interview Thomas on March 26. See Findon's October 24 statement to the HR department ("We being myself Shawn [Mentzer] and Dylan Burroughs made the decision to [p]ull Mr. Thomas [into] the [l]oss prevention room to conduct [an] interview."). The Company's videotape of the interview shows that one or both were also present throughout, each standing by one of the two doors to the room, even when Findon himself left (which, as discussed infra, he did several times). The videotape shows that Mentzer also assisted Findon, who admittedly was not "100 percent familiar" with the Company's drug

In the meantime, while waiting for Chavarria to bring Thomas to the office, Findon, Mentzer and Burroughs went into the adjacent security video room to talk and get ready for the interview. Findon at that time also called the store manager to find out where he could find the binder containing the drug and alcohol investigation manual and forms. Given his lack of experience with such matters, he wanted to read through the manual before beginning the

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and alcohol use policy, by showing and explaining the policy to Thomas before Findon asked Thomas to take a drug/alcohol test. See R. Exh. 17, at 8:14.42–8:16.11 p.m.; and Tr. 402–407. Thus, as with Chavarria, the Company's unexplained failure to call Mentzer and Burroughs warrants an adverse inference that they would not have corroborated Findon's otherwise unsupported testimony with respect to this and other matters within their knowledge. See generally *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (an adverse inference for a party's unexplained failure to call a witness is particularly appropriate where the witness is the party's agent). See also *Metallic Lathers Local 46*, 259 NLRB 70, 77 n. 19 (1981) (drawing adverse inference against the respondent union where it failed to call a shop steward to testify), enfd. in relevant part 727 F.2d 234 (2d Cir. 1984); *Vigo Industrial, LLC*, 363 NLRB No. 70, slip op. at 5 (2015) (drawing an adverse inference from the failure of the General Counsel or charging party union to call the individual who served as the union co-chair of the particular labor-management committee meeting at issue); and *Global Contact Services, Inc*., 29–RC–134071, unpub. Board order issued April 28, 2015 (2015 WL 1939736), at n. 1 (union's business agent may reasonably be presumed to favor the union), and cases cited there.

Moreover, there is no substantial evidence that Mentzer or Burroughs would have had any reason to suspect at that time that Thomas was using the unassigned locker. A former employee, Ashley Pinkerton, testified that she had seen Thomas take a drink from a Rainier beer and place it in the unassigned locker on March 23 or 24, when they were both on their way off shift, and that she immediately reported this to Chavarria and Assistant Manager Heather Owens orally and to HR Manager Mangum in writing. However, there is no evidence that any of them told Mentzer or Burroughs about it before Thomas was brought to the office on March 26. Like Chavarria, Owens was not called to testify. And while Mangum testified that she received the written report from Pinkerton, the report was never produced (Mangum testified she couldn't find it), and she never testified who, if anyone, she subsequently discussed it with, or whether she followed up on the report in any way. See Tr. 462, 496–497. See also fn. 32 below regarding inconsistencies in Pinkerton's testimony.

Mangum also testified, consistent with a short statement she gave the Company's labor relations office in April 2017, after the Union filed a contractual grievance, that Thomas told her about the beer cans in the unassigned locker when he spoke to her on March 26 (Tr. 494; R. Exh. 27). However, based on the record as a whole, this likewise appears to be a post-grievance embellishment to justify subjecting Thomas to a reasonable suspicion interview and test under the corporate drug and alcohol policy and protocol (which as indicated above Findon was not familiar with before bringing Thomas to the office). See R. Exh. 7, p. 10; and Tr. 507–508 (corporate policy requires that a manager personally witness the subject conduct, such as by observing the employee use alcohol or by smelling alcohol on the employee's breath, before conducting a reasonable suspicion drug/alcohol interview and test). See also fns. 9 and 27, below, regarding Findon's similarly discredited testimony that he personally smelled alcohol on Thomas's breath and that he recorded the type of beer he saw in the unassigned locker in his March 26 interview notes.

interview and use the forms in questioning Thomas. The store manager told Findon to contact Mangum, and gave him her phone number. Findon thereafter called or texted Mangum, but was either sent to voicemail or did not get an immediate reply.[8]

Chavarria arrived with Thomas a few minutes later, at 7:42 p.m., and Mentzer let them in (the office door automatically locked from the inside when it closed). Chavarria immediately walked over to the door to the video room to speak to Findon. Thomas followed her, but Chavarria directed him to go sit in a chair at the far corner of the office, and he did so. At this point, he had no idea that he was being brought in because of reports about him smelling of alcohol. In fact, Chavarria had told him a completely different reason; that loss prevention needed his help identifying a nonemployee who was harassing self-checkout attendants. So he had no concerns about potential discipline and made no effort to request or contact a union representative.[9]

About a minute later, Findon came out of the video room, spoke briefly with Mentzer, and left the office with Chavarria to go look for the binder. Shortly thereafter, Mentzer also left, but returned after a few minutes. Burroughs remained and chatted with Thomas about company loss-prevention incentives and other work-related matters.

Eventually, at about 7:49 p.m., Findon returned with a loose-leaf binder containing the drug and alcohol manual. He immediately sat down in a chair facing Thomas at the opposite corner of the office, set the binder on the end of a desk beside the chair, and began leafing through it. He continued doing this for another 2–3 minutes, without saying anything to Thomas, who continued to chat with Burroughs.

Findon was unable to find the particular drug/alcohol questionnaire form he was looking for in the binder. Nevertheless, at about 7:52 p.m., he decided it was time to reveal the real reason Thomas was brought to the office. So he stopped leafing through the binder and told

[8] The Company admits that managers Findon and Mangum have been supervisors within the meaning of Section 2(11) of the Act at all material times.

[9] Findon testified that he smelled alcohol on Thomas when Thomas came into the office (Tr. 294, 322). However, this appears to be another post-grievance embellishment. The videotape shows that Findon was in the adjacent video room, and that Chivarria was between them, when Thomas came into the office, and that Findon did not get close or speak to Thomas until much later, when Thomas approached Findon to request a union representative and hand him the Union's business card. Further, Findon did not mention that he personally smelled alcohol on Thomas in either his March 26 notes or his October 24 HR statement. And, as indicated above, Chavarria, Mentzer, and Burroughs were not called to corroborate that Thomas smelled of alcohol when he was brought to the office. Finally, while Mangum testified, consistent with her April 2017 statement, that Findon orally told her he had smelled alcohol on Thomas's breath (Tr. 473; R. Exh. 27), this appears to have also been a post-grievance embellishment, similar to her post-grievance accounts about Findon seeing open beer cans in the unassigned locker, to provide some arguable justification under the Company's drug and alcohol policy and protocol for conducting the drug/alcohol interview and test. See fn. 7, above.

Thomas that someone had reported smelling alcohol on his breath. He asked Thomas if he had been drinking, and Thomas said no.

Thomas had never met Findon before, and didn't know who he was. However, he now realized that he was being investigated and could be disciplined. He had previously been told by UFCW Local 555, the Union representing the store's checkstand department employees, that in such circumstances he should request the Company for a union representative. The Union had given him a business card when he was hired to keep and use in such situations. On one side, the card stated:

EXERCISE YOUR RIGHTS
CALL THE UNION!

WEINGARTEN RIGHTS

If this discussion could in any way lead to my being disciplined or terminated, or affect my personal working conditions, I request that my union representative or shop steward be present at this meeting. Without representation, I choose not to answer any questions.

On the other side, the card contained the name of the primary union representative and contact for the store, Mary Spicher, and her email address. It also contained several phone numbers, including a "Direct" number for Spicher, an "Office" number, a "Toll Free" number, and an "Emergency" number, which was highlighted with red print.[10]

Thomas had only been working at the store for about 10 months, and had never been in a situation where he needed to use the card. However, he always carried it in his wallet. He therefore immediately took the card out, told Findon he was requesting his *Weingarten* rights, and walked over and set the card down on top of the open binder, intending for him to read it. Findon, however, ignored the request, moved the card aside, and resumed looking through the binder.

Thomas therefore retrieved the card and read the *Weingarten* request to Findon out loud. Findon, however, continued looking through the binder and told Thomas he needed a few more minutes before they continued. Thomas asked Findon if he would provide him more information about why he had been brought in and what was going to happen. Findon told Thomas to be patient and repeated that he needed some more time to read through the manual. Thomas therefore put the card back in his wallet and returned to his chair.[11]

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[10] See R. Exh. 10, the card Spicher had with her at the April 2018 hearing; and Tr. 69, 72, 85–86. Thomas had an earlier version in March 2017 that was similar except that one side was in landscape (horizontal) rather than portrait (vertical) format. See Tr. 177–178.

[11] See R. Exh. 17, at 7:51.45–7:53.26 p.m.; and Tr. 310, 388–389. At the hearing, Thomas initially recalled reading the card aloud to Findon before handing it to him. However, after the Company's videotape was shown to him (which he had not seen before), he acknowledged that he merely started reading it before handing it to Findon, and did not read it out loud in full until several seconds later, after Findon set the card aside without reading it himself. (Tr. 125, 171–

Once Thomas sat back down, Findon looked up from the binder and explained that they had reason to believe he was under the influence and were going to ask him some questions. Thomas thereupon turned to Burroughs and asked what had happened to them needing his help to identify the person harassing self-checkout attendants. While Burroughs was responding, Findon checked his cell phone to see if he had received a response from his prior messages to Mangum about where to find the questionnaire form. He then resumed looking through the binder as Thomas and Burroughs continued talking.

After about a minute, however, Findon interjected and asked Thomas if he would open his locker so they could look inside it. Thomas said he would be happy to do so if he had a union representative with him. To emphasize the point, he pulled out the union business card again, walked back over to Findon with it, and asked Findon if he knew who the shop steward was.[12] Findon responded that it didn't matter because the Company had the right to inspect an employee's locker without a union representative or shop steward; that *Weingarten* didn't apply. However, Findon did not pursue the locker issue any further, but instead resumed looking through the binder.[13]

It was now about 7:57 p.m. As Findon continued looking through the binder, Thomas decided to try and call the Union on his cell phone. He therefore returned to his chair, took his phone out of his bag, and tried the office number on the card. However, the call went to voicemail, which stated that the office was closed. So he hung up and tried Spicher's direct number. But that call went to voicemail as well.

All of this occurred in a little over 2 minutes. And it got Findon's attention. He watched silently as Thomas made the two calls, intermittently picking up his own phone to text or check

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172.) As for Findon, unlike Thomas he reviewed the videotape extensively with company counsel a week before the hearing. And he was shown it again at the hearing. Nevertheless, he denied that Thomas requested a union representative after being told the real reason he was brought to the office, handed the union business card to him, or read the *Weingarten* request on the card out loud to him after retrieving it. (Tr. 328, 393, 424.) However, the weight of the evidence establishes otherwise. Although the videotape did not record sound, and the camera was behind Thomas (and thus the videotape cannot definitively confirm that Thomas was speaking), it is otherwise supportive of the account above. Further, Findon's contrary testimony was not corroborated by Mentzer or Burroughs, who as noted above were not called to testify.

[12] Thomas recalled reading the *Weingarten* paragraph on the card aloud again at this point (Tr. 106, 279–280). However, the videotape indicates otherwise; that he only looked at the card for about 2 seconds. As for Findon, he denied ever asking to see inside Thomas's locker. However, he admitted he might have. (Tr. 299, 306, 432.). Further, as noted above, neither Burroughs nor Mentzer were called to corroborate Findon's denial.

[13] See R. Exh. 17, at 7:56.32–7:57 p.m.; and Tr. 106, 108, 194–195, 278–280. There is no evidence that the store had a shop steward, that one was working that evening, or that Findon knew it.

for responses.[14] However, when it became apparent that Thomas was not reaching anyone, Findon decided to say something. Based on what he had read in the manual over the past several minutes, he concluded that, because the investigation involved drug or alcohol use, Thomas did not have the right to delay the interview if he couldn't contact a union representative.[15] And he told Thomas so.[16]

[14] There is no substantial or credible evidence that Thomas asked Findon if he could call the Union or that Findon told him he could. Although Findon testified that Thomas asked, and he said "yes," he immediately backtracked, saying:

> I don't know if it was yes, or what I said, but it was more or less yes, and you can see from the video that I sat my pen down and put the book down and I sat for 10, 15, 20 minutes, I can't remember for sure that he was on his cell phone trying to contact his union rep. [Tr. 298.]

Thus, "more or less" was apparently less, i.e., Findon's "yes" was tacit not explicit. See also Thomas's testimony, Tr. 262 (Findon never gave him explicit permission to contact a union representative).

[15] The Company's Corporate Policy Handbook, Section 4.3, states that, where a manager or supervisor has a reasonable suspicion that an employee is under the influence, he/she should:

> . . .
>
> Step 3: Conduct an interview with the Associate and give the Associate an opportunity to explain the situation. If the Associate requests a union representative be present, allow the Associate to call for a union representative and wait one hour for the representative to arrive. If the union representative does not arrive, proceed with steps 4 through 12.
>
> Step 4: Have the Associate sign a Alcohol and Drug Search and Test Release Consent Form to give the Company permission to conduct a search and to submit to a urinalysis or saliva swab test for drug, controlled substance and/or alcohol use and a Breathalyzer for alcohol use. If the Associate refuses to submit to a search or take the test, explain that refusal could result in termination.
>
> If the Associate still refuses to consent to a search and test, suspend the Associate and contact Associate and Labor Relations. . . .

(R. Exh. 7, p. 10). While the record is not entirely clear, this is apparently the manual and section Findon read and interpreted to mean that there was no need to delay a drug/alcohol investigation, even for an hour, if Thomas was unable to contact a union representative. See Tr. 306–307. (No other drug and alcohol investigation manual was introduced into evidence.)

[16] See R. Exh. 17, at 7:57–7:59.7 p.m. The General Counsel contends that Findon told Thomas that he did not have the right to a representative at the interview. And there is certainly record support for this, including: (1) Findon's earlier statement to Thomas that the Company had a right to inspect his locker without a union representative; (2) Spicher's uncontested testimony that a portion of what Findon said to Thomas ("This is about drugs, alcohol use. You don't have the right to . . .") was captured and recorded on her voicemail before Thomas hung up (Tr. 47–50); and (3) Findon's October 2017 HR summary, where Findon stated, "After going through the questions in the drug and alcohol manual and asking [Thomas] questions it came to my attention that, because of the nature of the complaints and the evidence we did not need to wait for union representation" (GC Exh. 6). However, there is even more compelling evidence to the contrary. Not only did Findon deny that he ever told Thomas he didn't have a right to a

Thomas therefore immediately tried recalling Spicher's direct number. As he did so, Findon picked up his own phone and exited the office, leaving Thomas with Mentzer and Burroughs. Once outside, he tried again to contact HR Manager Mangum and was finally able to reach her.[17] (She had just returned home from the beach.) Findon explained the situation to Mangum, told her that Thomas wanted to get ahold of a union representative, and asked her where to find the drug/alcohol questionnaire form he needed to interview Thomas. Mangum told Findon he could find the questionnaire in the store manager's office, and agreed that he did not need to wait until a union representative was available under the circumstances.[18]

In the meantime, Thomas's second call to Spicher likewise went to voicemail, so he hung up without leaving a message. Over the next 7–8 minutes, while Findon was out speaking to Mangum and getting the questionnaire, Thomas continued trying, unsuccessfully, to reach someone at the numbers on the card.[19] However, he never tried calling the red "emergency" number.[20] As its designation suggests, that was the one number on the card which was certain to

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union representative at the interview (Tr. 298–299), but Thomas himself admitted that Findon didn't tell him he couldn't call the Union or otherwise tried to prevent or discourage him from doing so (Tr. 189, 246–247). Thomas also admitted, and the videotape shows, that he did in fact repeatedly call the Union, including immediately after the point where the General Counsel contends Findon told him he didn't have the right to (Tr. 160–161). Further, as noted above, the corporate policy handbook clearly indicates that an employee who is suspected of drug or alcohol use should be given an opportunity to contact a union representative on request. It is unlikely that Findon missed this, even in the short time he was reviewing the manual. Thus, the more reasonable inference or conclusion is that Findon told Thomas he didn't have the right to *delay* the interview *if he couldn't contact a union representative*. Findon never denied that this is what he said, and it is a fair alternative interpretation of his October 2017 HR summary. It also explains why Thomas repeatedly tried to contact the Union again over the next several minutes.

[17] Findon denied calling Mangum after he left the office. He testified that he had received a text message from Mangum about where to find the questionnaire, and left solely to go get it. (Tr. 397–398). However, the record indicates otherwise. See fn. 18, below.

[18] See Tr. 475–476, 494; R. Exh. 27; and Findon's October 2017 HR statement, GC Exh. 6 ("I called my HR Lydia Mangum and explained to her that [Thomas] wanted to get a hold of a union rep. She backed up the manual and told me to explain to [Thomas] that under the circumstances we did not need the union present."). Mangum did not deny that she told Findon this (she was never asked).

[19] Thomas testified that all of his calls went to voicemail. As for whether he left a message, he testified either that he did not do so (because he was trying to reach a "warm body") or that he did not remember if he did so. (Tr. 154, 158, 179, 190–192, 268.) And neither the General Counsel nor the Union presented any other evidence that he did so, or explained the failure to present such evidence.

[20] Thomas testified that he called "a bunch of" or "numerous" numbers over the course of the meeting (Tr. 160–161). And the Company's videotape appears to support this, as it shows him dialing or inputting information and placing his cell phone to his ear a total of 13 times, including 5 times during the 7-8 minute period (7:59.50–8:07.11 p.m.) that Findon was out calling Mangum and getting the questionnaire form. However, Thomas testified that sometimes he was checking his voicemail (Tr. 183, 268). Further, he could only specifically remember

be answered, even on a Sunday night. Local 555 assigned the emergency number to a different union representative each week, and that representative was available to take calls 24/7 and trained to provide employees assistance.[21]

Eventually, at about 8:07 p.m., Findon returned carrying another binder with the questionnaire form he had been looking for. He went immediately back to his chair and began filling out the top, "Background Information" portion of the questionnaire (employee name, shift, date, time, facts or behavior observed that precipitated the interview, witnesses, interview location, and persons present) based on his personal knowledge or information he obtained from Mentzer and Burroughs.[22]

While Findon was doing this, at about 8:08 p.m., Mangum called to make sure he found the questionnaire form. So he got up and briefly left the room again to take the call and let her know that he had found it. After Findon left, Thomas tried again to call one of the numbers on the union business card. However, as before, the call went to voicemail.[23]

At about 8:09 p.m., Findon returned and immediately resumed filling out the background information on the questionnaire. In the meantime, Thomas dialed or inputted information and put the phone to his ear four more times, either to call one of the numbers on the card or to

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calling two numbers on the card, the office number once and Spicher's direct number twice before Findon left, and could not remember if he ever called the emergency number. (Tr. 154–160, 179–180.) Moreover, there is no other substantial record evidence to find or infer that he called the emergency number. Thomas testified that he no longer had the cell phone he used on March 26, 2017, and that he did not check his call history records (Tr. 157, 163). And neither the Union nor the General Counsel called the assigned emergency representative on March 26 to testify, offered any records of the emergency-number call history on that date, or provided any explanation for not doing so. Their failure to do so is telling, as the cell phone records in particular (assuming they showed one or more calls to the emergency number), likely would have "removed the linchpin" of the Company's defense that Thomas failed to call an available union representative. *York v. Ducart*, --- Fed. Appx. ---, 2018 WL 2453858 (9th Cir. June 1, 2018). So is the General Counsel's theory of the case. The General Counsel contends that Findon denied Thomas's repeated requests for a union representative, either expressly or effectively by refusing to honor the requests or failing to make any effort to help him contact a union representative or shop steward (Tr. 29–30; Br. 26). The General Counsel does not additionally or alternatively contend that a union representative was unavailable. Cf. *Ralphs Grocery* and *Manhattan Beer Distributors*, supra (finding violations on that basis).

[21] See Spicher's testimony, Tr. 70–72. The record does not reveal who the assigned emergency union representative was that evening, except that it was not Spicher.

[22] See CP Exh. 1, p. 3; and Tr. 398–399. Thomas testified that Findon got some of this initial information from him, such as his name, position, and length of service (Tr. 107). However, the videotape supports Findon's testimony that he filled out the background section without asking Thomas any questions. Further, Thomas's position and length of service are not even indicated on the questionnaire.

[23] See R. Exh. 17, at 8:09.7 p.m.; and Tr. 190.

check his voicemail.[24] He then set the phone down and waited while Findon continued writing. Findon did not speak to Thomas or ask him any questions while doing so other than whether he had been able to reach anyone from the Union.

Findon finished completing the background section at about 8:10 p.m. He then began asking Thomas questions from the next, "Interview Information" section of the questionnaire (e.g., whether he was hurt, whether he had been drinking an alcoholic beverage, when he had last had a drink, what he drank, how much he drank, etc.).[25] Thomas answered Findon's questions, believing that his job was in jeopardy and that he might be able to clear things up right away by doing so.[26] He told Findon that he was not hurt; that he had not been drinking alcohol; that he had last drank alcohol at 2 a.m.; that he drank Rainier/IPA; and that he did not keep track of how much he drank.[27]

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[24] As noted above, although Thomas admitted that he did not leave any messages, or could not remember if he did so, he testified that he checked his own voicemail to see if he missed a return call.

[25] Findon testified that, before beginning the interview, he asked Thomas, "Do you mind if we continue to fill this [questionnaire] out while we wait for your union rep?"; and that Thomas agreed to proceed (Tr. 401). However, Thomas denied that he ever rescinded his request for a union representative (Tr. 108). Further, Findon's testimony is unsupported and inconsistent with other evidence. As indicated above, Thomas had never been able to reach a union representative; Findon had already determined that he did not have to wait until Thomas was able to reach a union representative; and Mangum had agreed. Moreover, there is no mention in Findon's October 2017 HR statement that Thomas explicitly consented to be questioned without a union representative present. It is unlikely that Findon would have failed to include such a significant fact, even months after the event. Finally, Findon's testimony was not corroborated by Mentzer or Burroughs, who as noted above were not called to testify by the Company. In sum, it appears that Findon's testimony was another recent embellishment. And that, as indicated above, the only thing he asked Thomas was whether he was having any luck reaching the Union. See Tr. at 396–397, where Findon testified that this was the only thing he said or asked Thomas at about 7:58 p.m., when Thomas made his second call (but when, as found above, he actually told Thomas he did not have a right to delay the interview if he couldn't reach the Union).

[26] See Tr. 107–108 ("I felt intimidated. I felt like my job is in jeopardy and there's this guy I'd never even met before who had my—you know, was threatening my job, per se, and I was scared. . . . I thought maybe we could clear it up right away, you know, and so, oh, okay, no big deal, blah, blah, blah, you know"), and 197–199.

[27] See the questionnaire, CP Exh. 1, p. 3; and Thomas's testimony, Tr. 197–198. Findon testified that he wrote down "Rainier/IPA" on the questionnaire based on the two open beer cans that he saw in the unassigned locker, not based on what Thomas told him during the interview (Tr. 347). However, this testimony makes no sense as the question clearly asked what Thomas had been drinking when he said he last did so (i.e., at 2 a.m.). Further, Findon had previously admitted on cross-examination that he hadn't indicated anywhere on the questionnaire that he saw the beer cans (TR. 334). Moreover, the record indicates that Thomas only bought a six-pack of standard white Rainier "tallboys" on his 3 p.m. lunch break on March 26. See GC Exh. 5 (another Company videotape), at 3:10 p.m.; and Tr. 208–209, 259–261. (The Company allowed employees to purchase merchandise, including alcohol, on their breaks, and Thomas testified that

This took approximately 3 minutes, until about 8:13 p.m. Findon then turned the questionnaire over, and spent another minute filling in the final "Other important information" section. He essentially repeated what he wrote in the background section regarding what precipitated the interview: that two customers and an employee reported smelling alcohol on Thomas's breath, and that Chavarria had smelled it as well.

When he had finished, Findon closed the binder and reminded Thomas that the Company had a drug and alcohol use policy which he had signed when he was hired. Thomas responded by saying something to the effect that he did not remember exactly what the policy said. So Mentzer retrieved a copy of the one-page policy from the desk and gave it to Thomas. The policy listed several "unacceptable actions" related to alcohol and drug use, which "may be grounds for disciplinary action up to and including termination," including "[b]eing under the influence of alcohol . . . [which] is defined to include the smell of alcohol on [the] breath . . ." Mentzer also spent a few minutes explaining the policy to Thomas and answering his questions about it.[28]

When Mentzer was finished, at about 8:16 p.m., Findon stepped forward and told Thomas they were going to send him to a lab to take a drug/alcohol test. Thomas said that he would not do so without a union representative. Findon replied that, if Thomas could get ahold of the Union, the representative could meet them at the lab. But, Thomas repeated that he would not go for a drug/alcohol test without a union representative.[29]

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he usually bought a six-pack of Rainier tallboys at least once a week, which he took home and "put on ice" during on his lunch hour. See Tr. 101–102, 136–137; and R. Exh. 5, p. 38.) There is no evidence that he purchased a six-pack or can of India pale ale. Nor is there any evidence that he had ever previously bought, drank, or stored IPA at the store. Finally, as noted above (fn. 7), there is no substantial or credible record evidence that Findon actually saw the two open beer cans in the unassigned locker before the interview. In sum, it is reasonably clear that Findon's testimony was simply another fabrication, to create some documentary corroboration that he personally saw the open beer cans, and thereby justify the reasonable suspicion interview and test under the Company's drug and alcohol policy and protocol.

[28] See R. Exh. 6 (the one-page policy); R. Exh. 17 (the videotape), at 8:14.42–8:16.11 p.m.; and Tr. 404–407 (Findon's testimony). Thomas denied that he asked to see the policy or said he had never read or did not remember signing it (Tr. 199–203). However, the videotape indicates that he said something that prompted Mentzer to show and explain the policy to him.

[29] See Findon's testimony, Tr. 307, 320, 409–410. Like much of Findon's other testimony, this testimony was not corroborated. However, in this instance, his testimony is more credible and consistent with the record as a whole than Thomas's. Thomas testified that he and Findon went "around in circles" and "back and forth" for about 10 minutes, with him requesting a union representative before taking a drug/alcohol test, and Findon saying "that's not happening," or "just kind of being nonchalant and just dismissing it," or "not helping" him obtain a union representative (Tr. 110–111, 267). The videotape, however, shows that the conversation lasted only about 60 seconds. Further, as found above, Findon up to that point had allowed Thomas to repeatedly try and contact a union representative, and had done nothing to otherwise discourage him from doing so. Finally, Thomas's varying descriptions of Findon's response suggest that Thomas did not really have a good or reliable recollection of what Findon said.

Findon therefore left the room and called Mangum again. He informed her that Thomas was refusing to take a drug/alcohol test and asked what he should do. Mangum told Findon to suspend Thomas pending an investigation.[30]

It was now about 8:20 p.m. Per Mangum's instructions, Findon returned to the office and told Thomas that he was "suspended pending investigation," without any further elaboration or explanation. Along with Mentzer and Burroughs, he then escorted Thomas from the facility, stopping only to allow Thomas to retrieve his jacket from his locker.[31]

The following day, March 27, Findon met with Mangum and gave her the completed interview questionnaire. Findon also gave her a "voluntary statement" that another employee at the time, Ashley Pinkerton, had written that day regarding Thomas. Pinkerton reported that 2 days earlier, on March 25, at about 3:30 p.m., she had observed Thomas open his assigned locker and had seen a "white 'tallboy' of Rainier beer" inside it.[32]

Mangum considered all of this documentary information, along with Findon's oral reports on March 26 and 27, before deciding what further disciplinary action to take. She also considered certain previous reports she had received regarding Thomas's drinking or smelling of alcohol at work, but which had not been confirmed by her or another manager or by a drug/alcohol test at the time, and had not resulted in any further action under the Company's

[30] Findon testified that Thomas was not suspended for refusing to take a drug/alcohol test, but because of the reports about him smelling of alcohol and the open beer cans in the unassigned locker (Tr. 307–308). Mangum suggested this as well, testifying that she made the decision to suspend Thomas based on the reports by customers and employees, and by Findon himself, that Thomas smelled of alcohol (Tr. 473). However, the record as a whole indicates otherwise. Indeed, the Company's drug and alcohol policy and protocol specifically provides that an employee should be suspended following a reasonable suspicion interview if he/she refuses to take a drug/alcohol test. See R. Exh. 7, pp. 10, Step 4. See also fn. 34, below, regarding the stated basis for subsequently terminating Thomas.

[31] Tr. 110–113, 122, 266, 276–277, 304–305, 318, 409–415, 473, 475–476. When Thomas opened the locker to get his jacket, he said, "Look, there's no alcohol in there." Findon replied, "It's too late now." (Tr. 113–114.)

[32] See CP Exh. 1, p. 5; and Tr. 495–496. Pinkerton had previously worked for several years in the loss prevention office, but had transferred to the meat department in February 2017. Although she no longer worked for Fred Meyer Stores at the time of the April 2018 hearing, she was called by the Company to testify. Her testimony contained inconsistencies regarding how she came to submit the March 27 statement. She initially testified that she asked if she could write it up, but subsequently testified on cross-examination that she was asked to write it up, could not remember who asked her, but handed it directly to Mentzer in the loss prevention office (Tr. 363–364, 373–377). As previously noted, although Mentzer apparently continued to work for the Company (it never asserted or established otherwise), it did not call him to testify about this or any of the other relevant events he witnessed.

drug and alcohol policy and protocol.[33] However, after conferring with the corporate employee relations office, she ultimately decided that Thomas should be terminated based on his refusal to take the drug/alcohol test following the March 26 interview.[34] The Company therefore terminated Thomas on March 31.

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[33] These included the prior report that Pinkerton had made a few days earlier, around March 23 or 24, about observing Thomas drinking a Rainier beer by his locker before going off shift. See fn. 7, supra. As with her testimony about her March 27 statement, Pinkerton's testimony about the previous incident she reported on March 23 or 24 contained a number of apparent inconsistencies. For example, she initially testified that she saw Thomas drinking when she walked into the locker area and that Thomas quickly turned away from her, opened both his locker and the unassigned locker, and then quickly shut both lockers and exited the area. However, she later testified that Thomas did not notice her until he was finished and turned to leave. Further, in both accounts she made no mention of Thomas saying anything. However, when subsequently asked by Company counsel if Thomas had exhibited "any signs of being under the influence of alcohol," she testified that "he slurred his words a bit, but no. I mean, he was very quick. And it was a brief interaction." (Tr. 358, 359, 362–363, 370, 372.)

Other incidents included an occasion (Mangum could not remember when) where a non-supervisory person in charge of the front end, Andrew Canida, called to report that he and a customer had smelled alcohol on Thomas's person or breath. Mangum subsequently went to converse with Thomas, getting within a couple feet, but she could not personally smell it. (Tr. 452–453.) Another was an occasion on February 11 where an employee emailed Mangum and assistant manager Owen about an incident 3 days earlier when Thomas had been "acting like he was drunk, and smelled like boozes" [sic] after buying a six-pack of Rainier and being gone on break for a time. Neither Mangum, Owen, nor any other manager apparently took any action with respect to this report. See R. Exh. 19; and Tr. 472–473, 468, 472. A third occasion was on February 18, where Canida reported that a few employees, including Pinkerton, had mentioned Thomas smelling of alcohol again, and that Thomas accidentally cut his hand on a razor blade in the bathroom trash about an hour later. Canida reported that Thomas was given a post-accident drug test. (The collective-bargaining agreement provides that the Company does not need reasonable grounds to believe an employee is under the influence to require drug or alcohol testing if the employee was involved in an industrial accident which involves injury or damage. See Jt. Exh. 1, p. 25, Sec. 18.2.) However, he apparently passed the test as no disciplinary or other action was ever taken. See R. Exh. 11; and Tr. 141–143, 265, 459, 461.

[34] Mangum testified that, in deciding to terminate Thomas, she "relied on" everything Findon told her and the documentation he provided—including the completed March 26 questionnaire and then-employee Pinkerton's March 27 statement about seeing a Rainier tallboy in Thomas's assigned locker on March 25 (Tr. 464) —and that she terminated Thomas both because he refused to take the drug/alcohol test and because he was under the influence (Tr. 478). However, there are several problems with this testimony. First, the questionnaire only summarized reports by employees or customers about smelling alcohol on Thomas, which as previously noted (fn. 7) was insufficient by itself under the Company's drug and alcohol policy and protocol to conclude that he was under the influence and to take disciplinary action. Second, Pinkerton's March 27 report about seeing a Rainier beer in Thomas's locker on March 25 was likewise unconfirmed by any manager and insufficient to conclude that Thomas was under the influence on March 26. Third, as noted above, there is no substantial or credible evidence that Findon personally smelled

ANALYSIS

The foregoing facts fail to establish the alleged *Weingarten* violations under extant Board law for several reasons. First, although Findon never expressly granted Thomas's requests for a union representative at the drug/alcohol interview and test, he never expressly denied them either. Rather, he allowed Thomas to try and contact a union representative. And he did nothing to discourage Thomas from doing so.[35] Thus, prior cases cited by the General Counsel, such as *System 99*, 289 NLRB 723 (1988) and *Safeway Stores*, 303 NLRB 989 (1991), where the employers expressly denied the employees' requests to consult with a union representative before taking a drug test, are distinguishable. Compare also *Montgomery Ward & Co*., 254 NLRB 826, 830 (1981) (employer ordered the employee to hang up when he tried to use the office phone to call a union representative to assist during an investigatory interview), enfd. in part 664 F.2d 1095 (1981); and *Southwestern Bell Telephone Co*., 227 NLRB 1223 (1977) (employer told the employees that if they insisted on union representation higher management would have to be brought into the investigation and the consequences would probably be worse for them).

Second, Thomas was allowed over 18 minutes to contact a union representative from the time he was told the real reason he was brought to the office until Findon started asking him substantive questions from the questionnaire. The General Counsel does not dispute that this was a reasonable or sufficient time (the General Counsel's posthearing brief does not directly address

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alcohol on Thomas's breath or saw open beer cans in the unassigned locker on March 26, or told Mangum that he did. Fourth, Union Representative Spicher testified that, when she spoke to Mangum by phone on March 30, the day before Thomas was terminated, Mangum stated only that Thomas was being terminated for failing to take the drug/alcohol test (Tr. 53–54). Mangum did not deny this or otherwise contradict Spicher's testimony (she was never asked about it). Finally, as noted above, on April 7 the Union filed a grievance over Thomas's termination alleging that it violated the parties' collective-bargaining agreement. The grievance requested the Company to respond in writing "with a clear and complete statement of the reasons for [Thomas's] discharge" as required by the agreement (GC Exh. 2). The Company responded a week or two later, stating only one reason for his discharge: that he "violated the Company's policy on Alcohol and Drug use when he refused to submit to a drug and alcohol test" (GC Exh. 3). Although various documents were attached to the response, including the completed questionnaire, Pinkerton's March 27 statement, and certain company drug and alcohol policy documents (see CP Exh. 1), they were not mentioned or referenced in the response. Cf. *Manhattan Beer Distributors*, above, 362 NLRB No. 192, slip op. at 4 n. 15 (finding that the employer discharged the employee based on his refusal to submit to a drug test without union representation rather than its reasonable suspicion that he was under the influence, notwithstanding that several of the discharge documents described the circumstances which created those suspicions, as all of the discharge documents recited that he was fired for refusing to take the drug test).

[35] Although Findon had previously denied Thomas's request for a union representative or shop steward before permitting an inspection of his locker, Findon dropped the matter and never actually required Thomas to open his locker. Further, the General Counsel does not allege that Findon unlawfully denied Thomas's request for a union representative before opening his locker.

the issue). And it clearly was under the circumstances. As the Board has previously recognized, alcohol testing is time sensitive. See *Manhattan Beer Distributors*, 362 NLRB No. 192, slip op. at 3 n. 9 (2015) (distinguishing alcohol from marijuana in that respect). Both Findon and Thomas knew this.[36] Further, Union Representative Spicher had provided Thomas with a business card for just these kinds of situations, which contained four different numbers to call, including an "emergency number". Thomas had the card in his wallet, and was able to make numerous attempts to call the numbers with his personal cell phone over the 18-minute period.

Third, although Thomas was unable to reach Spicher, the primary union representative for the store, the record indicates, and the General Counsel again does not dispute, that an alternate union representative was available 24/7 at the emergency number. But, Thomas never called that number.[37] Board precedent indicates that an employer does not violate an employee's *Weingarten* rights by proceeding with an investigatory interview in such circumstances. See *Ralphs Grocery Co*., 361 NLRB 80, 86 (2014), and cases cited there. This is true regardless of whether the employee or the employer knew that an alternate union representative was available. See *Roadway Express, Inc.*, 246 NLRB 1127, 1130 (1979) (finding no violation even assuming the employee did not know that an alternate union representative was available); and *Coca-Cola Bottling Co*., 227 NLRB 1276 (1977) (finding no violation even though the employer did not know until later that an alternate union representative was available).[38]

Fourth, there is no substantial evidence that Thomas needed Findon's assistance to contact a union representative. Thomas denied, and continues to deny, that he had been drinking; he had a working personal cell phone; and he was able to use it repeatedly without any visible difficulty. Contrary to the General Counsel's posthearing brief, Findon had no legal duty in these circumstances to either affirmatively assist Thomas or independently attempt to contact a

[36] See Thomas's testimony, Tr. 171 (admitting that he was aware the body metabolizes alcohol fairly quickly, "at one drink per hour, something like that"); and Findon's testimony, Tr. 303, 306, 409–410.

[37] Thomas also never left a message when his calls to other numbers went to voicemail. Compare *Circus Circus Las Vegas*, 366 NLRB No. 110 (2018), where the Board found that the employer unlawfully denied an employee a *Weingarten* representative at a "due process" interview. The employee had left several messages with the union before the scheduled interview requesting assistance, and told the employer so, but no one showed up. In addition, although the record indicated that a shop steward worked across the hallway from the office where the interview took place, there was apparently no showing that the steward was actually available at that time.

[38] In contrast, where a union representative is unavailable, the employer "must give the employee time to obtain representation or, if it does not wish to accord the employee this right, proceed on the basis of information it could obtain through other means." *Manhattan Beer Distributors*, above, slip op. at 2. See also *Ralphs Grocery*, 361 NLRB at 86 ("If no union representative is available, the employer must either discontinue the interview or offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all (in which case the employer is free to take disciplinary action based on information obtained from other sources).").

union representative. See generally *Roadway Express* and *Coca-Cola Bottling*, above. Compare *Safeway Stores*, 303 NLRB at 996 (finding a violation where the employee, who apparently was not carrying a personal mobile phone, asked the manager to call the union business representative or the union's office, and the manager refused, stating that the employee would be required to take the drug test regardless).

Fifth, there is also no evidence that Findon wouldn't have waited for a union representative to arrive if Thomas had contacted one. The Company's policy and protocol was to wait up to an hour for a contacted union representative to arrive (see fn. 15, above), and Thomas made all of his calls within 28 minutes after he was brought to the office. Thus, even if the emergency number was the very last one Thomas called, a union representative still would have had more than a half-hour under the company policy to get to the store to actively assist him.[39] And there is no evidence or contention that this would not have been possible.

The Company also asserts various other arguments, including that Thomas "faked" or "pretended" making repeated calls to the Union in order to delay the interview and drug/alcohol test; that he ultimately waived his *Weingarten* rights by answering Findon's questions; and that he is not entitled to reinstatement or backpay in any event. However, given the findings above, it is unnecessary to address these additional arguments. Nor does this decision address the lawfulness of the Company's drug and alcohol policies and protocols, as the General Counsel has not directly challenged them.

CONCLUSIONS OF LAW

1. The Company did not deny Thomas's request for a union representative before submitting to the March 26, 2017 drug/alcohol investigatory interview and test in violation of Section 8(a)(1) of the National Labor Relations Act.

2. The Company did not violate Section 8(a)(1) of the Act by conducting the investigatory interview with Thomas and requesting him to submit to a drug/alcohol test on March 26, 2017.

3. The Company did not violate Section 8(a)(1) of the Act by suspending Thomas on March 26, 2017.

4. The Company did not violate Section 8(a)(1) of the Act by discharging Thomas on March 31, 2017.

[39] See *Washoe Medical Center*, 348 NLRB 361 (2006) (under *Weingarten*, the employee is entitled on request to have a union representative attend the investigatory interview and provide advice and "active assistance").

ORDER[40]

The complaint is dismissed.

Dated, Washington, D.C., July 2, 2018

Jeffrey D. Wedekind
Administrative Law Judge

[40] 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.