STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, Complainant, vs. METHOW VALLEY SCHOOL DISTRICT, Respondent.	CASE 15994-U-01-4074 DECISION 8400 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Eric T. Nordlof, General Counsel, for the union.

Stevens Clay Manix, by *Paul E. Clay*, for the employer.

On September 24, 2001, Public School Employees of Washington (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, naming the Methow Valley School District (employer) as respondent. The complaint was reviewed under WAC 391-45-110, and a preliminary ruling issued on October 23, 2001, found a cause of action to exist on allegations summarized as:

> Employer interference with employee rights in violation of RCW 41.56.140(1), by denial of an employees's request for union representation in connection with an investigatory interview (*Weingarten* rights) conducted on August 23, 2001.

The scheduling of a hearing was delayed for an extended period at the request of the parties, while they attempted to settle this and two other unfair labor practice complaints. While their settlement

effort was successful on the other cases, they were unable to resolve their differences in the above-captioned matter. A hearing was held on January 28, 2003, before Examiner Frederick J. Rosenberry. The parties filed post-hearing briefs.

On the basis of the evidence presented, the Examiner rules that the union failed to meet its burden of proof to establish that the employer committed unfair labor practices in regard to the disputed investigatory interview. The complaint is DISMISSED.

BACKGROUND

The Methow Valley School District (employer) is located in Okanogan County, and offers traditional educational services for students in kindergarten through high school. Louis Gates has been the superintendent since July of 2000.

A chapter of Public School Employees of Washington (union) is the exclusive bargaining representative of the employer's classified employees. The bargaining unit encompasses approximately 48 employees who perform office-clerical, maintenance, transportation, child nutrition or paraprofessional duties. The chapter is administered by officers who are rank-and-file employees of the employer. At all times relevant to this proceeding, Dan Corrigan was the chapter president, Rose Jones was the chapter vice-president and grievance officer, and Greg Stanovich was the chapter secretary-treasurer. The chapter receives services from a cadre of full-time professional staff representatives who are assigned by the union to geographic areas. At all times relevant to this proceeding, Karen Luton was the union staff representative assigned to the Methow Valley chapter and Don Contreras was another member of the union staff.

The facts relevant to this case are largely uncontested, although the parties argued "who said what to whom" details:

- In about July of 2001, a female custodian complained to Superintendent Gates that male employees in the maintenance-custodial department were engaging in harassment, intimidation and other inappropriate behavior while at work.

- Gates advised union officials Corrigan and Stanovich of the allegations, in general terms. He further advised them that the employer would be bringing in an independent investigator to conduct an investigation.

- Gates decided to not participate in the employee interviews, and he retained Lloyd Olson as an independent investigator to look into the allegations that had been raised.[1]

- Gates prepared a worksheet for Olson, detailing the lines of inquiry to be addressed in interviewing employees. Those questions addressed the following types of events that allegedly occurred at the workplace:

  - knowledge of deliberate slowing of work;
  - knowledge of threats between employees;
  - knowledge of events that have lead to threats;
  - knowledge of bullying;
  - knowledge of use of alcohol or drugs;
  - knowledge of sexual innuendo;
  - knowledge of sharing or watching pornographic videos;
  - knowledge of sharing off-color jokes using the employer's computer system;
  - knowledge of invitations to share motel rooms while attending conferences or conventions; and
  - knowledge of sexual encounters.

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[1] Olson was recommended to Gates by the educational services district for the area.

Olson was briefed regarding the matter, and was provided the list of interview topics.

Olson initiated his investigation by conducting separate interviews of three female maintenance/custodial employees on July 30, 2001. PSE representative Luton attended those interviews.

Olson interviewed three male maintenance/custodial employees in separate interviews on the next day, July 31, 2001. Union vice-president Jones attended those interviews.

At that point, the only employee remaining to be interviewed was union official Stanovich, who understood that the purpose of the interview was to investigate allegations against him. In a letter dated August 9, 2001, Stanovich advised the superintendent of his request concerning the investigatory interview, stating:

> I would like the meeting with Lloyd to take place on the 23rd. These are people I plan on bringing to my meeting. Could you please get back to me and confirm that everyone on the list is acceptable by you to attend?
> 1. Dan Corrigan - PSE Chapter President
> 2. Rose Jones - PSE Chapter Vice-president
> 3. Don Conta [sic] PSE Field Rep.[2]
> 4. Rolf Borgensen - Personal Attorney.

Gates was opposed to Stanovich's request, and responded with a memorandum dated August 15, 2001, stating as follows:

> You requested four representatives, including two attorneys and two local representatives, when you talk with Lloyd Olson about a variety of maintenance and custodial personnel issues at 11:00 am on August 23,

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[2] Examiner's note: The third individual named was likely intended to be Don Contreras, a union representative who subsequently attended the interview with Stanovich.

> 2001. You may bring one representative, not four. This is consistent with the local PSE contract and with state law. Please inform the District as to your choice for representation. Furthermore, when you talk with Mr. Olson you are directed to answer the questions and to describe the issues honestly and openly.
>
> As a reminder, the District's purpose in hiring Mr. Olson includes, but is not limited to: (1) researching issues that have led to several years of ferment within the maintenance and custodial departments; (2) hearing his recommendations as to how to resolve the issues; (3) helping develop a plan that will heal the wounds of the past; and (4) moving the departments into future months and years of productivity, amicably and without the ferment that damaged relationships and the District itself. In short, it is in the best interest of these employees of the departments and of the District to identify issues in order to meet the stated goals. The current working conditions within the departments are unacceptable to both the maintenance and custodial employees and to the District. These unacceptable condition will end.

No further written correspondence was exchanged, but there was some disputed testimony concerning conversations between Corrigan and Gates about the representation of Stanovich at the investigatory interview and about the union's interest in having what it described as a "second individual" serving as a non-participatory silent observer at the meeting.

On August 23, 2001, Stanovich appeared for the meeting accompanied by Corrigan, Jones, and Contreras. The superintendent declined to allow the interview to proceed with three union representatives present. After the union officials and Stanovich conferred, Stanovich designated Contreras as his representative. Olson then proceeded with the investigatory interview of Stanovich.

The union subsequently filed this unfair labor practice case. The outcome of the investigatory interview is not at issue here.

POSITIONS OF THE PARTIES

The union argues that the employer interfered with Stanovich's statutorily protected rights when it denied him a non-participating observer present at an investigatory interview. It also argues that the local chapter had a right to be represented at the interview, and that denial of local representation resulted in the chapter not having access to information that it needed to adequately represent the bargaining unit members.

The employer maintains that, notwithstanding the union's claim in this proceeding, the union never announced in 2001 that only some of the individuals who sought to attend the investigatory interview were present to represent Stanovich's personal interests while others were present to represent the union's institutional interests. Moreover, the employer defends its limitation on the number of union representatives at the investigatory interview, on the basis that the union's request went beyond the protections afforded to employees in such situations. It points out that it did not attempt to dictate which union representative would accompany Stanovich to the investigatory interview.

DISCUSSION

Applicable Legal Standards

The Right to Union Representation -

In 1975, the Supreme Court of the United States issued two landmark decisions holding that the National Labor Relations Act (NLRA) protects the right of private sector employees to request union representation at investigatory interviews, where the employee reasonably believes that he or she may be disciplined as a result

of the interview. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975); *Garment Workers v. Quality Manufacturing Co. Inc.*, 420 U.S. 276 (1975). Those decisions were based on Section 8(a)(1) of the NLRA, which states:

> It shall be an unfair labor practice for an employer:
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the NLRA] . . .

Several principles flow from the Supreme Court's *Weingarten* decision and subsequent cases decided under that precedent:[3]

- A union representatives' presence is allowed at an employer's investigatory interview to assist an employee, by clarifying facts and offering information that may be relevant to the employer's investigation, but the employer retains the right to direct the course of the inquiry.

- It is appropriate that a union representative be mindful of the organization's institutional interest of maintaining the rights of the entire bargaining unit with regard to the imposition of unjust discipline, but the presence of a union representative should not transform the investigatory interview into a collective bargaining confrontation.

- A knowledgeable union representative can offer assistance in getting to the root of a matter of concern to the employer, by helping elicit facts from an employee who may be too fearful or inarticulate to report accurately his or her knowledge or involvement in the matter being investigated.

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[3] For example, in *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir 2001), the court upheld an NLRB decision extending "*Weingarten*" rights to employees who are not even represented by a union.

Requests for union assistance in investigatory situations are thus an outgrowth of the employee's statutory right to a representative of his or her own choosing, and the denial of an employee request for union representation is deemed to be an unlawful interference with the rights protected by the statute.

The Commission and the Washington courts consider federal precedent in the evaluation of unfair labor practice complaints, where that federal precedent is consistent with Chapter 41.56 RCW. *Nucleonics Alliance, Local 1-369 v. WPPSS*, 101 Wn.2d 24 (1984); *Municipality of Metropolitan Seattle v. PERC*, 118 Wn.2d 621 (1992). RCW 41.56.140(1) is similar to Section 8(a)(1) of the NLRA, and numerous Commission decisions addressing investigatory interview situations have adopted principles enunciated in *Weingarten*:

- The threshold to application of *Weingarten* rights is that an employee reasonably believes the purpose of an employer-called meeting is to elicit information which might support potential disciplinary action. The employee then has the right to have (and the employer is obligated to allow) union representation. *Okanogan County*, Decision 2252-A (PECB, 1986).

- The union representative present under *Weingarten* can help to "ferret out questions which, if answered by the employee, might lead to discipline of the employee in an entirely different context from which the investigatory interview is based." *City of Vancouver*, Decision 7013 (PECB, 2000).

- The union representative present at a *Weingarten* interview is not limited to being a passive or silent observer, but the union representative does not speak in place of or for the employee who is being interviewed. *City of Bellevue*, Decision 4324-A (PECB, 1994).

- The right to representation does not extend to meetings which are not of an "investigatory" nature. *Pierce County Fire District 9*, Decision 3334 (PECB, 1989); *City of Mercer Island*, Decision 1460-A (PECB, 1982).

- An employer that does not desire to deal with a union representative can dispense with holding an investigatory meeting and rely on evidence obtained from other employees or sources where there may be no obligation to permit representation under *Weingarten*, but any discipline imposed would be subject to challenge by the union under the grievance procedure of the parties' collective bargaining agreement and the union would then be entitled, as the exclusive bargaining representative, to information upon which the employer relied in its decision to impose discipline (or any other information necessary to the intelligent evaluation of the merits of any grievance that may be lodged). Moreover, the processing of grievances provides opportunities: (1) for the parties to discuss the merits of the grievance; and (2) for the employee or union to attempt to persuade the employer to modify or rescind the complained of personnel action. *City of Tacoma*, Decision 3346-A (PECB, 1990).

The Burden of Proof -

The complainant in any unfair labor practice case bears the burden of proof. WAC 391-45-270. To prevail in this case, the union would need to establish that Stanovich was entitled to have more than one union representative at the investigatory interview, or that the union was entitled, on its own initiative, to have access to the *Weingarten* proceedings as a means of obtaining information from which to evaluate its future course of action in representing the members of the bargaining unit. Absent such proof, the union's complaint must be dismissed.

Application of the Standards

The Examiner notes, at the outset, that neither the precedents cited above nor the cases that the union relies upon to support its arguments provides for multiple union representatives at an investigatory interview.

Request for Union Representation -
Stanovich exercised his right to request union representation and the employer granted it, so the fundamental facts of this case weigh heavily against the union. The focus of *Weingarten* is on individual rights: The request for union representation is initiated by the individual employee; it is the individual that owns the statutory right to representation. *Epilepsy Foundation*, 268 F.3d at 1095. It is clear from this record that the employer expressed no preference or opinion as to which union representative would accompany Stanovich; that decision was left entirely to Stanovich.

The Rights of the Union -
The union contends that it had a right to protect its own interests by having multiple observers at the disputed investigatory interview. That argument is not persuasive.

The *Weingarten* right does not extend to the union, and a union does not have a right to attend an investigatory interview unless it is requested (invited) by the employee being interviewed. An employee who does not want union representation is free to proceed without any union representative present. Even when union representation is requested, the union is expected to be responsive to an employee-initiated request for representation and to provide a qualified representative, but the union does not in any way control the session.

Unions are sometimes faced with circumstances where two or more bargaining unit members have a conflict or, as here, one levels a charge of misconduct against another. The union will likely owe a duty of fair representation to each of the disputants, and it might want to use different representatives for different employees, but that does not alter the fundamental premise that the right to union representation at an investigatory interview belongs separately to each of the disputant employees. If discipline ensues and one or more grievances are filed, the union may need to determine the best course of action and whether to pursue grievances on behalf of any or all of the disputants, but such considerations are premature at the investigatory interview stage.

Effectiveness of Representation -

The union maintains the effectiveness of the union representative ultimately chosen by Stanovich was diminished, because Contreras was not aware of all of the details of the background leading to the employer's investigation. The argument is not persuasive.

Any union representative may have some limitations in terms of past experience or knowledge of the particular situation. Stanovich, who was himself a union official, had ample time to select and inform another union representative for the investigatory interview at issue in this case. Moreover, this is not a situation where there was an urgent call for any union representative due to a lack of time or distance limitations. Given the timing of the events in this case, the employer's insistence on Stanovich having only one union representative at the investigatory interview was entirely reasonable. The employer's limitation was not a violation of the employee's *Weingarten* rights.

Characterization as an Information Request -

The union asserts that its purpose in attempting to gain access for additional union representatives at the employer's investigatory

interview was to obtain information that might be of interest in representing other members of the bargaining unit. Therefore, the union reasons, it should have been granted access as a form of an information request. The union cites *Pullman School District*, Decision 2632 (PECB, 1987) in support of its position, and its brief includes an extensive quotation describing the standard procedure contemplated in an information request situation. Again, the argument is not persuasive.

As a matter of law, the presence of a union representative at a *Weingarten* interview is merely to provide assistance to the particular employee being interviewed. The performance of that task does not give the union a right to seat additional observers whose purpose would impliedly or actually be to gather evidence on behalf of some other employee(s) or to further the union's own interests.

As a matter of fact, this record contains conflicting testimony. Union official Rose Jones steadfastly maintained that she told the superintendent she was appearing at the investigatory interview to represent the union, while the superintendent maintained that no such remark was made. That conflict in testimony ultimately makes no difference to the outcome of this case, however. Jones further testified that the chapter's interests were her paramount concern. Accepting Jones' additional recollection as accurate, the union had no right to demand access to the interview. Because representation was a right of (and initiated by) Stanovich as the interviewee, the union did not have the right to interpose itself in an investigative interview on its own initiative.

While the union is correct that the statutory duty to bargain obligates employers to provide information needed by unions to

perform their representation functions in contract negotiations and grievance administration, this union's attempt to convert a *Weingarten* interview into a bargaining session is both novel and clearly contrary to the *Weingarten* precedents. *Weingarten* rights relate to investigatory interviews conducted by employers, where union involvement is only at the behest of the employee and there is no right of the union (or duty of the employer) to bargain. The abstract possibility of adverse personnel action does not provide a basis for union access to a *Weingarten* interview as a preemptive information-gathering exercise.

Conclusions -

Stanovich's stated interest was that Contreras be his representative, with the goal of ensuring that his employment rights would be upheld, and his request was fulfilled. The suggestion that the presence of union official Jones (who had been in attendance at investigatory interviews held earlier with other employees) to "make sure I had an equal playing field" evidenced a purpose beyond the right protected by *Weingarten*. The record does not reflect what role the union or Stanovich would have had Corrigan fill, had he been admitted to the interview. Thus, regardless of whether the desires of Stanovich and the union's interests in having multiple representatives were fully articulated to the employer, they went beyond the scope of a *Weingarten* investigatory interview. There is no evidence in this case that warrants an increase in the number of union representatives present at the meeting, and the union has not provided any precedent from any jurisdiction where such an information request analysis has been accepted. It is apparent that the union is attempting to commingle: (1) the collective bargaining obligation to provide relevant information; and (2) the right of individual employees to union representation at investigatory interviews which is separate and apart from the duty to

bargain. Those are two different protected rights, and adding them together does not compel a conclusion that cannot be reached under either of them separately.

Interference with the Union's Performance of its Duty -
The union also argues that Stanovich, unlike the other interviewed employees, chose a representative who was not able to serve as an adequate set of eyes and ears for the local bargaining unit. That argument cannot get past the fact that the focus of *Weingarten* is the exercise of a right by an individual to be accompanied by a union representative of his or her choice.

Contreras was a representative who was both made available by the union and selected by Stanovich. The employer did not limit Stanovich to any specific union representative, and the union is not in a position to second-guess the choice made by Stanovich.

The union did not provide evidence or argument adequate to explain why its professional staff representative (Contreras) should be deemed incapable or unsuited to represent Stanovich. If Contreras' unfamiliarity with the area and/or this bargaining unit was going to be a problem for the union, it should have declined to make Contreras available as one of the choices offered to Stanovich. The skills associated with representing employees in *Weingarten* situations relate more to the individual and to the type of situation than to other environmental factors: It is the employer, not the employee or the union, that controls the agenda in a *Weingarten* investigation interview. The right of the union to request information and to bargain with the employer about any resulting discipline would only attach later, if a grievance were to be filed and the union was called upon to evaluate the merits of and process such a grievance. The union has thus failed to prove

that it had a right to insist on more than one union representative at the investigatory interview at issue here.

FINDINGS OF FACT

1. Methow Valley School District is a school district operated under Title 28A RCW, and is a "public employer" within the meaning of RCW 41.56.030(1). Superintendent Louis Gates heads the employer's operations.

2. Public School Employees of Washington (PSE), a "bargaining representative" within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of the employer's classified employees performing office-clerical, maintenance, transportation, child nutrition and para-professional functions. Bargaining unit employees Dan Corrigan, Rose Jones, and Greg Stanovich are officers of the local union chapter. Karen Luton and Don Contreras are PSE staff representatives.

3. In July of 2001, the employer was contacted by a classified employee who alleged various incidents of harassment, intimidation and inappropriate behavior by one or more employees in the bargaining unit represented by the union. In response, the employer hired Lloyd Olson to investigate the allegations and to interview various employees.

4. Olson conducted investigatory interviews of three bargaining unit employees on July 30, 2001. Those individuals requested union representation, and were accompanied at those interviews by PSE representative Luton.

5. Olson conducted investigatory interviews of three additional bargaining unit employees on July 31, 2001. Those individuals

requested union representation, and were accompanied at those interviews by local chapter official Jones.

6. Olson scheduled an investigatory interview of Stanovich to take place on August 23, 2001.

7. On August 9, 2001, Stanovich notified the employer that he wanted to be accompanied at the investigatory interview by three union representatives and his personal attorney.

8. The employer did not accept Stanovich's request that he be accompanied by four representatives. By memorandum dated August 15, 2001, the employer advised Stanovich that he could be accompanied by one representative, and asked Stanovich to advise the employer who would be accompanying him.

9. When Stanovich appeared for the investigatory interview on August 23, 2001, he was accompanied by three union representatives including local chapter officials Corrigan and Jones, as well as PSE staff representative Contreras.

10. The employer declined to meet with Stanovich in the presence of three union representatives. Stanovich thereupon selected Contreras as his representative, and the investigatory interview then took place.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. The union has failed to establish, by a preponderance of the evidence, that the employer failed to meet its obligation to

allow Greg Stanovich the assistance of a union representative at the investigatory interview conducted as described in the foregoing findings of fact, so that no violation of RCW 41.56.140(1) has been established in this case.

3. The union has failed to establish, by a preponderance of the evidence, that a duty to bargain existed between it and the employer at or in connection with the investigatory interview conducted on August 23, 2001, or that the employer failed to meet its obligation to provide information to the union by and through that investigatory interview, so that no violation of RCW 41.56.140(4) has been established in this case.

ORDER

The complaint charging unfair labor practices filed in the above-captioned matter is DISMISSED on its merits.

Issued at Olympia, Washington on this 17th day of February, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Frederick J. Rosenberry

FREDERICK J. ROSENBERRY, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.