STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS, FOOD PROCESSING EMPLOYEES, PUBLIC EMPLOYEES, WAREHOUSEMEN AND HELPERS UNION, LOCAL 760,	)	CASE NO. 5478-U-84-997
Complainant,	)	DECISION 2252-A - PECB
vs.	)	
OKANOGAN COUNTY,	)	DECISION OF COMMISSION
Respondent.	)	

Hafer, Price, Rinehart and Schwerin, by John Burns, Attorney at Law, appeared on behalf of the complainant.

Michael D. Howe, Attorney at Law, appeared on behalf of the respondent.

This case arises from unfair labor practice charges filed by Teamsters Local 760 against Okanogan County. The county appeals from an examiner decision, issued December 11, 1985, holding that the county committed an unfair labor practice by conducting an investigatory interview with sheriff's deputy Gary Maxwell after denying Maxwell's request for union representation. The examiner ordered the reinstatement, with back pay, of the affected employee, who was discharged a few weeks after the interview.

The county raises the following issues:

1. Does a violation of the unfair labor practice provisions of RCW 41.56.140(1) or (2) occur when an employer conducts an investigatory interview with an employee after denying the employee the presence of a union representative?

2. If an unfair labor practice is committed, is a "make-whole" remedy favoring the affected employee appropriate when the violation is unrelated to the grounds for the discharge?

Except as to a few particulars,[1] the county does not contest the facts of this case as presented by the examiner. Gary Maxwell's discharge by the county was the culmination of a course of alleged misconduct arising from a number of incidents. The specific details of these incidents are set forth at length in the examiner's decision, and need not be repeated here in full. Particularly relevant to the issues on review is the following information: On August 15, 1984, Maxwell was summoned to appear before Sheriff John Johnston. Prior to the meeting, Maxwell was advised by both his union's business representative and his union's attorney to bring the shop steward to the meeting with Sheriff Johnston. At the outset of the meeting, Sheriff Johnston advised the shop steward and Maxwell that the meeting was not to be investigatory and that the shop steward could not participate. Johnston testified that he told the shop steward that "there would not be disciplinary action resulting in the meeting," and that he, Johnston, did not "know where it was going to go at this point." Maxwell proceeded alone into the meeting, where Johnston told Maxwell that Chief Deputy Fitzhugh (who was present) and Undersheriff Hull had made written recommendations for Maxwell's discharge. Johnston told Maxwell that he wanted to hear Maxwell's side of the story, and Maxwell was reportedly questioned for about 40 minutes about three incidents involving alleged misconduct. On August 22, 1984, Johnston

---

1 The county contends the following statements from the examiner's findings of fact are incorrect:

1. "Johnston described the nature of the meeting as being to elicit information on which to base a decision to discipline Maxwell." (Finding #4). The county maintains the sole purpose for the meeting was to allow Maxwell to present mitigating explanations for his actions.

2. "At the end of the interview, Maxwell requested a meeting of the Board of Review as per county policy in existence since 1979." (Finding #5). The county maintains that Maxwell did not request the Board of Review hearing until after his discharge on August 22, 1984.

3. "Johnston's decision to fire Maxwell was on the basis of reports in his possession as well as Maxwell's responses at the August 15 interview." (Finding #6). The county maintains no new information was gained at the interview.

gave Maxwell a termination letter, stating that he had based his decision on the recommendations of Hull and Fitzhugh.

The first issue raised by the county challenges prior decisions of PERC examiners tacitly approving NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), which holds that an unfair labor practice is committed when an employee is required to attend an investigatory interview without the presence of a union representative. City of Seattle, Decision 2134 (PECB, 1985); King County, Decision 1698 (PECB, 1983); City of Montesano, Decision 1101 (PECB, 1981).[2]

In deciding whether the policies of the Weingarten decision are applicable to Chapter 41.56 RCW, it is helpful to review the purpose of the rule, as articulated by the Supreme Court. In its decision, the Court examined the benefit of the rule to both the employer and the employee. It observed that an able union representative present at an investigatory interview may assist the employer in obtaining favorable facts, and may help both sides save valuable time in getting to the bottom of the issue. The interview is not an adversary proceeding, but good faith conduct on both sides can forestall future problems. The employee involved may be too fearful or inarticulate to adequately handle the situation alone. The Court also observed that some collective bargaining agreements, as well as arbitral authority (citing Chevron Chemical Co., 60 LA 1066, 1971 (1973); and Independent Lock Co., 30 LA 744 (1958)) provide for union representation at investigatory interviews.

The county correctly notes that the Weingarten decision was premised upon the "concerted activities for ... mutual aid or protection ..." clause of section 7 of the National Labor Relations Act, 29 U.S.C. sec. 157. The county also observes that comparable language is missing from Chapter 41.56 RCW. City of Mercer Island, supra.

---

2 In City of Mercer Island, Decision 1460-A (PECB, 1983), the Commission itself declined to adopt the Weingarten rule, but on the grounds that the rule was inapplicable to the facts of that case.

We find that, although Chapter 41.56 RCW does not have language identical to section 7 of the NLRA, rights comparable (insofar as relevant to this issue) to those emanating from section 7 may be inferred from RCW 41.56.040, which states:

> No public employer, or other person, shall directly or indirectly interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter. (emphasis supplied)

Given the salutary purpose of the rule, we further find its adoption (and its enforcement under the "interference" unfair labor practice, RCW 41.56.140(1)) to be consistent with the plain purpose of Chapter 41.56 RCW, as set forth in RCW 41.56.010.[3]

The county does not contend that the Weingarten rule was complied with in its interview of Maxwell. The prerequisites for a Weingarten violation[4] were set forth in the examiner's decision, and there is ample evidence in the record to support his finding that the county committed an unfair labor practice

---

3 RCW 41.56.010 states:

> The intent and purpose of this chapter is to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

4 According to NLRB v. Weingarten, 420 U.S. 251 (1975), those prerequisites are: 1) the employee must request representation; 2) the interview must be one which the employee reasonably believes will result in discipline; 3) the employer may refuse to proceed with the interview unless the employee waives his right to representation; and 4) the employer has no duty to bargain with the union representative present at the interview.

proceeding with the interview of Maxwell while denying his request for union representation.

The second issue raised by the county concerns the proper remedy in this case. The county relies on a relatively recent holding of the National Labor Relations Board in Taracorp, 273 NLRB No. 54 (1984), as well as on several federal court of appeals decisions, which hold that a "make-whole" remedy, (in this case, reinstatement with back pay) is inappropriate where there is no causal connection between the employer's unfair labor practice and the discharge or discipline of the employee. The union counters by noting that the Board's decision is a reversal of prior Board precedent,[5] and that, for policy reasons, (citing Cleveland Board of Education v. Loudermill, ___ U.S. ___, 105 S. Ct. 1487 (1985)), the Board's present position should not apply to public sector employees. The union also contends that without make-whole relief, the remedy for Weingarten violations (a cease and desist order) would be relatively ineffective.

In Taracorp, the Board held that make-whole relief in the context of Weingarten violates section 10(c) of the NLRA, 29 USC sec. 160(c), which prohibits reinstatement or back pay when an employee is discharged or disciplined for cause.[6] The Board further explained that the unfair labor practice committed in the Weingarten context is one resulting from the barring of a union representative during an investigatory proceeding. Thus, reasoned the Board, unless an employee is disciplined or discharged for asserting his or her Weingarten or some other statutorily-protected right, the employee's discipline or discharge does not violate the NLRA. It follows, according to the recent NLRB reasoning that when the employee is disciplined or discharged for cause, independent of the unfair labor prac-

---

5 The Board's Weingarten decision was itself a reversal of long-standing prior precedent. See dissenting opinions of Justices Burger and Powell (joined by Stevens) in NLRB v. Weingarten, Inc., Id.

6 Chapter 41.56 RCW contains no comparable remedial limitation. RCW 41.56.160 enables PERC to prevent unfair labor practices by issuing appropriate remedial orders.

tice, it makes no sense to set aside that result and make the employee whole. The Board also noted that the federal appeals courts on several occasions have refused to uphold a make-whole remedy for a Weingarten violation. NLRB v. So. Bell Tel. & Tel., 676 F.2d 499 (11th Cir. 1982); NLRB v. Ill. Bell Tel. Co., 674 F.2d 618 (7th Cir. 1982); Gen. Motors Corp. v. NLRB, 674 F.2d 576 (6th Cir. 1982); Montgomery Ward & Co. v. NLRB, 664 F.2d 120 (8th Cir. 1979). Accord, Pac. Tel. & Tel. v. NLRB, 711 F.2d 134 (9th Cir. 1983). This last point persuaded concurring member Zimmerman, who observed that he had previously endorsed Board decisions based on Kraft Foods, 251 NLRB 598, 105 LRRM 1233 (1980), approving make-whole remedies for Weingarten violations.

An underlying issue in federal cases is the test for determining whether the challenged discipline or discharge is unjustifiably tied to the Weingarten violation. Because the federal authorities are not entirely clear or consistent on this point, a review and synthesis of the decisions is in order.

We begin with Kraft Foods, Inc., supra, (the Board decision later repudiated by the Board as well as by at least five federal circuit courts of appeals), where the following test for make-whole relief was set forth:

> The burden was first on the General Counsel to make a prima facie case that a make-whole remedy was warranted. This could be done by proving a Weingarten violation, and that the affected employee was disciplined for conduct which was the subject of the unlawful interview. Once this proof was presented, the burden shifted to the employer to show that "its decision to discipline the employee in question was not based on information obtained at the unlawful interview." Id., at 598.

The first federal court to reject the Kraft Foods test was the Eighth Circuit in NLRB v. Potter Electrical Signal Co., supra, which denied make-whole relief after finding that it was "clear" that the employees were discharged for fighting, and that the Weingarten violation was only incidental to the remainder of the employer's investigation concerning the employees' mis-

conduct. This decision was affirmed by the same court in Montgomery Ward & Co. v. NLRB, supra. In General Motors Corp. v. NLRB, supra, the Sixth Circuit followed the Eight Circuit's lead in a case where there was evidence, apart from the Weingarten violation, upon which the employee's discharge could be grounded.

NLRB v. Southern Bell Tel. & Tel., supra, the Eleventh Circuit could not find any causal connection between the Weingarten violation and: (1) the employee's decision to refuse to offer a mitigating explanation, and (2) the suspension of the employee. The court specifically observed that the employer did not receive any incriminating information from the affected employee as the result of its Weingarten violation. It denied make-whole relief.

The Seventh Circuit, in NLRB v. Ill. Bell Telephone Co., supra, denied make-whole relief after finding that substantial evidence did not exist to support a finding that the employer's discharge stemmed from information gained at the tainted interview. Rather, independent evidence existed to support the discharge.

The Ninth Circuit, in Pac. Tel. & Tel. Co. v. NLRB, supra, 711 F.2d at 138, precluded make-whole relief where "employees were clearly discharged for cause and not for attempting to assert their Weingarten rights . . ."

Board member Zimmerman, in his concurring opinion in Taracorp, supra, 117 LRRM at 1500, expressed his understanding of the Federal courts of appeals cases (emphasis added):

> As my colleagues point out, the courts of appeals have consistently refused enforcement of a make-whole remedy for a Weingarten violation where employees were clearly discharged for cause and not for attempting to assert their Weingarten rights.

The other board members in Taracorp, however, stated, 117 LRRM 1499, note 12 (emphasis added):

> A make-whole remedy can be appropriate in a Weingarten setting, if, but only if, an employee is discharged or disciplined for asserting the right to representation.

Bearing in mind that the decisions in the cases described above were predicated upon Sec. 10(c) of the NLRA, 29 USC. sec. 160(c)[7], the following practical comparison can be made between the Kraft Foods test and the federal circuit court decisions:

1. Both lines of authority seem to impose a substantial burden on the employer to justify the discipline or discharge. While not expressly stated, the federal court decisions which use the phrase, "clearly discharged for cause," implicitly shift the burden of proof to the employer.

2. The Kraft Foods authority would not allow information gained at the interview to support the determination of "just cause". The federal court cases are unclear on this point.

3. More importantly, the Kraft Foods decision apparently would impose make-whole relief if the employer utilized information gained at the unlawful interview in its decision to discipline to the employee, even if there is an independent basis for a just cause determination. The federal court cases would not go this far.

4. At least several of the federal court decisions require a "clear" showing of just cause for the employer to avoid make-whole relief. The Kraft Foods decision did not express a quantum of proof.

---

7 See discussion supra, at note 5.

5. Both lines of authority probably would impose make-whole relief if the discharge or discipline resulted, in whole or part, from the employee's attempted assertion of Weingarten rights.

Thus, although the federal courts may have rejected one hurdle imposed by Kraft Foods on the employer (point three, above), they still would impose the substantial requirement that there be a showing, perhaps a "clear" showing, of just cause.[8]

Although the federal court of appeals cases are predicated upon a statute which differs from our own, we believe that they present a sensible approach to this issue. Make-whole relief is avoided only upon a showing of independent grounds for the employer's action, unrelated to and unaffected by events which occurred (or which did not occur) at the unlawful interview. Thus, we will impose make-whole relief for Weingarten violations unless there is a showing that the affected employee was clearly discharged or disciplined for cause, and not for attempting to assert Weingarten rights.[9] In making the

---

8 The majority decision in Taracorp, supra, goes further in its repudiation of Kraft Foods. It would impose make-whole relief only if the employee is disciplined or discharged for asserting Weingarten rights. This approach is not supported by federal court of appeals decisions.

9 In the context we note the union's suggestion that Cleveland Bd. of Educ. v. Loudermill, ____ U.S. ____ (1985), holding that due process requires an informal termination hearing prior to the dismissal of a public employee having a property right in his or her employment, provides a policy interest in giving public sector employees an enhanced remedy, as compared to private sector employees. The union does not suggest that Loudermill is directly applicable to the case at hand, presumably because the interests at stake in the Loudermill context are not within the realm of PERC jurisdiction.

just cause determination, we will not consider any information or inferences adverse to the employee obtained by the employer at the unlawful interview.[10]

In applying this standard to the case at hand, we find two things in the record to be of great significance. The first is that the record here is devoid of evidence showing that any ill-gotten information was used by the employer in making its discharge decision. The second is that an agency (a civil service commission) directly charged under Chapter 41.14 RCW with the task of determining whether or not Maxwell's discharge was just, found that it was.

The record is largely silent as to exactly what transpired at the unlawful August 15 interview. Moreover, no concrete suggestion is made, in the form of evidence or otherwise, as to how union representation at the August 15th interview could have improved Maxwell's chances of retaining his job. Although we recognize the general benefit of having a union spokesman, at a Weingarten interview, this benefit cannot be assumed without some specific substantiating evidence as to how a union representative could have aided the affected employee.

While we are not necessarily bound by a determination made by an entity, such as a civil service board or an arbitrator, with direct charge of determining the propriety of the discipline or discharge of an employee, we will give such determination great deference. This is especially true in a situation such as here where we are unable to find that the civil service determination was based on any "tainted" evidence. The record in the case supports the civil service commission's decision upholding the discharge. Accordingly, under the facts of this case, we defer to that finding.[11]

---

10 "Adverse inferences" might be made by an employer because of an employee's silence or inarticulateness at an investigatory interview.

11 Although an internal Board of Review apparently recommended against termination, we, like the Civil Service Board, have not been provided with a copy of that decision or a record of its proceedings.

Accordingly, the decision of the examiner is affirmed in part and reversed in part.

FINDINGS OF FACT

1. Okanogan County is a municipal corporation of the state of Washington and is a public employer within the meaning of RCW 41.56.030(1). Samuel R. (Johnny) Johnston is the elected sheriff.

2. Teamsters Union Local 760 is an employee organization within the meaning of RCW 41.56.030(3) and is a "bargaining representative" certified to represent all deputy sheriff employees of Okanogan County. Gary Maxwell was a deputy sheriff until his termination on August 22, 1984. Deputy Tom McCone was a shop steward during August, 1984.

3. Deputy Gary Maxwell had been disciplined on a prior occasion in 1982. On August 14, 1984, Maxwell was contacted by Chief Deputy Toney Fitzhugh and was instructed to report to Sheriff Johnston's office the next day to discuss his performance in three recent situations. Fearing discipline, Maxwell talked to his union representatives that evening.

4. Shop steward Tom McCone was present at the sheriff's office on August 15, 1984 for the purpose of attending and participating in the meeting between Johnston and Maxwell as Maxwell's union representative. McCone was told by the sheriff that the interview was not to be investigatory and that McCone could not participate in the interview with Maxwell conducted by Johnston. Maxwell entered the interview room without union representation, although he did so with a sense of foreboding about his job. At the outset of the interview, Maxwell was told that the undersheriff and chief deputy recommended his discharge. Maxwell answered Johnston's investigatory questions for some 40 minutes.

5. Maxwell requested a meeting of a Board of Review as per county policy in existence since 1979. Johnston said he was abolishing the Board of Review, but would allow Maxwell to take his case to such a panel. The policy creating the Board of Review was rescinded on August 22, 1984, but a Board of Review met on the Maxwell case and recommended against the termination.

6. Johnston held a brief meeting with Maxwell on August 22, 1984, at which time he gave Maxwell a letter of termination. Maxwell did not insist upon union representation at this meeting. Johnston's decision to fire Maxwell was on the basis of reports in his possession. There is no indication that Johnston sought to punish Maxwell for protected activity as a member of his union or for requesting union representation at the August 15, 1984 interview.

7. Maxwell at no time waived his right to have union representation at the disciplinary interview held on August 15, 1984. The opinion of the Board of Review was not available to either Sheriff Johnston on August 15th or to the Civil Service Commission in its review of the discharge.

8. Maxwell's appeal to the Civil Service Commission was denied after a two-day hearing. This decision is being appealed to the superior court. The record as a whole supports the Civil Service Commission's findings, and no information or inferences prejudicial to Maxwell obtained or gleaned from the August 15, 1984 interview were used as a basis for that agency's findings.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under RCW 41.56.

2. By conducting the investigatory interview with Gary Maxwell on August 15, 1984, without the presence of a union representative, Okanogan

County has interfered with Maxwell's rights as a public employee within the meaning of RCW 41.56.140(1).

3. By conducting an investigatory interview without the presence of a union representative, Okanogan County has interfered with a bargaining representative within the meaning of RCW 41.56.140(2).

AMENDED ORDER

Based upon the foregoing and the record as a whole, it is ordered that Okanogan County, its officers and agents, shall immediately:

1. Cease and desist from interfering with, restraining, or coercing public employees in the exercise of their rights secured by RCW 41.56.040, including denial of union representation at investigatory interviews with his or her employer when the employee reasonably believes that the interview may lead to disciplinary action, provided that the employee makes such a request.

2. Take the following affirmative actions which the Commission finds will effectuate the purposes and policies of RCW 41.56:

   (A) Post, in conspicuous places on the employer's premises in Omak, Washington, Okanogan, Washington, and where notices to all employees are usually posted, copies of the notice attached hereto and marked as "Appendix". Such notices shall, after being duly signed by an authorized representative of Okanogan County, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the county to ensure that said notices are not removed, altered, defaced or covered by other material.

   (B) Notify the Executive Director of the Commission, in writing, within thirty (30) days following the date of this order, as to what steps

have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by the preceding paragraph.

DATED at Olympia, Washington, this 12th day of May, 1986.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jane R. Wilkinson

JANE R. WILKINSON, Chairman

Joseph F. Quinn

JOSEPH F. QUINN, Commissioner

Commissioner Mark C. Endresen did not take part in the consideration or decision of this case.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF RCW 41.56, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain or coerce public employees in the exercise of their rights secured by RCW 41.56.040, including the right to have union representation at investigatory interviews, once a timely request has been made by the employee.

WE WILL allow, upon request, union representation at any investigatory or disciplinary meetings or interviews held with other employees, so long as the purpose of such meeting or interview is, to gather evidence concerning, to consider or to actually impose discipline against such employee.

OKANOGAN COUNTY

By:_____
AUTHORIZED REPRESENTATIVE

Dated:_____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone: (206) 753-3444.