STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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| KING COUNTY POLICE OFFICERS' GUILD, Complainant, | ) | CASE 9493-U-91-2116 |
| vs. | ) | DECISION 4299 - PECB |
| KING COUNTY, Respondent. | ) | FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER |

Aitchison, Hoag, Vick & Tarantino, by Deborah Bellam, Attorney at Law, appeared on behalf of the complainant. Don Heyrich, legal intern, assisted on the brief.

Norm Maleng, Prosecuting Attorney, by Mary E. Roberts, Senior Deputy Prosecuting Attorney, appeared on behalf of the respondent.

On November 18, 1991, the King County Police Officers' Guild (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that King County (employer) had interfered with an employee's right to union representation at a pre-disciplinary investigatory interview, in violation of RCW 41.56.140(1). The Executive Director made a preliminary ruling under WAC 391-45-110 finding a cause of action to exist, and the matter was assigned to Examiner Mark S. Downing for further proceedings. The parties waived their right to a formal hearing, and submitted a "stipulation of facts". Both parties filed briefs to complete the record.

## BACKGROUND

King County, which encompasses the City of Seattle within its borders, is the most populated county in the state of Washington.

The employer has collective bargaining relationships with numerous employee organizations. The King County Police Officers' Guild represents a bargaining unit of approximately 560 police officers and sergeants employed in the King County Department of Public Safety. John Vanderwalker was employed within that bargaining unit. Steve Eggert serves as president of the union.

The "stipulation of facts" filed by the parties contained the following information:

> 1. Officer John Vanderwalker first became a police officer for the King County Department of Public Safety (Department) on 4 June 1980.
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> 2. On 15 October 1991 Officer Vanderwalker was required to meet with Lieutenant Maehren and Sergeant Wilson of the King County Police regarding an allegation that Officer Vanderwalker had made an improper entry into a third party residence to effectuate an arrest on a domestic violence case.
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> 3. The meeting was for the purpose of interviewing Officer Vanderwalker about this alleged misconduct.
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> 4. Officer Vanderwalker reasonably believed the interview could result in disciplinary action.
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> 5. Since Officer Vanderwalker had requested Guild representation at this interview, Guild President Steve Eggert accompanied the officer to Major Larry Mayes' office to meet with the Lieutenant.
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> 6. Before the interview began, Lieutenant Maehren advised Officer Eggert that he could be present but could not participate in any way in the interview.
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> 7. Officer Eggert objected and cited the case of National Labor Relations Board v. Weingarten, 420 U.S. 251 (1975) as authority for the officer's right to union representation at the interview.

8. Steve Eggert explained that the officer has the right to meaningful representation, rather than a representative who acts merely as a "fly on the wall."

9. Lt. Maehren spoke with Major Larry Mayes by telephone and again advised Officer Steve Eggert that he could be present, but would not be allowed to participate in this proceeding.

10. Lt. Maehren did acknowledge that the results of the interview could lead to disciplinary action against Officer Vanderwalker.

11. When Officer Eggert advised Officer Vanderwalker not to answer any questions unless ordered to do so, the Lieutenant again told Officer Eggert that he was not to participate in the interview, although he could be present.

12. The Lieutenant then advised Officer Vanderwalker that if he refused to answer any of the questions the Department could take disciplinary action against him for his failure to answer.

13. Officer Vanderwalker then proceeded to answer each question put to him by the Lieutenant.

14. Because Officer Eggert was told that he was not allowed to participate in this interview, he did not object to any questions, advise Officer Vanderwalker any further, make any arguments on Officer Vanderwalker's behalf, or ask any questions of the Lieutenant or Officer Vanderwalker during the interview.

15. Officer Vanderwalker was not informed in writing of the allegations before the interview began. We [sic] was, however, informed verbally.

16. Officer Vanderwalker was not advised that he was suspected of misconduct, which, if sustained, could be grounds for administrative disciplinary action or the filing of criminal charges.

17. Officer Vanderwalker was not advised that he could consult with an attorney before submitting to a personal interview.

18. There is no King County Department of Public Safety policy forbidding the participation of Guild representatives in such interviews.

19. After this interview Major Mayes and Lt. Maehren recommended to the Sheriff that Officer Vanderwalker's employment with the Department be terminated.

20. After a pretermination (Loudermill) Hearing held on November 22, 1991, Officer Vanderwalker was notified that his employment with the Department was terminated.

The union had filed its unfair labor practice complaint in this case on November 18, 1991, even prior to the "Loudermill" hearing and discharge.

## POSITIONS OF THE PARTIES

The union contends that employees have the right to "meaningful representation" by a union representative at pre-disciplinary investigatory interviews. In the union's mind, this right includes the ability of the union representative to actively participate in the interview process, by assisting the employee in presenting facts and clarifying the issues in dispute. The union notes that the Supreme Court did not use terms such as "observer" or "witness" in describing the union's role at an investigatory interview in Weingarten, but rather the term "representative". The union argues that, by use of such language, the Court intended the union representative's role to be that of speaking for the involved employee at the interview. The union argues that the employer failed to sustain its burden of proof showing that Vanderwalker's discharge was unrelated to, or unaffected by, statements made at the unlawful interview.

The employer asserts that it met its Weingarten obligations by allowing the union representative to be present for the disputed interview. The employer maintains that it had no duty to bargain with the union representative at the interview, and was free to insist that it was only interested in hearing the employee's own account of the matter. In the alternative, if found guilty of a Weingarten violation, the employer argues that the appropriate remedy is a cease and desist order in accordance with precedents from the National Labor Relations Board (NLRB). The employer submits that the stipulated facts do not indicate the reason for Vanderwalker's discharge, nor has the union claimed that Vanderwalker was discharged for asserting his Weingarten rights, or because of information elicited at the unlawful interview.

## DISCUSSION

### The Right to Union Representation

The parties to this case bargain under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. The "rights" section of that statute, RCW 41.56.040, provides:

> RCW 41.56.040 RIGHT OF EMPLOYEES TO ORGANIZE AND DESIGNATE REPRESENTATIVES WITHOUT INTERFERENCE. 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.
>
> 1967 ex.s. c 108 §4. [Emphasis by **bold** supplied.]

Enforcement of the rights of employees is by means of the unfair labor practice provisions set forth in RCW 41.56.140 through

41.56.190. Of particular interest in this case, RCW 41.56.140(1) provides:

> RCW 41.56.140 UNFAIR LABOR PRACTICES FOR PUBLIC EMPLOYER ENUMERATED. It shall be an unfair labor practice for a public employer:
> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;

Chapter 41.56 RCW is patterned after the federal National Labor Relations Act (NLRA), as amended by the Labor Management Relations Act of 1947 (the Taft-Hartley Act). Both the Commission and the Washington courts have looked to decisions construing the NLRA in interpreting parallel provisions of Chapter 41.56 RCW. State ex rel. Washington Federation of State Employees v. Board of Trustees, 93 Wn.2d 60 (1980) at 67-68.

In National Labor Relations Board v. Weingarten, Inc., 420 U.S. 251 (1975), the Supreme Court of the United States affirmed a National Labor Relations Board (NLRB) decision which had held that an:

> ... employer's denial of an employee's request that her union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action constituted an unfair labor practice in violation of Section 8(a)(1) of the National Labor Relations Act ...

Weingarten, at page 252.

The cited section of the NLRA parallels RCW 41.56.140(1).

The Commission has adopted the legal principle enunciated in Weingarten as an operative interpretation of the state law. Examiner decisions applying the Weingarten precedent under Chapter 41.56 RCW date back to at least City of Montesano, Decision 1101 (PECB, 1981). The Commission's adoption of Weingarten principles

in Okanogan County, Decision 2252-A (PECB, 1986), was affirmed by the Superior Court for Thurston County.[1] The Commission revisited the Weingarten precedents in City of Seattle, Decision 3593-A (PECB, 1991), where it stated:

> [T]he law in such matters is clear: A public employee has a right to union representation, upon request, at an "investigatory" interview where the facts are to be examined.

Decision 3593-A, at page 6.

More recently, the Examiner in Washington State Patrol, Decision 4040 (PECB, 1992), set forth a step-by-step recitation of the Weingarten standards:

> First, **the right to representation attaches only where the employer compels the employee to attend an investigatory meeting.** ...
>
> Second, a significant **purpose of the interview must be to obtain facts which might support disciplinary action.** ...
>
> Third, the **employee must reasonably believe that potential discipline might result** from the interview. ...
>
> The fourth element is that the **employee must request the presence of the union representative.** ...

Decision 4040, at pages 9-10. [Emphasis by **bold** in original.]

Both parties to this case acknowledge that public employees are entitled to union representation at investigatory interviews, and that the rights prescribed in Weingarten attached to the employer's October 15, 1991 interview of Vanderwalker.

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[1] The oral ruling of the Court has not been finalized or published, as an issue has remained pending concerning the scope of a remand in that case.

Role of Union Representative at Interview

The parties have widely differing views as to the proper role of a union representative at a Weingarten interview. The employer would, indeed, confine the union representative to a passive role, as a witness or observer. The union urges that a more active role is proper. The Weingarten cases decided by the Commission in the past have involved the complete exclusion of union representatives from investigatory meetings. Accordingly, no case is cited by the parties or found by the Examiner where the Commission has been called upon to determine the proper role of a union representative at an investigatory interview. The Examiner thus turns to other precedents and sources for guidance on this question.

Inferences From the Facts of the Weingarten case -
The decision of the Supreme Court in Weingarten must be understood in the context of its facts. A union-represented retail store employee had been called into an interview, on suspicion of having paid less than the correct amount for merchandise she had taken for her own purposes. The employee gave satisfactory answers to questions asked by the employer's security official on the original allegation, but then blurted out an additional fact that got her into trouble of a different nature.

Limiting the role of a union representative to that of a passive observer in Weingarten would have accomplished nothing for either the employee or the union involved in that case. The only union role that could have made any difference for the employee and the union was if the union representative were able to counsel that employee about what she should or should not say in the investigatory interview. Neither the NLRB nor the Supreme Court of the United States is in the business of establishing useless requirements, so it is inferred that some active participation by the union official was contemplated by the drafters of the Weingarten decisions.

The Expressed Intent of the Supreme Court -

In explaining its rationale for allowing employees a right to union representation at investigatory interviews, the Supreme Court made reference to several NLRB decisions in its Weingarten decision. The Court quoted from Mobil Oil Corp., 196 NLRB 1052 (1972), as follows:

> [I]t is a serious violation of the employee's individual right to engage in concerted activity by seeking the **assistance** of his statutory representative if the employer denies the employee's request and compels the employee to appear **unassisted** at an interview which may put his job security in jeopardy.

Weingarten, at page 257. [Emphasis by **bold** supplied.]

Two paragraphs later, the Supreme Court quoted from Quality Mfg. Co., 195 NLRB 197 (1972), as follows:

> We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the **assistance** of his representative.

Weingarten, at pages 257-58. [Emphasis by **bold** supplied.]

The Supreme Court then quoted, with approval, from the NLRB's brief in the Weingarten case, stating:

> The representative is present to **assist** the employee, and may attempt to **clarify** the facts or **suggest** other employees who may have knowledge of them.

Weingarten, at page 260. [Emphasis by **bold** supplied.]

An active role for the union representative was also seen as consistent with the general purpose of the NLRA, as described by the Supreme Court later in Weingarten:

> The [NLRB's] construction plainly effectuates the most fundamental purposes of the Act. In section 1, 29 U.S.C. section 151, the Act declares that it is a goal of national labor policy to protect "the exercise by workers of full freedom of association, self-organization, and **designation of representatives of their own choosing**, for the purpose of ... mutual aid or protection." To that end the Act is designed to eliminate the "inequality of bargaining power between employees ... and employers." Ibid. **Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate**, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management." [citation omitted] ...

Weingarten, at pages 261-62. [Emphasis by **bold** supplied.]

The Court then listed the many benefits that occur when union representation is allowed at investigatory interviews, stating:

> The Board's construction also gives recognition to the right **when it is most useful** to both employee and employer. A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate **to relate accurately** the incident being investigated, or too ignorant **to raise extenuating factors.** A knowledgeable union representative could assist the employer by **eliciting favorable facts**, and save the employer production time by **getting to the bottom of the incident** occasioning the interview. ...

Weingarten, at pages 262-63. [Emphasis by **bold** supplied.]

The Supreme Court also cited several arbitration awards listing the benefits of participation by union representatives at investigatory interviews, quoting in footnote 7 from Independent Lock Company, 30 LA 744, 746 (Murphy, 1958)[2] and Caterpillar Tractor Company, 44 LA 647, 651 (Dworkin, 1965).[3]

Returning to a "contemporary standards" mode of analysis later in its decision, the Supreme Court indicated its ruling was consistent with many collective bargaining agreements which provided employees with the right of union representation at investigatory interviews. Even in those agreements that failed to explicitly contain such a right, the Court explained that a "well established current of

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[2] In Independent Lock Company, the arbitrator had explained the rationale for contractual language allowing for the "presence" of a shop steward, as follows:

> Such a provision might reasonably be designed to **clarify the issues** at this first stage of the existence of a question, to **bring out the facts and the policies** concerned at this stage, to **give assistance to employees** who may lack the ability to express themselves in their cases, and who, when their livelihood is at stake, might in fact need the **more experienced kind of counsel which their union steward might represent.** The foreman, himself, may benefit from the presence of the steward by seeing the issue, the problem, the implications of the facts, and the collective bargaining clause in question more clearly. Indeed, good faith discussion at this level may solve many problems, and prevent needless hard feelings from arising. Such a clause can be advantageous to both parties if they both act in good faith and seek to discuss the question at this stage with as much intelligence as they are capable of bringing to bear on the problem. [Emphasis by **bold** supplied.]

That arbitrator clearly envisioned the union representative's role as more than merely being present at the interview.

[3] In Caterpillar, the arbitrator was faced with the interpretation of contract language allowing a shop steward to "present" a grievance to the employee's immediate supervisor. The arbitrator stated:

> The principle objective of the provisions relating to union representation is to afford **assistance and advice to the employee** who is involved in a disagreement affecting the employment relationship ...
>
> The presence of the union steward is regarded as a factor conducive to the avoidance of formal grievances through the medium of **discussion and persuasion** conducted at the threshold of an impending grievance. [Emphasis by **bold** supplied.]

arbitral authority" had upheld the right of union representation at such interviews. In support of this principle, the Court cited numerous arbitration awards in footnote 12, including Chevron Chemical Co., 60 LA 1066 (Merrill, 1973); Schlitz Brewing Co., 33 LA 57, 60 (Meyers, 1959);[4] and Braniff Airways, Inc., 27 LA 892, 896 (Williams, 1957).[5]

In rejecting the analysis used by the Court of Appeals in its reversal of the NLRB's decision in Weingarten, the Supreme Court stated:

> The Court of Appeals impermissibly encroached upon the Board's function in determining for itself that an employee has no "need" for union **assistance** at an investigatory interview. ...

Weingarten, at page 266. [Emphasis by **bold** supplied.]

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[4] In Schlitz, an employee was found in the lunchroom during his normal working hours. When asked to come to the supervisor's office, the employee refused unless accompanied by his shop steward. The arbitrator stated:

> No injury could be done the rights of the Company, or the operation of the plant, by the employee's refusal to do so, and, conceivably, substantial injury could be done the employee were he required to enter such an interview without **the expert assistance of his union representative.** [Emphasis by **bold** supplied.]

The arbitrator clearly viewed the representative's role as assisting the employee at the interview, and not merely being present as a witness to the proceedings.

[5] In Braniff, the arbitrator discussed the role of a union representative in the grievance procedure in the following manner:

> The right of a designated labor union to be the exclusive bargaining representative of the employees in the bargaining unit is the fundamental principle of the Railway Labor Act and the National Labor Relations Act. As such, it would certainly be normal to expect the principle to have broad application, **to enable employees to have the union represent them throughout their dealings with management.** [Emphasis by **bold** supplied.]

The arbitrator saw the role of the union representative as the collective voice for the interests of individual employees in their dealings with the employer.

The Supreme Court's Weingarten opinion does not paint a picture of a passive role for a union representative at an investigatory interview. The use of terms such as "assist", "assistance", "clarify", "eliciting favorable facts", "getting to the bottom of the incident", "raise extenuating factors" and "suggest", indicate the Court's belief that a union representative must have the opportunity to be more than a witness to the interview process. From its numerous uses of active verbs when describing the role of a union representative during an investigatory interview, it is clear that the Supreme Court in Weingarten envisioned that role as including the ability to ask questions, to bring out additional facts, counsel the employee under investigation, and to provide information concerning past employment practices.

The employer's argument favoring a passive role for the union representative can only be based on two brief passages found within the Supreme Court's Weingarten decision. The first of those occurred as part of a five-step recitation of the NLRB's precedents on the subject, where the Supreme Court quoted a passage from the NLRB's brief:

> The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation.

Weingarten, at page 260, citing NLRB's brief at page 22.

The second is found at the end of the "The Board's construction ..." passage quoted at the bottom of page 10, above. After listing the benefits of various active roles for the union representative, the Supreme Court there stated, "Certainly his presence need not transform the interview into an adversary contest. ..." Those fleeting references are not persuasive, however, in the context of

the many references to an active role which precede and follow them in the Supreme Court's Weingarten decision.[6]

Subsequent NLRB and Federal Court Rulings -
The NLRB and several federal appellate courts have been faced with post-Weingarten cases involving the proper role of a union representative at an investigatory interview. In Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403 (9th Circuit, 1978), the role of the union representative at an investigatory interview was discussed in the following manner:

> The presence of an employee's representative at the interview would be of obvious benefit to the employee and in addition, **the representative "could assist the employer by eliciting favorable facts" from a frightened, inarticulate, or ignorant employee.**

587 F.2d at 440. [Emphasis by **bold** supplied.]

The federal court's direct quote from Weingarten indicates its belief that a union representative should not just be a passive observer at an investigatory interview.

In 1980, the NLRB issued decisions in two companion cases, concluding that employers cannot insist or require a union representative to remain silent at an interview at which the employee has the right to have his or her representative present. Southwestern Bell Telephone Company, 251 NLRB 612 (1980); Texaco, Inc., 251 NLRB 633 (1980). In Southwestern Bell Telephone Company, the Board explained that the Weingarten Court intended to strike a

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[6] It is interesting to note that the Supreme Court recited, but did not expressly affirm or reverse, a distinction drawn by the NLRB as to the existence of a "duty to bargain". It noted the existence of the "bargaining obligation" issue in Texaco, supra, but reversed the "interference" holding in that case without reaching the "bargaining" issue. Weingarten, at page 264.

balance between the right of an employer to investigate the conduct of its employees at a personal interview, and the role of the representative present at such interview. The Board noted that the employer's right to regulate the role of the representative at the interview could not exceed that which was necessary to ensure the "reasonable prevention of such a collective-bargaining or adversary confrontation with the statutory representative". The Board held that the employer, by demanding the union representative's silence at the outset of the interview, had gone beyond the bounds of regulation reasonably necessary to avoid a confrontation with the statutory representative.

On appeal in Southwestern Bell Telephone Co. v. NLRB, 667 F.2d 470 (5th Circuit, 1982), the Court accepted the NLRB's standard, but reached a different conclusion. The Court pointed out that the employee in question had consulted with his union steward prior to the investigatory meeting and upon the employee's request, the steward was included in the meeting. Based upon the supervisor's request, the steward did not answer any of the questions put to the employee. At the end of the questioning, the supervisor asked the steward if he had any questions or clarifications that he wished to make. The steward remained silent. At no time during the interview did the employee attempt to solicit the steward's advice or counsel. The Court concluded as follows:

> The union representative has the right to make additions and clarifications to the meeting. This right is not without restrictions, however. **The limitations in the instant case** were within the perimeters set forth by the Supreme Court in Weingarten and **did not interfere with [the steward's] ability to assist [the employee], to clarify facts, or to bring additional relevant facts to [the supervisor's] attention.**

667 F.2d at 473-74. [Emphasis by **bold** supplied.]

Thus, while a union representative has various rights at an investigatory interview, he or she cannot sit on those rights when the opportunity arises to participate in the interview process.

The NLRB's ruling in Texaco, Inc., supra, was affirmed in NLRB v. Texaco, Inc., 659 F.2d 124 (9th Circuit, 1981). The Court addressed the employer's claim that a union representative should remain silent in investigatory interviews, stating as follows:

> [The employer] cites language from Weingarten, in which the Court, after noting that the employer has no duty to bargain with the union representative at an interview, stated:
>
> > The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation. [Citation omitted].
>
> We agree with the Board here that this language, (taken by the Court from the Board's brief in Weingarten) is directed toward avoiding a bargaining session or a purely adversary confrontation with the union representative and to assure the employer the opportunity to hear the employee's own account of the incident under investigation. **The passage does not state that the employer may bar the union representative from any participation.** Such an inference is wholly contrary to other language in the Weingarten opinion which explains that **the representative should be able to take an active role in assisting the employee to present the facts.**

659 F.2d at 126. [Emphasis by **bold** supplied.]

The Court felt that the employer had not afforded the employee with the representational rights to which he was statutorily entitled, when it relegated the union representative to a passive role.

In subsequent cases, the NLRB has consistently rejected attempts by employers to silence union representatives at investigatory interviews. See, United Technologies Corporation, 260 NLRB 1430 (1982); Greyhound Lines, 273 NLRB 1443 (1985); San Antonio Portland Cement Co., 277 NLRB 338 (1985); and U.S. Postal Service, 288 NLRB 864 (1988). Furthermore, NLRB decisions on related issues evidence an intent that the union representative have an active role:

* The right of employees to consult with a union representative prior to the investigatory interview was reaffirmed in U.S. Postal Service, supra.

* The NLRB and the 10th Circuit held in Climax Molybdenum Co., 227 NLRB 1189 (1977), enf. denied 584 F.2d 360 (10th Circuit, 1978), that Weingarten requires an employer to schedule investigatory interviews at such a future time and place that provides an opportunity for the employee, on his own time, to consult with his union representative in advance thereof. Enforcement of the NLRB's order was denied because 17-1/2 hours transpired between the time employees were advised of a pending investigation and the time the interview took place.

* The right of an employee to the assistance of "[a] knowledgeable union representative" has been held to include a representative familiar with the matter under investigation. U.S. Postal Service, 303 NLRB No. 75 (1991), affirmed 969 F.2d 1064 (D.C. Circuit, 1992).[7]

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[7] In affirming the NLRB in U.S. Postal Service, the D.C. Circuit also turned to active verbs of the type used by the Supreme Court in Weingarten.

> Absent such familiarity, the representative will not be well-positioned to **aid** in a **full and cogent presentation** of the employee's view of the matter, **bringing to light** justifications, explanations, extenuating circumstances, and other mitigating factors.

969 F.2d at 1071. [Emphasis by **bold** supplied.]

* An employer cannot refuse to inform an employee, or their union representative, of the nature of the subject matter being investigated prior to an investigatory interview. Pacific Telephone & Telegraph Co., 262 NLRB 1048 (1982), affirmed 711 F.2d 134 (9th Circuit, 1983). The Board noted that a general statement as to the subject matter of the interview, which identifies to the employee and his or her representative the misconduct for which discipline may be imposed, will suffice.

Conclusion -

In Okanogan County, supra, the Commission explained the purpose of the right to union representation by means of the following references to Weingarten:

> [T]he 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.

Okanogan County, at page 4. [Emphasis by **bold** supplied.]

Based on that language, it appears that the Commission also sees the role of a union representative as being more in the vein of "assistance" than merely as a passive observer. One of the reasons that public employees organize under Chapter 41.56 RCW is to have a collective voice to speak for their interests in dealings with an employer. A union representative who is required to remain silent at an investigatory interview cannot serve in any way to "represent" the employee's interests in that setting. The employer violated RCW 41.56.140(1) by failing to allow Vanderwalker's union representative to participate in his investigatory interview.

## Remedy

To remedy the employer's "interference" violation, the union requested the following relief: (1) restoration of the status quo ante, by overturning the employer's discharge of Officer Vanderwalker; (2) destruction of any materials in the employee's personnel file related to the investigation; (3) issuance of a "cease and desist" order, requiring the employer to allow meaningful participation by union representatives at pre-disciplinary investigatory interviews; (4) posting of notice of any statutory violations; and (5) attorney's fees. The employer would have the Commission impose only a "cease and desist" order.

Standard Followed by Commission -
The Commission dealt with similar employer arguments in Okanogan County, supra, where a law enforcement officer was discharged after an investigatory interview conducted in violation of the Weingarten standards. The employer there argued that the NLRB, as well as several federal court of appeal decisions, had held a make-whole remedy to be inappropriate, where there was no casual connection between the employer's unfair labor practice and the discharge or discipline of the employee.[8] After a detailed review of the federal precedents, as well as section 10(c) of the NLRA,[9] the Commission indicated that Chapter 41.56 RCW does not contain any comparable limitations on its remedial authority. Noting that RCW 41.56.160 enables the Commission to prevent unfair labor practices by issuing appropriate remedial orders,[10] the Commission adopted the following remedial standard for Weingarten violations:

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[8] The employer based its argument on Taracorp Inc., 273 NLRB 221 (1984).

[9] That section prohibits reinstatement or back pay when an employee has been discharged or disciplined for cause.

[10] The Commission's broad remedial authority was recently discussed in METRO Seattle v. PERC, 118 Wn.2d 621 (1992).

> 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. In making the just cause determination, we will not consider any information or inferences adverse to the employee obtained by the employer at the unlawful interview.

Decision 2252-A, at page 10.

That standard was affirmed by the Superior Court for Thurston County on appeal in Okanogan County.[11]

In City of Seattle, Decision 3593 (PECB, 1990), the employer violated Weingarten when it refused to grant an employee's request for union representation at an investigatory interview. The examiner ordered a make-whole remedy, overturning a reprimand that had been issued to the employee. The examiner's decision was affirmed by the Commission in City of Seattle, Decision 3593-A (PECB, 1991). The Commission agreed that the burden had properly been placed on the employer to demonstrate that its unlawful conduct at the investigatory meeting had not contributed to the disciplinary decision. As the letter of reprimand was neither

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[11] The Court overturned the Commission's application of its own standard. In ruling that the employer had met its burden of proof, the Commission relied on two significant items for its decision: First, it found the record to be devoid of evidence showing that any ill-gotten information was used by the employer in making its discharge decision. Second, the Commission noted that no ill-gotten information or inferences prejudicial to the employee were used as a basis for the decision by the civil service commission which had found that the discharge was just under Chapter 41.14 RCW. The Court disagreed with the Commission about the effect of ill-gotten evidence on the discharge decision.

decided upon nor issued until after the meeting, the Commission ruled that information revealed at the unlawful meeting was reasonably perceived as part of the basis for the discipline imposed.

A make-whole remedy was also found to be appropriate in Washington State Patrol, supra. An Examiner held that the employer had not proven that a reprimand issued to an employee was unrelated to, or unaffected by, statements made by that employee at an unlawful investigatory meeting. The employer was ordered to expunge the disputed reprimand from the employee's employment record.

At the outset of the investigatory interview at issue in this case, management officials informed Vanderwalker that the results of the interview could lead to disciplinary action against him. After the interview, those same officials recommended to their superior that Vanderwalker's employment with the department be terminated. That recommendation was followed by higher officials, and Vanderwalker was discharged. Nevertheless, the employer made no attempt at all in this proceeding to show that it had any independent grounds for its discharge decision that were unrelated to, and unaffected by, the unlawful interview. Under these circumstances, the Examiner has no choice but to order that Vanderwalker's discharge be overturned, and that he be made whole.

## FINDINGS OF FACT

1. King County is a public employer under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, as defined in RCW 41.56.030(1).

2. The King County Police Officers' Guild is an exclusive bargaining representative within the meaning of RCW 41.56-.030(3), representing a unit of police officers and sergeants

employed in the King County Department of Public Safety. John Vanderwalker was employed within that bargaining unit. Steve Eggert serves as president of the union.

3. On October 15, 1991, Vanderwalker was compelled to attend an investigatory interview conducted by the employer. A significant purpose of the interview was to obtain facts which might support disciplinary action against him, and Vanderwalker reasonably believed that potential discipline might result from the interview.

4. At the October 15th interview, Vanderwalker requested the presence of a union representative. Union president Eggert was allowed to be present at the interview, but management officials told Eggert that he could not participate in the interview. After this directive, Eggert did not object to any questions, advise Vanderwalker any further, make any arguments on Vanderwalker's behalf, or ask any questions of employer officials or Vanderwalker during the interview.

5. After the October 15th interview, management officials recommended that Vanderwalker's employment be terminated, and Vanderwalker was subsequently discharged from the department.

## CONCLUSIONS OF LAW

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

2. The meeting held on October 15, 1991 between Vanderwalker and management officials was investigatory in nature, and Vanderwalker was entitled to representation by a union official under RCW 41.56.040.

3. By its refusal to allow a union representative to participate in the October 15th meeting, King County interfered with, restrained and coerced a public employee in the exercise of his rights guaranteed by RCW 41.56.040, and committed unfair labor practices within the meaning of RCW 41.56.140(1).

4. King County failed to sustain its burden of proof showing independent grounds for the discharge of Vanderwalker, unrelated to, and unaffected by, the unlawful interview of October 15, 1991.

## ORDER

King County, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Interfering with, restraining or coercing its employees in the exercise of their right to union representation at investigatory interviews, if the employee is compelled to attend, requests union representation, and reasonably believes that potential discipline might result from the interview.

   b. In any other manner interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

a. Permit employees covered by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, to have union representation at investigatory interviews, if the employee is compelled to attend, requests union representation, and reasonably believes that potential discipline might result from the interview.

b. Offer John Vanderwalker immediate and full reinstatement to his former position, without prejudice to his seniority and other rights and benefits, and make him whole for any loss of pay or benefits he suffered.

c. Expunge from the employment record of John Vanderwalker all references to the discharge imposed after the unlawful interview of October 15, 1991, and make no reference to that discharge in any future personnel matter, evaluation or dispute resolution procedure concerning Vanderwalker's employment with King County.

d. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

e. Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

f. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Issued at Olympia, Washington, on the 16th day of February, 1993.

PUBLIC EMPLOYMENT
RELATIONS COMMISSION

MARK S. DOWNING
Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

APPENDIX

# NOTICE

**THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:**

WE WILL offer John Vanderwalker immediate and full reinstatement to his former position, without prejudice to his seniority and other rights and benefits, and make him whole for any loss of pay or benefits he suffered.

WE WILL expunge from the employment record of John Vanderwalker all references to the discharge imposed after the unlawful interview of October 15, 1991.

WE WILL NOT make reference to the discharge of John Vanderwalker in any future personnel matter, evaluation or dispute resolution procedure concerning Vanderwalker's employment with King County.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their right to union representation at investigatory interviews, if the employee is compelled to attend, requests union representation, and reasonably believes that potential discipline might result from the interview.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

ALL OF OUR EMPLOYEES COVERED BY CHAPTER 41.56 RCW have the right to union representation at investigatory interviews, if the employee is compelled to attend, requests union representation, and reasonably believes that potential discipline might result from the interview.

KING COUNTY

DATED: _____ BY: _____
Authorized Representative

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

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, P.O. Box 40919, Olympia, Washington 98504-0919. Telephone: (206) 753-3444.