STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KING COUNTY POLICE OFFICERS' GUILD,	)	CASE 9493-U-91-2116
Complainant,	)	DECISION 4299-A - PECB
vs.	)	
KING COUNTY,	)	DECISION OF COMMISSION
Respondent.	)	

Aitchison, Hoag, Vick & Tarantino, by Deborah Bellam, Attorney at Law, appeared on behalf of the complainant.

Norm Maleng, Prosecuting Attorney, by Maureen Madion and Cheryl Carlson, Deputy Prosecuting Attorneys, appeared on behalf of the respondent.

This case comes before the Commission on a timely petition for review filed by King County, seeking to overturn a remedy ordered on February 16, 1993, by Examiner Mark S. Downing.

BACKGROUND

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

On November 18, 1991, the union filed a complaint charging unfair labor practices with the Public Employment Relations Commission. The union alleged that King County had interfered with Officer

Vanderwalker's right to union representation at a pre-disciplinary investigatory interview, in violation of RCW 41.56.140(1).

The parties waived their right to a formal hearing, and submitted the case to the Examiner on the following "stipulation of facts":

1. Officer John Vanderwalker first became a police officer for the King County Department of Public Safety (Department) on 4 June 1980.

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.

3. The meeting was for the purpose of interviewing Officer Vanderwalker about this alleged misconduct.

4. Officer Vanderwalker reasonably believed the interview could result in disciplinary action.

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.

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.

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)[1] Hearing held on November 22, 1991, Officer Vanderwalker was notified that his employment with the Department was terminated.

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[1] EDITORIAL NOTE: The term "Loudermill" was a reference to the decision of the Supreme Court of the United States in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

Following the receipt of post-hearing briefs, the Examiner issued his findings of fact, conclusions of law, and order on February 16, 1993. The Examiner concluded that the employer had violated RCW 41.56.140(1), by its refusal to allow a union representative to participate in the October 15th investigatory meeting.[2] The Examiner also found that the employer had failed to show grounds for the discharge of Vanderwalker that were independent of the October 15, 1991 interview. As part of the remedial order, the Examiner directed the employer to reinstate Vanderwalker with backpay and benefits, to expunge all references to Vanderwalker's discharge from his employment record, and to make no reference to that discharge in any future personnel matter, evaluation or dispute resolution procedure concerning Vanderwalker's employment with the employer.

POSITION OF THE PARTIES

The employer argues that there is insufficient evidence to support the remedial order; that the Commission should remand the case to the Examiner for the taking of further evidence on the issue of whether the union is entitled to a make-whole remedy. The employer contends that it entered into the stipulation of facts without notice that the issue of Officer Vanderwalker's termination was before the Commission. It argues that reinstatement and backpay are an inappropriate remedy in this case, because the record is devoid of evidence showing that the Weingarten violation resulted in ill-gotten information being used in making the discharge decision. In the employer's view, any remedy should be limited to a cease and desist order.

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[2] The Examiner cited City of Seattle, Decision 3593-A (PECB, 1991) and National Labor Relations Board v. Weingarten, Inc., 420 U.S. 251 (1975).

The union asserts that the employer had notice of the requested remedy of reinstatement with backpay, and simply failed to meet its burden of proof. The union agrees with the Examiner's decision and asks that it be affirmed.

DISCUSSION

The Existence of an Unfair Labor Practice Violation

In its petition for review, the employer challenged paragraph 5 of the Examiner's findings of fact, which reads:

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

We find no error in this finding, which is reasonably derived from paragraphs 19 and 20 of the parties' stipulated facts.

Although ostensibly appealing the Examiner's conclusions of law, the employer offered no reason why we should overturn the Examiner's ruling that a Weingarten violation occurred in this case. We concur with the Examiner's analysis, and with his conclusion that the employer violated RCW 41.56.140(1), by denying the union's representative any meaningful participation in the investigatory interview.

The Remedial Order

The focus of the employer's brief in support of its petition for review is on the propriety of the Examiner's remedial order. It particularly contends that reinstatement and back pay are not the appropriate remedies in this case.

The Public Employment Relations Commission is directed by RCW 41.56.160 to prevent unfair labor practices, by issuing appropriate remedial orders. When an unfair labor practice is found to have been committed, the scope and appropriateness of a remedial order is always before the Commission. WAC 391-45-410. We are not limited to those remedies suggested by a complainant. The Commission is guided by an obligation to judge what is appropriate, in light of the surrounding circumstances and prior precedent. The Commission's broad remedial authority was sustained in METRO v. PERC, 118 Wn.2d 621 (1992).

The appropriate remedy for a Weingarten violation was established well before the onset of this case. In Okanogan County, Decision 2252-A (PECB, 1986), the Commission examined the remedies available to public employees covered by Chapter 41.56 RCW in comparison to those granted to private sector employees covered by the National Labor Relations Act (NLRA), and then detailed the availability of the remedies challenged by the employer in the instant case:

> **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. [Emphasis by **bold** supplied.]

That remedial standard, which places the burden of proof upon an employer to establish the existence of independent grounds for adverse action against an employee, was affirmed by a reviewing

court,[3] and has been followed by the Commission in Weingarten cases ever since the Okanogan decision was issued. City of Seattle, Decision 3593-A (PECB, 1991).

The employer's assertion that it had an independent basis to terminate Vanderwalker's employment, regardless of any statements he may have made on October 15, 1991, is based upon facts not in evidence. The stipulation of facts entered into by the parties established the following relevant events:

(1) Officer Vanderwalker's attendance was required at a meeting with supervisors, for the purpose of responding to an allegation that he had made an improper entry into a third party residence;

(2) Officer Vanderwalker was interviewed regarding the allegation, after he had requested and was denied meaningful union representation at the interview;

(3) After being threatened with disciplinary action if he refused to answer, Officer Vanderwalker answered each question put to him by the supervisor conducting the interview;

(4) That supervisor subsequently recommended that Vanderwalker's employment be terminated; and

(5) Following a due process (Loudermill) hearing, Vanderwalker's employment was, in fact, terminated.

The stipulated facts provide no evidence of any other basis for Vanderwalker's termination. In Okanogan County, by comparison, the record contained evidence of the employee's disciplinary record and

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[3] The Superior Court for Thurston County affirmed the remedial standard adopted by the Commission in Okanogan County, but disagreed with the Commission as to the effect of ill-gotten evidence in that case. The case was to be remanded to the Commission for reconsideration on the question of whether the employer had met its burden of proof, but apparently has been resolved or dropped by the parties.

work-related problems.[4] Moreover, by the time the unfair labor practice occurred, supervisors had already recommended to the sheriff that the employee's discharge be considered.[5] Absent evidence of any other grounds for the discharge, it is reasonable to infer from the stipulation of facts that the employer's decision to terminate Vanderwalker's employment was affected by results of the October 15, 1991 interview. If the right to union representation had been honored on October 15, 1991, there might never have been a recommendation to terminate. That being the case, rescission of Vanderwalker's termination was merited. We reject the assertion that only a cease-and-desist order is appropriate.

The Examiner's decision is well reasoned and consistent with prior decisions of the Commission. The Examiner appropriately placed upon the employer the burden of proving an independent basis for its termination decision. When that burden was not met, the Examiner correctly directed a make-whole remedy which included Vanderwalker's reinstatement with backpay.

The Motion to Reopen the Record

The employer has requested an opportunity to present additional evidence in this matter. It would now seek to establish that it had grounds for the discharge of Officer Vanderwalker, independent of the meeting it unlawfully conducted on October 15, 1991.

A party is not entitled to the reopening of a hearing absent a showing of newly discovered evidence or other good cause.[6] Just as inadvertent failure to offer available evidence does not constitute good cause to reopen a record, neither does a party's

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[4] Decision 2252, at pages 3-8.

[5] Id. at page 19.

[6] Pateros School District, Decision 3911-B (PECB, 1992).

decision to forego evidence which it believes unnecessary to sustain its position. The time for a party to research its burden of proof is before the hearing, not after receipt of a decision on the merits of the case. Were we to decide otherwise, there would be no finality to the hearing process.

The Okanogan County decision was issued more than five years prior to the events giving rise to this case. The Commission's decision has been published and indexed in the Washington Public Employment Relations Reporter since August of 1986, in conformity with RCW 42.17.260 and RCW 34.05.220(3). The employer was under an obligation to know or learn the applicable legal precedents.

The employer asserts that it did not offer evidence on the discharge previously, because it did not realize that the discharge of Officer Vanderwalker was at issue. We find that assertion unpersuasive.

Although filed prior to Vanderwalker's discharge, the remedy requested in the union's unfair labor practice complaint included:

> ... the overturning of any disciplinary action taken against Officer Vanderwalker - subsequent to the Loudermill hearing now scheduled for 22 November 1991, ...

The complaint itself thus clearly placed the employer on notice that rescission of any subsequent disciplinary action would be at issue in this case. Thereafter, the employer entered into a stipulation of facts which made no mention of Vanderwalker's work record or other grounds for his discharge. If such evidence exists, it was clearly available to the employer at the time that it submitted the stipulation of facts to the Examiner.

The union's post-hearing brief to the Examiner offered arguments as to why reinstatement with backpay was an appropriate remedy for the

alleged Weingarten violation. The employer filed its post-hearing brief to the Examiner more than a month after receiving the union's brief, but it did not claim surprise at the union's requests for reinstatement and backpay. Instead, the employer addressed the union's contentions, suggesting that any such remedy was inappropriate because: (1) The stipulated facts did not reveal the reasons for Vanderwalker's discharge; (2) his discharge had not been alleged to constitute an unfair labor practice; and (3) NLRB precedent supported a remedy limited to a cease-and-desist order.

The employer argues that the parties' stipulations did not relieve the Examiner of an obligation to develop additional facts. The employer misunderstands its obligations in this regard. Our regulations and precedent make clear that the duty rests with the parties to prove the essential elements of their case:

> WAC 391-45-270 HEARINGS--NATURE AND SCOPE. ... **It shall be the duty of the examiner to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice so as to obtain a clear and complete factual record** on which the examiner and commission may discharge their duties under these rules: PROVIDED, HOWEVER, That **such duty of the examiner shall not be construed as authorizing or requiring the examiner to undertake the responsibilities** of the complainant with respect to the prosecution of its complaint or **of the respondent with respect to the presentation of its defense.**
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> [Emphasis by **bold** supplied.]

If there was evidence that the discharge of Vanderwalker was unaffected by the employer's Weingarten violation, then the burden of eliciting that information rested with the employer, not with the Examiner.

The employer was represented by an attorney in these proceedings. The failure to offer evidence showing an independent basis for

Vanderwalker's termination did not result from a lack of notice. It appears instead to have resulted from a strategic decision by the employer's representatives. That strategy may have been based upon an erroneous analysis of applicable burdens of proof. If so, the employer must live with the consequences. We do not reopen the record in cases where a party simply fails to offer available evidence as to a matter on which that party bears the burden of proof. The employer's request that we remand this case for the taking of additional evidence is denied.

NOW, THEREFORE, it is

ORDERED

1. The findings of fact, conclusions of law and order issued in this matter by Examiner Mark S. Downing are affirmed and adopted as the findings of fact, conclusions of law and order of the Public Employment Relations Commission.

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

   A. CEASE AND DESIST from:

      (1) 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.

      (2) 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.

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

(1) 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.

(2) 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.

(3) 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.

(4) 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.

(5) Notify the above-named complainant, in writing, within 30 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.

(6) Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 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, the 14th day of October, 1993.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JANET L. GAUNT, Chairperson

MARK C. ENDRESEN, Commissioner

DUSTIN C. McCREARY, Commissioner

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.