STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

BELLEVUE POLICE OFFICERS GUILD, Complainant,	)	CASE 9292-U-91-2064
vs.	)	DECISION 4324-A - PECB
CITY OF BELLEVUE, Respondent.	)	DECISION OF COMMISSION

Richard D. Eadie, Attorney at Law, appeared on behalf of the complainant.

Richard L. Andrews, City Attorney, by David E. Kahn, Assistant City Attorney, appeared on behalf of the respondent.

This case comes before the Commission on a timely petition for review filed by the City of Bellevue, seeking to overturn a decision by Examiner Kenneth J. Latsch.[1]

BACKGROUND

The Bellevue Police Officers Guild is the exclusive bargaining representative of a unit of City of Bellevue law enforcement personnel below the rank of captain. Stephen Cercone is a commissioned police officer represented by the guild.

In July, 1991, Deputy Chief of Police Garnett Arcand initiated an internal investigation into an incident on July 4, 1991, when Cercone allegedly refused to follow the orders of Lieutenant Mike Griffin. Arcand informed Cercone that Lieutenant William Ferguson

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[1] Decision 4324 (PECB, 1993).

was conducting the investigation,[2] and that Ferguson would contact him at some later point in the investigatory process. Before interviewing Cercone, Ferguson talked with those other officers who were familiar with the incident.

Ferguson scheduled an investigatory interview with Cercone for July 23, 1991. Christopher Vick, an attorney for the union, had an opportunity to consult with Cercone beforehand, and then accompanied Cercone at the interview. Ferguson announced his intent to tape record the interview, without objection by Cercone or Vick. When the interview commenced, Ferguson handed Cercone a document titled "Internal Affairs Advisement Form". The form contained the following statements regarding Cercone's right to representation during the interview:

> Only the employee who is the subject of an internal investigation may request and obtain the presence of a guild/union representative during the investigatory interview, provided that **the guild/union representative shall not** disclose the nature or content of the interview to any person, **shall not participate in the interview except as an observer**, ...
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> [Emphasis by **bold** supplied.]

Vick objected to the restriction on his participation. At Vick's suggestion, Ferguson left the room to consult with others.[3]

When Ferguson returned, he advised Vick and Cercone that the advisement form was in the process of being changed. Since a new form had not yet been adopted, Ferguson had been instructed to

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[2] Lieutenant Ferguson was the police department's internal investigation officer.

[3] Vick had attended other investigatory interviews at the Bellevue Police Department where the same restrictive advisement form was used. The investigator on those occasions was also the union president, and had allowed Vick to participate more fully than the form indicated.

continue to use the existing form. Despite the wording of the form, Ferguson believes he told Vick that he would allow Cercone or Vick to clarify any statements at the end of the interview. Vick does not recall Ferguson saying that he would depart from the wording of the advisement form. Vick sat silent while the interview progressed.

Ferguson asked Cercone a lengthy series of questions. Cercone answered Ferguson's questions without comment or assistance from Vick. At the end of the interview, Ferguson gave Cercone an opportunity to clarify or add any other information that he felt was relevant. Ferguson testified that he did not specifically ask Vick, but motioned to him with a gesture intended to ask if there was anything he wanted to add at that time. Ferguson believes Vick either shook his head or said "no", and the interview then ended.

Ferguson later discovered that the recorder had malfunctioned, and most of the tape was inaudible. Ferguson set up a second interview on July 25, 1991, to reconstruct the first one. Officer Stephen Braden, a union steward, attended this interview with Cercone. According to Braden, he did not actively participate because he understood from Ferguson that he was only there as an observer.

At the second interview, Ferguson had a partial transcript of the prior interview, with blanks showing inaudible sections. Ferguson restated the questions, and had Cercone fill in the blanks. Cercone reviewed Ferguson's typed report of questions and answers, and made minor editing changes in it. The internal investigation was concluded after this second interview. Ferguson forwarded the results of his investigation to Police Chief Joseph Smith, for his review.

On July 29, 1991, the union filed the instant unfair labor practice complaint in which it alleged that the employer's refusal to allow Vick to participate in the first interview was unlawful.

On August 29, 1991, the union requested a copy of the complete internal investigation file concerning Cercone. At some point, Smith scheduled a hearing concerning potential discipline of Cercone,[4] and the stated purpose of the request was to prepare for the anticipated Loudermill hearing. The information request was denied by Chief Smith, on the basis that the internal investigative file was regarded as "private, confidential and privileged".

On August 30, 1991, Chief Smith gave Cercone notice of an intended disciplinary action, which read as follows:

> This is to formally notify you of my intention to suspend you for one week (40 hours) without compensation based upon the below described violation of Department Rule and Regulation 2.09 Insubordination which reads as follows:
>
> > 2.09 Insubordination: Failure or deliberate refusal of any employee to obey a lawful order given by a supervisor shall constitute insubordination.
>
> The Department has concluded that on July 4, 1991 you refused to follow orders given to you by Lt. Mike Griffin, your immediate supervisor, in violation of Department Rule and Regulation 2.09 Insubordination.
>
> The facts determined and the conclusions reached following a comprehensive investigation into your acts/omissions in connection with your meeting with Lt. Griffin at or about 1500 hrs. on July 4, 1991 are summarized as follows:
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> > You and Lt. Griffin had a disagreement at about 1500 hours on that date concerning the adequacy of the information you had

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[4] The purpose of the hearing was to comply with the decision of the Supreme Court of the United States in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), which held that public employees could not be deprived of a property right in their employment, without a due process right to a prior hearing. This is often referred to as a "Loudermill hearing".

obtained in an investigation to support probable cause to obtain a search warrant. The verbal disagreement began in the Patrol Secretary's office and, as it became heated, Lt. Griffin requested that the conversation be continued in the Lieutenant's Office across the hallway. The two of you went into the Lieutenant's Office where, in response to your earlier exclamation to the effect that you did not want to "stick your neck out and submit a shoddy affidavit for a search warrant to a judge," Lt. Griffin explained to you that he wasn't asking you to put your job on the line and expressed displeasure at your demeanor.

You responded to Lt. Griffin by stating that you were no longer going to talk to him and that you were going to see the Captain.

Lt. Griffin advised you that the conversation wasn't finished and that you were not free to go. You responded by standing within inches of Lt. Griffin and stating, "If you don't get out of my way you are going to have a major problem with me."

After asking you if you were going to assault him and receiving the same statement from you in reply, Lt. Griffin backed away from you and you exited the Lieutenant's Office. As you were exiting the Lieutenant's Office and heading for the Captain's Office, Lt. Griffin lawfully ordered you back into the Lieutenant's Office at least twice. To each lawful order given by Lt. Griffin, your response was to willfully refuse to obey by stating that you were not going to talk to him and that you were going to see the Captain.

The disagreement had been verbal and loud and by this time Captain Sturza, whose office was close enough that he had partially overheard and was aware of the tenor of the conversation, approached and contacted both you and Lt. Griffin.

The fact that you refused to obey Lt. Griffin's orders to stay in the Lieutenant's Office and discuss the investigation with him is not in dispute. What you appear to dispute is your obligation to obey Lt. Griffin's

> lawful orders under the circumstances. Having investigated and reviewed those circumstances, I have concluded that there is no substantive basis to your belief that you did not have to obey Lt. Griffin's lawful orders and that you were not insubordinate.
>
> Lt. Griffin's orders directing you to remain in his office and to continue discussing the issue at hand were not unlawful, improper or unreasonable, regardless of your perception of the civility with which they were issued. While Department Rules and Regulations state very clearly the methods by which an employee may disagree with and/or object to a lawful order given by a supervisor, none of the regulations state that disobedience is an option. Your responsibility to follow the directions of your supervisors is and always had been clear during your tenure with this Department.
>
> Your angry response to Lt. Griffin by categorically and wilfully refusing to obey his lawful orders will not be tolerated by this Department. For the insubordination summarized above, you will be suspended for one week (40 hours) without compensation.
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> ...
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> If you fail to advise me of facts and circumstances of which you feel I might not be aware and which you want me to consider in imposing discipline against you, the disciplinary action shall remain unmodified.

Later that same day, Chief Smith conducted a Loudermill hearing regarding the proposed discipline of Cercone.[5] Smith and Arcand attended the hearing on behalf of the employer. A union steward attended with Cercone. Also present was Michael Zimmerman, a union consultant. No investigatory questions were asked there, but Cercone was given the opportunity to discuss a number of issues. After the Loudermill hearing, Chief Smith decided not to impose any

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[5] The Examiner's statement of facts erroneously suggests this hearing occurred prior to the notice of disciplinary action. Chief Smith testified that he issued the August 30, 1991 notice of discipline before the hearing. Cercone's recollection was in accord with the chief's.

discipline while the union and employer discussed the wording of the advisement form being used by the employer for internal investigation interviews.

On September 13, 1991, the union amended its unfair labor practice complaint to allege, as an additional count, that the employer had violated RCW 41.56.140(4) when it refused to provide the union with a copy of the investigative file.

On October 2, 1991, the employer gave the union notice that it would begin using a modified form, which read in relevant part:

> E) The employee who is the subject of an internal investigation may request and obtain the presence of a Guild/Union representative during the investigatory interview provided that:
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> ...
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> 2) **In addition to observing the interview, the Guild/Union representative may ask additional questions and seek to clarify responses at the conclusion of the investigative interview. The Union/Guild representative may invoke statutory privilege on behalf of the employee, and may reasonably consult with the employee to determine whether statutory privilege applies.** The Guild/Union representative may not otherwise interfere with the investigative interview.

[Emphasis by **bold** supplied.]

On March 24, 1992, Ferguson conducted a third investigatory interview of Cercone, using the modified advisement form. As of this point in time, discipline had not yet been imposed, but the chief had given no indication of changing the discipline from that described in the notice of August 30, 1991. Ferguson invited Vick to attend the March 24, 1992 interview, but Vick decided not to do so after being told by Ferguson that the only question to be put to

Cercone would be whether he had anything else to add for consideration. At the interview, Cercone simply signed a copy of the new advisement form, noting thereon that he had no further comments to add at that time.[6]

A hearing on the unfair labor practice charges was conducted on June 22 and July 26, 1992. The Examiner issued his findings of fact, conclusions of law, and order on March 22, 1993. The Examiner concluded that the employer had violated RCW 41.56.140(1) and (2) by interfering with Cercone's right to have union representation at his disciplinary interview, and by refusing to provide information needed by the union to process grievances. As part of the remedial order, the Examiner directed the employer to withdraw the discipline to be imposed on Officer Cercone, and remove all references of the discipline from his permanent work record.

POSITION OF THE PARTIES

The employer first contends that the Examiner erred in finding that the union representative was not allowed an opportunity to participate at the investigatory interview. The employer contends that Vick was allowed an opportunity to participate at the end of the interview. In the employer's view, that degree of participation should be found sufficient to satisfy any right to representation. Even if the Examiner's finding is affirmed, the employer asserts that the remedial order is improper because the chief had ample untainted evidence to sustain the disciplinary action. The employer argues that the Examiner also erred when finding that the internal investigation file should have been provided to the union. In the employer's view, it should be allowed to keep the contents of such files confidential unless and until discipline is imposed.

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[6] The chief continued to "stay" the suspension, pending resolution of this unfair labor practice complaint.

The union asserts that an invitation to add information at the end of an investigatory interview does not allow effective assistance by a union representative. The union urges the Commission to instead affirm the right to participation described in King County, Decision 4299 (PECB, 1993). The union also urges the Commission to affirm the Examiner's determination as to the impact of tainted evidence on Officer Cercone's discipline. As for its information request, the union argues that it sought information necessary for the performance of representational duties, and that a right to the information thus arose under Chapter 41.56 RCW. The union asserts that it should be awarded attorney's fees as an additional remedy, because the employer's appeal is frivolous.

DISCUSSION

The Request for Information

We choose to first address the scope of the employer's duty to provide information upon request by the union. It is by now well-settled that, under both the National Labor Relations Act (NLRA) and Chapter 41.56 RCW, an employer has a statutory duty to provide, upon request, information that is needed by an exclusive bargaining representative for the proper performance of its duties. NLRB v. Acme Industrial Co., 385 U.S. 432 (1967); City of Bellevue, Decision 3085-A (PECB, 1989) affirmed, 119 Wn.2d 373 (1992). This duty is derived from the duty to bargain in good faith, and it extends beyond the period of contract negotiations. The obligation applies, for example, to interest arbitration proceedings,[7] and to requests for information necessary for the representation of bargaining unit members in processing grievances to enforce the

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[7] City of Bellevue, supra.

terms of negotiated contracts.[8] In evaluating information requests, the Commission and the courts consider whether the requested information appears reasonably necessary for the performance of the union's function as bargaining representative.[9]

In this case, the union sought a copy of the internal investigation file regarding Cercone's alleged insubordination. The amended complaint alleged a violation of RCW 41.56.140(4) in the employer's refusal to provide a copy of the internal investigation file. It is clear that the union sought the information for the purpose of representing Cercone at the Loudermill hearing.[10] The sole question before us is whether a duty to provide the requested information arose at that time from the employer's obligations under Chapter 41.56 RCW. We find that it did not.

The Examiner found that the requested information was needed by the union for the processing of grievances.[11] He erred in that respect. There was no grievance pending at the time of the initial informa-

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[8] Pullman School District, Decision 2632 (PECB, 1987); City of Seattle, Decision 3329-B (PECB, 1990).

[9] J.I. Case Co. v. NLRB, 253 F.2d 149 (7th Cir. 1958); NLRB v. Item Co., 220 F.2d 956 (5th Cir. 1955).

[10] That is the only request for information before the Commission in this case. The record discloses that the union actually made a second request for information in April of 1992, and that the employer again refused to provide the requested information. The union did not amend its complaint to encompass that second request. The request for the internal investigation file on Cercone made in April of 1992 was in preparation for the hearing on this unfair labor practice case, and the employer's stated reasons for refusal related to its perceptions as to the issues raised in this case. The Examiner did not make any finding of fact or conclusion of law on the second incident, and the union did not petition for review (or cross-petition in response to the employer's petition for review) on that issue.

[11] Decision 4324, Conclusion of Law 3.

tion request or at the time of the Loudermill hearing. The union does not contend otherwise; it just asserts that it should be entitled to the information to perform representational functions in any forum.[12]

The Executive Director has previously rejected a Loudermill-based complaint under WAC 391-45-110, stating:

> The Public Employment Relations Commission does not assert jurisdiction through the unfair labor practice provisions of Chapter 41.56 RCW to enforce "due process" rights emanating from the federal and state constitutions.

City of Tacoma, Decision 3346 (PECB, 1989).[13]

The Commission itself has previously noted: "The interests at stake in the Loudermill context are not within the realm of PERC jurisdiction." Okanogan County, Decision 2252-A (PECB, 1986), at page 10, footnote 9. We see no justification for reaching a different result in this case.

It is important to note that, even if an information request is relevant to representational functions over which we have jurisdiction, an obligation to provide the requested information only arises if the information is reasonably viewed as **necessary** for the performance of a bargaining representative's duties. That showing of necessity was not made in the present case. Loudermill requires notice of the charges against a public employee, an explanation of the evidence against that individual, and an opportunity to respond. It does not require a complete evidentiary hearing, and

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[12] The union's brief makes passing reference to its renewed request for the internal investigation file made in April of 1992, and to preparations for unfair labor practice hearings. As noted above, however, the circumstances of any later denial are not before us in this case.

[13] Accord: Port of Seattle, Decision 4110 (PECB, 1992).

we find nothing in the Supreme Court's decision that indicates an accused employee is necessarily entitled to see the actual contents of an investigative file. What must be provided is an explanation of the accumulated evidence. Whether this is provided in the form of a description of the evidence in a file, or in the form of actual witness statements, is left to an employer's discretion.

Prior to Cercone's Loudermill hearing, he and his representative were given the chief's August 30, 1991 notice, which contained a lengthy explanation of the facts upon which the proposed discipline was based. Chief Smith testified that "Every fact that I considered in assessing this discipline was included and made very clear in the letter that I sent to him." Tr. 223. The notice described the offense which Cercone was accused of committing; it described the July 4, 1991 incident and the substance of the statements various participants were understood to have made; it explained why Smith felt discipline was appropriate. Because he mistakenly thought that the disciplinary notice was not issued until after the Loudermill hearing, the Examiner erred in stating that the employer flatly refused to provide any information contained in the internal investigation file. In actuality, Chief Smith had provided Cercone with quite a detailed description of the facts upon which discipline was based, and merely refused to provide copies of the witness statements from which those facts were derived.

The employer is understandably concerned about a precedent that would provide an automatic right to the contents of an investigative file, despite the quantity of information that Cercone was actually given here before any discipline was imposed or grieved. The information requested by a union does not have to be provided in the form requested by the exclusive bargaining representative; it need only be made available in a useful format.[14] In this case,

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[14] American Telephone & Telegraph Co., 250 NLRB 47 (1980), affirmed Communication Workers of America v. National Labor Relations Board, 644 F.2d 923 (5th Cir. 1981).

the record does not indicate that the union sought the names of witnesses, or that it was denied that information.[15] What is at issue here is the employer's obligation to produce the entire investigatory file, which consisted principally of witness statements. We concur with the National Labor Relations Board (NLRB) that the disclosure of such statements raises special considerations that must be balanced against any asserted necessity for their examination. There may be no entitlement to such records when the amount of information provided in another format has not been shown insufficient for a bargaining representative to perform its statutory functions.

For the reasons indicated herein, the Examiner's ruling that the employer violated RCW 41.56 140(4) when it denied the union's request for information is reversed.

The "Weingarten" Violation

In NLRB v. Weingarten, 420 U.S. 251 (1975), the Supreme Court of the United States held that Section 7 and 8(a)(1) of the NLRA guarantee covered private sector employees the right to union representation, upon request, at an "investigatory" interview which the employee reasonably believes could result in discipline. The same right has been found applicable to public employees in this state under Chapter 41.56 RCW. Okanogan County, supra. The Commission must now decide the extent of participation to be afforded union representatives in investigatory interviews.

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[15] An employer does have a duty to provide, upon request, the names of witnesses to an incident for which an employee is disciplined. The NLRB has held, however, that the general obligation to honor requests for information under the NLRA does not encompass a pre-arbitration duty to furnish witness statements themselves. Anheuser-Busch, 237 NLRB 982 (1978).

In resolving the issue before us, the Commission notes that the Examiner credited Ferguson's assertion that he asked Vick, at the end of the interview, whether there was anything the union representative wanted to add.[16] There is sufficient evidence in the record to support that finding. Even assuming that degree of participation was allowed, however, we find Vick's role was too limited to satisfy Officer Cercone's right to union representation.

In King County, Decision 4299 (PECB, 1993), Examiner Mark Downing analyzed the Supreme Court's Weingarten decision and subsequent Commission precedent in a thoroughly researched and well-reasoned decision that was cited by the Examiner in this case. Examiner Downing correctly concluded that the Commission views the union representative's role in an investigatory interview as more than a passive observer. In King County, Decision 4299-A (PECB, 1993), we affirmed, specifically noting our concurrence with that analysis, and with the conclusion that a union representative cannot be completely silenced.[17]

It is the nature of an "investigatory" interview that the employer is seeking information from the employee. A union representative is present to assist the employee at an investigatory interview, not to speak in place of that individual. An employer is entitled to ensure that the responses it gets are those of the employee, and it can rightfully insist that a union representative not answer the questions directed to an employee. The employer would go farther, and have us find that a union representative can be required to hold any and all comments until the end of the interview. We decline to do so.

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[16] Decision 4324, at page 4.

[17] Accord: NLRB v. Texaco, Inc., 659 F.2d 124 (9th Cir. 1981).

As well-described in a recent decision of the NLRB, the Supreme Court evidenced an intent in Weingarten to balance the respective interests of employer and employee:

> The Board has long recognized the Supreme Court's intention in the Weingarten decision to strike a careful balance between the right of an employer to investigate the conduct of its employees at a personal interview, and the role to be played by the union representative present at such an interview. [Citations omitted.] It is clear from the Court's decision in Weingarten that **the role of the union representative is to provide assistance and counsel to the employee being interrogated. .... The Court specifically declared, however, that the presence of the representative should not transform the interview into an adversary contest or a collective-bargaining** [sic] **confrontation**, and that the exercise of the Weingarten right must not interfere with legitimate employer prerogatives.

New Jersey Bell, 308 NLRB No. 32, 141 LRRM 1017, 1020 (1992). [Emphasis by **bold** supplied.]

The limits endorsed by the employer here would go far beyond the avoidance of "an adversary contest" or "collective bargaining".

The employer would have us preclude a union representative from inquiring at the outset as to the subject matter of an interview and the nature of the employer's concern. We can find no legitimate justification for denying an employee that assistance, if the employer does not volunteer the information.

Once the purpose of an interview is clarified, it is within an employer's legitimate prerogative to require the union representative to remain silent while an employee gives an initial statement without interruptions by either side. The Supreme Court noted:

> The employer, ... 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, supra, at 260.

We thus agree with the view that an employer may achieve an orderly interview, by hearing the employee's account first.

The balancing of interests changes, however, when an employer begins actively questioning an employee. It hardly makes sense to provide a right to representation and then force a union representative to sit idly by while the employer browbeats or intimidates an employee, or elicits damaging and unintended responses through the use of confusing or misleading questions. An employer cannot deny an employee the assistance a union representative can offer in alerting the employee to problems with the phrasing or scope of a question. Examples of the type of assistance which might be provided by a union representative include: Noting when questions are ambiguous or misleading; noting when questions invade a statutory privilege that the employee has the right to invoke; or interceding when questions become harassing or intimidating.

The right to raise objections to questions is one which the union representative must exercise cautiously. As the NLRB has noted:

> The repetition of a question, or the phrasing of it in alternative ways, is a common and legitimate investigatory technique, which, in our view, cannot fairly or reasonably, be described as harassment. Consequently, the representative cannot act to preclude the employer from using this technique.

New Jersey Bell, supra, 141 LRRM at 1021.[18]

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[18] In New Jersey Bell, the NLRB held that a union representative engaged in unprotected conduct by instructing an employee to answer questions only once, and then preventing the employer from asking questions more than once by persistent objections and interruptions.

Thus, the right of a union representative to participate during the questioning process does not necessarily allow that representative to confer with the employee before every answer. When a statutory privilege is not at issue, the representative cannot delay an employee's responses while the representative advises an employee whether or how to answer a question. Likewise, the union representative is not free to interject comments whenever he/she wishes during the interview. Some input or assistance can rightfully be delayed. In the interest of maintaining an orderly process, an employer may reasonably require the union representative to wait until the conclusion of employer questioning before seeking clarification of previous employee answers, bringing to light favorable facts the employee might have overlooked, suggesting other individuals who may have relevant knowledge, describing relevant practices, or advancing extenuating circumstances for the employer to consider.

Our conclusions as to the participation of a union representative at an investigatory interview can be summarized as follows. The right to meaningful representation means that an employer cannot preclude an employee from consulting with his/her union representative before commencing an investigatory interview. Nor can an employer limit the union representative to silent observation throughout the course of the interview. An employer can ask an employee to give his/her version of events without interruption by a union representative, and can preclude an employee from consulting with the union representative before answering each question. Once the employer starts asking questions of the employee, it cannot preclude the union representative from raising valid objections to the nature of the questions or from advising the employee of any privileges he/she has a right to assert.
By balancing the respective rights as we have, the Commission believes the Supreme Court's evident intent in Weingarten is best accomplished. In this case, the employer did not afford Officer Cercone the meaningful representation to which he was entitled,

because it instructed the union representative to sit silent throughout the questioning process, and prohibited any participation until the end of the interview. We concur with the Examiner's ruling that the employer thereby violated RCW 41.56.140(1).[19]

The Remedial Order

The appropriate remedy for a Weingarten violation is also well-established. In Okanogan County, supra, the Commission ruled that make-whole relief would be imposed **unless** there was a showing of independent grounds for an employer's disciplinary action:

> 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.][20]

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[19] An allegation and finding based on RCW 41.56.140(2) is misplaced in this case, in the absence of any allegation of interference with the union's internal affairs. That provision parallels Section 8(a)(2) of the NLRA, which was designed to protect employees from employer interference in the internal affairs of unions. See, Legislative History of the National Labor Relations Act, National Labor Relations Board, Volume I pages 15-26, 37-44, 46-57, and 89 ff; Washington State Patrol, Decision 2900 (PECB, 1988); City of Pasco, Decision 4197-A (PECB, 1994).

[20] The Commission also distinguished the remedies available to public employees covered by Chapter 41.56 RCW from those granted employees covered by the NLRA.

The Okanogan precedent requires a two-fold analysis in cases of an alleged Weingarten violation. The Commission must determine whether there was in fact an interference violation. If so, we must then determine whether there was sufficient untainted evidence to support the discipline actually imposed. The 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,[21] and has been followed by the Commission in Weingarten cases ever since the Okanogan decision was issued.[22]

In King County, supra, the Commission found no evidence of any basis for discipline of a law enforcement officer other than information gleaned during the tainted interview. In Okanogan County, by comparison, the record contained evidence of the discharged employee's disciplinary record and work-related problems,[23] and supervisors had already recommended that the employee's discharge be considered before the unfair labor practice occurred.[24] The present case is more like Okanogan than King County.

Although a disciplinary recommendation had not been made to the chief before Cercone's interview, Ferguson had interviewed all other witnesses to the July 4, 1991 incident. Ferguson testified that he had enough information from those interviews to write the

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[21] 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. The case was subsequently resolved or dropped by the parties without a ruling by the Commission.

[22] City of Seattle, Decision 3593-A (PECB, 1991).

[23] Decision 2252-A, at pages 3-8.

[24] Id. at page 19.

internal investigation report regarding the incident, without interviewing Cercone.

Chief Smith's August 30, 1991 notice of proposed discipline detailed facts sufficient to justify disciplinary action, and there is no evidence that he relied on information that could only have been derived from Cercone's investigatory interview. Chief Smith had sufficient evidence from other sources to conclude that Cercone refused to obey Griffin's orders to stay in the office and continue a work-related discussion. Smith found Griffin's order was lawful and thus Cercone's behavior constituted "insubordination". Chief Smith testified that he based the disciplinary sanction upon the fact that nothing in the statements of witnesses tended to exonerate Cercone from blame in the incident. If there were extenuating circumstances, Cercone and his union representative had a number of opportunities to describe those. One of these was at the end of the first interview, before any tentative decision regarding discipline had been made.

The foregoing facts persuade the Commission that the employer had sufficient evidence to establish cause for discipline even before Ferguson unlawfully limited the participation of the union representative at his investigatory interview of Cercone, and that it could have imposed the proposed discipline without regard to the results of that interview. It was inappropriate to direct rescission of the proposed disciplinary action, and the remedial order in this case will be revised accordingly.

AMENDED FINDINGS OF FACT

1. The City of Bellevue is a "public employer" within the meaning of RCW 41.56.030(1), and has collective bargaining relationships with several bargaining representatives.

2. The Bellevue Police Officers Guild, a "bargaining representative" within the meaning of RCW 41.56.030(3), represents a bargaining unit of non-supervisory law enforcement employees in the City of Bellevue Police Department. At all times pertinent to the instant proceedings, Chris Vick served as attorney for the union.

3. Officer Stephen Cercone is a member of the bargaining unit represented by the Bellevue Police Officers Guild. In July, 1991, Officer Cercone became involved in a situation which led to an internal investigation by police department management personnel. Cercone was notified that his conduct was under investigation, and he reasonably believed that discipline could result against him.

4. At all times pertinent to the instant proceedings, Lieutenant William Ferguson served as the internal affairs officer for the Bellevue Police Department.

5. On July 23, 1991, Ferguson conducted an investigatory interview with Cercone. At the request of Cercone, Vick attended the meeting in his capacity as union attorney. The meeting was tape recorded without objection from the union.

6. At the beginning of the interview, Ferguson gave Cercone a document titled "Internal Affairs Advisement Form", which contained specific questions about the incident leading to the investigation. Vick asked to review the document, but Ferguson refused to let him see it.

7. When Vick expressed concerns about the procedure, Ferguson delayed the interview and left the room to seek legal counsel. When he returned, Ferguson stated that the interview would continue without Vick's participation. Ferguson interviewed Cercone, who answered Ferguson's questions without comment or

assistance from Vick. At the end of the interview, Ferguson asked Cercone and Vick if they wanted to add anything for the record. Both declined the offer.

8. After the interview concluded, Ferguson reviewed the tape recording, and found that the tape was unusable. Ferguson informed Cercone that a second interview was necessary.

9. The second interview was conducted several days after the first interview. Cercone was accompanied to the second interview by a union shop steward. The interview consisted of Cercone repeating the inaudible answers he had given to Ferguson in the first interview. Ferguson typed the answers and allowed Cercone to review the final document.

10. On July 29, 1991, the union filed the instant unfair labor practice complaint.

11. On August 29, 1991, Michael Zimmerman, labor consultant for the union, sent a letter to Chief of Police Joseph Smith, requesting the contents of Cercone's investigatory file. Smith refused to provide the file. The stated purpose for requesting the file was to prepare for an upcoming due process hearing.

12. On August 30, 1991, Chief Smith sent Cercone a notice of disciplinary action, stating an intent to suspend Cercone for 40 hours.

13. On August 30, 1991, Cercone, Zimmerman and a union steward met with Chief Smith and Deputy Chief Garnett Arcand in a disciplinary hearing. By that time, Smith had not made a final decision concerning the discipline to be imposed on Cercone. Cercone was asked if he had any new information to bring forward. He did not.

14. In September, 1991, Arcand informed Cercone that Cercone would not be transferred to a detective's position. The transfer was denied because of the events leading to the internal investigation.

15. On September 13, 1991, the union filed an amended complaint adding an allegation that the employer committed a "refusal to bargain" violation by refusing the union's request for a copy of the internal investigation file.

16. At an unspecified time, the city changed the "advisement form" to allow union representatives the opportunity to participate in investigatory interviews. A third interview of Cercone was conducted by the employer in March, 1992, when Cercone was directed to sign the new form. Cercone had an opportunity to offer additional information at that time but chose not to do so. The level of discipline remained unchanged.

AMENDED CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. By refusing to provide its complete internal investigation file concerning Officer Cercone to the union for its use in connection with a due process hearing, as described in paragraph 11 of the foregoing findings of fact, the City of Bellevue did not commit unfair labor practices within the meaning of RCW 41.56.140(1) or (4).

3. By limiting the participation of the union representative at an investigatory interview, as described in paragraphs 5, 6, 7, and 8 of the foregoing findings of fact, the City of Bellevue interfered with the right of a public employee to

union representation under RCW 41.56.040, and committed unfair labor practices within the meaning of RCW 41.56.140(1).

AMENDED ORDER

Pursuant to RCW 41.56.160 of the Public Employees' Collective Bargaining Act, it is ordered that the City of Bellevue, its officers and agents immediately:

1. Cease and desist from:

   a. Refusing to allow union representation at investigatory interviews.

   b. In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights under Chapter 41.56 RCW.

2. Take the following affirmative actions to remedy the unfair labor practices and effectuate the purposes of Chapter 41.56 RCW:

   a. Post, in conspicuous places on the employer's premises where notices to employees are customarily posted, copies of the notice attached hereto. Such notice shall, after being duly signed by an authorized representative of the City of Bellevue, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the union to ensure that said notices are not removed, altered, defaced, or covered by other material.

   b. Notify the complainant, in writing, within twenty (20) days following the date of the Order, as to what steps have been taken to comply herewith, and at the same time

provide the complainant with a signed copy of the notice required by this Order.

c. Notify the Executive Director of the Public Employment Relations Commission, in writing, within twenty (20) 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 this Order.

Issued at Olympia, Washington, the 31st day of March, 1994.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Janet L. Gaunt

JANET L. GAUNT, Chairperson

Dustin C. McCreary

DUSTIN C. McCREARY, Commissioner

Commissioner Sam Kinville did not take part in the consideration or decision of this case.

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 NOT refuse to allow union representation at investigatory interviews where the employee believes that disciplinary action could result against them.

WE WILL NOT, in any other manner, interfere with, restrain or coerce our employees in the exercise of their rights under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW.

DATED_____

CITY OF BELLEVUE

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, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (206) 753-3444.