STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DISTRICT COUNCIL 24, THE WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, AFL-CIO, and its affiliated LOCAL UNION NO. 178; OFFICERS BEV DRAHEIM, JEROLD GANZ, BERNARD OOSTERWYK, THOMAS MILLER, DONALD WACKETT and BILLY GENTRY, Complainants, vs. STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES (DHSS), DIVISION OF CORRECTIONS (DOC), DODGE CORRECTIONAL INSTITUTION (DCI), Respondents.	Case 254 No. 40235 PP(S)-143 Decision No. 25605-A

Appearances:

Lawton & Cates, Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin, by Mr. Richard V. Graylow, at hearing and on brief, and Mr. Jeffrey D. Myers, Law Clerk, on brief, on behalf of District Council 24, Local Union No. 178, and individual Complainants.

Mr. David C. Whitcomb, Legal Counsel, Department of Employment Relations, State of Wisconsin, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin, on behalf of the State of Wisconsin.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

District Council 24, the Wisconsin State Employees Union (WSEU), AFSCME, AFL-CIO, its Local Union No. 178, and Officers Bev Draheim, Jerold Ganz, Bernard Oosterwyk, Thomas Miller, Donald Wackett and Billy Gentry, hereinafter the Complainants, having filed a complaint on February 18, 1988, with the Wisconsin Employment Relations Commission, hereinafter the Commission, wherein the Complainants alleged that the State of Wisconsin, Department of Health and Social Services (DHSS), Division of Corrections (DOC), Dodge Correctional Institution (DCI), hereinafter the Respondents, had committed unfair labor practices within the meaning of Secs. 111.84(1)(a) and (c) of the State Employment Labor Relations Act (SELRA); and the Commission having appointed James W. Engmann, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Sec. 111.07(5) Stats.; and the Respondent having filed an answer on December 2, 1988, wherein it denied that it had committed any unfair labor practices and it raised certain affirmative defenses; and a hearing on said complaint having been held before the Examiner on December 16, 1988; and the parties having completed filing post-hearing briefs on March 10, 1989; and the Examiner having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant District Council 24, WSEU, AFSCME, AFL-CIO, is a labor organization with its principal offices located at 5 Odana Court, Madison, Wisconsin; that Complainant Local Union No. 178 is appropriately affiliated with

District Council 24; that at all times material herein, Complainant Local Union No. 178 had representational and jurisdictional rights over certain classified employes employed by the Dodge Correctional Institution, including those employes whose positions have been allocated to the Security and Public Safety Bargaining Unit by the Commission; that the individually named Complainants are state employes who at the time involved in this matter worked full-time at DCI; that they are classified in the Correctional Officer series; and that they are represented for purposes of collective bargaining by District Council 24 and its affiliated Local Union No. 178.

2. That Respondent State of Wisconsin is an employer; that the Respondent State is represented for the purposes of collective bargaining and labor relations by the Department of Employment Relations which has its principal offices located at 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin; and that the Dodge Correctional Institution (DCI) is a state correctional institution with duties and responsibilities including the custody and discipline of inmates incarcerated therein.

3. That Complainant Jerold Ganz was an Officer 2 at all times relevant to this matter; that on August 3, 1987, he was told to report to the Security Office; that he met Kathleen Nagle, Security Director of DCI, and Jack Kestin, Personnel Manager of DCI at the Security Office; that he asked if he would need a union representative; that he requested a union representative because he was unaware of what the interview concerned; that he was told that the meeting did not pertain to him; that he was told that Nagle and Kestin wanted to ask him questions about alleged sexual harassment by Sgt. L.; 1/ that he was told that no discipline would ensue as it related to him; that he was not provided a union representative; that he was asked questions about alleged sexual harassment by Sgt. L.; and that he was not disciplined.

4. That Complainant Bernard Oosterwyk is an Officer 2; that on August 7, 1987, he was called into Security Director Nagle's office; that Personnel Manager Kestin and Nagle were present; that he asked for a union representative because he did not know the purpose of the meeting and thought he would be disciplined; that Nagle told him a union representative was not necessary because the meeting did not involve disciplinary action against him; that he was told that the subject matter was the alleged sexual harassment by Sgt. L.; that he was advised that if he was involved on his own, he would be entitled to a union representative; that he was not provided a union representative; that the subject matter of the meeting was the alleged sexual harassment by Sgt. L.; and that he was not disciplined.

5. That Complainant Thomas J. Miller is an Officer 3; that on August 11, 1987, he reported to Security Director Nagle's office; that when he entered the Security Suite, Union official Al Kuehn was discussing with Personnel Manager Kestin and Security Director Nagle whether Miller would be supplied with a union representative; that Miller wanted a union representative to be his witness; that he was told he would not need a union representative because it was not a disciplinary hearing; that he was not provided a union representative; and that he was not disciplined.

6. That Complainant Donald Wackett is an Officer 2; that on August 17, 1987, he reported to Security Director Nagle's office; that when he entered, he requested a union representative because he thought he should have another witness there to support his side of the interview; that he was told he would not need a union representative because the interview had nothing to do with him or his job performance; that he was told he would not be disciplined; that he was not provided a union representative; and that he was not disciplined.

7. That Personnel Manager Kestin and Security Director Nagle were investigating allegations of sexual harassment made against Sgt. L.; they interviewed Sgt. L. in the presence of his union representative, Officer Elgersma; that Sgt. L. and his union representative gave Kestin and Nagle six or seven names to be interviewed as part of the investigation; that four of the names are those of the persons discussed in Findings of Fact 3-6 above; that they interviewed these four persons to determine if they had any information regarding the alleged

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1/ The parties stipulated at hearing that individuals not parties to this matter would be referred to by initials.

sexual harassment by Sgt. L.; that they told each of the officers that the interview was not disciplinary for them and, because it was not going to lead to discipline, they would not give the officer a union representative; that they interviewed each officer about allegations of sexual harassment by Sgt. L.; and that after they finished the investigation, they made a recommendation about Sgt. L. to the Superintendent.

8. That Bev Draheim is an Officer 2; that on August 18, 1987, she was told to report to Captain George Peachy, Programs Captain at DCI; that she met Captain John Waltz at the door of the building housing Peachy's office; that she requested that a union representative be present; that she believed she needed a union representative with her if she was going to be disciplined; that Peachy told her that the meeting was a job instruction and that no discipline would result; that therefore Peachy denied the request for a union representative; that Peachy asked Draheim if she had released confidential information about one inmate to another inmate; that an employe can be disciplined for releasing confidential information about an inmate to another inmate; that Draheim denied releasing confidential information about one inmate to another inmate; that Peachy instructed Draheim about what she should not disclose pertaining to confidential medical information; that Peachy prepared an entry onto Draheim's Performance Planning Development (PPD) form; that PPD's are prepared by management as they anticipate the duties and responsibilities for the employe in the coming year; that PPD's are in the employe's personnel file; that PPD's are used to evaluate the performance of the employe each year; that PPD's are a job performance document exclusively and are not disciplinary documents; and that Draheim was not disciplined.

9. That Billy Gentry is an Officer 2; that on September 5, 1987, he was working his regular assignment as the Kitchen Officer from 5:00 a.m. to 1:00 p.m.; that as the Kitchen Officer he was responsible for supervising the inmates who made up the kitchen crew; that Larry Uhazie is an Officer 5 with the rank of Lieutenant; that Uhazie is a supervisor of officers, including Gentry; that on September 5, 1987, Uhazie received a telephone call from Sgt. P. at 11:55 a.m.; that Sgt. P. told Uhazie that an inmate had told Sgt. P. that the inmate had been slapped by an officer; that Uhazie told Sgt. P. to send the inmate to his office; that the inmate told Uhazie that Gentry had placed his hand over the inmate's forehead and applied a steady pressure which brought the inmate to his knees and caused dizziness in the inmate; that the inmate told Uhazie that this was a wrestling hold created by Baron von Raschke and known as the "Iron Claw"; that Uhazie asked the inmate for the names of witnesses; that the inmate provided Uhazie with some nicknames; that Uhazie was unable to determine the identities of the witnesses based only upon the nicknames; that Uhazie contacted Gentry at home and asked him for the names of the 10-15 inmates on the kitchen crew; that Gentry could not remember all the names; that Gentry returned to DCI; that Gentry asked Uhazie for a union representative prior to entering the Security Suite; that Uhazie told Gentry that Gentry would not need a union representative because Uhazie was not investigating Gentry; that Uhazie told Gentry that Uhazie was investigating an inmate because Uhazie believed the inmate made a false accusation against Gentry; that DCI investigates whenever an inmate makes an accusation against an officer; that an inmate is subject to discipline if he makes a false accusation against an officer; that Uhazie did not allow Gentry to have a union representative available during the meeting; that Gentry provided the names of the inmates on the kitchen crew that day from a piece of paper containing the kitchen crew; that Gentry asked Uhazie what was happening; that Uhazie told Gentry that an inmate had alleged that Gentry had applied physical force on the inmate; that Uhazie interviewed three inmates; that Uhazie told Captain John Waltz, his relief, what happened and gave him the list to complete the investigation; that on September 6, 1987, Uhazie determined that half the inmates saw Gentry put a physical hold on the inmate; that Uhazie wrote an incident report; that Uhazie called Gentry and a union representative, Mel Elgersma, to the security office; that Uhazie told Gentry that an inmate had accused Gentry of applying a wrestling hold to the inmate; that Uhazie had Gentry write his statement on another incident report; that Gentry received a letter of discipline as a result of the inmate's allegations; and that the decision to discipline was not made by Uhazie.

10. That by refusing individually named Complainants requests for union representation in these interviews, the Respondent did not encourage or discourage membership in any labor organizations by discrimination in regard to hiring, tenure or other terms or conditions of employment.

11. That by refusing Complainants Draheim, Ganz, Oosterwyk, Miller and Wackett's requests for union representation in these interviews, the Respondent did not interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in Sec. 111.82 of SELRA.

12. That Complainant Gentry was advised that an allegation of misconduct had been made against him by an inmate, that Complainant Gentry was advised that an agent of the Respondent was investigating that allegation; that Complainant Gentry had a reasonable belief that the investigatory interview would result in disciplinary action, and that by refusing Complainant Gentry's request for union representation in this interview, the Respondent interfered with, restrained and coerced state employes in the exercise of their rights guaranteed in Sec. 111.82 of SELRA.

Based on the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That as to the individually named Complainant officers, the Respondent did not violate Sec. 111.84(1)(c) of SELRA by refusing to provide union representation during the interviews at issue here.

2. That as to Complainant officers Bev Draheim, Jerold Ganz, Bernard Oosterwyk, Thomas Miller and Donald Wackett, the Respondent did not violate Sec. 111.84(1)(a) of SELRA by refusing to provide union representation during the interviews at issue here.

3. That as to Complainant officer Billy Gentry, the Respondent did violate Sec. 111.84(1)(a) of SELRA by refusing to provide union representation at the investigatory interview of September 5, 1987.

On the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 2/

1. That the instant complaint of unfair labor practices is dismissed as to all alleged violations of Sec. 111.84(1)(c) of SELRA.

2. That the instant complaint of unfair labor practices is dismissed as to all alleged violations of Sec. 111.84(1)(a) of SELRA involving Complainants Draheim, Ganz, Oosterwyk, Miller and Wackett.

3. That the Respondent cease and desist from refusing to grant employe requests for union representation in investigatory interviews where the employe could reasonably believe that the investigation will result in disciplinary action and that the Respondent expunge all references to the subject matter of the investigatory interview from the personnel file of Complainant Gentry.

Dated at Madison, Wisconsin this 9th day of May, 1989.

By James W. Engmann
James W. Engmann, Examiner

2/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition

(Footnote 2/ is continued on page 5.)

(Footnote 2/ continued from page 4.)

with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

STATE OF WISCONSIN (DEPARTMENT OF EMPLOYMENT RELATIONS)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainants

On brief, the Union argues that the Weingarten rule requires union representation upon request for all investigatory interviews, that a municipal employer's refusal to permit representation interferes with protected employe rights if the scheduled interaction could reasonably affect a decision to discharge or discipline, and that this analysis should be applied to the state employes involved in this case.

As to Complainant Gentry, the Union argues that the best objective evidence of the reasonableness of a fear of discipline is the actual imposition of discipline as a result of an investigatory interview, that actual discipline imposed subsequent to an interview for which representation was requested is prima facie and unrebuttable evidence of the objective reasonableness of an employe's request for representation, that Gentry received a letter of reprimand as a direct result of an investigatory interview with his supervisor who extracted information from him that lead to further sources of information regarding the incident under investigation, and that denial of Gentry's request for union representation was an unfair labor practice.

As to Complainant Draheim, the Union argues that the next best evidence of the reasonableness of a fear of discipline is the imposition of a preliminary step toward discipline as a result of an investigatory interview; that objectively Draheim could have and did believe that the interview would affect a decision to discipline because that interview may in fact affect a future decision; that characterizing the interview as a "job instruction" was an attempt to squeeze it into one of the recognized exceptions to the rule requiring union representation upon request; that this interview was not a "job instruction" in that it was a formal discussion in the supervisor's office, it sought an admission from Draheim that she had violated a work rule which clearly frames the interview as an investigatory interview, and it resulted in a preliminary step being taken toward discipline; and that it was reasonable for Draheim to believe the interaction would affect a decision to discipline and so she had a right to act on that belief by requesting union representation.

As to Complainants Ganz, Oosterwyk, Miller and Wackett, the union argues that it is reasonable to fear for oneself during the investigation of the behavior of another because not stepping forward with evidence of another's misbehavior is also misbehavior and that the Division of Corrections policy guide on sexual harassment, the subject of the investigation, is objective evidence of the reasonableness of the representation requests by these four Complainants.

On reply brief, the Union argues that it is misleading for the Respondent to state that Complainant Draheim was not disciplined and that, contrary to the Respondent's position, it is not necessary to establish anti-union animus to prove a violation of concerted action rights.

Respondents

On brief, the Respondents argue that the record does not support a conclusion that the Respondent violated any right of the Complainants concerning organization or collective bargaining activities, that in order to establish a violation of Secs. 111.84(1)(a) and (c) of SELRA, the Complainant has to prove by a preponderance of the evidence that the action or decision complained of was motivated in whole or in part by anti-union animus, and that there is not a scintilla of evidence in the record that the decision of DCI to deny the individually named Complainants a union representative was motivated by anti-union animus.

The Respondents further argue that the individually named Complainants have no right to union representation at the meetings at issue here, that an employe's right to request representation in an interview is limited to situations where the

employe reasonably believes the investigation will result in disciplinary action, and that the Complainants introduced no evidence into the record that would support a finding that the employes reasonably believed that discipline would result.

The Respondents also argue that the named Complainants were not disciplined as a result of the investigatory interview for which they were denied a union representative, that employes are not disciplined after an investigatory interview unless they have a union representative, that the named Complainants were informed that they did not need a union representative, that the named Complainants, except for Gentry, were specifically advised that no discipline would result, that it was not reasonable for any of the named Complainants to believe that discipline would be imposed, and that no discipline did result.

Finally, the Respondents argue that it is necessary to focus on exactly what the purpose of the interviews were; that Complainants Ganz, Oosterwyk, Miller and Wackett were not asked about their conduct or activities but about another officer's conduct and they were interviewed at the request of the Union; that with respect to Complainant Draheim, there was no investigatory interview at all in that the meeting was merely a job counseling session; and that Complainant Gentry was not being investigated, was not asked questions concerning his conduct or activities and he was only asked for information on record which did not implicate him or have anything to do with work rules.

On reply brief, Respondents argue that Complainants' misunderstanding of the facts leads to their mistaken inferences; that the only basis for Complainant Gentry's concern that discipline might ensue was his knowledge, which was not known or supported by management, that he had in fact abused an inmate; that Draheim's job instruction did not lead to discipline and was not formal; and that in regard to the four other named Complainants, the policy quoted by the Complainants is immaterial to this situation. Finally, the Respondents argue that the cases cited by the Complainants are not on point, and that the three situations at issue herein are examples of when a union representative does not have to be afforded to an employe.

DISCUSSION:

The Complainant alleges that the Respondent violated Secs. 111.84(1)(a) and (c) of SELRA when the Respondent refused the requests for union representation by the individually named Complainants during conferences with the Respondent. The Respondent does not deny it refused the requests for union representation in these instances; instead, it alleged that its actions were not contrary to any law over which the Wisconsin Employment Relations Commission has jurisdiction. 3/

Sec. 111.84(1)(c) of SELRA

Sec. 111.84(1)(c) of SELRA makes it an unfair labor practice for an employer, individually or in concert with others, to:

> . . .encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. This paragraph does not apply to fair share or maintenance of membership agreements.

To establish a violation of this section, the Complainant must establish by a clear and satisfactory preponderance of the evidence that the individually named Complainant was engaged in protected concerted activity, that the Respondent was aware of said activity and hostile thereto, and that the Respondent's action was

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3/ The Respondent also alleges that its action was not contrary to the collective bargaining agreement. As the Complainant did not allege a contract violation, the issue of whether a contractual obligation existed on the part of the Respondent to allow union representation in these instances is neither discussed nor decided.

based at least in part upon said hostility. 4/

It appears that the Complainant has abandoned this allegation of unfair labor practices. In its brief in chief, it cites applicable statutes, including Secs. 111.82 and 111.84(1)(a) of SELRA, but it does not cite Sec. 111.84(1)(c) of SELRA. At no place in either its brief in chief or its reply brief does it cite Sec. 111.84(1)(c) of SELRA, or offer argument to support its allegation in its Complaint that Respondent violated Sec. 111.84(1)(c) of SELRA. If the Complainant had not abandoned this allegation, it has not shown by a clear and satisfactory preponderance of the evidence that the Respondent committed an unfair labor practice within the meaning of Sec. 111.84(1)(c) of SELRA. For this reason, this allegation is dismissed for all Complainants.

Sec. 111.84(1)(a) of SELRA

Sec. 111.84(1)(a) of SELRA makes it an unfair labor practice for an employer, individually or in concert with others, to:

> . . . interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in ss. 111.82.

Sec. 111.82 of SELRA declares that state employes:

> . . .shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing under this subchapter, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Such employes shall also have the right to refrain from any or all of such activities.

To establish an independent violation of Sec. 111.84(1)(a) of SELRA, the Complainant must establish that Respondent's action was likely to interfere with, restrain or coerce the individually named Complainants in the exercise of their protected rights stated above. 5/ The Complainants allege that the Respondents refusal to permit union representation is interference with protected employe rights in violation of Sec. 111.84(1)(a), Stats., if the scheduled interaction between employe and employer could reasonably affect a decision to discharge or discipline. In support, the Complainants cite NLRB v. Weingarten. 6/

In Weingarten, the National Labor Relations Board held that the employer's denial of an employe's request that her union representative be present at an investigatory interview which the employe reasonably believed might result in disciplinary action constituted an unfair labor practice in violation of the National Labor Relations Act because it interfered with, restrained and coerced the protected individual right of the employe to engage in concerted activities for mutual aid and protection. 7/ The Fifth Circuit Court of Appeals held that this was an impermissible construction of the NLRA and refused to enforce the Board's order. 8/ The Supreme Court reversed, stating:

> The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal meaning that "(e)mployees shall have the right. . .to engage in. . .concerted activities for the purpose of. . .mutual aid or protection." Mobil Oil

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4/ State of Wisconsin, Dec. No. 25393 (WERC, 4/88); State of Wisconsin (Department of Employment Relations) v. Wisconsin Employment Relations Commission, 122 Wis. 2d. 132 (1985).

5/ State of Wisconsin, Dec. No. 19630-A (McLaughlin, 1/84), aff'd Dec. No. 19630-B (WERC, 2/84).

6/ 95 S. Ct. 959, 420 U.S. 251, 88 LRRM 2689 (1975).

7/ 202 NLRB 446, 82 LRRM 1559 (1973).

8/ 445 F. 2d 1135, 84 LRRM 2436 (1973).

Corp. v. NLRB, 487 F. 2nd 842, 846, 83 LRRM 2823, 2827 (1973). 9/

The right to seek representation is not absolute:

> . . .the employe's right to request representation as a condition of participation in an interview is limited to situations where the employe reasonably believes the investigation will result in disciplinary action. 10/

The Commission has applied the standards of Weingarten to cases involving SELRA. 11/ The parties agree that this case turns on whether the employe "reasonably believe(d)" the investigation would result in disciplinary action which, the court said, is measured by objective standards under all the circumstances of each case. 12/

1. Complainants Ganz, Oosterwyk, Miller and Wackett

Although minor details were different in each of the four interviews involved here, the pertinent facts are the same. Each of these Complainants was called in to an interview with the Security Director and the Personnel Manager. Each asked for a union representative. Each request was denied. Each of these Complainants was advised that he would not need a union representative, that the investigation did not involve him, that the investigation involved allegations of sexual harassment by another officer, and that he would not be disciplined as a result of the interview. None of these four Complainants were disciplined.

The Complainants argue that there is always an objective basis for fearing for oneself during the investigation of another because not stepping forward with evidence of another's misbehavior is also misbehavior. The Complainants do not cite any authority that supports this argument. These Complainants were advised before the interview proper that they were not being investigated and that they would not be disciplined. Complainants do not point to any instance where the Respondent made such assurances and then proceeded to discipline anyway. Absent that, these four Complainants could not reasonably believe that the investigation would result in disciplinary action against them.

Therefore, the Respondent did not commit an unfair labor practice within the meaning of Sec. 111.84(1)(a) of SELRA by refusing the requests of these four Complainants for a union representative to be present during the interview at issue here. For this reason, the allegation that the Respondent committed an unfair labor practice within the meaning of Sec. 111.84(1)(a) of SELRA is dismissed as it relates to these four Complainants.

2. Complainant Draheim

The Complainants argue that characterizing the interview as a "job instruction" is an attempt by the Respondent to squeeze it into one of the exceptions recognized in Weingarten to the rule requiring union representation upon request.

> 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

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9/ Weingarten, 95 S. Ct. at 965, 420 U.S. at 258, 88 LRRM at 2692.

10/ Weingarten, 95 S. Ct. at 963-964, 420 U.S. at 257, 88 LRRM at 2691.

11/ State of Wisconsin, Dec. No. 13198-B (Greco, 8/75); State of Wisconsin, Dec. No. 15716-C (WERC, 10/79).

12/ Weingarten, 95 S. Ct. at 963-64, 420 U.S. at 237, 88 LRRM at 2691, at FN 5.

> interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative. 13/

The Complainants argue that the interview was not a run-of-the-mill, shop-floor conversation in that it was a formal discussion which took place in the supervisor's office. But DCI is not the run-of-the-mill shop; it is a prison. It is not unreasonable for DCI to want discussions between a Captain and an officer, especially about an issue as sensitive as confidentiality of medical records, to be held in the Captain's office away from the inmates. The Officer has an interest as well in not airing this type of issue in front of the inmates.

The Complainants also argue that the Captain sought an admission from Complainant Draheim that she had violated a work rule which clearly frames the interview as an investigatory one, citing NLRB v. Texaco, Inc. 14/ In Texaco, the admission was sought as part of its investigation with the goal of determining whether discipline was appropriate. Here, there is no investigation because the Respondent had declared that no discipline will ensue. The assertion that no discipline would occur as a result of the interview was not present in Texaco, and that assertion makes this meeting a job instruction rather than an investigatory interview.

The Complainants further argue that the interview resulted in a preliminary step being taken toward discipline in that Draheim was told that suspension without pay would be the next step after the notation in her performance evaluation, quoting Alfred M. Lewis, Inc. v. NLRB as follows:

> In (Lewis) the counseling sessions were not simple shop-floor training. The Board found that the counseling was an integral part of the disciplinary system and was deemed by management to be a preliminary stage in the imposition of discipline. At least one employee was told that discipline would be the next step under the system. 15/

However, no evidence is in this record that the counseling that occurred here was an integral part of the disciplinary system, or that it was deemed by management to be a preliminary stage in the imposition of discipline. Nor was the Complainant told that discipline would be the next step under the system. She was told that discipline would ensue if she violated the work rule being discussed. Complainants argue a "just cause" analysis that if the Complainant did not have this first "black mark" on her record, the discipline would be less severe if she gets a second black mark. However, this was not a disciplinary warning not to do a certain behavior again, nor was it an oral reprimand. The Captain did not accuse the Complainant of violating the work rule, nor did she admit it. The Complainant was only advised of the consequences of violating the rule which is not a step in the just cause analysis of progressive discipline.

Finally, the Complainants argue that the Complainant objectively could have and did reasonably believe that the interview would affect a decision to discipline because that interview may affect a future decision to discipline her. The standard in Weingarten, however, is not whether the employe believes the interview would affect a decision to discipline but whether the employe believes the interview will result in disciplinary action. Here, the Complainant was advised the interview was a job instruction and that no discipline would ensue as a result of the interview. The Complainants offered no evidence that the Captain's assertions were fraudulent. Certainly this would be a different case if, after promising no discipline, the Captain had disciplined the Complainant. She had no reason not to believe him. Thus, the Complainant had no reasonable basis to believe the interview would result in discipline. In fact, it did not. Therefore, the Respondent did not commit an unfair labor practice within the meaning of Sec. 111.84(1)(a) of SELRA when it refused Complainant Draheim's request for a union representative and for this reason this allegation of unfair

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13/ Weingarten, 95 S. Ct. at p. 964, 420 U.S. at 257-258, 88 LRRM at 2691, quoting Quality Manufacturing Co., 195 NLRB 195, 199, 79 LRRM 1269, 1271.

14/ 108 LRRM 2850, 2851 (9th Cir., 1986).

15/ 587 F.2d 403, 99 LLRM 2841, 2845 (9th Cir. 1978)

labor practices as it relates to this Complainant is dismissed.

3. Complainant Gentry

The Respondents argue that Gentry was not disciplined as a result of the investigatory interview for which he was denied a union representative, that he was not disciplined until after the September 6, 1987, investigatory interview for which he was provided union representation. This is the kind of distinction that devours the rule. To deny union representation at the first investigatory interview, during which evidence is secured, follow it up with a second investigatory interview, after which discipline ensues, undermines the policy behind Weingarten, which recognizes the right of representation when it is most useful to both employe and employer: at the beginning of the investigation process.

The Respondents also argue that the Respondent was not being investigated, that instead the inmate who made the allegation was being investigated. This is a distinction without a difference, for by investigating the inmate, the Respondent is also investigating the Complainant. If the Respondent investigates the inmate and determines he lied, the Complainant is cleared. But if the Respondent investigates the inmate and determines his allegation is true, then the Complainant is guilty of a work rule violation. So the distinction between investigating the inmate versus investigating the Complainant fails. What the Respondent was doing was investigating the allegations made by the inmate against the Complainant.

The Respondents also argue that the Complainant was asked no questions concerning his conduct or activities. The record is unclear on this point. But it is hard to believe that the Lieutenant, investigating an allegation by an inmate against an officer and believing said allegation was false, would not ask the officer but would rely on the testimony of other inmates. The Respondent also argues that it is an absurd contention that the Complainant is entitled to a union representative every time a supervisor asks for the names of the kitchen crew. Of course, this is correct.

But here the Lieutenant had told the Complainant that an inmate had made an allegation of misconduct against the Complainant. Without an assurance that the interview would not be cause for discipline, the Complainant could reasonably believe that the investigation could result in disciplinary action. It is certainly reasonable to believe that the investigation will result in discipline when one is told that an allegation of misconduct has been alleged, that one knows that a finding of misconduct will result in discipline, and when one is interviewed regarding said conduct. This is exactly the situation where the court recognized the employe's right to union representation in Weingarten:

> A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or intimidated to relate 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. 16/

Thus, Complainant Gentry reasonably believed that the investigation would result in disciplinary action. Therefore, the Respondent committed an unfair labor practice within the meaning of Sec. 111.84(1)(a) of SELRA when it denied Complainant Gentry's request to union representation in an interview where he reasonably believed the investigation would result in disciplinary action.

Dated at Madison, Wisconsin this 9th day of May, 1989.

By James W. Engmann
James W. Engmann, Examiner

16/ Weingarten, 95 S. Ct. at 965, 420 U.S. at 262-63, 88 LRRM at 2693.