STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, COUNCIL 24, AFL-CIO, Complainant, vs. THE STATE OF WISCONSIN, Respondent.	Case 304 No. 44716 PP(S)-176 Decision No. 26739-B

Appearances:
Mr. Richard V. Graylow, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Stree
Mr. David J. Vergeront, Legal Counsel, Department of Employment Relations, State of Wisconsin, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the State of Wisconsin.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO (hereinafter Complainant, WSEU or Union) filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission on October 19, 1990, alleging that the State of Wisconsin (hereinafter Respondent, State or Employer) had committed unfair labor practices in violation of Sections 111.84(1)(a) and (c) of the State Employment Labor Relations Act (SELRA). On January 9, 1991, the Commission 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 as provided for in Sec. 111.07(5), Stats. On March 4, 1991, the Respondent filed an answer to complaint in which it denied that it had committed unfair labor practices in violation of SELRA. In said answer the Respondent also alleged three affirmative defenses to the complaint. In said answer, the Respondent also filed a motion to dismiss and a motion to strike. In Dec. No. 26739-A, the Examiner issued an Order on March 14, 1991, denying Respondent's motion to dismiss and motion to strike. A hearing on the complaint was held on March 14, 1991, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. The hearing was transcribed, a copy of which was received on March 27, 1991. The parties filed briefs, the last of which were received on April 29, 1991. The parties filed a reply brief or a waiver thereof, the last of which was received on June 20, 1991. The Examiner, having considered the evidence and arguments of the parties, makes and issued the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO (hereinafter Complainant, WSEU or Union), is a labor organization within the meaning of Sec. 111.81(12), Stats. As such, the Union represents the collective bargaining unit for security and public safety employes delineated in Sec. 111.825(1)(d), Stats. The Union maintains its office at 5 Odana Court, Madison, Wisconsin 53719.

2. The State of Wisconsin (hereinafter Respondent, State or Employer) is the employer within the meaning of Sec. 111.81(8), Stats. The Respondent operates the Oakhill Correctional Institution (OCI) and the University Hospital and Clinics (UWH&C). The Respondent delegates responsibility for collective bargaining to the Department of Employment Relations which maintains its office at 137 East Wilson Street, Madison, Wisconsin 53707-7855.

3. The Union and the Employer have been parties to a collective bargaining agreement at all times germane herein. Said agreement provides in part as follows:

ARTICLE II

. . .

Section 11: Visitations

2/11/1 The Employer agrees that non-employe officers and representatives of the WSEU or of the International Union shall be admitted to the premises of the Employer during working hours upon advance notice, 24 hours if possible, to the appropriate Employer representative. Such visitations shall be for the purpose of ascertaining whether or not this Agreement is being observed by the parties and for the adjustment of grievances. The Union agrees that such activities shall not interfere with the normal work duties of employes. The Employer reserves the right to designate a private meeting place whenever possible or to provide a representative to accompany the Union officer where operational requirements do not permit unlimited access.

. . .

ARTICLE IV

. . .

Section 6: Number of Representatives and Jurisdictions

4/6/1 (BC, SPS, T) Council 24 shall designate a total of up to 750 grievance representatives who are members of the bargaining units for the bargaining units.

. . .

Section 9: Discipline

. . .

4/9/2 An employe shall be entitled to the presence of a designated grievance representative at an investigatory interview

(including informal counseling) if he/she requests one and if the employe has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

4. Each of the following individuals is an employe of the State and is represented by the Union: Brian G. Beahm, Samuel R. Clemons, James L. Gunnelson, James D. Martin, Jerrold A. Schultz and John R. Wollin. Each of these individuals is an Officer 3 on the UWH&C Security Ward. The Superintendent of the Division of Adult Institutions is Catherine J. Farrey.

5. In a letter dated February 8, 1990, Farrey wrote a letter to Beahm, Clemons, Gunnelson, Martin, Schultz and Wollin in relevant part as follows:

> Complaints of sexual harassment and other potential work rule violations have been made regarding staff of the Security Ward. In order to ensure an impartial and expeditious investigation into these allegations, I have made the decision to reassign you effective Thursday, February 8, 1990, to OCI pending the outcome of this investigation.

6. In a letter dated February 23, 1990, Farrey wrote to Gunnelson and Martin in relevant part as follows:

> You are scheduled for an investigatory interview on February 28, 1990, at (various times). This investigatory interview is in regard to complaints of sexual harassment and a hostile work environment at the U. W. Hospital Security Ward. It is alleged that the sexual harassment and the hostile work environment is the responsibility of certain Security Ward staff, other than yourself.
>
> You will be allowed union representation. However, you will not be allowed a personal attorney, as we are not aware of any criminal charges connected with this investigation.

7. In a letter also dated February 23, 1990, Farrey wrote to Beahm, Clemons, Schultz and Wollin in relevant part as follows:

> You are scheduled for an investigatory interview on March 1, 1990, at (various times). This investigatory interview is in regard to complaints of sexual harassment and a hostile work environment at the U. W. Hospital Security Ward. It is alleged that your conduct constituted or contributed to sexual harassment or the hostile work environment, which, if true, would be a violation of work rules #1, 2, and 5.
>
> You will be allowed union representation. However, you will not be allowed a personal attorney, as we are not aware of any criminal charges connected with this investigation.

8. James D. Martin is also a Steward for Local 3021. In a letter to Glen Henderson, Security Director of the Oakhill Correctional Institution, dated February 26, 1990, Martin wrote that, on instructions from Don Frisch, field representative for Council 24, and Marty Beil, executive director of Council 24, Richard V. Graylow would represent the employes in the investigatory interviews scheduled for February 28 and March 1, 1990.

9. In a letter dated February 27, 1990, Farrey wrote to Martin and Gunnelson in relevant part as follows:

> You are scheduled for an investigatory interview on February 28, 1990 (at various times). As I informed you in my February 23, 1990, letter, this is in regard to complaints of sexual harassment and a hostile work environment at the U. W. Hospital Security Ward involving staff other than yourself.
>
> I also informed you in my February 23, 1990, letter that you would be allowed union representation. This letter is to reconfirm that you will not be allowed to have an attorney present as we are not aware of any criminal charges connected with this investigation.
>
> Although you are not alleged to have personally engaged in any behavior that constituted or contributed to the alleged hostile environment or sexual harassment at the U. W. Security Ward, you are required to participate in this investigatory interview. The investigators wish to meet with each of you in the interests of a full, fair, and complete investigation.
>
> You must appear at this investigatory interview unless yhou (sic) receive specific authorization from me not to attend. Failure to appear could be a violation of Work Rule #1 and could result in disciplinary action.

10. In a letter also dated February 27, 1990, Farrey wrote to Beahm, Clemons, Schultz and Wollin in relevant part as follows:

> You are scheduled for an investigatory interview on March 1, 1990, at (various times) for the reasons stated in my February 23, 1990, letter to you (copy attached).
>
> The purpose of this letter is to reconfirm that you will be allowed union representation but will not be allowed to have an attorney present as we are not aware of any criminal charges connected with this investigation.
>
> As you are facing allegations, your presence at this scheduled investigatory interview is mandatory unless you receive specific authorization from me not to appear. Failure to appear could be a violation of Work Rule #1 and could result in disciplinary action.

11. In a letter dated February 27, 1990, and addressed "To whom it may concern" at the Oakhill Correctional Institution, WCCS-Oregon, WCCS-Thompson, and University Hospital Security, Local 3021 President John Thompson wrote as follows:

> The union has designated Richard Graylow as a designated Union Rep. for Local 3021 immediately.

12. At hearing the parties stipulated to the following facts:

> 1. Joint Exhibit 1 is a true and correct copy of the effective collective bargaining agreement between Complainant and Respondent.
>
> 2. Prior to February 8, 1990, there were allegations of sexual harassment and other potential rule violations

regarding certain correctional officers at the Security Ward of the University of Wisconsin Hospitals and Clinics in Madison. While the allegations were under investigation, the following individuals were temporarily reassigned to Oakhill Correctional Institution, hereinafter OCI: Samuel R. Clemons, James D. Martin, James L. Gunnelson, John R. Wollin, Brian G. Beahm, and Jerrold A. Schultz.

3. Those Correctional Officers were so notified. (See Finding of Fact 5 above).

4. On or about February 23, 1990, the Correctional Officers were advised of investigatory interviews to be scheduled at various times on February 28 and March 1, 1990. These letters also advised those Correctional Officers regarding the purpose of the interview. (See Findings of Fact 6 and 7 above).

5. On or about February 26, 1990, Complainant by James D. Martin, Steward of Local 3021, advised Respondent that the Correctional Officers have requested that Richard V. Graylow, Esquire, represent them at the investigatory interview, and further advised Respondent that Attorney Graylow would present himself for that purpose. (See Finding of Fact 8 above).

6. On or about February 27, 1990, Respondent advised the Correctional Officers, among other things, that they would be allowed union representation at the investigatory interview, but would not be permitted to have an attorney as there were no criminal charges. (See Findings of Fact 9 and 10 above).

7. On February 28, 1990, prior to the first investigatory interview, Attorney Graylow appeared at OCI and presented a letter from Complainant designating him as union representative. (See Finding of Fact 11 above).

8. Respondent instructed Attorney Graylow that he could not represent the Correctional Officers at the investigatory interviews, and Attorney Graylow left the premises.

9. The investigatory interviews were conducted with a contractually designated union representative who is a classified employe of Respondent in the appropriate bargaining unit in attendance.

10. Richard V. Graylow, Esquire, at the times material to the stipulated facts, was not an employe of the State of Wisconsin.

Based upon the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That by refusing to allow the Complainant's attorney to represent employes during investigatory interviews, the State did not interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in Sec. 111.82 of SELRA and, thus, did not commit an unfair labor practice within the meaning of Sec. 111.84(1)(a) of SELRA.

2. That by refusing to allow the Complainant's attorney to represent employes during investigatory interviews, the State did not encourage or discourage membership in any labor organization in regard to terms or conditions of employment and, thus, did not commit an unfair labor practice within the meaning of Sec. 111.84(1)(c) of SELRA.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

IT IS ORDERED that the complaint in the instant matter be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin, this 20th day of November, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
James W. Engmann, Examiner

1/ 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 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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Union

On brief, the Union argues that the right of these state employes to representation was effectively denied in violation of Sec. 111.84(1)(a), Stats.; that legal counsel should have been allowed to appear and to represent these employes; that the right to representation in these circumstances was positively established and explained by the U.S. Supreme Court in NLRB v. Weingarten, 420 U.S. 251, 95 S.Ct. 959, 88 LRRM 2689 (1975); that the Commission has also recognized and developed this right, citing various cases; that the reason stated for not allowing legal counsel to participate was because of the absence of criminal charges; that this reason is specious and legally without merit; that legal counsel should have been allowed to participate as a representative during the investigative interviews conducted at OCI on February 28, 1990; and that appropriate remedial orders should be entered.

On reply brief, the Union argues that the stated reason for not allowing legal counsel into OCI was the absence of criminal charges or a criminal investigation; that this reason is specious and without merit; that the State admits that it was conducting an investigation which could lead to discipline; that Weingarten is not limited to criminal investigations; that the State's reliance on the absence of criminal charges is misplaced and simply incorrect; and that representational rights are not limited to the criminal arena.

The Union also argues that the State's brief devoted the majority of it brief to creating and arguing reasons which were not used by OCI in removing legal counsel; that the reasons include that legal counsel was not a state employe nor was he a Union steward, and that an Arbitration Award precluded legal counsel's appearance; that said reasons are specious and concocted; that the Local Union designated legal counsel as a local union representative prior to the investigatory interview; that the employes requested legal counsel to represent them; and that said requests were denied by the State.

Finally, the Union argues that the Commission has concurrent jurisdiction with the Courts to apply and adjudicate the operative sections of SELRA; that as such the Union filed the instant charge with the Commission alleging violations of Secs. 111.80(1)(a) and (c), Stats.; that the State defends based, in part, upon Sec. 111.84(1)(e), Stats.; that the Union is not alleging a breech of an Arbitration Award; that this Commission is not and cannot be bound by an Arbitration Award which does not interpret Secs. 111.84(1)(a) and (c), Stats.; and that the Commission has never deferred to an Arbitration Award given allegations of Sec. 111.84(1)(a) and (c), Stats.

Respondent

On brief, the Respondent argues that the Complainant has failed to meet its burden of proof and persuasion; that Complainant must demonstrate by clear and satisfactory preponderance of the evidence that Respondent's aggrieved conduct tended to or was likely to violate the employes rights under Secs. 111.84(1)(a) and (c), Stats.; and that Complainant has failed to meet that required standard.

The Respondent also argues that an employe upon request has a right to representation at an investigatory interview, citing Weingarten; that the right is one which can be waived by an employe or which can be modified or waived entirely by a union under a collective bargaining agreement, citing Prudential Ins. Co. of America, 108 LRRM 3041 (5th Cir. 1981); and that there is no reported decision which entitles an employe to have an attorney present at an investigatory interview.

In addition, the Respondent argues that the Complainant has agreed to a modification of an employe's right to representation by contract; that the parties have agreed that an employe is entitled to a designated grievance representative as a means of complying with Weingarten; that pursuant to Article 4, Section 6(1), grievance representatives are members of the bargaining unit; that such a person was present during the interviews; and that, in all respects, the Respondent complied not only with the contract but with the law under Weingarten.

The Respondent further argues that legal counsel was properly barred from attending the investigatory interviews; that while legal counsel was given the label of designated Union representative, he was not a designated grievance representative nor was he a member of the bargaining unit; that a union representative such as legal counsel does not have access to an investigatory interview under Article II, Section 11; that while non-employe Union representatives are allowed access to OCI, there is no evidence that legal counsel's request for access was for either of the two contractual purposes; that, instead, the avowed purpose for access to OCI was to attend an investigatory interview which are addressed by another Article.

Finally, the Respondent argues that in a previous Arbitration Award the arbitrator found that the right of visitation by any Union representative under Article II, Section 11, does not apply to investigatory interviews; that the specific provision of Article IV, Section 4/9/2, apply to investigatory interviews; that only a "designated grievance representative" can be present at an investigatory interview and one was present; that, therefore, a union field representative did not have a contractual right to attend an investigatory interview; and that legal counsel did not have a right to attend the investigatory interviews.

The Respondent requests that the complaint be dismissed.

DISCUSSION

The Complainant alleges that the Respondent violated Secs. 111.84(1)(a) and (c) of SELRA when the Respondent refused the requests of individual bargaining unit members to be represented in investigatory interviews with the Respondent by an attorney specified by the Complainant. The Respondent does not deny that it refused said requests; instead, it alleges that its actions were not violative of SELRA.

Section 111.84(1)(c) of SELRA

Section 111.84(1)(c) of SELRA makes it an unfair labor practice for an employer 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 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 based at least in part upon said hostility. 2/

It appears that the Complainant has abandoned this allegation of unfair labor practice. In its brief in chief, its statement of the issue is limited to whether the rights of the employes under Sec. 111.84(1)(a) of SELRA were violated. Section 111.84(1)(c) of SELRA is not mentioned. In its reply brief, Sec. 111.84(1)(c) of SELRA is mentioned only in the conclusion section of the brief, arguing that the arbitration award cited by the Respondent goes to a violation of Sec. 111.84(1)(e) and not Secs. 111.84(1)(a) and (c) of SELRA. In the body of the brief, the Complainant argues only a violation of Sec. 111.84(1)(a) of SELRA.

If the Complainant has not abandoned the Sec. 111.84(1)(c) of SELRA 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.

Section 111.84(1)(a) of SELRA

Section 111.84(1)(a) of SELRA makes it an unfair labor practice for an employer to:

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

Section 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 the Respondent's action was likely to interfere with, restrain or coerce the individually named Complainants in the exercise of

---

2/ 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).

their protected rights stated above. 3/ The Complainant alleges that the Respondent's refusal to allow an attorney chosen by the union to be present during investigatory interview of bargaining unit members interfered with protected employe rights in violation of Sec. 111.84(1)(a) of SELRA. In support, the Complainant cites NLRB v. Weingarten. 4/

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 employer to engage in concerted activities for mutual aid and protection. 5/ The Fifth Circuit Court of Appeals held that this was an impermissible construction of the NLRA and refused to enforce the Board's order. 6/ 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 Corp. v. NLRB, 487 F. 2d 842, 846, 83 LRRM 2823, 2827 (1973). 7/

The right to have assistance in an investigatory interview is not absolute.

> . . .the right arises only in situations where the employee requests representation. In other words, the employee may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative. . . . (In addition), exercise of the right may not interfere with legitimate employer prerogatives. 8/

The Commission has applied the standards of Weingarten to cases involving SELRA. 9/ The parties agree that the investigatory interviews in question here come under Weingarten and that, therefore, each of the employes had a right to be represented by the Union in the investigatory interview. 10/ The parties

---

3/ State of Wisconsin, Dec. No. 19630-A (McLaughlin, 1/84), affd. Dec. No. 19630-B (WERC, 2/84).

4/ 95 S. CT. 959, 420 U.S. 251, 88 LRRM 2689 (1975).

5/ 202 NLRB 446, 82 LRRM 1559 (1973).

6/ 445 F. 2d 1135, 84 LRRM 2436 (1973).

7/ Weingarten, 88 LRRM at 2692.

8/ Id. at 2691.

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

10/ Six employes were involved in the investigatory interviews at issue here. Two of the employes were advised by the Employer that they were not the subject of the investigation. The parties make no distinction between

also agree that each of the employes in question was indeed allowed a union representative. The parties disagree as to whom that representative should have been. The Complainant alleges that the Respondent violated the employes' Weingarten rights by not allowing the employes to be represented by an attorney of the employes' choice, an attorney designated by the Union president as a grievance representative. The Respondent alleges that it met the Weingarten standard by allowing the employes to be represented by designated grievance representatives, as specified in the collective bargaining agreement.

The Commission was faced with a similar situation in State of Wisconsin (hereinafter Cantwell). 11/ In that case, the Employer refused to allow Complainant Cantwell to be represented by a field representative of the Union; instead, the Employer allowed Cantwell to choose between being represented by the union steward, a designated grievance representative under the collective bargaining agreement, or foregoing the investigatory interview. The Union argued on appeal to the Commission that the State cannot condition the holding of the interview based on the union representative selected by the employe. The Commission wrote as follows:

> The Complainant Union contends that Cantwell had a fundamental right to select the representative to accompany him at the investigatory interview and therefore, the State did not have a legitimate employer prerogative to condition the interview on a certain representative being present. However, what the Union has failed to consider is the specific language and procedure which the parties have negotiated regarding union representation and investigatory interviews.
>
> . . .
>
> The collective bargaining agreement provides that "an employe shall be entitled to the presence of a designated representative at an investigatory interview." (The field representative) was not the designated grievance representative. . . .
>
> . . .In Weingarten, the Court stated that the right to union representation at an investigatory interview "may not interfere with legitimate employer prerogatives" and "the employer has no obligation to justify his refusal to allow union representation". In this matter the state denied Cantwell's request to permit (the field representative) to be present at the meeting since the pertinent provisions of the collective bargaining agreement were not complied with; namely, (1) (the field representative) was not the designated grievance representative, and (2) (the field representative) did not give the 24 hour advance notice of his intended visitation. Obviously, it is a "legitimate employer prerogative" to adhere to the provisions of the collective bargaining agreement and thereby maintain the underlying reasons for the provisions involved--an efficient and orderly

---

these two employes and the four employes who were under investigation. For purposes of this decision, the Examiner will operate as if all six qualified for Weingarten rights.

11/ Dec. No. 15716-C (WERC, 10/79).

operation. 12/

There are some factual differences in this case. First, the Union gave 24 hours notice of Graylow's appearance. Second, the Union attempted to designate Graylow as a designated union representative by a letter from the Union president. Third, Graylow is an attorney-at-law, not a union field representative. None of these facts, however, change the basic Cantwell analysis.

The 24-hour notice requirement, quoted in Finding of Fact 3 above, was of concern to the Commission in Cantwell because the State stated in that case that it had problems with the field representative "visiting the institution in his Representative capacity without the 24 hour notice and that when higher levels of union representatives were present that the State's labor relations specialists should also be involved." 13/ Even if the field representative had given the 24 hour notice in Cantwell, however, that would have gained him access to the facility "for the purpose of ascertaining whether or not this Agreement is being observed by the parties and for the adjustment of grievances," as specified in Article II, Section 11 of the agreement between the parties. Thus, a 24 hour notice would not have gained the field representative access to the investigatory interviews, which are governed by another Article in the contract. The same is true in this case.

As for the Union president's letter dated February 27, 1990, specifying Graylow as a designated grievance representative, it is not in dispute that the reason for Graylow's appearance was to represent the employes in the investigatory interviews. Article IV, Section 9, of the agreement between the parties covers investigatory interviews, stating as follows:

> 4/9/2 An employe shall be entitled to the presence of a designated grievance representative at an investigatory interview (including informal counseling) if he/she requests one and if the employe has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

Article IV, Section 6 of the agreement defines grievance representatives as follows:

> 4/6/1 (BC, SPS, T) Council 24 shall designated a total of up to 750 grievance representatives who are members of the bargaining units for the bargaining units.

The parties stipulated that Graylow was not a member of the bargaining unit. The contract is clear that the designated grievance representative must be a member of the bargaining unit. Thus, the attempt to name Graylow as a designated grievance representative by the Union president fails for Graylow does not meet the contractual requirements to be a grievance representative; that is, he is not a member of the bargaining unit.

Weingarten grants an employe a right to union representation in an investigatory interview which the employe reasonably believes will result in disciplinary action. It does not specify who that representative must be. And although the Commission does not specifically say in Cantwell that the Union

---

12/ Cantwell at 6-7.

13/ Cantwell at 6.

can agree to limits on Weingarten rights through the collective bargaining process, the Commission's decision is based on that assumption. Nonetheless, it is implicit in the Union's argument that Weingarten rights can not be so limited by the collective bargaining agreement.

But the Commission's assertion in Cantwell that "it is a 'legitimate employer prerogative' to adhere to the provisions of the collective bargaining agreement and thereby maintain the underlying reasons for the provisions involved--an efficient and orderly operation" 14/ allows for the limitation and the waiver of Weingarten rights through a collective bargaining agreement.

In Prudential Insurance Co. v. NLRB, the Court faced the issue of whether an employe's Weingarten rights can be waived by the bargaining agreement. The Court said:

> Other congressionally given fundamental rights, such as the right to strike, may be bargained away contractually by the union. Since the right to representation only inheres upon the employee's request, it is clear that the employee's silence can be an effective waiver of the right. Since the individual can waive his Weingarten right and the Supreme Court has recognized the right of a contractual waiver for other such fundamental rights, it would appear that a contractual waiver of the Weingarten right is possible.
>
> Identifying the Weingarten right as an individual right does not mean that it cannot be contractually waived by the union. A union is allowed a great deal of flexibility in serving its bargaining unit during contract negotiations. If makes concessions and accepts advantages it believes are in the beat interest of the employees it represents. This flexibility includes the right of the union to waive some employee rights, even the employee's individual statutory rights. Courts which have invalidated a clear contractual waiver of an employee's individual statutory right have done so only when the waived right affects the employee's right to exercise his basic choice of bargaining representative. The union should therefore be able to waive the employee's Weingarten right for other concessions during negotiations. 15/

The Court stated that such a waiver must be "clear and unmistakable". 16/ The Court found such a waiver in Prudential. In 1956, the parties agreed to language which stated that the Union should not interfere with the right of the Employer to "interview any Agent with respect to any phase of his work without the grievance committee being present." Weingarten was decided in 1975. During the negotiations for the three contracts subsequent to Weingarten, the Employer stated that the language in the contract waived said rights and the Union attempted to negotiate Weingarten rights into the contract. Given the Employer's position and the Union's acquiescence, the Court stated it was unmistakable that the Union had waived the Weingarten right.

14/ Cantwell at 7.

15/ 108 LRRM 3041, 3043 (5th Cir. 1981), (citations omitted).

16/ Id.

The record in this case does not indicate when the language in question came into existence. It was certainly present in 1979 when the Commission determined in Cantwell that the State's refusal to allow the union's field representative to represent a unit member in a Weingarten interview did not violate Sec. 111.84(1)(a) and (b), Stats. Here the parties contractually agreed sometime before 1979, and possibly after the decision in Weingarten, to limit the right of representation in investigatory interviews to designated grievance representatives who are members of the bargaining unit. Since the Union has not negotiated the right to have someone other than a designated grievance

representative represent employes in investigatory interviews, the State commits no offense in limiting that right to what has been agreed upon by the parties in their agreement.

As to the third difference, the Union makes much of the State's statement that as no criminal charges are connected with the investigation, the employes would not be allowed a personal attorney. The Union argues that this stated reason is specious and without merit. Such is not the case. As long as the Employer's action relates to the employe's employment, Weingarten governs the employe's representational rights in an investigatory interview. However, if the Employer had been investigating criminal charges, as the State is capable of doing, the employe's rights in an investigatory interview leave the realm of labor law and move into the world of criminal and constitutional law. Thus, if the State had been investigating these employes not only for violations of work rules but criminal laws as well, they may have had a right to have an attorney present, but said right would not be a Weingarten right. Otherwise, the fact that Graylow is an attorney makes no difference in the Cantwell analysis.

For these reasons, I conclude that the Respondent did not violate Sec. 111.84(1)(a) of SELRA when it refused to allow attorney Graylow to represent employes in investigatory interviews and, therefore, dismiss this allegation.

As there is no finding of a violation of either Sec. 111.84(1)(a) or Sec. 111.84(1)(c) of SELRA, the complaint is dismissed in its entirety.

Dated at Madison, Wisconsin, this 20th day of November, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
James W. Engmann, Examiner