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-C

Appearances:

Mr. Richard V. Graylow, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, WI 53703-2594, appearing on behalf of the Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO.

Mr. David J. Vergeront, Legal Counsel, Department of Employmen Relations, State of Wisconsin, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the State of Wisconsin.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner James W. Engmann having, on November 20, 1991, issued Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in the above matter, wherein he dismissed an unfair labor practice complaint filed by Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, wherein it was alleged that the State of Wisconsin had committed unfair labor practices within the meaning of Secs. 111.84(1)(a) and (c), Stats.; and AFSCME having thereafter filed a petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.07 and 111.84(4), Stats.; and the parties thereafter having filed written argument in support of and in opposition to the petition, the last of which was received on February 3, 1992; and the Commission having considered the matter and being fully advised in the premises, makes and issues the following

ORDER 1/

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 10th day of March, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(footnote continued on Page 3)

1/ (footnote continued from Page 2)

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

STATE OF WISCONSIN

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The complaint alleges that the State of Wisconsin violated Secs. 111.84(1)(a) and (c), Stats., by refusing to allow employes to be represented during an investigatory interview by an AFSCME attorney and agent.

The Examiner's Decision

The Examiner dismissed the complaint concluding that the State of Wisconsin's refusal to allow an AFSCME attorney and agent to represent employes during investigatory interviews did not violate Secs. 111.84(1)(a) or (c), Stats. In his decision, the Examiner reasoned as follows:

> 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:
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> > 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/

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

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

7/ Weingarten, 88 LRRM at 2692.

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 legiti-mate employer prerogatives. 8/

The Commission has applied the standards of Weingarten to cases involving SELRA. 9/ The parties agree that the investi-gatory 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 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

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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 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).

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 negoti-ated regarding union representation and investigatory interviews.
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> . . .
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> 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. . . .
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> . . .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 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.

12/ Cantwell at 6-7.

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.

13/ Cantwell at 6.

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 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 (sic) 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.
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> 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 (sic) makes concessions and accepts advantages it believes are in the beat (sic) 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

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14/ Cantwell at 7.

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 (sic) right.

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,

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

16/ Id.

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 to the alleged violation of Sec. 111.84(1)(c), Stats., the Examiner dismissed same based on a determination that AFSCME had abandoned said allegation and/or failed to meet its burden of proof.

Discussion

On review, AFSCME asks that the Commission reverse the Examiner's dismissal of the complaint. More specifically, AFSCME argues that the Examiner's reliance upon State of Wisconsin, Dec. No. 15716-C (WERC, 10/79) was inappropriate because the facts in that case are materially different than those herein. In that regard, AFSCME argues that here, unlike State of Wisconsin, the State was provided with the appropriate 24-hour notice. AFSCME further argues that the Examiner erred when concluding that the collective bargaining agreement restricts the rights of employes to choose their own representative. In this regard, AFSCME argues that the contract cannot restrict the Weingarten rights of employes. In the alternative, AFSCME argues that the Union attorney and agent became "a member of the bargaining unit" within the meaning of Article IV, Section 6, of the bargaining agreement when the AFSCME attorney and agent was designated by AFSCME as a "Union" representative.

Given the foregoing, AFSCME urges the Commission to reverse the Examiner.

The State urges the Commission to affirm the Examiner's decision. The State argues that the Examiner properly concluded that the collective bargaining agreement can limit an employe's rights to representation during an investigatory interview; and that the parties' collective bargaining agreement did not allow the employe to be represented by the AFSCME attorney and agent.

Given the foregoing, the State asks the Commission to affirm the Examiner.

We have reviewed the Examiner's decision and the parties' arguments on review. We conclude that the Examiner has thoroughly and correctly responded to all arguments made by AFSCME herein with the sole exception of the assertion on review that the attorney and agent became a "member of the bargaining unit" when designated as a "Union" representative. We find this argument to be unpersuasive as it is not supported by the plain meaning of the contractual language in question nor by any past practice or bargaining history.

Given the foregoing, we find it unnecessary to make further comment and have affirmed the Examiner's decision in its entirety.

Dated at Madison, Wisconsin this 10th day of March, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner