STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY
BRANCH 3

WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, AFL-CIO,
Petitioner,

vs.
WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent.

Case No. 92-CV-1444
Decision No. 26739-C

MEMORANDUM DECISION and ORDER

Petitioner, ("WSEU"), seeks review of a decision of the Wisconsin Employment Relations Commission, ("WERC"), which held that the State of Wisconsin, ("employer"), did not commit an unfair labor practice when it refused to allow a particular designee of WSEU, ("Attorney Graylow"), to appear with members of the union, ("employees"), summoned before the employer for investigatory interviews.

FACTS

Briefly stated, the facts of this case are that six members of WSEU, correctional officers on the security ward of the University Hospitals and Clinics, were notified that they were scheduled to appear for investigatory interviews that were being conducted by their employer, State of Wisconsin. Through the union steward, the employees requested that Attorney Richard Graylow, a private attorney who represents the union, be present at the interviews. The day following the announced interviews, Attorney Graylow was named a "designated union rep" by the president of WSEU. The employer refused to permit Attorney Graylow to attend the interviews.

WSEU and the State of Wisconsin had a collective bargaining agreement ("CBA"), that addressed investigatory interviews. [CBA Art. IV, Sec. 9] The CBA authorized employees to have "a designated grievance representative" present at investigatory interviews. The CBA provided that. The union "designate[ ] a total of up to 750 grievance representatives who are members of the bargaining units for the bargaining units.' [Id. at Sec. 6]. A union grievance representative designated by the CBA did attend the investigatory interviews.

WSEU filed an unfair labor practice complaint with WERC claiming that the employer's refusal to permit Attorney Graylow to be present at the interviews violated the State Employment Labor Relations Act, ("SELRA"), Sec. 111.80 - 111.94, Stats. The SELRA provision set forth in Sec. 111.82, Stats., is identical to Sec. 7 of the National Labor Relations Act, ("NLRA"), which provides in relevant part that "employees shall have the right... to engage in... concerted activities for the purpose of... mutual aid or protection." In *NLRB v. Weingarten, Inc.,* 420 US 251, 256 (1975), the U.S. Supreme Court held that NLRA Sec. 7 "creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline.'

DECISION

The *Weingarten* case provides that an employee has the statutory right to have a union representative at certain employer interviews under certain circumstances. The Supreme Court adopted the five limitations or contours of the right to have a union representative present that had been established by the NLRB: 1) the right is established [under NLRA Sec. 7] as a right of employees to act in concert for "mutual aid and protection;" 2) the right arises only where the employee requests representation; 3) the right is limited to situations where the employee reasonably believes the investigation will result in discipline; 4) the right may not be asserted to interfere with legitimate employer prerogatives such as proceeding with the investigation without the interview; and 5) the employer has no duty to bargain with the union representative about how it intends to proceed with its investigation or administer discipline. The parties agree that the interviews being conducted by the employer in this case fall under the *Weingarten* rule.

This case turns on the question of whether the *Weingarten* rule permits an employee to designate a union representative of his or her choice to be present at an investigatory interview, even though that individual choice has been modified or limited by the CBA between the parties. Although *Weingarten* does not directly answer this question, in my opinion, a negative answer is clearly implied, and WERC's decision so holding must be affirmed.

*Weingarten* established a statutory right to union representation as part of employee "concerted activities" authorized by NLRA Sec. 7 "for the purpose of mutual aid or protection." The *Weingarten* court noted that an employee is permitted to have a union representative at investigatory interviews because "even though the employee alone may have an immediate stake in the outcome[,]" the union representative safeguards not only that interest "but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly." Id. at 260-61. The court noted at 261 that:

> The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview.

Therefore, although the case recognizes an individual employee's right to have a union representative present at an investigatory interview, it authorizes this right as part of the overall bargaining unit's right to act in concert to protect the individual employee from a heavy-handed or abusive employer.

The *Weingarten* court pointed out that the statutory right to have a union representative present "is in full harmony with actual industrial practice{ }" and is guaranteed to an employee [e]ven where such a right is not explicitly provided for in the [collective bargaining] agreement..." *Id.* at 267. The court went on to state that "[m]any important collective bargaining agreements have provisions that accord employees rights of union representation at investigatory interviews." *Id.* In footnote 11, the Court quoted the applicable provision from the United Steelworkers Agreement of 1971, Art XI, Sec. 4(d). The provision provided:

> Any Employee who is summoned to meet in an enclosed office with a supervisor for the purpose of discussing possible disciplinary action shall be <u>entitled to be accompanied by the Assistant</u> <u>Grievance Committeeman</u> designated for the area if he requests such representation, provided such representative is available during the shift. (emphasis added).

In my opinion, the *Weingarten* court clearly recognized that the right to have a union representative at investigatory interviews is a proper topic for inclusion in a CBA. The right to have a union representative present at investigatory interviews is included in the CBA in this case.

Although WSEU states that "<u>Weingarten</u> rights cannot be limited by a CBA to the detriment of employees," (Brief, p. 7), it cites no case that addresses a CBA limitation on the right. Rather, it cites cases that address waiver of statutory rights. In my opinion, these cases are inapposite. 1/

The CBA in our case authorized and required the presence of a union representative at investigatory interviews. Like the Steelworker's CBA noted favorably in *Weingarten* footnote 11, the CBA designated the representative who must be

present. In the Steelworker's CBA, it was the union's Assistant Grievance Committeeman; in our CBA, it was one of the 750 grievance representatives designated by WSEU.

The CBA requires that the grievance representatives designated by the union be 'members of the bargaining units for the bargaining units." CBA at 4/6/1 and at 4/9/2. Although Attorney Graylow was appointed as a "union representative" by the President of WSEU, he could not qualify as a designated grievance representative as defined by the CBA because he was not an employee of the State of Wisconsin and, therefore, was not a member of the bargaining unit as defined by the CBA. (See, CBA, Art U, Sec. 1.) In my opinion, this CBA limitation did not deprive the employees of their *Weingarten* rights. In fact, this limitation is consistent with *Weingarten* rights.

The employer permitted a grievance representative to be present at the interviews but denied Attorney Graylow's attendance. The employer acted in conformity with the CBA. In doing so, the employer did not violate the employees' *Weingarten* rights and did not commit an unfair labor practice in violation of SELRA.

WSEU argues that Attorney Graylow should have been allowed access to the investigatory interviews under the "Visitations" provision of the CBA. [CBA Art. II, Sec. 11] 2/ I disagree.

The visitation provision provides that the employer will permit non-employe officers and representatives of the WSEU to be on the employer's premises during working hours upon notice "for the purpose of ascertaining whether or not this Agreement is being observed by the parties and for the adjustment of grievances." This provision has nothing to do with investigatory interviews which is the subject of a specific CBA provision. [CBA Art. IV., Sec. 9] The visitation provision does not apply in this case.

ORDER

For the foregoing reasons, the Decision of WERC is AFFIRMED in its entirety.

Dated: April 22, 1993

BY THE COURT:

/s/ P. Charles Jones
P. Charles Jones
Circuit Judge

Endnotes

1/ In *Alexander v. Gardner-Denver,* 415 U.S. 36, 51 (1974), although the court held that a union could not waive an employee's right to assert a cause of action under Title VII, "a union may waive certain statutory rights related to collective activity, such as the right to strike.' In *Barrentine v. Arkansas-Best Freight System,* 450 U.S. 728, 737 (1981), the court noted that an employee's statutory right to sue could not be waived by a union, but again noted that '[i]t is true that generally, employers and unions can bargain away statutorily protected rights to collective activity. WERC cites *Prudential Insur. Co. v. NLRB,* 661 F.2d 398 (5th Cir. 1981), were the federal court of appeals held that *Weingarten* rights could be waived by a CBA. WSEU challenges the applicability of the waiver in that case to the facts of our case. In my opinion, none of these cases apply because waiver of *Weingarten* rights is not the issue in our case.

2/ WSEU incorrectly refers to the applicable visitation provision as Art. IV, Sec. 11 rather that Art. II, Sec. 11 in its Brief and its Reply Brief. Art. IV, Sec. 11 deals with "Pay Status of Arbitration Witnesses."