STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, and it affiliated LOCAL 1486, Complainant, vs. VILLAGE OF BROWN DEER, Respondent.	Case 59 No. 54312 MP-3198 Decision No. 28896-A

Appearances:

Mr. Robert Haney, Podell, Ugent, Haney & Delery, S.C., Attorneys at Law, 611 North Broadway, Suite 200, Milwaukee, WI 53202, appearing on behalf of the Union.

Mr. Mark L. Olson, Davis & Kuelthau, S.C., Attorneys at Law, 111 E Kilbourn, Suite 1400, Milwaukee, WI 53202-6613, appearing on behalf of the Village.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee District Council 48, AFSCME, and its affiliated Local 1486 filed a complaint on July 25, 1996, with the Wisconsin Employment Relations Commission alleging that the Village of Brown Deer had violated Secs. 111.70(3)(a)1 and 5, Stats., by its conduct in interfering with the right to representation and by violating the terms of a collective bargaining agreement. The Commission appointed Karen J. Mawhinney to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. A hearing was scheduled for December 18, 1996, and the parties agreed to engage in mediation on that date, but were unsuccessful in resolving this complaint, and a hearing was held on April 10, 1997 in Brown Deer, Wisconsin. The parties completed their briefing schedule by August 12, 1997. The Examiner has considered the evidence and arguments of the parties, and now issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Milwaukee District Council 48, AFSCME, AFL-CIO, and its affiliated Local 1486, herein called the Union, are labor organizations with their principal offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

2. The Village of Brown Deer, herein called the Village or Employer, is a municipal employer with its offices located at 4800 West Green Brooke Drive, Brown Deer, Wisconsin 53223.

3. The Union represents a bargaining unit of employes in the Public Works Department, Water Utility, clerical and office employes, and Community Service Officers. On February 6, 1996, Jane Fredrickson was a records clerk in the Police Department, a position within the bargaining unit. Her supervisor at that time was Captain Louis Barth. Fredrickson was working in her work station which is a cubicle in the clerical area. About 9:15 that morning, Barth told her that he wanted to see her in his office at 10:00, and that it was regarding her work performance. She replied that she would have to arrange for Union representation. Barth responded, "Jane, you don't even know what this is about." Fredrickson did not inquire further what the matter was about and Barth did not elaborate any further. They ended the conversation at that point. Fredrickson then called a Union steward, Debbie Gerth, who was working in the Village Hall and asked her to go to Barth's office with her. Once in Barth's office, Barth asked Fredrickson, at least once and possibly twice, why Gerth was there, and Fredrickson replied that she always brought a Union representative to his office to discuss work performance. Barth left the room and got Captain Steven Pokrandt to join them. Barth then presented a letter of commendation to Fredrickson. Gerth said it was nice to be in his office for something good, and they left.

4. The Chief of Police, Steven Rinzel, was aware that Barth was going to give Fredrickson a commendation on February 6, 1996. The Chief suggested that Barth ask Fredrickson into his office and make it a little special. The Chief testified that the Village had been going through some traumatic negotiations with the Union, with some name calling going on. The negotiations were over three Community Service Officers who were being accreted to the bargaining unit. Rinzel recalled that his staff had been called "Nazi's" and "dictators" during negotiations, and were told that they were terrible managers who were not concerned about employes at all. District Council 48 Staff Representative Malou Noth testified that there were a lot of disputes going on between the Union and the Village during this time, many of them surrounding Fredrickson as well as the accretion of the Community Service Officers. Much of the hostility between the parties occurred before Rinzel became Chief, and the Union was hopeful that there would be change in attitudes with the arrival of a new police chief. Noth stated she never called anyone a Nazi. There was a small meeting after a negotiation session in which Noth made an overture to the Village to obtain a better relationship. This took place at the end of January 1996, and those attending were Noth, Gerth, one of the Community Service Officers, Attorney Mark Olson representing the Village, Chief Rinzel, and Assistant Village Manager Scott Gosse. Noth felt the meeting did not go well and that Chief Rinzel was impatient and not interested. Gosse felt that the Village had concurred with Noth in wanting a better relationship. Chief Rinzel thought that he could help improve relationships by seeing that Fredrickson got a compliment, since she had been involved in a number of concerns in the past.

5. On February 8, 1996, Chief Rinzel sent the following letter to Noth:

> On Tuesday, February 6, 1996, Captain Louis Barth of the Brown Deer Police Department attempted to give a commendation to

> Ms. Jane Fredrickson who is the records clerk for the Police Department. Ms. Fredrickson is also a member of the North Shore Suburban Employees Local 1486. Ms. Fredrickson demanded to have union representation present during this discussion with Captain Barth. I know of no requirements that the Department allow union representation during the receiving of a commendation. In the interest of good employee relationships, Captain Barth did concede and allow Ms. Debbie Gerth to be present during this discussion. It is little wonder that the Police Department management is very concerned when dealing with these employees.
>
> At our last negotiation session, you advised that the labor union wants to work with management. This certainly does not seem to be the case when an employee being given a commendation demands union representation. In this case the Department did concede and allowed that to take place. I am advising you that this is not precedent setting, and in the future will not be allowed. I believe it is the responsibility of management to recognize good performance as well as it is to recognize performance that needs to be corrected. That, I believe, is not contrary to what the intent of any good union would have for their members.
>
> I must say I am extremely disappointed in this incident and it appears that the intent is to push back management-employee relationships here in the Police Department. I have attached a copy of the commendation that was given to Ms. Fredrickson with this letter. I certainly believe that your organization has a long way to go in working on a positive relationship with the management employees that they claim they want to have.

Chief Rinzel testified that there are valid business reasons for not allowing Union representation during commendation meetings, such as having to take an employe off his or her position to attend the meeting. He also felt that it would have a chilling effect on supervisors to bring in Union representation every time they wanted to give someone a commendation. He was trying to convince his staff to give positive comments to employes, and Fredrickson's response on February 6th frustrated him. His letter to Noth was intended to convey that frustration. A copy of the above letter was sent to Attorney Mark Olson, Village Manager Paul Patrie and Barth.

6. Barth was surprised by Fredrickson's request for Union representation on the morning of February 6, 1996, because there was no indication from him or the Department that the meeting he requested had anything to do with discipline. Fredrickson had been called into Barth's office previously for disciplinary matters or complaints, such as making a personal phone call about her car, having keys that were too loud, or blowing her nose in the outer office. Barth had given her a performance evaluation on January 11, 1996, for 1995. On January 16, 1996, Fredrickson sent him a letter regarding that evaluation, taking issue with some matters in

the evaluation. Fredrickson filed a grievance about her job evaluation on January 29, 1996, just a few days before the incident that led to this complaint.

7. Fredrickson has filed other grievances in the past. She filed a grievance on February 3, 1995, regarding reimbursement and compensatory time for attending a computer training class. She filed a grievance on July 15, 1994, for overtime pay. These grievances were filed while she held the position of records clerk in the Police Department. A grievance was filed on September 13, 1994 after Fredrickson had met with Barth and after the meeting ended, Barth called her back into his office. Fredrickson asked him whether she had to get her Union representative, and he told her no, that it would not be about the disciplinary matter. When Fredrickson went back into his office, he continued to talk about the disciplinary issue and told her that her Union was giving her bad advice and that she might speak to someone in the Department or seek legal counsel. She left his office and reported this conversation to the Union officials, which resulted in the filing of a grievance on September 13, 1994. In the mediation process of this grievance and a companion prohibited practice complaint, a mediator told Fredrickson to never go into Barth's office without a Union representative present. The Union's attorney also told Fredrickson that it would be best to not go into any meetings alone again.

8. Fredrickson has received other commendations and letters of appreciation from the Department. On June 3, 1994, the former Director of the Department of Public Safety, James Sebestyen, put a letter in her personnel file regarding work excellence on a particular incident, with copies to Fredrickson and Barth. Sergeant John Graeber gave her a notice of recognition of effort on June 19,1994, although Fredrickson did not recall seeing it before. Fredrickson also received recognition of outstanding effort on July 26, 1993, from Sebestyen. The memorandum was written by Barth for Sebestyen. Barth commended her effort on a training conference on March 3, 1992, and gave her a similar memorandum on November 7, 1991. After the date of the incident leading to this complaint, on July 8, 1996, the Chief of Police, Steven Rinzel, sent her a letter noting his appreciation for her volunteer work. All of these were put in her personnel file. Fredrickson had seen commendations given out to others which were always in front of a group of co-workers or at roll call. She had not seen a commendation given out in private behind closed doors. Barth did not recall whether his prior commendations to Fredrickson had been given to her in his office or not. There is no Department procedure for issuing commendations, and they may be given publicly or privately.

9. The Police Department has a policy and procedure, No. 10.012, that deals with handling citizen complaints against employes and internal affairs, which is used for both the sworn and non-sworn employes in the Department. The procedure is dated March 1, 1991, and remains in effect. It is used in all cases in which discipline is being contemplated by the Department. There are certain forms to be given to employes. One is called "Internal Investigation Warning" and the other is called "Notification of Charges/Allegations." Those two are issued together to notify employes of their rights. Barth's practice is to give the form of Notification of Charges/Allegations at the start of an investigatory interview, and then the charges are discussed. There is also a form

called "Pre-Disciplinary Notice," and this form is

to be given in advance of an investigatory interview or meeting with an employe. Fredrickson received such a form in advance in 1994, when she was to have a meeting on September 27, 1994, and she signed the form on September 26, 1994. The form itself was dated September 22, 1994. Fredrickson has received prior notice of disciplinary meetings in the past. Pokrandt sent her a notice on September 27, 1995 notifying her to report by noon that day to the Chief regarding a sick day. On September 22, 1994, Fredrickson was given a notice that a disciplinary hearing would take place on September 27th, and she signed this notice on September 26, 1994. She did not get any notice that her meeting with Barth on February 6, 1996, was going to involve discipline. Fredrickson did not assume that this meeting was a disciplinary meeting, but she felt that she was entitled to have Union representation present for anything that entailed her work performance, and she knew that the meeting with Barth involved her work performance. Fredrickson did not ask Barth if the meeting was going to involve a disciplinary matter and he did not say what the meeting was about except that it was about her work performance.

10. The collective bargaining agreement in effect for January 1, 1996 to December 31, 1997, states in Article I, Section 2: "The Union shall represent all employees in the bargaining unit at all conferences and negotiations." The previous bargaining agreement contained the same language. Fredrickson characterized the meeting with Barth as a "conference" within the meaning of Article I, Section 2.

11. After the incident in question here and after the instant prohibited practice was filed, on December 1, 1996, Fredrickson became a dispatcher, a position which has a higher salary than her position as records clerk. Chief Rinzel appointed Fredrickson to that position, which he considers to be a promotion.

12. Fredrickson's request for a Union representative at the February 6, 1996 meeting with Barth was based on a reasonable belief that such a meeting could result in disciplinary action against her.

13. Barth's questioning the need for Union representation did not have a reasonable tendency to interfere with Fredrickson's protected rights where such questioning occurred mostly in the presence of the Union Steward and where Barth allowed the Steward to remain at the meeting.

14. Chief Rinzel's letter stating that Union representatives would not be allowed in the future at meetings where an employe is being given a commendation but demands representation does not have a tendency to interfere with employes' protected rights.

15. The collective bargaining agreement in existence between January 1, 1996 and

December 31, 1997 has a grievance procedure that ends in binding arbitration in Article VI.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. The Respondent did not interfere with, restrain or coerce Fredrickson in the exercise of rights guaranteed in Sec. 111.70(2), Stats., and therefore did not violate Sec. 111.70(3)(a)1, Stats., by asking Fredrickson why she needed Union representation at a meeting with her supervisor on February 6, 1996.

2. The Respondent did not interfere with, restrain or coerce employes in the exercise of rights guaranteed in Sec. 111.70(2), Stats., and therefore did not violate Sec. 111.70(3)(a)1, Stats., or by stating that in the future, Union representation will not be allowed at meetings where employes are being given commendations but have asked for Union representation at such meetings.

3. The Commission will not assert its jurisdiction to determine whether the Respondents have violated Sec. 111.70(3)(a)5, Stats.

ORDER 1/

IT IS ORDERED that the Complaint be dismissed in its entirety.

Dated at Elkhorn, Wisconsin this ____ day of August, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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. provides:

> (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

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By _____
Karen J. Mawhinney, Examiner

1/ (Continued)

> 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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

VILLAGE OF BROWN DEER

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS:

The Union:

The Union points out that the U.S. Supreme Court has spelled out the rights of employes in NLRB v. Weingarten, Inc., 420 U.S. 251 (1975). An employe has the right to have a union representative present at a meeting with the employer when the employe reasonably believes that the meeting might lead to discipline or threaten the employe's employment security. The key to establishing this right of representation is whether the employe seeks aid or protection against a perceived threat to his employment security. The "perceived threat" cannot be a mere whimsy; the belief that the meeting with the employer in some way threatens the employe's employment security must be a reasonable belief. Interference of this right to representation is a violation of Sec. 111.70(3)(a)1, Stats. Sipen et al. v. Richard Davis et al., Dec. No. 27135-A (Greco, 7/92), aff'd by operation of law (WERC, 7/92).

The Union states that the questions to determine if there was a Weingarten violation are: (1) was there a meeting between the employer and employe; (2) did the employe reasonably perceive that meeting as threatening her employment security; (3) did the employe request representation from her union; and (4) was that representation by the union interfered with by the employer? The Union asserts that based on the facts presented, there is no question that there was a meeting between Barth and Fredrickson, that she requested representation by her Union at that meeting, and that representation was interfered with by Barth's questioning of the presence of the Union representative. While Barth allowed the Union steward, Gerth, to be present during the meeting, he was attempting to dissuade Fredrickson from having her steward present by repeatedly questioning the need for her presence.

The only question then, submits the Union, is whether Fredrickson reasonably perceived the meeting as a threat to her employment security. The key to this analysis is what was in Fredrickson's mind when she requested Union representation. The incident must be looked at in the context of her relationship with her supervisor and her employer. Fredrickson knew only that the meeting pertained to her job performance. Less than three weeks before the meeting, she had the Union file a grievance over a performance evaluation that Barth had given her. Then there were very nasty negotiations going on between the Union and the Village. Fredrickson was aware of the WERC action at the time of certification of the bargaining unit that had identified her as supplying the critical vote in favor of Union representation. Also, she had previously been asked to meet with Barth and told by him that she did not need representation when she later found out that he had

misinformed her about the subject matter of the meeting and thus misinformed her about the need for any representation.

The Union argues that in light of the history of the creation of the bargaining unit, the history between Fredrickson and Barth, the tension between the Union and the Department stemming from negotiations, her perception that the meeting with him was a threat to her employment security was reasonable. Therefore, the Employer's efforts to dissuade her from having her Union representative present at the February 6, 1996 meeting violated Sec. 111.70(3)(a)1, Stats.

Furthermore, the Union submits that the Employer violated Sec. 111.70(3)(a)5, Stats., by violating the terms of the collecting bargaining agreement by restricting the right of members' representation by the Union at all conferences with the Employer. Under that bargaining agreement as well as its immediate predecessor, the right of employe representation goes far beyond a Weingarten situation -- it extends to all conferences between an employe and this Employer. Local 1486 did what Justice Powell argued that a union ought to do in his dissent in Weingarten when it expanded the right to represent members.

In an arbitration award, Milwaukee District County 48 v. M.A.T.C., Case LXXXII (Arb. Peroni, 1980), an employe was denied representation at a meeting with her employer and filed a grievance. The arbitrator found that under the contract language, which limited representation to conferences and negotiations related to the negotiation and implementation of the agreement, no violation had occurred. The arbitrator noted that the language could not be read to cover all conferences between the employer and employes and concluded that the employer did not intend to expand the union's right of representation beyond that required by law. But in this case, there is no such limitation in the language found in Article I, Sec. 2 of the collective bargaining agreement. The clear language states that the right of representation shall be at *all* conferences and negotiations. Chief Rinzel's letter to Noth limits the right of employes to be represented at certain types of meetings with the Employer. The Chief even testified that there was no requirement to allow Union representation at a commendation, showing his intent to limit Union representation.

The Union states that the contract language serves the legitimate interests of both the Employer and bargaining unit members. It insures that employes can avoid situations similar to the one faced by Fredrickson in 1994 when she went back into a meeting after being told that it was not about discipline when in fact it was. It also serves the interests of the Employer in situations like the present one, in that the Employer can build a better relationship between itself and the Union when it allows Union representation at a meeting where an employe is given a commendation. The parties agreed on this language at the bargaining table. By restricting the right of representation at some types of conferences between bargaining unit members and management, Chief Rinzel disregarded the terms of the collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats.

The Complainants request that the Employer be directed to post a notice acknowledging that it has engaged in prohibited practices, and that in the future it will respect the language of the collective bargaining agreement that gives the Union the right to represent its members at all conferences and negotiations.

The Village:

The Village submits that one cannot allege a Weingarten violation when representation at a non-disciplinary meeting has not been denied by the employer, and when it would be clearly unreasonable for an employe to assert that the meeting might be investigatory or disciplinary. In order to prevail on its claim, the Complainant must prove by a clear and satisfactory preponderance of the evidence that Fredrickson was entitled to Union representation at the meeting and was in fact denied such representation.

First, the Village states, it must be clearly demonstrated that the employe had a reasonable belief that the meeting in question might result in disciplinary action. While the February 6, 1996 event occurred during a period of contract negotiations between the Village and the Union, there is no evidence to suggest that the Village's prior actions might have led to a reasonable conclusion that this meeting might result in the discipline of Fredrickson, and the more reasonable conclusion would be that the meeting could not have been disciplinary.

The Village had established a procedure for disciplining employes, and that procedure required that an employe receive a pre-disciplinary notice prior to the inception of a disciplinary meeting. Fredrickson was aware of this procedure, and she had received notice in the past for disciplinary meetings but received no such notice for the February 6th meeting. While the Union alleged that Attorney Alvin Ugent and WERC Examiner Dennis McGilligan told Fredrickson that in the future it would be best not to go into any meetings alone, there is no evidence that substantiates those statements. Based upon those alleged statements, Fredrickson irrationally asserted that she was not to have any meetings with Barth without Union representation. Therefore, her demand for representation on February 6, 1996 was not based upon her belief that the meeting might be disciplinary, but only upon the unproven statements allegedly made to her by Ugent and McGilligan. Fredrickson testified that she made no assumption on February 6, 1996 that the meeting with Barth could be disciplinary. The Village asserts that since her demand was not based upon any reasonable belief that the meeting might result in disciplinary action, there can be no violation of Weingarten rights.

While the Complaint cites several events that led to Fredrickson's belief that the meeting could be disciplinary, the Village takes issue with all of these. Her lack of knowledge of the subject matter of the meeting did not form a basis for belief that the meeting was disciplinary, given the past practices of procedures regarding the imposition of discipline. Also, she made no assumption that the meeting was going to be disciplinary. While Fredrickson filed a grievance on January 30, 1996 regarding her annual evaluation by Barth, that grievance was not being handled by Barth and

there is no evidence in the record that he had any knowledge that the grievance had been filed. The Village asserts that it would be unreasonable for Fredrickson to believe that she could be disciplined by Barth in response to the filing of a grievance, which is not a disciplinary procedure. Also, the Complainant states that her vote in the Union election in 1992 supplied the critical vote in favor of the Union, but this election occurred more than four years before the current event. Any belief that Barth would wait four years to retaliate upon this basis is unreasonable.

The Village submits that no Weingarten violation occurred because the Village did not compel Fredrickson to appear in Barth's office without Union representation. Her Union steward was present throughout the meeting, even though it was unnecessary. The Village asserts that the Complainant unconvincingly argues that Barth interfered with Fredrickson's rights when he asked why Debbie Gerth was there. Barth merely inquired about her need for representation at a non-disciplinary meeting. He did not compel her to appear at a meeting without Union representation, and therefore, no violation of Sec. 111.70(3)(a)1, Stats., could have occurred.

Moreover, any such violation must be balanced against the Village's valid business reasons for its actions, and only when the chilling effect of an employer's actions outweighs the legitimate reasons offered by an employer will a violation of Sec. 111.70(3)(a)1, Stats., be found. The Village has a system to issue employe commendations in order to encourage positive management-employe relationships. However, the Village has legitimate business needs to resist requests for Union representation at meetings when commendations are given. It would require removing two employes from work each time a commendation is given, and it would discourage the Village from issuing commendations if required to present them in front of Union representatives, a setting more characteristic of an adversarial meeting. The Village argues that there is no chilling effect on employes when it merely asks why the Union steward is to be present at non-disciplinary meetings. If the Village's actions are found to infringe upon employe rights, these rights are outweighed by legitimate Village business purposes.

Finally, the Village argues that it did not violate Sec. 111.70(3)(a)5, Stats., because Article I, Sec. 2 of the labor agreement does not require representation at all conferences. The Village asserts that the Union has failed to interpret the agreement as a whole and has not considered the intention and past practice of the parties. The logical conclusion of this language is that the clause was only intended to deal with contract negotiations and it cannot be broadly asserted in order to deny the Village its authority to deal directly with its employes in non-disciplinary situations. The Complainant's assertion that Article I, Sec. 2 requires representation at all meetings between the Village and bargaining unit employes should be rejected based upon the pure absurdity of this claim. This would require several full-time Union stewards in order to be present each and every time management spoke any work to a unit member.

The Village asks that the complaint be dismissed with prejudice.

The Union's Reply:

The Union admits that Barth allowed the Union Steward to be present at the meeting with Fredrickson, but the issue presented is whether his attempts to dissuade Fredrickson from being represented, by his actions and demeanor, was a Weingarten violation. If so, an appropriate remedy would be a cease and desist order. Furthermore, the letter sent by Chief Rinzel indicating that a Union representation will not be allowed in the future when supervisors discuss work performance with employes is another Weingarten violation. That policy which unilaterally prohibits representation under those circumstances violates the Weingarten principles, and the Employer should be ordered to rescind that policy.

The Union states that its position is that whenever an employe is told by her immediate supervisor to appear for a closed door meeting to discuss her work performance, especially after recently grieving that supervisor's review of her job performance, the employe's perception that her employment security is threatened is a reasonable perception. Where the same supervisor misrepresented himself to the employe in a similar circumstance 18 months earlier, it would be unreasonable for the employe to not perceive a threat to her employment security.

The Union further notes that the gravamen of the Village's defense rests on the myth that pre-disciplinary notices are given to an individual before the individual meets with a supervisor. However, Barth testified that the term "prior to the meeting" was a matter of semantics, that the notice is given at the inception of the meeting. Fredrickson would not have had advance notice of the nature of the meeting, because she would have received a pre-disciplinary notice after she entered Barth's office. While the Village claims that Fredrickson received other commendations, there is only one exhibit which the Village has labeled a commendation. While agreeing with the Village that there is no evidence in the record that substantiates statements made by Attorney Ugent and WERC Examiner McGilligan, the Union asks - so what? Is the Village claiming that Fredrickson and Noth are lying?

The Union also disputes the Village's interpretation of the contract language in Article I, Section 2. The Village is ignoring the plain language of the contract, and reading the word "all" conferences to mean "some" conferences, the Union states. The Village has violated the collective bargaining agreement as well as the two Weingarten violations, the Union states in its conclusion.

DISCUSSION:

This case asks a narrow question -- whether an employer interferes with an employe's right to Union representation (the Weingarten right) by questioning the need for representation where the employer knows the meeting is not disciplinary in nature but the employe has no such knowledge, and where the employer allows Union representation during the meeting.

The parties agree about the essential facts in this case. Captain Barth asked to see Jane Fredrickson in his office and told her it was about work performance. She said she would have to get a Union representative, and he replied, "Jane, you don't even know what this is about." She got the Union Steward, Debbie Gerth, to come to the meeting and Barth asked why Gerth was there.

Fredrickson said she always brought a Union representative to his office to discuss work performance. Barth gave her a letter of commendation. That was all there was to this incident.

In NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), the U.S. Supreme court held that an employe has the right under the NLRA to refuse to submit to an investigatory interview without Union representation which the employe reasonably believes may result in disciplinary action. It held that "reasonable" was measured by objective standards, and not the subjective motivations of the employe. The Commission has adopted and applied the basic standards of Weingarten in other cases. 2/ However, in Waukesha County, the Commission said:

> The pertinent statutory and case law developments do not . . . require the conclusion . . . that municipal employes enjoy an absolute right under MERA to be represented in every conference they have with their municipal employer or its representatives on questions of wages, hours and conditions of employment. (Page 21)

The decision established that whether a right to representation exists depends on the purpose of the employer-employe interaction and whether protected rights could reasonably be impaired by denying representation in such circumstances. This differs from Weingarten to the extent that it is not limited to simply investigatory interviews. The Commission held that there is no statutory right to representation if an employe is under no compulsion to appear before the employer, 3/ if there is no reasonable cause to believe that an employer-employe meeting may result in discipline, 4/ or if the meeting is to impose discipline that has already been decided on. 5/ Conversely, the Commission has held that an employer's refusal to permit representation is considered interference with protected employe rights if an employe has requested representation and the scheduled interaction could reasonably affect a decision to discharge or discipline, 6/ or if the meeting's

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2/ See, for example, City of Milwaukee, Dec. Nos. 14873-B, 14875-B and 14899-B (WERC, 8/80); Waukesha County, Dec. No. 14662-A (Gratz, 1/78) aff'd, Dec. No. 14662-B (WERC, 3/78).

3/ City of Milwaukee, Dec. No. 17117-A (Davis, 1/80), aff'd by operation of law, Dec. No. 17117-B (WERC, 2/80).

4/ City of Madison (Police Department), Dec. No. 17645 (Davis, 3/80), aff'd by operation of law, Dec. No. 17645-A (WERC, 4/80).

5/ Waukesha County, Dec. No. 18402-C (Crowley, 1/82), aff'd, Dec. No. 18402-D (WERC, 9/82).

6/ City of Milwaukee, Dec. Nos. 14873-B, 14875-B, 14899-B (WERC, 8/80).

purpose is to determine whether an employe should be retained. 7/

There is no case on point here, where the employer is being charged with interference with protected rights for questioning the need for Union representation and still allowing such representation.

The first question would be whether Fredrickson had the right to representation at all, since the meeting was for the purpose of giving her a commendation. However, Fredrickson had a reasonable basis to believe that the meeting with Barth on February 6, 1996 would result in disciplinary action. While the parties argue extensively about her basis for believing that a meeting with Barth would be disciplinary in nature, the Examiner relies on three facts to determine that Fredrickson had such a reasonable basis. First, Barth said that the meeting was over her work performance. Secondly, she had just recently filed a grievance over her performance evaluation. And third, she had a prior experience with Barth where he told her that Union representation would not be necessary and when she went into his office, he continued to discuss a disciplinary matter where such Union representation would have been appropriate.

The Union argues that Barth interfered with Fredrickson's right to representation by repeatedly asking the need for the Steward's presence at the meeting. Barth initially implied that Fredrickson might not need a Union representative in his first response to her request to get a Union Steward present at the meeting. At the start of the meeting, he asked the need for Gerth's presence at least once, possibly twice. Taking the evidence in the light most favorable to the Complainant, the questioning of the need for the Union Steward's presence amounted to three questions. The first time was only a response to Fredrickson, saying that she did not even know what the meeting was about. The second and third time, if there was a third question, occurred while the Union Steward was already present. Therefore, under any circumstances, it is difficult to see how the Employer interfered with the employe's protected right of representation, where the representative was present when the questioning of the need for such representation took place, and the Union Steward was allowed to remain. Moreover, Barth knew that there was no need for a Union representative to be present, because he knew the nature of the meeting. If he had shared that information a little earlier with Fredrickson, this case should never have happened.

Accordingly, the Examiner concludes that there is no basis to find that the Employer interfered with Fredrickson's right to representation by questioning her need for it when the Union representative was already present and when the Employer allowed the representative to remain at the meeting. Under Sec. 111.70(3)(a)1, Stats., to prevail on a claim of interference, the complaining party must show that the employer has engaged in conduct which has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of the Section 2 rights, in this case, the right to Union representation. A supervisor's questioning of the need for Union

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7/ Boscobel Area School District, Dec. No. 18891-B (WERC, 12/83).

representation does not rise to the level of a reasonable tendency to interfere with rights, and the record does not show by a clear and satisfactory preponderance of the evidence that Barth's questioning the need for a Union representative had any tendency to interfere with Fredrickson's right to Union representation. As noted previously, the Union representative was already present, and continued to be present for the meeting.

The Union also contends that Chief Rinzel's letter about his policy in the future amounts to interference because that policy unilaterally prohibits representation under circumstances that violate the Weingarten principles. A closer examination of Rinzel's letter states the following:

> At our last negotiation session, you advised that the labor union wants to work with management. This certainly does not seem to be the case when an employe being given a commendation demands union representation. In this case the Department did concede and allowed that to take place. I am advising you that this is not precedent setting, and in the future will not be allowed.

All that can be gleaned from this letter about the future is that the Department will not allow a Union representative to be present when the employe is being given a commendation and demands Union representation. This does not violate the law or any Weingarten principles. It may violate the contract, but the Examiner will make no finding on the contract language, as noted next.

Contract Violation:

The complaint alleges a violation of Sec. 111.70(3)(a)5, Stats., which makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. Generally, the Commission will not exercise its jurisdiction to determine the merits of breach of contract allegations in violation of Sec. 111.70(3)(a)5, Stats., where the parties' collective bargaining agreement provides for final and binding arbitration. 8/ The parties' collective bargaining agreement has a provision for binding arbitration in Article VI. The parties must live with their bargain, and the Commission's policy is to give full effect to the parties' agreed-upon procedures for resolving disputes arising under their contract. Therefore, the undersigned will not exercise the Commission's jurisdiction over the contract dispute and the allegation of a violation of Sec. 111.70(3)(a)5, Stats., has been dismissed.

Dated at Elkhorn, Wisconsin this 29th day of August, 1997.

8/ Joint School District No. 1, City of Green Bay, et al., Dec. No. 16753-A, B (WERC, 12/79); Board of School Directors of Milwaukee, Dec. No. 15825-B (WERC, 6/79); Oostburg Joint School District, Dec. No. 11196-A, B (WERC, 12/79).

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner