STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

COLUMBIA COUNTY HIGHWAY UNION, LOCAL 995, AFSCME, AFL-CIO, Complainant,

vs.

COLUMBIA COUNTY (HIGHWAY DEPARTMENT), Respondent.

Case 275
No. 67516
MP-4397

Decision No. 32415-A

Appearances:

Jack Bernfeld, Associate Director, Wisconsin Council 40, AFSCME, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-2900, appeared on behalf of the Complainant Union.

Joseph Ruf III, Corporation Counsel/Human Resources Director, Columbia County, 120 West Conant Street, P.O. Box 63, Portage, Wisconsin 53901, appeared on behalf of the Respondent County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On December 3, 2007, Columbia County Highway Union, Local 995, AFSCME, AFL-CIO filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against the Columbia County Highway Department. The complaint alleged that on November 14, 2007, two bargaining unit employees were involved in an altercation at work, whereupon the Employer convened a meeting to determine what had happened. Prior to the start of that investigatory meeting, the Union President requested to have a private conference with the employees involved. A management official denied the request. The complaint contends that the denial of the Union President's request for a meeting with the employee(s) prior to the investigatory meeting violated Sec. 111.70(3)(a)1, Stats. After the complaint was filed, it was held in abeyance pending efforts to resolve the dispute. On April 29, 2008, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Secs. 111.07(5) and 111.70(4)(a), Stats. On May 21, 2008, the County filed an answer denying the allegations. Hearing on the complaint was held on

May 28, 2008 in Portage, Wisconsin. Following the hearing, the parties filed briefs and reply briefs by August 15, 2008. Having considered the record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Columbia County, hereinafter referred to as the County, is a municipal employer providing general government services to the people of Columbia County, Wisconsin. Its offices are located at 120 West Conant Street, Portage, Wisconsin 53901.

2. One of the County's departments is the Highway Department. The County employs about 75 workers in that department. These workers are deployed to various garages around the County.

3. The Columbia County Highway Union, AFSCME Local 995, AFL-CIO, hereinafter referred to as the Union, is a labor organization which represents the highway employees in Columbia County. Its mailing address is in care of Wisconsin Council 40, AFSCME, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-2900.

4. The County and the Union have been parties to a series of collective bargaining agreements which govern the wages, hours and working conditions of the employees in the bargaining unit referenced in Finding 3. The parties' most recent collective bargaining agreement was in effect from January 1, 2006 through December 31, 2007.

5. On November 14, 2007, about 7:30 a.m., two bargaining unit employees at the County Highway Shop in Wyocena – Tom Wiersma and Don Hupke – were involved in a verbal altercation. What happened was that Hupke accused fellow Master Mechanic Wiersma of being a bad employee. Wiersma responded by telling Hupke: "Don, if you don't shut up, I'm going to take you out in the street and shut you up." Hupke interpreted Wiersma's words as a threat of physical violence against him and reported it to Shop Superintendent Craig Steingraeber. Steingraeber then called Wiersma into his (Steingraeber's) office and asked Wiersma if he had threatened Hupke, to which Wiersma responded "Yes, I did." After Wiersma admitted to Steingraeber that he had threatened Hupke, Wiersma requested union representation before discussing the matter any further. In response to Wiersma's request for union representation, Steingraeber ended his conversation with Wiersma and sent Wiersma back to work. Shortly thereafter, Steingraeber ordered Wiersma to go to the Highway Shop lunchroom and wait. Wiersma did as directed and waited in the lunchroom for about an hour. He did not speak to anyone in the lunchroom while he waited.

6. Steingraeber reported the Wiersma/Hupke altercation, including Wiersma's request for union representation, to his (Steingraeber's) supervisor, Assistant Highway Commissioner T.O. Boge. About 9 a.m., Boge called Local Union Vice President/Steward John Stott who was working at the Portage Highway Shop that day. Boge asked Stott and Local Union President Mike Arndt to leave their work assignment in Portage and come to the

Department's headquarters in Wyocena because an employee had requested union representation. They promply left Portage in the same vehicle and arrived in Wyocena about 9:30 a.m.

7. When Arndt and Stott arrived at the Wyocena Highway Shop, all they knew about why they had been summoned was that an employee who faced potential disciplinary action had requested union representation. When they entered the Operations Office, they were met by Kurt Dey (the Highway Commissioner), Norm Dahl (the Operations Manager) and Boge. Boge told Stott and Arndt that they were there because there had been an altercation between Wiersma and Hupke and that management was going to conduct an investigation to determine what had happened. Arndt then asked to speak privately with both parties involved (meaning Wiersma and Hupke) before Boge interviewed them, to which Boge responded "absolutely not". Thus, Boge denied Arndt's request to speak with Wiersma and Hupke before Boge convened his investigatory meeting. Boge gave no reason at the time for denying Arndt's request. Arndt wanted to speak privately with Wiersma and Hupke to get their side of the story before going into the investigatory meeting.

8. Management then convened the investigatory meeting in a conference room in the Department Office. Those present for the entire meeting were Dey, Boge and Steingraeber (for the County) and Arndt and Stott (for the Union). After Steingraeber reviewed what he had been told by Wiersma and Hupke, management began to call employees to appear, one at a time. The interview order was Hupke, Rick Wendt, Greg Kearns, Jeff Hoff, and Wiersma. During their respective interviews, each employee was asked what they had witnessed between Wiersma and Hupke. Arndt and Stott were present during all the interviews and were allowed to ask questions. Before Wiersma was questioned, he did not request to speak or confer with Arndt. Wiersma was then questioned for about a half hour, during which time he admitted that he made the statement to Hupke referenced in Finding 5. After Wiersma's questioning was finished, he was escorted back to the lunchroom. During and following the employee interviews, Arndt urged leniency for Wiersma and contended that Wiersma's conduct did not warrant discharge. At Arndt's request, the parties then reviewed a videotape from the County's security camera. At the end of the meeting, Arndt asked what management was going to do and Dey responded that management would make no disciplinary decision until they discussed the matter with Joe Ruf (the County's Corporation Counsel/Human Resources Director). About 10:30 a.m., Boge sent Wiersma home for the rest of the day with pay.

9. The next day, November 15, 2007, the parties held a meeting wherein they negotiated over the discipline to be imposed on Wiersma for his altercation with Hupke the previous day. Those in attendance at this meeting were Wiersma, Arndt, Stott, AFSCME Council 40 Staff Representative David White, Dey, Boge, Steingraeber and Ruf. The end result of their negotiations was that the following discipline was imposed on Wiersma: 1) a Last Chance Agreement under which Wiersma could be immediately terminated for misconduct during a six (6) month period; 2) a three-day unpaid suspension; and 3) the requirement that Wiersma complete an anger management assessment with a doctor in Madison. This discipline was not grieved.

10. The Union filed a prohibited practice complaint against the County on December 3, 2007. The complaint alleged that by refusing to let Local Union President Arndt meet with Wiersma prior to the investigatory meeting, the County violated Sec. 111.70(3)(a)1, Stats.

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

CONCLUSIONS OF LAW

1. The Union is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. The County is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats. At all times material herein, Assistant Highway Commissioner Boge acted in his capacity as an officer and agent of the County.

3. Wiersma is a "Municipal employee" within the meaning of Sec. 111.70(1)(i), Stats.

4. The investigatory meeting to which Wiersma was summoned on November 14, 2007 could reasonably be expected to lead to discipline.

5. By denying Local Union President Arndt's request to meet with Wiersma before the November 14, 2007 investigatory meeting began, Boge committed an act which had a reasonable tendency to interfere with Wiersma's exercise of rights guaranteed at Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

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

ORDER

To remedy its violation of Sec. 111.70(3)(a)1, Stats., the County shall immediately:

(a) Cease and desist from refusing to allow a union representative to consult with or interview employees prior to investigatory interviews which the employees reasonably believe will result in disciplinary action.

(b) Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

(1) Notify members of the bargaining unit represented by the Union by posting and disseminating the attached "APPENDIX A" in the manner in which notices to bargaining unit employees are

typically made. Where the County posts a copy of "APPENDIX A", it shall take reasonable steps to assure that the notice remains posted and unobstructed for a period of thirty (30) days.

(2) Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date of this Order as to what steps have been taken to comply with this Order.

Dated at Madison, Wisconsin, this 24th day of September, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

APPENDIX "A"

NOTICE TO EMPLOYEES OF THE COLUMBIA COUNTY HIGHWAY DEPARTMENT REPRESENTED BY COLUMBIA COUNTY HIGHWAY UNION, LOCAL 995, AFSCME, AFL-CIO

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the (Wisconsin) Municipal Employment Relations Act, we hereby notify our employees that:

> COLUMBIA COUNTY WILL NOT violate Section 111.70(3)(a)1 of the Municipal Employment Relations Act by refusing to allow a union representative to consult with or interview employees prior to investigatory interviews which the employees reasonably believe will result in disciplinary action.

Dated this _____ day of _____, 2008.

COLUMBIA COUNTY HIGHWAY DEPARTMENT

By _____

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED OR COVERED BY ANY OTHER MATERIAL.

COLUMBIA COUNTY (HIGHWAY DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

As noted in this decision's prefatory paragraph, the complaint alleged that the County committed a prohibited practice when it denied the Local Union President's request to meet with an employee immediately before an investigatory interview. The Union contends that this action violated Sec. 111.70(3)(a)1, Stats. The County disputes that assertion.

POSITIONS OF THE PARTIES

Union

The Union's position is that the County violated Sec. 111.70(3)(a)1 when it denied the Local Union President's request to meet with an employee who was going into an investigatory interview. It makes the following arguments to support that contention.

It begins by reviewing the case law applicable to employees having union representation at investigatory interviews. First, it cites the seminal case of NLRB v. WEINGARTEN, 420 U.S. 251 (1975), wherein the U.S. Supreme Court held that an employee has the right under the National Labor Relations Act to refuse to submit to an investigatory interview without union representation, provided that the employee reasonably believes the meeting may result in disciplinary action. Second, it cites the WERC decisions of MILWAUKEE COUNTY, DEC. NO. 31394-A and WAUKESHA COUNTY, DEC. NO. 14662-A (Gratz, 1/78), aff'd, DEC. NO. 14662-B (WERC, 3/78), for the proposition that the WEINGARTEN standard has been applied to the Wisconsin public sector. The Union asserts that the County is well aware of the foregoing case law because a Commission examiner previously found that the County had violated Sec. 111.70(3)(a)1 by disregarding an employee's WEINGARTEN rights. COLUMBIA COUNTY, DEC. NO. 30197-A (McLaughlin, 11/01).

Next, the Union contends that not only do employees have the right to have a representative present when they face an investigatory interview, they also have the right to effective and robust representation. It notes that in CITY OF APPLETON, DEC. NO. 27135-A (WERC, 1992), the Commission found an employee's rights to have been violated where a union representative was allowed to be present at an investigatory meeting, but was not allowed to speak. The Union avers that part and parcel with the right of representation is the right to consult between the union and the employee seeking assistance. Here, though, that did not happen, and the Employer denied the Union's request to meet and consult with Wiersma prior to the investigatory meeting.

The Union believes that this right to consult before an investigatory interview was established in Wisconsin's public sector almost 30 years ago in CITY OF MILWAUKEE, DEC. NOS. 14873-B, 14875-B, 14899-B (WERC, 8/80). According to the Union, that decision

stands for the proposition "that an employee should have a reasonable opportunity to obtain the presence of and to consult with a union representative before and at various times during an interrogation." The Union also cites two private sector cases for the proposition that the National Labor Relations Board has reached the same conclusion. In the first case, CLIMAX MOLYBDENUM COMPANY, 227 NLRB 154 (1977), the NLRB held that the right to union representation clearly included the right to prior consultation. While the Court of Appeals subsequently denied enforcement of the Board's order, 584 F2D 360 (10th Cir., 1978), it did so because the investigatory interview was scheduled at a time wherein the employee had adequate opportunity to consult with union representatives on their own time prior to the interview. The Union emphasizes that in its ruling, the court still upheld the right to pre-interview consultation, stating "we do believe that WEINGARTEN requires that the employer set investigatory interviews at such a future time and place that the employee will be provided the opportunity to consult with his representative in advance thereof on his own time." In the second case, PACIFIC TELEPHONE AND TELEGRAPH COMPANY V. NLRB, 262 NLRB 125 and 127 (1982), the NLRB again found that a union could demand a pre-investigatory interview conference with an employee, even if the employee never made such a request. On appeal, the Court of Appeals upheld the NLRB's ruling that the employer's failure to grant employees pre-interview conferences with their union representatives violated the employee's right to act in concert, and enforced the NLRB's order. 711 F2D 134 (9th Cir., 1983).

The Union argues that notwithstanding the County's contention to the contrary, it met its burden of proof and proved an interference violation. Here's why. First, it notes that Wiersma was compelled to attend the investigatory meeting in question. Thus, it was a WEINGARTEN-type investigatory meeting. Additionally, that meeting was conducted during the workday, so consultation with the Union outside of work was not possible. Second, it notes that Wiersma had a reasonable belief that that the investigatory meeting could result in disciplinary action being taken against him. In fact, that's why he requested union representation in the first place and why the Employer asked union representatives Stott and Arndt to attend the meeting. Third, it avers that the investigatory meeting was not perfunctory, in that the Employer had not already decided on a course of action, but wanted to consult with Ruf before taking action. The Union argues that when the previously-cited case law is applied to the aforementioned facts, it proves that it was an interference violation for Boge to deny Arndt's request to speak with Wiersma and Hupke before the investigatory meeting started. While the Union acknowledges that Wiersma did not ask to speak to Arndt before or during the investigatory meeting, the Union avers that that fact does not mean that Wiersma waived his right to consult with Arndt. According to the Union, requiring an employee to specifically request such consultation, in addition to requesting representation, would create a "hyper-technical requirement that would defeat the purpose of WEINGARTEN and MERA." With regard to the County's argument that Wiersma had the opportunity to contact a union representative before the meeting but chose not to, the Union characterizes that argument as without merit and lacking factual support.

Next, the Union addresses the two reasons Boge proffered at the hearing for denying Arndt's request (to meet with Wiersma and Hupke). The first reason which Boge proffered

was that since there had been an altercation between two employees, and he did not know how serious it was, he was concerned for Arndt's safety. The Union characterizes this claim (i.e. that Wiersma would attack Arndt) as "laughable" and "preposterous" because Wiersma had no history of violence in the workplace. Additionally, Arndt testified that he did not fear for his safety. The Union also notes that Boge did not tell Arndt that was the reason he was denying his request to speak with Wiersma. It also avers that had the County truly feared for their workers' safety, they would not have put Wiersma in a setting where he had no supervision (i.e. the lunchroom). The second reason Boge proffered was that he was concerned that if Arndt had a conversation with Wiersma (prior to the investigatory meeting), it would interfere with his investigation. The Union argues this reason had nothing to do with "timing or missed opportunity". Instead, the County just did not want to let the Union consult with Wiersma prior to the investigatory meeting. The Union contends that the County did not have the (statutory) right to do that (i.e. prevent Arndt from consulting with Wiersma prior to the investigatory meeting). By doing so, it hampered the Union's ability to fully represent him. According to the Union, had the County permitted Arndt to consult with Wiersma prior to the investigatory meeting, both Arndt and Wiersma "would have been better prepared to participate in his representation and defense."

In conclusion, the Union asks that the examiner find that the County violated Sec. 111.70(3)(a)1 when it denied Wiersma the opportunity to consult with his union representative prior to the investigatory interview. It avers that regardless of their motives in denying the request, the County's action violated MERA. The remedy which the Union seeks is a cease and desist order. It also asks that the County be ordered to reimburse the Union for the filing fee in this matter.

County

The County contends that it did not commit a prohibited practice by denying Local Union President Arndt's request to have a private conference with Wiersma immediately before the November 14, 2007, investigatory interview commenced. According to the County, "current Wisconsin law does not require the County to grant a union representative's request for a pre-investigatory interview conference with an employee." Building on that premise, it's the County's view that it complied with the applicable case law established by the U.S. Supreme Court in WEINGARTEN because it provided Wiersma with union representatives Arndt and Stott and ensured that they attended and participated in Wiersma's investigatory interview. It avers that the WEINGARTEN decision did not create the right asserted here (i.e. a union right to have a pre-investigatory interview meeting), and in fact, never even addressed that issue. It makes the following arguments to support these contentions.

The County notes at the outset that the Union bears the burden of proof in this matter. According to the County, the Union did not meet its burden and failed to prove its case that the County committed a prohibited practice "by denying a right that the employee Wiersma did not request and that the local union representative, Arndt, does not have." As the County sees it, "it is impossible for the County to have committed a prohibited practice by denying a request that Wiersma never made."

Since the Union contends that the County violated MERA by denying Arndt's request for a pre-interview conference with Wiersma prior to the November 14, 2007 investigatory meeting, the County begins its defense by disputing that contention. It argues that Arndt did not have a (statutory) right to a pre-interview conference with Wiersma because such a right does not exist under Wisconsin law. It elaborates as follows.

As the County sees it, "the Union's theory seems to rest on a fundamental misunderstanding of the scope of the WEINGARTEN case." It notes that in WEINGARTEN, the U.S. Supreme Court established that an employee has the right to have a union representative present at an investigatory interview, at the employee's request, in situations where the employee reasonably believes that the investigation might result in disciplinary action. The County emphasizes that the decision did not create an unlimited right to union representation, however. Instead, the Court specifically provided that the "exercise of the right may not interfere with legitimate employer prerogatives" and that "the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview" thus distinguishing between disciplinary and investigatory interviews. (Id. at p. 258-260).

The County argues that in this case, it respected Wiersma's WEINGARTEN rights and did not deny him union representation. Here's why. First, after Wiersma requested union representation, it arranged to have two local union officers, Arndt and Stott, leave their work assignments in order to attend Wiersma's investigatory interview. The County emphasizes that "Wiersma never contacted his Union representatives, relying instead on the County to contact those representatives for him." Second, the County avers that Wiersma could have called Arndt and talked with him about the incident with Hupke either before he was sent to the lunchroom or while he waited in the lunchroom. According to the County, management did not tell Wiersma that he was prohibited from talking to anyone in person or on the phone while he waited in the lunchroom, so he could have called Arndt. That did not happen though, and Wiersma did not contact Arndt or any other union representative prior to the investigatory interview. It also emphasizes that Wiersma never requested a pre-investigatory interview meeting with Arndt or any other union representative on November 14, 2007. Third, the County maintains that when Arndt and Stott arrived at the Highway Shop, Boge's summary of the Wiersma/Hupke altercation was more than sufficient to prepare Arndt and Stott to provide Wiersma with effective union representation at the investigatory interviews of all the participants and witnesses to the altercation. It submits that "since Wiersma had already admitted threatening Hupke during Wiersma's initial conversation with Steingraeber, few surprises could reasonably have been expected at the November 14, 2007, investigatory interview." Fourth, the County points out that during the investigatory interview, Wiersma did not refuse to answer questions or deny threatening Hupke. That being so, it's the County's view that "Wiersma's voluntary admission made the investigation more about filling in the details than finding out what happened." Fifth, the County opines that during the investigatory interviews, Arndt actively advocated with management on Wiersma's behalf. According to the Employer, his advocacy was what saved Wiersma from getting fired. Based on all the above, it's the Employer's position that Wiersma received effective union representation at the November 14, 2007 investigatory interview.

Next, the County asserts that the WEINGARTEN decision did not address the issue of whether an employee is entitled to a pre-investigatory interview meeting with a union representative. Building on that premise, the County asserts that WEINGARTEN did not decide the question presented here (i.e. whether an employee is entitled to a pre-investigatory interview meeting with a union representative). The Employer argues that even if such a right does exist in Wisconsin, that right could not be based on the WEINGARTEN decision where it is not even mentioned.

Elaborating further on the last point mentioned above, it's the Employer's position that existing Wisconsin case law does not provide employees with the right to a pre-investigatory interview meeting with a union representative, at the Union's request. In making that claim, the Employer interprets the Commission's 1980 decision in CITY OF MILWAUKEE, on which the Union relies, differently than the Union does. Here's why. It avers that in that decision, the "WERC provided its opinion concerning two hypothetical fact situations at the mutual request of the parties in that case." In one of those fact situations, the WERC was asked to consider whether a prohibited practice could result from "compelling an employee to submit to an interrogation by (or for use of) supervisory personnel without permitting the employee a reasonable opportunity to obtain the presence of and to consult with a [union] representative before and at various times during the interrogation where the employee has requested such representation based upon the employee's reasonable cause to believe that a subsequent supervisory decision to discharge or discipline the employee could result from or be based upon, in whole or in part, the employee's responses during the interrogation." MILWAUKEE at 49. In response to that hypothetical fact situation, the WERC found that the WEINGARTEN "right to representation" was applicable, but noted that the "right to representation" was not absolute. It also found that the right was triggered only by a specific request from an employee, not the Union. The County emphasizes that when the Commission was addressing the issue of the right to consult with a union representative prior to an investigatory interview, the WERC cited, in footnote 49 of the MILWAUKEE case, CLIMAX MOLYBDENUM CO., 227 NLRB 154 (1977). In CLIMAX MOLYBDENUM CO., the NLRB specifically extended the WEINGARTEN "right to representation" to include the right to a pre-investigatory interview meeting with a union representative, even in situations where a union representative and not the employee requested the pre-investigatory interview meeting. The County avers that whatever significance that decision had was terminated by the 10th U.S. Circuit Court of Appeals' decision in CLIMAX MOLYBDENUM CO. V. NLRB, 584 F.2D 360 (10th Cir., 1978) because that decision effectively reversed the NLRB's "attempted expansion of WEINGARTEN." The County reads that decision to say that it was the employee, and not the union, who had to make the request for a pre-investigatory interview meeting with a union representative, and rejected the argument that WEINGARTEN should be extended to situations where the union, and not the employee, attempted to assert the right to union representation on the employee's behalf. The County argues that since the Commission's MILWAUKEE decision "relied on CLIMAX MOLYBDENUM CO. to create a right to a pre-investigatory interview meeting at the request of the union, that right ceased to exist when the 10th Circuit Court of Appeals effectively overruled" the NLRB's decision.

With regard to the PACIFIC TELEPHONE case cited by the Union, the County acknowledges that the Court of Appeals did order enforcement of the NLRB's order in that case. Be that as it may, the County emphasizes that that decision only covers the 9th Circuit, and Wisconsin is not part of that circuit. That being so, the County avers that PACIFIC TELEPHONE, like CLIMAX, is not controlling, and thus only WEINGARTEN is, and that decision did not mention or create a right for a union representative to demand a pre-investigatory conference with an employee.

Finally, the Employer argues that all the WERC cases cited by the Union, including the 2001 Commission case involving the instant parties, are factually distinguishable from Wiersma's situation and involve a different legal issue than is involved herein.

Based on the foregoing, the County opines that in order for the Union's claim to succeed, the WERC will have to "rewrite" existing case law and then apply that new case law retroactively to this case. It therefore asks that the complaint be dismissed.

DISCUSSION

Normally, my discussion in a MERA complaint case follows the following format: the applicable legal framework is identified and then that legal framework is applied to the facts. Oftentimes, there is no question about the applicable legal framework, and the dispute centers on the facts. In this case though, the situation is just the converse. What I mean is that in this case, the facts are essentially undisputed. Instead, what's disputed herein is what I earlier called the applicable legal framework and what it requires of the Employer. While this point will be elaborated on in detail below, it suffices to say here that identifying the applicable legal framework for deciding this case was no easy task. That being so, I've structured my discussion so that the previously identified format is reversed. Thus, I will address the facts before looking at the applicable legal framework.

As was noted in Findings 5-7, following the altercation between Wiersma and Hupke, the Employer convened an investigatory meeting to interview witnesses and determine what had happened. Wiersma was compelled to attend that meeting; there was nothing voluntary about his attendance. Wiersma had a reasonable belief that the investigatory meeting could lead to disciplinary action being taken against him. That's why he requested union representation. The Employer complied with his request for union representation and summoned two local union officers – Arndt and Stott - to the Wyocena shop to represent Wiersma at the investigatory interview. When they arrived though, they did not know anything about the underlying facts (i.e. who, what, where, when, and why). Boge then told them that there had been an altercation between Wiersma and Hupke. Boge did not elaborate any further or tell them about the nature of the altercation. Arndt then requested to speak privately with both parties (meaning Wiersma and Hupke) before Boge convened the investigatory interview. Boge denied Arndt's request.

It's the last fact referenced above (i.e. Boge denying Arndt's request to meet privately with Wiersma and Hupke before the investigatory interview started) that's at the heart of this case. The legal issue which is presented by that undisputed fact is whether it was it a violation of MERA for the Employer to deny Arndt's request to meet with Wiersma and Hupke before the investigatory meeting started. The Union contends that it was while the County disputes that contention.

I begin my analysis of the case law applicable to employees having union repersentation at investigatory interviews by reviewing the seminal case of NLRB v. WEINGARTEN, INC., 420 U.S. 251 (1975). In that case, the U.S. Supreme Court held that an employee covered by the National Labor Relations Act has a statutory right to the presence of a union representative at an investigatory interview which the employee reasonably believes might result in disciplinary action. In its discussion on the "contours and limits" of this statutory right, the Supreme Court opined as follows: First, the right to union representation "inheres in §7's guarantee of the right of employees to act in concert for mutual aid and protection" (Id. at 256-257). Second, the right arises "only in situations where the employee requests representation" (Id. at 257). Third, the employee's right to request representation as a condition of participation in an interview "is limited to situations where the employee reasonably believes the investigation will result in disciplinary action" (Id. at 257-258). Fourth, "exercise of the right may not interfere with legitimate employer prerogatives" (Id. at 258). Fifth, the employer may carry on its inquiry without interviewing the employee, thus leaving to the employee "the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one" (Id. at 258-259). Sixth, "the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview" (Id. at 259-260).

The Employer contends that it complied with WEINGARTEN. It did, in that Wiersma asked for union representation to be present at the investigatory interview and the Employer supplied it. Specifically, the Employer summoned union representatives Arndt and Stott to the meeting. They were present for the meeting's duration and were not prevented from participating in it.

However, that finding does not resolve the instant matter because, by the Employer's own admission, WEINGARTEN did not address the issue involved here (i.e. whether an employee is entitled to a pre-investigatory interview meeting with a union representative). That matter was not mentioned in the decision. Additionally, the statute which was interpreted and applied in WEINGARTEN was the NLRA, whereas here the statute being interpreted and applied is MERA. Given the foregoing, the focus now shifts to a review of Commission case law.

The Commission subsequently applied the right to representation principle of WEINGARTEN in its cases. See, for example, WAUKESHA COUNTY, DEC. NO. 14662-A (Gratz, 1/78), *aff'd*, DEC. NO. 14662-B (WERC. 3/78). The WAUKESHA COUNTY decision established that whether a right to representation exists depends on the purpose of the employer-employee

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. In WAUKESHA COUNTY, the Commission found in pertinent part that the Employer violated Sec. 111.70(3)(a)1 by denying an employee's request to have a union steward present with her during an investigatory interview which the employee reasonably believed could result in her being disciplined.

Sec. 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer to "interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed" by Sec. 111.70(2), Stats. The pertinent portion of subsection 2 is the part which says that "municipal employees shall have the right. . .to engage in lawful, concerted activities for the purpose of. . .mutual aid or protection. . ."

Subsequent Commission cases expounded on the nature of a municipal employee's right to representation when meeting with management agents. For example, the Commission held that there is no statutory right to representation if an employee is under no compulsion to appear before the employer (CITY OF MILWAUKEE, DEC. NO. 17117-A (Davis, 1/80) *aff'd by operation of law*, DEC. NO. 17117-B (WERC, 2/80), or if there is no reasonable cause to believe that an employer-employee meeting may result in discipline (CITY OF MADISON (POLICE DEPARTMENT), DEC. NO. 17645 (Davis, 3/80), *aff'd by operation of law*, DEC. NO. 17645-A (WERC, 4/80), or if the meeting is to impose discipline that has already been decided on (WAUKESHA COUNTY, DEC. NO. 18402-C (Crowley, 1/82), *aff'd*, DEC. NO. 18402-D (WERC, 9/82). Conversely, the Commission held that there is a statutory right to representation if an employee has requested representation and the scheduled interaction could reasonably affect a decision to discharge or discipline (CITY OF MILWAUKEE, DEC. NOS. 14873-B, 14875-B, 14899-B (WERC, 8/80), or if a collective union interest such as the adjustment of a grievance is at stake (BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-A (Jones, 10/83), *aff'd* DEC. NO. 20283-B (WERC, 5/84), or if the meeting's purpose is to determine whether an employee should be retained (BOSCOBEL AREA SCHOOL DISTRICT, DEC. NO. 18891-B (WERC, 12/83).

The Union argues that one of the cases cited above – namely CITY OF MILWAUKEE – addressed, and conclusively decided, the exact issue posed herein. According to the Union, that decision stands for the proposition "that an employee should have a reasonable opportunity to obtain the presence of and to consult with a union representative before and at various times during an interrogation." The Employer does not expressly dispute the Union's summary of that decision, but instead essentially argues that the MILWAUKEE decision should not be considered good law anymore. Given the parties' differing views over the continued viability of that decision, it will be reviewed in detail.

In that case, numerous police officers had requested union representation at hearings before the Milwaukee Board of Inquiry (BOI), and their requests had been denied. The Commission's decision was over 50 pages long, and the subsections in the **DISCUSSION** section indicate that the Commission addressed over two dozen issues. At the end of the

decision, the Commission addressed two hypothetical factual situations because the parties had asked the Commission for a "determination whether such contacts, in specified circumstances, are subject to MERA protection of a right to representation." One of the hypothetical situations which was posed was this:

> b. compelling an employee to submit to an interrogation by (or for use of) supervisory personnel without permitting the employee a reasonable opportunity to obtain the presence of and to consult with an MPA representative before and at various times during the interrogation where the employee has requested such representation based upon the employee's reasonable cause to believe that a subsequent supervisory decision to discharge or discipline the employee could result from or be based upon, in whole or in part, the employee's responses during the interrogation.
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> CITY OF MILWAUKEE, *supra*., at 49.

After identifying the various arguments raised by the parties concerning this matter, the Commission opined as follows:

> In our view, the situation posited in (b), again, falls squarely within the scope of the right to representation recognized in WAUKESHA COUNTY and in the WEINGARTEN case. 49/ (citation omitted). In that regard, we note that it is only a "reasonable opportunity" to obtain the presence of and to consult with an Association representative before and at various times during the interrogation, not an absolute right in those regards. Moreover, at the interrogation itself, only the presence of and consultation with the representative, not a right to have the representative act as spokesperson that is posited. 50/ (citation omitted). And finally, the reasonable opportunities are with regard to "an" Association representative, not to any particular Association representative. Furthermore, it is not all interrogations of employees by supervisors, but only those that are compelled by supervision that are involved. If the employee involved requests the reasonable opportunity to consult and have a representative present, Respondents' agents would be free to continue the investigation without benefit of the employees' answers to the oral interrogation, and to therefore put the employee to the choice of foregoing the consultation with and presence of the representative or of foregoing the interrogation and any benefit it might be to the employee.
>
> We are satisfied, given those limitations, that recognition of MERA protection in the posited circumstances would serve the underlying legislative purposes of MERA by providing a lawful and concerted means of achieving mutual aid and protection of legitimate employee interests in a manner giving appropriate weight to the Respondents' interests in efficiency of operations and effectiveness of discipline.

> For all of the foregoing reasons, we conclude that Respondents would commit a prohibited practice within the meaning of Section 111.70(3)(a)1, MERA, if they or their agents engaged in the conduct posited above.

CITY OF MILWAUKEE, *supra*, at 50.

As previously noted, the Union reads the section quoted above to stand for the proposition "that an employee should have a reasonable opportunity to obtain the presence of and to consult with a union representative before and at various times during an interrogation." The Examiner finds the Union's description of the Commission's holding in MILWAUKEE to be accurate.

Also as previously noted, the Employer does not expressly challenge the interpretation just noted. Instead, it essentially argues that the MILWAUKEE decision should not be considered good law anymore because the decision cited in footnote 49/ was overturned on appeal.

Given that contention, the focus turns to a discussion of the decision cited in footnote 49/ of MILWAUKEE. Footnote 49/, which is found at the end of the first sentence in the first paragraph quoted above, provided thus:

> 49/ See also, CLIMAX MOLYBDENUM CO., 227 NLRB No. 14, 94 LRRM 1177 (1977) (right to representation under NLRA includes right to consult with representative prior to investigatory interview).

Although the Commission's summary of CLIMAX in that footnote did not say so, the NLRB found that this right to consult with a union representative prior to an investigatory interview applied even in situations where the union representative, and not the employee, requested the pre-investigatory interview meeting. On appeal, the 10th Circuit Court of Appeals reversed the NLRB's decision and denied enforcement of the NLRB's order. 584 F.2D 360 (10th Cir., 1978). In its decision, the Court found that it was the employee, and not the union, who had to make the request for a pre-investigatory interview meeting with a union representative, and rejected the argument that WEINGARTEN should be extended to situations where the union, and not the employee, attempted to assert the right to union representation on the employee's behalf. The County avers that since the Commission's MILWAUKEE decision relied on CLIMAX "to create a right to a pre-investigatory interview meeting at the request of the union, that right ceased to exist when the 10th Circuit Court of Appeals effectively overruled" the NLRB's decision. The Examiner finds otherwise for the following reason. When the Commission issued its MILWAUKEE decision in 1980, both the NLRB decision and the Court of Appeals decision in CLIMAX had already been issued. The NLRB decision was issued in 1977 and the Court of Appeals decision was issued in 1978. Since both of the CLIMAX decisions were issued before the Commission issued its decision in MILWAUKEE in 1980, the Commission could have cited either one. The Commission chose to cite the NLRB decision in footnote 49/ because it supported the conclusion the Commission reached in MILWAUKEE (i.e. that

employees have a MERA right to consult with a union representative prior to an investigatory interview). It can be surmised that had the Commission ruled the opposite way in MILWAUKEE and found that there was no MERA right for employees to consult with a union representative prior to an investigatory interview, they would have cited the Court of Appeals' decision in CLIMAX. However, that did not happen because the Commission disagreed with the finding of the Court of Appeals and agreed with the finding of the NLRB. That was the Commission's call to make. That being so, the County's contention that the MERA right to consult with a union representative prior to an investigatory interview - which the Commission created in its MILWAUKEE decision – somehow "ceased to exist" based on a decision that was issued two years prior to the Commission's decision, is not persuasive.

Aside from that, the Court of Appeals decision in CLIMAX can be distinguished for the following reason. One of the factors which the Court cited in CLIMAX for concluding that WEINGARTEN could not be construed to cover the situation involved therein was that the investigatory interview in that case was scheduled for the next day. The Court reasoned that since there was a time lapse of 17½ hours between the time the employees were advised of the investigatory interview and the time it took place, the employees had an adequate opportunity to consult with union representatives on their own time prior to the investigatory interview. Here, though, the facts are different. In this case, the investigatory interview was scheduled and held just a couple of hours after the altercation occurred. The reason that is important is because the Court concluded its decision in CLIMAX by stating:

> The employer is under no obligation to accord the employee subject to an investigatory interview with consultation with his union representatives on company time if the interview date otherwise provides the employee adequate opportunity to consult with union representatives on his own time prior to the interview. Thus, we do believe that WEINGARTEN requires that the employer set investigatory interviews at such a future time and place that the employee will be provided the opportunity to consult with his representative in advance thereof on his own time.
>
> Id. at 365.

In this case, the "interview date" chosen by the Employer did not give Wiersma an "adequate opportunity to consult with union representatives on his own time prior to the interview." The investigatory interview was conducted during the workday, so consultation with the Union outside of work was not possible. While an employer has the right to insist that an investigatory interview take place immediately – as the County did here – the language quoted above instructs that when that happens, the employer must permit the employee and his union representative to confer in private in advance. See also UNITED STATES POSTAL SERVICE, 288 NLRB 864 (1988). That did not happen here.

Even if the Court of Appeals decision in CLIMAX cannot be distinguished for the reason identified above, it is noteworthy that the 9th Circuit Court of Appeals reached the opposite

conclusion in another decision. In PACIFIC TELEPHONE AND TELEGRAPH CO. V. NLRB, 262 NLRB 125 and 127 (1982), the NLRB again found that a union could demand a pre-investigatory interview conference with an employee, even if the employee never made such a request. On appeal, the 9th Circuit Court of Appeals upheld the NLRB's ruling that the employer's failure to grant employees pre-interview conferences with their union representatives violated the employee's right to act in concert, and enforced the NLRB's order. 711 F2D 134 (9th Cir., 1983).

Although the MILWAUKEE decision was issued 28 years ago, it is still good law because the pertinent finding from MILWAUKEE has not been reversed or modified by the Commission. As previously noted, the pertinent finding from that case is that municipal employees have a MERA right to consult with a union representative prior to an investigatory interview. Application of that principle here dictates that Wiersma had the right to consult with a union representative prior to going into the investigatory interview on November 14, 2007.

A related question is who can invoke the right just referenced. Can the union invoke it, or does it have to be the employee who invokes it? The Examiner finds it can be either the employee or the union that invokes this MERA right. In this case, it was union representative Arndt who unsuccessfully attempted to invoke this right. Arndt's request to speak/confer with Wiersma and Hupke before the investigatory meeting started should have been granted.

In light of this conclusion, it is unnecessary to address the various reasons which Boge proffered at the hearing for denying Arndt's request to meet with Wiersma and Hupke before the investigatory interview. Boge's action violated MERA, regardless of his motives. It is not necessary to prove unlawful intent to establish a violation of Sec. 111.70(3)(a)1, Stats.

In sum, after balancing the interests in this case, and applying the pertinent holding from the Commission's MILWAUKEE decision to the facts, it has been held that the Employer should have granted Arndt's request to meet with Wiersma and Hupke before the investigatory interview. Since that did not happen, the County committed an interference violation. As far as the remedy is concerned, the Examiner has issued a standard cease and desist order and posting requirement. The Union's request that the County be ordered to reimburse the Union for the WERC filing fee in this matter is denied.

Dated at Madison, Wisconsin, this 24th day of September, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

REJ/gjc
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