STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PATRICK O. PAUL, Complainant,

vs.

SCHOOL DISTRICT OF CUDAHY, Respondent.

Case 77
No. 70863
MP-4679

Decision No. 33810-A

Appearances:

Enochs Law Firm, by **Randy T. Enochs**, 500 West Silver Spring Drive, Suite K-200, Glendale, Wisconsin 53217, for the Complainant.

Franczek Radelet, by **Kathleen A. Rinehart**, 300 South Wacker Drive, Suite 3400, Chicago, Illinois 60606, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On July 21, 2011, Patrick O. Paul, the Complainant, filed a complaint with the Wisconsin Employment Relations Commission alleging that the School District of Cudahy, the Respondent, had committed a prohibited practice within the meaning of Sec. 111.84(2), Stats., by the manner in which it scheduled and conducted an investigative interview prior to the imposition of discipline. On January 13, 2012, Paul amended his complaint to allege that the District violated Sec. 111.70(3)(a), Stats., by its conduct. On March 2, 2012, the Commission appointed Stuart D. Levitan, a member of its staff, to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Order, pursuant to Secs. 111.70(4)(a) and 111.07, Stats. Hearing in the matter was held on March 13, 2012, in Cudahy, Wisconsin. A stenographic transcript was made available to the parties on March 23, 2012. The parties filed written arguments, the last of which was received on May 24, 2012. The Examiner, having considered the record evidence and the arguments of the parties, makes and issues the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Complainant Patrick O. Paul ("Paul") was employed as a custodian by the Cudahy School District from 1998 to May 17, 2011. Following the elimination of his second shift position at J. E. Jones Elementary School in April, 2011, Paul was awarded the position of Second Shift Custodian at General Mitchell Elementary School, pursuant to his bumping rights under a collective bargaining agreement between the District and Local 742, AFSCME, AFL-CIO. Paul was notified on April 21, 2011 that the reassignment would be effective April 25, 2011.

2. Local 742, AFSCME, AFL-CIO, ("Local 742") represents employees of the School District of Cudahy, including custodians, for the purpose of collective bargaining with the District.

3. Respondent School District of Cudahy ("the District") is a K-12 public school District in southeast Wisconsin. James Papala became the District's Director of Business Services in 1996, functioning essentially as its chief financial officer. Previously assisted by a Facility Manager, Papala has for several years been the District's primary supervisor of custodial employees, both individually and collectively as members of Local 742.

4. As of May, 2011, John Schultz, Head Custodian at Jones Elementary School, had worked for the District for a little under 30 years. For about ten to fifteen years, he had been the assistant steward for Local 742 and had been at three or four investigatory interviews with Paul.

5. The District's protocol for investigative interviews which may lead to discipline is to schedule the meeting a few days in advance, informing the employee of the right to union representation at the interview. If the steward were not available on the proposed date, the District would provide the alternate steward or reschedule the interview. At Park View Elementary School, where Paul had worked the longest during his tenure with the District, the District provided both oral and written notice to both Paul and Local 742. Prior to May 10, 2011, Papala had conducted several investigative interviews with Paul for poor cleaning performance, including prior to a three-day suspension in 2009. Every time Papala scheduled a pre-disciplinary investigative interview with Paul prior to May 10, 2011, Paul requested, and Papla provided, representation by a steward or assistant steward of Local 742.

6. On February 2, 2009, the then-facility manager gave Paul the following memo scheduling what he identified as a "Meeting to obtain information prior to possible discipline" for February 4. The memo read:

> The purpose of this meeting is to discuss unsatisfactory job performance while performing Custodial duties at Parkview Elementary School. Since disciplinary actions may be taken, you may arrange to have union representation (Steward) at the meeting. It is your responsibility to arrange this if you so choose.

7. When Papala notified Paul of his new assignment at General Mitchell, he suggested Paul formally 'shadow' the school's outgoing second shift custodian, to familiarize himself with the route sheets and building. Paul declined to do so, and Papala did not direct him to.

8. Sometime between 9:00 a.m. and 10:00 a.m. on Tuesday, May 10, 2011, Matthew Geiger, Principal of General Mitchell, called Papala to complain about the state of cleanliness of the school, particularly the handicapped-accessible boy's bathroom in the northwest corner on the top floor of the school. At Geiger's request, the two viewed the bathroom, which they quickly determined was filthy and in clear violation of custodial standards. At Papala's direction, Geiger took color, digital photographs to memorialize the condition of the bathroom and any other areas not cleaned adequately. Papala and Geiger did not direct the first shift custodian to either clean or close the bathroom at issue.

9. After meeting with Geiger, Papala met with Superintendent James Heiden to discuss Papala's plan for an immediate meeting with Paul. The two agreed that if Papala found Paul to have violated the District's cleaning standards, Paul would receive an automatic five-day suspension, with a second meeting scheduled, with Heiden, to consider termination.

10. On May 10, 2011, Papala was aware that the AFSCME staff representative assigned to Local 742, Penni Secore, was on an extended vacation out of the country. He was also aware that the Local 742 union steward, Mark Gerasch, also had taken a vacation day (in the northern part of Wisconsin), and that assistant steward Schultz was working his first shift assignment at Jones Elementary School.

11. Shortly after Paul punched in at about 1:50 p.m. on May 10 and was changing a bag on a vacuum cleaner, Papala came to his work area and said they needed to talk. Papala did not inform Paul of the specific topic, or that the conversation would be an investigative interview which could result in discipline.

12. Paul, who also knew that Gerasch was on a vacation day and that Schultz was planning to leave when his shift ended at 2:30 p.m., asked if he needed union representation; Papala told him he did not need it, but that it was his choice. Papala told Paul that Secore was on vacation, but that Schultz or some other rank-and-file union member would be provided if he wanted. Paul did not request union representation from Schultz or a non-steward.

13. Paul accompanied Papala back to his office, where, after the arrival of Geiger around 2:15 p.m., Papala informed Paul that there had been complaints about the level of cleanliness in one or more of the bathrooms. The two supervisors then interrogated Paul about the dirty bathroom and his general performance.

14. At the conclusion of the meeting, Papala informed Paul that he was being suspended for five days, and that the District was going to consider terminating him.

15. After it has imposed a five-day disciplinary suspension, the District's normal process is to schedule a meeting with the superintendent, the employee and a union representative to determine the next step.

16. Following the meeting at which he was suspended, Paul called Gerasch, who was coming home from the northern part of the state. Gerasch told Paul he had already been informed of the action.

17. On May 10, following the meeting, Papala and Geiger jointly issued a memo to Paul, copied to steward Gerasch and staff representative Secore, which read, in part:

> Present: Pat Paul, Jim Papala and Principal Matt Geiger. Pat Paul declined the offer of union representation.
>
> ….
>
> Your Response: During the meeting, you first indicated that you cleaned the bathrooms but sometimes the product, if applied in too strong a concentration, would leave the floor sticky. You then changed your statement, indicating that maybe you forgot to clean those bathrooms for the last 2 days. You indicated that this was only the first two days on your route.
>
> ….
>
> You have been employed by the District since July 20, 1998. The District's Support Services Goals and General Priorities (Board Policy EA) are distributed to all support staff annually (see attached).
>
> Conclusion: Based on the review of the facts presented at the meeting, I am concluding that you have violated the District's Standards of Conduct, including, but not limited to, number 1, 2, 7, 13 and 28. These Standards state: "Violations of these standards are subject to discipline, up to and including discharge."
>
> Actions to be taken at this time:
>
> 1. Unpaid suspension of 5 days, effective today, May 10, 2011.
> 2. Scheduling a meeting on Tuesday, May 17, 2011 at 2:30 PM at District Office.
> 3. Proper notification of actions taken to union as stated in Labor Agreement.

18. Following his receipt of the May 10 memo, Paul did not inform the District he disputed the stated explanation of why he was without representation at the meeting on that date.

19. On or about May 12, 2011, Heiden told Gerasch that the District would elevate the five-day suspension to a termination unless Paul resigned, in which case the District would provide a neutral letter of reference and not challenge his claim for unemployment compensation. Gerasch relayed the offer to Paul, suggesting he take it.

20. The District Board of Education was scheduled to meet on May 16, 2011. Paul's suspension was set to run until May 17, with a meeting set for 2:30 that afternoon with Heiden and Papala to consider Paul's termination. In order to expedite Paul's termination and make sure any necessary board action was noticed properly on the May 16 meeting agenda, Papala telephoned Paul at home on or about May 12 to discuss whether he would be resigning. Paul was not offered, and had no way of obtaining, union representation during that phone call.

21. Paul resigned in a letter to Heiden dated May 17, adding, "I appreciate the opportunities I have been given here, and wish you much success in the future."

22. Consistent with the agreement among the parties, the District provided Paul with a neutral letter of reference, and did not challenge his application for unemployment compensation. Paul was unemployed at the time of hearing.

23. The union did not grieve Paul's suspension or termination, nor file a prohibited practice complaint alleging he had been denied his right to union representation at the meeting on May 10, 2011 or in the telephone call from Papala on or about May 12, 2011.

24. By the manner in which it scheduled and conducted the pre-disciplinary investigative interview on May 10, 2011, the District effectively denied Paul his right to union representation.

Based on the above Findings of Fact, I hereby make and issue the following

CONCLUSIONS OF LAW

1. On May 10, 2011, Patrick O. Paul was a municipal employee as defined by Sec. 111.70(1)(i), Stats.

2. Local 742 AFSCME, AFL-CIO, is a labor organization as defined by Sec. 111.70(1)(h), Stats.

2. The School District of Cudahy is a municipal employer as defined by Sec. 111.70(1)(j), Stats.

3. James Papala is the authorized agent for the School District of Cudahy for the supervision of custodial employees represented by Local 742.

4. By the manner in which Papala scheduled and conducted the pre-disciplinary investigative interview with Patrick O. Paul on May 10, 2012, the District violated Sec. 111.70(3)(a)1, Stats.

On the basis of the above Findings of Fact and Conclusion of Law, I hereby make and issue the following

ORDER

To remedy its violation of Sec. 111.70(3)(a)1, Stats., and to effectuate the purposes of the Municipal Employment Relations Act, the District shall:

1. Inform employees when compulsory meetings with supervisors are investigative interviews which could result in discipline.

2. Post, in the area where employee notices are customarily posted, the notice identified below as "Appendix A." The notice shall be posted for no less than thirty calendar days and kept free from any defacement.

3. Pay Patrick O. Paul an amount equivalent to two days' gross pay, at the rates in effect May 10-12, 2011.

4. Notify the undersigned within twenty days of the actions it has taken to comply with this Order.

Dated at Madison, Wisconsin, this 9th day of August, 2011 [correction: 2012].

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/
Stuart D. Levitan, Examiner

Appendix "A"

NOTICE TO ALL EMPLOYEES IN BARGAINING UNITS REPRESENTED BY LOCAL 742, AFSCME, AFL-CIO

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

> WE WILL NOT INTERFERE with the rights of Local 742 members and their representatives to engage in lawful concerted activity for the purpose of mutual aid and protection, including the right to union representation at compulsory meetings which could result in discipline.
>
> WE WILL inform employees when compulsory meetings with supervisors are investigative interviews which could result in discipline.

Dates this ____ day of ____, 2012

James Papala
Director of Business Services

SCHOOL DISTRICT OF CUDAHY (Patrick O. Paul)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

In support of his position that the District should be found to have committed a prohibited practice, the complainant asserts and avers as follows:

> Complainant was led to believe the meeting on May 10 was not concerning discipline, and that administrators just wanted to talk about some issues, and there would be another meeting where he would be able to have union representation. After the meeting started, Papala said no union steward was available, but that Paul could have another union member present; when Paul asked if he needed a union steward present, Papala lied and said no. Paul did ask for a union rep or steward, but Papala again told him he did not need one. In lying and deceiving Paul that the meeting was not likely to lead to discipline and further stating he would not need union representation despite Paul's request, Papala violated MERA. The fact that no advance notice was given to Paul and the union, as has been the practice of the District, is further evidence of the District's violation.
>
> Given Papala's admitted, undisputed actions regarding the meeting, it is reasonable to conclude that Paul's rights were violated. Specifically, Papala admitted that no notice of the investigatory interview was issued, as was customary, that the meeting was scheduled when the Staff Representative was on vacation and only one union steward *might* have been available, and, contrary to custom, the Superintendent was not present. Not finding a violation would allow employers to trick employees into thinking they do not need representation or that some meetings held do not regard discipline or are otherwise investigative in nature, which is exactly what Papala did to Paul by not following practice and custom and then falsely telling Paul that he would not need union representation and that no representation was available, which was largely true.
>
> The Examiner should find that Paul's rights were violated and order his reinstatement with full back pay and benefits, plus attorney's fees.

In support of its position that it did not commit a prohibited practice, the District asserts and avers as follows:

> The facts unequivocally show the District did not commit a prohibited practice; it is clear the District has consistently met its obligations to provide a union steward once an employee requests representation.

As a veteran employee and long-time member of Local 742, Paul would have received training and/or information about his rights and responsibilities, including representation rights during investigative interviews. Numerous piece of Wisconsin AFSCME literature have a statement explaining the employee's right to representation upon request.

Papala is familiar with employee rights and responsibilities in this regard, and regularly communicates with AFSCME stewards and representative to make sure the union is aware of any actions that might involve discipline or termination. Heiden testified Papala's work and relationship with the union are exemplary. It is therefore reasonable to conclude that the District's actions regarding Paul were consistent with his right to union representation before a discussion of alleged misconduct occurs.

Paul bore the responsibility to request representation; the District was responsible for providing access to such representation once such a request was made. Paul's affirmative and voluntary decision to proceed without representation cannot in any reasonable way be refashioned now as a claim the District committed a prohibited practice.

The District's decision not to provide advance written notice of the meeting was not a prohibited practice. Although the District's general procedure is to provide a verbal or written notice of an investigatory interview to both the employee and the union, the District deviated from its general practice for a reason unique and specific to Paul – he had an established practice of not acknowledging poor performance during investigatory meetings. Thus, it was necessary to preserve the evidence, to ensure Paul did not have the chance to do a quick cleaning so as to avoid a discussion that he failed to meet cleaning standards over several days. The District's decision did not prevent or interfere with Paul's ability to request a union steward before the start of the meeting, or the District's ability and willingness to comply with such a request.

The District has been fully aware for many years of its duties and obligations under the statutes and case law. Paul's on-going pattern of poor work performance has required numerous investigative interviews about his refusal to comply with the District's cleaning standards. Paul has had union representation in every investigatory interview. His affirmative and voluntary decision to decline representation, either by the assistant steward or anyone else whom Papala said he was free to choose, does not mean the District committed a prohibited practice.

The District's adherence to its legal obligations is further shown by the fact that Heiden ensured that the post-suspension meeting would be conducted in accordance with expected standards, and that AFSCME District Council 48

never filed a grievance or prohibited practice claim concerning this matter. The complaint is without foundation and should be dismissed with prejudice.

In his response, the complainant posits further as follows:

Given the odd and uncommon approach the District took regarding the fateful meeting on May 10, it is highly reasonable to conclude Paul's rights were violated. First, the District contends that when Geiger viewed the bathroom, he was amazed at the lack of cleaning "for the last several days." Yet there was another custodian, working the first shift – if the bathroom hadn't been cleaned for several days, why was he not responsible as well, and held accountable as Paul was?

It is apparent the District wanted to blame Paul, and so held an immediate investigation – even though Geiger called Papala during the other janitor's shift. It appears the District was out to terminate Paul, so, again, it is highly reasonable to conclude that his rights were circumvented to get the results they wanted.

As the District notes, Paul was familiar with his rights under the contract and the law. So why would he suddenly elect not to have union representation when it was his practice to have representation in the past.? Likewise, Papala should have known what Paul's rights were.

Papala's testimony about allegedly offering Paul representation was directly negated by Paul's testimony that Papala never said that, but instead said he could be represented by two union members who were not stewards. Lending credence to Paul's testimony is the fact that at the time of the meeting, staff representative Secore and steward Gersarch were both out of town, and that assistant steward Schultz was ending his shift and likely to be headed home.

It is also interesting that the District claims it took pictures of the dirty bathrooms because of Paul's history of not accepting responsibility, yet did not make sure the first shift custodian did not clean up the bathroom before Paul got to work. Papala's testimony just does not add up. If clean bathrooms are so important, why would they allow children inside this dirty bathroom until the meeting was held to "preserve evidence."

The fact that the District did not issue advance notice of the meeting is further evidence of Paul's rights being violated. Papala testified the purpose of the advance notice is, in part, to make sure a union representative is available; without the advance notice, the District would not know if that was the case. This fact leads credence to Paul's testimony that Papala told him no union representative was available.

In its response, the District posits further as follows:

The District has never been accused of committing a prohibited practice, but instead has cultivated a good working relationship with union stewards and Council 48. Veteran employee and union steward John Schultz testified he had never been denied access to any custodial employee during investigative meetings where discipline was a possibility.

Further, Council 48 has not filed a grievance or prohibited practice regarding this situation, and has never argued that Paul actually requested union representation and that such representation was denied.

Having been disciplined previously, Paul knew how to ask for union representation if he desired it. The District's readiness to provide Paul with representation if he had asked was corroborated by Papala's testimony that he knew Schultz' shift was ending around 2:00 PM, and that he would have delayed the investigative meeting to await his arrival if Paul had so requested.

Having established a pattern of poor performance, with the resultant discipline, Paul cannot now credibly claim he did not understand the import of a meeting that featured both Papala and Geiger, and that he did not know he could request the presence of steward Schultz, which request the District would honor. The deviation from the written notice typically provided prior to an investigatory interview is not an example of District trickery, but a reflection of Paul's untrustworthiness; given his practice of not acknowledging performance issues, the District felt it was necessary to preserve the evidence and make sure Paul did not have a chance to do a quick surface cleaning. The lack of written prior notice did not prevent or interfere with Paul's ability to request a union steward; to the contrary, the District was prepared to delay or reschedule to accommodate such a request.

The District is aware of its duties and obligations to allow for representation in investigative interviews. Paul's affirmative and voluntary decision not to request such representation was his to make. It defies credibility and logic for Paul to claim he did not know how to make such a request, especially given his disciplinary record of the previous two years.

The complaint should be dismissed.

DISCUSSION

The Wisconsin Municipal Employment Relations Act makes it unlawful for municipal employers to "interfere with, restrain or coerce municipal employees from exercising their … right … to engage in lawful, concerted activities for the purpose of . . .mutual aid or

protection," [1] including having union representation throughout the disciplinary and grievance process. It is well-settled that it is a prohibited practice for a municipal employer to deny a municipal employee's request for union representation at a compulsory investigatory meeting which the employee reasonably believes could result in discipline. Waukesha County, Dec. No. 14662-A (Gratz, 1/78), *aff'd by operation of law,* Dec. No. 14662-B (WERC, 3/78), City of Madison (Police Department), Dec. No. 17645 (Davis, 3/80), *aff'd by operation of law,* Dec. No. 17645-B (WERC, 4/80) and City of Milwaukee, Dec. No. 14873-B, 14875-B, 14899-B (WERC, 8/80), all relying on NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

All parties benefit from such a policy, as Mr. Justice Brennan explained:

> A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest. Id., at 262-3.

As the state with the first statute recognizing the right of public employees to organize and bargain collectively, Wisconsin has "its own history of decisions" concerning an employee's right to union representation in a pre-disciplinary conference, showing that the right enunciated in Weingarten actually "pre-existed that case under Wisconsin law." City of Milwaukee, Dec. No. 13558-B (Schurke, 5/76), *aff'd,* Dec. No. 13558-C (WERC, 5/76).

Indeed, the commission found in an earlier, weaker iteration of the statute a right the Supreme Court would not find in the National Labor Relations Act ("NLRA") until more than three years later:

> …Section 111.70(2) clearly mandates that municipal employes (sic) have a right to be represented by a labor organization of their own choice when conferences and negotiations do occur concerning their wages, hours and working conditions. The denial of representation in a conference does interfere with the right to be represented set forth in Section 111.70(2), and in denying representation in such a conference the Municipal Employer here has committed prohibited practices with the meaning of Section 111.70(3)(a)1. Whitehall School District, Dec. No. 10268-B (WERC, 9/71) and Crandon Joint School District No. 1, Dec. No. 10271-C (WERC, 10/71).

The statute under consideration in Whitehall and Crandon was subsequently amended, and strengthened, along the lines of Section 7 of the NLRA, as quoted above. Although general municipal employees "lost most of (their) rights" to organize and bargain collectively in

[1] Sec. 111.70(3)(a)1, referencing Sec. 111.70(2), Stats.

amendments enacted in 2011[2], the pertinent provisions of 111.70(2), Stats., were not affected and thus have their same meaning as before.

The representational right guaranteed by Sec. 111.70(2), Stats., is the "right to be assisted by effective union representation." (emphasis in original) City of Appleton (Fire Department), Dec. No. 27135-A (Greco, 7/92), *aff'd by operation of law,* Dec. No. 27135-B, (WERC, 7/92). The union representative "should be able to take an active role in assisting the employee to present the facts." NLRB v. Texaco, Inc., 659 F. 2d 124, 126 (9th Cir., 1981). The union representative cannot be relegated, even temporarily, to the role of passive observer. NLRB v. Lockheed Martin Astronautics, 330 N.L.R.B. 422, 430 (2000).

In the decades after Weingarten, the role of the union representative grew from silent observer to active participant to advocate. Jodie Meade Michalski, *Knowing When to Keep Quiet: Weingarten and the Limitations on Representative Participation, 26:163* Hofstra Lab. & Emp. L. J., 169-70 (2008). The employee has a right to a union representative who understands the charges, with whom the employee is able to have confidential discussions both before and during the interview. An employee "should have the reasonable opportunity to obtain the presence of and to consult with a union representative before and at various times during an interrogation." Columbia County, Dec. No. 32415-A (Jones, 2/2008), *aff'd by operation of law* Dec. No. 32415-B, (WERC, 10/08), explicating the Commission's holding in City of Milwaukee (Decs. No. 14873-B, 14875-B and 14899-B, WERC 8/80). An employee must be afforded an "adequate opportunity to consult with union representatives on his own time prior to the interview," or be given time during the workday to confer in private with a representative prior to the interview. Climax Molybdenum Co., 584 F.2d 360, 365 (10th Cir., 1978) discussed in Columbia County, supra, at 16-17. "[I]t is now settled that an employee has the right to consult with an employee representative before undergoing an interview when Weingarten protections apply," System 99, 289 N.L.R.B. 723, 727 (1988).

Even prior to the Weingarten decision, arbitrators found employees had an inherent right to union representation, especially in the context of a grievance procedure. "(T)here is a well-established current of arbitral authority sustaining the right of such representation where the situation is such that the employee who is called in for interrogation has reasonable cause to anticipate the interview will result in the development of information which will be utilized as the basis for disciplinary action against him." Chevron Chemical Co., 60 LA 1066, 1071 (Merrill, 1973), cited in Weingarten, footnote 12. "[W]henever an employee has reasonable grounds for believing that the Company is considering disciplinary action, the employee has the right of Union representation before consenting to a conference with management." Valley Iron Works, 33 LA 769, 771 (Anderson 1960), cited in Chevron Chemical. [3]

The District readily acknowledges that Paul was entitled to union representation at the

[2] WEAC v. Walker, 824 F. Supp. 2d 856, 857 (W.D. Wis., 3/12).
[3] The distinguished arbitrator Arvid Anderson was then a member of the Wisconsin Employment Relations Board, later chairman of the New York City Office of Collective Bargaining.

meeting on May 10, and but contends that he never requested representation. Paul asserts he

did, but that Papala told him no steward was available, and also that he didn't really need representation because there would be another meeting.

If Paul did not request representation, he was acting contrary to character and experience. Having already been suspended for poor performance, he was aware of his right to have, and need to request, representation. He had indeed availed himself of that opportunity on three or four occasions. Paul testified credibly he would not knowingly waive his Weingarten/Waukesha rights:

"I'd never go into a meeting – a disciplinary meeting without union representation." [4]

If Paul did request representation and Papala declined to provide it, Papala was acting contrary to character and experience. Papala's credible testimony, and that of superintendent Heiden, establishes that Papala understood and observed Weingarten/Waukesha rights, and would not have refused a direct request by Paul for union representation. However much he may have wanted to discipline Paul, I believe Papala would have had assistant steward Schultz come over from Jones School to be at the meeting if Paul had made a formal request for representation. I do not find that Papala intended to unlawfully deny Paul his Weingarten/Waukesha rights.

But while I reject Paul's assertion he was unlawfully denied a formal request for representation, I do find support in the record for several important aspects of his narrative. As Paul contended, Papala *did* say there would be a second meeting – in fact, its date and time is specified in the May 10 meeting memo, and was verified by Papala and Heiden at hearing. [5] As Paul contended, Papala *did* offer representation by non-stewards. [6] Most importantly, as Paul contended, Papala *did* tell him he did not need representation; as Papala testified at hearing:

"I said you don't need it (union representation), it is your choice." [7]

At the time Papala told Paul he did not need union representation, Papala knew the meeting would likely result in Paul's immediate five-day disciplinary suspension, with a recommendation of termination. If Paul had known this, it's reasonable to conclude he would have felt he absolutely *did* need union representation.

It is critically important that the District clearly deviated from its standard practice regarding scheduling and notice of pre-disciplinary interviews. Prior to May 10, 2011, it had been the District's established protocol to schedule an investigative interview at least a few

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[4] Tr., p. 10.
[5] Tr., pps. 48, 59-60.
[6] Papala testified, "I said that whoever he felt comfortable (with), we could make arrangements for." Tr., p. 37. A similar statement appears on pps. 47-48.
[7] Tr., p. 37.

days in advance – expressly to schedule union representation. As Papala testified:

> We would have either a written notice or verbal notice of the meeting to investigate the issue that is at hand and then we'd follow through and have a meeting and then have a follow-up summary of that meeting. [8]

Paul had personal knowledge that that was the case. Papala acknowledged that the normal protocol that Paul had experienced at Park View was for the District to issue a notice to the employee, with a copy to the union, scheduling investigative interviews:

> At Park View, we sent a notice.... When we sent notice out, it stated in there that if you wanted – if he wanted union representation, that he should arrange for that if he so chose, and of course we would send a copy of that to the union as well. So that is how the union became aware of it and they appeared together. [9]

Based on his personal experience of the District's acknowledged policy, Paul could reasonably believe that the District provided written notice scheduling pre-disciplinary interviews a few days in advance. Thus, he could reasonably believe the unscheduled, unnoticed meeting – for which Papala told him he did not need a representative -- was not a pre-disciplinary investigative interview.

As noted above, an employer's apparent interference with an employee's exercise of Sec. 111.70(2) rights will generally not be found to violate Sec. 111.70(3)(a)1 if the employer has a valid business reason for its actions. Milwaukee Board Of School Directors, Dec. No. 27867-B (WERC, 5/95). Papala testified he did not provide notice in this instance because he did not want to give Paul the opportunity to "destroy the evidence" by quickly cleaning the bathroom. That explanation doesn't make any sense, and does not provide justification.

The District had known since about 9:00 that Tuesday morning that the bathroom hadn't been cleaned, and had already made plans to interrogate and likely discipline Paul when he reported about 2:00 pm. That gave the District almost five hours to document the scene and preserve the evidence; indeed, color digital photographs were taken. [10] Since assistant steward Schultz was working first shift, Papala could easily have called him over to view the scene, even before Paul arrived. I also take arbitral notice that the ubiquity of smartphones with video capabilities would have made it easy for Papala and Geiger to produce a comprehensive and convincing record of the state of cleanliness of the bathroom. "Preserving the evidence" was not a valid business reason for the District to deviate from its general practice of providing advance notice of pre-disciplinary investigative interviews.

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[8] Tr., p. 30.
[9] Tr., p. 32.
[10] I did not admit the photographs into evidence because they were not relevant to the legal issue of whether Paul had been denied his right to union representation, and were potentially prejudicial. However, their existence is part of the record, through both Papala's testimony and Ex. 2.

There are, of course, tragic or threatening situations which demand urgent and immediate investigative interviews and thus justify an employer deviating from a standard policy of advance notice. A dirty elementary school bathroom is not one of those situations.

Not only did Papala act with unjustified urgency – he did so precisely at the moment he knew union representation was at its lowest level. Papala knew that the AFSCME staff representative was on an extended vacation out of the country. He knew that the steward was also off that day, far away from the city. He knew that the assistant steward was ending his shift, expecting to be going home, and would not have a meaningful opportunity to adequately prepare for what turned out to be a pre-termination disciplinary meeting (especially since Papala did not give Paul a full understanding of the charges.)

Papala testified that he had "always presented to (Paul) the opportunity to have anybody he wanted available" at the meeting, if he so chose. [11] But other than validating Paul's claim that Papala was offering representation by non-stewards, this statement is simply not true. Paul could have anybody he wanted, except two of the three representatives he was legally entitled to.

Paul was also about to lose the opportunity to call on the third. Papala testified he discussed the issue of union representation with Paul around 2:10 p.m., and that Geiger shortly afterwards, meaning the meeting started about 2:15 p.m. – fifteen minutes before the end of Schultz' shift. Although neither the duration of the meeting nor the time Schultz actually left the school is in the record, the potential existed for Paul to change his mind and formally request representation, only to find that Schultz had already left. That scenario would not satisfy Paul's right to effective representation. The employer has a higher responsibility to provide for union participation in interviews which are clearly pre-disciplinary, as opposed to a non-targeted investigatory interview. Texaco, Inc., Houston Producing Division, 168 N.L.R.B. 361 (1967); Chevron Oil Co., 168 N.L.R.B. 574 (1967); Jacobe-Pearson Ford, Inc., 172 N.L.R.B. 594 (1968).

The parties share responsibility in the implementation of Weingarten/Waukesha rights. It is the employee's responsibility to request union representation when it would be reasonable to believe the meeting could end in discipline; the right to representation arises only in situations where the employee makes such a request. Weingarten, 420 U.S. at 257. But for the employee to know if it would be reasonable to believe an interview could lead to discipline, the employer must act reasonably and provide an accurate representation of the upcoming meeting. The employer's responsibility involves more than honoring a request for union representation; it must make sure the employee can make an informed decision about representation. The employer cannot deceive or conceal information, preventing the employee from making an informed decision about representation. An employee who has no reason to believe that a meeting is a pre-disciplinary investigative interview cannot be held to the

[11] Tr., pps. 37-8.

Weingarten/Waukesha requirement to formally request union representation.

An employer who advises that an interview will not result in discipline and then imposes discipline commits a prohibited practice. State of Wisconsin (Department of Health and Social Services, Division of Corrections, Dodge Correctional Institution), Dec. No. 25605-A (Engmann, 5/89), *aff'd by operation of law*, Dec. No. 25605-B (WERC, 5/89). "(N)either an employer's right to conduct the interview, nor any other legitimate prerogative, extends to entrapping an employee into unknowingly confessing to misconduct ....." United States Postal Service, 351 N.L.R.B. 1226, 1227 (2007).

Hours before the meeting started, Papala and Heiden were already anticipating suspending Paul for five days, and likely terminating him. Yet at the time the meeting started, Paul did not even know the specific topic, other than it had something to do with his work performance. [12] "If the right to prior consultation, and, therefore, the right to representation, is to be anything more than a hollow shell, both the employee and his representative must have some indication as to the subject matter of the investigation." Pacific Telephone and Telegraph, 262 N.L.R.B. 1048 (1982)

A 13-year-employee facing an investigative interview that will effectively result in his immediate termination for general poor performance is entitled to more notice -- both in terms of time and information provided -- than the District gave Paul.

It is not necessary for the complainant to demonstrate that the employer intended its conduct to interfere with an employee's exercise of section (2) rights, or even that there was actual interference; instead, interference may be proven by showing that the conduct has a reasonable tendency to interfere with the exercise of protected rights. Dane County, Dec. No. 11622-A (WERC, 10/73); City of Cudahy, Dec. No. 13246-A (Greco, 7/75), *aff'd by operation of law,* Dec. No. 13246-B (WERC, 8/75). If the conduct in question has a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and no employee felt coerced or was, in fact, deterred from exercising those rights. Juneau County, Dec. No. 12593-B (WERC, 1/77); Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84). However, employer conduct which may well have a reasonable tendency to interfere with an employee's exercise of Sec. 111.70(2) rights will generally not be found to violate Sec. 111.70(3)(a)1 if the employer had valid business reasons for its actions. City Of Brookfield, Dec. No. 20691-A, (WERC, 2/84); Cedar Grove-Belgium Area School District, Dec. No. 25849-B (WERC, 5/91); Brown County, Dec. No. 28158-F (WERC, 12/96).

As noted above, the record evidence is that Papala understands and appreciates Weingarten/Waukesha well enough that had Paul made an explicit request for union representation, Papala would have honored it. Papala did not deny an explicit demand from

[12] He testified Papala didn't tell him the what the meeting was to be about until Geiger joined them, which testimony Papala did not rebut. (Tr., pps. 7-8.)

Paul for union representation.

But Paul did not have to make an explicit demand, because he could reasonably believe the meeting was not a pre-disciplinary investigative interview.

Rather than get the standard advance notice of 2 or 3 days, Paul was brought into Papala's office within minutes of starting his shift; he didn't even learn the actual topic until the meeting started. Even though Papala knew he was likely to suspend Paul for five days, in anticipation of termination, he told Paul he did not need representation. At the time the meeting began. Paul knew the steward and staff representative were both on vacation, and that the assistant steward was minutes away from ending his shift and leaving, unaware of the situation.

On the basis of these factors, Paul could reasonably believe the meeting with Papala and Geiger was not a pre-disciplinary investigative interview. Yet it was, meaning his Weingarten/Waukesha rights attached. But because Papala prevented Paul from knowing that, the requirement that he demand representation must be waived.

Papala denied Paul the standard advance notice without justification, concealed that the meeting was to be a pre-disciplinary investigative interview, and told him he did not need representation – all of which kept Paul from reasonably expecting the meeting would result in discipline, and which thus denied him the opportunity for effective union representation. In so doing, he interfered with Paul's ability to exercise his right to engage in lawful, concerted activity for mutual aid and protection and thus violated his rights under Secs. 111.70(2) and 111.70(3)(a)1, Stats.

REMEDY

Having concluded that the District violated Paul's statutory rights, I turn to the matter of a remedy.

Almost four decades after Weingarten was decided, the proper remedy for an employer's violation of an employee's right to representation at a pre-disciplinary investigative interview is "among the issues that remain unresolved." Michael D. Moberly and Andrea G. Lisenbee, *Honing our Kraft?: Reconciling Variations in the Remedial Treatment of Weingarten Violations,.* 21:2 Hofstra Lab. & Emp. L.J., 523, 525 (2005).

The WERC has a long history of ordering make-whole remedies for an employer's unlawful denial of union representation. In the pre-Weingarten cases noted above, the Commission ordered two school Districts to repeal their resolutions of non-renewal and reinstate two teachers who were denied union representation at conferences held to consider their non-renewal. Whitehall School District, Dec. No. 10268-B (WERC, 9/71), Crandon Joint School District No. 1, Dec. No. 10271-C (WERC, 10/71).

The NLRB's application of remedies under the NLRA has not been a model of

consistency.

In general, the Board has held that making employees whole for losses suffered on account of an unfair labor practice furthers the public policy reflected in the NLRA, Nathanson v. N.L.R.B., 344 U.S. 25, 27 (1952), that a proper remedy should "return the unlawfully discharged employee to the status quo that would have existed absent the unfair labor practice," Dean Gen. Contractors, 285 N.L.R.B. 146, 149 (1988), and that a make-whole remedy is important both to compensate a wrongfully discharged employee and to deter future wrongful conduct by the employer, Iron Workers Local Union 377, 326 N.L.R.B. 375 (1998). It has noted that a cease-and-desist order, "standing alone, is insufficient to return the parties to the status quo existing prior to the commission of the unfair labor practice and . . . effectuate the purposes and policies of the Act." Cardinal Sys., 259 N.L.R.B. 456, 457 (1981). See also, Local 425, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., 125 N.L.R.B. 1161, 1164 (1959), (a remedy that deters future unlawful conduct "more properly effectuates the purposes of the Act" than a "mere cease and desist order [that] will have little impact."); R.L. White Co., 262 N.L.R.B. 575, 578 (1982) (it is "doubtful that a cease-and-desist order would deter the recurrence of unfair labor practices,"), and Davis Supermarkets, Inc., 306 N.L.R.B. 426, 469 (1992) ("a mere cease-and-desist order would not deter the recurrence of unfair labor practices.")

Although a make-whole order (reinstatement and back pay) is thus the Board's usual remedy when an employee has been disciplined in violation of the NLRA, the Board in the first round of cases immediately after the Weingarten decision, without explanation, generally provided no affirmative relief to employees.[13] Within a few years, again with little explanation, it adopted a policy of returning the parties to the *status quo ante* by rescinding discipline which followed Weingarten violations, "(a)t least unless the employer can affirmatively show that [it] would have taken the same action even if the union representative had been permitted to attend...." United States Postal Service, 241 N.L.R.B. 141, 159 (1979). In Kraft Foods, Inc., 251 N.L.R.B. 598 (1980), the Board held that if the employer *did* establish that its decision to discipline was not based on information obtained in the unlawful interview, it would limit its remedy to a cease-and-desist order and not provide make-whole relief.

A few years later, after a change in administrations, the N.L.R.B. adopted an even more restrictive policy, explicitly overruling Kraft Foods and declaring that *any* make-whole relief in the context of a Weingarten violation "is contrary to the specific restriction contained in Section 10 (c)" of the NLRA, and "constitutes bad policy." Taracorp Industries, 273 N.L.R.B. 221-22 (1984). "[H]enceforth," the Board declared, "we will not impose make-whole remedies for Weingarten violations." Id., at 222. [14] A make-whole remedy for a Weingarten violation is appropriate, the Taracorp Board held, only when the employee was disciplined or discharged for asserting a Weingarten right to representation. Id., at 223, fn. 12.

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[13] See, e.g., Keystone Steel & Wire, 217 N.L.R.B. 995, 997 (1975).

[14] The Kraft Foods Board had a majority of members appointed by President Carter. A majority of the Taracorp Board were appointed by President Reagan.

In forswearing a make-whole remedy, the Taracorp Board's relied on Sec. 10(c) of the NLRA, which states that "no order of the Board shall require the reinstatement of any

individual … who has been suspended or discharged, or the payment to him of any back-pay, if such individual was suspended or discharged for cause." [15]

Taracorp has not won universal acclaim. "We are not so sure as the Board that the proviso to Sec. 10(c) precludes reinstatement," the Court of Appeals for the Seventh Circuit declared a few years later, although it concluded that, "in the long run, our refusal to grant make-whole remedies for Weingarten violations will serve the interests of the entire labor-management community." Communication Workers of America v. N.L.R.B., 784 F. 2d 847, 850 (1986).

At least one state labor relations agency has explicitly renounced Taracorp and endorsed Kraft. Noting that it was "not required to blindly follow NLRB precedent," the Pennsylvania Labor Relations Board determined that the Kraft standard –a traditional make-whole remedy, unless the employer can show that discipline was not based upon information obtained at the unlawful interview – was consistent with its remedial powers and "provides a sound workable approach" to addressing Weingarten violations. Commonwealth of Pennsylvania, PEMA, Case No. PERA-C-98-396-E (1/00), *aff'd sub. nom.* Commonwealth v. Pa. Labor Relations Board, 768 A. 2d 1201 (Pa. Commw. Ct. 2001).

Whether or not the Taracorp Board interpreted 10(c) correctly, there is no similar provision in the Wisconsin MERA; thus, Weingarten and Taracorp do not prevent a make-whole remedy for a Weingarten/Waukesha violation.

Nor is there a similar provision in the Federal Service Labor-Management Relations Statute ("FSLMRS"), which Congress enacted three years after Weingarten. Section 14(a)(2)(B) of the FSLMRS explicitly grants represented federal employees the right to union representation at investigatory interviews that they reasonably believe may result in disciplinary action. Congress' intent in enacting this provision was to provide federal employees with representational rights comparable to those afforded to private sector employees by the Weingarten decision itself. U.S. Department of Justice, Bureau of Prisons, 35 F.L.R.A. 431, 438-39 (1990). [16]

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[15] Section 10 (c) itself reflected an earlier vast ideological swing in the federal government. The National Labor Relations Act, which empowered the Board to take affirmative action to remedy the unfair labor practice committed, was enacted during the very liberal Second New Deal in 1935; the provision banning the Board from awarding make-whole relief to employees suspended or discharged for cause was an amendment included in the Taft-Hartley Act, enacted over President Truman's veto in 1947.

[16] The FSLMRS is interpreted and applied by the Federal Labor Relations Authority, which "Congress intended (to have a) … role in adjudicating unfair labor practice cases in the federal sector … similar to that of the NLRB's in the private sector," Am. Fed'n of Gov't Employees v. FLRA, 785 F.2d 333, 336 (D.C. Cir. 1986). Given its application to public sector employees, decisions of the Federal Labor Relations Authority under the FSLMRS are thus arguably even more relevant to the matter before me than are decision of the National Labor Relations Board under the NLRA. This is especially true in Weingarten cases, where the FSLMRS, like the Wisconsin MERA, has no analog to the NLRA's Section 10(c).

The Federal Labor Relations Authority, administering the FSLMRS, has recognized "the need for a remedy, in addition to the traditional cease and desist order, in cases where a denial of representation rights has occurred," because a remedy limited to a cease and desist order "will not adequately redress the wrong incurred by the unfair labor practice in cases where an employee has been denied" the right to union representation. United States Department of Justice, Bureau of Prisons, Safford, Arizona, 35 FLRA 431, 461 [56] (1990). The FLRA agrees that "remedies for unfair labor practices under the Statute should, like those under the NLRA, be "designed to recreate the conditions and relationships that would have been had there been no unfair labor practice," Local 60, United Brotherhood of Carpenters & Joiners v. NLRB, 365 U.S. 651, 657 (1961) (Harlan, J., concurring), and should be designed to "restore, so far as possible, the status quo that would have obtained but for the wrongful act." NLRB v. J.H. Rutter-Rex Manufacturing Co., 396 U.S. 258, 265 (1969) citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). Of course, remedies must effectuate the policies of the statute, American Federation of Government Employees v. FLRA, 785 F.2d 333, 338 (D.C. Cir. 1986), and should not be punitive. Carpenters v. NLRB, 365 U.S. at 655.

The FSLMRA, as interpreted by the FLRA, thus allows for employees whose Weingerten rights were violated to be reinstated and made whole. See, Bureau of Prisons, 35 FLRA 0431[56] slip op 9-10; Department of Justice, Immigration and Naturalization Service (Border Patrol, El Paso, Texas), 36 FLRA 41[6] (1990), slip op. at 11-12.

I agree with the Pennsylvania agency that the policy considerations reflected in Kraft best balance the various policy interests at stake. The employer should not benefit from an unlawful interview, but should still have the opportunity to demonstrate that it had sufficient independent grounds to determine and support the discipline. In essence, this is a labor law analog to the exclusionary rule in criminal law. [17]

Although the District did get some additional disciplinary material from the May 10 meeting – notably, Paul's admission that he might not have cleaned all the bathrooms on his route – the discipline did not rest on information Paul provided or the way he behaved during the interview. The District had enough other proper and credible evidence without the tainted interview, including eyewitness testimony from Papala and Geiger, supplemented by the large color photos, to establish – at least for its own consideration -- that the bathroom hadn't been cleaned, and that it was Paul's job to do so. Given Paul's refusal to take the opportunity to shadow the outgoing custodian, I do not believe the explanation "it was only my second day at the school, I guess I just missed it," would have swayed Papala. [18] The presence of a union

[17] "There is a strong argument that the Board has discretion to shift the burden to the employer and apply an exclusionary rule, as it did in Kraft Foods." Communication Workers of America v. NLRB, 784 F. 2d 847, 851 (7th Cir. 1986).

[18] Papala's letter to Paul informing him of the General Mitchell assignment states a starting date of April 25; Paul testified, without rebuttal, that May 10 would have been his third day on that job. Whether May 6 and 9 really were Paul's first two days at General Mitchell or his third week would not have mattered to Papala and Geiger.

representative at an interview on May 10, 2011 would not have deterred the District from

concluding that Paul had failed to carry out his assignment and thus violated the established conduct and cleaning standards.

Nor would the presence of a union representative at the interview have deterred the District from imposing a five-day suspension on Paul, effective immediately. Heiden and Papala had already decided that a determination that Paul violated cleaning would automatically trigger that penalty; [19] there is no evidence in the record to support a finding that any argument or appeal, by any of the union representatives, would have been successful.

Even with the exclusion of the confession extracted at the investigative interview held in violation of Weingarten/Waukesha, the District would have imposed a five-day disciplinary suspension on Paul. Accordingly, I have let that discipline stand. In so doing, I explicitly do not address the question of whether the District would have had just cause to impose that discipline, only that the District's internal deliberations on the matter would have reached the same outcome as they did on May 10, 2011.

That suspension, however, was not the final outcome of the May 10 meeting; another unusual aspect of this case is that the District disciplined Paul twice for the same conduct. As the induced resignation in lieu of termination was a continuation of the suspension, the Weingarten/Waukesha violation which attached to the suspension also applies to it.

As with the suspension, I do not know whether the District would have had just cause to terminate Paul for failing to clean the bathroom, or how a grievance arbitrator would rule on that issue. But that question is not before me. Nor is the legality of Papala's May 12 phone call to Paul before me, as that matter was neither pled nor litigated.

As Paul testified, he discussed with steward Gerasch (who had earlier talked with Heiden) whether to resign or face termination. [20] Paul's ability to consult with Gerasch, and Gerasch's collaboration with Papala and Heiden in implementing their plan, establishes that the District did not violate Paul's statutory rights in its communication with him regarding a resignation in lieu of termination. I thus have no grounds to disturb that personnel transaction either.

The record evidence establishes that the District's standard practice is to schedule pre-disciplinary investigative interviews a few days in advance. The District had no cause to schedule the pre-disciplinary interview with Paul any sooner than May 12. I have therefore ordered the District to pay Paul wages for the two days he would have worked prior to his suspension, had the District followed its standard policy. Because Paul did not benefit from any health insurance or other fringe benefits which would have occasioned deductions, I have specified gross wages.

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[19] Tr., p. 59.
[20] Tr., pps. 11-12.

Finally, in order that such a situation not recur, I have ordered the District to inform employees when compulsory meetings with supervisors are investigative interviews which could result in discipline. Upon such notice, it remains the employee's responsibility to request representation.

Dated at Madison, Wisconsin, this 9th day of August, 2011 [correction: 2012].

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/
Stuart D. Levitan, Examiner

SDL/gjc
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