STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

AFSCME IOWA COUNCIL 61 Complainant, and STATE OF IOWA, Respondent.	CASE NO. 102059

DECISION ON APPEAL

This case is before the Public Employment Relations Board (PERB) on the State of Iowa's appeal of a proposed decision and order issued in PERB Case No. 102059. In this case, AFSCME Iowa Council 61 ("AFSCME") filed a prohibited practice complaint against the State of Iowa alleging the State committed a prohibited practice within the meaning of Iowa Code section 20.8 and 20.10(2.) AFSCME claims the State failed to allow AFSCME bargaining unit members union representation both during investigatory interviews and during the State's merit system grievance and disciplinary resolution process and meetings in violation of Iowa Code chapter 20.

The ALJ held an evidentiary hearing on December 5, 2018. The ALJ issued a proposed decision on January 29, 2020, in which the ALJ concluded AFSCME established the State's commission of a prohibited practice pursuant to Iowa Code section 20.10(2.)

On February 14, 2020, the State appealed the proposed decision.

Counsel for the parties, Mark Hedberg for AFSCME and Nathan Reckman for the State, telephonically presented oral arguments to the Board on July 15, 2020. Prior to the oral arguments, the State filed a brief outlining its position.

On Board review, the Board has the same power it would have had if the Board had initially made the determination except the Board may limit the issues with notice to the parties or by rule. Iowa Code § 17A.15(3.) Pursuant to PERB rule 621—9.5, on this appeal to the Board, we have utilized the record as submitted to the ALJ, except where otherwise stated.

After a review of the ALJ's proposed decision, the record, and the parties' briefs and arguments, we find AFSCME has established the State's commission of a prohibited practice when denying employees' union representation and associated rights during investigatory interviews. Based on the record in front of us, AFSCME has not demonstrated the State's commission of a prohibited practice when it denied bargaining unit employees union representation during merit system grievance and disciplinary resolution meetings.

FINDINGS OF FACT

The State of Iowa is a public employer within the meaning of Iowa Code section 20.3(10) and AFSCME Iowa Council 61 is an employee organization within the meaning of section 20.3(4.) AFSCME Iowa Council 61 is certified by PERB to represent multiple bargaining units of State employees. AFSCME employs staff representatives who work with the local bargaining units, including the State units, and acts as the representatives for bargaining unit employees. AFSCME staff representatives have a myriad of work duties which include negotiating contracts,

participating in investigations, processing grievances, representing employees in grievance arbitrations, and participating in labor managements meetings. The AFSCME staff representatives are not employees of the State. However, there are state employees who are union stewards and in union leadership positions who assist AFSCME with representation of bargaining unit employees. AFSCME trains not only its staff representatives, but also union stewards and other local leadership about employee rights including employee rights during grievance meetings and investigations.

AFSCME and the State have been parties to successive collective bargaining agreements. Prior to July 1, 2017, the parties' contract contained a detailed grievance process. On a daily basis, AFSCME staff representatives or union stewards were involved in the grievance process. The grievance process included investigations, information gathering, formal grievance or "step" meetings, and other meetings with the State. Under the grievance process outlined in the collective bargaining agreement, AFSCME staff representatives and union stewards actively represented employees in a formal process of adjudicating employee rights or disciplinary action against an employee.

On and after July 1, 2017, the State by rule and policy allowed only a "peer employee" to represent employees in an investigatory interview or in a non-contract merit system grievance meeting. The State informed AFSCME a "peer employee" meant an employee in the same classification as the employee grievant or employee under investigation. As AFSCME staff representatives are not employed by the

State, they did not constitute a "peer employee" and were not allowed in these meetings.

In application of the State's new rule and policy, the State sometimes selected the employee or grievant's peer representative. In other instances, the employee or grievant chose their peer representative, who may be a union steward. Under the State's new rule and policy, a peer employee tasked with assisting an employee grievant might not have the necessary knowledge, training, or experience to adequately assist the employee or grievant with the investigatory interview or the non-contract grievance process. Additionally, in guidance and in examples provided in the record, management stated peer employees were not allowed to talk, take notes, or record the meeting. Instead these "peer employees" were merely present to witness the meeting.

AFSCME argues the employee or grievant is harmed by the State's actions as, in the absence of representation with knowledge of the rights of the employees, namely AFSCME staff involvement, important evidence could be missed that would be vital to the employee's case before an arbitrator or PERB. AFSCME also argues the State's elimination of AFSCME staff representatives from the investigatory interview and the non-contract grievance process harm AFSCME's ability and responsibility to represent the bargaining unit.

At the evidentiary hearing on this matter, the parties entered the following stipulated facts into the record:

> 1. Mr. Arellanes is employed by the State of Iowa, covered by the Collective Bargaining Agreement that exists between AFSCME Iowa Council 61 and the State of Iowa. On Tuesday, August 14, 2018,

(between 10:00 a.m. and 12:00 p.m.) Mr. Luis Arellanes was repetitively denied his union steward. He was told, "There are no stewards now but you can have peer support." He was also told "Luis, please let me know if you have a preference for a peer in Marshalltown office as we do not utilize union stewards anymore." You are not entitled to a union steward. If you are choosing a peer support it will be a fellow employee from Marshalltown office. Please let me know if you have a preference for a peer from a fellow employee from the Marshalltown office." The union provided a steward (Jenn Westphal) who was ready and available at the interview location but was not allowed to participate rather management provided Sergio Marin who at this time is neither a union steward nor union representative.

2. Ms. Sheetz-Cook is employed by the State of Iowa, covered by the Collective Bargaining Agreement that exists between AFSCME Iowa Council 61 and the State of Iowa. On December 21, 2017, Ms. Sheetz-Cook received a phone call asking if she would be available the next day to come in for an investigation. Cindi Rigdon, Supervisor Child Support Unit Waterloo State of Iowa Human Services, texted the statement to a merit employee Kim Sheetz-Cook when she requested a union person for the investigation. "We no longer have union people but you can have a peer assistance person so you want Karen or Julie?" Ms. Sheetz-Cook respond, "Per Chapter 20 of the Iowa Code as a merit employee, am covered under a union certification we still have union people, so by denying my Union steward would be violating my Weingarten rights." On December 28, 2017, Ms. Sheetz-Cook asked, "Did you line up a union steward to be present also? Or do you want me to?" Ms. Rigdon says, "We have Karen W. your peer assistant lined up already."

3. Shannon Bundy is an employee of the State of Iowa, covered by the Collective Bargaining Agreement that exists between AFSCME Iowa Council 61 and the State of Iowa. On or about October 19, 2017, Shannon had asked for a union peer to attend a grievance meeting, State Employee Grievance No. 18-0030. She was informed that she could only have a peer of the same bargaining status assist her if she wanted an in-person meeting.

4. Rob Helmick is an employee by the State of Iowa, covered by the Collective Bargaining Agreement that exists between AFSCME Iowa Council 61 and the State of Iowa. On or about June 7, 2018, Rob Helmick underwent an investigative interview. Mr. Helmick was not initially allowed to caucus with his union representative and the union representative was informed that he was there as a peer and not as a union representative. . . . .

> 5. On or about June 26, 2018, Phyllis Porter, Executive Officer I/HR at the Iowa State Penitentiary informed the Department of Corrections Leadership Team through an email. She informed management that during investigatory interviews, that individuals were not allowed to use a union representative or ask questions during interviews and would not be allowed to participate in the same manner as union representatives have in the past. . . . .
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> 6. Don Post is an employee by the State of Iowa, covered by the Collective Bargaining Agreement that exists between AFSCME Iowa Council 61 and the State of Iowa. On or about April 13, 2018, Don Post, a steward of AFSCME Local 2991, was participating in an investigatory interview of Diana Mueller, a residential treatment worker at the Glenwood Resource Center in Glenwood, Iowa, and was told that peers and stewards can no longer take notes or do tape recordings at investigatory meetings.
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> 7. Since July 1, 2017, and continuing, the State of Iowa has implemented a rule restricting assistance at grievance meetings. It provides:
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> > The grievant may be assisted at a grievance meeting by an employee with the same bargaining status as the grievant. This peer employee may be of the grievant's choosing except where it would constitute a conflict of interest or unreasonably impact the operational efficiency of an appointing authority as determined by the director.

By memorandum dated August 17, 2018,[1] the State sought to clarify and cure any deficiencies in its policy. In this memorandum, the State provided guidance to "Stakeholders and Management Liaisons" regarding employee representation for investigatory interviews. The memorandum specifies it does not apply to grievance meetings and "DAS rules permitting a peer representative . . . should continue to be followed for grievance meetings." This memorandum provides in relevant part:

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[1] As mentioned in the proposed decision and order, AFSCME Iowa Council 61 President, Danny Homan, was not provided a copy of the memorandum until the hearing.

Weingarten Rights

- Three prerequisites must exist
  - *The meeting with the employee is an investigative interview;*
    . . . .
  - *The employee reasonably believes that the interview might result in discipline either immediately or in the reasonably near future.*
    . . . .
  - *The employee has requested the presence/assistance of a union representative.*
    . . . .
- The role of the union representative is that of an observer on behalf of the employee and to ensure that the rights of the employee are not abridged. The employer cannot refuse to allow the representative to speak.
- There is no obligation to negotiate with either the employee or union representative over the subject of the meeting. The union representative does not have the right to tell the employee not to answer a question or to give untrue answers. An employee's refusal to answer questions can be a reason for discipline. Note: If the conduct of either the employee or the union representative becomes disruptive, the interview may cease and a decision made without the benefit of the employee's side of the story.
- The union representative should be given an opportunity to comment on the matter under investigation prior to the conclusion of the interview.

Procedure for granting an employee's request for a union representative

- The Weingarten right does not arise until the interview begins.
- If the employee requests a particular union representative, allow the employee to have that particular representative present if available at the work site and eligible to be relieved. If the particular representative requested by the employee is not available, allow the attendance of another representative who is readily available and eligible to be relieved.
- If no union representative is available, the employer will allow a union representative to be called to the work site.
- It is the union's right to select the union representative.
- Both the employer and employee have the right to tape record the interview.

In the ALJ's proposed decision and order, she took various items under official notice. We find only the following items to be relevant and proper items for official notice under Iowa Code section 17A.14(4) and Iowa Rule of Evidence 5.201:

(1) Pursuant to chapter 20 amendments effective February 17, 2017, "grievance procedures" is a permissive, not mandatory, subject of bargaining for non-public safety bargaining units, such as the AFSCME-represented State bargaining units at issue.

(2) The parties' collective bargaining agreement effective July 1, 2017, did not include grievance provisions. As a result, AFSCME-represented State employees who are merit-covered may proceed through the grievance process as described in Iowa Code sections 8A.413, 8A.415, and adopted in DAS rules. On Step 3 of this process a DAS attorney evaluates' the parties' evidence and arguments and issues a third-step answer. That answer may be appealed to PERB pursuant to Iowa Code section 8A.415. PERB's decisions are subject to judicial review pursuant to Iowa Code chapter 17A.

CONCLUSIONS OF LAW

AFSCME Iowa Council 61 argues the State committed prohibited practices by denying AFSCME bargaining unit members their right to union representation during investigatory interviews and by denying AFSCME bargaining unit members' union representation during the non-contract merit system grievance and disciplinary resolution process and meetings.

In prohibited practice complaints, the complainant has the burden of establishing each element of the charge. *United Elec. Radio Mach. Workers of*

Am., Local 896 (COGS) and State of Iowa, Bd. of Regents, 2019 PERB 100800 & 100814, at 17. In this case, AFSCME contends the State engaged in prohibited practices within the meaning of Iowa Code sections 20.8 and 20.10(2.) Those provisions state:

> **20.8 Public employee rights.**
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> Public employees shall have the right to:
>
> 1. Organize, or form, join, or assist any employee organization.
>
> 2. Negotiate collectively through representatives of their own choosing.
>
> 3. Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by chapter or any other law of the state.
>
> . . . .
>
> 5. Exercise any right or seek any remedy provided by law, including but not limited to those rights and remedies available under sections 70A.28 and 70A.29, chapter 8A, subchapter IV, and chapters 216 and 400.
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> **20.10 Prohibited practices.**
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> 2. It shall be a prohibited practice for a public employer or the employer's designated representative to:
>
> *a.* Interfere with, restrain, or coerce public employees in the exercise of rights granted by this chapter.
>
> *b.* Dominate or interfere in the administration of any employee organization.
>
> *c.* Encourage or discourage membership in any employee organization, committee, or association or discrimination in hiring, tenure, or other terms or conditions of employment.
>
> . . . .

e. Refuse to negotiate collectively with representatives of certified employee organizations as required by this chapter.

f. Deny the rights accompanying certification granted in this chapter.

A. Union Representation at Investigatory Interview—Weingarten Right.

AFSCME argues beginning in July 2017, the State has denied bargaining unit members their right to a union representative of their choice during investigatory interviews in violation of section 20.8, and this denial of representation amounts to a prohibited practice under Iowa Code section 20.10(2.) The State denies its actions constitute a prohibited practice.

At hearing, the State denied its actions constituted a prohibited practice. However, in order to demonstrate it had cured any perceived deficiencies, the State also admitted into evidence a memorandum to managers, which explicitly acknowledged an employee's *Weingarten* right to requested union representatives during investigatory interviews which the employee reasonably believes might result in discipline. Thus, at hearing the State seemed to acknowledge *Weingarten* is applicable under the Public Employment Relations Act (PERA.) However, on appeal to the Board, the State asserts the *Weingarten* holding is no longer applicable due to the 2017 statutory changes in PERA. Based on the record presented, it is unclear whether the State truly preserved this argument. Although we seriously question whether the State preserved this argument on appeal, we will later address the merits of this argument.

AFSCME claims the State denied employees union representation and limited the role of representation during investigatory interviews in violation of what is commonly referred to as an employees' *Weingarten* rights.

Iowa Code section 20.8 grants public employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Iowa Code section 20.10(2)(*a*) provides that a public employer who interferes with, restrains, or coerces public employees in the exercise of those rights commits a prohibited practice. The National Labor Relations Act (NLRA) has virtually identical provisions.

i. Weingarten rights

In the *Weingarten* case issued by the United States Supreme Court in 1975, the Court upheld the National Labor Relations Board's (NLRB) conclusion that an employee's right to engage in concerted activity for mutual aid or protection under the NLRA included the right of an employee to refuse to submit, without union representation, to an interview the employee reasonably feared might result in discipline. *Nat'l Labor Relations Bd. v. J. Weingarten, Inc.*, 420 U.S. 251, 256, 260 (1975.) The employee rights laid out in the decision are often referred to as an employee's "*Weingarten* rights."

By 1980, PERB determined the rights as described in *Weingarten* are also included within the employee rights guaranteed by Iowa Code section 20.8. *McCormack and City of Cedar Falls*, 1980 PERB 1511, at 3–4. The Iowa Court of Appeals approved PERB's application of this right for public employees in Iowa. *City of Marion v. Weitenhagen*, 361 N.W.2d 323, 328 (Iowa Ct. App. 1984.)

In *Weingarten* the Court determined employees have a right to union representation during an investigatory interview which the employee reasonably believes might result in discipline. *Weingarten, Inc.*, 420 U.S. 251, 256–57. The Court determined these circumstances constituted concerted activity for mutual aid or protection because during the investigatory interview, a union can safeguard the interests of the entire bargaining unit by making certain the employer does not initiate or continue a practice of imposing punishment unjustly. *Id.* at 260–61. The Court went on to note that a representative's presence during an investigatory interview is an assurance to all employees in the bargaining unit that they can obtain aid or protection if called into a similar interview, which furthers the purpose of the National Labor Relations Act (NLRA.) *Id.* at 261.

In its discussion about the NLRA, the Court stated the Act was designed to eliminate the inequality of bargaining power between employees and employers. *Id.* at 262. The Court reasoned requiring a lone employee to participate in an investigatory interview which the employee reasonably believes might result in discipline perpetuates the inequality the Act was to eliminate and bars recourse to redress the perceived imbalance of economic power between labor and management. *Id.*

The Court also discussed the suitability of allowing union representation at the investigatory interview stage of potential disciplinary proceedings. The Court stated by limiting this right to union representation to investigatory interviews, union representation is provided upon an employee's request when

it is most useful to both the employer and the employee. *Id.* at 262–63. A single employee may be too fearful or inarticulate to recount knowledge accurately, or may fail to raise relevant extenuating factors. *Id.* at 263. A trained and knowledgeable union representative could assist the employer by eliciting the necessary facts, which would save everyone time. *Id.* If the union representative is not engaged at this stage in the potential discipline proceedings, it becomes increasingly difficult for an employee to vindicate himself or herself, and the value of representation at later stages is correspondingly diminished. *Id.* at 263–64. After this stage in the disciplinary proceedings, an employer is simply trying to justify its actions rather than gathering relevant information to make a determination. *Id.*

The Court further found the denial of this right to union representation in investigatory interviews had the reasonable tendency to interfere with, restrain, and coerce employees in violation of the Act. *Id.* at 257. The Court declared a serious violation of an employee's rights occurs when an employer denies the employee's request for union representation, and "compels the employee to appear unassisted at an interview which may put his job security in jeopardy." *Id.*

Although the Court acknowledged an employee's *Weingarten* right to union representation in investigatory interviews, the Court also identified several important restraints on employees' *Weingarten* rights. Iowa has also adhered to these limitations. First, the right to union representation only arises in situations where an employee requests representation. *Id.* Secondly, the Court determined

an employee's right to request representation is limited to situations in which an employee reasonably believes the investigation might result in disciplinary action. *Id.* at 257–58; *see, e.g., AFSCME/Iowa Council 61 and State of Iowa (Dep't of Corr.)*, 2013 ALJ 8619, at 16–17 (finding the grievant's belief that discipline may result from the interview was reasonable.)

Thirdly, the *Weingarten* rule applies only to investigatory interviews, and does not apply to supervisory meetings or "run-of-the-mill" employer/employee contact such as giving instructions, training, or needed correction of work techniques. *Weingarten*, 420 U.S. at 257–58; *see AFSCME/Iowa Council 61*, 2013 ALJ 8619, at 12; *see e.g. United Elec. Local 893/Iowa United Prof'ls and State of Iowa*, 2001 ALJ 5956, at 5–6 (finding the statutory *Weingarten* right did not apply when the employee requested union representation and believed the meeting on her evaluation might result in discipline, but no investigation had been opened and the employee was not questioned or interviewed during the meeting.)

Finally, the Court stated the *Weingarten* right may not interfere with legitimate employer prerogatives. As such, the employer may grant the employee's request for union representation, or may deny the employee's request and leave the employee the choice between whether to proceed with the interview unaccompanied, or have no interview. *Weingarten*, 420 U.S. at 258.

Weingarten not only provided the parameters for the employees' right to union representation, but also described the role of the union representative in these interviews. The Court stated the employer has no duty to bargain with the

union representative who may be permitted to attend. *Id.* at 259. However, the representative is present to assist an employee and may attempt to clarify the facts or suggest other employees who may have knowledge of them. *Id.* at 260. While allowing the union representative to take an active role in the investigatory interview, the principles laid out in *Weingarten* still seek to ensure management can investigate the conduct of its employees. *See Teamsters Local 238 and Muscatine County*, 2014 ALJ 8744, at 23 (stating the union representation's rights "lies 'somewhere between mandatory silence and adversarial confrontation.' ") (quoting *United States Postal Serv.*, 288 NLRB 864, 867 (1988.)) *Weingarten* constructed "a careful balance between the employer's right to investigate the conduct of its employees at a personal interview, and the role to be played by the union representative present at the interview." *Id.*

Although an employee's *Weingarten* rights were acknowledged nearly forty years ago in Iowa and other jurisdictions, reviewing bodies have continued to analyze the parameters of the holding.

Iowa adopted the holding in *Weingarten* in order to ensure the employee's rights are protected and to assure employees are adequately represented during investigatory interviews. *AFSCME, Council 61 and State of Iowa*, 1985 PERB 2891, at 2–3. Thus, in Iowa, a public employee can insist on the presence of a union representative at an investigatory interview when the employee reasonably believes discipline might result. *AFSCME/Iowa Council 61 and State of Iowa (Dep't of Corr.)*, 2005 PERB 6436, at 5, *McCormack and City of Cedar Falls*, 1980 PERB 1511, at 3, *AFSCME/Iowa Council 61 and State (Dep't of Corr.)*, 2013 ALJ

8619, at 11. Upon receipt of this request, an employer must either grant the request, discontinue the interview, or offer the employee the choice between continuing the interview unaccompanied or having no interview at all. *AFSCME/Iowa Council 61*, 2005 PERB 6436, at 5, *McCormack*, 1980 PERB 1511, at 3, *AFSCME/Iowa Council 61*, 2013 ALJ 8619, at 11.

Subsequent case law clarified the circumstances under which an employee's *Weingarten* rights arise. A meeting between an employer and employee arises to the level of an investigatory interview as described in *Weingarten* when the meeting is designed to elicit answers to work-related questions which might affect the employee or bargaining unit and the employee reasonably fears discipline might result. *See AFSCME/Iowa Council 61*, 2013 ALJ 8619, at 12–15 (citing *Lennox Industries, Inc. v. Nat. Labor Relations Bd.*, 637 F.2d 340, 343 (5th Cir. 1981).) *Weingarten* seeks in part to safeguard fearful or inarticulate employees from inadvertent results to answers given during work-related interviews in which the employee's job security is at stake. *Lennox Industries, Inc.*, 637 F.2d at 344. Hence, it is appropriate to limit the application of *Weingarten* to such investigatory interviews.

A meeting between the employer and employee is not an investigatory interview as described in *Weingarten* when the only purpose is to impose discipline, and the employer does not seek additional information from the employee. Federal courts have stated that no concerted activity for mutual aid or protection exists when a union representative is present at a meeting held solely for the purpose of informing the employee of and acting upon a previously

made disciplinary decision, and the employer conducts the interview without going beyond that point. *Anchortank, Inc. v. Nat'l Labor Relations Bd.*, 618 F.2d 1153, 1167-68 (5th Cir. 1980.) If the employer already made a determination on the discipline, then a union representative would not be acting to safeguard the interests of the bargaining unit. *Id.* at 1168. Additionally, there would be no fact-finding done at a purely disciplinary meeting, so the union representative could not aid the employer and employee by furthering the employer's investigation of the incident at issue. *Id.*

Subsequent *Weingarten* case law also further defined situations under which an employee reasonably believed discipline might result from the investigatory interview. An employer should not assume that telling an employee he or she is not the subject or the focus of the investigation would be viewed as sufficient to dissipate or prevent the employee's reasonable belief of possible discipline. *AFSCME/Iowa Council 61 & State (Sixth Judicial Dist. Dep't of Correctional Servs.)*, 2005 ALJ 6824, at 10. Again, this limitation on the applicability of *Weingarten* ensures a proper balance between the employee's and management's right to conduct the interview.

When evaluating an employee's request for union representation, both the NLRB and Iowa have viewed an employee's request for representation liberally. *Teamsters Local 238 and Muscatine County*, 2014 ALJ 8744, at 20. An employee's inquiry about the need or advisability of having union representation at an interview may be enough to establish the requisite request for union representation. *AFSCME/Iowa Council 61*, 2005 ALJ 6824, at 9–10. However,

the request must be specific enough to demonstrate concerted activity for mutual aid or protection by showing the employee and the union are truly seeking to act for the mutual aid or protection of all the unit members. *See Peters & Waterloo Cmty. Sch. Dist.*, 2010 PERB 8218, at 8-9 (finding the *Weingarten* right to union representation does not include the right to have private counsel present and thus dismissing the prohibited practice complaint when the employee requested private counsel.)

Generally, absent extenuating circumstances, including unavailability, the employee has the right to choose his or her representative during a *Weingarten* interview. *AFSCME/Iowa Council 61*, 2005 PERB 6436, at 6; *Teamsters Local 238*, 2014 ALJ 8744, at 14. This right to choose a representative is not absolute, however, because an employee's right to representation at a *Weingarten* interview may not interfere with legitimate employer prerogatives. *Teamsters Local 238*, 2014 ALJ 8744, at 14. Federal law has found an employer may conduct an investigatory interview if the employee insists on a union steward who is unavailable. *AFSCME, Council 61 and State of Iowa*, 1985 PERB 2891, at 4.

An employee's *Weingarten* right entitles the employee's representative to attend the investigatory interview, and also to provide advice and active assistance to the employee in presenting facts during the interview. *Teamsters Local 238*, 2014 ALJ 8744, at 22. An employer fails to afford the employee his or her statutory *Weingarten* right to representation if the employer refuses to permit the representative to speak and relegates the representative to a passive observer. *AFSCME/Iowa Council 61*, 2005 PERB 6436, at 6–7 (finding a

prohibited practice when the State told the representative he could be present but could not participate during the investigatory interview.)

An employer's refusal to inform the employee and representative of the nature of the matter being investigated, upon their request, constitutes a denial of the right to *Weingarten* representation. *Teamsters Local 238*, 2014 ALJ 8744, at 18–19. Additionally, an employer's refusal to allow a pre-interview consultation between an employee and his or her union representative, upon request, also constitutes a denial of the right to *Weingarten* representation. *Id.* Iowa has also found an employee's *Weingarten* rights include the right of the representative to tape record the interview, although the employer may provide guidance on the use of the recording. *AFSCME, Council 61 and State of Iowa*, 1985 PERB 2891, at 5.

Although *Weingarten* allows the union representative to take an active role, that role is not unfettered. A union representative may assist the employee in presenting facts and can make additions or clarifications, but the union representative is not entitled to transform the interview into an adversarial contest. *Teamsters Local 238*, 2014 ALJ 8744, at 22–23. The union representative may not prevent the employer from questioning the employee and may not interfere with legitimate employer prerogatives. *Id.* Additionally, the employer is under no obligation to bargain with the union representative during the investigatory interview. *AFSCME, Council 61*, 1985 PERB 2891, at 4. *Weingarten* seeks to ensure the employee has access to a union representative

that can adequately assist the employee without infringing on the employer's right to investigate the conduct of its employees.

ii. Weingarten's applicability to PERA after 2017 legislation

The State argues the holding in *Weingarten* and subsequent decisions may no longer be applicable under Iowa law due to the 2017 amendments to Iowa Code chapter 20. We disagree. Although the 2017 legislation amended many provisions of Iowa Code chapter 20, the applicable sections, Iowa Code sections 20.8 and 20.10, which provide the basis for the application of the *Weingarten* decision in the Iowa public sector, remain unchanged.[2] Further, none of the amendments to chapter 20 altered the forty years of Iowa case law upholding and examining the parameters of an employee's *Weingarten* rights. The legislature is presumed to know the law, and yet chose not to change the provisions underlying Iowa's adoption of *Weingarten*. *See Iowa Farm Bureau Fed'n v. Environmental Prot. Comm'n*, 850 N.W.2d 403, 434 (Iowa 2014) (stating the "legislature is presumed to know the state of the law, including case law, at the time it enacts a statute.") Therefore, we find the 2017 changes to the chapter 20 landscape did not alter the applicability of the *Weingarten* precedent.

Further, even when reviewing PERA in light of the changed landscape that occurred due to the 2017 amendments, we still find *Weingarten* rights are included within the rights granted under chapter 20 as amended. In Iowa Code

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[2] *See, e.g., AFSCME/Iowa Council 61*, 2005 PERB 6436, at 5, *McCormack*, 1980 PERB 1511, at 3, *AFSCME/Iowa Council 61*, 2013 ALJ 8619, at 10–11 (all citing Iowa Code sections 20.8(3) and 20.10(2)) as the legal underpinning for adopting *Weingarten*).

chapter 20, Iowa still seeks to balance the rights of employers and employees in order to "promote harmonious and cooperative relationships between government and its employees." PERA balances these rights and promotes this relationship by protecting "the rights of public employees to join or refuse to join, and to participate in or refuse to participate in, employee organizations." Iowa Code section 20.1(1.) The rights laid out in *Weingarten* and subsequent case law as adopted in Iowa, do just that. The existence of *Weingarten* rights balances the rights of management and labor to restore a real or perceived imbalance of economic power.

The balance between management and labor rights to promote cooperative relationships as sought by PERA is also espoused in an employees' *Weingarten* rights, as demonstrated by the carefully crafted limitations to this right. As discussed above, an employee's *Weingarten* right is limited to meetings that constitute investigatory interviews and the employee has to reasonably believe the interview might result in discipline. Further, *Weingarten* only attaches when an employee makes a request for union representation. Finally, even if the employee makes a request for union representation at an investigatory interview, the employer has the ability to end the interview or simply deny the request and then leave the employee the choice to continue unrepresented or to forgo the interview. The *Weingarten* limitations all strike appropriate balances between an employee's right to union representation and an employer's right to conduct an interview in furtherance of an investigation. These limitations further the goal of promoting a cooperative relationship between the government and its

employees. The 2017 legislation did not diminish or nullify public employees' *Weingarten* rights in Iowa.

Based on our review of the Public Employment Relations Act as amended in 2017 and the rationale behind the *Weingarten* decision, we reaffirm that *Weingarten* applies under PERA as it strikes the appropriate balance in protecting the rights of public employees and the rights of management while promoting harmonious and cooperative relationships between government and its employees and fulfilling the public policy of PERA.

iii. Weingarten rights as applied in this case

In examining the facts of the instant case, the record demonstrates after July 1, 2017, the State denied employees the right to union representation as required under Iowa Code section 20.8. The State does not dispute it conducted investigatory interviews, which the employee reasonably believed might result in discipline, and denied the employee's request for union representation. As we have determined *Weingarten* is still applicable, the State's actions clearly violate Iowa Code section 20.8. AFSCME has demonstrated the State's actions, in denying employee's union representation, constitute a prohibited practice pursuant to Iowa Code section 20.10(2)(*a.*)

Further, as noted in the stipulation provided by the parties, management limited the role of employees' representatives in violation of section 20.8. In an email, management stated that employees' representatives could not actively participate in the same manner as the past, and the representatives could not ask questions during investigatory interviews. The parties' also agree that in

some instances, employee representatives were informed they could not take notes or record the interview. As we have determined previous case law pertaining to the role of the representative in investigatory interviews is still applicable, we find the State violated section 20.8 by limiting the role of employees' representatives. *See AFSCME, Council 61*, 1985 PERB 2891, at 4–5 (finding the representative is not a passive observer, can ask questions, and can tape record the interview.) AFSCME has demonstrated the State's actions in limiting the role of the employees' representatives constitute a prohibited practice pursuant to Iowa Code section 20.10(2)(*a.*)

The State also presented evidence that it sent managers a memorandum, dated August 17, 2018, describing the *Weingarten* right and, to the extent that its policies were circumspect, the State has cured the issue. Regardless of the creation, transmission, and legal accuracy of this memorandum, AFSCME has still demonstrated the State's commission of a prohibited practice. A remedy for those violations is required even if the State is no longer engaging in such practices.[3] *See AFSCME Iowa Council 61 and State of Iowa*, 2019 PERB 100817, at App. 15 (stating that "PERB has consistently held subsequent contract settlements do not render moot potential violations of the Act that may have been committed during the negotiations."); *see also Oelwein Cmty. Educ. Ass'n and Oelwein Cmty. Sch. Dist.*, 1980 PERB 1593, at 11 (stating "A complaint that is otherwise found to be a violation of the Act does not cease to be a violation upon

[3] This memorandum may still raise some concerns as it placed a time limitation on the employee's reasonable belief that discipline might occur "in the near future," which we don't find to be a necessary component under the *Weingarten* principle as applied in Iowa law.

the settlement of the underlying contract negotiations which gave rise to the complaint.")

Consistent with PERB's authority to administer chapter 20 and the responsibility to adjudicate prohibited practice complaints, we find the State committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(*a*) by denying employees' their requested union representation during investigatory interviews in which the employee reasonably believed discipline might result, and improperly limiting the role of the employees' representative to participate in the investigatory interview.

B. Union Representation at Non-Contract Grievance Processing and Meetings

AFSCME also contends the State committed a prohibited practice in violation of Iowa Code section 20.8 and 20.10(2) by denying requested union representation during the Iowa Code chapter 8A, subchapter IV merit system grievance and discipline resolution process implemented pursuant to DAS rule 11—61. The State denies its commission of a prohibited practice and argues the employee grievant has no right to union representation in this non-contract grievance process. AFSCME argues the State violated employees' rights under section 20.8 in its implementation of DAS subrule 11—61.1(4.)

Before addressing the merits of this argument, we need to address the State's contention that PERB does not have jurisdiction to declare the rule facially violative of chapter 20. Chapter 20 provides PERB with the statutory authority to adjudicate prohibited practice complaints and fashion appropriate

remedies. Iowa Code § 20.1(2)(*b*)–(*c*.) However, both chapter 20 and PERB rules restrict PERB's jurisdiction to cases filed with the Board within ninety days of the alleged violation. Iowa Code section 20.11(1); *Area Educ. Agency 7 Educ. Ass'n and Area Educ. Agency 7*, 1991 PERB 4252, at 14. PERB must dismiss a complaint as untimely due to lack of jurisdiction if the case is filed with the Board more than ninety days following the alleged violation. *Id.* Similarly, complaints filed too early are also outside of PERB's jurisdiction because the 90-day jurisdictional period begins to run after the occurrence of the prohibited practice. *Id.* PERB has "no jurisdiction to entertain complaints that are not yet ripe." *Id.* Thus, we find PERB's jurisdiction in this case is limited to a determination of whether the State committed a prohibited practice in its implementation or application of the DAS rule, not whether the DAS rule itself is violative of Iowa Code section 20.8.

AFSCME claims employees have a right to union representation in the merit system grievance and discipline resolution process as the employees are engaging in "other concerted activities" for "mutual aid or protection," pursuant to Iowa Code section 20.8(3.) AFSCME further claims the State's denial of union representation during the merit system grievance and discipline resolution process is a violation of section 20.10(2.) These same provision gave rise to the *Weingarten* rights previously discussed.

As aforementioned, Iowa Code section 20.8, subsection 3 states that public employees have the right to "[e]ngage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such

activity is not prohibited by this chapter or any other law of the state." An employer's interference with or restraint of this right to engage in other concerted activity amounts to a prohibited practice pursuant to Iowa Code section 20.10(2)(*a.*) These statutes are similar to section 7 of the NLRA, and PERB has found federal case law informative and illuminating, although not binding. *Koehn and Indian Hills Cmty. Coll.*, 2003 PERB 6414, at App. 20.

As described in federal case law, by enacting the NLRA Congress sought to equalize bargaining power of the employee with that of the employer by allowing employees to band together to confront an employer regarding terms and conditions of employment. *Nat'l Labor Relations Bd. v. City Disposal Sys., Inc.*, 465 U.S. 822, 835–36 (1984.) Congress sought this equalization throughout the entire process of labor organizing, collective bargaining, and enforcement of collective bargaining agreements. *Id.* Similarly in Iowa, section 20.8 seeks to equalize the bargaining power of employees and employers in order to promote harmonious relationships.

Although the scope of protected section 20.8 activities may be broad, they are not all-encompassing. *Public, Prof'l and Maint. Emps., Local 2003 and Black Hawk County*, 1997 PERB 5399, at 6. For an activity to be protected, the complainant must demonstrate the activity was concerted in nature and done for mutual aid or protection. *El Gran Combo de Puerto Rico v. Nat'l Labor Relations Bd.*, 853 F.2d 996, 1002 (1st Cir. 1988.) Federally, these two prongs have not been construed in an overly literal fashion. *Id.*

Concerted activity clearly encompasses two or more employees joining together in order to achieve common goals. *City Disposal Systems, Inc.*, 465 U.S. at 830. Generally, to be considered concerted activity two or more employees must undertake the activity together or one employee must act on behalf of or on the authority of others. *Koehn*, 2003 PERB 6414, at App. 21., *Public, Prof'l and Maint. Emps., Local 2003*, 1997 PERB 5399, at 6.

However, federal and Iowa case law also has found a single employee can engage in concerted activity when the employee is invoking a right grounded in the collective bargaining agreement. *City Disposal Sys., Inc.*, 465 U.S. at 832, *Koehn*, 2003 PERB 6414, at App. 21. A lone employee's action in invoking rights granted under the collective bargaining agreement is deemed concerted because it represents a continuation of the concerted activity of negotiating the agreement. *Koehn*, 2003 PERB 6414, at App. 21, *Public, Prof'l and Maint. Emps., Local 2003*, 1997 PERB 5399, at 6–7.

The scope of section 20.8(3) applies not only to concerted activity under the collective bargaining agreement or to enforce the agreement, but also for "other mutual aid or protection." This broadens the scope of protected activity beyond those concerted activities directly related to collective bargaining. *Koehn*, 2003 PERB 6414, at App. 21. Thus, section 20.8(3) also finds an employee's attempts to initiate, induce, or prepare for group action to be protected activity. *Id.*

Under the NLRA, the "mutual aid or protection" clause protects employees from retaliation by employers when they seek to improve working conditions

through resort to administrative and judicial forums. *Eastex Inc. v. Nat'l Labor Relations Bd.*, 437 U.S. 556, 565–66 (1978.) Federal courts have found this clause protects employees in their appeals to legislators to protect their interests. *Id.* Federal courts have also found an employee's threat to invoke an employer's non-contract grievance process may be protected activity. *See Keokuk Gas Serv. Co. v. Nat'l Labor Relations Bd.*, 580 F.2d 328, 333 (8th Cir. 1978) (finding the employee's statutory right under the NLRA to engage in concerted activity for mutual aid or protection remains viable only if it is interpreted to encompass conduct which intends or contemplates at its end result group activity which will benefit the participants in their status.)

The NLRA, however, is more expansive than PERA on whether activity outside of the collective bargaining agreement constitutes concerted activity for mutual aid or protection. PERA has different purposes than the NLRA. PERA seeks to promote harmonious relationships between the government and its employees, and limits the protections of the Act to public employees as defined in the Act. *See Clay County v. Public Emp't Relations Bd.*, 784 N.W.2d 1, 5–7 (Iowa 2010) (stating that section 20.8(3) of PERA does not protect a public employee's alleged concerted activities with a non-public employer.) Thus, federal case law finding activity to be protected as concerted activity for mutual aid or protection, while instructive, may not be applicable in all cases under Iowa law.

One such example of protected concerted activity for mutual aid or protection in PERA and the NLRA is an employee's *Weingarten* rights discussed

previously. *Weingarten* concluded that concerted activity for mutual aid or protection exists when an employee requests union representation in an investigatory interview which the employee reasonably believed might result in discipline. *Weingarten* is applicable under both federal law and Iowa law regardless of the more limited nature and purpose of PERA.

Despite the application of an employee's *Weingarten* rights under Iowa law, this right is not unfettered. An employee's right to request and have union representation is limited to circumstances in which the employer was conducting an investigatory interview. *See Lennox Industries, Inc.*, 637 F.2d at 343, *AFSCME/Iowa Council 61*, 2013 ALJ at 8619, at 12–15. *Weingarten* does not apply when the meeting between the employer and employee is disciplinary or supervisory. *Lennox Industries, Inc.*, 637 F.2d at 343–44. Courts have reasoned that no concerted activity for mutual aid or protection exists when a union representative is present at an interview held solely for the purpose of informing an employee of and acting upon a previously made disciplinary decision. *Nat'l Labor Relations Bd. v. Southwestern Bell Telephone Co.*, 730 F.2d 166, 171 (5th Cir. 1984), *Anchortank, Inc.*, 618 F.2d at 1166–68. After the investigatory stage, there is limited opportunity to safeguard the interests of other employees and the employer is no longer engaging in fact-finding. *Anchortank, Inc.*, 618 F.2d at 1167–68.

In this case AFSCME argues bargaining unit employees who also may be merit employees are engaging in concerted activity for mutual aid or protection

when requesting union representation during the State's grievance and discipline resolution procedure.

Under this record, we cannot find sufficient evidence that employees have engaged in concerted activity for mutual aid or protection when requesting union representation during the merit system grievance and discipline resolution process. The record demonstrates that AFSCME-represented bargaining unit members utilized the grievance and discipline resolution process and, at some step in that process, at least one employee requested union representation and was denied. The record does not contain information concerning the substance of the matter at issue. In fact, the record does not contain evidence concerning whether the matter at issue was an employee grievance about the application of a DAS rule or whether the matter concerned the imposition of discipline. Further, the record is silent concerning what stage of the process the employee requested such representation. It is unclear if the employee was meeting with a supervisor or with a DAS attorney or some other representative of the State.

As the record is silent about the substance of the matter at issue, PERB cannot determine whether the employee was truly engaging in concerted activity for mutual aid or protection or whether the employee was only pursuing the matter for their own self-interest and the grievance would not actually advance group goals or interests. *See Koehn*, 2003 PERB 6414, at App. 21 (stating that in order for activity to be protected under section 20.8 it must be pursued for collective bargaining or other mutual aid or protection so employees who engage jointly in acts of vandalism clearly would not have protection under section

20.8(3).) Without knowing the substance of the grievance it is impossible to determine whether the employee could potentially be acting for mutual aid or protection of the other bargaining unit members.

AFSCME has the burden to establish the State committed a prohibited practice. Under this record, AFSCME has not established that employees engaged in protected activity under section 20.8(3), and thus has not shown the State interfered with or restrained an employee in their exercise of those rights under section 20.10(2.)

Even if the record contained such evidence concerning the substance of these grievance meetings, we find AFSCME still has not shown the State engaged in a prohibited practice under the circumstances at issue.

A finding that employees have a right to union representation during non-contract grievance meetings is inconsistent with state and federal case law, specifically *Weingarten*. *Weingarten* and subsequent case law limited the right of employees' to have union representation available during meetings with the employer to investigatory interviews only. No authority has been found that an employee has the right to union representation in an employer's internal non-contract grievance process.

The holding in *Weingarten* clearly limits the employee's right to requested union representation to investigatory interviews, not subsequent meetings with management or appeals of management's decision reached after the investigation. *See Anchortank, Inc.*, 618 F.2d at 1167–68. An employer's internal, non-contract, grievance and discipline resolution process does not raise the

same concerns of inequity as an investigatory interview. *Weingarten* limited the employees' right to requested union representation to this stage of the proceedings because after that an employer is trying to justify actions rather than truly find facts to make a decision. At the point a grievance or appeal of discipline is filed under the State merit system grievance and disciplinary resolution process, the employer, in this case the State, has already reached and instituted a decision. An employee is grieving the decision. Thus, *Weingarten*, since it is limited to the investigatory process, clearly does not apply. A finding that an employee has a right to union representation past the investigatory stage would be in conflict with *Weingarten's* clear attempt to balance the rights of labor and management.

AFSCME is essentially arguing to expand an employee's *Weingarten* rights beyond its carefully crafted parameters. We decline to do so.

AFSCME further argues that PERB case law has already established an employee's right to union representation in these types of proceedings.[4] We find the case law to be unpersuasive.

In one of PERB's first cases discussing whether *Weingarten* applied to the public sector in Iowa, an ALJ determined that under the facts presented and pursuant to *Weingarten*, an employee grievant and his union representation

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[4] During oral arguments AFSCME and the State incorrectly cited to *Weitenhagen* for this proposition. *Weitenhagen* addressed *Weingarten* rights as it determined a violation of 20.8(3) due to the employer's denial of requested union representation during an investigatory interview of an employee. *City of Marion v. Weitenhagen*, 361 N.W.2d 323, 325-328 (Iowa Ct. App. 1984). Based on the substance of the arguments, we believe AFSCME and the State were discussing *Dubuque Policeman's Protective Association and City of Dubuque*, which was cited in *Weitenhagen*.

engaged in concerted activity for mutual aid or protection. *Dubuque Policemen's Protective Ass'n v. City of Dubuque*, 1977 H.O. 948, at 5. In that case, the employer attempted to prevent an employee that was appointed by the Association from providing representation to another employee on his disciplinary appeal at the Dubuque Civil Service Commission. *Id.* The hearing officer incorrectly summarized the *Weingarten* holding when stating that "employees involved in disciplinary actions have a protected right to assistance from a union representative." *Id.* at 4. Hence, the hearing officer concluded the employer restrained and coerced the employees in "their right to engage in concerted activities for the purpose of mutual aid and protection within the meaning of *Weingarten*." *Id.* at 5. This case failed to properly state the *Weingarten* holding, which, as previously discussed, provides that *Weingarten* rights arise during investigatory interviews, not merely disciplinary proceedings. Due to the case's reliance on an inaccurate characterization of *Weingarten* rights, we cannot find this case to be persuasive authority on whether an employee has a right to union representation during internal non-contract grievance proceedings.

Based on our review of the purpose of PERA and acknowledging the limitations of an employee's right to union representation as framed in *Weingarten*, we cannot conclude that an employee grievant utilizing an employer's non-contract grievance process has a right to union representation upon request. To do so would be an improper expansion of *Weingarten*. Such a finding would be inconsistent with federal and PERB cases, which found that an employee's right to requested union representation only attached during the

investigatory stage, which occurs before a decision that may ultimately result in an employee's filing of a grievance or appeal pursuant to the State merit system grievance and disciplinary resolution process.

We find AFSCME has not presented evidence to establish employees engaged in activity protected by section 20.8(3) when requesting union representation during State merit system grievance and disciplinary resolution meetings. As such, AFSCME has not shown the State committed a prohibited practice under section 20.10(2) in denying an employees' request for union representation in grievance and discipline resolution meetings held pursuant to the State's merit system grievance and discipline resolution process.

AFSCME has not established the State's actions in denying employees union representation during the merit system grievance and discipline resolution process and meetings amount to a prohibited practice. However, AFSCME has shown the State's actions in denying bargaining unit members union representation during investigatory interviews as required by *Weingarten*, amount to a prohibited practice within the meaning of Iowa Code section 20.10(2.) Consequently, we issue the following:

ORDER

IT IS HEREBY ORDERED that the State of Iowa cease and desist from any further violations of Iowa Code section 20.10(2)(*a*).

IT IS FURTHER ORDERED the State of Iowa post the attached Notice to Employees for 30 days, in its main offices accessible to the general public and

all places customarily used for the posting of information for AFSCME-represented bargaining unit employees.

The costs of reporting and the agency-requested transcript in the amount of $206.20 are assessed against the State of Iowa pursuant to PERB rule 621—3.12. A bill of costs will be issued to the parties in accordance with PERB subrule 621—3.12(3.)

The Board retains jurisdiction to enter whatever orders may be necessary or appropriate to address any remedy-related matters which may arise.

DATED at Des Moines, Iowa this 5th day of August, 2020.

PUBLIC EMPLOYMENT RELATIONS BOARD

Cheryl K. Arnold, Chairperson

Mary T. Gannon, Board Member

Erik M. Helland, Board Member

Filed electronically.
Parties served via eFlex.

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A DECISION OF THE PUBLIC EMPLOYMENT RELATIONS BOARD

The Iowa Public Employment relations Board (PERB) has determined that the State of Iowa committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(*a.*)

The violation occurred when management conducted investigatory interviews which employees reasonably believed might result in discipline, and despite request from the employee, management refused to provide the employees with a union representative. The State also improperly limited the role of employees' representatives when stating the representatives could not actively participate in the investigation, could not ask questions, could not take notes, and could not record the interview. This interfered with and restrained employees from exercising rights to engage in concerted activity for the purpose of mutual aid and protection as granted by Iowa Code section 20.8.

The section of the Iowa Public Employment Relations Act found to have been violated provides:

20.10 Prohibited practices.

2. It shall be a prohibited practice for a public employer or the employer's designated representative to:

a. Interfere with, restrain, or coerce public employees in the exercise of rights granted by this chapter.

To remedy this violation, the State has been ordered to:

-Cease and desist from further violations of Iowa Code chapter 20;

-Post this notice in a prominent place in its main offices accessible to the general public and in conspicuous places customarily used for the posting of information to employees in the affected bargaining units, for a period of not less than 30 days.

Any questions regarding this Notice or the State's compliance with its provisions may be directed to:

Public Employment Relations Board

510 East 12th Street • Suite 1B

Des Moines IA 50319-0203

515/281-4414

Dated 08/05/2020