

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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UE LOCAL 893/IOWA UNITED PROFESSIONALS, )  
Complainant, )

and )

STATE OF IOWA (DEPARTMENT OF HUMAN )  
SERVICES) )  
Respondent. )

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CASE NO. 102139

PROPOSED DECISION AND ORDER

The Complainant, UE Local 893/Iowa United Professionals (IUP) filed this prohibited practice complaint with the Public Employment Relations Board (PERB) pursuant to Iowa Code section 20.11 and PERB rule 621—3.1(20).<sup>1</sup> The complaint alleges that the State of Iowa (Department of Human Services) (State or DHS) committed prohibited practices within the meaning of Iowa Code section 20.10(2)(a) and (d) by violating Pamela Bloomer Pinkston's right to union representation on November 1, 2017, when DHS refused to allow Bloomer's preferred representative to speak, ask questions, or advocate on behalf of Bloomer during an investigatory interview. The complaint further alleges the State also committed prohibited practices on December 22, 2017, when DHS directed Bloomer to participate in an investigatory interview without making arrangements for a union steward to attend the interview and conducted an investigatory interview without a union steward present after Bloomer repeatedly asserted her *Weingarten* rights. Additionally, the complaint alleges the State committed prohibited practices when it retaliated against

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<sup>1</sup> The filed complaint included Pamela Bloomer as a complainant and Felicia Toppert as a respondent. At hearing, the parties agreed to remove Bloomer and Toppert as named parties.

Bloomer by placing her on administrative leave pending an investigation after the December 22, 2017, interview. The State denies it has committed any prohibited practices.

Pursuant to notice, an evidentiary hearing on the complaint was held before me on June 14, 2018, in Burlington, Iowa. Jennifer Marsh represented UE Local 893/IUP and attorneys Alla Mintzer Zaprudsky and Henry Widen represented the State. Both parties filed post-hearing briefs on August 10, 2018.

Based upon the entirety of the record, I conclude that UE Local 893/IUP has established that DHS' Eastern Iowa Service Delivery Area committed prohibited practices as alleged in its complaint.

#### FINDINGS OF FACT

The State of Iowa is a public employer within the meaning of Iowa Code section 20.3(10) and UE Local 893/IUP is an employee organization within the meaning of Iowa Code section 20.3(4) and is the certified bargaining representative for certain professional social service classifications employed by the Department of Human Services.

The State and UE Local 893/IUP (UE) were parties to a collective bargaining agreement effective July 1, 2015 through June 30, 2017. A question arose whether there was a collective bargaining agreement between the parties for the term July 1, 2017 through June 30, 2019. The state contended that a collective bargaining agreement did not exist and as a result did not recognize the collective bargaining agreement. Due to the absence of

language from the disputed collective bargaining agreement regarding procedures for investigatory interviews, DHS, with the assistance of the Department of Administrative Services, developed a procedure to use during an employee's investigatory interview. Instead of an employee using a union steward, employees could be assisted by a peer representative which DHS defined as "someone with the same bargaining status as the employee/Grievant."<sup>2</sup> In the Eastern Iowa Service Delivery Area, DHS was using peer representatives at investigatory interviews.

Pamela Bloomer Pinkston (Bloomer) is a child protection worker, classified as a social worker III, a position within the UE represented bargaining unit. Bloomer was based in DHS' Eastern Iowa Service Delivery Area, in the Des Moines County office located in Burlington, Iowa.

November 1<sup>st</sup> Investigatory Interview:

On November 1, 2017, at approximately 9:45 a.m., Gregory Lorber, a social worker supervisor, notified Bloomer that the State would be conducting an investigatory interview later that day regarding work performance issues. Bloomer informed Lorber that she was invoking her *Weingarten* rights and requested to have a union steward present at the meeting. Chad Reckling, a social worker II also based in the Des Moines County office and an IUP union steward, was asked by Lorber to assist Bloomer in the investigatory interview.

The investigatory interview took place at the Des Moines County DHS office located in Burlington, Iowa. In attendance was Bloomer, Felicia Toppert

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<sup>2</sup> Union's Exhibit G. Italics removed.

(Executive Officer II), Lorber (Bloomer's supervisor), and Reckling, who in his words was in attendance "as an IUP Steward, as well as a peer chosen by Pam Bloomer to help represent her in this investigatory interview...."<sup>3</sup>

The interview was conducted by Toppert. During the meeting, Toppert asked Bloomer questions regarding work performance and whether she followed certain supervisory directives. At several times during the meeting, Bloomer consulted with Reckling. At no time did Toppert tell Bloomer that she could not consult with Reckling nor did Toppert instruct Reckling that he could not speak with Bloomer. Although Reckling took notes, which contained questions he was going to ask Toppert and data he wanted to receive, he did not ask any questions while Toppert was questioning Bloomer, instead waiting until Toppert had finished questioning her. At the end of Toppert's questioning, the following exchange took place:

Felicia (Toppert): Okay. Alright. That is all of my questions for the moment. Um, anything else you would like to add Pam?

Pam (Bloomer): There's a lot but obviously that's not anything you'd like to hear.

Felicia (Toppert): Okay.

Chad (Reckling): Do we have the ability to ask questions of you as part of this Investigatory Interview process now at this time?

Felicia (Toppert): Is it about the process?

Chad (Reckling): No, it's about the subject matter contained within the questioning that occurred during today's interview.

Felicia (Toppert): No.

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<sup>3</sup> Union's Exhibit E and State's Exhibit S-4.

Chad (Reckling): Okay. Duly noted that management refused to request or answer questions posed by this worker in representation to their union member with regards to this Investigatory Interview for today.

Felicia (Toppert): Interview ended at 1:57.<sup>4</sup>

As a result of Toppert's response, Reckling did not ask any questions or seek the data he had noted during Bloomer's investigatory interview. As a result of the investigation, Bloomer received a three-day suspension without pay.

December 22nd Investigatory Interview:

On December 21, 2017, DHS decided to conduct an investigatory interview with Bloomer about work performance issues. The next day, Lorber notified Bloomer at approximately 9:10 a.m. about the investigatory interview which was to take place at 2:00 p.m. that afternoon. Bloomer informed Lorber that she was unavailable at this meeting time as she had another prescheduled appointment and that she was invoking her *Weingarten* rights; she wanted a union steward present as she believed discipline could result. The meeting was scheduled for later that morning. Although Reckling was contacted by both Lorber and Toppert, he was unable to attend the interview. Todd Larson, an income maintenance worker, who was not an IUP-trained union steward, was contacted by Lorber. Larson, however, did not attend the investigatory interview. He came to the door where the investigatory interview was being held, looked in, listened to the interactions between Bloomer and Toppert, shut the door, and left.

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<sup>4</sup> Union's Exhibit E and State's Exhibit S-4.

The investigatory interview began at 11:34 a.m. Present at the interview was Bloomer, Toppert and Lorber. Once the interview started, Bloomer reiterated that she had asked and been denied a union steward. Toppert did not discontinue the interview. Instead, she responded that the union steward requested by Bloomer chose not to come, that Bloomer had failed to identify a peer that she would like to attend, and that “we are going to start the investigation.”<sup>5</sup> Although Toppert testified that she attempted to conduct the interview because she interpreted Bloomer’s refusal to have the income maintenance worker present as an indication that she did not want representation, I cannot reach such a conclusion. There is no evidence in the record that Bloomer refused to have the income maintenance worker as her representative. Instead, as noted above, the record shows that it was the income maintenance worker who decided not to attend the interview. Further, this testimony is contradicted by the following exchanges during the interview:

Bloomer: I am invoking my *Weingarten* rights and I have no one here as a union steward to represent me so (interruption by Toppert)

Toppert: You are being given a directive to participate (interruption by Bloomer)

Bloomer: I am invoking my *Weingarten* rights (interruption by Toppert)

Toppert: in this investigatory interview (interruption by Bloomer)

Bloomer: and that is not being followed (interruption by Toppert)

Toppert: Your refusal (interruption by Bloomer)

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<sup>5</sup> State’s Exhibit S-6, an audio of the December 22, 2017, interview.

Bloomer: followed through and respected. (interruption by Toppert)

Toppert: Your refusal to cooperate and participate in this interview could result in discipline up to and including discharge.

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Toppert: I am going to ask this question again as part of this investigatory interview. You are required to cooperate with an investigatory interview. Your failure to do so could result in discipline up to and including discharge.

Bloomer: Again, I am invoking my *Weingarten* rights and have been asked to take place and that has not happened. When I asked for a union steward, it doesn't have to be just someone here.

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Toppert: Okay. I am going to say it for the third time: You are required to by directive to cooperate in this investigatory interview. Your failure to do so will result, could result in discipline up to and including discharge. Are you failing to cooperate with this interview?

Bloomer: I am not failing to cooperate; I am sitting here.

Toppert: I am asking (interruption by Bloomer)

Bloomer: You have failed my rights, my *Weingarten* rights to have a union steward present with me to assist in this investigatory interview.

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Toppert: Interview ended effective 11:44. We will take a 5 minute recess for Pam (Bloomer) to reconsider her cooperativeness with this investigatory interview. Time ended: 11:44.<sup>6</sup>

Based upon these exchanges, I find that Bloomer was not indicating that she did not want representation, but rather by invoking her *Weingarten* rights, she was requesting a union representative be present with her in the

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<sup>6</sup> State's Exhibit S-6, an audio of the December 22, 2017, interview. This is my transcription of the recording. Although both parties testified that the interview continued after the break, it was not contained on the recording.



investigatory interview which she reasonably believed might result in disciplinary action. Toppert did not discontinue the interview or offer Bloomer the choice of continuing the interview unrepresented or having no interview at all. Instead, she unsuccessfully attempted to interview Bloomer. Throughout the limited interview, Bloomer interjected that she was “invoking her *Weingarten* rights” and Toppert informed Bloomer that she needed to answer the question. The recorded interview ended with Bloomer being instructed by Toppert to reconsider her cooperativeness with this interview.

Approximately one hour later, Lorber presented Bloomer with a letter that placed her on administrative leave effective December 22, 2017. The administrative leave lasted approximately 3.5 hours. No discipline was issued as a result of the investigatory interview conducted on December 22.

UE filed its prohibited practice complaint on January 5, 2018.

#### CONCLUSIONS OF LAW

UE’s complaint alleges that the State committed prohibited practices within the meaning of Iowa Code section 20.10(2)(a) and (d) which provide:

##### **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.

d. Discharge or discriminate against a public employee because the employee has filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has formed, joined, or chosen to be represented by any employee organization.



Also relevant to this matter is Iowa Code section 20.8, which provides in relevant part:

**20.8 Public employee rights.**

Public employees shall have the right to:

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3. Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...”

PERB case law has long recognized that an employee’s section 20.8 rights include the employee’s right to insist upon the presence of a union representative at an investigatory interview which the employee reasonably believes might result in disciplinary action. This has become known as the “Weingarten right.” *Colo-Nesco Educ. Ass’n and Scott Bauer and Colo-Nesco Cmty. Sch. Dist.*, 2016 ALJ 100001 at 5; *AFSCME/Iowa Council 61 and State of Iowa (Dep’t of Corr.)*, 2013 ALJ 8619 at 10-11; *Sherrie Peters and Waterloo Comty. Sch. Dist.*, 2010 PERB 8218 at 6. In *City of Marion v. Weitenhagen*, the Iowa Court of Appeals approved PERB’s application of the *Weingarten* right to Iowa public employees. 361 N.W.2d 323, 327, 328 (Iowa Ct. App. 1984). Accordingly, a public employer’s interference with an employee’s exercise of the *Weingarten* right violates section 20.10(2)(a). See *Teamsters Local 238 and Muscatine Cty.*, 2014 ALJ 8744; *AFSCME/Iowa Council 61*, 2013 ALJ 8619; *AFSCME/Iowa Council 61 and State of Iowa (Dep’t of Corr.)*, 2005 PERB 6436.

In prohibited practice proceedings, the complainant bears the burden of establishing each element of the complaint. *United Elec., Radio & Mach. Workers of Am., Local 896 (COGS) and State of Iowa (Bd. of Regents)*, 2019

PERB 100800 & 100814 at 17; *Colo-Nesco Educ. Ass'n and Scott Bauer*, 2016 ALJ 100001 at 7. UE's complaint alleges the State violated Bloomer's *Weingarten* rights when a DHS Executive Officer refused on November 1, 2017, to allow a union steward to speak, ask questions or advocate on behalf of Bloomer in an investigatory interview, as well as on December 22, 2017, when the State denied Bloomer's request for a union steward and directed Bloomer to participate in an investigatory interview without a union steward being present. Thus, whether Bloomer's *Weingarten* rights were violated centers upon two interviews; November 1 and December 22, 2017.

November 1<sup>st</sup> Investigatory Interview:

The parties agree that the November 1 meeting was an investigatory interview which triggered Bloomer's *Weingarten* rights, that Bloomer requested a union representative as she believed that the interview could result in disciplinary action, and that Reckling was Bloomer's representative.

The parties' dispute centers on whether the interview was finished when Reckling decided to ask questions. UE alleges that Toppert's decision not to answer any subject matter questions at the end of the interview limited Reckling's role as Bloomer's representative and thus violated Bloomer's *Weingarten* rights.

The State argues that Bloomer's *Weingarten* rights were not violated by Toppert denying Reckling the ability to ask questions as Reckling's questions were not germane to the interview, but instead an attempt to gather information for a grievance or a prohibited practice complaint. However, in

determining whether Bloomer's *Weingarten* rights were violated, the substance of the questions is not relevant because at the time Toppert told Reckling she was not going to answer any subject-matter questions she was unaware of the questions' substance. Toppert only knew that the questions were not process-related, and involved the subject matter of the questions that she had asked Bloomer.

The State further argues that Bloomer's *Weingarten* rights were not violated because Reckling's question to Toppert occurred after the investigatory interview was finished. However, I cannot conclude that Reckling's question to Toppert was asked after the investigatory interview had finished. Although Toppert may have completed her questioning of Bloomer, this cannot be construed to mean the interview was finished.

An employee's *Weingarten* representative is not only entitled to attend the investigatory interview, but also participate in the interview by asking questions, making additions, clarifications, and to eliciting favorable facts. *Teamsters Local 238*, 2014 ALJ 8744 at 25. Further, this right may occur at any time during the interview. The NLRB has held that during an investigatory interview, an employer is free to hear the employee's explanation first and delay until the end of the interview the union representative's additions and clarifications. *NLRB v. SW Bell Tel. Co.*, 730 F.2d 166 (5th Cir. 1984), *SW Bell Tel. Co. v. NLRB*, 667 F.2d 470 (5th Cir. 1982). Although Toppert did not require or request that Reckling wait until the end of the interview to ask his questions, this is what occurred. However, Reckling's choice to wait until

Toppert had completed her questioning of Bloomer, should not have foreclosed him from asking questions. Toppert's refusal to allow Reckling to ask questions after she had finished her questioning of Bloomer denied Reckling the opportunity to participate fully in the investigatory interview. By limiting Reckling's role as Bloomer's representative, DHS denied Bloomer an aspect of her right to representation. This denial of her *Weingarten* rights granted under Iowa Code section 20.8 constitutes a prohibited practice within the meaning of section 20.10(2)(a).

December 22<sup>nd</sup> Investigatory Interview:

The State contends the December 22, 2017, interview was not an investigatory interview which resulted in discipline being issued, and thus *Weingarten* is not applicable.

The State argues that because no disciplinary action was taken, Bloomer was not entitled to invoke her *Weingarten* rights. However, the issuance of discipline is not relevant to the question of whether *Weingarten* is applicable. *AFSCME Iowa Council 61*, 05 HO 6436 at 14.<sup>7</sup> Instead, the question is whether the employee reasonably believed, at the time of the interview, that the interview may result in disciplinary action. *AFSCME/Iowa Council 61*, 2013 ALJ 8619 at 11; *Dubuque Policeman's Prot. Ass'n and City of Dubuque*, 88 PERB 3316 at 5. In the instant case, it is not contested that DHS was conducting an investigatory interview because its purpose was to illicit answers

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<sup>7</sup> This decision was subsequently appealed to the Board, but the applicability of *Weingarten* rights was not an issue before the board.

to work-related questions which had the possibility of resulting in discipline. *AFSCME/Iowa Council 61*, 2013 ALJ 8619 at 13.

The State further argues that an investigatory interview did not take place because once Toppert determined that Bloomer did not want the income maintenance employee as her peer representative, the investigatory interview was suspended.

PERB case law is clear that a bargaining unit employee possesses the right to insist upon the presence of union representation at an investigatory interview if the employee reasonably believes that the interview may result in disciplinary action. Once an employee makes a valid request for union representation, the employer must (1) grant the request; (2) deny the request and end the interview; or (3) offer the employee the choice between continuing the interview unaccompanied by a representative or having no interview at all. *See Colo-Nesco Educ. Ass'n and Scott Bauer*, 2016 ALJ 100001 at 6; *AFSCME/Iowa Council 61*, 2013 ALJ 8619 at 11; *Dubuque Policeman's Prot. Ass'n*, 88 PERB 3316 at 5.

However, the evidence in the record does not support the State's argument that once Toppert determined that Bloomer did not want the income maintenance worker as her peer representative, the interview ended. Bloomer clearly invoked her *Weingarten* rights before and at the beginning of the interview. Additionally, she repeatedly interjected, during the interview, that she was invoking her *Weingarten* rights. By saying she was invoking her *Weingarten* rights, Bloomer clearly indicated that she wanted a union

representative. As a result, Toppert was obligated either to discontinue the interview or give Bloomer the choice of not having an investigatory interview or continuing the interview unaccompanied by a union representative. Instead, Toppert attempted to proceed with the interview. Bloomer was repeatedly told that she was “required to cooperate in this investigatory interview”, or was “being given a directive to participate” and that “her refusal to cooperate and participate in this interview could result in discipline up to and including discharge.” Further, Toppert called for a five-minute recess “for Pam (Bloomer) to reconsider her cooperativeness with this investigatory interview.”

Because Bloomer invoked her *Weingarten* rights and asked for union representation, and DHS’ management did not discontinue the interview nor offer Bloomer the choice of continuing the interview unaccompanied by a representative or not having the interview, the State interfered with, restrained or coerced Bloomer in the exercise of her rights granted under Iowa Code section 20.8 and committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(a).

UE also alleges that the State violated Iowa Code section 20.10(2)(d). However, it did not make any arguments addressing this Code section. PERB has previously determined that when a complainant fails to explain how any of the evidence proves that the respondent has committed a violation of the Act, it in effect abandons that claim. *UNI-United Faculty (AAUP IHEA) and State of Iowa (Bd. Of Regents)*, 2019 PERB 100798 at 11; *Int’l Ass’n of Prof’l Firefighters and Cedar Rapids Airport Comm’n, Local 2067*, 2013 PERB 8637 at 18.

Because UE failed to explain how the evidence presented proved that DHS retaliated against Bloomer when Bloomer was placed on administrative leave after the December 22, 2017, interview, it has abandoned its 20.10(2)(d) retaliation claim. As a result, UE has failed to establish any prohibited practice based upon this provision of the Iowa Code.

Accordingly, for the reasons stated above, I propose the following:

#### ORDER

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

IT IS FURTHER ORDERED that the State of Iowa (Department of Human Services) post the attached Notice to Employees in DHS' Eastern Iowa Service Delivery Area offices accessible to the general public, and other places customarily used for the posting of information to employees in the bargaining unit of social workers represented by UE Local 893/Iowa United Professionals. The posting shall be for a period of 30 days from the date this proposed decision becomes final agency action.

The costs of reporting and agency-requested transcript in the amount of \$666.70 are assessed against the State of Iowa pursuant to PERB rule 621—3.12. A bill of costs will be issued in accordance with PERB subrule 621—3.12(3).



DATED at Des Moines, Iowa this 3rd day of July, 2019.

*Susan M. Bolte*  
Susan M. Bolte, Administrative Law Judge

# **NOTICE TO EMPLOYEES**

## **Posted Pursuant to a Decision of the Public Employment Relations Board**

UE Local 893/Iowa United Professionals filed a prohibited practice complaint with the Public Employment Relations Board (PERB) in PERB Case No. 102139, against the State of Iowa (Department of Human Services).

PERB has determined that the State of Iowa (Department of Human Services) committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(a). This section 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.

The violation occurred on November 1, 2017, when DHS refused to allow an employee's preferred representative to ask questions or advocate on the employee's behalf at an investigatory interview and on December 22, 2017, when DHS directed the employee to participate in an investigatory interview without affording the employee her *Weingarten* rights. These violations interfered with and restrained her from exercising her rights to engage in concerted activity for the purpose of mutual aid and protection as granted by Iowa Code section 20.8.

To remedy the prohibited practice, DHS' Eastern Iowa Service Delivery Area has been ordered to:

- Cease and desist from any further violations and
- Post this notice in a prominent place in DHS' Eastern Iowa Service Delivery Area offices accessible to the general public and in conspicuous places customarily used for the posting of information to employees in the affected bargaining unit, for a period of not less than 30 days.

Any questions should be directed to:

**Public Employment Relations Board**  
510 East 12<sup>th</sup> Street, Suite IB  
Des Moines, Iowa 50319-0203  
515/281-4414

Issued: July 3, 2019