

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

AFSCME/IOWA COUNCIL 61,
Complainant,

and

STATE OF IOWA (DEPARTMENT OF
CORRECTIONS),
Respondent.

CASE NO. 8619

PUBLIC EMPLOYMENT
RELATIONS BOARD

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PROPOSED DECISION AND ORDER

Complainant AFSCME/Iowa Council 61 (AFSCME) 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). The complaint alleges that Respondent State of Iowa, through its Department of Corrections, committed prohibited practices within the meaning of Iowa Code sections 20.10(2)(a), (b), (d) and (f) when, in February, 2013, Correctional Officer Leonard Willison, Jr. requested and was denied union representation when questioned by Fort Dodge Correctional Facility Warden James McKinney, Willison believing the questioning would lead to discipline, and was directed to and did answer the warden's questions. The State denied its commission of a prohibited practice.

Pursuant to notice, an evidentiary hearing on the complaint was held before the administrative law judge in Fort Dodge, Iowa, on June 13, 2013. AFSCME was represented by attorney Mark T. Hedberg and the State by attorney Tedra Joy Porteous. Both parties filed post-hearing briefs on August 16, 2013.

Based upon the entirety of the record, the ALJ has concluded that AFSCME has established the State's commission of a prohibited practice within the meaning of Iowa Code section 20.10(2)(a).

FINDINGS OF FACT

AFSCME is an employee organization within the meaning of Iowa Code section 20.3(4).¹ It has, since 1977, been the certified bargaining representative of employees of the State, a public employer within the meaning of section 20.3(10), in what is commonly referred to as the "security" bargaining unit.

Leonard Willison has been a correctional officer, a position within the AFSCME-represented unit, since 1997 and has been employed at the Fort Dodge Correctional Facility (FDCF) since 1998.

Willison has been the subject of workplace discipline during his employment at FDCF. Eight or nine years before hearing, Willison was suspended for five days for excessive computer use (later reduced to two, apparently as a result of a grievance arbitration). During the investigation which resulted in this discipline, Willison requested and was granted the assistance of an AFSCME steward.

More recently, attendance issues have been the source of Willison's disciplinary concerns. Although no real detail is provided by the record, Willison apparently received a written reprimand in March, 2010, for unauthorized leave.

¹ This and all subsequent statutory citations are to the Code of Iowa (2011).

Around September, 2012, Warden McKinney spoke with Willison about attendance, Willison apparently having missed work on a number of occasions which had caused management concern. Willison's unit manager told him they needed to see the warden and when asked indicated that no union representative was necessary because they were just going to discuss his rounds. After an initial discussion with McKinney about making proper rounds, the conversation shifted to Willison's attendance, the warden indicating that he expected it to improve and that if Willison continued to miss work, disciplinary action could be taken. During the conversation Willison told McKinney that he suffered from a phobia about driving in the winter.

On December 5, 2012, Willison was presented with a memo noting his excessive use of sick leave during the past year, and advising that he was "being placed on 1-day sick slips." The memo instructed that any time Willison called in sick he would be required to bring in a doctor's note and turn it in with his leave request, and added that the failure to do so "will result in progressive discipline and the absence being considered unauthorized leave without pay."

Willison had been absent on October 17, 2012. When he returned to work the following day he submitted an application for 8 hours of paid sick leave, although he had only 2.7 hours of paid leave available. He was counseled concerning this apparent violation of DOC's work rules, and was paid for only the 2.7 hours of leave had available at the time—the other 5.3 hours being treated as unauthorized leave without pay.

On December 28, 2012, Willison was again absent and submitted a leave slip for 8 hours of paid sick leave when only 1.83 hours were available to him. He was again counseled regarding the attendance/leave usage rule violation, and paid for only the 1.83 hours.

Willison also missed work on January 3 and 4, 2013, and submitted a request for 16 hours of paid sick leave. Although the documentation does not reveal the extent of his sick leave shortfall, it appears that at least a portion of these 16 hours was unauthorized leave without pay, and Willison was again counseled about his violation of DOC work rules.

Willison called in sick and was absent from work on January 30, 31, and February 1, 2013. Upon his return to work on February 4, he submitted leave slips (not offered into evidence) for his January 31 and February 1 absences, but not his January 30 absence. The FDCF management was aware that Willison had been absent on January 30, and was unsure of the reason for his absence and the form of leave he was proposing to utilize. Management also viewed the leave requests that Willison had submitted as incomplete. FDCF's human resources person and its DAS/HRE representative consulted and identified issues with Willison's leave slips which caused concern. It appears the discussion of those issues revealed at least some confusion about what types of leave would be allowed under what circumstances.

The warden thought it appropriate to meet with the available managers involved with Willison's leave issues to not only discuss what the facility's payroll people were to do in connection with Willison's absences (with pay or

without pay), but to also clarify any confusion about leave policies generally. He scheduled a meeting for those purposes for the following day.

On February 5, 2013, five other managers met with McKinney in his conference room—FDCF's business manager/associate warden of administration; a representative of its human resources office; Willison's unit manager; his captain, and another manager whose position is not clear from the record.

The managers discussed the leave slips Willison had submitted, as well as the three earlier ones which had been deemed rule violations in 2012 and early January 2013, patterns in his absences and those of other employees, how certain types of leaves (including FMLA, inclement weather, and without pay) should be treated and what leaves should be approved or disapproved. They decided they needed to clarify the leave slips Willison had submitted for January 31 and February 1 and determine why he had called in on January 30 and the type of leave he was purporting to use, and directed that Willison be told to report to the warden's conference room.

Another captain contacted Willison and told him to report to the conference room to see the warden. Willison asked if he needed a union representative and was told that the warden had indicated that he did not. When Willison said he felt he needed a union steward the captain said he would check, then called Willison back and advised that he didn't need a union representative. Willison said he thought he did, and the captain indicated

Willison could hash that out with the warden. Willison reported to the conference room as directed, without a union representative.

When Willison arrived in the reception area of the warden's office, he saw the assembly of managers inside and that the warden was talking on the telephone. One of the managers signaled to Willison to wait outside the conference room and while waiting, he overheard a part of what McKinney was saying on the telephone and realized it had to do with leaves of absence.²

While waiting for Willison to appear, conversation among the managers had addressed the particulars of DOC's policy concerning when using vacation "in lieu of" sick leave would be allowed, and a call had been placed to DAS/HRE representative Susie Pritchard, who was on the telephone with McKinney when Willison arrived at the conference room.

Willison felt that, based upon his past experience, when one is called to the warden's office and into a meeting with that many managers present, nothing good is about to happen. Willison knew that he had been told that further absenteeism could result in discipline, that he had been confronted and counseled a number of times concerning his unauthorized absences and requests for paid leave he did not possess, that he had just been absent again,

² The testimony about what McKinney said during the telephone conversation is in conflict. There is testimony which would support a finding that McKinney mentioned Willison by name and the names of other employees in connection with a statement to the effect that "the bad officers do that." McKinney, on the other hand, testified that he did not recall using Willison's name during the conversation and denied having referred to him as a bad employee, a bad officer, or using any other descriptive term for Willison. Business manager Dru Saathoff, also present in the conference room during the telephone call, testified that Willison was not mentioned during the conversation.

The ALJ thinks it unnecessary to resolve this conflict or to make a specific finding concerning whether Willison was mentioned in the telephone conversation and, if he was, whether it was in the pejorative sense. Even were the ALJ to credit the testimony that Willison was not mentioned by McKinney, such would not alter the conclusions reached below.

and that the warden, his captain, unit manager and HR person were discussing leaves in the room to which he had been summoned. Willison believed that he might be disciplined at or as a result of the meeting he was about to attend.

When McKinney finished his telephone conversation and Willison was waived into the conference room, he immediately requested a union representative. McKinney responded that Willison didn't need one because there was no pending investigation and no pending discipline. McKinney told Willison that because leave slips he had submitted were not accurate, Willison needed to list each day of his absence, January 30, 31 and February 1, and tell why he called in sick and what leave he was using. Willison requested a union steward again but was told he didn't need one because there was no pending investigation or pending discipline. McKinney told Willison to go into another room, not talk to anybody else, write down the information about his absences and then turn that in.

Although McKinney knew, at a minimum, that Willison had not submitted any leave slip for one day of his recent absence—and that failure to turn in a slip can lead to discipline—McKinney testified that he did not contemplate any discipline when Willison was summoned to the meeting or told to write the statement concerning his absences.

Willison was directed to another room where he produced a written statement, indicating that he couldn't make it in to work on January 30 because travel was not advised and that he had started for work on January 31

and February 1 but had panic attacks on the way to FDCF and returned home both days. Willison's statement included mention of the chiropractic treatment he had received later in the day on February 1, the existence of "FMLA papers" at his doctor's office, his requests for a union steward and his being told he wasn't being disciplined and didn't need one.

Willison returned his written statement to Warden McKinney and returned to his post.

McKinney read Willison's statement to the assembled managers and indicated the only relevant portion was what Willison had written about why he hadn't reported for work January 30-February 1. Discussion ensued about whether Willison's absences would be authorized leave without pay or unauthorized leave without pay. According to McKinney's testimony, it was determined that January 30 would be authorized without pay because of the collective bargaining agreement's provisions concerning declared inclement weather days; that January 31 would be, at least in part, unauthorized leave without pay because Willison had inadequate sick time to cover the absence and that February 1 was not an issue and leave was authorized because Willison was able to use a combination of new sick leave and vacation in lieu of sick leave.

Because of their conclusion that unauthorized leave had been taken on January 31, the group reviewed how many prior unauthorized days Willison had and concluded he was at the written reprimand stage of the attendance policy. McKinney instructed that an investigation be conducted to determine if

DOC attendance policy called for discipline. Willison's unit manager and captain, both of whom had been present throughout the meeting, were assigned as investigators to talk with Willison and determine if he had a reason why his unauthorized absence should be deemed authorized and, if unauthorized, whether the attendance policy called for discipline.

Approximately an hour after leaving the warden's conference room, Willison was summoned by the investigating captain and told to bring a union steward with him. Willison obtained a steward and together they reported to the investigating captain and unit manager. There he was presented with a document advising that he was "being placed under investigation for your 4th occurrence of unauthorized leave without pay." When the steward noted that Willison had just talked to the warden who had said it would not lead to discipline and that there was no investigation, one of the investigating officers replied that he was under investigation now and that "this is official." The investigators asked about his absences and had him rewrite two leave slips.

The next day the investigators prepared a "workrule violation worksheet" which indicated that "on 2/4/13 it was found that CO Leonard Willison had taken unauthorized leave without pay on 1/31/13" and noted that he had previously been coached and counseled on three separate occasions within the previous four months for incidents of unauthorized leave without pay. The investigators noted the specific policy which specifies a written reprimand and loss of pay for the fourth offense within a one-year period, and recommended that a written reprimand be issued.

AFSCME filed its complaint in this matter on February 19, 2013.

On March 15, 2013, Willison was reprimanded in writing as a result of his fourth violation of DOC work rules regarding unauthorized leave without pay. The reprimand did not specify the day or days when the violation occurred, and noted that the delay in serving the reprimand was due to the absences of the investigators and Willison.

CONCLUSIONS OF LAW

AFSCME's complaint alleges the State's commission of a prohibited practice within the meaning of Iowa Code sections 20.10(2)(a), (b), (d) and (f), 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.

b. Dominate or interfere in the administration of any employee organization.

d. Discharge or discriminate against a public employee because the employee had 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.

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

Iowa Code section 20.8 grants public employees the right, *inter alia*, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 20.10(2)(a) prohibits public employers from

interfering with, restraining or coercing public employees in the exercise of such rights. A virtually identical right and prohibition is contained in the National Labor Relations Act. See 29 U.S.C. §§ 157, 158(a)(1). In the private sector, this statutory right of employees to engage in concerted activities for the purpose of mutual aid or protection has long been recognized as including an employee's right to request and have present a union representative at any investigatory interview which the employee reasonably believes may result in his or her discipline. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975).

PERB had adopted and followed the reasoning of *Weingarten* in the Iowa public sector, indicating that what has come to be known as the “*Weingarten* right” is included within the rights granted by Iowa Code section 20.8. See, e.g. *McCormack v. City of Cedar Falls*, 80 PERB 1511; *State of Iowa*, 85 PERB 2891; *Dubuque Police Protective Assn. v. City of Dubuque*, 88 PERB 3316. The Board has thus held that a represented employee possesses the right to insist upon the presence of a union representative at an investigatory interview if the employee reasonably believes that the interview may result in disciplinary action, and that upon its receipt of a request for a union representative in such circumstances the employer must grant the request, discontinue the interview, or offer the employee a choice between continuing the interview unaccompanied by a representative or having no interview at all. *Dubuque Police Protective Assn., supra.*

Certain conditions must exist for this right to union representation to attach: The employer/employee contact in question must be an investigatory interview of the employee which the employee reasonably believes will result in disciplinary action, and the employee must request union representation. And as the NLRB and the Supreme Court have recognized, the *Weingarten* right to union representation does not apply to run-of-the-mill employer/employee contacts such as the giving of instructions or training or needed corrections of work techniques. *Weingarten, supra*, at 420 U.S. 257-8.

Investigatory interview

Here it is apparent, despite the insistence of the State's witnesses at hearing, that the meeting to which Willison was summoned on February 5, 2013, was an investigatory interview. The clear purpose of the meeting with Willison was to find out why he had been absent from work on the three days in question, and what sort of leave he was attempting to claim.³ This inquiry by the warden and managers was plainly one into the reasons for his recent absences, *i.e.*, an investigation in any real sense of the word.

The fact that McKinney told Willison what he wanted Willison's written statement to contain, rather than asking him verbally "why were you absent on

³ According to McKinney, "we needed to clarify Mr. Willison's leave slips because I think he had a leave slip for the 31st, and he had one for the 1st, but we didn't have a leave slip for the 30th. We knew he didn't work the 30th, and we needed to have clarification of what time he was using and why he called in for the 30th, and we wanted to clarify what the other use of the time was going to be." McKinney also testified he told Willison "what I need is for you to list each day, tell me why you called in sick and what leave you're using." According to Saathoff, "we were just trying to clarify his absences and why he was absent." She also testified that McKinney told Willison, "we just need to know why you're gone," that "we'd only asked him for clarification of his absences, why he was gone," and that "we asked him to clarify a couple of the leave slips and to say why he was gone because I believe we were missing one leave slip."

January 30, 31 and February 1, 2013?” is of no consequence. The acknowledged purpose of Willison’s attendance at the meeting was to illicit his account of why he was absent and what sort of leave he was attempting to use because there was a problem with his absences. It constituted an interview regardless of whether Willison was asked questions directly in order to illicit the information or told to put the information in a written statement and turn it in.

The State argues that the meeting with Willison was not an investigatory interview such as would trigger the *Weingarten* right because the purpose of the meeting was not to illicit facts to support disciplinary action that was probable or being seriously considered. This argument, which would effectively add a new limitation on the right to representation not specified in *Weingarten*, is unpersuasive here for a number of reasons.

In support of the proposition that disciplinary action must be “probable” or “seriously considered” in order for the inquiry to trigger the right to representation, the State cites *State of Iowa (Department of Corrections)*, 11 PERB 8075, which cites *AAA Equipment Service Co.*, 598 F.2d 1142 (8th Cir. 1979), citing *Alfred M. Lewis, Inc.*, 587 F.2d 403 (9th Cir. 1978). The ALJ in *State (Department of Corrections)*, *supra*, did cite these cases in support of the notion that the right to representation arises when a significant purpose of the interview is to illicit facts from an employee in order to support the disciplinary action that is probable or being seriously considered. Certainly it is true that an investigatory interview under such circumstances would trigger the right to

representation if the employee reasonably believed that discipline might result and requested union representation. It is not clear, however, that the ALJ viewed such “probability” or “serious consideration” as an essential precondition to the existence of the right.

But even if such was the intent of *State (Department of Corrections)*, *supra*, this ALJ respectfully rejects such a modification of *Weingarten*’s holding, for the same reasons as did the Fifth Circuit Court of Appeals when it addressed the same question in *Lennox Industries, Inc.*, 637 F.2d 340 (5th Cir. 1981):

[W]e reject the language in Eighth and Ninth Circuit opinions which suggests that it is only when disciplinary action is “probable” or “seriously considered” that the right of representation arises. *See, e.g., AAA Equipment Service Co., supra*, 598 F.2d at 1146; *Alfred M. Lewis, Inc., supra*, 587 F.2d at 410. Such language is plainly inconsistent with the dictates and rationale of the Supreme Court in *Weingarten*. An interview may well be “investigatory” and may well reasonably include the “risk of discipline” even though the employer is not seriously contemplating discipline at the time the interview is conducted. Indeed, a purpose of the interview may be to decide whether discipline against an employee is an option to be seriously considered. Furthermore, an interview in which work-related questions are asked of an employee, but which the employer does not intend to result in discipline may nevertheless result in discipline if the employee surprises his employer with an answer which the employer finds unsatisfactory or threatening. The *Weingarten* rule is designed to protect such “fearful” or “inarticulate” employees from the inadvertent results of their answers during work-related interviews. *See, J. Weingarten, Inc., supra*, 95 S.Ct. at 966-67. For the *Weingarten* rationale to be effectively achieved, courts must not narrow the scope of the doctrine as enunciated by the Supreme Court: it is whenever the risk of discipline reasonably inheres in an investigatory interview that a union representative is required, and not merely when disciplinary action is “probable” or “seriously considered.” *See*

Id. at 965-67. *But see AAA Equipment Service Co., supra*, 598 F.2d at 1146; *Alfred M. Lewis, Inc., supra*, 587 F.2d at 410. We break no new ground, but merely restate the words of *Weingarten* in holding that where an interview is designed to illicit information which might reasonably result in discipline either immediately or at some time in the future a union representative is required if the employee so requests.

Id. at 344.

Willison's interview was investigatory because it was designed to illicit answers to work-related questions which had the potential to affect him or the bargaining unit, regardless of whether discipline was "probable" or was being "seriously considered" by management at the time.

But even in the event that *State (Department of Corrections), supra*, is viewed by the PERB itself as requiring discipline be "probable" or "seriously considered" before an investigatory interview can trigger the right to representation, the ALJ would conclude that the investigatory interview of Willison was to elicit facts from him in order to support disciplinary action which was probable. At least McKinney, if not others at the meeting, knew of Willison's poor attendance history and McKinney had warned him of potential discipline if he did not improve. The managers also had information that Willison had enough previous unauthorized absences that another would put him "at the written reprimand stage." Although the ALJ has rejected the argument that discipline must be "probable" or "seriously considered" at the time in order for the right to representation to arise, the circumstances of this case would also fully support the conclusion that Willison's discipline was probable.

Reasonable belief that discipline might result

The ALJ has credited Willison's testimony on the point and found as fact that he believed he might be disciplined at or as a result of the investigatory interview conducted by the warden and managers. Consequently, the real question for *Weingarten* purposes is whether this belief was reasonable under the circumstances. The ALJ concludes that is clearly was.

Willison was well aware of his own attendance problems and of the warden's earlier warning that discipline might occur if his attendance did not improve. He was also aware of the coaching and counseling he had received on at least three prior occasions where his absences had been deemed to be violations of DOC work rules due to their unauthorized nature—the most recent of which occurred barely a month earlier. He was confronted with his warden, who he had overheard talking about an employee leave issue moments earlier, and five managers who had at least some of his leave slips before them and who wanted to know the reasons for his recent three-day absence (one of which he had not provided any documentation for), and the nature of the leave to which he thought he was entitled. Under these circumstances, it would have been illogical for Willison, who knew he already had three “strikes” against him for unauthorized leave, to have not formed the belief at some point that discipline might result from his providing the information management sought to illicit from him. The reasonableness of this belief is certainly not diminished by the fact that Willison was in fact subsequently disciplined for an

unauthorized leave work-rule violation arising out of one of the absences which was the subject of his investigatory interview.

Request for representation

The ALJ has found as fact, and the State acknowledges, that Willison made several requests for representation and that no union representative was provided to him at the meeting in the warden's conference room, which proceeded notwithstanding Willison's request. Even if one were to view the record as supporting the idea that Willison could not have possessed a reasonable belief that discipline might result from the interview until the point where McKinney told him what he wanted Willison's statement to address and contain, it is clear that Willison again requested representation after this point in the proceedings.

Conclusion

AFSCME has established that the February 5, 2013 meeting to which Willison was summoned was an investigatory interview, that Willison reasonably believed it might result in disciplinary action, and that he requested union representation. Because management did not grant the request, discontinue the interview, or offer Willison the choice between continuing the interview alone or having no interview at all, it interfered, restrained or coerced Willison in his Iowa Code section 20.8 right to engage in concerted activities for the purpose of mutual aid or protection, and committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(a). AFSCME has not,

however, established conduct by the State which constitutes a prohibited practice within the meaning of Iowa Code sections 20.10(2)(b), (d) or (f).

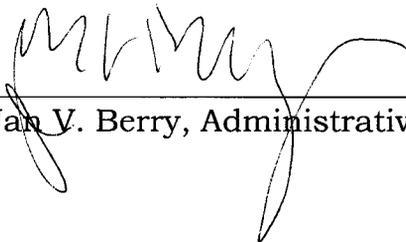
The ALJ consequently proposes entry of the following:

ORDER

IT IS HEREBY ORDERED that the State of Iowa (Department of Corrections) 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 Corrections) post the attached Notice to Employees, for 30 days from the date this proposed decision becomes final, in the main office of the Fort Dodge Correctional Facility and all other places customarily used for the posting of information to employees of the Fort Dodge Correctional Facility.

DATED at Des Moines, Iowa, this 15th day of October, 2013.



Jan V. Berry, Administrative Law Judge

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NOTICE TO EMPLOYEES OF THE FORT DODGE CORRECTIONAL FACILITY

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 (Department of Corrections, Fort Dodge Correctional Facility) committed a prohibited practice within the meaning of Iowa Code section 20.10(2)(a).

The violation occurred on February 5, 2013, when officials of the Fort Dodge Correctional Facility refused to provide Correctional Officer Leonard Willison with a union representative at an investigatory interview which Willison reasonably believed might result in discipline, thereby interfering with and restraining him from exercising his right 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 willfully to:
 - a. Interfere with, restrain or coerce public employees in the exercise of rights granted by this chapter.

To remedy this violation, the correctional facility has been ordered to cease and desist from any further violations and to post a true copy of this Notice in the main office of the Fort Dodge Correctional Facility and other places customarily used for the posting of information to employees, for 30 days.

Any questions concerning this Notice or the State's compliance with its provisions may be directed to the Public Employment Relations Board at 515/281-4414.