

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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TEAMSTERS LOCAL 238,
Complainant,

and

MUSCATINE COUNTY,
Respondent.

CASE NO. 8744

PROPOSED DECISION AND ORDER

Complainant Teamsters Local 238 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 Muscatine County committed prohibited practices within the meaning of Iowa Code section 20.10(2)(a) by violating employees' right to union representation during investigatory interviews on December 10, 2013, when it refused to allow the employees' preferred union representatives to participate, failed to disclose the nature of the alleged misconduct under investigation and failed to provide employees with an opportunity to meet with their representative in advance of their interviews. The complaint further alleges the County's commission of section 20.10(2)(a) prohibited practices on December 19, 2013, when it refused to allow the employees' representative to participate fully in their interviews and refused to share documentation of the employees' alleged violations of County rules during the interviews. The County denied its commission of any prohibited practice.

Pursuant to notice, an evidentiary hearing on the complaint was held before me in Muscatine, Iowa, on March 27, 2014. Local 238 was represented by

attorney Jill M. Hartley and the County by attorney James C. Hanks. Both parties filed post-hearing briefs, the last of which was received on June 12, 2014.

Based upon the entirety of the record, I have concluded that Local 238 has established the County's commission of some, but not all, of the prohibited practices alleged in its complaint.

FINDINGS OF FACT

Muscatine County is a public employer within the meaning of Iowa Code section 20.3(10). Local 238 is an employee organization within the meaning of Iowa Code section 20.3(4) and is the PERB-certified bargaining representative of a unit of full-time and part-time correctional officers employed by the County (within its sheriff's office) at the County's jail facility.

At all relevant times, Correctional Officers Barry Major, Nick Doy and Ryan Dreyer were employed within this Local 238-represented unit. Each served as a Local 238 steward. At the time of the events precipitating the complaint, Dreyer was assigned to the jail's second shift (3-11 p.m.) while Major and Doy were assigned to the third shift (11 p.m.-7 a.m.). One of the duties of third-shift correctional officers is to monitor or review the recorded telephone conversations of inmates at the jail.

During the early morning of November 19, 2013, Major and Doy stopped at the offices of MUSCOM to deliver some paperwork. MUSCOM is the multi-jurisdictional entity which provides law enforcement communications and dispatch services to a number of law enforcement agencies in the area, including the Muscatine County Sheriff's Office. It is governed by an independent board

made up of representatives from the political subdivisions it serves, and this board, rather than the County, is the employer of MUSCOM's personnel.

Major and Doy encountered MUSCOM dispatcher Chris Jasper. In the presence of Doy, Major asked Jasper what was going on with Muscatine County Deputy Mike Channon. When Jasper responded that he did not know, Major indicated that he had overheard a call between a jail inmate and her boyfriend, an individual known to law enforcement, in which the inmate indicated that she was being questioned by members of the sheriff's drug task force in the course of their investigation about Channon possibly "taking a payoff" of some kind. Although it is unclear whether Channon was then a member of the drug task force, he had been assigned to it in the past.

Jasper reported Major's disclosure of this information to another Muscatine County deputy, and on November 21, 2013, provided the sheriff's office with a written statement concerning the November 19 event.

Limiting the access to confidential information to those with a need to know is important to law enforcement agencies such as the sheriff's office. Restricting the acquisition and dissemination of non-public criminal history, medical or investigative information, for example, may not only be required by law, but may serve to protect the reputations and safety of suspects, witnesses and employees. Investigations of potential wrongdoing, both by the public and by individuals within the law enforcement agency itself, could also be thwarted or compromised by the sharing of such information, including the mere existence of an ongoing investigation.

Accordingly, the sheriff's office has adopted a very broad-reaching confidentiality of information policy and statement which employees are expected to acknowledge and sign. Major signed such a confidentiality statement in early 2011, which provided in part:

I understand that discussing or divulging information or becoming involved in proceedings pertaining to anyone that this department or any aforementioned department or person is involved with to anyone without the expressed (sic) written consent of the Sheriff or his designee will be an immediate basis for my dismissal from employment.

Major also executed a statement in which he pledged not to divulge confidential information contained in the County's records and acknowledged that failure to do so could result in disciplinary action, including termination. In addition, the County's work rules, embodied in its Employee Handbook, describes an employee's "[f]ailure to report an accident/incident involving an employee, yourself, or visitor" as a serious rule violation which may result in immediate discharge. Both Major and Doy had previously acknowledged their receipt of and responsibility to read and comply with the handbook.

The idea that Major may have divulged the existence of an investigation into possible wrongdoing by a named deputy sheriff to an employee of an outside agency, and the possibility that Doy may have been aware of the disclosure, yet failed to report it, were consequently matters of concern to the sheriff's command staff. The sheriff directed that an investigation be conducted. The early portion of the ensuing investigation included the collection of a statement from another MUSCOM dispatcher who had been on duty when Major and Doy had visited, as

well as the review of recorded telephone calls from the inmate in question, one of which, it was discovered, contained the substance of the information Major had allegedly disclosed. It was also determined that this call had been reviewed during the third shift on November 13, 2013, by someone with log-in access to the recording system — a time when Major had been on duty. A determination that Major and Doy should be separately interviewed was made, as was the decision that even though they were both Local 238 stewards they would not be allowed to represent each other at their respective interviews.

Soon after reporting for duty on December 10, 2013, but before the actual start of the third shift, Doy was summoned to the jail's nurse's station by his supervisor, Lt. Beth Sperstad. Moments later Major was directed to report to the jail's supervisors' office. Neither was told the reason for their being summoned.

When Doy arrived at the nurse's station he met with Sperstad, who asked if he wanted union representation. Doy indicated that he thought Major was there, and mentioned Dreyer when Sperstad advised that Major was not available.

The other Local 238 steward, Dreyer, who was coming off duty at the conclusion of the second shift, was told by a superior to go to the nurse's area, and then received another instruction to go to the supervisors' office. Arriving at the supervisors' office he found Major and Lt. Matt McCleary. McCleary advised that Dreyer should go to the nurse's station first.

Dreyer went to the nurse's station where Doy and Sperstad were waiting. Neither he nor Doy asked about the purpose or subject of the meeting or for an

opportunity to consult prior to it. Sperstad began the interview by asking Doy whether he was aware of an investigation involving Deputy Channon. She did not volunteer to Doy that he was under investigation or suspected of misconduct, or that he could be subject to discipline, but Dreyer asked whether the interview could possibly lead to discipline and Sperstad advised that it could. Neither Doy nor Dreyer asked further questions or asked to consult in private.

Sperstad proceeded to question Doy about his knowledge of an investigation involving Channon, the reported conversation between Major and Jasper, and whether he had told others about the phone call between the inmate and her boyfriend. Other than his initial inquiry about the possibility for discipline, Dreyer posed no questions to either Sperstad or Doy during the meeting.

When Major had first arrived at the supervisors' office McCleary asked him if he wanted union representation. Major indicated that he did, and asked that Doy act as his representative. McCleary indicated that Doy was not available, and Major then requested Dreyer. While Major and McCleary waited for Dreyer to appear, Major asked if he "was being sent home," and McCleary indicated that nothing would be discussed until Major's union representative arrived.

At the conclusion of the meeting with Doy and Sperstad, Dreyer returned to the supervisors' office where Major and McCleary were waiting. Neither Dreyer nor Major asked for an opportunity to consult prior to meeting with McCleary, although Dreyer knew the nature of management's inquiry and that Major was involved, based upon what he had heard during Doy's interview. Dreyer asked

McCleary if this meeting was going to be like the one he had just had with Doy and Sperstad, and was told that it was. McCleary did not respond to Major's earlier inquiry about whether he was being sent home.

McCleary asked Major if he knew of an investigation involving Deputy Channon. He did not volunteer that Major was under investigation or suspected of misconduct, or that he could be subject to discipline, but Dreyer asked, as he had in Doy's interview, whether Major's interview could possibly lead to discipline and was told that it could. Neither Major nor Dreyer asked to consult in private prior to proceeding. McCleary then questioned Major about his knowledge of an investigation involving Channon, whether Major had listened to a telephone conversation involving the inmate and her boyfriend, and whether he had been involved in a conversation with Jasper. Other than his inquiries about whether the meeting would be like Doy's and the possibility of discipline for Major, Dreyer posed no other questions during the meeting and made no requests of McCleary.

Both Sperstad and McCleary wrote and submitted reports of their respective interviews with Doy and Major. After reviewing those reports and the other information gathered to date, Cpt. Dean Naylor, the jail administrator, prepared separate documents as to both Major and Doy, both denominated as a "statement of charges." Both documents directed the employee to report to Naylor's office on December 19, 2013 (Major at 10:00 a.m., Doy at 11:30 a.m.) "to discuss with you the complaints made against you." The statements advised that the employee could bring a representative to what was characterized as "the hearing," that they would be required to answer questions, and that nothing they

said would be used against them in any subsequent criminal proceedings.

The statement prepared for Major characterized the incident in question as “[o]n 11-19-13 you made comments at dispatch that were inappropriate, also you were aware of a serious incident and failed to report it.” The document addressed to Doy described the incident as “[o]n 11-19-13 you were present during comments made at dispatch and failed to report them, also you were aware of a serious incident and failed to report it.” Both statements listed a number of rules or policies alleged to have been violated by the employee.

Major and Doy were presented with a copy of their respective statement of charges early on December 14, 2013, and both shared them with Dreyer, who made plans and began to prepare to represent Major and Doy at the December 19 proceedings.

At the time, Dreyer had been a Local 238 steward for only six months, and thought it an opportune time to draft a list of questions to use when serving as an employee’s representative at an investigatory interview, including those scheduled for December 19. His list was designed to elicit information about matters such as the allegations against the employees, how the County’s investigation had been conducted, and who would determine whether and what discipline would be imposed. The list also included questions he anticipated

asking the employee concerning his or her good faith, intent and truthfulness.¹ He intended to ask each of the questions at the December 19 meetings unless the information sought had been revealed in another way.

Major and Dreyer reported to Naylor's office on December 19 as directed, and met with Naylor and Lt. Doug Boulton. At the commencement of the recorded interview Naylor read the summary of the incident from the statement of charges and then began to question Major about the inmate's recorded call and what had happened at the MUSCOM dispatch office. During the questioning of Major, Naylor was referring to and at times read from documents in his possession, and played a portion of a recorded inmate telephone call. On more than one occasion Dreyer asked to see the documents Naylor was referring to, and asked for a recording of the telephone call, but no documents were shared

¹ Dreyer's list of questions provided:

How did the complaint or allegation arise? Who made the complaint? Is there any evidence (documented, audio, video, witnesses) supporting the complaint?
Who was the Officer that took the complaint?
Who was the investigating Officer?
Who was the interviewing Officer? When was the date and time of the interview?
Who was the charging Officer? What was the date and approximate time the "Statement of charges were issued? Was there an attempt to informally resolve the complaint?
Who will determine the sanctions/discipline imposed?
What or Where is the documented procedure that was not followed?
Since this is the first opportunity to discuss the charges (review each charge):
Who
What
When
How
Why
(Employee) Were you acting in good faith? Was your intent to affect the morale of fellow employees? Have you been untruthful with any statements then or now? Would you have any reason to intentionally cause harm, ill will, or malicious to Muscatine County or any of its employees?
(Conclusion) We are requesting copies of any and all evidence to include: video, audio, audio transcripts, statements, pertinent policy/procedures, and other documents use to conduct the investigation.

and no recording provided. Dreyer was told that should Major be “found guilty” of charges, he and Major would be provided with the evidence upon which the determination had been made.

During Major’s questioning Dreyer began to ask Naylor the questions he had developed. He asked, and received answers to, questions concerning how the complaints/allegations arose, who had made the complaint, and who the investigating officer had been. But at some point Naylor told Dreyer that he, rather than Dreyer, was conducting the investigation; that Dreyer did not have the right to do so; that he allowed questions in order to maintain a good working relationship with the union although “Weingarten” does not allow the employee’s representative to ask questions, and that Dreyer’s job was to sit there and make sure the employee’s rights were not violated.

Dreyer did not ask the other questions he had prepared, but did ask and receive answers to clarifying questions designed to ensure that he and Major understood what was being asked. At the conclusion of the session with Major, Dreyer again requested copies of all evidence, including documents, videos, audio recordings, witness statements and the pertinent policies and procedures involved, and was again told that all materials relied upon would be provided if it was determined that Major was guilty of charges.

Following the questioning of Major, Naylor and Boulton met with Dreyer and Doy. After an introductory statement like the one he had given in the Major interview, Naylor questioned Doy about his involvement in the conversation with the dispatcher and what, if anything, he had done in response. As in the Major

interview, Naylor had before him and appeared to be making reference to documents, and both Doy and Dreyer asked to see those documents. None were shared, Naylor responding, as he had earlier, that they would be provided were it determined that Doy was guilty of a charge.

Because of what Naylor had said when Dreyer had posed his questions during Major's interview, Dreyer refrained from asking any of the questions on his list, but did ask and receive answers to clarifying questions designed to ensure that he and Doy understood what was being asked.

On January 6, 2014, Major's employment was terminated on the basis of the County's conclusion that he had violated a number of the policies listed on the statement of charges he had received. On January 12, as a result of management's conclusion that he had been present during "inappropriate comments made at dispatch" which he had not reported, Doy was presented with a "counseling log" reminding him of his duty to report rule violations to his supervisor. Local 238's prohibited practice complaint was postmarked to PERB on January 30, 2014, and is deemed filed that date pursuant to Iowa Code section 17A.12(9).

CONCLUSIONS OF LAW

Local 238's complaint alleges the County's commission of prohibited practices within the meaning of Iowa Code section 20.10(2)(a), which 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.

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. Section 20.10(2)(a) prohibits public employers from interfering with, restraining or coercing public employees in the exercise of such right. 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 has long indicated 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., State of Iowa*, 85 PERB 2891; *Dubuque Police Protective Assn. v. City of Dubuque*, 88 PERB 3316. Thus, a represented employee in the Iowa public sector 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. 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.* An employer's interference with this section 20.8 right constitutes a prohibited practice within the meaning of section 20.10(2)(a).

PERB has likewise followed private-sector authority concerning specific aspects of the *Weingarten* right, as well as some of the right's boundaries. See, e.g., *Peters v. Waterloo Comm'y School Dist.* 10 PERB 8218 (citing NLRB cases concerning whether an employee's request for private counsel is sufficient to trigger the *Weingarten* right); *AFSCME and State of Iowa (DOC)*, 05 PERB 6436 (citing NLRB and federal court decisions concerning employees' right to choose their union representative and the role of such representatives at investigatory interviews).

The parties in this case agree that the *Weingarten* right was fully applicable to the December 10 and December 19 interviews of both Doy and Major, and it is clear from the record that all of these interviews were conducted in the presence of a union representative. The parties' dispute instead involves specific aspects of the right, some of which do not appear to have been the subject of prior PERB decisions.

I. Employees' choice of representative

Local 238's complaint alleges that the County committed a prohibited practice as to both Doy and Major by "refusing to allow their preferred union representatives to participate" in their separate December 10 interviews. Its brief does not renew that claim as to Doy, however, instead arguing only that the County committed a prohibited practice when it refused to allow Major his

requested representative.

Upon his arrival at the interview site, Major asked that Doy serve as his representative, but was told by McCleary that Doy was unavailable. McCleary's statement, at the time it was made, was plainly true. Doy was unavailable at that moment in the literal sense of the word — he was at the nurse's station and about to be interviewed concerning the same event which was to be the focus of Major's interview.

Local 238 argues, however, that by the time Major's interview began Doy's interview had been completed, that Doy was thus available to serve as Major's representative, and that even though neither he nor Dreyer renewed the request, McCleary's "denial" of Major's request for Doy amounts to a denial of representation and thus a prohibited practice.

Consistent with private-sector authority, PERB has recognized that generally, absent extenuating circumstances such as unavailability, an employee has the right to choose his or her representative in a *Weingarten* interview. *AFSCME and State (DOC)*, 05 PERB 6436. *See also Consolidation Coal Co.*, 307 NLRB 976 (1992); *Anheuser-Busch, Inc. v. NLRB*, 338 F.2d 267 (4th Cir. 2003). This right is not absolute, however, because an employee's right to representation at an investigatory interview may not interfere with legitimate employer prerogatives. *Weingarten*, 420 U.S. at 258.

Assuming for the moment that, as Local 238 argues, Doy was not "unavailable" to serve as Major's representative in the common and ordinary sense of the word, the question remains whether an extenuating circumstance

existed which justified the County's effective denial of Major's request. The County argues that the fact that Doy and Major were both under investigation regarding the same alleged incident constitutes an extenuating circumstance which allowed it to legitimately deny Major's request for Doy's representation.

Surely it is a legitimate employer prerogative to attempt to ascertain what actually occurred when investigating alleged employee misconduct. When doing so, the employer has a legitimate interest in preventing collusion between those being investigated in order to preclude the potential tailoring or outright fabrication of testimony. In the law enforcement arena, the separation of witnesses or suspects in a criminal investigation is a routine measure taken in order to minimize the chance that such collusion might occur.

The NLRB has recognized that similar genuine and legitimate concerns arise for managers seeking the facts about alleged employee misconduct under circumstances like those presented here. In *IBM Corp.*, 341 NLRB 1288 (2004), although in a somewhat different context, the NLRB cited several examples where representation would impede management's legitimate investigatory efforts, one of which was the following:

[A]n employee being interviewed may request as his representative a coworker who may, in fact, be a participant in the incident requiring investigation, as a "coconspirator." It can hardly be gainsaid that it is more difficult to arrive at the truth when employees involved in the same incident represent each other.

Id. at 1292.

Accordingly, the NLRB has found that the employer's denial of employee requests to be represented by an employee who was also being interviewed

concerning the same alleged misconduct, while providing the employee with a different union representative, was not a denial of representation and a violation of the NLRA. *Dresser-Rand Co.*, 358 NLRB No. 34 (2012).

Although it does not appear that PERB has ever been confronted with a case involving facts like those presented here, the PERB “choice of representative” case cited by both parties seemingly recognizes the legitimacy of the employer avoiding representation of an employee by another employee who is also involved in the events under investigation.

In *AFSCME and State of Iowa (DOC)*, 05 PERB 6436, the Board concluded that the employer had committed a prohibited practice within the meaning of section 20.10(2)(a) by denying an employee’s request for a specific union representative on the ground that the requested representative was a witness in the investigation. The rejection of the employer’s claim of extenuating circumstances was not, however, based upon a rejection of the idea that legitimate management prerogatives would be impeded by allowing employees involved in or witnesses to the same misconduct to represent each other. The claim was instead rejected on the basis that the requested representative was not really involved in the incident under investigation, but was only a witness in a different investigation of separate allegations by the same complainant against a different employee. The case does not support the proposition that management must honor an employee’s request for a representative who is also involved in and under investigation for the same alleged misconduct.

Since the employee to be interviewed has a right to a preinterview

consultation with his or her union representative (discussed in the next division of this proposed decision), it is evident that denying Major's request for Doy and arranging for Dreyer's presence instead would not necessarily preclude Dreyer from telling Major precisely what questions had been asked of Doy and precisely how Doy had responded. Providing different representatives to each employee and conducting their interviews simultaneously, as did the employer in *Dresser-Rand, supra*, would have eliminated this possibility and would have been justified under the circumstances. But the record here reveals the existence of only three union stewards, and two of them — Doy and Major — were alleged to have been involved in the misconduct. While designating Dreyer to represent both Doy and Major left open the possibility that Major could have learned the details of Doy's interview in advance, it did avoid the possibility that Doy and Major could have reviewed and coordinated the entirety of their respective stories in advance of Major's interview.

On the particular facts established by this record, I conclude that the County has shown extraordinary circumstances which legitimately rendered Doy unavailable to serve as Major's representative, and that the County did not commit a prohibited practice when it denied Major's request that Doy represent him at Major's December 10 investigatory interview.

II. Preinterview disclosure and consultation

Local 238's complaint alleges that the County committed prohibited practices as to both Doy and Major by "failing to disclose the nature of the alleged misconduct under investigation in advance of the [December 10] meeting and by

failing to provide an opportunity to meet with their union representative in advance of the meeting.”

The NLRB has held that an employee’s *Weingarten* right to representation includes the right to confer with the employee’s representative before a *Weingarten* interview, on request of either the employee or the representative. *Climax Molybdenum Co.*, 227 NLRB 1189 (1977). And in *Pacific Telephone and Telegraph, Co.*, 262 NLRB 1048 (1982), the NLRB affirmed the ALJ’s conclusion that the employer had violated that statute by refusing to apprise employees or their union representative, upon their request, of the nature of the matter being investigated prior to the investigatory interviews. As to the extent of the information which must be provided in response to such a request, the NLRB indicated:

The employer does not have to reveal its case, the information it has obtained, or even the specifics of the misconduct to be discussed. A *general* statement as to the *subject matter* of the interview, which identifies to the employee and his representative the misconduct for which discipline may be imposed, will suffice.

Id. at 1049. Accordingly, refusing a request to be informed of the nature of the matter being investigated, or refusing a request that consultation between an employee and his or her union representative be allowed before an investigatory interview, constitutes a denial of the right to *Weingarten* representation.

Local 238 has failed to establish such a denial as to Doy. Neither Dreyer nor Doy asked to be informed of the subject of the meeting or the nature of the matter being investigated by Sperstad, and neither requested that they be allowed to consult prior to the commencement of the interview. While an

employee's *Weingarten* right includes the right to advance notice of the subject matter upon request and the right to advance consultation upon request, no authority for the proposition that such notice and opportunity for consultation must be provided absent request by the employee or the union representative has been located or cited by either party.

Local 238 emphasizes that in prior investigations of alleged employee misconduct, the County has provided advance notice of the subject matter through the issuance and service upon the employee of a "statement of charges," and that no such statement was provided to either Doy or Major in advance of their December 10 interviews.

In the absence of any claim that the County discriminated against Doy or Major by not providing a statement of charges because of their status as union stewards or some other exercise of protected activity, I think the discussion about the absence of such written statements largely irrelevant. I agree with the County's assertion that simply because it has provided such statements prior to other investigatory interviews in the past does not mean that the County was required to provide them to Doy and Major prior to their December 10 interviews. The question is whether the County refused to inform Doy, Major or Dreyer of the nature of the matter being investigated upon request, not whether the County has volunteered such advance information in other cases.

As is the case with Doy's interview, Local 238 has not established a December 10 violation of Major's *Weingarten* right to a preinterview consultation with Dreyer because neither Major nor Dreyer requested such a consultation.

However, the facts concerning the alleged denial of Major's right to be advised of the subject matter of the investigatory interview differ from those surrounding Doy.

Like Doy, when Major arrived at the site of his interview he was asked if he wanted union representation — thus at least suggesting that something involving potential discipline was afoot. Unlike Doy, however, Major did make an inquiry concerning the nature of the proceeding by asking if he was being sent home. His interviewer, Lt. McCleary, did not respond substantively, but instead indicated that nothing would be discussed until Major's union representative arrived. And when Dreyer did arrive, McCleary gave no response to Major's inquiry.

While it is clear that Dreyer knew the nature and subject matter of management's inquiry on the basis of what he had heard during Doy's interview, both the employee and the union representative had a right, upon request, to some indication of the subject matter of the investigation. *Pacific Telephone*, 262 NLRB at 1048.

The NLRB views requests for representation liberally, and has held that a request "need only be sufficient to put the employer on notice of the employee's desire for union representation." *Consolidated Edison Co. of New York*, 323 NLRB 910, 916 (1997), citing *Southwestern Bell Telephone Co.*, 227 NLRB 1223, 1227 (1977) (employee asking supervisor if he should obtain union representation sufficient); *Illinois Bell Telephone Co.*, 251 NLRB 932, 938 (1980) (employee's question to supervisor if she should have someone from the union present

deemed both a request for advice and an expression of a desire for union assistance); *Bodolay Packaging Machinery*, 263 NLRB 320, 325-26 (1982) (employee's question to supervisor asking if he needed a witness deemed sufficient).

Although Major's question was posed in a different context, I agree with Local 238 that by inquiring about whether he was being sent home Major was seeking some explanation as to why he had been summoned to what was obviously a proceeding involving potential discipline and was inquiring into the subject of the proceeding. The question was sufficient to put McCleary on notice of Major's desire to learn the subject matter of the impending interview. While Dreyer surely could have alerted Major to the subject of the investigation had either of them requested a preinterview consultation, the County nonetheless had an obligation to apprise Major of the nature of his alleged misconduct upon his request, and did not do so.

The County argues that McCleary "announced that the purpose of the meeting was to determine [Major's] knowledge of the investigation of Officer Channon," suggesting that this was sufficient preinterview notification of the purpose/subject matter of the interview. The argument is not supported by the record, which instead establishes that rather than "announcing" anything about the meeting, McCleary simply began his questioning of Major by asking if Major knew of an investigation involving Channon. I agree with Local 238 that asking questions during an interview, even ones which may illuminate the reasons it is being conducted, is distinct from and does not satisfy the employer's obligation to

provide this information prior to the commencement of the interview, if requested.

The County's refusal to inform Major of the subject matter of the pending interview in response to his inquiry denied him an aspect of his right to representation and constituted a prohibited practice within the meaning of section 20.10(2)(a).

III. Representative's participation and access to documents/information

Local 238's complaint also alleges that the County committed prohibited practices on December 19 when it refused to allow Dreyer to participate fully in the two interviews and refused to share documentation of the alleged violations during the meetings.

An employee's *Weingarten* representative is entitled not only to attend the investigatory interview, but to provide advice and active assistance to the employee. *Barnard College*, 340 NLRB 934 (2003). The union representative thus cannot be made to sit silently like a mere observer. *Id.* Indeed, the Supreme Court has indicated that the union representative may also assist the employer's goal of getting to the bottom of the incident by soliciting favorable facts. *Weingarten*, 420 U.S. at 263.

While the union representative thus has the right to make additions and clarifications to the meeting, the right is not unrestricted. *Southwestern Bell Telephone Co. v. NLRB*, 667 F.2d 470, 473-74 (5th Cir. 1982). The union representative is not entitled to transform the interview into an adversary

contest, *Weingarten*, 420 U.S. at 263, may not prevent the employer from questioning the employee, *New Jersey Bell Telephone Co.*, 308 NLRB 277, 279 (1992), and may not interfere with legitimate employer prerogatives. *Weingarten*, 420 U.S. at 258.

The NLRB has long recognized that *Weingarten* intended to strike 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. *See, e.g., Texaco, Inc.*, 251 NLRB 633, 636 (1980). The permissible extent of participation of union representatives in *Weingarten* interviews thus lies "somewhere between mandatory silence and adversarial confrontation." *U.S. Postal Service*, 288 NLRB 864, 867 (1988).

During the course of Major's December 19 interview, Dreyer asked and received answers to at least three questions which related not to Major's alleged misconduct so much as to the County's investigation of it. Naylor felt that Dreyer was trying to "take the focus off me being able to ask questions," was trying to "conduct an investigation during my investigation," and was trying "to give me a list of questions that I had to answer." Accordingly, when Dreyer asked the identity of the investigating officer, Naylor told Dreyer that he, not Dreyer, was conducting the investigation, that he allows questions in order to maintain a good working relationship with the union, although *Weingarten* does not allow it, and that Dreyer's job was to sit there and make sure the employee's rights were not violated. Confronted by this less-than-accurate recitation of his rights as a union representative, delivered by a superior officer in his own chain of

command, Dreyer discontinued his plan to elicit information from the County and to ask Major questions about his lack of bad faith or intent to adversely affect the County or its employees. Instead, for the remainder of Major's interview (and throughout the subsequent interview of Doy) Dreyer asked only clarifying questions to ensure that he and the employee understood what was being asked.

The County argues that Dreyer attempted to convert Major's interview into an adversarial contest in which he directed questions to Naylor which Naylor "would be compelled to answer before he could question Officer Major." It argues that Naylor did answer some of Dreyer's questions although he was under no obligation to do so, and allowed clarifying questions throughout the interview. But the County was justified, it argues, in telling Dreyer during the interview that he was not entitled to ask questions and that his job was to sit there and make sure Major's rights weren't violated, because Dreyer was attempting to take control of the meeting.

I cannot conclude on this record that Dreyer attempted to take control of the interview or turn it into an adversarial contest, much less that his questions about the County's investigation were ones which Naylor "would be compelled to answer before he could question Officer Major." There is no evidence that Dreyer's questions actually interfered with the questioning of Major, were disrespectful, aggressive or disruptive, or created an adversarial contest. And there is nothing which would so much as suggest that Dreyer somehow conditioned Major's participation on Naylor responding to Dreyer's questions.

Setting aside the question of whether Dreyer was entitled to answers to questions concerning the County's investigation and the disciplinary decision-making process, he was plainly entitled to ask Major his planned questions about Major's intent, honesty and good faith. A *Weingarten* representative has the right to make additions and clarifications and to elicit favorable facts.

No authority has been located, and Local 238 has cited none, which indicates that Naylor was required to respond to Dreyer's substantive questions about the background of the charges and the County's evidence. Naylor thus could have responded, much as he did to Dreyer's requests for documents, by refusing to provide that information. But Naylor went too far when he told Dreyer that he allowed questions as a matter of grace even though *Weingarten* did not allow them, and instructed Dreyer that his job was to sit there and make sure Major's rights were not violated. Although Dreyer did ask purely clarifying questions after Naylor's comments were made, those comments prevented Dreyer from asking questions of Major which were designed to elicit additional facts which could have been deemed relevant by the County in determining the degree of discipline to be imposed should it conclude Major had engaged in misconduct. By so limiting Dreyer's participation in Major's December 19 interview, the County interfered with and restrained Major's right to representation and committed a prohibited practice within the meaning of section 20.10(2)(a).

I reach the same conclusion as to Doy's subsequent December 19 interview. Although Dreyer did not again pose the substantive questions on his list to either Naylor or Doy, this was because of what Naylor had told Dreyer

during the just-completed Major interview.

The County points out that during Doy's interview, Dreyer did not ask any questions which were not answered. While this is consistent with the record, which reveals that Dreyer asked only questions to clarify what was being asked of Doy, it overlooks what Naylor had said to Dreyer during Major's interview. Naylor's admonition to Dreyer, which interfered with Major's right to representation, equally restricted Dreyer's full participation in Doy's interview and interfered with Doy's right to representation — a section 20.10(2)(a) prohibited practice.

Local 238 also argues that the County committed a prohibited practice by refusing requests that Dreyer and the employees be allowed to see or obtain copies of documents related to the County's investigation which were in Naylor's possession. The County notes that Local 238 has cited no authority in support of the contention that the *Weingarten* right includes the right to examine material in the employer's possession concerning the alleged misconduct being investigated. It also quotes language from *Pacific Telephone and Telegraph, supra*, to the effect that the employer does not have to reveal its case against the employee or the information it has obtained, in arguing that *Weingarten* does not include such a right.

The passage from *Pacific Telephone and Telegraph* quoted by the County addresses the content of the employer's preinterview disclosure of the subject of the pending interview, rather than the employer's obligation to provide information during the interview. It is thus not directly applicable here, where

Local 238 complains that the employees' rights were interfered with and restrained when the County refused to share documentation during the interview itself.

If *Pacific Telephone* is viewed as being applicable to the employer's duty during an investigatory interview, rather than only to its duty to disclose information on preinterview request, it is clear that no prohibited practice occurred when Naylor refused to share the County's documentation during the December 19 interviews. But even assuming that the quoted portion of *Pacific Telephone* is limited to the preinterview disclosure of information, no authority has been located, or cited by Local 238, which supports the proposition that the *Weingarten* right to representation includes the right to access to documents, recordings, or other information in the employer's possession.²

In the absence of any authority in support of the proposition, I cannot conclude that the *Weingarten* right includes the right of the employee or the union representative to view or copy documents or information possessed and used by the employer during the course of an investigatory interview. Local 238 has thus failed to establish a prohibited practice in this regard.

IV. Appropriate remedy

Local 238's complaint seeks an order that the County cease and desist

² One could certainly argue that such a requirement would be inconsistent with *Weingarten's* clear indication that the right to representation may not interfere with legitimate employer prerogatives. The employer has a legitimate interest in ascertaining the truth, and a requirement that it share its own investigatory product could well interfere with that interest if the employee under investigation has access to that information and can tailor his or her answers to avoid or minimize inconsistencies with information already in the employer's possession.

from denying employees their right to representation, reinstate and make Major whole, and remove the written counseling from Doy's personnel file. Its briefs repeat this prayer but do not actually discuss the issue of the appropriate remedy for the prohibited practices which have been established.

Iowa Code section 20.1(2) is a non-exclusive list of PERB's powers and duties, which include "[f]ashioning appropriate remedial relief for violations of this chapter, including but not limited to the reinstatement of employees with or without back pay and benefits." Iowa Code § 20.1(2)(c). While PERB thus possesses general authority to order that employees be reinstated and made whole as a remedy for a prohibited practice, whether that remedy is "appropriate" in a given case is a separate issue.

The County argues that even if *Weingarten* violations occurred in this case, the "make whole" reinstatement of Major and the removal of the written counseling from Doy's personnel files are not appropriate remedies under the circumstances.

Since its 1984 decision in *Taracorp Industries*, 273 NLRB 221, the NLRB has held that reinstatement of a discharged employee with back pay is not an appropriate remedy for *Weingarten* violations when the employee was disciplined or discharged for cause. *Id.* at 223. Only when the discipline was the direct result of the employee's assertion of *Weingarten* rights or when the reason for the discharge was itself an unfair labor practice will a "make-whole" remedy be ordered. *Id.* See also *U.S. Postal Service*, 314 NLRB 227 (1994) (employee not entitled to expungement of written warning absent demonstration of nexus

between wrongful denial of representation and the discipline); *Storer Communications*, 292 NLRB 894 (1989) (make-whole remedy not appropriate for employee discharged for misconduct unrelated to the assertion of *Weingarten* rights).

Taracorp was premised in part on 29 USC § 160(c), which specifically provides that the NLRB shall not require the reinstatement of or the payment of back pay to an employee who was suspended or discharged for cause. While Iowa Code chapter 20 contains no such specific limitation on PERB's remedial authority, the 29 USC § 160(c) concept that an employee disciplined or discharged for misconduct or any other nondiscriminatory reason not receive a "make whole" remedy, even though the employee's rights may have been violated in a context unrelated to the discharge of discipline is, I think, fairly embodied in the Iowa Code section 20.1(2)(c) requirement that remedial relief ordered by PERB be "appropriate." An employee who is discharged for reasons wholly independent of any prohibited practice, such as misconduct, yet is reinstated with full back pay and benefits due only to a violation of *Weingarten* rights, receives a windfall which is not "appropriate" within the meaning of section 20.1(2)(c).

As the NLRB noted in *Taracorp*, the typical *Weingarten* case does not present a situation where an employee is discharged for engaging in protected concerted activities. Instead, the employee is discharged for what the employer considers misconduct. *Taracorp* at 223. Such is precisely the case here, where Local 238 has neither established nor argued that Major and Doy were

disciplined for asserting *Weingarten* rights or for engaging in other protected concerted activities. Instead, on this record it can only be concluded that the reason for their discipline was the County's conclusion that they had engaged in workplace misconduct. Accordingly, a make-whole remedy for Major's discharge or Doy's written counseling is not appropriate in this case.

I consequently propose the following:

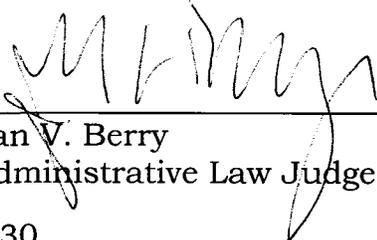
ORDER

Respondent Muscatine County shall cease and desist from:

1. Depriving any employee of any aspect of his or her right to union representation at an investigatory interview that the employee reasonably believes might result in disciplinary action, and
2. In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Iowa Code section 20.8.

Respondent Muscatine County shall, not later than the date this proposed decision becomes final pursuant to PERB rule 621-9.1(20), post copies of the attached notice to employees in its main office and in all other places customarily used for the posting of information to employees in the bargaining unit of Correctional Officers represented by Teamsters Local 238, and continue such postings for not less than 30 consecutive days.

DATED at Des Moines, Iowa this 4th day of December, 2014.



Jan V. Berry
Administrative Law Judge

Mail copies to:

Jill M. Hartley
1555 North RiverCenter DR, Suite 202
Milwaukee WI 53212

James C. Hanks
100 Court AVE, Suite 600
Des Moines IA 50309-2231

NOTICE TO EMPLOYEES OF MUSCATINE COUNTY

POSTED PURSUANT TO A DECISION OF THE PUBLIC EMPLOYMENT RELATIONS BOARD

The Iowa Public Employment Relations Board (PERB) has determined that Muscatine County committed prohibited practices within the meaning of Iowa Code section 20.10(2)(a).

The violations occurred on December 10, 2013, when officials of the Muscatine County Sheriff's Office failed to inform Correctional Officer Barry Major, on his request, of the subject matter of an investigatory interview to which he had been summoned, and on December 19, 2013, when officials of the sheriff's office prevented the union representative of Major and Correctional Officer Nick Doy from participating fully in their representation in separate investigatory interviews which they reasonably believed might result in discipline. PERB has concluded that these actions by the County interfered with and restrained the employees' 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, Iowa Code ch. 20, 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 County has been ordered to cease and desist from any further violations and to post a true copy of this Notice for 30 days in its main office and in other places customarily used for the posting of information to employees in the bargaining unit of Correctional Officers represented by Teamsters Local 238.

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