STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

ANNAMARIE BERDICK, Complainant,	)	CASE 18379-U-04-4687
vs.	)	DECISION 8794 - PECB
UNIVERSITY OF WASHINGTON, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

John Scannell, Attorney at Law, appeared for the complainant at the hearing and filed the brief.[1]

Attorney General Christine O. Gregoire, by *Jeffrey Davis*, Assistant Attorney General, for the employer.

Annamarie Berdick works as a classified employee at the University of Washington (employer). She filed an unfair labor practice complaint with the Public Employment Relations Commission against her employer on April 2, 2004. The Commission issued a preliminary ruling on April 27, 2004. It determined a cause of action existed from the allegations that the employer denied Berdick union representation during investigatory interviews, thus creating an employer interference violation of RCW 41.56.140(1). Berdick is a member of a bargaining unit represented by Service Employees International Union, Local 925 (union); however, the union did not join Berdick in the complaint. Examiner Katrina I. Boedecker held a hearing on August 18, 2004. The parties filed post-hearing briefs.

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[1] John Scannell withdrew from representing the complainant prior to this Order being issued.

ISSUE

Were the meetings between Berdick and her supervisor on December 10 and 17 investigatory?

The Examiner holds they were not, and thus *Weingarten* principles do not apply. The complaint is DISMISSED on the merits.

ANALYSIS

Applicable Standards

RCW 41.56.040 guarantees the right of public employees to organize and be free from interference in the exercise of their collective bargaining rights. RCW 41.56.140(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce public employees in the exercise of their collective bargaining rights.

An employee covered under a collective bargaining agreement is guaranteed the right to union representation during investigatory meetings that the employee reasonably believes may result in disciplinary action. *NLRB v. Weingarten,* 420 U.S. 251 (1975). The Supreme Court of the United States affirmed a National Labor Relations Board decision to that effect, and explained that a lone employee may be too fearful or may not be articulate enough to present her side of the story during an investigatory interview. *Weingarten*, 420 U.S. at 263. A representative's presence protects the employee from being overpowered or outmaneuvered by the employer. *Weingarten,* 420 U.S. at 265 n. 10. The Commission adopted the *Weingarten* standard nearly twenty years ago and has consistently applied it in decisions. *Okanogan County,* Decision 2252-A (PECB, 1986); *Methow Valley School District,* Decision 8400-A (PECB, 2004).

Under *Weingarten*, an employer interferes with an employee's collective bargaining rights when:

1. The employee reasonably believes that a meeting called by management is for the purpose of eliciting information which might support potential disciplinary action; and

2. The employee requests union representation; and

3. The employer denies the request.

Mason County, Decision 7048 (PECB, 2000).

An investigatory interview exists where the employer seeks information from the employee. *Cowlitz County,* Decision 6832-A (PECB, 2000). The employer's questions must relate to alleged misconduct by the employee. Then the employee must reasonably believe the interview might result in disciplinary action. *Clover Park School District,* Decision 7073 (EDUC, 2000). An employee's fear of a supervisor does not translate into an automatic right to representation in all meetings with that supervisor. *Clover Park School District,* Decision 7073. An employee's subjective perceptions will not constitute reasonable grounds for concerns about potential discipline; rather, objective standards based on all the circumstances of a particular case determine if the concerns are reasonable or not. *Mason County,* Decision 7048 (citing *Spartan Stores, Inc., v. NLRB,* 628 F.2d 953 (6th Cir. 1980)).

The Commission focuses on the circumstances of the interview in determining whether it comes under *Weingarten*. An employer's assurances that the inquiry is non-disciplinary do not protect the employer from *Weingarten* violations if the employer changes direction during the meeting and converts an announced non-disciplinary, "counseling" session into an investigation. *Cowlitz County,* Decision 6832-A. The Commission is mindful that the employee whose rights were enforced in *Weingarten* was disciplined

for something she "blurted out" during the interview where she was denied union representation, rather than for the allegation occasioning the interview. *City of Vancouver,* Decision 7013 (PECB, 2000). The Commission has historically firmly protected employees' *Weingarten* rights. Employers who dissuade employees from exercising those rights take on substantial risk. *Cowlitz County,* Decision 6832-A. On the other hand, the Commission recognizes that an employer has the lawful option of dispensing with the interview, in which case *Weingarten* is inapplicable. *Morton School District,* Decision 6735 (PECB, 1999).

Application of Standards

Berdick began working for the employer in the fall of 1997 and moved to her present position in the summer of 1998. She works as a part-time senior secretary at the Jackson School of International Studies. James Donnen is her immediate supervisor. The collective bargaining agreement between the union and employer governs the employer's actions regarding represented employees. That agreement provides for a corrective action/dismissal process "considered to incorporate the concept of progressive action while providing a positive method for improvement rather than punitive action." The process has the following steps: informal counseling, formal counseling, final counseling, demotion, and dismissal.

Formal counseling may involve administrative personnel other than the employee's immediate supervisor. Formal counseling includes development of a written action plan identifying specific problem areas, performance objectives, suggestions for remedying the problem, and a time frame for improvement. Final counseling may also involve other administrative personnel, action plan discussion and revision. Formal counseling adds a paid, day-long decision making period away from work for the employee to "consider the consequences of failure to follow the action plan . . . ."

The facts pertinent to this complaint began with an informal counseling session between Berdick and Donnen on August 14, 2003. This resulted from an oral exchange between Berdick and a co-worker. Donnen believed the exchange was the confirmation of a pattern of disruptive behavior at work on Berdick's part. According to Donnen, similar incidents again occurred on November 3, 7, and 17, 2003. On November 19, 2003, Donnen sent Berdick a letter scheduling a formal counseling session, along with a formal counseling action plan. The letter identified areas where, according to Donnen, Berdick's performance did not meet his expectations. Those areas included, "disruptive and unprofessional behavior in the office [and] failure to communicate in a professional manner with your supervisor." Donnen scheduled the formal counseling session and advised Berdick she was entitled to union representation. The formal counseling occurred on December 3, 2003. Berdick's union representative attended. Donnen sent a follow-up letter the next day, with an attached action plan. The plan set forth performance deficiencies, expectations, action steps, and a time line. Donnen's letters of November 26 and December 4 did not threaten or imply disciplinary action, nor did the action plan involve sanctions. In his December 4 letter, Donnen wrote, in pertinent part:

> You expressed some concern about my expectations, but I am confident that if you apply yourself you will be able to meet them.
>
> I will meet with you weekly for the next month to see how things are progressing; after that we will meet as needed. If you find that you need assistance in implementing the action plan, please let me know so that we can discuss any problems that you are having.

Donnen set the first meeting for December 10. Berdick appeared, but told Donnen she wanted a union representative present. Donnen refused; Berdick declined to meet with him. Donnen rescheduled the meeting for the next week. Berdick came to the December 17

meeting, but again refused to meet without a union representative. She also refused to meet with Donnen in his office if the door to the office were closed. Donnen cancelled that meeting and later wrote Berdick that he would not set future meetings to discuss the action plan. Donnen did not threaten Berdick with discipline for refusing to meet with him or demanding a union representative, nor did he threaten final counseling.

Donnen testified that the purposes of the December 10 and 17 meetings were to follow-up the December 3 formal counseling. Donnen never indicated the meetings were considered final counseling. Berdick never alleged she considered them to be so. Donnen testified that there were no new incidents of alleged misbehavior by Berdick and that the meetings were not intended to raise new issues.

Berdick stated that her unease in attending the meetings without a union representative resulted from her fear that she would say something to Donnen leading to further actions against her. She further asserted that she did not understand the purpose or content of the action plan and wanted a union representative present to help her understand it.

Donnen stated that had Berdick made statements involving new issues subject to the corrective action process, he would have suspended the meeting and allowed Berdick to bring in a union representative. He also said that the purpose of the follow-up meetings was specifically to help Berdick understand the action plan.

Conclusion

On the facts presented in the record, the employer did not commit an unfair labor practice by refusing Berdick union representation for the December 10 and 17 meetings. The employer did not intend to question Berdick again about the August or November incidents and had no new incidents to bring up.

The record shows the employer understood Berdick's *Weingarten* rights. The employer apparently considered the December 3 meeting investigatory and advised Berdick she could be represented. However, the follow-up meetings in question were not intended by the employer as either investigatory or disciplinary. Berdick's misunderstanding of *Weingarten* does not trigger its protections.

Berdick never articulated a reasonable belief that the meetings at issue might lead to discipline. She admitted she understands the need for professional behavior on the job, but denied understanding why Donnen felt she needed corrective action. She explained that she believed that the meetings might result in discipline because she did not understand Donnen's purpose in giving her the action plan.

The Examiner did not find her testimony persuasive. Berdick refused to meet to clarify the action plan, and then claimed she was afraid of Donnen because she did not understand the plan. A mere profession of incomprehension does not qualify as a reasonable belief, nor does an employee's subjective, unexplained fear of a supervisor.

In summary, Berdick could not reasonably believe the meetings of December 10 and 17 were investigatory, she had no right to a union representative, and the employer did not err in denying the same. Further, the employer's cancellation of the meetings precluded a *Weingarten* violation, since Commission precedent holds that no cause of action under *Weingarten* exists if the employer declines to meet. Berdick's claim is without merit.

FINDINGS OF FACT

1. The University of Washington is a public employer within the meaning of RCW 41.56.030(1).

2. Annamarie Berdick is a classified employee of the University of Washington and is a member of a bargaining unit representing classified employees of the university.

3. The employer and union are parties to a collective bargaining agreement providing formal counseling as a step in the corrective action/dismissal process. The employer allowed Berdick union representation at the initial formal counseling session.

4. The formal counseling session resulted in an action plan designed as a remedial, rather than a punitive tool to improve the working relationship between Berdick and her immediate supervisor.

5. The employer designated four weekly follow-up sessions between Berdick and her immediate supervisor for the purpose of clarifying any issues or concerns Berdick might have with the action plan.

6. The employer did not intend to use the follow-up sessions to conduct further investigations of Berdick's job performance.

7. At the first two follow-up sessions, on December 10 and 17, 2003, Berdick demanded union representation; the employer denied the request.

8. When Berdick refused to meet without union representation, the employer cancelled the meetings, with no sanctions imposed on Berdick.

9. Berdick did not have a reasonable belief that the employer called the meetings of December 10 and 17 for the purpose of eliciting information that might lead to disciplinary action against her.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. On the basis of the foregoing findings of fact, Annamarie Berdick has failed to sustain her burden of proof to establish that the University of Washington interfered with her right to union representation during an investigatory interview. The University did not violate her rights under RCW 41.56.140(1).

ORDER

The complaint charging an unfair labor practice filed in Case 18379-U-04-4687 against the University of Washington is DISMISSED on its merits.

Issued at Olympia, Washington, this 8th day of December, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Katrina I. Boedecker

KATRINA I. BOEDECKER, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.