STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS, FOOD PROCESSING EMPLOYEES, PUBLIC EMPLOYEES WAREHOUSEMEN AND HELPERS UNION LOCAL 760, Complainant, vs. OKANOGAN COUNTY, Respondent.	CASE NO. 5478-U-84-997 DECISION NO. 2252 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hafer, Price, Rinehart and Schwerin, by John Burns, Attorney at Law, appeared on behalf of the complainant.

Michael D. Howe, Attorney at Law, appeared on behalf of the respondent.

Teamsters Local 760 filed unfair labor practice charges against Okanogan County on October 2, 1984, alleging that the county had violated RCW 41.56.140(1), (2) and (4) by terminating sheriff's deputy Gary Maxwell after a disciplinary hearing at which a union representative was told that his presence would not be necessary. The county's prosecuting attorney assigned the defense of this unfair labor practice case to a private attorney, citing a perceived conflict of interest. The hearing was held before Examiner Martin Smith on March 20, 1985. Post-hearing briefs were filed April 23, 1985.

BACKGROUND

In terms of area, Okanogan County is the largest of the state's 39 counties. Deputy sheriffs employed by the county are usually assigned in each of the major population centers: Oroville, Tonasket, Twisp, Omak, and Brewster. Each deputy is responsible for a geographical area, but must also travel to the county courthouse at Okanogan at least twice per week for delivering evidence, receiving service orders and making appearances at superior court.

Teamsters Local 760 represents the deputy sheriffs. Local 760 and the county are parties to a collective bargaining agreement dated September 18, 1984, and effective through December 31, 1985. Gary Maxwell was a deputy sheriff in Okanogan County for seven years, stationed in the Winthrop-Twisp area.

The pivotal issue in this case is whether Maxwell was unlawfully denied union representation during an interview which led to his termination. Maxwell was summoned to appear before Sheriff John Johnston on August 15, 1984. Upon Maxwell's request for representation by a shop steward or other agent of the union, Sheriff Johnston deflected involvement of the union by indicating to Maxwell that his chosen representative, Deputy Tom McCone, would not be needed in the closed-door meeting. Maxwell then entered the meeting alone and was questioned for over 40 minutes concerning several incidents involving his execution of department policies. His employment was terminated on August 22, 1984.

While they are not directly at issue, it is necessary to review certain allegations and incidents which occurred prior to the meeting of August 15, 1984, in order to appreciate the record of events leading to the allegations under RCW 41.56.140. 1/

There is little in the record to indicate the work history of Gary Maxwell prior to 1982, although it appears that problems began to surface late in 1981. Maxwell's personnel file contains two letters from Chief Criminal Deputy Fitzhugh dated in 1982. The first, dated October, 1982, referred to a handgun which had been left in Maxwell's patrol car rather than turned in to the department as evidence in a homicide. The second letter, dated November 30, 1982, also referred to improper handling of evidence. Maxwell received a three-day suspension as a result. By late 1983, the circumstances which led to Maxwell's termination fell in more rapid succession. In November, 1983, Maxwell went on temporary partial disability leave for phlebitis problems. He was off duty through April 9, 1984. Three incidents which occurred in 1983 and 1984 were relied upon by the sheriff in his decision to fire Maxwell. One of those involved loss of a roll of film taken at a crime scene. The second involved an altercation with a citizen concerning removal of some

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1/ Most of what appears in this record was also brought out at a hearing before the Okanogan County Civil Service Commission held to consider an appeal from Maxwell's termination. The record in those proceedings documented, in considerable detail, the disciplinary record and work-related problems that led Johnston to terminate Maxwell. Basically, the county argued that Maxwell was terminated for "inattention to duty, dereliction of duty and willful failure to properly conduct himself". The county sought to prove in the civil service commission proceedings that Maxwell had improperly handled property and evidence which was necessary to criminal prosecutions in the county. The Civil Service Commission took testimony on September 27 and October 20, 1984. Those who testified at that hearing were: Sheriff John Johnston, Robert Hull, Toney Fitzhugh, Gary Martzall, Bruce Nash, Robert Tyrell, James Ditzell, Jim Weed, Mike Dobbs, Rick McGuire, Fred Aumell, Sigurd Bakke, and Gary Maxwell. Of those, only Johnston, Fitzhugh, Hull and Maxwell gave testimony at the March 20, 1985 hearing before the Examiner in the instant proceeding.

official legal notices which Maxwell had posted on a building, and the third involved a property dispute regarding a mule named "Ruthie".

Maxwell was one of the investigating officers in an assault case where a suspect had discharged a firearm and taken away a young woman from the Brewster Flats area. Maxwell took several photos at the crime scene, especially of shell casings which indicated the use of a firearm at the scene. Several other officers were at the scene, including Fitzhugh, city police and deputies from Douglas County. No one person was in charge of the crime scene investigation, but it was clear to all of the officers present that a felony might have been committed. Maxwell made his investigation accordingly. No other officers took photos of the crime scene, and Maxwell's film was never developed into photographic prints. Accepted procedure in 1983 was to have an officer remove the film from his camera, place it into a canister and then transport the film to the sheriff's office at Okanogan, where there was a box marked for the receipt of photographic evidence. From there, the office sent undeveloped film to a lab for processing. Maxwell stated in his written report that he had taken photographs, and he described what was photographed. The suspect was found in Houston, Texas after eight months, and had to be extradited back to Washington. Somewhere between the exposure of the film and the prosecution of the suspect, the film was lost. Either Maxwell lost the film can himself, or it was lost by another officer after being turned over by Maxwell for transport to Okanogan, or the film was lost when it got to the sheriff's office. The prosecutor felt that the lack of photographs hampered prosecution for assault and kidnapping, and resulted in a plea bargain.

In the second incident, Maxwell was instructed to serve civil papers on a business in Winthrop, by posting them on the exterior wall of the building. Maxwell did so, but the owner of the building promptly tore the papers off of the wall. The town marshall noticed the removal and called Maxwell about the incident. Maxwell talked to the deputy prosecuting attorney for advice, and proceeded to the business establishment to make contact with the owner, a Mr. Jesmore. A heated conversation turned into a scuffle and then a wrestling match involving officer Maxwell and Mr. Jesmore. Maxwell was slightly injured in the altercation, and later filed assault charges and "obstructing an officer" charges against Jesmore. As it later developed, Jesmore had not been under a legal obligation to maintain the documents posted on his store. Jesmore later retained an attorney and filed a damage claim against the county under RCW 36.45 et. seq.

The incident with the mule arose out of a dispute between former spouses as to the division of community property and the sale of that property (the mule) to another party. Maxwell investigated a complaint that the mule had been stolen from one of three individuals in the Twisp area. At first, Maxwell decided that the ownership of the mule was a civil, not criminal,

matter. On June 14, 1984, Maxwell submitted an additional report on the mule theft case. On June 15th, Maxwell discussed the mule case with Chief Deputy Toney Fitzhugh. Maxwell testified that the complaining party, a Mr. Rothgeb, also talked to him on June 15th. Maxwell explained to Rothgeb the civil issues involved in the case, such as the fact that the mule may have been community property which another of the disputants had a limited right to sell. The three "owners" had already talked to the deputy prosecuting attorney in Okanogan. Maxwell sat down to talk with all three of them the next day at Okanogan. Maxwell also talked to the prosecutor, who told Maxwell that the case sounded 90 percent civil in nature, but that he should write a report on the incident and submit it to the office as with any other complaint. Maxwell took three statements from the owners, and obtained a copy of the sale transcription between the three and the original owner of the mule. Maxwell tried to contact Michael Bourn, a fourth individual who purported to now own the mule, but was unable to locate him. After talking to the involved parties, Maxwell was convinced that the mule was stolen under criminal law, and he decided to let Mr. Rothgeb maintain custody rather than leave the animal where he found it, on a golf course in the (apparent) custody of Bourn. Maxwell did not consider this action an "impoundment" in the strict police sense. The sheriff was most upset, however, with Maxwell's decision to "impound" the animal by returning it to the custody of one of the purported owners, rather than leaving the mule where he found it. The sheriff asserted that there was a department policy preventing officers from impounding livestock, even if evidence of a crime. That policy, which was contained in a memorandum sent out by Chief Deputy Fitzhugh in September, 1982, was made part of the record in the civil service hearing. Maxwell testified that he released the mule to one of the purported owners to end the personal harrassment he was receiving daily from the owners, who insisted that a crime had been committed.

In addition to these incidents, the county cited several others where Maxwell had been tardy with filing written reports on crimes committed in his area. Other minor deficiencies and incidents surfaced during the civil service hearing and may have been considered by the Civil Service Commission during its deliberations.

On the 14th of August, at about 4:00 PM, Maxwell received a radio call at Twisp instructing him to "detail the county and talk to U-3", who is Chief Deputy Fitzhugh. Fitzhugh indicated that Sheriff Johnston was going to ask Maxwell about the lost roll of film and the stolen mule incident. Maxwell detected a tone of disapproval in the radio message. Maxwell was then told to respond to a burglary call at Loop Summit, and the meeting with Johnston was put off until the next day, August 15th. Maxwell talked to union business representative, Al Hobart, as well as to the union's attorney, John Burns, both of whom recommended having the shop steward, Deputy Tom McCone, available at the meeting.

On August 15, 1984, Officer McCone drove down from Tonasket at Maxwell's request. McCone told Johnston and Fitzhugh that "Maxwell asked me to be here". Fitzhugh did not object to McCone's participation. Johnston, however, told McCone that the meeting was "not investigatory" and, therefore, that McCone should not be present. Johnston's own testimony was that he told McCone, "No, that there would not be disciplinary action resulting in the meeting, and I didn't know where it was going to go at this point". McCone then informed Maxwell that the sheriff did not want him present, but that he would "wait around" the meeting room in the sheriff's office if he was needed.

Maxwell entered the meeting on August 15, 1984 with only himself, the chief deputy and the sheriff present. Maxwell testified that he felt an atmosphere of "impending doom". Once seated, Johnston told Maxwell that Fitzhugh and Undersheriff Hull had made written recommendations calling for Maxwell's discharge. Sheriff Johnston said that he wanted to hear Maxwell's side of the story and, during the next 40 minutes, proceeded to ask Maxwell several questions regarding the mule incident, the film incident, and the Jesmore scuffle. Johnston asked for Maxwell's "explanations" and said that he intended to base any decision to discipline partly upon Maxwell's answers. McCone was never invited into the meeting room. Johnston pulled several documents from a manila folder, but did not allow Maxwell to see or read any of them. Maxwell was told to return on August 21st so that he could be told of Johnston's decision.

The follow-up meeting could not occur until August 22nd. Maxwell requested that McCone be present, but Hull told Maxwell that Johnston had already reached a decision. Maxwell then went into the August 22, 1984 meeting without McCone. Johnston handed Maxwell the termination letter, and said he based his decision on the recommendations of Hull and Fitzhugh.

A sheriff's department policy dated November 15, 1979 and still in effect on August 22, 1984 permitted employees to request that a disciplinary review board be convened. Maxwell requested that a disciplinary review board be convened pursuant to that policy. The record in the instant case reveals that a disciplinary review board was convened on the Maxwell case, and that the board of review recommended against the termination. Sheriff Johnston rescinded the board of review procedure by a memorandum of August 23, 1984, one day after the termination letter was given to Maxwell.

The Okanogan County Civil Service Commission denied Maxwell's statutory appeal on November 8, 1984. The civil service commission did not consider the recommendation of the disciplinary review board, stating that "the Commission does not have these recommendations in evidence". The civil service commission ruled that Maxwell had waived his right to a timely board of review hearing between August 15 and August 22, 1985. Maxwell appealed

that decision to the Superior Court for Okanogan County, where the case remains pending.

Although the collective bargaining agreement contains a grievance procedure ending with final and binding arbitration, there is nothing in the record which suggests that Maxwell filed a grievance under that agreement. This unfair labor practice case was filed October 3, 1984.

POSITIONS OF THE PARTIES

The union contends Gary Maxwell's rights as a public employee (pursuant to RCW 41.56.140(1)) were violated when he was required to attend an investigatory interview without the presence of a union representative. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). The union further argues that Maxwell at no time waived his right to have union representation at a disciplinary interview, up to the time of termination, and that the appropriate remedy is to reinstate Maxwell with full back pay. The union also urges the application of the Weingarten principle because of a perceived deprivation of a constitutional right of substantive due process, citing the decision of the Supreme Court of the United States in Cleveland Board of Education v. Loudermill, ___U.S.___, 105 S. Ct. 1487, 118 LRRM 3041 (March 20, 1985).

The employer denies that it has not violated Maxwell's rights under Chapter 41.56 RCW. It contends that Sheriff Johnston's firing of Maxwell was proper because Maxwell waived his right to have union representation by not summoning the shop steward while the August 15th meeting was in progress, and because no information was discovered during the interview which ultimately led to the decision to terminate Maxwell. Because there are claimed to be sufficient independent grounds to justify the termination for cause, the provisions of Weingarten and similar PERC cases are said to not apply in this controversy. The county further argues that reinstatement and back pay is not an appropriate remedy where no causal connection existed between the investigatory meeting and the actual discharge. NLRB v. Southern Bell Telephone, 676 F.2d 499 (Cir. 1982). The county contends that PERC's remedy would be limited to "cease and desist" order even if a technical violation of RCW 41.56.140 is proved.

DISCUSSION

The issues in this case may appear, because of the circumstances of a discharge challenged under the state civil service law, the assertion of rights guaranteed under federal law, and the simultaneous assertion of rights under the state collective bargaining statute covering public employees, to be excessively complicated. It is important to focus in this

proceeding, however, upon the relatively uncomplicated factual pattern of the case, and to adhere to enforcement of the rights exclusively protected by Chapter 41.56 RCW within the jurisdiction of the Public Employment Relations Commission.

The Representation Rights of Public Employees

The National Labor Relations Board ruled in J. Weingarten, Inc., 202 NLRB 69, 82 LRRM, 559 (1982) that an employer violated Sections 7 and 8(a)(1) of the National Labor Relations Act (NLRA) when it refused to allow an employee's union representative to participate in a meeting designed to investigate the employee's misconduct. The employer appealed to the Fifth Circuit Court of Appeals, which reversed, holding that the "concerted activities" clause of Section 7 of the NLRA is not eclipsed when an employee is brought before supervisors for a preliminary, fact-finding interview, even if no union representative is present at the interview. NLRB v. Weingarten, 485 F.2d 1135, 84 LRRM 2436 (5th Cir., 1973). The circuit court decided that:

> An investigatory interview would be a premature stage at which to involve a requirement of union representation in the absence of some showing that the purpose of the interview was not merely to elicit facts concerning employee conduct but to impose disciplinary measures upon the employee so that the grievance hearings later on would merely put the seal on the employer's prejudgment. (emphasis added)

In the Weingarten case, an employee explained to her employer that she had in fact paid for a box of chicken commonly sold at the Weingarten store where she worked. But during the course of the interview, she stated that the only thing she had "taken" were the "free" lunches provided by the store. True to the old saying, there was no "free" lunch -- employees had to pay for them. The employee was required to refund $160 to the company. The fifth circuit may have been persuaded by the fact that no disciplinary action was taken against the employee. The fourth circuit had recently ruled that Section 7 of the NLRA required no right of representation at an investigatory interview, even where several terminations and clear "concerted activity" was evident. NLRB v. Quality Mfg. Co., 481 F.2d 1018, 83 LRRM 2817 (4th Cir., 1973).

The U. S. Supreme Court granted certiorari and reversed the Court of Appeals decisions in both Weingarten and Quality Mfg., holding that Sections 7 and 8(a)(1) of the NLRA support the right of an employee to have union representation for an investigatory interview where the employee reasonably believes that disciplinary action could result. NLRB v. Weingarten Inc., 420 U.S. 251, 88 LRRM 2689 (1975). As seen by the Supreme Court, this right originates in the Section 7 right of employees' to "act in concert for mutual

aid and protection", and is necessary for the labor organization and its members because "a single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors...". The court further stated:

> The union representative whose participation he (the employee) seeks is however safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the bargaining unit that they too can obtain his aid and protection if called upon to attend a like interview. . . . .

Thus, although not based directly on the duty to bargain collectively, the right to representation was clearly based on the collective interests of all of the employees in the bargaining unit.

The Public Employees Collective Bargaining Act was enacted in 1967. RCW 41.56.010 declares its purpose to be the promotion and "continued improvement of the relationship between public employers and their employees. . ." Employees are protected by RCW 41.56.040, stating that:

> No public employer, or other person, shall directly or indirectly interfere with, restrain, coerce, or discriminate against any public employee or group of public employees in the free exercise of their right to organize and designate representatives of their own choosing for the purpose of collective bargaining, or in the free exercise of any other right under this chapter. (emphasis supplied)

The Public Employment Relations Commission has noted that Chapter 41.56 RCW contains no explicit "concerted activities clause" or "mutual aid or protection" clause. City of Seattle, Decision 489 (PECB, 1978). But in Valley General Hospital (King County Public Hospital District No. 1), Decision 1195, 1195-A (PECB, 1981), the Commission held that union representation at interviews was a right protected under RCW 41.56.040 and RCW 41.56.140(1).[2/] The Commission cautioned that the exercise of an employee's right to file a grievance is a protected activity, so that denying a bargaining unit employee representation by the union at a termination hearing tended to discourage the pursuit by all bargaining unit employees of their statutorily protected activities. See also: City of Seattle, Decision 2134 (PECB, 1985).

2/ Like Section 8(a)(1) of the NLRA, RCW 41.56.410(1) makes it an unfair labor practice for a public employer to "interfere with, restrain or coerce public employees in the exercise of their rights guaranteed by this chapter." (emphasis supplied)

In Weingarten, the Supreme Court set out five important "ground rules" for the assertion of the employee's representation right. In addition to the adoption of policy protecting a right of representation parallel to that secured in the Weingarten case, the Public Employment Relations Commission has established precedent on each of those limitations.

The right to representation attaches under Weingarten only where the employer compels the employee to attend an investigatory meeting. Thus, an employee who actually initiated the meeting later complained of cannot then assert a violation of Weingarten rights. City of Mercer Island, Decision 1460 (PECB, 1982).

Another critical restriction on the right to union representation under Weingarten is that a significant purpose of the interview must be investigatory, i.e., to obtain facts which would support a disciplinary action. Alfred Lewis Co. v. NLRB, 587 F.2d 403 (9th Cir. 1978). This limitation was decisive in City of Mercer Island, supra, because the meeting was held after the employee was disciplined. See, also, City of Renton, Decision 1825 (PECB, 1984), where the purpose of the interview was to review discipline already imposed.

The right to representation secured by the Weingarten ruling is subject to a requirement that the employee request union representation. Accordingly, an employee may fail to assert the right, or otherwise knowingly waive the right to union representation. Thus, it was held in City of Montesano, Decision 1101 (PECB, 1981), that an employee waived her rights by a demonstration that she did not wish union involvement in her disciplinary situation.

A fourth limitation of the Weingarten rule is that the employee must reasonably believe that a forthcoming investigatory meeting could result in disciplinary action. This proviso, too, has been accepted by PERC in King County, Decision 1698 (PECB, 1983), where an employee was subjected to a series of interviews, any one of which could have created the probability of discipline in the employee's mind.

Faced with a demand for union representation under Weingarten, the employer may dispense with the interview. While the union is the exclusive bargaining representative, some of the case law suggests that the employer is not required to "bargain" or negotiate settlements with the union representative during an investigatory interview if the employer decides to go forward with the interview with the participation of the union representative. Weingarten, supra, 88 LRRM 2689 at 2692-3; City of Mercer Island, supra.

Maxwell's Investigatory Interview

Focusing upon the events leading up to the meeting between Maxwell and county officials on August 15,1984, the record leaves no doubt whatever that Maxwell

was compelled to attend. There was an explicit order from his supervisor, requiring him to report to the sheriff's office to discuss his conduct on specified prior incidents.

Was the interview to be "investigatory" in nature? Had the sheriff merely intended to advise Maxwell of his decision to terminate Maxwell's employment based upon recommendations previously made by Fitzhugh and Hull, he would not have needed Fitzhugh's presence at the meeting held on August 15th or a one week delay for a second meeting to inform Maxwell of a final decision. This also overstates the nature of the recommendations which had been made. Sheriff Johnston testified that Hull and Fitzhugh "made a recommendation that I seriously consider terminating Maxwell as a result of his continued refusal to follow departmental policy..." The "seriously consider" qualification clearly left Johnston broad discretion as to what would happen as a result of the meeting held on August 15th. Indeed, while the incidents detailed above were not news to Fitzhugh and Hull, Johnston had little prior knowledge of the lost film and mule incidents, so that those files were explained to him for the first time. Most importantly, Sheriff Johnston held the interview with an expressed intention to elicit facts which would support discipline. Under examination by the employer's attorney, Sheriff Johnston testified that he told Tom McCone the purpose of the meeting:

> Q. And would you tell us, the best you can recall, what was said in that conversation by each of you?
>
> A. I -- after Chief Deputy Fitzhugh had advised me that Deputy McCone wanted to be present at the meeting as union representative, I had a brief conversation with Tom, wherein I told him I didn't feel it was necessary for him to be at the meeting. I believe he asked me if there was disciplinary action going to result in the meeting, and I indicated "No, there would not be disciplinary action resulting in the meeting," and I didn't know where it was going to go at that point . . .

Johnson also told Maxwell his purpose in having the meeting:

> A. I told him (Maxwell) that the undersheriff and the chief criminal deputy had presented me with a number of incidents wherein he had been involved in policy violations and poor judgment, improper action; and that I was seriously considering that recommendation. And I just wanted to give him the benefit of providing me with any information - not information, but mitigating circumstances that he might have that would sway my decision...

Johnston later said under cross-examination that the decision to terminate Maxwell was made after the August 15th interview and Maxwell's explanation of

the "incidents". Based on the sheriff's own testimony as to his statements at the outset of the meeting, the record amply supports a finding that the August 15th meeting was investigatory in nature. The sheriff's use of the Weingarten "investigatory" buzz-word takes on a particular irony here. In light of the sheriff's conduct once inside the closed-door meeting with Maxwell, his earlier representation to McCone that the meeting was not to be "investigatory" was a breach of the employer's obligation to deal in good faith.

Also unassailable is a finding that Maxwell made his request for union representation known to the employer at the outset of the August 15th meeting. He called his union and its attorney the day before the meeting. He asked his shop steward, Tom McCone, to be present at this meeting. McCone was present in Okanogan on August 15, 1984, ready to attend the meeting. The employer was well aware of the reason for McCone's presence at the sheriff's office on that day. McCone was assured by Sheriff Johnston that the meeting was "not investigatory". The record does not support the notion, as argued by the county, that Maxwell "withdrew" his request for representation. In any event, any such withdrawal was based on and prejudiced by the employer's statements to McCone. In light of Johnston's blatant mis-representation of the situation to McCone, the employer's "waiver" defense is also rejected as being entirely without merit. McCone remained in the courthouse during the August 15th meeting, readily available to be called in if the employer had a change of heart during the course of the meeting as to the nature of that meeting. Johnston evidently never recognized (or at least never acknowledged) that he was conducting an investigatory interview of Maxwell. In fact, as noted above, there was no change of the nature of the meeting during its course, because it was "investigatory" from the outset. Once present, Maxwell was never told that the employer had an option of proceeding without the interview. City of Mercer Island, supra. Under these circumstances, Maxwell was not obligated to stop the questioning in the midst of the meeting and repeat his demand to have his union representative enter the room. Given McCone's presence again at the meeting on August 21st, it cannot be said that Maxwell failed to request union representation or in some other manner "waived" his right to union representation during the intervening one-week period.

As to the fourth of the tests stated above, the record also supports a finding that Maxwell reasonably could have believed, and did in fact believe, that the August 15th meeting with Sheriff Johnston could result in disciplinary action against him. Chief Deputy Fitzhugh's testimony affirmed the notion that Maxwell was being "called on to the carpet". Maxwell's conversations on August 14 with union officials and their attorney were indicative of his perceived concern for his job.

By conducting an investigatory interview of Maxwell on August 15, 1984, after having deflected the participation of union official McCone by

misrepresenting the nature of the meeting, Okanogan County interfered with Maxwell's rights protected by RCW 41.56.040 and violated RCW 41.56.140(1). Having found this unfair labor practice violation under the statute, the Examiner declines to address the constitutional due process considerations raised by the union by reference to Cleveland Board of Education v. Loudermill, supra.

REMEDY

The Public Employment Relations Commission is directed by RCW 41.56.160 to prevent unfair labor practices by issuing appropriate remedial orders. The purpose of a "remedial" order (as distinguished from damages or punishment) is to put the injured party back in the same position they would have occupied had the unfair labor practice violation not been committed.

The union asked in the unfair labor practice complaint for "reinstatement and back pay plus an order to cease and desist violating" the statute. A reinstatement remedy is commonly ordered where employees are discharged in retaliation for the exercise of rights guaranteed by Chapter 41.56 RCW. See: City of Asotin, Decision 1978 (PECB, 1984). The backpay remedy which generally accompanies a reinstatement order is regulated by the provisions of WAC 391-45-410. There may be legitimate concern in this case, however, that the traditional reinstatement and backpay order is not an appropriate remedy. It is clear from the record that Maxwell's employment was in question based on the recommendations made by Undersheriff Hull and Chief Deputy Fitzhugh. He was facing allegations that he had violated department policy on three recent occasions. There is no indication of anti-union animus, or of a motive to punish Maxwell for assertion of a grievance or of his rights under Chapter 41.56 RCW, as was found in King County Public Hospital District No. 1, supra. To free Maxwell from employer scrutiny of his own prior misdeeds would be to put Maxwell in a better position than he would have enjoyed had the unfair labor practice violation not been committed.

NLRB precedent is to be considered, but is not controlling. The NLRB ruled in Taracorp Industries, 273 NLRB No. 54, 117 LRRM 1497 (Dec. 1984) that reinstatement will be ordered in Weingarten situations only where "an employee is discharged or disciplined for engaging in union or other protected concerted activities". (117 LRRM at 1498). The NLRB therein overruled its own Kraft Foods, 251 NLRB 598, 105 LRRM 1233 (1980) precedent. See also: International Ladies Garment Workers v. Quality Manufacturing Co., 420 U.S. 276, 88 LRRM 2698 (1975). As in other areas, there may be some doubt as to the stability of NLRB policy. See: Pierce County, Decision 2209 (PECB, 1985). In Valley General Hospital (King County Public Hospital District No. 1), Decision 1195 (PECB, 1981), the examiner ordered

reinstatement of a discharged employee who had been forced to participate in an investigatory interview without union representation; but in affirming the order and remedy the Commission cautioned that the remedy was also based upon the finding of reprisals against the employee's assertion of her rights to pursue a grievance and otherwise engage in concerted activity. No PERC precedent is cited or found which is directly in point.

To limit the remedy to a "cease and desist" order applicable to the future, without doing something to repair the damage already done to Maxwell, would leave Maxwell far short of an adequate remedy. Sheriff Johnston excluded Officer McCone from the August 15, 1984 meeting, saying that he was not certain that discipline would result and because he only wanted to hear Maxwell's explanations of facts he assumed were accurate. The other participant in the meeting, Chief Deputy Toney Fitzhugh, told McCone that his participation would not be a problem, but the sheriff was clearly the superior officer. In his effort to elicit Maxwell's explanations for the incidents, the sheriff was asking for exculpatory information -perhaps relating to other deputies - of the type that might ease the punishment on a wayward employee. In asking for mitigating circumstances, it is also clear that all of the pieces of the investigatory puzzle were being arrayed by the sheriff. The county points out that no new "evidence" came to light as a result of these questions, unlike the situations in Weingarten, supra, and General Motors Corp. v. NLRB, 674 F.2d 576, 109 LRRM 3345 (6th Cir. 1982), where there were confessions by the employees that misconduct had in fact occurred. Johnston may have heard little from Maxwell that was not already in the report of Hull or in the file. His view of the result of the August 15th meeting may have been that he simply did not hear any extenuating circumstances which might have persuaded him to avoid discipline. But the reason this may seem to be true is that no union representative was present to assist Maxwell. In fact, Maxwell's failure to change his prior explanations was information Johnston relied on to make the termination decision. In a Weingarten sense, the existence of the right to union representation at an investigatory interview does not depend on the production of damaging evidentiary material, any more than an illegal search without a warrant is justified because nothing is found.[3/] In the termination letter of August 22nd, Johnston clearly premised the firing on the interview a week earlier.

The PERC precedent closest to the situation of the case at hand is King County, Decision 1698 (PECB, 1983), where the clock was turned back to require re-processing of a dispute from the time of the unfair labor practice violation, without reliance by the employer on defenses which may have arisen in the intervening period. That remedial order did not involve a reinstatement or back pay, because the employee was never suspended or discharged. But it demonstrates the remedy of the "process" violation without infringing on the resolution of an underlying substantive dispute.

3/ See particularly the questions asked in Alfred M. Lewis, 587 F.2d 403, 99 LRRM 2841 (9th Cir. 1978).

The Public Employment Relations Commission has not asserted jurisdiction to decide the dispute concerning Maxwell's discharge "on the merits", nor can the Commission substitute its judgment for that of the county, even if it might have ruled differently based upon the same set of facts. It is equally certain that the Commission cannot substitute its judgment for the Board of Review, the Civil Service Commission or the Superior Court. However, this does not exclude the possibility that the decisions of the county and the civil service commission may have been prejudiced by the unlawful interview. The fact that the Board of Review recommended against the discharge of Maxwell reinforces the conclusion that the merits of the case are not so cut and dried as to make any prejudice resulting from the unlawful interview de minimus.

There is little to indicate Johnston's reasons for terminating the Board of Review policy which had been in effect since 1979. It is clear that he decided to end the policy one day after meeting with Maxwell, and his written repeal surfaced one day after the termination letter went to Maxwell. Although the review board did meet on Maxwell's case later, its findings and opinions were not available to Johnston, Maxwell or the union at the time of the August 22nd termination meeting. It is clear that the recommendation of the Board of Review was rejected (or at least not considered) by the civil service commission.

At the time the unfair labor practice violation occurred, Maxwell was fully employed, the Board of Review process was still in place, and the sheriff had recommendations before him from his principal subordinates asking him to seriously "consider" whether Maxwell ought to be discharged. There had been no determination to discharge, there had been no Board of Review hearing and there had been no civil service commission proceedings. The appropriate remedy in this case is to re-create that situation as nearly as possible. The employer will thus be ordered to withdraw its discharge of Maxwell and to reinstate Maxwell with back pay. This will moot the proceedings before the civil service commission and the appeal now pending in the Superior Court. The employer will not be precluded from again considering the recommendations made by Hull and Fitzhugh. Should it choose to consider any discipline or discharge action against Maxwell based on the incidents which took place prior to August 15, 1984, the employer is ordered to cease and desist from reliance on anything which transpired at the unlawful interview of August 15, 1984, or from asserting any defenses which may have arisen during the intervening period affected by the unfair labor practice. Should the employer proceed with discipline or discharge of Maxwell based on the incidents which took place prior to August 15, 1984, it will also be obligated to afford Maxwell the use of the Board of Review procedure which was in effect on that date.

FINDINGS OF FACT

1. Okanogan County is a municipal corporation of the state of Washington and is a public employer within the meaning of RCW 41.56.030(1). Samuel R. (Johnny) Johnson is the elected sheriff.

2. Teamsters Union Local 760 is an employee organization within the meaning of RCW 41.56.030(3) and is a "bargaining representative" certified to represent all deputy sheriff employees of Okanogan County. Gary Maxwell was a deputy sheriff until his termination on August 22, 1984. Deputy Tom McCone was a shop steward during August, 1984.

3. Deputy Gary Maxwell had been disciplined on a prior occasion in 1982. On August 14, 1984, Maxwell was contacted by Chief Deputy Toney Fitzhugh and was instructed to report to Sheriff Johnston's office the next day to discuss his performance in three recent situations. Fearing discipline, Maxwell talked to his union representatives that evening.

4. Shop Steward Tom McCone was present at the sheriff's office on August 15, 1984 for the purpose of attending and participating in the meeting between Johnston and Maxwell as Maxwell's union representative. McCone was told by the sheriff that the interview was not to be investigatory and that McCone could not participate in the interview with Maxwell conducted by Johnston. Maxwell entered the interview room without union representation, although he did so with a sense of foreboding about his job. At the outset of the interview, Maxwell was told that the undersheriff and chief deputy recommended his discharge. Johnston described the nature of the meeting as being to elicit information on which to base a decision to discipline Maxwell. Maxwell answered Johnston's investigatory questions for some 40 minutes.

5. At the end of the interview, Maxwell requested a meeting of a Board of Review as per county policy in existence since 1979. Johnston said he was abolishing the Board of Review, but would allow Maxwell to take his case to such a panel. The policy creating the Board of Review was rescinded on August 22, 1984, but a Board of Review met on the Maxwell case and recommended against the termination.

6. Johnston held a brief meeting with Maxwell on August 22, 1984, at which time he gave Maxwell a letter of termination. Maxwell did not insist upon union representation at this meeting. Johnston's decision to fire Maxwell was on the basis of reports in his possession as well as Maxwell's responses at the August 15th interview. There is no indication that Johnston sought to punish Maxwell for protected activity as a member of his union.

7. Maxwell at no time waived his right to have union representation at the disciplinary interview held on August 15, 1984. The opinion of the Board of Review was not available to either Sheriff Johnson on August 15th or to the Civil Service Commission in its review of the discharge. Maxwell's appeal to the Civil Service Commission was denied after a two-day hearing. This decision is being appealed to the superior court.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under RCW 41.56.

2. By conducting the investigatory interview with Gary Maxwell on August 15, 1984, without the presence of a union representative, Okanogan County has interfered with Maxwell's rights as a public employee within the meaning of RCW 41.56.140(1).

3. By conducting an investigatory interview without the presence of a union representative, Okanogan County has interefered with a bargaining representative within the meaning of RCW 41.56.140(2).

ORDER

Based upon the foregoing and the record as a whole, it is ordered that Okanogan County, its officers and agents, shall immediately:

1. Cease and desist from:

   (A) Interfering with, restraining or coercing public employees in the exercise of their rights secured by RCW 41.56.040, including denial of union representation at investigatory interviews with his or her employer when the employee reasonably believes that the interview may lead to disciplinary action, provided that the employee makes such a request.

   (B) Giving any effect to the discharge action taken against Gary Maxwell on or about August 22, 1984.

   (C) Relying on, basing any decision on, or basing any defenses on the unlawful investigatory interview of Maxwell held by the employer's agents on August 15, 1984, should the employer choose to consider discipline or discharge of Gary Maxwell based on any conduct occurring on or prior to August 15, 1984.

2. Take the following affirmative actions which the Commission finds will effectuate the purposes and policies of RCW 41.56:

(A) Reinstate Gary Maxwell to his former position or a substantially similar position and make him whole for the loss of pay and benefits he may have suffered by reason of his unlawful discharge.

(B) Should the employer choose to consider discipline or discharge of Gary Maxwell based on any conduct occurring on or prior to August 15, 1984, permit Gary Maxwell the use of the Board of Review procedure as in effect on August 15, 1984, as well as any civil service procedures that would have been available to him on that date.

(C) Upon request, permit Gary Maxwell and any other bargaining unit employee representation by the exclusive bargaining representative in any investigatory interview during which the employer is considering the imposition of discipline against the employer.

(D) Post, in conspicuous places on the employer's premises in Omak, Washington, Okanogan, Washington, and where notices to all employees are usually posted, copies of the notice attached hereto and marked as "Appendix". Such notices shall, after being duly signed by an authorized representative of Okanogan County, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the county to ensure that said notices are not removed, altered, defaced or covered by other material.

(E) Notify the Executive Director of the Commission, in writing, within thirty (30) days following the date of this order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by the preceding paragraph.

DATED at Spokane, Washington, this 6TH day of December, 1985.

ISSUED at Olympia, Washington, this 11th day of December, 1985.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

J. Martin Smith

J. MARTIN SMITH, Examiner

This Order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

APPENDIX A

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF RCW 41.56, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain or coerce public employees in the exercise of their rights secured by RCW 41.56.040, including the right to have union representation at investigatory interviews, once a timely request has been made by the employee.

WE WILL NOT give effect to the discharge action taken against employee Gary Maxwell which occurred August 15, 1984 and August 22, 1984.

WE WILL reinstate employee Gary Maxwell to his former position or a substantially similar position and make him whole for loss of pay and benefits he may have suffered because of his unlawful discharge after August 22, 1984.

WE WILL allow employee Gary Maxwell the use of the Board of Review procedure as in effect August 15, 1984, in the event the employer chooses to consider discipline or discharge of Gary Maxwell based upon any conduct occurring before August 15, 1984.

WE WILL allow, upon request, union representation at any investigatory or disciplinary meetings or interviews held with employee Gary Maxwell, as well as other employees, so long as the purpose of such meeting or interview is to consider or to actually impose discipline against such employee.

OKANOGAN COUNTY

By: _____
AUTHORIZED REPRESENTATIVE

Dated: _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone (206) 753-3444.