STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF WARREN,
Respondent-Public Employer, Case No. C02 C-060

-and-

WARREN POLICE OFFICERS ASSOCIATION,
Charging Party-Labor Organization,

_____/

APPEARANCES:

Peter P. Sudnick, Esq., for the Charging Party

Howard L. Shifman, Esq., for the Respondent

DECISION AND ORDER

On July 25, 2003, Administrative Law Judge Shlomo Sperka issued his Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chair

_____
Maris Stella Swift, Commission Member

_____
Harry W. Bishop, Commission Member

Dated:_____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF WARREN,
Respondent,

- and - Case No. C02 C-060

WARREN POLICE OFFICERS ASSOCIATION,
Charging Party.
_____/

APPEARANCES:

Peter P. Sudnick, Esq., for the Charging Party

Howard L. Shifman, Esq., for the Respondent.

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10) this matter came on for hearing in Detroit, Michigan on February 10, 2003, before Shlomo Sperka, Administrative Law Judge for the Michigan Employment Relations Commission. These proceedings were based upon unfair labor practice charges filed by Warren Police Officers Association, hereinafter sometimes referred to as Charging Party or the Union, alleging that the City of Warren, hereinafter sometimes referred to as Respondent or the Employer, has violated Section 10 of PERA. Based upon the entire record, including briefs filed by the parties on or about May 13 and June 10, 2003, the undersigned makes the following findings of fact and conclusions of law, and issues the following recommended order, pursuant to Section 16(b) of PERA:

The Charges:

The charges allege a violation by the Employer of rights under NLRB v Weingarten, 429 US 251(1976) by a denial of Union representation to Officer Dale Van Horn, during an investigatory interview on or about Tuesday, March 5, 2002.

Facts:

The Charging Party represents a unit of non-supervisory police officers of the Employer's police department. Dale Van Horn was hired by the Employer as a police officer on January 21, 2001. Prior to that, he had worked in the Romulus Police Department for five (5) years and for the Bangor Police Department for nine (9) months after attending police academy. He completed his probation in January 2001.

In early 2002, the Employer began an investigation of an alleged theft within the Department. This investigation was based on a complaint by a citizen who reported that on October 23, 2001, she had turned in a wallet, which she found, to the Employer's police department. She had reported that there was approximately $400.00 cash in the wallet. She returned to the police department after thirty (30) days, again after sixty (60) days, and a third time after ninety (90) days, and was unable to determine whether the wallet had been claimed or its status. She complained to the office of the Mayor, and an investigation was launched by the Police Department. The Department was unable to locate the wallet or any record of its receipt. The investigation revealed that on the date in question, Officer Van Horn was assigned to the police desk with Officer Cliff Narlock. Because police officers were involved, the Department's Internal Affairs Department conducted an investigation which began with interviews of both of the officers. Based on

the citizen's physical description of the officer who received the wallet, the Department focused its investigation primarily on Officer Narlock.

The investigation had two parts, that by Internal Affairs, and thereafter a criminal investigation by the Detective Bureau. Different departmental personnel conducted these investigations and the interviews. Van Horn and Narlock were interviewed separately. Internal Affairs notified Van Horn of his interviews. Two were conducted. Van Horn contacted Union officers who attended each of these interviews. By the second interview, both the Union and Van Horn knew that Narlock was the focus of the investigation. After the two interviews by the Internal Affairs Section, the Department turned the matter over to its Detective Bureau for a criminal investigation. No formal termination was announced of the Internal Affairs investigation, but Department employees generally, and Van Horn individually, knew that Narlock was the primary suspect.

The issue in this case relates to the interview conducted by the Detective Bureau on March 5, 2002. When Officer Van Horn reported for duty at 11:00 p.m., he was told by the Watch Commander to report upstairs for another interview. He asked the Watch Commander whether he would need a Union representative. The Watch Commander, a Lieutenant, remarked, "If I was going upstairs I would." However, Officer Van Horn did not call a Union Steward but reported to the meeting. In the Detective Bureau office he found Lieutenant Randall Willms and Captain Roger Barnett. Lieutenant Willms conducted the interview of Van Horn, which was tape-recorded. The transcript and original tape were placed in the record. All three witnesses agree that a brief conversation took place before the tape recorder was turned on. It is the substance of this

conversation which is the crux of the first issue in this matter. Van Horn testified that during this brief conversation he requested Union representation and the request was denied. Willms testified that he did not recall Van Horn making any such request. In any event, had there been a request, he testified, it would have been refused because this was a criminal investigation in which Van Horn was only a witness and not a suspect so that, both under the contract and the law, there was no right to Union representation. Barnett, in his brief direct testimony, testified only that the tape recording was an accurate statement of the interview.

On the tape recording, Lieutenant Willms made a short statement, at the opening of the interview, summarizing the earlier off-the-record discussion. According to the tape recording, and his testimony, Willms told Van Horn this was a criminal investigation involving the incident of the wallet turned in on October 23, 2001, that the wallet is missing, that Van Horn is not a suspect and only a witness, and the questions would be asked only to help determine what happened to the wallet. He was then asked, "Do you have any questions up to this point," and he answered, "Not at this time." From the statement by Willms, it is not entirely clear whether he was summarizing what he had stated before the tape recorder was turned on or first stated that this was a criminal investigation in his first statement on the tape recorder. According to Van Horn's testimony, this was stated on the record and not in the preliminary conversation.

The testimony described to this point relates to the issue of whether Officer Van Horn asked for Union representation. The balance of the testimony related to the content and context of the interview, and the second issue in this case, whether Officer Van Horn could reasonably have believed that this interview carried any threat of discipline to him.

The interview itself lasted less than ten (10) minutes. The bulk of the questions related to the events of the night of October 23, 2001, and any recollection that Van Horn might have of his desk assignment the evening. He had no recollection of anyone turning in a wallet or of any other events of that night shift. Towards the end of the interview, the following exchange took place.

Q. Did you steal the wallet?

A. [by Van Horn] No, I did not.

Q. Did you take the cash?

A. No, I did not.

Q. Do you know where the cash is at?

A. No, I do not.

Q. Are you willing to take a polygraph test?

A. Yes, I would.

Q. If I can set one up this week?

A. Yes, I would take one.

Q. You would take one?

A. Yes, I would.

Q. Again, they would ask you pretty similar questions that I did, you know, I mean, do you know where the money's at?

A. Mm-hmm.

Q. All right. Is there anything you need to tell me or anything you want to tell me either related to this incident or otherwise or anything I need to know to help me in this case?

A. No.

Cpt. This isn't the first time you've been spoken to regarding this incident I've gathered.

A. No, this is not.

Cpt. O.K. I guess that's it. I mean the interview's just about over and I guess the last question that we have here is then in your thoughts and consideration over this whole incident or whatever, is there anything that you think that we need to know about or should know as a police officer or employee of this department?

A. I don't know anything.

Cpt. O.K.

By contrast, the interview of Officer Narlock by the Detective Bureau took place a day later. At this time, Narlock had been advised that he was a suspect in the criminal investigation. Present with him was a Union attorney, his personal attorney, and a representative of the Union. The interview began with a reading of Miranda rights and other preliminaries relevant to a criminal suspect. The questions included questions such as placed to Van Horn, "Did you take the cash? Do you know where the cash is?" etc. A warrant was issued on April 1, 2001 against Officer Narlock. No grievance was filed by Officer Van Horn over the denial of union representation during the third interview.

Officer Van Horn testified that at the time of the first interview in January, he knew that a citizen complaint had been filed but did not know against which officer. At the time of his second interview by Internal Affairs, he was aware that Narlock was the suspect. A month later was the Detective Bureau interview. He also testified, on cross-examination, that Willms and Barnett told him that this was a criminal investigation and that he was only a witness. He knew that as a witness he could interrupt the interview at any time or decline to answer questions, or ask for representation. He did not do so because he wanted to be cooperative with the Department and, since he knew nothing

about the incident, there was no harm in his being there. When he was asked if he took the wallet, he also understood that he could ask for an attorney but voluntarily decided not to.

Discussion and Conclusions:

As both parties recognized, rights under the so-called Weingarten case, as adopted by the Commission in University of Michigan, 1977 MERC Lab Op 496 depend on certain elements. One is that the employee must request representation. A second is that representation is only a right when the employee has "a reasonable belief" that the investigatory interview may lead to discipline, City of Troy, 1989 MERC Lab Op 291, 307; City of Wyoming, 1983 MERC Lab Op 1024, 1029. The two questions posed by this case are (1) whether Officer Van Horn actually requested Union representation and (2) whether he held a reasonable belief that the investigation might result in discipline.

The first of these issues presents a credibility conflict. Officer Van Horn contends that before the interview began and the tape recorder was turned on, he made such a request. Lieutenant Willms testified that he could not recall any such request by Van Horn.

Where a credibility conflict is presented, the finder of fact, lacking clear direct evidence of what occurred, must search the record to see what conclusions the record will support by inference or indirect reasoning. The Charging Party has the burden of proof, but the conclusion should be supported by the record as a whole. In this case, three (3) persons were present. Captain Barnett testified only that the tape recording was accurate. He did not speak to this issue directly. The Charging Party argues that Lieutenant Willms has not fully denied Van Horn's testimony, but simply testified that he did not remember.

However, a close reading of the record indicates a stronger statement. His testimony that he has no recollection of any such request by Van Horn is not the same as a direct statement that no request was made. However, he stated very specifically on the record, "I do not recall. I don't believe he ever, ever, ever asked for a Union rep." This is sufficient to present a conflict in the evidence.

Other facts support inferences in different directions. Van Horn asked the Watch Lieutenant about Union representation and the Lieutenant told him he thought it would be appropriate. Thus, as Van Horn headed to the meeting, this question was on his mind. Willms testified that when the tape recorder was turned on, he summarized the prior discussion and, "We basically reiterated everything on tape that we had mentioned off the record." This summary makes no reference to either a request by Van Horn or a denial of representation. Van Horn was not asked about the accuracy of the summary although his answer implies that he disputes the accuracy of this testimony. After the brief introduction, Willms asked Van Horn if he had any other questions. Van Horn said he had none. This would have been an opportunity for recording any exchange about Union representation that was omitted from the summary. The Union brief argues that Willms may have omitted this part of the off-the-record discussion because, in his opinion, it was irrelevant to the criminal investigation. This is not an unreasonable suggestion, but Willms testified that he summarized the entire off-the-record discussion. This direct testimony is stronger than the proposed inference.

The Employer argues that Van Horn's testimony is not credible because he showed some confusion as to the relevant events. His testimony contains conflicts as to whether he approached the Union to attend the first two (2) interviews, or whether the

Employer arranged for Union representation at the Internal Affairs interviews. The Employer also argues that no grievance was ever filed by Van Horn regarding a denial of representation. This is significant because there is not just a statutory right, but an additional contract right. Article 7b of the contract states that in all cases of disciplinary proceedings, the employee to be interrogated may have union representation and "In all cases the employer shall advise the employee of his right to have a union representative present." This is a positive duty to advise, not part of Weingarten.

Section 7 (1) (d) covers criminal proceedings and requires that at any interrogation a representative and/or counsel of the employee's choosing shall be present. It also states that the interrogation will terminate at the request of the employee or his representative. Both Willms and Barnett testified that had Van Horn made any statement or given any response which implicated either criminal or disciplinary wrongdoing, they would have terminated the interview and applied the appropriate Contract provision. Probably, as detectives, they were concerned that improper interrogation might ultimately ruin any future prosecution. Also, Lieutenant Willms would have no reason to deny Van Horn's testimony of the refusal of union representation since he believed that was the proper procedure. He testified that had there been such a request he would have denied it.

Despite these conflicting inferences, the context suggests a conclusion as to this point. It appears to the undersigned that the Employer was aware of the obligations of the Contract. At the two Internal Affairs interviews, Union representation was provided. At the Narlock interview a day after Van Horn's, the Detective Bureau made elaborate arrangements with two attorneys and a Union representative present there with the officer

who was the suspect. Both Van Horn and Willms agree that at the beginning of the interview, Willms announced that this was a criminal investigation and that Van Horn was not a suspect. This supports Willms' testimony that his summary covered the entire off-the-record discussion and most consistent with what took place, by comparison, and contrast at the other interviews. If Van Horn or the Union felt there was a violation, no grievance was filed. Although a charge was filed, Willms' testimony does not claim to have given the notice required by Article 7(D), yet no grievance was filed. On the credibility issue, the undersigned finds that the record most closely supports the conclusion that, whatever Van Horn may have been thinking after his brief conversation with the Watch Lieutenant, when he entered the Detective Bureau, he was immediately told by the interviewers that this was a criminal investigation in which he was not a suspect, but was a witness, and the interrogation proceeded on that basis. This is consistent with the physical evidence of the tape recording and I credit the testimony that the introductory summary on the tape recording was a full report of the off-the-record introduction. Van Horn did not recall which detective denied his request or explain why he did not mention the issue when offered the opportunity to ask questions after the summary of the off-the-record discussion. Possibly, Van Horn confused this meeting with the previous two where he requested Union representation either before the interviews or when he found the two Union representatives present at the meeting. The undersigned concludes, on the record as a whole, that the evidence does not support a finding the first element of a Weingarten violation, a request for union representation, has been proven.

Although this is sufficient to resolve the case, it is subject to exceptions so the second issue, whether Van Horn had a reasonable expectation of discipline remains. Lacking that, there would be no obligation by the Employer to grant his request. On this issue, the Charging Party stresses that the interrogation included questions about taking the money which, if a witness answered that he had, would lead to discipline. The brief also stresses that the interrogators never told the employee that his answers were voluntary, they were promising immunity, or that he could terminate the interview at any time. The Employer stresses that discipline was not being considered in any way for Van Horn, that he knew this was a criminal proceeding and he was not the suspect and, therefore, there was no reasonable basis to expect any discipline could result from these questions. However, the case law on Weingarten does not require that the employer is considering or expects to discipline the employee as long as there is some possibility. Lenox Industries v NLRB, 637 F.2d 340 106 LRRM 2607.

The facts in this case present a close question. One can argue that this is a right which should be liberally construed to affect the intent of the Act since questions were asked which could lead to discipline if answered one way. However, the employee had gone through two prior interviews with the same questions being asked. Also, while we need not expect the police officer to know his Collective Bargaining Agreement by heart, based on his experience and the opening statement by Willms, he knew that he was being called only as a witness in a criminal matter in which someone else was the suspect.

The Charging Party's brief cites cases showing that the Commission has held that the employee's reasonable belief is to be measured by objective standards under the totality of circumstances, City of Detroit (Human Rights Department), 2000 MERC Lab

Op 302; Quality Manufacturing Company, 195 NLRB 197 (1972). Searching for a list of "objective factors," the brief cites a State of Oregon case, Oregon AFSCME Council 75 v State of Oregon, UP-9-01 (Oregon ERB 2002) which proposes a list of objective factors. They are (1) whether the interview could lead to discipline; (2) whether the employer was in possession of any wrongdoing by the employee being interviewed; (3) the authority of the employer's representative conducting the interview to impose discipline on the employee; (4) what was communicated to the employee about the nature of the interview; (5) the knowledge of the employee about discipline imposed on other employees for similar misconduct; and (6) the circumstances surrounding the interview including formality, persons present, the time and location. The brief argues that these factors applied to the facts herein support a finding that Van Horn could reasonably believe discipline could follow.

The undersigned agrees as to elements 1, 3, 5, and part of 6. However, the other factors are not as clear. The Employer here was not "in possession of any wrongdoing" by Van Horn. On the contrary, Van Horn was told that he was not a suspect, unless he surprised both himself and the interviewers by admitting this wrongdoing. However, the formal conclusion of the investigation, the warrant against Norlock, had not been issued. As to element #4, the detectives did not use the word "witness," but they told Van Horn that he was there to help them determine what happened and that he was not the suspect. Van Horn testified that he knew that he could terminate the interview or refuse to answer the questions, but voluntarily decided not to do so. Charging Party argues that he did this because he was just past his probationary year and did not wish to upset his supervisors. Although he was not told during the interview of the differences between an internal

investigation and a criminal investigation, he testified that he did understand these differences. Van Horn testified that he believed that he could be subject to departmental discipline as a result of his responses to the criminal investigation. This is technically correct but is it a basis for a reasonable belief that discipline might follow from this particular interview. The Charging Party argues that since the warrant had not been issued for Narlock, there was a potential for discipline to Van Horn. Van Horn was generally aware, as apparently was the entire Department, that he was not a suspect. This is demonstrated from the Employer point of view, by the two interviews, one day apart, with totally different formality, applying the full criminal investigation procedure and rights to Narlock one day later. However, Van Horn would not know that at the time of his interview. The questions, "Did you take the wallet?" etc. were appropriate in the context of any criminal investigation as explained by Willms in his testimony. However, while there is no need to doubt this, it ignores the context. This was not "any" criminal investigation. The witness was also an employee. Therefore, the questions carry a different weight and implicate other rights. Willms and Barnett stressed that if Van Horn gave any answer which admitted any wrongdoing (which they did not expect), they would terminate the interview presumably to change the form of the interrogation. But this is precisely the point. Weingarten rights are designed to be in place before and during the interview, not afterwards.

The undersigned would not find it determinative that the Employer failed to expressly state a promise of immunity or assurances of voluntariness, as argued by the Charging Party, as long as the questions were about the other suspect. Although Van Horn was an experienced officer and aware of the context in which the interview was

taking place, it is not fair to assume his knowledge of trial procedure and evidence was sufficient to understand that Willms' questions were solely to protect the trial record and that he could not be implicated in any way. Although the important facts had been determined from the Employer's perspective, the employee did share the same clarity that discipline could not be reasonably anticipated. On these facts, this Weingarten prerequisite was satisfied. However, in light of the earlier finding, I find no violation occurred and the charge should be dismissed.

RECOMMENDED ORDER:

It is hereby recommended that the Commission issue an Order dismissing the charge.

Dated:_____ _____

Shlomo Sperka
Administrative Law Judge