STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF MARINE CITY (P.D.),
Public Employer- Respondent,

Case No. C02 D-096

-and-

ROBERT KLIEMAN,
Individual Charging Party.
_____/

APPEARANCES:

Plunkett & Cooney, P.C., by Larry W. Barkoff, Esq., for the Respondent

Robert Klieman, in pro per

DECISION AND ORDER

On January 10.2003, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated: _____

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on July 30, 2002, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including a post-hearing brief filed by the Respondent on September 9, 2002, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

Robert Klieman filed this charge against his Employer, the City of Marine City, on April 25, 2002. Klieman asserted that on March 18, 2002, Respondent Police Chief Rod Papin interviewed him in connection with a complaint made against Klieman by a citizen. Klieman alleged that Respondent violated Section 10(1)(a) of PERA when it refused to let Klieman talk privately with his union representative before he was forced to make a written statement.

Facts:

Klieman is a sergeant in the Marine City Police Department. He is a member of a bargaining unit represented by the Police Officers Labor Council (the Union). On March 18, 2002, Papin called Klieman

into his office. Papin told Klieman that a citizen had filed a complaint against him and a patrol officer under his supervision. Papin was angry. When Klieman asked what the complaint was, Papin took out a so-called "Garrity" form and ordered Klieman to sign it.1 After Klieman signed the form, Papin explained that a citizen had complained that the patrol officer had improperly tried to administer a breathalyzer test inside the citizen's home. Klieman told Papin that he wasn't present when the officer tried to administer the test. Klieman testified that he assumed from the fact that he had been ordered to sign a Garrity form that he might be disciplined as a result of the interview. He asked for a union representative. Papin brought Union Steward James VanderMeulen into the meeting. After hearing that a citizen had made a complaint, VanderMeulen told Papin that he wanted to talk to Klieman privately. Papin refused. Papin insisted that Klieman write and sign a statement about the incident immediately. When VanderMeulen protested, Papin said, "You are not (Klieman's) attorney." Papin then said that if Klieman left the room before writing his statement, he would be suspended. Klieman wrote out a statement. VanderMeulen read it over while he was writing it.

Klieman was not formally disciplined as a result of the breathalyzer incident. However, on April 10, 2002, Papin told Klieman that because of this incident he was being transferred to the day shift so that the patrol officer involved would no longer be under his supervision. When Klieman pointed out that shift pick was by seniority under the contract, Papin said he didn't care about the contract. The matter was resolved when the patrol officer agreed to switch shifts.

On April 15, Papin sent a letter to the citizen apologizing for incident. Papin explained that formal discipline was not possible since the department lacked a formal policy concerning the appropriate use of portable breathalyzers. However, the letter stated, "the employees involved had been separated."

The Union did not file a grievance on Klieman's behalf. However, the Union business representative told Papin that he had concerns about the way Klieman's interview had been conducted. On April 15, the Union business representative, Papin, and their lawyers met to discuss the issue. Their agreement was memorialized in a letter dated April 16. They agreed that an employee has no right to union representation if he or she is being questioned as "a witness to a situation." They agreed that the Respondent has the right to demand that the employee provide information when asked. They also agreed that at the point in the interview that Respondent's representative determines that the interview may lead to discipline of the interviewee, the interviewee would be advised that he or she has the right to union representation. According to their agreement, upon the employee's request, Respondent would then provide the employee with union representation. They also agreed that, upon request, the union representative and the employee would be given a reasonable time to consult either before or during the course of the interview.

Discussion and Conclusions of Law:

Under Section 10(1)(a) of PERA, employees represented by a bargaining agent have the right to

1 A "Garrity" form acknowledges that the signer understands that that anything the signer says will not be used against him for criminal purposes. The form Papin gave Klieman also said that his statements could be used for disciplinary or other purposes.

union representation at an investigatory interview. *Wayne-Westland Ed Assoc. v Wayne-Westland Schools*, 176 Mich App 361 (1989), *lv denied*, 433 Mich 910 (1989). Adopting the reasoning of *NLRB v Weingarten, Inc.*, 420 US 251 (1971), the Commission has held that an employee is entitled to union representation at an investigatory interview when the employee reasonably believes that the interview may lead to discipline, and invokes his right by requesting the presence of a union representative. *City of Kalamazoo*, 1996 MERC Lab Op 556; *Charter Twp of Clinton*, 1995 MERC Lab Op 415.

Klieman alleges that his *Weingarten* rights were violated when he was refused permission to speak privately with his union steward before he was forced to write a statement at his interview on March 18, 2002. I find that Klieman had a legal right to union representation at this interview because he had a reasonable belief that this interview might lead to his being disciplined. Papin told Klieman that a citizen had filed a complaint against both him and a patrol officer under his supervision. Papin then made Klieman sign a Garrity form that stated that what he was about to say could be used in a disciplinary proceeding. Papin did not tell Klieman that the purpose of the interview was to determine what the patrol officer had done, or that Klieman would not be disciplined.

In *Climax Molybdenum Co.*, 227 NLRB 1189 (1977), the National Labor Relations Board (NLRB) held that *Weingarten's* provision for union representation at investigatory interviews which may result in disciplinary action logically requires an employer to allow the employee to consult with his union representative prior to answering questions. The NLRB noted that, according to the *Weingarten* decision, an employer may be required to allow a union representative at an investigatory interview because the union representative may: (1) assist employees who may be fearful or inarticulate in relating the facts accurately; (2) use his or her knowledge to help elicit favorable facts. The NLRB concluded that both objectives can be more readily achieved when the union representative is given an opportunity to consult beforehand with the employee to learn his version of the events and gain a familiarity with the facts. The NLRB also noted that employees might be reluctant to discuss an incident fully and accurately with their union representatives in the presence of an interviewer contemplating disciplinary action. The right to representation, the NLRB held, clearly embraces the right to a prior, private, consultation. 227 NLRB at 1190.2 See also *United States Postal Service*, 303 NLRB 463 (1991), *enf'd* 969 F2d 1064 (DC Cir, 1992); *Pacific Telephone & Telegraph Co.*, 262 NLRB 1034 (1982), *enf denied on other grounds*, 711 F2d 134 (9th Cir, 1983); *RGC Mineral Sands, Inc.*, 332 NLRB No. 172 (2001)(interim decision of ALJ).

In *City of Oak Park*, 1995 MERC Lab Op 576, the Commission held that an employer did not violate PERA by insisting that an employee answer its questions during an investigatory interview without interruption from the employee's union representative. However, the employee in *City of Oak Park* was given a set of written questions on the day before the interview. He knew the purpose of the interview beforehand and had the opportunity to consult with his union representative before answering these questions. In addition, on the day of the interview, the employee and the union representative were left alone

2 The Court of Appeals refused to enforce the Board's order in *Climax* on the grounds that the employees had time to consult with their union representatives on their own time before the interview, but elected not to. *Climax Molybdenum Co, a division of Amax, inc. v NLRB*, 584 F2d 360 (1978).

together before the employer began orally questioning the employee.3 Nothing in *City of Oak Park* suggests that an employer should be permitted to require an employee to respond to its questions or make a statement at an investigatory interview without the employee's first having an opportunity to consult privately with his or her union representative. I also agree with the NLRB that an opportunity for such private discussion is an intrinsic part of the right provided by *Weingarten*. I conclude that Respondent violated Klieman's rights under Section 10(1)(a) of PERA when it refused to let him speak privately with his union steward before writing out his statement during the interview held on March 18, 2002.

As a remedy for the violation of his Weingarten rights, Klieman asks the Commission to order Respondent to remove all records of the citizen's complaint from his file and "rescind" Papin's letter to this citizen dated on April 15, 2002. In *Kraft Foods, Inc.*, 251 NLRB 598 (1980), and *Illinois Bell Telephone Co.*, 251 NLRB 932 (1980), the NLRB held that a make-whole remedy was appropriate when employees were disciplined or discharged after interviews from which union representatives were unlawfully excluded, unless the employer demonstrated that its decision to discipline or discharge the employee was not based on any information gathered at the illegal interview. In *River Valley School District*, 1980 MERC Lab Op 1107, a decision adopted by the Commission when no exceptions were filed, the administrative law judge recommended that the Commission follow this rule. However, the NLRB overruled *Kraft* and *Illinois Bell* in *Taracorp Industries*, 273 NLRB 221 (1984). The Board will not now order a make-whole remedy for a *Weingarten* violation unless the General Counsel can show that the discipline was a direct result of the employee's assertion of his *Weingarten* rights. *United States Postal Service*, 314 NLRB 227 (1994); *Massilon Hospital Assoc.*, 282 NLRB 675 (1987). See also *Barnard College*, 2002 NLRB LEXIS 564 (interim decision of the administrative law judge), issued November 14, 2002.

I find that Klieman did not establish that Respondent would not have put the citizen's complaint in his file or sent the letter of April 15 without the information provided by Klieman in his March 18 statement. I conclude, therefore, that a cease-and-desist order, along with the posting of a notice, is the appropriate remedy for the violation in this case.

I note that Respondent asserts that there is no need for any remedial order in this case because on April 15, 2002, Respondent agreed to certain procedures to safeguard the *Weingarten* rights of all bargaining unit members. It is by no means clear to me that following these procedures will guarantee that Respondent will not violate employees' rights to union representation. 4 In any case, I see no reason why the Commission should refrain from issuing a cease-and-desist order for the violation in this case.

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3 In *City of Oak Park*, the Commission adopted the reasoning of the Court in *NLRB v Southwestern Bell Telephone Co.*, 730 F2d 166 (5th Cir, 1984), holding that an employer could lawfully insist that the union representative not answer any of the questions put to the employee by the employer. In *Southwestern Bell*, however, the Court specifically noted that the employee had been allowed to consult with his union representative prior to the interview.

4 For example, it is unclear whether an employee who was being questioned as a witness, but who nevertheless reasonably feared that discipline might result from the interview, would be entitled to the presence of a union representative.

In accord with the above findings of fact and discussion and conclusions of law, I find that Respondent violated Section 10(1)(a) of PERA when it denied Robert Klieman his right to consult privately with his union representative before making a written statement in an investigatory interview conducted on March 18, 2002. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent City of Marine City (Police Department), its officers and agents, are hereby ordered to:

1. Cease and desist from denying employees the right to consult privately with a union representative before making statements or answering questions during an investigatory interview, if the employee being interviewed reasonably believes that the interview may lead to his or her being disciplined.

2. Post the attached notice to employees on Respondent's premises, including all places where notices to employees are customarily posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the City of Marine City (Police Department) has been found to have committed an unfair labor practice in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT *deny our employees the right to consult privately with a union representative before making statements or answering questions during an investigatory interview, if the employee being interviewed reasonably believes that the interview may lead to his or her being disciplined.*

CITY OF MARINE CITY (POLICE DEPARTMENT)

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission/Bureau of Employment Relations, Cadillac Place, 3026 W. Grand Blvd., Suite 2-750, PO Box 02988, Detroit, MI 48202-2988.