STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

KENT COUNTY,
Public Employer-Respondent,

Case No. C05 H-193

-and-

UAW LOCAL 2600,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Thomas L. Drenth, Esq., for Respondent

Virginia Smith, President, UAW Local 2600, for Charging Party

DECISION AND ORDER

On January 17, 2007, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order finding that Respondent, Kent County (Employer), violated Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, by denying an employee Union representation during an investigatory interview that resulted in the employee's termination. The ALJ recommended that we order Respondent to cease and desist from interfering with, restraining, or coercing employees in the exercise of rights protected under PERA and to take certain affirmative action including the reinstatement of the discharged employee. The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA.

On February 9, 2007, Respondent filed exceptions to the ALJ's Decision and Recommended Order. After receiving an extension of time in which to file, Charging Party UAW Local 2600 (Union) filed a brief in support of the ALJ's Decision and Recommended Order on March 22, 2007.

In its exceptions, Respondent alleges that the ALJ erred in finding that the Employer violated the employee's *Weingarten*[1] rights and in finding that the employee

[1] See *NLRB* v *J. Weingarten, Inc*, 420 US 251; 95 S Ct 959; 43 L Ed 2d 171 (1975), which held that an employee covered by the National Labor Relations Act has the right, upon request, to the

was unlawfully fired as a direct result of the interrogation. Respondent also excepts to the remedy of reinstatement recommended by the ALJ and asserts that the ALJ erred in finding that the parties had not agreed to defer the merits of the discharge to arbitration. We have reviewed Respondent's exceptions and find them to be without merit.

Factual Summary:

We adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order; we will not repeat them here, except as necessary. The Employer required an employee in its health department, Nancy Wilson, to meet with two supervisory employees, Kate D'Amour and Becky Ginbey,[2] on August 9, 2005. The meeting was an investigatory interview prompted by a complaint against Wilson from an agency client. During the 30-minute meeting, Wilson, a member of the bargaining unit represented by Charging Party, repeatedly asked if she needed or could have union representation. She was told the meeting was merely a fact finding meeting, and she did not need a union representative. The meeting ended when Ginbey observed that Wilson's answers to the supervisors' questions "raise a red flag." She explained that they were not going to discuss discipline at that meeting, thus the discussion would take place on another occasion. When the meeting resumed on August 12, 2005, the Employer informed Wilson and her union representatives that she was being discharged. Wilson's discharge was based on information she provided to the Employer at the August 9 meeting when she was without union representation. Respondent did not offer any evidence to establish that Wilson's discharge was for cause and its only witness, D'Amour, testified that she did not believe Wilson should have been terminated.

According to D'Amour, she would have stopped the interrogation if Wilson had specifically said, "I want my union rep," rather than merely asking, "Do I need my union rep?" Moreover, D'Amour expressed the belief that employees do not need union representation at fact finding interviews. It is the Union's position that in the past, such interviews have been conducted without allowing the employees who were interrogated to have union representation. According to Charging Party, this practice by the Employer has been a source of contention between the Union and the Employer.

Discussion and Conclusions of Law:

The right to union representation at an investigatory interview is based on the right of public employees under Section 9 "to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for . . . mutual aid and protection." First, the act of requesting union assistance is, in and of itself, engaging in concerted activity. *Wayne-Westland Cmty Sch v Wayne-Westland Ed Assn,* 176 Mich App 361 (1989). Second, the presence of a union representative is essential to aid the

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presence of a union representative at an investigatory interview when the employee reasonably believes that the interview may lead to discipline.

[2] The transcript has the spelling of the second supervisor's name as 'Gimby,' while the Employer's brief states that it is 'Ginbey,' which was the name used by the ALJ and which will be used by the Commission.

employee in answering the questions asked by the employer and in presenting facts. *City of Oak Park*, 1995 MERC Lab Op 576. The presence of a union representative is meant to provide the employee with a person who will act as an advocate on the employee's behalf. The employee's right to representation where the employee reasonably believes that the interview may lead to disciplinary action being taken against him or her was set forth in *NLRB v J. Weingarten Inc*, 420 US 251 (1975), and the doctrine was adopted by this Commission[3] in *University of Michigan*, 1977 MERC Lab Op 496.

When a public employee is required to submit to an investigatory interview that the employee reasonably believes may result in discipline, the employee is entitled to union representation upon request. See *City of Kalamazoo*, 1996 MERC Lab Op 556; *Clinton Charter Twp*, 1995 MERC Lab Op 415 (no exceptions). Reasonable belief is measured by objective standards under all the circumstances of the case. See *Quality Mfg Co*, 195 NLRB 197, 198 (1972). See also *Weingarten*, at 258; *City of Allen Park*, 16 MPER 39 (no exceptions). The right to union representation is triggered by the employee's request. *City of Marine City (Police Dep't)*, 2002 MERC Lab Op 219, 15 MPER 33052 (no exceptions). No particular language is required for the request; the employee must merely put the employer on notice that representation is desired. See *e.g., Montgomery Ward & Co*, 273 NLRB 1226, 1227 (1984); *Bodolay Packaging Machinery, Inc.*, 263 NLRB 320 (1982); *Southwestern Bell Telephone Co*, 227 NLRB 1223 (1977). An employee's query as to whether union representation is needed is sufficient to constitute a request for union representation as it puts the employer on notice that union representation is desired. *NLRB v Illinois Bell Telephone Co*, 674 F2d 618, 621 (CA 7, 1982). See also *NLRB v New Jersey Bell Telephone Co*, 936 F2d 144, 149 -150 (CA 3, 1991)

In its exceptions, Respondent alleges that the ALJ erred in finding that the Employer violated the employee's *Weingarten* rights. The Employer contends that Wilson had no reasonable belief that the August 9, 2005 meeting would result in disciplinary action. Relying on *City of Detroit (Human Rights Dep't)*, 2000 MERC Lab Op 302; 14 MPER 32000 (2000), Respondent argues that Wilson had no reasonable expectation that the meeting could result in discipline because she was told at the beginning of the meeting that she had done nothing wrong. Respondent's reliance on *City of Detroit (Human Rights Dep't)* is misplaced; the employee in that case was discharged for insubordination when she refused to report for a meeting without union representation after assurances that such representation was not needed. In the case before us, Wilson participated in the meeting as directed by the Employer. Had she refused to participate because she was not allowed representation, the reasonableness of that refusal, and the reasonableness of her belief that she might be disciplined would be at issue. While the reasonableness of Wilson's belief that she could be subject to discipline is not at issue here, it is apparent that such a belief was objectively reasonable.

3 Although not controlling, we often look towards federal precedent developed under the National Labor Relations Act (NLRA) for guidance in interpreting PERA. *Oakland Co*, 2001 MERC Lab Op 385, 389. See also *Gibraltar Sch Dist v Gibraltar MESPA-Transp*, 443 Mich 326, 335; 505 NW2d 214 (1993); *St. Clair Intermediate Sch Dist v Intermediate Educ Ass'n*, 458 Mich 540, 559; 581 NW2d 707 (1998).

Interrogation by two supervisors regarding a client complaint would cause the average reasonable employee in those circumstances to fear that discipline was a possibility.

In this case, unlike the employee in *City of Detroit (Human Rights Dep't),* Wilson participated in the investigatory interview; where she made statements that the Employer found incriminating. The Employer's sole witness at the hearing expressed her belief that union representation was not necessary at a "fact-finding" interview of the nature of the one to which Wilson was subjected. However, that is precisely the type of meeting to which employees' *Weingarten* rights attach. Where, as in this case, the purpose of the interview is to determine whether the employee has engaged in a violation of the employer's rules or participated in other conduct for which discipline may be merited, the employer is required to honor employee requests for union representation. The employer's failure to do so is a violation of Section 10(1)(a) of PERA. In *Weingarten,* the Supreme Court explained that the denial of a request for union representation at an investigatory interview is a serious violation of employees' rights to engage in concerted activity. There, the Court stated:

> This is true even though the employee alone may have an immediate stake in the outcome; he seeks 'aid or protection' against a perceived threat to his employment security. The union representative whose participation he 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.
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> *NLRB v J Weingarten, Inc* 420 US 251, 260-261, 95 SCt 959, 965 (U.S. 1975)

The Respondent also excepts to the ALJ's finding that Wilson was unlawfully fired as a direct result of the unlawful interrogation. We agree with the ALJ that Wilson was fired as the result of statements that she made during the August 9, 2005 interview. Despite Wilson's repeated requests for union representation, the interview did not end until Ginbey concluded that Wilson's statements indicated that she had committed a major violation of the Employer's rules. Although the supervisors ceased questioning Wilson at that point, it is evident that her subsequent termination was directly linked to the incriminating statements that she had made at the interview while unrepresented. The Employer has not offered an alternate explanation or rationale for Wilson's termination beyond her disclosures made during the initial meeting. Accordingly, we conclude that her discharge was motivated by the information unlawfully obtained during the meeting. By the time that Ginbey decided to end the interview, Wilson had already been harmed by the Employer's denial of her right to union representation. It is evident that it was these statements, made by Wilson without the benefit of union representation, that served as the basis for the Employer's conclusion that discipline was warranted; therefore, these statements resulted in Wilson's discharge. As the ALJ pointed out, the Employer failed to offer evidence of any other facts supporting its finding that Wilson should be discharged.

Respondent also excepts to the remedy of reinstatement recommended by the ALJ and asserts that the ALJ erred in finding that that the parties had not agreed to defer the merits of the discharge to arbitration. In the charge, the Union contends that Wilson's discharge was unlawful and that, if Wilson had been allowed to have union representation at the August 9 interview, she might not have revealed the information that was subsequently used to terminate her employment. Inasmuch as the charge seeks review of the lawfulness of the discharge, we cannot conclude that the Charging Party intended that we defer consideration of that issue or limit any remedy to the remedy awarded in arbitration. Indeed, while Respondent contends the ALJ erred in finding that the parties had not agreed to defer the merits of the discharge to arbitration, Respondent fails to offer evidence of such agreement.

As the ALJ explained in his Decision and Recommended Order, the National Labor Relations Board (NLRB or Board) has changed its position on whether make-whole relief is appropriate for a violation of an employee's right to union representation during an investigatory interview. Initially, the NLRB adopted a burden shifting approach with respect to make-whole remedies when an employee is deprived of his *Weingarten* rights. Under the NLRB's original approach to the issue, the general counsel established a prima facie case for a make-whole remedy by showing that an employee deprived of *Weingarten* rights was disciplined or discharged based on the conduct that was the subject of the unlawful interview. The burden then shifted to the employer to show that the decision to discipline or discharge the employee was not based on information obtained at the illegal interview. If the employer met that burden, the Board would limit relief to a cease and desist order. See *Illinois Bell Telephone Co*, 251 NLRB 932, 934-935 (1980); *Kraft Foods, Inc*, 251 NLRB 598 (1980). However, the Board rejected this approach four years later in *Taracorp Inc*, 273 NLRB 221, 222, (1984), when it concluded that it would no longer grant make-whole relief for *Weingarten* violations and expressly overruled *Kraft Foods*, and its progeny.

Respondent urges that we follow the Board's lead in *Taracorp Inc.* While federal precedent is often given great weight in interpreting PERA, at least where PERA's language is identical to that of the NLRA, this Commission is not bound to follow its "every turn and twist," *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 537; *Marquette Co Health Dep't*, 1993 MERC Lab Op 901, 906. Indeed, there are several issues over which PERA and the NLRA differ or where MERC has not followed Board changes in position. The chief example of that is the right of private sector employees to strike, which affects many of the policies adopted by the NLRB, but is not recognized under PERA. *Rockwell v Crestwood Bd of Ed*, 393 Mich 616 (1975). See also e.g. *West Branch-Rose City Ed Assn*, 17 MPER 25 (2004) (The Commission noted differences in the NLRB's position on union implementation of window periods for employees wishing to end their union membership.) See also *Seventeenth District Court (Redford Twp)*, 19 MPER 88 (2006) and *Michigan Technological Univ*, 20 MPER 36 (2007) (no exceptions). (Both cases discuss the Commission's continued application of the *Midwest Piping/Shea Chemical*[4] principle of employer neutrality after the Board expressly overruled *Shea Chemical*, in *RCA Del Caribe*, 262 NLRB 963 (1982).)

[4] *Midwest Piping & Supply Co*, 63 NLRB 1060 (1945); *Shea Chemical Corp*, 121 NLRB 1027 (1958),

In this case, we find persuasive the rationale given by the NLRB in *Illinois Bell Telephone Co*, for a make-whole remedy in certain cases where there have been *Weingarten* violations. Like the Board, we have the authority to restore the status quo ante where necessary to undo the effects of unfair labor practices in violation of PERA. In this case, we find the employer's actions to be particularly egregious. We agree with the ALJ that D'Amour and Ginbey were well aware of their obligation under *Weingarten* to allow union representation upon request. Since the sole purpose of the August 9 meeting was to investigate a client complaint against Wilson, D'Amour and Ginbey were undoubtedly aware that the results of the meeting could lead to disciplinary action. Nevertheless, they assured Wilson that she had done nothing wrong and did not need union representation. Wilson's repeated inquiries as to her need for union representation put D'Amour and Ginbey on notice that she desired such representation. *NLRB v Illinois Bell Telephone Co*, 674 F2d 618, 621 (CA 7, 1982); *NLRB v New Jersey Bell Telephone Co*, 936 F.2d 144, 149-150 (CA 3, 1991). By repeatedly and falsely assuring Wilson that union representation was unnecessary, D'Amour and Ginbey put Wilson in the untenable position of choosing between submitting to the investigatory interview without union representation or leaving the meeting and risking a charge of insubordination. It was only after Wilson made statements that Ginbey considered incriminating that the Employer ended the interview and scheduled it for another occasion in which Wilson was permitted to have union representation. Thus, we agree with the ALJ that in this case, a cease and desist order, while necessary, is inadequate. For the reasons stated above and in the ALJ's Decision and Recommended Order, we find that Wilson's reinstatement to employment is an appropriate remedy.

The Commission therefore affirms the ALJ's decision and enters the following Order.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

KENT COUNTY,
Respondent-Public Employer,

-and- Case No. C05 H-193

UAW LOCAL 2600,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Thomas L. Drenth, for the Respondent

Merry Smith, for the Charging Party

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 April 4, 2006, before Roy L. Roulhac and briefed before Doyle O'Connor, Administrative Law Judges (ALJ) for the Michigan Employment Relations Commission[5]. Based upon the entire record, including the pleadings, transcript and post-hearing briefs filed by the parties on or before May 22, 2006, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On August 29, 2005, UAW Local 2600 (Union) filed the charge in this matter, which asserts that on or about August 9, 2005, Kent County (Employer or County) denied an employee, Nancy Wilson, the right to have a Union representative present as requested by her during an investigatory interview. It is asserted that as a result of the denial of Union representation, Wilson was discharged from employment.

Findings of Fact:

UAW Local 2600 represents a unit of non-supervisory employees of Kent County, including those employed at the Kent County Department of Health. Nancy Wilson was

[5] Pursuant to Commission Rule 423.174, the parties were notified on October 24, 2006, that this matter was reassigned to Administrative Law Judge O'Connor, following the retirement of Administrative Law Judge Roulhac.

employed in the health department for fourteen years until her discharge from employment on August 12, 2005.

On August 9, 2005, Nancy Wilson was summoned to a meeting by her immediate supervisor, Kate D'Amour. The meeting was to include a second supervisor, Becky Ginbey[6]. The purpose of the meeting was to investigate a complaint made against Wilson by an agency client. Wilson testified that she asked three times if she was in trouble, and requested that if there was any chance she could be disciplined, the meeting should be stopped so that she could have a Union representative present. D'Amour testified that Wilson said that she was "uncomfortable" with the meeting and had asked if she "should have a Union rep" and that "if there's going to be trouble, do I need a Union Steward? ". D'Amour brought Wilson's request to the attention of Ginbey. Regardless of the precise phrasing of the request by Wilson, Ginbey assured Wilson that she did not need a Union representative, as it was just a 'fact-finding' meeting. Ginbey proceeded to question Wilson for about thirty minutes.

In the course of the questioning, certain answers by Wilson led Ginbey to stop the meeting and announce that the answers "raise a red flag . . . we are not going to talk about discipline today." The meeting was reconvened with Union representation on August 12, 2005. Wilson's termination notice was given to the Union on August 12, based on admissions allegedly made by Wilson in the interview on August 9.

D'Amour had conducted such 'fact-finding' meetings regarding client complaints previously, and those meetings sometimes resulted in discipline. It was unusual for D'Amour to take along an additional supervisor for such an interview, but she did so because of the nature of the client's complaint. D'Amour asserted that she would have stopped the interrogation if Wilson had specifically said "I want my Union rep" rather than merely asking "Do I need my Union rep?."[7] There had been prior controversy between the Union and the County, with the Union asserting that the Employer had improperly conducted such interviews in the past without allowing employees Union representation. D'Amour testified that she did not believe employees were entitled to Union representation at such "fact-finding" interviews.

Wilson was terminated as a result of the information she gave during the August 9th interview. No evidence was introduced to substantiate the basis for the termination of Wilson, other than the unequivocal testimony by D'Amour, the Employer's only witness, that she did not believe Wilson should have been terminated.

Discussion and Conclusions of Law:

An employee has the right, upon request, to the presence of a union representative at an investigatory interview when the employee reasonably believes that the interview may lead to

[6] The transcript has the spelling of the second supervisor's name as 'Gimby', while the Employer's brief has it as 'Ginbey', which will be utilized here.

[7] The two Union stewards present at the meeting of August 12, Scott Dalrymple and William Fekete, testified without contradiction that at that meeting, D'Amour acknowledged that Wilson had requested a Union representative at the meeting of August 9.

discipline. This entitlement was first recognized in a case arising under the National Labor Relations Act, 29 USC 151, *et seq*, by the United States Supreme Court in *NLRB v Weingarten, Inc*. 420 US 251 (1975). In *University of Michigan*, 1977 MERC Lab Op 496, the Commission chose to follow that precedent, and applied the so-called *Weingarten* doctrine to employees covered by PERA.[8] The right to union representation, upon request, in an investigatory interview by the employer has been for nearly thirty years, and remains, the established law under PERA. *Grand Haven Board of Light and Power*, 18 MPER 80 (2005).

The purpose of recognizing such a right is two-fold. First, the very act of requesting assistance is a fundamental exercise of the right to engage in concerted activity. *University of Michigan*, *supra*. Second, the presence of a union representative is necessary to aid the presumptively less articulate, and more timid, individual employee in presenting the facts to the employer. The Union representative is expected to play an active advocacy role, not merely serving as a witness, and is entitled to consult privately with the individual employee. See, *Barnard College*, 340 NLRB No. 106 (2003); *U.S. Postal Serv*., 288 NLRB 864 (1988). A fact-finding interview of the sort in dispute here is precisely the circumstance where *Weingarten* anticipates Union representation.

I find that, Wilson reasonably, and accurately, feared the possibility of discipline arising from the August 9, 2006 interrogation by two supervisors. The meeting was unprecedented, in her experience, as it involved two supervisors. She repeatedly sought, and was denied, Union representation. It matters little whether her words were 'I want a Union representative' or 'Do I need a Union representative?'. Either phrasing is sufficient to obligate the Employer to comply with the *Weingarten* rule.[9] The individual supervisors were aware of the obligation to allow for Union representation upon request.[10] The Employer representatives, who knew the purpose of the meeting was to investigate a client complaint and that such an investigation could lead to discipline, misled Wilson, expressly telling her she did not need a Union representative. They then interrogated her for approximately thirty minutes, and fired her for admissions allegedly made during that interview. By denying Wilson's request for a union representative during this interrogation, the County has violated the Act. A cease and desist order and the posting of the requisite notice will be recommended. The question remains whether or not additional relief is necessary to effectuate the purposes of the Act.

Had Wilson refused to take part in the meeting due to the denial of her request for a Union representative, she would have been insubordinate, but under PERA she would have been

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[8] Where the state and federal statutes have identical language, the federal precedent is given great weight; however, the Commission is not bound to follow Board precedent and must utilize its own specialized expertise, particularly in light of the differences between PERA and the NLRA, and especially where the Commission has an existing body of law. *City of Grand Rapids*, ___MPER___(Dec 12, 2006); *Rockwell v Bd of Ed of Sch Dist of Crestwood*, 393 Mich 616, (1975)

[9] See, e.g., *NLRB v New Jersey Bell Tel Co*, 936 F2d 144 (3rd Cir 1991), *enforcing* 300 NLRB 42 (1990), finding that employee's question at the outset of an investigatory interview as to whether or not she should have a Union representative was sufficient to trigger *Weingarten* rights.

[10] It is notable that the supervisors were sufficiently aware of the *Weingarten* obligations that they would have stopped the interrogation if Wilson had used the magic words "I want a Union representative", but were apparently not trained to understand that a similar inquiry as to whether a union representative was needed equally invoked the *Wiengarten* protections.

protected from discipline and would be ordered reinstated with a make-whole remedy.[11] Although she was not fired for such insubordination, that finding cannot end the inquiry, without encouraging such self-help insubordination as the means for individual employees to test the applicability of *Weingarten* to their situation.

In his recommended decision in *University of Michigan, supra,* Administrative Law Judge Joseph B. Bixler opined that in some *Weingarten* rule violation situations the mere issuance of a cease and desist order would be "rather an empty cup or hand-slapping matter". The Commission found in that instance that the parties had expressly agreed at the hearing to defer the merits of the discharge to arbitration, and, therefore, limited relief to a cease and desist order.[12] No such agreement of the parties is present in this case.

In *Kraft Foods, Inc*, 252 NLRB 598 (1980), and in *Illinois Bell Tel Co,* 251 NLRB 932 (1980), the NLRB held that a make whole remedy was appropriate where employees were disciplined after improper interviews, unless the employer affirmatively showed that its decision to discipline was not based on information gathered at the illegal interviews. In *River Valley Schools*, 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 the *Kraft Food/ Illinois Bell* rule, adopting the NLRB's rationale from *Illinois Bell*, as follows:

> We think that the answer to the question is a simple one. The Board has the authority to restore the status quo ante where restoration is necessary to "undo the effects of violations of the Act," and where the remedy is "well designed to promote the policies of the Act." Here, Respondent's unlawful interview of Hatfield resulted in a confession which Respondent then used as the basis for discharging Hatfield. Accordingly, we think it appropriate, in order to rectify the harm which resulted from the unlawful interview, to grant the remedy of reinstatement and backpay. In so doing we hold that, where the general counsel shows that an unlawful interview has occurred and that the employee was disciplined or discharged for conduct which was the subject of the interview, the burden then shifts to the employer to show that its decision to discipline or discharge was not based on information which it obtained at the interview.

In *River Valley Schools* itself, relief was limited to a cease and desist order, based on the employer's affirmative showing that the discipline would have been imposed regardless of the interrogation. 1980 MERC Lab Op at 1114.

In *Marine City (P.D.)*, 16 MPER 18 (2003), a decision adopted by the Commission when no exceptions were filed, the administrative law judge noted that, subsequent to the *River Valley Schools* decision, the NLRB had overturned *Kraft Foods/ Illinois Bell*, in *Taracorp Industries*, 273 NLRB 221 (1984).[13] The new rule to be followed by the NLRB under *Taracorp* shifted the

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[11] *ILGWU v Quality Mfg Co*, 420 US 276 (1965); *Wayne-Westland Education Assoc* v *Wayne-Westland Community Schools*, 176 Mich App 361 (1989)

[12] The Commission also noted that the typical NLRB remedy at the time was a cease and desist order in *Weingarten* cases where the discipline was proven to be for conduct other than insisting on union representation.

[13] Neither the Commission, nor its ALJ, were obliged to follow the shift by the NLRB in fashioning remedies for violations of *Weingarten* rights. *Rockwell, supra*.

burden from the employer, and the NLRB will not order a make-whole remedy unless it is shown that the discipline was a direct result of the assertion of *Weingarten* rights. In partial recognition of that shift by the NLRB, the *Marine City* decision shifted the burden to the employee, and found that the employee had failed to establish that the discipline would not have been imposed but for the information secured at the improper interview. Consequently, the relief in *Marine City* was limited to a cease and desist order and a posting.

Here, regardless of where the burden of proof lies, under this record, it is undisputed that Wilson was fired as a direct result of, and solely because of, comments she made at the unlawful interview. No proofs were offered by the Employer to establish that Wilson was otherwise fired for cause. Moreover, the Employer's sole witness, one of the two interrogators, testified that, in her opinion, Wilson should not have been fired. Whether the Employer has the burden, as under *River Valley Schools,* of establishing that the discipline would have been imposed without the unlawful interview, or the employee has the burden, as under *Marine City*, of showing that but-for the information secured through the unlawful interrogation she would not have been fired, it has been established that Wilson was unlawfully fired as a direct result of the unlawful interrogation and would not have been fired in the absence of that unlawful act. [14]

A mere cease and desist order is inadequate under these facts. The *Weingarten* rule has been followed in the public sector in Michigan for nearly thirty years. The clear obligations under that rule were violated in this case. The Union had previously objected to the employer conducting such 'fact-finding' interrogations with other employees without Union representation. It is notable that even at the point of the hearing before the Commission's ALJ, it remained the Employer's position that it believed that, even upon clear request, there was no right to Union representation in these 'fact-finding' interviews, which have admittedly led to discipline in the past. Under such circumstances, reinstatement is recognized as the only sanction that effectuates the purposes of the Act and prevents an employer from benefiting from its unfair labor practices. *Rockwell*, *supra,* relying upon *Local 283 UAW, AFL-CIO v NLRB*, 300 F2d 699 (1962). Such reinstatement orders are appropriate even where the employer's unlawful conduct is mirrored by actionable misconduct by the employee. *Rockwell*, *supra*. The Commission is not obliged to apply the equitable 'clean hands' doctrine, and may order reinstated an employee who shares culpability with the employer. *Rockwell*, *supra*, relying upon *Republic Steel Corp v NLRB*, 107 F2d 472 (CA 3, 1939), modified on other grounds, 311 US7 (1940).

Unlike in *University of Michigan*, *supra*, the parties here have not agreed in the hearing before the Commission to defer the merits of the discharge to arbitration; however, they did indicate that the matter was subject to arbitration pursuant to their collective bargaining agreement. Neither party introduced evidence as to interim earnings or related to make-whole relief. The Act authorizes the Commission, upon finding the discharge of an employee to have occurred based on a violation by an employer, to order reinstatement of the employee 'with or without backpay'. MCL 423.216 (b). The recommended order of reinstatement will be without backpay, or other make-whole relief, and with other such relief, if any, left to the dispute resolution mechanism under the collective bargaining agreement.

[14] Because of the necessarily fact-specific nature of such disputes, it is unnecessary, and would be perhaps unwise, to attempt to establish a bright-line rule regarding the burden of proof, where an unlawful interview has occurred.

RECOMMENDED ORDER

Kent County, its officers, agents, and representatives shall:

1. Cease and desist from

    a. Interfering with, restraining, or coercing employees, including but not limited to Nancy Wilson, in the exercise of rights guaranteed in Section 9 of the Act, including the right to request the presence and active assistance of a Union representative during any questioning by supervisors, including during 'fact-finding' interviews, where the individual employee reasonably believes that the interview may lead to discipline.
    b. Failing to honor an employee request for Union representation during any questioning by supervisors, including during 'fact-finding' interviews, where the individual employee reasonably believes that the interview may lead to discipline, regardless of the phrasing used by the employee in seeking Union representation.

2. Take the following affirmative action necessary to effectuate the purposes of the Act

    a. Offer to Nancy Wilson reinstatement to employment in a position comparable to the position from which she was terminated, within thirty days of this Order, without backpay, but with seniority for all purposes restored.
    b. Either comply with employee requests for Union representation during any questioning by supervisors, including during 'fact-finding' interviews, where the individual employee reasonably believes that the interview may lead to discipline, or promptly cease such questioning once the request for representation is made.
    c. When an employee asks whether or not they need or can have a Union representative present for an investigatory interview, the employer shall treat that question as a request for Union representation.
    d. Notify employees at the outset of any 'fact-finding' interview that the questioning may lead to discipline.

3. Posted the attached notice to employees in a conspicuous place for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Doyle O'Connor
Administrative Law Judge

Dated: _____

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, KENT COUNTY, a public employer under the PUBLIC EMPLOYMENT RELATONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT

a. Interfere with, restrain, or coerce employees, including but not limited to Nancy Wilson, in the exercise of rights guaranteed in Section 9 of the Act, including the right to request the presence and active assistance of a Union representative during any questioning by supervisors, including during 'fact-finding' interviews, where the individual employee reasonably believes that the interview may lead to discipline.

b. Fail to honor an employee request for Union representation during any questioning by supervisors, including during 'fact-finding' interviews, where the individual employee reasonably believes that the interview may lead to discipline, regardless of the phrasing used by the employee in seeking Union representation.

WE WILL

a. Offer to Nancy Wilson reinstatement to employment, within thirty days of this Order, without backpay, but with seniority for all purposes restored, to a position comparable to the position from which she was terminated.

b. Either comply with employee requests for Union representation during any questioning by supervisors, including during 'fact-finding' interviews, where the individual employee reasonably believes that the interview may lead to discipline, or promptly cease such questioning once the request for representation is made.

c. Treat an employee question as to whether or not they need or can have a Union representative as a request for Union representation.

d. Notify employees at the outset of any 'fact-finding' interview that the questioning may lead to discipline.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

KENT COUNTY

By:_____

Title:_____

Date:_____

This notice must be posted for thirty (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, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.