STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DEARBORN,
Public Employer-Respondent, Case No. C09 A-005

-and-

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Kimberly M. Craig, Assistant Corporation Counsel, City of Dearborn, for Respondent

Douglas M. Gutscher, POAM's Assistant General Counsel, for Charging Party

DECISION AND ORDER

On August 24, 2010, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, City of Dearborn (Employer), violated Section 10(1)(a) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(a), by interfering with an employee's attempt to have a union representative present during an investigatory interview that the employee reasonably believed could lead to discipline. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. On September 16, 2010, Respondent filed its exceptions and supporting brief. On September 28, 2010, Charging Party, Police Officers Association of Michigan (Union), filed a Memorandum in Support of the ALJ's Decision and Recommended Order.

In its exceptions, Respondent argues that the ALJ erred by concluding that the bargaining unit member reasonably believed that the police investigatory interview pertaining to possible criminal actions could lead to workplace discipline. Respondent also excepts to the ALJ's conclusion that it was aware that the employee wanted union representation during the interview.

Finally, Respondent asserts that the ALJ's decision is inconsistent with a settlement agreement reached by the parties in another matter[1].

In its support of the ALJ's conclusions, Charging Party asserts that its bargaining unit member sought the assistance of a union representative for the investigatory interview and that Respondent was aware of that effort. Charging Party also argues that the tentative agreement referenced by Respondent in a related matter does not conflict with the ALJ's recommended order.

After reviewing the pleadings filed by both parties, as well as an examination of the record, we find Respondent's exceptions to be without merit.

Factual Summary:

We adopt the ALJ's Findings of Fact and repeat them here only as necessary. While working as a communications dispatcher in Respondent's police department, Angela Papalia--a member of Charging Party's bargaining unit--created a personal web blog comprised of stories about her relations with coworkers and information she obtained from department emergency calls and police reports. The blog also contained stories made up from details obtained from a computerized law enforcement database. After learning of the blog and its content, Respondent contacted the Michigan State Police (MSP). MSP directed Respondent to conduct a preliminary criminal investigation and follow-up with the local prosecutor's office.

On November 13, 2008, Respondent reprimanded Papalia for a workplace violation unrelated to her public web blog or internet use. Later that same day, Papalia's supervisor escorted her to an investigatory interview on possible criminal infractions. The interview was conducted by two detectives assigned from another unit within Respondent's police department. As she walked to the interview location, Papalia caught the attention of her union representative and motioned him to attend the meeting for possible assistance. However, the union representative did not attend after being informed by Papalia's supervisor that the meeting involved a "criminal investigation." Following the interview with police detectives, the supervisor returned and immediately suspended Papalia pending the outcome of the criminal investigation. At the conclusion of the criminal investigation and review by the prosecutor's office, a written report was issued. After reviewing the report, Respondent returned Papalia to full work status following the prosecutor's determination that a criminal warrant would not be sought.

Over the next few weeks, Respondent conducted a separate internal investigation that included meeting with Papalia and her union representative. On January 7, 2009, Respondent terminated Papalia for work rule violations including internet and equipment misuse, and for the prohibited release of information obtained from the state's law enforcement database. Charging Party filed a charge alleging a violation of Papalia's right to have a union representative present

[1] In *City of Dearborn and Police Officers Association of Michigan*, Case No. C09 K-230, the parties tentatively agreed on new contract provisions distinguishing the handling of internal investigations on criminal matters versus work place violations. This tentative agreement was reached after the record closing date in the instant case, but before the ALJ issued her Decision and Recommended Order.

during the investigatory interview with police detectives. Respondent refuted the claim asserting that Papalia never requested union representation, and that the disciplinary action taken was not based on information obtained from the criminal investigation interview.

Discussion and Conclusions of Law:

The issue here is whether Respondent's agents violated the *Weingarten*[2] protections owed to a member of Charging Party's bargaining unit. It is well settled that a represented employee has a right to have a union representative present at an investigatory interview conducted by an employer when that employee reasonably fears that disciplinary action may result. *City of Kalamazoo, 1996 MERC Lab Op 556*. As the ALJ indicates, we adopted this rule over thirty years ago in *University of Michigan*, 1977 MERC Lab Op 496, concluding that a violation of this "*Weingarten* rule" constitutes a violation of Section 10(1)(a) of PERA. One fundamental purpose of having the union representative present is to aid the employee in answering questions and presenting facts inquired upon by the employer. *City of Oak Park*, 1995 MERC Lab Op 576. This protection is afforded to an employee during an investigatory interview by an employer and remains the established law under PERA. *Grand Haven Board of Light and Power*, 18 MPER 80 (2005). An examination of the *Weingarten* defense often will focus on whether the employee ever requested union representation (*University of Michigan*, 1977 MERC Lab Op 496, 500; *City of Oak Park*, 1995 MERC Lab Op 576, 578) and whether the employee reasonably believed the investigatory interview might culminate in disciplinary action (*City of Troy*, 1989 MERC Lab Op 291, 307.) Questions posed by Respondent's exceptions relate to whether Papalia reasonably believed that the police interview might result in disciplinary action by Respondent, and whether she ever sought union representation.

Respondent contends that Papalia never requested union representation, or alternatively, that it was unaware of any request. No special words or phrases are necessary to satisfy the demand requirement under *Weingarten*; only that the employee puts the employer on reasonable notice that union representation is desired. *Kent Co*, 21 MPER 61, 220 (2008). We find it unnecessary to determine what method(s) Papalia used to communicate with her union representative. Respondent's own pleadings indicate that Papalia's supervisor told the Union's official that the police investigatory interview pertained to a "criminal matter" only. This response indicates the supervisor's knowledge of Papalia's desire to have her union representative present during the police interview, as well as the Union's willingness to honor that request. Respondent's pleadings also demonstrate the Employer's belief that employees are not entitled to union representation during a criminal investigatory interview. Therefore, we reject Respondent's attempt to now disclaim its awareness of Papalia's desire to have her union representative assist her during the investigatory interview with police detectives.

Respondent also asserts that Papalia could not have reasonably believed that the police interview could lead to further workplace discipline. We disagree. As the ALJ indicates, the "reasonable belief" standard used in a *Weingarten* analysis is measured objectively based on the "totality of circumstances" in a particular case. *Quality Mfg. Co.*, 195 NLRB 197 at 198 (1972). Reliance on the defense does not require proof that an employer actually considered or planned to issue discipline, as long as there is a reasonable possibility that disciplinary action could

[2] Refer to *NLRB v Weingarten*, 429 US 251 (1976).

result. *Lenox Industries v NLRB*, 637 F.2d 340 106 LRRM 2607. After our review of the record, we agree with the ALJ that it was reasonable for Papalia to fear that the criminal investigatory interview conducted on November 13 could result in further disciplinary action by Respondent, especially because she received a written reprimand earlier that same day.

We also concur with the ALJ that a *Weingarten* violation occurred when Papalia's union representative was not permitted to attend the criminal investigatory interview on November 13, 2008. While *Weingarten* protections do not attach where a meeting or interview with an employee is merely to deliver disciplinary action already decided upon by the employer (*City of Kalamazoo*, 1996 MERC Lab Op 556, 562), the overall intent of the meeting between Papalia and the police detectives was larger in scope. The record indicates that Respondent immediately suspended Papalia following the criminal investigatory interview. However, Papalia still faced further disciplinary action, pending the outcome of a "criminal investigation" which would rely on information obtained during the police interview. We also agree with the ALJ that although Respondent reached its decision to terminate Papalia independent of the police investigatory interview, the possibility existed that the interview information could have been used.

Finally, we reject Respondent's claim that the tentative agreement reached in C09 K-230 contradicts a finding of a PERA violation in this matter. A review of the proposed agreement suggests that it seeks to clarify and establish a process for handling internal investigations of department personnel. However, we find nothing in the proposed agreement or the record here to support a retroactive application of the proposed process. We have also considered the remaining claims raised in Respondent's exceptions and Charging Party's supporting memorandum, and find they would not change the result here.

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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Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF DEARBORN,
Public Employer-Respondent,

Case No. C09 A-005

-and-

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Kimberly M. Craig, Assistant Corporation Counsel, City of Dearborn, for Respondent

Douglas Gutscher, Assistant General Counsel, Police Officers Association of Michigan, for 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 August 25, 2009, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on November 9, 2009, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Police Officers Association of Michigan filed this charge against the City of Dearborn on January 12, 2009. Charging Party represents a bargaining unit of communications dispatchers employed by Respondent. The charge alleges that on November 13, 2008, Respondent violated Section 10(1)(a) of PERA by refusing dispatcher Angela Papalia's request for a union representative at an investigatory interview. After the interview, Papalia was suspended with pay. On January 7, 2009, she was terminated.

Findings of Fact:

Angela Papalia was employed by Respondent as a communication dispatcher in its police department from May 30, 2006 until her termination in 2009. In July 2007, Papalia began a publicly accessible, on-line weblog, popularly referred to as a "blog." Papalia told her supervisor that she was starting the blog, and the individual in charge of the dispatch operation at the time

also knew about it. Papalia's blog identified her as "Angie" and also displayed her picture. It did not give her last name. In the blog, Papalia explained that she was a police dispatcher for what she called "Disfunctional [sic] City." The blog did not identify the city, state, or region. In addition to entries about her personal life and relations with her co-workers, Papalia's blog related the content of calls she or her fellow dispatchers had received and commented on them. From time to time, Papalia described and commented on incidents contained in police reports. Papalia sometimes fictionalized details to make the blog more entertaining. No real names were used in the blog. Papalia blogged at home and also on downtime during her shift using Respondent's computers.

In 2008, Lieutenant Karen Wilkes was in charge of the dispatch operation in Respondent's police department.[3] In July or August 2008, Papalia received a verbal counseling for failing to cancel a warrant. On October 31, 2008, Wilkes prepared a written warning to be given to Papalia for her handling of a dispatch call on October 26, but did not deliver it to her. On November 11, 2008, Wilkes discussed Papalia with two dispatch supervisors. During the course of the conversation, the supervisors mentioned that Papalia spent an unusual amount of time typing at a computer. Wilkes testified that she was aware that Papalia had a blog, but had never visited it. Wilkes logged on and read Papalia's entries. It was evident from the dates and times of the postings that Papalia was blogging during her shift. Wilkes had several concerns about the blogs, including the fact that they appeared to contain non-public information obtained through Papalia's employment. The police department has a rule prohibiting the public dissemination of official records or reports without approval, and it also has a policy on the proper use of the Law Enforcement Information Network (LEIN) system. In addition, Wilkes was concerned that Papalia had violated the Criminal Justice Information System Policy Council Act, MCL 28. 214, by using information she had obtained through LEIN in her blog.

Wilkes reported the blog to her superiors. Over the next two days, the entire blog was downloaded and copied. Wilkes went through the blog entries and identified a police report that matched an incident described in a blog entry; portions of the police report appeared to have been cut and pasted into the blog. Wilkes also contacted the Michigan State Police for advice on whether Papalia had violated the LEIN law. An employee of the Michigan State Police told her that dissemination of information from LEIN was illegal even if the employee attempted to make it anonymous. The State Police directed the police department to conduct an investigation and then consult with the Wayne County Prosecuting Attorney.

On the morning of November 13, 2008, Wilkes gave Papalia the October 31 written reprimand in the presence of Charging Party local union president Patrick Frank. Wilkes said nothing to Papalia or Frank about the blog at this time. Later the same day, the police department assigned two detectives from its investigative division, including Lieutenant William Leavens, to investigate Papalia's possible criminal misuse of LEIN. Wilkes was informed by her superiors that the detectives would interview Papalia that evening. After the interview was completed, she was to give Papalia a notice suspending her with pay pending completion of the criminal investigation. Leavens decided that he would interview Papalia in the investigative division.

[3] At the time of these events, Lieutenant Wilkes was known as Lieutenant Ehlert.

During the evening of November 13, Wilkes came to Papalia's work station. According to Papalia, Wilkes said that two detectives needed her help with a case and wanted to speak to her. According to Wilkes, she simply told Papalia that she needed to speak with her. Papalia began following Wilkes through the dispatch center on the way to the investigations section, which is on the other side of the police building. Papalia testified that she suspected that she was going to receive further discipline for the incident on October 26. When Papalia passed behind Frank's chair, she tapped him on the back and motioned for him to come with her. The record does not indicate whether Wilkes saw Papalia make these gestures. Frank stood up and began to follow the two women. When Wilkes saw Frank, she stopped and told him that "this was not a union matter." Frank and Wilkes had different versions of what else was said as they stood there with Papalia. According to Wilkes, she told Franks that it was a criminal investigation and Franks returned to his seat. Franks, however, testified that he asked Wilkes if she was saying that it had nothing to do with Papalia, that she was not facing any discipline or in any trouble. According to Franks, Wilkes replied in the affirmative and said that they just needed Papalia's help with an investigation. Franks returned to work. Papalia did not say anything during this exchange.

Wilkes delivered Papalia to a conference room in the investigative division, introduced her to Leavens and another detective, and left. Leavens has done many criminal investigations of Respondent's employees. According to Leavens, he immediately explains to the employees that it is a criminal investigation, but that they are not in custody and are free to leave. Leavens testified that if the employee is a police department employee, he makes sure that they understand that they are not being ordered to be there as part of their employment, that they don't have to talk to him because of his status as a lieutenant, and that he is interviewing them as a criminal investigator. Leavens testified that he communicated all this to Papalia. Leavens testified that he also begins by asking people if they know why they are there, and that he did that with Papalia.

Papalia's version of this part of the meeting was different. Papalia denied that Leavens told her at any time that she was free to leave the interview, and testified that Wilkes also never said this. She testified that she did not believe that she was free to leave because she was being interviewed by two command officers and had been delivered to the interview by her supervisor. According to Papalia, Leavens did not immediately tell her that it was a criminal investigation, but simply started asking her generic questions about herself and her background. Papalia testified it was not until a few minutes into the interview, when the two officers asked her if she was on drugs or in debt and if she was selling police information, that she realized that the interview was about her conduct. According to Papalia, after a few more questions she began to suspect that the interview was about her blog. When she asked the officers if this was the case, Leavens said possibly. Papalia testified that she continued to answer questions believing that the interview had something to do with her job. According to Papalia, it was not until about halfway through the interview that she was told that this was a criminal interview and that she was accused of violating the LEIN law.

Papalia and Leaven, however, agreed about the substance of Leavens' questioning and how Papalia answered. Leavens testified that his role was to investigate the facts underlying a possible criminal violation of LEIN laws. During the interview, the detectives went through a

line of questioning designed to determine Papalia's understanding of LEIN, whether she had run names through LEIN, and if she had disseminated information from LEIN by putting it on the blog. Papalia and Leavens agree that Papalia admitted that she was the author of the blog and had done some of it while on duty. She stated that she did not believe that she was violating the law by posting the information that she had posted. They agree that Papalia also denied providing LEIN information or department records to anybody outside of the department or removing LEIN information from the department by transferring it to her personal computer. Papalia told Leavens that a relative had asked her to run a check on someone on LEIN for them, but that Papalia had refused. Papalia also told Leavens that she had not accessed LEIN in order to obtain material for the blog, but had merely used information that she had seen or heard about while performing her normal duties.

Papalia and Leavens agree that Papalia did not ask Leavens for a union representative. According to Papalia, at the end of the interview Leavens thanked her for her cooperation and said that "he supposed she could have asked for a union representative, but they would have just told me that I needed a lawyer." Leavens denied saying anything about union representation. When Papalia left the interview, Wilkes handed her a notice suspending her with pay pending completion of the criminal investigation.

Leavens prepared an investigative report and Respondent submitted this report to the Wayne County Prosecutor's office. According to a follow-up report prepared by Wilkes, Wilkes read Leavens' report, including his account of the interview. The Prosecutor declined to prosecute, stating that "administrative action was sufficient." On December 2, after the decision by the prosecutor, Papalia returned to work. Wilkes was then directed to conduct an internal investigation into whether Papalia had violated police department and/or City policies. Wilkes interviewed Papalia as part of this investigation in the presence of her union representative. Wilkes brought a copy of Papalia's blog to the interview. During the interview, Wilkes went through the blog, pointed out a number of entries and asked Papalia if she believed that these entries violated various department policies. Wilkes then prepared a report for the police chief. The report contains a summary of Wilkes' interview with Papalia, as well as a copy of Papalia's entire blog. In her report, Wilkes concluded that Papalia had, in fact, put information from the LEIN system and from department police reports on the blog with the names changed.

On January 7, 2009, after the police chief received Wilkes' report, Papalia was discharged. Her discharge notice stated that Papalia's extensive use of paid work hours for the personal activity of posting entries to her blog was improper; that the blog contained material which was "privileged, restricted, confidential and highly sensitive;" that some of the postings were in direct violation of rules and laws concerning LEIN use; and that many blog postings contained material that was "unprofessional, inflammatory, sexist, racist and socially insensitive." The discharge notice stated that Papalia had violated numerous departmental rules and regulations, including rules regarding public statements and appearances, the dissemination of information about official business, and the use of departmental equipment and supplies, and Respondent's Internet use policy.

Discussion and Conclusions of Law:

In *Univ of Michigan*, 1977 MERC Lab Op 496, the Commission adopted the rule set forth in *NLRB v Weingarten***,** 429 US 251 (1976) that an employee has the right to have a union representative present when interviewed by his employer when the employee reasonably believes that the interview may lead to discipline. "Reasonable belief" is measured by objective standards, taking account of all the circumstances of the case. *Kent Co*, 21 MPER 61 (2008), citing *Quality Mfg. Co*., 195 NLRB 197 at 198 (1972); *Weingarten*, at 258. As the Court stated in *Weingarten*, the employee must invoke the right by requesting union representation. *Grand Haven Board of Water and Light*, 18 MPER 80 (2005); *City of Marine City (Police Dep't)*, 2002 MERC Lab Op 219 (no exceptions). No particular language is required for the request; the employee must merely put the employer on notice that representation is desired. *Kent Co; Bodolay Packaging Machinery, Inc*, 263 NLRB 320 (1982); *Southwestern Bell Telephone Co*, 227 NLRB 1223 (1977). The employer then may grant the request, present the employee with the option of continuing the interview without representation or foregoing the interview altogether, or deny the request and terminate the interview. *Montgomery Ward & Co*, 273 NLRB 1226, 1227 (1984); *New Jersey Bell Telephone Co*, 300 NLRB 42 (1990).

Respondent asserts that Papalia did not request union representation at her November 13, 2008 interview. It points out Papalia never asked either Wilkes or Leavens to provide a union representative, and that Charging Party did not assert that Wilkes saw Papalia tap Frank on the back or motion to him to come with her on her way to the meeting. According to Respondent, Wilkes knew that Frank wanted to come with them, but Papalia never communicated a desire for union representation to either Wilkes or Leavens.

The record indicates that Papalia asked Frank to accompany her to the interview by nonverbal gestures which Wilkes might not have seen. Frank began to follow her. When Wilkes saw Frank, she told him, with Papalia standing nearby, that it "was not a union matter." That is, Wilkes effectively told Papalia that she could not have Frank at the interview before Papalia had any reason to explicitly ask Wilkes to allow him to be there. Papalia did not protest, and she did not ask Leavens for a union representative when he began interviewing her. However, since Papalia had been told by her supervisor Wilkes that she did not have the right to a union representative at the interview, she could have reasonably assumed that her own request would not have been granted. As discussed above, to invoke his *Weingarten* rights, an employee must merely put the employer on notice that he or she desires representation at the interview. I conclude that, under these circumstances, Papalia's silence when Frank got up to follow her and during his conversation with Wilkes was sufficient to put Wilkes on notice that Papalia wanted him present at the interview.

Respondent also argues that Papalia could not have reasonably believed that her interview would lead to discipline. As discussed above, the reasonableness of the employee's belief is evaluated objectively, based on all the circumstances. According to Papalia's testimony, when she stood up to follow Wilkes and when she tapped Frank on the back, she incorrectly believed that the purpose of the interview was to further discuss the incident for which she had been disciplined that morning. If Frank's testimony were to be credited, Wilkes then made

statements which led Papalia to believe, also incorrectly, that the interview was unrelated to her own misconduct.

I find it unnecessary to resolve the credibility conflict between Wilkes and Frank or to determine whether Wilkes deliberately misled Papalia and Frank about the purpose of the interview. The record clearly indicates that the purpose of the interview was to question Papalia regarding her possible misuse of the LEIN system, conduct which was both potentially criminal and in violation of department policy. As Leavens testified, his role – and the purpose of the interview – was to gather facts. This included, of course, obtaining admissions from Papalia that she had engaged in wrongful acts. However, Respondent asserts that Papalia had no right to a union representative at the interview because the interview was criminal, not disciplinary, in nature; that Leavens was not acting as an agent of the employer, but as a criminal investigator; and that the interview did not and could not have led to any disciplinary action.

In *United States Postal Service*, 241 NLRB 141 (1979), the National Labor Relations Board (NLRB), rejected arguments made by the US Postal Service that its employees had no *Weingarten* right to union representation at interviews conducted by Postal Service Inspectors as part of criminal investigations. The Postal Inspection Service was a subdivision of the employer and its inspectors were employees of the Postal Service. The Postal Inspection Service was also a law enforcement agency of the Federal government. Postal inspectors had the authority to carry weapons, make arrests, and enforce postal and other federal laws. One of its functions was to investigate alleged misconduct engaged in by postal workers which involved possible violations of the law, i.e., theft, embezzlement. Postal inspectors, however, were only called upon to investigate employee misconduct if it involved a possible violation of the law. If postal inspectors uncovered evidence leading them to believe that a Postal Service employee had violated federal law, they were authorized to place the employee under arrest. If the investigation revealed no crime, the inspectors turned over the evidence they gathered to USPS management, without recommendation or evaluation. Management then decided whether the evidence warranted disciplinary action. In the 1979 *Postal Service* case, the NLRB rejected the Postal Service's argument that its employees should not have the right to a union representative at interviews conducted as part of criminal investigations by postal inspectors because this might significantly interfere with legitimate employer and societal prerogatives. It also rejected the argument that employees waived their right to union representation by signing documents waiving constitutional criminal rights. The NLRB held that since postal employees were, in fact, administratively disciplined as the result of the fruits of criminal investigations, holding that union representatives could be excluded from criminal investigations conducted by the Postal Inspection Service would in effect nullify the *Weingarten* rights of the postal service employees subject to these investigations. The NLRB and the federal courts have since reaffirmed that postal service employees have *Weingarten* rights at interviews conducted by postal service inspectors as part of criminal investigations. See *United States Postal Service*, 288 NLRB 864, 866 (1988), aff'd *United States Postal Service v NLRB*, 969 F 2d 1064 (CA DC, 1992); *United States Postal Service*, 347 NLRB 885 (2006).

The NLRB's conclusion that Postal Service employees had the right to union representation at interviews conducted as part of a criminal investigation was based on the fact that information from these interviews could be, and was, used to discipline them if their

misconduct was found not to be criminal. Respondent asserts that Leavens' interview of Papalia did not and could not have led to discipline. I find that the record supports the first assertion, but not the second. Respondent produced no evidence that it had internal policies prohibiting statements made by employees as part of criminal investigations from being used in disciplinary proceedings. [4] There is also no testimony that either Wilkes or Leavens told Papalia that statements she made in the interview would not be used to discipline her. In this case, Papalia did not admit in her interview with Leavens to any acts of misconduct beyond those already evident from the blog itself. Papalia was interviewed by Wilkes, in the presence of her union representative, before she was terminated. However, there is nothing in the record, other than an assertion in Respondent's post-hearing brief, to support a finding that if Papalia had admitted misusing the LEIN system in her interview with Leavens these admissions would not have been used to discipline her. I conclude that Papalia had a right under PERA to the presence of a union representative at the interview conducted by Leavens as part of a criminal investigation on November 13, 2008 and that Respondent refused to allow her to exercise that right.

The remaining question is the appropriate remedy for the violation. Charging Party seeks an order reinstating Papalia and making her whole. The NLRB does not currently issue make whole remedies for *Weingarten* violations except where an employee is disciplined or discharged for refusing to participate in an interview after his or her request for union representation has been denied. See, e.g., *Barnard College,* 340 NLRB 934 (2003). However, in *Kent Co,* 21 MPER 61 (2008), the Commission explicitly refused to follow the NLRB's rule on this point. Instead, the Commission reaffirmed its use of the test set out in two older NLRB cases, *Illinois Bell Telephone Co,* 251 NLRB 932, 934 (1980) and *Kraft Foods, Inc,* 252 NLRB 598, 599 (1980), for determining the appropriate remedy for a *Weingarten* violation when an employee is disciplined or discharged after an unlawful interview. Under this test, a charging party has the burden of making a *prima facie* showing that a make whole remedy, such as reinstatement and backpay, is warranted. It can make this showing by proving that the respondent conducted an investigatory interview in violation of *Weingarten* and that the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview. The burden then shifts to the respondent to demonstrate that the decision to discipline the employee was not based on information which it obtained at the interview. If the employer meets this burden, the remedy is limited to a cease and desist order.

In this case, I conclude that Respondent met its burden of demonstrating that its decision to discipline Papalia was not based on information obtained at her interview with Leavens. The record includes Leavens' report of his interview with Papalia, testimony from both regarding the questions he asked and her answers, Wilkes' administrative investigative report and conclusions, and Papalia's discharge notice stating the reasons for her termination. These documents indicate that the decision to terminate Papalia was based on Respondent's examination of her blog, which was open to its inspection on the Internet, and not on information obtained either at her interview by Leavens or at the later interview by Wilkes. I conclude, therefore, that an order requiring Respondent to reinstate Papalia and make her whole would not be an appropriate remedy in this case. I recommend that the Commission issue the following order.

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[4] *Garrity v New Jersey,* 385 US 493 (1967), protects a police department employee from prosecution for statements he or she was compelled to give under threat of discipline. However, there is no constitutional prohibition against using statements made during a criminal investigation to discipline any employee.

RECOMMENDED ORDER

Respondent City of Dearborn, its officers and agents, are hereby ordered to:

1. Cease and desist from interfering with, restraining, or coercing employees, including in the exercise of rights guaranteed by Section 9 of PERA, including the right, on request, to the presence and active assistance of a union representative at an interview, including an interview conducted as part of a criminal investigation, which the employee reasonably believes may lead to discipline.

2. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees represented by the Police Officers Association of Michigan are customarily posted, for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____ _____

Julia C. Stern
Administrative Law Judge

Dated: _____