

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-054-13

(UNFAIR LABOR PRACTICE)

AFSCME COUNCIL 75, LOCAL 1082,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
HOOD RIVER COUNTY,)	CONCLUSIONS OF LAW,
)	AND ORDER
Respondent.)	
_____)	

Giles Gibson, Legal Counsel, AFSCME Council 75, Portland, Oregon represented Complainant.

Nancy J. Hungerford, Attorney at Law, Hungerford Law, Oregon City, Oregon, represented Respondent.

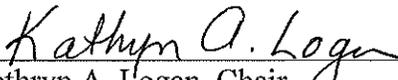
On August 15, 2014, Administrative Law Judge Julie D. Reading issued a recommended order in this matter. The parties had 14 days from the date of service in which to file written objections. See OAR 115-010-0090; OAR 115-035-0050(2). Neither party filed objections.

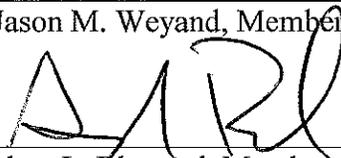
When neither party objects to a recommended order, we generally adopt the recommended order as our final order, and we consider any objections that could have been made to that order unpreserved and waived. *International Brotherhood of Electrical Workers, Local Union No. 659 v. Eugene Water & Electric Board*, Case No. UP-008-13, 25 PECBR 901 (2014). Consistent with that practice, we will adopt the recommended order as our final order in this matter. The final order is binding on, and has precedential value for, the named parties only. *Id.* Despite the precedential limitations of such a final order, we publish the uncontested recommended order as an attachment to the final order. *Clackamas County Peace Officers Association and Atkeson v. City of West Linn*, Case No. UP-014-13, 26 PECBR 1 (2014).

ORDER

1. The Board adopts the recommended order as the final order in this matter.
2. The complaint, as amended, is dismissed.

Dated this 15 day of September, 2014


Kathryn A. Logan, Chair

*Jason M. Weyand, Member

Adam L. Rhynard, Member

*Member Weyand Dissenting

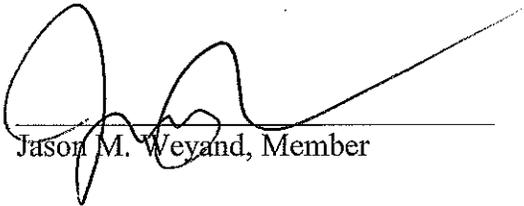
Consistent with the procedure established in *International Brotherhood of Electrical Workers, Local No. 659 v. Eugene Water & Electric Board*, Case No. UP-008-13, 25 PECBR 901 (2014) (*EWEB*), my colleagues have adopted the ALJ's recommended order as our final order in this case because neither party filed objections. In *EWEB*, I dissented from the majority's decision to utilize this procedure, stating that I would not adopt recommended orders that I felt incorrectly applied the Public Employee Collective Bargaining Act (PECBA). I believe this is such a case, and therefore, I respectfully dissent from the order above.

This case involved an allegation that the County violated ORS 243.672(1)(a) by, among other things, denying an employee's request for union representation in an investigatory meeting. I agree with the recommended order's conclusion that the employee was entitled to union representation and made a satisfactory request for such representation. However, I disagree with the ultimate legal conclusion that the County did not unlawfully deny the employee union representation. I do not believe that, in this situation, the County's obligation to provide *union* representation was satisfied by allowing a coworker who was not a designated representative of the labor organization (such as a steward, officer or business agent) to attend the investigatory meeting with the employee. Therefore, I would conclude that the County violated ORS 243.672(1)(a).

I am also concerned with *dicta* in the recommended order that implies that it was lawful for the County to compel the employee to accept an alternate union representative because the employee's supervisor and the particular union representative had a heated argument earlier in the

day. In *Lane County Peace Officers Association v. Lane County Sheriff's Office*, Case No. UP-32-02, 20 PECBR 444, 463 (2003), we concluded that the employer did not violate ORS 243.672(1)(a) by prohibiting association representatives who were under investigation from representing bargaining unit members who were subjects of *the same investigation*. We noted that this apparent or actual conflict of interest “could interfere with both the County’s investigation and the Association’s ability to represent its members.” *Id.* However, the general rule is that, absent compelling reasons that require a different result, the employer should provide the union representative of the employee’s choice.

The exception to the general rule recognized in *Lane County Sheriff's Office* is a narrow one, and there are no facts present that justify the application of such an exception here. A mere history of tense interactions between representatives of labor and management alone cannot justify an employer’s decision to prohibit a union representative from providing representation to bargaining unit members. Allowing such a result would undermine the value of an employee’s right to union representation, and would be inconsistent with the purposes and policies of the PECBA.



Jason M. Weyand, Member

This Order may be appealed pursuant to ORS 183.482.

On April 15, 2014, the Union moved to amend the statement of issues as stated in the Notice of Hearing. The County opposed the motion. Prior to the hearing, the ALJ heard the parties' arguments on the motion. Upon the Union's admission that the ALJ's phrasing of the issues was more consistent with the second amended complaint, the ALJ denied the Union's motion to amend the issues.

Accordingly, the issues are:

1. Did the County Records and Assessment Director Brian Beebe: (1) refuse to let shop steward Hoby Hansen represent employee Diana McCrea during a May 31 meeting; (2) tell McCrea he was offended that she had chosen to consult with Hansen rather than talk to him directly about a time sheet issue; and (3) refuse to postpone the May 31 meeting until a shop steward could be present? If so, did the County interfere with and restrain McCrea in, or because of, the exercise of rights guaranteed in ORS 243.662, in violation of ORS 243.672(1)(a)?
2. Did the County Records and Assessment Director Brian Beebe deny employee and shop steward Hoby Hansen the opportunity to represent Diana McCrea during a May 31 meeting? If so, did the County interfere and restrain Hansen in, or because of, the exercise of rights guaranteed in ORS 243.662, in violation of ORS 243.672(1)(a)?

We conclude that the County did not deny McCrea's request for Union representation, as McCrea was allowed to bring Keller to the meeting as she requested. Accordingly, the County did not violate ORS 243.672(1)(a) as alleged.

RULINGS

On April 9, 2014, the Union requested to have McCrea present her testimony by telephone. The County opposed the motion, but proposed an internet-based video conferencing service as a compromise. The ALJ ruled that the testimony could be provided by video conferencing. Given the late request of the Union and the availability of an alternative that was acceptable to the County, we determine that the ALJ's ruling was correct.

The remaining rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties

1. The Union is a labor organization within the meaning of ORS 243.650(13).
2. The County is a public employer within the meaning of ORS 243.650(20).

3. The Hood River County Records and Assessment Department (Department) is headed by Director Brian Beebe. Beebe supervises Kim Keene and Duane Ely. In May 2013, Kim Keene supervised Diana McCrea, the Elections and Personal Property Clerk, and Micaela Keller, the Recording Clerk. Duane Ely supervised the Department appraisers, including Hoby Hansen. In May 2013, Hoby Hansen was the Union Vice President and Steward.

4. During the weekend of May 18, 2013, McCrea left her dog in the care of Keene. McCrea had told Keene that her dog would only be there for one day, but instead McCrea left her dog with Keene the entire weekend.

5. On May 20, 2013, McCrea came into the office and started the process of opening the public counters. During this time, she spoke with Keller about her weekend. Shortly thereafter, Keene confronted McCrea about not picking up her dog.

6. McCrea was very upset about Keene's confrontation and started to cry. McCrea decided she would not be able to perform work that day. McCrea went to Beebe and told him that she would be going home and using sick leave for the remainder of the day. Beebe permitted her to do so.

7. Beebe reviews all Department employee time cards at the end of each month and often finds errors that employees correct without incident.

8. On May 31, 2013, Department employees submitted their timecards to Beebe. Beebe noted that Hansen had erroneously failed to report holiday leave. Further, Beebe identified three concerns with McCrea's time card. Specifically, McCrea had failed to report some overtime worked and had forgotten to report some vacation leave used. Beebe also noticed that McCrea had claimed 15 minutes of work time for May 20, and had reported sick leave for the remainder of the day.

9. Beebe asked McCrea into his office to address the timecard concerns. McCrea noticed that Beebe had circled her 15 minutes of reported worked time on May 20, 2013, and had written, "did not work" in red ink. Beebe showed McCrea her errors with the vacation time and overtime. Beebe also told McCrea that she needed to report using sick leave for the entire day on May 20 because she had not worked. McCrea told Beebe that she had worked for the first fifteen minutes of the day. McCrea and Beebe briefly argued the issue. Beebe explained that he was watching out for the County and did not want it cheated. After deciding that she was not going to convince Beebe that she had worked, McCrea agreed to claim sick leave for the entire day.

10. McCrea returned to her desk, which was outside Beebe's office and next to Keller's desk. McCrea told Keller that Beebe had told her to change her timecard. Keller told McCrea that since she had worked for 15 minutes that day, she should discuss the issue with Union steward Hoby Hansen.

11. After some deliberation, McCrea decided to discuss her timecard issue with Hansen. McCrea went to Hansen's office and expressed her concern. Hansen told McCrea that he needed to submit his corrected time sheet to Beebe and he would discuss her concern with Beebe at that time.

12. Shortly thereafter, Hansen walked into Beebe's office and up to his desk.¹ Hansen provided Beebe with his time sheet. Hansen made a statement that clearly communicated that he was there to discuss McCrea's time card.²

13. Beebe then came out from behind his desk.³ Beebe asked Hansen to shut the office door so that the entire office would not be involved in the discussion. Hansen backed up against the door and partially closed it.

14. Beebe then explained his direction to McCrea to report sick leave for the entire day on May 20. He stated that McCrea would be paid more if she claimed sick leave for the entire day. Beebe further explained that he was trying to be fair and prevent McCrea from cheating the county. Hansen responded that Beebe was pushing employees too hard. Hansen and Beebe began arguing. Hansen again asked Beebe to close his office door. Hansen closed it. The mechanics of the door cause it to shut loudly even when the person closing it does not intend to slam it. Therefore, the door sounded as if it had been intentionally slammed.

15. Beebe and Hansen continued to argue. Beebe stated that maybe he should push employees even harder and tighten things up more. At this point, Beebe's voice became louder, and it increased until Keller and McCrea could hear that Beebe was yelling at Hansen, even though they could not discern what he was saying.⁴

16. The argument between Beebe and Hansen continued for approximately five minutes, with Keller and McCrea being able to hear Beebe yelling during that time. Keller and McCrea were frightened by the yelling. Because McCrea had talked to Hansen about her timecard, she assumed the argument related to her.

¹Hansen and Beebe offered conflicting testimony regarding whether Hansen knocked before coming in, approached Beebe from behind, and was aggressive in his movements. However, because these are not facts that need to be resolved for our analysis, we decline to make specific findings.

²Hansen testified he calmly told Beebe that McCrea was entitled to the 15 minutes of work time while putting down McCrea's timecard. Beebe testified that Hansen said "You're going to pay Diana for the 15 minutes or I'm going to file a grievance!" Because what Hansen said is not a fact that needs to be resolved for our analysis, we decline to make a specific finding.

³Hansen and Beebe offered conflicting testimony about what Beebe said as he walked out from his desk. Further, their testimony differed on whether Beebe sat down at his conference table after coming out from behind the desk. Again, because these are not facts that need to be resolved for our analysis, we decline to make specific findings.

⁴Beebe testified that he did not yell. However, his testimony is contradicted by the testimonies of Keller, McCrea, and Hansen. Therefore, we find their collective testimony more credible due to the corroboration. Further, future events, such as McCrea expressing fear of meeting with Beebe alone, only make sense if Keller and McCrea heard yelling.

17. After the argument, Hansen left Beebe's office, came to McCrea's desk, and told her to complete her time card as Beebe had instructed.

18. Beebe then left his office and went to the office of Human Resource Director Denise Ford. Beebe discussed the situation with McCrea's time card with Ford. Ford advised Beebe that 15 minutes of claimed work time was not worth significant conflict. Ford told Beebe, however, that he could ask McCrea why she believed she was entitled to claim the 15 minutes of worked time.

19. Beebe returned to his office and phoned McCrea at her desk. Beebe requested that McCrea come into his office. McCrea told Beebe that she did not feel comfortable coming in alone. Beebe told her it was not necessary to bring someone. McCrea again said she did not feel comfortable coming in alone and asked if she could be joined by either Keller or Hansen.⁵ Beebe again told McCrea that it was not necessary for her to bring one of them, but he stated that she could bring Keller with her.⁶ McCrea explained she could not come in until the front counter customers had been assisted, and Beebe agreed.

20. Shortly thereafter, Beebe walked by McCrea's desk and asked her if it would be okay if Ely also joined them in the meeting. McCrea agreed.

21. Approximately 30 minutes after Beebe requested the meeting, Keller, Ely, McCrea, and Beebe met in Beebe's office, sitting at his small conference table. Beebe started the meeting by telling McCrea that he was hurt that she felt she needed to have someone else there.⁷ Beebe then began telling McCrea that he had done a great deal for the Department and if it was not appreciated, he could tighten up the rules.⁸ Keller became uncomfortable with Beebe's statements. Keller interrupted Beebe and stated that McCrea should have union representation because Keller did not feel comfortable representing McCrea. Beebe did not respond to Keller.

22. Beebe then started repeatedly asking McCrea why she felt she was entitled to the 15 minutes of worked time and what she considered "work." McCrea attempted to answer Beebe's questions and defend her claim of 15 minutes of regular work time.

⁵Keller testified that McCrea initially requested Hansen, and then asked if she could bring Keller. However, as Keller was not a direct party to the conversation, and her testimony is not consistent with that of Hansen and McCrea we do not accord it any weight.

⁶The record is not clear as to why Beebe chose Keller of the two options rather than stating either would be fine. It may have been due to the heated exchange he had recently had with Hansen.

⁷Beebe testified that he started the meeting by telling McCrea that she would be able to claim the 15 minutes of regular work time. However, both McCrea and Keller testified that he started the meeting by stating that he had been hurt by McCrea's need to have others attend the meeting.

⁸Beebe testified that he told Keller that McCrea was not in trouble and union representation was not necessary. However, his statement was contradicted by the testimony of both Keller and McCrea who stated that he simply ignored Keller.

23. Throughout the questioning, McCrea felt that Beebe was trying to impugn her character and accuse her of wrongdoing. McCrea asked Beebe on at least one occasion if she was in trouble. After a while, Keller again interrupted Beebe and stated that McCrea should have union representation because Keller did not feel comfortable representing McCrea given the lines of questioning. Again, Beebe did not respond to Keller.

24. After one of the times McCrea asked Beebe if she was in trouble, Beebe told her that she was not and she would be allowed to claim the 15 minutes as regular worked time.⁹

25. Subsequently, the Union filed a grievance on McCrea's behalf, but did not take it to arbitration. McCrea has since voluntarily left employment with the County and lives in another state. She provided her testimony via the webcam service Skype.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. The County did not refuse a request by McCrea for Union representation at the May 31 meeting, and therefore did not violate ORS 243.672(1)(a).

DISCUSSION

Standards of Review

The Union asserts that McCrea requested Union representation before and during the May 31 meeting, and Beebe denied the requests, which interfered with and restrained McCrea in, or because of, the exercise of rights guaranteed by ORS 243.662. *See* ORS 243.672(1)(a). A bargaining member who requests union representation at an investigatory interview that could reasonably result in discipline exercises a right guaranteed by ORS 243.662. As a result, an employer's denial of such representation may violate ORS 243.672(1)(a).

An employer can violate ORS 243.672(1)(a) in two ways. One violation occurs if we conclude that the employer violated the "because of" prong of the statute. When an employer takes action "because of" an employee's activities, which are protected under the Public Employer Collective Bargaining Act (PECBA), the natural and probable effect of this conduct will be to chill employees in their exercise of protected rights. *See International Longshore and Warehouse Union, Local 28 v. Port of Portland*, Case No. UP-35-10, 25 PECBR 285, 295 (2012) (citing *State Teachers Education Association/OEA/NEA and Andrews, et al. v. Willamette Education Service District and State of Oregon, Department of Education*, Case No. UP-14-99, 19 PECBR 228, 249 (2001)). An employer may also violate the "in the exercise" prong of subsection (1)(a). Such a violation typically occurs when an employer representative makes threatening or coercive statements. *See Clackamas County Employees' Assn. v. Clackamas County*, 243 Or App 34, 42, 259 P3d 932 (2011).

⁹It is not clear from the record when McCrea first asked Beebe if she was in trouble, or how many times.

Under the PECBA, an employee is entitled to union representation at an investigatory interview if the following three criteria are met: (1) the employee reasonably believes that disciplinary action may result from the interview; (2) the employer insists upon the interview; and (3) the employee requests representation. *Port of Portland*, 25 PECBR at 293 (citing *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-21-88, 11 PECBR 480, 488 (1989)). Having originated in the case of *NLRB v. J. Weingarten, Inc.*, 420 US 251, 88 LRRM 2689 (1975), the right to union representation during an investigatory interview is colloquially referred to as a *Weingarten* right. As the complainant, the Union has the burden of proof and must establish by a preponderance of the evidence that the County denied McCrea her *Weingarten* rights.

In *Washington County Police Officers Association v. Washington County*, UP-15-90, 12 PECBR 693 (1991), *adh'd to on recons*, 12 PECBR 727 (1991), we defined the role of the union representative in an investigatory interview under the PECBA. We held that (1) before the meeting, the representative may inquire about the purpose of the interview; (2) during the meeting the representative may seek clarification and elaboration of the employer's questions and employee's answers; and (3) at the end of the meeting, the representative may suggest to the employer other witnesses to interview, and discuss prior situations or other mitigating factors that could bear on the employer's deliberations concerning discipline. We made it clear that the representative does not have the right to counsel the employee in answering questions. 12 PECBR at 704-705. Accordingly, under the PECBA, a union representative is not a silent observer who cannot assist the employee, nor does a union representative serve as an employee advocate who turns the interview into an adversarial proceeding. Rather, the union representative's role is that of a monitor to ensure that the integrity of the investigation is not compromised by factual inaccuracies, misunderstandings, or incomplete information. *Id.*

The issues in this case as identified in the complaint are whether Beebe: (1) refused to let shop steward Hoby Hansen represent McCrea on May 31; (2) told McCrea he was offended that she had chosen to consult with Hansen rather than talk to him directly about a time sheet issue; and (3) refused to postpone the May 31 meeting until a shop steward could be present. In arguing its request to modify the issue statements, the Union acknowledged that there is insufficient factual support for the second allegation as stated, so we will not address that here.

With respect to the first and third allegations, we address those together under the *Weingarten* criteria, separately analyzing McCrea's request for Hansen or Keller, and Keller's request for a Union steward under the third criterion. We conclude that the County did not deny McCrea her *Weingarten* rights. Specifically, although Beebe insisted on an investigatory meeting, and McCrea reasonably believed that disciplinary action may result, we conclude that Beebe did not deny a direct request from McCrea for Union representation. Accordingly, the County did not deny McCrea's *Weingarten* rights and violate ORS 243.672(1)(a).

REASONABLE BELIEF THAT DISCIPLINARY ACTION MAY RESULT

McCrea reasonably believed that disciplinary action might result from her meeting with Beebe. We first note that Beebe did not intend to discipline McCrea when he met with her. Beebe and Ford decided to allow McCrea to claim the 15 minutes as work time and they did not discuss

discipline. However, an employee has a right to union representation even if the employer does not contemplate taking any disciplinary action against the employee at the time of the interview since disciplinary action will rarely be decided upon until after the results of the inquiry are known. *Port of Portland*, 25 PECBR at 293 (2012) (citing *Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department of Corrections*, Case No. UP-3-00, 19 PECBR 568, 577 (2002)).

The right to the presence of a union representative attaches when an employee reasonably believes that the purpose of the meeting is to obtain information that could be the basis of discipline. To determine if an employee's belief that discipline may result from a meeting is reasonable, we examine the totality of the circumstances. We have previously identified the following factors, which are merely illustrative and not exhaustive or all-inclusive:

- "1) Whether the interview concerns a subject that may result in discipline;
- "2) Evidence of employee wrongdoing;
- "3) Whether the employer representative conducting the interview has authority to impose discipline;
- "4) Whether the employee attending the meeting knows about discipline imposed on others for similar conduct;
- "5) Whether other circumstances suggest a possibility of discipline, *e.g.*, a more formal-style of meeting is more likely to suggest the possibility of discipline." *Id.* at 294 (citing *Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department of Corrections, Snake River Correctional Institution*, Case No. UP-9-01, 20 PECBR 1, 17 (2002)).

The Union did not present any evidence that other County employees had been disciplined for time card errors. Additionally, Beebe testified that employees routinely made inadvertent errors on their time cards that were corrected without incident. Further, in testifying about her meeting with Beebe, McCrea did not use the term "disciplinary action" or specifically state that she feared it might result. However, McCrea's testimony indicates that she reasonably feared that there may be consequences to her and the entire office based on her timesheet and her responses to Beebe's questions. Specifically, with respect to her meeting with Beebe and his assertions about how he had done good things for the office, McCrea testified:

"I just felt like if I wasn't going to follow in his direction or do something, you know, stand up to him, that he was going to change his ways. So, I felt I was the person that was going to make things tighter in the office. That's what I felt like he implied, that I was going to cause that." (Testimony of McCrea.)

With respect to McCrea claiming fifteen minutes of work time on May 20, McCrea testified that Beebe continually questioned her work ethic and her definition of work. Specifically, McCrea described her meeting with Beebe as follows:

“He was, he, it fully felt like he was trying to tear down my character. He, he was just doing his normal thing where he tries to act like you’re doing something wrong or that you’re in trouble or something like that. And, and, I even asked him at one part of the conversation...that...sorry...I asked him, like, ‘[A]m I in trouble here?’ like, ‘[W]hat’s happening?’ And he said ‘[N]o, no, you’re not in trouble.’ But then he kept asking questions like that, like ‘[W]ell do you think that’s working? What did you do?’ * * * I mean, a couple times, I asked him more than once if I was in trouble because of his interrogating questions, and how he was interrogating me. And at the time, he was like, ‘[E]verything is going to be okay, you’re going to get to claim this.’ But then he would start interrogating again and asking those questions. So then you felt like ‘[I]f you are going to do that, then why are you asking these questions?’ It just continued on.” (Testimony of McCrea.)

McCrea also testified that she believed Beebe was attempting to get her to admit that she had lied when she claimed the fifteen minutes for May 20. (Testimony of McCrea.) Additionally, Beebe’s questioning was intensive enough that it upset Keller and caused Keller to request Union representation on McCrea’s behalf.

By focusing on McCrea’s definition of work and what she did during the disputed fifteen minutes, Beebe’s questions reasonably suggested to McCrea that she may be disciplined directly or that the entire office may suffer consequences based on her actions. It is axiomatic that public employees are expected to report their work time accurately and an intentional failure to do so can result in disciplinary action. Additionally, Beebe had told McCrea earlier that he was trying to prevent the County from being cheated. Finally, although Beebe was not McCrea’s direct supervisor, he was the Department Director and had the authority to discipline McCrea. Therefore, we conclude that McCrea reasonably believed that disciplinary action might result from her meeting with Beebe. *See, e.g., Port of Portland*, 25 PECBR 285 (employee could reasonably view meeting as an interview that could result in discipline following his refusal to sign a letter imposing medical restrictions), and *Department of Corrections*, 19 PECBR 568 (employees who knew they violated policy reasonably believed that their interviews could lead to disciplinary action despite the employer’s assurances that they were only witnesses).

THE EMPLOYER INSISTS UPON THE INTERVIEW

We conclude that Beebe insisted on the interview. He asked McCrea to meet with him. She told Beebe that she was uncomfortable meeting with him alone. Beebe did not cancel the meeting at that time. He also did not conclude the meeting when Keller asked for it to stop until McCrea could have Union representation. We determine this is sufficient to show that Beebe insisted on the interview.

THE EMPLOYEE REQUESTS REPRESENTATION

Finally, under the *Weingarten* third criterion, we conclude McCrea requested Union representation. The Union asserts that McCrea requested Union representation before the May 31 meeting when she said she wanted to bring Keller or Hansen, and Beebe denied the request when he stated that she may bring Keller. The Union also asserts that by ignoring Keller’s request for a

Union steward during the meeting, Beebe violated McCrea's representation request. The County responds that McCrea herself never directly requested Union representation, and therefore, Beebe did not deny her representation. Having considered the arguments of both parties, we construe McCrea's request as a request for Union representation. However, as McCrea requested Keller or Hansen in the alternative, and was allowed Keller, we conclude she was not denied representation.¹⁰ Additionally, we conclude that, as it was Keller, not McCrea, who requested Hansen or another steward at the interview, Beebe did not deny McCrea's request for a Union representative.

We first conclude that McCrea's request to have Keller or Hansen join her in Beebe's office constituted a request for Union representation. This Board has never analyzed the "employee requests representation" element in our *Weingarten* cases to determine how specifically a request must be phrased. However, the National Labor Relations Board (NLRB) has addressed this issue under the National Labor Relations Act (NLRA) in at least three previous cases, determining that an employee's request to simply have "someone" or "somebody" accompany them to an investigatory interview sufficed to be considered a request for union representation. *See General Die Casters, Inc.*, 358 NLRB 85 (2012), *Circuit-Wise, Inc.*, 308 NLRB 1091 (1992), and *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977). The NLRB's rulings in these cases have been based on its determination that the employer either knew that the employee was requesting union representation or had sufficient reason to infer it. *Id.* In this case, Beebe testified that the reason he asked Ely to join the meeting is that he had always been taught that if the union brings someone to a meeting, management should as well. (Testimony of Beebe.) Therefore, Beebe's testimony indicates that he understood McCrea's request for accompaniment to be a request for Union representation. As such, we find no reason to diverge from the NLRB rulings holding that an employee's request for "someone" or "somebody" was sufficient in cases where the employer understands the request to be one for union representation.

While we have determined that McCrea requested representation, we also conclude that Beebe did not deny her request. After hearing the yelling between Beebe and Hansen over her timecard claim, McCrea was fearful of meeting with Beebe alone. Therefore, before the meeting, McCrea asked Beebe if either Keller or Hansen could join her. Beebe originally said that it would not be necessary. After McCrea again requested either Keller or Hansen, Beebe told her she could bring Keller. Therefore, McCrea sought accompaniment at the meeting for the purpose of personal comfort, and Beebe permitted her to bring Keller for that purpose. Accordingly, Beebe did not deny McCrea's request for Union representation prior to the meeting.

During the meeting, it was Keller, not McCrea who requested Union representation for McCrea. We have not previously considered the issue of whether a third party can request representation on behalf of an interviewed employee. However, we have always phrased the final

¹⁰We have never analyzed whether a fellow employee who is not an elected union representative can accompany an employee during an investigatory interview. The NLRB has considered this issue several times; however, it has always been in the context of whether employees in non-Union work environments were subject to *Weingarten* rights. *See* Christine Neylon O'Brien, *The NLRB Waffling on Weingarten Rights*, 37 Loy. U. Chi. L.J. 101 (2005). Because we are not considering *Weingarten* in the context of non-union environments, we do not rely on the NLRB's discussion of co-worker representation in investigatory meetings.

requirement for finding a *Weingarten* violation as “the employee requests representation.” See *Port of Portland*, 25 PECBR at 293 (emphasis added). We do not find any reason to expand this requirement for the following reasons. First, the NLRB has considered this issue and has consistently required that the involved employee be the one to initiate the request. See *Appalachian Power Co.*, 253 NLRB 931 (1980) (citing *Kohl’s Food Company*, 249 NLRB 75 (1980); *First National Supermarkets, Inc., d/b/a Pick-N-Pay Supermarkets, Inc.*, 247 NLRB 1136 (1980); *Lennox Industries, Inc.*, 244 NLRB 607 (1979); and *Inland Container Corporation*, 240 NLRB 1298 (1979). Second, the Union has not provided us with any compelling authority or arguments to support an assertion that we should diverge from the NLRB’s rulings and expand the request rights to a third party. Third, McCrea did not echo Keller’s request and has not provided a compelling reason for failing to do so. When asked why she did not repeat Keller’s request or make the request herself, Keller testified that she felt like it would not do any good since Beebe did not respond to Keller’s request. (Testimony of McCrea.) However, McCrea’s testimony also indicates that although she reasonably anticipated discipline from the interview, she did not feel intimidated and continued to successfully defend herself. Fourth, McCrea did not testify that she felt that the presence of a Union steward was necessary. Therefore, while McCrea may have assumed that the request would be futile, the onus was still on her to verbalize it and give Beebe the opportunity to respond.

Finally, even if McCrea had made or echoed Keller’s request for Hansen during the meeting, we have held that in given circumstances, the employer can compel the choice of one representative over another. Specifically, in *Lane County Peace Officers Association v. Lane County Sheriff’s Office*, Case No. UP-32-02, 20 PECBR 444 (2003), we held that the employer could exclude the employees’ requested union representatives because they were subjects of the same ongoing investigation, and there was no evidence that the employees received inadequate representation or suffered a hardship. In this case, Beebe’s previous explosive meeting with Hansen could lead to the interview with McCrea turning unnecessarily hostile. Therefore, this would be a valid reason for Beebe to have initially excluded Hansen. Further, McCrea’s testimony does not indicate that *she* felt as if she received inadequate representation or suffered a hardship beyond what Keller was providing. As noted above, the Union representative’s role is not that of an advocate, but more that of a monitor to ensure that the integrity of the investigation is not compromised by factual inaccuracies, misunderstandings, or incomplete information. Keller was upset by Beebe’s approach and was not an elected Union official; however, there is no indication that she could not fulfill the monitoring process to the extent McCrea needed. Accordingly, we determine that Keller’s request was not sufficient to meet the requirement of the employee making the request.

In conclusion, we hold that the Union met the first two prongs – that McCrea reasonably believed disciplinary action may result, and that Beebe insisted on the interview. However, the Union fails on the third prong – that McCrea requested representation and Beebe denied it. Specifically, McCrea requested, and was granted, representation by Keller and did not suffer inadequate representation or hardship.

3. The County did not refuse a request by McCrea for Union representation at a May 31 meeting, and therefore did not deny employee and shop steward Hoby Hansen the opportunity to represent Diana McCrea.

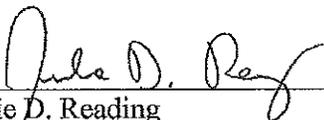
DISCUSSION

Having concluded that Beebe did not deny McCrea's request for a Union representative, we also conclude that the County did not deny employee and shop steward Hoby Hansen the opportunity to represent Diana McCrea during a May 31 meeting.

PROPOSED ORDER

The complaint, as amended, is dismissed.

SIGNED AND ISSUED on the 15th day of August, 2014.



Julie D. Reading
Administrative Law Judge

NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The "date of filing objections" means the date objections are received by this Board; "the date of service" of a recommended order means the date this Board mails or personally serves it on the parties.) A party that files objections to a recommended order with this Board must simultaneously serve a copy of the objections on all parties of record in the case and file with this Board, proof of such service. This Board may disregard the objections of a party that fails to comply with those requirements, unless the party shows good cause for its failure to comply. (See Board Rules 115-010-0010(5) and (6); 115-010-0090; 115-035-0050; 115-045-0040; and 115-070-0055.)