

EMPLOYEES' RIGHTS TO UNION REPRESENTATION AT DISCIPLINARY MEETINGS

Our clients often ask us about a school district's obligation to allow a union representative to be present at a meeting between an administrator and an employee. It is a common misperception that a union representative must be present at all such meetings. In fact, under the United States Supreme Court decision in *NLRB v. Weingarten*, an employee is not necessarily entitled to the presence of a representative at all meetings. This article will highlight some of the more important questions that are typically encountered.

What are *Weingarten* rights?

Basically, the U.S. Supreme Court's decision in *Weingarten* gives employees the right to ask for a representative to be present at a disciplinary meeting with an employer. The right is not without limits, however, as detailed later in this article. In *Weingarten*, the Court held that (1) the right to a union representative's assistance is based on the statutory guarantee that employees may act in concert for mutual aid and protection; (2) the right arises only when the employee requests representation; (3) the right is limited to situations where the employee reasonably believes the investigation will result in disciplinary action; (4) the right may not interfere with the employer's legitimate prerogative to continue the interview; and (5) the employer has no duty to bargain in any way with a union representative who may be permitted to attend.

When is an employee entitled to a union representative?

Often administrators believe that employees have a right to union representation at all meetings. As noted above, the right to representation is limited to situations where the employee reasonably believes the investigation will result in disciplinary action. An "investigatory interview" is one in which possible disciplinary action may be taken and more information is needed. However, an employee does not have a right to union representation in a meeting called by an employer solely for the purpose of informing the employee of discipline where the decision to discipline has already been made.

Moreover administrators often presume that they have an affirmative obligation to offer an employee union representation during an investigatory interview. However, even during an investigatory interview, an employee must affirmatively request union representation before there can be a violation of his/her *Weingarten* rights. The employer has no duty to offer representation or advise the employee of the right prior to questioning him/her.

It is also important to note that while an employee has a right to a union representative upon such request, he/she does not have a right to a particular representative and such a request for a specific representative does not need to be granted. In addition, an employer does not have to tolerate unreasonable delays in obtaining a representative or postpone interviews with its employees because a particular union representative is not available where another representative is available. If a particular representative is not available, a meeting may still take place with a different union representative even if the employee objects to that particular representative.

Once a request for a representative is made, the employer essentially has three options: (1) grant the request; (2) discontinue or cancel the interview; or (3) offer the employee the choice of continuing the interview without union representation or having no interview at all. In order to avoid undue delay, an employer may decline to interview an employee if the employee insists that a union representative be present and may continue the investigation without any information that the employee might furnish.

It should also be noted that when an employee makes a request for a representative at the first of several investigatory meetings, it is not necessary for the employee to renew the request at subsequent meetings.

Over the years, the Pennsylvania Public Labor Relations Board (PLRB) has provided an overview of conduct violating Weingarten rights. For example, the PLRB has held it a violation to force an employee to continue an investigatory interview after denying that employee's request to have a union representative, to deny an employee's request for a private consultation with a union representative prior to an investigatory interview, to constructively deny or discourage and dissuade an employee from adhering to an initial request for union representation at an investigatory interview, to deny an employee's request to consult with a union representative prior to deciding whether to consent to a drug test, to deny an employee's request for union representation at any further meeting or interview beyond a first meeting to discuss or review a public employee's performance evaluation or rating, to deny an employee's request for a private consultation with a union representative once the investigatory interview has begun; or to prohibit a union representative from speaking at an investigatory interview.

What role does the union representative play in the hearing?

The primary purpose of the representative is to protect the employee's rights under the collective bargaining agreement (CBA) and relevant labor laws. However, the exercise of the right to representation may not interfere with legitimate employer prerogatives. Therefore, the union representative is permitted to attend the meeting but cannot speak for the employee. It is reasonable for a representative to offer advice to the employee, but he cannot interfere with the process. It would be wrong for an administrator to tell a representative to keep completely silent, but it is permissible to confine him to make a statement only after the questioning of the employee. It is entirely permissible to require that the employee answer questions or explain their behavior without the aid or interference of the representative.

Please note that the employee may be directed to make a statement in writing as opposed to a face-to-face interview but this does not strip the employee of his/her right to a union representative.

What happens if the employees Weingarten rights are violated?

A violation of an employee's right to a representative in such circumstances could mean a possible unfair labor practice charge under the Pennsylvania Public Employees Relations Act. In addition, if the employee leaves a meeting because the employer refused to allow a representative to be present, and the employee actually had a right to the representative, any discipline that was given to the employee could be overturned. Further, if the employer refuses

to allow a representative to be present and the meeting is still held, any adverse actions taken by the employer against the employee based upon the meeting could be overturned. Based upon these dire consequences, it is important to ensure that such rights are respected and adhered to during an investigation into employee conduct.

Are there any other times in which an employee can have a representative present?

It is extremely important to carefully read your collective bargaining agreement. Although the CBA cannot simply deny the rights of an employee to a representative, it can in fact provide greater protection than available solely under law. For instance, some collective bargaining agreements explicitly detail certain times that a representative may be present. These could include searches of computer files or work areas. It is also important to read all sections of the CBA because the heading of the section may be misleading. For instance, language conferring rights may be found under a heading such as “Technology” or “Working Conditions,” so check your CBA carefully.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.