

EMPLOYEES' RIGHTS TO UNION REPRESENTATION AT DISCIPLINARY MEETINGS

By Richard B. Galtman

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 1975, the United States Supreme Court's decision in *National Labor Relations Board v. J. Weingarten, Inc.* ("Weingarten") gave employees the right to ask for a representative to be present at a disciplinary meeting with an employer. Specifically, in *Weingarten*, the U.S. Supreme 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. The so-called *Weingarten* rule was adopted by the Pennsylvania Labor Relations Board in relation to Pennsylvania public employers in *Conneaut School District* in 1981.

The *Weingarten* right to representation is limited in several facets:

First, an employee does not have the right to union representation at all meetings. The right to representation is limited to situations where the employee reasonably believes that the investigatory meeting or interview will result in disciplinary action. An "investigatory interview" is one in which possible disciplinary action may be taken and more information is needed. Conversely, 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.

Second, administrators do not have an affirmative obligation to offer an employee union representation during an investigatory interview. 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.

Third, in *Pennsylvania Office of Administration v. Pennsylvania Labor Relations Board*, the Pennsylvania Supreme Court recently stated that the right to union accompaniment during an investigatory interview includes the employee's choice of a particular union representative, but only where the particular union representative is reasonably available and there are no extenuating circumstances. Under the Supreme Court's ruling, the employee has the right to specify the representative that he or she wants, and the employer is obligated to supply that representative absent some extenuating circumstances. Where the requested representative is unavailable, however, the employee does not have a right to be represented by that particular representative at that particular meeting. Thus, when an employee requests a union representative who is not available for the meeting, the employer is not required to postpone the meeting, secure an alternative representative, or otherwise take steps to accommodate the employee's specific request. Rather, the employee has the right and obligation to request an alternative representative who is available for that meeting.

In practical terms, once an employee requests that a representative be present and the requested representative is available, the employer essentially has two options: (1) grant the request; or (2) discontinue or cancel the interview. As to this second option, it should be noted that the employer can decide not to meet with an employee in such instances and may continue the investigation without obtaining any information that the employee might furnish. The employee's right is to have a representative at such meetings; it is not to have the meeting. Of course, this option is offered with caution as it may inhibit or prevent a thorough and accurate investigation and may present subsequent issues as to "due process" and "just cause" in relation to any discipline that ultimately is meted out.

In addition, employers are further cautioned 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 each subsequent meeting. The employer is placed on notice that the employee requests a representative for such meetings and must adhere to the "ongoing" request.

Once a representative is present, it is important to remember that the primary purpose of the union representative being present is to protect the employee's rights under the collective bargaining agreement and relevant labor laws. However, as noted in *Weingarten*, the exercise of the right to representation may not interfere with legitimate employer prerogatives. Therefore, the union representative is entitled to attend the meeting, but he/she cannot speak for the employee. A representative may offer advice to the employee, but he/she cannot interfere with the investigative process. While it would be improper for an administrator to tell a representative to keep completely silent, it is permissible for an employer to confine the representative to making a statement only after the questioning of the employee. It is also entirely permissible to require that the employee answer questions or explain his/her behavior without the aid or interference of the representative.

An employer's improper refusal to allow an employee to be represented at such meetings has broad consequences. An employer's refusal may lead to an unfair labor practice charge under the Pennsylvania Public Employees Relations Act or a grievance under the applicable collective bargaining agreement. Further, if the employer refuses to allow a representative to be present and a meeting is still held, any subsequent adverse actions taken by the employer against the employee based upon the meeting could be overturned. 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 presence of the representative, any discipline that was given to the employee for leaving the meeting could be overturned. Based upon these serious and potentially costly consequences, it is important to ensure that this right is respected and adhered to in such instances.

Finally, many employers' collective bargaining agreements provide greater rights to representation than addressed or outlined in *Weingarten* or the subsequent decisions interpreting *Weingarten*. Therefore, it is imperative that administrators be familiar with those agreements so as to avoid further unnecessary conflicts and grievances.

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 or 570-654-2210.