

Use It Or Lose It

A review of Weingarten rights

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Weingarten Rights

- Union members have a right to a union representative at an investigatory hearing if they reasonably believe that the investigation could lead to disciplinary action.

NLRB v. Weingarten, 420 US 251 (1975)

- (1) The employee must be in a bargaining unit that has a recognized union
- (2) The meeting must be an investigatory meeting
- (3) The employee must have a reasonable belief that the investigation will lead to disciplinary action
- (4) The employee must request union representation

Employee *MUST REQUEST* representation

- No duty on employer to remind employee or tell her about the right
- Employee must ask for it
- Contract governs
- What must an employee say to make valid request?
 - Do I have a right to representation? Magic formula? Conditional language?

Accessing the Right

- Q. Must the employer inform the employee of his/her rights?
- No. The member must request a representative, the employer has no obligation to inform the employee of that right.

Bargaining Note

- An employer can agree in a CBA/MOU to provide affirmative statements to employees about Weingarten rights.
- Usually, in those situations, if an employee declines representation, they sign a form indicating representation has been offered but not accepted

How Do You Know?

- Q. What is the best way for the employee to find out if the meeting could lead to discipline against him/her?
 - Ask the employer: “Could this meeting lead to discipline against me?”
- Once the employee asks for representation, must management conduct the meeting and include a union representative?
 - Not necessarily. Instead of conducting the meeting, the employer may simply issue the discipline, or conduct the meeting without the accused employee.

Reasonable Belief “Could Lead to Discipline?”

- Depends on facts
- Even if employer says there will not be discipline, circumstances may mean employee reasonably believes discipline likely
- Discipline must be probable or being considered by employer
- Can a meeting start as non-disciplinary, but then become disciplinary?

When the Right is Denied

- What should the employee do if the employer denies the request for union representation, and orders him/her to attend the meeting anyway?

When Employer Denies *Weingarten*

- If representation has been denied employee may refuse to attend.
- BUT, risky to refuse (insubordination)
- Alternative:
- Remain silent (say nothing, sign nothing)
- Continue to insist on representative
- Avoid insubordination
- File grievance: WORK NOW, GRIEVE LATER.

Practical Issues

- If the employer moves forward with the investigation without speaking to the employee, what does that mean about the quality or comprehensiveness of the investigation?
- Does it help to bring your evidence first or last in the process?

When There Is NO *Weingarten*

- *Weingarten* is not available for a routine evaluation conference (or coaching), even if the employee expects a negative evaluation.

*Possible exception when there is a “toxic relationship” between employee and evaluator.

- If purpose is only to deliver discipline, then no *Weingarten* right
- If employee is asked no questions, no role for Steward

What Happens If....

- The employer did not intend to ask questions but the employee runs their mouth or starts providing information?

Review: Do I Have A Right To Representation At...?

- Investigatory Meetings
- Annual Performance Evaluations
- Daily start-up meetings
- Grievance meetings
- Performance Improvement Plans
- Follow-up on PIP

What About Non-Disciplinary Actions?

- Employees have the right to representation during
 - An employer-administered drug test
 - During the ADA Interactive Process

Using the Right

- The employee has a right to designate the individual from the union as long as it doesn't cause a delay.
 - An untrained member of the bargaining unit is insufficient
- The employee is generally entitled to know the subject of the meeting in advance.
- The employee may consult with the representative in advance of the meeting.

Before the Meeting

- The representative has the right to know the subject matter of the meeting in advance.
- The representative should consult with the member in advance of the meeting.
- The representative should encourage the member to be truthful with the Union.

Legal Rights of Stewards

- When you are acting in the capacity of shop steward you are the equal of management!
- You must not be insubordinate.
- Obey and grieve or take other action.
- Management must treat you with respect.

The Role of Representatives in the Investigatory Meeting

- Q. What can the representative do in the meeting?
 - The representative has the right:
 - To know the subject of the investigatory meeting;
 - To confer with the member prior to the meeting;
 - Request breaks during meeting to consult with member;
 - To speak/participate in the meeting;
 - Request the supervisor clarify a question;
 - Advise employee on how to answer a question; and
 - Stop harassment or abuse.

Weingarten Rights

- DURING the “investigatory interview”:
 - Take as much control as possible;
 - Indicate willingness to cooperate fully;
 - Caucus with employees as necessary;
 - Ask questions to assist employee tell story, mitigate circumstances;
 - Summarize favorable information;
 - Take good notes.

Representative's Role During The Meeting

- The representative has a right to speak at the meeting. But an employer has a right to insist on answers from the employee directly, and can discipline for refusal to cooperate in an investigation.
- If representative is also an employee, he/she may not be disciplined for attending, but may be disciplined for certain kinds of behavior at the meeting.

During the Meeting (cont.)

- You have the right to consult privately with member (caucus break).
 - Question: How many? How Long? What is reasonable?
- DO take notes.
- DO ask questions of Management.

- Do NOT disrupt.
 - What is disruptive?

Employer Rights

- The employer has the right to question and receive answers directly from the employee.
 - Representative may not interfere with this.
 - The representative should not be arguing the case – this is not a formal hearing.

Tips for meeting with the boss

- Act as an equal
- Remember your goal
- Stick to the point and take charge of the meeting
- Maintain a united front
- Take notes and record what management says
- Repeat your best arguments and facts
- Disagree with dignity
- Be ready to suspend or end the meeting if abusive, circular, harassing

Remedy: Denial Of *Weingarten* Rights

- *Weingarten* is a labor right; violation is an unfair practice under NLRA
 - Make Whole Remedy?
- Move to exclude statements obtained after violation of *Weingarten* from a disciplinary hearing (mention violation in the grievance appeal discipline)

Remedy

- Q. What remedy will the NLRB give an employee whose *Weingarten* rights are violated?
 - If the employer discharges an employee because of a refusal to attend a meeting where *Weingarten* rights have been denied, discharge is not for “cause,” and the employee is entitled to reinstatement with back pay.
 - BUT, if the employee is disciplined for another, valid reason, the Board will not order reinstatement. Instead, the Board will issue a cease-and-desist order.

Remedy: Denial of *Weingarten* Rights

- What about if a representation right is in the CBA?
 - What is the remedy then?

What About the Public Sector?

- Washington Public Employment Relations Commission
 - *Teamsters, Local 760 v. Okanogan County*, 1986 WA PERC Lexis 11
 - Unfair labor practice, RCW 41.56.140(1)
 - Adopts *Weingarten* in the entirety
- *Warden Education Association v. Warden School District*, 2019 WA PERC Lexis 149 develops the concepts

Oregon

- Oregon Employment Relations Board adopted the *Weingarten* rule in *AFSCME, Local 328 v. Oregon Health Sciences University*, Case No. UP-119-87, 10 PECBR 922, 926-929 (1988).
- This decision made it a violation of ORS § 243.662 to deny representation in an investigatory interview once requested

Role of the Representative

- Before the meeting the representative may inquire about the purpose of the interview;
- During the meeting the representative may seek clarification and elaboration of the employer's questions and the employees answers; and
- 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...
- The representative does not have the right to counsel the employee in answering questions.
- *AFSCME Council 75, Local 1082 v. Hood River County*, 2014 PER Lexis 112

Questions?