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Representative Information Bulletin

Weingarten Rights

Most representatives and members have some basic knowledge of Weingarten Rights. In recent years, we have compelled the employer to become more knowledgeable in the Weingarten Right and its application.

The Weingarten Right refers to a 1975 U.S. Supreme Court decision in: *NLRB vs. J. Weingarten, Inc.*, 420 U.S. 251 (1975). In this decision, the Supreme Court ruled that the employee had a right, under the NLRA, to union representation during a disciplinary investigation.

New Jersey has adopted a “Weingarten Rule” due to the similarity between the unfair labor provisions of the NLRA and New Jersey’s Employer-Employee Relations Act. In 1996, the New Jersey Supreme Court touched on the participation of a union representative during a disciplinary investigation. In this decision, the Supreme Court held that a union representative serves to “observe, assist, and clarify.” The Court maintained that the employer does not have to bargain with the union representative, and that the employer runs the interview. The Court also reasoned that the union representative’s role is not that of adversarial, but to simply assist the employee in understanding the questioning and the proceedings. The Court further held that the employer could remove the union representative if s/he interferes with the disciplinary interview.

This does not mean that the employer may restrict a union representative from speaking at all. In fact, the 9th Circuit Court of Appeals ruled in favor of the union in *NLRB vs. Texaco, Inc.*, when the employer restricted a union representative from speaking at a disciplinary investigation. In this decision, the Court ruled that an employer cannot bar a union representative from any participation and that the union representative is allowed to assist the employee in presenting the facts during a disciplinary interview.

Our Collective Bargaining Agreement also has language that adopts the concept of Weingarten. In Article XI; L. 2., these rights are delineated. This section of the contract states, in pertinent part: "In the event a formal charge of misconduct is made by the State against an employee and, if he so requests, he shall be entitled to a representative of the Association only as a witness or as an advisor during any subsequent interrogation of the employee concerning such charge." It goes on further to state, "Where an employee is interrogated during the course of an investigation and when there is a reasonable likelihood that the individual being questioned may have formal charges preferred against him, the employee who shall then, if he requests, be entitled to a representative of the Association, only as a witness or as an advisor, during subsequent interrogation concerning the charge provided that the interrogation process shall not be delayed and/or the requirement to expedite any official duty not be impaired."

The nuts and bolts of the Weingarten Right are as follows:

If during an investigation, the employer becomes aware that disciplinary action may be taken against the employee, the employer must advise the employee, and the employee shall be entitled to have a union representative present during the investigation.

If the employee feels that anything s/he may say during an investigation may lead to disciplinary action s/he is entitled to have a union representative present during a disciplinary investigation.

The union representative may not answer questions for the employee, but may assist the employee in understanding any question, and/or any part of the proceeding.

The union representative may offer advice on how to answer questions, object to intimidating tactics, help the employee avoid fatal admissions or insubordinate outbursts, and insure that the interviewer gives an honest and accurate account of the interview.

The employee and the union representative are permitted to meet privately (caucus) after being informed of the nature of the disciplinary investigation.

Please remember that the employer does not have to inform the employee that s/he is entitled to a union representative during a disciplinary interview. It is incumbent upon the employee to request that a union representative be present.

If after a request for union representation, the interviewer refuses to allow a representative to be present, and continues the interview without the employee's permission, the employee can refuse to answer any further questions.

It is important that we educate not only our representatives, but most importantly, our members. It is the members who must know their rights and initially request the presence of a union representative.

Good luck,

Jeffrey Smith