

## **The Weingarten Right**

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### **ELEMENTS**

- An employee who is represented by a union is entitled to union representation when:
  - 1) The interview is investigatory in nature,
  - 2) The interview of the employee is conducted by the employer or its agent,
  - 3) The employee reasonably believes that he may be disciplined as a result of the information obtained from the interview, and
  - 4) The employee requests representation.
  
- The reasonable belief of the employee is based on objective standards under all the circumstances of the matter. If an employee being interviewed in an internal investigation requests a Weingarten representative, the only issue which must be determined is whether the requisite reasonable belief of discipline is present before a decision is made on granting or denying the request for a Weingarten representative.
  
- The employer's designation of an employee being interviewed as a witness rather than a target or principal does not mean that the employee is unentitled to union representation. If all the Weingarten elements are present for an employee designated only as a witness, that employee is still entitled to such representation.
  
- A case-by-case analysis is necessary in order to determine whether the Weingarten right attaches. While an employee being interviewed may be designated as either witness or a target, an individualized assessment of the Weingarten elements should be made for each employee being interviewed if union representation is requested.
  
- An interview is investigatory when it is designed to elicit answers to work-related questions. However, if a meeting is held merely to inform an employee of a disciplinary decision that has already been made, there is no right to representation.
  
- The employee who is to be interviewed must request representation. The Weingarten right belongs to the employee and may not be invoked by the

representative without the employee's acknowledgement that he wants representation. If the employee fails to request representation, his failure to do so is constructed as a waiver of the right.

- In an unfair practice case, the charging party has the burden of proving that an employee is entitled to a Weingarten representative.

### **ISSUES IF REPRESENTATION IS REQUESTED**

- If an employee requests and is entitled to a Weingarten representative, the employer has three options:
  - 1) Allow the representation,
  - 2) Discontinue the interview, or
  - 3) Offer the employee the choice of continuing the interview unrepresented or having no interview at all.
- When two union officials are equally available to serve as a Weingarten representative, the decision as to who will serve should be decided by the union officials unless the employer can establish special circumstances that would warrant precluding one of the two union officials from serving as representative. The employee does not have a right to a particular union representative.
- If an employer has granted the employee's request for Weingarten representation, the employee should be provided an opportunity to consult with his representative before the investigatory interview only if the employee has not had an adequate opportunity to consult with a union representative before the interview date.

### **LIMITS ON THE RIGHT**

- The exercise of the right to union representation may not interfere with legitimate employer prerogatives, and the employer is under no duty to bargain with a union representative who attends the interview.
- The Weingarten representative is not in equal control of the interview and may not turn an interview into an adversarial confrontation obstructing the employer's right to conduct the interview. The representative's role is to observe and assist the employee rather than to bargain with the employer.

- While an employer cannot condition a union representative's attendance at an interview upon the representative's silence and the representative may assist in clarifying confusing questions and suggest additional witnesses, an employer may insist on hearing an employee's account first before the representative suggests clarifications or additions. The representative may not answer for the employee.
- A union representative may forfeit his right to act as a Weingarten representative if he prevents the employer from conducting an interview by repeatedly objecting and interrupting the interview.

### **REMEDY**

- If it is established that an employer violated an employee's Weingarten right, the burden is on the employer to show that any discipline was not based on information obtained during the interview at issue.
- Thus, if the discipline is based upon the independent evidence separate from the information obtained from the interview, the employee is not entitled to a reversal of discipline simply because his Weingarten right was violated.