Right to Union Representation at Meeting Which May Lead to Discipline

In its Weingarten[1] decision, the United States Supreme Court held that an employee has the right to have a union representative present at an investigatory interview, when the employee reasonably believes the interview will result in disciplinary action and requests representation. The Board has concluded that Weingarten rights apply under the statutes that the Board administers.

In Weingarten, the Court recognized that the employee's right was subject to certain limitations. First, the right arises only in situations where the employee requests representation.[2] Second, the employee's right to request representation as a condition to participation in the interview "is limited to situations where the employee reasonably believes the investigation will result in disciplinary action".[3] Reasonable belief is "measured . . . by objective standards under all the circumstances of the case", rather than by the subjective reaction of the employee.[4] Third, the employer may carry on its inquiry without interviewing the employee, thus leaving the employee "the choice between having an interview unaccompanied by (his or her) representative, or having no interview and foregoing any benefits that might be derived from one".[5] Fourth, the employer has no duty to bargain with any union representative who attends the investigatory interview.[6]

The Vermont State Employees' Association and the State of Vermont have expanded on this right in their contracts, providing that supervisors have an affirmative duty to inform the employee of the right to union representation at such

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[1] 420 U.S. 251 (1975).
[2] Id. at 257.
[3] Id. at 257-58.
[4] Id. at 257, n.5.
[5] Id. at 258-59.
[6] Id. at 259-60.

a meeting. The opportunity for VSEA representation is required whenever a supervisor, manager or investigator of the employer is requiring an employee to give oral or written statements on an issue involving the employee, and it is reasonable for the supervisor, manager or investigator to suspect that the statements may lead to discipline against the employee.[7]

However, when an employee is questioned about other employees' potential misconduct and there is no indication that employee has engaged in the misconduct, the Board has determined that the employee is not giving statements on an issue which may lead to discipline against the employer and the right to VSEA representation does not exist.[8] The situation would be different if, during the course of interviewing employees, it becomes reasonable for the investigator to believe that an employee was beginning to provide information that may result in such employee being disciplined. At such time, the investigator would have an affirmative duty under the VSEA-State contract to inform the employee of the right to the presence of a VSEA representative.[9]

If the right to union representation exists and management fails to grant it, the VLRB has excluded as inadmissible evidence of any harmful statements made by the employee at a meeting.[10] Where those statements form the sole basis for disciplinary action, the VLRB has rescinded the disciplinary action imposed.[11] The Board has indicated that an employer should not benefit, and an employee should not be harmed, by the fruits of a prohibited interview.[12]

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[7] Grievance of Rosenberger, 28 VLRB 197, 212-214 (2006). Grievance of Alexander, 31 VLRB 411, 428-29 (2011).
[8] Grievance of VSEA and Dargie, 27 VLRB 32, 60 (2004); *Affirmed*, 179 Vt. 228 (2005). Grievance of VSEA, 27 VLRB 65, 71-73 (2004).
[9] Grievance of VSEA, 27 VLRB at 73.
[10] Grievance of Dustin, 9 VLRB 296, 301-302 (1986).
[11] Id.
[12] Id.

However, evidence relied on by the employer gathered outside of, and independent from, admissions made by an employee during a contractually-prohibited interview is properly before the Board in determining the validity of the disciplinary action. In deciding whether an employer may rely on evidence to support discipline taken against an employee, it must be determined whether evidence was obtained by means sufficiently distinguishable from the taint of the contract violation or by exploitation of the violation.[13]

The Board elaborated on the extent of Weingarten rights in decisions issued in 2004. The Board addressed the notice that must be provided to an employee under investigation concerning the nature of the investigation, an employee's right to consult with a union representative prior to an investigative interview, and the role of the union representative at the investigative interview. The notice to employees of the nature of an investigative interview, prior consultation between the employee and union representative, and the role of the union representative at the investigative interview are intertwined and necessarily dependent on each other.[14] The extent of notice to an employee and the employee's ability to meaningfully consult with a union representative prior to an investigative interview significantly affect the extent of necessary involvement by the union representative at the interview to adequately represent the employee's interests.[15]

The investigator needs to provide the employee with notice of the general nature of the potential misconduct being investigated to ensure meaningful prior consultation between the employee and union representative.[16] The investigated

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[13] Grievance of Rosenberger, 28 VLRB 197, 216 (2006); 28 VLRB 284, 309 (2006); *Reversed on other grounds*, 185 Vt. 343 (2009). Grievance of VSEA and Tatro, 10 VLRB 78, 86-87 (2006).
[14] Grievance of VSEA, 27 VLRB 1, 28 (2004); *Affirmed,* 179 Vt. 578 (2005).
[15] Id.
[16] Id.

employee has the right during an investigative interview to be assisted by a knowledgeable union representative through the providing of effective representation. The Board's views in this regard do not result in turning investigative interviews into adversarial contests contrary to the Weingarten decision. The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist on only being interested at that time in hearing the employee's own account of the matter under investigation. The employer remains in command of the time, place and manner of the interview, and can concentrate on hearing the employee's account with no duty to bargain with the union representative at the interview.[17]

In interpreting contract language between VSEA and the State requiring the State "to provide such additional information as is reasonably necessary to serve the needs of VSEA as exclusive bargaining agent", the Board determined that the State violated this provision by failing to provide a correctional officer with copies of witnesses' statements at a pre-disciplinary meeting. The purpose of the meeting was to allow the officer the opportunity to present his response to charges made against him, and the Board concluded that copies of witnesses' statements were reasonably necessary for the officer and his VSEA representative to adequately respond to charges made against him based on such statements.[18]

In deciding whether to permit a break during an investigative interview, an investigator needs a reasonable basis to deny a break and does not have a right to prohibit reasonable consultation. It is unreasonable to deny a break if the scope of the investigation is expanded and the employee and union representative have not

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[17] 27 VLRB at 29-30. Grievance of VSEA and Dargie, 27 VLRB 32, 62 (2004); *Affirmed,* 179 Vt. 228 (2005).
[18] Grievance of Munsell, 11 VLRB 135, 144 (1988).

had the opportunity to consult on the subject matter of the expanded scope of the investigation.[19] However, it is reasonable for an investigator to seek an unrehearsed answer to a question on an issue for which the employee had received advance notice would be a subject of the investigative interview before allowing the employee and union representative to consult during a break.[20]

[19] Grievance of VSEA, 27 VLRB at 29-30.
[20] Grievance of VSEA and Dargie, 27 VLRB at 61-63.