

Union Representation at Meeting Which May Lead to Discipline

An employee's right to engage in "concerted activities for . . . mutual aid or protection" includes the right to union representation at a meeting that may lead to discipline against the employee.¹ In its Weingarten² decision, the U.S. Supreme Court held 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 State Employees Labor Relations Act.³

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.⁴ 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".⁵ Reasonable belief is "measured . . . by objective standards under all the circumstances of the case, rather than by the subjective reaction of the employee".⁶ 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".⁷ Fourth, the employer has no duty to bargain with any union representative who attends the investigatory interview.⁸

¹ Vermont State Colleges Staff Federation, AFT Local 4023, AFL-CIO v. Vermont State Colleges, 16 VLRB 255 (1993).

² 420 U.S. 251 (1975).

³ Vermont State Colleges, 16 VLRB at 259.

⁴ 420 U.S. at 257.

⁵ Id. at 257-58.

⁶ Id. at 257, n.5.

⁷ Id. at 258-59.

⁸ Id. at 259-60.

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.⁹ 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.¹⁰

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.¹¹ The investigated 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

⁹ Grievance of VSEA, 27 VLRB 1, 28 (2004); *Affirmed*, 179 Vt. 578 (2005).

¹⁰ Id.

¹¹ Id.

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.¹²

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 had the opportunity to consult on the subject matter of the expanded scope of the investigation and union representative have not had the opportunity to consult on the subject matter of the expanded scope of the investigation.¹³

¹² Grievance of VSEA, 27 VLRB at 29-30. Grievance of VSEA and Dargie, 27 VLRB 32, 62 (2004); *Affirmed*, 179 Vt. 228 (2005).

¹³ Grievance of VSEA, 27 VLRB at 29-30.