UNION REPRESENTATION AND THE DISCIPLINARY INTERVIEW

EMPLOYEE RIGHTS UNDER THE WEINGARTEN RULE

An employee who is called to an interview with his or her employer which may lead to some disciplinary action is entitled to union representation. In NLRB v. Weingarten and its companion case, ILGWU v. Quality Mfg. Co., (88 LRRM 2689), the Supreme Court agreed with the NLRB that an employee has the right to union representation at an investigatory interview the employee reasonably believes will result in disciplinary action. Seeking union representation in a confrontation with an employer, the Court said, is protected activity within the meaning of Section 7 of the National Relations Act. The Court added these limitations to its ruling:

1) The right arises only when the employee requests union representation;
2) Exercise of the right to union representation may not interfere with "legitimate employer prerogatives," such as the employer's right to conduct an interview without undue delay;
3) An employer need not justify its refusal to permit union representation but may go forward with the investigation from other sources;
4) The employer is under no duty to bargain with the union representative during an investigatory interview and may insist on hearing only the employee's account of the matter being investigated. (There is, of course, a duty to bargain during a grievance hearing.)

In subsequent decisions, the NLRB has expanded the right to union representation.

Prior Consultation: the right to union representation at a disciplinary interview includes a right of prior consultation between the employee and the union representative. (NLRB v. Amax, Inc., 94 LRRM 1177).

Refusal to Participate: an employee may refuse to participate in an investigatory interview where a request for union representation has been made and denied. (NLRB v. Glomac Plastics, Inc., 97 LRRM 1441).

Counseling Sessions: the right to union representation may also be invoked at counseling sessions held by an employer to discuss production quotas where such sessions were "a preliminary step to the imposition of discipline." (NLRB v. Alfred M. Lewis, Inc., 95 LRRM 1216). However, the right to representation does not extend to instances of normal counseling. In NLRB v. Amoco Oil Co. (99 LRRM 1017), employees were denied union representation at counseling sessions for absenteeism, in view of the supervisor's assurances that the sessions were not disciplinary meetings and would not be recorded in their personnel files. The Board has also said that the Weingarten rule does not apply to "run-of-the-mill" shop-floor conversations where instructions are given or work techniques are corrected and there is no reasonable basis for an employee to fear an "adverse impact" from the interview.

Interference with Employee Rights: an employer has unlawfully interfered with an employee's right to union representation at an interview by threatening the individual that the exercise of this right would result in more severe discipline. (NLRB v. Southwestern Bell Tel. Co., 94 LRRM 1305).

Not all of the post-Weingarten rulings have expanded the right to union representation, however.

Request for a Particular Union Representative: the employer is not required to postpone an interview with an employee because a particular union representative is unavailable, nor is the employer obligated to suggest or secure alternative representation for the employee. An employee's right to representation may not interfere with legitimate employer prerogatives, and the NLRB has held that the right to hold an interview without delay is such a prerogative. (NLRB v. Coca-Cola Bottling Co., 94 LRRM 1200).

Informing an Employee of a Disciplinary Decision: union representation is not required to inform employees of disciplinary decisions which have already been made by the employer. When an interview is held solely to tell an employee of a disciplinary decision which has already been made and which was based on facts and evidence obtained prior to that interview there is no Section 7 right to union representation. However, if the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, then the full range of Weingarten protections may apply. (NLRB v. Baton Rouge Water Works Co., 103 LRRM 1056).

Union Waiver of Worker's Weingarten Rights: the NLRB has recently ruled that a worker may be denied a union representative during a disciplinary interview where the contract has limited the union's right in this area. The language involved stated: "...neither the Union nor its members shall interfere with the right of the employer...To interview any Agent with respect to any phase of his work without the grievance committee being present." (NLRB v. Prudential Insurance Company of America, 119 LRRM 1073).

Remedies for Weingarten Violations Where Just Cause Exists: in a serious setback to workers rights, the NLRB has ruled that disciplinary actions taken for "just cause" will stand whether or not a worker was given their Weingarten representative. (NLRB v. Taracorp, 117 LRRM 1499). This ruling would appear to make it more important that workers refuse to continue with a disciplinary interview when they are denied a Weingarten representative (under the Glomac Plastics rule, see above). The way that this is done and, the possibilities of refusal to continue the interview being construed as insubordination, make this a problematic situation.

THE ROLE OF THE STEWARD

Unlike grievance proceedings, investigatory interviews may occur without the employee being given formal advance notification. Therefore the steward must be sure the workers in his or her section have been informed of their rights and understand when they can exercise the right to union representation.

Stewards should also be aware that their efforts to furnish requested representation are protected; an employer may not retaliate against a union agent who is attempting to comply with an employee's request for representation.