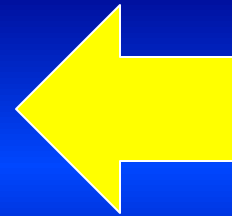


Representing Employees During Investigatory/ Weingarten Meetings



*FEDERAL EMPLOYMENT LAW FOR FEDERAL EMPLOYEES AND
UNIONS. PERIOD!!*

WHAT IS WEINGARTEN AND WHY SUCH A FUNNY NAME?



As With Most Good Things . . .



It All Started With a Box of Fried Chicken!

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Weingarten v. NLRB, 420 US 251 (1975)

All the ingredients of an exciting case:

- “Big Brother” style surveillance;
- An employee snitch;
- An Employee Who Can’t Keep her mouth shut; and
- A Final Determination that management was wrong

I suppose *Weingarten* is better
than some other choices . . .



REASONS FOR PROVIDING REPRESENTATION

In order of statistical significance . . .

- 1st To serve as a witness to the investigatory meeting (60%)
- 2nd To protect employees from self incrimination (20%)
- 3rd To Ascertain the Scope of Questioning (10%)
- 4th To ensure a fair and accurate record is maintained (10%)

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REASONS FOR PROVIDING REPRESENTATION

**AS A TOOL IN RECRUITING
NEW MEMBERS!!!!!!**

The Other 100%

REMEDIES FOR WEINGARTEN VIOLATIONS

- When an employee is discharged for requesting a steward or refusing to answer questions without one -
 - **Remedy** – Usually reinstatement with back pay. A make-whole remedy is also imposed if an employee is demoted, transferred, or loses privileges because of a request for union representation.
- When an employee is refused union representation and confesses to wrongdoing –
 - **Remedy** - Usually just a bulletin-board posting in which the employer acknowledges that it violated the Weingarten rules and promises to obey them in the future.

BEFORE JUMPING INTO *WEINGARTEN* . . .



FORMAL DISCUSSIONS

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BUEs' Right to Union Representation: TWO VERY DISTINCT RIGHTS

1. *Formal meetings* (by far the more common situation) –
5 USC 7114(a)(2)(A)
2. “*Weingarten meetings*” 5 USC
7114(a)(2)(B)

Formal Meetings

5 USC 7114(a)2(A):

- Provides the Union the institutional right to be present “at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment.”

Requirements of A Formal Discussion:

- 1) At least one representative of agency management and at least one bargaining unit employee in attendance;
- 2) There has to be a “discussion” (sort of);
- 3) The discussion has to be formal; and
- 4) Has to concern either a grievance or a personnel policy, practice, or other condition of employment of unit employees

Who Qualifies as a Representative?

Individuals acting on behalf of or at the direction of agency management, including:

- Managers/Supervisors;
- Legal Counsel; and
- EEO/LMR officials.

What Constitutes a Discussion??

Discussion has been defined by the FLRA as being a “meeting”. No “discussion” necessary.

In other words, it can be a one sided conversation and still meet the definition of “discussion”.

How Formal is “Formal”: My tuxedo is at the cleaners!!

- The formality of a discussion is determined based on the totality of circumstances surrounding it, including:
 - the number and level of management representatives in attendance;
 - whether the meeting was scheduled in advance or on the fly;
 - how long the meeting lasted;
 - the location of the discussion,
 - whether attendance was mandatory;
 - how the meeting was conducted; and
 - Who initiated the meeting.

How Formal is “Formal”? (cont.)

Can an informal meeting turn formal?

Yes. At the point it turns formal, the union should be notified and provided a reasonable opportunity to provide a representative of its choice.

What is a grievance?

The FLRA has expanded the definition to include:

- Grievances/Arbitrations under the MLA;
- Witness preparation in MSPB hearings by Agency officials;
- Meetings pertaining to EEO hearing prep and settlement (FLRA has been overruled on this in 9th Cir.)

Personnel Policies and COEs

- Meeting can be for the purpose of announcing new policies, discussing the implementation of policies, and gathering employee thoughts or opinions regarding COEs all can qualify as formal discussions.
- Generally, effect of policy has to be on more than one BUE. For example, FLRA has held that an individual employee's performance counseling is not a formal discussion.

Union Rights in a Formal Discussion

- ▶ Advance notice (reasonable)
- ▶ The right to select who will represent it. Union's decision to not send representative is viewed as waiver of right (but only for that one discussion)
- ▶ The right to state union's position, ask questions, take notes, and otherwise contribute to discussion.
- ▶ The representative cannot take charge of the meeting or disrupt it.

Practical Example – Formal Discussion

On Monday, Ralph's supervisor calls him at his desk and informs him that he is unhappy with his job performance over the last two weeks. He asks him to think about things that would help him perform his duties better?

On Tuesday, Ralph stops his supervisor in the hall and asks him if it would be possible to change his work schedule. The supervisor tells him that this may be possible but will need to think about it. On Wednesday, the supervisor calls a staff meeting to assess what the impact of Ralph's schedule change would have on the office. The supervisor asks employee's to give their honest opinions. As a result of information learned during this meeting, on Thursday management gets together with HR and decides to terminate Ralph for poor performance. Several months later, after the Agency terminates Ralph for poor performance, the remaining employees in the notice are informed that they are going to be testifying in the subsequent MSPB hearing and to expect a call from the Agency attorney who is working on the case for the Agency. Shortly thereafter, the Agency attorney begins calling employees and asking them about their observations of Ralph's performance.

- Do Weingarten rights apply Monday? Tuesday? Wednesday? Thursday? The subsequent conversation with the supervisor? With the Agency attorney? Why or why not?
- If the Union is denied a union rep during any of the above conversations, what rights does it have after the fact?

Weingarten Meetings

5 USC 7114(a)2(B):

“An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at ... *any examination of an employee in the unit* by a *representative of the agency* in connection with an *investigation* if (i) *the employee reasonably believes that the examination may result in disciplinary action against the employee*; and (ii) *the employee requests representation.* “

Weingarten Meetings: The Elements

- 1) *A Representative of the Agency*: The person examining the employee must be an “agency representative”;
- 2) *A Unit employee*: The employee being examined must be a bargaining unit employee
- 3) *An Examination must be taking place*:: The Agency must be questioning an employee in some way;
- 4) *Reasonable belief*: The employee must have a reasonable belief that he or she may be disciplined as a result of the questions being asked
- 5) *Request for representation*: The employee must ask for representation

Who is a “Representative of the Agency”?

In determining whether or not an examiner/investigator is an Agency representative, two questions should be asked:

- 1) Does the individual work for the employee's Agency and have some authority to conduct an investigation?**
- 2) Is the outside investigative Agency “working in collaboration” with the employee's Agency?**

Who is a “Representative of the Agency”?

(cont.)

1) **Does the individual work for the employee’s Agency and have some authority to conduct an investigation?**

- Managers/Supervisors;
- Internal Agency Investigators;
- LMR/HR officials

Who is a “Representative of the Agency”?

(cont.)

2) Is the outside investigative Agency
“working in collaboration” with the
employee’s Agency?

- OIG;
- OPM;
- and other outside LEOs.

Who is a “Representative of the Agency”?

(cont.)

- **Factors to look at to determine if “collaboration” exists include:**
 - 1) the amount and degree of contact; the amount and degree of input provided by the employee’s Agency;**
 - 2) who initiated the investigation; and**
 - 3) whether the employee is compelled to attend the investigation.**

Who is a “Representative of the Agency”?

(cont.)

DO THE FOLLOWING COUNT AS AGENCY REPRESENTATIVES?

- 1) FBI agents conducting a criminal investigation at the VA???
- 2) A private psychiatrist performing a fitness for duty examination???

Who is a “Unit Employee”?

- All bargaining unit employees, regardless of membership in the Union, are entitled to *Weingarten* Rights.
- The tenure status of the employee is irrelevant to the determination of whether or not they are in the bargaining unit. Therefore, full time, part time, probationary, and term employees all can constitute bargaining unit employees, assuming your CBA identifies them as being part of the bargaining unit.
- Employee has to be in bargaining unit at time of interview, not at time of alleged misconduct.

What is an “examination in connection with an investigation?”

- No formality requirement as with formal discussions;
- Look to the Agency’s purpose for meeting with the unit employee;
- Requires some form of questioning of (or other attempt at obtaining information from) a unit employee;
- Both administrative and criminal investigations are covered under *Weingarten*

What is an “examination in connection with an investigation?” (cont.)

Important examples of NON-examinations:

- Disciplinary Meetings: Where discipline is discussed after an investigation is complete;
- Performance Evaluations/Counseling: Where an employees (presumably bad) performance is being discussed.

WHAT ABOUT PIP MEETINGS?

What is a “reasonable belief that discipline could be imposed”?

- Whether or not an individual employee may or may not fear discipline is not the relevant determination in this element. (Subjective)
- Rather, the question is whether a **reasonable person**, faced with the same understanding and knowledge of the situation as the unit employee, would fear the likelihood of discipline if similarly subjected to the same examination.

What is a “reasonable belief that discipline could be imposed”? (cont.)

Factors to determine reasonableness:

- 1) Subject vs. Witness;
- 2) Degree of Culpability;
- 3) Agency Working Environment; and
- 4) Statements made by Investigator (maybe)

The only valid assurance of immunity is one made in writing and signed by an Agency official with the authority to make such an assurance.

Employee Must Request Union Representation

- Very different requirement from formal discussions
- Must be specific enough to place the Agency on notice that an employee is actually requesting a Union representative.
 - Not enough to ask for a lawyer or other representative
 - Not enough to saying he/she is “thinking about” getting a union representative
 - Not enough to ask “Do I need a union representative?”

Employee Must Request Union Representation (cont.)

- Need not be made to the actual investigator so long as made to an Agency management official within a close proximity of time.
- An employee need not request a union representative at the beginning of an examination. If they reserve their right to do so until later in the examination, they do not waive their rights. This is similarly true for consecutive examinations.

Employee Must Request Union Representation (cont.)

An employee can waive their *Weingarten* rights by doing the following:

- 1) Failing to ask for a union representative;
- 2) Allowing their request to be ignored;
- 3) Changing their minds;
- 4) Unreasonably delaying in the investigation; and
- 5) Allowing themselves to be talked out of representation

Criminal vs. Administrative Investigations

- *Weingarten* Rights apply both during administrative investigations (i.e. those where the Agency is investigating misconduct which could result in discipline) and criminal investigations (i.e. those where the Agency is investigating misconduct which could result in criminal prosecution).
- During criminal prosecutions in which the employee is the subject of the investigation, the employee has the right not to answer the investigator's question pursuant to the 5th Amendment of the US Constitution.

Practical Example – Weingarten Meetings

On Monday evening, Susan's supervisor calls her at home and asks her what she knows about missing property at the agency. The supervisor then tells Susan that Susan must meet with a GAO investigator and someone from HHS's Office of the Inspector General on Tuesday to discuss how she tracks property as part of her job at IHS. On Wednesday, Susan's supervisor asks her how the meeting with GAO and the OIG went. On Thursday, an FBI investigator finds Susan in the lunchroom and asks her if she knows anything about missing federal property.

- Do Weingarten rights apply Monday? Tuesday? Wednesday? Thursday? Why or why not?
- If Susan is denied a union rep when her Weingarten rights apply, what rights does she have after the fact?

THE KEY TO EFFECTIVE
WEINGARTEN REPRESENTATION
BEGINS LONG BEFORE THE
INVESTIGATION BEGINS!!!

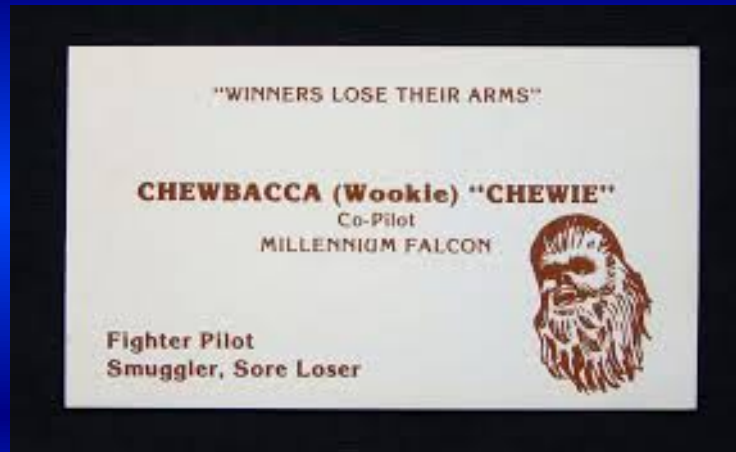


IN ORDER TO HAVE *WEINGARTEN* RIGHTS, EMPLOYEES NEED TO KNOW ABOUT THEM . . .

- ✓ Not All Discussions with Management Create A Right to Representation
- ✓ If You Don't Use it, You Lose it
- ✓ Once You Use it, Stick to your guns



IN ORDER TO HAVE *WEINGARTEN* RIGHTS, EMPLOYEES NEED TO KNOW ABOUT THEM . . .



WEINGARTEN RIGHTS

If this discussion could in any way lead to my being disciplined or terminated or have any effect on my personal working conditions, I respectfully request my union representative, officer or steward to be present at this meeting. Without union representation, I choose not to participate in this discussion.

EFFECTIVE COUNSELING PRIOR TO AN EXAMINATION

- Whether its days or minutes before the beginning of an examination, a Union representative has the absolute right to talk to and with the unit employee in private.
- Prior to this meeting, however, it is important to establish four key facts from the Agency.

Questions You Should Ask the Agency Before Getting Started

- 1) Is the meeting investigatory in nature?
 - Yes. Go to #2 below
 - No. Still may be a “formal meeting”
- 2) Is the meeting voluntary or involuntary?
 - Voluntary. Say bye bye.
 - Involuntary. Go to #3.
- 3) Is it a criminal or administrative investigation?
 - Criminal. Advise employee of Miranda Rights.
 - Administrative. Insist on written Garrity warnings and go to #4.
- 4) What is the scope of the investigation (the charge)?

Standard Garrity Warning Language

I wish to advise you that you are being questioned as part of an official investigation of the Police Department. You will be asked questions specifically directed and narrowly related to the performance of your official duties or fitness for office.

You are entitled to all the rights and privileges guaranteed by the laws and the constitution of this state and the Constitution of the United States, including the right not to be compelled to incriminate yourself (and to have an attorney of your choice present during questioning).*

I further wish to advise you that if you refuse to testify or to answer questions relating to the performance of your official duties or fitness for duty, you will be subject to departmental charges which would result in your dismissal from the Police Department.

If you do answer, neither your statements nor any information or evidence which is gained by reason of such statements can be used against you in any subsequent criminal proceeding. However, these statements may be used against you in relation to subsequent departmental charges.

KEY POINTS TO COVER WHEN PREPARING A UNIT EMPLOYEE

1) Obtain the factual background:

Ask the individual to describe his/her knowledge of the underlying facts of the matter.

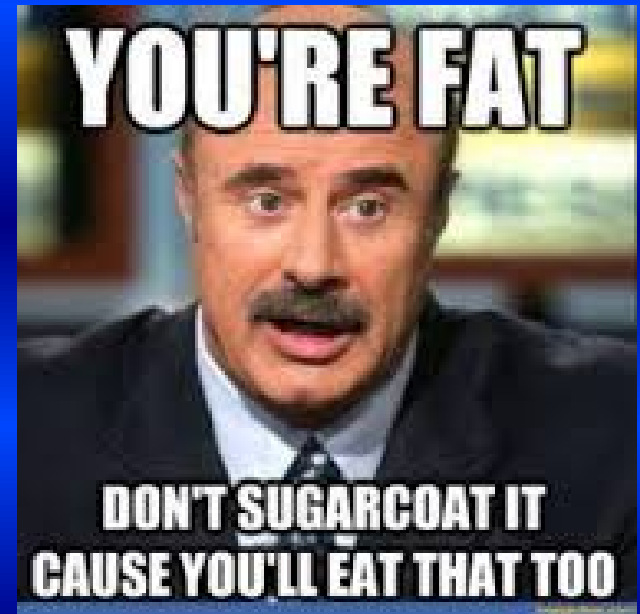
Avoid questions such as “Did you do it?”

Rather, utilize more open-ended questions, such as “Tell me what you know about what the Agency is alleging” or “Do you know anything about what they are accusing you of doing?”

KEY POINTS TO COVER WHEN PREPARING A UNIT EMPLOYEE (CONT.)

2) Assess the Employee's Personality:

- Scared to Death
- Ready to Fight
- Ready to Hide



KEY POINTS TO COVER WHEN PREPARING A UNIT EMPLOYEE (CONT.)

3) Explain the Ground Rules:



Administrative

or



Criminal

KEY POINTS TO COVER WHEN PREPARING A UNIT EMPLOYEE (CONT.)

- 4) *Describe How, not What, the Unit Employee Should Answer:*

Key Mistakes During Examinations

- Answering in too great a detail;
- Talking too much;
- Becoming argumentative;
- Improperly relying upon “I Don’t know”

KEY POINTS TO COVER WHEN PREPARING A UNIT EMPLOYEE (CONT.)

5) Explain the Real Purpose for Objections:

Since mid-examination caucusing is not always allowed, it is necessary to find creative ways to communicate with the unit employee. Objections serve this purpose.

DURING THE EXAMINATION

UNION RIGHTS:

- Speak and participate on the record;
- Ask questions and help the employee express their views;
- Make appropriate objections;
- Provide additional information at end of examination.

DURING THE EXAMINATION

AGENCY RIGHTS:

- Require that the investigation not be impeded;
- Require the Employee (and not the Union Rep.) to answer questions;
- Require that the investigation occur within a reasonable time period.

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