

Commission Issues “Primer” on Public Employees’ *Weingarten* Rights
By: Katherine F. Weber

So-called “Weingarten rights” are often the source of confusion for employers of union-represented employees. “When do these rights apply?”, “what is the extent of these rights?”, and “may an employee demand a particular representative?” are just a few of the questions often raised in the wake of *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), a pinnacle labor case that guarantees represented employees the right to union representation during an investigatory interview when the employee reasonably believes that such interview may lead to disciplinary action against the employee. The Washington Public Employment Relations Commission (the “Commission”) has consistently held that the rights announced in the *Weingarten* decision apply to public employees who exercise collective bargaining rights under Chapter 41.56 RCW. A recent Commission decision, *Omak School District*, Decision 10761-A (PECB, 2010), further clarifies these rights and the employer’s correlating obligations under *Weingarten*.

In *Omak*, the employer school district initiated an investigation into suspected misconduct by one of its custodial employees. In connection with the investigation, the employer notified the union president of the investigation and what it was about, but instructed the president not to inform the employee of the subject matter of the investigation. The employee subsequently received a letter from the principal, instructing him to appear for an investigatory interview the next day. This letter did not inform the employee what the meeting was about but did state that the meeting could lead to disciplinary action. When the employee contacted the union president about the notice, the president represented to the employee that she did not know what the investigation was about. The employee eventually learned about the nature of the investigation from a second union representative (the business agent).

Upon discovering the subject matter of the investigatory meeting, the employee contacted the principal and asked him to postpone the meeting until the business agent could attend. However, because the business agent would not be available for two weeks, the principal declined to postpone the meeting and informed the employee that the union president would be an adequate union representative.

When the employee arrived at the investigatory interview, he informed the employer that he knew what the meeting was about and felt uncomfortable having the union president as his representative, given her dishonesty regarding her knowledge of the subject of the meeting. The discussion became heated and the employee eventually stormed out. When he was later terminated, the union filed an unfair labor practice charge accusing the employer of violating the employee’s *Weingarten* rights.

On appeal, the Commission found that the employer committed a number of unfair labor practices when it: (i) directed the union president not to disclose the nature of the interview, thereby refusing to inform the employee of the nature of the subject matter being investigated; (ii) insisted that the union president would be an adequate representative, thereby denying the employee the right to select who would or would not represent him at the meeting; and (iii) failed to inform the employee of his options under *Weingarten* once he invoked these rights.

In so holding, the Commission set forth the following explicit rules relating to an employee’s *Weingarten* rights:

- When an employee makes a request for union representation, an employer has three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice of continuing the interview unrepresented, or having no interview at all, thereby foregoing any benefit that the interview might have conferred upon the employee.

- An employer *may not* continue the interview with an unrepresented employee who has asserted his/her *Weingarten* rights unless the employee voluntarily agrees to continue the interview unrepresented after the employee has been made aware of the options set forth above.
- When an employee asserts his/her *Weingarten* rights, an employer may only schedule the investigatory meeting at a future time and place that provides an opportunity for the employee, on his/her own time, to consult with a union representative beforehand.
- An employer cannot refuse to inform employees or their respective union representatives of the nature of the subject matter being investigated prior to an investigatory interview. An employer is not required to provide specific details, but must give a “general statement” that identifies the misconduct for which discipline may be imposed.

The Commission held that once the employee invoked his *Weingarten* rights, the employer should have informed the employee that he could: (1) select another representative; (2) attend the interview unrepresented; or (3) cancel the meeting, which would result in the employee losing any benefit that the meeting would have provided.

The *Omak* decision limits an employer’s ability to conduct a “spontaneous” investigatory interview with the employee, in hopes of preventing the employee from “practicing” or “rehearsing” his/her answers ahead of time. Under *Omak*, an employee should be informed of the nature of the investigatory meeting at the time the employee receives notice of the meeting. However, as noted above, employers are not obligated to share specific details relating to the investigation, but rather only describe the general nature of the misconduct being investigated.

An employer must also afford the employee being investigated a reasonable opportunity to confer with his/her selected union representative before the investigatory meeting. While *Omak* does not specify what constitutes reasonable advance notice, in our opinion this *at a minimum* should be 24 hours (more if the employee may not reasonably contact a representative within this timeframe).

Importantly, although *Omak* does impose certain limitations on an employer’s exercise of authority, it also expressly holds that an employer is not required to postpone disciplinary interviews for an “unreasonable” period of time when a particular union representative is unavailable for reasons not attributable to the employer, so long as another representative is available. *Omak* makes clear that an employer is not obligated to postpone the investigation to accommodate the schedule of an employee’s selected representative; if that representative is not reasonably available, the employer need only inform the employee of his/her options, *i.e.*, select a different representative; attend the interview unrepresented; or cancel the meeting and lose any benefits associated with that meeting.

Omak offers employers specific guidelines for initiating and implementing disciplinary interviews-- public employers are strongly encouraged to re-evaluate their investigatory procedures to ensure compliance with the new Commission standards. It is particularly important that supervisors understand the implications of an employee’s invocation of his/her *Weingarten* rights, and that they be trained to properly respond to such invocation by offering the employee the options outlined above.

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