

An employee's right to union representation at meetings:

An overview for Florida school & district administrators

A presentation to the Florida Educational Negotiators by:

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Orlando, Florida

January 26, 2018

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Common questions

- Does an employee have the right to bring a union representative to any meeting with a supervisor?
- Does an employee have the right to include a union representative in any conversation with a supervisor?
- What are “Weingarten” rights and do they apply in Florida?

Common questions

- What is an investigatory interview?
 - How is the interview conducted?
- Does the supervisor have to offer the opportunity for union representation at an investigatory interview?
Any meeting?
- Is the employee entitled to union representation if meeting is limited to supervisor informing employee of disciplinary action?
- Are there exceptions in emergency situations?

What is a “Weingarten” Right?

- An employee’s right to union representation in an investigatory interview is commonly called a “Weingarten right.”
- Named after U.S. Supreme Court case of *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).
- Involved interpretation of federal law and employers subject to the National Labor Relations Act – not Florida public employers.
- Involved allegation of theft by employee at lunch counter in retail store.
 - Payment of \$1 rather than \$2.98 for box of chicken.

What is a “Weingarten” Right?

- Employee was interrogated during investigatory interview about alleged theft.
- Employee’s request for union representation during the investigatory interview was denied by the employer.
- Union filed unfair labor practice charge with the National Labor Relations Board (NLRB).
- Supreme Court held that the right to union representation at investigatory interview exists under the following circumstances:
 1. The employee requests representation;
 2. The employee reasonably believes the interview will result in disciplinary action; and
 3. The exercise of the right will not interfere with legitimate employer prerogatives.
- How – and whether – that right applies in various circumstances has been the subject of a variety of lawsuits.

What is an investigatory meeting?

- PERC has considered federal rulings on what constitutes an investigatory meeting.
 - A meeting is 'investigatory' if it is used to elicit 'information' pertaining to perceived misconduct.
 - *ITT Corp. v. NLRB*, 719 F.2d 851, 854 (6th Cir. 1983).
 - An investigatory meeting is one where the employer 'seeks facts or evidence in support of' the perceived misconduct.
 - *Baton Rouge water Works*, 246 NLRB 995, 997 (1979)

Does Weingarten apply in Florida?

- *Weingarten* ruling did not apply to Florida school districts.
- However, the Public Employee Relations Commission (PERC) adopted the rationale of the *Weingarten* decision.
- The right to union representation in meetings has been interpreted in later PERC cases.
- The right to union representation has limits and may be too broadly interpreted by unions.

Florida statutory background

- Section 447.301, Florida Statutes provides for a series of public employee rights.
- The source in Florida statute for union representation rights in investigatory interviews is found in paragraph (3) , which provides:

“Public employees shall have the right to engage in concerted activities not prohibited by law, for the purpose of collective bargaining or other mutual aid or protection. Public employees shall also have the right to refrain from engaging in such activities.”

PERC rulings: the beginning

- In 1978, PERC held that a public employee has a right to union representation, if requested, at an investigatory interview between an employee and employer if the employee reasonably believes that he might be disciplined. See, *Seitz v. Duval County School Bd.*, 4 FPER 4154 (1978, rev'd in part on other grounds, 366 So.2d 119 (Fla. 1st DCA 1979).
- In discussing the *Weingarten* ruling, PERC applied section 447.301, Fla. Stat. to provide the same right to public employees in Florida.

PERC rulings: the beginning

- “If an employee has a reasonable belief based on factual circumstances that disciplinary action may result from an interview, he has a right to be represented at that interview.”

Orange Cty. Classroom Teachers Assoc. v. Sch. Bd. of Orange Co., 4 FPER 4294 (1978), citing *Seitz*, 4 FPER 4154 (1978).

PERC rulings: the basics

- An employee does not have the right to the presence and assistance of a union representative at every meeting with his or her employer.
- The right to requested union representation exists only if:
 1. The employee reasonably believes based on objective criteria that he or she may be disciplined as a result of the information gathered at the meeting;
 2. The employee is required at the meeting to make a decision which will have a significant impact on the employee's job interests or employment record.

Broward Teachers Union v. Sch. Dist. Of Broward Co., 12 FPER 17251 (1986), citing *FOP, Lodge 31 v. City of Ft. Lauderdale*, 12 FPER 17167 at 377 (1986).

PERC rulings:
meeting to
merely
announce
disciplinary
action

- No right to union representation at meeting called by supervisor for the sole purpose of informing teacher that discipline would be imposed.
 - *Broward Teachers Union v. Sch. Dist. Of Broward Co.*, 12 FPER 17251 (1986), citing *FOP, Lodge 31 v. City of Ft. Lauderdale*, 12 FPER 17167 at 377 (1986).
 - See also, *Sarasota-Manatee Airport Authority*, 14 FPER 19064 (1988)
- This is a one-way conversation. Not an interview.



PERC rulings:
employee
given choice to
resign

- Firefighter called into chief's office and informed that he was being terminated.
- Chief then asked if firefighter preferred to resign in lieu of termination.
- Firefighter then asked for representation which was denied.
- PERC found employer acted unlawfully because employee could reasonably believe the choice might have a "significant adverse impact on this job interest and employment record."

Lewis v. City of Clearwater, 6 FPER 11222 (1980), aff'd.
404 So.2d 1156 (Fla. 2d DCA 1981)

PERC rulings:
preempting
right to
representation

- Clerical employee complained to union about perceived change in work shifts.
 - Union then asked for meeting with city management.
- City management called employee into meeting and questioned her about contacting the union.
 - Employee told meeting was not disciplinary in nature.
 - Employee requested union representation which was denied.
- Unfair labor practice filed alleging violation for denying representation in that meeting.
- PERC held that it was not reasonable to believe disciplinary action would – or has – resulted when:
 - No discipline resulted.
 - Told up front that meeting was not disciplinary in nature.

City of Boynton Beach, 25 FPER 30244 (1999)

PERC rulings:
when
discipline
decided

- Employee and union president instructed by employer that union leave requests must be submitted two weeks in advance.
 - Express language of CBA supported two week requirement.
- Union president suspended for taking union leave days without prior approval.
- Disciplinary action already decided when supervisor presents disciplinary action to union president.
 - Supervisor asks if allegations were true.
 - Union president demands union representation and refuses to sign form.
- PERC found no violation because supervisor's question was not investigatory interview since disciplinary action had already been decided.

City of Gainesville, 19 FPER 24083 (1993)

PERC rulings:

no
interrogation
but demand
for object

- Police officer observed by sergeant typing grievance letter regarding overtime while on duty.
 - Sergeant warns against conducting union business while on duty.
- Shortly thereafter, police officer directed to meet same sergeant in parking lot while on duty.
 - Directed to hand over grievance letter.
 - Police officer requested union representation which was denied.
 - Also informed of disciplinary action.
- Evidence that sergeant viewed grievance with “disfavor.”
- PERC held:
 - “We conclude that under the facts of this case [the police officer] being asked to surrender his personal letter is, for all practical purposes, the same as being asked to answer possibly incriminating questions about the letter.”

City of Fort Lauderdale, 12 FPER 17167 (1986)(emphasis added)

PERC rulings:
options to
employer
when
representation
lawfully
requested

1. Grant the request;
2. Discontinue the meeting; or
3. Offer the employee the choice of continuing the meeting unaccompanied by a union representative or having no meeting at all.

City of Fort Lauderdale, 12 FPER 17167 (1986)
(emphasis added)

- Employer can elect to forgo meeting and complete investigation.

PERC rulings: emergency exception

- Employer may reject employee's request for union representation in an investigatory meeting in emergency situations.
- PERC finds an emergency situation is one which:
 1. The employer must conduct a prompt investigation in order to resolve an existing or imminent problem;
 2. A union representative is not readily available; and
 3. Delay in conducting the interview may reasonably be expected to jeopardize some significant interest of the employer.

City of Fort Lauderdale, 12 FPER 17167 (1986)

*Practical tips:
What
Weingarten
does not
require*

- *Weingarten* does not grant an entitlement by an employee to an investigatory interview;
- *Weingarten* does not regulate the timing of an investigatory interview;
- *Weingarten* does not require the disclosure of the employer's evidence obtained during an investigation;
- *Weingarten* does not grant a 5th amendment right to not answer questions by an employer;
- *Weingarten* does not authorize a union representative to stop an investigatory interview;
- *Weingarten* does not authorize a union representative to answer for the employee.

Practical tips

- Not all conversations between an employer and employee about that employee's mistake or error are investigatory interviews.
 - An employer can ask "what happened?" in order to address an operational issue.
 - And there is always the emergency exception.



Practical tips

- When applicable, tell an employee up front that this is not an investigatory meeting which could result in disciplinary action.
 - Then there is no “reasonable belief” that questions may lead to discipline.
- Look to your collective bargaining agreement for minimum notice requirement for meeting.
- There is no right to remain silent.
 - An employee’s failure to cooperate with an investigation or refusal to answer is insubordination.

Practical tips

- Tell the employee the nature of the allegations but there is no entitlement that a school district employee first be presented with the names of all complainants and evidence in an interview.
- School district employees are not subject to the “Law Enforcement Officers’ Bill of Rights” in Sec. 112.532, Fla. Stat.
- To do otherwise can undermine investigation or lead to interference with witnesses.

Group discussion