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An Employee's Right to Union Representation During Investigatory Interviews

by Sharon N. Berlin and Richard K. Zuckerman

On October 2, 2002, the New York State Public Employment Relations Board ("PERB" or "Board") issued a ruling in *Transportation Workers Union of America, Local 100 v. New York City Transit Authority*[2] that directly affects the manner in which many public employers handle issues involving employee interviews. Specifically, the Board, resolving for the first time a long-standing split in decisions by PERB Administrative Law Judges, held that an employee has the right to union representation during an investigatory interview that may reasonably be expected to lead to discipline. The Board's decision was issued after legislation did not pass in 2001 and the Governor's veto of legislation in 2002 that would have provided all public employees with essentially the same right.[3]

The Transit Authority Case

In the *New York City Transit Authority* case, the employer directed an employee to respond in writing on an employer form to an allegation that the employee had made a racial remark to a co-worker. Upon the employee's request, the employee was given the opportunity to meet with a union representative while he completed the form. Thereafter, the employer, concerned that the union representative either wrote or influenced the employee's written communications, directed the employee to complete another form in the presence of his supervisor while in a locked office. Union representatives attempted to enter the office but were denied access by the employer.[4]

The union filed an improper practice charge with PERB alleging that the employer had violated sections 209-a.1(a) and (c) of the Public Employees' Fair Employment Act when it denied the employee's request for union representation when he was required to complete the form.[5] Relying on the United States Supreme Court's decision in *National Labor Relations Board v. Weingarten*,[6] the ALJ found that the employer had violated section 209-a.1(a) of the Act.[7] In *Weingarten*, the Supreme Court had found that an employee has a statutory right to request union representation prior to participating in an employer interview that the employee reasonably fears may result in discipline. PERB adopted the Supreme Court's reasoning that:

"It is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview that may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action."[8]

The employer filed exceptions to the ALJ's decision and argued that the ALJ had improperly relied on *Weingarten*. PERB affirmed the ALJ's decision. The Board ruled that ". . . an employee has the right to union representation during an investigatory interview which may reasonably lead to discipline."

Implications of the Decision

While the full scope of the implications of the Board's decision still have to be fleshed out, municipalities can take some guidance based upon the private sector *Weingarten* decision and its progeny.

1. Coverage of the Decision

PERB's decision appears only to apply to employees represented by a union and thus not to those who have been designated as managerial and/or confidential or who are not covered by a bargaining unit. If PERB decides to follow relevant National Labor Relations Board (NLRB) precedent, though, the reach of the decision may be further extended. This is because the NLRB, applying *Weingarten*, recently granted non-union employees the same representational right as that granted to organized employees during investigatory interviews.[9]

2. Relationship to Statutory and Collectively Bargained Rights to Representation

The right to union representation during an investigatory interview that may reasonably lead to discipline is fundamentally the same right as that already statutorily granted to those employees covered by New York Civil Service Law Section 75.[10] There will likely be no need to change the public employer's practices for those employees.

The right created by *Transit Authority* is similar, but not identical, for employees not covered by Section 75. Under prevailing NLRB precedent, the employer does not have to tell the affected employee of his/her right to *Weingarten* protections. Also, unlike the situation with employees covered by Section 75, written notice need not be given to the employee prior to commencing the interview.

It is unclear what impact this Taylor Law-based right will have on existing contractual entitlements regarding union representation in disciplinary interviews. It is likely, though, that the new entitlement will be held to supplement, rather than supercede, existing contractual rights.

3. Investigatory Interviews

The right only applies to "investigatory interviews" that "may reasonably lead to discipline." The right does not apply where, for example, the decision to impose discipline has already been made and is merely being announced to the employee.

4. The Right to a Specific Representative

If the employee requests a particular union representative and he or she is available, the employer would be well advised to allow the representative to partake in the interview. Under the progeny to *Weingarten*, employees have the right to specify the union representative they wish to have present and the employer must comply with the request absent special or extenuating circumstances.[11]

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5. The Role of the Union Representative

Under prevailing NLRB precedent, the representative is to be present in a representational and not a confrontational capacity. The employer may refuse to let the representative speak during the interview, although the employee may request to meet privately with the representative.

6. Employers Need Wait Only for A Reasonable Period of Time for the Representative to Appear

Finally, under private sector precedent, the employer need wait only a "reasonable" period of time for a representative to arrive. Reasonableness is defined by the specific factual circumstances.

Conclusion

For many public employers, the rights created by the Board in *Transit Authority* only codify existing practices. Others, though, will have to change their practices to reflect this decision or risk having their disciplinary decisions vacated by PERB or another reviewing entity.

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[2] 35 PERB ¶3029 (2002).

[3] A.10288 (2002); A08741 (2001).

[4] The Board's decision does not indicate whether the employee requested representation when he was asked to prepare the second statement. The Administrative Law Judge's decision found that the employee's request for representation when he was asked to prepare the first written statement was an implicit request for continuing representation, although there is no reference to a specific request by the employee for a representative to be present when he wrote the second statement. 35 PERB &ð 4563 (ALJ 2002).

[5] Section 209-a.1(a) makes it an improper practice for a public employer to deliberately interfere with, restrain or coerce public employees in the exercise of their rights under the Act. Section 209-a.1(c) makes it an improper practice for a public employer to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization.

[6] 420 U.S. 251 (1975).

[7] Given the finding on the first charge, the ALJ did not reach the section 209-a.1(c) issue.

[8] 420 U.S. at 257.

[9] *Epilepsy Found. of N.E. Ohio v. NLRB,* 331 N.L.R.B. No. 92, 164 L.R.R.M. 1233 (2000), *conf'd,* 268 F.3d 1095 (D.C. Cir. 2001).

[10] Civil Service Law Section 75 provides, among other things, that an employee who at the time of questioning appears to be a potential subject of disciplinary action has the right to representation by his/her union representative and that (s)he must be notified in advance, in writing, of this right. If the employee requests representation,a reasonable period of time must be afforded for the employee to obtain representation. If the employee is unable to obtain representation within a reasonable period of time the employer has the right to then question the employee.

[11] *Anheuser-Busch, Inc.,* 337 N.L.R.B. No. 2, 170 L.R.R.M. 1206 (2001).

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advisory role [will] be able to express their opinions freely to agency decision makers." By their nature, risk analyses and assessments represent opinions, advice, recommendations and often conjecture, all of which may be withheld under 87(2)(g). It is also noted that records prepared by consultants for agencies may be characterized as "intra-agency" materials that fall within the coverage of 87(2)(g).

The fourth provision in the Freedom of Information Law that is particularly relevant in the context of terrorist or similar activity is based on the Committee on Open Government's first legislative priority offered in its 2000 report to the Governor and the Legislature. That recommendation specifically addressed the security of records and came to fruition through the approval of a new exception to rights of access, 87(2)(i). Until recently, a description of an agency's security procedures concerning the protection of its records would not, if disclosed, compromise the ability to guard against unauthorized access. Even if written procedures were available, without the first key to unlock the door to the room in which the records were stored, and more importantly, without the second key needed to unlock the filing cabinet, records could be protected with reasonable certainty. In contrast, today's disclosure of an agency's security procedures could result in devastating attacks and incursions on agencies' electronic information systems. The use of the key to unlock the door or filing cabinet, being physically present, is no longer necessary; an electronic attack can emanate from anywhere.

The recent amendment to the rights of access in the Freedom of Information Law provides state and local government with a means of denying access when the security of electronic information systems may be threatened. Specifically, the new language of §87(2)(i) states that an agency may deny access to records when disclosure "would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures."

In sum, the Freedom of Information Law provides government with the ability to deny access in the context of security when reality warrants a denial of access.

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encroachment becomes a cloud on title. With its alienability restricted, the encroaching property was often abandoned, burdening the municipality with lost tax revenues and the cost of removing the abandoned property.

The amendments do not impair the municipality's right to the land upon which the encroachment is situated. Nor does it confer any right or claim against the municipality by virtue of the encroachment. Rather, by conferring upon the property owner a temporary or conditional right to maintain the encroachment, the legislation enhances the encroaching property's value, promotes its alienability, assures the continued payment of taxes and avoids the threat of abandonment.

Section Meeting

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of Rochester and Program Chair Howard Protter, Esq., Jacobowitz & Gubits, Walden. For reservations and further information, please contact the New York State Bar Association at (518) 463-3200.

Look for the "New" *Municipal Lawyer*

Negotiations are under way between the Edwin G. Michaelian Municipal Law Resource Center of Pace University and the New York State Bar Association to convert the *Municipal Lawyer* into a magazine format with expanded content and enhanced graphics. As currently envisioned, the publication would be issued quarterly, beginning with the Spring of 2003. The publication would also appear on the Section's website. Under the proposal being discussed, the State Bar Association would assume responsibility for the production and distribution of the *Municipal Lawyer* at a reduced cost to the Municipal Law Section and Pace University. The publication would continue to be a joint publication of the State Bar and the Municipal Law Resource Center of Pace University.

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