## United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

# Advice Memorandum

DATE: September 16, 2003

TO : James J. McDermott, Regional Director

Byron B. Kohn, Regional Attorney

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Region 31

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: California Nurses Association

(Henry Mayo Newhall Memorial Hospital) 536-5075-0187

Case 31-CB-11267 554-1450-0120

554-1450-4100

554-1467-7500

This case was submitted for advice as to whether the Union's inclusion of language regarding employees'

Weingarten¹ rights on the back cover of the parties' printed labor contract violated Section 8(b)(1)(A) because it misrepresented those rights; and whether the Union violated Section 8(b)(3) and 8(d) by unilaterally including the Weingarten language.

We conclude that the Union's Weingarten language violates Section 8(b)(1)(A) because it implies that employees must request a Union representative during investigatory meetings and, therefore, employees are not free to either request the presence of a non-Union coworker or other witness or exercise their Section 7 right to avoid union activity altogether. We further conclude that the Union violated Section 8(b)(3) and 8(d) by printing the Weingarten language on the back cover of the agreement because it falsely implies that the Employer has agreed to a term and condition of employment that affects the relationship between the Employer and its employees, and because the language directly conflicts with specific, agreed-upon terms of the contract that constitute mandatory subjects of bargaining. The Region should issue complaint, absent settlement.

### FACTS

California Nurses Association ("the Union") has represented registered nurses at Henry Mayo Newell Memorial Hospital ("the Employer") since 1999. The parties' current

<sup>&</sup>lt;sup>1</sup> NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

collective bargaining agreement is effective by its terms from January 21, 2003, to January 21, 2006.<sup>2</sup>

Pursuant to Article 6 of the contract, the Union printed copies of the agreement for distribution to the unit employees. The Union's printed version of the agreement, however, contained a number of terms that the parties had not agreed to, including an extra paid holiday and language regarding premium pay. The Union also included a section regarding employees' Weingarten rights, which the Union had printed on the back cover of the agreement. That section reads as follows:

### The Weingarten Rights

The Supreme Court has ruled that an employee is entitled to have a CNA Representative present during any interview which may result in discipline. These rights are called your Weingarten Rights.

- 1. You must request that a CNA rep be called into the meeting.
- 2. You must have a reasonable belief that discipline will result from the meeting.
- 3. You have the right to know the subject of the meeting and the right to consult your CNA rep prior to the meeting to get advice.
- 4. Do not refuse to attend the meeting if a rep is requested but denied. We suggest you attend the meeting and repeatedly insist upon your right to have a CNA rep present. If this fails, we suggest that you not answer questions and take notes.

The parties' previous contract did not contain any reference to employees' <u>Weingarten</u> rights, and the parties had not discussed <u>Weingarten</u> rights during negotiations for the current contract.

On April 16, 2003, the day after the Employer learned of the additional terms, it contacted the Union and

<sup>&</sup>lt;sup>2</sup> The parties' previous collective bargaining agreement was effective from 2000 through 2002.

<sup>&</sup>lt;sup>3</sup> The Region does not seek advice regarding the Union's inclusion of the additional paid holiday and premium pay.

demanded that the Union rescind the erroneous copies of the agreement, reprint and distribute to employees corrected copies of the agreement, and distribute to employees a notice explaining and disavowing the Union's conduct.

Two days later, the Union distributed to unit employees a memorandum whereby the Union acknowledged that a "mis-print" resulted in the "inadvertent" inclusion of Presidents' Day as a paid holiday. The Union's memorandum did not address the Union's inclusion of language that expanded the availability of premium pay, or its inclusion of the Weingarten language on the back cover. The Union has not recalled copies of the erroneous agreement, nor has it printed and distributed corrected copies of the agreement.

#### ACTION

The Region should issue complaint, absent settlement. The Union's inclusion of language on the back cover of the contract regarding employees' Weingarten rights violates Section 8(b)(1)(A) because it improperly suggests that employees may not request the presence of an employee witness other than a Union representative, or waive the right to have a witness at all, during investigatory meetings that the employees reasonably believe may result in discipline. Rather, the language unlawfully implies that employees must request the presence of a Union representative and, therefore, they are not free to exercise their Section 7 right to refrain from engaging in Union activity.

We further conclude that by printing the <u>Weingarten</u> language on the back of the contract, the Union violated Section 8(b)(3) and 8(d) by unilaterally making significant, material, and substantial changes to the agreement. By including this language, the Union unilaterally included a term and condition of employment that directly affects the relationship between the Employer and its employees. Moreover, the Union's <u>Weingarten</u> language directly conflicts with specific terms of the agreement that constitute mandatory subjects of bargaining.

A. The Union's Inclusion of Weingarten Language on the Back Cover of the Printed Contract Violates Section 8(b)(1)(A).

While <u>Weingarten</u> entitles employees to the assistance of their union in interviews they believe will lead to discipline, that right is personal to the employees and

does not reside in the union. $^4$  As a result, employees also have the statutory right to decline such union assistance or representation. $^5$ 

Meingarten rights, as written, is subject to at least two interpretations, only one of which does not interfere with the unit employees' right to refrain from seeking Union representation during an investigatory interview. For example, the language could be read as little more than an inartful, but generally accurate, recitation of the Supreme Court's Weingarten decision, and of what employees must do if they choose to invoke or preserve their rights under that decision. Another reading of the Weingarten language, however, is that, simply because unit employees are entitled to have a representative or witness present during certain investigatory meetings, they must exercise this right by requesting that a Union representative be present for such meetings.

Since the employees reasonably could interpret this ambiguous language as <u>requiring</u> the presence of a <u>Union</u> representative at investigatory interviews,  $^6$  we conclude that it is unlawful. That interpretation interferes both with the right of unit employees to request the presence of an employee witness, other than a Union representative,  $^7$  and with their right to participate in such an interview unaccompanied.  $^8$ 

The Union's <u>Weingarten</u> statement is unlawful because the Union has presented it as a contract provision, rather than an internal Union rule. While a union may lawfully maintain and enforce internal rules that would require members to request the presence of a union representative at investigatory interviews, employees would be free under Section 7 to resign their membership in that union and

<sup>4</sup> See Weingarten, 420 U.S. at 260. See also Consolidated
Edison Co. of New York, Inc., 323 NLRB 910, 910 (1997);
Appalachian Power Co., 253 NLRB 931, 933 (1980).

<sup>&</sup>lt;sup>5</sup> See <u>Weingarten</u>, 420 U.S. at 257, 260. See also Appalachian Power Co., 253 NLRB at 933.

<sup>6</sup> See, e.g., Lafayette Park Hotel, 326 NLRB 824, 828 (1998)
(citing Norris/O'Bannon, 307 NLRB 1236, 1245 (1992)).

<sup>&</sup>lt;sup>7</sup> See, e.g., <u>Anchortank</u>, <u>Inc.</u>, 239 NLRB 430, 430 (1979), enfd. 618 F.2d 1153 (5th Cir. 1980).

<sup>&</sup>lt;sup>8</sup> See <u>Weingarten</u>, 420 U.S. at 257.

avoid discipline under the rule. 9 Here, however, the Union couches its rule within the context of the collective bargaining agreement, suggesting that the rule is as enforceable as other terms and conditions of employment (e.g., the union security provision). Thus, by printing the ambiguous Weingarten language as part of the agreement, the Union unlawfully suggests that employees must follow the policy and, therefore, engage in Union activity, regardless of their Union membership.

B. The Union's Inclusion Of Inaccurate Weingarten
Language on the Back Cover of the Printed Contract
Also Violates Section 8(b)(3) and 8(d).

A union violates Section 8(b)(3) and 8(d) of the Act if it unilaterally modifies a term in a collective-bargaining agreement that deals with a mandatory subject of bargaining. <sup>10</sup> In general, mandatory bargaining subjects are those that settle "an aspect of the relationship between the employer and employees." <sup>11</sup> More specifically, mandatory subjects of bargaining include, among other things, investigatory meetings; <sup>12</sup> provisions governing employees'

<sup>9</sup> See, e.g., Sheet Metal Workers, Local 550 (Dynamics Corporation), 312 NLRB 229, 229 (1993) (union lawfully maintained rule that required the presence of union representative at members' investigatory interviews). See also Teamsters, Local 741 (A.B.F. Freight), 314 NLRB 1107, 1109 (1994) (union lawfully maintained rule that prohibited members from engaging in conduct, including approaching the employer without union representation, that would undermine the union's role as employees' collective bargaining representative).

<sup>10</sup> See, e.g., <u>Service Employees (Alta Bates Medical Center)</u>, 321 NLRB 382, 384 (1996) (quoting <u>Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass</u>, 404 U.S. 157, 185-186 (1971)).

<sup>11 &</sup>lt;u>Id.</u>, 321 NLRB at 384 (quoting <u>Pittsburgh Plate Glass</u>, 404 U.S. at 178). Cf. <u>Electrical Workers (IBEW) Local 3</u> (Eastern <u>Electrical</u>), 306 NLRB 208, 211 (1992) (how the employer's name appeared on the contract's cover only identified a contracting party and did not "materially or significantly affect" employees' terms and conditions of employment).

<sup>12</sup> See Exxon Shipping Co., 291 NLRB 489, 492 (1988).

access to and the role of union representatives;  $^{13}$  and disciplinary systems.  $^{14}$ 

Weingarten language to the back cover of the printed contract is unlawful because it falsely implies that the parties have agreed to terms regarding a mandatory bargaining subject. Thus, because the unit employees may interpret the language to require Union representation at investigatory interviews, its inclusion on the back cover of the contract falsely implies that the Employer agreed to that requirement. In fact, there was no such agreement; the parties prior contract did not deal with this subject and the parties never bargained about this subject during negotiations for the current contract. Rather, the Union has attempted to achieve away from the bargaining table that which it did not try to achieve, and may not have been able to achieve, through good faith bargaining. Thus, the

<sup>13</sup> See, e.g., Alta Bates Medical Center, 321 NLRB at 385; BASF Wyandotte Corp., 274 NLRB 978, 978 (1985), enfd. 798 F.2d 849 (5th Cir. 1986) (citing American Ship Building Co., 226 NLRB 788 (1976), and Axelson, Inc., 234 NLRB 414 (1978), enfd. 599 F.2d 91 (5th Cir. 1979)).

<sup>14</sup> See Washoe Medical Center, Inc., 337 NLRB No. 32, slip op. at 7 (2001) ("Employee discipline is unquestionably a mandatory subject of bargaining, and any alteration of a disciplinary system is also a mandatory subject of bargaining."); Artesia Ready Mix Concrete, Inc., 337 NLRB No. 93, slip op. at 1 (2002); Technicolor Government Services, Inc., 268 NLRB 258, 261 (1983), enfd. 739 F.2d 323 (8th Cir. 1984).

<sup>15</sup> See Alta Bates Medical Center, 321 NLRB at 385 (finding union's post-agreement addition of "foreword" to parties' contract to be unlawful because it "falsely implie[d] that both parties have agreed to it as part of the contract"). The Union could have bargained for the ambiguous language here, and in fact could have bargained away the unit employees' Weingarten rights entirely. See Prudential Ins. Co., 275 NLRB 208, 209 (1985) (finding union can waive employees' Weingarten rights). The Employer also could have agreed to a disciplinary procedure that explicitly required Union involvement.

The Employer asserts it would not have agreed to the <u>Weingarten</u> language, as written, without first obtaining concessions from the Union. The Employer does not specify what concessions it would have demanded, but points to a contemporaneous agreement with another union in which it agreed to include that union's language regarding

Union unlawfully modified the parties' current contract by falsely implying to employees that a term of employment existed to which both parties had not agreed.

Moreover, a union violates Section 8(b)(3) by unilaterally adding language post-agreement that conflicts with portions of the agreement concerning mandatory subjects of bargaining. For example, in Alta Bates Medical Center, the union unilaterally added a "Foreword" as the first page to the parties' contract that, among other things, purported to expand unit employee access to shop stewards beyond that provided for in the contract. 17 Because this additional language contradicted substantive terms of the contract dealing with the role of the shop steward, the ALJ, who was affirmed by the Board, held that the union violated Section 8(b)(3). 18

The facts of the current case are similar to those in Alta Bates Medical Center. Here, the requirement that employees request a Union representative at investigatory meetings directly conflicts with provisions in Article 5 of the parties' current contract, which deal with the duties of Nurse Representatives and limitations on when they may conduct Union business. For example, Article 5, Section C states, in pertinent part:

Whenever the [Employer] requests the presence of a Nurse Representative during the Nurse Representative's working time, for the purpose of administration of this Agreement, the time so spent by the Nurse Representative shall be compensated as working time. A Nurse Representative shall not otherwise conduct [Union] business during working time of the Nurse Representative. . . .

(Emphasis added).

The <u>Weingarten</u> language directly contradicts these specific terms regarding the scope of Union business that Nurse Representatives may conduct during their working time; it suggests that a Nurse Representative must be present at an investigatory interview, even if that interview takes place at a time when all Nurse

employees' <u>Weingarten</u> rights in exchange for unspecified concessions.

<sup>&</sup>lt;sup>17</sup> 321 NLRB at 384-385.

<sup>&</sup>lt;sup>18</sup> Id. at 385.

Representatives are working.  $^{19}$  Thus, the Union has unilaterally modified the contract by appending the Weingarten language.

Accordingly, the Region should issue complaint, absent settlement.  $^{20}$ 

B.J.K.

<sup>19</sup> Additionally, the Union's <u>Weingarten</u> language arguably alters the contractual terms regarding nurse discipline by requiring employees to involve Union representatives in pre-disciplinary meetings, which could introduce procedural grounds for challenging discipline.

<sup>&</sup>lt;sup>20</sup> We recognize that our conclusions herein are partially at odds with our conclusion in <u>California Nurses Association</u> (Alta Bates Medical Center), Case 32-CB-4461, Advice Memorandum dated September 21, 1995 where we directed the Region to dismiss a charge alleging that the union violated Section 8(b)(3) by appending similar <u>Weingarten</u> language to the cover of its agreement. However, in that case, there was no conflict between the additional language and the parties' final agreement. The Board's later decision in <u>Alta Bates</u> makes it clear that, where such a conflict exists, the union's conduct violates Section 8(b)(3) and 8(d).