

United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: June 30, 2016

TO: Ronald K. Hooks, Regional Director  
Region 19

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Valley Hospital  
Case 19-CA-172921

*Weingarten* Chron  
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The Region submitted this case for advice on whether the Employer violated the Employee's *Weingarten*<sup>1</sup> rights where, in an investigatory interview, the Charging Party asked an Employer representative what the meeting was about and whether it was a disciplinary action, and the representative ignored (b) (6), (b) (7) questions and instead began questioning (b) (6), (b) (7).

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) of the Act by not only preventing the Charging Party from requesting *Weingarten* representation, but also effectively precluding (b) (6), (b) (7) from having a pre-interview consultation with a Union representative, when it failed to answer (b) (6), (b) (7) questions regarding the meeting's purpose.

### FACTS

#### Background

Valley Hospital (Employer) operates an acute-care hospital in Spokane Valley, Washington, affiliated with Community Health Systems, Inc. (CHS). The SEIU Local 1199NW (Union) represents the Employer's registered nurses, and the parties' current collective-bargaining agreement is effective through July 13, 2016.<sup>2</sup> The Charging Party is a registered nurse in the Employer's surgical services department, who has worked at the hospital for (b) (6), (b) (7) years.

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

<sup>2</sup> CHS acquired Valley Hospital in 2009. The Union's representation of the Employer's registered nurses predates that acquisition.

### The Charging Party's Alleged Misconduct

On (b) (6), (b) (7)(C), 2016, a surgical charge nurse (Charge Nurse) learned from an anesthesiologist that an upset patient told (b) (6), (b) (7) that the registered nurse who was assigned to (b) (6), (b) (7) had said something inappropriate. Specifically, the patient stated that the nurse had difficulty inserting (b) (6), (b) (7) IV and said that (b) (6), (b) (7) would not have had so much trouble if the patient were not an IV drug abuser. Soon thereafter, the OR nurse who had been in charge of transporting the patient from the pre-op area also approached the Charge Nurse. The OR nurse conveyed the same information to the Charge Nurse and told (b) (6), (b) (7) that (b) (6), (b) (7) needed to report the information to upper management. After some investigation, the Charge Nurse confirmed that the Charging Party was the nurse who allegedly made the statement to the patient.

The Charge Nurse then went to the office of the Director of Surgical Services (Director), who was holding a meeting on other matters with the Assistant Manager of Surgical Services (Assistant Manager), Outpatient Department Manager, and Assistant Chief Nursing Officer. The Charge Nurse asked to speak privately with the Assistant Manager and relayed the information about the patient interaction to (b) (6), (b) (7). Thereafter, the Assistant Manager returned to the manager's meeting, and relayed the information to the Director. After (b) (6), (b) (7) and the Director discussed the potential consequences of the patient lodging a formal complaint, they decided to meet with the Charging Party immediately to ascertain what (b) (6), (b) (7) had said to the patient. The Assistant Manager then contacted the Charge Nurse and told (b) (6), (b) (7) to send the Charging Party to the Director's office.

### The Investigatory Meeting

At some point thereafter, the Charge Nurse instructed the Charging Party to go to the Director's office but did not say what the meeting was about. Because the Director had only called the Charging Party into (b) (6), (b) (7) office in the past in order to discuss a problem or to issue discipline, the Charging Party was concerned that (b) (6), (b) (7) would be disciplined. When the Charging Party arrived at the Director's office, all four managers were still present. Before the managers asked (b) (6), (b) (7) any questions, the Charging Party asked whether the meeting was a disciplinary action and what the meeting was about. The Charging Party wanted to know if the meeting was investigatory and, if it was, (b) (6), (b) (7) intended to ask for Union representation.

The Assistant Manager did not respond to or even acknowledge the Charging Party's questions. Instead, (b) (6), (b) (7) immediately began asking (b) (6), (b) (7) questions about the patient interaction. The Charging Party attempted to ask if the meeting was disciplinary in nature a second time, but the Assistant Manager cut (b) (6), (b) (7) off before (b) (6), (b) (7) could complete (b) (6), (b) (7) sentence and continued asking (b) (6), (b) (7) questions. After the Assistant Manager asked the Charging Party a multitude of questions, (b) (6), (b) (7) told the Charging Party what the patient had accused (b) (6), (b) (7) of saying, and the Charging Party

immediately denied saying it. The meeting lasted no longer than fifteen minutes, and the Employer later issued a verbal warning to the Charging Party for the patient interaction.

The Charging Party acknowledges that (b) (6), (b) (7)(C) never actually requested the presence of a Union representative or shop steward before or during the interview. (b) (6), (b) (7)(C) asserts that (b) (6), (b) (7)(C) was prevented from making a more specific request for a *Weingarten* representative because the Assistant Manager immediately launched into the questions about the patient interaction without first addressing (b) (6), (b) (7)(C) questions about the nature of the meeting. The Employer argues that the Charging Party's requests for Union representation during prior investigatory and disciplinary meetings establish that (b) (6), (b) (7)(C) clearly understood (b) (6), (b) (7)(C) *Weingarten* rights and yet failed to specifically assert them during the interview.

### ACTION

We conclude that the Employer's failure to answer the Charging Party's initial questions — whether the meeting was disciplinary in nature and what the meeting was about — not only prevented (b) (6), (b) (7)(C) from requesting Union representation during the investigatory meeting, but also effectively precluded (b) (6), (b) (7)(C) from requesting a pre-interview consultation with a Union representative. Therefore, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) of the Act.

I. The Employer Violated the Charging Party's *Weingarten* Rights by Preventing (b) (6), (b) (7)(C) from Making a More Specific Request for a Union Representative.

In *Weingarten*, the Supreme Court held that employees in a unionized workplace have a Section 7 right to a union representative at an investigatory interview that the employee reasonably believes may result in disciplinary action.<sup>3</sup> *Weingarten* rights only apply to fact-finding interviews, as opposed to run-of-the-mill shop floor conversations<sup>4</sup> or announcements of predetermined discipline.<sup>5</sup> To secure the right to consult a union representative, an employee must reasonably believe that the investigation at issue will result in disciplinary action and then request union

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<sup>3</sup> *Weingarten*, 420 U.S. at 256-27.

<sup>4</sup> *Id.* at 257-58, citing *Quality Mfg. Co.*, 195 NLRB 197, 199 (1972).

<sup>5</sup> See *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979).

representation.<sup>6</sup> After an employee makes a valid request for union representation at an investigatory interview, the employer has three choices: it may grant the request, end the interview, or give the employee the option to continue with no representative or having no meeting at all.<sup>7</sup>

Here, there is no dispute that the meeting was an investigatory interview that the Charging Party reasonably believed could result in discipline. The issue is whether [REDACTED] was entitled to a Union representative even though [REDACTED] did not specifically request one.

It is well established that an employer is not required to volunteer union representation during an investigatory meeting absent a valid request.<sup>8</sup> Indeed, in *Montgomery Ward & Co.*, the Board concluded that because the employee had made no request or other statement indicating that she desired a union representative, the employer did not violate her *Weingarten* rights, rejecting the administrative law judge's conclusion that the mere fact that an employee is "frightened and confused" or that the employer conducted an "intense, sophisticated, and thorough interview" excused the employee's failure to request union representation.<sup>9</sup> Yet, the Board also reaffirmed the principle that an employee's request does not have to "be in a particular form, so long as it is sufficient to place the employer on notice that representation is desired."<sup>10</sup>

The Board carefully scrutinizes instances where it is alleged that an employer's conduct prevented or precluded the employee from exercising his or her *Weingarten* rights. Thus, the Board has found violations where an employer denied the employee's request for a representative,<sup>11</sup> ignored the employee's request for a

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<sup>6</sup> *Weingarten*, 420 U.S. at 257.

<sup>7</sup> *Id.* at 258; *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982).

<sup>8</sup> See *Montgomery Ward & Co.*, 269 NLRB 904, 904-05 (1984).

<sup>9</sup> *Id.* at 905.

<sup>10</sup> *Id.* at 905, n.3, citing *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977).

<sup>11</sup> See, e.g., *Axelson, Inc.*, 285 NLRB 49, 52-53 (1987) (employer unlawfully denied employee his *Weingarten* rights where he requested a union representative and employer responded that "as far as he was concerned there was no union representation" and offered to call the personnel manager to act as the employee's representative).

representative,<sup>12</sup> informed the employee that he or she did not need a representative,<sup>13</sup> or threatened the employee that the consequences would be worse if a union representative were present.<sup>14</sup> In these cases, the Board carefully scrutinizes the surrounding circumstances in light of “the ‘mischief to be corrected and the end to be attained’” by the right to representation.<sup>15</sup> In this regard, because “[a] single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors,” permitting an employer to “play upon these fears” through its conduct at the interview “would defeat the right that *Weingarten* protects.”<sup>16</sup>

Furthermore, the Board has rejected the notion that the employee’s individual experience with disciplinary investigations or matters is a relevant factor in ascertaining whether the employee sufficiently invoked the *Weingarten* right. Thus, the Board has not found persuasive employer arguments that the fact that the employee previously had a *Weingarten* representative present at prior investigatory

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<sup>12</sup> See *New Jersey Bell Telephone Co.*, 300 NLRB 42, 42 n.3 (1990), *enforced*, 936 F.2d 144 (3d Cir. 1991).

<sup>13</sup> See *General Die Casters, Inc.*, 358 NLRB 742, 742, 749 (2012) (*Noel Canning* Board) (employer unlawfully violated employee’s *Weingarten* rights where the employee twice asked plant manager if he “needed to get somebody else in here,” and the plant manager answer “no” to the employee’s first request and then disregarded the second request and proceeded to question the employee); *Bodolay Packaging Machinery, Inc.*, 263 NLRB 320, 320 & n.3, 325 (1982) (in the absence of exceptions, Board adopted administrative law judge’s decision that employer unlawfully violated employee’s *Weingarten* rights where he asked his supervisor whether “he needed a witness” and his supervisor responded “no.”)

<sup>14</sup> See, e.g., *Montgomery Ward & Co.*, 254 NLRB 826, 831-32 (1981) (employer unlawfully denied employees their *Weingarten* rights by threatening them with dire consequences if they insisted upon union representation); *Southwestern Bell Telephone Co.*, 227 NLRB at 1223 (foreman told group of employees, on three different occasions, “in response to their inquiries regarding the propriety of obtaining union representation and an outright request for representation, that the result of granting those requests would be that higher management would have to be called in on the investigation and that the probable consequences would be worse for the employees.”).

<sup>15</sup> *Southwestern Bell Telephone Co.*, 227 NLRB at 1223, quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944).

<sup>16</sup> *Id.* at 1223, quoting *Weingarten*, 420 U.S. at 263.

interviews,<sup>17</sup> was a shop steward,<sup>18</sup> or was a union official who was involved in the grievance process<sup>19</sup> weighed against finding a violation, notwithstanding the respective employer's otherwise unlawful conduct.

Significantly, the Board decided in another case involving Montgomery Ward (hereinafter "*Montgomery Ward II*"), that the employer's conduct effectively precluded an employee from making a request for representation.<sup>20</sup> In *Montgomery Ward II*, the employee requested that an individual who was a statutory supervisor, and therefore ineligible to act as an employee representative, serve as his *Weingarten* representative.<sup>21</sup> The employer denied his request, "stating that he could not see anyone and that the tape recording of the interview would serve as his protection," and then proceeded to interview him while recording the session.<sup>22</sup> The Board concluded that the employer's conduct was unlawful because the employee's initial request put the employer on notice that he desired representation, Board law

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<sup>17</sup> See *Penn-Dixie Steel Corp.*, 253 NLRB 91, 99-95 (1980) (Board affirmed administrative law judge's decision rejecting employer's defense that the fact that the employee had a *Weingarten* representative present for prior disciplinary interviews established that employee made a knowing waiver of his *Weingarten* rights by not ending the interview when the employer ignored his requests for union representation).

<sup>18</sup> See, e.g., *New Jersey Bell Telephone Co.*, 300 NLRB at 50 n. 7 (Board upheld administrative law judge's finding that interviewed employee, who was also a shop steward, did not waive her *Weingarten* rights by failing to make a second request for a *Weingarten* representative); *Consolidated Freightways Corp.*, 264 NLRB at 542 (finding it insignificant that interviewed employee was an active and aggressive union steward, because "*Weingarten* rights are not hinged on an employee's personality; nor may a steward, regardless of his knowledge of labor law and participation in the grievance procedure, be compelled to forgo Section 7's guarantee of the right to the mutual aid of other employees.").

<sup>19</sup> See, e.g., *General Motors Corp.*, 251 NLRB 850, 857-58 (1990) (Board affirmed administrative law judge decision rejecting employer's defense that employee was aware of or should have been aware of his *Weingarten* right to discontinue the interview, based upon his experience presenting grievances as a committeeman).

<sup>20</sup> *Montgomery Ward & Co.*, 273 NLRB 1226, 1226-27 (1984), *enforced mem.*, 785 F.2d 316 (9th Cir. 1986) (table opinion).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

permitted him to request an alternative representative when the requested representative was unavailable,<sup>23</sup> and the employer's response "was preemptive and effectively prohibited [him] from" requesting an alternative representative.<sup>24</sup> Thus, notwithstanding that established Board law otherwise required the employee to make an affirmative request for an alternate representative, the Board found that the employer violated the employee's *Weingarten* rights.<sup>25</sup>

Similarly, in *New Jersey Bell Telephone Co.*, the Board affirmed the administrative law judge's determination that the employer violated an employee's *Weingarten* rights by essentially ignoring the employee's request for a union representative.<sup>26</sup> In that case, the employee first asked the employer's security representatives what she was there for, why security was there, and what this was all about; and, before receiving an answer to any of those questions, she asked if she should have a union representative present.<sup>27</sup> The security representative who led the questioning replied that the employee should let the representative explain what the interview was about and then the employee "could make that decision."<sup>28</sup> The employee did not respond to that statement. After the security representative explained that she intended to ask the employee some questions about an account that the employee had accessed, the representative did not pause or ask the employee whether she wished representation "now that she knew the purpose of the interview."<sup>29</sup> The employee did not again raise the issue of representation because her "mind went blank" and all she could think of "was I was going to lose my job."<sup>30</sup> The Board affirmed the judge's finding of a violation and characterized the employer's action as unlawfully ignoring the employee's request for union representation.<sup>31</sup>

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<sup>23</sup> See *id.* at 1227, citing *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977).

<sup>24</sup> *Id.* at 1227.

<sup>25</sup> *Id.*

<sup>26</sup> 300 NLRB at 42 & n.3, 50.

<sup>27</sup> *Id.* at 46.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 42, n.3.

Here, the Employer unlawfully infringed upon the Charging Party's *Weingarten* rights by ignoring (b) (6), (b) (7) questions regarding what the meeting was about and whether the interview was disciplinary. Because employees only have the right to *Weingarten* representation where the meeting is investigatory and the employee has a reasonable expectation that discipline could result,<sup>32</sup> the obvious reason that the Charging Party asked what the meeting was about and whether the meeting was a disciplinary action was to ascertain whether (b) (6), (b) (7) had the right to have a Union representative present at the meeting. This was obvious because the Charging Party made requests for Union representation in prior investigatory meetings and the Employer has dealt with a unionized workforce since 2009. Indeed, Advice has previously determined that an employee's request about whether a meeting is disciplinary in nature is the initial step in requesting a representative.<sup>33</sup> Thus, the Employer's representatives would have understood that the Charging Party asked the questions in order to ascertain whether (b) (6), (b) (7) was entitled to Union representation.

Yet, as in *New Jersey Bell*, the Employer ignored the Charging Party's questions, and failed to either offer (b) (6), (b) (7) Union representation or the choice of proceeding with the interview without Union representation or ending the interview. Additionally, as in *Montgomery Ward II*, the Employer's failure to respond to the Charging Party's questions and the Assistant Manager's simultaneous conduct of immediately asking (b) (6), (b) (7) questions relating to the patient interaction prevented (b) (6), (b) (7) from requesting a *Weingarten* representative. Indeed, the fact that the Charging Party requested and received a *Weingarten* representative in prior investigatory interviews weighs in favor of finding a violation here rather than weighing against it. Notably, because the Employer's representatives would have reasonably understood that the Charging Party's questions were intended to ascertain whether (b) (6), (b) (7) was entitled to Union representation, the Assistant Manager's conduct of ignoring (b) (6), (b) (7) questions caused the natural (and likely intended) effect—preventing the Charging Party from exercising (b) (6), (b) (7) *Weingarten* rights. Accordingly, the Employer's action of ignoring the Charging Party's questions violated (b) (6), (b) (7) *Weingarten* rights.

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<sup>32</sup> See, e.g., *Weingarten*, 420 U.S. at 256.

<sup>33</sup> *AT&T/Southwestern Bell Telephone Company*, Case 17-CA-061507, Advice Memorandum dated Jan. 30, 2012, p. 7 (finding that employee took a preliminary step to request a *Weingarten* representative when (b) (6), (b) (7) asked (b) (6), (b) (7) supervisor whether “there [was] going to be discipline from th[e] call” in order to ascertain whether (b) (6), (b) (7) might need a union representative).

II. The Employer Effectively Denied the Charging Party's *Weingarten* Right to a Pre-Interview Consultation with a Union Representative by Ignoring Questions Regarding the Interview's Purpose. (b) (6), (b) (7)

Employees' *Weingarten* rights are not limited to representation during the interview. Thus, employers must also provide employees with the opportunity to consult with their union representative *before* an investigatory interview that the employee reasonably believes may result in discipline.<sup>34</sup> This is so because “[p]rior consultation, and the ‘knowledge’ which results therefrom,” advances one of *Weingarten*'s primary purposes by enabling “the representative to ‘assist the employer by eliciting favorable facts and save the employer production time by getting to the bottom of the incident.’”<sup>35</sup> It also “enables the representative to counsel and assist the employee who may be ‘too fearful or inarticulate to relate accurately the incident being investigated.’”<sup>36</sup>

The *Weingarten* right to a pre-interview consultation is violated when the interview occurs without the employer having given the employee sufficient information regarding the subject of the interview.<sup>37</sup> Where an employee asks about the nature of the investigation or the investigatory interview, the employer must provide “[a] general statement as to the subject matter of the interview, which identifies to the employee and his representative the misconduct for which discipline may be imposed.”<sup>38</sup> Indeed, if the right to prior consultation is to have any meaning, “the employee and his representative must have some indication of the matter being

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<sup>34</sup> See *Climax Molybdenum Co.*, 227 NLRB 1189, 1189-90 (1977) (finding that “the representative’s aid in eliciting the facts can be performed better, and perhaps only, if he can consult with the employee beforehand”), *enforcement denied*, 584 F.2d 360 (10th Cir. 1978). *Accord Postal Service*, 303 NLRB 463, 463 n.4, 469-70 (1991), *enforced*, 969 F.2d 1064 (D.C. Cir. 1992); *Pacific Telephone and Telegraph Company*, 262 NLRB 1048, 1048 (1982), *enforced in relevant part*, 711 F.2d 134 (9th Cir. 1983).

<sup>35</sup> *Pacific Telephone*, 262 NLRB at 1048, quoting *Weingarten*, 420 U.S. at 263.

<sup>36</sup> *Id.*, quoting *Weingarten*, 420 U.S. at 263.

<sup>37</sup> See generally *id.* at 1048 (where the employee does not know the basis of the investigatory interview, the employee essentially has nothing he can consult his union representative about in a pre-investigatory interview), and cases cited *supra* note 34.

<sup>38</sup> See *id.* at 1049 & n.10 (employer’s statement to union representative that “there was a problem involving two installers” was insufficient to inform the employees and their representative of the nature of the matter being investigated).

investigated for, without it, there is nothing about which to consult.”<sup>39</sup> Likewise, without adequate information regarding the subject of the interview, the employee will not be found to have waived his or her *Weingarten* right to a pre-interview consultation.<sup>40</sup>

Here, the Employer failed to provide the Charging Party with sufficient information regarding the interview’s purpose when [REDACTED] requested it. Thus, because the Employer ignored [REDACTED] questions rather than informing [REDACTED] of the interview’s purpose, it effectively denied the Charging Party [REDACTED] *Weingarten* right to a pre-interview consultation with a Union representative.

Accordingly, the Region should issue a Section 8(a)(1) complaint, absent settlement, consistent with the analysis herein.

/s/  
B.J.K.

ADV.19-CA-172921.Response.Valley Hospital.[REDACTED]

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<sup>39</sup> *Id.* at 1048.

<sup>40</sup> See generally *Southwestern Bell*, 227 NLRB at 1223 (finding it necessary to “carefully scrutinize any claim that employees have waived their guaranteed [*Weingarten*] right” and to assure that the employee acted “knowingly and voluntarily” before inferring that a waiver has occurred); *Illinois Bell Telephone Co.*, 251 NLRB 932, 938 (1980) (after employee asked whether she should have someone present from the union, employer not at liberty to proceed until union representation provided, or unless other employee statements or events evidenced “a clear and unambiguous waiver”), *enforced in relevant part*, 674 F.2d 618 (7th Cir. 1982).