

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

Advice Memorandum

DATE: February 16, 2011

TO : James J. McDermott, Regional Director
Region 31

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

SUBJECT: California Nurses Association 536-1200-0000
(Henry Mayo Newhall Memorial Hospital) 554-1467-7200
Case 31-CB-12913

This case was submitted for advice as to whether the Union's unilateral inclusion of its own explanation of Weingarten¹ rights on the back cover of the parties' collective bargaining agreement violated Sections 8(b)(1)(A) and/or 8(b)(3) and (d).

We conclude that the Union's inclusion of the statement of Weingarten rights on the back cover of the parties' collective bargaining agreement 1) violated Sections 8(b)(3) and (d) because by including the statement, the Union unilaterally altered the agreement entered into and signed by the parties; and 2) violated Section 8(b)(1)(A) because the language of the statement is ambiguous as to whether employees are required to request Union representation, and its placement on the cover of the Agreement creates the impression that the Union and the Employer agreed to make it a requirement.

FACTS

The California Nurses Association ("the Union") and Henry Mayo Newhall Memorial Hospital ("the Employer") are parties to a collective bargaining agreement, effective from January 22, 2009 until January 21, 2012. After the parties had reached and signed the final agreement, the Union printed copies of the agreement and included a statement of Weingarten rights on the back cover. The Union's statement in its entirety was printed as follows:

The Weingarten Rights

The Supreme Court has ruled that an employee is entitled to have a CNA Representative present

¹ NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

during any interview which may result in discipline. These rights are called your Weingarten Rights.

You must request that a CNA rep be called into the meeting.

You must have a reasonable belief that the discipline will result from the meeting. 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.

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.

Weingarten rights were not discussed during bargaining, and the Employer did not consent to the printing of the Weingarten language on the back cover of the parties' agreement. After receiving a copy of the printed agreement in October of 2010, the Employer filed an unfair labor practice charge alleging that the Union had violated Sections 8(b)(1)(A) and 8(b)(3) and (d) by including the statement of Weingarten rights without the Employer's consent.

This is not the first instance in which the Union unilaterally included the same Weingarten language on the back cover of the parties' agreement. When the Union included the language on the parties' agreement in 2003, the Employer filed an unfair labor practice charge, and Advice concluded that the Union's conduct violated Sections 8(b)(1)(A), and 8(b)(3) and (d).²

ACTION

The Region should issue complaint, absent settlement, alleging that the Union's unilateral inclusion of the Weingarten statement on the back cover of the parties' collective bargaining agreement violated Sections 8(b)(3) and (d) because by including the statement on the

² The parties reached a non-Board settlement prior to the hearing whereby the Union agreed to re-print the collective bargaining agreements without the Weingarten language on the back cover. California Nurses Association (Henry Mayo Newhall Memorial Hospital), Case 31-CB-11267, Advice Memorandum dated September 16, 2003.

contract cover, the Union unilaterally altered the agreement entered into and signed by the parties; and violated Section 8(b)(1)(A) because its placement on the cover of the contract could be construed as requiring the employees to invoke their Weingarten rights.

A. The Union's Unilateral Inclusion of Weingarten Language on the Back Cover of the Parties' Collective Bargaining Agreement Violated Sections 8(b)(3) and (d).

It is well settled that Section 8(d)'s duty to bargain in good faith includes an obligation to sign a contract reflecting the parties' agreement.³ The Board also has held that "Section 8(d) requires that a party incorporate into a written contract only those matters as to which 'agreement' was reached."⁴ Thus, a party to a collective bargaining agreement violates its duty to bargain in good faith under Section 8(d) when it attempts to alter the written agreement after its final terms have been agreed to by the parties.⁵ The policy underlying that rule is that when a party fails to honor its obligation to sign a written contract reflecting the agreement, "[it] impairs the bargaining process and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining."⁶

In this case, the Union added language to the parties' final and signed agreement without the consent of the Employer. This was a clear violation of 8(d),

³ H.J. Heinz & Co. v. NLRB, 311 U.S. 514 (1941).

⁴ Henry I. Siegel Co., Inc., 153 NLRB 1448, 1452 (1965).

⁵ See e.g., Service Employees (Alta Bates Medical Center), 321 NLRB 382 (1996) (union violated Sections 8(b)(3) and (d) by unilaterally adding a forward to the contract after the parties had reached agreement); E-Systems, Inc., 318 NLRB 1009, 1015 (1995) (employer obligated "to incorporate [the] exact wording accepted during negotiations and ratified by the Union's members."); Ohio Car & Truck Leasing, Inc., 149 NLRB 1423, 1429 (1964) (employer's unilateral addition of language to contract provision after final agreement was reached "constituted an unlawful refusal to execute a completed contract"). See also General Counsel's Minute, United Food and Commercial Workers of America, Local 75 (Blue Grass Provisions d/b/a Blue Grass Quality Meats), 9-CB-12238 (June 17, 2010) (parties have a duty not to make unilateral alterations to the contract text regardless of whether the terms involved are mandatory or permissive subjects of bargaining).

⁶ H.J. Heinz & Co., 311 U.S. at 526.

which requires that parties sign a written contract reflecting their agreement.⁷

B. The Union's Inclusion of the Weingarten Language on the Back Cover of the Collective Bargaining Agreement Violated Section 8(b)(1)(A)

Under the Supreme Court's decision in Weingarten, an employee is entitled to request union representation at an investigatory interview that the employee reasonably believes will result in disciplinary action.⁸ At the same time, the Court held that Section 7 also protects the right of an employee to decline such representation.⁹

Here, the Union's inclusion of the Weingarten language as part of the agreement violated Section 8(b)(1)(A) because an employee could construe it to mean that the parties agreed to require that an employee request union representation. Thus, the statement advises employees that "[they] must request that a CNA rep be called into the meeting." Although this language could be read as indicating that a request is a prerequisite to an employee invoking Weingarten rights, another plausible reading is that it *requires* employees to request such representation. By placing this language on the cover of the agreement, and thereby suggesting that the Employer agreed to its inclusion, employees were coerced in the exercise of their Section 7 rights because they reasonably would believe that this "requirement" could be enforced like other provisions of the agreement.

⁷ In California Nurses Association, Case 31-CB-11267, Advice Memorandum dated September 16, 2003, we found a violation of Sections 8(b)(3) and (d) because the statement of Weingarten rights conflicted with another provision of the collective bargaining agreement. Because we now decide that the Union's unilateral alteration of the parties' agreement *ipso facto* violated Sections 8(b)(3) and (d), we need not reach the question of whether the language conflicted with other sections of the collective bargaining agreement. See General Counsel's Minute, United Food and Commercial Workers of America, Local 75 (Blue Grass Provisions d/b/a Blue Grass Quality Meats), 9-CB-12238.

⁸ Weingarten, 420 U.S. at 260.

⁹ Id. at 257.

Accordingly, the Region should issue complaint, absent settlement.¹⁰

B.J.K.

ROF(s) - 1

x: ADV.31-CB-12193.Response.CNA (b) (6)

¹⁰ The Region indicated that if Advice authorized a Section 8(b)(1)(A) complaint, it would conduct additional investigation regarding whether the Union has unilaterally included this language in its collective bargaining agreements with other employers. If, upon completion of that investigation, the Region has questions with respect to the appropriateness of a nationwide remedy, it should contact the Division of Advice.

