

Union Representation and Disciplinary/Adverse Action

Supervisors and employees frequently have questions regarding management's and bargaining unit members' rights relative to disciplinary and adverse actions. Two important labor law provisions address the issue. Both provisions are contained in the Statute. They are 5 USC 7114(a)(2) (Weingarten Rights) and 5 USC Chapter 7106 (a)(2)(A).

Weingarten Rights – A bargaining unit member shall be given the opportunity to be represented at any examination of an employee by a representative of the agency in connection with an investigation if:

- The employee reasonably believes the examination may result in disciplinary action; and
- The employee requests representation.

There are a couple of important points to consider when confronted with a potential Weingarten situation. First, to legally invoke the Weingarten rights, the employee must be in a situation where he/she is being examined. If the supervisor, is **asking** questions, or is otherwise **seeking** information, he/she is probably engaging in an examination. The Weingarten right does not prohibit the supervisor from examining bargaining unit members. Rather, it affords the employee the right to have a Union official present during such an examination. Second, whether or not an employee reasonably believes disciplinary action may result from the examination is based almost entirely on the employee's perception. Additionally, the employee need not perceive that potential discipline would only apply to him/herself – if he/she perceives someone else may be disciplined as a result of the examination, he/she may exercise the Weingarten rights. Finally, the employee must request representation. A supervisor has no obligation to inform the employee of his/her right. However, if the employee requests representation, and all of the other criteria mentioned previously are met, the supervisor must postpone the examination until representation is available.

Proposing/Issuing Disciplinary/Adverse Actions – Section 7106 of the FLSA gives management the right to suspend, remove, reduce in grade or pay, or take other disciplinary action against an employee. Employees do not have an explicit right to representation at a meeting during which a supervisor is counseling on performance or conduct, or issuing a disciplinary or adverse action. The key point that removes such activity from Weingarten is that in such circumstances, the supervisor is **telling, issuing, or proposing** rather than examining.