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Investigatory Meetings

Presented by
Commissioner Dan Sims



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The Federal Mediation and Conciliation Service

- Independent Agency
- Established 1947
- 130 Mediators
- 60 Field Stations





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FMCS Mission

- Promote sound, stable L-M relations
- Prevent, minimize work stoppages
- Advocate collective bargaining, mediation & voluntary arbitration
- Develop methods of conflict resolution
- Improve employment security & organizational effectiveness



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Discussion Objectives

- Weingarten Rights
- Stewards Rights/Role in Investigatory Meetings
- Loudermill Hearings (Public Sector Only)
- Pre-Disciplinary Investigations and Hearings



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Weingarten Rights

“Weingarten Rights” are based on a 1975 U.S. Supreme Court decision which upheld and affirmed **the right** of employees:

“To refuse to participate in investigatory interviews without union representation and in situations where the employee reasonably fears the interview will result in discipline.”



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WEINGARTEN RIGHTS

- ALL of the following conditions must exist:
 - a representative of the employer
 - conducts an investigatory interview of an employee
 - the employee reasonably believes that disciplinary action might result from questioning, and
 - the employee requests representation



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Weingarten Rights Investigatory Interview

- An **investigatory interview** occurs when a supervisor questions an employee to obtain information which could be used as a basis for discipline or asks an employee to defend his or her conduct



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Weingarten Rights

- Employees have the right to know beforehand what the subject of the discussion will be.
- Employees have the right to consult (caucus) privately with their Steward before and during the meeting.



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Weingarten Rights

- Employees have the right to stop a meeting and call in a Steward at any point where the reasonable belief arises that they are being asked questions which could result in discipline.
- An employee cannot be punished for requesting a Steward's presence.



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Weingarten Rights

Once an employee makes a request for a steward, the Employer must choose from among three options:

1. Grant the request and delay questioning until the Steward arrives and has a chance to consult privately with the employee; or
2. Deny the request and end the interview immediately; or
3. Give the employee a choice of having the interview without representation.



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Test of “Just Cause”



- Forewarning
- Reasonableness
- Investigation
- Equal Treatment
- Internal consistency
- Proof of Guilt
- Documentation



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“Just Cause”

- NOTICE
 - Did employee know (or should have known) possible consequences of conduct?
- INVESTIGATION
 - Did employer fairly & objectively investigate the allegations of misconduct?
- REASONABLE
 - Is the rule reasonably related to the efficient & safe operation of the business?



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“Just Cause”

- REASONABLE PENALTY
 - Is the penalty reasonable based on proven allegations?
- Progressive discipline
 - based on work history, discipline record, similarly situated employees, etc.
 - Serious behavior exception (e.g., stealing)
- EQUITABLE TREATMENT
 - Did employer administer discipline evenhandedly and without discrimination?
- EVIDENCE/PROOF
 - Is there substantial evidence that the employee did what was alleged?
- DOCUMENTATION



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What is the ROLE of a Steward in a investigatory meeting?

- **When** a Steward arrives, the Supervisor must inform him/her of the subject matter of the interview, i.e. the type of action/misconduct for which discipline is being considered.
- **The** Steward must be allowed a private pre-interview conference before the questioning begins.



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What is the ROLE of a Steward in a investigatory meeting?

- **The** Steward must be allowed to speak during the interview
- **The** Steward can give advice on how the employee should answer questions.



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What is the ROLE of a Steward in a investigatory meeting?

- The right of the steward to actively assist the employee during the interview
 - May ask for clarification
 - May interrupt if harassment or repeated questions arise
 - May not bargain over the purpose of the interview



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What if a Supervisor denies a request for a Steward?

- If an employee is denied a steward's presence and the Employer persists in asking questions, the Employer may commit an unfair labor practice.
- Under such circumstances, if the employee subsequently receives discipline, that discipline may be overturned by the NLRB and Arbitrator, or both.



Weingarten Rights

- The employer can refuse the request, terminate the interview and simply issue the discipline
- This only requires a representative and does not require the employee's preferred representative
- The employee has the right to leave the room until a representative arrives
- Generally, once an employee requests a representative, the interview must cease until a representative can be present



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Weingarten Rights

- An employee can not be disciplined for requesting a representative
- An employee does not have a “Weingarten” right to a representative if the employer assures the employee that:
 - no questions will be asked, or
 - no discipline will result from any responses



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Weingarten Rights

- The representative has a right to:
 - know the SUBJECT of the investigatory meeting
 - privately CONFER with the employee prior to the interview
 - PARTICIPATE in the meeting

However, the representative
does not have a protected
right to argue the case.

This is not a grievance meeting



Weingarten Rights





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Loudermill Hearings Public Sector Employers ONLY

- Supreme Court decision - Cleveland Board of Education v. Loudermill (470 U.S. 532 (1985))
- At issue was the termination of public sector employee
- The Court determined that:
 - A public sector person's "continued employment" was in fact "a property interest"
 - Therefore, you cannot have your job taken without proper "Due Process" (5th and 14th Amendment)
 - 5th Amendment: No person shall be.....deprived of life, liberty or property without due process of law
 - 14th Amendment: Nor shall any State deprive any person.....



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Loudermill Hearings Public Sector Employers ONLY

The Decision made the “pre-disciplinary” hearings a due process right as envisioned by the U.S. Constitution

At the hearings, the employer must:

- A. Apprise the employee of the charge(s) against him/her
- B. Explain to the employee the nature of the evidence regarding charges against him/her, and
- C. Provide the employee an opportunity to respond



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Pre-disciplinary Hearings



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What is a Pre-disciplinary Hearing?

A meeting between the employer and an employee in which the employer presents evidence of an employee's misconduct and the employee is provided an opportunity to respond.

To determine whether just cause exists for discipline



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Employee Rights

- Notice
- Opportunity to respond, rebut, refute



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Pre-Disciplinary Notice

- ☑ Charges and evidence
- ☑ Date, time and location
- ☑ Right to representation
- ☑ Right to cross-examine
- ☑ Right to present witnesses
- ☑ Right to waive the hearing



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Pre-Disciplinary Hearing

Conducting the meeting

- Employer's burden
- Use of witnesses
 - Separate if necessary
- Provide an opportunity to refute, rebut, respond



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