Representing the Educational Employee from the Employee Perspective

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I. Investigatory Interviews: *Weingarten* Rights

What is the right?

In *NLRB v. J. Weingarten, Inc*., the U.S. Supreme Court affirmed that the National Labor Relations Act (NLRA) "creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256 (1975).

In *Summit Hill School District*, 4 PERI 1009 (IELRB 1987) the Illinois Educational Labor Relations Board (IELRB) recognized *Weingarten* rights for public sector educational employees, concluding that:

- Section 3(a) of the Illinois Educational Labor Relations Act (IELRA) encompasses the right to refuse to submit to an investigatory interview without union representation where the employee reasonably fears that the interview might result in discipline;
- such a right arises only where the employee specifically makes a request for union representation;
- in a routine disciplinary situation, the employer may deny the request for representation, discontinue the interview and proceed to obtain information from other sources. However, if the employee requests representation and the request is denied, the employer violates the Act if it continues to conduct the interview; and the right to have union representation as a matter of law does not attach to post-observation conferences of a teacher under remediation.

Weingarten rights do not extend to non-union employees. *IBM Corp.*, 341 NLRB 1288 (2004). *Weingarten* rights do not apply to meetings in which previously-decided upon disciplinary action is being announced or meted out. *Baton Rouge Water Works Co.*, 246 NLRB No. 161 (1979).

Invoking the *Weingarten* Right

If an employee has a reasonable belief that discipline or other adverse consequences may result from what he/she says to a supervisor during an investigatory interview, then the employee has the right to request union representation. An employer is not required to inform the employee of his/her *Weingarten* rights; it is the employee's responsibility to make a clear request for union representation before or during the interview. An employee cannot be disciplined for making such a request or coerced into waiving *Weingarten* rights.

The following is a sample request for union representation: "If this discussion could in any way lead to my being disciplined or terminated, I respectfully request my union representative, officer or steward to be present at this meeting. Without union representation, I choose not to participate in this discussion."

When an employee asks for representation, the employer must:

1. Grant the representation request and delay questioning until the union representative arrives;
2. deny the request and end the interview immediately; or
3. *only if the employee authorizes*, proceed with the interview without representation.

If, without employee authorization, the employer denies the request for union representation and continues to ask questions, it commits an unfair labor practice under Section

8(a)(1) of the NLRA or Section 14(a)(1) of the IELRA and the employee has a right to refuse to answer.

Who is the union representative?

In *Village of Streamwood*, 14 PERI 4004 (1997), the Illinois Appellate Court recognized that an employee's *Weingarten* right requires the assistance of a "knowledgeable union representative." This "sensibly means a representative familiar with the matter under investigation. Absent such familiarity, the representative will not be well-positioned to aid in a full and cogent presentation of the employee's view of the matter, bringing to light justifications, explanations, extenuating circumstances, and other mitigating factors." *Id.* The employee does not have the right to delay the interview until the union representative of his or her choosing is available if another competent representative is available. *Id.*

What is the union representative's role?

Although an employer has no duty to bargain with any union representative who may be permitted to attend an investigatory meeting, it is unlawful for an employer to demand that a union representative remain silent during an investigatory interview. *Chicago State Univ*., 20 PERI 98 (IELRB Exec. Dir., 2004) (citing *NLRB v. Texaco, Inc*., 659 F.2d 124 (9th Cir. 1981) (holding that "the representative should be able to take an active role in assisting the employee to present the facts. 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. A knowledgeable union representative could assist the employer by eliciting favorable facts and save the employer production time by getting to the bottom of the incident occasioning the interview.")

Expanded *Weingarten* Rights Pursuant to a Collective Bargaining Agreement

Weingarten rights can be expanded in a collective bargaining agreement. For example, a union could bargain for *Weingarten* rights to apply to meetings other than investigatory interviews, such as post-evaluation conferences or meetings during which non-disciplinary changes to an employee's job duties are being discussed. A collective bargaining agreement also could obligate an employer to inform an employee of her right to union representation in advance of an investigatory interview.

II. Discipline, Suspension & Termination

K-12 Employees in Positions Requiring a Professional Educator License

Teachers in General

School districts may suspend licensed employees either with or without pay for a temporary disciplinary reason or pending a dismissal hearing. In order to lawfully suspend a teacher without pay, the school district must have a suspension policy either in an applicable collective bargaining agreement or Board Policy. *Spinelli v. Immanuel Evangelical Lutheran Congregation, Inc.*, 144 Ill.App.3d 325, 494 N.E.2d 196 (2nd Dist. 1986); *Massie v. East St. Louis School District #189,* 203 Ill.App.3d 965, 56 N.E.2d 246 (5th Dist. 1990). If a temporary disciplinary suspension violates a collective bargaining agreement, a grievance can be filed and pursued to binding arbitration. *Granite City Community Unit School District #9 v. IELRB*, 279 Ill.App.3d 439, 664 N.E.2d 1060 (4th Dist. 1996).

Section 10-22.4 of the Illinois School Code empowers boards of education to dismiss a teacher for incompetency, cruelty, negligence, immorality or other sufficient cause, to dismiss any teacher on the basis of performance and to dismiss any teacher whenever, in its opinion, he

or she is not qualified to teach, or whenever, in its opinion, the interests of the schools require it, subject, however, to the provisions of Sections 24-10 to 24-16.5, inclusive. Temporary mental or physical incapacity to perform teaching duties, as found by a medical examination, is not a cause for dismissal. Marriage is not a cause of removal. 105 ILCS 5/10-22.4.

Probationary Teachers

Probationary teachers who have not yet achieved tenure can be dismissed for any lawful reason. Probationary teachers in their first, second or third year in the school district may have their contract non-renewed so long as the school board gives the teacher written notice at least 45 days prior to the end of the school year. If the employing board of education determines to dismiss a non-tenured teacher in the last year of the 4-year probationary period, the written notice of dismissal provided by the employing board must contain specific reasons for dismissal. 105 ILCS 5/24-11(f). The phrase "specific reason" means that it must "fairly apprise the teacher of the alleged deficiency" on which the dismissal is based and do so with "sufficient specificity to enable the teacher to refute the charge." *Wade v. Granite City Community Unit School District No. 9*, 71 Ill. App.2d 34, 36, 218 N.E.2d 19, 20 (1966). Deficiencies explained during meetings and at prior evaluations which occurred before the dismissal may help fulfill the "specific reason" requirements. *Howard v. Board of Education of Freeport School District No. 145*, 160 Ill. App. 3d 309, 314, 513 N.E.2d 545, 548 (1987); *Roller v. Board of Education of Glen Ellyn School District No. 41*, 2006 WL 200886 (N.D. Ill. Jan. 18, 2006).

Often, non-renewal of probationary teachers will be the result of deficiencies in performance rather than conduct-based investigations. Probationary teachers dismissed mid-year without cause may have a breach of contract claim against the employer.

Dismissal of Tenured Teachers

Tenured teachers may face dismissal for failure to remediate unsatisfactory performance or for cause due to alleged misconduct. As the focus of this seminar is on representing the employee accused of misconduct, I will focus on conduct-based dismissal of tenured teachers.

Section 24-12 of the Illinois School Code governs the tenured teacher dismissal process. 105 ILCS 5/24-12. Section 24-12(d) provides in part:

> If a dismissal of a teacher in contractual continued service is sought for any reason or cause other than an honorable dismissal under subsections (a) or (b) of this Section or a dismissal sought under Section 24-16.5 of this Code, including those under Section 10-22.4 [105 ILCS 5/10-22.4], the board must first approve a motion containing specific charges by a majority vote of all its members. Written notice of such charges, including a bill of particulars and the teacher's right to request a hearing, must be mailed to the teacher and also given to the teacher either by certified mail, return receipt requested, or personal delivery with receipt within 5 days of the adoption of the motion. Any written notice sent on or after July 1, 2012 shall inform the teacher of the right to request a hearing before a mutually selected hearing officer, with the cost of the hearing officer split equally between the teacher and the board, or a hearing before a board-selected hearing officer, with the cost of the hearing officer paid by the board.
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> Before setting a hearing on charges stemming from causes that are considered remediable, a board must give the teacher reasonable warning in writing, stating specifically the causes that, if not removed, may result in charges; however, no such written warning is required if the causes have been the subject of a remediation plan pursuant to Article 24A of this Code [105 ILCS 5/24A].
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> If, in the opinion of the board, the interests of the school require it, the board may suspend the teacher without pay, pending the hearing, but if the board's dismissal or removal is not sustained, the teacher shall not suffer the loss of any salary or benefits by reason of the suspension.

105 ILCS 5/24-12(d)(1).

Teachers have 17 days after issuance of the notice of charges and bill of particulars to request a hearing before a neutral hearing officer at the Illinois State Board of Education. The School Code grants the hearing officer the authority to "report to the [district's] school board

findings of fact and a recommendation as to whether or not the teacher shall be dismissed for cause." 105 ILCS 5/24-12(d)(7).

The School Code grants the school board the following authority in processing the hearing officer's findings of fact and non-binding recommendation:

> The school board, within 45 days after receipt of the hearing officer's findings of fact and recommendation as to whether (i) the conduct at issue occurred, (ii) the conduct that did occur was remediable, and (iii) the proposed dismissal should be sustained, shall issue a written order as to whether the teacher must be retained or dismissed for cause from its employ. The school board's written order shall incorporate the hearing officer's findings of fact, except that the school board may modify or supplement the findings of fact if, in its opinion, the findings of fact are against the manifest weight of the evidence.
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> If the school board dismisses the teacher notwithstanding the hearing officer's findings of fact and recommendation, the school board shall make a conclusion in its written order, giving its reasons therefor, and such conclusion and reasons must be included in its written order. (…) The decision of the school board is final, unless [appealed and overturned through judicial review].

105 ILCS 5/24-12(d)(8).

As set forth by the Illinois Supreme Court in *Beggs v. Bd. of Ed. of Murphysboro Community School District 186*, 2016 IL 120236, 72 N.E.3d 388 (Dec. 1, 2016), the school board's decision is the final administrative order and the standard on appeal must establish that the decision is against the manifest weight of the evidence.

Just Cause Protections Pursuant to a Collective Bargaining Agreement

The principal of just cause is contrary to that of employment at-will, in which employees can be disciplined or terminated for a good reason, a bad reason or no reason at all. Whereas pursuant to a just cause provision in a collective bargaining agreement, employees may only be disciplined or discharged for a just cause. A just cause provision is often accompanied by a progressive discipline policy providing for successively higher penalties for the same or similar

infractions. Typically, the steps in progressive discipline are verbal warning, written warning, suspension and finally termination. Collective bargaining agreements often provide that serious infractions may justify bypassing lesser disciplinary steps.

Many arbitrators agree that collective bargaining agreements need not use the words "just cause" in order for a just cause limitation to apply to discipline and discharge. Arbitrators generally agree that the "absence of a specific 'just cause' provision in the contract does not preclude an arbitrator from implying a 'just cause' requirement." *Giant Food, Inc.*, 131 LA 725, 732 (Trotter, Arbitrator, 2012). Many arbitrators would imply a just cause limitation in any collective bargaining agreement. Elkouri & Elkouri, *How Arbitration Works*, 8th ed., at 15-3 (BNA 2016). The rationale for implying a just cause provision is that without a standard in place, an employer could "do whatever it wished with no recourse available to the Union." *Firefighters Union*, 2013 BNA LA Supp. 148149. Indeed, "if management can terminate at any time for any reason, such as one finds in the 'employment-at-will' situation, then the seniority provision and all other 'work protection' clauses of the labor agreement are meaningless." *How Arbitration Works*, at 15-3 (quoting *Herlitz, Inc.*, 89 LA 436, 441 (Allen, Jr., Arbitrator, 1987)).

"[T]he prevailing view is that to alter this implied requirement of just cause, the parties must in fact so specify in their written agreement." *Binswanger Glass Co.*, 92 LA 1153, 1155 (Nicholas, Jr., Arbitrator, 1989); accord. *J & J Maintenance* 121 LA 847, 855 (Henderson, Arbitrator, 2005). Although arbitrators commonly imply a "just cause" requirement where one is not explicit in a contract, an arbitrator will "bypass the fairness doctrines associated with the just-cause principle" when the contract language expressly preserves an at-will employment relationship. *J & J Maintenance* 121 LA at 855. However, the contract language should clearly

and specifically indicate that an at-will relationship exists, because only a "high degree of assurance about intent" will cause an arbitrator to depart from the fairness doctrine. *Id*.

Moreover, arbitrators have found the presence of certain clauses in a collective bargaining agreement to strongly imply a just cause standard. Thus, "the presence of an arbitration clause is an important event pointing toward implicit 'just cause' protection, because the very nature of labor arbitration indicates that arbitrators not expressly confined by contract are empowered to award a remedy for employees discharged without cause." *J & J Maintenance,* 121 LA at 854. One arbitrator has held that the presence of a recognition clause in the parties' CBA merited the implication of a just cause standard for discipline:

> Management has agreed to recognize the Union as the exclusive bargaining agent for the affected employees with regard to matters of wages, hours and conditions of employment. By doing this it was agreeing tacitly, if not overtly, that the Union had a voice in administering and policing the aforesaid matters. The Employer has agreed to share his authority and no longer has sole and unilateral control over employees' wages, hours and conditions of employment-which perforce also encompass disciplinary sanctions for employee violations of the provisions of the collective agreement. It follows that if the Employer is to prevail in contested matters involving discipline, it must be prepared to convince the Union that its disciplinary action was founded on just or good cause.

National Lawyers Club, Inc., 52 LA 547, 551 (Seidenberg, Arbitrator, 1969). In addition, arbitrators have implied just cause into agreements with a seniority provision, where the failure to imply the limitation would "nullify" the provision. *See e.g.*, *Theole Asphalt* 129 LA 953 (Rohlik, Arbitrator, 2011); *Herlitz, Inc.*, 89 LA at 441.

"Whether there was just cause for an Employer's disciplinary action breaks down into two questions: was there just cause for any discipline, and if so, was there just cause for the discipline meted out." *Android Industries (Ai-Belevidere, LLC)*, 2008 BNA LA Supp. 119472, at 4 (Draznin, Arbitrator, 2008). The seven tests of just cause, recognized by many arbitrators since their articulation by Arbitrator Carroll Daugherty in 1964, consist of the following: (1)

notice to the employee of the possible disciplinary consequences of particular conduct; (2) rule reasonably related to the employer's operations; (3) investigation prior to discipline; (4) fairness of investigation; (5) sufficiency of proof; (6) non-discrimination in enforcement; and (7) appropriateness of penalty. *Discipline and Discharge in Arbitration*, at 2-6 (citing *Grief Bros. Cooperage Corp*., 42 LA 555, 557-559 (Daugherty, Arbitrator, 1964)). In Arbitrator Daugherty's view, if any of the seven tests were not met in a particular case, just cause did not exist for discipline. *Id.*

Just cause provisions may apply to discipline and discharge of K-12 and public and private sector educational support employees. A collective bargaining agreement may also provide that teachers and other employees in positions requiring a Professional Educator License may not be disciplined without just cause. However, the Illinois Supreme Court has held that notices to remedy issued to tenured teachers cannot be challenged pursuant to a just cause provision. *Board of Education of Rockford School District No. 205 v. IELRB (Wehrle)*, 165 Ill.2d 80, 649 N.E.2d 369 (1995). In *Wehrle*, the Court held that the implementation of a collective bargaining agreement's "just cause" provision in an arbitration award ordering rescission of a notice to remedy was prohibited where the award conflicted with the comprehensive scheme governing dismissal of tenured teachers contained in the Illinois School Code. *Id.* Similarly, just cause provisions cannot be applied to challenge discharge of probationary or tenured teachers because this would conflict with the authority of school boards to dismiss teachers pursuant to the Illinois School Code.

Some arbitrators have overturned discipline pursuant to a just cause provision where the grievant's *Weingarten* rights were violated. *See, e.g.*, *Walker Processing Equipment*, 137 BNA LA 320 (Smith, Arbitrator, 2017).

***Loudermill* Rights**

Public employees deemed to have a protected property interest in their employment have a right to a due process hearing before being suspended without pay or terminated. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). This due process right applies to regularly employed public educational employees, including probationary teachers facing a mid-year unpaid suspension or dismissal. The pre-dismissal/suspension hearing need not be as extensive as the post-dismissal/suspension hearing, but it must permit the employee to have notice of the charges, an explanation of the evidence, and an opportunity to present his or her side of the story. The contemplated adverse actions prior to which a public employer is required to provide due process may be expanded in a collective bargaining agreement.

III. Resignation in Lieu of Termination: Considerations for Settlement

Some factors to consider when advising an accused employee exploring the possibility of a resignation and separation agreement in lieu of an imminent termination include:

- Does the employee want to continue in the educational profession? If so, it will be more difficult to secure future employment with a termination on the employee's record.
- Will the employer allow the employee to resign in lieu of termination?
- Settlement terms to consider include:
    - Monetary compensation
    - Health insurance—this could be particularly important in cases where the accusations against the employee involve substance abuse
    - Retirement incentive benefits
    - Neutral letter of reference

- Agreement by employer not to contest unemployment benefits
- Non-disclosure clause (but note that public sector board of education-approved settlement agreements are subject to FOIA)