CONSTITUTIONAL ISSUES WITH REPRESENTING MEMBERS

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PROTECTING YOUR PROPERTY INTEREST AS A PUBLIC EMPLOYEE

- In Ohio, classified public employees possess a property interest in their continued employment that their employer cannot deprive them of without due process of law. *Cleveland Bd. Of Educ. V. Loudermill*, 470 U.S. 532, 538-539 (1985).

- In this setting, due process requires that the public employee receive:
- 1. Oral or written **notice of the charges** against them;
- 2. An **explanation of the employer's evidence**;
- 3. A **pre-disciplinary hearing**, where the employee is given an opportunity to present their side of the story, respond to the charges against them, and present reasons why the proposed disciplinary action should not be taken; and
- 4. **Post discipline administrative review** if the employee is suspended or disciplined.

- In most cases, this right should be specifically addressed through the grievance and arbitration provision in the applicable CBA.

- A failure by the employer to provide these basic due process rights prior to issuing discipline may constitute grounds to overturn the discipline imposed by the employer.

Ensuring Your Right To Union Representation

- An employee has the right to request the presence of a union representative when the employee has a **reasonable belief that the interview will result in disciplinary action against them**. *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 256, 260 (1975) (also known as "*Weingarten* rights").

- *Weingarten* rights do NOT apply in “run-of-the-mill shop-floor conversations,” situations where an employer gives an employee instructions, training, or advice on how the employee can improve their work techniques.

- There must be a reasonable basis for the employee to fear that the interview will result in the employer taking disciplinary action.

- In order to invoke this right, the employee **must request** the presence of the union representative; if the employee fails to request the presence of a union representative, the employee waives their *Weingarten* rights.

- It should be noted, however, that there are no magic words that the employee is required to use; the employee must simply put the employer on notice that he/she desires union representation.

- The employee can do this by directly requesting the presence of a union representative before continuing with the interview, or the employee can simply ask the employer if this is the type of interview where he/she *should* have a union representative present.

- The key is that the employee must somehow let the employer know that he/she desires union representation. See *In re City of Cleveland*, SERB 97-011 (6-30-97).

- If an employer insists on conducting an investigatory interview with an employee without the presence of a union representative, the **employee has a right to refuse to submit to the interview** if he/she reasonably believes that the interview will result in disciplinary action against them.

- This right, however, does not necessarily prohibit the employer from taking disciplinary action against an employee who refuses a direct order to answer questions. Rather, the right would serve as a basis for challenging the discipline.

Asserting Your Rights In An Investigation

- Under Ohio Revised Code 9.84, any person *appearing as a witness* before any public official, department, board, bureau, commission, agency, or representative thereof, in any administrative or executive proceeding or investigation, public or private, has the right to be accompanied, represented and advised *by an attorney* if he or she so requests.

- In other words, when a public employee who is called as a witness in an administrative or executive proceeding, or called in for questioning in a *formal investigation*, the employee is entitled to have an attorney present. See *In re Cov. Serv. Charges & Specs. Against Piper*, 88 Ohio St.3d 308, 311-312, 725 N.E.2d 659, 662 (2000) (also known as "*Piper* rights").

- For purposes of the *Piper* rights, a “witness” is considered to be anyone who is called upon by the employer and/or investigator to relate facts that they personally observed.

- Of course, an employee who is the *subject* of an investigation is also considered to be a “witness.”

- In regard to what constitutes an “administrative or executive proceeding,” the proceeding or investigation must be one with a certain level of formality.

- Simply being called into a principal’s office to discuss employment issues is not generally enough to trigger an employee’s *Piper* rights.

- If, however, the employer is recording the employee's statements in some way (video, transcript, etc.); there is high ranking managers and/or employer's counsel present for the questioning; or the employer reads the employee his *Garrity* rights, these are all indications of circumstances where *Piper* rights may be asserted.

Protecting Your Constitutional Right Not To Incriminate Yourself

- In *Garrity v. New Jersey,* the U.S. Supreme Court held that a public employer cannot use the threat of discharge to force a public employee to "waive" their Constitutional right to refuse to incriminate themselves. *Garrity v. New Jersey*, 385 U.S. 493, 497-498 (1967) (also known as "*Garrity* rights").

- Under *Garrity*, any incriminating statements obtained from a public employee under a threat of discipline or discharge cannot be used against him/her **in subsequent criminal proceedings**.

- *Garrity*, however, does *NOT* prohibit an employer from using those same incriminating statements against the employee in **employment disciplinary proceedings**.

- Under *Garrity*, an employer is NOT prohibited from disciplining an employee (potentially up to discharge) if the employee refuses to answer questions in an honest and straightforward manner.