

DC Circuit Says Nurses Not Improperly Denied Weingarten Rights During Peer Review Investigation Interview

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One of the long-standing rights under the National Labor Relations Act (“NLRA”) is for union-represented employees to be accompanied by a union representative at workplace investigatory interviews that the employee reasonably believes may result in disciplinary action. These rights are referred to as “*Weingarten*” rights after the case, *NLRB v. Weingarten, Inc.*, in which the United States Supreme Court established this rule of law. (Over the years, the issue of whether non-union employees have the same right has ping-ponged back and forth, with the current interpretation being that they do not.) In a recent case, *Menorah Medical Center v. NLRB*, the National Labor Relations Board (“NLRB”) had held that a Kansas hospital had improperly denied two nurses their *Weingarten* rights when it refused to allow them to have representation during interviews conducted as part of a hospital peer review investigation. The hospital argued, first unsuccessfully to the NLRB, then on appeal to the United States Court of Appeals for the District of Columbia, that the nurses were not entitled to union representation because the peer review interviews were not mandatory.

In this case, two nurses – each represented by the National Nurses Organizing Committee – received written notices that they were under investigation by the hospital’s peer review committee for conduct believed to be unprofessional and, therefore, could be subject to disciplinary action. The peer review committee was responsible for investigating concerns brought to its attention about the care provided by hospital nurses. The investigation notices provided to the nurses informed them that they had a right to appear in front of the peer review committee prior to its final determination, but that attendance was optional. Both nurses chose to appear and each requested union representation during their respective interviews. The hospital denied the nurses’ requests and proceeded with the interviews. Although the NLRB found this violated the nurses’ *Weingarten* rights, the DC Circuit panel disagreed because the hospital told the nurses they could attend, “if you choose.” Citing *Weingarten*, the Court reiterated that an employer is free to carry on an investigation without interviewing an employee who refuses to participate without union representation, leaving the employee the choice between an unrepresented interview and having no interview at all; notwithstanding whether the employee herself thought that appearing was in her best interests. In other words, if an employer leaves the choice to participate in an investigatory interview to the employee, the employer retains the choice whether to allow the employee to have union representation at the interview. The decision is thus notable for clarifying an interesting gap in the

Weingarten analysis, even as applied in the union-represented context.

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