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Kurt H. Decker

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I. Introduction

During the past decade, Pennsylvania's labor law has furthered public employees' rights to organize and bargain collectively.[1] Public employees are no longer isolated individuals dealing with employers, but are increasingly united in organizations. Unlike private sector employees,[2] however, public employees have not been specifically accorded the right to union representation during investigatory interviews that may result in disciplinary action. Nevertheless, the right to union representation at investigatory interviews is important for public employees, unions, and employers.

Collective bargaining in the public sector, which is still a relatively new concept, suffers from a paucity of interpretative decisions. Moreover, the impact of existing decisional law is limited by individual state or local statutes, court decisions, executive orders, and attorney general opinions[3] that vary from one state to another.[4] In the private sector, however, precedent is virtually unlimited because the National Labor Relations Act (NLRA)[5] is interpreted through a centralized agency, the

* B.A., Thiel College; M.P.A., The Pennsylvania State University; J.D., Vanderbilt University; Ass't Att'y General, Pa. Governor's Office, Bureau of Labor Relations; Member, Pennsylvania Bar. The views expressed herein are solely those of the author and do not necessarily represent policy or positions of the Pennsylvania Governor's Office, Bureau of Labor Relations.

1. The Act of June 24, 1968, P.L. 237, No. 111 (Act 111), established police and firemen's rights to organize and bargain collectively. PA. STAT. ANN. tit. 43, §§ 217.1-.10 (Purdon Supp. 1977-78). All other Pennsylvania public employees were granted the right to organize and bargain collectively by the Act of July 23, 1970, P.L. 563, No. 195 (Act 195). PA. STAT. ANN. tit. 43, §§ 1101.101-.2301 (Purdon Supp. 1977-78).

2. The United States Supreme Court in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), acknowledged the right of private sector employees to union representation when an employer's investigation may reasonably result in disciplinary action.

3. At least 45 states provide some form of collective bargaining for either all or a portion of their public employees. 51 GOV'T EMPL. REL. REP. (BNA) 501 (1977).

4. *See* Drachman & Ambash, *Is Looking Up Case Precedent in Other Jurisdictions Worthwhile in Public Sector Labor Relations?—A Management Perspective*, 6 J.L. & EDUC. 209 (1977).

5. 29 U.S.C. §§ 151-168 (1970).

National Labor Relations Board (NLRB).[6] Private sector precedents provide reliable, if not analogous authority to public sector tribunals when the statutory language in both sectors is parallel.[7] Blind deference, however, is unwarranted unless the legislature intended that the statute be so construed.[8] In Pennsylvania, private sector precedent "may provide some guidance," but it is also necessary to consider "the distinctions that necessarily must exist between legislation primarily directed to the private sector and that for public employees."[9]

II. Relevance of the *Weingarten* Decision to the Public Sector

An example of guidance from the private sector is provided by the Supreme Court's decision in *NLRB v. Weingarten, Inc.*[10] that an employee has a qualified right to union representation during investigatory interviews.[11] The right arises when the employee reasonably believes the investigation will result in disciplinary action,[12] but only if the employee specifically requests union representation.[13] When an employee demands union representation, the employer has two alternatives. First, he may pursue his investigation without an interview.[14] Second, he may allow union representation, but restrict the union representative's participation. There is no obligation to bargain with the union at the interview, and the employer may insist upon hearing only the employee's version.[15]

A qualified right to union representation during investigatory interviews can be justified by its elimination of the power imbalance that

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6. *Id.* § 153.

7. *See, e.g.*, Fire Fighters Union, Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974); Kerrigan v. City of Boston, 361 Mass. 24, 278 N.E.2d 387 (1972); Detroit Police Officers Ass'n v. City of Detroit, 391 Mich. 44, 214 N.W.2d 803 (1974); Kahn, *Is Looking Up Case Precedent in Other Jurisdictions Worthwhile in Public Sector Labor Relations?—The Perspective of a Neutral*, J.L. & EDUC. 221 (1977).

8. The California Agricultural Labor Relations Act, for example, provides that the Agricultural Labor Relations Board "shall follow applicable precedents of the National Labor Relations Act as amended." 44 CAL. STAT. ANN. § 1148 (1977).

9. Pa. LRB v. State College Educ. Ass'n, 461 Pa. 494, 499, 337 A.2d 262, 264 (1975). The Pennsylvania Supreme Court has stated,

> We emphasize that we are not suggesting that the experience gained in the private sector is of no value here, rather we are stressing that analogies have limited application and the experience gained in the private employment sector will not necessarily provide an infallible basis for a monolithic model for public employment.

Id. at 500, 337 A.2d at 264-65. Borough of Wilkinsburg v. Sanitation Dep't, 463 Pa. 521, 345 A.2d 641 (1975); Pa. LRB v. American Federation of State, County and Municipal Emp., 22 Pa. Commw. Ct. 376, 348 A.2d 921 (1975).

10. 420 U.S. 251 (1975).

11. *Id.* at 253. The Court discussed the nature and extent of the union representation right as developed by the NLRB in NLRB v. Quality Mfg. Co., 195 N.L.R.B. 197 (1972), *enforcement denied*, 481 F.2d 1018 (4th Cir. 1973), *rev'd*, 420 U.S. 276 (1975) and NLRB v. Mobil Oil Corp., 196 N.L.R.B. 1052 (1972), *enforcement denied*, 482 F.2d 842 (7th Cir. 1973).

12. 420 U.S. at 256.

13. *Id.* at 257.

14. *Id.* at 258-59.

15. *Id.* at 259-60.

arises when employees confront employers without assistance.[16] A union representative's presence shields an employee from any threat to employment while safeguarding the bargaining unit's interests.

Weingarten's implications for the private sector are obvious.[17] Its significance to the public sector, however, is also important. Like their private sector counterparts, public employers confront employees in disciplinary situations during which union representation may be requested. It is essential, therefore, to determine whether the right to union representation exists in the public sector. Before such a determination can be made, however, it is necessary to outline the perimeters of the union representation right as it exists in the private sector.

A. The Right to Union Representation: A Subjective Test

The union representation right at an investigatory interview depends on a subjective rather than objective test—the employee must reasonably believe that discipline may result.[18] Thus, the employer who desires to avoid unfair labor practice charges would be wise to err on the side of union representation. It is clear that the right to union representation does not arise during a routine employer-employee conversation because no reason to fear disciplinary action exists in such a situation.[19] Nevertheless, a subjective test is too easily satisfied, even if the nature of the

16. Western Electric Co., 205 N.L.R.B. 195 (1973); New York Telephone Co., 203 N.L.R.B. 1153 (1973); NLRB v. J. Weingarten, Inc., 202 N.L.R.B. 446 (1973), *denying enforcement*, 485 F.2d 1135 (5th Cir. 1973), *reversed*, 420 U.S. 251 (1975); National Can Corp., 200 N.L.R.B. 1116 (1972); Western Electric Co., 198 N.L.R.B. 623 (1972); Mobil Oil Corp., 196 N.L.R.B. 1052 (1972), *enforcement denied*, 482 F.2d 842 (7th Cir. 1971); Lafayette Radio Electronics, 194 N.L.R.B. 491 (1971); Illinois Bell Telephone Co., 192 N.L.R.B. 834 (1971); Texaco, Inc., 179 N.L.R.B. 976 (1969); United Aircraft Corp., 179 N.L.R.B. 935 (1969), *aff'd on another ground*, 440 F.2d 85 (2d Cir. 1971); Wald Manufacturing Co., 176 N.L.R.B. 839 (1969), *aff'd on other grounds*, 426 F.2d 1328 (6th Cir. 1970); Dayton Typographic Services, Inc., 176 N.L.R.B. 357 (1969); Jacobe-Pearson Ford, Inc., 172 N.L.R.B. 594 (1968); Texaco, Inc., 168 N.L.R.B. 361 (1967), *enforcement denied*, 408 F.2d 142 (5th Cir. 1969); Chevron Oil Co., 168 N.L.R.B. 574 (1967); Electric Motors & Specialties, Inc., 149 N.L.R.B. 1432 (1964); Dobbs Houses, Inc., 145 N.L.R.B. 1565 (1964); Ross Gear & Tool Co., 63 N.L.R.B. 1012 (1945), *enforcement denied*, 158 F.2d 607 (7th Cir. 1947). *See generally* Comment, *Employee's Right to Presence of Union Representative at an Investigatory Interview*, 14 DUQ. L. REV. 257 (1975); Comment, *Employer Must Allow Union Steward's Presence at Interview where Employee has Reasonable Fear of Discipline*, 6 SETON HALL L. REV. 514 (1975); Comment, *Employee Right to Union Representation During Employer Interrogation*, 7 U. TOL. L. REV. 298 (1975).

17. 420 U.S. at 260-64.

18. *Id.* at 256. In *Quality*, the NLRB stated, " 'Reasonable ground' will of course be measured, as here, by objective standards under all the circumstances of the case." NLRB v. Quality Mfg. Co., 195 N.L.R.B. 197, 198 n.3 (1972), *enforcement denied*, 481 F.2d 1018 (4th Cir. 1973), *rev'd*, 420 U.S. 276 (1975). The test, however, is actually subjective, since it depends on the employee's beliefs.

19. We would not apply the rule to such run-of-the-mill shop floor conversations as, for example, the giving of instructions or training or needed correction of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would see no reasonable basis for him to seek the assistance of his representative.

NLRB v. Quality Mfg. Co., 195 N.L.R.B. 197, 199 (1972), *quoted with approval in* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 257-58 (1975).

interview is nonaccusatory.[20] Moreover, the right to union representation may arise during seemingly innocuous discussions concerning the employer's distribution of such benefits as overtime and holiday pay, because disciplinary actions may result from such conversations even if they cannot be characterized as discharges, suspensions, or warnings.[21]

1. Advantages of Subjective Test to Employees.—Employees confronted with possible discipline must be able to present their case effectively. This objective may be accomplished by the presence of a union representative who is more familiar with the contract, rules, and employer customs than an employee who is intimidated by both his predicament and meeting his employer on unequal terms.[22] Moreover, union representation deters disparate treatment of employee-offenders by insuring that equal punishment is dispensed for identical infractions.[23] Finally, the union representative can safeguard the interests of other employees by informing them of employer decisions.

2. Advantages of Subjective Test to Unions.—Presence at investigatory interviews gives the union information to detect potential grievances[24] and problem areas relevant to future negotiations. The right is analogous to permitting union presence at grievance adjustments.[25]

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20. In *Weingarten*, for example, the employer's investigatory interview was essentially nonaccusatory until the employee made statements about her right to free lunches that the employer challenged. 420 U.S. at 255-56.

21. Discipline in its broadest sense may include any tangible or intangible loss an employee suffers during the employer-employee relationship, such as demotions or downgrading. Thompson Bros. Boat Mfg. Co., 55 Lab. Arb. & Disp. Settl. 69 (1970) (Moberly, Arb.); Duquesne Light Co., 48 Lab. Arb. & Disp. Settl. 1108 (1967) (McDermott, Arb.); Allied Tube and Conduit Corp., 48 Lab. Arb. & Disp. Settl. 454 (1967) (Kelleher, Arb.); National Carbide Co., 47 Lab. Arb. & Disp. Settl. 154 (1966) (Kesselman, Arb.); Albert F. Goetze, Inc., 47 Lab. Arb. & Disp. Settl. 67 (1966) (Rosen, Arb.); H. K. Porter Co., 46 Lab. Arb. & Disp. Settl. 1098 (1966) (Dworkin, Arb.). Other examples of discipline include transfers, withholding monetary benefits without actual suspension, requiring employees to present a medical certificate before returning to work after an alleged illness, and forcing public apologies. Parkside Manor, 53 Lab. Arb. & Disp. Settl. 410 (1969) (Belcher, Arb.); City of Stamford, 49 Lab. Arb. & Disp. Settl. 1061 (1967) (Johnson, Arb.); Continental Moss-Gordin Gin Co., 46 Lab. Arb. & Disp. Settl. 1071 (1966) (Williams, Arb.); Celotex Corp., 36 Lab. Arb. & Disp. Settl. 517 (1961) (Dworkin, Arb.); Reynolds Metals Co., 22 Lab. Arb. & Disp. Settl. 528 (1954) (Klamon, Arb.); Armstrong Tire & Rubber Co., 18 Lab. Arb. & Disp. Settl. 544 (1952) (Ralston, Arb.).

22. *See* Thrifty Drug Stores, Co., Inc., 50 Lab. Arb. & Disp Settl. 1253 (1968) (Jones, Arb.); Novo Indus. Corp., 41 Lab. Arb. & Disp Settl. 921 (1963) (Gill, Arb.).

23. *See* S. SLICHTER, J. HEALEY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 625, 631 (1960).

24. One commentator has noted in the grievance procedure context,

> Grievances may relate to the establishment of new rates and the adjustment of old; to rulings on seniority, layoffs, and rehires; to discharges and other disciplinary measures; to merit-increases, transfers, promotions; to the operation of an incentive system and countless other measures. Whether they are cast in the form of an interpretation of an agreement or not, any adjustments made of these questions affect the whole plant. The rulings tend to become precedents and may eventually constitute a body of industrial common law supplementing the formal agreement.

Cox, *Some Aspects of the Labor Management Relations Act, 1947* (pt. 2), 61 HARV. L. REV. 274, 302 (1948).

25. 29 U.S.C. § 159(a) (1970). This prohibits direct bargaining between employer and

Union presence during an investigatory interview may be considered part of its duty as bargaining agent to enforce the collective bargaining agreement's provisions and resolve disputes arising thereunder.[26] The union's right to bargain with the employer on wages, hours, and working conditions does not cease with the contract's signing. Bargaining is a continuing relationship requiring each party to resolve issues arising during the contract's term.[27] Union presence at investigatory interviews is part of this continuing duty to bargain over the employee's job rights.

3. Legitimate Employer Prerogatives.—Employers insist that union presence at investigatory interviews results in disruption of operations and challenges their authority. Indeed, employers have a significant interest in preserving their power to investigate working conditions or job performance absent union interference. An employer would not desire a union representative who perceived his role as counsel in a criminal case. Employers fear situations in which the union representative instructs the employee how to respond. These fears may be compounded by the employer's interest in avoiding unnecessary conferences resulting in disciplinary delays.

This must be contrasted with the potential benefits that might be offered. Union presence may generate a better understanding of the dispute. A good union representative may assist by discouraging frivolous grievances that would result without early union involvement.[28] Early review affords an opportunity to correct errors that might produce ill feelings among employees. Moreover, informal consideration of the merits of a potential grievance may reduce the parties' costs in the grievance procedure.[29]

B. Contours and Limits of the Right to Union Representation

However legitimate an employer's fears of union representation at investigatory interviews may be, the concerns are minimized by the detailed explanation of the contours and limits of the right to union

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employee to prevent the undermining of the union's position and possible jeopardy to other employees' rights. *See* Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 273 (1964).

26. Comment, *Union Presence in Disciplinary Meetings*, 41 U. CHI. L. REV. 329, 341 (1974).

27. NLRB v. Acme Indus. Co., 385 U.S. 432, 436 (1967); Conley v. Gibson, 355 U.S. 41, 46 (1957).

28. *See* Caterpillar Tractor Co., 44 Lab. Arb. & Disp. Settl. 647, 651 (1965) (Dworkin, Arb.).

29. Inadequate investigation of grievances by some unions has been considered a factor in the overload that plagues arbitration. Ross, *Distressed Grievance Procedures and their Rehabilitation*, in LABOR ARBITRATION AND INDUSTRIAL CHANGE, PROCEEDINGS OF THE 16TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 104, 107, 109 (1963). When the grievance procedure is overloaded, both employer and union are tempted to engage in "horse-trading" of grievances, a result sometimes harmful to individual interests. *Id.* at 111.

presence provided by *Weingarten* and later decisions.[30] The right inheres in the NLRA's guarantee of employee rights to act in concert for mutual aid and protection.[31] Denial of this right interferes with, restrains, and coerces employees and thus results in an unfair labor practice.[32] Refusing an employee's union representation request is a serious violation of this right. This compels the employee to appear unassisted at an interview and possibly jeopardizes his job security.[33]

It is the employee's affirmative responsibility, however, to request union representation.[34] The employer has no obligation to inform the employee of the union representation right. Moreover, the employee may voluntarily forgo the right and, if preferred, participate in an investigatory interview unaccompanied by a union representative.

The right to union representation, once asserted, includes the right to confer with a union representative before the interview.[35] To represent effectively an employee "too fearful or inarticulate to relate accurately the incident being investigated" and to be "knowledgeable" to "assist the employee by eliciting favorable facts, and . . . getting to the bottom of the incident," the union representative must be able to consult prior to the interview.[36] In this way, the union representative can learn the employee's version and gain familiarity with the facts. A fearful or inarticulate employee may be more likely to discuss the incident fully and accurately with a union representative. *Weingarten* did not deny union representatives the opportunity of consulting prior to the interview.[37] Moreover, the union as well as the employee, may request prior consultation.[38]

The employer, however, need not postpone an investigatory interview merely because the requested union representative is unavailable.[39] The reason for the unavilability is irrelevant, especially when another union representative is available and could have been requested. Moreover, the employer is not obligated to suggest or secure alternate union representation.[40]

Since the exercise of the right may interfere with legitimate employer prerogatives,[41] the employer has no obligation to justify a refusal to

30. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).
31. 29 U.S.C. § 157 (1970).
32. *Id.*
33. Mobil Oil Corp., 196 N.L.R.B. 1052 (1972), *enforcement denied*, 482 F.2d 842 (7th Cir. 1973).
34. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 257 (1975). The union representative right cannot be equated with the *Miranda* warnings that must be furnished to an arrestee under the Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966).
35. Climax Molybdenum Co., 94 L.R.R.M. 1177 (1977).
36. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 263 (1975).
37. *Id.*
38. Climax Molybdenum Co., 94 L.R.R.M. 1177 (1977).
39. Coca-Cola Bottling Co., 94 L.R.R.M. 1200 (1977).
40. *Id.* at 1201.
41. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 258 (1975).

allow union representation. The employer may simply advise that the interview will not proceed unless the employee is willing to enter the interview unaccompanied. The employee may refrain from participating. This protects the employee's right, but relinquishes any benefit that could be derived from the interview.[42] The employer is free to act on information from other sources. The employer, however, cannot threaten, coerce, or cajole the employee to remain without a union representative.[43] He cannot threaten that the right's exercise will lead to more severe discipline or that the employee's fate will be in more capricious and hostile hands.[44]

A final limitation on the right to union presence during an investigatory interview is that the employer has no duty to bargain with any union representative who might attend.[45] Even though the union representative could attempt to clarify the facts, the employer may insist on hearing only the employee's account.

C. Fairness and Due Process: A Rationale for Union Representation

Perhaps the best rationale in support of a right to union representation at investigatory interviews is that it assures fairness.[46] The key to fairness is not the mere resolution of factual issues, but the process used by the employer that makes a factual resolution possible. Admittedly, the process of union representation at investigatory interviews is less efficient than investigation without an interview or an interview without union presence. Nevertheless, the process is not intended to promote efficiency, but to protect the employee who reasonably believes that disciplinary action is imminent. The union representation right recognizes higher values than speed, convenience, and efficiency. It safeguards employees from unresponsive employers and protects the bargaining unit's fairness and due process interests.

D. Sanctions for Failure to Accord the Right to Union Representation

1. Grievance Arbitration.—Because the right to union representation during investigatory interviews is essential to fair fact-finding, it is not surprising that this right fully comported with actual labor relations practice before the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*[47] and was expressly included in many collective bargaining agreements.[48] Even when not expressly provided for by contract, a well-

42. Mobil Oil Corp., 196 N.L.R.B. 1052 (1972), *enforcement denied*, 482 F.2d 842 (7th Cir. 1973).

43. Southwestern Bell Tel. Co., 94 L.R.R.M. 1305 (1977).

44. *Id.* at 1305.

45. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 259 (1975).

46. *See* F. ELKOURI & E.A. ELKOURI, HOW ARBITRATION WORKS 632-34 (3d ed. 1973) [hereinafter cited as ELKOURI], Comment, 41 U. CHI. L. REV. 329, *supra* note 26, at 338.

47. 420 U.S. 251, 267 (1975).

48. *See* [1977] 1 COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) 21:22, 23.

established current of arbitral authority sustained the right at investigatory interviews from which discipline could result.[49] Contractual due process requires that procedural requirements for discipline be followed. With or without specific contractual language, arbitrators have found that union representation rights are closely allied with due process. Just as arbitrator Walter Boles found that "a 'just cause' basis for consideration of disciplinary action is, absent a clear proviso to the contrary, implied in a modern collective bargaining agreement,"[50] the union representation right may also be implied in any fair grievance procedure. Arbitrators have refused to sustain disciplinary action when it fails to comport with procedural due process.[51] Thus, refusal to attend an investigatory interview without union representation does not constitute insubordination.[52]

2. Unfair Labor Practices.—Failure to accord the right to union representation upon request at an investigatory review may constitute an unfair labor practice. The keystone of the private sector right is the NLRA's guarantee of employees' associational economic rights,[53] which are effectuated through the NLRA's unfair labor practices section.[54] There is also a sound statutory basis under section 159(a) for the union representation right.[55] Union presence may be considered part of its general bargaining duty. The union's claim is further supported by its right to information essential to its bargaining function. Presence at investigatory interviews provides the union with this type of information.

III. The Right to Union Representation in Pennsylvania's Public Sector

It would be anomalous to suggest that the rationale for union representation during investigatory interviews in the private sector is inappo-

49. *See* Morton-Norwich Prods., Inc., 67 Lab. Arb. & Disp. Settl. 352 (1976) (Markowitz, Arb.); Combustion Engineering, Inc., 67 Lab. Arb. & Disp. Settl. 349 (1976) (Clarke, Arb.); Rexall Drug Co., 65 Lab. Arb. & Disp. Settl. 1101 (1975); Clow Corp., 64 Lab. Arb. & Disp. Settl. 668 (1975) (Cohen, Arb.); Babcock & Wilcox Co., 61 Lab. Arb. & Disp. Settl. 360 (1973) (Ells, Arb.); Chevron Chemical Co., 60 Lab. Arb. & Disp. Settl. 1066 (1973) (Merril, Arb.); Universal Oil Prods. Co., 60 Lab. Arb. & Disp. Settl. 832 (1973) (Schieber, Arb.); Allied Paper Co., 53 Lab. Arb. & Disp. Settl. 226 (1969) (Holly, Arb.); Thrifty Drug Stores Co., Inc., 50 Lab. Arb. & Disp. Settl. 1253 (1968) (Jones, Arb.); Waste King Universal Prods. Co., 46 Lab. Arb. & Disp. Settl. 283 (1966) (Petree, Arb.); Dallas Morning News, 40 Lab. Arb. & Disp. Settl. 619 (1963) (Rohman, Arb.); The Arcrods Co., 39 Lab. Arb. & Disp. Settl. 784 (1962) (Teple, Arb.); Valley Iron Works, 33 Lab. Arb. & Disp. Settl. 769 (1960) (Anderson, Arb.); Schlitz Brewing Co., 33 Lab. Arb. & Disp. Settl. 57 (1959) (Meyers, Arb.); Singer Mfg. Co., 28 Lab. Arb. & Disp. Settl. 570 (1957) (Cahn, Arb.); Braniff Airways, Inc., 27 Lab. Arb. & Disp. Settl. 892 (1957) (Williams, Arb.); John Lucas & Co., 19 Lab. Arb. & Disp. Settl. 344 (1952) (Reynolds, Arb.).

50. Cameron Iron Works, Inc., 25 Lab. Arb. & Disp. Settl. 295, 301 (1955) (Boles, Arb.).

51. ELKOURI, *supra* note 46, at 127-29.

52. *Id. See also* Nelson, *Union Representation During Investigatory Interviews*, 31 ARB. J. 181 (1976); Nelson, *Union Representation During Management Investigations of Alleged Rule Infractions*, 26 LAB. L.J. 37 (1975).

53. 29 U.S.C. § 157 (1970).

54. *Id.* § 158(a).

55. *Id.* § 159(a).

site to the public sector. Public sector employees, however, are not governed by the provisions of the NLRA that make the right to union representation possible. Nevertheless, Pennsylvania's labor relations statutes are sufficiently similar to the NLRA possibly to guarantee the right to union representation at investigatory interviews. The right also receives at least limited support from the decisions of the Pennsylvania Labor Relations Board (PLRB).

A. Statutory Basis for the Right

1. Pennsylvania Public Employe Relations Act (Act 195).—The Pennsylvania Public Employee Relations Act (Act 195)[56] governs labor relations for all public employees except police and firemen.[57] Since its statutory language is patterned after much of the NLRA, private sector interpretations of the NLRA provide some guidance to the meaning of Act 195, but are not controlling.[58]

Section 157 of the NLRA, which supports the private sector's union representation right,[59] provides that

> [e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).[60]

Pennsylvania's Act 195 closely parallels section 157 of the NLRA.[61] Section 1101.401 of Act 195 provides,

> It shall be lawful for public employes to organize, form, join or assist in employe organizations or to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or to bargain collectively through representatives of their own free choice and such employes shall also have the right to refrain from any or all such activities, except as may be required pursuant to a maintenance of membership provision in a collective bargaining agreement.[62]

Section 1101.401 is Act 195's keystone guaranteeing employees' associational rights,[63] which are effectuated by an unfair labor practices section.[64] Specifically, section 1101.1201 (a)(1) provides that unfair labor practices include "[i]nterfering, restraining or coercing employes in the

56. PA. STAT. ANN. tit. 43, §§ 1101.101-.2301 (Purdon Supp. 1977-78).
57. *Id.*
58. *See* notes 7-9 and accompanying text *supra*.
59. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 256 (1975).
60. 29 U.S.C. § 157 (1970).
61. *Id.*
62. PA. STAT. ANN. tit. 43, § 1101.401 (Purdon Supp. 1977-78).
63. *Id.*
64. *Id.* § 1101.1201.

exercise of the rights guaranteed in Article IV [§ 1101.401] of this act."[65] This language is similar to section 158(a)(1) of the NLRA, which provides that it shall be an unfair labor practice for an employer to "[i]nterfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [§ 157]."[66] Specific public employer unfair labor practices are enumerated in sections 1101.1201(a)(2)-.1201 (a)(9) of Act 195[67] similarly to the approach adopted in the NLRA.[68] Violation of any of these unfair labor practice sections also constitutes a derivative violation of section 1101.1201(a)(1).[69] Moreover, interference with section 1101.401 rights that are not enumerated in the specific unfair labor practice sections of Act 195 are, nevertheless, "independent" violations of section 1101.1201(a)(1).[70] These "independent" violations traditionally encompass employer interference with organizational activities and include coercive promises or threats designed to discourage union membership and elections, or the interrogation of employees about union involvement. The specific "independent" violation dichotomy that exists in Act 195 can also be found in the NLRA.[71]

Because of the similarity of sections 1101.401 and 1101.1201(a)(1)[72] of Act 195 to sections 157 and 158 (a)(1) of the NLRA,[73] the *Weingarten*[74] rationale may support the existence of the union representation right in Pennsylvania's public sector. The public employee who seeks union representation during a confrontation with his employer may satisfy the literal language of section 1101.401 that "it shall be lawful for public employes . . . to engage in . . . concerted activities for the purpose of . . . mutual aid and protection."[75] The employee seeks "aid and protection" against a perceived job security threat. Union representation safeguards the interests of both the particular public employee and his bargaining unit by ensuring that the public employer does not initiate or continue unjust disciplinary practices.[76] Union presence also assures other employees that they can obtain similar assistance.

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65. *Id.* § 1101.1201(a)(1).
66. 29 U.S.C. § 158(a)(1) (1970).
67. PA. STAT. ANN. tit. 43, §§ 1101.1201(a)(2)-.1201 (a)(9) (Purdon Supp. 1977-78).
68. *See* 29 U.S.C. §§ 158(a)(2)-158(a)(5) (1970).
69. PA. STAT. ANN. tit. 43, § 1101.1201(a)(1) (Purdon Supp. 1977-78).
70. *Id* §§ 1101.401, 1101.1201(a)(1)-.1201(a)(9).
71. *See* 29 U.S.C. §§ 158(a)(1)-158(a)(5) (1970).
72. PA. STAT. ANN. tit. 43, §§ 1101.401, 1101.1201(a)(1) (Purdon Supp. 1977-78).
73. 29 U.S.C. §§ 157, 158(a)(1) (1970).
74. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).
75. PA. STAT. ANN. tit. 43, § 1101.401 (Purdon Supp. 1977-78).
76. The quantum of proof that the public employer considers sufficient to support disciplinary action is of concern to the entire bargaining unit. A slow accretion of custom and practice may come to control the handling of disciplinary disputes. If, for example, the public employer adopts a practice of considering his supervisor's unsubstantiated statements sufficient to support disciplinary action, public employee protection against unwarranted punishment is affected. The presence of a union representative allows protection of this interest. Comment, 41 U. CHI. L. REV. 329, *supra* note 26, at 338.

Section 1101.101 declares that the purpose of Act 195 is to promote "orderly and constructive relationships between all public employers and their employes" by "(1) granting to public employes the right to organize and choose freely their representatives; (2) requiring public employers to negotiate and bargain . . . ; and (3) establishing procedures to provide for the protection of the rights of the public employe . . ."[77] Ideally, Act 195 is designed to eliminate unequal bargaining power between public employers and employees. Since the employer who requires that employees attend investigatory interviews unaccompanied by union representatives perpetuates the inequality Act 195 was intended to remedy, section 1101.401 may be construed to guarantee the public employee's union representation right at investigatory interviews in which disciplinary risk reasonably exists.[78]

Although it appears that section 1101.401 alone supports the right, a statutory basis for union representation may also exist under section 1101.606.[79]

> Representatives selected by public employes in a unit appropriate for collective bargaining purposes shall be the exclusive representative of all the employes in such unit to bargain on wages, hours, terms and conditions of employment: Provided, That any individual employe or a group of employes shall have the right at any time to present grievances to their employer and to have them adjusted without the intervention of the bargaining representative as long as the adjustment is not inconsistent with the terms of a collective bargaining contract then in effect: And, provided further, That the bargaining representative has been given an opportunity to be present at such adjustment.[80]

The union's presence at investigatory interviews, therefore, may possibly be considered part of the union's duty as bargaining agent to enforce the collective bargaining agreement's provisions and resolve "any questions arising thereunder."[81] It is a continuing relationship requiring each party

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77. PA. STAT. ANN. tit. 43, § 1101.101 (Purdon Supp. 1977-78).

78. *Id.* § 1101.401.

79. *Id.* §§ 1101.401, 1101.606.

80. *Id.* § 1101.606. This provision of Act 195 is similar to § 159(a) of the NLRA, which provides,

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 159(a) (1970).

81. PA. STAT. ANN. tit. 43, § 1101.701 (Purdon Supp. 1977-78). Section 1101.701 defines "collective bargaining" for Pennsylvania's public employees:

> Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employes to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and condi-

to meet and resolve issues that arise during the life of the contract.[82]

The union representation right may be further buttressed by the union's right to information needed to perform the bargaining obligation.[83] Union representation at investigatory interviews enables the union to prepare negotiation demands and facilitates contract enforcement. Moreover, union presence alerts the bargaining agent to disciplinary problems and assists later grievance processing.

2. Collective Bargaining by Policemen or Firemen's Act (Act 111).[84]—In sharp contrast to the provisions of Act 195,[85] the Collective Bargaining by Policemen or Firemen's Act (Act 111)[86] lacks any procedure regarding representation elections[87] or unfair labor practices. Moreover, Act 111 contains little, if any, language that parallels the NLRA.[88] Nevertheless, Act 111 is not devoid of statutory support for the right to union representation at investigatory interviews. Section 217.1 declares that policemen or firemen "shall, through labor organizations or other representatives . . . have the right to bargain collectively . . . and shall have the right to an adjustment or settlement of their grievances. . . ."[89] Thus, the right to union representation at investigatory interviews may be justified under Act 111 as part of the union's general bargaining duty.

Further statutory support for the right to union representation under the terms of Act 111 results only if Act 111 can be read *in pari materia*[90] with the Pennsylvania Labor Relations Act of 1937 (PLRA)[91] to produce a limited right to concerted activity.[92] Although the Pennsylvania Su-

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tions of employment, or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Id.

82. For a discussion of the private sector's bargaining obligation, see Morris, *The Role of the NLRB and the Courts in the Collective Bargaining Process: A Fresh Look at Conventional Wisdom and Unconventional Remedies*, 30 VAND. L. REV. 661 (1977).

83. PA. STAT. ANN. tit. 43, § 1101.606 (Purdon Supp. 1977-78).

84. PA. STAT. ANN. tit. 43, §§ 217.1-.10 (Purdon Supp. 1977-78).

85. *See* notes 56-83 and accompanying text *supra*.

86. PA. STAT. ANN. tit. 43, §§ 217.1-.10 (Purdon Supp. 1977-78).

87. *See* Philadelphia Fire Officers Ass'n v. Pa. LRB, 460 Pa. 550, 369 A.2d 259 (1977) (supreme court noted deficiency of Act 111 in the representation area).

88. Act 111 contains no language that parallels § 157 of the NLRA, 29 U.S.C. § 157 (1970), or § 1101.401 of Act 195, PA. STAT. ANN. tit. 43, § 1101.401 (Purdon Supp. 1977-78).

89. PA. STAT. ANN. tit. 43, § 217.1 (Purdon Supp. 1977-78). This language approximates that contained in § 1101.606 of Act 195, PA. STAT. ANN. tit. 43, § 1101.606 (Purdon Supp. 1977-78), and in § 159(a) of the NLRA, 29 U.S.C. § 159(a) (1970).

90. *In pari materia* is a technique of statutory interpretation meaning that ambiguous legislative intent may sometimes be gathered from other statutes dealing with the same subject matter. *See generally* 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION §§ 51.01-.08 (4th ed. 1973).

91. PA. STAT. ANN. tit. 43, § 211.1-.39 (Purdon 1968). This act created the Pennsylvania Labor Relations Board (PLRB) and charged it with the responsibility of administering private sector labor relations.

92. *See id.* § 211.5.

preme Court has determined that Act 111 must be read *in pari materia* with the PLRA, at least to the extent of the PLRB's responsibility to administer police and firemen representation elections,[93] this rationale should not be invoked to interpret the specific language of Act 111 so expansively.[94]

It is difficult to find a statutory basis for the right to union representation in the language of Act 111. Notwithstanding the absence of persuasive statutory authority, the right may nevertheless be justified for police and firemen under the fairness or due process requirements applicable to the grievance arbitration procedure.

B. NLRB Authority Supporting the Existence of the Right

No definitive PLRB ruling exists concerning the right to union representation at investigatory interviews. The PLRB has, however, decided that (1) no grievance may be adjusted without union presence;[95] (2) a corrective interview is not an investigatory interview from which discipline may result;[96] and (3) anti-union animus must be shown when the right to union representation is denied.[97] In *PLRB v. Pennsylvania Department of Health and Welfare*,[98] the PLRB came close to acknowledging the right's existence by finding that, because the employee was ultimately accorded union representation, no unfair labor practice occurred when a supervisor suggested that a different person be selected to represent the employee at a grievance meeting than the person originally chosen.[99] Thus, it may be concluded that the PLRB recognizes some form of the right. Nevertheless, the limited Pennsylvania case law and purported statutory bases for the existence of the right are far from clear.

C. The Right's Potential Operation in Pennsylvania

Public employees have the same rights as the general public to challenge governmental regulatory actions. Until recently, however, these employees have been denied an equivalent ability to effectively deal with their employers. The United States Supreme Court has recognized that the government, as an employer, can exert greater control over its employees than it could over the public.[100] The public employer's need for wide control over its employees,[101] however, must be weighed against

93. Philadelphia Fire Officers Ass'n v. Pa. LRB, 470 Pa. 550, 369 A.2d 259 (1977).
94. *See* Decker, *The PLRB's New Jurisdiction for Police and Firemen*, 16 DUQ. L. REV. 185 (1978).
95. Pa. LRB v. Warwick Bd. of School Directors, 4 P.P.E.R. 146 (1974).
96. Pa. LRB v. Commonwealth, Polk State School & Hosp., 4 P.P.E.R. 74 (1974).
97. Pa. LRB v. Commonwealth, Philadelphia County Bd. of Assistance, 7 P.P.E.R. 213 (1976).
98. 5 P.P.E.R. 8 (1974).
99. *Id.*
100. *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).
101. In *Arnett v. Kennedy*, 416 U.S. 134 (1974), it was stated that
the Government, as an employer, must have wide discretion and control over the

the employee's interest in union representation in personnel decisions affecting assignment, promotion, transfer, discipline, and discharge.[102]

A public employer's internal administration does not make it immune to statutory, fairness, or due process requirements. Its discretion cannot be merely subjective judgment, but must be controlled by clear rules governing its actions. For example, welfare benefits cannot be terminated,[103] parole revoked,[104] or wages garnished[105] without established reasons. Extending union representation rights to public employees, therefore, at the very least may make judgments over employee problems more objective.

To protect both public employer and employee interests the right should be accorded limited operation. A test is needed that gives a reasonable accurate indication of the nature of a meeting without elaborate inquiries into what might have been said or intended. The *Weingarten* test does not provide an administrable method for determining when the right to union representation can be requested.[106] It relies solely on the employee's subjective, through reasonable, belief that discipline may result.

The union and public employee are primarily interested in a union representative's presence when a decision affecting the employee's job rights may occur. Uncertainties can be reduced by requiring notice of the meeting's purpose. If the notice indicates a disciplinary purpose, the employee's right will be clear.

The test of whether an investigatory interview is disciplinary should be its result and not the employee's belief. If discipline is imposed immediately or shortly after an employer-employee confrontation, the meeting should be characterized as disciplinary. The possibility that a public employer will postpone discipline to evade a result test can be dismissed as remote because it is against an employer's interest to retain a delinquent employee or delay hiring a replacement.

The result test would solve the problems created when the public employer claims that the meeting began as something else. It would require the public employer to determine preliminarily the probability of discipline. Even a small risk of nullifying disciplinary action is likely to

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management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Id. at 168.

102. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PENN. L. REV. 942, 991 (1976).

103. Goldberg v. Kelly, 397 U.S. 254 (1970).

104. Morrissey v. Brewer, 408 U.S. 471 (1972).

105. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). *See also* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972).

106. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 256 (1975).

outweigh a union representative's inconvenience. This test encourages the public employer to be honest about the meeting's purpose. The public employer will, therefore, be motivated to allow union representation whenever discipline seems probable or possible.[107]

To facilitate the right's public sector operation by preserving employer and employee interests, the following should be considered:

1. The right arises only in interviews from which discipline may result.
2. Whether a meeting is disciplinary should be determined by its result. If disciplinary, the public employer should be required to give the employee notice of the meeting's purpose.
3. The right arises only when the public employee requests it.[108]
4. Before the potentially disciplinary interview commences, the employee should be permitted to consult with his union representative if requested.
5. The exercise of the right should not be permitted to interfere with legitimate public employer prerogatives.[109]
6. The public employer has no duty to bargain with any union representative permitted to attend the meeting and may insist on hearing only the employee's version.

The above standards suggest a reasonable application of union representation rights for public employers and employees covered by Acts 195 and 111.

D. Failure to Accord the Right

The public employer's failure to accord the right when requested may impair disciplinary action. This may occur through an arbitrator's award[110] or an unfair labor practice.[111] In all instances, the public employer's paramount interest should be the preservation of disciplinary action from reversal. Consequently, the public employer may be wise to accord the right even if it is only arguably guaranteed.

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107. The result test was first suggested for the private sector. *See generally* 41 U. CHI. L. REV. 329, *supra* note 26, at 345-47.

108. *See* note 34 and accompanying text *supra*.

109. The public employer (1) cannot be required to justify a refusal to allow union representation; (2) may investigate without interviewing the employee; (3) may impose upon the employee the choice of attending the interview alone or forgoing the interview and any accompanying benefits; (4) cannot be required to postpone the interview because a particular union representative is unavailable; and (5) cannot be obligated to suggest or secure other representation for the employee. *See* notes 30-45 and accompanying text *supra*.

110. For a discussion of the employer's failure, in the public sector, to accord representation rights upon request, see Metro Contracts Servs., 68 Lab. Arb. & Disp. Settl. 1048 (1977) (Moore, Arb.); Social Security Admin., 68 Lab. Arb. & Disp. Settl. 195 (1977) (Lubow, Arb.); Town of Plainville, 67 Lab. Arb. & Disp. Settl. 442 (1976) (McKone, Germjin, Zuilkowski, Arbs.). These cases indicate that the union representation right is still in the developing stages in the public sector.

111. *See* notes 95-98 and accompanying text *supra*.

IV. Conclusion

The right to union representation at investigatory interviews has already been acknowledged in the private sector. A corresponding right for the public sector is particularly important for employers, employees, and unions, since it relates to the continunity and overall functioning of the grievance procedure. Recognition of this right, for which a statutory basis may exist, need not disrupt operations if the right is properly limited to situations in which disciplinary action could result