Labor and Employment Law Information Memo

March 2007

Electronic Dispatch

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NEW YORK COURT OF APPEALS HOLDS THAT PUBLIC SECTOR EMPLOYEES DO NOT HAVE A "*WEINGARTEN* RIGHT"

In *New York City Transit Authority v. New York State Public Employment Relations Board*, the New York Court of Appeals recently held that public sector employees in New York do not have a right under the Taylor Law to have a union representative present at investigatory interviews that could reasonably result in disciplinary action. This information memo sets forth the legal background with respect to this issue, summarizes the Court of Appeals' *New York City Transit Authority* decision, and discusses the practical implications of the decision for public sector employers.

Legal Background

In the 1975 case of *NLRB v. Weingarten*, the United States Supreme Court held that the National Labor Relations Act ("NLRA") affords private sector employees covered by the NLRA the right to have a union representative present at investigatory interviews that could reasonably result in discipline. The Supreme Court's *Weingarten* decision was based, in part, on the following language contained in Section 7 of the NLRA:

> Employees 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.

Because the right to a union representative at investigatory interviews had its origin in the Supreme Court's *Weingarten* decision, this right became known as a "*Weingarten* right."

The Taylor Law provides public sector employees in New York with the right to organize and join labor organizations. Specifically, the Taylor Law provides:

> Public employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing.

The Public Employment Relations Board ("PERB"), the agency responsible for interpreting and enforcing the Taylor Law, has long held that public sector employees have the same type of *Weingarten* right under the Taylor Law that private sector employees have under the NLRA. However, the Court of Appeals, New York's highest court, had not formally addressed the issue until its decision in *New York City Transit Authority*.

The *New York City Transit Authority* Case

In *New York City Transit Authority*, an employee named Igor Komarnitskiy was asked by a fellow employee to show his pass before entering the train yard. In response, Mr. Komarnitskiy became angry and directed a racial slur towards his co-worker. Upon being notified of the incident, the Transit Authority requested that Mr. Komarnitskiy respond to the allegations in writing. Mr. Komarnitskiy returned a written response that he had prepared with the help of a Transport Workers Union ("TWU") representative. After reading the response, the Transit Authority believed that the TWU had unduly influenced the statement and may have even drafted the statement for Mr. Komarnitskiy. Mr. Komarnitskiy was then told to report to his supervisor's office and prepare a second written response, this time without a union representative present.

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The TWU filed an improper practice charge with PERB, claiming that the Transit Authority had violated Mr. Komarnitskiy's *Weingarten* right. PERB upheld the charge and found a violation of the Taylor Law. The Transit Authority appealed PERB's decision to the New York State Supreme Court, which affirmed PERB's decision. On the next level of appeal, the Appellate Division also affirmed PERB's decision. The Court of Appeals then heard the case on appeal.

The Court of Appeals reversed the decision of PERB and the lower courts, finding that a *Weingarten* right did not exist under the Taylor Law. As the Court of Appeals recognized, the principal basis for the Supreme Court's conclusion that private sector employees have a right to union representation at investigatory interviews was the language of Section 7 of the NLRA providing that employees have the right to "engage in other concerted activities for . . . mutual aid or protection." The Court of Appeals concluded that, because the Taylor Law does not include this specific language regarding the right to engage in other concerted activities for mutual aid or protection, the Taylor Law does not afford public sector employees a *Weingarten* right.

The Court of Appeals also relied on the fact that a 1993 amendment to Section 75 of the New York Civil Service Law granted a *Weingarten* right only to certain public sector employees in New York. Specifically, public sector employees who are covered by Section 75 of the Civil Service Law were granted a statutory right to have a union representative present when they are questioned, if they appear to be a potential subject of disciplinary action. The Court of Appeals reasoned that it would have made no sense for the New York Legislature to codify a *Weingarten* right for certain public sector employees through the 1993 amendment, if such a right already existed under the Taylor Law for all public sector employees.

What Should Public Sector Employers Do?

Despite the Court of Appeals' decision in *New York City Transit Authority*, many public sector employees in New York continue to enjoy the right to have a union representative present at investigatory interviews that could reasonably result in disciplinary action. Employees who are covered by Section 75 of the Civil Service Law have a statutory *Weingarten* right. In addition, if such a right is set forth in a collective bargaining agreement between a public sector employer and the employees' bargaining representative, that right must still be recognized despite the Court of Appeals' decision in *New York City Transit Authority*. However, absent such a statutory or contractual right, public sector employees no longer have a right to have a union representative present at investigatory interviews that could reasonably result in discipline.

An amendment to the Taylor Law has already been introduced in the New York Legislature to codify a *Weingarten* right for all public sector employees under the statute. In light of this pending legislation and in light of the fact that many public sector employees still may have a statutory or contractual *Weingarten* right, it may be a good labor relations practice in most circumstances to continue to permit unionized public sector employees to have a union representative present at investigatory interviews that could reasonably result in discipline. However, the *New York City Transit Authority* decision provides public sector employers with the flexibility to deny an employee's request for a union representative (as long as the employee does not have such a statutory or contractual right) if the public employer believes that the presence of a union representative would impede the investigatory or disciplinary process.

If you have any questions or need any advice regarding this issue or other labor relations issues under the Taylor Law, please contact:

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This program is designed for senior municipal officials and in-house municipal attorneys and will be followed by a networking luncheon.

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