

## Meetings with Management

### Performance Discussions

Hello NWP Reps and Members;

Welcome to LR Chronicles number 23. Often times, our bargaining unit employees (BUEs) are called into meetings with management to discuss a "performance" issue. When the employee asks for Union representation, the employee is told "*no, this is a discussion about performance.*" In this edition of the LR Chronicles, I will explain why this statement may or may not be correct, depending on the circumstances surrounding the "performance" discussion. The truth is that there is no black and white rule to be followed, in every instance. Third Parties deciding these types of cases must look at the "totality of circumstances" surrounding the facts of each case. Ultimately, the default understanding is that the discussion of an individual's performance does not rise to the level of a formal meeting/discussion or an investigatory interview. The burden on the employee, and the Union, to show that a performance discussion required the presence of a Union representative is quite high.

A discussion regarding an employee's performance could meet the definition of a Weingarten meeting (5 USC 7114(a)(2)(B); Article 6, Section 1 of the CBA; and LR Chronicles number 7) and/or a formal discussion (5 USC 7114(a)(2)(A); Article 6, Section 3 of the CBA; and LR Chronicles number 6) depending on what is "discussed" and/or "said" in the performance meeting. The case law regarding a performance-related discussion is quite clear; a performance meeting can only be viewed as a Weingarten meeting or a formal discussion after a review of the "totality of circumstances." Unfortunately, the action, on the part of management, that would trigger a right to representation of the employee, would not be known until after the meeting begins.

On the surface and without any further facts or details, a performance discussion does not meet the definition of either a Weingarten meeting or a formal discussion. However, as mentioned above, a performance meeting with management can easily turn into one or the other based on the actions of the management official conducting the meeting. If the management official "crosses the line" and begins to discuss working conditions or other conditions of employment (formal discussion) or begins to ask questions or seeks additional information from an employee (Weingarten meeting), then the right to representation will attach. In both of these examples, the performance discussion was merely the vehicle to start meeting with the employee. Subsequent events, unrelated to the performance discussion, initiated a meeting that necessitated Union representation. There is a provision contained within our CBA which covers the issue of the conduct of the management official during a meeting. Article 6, Section 1 states in part "If during the course of a meeting it becomes apparent for the first time that discipline or potential discipline could arise, the agency shall stop the meeting and inform the employee of his/her right to representation if he/she so desires, and provide a reasonable opportunity to both obtain representation and confer confidentially before proceeding with the meeting, if

requested.” This provision was negotiated for, among other reasons, to cover these types of situations.

The FLRA has issued numerous decisions regarding this very important issue. Here is an example of a few: *“A risk of discipline arising out of an employee’s inability to perform in accordance with standards, standing alone, does not support the description of a counseling session as an examination in connection with an investigation, a characterization requiring the existence of an investigative element.”* (Discussing the possibility of a Weingarten meeting.) Additionally, the Authority has reasoned that, *“[n]o representative need be allowed in a remedial counseling session if no information is sought from the employee and the counseling, including the threat or possibility of future performance-related action, is based on information already in the hands of management.”* (Chapter 22, 8 FLRA 324, 331 (1982))

Here are a few other examples of the FLRA’s treatment of “performance meetings/discussions” as they relate to possible Weingarten meetings:

- *“The right to representation is dependent upon the existence of an investigation. This is what Weingarten is all about.”* (10 FLRA 97) (The FLRA will look for an investigation with the same tone as required by Weingarten in order to rule a performance discussion is an investigatory interview requiring union representation.)
- *“The meeting was of a remedial nature in which the employee was made aware of performance deficiencies without being solicited for additional information.”* (10 FLRA 97) (Because the meeting in question did not rise to the level of an investigation, the FLRA determined that Union representation was not required at this meeting.)
- *“If the employer were to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or attempts to have the employee admit alleged wrongdoing, or sign a statement to that effect, the employee’s right to Union representation would attach”* (10 FLRA 97) (Here, the FLRA viewed the situation through the lens of a Weingarten meeting and not a mere performance discussion. Management’s actions were akin to such an investigation not a simple discussion of performance.)
- *“The right to Union representation does not extend to a counseling session which is not investigative in nature and which is held to inform the employee of deficiencies in work performance or of a previously made determination to impose discipline.”* (10 FLRA 97) (Again, a discussion focused on performance or any performance deficiency is not sufficient to give rise to a right to union representation. Further, even though there was a determination to impose discipline, the meeting did not involve an investigation regarding the discipline.)
- *“Where a decision to discipline has already been made and the employer is not seeking to gain information from the employee in order to make that determination, the employee does not need a representative because the employer has made it’s findings of fact and*

*has come to its conclusion as to the action it wishes to take.” (10 FLRA 97) (Employees do not have a right to representation when management merely provides them with a decision regarding discipline. The fact that performance may be discussed at the time does not turn this meeting into an investigation or a formal discussion.)*

As you can see, the nexus between a performance/counseling discussion and a Weingarten meeting is not solely the prospect of discipline that would result in a right to representation, but the presence of an investigatory element.

Similarly, a performance discussion could turn into a formal discussion. This would happen if the management official goes beyond discussing ONLY the employee's performance, but also discusses changes in any performance standards for which employees must conform. For a management representative to move a discussion from the realm of performance to a formal meeting, he or she would have to engage an individual employee in a discussion concerning a grievance or working conditions. It is important to note that a discussion with management concerning compliance with an altered performance standard that has already been announced would still be a meeting that does not require representation.

In your regular LMR meetings with management, you can stress the fact that you represent all of the BUEs at your facility. If there is an employee whose performance needs to be strengthened, then you would support that effort. To that end, when they hold a "performance meeting" and do not allow a Union representative to be present, they run the risk of crossing the line and making the meeting investigatory in nature. In that instance they have committed an Unfair Labor Practice and potentially open themselves up to a harmful critical error in that none of the information garnered can be used to discipline the employee. (Remember that an ODP has the threat of discipline attached, but does not mandate Union representation unless the performance meeting becomes investigatory in nature.) By using this tactic, you can often insert Union representation into virtually all performance based meetings. Remember that you are stressing the "efficiency of the agency" and a desire to have the system work as intended.

Regardless of the type and/or nature of ANY meeting with management, an employee should ALWAYS request Union representation. Let the management official tell you "no", in which case, you should notify your FACREP and let them handle it. Of course, your RVP and the Regional LR Team stand ready to always give assistance.

If there are any questions, please feel free to contact me.

Mike Hull  
NWP LR Lead