

May 3, 2004

Dear BNA Books Customer,

This notice is to alert you to a substantive error in the new 6th Edition of *Elkouri & Elkouri: How Arbitration Works*. The Editor-in-Chief, Professor Alan Miles Ruben, calls attention to the fact that the statement on page 1266 (Chapter 19) that some states have declined to extend *Weingarten* rights to public employees is incorrect. He has provided the appropriate correction.

A corrected page 1266 appears on the following page. On the corrected page, the following changes have been made: In the second full paragraph on page 1266 of the printed book, the second and third sentences have been deleted, along with associated footnotes 104–107; this material has been replaced on the corrected page by two new sentences and new footnotes 104–107c. Please print out this replacement page and insert it into your copy of the treatise at p. 1266.

We sincerely apologize for any inconvenience this may cause. Please contact BNA Books at 202-452-4343 if you have any questions.

Supreme Court, affirming a decision of the National Labor Relations Board (NLRB, or the Board), held that a union employee may insist on union representation during an *investigatory* interview that the employee believes may reasonably result in disciplinary action.<sup>101</sup> A private-sector employer, therefore, violates Section 8(a)(1) of the National Labor Relations Act<sup>102</sup> by depriving employees of their *Weingarten* rights.

Even before *Weingarten*, arbitrators recognized an employee's right to union representation during an investigatory interview. Unlike the NLRB and the courts, however, arbitrators have granted employees subjected to a *Weingarten* violation substantive remedies, such as reinstatement and back pay.<sup>103</sup>

For public-sector employees, the right to union representation is not constitutionally guaranteed as an element of procedural due process, but rather is derived from statute. State public employee collective bargaining statutes containing provisions mirroring Section 7 of the National Labor Relations Act<sup>104</sup> and granting employees the right to engage in "concerted activities for mutual aid and protection" have been interpreted consistently with *Weingarten*<sup>105</sup> to include the right to union representation, when requested, at investigatory interviews that employees reasonably believe may lead to disciplinary action.<sup>106</sup> Even absent a specific "concerted activities" provision, the right to such representation has been inferred from labor legislation containing other formulations of public employee organizational rights, such as the right of employees to "join and assist any employee organization,"<sup>107</sup> to "participate in any employee organization,"<sup>107a</sup> to "participate in the activities of employee organizations ... for the purpose of representation,"<sup>107b</sup> or to "designate representatives ... for the purpose of collective bargaining."<sup>107c</sup>

In the federal sector, *Weingarten* rights have also been recognized by arbitrators.<sup>108</sup>

<sup>101</sup>Reversing precedent, the NLRB, in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676, 164 LRRM 1233 (2000), extended *Weingarten* rights to nonunion employees. The NLRB has applied *Epilepsy Foundation* retroactively, so that employers that did not permit a nonunion employee to have a representative present may be guilty of an unfair labor practice even though, at the time of the alleged offense, *Epilepsy Foundation* was not the law.

<sup>102</sup>29 U.S.C. §151 et seq.

<sup>103</sup>*See, e.g.*, *City of Lansing*, Mich., 106 LA 761 (Ellmann, 1996) (finding that cause did not exist and overturning suspension due to *Weingarten* violation); *Cook County Hosp.*, 105 LA 974 (Wolff, 1995) (reducing suspension); *Maui Pineapple Co.*, 86 LA 907, 910 (Tsukiyama, 1986) ("[T]he trend of arbitral authority regards the 'Weingarten right' as an implied requirement of procedural 'just cause' in management's disciplinary process."); *Kraft, Inc.*, 82 LA 360, 365-66 (Denson, 1984) (balancing just cause and management rights and reducing discharge to suspension). For a comparison of statutory *Weingarten* rights and arbitral *Weingarten* rights, see generally Silverman, *Special Topics in Labor Relations: The Role of Arbitration in Collective Bargaining Dispute Proceedings: Comment: The Differing Nature of the Weingarten Right to Union Representation in the NLRB and Arbitral Forums*, 44 U. MIAMI L. REV. 467 (1989).

<sup>104</sup>29 U.S.C. §157.

<sup>105</sup>NLRB v. J. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975).

<sup>106</sup>*See, e.g.*, *Alaska (Munson v. State of Alaska Dep't of Corr., Dec. & Order No. 206 (1996), available at <http://146.63.75.50/laborr/ dosearch.htm>* (search term "Weingarten"); *Connecticut (State Dep't of Educ. & State Vocational Fed'n of Teachers, Case No. SPP-6347 (1982), available at <http://www.ctdol.state.ct.us/esbir/decisions-pdf/1982/2165.pdf>*); *Florida (City of Clearwater v. Lewis, 404 So. 2d 1156 (Fla. Dist. Ct. App. 1981); Seitz v. Duval County Sch. Bd., 4 Fla. Pub. Empl. Rep. (LRP) ¶4154 (1978))*; *Illinois (Electrical Workers (IBEW) & Chicago Park Dist., 17 Ill. Pub. Empl. Rep. (LRP) ¶3012 (2001))*; *Indiana (North Montgomery Teachers Ass'n v. North Montgomery Cmty. Sch. Corp., 26 Ind. Pub. Empl. Rep. (LRP) ¶32,012 (2001))*; *Iowa (City of Marion v. Weitenhagen, 361 N.W.2d 323 (Iowa Ct. App. 1984))*; *Massachusetts (Massachusetts Corr. Officers Federated Union v. Labor Relations Comm'n, 424 Mass. 191, 675 N.E.2d 379 (1997))*; *Michigan (Regents of the Univ. of Mich. v. State, County & Mun. Employees Local 1583, Case Nos. C76E-139 & 140, Labor Opinion 496 (Mich. Empl. Rels. Comm'n, June 27, 1977))*; *Wayne-Westland Educ. Ass'n v. Wayne-Westland Cmty. Schs., 176 Mich. App. 361, 439 N.W.2d 372 (Mich. Ct. App. 1989))*; *Ohio (Cleveland Ass'n of Rescue Employees v. SERB, 134 Ohio App. 3d 100, 730 N.E.2d 426 (Ohio Ct. App. 1999))*; *State Employment Relations Bd. v. State of Ohio Bureau of Workers Comp. [In re Davenport], SERB 95-023 (Dec. 29, 1995))*; *Pennsylvania (Commonwealth v. Pennsylvania Labor Relations Bd., 826 A.2d 932, 173 LRRM 2019 (Pa. 2003))*; *Commonwealth v. Pennsylvania Labor Relations Bd., 768 A.2d 1201 (Pa. Commw. Ct. 2001))*; *Vermont (Vermont State Colls. Staff Fed'n Local 4023 v. Vermont State Colls., Docket No. 92-40 (Pa. Commw. Ct. 1993))*; *Wisconsin (Wisconsin State Employees Union v. State of Wisconsin, Case No. 304, Dec. No. 26739-C (1992), available at <http://www.wisbar.org/res/wercd/1992/26739-c.htm#N\_2\_>* (adhering to precedents established in Dec. No. 13198-B (Aug. 1975), and Dec. No. 15716-C (Oct. 1979)). The laws of three other states with public employee bargaining laws containing the "concerted activities" language have not been the subject of a reported *Weingarten* issue opinion. *See* Delaware (DEL. CODE ANN. tit. 19, §1303(3)); Hawaii (HAW. REV. STAT. ANN. §377-4); Montana (MONT. CODE ANN. §39-31-201).

<sup>107</sup>N.J. Rev. Stat. §34:13A-5.3 (2004); *University of Med. & Dentistry of N.J. v. Committee of Interns & Residents*, 144 N.J. 511, 677 A.2d 721, 152 LRRM 2606 (1996) (*Weingarten* principle furthers the "principle of collectivity" at the heart of the legislative scheme by reducing the isolation and intimidation of the employee in a disciplinary interview and facilitating the articulation of defenses and mitigating circumstances.); *East Brunswick Bd. of Educ. & East Brunswick Educ. Ass'n*, PERC No. 80-31, 5 N.J. Pub. Empl. Rep. (LRP) ¶10206 (Aug. 29, 1979).

<sup>107a</sup>N.Y. CIV. SERV. LAW §§202, 203 (2004); *New York City Transit Auth. & Transport Workers Union Local 100, Case No. U-22551, 35 N.Y. Pub. Empl. Rep. (LRP) ¶3029 (Oct. 2, 2002), petition denied, New York City Transit Auth. v. New York State Pub. Employment Relations Bd., 766 N.Y.S.2d 282, 196 Misc. 2d 532 (N.Y. Sup. Ct. 2003), appeal pending, N.Y. App. Div. 2d Dep't, Docket No. 2003-05268.*

<sup>107b</sup>California (CAL GOV'T CODE §3502 (Deering 2004)); *Civil Serv. Ass'n Local 400 v. City & County of San Francisco*, 27 Cal. 3d 552, 567, 22 Cal. 3d 552, 586 P.2d 162, 150 Cal. Rptr. 129, 99 LRRM 3284 (1978); *Redwoods Cmty. Coll. Dist. v. Public Employment Relations Bd.*, 159 Cal. App. 3d 617, 205 Cal. Rptr. 523, 117 LRRM 2173 (1984); *Oregon (OR. REV. STAT. §243.662; State, County & Mun. Employees Local 328 v. OHSU, Case No. UP-119-87, 10 PECBR 922 (1988))*; *Washington County Police Officers Ass'n v. Washington County, Case No. UP-15-90 (Or. Empl. Rel. Bd., Jan. 31, 1991))*; *Maine (ME. REV. STAT. ANN. tit. 26, §963; Sanford Fed'n of Teachers v. Sanford Sch. Comm'n, Case No. 01-24 (2002), available at <http://janus.state.me.us/mlrb/decisions/ppc/01-24.htm>*).

<sup>107c</sup>Washington (WASH. REV. CODE §41.56.040; *King County Police Officers v. King County, Dec. 4299 (PECB 1993), available at <http://www.perc.wa.gov/databases/ulp/4299.htm>*); *Rhode Island (R.I. GEN. LAWS §36-11-1(a); State of Rhode Island (Ladd Ctr.), 11 NPER RI-20002 (1988))*.

<sup>108</sup>Department of Treasury, 82 LA 1209 (Kaplan, 1984); *Department of the Air Force, 75 LA 994 (Hart, 1980)* (federal sector arbitrators are bound to apply external law).