

## HANDOUT #7

### EMPLOYEE'S RIGHT TO REPRESENTATION

"Robinson Rights" (rights during an investigatory interview)

The Third District Court of Appeal has held that, "a State employee has a right to union representation at a meeting with his/her (sic) supervisors held with a significant purpose to investigate facts to support disciplinary action and may not be dismissed for attempted exercise of the right." Robinson vs. State Personnel Board (1971) 97 Cal. App. 3d 994.

Therefore, a state employee\* has the right to representation at:

- a meeting with his/her superiors...
- held with a significant purpose...
- to investigate facts...
- to support disciplinary action.

In this instance, "state employee" refers to rank and file and supervisory employees only.

#### **Determining Whether A Meeting Is Held With A Significant Purpose**

Whether or not a meeting is held with a significant purpose to investigate facts to support adverse action is an objective inquiry based upon a reasonable evaluation of all the circumstances, not upon the subjective reaction of the employee or the subjective opinion of the interviewer.

Employees are not entitled to have a representative present during routine business communications which occur between a supervisor and an employee, such as:

- performance evaluations
- training
- job audits
- counseling sessions
- work-related instructions

This is so even though an informal letter of instruction may routinely warn that adverse action may be justified if the employee's performance does not improve.

If the meeting is disciplinary in character, but explanatory in the sense that the employee is only told what the employer intends to do and is not required to respond, there is no right to representation.

A routine counseling session may at any time transform into an investigatory interview, which may lead to adverse action. For example, a "witness" in an investigation may become a "subject" of the investigation. If this happens, the employee would be so informed, and if representation is then requested, the meeting should be terminated and rescheduled to allow for representation.

### **The Right To Representation Arises Only When The Employee Requests Representation**

An employee who requests a specific representative should be accommodated if reasonably possible. However, the interview need not be postponed if the employee insists on a specific representative who is unable to attend a meeting within a reasonable period of time and another representative is available.

### **The Representative Need No Necessarily Be A Union Agent**

Represented employees may select another represented employee, a personal advisor, or legal counsel; however, the representative cannot be an agent of the employee organization other than the exclusive representative. Supervisors may select another supervisor or a personal advisor or counsel.

### **The Representative May Not Disrupt The Interview**

The investigation should be handled in a setting of cooperation among the employee, employer, and representative. If the representative becomes unduly disruptive, the interview should be recessed. If the representative refuses to cooperate and another representative is not reasonably available, the interview may proceed without a representative.

### **The Employer Should Not Bargain With The Employee's Representative About Appropriate Disciplinary Action**

The representative is present to assist and advise the employee regarding his/her rights, not negotiate with management regarding appropriate discipline. Disagreements concerning any adverse action, which may be taken, can be dealt with in the appeal processes.

### **The Right To Representation Does Not Apply In An Emergency**

In the extremely rare situation of a bona fide emergency when the employer must conduct a prompt investigation and representation is not reasonably available, the right to representation does not apply and the employee would be so informed.

Such emergencies may involve possible criminal conduct. In these situations, if the employee is placed under arrest and the interrogation is conducted by a peace officer, remember the employee has the right to legal counsel.

### **UNION'S RIGHT TO REPRESENTATION**

The various union contracts contain a "union rights" clause that defines the areas that the State will address with designated union stewards, elected bargaining unit counsel representatives or union staff. These areas include:

- the administration of the contract
- employee discipline cases
- informal settlement conferences or formal hearings conducted by the PERB
- matters scheduled for hearing by the Board of Control
- matters pending before the State Personnel Board
- AWOLS and appeals to set aside resignations