MEMORANDUM OF LAW

DATE: February 18, 1994

TO: Bill Lopez, Labor Relations Representative

FROM: City Attorney

SUBJECT: Union Representation at Investigatory Interviews

BACKGROUND

Recently, recognized City employee organizations have been distributing handouts to employees summarizing the rights delineated in the United States Supreme Court case of NLRB v. Weingarten, Inc., 43 L.Ed 2d 171 (1975) and advising employees that "Weingarten" rights are applicable to City employees. The handout advises employees that, among other rights, they have a right to union representation at all investigatory interviews which the employee believes may lead to disciplinary action. In response to the union handout, you have asked a number of questions regarding the validity of the representations made by the union. The questions are:

1. Is this decision binding on public sector labor relations in general and California municipalities in particular?
2. Does this decision create procedural requirements for all "investigatory" interviews or only those leading to property-interest discipline?
3. Does this decision create representation rights for all interviews that the employee believes could result in discipline, regardless of the supervisor's actual intent?
4. If these rights do apply to City employees, are supervisors obligated to notice the employee of the rights, and does failure to do so preempt any discipline for the alleged misconduct?

ANALYSIS

The Weingarten case was decided under the auspices of the federal Labor Management Relations Act ("LMRA") 29 U.S.C. sections 151 et seq. States and political subdivisions of states (cities, counties, municipalities, etc.) are specifically exempted from coverage of the LMRA at 29 U.S.C. section 152(2). Employer-employee relations for public sector employees in the

state of California are governed primarily by the Meyers-Milias-Brown Act ("MMBA") Government Code sections 3500 et seq. Despite the fact that the LMRA is not binding on public sector employees, California courts have consistently held that where the MMBA mirrors the LMRA, federal guidelines may be used in the interpretation of issues arising under the MMBA. For example, in Civil Service Assn. v. City and County of San Francisco, 22 Cal. 3d 522 (1978), the Court noted at page 566:

> We did, however, in Social Workers' Union, Local 535, demonstrate our sensitivity to developments in the federal law in interpreting state legislation (11 Cal.3d 382, 391), noting that the phrase "wages, hours and other terms and conditions of employment" as used in Government Code sections 3504 seems to be taken from the federal Labor Management Relations Act
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> . . . .

The California reliance on federal guidelines was reiterated the following year in Robinson v. State Personnel Bd., 97 Cal. App. 3d 994, 1001 (1977) at which time the court said "The Weingarten rule has most recently been explored in Alfred M. Lewis, Inc. v. N.L.R.B., (9th Cir. 1978) 587 F.2d 403. We adopt its reasoning in interpretation of the California law." Thus, while the unions may be technically incorrect in citing the Weingarten guidelines as binding on the City, they are correct in the assertion that the guidelines, to the extent they have been similarly interpreted by California courts, may be applicable to the City.

Whether the procedural protections that are created under the MMBA apply to all investigatory interviews, or only to those where property interests are involved, has not been clearly defined. The California courts have distinguished between disciplinary actions that involve the taking of property, such as terminations, and those that do not for purposes of delineating the due process requirements that must be met before the discipline may occur. Courts have noted that "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances" (citation omitted). "Due process is flexible and calls for such procedural protections as the particular situation demands." Civil Service Assn. v. City and County of San Francisco, 22 Cal. 3d 552, 561 (1978). For example, the courts have determined that "the detriment to an employee of no more than 5 days suspension

in a 12-month period, while not negligible, is, in our view, not sufficient to justify a holding that a hearing is in the employee's constitutional right." Id. at 560.

However, due process rights and representation rights differ. Although representation rights have a similar degree of flexibility, the flexibility hinges on the intent behind the interview rather than the degree of discipline that may be meted out as a result of the interview. If the intent of the interview is investigation for possible disciplinary actions, representation rights accrue to the employee. In explaining the determination of intent, courts have held that:

> Whether an investigatory interview may lead to disciplinary action is an objective inquiry based upon a reasonable evaluation of all the circumstances, not upon the subjective reaction of the employee. NLRB v. J. Weingarten, Inc. (1975) 420 U.S. 251, 257 fn. 5 (43 L.Ed.2d 171, 95 S.Ct. 959, 964). The court in Weingarten quoted with approval the NLRB's statement that "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 corrections 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 then see no reasonable basis for him to seek the assistance of his representative." Id., at 257-58, 95 S.Ct. at 964, quoting Quality Manufacturing Co., 195 N.L.R.B. 197, 199 (1972). It should be acknowledged that a supervisory interview in which the employee is questioned or instructed about work performance inevitably carries with it the threat that if the employee cannot or will not comply with a directive, discharge or discipline may follow; but that latent threat, without more, does not invoke the

> right to the assistance of a union representative. The right of representation arises when a significant purpose of the interview is to obtain facts to support disciplinary action that is probable or that is being seriously considered.

Robinson v. State Personnel Bd., 97 Cal. App. 3d 994, 1001 (1979) (emphasis added).

Case law indicates the right to representation is predicated on a reasonable expectation of discipline and that the particular level of discipline is not the determinative factor. "The inclusion of investigatory meetings within the scope of representation is in keeping with the generous interpretation accorded to the federal language." Redwoods Community College Dist. v. Public Employment Relations Bd., 159 Cal. App. 3d 617, 624 (1984).

Additionally, statutory law specifically addressing the representation rights of police officers mirrors the guidelines found in case law. Government Code section 3303(h) states, in pertinent part:

> (h) Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters which are likely to result in punitive action against any public safety officer, that officer, at his request, shall have the right to be represented by a representative of his choice who may be present at all times during such interrogation . . . . This section shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities.

In certain instances, the courts have found that the right to representation attaches even absent the discipline element.

In Redwood Community College Dist., the court confirmed that an employee had a right to union representation at an investigative interview conducted by a high level administrator concerning the employee's work performance, even though the employee could not reasonably expect discipline to result from the interview. The court went on to say, however, "although the precedents do not compel a conclusion that the discipline element is invariably essential to a right of representation, under EERA and other California labor statutes representation should be granted, absent the discipline element, only in highly unusual circumstances." Id. at 625.

Thus, pursuant to case law, employees have a right to representation when there is a reasonable objective expectation that discipline will result from an investigatory interview.

Finally, it is the responsibility of the employee to request representation. The employer is not required to provide representation nor advise an employee of his or her right to representation. The labor organization may participate if requested by the employee. Civil Service Assn. v. City and County of San Francisco, 22 Cal. 3d 552, 568 (1978). Each of the Memoranda of Understanding with the recognized employee unions notes that representation is available at the request of the employee. Failure to advise an employee of the right to representation will not, therefore, automatically invalidate a disciplinary decision.

CONCLUSION

Weingarten rights are not directly applicable to public sector employees in California. However, California courts have interpreted provisions of the MMBA using the Weingarten case as a guideline. Employees are entitled to union representation at the employee's request based upon a reasonable objective evaluation that discipline may result from the interview. In the event the outcome of the interview is uncertain, it is best, given the courts generous interpretation of representation rights, to err in the direction of allowing representation.

If you have any further questions, please contact me.

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