SCHOOLS LEGAL SERVICE

LAW UPDATE
LABOR AND EMPLOYMENT

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August 3, 2016

TEACHER DISMISSAL BILL (AB 215) SIGNED INTO LAW – IS IT ENOUGH? (UPDATED)

Assembly Bill 215 was author Assembly Member Joan Buchanan's third attempt to reform California's complex, and often criticized, teacher dismissal laws. Backed by the California Teachers Association and Ed Voice, AB 215 created a separate, expedited proceeding solely for egregious misconduct cases and otherwise attempted to overhaul the hearing process for all other dismissal or suspension causes.[1] The following are the most significant changes that took effect January 1, 2015 as a result of AB 215:

- A separate dismissal or suspension proceeding based *solely* on charges of egregious misconduct. ("Egregious misconduct" is defined as specified sex, drug, and child abuse and neglect offenses.) Charges may be filed at any time (rather than within the old September 15 to May 15 mandated time period) and the hearing is conducted by an administrative law judge (ALJ) rather than the current three (3) member Commission on Professional Competence (CPC). The hearing must commence within 60 days of the teacher's request for hearing, with a maximum extension of 30 days. Evidence of egregious misconduct more than four (4) years old may be introduced. Pre-January 1, 2015 law governing discovery in dismissal proceedings applies to egregious misconduct cases only.
- For all other causes (including if combined with egregious misconduct, and except where a charge is for unsatisfactory performance only, as discussed below), charges may be filed at any time (rather than within the old September 15 to May 15 mandated time period). Notice must be by personal service on the teacher if served outside of the instructional year. Hearings must commence within six (6) months and conclude within seven (7) months from the teacher's request for hearing (though the ALJ may extend these timelines under certain circumstances). Discovery is limited to defined disclosures and five (5) depositions of witnesses. If disclosures are not timely made, evidence is precluded from introduction at the hearing except where good cause is shown. Evidence older than four (4) years is not allowed except if it involves sex-based offenses, child abuse, neglect or endangerment. A process is provided for the ALJ to hear teacher challenges to suspensions pending dismissal. The experience required for CPC panel members in the discipline of that of the affected employee was reduced from five (5) to three (3) years.
- Where charges are only based on unsatisfactory performance, notice must be served during the instructional year of the school site where the teacher is physically employed.

[1] The measure was opposed by the Association of California School Administrators and Los Angeles Schools Superintendent John Deasy. Of particular concern was that AB 215 narrowly defined egregious misconduct to the exclusion of other serious crimes (i.e., aggravated assault, armed robbery, etc.) Additionally, not all stakeholders from the education community were involved in this measure.

- Consistent with existing law, school districts, county offices of education and charter schools are prohibited from entering into agreements which prevent the reporting of egregious misconduct to the Commission on Teacher Credentialing (CTC), or any other state or federal agency.
- Agreements to expunge from a school employee's personnel file credible complaints of, substantiated investigations into, or discipline for, egregious misconduct are prohibited. (This does not include the removal of documents where the allegations have been found to be false or unsubstantiated or where discipline was unwarranted.)
- Reports made by school districts, county offices of education and charter schools to CTC involving a teacher's egregious misconduct must be disclosed *upon inquiry* to a school district, county office of education or charter school considering an application for employment from the employee.
- An employee who accuses another school employee of egregious misconduct knowing the allegation is false, shall be subject to certificate revocation.

The charges listed in Education Code §44932 were renumbered. The charge listed in subdivision (a)(1) is now immoral conduct, inclusive of egregious misconduct (which is defined in this subdivision). Subdivision (a)(2) is now solely unprofessional conduct. The remaining charges in subdivision (a) of §44932 are conformed to these changes.

Passage of AB 215 followed closely on the heels of a Los Angeles Superior Court's determination that the same dismissal statutes (Education Code §§44934, 44938(b)(1) and 44944) violated the California Constitution. The court held the dismissal statutes "impose a real and appreciable impact on students' fundamental right to equality of education" and present an "über due process" which is "so complex, time consuming, and expensive as to make an effective, efficient, yet fair dismissal of a grossly ineffective teacher illusory."[2] The California Second District Court of Appeal later unanimously reversed the trial court's ruling and maintained the status quo in terms of teacher dismissal statutes. Attorneys representing the student plaintiffs in *Vergara v. State of California*, filed a petition in May of 2016 to have the case heard by the California Supreme Court. As of this writing, it remains to be seen whether the case will be heard by the Court, and what effect any future court decision will have on the AB 215 changes regarding the teacher dismissal statutes. As always, we will keep you updated on any new developments in this area of the law.

If you have any questions concerning this issue, please do not hesitate to contact our office.

– Melissa H. Brown

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[2] Tentative Decision, *Vergara v. State of California* (*Vergara*), Los Angeles Superior Court Case No. BC484642. The term "uber" means to an extreme or excessive degree, out of the norm of what one would expect of its kind of class. (Dictionary.com) The Court in *Vergara* queried, "does a school district classified employee have a lesser property interest in his/her continued employment than a teacher, a certificated employee? To ask the question is to answer it. This Court heard no evidence that a classified employee's dismissal process (i.e., a *Skelly* hearing) violated due process. Why, then, the need for the current tortuous process required by the dismissal statutes for teacher dismissals which has been decried by both plaintiff and defense witnesses?" (Tentative Decision, at p. 12.)

OAH Decision on pages A-3 through A-36 redacted from posting

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WEINGARTEN RIGHTS: REVISITED (AGAIN)

District administrators regularly meet with employees concerning a myriad of employment matters. The meetings can take the form of training, work direction, investigations into employee misconduct, or disciplinary matters. In certain situations, an employee is entitled to have a union representative present at the meeting.

The right to have a union representative available is the result of a 1975 U.S. Supreme Court decision (*NLRB v. Weingarten, Inc.*). The Supreme Court ruled that an employee's insistence upon union representation at an employer-initiated investigatory interview, where the employee "reasonably" believes disciplinary action may result, constitutes protected concerted activity. Today, the right to a union representative is referred to as "*Weingarten* Rights." *Weingarten* Rights are recognized under the Educational Employment Relations Act ("EERA") and are applicable to union represented employees of school districts.

Weingarten Rights guarantee an employee the right to union representation during an investigatory interview.[1] The *Weingarten* Right must be raised by the employee, unless otherwise specified in the collective bargaining agreement. A supervisor is not obligated to inform an employee that they are entitled to union representation.

Investigatory Interview:

An investigatory interview generally involves the questioning of an employee by a supervisor where the information sought could be used as a basis for discipline. If an employee has a reasonable belief that discipline or discharge may result from what is said, the employee has the right to request and be afforded union representation.

Here are some examples where an employee would be entitled to union representation:

[1] In *SEIU v. Sonoma County Superior Court* (2015 PERB Decision No. 2409-C), the Public Employment Relations Board overruled earlier precedent and held the right to union representation, only upon request by the employee, also extends to interactive process meetings convened to explore possible reasonable accommodations to enable an employee with a disability to perform essential job functions.

- The interview is an aspect of the employer's procedure for determining whether discipline will be imposed.
- The purpose of the interview is to investigate an employee's performance where discipline, demotion or other adverse consequences may result.
- The purpose of the interview is to elicit facts from the employee to support disciplinary action that is probable or that is being considered.
- The purpose of the interview is to obtain admissions of misconduct or other evidence to support a disciplinary decision already made.
- The employee is required to explain his/her conduct, or defend it during the interview, or is compelled to answer questions or give evidence.

Weingarten Rules:

When an investigatory interview occurs, the following rules apply:

1. The employee must make a clear request for union representation before or during the interview. The employee cannot be discriminated against or otherwise disciplined for making this request.

2. After the employee makes the request, the administrator has three options:

   a. Grant the request and delay the interview until the union representative arrives and has a chance to consult privately with the employee;
   b. Deny the request and end the interview immediately; or,
   c. Give the employee a choice of: having the interview without representation or ending the interview.

3. An administrator commits an unfair labor practice by denying an employee's request for *Weingarten* representation and continuing to ask questions. Under this scenario, an employee has the right to refuse to answer and cannot be lawfully punished for the refusal to answer.

What are a Union Representative's Rights under *Weingarten*?

The following are some guidelines in dealing with a union representative during a *Weingarten* interview:

1. Inform the representative of the purpose of the interview;

2. Allow the representative to speak with the employee in private before questioning begins;

3. The representative may speak during the interview to clarify questions;

4. The representative may provide the employee with advice on how to answer a question; and,

5. The representative may offer additional information to the administrator at the end of the interview.

A union representative does not have the right to tell an employee not to answer a question. In fact, an employee can be disciplined for refusing to answer questions during an investigatory interview.

An employee does not have the right to the presence of a union representative where:

1. The meeting is merely for the purpose of conveying work instructions, training, or communicating needed corrections in the employee's work techniques.

2. The employee is assured by the employer prior to the interview that no discipline or employment consequences can result from the interview.

3. The employer has reached a final decision to impose certain discipline on the employee prior to the meeting, and the purpose of the meeting is to inform the employee of the discipline or to impose it.

4. Any conversation or discussion about the previously determined discipline is initiated by the employee and without employer encouragement or instigation after the employee is informed of the action.

Even in the foregoing circumstances, an employee can still ask for representation. Permitting a representative to attend even when not required is discretionary. It is recommended that a representative be permitted to attend where one is reasonably available.

Assuming a *Weingarten* scenario, is an employee entitled to a representative of his/her choosing? Not necessarily. If the employee demands to have a particular union representative attend, but the representative is out of town for two weeks, the district would have to consider the impact of the time delay of the investigatory meeting. If the meeting needed to move forward immediately, then the employee would have to "make do" with another union representative.

Assuming a *Weingarten* scenario, is an employee entitled to an attorney representative of his/her choosing? No. An employee is entitled to be assisted by a union representative. If an employee states that he/she does not want a union representative present, but would like his/her personal lawyer to attend an investigatory meeting, the district could and should decline to allow the employee's personal attorney to be present. If the attorney is a CTA or CSEA attorney, then the employee would have a reasonable basis for the request assuming the attorney is attending in the capacity as counsel for the respective association.

Remedies for Violation of *Weingarten* Rights:

The district will be ordered to cease and desist from the unfair labor practice conduct. Additionally, the district will be required to post a notice which sets forth employee rights under EERA and confirms the district's commitment to respect employee rights. Any discipline that is imposed in violation of *Weingarten* Rights will be reversed. Further, information gained by a district as a result of a *Weingarten* violation will likely be excluded from any hearing on the matter.

If you have any questions concerning this issue, please do not hesitate to contact our office.

– *Timothy L. Salazar*

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THE *SPIELBAUER* ADVISEMENT: INVESTIGATING JOB-RELATED CONDUCT WHICH MAY HAVE CRIMINAL RAMIFICATIONS (UPDATED)

When investigating employee misconduct, which may subject an employee to not only employer discipline but also criminal prosecution, district administrators should be aware of the California Supreme Court ruling in *Spielbauer v. County of Santa Clara.*[1] In *Spielbauer*, the Court suggested that protection of an employee's right against self-incrimination requires a clear advisement at the outset of the investigatory interview. The advisement must warn that while the employee is directed to respond to the questions asked of him/her by the employer, the employee's compelled answers may not be used against the employee in a subsequent criminal proceeding.

The plaintiff in the case, Tom Spielbauer, was a deputy public defender for the County of Santa Clara under investigation by his employer for misrepresenting facts to the court. Deceit of a court can subject an attorney to State Bar discipline as well as criminal sanctions. As part of its investigation, the County Public Defender interviewed Spielbauer. It was explained to Spielbauer that the investigation was not a criminal proceeding. It was further explained that nothing that Spielbauer said in his interview could be used against him in any subsequent criminal proceeding. It was also made clear by Spielbauer's employer that in the event that Spielbauer refused to answer questions, his refusal would be deemed insubordination leading to administrative discipline up to and including termination. Upon advice of Spielbauer's attorney, Spielbauer remained silent. Spielbauer was terminated on grounds of insubordination (stemming from his refusal to answer the investigator's questions) and the underlying ethical misconduct in misleading the court through false statements. Spielbauer challenged his termination based on his refusal to answer questions claiming that the County was first required to give him a "formal grant of criminal use immunity."

Spielbauer's challenge raised the following issue for public employers: In a noncriminal public employment investigation, does the public employer have to "seek, obtain, and confer a formal guarantee of immunity before requiring its employee to answer questions related to that investigation" where the result of the employee's refusal would be termination or other job discipline? The Supreme Court said, "no." Under both the federal and state Constitutions, a public employer can compel an employee to answer questions about job-related conduct without

[1] *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704.

making a formal grant of immunity, and can terminate or otherwise discipline an employee for refusing to do so, provided that the employer does not, on threat of dismissal, require that the employee waive the constitutional protection against criminal use of those answers. Notably, since Spielbauer was told that his compelled statements could not be used against him in a subsequent criminal proceeding, the Supreme Court refrained from deciding whether public employers must give such advisements in order to properly terminate an employee for his or her refusal to answer questions during a noncriminal, internal investigation.

In light of *Spielbauer,* districts are advised to give a *Spielbauer*-type advisement when investigating an employee for job-related conduct which could also lead to subsequent criminal prosecution, particularly where a charge of insubordination is based on a refusal to answer. Such an advisement may look something like this:

> "This is an internal investigation which could lead to employee discipline, not a criminal proceeding. Any statements made by you cannot be used in a subsequent criminal case. You are directed to answer my questions and any refusal will be deemed insubordination, leading to administrative discipline, up to and including termination of your employment."

In addition, districts are well-advised to involve legal counsel any time employee conduct may have criminal ramifications. While the court recognized the "strong interest" in a public employer's ability to act promptly and freely in response to employee misconduct and breach of public trust, the employer cannot force the employee to waive the constitutional right against self-incrimination in order to avoid discipline. Instead, the employee should be specifically advised that he or she retains that right and, therefore, may be disciplined for refusing to answer the employer's questions, including termination of his or her employment.

As always, if you have any questions concerning this update, please do not hesitate to contact us.

– Melissa H. Brown

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