***Weingarten* Meetings**

**Overview**

5 USC 7114 (a)(2)(B) provides that an exclusive representative shall be given the opportunity to be represented at any examination of an employee by a representative of the agency in connection with an investigation if the employee reasonably believes the examination may result in disciplinary action and the employee requests representation.

This is commonly known as the *Weingarten* right because the language of the statute reflects a ruling of the Supreme Court in a private sector case, *NLRB v. J. Weingarten, Inc*., 106 LRP 14885, 420 U.S. 251 (U.S. 1975). The facts of that case show that an employee who was denied representation at an investigative interview admitted taking free lunches, a matter the employer's representatives were not investigating.

The statute does not require that employees be advised of the *Weingarten* right at each investigative meeting. Instead, agencies are required to notify employees of the right on an annual basis.

**Key Points**

These key-point summaries cannot reflect every fact or point of law contained within a source document. For the full text, follow the link to the cited source. The references to ***Broida*** in this Quick Start Guide are to federal employment law expert Peter Broida's treatise, *A* *Guide to Federal Labor Relations Authority Law and Practice* (Dewey Publishing Inc.), to which ***cyber*FEDS®** has exclusive Web rights.

**In general**

* To trigger the *Weingarten* right, four elements must be met: 1) an examination of a bargaining unit employee by an agency representative; 2) the examination must occur in connection with an investigation; 3) the employee must reasonably believe that the examination may result in discipline; 4) the employee must request representation. *AFGE Local 1941 v. FLRA*, 88 FLRR 1-8011, 837 F.2d 495 (D.C. Cir. 1988).
* ***Broida:*** The agency need not advise the employee during the investigation of the right to a representative. An annual notice of that right is sufficient. 5 USC 7114(a)(3); *Sears v. Department of the Navy*, 680 F.2d 863 (1st Cir. 1982). [*Broida Guide to FLRA Law and Practice*: Need to Request Representative](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+02:+Management+Violations,+Section+H:+Representation+During+Investigations,+Subsection+02:+Need+to+Request+Representative)*.*
* When ruling on an alleged violation of the *Weingarten* right, an arbitrator must address all four elements. *FCC, Coleman, Fla.,* 109 LRP 29915, 63 FLRA 351 (FLRA 2009).
* When a valid request for representation has been made, the agency has the choice to: 1) grant the request; 2) discontinue the interview; or 3) offer the employee the choice to continue the interview without representation or have no interview at all. *Norfolk Naval Shipyard*, 90 FLRR 1-1312, 35 FLRA 1069 (FLRA 1990).
* The agency did not violate the *Weingarten* right when it terminated an investigative interview when the employee requested representation, then obtained information through other sources. *2750th Air Base Wing, Air Force Logistics Command*, 82 FLRR 1-1623, 9 FLRA 871 (FLRA 1982).
* The decisive consideration as to whether an employee is entitled to representation is whether he wants union support and reasonably fears discipline. That the interview is not custodial in nature and the employee is not compelled to attend are irrelevant factors. *AFGE Local 1941 v. FLRA*, 88 FLRR 1-8011, 837 F.2d 495 (D.C. Cir. 1988).
* To qualify as an examination for the purposes of the *Weingarten* right, a meeting does not necessarily have to occur on duty time. *IRS, Los Angeles District Office*, 84 FLRR 1-1615, 15 FLRA 626 (FLRA 1984).
* An employee's decision to participate in an investigative interview without representation must not be coerced. *Border Patrol, El Paso, Texas*, 91 FLRR 1-1449, 42 FLRA 834 (FLRA 1991).
* An employee's refusal to participate in a meeting that meets the *Weingarten* criteria, after a valid request for representation has been denied, is protected by the statute. The employee does not commit insubordination. *DVA Medical Center, Fort Wayne, Ind.,* 91 FLRR 1-1089, 39 FLRA 717 (FLRA 1991).
* An employee's refusal to attend a meeting that is not an examination in connection with an investigation is an act of insubordination and grounds for disciplinary action. *Hanscomb Air Force Base*, 92 FLRR 1-1218, 45 FLRA 484 (FLRA 1992).
* A union proposal requiring the agency to provide employees with tapes or stenographic records of investigative meetings impacted the agency's right to determine internal security practices and did not constitute an appropriate arrangement. *Customs Service*, 100 FLRR 1-1022, 55 FLRA 1174 (FLRA 1999).
* Proposals that supplement employee rights to union representation under Section 7114(a)(2)(B) are negotiable if they are otherwise consistent with law and regulation. *Nuclear Regulatory Commission*, 93 FLRR 1-1081, 47 FLRA 370 (FLRA 1993).
* A proposal requiring the agency to advise employees of their right to remain silent during investigative interviews interfered with the agency's rights to discipline, assign, and direct employees. *Kansas City District, Corps of Engineers, Kansas City, Mo.*, 86 FLRR 1-1520, 21 FLRA 233 (FLRA 1986).
* Probationary employees are not excluded from the coverage of 5 USC 7114(a)(2)(B). *DVA Medical Center, Jackson, Miss.*, 93 FLRR 1-1266, 48 FLRA 787 (FLRA 1993).

**Examinations/interviews**

* A requirement for employees to provide written statements rather than confrontational investigative interviews did not negate the union's *Weingarten* right to represent the employees upon request. *Border Patrol, Del Rio, Texas*, 92 FLRR 1-1347, 46 FLRA 363 (FLRA 1992).
* There is no statutory right to representation at a counseling meeting. *DVA Medical Center, Asheville, N.C.*, 93 FLRR 1-1271, 48 FLRA 849 (FLRA 1993).
* Labeling a meeting "counseling" does not necessarily make it so. An employee is entitled to representation if the meeting contains the *Weingarten* elements. *FAA, St. Louis Tower*, 81 FLRR 1-1223, 6 FLRA 678 (FLRA 1981).
* A meeting to inform an employee of an agency's decision and to counsel the employee about future misconduct is not an examination of the employee. *2750th Air Base Wing, Air Force Logistics Command*, 82 FLRR 1-1623, 9 FLRA 871 (FLRA 1982).
* Monitoring phone conversations between employees and customers was a form of surveillance but not an examination of employees by a representative of the agency. *IRS Jacksonville District*, 86 FLRR 1-1831, 23 FLRA 876 (FLRA 1986).
* A meeting held to discuss a last chance agreement, although concerning potential disciplinary action, is not an examination in connection with an investigation. *Air Force Logistics Command*, 90 FLRR 1-1591, 38 FLRA 309 (FLRA 1990).
* Nothing in the plain language of 5 USC 7114(a)(2)(B) excludes security-related interviews from the definition of "examination." *Nuclear Regulatory Commission*, 110 LRP 54886, 65 FLRA 79 (FLRA 2010).

**Representative of the agency**

* In a 5-4 decision, the Supreme Court held that an agency's Office of Inspector General is a representative of the agency when conducting an examination of an employee in an interview otherwise meeting the *Weingarten* criteria. *NASA v. FLRA*, 99 FLRR 1-8005, 119 S. Ct. 1979 (U.S. 1999).
* Even though an investigation conducted by an agency's Office of Inspector General is criminal in nature, the Supreme Court's ruling in *NASA* applies. The OIG is a representative of the agency and must honor the union's *Weingarten* right. *Office of the OIG, Department of Justice v. FLRA*, 102 FLRR 1-8001, 00-1433 (D.C. Cir. 2001).
* A bargaining unit employee could, under some circumstances, meet the definition of "representative of the agency" for *Weingarten* purposes. *IRS Los Angeles District Office*, 84 FLRR 1-1615, 15 FLRA 626 (FLRA 1984).
* To determine whether an activity is responsible for unlawful conduct during an investigation conducted by its parent agency, the FLRA examines the level of collaboration between the two entities. *FCI, Forrest City, Ark.,* 102 FLRR 1-1083, 57 FLRA 787 (FLRA 2002).
* Employees of the Office of Personnel Management, conducting suitability investigations on employees in the competitive service, or other "covered employees," in accordance with [5 CFR Part 731](http://www.cyberfeds.com/CF3/servlet/CFSearchAll?searchstring=&searchscreen=%2FCF3%2Fstatsearch.jsp&destination=index.jsp%3Ftopic%3DMain%26results%3Dyes&db=STATSREGS&thesaurus=yes&sortorder=document&results=100&title=5+CFR&part=731&restrictors=title&restrictors=part), are performing an OPM function and are not under the control of the agency. Consequently, they do not have an obligation to honor the *Weingarten* rights of agency employees under investigation. *Internal Revenue Service*, 112 LRP 9086, 66 FLRA 506 (FLRA 2012).
* Background investigations of employees in the excepted service are not suitability investigations conducted under [5 CFR Part 731](http://www.cyberfeds.com/CF3/servlet/CFSearchAll?searchstring=&searchscreen=%2FCF3%2Fstatsearch.jsp&destination=index.jsp%3Ftopic%3DMain%26results%3Dyes&db=STATSREGS&thesaurus=yes&sortorder=document&results=100&title=5+CFR&part=731&restrictors=title&restrictors=part). OPM investigators conducting these investigations are operating on behalf of the agency, are performing an agency function, and are under the control of the agency. Therefore, because employees may be removed as a result of such investigations, OPM investigators must honor a union's right to represent bargaining unit employees in these interviews. *Internal Revenue Service*, 112 LRP 9086, 66 FLRA 506 (FLRA 2012).

**Reasonable belief of discipline**

* The determination of whether an employee's alleged fear of discipline was reasonable is made from the perspective of the employee rather than the intentions of the agency's representatives. *DVA Medical Center, Hampton, Va.*, 96 FLRR 1-1086, 51 FLRA 1741 (FLRA 1996); *AFGE Local 2544 v. FLRA*, 85 FLRR 1-8034, 779 F.2d 719 (D.C. Cir. 1985).
* The timing and other circumstances surrounding an interview may be factors in determining whether an employee's fear of discipline was reasonable. *DVA Medical Center, Fort Wayne, Ind*., 91 FLRR 1-1089, 39 FLRA 717 (FLRA 1991).
* An express promise of immunity in some cases may negate an employee's reasonable fear of discipline, but the employee must have sufficient assurances that the offer is valid. *AFGE Local 2544 v. FLRA*, 85 FLRR 1-8034, 779 F.2d 719 (D.C. Cir. 1985).
* Although an investigation does not center on the employee being questioned, the employee could still reasonably believe discipline against him might result. If so, he has the right to representation. *Immigration and Naturalization Service, El Paso, Texas*, 93 FLRR 1-1169, 47 FLRA 1254 (FLRA 1993).

**Request for representation**

* An employee does not have to specifically request "union" representation in a *Weingarten* meeting. A request for "an attorney" and "somebody to talk to" was sufficient to put the agency on notice that the union's right to represent the employee had been triggered. *Bureau of Prisons, Office of Internal Affairs*, 99 FLRR 1-1048, 55 FLRA 388 (FLRA 1999).
* A request for representation does not have to be repeated in order to remain in effect. *Norfolk Naval Shipyard*, 84 FLRR 1-1395, 14 FLRA 82 (FLRA 1984).
* A proposal requiring the agency representative to advise an employee of his right to representation before beginning a *Weingarten* interview was ruled negotiable. *Nuclear Regulatory Commission*, 93 FLRR 1-1081, 47 FLRA 370 (FLRA 1993).
* A proposal to delay an investigative meeting for a reasonable amount of time in order to allow an employee to obtain union representation does not affect an agency's right to discipline. *DVA Medical Center, Providence, R.I.*, 101 FLRR 1-1154, 57 FLRA 373 (FLRA 2001).
* An employee may waive his right to representation after making a request, but the waiver must be clear and unmistakable. *Mine Safety and Health Administration*, 90 FLRR 1-1280, 35 FLRA 790 (FLRA 1990).

**Role of the union**

* The Supreme Court intended union representatives to be allowed to play an active role in *Weingarten* meetings. However agency representatives have a limited right to regulate the union representative's conduct. *Norfolk Naval Shipyard*, 82 FLRR 1-1561, 9 FLRA 458 (FLRA 1982); *FAA St. Louis Tower*, 81 FLRR 1-1223, 6 FLRA 678 (FLRA 1981).
* ***Broida:*** In *Weingarten*, the Supreme Court recognized that an employee who is questioned during an investigatory examination which may result in discipline "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." Thus, the union representative must be free to help clarify the issues or facts, or to suggest other employees who may have knowledge of them.[*Broida Guide to FLRA Law and Practice:* Scope of Investigatory Representation](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+02:+Management+Violations,+Section+H:+Representation+During+Investigations,+Subsection+03:+Scope+of+Investigatory+Representation).
* ***Broida:*** The union's representational rights under Section 7114(a)(2)(B) are not without qualification. For example, a union may not interfere with an employer's legitimate interest and prerogative in achieving the objective of the examination or compromise its integrity. *Federal Aviation Administration, New England Region, Burlington, Mass.*, 90 FLRR 1-1269, 35 FLRA 645 (FLRA 1990). [*Broida Guide to FLRA Law and Practice:* Exclusion of Particular Representative](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Subchapter+02:+Management+Violations,+Section+H:+Representation+During+Investigations,+Subsection+06:+Exclusion+of+Particular+Representative).
* Preventing a union representative from actively participating in an investigative meeting is an unfair labor practice. *NASA Office of the Inspector General*, 95 FLRR 1-1068, 50 FLRA 601 (FLRA 1995).
* As a general matter, a union has the right to designate the individual to serve as its representative at an investigative meeting. *FCI* *Englewood, Littleton, Colo*., 98 FLRR 1-1208, 54 FLRA 1502 (FLRA 1998).
* ***Broida:*** Absent special circumstances, if an agency refuses to honor the union's designation of a representative, it violates Sections 7116(a)(1) and (5). *Food and Drug Administration, Newark District Office, West Orange, N.J.*, 93 FLRR 1-1100, 47 FLRA 535 (FLRA 1993). [*Broida Guide to FLRA Law and Practice:* Exclusion of Particular Representative](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Subchapter+02:+Management+Violations,+Section+H:+Representation+During+Investigations,+Subsection+06:+Exclusion+of+Particular+Representative).
* Where "special circumstances" do exist, an agency may deny representation by a specific union representative. *Customs Management Center, Tucson, Ariz.,* 101 FLRR 1-1150, 57 FLRA 319 (FLRA 2001).
* The FLRA will construe the term "special circumstances" narrowly. *FCI Englewood, Littleton, Colo*., 98 FLRR 1-1208, 54 FLRA 1502 (FLRA 1998).
* ***Broida:*** The union's right to designate its representative during an investigatory interview is broad but not absolute. The union may be precluded from designating a representative who is the subject of the investigation, at least until after the investigatory interview of the representative has been concluded. *Federal Correctional Institution, Petersburg, Va.*, 87 FLRR 1-1016, 25 FLRA 210 (FLRA 1987). [*Broida Guide to FLRA Law and Practice:* Representation During Investigations](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+02:+Management+Violations,+Section+H:+Representation+During+Investigations).
* An agency's refusal to postpone an investigative interview until a specific union representative could be present was not, under the facts of the case, a violation of the *Weingarten* right. *INS, New York District Office, New York, N.Y.*, 93 FLRR 1-1016, 46 FLRA 1210 (FLRA 1993).
* A union proposal outlining the role of a representative in a *Weingarten* meeting was negotiable. The union proposed that a representative: 1) clarify questions; 2) clarify answers; 3) assist an employee in providing favorable or extenuating facts; 4) suggest other employees who may have knowledge of relevant facts; 5) advise the employee. *Nuclear Regulatory Commission*, 93 FLRR 1-1081, 47 FLRA 370 (FLRA 1993).
* The FLRA declined to adopt a per se rule giving employees the right to confer with their union representative where doing so would not unduly disrupt the examination. *FCI, El Reno, Okla.,* 96 FLRR 1-1132, 52 FLRA 421 (FLRA 1996).
* An agency's refusal to grant a recess during an investigative meeting did not, under the specific facts of the case, prevent the union from actively and effectively representing the employee. *FCI El Reno, Okla.*, 96 FLRR 1-1132, 52 FLRA 421 (FLRA 1996).
* Statements made by an employee to his union representative during an investigation are protected from disclosure. *Customs Service*, 91 FLRR 1-1003, 38 FLRA 1300 (FLRA 1991).

**Attorney work-product privilege**

* ***Broida:*** Interviews of unit employees may be conducted by agency counsel seeking to develop information to use in an adversarial proceeding or to use in assessing the strength or weakness of an agency's or union's case. The assertion has been made that the attorney's work product is reflected through questioning of witnesses, and that a union representative's presence impairs or destroys that privilege. The FLRA has determined that the claim of attorney work-product privilege does not preclude the agency from ensuring that the union has notice of and an opportunity to be present during formal discussions. *McClellan Air Force Base*, 90 FLRR 1-1264, 35 FLRA 594 (FLRA 1990). [*Broida Guide to FLRA Law and Practice:* Questioning of Witnesses](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+02:+Management+Violations,+Section+I:+Representation+During+Formal+Discussions,+Subsection+06:+Questioning+of+Witnesses).

**Remedies for *Weingarten* violations**

* When the union's *Weingarten* right is violated but the employee involved was not disciplined, the proper remedy is a cease-and-desist order. *Border Patrol*, 91 FLRR 1-1295, 41 FLRA 154 (FLRA 1991).
* The goal of efficient and effective government would not be met if an agency had to rescind a disciplinary action solely because the union's *Weingarten* right was not honored. Instead a proper remedy is to order the agency to redo an investigative interview allowing union representation and to reconsider the disciplinary action in light of the results of that interview. *Bureau of Prisons, Safford, Ariz.*, 90 FLRR 1-1252, 35 FLRA 431 (FLRA 1990).
* Cancellation of discipline would be an appropriate remedy only if the discipline resulted from an incident that occurred during an investigative meeting at which an employee was improperly denied representation. *Charleston Naval Shipyard*, 88 FLRR 1-1203, 32 FLRA 222 (FLRA 1988).