

CLIENT NEWS BRIEF

Employees' Representation Rights Now Expand Beyond Oral Interviews

Three recent decisions by the Public Employment Relation Board (PERB) have expanded or highlighted employees' rights to union representation when employees are asked to prepare a written statement or are searched unclothed.

Written Statements

In *San Bernardino Community College District* (2018) PERB Dec. No. 2599, PERB expanded the right to union representation to those circumstances where an employee is asked to provide a written statement. In this case, an employee was questioned by a community service officer (CSO) in the District's police department concerning the employee's location during the employee's work shift. After verbally answering the CSO's questions, the employee requested a union representative. The CSO agreed that the employee had a right to a union representative, but directed the employee to draft a written statement before he was relieved of duty. In its decision, PERB reiterated the rationale for the right to union representation in an investigatory interview, explaining:

The right to representation in an investigatory interview is based on the following rationale: A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.

PERB rejected the employer's argument that the right to union representation only attached during an oral interview. Instead, PERB held that the right extended to a written statement as well because the employee reasonably believed that his written statement, like a verbal statement, could also be used for disciplinary purpose.

In *County of San Joaquin (Sheriff's Department)* (2018) PERB Dec. No. 2619, PERB ordered the employer to rescind and expunge the disciplinary action taken as a result of the employee's insistence on union representation at a meeting with his supervisor where the employee was asked to prepare a written statement. The employee made repeated requests for union representation, but was denied. The employee's refusal to prepare the written statement without union representation escalated into an internal affairs investigation for insubordination, which concluded in discipline. PERB held that an employee is entitled to union representation prior to providing a written statement which the employee reasonably believed could result in disciplinary action, and that absent his request for union representation the employee would not have been disciplined. PERB also took the additional step of ordering the employer to rescind and expunge the disciplinary action taken as a result of the employee's insistence on union representation.

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Body Searches

In *State of California Department of Corrections & Rehabilitation* (2018) PERB Dec. No. 2598, PERB expanded the right to union representation to include unclothed body searches. In this case, the employer was tipped off by an inmate claiming that the employee was going to bring narcotic powder into the prison. A criminal investigation was initiated, during which the employee was told that the investigators would search her bags, vehicle, and person. The employee consented to the search of her bags and vehicle, but when the employee was told to remove her clothes for an unclothed body search, the employee demanded the presence of a union representative, a supervisor, or someone from peer support. The employer denied the employee a right to union representation twice on the basis that (1) she was "only being searched, not questioned," and (2) she signed a consent-to-search form when she was first hired. PERB held that an invasive search of an employee's person, including an unclothed body search, is the type of investigatory meeting which gives rise to the right to union representation. Further, PERB held that if an employer rejects an employee's request for union representation, the employee cannot be found to have voluntarily waived his or her right to union representation. Moreover, an employee does not waive his or her right to union representation by signing an acknowledgement of the employer's rule that he or she is subject to search at any time while on the employer's grounds.

This case further emphasizes that PERB believes employees' rights to union representation extend beyond oral questioning. Further, PERB is protective of employees when interpreting the waiver of employees' rights to union representation.

Takeaways

These three cases demonstrate that PERB believes a public employee has a right to union representation when an employer conducts an invasive search or requires an employee to prepare a written statement that may lead to discipline. In light of these cases, public employers should evaluate their investigation procedures and directives. When an investigation calls for an invasive search, or an employee is directed to prepare a written statement which could lead to the discipline of the employee, public employers should provide employees the right to union representation.

For additional information regarding the three PERB decisions, please contact the authors of this Client News Brief, an attorney at one of our [eight offices](#) located statewide, or an attorney in Lozano Smith's [Investigative Services team](#). You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).