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WEINGARTEN AND THE TAYLOR LAW —
A CLAIMED DIFFERENCE WITHOUT
DISTINCTION

Anthony R. Baldwin*

I. INTRODUCTION

There is a claimed difference between the application of National Labor Relations Board v. J. Weingarten1 to: employees defined by section 2(3) of the National Labor Relations Act,2 federal employees3 and public employees in twelve states other than New York4 on the one hand, and to New York's public employees on the other. Weingarten is precedent for section 2(3) employees, and its principles and standards apply to federal employees and to the public employees in twelve states.5 In New York, the courts and the New York Public Employment Relations Board have “disassociated” public employees from Weingarten.6 This Article focuses on the claimed

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5. See infra note 296 (setting forth the caselaw in ten states).
difference between *Weingarten* and New York's Civil Service Law, and illustrates by an example referenced throughout the article that the difference is without distinction.

Hypothesize three janitors who work in three neighboring buildings in Any Town, New York. P, the first janitor, is a section 2(3) employee assigned to clean a privately owned building by a cleaning service that is an employer pursuant to section 2(2) of the National Labor Relations Act. Fed., the second janitor, works at the Any Town Federal Building and is a federal employee. The third janitor NY, cleans the Municipal Building and is an Any Town employee.

The Public Employees Fair Employment Act section of the New York Civil Service Law applies to NY, and the Federal Labor Relations Act section of the Civil Service Reform Act of 1978 applies to Fed. The New York Civil Service Law and the Civil Service Reform Act entitle both NY and Fed to representation by a duly certified collective bargaining representative. In each statute, employee entitlement to a certified collective bargaining representative is conditioned on agreements by the employee and by the union to refrain from striking and engaging in other types of concerted activity. Therefore, NY, Fed and their respective unions face possible statutory penalties for striking. Under the National Labor Relations Act, P is entitled to a duly certified collective bargaining representative, and has a right to engage in "collective concerted activity."

There is a difference in the way that the New York Civil Service Law, the Civil Service Reform Act of 1978, and the National Labor Relations Act are applied if NY, Fed, and P respectively, request union representation at a pre-charge interrogation or pre-charge investigatory interview where they are targets of a miscon-
duct investigation and their jobs are in jeopardy. For example, brooms are missing from the Any Town Municipal Building, NY’s supervisor investigates, and NY is the focus of his investigation. NY’s supervisor or another Any Town management representative would probably summon NY for a pre-charge interrogation or investigatory interview about the theft. Theft is a serious charge in the workplace, so serious that it can lead to workplace discipline such as suspension or discharge, as well as criminal penalties.

If NY is the target of an investigation into the theft of brooms from the Any Town Municipal Building, present interpretation of New York Civil Service Law prohibits NY from having a union representative present for a pre-charge investigatory interview, even if she fears that her job is in jeopardy. In contrast, P is entitled to a collective bargaining representative at such an interview if he requests it. In the same circumstances, a provision in the Federal Labor Relations Act section of the 1978 Civil Service Reform Act would entitle Fed to union representation. If NY were a public employee in one of the twelve other states with a public employee collective bargaining statute, then NY would be entitled to a union representative present on request as well. However, NY, Fed, and P would be treated the same, if questioned by the Any Town police about the theft of brooms while in police custody. Since NY would be in custody at the time of questioning, she, like Fed, P, or any interrogated person, is entitled to representation by an attorney and must receive notice of the right before the police interrogation.


19. See supra note 6 (discussing relevant cases).


22. See supra note 4; see also infra notes 226-48.

begins. Failure to warn NY about the right to counsel, or failure to give any of the other three Miranda warnings before interrogating NY, could preclude any pre-charge interrogation, self-incriminating statement that NY might make if she is later a defendant in a criminal trial for the theft. Nevertheless, if NY knowingly waives her "Miranda rights," then a prosecutor may introduce those statements.

In New York, Miranda was applied to a county employee at an investigatory interview, conducted by her county employer at her employer's offices when the interview focused on her suspected criminal activity. Under New York Civil Service Law and absent allegations of criminal activity, NY would endure her interrogation alone unless her union negotiated a collective bargaining agreement provision that provided for the presence of her union representative. Moreover, in NY's circumstances, whether or not there is a union representative at the interview, her employer may use any fruits of the pre-charge investigatory interview against her in later proceedings that review her misconduct.

Contrary to current notion in New York, entitlement to a collective bargaining representative at a pre-charge interrogation ac-

25. Id. at 467-75 (establishing that an individual is entitled to know that he has a right to remain silent, that anything said can be used against him in court, and that if he is indigent an attorney will be provided).
27. Id. at 474-76, 479.
28. See People v. Knapp, 141 Misc. 2d 517, 533 N.Y.S.2d 413 (Broome County Ct. 1988) (applying Miranda v. Arizona, 384 U.S. 436 1966). The facts are similar to the Any Town hypothetical. Broome County Social Service officials suspected that a county employee had misappropriated funds. See id. The employee's supervisor directed her to attend an "interview" at which a Social Services supervisor and county sheriff official interrogated her. Knapp, 141 Misc. 2d at 518-19, 533 N.Y.S.2d at 414. At the time of the meeting, the county investigation was focused on the employee. See id. The employee requested an opportunity to talk to someone at least twice. See id. The security official testified that he understood she meant a lawyer. Knapp, 141 Misc. 2d at 519, 533 N.Y.S.2d at 414. She was denied access to anyone other than her interrogators and she ultimately signed a prepared incriminating statement. Knapp, 141 Misc. 2d at 520, 533 N.Y.S.2d at 414. At her criminal trial, the State sought to introduce Knapp's statement. See id. The county court, citing Miranda, held that the statement should be suppressed. Knapp, 141 Misc. 2d at 525, 533 N.Y.S.2d at 418. Under New York Civil Service Law, the same employee would not be entitled to a union representative at an interview to investigate workplace misconduct if the employee is a target. See supra note 6 (providing cases which discuss this).
29. See Scarsdale Police Benevolent Ass'n, 8 P.E.R.B. ¶ 3075 (1975) (stating that a union's demand for representation at preliminary investigations is not a mandatory subject of bargaining).
cording to *Weingarten* standards is consistent with express state public policy and with the no strike provision of New York Civil Service Law. This Article will discuss the United States Supreme Court’s recognition of the importance of representation for those interrogated by law enforcement officers and employers in the private and the public sector before charges are issued. This Article will outline the facts and holding of *Weingarten*, describe its standards and underlying rationale, and discuss the existing applications of its principles to the public sector. *Weingarten* and *Miranda* will be compared to New York case law, New York State Public Employment Relations Board decisions (hereinafter “PERB”), and New York legislative history to establish that it is time for the legislature or PERB to more carefully examine the *Weingarten* principles, standards, and its existing applications to the public sector and associate *Weingarten* with New York’s Civil Service Law.

II. CUSTODIAL INTERROGATION AND REPRESENTATION — *Miranda v. Arizona*

The issue in *Miranda* was whether a confession obtained while in police custody was admissible at Miranda’s trial, given the protection against self-incrimination afforded him by the Fifth and Fourteenth Amendments. In *Miranda*, the Court, through Chief Justice Warren, examined the circumstances of a custodial interrogation. Chief Justice Warren expressed concern about the “very fact of custodial interrogation” and the potential price of self-incrimination to be paid by the interrogated. As part of a balance to the circumstances, he noted the “indispensable” presence of counsel to ameliorate the practical realities.

The interrogation on which the Court focused in *Miranda* would be analogous to one conducted by the Any Town police if NY was suspected of theft. At such an interrogation, NY may be isolated at a police station, in a police vehicle, or located in an unfamiliar place. If an inference from the circumstances suggested it, there would be a focus on her guilt. The potential for intimidation, and subjugation of NY’s will after an interrogator concludes that NY is guilty, promote a ripe atmosphere for self-incrimination.

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33. See id. at 455.
34. Id. at 455, 469-71.
35. Id. at 469.
36. Id. at 455-69.
In the Any Town hypothetical, Miranda would afford NY an opportunity for an advised choice between waiving the privilege against self-incrimination by speaking to the police or maintaining silence. During an interrogation, an attorney's presence could assist with the accuracy of NY's statements. In any event, the attorney would witness the interrogation process. The Court majority placed sufficient importance on the Miranda warnings to make them "a prerequisite to the admissibility of any statement made by a defendant." As a result, Miranda's confession obtained without the warnings was inadmissible unless the government could show that Miranda had knowingly and intelligently waived his Fifth and Fourteenth Amendment privilege. The timing and waivability of a Miranda warning have changed in the twenty-one years since Miranda was decided. Nevertheless, Miranda remains good law because advice from counsel still outweighs an incriminating statement that is the fruit of a custodial interrogation obtained in isolation.

37. See id. at 470.
38. Id. at 476.
39. Id. at 479.
40. For a discussion of recent Supreme Court decisions applying Miranda, see generally: Duckworth v. Eagan, 109 S. Ct. 2875 (1989) (holding that the police officer's statement that an attorney would be appointed "if and when [he] [went] to court" did not render Miranda warning inadequate); Patterson v. Illinois, 487 U.S. 285 (1988) (Miranda warning sufficient for post indictment questioning); Arizona v. Roberson, 486 U.S. 675 (1988) (stating that the defendant's waiver of his privilege against self-incrimination was made knowingly and intelligently within the meaning of Miranda where there was no allegation that the defendant failed to understand his basic privilege, nor was there any allegation that he misunderstood the consequences of speaking freely to law enforcement officials); Edwards v. Arizona, 451 U.S. 477, reh'g denied, 452 U.S. 973 (1988) (stating that the rule under which a suspect, who has invoked his right to counsel, is not subject to further interrogation until counsel has been made available to him, applies when a police-initiated interrogation following a suspect's request for counsel occurs in context of a separate investigation, and the fact that the officer who conducted defendant's second interrogation did not know he had requested counsel when he was arrested will not justify the failure to honor that request); Colorado v. Spring, 479 U.S. 564 (1987) (stating that the mere silence by law enforcement officials as to the subject matter of the interrogation is not "trickery" sufficient to invalidate the suspect's waiver of his Miranda rights).

Additionally see Connecticut v. Barrett, wherein defendant's invocation of the right to counsel, by refusing to make written statements without the presence of his attorney, was limited by its terms to making of written statements and did not prohibit all further discussion with police, where defendant then agreed to make oral statement. 479 U.S. 523 (1987). Defendant's limited invocation of the right to counsel did not demonstrate that he incompletely understood his rights under Miranda so as to make his limited invocation effective for all purposes. See id. The Court has also stated that coercive police activity is a necessary predicate to finding that a confession is not voluntary within the meaning of the due process clause of the Fourteenth Amendment. Colorado v. Connelly, 479 U.S. 157 (1986). In Connelly statements made by the defendant when he approached the police officer and stated that he wanted to confess to murder, and then did so after receiving his Miranda rights, could be admitted...
If either NY, Fed, or P is interrogated about the theft of brooms by their employers, at his hypothetical workplaces as targets of investigations, he is in circumstances that are analogous to a police custodial interrogation. All of the potential problems catalogued by Chief Justice Warren will exist without a public or private sector distinction. A pre-charge interrogation is usually conducted in privacy and usually is in a location that an employee does not frequent during the normal work day. Often a supervisor, the employer's representative with whom an employee has the greatest familiarity and contact in the workplace, is not the interrogator. For any employee who is suspected of misconduct, such as theft in the workplace, the isolation and privacy of an investigatory interview is as potentially coercive as is a police custodial interrogation conducted in isolation without an opportunity for counsel.

In the experience of this author as a New York public employer without violation of the Due Process clause regardless of defendant's mental health. See id. The state must prove a waiver of the Miranda rights. See id.; see also Moran v. Burbine, 475 U.S. 412 (1986) (noting that the failure of the police to inform the defendant of the efforts of his attorney, who had been retained by the defendant's sister without his knowledge, to reach him, did not deprive the defendant of his right to counsel or vitiate waiver of his Miranda rights); Wainwright v. Greenfield, 474 U.S. 284 (1986) (holding that the use of the petitioner's post-arrest, post-Miranda warnings silence as evidence of his sanity violated due process); Lanier v. South Carolina, 474 U.S. 25 (1985) (stating that a confession that may be "voluntary" for purposes of the Fifth Amendment, in the sense that Miranda warnings were given and understood, is not by itself sufficient to purge the taint of illegal arrest; in this situation, a finding of "voluntariness" for purposes of the Fifth Amendment is merely a threshold requirement for a Fourth Amendment analysis).

In Oregon v. Elstad, the Court stated that there is no presuming coercive effect where a suspect's initial inculpatory statement, though technically in violation of Miranda was voluntary, and the relevant inquiry is whether the second statement was also voluntarily made. 470 U.S. 298 (1985). Where initial statements made while the defendant was in police custody in his home were voluntary, failure to give Miranda admonitions did not bar admissibility of a station house confession made shortly thereafter and preceded by careful admonition and waiver of Miranda rights, notwithstanding failure to advise the defendant that prior statement could not be used against him. Id. It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period, and admissibility of any subsequent statement should turn solely on whether it is knowingly and voluntarily made. Id.; see also California v. Beheler, 463 U.S. 1121 (1983) (holding that Miranda warnings are not required where a suspect voluntarily comes to a police station and is allowed to leave unhindered after a brief interview); Edwards v. Arizona, 451 U.S. 477 (1981) (noting that once a suspect has invoked his right to counsel, the police may not initiate an interrogation until counsel has been made available to the suspect).

41. See People v. Knapp, 141 Misc. 2d 517, 533 N.Y.S.2d 413 (Broome County Ct. 1988).

42. See id.
representative and labor arbitrator, there are collective bargaining and labor relations reasons, beyond the potential practical problems analogous to Miranda, that compel the presence of a union representative at a pre-charge interrogation in any public or private sector workplace where there is a certified union, even though there are no labor laws or labor relations analogous to the Miranda warnings. Prior to a workplace pre-charge interrogation, an employer ordinarily has some basis for focusing suspicion on a particular employee. Whether there is an investigation in depth or no investigation at all, if NY, Fed, or P is summoned to a pre-charge interrogation, the employer is targeting the investigation. A pre-charge interrogation is at or near the final step of the employer's investigation. It is usually the employee's first formal opportunity to learn the facts and allegations that lead the employer to focus its inquiry. It is also the employee's last formal opportunity to challenge those facts and allegations, to exculpate itself, or to offer an explanation before the employer issues formal charges and prescribes a penalty.

A public or private sector employer can use the interrogation as an opportunity to assess a suspected employee's credibility. An assessment of credibility is an analysis of the employee's capacity to be believed. It is based on listening to the employee's testimony, observing the employee's demeanor, comparing it with other employee statements and documents. Credibility will be a critical factor for the employee and the Union as they decide whether to appeal the grievance.

For example, if NY, Fed, or P explained possession of the brooms credibly and plausibly, the employer could remove NY, Fed or P as the target of its investigation. Even if the employee is guilty, a credible explanation for the action could alter the proposed penalty. An explanation that is not credible can reinforce the employer's conclusion that an employee is guilty, and might cause an employer to issue misconduct charges and prescribe a penalty, such

43. The author was employed by the New York City Office of Municipal Labor Relations Legal Department from 1973-1976, as a member of the North Carolina AFL-CIO Labor Law Center Executive Board from 1976-1980, and has served as a labor arbitrator in the public sector since 1981 and the private sector since 1984.


45. See, e.g., Metropolitan Atlanta Rapid Transit Auth. AAA, Case No. 30 390 0050 88 (1988) (Baldwin, Arb.) [hereinafter MARTA]. The author thanks Melinda Wells, Esq. Counsel to the Metropolitan Atlanta Rapid Transit Authority, and Ralph Green Vice President Local 732 Amalgamated Transport Worker's, A.F.L.-C.I.O. Union for their permission to use this award.
as discharge.

If an unrepresented NY, Fed or P admits to stealing the brooms from the workplace at the pre-charge interrogation and offers no explanation, an admission without explanation could materially affect any appeal of the charge and penalty. Whatever is said at an interrogation may be used by the employer to author charges produced at later stages in the discipline appeal process for impeachment purposes.\textsuperscript{46} Such an admission might also affect the severity of the proposed penalty.

A public or private sector employee at a pre-charge interrogation faces additional jeopardy for misconduct and penalty beyond any incident or facts which focuses suspicion on him. In the workplace, insubordination is misconduct that occurs when an employee disobeys a direct order.\textsuperscript{47} Unlike the suspect in a police custodial interrogation, a public or private sector employee risks independent workplace misconduct charges and an additional penalty if he refuses to answer questions at the pre-charge interrogation.\textsuperscript{48}

In the Any Town hypothetical, if NY refused to attend a pre-charge interrogation, or if she refused the direct order of an Any Town employer representative to answer a question posed during the interrogation that she does attend, NY is insubordinate. In the same circumstances with their respective employers, Fed or P would be subject to the same charges. Because insubordination is misconduct independent of any misconduct flowing from the alleged theft of brooms, Any Town has the option to maintain charges and to prescribe a penalty for insubordination in addition to, and separate from, any charges and penalty that may flow from its investigation, even if it exonerates NY from theft.\textsuperscript{49}

\textsuperscript{46} Jackson Township, No. CO-H-87-278, 10 NPER, NJ 19109 (April 8, 1988). The employer used information at an investigatory interview to charge the employee. \textit{Id.} This information was elicited after the employer denied the employee's request for representation. \textit{Id.}

\textsuperscript{47} See MARTA, \textit{supra} note 45, at 4. “Insubordination is employee misconduct and it occurs when an employer gives a direct order and an employee refuses to obey.” \textit{Id.} “An order may be verbal or in writing, and refusals may be in writing or inferred from the employees conduct.” \textit{Id.; see also} Rockwell Int'l, 88 Lab. Arb. (BNA) 418 (1986) (Scholtz, Arb.) (discussing discharge as an appropriate penalty for insubordination).

\textsuperscript{48} The employer improperly charged an employee with insubordination for refusing to answer questions after the employer denied the employee's request for union representation when the employee reasonably believed that the meeting could result in discipline. Falls Township Case, No. PFC-86-123-E, 10 NPER, PA 18214 (Sept. 25, 1987).

\textsuperscript{49} See MARTA, \textit{supra} note 45. In MARTA the grievant committed misconduct called “Failures to Report” by absenting himself from the workplace. See \textit{id.} By the employer’s rules, “Failure to Report” for three consecutive days, was a voluntary termination. \textit{Id.} The employer contended that there were three consecutive work shifts. See \textit{id.} The arbitrator concluded that the employee was guilty of such extreme insubordination that his discharge could be sustained.
NY, Fed or P has a lot at stake if charged with theft. At worst, there is termination. Termination is a permanent blemish on an employment record. It can have an impact on subsequent employment opportunities. At best, quality and timing of wage increases and related benefits, seniority rights, promotions, work assignment’s and leave accruals, can be affected until the charges are resolved. Even if NY, Fed or P is exonerated, and lost salary and benefits are restored, there is no recovery for the period when there were no wages and benefits.

After an interrogation is completed, if the employer issues charges and proposes a penalty there is usually some process for review. An employer in the private sector and a certified union usually have a collective bargaining agreement grievance procedure to appeal the employer’s decision, with progressive steps for appeal culmi-

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51. See the following cases for examples of this. In United Food & Commercial Workers, 87-2 Lab. Arb. Awards (CCH) ¶ 8387 (1987) (Sisk, Arb.) grievances were discharged for theft on November, 1985. Their grievances were sustained and Arbitrator Henry Sisk, awarded “full back pay, full seniority and all rights and privileges appertaining thereto.” Id. The hearing was held on October 21, 1987 and arbitrator Sisk issued the award on February 10, 1987, fifteen months after the union filed grievances with the company. Id. In General Telephone, 86-2 Lab. Arb. Awards (CCH) ¶ 8556 (1986) (Collins, Arb.), Arbitrator Collins held a hearing on May 28, 1986, and issued an award on June 19, 1986 in which he reinstated the grievances, had been charged and suspended for unauthorized possession of drugs and unauthorized possession of company property. Arbitrator Collins' remedy made the grievances "whole" with respect to all wages, benefits and seniority that they lost as a result of their suspensions. Id. The award was issued almost eight months after the suspensions. Id. In Hackley Hospital, 88-1 Lab. Arb. Awards (CCH) ¶ 8164 (1987) (Frost, Arb.), a grievant was charged with theft of company property and was suspended pending investigation on January 30, 1986. He was discharged on January 31, 1986. Id. Arbitrator Elaine Frost sustained the grievance and ordered that the discharged employee, “be made whole for all lost wages and benefits, and that he be . . . reinstated with full seniority.” Id. She issued the award on August 13, 1989, after holding a hearing on June 12, 1987. See id. The award was issued more than sixteen months after the grievant's suspension. In Acme Food Markets, 87-1 Lab. Arb. Awards (CCH) ¶ 8149 (1987) (Mullin, Arb.), arbitrator Charles L. Mullin, Jr., issued an award on August 11, 1986, which reinstated an employee, and ordered that the period from the date of discharge to the date of reinstatement be treated as a suspension. Id. The date of discharge was August 31, 1985, more than eleven months earlier. Id. In Robins Air Force Base, 87-2 Lab. Arb. Awards (CCH) ¶ 8382 (1986) (King, Arb.), arbitrator Thomas King reduced a suspension to an “oral admonishment” in an award that he issued on October 29, 1986. The grievant was suspended on January 21, 1985 more than eleven months earlier. Id. Arbitrator King ordered that he "be compensated for the pay and any benefits he lost." Id. In American Bakeries Co., 87-1 Lab. Arb. Awards (CCH) ¶ 8176 (Statham, Arb.), arbitrator C. Gordon Statham also reinstated a discharged employee without loss of seniority, pay increases or benefits but without back pay. Id. The hearing was held on October 29, 1986, and arbitrator Statham issued his award on December 11, 1986, more than three months after the grievants' discharge. Id.
nating in some form of arbitration.

For all public employees, an appeal from misconduct charges is an exercise of a right to notice and an opportunity to be heard consistent with the due process clause of the Fourteenth Amendment.\textsuperscript{65} In New York, the Civil Service Law\textsuperscript{63} provides due process protection for New York public employees. As a consequence, all public employees in New York are entitled to an opportunity to author a written response to the misconduct charge(s), the presence of counsel or a certified collective bargaining representative at a hearing on the charges, and an opportunity to call witnesses \textit{after} the public employer notifies a public employee in writing that he is being charged with misconduct.\textsuperscript{64} Disciplinary action by a New York public employer may be reviewed by the New York Supreme Court, Special Term.\textsuperscript{65}

Notwithstanding the post-charge, due process Civil Service Law procedures, New York courts reject representation for a public employee like NY at any time \textit{before} she is charged with misconduct,\textsuperscript{66} even when NY faces an insubordination charge because she disobeyed a direct order to answer questions at the interrogation.\textsuperscript{67} While advice of counsel about legal rights, as opposed to mere strategic advice, is required when "a person's very livelihood may depend on the correctness of a spontaneous decision," and when the potential jeopardy to NY is not a collateral consequence of the interview,\textsuperscript{68} the requirement does not apply to a pre-charge.

\begin{footnotesize}
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\item \textsuperscript{52} See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985); Paul v. Davis, 424 U.S. 693 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972).
\item \textsuperscript{53} N.Y. CIV. SERV. LAW §§ 75-76 (McKinney 1983 & Supp. 1990).
\item \textsuperscript{54} N.Y. CIV. SERV. LAW § 75.2 (McKinney 1983).
\item \textsuperscript{55} N.Y. CIV. PRAC. L. & R. §§ 7803.3, 7804 (b) (McKinney 1981).
\item \textsuperscript{56} See, e.g., Alpert v. Greco, 73 A.D.2d 710, 711, 422 N.Y.S.2d 523, 524 (App. Div. 1979) (stating that "clearly the due process guarantees provided in the Civil Service Law [section 75] need not be extended to the preliminary investigative inquiries conducted by respondents here." (quoting Donofrio v. Hastings, 54 A.D.2d 1110, 388 N.Y.S.2d 779 (App. Div. 1976))); see also Application of Yorke, 61 Misc. 2d 794, 306 N.Y.S.2d 343 (Sup. Ct. 1969) (discussing that a teacher's statutory right to representation by counsel at a disciplinary hearing did not include a right to counsel during investigatory inquiries made by the teacher's superiors prior to the disciplinary hearing).
\item \textsuperscript{57} Donofrio, 54 A.D.2d at 1110, 388 N.Y.S.2d at 780 (holding that a police officer's right to counsel, which was guaranteed by New York Civil Service Law section 75, did not extend to preliminary investigative inquiries in disciplinary matters even though his failure to respond to his superior in a departmental inquiry concerning an altercation with a fellow officer could result in disciplinary action); see also Schwartz, \textit{Administrative Law}, 29 SYRACUSE L. REV. 15, 18-19 (1978).
\item \textsuperscript{58} May v. Shaw, 87 Misc. 2d 808, 811, 386 N.Y.S.2d 625, 628 (Sup. Ct. 1976). The \textit{May} court held that a police officer was deprived of due process of law guaranteed by Civil Service Law section 75 when he was "denied his right to the advice of counsel before" an investigation.
\end{itemize}
\end{footnotesize}
In New York, a public employer can agree to substitute its collective bargaining agreement grievance procedure for the Civil Service Law appeal process, and the procedure can require a public employee to waive all other opportunities to appeal as a prerequisite to using the procedure without offending the Civil Service Law or Fourteenth Amendment due process. Consistent with New York Civil Service Law, NY’s union could bargain away a statutory right through collective bargaining.

On the other hand, NY’s union could enhance her rights through the collective bargaining process. As part of enhancement, a New York public employer and a union could agree to permit union representation at a pre-charge interrogation. Although a post-misconduct charge hearing is available to New York public sector employees, there is no constitutional or statutory entitlement to union representation for NY at a pre-charge interrogation unless her administrative hearing concerning two separate charges of alleged misconduct which resulted in the officer’s dismissal. Id. at 812, 386 N.Y.S.2d at 628. (emphasis in original).

59. See id. at 812, 386 N.Y.S.2d at 627 (stating that as a general rule petitioner possessed no constitutional right to legal representation at a purely investigatory proceeding).

60. N.Y. CIV. SERV. LAW § 76.4 (McKinney 1983) (stating that those sections of the Civil Service Law, “relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division... [could be]... supplemented, modified or replaced by agreements negotiated between the state and an employee organization...” pursuant to the Taylor Law); see Board of Educ. v. Associated Teachers of Huntington, Inc., 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972). The school board was allowed to enter into a collective bargaining agreement providing economic benefits to school teachers even though they were not specifically authorized to do so by any statute. Id. The Court held that a school board could enter into a collective bargaining agreement containing a clause providing for arbitration of disputes relating to disciplinary action taken against tenured teachers. Id.; see also Antimoro v. States, 49 A.D.2d 6, 371 N.Y.S.2d 214 (App. Div. 1975), aff’d, 40 N.Y.2d 921, 358 N.E.2d 268, 389 N.Y.S.2d 576 (1976).

61. See infra text accompanying notes 176-180; see also Ferro v. New York City Transit Auth., 121 Misc. 2d 716, 468 N.Y.S.2d 812 (N.Y. Civ. Ct. 1983). The Ferro court upheld an imposition of suspension that was different from the statutory one in light of the option to seek review in the collective bargaining agreement. See id. The court stated that the “union was free to bargain away certain statutory rights in disciplinary actions, and the members of the union are bound by the terms of the agreement.” Id. at 718, 468 N.Y.S.2d at 814; see also Board of Educ. v. Nyquist, 62 A.D.2d 265, 404 N.Y.S.2d 710 (App. Div. 1978), modified, 48 N.Y.2d 97, 397 N.E.2d 365, 421 N.Y.S.2d 179 (1979). The Nyquist court also upheld a provision of the collective bargaining agreement for payless suspension of teachers. See id. The Nyquist court concluded that “any constitutional right to continued payment during suspension by the teacher would be waived by the collective bargaining agreement.” 62 A.D.2d at 267, 404 N.Y.S.2d at 712. For the collective bargaining provision to be upheld, it cannot be so ambiguous as to be subject to more than one interpretation. Sanders v. New York Transit Auth., 130 Misc. 2d 719, 497, N.Y.S.2d 231 (N.Y. Civ. Ct. 1983).


63. Id.
rights were enhanced through collective bargaining. While the negotiation of a grievance procedure is a mandatory item for collective bargaining, the negotiation for a union representative at a pre-charge interrogation is not.

If NY’s union files a grievance for NY pursuant to its collective bargaining agreement with Any Town, it would face an accumulation of potential back pay and benefits liability until NY’s grievance is resolved. Unless the town hires a replacement immediately, there will be one less janitor to clean the Any Town Municipal Building if NY is suspended or terminated. If there is a replacement janitor, there may only be a temporary replacement. Whether temporary or permanent, the town will have to pay the new janitor salary and benefits as well as training or orientation costs. If NY’s grievance is sustained, Any Town may have back pay liability to NY in addition to whatever pay and benefits it already has made to NY’s replacement.

If NY’s union grieves her misconduct charge and penalty, NY cannot be certain that the appeal will be sustained at any step in the grievance procedure nor can she or her union predict whether the employer’s proposed penalty will be sustained, reduced or dismissed even if an arbitrator sustains her grievance at the final step.

If NY is suspended with pay, she may lose benefits other than wages. If she is suspended without pay, she will be without wages. If NY is terminated, she does not know if an appeal will lead to reimbursement, back pay and benefits. Even if the charge is dismissed at some point in the grievance appeal process, the remedy that NY receives, if any, will not replace the income and benefits that she did not have during her days off the job unless she manages to secure other management with the same or better salary and benefits. During the grievance appeal period, NY will be ineligible for any unemployment benefits because state unemployment benefits are affected if NY is terminated or suspended without pay for misconduct.

When the alleged misconduct can result in termination, there are significant interests which raise the stakes for public and private sector employers and employees. In Weingarten, the United States Supreme Court recognized the interests and the stakes for all parties

64. Id.
66. See supra note 51 (discussing related caselaw).
67. See supra note 51 (discussing examples of this).
68. N.Y. LAB. LAW § 593.3 (McKinney 1988).
covered by the Act when it held that section 8(a)(1) of the National Labor Relations Act entitles a section 2(3) employee, like hypothetical P, to union representation at a pre-charge investigatory interview.\(^6\)

### III. Weingarten - The Facts

The J. Weingarten Company transferred employee Leura Collins from its Retail Store #2 lunch counter to its lobby lunch counter in Retail Store #98.\(^7\) When it received a report alleging that Ms. Collins was taking money from the Store #98 lunch counter cash register,\(^7\) the Company assigned one of its “Loss Prevention Specialists,”\(^7\) to conduct undercover surveillance. After two fruitless days of observing Ms. Collins, the “Specialist” revealed his presence to the store #98 store manager.\(^7\) The manager told the “Specialist” that an employee had just observed Ms. Collins place $1.00 in the cash register for a chicken order that she served in a $2.98 box.\(^7\)

Suspecting theft, the “Specialist” and the manager summoned Ms. Collins to an interrogation.\(^7\) Several times during the interrogation, she asked to speak with her own shop steward or some other union representative, and each request was refused.\(^7\)

At the interrogation, Ms. Collins explained that she packed $1.00 chicken orders in $2.98 boxes because there were no $1.00 boxes available at the lunch counter, and that she had paid the Company in full for all of the other items taken.\(^7\) Ms. Collins’ explanation was verified while she was in custody, and the “Specialist” informed her that the matter was closed.\(^7\) At that point, Ms. Collins “burst into tears and blurted out that the only thing she had ever gotten from the store without paying for it was her free lunch.”\(^7\)

Ms. Collins’ spontaneous remark caused the interrogation to resume since the two men understood that company policy precluded free lunches at all stores operating lobby lunch counters.\(^8\) The two

\(^6\) Weingarten, 420 U.S. 251, 251-68.
\(^7\) Id. at 254.
\(^7\) Id.
\(^7\) “Loss Prevention Specialists” (hereinafter “Specialists”) were J. Weingarten employees working undercover to detect shoplifting and employee dishonesty. Id.
\(^7\) Id.
\(^7\) Id.
\(^7\) Id.
\(^7\) Id. at 254-55.
\(^7\) Id. at 255.
\(^7\) Id.
\(^8\) Id. At Ms. Collins’ prior work location in Store #2, the staff ate free lunches. Id.
men closely interrogated Ms. Collins about her free lunches and she requested union representation for the second time.\(^{81}\) The manager again denied her request, and the “Specialist” authored an incriminating statement with an estimate of costs for the lunches.\(^{82}\) He asked her to sign it, but she refused.\(^{83}\)

While the two were still interrogating Ms. Collins,\(^{84}\) the manager learned that there was uncertainty about the application of Weingarten’s no free lunch policy to store #98.\(^{85}\) When neither the store manager nor the “Specialist” could ascertain whether the policy actually applied, they terminated their interrogation.\(^{86}\)

The manager asked Ms. Collins to keep the interrogation a secret.\(^{87}\) Nevertheless, she reported the events to her shop steward and other union representatives.\(^{88}\) Thereafter, the union duly filed an unfair labor practice charge against J. Weingarten, Inc.\(^{89}\) alleging that the company violated section 8(a)(1) of the National Labor Relations Act\(^{90}\) when Ms. Collins’ two requests for union representation were denied. The National Labor Relations Board (hereinafter “the Board”) concluded that the denial of union representation violated section 8(a)(1).\(^{91}\) The Fifth Circuit Court of Appeals reversed the Board,\(^{92}\) and the Supreme Court reversed the Court of Appeals.\(^{93}\)

The Court, by Justice Brennan, affirmed and adopted the Board’s findings and rationale.\(^{94}\) The Court concluded that the Company committed, “a serious violation of the employee’s individual right to engage in concerted activity by seeking the assistance of his statutory representative” when it denied the employee’s request and

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81. Id.
82. Id.
83. Id.
84. Id.
85. Id. at 256.
86. Id. at 255-56. The National Labor Relations Board found that Store #98 lobby lunch counter employees, including the manager of the department, ate free lunches and were unaware of a “no free lunch policy.” Id.
87. Id. at 256.
88. Id.
89. Id.
90. 29 U.S.C. § 158(a)(1) (1982) (forbidding section 2(2) employers from taking disciplinary actions that “interfere with, restrain or coerce” an employee’s exercise of rights guaranteed by section 7 of the NLRA).
93. Weingarten, 420 U.S. at 253.
94. Id. at 266-67
compelled her to appear unassisted.\textsuperscript{95} According to the Court, the denial diluted Ms. Collins' right to protect her job.\textsuperscript{96} Preventing Ms. Collins from protecting her job interests with the help of her union was "an unwarranted interference with her right to insist on concerted protection rather than individual self-protection against possible adverse employer action."\textsuperscript{97} In balancing the employee's statutory protection against the employer's interest in the pre-charge interrogation, the Court adopted and applied four standards applied by the Board.\textsuperscript{98}

Justice Brennan noted practical considerations for affirming the result reached by the Board. The representation was consistent with the "most fundamental purposes" of the Act.\textsuperscript{99} The presence of the union represented an assurance to other bargaining unit employees that the union would be there when they needed it,\textsuperscript{100} and union representation for an employee in jeopardy would be most useful before charges were filed.\textsuperscript{101} Input from a union representative could make the pre-charge interrogation more productive and the entire disciplinary process more efficient.\textsuperscript{102}

The company contended that union representation at the pre-charge investigatory interview was unnecessary because any mistake in the determination of guilt or innocence and penalty could be corrected in the grievance process established by the parties in their collective bargaining agreement.\textsuperscript{103} Justice Brennan dismissed the contention by noting that an employee and his union have a progressively more difficult task in vindicating the employee's innocence as the parties ascend the steps of their grievance procedure.\textsuperscript{104}

\textsuperscript{95} Id. at 256-58 (citing NLRB decisions in Quality Mfg. Co., 195 N.L.R.B. 197 (1972) and Mobil Oil Corp., 196 N.L.R.B. 1052 (1972), wherein the Boards construed section 7 to include an employee's right to refuse to be subjected to an investigatory interview without a union representative when reasonably fearing that the interview will jeopardize his job security).

\textsuperscript{96} Id. at 257 (quoting the Board in Mobil Oil Corp., 196 N.L.R.B. 1052 (1972)).

\textsuperscript{97} Id.

\textsuperscript{98} Id. at 256-59. The employee must request representation and must reasonably believe that the investigation will result in disciplinary action. Id. at 257. The exercise of the right cannot interfere with employer prerogatives. Id. at 258. An employer can investigate and allege misconduct without interviewing the employee if an employee requests union representation, and the employer is not under any statutory duty to bargain with the union representative who attends the investigatory interview. Id. at 258.

\textsuperscript{99} Id. at 261-62.

\textsuperscript{100} Id.

\textsuperscript{101} Id. at 262.

\textsuperscript{102} Id. at 263.

\textsuperscript{103} Id.

\textsuperscript{104} Id. at 264.
the cost of arbitration is calculated, progress through the appeal steps of a disciplinary grievance procedure becomes more costly, more time consuming, more adversarial, and more complex. Given the statutory mandate and consideration of the practical realities, the Court concluded that the Company violated section 8(a)(1) and section 7 of the Act when its representative denied Leura Collins’ requests for union representation.

Court consideration for the practical realities in *Weingarten* mirrors some practical Court concerns for the interrogated in *Miranda*. There are at least five facts in *Weingarten* that parallel *Miranda* and underscore the importance of a union representative at a pre-charge interrogation or pre-charge investigatory interview. The privacy of the interrogation, Ms. Collins’ isolation, the questioners and the threat to Ms. Collins’ job security contributed to an environment that caused Ms. Collins to burst into tears and “blurt out” that she received a free lunch from the company. Concern for fairness to a targeted employee in such an environment is at the heart of *Weingarten*, and the Court was similarly concerned in *Miranda*.

Justification for NLRB and judicial scrutiny of the isolated pre-charge interrogation lies in the fact that what Ms. Collins’ “blurt(ed) out” sounded like an admission of guilt and led to further

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105. *Id.* As illustrations of the extra cost of arbitration alone, Richard M. Reilly, Vice President, New England Region, American Arbitration Association, in a letter to New England Arbitrators dated March 7, 1989, reported that surveyed arbitrators in New England set their daily hearing fees from a low of $250 to a high of $600. Letter from Richard M. Reilly, Vice President, New England Region, American Arbitration Association to New England Labor Arbitration (Mar. 7, 1989). Arbitrators surveyed outside New England who scheduled arbitrations in New England had per diem rates ranging from $300 to $750 for hearings. *Id.* Thus, an arbitration in the New England Region with an arbitrator selected from the American Arbitration Association New England Regional Office could cost the parties from $250 to $700 a piece for one day of hearing and one day of study and preparation assuming that the rates for study and preparation days are the same as for hearings days, and that the parties' collective bargaining agreement mandates that they split the expenses equally. *Id.* The aforementioned range excludes splitting any transportation, lodging and meal costs billed by an arbitrator. *Id.* In a letter dated November 1, 1988, to arbitrators on the Upstate New York Region Labor Arbitration Panel, Region Vice President Deborah Brown reported a 1987 per diem fee range of $150 to $500 in the region. Letter from Deborah Brown, Vice President, New York Region, American Arbitration Association to New York Labor Arbitrators (Nov. 11, 1988). On a national scale in 1987, arbitrators on the American Arbitrations Association Labor Arbitration Board charged an average per diem fee from $407, a median per diem fee of $425, an average per diem bill of $1,180 per case and an average of $1,277 for per diem fees and all other expenses. *Id.* The author thanks Richard M. Reilly, Vice President of the American Arbitration Association, New England Region and Raymond G. Riddent, Supervisor of Case Administration, American Arbitration Association Upstate New York Region, for their permission to discuss the Reilly and Brown letters.


isolation and questioning. The goal of the resumed investigatory interview was to induce a confession for the theft of free lunches. That conduct was not the original focus of the interrogation and it had not been investigated. The fact that the “Specialist” prepared a written confession evidences his immediate conclusion that Ms. Collins was guilty of the uninvestigated conduct. What would have been the impact on Ms. Collins’ employment if she had signed the prepared confession?

The environment was ripe for Ms. Collins to agree to remain silent about her pre-charge interrogation as her interrogators requested. She was alone. She was isolated. Two requests for union representation were denied, and she had resisted signing a confession. But for Ms. Collins’ unwillingness to keep her promise to the store manager, would the episode have been reported to the company or the union? The facts suggest what can occur without union representation. The facts also suggest that the practical reality and the potential jeopardy created by the absence of union representation in a workplace pre-charge interrogation parallel the absence of counsel at a police custodial interrogation.

The federal courts and the Board have followed, and clarified, Weingarten since 1975. Nevertheless, Weingarten is still the


law when charges are issued against a person, like hypothetical em-

union representation are unnecessary once an employee requests representation at an early stage of an investigation. See TCC Center Co., 275 N.L.R.B. 604 (1985); Consolidated Casinos Corp., 266 N.L.R.B. 988 (1983).


The Weingarten rights are triggered when an employee is faced with possible disciplinary action and responds, “I would like to have someone . . . that could explain to me what is happening.” See, e.g., Gulf States Mfg., Inc., 261 N.L.R.B. 852 (1982); Appalachian Power Co., 253 N.L.R.B. 931 (1980); Southwestern Bell Tel., 251 N.L.R.B. 612 (1980); Good Hope Ref., Inc., 245 N.L.R.B. 380 (1979); Pacific Tel. & Tel. Co., 246 N.L.R.B. 1007 (1979); The Miesel Co., 237 N.L.R.B. 1192 (1978); Southwestern Bell Tel. Co., 227 N.L.R.B. 1223 (1977).

The Weingarten right of representation arises upon request by the employees. See Pacific Tel. & Tel. Co., 262 N.L.R.B. 1034 (1982); United Tech. Corp., 260 N.L.R.B. 1430 (1982); Colgate Palmolive Co., 257 N.L.R.B. 130 (1981); Texaco, Inc., 251 N.L.R.B. 633 (1980); United States Postal Serv., 252 N.L.R.B. 61 (1980); Climax Molybdenum Co., 227 N.L.R.B. 1189 (1977), enf. denied, 584 F.2d 360 (10th Cir. 1978). When a representation request is made, it does not have to be repeated. See id. Once a request is made the employer must either: (1) grant the request; (2) stop the interview; or (3) give the employee a choice between continuing the interview without union representation or dispensing with the interview. See Purolator Prod., Inc., 270 N.L.R.B. 694 (1984); Northwest Eng'r Co., 265 N.L.R.B. 190 (1982); Kahn's and Co., 253 N.L.R.B. 25 (1980); Stewart-Warner Corp., 253 N.L.R.B. 136 (1980); United States Steel Corp., 253 N.L.R.B. 593 (1980); Lennox Indus., Inc., 244 N.L.R.B. 607 (1979).


Employees are not entitled to have a union representative at a meeting if the employee has been assured that the meeting is not a disciplinary investigation. See Bridgeport Hosp., 265 N.L.R.B. 421 (1982); I.L.G.W.U. v. Quality Mfg. Co., 420 US 276 (1975) (reaffirming and upholding Weingarten).

An employee has no right to representation if the employer convenes a meeting solely to inform the employee of a previously made disciplinary decision. See Axelson, Inc., 285 N.L.R.B. No. 5 (1987); Baton Rouge Water Works Co., 246 N.L.R.B. 995 (1979); Texaco, Inc., 246 N.L.R.B. 1021 (1979). The Weingarten right does not extend to include the right to consult with the union representative before the investigatory interview on company time. See Climax Molybdenum, 227 N.L.R.B. 1189 (1977), enf. denied, 584 F.2d 360 (10th Cir 1978).
ployee P, when P meets the Weingarten standards, and when P is represented by a Union and is the target of an investigation.\textsuperscript{110}

Weingarten presently applies to federal government employees. Congress codified Weingarten in the Federal Labor Relations Act.\textsuperscript{111} Section 7114 (a)(2)(B) of that Act requires each federal agency to provide notice of the statutory right to union representation if the employee reasonably believes that the examination will result in a disciplinary action, and the employee requests representation.\textsuperscript{112} Thus, Fed is entitled to be notified that he may have a union representative present in our hypothetical circumstances by statute. Twelve states (California, Connecticut, Florida, Iowa, Maine, Massachusetts, Michigan, New Jersey, Pennsylvania, Vermont, Washington and Wisconsin) similarly apply Weingarten to their public employees in the hypothetical circumstances.\textsuperscript{113}

The Weingarten right includes the right to prior consultation with the union representative. Climax Molybdenum Co., 227 N.L.R.B. 1189 (1977), enf. denied, 584 F.2d 360 (10th Cir. 1978). Furthermore, the employer must give the employee prior knowledge of the topic of the proposed investigatory interview. See Pacific Tel. & Tel. Co., 262 N.L.R.B. 1048, 1049 (1982). However, the NLRB has held that the employer "does not have to reveal his case, the information it has obtained or the specifics of the misconduct." Id.

The employer does not have to provide the best representative possible. Where representation is available, an employee may not insist on a union representative if a fellow employee attends and participates competently in the investigatory interview. See Crown Zellerbach, 239 N.L.R.B. 1124 (1978).


112. Id.; cf. supra note 96 (citing a statement by the Board in Mobil Oil Corp., 196 N.L.R.B. 1052 (1972)).

113. See Personnel Bd., 97 Cal. App. 3d 994, 159 Cal. Rptr. 222 (Ct. App. 1979) (holding that a state employee has a right to union representation at a meeting with his superiors, where the meeting is held to investigate facts that support disciplinary action); Social Workers' Union v. Alameda County Welfare Dep't, 11 Cal. 3d, 521 P.2d 453, 113 Cal. Rptr. 461 (1974) (where a public employee's right to union representation includes the right to have a union representative present at a meeting with an employer, and where the employee reasonably fears that his employer may take adverse action against him as a result of union related conduct); see also City of Marion v. Weitenhagen, 361 N.W.2d 323 (Iowa Ct. App. 1984)(where city police officers should have been allowed to have a union representative present at an internal disciplinary investigation regarding alleged misconduct); City of Clearwater v. Lewis, 404 So. 2d 1156 (Fla. Dist. Ct. App. 1981) (where a city employee was allowed to have a union representative present at a meeting in which he was given the option of resigning or being dismissed, because this decision could affect his substantial rights, and a union representative would be more capable of helping the employee make a knowledgeable and informed decision); infra note 226 and accompanying text. But see Swiger v. Civil Serv. Comm'r, 365 S.E.2d 797 (1987) (where a state correction officer had no statutory right to have a union representation present at a meeting with his superior, and where the employee reasonably feared that his employer may take adverse action against him as a result of union related conduct).
IV. **Weingarten, and New York Public Employees**

The New York courts and the New York Public Employment Relations Board have not yet applied Weingarten to New York public employees. Therefore, pursuant to New York law and absent a collective bargaining clause mandating union representation, an Any Town representative can interrogate NY without union representation and before Any Town issues any charges. NY's statements at the interrogation can be used against NY if she appeals the charges and penalty.

**A. Tale of Disassociation**

In 1967, eight years before the Supreme Court decided Weingarten, the New York Legislature repealed the Condon-Wadlin Act and at the same time, amended New York Civil Service Law to add Article 14, which is the Public Employees Fair Employment Act (hereinafter “the Taylor Law”). In Article 14 the legislature for representative present at a pre-disciplinary meeting with his employer, and this was not considered an unfair labor practice or denial of due process; Metropolitan Dade County v. Dade County Employees, 376 So. 2d 1206 (Fla. Dist. Ct. App. 1979) (where the Public Employee Relations Act did not authorize lay union representation to county employees bringing civil service appeals to a hearing officer acting under the county code); Cislo v. City of Shelton, 35 Conn. Supp. 645, 405 A.2d 84 (1978) (where municipal employees dismissed for making political contributions were not entitled to grievance procedures under their collective bargaining agreement in instances where there were municipal charter provisions concerning political activity by municipal employees).

114. See supra note 6 and accompanying text.


116. Article 14 is popularly known as the Taylor Law. It derives its name from the late Dr. George L. Taylor, who in 1966 was Harnwell Professor of Labor Relations at the University of Pennsylvania's Wharton School of Business. See Court Opens Way to Suits Seeking to Punish, N.Y. Times, Jan. 22, 1966, at A1, col. 3; Rockefeller Seeks New Way to Curb Municipal Strikes, N.Y. Times, Jan. 16, 1966, at A1, col. 1 (noting that Dr. Taylor chaired a five member panel appointed by Governor Nelson A. Rockefeller after the 1966 New York City Transit Strike); see also Public Papers of Nelson A. Rockefeller, 1966, at 767 (noting the appointment of a special panel to make legislative proposals for protecting the public against the disruption of government services by illegal strikes); Rockefeller Seeks New Way to Curb Municipal Strikes, N.Y. Times, Jan. 16, 1966, at A1, col. 1 (stating that Governor Rockefeller has realized that it would be difficult to formulate new legislation that would correct the State's Condon-Wadlin Law, which prohibits strikes by public employees who are threatened with dismissal); Transit Strike Accord is Reached; Service is Expected to Resume Today, N.Y. Times, Jan. 13, 1966, at A1, col. 7; Transit Strike Apparently on; Lindsay on First Day in Office, Outlines an Emergency Plan, N.Y. Times, Jan. 1, 1966, at A11, col. 8. See generally Collins, Labor Relations Law, 19 SYRACUSE L. REV. 308 (1968) The Condon-Wadlin Act was law for only twenty years. Id. Professor Collins described the Condon-Wodlin Act as “a remarkable dragon at law but a most embarrassing paper tiger in labor relations fact.” Id.

On April 1, 1967, Bill 4639, was reported from New York’s Senate Rules Committee on Labor Relations and passed in the State Senate on its third reading under Governor Rockefeller-
the first time established a dual state policy "to promote harmonious and cooperative relationships between government and its employees and to . . . assure . . . the orderly and uninterrupted operations and function of government." The Statement of Policy for the Taylor Law specified the best methods to effectuate both these goals. To achieve the first goal, the Legislature protects the public employee's right to form, join or participate in employee organizations or to refrain from those activities.

Public employees are allowed to be represented by a certified union, and public employers and public employees are encouraged to specify practices that are repugnant to the Taylor Law. The Legislature considers an employer's practices to be improper if his actions "interfere with, restrain or coerce public employees in the exercise of their rights . . . for the purposes of depriving them of such rights."

In implementing the Taylor Law, the Legislature established procedures and standards for union certification. The Legislature's message of necessity. See Collins, supra, at 309. On the same day, the Bill was sponsored by the Assembly Rules Committee. Id. The Bill also passed in the Assembly under the Governor's message of necessity. Id. On April 2, 1967, the proposed legislation was transmitted to Governor Rockefeller to be signed into law. Id. On April 21, 1967, Article 14 commonly known as the Taylor Law became part of New York Civil Service Law. Id.; see also Governor Signs New State Law to Curb Public Employee Strikes, N.Y. Times, Apr. 22, 1967, at A19, col. 3; infra notes 167-69.

118. The goals of Article 14 can best be achieved by:
   (a) granting to public employees the right of organization and representation, (b) requiring the state, local governments and other political subdivisions to negotiate with, and enter into written agreements with employee organizations representing public employees which have been certified or recognized, (c) encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes, (d) creating a public employment relations board to assist in resolving disputes between public employees and public employers, and (e) continuing the prohibition against strikes by public employees and providing remedies for violations of such prohibition.

122. N.Y. Civ. Serv. Law § 209-a(1)(g) (McKinney 1983).
123. See N.Y. Civ. Serv. Law § 204 (McKinney 1983 & Supp. 1990) (stating that public employers are empowered to recognize and certify employee collective bargaining organizations); N.Y. Civ. Serv. Law § 206 (McKinney 1983) (stating that local governments are empowered to establish procedures to resolve disputes concerning government employee organizations); N.Y. Civ. Serv. Law § 207 (McKinney 1983) (stating that disputes over representation status, the board or government defines the appropriate employer — employee negotiating units based on several factors); see also N.Y. Civ. Serv. Law § 208 (McKinney 1983 & Supp. 1990) (stating that public employers shall extend certified or recognized rights to public employees); N.Y. Civ. Serv. Law § 209 (McKinney 1983) (setting terms for the resolution of
also established a hierarchy of penalties, to be imposed on striking employees and a process for penalizing unions that strike to meet its second policy goal.

The Taylor Law draws heavily from the National Labor Relations Act. However, a primary difference between the National Labor Relations Act and the Taylor Law is that Congress protects concerted employee activity if it is for the mutual aid and protection of fellow employees. Among the protected concerted activities is the employee’s right to strike.

Section 7 of the National Labor Relations Act contains language that allows private employees “to engage in ... concerted activities for the purpose of ... mutual aid and protection” (hereinafter referred to as “the language”) and which is absent from the Taylor Law. The New York Legislature made no reference to concerted activity or mutual aid and protection in the Taylor Law. A reason for this omission is to achieve the second legislative goal.

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disputes that occur in the course of collective bargaining or if impasse occurs).

124. See N.Y. CIV. SERV. LAW § 200(e) (McKinney 1983) (establishing remedies for employee strike violations); see also N.Y. CIV. SERV. LAW § 210 (McKinney 1983 & Supp. 1990) (stating that removal or other disciplinary action can be taken by the public employer against the employee; union penalties against the employer include payroll deductions of an amount equal to twice the employee’s daily rate of pay, for each day that he strikes).

125. See N.Y. CIV. SERV. LAW § 210(3) (McKinney 1983) (stating employee organizations can be penalized by a forfeiture of their rights on fines imposed, where it can be shown that the employee organization engaged, caused, instigated, encouraged, or condoned a strike).


127. Compare 29 U.S.C. § 157 (1982) with Helsby, 21 N.Y.2d 541, 236 N.E.2d 481, 289 N.Y.S.2d 203 (1977) (noting that to distinguish the differences between the Taylor Law and the National Labor Relations Act, the court must look to the language of each to determine whether the intent of the Taylor Law is to be broader or more restrictive); see also Rosen, 72 N.Y.2d 42, 236 N.E.2d 25, 530 N.Y.S.2d 534 (1988) (stating that the New York Legislature omitted the term “concerted activity” from the Taylor Law, thus not intending to extend the same broad range of protected employee activity as the National Labor Relations Act).

128. The legislative protection of strikes and other concerted collective activity resulted from late 19th and early 20th century judicial intervention into these activities. See e.g. duplex Printing Press v. Deering, 254 U.S. 443 (1921); Loewe v. Lawlor, 208 U.S. 274 (1908); Plant v. Woods, 176 Mass. 492, 1011 (1900); Vegelahn v. Guntner, 176 Mass. 492, 44 N.E. 1017 (1896).


131. The Taylor Law in pertinent part states:

The legislature of the State of New York declares that it is the public policy of
To prevent public employees from striking, the Legislature established procedures that attempt to resolve employee strikes.\footnote{132}

Since one of the express legislative goals in the Taylor Law is for public employees to deliver uninterrupted service to the public,\footnote{133} and since section 8(a)(1) of the National Labor Relations Act makes it an unfair labor practice for an employer to interfere with an employee's right to engage in concerted activity for mutual aid and protection,\footnote{134} one could easily conclude that \textit{Weingarten} should not apply to public employees in New York. To date, New York courts and PERB decisions have reached that conclusion.

PERB first rejected an opportunity to apply \textit{Weingarten} to New York's public employees in \textit{City of New York, Department of Investigations and Social Service Employees Union Local 371}, (hereinafter "City of New York").\footnote{135} In \textit{City of New York}, the City Department of Investigations was probing allegedly illegal and unethical conduct in the negotiation of a proposed City Department of Social Services lease.\footnote{136} Sanford Rifkin, a New York City Department of Social Services employee who had participated in the negotiation of the lease went to an "investigatory interview" at the direction of the Department of Social Services.\footnote{137}

Rifkin went to the interview accompanied by his union repre-
sentative and a union attorney. The Department of Investigation examining attorney assigned to the interview was willing to permit the union attorney to attend the investigatory interview with Rifkin, but he refused to admit Rifkin's union representative. Initially, Rifkin refused to participate in the interview. The examining attorney told Rifkin that he would not conduct the interview if Rifkin insisted on the presence of his union representative. Rifkin, concerned with media publicity regarding his role in the investigatory transaction, feared disciplinary action if he refused to attend the interview. After Rifkin learned that the Department would pursue its investigation whether or not the examining attorney conducted the interview, he submitted to questioning with his union attorney present but without his union representative.

The union subsequently filed an Improper Employer Practice Charge with PERB alleging that the rejection of Rifkin’s request for the presence of his union grievance representative at the investigatory interview violated New York Civil Service Law §§ 209-a(1)(a), (b) and (c) of the Taylor Law, and that Weingarten should be applied to these circumstances.

The analogy to Weingarten was appropriate because Rifkin feared disciplinary action and publicity arising from the Department’s probe. In requesting the presence of his union representative, Rifkin was attempting to exercise his right to answer questions with his union grievance representative’s help. Rifkin simply wanted to protect against what he perceived to be potential jeopardy to his job and potential adverse publicity. He specifically requested that his union representative be present, and the Department of Investigation’s examining attorney told Rifkin that the investigation would proceed whether or not Rifkin was interviewed. Given the readily apparent similarities to Weingarten, the analogy was imminently reasonable and appropriate. Therefore, the general rule of Weingarten should have been applied to the Rifkin case.

Since a union attorney accompanied Rifkin to his interview, PERB’s hearing officer found that Rifkin participated in the investigation voluntarily and with union advice and representation. The hearing officer concluded that there was no anti-union animus, in-

138. Id.
139. Id.
140. Id.
141. Id.
142. 9 P.E.R.B. ¶ 3047, at 3080.
143. Id. at 3079-80.
timidation or coercion of Rifkin's § 209 rights and dismissed the charge, therefore, Rifkin was never forced to submit to the interview without a union grievance representative.  

Though he was not bound to apply Weingarten, the hearing officer found that the general rule of Weingarten was applicable. The hearing officer applied Weingarten since he found that it was "proper to draw from the vast private sector experience those analogies compatible with the public sector."

The union appealed the dismissal of the charges, and the City appealed the hearing officer's application of the general rule of Weingarten. PERB affirmed the dismissal and disassociated itself from the hearing officer's conclusion that Weingarten applied. PERB noted that the concerted language of section 7, on which the Court based Weingarten, was not present in the Taylor Law. In its opinion, PERB recalled that the presence of a union representative at an investigatory interview was not a mandatory subject for collective bargaining. In any event, PERB reasoned that the presence of the union's attorney dispelled any anti-union animus. The union appealed.

The New York Appellate Division, First Department, affirmed the dismissal and PERB's "disassociation" from Weingarten on three grounds. First, the court distinguished between a public sector and private sector employee. Relying on section 209-(a)(3) of the Taylor Law, the court then pointed to the relationship of the National Labor Relations Act's section 7 concerted protected activity to Weingarten and noted that the Taylor Law proscription against strikes precluded mutual aid and protection on the basis of concerted activity. Second, the court concluded that New York Civil Service Law section 75 "affords public employees more protection throughout the processes of investigation and disciplinary proceedings than the private processes noted in Weingarten."

Finally, the Appellate

144. Id.; see also 9 P.E.R.B. ¶ 4509, at 4533.
145. 9 P.E.R.B. ¶ 4509, at 4533.
146. 9 P.E.R.B. ¶ 3047.
147. Id.
148. Id. at 3080.
150. 9 P.E.R.B. ¶ 3047.
152. Id.
153. Id. at 560, 400 N.Y.S.2d at 822.
154. Id.
155. Id.
Division deferred to PERB and ruled that it would not substitute its judgment for a PERB decision where that decision contained a statutory interpretation that was "legally permissible." There is no question that PERB’s conclusion was legally permissible, but the facts before PERB’s hearing officer and the first two bases for affirming the PERB decision deserve closer examination.

B. No Disassociation on the Facts

City of New York, though facially similar to Weingarten is nevertheless distinguishable. City of New York does not provide direction to conclude that Weingarten should be “disassociated” from New York public employees (like the hypothetical janitor NY). In fact, even if Weingarten controlled the result, Rifkin’s charge would be dismissed.

In City of New York, Rifkin actually had a union representative at the interview. The union attorney’s presence served as the functional equivalent of a union grievance representative. Although he was not Rifkin’s actual union grievance representative, he was the union’s attorney. Thus, Rifkin suffered no dilution of his ability to have the union representative present to help him protect his job interest at the investigatory interview. Rifkin simply was not allowed to have the union representative that he wanted present. The decisions subsequent to Weingarten establish that under similar circumstances a section 8(a)(1) charge would be dismissed.

The inquiry by the Department of Investigations was focused on a Department of Social Services real estate transaction, not on Rifkin individually. On the other hand, in Weingarten Ms. Collins (like NY in the hypothetical) was the focus of suspicion and the target of an undercover investigation and interrogation. Additionally, the Department’s investigatory interview was about the transaction and not a pre-charge investigatory interview that focused on a suspect. In sum, the purpose of the investigatory interview in City of

156. See West Irondequoit Teachers Ass’n v. Helsby, 35 N.Y.2d 46, 315 N.E.2d 775, 358 N.Y.S.2d 720 (1974), cited with approval in, Sperling, 60 A.D.2d at 559, 400 N.Y.S.2d at 821. In Helsby, the Court of Appeals stated:

So long as PERB’s interpretation is legally permissible and so long as there is no breach of constitutional rights and protections, the courts have no powers to substitute another interpretation on the strength of what the NLRB or the federal courts might do in the same or a similar situation.

35 N.Y.2d at 50, 358 N.Y.S.2d at 722; see also Murphy, Labor Relations Law, 30 SYRACUSE L. REV. 129, 147 (1979).


New York was different from the purpose in Weingarten.

It is not clear whether the Department of Investigations had the authority to charge or even to penalize Rifkin's misconduct as the J. Weingarten Company did, or Any Town, New York would in our hypothetical. By the authority of Chapter 34 of the New York City Charter, the Department of Investigations was established to probe and refer evidence of criminal misconduct, by city employees, in City transactions. The Department only investigated criminal misconduct and performed no labor relations role vis-a-vis Rifkin. Although Collins' activity may have suggested criminal activity, nothing in the opinion of the Board's hearing officer, the Board, the Fifth Circuit Court of Appeals, or the United States Supreme Court suggests that the actions taken by the Weingarten "Loss Prevention Specialist" and store manager were motivated by anything other than concern that Collins was violating Company policy.

That is also true for hypothetical janitor NY. In Weingarten, the Company manager supervised Collins just as an Any Town supervisor would supervise Municipal Building cleaning and maintenance. In City of New York, although the Department of Social Services had supervisory responsibility for Rifkin, the Department of Social Services did not interrogate Rifkin as the J. Weingarten Company did or Any Town would; there is no indication in the decision that the Department of Social Services ever considered or issued misconduct charges against Rifkin, even though Rifkin may have anticipated them. In Weingarten, the Company did consider charges. In our hypothetical, Any Town would consider charges.

Thus, Rifkin's circumstances in City of New York are so factually distinguishable from Leura Collins' circumstances in Weingarten that PERB would have been compelled to dismiss Rifkin's improper employer practice charge, even if it had applied Weingarten wholesale. In sum, PERB and the Appellate Division "dissociated" Weingarten from New York's public employees in a case where an employee had no right to union representation under Weingarten standards.

159. New York City Charter, Chapter 34 §§ 801-807 (1986).
160. Weingarten, 420 U.S. at 254-56.
161. See id.
163. Weingarten, 420 U.S. at 255.
C. City of New York, Sperling and Taylor Law Legislative History

Although the City of New York and Sperling analyses appears inexorable at first blush, a careful review of the Taylor Law and its legislative history support the conclusion that PERB should have applied Weingarten. The Condon-Wadlin Act (hereinafter "Condon-Wadlin") preceded the Taylor Law.\footnote{164} By the provisions of Condon-Wadlin, a New York public employer could fire a public employee if it was determined that the employee was striking.\footnote{165} Though the Condon-Wadlin penalty may have been considered draconian, the Court of Appeals in Dimaggio v. Brown pointed out that the penalty was enforced twice its twenty-two-year life, despite numerous public employee strikes.\footnote{166} There was no recognition of public employee collective bargaining and no individual protection from public employer attempts to intimidate, coerce or restrain a public employee seeking to be represented by a collective bargaining representative in Condon-Wadlin.

The late Governor Nelson A. Rockefeller began the alteration of New York public policy when he appointed the Governor's Committee on Public Employee Relations\footnote{167} and later signed legislation

\footnote{164. N.Y. CIV. SERV. LAW § 108 (McKinney 1963) (repealed 1967). The Taylor Commission, in its final report to Governor Rockefeller, concluded that the Condon-Wadlin Act should be repealed. See supra note 119; see also State Panel Assoc. for Replacement of Condon-Wadlin, N.Y. Times, Apr. 8, 1967, at A1, col 1; supra note 109 (where the Governor concluded that the Condon-Wadlin Act should be repealed).

The trouble for the legislature was that it could not agree on the formation of a Commission to study the problem of public employee relations or a bill to address it. In 1966, the State Senate proposed Bill 806 and the State Assembly proposed Bill 1528. The Senate and Assembly bills, sponsored by Senator Anthony Giuffe and Assemblyman Warren J. Sinsheimer, respectively charged the Commission to "study law pertaining to labor relations between governmental and quasi-governmental bodies and employees thereof, . . . [and] . . . to determine effectiveness of current laws dealing with strikes." 1966 N.Y. LAWS 77, 616. A Commission was formed due to the proposed bills. Hanslowe, Labor Relations Law, 18 SYRACUSE L. REV. 247, 253-54 (1966-67). Three members of the Commission were appointed by the Governor, three by the Assembly and three by the Senate. Dr. Taylor was one of the three members appointed by the late Governor Nelson Rockefeller. Id. In 1965 and 1966, bills proposing alternatives to Condon-Wadlin were introduced in the State Senate and Assembly, but none survived. Id.

165. See N.Y. CIV. SERV. LAW § 108.4 (McKinney 1963) (repealed 1967) (stating that any public employee who was found striking would have his appointment or employment abandoned and terminated); Dimaggio v. Brown, 19 N.Y.2d 283, 225 N.E.2d 871, 279 N.Y.S.2d 161 (noting that the termination of employment had only been enforced twice in the statute's twenty-two-year life, despite numerous public employee strikes).


167. See Rockefeller Bill Asks Union Curbs, N.Y. Times, May 6, 1966, at A1, col. 2 (discussing the proposed penalties for unions responsible for public employee strikes, including
that became the Taylor Law,\(^{168}\) based on proposals contained in the Committee's final report.\(^{169}\) With a mandate to make legislative proposals for protecting the public against *disruption* (emphasis added) of vital public services by illegal strikes, while at the same time protecting the rights of public employees\(^{170}\) the Governor's Committee proposed that Condon-Wadlin be replaced by a statute which would:

(a) grant to public employees the right of organization and representation, (b) empower the state, local governments and other political subdivisions to recognize, negotiate with, and enter into written agreements with employee organizations representing public employees, (c) create a Public Employment Relations Board to assist in resolving disputes between public employees and public employers; and (d) continue the prohibition against strikes by public employees and provide remedies for violations of such prohibition.\(^{171}\)

The Governor's Committee recognized that it was taking a "marked[ly] contrast[ing]" approach, but they noted that the Condon-Wadlin approach to maintaining public service "ha[d] not been successful."\(^{172}\) The Committee acknowledged "widespread realization" that, "protection of the public from strikes in public services require[d] the designation of other ways and means for dealing with claims of public employees for equitable treatment."\(^{173}\)

Although the Committee recommended an approach in "marked contrast to Condon-Wadlin," it also concluded that the New York policy against public employee strikes should continue, and that the Legislature should make the prohibition explicit and punishable.\(^{174}\) The Committee compared the strike and the employee's countervailing economic weapons in the private sector with the employer-employee structure in government, and they were "convinced that the strike must not be used in the public service."\(^{175}\) In its only use of a synonym for the word strike, the Report used the
decertification and limitless court fines).

168. See Governor Plans Own Strike Bill, N.Y. Times, May 5, 1966, at A1, col. 5 (stating that the proposed statute would emphasize improving collective bargaining machinery and would shift the burden of strike penalties from the government workers to their unions).
169. See GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, FINAL REPORT (1966).
170. Id. at 9.
171. Id. at 6.
172. Id. at 42.
173. Id. at 9.
174. Id. at 6, 14-17, 18, 41-44.
175. Id. at 14-17, 41-42.
The Report counselled a fundamental change in New York public policy with respect to public employees when it concluded that New York public employees ought to be entitled to union representation and collective bargaining. Although the Report recommended that strikes be prohibited, there was no express or implied limitation on concerted activity for mutual aid or protection so long as the activity is an expression of an employee organization, is consistent with the goal to resolve disputes peacefully, and is not a strike or work stoppage.

By permitting a right to employee representation and protecting individual assertions of that right, and in adopting and codifying the Committee's final recommendations, Governor Rockefeller and the New York Legislature acquiesced to some concerted activity for mutual aid and protection. While the activity does not include striking or work stoppages, it certainly includes the ability to work with or for a union without fear of reprisal, and the ability to seek advice from a union on matters affecting an employee's interest without employer interference. At a pre-charge investigatory interview or pre-charge interrogation, the latter is all that an employee like hypothetical janitor NY seeks, and that is precisely what Leura Collins sought in Weingarten.

The Committee concluded that a shift in New York public policy away from Condon-Wadlin was clearly necessary. The Taylor Law represents codification of that conclusion and a policy direction that at least raises questions about whether Weingarten is as inconsistent and distinguishable from the Taylor Law as heretofore claimed. Given the New York public policy shift, one should not conclude that the absence of "the language" from the Taylor Law automatically disassociates the type of concerted activity for mutual aid and protection attempted by Leura Collins simply because "the language" is absent from the Taylor Law. The broad Taylor Law definition of strike established what the legislature determined to be those disruptive actions that offend its second policy goal, to assure

176. Id. at 15.
177. See generally id.
178. Id.
uninterrupted government service.\textsuperscript{181} When the concerted activity does not interrupt government service, a concerted activity for mutual aid and protection is not necessarily in conflict with the Taylor law.\textsuperscript{182} Moreover if an activity promotes harmony and cooperation between New York public employers and employees, secures resolution of disputes without resort to strikes, and is an assertion of an individual's right to representation without intimidation, coercion or restraint,\textsuperscript{183} it should be protected by the Taylor Law. In fact, any public employee organization activity fitting the just described contours of New York's public policy as expressed in the Taylor Law should be protected whether or not "the language" is in the statute. Hypothetical janitor NY effectively illustrates this point.

If NY requests union representation at her pre-charge interrogation, she is attempting to use her employee organization and seeking "to act collectively to protect . . . job interests . . . against possible adverse employer action."\textsuperscript{184} Seeking job protection through use of union representation is not automatically at odds with the Governor's Committee Final Report or the Taylor Law so that the absence of "the language" would conclusively preclude application of \textit{Weingarten}, or warrant "disassociation" from its principles or standards.

The prohibition against public employee strikes in New York does not necessarily demand disassociation either. The Committee, Governor Rockefeller, and the New York Legislature recognized some mutual aid and protection when the Legislature declared that its policy would be best effectuated by "granting to public employees the right of organization and representation."\textsuperscript{185} Even though the breadth of that recognition is narrowed by prohibiting strikes, the kind and quality of concerted activity that is protected in \textit{Weingarten} is not prohibited by the legislative goal to assure orderly and uninterrupted operations and functions of government, nor is it in conflict with that goal.\textsuperscript{186}

Strikes and work stoppages are not the linchpin of \textit{Weingarten}. Justice Brennan refers to the right to strike once in the entire seventeen page \textit{Weingarten} opinion.\textsuperscript{187} In the opinion, Justice Brennan

\textsuperscript{182} N.Y. CIV. SERV. LAW § 200 (McKinney 1983).
\textsuperscript{183} Id.
\textsuperscript{184} \textit{Weingarten}, 420 U.S. at 257 (quoting Mobil Oil Corp., 196 N.L.R.B. 1052 (1972)).
\textsuperscript{185} N.Y. CIV. SERV. LAW § 200 (McKinney 1983); see also N.Y. CIV. SERV. LAW §§ 202, 203 (McKinney 1983).
\textsuperscript{186} N.Y. CIV. SERV. LAW § 200 (McKinney 1983).
\textsuperscript{187} \textit{See Weingarten}, 420 U.S. at 261.
quotes from *Houston Insulation Contractors Association v. NLRB*,\(^{188}\) in order to draw a parallel between the quality and importance of concerted activity for mutual aid and protection in *Weingarten*, and the quality and importance of concerted activity when employees strike to support a co-worker's grievance.\(^{189}\) The drawing of a parallel does not suggest that union representation at an interrogation cannot apply where striking is prohibited, nor does it suggest that striking is the sine qua non for all employee activity in furtherance of mutual aid and protection.

No analogies exist to the strike in *Houston Contractors Association* and "the language"\(^ {190}\) under the Taylor Law, but the absence of an analogy does not preclude applying *Weingarten* to New York's public employees. The inquiry centers around whether the association of *Weingarten* to circumstances like those of hypothetical janitor NY is consistent with New York public policy as expressed in the Taylor law. The fact that there is no analogy should not be the controlling factor. Nevertheless, the New York Appellate Division and PERB permit the absence of analogy to control, without considering the consistent themes between *Weingarten* and those dual policy goals and standards proposed by the Governor's Committee's Report and established by the Taylor Law.

The question to address is not what words the New York Legislature left out, but whether the Taylor Law's dual public policy goals are better effectuated by: (1) precluding a public employee's opportunity to be represented by his certified union representative at a pre-charge interrogation unless a collective bargaining provision exists, or (2) entitling New York's public employees to union grievance representation according to *Weingarten*. The Taylor Law, the facts, and the interests at stake suggest that the goals are best effectuated by associating the general rule of *Weingarten* as PERB's own hearing officer concluded thirteen years ago.

**D. No Disassociation in the Law**

In *Sperling*, the Appellate Division noted that public employees are "afford[ed] . . . more protection throughout the processes of investigation and disciplinary proceedings than the private processes

\(^{188}\) *Weingarten*, 420 U.S. at 261; *Houston Insulation Contractors Ass'n v. NLRB*, 386 U.S. 664, 668-69 (1967) (quoting NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505-06 (2d Cir. 1942)).

\(^{189}\) *Weingarten*, 420 U.S. at 261.

\(^{190}\) *Houston Insulation Contractors Ass'n*, 386 U.S. 664.
noted in *Weingarten*.

The statement is correct to the extent that the Fourteenth Amendment of the U.S. Constitution and Article V, sections 75 and 76 of the New York Civil Service Law provide notice and an opportunity for NY to appeal after there is a misconduct charge and penalty. Article 76 can provide an opportunity for the enhancement of those entitlements through collective bargaining.

A private sector employee like hypothetical janitor P does not have post-charge constitutional protections. There is statutory protection to the extent that employer conduct is measured against the unfair labor practices of the NLRA. If no collective bargaining agreement and no unfair labor practice exist, then P could appeal provided that the cleaning service company had an internal appeal process. Alternatively, P could pursue a remedy under the common law principles of wrongful discharge. A wrongful discharge complaint may be an opportunity to redress termination through the judicial process, but it is not the kind or quality of post-charge review that public employees NY and Fed enjoy under the Fourteenth Amendment and Federal or State civil service law.

According to PERB, opportunity for union representation at a pre-charge interrogation for New York public employees is qualified, even if it is negotiated into a collective bargaining agreement. In *Scarsdale Police Benevolent Association, Inc.*, PERB ruled that a provision for union representation at an interrogation on request is a non-mandatory subject for negotiations. In *New Paltz Central School District*, PERB reiterated its *Scarsdale* decision and voided a *Weingarten* collective bargaining provision that “improperly interfered with [the] district’s right to conduct . . . [preliminary] investigations.”

199. Id.
201. Id. at 4618.
The Appellate Division asserts that protection is available only if the collective bargaining agreement contains the non-mandatory subject, and circumstances exist where the provision will improperly interfere with the public employer's right to conduct "preliminary investigatory interviews" even if it exists. Clearly, the hypothetical janitor NY would enjoy as good a position as Leura Collins had with respect to appealing a charge and penalty. NY can rely on the U.S. Constitution and New York Civil Service Law for notice, a right to representation, and an opportunity to be heard. However, when NY is at a pre-charge interrogation, her position is inferior to Leura Collins' position unless her union negotiated a provision for representation at pre-charge interrogations. Even if the provision exists, when the provision interferes with Any Town's ability to conduct a "preliminary investigatory interview," the provision providing the protection can be voided.

The assertion that New York Civil Service Law provides more protection for public employees is a correct overview if one considers the process holistically. This holistic view misperceives the high stakes at a pre-charge interrogation. The view misunderstands a potentially pivotal role that the pre-charge interrogation can play. It fails to consider that the goals of assuring uninterrupted public service, resolving disputes without strikes, and Taylor Law rights to organization, representation, and collective bargaining are consistent with Weingarten. A holistic view may be correct as a general analysis, but it fails to distinguish Weingarten as different from and inapplicable to the Taylor Law.

Weingarten established a principle and standards that are consistent with the New York Legislature's statement of public policy and structure for protection of New York public employees. Although the Taylor Law prohibits public employees from striking, it is equally apparent that the statute and PERB recognize the importance of protecting the "full measure of the protected right of organization and representation."

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202. Id.
203. Id.
204. See supra note 192 and accompanying text.
205. Id.; see also, New Paltz United Teachers, 16 P.E.R.B. at 4618.
206. See Sperling, 60 A.D.2d 559, 400 N.Y.S.2d 821; supra text accompanying note 171.
207. See supra notes 55-61 (illustrating that the Appellate Division has held that representation does not extend to the investigatory interview under N.Y. Civil Service Law).
208. N.Y. CIV. SERV. LAW. § 200 (McKinney 1983 & Supp. 1989); see also City of Newburgh v. Brady, 11 P.E.R.B. ¶ 3108 (1978) (noting that the statute and PERB recognize...
As a matter of labor relations, it is both time efficient and economically efficient for an employee like NY, an employer like Any Town, and a union like NY to attempt to resolve the question of NY’s guilt or innocence for the Any Town broom theft at a pre-charge interrogation.\(^{209}\) Even if the matter is not resolved, an early opportunity exists for the union and the employer to gather facts, share information, and potentially facilitate the later processes of review.\(^{210}\)

The “contours” of the protection set out by the National Labor Relations Board and cited with approval by the Supreme Court in *Weingarten* fit within the Taylor Law. First, the protection only arises when an employee requests representation, and only when the investigation may result in disciplinary action against the employee.\(^{211}\) *Weingarten* would not apply if NY had no reasonable basis to fear adverse disciplinary impact from the interview.\(^{212}\) Second, the employer does not have to justify its refusal to allow union representation and can elect to continue investigating without interviewing NY.\(^{213}\) Consistent with this standard, Any Town still could investigate its missing brooms problem and charge NY without interrogating her. Third, the employer does not have to bargain with the union representative who attends the interrogation.\(^{214}\) By the third standard, Any Town representatives do not have to bargain with NY’s representatives. Fourth, the union representative attends the pre-charge interrogation only to assist the employee, to clarify facts, and to suggest other potential witnesses.\(^{215}\) The *Weingarten* rationale for a private sector employee’s interest thus fits within the Taylor Law without disturbing important management prerogatives of the New York public employer. Post *City of New York/Sperling* decisions and opinions demonstrate that *Weingarten* is consistent with applications of the Taylor Law.


\(^{210}\) *Id.*

\(^{211}\) *Weingarten*, 420 U.S. at 257.

\(^{212}\) *Id.* at 257-58.

\(^{213}\) *Id.* at 258-59.

\(^{214}\) *Id.* at 259-260.

\(^{215}\) *Id.* at 260.
E. City of New York and Sperling, Subsequent Differences Without Distinction

In 1978, PERB applied City of New York to preclude the presence of a union representative at an investigatory interview where there was no union attorney to accompany the public employee.\textsuperscript{216} In City of Newburgh,\textsuperscript{217} the Board distinguished between the employer's denial of an employee's request for union representation at an investigatory interview and the public employer's interference with an employee's opportunity to consult his union about anticipated charges.\textsuperscript{218} The latter was permissible, though the former was prohibited.\textsuperscript{219}

In City of Newburgh, PERB noted that the employer interfered with "the full measure of the protected right of organization and representation accorded by the Taylor Law" when he questioned the union representative about his conversations with the employee.\textsuperscript{220} The questioning interfered with the employee's opportunity to consult with his union representative.\textsuperscript{221} PERB reasoned that the inquiry invaded internal communications and inhibited the employee as he sought advice from union representatives on matters affecting his interests.\textsuperscript{222} The Appellate Division affirmed City of Newburgh, because PERB rendered a reasonable interpretation of the Taylor Law.\textsuperscript{223}

After City of Newburgh, a line was drawn between janitor NY's ability to consult her union on matters affecting her interest outside a pre-charge interrogation, and her opportunity to consult her union representative inside the interrogation room.\textsuperscript{224} When does consultation on matters affecting NY's interests become more acute? Are the expressed goals of the Taylor Law so clearly consistent with protecting one aspect of the opportunity for union representation and not the other?

Both acts by the employee are efforts to protect job interests. The employee is attempting to protect those interests exercising a right to employee organization, and both are actually concerted ac-

\begin{footnotes}
\item 216. City of Newburgh, 11 P.E.R.B. ¶ 3108.
\item 217. Id.
\item 218. Id.
\item 219. Id. at 3176.
\item 220. Id.
\item 221. Id.
\item 222. Id.
\item 224. Id. at 364-65, 421 N.Y.S.2d at 675.
\end{footnotes}
tions for mutual aid and protection. Neither disrupts the functions of government,225 and both are consistent with the dual policy goals of the Taylor law.226 While the Appellate Division and PERB conclusions are reasonable, the PERB analysis fails to distinguish between the two employee acts vis-a-vis Taylor Law policy and goals.227

PERB simply concludes that an absence of "the language" of concerted activity for mutual aid and protection makes its conclusion so. As with City of New York, no inquiry was made into the question of whether the existing public policy expressed in the Taylor Law without "the language" actually mandates the distinction in City of Newburgh given the potential importance of the pre-charge interrogation to the public employer and public employee.228

In 1984 PERB affirmed a hearing officer's finding that a meeting between a school principal and a school teacher was at the teacher's request and therefore not investigatory.229 Although application of Weingarten was not directly at issue in Dundee Central School District,230 PERB approved the hearing officer's reassertion that under the Taylor Law, an employee had no right to request the presence of a union representative even if the meeting was an investigatory interview.231

The reassertion is as fundamentally weak as PERB's initial "disassociation" in City of New York.232 The conclusion that Weingarten cannot apply comes in a case where the same outcome would occur even if Weingarten was controlling.233 In fact, in the private sector Weingarten does not apply if no reasonable basis for the employee to fear any adverse impact from the interview exists, or where there are assurances that the meeting is not a disciplinary investigation.234 Without a finding that there was a pre-charge interrogation, Weingarten does not protect a private sector employee from termina-

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225. Id.
226. Id.
227. Id.
230. Id.
231. Id. (citing with approval, City of New York); see also Buffalo Teachers Fed'n, 16 P.E.R.B. ¶ 3018 (1983) (discussing an employee's right to request a representative at an investigatory interview).
Weingarten and the Taylor Law

Where the facts do not support a conclusion that there was a pre-charge interrogation, PERB would dismiss a case like Dundee Central School District and City of New York, even if it associated itself with Weingarten. Dundee Central School District is similar to City of New York. In each decision, if PERB applied Weingarten, the charges would still be dismissed.

In Dutchess Community College, PERB applied its absence of “the language” analysis to dismiss an improper employer practice charge. Francine Rosen, a teacher who was not a member of any employee organization and who was not seeking to join, form or participate in one, contended that her articulation of her colleagues’ concerns to her employer, and the informal meetings with her colleagues to discuss workplace concerns, were sufficient to bring her within the scope of the protection afforded by section 202 of the Taylor Law.

PERB rejected Rosen’s contention because of an absence of “the language” from section 202, and concluded that the Legislature “intend[ed] not to afford protection to the concerted activities of employees that fall short of an attempt to form, join, participate in or refrain from forming, joining or participating in an employee organization.”

The New York Supreme Court, Dutchess County, reversed PERB’s conclusion. Justice Slifkin noted that “the language” was absent by legislative intent, but found PERB’s inference from that absence “not ineluctable.”

The Appellate Division reversed the Supreme Court and affirmed PERB’s interpretation because “PERB is presumed to have developed an expertise which requires us to accept its construction of that law if unreasonable.” While acknowledging that the New York Legislature drew heavily on labor law and labor relations in

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235. See Weingarten, 420 U.S. 251.
236. Id.
238. Id. at 3144 (discussing the fact that Respondent cited section 7 at the National Labor Relations Act to support her argument that she was protected under section 202 of the Taylor Law).
239. Id. (citing City of New York, 9 P.E.R.B. ¶ 3047).
241. Id. at 632, 490 N.Y.S.2d at 708.
243. Id. at 659, 510 N.Y.S.2d at 181.
the private sector for the Taylor Law, and noting the "substantial parallels" between the Act and the Taylor Law, the Appellate Division deferred to PERB's conclusion that the absence of "the language" evinced a legislative intent not to apply section 202 to public employees who were not joining, forming or participating in an employee organization. The Court of Appeals affirmed.

There were two issues in Rosen, but PERB and the Appellate Division addressed just one. Of greater significance than any reasonable inference from an absence of "the language" is the title that the New York Legislature gave to Article 14 section 202. It is called the "Right of Organization." On the other hand, section 7 of the National Labor Relations Act is entitled "Rights of Employees." The difference evinces an affirmative intent by the New York Legislature to establish rights for public employees that attach to activities related to employee organizations.

The hearing officer in Dutchess Community College concluded that Rosen was not acting to form, join or participate in an employee organization at the time of the alleged violation. Since section 202 establishes New York public employee rights with respect to employee organization by its title and language, Rosen was not entitled to protection. That is the basis on which the Court of Appeals affirmed the Appellate Division and held that PERB rationally interpreted the scope of a public employee's right to organize under section 202.

Even if legislators decided to amend section 202 in order to add "the language," the title "Rights of Organization" alone would limit the application of Weingarten to employees who were "form[ing], join[ing], or participat[ing]" in employee organizations. Since the hearing officer found that Rosen was not engaged in any section 202 activity, an application of Weingarten would not create a different result in Rosen either.

In the Any Town hypothetical, janitor NY is covered by section

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244. Id. at 659-60, 510 N.Y.S.2d at 182.
252. Id.
202 because he is represented by a union. In this context, the primary question is one which Rosen did not reach or address. The Legislature left no affirmative direction for the application of Weingarten similar to the clear direction that the title "Employee Organization" provides for resolution of the Rosen claim. For that reason, Rosen is not dispositive on disassociating Weingarten from the Taylor Law when an employee, like NY, satisfies the prerequisites of section 202. Moreover, it would seem logical to associate Weingarten, since to do so is consistent with sections 202 and 206.

In 1986, two PERB Administrative Law Judges (hereinafter "A.L.J.") reaffirmed the disassociation of Weingarten from the Taylor Law. As with City of New York and Dundee Central School District, the claimants in Wayne-Finger Lakes BOCES were not entitled to union representation at an interrogation even if Weingarten applied. In that decision, the A.L.J. concluded that neither employee could reasonably have believed or expected that her meeting with her supervisor would lead to disciplinary action. Such an expectation must exist before Weingarten affords protection. As with City of New York, the claims would be dismissed if Weingarten applied. Interestingly, while eschewing the application of Weingarten on the facts, the A.L.J. applied a Weingarten and post-Weingarten caselaw analysis in dismissing the petitioners’ improper employer practice charges. Her application of post-Weingarten caselaw is reasonable given the symmetry of the parallel between Weingarten principles for private and public sector employees.

In New York City Transit Authority, a second A.L.J. cited PERB decisions in City of New York, Dutchess Community College (Rosen) and Wayne-Finger Lakes BOCES to dismiss a claim that an employee was entitled to a union representative. New York City Transit Authority is the first time that associating Weingarten to the Taylor Law could have affected a different result than the actual outcome. In that case, employee Lawrence Hanley was questioned

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261. Id. at 4790-92.
by a supervisor in the presence of two other supervisors. The supervisor told Hanley he was conducting an investigation. At that point Hanley attempted to telephone his local union president, but the supervisor questioning him “depressed the button on the telephone instrument.” When Hanley refused to answer questions without his union representative, the supervisor suspended him.

After stating that PERB never directly ruled on the applicability of *Weingarten* to New York public employees, the A.L.J. noted an absence of “the language” from the Taylor Law and concluded that *Weingarten* is “not a protection to be accorded to public employees.”

*Weingarten* was not applied, so the A.L.J. in *New York City Transit Authority* did not address some important factual questions that were dispositive of a *Weingarten* claim. For example, one cannot tell if Hanley perceived his job to be in jeopardy, nor do the facts disclose whether he was suspended for workplace activity or insubordination. It is likely that Hanley felt that his job was in jeopardy since he reached for the telephone after he was told that he was participating in an investigation. Depressing the phone receiver hook was a denial of access to union representation. Hanley refused to answer questions. Refusing to answer questions can constitute insubordination. A misconduct charge and subsequent disciplinary action could effect the quality and timing of Hanley’s promotions, work assignments, salary and related benefits, as well as seniority rights. Since those issues would directly affect Hanley’s workplace standing, it was important to resolve any potential charges fairly, efficiently and expeditiously. *New York City Transit Authority* suggests circumstances that are at the heart of *Weingarten* and a circumstance where a New York public employee should have *Weingarten* rights.

Hanley’s interests and risks are the same as Leura Collins. In *Weingarten*, the Court concerned itself with the “dilution of the employee’s right to act collectively to protect his job interests.” There is no less dilution of Hanley’s right to participate in an organization under the Taylor Law when he attempts to telephone a union repre-

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262. *Id.* at 4788.
263. *Id.* at 4788-89.
264. *Id.* at 4788.
265. *Id.* at 4788-89.
266. *Id.* at 4790.
267. *Id.* at 4791.
269. *Id.* at 257 (quoting Mobil Oil Corp., 196 N.L.R.B. 1052 (1972)).
sentative at a pre-charge interrogation, and a supervisor depresses the telephone receiver hook while he is attempting to call.\textsuperscript{270} Nevertheless, the inference from an absence of "the language" continues. Since the decision was not appealed, answers to some dispositive factual questions are not known, and Hanley was simply held to have no right to a union representative.\textsuperscript{271}

In 1988, an A.L.J. reiterated that "there is a question as to whether [the Taylor Law] affords employees the right to any representation at such [departmental] investigations."\textsuperscript{272} As recently as June, 1988, PERB's Director of Employment Practices and Representation, citing \textit{New York City Transit Authority} and \textit{Dutchess Community College} opined that "a right of union representation in disciplinary investigations is not accorded by the Taylor Law."\textsuperscript{273}

\textbf{F. Weingarten—Current Applications to the Public Sector}

Congress applied \textit{Weingarten} to federal employees twelve years ago when it codified \textit{Weingarten} in the Federal Labor Relations Act section of the Civil Service Reform Act of 1978.\textsuperscript{274} Section 7114(a)(2)(B) is a literal codification of \textit{Weingarten} for federal employees like Fed.\textsuperscript{275} At the time the provision was introduced in the House of Representatives, Congressman Morris Udall, sponsor of the amendment containing the "Weingarten provision," publicly acknowledged its relationship to \textit{Weingarten}.\textsuperscript{276} The Federal Labor Relations Authority, an agency with a legislative mandate that parallels PERB,\textsuperscript{277} fleshed out the provision in a manner that parallels post

\begin{itemize}
\item \textsuperscript{270} N.Y. City Transit Auth., 19 P.E.R.B. at 4788.
\item \textsuperscript{271} Garden City Police Benevolent Ass'n, Inc., 21 P.E.R.B. ¶ 4511, at 4518 n.10 (1988).
\item \textsuperscript{272} \textit{Id.} at 4518.
\item \textsuperscript{273} Vincent \textit{v.} Yacobucci, 21 P.E.R.B. ¶ 4558 (1988) (deciding the case on other grounds).
\item \textsuperscript{275} 95 \textit{CONG. REC.} 29,182 (1978) (statement of Rep. Udall). During debate on the amendment, there were only two references to section 7114(a)(2)(B). \textit{See} \textit{CONG. REC.} 29,182, 29187, 29200 (1978). No one questioned how \textit{Weingarten} could apply to federal employees even though they could not strike like employees covered by the National Labor Relations Act. \textit{Id.}; \textit{see also} 5 U.S.C. § 7311 (1982). The Senate version of the Federal Labor Relations Act contained no provision comparable to § 7114(a)(2)(B), but the House and Senate conference agreed to adopt the wording in the House Bill that included the Udall provisions and two other amendments. Civil Service Reform Act, Pub. L. No. 95-454 (Legislative History).
\item \textsuperscript{276} See 95 \textit{CONG. REC.} 29,182, 29,184 (1978) (statement of Representative Morris Udall).
\item \textsuperscript{277} Compare 5 U.S.C. §§ 7104-7105 with N.Y. CIV. SERV. LAW, Article 14 §§ 204-205.
\end{itemize}
The Court of Appeals for the District of Columbia and the Court of Appeals for the Federal Circuit have applied Weingarten analysis when federal employees have alleged violations of section 7114(a)(2)(b). The examination of an employee without union representation requested by the employee is an unfair labor practice. If an employee believes that an investigation might result in discipline, the employer’s rejection of the employee’s request for union representation will cause exclusion of the employee’s statements from the disciplinary proceedings. Where the audit examination is an extension of the investigation examination of an employee, it is an unfair labor practice to refuse to permit union representation for the employee investigated. When an employee only asked an employee to read entries on a form which noted that employee’s work deficiencies, the meeting did not constitute “examination” or “investigation” within the meaning of section 7114(a)(2)(B). A nondisciplinary desk audit is not an examination and does not require union representation. Telephone surveillance is not an examination within the meaning of section 7114(a)(2)(B) and no right to union representation arises when phone calls are monitored.
Weingarten applies to public employees in other states. The Supreme Court of California applied similar standards to California public employees before the United States Supreme Court decided Weingarten. The California Court held that a public employee's statutory right to effective union representation includes a right to have a union representative accompany him to a meeting with his employer when the employee reasonably anticipates that such meeting may involve union activities, and when the employee reasonably fears that adverse action may result from such a meeting because of union related conduct.

In Civil Service Association, Local 400 v. City and County of San Francisco, the Supreme Court of California held that a recognized union could represent an employee in advance of the imposition of discipline under section 3503 of California's Meyers-Milias-Brown Act. The Court, by Justice Manuel, stated that Social Workers Union Local 535, Alameda City, was not entirely dispositive, but found that the right of union representation in the informal process followed from the right to union representation in the statute. Justice Manuel cited and quoted Weingarten and rested the holding on the consistency of the holding with the California public em-

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281. Id. at 385, 521 P.2d at 454, 113 Cal. Rptr. at 462.
283. CAL. GOV'T CODE § 3503 (West 1980).
284. Civil Service Ass'n, 22 Cal. 3d at 566, 586 P.2d at 170, 150 Cal. Rptr. at 137.
285. Id. at 568, 586 P.2d at 171, 150 Cal. Rptr. at 138.
286. Id. at 567, 586 P.2d at 171, 150 Cal. Rptr. at 138.
employee's right to representation.287

The California Court of Appeals for the Third District held that a state employee had a right to union representation at a meeting with a bus supervisor when a significant purpose of the meeting was to investigate facts to support disciplinary action.288 In extending protection to state employees under the Employee Organization Law,289 the Court pointed out that, "[t]he union representative whose participation [the state employee] . . . seeks is . . . safeguarding not only the particular employee's interest, but also the interest of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly."290

The District Court of Appeals of Florida, Second District, in City of Clearwater v. Lewis,291 affirmed a determination by the Florida Public Employee Relations Commission that "Weingarten protections are applicable to situations in which an employee is given an option to resign or be fired."292 In its opinion, the court also affirmed the application of Weingarten to Florida public employees.293

The Iowa Court of Appeals, in City of Marion v. Weitenhagen,294 applied Weingarten to Iowa public employees and concluded that "there is nothing in the nature of a public employee's work which would result in harm to the public if he or she is given such representaion, in the same way harm would result if employees were allowed to strike."295 State agencies that parallel PERB's authority have applied Weingarten in twelve states.296 State courts in

287. Id.
290. Robinson, 97 Cal. App. 3d at 1000, 159 Cal. Rptr. at 225.
292. Id. at 1162.
293. Id. at 1159-62.
295. Id. at 328.
296. See, e.g., the following:
   California-California Public Employment Relations Board. An employee who does not request union representation is not entitled to it. State of California (Dep't of Forestry), No. SF-CE-775, J NPER CA 18143 (July 24, 1987). There is no Weingarten type union representation if the employee makes no request. University of Cal., SF-CE-67-H, No. 310-H, 5 NPER 14156 (May 19, 1983). If an employee reasonably fears that a meeting is called for disciplinary purposes and makes a request for union representation, then that employee is entitled to representation. See Mammoth Unified School Dist., No. LA-CE-91-S, & PERC 14063, 6 NPER 5-15015 (Oct. 14, 1983) (wherein a teacher who refused a co-curricular coaching assignment and reasonably feared that a subsequent meeting was called for disciplinary purposes was entitled to a union representative); Riverside Unified School Dist., No. LA-CE-1103,
those states that have not applied *Weingarten* to public employees

4 NPER 5-13095 (March 29, 1982) (where given past deficiencies, the teacher's reasonable expectations for discipline gave rise to a right to request the presence of a union representative). An employer cannot deny the presence of a union representative; nor can the employer place limitations on the union's participation in discussion. See Redwoods Community College, No. SF-CE-516, Order No. 293, 5 NPER 14998 (March 15, 1983), *aff'd*, Redwoods Community College v. PERB, 159 Cal. App. 3d 617, 205 Cal. Rptr. 523, (Ct. App. 1984); *see also* East Whittier City School Dist., No. LA-CE-1377, 5 NPER 5-14100 (Nov. 15, 1982) (where if a school district seeks to investigate the parent's complaints, the teacher is entitled to union representation).

However, no union representation is required if the purpose of the meeting is merely to inform an employee of a decision that has already been made regarding that employee. California Dep't of Transp., No. LA-Ce-91-5 A.L.J. (Oct. 1, 1983); *see also* Place Hill Unions School Dist., No. S-Ce-453, Order No. 377, 6 NPER 05-15037 (Feb. 14, 1984) (where the presence of a union representative was attacked at two consecutive meetings when an employee refused to sign documents imposing weight limits and at the second meeting received a letter of reprimand for the refusal to sign documents from the first meeting). *But see* Rio Hondo Community College Dist., No. LA-CE-1403, 5 NPER 14185 (June 23, 1983) (where the teacher was provided the right to union representation to discuss evaluation).

Connecticut-Connecticut State Labor Relations Board: When employees fear that their jobs are in jeopardy, they may request a union representative to accompany them to a meeting. East Hartford Bd. of Educ., No. TPP-7163, Order No. 2256, 6 NPER 7-15004 (Dec. 6, 1983) (when a teacher feared that her job was in jeopardy, that teacher had a right to be accompanied by a representative of her choice); *see also* Town of Greenwich, No. MPP 6699, Order No. 2269, 6 NPER 07-15010 (Jan. 13, 1984) (when a police officer feared discipline for the propriety of his using firearms at a stakeout, that officer was entitled to a union representative); City of Shelton, 3 NPER 7-12037 (April 13, 1981) (where a police officer was called to a meeting to discuss tardiness for duty, he was entitled to a union representative); Town of Watertown, 1 NPER 7-10057 (July 19, 1979) (where a police officer requested a union representative at an interview concerning possible charges against him, that officer was entitled to that representative). During the interview process the employer cannot require that the union representative remain silent, nor disallow any questions until the employer is finished nor require any union questions to be channeled through the employee. Connecticut State Dep't of Health, No. SPP-6347, 5 NPER 07-14002 (Nov. 23, 1982).

Florida-Florida Public Employment Relations Commission: When an employee reasonably anticipates disciplinary action, that employee is entitled to union representation. Duval County School Bd., 1 NPER 10-10389 (Jan. 4, 1979), *aff'd*, 366 So. 2d 119 (Fla. Dist. Ct. App. 1979) (when a teacher was in fear of discipline he was entitled to a representative). The *Weingarten* right carries over into the public sector and entitles public employees to the same right of union representation. School Bd., 4 F.P.E.R. 4294 (1978). However, if a meeting is called solely to notify an employee that he is discharged, then that employee has no right to union representation. Sarasota-Manatee Airport Authority, No. CA 87-074, 10 NPER F1-19064 (Feb. 10, 1988).

Maine-Maine Labor Relations Board: An employer must comply with an employee's request for the presence of a union representative if that employee reasonably believes that the meeting will result in disciplinary action. University of Maine, 1 NPER 2-20021 (June 29, 1979). This rule applies to instances in which an employee requests a representative and where the employer requests a meeting. *Id.* However, if the employee requests the meeting there is no right to union representation. *Id.*

Massachusetts-Massachusetts Labor Relations Commission: When an employee has a reasonable belief that a meeting will result in discipline, that employee has a right to union representation at that meeting. City of Fitchburg, 4 NPER 22-13058 MUP-4600 (Hearing Officer) (March 9, 1982) (when discipline was certain after two prior suspensions, the em-
ployee had a right to union representation at a meeting); Commonwealth of Mass., 3 NPER 22-12081 (March 25, 1981) (Hearing Officer); Massachusetts Dep't of Corrections, 1 NPER 22 (Feb. 26, 1979). But see Commonwealth of Mass., 4 Mass. Lab. Rel. Comm. 1415, 3 NPER 22-12001 (Oct. 31, 1988) (where a meeting was to ascertain the reasons for tardy preparation of a report there was no right to union representation); Commonwealth of Mass., No. Sup-2443, 4 NPER 22-12171 (Aug. 20, 1981) (when there is a meeting to warn an employee it is not an investigatory interview and employee was not entitled to representation). When an employee believes that an investigatory interview will lead to disciplinary action against him, an employer cannot lawfully refuse to allow the presence of a union representative. Town of Rockland, No. MLP-5446, 6 NPER 22-15033 (Hearing Officer) (Feb. 29, 1984). This right is statutory and need not be contained in a collective bargaining agreement. Avon School Comm., 3 NPER 22-12101 (May 6, 1981).

An employee who is required to appear at an investigatory interview must request representation; the union may not request to be the representative. Commonwealth of Mass., 5 NPER 22-14026 (Jan. 11, 1983). If a union representative is absent and an employer offers the employee the option of having a co-employee present and the employee refuses, then that employee has waived his right to a union representative. Commonwealth of Mass., No. Sup. 2687, 6 NPER 22-1140 (Aug. 25, 1981). Even if an employee is not a member of the union, that employee may still be entitled to union representation inasmuch as the union represents that employee's collective bargaining unit. Massachusetts Comm'n of Admin. & Fin., 1 NPER 22-10142 (Aug. 1979).

Michigan-Michigan Employment Relations Commission: An employee is entitled to union representation at an investigatory interview where that employee fears disciplinary action, but, if the purpose of the meeting is not investigatory then there is no entitlement. Wyoming Police Dep't, No. C 83-E131-CU83 E-41, 6 NPER 2315021 (Nov. 2, 1983); Wayne County Community College, Nos. C-81, B-44, CU81, B-9, 5 NPER 23-13154 (Sept. 3, 1982); City of Detroit, 3 NPER 233-12073 (June 11, 1981); Detroit Bd. of Educ., 2 NPER 23-11118 (Oct. 27, 1980); see also Grosse Point Public Schools, No. C81, B-44, CU81, B-9, 5 NPER 23-13147 (Sept. 3, 1982) (when the discussion was to review the discipline of a student there was no right to union representation at that interview). If the employee requests representation and that request is denied, the employee may not subsequently be discharged for failure to answer questions. Township of Canton, No. C81-G254, 4 NPER 31-13048 (Feb. 22, 1982).


New Jersey-New Jersey Public Employment Relations Commission: An employee who is in apprehension of discipline and requests union representation is entitled to union representation, and the employer's denial of this request is unlawful. See Dover Municipal Utilities Auth., Nos. CI-83-16-43, Co 83-85-44, PERC No. 84-132, 6 NPER 31-15157 (June 1, 1984); Bergen County Prosecutors Office, No. CO-81-278-39, PERC No. 83-130, 5 NPER 31-4121 (April 20, 1983); Township of East Brunswick, No. Co-82-21-71, HE No. 82-59, 5 NPER 31-13224 (June 11, 1982); Cape May County, Nos. CO-82-301-120, and CO-80-302-121, PERC No. 82-2, 4 NPER 31-12192 (July 22, 1981); Camden County Vocational Tech., CO-80-11085, PERC No. 82-16, 4 NPER 12206 (July 22, 1981). When an employee asks for union representation, is refused and discipline results from information in the subsequent interview held without union representation, then there was a right to union representation. Jackson Township, No. Co-H-87-278, 10 NPER NJ-19109 (April 8, 1988). Additionally, if an employee waives union representation without intimidation, restraint, or coercion, he is not enti-
tied to union representation. County of Hudson Youth House, No. CO-H-87-310, 10 NPER NJ-19074 (March 1, 1988).


Pennsylvania-Pennsylvania Labor Relations Board: There is no right to representation where an employee has no fear of disciplinary actions at the time that he participates in an investigatory interview. Pennsylvania Labor Relations Bd. v. City of Philadelphia, No. PERA-C-83-386-E, 9 NPER PA-18041 (Jan. 6, 1987); Falls Township, No. PFCC-386—E, 9 NPER PA-18041 (Jan. 6, 1987); Falls Township, No. PFC-86-123-E, 10 NPER PA-18214 (Sept. 25, 1987) (where an employer improperly charged an employee with insubordination for refusing to answer questions, after the employer had denied the employee's request for union representation, when the employee reasonably believed that the meeting could result in discipline); AFCME v. Commonwealth of Pennsylvania, No. PERA-C-86-190-E, 9 NPER PA-17198 (Sept. 9, 1986) (where a witness had a reasonable belief that an investigation might result in disciplinary action, he has a *Weingarten* right to union representation); AFCME v. Commonwealth of Pennsylvania, No. PERA-C-86-190-E, 9 NPER PA-18007 (Nov. 17, 1986); School Dist. of City of Erie, NPER 40-10-158 (June 29, 1979) (where a teacher was summoned to a meeting directly after an altercation, and feared discipline, the teacher was entitled to a union representative upon request, despite the employer's claim that meeting was not disciplinary). In order to be entitled to representation, an employee must request it. Department of Public Welfare, No. PERA-C-86-314-E, 10 NPER PA-19028 (Dec. 29, 1987). Moreover, an employee is entitled to a union representative, not the representative of his choice. Boling v. Commonwealth of Pennsylvania, No. PERA-C-86-97, 9 NPER PA-18049 (Jan. 1, 1987).

This right to representation arises during an investigatory interview. Therefore, if a meeting is to merely inform an employee about disciplinary decision, there is no *Weingarten* right to representation. AFCME v. Commonwealth of Pennsylvania, No. PERA-C-86-190-E, 9 NPER PA-18007 (Nov. 17, 1986). If an employer decided to discipline an employee before the investigatory interview, the employee is not entitled to union representation. Commonwealth of Pennsylvania, 18 NPER PA-18028 (1986). But see Southeastern Pa. Transp. Auth., 5 NPER 40-14047 (Feb. 2, 1983) (where an employer reached a decision to discharge an employee before an interview, the facts established at the interview were nevertheless investigatory and the employee was still entitled to union representation).


Washington-Washington Public Employees Relations Commission: An employee has the right to union representation at an investigatory interview, but not where the employee initiated the meeting. City of Mercer Island, No. 3731-U-81-568, 1460 PERB, 5 NPER 49-14009 (Oct. 27, 1982). Under the Washington Public Employee's Collective Bargaining Act, a probatory employee cannot be discharged if he is pursuing union representation at an investigatory interview that he reasonably fears will lead to discipline. Valley General Hosp., No. 2371-U-79-339-1195-A, 4 NPER 49-13010 (Dec. 11, 1981). However, if an employee does not request union representation, that employee waives the right to representation. City of Montesano, 3 NPER 49-12023 (March 31, 1981).

Wisconsin-Wisconsin Public Employee Relations Commission: When investigatory interviews are adversarial, union may not be limited in representation of employee. City of Milwaukee Police Dep't, 2 NPER 511028 (July 26, 1980). However, an employee is not entitled to
have done so on grounds wholly consistent with *Weingarten*.297

The Supreme Court of Appeals of West Virginia cited *Sperling v. Helsby*298 with approval when it held that a state employee was not entitled to union representation at a pre-disciplinary meeting with his supervisor.299 The West Virginia court attempted to draw a line between "civil service laws . . . [that] . . . do not offer specific procedural due process protection . . . [and] . . . states where the civil service laws afford public employees more protection throughout the process of investigation and termination than private employees."300

Like the New York Appellate Division and PERB, the West Virginia Court of Appeals misperceived a connection between due process protection for public employees and the interests at stake in a pre-charge investigatory interrogation in *Swiger v. Civil Service Commission*.301 A state senator ordered Swiger's supervisor to fire Swiger for insubordination.302 Swiger was notified by letter that he was going to be discharged for misconduct, and that he had a right to meet with the employer to state why the action was unwarranted.303 Swiger asked that a union representative be present, and his request was rejected.304

The *Swiger* facts describe a post-charge and penalty meeting rather than a pre-charge interrogation at which an employee requests union representation when he perceives that his job is in jeopardy. As earlier discussed, due process rights apply to public employ-
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ees in Swiger's circumstances, but not Weingarten protection. In fact, the Board has held that Weingarten does not apply in those circumstances. Whether Weingarten will be applied to West Virginia public employees when union representation is requested for a pre-charge interrogation at which the employee fears he will be disciplined is still open after Swiger.

The West Virginia Supreme Court of Appeals' misperception is also similar to that of the Appellate Division in Sperling when the West Virginia court concluded that more protection is afforded public employees as a result of due process protection. The question that the Swiger court answered is how much post-charge due process protection is available at a time when Weingarten does not apply, but the remaining question is whether a West Virginia public employee is entitled to Weingarten protection when he is interrogated before being charged, when the employee fears discipline, and when he requests union representation. That issue is not posed when the facts set forth a post-charge interview, and it is not answered by measuring how much process is due after a public employee is charged with misconduct and the penalty is already set. The facts in Swiger do not raise the Weingarten issue, and measuring post-charge quality and quantity of due process protection does not address the pre-charge interrogation union representation question for West Virginia public employees.

Section 7114 (a)(2)(B), as well as the federal and state cases and agency decisions, point to a quality kind of concerted, collective activity that is consistent with the Federal Labor Relations Act and collective bargaining statutes of the twelve states where there is a prohibition against strikes and work stoppages. Although the statutes may be distinguishable from the Taylor Law because some contain "the language," the essence of the application of Weingarten in other states is the recognition that the interest in protecting public employee job security outweighs the benefit to be gained from a pre-charge interrogation. The interests of employees such as Leura Collins are parallel and similar to the interests of public employees in those states, and these particular interests outweigh all other inter-

305. See supra note 52 (citing pertinent cases).
306. See Baton Rouge Water Works, 246 N.L.R.B. 995 (1979); Texaco, Inc., 246 NLRB 1021 (1979); see also supra note 109 (citing various Board decisions).
307. See generally Swiger, 365 S.E.2d 797.
309. Swiger, 365 S.E.2d 797.
310. Id.
ests as a matter of public policy.

V. HOW CAN WEINGARTEN BECOME THE LAW FOR NEW YORK PUBLIC EMPLOYEES?

Inasmuch as the New York Legislature has amended the Taylor Law several times in the twenty-two-year life of the statute, it could undertake to amend the law in one of two ways. First, it could add "the language" to the statute. After twenty-two-years, it may be time for the legislature to hold hearings to ask if "the language" should be added. Since Article 14 became law in 1967, public employee collective bargaining statutes have been enacted in thirty-three states. Those twelve states contain "the language" as well as a "no strike" provision. All have dual public policy goals like section 200 of the Taylor Law, and in twelve states, the holding and principles of Weingarten are applied. The legislature should consider the experience of those twelve states. It may suggest that "the language" is not inconsistent with the dual policy goals of the Taylor Law. After review, the legislature could adopt a Weingarten provision similar to section 7114 (a)(2)(B) of the Federal Labor Relations Act instead of "the language." Either or both amendments are plausible. On the other hand, since PERB has the legislative mandate to interpret and oversee the operation and application of the Taylor Law, the association of Weingarten to New York public employees could also occur by PERB decision.

PERB has "disassociated" itself from Weingarten on inferences that it has drawn from the absence of "the language" in the Taylor Law. The disassociation has remained even though applying Weingarten would actually produce the same results in all but one of the PERB decisions. In Sperling, the Appellate Division affirmed a dis-


312. See Appendix.

313. Id.

314. Id.


316. N.Y. CIV. SERV. LAW §§ 204-205 (McKinney 1983).
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missal where the employee voluntarily submitted to interrogation and had union representation at the interrogation. In Rosen, there was no employee organization certified to represent the charging party, and section 202 didn’t apply. In Dundee School District and Wayne-Finger Lakes BOCES, there was no pre-charge interrogation. In New York Transit Authority there were insufficient findings of facts to conclude that Weingarten could make a difference if applied. Finally in Depew Union Free School District the charge was dismissed because it was not timely. The circumstances of Leura Collins and hypothetical janitor NY are not covered by any of those decisions.

PERB should directly face the question. While there is opportunity for pre-charge interrogation union representation through the contractual arrangement of a collective bargaining agreement, that opportunity is merely a non-mandatory bargaining item. Whether or not bargained, union representation at the pre-charge interrogation is important to the interests of New York public employees and public employers in continued, unblemished employment and uncoerced exercise of Taylor Law rights. It is consistent with Taylor Law policy goals, and distinguishable from the concerted activity mutual aid and protection that the legislature intended to prohibit by the Taylor Law. PERB should not continue to “disassociate” Weingarten from New York’s public employees. Rather than “disassociate,” PERB should associate Weingarten with the Taylor Law.

VI. CONCLUSION

The New York Legislature ought to determine if Weingarten should now be associated with the Taylor Law. Alternatively, PERB should reexamine its disassociation from Weingarten in light of the Taylor Law’s dual public policy goals, the important employee and employer interests at stake, the potential economic and time efficiencies, the potential benefits to the process of investigation and resolution of disciplinary charges for the parties, and the sensible solution and standards that Weingarten formulates. The Federal Labor Relations Act includes it notwithstanding a stringent no strike prohibi-

tion. Twelve other states also apply it.

When the PERB disassociation from Weingarten is observed, and one realizes that the Taylor Law is twenty-two years old and the Weingarten decision thirteen, one is reminded of the late Justice Potter Stewart's reflection on an earlier decision that he concluded was erroneously decided. Justice Stewart was reminded of an "aphorism" in Justice Frankfurter's dissent in Henslee v. Union Planters Bank. "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."

It is time for the New York Legislature or PERB to associate Weingarten and its contours for an Any Town janitor like NY and all New York public employees when they are faced with pre-charge interrogation, are targets of the investigation, believe that their jobs are in jeopardy, and request the assistance of their union representatives. The wisdom of associating Weingarten with the Taylor Law is consistent with the expressed dual goals of New York public policy, is long overdue, and ought not to be rejected because it comes late.

325. Boys Mkt., Inc., 398 U.S. at 255.
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<th>None — See County v. SEIU Local 660, 1191 B.R.M. (BNA) 2403 (Cal. Sup. Ct. 1985)</th>
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<td>OR. REV. STAT. § 243-662 (1983)</td>
<td>No</td>
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<td>OR. REV. STAT. § 243.726 (1983): public Employees who are not part of an appropriate bargaining unit which has been certified by the board or recognized by an employer cannot strike</td>
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<p>| absolute | OR. REV. STAT. § 243.732 (1983): police, fire-fighters, and guards of mental institution cannot strike | None    |</p>
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<td>Pennsylvania</td>
<td>PA. STAT. ANN. tit. 43, § 211.3 (Purdon 1964)</td>
<td>Restrictive, cannot strike during dispute</td>
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<td>Rhode Island</td>
<td>R.I. GEN. LAWS § 28-7-12 (1956)</td>
<td>Restricted to Police, firef.i., health care providers</td>
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