

Section 2 – Problem Solving in the Workplace

- **The Right to Union Representation**
- **Duty of Fair Representation**
- **Union’s Right to Information**
- **The Special Status of Union Representatives**
- **Grievant’s Rights**
- **What is Grievable?**
- **The Grievance Process**
- **Obey Now, Grieve Later**
- **Grievance Investigation (Step by Step)**
- **Security, Ethics, and EEO Interviews**

The Right to Union Representation

The National Labor Relations Board (NLRB) and the National Labor Relations Act (NLRA)

In 1935, Congress enacted the National Labor Relations Act (NLRA). The “Act” provides a legal foundation for what is termed “protected activity.” This means workers have the right to form, join, and participate in union activity. It also established the basic right for unions to negotiate bargaining agreements as well as the legal basis for “concerted activity” such as organizing, picketing, and striking.

When employers take actions that infringe on the rights of employees under the NLRA, the union has the option of filing an Unfair Labor Practice (ULP) to the National Labor Relations Board (NLRB). The NLRB will then investigate and adjudicate violations to the Act. Most NLRB actions are handled by SPEEA general counsel and staff.

Weingarten Rights

As a Council Representative (CR), one of your most important duties is to provide representation for employees whenever they are faced with discipline or an investigation that could lead to discipline. Part of that duty is to educate members on their right to representation. Specific education should be to make sure the employee knows that he or she **must request** representation. This right is based on a legal decision (NLRB v. J. Weingarten Inc.) referred to as “Weingarten Rights”. CR’s should become familiar with the verbiage to be used to invoke these rights:

“If this discussion could in any way lead to my being disciplined or terminated, or affect my personal working conditions, I respectfully request that my union representative or steward (CR) be present at this meeting. If this discussion could lead to my being disciplined and you deny my request for representation, I choose not to answer any questions”.

In *NLRB v. J. Weingarten, Inc.* (1975), the Supreme Court established the right of members to union representation in investigatory interviews.

- When management questions a member to obtain information that could be used in discipline or asks a member to defend his or her conduct -- INVESTIGATORY.
- When a member has reasonable belief that discipline or other adverse consequences could result from what he or she says -- INVESTIGATORY.
- To receive union representation -- THE MEMBER MUST MAKE A CLEAR REQUEST FOR IT.

All of the following meetings are investigatory. Members are entitled to have representation when called into:

- Security interviews
- Meetings to announce discipline (past practice)
- EEO investigations

- Ethics investigations

Note: The employer is not required to allow representation if you are not the subject of the investigation (i.e., if you are called in as a witness) however they will often honor such a request.

Further, there are times when management will allow (or even request) that the union representative be present at a meeting with a member that is not disciplinary. For example when management initiates a meeting with members to discuss a specific issue, or to address concerns raised by members, the union representative can be present. Historically, management has been supportive in allowing union representatives to attend such meetings regardless of the fact that they are under no obligation to do so.

What is the role of the Council Representative?

A CR should educate the members they represent to request a union representation whenever they are called into a meeting with management or Company representatives that could result in discipline.

What is the role of the SPEEA Staff?

The Contract Administrator will assist in providing coverage for representation requests. When necessary the CA can fill in for the Council Rep.

Duty of Fair Representation (DFR)

Although not defined in the National Labor Relations Act (NLRA), the Supreme Court says that Duty of Fair Representation (DFR) is a necessary consequence of the exclusive powers granted to unions by the Act. The duty of the union is to equally represent all members of the bargaining unit without regard to race, gender, nationality, age, religion, politics, unpopularity, union membership or dues-paying status. DFR applies to all employees covered by the labor contract for all matters covered in the labor contract.

Members and non-members who feel that their union has breached the Duty of Fair Representation can file a complaint with the NLRB. They may also seek remedy through the court system.

Examples of when DFR violations can occur are when a union arbitrarily, discriminatorily, or in bad faith:

- *does not file a meritorious grievance;*
- *does not investigate a meritorious grievance;*
- *withdraws or otherwise fails to pursue a meritorious grievance;*
- *does not pursue a meritorious grievance according to timelines;*
- *does not arbitrate a meritorious grievance.*

What is the role of the Council Representative?

CR's should investigate all grievances and report findings to SPEEA Staff. It is not the Council Rep's role to unilaterally determine which grievances have merit.

Remember, this responsibility applies to everyone we represent, even non-members.

Always tell a member who reports a concern to you, "I'll look into it." **DO NOT** promise a particular outcome.

Confidentiality

Any interaction between the CR and member should be kept confidential. The information can be shared with your Contract Administrator as part of the grievance process. However, the best practice is to only share information to other union representatives on a "need to know" basis. If there is no need to share the information - don't. A CR should never divulge such information to management or other employees or members without the consent of the individual.

What is the role of the Staff ?

Staff, together with the assistance of the CR, other staff, SPEEA attorneys, with the collective experience of the union, determine whether and how to pursue and process grievances.

Union's Right to Information

Under the NLRA, unions have the right to information in carrying out their duty as the exclusive bargaining representative for members. The employer must furnish information in a reasonable time frame to enable the union to process grievances. It is also necessary for the union to have access to information in order to enforce the contract. Some examples for information needed to ensure contract compliance include, but are not limited to:

- Monitoring layoff and recall activity
- Monitoring contractor activity
- Guaranteed wage increases and salary minimums
- Retention ratings

If you are ever refused information in processing a grievance, see your Contract Administrator.

The Special Status of Union Representatives

Under the law union representatives should be able to carry out their duties without fear of retaliation or coercion by management. A principle known as the “equality rule” provides a clear understanding of your status as a Council Rep.

The Equality Rule:

When stewards (Council Representatives) engage in representational activities they are equal with management. This means that when you are in your representational capacity you can:

- *Speak forcefully*
- *Gesture*
- *Use salty language*
- *Challenge management’s truthfulness*
- *Threaten legal action*
- *Raise the possibility of group action*

When does the Equality Rule apply?

When you are in your **representational capacity**. *This means you are:*

- *Investigating a complaint*
- *Requesting information*
- *Presenting a grievance*
- *Otherwise representing a member*

The Equality Rule does not apply when you are in an individual capacity.

For example:

- *When you are talking with management about your own employment situation*

Limits on the Equality Rule:

A CR **may be disciplined for representational conduct** that is:

“So flagrant or violent as to render the employee unfit for further service.”

Example:

- *Unrestrained profanity*
- *Racial epithets*
- *Threatened violence*

No Reprisal Rule:

An employer cannot retaliate against you because of the way you carry out your union duties.

Same Standards Rule:

The Employer must apply the same standards to you as to other employees; i.e., some employers take the attitude that stewards (CR's) can be held to higher standards than other employees.

You can't be expected to set an example for other workers.

Use Common sense:

Although your status as a union representative gives you the ability to “respond in kind” to a manager who has opted to raise his voice and/or use harsh language, it does not compel you to do so. After all, anger is an indicator that the individual is losing control of the situation either because they feel threatened or frustrated that you are not in agreement with them.

Sometimes it is better to pause and explain to the individual that you want to cool things off before proceeding. This will send a message that you are maintaining your composure and may even cause other individuals to be more sympathetic to your comments. Rather than getting into a shouting match, you have the option of demonstrating your ability to avoid one (even though you have every right to do so).

In other words, use common sense when determining how to respond to others in your role as a Council Representative.

Grievance Rights

An employer violates the NLRA if it interferes with, harasses or threatens a grievant. Examples of such violations include, but are not limited to:

- Using harsh language;
- Increasing a penalty because a grievance is filed;
- Threatening a grievant for testifying;
- Telling a grievant to stay away from the CR (steward).

Investigating Grievances

- Council Reps have the right to do so during breaks, meals and other non-working time. Generally, SPEEA Representatives can investigate on Company time per the Union Rights of the contract.
- Nothing in the NLRA requires employers to tolerate union business during work time.

Confidentiality of Conversations with Grievants

- Conversations between an employee and a CR are confidential.
- A supervisor may not question a member about a CR's investigation.

What is the role of the Council Rep?

To investigate potential grievances when you become aware of a problem and/or are contacted by a represented employee.

What is the role of SPEEA Staff?

To assist the Council Representatives through the grievance process.

What is Grievable?

Your union contract limits grievances to matters dealing with the interpretation or application of terms of the Collective Bargaining Agreement (CBA). As stated previously, this is a rather broad statement because of the other forms of agreement involved in the application and interpretation of the CBA. Some examples of matters subject to the grievance procedure include:

Grievances

- Any Contract Violation (**Note: contract in broad terms described above**)
- Discipline/Discharge as a result of:
 - Notice of Remedial Action – NORA
 - Corrective Action Memo – CAM
 - Suspension
 - Layoff (in-lieu of termination)
 - Layoff without recall rights (to Step 3 only)
 - Termination

Appeals (not subject to grievance procedures):

- Retention appeals
- Reclassification appeals
- Designated as ineligible for first consideration rights

Council Reps are faced with situations that are not clearly or technically grievances. In other words, not every problem in the workplace is grievable, but every problem has the potential for resolution.

The Council Rep can play a key role in solving problems in a number of ways. For example, issues regarding pay, benefits, work schedules etc. Council Representatives can help direct members to pursue the proper channels to address their concerns. Obviously, the Council Rep can not be expected to right every wrong. However, your effort to find solutions will send a message to the members that the Union takes membership concerns seriously regardless of contractual technicalities. As the “go to” person, you will have many opportunities to develop your problem-solving abilities in a wide variety of matters including:

- Insurance problems
- Transfers
- Performance Management
- Selective Adjustments
- Employee Requested Transfer
- Coworker conflict

Just as Council Reps are not expected to right every wrong, neither are they expected to know all the answers. The key is to identify the problem and then seek a resolution. The SPEEA Contract Administrators and staff are an important resource in helping Council Reps find solutions to problems they have identified.

The Grievance Process

Webster defines a grievance as: “Something to afford just cause for complaint or protest. Or: A complaint of unfair treatment, esp. by an employee.” While these descriptions begin to define the term they do not give the full picture. What follows in this section is a better description of a grievance, the applicable contract references and some information on the when, where, and why of using a grievance.

Each SPEEA contract has a definition of the grievance procedure. Example language is as follows:

“only matters dealing with the interpretation or application of terms of this Agreement”

Some of this language may appear to imply more limitations than actually exist in practice. SPEEA encourages all Council Representatives to take advantage of additional training opportunities. These trainings will teach you how to investigate the pertinent labor laws and educate you on maintaining a healthy district. The SPEEA Staff is always available to answer additional questions.

SPEEA views a grievance as only one of the many available tools. Grievances are a vehicle for correcting violations of the contract or work rules. By enforcing our contract, we provide a measure of justice in the workplace.

Grievances may be used strategically as a deterrent to future wrongdoings by management. Used wisely, grievances, along with other tools and strategies will enable the Council Representative to make his or her district a more hospitable place to work. Good managers soon discover that working productively with the Council Representative can increase moral and productivity in their area.

Additional information can be found in *The Legal Rights of Union Stewards*
Written by union attorney Robert M. Schwartz. www.workrightspress.com.

Exploring the Grievance Procedure:

Each SPEEA contract defines the grievance procedure. The following highlights those general provisions of any contract that Council Representatives should take particular note.

- Defines a grievance and clarifies there must be “just cause” for termination or suspension.
- Establishes the grievance handling procedure:
 - *Note time limits.*
 - *Assist grievant at First Step, if requested.*
 - *Investigate facts thoroughly, insuring accuracy of names, dates and times surrounding the events that suggest a contract violation.*
 - *Refer the grievance to a Contract Administrator to pursue beyond the First Step. Staff will keep the Council Rep informed as to progress.*
 - *Arbitration processing is the province of Staff -- however, successful arbitration can depend on the initial fact-gathering by Council Representatives.*
- Allows SPEEA to file a grievance as a union.
- Defines selection of an arbiter.
- Establishes rules of procedure for arbitration.
- Binds the decision of the arbiter on both parties.
- Limits claims requesting back pay to 30 days prior to filing for retroactive compensation.
- Allows the parties to mutually extend time limits established in the contract.
- Allows conferences necessary to solve problems and handle grievances during work hours.
- Provides no precedent setting when grievances are settled.
- Sets forth a procedure to resolve jurisdictional disputes.

SPEEA Internal Grievance Procedures

If a decision is made “not to pursue” a case, the member may appeal such a decision internally within SPEEA.

- First, the employee must appeal to the appropriate Contract Administrator;
- Next, if not satisfied, to the Executive Director;
- And finally, if still not satisfied, the Executive Board.
- The Contract Administrator will ensure that the time limits of the grievance are protected while an employee is in the process of internal appeal.
- An internal appeal must be exercised within 2 days from the decision not to pursue. A complete appeal shall not take longer than two weeks to complete.

Per the Collective Bargaining Agreement, Step 1 and Step 2 are normally handled via oral submission – that is, the Council Representative will meet with management to try to resolve the issue. **The most important part of the Council Representative’s duty is to take good notes and gather copies of any documents pertaining to the meeting.**

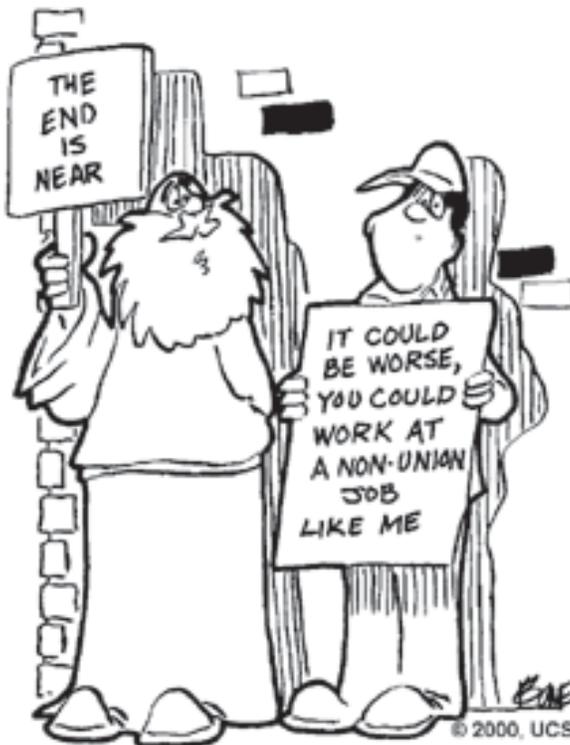
Obey Now, Grieve Later

When anyone in management gives a direct order, SPEEA directs its members to obey the order now and grieve the action later. Arbitrators generally apply the principle that workers are expected to follow directives of a supervisor or manager. If a member believes that a directed action violates the contract or an employer's policy, they may grieve at a later time. Failure to follow a directive from a supervisor could result in the member being disciplined for insubordination.

Arbitrators recognize two exceptions to this rule that allow the member to refuse a direct order:

1. The order would result in them doing something illegal.
2. The order would put them in "imminent danger" of their health and safety.

If management takes disciplinary action after such refusals, the member and their union would then need to substantiate that their refusal was justified under the two conditions above.



Grievance Investigation (Step by Step)

1. The first step is to **listen actively to the employee**. A member who comes to you with a complaint or concern normally wishes to tell you about it in their own way and in their own words. It's important to listen actively during this phase because the member will present information that's very important to the adjudication of a grievance or the solution to a problem. Don't worry about taking copious notes during this phase: it's more important to keep good eye contact with the person you are listening to and simply jot down ideas or key words that you may want to ask them about later. You can always finish your notes after the member has left.
2. **Restate the issue chronologically**. For almost every conceivable grievance or problem it becomes important early on to understand what happened in strict chronological order. This is your opportunity to go back and ask about chronology and pick up clarifications at the same time. Most members feel that your questions show your concern and the more questions you ask about what happened and when, the more empathy you are displaying towards them.
3. The third step involves identifying which contract clauses, laws, or Company procedure(s) may have been violated. You are not expected at this stage to identify them with any precision. It is, however, very important to **identify potential violations** of the contract, law, procedures, and to let the employee know what those potential violations are. This will provide a sense of direction to whatever happens afterwards. It will also educate the member.
4. Attempt to corroborate the facts developed in the chronological listing from the second step. There are far more cases lost because of failure to provide corroboration than because of disagreements over labor contracts. Not all points can be corroborated by SPEEA without further investigation. This is O.K. What we want to rule out at this stage is hearsay and fantasy and things that there was no conceivable witness to, yet the employee believes play paramount roles in his or her grievance or problem.
5. Finally, at the most crucial level of analysis, it is necessary to **determine whether we have a provable case of a violation of the contract, laws or procedures**. That is, what does it take to prove that a particular contract clause has been violated? Many Council Reps cannot initially take on this kind of analysis without a Contract Administrator. It will be important to the final resolution to not only have contract clauses, procedures and laws identified that may have been violated, but we must have an understanding of what it takes to prove those violations.

Security, Ethics and EEO Interviews

The SPEEA contracts contain a provision (Section 12.3 Union Staff Representatives, Executive Board members or Council Representatives – Security Interviews) which establishes the right of any represented employee to have the presence of a Union official at his or her disciplinary Security interview. This section describes the allowed activities of the Union representative during such interview:

- *Act as an observer;*
- *Ask additional questions of the employee in order to provide information which is as complete as possible;*
- *As well as activities the Union representative cannot be involved in;*
- *Do not obstruct or interfere with the interview.*

This responsibility of the Council Representative is very important; it has been SPEEA's experience that security interviews can lead to serious disciplinary consequences. Your attendance at these interviews can be vital to preparation of the case for the defense in subsequent discharge or suspension determinations.

When a SPEEA-represented employee is the subject of an investigatory interview...

As a member of a collective bargaining unit, SPEEA-represented employees benefit from a special and important right that is not available to non-represented employees.

The United States Supreme Court, in the case of NLRB v Weingarten, employee is entitled to have a union representative present at an investigatory interview if the employee reasonably believes disciplinary action may result.

An investigatory interview is essentially a meeting called by someone with management authority. The meeting will be conducted either by a Company Security Investigator or EEO Investigator. The purpose is to disclose additional information or admissions that support allegations that have caused management to suspect either performance deficiencies, personal misconduct, or violation of Company rules.

Employees summoned to such meetings should invoke their right to have a SPEEA representative be with them during the entire meeting. As soon as the employee becomes aware of the nature of the meeting he or she is being directed to attend, he or she should immediately request SPEEA representation. A SPEEA Council Representative, Executive Board member or member of the SPEEA Staff should be contacted.

Management is required to allow a reasonable delay until the SPEEA representative can arrive at the meeting.

The SPEEA Council Representatives, Executive Board members, and Staff members are trained in how they and the employee should conduct themselves during the interview. The employee and the SPEEA representative should confer before the interview begins and, if necessary, during the interview.

The employee should follow the advice of the SPEEA representative. This right of representation is not automatic. It must be specifically invoked by the employee. *The Company has no obligation to advise you of this right.*

Security, Ethics and EEO Interviews

Employee Interviews by Company Security, Ethics and EEO Investigators

The Company's Security and EEO Investigators are trained and experienced interrogators. Almost always, when they summon an employee to an interview relating to that employee's conduct, they are attempting to obtain a confession that could cause the employee's termination.

Whenever an employee is summoned to such an interview, and it becomes obvious that his or her conduct is the subject of the investigation, the employee has reason to become very alarmed.

Without exception, in such circumstances the employee should insist on being accompanied by a Council Representative or SPEEA Staff. You have an enforceable right to such representation by virtue of our collective bargaining agreements as well as a U.S. Supreme Court decision.

Such representation is very important. The employee will inevitably feel great pressure from the interrogator. The Union representative will be more detached and unemotional.

The employee being questioned has no obligation to give answers to questions when those answers might be the evidence that would lead to discharge or other discipline.

While it is not SPEEA's role to condone misconduct, we believe it proper to help our people avoid convicting themselves out of their own mouth. Except in cases involving truly criminal behavior, SPEEA has no inclination to help management remove people from the payroll.

A final word of advice - **NEVER** sign a statement prepared by a Security Investigator. And **NEVER** admit verbally that a statement read to you by the Investigator is true.

Security, Ethics and EEO Interview Checklist

Before the Interview

1. Employee must **REQUEST** SPEEA representation.
2. Check to see if the employee has been told why they are being interviewed. If not, ask the employee for possible reasons.
3. Advise the employee of the following:
 - a) They should insist on knowing the specific reason for the interview.
 - b) They have the right not to admit to any wrongdoing.
 - c) Any admissions **MAY** be used against them later.
 - d) They should not assist in the development of a written statement; i.e., writing it, reviewing it for accuracy or signing it.
 - e) They may request a caucus to speak to the SPEEA Rep privately as necessary. (Tip: Provide a code word so they will request a caucus at your request.)
 - f) They should insist on being treated in a professional and non-intimidating manner.

During the Interview

1. Take extensive notes of the proceedings; **do not** share these with the Investigator.
2. Remain impartial and objective, but remember you are the advocate.
3. Ask a question only when you are sure that the answer will help the employee's case.
4. Insist that a written statement, if any, is only another form of the security investigator's notes.
5. If necessary, caucus if the employee appears to be willing to sign the statement.
6. If the employee insists on signing the statement, advise them to ask the following questions:
 - a) Can the written statement be used as justification for discipline?
 - b) Can the employee receive a copy of the statement once it is signed?
7. Do not sign the statement as a witness, even if the employee signs.

After the Interview

1. Advise the employee that they have a right to SPEEA Representation in any follow-up security interviews or disciplinary meetings.
2. Submit a report to the SPEEA Contract Administrator.

Remember:

You can:

- ✓ Ask pertinent and/or clarifying questions
- ✓ Match enthusiasm of management and/or security
- ✓ Advise the employee not to answer abusive, misleading, badgering or harassing questions
- ✓ Call for a caucus at any time and call SPEEA Headquarters for advice (technically, the employee has the right to call a caucus)

You cannot:

- ✓ End the meeting
- ✓ Intentionally obstruct the meeting

You should:

Advise employees not to sign the security interview statement. It is simply the investigator's notes for the meeting.