

**COUNTY OF MARIN
DEPARTMENT OF HUMAN RESOURCES**

**Guidelines Regarding Employees' Rights to Union Representation
in
Investigatory Meetings with Managers and Supervisors**

The information below is intended to provide managers and supervisors with guidance in determining when an employee is entitled to union representation in a meeting with his or her supervisor and the role of union representatives in such meetings. The responses to the questions presented below are based on recent labor law decisions in this area.

The County encourages supervisors to keep in mind that in accommodating employee requests for representation *within the guidelines that follow*, which are reflective of legal requirements, a union representative can be a valuable resource.

Also, critical to the application of these guidelines is the understanding that an employee's right to representation can turn on whether the employee has a reasonable expectation that disciplinary action may result from the meeting. The employer's failure to accommodate the request in such instances could lead to a grievance and interfere with appropriate resolution of the matter, including disciplinary action, if necessary.

Please distribute and discuss these guidelines with your managers and supervisors. If you or any of your staff have questions, please do not hesitate to contact me.

1. When is an employee entitled to union representation in a meeting with his/her manager, supervisor, or other representative of management?

An employee has a right to request representation as a condition of participation in an investigatory interview or a meeting which the employee reasonably believes the investigatory interview or meeting will result in disciplinary action. Therefore, if you are meeting with an employee to obtain information in order to determine whether or not some aspect of their performance or behavior on the job may result in disciplinary action, the employee is entitled to have a union representative at that meeting. This applies to investigatory meetings and conversations conducted by outside investigators as well as those conducted by department management.

Furthermore, an employee is entitled to union representation at any time the employee's fear of disciplinary action is reasonable, even if the stated purpose of the meeting or conversation is not investigatory. If an employee requests a representative at a meeting that is not investigatory, the supervisor should inform the employee that the meeting is not intended to investigate information that could lead to discipline of the employee. However, if an employee indicates that he or she will provide information to the supervisor that could result in discipline, the supervisor should permit the representative to be present.

2. Is an employee entitled to union representation at a meeting intended to give instructions or training, or to provide needed corrections of work techniques or behavior?

Most of the time, no. There is not normally any reasonable basis for an employee to fear that disciplinary action will result from a meeting in which management provides work assignments, provides feedback or coaching, corrects work techniques, or discusses work standards with employees. The right of representation arises only when a significant purpose of the meeting is to obtain facts to support disciplinary action that is probable or that is being seriously considered (i.e. the meeting is investigatory).

3. Does the employee have a right to union representation at a meeting with his/her supervisor to discuss their current performance evaluation?

No. A performance evaluation meeting is intended to give the employee a written appraisal covering a specific rating period, and contains information on the employee's performance over a broad range of job-related areas. Performance evaluations are not disciplinary actions, nor should they be characterized as so. Performance evaluations are an opportunity to provide feedback and coaching to employees so they can improve their job performance. In the performance evaluation, a supervisor may identify areas of the employee's performance that are unsatisfactory or need improvement, may identify a corrective action plan designed to assist the employee to meet performance standards within a specific time frame, and may set a specific time for a progress review and re-evaluation of the employee's performance in critical areas. The supervisor may also hold a meeting with the employee to discuss issues of performance and ways in which that performance might improve.

4. Does an employee have a right to union representation at a meeting scheduled by the supervisor to inform them that disciplinary action is being recommended?

No. The right to union representation is intended to provide the employee with protection during investigatory meetings so that their rights are not violated by a supervisor who is seeking information pertinent to determining the need for disciplinary action. Once that information has been obtained, if the supervisor determines that disciplinary action should be taken, the employee is not entitled to union representation at the meeting informing him/her of the action (for example, a meeting to give the employee a notice of disciplinary action.)

However, if at the time that the supervisor issues a notice of disciplinary action, he or she questions or explores the reasons for the employee's failure to perform or comply with personnel rules, this may change the nature of the meeting to investigatory. An employee would be entitled to a representative under such circumstances. Therefore, in a meeting in which a supervisor informs an employee of a notice of discipline, he or she should refrain from making the meeting investigatory by questioning the employee regarding their performance or conduct.

5. Does the employee have the right to the steward of his/her own choice?

An employee can request a steward of his or her choice. However, if the steward is not

available, the employer can insist upon use of the available shop steward or union-appointed representative over the objections of the individual employee. Unless the supervisor believes that the resulting delay from accommodating the employee's request for a particular steward will be disruptive to County business or will be contrary to the public interest, every effort should be made to accommodate such requests.

6. What should the supervisor tell the employee in advance of the meeting?

The manager or supervisor should inform the employee that the meeting is investigatory in nature and that the purpose of the meeting is to determine if a policy violation has occurred. This should include information about the general nature of the investigation. (e.g. "This is an investigation into allegations of misconduct.") The supervisor should also inform the employee that he or she has the right to bring a representative to the meeting if he or she chooses to do so. This will allow the employee to facilitate arrangements ahead of time for a representative to be present if the employee chooses. The employee is entitled to consult with the union representative prior to the meeting.

7. Does the manager/supervisor have a duty to bargain or negotiate with the union representative in meetings at which the representative is present?

The employer has no duty to bargain with the union representative at an investigatory meeting, and has no authority to do so. The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them.

8. Should the employer insist that the union representative remain silent during the meeting?

No. Both the employee's and employer's interests are best protected by allowing the union representative to speak and to provide information and suggestions during the meeting. Although the employer retains the right to determine the content and conduct of the meeting, the union representative is entitled to participate in the meeting in order to give assistance to employees who may lack the ability to express themselves and bring out relevant factual information. The representative may ask clarifying questions and may momentarily suspend the meeting in order to caucus with the individual employee.

9. What if an employee refuses to meet with their manager/supervisor without union representation?

No right to ask for a union representative exists for ordinary workplace conversations between a supervisor and an employee, such as to give instructions or correct work. If an employee refuses to meet with his or her supervisory in a non-investigatory context, and the employee does not have a reasonable belief that the meeting would result in discipline, such action may be insubordination and could lead to disciplinary action. In such cases, the employee should be so advised and strongly encouraged to contact his/her union representative to discuss the matter. The direction to meet, at a specific date and time, should be repeated.

Employees' Rights to Union Representation

If the employee has requested union representation at an investigatory meeting, or a meeting which the employee reasonably believes will result in disciplinary action, and is denied such representation, any evidence obtained from such a meeting cannot be used to impose discipline.