

All members are entitled to Union representation in investigatory interviews. An employee's right to union representation at an investigatory interview or other meeting with her/his employer is established by the EERA.

As PERB's Chief Administrative Law Judge recently observed, EERA section 3543.5 (a), makes it unlawful for a public school employer to interfere with an employee's rights guaranteed by EERA. EERA section 3543, subdivision (a), guarantees an employee's right to "participate in the activities of the employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." An investigatory or disciplinary interview falls under the broad definition of "all matters of employer-employee relations" and guarantees public sector employees representational rights that are at least as broad as those afforded to private sector employees under *NLRB v. J. Weingarten, Inc.* (1975) 42 US 251. (Capistrano Unified School District (2015) PERB Decision No. 2440, p. 11)

Additionally, as EERA guarantees a right to representation "in all matters of employee-employer relations," not all meetings with management must conform to the requirements of *Weingarten* before the right to representation attaches. (Sonoma County Superior Court (2015) PERB Decision No. 2409-C, p. 8.) Indeed, California law extends the right of representation to employer-initiated meetings which are held under "highly unusual circumstances" even if those circumstances are not "investigatory" or "disciplinary" per se. (*Redwoods Community College District v. PERB* (1984) 159 Cal.App.3d 617.) See *Piedmont USD* (2019) 44 PERC 117, 2019 Westlaw 7903257.

Requests for representation are protected by the EERA. *Los Angeles USD* (1991) PERB Dec. No. 874; *California State University* (1982) PERB Dec. No. 211-H. If the District impedes on such requests, it will be discriminating against you and therefore violating the Act.

Simply because an employer denies a meeting is investigatory does not preclude the right to representation at an employee-manager meeting. If the employee reasonably believes the meeting might result in disciplinary action, the employer must allow representation. *Rio Hondo CCD* (1982) PERB Dec. No. 260.

The District cannot limit your communication regarding a request for a meeting. Ordinarily there cannot be restrictions on employee communication with colleagues, family and friends, including potential witnesses. In the case of *Los Angeles Community College District*, PERB Decision No. 2402 (2014), PERB held that, in general, employees cannot be ordered to keep employer investigations confidential.

The case arose when an individual adjunct instructor, Mr. Perez, was involved in a work dispute, that spilled over into the classroom. This dispute resulted in the District placing Mr. Perez on paid administrative leave and ordering him to attend a fitness-for-duty examination. The directive included this "confidentiality" order:

You are hereby directed not to contact any members of the faculty, staff or students. If you have any questions during the time that you are on leave, please contact [the Vice President of Academic Affairs]. (ALJ decision, p. 6)

The PERB General Counsel issued a complaint alleging that this directive interfered with Perez's protected rights to discuss his working conditions with others, including employees and students, in violation of section 3543.5(a) of the EERA. After a PERB trial, the ALJ issued a proposed decision holding that the directive violated the Act, as the PERB General Counsel had alleged. The District appealed. PERB rejected the appeal.

In its decision, PERB held that the ALJ's conclusions were in accordance with applicable law, supplementing it with a decision rejecting various employer defenses. In its ruling, PERB concluded:

It is fundamental that employees have the right to discuss their working conditions amongst themselves. The District's directive infringes on employees' protected rights by prohibiting Perez from contacting faculty, staff or students in connection with the actions taken by the District against Perez and its ongoing investigation. The scope of the directive is overbroad and vague in that the directive fails to define the specific conduct it sought to prohibit in a clear manner. And, at no time did the District clarify that protected communications were excluded from its scope. By failing to delineate which communications are lawful or unlawful, the directive would reasonably be construed to mean that all communications, including those made while engaging in protected activity.

In another case, *Banner Health Systems*, 358 NLRB No. 93 (2012), the NLRB held that the employer unlawfully prohibited employees from discussing ongoing investigations of employee misconduct.

The burden, however, is squarely on the employer to demonstrate that a legitimate justification exists for a rule that adversely impacts employees' protected rights.