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IN ARBITRATION PROCEEDINGS PURSUANT TO

AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy between: SEIU LOCAL 221, Union, and COUNTY OF SAN DIEGO, Employer. Re: Grievance	ARBITRATOR'S OPINION AND AWARD CSMC No. ARB-12-0174

This arbitration arises pursuant to a Collective Bargaining Agreement between **SEIU LOCAL 221**, (referred to below as "Union"), and the **COUNTY OF SAN DIEGO,** (referred to below as "Employer"). Under its terms, **MATTHEW GOLDBERG** was selected from a California State Mediation and Conciliation Service list to serve as neutral Arbitrator and to render a final and binding decision.

A hearing in this matter was conducted on July 16, 2013 in San Diego, California. All parties had full opportunity to examine and cross-examine witnesses, and to submit evidence and argument. The parties submitted post-hearing briefs that were received on or about August 14, 2013.

APPEARANCES:

On behalf of the Union:

SARAH LOUD, Senior Advocacy Center Organizer, **SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 221**, 4004 Kearny Mesa Rd. San Diego, CA 92111; and

FERN M. STEINER, Esq., **SMITH, STEINER, et al.**, 401 West A Street, Suite 328 San Diego, CA 92101

On behalf of the County:

KEVIN POWELL , Labor Relations Officer 2, **COUNTY OF SAN DIEGO,** 1600 Pacific Highway Room 452, San Diego, California 92101

THE ISSUE

Did the County of San Diego's Health and Human Services Agency violate Article 11, Personnel Practices, Section 2, Disciplinary Action, Subsection B, Disciplinary Representation, of the SEIU, Social Welfare (SW) Unit Contract, and Weingarten Rights when the grievant, , was denied Union Representation at his October 24, 2012 Performance Improvement Plan meeting? If so, what should be the appropriate remedy?

PERTINENT SECTIONS OF THE MOA

ARTICLE 11, PERSONNEL PRACTICES

Section 2, Disciplinary Action

A. Definition

Disciplinary action, as defined by the County Rules of the Civil Service, will include written reprimand, suspension, demotion, or discharge.

If the Agency believes there is just cause for disciplinary action. the Agency will furnish the employee copies of any documents or written statements used by the Agency in justifying its action and, upon request of the employee, furnish the Union copies of any such documents.

For employees in the Health & Human Services Agency only. Letters of Warning arc reviewable under the provisions of the grievance procedure only to step "F," the level of the Agency Head or the Agency Head's designee. Letters of Warning shall not be subject to the arbitration clause of the Grievance Procedure.

When an employee's caseload is over workload standard, such fact shall be taken into consideration in any disciplinary action, and shall be a factor in determining the appropriate level of discipline to be implemented. A workload reduction may assist supervisors in evaluating non-repetitive workload related performance issues. Supervisors may reduce workload while assessing if the problem is one of performance or a result of excessive workload.

B. Disciplinary Representation

At the time of conferences, meetings, or hearings held for the purpose of disciplinary action as defined in Paragraph A, or which the employee believes may result in disciplinary action, the employee shall have the right to representation, including Union representation.

DEPARTMENT OF HUMAN RESOURCES POLICY AND PROCEDURES MANUAL
POLICY NUMBER: 1004

SUBJECT: **EMPLOYEE DISCIPLINE**

POLICY

It is County policy to motivate its officers and employees to perform efficiently and effectively through positive encouragement and recognition for satisfactory. above standard and outstanding job performance. However, the issues of unacceptable job performance, misconduct or violation of County policies and procedures must be addressed and may result in disciplinary action. Officers and employees of the County have the responsibility to provide service to the public in an appropriate manner. They are, therefore, expected to exercise judgment and discretion and observe established and accepted standards of personal behavior in the performance of duties and responsibilities.

APPLICATION

This policy covers all officers and employees of the County of San Diego and must be applied equitably in dealing with issues involving employee job performance arid conduct that may call for disciplinary action.

PROCEDURES

A. **Forms of Disciplinary Action**

The forms of disciplinary action provided for in County rules and regulations in progressive order of rnagnitude are as follows:

1 . **Informal discipline**
- – Counseling
- – Oral Warning
- – Written Warning

2. **Formal Discipline**
- – Reprimand

– Transfer to another position in same class
– Suspension without pay or with reduced pay
– Demotion (reduction in rank or pay)
– Termination (removal)

(Performance reports are not considered a disciplinary device. However. ratings of "improvement needed" or "unsatisfactory" performance or conduct on a regular or supplemental report can support disciplinary action).

B. Progressive Discipline

Progressive discipline is characterized by the following:

- Addressing unacceptable job performance or conduct with a corrective and rehabilitative (rather than punitive) approach
- Addressing unacceptable job performance or conduct with informal disciplinary action appropriate to the situation.
- Addressing continuing or repeated instances of unacceptable job performance or conduct with increasingly stringent forms of disciplinary action available as appropriate.
- Instances of unacceptable job performance or conduct which are serious may require formal disciplinary action at the outset to provide an appropriate remedy. . .

COUNTY CIVIL SERVICE RULES
RULE VII
DISCIPLINE

SECTION 7.2 CAUSE FOR DISCIPLINARY ACTION

Any of the following shall be deemed sufficient cause for reprimand, transfer, reduction in compensation, suspension, demotion or removal of any person:

(a) That the employee has been guilty of incompetency;
(b) That the employee has been guilty of inefficiency; . . ..

FACTS

The facts leading to this grievance are not in dispute. Grievant works in the County's Health and Human Services Agency ("HHSA") as a Human Services specialist. He was placed on a Performance Improvement Plan ("PIP") because he did not meet productivity standards in the previous rating period. The 60-day PIP ran from August 28 through October 28, 2012.

Part of the PIP included weekly meetings with his supervisor, Supervising Human

Services Specialist _____ The purpose of these meetings was to review his performance the previous week, discuss whether it met expectations, and provide coaching and suggestions how that performance might be improved. As per the terms of the PIP, grievant was "encouraged to provide input." He was also cautioned that the in the event that he failed to meet the PIP criteria, "further appropriate action will be determined and discussed with you," and the PIP would be mentioned in his performance appraisal.

A Confirmation of Conference (COC) was issued after each meeting which set out the particulars of grievant's performance each week as well as a summary of the discussion about it, if any there was, between grievant and ___ COCs are not considered formal discipline and are not kept in an employee's personnel file. testified that discipline was not mentioned in any of the meetings, although she acknowledged that grievant asked her what would happen if he did not improve. She maintained, however, that the PIP is a coaching tool designed to help a worker succeed.

Grievant's normal workload including processing Medi-Cal renewals, as well as those for other benefits, During the PIP period, his work was limited to Medi-Cal renewals. He was expected to process a minimum of eight of these per day. In six of the eight weeks within the PIP, grievant did not meet this standard.

Madge Blakey was the County's Labor Relations Manager from 1975 to 2002. She negotiated the subsection at issue in 1977 with the Union's predecessor local. A minor change was made to it in the 1982 Agreement, and the language has remained as it appears in the current Contract ever since. Blakey testified that the intent behind the language was to incorporate the principle of *Weingarten* into the MOA without specifically mentioning the case by name. Its purpose was to provide guidance to managers about the impact of that

decision on their interactions with employees, but never to broaden the rights of employees as therein defined.

Blakey could not recall whether she also participated in the bargaining for the Probation Officers Contract, which was negotiated at the same time as the Social Workers Contract under examination. The PO Contract, however, is worded differently than the Union's, in that where the Union Contract omits the terms "reasonable and investigatory," the PO Contract includes them in its Article 11, Section 6 B., as follows:

> At the time of conferences, meetings, or hearings held for the purpose of disciplinary action as defined in Paragraph A, or *an investigatory interview* which the employee *reasonably* believes may result in disciplinary action, the employee shall have the right to representation, including Union representation

Allison Boyer, an HHS Administrator and manager at the Center City Family Resource Center, was directly involved with five PIP's. She stated that she has allowed Union representatives to attend the meetings on a case-by-case basis. In one instance, there had been a personality conflict between the employee and his/her supervisor. She further maintained that a letter of warning is "informal discipline," although it is placed in the personnel file and may be used to justify a substandard performance rating.

Brandy Winterbottom-Whitney, Group HR officer for HHS and former labor relations officer, stated that in her experience, PIP's did not lead to discipline. Similarly, Article 11 has not been applied in PIP situations, and she was not aware of any supervisors who allowed Union representation in these meetings.

Kimberly Evers, who is currently an HR manager in HHS, worked as a representative for the Union's previously designated local for three years up until 2005. She stated that representatives would attempt to participate in any meeting possible whether or not it was permitted by law or Contract, and would succeed with supervisors who were unfamiliar with

either. She herself filled that role. She was also familiar with one instance in which Loud e-mailed a request for representation to as supervisor which was permitted. She directly supervised that supervisor, whom it was her responsibility to train. She was also familiar with the case, which resulted in the eventual termination of the employee.

Via e-mail October 16, grievant invoked his *Weingarten* rights and requested that a Union representative be present at any meeting that might "result in discipline." The Employer denied the request, despite the fact that two more meetings after that date were scheduled pursuant to PIP. At the end of the 60 days, grievant had not met the terms outlined in the plan. At the ultimate PIP meeting on October 24, _____ advised grievant that she and manager Allison Boyer would be reviewing his performance during the PIP period and determine the appropriate next step.

This grievance was filed October 31, alleging that the County had violated Article 11, Section 2. The following day, Director of Human Resources Donald Turko issued a memo to HR Directors and HR Officers stating that there was no right to Union representation at "performance meetings," which, he stated, were "designed to convey work instructions, expectations, training, and communicate needed corrections in the employee's work techniques" and were "*not disciplinary or investigatory* in nature. (Emphasis in original). To the extent that their presence was currently being allowed, he instructed that steps should be taken to "see this is stopped immediately." Turko states further that the fear of discipline resulting from failing a PIP "does not create a right under *Weingarten.*" The then recites::

> Management is reminded that meetings regarding performance, such as those that occur during a PIP must be limited to discussing performance matters. The discipline process must be addressed separately. If an employee requests Union representation for a PIP meeting. the request should be denied. However, when denied, if during the meeting a subject arises that. based upon how the employee responds, may warrant discipline, the meeting should be

stopped and the employee should be afforded the opportunity to get his or his Union Representative.

The County's denial of the grievance at both the middle manager and department head levels repeated the language of the memo quoted above describing the purpose of "performance meetings" as "designed to convey etc." At a meeting with the Department Head or designee pursuant to the grievance procedure,[1] Union representative Loud presented a spreadsheet which provided a number of examples over the past three years when Union representatives were present when PIP's were discussed, asserting that the spreadsheet provided evidence of a past practice in this regard. She subsequently provided the spread sheet to Maria Casanova, Senior Department HR Officer at HHSA via e-mail. Loud also presented this evidence to Labor Relations Officer Powell and Senior Labor Relations Manager Jeannine Seher at the pre-arbitration meeting.

In denying the grievance at this stage, the County stated that upon its review of the list, it was unable to substantiate the claim of past practice, maintaining that "after careful review of the list, . . ., we were unable to identify even one example on the entire list where the HHSA allowed an SEIU rep to attend a PIP meeting." The Union, however, produced numbers of e-mail exchanges in which it was requested that a representative be present during a PIP meeting and that request was granted.

Loud testified that she has represented employees at PIP meetings. Part of her role is to determine whether the goals which are set by the PIP are objective and reasonable. When she has been told that she has no right to be there, she has asserted the employee's *Weingarten* rights, and is then allowed to remain. She has also assigned other

[1]Barbara Jimenez, HHSA deputy director, served as the County's designee during the meeting.

representatives to be present at PIP meetings.

On December 13 grievant received a letter of warning based on his failure to meet the goals in his PIP and improve his productivity. Although they may be grieved, letters of warning, as noted, are not subject to arbitration under the Contract.

POSITION OF THE UNION

A violation of the MOA is established by the plain meaning of Article 11, Section 2B, the language as read in conjunction with the other County rules on discipline and pertinent case law, and the Contract language read in conjunction with past practice.

Although the Union submitted testimonial and documentary evidence of a past practice allowing for Union representation at PIP meetings, notwithstanding the testimony of Winterbottom-Whitney, the Country did not provide any evidence that the meetings did not in fact occur. The evidence established that the Union was providing representation at PIP meetings and other non-disciplinary meetings such as interactive accommodation, performance evaluation appeals, and harassment claims at the request of employees, with the acquiescence of the County through its departmental HR officers. The Union keeps records in its detailed electronic case management system, whereas the County does not.

Boyer acknowledged that she allowed Union representation at other PIP meetings on a "case-by-case basis." While the Union agrees that having a representative present is of value when the employee believes that a supervisor may be disagreeable, even without asserting *Weingarten* or Contract rights, if management concludes that representation is appropriate under these circumstances it should be appropriate when the employee believes discipline will result from a meeting about alleged performance deficiencies. In this case, discipline actually resulted after grievant was repeatedly assured that the meetings were not

disciplinary.

County claims that it had no knowledge of representatives' presence in a host of non-disciplinary, non-investigatory meetings, after having been provide with the documentation on at least three occasions, is not credible. Nor is the denial that any such meetings occurred. The entire County HR staff was unable or unwilling to independently verify that a single such meeting had taken place even after being provided with a list of employee names, departments and dates.

The County appears to argue that a written warning is not discipline. While Winterbottom-Whitney and Evers testified that informal discipline is not governed by Civil Service Rules, they agreed that written reprimands and warnings are governed by the MOA. Most forms of formal discipline, excluding letters of reprimand, are appealed to the Civil Service Commission and informal discipline is appealed through the grievance procedure. This does not change the fact that a letter of warning is discipline.

Although the County took great pains to differentiate between formal and informal discipline, it is unclear what its purpose was. Letters of warning are subject to the grievance procedure, used for support in adverse performance evaluations, and remain indefinitely in personnel files. A letter of warning is the first step of progressive discipline. The only difference between it and a suspension or dismissal is the tribunal to which it may be appealed. Counseling is also considered discipline under the same policies. That the County could argue that performance matters are not disciplinary is contradicted by every one of its own rules.

The claim by County witnesses that PIP's do not lead to discipline is a semantic argument at best. Discipline is an undisputed direct consequence of failing a PIP, as

grievant experienced. The County's repeated attempts to characterize PIP's and resulting discipline as being for the employee's "benefit," and demonstrating an intent to teach a lesson, do not preclude them from being immediately punitive.

The County also argues that PIP meetings are neither "investigatory" nor "disciplinary," and hence its denial of representation rights. The subject of this grievance is Article 11, Section 2B, which lacks investigatory and reasonable requirements, but has the word "disciplinary." The County nonetheless asserts that the Contract language is identical to *Weingarten*.

Case law, including *Rio Hondo Community College District* (PERB No. 260, 1982) and *Redwoods Community College District v. PERB* (1984), 159 Cal App 3d 617, establishes the conditions under which an employee is entitled to Union representation in meetings with his/her employer. PIP's are only required of employees who have alleged performance deficiencies. While discipline may be issued to employees without asking questions or requiring a meeting, PIP meetings require an employee's input so that management can document attempts to correct, and in some instances use that documentation to satisfy the notice requirement of "just cause" when discipline results. Grievant was disciplined for failing the PIP and support for the discipline was developed at a meeting in which he was denied representation. The meetings were thus investigatory.

Grievant's belief that he would be disciplined was objectively reasonable. Despite the County's claim that PIP meetings were not disciplinary, this employee was disciplined. The County seems to argue that they are not disciplinary because discipline is not actually imposed at these meetings. *Weingarten* is not triggered when an employee is physically handed discipline, absent other components. Discipline is rarely imposed on employees at

formal investigatory meetings. There is no logical basis for asserting that the PIP meeting is not disciplinary simply because the discipline follows weeks or months later. Another semantic attempt that these meetings are not disciplinary because employees are not disciplined for failing the PIP, but for poor performance, is similarly unavailing.

The County may be asserting that Union representation is never permitted because the purpose of the meeting is not to solicit damaging facts but to coach or train. It is really arguing that the Employer's subjective intent should determine whether representation should be permitted, and that PIP meetings are never disciplinary. The Contract refers only to the employee's belief, not the Employer's. PIP meetings can and do lead to discipline. They may begin one way and end another. Grievant's did not request representation until it became clear that he was not meeting expectations, some two months after the process began. "Disciplinary" in the context of the disputed Contract language simply means any meeting or conference where the employee believes discipline may follow as a result of what is discussed or investigated.

Presumably, the level of discipline had not been determined at the time representation was requested. Management's decision to make the discipline a letter of warning after the grievance was filed is not relevant to grievant's belief at the time.

Madge Blakey's testimony regarding the origins of the language in question is reasonable in light of the interest in having *Weingarten* applied and extended to public employees. The differences between the SW and the Probation Officers Contract language is significant in that the former omits the "reasonable" and "investigatory" language while the latter expressly includes them. The omissions were intentional as shown by clear past practice.

As shown by Evers' testimony, HR was fully aware that Union representatives were attending PIP meetings, and allowed such attendance, either as a matter of course or after it was explained to managers why attendance was appropriate. The appointment of a new Director of Human Resources has triggered a change as to when Union representation is to be allowed. This has created confusion as whether to grant representation where it is anticipated that an employee may be disciplined based on interactive work performance meetings. Even under the terms of Turko's memo, grievant was entitled to representation: he reasonably believed discipline would follow as a result of what was stated at the meetings and he was asked questions pertaining to work performance which were investigatory in nature.

The plain language of the MOA entitled grievant to representation. While the Union does not believe that it has to establish a *Weingarten* violation to establish a violation of the Contract, the facts in this case contain the "highly unusual circumstances" described in *Redwoods.* Grievant was required to attend the meetings, which were related to his performance deficiencies. The interviews were interactive and formal. A hostile attitude towards the employee was shown by the language of the PIP regarding the failure to comply with its terms, the denial of representation, the involvement of labor relations staff and the performance evaluations, and the fact that grievant was disciplined based on information gathered during the meetings in which he was denied representation.

The Union requests that the grievance be sustained and that all discipline and counseling memos should be ordered removed from grievant's employment record.

POSITION OF THE COUNTY

The "Disciplinary Representation" language was negotiated in 1978 order to

incorporate the then-recently decided *Weingarten* rule. This language has not changed since the 1982-1984 MOA and was never intended nor negotiated to expand the meaning of the subsection beyond the elements of that case. The language of the clause is clear and unambiguous, and may not be changed by prior acts. It does not and has not applied to PIP meetings.

Letters of Warning are not formal discipline. Formal discipline in the County, as defined by the County Rules of the Civil Service, includes written reprimand, suspension, demotion, or discharge. MOA Article 11 Personnel Practices Section 2.A defines disciplinary action by referring to the definition contained in the County Rules of Civil Service.

A key component of this MOA language is, "At the time of conferences, meetings, or hearings held for the purpose of disciplinary action as described in Paragraph A, or which the employee believes may result in disciplinary action ... " The PIP meetings here were not "for the purpose of disciplinary action," but to provide grievant with coaching and mentoring. was trying to improve grievant's performance, just as she had in the two prior PIPs with other employees that she had been involved with as a supervisor. Bringing performance to acceptable levels is the ultimate goal of a PIP.

never stated, during any of her meetings with the grievant, that discipline was a possible outcome pending the completion of the PIP. When he asked if he would be disciplined for failing to improve to an acceptable level, explained that there was still time left during the PIP period in which she would try to help him reach an acceptable performance level. This is shown by the COC's where the statistics, coaching techniques, and suggestions for improvement are consistently mentioned, while there is not a single reference to possible discipline for failing to perform at a satisfactory level.

Even after the PIP period was completed, never told grievant that discipline would follow. Instead, she stated that she would be consulting with her manager in order to determine what the appropriate next step would be. The Contract language grants the right to have Union representation only where the *Weingarten* elements are met. Because the purpose of the meetings were not disciplinary, and no discipline was considered or could be reasonably expected, and no right of representation ever attached to the request made by grievant, representation was legally denied.

Under *Weingarten*, three elements must be met to trigger the employee's right to representation. The meeting must be investigatory; the employee must hold an objectively reasonable belief that discipline will result from what happens during the meeting; and the employee must request representation. When grievant participated in his PIP, weekly meetings with were held to discuss his progress in the prior week. The earlier meetings were relatively short and mainly contained discussions about grievant's self-reported caseload. He chose not to actively participate which made it difficult for to make suggestions to aid grievant to increase his productivity.

The PIP meetings were coaching sessions where grievant was given tools by to help him improve. She asked clarifying questions about his self-reported work statistics. He sometimes disputed the accuracy of how was interpreting his numbers. needed clarification from the grievant so that she could properly assess his performance and determine what tools would best aid him in completing his tasks. Once she obtained clarification, her suggested tools included "excluding him from being assigned status reports so he could focus on his backlog," "having his supervisor shadow him," and "suggesting to use abbreviations on his case comments to save time."

"Whether an investigatory interview may lead to disciplinary action is an objective inquiry based upon a reasonable evaluation of all the circumstances, not upon the subjective reaction of the employee. [*NLRB v. J. Weingarten, Inc.* (1975) 420 US 251, 257, fn. 5 (43 L.Ed.2d 171, 95 S.Ct. 959, 964). It should be acknowledged that a supervisory interview in which the employee is questioned or instructed about work performance inevitably carries with it the threat that if the employee cannot or will not comply with a directive, discharge or discipline may follow, but that latent threat, without more, does not invoke the right to the assistance of a union representative. The right of representation arises when a significant purpose of the interview is to obtain facts to support disciplinary action that is probable or that is being seriously considered." Alfred M. Lewis, Inc. v. N.L.R.B, supra, 587 F.2d at p. 410.

Because these meetings were not to obtain facts to support disciplinary action, it is not reasonable for the employee to objectively believe discipline might result. Grievant requested union representation. Burnham denied the request because the purpose of the meetings was to discuss and correct his performance issues.

The Union asserted that there was a past practice of allowing Union representation at PIP meetings and provided eighteen examples in the last five years where an SEIU representative allegedly attended a PIP meeting. However, many of the exhibits presented do not support or substantiate this allegation. The County has over 15,000 employees while the HHSA alone has approximately 5,000. For the Union to identify only eighteen potential situations where a Union representative attended a PIP meeting in the last five years does not illustrate a practice.

Further, the Union did not meet its burden of proof in demonstrating that a PIP meeting took place with a Union representative present. The emails presented do not confirm

a meeting took place. Direct testimony was not provided to support this contention. Nor do the emails confirm that PIP meetings in question took place with a Union representative present. Additionally, Boyer, Winterbottom-Whitney, and Evers all testified that it is not a common practice to allow a Union representative at PIP meetings unless there is an extenuating circumstances.

Grievant's request for Union representation is not supported under the current Contract language. The meetings were not to elicit facts that could lead to discipline, but coaching sessions to improve his performance and thus avoid discipline based upon overall poor performance during the entire annual rating period. The Letter of Warning that was ultimately issued in December of 2012 would have occurred regardless of the PIP meetings because his caseload statistics over an extended period of time from February 2012 until December 24, 2012 provided the basis for the informal discipline that was imposed.

The County did not therefore violate Article 11, Personnel Practices, Section 2, Disciplinary Action, Subsection B.

DISCUSSION

When a Contract interpretation question is presented, the Arbitrator is asked to enforce the mutual intent of the parties as expressed in the language of their Agreement. When that language is clear and unambiguous, intent is apparent. "Interpretation" is unnecessary, as the language is simply applied as written. Where, however, language is unclear and is susceptible to different though plausible interpretations, intent is not readily apparent. it then becomes necessary to resort to technical rules of contract construction or refer to extrinsic evidence, such as bargaining history or past practice, to determine what was meant by the words that the parties used and hence their true intent.

The language of Article 11 Section 2(B) is clear on its face. It declares that an employee shall be entitled to Union representation in any meeting, hearing or conference which is held "for the purpose of disciplinary action as defined in Paragraph A, *or* which the employee believes may result in disciplinary action." Thus, the clause permits the right of representation to be invoked under two alternative circumstances: either the meeting, etc. is held for disciplinary purposes, or the employee believes that it will lead to discipline.

As indicated in a recent PERB case, *Gutierrez v. State Board of Equalization,* SA-CE-1849-S, the Board adopted the *Weingarten* rule in 1982 in its Decision No. 260 (*Rio Community College District).* Paralleling the language of that case, to establish a *Weingarten* violation, the evidence must demonstrate that the employee requested representation in an investigatory meeting that the employee reasonably believed would result in disciplinary action, and the employer denied the request. The right to representation does not attach when the employer intends only to deliver notice of a disciplinary action, but where an employer seeks facts or evidence in support of that action. Once requested, to avoid a violation, the employer may grant the request, discontinue the interview, or offer the employee the choice of continuing the interview without representation of having no interview take place.

The language in the Union's Agreement contains some, but not all of these *Weingarten* requirements. Plainly, it was inspired by and partially based on the holding in that case. However, the *Weingarten* rule requires the interview to be an investigatory one, and further requires the employee to "reasonably" believe that discipline will follow. Language to that effect is notably absent from Article 11, Section 2(B).

Notwithstanding Blakey's testimony, Article 11, Section 2(B) thus does not incorporate

the *Weingarten* rule wholesale, but allows the presence of Union representation on request whether the meeting is investigatory or not. This is shown conclusively by the Probation Officers Agreement, which spells out the "investigatory" and "reasonably" pre-conditions. When the County wished to make a distinction between following the letter rather than the spirit of *Weingarten*, it was well aware how to do so.

Although the Union contends that circumstances in grievant's situation supplied all the elements necessary to trigger the exercise of *Weingarten* rights, given the Contract's clear language as distinguished from the *Weingarten* rule, the fact that the PIP meetings were not considered "investigatory" but to coach and improve performance is essentially irrelevant. Moreover, while improvement is the goal for all concerned with a PIP, there is also the possibility that improvement may not happen. When it does not, discipline becomes more or less an inevitability. The implementation of the plan itself is a reminder of that outcome.

A PIP is, or can be, the first step in disciplining an employee for poor performance. Under a just cause system, employees who have performance deficiencies are given an opportunity to adjust that performance so that it meets the employer's expectations. It is only after they have demonstrated that they are unable or unwilling to make that adjustment that serious discipline for performance issues is consistent with just cause principles. Accordingly, the existence of the PIP, coupled with a record of failing to comply with its terms, gives rise to the reasonable belief that discipline will result, as it did in this case. Grievant's request for representation met the Contract's requirements. When it was denied, the County violated the Agreement.

The County maintains nonetheless that the PIP conferences were not to obtain facts which might support discipline but to correct performance issues. The failure to make

appropriate corrections and presumably the reasons therefor were discussed at the meetings, however. That failure supplied the basis for later discipline and the facts which were used to justify it. Grievant's belief that he might be disciplined as a consequence of what was discussed at these meeting was an altogether reasonable one.

As it has been found that the language of Section 11, Section 2(B) is clear on its face, it is unnecessary to determine whether the parties established a past practice allowing representation during a PIP meeting. The fact that it occurred in certain instances demonstrates the language at issue was construed by managers in the manner suggested, and accepted by the County. However, the mere fact that an employee is subject to a PIP would not necessarily result in discipline. It is only after it becomes apparent that the employee cannot meet the requirements of a PIP that discipline becomes a real possibility. As such, Union representation would only be warranted under the Contract when that circumstance arises.

AWARD

The grievance is sustained. The County of San Diego's Health and Human Services Agency violated Article 11, Personnel Practices, Section 2, Disciplinary Action, Subsection B, Disciplinary Representation, of the SEIU, Social Welfare (SW) Unit Contract when the grievant, _____ was denied Union Representation at his October 24, 2012 Performance Improvement Plan meeting.

The Letter of Warning which resulted from his failure to meet the terms of that Performance Improvement Plan is to be rescinded, removed from his personal file, and not to be used as a basis for future progressive discipline. The County is further ordered to permit a Union or other representative to be present during a Performance Improvement Plan

meeting after the employee subject to the plan has demonstrated that he/she has been unable or unwilling to meet the performance standards of that plan.

The Arbitrator retains jurisdiction over any questions arising from the interpretation or implementation of this Award.

Dated: August 28, 2013

MATTHEW GOLDBERG
Arbitrator