

Hearing or No Hearing

Legal Requirements for Disciplining Union Employees

By Carla P. Maresca, Sheryl L. Brown and Joe DePaul

The recent U.S. Supreme Court decision in *Schmidt v. Creedon* establishes another legal consideration for public employers disciplining their employees. Michael Schmidt was a police officer in Pennsylvania's Capital Police who claimed that his due process rights were violated as a result of not being provided a hearing before he was suspended without pay and because the pre-disciplinary hearing notice did not specifically identify the rules he was alleged to have violated. The Third Circuit affirmed summary judgment as to both claims; however, in doing so they made it clear that in cases of suspension without pay, the law requires a pre-suspension hearing.

The Court confirmed that a borough police officer has a constitutionally protected property interest in not being terminated or suspended from his or her position without good cause. Because of this property right, absent extraordinary circumstances, Schmidt had a right to a pre-suspension hearing. The Court distinguished this case from *Gilbert v. Homar*, 520 U.S. 924 (1997), which involved a police officer who had been arrested and charged with a drug possession, who also did not have a pre-suspension hearing. In that case, because there was probable cause to believe the officer committed a crime, no pre-suspension hearing was necessary. In this case, Schmidt was only accused of a wrong doing by his supervisor.

Where does that leave Borough employers? Absent extraordinary circumstances, a pre-suspension hearing *must* be provided when they intend to suspend without pay.

Here is a guideline of the existing legal rights of public employees subject to disciplinary proceedings following *Schmidt* and its predecessors.

Right to Pre-Termination Hearing – The Loudermill Rule (*Cleveland Board of Education v. Loudermill*)

Before an employer takes away the property right of a public employee to an employee's job or to a full paycheck by way of a suspension or a termination, the employer must give the employee a pre-disciplinary or pre-termination hearing.

The employer must at a minimum follow certain guidelines for what is referred to as a Loudermill hearing:

- 1) Provide the employee with specific notification of the charges against the employee — should be in writing at least 24 hours prior to hearing.
- 2) Allow the employee to have a representative present (see *Weingarten* Rule below).
- 3) Allow the employee on an informal basis to respond to the charges against the employee.

The employer must provide information about the allegation, the investigation and findings, and the recommended discipline so that employee can be prepared to respond.

Right to Union Representation – The Weingarten Rule (*NLRB v. Weingarten, Inc.*)

Employees are guaranteed the right to union representation whenever an employee is being questioned under circumstances that

may lead to discipline. If during an interview or investigation, an employee feels that disciplinary action may result, he or she may request a union representative be present. Likewise, if during an investigation, the employer becomes aware that disciplinary action may be invoked, he or she must inform the employee.

The employer has a duty to advise the employee of the nature of the investigation or interview. The employee is entitled to representation only if the employee requests representation. Absent a request from the employee, the employer has no obligation to notify the employee of the employee's right to request representation.

At a minimum, *Weingarten* rights exist for any disciplinary interview concerning a citizen's complaint, any disciplinary

interview concerning a department-initiated complaint and any situation where the employee is required to give an oral or written report about the use of force.

Right to Granted Immunity Before Answering Questions – The Garrity Rule (*Garrity v. New Jersey*)

If a public employer orders a public employee to answer a question, the employee's answer and the fruits of that answer cannot be used against the employee in a subsequent criminal proceeding. The employee must invoke *Garrity* rights, which are not automatically invoked. Any statements made by employee after invoking *Garrity* may only be used for investigation purposes and not in criminal prosecutions.

There are two prongs for compliance with *Garrity*: If an employee is compelled to answer questions as a condition of employment, the employee's answers and the fruits of those answers may not be used in *criminal* prosecution; and the employer becomes limited as to what can be asked. Such questions must be narrowly tailored to the employee's job.

After the employee invokes *Garrity*, the interviewer must suspend the interview and seek "use immunity" from the county prosecutor and when granted, the employer must advise the employee in writing.

Right to Pre-Suspension Hearing – The Schmidt Rule

Absent extraordinary circumstances, a borough police office cannot be suspended

without pay unless a pre-suspension hearing has taken place. Taking instruction from the Court discussing *Loudermill*, the hearing need not be elaborate. Furthermore, where post-deprivation grievance procedures are available, the employee is only entitled to notice of the charges against him or her, an explanation of the employer's evidence and the opportunity for the employee to present his or her side of the story. [LMI](#)

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