



The Limits of Union Representation at Post-Evaluation and Remediation Conferences

By: John Fester and Adam Dauksas

Can a probationary teacher insist on union representation at a post-evaluation or remediation conference where the subject of that conference is limited to the teacher's performance? On Friday, the Illinois Supreme Court said no, at least not in the case of Rachel Warning. In *SPEED District 802 v. Warning*, the Court held that SPEED, a special education cooperative, did not commit an unfair labor practice by failing to renew the teaching contract of Warning, a nontenured probationary teacher, after she insisted on being accompanied by a union representative at a post-evaluation conference and several subsequent remediation meetings.

In February 2005, Warning received a teaching performance evaluation of "Unsatisfactory." Although Warning was a fourth-year probationary teacher at the time, the collective bargaining agreement between the union and the district prohibited SPEED from dismissing a third- or fourth-year probationary teacher for performance-based reasons "without at least one documented attempt to correct deficiencies." Therefore, SPEED's principal scheduled a meeting to not only review the evaluation with Warning, but also discuss a corrective action plan that had been developed for her. The plan called for biweekly remediation meetings with Warning in order to discuss, among other things, Warning's lesson plans and her difficulties in effectively communicating with other staff members.

Over the objections of several of SPEED's administrators, Warning brought a union representative with her to the initial post-evaluation conference and every subsequent remediation meeting held thereafter. Having determined that Warning's overall performance remained "Unsatisfactory" following the remediation sessions, SPEED chose not to renew Warning's contract.

In August 2005, Warning and the union filed an unfair labor practice charge with the IELRB, asserting that SPEED failed to renew her contract "in retaliation for Warning's insistence on having a fellow employee and Union representative assist her in defending herself against the possibility of adverse employment actions." Both the IELRB and the Illinois Appellate Court ruled in Warning's favor. Each held that the district committed an unfair labor practice by discharging Warning in retaliation for insisting on union representation at the remediation meetings and ordered that as a remedy, Warning be reinstated to her teaching position and granted tenure.

The Illinois Supreme Court reversed, however, holding that SPEED could not have committed an unfair labor practice because Warning was not engaged in a protected union activity when she insisted on having union representation at her remediation meetings. An employee engages in a protected union activity only when the employee's actions invoke a right under the law or the collective bargaining agreement. The majority held that Warning's actions did neither.

Specifically, the Court held that the right to union representation does not attach to a probationary teacher's post-evaluation conferences or remediation meetings as a matter of law. The IELRB has long held that union representation rights do not apply to *tenured* teacher post-evaluation conferences or remediation meetings, unless bargained otherwise. Under the Court's decision, that holding has now been extended to *probationary* teachers as well.

Additionally, in the majority's estimation, the parties' collective bargaining agreement did not provide for union representation at post-observation or remediation conferences. As such, Warning could not demonstrate that she had engaged in a protected union activity, and without protected union activity, there could be no illegal retaliation by SPEED under the Illinois Educational Labor Relations Act. Consequently, her claim failed and the Court's majority opted not to reach the issue of whether reinstating Warning to a tenured position was within the IELRB's authority.

Although the Court's narrow majority ruled in SPEED's favor, Justice Charles Freeman filed a dissenting opinion that persuasively argues that whether an employee like Warning is entitled to union representation should ultimately depend on how the meeting is characterized and the nature of the employee's grievance. For instance, if a post-observation conference or remediation meeting also covers grievable subjects, such as disciplinary matters or evaluation procedures, Freeman would find the right to union representation attaches, even if the meeting is styled as an evaluation meeting.

The lessons to take away from this case are as follows:

1. Probationary teachers do not have the right to union representation at post-observation evaluation conferences unless that right has been previously negotiated. Check your collective bargaining agreement and evaluation plan and follow the requirements in each.
2. A teacher evaluation conference may start out as one with no right to union representation. But depending on where the meeting goes, the right to union representation may attach. Unions may argue that a meeting was really a disciplinary meeting and not an evaluation meeting.
3. Expressed hostility to union representation, even when the right does not attach, will almost always form the basis for an unfair labor practice charge. Stay calm in the face of obstinate behavior and call us for advice on handling a request for representation when you believe the request is unwarranted.

The presence of a union representative at any meeting can be managed so that you can accomplish the purpose of the meeting without undue disruption or delay (or five years of litigation). For help managing the presence of union representation in meetings, or if you have any questions about this case, please do not hesitate to contact your lawyers at Scariano, Himes and Petrarca.

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CHICAGO OFFICE

Two Prudential Plaza
180 N. Stetson, Suite 3100
Chicago, Illinois 60601-6702
Phone 312.565.3100 / Fax 312.565.0000

CHICAGO HEIGHTS OFFICE

1450 Aberdeen
Chicago Heights, Illinois 60411
Phone 708.755.1900 / Fax 708.755.0000

WAUKEGAN OFFICE

209 W. Madison Street
Waukegan, Illinois 60085
Phone 847.662.5800 / Fax 847.662.6813

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