

**INTERACTING WITH THE UNION:
PROFESSIONAL LICENSURE DEFENSE
AND COLLECTIVE BARGAINING AGREEMENTS**

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Definitions

Labor organizations: The exclusive representative for a defined group of employees with respect to wages, benefits, and working conditions.

Bargaining unit: A defined group of employees represented by a labor organization.

Collective Bargaining Agreement (CBA): An agreement with respect to wages, benefits, and other working conditions that is negotiated with an employer on behalf of the members of a bargaining unit by the labor organization representing the employees in the bargaining unit.

Labor Organizations—Purpose

A labor organization exists to represent fairly all the employees within a bargaining unit with respect to wages, benefits, and other working conditions. For our purposes, the most important function of the labor organization is its representation of employees when they are disciplined or under threat of discipline.

An employee represented by a labor organization has a right to representation by the organization during the investigation and disciplinary processes. This right encompasses what are usually called “Weingarten Rights.” Conversely, the labor organization has an obligation to fairly represent the employee during the investigation and disciplinary processes and to ensure that the employee’s rights under the CBA are respected and observed.

Jurisdiction of the Labor Organization

A labor organization has jurisdiction over all matters arising under a CBA that pertain to the bargaining unit for which it is the exclusive representative. Conversely, if a matter or dispute does not arise under the CBA, there is no jurisdiction for the labor organization.

Practically, this means that most investigatory and discipline matters that pertain to employees represented by a labor organization must involve the labor organization at some point. However, disciplinary issues can arise that involve not only the labor organization and the CBA but also involve statutory matters such as illegal discrimination and professional licensure issues

under the jurisdiction of state boards of nursing. It is this intersection with which we are concerned in this seminar.

Collective Bargaining Agreements—Contents

Collective bargaining agreements (CBAs) contain a great many things—wage rates and pay scales, work rules, benefits, etc. What we are most concerned with here is an essential part of most CBAs—discipline and dispute resolution.

Most CBAs require what is known as “just cause” before the employer may impose discipline. What is just cause? There are many definitions but generally just cause encompasses the idea that (1) the employer must be able to prove that what the employee is accused of having done in fact was done and (2) the consequent sanction is fair, given the nature of the offense, how other employees have been treated for like or similar offenses, and the employee’s work record. An employer cannot impose discipline under most CBAs without just cause.

Most CBAs also include a dispute resolution mechanism. This generally starts out with the ability to file grievances with the employer that the employer alone resolves. At the end of the grievance process a labor organization may choose to arbitrate the dispute before an independent arbitrator.

Nurses and CBAs

A nurse working under a CBA who is accused of an action for which he or she may be disciplined is entitled to representation by the labor organization that represents him or her under the CBA. This is separate and apart from any private attorney or counsel he or she may retain to address professional license issues or other employment-related concerns.

The nurse is entitled to a just cause determination before discipline may be imposed and to test that determination through his or her union and the dispute resolution process of the CBA. This representation occurs during the investigation and disciplinary process. A nurse is entitled to representation during the investigation. Then, assuming discipline is imposed, he or she is entitled to grieve any discipline and, ultimately, to have the discipline arbitrated by an independent arbitrator. The only caveat is this—the labor organization controls the grievance and how far it proceeds. The labor organization has the authority to stop a grievance or to refuse to arbitrate a grievance.

Nurses, CBAs, and Professional Licensure

A nurse contesting discipline under a CBA may or may not be successful in overturning or limiting the discipline that has been imposed. To take an example, if a nurse has been suspended or discharged from employment because he or she allegedly diverted oxycodone for his or her own use, the labor organization may contest the suspension or discharge under the CBA. If the labor organization is successful, the suspension or discharge is overturned, and the

nurse resumes employment (or is reimbursed for the suspension). If the labor organization is not successful, the employer's decision stands and may not be further contested.

Grievances and arbitrations and other actions under the CBA may not be conclusive on licensing boards (or, for that matter, courts with respect to employment actions). Licensing boards conduct their own investigations and make their own decisions.

However, what happens during the dispute resolution process under the CBA inevitably affects what happens before a licensing board. For instance, in the course of an arbitration or grievance, documents or witnesses may come to light that affect what happens before the licensing board. Likewise, a determination of fact in front of an arbitrator may be conclusive on the nurse in the licensing proceeding. This is why attorneys who represent nurses in licensing proceedings must at least be conversant with CBAs, the CBA dispute-resolution process, and, optimally, the attorney handling his or her client's grievance or arbitration.

Example 1:

CH is an RN. She works at the local hospital as a floor nurse. CH is also a member of the nurses' union. The union and hospital are engaged in negotiations for a new contract (CBA), and CH is on the union bargaining committee. Bargaining has not gone well, and there have been numerous allegations traded by each side of unfair labor practices.

While bargaining is going on, CH is accused by her supervisor of failing to change the bedsheets of a severely injured motorcycle accident victim, resulting in bed sores for the patient. She is written up on disciplinary charges and called into a meeting with her supervisor and another manager to discuss the charges. CH goes to the meeting and asks for a union representative, but the request is denied.

Subsequent to the meeting, CH is fired. CH informs her union and files a grievance. The grievance is denied. The union decides not to arbitrate the dispute. The state board of nursing learns of the dismissal and notices an investigation that could lead to loss of CH's license.

Questions:

If you agree to represent CH at the point that she has been discharged, in general how would you conduct your representation? Would your approach be different if you were retained earlier in the process? On what issues or claims would you represent her? Is there a potential conflict of interest?

Example 2:

LE is a family nurse practitioner. She works at a local clinic. The nurses and nurse practitioners at the clinic decide they want to form a union. They conduct a successful organizing drive, resulting in certification of their union as exclusive representative.

Management believes LE is one of the "ringleaders" behind the union even though, in fact, she is anti-union. Management starts looking for a reason to fire LE. Finally, LE's supervisor writes her up on a charge of practicing outside the scope of her certification (prescribing psychiatric drugs). The union takes up a grievance, advances to arbitration, but loses at arbitration.

In the meantime, the state board of nursing starts investigating a complaint made by management that mirrors the alleged reason for the termination.

Questions:

Assuming you agree to represent LE at the point she receives notice of investigation from the nursing board, what do you see as the issues and potential pitfalls?