

# **Investigations of Employees**

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# What We're Going to Cover.

- Investigative Interviews of Employees
- Investigations and the Privacy Act
- Employee, Union, and Agency Rights
- Guidance to Employees and Union Officials on what do to during an Investigative Interview.
- Supplementary handouts.

# Types of Investigative Meetings

- Administrative Investigations.
- Administrative Investigations with Possible Criminal Implications.
  - Voluntary Answers (Garrity Warnings)
  - Compelled Answers (Kalkines Warnings)
- Criminal Investigations.

# Miranda Interviews

- YOU ARE UNDER ARREST....

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to speak to an attorney, and to have an attorney present during any questioning. If you cannot afford a lawyer, one will be provided for you at government expense. Do you understand?

# Miranda

- Arrests can occur without questioning and without the Miranda warning — although if the agent/officer later decides to interrogate the suspect, the warning must then be given.
- If public safety warrants it, the agent/officer may ask questions prior to a reading of the Miranda warning, and the evidence thus obtained can sometimes still be used against the defendant.
- In some cases, the suspect does not have to be under arrest to be in custody and Miranda rights attach. (Known as a “custodial interview”.)

# Miranda Interviews

- These are the most serious interviews, and imply criminal activity.
- Most times the interviewer will be from outside of the agency and typically will be a law enforcement officer.
- These are the “easiest” to handle as a Union official: **Don’t!**

**The employee should be represented by an attorney.**

# Types of Investigative Meetings

- Administrative Investigations (Weingarten Rights may attach).
- Administrative Investigations with Possible Criminal Implications.
  - Voluntary Answers (Garrity Warnings)
  - Compelled Answers (Kalkines Warnings)
- Criminal Investigations.

# **"What is an Administrative Investigation?"**

**“Any agency investigation that is not conducted for the purpose of law enforcement or criminal prosecution.”**

- Steven Seaton, Attorney, Department of the Navy; David B. Franey, Labor Relations Specialist, Department of the Navy.

2003 Symposium On Employee and Labor Relations

# "What is an Investigative Interview ?

An **Investigative Interview** is any meeting during which an authorized representative of management (e.g. Personnelist, Special Agent, etc.) asks questions of a bargaining unit employee for the purpose of ascertaining facts about alleged misconduct.

- Forest Service 6/2007

# Agency Objectives in Conducting Investigations

- In order to fulfill its duty to the taxpayers and to provide “good government,” a federal agency may need to perform investigations regarding employee misconduct.
- Interviews often are used to learn the facts surrounding issues of misconduct in the workplace.

Authority to conduct investigations includes: 1978 Civil Service Reform Act, 29 C.F.R. § 1614.108(b) (EEO), Inspector General Act of 1978.

# What can the Agency Investigate?

Most agencies are authorized to conduct investigations of possible misconduct by agency employees involving violations of rules, regulations, or law, that, even if proved, will not likely result in criminal prosecution.

Some examples....

## (Generally) Authorized Agency Investigations:

- (1) Absence without leave and attendance irregularities.
- (2) Falsification of documents not within the purview of OIG (USDA) investigations.
- (3) Conducting personal business during duty hours.
- (4) Fighting, threatening, or using abusive language to coworkers, supervisors, or the public.
- (5) Refusal or failure to follow instructions or procedures.
- (6) Neglect of duty.
- (7) Misuse of Government vehicles.

# Authorized Agency Investigations cont.:

(8) Off duty conduct resulting in arrest or conviction.

[Investigation into such matters will normally be limited to gathering information from outside law enforcement officials.]

(9) Use of Government facilities, supplies, equipment, services, telephones, for personal for other than official purposes.

(10) Sexual harassment.

# Authorized Agency Investigations cont.:

(11) Falsification of an application for employment.

(12) Intoxication or consumption of alcohol or drugs while on duty.

(13) Prohibited political activity [often coordinated with the Office of the Special Counsel].

**In general, agencies are  
not authorized to investigate:**

Violations of law in which there is some likelihood that criminal prosecution might result, such as:

- (a) Extortion or acceptance of bribes.
- (b) Theft of Government property, or misuse/embezzlement of funds.
- (c) Sale of illegal drugs.
- (d) Submission of false claims, (18 U.S.C. 287).
- (e) Concealment, removal, or mutilation of official documents (18 U.S.C. 2071).
- (f) Criminal conflicts of interest (18 U.S.C. 207-208).

# Who can conduct employee investigations?

- An employee lawfully assigned to investigate irregularities or misconduct by Federal employees may be empowered to administer oaths to witnesses (5 U.S.C. 303). Witnesses may include Federal employees and non-Federal employees.
- For administrative investigations, the investigator should not be a law enforcement officer.
- The agency may use contract investigators.

# Sample Investigator Authorization Letter

**SUBJECT:** Authorization to Perform Investigations of Employee Misconduct

**TO:** (Designee)

You are hereby authorized to perform such official investigations as may be assigned to you regarding alleged or suspected misconduct on the part of employees or agents of the Agency.

Under the provisions of 5 U.S.C. 303, you are authorized to administer oaths to witnesses and take sworn statements in the course of assigned investigations.

This authorization is subject to periodic review and may be withdrawn at any time.

(Signature)

# CONDUCT OF AGENCY INVESTIGATIONS

- The agency has limits on the nature of the questions that it is allowed to ask.

## Questions:

- must pertain to the subject's employment with the agency;
- must be material and relevant to the subject's conduct or performance of official duties.

# RIGHTS AND OBLIGATIONS OF EMPLOYEES

- Employees are obligated to provide information to authorized representatives of the Agency if an investigation relates to an official matter and the information is obtained in the course of employment or as a result of relationships incidental to employment.
- This includes the furnishing of a signed sworn or affirmed statement.
- Failure to cooperate with an investigation may constitute the basis for disciplinary action.

# Note:

The obligation to provide information does not infringe on an employee's right to invoke the protection of the Fifth Amendment to the Constitution with regard to self-incrimination. (7 C.F.R. 0.735-23(c)).

**BUT** this right applies only to investigations that may disclose criminal acts - not to violations of administrative rules or regulations.

*(Stay tuned – more on this to follow.)*

# RIGHTS AND OBLIGATIONS OF EMPLOYEES cont.

- Employees have the right to representation, if they so request, when questioned during an official inquiry.
- Employees in bargaining units may have additional rights based on a negotiated agreement.
- These rights, however, may not be used to frustrate the investigative process by causing undue and unwarranted delays.

# Weingarten Rights

## (Weingarten Meetings/Investigations)

- Landmark case: NLRB vs. J. Weingarten, Inc. (1975): the Supreme Court determined that if an employee is being questioned by management, and certain circumstances are met, the employee is entitled to Union representation.

[\(NLRB vs. Weingarten, Inc. 420 U.S. 251, 88 LRRM 2689\).](#)

# Weingarten Rights

- 5 United States Code 7114(a)(2)(B) grants the Union the right to be present during:
  - an examination of a bargaining unit employee in connection with an investigation, **if**,
  - the employee reasonably believes that the examination may result in disciplinary action against the employee,
  - **and**, the employee requests representation.

# Weingarten Rights

continued

- By law, the agency is not required to inform the employee of the *Weingarten* rights when calling the interview; it is the responsibility of employees to know their rights and to request representation. (*But some negotiated agreements may require notification of Weingarten rights.*)
- By law, the agency is required to inform employees about their Weingarten rights annually.

# Weingarten or not?

“...an examination...in connection with an investigation...”

This does not include, for example:

- a discussion for the purpose of conveying work instructions or training;
- a meeting solely concerned with an employee's performance evaluation; 5 FLRA 421
- a meeting strictly limited to informing an employee of a decision already reached. 9 FLRA 871

**What if the agency states that a disciplinary decision has already been made, but then begins to question the employee about his or her conduct?**

- Weingarten or not? Employees should ask for representation at any point in the meeting when the agency solicits information about their conduct. The Union would argue that seeking such information shows that the agency is trying to support, or possibly alter, its disciplinary decision, or is beginning a new investigation, which gives rise to Weingarten rights.

# How about "counseling" sessions with supervisors regarding absenteeism or drug or alcohol problems?

- Weingarten or not? Possibly, especially when the agency is seeking information from the employee or has given the employee a reasonable basis for believing that discipline or termination might result from the problems under discussion.

# The “Reasonableness” Standard

- Case law regarding the “reasonableness standard” contained in 5 USC 7114(a)(2)(B)(i):  
When judging “reasonable belief”, the FLRA applies an objective standard.

This means *“whether a reasonable employee in the same circumstances would conclude that discipline might result, rather than whether the employee involved was fearful of discipline.”*

# Written memos can be examinations.

- In connection with an investigation, the agency asked an employee to prepare a written memorandum detailing the employee's recollection of an incident.
- This was found to be an "examination" to obtain information and to question the employee's conduct. Therefore, Weingarten rights would apply.

(46 FLRA No. 31)

# Does the location of the interview matter?

- It is more likely that Weingarten rights are involved when the interview or discussion takes place in a supervisor's office or conference room.

But this is not a hard and fast rule.

# Employee Weingarten Rights

How to ask for a representative.

Lawyer-talk:

“The totality of the circumstances must be sufficient to put the agency on notice of the employee’s desire for representation.”

55 FLRA 388

# How to ask for a representative:

**“I WANT A UNION REP!”**

Better than:

“I think I should have a Union Rep.”

or

“Maybe we should get a steward.”

(Although statements such as these generally are sufficient, it is better to be direct and clear in seeking representation.)

# Weingarten Rights

The Union has a right to be present at investigative (Weingarten) meetings under specific circumstances

5 USC 7114(a)(2)(B).

**Only** the Union, as the exclusive representative of the Bargaining Unit, has this right.

# Weingarten - Representation

- Because of the sensitive nature of investigative meetings, the employee may desire not to have a Union representative present.
- If the employee does not want Union representation at an investigative meeting, the Union has no right to attend.
- However, most times, it is in the employee's best interest to be represented at such a meeting — but because the employee must request this assistance, *it is important to make them aware of this right long before any meeting.*

# **Can the employee ask for a Union representative after the meeting starts?**

- Yes.
- If during the course of a meeting it becomes apparent for the first time that discipline or potential discipline could arise, the employee may then ask for a Union representative.
- But, any information given before asking for a representative may be used by the agency in subsequent proceedings.

# Who selects the Union representative?

- The employee?
- The agency?
- The Union?
- It's negotiable, right?

# Who selects the Union representative?

- The Union has the right solely to determine its representatives.
- This is non-negotiable.
- However, if the agency or the employee express an interest in a particular representative, or in avoiding a particular representative, the Union should listen to the reasons, and then make its decision.

# Who selects the Union representative?

- **An exception to the Union selecting its representative.**
- 54 FLRA 1502(133): “A union's presumptive right to designate a particular representative for an investigatory examination may be overcome if the agency establishes 'special circumstances' that warrant precluding a particular individual from serving as a representative.”
- If there is a conflict of interest that the agency is aware of, the agency may reject, but not select, a particular representative.
- Example: the agency is investigating travel voucher fraud in a work group, the Union-selected representative is a member of that group, and is suspected of being the ring-leader. (The designated representative presents real potential harm to the investigation.)

# **And, a limitation on the Union selecting its representative.**

The agency is not required to postpone an examination to allow a particular Union official to attend if another is available.

46 FLRA 1210

But, remember, there may be provisions in your Collective Bargaining Agreement regarding the selection of Union reps.

- CHECK YOUR CONTRACT.

# **What can the agency do when an employee asks for Union representation?**

**Once the elements for a Weingarten meeting are established, the agency may:**

- 1) grant the request for representation,
- 2) postpone the interview if a representative is not immediately available,
- 3) offer the employee the option of proceeding with the interview without representation or have no interview at all.

# **What if the agency denies Union representation and simply continues the examination?**

If the agency denies the request for Union representation, and continues to ask questions, it commits an unfair labor practice, and the employee has a right to refuse to answer.

The employer may not discipline the employee for such a refusal.

# If the agency denies Union representation and simply continues the examination...

1) If the employee is **certain** that it is a Weingarten meeting, an appropriate response is: "I will be glad to participate in this investigation as soon as I am permitted to obtain a union representative to assist me."

# If the agency denies Union representation and simply continues the examination...

2) If the employee is uncertain that it is a Weingarten meeting, it is best to again clearly ask for a Union representative, but given the complexity and unpredictability of the law, it often may be prudent for the employee to comply with the agency's orders.

Later, it may be possible to overturn any discipline that results from the meeting if it was unlawful. Otherwise, the employee could be charged with insubordination and risks being disciplined.

## **A clarification about who is an investigator.**

- Earlier, it was stated that an investigator was an employee (or contractor) who is trained and authorized to conduct the interview.
- However, under the statute there is no such definition. Weingarten rights exist even when the “investigator” is a supervisor or manager who is not a specially trained investigator.

# **If all of the Weingarten rights are observed, may an employee refuse to answer the questions?**

- No.  
*(Unless the matter under discussion has criminal implications.)*
- Generally, in administrative investigations, an employee does not have the right to remain silent, as long as the representational rights have been honored.
- The Union representative must not direct the employee to remain silent in an administrative, non-criminal investigation.

# Does the employee have to tell the truth in administrative investigations?

- Yes.
- Case law teaches us that employees who have lied in investigations, sometimes over rather minor disciplinary matters, have been fired. Not because of the minor misconduct, but **because they lied about it.**
- The frequently offered justification is that the agency can no longer trust the employee and removal is “for the efficiency of the service.”

**But, President Reagan told investigators,  
“I do not recall,” when asked about his  
Iran-Contra dealings!**

- Who said life is fair?
- Nevertheless, employees, Presidents and even Scooter Libby and ex-AG Gonzalo are expected to be truthful.
- The Union should NEVER suborn perjury.

**Do not instruct or encourage  
an employee to lie.**

**But what should a Union Rep. do if s/he knows that the employee is lying?**

Cartoon: Jail scene shows prisoner talking to his attorney.

Prisoner: “I’m guilty as sin and I am going to lie my butt off on the stand. Is that covered by attorney-client privilege?”

Attorney: “It would be unethical of me to reveal your secret. It would also be nuts of me to give up the 750 smackers an hour.”

# A simple cartoon yields some lessons for us:

1. Some employees are “guilty as sin.”  
*(The Union’s role then is to make sure proper procedures are followed and that any discipline taken is appropriate.)*
2. Some employees will lie!
3. There is employee/representative privilege.

# Can Union officials be compelled by the agency to answer questions?

- Generally, no.
- If, in the course of representational duties, Union officials learn of misconduct or illegal activities, they cannot be compelled by the agency to disclose them.
- This is privileged and confidential information – not unlike the relationship between a client and attorney.

(Privilege under 5 USC 71,  
but maybe not so much in court.)

# Employee/Rep “Privilege”

- In a subsequent legal proceeding, the Union Rep’s notes may be subject to disclosure through the discovery process.
- If an employee lies, you may not want to document it in writing.

# But back to the question, what should a Union rep do when an employee lies?

- No responsibility to blow the whistle.

*(Generally should not do so. Consult with NFFE national office first, or if you have questions.)*

- Discretely remind the employee the consequences of lying.
- Never use the lie to advance the case.
  - Unethical.
  - Could be a bad-faith bargaining ULP.
  - and, if caught...

...the Union official could be disciplined for knowingly using the employee's lie to advance the case.

- A Union Rep generally cannot be disciplined for conduct while engaged in a “protected activity”.
- BUT, discipline is permissible if the conduct constitutes flagrant misconduct or otherwise exceeds the boundaries of protected activity.

See 58 FLRA 636 and citations therein.

## **What if the agency proposes to stop the interview when the employee asks for a representative?**

- Canceling the interview is intimidating.
- Employees fear they will have no opportunity to give their side of the story.

*Might this be used as a strategy to get the employee to continue the interview without a Union representative?*

# Employees fear they will have no opportunity to give their side of the story.

This is a misplaced fear:

If discipline is proposed, the employee will have an opportunity to present oral and/or written comments before the agency acts.

– *If discipline is enacted, the employee may grieve or file some other appropriate appeal.*

**The employee's story will get told even if the investigative meeting is canceled.**

A prepared response is often preferable to reacting at an interview.

- In the interview, an employee can be caught off guard, may stumble, may say the wrong things, may say things the wrong way, and so on. And the Union rep most likely will not be “at speed”.
- In a response to proposed discipline, the employee has an opportunity to take a deep breath, think about and organize the response, and most importantly, having more time to consult with a Union rep, has a better chance to get it right.

# What are the Union representative's Weingarten rights?

- Ask what the interview is about.  
But there is no right to know if the employee is the target of the investigation or what the charges might be, *Ashford v. DOJ*, 6 M.S.P.R. 389 (June 1, 1981).
- Meet privately with the employee prior to the meeting.
- Confer privately with the employee during the interview –but only if permitted, or if you want to be a test case in litigation...
- Speak and ask questions of management during the interview.
- Assist the employee in answering questions.
- Object to improper, abusive or harassing questions.
- State the union's position on the matters discussed.

# **Confer privately with the employee during the interview –if permitted, or if you want to be a test case in litigation...**

- No *per se* right to stop the examination to confer with the employee.
- See 52 FLRA 421.
- The FLRA considers the totality of circumstances and decides whether the agency precluded the Union from effectively representing the employee by denying a request for a short break to confer privately.
- Think of alternatives to a separate meeting...

# During the Meeting

- The Union representative cannot take charge of, usurp, or disrupt the meeting.
- But, do ask clarifying questions, and try to have key points/objections entered into the record.
- Both parties should see to it that the interview does not become an adversarial contest of wills, with the employee caught in the middle.

# Can job performance reviews or evaluation conferences give rise to Weingarten rights?

Depends.

- If the meeting is simply to counsel an employee about performance and ways to improve, then no Weingarten right. 15 FLRA 360
- If the meeting is to elicit explanations from the employee about what s/he did and did not do, then the meeting could be an examination in connection with an investigation. In this case, if the employee has a reasonable fear of discipline, then Weingarten right to representation would attach.

# What remedies are possible for violations of Weingarten rights?

- Case-by-case.
- Some examples:
  - rescission of retaliatory threats or discipline imposed because an employee or Union representative exercised Weingarten rights;
  - if the discipline ultimately imposed by the agency was based essentially on the information obtained at the unlawful meeting, or was affected by the fact that no union representative was present, the discipline may be reduced or rescinded;
  - “make whole” provision available;
  - posting of a notice that the agency violated the law.

# When the agency begins to investigate employee misconduct, whom should they talk to first?

- The employee's friends?
- The employee's enemies?
- Those employees who might know something about the allegations?
- The employee?

**THE EMPLOYEE!**

# Employee Misconduct Investigations and the Privacy Act

- The Privacy Act (5 U.S.C. 552a(e)(2)), states: "Each agency that maintains a system of records [covered by the Privacy Act] shall . . . collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under federal programs."

# In Plain English:

- Most times, the agency must talk first to the employee suspected of misconduct.

# What does “most times” mean?

- When objective and reliable information can be directly obtained from the employee.
- When it is not likely that the employee can or would interfere with the investigation.

# Key Cases

- Dong v. Smithsonian Institution, 943 F. Supp. 69 (D.D.C. 1996)
- Waters v. Thornburgh, 888 F.2d870, 873 (D.C. Cir. 1989)
- See handout for discussion.

# Privacy Act & Investigations

- Managers and supervisors should not question other employees as "witnesses" before confronting the accused employee with the alleged misconduct.
- Such action violates the accused employee's Privacy Act rights, and may constitute an intentional violation of the Privacy Act.
- Intentionally violating the Privacy Act could lead to civil penalties imposed on the agency, and even criminal penalties imposed on the manager or supervisor.

# Why is the Privacy Act involved?

1. Discipline and investigations are supposed to be confidential and private.
2. Accused employees benefit when they are interviewed first because they might provide information that could reduce or eliminate the need for a more wide-spread investigation.

# What are the consequences if the Privacy Act is violated?

- 5 USC 552a(g)(4): In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--
  - (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000.

# Can a grievance be filed on this violation of the Privacy Act?

- Probably - depends upon your CBA.
- While the law provides the courts as the avenue of complaint, most CBAs allow grievances on violations of law.
- Arbitrators generally have the ability to grant the same resolutions as courts.
- We are unaware of any established case law regarding grieving such a matter. If the damages are large, it is recommended to file in federal court.

# But...

## Exceptions to the Privacy Act/Investigations (40 Fed. Reg. 28,948 and 28,961)

- Such as: a third party may be contacted first if there exists a risk that information might be lost, tampered with, or falsified, for example, through intimidation of other witnesses.
- Another exception is if the employee's testimony would lack veracity.

# **Questions an investigator should answer before going to a third party:**

- Why is the information necessary?
- Is the information unobtainable from the subject?
- Has there been an attempt to obtain verification from the subject?
- Is objective information from the subject inadequate? If so, why?
- Will the subject somehow impede or hamper your investigation?

Some (dirty little) secrets  
about investigations....

# Mgmt: “Tips for Investigators”

- Always open an interview by introducing yourself, providing your authority to conduct the investigation, and the purpose of the interview.
- The opening remarks should convey that this is YOUR interview and you are in control.
- If you sit at a table you should sit at the head of the table since this conveys the psychological message that you are in control.

# Mgmt: “Tips for Investigators”

cont.

- “If you have advance information that the subject is difficult, hostile, or uncooperative, you may want to gain a psychological advantage by subtly demonstrating that you are in charge. You can do this by allowing him/her to take seat. You should then politely ask them to move to a seat that you select. This places them at a psychological disadvantage, by subtly indicating that you are in control.”

“Do not ask them if they mind changing seats since this provides them with an opportunity to refuse or argue.”

Ray Fenwick, Senior Special Agent Department of Justice  
Sherba J. Essex, Personnel Management

# Mgmt: “Tips for Investigators”

cont.

- Ask open ended questions that cannot be answered with a simple “yes or no.”
- Give employees minimal notice of the interview.
  - HR advisor

# Intimidation through numbers.

- Management will often have others in the room: supervisor(s), line officers, gun-toting officers, even other employees.
- Ask that the “extras” leave. If they don’t it could be a violation of your CBA and/or the Privacy Act.

It is not a secret that  
employees must tell the truth...

...while investigators can,  
and do, tell lies.

# Ever watch Law and Order?

While Det. John Munch is getting no answers from Fitzzy, one of two suspects, Det. Lennie Briscoe, in a separate interview room, tells the other “perp” to give it up and talk because Fitzzy just spilled his guts.

A lie? Of course.

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# Garrity and Kalkines Rights/Warnings

- The government's need to fully investigate matters can be in conflict with an employee's 5<sup>th</sup> amendment rights.
- The Courts have found that the employee's right to not self-incriminate trumps the agency's right to get answers.
- Garrity and Kalkines rights/warnings address these two issues.

# The Garrity Case

## Lesson Learned

In an administrative investigation having criminal implications, the government cannot deprive employees of their Constitutional right to not self-incriminate.

It is illegal to coerce employees with “answer or be fired” if they choose to remain silent.

# Putting the Garrity Lesson in Practice: “Garrity Warnings”

- A Garrity Warning is given when an employee is requested to give information on a voluntary basis in connection with his or her own administrative misconduct, and the answers might also be used in a future criminal proceeding.
- The employee is informed of the right to remain silent if the answers may tend to incriminate the employee; that anything said may be used against the employee in either a criminal or administrative proceeding; and he or she cannot be disciplined for remaining silent.

## **Garrity (Voluntary Answers): Putting the Lesson into Practice.**

- The employee must be told that the interview is strictly voluntary and that they may leave at any time.
- The agency may not discharge or discipline an employee solely for remaining silent.

*However, in an administrative proceeding, the agency may consider the employee's silence for its evidentiary value that is warranted by the facts surrounding the case.*

# Example of Garrity Warning. (Voluntary Answers)

*You are being contacted/interviewed to solicit your cooperation in an inquiry regarding information pertaining to allegations of misconduct or improper performance of official duties. You are advised the authority to conduct this interview is contained in Title 50, Code of Federal Regulations, Subchapter A, Section 1.2, and Title 43, Code of Federal Regulations, Section 1466. This interview is confidential. The matter under investigation could also constitute a violation of law which could result in criminal prosecution of responsible individuals. You have the right to remain silent. If you do decide to answer questions or make a statement, you may stop answering at any time. Although you would normally be expected to answer questions regarding your official duties, in this instance you are not required to do so. Your refusal to answer on the ground that the answers may tend to incriminate you will not subject you to disciplinary action by the Agency. Any statement you furnish may be used as evidence against you in any future criminal proceeding or agency disciplinary proceeding or both.*

# The Kalkines Case

## What happened?

- Mr. Kalkines, a Customs employee, was fired for refusing to participate in interviews regarding taking bribes from an importer.
- In reversing his removal, the court stated Mr. Kalkines should have been:
  - “duly advised of his options [whether to answer the questions or not] and the consequences of his choice”
  - and “assured of protection against the use of his answers or their fruits in any criminal prosecution.”  
(Use immunity.)

# The Kalkines Case

## Lesson learned:

In an administrative investigation, an employee cannot be **compelled** to answer questions having criminal implications **unless** granted “use immunity” in any criminal prosecution.

# **Kalkines Warning**

***(compelled to answer)***

## Putting the Lesson into Practice

- Kalkines warnings are given when the possibility of criminal prosecution has been removed, usually by a declination to prosecute by the Department of Justice,
- The employee is then required to answer questions relating to the performance of official duties or be subject to disciplinary action.

# **Kalkines Warning**

## ***(compelled to answer)***

- The Kalkines Warning contains a “use immunity” for any admission revealed in the interview.
- “Use immunity” means that the information provided, and the fruits obtained from that information, cannot be used in any criminal action against the employee.

*(The tree is poison and so are its fruits.)*

# **Kalkines continued.**

***(compelled to answer)***

- Only the Department of Justice has the authority to grant an individual use immunity.
- Before issuing this type of warning, the investigator must first contact the U.S. Attorney's Office and receive a letter of declination for the individual to be interviewed.
- For some routine uses, DOJ can give a blanket authorization to an agency.

# Nota Bene

**The Kalkines “use immunity” does**  
**NOT mean that the employee**  
**is immune from prosecution!**

If other information is obtained from outside of the interview, a criminal indictment may still be made.

# Sample Kalkines Warning:

*(compelled to answer)*

*This is an administrative inquiry regarding allegations of misconduct or improper performance of official duties. The purpose of this interview is to obtain information, which will assist the determination of whether administrative action is warranted. You are advised the authority to conduct this interview is contained in Title 50, Code of Federal Regulations, Subchapter A, Section 1.2, and Title 43, Code of Federal Regulations, Section 1466. This interview is confidential.*

*You are going to be asked a number of specific questions regarding the performance of your official duties. You have a duty to reply to these questions and disciplinary action, including dismissal, may be undertaken if you refuse to answer or fail to reply fully and truthfully.*

*Neither your answers nor any information or evidence gained by reason of your answers can be used against you in any criminal proceeding, except that if you knowingly and willfully provide false statements or information in your answers, you may be criminally prosecuted for that action. The answers you furnish and any resulting information or evidence resulting may be used in the course of disciplinary proceeding which could result in disciplinary action, including dismissal.*

- But what if the investigator “forgets” about an employee’s right to not self-incriminate?
- What if the agency sees the matter strictly as an administrative investigation with no criminal implications whatsoever, and sees no need for Garrity/Kalkines warnings?

**What should an employee do, if during an investigative meeting she realizes that her responses may have criminal implications and she hasn’t received either warning?**

# What should an employee do if not warned?

- Many times, the employee may be in a position to know better about potential criminal liability than the agency.
- In such a case, the employee should immediately ask if her responses to the questions are voluntary or mandatory.
- If the agency says the replies are voluntary, the employee may remain silent.
- If the agency says that the employee must answer or face discipline, the employee should immediately state: “I will respond to the questions as soon as I am given use immunity for my answers according to the Kalkines court ruling.”

# Caution: Confusion May Be Ahead

- If you had already heard about Garrity and Kalkines Rights/Warnings, or will be reading more about them, beware, because depending on who is doing the talking, the emphasis changes.

# The confusion:

As we have just seen, in the Federal sector, discussions and guidance about Garrity typically involve interviews that are voluntary.

But it is the opposite in the non-Federal sector (state and municipal govts.), discussions and guidance about Garrity typically emphasize interviews where the employee is compelled to answer.

A more detailed discussion of the two differing uses of Garrity is included in the handouts.

# G/K Summary

(Discipline refers to not responding to questions.

Administrative penalties for the offense may still occur.)

Employee response	Use Immunity	Discipline	Criminal Use of Info	Admin. Use of Info
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Voluntary Garrity	No	No (Talked or not)	Yes	Yes
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Compelled Kalkines	Yes	No (Talked)	No	Yes
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	Yes	Yes (Did not talk)		
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# Representation: Weingarten and Garrity/Kalkines (Voluntary/Compelled)

- Regarding Garrity & Kalkines situations, Weingarten rights exist independently, and, as long as Weingarten applies, the employee has right to a Union representative.
  - If the interview is conducted entirely by a separate entity (e.g., the FBI), *and they are not acting on behalf of the Agency*, then Weingarten does not attach.
  - As long as some component of the agency is involved in the interview that has the exclusive representation (e.g., VA and FBI), then Weingarten applies.

*(If a representative of the Agency is present, but merely as a witness, there are no Weingarten rights.)*

**What are employee rights during a  
incident (accident or safety)  
investigation?**

**The same as in  
any investigation.**

**(Weingarten, Garrity, Kalkines may apply.)**

## **Key Points: What employees (and the Union representative) need to keep in mind.**

1. If you are being investigated, take the matter very seriously, but don't be intimidated.
2. **Seek representation for the interview.** (Union rep. for a Weingarten meeting; an attorney for criminal matters). A prime role of the representative is to witness the interview, so take good notes.
3. Ask:
  - what the investigation is about;
  - if you are being investigated;
  - whether the investigation is criminal or administrative;
  - to see the investigator's letter of authorization.

## Key Points: What employees (and the Union representative) need to keep in mind.

4. Never waive your Miranda or constitutional rights. If it is an administrative investigation with criminal implications, ask whether your testimony is voluntary or compelled. Ask if you are free to leave (if not, reverts to custodial/Miranda setting).
  - If compelled, you have use immunity for your testimony; your testimony cannot be used against you in a criminal matter. (Kalkines).
  - If voluntary, with possible criminal disclosures, you have the right to be silent without being disciplined. (Garrity; *Gardner v. Broderick*, 392 U.S. 273 (1968)).

## Key Points: What employees (and the Union representative) need to keep in mind.

### 4. continued:

If there are criminal implications, and either a Garrity or Kalkines Warning is given, **get it in writing.** (Kalkines use immunity comes from the DOJ.)

Even if the investigator assures you that there are no criminal matters involved, but you **BELIEVE** otherwise, invoke your right to remain silent – and get an attorney.

## **Key Points: What employees (and Union representatives) need to keep in mind.**

5. Tell the truth. (Lie in an administrative investigation and be fired. Lie after a Kalkines warning and be fined and/or go to jail.)
6. Do not give your opinion in response to questions.

*I saw, I heard, I did.*

*Not: I believe, I feel, I think.*

When its true,

**“I don’t know,” is an appropriate response.**

**Key Points: What employees (and Union representatives) need to keep in mind.**

7. Answer the question asked; do not volunteer information.
8. Be succinct. Do not ramble. Answer yes or no to yes or no questions.

## **Key Points: What employees (and the Union representative) need to keep in mind.**

9. Watch out for complex questions. If the question requires more than one answer, ask to have the questions restated and/or clarified so each question requires one answer. Always focus on one question at a time.
10. Stay away from "I don't recall." It is over used and often gives the impression that you're hiding something. If you don't know, or are unsure, simply state, "I don't know" or "I'm not sure," or "I can't remember the exact details, and I need to refer to my notes, papers, etc."

## Key Points: What employees (and the Union representative) need to keep in mind.

11. Don't argue with the investigator or put on your case in the interview. If necessary, you will have your chance later to defend your actions.
12. While the investigator may be friendly, **never** believe he is your friend.
13. Never assume what you disclose is confidential. (But if you are instructed not to talk about the matter with others, keep it confidential – if you don't, you could be disciplined for insubordination.)

## **Key Points: What employees (and the Union representative) need to keep in mind.**

14. Keep a clear head. Don't feel rushed. Fatigue and stress can lead to poor, and even wrong, answers. Ask to take breaks in long or tedious interviews. Consult with your representative.
15. You may be asked to review, correct, and sign a summary or transcript of your interview. Do not be pressured. Take time and make sure it is correct. Ask to review it overnight. Get a copy for yourself.

# Some Suggestions.

- Use appropriate parts of this presentation to educate your Bargaining Unit Members!
- Local officials should develop a “tool kit” to deal with investigations. (Include this presentation and the handouts for a start.)
- Your Local/Council should consider developing a cadre of representatives who are knowledgeable and experienced in representing employees in investigations.

# Supplementary Handouts

- **Taking Investigations Seriously**
- **Weingarten Rights**
- **The Privacy Act and Investigations**
- **Case Law: Garrity v New Jersey**
- **Case Law: Kalkines v United States**
- **Summary of Kalkines and Garrity Warnings; differing uses of Garrity in the federal and non-federal arenas.**
- **Bonus: Brookhaven Interviews.**

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