TPSA
December 2020 News

The Nuts & Bolts of Investigatory Interviews

Have you ever been asked to participate in an investigatory meeting either as a witness or as a subject of an investigation about an alleged workplace incident at your Agency? These interviews can be intimidating and can have consequences if you are not careful. It is something you should consult your Association or professional staff about *before* going into the meeting. But here are some general considerations to keep in mind.

Invoke Your Right to Representation: Under federal law, you have the right to a union representative when you are questioned and your responses could reasonably lead to your discipline in the future (for example, if you are the subject of an investigation into misconduct in the workplace). *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251. It is not the same as Miranda rights, though. Your employer does not have to inform you of your rights. You must make an explicit request for union representation before or during the interview. You cannot be punished for making this request. Your employer must give you time to consult privately with your representative outside the presence of your employer.

If your employer denies your request and directs you to answer the questions despite you invoking your right to representation, your employer will have committed an unfair labor practice. You may invoke this right at any time during the questioning. Even if you do not initially request a representative, you may request one in the middle of the interview if you realize the interview is turning towards discipline. The remedy for any unfair labor practice may include rescinding or expunging any subsequent discipline based on information discovered through the illegal interview. *County of San Joaquin (Sheriff's Dep't)* (2018) PERB Decision No. 2619-M.

Sometimes, your employer will not be forthcoming about the nature of the interview. This is another reason to contact your Association or professional staff before the meeting. They can help you discover the purpose of the meeting, if you are a possible

subject, or merely a witness. Even if you do not have a right to a representative, they can still help you think about what to say and how to say it before you go into the interview.

You may also have a right to representation if you are asked to submit written statements in lieu of verbal questioning, or if you are asked to submit to a physical body search. For example, in one case, an employee was put in a room and directed to write a statement about his whereabouts during his work shift, even though he had invoked his *Weingarten* right during earlier questioning by his supervisor. In that case, the state Public Employment Relations Board ("PERB") said the employer cannot avoid complying with *Weingarten* requirements by reducing the interview to written questioning. *San Bernardino Community College District* (2018) PERB Decision No. 2599-E. In another case, PERB said an employee can invoke the right to representation before the agency could lawfully perform an invasive body search. *State of California (Dep't of Corrections & Rehabilitation)* (2018) PERB Decision No. 2598-S.

Limits on the Right to Representation: There are limits on the right to representation, though. For example, your request for representation cannot be used to unreasonably delay the meeting. There is no right to representation for ordinary workplace conversations between a supervisor and employee, such as to give instruction or correct work. There is no right to representation where an employer simply informs an employee of discipline by distributing paperwork. In that case, simply take the papers without offering any commentary. Your representative can help you present your case later.

The right to representation does not extend to situations where you are just a witness. Suppose there is no objectively reasonable basis to conclude that your responses to a line of questioning is likely to lead to discipline against you. If so, you do not have a right to representation, and you cannot refuse to answer the questions. It is not always easy to know when this is the case, especially if you do not know what the meeting is about.

Tell the Truth: It should go without saying, but it still bears emphasis. The quickest way for the interview to go south is to lie. In that case, in addition to discipline for the underlying misconduct, or even if the alleged underlying misconduct is unfounded, you will likely also be disciplined for not providing truthful responses. They may already have evidence about what transpired. They often interview the subject last, and the evidence they have by then could implicate you. If that is the case, not answering truthfully may lead to serious discipline.

Understand the Question Asked: Good investigators will ask simple open-ended questions where you do most of the talking, rather than the other way around. Some leading of the witness can be helpful. But if the question is long or complicated and you are confused as to what exactly is being asked, ask the interviewer to restate the question, or to break the questions into smaller parts. Then, be sure you are responding to each question, and only that question, one at a time.

Respond to the Question Being Asked: It is reasonable to be nervous in these types of interviews. Nervousness does not mean you have done anything wrong. Be sure to listen carefully to the investigator's question. Let the investigator guide you through the questioning by answering the question asked. At the conclusion of the interview, many investigators will allow the interviewee to add anything that was not asked or clarify something that was asked. Consider offering information at that time but recognize that doing so may open the door to more questioning. So be thoughtful about volunteering information. This is not the time to present your defense to any possible discipline.

If Necessary, Insist on Professionalism and Proper Decorum: Investigatory meetings are not supposed to be an opportunity for the interviewer to grandstand, badger, or accuse you. If the interviewer is a novice, or has gone off the rails, politely ask the interviewer to keep it professional and respectful. The Agency has a right to ask you questions, but they do not have the right to physically or verbally abuse you. This is one of the significant benefits of having a representative present with you in the room, someone who can step in and address this for you. Often, the interview will go smoothly when the interviewer knows that you can handle yourself professionally and/or that you have competent representation by your side. Although your representative cannot testify for you, your representative can provide insight as to what is being asked, request clarification, or help you understand the question better so that you can respond more accurately.

Tape Record: Many investigators will inform you at the outset of the interview that they are tape recording the meeting. If you are not sure, ask if the interview is being recorded and request a copy of the recording. You can also record your own copy of the interview but be sure to tell the interviewer that you are recording it before the interview begins.

Take a Break: If you are confused by a question, need to talk to your representative, or just need a minute to regroup, request a break in the interview. If a question is pending, you may have to answer that question first before breaking, but you can go back and clarify your answer when the interview resumes.

Invoke your Right to Remain Silent: In most instances you should answer the questions asked. The Agency can fire you for insubordination if you refuse to answer their questions. But there is an instance where remaining silent at the risk of losing your job may be the way to go. That is when your answers may give rise to criminal liability.

The U.S. Supreme Court has held that the Fifth and Fourteenth Amendments' protections against coerced statements prohibits the Agency from obtaining statements from you under threat of removal from office and then using those same statements against you in subsequent criminal proceedings. *Garrity v. New Jersey* (1967) 385 U.S. 493.

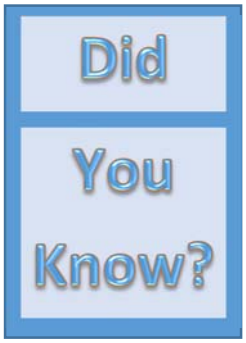
The California Supreme Court held that a city violated a police officer's right to remain silent by failing to admonish him that any statements he made could not be later used against him in a criminal proceeding. A "*Lybarger* admonition" became standard in many investigatory interviews ever since. *Lybarger v. City of Los Angeles* (1985) 40 Cal. 3d 822. It is frequently given at the beginning of the interview if you are accused of misconduct that could be criminal in nature. Before asking questions, the interviewer explains that your silence could be considered insubordination and grounds for termination.

In a later case, the California Supreme Court clarified that a public employee may be compelled to answer questions about possible misconduct, provided that the employee is not required, on pain of dismissal, to waive the constitutional protection against the use of those answers in criminal court proceedings. *Spielbauer v. County of Santa Clara* (2009) 45 Cal. 4th 704.

So why invoke your right to remain silent and thereby risk losing your job? According to some criminal defense attorneys, the "*Lybarger* admonition" is not adequate protection against self-incrimination. If you consent to questioning after a *Lybarger* admonition, *your statements* cannot be used against you, apart from narrow exceptions such as impeachment. But that does not mean that prosecutors cannot use other evidence to charge and convict you of criminal offenses. The Court made clear in *Spielbauer* that a *Lybarger* admonition is not a grant of immunity. Additionally, if you admit to criminal misconduct, it could also serve as a basis for the Agency to terminate your employment for possible job-related misconduct, too. So, you could still end up with both a criminal conviction and your job loss by answering the questions.

In short, if you believe the Agency will ask you questions about your activities that could be criminal in nature, it is another reason to contact your representative right away.

Ideally, you should retain a criminal defense attorney before the interview and follow your counsel's advice about whether to submit to the interview in the first place.



President Richard M. Nixon signed the Federal Occupational Safety and Health Act ("OSH Act") into law on December 29, 1970. Later this month, this landmark Federal law will celebrate its 50th birthday. The OSH Act established the Occupational Safety and Health Administration ("OSHA"), which is a large regulatory agency of the U.S. Department of Labor. OSHA's mission is to ensure safe and healthy working conditions by setting and enforcing standards and providing training, outreach, education, and assistance.

Workers at state and local governments are not covered by the Federal OSHA, but they may have protections under the OSH Act if they work in a state with an OSHA approved state program. The California Department of Industrial Relations (DIR) has a Division of Occupational Safety and Health (DOSH), better known as Cal/OSHA. After the OSH Act had passed, the state established Cal/OSHA under the California Occupational Safety & Health Act of 1973.

Cal/OSHA protects and improves the health and safety of workers all across California. This includes setting and enforcing workplace safety standards; providing outreach, education and assistance; and issuing permits, licenses, certifications, registrations, and approvals. Cal/OSHA has been active in the wake of the COVID-19 Pandemic, helping to ensure employers take steps to protect workers exposed to infectious diseases like COVID-19. Cal/OSHA recommends that employers incorporate Department guidance – including all public health guidelines – into the employer's existing procedures to help keep workers safe. https://www.dir.ca.gov/dosh/coronavirus/

Cal/OSHA does aggressively pursue and enforce violations when it has jurisdiction. This may include areas such as heat illness prevention, construction activities, cranes, electrical work, public works projects, ergonomics, blood borne pathogens, confined spaces, hazardous materials, asbestos, and where there has been a workplace accident. Cal/OSHA may also be an excellent resource for developing an Injury and Illness Prevention Program (IIPP), which is a basic written workplace safety program. You can also find a list postings at http://www.dir.ca.gov/wpnodb.html that employers must post in your workplace. You can find more great information at http://www.dir.ca.gov/dosh.

You can file a Cal/OSHA complaint about workplace safety and health hazards. Your name will be kept confidential unless you request otherwise. You might contact your Association first, and consider notifying management and/or filing a grievance over workplace safety issues before filing a Cal/OSHA complaint. The issues that may be prevented or resolved internally are likely broader than what Cal/OSHA will consider.

News Release - CPI Increases!

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

1.2% - CPI for All Urban Consumers (CPI-U) Nationally

1.2% - CPI-U for the West Region

0.7% - CPI-U for the Los Angeles Area

1.1% - CPI-U for San Francisco Bay Area

1.7% - CPI-U for the Riverside Area (from September)

1.1% - CPI-U for San Diego Area (from September)

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: I know the employer has the right to ask for a doctor's note when only calling out for one day. But if they are fishing for COVID related symptoms, do I have to answer those questions? And if I need to get a COVID test to return to work, is the time waiting for the results covered under the Federal CARES Act?

Answer: Although the general rule is that the Americans with Disabilities Act (ADA) prohibits your employer from requiring you to disclose your specific symptoms or diagnosis in order to return to work, different rules apply during a pandemic. During the COVID pandemic your employer can: (1) ask you if you are experiencing COVID symptoms before you report to work; (2) take your temperature when you report to work;

and (3) tell employees who have COVID symptoms to stay home or leave work. So, if your employer is asking you about COVID symptoms, you should answer the questions.

Under the federal Families First Coronavirus Response Act (FFCRA), employers must provide up to 80 hours of emergency paid sick leave to most employees who have COVID symptoms and are seeking a medical diagnosis. So, if your employer requires you to get a COVID test to return to work because of your symptoms, the time waiting for the results is probably covered by the FFCRA.

Question: I just promoted to a different Department, and although the job title is different, I am basically still a Building Inspector. I had been getting Bilingual pay to translate Spanish for other employees both on phone calls and in the field. Ever since the transfer to a different division, HR has taken away the extra pay. They say that there are already enough Bilingual employees in my new division. What HR does not understand is that I am the only one at my job level with that ability. Can HR remove the Bilingual pay with the change of a department or promotion once it has been granted?

Answer: It depends. The rules for bilingual pay are typically set out in your MOU or your Agency's personnel policies. If your MOU lists certain positions eligible for bilingual pay and your new position is not listed, you would not be eligible. If the rules state that bilingual pay is subject to the Agency's discretion, then you are probably out of luck. But if your new position is listed in your MOU and the Agency does not have any discretion on the number of employees who can qualify or in what division or department, or the Agency is expecting you to speak Spanish as a requirement in your new job, then you should be getting bilingual pay.

If the problem is that the Agency does not understand the need for your skills, the solution might be to help them understand it. If you have been told that your language skills do not need to be used in the workplace – consider not using them. If residents complain about the lack of translation, the Agency might realize they should keep paying you to do this. Either way, call your professional staff to help you analyze your case.

Question: A customer has a close relationship with an employee who works under me. The customer does not like me, for whatever reason, and wrote in regarding my actions in the field. The customer said something like she did not like what I said. I wrote up a response and management agreed that the customer's letter seemed suspect. However, management put the letter in my file anyway. Now I am questioning why. Can I ask that it be removed?

There was no counseling and reinstruction. Can management put whatever they want in your employee file? I feel like I am being set-up.

Answer: Although management has broad discretion to place non-medical documents into personnel files, some MOUs have limitations on how long certain types of discipline can remain there. If your MOU, for example, states that written reprimands will be removed from personnel files after one-year, you can certainly ask for this letter to be removed once that timeframe is met.

Even if your MOU doesn't require management to pull discipline after a specific length of time, you can ask management to explain why they are putting the letter in your personnel file, and disclose how long they plan on keeping it there. If it is not disciplinary, then management should be willing to remove it after a reasonable length of time, especially if no other customers file similar complaints.

In any event, management should give you notice of any negative actions placed in your file. You have the right to inspect the contents of your own personnel file. You may also request that your written response be included with the complaint in your personnel file. Contact professional staff for help with this issue.

Question: Can the Agency pay me at ONLY straight time when I was called in to work an extra shift? The Agency says they can, because I was on standby to cover that shift and I have NOT worked over 40 hours in a week. Our standby and overtime language in the MOU makes me think the answer is that they can. I was paid at straight time and NOT time-and-a-half. Can I demand the overtime rate for the extra shift?

Answer: They probably can. The Fair Labor Standards Act (FLSA) sets the minimum requirements for overtime and requires employers to pay overtime at time-and-one-half for any hours *worked* more than 40 hours. However, the FLSA typically permits employers to exclude standby time from the hours that count toward the 40 hours requirement.

If you worked 40 hours in the week, not including your standby time, and then worked an extra shift, all the hours on the extra shift are paid at time-and-one-half. If you worked 35 hours, not counting standby, and then worked an additional 8 hours, 5 hours are paid at straight time, and the remaining 3 hours are paid at time-and-one-half. If you worked 30 hours, not counting standby, and then worked an additional 8 hours, all 38 hours are paid at straight time.

Your Association can negotiate more generous rules for overtime than what the FLSA requires, such as a certain number of guaranteed hours for callbacks, double-time for working on

holidays, or counting paid leave as hours worked. This is called contractual overtime. At a minimum, though, the Agency must follow the FLSA for all non-exempt employees.

Question: I received my annual performance review last month. The overall rating is negative, which of course I disagree with. The Agency also put me on an improvement plan, they did not say for how long. On top of all that, they took me off my alternate work schedule. I had been working the 4/10, but they now have me working the traditional 5/40, which is terrible for me, to put it mildly. I recognize I am not the Agency's star number 1 employee, but I am good at my job. This feels like retaliation, that I am being singled out. I cannot help but think the Agency has it out for me in some way. What can I do to fight back? This is triple jeopardy, all based on my boss's subjective belief.

Answer: You need to respond to all three items, do so quickly, and contact professional staff for assistance. You have the right to file a written response to your performance review. You should identify the things that you disagree with and explain why you feel they are inaccurate or unfair. This response should be attached to your performance review and placed in your personnel file. Beware, however, most MOUs or personnel rules limit how much time you have to respond.

The Agency can put you on a performance improvement plan (PIP), but it should have quantifiable goals that you can reach and a reasonable timeframe for achieving them. Make sure you understand your PIP and the expectations it places on you. You can ask for clarification of the goals and a deadline for the PIP to expire. You have the right to union representation to assist you with your PIP.

In most cases, work schedules like a 4/10 or a 5/40 are a management right to set so long as you get some notice of a change. If your MOU requires the Agency to provide notice for a schedule change, and they have not done so, you may file a grievance for their failure to provide the required notice. But most grievance procedures have tight deadlines that require you to file the grievance within a certain timeframe after the incident occurs (in this case the schedule change). Your professional staff can help you with all three items. Call for help right away!