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Employment & Labor Law for Public Safety Agencies

Disciplinary Interviews & Compelled Reports

ABUSIVE OR COERCIVE INTERVIEWS/INVESTIGATIONS

Arbitrator concludes that a supervisor's conduct in brusquely questioning a foreman about inmates under his control did not violate the bargaining agreement or Federal Bureau of Prisons standards of conduct. It did not rise to level of "workplace violence." Federal Correctional Institution, El Reno, Okla. and AFGE L-171, 119 LA (BNA) 129, FMCS Case No. 02/12027 (Woolf, 2003). {N/R}

Seventh Circuit rejects the Fourth Amendment claims of three officers who were ordered to be interviewed by I-A personnel; they received overtime and were not disarmed or relieved of their IDs. A fourth officer pled a valid claim; although only partnered with another officer who was under suspicion, he was grabbed off the street and escorted to headquarters. Driebel v. City of Milwaukee, #01-1689, 298 F.3d 622, 2002 U.S. App. Lexis 15304 (7th Cir. 2002). [2002 Oct. FP]

Federal court enjoins an internal investigation interview of an officer who is suing superiors and the city for gender bias and retaliation. The proposed questioning was viewed as retaliatory and likely to interfere with the progress of the discrimination lawsuit. Karmel v. City of N.Y., #00 Civ. 9063, 200 F.Supp.2d 361, 2002 U.S. Dist. Lexis 8056, 88 FEP Cases (BNA) 1194 (S.D.N.Y. 2002), relying on the reasoning in Alvarez v. City of N.Y., #98 Civ. 7227, 31 F.Supp.2d 334, 1998 U.S. Dist. Lexis 19328 (S.D.N.Y. 2002). [2002 FP Sep]

California appeals court upholds and tightens an injunction against management attempts to deny the constitutional and statutory rights of corrections officers being interviewed as witnesses and targets in a criminal investigation.Management cannot recast an internal inquiry as an independent or outside investigation when it enlists that investigation. Calif. Correctional POA v. St. of Calif., #A085064, 82 Cal.App.4th 294, 2000 Cal. App. Lexis 566, 98 Cal.Rptr.2d 302. [2000 FP 131-3]

Police dept's overly intrusive internal investigation of a sexual harassment complainant's personal life may lead to liability. Sarro v. City of Sacramento, 1999 U.S. Dist. Lexis 19589 (E.D. Cal. 1999).

Appellate court authorizes a disability award for an employee who was threatened with jail unless she confessed to embezzlement. Miller v. WCAB, 724 A.2d 971, 1999 Pa. Commw. Lexis 39. [1999 FP 116-7]

State employee who was videotaped while looking in a coworker's desk and was later questioned by the state police is entitled to worker's comp. benefits for stress. Prettyman v. State of N.J., 298 N.J. Super. 580, 689 A.2d 1365 (A.D. 1997). [1997 FP 163-4]

Federal court declines to dismiss a damage suit against investigators who allegedly conducted an abusive interrogation of a city employee. Angara v. City of Chicago, 897 F.Supp. 355 (N.D.Ill. 1995). [1996 FP 69-70]

Coercive and intimidating employment interrogation did not give rise to a suit for the infliction of emotional distress. Publication of unfounded allegations of theft leading to dismissal would support a damage claim for defamation, including publicity wholly within the employing entity. Etzel v. The Musicland Group, 8 IER Cases (BNA) 483 (D.Kan. 1993). [1993 FP 69-70]

Intrusive, lengthy, coercive-styled interrogation of subordinates required reinstatement and back pay. Oddsen v. Board of Fire and Police Cmsrs. of Milwaukee, 321 N.W.2d 161 (Wis. 1982).

Police officer could seek injunctive relief against internal affairs investigation and disciplinary interrogation when he sufficiently pleaded political harassment and bad faith. Buege v. Lee, 373 N.E.2d 427 (Ill.App. 1978).

Requiring employee to submit to on-job interview concerning misconduct complaint is not a "false imprisonment'; $7,000 jury verdict reversed. Faniel v. Chesapeake & Pot. Tel. Co. of Md. 404 A.2d 147 (D.C. App. 1979).

DISCIPLINARY INTERVIEWS: BARGAINING ISSUES (RELATED TO INTERVIEWS)

Federal Labor Relations Authority finds that federal law enforcement agencies may videotape its internal affairs interviews, but must bargain over the “impact and implementation” of the process. Customs Service and NTEU-143/#168, #DA-CA-60047,-48, 2000 FLRA Lexis 75, 56 FLRA No. 56. [2000 FP 147-8]

Police union's demand that an officer cannot be compelled to testify at a departmental hearing concerning the officer's conduct was a nonmandatory subject of bargaining. City of New Rochelle and Police Assn. of N.R., N.Y. PERB #U-10093 (ALJ decis.), 21 NYPER (LRP) ¶ 4592, 1988 NYPER (LRP) Lexis 2235. {N/R}

DISCIPLINARY INTERVIEWS: CONFIDENTIALITY REQUIREMENTS AND ASSURANCES

Citing the First Amendment, the Eleventh Circuit invalidates a Florida law that prohibited participants in a police internal investigation from disclosing any information. Cooper v. Dillon, #04-11150, 2005 U.S. App. Lexis 4703, 2005 WL 653313 (11th Cir. March 22, 2005). [2005 FP May]

Milwaukee police rule prohibiting officers from discussing matters under internal investigation challenged.Appellate court remands for findings.Milwaukee Police Assn. v. Jones, #98-2904, 192 F.3d 742, 1999 U.S. App. Lexis 23357, 15 IER Cases (BNA) 961. [2000 FP 4-5]

I-A "gag rule" invalidated: NLRB orders an employer not to interfere with discussions among employees concerning their grievances and complaints. The gag rule violated 29 U.S. Code 158(a)(1).

Lockheed Martin and Fiala, #27-CA-14557 et al., 2000 NLRB Lexis 6, 330 NLRB No. 66. [2000 FP 61-2]

Arbitrator reduces the penalty, but sustains the punishment of a corrections officer who disobeyed a policy against discussing a pending internal investigation with one's coworkers. Minn. Dept. of Corr. and AFSCME C-6 (Henderson), RMS #96-PA-2070 (Imes, 1996). [1997 FP 132-3]

In a criminal prosecution [of an ex-Presidential Aide, USMC Lt.Col. Oliver North], immunized testimony could not be used to refresh the recollections of a witness or to prepare a witness.U.S. v. North, #89-3118, 910 F.2d 843; 1990 U.S. App. Lexis 12106 (amended 11-22-1990; modified 11-27-1990)(D.C. Cir.). {N/R} Note: The reasoning of U.S. v. North was rejected by the 9th Cir. in U.S. v. Koon, 34 F.3d 1416 (9th Cir. 1994). [1995 FP 53]

Federal court dismisses union suit which tried to block internal affairs questioning because IA files lose their confidential status when released on court order. Toledo Police Assn. v. City of Toledo, 716 F.Supp. 300 (N.D. Ohio 1988).

Secretly taping an internal affairs conversation not conduct unbecoming. City of Birmingham v. Jefferson Co. Personnel Bd., 468 So.2d 181 (Ala. App. 1985).

Employee could not be disciplined for secretly tape recording conversation with chief concerning union activities. McCallum v. Hinson, 489 F.Supp. 627 (M.D. Ga. 1980).

DISCIPLINARY INTERVIEWS: CRIMINAL INVESTIGATIONS AND IMMUNITY

A woman claimed that she was gang raped in a Bronx fire station that firefighters call the "Animal House." Although criminal charges were not brought, a civil court in Manhattan affirms the termination of a firefighter who, on the advice of his lawyer, refused to cooperate with internal investigators after being offered limited immunity. Waugh v. N.Y.C. Fire Dept., #103546/2005 (Sup. Ct. N.Y. Co., NY 2005). [2006 FP Feb]

Sixth Circuit finds that police officers were not entitled to bring a damage suit against the chief of police, even if the I-A interrogation of the officers was partially criminal in nature, and Miranda rights were not observed. Lingler v. Fechko, #01-3554, 312 F.3d 237, 2002 U.S. App. Lexis 25131, 2002 FED App. 0420P (6th Cir. 2002). [2003 FP Mar]

Federal appeals court allows an officer's testimony in a prior civil lawsuit to be used against her in a criminal prosecution. Her failure to claim the 5th Amendment privilege at the civil trial was critical. U.S. v. Vangates, #01-12967, 287 F.3d 1315, 2002 U.S. App. Lexis 6433 (11th Cir. 2002). [2002 FP Nov]

Incriminating statements given by a law enforcement officer to his superiors, after he had received the Miranda warnings, were admissible in his criminal prosecution. At no time did his superiors advise him that he had to answer questions as a condition of continued employment. State v. Koverman, #01SA210, 38 P.3d 85, 2002 Colo. Lexis 58 (2002). [2002 FP Aug]

Appellate court overturns an arbitration award that gave state troopers the same rights when interviewed as a criminal suspect they enjoy when interviewed for disciplinary purposes.Even if the arbitrator's interpretation of the contract was correct, "an employer cannot by contract give its employees procedural rights and benefits regarding criminal investigations." Illinois State Police v. FOP L-41, #4-00-0774, 323 Ill. App.3d 322, 751 N.E.2d 1261, 2001 Ill.App. Lexis 505. [2001 FP 116-7]

Federal appeals court holds that a member of a bargaining unit is entitled to a union rep. during an interview, even if management characterizes the investigation as "criminal" rather than administrative. U.S. Dept. of Justice v. FLRA, #00-1433, 2001 U.S. App. Lexis 21573 (D.C.Cir.). [2001 FP 163-4]

Federal impasses panel mandates a union-proposed, warning in a Treasury Dept. contract dispute. It would apply to inquiries where criminal wrongdoing is suspected. Treasury, Bur. of Engrv. v. C-201 NTEU, #99 FSIP 96, 1999 FSIP Lexis 41. [2000 FP 52-3]

California appeals court upholds and tightens an injunction against management attempts to deny the constitutional and statutory rights of corrections officers being interviewed as witnesses and targets in a criminal investigation. Management cannot recast an internal inquiry as an independent or outside investigation when it enlists that investigation. Calif. Correctional POA v. St. of Calif., #A085064, 82 Cal.App.4th 294, 2000 Cal. App. Lexis 566, 98 Cal.Rptr.2d 302. [2000 FP 131-3]

Federal appeals court upholds compulsory questioning of police officers, demanded by their superiors as part of an administrative investigation of potentially criminal conduct. Wiley v. Mayor of Baltimore, 48 F.3d 773 (4th Cir. 1995); cert.den. 64 LW 3241. [1995 FP 91]

Ninth Circuit declines to follow the Oliver North holding {U.S. v. North, 910 F.2d 843(D.C. Cir.)} that witnesses may be excluded in a criminal trial because (1) they have read an officer's statement to internal affairs investigators and (2) were influenced, directly or indirectly, by that statement. U.S. v. Koon, 34 F.3d 1416 (9th Cir. 1994). [1995 FP 53]

Fact that police officer had been ordered to give a statement to internal affairs investigators did not immunize him from a parallel criminal prosecution. Officer was entitled to use immunity, not transactional immunity. State v. Beugli, 126 Or.App. 290, 868 P.2d 766 (1994). {N/R}

California appellate court holds that a person may not assert his Fifth Amendment right to remain silent in a civil proceeding, without showing a possibility of criminal prosecution. The self incrimination privilege is not applicable to a person's possible civil liability. Blackburn v. Superior Court (Kelso), 27 Cal.Rptr.2d 204 (1993). {N/R}

Transmittal of officer's internal affairs statements, immunized under Garrity, to the prosecutor, who then used the statements to bring charges against him, did not violate his civil rights. Gwillim v. City of San Jose, 929 F.2d 465 (9th Cir. 1991). [1992 FP 53-4]

Massachusetts Supreme Court holds that public employees who are interrogated in a disciplinary investigation are entitled to full and final immunity from prosecution; other states limit the scope of any constitutionally-protected immunity, and ban the use of employer-compelled statements in criminal proceedings. Carney v. City of Springfield, 403 Mass. 604, 532 N.E.2d 631; City of Springfield v. Civil Serv. Cmsn., 403 Mass. 612, 532 N.E.2d 636; Doe v. City of Springfield, 403 Mass. 1010, 532 N.E.2d 639 (Mass. 1988).

Promise to employee that his statements to internal affairs and resignation will avoid criminal charges is not binding on the prosecutor; employee's conviction does not violate due process. People v. Early, 158 Ill.App.3d 232, 511 N.E.2d 847 (1987).

Appeals court rejects claim that dept. must grant transactional immunity to employee questioned about criminal conduct. Shales v. Leach, 500 N.Y.S.2d 890 (A.D. 1986).

Public safety employees entitled to take Fifth amendment at grand jury proceedings. Mountain v. City of Schenectady, 474 N.Y.S.2d 612 (A.D. 1984).

Immunity from prosecution does not bar use of confession indepartmental disciplinary trial. City of Hollywood v. Washington, 384 So.2d 1315 (Fla. App. 1980).

Employee must answer job-related questions or forfeit employment; no Fifth Amendment privileges applicable to interrogation, but answers not admissible in a criminal prosecution. Szmaciarz v. Calif. St. Personnel Bd., 145 Cal.Rptr. 396 (App. 1978).

U.S. Supreme Court upholds a limited grant of immunity to witnesses compelled to incriminate themselves (testimonial immunity); transactional immunity not constitutionally required. Zicarelli v. State Inves. Cmsn., 406 U.S. 472, 92 S.Ct. 1921 (1972).{N/R} Note: see U.S. v. North, #89-3118, 910 F.2d 843, 1990 U.S. App. Lexis 12106 (amended 11-22-1990; modif. 11-27-1990)(D.C. Cir.). The

reasoning of U.S. v. North was rejected by the 9th Cir. in U.S. v. Koon, 34 F.3d 1416 (9th Cir. 1994) mentioned above.

See also: Garrity Warnings and Miranda (sections in this topic)

DISCIPLINARY INTERVIEWS: DISCOVERY ISSUES (RIGHT TO DOCUMENTS, ETC.)

California appellate court interprets PSO bill of rights law to include the right to see statements taken of employees before answering IAD questions. Pasadena Police Officers Assn. v. City of Pasadena, 251 Cal.Rptr. 865 (App., 2d Dist. Cal. 1988).

DISCIPLINARY INTERVIEWS: EVIDENTIARY ISSUES

Compelled statements are admissible without proof of "corpus delecti". DiCiacco v. Civil Serv. Cmsn. of Phila., 389 A.2d 703 (Pa. Cmwlth. 1978).

The discharge of a public employee was not barred because he relied upon the erroneous advice of counsel. His attorney erroneously informed him that he had a legal right not to answer certain questions. Silverio v. Municipal Courtof Boston, 355 Mass. 623, 247 N.E.2d 379, cert. denied, 396 U.S. 878, 90 S.Ct. 151 (1969). {N/R}

DISCIPLINARY INTERVIEWS: EXCLUSIONARY RULE (APPLICATION OF)

Failure to provide procedural rights during disciplinary interrogation should not result in its suppression. Exclusionary Rule is too drastic a remedy. Williams v. City of Los Ang,, 47 Cal. 3d 195, 252 Cal.Rptr. 817, 763 P.2d 480 (1988).

Contract clause requiring disciplinary interviews to be recorded must be followed; discipline set aside. Cymbalsky v. Dilworth, 467 N.Y.S.2d 902 (A.D. 1983).

Collective bargaining agreement concerning employee questioning must be complied with; reinstatement and back pay ordered for terminated officers in New Mexico. Conwell v. City of Albuquerque, 637 P.2d 567 (N.M. 1981). [1982 (88) FP 6]

DISCIPLINARY INTERVIEWS: GARRITY WARNINGS

Note: This refers to the warnings designed to avoid the problems encountered in Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 1967 U.S. Lexis 2882, 17 L.Ed.2d562 (1967). See also Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 1968 U.S. Lexis 1351 (1968), Uniformed Sanit. Men Assn. v. Cmsnr. of Sanitation, 392 U.S. 280, 88 S.Ct. 1917 (U.S. 1968) and Lefkowitz v. Turley, 414 U.S. 70, 94 S.Ct. 316, 1973 U.S. Lexis 132 (1973), -- plus a discussion of the meaning of Garrity in Kelley v. Johnson, 425 U.S. 238, 96 S.Ct. 1440, 1976 U.S. Lexis 35 (1976).

The employee is informed that although he (or she) has a right to remain silent and not incriminate himself, his silence can be deemed insubordination and will result in administrative discipline; further, any statement he makes under compulsion of the threat of such discipline cannot be used against him in a later criminal proceeding.

Colorado Supreme Court finds that a Garrity Warning used by a sheriff's office was "ambiguous" and possibly deficient because it advised an employee that a failure to cooperate in an internal investigation "could" result in disciplinary action -- rather than would result in her termination. Hopp & Flesch, LLC v. Backstreet, #04SC697, 2005 Colo. Lexis 1044, 23 IER Cases (BNA) 1263 (2005). [2006 FP Mar]

Federal appeals court reinstates a civil rights suit filed by an officer against his superiors, after the prosecutor used his Garrity-protected statements against him in a subsequent prosecution. McKinley v. City of Mansfield, #03-4258, 2005 U.S. App. Lexis 5875, 2005 FED App. 0170P (6th Cir. 2005); also see, State v. McKinley, #01CA98, 2002 Ohio 3825, 2002 Ohio App. Lexis 3866, 2002 WL 1732136 (5th App. Dist, 2002). [2005 FP Jun]

Seventh Circuit reinstates a civil rights suit brought by a city worker who, while facing criminal prosecution for drug possession, refused to answer questions at an internal interview. The city had failed to inform him that his answers would be immunized from use in a criminal case. Franklin v. City of Evanston, #03-2127, 384 F.3d 838, 2004 U.S. App. Lexis 20311, 94 FEP Cases (BNA) 921 (7th Cir. 2004). [2004 FP Dec]

Maryland appellate court affirms that public employees must answer questions, if required to do so, that specifically, directly, and narrowly relate to the performance of their official duties or their fitness for continued employment. Superiors must give a clear order (and advice of rights) to interviewed employees. Dept. of Pub. Sfty. v. Shockley, #2081 S. T. 2000, 790 A.2d 73 (Md.Sp.App. 2002). [2002 FP May]

NC Supreme Court holds that an employer is not required to warn an employee that his answers to a disciplinary interview are not admissible in a criminal prosecution. Employee was lawfully terminated for noncooperation, despite the fact the admonition failed to mention use immunity. Debnam v. N.C. Dept. of Corr., 334 N.C. 380, 432 S.E.2d 324 (1993). [1994 FP 85-6]

Appellate court annuls termination of corrections officer who ceased cooperation with an internal investigation. Interrogators failed to warn him his responses were immunized from use in a criminal prosecution. Debnam v. N.C. Dept. of Corr., 421 S.E.2d 389 (N.C.App. 1992). Reversed! See 432 S.E.2d 324, discussed above. [1993 FP 70-1]

Federal appellate court restates the holding in Garrity that employees who are compelled to answer their employer's questions automatically acquire use immunity for their answers. Gilbert v. Nix, 990 F.2d 1044 (8th Cir. 1993). [1994 FP 39-40]

N.Y. Court clarifies Garrity Warnings: employees are required to answer narrowly focused questions concerning the possible misconduct of a fellow employee. Evangelista v. City of Rochester, 141 Misc. 2d 1040, 535 N.Y.2d 928 (1988).

Garrity rule upheld in Texas; reliance on Harris v. New York misplaced. Accused employee must answer relevant questions or be fired. Plaster v. City of Houston, 721 S.W.2d 421 (Tex.App. 1986). Note: U.S. Supreme Court held in Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978) that an "involuntary" statement cannot be used against a defendant to impeach his in-court testimony. [86 (149) FP 3]

Officers may take Fifth Amendment in criminal case where they are merely witnesses; only dept. can give Garrity immunity. Benjamin v. City of Montgomery, 785 F.2d 959 (11th Cir. 1986).

Garrity warnings must be given before disciplining an employee for failure to answer a supervisor's questions. Lybarger v. City of Los Ang., 40 Cal.3d 822, 710 P.2d 329, 1985 Cal. Lexis 436, 221 Cal.Rptr. 529 (Cal. 1985).

Missouri court upholds Garrity warnings. Schulte v. Sayad, 667 S.W.2d 26 (Mo.App. 1984).

Trial judge holds that officers may consult with union reps or their attorney before completing a shooting report; prior policy continued. Long Beach Police Off. Assn. v. City of Long Beach, L.A.

Daily Jour. (11/10/82); affirmed, 156 Cal.App.3d 996, 203 Cal.Rptr. 494 (1984). Appellate panel concluded that city unilaterally changed a past practice, and the bargaining agreement (M.O.U.) specifically perpetuates past practices.

DISCIPLINARY INTERVIEWS: INSUBORDINATION - REFUSAL TO ANSWER

Federal appeals court upholds the termination of a public employee who declined to answer I-A questions relating to possible criminal conduct. Both the investigator and her lawyer gave her bad advice to take the Fifth Amendment. She may have a remedy against her lawyer for malpractice, but is not entitled to get her job back. Atwell v. Lisle Park Dist., #01-2520, 286 F.3d 987, 2002 U.S. App. Lexis 6775, 18 IER Cases (BNA) 901 (7th Cir. 2002). [2002 FP Aug]

Arbitrator sustains the termination of an employee, accused of sick leave abuse, who refused to answer her superiors questions on the advice of her attorney. Reliance on bad legal advice is no defense. CITGO Refining and CITGO Employees Feder., AAA Case #70-300-00087-00, 115 LA (BNA) 65 (Moore, 2000). [2001 FP 21]

A 2-to-1 federal appeals panel affirms the termination of an officer who refused to answer duty-related questions or take a polygraph. Dissenting judge said that management failed to clarify the role between ongoing criminal and administrative investigations. Hill v. Johnson, #98-1431EA, 160 F.3d 469, 1998 U.S. App. Lexis 28603, 14 IER Cases (BNA) 985 (8th Cir.); Reh. den. 1998 U.S. App. Lexis 32016. [1999 FP 37-8]

A police chief did not violate the First Amendment in suspending a police officer who disobeyed his order to answer questions pertaining to a "confidential memorandum" regarding the strategy to obtain the union's agreement to a proposed consolidation of police with a neighboring town. Heil v. Santoro, 147 F.3d 103, 1998 U.S. App. Lexis 11627, 14 IER Cases (BNA) 30 (2nd Cir. 1998). {N/R}

Firefighters, accused of oral, anal and vaginal sex with a citizen while on duty, refused to answer questions during an internal investigation. Appellate court concluded there was insufficient evidence to affirm their termination for sexual misconduct, but their dismissal was warranted for their refusal to answer questions pertaining to the incident. Blunier v. Bd. of Fire & Police Cmsnrs. of Peoria, 545 N.E.2d 1363 (Ill.App. 1989).

Florida appellate court upholds termination of deputy for refusing to answer job-related questions. Thomas v. Brevard Co. Sheriff's Office, 456 So.2d 540 (Fla. App. 1984).

Louisiana appellate court affirms dismissal of public employee who refused to give a statement to employer; Fifth Amendment no bar to dismissal. Lemoine v. Dept. of Police, 348 So.2d 1281 (La. App. 1977).

DISCIPLINARY INTERVIEWS: LEGAL COUNSEL - RIGHT TO

California appeals court upholds a compelled disciplinary interview, without the officer's lawyer present, when counsel was unable to appear for a rescheduled interview. Upland POA v. City of Upland, #E032607, 111 Cal.App.4th 1294, 4 Cal.Rptr.3d 629, 173 LRRM (BNA) 2367, 2003 Cal. App. Lexis 1407 (Cal. App.4th Dist. 2003). [Dec FP 2003]

New Jersey appeals court affirms reinstatement of an officer who was fired because he declined to answer questions without the assistance of his attorney. State Criminal Justice guidelines specifically afforded him that right. In Matter of William Carroll, #A-1003-99T3, 339 N.J. Super. 429, 772 A.2d 45, 2001 N.J. Super. Lexis 175. [2001 FP 165]

Arbitrator rules that an employer was not obligated to furnish legal counsel to a police officer accused of excessive force, during his interview with management. While the contract required management to furnish employees with legal representation in all "legal proceedings," the contract excepted "internal university proceedings." Univ. Mich. and Mich. Assn. of Police, 103 LA (BNA) 401 (Daniel, 1994). {N/R}

Appellate court upholds right to discipline an officer who refused to answer a superior's job-related questions without first consulting with legal counsel. Brougham v. City of Normandy, 812 S.W.2d 919 (Mo.App. 1991). [1992 FP 132-3]

Chief may lawfully require police officers involved in fatal shootings to write incident reports before they have consulted with an association attorney. City has strong, compelling interest in obtaining prompt, accurate and "unvarnished" reports of fatal shootings for training purposes. Ward v. City of Portland, 857 F.2d 1373 [the opinion which appeared in the paperbound volumes (advance sheets) was modified and portions were withdrawn] (9th Cir. 9/29/88), reversing 658 F.2d 1272 (9th Cir. 1981). In Ward, the court inadequately addressed the issue of whether an officer in an agency that recognizes his right to counsel during an internal investigation would also have that right before completing a use of force or major incident report. In a prior ruling the federal court held that officers were not entitled to consult private legal counsel prior to completion of use-of-firearms reports. Portland Police Assn. v. City of Portland, Civil #78-808 (D.Ore. 1978). Also see Watson v. Riverside, 1997 U.S. Dist. Lexis 13797 (discussed above).

In states where employee has right of counsel during interview, lawyer is entitled to object and consult with client. Nichols v. Baltimore Police Dept., 455 A.2d 446.

Interrogated department member, suspected of misconduct, is not entitled to legal counsel at disciplinary interview. Wilson v. Swing, 463 F.Supp. 555 (M.D. N.C. 1978).

N.Y. courts have split on right to counsel at a disciplinary interrogation. A trial judge found an officer was deprived of his right of due process when he was ordered to give a statement at a time when his attorney was not available. May v. Shaw, 396 N.Y.S.2d 258 (A.D. 1977). In another case, an appellate panel ruled 3-to-2 that there was no right to an attorney during the interrogation process, even though a collectively bargained agreement granted that right. Donofrio v. Hastings, 388 N.Y.S.2d 779 (A.D. 1976).

See also: Weingarten Rights (part of this Topic)

DISCIPLINARY INTERVIEWS: MIRANDA - APPLICATION OF

The failure to give Miranda warnings did not violate the plaintiff's rights because she was never charged with a crime. Reyes v. Granados, 879 F.Supp. 711 (S.D.Tex. 1995). [1996 FP 70]

Plaintiff who was repeatedly questioned in violation of his Miranda rights could sue for damages for a violation of his Fifth Amendment rights. Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992), cert. denied 113 S.Ct. 407 (1992). [1996 FP 70]

Massachusetts reaffirms its rule that public employees must be given transactional immunity before they can be required to respond to a superior's questions, in cases where the conduct can be prosecuted under the criminal code. Baglioni v. Chief of Police of Salem, 421 Mass. 229, 656 N.E.2d 1223 (Mass. 1996). [1996 FP 70]

NJ appellate court rules that a disciplinary interrogation is non-custodial for purposes of “Miranda”, but an employee may not be required to waive his Fifth Amendment rights as a condition of employment. State v. Lacaillade, 266 N.J. Super. 522, 630 A.2d 328 (1993). [1994 FP 70-1]

Officer's statement to superiors in criminal inquiry was not “coerced” but “Miranda” applies if the

interrogation was "custodial." State v. Connor, 861 P.2d 1212 (Idaho 1993). [1994 FP 71]

Officer, who questioned another deputy at the scene of an officer-involved shooting, was not required to give him the Miranda warnings. "Custody" did not arise because shooting officer had to remain at the scene. Peo. of Colo. v. Probasco, 795 P.2d 1330 (Colo. 1990).

DISCIPLINARY INTERVIEWS: PRIVILEGED COMMUNICATIONS

A police chief did not violate the First Amendment in suspending a police officer who disobeyed his order to answer questions pertaining to a "confidential memorandum" regarding the strategy to obtain the union's agreement to a proposed consolidation of police with a neighboring town. Heil v. Santoro, 147 F.3d 103, 1998 U.S. App. Lexis 11627, 14 IER Cases (BNA) 30 (2nd Cir. 1998). {N/R}

The "Union Official-Union Member Privilege" does not bar a prosecutor or grand jury from inquiring into conversations between a union member and his union representative. In re Grand Jury Subpoenas, 995 F.Supp. 332 (E.D.N.Y. 1998). {N/R}

In a civil rights damage suit against police officers for the use of excessive force, a conversation between an officer and the union president was not privileged against disclosure. Walker v. Huie, 142 F.R.D. 497 (D. Utah 1992). {N/R}

It would be an improper employment practice if the city's Commissioner of Corrections compelled the union president to answer questions about reports or complaints related to the trouble at Rikers Island in 1990 if those reports and complaints had been made to him in his role as Union President by union members. Seelig v. Shepard, 578 N.Y.S.2d 965 (N.Y. Sup. 1991).{N/R}

Police chief did not violate Ohio labor law by attempting to question a union official regarding his representation of a police officer in drug testing matter. The questioning of the union official ceased as soon as the official asserted that his representation was related to union matters and no union representative was ever ordered to answer questions or that any action was taken against him for refusing to do so. State Empl. Rel. Bd. v. Rudolph, #87-ULP-05-0209, 5 Ohio Pub. Emp. Rptr. (LRP) ¶ 5706, 1988 OPER (LRP) Lexis 2822 (Ohio SERB Hrg.Ofcr. 1988). {N/R}

City engaged in an improper employment practice when the Police Commissioner ordered a police officer, who was the president of a police union, to answer questions about his observations on the occasion of a meeting with one of his union members. City of Newburgh v. Newman, 70 A.D.2d 362 (N.Y. App. 1979). {N/R}

DISCIPLINARY INTERVIEWS: SUBJECT MATTER (IMPROPER, IRRELEVANT, ETC.)

NLRB holds that an employer improperly questioned an employee about distributing fliers on coworker desks after-hours, protesting the layoff of some employees, and then unlawfully fired her for lying about her activities. Because the subject matter of the disciplinary interview was improper (concerted labor activities) the employer could not terminate her for untruthfulness. U.S.A.A. and Williams, #12-CA-21735, 2003 NLRB Lexis 666, 173 LRRM (BNA) 1331, 340 NLRB No. 90 (NLRB 2003). [2004 FP Feb]

Under Title VII, employers have a legal duty to investigate a complaint of rape or sexual harassment. Jackson v. McCrory, Comm. Pl. Ct. of Phila. Co. (2002). [N/R]

Fire chief could not require firefighter to answer questions about complaint of off-duty sexual contact with 12 year old. Young v. Winkle, #86-2501, Lucas Co. Ct. Cm. Pls., 1 IER Cases (BNA) 1483 (1986).

State trooper given $50,000 and reinstatement; improperly terminated for refusing polygraph questions pertaining to his sex life. J.R. Lopez v. Idaho Dept. of Law Enforcement and Idaho Personnel Cmsn., Fourth Dist. Ct., Idaho Falls, ID (Dec. 1984).

Department's inquiry into officer's off-duty relationship with female violated his "zone of privacy'; refusal to answer questions justified. Shuman v. City of Philadelphia, 470 F.Supp. 449 (E.D. Pa.); Gilles v. Civil Serv. Bd., 99 Cal.App.3d 417, 160 Cal.Rptr. 278 (1979). But see Shago v. Spradlin, 701 F.2d 470 (5th Cir. 1983), aff'd U.S. Sup. Ct. (1983).

Failure to provide list of friends at alleged drug parties was insubordination; discharge not an excessive penalty. Kelly v. State Personnel Board, 156 Cal.Rptr. 795 (App. 1979).

Scope of questioning limited to official duties by New York Court, Ronayne v. Lombard, 400 N.Y.S.2d 693 (Misc. 1977).

Tennessee high court reinstates captain discharged for failure to answer questions unrelated to duties. Cox v. City of Chattanooga, 516 S.W.2d 94 (Tenn. App. 1973), aff'd (Tenn. Sup. Ct. 1974), cert. den. 95 S.Ct. 59 (1974).

DISCIPLINARY INTERVIEWS: TIME OF INTERVIEW

Department may continue to question accused employee after charges are filed. Tanico v. McGuire, 438 N.Y.S.2d 791 (A.D. 1981).

Union president, on leave, was still required to report to internal affairs office to answer questions. Crowley v. C&C of San Francisco, 83 Cal.App.3d 776, 1978 Cal.App. Lexis 1809, 146 Cal.Rptr. 264.

DISCIPLINARY INTERVIEWS: UNTRUTHFULNESS

Appeals court declines to overturn the termination of a police officer who violated agency policy and was untruthful about his conduct. Honesty is critical to an officer's performance of duty. Huemiller, v. Ogden Civil Service Cmsn., #20010968-CA, 2004 UT App 375, 101 P.3d 394, 2004 Utah App. Lexis 414 (2004). [2005 FP Mar]

A fire captain with 18 years of service was fired for failing to cooperate truthfully in an I-A investigation of a "blue flu" sickout in 2000, when 141 out of 194 firefighters called in sick during a four days. An appellate court found that the decision to terminate him was not made in good faith or with just cause, even though he gave evasive answers during an I-A interview to questions regarding a telephone conversation. Lacombe v. Lafayette City-Parish Consol. Govt., #03-483, 2003 La. App. Lexis 3122, 20 IER (BNA) Cases 1059 (La.App.3rd Cir., 2003). {N/R}

Although termination might not be appropriate for making a false insurance claim 14 years earlier, an arbitrator upholds the dismissal because the officer lied during the I-A investigation and continued to mislead his superiors up until his time of termination. Kitsap County and Kitsap Co. Deputy Sheriff's Guild , 118 LA (BNA) 1173, AAA Case #75-L-390-00240-02 (Gaba, 2003). [2004 FP Feb]

Supreme Court reverses lower decisions; upholds the termination of employees who lied to their superiors. Punishment also can be added for those who lie. LaChance v. Erickson, 522 U.S. 262, 118 S. Ct. 753, 1998 U.S. Lexis 636, 13 IER Cases (BNA) 1015, 118 S.Ct. 753. [1998 FP 35]

Supreme Court votes 7-to-2 to reverse the line of cases that allowed a criminal suspect to reply an “exculpatory no.” 18 U.S. Code 1001 permits prosecutions for lying to a federal agent. Brogan v. U.S., 1998 U.S. Lexis 648, 118 S.Ct. 805. [1998 FP 35]

Reversed: Federal appeals court, in five consolidated cases, holds that public employees cannot be

disciplined for falsely denying any misconduct after formal disciplinary charges have been made. Decision would still allow agencies to discipline employees for at the investigatory stage. King v. Erickson et al, 1996 U.S. App. Lexis 17473 (Fed.Cir. 1996. In a sixth, unpublished decision, the court rejects discipline for lying during an internal affairs jurisdiction. King v. McManus, 1996 U.S. App. Lexis 18002, 30307 (Fed. Cir. 1996). See LaChance v. Erickson, above for Supreme Court's reversal. [1997 FP 116-8]

Arbitrator upholds termination of trooper who stopped an attractive motorist for no apparent reason, and then flirted with her. He also lied about the incident to his superiors. Ohio (State of) and FOP Council 1, 34 (1693) G.E.R.R. (BNA) 1702 (Feldman, 1996). [1997 FP 36]

Arbitrator sustains termination of officer who was untruthful during I.A. interview. Las Vegas and L.V. Police Prot. Assn., LAIG #4669; 2 (9) Pub.Sfty.Lab. News (LRIS) 8 (Hardbeck, 1993). {N/R}

Discipline upheld for giving evasive answers during an internal affairs interview. Steinberg v. Dolley, 562 N.Y.S.2d 742 (A.D. 1990).

Termination not excessive punishment for untruthfulness during an internal investigation, even though officer had over thirty years of service. Donofrio v. City of Rochester, 144 A.D. 2d 1027, 534 N.Y.S.2d 630 (1988). [89 FP 166]

DISCIPLINARY INTERVIEWS:
:VIDEO OR AUDIO TAPING

Federal Labor Relations Authority finds that federal law enforcement agencies may videotape its internal affairs interviews, but must bargain over the "impact and implementation" of the process.Customs Service and NTEU-143/#168, #DA-CA-60047,-48, 2000 FLRA Lexis 75, 56 FLRA No. 56; also see prior decis. at 55 FLRA No. 16, 1998 FLRA Lexis 257. [2000 FP 147-8; 1999 FP 54

DISCIPLINARY INTERVIEWS:
POLYGRAPHED INTERVIEWS

Detectives did not violate the Constitutional rights of two police trainee-officers, who were suspected of armed robbery, when they requested them to take a polygraph exam. Scott v. City of Dallas, 876 F.Supp. 852 (N.D.Tex. 1995). [1995 FP 117]

See also: Polygraph Examinations (another Topic)

DISCIPLINARY INTERVIEWS:
WEINGARTEN RIGHTS:

Arbitrator holds that a transit authority did not have just cause to discharge a bus driver who stole money from a wallet that had been left in her bus, because she was not properly informed of her Weingarten rights. Had she consulted with a union steward, she may not have lied about how she got the wallet. Chicago Transit Auth. and Amal. Transit Union L-241, 121 LA (BNA) 478, Grievance No. 03-327 (Wolff, 2005), relying on County of Cook and RW&DS Union L-200, 105 LA (BNA) 974, FMCS Case #95/15973 (Wolff, 1995). [2005 FP Dec]

Appellate court overturns a NY labor board ruling that allowed police officers and other unionized public employees to have the assistance of a Weingarten representative during a criminal interview where the union member is a suspect. City of Rochester v. Public Empl. Rel. Bd. and Rochester Police Locust Club, #TP 04-01759, 15 A.D.3d 922, 790 N.Y.S.2d 788, 2005 N.Y. App. Div. Lexis 1068 (App. Div. 4th Dept.); review denied, 2005 N.Y. Lexis 1120 (N.Y. 2005). [2005 FP Jul]

Arbitrator reinstates an officer who, after an auto collision, declined to sign a statement without

conferring with his union representative. U.S. Customs and AFGE L-2455, 120 LA (BNA) 1397 (Mitchell, 2005). [2005 FP Jul]

Arbitrator reduces a termination to a demotion, with loss of back pay, and salary reduction for a police civilian employee who was untruthful at an interview. Management failed to provide her with the assistance of a union representative at an official interview. Prince George's County and PGC Police Civilian Employees Assn., AAA Case #16-390-00381-04, 120 LA (BNA) 682 (Smith, 2004). [2005 FP Apr.]

New York's PERB holds that a union employee is entitled to have his Weingarten representative present during a criminal interview. Although the conduct of criminal investigations of officers is not a mandatory topic for collective bargaining, the representative is there to assist an employee, not to negotiate with the employer. Rochester Police Locust Club and City of Rochester, Case #U-23938, 37 NYPER 3015, 2004 NYPER (LRP) Lexis 80 (NY PERB 2004). [2004 FP Nov]

A divided National Labor Relations Board reverses Epilepsy Foundation v. NLRB, a controversial ruling that extended Weingarten rights to employees that are not members of a bargaining unit. Nonunionized employees are no longer entitled, under Sec. 7 of the NLRA, to have a coworker accompany them to a disciplinary interview. IBM Corp. and Schult, #11-CA-19324, 341 NLRB No. 148, 2004 NLRB Lexis 301 (NLRB 2004). [2004 FP Sep]

In a nonpublished decision, a California appeals court holds that if Weingarten rights apply to nonunionized public employees, those rights are not retroactive before July 10, 2000. Traina v. City of Fontana, #E031851, 2003 Cal. App. Unpub. Lexis 1623 (4th Dist. 2003). [2003 FP May]

DC Circuit upholds a NLRB decision that extends Weingarten rights to nonunion employees. Supreme Court declines review. Epilepsy Fdn. of NE Ohio v. NLRB, #00-1332, 268 F.3d 1095, 2001 U.S. App. Lexis 23722, 168 LRRM (BNA) 2673 (D.C. Cir. 2001); cert. den. 536 U.S. 904 (2002). [2002 FP Aug] Note: overruled by IBM Corp. and Schult, #11-CA-19324, 341 NLRB No. 148, 2004 NLRB Lexis 301 (NLRB 2004). [2004 FP Sep]

Federal appeals court holds that a member of a bargaining unit is entitled to a union rep. during an interview, even if management characterizes the investigation as “criminal” rather than administrative. U.S. Dept. of Justice v. FLRA, #00-1433, 2001 U.S. App. Lexis 21573 (D.C.Cir.). [163-4]

NLRB extends Weingarten Rights to nonunion worksites. Epilepsy Fdn. of NE Ohio and Borgs, #8-CA-28169, 331 N.L.R.B. 92, 2000 NLRB Lexis 428, 69 Law Week 2038 (7/10/00). [2000 FP Sep] Note: reversed by IBM Corp. and Schult, #11-CA-19324, 341 NLRB No. 148, 2004 NLRB Lexis 301 (NLRB 2004). [2004 FP Sep]

Railway Labor Act did not give railroad police officer the right to the presence of a union representative during questioning by his supervisors about a possible work rule violation concerning possession of a weapon. Pawlowski v. N. Ill. Reg. Commuter R.R., #98-4287 186 F.3d 997 (7th Cir. 1999). {FP N/R} {2000 SLU 21}

Supreme Court holds that a federal employee who is a member of a bargaining unit is entitled to the presence of his union representative at an interview, conducted by the Office of Inspector General. Although the OIG is not a part of the management hierarchy, discipline could result from the interview.NASA v. NLRA, 119 S.Ct. 1979, 1999 U.S. Lexis 4190. {N/R}

Federal court issues an injunction preventing management from introducing a use-of-force incident report in the disciplinary hearing. Superiors required the involved officer to complete the report without the presence of the union attorney. Court put compelled reports in the same category as formalized IA interviews. Watson v. Co. of Riverside, 976 F.Supp. 951, 1997 U.S.Dist. Lexis 13797 (C.D.Cal.). [1998 FP 3-4]

Illinois Supreme Court upholds the termination of a sergeant who refused to speak with the sheriff without her union rep. present. Justices conclude that Weingarten is not applicable because the

interview was "informal" and nondisciplinary. Ehlers v. Jackson Co., 183 Ill.2d 83, 697 N.E.2d 717, 1998 Ill. Lexis 916; app. decis. at 683 N.E.2d 141 reversed. [1998 FP 117]

Divided state labor board holds that an EMT was entitled to Weingarten representation at an interview to have his picture taken, and to answer a questionnaire. State Empl. Rel. Bd. v. Cleveland, #96-ULP-04-0254, 1997 OPER (LRP) Lexis 345, SERB 97-011 (Ohio SERB 1997). {N/R}

Arbitrator concludes that the Weingarten decision has no application to an immediate suspension and an order to leave the premises. The employee had a duty to obey and was not entitled to consult with his union representative at that time. Hussman and USA L-9014, 109 LA (BNA) 833 (Crider, 1997). [1998 FP 132]

Riverside deputy, accused of beating illegal immigrants, sues the Sheriff Dept., because he was required to complete an "incident" report without the assistance of counsel. Watson v. Co. of Riverside, #ED CV96-148-RT,(C.D.Cal. 1996). [1996 FP 116] Note: See 1997 U.S. Dist. Lexis 13797 for the decision in that case.

Michigan arbitrator extends Weingarten Rights to a written report that was requested by a supervisor. Officers need not assert their rights; management must inform subordinates of their right to representation if the inquiry can lead to discipline. Lansing (City of) and Capitol City Post 141, 106 LA (BNA) 761 (Ellmann, 1996). [1996 FP 133-4]

Appellate court upholds termination of trooper who refused to give a statement because the union rep was not present. He should have obeyed the order and filed a grievance. Kennedy v. N.Y. St. Police, 628 N.Y.S.2d 445 (A.D. 1995). [1996 FP 54]

Arbitrator concludes that the Weingarten decision requires management to delay an employee interview until a labor rep. is present, whenever the employee "reasonably believes" that disciplinary action might be taken. The fact that management chooses to characterize an interview as "nondisciplinary" is not controlling. Manchester (City of) and Manchester Police Patrolmen's Assn., AAA 11-390-01552-93 (Greenbaum, 1994). {Our Ref. 5569} [1995 FP 21-2]

Michigan appellate court holds that Weingarten applies: Wayne-Westland Educ. Assn. v. W-W Comm. Schools, 439 N.W.2d 372 (Mich.App. 1989), appeal den. 433 Mich. 908 (1990).

Iowa holds that public employees are entitled to a union rep's presence at a disciplinary interview or interrogation. City of Marion v. Weitenhagen, 361 N.W.2d 323 (Iowa App. 1984).

New Hampshire Public Employment Labor Relations Commission has adopted Weingarten rights for public employees. N.H. PELRB Decisions 92-73, 92-194 (1992).

New York and West Virginia have declined to follow Weingarten. Sperling v. Helsby, 400 N.Y.S.2d 821, 60 A.D.2d 559 (1977); Swiger v. Civil Serv. Cmsn., 365 S.E.2d 797, 179 W.Va. 133 (1987).

Weingarten does not give an employee the right to have a labor rep present when a strip-search is conducted. DoJ Bur. of Prisons and AFGE L-3696 (ALJ opin. 1983), rptd. at 1984 FLRA Lexis 544, 14 FLRA No. 59. {N/R}

Trial judge holds that officers may consult with union reps before completing a shooting report; prior policy continued. Long Beach Police Off. Assn. v. City of Long Beach, L.A. Daily Journal (11/10/82).

Florida reaffirms that Weingarten applies to public employees. City of Clearwater v. Lewis, 404 So.2d 1156 (Fla.App. 1981).

Pennsylvania applies Weingarten decision; officer has right to union representation during disciplinary interrogation.Penn. Labor Rltns. Bd. v. Shaler Twp., Case #PF-C-93-W (1980).

Right to representation by union representative upheld in Florida. Seitz v. Duval Co. Sch. Bd., Fla. PERC Case #8H-CA-764-1015, G.E.R.R. (BNA) 767:14 (1978). [#51 FP 4]

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prior policy continued. Long Beach Police Off. Assn. v. City of Long Beach, L.A. Daily Jour. (11/10/82).

Calif. follows Weingarten decision. Robinson v. St. Persnl. Bd., 97 Cal.App.3d 994, 159 Cal.Rptr. 222 (1979). {N/R}

Federal appeals court reaffirms Weingarten holding and extends it to counseling sessions about the employee's job performance, which was a "preliminary stage in the imposition of discipline." Lewis v. NLRB, 587 F.2d 403 (9th Cir. 1978).

Right to representation by union representative upheld in Florida. Seitz v. Duval Co. Sch. Bd., Fla. PERC Case #8H-CA-764-1015, G.E.R.R. 767:14 (1978). (1979 (51) FP 4).

Supreme Court concludes that a member of a bargaining unit is entitled to representation at a disciplinary interview. NLRB v. Weingarten, 420 U.S. 251, 95 S.Ct. 959 (1975).

CROSS REFERENCES

See also: Bill of Rights Laws; Disciplinary Hearings; Past Practices Clauses; Polygraph Examinations.