

Employees Rights and Responsibilities in Administrative Investigative Interviews

July 11, 2011

(Reference: Master Agreement Article 4, Section 3(b))

This document addresses administrative investigations. In all types of interviews discussed below, you may be disciplined or even criminally prosecuted for making false statements. If an overt criminal violation is revealed during an administrative investigation, the investigator is obligated to stop the interview and notify Law Enforcement. This document addresses your legal rights in such circumstances; however, it does not address criminal investigations *per se*.

Rights to representation. There are two separate rights to representation in an interview. As noted below, whether both, one, or neither of these rights applies to a particular interview depends on whether you as the person being interviewed are (1) a subject of the investigation or are (2) a member of a bargaining unit who reasonably believes that the investigation may result in disciplinary action against you.

1. Basic right of representation for a subject of an investigation. It is Forest Service policy to honor any request by a subject of investigation to have an advisor, lawyer, or other representative present during the interview. You need not be a member of the bargaining unit to assert this right. You may assert this right prior to the beginning of the interview or at any time during it. You may not be disciplined for refusing to answer questions without an advisor, lawyer, or other representative present if you have requested one under these circumstances. If you wish an advisor, lawyer, or representative to be present for the interview, the interview will be cancelled or postponed for a reasonable period of time to allow you to obtain an advisor, lawyer, or representative.

2. Weingarten right of representation for a member of a bargaining unit. If you are a member of a bargaining unit and if you reasonably believe that the investigation may result in disciplinary action against you, you have the right to have a union representative present with you during the interview if you request it. You need not be a subject of the investigation to assert this right. You may assert this right prior to the beginning of the interview or at any time during it. You may not be disciplined for refusing to answer questions without a union representative present if you have requested one under these circumstances. If you wish a union representative to be present for the interview, the interview will be cancelled or postponed for a reasonable period of time to allow you to obtain a union representative.

Voluntary interviews. You may be asked but not ordered to participate in an investigatory interview. It is strictly up to you whether you wish to participate in a voluntary interview. You may decline to do so. If you begin to participate and change your mind, you may stop the interview and leave at any time. You will not be disciplined for non-participation. However, your silence can be construed in an administrative proceeding for its evidentiary value that is warranted by the facts surrounding your case. Since no coercion is involved in a voluntary interview, anything you say may be used as evidence against you in either an administrative or criminal proceeding.

Safety investigation interviews. Safety investigation interviews are guided by the same rules as voluntary interviews. You may be asked, but not ordered, to participate in a safety investigation interview. It is strictly up to you whether you wish to participate in this voluntary interview. You may decline to do so. If you begin to participate and change your mind, you may stop the interview and leave at any time. You will not be disciplined for non-participation. The purpose of a safety investigation is to determine the cause of the incident and to develop processes that will prevent a recurrence. If an overt criminal violation is revealed during a safety investigation, the investigator is obligated to stop the interview and notify Law Enforcement.

Involuntary interviews. If ordered to do so, you are required to provide information you have obtained in the course of employment to authorized representatives of the Department or Agency in investigations related to official matters. Failure to cooperate may constitute a basis for disciplinary action up to and including removal. You are required to answer questions related to your official duties even if your answers may lead to administrative discipline because there is no constitutional right regarding self-incrimination in *administrative* matters. However, you may not be coerced into self-incriminating yourself in a criminal matter. Court decisions have established that the threat of dismissal from one's job is coercive. If you believe your answer to a question may incriminate you in a *criminal* matter, you are within your rights to say so and refuse to answer it. If, on the other hand, you do disclose information with criminal implications in an

involuntary interview, you may be able to suppress its use in subsequent criminal proceedings on the grounds your disclosure was coerced.

Use immunity for compelled testimony. The agency may compel you to answer questions that would reveal criminal acts on your part only if you are given written assurance that neither your answers nor any information or evidence which is gained through their use can be used against you in any criminal proceeding. This is known as “use immunity.” Since use immunity requires approval from the Department of Justice, it is only offered in rare and exceptional circumstances. Should you be faced with this situation, you will be provided with form FS 5300-17b (Kalkines warning), which documents the use immunity and your rights and responsibilities. Use immunity does not limit the right of the agency to impose administrative discipline as appropriate.

Note: There is no mandatory requirement to provide bargaining unit employees with this document during an administrative investigation unless the employee requests it.

Administrative Investigative Interview Check-List

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There is no mandatory requirement to inform and/or provide bargaining unit employees with this check-list during an administrative investigation unless the employee requests it.

Investigator: inform the employee of the following facts, rights, and responsibilities pertaining to the investigative interview. Initial the appropriate lines and give the employee a copy.

Provide employee with a signed copy of the interviewer's letter of authorization

Provide employee with a copy of "**Employees' Rights and Responsibilities in Administrative Investigative Interviews**" (date/version)

This is an administrative investigation, not a criminal investigation.

You are:

a subject of the investigation

a witness

your status is unknown at this time.

Your participation in this interview is completely voluntary.

You may decline to participate. If you begin and then change your mind, you may stop the interview and leave at any time. You will not be disciplined for nonparticipation. You may be disciplined or criminally charged for intentionally providing false answers.

You are being ordered to participate in this interview.

Failure to answer questions would constitute insubordination, for which you may be disciplined or even removed from your position. You may be disciplined or criminally charged for intentionally providing false answers.

[***If the employee is the subject of an investigation***] You have the right to have an advisor, lawyer, or other representative present during the interview. If you wish an advisor, lawyer, or representative to be present for the interview, this interview will be cancelled or postponed for a reasonable period of time to allow you to obtain an advisor, lawyer, or representative.

[***If the employee is a member of a union bargaining unit***] You have the right to have a union representative present if you reasonably believe this investigation may result in disciplinary action against you, and you request representation. If you wish a representative to be present, this interview will be cancelled or postponed for a reasonable period of time to allow the union to provide you with a representative.

Your statements in this interview will be summarized in a written statement/affidavit. Following the interview, you will be provided a reasonable amount of time to review your affidavit/statement and make any corrections. You are under no obligation to sign the affidavit. You will be provided with a copy of your affidavit upon signing.

If the interview is recorded, you will receive a transcript upon your request.

Interviewer's Name (print)

Signature

Date

Administrative Investigative Interview Check-List

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Employee: Initial applicable statements below and give the interviewer a copy.

___ Prior to the interview I was provided with a signed copy of the interviewer's letter of authorization.

___ Prior to the interview I was provided with a copy of "**Employees' Rights and Responsibilities in Administrative Investigative Interviews**" (date/version)

I (initial one):

- ___ voluntarily participated in this interview.
- ___ declined to participate in this interview.
- ___ voluntarily began but then discontinued my participation in this interview.
- ___ was ordered to participate in this interview.

[If the employee is the subject of an investigation] I (initial one):

- ___ requested and obtained a personal representative.
- ___ declined to have a personal representative present.

[If the employee is a member of a union bargaining unit] I (initial one):

- ___ requested and obtained union representation.
- ___ requested but was denied union representation.
- ___ declined union representation.

___ I have received a signed copy of my affidavit.

Employee's Name (print)

Signature

Date