

AFSA'S GUIDANCE FOR EMPLOYEES INVOLVED IN INVESTIGATIONS (09/15/03)

This advisory was prepared by AFSA to apprise Foreign Service employees of their rights and responsibilities during Office of the Inspector General (OIG), Diplomatic Security (DS), Office of Security, Federal Bureau of Investigation (FBI) and other interviews and investigations. This guidance is applicable to each type of interview, except where otherwise provided. Persons being interviewed by an OIG, DS, or other investigator have the following rights:

Right to Union or Legal Representation

An employee always has the right to consult with an AFSA representative or legal counsel prior to an OIG, DS, or other interview and to be represented by legal counsel at the interview. However, whether the employee has the right to be represented at the interview by an AFSA representative (instead of an attorney) depends upon who is conducting the interview. Employees in the bargaining unit have the right (the so-called "Weingarten Right") to be represented by an AFSA representative at any interview or investigation conducted by a representative of the employing agency which the employee reasonably believes could result in disciplinary action. Under this rule, employees have the right to be represented by AFSA at interviews conducted by DS, the Office of Security, and OIG.

The Weingarten Right, however, does not apply to interviews conducted by an outside law enforcement agencies (such as the FBI). An AFSA attorney has on occasion attended as the employee's legal representative in interviews conducted in Washington by outside law enforcement agencies.

If an employee finds him or herself alone in an interview situation or an investigator requests a "quick, informal meeting that won't take a lot of time" an employee should immediately ascertain from the investigator whether the employee is the subject of the investigation and whether it could lead to criminal or administrative action. If the answer to either of these questions is yes, the employee should specifically request the right to speak to a union representative or attorney and terminate/delay the interview until he or she has done so. It is especially important that employees accused of criminal misconduct, even those who believe they have done nothing wrong, follow this advice. When the allegations against employees could result in criminal prosecution, we strongly recommend that they be represented by an experienced criminal attorney. AFSA has a list of criminal attorneys in the Washington, D.C. area which we can provide to you. In many cases, these attorneys can represent you even if you are overseas.

In administrative cases, the presence of an AFSA representative serves several useful purposes. The AFSA representative can help to ensure that the investigator affords the employee all of his or her rights and conducts the interview in an appropriate and professional manner. The representative can also take contemporaneous notes so that the employee, will have a record of the interview. This is particularly helpful if there is a discrepancy between the investigator's record of events and the employee's recollection of what he or she said.

Right to Know the Nature of Charges

Employees should attempt to gather as much information as possible from the investigator regarding the nature of an interview before the personal interview. If the investigator refuses to provide this information at that time, the investigator should, at the outset of the interview, advise the employee: whether he/she is a subject of an investigation or merely a witness; the nature of the inquiry being conducted (e.g., the statute or regulation which the employee is alleged to have violated); and whether the investigation could lead to criminal, civil or administrative action. Investigators typically ask employees to sign a form acknowledging that they have been advised of the foregoing information.

Preparation for the Interview

It is important to realize that an interview requires preparation. If the employee knows the subject matter of the investigation prior to the interview, he or she should refresh his memory by reviewing pertinent documents, if appropriate. The employee may also want to bring copies of relevant documents to the interview to leave with the investigator.

Participation at the Interview

When participating in an interview, employees should take the following steps to limit possibly damaging testimony. First, the employee should only testify as to facts known to the employee. Do not speculate! Honest mistakes of fact on the employee's part during the course of the interview may be subsequently misinterpreted by the investigator as contradictory. When answering questions, an employee should distinguish between what he or she knows first-hand and what he or she has been told by others. In addition, if an employee is making a statement based on records compiled by someone else, the investigator should be told this. If the investigation may lead to criminal charges, the employee may invoke the protection of the Fifth Amendment which allows the employee to refuse to provide information which may be used against him or her in a criminal proceeding.

If the employee has been told in writing that his or her answers will not be used in a criminal proceeding but may only lead to disciplinary or other administrative action, the employee is required to furnish all pertinent information relating to the scope of his or her employment. (The investigator is required to notify the employee in writing that his or her responses will not be used against the employee in a future criminal proceeding.) While in this situation an employee's responses cannot be used in a criminal proceeding, they can be used against him or her in a future civil proceeding or in an administrative case (e.g., discipline, suitability, security clearance revocation, etc.).

Sworn Statement

The investigator may prepare a written statement from the answers that the employee has given during the interview which the employee will be asked to sign. In some circumstances, AFSA has found that the written statements tend to reflect inculpatory statements and omit exculpatory statements. That is, they focus on incriminating statements made by the employee, rather than those tending to exonerate the employee. Therefore, the employee should both take care that his

or her oral statements during the interview are not vague and verify that the investigator's written statement accurately reflects the employee's statements. A person should not sign a statement containing blanket legal conclusions. Any statement such as "all laws, regulations, and policies have been complied with" is a particularly dangerous statement to sign since it is not clear which regulations are at issue in the investigation. The employee should state that he or she believes a certain policy or regulation has been adhered to and the relevant policy or regulation should be identified, to the maximum extent possible. It is critical that the employee carefully read the statement prior to signing it to ensure that his or her statements have not been misinterpreted. An employee has the right to terminate the interview prior to signing the statement so that a union representative or attorney may review the statement.

Summary

To sum up the foregoing, if an employee is contacted by an OIG, DS, or other investigator, he or she should attempt to ascertain whether he or she is the subject of the investigation and what type of investigation (criminal or administrative) is being undertaken before meeting with the investigator. If an employee is unable to obtain this information from the investigator prior to the meeting and the employee has a reasonable belief that some type of criminal or administrative action could be taken against him or her as a result of the investigation, contact AFSA immediately for assistance. AFSA suggests that employees who are the subject of investigations, and especially those who may be subject to criminal prosecution, be represented by AFSA or a legal representative at the interview.

The above information provides general guidance for all employees interviewed by the OIG, DS, or other agency. Questions regarding specific cases should be referred to AFSA's Labor Management office at tel. 202-647-8160, fax 202-647-0265, or DOSNET e-mail or internet (afsa@state.gov for attention of AFSA General Counsel or Labor Management Attorney).