# FBI LAW ENFORCEMENT BULLETIN

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# Contents



**The Cover:**
A patrol boat and helicopter of the Portsmouth, Va., Police Department respond to a call.

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**William H. Webster, Director**

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# Interview of Public Employees Regarding Criminal Misconduct Allegations

## Constitutional Considerations (Conclusion)

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*Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.*

Part I of this article discussed some of the major priniciples that courts have developed in regard to a public employee's obligation to answer an employer's work-related questions when there is a substantial risk that the employee may be subject to criminal prosecution for his actions. For purposes of continuity, these are briefly summarized:

1) As a matter of constitutional law, any statement given by a public employee based upon a threat of dismissal from his job if he fails to respond will be inadmissible against the employee in a subsequent criminal proceeding.

2) An employee who is being questioned in any proceeding about a matter that could result in a criminal prosecution of him may not be discharged solely for invoking his fifth amendment privilege and refusing to answer or for refusing to sign a waiver of immunity.

**". . . no *Miranda* warning or any warning of fifth amendment rights is suggested [in disciplinary interviews]."**

3) A public employee does have an obligation to answer his employer's work-related inquiries. Therefore, if an employee is assured that his answers and information obtained as a result of those answers cannot be used against him in a criminal proceeding and that he may be disciplined or discharged for failure to respond, then he may properly be disciplined or discharged for any refusal to answer such questions.

The conclusion of the article will suggest procedures for interviewing employees which will satisfy these principles.

It should be recognized the Government is often "wearing two hats" in pursuing inquiries into allegations of criminal misconduct on the part of public employees. The Government *as an investigator and prosecutor* is responsible for uncovering and prosecuting individuals, Government employees included, who violate criminal statutes. Additionally, the Government *as an employer* has a legitimate interest in obtaining all the facts regarding misconduct of its employees, in order to take appropriate disciplinary action against offending employees. This dual role is particularly apparent in the case of a law enforcement agency.

The foregoing often causes confusion in the minds of both the investigator, who is acting on behalf of the agency in pursuing the inquiry, and the employee, who is called upon to respond to questions regarding his official duties.

Often, it is impossible for the interviewer to pursue both roles simultaneously, at least to the fullest extent. For example, as a criminal investigator the interviewer must be concerned that no improper coercion is exerted on the employee, because this could result in a finding that the statement is "involuntary" and hence inadmissible in a criminal proceeding. He may also be concerned with whether full *Miranda* warnings or some modified warning should be given to the employee.[25] On the other hand, as a representative of the employer, the interviewer may wish to compel the employee to answer fully all questions relating to his duties and enforce this by a threat of disciplinary action, including dismissal, if the employee fails to account for his duties.

Because these interests conflict, any attempt to pursue them both simultaneously is likely to result in a situation that ill-serves the interests of both the employer and the employee.

An illustration of this conflict is provided in *Peden* v. *United States*,[26] a recent U.S. Court of Claims case. Peden was a special agent with the Intelligence Division of the Internal Revenue Service (IRS) and was assigned to investigate criminal tax frauds. He was suspected of arranging payment of bribes to IRS personnel by a taxpayer who was under investigation. Agents of the Inspection Service of the Treasury Department attempted to interview Peden regarding his investigation of the taxpayer and certain other tax cases assigned to him. The inspectors gave Peden the usual *Miranda* warnings, after which he refused to answer any of their questions. The inspectors then informed him of a portion of the Rules of Conduct for IRS Employees, which required him to "respond to questions on matters of official interest." They again emphasized that they wished to question him concerning the tax liability of individuals he was assigned to investigate as part of his official duties. Peden persisted in his refusal to answer any questions.

A few days after the abortive interview, Peden was arrested on criminal charges relating to the alleged bribery. He was later terminated based, in part, on the fact that he had refused to answer questions regarding his official duties in the course of the interview mentioned above. The court of claims commented on the validity of the "refusal to answer" charges by stating:

> "The statements of the agents to Peden were a masterpiece of confusion. They told him per the *Miranda* formula that he could have counsel and did not have to talk. Thus, as a criminal investigator himself, he could have had no doubt he was suspected of having committed a crime. Then they told him, per the Treasury regulation, that he did have to talk. No explanation or resolution of this inconsistency was offered. . . . (A) regulation of this Treasury type can be used to coerce information from a criminal suspect only if he is given adequate assurance that his responses will not be used against him in any criminal proceeding. No such assurance was given here." [27]

The court held that the firing could not be supported based on the agent's failure to answer.



To avoid unnecessary problems, before undertaking the interview, the employer should determine whether the goal of the interview is to obtain a statement usable in a criminal proceeding or rather to compel the employee to account fully for his work-related actions.

### Interviews for Criminal Investigative Purposes

If the employer believes criminal prosecution is a possibility and wishes to insure any statement obtained is usable against the employee in a criminal proceeding, or at least wishes to preserve the option of its use, then the following procedure is suggested:

1) The employee should be given some warning of his fifth amendment rights, at least an assurance that he may refuse to answer any questions that may be incriminating and that any answers the employee gives may be used against him in a subsequent criminal proceeding.

2) The employee should be advised that if he asserts his constitutional right to refuse to answer incriminating questions, no adverse administrative action will be taken against him based upon his refusal to answer.

If the above procedure is followed, any statement given should be "voluntary" and usable in any subsequent criminal proceeding. Of course, the statement also could be used for disciplinary purposes.

It can be argued that no warning of constitutional rights is required, or at least not a full *Miranda* warning. The employee in most instances is not in custody or significantly deprived of his freedom of action for purposes of the *Miranda* requirement, and he has not been arrested or charged with a crime.[28] However, there is coercion inherent in an interview of an employee regarding his duties by a representative of his employer, often a superior officer. To overcome this inherent compulsion, some fifth amendment warning is recommended.

The same holds true for the suggested assurance to the employee that he will not be punished for his failure to respond. It simply dispels any doubts that the employee may have as to whether he must answer or face disciplinary action for failure to do so. It also substantially reduces the possibility that an employee may later convince a court that he was "compelled" to make an incriminating statement because of an implied threat of disciplinary action. It would appear this is particularly advisable when there is a statute, regulation, etc., that on its face appears to require the employee to respond to all questions regarding official duties.

If full *Miranda* warnings are given, they will include the right to have counsel present at the interview and even the right to appointed counsel. As a matter of constitutional law, it does not appear that a person who is not in custody or significantly deprived of his freedom of action or who has not previously been charged with a crime has a sixth amendment right to counsel at an interview.[29] Therefore, no warning of right to counsel is required by the Constitution. Of course, since the employee being interviewed may refuse to answer at all, he may also refuse to answer until he consults with an attorney. If the employee asks to consult with an attorney before answering or to have an attorney present during the interview, then it becomes a policy question as to whether the employer wishes to conduct the interview under those circumstances.

On the other hand, if the employer determines that the goal of the interview is simply to require a full statement from the employee as to matters directly relating to the performance of his duties, for the sole purpose of determining if disciplinary action is warranted, a different approach is appropriate.

### Interviews for Administrative Purposes Only

If the employer wishes to compel the employee to answer fully questions directly related to the employee's official duties and is willing to forego any use of his answers or their fruits in a criminal prosecution, then the following procedure is suggested.

The employee should be advised that:

1) The purpose of the interview is to solicit responses that will assist in determining whether disciplinary action is warranted, and the answers furnished may be used in disciplinary proceedings that could result in administrative action against the employee, including dismissal.[30]

2) All questions relating to the performance of official duties must be answered fully and truthfully, and disciplinary action, including dismissal, may be undertaken if the employee refuses to answer fully and truthfully.

**". . . several court decisions have directly held that no sixth amendment right to counsel applies in purely disciplinary proceedings."**

3) No answers given nor any information gained by reason of such statements may, as a matter of constitutional law, be admissible against the employee in any criminal proceeding.

If the above warning and assurance is given, the employee is required to answer fully questions relating to performance of his job.[31] If the employee refuses to respond to such questions, there is no constitutional bar to disciplinary action, including dismissal from employment, based upon such refusal.[32]

Note that no *Miranda* warning or any warning of fifth amendment rights is suggested. Giving fifth amendment warnings, particularly the full *Miranda* warnings, in such an interview is not only unnecessary, it is inconsistent with the required assurance that the employee's statements *cannot* be used against him in a criminal proceeding.[33] It causes confusion in the mind of the employee that may result in an unjustified refusal to answer. Alternatively, a court could also find that this contradictory advice so confused the employee as to the consequences of his refusal to answer that disciplinary action could not properly be taken for any refusal.[34]

There is no right to counsel under the sixth amendment in such administrative interviews. The sixth amendment guarantees a right to assistance of counsel "in all *criminal prosecutions.*"[35] (emphasis added) More specifically, several court decisions have directly held that no sixth amendment right to counsel applies in purely disciplinary proceedings.[36]

Apart from the 6th amendment right to counsel guarantee, the 5th and 14th amendments provide that the Government may not deprive a citizen of "life, liberty, or property, without due process of law."[37] This has been interpreted to require certain minimal procedural safeguards prior to deprivation of any substantial "property" right. Public employees, particularly competitive Civil Service employees, have been held to have a property interest in continued employment sufficient to require procedural due process in termination proceedings.[38] Assuming for purpose of this discussion that such a property right does exist, the question then arises as to whether a right to consult with counsel or to have counsel present in such administrative interviews might be inferred.

The Supreme Court and lower courts have recognized that fewer procedural safeguards are required to satisfy due process in the "investigatory" (factfinding) stages of a proceeding than are required in the "adjudicatory" (decisionmaking) stages of the proceeding.[39]

The few cases which have directly considered the question have refused to recognize any right to counsel in a purely disciplinary interview or proceeding, particularly if the interrogation takes place in the investigatory stage of the proceeding.[40] These cases appear to be correct. Having an attorney present during such an administrative interview would seem to offer minimal benefit to the employee. The employee is required to answer fully all questions relating to the performance of his duties. No problem of self-incrimination arises that would require the advice of counsel, as the Government is prohibited from using such compelled statements or the fruits thereof in any subsequent criminal proceeding. The obvious burden on the agency of allowing consultation with counsel or presence of counsel during the course of such interviews will be considered by a court and balanced against the benefit to the employee in having his attorney present.[41] Generally, if the interview is factfinding in nature and conducted solely for disciplinary purposes, the court is likely to resolve the question in favor of no constitutional right to counsel under either the 6th or 5th and 14th amendments.

Assuming, as indicated above, there is no constitutional right to counsel in such administrative interviews—it becomes a question of policy as to whether an agency wishes to allow consultation with or presence of counsel in such proceedings. If a public employer decides to allow the presence of counsel in such interviews,[42] there seems to be no constitutional reason why certain conditions could not be imposed on the attorney's participation.

## Conclusion

From the foregoing it should be apparent that interviews of public employees regarding allegations of criminal misconduct require careful planning. It is essential that the employer consider beforehand the purpose of the interview and then tailor the approach to comply with the constitutional principles discussed above.



Although some basic requirements as to such inteviews are well-established by Supreme Court and other appellate court decisions, there are many issues which have not been considered. There is some diversity in the resolution of these problems.

Because of the complexity of the legal issues and the variety of State and local statutes and regulations, agencies are strongly encouraged to consult with legal counsel in formulating guidelines for such employee interviews.

**FBI**

**Footnotes**

[25] In *Miranda* v. *Arizona,* 384 U.S. 436 (1966), the U.S. Supreme Court held that when an individual is in police custody or otherwise deprived of his freedom of action in any significant way, and police desire to question him, he must be first advised of certain rights set forth in the *Miranda* opinion and must make an intelligent waiver of those rights.

[26] 512 F. 2d 1099 (Ct. Cl. 1975).

[27] *Id.* at 1101–02.

[28] *Miranda* v. *Arizona, supra* note 25. Subsequent Supreme Court decisions have made it clear that it is the combination of *custody* and *interrogation* that triggers the requirement for *Miranda* warnings. If an individual is not in custody or significantly deprived of his freedom of action, police may question him without the required warnings. *Beckwith* v. *United States,* 425 U.S. 341 (1976); *Oregon* v. *Mathiason,* 429 U.S. 492 (1977). See *People* v. *Wenstrom,* 356 N.E. 2d 1165 (Ill. Ct. App. 1976) (officer's confession without full *Miranda* warnings was admissible, as there was no custody.)

In *Massiah* v. *United States,* 377 U.S. 201 (1964), the Court held that incriminating statements, deliberately elicited by Government agents after indictment and in the absence of counsel, are inadmissible. Therefore, if an employee has been formally charged with a crime a full *Miranda* warning should be given and a waiver obtained before proceeding with the interview.

Many police agencies have policies that go beyond those strictly required by *Miranda* and subsequent decisions and require warnings be given whenever any individual who is a "suspect" or "subject" or the "focus" of an investigation is interviewed, regardless of whether there is custody. Agencies having such policies may desire to apply the same standards to employee interviews where a statement usable in a criminal proceeding is being sought.

[29] See citation of authority and discussion, *supra* notes 25 and 28.

[30] This statement serves two purposes. First, it helps assure the employee that the interview is solely for administrative, as opposed to criminal investigative, as opposed to criminal investigative purposes, and second, by specifically informing the employee that his answers can be used against him for disciplinary purposes, it removes any possibility of confusion over the scope of the "immunity" as to the use of his response.

[31] As Judge Friendly of the U.S. Court of Appeals for the Second Circuit explained, ". . . public employees do not have a absolute constitutional right to refuse to account for their official actions and still keep their jobs; their right, conferred by the Fifth Amendment itself, as construed in *Garrity,* is simply that neither what they say under such compulsion nor its fruits can be used against them in a subsequent prosecution." *Uniformed Sanitation Men Association* v. *Commissioner,* 426 F. 2d 619 (2d Cir. 1970), *cert. denied,* 406 U.S. 961 (1972).

[32] *Uniformed Sanitation Men Association* v. *Commissioner, supra* note 31; *Hank* v. *Codd,* 424 F. Supp. 1086 (S.D.N.Y. 1975); *McLean* v. *Rochford,* 404 F. Supp. 191 (N.D. Ill. 1575); *Seattle Police Officer's Guild* v. *City of Seattle,* 494 P. 2d 485 (Wash. 1972); *Confederation of Police* v. *Conlisk,* 489 F. 2d 891 (7th Cir. 1973) (dictum), *cert. denied,* 416 U.S. 956 (1974).

[33] *Peden* v. *United States, supra* note 26, *Kalkines* v. *United States,* 473 F. 2d 1391 (Ct. Cl. 1973).

[34] *Peden* v. *United States, supra* note 26, *Kalkines* v. *United States, supra* note 33. If a public employer is required by statute, regulation, collective bargaining agreement, or other provision to give a fifth amendment warning of rights, the person conducting the interview should explain the apparent inconsistency to insure the employee understands that answers compelled upon threat of job termination *cannot* be used against the employee in a criminal proceeding. Note that such a procedure was approved in *Uniformed Sanitation Men Association* v. *Commissioner, supra* note 31, although the fifth amendment warning given in that case was limited to the right to remain silent and was closely followed by a statement that the employee would be subject to disciplinary action for refusing to answer and that neither the answers nor their fruits could be used against the employee in a criminal proceeding.

[35] U.S. Const. amend. VI. The sixth amendment states, in part, "In all criminal prosecutions the accused shall enjoy the right . . . to have Assistance of Counsel for his defence"; See *Ganz* v. *Bensinger,* 480 F. 2d 88 (7th Cir. 1973); *Barker* v. *Hardway,* 283 F. Supp. 228 (S.D. W.Va. 1968), *aff'd,* 399 F. 2d 638 (4th Cir. 1968), *cert. denied,* 394 U.S. 905 (1969); See generally *United States* v. *Zucker,* 161 U.S. 475, 481 (1896).

[36] *Grabinger* v. *Conlisk,* 320 F. Supp. 1213 (N.D. Ill. 1970), *aff'd,* 455 F. 2d 490 (7th Cir. 1972) (police officer's suspension without pay for refusal to submit to polygraph exam ordered by superior without the presence of counsel did not violate the sixth amendment right to counsel, as the proceedings were purely disciplinary in nature); *Boulware* v. *Battaglia,* 344 F. Supp. 889 (D. Del. 1972), *aff'd without opinion,* 478 F. 2d 1398 (3d Cir. 1973) (police officer's interrogation in the couse of internal disciplinary investigation without a warning of right to counsel did not violate the sixth amendment, as the proceedings were disciplinary in nature); *Jones* v. *Civil Service Commission,* 489 P. 2d 320 (Col. 1971) (failure to advise prison guard of constitutional rights or to allow consultation with counsel during interrogation by the warden in the course of a misconduct investigation did not violate the employee's constitutional rights where the statements were never used in a criminal prosecution); *Wilson* v. *Swing,* 453 F. Supp. 555 560–61 (M.D. N.C. 1978).

[37] U.S. Const. amends. V and XIV.

[38] *Arnett* v. *Kennedy,* 416 U.S. 134 (1974). For a more detailed discussion of the requirements of procedural due process in termination proceedings see "Public Employment and the U.S. Constitution—Recent Supreme Court Opinions" by Special Agent Daniel L. Schofield, published in the July and August 1978, issues of the FBI *Law Enforcement Bulletin.*

[39] *Hannah* v. *Larche,* 363 U.S. 420, 441 (1960); *United States ex rel. Catena* v. *Elias,* 465 F. 2d 765 (3d Cir. 1972); *Womer* v. *Hampton,* 496 F. 2d 99 (5th Cir. 1974).

[40] *Grabinger* v. *Conlish, Boulware* v. *Battaglia, Jones* v. *Civil Service Commission, supra* note 36.

[41] *Grabinger* v. *Conlish, supra* note 36.

[42] In *McLean* v. *Rochford, supra* note 32, the court upheld a dismissal of a police officer based upon his refusal, after a proper warning and assurance, to answer his employer's work-related questions, even though he was relying on advice of his attorney who was present during the interview.

END