

Cooperation and Participation In Official Investigations

Hello NWP Members and Reps;

Welcome to LR Chronicles number 26. In previous editions of the LR Chronicles, I have discussed “meetings with management” and specifically a “Weingarten” (Investigatory) meeting. (See LR Chronicles number 7). In that edition, I briefly discussed the two types of interviews that can be derived from that type of meeting. Those are an “administrative” interview and an interview where possible “criminal” proceedings may result. This edition of the LR Chronicles will focus on an employee’s requirement to cooperate and participate in an official investigation as well as explain what needs to be done should an employee and their Representative face a situation where possible criminal proceedings may result.

As stated in LR Chronicles number 7, if it becomes apparent during an investigatory interview that possible criminal proceedings may result, NATCA must excuse themselves and advise the Investigator that the meeting needs to be rescheduled as the employee needs time to consult with an attorney. That being said, there may come a time where an employee and a Representative find themselves in a situation where this is not possible. Therefore, it is very important for every employee to know their rights and responsibilities to cooperate and participate in official investigations whether these investigations are administrative or criminal in nature.

To begin with and as a refresher, below is the relevant provision from our collective bargaining agreement (CBA), Article 6, Section 2. *“In an interview where possible criminal proceedings may result and the employee is the subject of the investigation, the employee will be informed of the general nature of the matter (i.e., criminal or administrative misconduct) being investigated, and, upon request, be informed whether or not the interview is related to possible criminal misconduct by him/her. The employee will be required to answer questions only after he/she has been informed that he/she must answer questions specifically related to their job performance or face disciplinary action. Any answers given under these circumstances are considered involuntary. Such answers may not be used against the employee in a subsequent criminal proceeding, except for possible perjury charges for giving any false answers while under oath. When a written declination of criminal prosecution is received from the appropriate authority, the employee will be provided a copy.”* Although this may appear confusing, it will become clear later when I explain the relevant case law regarding this very important issue.

Additionally, the agency has addressed this topic in their conduct and discipline order, in paragraph 9, entitled Human Resources Policy Manual (HRPM) ER 4.1, “Standards of Conduct.”

“9. *Giving Statements and/or Testimony:*

- a. *It is the duty and requirement of every employee to give oral and/or signed statements, as directed, to any manager, Special Agent or DOT official conducting an investigation, inquiry or hearing in the interest of the agency. Such statements must be complete and truthful.*

- b. *When directed by the Administrator (or his/her authorized representative), an employee shall take an oath or make an affirmation about his/her testimony or written statement before an agent authorized by law to administer oaths, and the employee shall, if requested, sign his/her name to the transcript of testimony, affidavit or written statement which the employee provided. No employee may refuse to testify or provide complete and truthful information pertinent to matters under investigation or inquiry.*
- c. *All employees must give complete and truthful information in response to requests received from Congress, the General Accounting Office, the Office of the Inspector General, the Office of Personnel Management or other duly authorized investigative bodies, regarding matters under their jurisdiction. It is FAA policy to fully cooperate with such bodies in the public interest. Employees must notify their manager or their middle or senior-level manager if the inquiry concerns the front-line manager, of any such request.*
- d. *Employees will produce any documentation held by the employee relative to any inquiry or investigation. Employees may not discuss their statements or testimony unless permitted by an authorized official.”*

The FAA’s Table of Penalties outlines the possible penalties for any of the above alleged infractions and they are as follows:

Nature of Offense number 16 – *Refusal or failure to give oral or written statements or testimony in connection with any inquiry, investigation, etc., to include failure to cooperate with any management inquiry, etc.*

- *1st OFFENSE – 30-day suspension to removal*
- *2nd OFFENSE – Removal*

Nature of Offense number 17 – *Making false or misleading statements in connection with any inquiry, investigation etc., for oneself or another; concealment of information (not having a direct impact on the safety of the National Airspace System (NAS) or the flying public).*

- *1st OFFENSE – 45-day suspension to removal*
- *2nd OFFENSE – Removal*

Nature of Offense number 20 – *Lack of candor; Failure to give complete and truthful information in connection with any inquiry, investigation, etc. (not having a direct impact on the safety of the NAS or flying public).*

- *1st OFFENSE – 14-day suspension to removal*
- *2nd OFFENSE – 30-day suspension to removal*
- *3rd OFFENSE – Removal*

Nature of Offense number 44 – *Making false or misleading statements in connection with any inquiry, investigation, etc., related to the safety of the NAS or flying public, for oneself or another.*

- *1st OFFENSE – 60-day suspension to removal*
- *2nd OFFENSE – Removal*

Nature of Offense number 46 – *Lack of Candor; Failure to give complete and truthful information in connection with any inquiry, investigation, etc. related to the safety of the NAS or flying public.*

- *1st OFFENSE – 30-day suspension to removal*
- *2nd OFFENSE – Removal*

As mentioned in the last edition of the LR Chronicles, a “second” or “third” violation of ER 4.1 is considered as such whether or not a previous disciplinary action is even remotely related to a subsequent alleged infraction.

As you can see from ER 4.1, it is a requirement for FAA employees to fully and completely participate in investigations or be subject to administrative action (disciplinary or adverse action). Additionally, Department of Transportation (DOT) regulations require employees to fully participate and cooperate in investigations, especially those conducted by the Office of Inspector General (OIG). DOT Order 8000.5A, covers DOT OIG investigative procedures. Cooperation means testifying, if asked, and providing information related to the performance of an employee’s official job-related duties. The duty to cooperate and participate is a broad obligation on the part of FAA and DOT employees.

Of course, there is a very huge difference between an “administrative action” and a “criminal action,” the latter of which may result in an employee being faced with jail or prison. If there is ANY possibility for a matter to have criminal consequences, it is extremely important to have this clarified, if possible, right from the start. In criminal investigations, the overriding concern is to ensure that the employee’s Fifth Amendment privilege against self-incrimination is appropriately asserted and protected. If the Investigator does not sufficiently provide that clarity, or fails to inform the employee of his/her rights, it is imperative that the representative seek the appropriate assurances.

There are four landmark court cases that specifically address a person’s right against self-incrimination. Each one covers a specific situation, depending on the circumstances presented in a given investigation. Below are the four cases along with an explanation of each and when they would apply. Once again, these cases only apply to a possible “criminal” investigation and do not apply to an “administrative” investigation.

Miranda v. Arizona, 384 US 436 (1966):

An employee is entitled to receive a Miranda warning only when he/she is in a “custodial” setting (not free to leave of their own volition). This case held that in order to protect a person’s Fifth amendment privilege, he/she must be advised that:

- They have the right to remain silent;
- That anything they say may be used against them in court; and

- That the employee has a right to consult with an attorney.

It is extremely unlikely that a NATCA representative would ever represent an employee while they are in custody.

Beckwith v. United States, 425 US 341 (1976):

The Beckwith warning is very similar to the Miranda warning, except that it is given when the employee is NOT in custody, but IS still the subject of a criminal investigation. The investigator conducting the interview is required to notify the employee that he/she cannot be compelled to answer questions or provide information if the answers or information may incriminate them. The investigator must also notify the employee that any answers or information provided may be used against him/her in a subsequent criminal proceeding. The best course of action for a representative to take in this situation is advise the employee to assert their Fifth Amendment privilege, terminate the interview and tell the employee to seek advice from a criminal attorney.

Garrity v. New Jersey, 385 US 493 (1967):

Commonly referred to as the “Garrity immunity,” the Supreme Court ruled that an employee cannot be faced with the choice of self-incrimination and removal. Therefore, an employee cannot have his/her statements used against them in a criminal procedure if those statements are coerced by the threat of removal. This case states that an employee must receive adequate notice of immunity in order to justify a subsequent decision to take an adverse action based on a failure to cooperate charge. The agency should notify the employee that they may face a disciplinary or adverse action for failing to answer questions and that any statements given cannot be used against them in a criminal proceeding.

Kalkines v. United States, 473 F.2nd 1391 (1973):

This warning is given to an employee when the employee is assured by the investigator that any answers or information provided will not be used against the employee in any criminal proceeding due to the fact that the possibility of prosecution has been waived by the Government. The Supreme Court held that a public employee cannot be disciplined for invoking his/her Fifth amendment privilege against self-incrimination in refusing to respond to questions unless the employee has been adequately assured that he/she is subject to termination for refusing to answer AND that the answers or information will not be used against him/her in a criminal proceeding. However, if the employee provides false answers or information, he/she may be subject to criminal prosecution for providing false answers or information. Should an employee or representative ever encounter this situation, the representative must advise the employee to answer questions fully and truthfully. This Kalkines warning is specifically addressed, as stated above, in Article 6, Section 2 of our CBA.

Notwithstanding the above case law, please know that an employee CAN be terminated for refusing to answer questions in an investigatory interview, absent a reasonable belief that his/her statements will not be used against them in a subsequent criminal proceeding. Therefore, it is

extremely important that a representative does NOT advise an employee to refuse to answer questions that may incriminate him/her.

While it is highly unlikely that a NATCA representative in the field would ever be faced with a representational role where an employee may be subject to criminal charges, I feel it is absolutely necessary for all representatives to at least be familiar with these situations. Should a representative or employee ever discover that there is a possibility of criminal charges and/or prosecution under the “crime provision,” it is imperative that you immediately call your RVP or Regional NATCA LR Lead. As was stated in the beginning of this edition, the Agency/investigators may not be inclined to adjourn the meeting and allow the employee to seek legal counsel. If this occurs, you as the representative can still assert your right to brief private counsel with the employee under the auspices of needing to explain and discuss the ramifications of a criminal investigation. You need to use this brief period to contact Regional NATCA Leadership. In extreme cases it may be possible to redesignate one of us to be the employee’s representative telephonically. We will make that decision based on the information that you supply.

This cannot be overstated!! At the first sign or mention that an investigation may be, or turn into a criminal investigation, you need to make that call without delay! We will, in turn, involve our Attorneys at the NATCA National Office.

If there are any questions, please feel free to contact me.

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