

CHAPTER 13

FORMAL MEETINGS AND INVESTIGATORY INTERVIEWS₁

An NTEU representative is responsible for many jobs, and one of the most important is to attend and to participate in formal and investigatory meetings. To be effective, a representative must: be able to recognize these meetings; know the rights of employees and NTEU; and understand the representative's role at such meetings. The Civil Service Reform Act (CSRA) sets out the rights of employees and unions and the corresponding duties of agencies at these meetings.

I. Formal Meetings

Section 7114(a)(2)(A) states:

- (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at –
 - (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment.

The law requires that when a formal meeting is held, NTEU has a right to be notified and the opportunity to be present. **It is NTEU, through its representatives, who may attend these formal meetings and represent the interests of employees. But before an agency is required to invite NTEU, there are four (4) distinct elements that must be present:**

- (1) there must be a discussion;
- (2) it must be formal;
- (3) it must be between one or more representatives of the agency, and one or more employees in the unit or their representatives; and
- (4) it must concern any grievance, personnel policy, practice or general condition of employment.

If all of these elements are present, NTEU is entitled to advance notice and the opportunity to attend. However, the absence of any element eliminates the right to be present. Bureau of Government Financial Operations, Headquarters, 15 FLRA No. 87 (1984). In considering whether these elements are present, the intent and purpose of Section 7114(a)(2)(A) should be considered; to provide the union with an opportunity to safeguard its interests and the interests of bargaining unit employees as viewed in the

context of the full range of the union's statutory responsibilities. GSA and Bobbie J. Brunning and NFFE, Local 1800, 50 FLRA 401 (1995).

A. The Requirement Of A Discussion

“Discussion” is synonymous with “meeting”; there need not be an actual dialogue or give and take. VA Medical Center, Brockton, MA and NAGE Local R1-25, 37 FLRA 747, 754 (1990). A meeting at which employees were asked to select their shifts in the order of their seniority was a “discussion.” Id. Even meetings to make a statement or announcement can be formal “discussions.” Department of Defense, National Guard Bureau, Texas Adjutant General, 149th TAC Fighter Group (ANG) (TAC) Kelly Air Force Base, 15 FLRA No. 111 (1984).

B. The Discussion Must Be "Formal"

It is not enough that a discussion or meeting occurs between management and unit employees. It must also be "formal." In determining whether a meeting is formal, consider the following factors:

1. Who calls the meeting; a mere first line supervisor or a higher level management official?
2. Are there other management representatives in attendance?
3. Where is the meeting held (i.e., in the supervisors's office, at an employee's desk, or elsewhere)?
4. How is the meeting called; by formal advance notice or more spontaneously and informally?
5. How long does the meeting last? Brief discussions generally are not considered "formal."
6. Whether there is a formal agenda.
7. Is employee attendance mandatory?
8. The manner in which the meeting is conducted. Were employee comments written down or noted?

These factors are not exhaustive. And, the presence or absence of one or more factors will not necessarily make the discussion formal or informal. Instead, the “totality of the facts and circumstances” will be considered. AFGE Local 648 and

Dept. of Labor, 32 FLRA No. 69 (1988); General Services Administration, Region 9, 48 FLRA No. 140 (1994); U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas, 51 FLRA No. 109 (1996). For example, where indicators of formality exist, a teleconference can be a formal meeting. Dept. of Air Force, Sacramento, McClellan AFB, 35 FLRA No.68 (1990).

C. The Meeting Must Be Between Management And Unit Employees

The statute does not give NTEU the right to be present at formal meetings where there are no bargaining unit employees (i.e., employees covered by the contract between NTEU and the agency) present. Employees excluded from the bargaining unit include management officials, confidential employees, and employees engaged in personnel work in other than a purely clerical capacity. Check the coverage article of your contract to see if other categories of employees are excluded from the bargaining unit.

Note, that Section 7114(a)(2)(A) also requires that NTEU be given the opportunity to be present at formal meetings between employees' representatives and management representatives. For example, the union was entitled to be present when management representatives met with a representative of hearing-impaired employees. U.S. Government Printing Office, 17 FLRA No. 38 (1985). A representative of the Agency must participate for a meeting to trigger NTEU's representational rights. While the management or supervisory authority of an individual may have an impact in determining whether the meeting is formal in nature, it is not relevant in deciding whether the Agency participated because the Agency is responsible for the acts and conduct of its agent, regardless of that agent's management or supervisory authority. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Region X, Seattle, Washington, 39 FLRA No. 23 (1991). In addition, the FLRA has held that a contractor may serve as a representative for an agency. Defense Logistics Agency, Defense Depot Tracy, Tracy California, 39 FLRA No. 86 (1991).

D. The Subject Matter Of The Meeting

For the Union to have a right to be present at the meeting, the subject matter must concern a grievance or personnel policy or other practice or general condition of employment. It is true that the Statute uses some fairly vague terms. The test for deciding whether a meeting concerns "any personnel policy or practices" is whether the subjects of the meeting are general rules applicable to agency personnel. To be a "general condition of employment," the matter must concern conditions of employment having an impact on unit employees generally. Bureau of Field Operations, Social Security Administration, San Francisco, California, 20 FLRA No. 9 (1985).

“Grievance”

The term “grievance,” for purposes of Section 7114(a)(2)(A), mirrors the broad statutory definition of a grievance found at 5 U.S.C. Section 7103(a)(9): any complaint by any employee or the union concerning any matter related to the employment of the employee or any claimed violation of a collective bargaining agreement, law, rule or regulation. *NTEU v. FLRA*, 774 F.2d 1181 (1985). Thus, a meeting held to discuss a **grievance** filed under the negotiated grievance procedure is a formal meeting that the union must be given an opportunity to attend. *SSA, Baltimore, MD*, 18 FLRA No. 33. Interviews of bargaining unit employees in preparation for **MSPB or ULP hearings** are also considered formal discussions when planned in advance and participation is mandatory. *Dept. of Veteran Affairs Medical Center, Long Beach, CA*, 41 FLRA 1370 (1991); *Warren AFB*, 31 FLRA No. 35 (1988). Meetings with bargaining unit employees to discuss formal **EEO complaints**, including settlement discussions, can also be “formal discussions” if formal in nature. *Marine Corp Logistics Base, Barstow, CA*, 52 FLRA No. 107 (1997), *Department of the Air Force, 436th Airlift Wing, Dover Air Force Base v. Federal Labor Relations Board*, No. 011373, 2003 U.S. App. LEXIS 644 (D.C. Cir. Jan. 17, 2003), *NTEU v. FLRA*, 774 F.2d 1181 (D.C. Cir, 1985). Recently, statutory appeals have also been found to be grievances for formal discussion purposes. *Luke Air Force Base, Arizona*, 54 FLRA No. 75 (1998) rev’d *Luke Air Force Base v. FLRA*, 208 F.3d 221 (9th Cir. 1999).

In situations where bargaining unit employees are being interrogated by an agency representative in preparation for a proceeding before a third party, like arbitration, where the **union is either a party to the proceeding or acting as a representative**, the agency representative must comply with the following safeguards to mitigate the potentially coercive effects of the situation:

1. inform the employee of the purpose of the questioning, that his/her participation is voluntary, and that no reprisal will occur if he/she refuses;
2. ensure that the questioning occurs in a non-coercive (non-threatening) context; and
3. limit the questions to the scope of the legitimate purpose of the inquiry, i.e., to the existence of relevant facts, as opposed to the Union's strategy or what questions the Union asked.

IRS, Brookhaven Service Center, 9 FLRA 930 (1982). These safeguards are sometimes referred to as the “Brookhaven” or “Johnnie’s Poultry” requirements.

“Personnel Policies, Practices or other General Conditions of Employment”

If the subject of the meeting does not concern a “grievance,” it must concern conditions of employment affecting employees in the unit *generally*, as opposed

to discrete matters affecting individual employees. Bureau of Field Operations, SSA, San Francisco, CA, 20 FLRA 80 (1985).

The following are examples of discussions that affect general conditions of employment:

- * meetings to discuss implementation of group performance standards and critical elements. DHHS, Dallas, 23 FLRA No. 104 (1982).
- * a meeting to announce a change in receiving and shipping procedures. VA Medical Center, New York, NY, 47 FLRA 1072 (1993).
- * discussion of dress code. U.S. Customs, 18 FLRA No. 27 (1985).
- * orientation of new employees. HHS, SSA, 16 FLRA No. 33 (1984).
- * interviews of employees in connection with a study analyzing managers' duties, where employee views were sought on training, time constraints, duties, etc.. IRS, 11 FLRA No. 23 (1983).

The following are examples of discussions that have been held *not* to concern general working conditions:

- * an oral reply to a proposed adverse action. USAF, AFLC, Wright-Patterson, OH, 38 FLRA No. 34 (1990)
- * job performance discussions or meetings to discuss performance evaluations. Hanscom AFB, MA, 1 FLRA No. 25 (1979); IRS, Detroit, MI, 5 FLRA No. 53 (1981); SSA, 14 FLRA No. 5 (1984).
- * meeting with two employees to give them reassigned duties. HHS, SSA, Bureau of Field Operations, 20 FLRA No. 9 (1985).

NTEU contracts often specify common types of formal meetings of which NTEU must receive notice in the "Union Rights" article. In addition, the subject matter of a meeting may not initially concern personnel policies, practices or general working conditions but may be converted into a formal meeting when management begins responding to employee-initiated questions about these topics. In these situations, management should either avoid these matters or postpone further conduct of the meeting until the union is given an opportunity to be present. *See e.g.*, AFGE, Local 2513 and Dept. of Labor, 20 FLRA No. 2 (1985). Further, a meeting that does not begin as a formal discussion may develop into, or become, a formal discussion. U.S. Department of Defense, Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 37 FLRA No. 80 (1990).

E. Notice to the Union

NTEU contracts typically specify the chapter official(s) to whom notice of formal meetings should be provided and how far in advance notice must be given (e.g., 5 workdays). Absent a contractually specified notice period, advance notice of the meeting must be sufficient to give the union an adequate opportunity to attend without “unreasonably” delaying the meeting. This is a case by case determination. Dept. of Labor, Employment Standards Administration, 13 FLRA No. 35 (1983).

The mere presence of a union steward or other union member at the meeting will not satisfy the management’s obligation to notify the union of a formal discussion. Dept. of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 29 FLRA No. 53 (1987). Section 7114(a)(2)(A) is intended to allow the union *the* right to designate its own representative to attend a formal discussion. Prior notice is necessary to enable the union to choose its own representative. *Id.* However, where a Union representative receives “actual notice” of a meeting—but does not receive “formal notice” as a Union representative—the Federal Labor Relations Authority must determine whether the receipt was sufficient to establish that the Union had the opportunity to be represented. General Services Administration, Region 9, 56 FLRA No. 114 (2000). This determination must, however, factor in whether the Union had the opportunity to designate a representative of its own choosing. *Id.*

F. The Representative's Role

Once you have been notified that a formal discussion will occur, and it has been determined that you will represent NTEU, what is your role? **You have the right to comment, ask questions, and otherwise provide NTEU’s position on the meeting subject matter** but you cannot usurp or disrupt the meeting. NRC and NTEU, 21 FLRA No. 96 (1986); U.S. Department of the Army, New Cumberland Army Depot, New Cumberland, Pennsylvania, 38 FLRA No. 61 (1990). Remember, any effort by an agency to prevent the Union from exercising this right is a violation of the Statute.

Union participation in formal meetings is critical to building the strength of your chapter. These meetings are a great opportunity to increase union visibility and to show that the union is making a difference on issues of importance to employees. Conversely, failing to cover formal meetings sends a very bad signal to employees that the union is incompetent or does not care enough about employees. **Each chapter should have a program in place to make sure all formal meetings are attended.**

Ten Tips for Active Involvement In Formal Meetings

Attending a formal meeting is not just exercising a legal right on behalf of the union. Nor is it simply representing employees as an advocate. It is a golden opportunity to promote NTEU's visibility. Here are some tips on how to build your Chapter through formal meetings.

1. Speak with management about the meeting agenda in advance--that way you ensure your role is defined and substantive. Make sure you are formally introduced.
2. Educate yourself on any local or national MOUs or contract provisions that are relevant to the meeting topic.
3. If you have time, speak with employees about the meeting in advance. Give them a preview of the topic. Do they have concerns you can express? Maybe they can't make the meeting and you can bring the information back to them later. Consider doing your own flyer announcing the meeting.
4. See if your Chapter will provide coffee and/or donuts. These little courtesies go a long way towards making employees feel good about the union.
5. Participate actively in the meeting. Ask the difficult questions, and let employees know the union will be following up. Draw out concerns of all types of employees (professionals, technical, clerical). Reach out to passive employees, not just the vocal ones.
6. See if you can schedule a follow-up meeting or survey, so employees can express their concerns without management present or encourage them to contact you after the meeting with their concerns.
7. If asked a question you cannot answer, don't be embarrassed to say so. Tell them you will find out and get back to them. Then, do so.
8. Identify activists at the meeting. Approach vocal or especially concerned employees about becoming more involved. Would they like to be on the negotiating team to deal with this issue? How about becoming a steward? Let your Chapter President know who the "hot prospects" are.
9. **Always, Always, Always bring 1187's with you!**
10. Bring and pass out copies of the latest Chapter newsletter or flyer.

G. Addressing Violations of NTEU's Right to Participate in Formal Meetings

If NTEU is not given proper notice of a formal meeting or is not allowed to actively participate, we have two options: file an unfair labor practice (ULP) or file an institutional grievance, alleging a violation of any relevant contract section and 5 U.S.C. Sections (1) and (8). Contact your National Field Representative/ Assistant Counsel in your servicing NTEU Field Office to discuss filing a ULP. Contact your chapter chief steward to discuss filing an institutional grievance. As a remedy, at a minimum, insist that the meeting be reconvened with NTEU being given an opportunity to be present and to participate in accordance with our rights.

II. Investigatory Interviews

The second type of meeting covered by Section 7114(a)(2) is the investigatory interview. §7114(a)(2)(B) states:

- (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at –
 - (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if –
 - (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
 - (ii) the employee requests representation.

This right of representation at investigatory meetings is also commonly referred to as the "Weingarten" right after the private sector case of the same name. The private sector law, the National Labor Relations Act, contains no statutory provision like §7114(a)(2)(B). However, in 1975, the Supreme Court of the United States decided *NLRB v. Weingarten*, 95 S. Ct. 959 (1975), in which it found that employees' Section 7 right to act in concert for mutual aid and protection included the right to representation during an investigatory meeting if the employee reasonably feared discipline might ensue. When the Civil Service Reform Act was passed, the Weingarten right was codified in the Labor-Management Relations Section of 7114(a)(2)(B). Of course, only bargaining unit employees have the right to representation at investigatory interviews.

As you read that Section, it should be clear that it has several elements, all of which must be present for the right to representation to apply. Now let's look at them individually and see what they mean.

A. Required Elements

1. **There must be an examination (questioning) of the employee with the intent to solicit information.** The term “examination” is not defined by the statute. Thus, the Authority examines the totality of circumstances surrounding each particular meeting and considers such factors as whether the meeting: (1) was designed to ask questions and solicit information from the employee, United States Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York, 27 FLRA No. 97 (1987); (2) was conducted in a confrontational manner; (3) was designed to secure an admission from the employee of wrongdoing; and/or (4) required the employee to explain his or her conduct. Department of the Treasury, Internal Revenue Service 15 FLRA No. 78 (1989) For example, a meeting for the purpose of warning an employee to cease a pattern of disruptive conduct was not an examination. ID.

Likewise, a meeting held to merely inform an employee of a decision already made is not an examination. Department of the Navy, Portsmouth Naval Shipyard, 7 FLRA 129 (1982). A meeting to discuss an annual performance evaluation is not an examination. IRS, Detroit, Michigan, 5 FLRA No. 53 (1981). A case review meeting is not an examination. U.S. Department of the Treasury, IRS and NTEU. 8 FLRA No. 72 (1982). And, a counseling session to discuss individual performance deficiencies is not an examination. United States Air Force, 2750th Air Base Wing H.Q., USAF Logistics Command, Wright Patterson AFB, Ohio, 10 FLRA No. 23 (1982). While the Authority has not yet ruled on the matter of drug testing, some case law indicates that drug testing has not been considered an examination under §7114(a)(2)(B). Air Force Flight Test Center, Edwards Air Force Base, CA, Case No. 8-CA-70401, 8-CA-70402 (Gen. Counsel September 30, 1987). Should such a case arise in the Federal Sector, the Authority may look to case law from the private sector and analyze all the circumstances, including whether any dialogue occurred and whether the exam was part of a specific investigation. In U.S. Postal Service, 252 NLRB 61 (1980), the Board held that a physical exam without an interview did not constitute an exemption. The Board did however rule that a drug test that was part of an investigation into an employee’s conduct was an examination and, thus, afforded the employee protection under his Weingarten rights. Safeway Stores, 303 NLRB 989 (1991).

2. **The examiner must be a representative of the agency.** This literally means any agent of management, whether or not actually employed by the agency. It can be an investigator, manager or other type of employee. The term “representative” also includes Office of Inspector General (OIG) agents, even though they are statutorily independent of an agency’s executive management. The Supreme Court has held that an OIG investigator is a “representative of the agency” when examining a bargaining unit employee who reasonably fears that discipline might result

from the examination. The court rejected the argument that “representative” is limited to the entity that collectively bargains with the Union. *National Aeronautics and Space Administration, Washington, DC and NASA, Office of the Inspector General v. FLRA*, 119 S. Ct. 1979 (1999).

3. **The examination must be in connection with an investigation.** That is, there must be an ongoing inquiry of which the examination is a part. This is another reason why performance evaluation meetings, workload reviews, counseling sessions and meetings to issue warnings are not considered investigatory interviews. They are not part of an investigation, but are unique to themselves. An examination in connection with an investigation refers to situations such as those in which an agency representative questions an employee about their conduct, compliance with agency rules, etc. For example, a tax audit of an IRS employee is an investigatory meeting. *National Treasury Employees Union and Internal Revenue Service, L.A. District Office*, 15 FLRA No. 133 (1984). One should not, however, focus too hard on the investigation aspect because some investigations may involve no more than the examination. Be more concerned about whether there was an examination or questioning.
4. **The employee must “reasonably believe” the questioning could lead to discipline.** Whether the employee “actually fears” discipline is not controlling. What matters is whether objective, external evidence would cause a person to reasonably believe discipline “may or could” result.

3rd Party Witnesses: An employee may be told that they are only being interviewed as a third party witness. Nevertheless, the employee may still reasonably believe discipline could result if there are other objective factors which indicate that the focus of the investigation could turn on him or her. *Internal Revenue Service Hartford District*, 671 F.2d 560 (D.C. Cir. 1982). Further, a reasonable belief of discipline can be found even if the agency did not contemplate discipline at the time of the exam; it is the possibility, rather than the inevitability, of future discipline that triggers the right to representation. *American Federation of Government Employees, Local 2544 v. FLRA* 779 F.2d 719 (D.C. Cir. 1986).

Grants of Immunity from Administrative Action: Be aware that an agency's express grant of immunity from discipline is sufficient to dispel any reasonable fear of discipline on the part of the employee. Where such an express assurance has been provided, the agency does not violate the statute when it denies an employee's request for representation. *Immigration and Naturalization Service, San Diego, CA., and AFGE Local 2544*, 15 FLRA No. 80 (1984).

5. **Finally, the employee must request representation.** The Statute does not require agency representatives to inform employees of their right to representation prior to an investigatory interview. They must only do so on an annual basis. Therefore, although some NTEU contracts require that employees be notified of this right prior to an actual interview, it is important that your chapter educate bargaining unit employees about their right to representation and that the need to ask for it. An employee's request for representation must be sufficient to put the employer on notice that he or she desires representation. The request need not be made in any specific form. For example, an employee's statement that "maybe I need to see a union rep" is a valid request. United States Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York, 27 FLRA No. 97 (1987).

Remember, in order to ensure coverage by this statutory right, these elements must be present:

1. it must be an examination;
2. examiner must be a representative of the agency;
3. examination must be in connection with an investigation;
4. the employee must reasonably believe discipline will result; and
5. the employee must ask for a representative.

B. Preparation For The Interview

Prior to the interview you, as the representative, should meet with the employee. There is time available under our agreements to do this. At this meeting, you need to remind the employee that his/her job, career and livelihood may be in jeopardy, and your instructions should be followed. Then, give the employee the following advice:

- * At all times be truthful in your answers. Any false or misleading statements will give the agency an independent basis for disciplining you, regardless of your guilt or innocence of the allegations being investigated.
- * Do not make statements about other employees unless you know for a fact what you say is true. Otherwise, you should answer questions about others by saying you have no definite knowledge, or that your information is hearsay.
- * If you do not understand a question, say so. Don't guess at what the investigator is trying to get at and don't answer a question you don't

understand.

- * Respond to questions with “yes” or “no” answers where possible. Qualify your answer only if necessary. Answer only the questions asked and do not volunteer anything.
- * If you are not sure of an answer to a question, answer that you don’t know or don’t remember.
- * Keep the interview formal and professional. Don’t get on a first name basis with the investigator and don’t consider any discussion “off the record.” Anything you say may be used against you.
- * Control your voice, temper and speech. Don’t become indignant over a lie or false accusation. Try to be courteous. Take your time; think through your answers before providing them.
- * If you get flustered or feel you need a break, say so and we’ll take one.
- * Politely decline to sign any statement, pointing out that you would rather not because it may not include all relevant facts and circumstances.

The overall objective of these guidelines is not to obstruct the interview or investigation. It is to ensure that only facts are provided and to minimize the chances of the employee’s responses being misinterpreted or misrepresented when the investigator subsequently writes up a report of the interview.

Confidentiality of Discussions Between Employees and Their Union Representatives. There is a quasi-privilege of confidentiality protecting statements made by an employee to his or her union representative. This means that union stewards cannot be interrogated about statements made to them in their representational capacity by employees they are representing, absent an overriding need or waiver of the privilege. U.S. Dept. of Treasury, Customs Service, 38 FLRA 1300 (1991). The privilege can be **waived** if either the steward or employee voluntarily discloses the content of their discussion. An **overriding need** generally exists if the interrogation is part of an open criminal investigation. If it appears the employee wants to divulge information concerning his or her involvement in a criminal matter, advise him or her to seek criminal counsel and to decline to respond to questioning by an investigator. More guidelines on how to handle interviews in connection with criminal investigations are provided below.

C. The Steward's Role At the Interview

The right to representation at an investigatory meeting means the right to participate. This means the representative may:

- make comments on the form of questions
- seek clarification of questions
- assist the employee in clarifying answers or expressing his/her view
- suggest other avenues of inquiry
- point out facts favorable to the employee

It is a violation of the Statute to limit the union representative's participation in this fashion, although the representative cannot turn the interview into an adversarial proceeding. Federal Aviation Administration, St. Louis Tower and PATCO, 6 FLRA No. 116 (1981). Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, 9 FLRA No. 55 (1982). The employer always retains the option of not conducting the examination if it decides that the interview, in the presence of the union representative, will not produce the desired results, or, in other words, is not "efficacious." U.S. Customs Service, Region VII, Los Angeles, CA and NTEU, 5 FLRA No. 41 (1981).

Set A Professional Tone At the Beginning: Arrive at the interview on time and introduce yourself to the investigator(s). Be formal and businesslike. The employee's job may be at stake so avoid jokes and levity.

Private Consultation During the Interview: The interviewed employee has the right to consult privately with the union representative before the interview starts and at periodic intervals during the interview, as well. INS, Northern Region, Twin Cities, MN, 93 FLRR 1-1048 (1993). The Statute does not grant a right to engage in private conferences outside the presence of the investigator. Some situations, however, may call for a private conference. The FLRA will evaluate all of the agency's actions to determine whether they interfered with the active and effective participation by the union representative. Bureau of Prisons, Office of Internal Affairs, Washington, DC and Phoenix, Arizona, 52 FLRA No. 43 (1996). Use this right to request a brief recess when it appears that the employee is getting flustered, confused, contradicting themselves, or otherwise losing composure.

Questions About Documents: Be sure to insist that the employee be provided a copy of any document for review before further questioning about it, particularly if the employee authored the document.

Record the Interview: Come to the interview prepared take notes of the questions and responses. Check your contract to determine if you have the right to mechanically record the interview. If so, not only will this provide a more accurate record of what transpired but it sometimes has the collateral benefit of promoting better interview behavior on the part of the investigator.

D. Responding To A Denial Of Union Representation

If all the requirements for union representation at an investigatory interview are met but the employee is denied representation, or the representative is denied an opportunity to meaningfully participate, *do not advise the employee not to cooperate once they are directed to respond*. Although there are cases where discipline against employees for refusing to cooperate has been overturned because the employees were unlawfully denied union representation, this is an extremely risky approach. The safest course of action is to ask, or have the employee ask, that the denial be put in writing. The employee and/or the excluded representative should also record the denial. NTEU can then challenge the unlawful denial by filing an unfair labor practice charge and/or raising it as a defense to any subsequent disciplinary action.

E. Interviews Concerning Potential Criminal Conduct

As a steward, you may find yourself in a situation where the employee is the subject of an interview concerning potential criminal conduct. If so, the overriding concern is that the employee's **Fifth Amendment privilege against self incrimination** is properly asserted and protected. Most often, the employee will be given certain warnings associated with this privilege so it is important that you understand what the warnings mean and advise the employee accordingly. In rarer instances, no warnings will be given, which means you will have to clarify whether the matter is considered criminal and, if so, seek the appropriate assurances.

“Miranda” Warning: This warning comes from the landmark U.S. Supreme Court decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), which essentially held that, to protect a person's 5th Amendment privilege against self incrimination when being interrogated *in custody* (i.e., when she is not free to leave), the person must be advised: of the right to remain silent, that anything said may be used against her in court; and, her right to consult with an attorney.

It is highly unlikely that you will be representing an employee subject to a *custodial* interrogation but, if the Miranda warning is given, **advise the employee not to answer any further questions, assert his or her 5th Amendment privilege, and seek advice from a criminal attorney**. If the employee is given a form with the warning on it, advise the employee not to sign any portion of the form waiving the privilege.

“Beckwith” Warning: This warning also comes from a U.S. Supreme Court decision, *Beckwith v. United States*, 425 U.S. 341 (1976). This warning is generally given when the employee is *not in custody* but is the subject of a criminal investigation. The employee is advised that he cannot be compelled to answer questions or provide information if doing so might tend to incriminate him and that any information provided may be used against him in a criminal proceeding.

If you are representing an employee to whom this warning is given, **advise him to assert his 5th Amendment privilege, terminate the interview, and seek advice from a criminal attorney.**

“Kalkines” Warning: Like the other two warnings, this warning also comes from a court decision, *Kalkines v. United States*, 473 F.2d 1391 (Ct.Cl. 1973). In that case, the court held that a public employee cannot be disciplined for invoking his 5th Amendment privilege against self-incrimination in refusing to respond to questions, unless he has been adequately assured that he is subject to discharge for refusing to answer *and* that his answers or information gained from his answers, will not be used against him in a criminal proceeding. As a practical matter, the Kalkines warning is given when prosecution has already been declined. Typically, the Kalkines warning also includes a statement that the employee may be subject to criminal prosecution for providing false answers.

If the employee is given the Kalkines warning, **advise her to answer the investigator’s questions truthfully**, and in accordance with the advice discussed earlier.

Potential Criminal Misconduct/ No Warnings Given: An employee can be fired for refusing to answer questions in an investigatory interview absent a “reasonable belief” that elicited statements will be used in a criminal proceeding. *See e.g.*, *Ashford v. Bureau of Prisons*, 81 FMSR 7044 (1981). Therefore, it is important that you do not unwittingly advise an employee to refuse to answer questions that you think may incriminate the employee. When none of the above three warnings are given, but you or the employee think the matter under investigation is potentially criminal in nature, use the following approach:

1. At the outset, **ask the investigator if the matter being investigated is criminal in nature.**
2. **If the investigator states that it is a criminal matter**, advise the employee to assert her 5th Amendment privilege against self incrimination and decline to answer any further questions, unless ordered to do so.

If the investigator orders (or has the employee’s manager order) the the employee to answer, ask that the order be put in writing. Advise the employee to answer, but “under protest” citing her 5th Amendment privilege. (Whether the order is put in writing or not, keep detailed notes of what has transpired.).

3. **If the investigator responds that the matter is not criminal** or refuses to say whether it is or is not, ask that the employee be given a written assurance that no information provided will be used in a criminal proceeding against the employee (i.e., the Kalkines warning). If the assurance is given, advise the employee to answer.

If the investigator refuses to provide the written assurance, advise the employee to invoke the employee's 5th Amendment privilege and refuse to answer any further questions.

If the employee is then ordered to answer the questions, advise the employee to answer "under protest," citing his 5th Amendment privilege against self-incrimination. Ask that the directive be put in writing. In all cases, keep detailed notes of the exchange.

By following these steps, you will have advised the employee in such a way that (1) the agency cannot discipline the employee for refusing to cooperate in the investigation while (2) preserving the possibility of having the elicited information suppressed in a criminal proceeding, should the information be used for that purpose.

Finally, in the absence of any of the formal warnings discussed above, it is important that the employee expressly assert the 5th Amendment privilege when refusing to respond to questions, as opposed to merely refusing to answer. Generally, the privilege must be asserted or invoked for it to apply. *See e.g.*, *Johnston v. Herschler*, 669 F. 2d 617 (10th Cir. 1982).

E. Remedies For Unlawful Denial Of Union Representation

Where there has been a denial of representation rights under section 7114(a)(2)(B) and disciplinary action has been taken, the Authority may order the agency, upon request of the union and the employee, to repeat the investigatory interview and to afford the employee full rights to union representation. U.S. Department of Justice, Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C., 55 FLRA 388, 395 (1999). After repeating the investigatory interview, the Agency must reconsider the disciplinary action taken against the employee. *Id.* If on reconsideration the Agency concludes that the disciplinary action was unwarranted or that a mitigation of the penalty is warranted, the employee is made whole for any losses suffered. *Id.* The Agency then must notify the results of the reconsideration, including whatever make-whole actions are to be afforded the employee and be afforded all rights to appeal the reconsidered decision under the collective bargaining agreement, statute, or regulation. *Id.*

An unlawful denial of union representation may also be cited as an affirmative defense to an adverse action against the employee if it can be shown that it was "**harmful error**," or that the outcome would likely have been different had union representation been provided. This, however, is a difficult showing to make.

F. Make The Most Of NTEU's Ability To Represent Employees At Investigatory Interviews

1. Make sure the employee you are representing is a union member. If not, ask him or her to join. By requesting your representation, he or she will understand the value of NTEU more than ever at that point. Always have a copy of an 1187 with you and be sure to explain that members dues are paying for the representation the employee receives.
2. Advertise the service we provide with regard to investigatory interviews through flyers and on bulletin boards, explaining to employees their rights in investigatory interviews.
3. At the conclusion of the interview, be prepared to explain to the employee his or her procedural rights should the Agency decide *to impose any disciplinary action*. If he has not joined yet, inform him that NTEU does not have to represent him at oral replies to proposed adverse actions if he is not a member.

Remember that the right to representation at these investigatory interviews is critical to the employee you assist. The better prepared you and the employee are, the better represented and served he/she will be. Employees are counting on you for assistance.

Once you understand the basic tenets of NTEU's right to be present at formal discussions and investigatory meetings, you will be a far more respected and effective advocate for the employees you represent.