

## **Representing BUEs In Security Investigations**

Hello NWP Reps and Members;

Welcome to LR Chronicles number 17. Now that we are done with the "Arbitration Hearing process," I want to dedicate the next few versions of the LR Chronicles to an extremely important topic for all representatives and members alike. The next two or three LR Chronicles will focus on representation of BUEs during certain and specific meetings with management. While I have already covered "Formal Discussions" in LR Chronicles number 6 and "Weingarten Meetings" in LR Chronicles number 7, I will now turn to another very important meeting with management, that being a "Security Investigation," commonly referred to as a "Security and Compliance Investigation."

A security investigation takes place when an employee is alleged to have violated a rule or regulation of their employer, such as fraud, theft, gambling, failure to report, etc. For our purposes within the FAA, security investigations are conducted by the Civil Aviation Security Division (CASD). Just because "security", rather than another member of AT or HR management, conducts this type of interview/investigation, there is absolutely no cause for alarm. They are no different than any other member of management that may conduct any other investigatory meeting with an employee. In the example of a security investigation, the investigator from CASD would be viewed as serving as a representative of the FAA. The Supreme Court has found that such investigators are "representatives" of an agency for purposes of the Federal Service Labor-Management Relations Statute so as to allow the employee to invoke their right to union representation at an investigatory interview. (See National Aeronautics and Space Administration v. Federal Labor Relations Authority, 527 U.S. 229 (1999)). Thus, if the indicia of an investigatory interview exist, the mere fact that a member of CASD, and not a front line manager, conducts an investigation does not negate an employee's right to representation. There is no reason to be nervous when notified of this type of interview. As such, these types of meetings with management should basically be handled in the same manner as most other types of interviews.

A security investigation mostly meets the definition of a "Weingarten" meeting as outlined in Article 6, Section 1 of our collective bargaining agreement (CBA) and 5 USC 7114(a)(2)(B). (Please refer to LR Chronicles number 7 on our regional website). Additionally, Article 6, Section 2 of the CBA outlines the procedures during investigations where possible criminal proceedings may result. While a security investigation mostly meets the definition of a Weingarten meeting, there are times where it could also meet the definition of a "Formal Discussion" as outlined in Article 6, Section 3 of the CBA and in 5 USC 7114(a)(2)(A). (Please refer to LR Chronicles number 6 on our regional website). Please remember that notification from the agency to the employee as well as the Union includes notification of the subject matter in advance under both Section 1 and Section 3 of Article 6. For further guidance on whether or not a security investigation meets one or the other criteria, please contact your RVP or the NWP LR Lead. The NATCA Western Pacific Region (NWP) Regional website can be found at <http://nwp.natca.net>

I will now outline how to properly and appropriately represent employees and how you should conduct yourself in advance of, during and after the interview. Since a security interview/investigation is essentially the same as most other interviews, the role of the representative is essentially the same, that being:

- Ensure the rights of the Union are protected (protect the box)
- Ensure the rights of the employee are protected
- To prevent the employee from "digging a hole" for or perjure themselves
- To take notes
- To be proactive
- To speak
- To advise and counsel the employee
- To bear witness to the proceeding
- To ask clarifying questions
- To provide clarifying answers
- To raise extenuating circumstances
- To give the employee advice on how to answer a question
- To temporarily stop the meeting in order to have a confidential conversation with the employee (as long as it does not "unreasonably delay" the meeting)

That being said, a Union representative may not:

- Disrupt the meeting
- Answer a question for the employee
- Insist on taping the meeting
- Unreasonably delay the meeting

There are certain things that need to be accomplished before, during and after any such investigation/interview. I will now outline those for you:

### **In advance of the interview:**

After notification that security will be at the facility and of the subject matter, the representative must have a full and frank discussion with the employee in advance of the interview. The representative needs to notify the employee of the confidentiality of the conversation between the employee and the representative as contained in Article 6, Section 5 which states **"A Union representative, while performing his/her representational duties, will not be required to disclose information obtained from a bargaining unit employee who is the subject of an investigation, unless the confidentiality of the conversation with that employee is waived by the representative, or an overriding need for the information is established."** The employee must be thorough and provide the representative with the full and complete story in order for the representative to properly represent the employee. If the employee is not forthcoming with the representative, then it is the employee that will suffer any consequences, not the representative.

The representative needs to interview the employee as many times as it takes in order for the representative to feel comfortable and have all of the information that is needed to represent the employee. The representative, with this confidential conversation with the employee, wants and needs to have an idea of what questions will be asked by the investigator as well as what is in the mind of the investigator regarding any objectives that the agency may have for this interview.

The representative must tell the employee certain things to prepare them to conduct themselves during the interview. These include, but are not limited to:

- Conduct yourself at all times in a professional manner
- Always tell the truth
- Do not embellish on any answer. If the answer can be stated in a yes or no fashion, this must be done
- If the employee cannot remember the ONLY answer is "I do not recall" do NOT make things up and do NOT "think" you remember
- Be humble

It must be remembered that the investigator's own comments on what they observed will be included in the Report of Investigation (ROI).

### **During the interview:**

The first thing the representative should do when the interview begins is to introduce both himself/herself as the employee's representative as well as introduce the employee to the security agent. The representative should present the investigator with a business card or other identification. The representative should also ask the security agent for a business card.

The very next item for the representative is to ask the security agent whether this interview/investigation is "criminal" or "administrative" in nature. This is extremely important. If the investigator answers that it is a "criminal" proceeding, the representative must advise the investigator that the employee will be seeking an attorney and request to delay/postpone the interview until this has happened. NATCA is just not prepared to represent individuals who may face criminal charges. Although this used to be the case, this has changed and if the government will pursue a "criminal" investigation against an employee, these duties are normally performed by the Department of Justice (DOJ) rather than the CASD.

If the investigator answers that the interview is "administrative", you may continue as the representative. At this point, the representative needs to ask the agent if the "employee" is the scope/subject of the investigation." This will tell both the representative and the employee whether or not it is the employee being investigated or if they want to know something about another employee. Very rarely is a security investigation "criminal" in nature. If it is, you will know far in advance of the interview itself and/or when you confidentially interview the employee in advance of the meeting. If there is any doubt, contact your RVP or the NWP LR Lead. Although local management is required to notify the employee and/or the Union of the subject matter in advance, the representative needs to clarify with the agent, at the beginning of the interview, the subject matter of the investigation.

At the beginning of the interview, the security agent may ask the employee to sign a "privacy release", otherwise known as an "oath of affirmation". Although it is not a requirement to sign this document, NATCA recommends that the employee sign it for the simple fact that neither employee nor NATCA have anything to hide.

The representative must be on the look out and be very aware of certain types of questions that may be asked by the investigator. You may object and advise the employee NOT to answer the following types of questions:

- Compound
- Asked and Answered
- Outside the realm/scope of the investigation

### **Compound Questions:**

These types of questions are designed to elicit two or more pieces of information in a single question. An example of a compound question is "When Jane Doe told you that you may have just had an operational error, what was your response **AND** did you report this to a member of management or the CIC?"

### **Asked and Answered questions:**

Often times, a question may be asked an employee and the employee will answer that question. Later on in the interview, the investigator may ask the very same and/or very similar question that may be phrased differently. Be very aware of questions that meet these criteria. You, as the representative must be prepared to tell the investigator that the employee has already answered that question. An example of a question that has been asked and answered is...question number 1; "When the police officer told you that you failed the field sobriety test, did you request to have a blood test taken?" Question number 2, later on in the interview "Was there ever a time when you were in custody that you requested to have a blood test taken?" These questions are particularly dangerous in that if during the meeting you offer a misleading statement, this can be grounds for further and more severe discipline.

## **A question that is outside the realm/scope of the investigation:**

Many times, an investigator will ask an employee a question that has nothing to do with the subject matter of the interview/investigation being conducted. For example, the investigation is about a DUI that the employee failed to report to management in accordance with ER 4.1 (the agency's conduct and discipline order). The investigator may ask the employee "do you drink alcohol?" or "how many drinks do you have in one day?" These questions have **NOTHING** to do with failure to report a DUI.

## **Employees answers to questions during the interview:**

As mentioned above when "prepping" the employee, the employee must be:

- Truthful, honest and forthright in answering any question
- Short answers...yes, no, I do not recall
- No embellishing on any answer
- Conduct yourselves in a professional and humble manner at all times

The representative should feel free to take breaks during the interview as needed. Always ask the investigator permission first to take a "comfort break."

Should the need arise during the interview, do not hesitate to have the employee invoke Article 22, Section 6 of the CBA at any point during the interview. Article 22, Section 6 states **"An employee, pursuant to OPM regulations, may request that a record maintained by the Agency be corrected or amended if he/she believes the information is incorrect. The Agency will advise the employee within fifteen (15) days of its determination concerning the employee's request. An employee who attempts unsuccessfully to correct or amend a record maintained by the Agency will be advised of the reasons for the refusal and may have a statement of disagreement placed in his/her folder."**

At the end of the interview, the security agent may ask the employee to prepare and sign a statement. We do **NOT** do this. The representative needs to notify the security agent that he/she already has the questions that were asked and the employee's answers thereto and they are all written down. Those answers given by the employee were honest and forthright and that the employee will only sign any statement if it is correct and factual. The representative should tell the agent that he/she needs to prepare their own statement for the employee to sign. The agent can write the questions asked as well as the employee's answers down on a sheet of paper. In turn, the representative and the employee will review said document for completeness and accuracy and the representative and the employee will make corrections as necessary and appropriate and then and **ONLY** then will the employee sign that document.

Make the security agent do this as many times as it takes to get it correct and to get it to reflect what the employee meant to say. Additionally, the employee needs to write the following statement on that document **PRIOR** to signing it...**"I am signing this statement involuntarily for fear of reprisal that could lead to discipline."** If the security agent has a problem with this, you, as the representative must remind the agent that it **IS** the employee's statement. If the "statement" is incorrect or lacks what the employee or representative wants contained therein, the employee should refuse to sign the statement.

Once this is completed, the representative must ask the security agent to make two (2) copies of the statement; one for the agent (the original), one for the representative and one for the employee.

Lastly, if the agency asks the representative to sign the statement as a witness, the representative must respectfully decline. You, as the representative must notify the agent to find someone else to sign as a witness. This is because you are a representative of the Union. If this investigation/interview is elevated to another level, you, as the representative may be called, by the agency, as a witness. In the end, you will **ONLY** be a witness for the Union.

After the security agent is done, the representative and the employee must notify the agent that we formally request the final copy of the "Report of Investigation" (ROI). Additionally, tell the agent that you request the ROI be delivered to the employee's home address or the representative's home address. If the request is for it to be delivered to the representative's home address, then this must be accompanied by a privacy release signed by the employee. This privacy release needs to be in writing and prepared in advance and have the investigator sign for it. Under no circumstances should this ROI be delivered to the facility address.

### **Post Interview:**

Although, you made the request through the security agent for a copy of the ROI, once again, make the request through the ATM. Inform them, in writing, that you are requesting a copy of the ROI be delivered to the home address of the employee or the representative. If the latter, give a copy of the signed privacy release form to the ATM.

If there is incorrect information, or the ROI is not factual, the employee, with their representative can prepare a rebuttal to be included with and attached to the ROI.

If there are any questions, please do not hesitate to contact me.

Mike Hull  
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