

# AFGE GUIDE TO OFFICE OF INSPECTOR GENERAL INTERVIEWS

*WARNING: This guide is intended to provide general information on Office of Inspector General [OIG] interviews. This document is not a substitute for individualized legal advice based upon an employee's specific circumstances. Consult with legal counsel to determine whether there has been a change in the law since this document was created.*

The OIG's mission is to seek out and eliminate fraud, waste, and abuse within your agency. In order to carry out its mission, the OIG has the statutory authority, under 5 U.S.C.A. App. 3 §6, to:

- A. Interview employees under oath;
- B. Review agency documents;
- C. Subpoena individuals to provide the OIG with documents; and
- D. Inform the Attorney General and local United States Attorney of any potential criminal violations.

The OIG does not have the legal authority to:

- A. Place employees under arrest;
- B. Physically threaten or intimidate employees; or
- C. Order employees to appear for interviews or discipline employees if they refuse to appear or cooperate. [This is a technicality easily cured by the OIG by requesting any management official to direct employees to appear or by recommending to management that employees be disciplined.]

The OIG has a job to do and will use any legal means to achieve its statutory mission of eliminating fraud, waste, and abuse within your agency. Individual employees, however, may become "casualties" of overly-aggressive OIG investigations. It is your decision as to the level of cooperation you choose to give OIG investigators, but remember to use extreme caution when talking to OIG investigators. For instance, do not let yourself be drawn into an extended conversation with the OIG investigator or any management official at the interview. Keep all of your answers to OIG questions short, simple, truthful, and responsive. As the Supreme Court made clear in LaChance v. Erickson, 118 S.Ct. 753

(1998), you may be disciplined if you deny alleged misconduct and the OIG or agency later learns that your denial was a lie. If called in for an OIG interview, you must attend the interview [See sec. 3 regarding employee request to ask if not compelled through discipline to answer questions, which if confirmed, would then permit employee to leave interview] or face possible discipline. However, as a federal government employee, you have the following rights if called in for an interview with the OIG:

**1. The right to have a union representative present during questioning.** 5 U.S.C.

§7114(a)(2)(B) gives bargaining unit employees the right to have a union representative present during agency investigations if "**the employee reasonably believes that the examination may result in disciplinary action against the employee" and if they so request.** Go to your shop steward before the OIG interview to arrange for union representation. Then, with your union representative present, you must request union representation at the OIG interview in order to properly invoke your rights.

The OIG had maintained that they are not a “representative of the agency” with regard to affording union representation. In a very significant case, AFGE argued successfully before the Supreme Court that the OIG acts as a representative of the agency, when examining its employees, finding that “OIG investigators are employed by, act on behalf of, and operate for the benefit of their [employing Agency].” NASA v. FLRA and AFGE, 119 S. Ct. 1979 (1999). The Justice Department recently attempted to limit the Supreme Court’s holding, arguing that the right to union representation does not apply when the OIG investigator acts solely as a criminal investigator interviewing to ascertain whether the employee has engaged in criminal conduct. AFGE vehemently opposed this interpretation and maintained that the Supreme Court has conclusively resolved this issue with respect to all OIG interviews. The U.S. Court of Appeals for the D.C. Circuit again agreed with our position in U.S. Dept. of Justice v. FLRA and AFGE, D.C. Cir. No. 00-1433 (decided Oct. 9, 2001), flatly rejecting Justice’s attempt to further limit the right to union representative in IG examinations.

If union representation is denied for this or any reason, attempt to get, ON THE RECORD, the following statements [if the OIG is recording the interview, make sure the tape recorder is running when you exercise all of your rights]:

- a. "I request a union rep."
- b. "My union rep is here (or is just outside this room)"
- c. "May I call in my union rep?"

[If the OIG continues to deny you your union rep.]

d. "After repeated requests, you have denied me my statutory right to a union rep."

e. "I am continuing this interview but have not been given my right to have my union rep. present and do not waive any right I may have to union representation."

If the OIG refuses your right to a union representative, you cannot refuse to continue the interview without placing yourself in jeopardy of possible discipline for refusing to be interviewed. You should ask your union representative to consider filing an unfair labor practice charge if you are denied the right to union representation.

The employer [including the OIG] always retains the right to: 1) grant the employee's request for representation, (2) discontinue the interview or 3) offer the employee a choice to continue the interview without representation or have no interview.

Moreover, an employee can be compelled to participate in an examination without a representative if they are given written administrative immunity [in essence, then no reasonable belief of discipline].

**2. The right to have an attorney present during questioning.** 5 U.S.C. §555(b) provides that "A person compelled to appear in person before an agency or representative thereof **is entitled to be accompanied, represented, and advised by counsel** or, if permitted by the agency, by other qualified representative." You therefore have the right to have an attorney present at an OIG interview if you so desire. As this right is an individual right, and not a union right, it is your responsibility to get an attorney to your OIG interview. Once again, you may insist on this right to an attorney and request that the interview be postponed until your attorney can be present. Make sure such requests are made ON THE RECORD.

**3. The right to ask questions during the interview.** At the very beginning of the OIG interview, you should ask the following questions:

a. "What is the matter under investigation?"

i. "Do you think I was involved in the matter you are investigating?"

ii. "Am I the subject or focus of your investigation?"

b. "Am I free to refuse to answer questions and leave this interview without risk of discipline by my agency?"

i. If "yes," then it is your option to quickly, but politely, leave the interrogation without answering any questions.

ii.If "no," then ask "Am I under arrest?"

A.If the answer to this question is "yes," then ask to see, in writing, the legal authority that keeps you at the interrogation. At this time you are entitled to "Miranda warnings."

B.If the answer to this question is "no," but you are not free to go, or face discipline if you leave, you may state: "I am invoking my Fifth Amendment right to silence."

**4.The right to remain silent.** The Fifth Amendment right should be invoked only after in-depth discussion with your attorney who can explain all the legal nuances involved. The Fifth Amendment of the United States Constitution gives you the right to remain silent if you believe that your statements may tend to incriminate you. As a federal employee, the right to remain silent, if properly exercised, may provide you with important criminal law protections, but it may also expose you to significant administrative adverse actions. If, after invoking your Fifth Amendment right to silence you are given written assurance [properly authorized by a U.S. Attorney in that jurisdiction] that your answers can not be used against you criminally - a protection called "criminal use immunity," - and you are ordered to speak under threat of discipline, then you must answer all questions asked or you can be disciplined. At this point, one of two things may happen:

- a.If you refuse to speak, the agency may discipline you.
- b.If you speak, whatever you say, and the 'fruits' of your replies [i.e. additional investigative informational obtained only from your statement] should not be used against you in any criminal prosecution, but the agency may still discipline you for what you say.

Get ON THE RECORD that the agency ordered you to talk under threat of discipline. If possible, also get a written statement from your agency and the OIG acknowledging that you are being compelled to speak by your agency and that your answers cannot be used in any criminal charges against you.

After the interview, inform your Local President or Shop Steward that you were interviewed by the OIG. If you are confronted by abusive OIG investigators who threaten or use physical force or intimidation, such as brandishing a weapon or handcuffs, at any time before or during the interview, you should request that your local inform your AFGE National Vice President and the AFGE General Counsel of these OIG actions and the general subject of the interrogation so that further action can be taken to enjoin such abuses.

Remember, if you are frightened or confused, you may demand your right to have an attorney present and a reasonable postponement to obtain counsel.

## **5. Union Representative Entitled to “Active Role” in Representation**

The FLRA has interpreted the Weingarten right to include right to be informed in advance of the general subject of the examination so that employee and union representative may consult before questioning; right of union representative to make comments concerning form of questions or statements and clarify facts or elicit favorable facts; and an opportunity for a private conference between an employee and union representative.