

2002

IG and OSC Investigations Handbook



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2002 IG and OSC Investigations Handbook

Published by Federal Handbooks, Inc.

Author: Law firm of Shaw, Bransford, Veilleux & Roth
CEO & President: Susan McWilliams
Publisher: G. Jerry Shaw

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Updated: September 2002

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Introduction

In today's government, federal employees are subjected to more scrutiny and oversight than ever before. All federal employees, regardless of their positions, will, at some point during their careers, be responsible for exercising Federal authority. Federal employees often have enormous budgetary, fiscal, international, security, environmental, regulatory and law enforcement authority, just to name a few. And in order for there to be public confidence in the federal government, employees exercising their authority must be accountable for their actions, and there must be oversight and scrutiny to ensure that this authority is not abused. Federal employees at all levels are therefore subject to this oversight and scrutiny, and the more authority that is bestowed upon a federal employee (such as managers and law enforcement personnel), increased scrutiny and oversight can surely be expected.

In particular, there are two investigative bodies that are generally responsible for exercising this scrutiny and oversight. One is the United States Office of Special Counsel (OSC) and the other is the Office of the Inspector General (OIG), which is found in each agency.¹ An investigation from either one of these investigative bodies is a very serious matter that could result in disciplinary action and/or criminal liability. The most significant distinction between an IG and OSC investigation is that IG investigations may lead directly to a criminal prosecution if evidence of a crime is uncovered. Therefore, it is extremely important for federal employees to understand the process, their rights and responsibilities, and generally how to conduct themselves when they come under the scrutiny of the OIG or OSC.

This handbook will explain the role and jurisdiction of the OSC and OIG. It will also explain what an employee can expect if he or she is involved in an investigation. Most importantly, this handbook will provide employees with some advice about how to conduct themselves if they find themselves the subject of an OSC or IG investigation.

¹ References in this handbook to the OIG also include other internal investigative bodies within Federal agencies whose responsibility is to investigate allegations of ethical and professional misconduct, and any violation of the agency's standards of conduct, as well as potential criminal violations. These investigative bodies are commonly referred to in some agencies as the Office of Professional Responsibility (OPR), Office of Internal Affairs (OIA), and/or Office of Inspection (OI).

Overview of the OIG and OSC

Before we can talk about what to do if you find yourself the subject of an OSC or OIG investigation, you need to first understand the jurisdiction and the investigative role of the OIG and OSC. Understanding a little about the missions and the jurisdiction of the OSC and OIG will give you a greater understanding of the entire investigative process, and put you in the right frame of mind to deal with an OSC or OIG investigation.

Office of Special Counsel

The Office of Special Counsel is an independent federal investigative and prosecutorial agency. Its core responsibility is to protect the well-established merit system principles created by the Civil Service Reform Act of 1978 (P.L. 98-454). Generally, this is done by protecting federal employees and applicants from being subjected to prohibited personnel practices (PPP), including whistleblower reprisal (see Whistleblower Protection Act of 1989 (P.L. 101-12)).

Twelve prohibited personnel practices, including reprisal for whistleblowing, are defined by law at § 2302(b) of title 5 of the United States Code. A personnel action (such as an appointment, promotion, reassignment, or suspension) may need to be involved for a prohibited personnel practice to occur. Generally stated, § 2302(b) provides that a federal employee authorized to take, direct others to take, recommend or approve any personnel action may not:

- 1) discriminate against an employee or applicant based on race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation;
- 2) solicit or consider employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics;
- 3) coerce the political activity of any person;
- 4) deceive or willfully obstruct anyone from competing for employment;
- 5) influence anyone to withdraw from competition for any position so as to improve or injure the employment prospects of any other person;
- 6) give an unauthorized preference or advantage to anyone so as to improve or injure the employment prospects of any particular employee or applicant;
- 7) engage in nepotism (i.e., hire, promote, or advocate the hiring or promotion of relatives);
- 8) engage in reprisal for whistleblowing – i.e., take, fail to take, or threaten to take or fail to take a personnel action with respect to any employee or applicant because of any disclosure of information by the employee or applicant that he or she reasonably believes evidences a violation of a law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety

(if such disclosure is not barred by law and such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs – if so restricted by law or Executive Order, the disclosure is only protected if made to the Special Counsel, the Inspector General, or comparable agency official);

- 9) take, fail to take, or threaten to take or fail to take a personnel action against an employee or applicant for exercising an appeal, complaint, or grievance right; testifying for or assisting another in exercising such a right; cooperating with or disclosing information to the Special Counsel or to an Inspector General; or refusing to obey an order that would require the individual to violate a law;
- 10) discriminate based on personal conduct which is not adverse to the on-the-job performance of an employee, applicant, or others; or
- 11) take or fail to take, recommend, or approve a personnel action if taking or failing to take such an action would violate a veterans' preference requirement; and
- 12) take or fail to take a personnel action, if taking or failing to take action would violate any law, rule or regulation implementing or directly concerning merit system principles at 5 U.S.C. § 2301.

The OSC also serves as a safe haven for federal employees who wish to disclose violations of law, gross mismanagement or waste of funds, abuse of authority, or a specific danger to the public health and safety. Finally, the OSC enforces the provisions of the Hatch Act Reform Amendments of 1993 (P.L. 103-424), which concerns federal employees' political activity, and protects the rights of federal employee military veterans and reservists under the Uniformed Services Employment and Reemployment Rights Act of 1994 (P.L. 103-94).

If an employee believes that someone has committed a prohibited personnel practice or a Hatch Act violation, the employee can file a complaint with the OSC by calling the OSC hotline at (800)-872-9855, the Whistleblower Disclosure Unit at (800)-572-2249, or the Hatch Act Unit at (800)-85-HATCH. If the OSC believes there is sufficient evidence to suggest a possible violation within OSC jurisdiction, it will investigate. The OSC investigations division consists of attorneys and GS-1811 criminal investigators who investigate complaints to determine whether there are reasonable grounds to conclude that a violation of law has occurred. During this investigation stage, federal employees may be required to provide sworn testimony, and/or documents. This testimony may be compelled by subpoena, if necessary. If the OSC determines that a violation of law has occurred, it may either request that the employee's agency initiate appropriate disciplinary action against the employee, or the OSC may act as an independent prosecutor and initiate a disciplinary action on its own.

The one good thing about the OSC investigation is that you generally do not need to worry about a criminal prosecution as a result of the investigation. There is one caveat, however, which is if an OSC investigator uncovers evidence of a crime, he or she can refer the matter to another office for a criminal investigation.

Office of Inspector General

Most federal agencies have an Inspector General who is appointed by the President and confirmed by the Senate. By statute, the Inspector General serves as the independent watch dog of an agency and has the authority to investigate criminal allegations, gross mismanagement, fraud, waste and abuse, as well as any violation of statutes, rules or regulations. Any individual, including private citizens, can lodge a complaint with an agency's IG by contacting that agency's OIG either in writing or by telephone. Complaints made by telephone are commonly referred to as "hotline complaints."

Once a complaint is received, the IG typically makes a preliminary inquiry to determine if the complaint is credible. If the IG concludes that the complaint is credible, the matter will be assigned to one or more criminal investigators to conduct a full investigation. The investigators are commonly referred to as Special Agents. Special Agents have the authority to gather evidence by sworn testimony and/or by document production. Like the OSC, the IGs have federal subpoena power as well. If the investigation reveals a criminal violation, the OIG will refer the matter to the appropriate United States Attorney's Office or to the Department of Justice's (DOJ) Office of Public Integrity for potential prosecution. If the Department of Justice declines to prosecute the employee, the matter is usually then referred to the employee's agency for appropriate discipline, which may include a suspension without pay, demotion, or removal from federal service. The decision to discipline is usually made by someone in the employee's management chain or some administrative body within the employee's agency that is responsible for disciplinary matters.

The Investigation

There are generally two ways one can be involved in an OSC or OIG investigation— you can either be a witness or a subject. This handbook focuses on what to do if you are the subject of the investigation. However, many of the same rules will apply if you are a witness in the investigation. This is so because often during an investigation facts may surface which reveal misdeeds on your part or, alternatively, others may be pointing the finger at you in an attempt to save themselves. Therefore, you should apply the following general rules even if you are merely a witness in the investigation.

So what do you do if you find out that you are the subject of an OIG or OSC investigation? The very first thing to do is to take the matter very seriously. The investigator making initial contact with you may be very polite and say something along the lines of, “I just want to ask you a few questions and we can probably clear this matter right up.” Do not be fooled by an investigator’s apparently cavalier attitude toward the investigation or the friendly nature in which the investigator is dealing with you. They are not your friends. They are there to investigate you for alleged criminal conduct or administrative misconduct, which could lead to criminal penalties (such as jail time) or disciplinary sanctions (such as being terminated from your job). Take the investigation seriously.

If you find yourself the subject of an OSC or OIG investigation, you should definitely consider hiring an attorney to represent you. If you don’t want to hire an attorney to represent you at the outset of the investigation, you should at least think about consulting with an attorney to discuss the allegations against you and to monitor the situation with you. That way, the attorney can step in and get “up to speed” quickly if you decide later that you want representation. Employees under investigation have often found that it can be very helpful to have someone representing their interests who understands the process, who can assist in responding to questions and document requests, and who can help put their position in the best light possible. Most importantly, an attorney will be able to spot any areas of possible criminal liability that may be overlooked by the employee.

Many federal employees have Professional Liability Insurance, and if you are one of them, you can invoke coverage under your policy as soon as you are informed that you are the subject of an OSC or OIG investigation. Invoking coverage means the policy will pay for the services of an attorney up to \$100,000. If you do not have the insurance, you may want to consider getting it, particularly if you supervise employees, have significant contact with the public, or are a federal law enforcement officer.

OIG Investigations

When the OIG knocks on your door, the first thing you should do is ascertain whether you are the subject of the investigation and whether the nature of the investigation is criminal or administrative. To determine whether you are the subject of the investigation, just ask the investigator; they are required to inform you if you are the subject of the investigation.

Determining the nature (criminal versus administrative) of the investigation, however, is more complicated. As will be explained below, you cannot rely on the investigator's statement that the investigation is purely administrative.

By way of background, you should know that as a condition of their employment, federal employees are required to cooperate with OIG investigations and give testimony when requested. In fact, most agencies will terminate an employee who refuses to cooperate with an OIG investigation. See Weston v. HUD, 724 F.2d 943, 949 (Fed Cir. 1983) (refusing to cooperate in an official investigation may be the basis for misconduct, including removal from federal service); but see Franklin v. DOJ, 71 M.S.P.R. 583 (1996) (a lesser action than removal was warranted for failure to cooperate in an official investigation where the agency gave the employee only one chance to cooperate and did not advise the employee of the consequences of not cooperating).

However, this rule creates an uneasy tension with the right against self incrimination embodied in the Fifth Amendment to the United States Constitution. There is very little a federal employee can do wrong in the workplace that could not potentially implicate some provision of the criminal code. For instance, if an employee is being investigated for falsifying overtime records, he or she could also be prosecuted for theft, or an employee who is being investigated for sexual harassment could also be criminally charged with assault and battery if the alleged harassment involved touching. Therefore, employees who are alleged to have committed misconduct in the workplace run the risk of facing a criminal prosecution.

Federal employees, like all individuals in the United States, have rights against self incrimination. The right against self incrimination embodied in the Fifth Amendment to our Constitution is a well established and cherished principle of law. Thus, if answering the OSC's or OIG's questions could expose an employee to criminal prosecution, the employee may exercise his or her right to remain silent and cannot be disciplined for doing so. See Garrity v. New Jersey, 385 U.S. 493 (1967); Gardner v. Broderick, 392 U.S. 273 (1968) (the rule of law enunciated in Garrity is that a public employer violates the constitutional rights of the public employee if it threatens a job action as a means of securing testimony which is later used against the employee in a criminal proceeding); see also Kalkines v. United States 473 F.2d 1391,1393 (Ct. Cl. 1973)(reversing the termination of a U.S. Department of Treasury employee who refused to answer questions by his employer regarding the performance of his duties because the employee was faced with "the dilemma of either answering and thereby subjecting himself to the possibility of self-incrimination, or of avoiding giving such help to the prosecutor at the cost of his livelihood.")

The practical effect of these two concepts - the right to remain silent and the requirement to cooperate with an investigation - has resulted in a rule of law called "de facto use immunity." "Use immunity" means that the testimony you give cannot be used against you in a criminal prosecution. Use immunity (also commonly referred to as "queen for a day") in its purest sense is a concept historically used in the criminal arena, when a prosecutor needed to compel testimony. Since traditional "use immunity" can only be offered by a prosecutor, we call the application of this concept to the federal employment arena "de facto use immunity." The result of being given this de facto use immunity is that once it is given expressly or implicitly, the

employee is required to cooperate and answer questions or face discipline. Decisions of the United States Supreme Court plainly provide that if you are “compelled” to answer questions as a condition of your federal employment, and if you face discipline for refusing to answer questions, then you have de facto use immunity, and thus, your testimony cannot be used against you later in a criminal matter.

Whether or not an employee is actually given this de facto use immunity is not often clear unless you know what questions to ask. De facto use immunity may present itself in many different forms. An investigator may inform you that a prosecutor has declined prosecution and read you an “administrative warning,” which will state that anything you say cannot be used against you in a subsequent criminal proceeding. In this case, you should ask for written notification from the prosecutor that he or she has declined prosecution. This is not always given, so as an alternative you should ask for the name and telephone number of the prosecutor and have your representative (i.e., your attorney) verify that a declination has occurred. For matters that are purely administrative (i.e., matters that are not even presented to DOJ for potential prosecution), an investigator may simply read you an “administrative warning” and have you sign and acknowledge the warning. The warning may say something along the lines of, “You are hereby advised that this not a criminal investigation and that the answers you give in response to the investigator’s questions will not be used against you in a criminal proceeding unless you knowingly provide false information.” Some OIGs will go further and state that neither the information you provide in response to questions by the investigator nor any evidence gained by reason of your answers will be used against you in a criminal proceeding. However, constitutionally speaking, this extension is not required. It is important to emphasize that use immunity only protects your testimony on that day from being used against you. If the investigator develops independent evidence of a criminal violation, you may still face prosecution; your testimony, however, still cannot be used against you. This rarely happens, though - especially if you have received a declination of prosecution. Finally, be sure to ask for a copy of the warning/declination for your records.

The situations described above generally are not problematic. It is the final scenario where an investigator simply shows up at your post of duty and starts asking questions and/or states that you are “required to cooperate” that can get you into trouble. In this case, the employee has not been given an express administrative warning that his or her testimony cannot be used against them in a subsequent criminal proceeding. Therefore, it is unclear whether the employee would have immunity for his or her testimony. If you find yourself in this situation, you want to ask the investigator the following questions before you start answering any of the investigator’s questions: (1) Am I being compelled to testify? and (2) Will I face discipline if I refuse to answer questions? If the answer to both of these questions is yes, then you have de facto use immunity for your testimony. If the answer is no, then your further attendance at the meeting is voluntary and you should get up and leave.

If you are informed or can otherwise discern that you are either the subject of a criminal investigation or face potential criminal exposure because the investigator does not, or will not, give you the administrative warning described above, then you should seek the advice of an attorney immediately if you have not yet done so. Be aware that the decision to waive your Fifth Amendment rights and speak to the investigators without use immunity should not be taken

lightly. Do not fall victim to the common strategy of uninformed federal employees in these situations, which is, “If I just explain to them what happened, they will surely understand.” You will almost never be able to “talk your way out” of a criminal investigation once it has commenced. That is not to say that there are not times when one can make an informed decision to speak with prosecutors without use immunity, but rather, that the decision to waive your Constitutional right should be made in consultation with an attorney.

As far as an OSC investigation is concerned, while you do not have the threat of criminal prosecution weighing on you for an OSC investigation, the results of such an investigation can be career-ending. Therefore, you need to take the OSC investigation just as seriously as you would an OIG investigation.

OSC Investigations

There are some differences in the way the OSC investigates matters about which you should be aware. Initially, before answering any questions, you want to be sure you have received the administrative warning described above. Although the OSC does not have criminal jurisdiction, they may refer the matter and your statement to an entity that does, such as the local United States Attorney’s Office. Therefore, you want to be sure you have received use immunity for your answers.

One of the first things you need to ascertain for an OSC investigation is the extent and scope of the investigation. This is generally determined by the allegations in the complaint. The OSC investigator will usually inform you of the allegations when he or she makes initial contact with you. You should be aware, however, that the OSC is free to add new allegations that are developed during the course of the investigation. While most investigations are initiated with a complaint, OSC does have the authority to investigate personnel actions on its own initiative. When determining the nature of the investigation, your focus should be on the 12 prohibited personnel practices discussed earlier and the merit principles. The most common complaints are based on whistleblower reprisal (Prohibited Personnel Practice #8 outlined in chapter 2 above) and a violation of law implementing a merit principle (Prohibited Personnel Practice #12, also outlined in chapter 2). For more minor allegations, do not be surprised to see the OSC conduct its investigation by telephone, mail, facsimile and electronic mail communications. You should still treat this type of investigation seriously, though, since it can easily expand into a full-blown investigation. For the most serious investigations, OSC will usually assign a team that will consist of investigators and an attorney. This type of investigation usually begins with a document request, which will require you to turn over all relevant documents in your or your agency’s possession. In turning over relevant documents, ensure that you make a copy for yourself and be careful to distinguish between personal property versus government property. You do not need to turn over personal property, such as a personal calendar that you bought.

Be aware that the OSC has a mediation program that it uses for certain kinds of cases. Mediation is an informal process in which a neutral third party assists the parties in reaching a voluntary, negotiated resolution of the complaint. Participation is voluntary and the mediator has no authority to make a decision. The decision making power rests solely with the parties. Mediation is often a good alternative to an OSC investigation and is an option that merits serious consideration.

Preparing for the Investigative Interview

Once you are able to discern that the investigation is administrative and you have received the proper warning, or if the investigation is criminal and you and your attorney have decided to waive your Fifth Amendment right to remain silent (again, something that should never be done without the advice of a criminal defense attorney), then your next step is to prepare for the interview. To prepare for the interview, you need to learn as much as you can about the allegations. The best way to get information about the allegations is to have your attorney or representative simply ask the investigator. While the investigator is under no obligation to provide details about the allegations, you would be surprised at the information you can get if you just ask. Remember, though, that generally your attorney or representative should be the one contacting the investigator, not you as the subject.

Another source of information is other potential witnesses. However, you want to be very careful about talking to potential witnesses because you do not want to find yourself in a situation where the investigator thinks you are intimidating witnesses or otherwise interfering with the investigation. The rule is that you, as the subject of the investigation, should not approach potential witnesses at all. If a witness approaches you and gives you unsolicited information about the investigation, you may listen, but that is all. Don't contact potential witnesses to ask them what they remember or if they agree with your version of events. This can lead to trouble!

Next you want to ascertain whether you may have your attorney or representative present for the interview. Although there is no due process right to have an attorney or representative present for the interview,² it is often the policy of OSC and most OIGs to allow them to attend the interview. Therefore, you should always ask to have your attorney or representative present for the interview. With regard to OIG matters, the Supreme Court has stated that pursuant to the Federal Sector Labor-Management Relations Statute, a bargaining unit employee is permitted to have a union representative present for the interview.³

Even if you are not permitted to have an attorney present during the interview, you may postpone the interview for a reasonable amount of time to consult with an attorney. Recently, the Court of Appeals for the Federal Circuit held that it was arbitrary and capricious for an agency to charge an employee with the offense of "failure to cooperate" when the employee refused to answer questions in an agency-initiated administrative investigation until he had time to meet with his attorney.⁴

² See Modrowski v. Department of Veterans Affairs, 252 F.3d 1344 (Fed. Cir. 2001); Asford v. Department of Justice, 6 M.S.P.R. 458, 464 (1981).

³ NASA v. FLRA, 527 U.S. 229 (1999).

⁴ Modrowski, 252 F.3d at 1352.

Once you've learned as much about the allegations as possible and have requested that your attorney or representative be present during the interview, you want to start practicing interviewing techniques. There are three general rules to follow during the interview: (1) Tell the truth; (2) Do not guess or speculate when answering questions; and (3) Do not volunteer information, but fully answer the question.

The first rule seems easy enough, but it is the area that gets federal employees in trouble the most often. The quickest way to get yourself fired is to lie during the interview. The U.S. Supreme Court has stated that a government agency may take adverse action against an employee because the employee made false statements in response to the underlying charge of misconduct.⁵ Moreover, pursuant to 18 U.S.C. § 1001, it is a felony to lie to a federal official about a federal matter – and an OIG or OSC investigation is a federal matter. Even if you have received the administrative warning described above and have use immunity, you may still be prosecuted for a lie during the interview. Unfortunately, some of our politicians and television shows have set bad examples resulting in the erroneous impression that it is permissible to lie or obfuscate when under oath. For instance, when presented with a difficult question that might reveal misconduct, many employees will respond by stating, "I do not remember." Saying that you do not remember when you actually do remember is perjury, plain and simple. If you take one lesson away from reading this handbook it should be this: tell the truth, tell the truth, and tell the truth! There are too many instances where employees fudge the truth on some minor misconduct where they would have faced a minor disciplinary action, only to find themselves terminated from employment because they lied during the investigation.

The second rule is also fairly straightforward. If you really do not know the answer to a question, then say "I don't know." It is a perfectly acceptable answer. Do not attempt to guess during the interview. As with most rules, though, there is an exception. The exception is that you may make educated guesses as long as you identify them as such. For instance, if you are asked the question, "How did you get to work on May 30, 1998?" and you know that for the past five years you took the bus to work every day, it is permissible for you to assume that on May 30, 1998 you got to work by taking the bus. But be sure to explain when answering the question that since you always take the bus to work, you are making an educated guess that you took the bus to work on that particular day as well.

Also, be careful to distinguish between "I don't know" and "I don't remember." "I don't know" usually means you never knew it, while "I don't remember" means you knew it at one time but cannot recall the information at the time of the interview.

Further, be aware that you are not required to answer hypothetical questions or render an opinion about your conduct. Hypothetical questions often begin with phrases like, "What would you have done if..." Be on the lookout for these kinds of questions. The rule is do not answer hypothetical questions during an interview, and do not answer questions that ask you to give an opinion about your conduct. Just testify about what you know, how you know it, and where you learned it.

⁵ LaChance v. Erickson, 118 S.Ct. 753, 754 (1998).

Finally, do not volunteer information. Providing excess information in an OIG or OSC investigation that is not specifically asked for is like giving chum to a shark. While you are required to cooperate and answer questions, you are not required to help the OIG or OSC with its investigation. This is often very difficult to do because you may feel that the investigator is not asking the right questions, or you may feel that if you “got your whole story out” they would understand and clear you of any wrongdoing. You must resist this urge! You will have ample opportunity after the investigation is completed to fully explain your side of the events. This point is crucial because even though you may feel you did nothing wrong, you do not know all the evidence the OSC or IG has against you. It is far better to wait and respond to any charges of alleged misconduct once you are able to evaluate all the evidence against you.⁶ Further, the more information you give them, the more you potentially give them to investigate. Consider this example: If you are being investigated in connection with an accident in your Official Government Vehicle (OGV), and you are asked to describe how the accident occurred, and you respond by stating, “It was Friday, so I left early to beat the weekend traffic,” the investigator may now want to check to see if you were authorized to leave early and whether you put in for the appropriate leave. Instead, simply answer the question of how the accident occurred.

The same rule applies for providing documentary evidence. If the investigator does not ask for a specific document, the general rule is not to volunteer it even if you think it will clear you of any misconduct. Further, even if an investigator asks for a particular document, make sure you are required to produce it. Consider this example: You are being investigated in connection with a travel voucher allegation and your whereabouts on a particular day are in question. You offer your personal calendar as evidence of where you were on that day. The investigator now has your personal calendar for the year and can pour over it looking for any evidence of misconduct, such as notations about vacations and doctor visits so that they can be compared to your leave records. Therefore, unless you are required to hand over a document, do not provide it to the investigator.

The overarching principle here is to listen carefully to the question being asked and only answer that question. Do not assume that the investigator is asking something else and do not presume what the follow up question will be. For instance, say someone asked you, “Do you know what time it is?” You would normally answer by telling them the time. During the investigative interview, the appropriate response would simply be “yes,” if you do, in fact, know the time. At least a day before the interview, practice answering questions this way. You may drive your family or friends crazy, but it will help prepare you to listen to questions carefully and answer only the question being asked.

Finally, find out from the investigator whether a court reporter will be present during the interview, or whether some other recording process will be used. If there will be a transcript of the interview, ask for a copy so you can review it for accuracy and make corrections if necessary. Also, find out whether you will be required to provide a written statement at the end of the interview. Often, investigators will give you the option of providing a written statement. If you are not required to give a written statement, the general rule is not to give one.

⁶ As a federal employee, you generally have a due process right to respond to allegations of misconduct before any disciplinary action can be imposed.

The Interview

After all the preparation, the big day is finally here – the investigative interview. This is one of the most important parts of the investigation. Following a few simple rules should help the interview go as smoothly as possible.

At the interview, you should expect to be questioned by at least two investigators. You may only have one investigator interviewing you, but don't be thrown if two are present. Also, you should expect to be nervous; this is normal. Dress professionally, but make sure that you are comfortable.

Take your time in answering the questions. A good rule is to allow, at a minimum, between 15 and 30 seconds to elapse before answering a question. This is difficult to do because silence makes us feel uncomfortable, but doing this will give your attorney or representative time to interject if he or she feels it is necessary, and more importantly, it will give you time to really think about your answer. This will help you give a clear and concise answer to each question. After you have answered the question, stop talking. The investigator may pause before asking you the next question to see if the silence will prompt you to continue talking. Don't fall into this trap. Once you have finished answering the question, simply wait in silence for the next question.

Bring a watch to the interview and ask for a break every 45 minutes, whether you think you need one or not. If you get restless and tired, you will make mistakes. During the break, remember that there is no such thing as "off the record," so do not engage the investigator in any conversation. Also, if you are conferring with your attorney or representative, be careful that you are not somewhere you can be overheard, such as in the rest rooms or in a restaurant during a lunch break.

If you do not understand a question, tell the investigator you do not understand. Be very cooperative and polite, but do not allow yourself to be bullied and do not let the investigator put words into your mouth. If you are being questioned about any documents and you are shown a document to review, review it very carefully in its entirety. You need to do this even if it is a document you prepared or one that you are very familiar with - you want to ensure that it has not been altered in any way.

If you make a mistake in answering a question, and realize it later, do not be afraid to amend your answer. You should always correct the record as soon as possible if you misstated something. If this happens, you should ask to take a break, talk it over with your attorney or representative, and then explain your misstatement to the investigator and correct the record.

Finally, we have said it before and we are going to say it again, always tell the truth!

Post-Investigation

If the allegation(s) that led to the investigation cannot be substantiated once the investigation ends, you should receive a clearance letter from the OIG, OSC or a management representative. However, not all agencies provide these clearance letters. If you are at one of these agencies, you should have your attorney or representative inquire about the status of the investigation from time to time. You want to be careful and use good judgment, though, so that you do not “pester” the investigators. A good rule of thumb is to wait at least six months to one year before inquiring, unless there is a compelling reason to inquire sooner. Once you are advised that the investigation has been closed, you can request a copy of the investigation under the Freedom of Information Act (FOIA) and Privacy Act. An investigation about you is generally releasable in some form to you under the FOIA/Privacy Act.

If criminal allegations are substantiated, the matter will be referred to the Department of Justice for potential prosecution. If that happens, and you have not already retained an attorney, you should do so immediately!

If non-criminal allegations are substantiated, or the Department of Justice has declined prosecution in the matter, your agency (or OSC) may propose to take disciplinary action against you. For most employees, disciplinary actions are governed by Chapter 75 of the United States Code. Pursuant to Chapter 75, federal employees against whom a disciplinary action has been proposed have a right to notice and an opportunity to respond to the specific charges brought against them. Most federal employees can appeal suspensions of more than 14 days, demotions, and removal actions to the U.S. Merit Systems Protection Board. The procedures governing adverse actions are covered in a separate publication available from FederalHandbooks.com entitled, “2002 Adverse Actions Handbook.”

Conclusion

The bottom line is that if you are faced with an investigation from either the OSC or OIG, take it seriously and obtain legal advice, especially if there is potential criminal exposure. What may seem at first blush to be a very minor matter can easily balloon into a career-ending situation.

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