

Ruby and Me

An Employee's Guide to Administrative Investigations

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I met Ruby Weston when she appeared before me at the hearing on the appeal of her removal from the Department of Housing and Urban Development to the Merit Systems Protection Board in New York City, where I served as an Administrative Judge.

Ms. Weston testified that she was first employed with HUD as a realty specialist in its New York Area Office and was then reassigned to its Newark Area Office to serve as an equal opportunity specialist. Thereafter, HUD received information which suggested that her son was the actual buyer of real property on Pilling Street in Brooklyn, New York, sold by HUD when she was serving as a realty specialist for that property and, further, that she saved document received and endorsed a check from an insurance company in settlement of a claim for fire damage to the property. Richard J. Scott of the Office of the Inspector General of HUD began a criminal investigation into this possible conflict of interest by interviewing Ms. Weston on January 23, 1979. He informed her of the pending investigation and her rights under the law, including the right to remain silent and to have the advice of an attorney. Although not stated in either the MSPB or Federal Circuit Court of Appeal decisions, Ms. Weston answered Mr. Scott's questions, although she declined to sign a statement setting forth the matters discussed.

Thereafter, Scott's efforts to continue the interview with or without her attorney were unsuccessful. On October 20, 1980, Ms. Weston confirmed in person her refusal to continue the interview, and the matter was submitted for review by the United States Attorney, who declined prosecution.

On February 25, 1981, Ms. Weston and her daughter, who was also her attorney, Michelle Patterson, attended a meeting with Mr. Scott and HUD Acting Regional Inspector General, Earl F. O'Hara. They were given a copy of the statement below to follow as it was read aloud by Mr. O'Hara:

Before we ask you any questions you must understand your rights and your responsibilities as an employee of the Department of HUD.

The purpose of this interview is to obtain your responses to questions concerning possible violations of the HUD Standards of Conduct (24 Code of Federal Regulations Part O, Subpart B, 0.735-202(a)(b)(c)(d)(f); 0.735-204(a)(1)(4)(5)(6)(7)(8)(d); 0.735-205(a)(8)(b)(1); 0.735-

***Achtung:* This article contains no legal advice. If you need legal advice, you should get it from someone qualified to dispense it.**

210(b)) with respect to the purchase of the HUD-owned property located at 1 Pilling Street, Brooklyn, New York, during 1976 and your outside employment as they relate to your official duties.

You are advised that the United States attorney has declined criminal prosecution of you in the above matter. This is purely an administrative inquiry. You have all the rights and privileges, including the right to remain silent and the right to be represented by legal counsel, guaranteed by the Constitution of the United States, although, since you have a duty as an employee of HUD to answer questions concerning your employment, your failure to answer relevant and material questions, as they relate to your official duties, may cause you to be subjected to disciplinary action, including possible removal by the Department of HUD.

Any information or evidence you furnish in response to questions propounded to you during this interview, or any information or evidence which is gained by reason of your answer may not be used against you in criminal proceedings; however, it may be used against you administratively.

(Congratulations. You have now read your first and hopefully only *Kalkines, infra*, warning.)

Ms. Patterson insisted that the United States Attorney issue a *letter* declining to prosecute her mother; and, when the US attorney refused to issue that letter, Miss Patterson advised her mother not to answer the investigators' questions. What was Ms. Weston to do? She followed her daughter's advice. HUD removed Ms. Weston for refusing to cooperate in the administrative investigation, among other reasons. Ms. Weston then appealed her removal to the Merit Systems Protection Board in New York City, and I assigned the case to myself because it seemed interesting and hard.

Following a hearing, I sustained the charge of failure to cooperate in an official investigation, finding a direct relationship between Ms. Weston's conduct and the efficiency of the service.¹ However, because the agency's action was based on multiple charges, some of which I did not sustain, I reexamined the penalty of removal in light of *Douglas v. Veterans Administration*². I found that because Ms. Weston had relied on erroneous advice of her daughter, the lawyer, she was not fully responsible for her refusal to cooperate. I mitigated the penalty of removal to a 15-day suspension. HUD filed a petition for review from my initial decision. The Board affirmed my determination to

¹ 5 U.S.C. § 7513(a)

² 5 MSPB 313, 5 M.S.P.R. 280 (1981)

sustain the charge of failure to cooperate an official investigation, but reinstated the penalty of removal. Ms. Weston appealed the Board's final decision to the Federal Circuit Court of Appeals, which affirmed the Board's decision.³

The Law

The Fifth Amendment to the Constitution of the United States provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." In addition to protecting an individual "against being involuntarily called as a witness against himself in a criminal prosecution," the Fifth Amendment also privileges an individual "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might *incriminate* him in future *criminal* proceedings."⁴(Emphasis added). An individual therefore properly may refuse to answer questions asked in an internal investigation by a government employer "unless and until he is protected at least from the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant."⁵

In *Garrity v. New Jersey*,⁶ police officers were questioned by the Attorney General of New Jersey regarding allegations of "fixing" traffic cases in municipal courts. Before being questioned, each officer was advised that anything he said might be used against him in a later criminal proceeding and that he had the right to refuse to answer if the answer would tend to incriminate him, but that, if he did refuse to answer, he would be subject to dismissal. The officers answered the attorney general's questions, and some of their answers were used as evidence against them in subsequent criminal prosecutions. The Supreme Court of the United States held that, where the officers were forced to choose between incriminating themselves by answering questions or losing their jobs by remaining silent, the responses made by the officers to the attorney general's questions were involuntary. Thus, "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits [the use] *in subsequent criminal proceedings* of statements obtained under threat of removal from office."⁷

In *Gardner v. Broderick*, a New York City patrolman was discharged after he had appeared before a grand jury which was investigating charges of police corruption, had been told that he would be fired if he did not sign a waiver of immunity, and **329 had refused to sign the waiver.⁸ The Supreme Court of the United States held that the officer could not be dismissed on the basis of his refusal to waive the immunity provided by the privilege against self-incrimination, concluding that "the mandate of the great privilege against self-incrimination does not tolerate the attempt ... to coerce a waiver of the immunity it confers on penalty of the loss of employment."⁹ However, the Court noted,

³ *Weston v. U.S. Dept. of Housing and Urban Development* 724 F.2d 943 (C.A.Fed.,1983)

⁴ *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed.2d 274, 281 (1973)

⁵ *Id.* at 78, 94 S.Ct. at 322, 38 L.Ed.2d at 282 (citing *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972)).

⁶ 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967),

⁷ *Id.* at 500, 87 S.Ct. at 620, 17 L.Ed.2d at 567 (emphasis added).

⁸ 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968).

⁹ *Id.* at 279, 88 S.Ct. at 1916, 20 L.Ed.2d at 1087.

by way of *obiter dictum*, that if the officer "had refused to answer questions ... without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, ... the privilege against self-incrimination would not have been a bar to his dismissal."¹⁰

In *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of the City of New York*¹¹, decided on the same day as *Gardner*, the Supreme Court also addressed the propriety of the dismissal of a public employee for refusal to waive the privilege against self-incrimination. In *Sanitation Men*, employee witnesses were summoned before the City Commissioner of Investigation and were told that their failure to testify on the grounds of the privilege against self-incrimination would result in their dismissal. Twelve employees also were told that their answers could be used against them in later criminal proceedings and were discharged for refusing to testify following this warning; three additional employees were discharged after they refused to sign waivers of immunity.¹² The Supreme Court held that, under these circumstances, the "[p]etitioners were ... dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to *criminal prosecution* based on testimony which they would give under compulsion, despite their constitutional privilege."¹³ Noting that *Garrity* had not yet been decided when the twelve employees were told that their responses could be used against them in later criminal proceedings and were forced to decide whether they wished to answer questions, the Court stated that the employees were "entitled to remain silent because it was clear that New York was seeking, not merely an accounting of their use or abuse of their public trust, but testimony from their own lips which, despite the constitutional prohibition, could be used to prosecute them criminally."¹⁴ In conclusion, the Court stated that New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake.¹⁵

Following *Garrity*, *Gardner* and *Sanitation Men*, the Supreme Court has continued to hold that "the State may not insist that [employees] waive their Fifth Amendment privilege against self-incrimination and consent to the use of the fruits of the interrogation in any later proceedings brought against them,"¹⁶ because such an insistence constitutes an attempt "to accomplish what *Garrity* specifically prohibit[s]--to compel testimony that ha[s] not been immunized."¹⁷ While so holding, the Court also has emphasized that, so long as they "have not been required to surrender their constitutional

¹⁰ *Id.* at 278, 88 S.Ct. at 1916, 20 L.Ed.2d at 1087.

¹¹ 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968)

¹² *Id.* at 283- 84, 88 S.Ct. at 1919-20, 20 L.Ed.2d at 1092.

¹³ *Id.* at 283, 88 S.Ct. at 1919, 20 L.Ed.2d at 1092 (emphasis added).

¹⁴ *Id.* at 284, 88 S.Ct. at 1919-20, 20 L.Ed.2d at 1092.

¹⁵ *Id.* at 284, 88 S.Ct. at 1920, 20 L.Ed.2d at 1093.

¹⁶ *Lefkowitz v. Turley*, 414 U.S. at 84-85, 94 S.Ct. at 326, 38 L.Ed.2d at 286,

¹⁷ *Id.* at 82, 94 S.Ct. at 325, 38 L.Ed.2d at 284.

immunity," public employees "may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties."¹⁸ "Although due regard for the Fifth Amendment forbids the State to compel incriminating answers from its employees and contractors that may be used against them in *criminal* proceedings, the Constitution permits that very testimony to be compelled if neither it nor its fruits are available *for such use*."¹⁹ The decisions of the Supreme Court of the United States in *Gardner*, *Sanitation Men*, *Turley* and *Cunningham* "emphasize that the employee's rights are imperiled *only* by the combined risks of both compelling the employee to answer incriminating questions and compelling the employee to waive immunity from the use of those answers."²⁰

Ruby Redux

Of course, HUD did not compel Ms. Weston to waive immunity from the use of her answers in a subsequent criminal proceeding. HUD explained to Ms. Weston:

Any information or evidence you furnish in response to questions propounded to you during this interview, or any information or evidence which is gained by reason of your answer may not be used against you in criminal proceedings; however, it may be used against you administratively.

But when exactly did Ms. Weston's duty to answer the investigators' questions arise? After she had been threatened with removal for refusing to cooperate? After she had been assured that her answers were immunized for use by the government in a subsequent prosecution? After she had been informed that the U.S. Attorney had declined prosecution? Are all three necessary for the duty to arise? Former MSPB Chair Beth Slavet thinks so and said so in her separate opinion in *Bucknor v. U.S. Postal Service*²¹.

On February 19, 2000, Donald Bucknor drove a government vehicle (GOV) to assist his son and nephew who were having problems with a privately-owned vehicle and to get lunch for them. While he was using the GOV for these nongovernmental purposes, the GOV was damaged. On February 25, 2000, Postal Inspectors attempted to question Bucknor about the incident. Bucknor refused to answer any questions without his attorney present. Bucknor subsequently retained an attorney, met with the agency officials on March 9, 2000, and responded to their questions. On May 24, 2000, the agency issued Bucknor a notice of proposed removal for the unauthorized use of a government vehicle and impeding the subsequent Postal Service investigation by refusing to answer the Postal Inspectors' questions and by providing conflicting statements regarding his whereabouts at the time he was contacted by his son. On September 29, 2000, the agency's deciding official reduced the removal to a 45-day suspension.

¹⁸ *Lefkowitz v. Cunningham*, 431 U.S. 801, 806, 97 S.Ct. 2132, 2136, 53 L.Ed.2d 1, 7 (1977).

¹⁹ *Lefkowitz v. Turley*, 414 U.S. at 84, 94 S.Ct. at 325, 38 L.Ed.2d at 285 (emphasis added).

²⁰ *Arrington v. County of Dallas*, 970 F.2d 1441, 1446 (5th Cir.1992)

²¹ 93 M.S.P.R. 271 (2003)

Bucknor appealed to suspension to MSPB where he alleged among other things that the 45 day suspension was too harsh. After holding a hearing on the merits of the appeal, the administrative judge issued an initial decision finding that the agency established that the appellant impeded the Postal Service investigation by refusing to answer the questions posed to him agency officials on February 25, 2000. The administrative judge also found that the agency established its charge of unauthorized use of a government vehicle. The administrative judge affirmed the 45-day suspension as reasonable.

Bucknor then petitioned the Board to review the administrative judge's initial decision. Bucknor argued that he had not impeded the agency's investigation on February 25, 2000. In her separate opinion, former Chair Slavet agreed with Bucknor, but affirmed the 45 day suspension as reasonable based on the sustained charge of unauthorized use of a government vehicle.

As former Chair Slavet recounted the facts, none of the Postal Inspectors who attempted to question Bucknor on February 25, 2000, told him that he had no choice but to answer. So if the inspectors didn't threaten to fire Bucknor for refusing to answer their questions, *Garrity* use-immunity did not arise, and Bucknor had a right to clam up. End of discussion, right? I think so, but Chair Slavet forges on, noting that although the inspectors told Bucknor that the Inspection Service would not charge him criminally, that assurance did not bind the US Attorney:

In addition, although the administrative judge found that the agency informed the appellant that the Inspection Service was not taking any action against the appellant and that it considered the matter an administrative one, ID at 7, the Inspection Service is not the prosecuting authority and could not bind the U.S. Attorney's office. See Ashford, 6 MSPB 389, 6 M.S.P.R. at 465, n. 9 (the agency's mere assurance of immunity is insufficient to defeat the employee's Fifth Amendment privilege because the agency's assurance does not bind law enforcement officials); cf. **Weston, 724 F.2d at 946** (in affirming a Board decision sustaining the agency's removal of an employee for refusing to cooperate in an agency investigation, the court stated that it was significant that the appellant was informed that (1) criminal prosecution against her had been declined by the United States Attorney, (2) no information gained from the interview could be used against her in a criminal proceeding, and (3) her failure to cooperate could subject her to disciplinary action, specifically including removal from employment) (emphasis added). Therefore, the agency did not invoke the *Garrity* rule, and, if the appellant reasonably believed that his responses might be used against him in a criminal proceeding, he had a Fifth Amendment privilege to decline

to answer the agency's questions, and the agency could not discipline him for impeding its investigation.

Former Chair Slavet mixes up use immunity with declination of prosecution, the latter having absolutely nothing to do with the Fifth Amendment privilege against self incrimination. The Fifth Amendment privilege against self incrimination prohibits the use of coerced confessions in criminal prosecutions; and *Garrity* holds that the government coerces a confession from a public employee when the government threatens to fire her if she clams up during an investigation into possible criminal conduct. Accordingly, when the HUD investigators warned Ms. Weston that HUD might fire her if she did not answer their questions, the U.S. Attorney was not thereafter barred from criminally prosecuting her; they just could not *use* her answers to the investigators to convict her because her answers would have been coerced by that threat. So if former Chair Slavet is implying that the Fifth Amendment privilege requires the government to decline prosecution when the government requires an employee to answer questions in a purely administrative investigation into misconduct that otherwise would be criminal, she is mistaken. The government can prosecute but cannot use the employee's answers or the fruits of those answers in that prosecution.²²

At bottom, what former Chair Slavet fails to appreciate is that the courts are attempting to adjust the balance between an employee's duty to cooperate in agency investigation and her Fifth Amendment privilege against self incrimination. If the latter did not exist, an employee's obligation to cooperate would be absolute, unconditional, and unfettered save only her *Weingarten* rights. Consequently, since the Fifth Amendment privilege against self incrimination never ever requires the U.S. Attorney to decline prosecution even when a confession is coerced---only the confession and its fruits cannot be used---it follows that an employee cannot insist on receiving a declination of prosecution as a condition precedent to answering questions in a purely administrative investigation.

By wrongly commingling use immunity with declination of prosecution, former Chair Slavet implies that a declination of prosecution by itself might require an employee to answer questions in an agency investigation. It clearly does not because a declination of prosecution is not coextensive with use immunity. Whereas use immunity is etched in stone, a declination of prosecution is not; it is contextual; and if the facts change, the U.S. Attorney would be free to rescind the declination, consistent with due process. Consequently, because a declination of prosecution would not immunize the employee's answers if the U.S. Attorney revived the prosecution or brought a new one, the employee is free to refuse to answer even if the U.S. Attorney declines to prosecute unless those asking the questions give the employee the infamous *Kalkines* warning.

And contrary to former Chair Slavet's insinuation, *Weston* in no way shape or form requires a declination of prosecution to be issued before the employee's duty to cooperate is triggered. According to *Weston*, under *Garrity* an employee can be compelled to answer "pertinent questions about the performance of an employee's duties ... when that employee is duly advised of his options to answer under the immunity granted or remain

²² *Lefkowitz v. Turley*, *supra*, 414 U.S. at 84, 94 S.Ct. at 325, 38 L.Ed.2d at 285

silent and face dismissal. *Kalkines v. United States*, 200 Ct.Cl. 570, 473 F.2d 1391, 1393 (1973).”²³

Finally, the *Kalkines* warning:

[A] public servant can be removed for not replying if he is adequately informed both that he is subject to discharge for not answering and that his replies (and their fruits) cannot be employed against him in a criminal case.²⁴

It should be emphasized that the employee has to be given the *Kalkines* warning *only* when “the employee may be subject to prosecution for actions connected with the subject of management's inquiry.”²⁵

Tooty fruity

Do you remember that HUD notified Ms. Weston that

Any information or evidence you furnish in response to questions propounded to you during this interview, or any information or evidence which is gained by reason of your answer, may not be used against you in criminal proceedings?

What if HUD had not notified her that the *fruits* of her answers also could not be used? Would she still have received the *Kalkines* warning? Absolutely not; for the Court of Claims specifically held that *Kalkines* had a right to clam up in the fourth and final investigative interview even though he was advised that his answers could not be used in a subsequent criminal proceeding because his employer, IRS, failed to add that the fruits of his answers also could not be used.²⁶ Alas, the Supreme Court of Ohio does not believe that fruit has to be part of the meal served to an employee by an investigator who is about to ask the employee job-related questions in an administrative interview:

Consistent with *Eshelman*, we conclude that an officer need not be told that the results of the polygraph test cannot be used in a later criminal proceeding. If the officer's answers during the test cannot be used, then necessarily the test results themselves cannot be used, those results being useless without the accompanying answers. Nor is it necessary, in our view, that the officer be told that any

²³ *Weston v. U.S. Dept. of Housing and Urban Development* 724 F.2d 943, *948 (C.A.Fed.,1983)

²⁴ *Kalkines v. U. S.* 473 F.2d 1391, *1393 (Ct.Cl.1973)

²⁵ *Id.* quoting *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 426 F.2d 619 (C.A.2, 1970), cert. denied, 406 U.S. 961, 92 S. Ct. 2055, 32 L.Ed.2d 349 (1972)

²⁶ *Id.* at 1396.

"fruits" derived from his answers cannot be used in a criminal prosecution. When the officer is told that his answers cannot be used in a later criminal prosecution, we believe there is an adequate implicit assurance that the fruits derived from the answers likewise cannot be used. To the extent other courts have held that an additional express warning regarding fruits is essential, *see Kalkines v. United States* (1973), 200 Ct.Cl. 570, 580, 473 F.2d 1391, 1396, we decline to follow those courts.²⁷

If you are a federal employee or a Postal Service worker and if you refused to answer questions put to you by an investigator who neglected to explain to you the fine points of use immunity, you were more interested in dueling over legalities than in keeping your job. For you received *all* of use immunity, lock, stock, and barrel, once the investigator threatened to fire you if you did not answer his questions even if he did not tell you that the fruits of your answers as well as the answers themselves could not be used in a subsequent criminal prosecution. And you received it by operation of the Constitution whether or not the investigator explained that to you.

You might have a much more pressing and profound legal problem than debating with the investigator over the extent to which your answers cannot be used in a subsequent legal proceeding. What if you and the investigator disagreed about whether you are entitled to the *Kalkines* warning at all? In other words, what if you and the investigator disagreed about whether you "may be subject to prosecution for actions connected with the subject of management's inquiry"?²⁸ What if you think you may be, but she thinks you are not? What if you guessed wrong and refused to answer when you should have answered? Can the agency discipline you for refusing to answer? What if you asked to consult with an attorney before you decided whether you were going to answer, but the agency turned down that request? Would you still have to answer? What if you refused to answer because the agency would not let you consult with an attorney? Would that always be a good affirmative defense to a charge of refusing to cooperate? Would it be a good defense if it turned out that you were not in jeopardy of criminal prosecution? What if you asked to speak with your shop steward, but were turned down? Could you clam up then?

Let's assume that you were not in jeopardy of criminal prosecution, but that the investigator refused to assure you that your answers would not be used in a subsequent criminal prosecution. What if you refused to answer because you did not receive that assurance? Would that be a good affirmative defense to a charge of refusing to cooperate? Finally, let's assume that the investigator gave you the *Kalkines* warning when you were not in jeopardy of being prosecuted. Could your answers be used against you in a subsequent criminal prosecution?

²⁷ *City of Warrensville Heights v. Jennings* 58 Ohio St.3d 206, *210, 569 N.E.2d 489, **493 (Ohio,1991)

²⁸ *Id. quoting Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 426 F.2d 619 (C.A.2, 1970), cert. denied, 406 U.S. 961, 92 S. Ct. 2055, 32 L.Ed.2d 349 (1972)

Oops. Time's up. Got to run. But I will be happy to answer these questions and many more if you hire me to speak to your bargaining unit or to train your stewards for free. (Just reimburse my travel and lodging expenses.) Maybe I will invite Ruby Weston along as a guest speaker. I suspect she has some free time.

About the author

Mitchell Kastner served as an Administrative Judge with the United States Merit Systems Protection Board and its predecessor, the United States Civil Service Commission, for ten years. During the last three years of his tenure, he was the Deputy Regional Director of the Board's New York Regional Office. As an Administrative Judge, he conducted hearings and wrote decisions on all of the appeals over which the Board's Regional Offices had jurisdiction, including adverse actions (removals, demotions, and suspensions for more than 14-days); reductions in force; denials of within-grade salary increases; disability retirement reconsideration decisions; legal retirement reconsideration decisions; performance-based removals or reductions in grade; OPM suitability determinations; denials of restoration of reemployment rights, and certain terminations of probationary employees.

Since returning to private practice in 1985, he has represented employees before the Board on all of these types of appeals and several others which were added after he left, most notably, representing whistleblowers in Independent Right of Action appeals under the Whistleblower Protection Act of 1989. He has also represented federal employees and postal workers before EEOC and in federal court on claims under all of the federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act. With the exception of the National Treasury Employees Union (which employs its own attorneys), he has represented bargaining unit members of every major federal employee and postal service worker union in arbitrations. He is featured with former MSPB Chairman Daniel Levinson on Dewey Publication's compact disc *MSPB LITIGATION TECHNIQUES*

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