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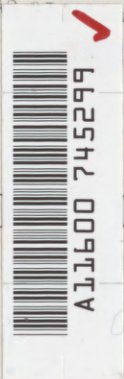
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HEARING

BEFORE THE

COMMITTEE ON CIVIL SERVICE

OF THE

COMMITTEE ON

OFFICE AND CIVIL SERVICE

HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

H.R. 3793

A BILL TO AMEND TITLE 5, UNITED STATES CODE, TO PROVIDE FEDERAL EMPLOYEES UNDER INVESTIGATION FOR MISCONDUCT THE RIGHT TO REPRESENTATION DURING QUESTIONING REGARDING SUCH MISCONDUCT

JULY 21, 1977

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RIGHT TO REPRESENTATION

THURSDAY, JULY 21, 1977

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
SUBCOMMITTEE ON CIVIL SERVICE,
Washington, D.C.

The subcommittee met at 9:45 a.m., in room 311, of the Cannon House Office Building, Hon. William L. Clay (chairman of the subcommittee) presiding.

Mr. CLAY. The subcommittee will come to order.

This morning, the Subcommittee on Civil Service conducts public hearings on H.R. 3793, which was introduced by my distinguished colleague, Mrs. Spellman, on February 22 of this year.

It would extend to Federal employees, who are under investigation for misconduct which could lead to suspension, removal, reduction in rank or pay, the right to be advised in writing of the investigation and the right to representation during questioning regarding such misconduct.

Under existing law, an employee is entitled to representation in connection with disciplinary proceedings only after formal charges have been lodged.

Proponents of H.R. 3793 believe that information secured during the informal stages of an investigation makes it difficult for the employee to subsequently vindicate himself and that the value of representation at formal hearings is diminished considerably.

Enactment of H.R. 3793 would extend the right of representation to employees during the informal stages of this investigatory process.

During the 94th Congress, virtually identical legislation was considered by the Subcommittee on Retirement and Employee Benefits during 2 days of public hearings.

A clean bill, H.R. 6227, was reported by the committee and passed the House on October 8, 1975. The bill was referred to the Senate but no action was taken.

I am pleased to welcome our first witness this morning, Mr. Fred Kistler, from the Civil Service Commission.

**STATEMENT OF FREDERICK A. KISTLER, DIRECTOR, BUREAU OF
POLICIES AND STANDARDS, U.S. CIVIL SERVICE COMMISSION,
ACCOMPANIED BY JOYCE EVANS, ASSISTANT GENERAL COUNSEL**

Mr. KISTLER. Chairman Clay, this is my first occasion to appear before your subcommittee, and I very much appreciate the opportunity to do so and to present the views of the Civil Service Commission on

H.R. 3793, a bill to provide Federal employees under investigation for misconduct the right to representation during questioning regarding such misconduct.

I am accompanied today by Joyce Evans, who is the Assistant General Counsel of the Civil Service Commission.

Mr. CLAY. We have your prepared statement. You may proceed as you see fit.

Mr. KISTLER. Thank you.

The bill, Mr. Chairman, would provide that employees of executive agencies under investigation for misconduct which could lead to suspension, removal, or reduction in rank or pay would not be required to answer questions relating to the misconduct under investigation, unless they were first advised in writing that they were under investigation, the specific nature of the misconduct, and of their right to have a representative of their choice present during the questioning.

They would have to be given a reasonable time to obtain the representative. When this warning is not made, any employee admissions could not be used against them in the course of any action for suspension, removal, or reduction in rank or pay.

The bill also would provide for an appeal to the Commission by employees disciplined on the basis of their admissions when they were not first advised of the rights provided by the bill.

This bill is not a new one. It was first introduced in the 94th Congress as H.R. 1674. Tony Mondello, the Commission's former General Counsel, testified against the bill before the Subcommittee on Retirement and Employee Benefits on March 11, 1975. He stated that the provisions of H.R. 1674 were overbroad, unwarranted, and unnecessary. It should be noted that H.R. 1674 provided for representation only if the employee requested it. The successor bill, the one actually passed by the House in October 1975, went even further in requiring specific notice of the nature of the alleged misconduct, and the "right to counsel" in each individual case, and up to 5 working days to obtain a representative. The bill before us today is identical to that latter bill.

The Commission believes that H.R. 3793 is unnecessary because of the already ample protections provided by statute and Executive order to employees faced with disciplinary action.

We also think that legislation of this magnitude is unwarranted as a means of correcting alleged abuses in a handful of agencies.

Most importantly, we are concerned that the language of H.R. 3793 is sufficiently vague that it could be interpreted as applying to any questioning of employees and thus would be disruptive of normal employer-employee relations in the Federal service. In fact, it could well be contrary to the best interests of employees by inhibiting counseling on their work performance and conduct.

I would like to take a few moments to elaborate on these points. First, I would like to point out that ample employee protections are presently provided by statute, Executive order, and Commission regulations for employees formally charged with misconduct.

Most of you are familiar with these rights. They provide that no adverse action, removal, suspension for more than 30 days, furlough

without pay, or reduction in rank or pay, can be taken except for such cause as will promote the efficiency of the service.

All competitive service employees and veterans in the excepted service are given such procedural rights as 30 days' advance written notice of proposed adverse action, an opportunity to respond personally and in writing to the charges and a written decision by a higher level agency official than the proposing officer.

These employees are entitled to appeal the agency decision to the Federal Employee Appeals Authority where the employee is entitled to a hearing at which he can have a representative of his own choosing, and a written decision that is binding on the agency.

Private sector employees do not generally have such protections against arbitrary and capricious agency actions. In the Federal Government, employees are given time to prepare their defense against the accusations of proposing officials and often are allowed representation within the agency before the action is finally effected.

As stated above, Federal employees also have the opportunity to appeal the agency decision to an independent appeals authority that is empowered to issue binding decisions.

I understand that H.R. 3793 is intended to provide protections to Federal employees similar to those provided to private sector employees under the National Labor Relations Act as interpreted by the decision of *N.L.R.B. v. Weingarten, Inc.*, decided by the Supreme Court in February 1975.

In that decision, the Court recognized the right of an employee in private industry to have a representative during investigatory interviews when the employee requests representation, but only when the employee reasonably fears disciplinary action.

H.R. 3793, however, requires that an employee be advised in writing of the fact that he is under investigation for misconduct, the nature of the misconduct, his right to a representative, and a period of up to 5 days to obtain a representative.

Because the phrase "under investigation for misconduct" is nowhere defined in the bill, these formal "Miranda type" protections could apply to almost any kind of supervisor-employee discussions, including such nonadversary situations as discussions concerning work performance, discussions designed to help improve deficiencies in work performance, or even informal interchange between supervisor and employee.

In these ways, the bill would offer much greater protections than those enjoyed in the private sector, where employees have no other protections from arbitrary and capricious actions.

In considering this bill, it should be remembered that many citizens feel that Federal employees are not only more than amply protected against arbitrary and capricious agency actions, but are essentially protected against any disciplinary actions.

The second point that I would like to make today is that a bill as all-encompassing as this one is unwarranted to correct the alleged abuses testified to by several of the witnesses before Congress when this bill was considered in 1975.

This bill covers all employees of executive agencies during any questioning which might lead to a suspension—perhaps of only 1 day,

a removal, or a reduction in rank or pay; any employee who is later disciplined on the basis of information obtained in violation of the first part of the bill can appeal the action to the Civil Service Commission, whether or not the employee is otherwise entitled to appeal.

We agree that no Federal employee should be subjected to extensive "police type" interrogation without a representative. However, we believe that such interrogations, if they occur at all, are very rare in the Federal Government.

Several agencies already provide their employees with the right to representation at various stages in the interdisciplinary process through either agency regulation or negotiated agreement.

I would also like to point out that H.R. 3793 could well apply to any instance when an employee is to be questioned on a potentially disciplinary matter since it does not define "under investigation" or establish any criteria for determining the applicability of proposed section 7171.

As a result, almost any supervisor-employee meeting that was not limited to giving out work assignments or to "thanks for a job well done" might be subject to the provisions of this bill, including such things as performance evaluations, informal counseling, or questioning of a group of employees who may have been involved in an altercation at the work site.

None of these situations should be subject to the elaborate procedures provided by the bill. These are all situations that are best addressed when the incident occurs and not a week later, in what would become for most purposes an adversary hearing.

I think it is important to point out the harmful effect that the 5-day period to obtain a representative would have on the employee as well as on the management official that wants to talk to him. In many cases, both will be unable to recall all the details of the incident when they meet 1 week later and will have to rely on hearsay. Situations involving such things as altercations between employees will be allowed to fester when they could have been quickly dealt with if the supervisor had been allowed to ask a few questions and straighten the matter out when the incident occurred.

It has been argued that because the provisions of this bill would give an employee the opportunity to secure representation at a pre-disciplinary stage, the employee would be able to avoid the stigma of a proposed adverse action. We believe the contrary. If the point at which the supervisor-employee relationship becomes an adversary one is pushed back, more rather than fewer adverse actions are likely to be proposed.

This is so because agency officials might well decide to omit preliminary informal questioning, which in many cases results in an understanding which makes an adverse action unnecessary, because the procedural requirements are substantially the same as those now required for a proposed adverse action.

We believe that the broad provisions of this bill could make it difficult for supervisors to counsel employees informally. Supervisors will fear asking their employees any questions without providing the elaborate warning required by this bill. This proposed legislation would have a chilling effect on the willingness of supervisors to employ

informal preventive measures which primarily benefit the employee whose performance or conduct needs improvement.

I would like to mention in passing another concern. We interpret the bill as extending appeal rights to cover probationary employees in the competitive service, all excepted service employees, and temporary employees in both the competitive and excepted services. (The Commission currently has appellate jurisdiction over suspensions, removals, or reductions in rank or pay for competitive service employees who have completed their probationary periods and preference eligible employees in the excepted service with 1 year of continuous service.) I think it is inappropriate to grant appeal rights of the kind contemplated by section 7172 to employees who cannot otherwise appeal agency decisions to suspend, remove, or reduce them in rank or pay. Agency failure to advise an employee of his right to obtain representation before questioning would most likely result in reversal of an agency disciplinary action whenever the employee exercised the appeal right granted by the bill. In that way, the bill would change the employment conditions of probationary, temporary, and excepted service employees and would have a severe impact on the ability of agency heads to manage their staffs. Imagine for a moment a case like this one—a “political” employee is removed because he or she can no longer maintain the confidence of the agency head. The employee appeals his separation to the Commission. The Commission reverses the agency action because the action was based, in part, upon “evidence” obtained in an interview with the employee who was not advised of his right to representation. The employee is restored to duty with backpay. I predict that the employee will likely spend most of his working days reading the newspaper. And everyone will suffer because an unproductive employee is on the payroll, most especially the taxpayers who are paying his salary.

In summary, the Commission believes that the provisions of H.R. 3793 are undesirable, unnecessary, unwarranted, and would have an adverse effect on the current state of employee-management relations. It would preclude supervisors who lack sufficient information to decide whether anyone should be disciplined, from engaging in cooperative discussions, and developing informal judgments. Instead, it will freeze situations into an adversarial form at high procedural costs, and at the risk of being unable ever to solve what may be a simple matter which merits no charges. What the bill does is to apply the *Miranda* rule, a protection for accused persons in the custody of the police, to the workplace. This is counterproductive and unnecessary in light of the already substantial rights enjoyed by competitive service employees and veterans in the excepted service, and vastly exceeds the rights of private sector employees in similar situations.

That concludes my prepared remarks, Mr. Chairman; and Mrs. Evans, and I would be most happy to answer any questions you might have.

Mr. CLAY. On page 2, at the bottom of the page, you say, “We also think that legislation of this magnitude is unwarranted as a means of correcting alleged abuses in a handful of agencies.”

Would you care to elaborate on those alleged abuses?

Mr. KISTLER. Well, sir, only to this extent: I reviewed the report on H.R. 1674 and the successor bill that was ultimately enacted by the House. There were suggestions made in the testimony by a number of witnesses at that time, that in some agencies—and I believe the Treasury Department was one specifically cited—there are, in fact, internal security kinds of investigative teams that get rather deeply involved in intense interrogation of employees.

I don't know that the Civil Service Commission has any particular evidence one way or another to this effect. But this is the kind of incident that was talked about as being at least part of the motivation for this kind of legislation.

Our view on that point, Mr. Chairman, is that the legislation before

Mr. CLAY. Yes; but an identical bill to this one was passed over 2 years ago. The allegations have been made for a number of years. Why is it that the Commission, in your words, has no evidence that these abuses do, in fact, occur? Have you ever decided to investigate them?

Mr. KISTLER. I don't come equipped with any figures or information on the investigative efforts of the Commission. However, it is clear that in any instance where an employee is subjected to this kind of an interrogation, and is subsequently subjected to an adverse action—that is, a removal, suspension for over 30 days, or downgrading, that action is, in fact, appealable to the Commission's Federal Employee Appeals Authority; and, therefore, through that device and technique there is a review conducted.

If employee rights have, in fact, been violated in the process, those rights can and are protected through adjudication.

Now, I could attempt to develop for the committee—I don't have it with me—agency-by-agency data on adverse action appeals and the results of those adjudications. That would perhaps be helpful to the committee, and I would be pleased to try and provide that.

Mr. CLAY. We would be pleased to have it.

You also say, "enactment of this legislation would mean disruption of the normal employee-employer relationships in the Federal service." Isn't this really a way of shirking your responsibility, because you don't want the increased burdens of having to provide additional protections to Federal employees?

Mr. KISTLER. No, sir; I certainly don't think so.

Our view is that the supervisory-employee relationship at the worksite and the carrying out of supervisory responsibility is a positive one in the sense of providing leadership, support, and motivation to the employee.

But it also clearly covers the other side of the spectrum—that is, the provision of firm guidance and support and when necessary correction of behavioral, performance, and conduct problems that the supervisor encounters at the worksite.

We believe that to provide a time period of some 5 days as an opportunity for an employee to cut off those conversations simply by triggering the protections in this bill is not conducive to good communication and effective management of problems when they occur at the worksite.

That is the basis for our view on that point.

Mr. CLAY. Well, how do employees ever satisfactorily resolve their grievances unless some effective mechanism is set up for it? You talk about employees having the right to appeal the decision to the Federal Employee Appeals Authority. What is your personal view of the kind of confidence the average Federal employee has in that Authority?

Mr. KISTLER. Well, I would make the point, Mr. Chairman, that once an employee is subjected to an adverse action and chooses to take his or her case to the Appeals Authority, there is a full right to representation—that can be an employee's personal attorney, a union-designated representative, or whomever the employee selects.

So, when it gets to the point in the process where the employee is, in fact, materially affected in terms of his job—his or her job or grade or pay—the right to representation does, in fact, exist—a clearcut, regulatory right to representation. This bill would, in our judgment, introduce that right to representation much earlier in the disciplinary process and, we think, much too soon in that process.

Mr. CLAY. Do you think it is ever too soon to provide a person with a right of protection against someone securing information that could subsequently be used to harm him at his workplace?

Mr. KISTLER. I think that issue has to be viewed in the context of the other procedural and substantive protections that exist for that same employee. And also, the Federal situation should be contrasted with industry, where a summary dismissal may follow upon the kind of interview that you just described. In the Federal sector, an agency is obligated to turn whatever information it has into a set of charges and make those set of charges at least 30 days before the date of the adverse action. The notice of charges must meet certain very stringent statutory requirements as to specificity and detail. Then, the entire investigative file is made available to the employee. The employee also can receive an outside review of that action by another body—an impartial body—the Appeals Authority.

In that context, sir, as my answer to your question, I would say, yes, I think one can provide the right of representation too soon.

Mr. CLAY. On page 4, you say, "Because the phrase 'under investigation for misconduct' is nowhere defined in the bill, these formal 'Miranda type' protections could apply to almost any kind of supervisor-employee discussions, including such nonadversary situations as", et cetera, et cetera.

This was a similar statement made by the Commission when they testified in 1975. If we defined "under investigation for misconduct" in the bill, are you implying that perhaps the Commission might support this bill?

Mr. KISTLER. Certainly, that is one of the key flaws in the bill, Chairman Clay. But, it is certainly not the only key flaw in the bill, as we see it.

We would be most willing to look at and react to a more narrowly drawn piece of legislation that would deal with the real problems that people are encountering. I am not, however, in a position to commit the Commission to support such a bill.

In our statement, we tried to detail, not just our general objections to this bill, but four or five very specific kinds of problems we see with

it. One of those is the fact that supervisory inquiries could be considered as investigations. So, it's not just the term "under investigation," but it is also the question of who is making inquiries. That is another flaw in the bill.

A bill more narrowly drawn would be certainly worth looking at. We would be willing to expose it to the other Federal agencies who would be living under such a bill and get their reactions on it. But I won't predict the outcome of that at this point.

Certainly, any bill that overcomes the problems that we have cited here would tend to be much more acceptable to us.

Mr. CLAY. Mr. Johnson, do you have any questions?

Mr. JOHNSON. Yes, Mr. Chairman.

Mr. Kistler, when does an informal investigation begin?

Mr. KISTLER. Well, I think, Mr. Johnson, you put your finger on one of the problems in the bill. I'm not sure under terms of this bill.

Mr. JOHNSON. What I meant was, under existing law.

Mr. KISTLER. Well, I think investigation has no formal meaning. It means whatever the parties want it to mean. When a supervisor encounters a situation on the worksite and says, "OK, who threw the first punch; who started this?" I think under dictionary terms one can conclude that question is, in fact, the beginning of an informal investigation.

Mr. JOHNSON. And when does it end?

Mr. KISTLER. I guess it ends when the factual issues are resolved. In some circumstances it might be continuous process. I don't mean to be evading your question. The terms, I think, have no real meaning in the employment situation. They may well, in fact, have a meaning in a police-type situation, where something is docketed, an investigator is assigned to a situation, and the investigative process is formally initiated.

I guess I would have to respond this way: we require, in the adverse action arena that we are talking about here, that there be made available to an employee all the evidence that is the basis of agency charges against him, whether that evidence is obtained through informal investigation, affidavits, or whatever. As far as we are concerned, that constitutes the file of the formal investigation; that is, the data upon which the charges are based.

It is not a clear-cut answer to your question, but it is the best I can do.

Mr. JOHNSON. Well, I think that's the problem. It seems to me that, if I interpret what you are saying properly then, the informal investigation could continue for a rather extended period of time.

And it seems to me also that this might have a somewhat chilling effect upon the employee. He may not be facing time in jail, but it seems to me that for any working person there is no greater threat than the potential for loss of income.

Mr. KISTLER. As I have tried to express, I have problems with the term, "informal investigation," and that is why I am having problems answering your questions as to when it begins and when it ends.

Let us consider as an example, the fact that an employee is continuously accountable, and ought to be accountable, for putting in a full day's work for a full day's pay and not abusing rights such as en-

itlement to sick leave when one is ill. And let's assume a pattern of sick-leave abuse develops over a period of time. The awareness of that abuse occurs as a product of a continuing process; that is, in most agencies, one reports one's time every week or every 2 weeks and puts in one's claim to leave, pay, hours worked. That type of record is part of the regular payroll accounting process, rather than an investigation as such.

Yet, payroll records provide data that might indicate possible abuse at some point to a supervisor—he has a responsibility for continuously reviewing such records and assuring that employees put in a full day's work for that full day's pay—who has occasion to review such records. I have problems calling that an investigation, and yet that process may well reveal the need for counseling, some lesser type of discipline like a reprimand or an admonishment, or perhaps ultimately in a case of severe abuse, to more severe action.

So I am having difficulty relating that kind of situation to the concept of an informal or a formal investigation because it is really the continuous role of the supervisor to monitor and assure effective performance and on-the-job conduct for his or her employees.

Mr. JOHNSON. Thank you very much.

Mr. CLAY. Thank you, Mr. Kistler.

Mr. KISTLER. Thank you very much.

Mr. CLAY. The next witnesses are representatives of the National Treasury Employees Union: Mr. Vincent Connery, Mr. Robert Tobias, and Mr. Jerry Klepner.

STATEMENT OF VINCENT CONNERY, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION, ACCOMPANIED BY ROBERT TOBIAS, GENERAL COUNSEL, AND JERRY KLEPNER, DIRECTOR OF COMMUNICATIONS

Mr. CONNERY. Thank you. I am Vincent L. Connery, national president of the National Treasury Employees Union. Our union is the exclusive representative of more than 95,000 Federal employees throughout the U.S. Treasury Department and the Federal Energy Administration.

We would like to thank you, Mr. Chairman, for holding early hearings on H.R. 3793, a bill introduced by Representative Gladys Spellman. This uncomplicated, but vital, legislation would provide Federal employees the same right to counsel at investigative interviews which the Supreme Court granted to millions of private sector workers more than 2 years ago.

During the 94th Congress, the House of Representatives approved a bill identical to H.R. 3793 by a vote of 217 to 163, but the Senate failed to act on the measure. This year, companion bills have been introduced in both Houses of Congress. We are very hopeful that this legislation will be speedily enacted, so that Federal workers will share in a fundamental due process right now afforded their private sector counterparts.

Under H.R. 3793, a Federal employees must be given 5 days' written notice before an investigative interview. This notice must advise

the employee that he or she is under investigation for misconduct, the nature of the alleged misconduct, and a full list of the rights to which the employee is entitled, including the right to have the representative of his or her choice present during the interview.

Unless these requirements are met, any statement made by or evidence obtained during questioning of an employee may not be used in the course of any action for suspension, removal, or reduction in pay or rank subsequently taken against that employee. In addition, H.R. 3793 specifies that employees of the Federal Bureau of Investigation, Central Intelligence Agency, and National Security Council may only have as counsel other employees of their agencies or a person who has received clearance to review the information relevant to the investigation.

The provisions of H.R. 3793 are based on the Supreme Court's landmark in *National Labor Relations Board v. J. Weingarten, Inc.* (420 U.S. 251 (1975)). In this case, the Court held that section 7 of the National Labor Relations Act requires that private sector employees be permitted representation during investigatory interviews when they "reasonably fear" disciplinary action and request such assistance.

Writing for the Court in the *Weingarten* case, Justice William Brennan explained that representation can be beneficial to both employer and employee as—

* * * a single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transfer the interview into an adversary contest.

Mr. Justice Brennan also pointed out that there are those who believe that representation during investigatory interviews is unnecessary "because a decision as to employee disciplinary action can be corrected after the decision to impose discipline has become final. In other words, they would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined." However, as the Court explained, "at that point it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished."

We could not agree more with the learned Justice. In the Federal service, as in the private sector, employees who must face an investigatory interview which would result in the loss of their job often become nervous and confused, particularly when they are being questioned about events which occurred long ago. Without a representative or counsel to assist them, they may not respond accurately to the questions or raise mitigating factors and, no matter what protections are afforded them at a later stage in the disciplinary procedure, it is too little and too late.

We could furnish the subcommittee with a litany of "horror stories" based upon our own experience with the Internal Revenue Service Inspection Service or the U.S. Customs Service's Office of Internal Affairs, both of which are charged with investigating allegations of

employee misconduct. Too often employees have been unjustly disciplined or discharged from these agencies based upon statements made during investigatory interviews, which could have been fully explained or clarified if counsel had been present at the interrogations.

Typically, when an employee is summoned to appear before the IRS Inspection Service, for example, it is done without warning and seldom is the employee advised of the nature of the interview. He or she is merely told to report to a certain room at a specified time. Upon arriving, and with no opportunity to collect his or her thoughts, the employee is immediately sworn in and must answer all questions. Failure to report for the interview, be sworn in, or answer any questions is alone the basis for disciplinary action.

Normally, there are two inspectors present to question a single employee. One conducts the interrogation, firing questions at the employee, while the other takes notes. There is no formal record or transcript of the interview. Though IRS regulations require that inspectors reveal to employees information within their possession concerning the incidents being investigated, this is seldom done.

With no one to advise them of their rights, few employees have the experience or presence of mind to deal with professionally trained criminal investigators who are supposed to be experts in the art of interrogation. Nervous and unaccustomed to such surroundings, employees are oftentimes questioned about matters which occurred years before. They may be subject to badgering or harassment, becoming so confused and flustered that they agree with answers suggested by the inspectors even though their responses do not truly reflect what transpired.

Once the interview is completed, the inspectors compile their notes and prepare an affidavit that the employee is then "requested" to sign. Rarely is the employee even informed that he or she is not obligated to sign the affidavit, but instead the clear impression is given that refusing the inspectors' "request" will lead to swift disciplinary measures.

In addition, the affidavit is worded in such a manner that the employee's statements are slanted to imply guilt no matter what meaning he or she may have intended. It is impossible for the employee to correct these distortions without rewriting the entire affidavit, which normally is not permitted. If an employee should refuse to sign the affidavit, it is duly noted by the inspector, and he or she is not furnished a copy of the proposed affidavit.

Upon the conclusion of their investigation, the inspectors prepare a report which is forwarded to the appropriate IRS director for action. The Inspection Service has justified its abuses in the past by stating, "We are mere fact gatherers." However, if a management official fails to take disciplinary action based on a report prepared by an inspector, he or she must justify this decision to the Inspection Service. Thus, the "fact gatherer" has a distinct role in the disciplinary procedure.

Such is the power the Inspection Service holds within the IRS. Taken all in all, the entire process is geared toward the enforcement

of discipline, not fair consideration of the employee's guilt or innocence. In such a system, an employee who is denied counsel or a union representative is often doomed from the beginning.

One incident which occurred several months ago in the Philadelphia District of the IRS serves as a particularly revealing example of the disdain for the rights of employees and their representatives exhibited by the Inspection Service.

An IRS revenue agent from the Wilmington, Del., office was told by Inspection to report to Philadelphia for an interview the very next day. The revenue agent immediately sought the assistance of an NTEU attorney who advised him to file a request for representation during the interview. Employees are allowed to make such requests, but they are routinely denied.

When the revenue agent and the NTEU attorney appeared at the Inspection Service's offices, they met Chester Felkner, the inspector who was to interrogate the employee. Felkner, a huge man, intimidating in both manner and appearance, ignored the presence of the attorney and brusquely told the employee to follow him to a conference room. The NTEU attorney then interjected and asked the inspector the status of the employee's request for representation.

Suddenly and without provocation, Inspector Felkner wheeled on the NTEU attorney, and, thrusting his fist to within inches of the attorney's face, threatened him with dire consequences for interfering with official IRS business. Felkner repeatedly ignored the NTEU attorney's questions concerning the employee's request and continued to behave in an abusive and threatening manner. Finally, Felkner again ordered the revenue agent to accompany him to the conference room, and the attorney advised the employee to go, since failure to do so could have resulted in a serious and automatic disciplinary action.

Following this encounter, I lodged a formal protest with the IRS Assistant Commissioner for Inspection, complaining about Inspector Felkner's conduct and mistreatment of the NTEU attorney and his utter disregard for the revenue agent's rights. Though the Inspection Service held a cursory investigation, they have refused to provide us with any information. In the meantime, Inspector Felkner is still on the job, showing the same contempt for the rights of the employees he is assigned to investigate.

Faced with inspectors such as Chester Felkner, it is little wonder that employees often become traumatized during investigative interviews. Subject to continuous questioning, and knowing that misleading information can result in dismissal, few employees are able to remain lucid and overcome the intimidating surroundings created by the inspectors. This gives rise to an atmosphere of interrogation at its very worst; one which, because of the palpable prospect of intimidation, results in unreliable and untrustworthy testimony. These are the very concerns to which the Supreme Court addressed itself in the *Weingarten* decision and many others, concluding that counsel must, if so requested, be present at such interrogations.

Despite the fact that the Supreme Court has guaranteed the "right to counsel" to private sector workers under the National Labor Relations Act, the Federal Labor Relations Council has refused to extend

this same protection to Federal employees under Executive Order 11491, as amended.

In May 1975, NTEU presented this issue as a "major policy question to the Council, the highest appellate body in the Federal sector labor relations program. Following 20 months of silence, the Council issued a decision in December 1976 holding that "* * * no substantial purpose would be served by an interpretation of [Executive Order 11491] to include the right of an employee to union representation or assistance at an * * * investigative interview or meeting to which he is called by management."

Through this action, the Council in effect ruled that there were two sets of standards for employee rights, one for private sector workers, and a lesser, more restrictive one for Federal employees. While the Council did concede that employees could negotiate right to counsel protections concerning interrogations between employees and their supervisors, section 11(b) of the order allows management to unilaterally refuse to negotiate contract provisions which are binding on the internal security arm of an agency.

Since, as we have explained, it is internal security that is primarily charged with the responsibility for investigating allegations of employee misconduct, the Council's concession will have little or no practical impact on employees. IRS Inspectors, and their counterparts in other agencies, can and will continue their threatening and abusive tactics during investigative interviews.

For all practical purposes, the Council has dashed any hopes of obtaining the right to counsel through administrative channels. If Federal employees are to be accorded the full protection which private sector employees now enjoy, Congress must act favorably on H.R. 3793.

Opponents of this legislation persist in contending that the bill is unnecessary, and that Federal employees are already guaranteed sufficient due process under existing laws and regulations. We believe that this argument is totally without merit. No matter what protections exist later in the process, unless advised of his or her rights from the very beginning an individual can easily be coerced into making damaging statements that can seal his or her fate.

This was emphasized by the Supreme Court in *Weingarten* and other decisions. In their rulings, the Court recognized the futility and hypocrisy of providing employees with elaborate legal protections in the grievance procedure while allowing managers unfettered discretion to obtain confessions during interrogations. The Court concluded that the presence of a representative during interrogations is a basic right that "enhances the integrity of the fact-finding process." Any individual who is denied the right to counsel under such circumstances is left totally vulnerable to the very real prospect of intimidation and self-incrimination which can destroy his or her chances for vindication later.

Those who oppose H.R. 3793 also charge that the legislation would impair the Federal Government's ability to function because employees would be constantly seeking to impose an attorney or union representative between themselves and their supervisors or other management officials.

Such allegations, however, are no more than a smokescreen; the bill clearly provides that an employee is entitled to representation only when he or she is "under investigation for misconduct" and during an interrogation which could "lead to disciplinary action." This is the basic standard that the Supreme Court adopted in the *Weingarten* case.

In conclusion, we see absolutely no reason to delay the enactment of H.R. 3793. While the cost of the bill to the Federal Government would be miniscule, its value to Federal employees is immeasurable. H.R. 3793 would simply extend to Federal employees the same rights and protections afforded all other working Americans by the Supreme Court over 2 years ago. We strongly urge the subcommittee to expedite the passage of this vital and extremely worthwhile legislation.

On behalf of the National Treasury Employees Union, I appreciate the opportunity to present our views before you today. I would be glad to answer any questions you may have.

Mr. CLAY. Thank you.

This bill provides for a period of 5 days in which the employee may select a representative. Do you believe that 5 days' notice is necessary for an employee to obtain representation?

Mr. CONNERY. Well, Mr. Chairman, the language of the bill provides for a reasonable time not to exceed 5 days. In most every case, I'm certain, it would not be necessary to go to the maximum of 5 days, because surely a union steward would be available at the worksite or reasonably nearby; and if an employee had to seek outside counsel, 5 days might be considered reasonable because of the counsel's schedule.

Mr. CLAY. The bill also provides for written notice to the employee that he or she is under investigation. Based on your experiences and the experience of your organization, do you think this written notice is necessary?

Mr. CONNERY. I would like to have that question again, Mr. Chairman. I missed a portion of it.

Mr. CLAY. The bill provides for written notice to the employee that he or she is under investigation, and based upon your experience and the experience of your organization, why do you think the written notice is necessary?

Mr. CONNERY. Well, I would like our counsel to answer that.

Mr. TOBIAS. We believe, Congressman Clay, that the written notice is essential so that the employee knows for certain that he or she is the subject of that investigation and particularly what the subject of the investigation is all about.

We find that the regulations of these various internal security agencies require that an employee be told what the investigation is all about. However, in the sessions that are usually two-on-one—two Inspectors on one employee—when the employee requests that information, it is not furnished. So, the only way to provide that protection and to make it stick is to have the notice in writing prior to the commencement of the session itself.

Mr. CLAY. In the testimony of the previous witness from the Civil Service Commission, he talked about how disruptive passage of this

bill would be. Do you envision, as a result of this legislation, that a supervisor would be required to permit an employee a representative each time he met with one of his employees for informal purposes?

Mr. CONNERY. Absolutely not. This has been a long-held smokescreen by these administrative agencies. We have been calling attention to this problem for well over 10 years. They have done absolutely nothing about it. And, as I pointed out, we have carried this to their highest councils—the Federal Labor Relations Council. We have put them into court. We have them in court right now on cases they have held under investigative status.

Relative to a point Mr. Johnson was raising with the prior witness as to when these things begin and when they end, well, we have a case we put in court recently where they have had the man under investigation for 10 years—10 years.

We have another case that immediately comes to mind, down in Texas. The man's name is Russell Johnson. This man has written to all of the officials of the Internal Revenue Service, the Commissioner, the Assistant Commissioner for Inspection, and others, asking that he be advised what he has done that is wrong.

He has written—I have copies of the letters he has sent me that he has written—these officials letter after letter, and he has yet to receive any substantive reply from them. And so, it is instances like this that would give Mr. Kistler or anybody else a great deal of trouble.

I fully understand Mr. Kistler's problem with telling anybody when these start and when they end, because sometimes they never end.

Mr. TOBIAS. The other point, I think, Congressman Clay, is that the lament of the employer was made to the Supreme Court that "I won't be able to operate; there will be a union representative present at every one of these discussions with the supervisors." And Justice Brennan said:

Yes, and that would be good if the union representative was present. It would be more efficient in your operations if the union representative was present, because the matter would be solved more quickly and more efficiently to your benefit and particularly to the employee's benefit.

So, that argument that has been promulgated by the Civil Service Commission is more appropriately the employer's lament, and I think that is certainly without foundation.

Mr. CONNERY. And these administrative people from the Commission and elsewhere are fully and absolutely aware of what we are talking about. We have made it very clear. We are talking about Federal police. We are not talking about supervisors.

Mr. CLAY. In your statement, you say that you can provide the committee with a litany of "horror stories" based upon your own experiences with the Internal Revenue Service. Would you provide us with that list?

Mr. CONNERY. Yes; I would be glad to, Mr. Chairman.

Mr. CLAY. Mr. Johnson?

Mr. JOHNSON. I have one very brief question, Mr. Chairman, and that relates to the coverage of employees who are on probationary status under this legislation.

As I understand it, the bill would give the right of representation to employees who, under current law, do not now have that right. Does

this include those employees who are serving in a probationary capacity?

Mr. TOBIAS. The language in the act makes no distinction between employees who are in a probationary status and those who have not completed their probationary trial period; and it guarantees to all employees the right to representation when they are under investigation for misconduct. And this is entirely appropriate. Employees are no less subject to the loss of their jobs because they are probationary or nonprobationary. The rationale for providing that representation, that the facts come out and are discussed and resolved, is no less appropriate because someone is probationary or nonprobationary.

I think that is how this matter gets confused, that a probationary employee doesn't have certain appeal rights to the Civil Service Commission if the investigation leads to discharge.

And so, we would say that a probationary employee has an even more important stake in having a representative in getting this matter out and getting it resolved quickly and efficiently.

Mr. KLEPNER. If I could just add one thing to that—a probationary employee would only have the protections under the provisions of this bill. A probationary employee would not have any other protections such as a full hearing on the substance of the charges that may be brought against the probationary employee.

So, the bill does not expand, in that regard, the rights of the probationary employee into a full substantive type of hearing at a later stage in the process.

Mr. JOHNSON. Let me play the devil's advocate for a moment, if I may. There are some people who say that once Federal employees become entrenched in Government, that it is very difficult to remove those who are incompetent from their positions.

Indeed, as you may or may not know, I understand that the General Accounting Office is now looking into this matter. Doesn't this bill give such persons even more protection and therefore make it harder for an agency to remove them from their job, if this appears to be necessary?

Mr. CONNERY. Well, we think that it should be difficult to deprive an employee of his livelihood. However, we do not see that the presence of an attorney would make it more difficult if the facts that warrants an adverse action exist. The presence of an attorney does not change what the facts are; and the agency will be able to prove up their facts, regardless of the presence or the lack of presence of an attorney.

Mr. TOBIAS. One more point to keep in mind. This isn't a situation where you have a fifth amendment right to remain silent, as in a criminal investigation. In an administrative interrogation, an employee must respond to all questions. And so, if the investigator puts those questions to the employee, the employee has to respond.

So, we're not talking about a situation where, through the presence of a representative, people are advised that they should remain silent, the common criticism of the *Miranda* warning in the criminal area.

What an attorney or a representative would do in the administrative field is to clarify the issues to make sure that all of the evidence, both favorable and unfavorable, is elicited and thereby resolve matters much more quickly, we believe.

Mr. CLAY. Let me ask you a question: In the closing statement of Mr. Kistler, he said that what the bill really does is to apply the *Miranda* rule to the workplace; and this is counterproductive in light of the fact that competitive service employees now enjoy much more substantial rights than those in the private sector.

Would you care to comment on that?

Mr. TOBIAS. I would think that that is patently untrue. For example, the *Weingarten* principle applies to all private sector employees. It does not apply to Federal sector employees. Non-Federal public employees have the right to pretermination hearings. Federal employees don't have the right to pretermination hearings before discharge.

Non-Federal employees have a *Miranda* protection in many instances, where they don't have to respond to questions. Federal employees must respond to questions. Federal employees must respond to questions or face discharge for insubordination, that is, a refusal to respond to the questions. So, I think that Mr. Kistler's statement is erroneous.

Mr. CLAY. Are there any cities or State jurisdictions, to your knowledge, that provide the same kind of protection that this bill seeks to provide to Federal employees?

Mr. KLEPNER. Congressman, we are right now working on putting together a list of these cities or counties or States that may provide this right; and we would be very happy to furnish that to the subcommittee at a later date.

Mr. CLAY. We would appreciate that.

We certainly want to thank you for your testimony.

Mr. CONNERY. Thank you, Mr. Chairman.

Mr. CLAY. The next witness is from the National Association of Government Employees, Mr. Peter Lyons.

STATEMENT OF PETER T. LYONS, ASSISTANT GENERAL COUNSEL, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

Mr. LYONS. Mr. Chairman, I'm an attorney with the National Association of Government Employees and appear before you today to present the union's views on the proposed legislation dealing with the Federal employee's right to representation during questioning.

The National Association of Government Employees represents approximately 100,000 Federal employees and thus it is obvious that we have a great concern for any possible legislative enactment which may amend or revise their rights in regard to investigatory proceedings.

Executive Order 11491 is the document which governs labor-management relations in the Federal Government. Signed in 1969 and amended in 1971 and 1975, the Executive order represents a clear statement of the respective rights and obligations of labor organizations and agency management.

The order applies to all agencies in the executive branch except for the Federal Bureau of Investigation, the Central Intelligence Agency, and the Foreign Service.

Section 10(e) of Executive Order 11491 sets out the right for employees to be represented at "formal discussions" concerning grievances, personnel policies and practices, or other matters affecting general working conditions of the employees in the unit.

However, no such right is afforded Federal employees with regard to "informal discussions" with their supervisors. These "informal discussions" often provide the basis for commencing an adverse action against an employee, which could lead to their suspension, removal, or reduction in rank or pay.

The right to be represented at formal proceedings is negated for the agency has already compiled their case to the detriment of the beleaguered employee.

These "informal meetings" are normally held under the guise that the supervisor just wants to have a "heart-to-heart" talk with the employee. The tone is set, and the relaxed employee proceeds to divulge evidence concerning his misconduct which will eventually lead to his demise.

These "informal inquiries" are advantageous to the employer, for he knows the reasons for the investigation he is conducting, while the employee is left pondering the reasons for such interrogation. The union believes that the "informal inquiry" stage of the process of determining whether disciplinary action is warranted constitutes a critical stage of such process and that the employees should be afforded the right to be represented at such inquiries.

The Supreme Court decision of *NLRB v. Weingarten, Inc.*, provided private sector employees with the right to have a representative present at investigatory interviews and we feel that such a right as proposed by H.R. 3793 ought to accrue to the benefit of the employees in the Federal sector.

In that case, the Supreme Court upheld a ruling of the National Labor Relations Board with regard to the right of representation at investigatory interviews. The issue was confronted by the Federal Labor Relations Council in a major policy statement which was issued in December 1976.

At this time, Mr. Chairman, I have copies of that policy statement that I would like to submit to the record.

Mr. CLAY. Yes; that will be inserted in the record at the end of the testimony received today.

Mr. LYONS The FLRC held that a Federal employee does not have a protected right under the order to representation at investigatory interviews, but such right is a negotiable item when the exclusive representative and agency confer at the bargaining table. On paper the union felt that this was a major breakthrough; but, in reality, the agencies are reluctant to agree to such a provision in any contract. The agencies do not wish to barter away their dictatorial powers; and thus the short history of such negotiations seems to establish a trend which will have the Federal Service Impasse Panel serve as the final decisionmaker as to whether or not such provision will be included in the contracts.

The National Association of Government Employees feels that such right should not be the subject of contract negotiations, but that the

right to representation during questioning is an inherent right granted the employee under the sixth amendment of the U.S. Constitution.

H.R. 3793 codifies this right, and the passage of such bill would eliminate unnecessary haggling over the right during contract negotiations.

The Federal employee does have a property interest in his job, and such interest should be afforded full protection during these "informal inquiries." Subsection (c) of section 7171 aligns itself to the exclusionary rule in the criminal law and such safeguard is a must when dealing with these disciplinary actions.

The union realizes that the scope of subsection (c) is not as broad as the criminal law's exclusionary rule, but the union believes that it affords the Federal employees adequate protection if paragraphs (1) and (2) of section 7171(a) are not adhered to during the questioning.

The "informal meetings" are synonymous to custodial interrogation in the criminal law for the employee is required to attend such meetings if summoned by his supervisor.

Custody is said to most commonly occur when one is either arrested or involuntarily held at the police station. Arrests are seldom made in regard to disciplinary action in the Federal sector; however, employees are oftentimes temporarily detained by their supervisors or requested to attend these informal hearings. The employee must attend these informal meetings or will subject himself to discipline for insubordination—that is, refusing to obey an order of a supervisor. The employee does not actually have the freedom to walk away from the investigating officials, and thus the employee is oftentimes in the custody of the supervisor and subject to interrogation.

This should be considered a critical stage of the disciplinary proceedings, and thus the employees should be afforded the right to be represented at such proceedings.

In closing, I would like to compliment you, Mr. Chairman, and each of the subcommittee members, for the careful process you have followed in studying this important issue. The National Association of Government Employees supports the enactment of H.R. 3793 and thanks you for allowing us to express our views on this important piece of legislation.

Mr. CLAY. Thank you.

In the past, the Civil Service Commission has objected to similar legislation because, supposedly, the language "under investigation" is not sufficiently clear.

Would you have any objection to this language being defined in the legislation itself?

Mr. LYONS. Right now, I think the language is fairly clear. It is "under investigation" where one has reason to believe that there may be either a separation from service or a reduction in rank or pay; and I don't see any problem with that wording at all.

Mr. CLAY. So, you're of the opinion, as the previous witness, that this is just a smokescreen?

Mr. LYONS. Yes; Mr. Kistler said the language is ambiguous. I can't find anything more ambiguous than when you start the disciplinary actions, "You can separate an employee, if it is going to promote the efficiency of the service."

What does that mean? I don't understand. They construe it in different ways everytime you are confronted with these situations.

Mr. CLAY. The Commission also contends that it would be difficult for the Government to function if every question by a supervisor to an employee which could lead to a disciplinary action in whatever manner must be preceded by a warning that the employee is entitled to the presence of an attorney before answering the question.

How do you respond to this allegation?

Mr. LYONS. Well, I don't think society is doing too bad with the *Miranda* ruling; right? I don't think the police are having too difficult a time advising criminals of their rights. I think that Mr. Justice Brennan stated in his opinion in the *Weingarten* decision that it helps to clarify the issues, the issues that they are going to be confronted with and also to aid the usually mystified employee in these types of interviews.

Mr. CLAY. Are you personally aware of instances where you feel the rights of employees have not been properly protected during informal questioning?

Mr. LYONS. I have been confronted with a few cases. I've been with the national association for a year now. I had one that just came up last week where an employee of the FAA was brought in for an investigatory interview. He asked what it was about; they wouldn't tell him. He asked where the allegations came from; they wouldn't tell him who apprised them of the situation.

He was alleged to have been carrying a gun on FAA premises. Now, he doesn't even own a gun; and he asked what kind of gun he was alleged to have been carrying; and they told him "a 9-mm Browning" or something.

And when he asked who brought these allegations to their attention, they said, "None of your business." They then put him on mandatory sick leave, which is in total disregard for the procedures set out in the Code of Federal Regulations.

I have since appealed their actions to the Southeast Regional Director of the FAA. I'm waiting for a response on that, but there have been other instances where an employee—another situation that arose over at Fort Meade, a janitor allegedly threatened a supervisor with physical violence.

The threat was, I argued, a conditional threat. He told the supervisor if he takes off his glasses he's going to kill him. Well, the supervisor never took off his glasses.

Mr. CLAY. So he is still alive?

Mr. LYONS. Yes; he's still alive. But that was the allegation that was made. That would amount to a 6- to 10-day suspension under the guidelines set out in the rules and regulations of the Army.

But what they did in that particular case—and if I can address just one other issue about the written notification of charges—in that particular case they charged him with threatening with physical violence and they also added three or four charges that were compiled over the course of 4 or 5 years which they never took action on.

Now, these would be grounds for removal when all of the charges were compiled. I got the other charges stricken for untimeliness, because after an investigation is completed with regard to any misconduct, charges have to be brought within 30 days.

But they did remove this person from the service. I thought it was totally unwarranted.

Mr. CLAY. Do you agree with Mr. Kistler that employees in the Federal sector have substantially more protection than those in the private sector?

Mr. LYONS. Well, definitely not. After the *Weingarten* decision came down, I noted in the legislative history the Civil Service Commission, in the minority opinion with regard to this bill when it came up 2 years ago, sets out the different rights. But I think the rights are ambiguous. They can be construed in many different fashions by different agency heads.

Mr. CLAY. We want to thank you, Mr. Lyons.

Mr. LYONS. Thank you very much, Mr. Chairman.

Mr. CLAY. The next witnesses are from the National Federation of Federal Employees, Mr. James Peirce, and Mr. George Tilton.

**STATEMENT OF JAMES M. PEIRCE, PRESIDENT OF THE NATIONAL
FEDERATION OF FEDERAL EMPLOYEES, ACCOMPANIED BY
GEORGE TILTON, ASSOCIATE GENERAL COUNSEL**

Mr. PEIRCE. Thank you, Mr. Chairman.

I am James M. Peirce, president of the National Federation of Federal Employees. Accompanying me today are George Tilton, the Federation's associate general counsel, and Maureen Clancy, our legislative liaison. NFFE is the oldest and largest independent union, representing civil service workers in virtually every agency nationwide and overseas.

I welcome the opportunity to present the views of NFFE on H.R. 3793, a bill to provide Federal employees under investigation for misconduct the right to representation during questioning regarding such misconduct.

The NFFE is in full support of this bill. Indeed, as early as 1972 we suggested similar legislation and in 1975, during testimony on H.R. 1674, we suggested legislation that is quite similar to this bill. We suggested that whenever an agency fails, during the course of an interview, to advise an employee suspected of misconduct that he has a right to have a representative present, that any evidence obtained in derogation of this right could not be used against the employee in any subsequent disciplinary hearing. We were, therefore, most gratified when we reviewed this bill and noted that section 7171(c) does include a provision that all evidence obtained during the course of any investigation for misconduct may not be used against the employee unless the agency advises the employee, pursuant to section 7171(a) (1) (A) (B) and (C), that he is under investigation for misconduct, the specific nature of such misconduct and the right to have a representative present during the interview. This section is the heart of the bill. It provides an appropriate sanction to control those who would disregard the rights created by the bill.

Although we do fully support H.R. 3793, we believe that the bill could be strengthened in a few areas. First, the bill speaks only in terms of those situations where the agency already believes the employee guilty of misconduct or has evidence that points to a particular

person. We think this is unduly restrictive. Accordingly, we would recommend that an agency be required to notify an individual of his right to representation whenever suspicion begins to focus on the individual as being involved in conduct which might result in a disciplinary action. Thus, if during the course of an interview on another unrelated subject, the employee mentions something which arouses a belief that the employee has engaged in some misconduct, the interviewer would be required at that point to either terminate the conversation on that topic or else advise the employee that he is under suspicion for misconduct and that the employee has a right to have a representative present during the remainder of the interview.

Second, we suggest that whenever an employee reasonably fears that an investigatory interview may result in his discipline, at that moment the right to representation should attach, and the employee, upon his request, must be allowed the right of representation. This suggestion is the law in the private sector. In the case of *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), the Supreme Court held that an employee has such a right. In reaching this conclusion the Court stated, among other things, that:

The Board's construction plainly effectuates the most fundamental purposes of the Act. The Act declares that (it) is a goal of national labor policy to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection." To that end the Act is designed to eliminate the inequality of bargaining power between employees . . . and employers." Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316, 58 LRRM 2672 (1965). Viewed in this light, the Board's recognition that § 7 guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres is within the protective ambit of the section "read in light of the mischief to be corrected and the end to be attained." *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 124, 14 LRRM 614 (1944).

The Board's construction also gives recognition to the right when it is most useful to both employee and employer. A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest. Respondent suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. In other words, respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined. At that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them.

The logic of the Court, although it applies to the private sector and interprets the NLRA, is equally applicable to the Federal sector. Federal employees are also disadvantaged when confronted by an "... employer investigating whether certain conduct deserves discipline."

Federal workers also need and deserve mutual aid and protection, and, like the private sector employee, the value of representation is diminished if it is delayed. Vindication becomes, as the Court stated, "increasingly difficult."

Finally, we suggest that the bill specifically provide for the voluntary arbitration of all disciplinary action. We suggest a system which would permit the employee to either utilize the present system or, with the concurrence of the exclusive representative, to take the matter to arbitration. We think the benefits of such a system is obvious and will not burden the record with a lengthy dissertation. However, we would like to point out that this would parallel the private sector system, but, even more important, arbitration of disciplinary actions would provide a yardstick against which the fairness of the present system could be judged.

This will conclude our testimony. I will be pleased to respond to any questions you may have.

Mr. CLAY. Thank you.

I see you have made three suggested changes in the bill. Do you feel that perhaps one of the suggestions might be overly vague, in terms off how you enforce it, when you talk about the moment suspicion begins? How do you determine that?

Mr. TILTON. Well, Mr. Chairman, I really don't think it is all that vague. Frequently, what happens during the course of an interview, an investigatory interview or any other kind, a topic of conversation may turn to another matter. The employee may mention something which relates to another matter, and suspicion will begin to focus on that person. And at that time, the agency knows that there is a possibility that the employee is involved in misconduct or may be involved in some misconduct; and we don't think it unreasonable at that point for the agency to say, "Well, based upon what you just said, it appears that you may be guilty of some other offense; and, at this time, I would like to advise you that you are under suspicion, that you do have a right to have a representative present so we can help clarify this matter."

I don't really think it is any more vague than "removal for the good of the service."

Mr. CLAY. I want to ask you the same question I've asked the two preceding witnesses. The Civil Service Commission contends that it would be difficult for the Government to function if every question by a supervisor to an employee which could lead to a disciplinary action had to be preceded by a warning that the employee is entitled to the presence of an attorney before answering the question.

How do you respond to that allegation?

Mr. TILTON. Well, Mr. Chairman, again, the Supreme Court answered that question adequately: It will not impede the agency; it will clarify the situation and lead to increased efficiency.

But beyond that, the Commission and its fears are absurd. This bill would not apply to every set of circumstances. It won't prohibit supervisors from engaging in what is truly informal conversations. It won't prohibit the supervisor from coming up to an employee and saying, "You know, you haven't quite done your work properly, and you had better be a little more careful in the future."

It won't prohibit an agency from removing a person for inefficiency. It is limited to employee misconduct.

The Commission's testimony creates a strawman that just does not exist.

Mr. PEIRCE. Might I add, Mr. Chairman, in my civil service career, at one time I did serve as a supervisor. The Commission's fear that this would make it even more difficult to remove an employee, to me, is absurd. Even the inference that it is difficult if not impossible to remove a civil service employee is absurd.

The fact is, as I have experienced it in the past, that if supervisors, in fact, do their job; if they rate the performance of employees; if they, in fact, supervise employees, then there is no problem with removal when it is necessary.

So I think that most supervisors or management officials do not want to document, do not want to put on top of the table with the employee what is occurring and what the conditions are.

Mr. TILTON. I might also add, Mr. Chairman—I don't have the statistics right at the tip of my fingers—but I do recall reading a Commission publication sometime ago which suggested, I believe, that some 20,000 people are removed per year.

I hedge my bets a little with the figure, but I think it might be well for the subcommittee to ask the Commission exactly how many people are removed and to see how difficult it really is to remove a person.

Mr. CLAY. We will be glad to ask that question.

Mr. Johnson?

Mr. JOHNSON. Mr. Peirce, on the bottom of page 4 of your statement, you suggest that the bill specifically provide for the voluntary arbitration of all disciplinary action. How would you resolve any conflict between that provision, if it were to be incorporated into the bill, and the existing statutory appeals procedure provided for by law?

Mr. PEIRCE. Well, it would be optional, of course. This is something we have sought for quite some time. In fact, the right to negotiate arbitration of disciplinary actions and even the statutory appeals area—I can't see a real conflict. As I said, we have indicated that it should be optional.

Mr. JOHNSON. So you would see this, then, as a choice that both parties—employees as well as management—could decide to take advantage of?

Mr. TILTON. Not precisely a choice because, if it were a choice and both parties were given that right, I would venture to guess that there would never be an arbitration because management would never agree to do it.

Mr. JOHNSON. Well, when you say "voluntary arbitration"—

Mr. TILTON. Well, "voluntary arbitration"—what we suggest is that there, in fact, be a dual system. Not every employee will want to have his case arbitrated. Not every employee is represented by a local organization that can afford the cost of arbitration, but there will be many, many cases where either the employee is represented or the local organization has sufficient funds to engage in arbitration. In those cases where the employee wants it and where the local exclusive representative agrees to provide the necessary finances, we suggest that

there should be arbitration, not as a matter of whether or not the agency agrees with it, but rather does the employee, No. 1, want it; and No. 2, the exclusive representative agrees that arbitration would be appropriate in that particular case.

Mr. JOHNSON. So that it would be up to the discretion of the employer, employee, and the organization holding the exclusive recognition but only if those two parties agree?

Mr. TILTON. Only if those two parties agree, which would be appropriate. And of course, in the present system right now, the employee cannot have arbitration unless the exclusive representatives agrees.

And the reason is very, very sound: If the local organization is going to pay the bill, they ought to also be able to have some control over it.

But I really think the most important thing is that there is no way to judge how fair the Commission action is, and of course, we think that it is grossly unfair. We think a few arbitration cases that were binding would reveal the gross unfairness that the Commission engages in, in these types of actions.

Mr. PEIRCE. I think really what we're saying is that we need to have the opportunity to negotiate the right to arbitrate disciplinary actions, which we don't have today.

And here again, with that provision, we would wind up with a stipulation of the contract as to how it was approached, et cetera, and so on.

Mr. JOHNSON. Thank you very much.

Mr. CLAY. We wish to thank you for your testimony.

That concludes the hearing.

[Whereupon, at 11:05 a.m., the hearing was adjourned.]

[The statements and letters which follow were received for the record, subsequent to the hearing:]

STATEMENT OF JOHN H. F. SHATTUCK, DIRECTOR, A.C.L.U. WASHINGTON OFFICE

I appreciate this opportunity to present for the record views in support of H.R. 3793, which would extend to federal employees the right to be represented at misconduct investigations. The American Civil Liberties Union is a nationwide, non-partisan organization of more than 275,000 members devoted to the preservation of the Bill of Rights. We have long had an interest in protecting and enforcing the constitutional rights of government employees.

The Supreme Court has recognized that nonprobationary federal employees have a property interest in their continued employment of which they may not be deprived without due process of law. *Arnett v. Kennedy*, 416 U.S. 134 (1974). The Court there also realized that the discharge of an employee can result in attachment of serious stigma which may well follow the employee out of government. Liberty interests under the Fifth Amendment's due process clause are therefore also implicated. We believe that H.R. 3793's provisions requiring that a federal employee under investigation be notified of that fact and of the charges being considered, and be permitted legal representation during any questioning, are essential to protecting these important due process and liberty interests.

In determining what procedural safeguards are constitutionally permissible in any given situation, the Supreme Court has identified three factors that must be considered: (1) the private interest at stake; (2) risk of erroneous deprivations of such interest through faulty procedures; and (3) the financial and administrative burdens that additional procedures would impose upon the government. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The individual interests at stake in H.R. 3793 are weighty and apparent—the employee's interest in continued employment and in his or her continued ability to provide the essentials of life that is made possible from the wages and other

benefits from that employment. A parallel interest is the employee's reputation. Finally there is the related interest of the employee's co-workers and colleagues in making certain that their employer "does not initiate or continue a practice of imposing punishment unjustly." *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 260-1 (1975).

The importance of these interests need hardly be emphasized. Dismissal, of course, is the most severe sanction an employee may suffer and has been likened to "civil capital punishment" because of its far-reaching and serious consequences. But even less serious disciplinary action will result in extensive interference with individual interests. As has already been pointed out, suspension for even a short while can well result in the loss of hundreds of dollars in wages, exceeding by far the fines imposed in countless criminal cases.

It is sometimes argued that the right to representation at the initial investigating questioning stage is unnecessary since the employee is entitled to counsel once formal charges are levied. This argument, however, overlooks the basic fact that once an employee is questioned in the absence of counsel or friend and has made erroneous or damaging statements under pressure, no protection provided at a subsequent stage will be completely adequate in correcting the damage from an earlier incriminating admission.

The relationship between a government employee and management personnel is not ordinarily adversarial, but the context of an investigation into alleged misconduct necessarily takes on the nature of an adversary proceeding, sometimes resulting in intimidation or coercion of the employee. See, for example, the testimony of Vincent Connery, president of the National Treasury Employees Union, on earlier similar legislation. Hearings on H.R. 1674 before the Subcommittee on Retirement and Employee Benefits of the House Committee on Post Office and Civil Service, 94th Congress, 1st Session, Serial No. 10 (1975).

The atmosphere of intimidation raises substantial fairness concerns, but of even greater importance is the fact that the questioning of an unrepresented employee will often result in inaccurate answers that will lead to inaccurate disciplinary decisions. As the Supreme Court held in holding that employees in the private sector have right to representation under some circumstances during investigative questioning:

"A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." *NLRB v. Weingarten, Inc.*, *supra*, at 262-3.

The Court went on to recognize that to deny representation at the questioning stage trusting correction to take place in later proceedings was unrealistic, since it becomes "increasingly difficult for the employee to vindicate himself" and since the employer "may be more concerned with justifying his actions than re-examining them." *Id.*, at 263-4.

Due process requires that the employee be heard "at a meaningful time and in a meaningful manner". *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The right to have representation at the final stages of disciplinary proceedings will mean little if the absence of representation at earlier, critical stages has resulted in the coercive acquisition of damaging, often inaccurate, evidence that is almost impossible to later successfully challenge. Just as counsel must be provided in criminal proceedings at every stage where it is "necessary to preserve the defendant's basic right to a fair trial . . . and to have effective assistance of counsel at the trial itself", [*United States v. Wade*, 388 U.S. 219, 227 (1967)] so must an employee be able to be represented at questioning where that representation is necessary to preserve the employee's due process rights to a fair disciplinary hearing.

It should be noted that the disciplinary action involved in the *Weingarten* case was based upon an ambiguous, but incriminating, statement made by the employee in an attempt to show her innocence of other, unrelated suspected wrongdoing. Such a statement would certainly not have been made had the employee had with her a representative who could have perceived danger of incrimination presented by the questioning and advised her accordingly.

Arguments made against this legislation focus on the third factor identified by the Court in *Mathews, supra*, that of the government's interest in not instituting additional procedures. It has been claimed that allowing counsel or other representatives to be present during employee questioning will disrupt day-to-day agency functioning and impose too great administrative costs in the affects on supervision and discipline.

H.R. 3783, however, would not apply to routine exchanges during working hours when the employee is offered instruction, counselling, or cautionary statements, the kind of "run-of-the-mill shop-floor conversations" recognized as permissible in *Weingarten, supra*, at 284-5. The bill's requirements would only apply when charges of misconduct are being considered and questioning is to be undertaken.

The government is not, of course, required to provide or to pay for the employee's representation, and any administrative or financial burden created by having to provide the employee with written charges and notification of certain rights is bound to be negligible. Virtually the only burden that the government could realistically legitimately claim is that the imposition of discipline may be somewhat delayed. Yet the maximum loss of time is only five days, and much more time than is already required by existing notice and hearing requirements. Of course, it can be expected that not all employees who are charged will desire representation, nor that those who do will expend all five available days, especially given the availability of union officials for representation. Even if the full five days is utilized, the government is free to continue its investigation in every respect save that of interviewing the employee. See *Weingarten, supra*, at 258.

Finally, the added reliability of the bill's proposed proceeding would inure to the government's benefit as well as the employee's. As the Supreme Court recognized in *Weingarten, supra*, a knowledgeable representative "could assist the employee by eliciting favorable facts, and save the employee production time by getting to the bottom of the incident occasioning the interview." *Id.* at 263. This consideration of the factors leads unmistakably to the conclusion that the rights extended by H.R. 3793 provide employees under investigation with full and appropriate due process protection. This protection is made meaningful by the application of an exclusionary rule that would not permit disciplinary action to be grounded upon evidence obtained in violation of these provisions. Recognizing the importance of the employee's interests at stake, the bill also provides that appeals from adverse action taken in violation of the safeguards may be taken by *all* employees to the Civil Service Commission, and not just be those employees now entitled to appeals of adverse action in all circumstances. This right of appeal and the built-in exclusionary rule are necessary to accomplish the goals of employee protection intended by this legislation. The ACLU strongly supports this entire scheme.

The only caveat we would offer the Committee concerns subsection (b) of Section 7171, which would require that a representative of an employee of the NSA, CIA or FBI also be a security-cleared employee of the same agency. While it is somewhat difficult to see how an investigation into employee misconduct would originally involve sensitive documents or information, we believe that this security goal can better be achieved by permitting the employee of one of these agencies to be represented by any person able to obtain a security clearance commensurate with the classification of the material relevant to the investigation. The additional requirement that the representative also be an employee of the agency accomplishes nothing, and only interferes with the employee's right to be represented by the person truly of his or her own choosing, excluding at the same time any chance for representation by a federal employee union representative not an agency employee.

We would therefore urge the Committee to consider this one question, and otherwise offer our wholehearted support for H.R. 3793.

NATIONAL FEDERATION OF
PROFESSIONAL ORGANIZATIONS
1220 19th Street, N.W.
Washington, D. C. 20036

August 22, 1977

Honorable William L. Clay, Chairman
Subcommittee on Civil Service
House of Representatives
406 Cannon House Office Building
Washington, D.C. 20515

Re: H.R. 3793

Dear Mr. Chairman:

We are a federation of 11 Federal professional societies, composed of approximately 30,000 Federal employees, and we are writing to you to support H.R. 3793, a bill to provide a right of notice and representation to Federal employees during questioning regarding misconduct.

First, we would like to say that we are wholly in accord with the purposes sought to be accomplished by this bill. In the past, Federal employees have frequently been ordered to attend questioning by agency investigators without any knowledge of what the subject will be, and without any opportunity to refresh their recollection and prepare for it. The employee is not entitled to have counsel present to assist him, and to inform him of his rights, and any such request by the employee is usually rejected summarily. We endorse and support the bill wholeheartedly.

Second, in one respect we do not think that the bill goes far enough in that it does not establish the extent to which the employee's self incriminating statements made during the investigation may be used against him, nor the consequences of his refusal to answer. Up until the present, the Civil Service Commission has upheld agency discharges based on incriminating statements made by the employee in the course of such investigations. It has also upheld agency discharges of employees who have refused to answer. These decisions have been upheld by the courts. For example, see Anonymous v. Kissinger, 163 App. D.C. 92 499 F.2d 1097 (1974). In Kalkines v. United States, 202 Ct. Cls. 1123, 473 F.2d 1391 (1973), the Court of Claims held that an employee must answer at an agency interrogation, if he is given immunity from criminal prosecution. However, he need not be given immunity from a discharge, based on his answers. The Court of Claims said:

"But a governmental employer is not wholly barred from insisting that relevant information be given it; the 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."

Other agencies have held to the contrary. For many years the Civil Aeronautics Board had the function of suspending or revoking airman pilot

certificates on complaints filed by the Administrator of the Federal Aviation Administration. In Lee, Administrator v. Brubaker and Olsen, 19 C.A.B. 885 (1954), the Civil Aeronautics Board held that where two airmen had testified before a CAB aircraft accident investigation, after claiming their Fifth Amendment rights, and having been granted immunity, the testimony given by them could not be used in a subsequent certificate revocation proceeding, on the ground that it was a punitive, disciplinary proceeding, although a civil action, and was governed by Fifth Amendment principles. Affirmed: Lee, Administrator v. Civil Aeronautics Board, 225 F.2d 950 (D.C. Circuit, 1955).

We can appreciate that an agency may have good and sufficient reasons to want to interrogate an employee, other than for the purpose of coercing him to provide evidence to be used against him in a subsequent discharge proceeding. If, for example, an employee had embezzled a large amount of public money, the agency might feel it to be more important to ascertain what he did with it and to get it back, than to subject the employee to criminal or discharge proceedings. If so, this is the agency's right, and the employee should be compelled to answer. However, he should not be compelled to give evidence which will then be used against him in a future criminal or civil punitive proceeding.

An agency should not be entitled to build a case to discharge an employee by forcing him to testify against himself, or because he refuses to answer. If an employee cooperates with an agency investigation into an act of misconduct, he is still subject to prosecution or discharge for the misconduct, but he should not be prosecuted or discharged because of evidence resulting from his cooperation.

We therefore request that a new subsection be added to the bill, as Section 7171(d), to meet this employee need. The following is adapted from the Federal Aviation Act of 1958, Section 1004(i), 49 U.S. Code, Section 1484.

Section 7171(d)

No employee shall be excused from testifying, or from producing books, papers or documents in the course of any agency investigation on the ground, or for the reason, that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no employee shall be prosecuted or subjected to any civil penalty or forfeiture including adverse action, for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against incrimination, to testify or produce evidence, documentary or otherwise, except that any employee so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

We greatly appreciate the opportunity to submit these comments.

Sincerely,

James D. Hill
Executive Director

UNITED STATES CIVIL SERVICE COMMISSION
BUREAU OF POLICIES AND STANDARDS
WASHINGTON, D.C. 20415

AUG 16 1977

Honorable William Clay, Chairman
Subcommittee on Civil Service
House Post Office and Civil Service Committee
House of Representatives
Washington, DC 20510

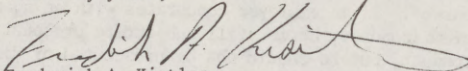
Dear Chairman Clay:

I appreciated the opportunity you gave me on July 21 to express the Civil Service Commission's views on H.R. 3793.

During questioning I promised to provide you with further information on adverse action appeals. I am enclosing statistical data on the adverse actions taken by agencies and the percentage of those resulting in appeals. Also enclosed are data on the different kinds of adverse actions taken, and the appellate decisions rendered by the Federal Employee Appeals Authority (FEAA).

If additional information is needed, please contact Ms. Jeanette Neville (632-6077) of my staff.

Sincerely yours,


Frederick A. Kistler
Director

Enclosures

Section 7511 of title 5, United States Code, defines adverse action as a "removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay."

ADVERSE ACTIONS

<u>Nature of Action</u>	<u>FY 1975</u>	<u>FY 1976</u>
- Removal Actions		
o Separation - Inefficiency	340	226
o Separation - Declined Relocation	447	538
o Separation - Declined Assignment	112	85
o Separation - Disability	319	528
o Removal - Pre-appointment conditions	180	236
o Removal for Cause	<u>2,581</u>	<u>2,925</u>
- Total Appealable Removal Actions	3,979	4,538
- Suspension - More Than 30 days	138	187
- Change to Lower Grade	<u>7,565</u>	<u>12,852</u>
TOTAL APPEALABLE ADVERSE ACTIONS	11,682	17,577

Adverse personnel actions taken during Fiscal Year 1976 increased by 50% over FY 1975 with most of the increase coming from change-to-lower-grade actions. Most of the change-to-lower-grade actions were the result of implementation of new wage grade standards. The 70% increase in these actions in FY 1976 was the largest increase since implementation under the Federal Wage System began to result in numerous changes-to-lower-grade in FY 1970, and the first such increase in the past four years. The Federal Employee Appeals Authority (FEAA) continued to receive appeals in close to 40% of all appealable adverse actions taken.

Adverse Actions Taken by Major Federal
Agencies - FY 1976

<u>Agency</u>	<u>Total Adverse Actions</u>	<u>Percent of Adverse Actions Taken</u>	<u>Percent of Total Appeals to FEAA</u>
U.S. Postal Service	8,266	47.0	21.3*
Department of Defense (combined)	7,597	43.3	40.7
Army	2,788	15.9	16.0
Navy	2,312	13.2	12.4
Air Force	1,487	8.5	9.3
Other DOD	1,010	5.7	3.0
Veterans Administration	502	2.9	3.0
Department of Transportation-	192	.9	3.1
Department of Agriculture	161	.9	1.9
Department of the Treasury	156	1.1	4.4
Department of Health, Education, and Welfare	117	.7	2.3
General Services Administration	99	.5	4.9
Department of Commerce	97	.5	.7
Department of Justice	95	.5	2.0
Department of the Interior	60	.3	2.6
National Aeronautics and Space Administration	23	.1	.2
All other Agencies	212	1.3	12.9

*Adverse action appeals to Federal Employees Appeals Authority from Postal Service employees are limited by law to veterans.

DECISIONS OF THE FEDERAL EMPLOYEE
APPEALS AUTHORITY

An Overview of Adverse Action Appeals

A relatively high percentage of cases (25% in FY 1975 and 21% in FY 1976) were rejected for being untimely filed or because they were not within the jurisdiction of Commission regulations. About two-fifths of these cases were not filed within the prescribed time limits and three-fifths did not come within the jurisdiction of Commission regulations for both fiscal years. Among the appeals rejected as not within the jurisdiction or purview of Commission regulations are appeals from non-veterans in the Postal Service and appeals from alleged involuntary actions which are found to be voluntary.

In the following table, the percentages of affirmed and reversed cases are computed on the basis of only those cases accepted for adjudication (total, minus those rejected for reasons of timeliness or jurisdiction).

<u>Adverse Action Appeal Decisions</u>	<u>FY 1975</u>	<u>FY 1976</u>
<u>Total Cases</u>	1,862	2,569
Appellants Affected	2,728	4,133
Rejected for Timeliness or Jurisdiction	459	545
% Rejected	25%	21%
<u>Total Adjudicated</u>	1,403	2,024
Affirmed Agency Actions	935	1,354
% Affirmed	67%	67%
Reversed Agency Actions	463	663
% Reversed	33%	33%
- Reversed on Procedures	(288)	(452)
- % Reversed on Procedures	(21%)	(22%)
- Reversed on Merits	(175)	(211)
- % Reversed on Merits	(12%)	(11%)
Modified Penalty	5	7
% Modified	0.4%	0.3%

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

FLRC No. 75P-2

STATEMENT ON MAJOR POLICY ISSUE

As previously announced, the Council determined, pursuant to section 4(b) of the Order and section 2410.3 of its rules of procedure (5 CFR 2410.3), to provide a major policy statement on the following issue which the Council found has general application to the Federal labor-management relations program:

Does an employee in a unit of exclusive recognition have a protected right under the Order to assistance (possibly including personal representation) by the exclusive representative when he is summoned to a meeting or interview with agency management, and, if so, under what circumstances may such a right be exercised?

Concurrently, in accordance with section 2410.6 of its rules (5 CFR 2410.6), the Council invited all interested parties to express their views in writing with regard to the manner in which the issue should be resolved. The responses submitted to the Council, including those from major agencies and labor organizations, were most thorough and helpful and have been carefully considered.

The provisions of the Order which are immediately relevant to the resolution of the above-stated issue are contained in sections 1(a) and 10(e), as follows:^{1/}

Section 1. Policy. (a) Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. . . . The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section, and that no interference, restraint, coercion, or discrimination is practiced within his agency to encourage or discourage membership in a labor organization.

^{1/} Section 7(d)(1) of the Order, which refers to an employee's "choosing his own representative in a grievance or appellate action," is not apposite, since, as the Council has previously held, that section does not grant an employee any right to union representation, but merely ensures that exclusive recognition does not prevent an employee from selecting his own representative (except under a negotiated grievance procedure) if such right is granted elsewhere under law or regulation. Internal Revenue Service, Chicago District, A/SLMR No. 279, FLRC No. 73A-32 (Oct. 22, 1974), Report No. 58.

Sec. 10. Exclusive recognition.

(e) When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

For convenience in considering whether an employee has a right under these provisions of the Order to assistance or representation by the exclusive representative, when he is called to meet with management, we shall consider the problem first with respect to formal discussions between the employee and management, and next with respect to nonformal discussions (particularly investigative interviews) initiated by management officials.^{2/}

1. Formal discussions conducted by management. Section 10(e) of the Order, in the last sentence thereof, specifically requires that an agency afford the exclusive representative an opportunity to be represented at any formal discussion between management and an employee concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit. While this right of representation at formal meetings plainly inures to the union, we are of the opinion that the employee involved likewise is vested with a derivative or companion right to insist that the agency fulfill its express obligation under the Order, when the employee deems such representation imperative for the protection of his own employment interests.

Our conclusion in this regard is compelled by the clear intent and purpose of the last sentence of section 10(e) itself. For that sentence of the Order was manifestly designed to provide the union with the opportunity to safeguard the interests of unit employees at formal meetings held by management with those employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions. And it would be wholly inconsistent with that purpose to prohibit the immediate beneficiaries of that protection from invoking the agency's obligation under the Order to sanction union representation, if the agency wishes to proceed with such meetings.^{3/}

Accordingly, we hold that an employee has a protected right under the last sentence of section 10(e) of the Order to the assistance or representation by the exclusive representative, upon the employee's request, when he is summoned to a formal discussion with management concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

2. Nonformal meetings or interviews held by management. Unlike the express provisions relating to formal discussions, section 10(e) provides no right of a union to representation at nonformal meetings or interviews held by

[FOOTNOTES ARE AT END OF ARTICLE]

management with an employee (absent agreement of the parties),^{4/} and therefore no derivative or companion right of an employee to such assistance or representation may be predicated on that section of the Order. However, the question remains whether section 1(a) of the Order may be deemed to grant an employee any such right to representation at nonformal meetings or interviews held by management with an employee particularly at nonformal investigative interviews called by management with the employee.

Section 1(a), as here pertinent, grants each employee "the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization, or to refrain from any such activity," and guarantees that "each employee shall be protected in the exercise of this right." In our opinion, these provisions fail to establish any right of an employee to union assistance or representation at a nonformal investigative interview or meeting conducted by management on matters of individual concern to that particular employee.

Clearly, nothing in the literal wording of section 1(a) refers either to union attendance at a meeting or interview between employees and management or to any employee right to request such union attendance when summoned to a meeting or interview by management. Rather, the subject provisions are expressly confined to the employee's right to organize, become a member of, and support, that organization, or to refrain from any such activity.

Moreover, the stated purposes of the Order would not be effectuated by an interpretation of section 1(a) to afford such right of an employee to union assistance or representation at a nonformal investigative interview or meeting regarding his own possible misconduct and without immediate significance to the employment interests of other personnel in the bargaining unit. Thus, the preamble of the Order, insofar as it pertains to individual employees, refers merely to their participation "in the formulation and implementation of personnel policies and practices," and to the finding that such participation should be improved through proper relations between "labor organizations and management officials."^{5/} While the Order therefore seeks to enhance employee participation, particularly through their exclusive representative, in the formulation and implementation of personnel policies and practices, no intent is reflected to afford union representation at a nonformal investigative interview or meeting where such right of the employee has not been established as a personnel policy or practice of the agency involved.

Furthermore, as to the purposes of the Order, a detailed framework of statutes and regulations already protects an employee in the Federal program against arbitrary action by an agency when serious misconduct is alleged. Thus, for example, adverse actions sought to be taken by agencies against employees (i.e., removals, suspensions for more than 30 days, furloughs without pay, or reductions in rank or pay) are subject to the rigid requirements of 5 U.S.C. Chapters 75 and 77,^{6/} and of FPM Supplement 990-1, Parts 752 and 772, the latter specifically including the right of representation upon appeal to the Commission from agency actions.^{7/} And in matters not covered by statutory appeals procedures, and not otherwise in conflict with statutes or the Order, negotiated grievance procedures, including binding arbitration, are sanctioned for employee protection under section 13 of the Order. Consequently, no substantial purpose of the Order would be served by an interpretation of section 1(a) to include the right of an employee to union representation or assistance at a nonformal investigative interview or meeting to which he is called by management.

To repeat, therefore, an employee in a unit of exclusive recognition does not have a protected right under the Order to assistance or representation at a nonformal investigative meeting or interview to which he is summoned by management.^{8/}

2/ Our concern here is with the duty, if any, of the agency under the Order to permit union representation when requested by the employee, not with such ancillary questions as the obligation of the union to represent the employee, the negotiability of proposed waivers of any employee right to union representation, or the like.

3/ Our determination as to an employee's right to union assistance or representation at a formal discussion concerning matters adverted to in the last sentence of section 10(e) is consonant with the result reached by the Assistant Secretary in U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278 (June 25, 1973), and related cases, although we do not adopt the reasoning relied upon by the Assistant Secretary in reaching that result. See United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, A/SLMR No. 400, FLRC No. 74A-54 (Oct. 23, 1975), Report No. 87. This result, which has not been questioned in any appeal before the Council, has been tacitly recognized by the Federal community over an extended period of time and no persuasive reason has been advanced for reaching a contrary result in the instant proceeding.

4/ As the Council has previously decided, the right of a union to be afforded the opportunity to be represented at a discussion between management and employees (unless otherwise agreed to by the parties) is confined to the circumstances set forth in the last sentence of section 10(e). National Aeronautics and Space Administration (NASA), Washington, D.C., A/SLMR No. 457, FLRC No. 74A-95 (Sept. 26, 1975), Report No. 84.

5/ The preamble of the Order reads in full:

WHEREAS the public interest requires high standards of employee performance and the continual development and implementation of modern and progressive work practices to facilitate improved employee performance and efficiency; and

WHEREAS the well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment; and

WHEREAS the participation of employees should be improved through the maintenance of constructive and cooperative relationships between labor organizations and management officials; and

WHEREAS subject to law and the paramount requirements of public service, effective labor-management relations within the Federal service require a clear statement of the respective rights and obligations of labor organizations and agency management:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including sections 3301 and 7301 of title 5 of the United States Code, and as President of the United States, I hereby direct that the following policies shall govern officers and agencies of the executive branch of the Government in all dealings with Federal employees and organizations representing such employees.

6/ Certain provisions of the Code applicable to veterans were extended to all employees in the competitive service under section 22 of the Order.

7/ FPM Supplement 990-1, Part 772, section 772.307(c), provides:

(c) Hearing procedures. (1) An appellant is entitled to appear at the hearing on his appeal personally or through or accompanied by his representative

8/ Cf. Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336, FLRC No. 74A-11 (June 18, 1974), Report No. 54; and Internal Revenue Service, Washington, D.C., Assistant Secretary Case No. 22-4056(CA), FLRC No. 74A-23 (Oct. 22, 1974), Report No. 58. The decision of the U.S. Supreme Court in NLRB v. Weingarten, 420 U.S. 251 (1975), upholding the right of an employee to union representation at an investigative interview under section 7 of the Labor-Management Relations Act (29 U.S.C. 157) clearly does not compel a contrary determination. Apart from other considerations, the literal provisions and stated purposes of the Order are dissimilar from those of the LMRA relied upon by the Court in its decision. Moreover, the Council, and not the NLRB, is the agency charged by the President under section 4(b) with the authority to "administer and interpret" the provisions of the Order, so the Council is without obligation to accord the special deference to the NLRB ruling in Weingarten which the Court stressed as a basis for its decision upon appeal in that case.

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

JUL 19 1977

Honorable Robert N. C. Nix
Chairman, Committee on Post Office
and Civil Service
Suite 309 Cannon House Office Building
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in reply to the Committee's request for the views of this Office on H.R. 3793, "To amend title 5, United States Code, to provide Federal employees under investigation for misconduct the right to representation during questioning regarding such misconduct."

The principal purpose of H.R. 3793 is to require the presence of counsel during any interrogation of an employee under investigation for misconduct which may lead to disciplinary action. The bill specifies that information or evidence obtained during such questioning cannot be used as the basis for suspension, removal or other disciplinary action unless the employee had prior written notice that he was under investigation, of the nature of his misconduct, and of his right to counsel during questioning including at least 5 days to obtain counsel.

In its report and testimony, the Civil Service Commission states a number of reasons for strongly opposing enactment of this bill.

We concur in the views expressed by the Civil Service Commission and, accordingly, strongly recommend against enactment of H.R. 3793.

Sincerely,

Naomi R. Sweeney

Naomi R. Sweeney
Acting Assistant Director
for Legislative Reference

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

July 20, 1977

Honorable Robert N.C. Nix
Chairman, Committee on Post
Office and Civil Service
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the Civil Service Commission's views on H.R. 3793, a bill "To amend title 5, United States Code, to provide Federal employees under investigation for misconduct the right to representation during questioning regarding such misconduct."

H.R. 3793 would provide that Federal civilian employees who were under investigation for misconduct which could lead to suspension, removal, or reduction in rank or pay would not be required to answer questions relating to the misconduct unless they were first advised in writing that they were under investigation for misconduct, the specific nature of the misconduct, and of their right to have a representative present during the questioning. The employees would have to be given a reasonable amount of time, not to exceed five working days, before questioning in order to obtain a representative. H.R. 3793 would prohibit the use of any employee admissions in subsequent actions for suspension, removal, or reduction in rank or pay unless the employees had been advised of their right to representation.

The second portion of the bill provides for an appeal to the Commission by employees disciplined on the basis of their admissions when they were not informed of the rights provided by the first portion of the bill.

The procedures provided in the bill are substantially the same as those required of the police in criminal investigations. The Civil Service

Commission believes that ample protections are presently provided by statute, Executive order, and Commission regulations for employees formally charged with serious misconduct. The provisions of the Veterans Preference Act (now codified in section 7512 of title 5, United States Code) require 30 days' advance written notice of proposed adverse action against a Federal employee who is a veteran, with opportunity to respond personally and in writing, to the charges. These protections were extended to all employees in the competitive service by Executive Order 10988, the predecessor of Executive Order 11491, which now governs the Federal Labor Relations Program. In addition, the Commission's regulations (Part 772 of title 5, Code of Federal Regulations) insure such employee protections as advance written notice of adverse action, reasonable time to reply, written decision by a higher level agency official than the proposing officer, appeal of the agency decision to the Commission, full hearing by the Commission, and written decision.

The Commission is deeply concerned about the effect that passage of this bill would have on personnel management in the Federal service. H.R. 3793 would provide protections to Federal employees similar to, but in some ways more extensive than, those provided to private sector employees under the National Labor Relations Act as interpreted by the Supreme Court in the decision of N.L.R.B. v. Weingarten Inc., 43 U.S.L.W. 4275 (February 19, 1975). In that decision, the Court recognized the right of an employee in private industry to have a representative present during investigatory interviews when the employee reasonably believes that the interview might lead to disciplinary action and when the employee asserts his right to representation. H.R. 3793 goes further in requiring that specific notice be given to the employee of his right to representation. Extension of "Weingarten" type protections to the Federal sector is inappropriate because Federal employees already enjoy statutory and regulatory rights and protections against arbitrary and capricious disciplinary actions whereas private sector employees do not have such rights and protections. The bill also ignores the Supreme Court's suggestion in the Weingarten case that employees may find positive benefits in cooperative discussions with managers.

The bill does not define "under investigation" or establish any meaningful criteria for determining the circumstances under which the procedural protections of proposed section 7171 would apply. While we question whether the bill is really intended to provide formal procedures for all instances when employees are to be questioned on potentially disciplinary matters (however minor), the general language of the bill could well lead to this kind of interpretation and/or application. The Commission feels strongly that informal counseling of employees by supervisors concerning their work should never be subjected to adversary procedures. One of the most effective management tools is appropriate and timely informal counseling of employees concerning the less favorable aspects of their work performance or conduct. (Counseling obviously assists the employee as well.) Part 735 of the Commission's regulations (title 5 of the Code of Federal Regulations), issued pursuant to Executive Order 11222, requires agencies to provide employee counseling concerning employee responsibilities and conduct. We believe that the broad provisions of this bill could make it difficult for superiors to counsel employees informally. Allegations of "fruit of the poisoned tree" would become commonplace. The very existence of this legislation would have a "chilling" effect on the willingness of supervisors to employ informal preventive measures which primarily benefit the employee whose performance or conduct needs improvement.

It has been argued that because the provisions of this bill would give

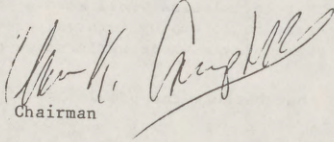
an employee the opportunity to secure representation at a pre-disciplinary stage, the employee would be able to avoid the stigma of a proposed adverse action. We believe the contrary--if the supervisor-employee relationship becomes an adversary one at an earlier stage more rather than fewer adverse actions are likely to be proposed. This is so because agency officials might well decide to omit preliminary informal questioning (which in many cases results in an understanding which makes an adverse action unnecessary) because the procedural requirements are substantially the same as those now required for a proposed adverse action.

H.R. 3793 would also provide that any civilian employee of an executive agency against whom an action is taken in violation of proposed section 7171, could appeal the violation to the Commission. We interpret the bill as extending appeal rights to cover probationary employees in the competitive service, all excepted service employees and temporary employees in both the competitive and excepted service. (The Commission currently has appellate jurisdiction over suspensions, removals, or reductions in rank or pay for competitive service employees who have completed their probationary periods and preference eligible employees in the excepted service with one year of continuous service.) Obviously, an extension of appeal rights like the one contemplated by H.R. 3793 would impose a burden on the Commission's appeals system which would seriously affect expeditious resolution of the cases that affect employees most adversely. More importantly, H.R. 3793 would grant many employees who have been excluded from past extensions of appeal rights what would amount to a right to appeal adverse actions. This is so because failure of an agency to advise employees of their right to obtain representation before questioning would most likely result in reversal of any action to suspend, remove, or reduce an employee in rank or pay whenever the employee exercised the appeal right granted by the bill. The Commission believes that extension of appeal rights to probationers, excepted service employees, and all temporary employees must be carefully considered.

In summary, the bill is modeled on the Miranda rule which applies to sharply adversary situations where police have in custody individuals who have become "accused" persons. Such a process could well be applied to nonadversarial situations in which a manager who lacks sufficient information to decide whether it is worth charging anyone, is precluded from engaging in cooperative discussion to develop an informal judgment and must instead freeze the situation into adversarial form at high procedural cost and at the risk of being unable ever to solve what may prove to be a simple matter which merits no charges. We also feel that Federal employees already have ample protections against arbitrary and capricious agency actions. Accordingly, the Commission believes that the provisions of H.R. 3793 are extremely undesirable, unnecessary, and unwarranted, and strongly urges that the Committee not approve the bill. The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

By direction of the Commission:

Sincerely yours,


Chairman

The Director of Central Intelligence

Washington, D.C. 20505

25 August 1977

Honorable Robert N. C. Nix, Chairman
Committee on Post Office and Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to offer my views on H.R. 3793. Under this bill, an employee being investigated for "misconduct which could lead to suspension, removal, or reduction in rank or pay" can be questioned only after he has been advised in writing of the fact he is under investigation and has been given up to five days to obtain a representative of his choice to be present during questioning. This bill is virtually identical to H.R. 6227, introduced in the last Congress; and, for the reasons stated below, we continue to oppose this legislation.

We share the concerns raised already by other Government agencies regarding H.R. 3793. In addition, I would like to draw the Committee's attention to considerations relating to the bill's potential impact on the the National Foreign Intelligence Program.

The administration of the Central Intelligence Agency is governed by the National Security Act of 1947 and the Central Intelligence Agency Act of 1949. The former imposes on the Director of Central Intelligence responsibility for protecting intelligence sources and methods from unauthorized disclosure (50 U.S.C. 403). It also grants the Director the discretion to terminate the employment of any officer or employee of the Agency "whenever he shall deem such termination necessary or advisable in the interests of the United States" (50 U.S.C. 403). The Director of the National Security Agency has similar termination authority and, in addition, is required by law to adhere to personnel security standards and procedures (50 U.S.C. 831 - 835). These statutory authorities and requirements are considered to be absolutely essential in the management of our foreign intelligence efforts. I believe the requirements of section 7171(b) of H.R. 3793, while affording certain safeguards for investigations of employees of the CIA, the National Security Agency and the FBI, conflict with these statutory authorities and would undermine important managerial programs which have as their purpose the protection of intelligence sources and methods.

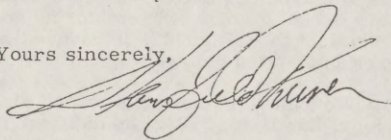
In fulfilling their statutory responsibilities, the Central Intelligence Agency and the National Security Agency have developed personnel and security programs which are unique. These programs, which in the case of the National Security Agency are mandated by law, are designed to protect both the national security and the rights and privacy of employees. They also reflect the special responsibility upon these agencies to insure loyalty, security consciousness, and the personal integrity and stability of employees. This attitude of trust and confidence is imperative in identifying and attending to potential problems before serious injury

to the national security occurs. The adversary setting encouraged by the requirements of H.R. 3793 would undermine this firm basis of understanding and cooperation which sustains the integrity of an intelligence organization.

Perhaps more than other institutions, intelligence organizations, if they are to be effective, must treat their personnel fairly. In most instances, the practices and regulations of the Central Intelligence Agency and the National Security Agency are fully consistent with the underlying purpose of H.R. 3793. However, there are circumstances in which applying such a blanket statutory requirement to the Government's intelligence agencies would be inappropriate and inadvisable. Even though sections 7171(b) and 7172(b), which provide for the employee's representative to be an employee of the same agency and for the action to be reviewable only by the President, meet some of the special considerations which must apply in the case of our foreign intelligence agencies, I believe it is essential that these agencies be fully exempted from H.R. 3793 in light of their unique missions and statutory authorities.

The Office of Management and Budget has advised there is no objection to the submission of this report from the standpoint of the Administration's program.

Yours sincerely,

A handwritten signature in dark ink, appearing to read "Stansfield Turner", written in a cursive style.

STANSFIELD TURNER

95TH CONGRESS
1ST SESSION

H. R. 3793

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 22, 1977

Mrs. SPELLMAN introduced the following bill; which was referred to the Committee on Post Office and Civil Service

A BILL

To amend title 5, United States Code, to provide Federal employees under investigation for misconduct the right to representation during questioning regarding such misconduct.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That (a) chapter 71 of title 5, United States Code, is
4 amended by adding at the end thereof the following new
5 subchapter:

6 "SUBCHAPTER III—EMPLOYEE RIGHTS

7 "§ 7171. Right to representation during questioning

8 "(a) Any employee of an Executive agency under in-
9 vestigation for misconduct which could lead to suspension,
10 removal, or reduction in rank or pay of such employee

1 shall not be required to answer questions relating to the
2 misconduct under investigation unless—

3 “(1) the employee is advised in writing of—

4 “(A) the fact that such employee is under
5 investigation for misconduct,

6 “(B) the specific nature of such alleged mis-
7 conduct, and

8 “(C) the rights such employee has under para-
9 graph (2) of this subsection, and

10 “(2) the employee has been provided reasonable
11 time, not to exceed 5 working days, to obtain a repre-
12 sentative of his choice, and is allowed to have such
13 representative present during such questioning, if he so
14 elects.

15 “(b) For the purpose of subsection (a) (2), an em-
16 ployee of the Central Intelligence Agency, National Security
17 Agency, or the Federal Bureau of Investigation who is under
18 investigation for misconduct may have a representative of
19 his choice present during such questioning, except that such
20 representative shall be—

21 “(1) an employee of the agency in which the
22 employee who under investigation for misconduct is
23 employed, and

24 “(2) approved by the agency for access to the in-
25 formation involved in the investigation.

1 “(c) Any statement made by or evidence obtained
2 during questioning of an employee of an Executive agency
3 may not be used as evidence in the course of any action
4 for suspension, removal, or reduction in rank or pay sub-
5 sequently taken against the employee, unless the require-
6 ments of paragraphs (1) and (2) of subsection (a) of
7 this section were complied with during such questioning.

8 **“§ 7172. Right to appeal**

9 “(a) Except as provided under subsection (b) of this
10 section, an employee of an executive agency against whom
11 any action is taken for suspension, removal, or reduction in
12 rank or pay in violation of section 7171 of this title, and
13 who is not otherwise entitled to appeal such action to the
14 Civil Service Commission, is entitled to appeal such action
15 to the Commission if the employee submits the appeal in
16 writing within a reasonable time after receipt of
17 notice of such action. Under regulations prescribed by the
18 Commission, the employee is entitled to appear personally
19 or through a representative of his choice. The Commission,
20 after investigation and consideration of the evidence sub-
21 mitted, shall submit its findings and recommendations to
22 the administrative authority and shall send copies of the
23 findings and recommendations to the appellant or his
24 representative. The administrative authority shall take

1 the corrective action that the Commission finally
2 recommends.

3 “(b) Under such regulations as the President may pre-
4 scribe, an employee of the Central Intelligence Agency,
5 National Security Agency, or the Federal Bureau of In-
6 vestigation against whom any action is taken for suspen-
7 sion, removal, or reduction in rank or pay in violation of
8 section 7177 of this title is entitled to appeal such action
9 solely to the President, or to an appropriate designee of the
10 President, whose findings and recommendations shall be
11 final and conclusive.

12 **“§ 7173. Regulations**

13 “The Civil Service Commission shall prescribe regula-
14 tions necessary to carry out the purposes of this subchapter,
15 except section 7172 (b) of this title.”.

16 (b) The analysis of chapter 71 of title 5, United
17 States Code, is amended by adding the following at the end
18 thereof:

“SUBCHAPTER III—EMPLOYEE RIGHTS

“Sec.

“7171. Right to representation during questioning.

“7172. Right to appeal.

“7173. Regulations.”.

19 SEC. 2. The amendments made by the first section of this
20 Act shall take effect on the ninetieth day beginning after the
21 date of enactment of this Act.

STATEMENT OF HON. GLADYS NOON SPELLMAN, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF MARYLAND

Mr. Chairman, I would like first to thank you and the members of the subcommittee for the opportunity to testify in support of my bill, H.R. 3793, legislation which I feel is of vital importance to Government employees.

The Civil Service Commission has endorsed and recognized the right of an employee to have counsel or other representatives of his choice present during formal proceedings which may lead to disciplinary action. The Commission should be commended for the procedural safeguards which it has provided under its regulations. However, it should be stressed that these procedural safeguards apply during formal proceedings and not during preliminary investigations (i.e., the informal questioning of employees by employers) which often lead to the imposition of formal charges. Therein lies the crux of the problem which H.R. 3793 addresses.

The existing regulatory right to representation ignores the fact that when an employer questions an employee, the employer generally knows beforehand the reasons for his questions and, in most cases, also knows what penalty he plans to impose if the employee's answers are not satisfactory. The questioning of the employee is often a critical stage in the process of determining whether disciplinary action will be taken. And, as the Supreme Court noted in *National Labor Relations Board v. Weingarten*: "A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating facts."

Thus, H.R. 3793 would provide Government employees with counsel during the period when the determination is being made as to whether formal charges should be initiated. Since, in many instances, this period is the most crucial with respect to the outcome of the case, an employee should have the right to have a representative present at that point during the proceedings rather than only later on when it might be too late for counsel or a representative to be of maximum support to the client.

Arguments to the contrary, the enactment of this legislation would have limited application to, and effect upon, day-to-day supervisor-employee relationships. The right to representation would arise only when the questioning pertains to misconduct which could lead to suspension, removal, or reduction in work or pay—in other words, when the questioning pertains to serious misconduct. If the employee realizes that the misconduct under investigation is of a minor nature and would not lead to suspension, removal, or reduction in rank or pay, then the employee need not be advised of his right to have a representative present. This would hold true even in cases where the misconduct could warrant substantial disciplinary action, but the supervisor does not intend to initiate such action. In any case, however, it should be noted that an employee cannot base a refusal to answer questions on the provisions of this legislation. And, in turn, the sole sanction against an employer for failing to accord the notice of the right to representation, is the inadmissibility of any statements or evidence obtained from the employee during the questioning in the course of any action for suspension, removal, or reduction in rank or pay to be taken subsequently against the employee.

Furthermore, I would like to make the point that the provisions of this legislation would provide Government employees with rights currently enjoyed by their counterparts in the private sector. Again, I refer to the case of *National Labor Relations Board v. Weingarten*, in which the Supreme Court recognized the right of an employee in the private sector to have a representative present during investigatory interviews which the employee reasonably believes might lead to disciplinary action.

In summary, I believe the enactment of H.R. 3793 is essential if we are to provide Government employees with the rights necessary to effectively protect themselves against adverse action proceedings. And, it will do so without interfering with the daily operations of Federal agencies.

STATEMENT OF KENNETH T. BLAYLOCK, NATIONAL PRESIDENT, AMERICAN
FEDERATION OF GOVERNMENT EMPLOYEES

The American Federation of Government Employees, which represents over 700,000 Federal workers with exclusive recognition agreements under Executive

Order 11491, welcomes the opportunity to appear and testify on H.R. 3793, a bill to provide Federal employees under investigation for misconduct the right to representation during questioning regarding such misconduct.

On March 26, 1975, we appeared before the House Subcommittee on Retirement and Employee Benefits in support of H.R. 1674, a similar bill, which provided it would be unlawful for any officer of any executive department to require an employee under investigation for misconduct to submit to interrogation which could lead to disciplinary action without the presence of a representative, if the employee requests such representation.

Since that time, the Federal Labor Relations Council has, in a major policy decision (FLRC No. 75P-2), dated December 2, 1976, ruled that: "An employee in a unit of exclusive recognition does not have a protected right under the order to assistance or representation at a nonformal investigation meeting or interview to which he is summoned by management; but such right may be established through negotiations conducted by the exclusive representative and the agency in accordance with section 11(a) of the order."

EFFECT OF THE FLRC DECISION

This policy decision is clear. It establishes that in the Federal service there is no right to counsel or representation, unless management decides to give it. In effect, this decision, made in the light of the Supreme Court's decision in *N.L.R.B. v. J. Weingarten, Inc.*, 95 S.Ct. 959 (1975), relegates Federal employees, and their unions, to a second class status when compared with employees in the private sector covered by the National Labor Relations Act.

Figures obtained in 1976 from the Labor Retrieval Information System, which provides data on Federal sector labor agreements and is maintained by the Civil Service Commission, reveal that of the 66 Federal labor agreements which took effect since the FLRC decision, only thirty six grant employees rights to representation in various types of meetings of an informal nature with management.

The recent experience of one of our AFGE locals in attempting to negotiate such a provision illustrates the problem.

In the Fall of 1976, AFGE Local 916 initiated a round of contract bargaining on this specific issue with the Oklahoma City Air Logistics Center, which is a component of the Air Force Logistics Command, Department of the Air Force.

During the first round of negotiations, the employer declared representation rights as non-negotiable, and cited existing agency regulations as jurisdiction for this position. Despite a ruling from the Defense Department that these issues were subjects for bargaining, the employer still refused to sit down at the table to negotiate them with the union. Subsequently, Local 916 had to resort to 6 full days of picketing at Tinker AFB in order to force contract negotiations on the representation issue.

Once bargaining had resumed, the employer still refused to negotiate this issue. On February 1, 1977, therefore AFGE filed a request with the Federal Services Impasses Panel (FSIP) to consider an impasse under section 17 of E.O. 11491. A fact-finding hearing was held and the FSIP subsequently ruled the following provision should be incorporated into the agreement between the parties: "When the employer conducts a nonformal, investigatory interview, the employee being interviewed is entitled, upon the employee's request, to the presence of a Union representative, if the employee has reasonable grounds to believe that the interview may result in disciplinary action against him or her."

Although the recommendation of the FSIP was clear, the employer still did not accept it, and another show-cause hearing was held by the FSIP. After this hearing, the FSIP handed down a decision and order binding on both parties and the recommended provision was included in the final contract.

I wish this were the end of the story, but the battle won here by Local 916 does not constitute victory in the war. FSIP decisions are binding only upon the parties to the dispute covered by that decision. The decision in this case does not extend representational rights binding upon the Department of the Air Force, the Department of Defense, or the Government as a whole. Each AFGE local must wage this same fight if the local base commanders decide to resist negotiations on such representation rights. This experience argues well for the passage of H.R. 3793. It is badly needed by all employees of the Government including those represented by unions.

EXISTING PROTECTIONS ARE INADEQUATE

We find little merit in arguments that present regulations of the Civil Service Commission and executive branch agencies assure employees adequate protection in the early stages of disciplinary action against an employee, before formal charges are actually filed. At this time, for the reasons we have mentioned, the vast majority of Federal employees are still denied representation, even if they are in exclusive units of recognition and even if they request the presence of a union representative, during the preliminary phases of a disciplinary investigation. By the time they are entitled to such representation, the basis for formal proceedings against them have actually been completed or the formal proceedings begun. In the meantime the employee may have been subjected to improper treatment, may not have understood his rights or the significance of the investigation. Many employees are actually unaware of even such limited rights as they now have.

Anthony Mondello, former General Counsel of the Civil Service Commission, in testifying on H.R. 1674 during the 94th Congress admitted that there exist enormous disparities between agencies when it comes to efforts to inform employees of relevant procedures appearing in title 5 of the Code of Federal Regulations.

Despite the efforts made by our union and other employee organizations in the Federal sector, therefore, we must still assume that the existing administrative and investigative appeals systems remain a mystery to the majority of Government workers. This is especially true in agencies which make no great effort to inform employees of their rights and how to exercise them during the preliminary stages of such proceedings.

The Federal Personnel Manual, useful to the trained personnel experts available to management, has little utility for the investigative stages or adverse actions. Indeed for those workers who lack the required expertise to accurately interpret its provisions, it is of little assistance even as to the formal procedures governing appeals.

This deficiency has been recognized by the General Accounting Office, which in a recent report (B-179810) dated February 8, 1977, argued that: "Federal employees generally rely on their agency for information and assistance in appeal matters. A number of employee representatives commented that individuals are not given adequate appeal information and assistance by the agencies. We noted that in those agencies contacted, information given to employees on statutory appeals was generally limited. In one agency, new employees were orally briefed on appellate protections during an orientation seminar. In most other instances the available literature on appeals was either very broad or incomplete."

This lack of "outreach effort" on the part of the agencies might be more understandable and acceptable if the appeals systems were relatively simple and the procedures and provisions otherwise readily accessible to most employees.

AN EXAMPLE OF THE INADEQUACY OF PRESENT PROTECTIONS

A very recent example of why legislation providing the right to representation is urgently needed by Federal workers, involves employees of the Food and Drug Administration in Chicago, Ill. The employees recently participated in a formal factfinding investigation conducted by the Civil Service Commission concerning a case pending before the Federal Employee Appeals Authority. AFGE members involved in the investigation felt their rights were being violated in the following manner:

- (1) employees being questioned were not informed of their right to have a representative present during the interview;

- (2) interviewees were initially denied the right to have competent counsel or a representative review their statements prior to signature, and only after strong objections were lodged with the HEW and FDA was a review allowed; and

- (3) testimony offered was not strictly voluntary as the statement they signed indicated; rather, by regulation of the CSC, employees were required to be interviewed and to sign the statements.

The situation became so intolerable that Frank Fucile, Jr., president of AFGE Lodge 112, was forced to write a letter to the Regional Director of the Civil Service Commission calling attention to the irregularities and improprieties of the investigation.

We have attached Mr. Fucile's letter to our statement, for the information of the subcommittee. We would like to point out that these abuses of the investigatory powers of the Civil Service Commission occurred during a formal proceeding. The abuses which occur during informal proceedings are common place.

The foregoing is but one graphic example of how employees' rights to representation can be ignored, even when those rights are presumably protected by statute or regulations. It demonstrates the need for establishing a right to some form of representation during the informal stages of an investigation if Federal employees are to be shielded from arbitrary and potentially harmful abuses of official authority.

We would now like to turn our attention to the specific provisions of H.R. 3793, and propose a few ways in which we believe some of its features can be improved. On the whole, we strongly endorse this legislation.

Our first concern relates to the language in sec. 7171(a), which establishes the right to representation during questioning. We are of the opinion that the phrase "under investigation for misconduct which may lead to suspension, removal, or reduction in rank or pay," may be too restrictive in defining the types of situations in which an employee may experience the need for representation during the preliminary phase of an investigatory process.

First, an employee may be required to be present at an interview with a supervisor in which neither party is then fully aware that misconduct charges against that employee may develop as a result. Rather, only during the course of the interview might such an awareness arise, and the employee should have the right to request representation at that point before proceeding further with the interview.

The term "misconduct" also implies malfeasance on the part of the employee and does not cover situations of nonfeasance, in which the employee has not done something wrong, but, for example, has allegedly failed to act as required by orders or regulations. The language in this section should be broadened accordingly.

Second, there may be investigations which do not result in actual "adverse actions," as defined in the bill, being taken against the employee, but which can still lead to other types of punitive measures. Letters of reprimand placed by the employer in a personnel file constitute but one example. Once an employee has accumulated two or three of these in his "jacket", chances of further promotion tend to evaporate rather rapidly. Other kinds of reprisals and retaliation are familiar—such as, job reassignments, changes in work assignments, harassing supervision, harsh criticism of work products, setting of unrealistic deadlines, and so on. Even if no formal charges or actions are filed or taken, a supervisor may damage the reputation of an employee in conversations with superiors or coworkers, based on one-sided and inaccurate information obtained during an informal interview in which the employee lacked adequate representation.

We would, therefore, like to suggest a language change, based on the contract provision recommended by the FSIP, which would help correct these situations. Sec. 7171(a) would then read: "Any employee of an executive agency under questioning which may lead to disciplinary action shall not be required to answer questions unless . . ."

We do not feel that such language would interfere unduly with the proper relationship between the worker and the employer. It would merely provide that during the initial phase of any investigation a supervisor would be required to inform an employee of his right to representation at the moment when the supervisor becomes aware that some form of disciplinary action against that employee may develop out of his questioning, or when the employee being questioned becomes so aware and requests representation from that point on.

This would leave the supervisor free, for example, to talk to an entire crew as to why all the work assigned was not being performed as required. When it appeared to the supervisor that the crew as a whole was probably not to blame, but rather one or two individuals, who may have taken unauthorized leave on the job, then those individuals would have the opportunity to have a representative present with them at any subsequent interview. Correspondingly, the employer would then be free to develop his investigation to the fullest, confident that all evidence discovered in the interview would probably be admissible in any later disciplinary proceeding.

In this connection, we suggest that sections 7171(c) and 7172 (a) and (b) be modified so that the existing definitions of "adverse action" be replaced by the phrase "disciplinary action," in conformance with sec. 7171(a).

We further suggest that the Civil Service Commission, in prescribing regulations to carry out the purposes of the law, be authorized to provide administrative penalties, i.e., disciplinary action, against agency officials who interrogate employees in a manner not in compliance with applicable laws and regulations.

In summary, we feel that enactment of H.R. 3793 would remove inequities in the area of due process rights for workers between the public and private sectors and within the public sector itself, would ensure employees fairer treatment, and would not interfere with efficient operations in supervisory authority. Existing procedures are inadequate, as we have already described, and are not adequately comprehended by the vast majority of employees whose livelihoods and reputations may depend upon them.

AFGE, therefore, strongly supports and urges the early enactment of this legislation.

This concludes my prepared testimony. I thank the members of this subcommittee for this opportunity.



