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Office of the Attorney General
Washington, D. C. 20530

MAY 6 1976

Attached hereto is a memorandum which provides guidelines concerning certain administrative investigations and the reporting requirements of Section 535 of Title 28, United States Code. The memorandum results from the joint efforts of this Department and the Civil Service Commission, and supersedes a February 9, 1971 memorandum from then Attorney General Mitchell on the same subject.

Sincerely,

Edward H. Levi
Attorney General

Enclosure

Office of the Attorney General
Washington, D. C. 20530

MAY 4 1976

MEMORANDUM TO THE HEADS OF ALL DEPARTMENTS AND AGENCIES IN THE EXECUTIVE BRANCH OF THE GOVERNMENT

The purpose of this communication is to provide guidelines concerning administrative investigations of Federal officers and employees for wrongdoing involving possible criminal violations, and to achieve fully the objectives sought by the reporting requirements of Section 535 of Title 28, United States Code. This communication is not intended to revoke existing specific memoranda of understanding between the Department of Justice and other Federal departments and agencies. This memorandum supersedes former Attorney General John N. Mitchell's February 9, 1971 memorandum to the heads of all departments and agencies concerning the reporting requirements of Section 535 of Title 28, United States Code.

Section 535 of Title 28, United States Code, imposes upon every department and agency of the executive branch of the government the duty to report expeditiously to the Attorney General any information, allegations, or complaints relating to violations of Title 18, United States Code, involving government officers and employees.[1/] Whenever a department or agency is uncertain as to whether referral pursuant to Section 535 of Title 28 is warranted, a designated representative from the department or agency concerned should consult with the concerned Division in the Department of Justice.

1/ For the purpose of the reporting requirement set forth in this memorandum, the phrase "government officers and employees" includes a former officer or employee (a) when the suspected offense was committed during his federal employment and (b) when the suspected offense, although committed thereafter, is connected with his prior activity in the federal service (see, for example, 18 U.S.C. 207).

Guidelines

1. Whenever information, allegations or complaints are obtained during an administrative inquiry, internal investigation, or otherwise, which indicate that an officer or employee may have violated the provisions of Title 18, United States Code, the department or agency, in the absence of any applicable exception referred to in 28 U.S.C. 535(b)(1), (2) and 535(c), or existing understandings or agreements with the Department of Justice, shall expeditiously notify the Department of Justice. All such information, allegations, or complaints should be reported to the local office of the appropriate investigative agency, the office of the United States Attorney for the district in which the illegal violation has occurred, and directly to the appropriate Division of the Department of Justice.

2. Upon making such referral, the referring department or agency should suspend any further administrative investigation and/or interrogation of the

employee with respect to the area of suspected criminality. However, if such independent administrative investigation is desired by the department or agency, it should be coordinated with the interested United States Attorney, Division in the Department of Justice, and/or investigative agency to insure that such administrative action does not jeopardize the government's criminal investigation or prosecution.

3. If the department or agency determines that disciplinary or other adverse action against the officer or employee is warranted, such action should be coordinated with the interested United States Attorney, Division in the Department of Justice, and/or investigative agency to avoid prejudicing the criminal investigation or prosecution.

4. If an agency of the Department of Justice declines criminal prosecution, the referring department or agency shall be informed as soon as possible. Further coordination between the referring departments or agency and this Department in connection with administrative proceedings is not necessary. However,

the referring department or agency, upon receipt of a request for information about administrative action, if any, taken or contemplated, should make a complete response within a reasonable time.

Attorney General

Office of the Attorney General
Washington, D. C. 20530

June 4, 1980

Attached is a memorandum which provides guidelines for you, your personnel officials, and your staff concerning procedures to be followed in administrative investigations of certain employee misconduct. This memorandum was developed as a result of inquiries from a number of federal agencies. It supplements the May 4, 1976 memorandum from then Attorney General Edward H. Levi on the same subject.

Benjamin R. Civiletti
Attorney General

Enclosures

MEMORANDUM TO THE HEADS OF ALL DEPARTMENTS AND AGENCIES IN THE EXECUTIVE BRANCH

The purpose of this communication is to provide guidance concerning the necessity of giving warnings to the subject of administrative misconduct proceedings, the form which such warnings should take, and the need to coordinate with the Criminal Division certain actions that may impact adversely on the prosecution of criminal cases arising out of the same or parallel facts. This communication is intended to supplement former Attorney General Edward H. Levi's Memorandum of May 4, 1976 to the heads of all departments and agencies concerning the implementation of the reporting requirements of 28 U.S.C. 535.

Statements made by Federal employees during administrative misconduct proceedings frequently have substantial value as evidence in criminal prosecutions arising from the activity which led up to the administraive misconduct proceeding. On the other hand, actions taken by an agency during an administrative misconduct proceeding may impede the ability of the Department of Justice to prosecute criminal offenses arising out of the same underlying facts. It is important, therefore, that steps be taken to assure that statements made in the course of administrative misconduct proceedings are obtained through procedures that are consistent with the

Fifth Amendment protection against compulsory self-incrimination. Similarly, it is imperative that whenever a Department or Agency considers it necessary to obtain or induce the cooperation of their employees in administrative misconduct proceedings through procedures that may adversely affect the ability of the Department of Justice to discharge its paramount criminal law enforcement obligations, such procedures be coordinated beforehand with the Department of Justice.

1. Most administrative misconduct hearings involve situations where, under agency regulations, an employee is merely provided an opportunity to respond to questions concerning job-related misconduct. However, on occasion the cooperation of an employee in an administrative proceeding is deemed essential enough that the employee should be required to answer questions concerning his job-related misconduct or face dismissal for not cooperating. In this latter situation, any statement which the employee provides concerning job-related misconduct would be considered "compelled" for Fifth Amendment purposes, and as a result those statements and their evidentiary leads would not be admissible as evidence at a subsequent criminal prosecution of the employee. Garrity v. New Jersey, 385 U.S. 493 (1967). However, where an employee is merely afforded an opportunity to respond to a charge of misconduct, any statements made by him would not

be "compelled" for Fifth Amendment purposes, and such statements could be used in the preparation and prosecution of related criminal offenses provided other coercion was not present. See e.g., O'Toole v. Scafati, 386 F.2d 168 (1st Cir. 1967), cert. denied, 390 U.S. 985 (1968); Terry v. United States, 499 F.2d 695 (Ct. Cl. 1974).

In view of these considerations, I have decided that the following warnings should be given whenever a Federal employee is requested to provide evidence on a voluntary basis in connection with administrative misconduct proceedings. The purpose of these warnings is to prevent those providing statements from subsequently attempting to prevent their use by the Department of Justice in criminal litigation:

- - - You have a right to remain silent if your answers may tend to incriminate you.

- - - Anything you say may be used as evidence both in an administrative proceeding or any future criminal proceeding involving you.

- - - If you refuse to answer the questions posed to you on the ground that the answers may tend to incriminate you, you cannot be discharged solely for remaining silent. However, your silence can be considered in an administrative proceeding for its evidentiary value that is warranted by the facts surrounding your case.1/

1/ See, e.g. Baxter v. Palmingo, 425 U.S. 308 (1975).

These warnings should be administered prior to questioning or taking a statement from an employee, and an appropriate record made of this fact.2/

2. In those exceptional circumstances where it is considered necessary or desirable to require employees to respond to questions concerning misconduct or face loss of employment, the Supreme Court has held that a termination may not be predicated solely upon a refusal to answer questions through an assertion of the Fifth Amendment privilege. Gardner v. Broderick, 392 U.S. 273 (1968); or because the employee refused to waive his Fifth Amendment rights, Sanitation Men v. Sanitation Commissioner, 392 U.S. 280 (1968). However, an employee may be dismissed for refusing in an administrative proceeding to answer specific, direct and narrow questions relating to the performance of official duties, when doing so will not result in the deprivation of Fifth Amendment rights. This state of affairs is confined for all practical purposes to those situations where the employee being interviewed has been provided with an express assurance that his answers will not be used against him in a criminal proceeding--a result tantamount to granting the employee "use immunity". Garrity v. New Jersey,

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2/ If the employee being questioned is employed in a bargaining unit with respect to which a labor organization has been accorded recognition as the exclusive representative of the unit's employees, 5 U.S.C. 7114(a) (2) (B) provides that the employee has a right to be represented during questioning by a representative of that labor organization, if the employee reasonably believes that the questioning may result in disciplinary action against the employee and the employee requests representation.

supra; Sanitation Men v. Sanitation Commissioner, supra; Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973).

Under no circumstances should a prospective interviewee with foreseeable criminal exposure be interviewed under an express or implied threat that he will be discharged if he refuses to cooperate in the investigation by invoking his rights under the Fifth Amendment, unless this course has been discussed with and approved by the Department of Justice. Requests for permission to utilize this interrogation procedure should be directed to the Justice Department component to which a referral of the matter would be made pursuant to 28 U.S.C. 535. Such clearance should be obtained before the witness is questioned. If clearance is obtained, the witness should be given the following warning prior to interview in order to avoid a challenge to a subsequent dismissal based on a claim that the employee was not adequately informed he had been given "use immunity."3/

- - - You are going to be asked a number of specific questions concerning the performance of your official duties.

- - - You have a duty to reply to these questions, and agency disciplinary proceedings resulting in your discharge may be initiated as a result of your answers.4/ However, neither your

3/ Kalkines v. United States, 472 F.2d 1391 (Ct. Cl. 1973).

4/ An agency employee may be terminated or disciplined on the basis of the substance of a statement he voluntarily provides under a threat of termination even though he is not expressly advised of the fact he is being accorded "use immunity" with respect to his criminal liability. See, Womar v. Hampton, 496 F.2d 99, 109 (5th Cir. 1974).

answers nor any information or evidence which is gained by reason of such statements can be used against you in any criminal proceedings.

- - - You are subject to dismissal if you refuse to answer or fail to respond truthfully and fully to any questions.5/

3. Promises and representations made informally to prospective interviewees in administrative misconduct proceedings can likewise affect criminal liability, Santobello v. United States, 404 U.S. 257 (1971); United States v. Rodman, 519 F.2d 1058 (1st Cir. 1975); United States v. Carter, 454 F.2d 426 (4th Cir. 1972), cert. denied, 406 U.S. 906; cf. United States v. Long, 511 F.2d 878, 880-881 (5th Cir. 1975). Under no circumstances should a department or agency enter into informal understandings or agreements with prospective witnesses in administrative misconduct proceedings which may be interpreted as waiving further criminal liability in exchange for cooperation in a continuing investigation involving himself or other employees, without prior consultation with and approval by the Department of Justice along the lines set forth in item #2 above.

4. A department or agency may agree to waive further administrative discipline in exchange for cooperation. However, whenever the employee in question faces foreseeable criminal exposure, the terms of any such agreement between the employee

5/ Again, 5 U.S.C. 7114(a)(2)(B) provides that an employee is entitled to be represented during questioning by his labor organization if he is employed in a bargaining unit with respect to which a labor organization has been accorded recognition as the exclusive representative of the unit's employees, if the employee reasonably believes that the questioning may result in disciplinary action against the employee and the employee requests representation.

and the agency should be reduced to writing, and should contain the following written disclaimer:

"Nothing contained herein shall be deemed or construed to affect criminal liability or to limit the responsiblity of the Department of Justice to prosecute violations of Federal criminal laws. This agreement does not constitute a grant of immunity from criminal prosecution, and its acceptance by (the employee) shall constitute a knowing and personal waiver of rights under the Fifth Amendment to the United States Constitution."

The agreement containing the statement must be signed personally by the employee being interviewed. In the event that the employee's statement contains evidence reflecting that a criminal violation of Federal law has been committed, or in the event that other evidence is developed reflecting such a criminal violation, the signed statement containing the disclaimer shall be forwarded to the Department of Justice when the matter is referred pursuant to 28 U.S.C. 535.

BENJAMIN R. CIVILETTI
Attorney General

June 4, 1980