

# Employee Misconduct Investigations

Deborah Witzburg

Deborah Witzburg, CIG

Inspector General  
for the City of Chicago



# Learning Objectives

- Understand different types of employee misconduct
- Understand different types of investigations
- Understand the complaint assessment process
- Understand the importance of investigative planning
- Understand the proof analysis process
- Understand the conclusion process



## What is Misconduct?

- A deliberate violation of an established rule reasonably designed to protect the legitimate employer interests, or an intentionally committed act or omission in disregard of the employer's interests in absence of an allowable reason (Source: FDOT OIG, Paraphrased)
- May be an administrative violation, such as failure to abide by policy, or could be a violation of law, such as civil & criminal law

# Types of Misconduct

- Insubordination
- Abuse of position
- Gross negligence
- Falsifying records
- Workplace violence
- Sexual harassment
- Bribery
- Conflict of interest
- Theft of government property
- Law enforcement-related:
  - Use of force, officer-involved shootings

# Insubordination

- Employee's intentional refusal to obey a lawful and reasonable order
- The refusal would undermine a supervisor's level of respect and ability to manage and, therefore, it is often a reason for disciplinary action
- Three factors:
  - The employer gives the order.
  - The employee acknowledges the order.
  - The employee refuses to carry out the order

(Source: Society for Human Resource Management, <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/what-constitutes-insubordination.aspx>)

# Abuse of Position

- Prohibited: “Theft or unauthorized possession of City of Chicago or other public property, or use of such property for unauthorized purposes; having other City employees perform services or directing other City employees to perform services for unauthorized purposes or accepting the benefits of such performance.” (Source: City of Chicago Personnel Rule XVIII, Sub. 19)
- Prohibited: “Any conduct taken to use the official position for personal gain or influence.” (Source: Chicago Police Dept. Rules of Conduct, Rule 4)

# Abuse of Position at CPD



A high-ranking CPD supervisor directed on-duty CPD officers to chauffeur the supervisor's child from school to a district police station in a CPD vehicle on a weekly basis, for approximately one year, in addition to monitoring the supervisor's child for recurring two to three-hour periods while on duty. This violated CPD rules by improperly diverting resources away from the community and creating additional stress for officers, which ultimately had a detrimental impact on their morale.



# Gross Negligence

- Gross negligence is an act or omission, which is more than ordinary negligence, but less than willful or intentional misconduct.
- Gross negligence refers to a person's conduct where an act or failure to act creates an unreasonable risk of harm to another because of the person's failure to exercise slight care or diligence.

(Source: New Jersey Supreme Court)

# False Statements

False Statement to a Federal Agency (18 U.S.C. 1001):

- The Defendant [made the statement] [made or used the document], as charged;
- The [statement] [document] was false;
- The falsity concerned a material matter;
- The Defendant acted willfully, knowing that the [statement] [document] was false; and
- The [false statement] [false document] was made or used for a matter within the jurisdiction of a department or agency of the United States.

# Workplace Violence

- Workplace violence is any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site. It ranges from threats & verbal abuse to physical assaults & even homicide.
- Of the 5,147 fatal workplace injuries in the US in 2017, 458 were intentional injury by another person.

(Source: Occupational Safety and Health Administration, <https://www.osha.gov/workplace-violence>)

# Sexual Harassment

- Unwelcome sexual advances, requests for sexual favors, & other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment

(Source: U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/laws/guidance/fact-sheet-sexual-harassment-discrimination>)

# Bribery

- Bribery: Act of taking a bribe, which is a sum of money or something valuable that you give or offer to somebody to persuade them to help you, especially by doing something dishonest (Source: Oxford Dictionary)
- Collusion: Secret agreement or cooperation especially for an illegal or deceitful purpose (Source: Merriam-Webster Dictionary)

# More Bribery

Receipt of a Bribe by a Public Official (18 U.S.C. 201):

- The subject was a public official;
- The subject [demanded or sought] [received or accepted][agreed to receive or accept] either personally or for another person or entity, something of value; and
- The subject did so knowingly and corruptly in return for being influenced in the performance of an official act.

# Bribery: Darlene Druyun

- Top AF career civilian acquisition official from 1993-2002
- Gave Boeing preferential treatment on numerous contracts
- Controversial \$20 billion lease program for Boeing KC-767 aerial tankers
- Confessed she performed the favors to in return for getting a high-paying executive position & jobs for her daughter & son-in-law
- Failed a polygraph during the investigation & then admitted she had lied about the facts
- Admitted to fabricating diaries to support her original version of the story
- Hired into a \$250K job with Boeing after leaving the AF with a \$50K bonus
- Convicted; sentenced to 9 months in prison, followed by house arrest and 3 years of probation
- Boeing COO also convicted and sentenced to prison
- \$650 Million Boeing settlement



# Bribery: Lennie Perry



- In the late hours of the evening, a vehicle owner returned from sight-seeing to find her vehicle had been towed; flagged down a City of Chicago tow truck sitting near-by to ask for assistance
- Victim encountered Perry who told her that if she would pay him \$150 in cash, the vehicle would be returned; when she told him that she did not have any money, he directed her to his wife who was parked in a vehicle across the street
- Perry's wife drove the victim to a nearby ATM, dropped her at her vehicle after receiving the requested \$150
- Investigation revealed additional occasions on which Perry was identified as having towed the cars of victims (who had also parked their cars in the downtown area while sight-seeing) and then solicited payments of \$100 and \$150 respectively from each for the return of their vehicles
- Convicted on 2 counts of bribery, 2 counts of official misconduct; sentenced to 9 years of imprisonment followed by 3 years of supervised release



# Conflicts of Interest

- The person is an employee
- The employee has a personal (outside) interest
- The outside interest is in connection with a business transaction
- The outside interest interferes (or appears to interfere) with the employee's ability to make independent decisions in connection with their official actions
- The employee acted willfully, knowing that their personal interest conflicted with (or appeared to conflict with) their official actions
- The conflict (or appearance) was not disclosed to agency officials

# Theft of Government Property

Public Money, Property or Records (18 U.S.C. 641):

- Whoever embezzles, steals...or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the US or any department or agency thereof
- Up to 10 years imprisonment & \$250K Fine

# Law Enforcement Oversight

- Bill of Rights
  - Approximately 20 states: “Police Officers Bill of Rights” (LEOBR) (<https://www.pbs.org/newshour/show/what-it-will-take-to-reform-policing-according-to-3-experts>)
- Special exceptions & requirements
  - Notifications, representation, time constraints & contracts
- Use of force matters
  - Officer involved shootings
- Training and resources: National Association for Civilian Oversight of Law Enforcement (NACOLE)



## Types of Investigations

- Administrative: Focuses on policy violations
- Civil: Focuses on civil law violations
- Criminal: Focuses on criminal law violations

What type(s) does your office investigate?

# Intake and Assessment

## Triaging your intakes

- Is it a misconduct complaint?
  - What is the best oversight hammer for the nail?
- Is there a violation?
- Does your agency have a nexus & requisite authority?
- Is it worth the investment of your time?

# Complaint Assessment

What is indicated?

- What does your agency do?
- What is the level of misconduct?
- Allegation, if proven, punished by a suspension or more?
- Perhaps typically punished by a reprimand or less?

# Assessment, Continued

- How many allegations are there in a complaint?
- Each allegation will need to be separated
- Every separate allegation must be matched to related criteria
- What was violated?
  - Laws, policies, rules, ethics, etc.

# Assessment, Continued

- Each actionable criteria contains elements of the offense that must be identified
- Each element must be addressed in the investigation
- No actionable criteria? Then no investigation
  - A different oversight opportunity?



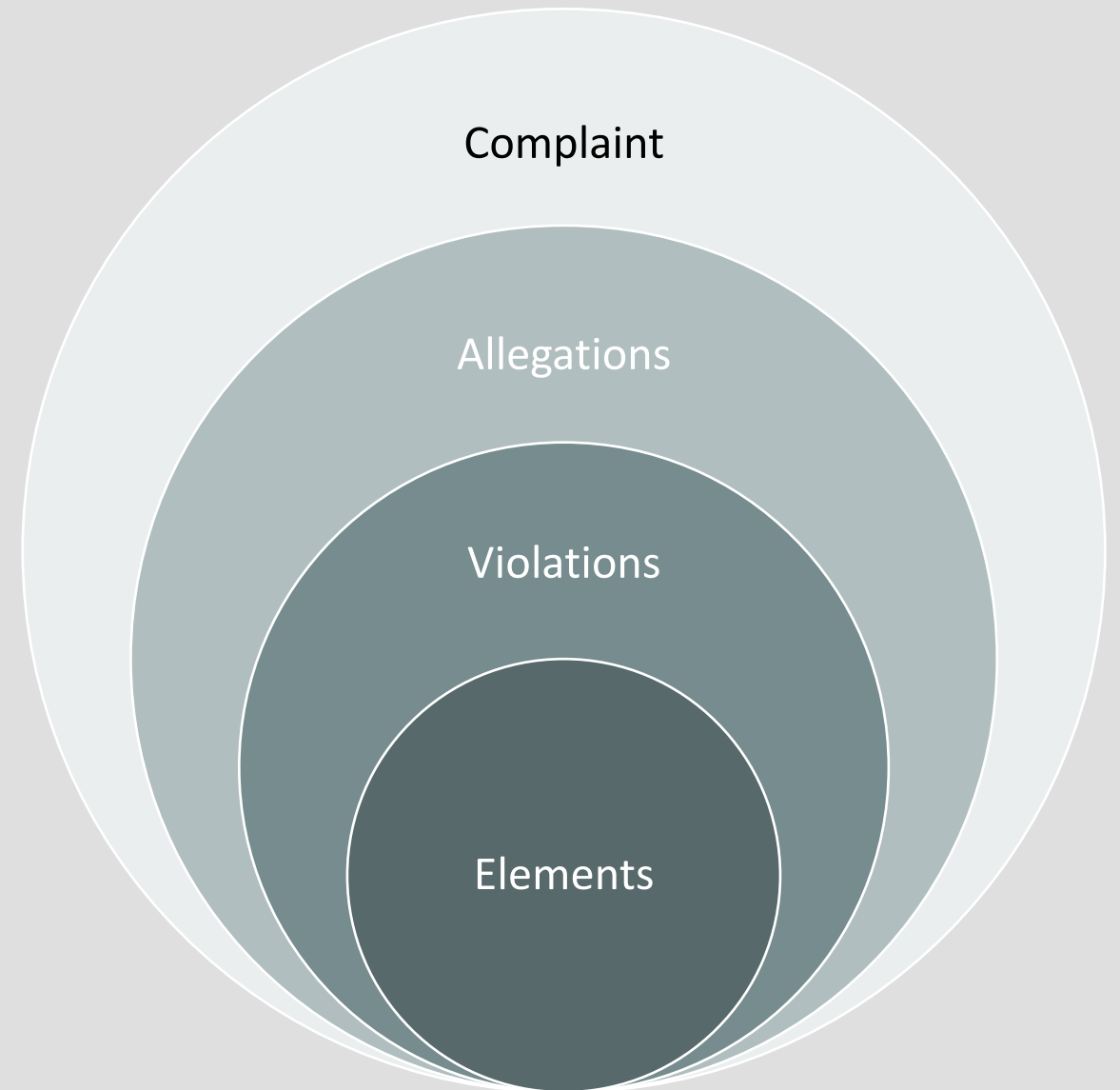
# Plans and Considerations

- Green Book Qualitative Standards
- Other required standards? (CIGIE for Federal, Florida is CFA, etc.)
- Living Investigative Plan

# Investigative Plan

- Allegation: distill the violations
- Review the statutes, break out the elements
- Determine evidence needed to support (or refute) the elements
- Outline the investigative steps to obtain the evidence
- Interviews (complainant, witnesses, subject)
  - Consider warnings/advisements (*Garrity, Kalkines, etc.*)
- Documents, emails, social media, etc.
- Cyber analysis – cell phones, computers & tablets
- Execute!

# Elements of the Offense



# Plan Preparation

Planning is a Green Book Qualitative Standard

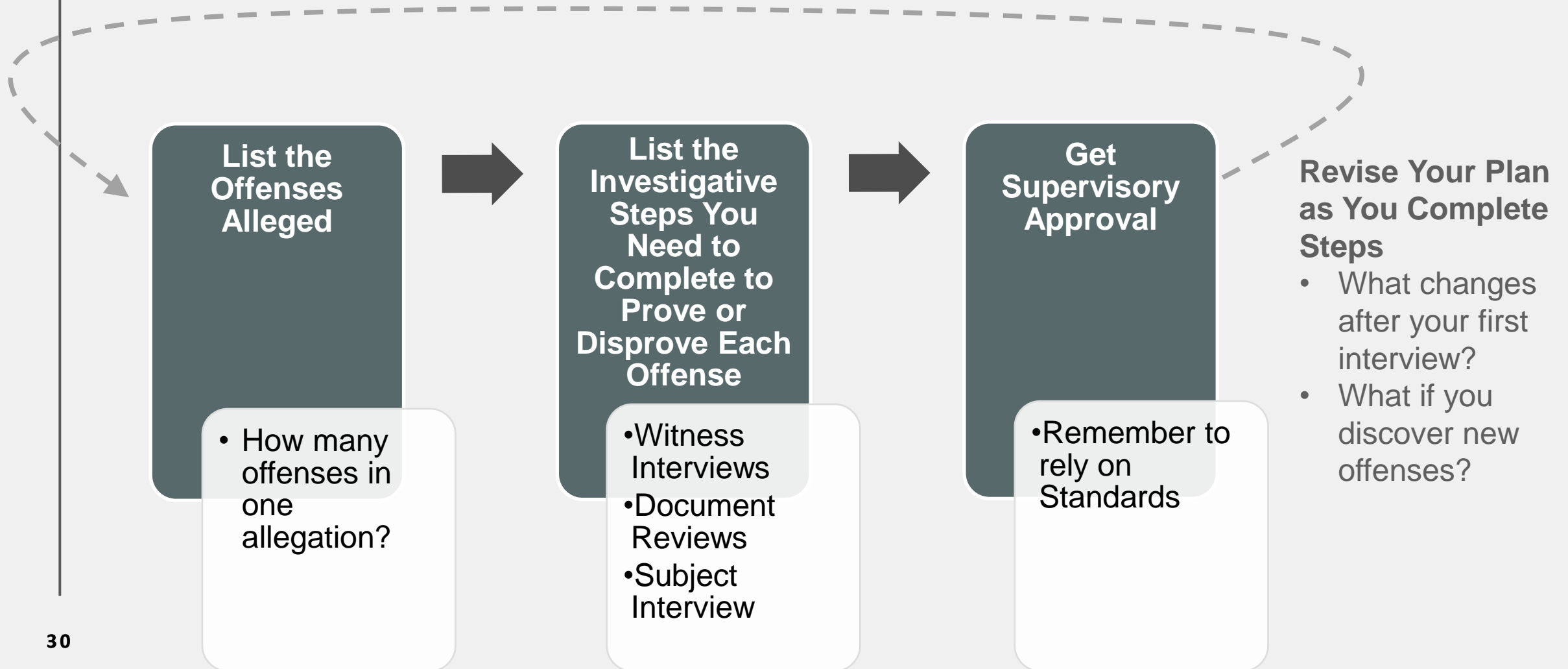
- Investigative work is to be adequately planned
- Guidelines include preparation of a written plan
- Identify issues before initiating the investigation
- Plan should make a sufficient effort to include objectives, steps, and time constraints

# Plan Preparation, Continued

Proper supervision is also a Green Book Qualitative Standard

- Supervisors add judgment and provide training
- Supervisors ensure investigators understand the task
- Supervisory reviews ensure:
  - Investigative plans are followed
  - Investigations meet objectives

# Investigating, Continued



# Investigating, Continued

Interview the complainant

- Get the rest of the relevant information
- Refine your plan
- Does your policy permit anonymous allegations?
  - If so, you can randomly assign number to complainants
  - Ask them to call in a week or two to see if you have questions

# Investigating, Continued

- Interview the Subject
  - Rights
    - Union Bargaining Agreement (*Weingarten*)
    - *Garrity*
    - *Kalkines*
- Documenting?
  - Notes
  - Sworn statement from the Subject
  - Memorandum of interview
  - Video recording
  - Audio recording





## Proof Analysis

- Organize the evidence as it relates to the elements
- Each element needs to be supported, ideally with corroborating evidence (e.g., testimony and physical evidence)

# What was the Conduct?

- Witness interviews
- Subject interviews
- Document reviews
- Recordings
- Other evidence
- ...or any combination

# What is the Criteria?

- Laws
- Rules
- Policies
- Conduct standards
- Documented expectations
- Contract standards

# Burden of Proof

## Burden of proof

- What is a burden of proof?
- What are the types of burdens?
- What is YOUR burden in the administrative context?
  - Work with your customers
  - Write in into your policy

# Burden of Proof, Continued

What is a burden of proof?

- Duty of proving a disputed assertion or charge (Source: Websters Dictionary)
- The standard that a party seeking to prove a fact in course must satisfy to have that fact legally established (Source: Cornell Law School)

# Burden of Proof, Continued

Type of burdens of proof:

- Beyond a reasonable doubt
  - IL law prohibits further definition; does NOT mean beyond any doubt
- Clear and convincing evidence
  - Produces the firm and abiding belief that it is highly probable that the proposition is true (IL Pattern Instructions)
- Preponderance of the evidence
  - More probably true than not (Source: IL Pattern Instructions)

Note: There are other standards, such as probable cause & reasonable belief, that are not typically used for OIG investigations.

# Burden of Proof, Continued

What is YOUR burden in an administrative investigation?

- Typically preponderance of the evidence, but sometimes clear and convincing (unless it is a criminal case)
- Work with your customers to determine best standard of proof
- Write it into your policy

# Reaching a Conclusion

- Succinct comparison of the conduct against the criteria
- ...With an assessment of the gap
  - Proved or Substantiated
  - Disproved or Unfounded
  - Inconclusive or Unsubstantiated



# Reporting

- Fact-based writing and analysis are two of the investigator's primary tools
- They require different skills but are both typically presented in the same written work product

# Proof Analysis...Not Opinion

Completing a proof analysis requires a clear understanding of the difference between opinion and analysis.

- An opinion is a statement of preference whose grounds are wholly personal.
- A proper proof analysis is objective and does not depend on an individual's perspective or preference.

# Presentation

A proof determination rests solely on the evidence that has been presented.

- Requires the ability to logically organize and mentally process the information and evidence gathered
- Captures the significance of the information to the matter at hand
- Presents the analysis in a clear, concise, well-written manner for the reader



## Legal Considerations

## *Miranda v. Arizona*, 384 US 436 (1966)



The prosecution may not use statements obtained from a subject through interrogation after the subject has been taken into custody or deprived of his freedom of action in a significant way unless procedural safeguards to secure the subject's Fifth Amendment rights against self incrimination have been secured.

## *Garrity v. New Jersey*, 385 U.S. 493 (1967)



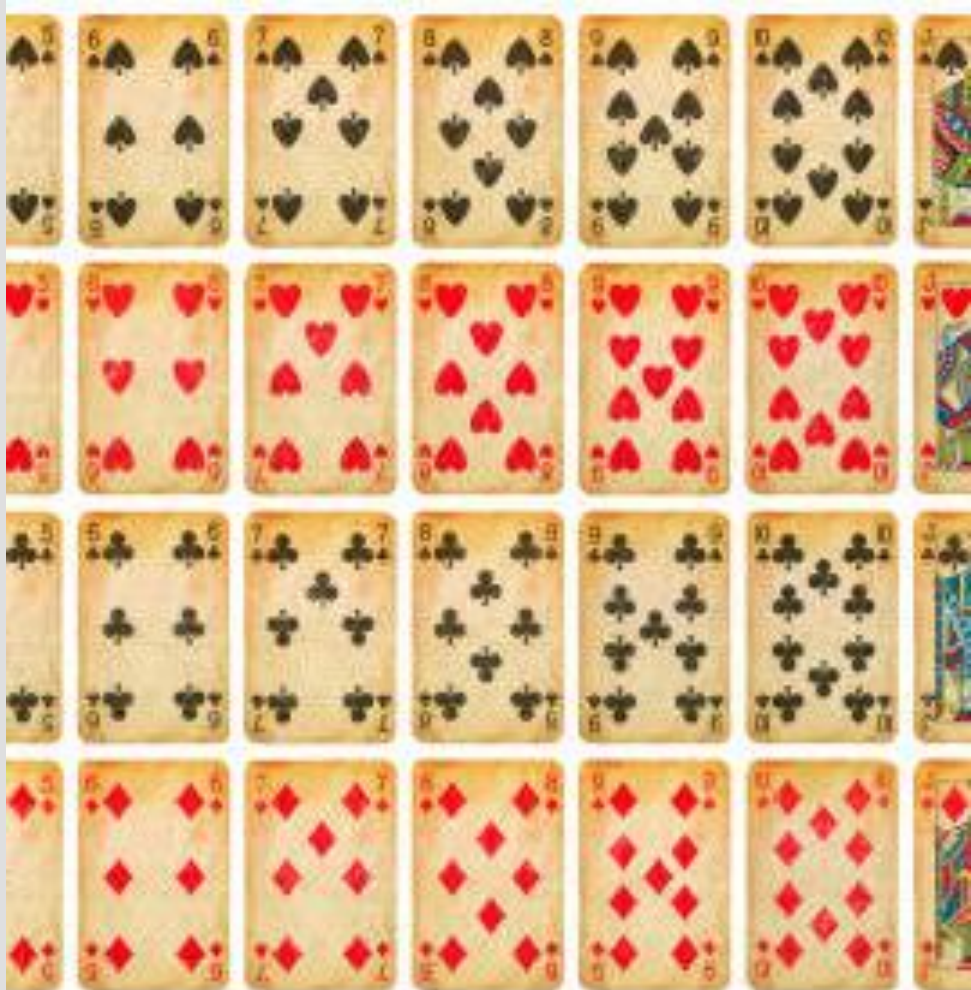
The State Attorney General was conducting an investigation into a traffic ticket fixing scheme involving six public employees. Among the six were four police officers, including Bellmawr Police Chief Ed Garrity. They were advised before questioning that their statements would be used against them in a prosecution, and that they could invoke their Fifth Amendment right, but that they would be terminated if they did so. They spoke.

# *Garrity*, Continued

Are the police officers' statements admissible?

- The court held that the threat of removal from public office rendered the statements involuntary, and thus **inadmissible** in a criminal prosecution.
- “Policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.”

## *Gardner v. Broderick*, 392 U.S. 273 (1968)



Officer Gardner of the NYPD was ordered to appear and testify before a grand jury in an investigation into police corruption relating to a gambling scheme. Broderick was the NYPD Commissioner. Officer Gardner was asked to sign a waiver of his Fifth Amendment right. He declined and was fired.



## *Gardner*, Continued

- Is Gardner's statement admissible?
  - The court held that if a public employee cannot be compelled to incriminate themselves under *Garrity*, then they likewise cannot be compelled to waive their right against self incrimination.
  - "The mandate of the great privilege against self incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of immunity if it confers on penalty the loss of employment."

*Uniformed Sanitation Men Association v.  
Commissioner of Sanitation, 392 U.S. 280 (1968)*



Fifteen sanitation workers are called before the NYC Sanitation Commissioner to speak to allegations that they were diverting city garbage disposal fees to themselves. Some asserted their Fifth Amendment rights and were fired. Others testified but were then asked to sign waivers and refused and then were fired.

## *Sanitation Men Association (I), Continued*

Are the workers' statement admissible?

- Employees must be reinstated and their statements are not admissible.
- “[I]f New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring the relinquishment of the benefits of constitutional privilege, and if they had refused to do so, this case would be entirely different.”

## *Sanitation Men Association (II)*

- 1970: Sanitation men are brought back and again subjected to compelled questioning, but this time they are advised that their statements were immunized from use in future criminal proceedings.
- They still refused to answer.

## *Sanitation Men Association (II), Continued*

- Yes; if the statements compelled under threat of termination are immunized from use in future criminal prosecution, then employees refusing to answer questions can be terminated.

## *Kastigar v. U.S.*, 406 U.S. 441 (1972)



Subjects were summoned to appear before a federal grand jury by subpoena. They refused to testify because they wanted transactional immunity and federal subpoenas only afforded use and derivative use immunity. They were held in contempt of court by the District Court Judge. They appealed.

## *Kastigar*, Continued

Can the subjects be compelled to testify?

- Yes; the subjects subpoenaed to testify could be sanctioned by contempt and incarceration if they failed to testify under a grant of use and derivative use immunity. They may be later prosecuted for the matter about which they were questioned.
- BUT, in order to prosecute the subject, the prosecutors must prove they are relying only on evidence other than the protected statements and their fruit.

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



George Kalkines was a federal investigator with the Treasury Department's Bureau of Customs who was suspected of taking bribes from importers. Kalkines knew that he was under internal administrative investigation as well as criminal investigation. When brought in for an administrative statement, he refused to answer questions regarding his finances and other performance related issues. He was terminated from his employment. He was not given any warnings prior to the administrative statements.



# *Kalkines*, Continued

Can Kalkines be terminated?

- “By failing to make and maintain a clear and unequivocal declaration of plaintiff’s ‘use’ immunity, the Customs agents gave the employee very good reason to be apprehensive that he could be walking into a criminal trap if he responded to potentially incriminating questions.”
- Kalkines is re-employed
- Applies a “*Miranda*-like” **admonition of rights principal** to administrative interrogations

I understand that this interview is part of an official investigation and that I have a duty to cooperate with the Office of Inspector General, which includes answering all questions completely and truthfully.

I understand that any statement made by me during this interview may be used as evidence of misconduct for purposes of an administrative investigation or as the basis for administrative disciplinary action up to and including removal or discharge.

I understand that any statement made by me during this interview for purposes of this administrative investigation and the fruits thereof cannot be used against me in a criminal proceeding, including any criminal proceeding that may relate to this administrative investigation.

I understand that I have the right to have a union representative, or legal counsel of my choosing, present at the interview to consult with, and will be given a reasonable time to obtain a union representative or legal counsel as long as the interview is not unduly delayed. (*See* Municipal Code of Chicago § 2-56-050(c))

I understand that a refusal to answer any question or any false, inaccurate or deliberately incomplete statement by me would constitute a violation of City of Chicago Personnel Rule XVIII and Municipal Code of Chicago, Chapter 2-56, and may serve as the basis for my discharge.

I acknowledge that this statement of my administrative rights has been read aloud to me, and I have been allowed to review this document.

Employee Signature: \_\_\_\_\_

Witness: \_\_\_\_\_

Witness: \_\_\_\_\_



**COUNTY EMPLOYEE  
INTERVIEW ACKNOWLEDGEMENT**

County  
Employee  
Initials

CD I have been advised that the Office of the Inspector General (OIG) is investigating a matter that concerns me in connection with my employment with Miami-Dade County.

CD The OIG has given me this opportunity to discuss my version of the events and to offer the names of any witnesses on my behalf or to offer any other information.

CD I understand that I am not obligated to speak to any representative of the OIG and should I choose not to speak to the OIG, I will not be subject to any discipline by my employer (Miami-Dade County) because of my refusal to talk to the OIG.

CP I have been advised that I can have a lawyer or representative with me and that I can reschedule this interview in order to arrange for an attorney or representative to be present.

CD I understand that I can end this interview at any time. I do realize that any statement(s) made here today can be used against me in a court of law (criminal or civil) or disciplinary proceeding.

CD By my signature below, I acknowledge my willingness to freely discuss this matter with the OIG.

CHARLES LEE DINKINS                      8/14/17  
County Employee (Print Name)                      Date

[Signature]                      8435  
Signature of County Employee                      Employee ID # or Social Security #

(If applicable) Acknowledgment by counsel that he or she has explained the above to his or her client.

\_\_\_\_\_  
Name of Attorney (Print Name)                      Signature of Attorney

JUAN KOOP                      [Signature]  
OIG Agent (Print Name)                      Signature of OIG Agent

STEPHEN GARGAS                      [Signature]  
Witness (Print Name)                      Signature of Witness

CS I have been advised that the Office of the Inspector General (OIG) is investigating a matter that concerns me in connection with my employment with Miami-Dade County.

CS The OIG has given me this opportunity to discuss my version of the events and to offer the names of any witnesses on my behalf or to offer any other information.

CS I understand that I am not obligated to speak to any representative of the OIG and should I choose not to speak to the OIG, I will not be subject to any discipline by my employer (Miami-Dade County) because of my refusal to talk to the OIG.

CS I have been advised that I can have a lawyer or representative with me and that I can reschedule this interview in order to arrange for an attorney or representative to be present.

CS I understand that I can end this interview at any time. I do realize that any statement(s) made here today can be used against me in a court of law (criminal or civil) or disciplinary proceeding.

CS By my signature below, I acknowledge my willingness to freely discuss this matter with the OIG.



## Reaching a Conclusion

# Concluding an Investigation

- Did the evidence support the allegation?
- Did the evidence refute the allegation?
- If supported, to what standard of proof?
  - Preponderance of the evidence?
  - Clear and convincing?
  - Beyond a reasonable doubt?
- What terminology does your agency use?
  - Substantiated? Sustained? Proven? Inconclusive? Exonerated?
- Does your agency use “Findings” and “Recommendations”?

# North Star(s)

- Independence: The Inspector General and OIG staff involved in performing or supervising any investigative assignment must be free from personal or external impairments to independence and should constantly maintain an independent attitude and appearance.
- Objectivity: Evidence should be gathered and reported in a fair, unbiased manner in an effort to determine the validity of alleged improprieties or evaluate the likelihood of violations of statutes, rules, or regulations.

(Source: Principles and Standards for Offices of Inspector General)

# Questions?

Deborah Witzburg

[dwitzburg@igchicago.org](mailto:dwitzburg@igchicago.org)

[igchicago.org](http://igchicago.org)

# Thank you!