



INTERROGATIONS

1. **Employees' Obligation to Answer Questions**

- 1.1 Generally, the employer can require employees to answer questions specifically and directly related to their duties or to their fitness for duty. This may include questions regarding off-duty conduct.

2. **Right to Union Representation**

- 2.1 The contractual Bill of Rights, Section G, guarantees the right to union representation to employees who are likely subjects of discipline. (Employees who are only witnesses do not have a right to representation.)
- 2.2 The Weingarten legislation (Chapter 244 of the Laws of 2007) amended the Taylor Law (*Civil Service Law (CSL)* §209-a.1(g)) to provide public employees in New York with a right to representation broader than that contained in the Bill of Rights.
- 2.3 In the recent Memorandum of Understanding for a new Collective Bargaining Agreement covering 2016-2023, the Bill of Rights, Section G, was amended to also include a statement that an employee is entitled to representation if they would be entitled under CSL § 209-a.1(g).
- 2.4 Questioning: - whenever an employee is likely to be served a Notice of Discipline or if it reasonably appears an employee may be the subject of a potential disciplinary action, an employee is entitled to representation.
- 2.5 In situations where it is difficult to determine whether an employee is entitled to representation, assert the right to representation! The denial of representation can be grieved. Furthermore, the denial of representation in certain circumstances not covered by the Bill of Rights may be a violation of the Taylor Law, challenged by an Improper Practice Charge. In each instance, the employee must actually request union representation.

If an employee requests representation and is denied, the employee will still be required to answer the questions (as they are "ordered"). The request for the union representation should be clear on the record. A denial situation may occur if the agency indicates that the employee is "a witness." In these cases, make the request, and continue. Then, after the interview, if the member feels like the

questioning was such that they had reason to believe they may be subject to disciplinary action, they should immediately draft a memo, to be provided to the union only (not employer) outlining all relevant facts (date, time, people, request, denial, details of the questioning). This memo can be forwarded to our offices for review for potential action.

- 2.6 Statements made by an employee without union representation, who is entitled to representation, may not be used against that employee in a subsequent disciplinary proceeding (Bill of Rights, Section H).
- 2.7 Before being questioned by the Agency's Inspector General's office (each Agency uses a different name for the office), members have the right to be informed of the nature of the investigation. (Bill of Rights, Section K). Enclosed is a letter outlining the types of details necessary.
- 2.8 Employees must be notified at least 24 hours before the questions (when the nature of the investigation permits). Members who were notified of an investigation pending against them will now be notified, within two weeks, of the closure of the investigation. (It will no longer be necessary to make a written request to be notified). (Bill of Rights, Section L).

3. **Probationary Employees**

- 3.1 Pursuant to the *CSL* §209-a.1(g), which is now incorporated into Bill of Rights, Section G, all bargaining unit employees, including probationers, have a right to ask for representation when being questioned if it reasonably appears that the employee may be subject to potential disciplinary action.
- 3.2 When in doubt – always have the employee ask for union representation.

4. **Self-Incrimination and Use Immunity**

- 4.1 When employees are compelled, under threat of discipline, to answer questions related to their employment, they receive use immunity under principles enunciated by the U.S. Supreme Court in *Garrity v. New Jersey*, 385 U.S. 493 (1967).
- 4.2 Use immunity means that a compelled statement cannot be used against an employee in a subsequent criminal proceeding.
- 4.3 A compelled statement may be, and customarily is, used against an employee in a subsequent disciplinary proceeding.
- 4.4 An employee who receives use immunity may not refuse to answer questions based on the Fifth Amendment right against self-incrimination. Refusal to answer may result in discipline, including termination from employment.
- 4.5 Procedure to ensure employee receives use immunity.

- (a) The steward should ask if the employee must answer under threat of discipline or termination.
 - (b) If the answer is yes, use immunity automatically attaches.
- 4.6 The employer does not have to tell the employee about use immunity.
- 4.7 The employer cannot require the employee to waive use immunity.
- 4.8 DOCCS Directive 0102 (attached) applies to interrogations by DOCCS.

5. The Meaning of “Representation” in the Context of an Interrogation

- 5.1 There is no contractual definition.
- 5.2 A reasonable interpretation includes the right of the member to be properly advised during the course of the interrogation. You should meet with the employee beforehand. Ask for clarification of confusing questions. Object to irrelevant questions. Make sure the employee has a time to break or caucus if he needs it.

6. Outside Police Agreement

- 6.1 As provided in a “side letter” to the collective bargaining agreement (attached), members have no obligation to cooperate with, or give a statement to, an outside police agency (FBI, State Police, Sheriff, local police, etc.) or an outside investigative agency. This provision, however, does not apply to commissions or bodies charged by the Mental Hygiene Law with the duty to conduct investigations.

7. The Justice Center

- 7.1 The Justice Center was created pursuant to legislation in June of 2012 with the purpose of protecting vulnerable persons. The Justice center has the primary responsibility for tracking, investigating and pursuing serious abuse and neglect complaints for facilities and provider agencies that are operated, certified or licensed by the following six agencies: Department of Health, Office of Mental Health, Office of People with Developmental Disabilities, Office of Children and Family Services, Office of Alcoholism and Substance Abuse Services and the State Education Department.
- 7.2 With respect to union representation in these matters, a member employed by one of the agencies listed above has the same right to union representation as they would if the employer was questioning them. Keep in mind, as discussed above, this may not mean a right to union representation in every instance, but a member should always make the request.

7.3 The Justice Center also employs a Special Prosecutor and has a law enforcement branch which has concurrent jurisdiction with district attorneys to prosecute abuse and neglect crimes. With respect to any questioning by this branch of the Justice Center, the provisions of the Outside Police Agreement will apply. This is why it is important at the start of any questioning to establish whether you are compelled, as a condition of employment, to answer the Investigator's questions. If yes, then the Justice Center is acting as your employer, and you must answer the questions (and need to request a union representative). If the answer is no, then the Outside Police Agreement applies, and you cannot be compelled to answer the Investigator's questions.

7.4 The Justice Center as it relates to DOCCS: The Justice Center does have authority to visit and investigate DOCCS SHU and OMH Satellite units for the purpose of making "programmatic recommendations" (this is a function they inherited when they replaced the Commission on the Quality of Care). In that context, they may interact with DOCCS employees, and have authority to question DOCCS employees in that capacity. These investigations, however, cannot result in DOCCS employees being disciplined by the Justice Center.

The Outside Police Agreement expressly excludes the Commission on the Quality of Care and now the Justice Center (as "Commissions or bodies charged by Mental Hygiene Law with the duty to conduct investigations."), therefore members at DOCCS still have to speak to Justice Center investigators (even though the Justice Center does not have authority to "discipline" a member employed by DOCCS). Because we believe the Justice Center reports will be given to DOCCS, we recommend that any member required to answer questions from a Justice Center investigator: 1) seek confirmation from DOCCS that he or she is required to answer questions under threat of discipline; and 2) request union representation from DOCCS and the Justice Center investigators.

8. Questioning of Members by Outside Investigative Agencies other than the Justice Center

8.1 Some outside agencies have subpoena authority and can compel members to testify. If subpoenaed, the member must cooperate but has a right to counsel.

8.2 The State Inspector General, however, may require any officer or employee in a covered agency to answer questions concerning any matter related to the performance of his or her official duties even without a subpoena. The statutory authority which allows the State Inspector General to compel employees to answer questions includes certain use immunities. The State Inspector General generally provides notice, frequently coordinating with our office, and legal representation is permitted.

- 8.3 The New York State Commission of Corrections can speak to members during the course of an investigation based upon statutory authority allowing: a) issuance of a subpoena, or b) broad authority to obtain information.

The statute provides that the Commission may “require from the officers or employees of a correctional facility any information deemed necessary for carrying out the Commission’s functions, powers and duties.” *Corrections Law §46(1)*. As such, ultimately the Commission will be able to speak to members. Generally, the Commission does provide notice prior to questioning and has frequently worked through our office to schedule the interviews and has allowed union representation and/or an attorney.

- 8.4 Based upon specific statutory authorities, both the Commission of Corrections and the New York State Inspector General’s Office will be able to compel members to speak to them. If a member is contacted by either of these agencies, they should notify NYSCOPBA and/or our office immediately to discuss.

9. **Investigations Regarding Workplace Discrimination**

- 9.1 Workplace discrimination complaints used to be investigated by a diversity management office within each agency. As such, an employer was asking employees questions, therefore, employees could be compelled to answer and union representation rights attached.
- 9.2 Recently, all diversity management complaints and investigations were transferred to a new unit within the Governor’s Office of Employee Relations (“GOER”). As such, NYSCOPBA has taken the position in a grievance that this is an outside agency and employees cannot be compelled to answer questions by this GOER unit at all. The State disagrees. In an effort to resolve, NYSCOPBA has been discussing an agreement whereby those investigations will include union representation, notice pursuant to BOR(K) and Garrity rights. These rights generally have been provided to members in the past six months and NYSCOPBA is continuing to finalize.
- 9.3 A union can be placed in a difficult position when one member accuses another member or members of engaging in workplace discrimination. It is NYSCOPBA’s policy to oppose workplace discrimination, but it is also NYSCOPBA’s policy and duty to provide its members with representation when they are accused of misconduct.

It would be in everyone’s best interest (the union, the complainant, witnesses and the alleged perpetrator) to avoid any appearance of a conflict of interest. For that reason, if at all possible, the union should try to provide different representatives for the alleged victim and the alleged perpetrator.

Local Office of Special Investigations Q & A Notes: Highlights

1. Employee rights under Bill Of Rights in CBA.
2. Rights are also preserved under Directive 0102.
3. Do not submit to questioning without a Union representative.
4. 24-hour notice must be given to the employee. (It is not mandatory for Union to be notified by OSI or management) Such notification shall include facts sufficient to reasonably inform the employee of the particular nature of the investigation.
5. Ask for questioning to be rescheduled if Union representation is not available.
6. Employee should remove all papers, notes, calendar books etc.... as this information can be used in questioning if on your person.
7. Pace is important. Do not rush answers. Do not anticipate what the OSI question will be. Let investigator finish question; think and then answer.
8. Breaks can be requested and granted upon completion of a line of questioning.
9. Only answer what is asked – Don't elaborate.
10. Questions should only be asked once. Once an answer is given to a question, it should not be asked again.
11. Answers should be as short as possible.
12. Don't answer hand gestures – make them ask a question.
13. Ask for clarification of any question you don't understand.
14. Ask investigator to repeat.
15. You can not speculate why another Officer, Supervisor, Civilian or inmate said something or performed some action – you are not them.
16. You are not a doctor – don't make medical determinations.
17. When asked if there is anything you would like to add in this statement, take a time out and discuss privately with Union representative. Usually there is nothing to add, but certain circumstances may warrant otherwise.
18. **DO NOT SIGN INVESTIGATOR NOTES** – The investigator will likely read his / her notes and will ask you if you feel they are accurate; then want you to sign them. You are not the investigator.

BILL OF RIGHTS

To insure that individual rights of employees in the Security Services Unit are not violated, the following shall represent the Employees' Bill of Rights:



- (A) An employee shall be entitled to Union representation at each and every step of the grievance procedure set forth in this Agreement.
- (B) An employee shall be entitled to Union representation at each stage of a disciplinary proceeding instituted pursuant to Article 8 of this Agreement.
- (C) No employee shall be requested to sign a statement of an admission of guilt to be used in a disciplinary proceeding under Article 8 without having Union representation.
- (D) No recording devices of any kind shall be used during any disciplinary proceedings except as provided for in Article 8, unless agreed to by all parties and each party receives a copy of the tape.
- (E) In all disciplinary hearing proceedings under Article 8, the burden of proof shall rest with the Employer.
- (F) An employee shall not be coerced or intimidated or suffer any reprisal either directly or indirectly that may adversely affect his hours, wages, or working conditions as the result of the exercise of his rights under this Agreement.
- (G) An employee shall be entitled to Union representation at an interrogation if it is contemplated that such employee will be served a notice of discipline pursuant to Article 8 of this Agreement. Such employee shall not be required to sign any statement arising out of such interrogation.
- (H) Except as provided below, any statements or admissions made by an employee during such an interrogation without the opportunity to have Union representation may not be subsequently used in a disciplinary proceeding against that employee.
- (I) If representation is requested by the employee and if such representation is not provided by the Union within a reasonable period of time, the Employer may proceed with the interrogation.
- (J) The Employer shall not infringe upon the right of an employee to be accompanied by counsel as provided by Section 73 of the Civil Rights Law, when said employee is

summoned to appear before any “hearing” or before any “agency”, as such terms are defined in Section 73 of the Civil Rights Law.

(K) Any employee who is subject to questioning by his/ her Department’s Office of Special Investigations (formerly Inspector General’s Office) shall, whenever the nature of the investigation permits, be notified at least 24 hours prior to the interview. Such notification shall include facts sufficient to reasonably inform the employee of the particular nature of the investigation.

(L) Any employee who was notified that there was an investigation pending against him or her by their Department’s Office of Special Investigations shall be notified by the Employer of the closure of the investigation within two weeks of the closure of such investigation related to such employee.



(M) The Employer shall keep confidential all employee medical records.

 NEW YORK STATE Corrections and Community Supervision REVISION NOTICE	TITLE		NO. 0102
	Rights of Departmental Employees		
REVISES DIR# 0102 Dtd. 12/13/2016	DISTRIBUTION A	PAGES PAGE 1 OF 1	DATE 01/19/2017
REFERENCES (Include but are not limited to) Article 75 of the Civil Service Law for M/C employees Collective Bargaining Agreements	APPROVING AUTHORITY 		

Added new material double underlined. Delete material ~~lined out.~~

□ Section II-B-2-a-6

The following Garrity warnings will be given to the employee concerned (Either~~both~~ in writing with a signed receipt or transcribed on the record with the employee acknowledging his or her understanding) prior to the commencement of the interrogation.

 Corrections and Community Supervision DIRECTIVE	TITLE Rights of Departmental Employees		NO. 0102
			DATE 12/13/2016
SUPERSEDES DIR# 0102 Dtd. 04/03/15	DISTRIBUTION A	PAGES PAGE 1 OF 3	DATE LAST REVISED
REFERENCES (Include but are not limited to) Article 75 of the Civil Service Law for M/C employees Collective Bargaining Agreements	APPROVING AUTHORITY 		

I. **DESCRIPTION:** This directive sets forth the rights of Department of Corrections and Community Supervision (the Department) personnel relating to investigations by the Department of Corrections and Community Supervision.

II. **INVESTIGATIONS BY THE DEPARTMENT**

A. References & Background:

The U.S. Supreme Court in Garrity v. New Jersey, 385 U.S. 493 (1967) and Gardner v. Broderick, 392 U.S. 273 (1968) held that where government employees being investigated for misconduct and/or criminal conduct were given a choice, either to give a statement or face disciplinary action, the government employees' confessions were not voluntary. Therefore, any such statements were taken in violation of the Fifth Amendment and cannot be used against the employee in a criminal trial.

Yet in subsequent cases, courts have made it clear that an employee cannot refuse to answer work related questions if they are given immunity under Garrity. This means any such statements are not admissible in a subsequent criminal prosecution but can only be used to discipline the employee. See, e.g., People v. Avant, 33 N.Y. 2d 265 (1973); Matt v. LaRocca, 71 N.Y. 2d 157 (1987). Thus, a public employee who is ordered to answer questions about work related matters and given Garrity protection, who thereafter refuse to answer questions may be terminated.

B. Procedures:

The Department recognizes the need to conduct investigations into the conduct of Department employees in order to safely and effectively perform all of the functions of the Department. The Department also requires that all employees be accorded the full protections of state and federal laws, the legal system, and the employee's union contract. These procedures accomplish both objectives.

The Department will pursue two types of investigatory questioning of Department employees;

1. Questioning by a Department supervisor or other representative of the Department (e.g., a member of the Office of Special Investigations (OSI) or Bureau of Labor Relations (BLR)) in which the employee is **specifically compelled by the employer to give information** (i.e., an order and a threat of discipline to give information), but is not compelled to waive assertion of the Garrity protection (i.e., no order and no threat of discipline to waive assertion of Garrity rights; and

2. Questioning by a member of the OSI concerning potential criminal conduct by the Department employee in which there is no compulsion or threat of discipline for a refusal to answer questions. Department employees, by this or any other directive, are **not automatically compelled** to answer questions posed by the Department and will be afforded all of their statutory, constitutional and contractual rights. The following outline will further define steps that the Department will take under particular circumstances.
 - a. Questioning regarding potential Disciplinary Action: When an employee is questioned by a Department supervisor or other representative of the Department (e.g., OSI) under circumstances in which it reasonably and objectively appears that the employee may be the subject of a potential disciplinary action, and the Department may use the employee's statement(s) for disciplinary purpose, the following shall apply;
 - (1) The employee shall be notified that personal counsel or union representatives may be present at all times during the interrogation if so requested by the employee.
 - (2) The employee shall be notified that a postponement may be granted until 10:00 a.m. the following day to provide the employee the opportunity to retain counsel or union representation.
 - (3) The interrogation shall be conducted at reasonable hours. For the purposes of this directive, the term "interrogation" is defined by the applicable collective bargaining agreement or Article 75 of the Civil Service Law for M/C employees.
 - (4) No threats or offensive language will be used.
 - (5) The length of the questioning period shall not be excessive and shall include breaks for meals and personal necessities.
 - (6) The following Garrity warnings will be given to the employee concerned (both in writing with a signed receipt or transcribed on the record with the employee acknowledging his or her understanding) prior to the commencement of the interrogation.
 - (a) You are being questioned as part of an official investigation by the Department of Corrections and Community Supervision. You will be asked questions specifically directed toward and narrowly related to the performance of your official duties.
 - (b) You are entitled to all the rights and privileges guaranteed by the laws of the State of New York, the Constitution of the United States, including the right not to be compelled to incriminate yourself and the right to have legal counsel present during any questioning.
 - (c) If you refuse to testify or to answer questions relating to the performance of your official duties, you will be subject to Departmental charges which could result in your dismissal from the Department of Corrections and Community Supervision.

- (d) If you do answer, neither your statements nor any information or evidence which is gained by reason of such statements can be used against you in any subsequent criminal proceeding. However, these statements may be used against you in relation to subsequent Departmental charges.
 - (e) Do you understand your rights and what I have just informed you?
 - (f) Do you now wish to proceed with answering my questions?
- b. Questioning Regarding Potential Criminal Conduct: When a member of the OSI questions a Department employee regarding conduct which may result in criminal charges against that employee, but those answers are not sought for use for administrative or disciplinary purposes, the employee will be advised by the member of the OSI, in sum and substance, the following;
- (1) This is a voluntary interview;
 - (2) You are not being compelled or threatened by your employer to waive your constitutional rights;
 - (3) Whether or not you speak with me it will not be held against you;
 - (4) Do you understand your rights, and do you wish to speak with me now?

When this questioning of the Department employee by a member of the OSI is in a custodial setting under the "Reasonable Person Standard", then *Miranda* warnings also will be administered in a manner consistent with the following;

- (1) You have the right to remain silent
- (2) Anything you say can be used against you in a court of law
- (3) You have the right to an attorney present during questioning on this matter
- (4) If you cannot afford to hire an attorney, one will be appointed to represent you free of charge
- (5) You may decide at any time to exercise these rights.
- (6) Do you understand these rights?
- (7) Having these rights in mind, do you wish to waive your rights and to speak with me now?