

The NRC Improperly Limits Individuals' Right to Counsel in Agency Investigative Interviews



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When the Nuclear Regulatory Commission's ("NRC's") Office of Investigation ("OI") conducts an investigation into alleged wrongdoing or misconduct, an OI investigator typically interviews multiple NRC licensee and licensee contractor employees (sometimes including Employee Concern Program professionals who investigated the same or related issue being investigated by OI). The interviews are conducted under oath, and the employee's sworn testimony becomes part of the investigation record. Once OI finds the facts and determines a violation, their findings are turned over to the appropriate NRC staff for a decision on enforcement action, and may be referred to the U.S. Department of Justice for potential criminal prosecution. These enforcement actions and prosecutions are often directed at individuals as well as NRC licensees and their contractors.

Employees have the right to representation during their OI interviews under the Administrative Procedure Act ("APA"), which is particularly important in light of the potential civil and criminal penalties that can result from an OI investigation. The APA became federal law in 1946 and generally governs the ways in federal administrative agencies conduct their affairs. The APA guarantees that an individual compelled to appear before a federal agency has a statutory right "to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative." 5 U.S.C. 555(b). The NRC has enacted a regulation at 10 C.F.R. § 19.18(b) that mirrors the APA's statutory right to counsel provision. Typically this representative is legal counsel retained by the company, but may also be, for example, a union steward accompanying a bargaining unit employee. The choice of whether to be represented is the employee's to make. Having representation by experienced counsel familiar with the OI process is strongly recommended.

Neither the APA nor the NRC implementing regulation restricts the number of counsel that may accompany a witnesses participating in an OI investigative interview. The NRC requires a showing of "concrete evidence" that counsel's presence "would obstruct or impede the investigation" before prohibiting counsel from attending the interview. 10 C.F.R. § 19.18(b). Nonetheless, OI maintains a policy (apparently endorsed by the NRC's Office of General Counsel) that limits the employee's representative to one individual without any showing of obstruction or impediment to the investigation. This policy unlawfully infringes on an individual's right to counsel or other representative under the APA.

OI's policy is flawed for multiple reasons. Federal courts charged with interpreting this APA provision have uniformly held that it constitutes the right to counsel of one's choice,¹ with no limitation on the number of individuals who might assist in a representation. However, under OI's policy, employees being interviewed are deprived of the assistance of co-counsel. The presence of co-counsel would improve representation by allowing advice and cooperation amongst colleagues, or even an extra set of ears and hands to listen carefully and take notes. It also deprives attorneys new to NRC

¹ See, e.g., *Backer v. Comm'r of Internal Revenue*, 275 F.2d 141,144 (5th Cir. 1960); *SEC v. Higashi*, 359 F.2d 550, 553 (9th Cir. 1966); *Great Lakes Screw Corp. v. NLRB*, 409 F.2d 375, 380 (7th Cir. 1969); *SEC v. Csapo*, 533 F.2d 7, 10-11 (D.C. Cir. 1976).

investigations of valuable mentorship and training opportunities. Being excluded from OI interviews means up and coming attorneys cannot learn first-hand the best practices for conducting such interviews. In contrast, OI routinely has multiple agents attend interviews, or has experienced agents accompany junior or new agents during interviews.

Perhaps the investigation involves complicated technical matters. Under OI's policy, the employee and his or her legal counsel are denied technical assistance from a qualified individual during an employee interview. OI's policy is more egregious in light of the fact that NRC OI investigators routinely conduct their interviews with the assistance of technical experts.

OI's policy also forces bargaining unit employees to choose between legal counsel and a union representative as their sole representative during an investigative interview. OI's policy forces bargaining unit employees to choose between their duty of loyalty to their union membership and their own legal rights and protections. As a result, a bargaining unit employee has to keep either the union or the legal representative outside the interview room door for consultation.

Several possible avenues are available for challenging OI's unlawful and flawed policy. An employee could refuse to participate in the OI "voluntary" interview unless OI permitted more than one representative to be present. This option, however, would likely result in OI responding with a subpoena to compel the interview, which could itself be challenged before the Commission, and ultimately in federal court – all amounting to expensive and time consuming litigation. The upside to this option would be that a favorable ruling would reject OI's policy for every OI investigation from that point forward.

Other options include petitioning the Commission to make it clear that 10 C.F.R. § 19.18(b) does not limit the number of counsel or representatives, or more formally petitioning the Commission for a rulemaking to modify section 19.18(b) as such. These options would likely permit the balancing of OI's interests in maintaining its policy with the right to counsel of one's choice enshrined in the APA.

It's understandable that NRC licensees, their contractors, and their employees want to cooperate and maintain cordial relations with their regulator – particularly when under investigation by OI – and may thus shy away from challenging OI's policy. But there are undoubtedly cases where the strong right to counsel and representation under the APA will trump the desire to get along with the NRC. The best option to address this issue is a coordinated industry response.