

PDR

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June 3, 1983

Earl J. Silbert, Esq.
Schwalb, Donnenfeld, Bray
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Suite 400
2828 Pennsylvania Avenue, N.W.
Washington, D.C. 20007

Re: NRC Advisory Committee on Rights of
Employees Under Investigation

Dear Mr. Silbert:

I want to respond to the Advisory Committee's question whether any other government agencies advise witnesses about their right to counsel during informal interviews. I understand that the Committee is concerned that the NRC would be setting a precedent by advising witnesses about this right in non-custodial situations.

During a telephone survey, Anne Cottingham and I talked to agency representatives who follow this practice:

- ° The FAA's Aviation Security Service. When it investigates airline employees, this unit regularly volunteers advice about the right to counsel.
- ° The FERC's Enforcement Division. This Division has acknowledged in print that witnesses in informal investigations have a right to counsel. */ At least some investigators (and perhaps all) advise interviewees about this right.

*/ 4 Energy Law Journal 39 at 43 (1983).

- ° The IRS' Criminal Investigations Division. Special Agents regularly advise individuals of their right to counsel, even if the investigation stems from unsubstantiated allegations and no charges have yet been brought.


Generalizations about other agencies cannot be made easily. On the one hand, the NTSB requires by regulation that in a field investigation any person interrogated "be accorded" the right to be accompanied by counsel or any other "duly" qualified representative. Representatives of the NTSB General Counsel's Office have indicated informally that "accord" appears to imply an obligation on the part of the investigator to affirmatively advise witnesses that they are entitled to counsel.

On the other hand, in several agencies, investigators advise some -- but not all -- employees about their right to counsel. Interviewees who "could" be charged with a criminal violation are informed about their right to counsel -- even if they are not in a Miranda custodial situation. Agencies following this practice include the U.S. Customs Service, the Departments of Interior and Energy, EPA and the ICC.

Agencies such as OSHA and the FDA only investigate and bring charges against companies, not employees. Typically, when an investigation begins, the agencies formally notify the companies, who are free to engage counsel.

Very truly yours,

DEBEVOISE & LIBERMAN


By Richard Littell