

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 20-08

June 17, 2020

TO: All Regional Directors, Officers-in Charge, and Resident Officers

FROM: Peter B. Robb, General Counsel

SUBJECT: Changes to Investigative Practices

This memorandum sets forth instructions regarding how Regions are to proceed during investigations in connection with securing the testimony of former supervisors and former agents, and how audio recordings should be dealt with during investigations. As explained below, the guidance has been created to ensure consistency, promote transparency and apply fairness. The dissemination of information during the investigation will facilitate the prompt and efficient resolution of labor disputes and afford more timely protection of employee rights set forth in the Act. This memorandum has been reviewed for compliance with ethics rules by the Agency's Designated Agency Ethics Official. Nothing in this memorandum should be construed to inhibit any Agency employee from seeking guidance from the Agency's Ethics Office.

I. Testimony of Actor Former Supervisors and Agents

Jurisdictions differ as to whether and in what circumstances a former supervisor or agent of an organization is deemed a client of that organization's attorney after the supervisory and/or agency relationship concludes. Where it is claimed that an individual actor's action at a certain time was binding on a party,¹ Regions are to apprise the party or its representative in advance of communicating with the individual about the substance of the matter, even if the supervisory and/or agency relationship has concluded and although skip counsel rules in some jurisdictions might not prohibit ex parte contact, and afford the party or its designee the opportunity to be present as an observer for substantive communications with the former supervisor or agent.²

An example of the situation described above is where the Region wishes to interview a former business agent about her/his administration of a hiring hall list during a time when

¹ In Ethics nomenclature, individuals alleged to have made unlawful statements or undertaken unlawful actions are referred to as "actor" former supervisors and agents, as distinct from former supervisors and agents who are merely fact witnesses. Fact witnesses are not alleged to have perpetrated unlawful conduct, but their testimony may be probative as to what some other current or former supervisor or agent did.

² Where skip counsel rules do not apply because a party is unrepresented, the Region should also afford the unrepresented party's designated non-attorney representative the opportunity to be present as an observer in all substantive communications with current supervisors and agents.

the relevant charge alleges the union bypassed a hiring hall registrant for unlawful reasons. The Region should communicate with the union before having substantive conversations with the former business agent and permit the union, or designee, to be present at the taking of any affidavit. As another example, if the Region wishes to interview a former supervisor about her/his recommendation to discharge an employee, which is alleged to have been the result of union activity, the Region should afford the employer, or designee, an opportunity to be present for any substantive communications with the former supervisor about the matter, and to be present for the taking of any affidavit. This policy will apply even if the skip counsel rules for the jurisdiction involved would permit ex parte communication with the former supervisor or agent.³

By contrast, if the former agent or former supervisor is a fact witness only, who would testify as to what some other official – the plant manager, or a union’s district representative, for example – allegedly said, the Region need not involve the union or employer in its communications if the ethics rules do not compel it. Sometimes the delineation of fact witnesses, rather than actor witnesses can be a tricky one. Where appropriate, Regions should contact the Ethics Office and include Operations on the communication.

The Region may seek additional guidance from the Division of Operations-Management if the Region otherwise has concerns that particular circumstances warrant a departure from this policy.

Regions should communicate with former agents and supervisors about this policy so that they are aware that the party representative may be involved in or present at the substantive communication. Where the former agent or supervisor has independent representation and/or does not want the charged party’s representative to be present, or where the charged party’s attorney seeks to participate as more than an observer, the Region should contact the Ethics Office.

II. Recordings During Investigations

Audio⁴ recordings sometimes contain relevant evidence of disputed conversations. Regions should therefore seek relevant recordings during investigations and should continue to do so, but consistent with guidance set forth below. There are three parts to this guidance:

- A) recordings Regions should not receive (or should not receive before checking with Ethics);

³ This approach of simply involving counsel or the party, will in many instances avoid the need for the inquiry altogether.

⁴ Regions’ approach should be the same for video recordings as is described here for audio recordings, noting that statutes may have different consent requirements for video recordings than for audio recordings.

- B) recordings where Regions will alert charged parties, before making merit determinations, that they possess highly relevant recordings, and offer to play the recordings for the charged party;
- C) recordings where, *before receiving recordings*, Regions will advise the person or party proffering the recording concerning the Region's potential use of the recordings and concerning the proffering person or party's potential responsibility for any law or work rule they may have breached in making the recording.

A) Recordings Regions Should Not Receive

The Federal Wiretap Act prohibits recording voices where there is an expectation of privacy and no one present consents. The Federal Wiretap Act further contains prohibitions on use of recordings made in contravention of the Act. Accordingly, Regions should not receive recordings they know to have been made without the consent of any participant in the conversation and with an expectation of privacy. Where this is in doubt, Regions should consult with the Ethics Office. By contrast, although a recording may have been made in contravention of a state wiretap statute or an employer policy, this may not prohibit the Region from receiving the recording, but, as set forth below, Regions should advise persons or parties proffering such recordings regarding possible repercussions so that the person can make an informed choice as to whether or not to provide a recording to the Region.

B) Regions Should Offer to Play Relevant Recordings for Charged Parties Before Making Merit Determinations

Where the Region determines that an audio recording is relevant to the decision of whether an employer or labor organization committed an unfair labor practice, Regions should apprise the charged party as to the existence of the recording during the investigation, offer to play the relevant portion of the recording for them and solicit the charged party's position before making a determination on the merits.⁵

C) Advising Persons and Parties Proffering Recordings about Potential Ramifications Before Receiving Recordings

Before receiving such recordings, the Region should advise the party or person who proffers the recording of what the Region may do with it upon receipt, specifically:

1. The Region should advise any party or person who proffers a recording that the Region's intended use of the recording may include playing the recording, or relevant portions, for the charged party before the conclusion of investigation;⁶

⁵ Of course, Regions will determine when during the investigation to do so, e.g. at the outset, after interviewing the charged party's witnesses or after receiving the charged party's initial response.

⁶ Generally, the charged party's agent(s) will be on the recording and thus will know who was present. Therefore, confidentiality concerns over revealing recordings are similar to those created when the alleged

2. The Region should apprise the party or person who proffers a recording that if the recording was made contrary to law, the one who made the recording may be subject to prosecution or to a civil claim;
3. The Region should apprise the party or person who proffers a recording that if the recording was made contrary to a lawful employer work rule or policy, the employer may take action based on a violation of its rules.

Where the party or person proceeds with proffering a recording after the Region relays this information, the Region may utilize the recording to the full extent of its probative value during the investigation. Should the charged party ask for a copy of the recording, the request should be denied. If the Region decides the use of the recording at any hearing would support counsel for General Counsel's case, and it has concerns about whether doing so is consistent with ethics obligations, the Region should contact the Ethics Office regarding whether the use of the recording at trial would be permissible.

Conclusion⁷

The contact for inquiries and consultation with Operations-Management is Deputy Associate to the General Counsel John Doyle. If you have any questions regarding this memorandum, please contact your AGC or Deputy in Operations-Management, or Deputy Associate to the General Counsel John Doyle.

/s/

P.B.R.

unlawful statements or conduct are revealed during the investigation. However, the Region should consult with Operations and/or Ethics, as appropriate, if there are unusual confidentiality issues.

⁷ NLRB Casehandling Manual, Part 1, Unfair Labor Practice Proceedings, will be updated where appropriate.