No Honor, No Glory
Labor Counsel's Guide to Employee Misconduct Interviews after *LaChance v. Erickson*

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Introduction

In 1998, the Supreme Court issued two decisions that made clear that individuals have no right to lie to the federal government. In *LaChance v. Erickson*,[1] the Court held that employees do not have a right to lie to federal agencies in their responses to agency charges.[2] In *Brogan v. United States*,[3] the Court held that individuals have no right to lie to federal law-enforcement agents during investigations.[4]

Misconduct exists in the federal workplace, as it does in the private sector. Thus, federal agencies investigate employee misconduct, just as employers do in the private sector. Prior to 1988, the law mandated that employees had a duty to cooperate, and provide truthful testimony, in agency investigations.[5] Also, agencies could discipline employees for making false statements during agency investigations.[6] In many cases, agencies disciplined employees for both the original misconduct, and for making false statements during agency investigations.[7] The Merit Systems Protection Board (MSPB) routinely upheld such agency disciplinary actions.[8]

This article traces the development of the law of false statements in pre-charge investigations, from the law prior to *Grubka v. Department of Treasury*,[9] through the Federal Circuit's line of cases holding that employees have a due process right to deny the agency's charges against them. The article then discusses the Supreme Court's decision in *LaChance v. Erickson*,[10] and concludes with a labor counselor's guide to employee misconduct investigations.

The Settled Law Prior to *Grubka*

Prior to 1988, when the Federal Circuit decided *Grubka*, the law was settled that agencies could discipline employees for lies they tell during investigations.[11] Lies in the federal workplace can be divided into lies related to misconduct actions and those unrelated to these actions. This article discusses only the first type. Lies that are related to misconduct actions can be further subdivided into lies that employees tell during agency investigations into misconduct (investigation stage), and lies that employees tell during the agency's adjudication of misconduct charges against them (adjudication stage).

One type of lie involves an employee who commits a crime and lies about it during an agency investigation. In *Rhoads*, the employee, a law-enforcement officer, used marijuana and lied about it during an agency investigation, through a simple denial.[12] The agency disciplined the employee for making a false statement. The MSPB sustained the disciplinary action.[13]

Another type of lie involves an employee who commits misconduct, which is short of a crime, and lies about it. In *Perez*,[14]

1. 118 S. Ct. 753 (1998).

2. *Id.* at 756.

3. 118 S. Ct. 805 (1998).

4. *Id.* at 809-10.

5. Weston v. Department of Housing and Urban Dev., 724 F.2d 943, 949 (Fed. Cir. 1983).

6. *Id*.

7. *See, e.g.*, Rhoads, 12 M.S.P.B. 115, 116 (1982).

8. *Id.* Pursuant to 5 U.S.C.A. **§** 7701(b), the Merit Systems Protection Board (MSPB) reviews employee appeals from agency actions. 5 U.S.C.A. § 7701(b) (West 1998).

9. Grubka v. Department of Treasury, 858 F.2d 1570 (Fed. Cir. 1988).

10. 118 S. Ct. 753 (1998).

11. *Weston*, 724 F.2d at 949.

the employee attended a trade show during duty time and lied about it to agency investigators.[15] His lie went beyond a simple denial. In addition to denying the allegation, the employee stated that he spent only twenty to thirty minutes at the hotel where the trade show was held.[16] Investigators, however, uncovered other evidence indicating that Mr. Perez was at the hotel for about two hours.[17] The MSPB sustained the disciplinary action.[18]

Employees can also lie to agency investigators about whether they told other lies. In *Amann*,[19] an employee made false statements on his employment and security clearance applications.[20] He subsequently lied to agency investigators who were looking into the earlier false statements.[21] It was unclear, however, whether the later lies were simple denials or affirmative falsehoods. The MSPB sustained the disciplinary action.[22]

Finally, employees occasionally lie to agency investigators when they are interviewed as witnesses to misconduct by third parties. In *Cogman*,[23] the employee falsely told agency investigators that she did not know anything about misconduct by another employee.[24] Although she made only a simple denial, the MSPB sustained the disciplinary action against her.[25]

The above cases dealt with disciplinary actions for false statements that were made during agency investigations. Another category of lies related to misconduct cases involves employees who make false statements during the adjudicative stage, the period after an agency formally charges the employee. One of these cases, *Williams*,[26] involved an employee who submitted a false leave request.[27] The agency charged Williams with misconduct.[28] During the adjudication of that misconduct, Williams made some unspecified false statements.[29] The agency charged Williams with making those false statements.[30] The MSPB later sustained the agency's disciplinary action.[31]

12. *Rhoads*, 12 M.S.P.B. at 116.

13. *Id*.

14. 26 M.S.P.B. 546 (1985), *enforced*, 790 F.2d 92 (Fed. Cir.).

15. *Id.* at 547.

16. *Id*.

17. *Id*.

18. *Id.* at 549.

19. 19 M.S.P.B. 116 (1984).

20. *Id.* at 117.

21. *Id*.

22. *Id.* at 118.

23. 12 M.S.P.B. 569 (1982).

24. *Id.* at 569.

25. *Id*.

26. 34 M.S.P.B. 54 (1987).

27. *Id.* at 56.

28. *Id*.

29. *Id.* at 58.

30. *Id*.

31. *Id*. at 59.

The *Grubka-Erickson* Due Process Right to Lie

Grubka: Wrong as a Matter of Law to Charge False Statements

Prior to *Grubka*, agencies disciplined employees for making false statements related to the workplace, and the MSPB sustained the agencies' actions. The Federal Circuit, however, turned that body of law "upside down" with its decision in *Grubka*.[32] Mr. Grubka was a senior-level (GS-14) employee of the Internal Revenue Service.[33] The charges against him arose out of an after-hours party that a female trainee agent organized for other trainees, their instructors, and supervisors.[34] The agency charged Mr. Grubka with three charges of conduct unbecoming a manager, based on his actions with three female trainees.[35] The Federal Circuit set aside all three charges based on insufficient evidence.[36]

The agency also charged Mr. Grubka with making a false statement to its investigators.[37] Agency investigators interviewed Mr. Grubka about an incident that allegedly occurred in a stairwell.[38] During the questioning, Mr. Grubka admitted that he smelled a female employee's perfume, but denied the allegations that he leaned toward her and was sexually aroused.[39] The MSPB sustained the false statement charge against Mr. Grubka.[40] The Federal Circuit, however, reversed the MSPB.[41] The Federal Circuit held that the agency's evidence was insufficient. According to the court, there was no nexus between the allegations and the agency's mission. Additionally, the court held that Mr. Grubka had a due process right to deny the allegations.[42] Therefore, the false statement charge was erroneous "as a matter of law."[43]

Assuming that the Federal Circuit was correct about the other bases for its decision, the court's due process rationale appears to be wrong. Specifically, the court failed to distinguish between due process rights that exist at the investigation stage and those that exist at the adjudication stage. Regardless of the due process rights that exist at the adjudication stage, employees have no right to lie at the investigation stage.[44] Absent a Fifth Amendment privilege against self-incrimination, agency employees are required to fully cooperate in agency investigations and to answer truthfully.[45] The Federal Circuit was wrong because it stated a single rule that employees have a due process right to deny agency allegations.[46] It should have first decided whether Mr. Grubka lied at the investigation stage or at the adjudication stage.

Bradley: Did the Federal Circuit Backtrack from Grubka?

In *Bradley v. Veteran's Administration*,[47] the Federal Circuit wrote, in *dicta*, that agencies may impose discipline on employees who lie to agency investigators.[48] This was different from the court's holding in *Grubka*, two years earlier. In *Grubka*, the court held that the agency was wrong "as a matter of law" to discipline Mr. Grubka for lying to agency investigators.[49]

32. Grubka v. Department of Treasury, 858 F.2d 1579 (Fed. Cir. 1983).

33. *Id*. at 1571.

34. *Id*. at 1572.

35. *Id*.

36. *Id*

37. *Id*. at 1574.

38. *Id*.

39. *Id*. at 1573.

40. *Id*. at 1571.

41. *Id*. at 1574.

42. *Id*. at 1575.

43. *Id*.

44. Weston v. Department of Housing and Urban Dev., 724 F.2d 943 (Fed. Cir. 1983).

45. *Id.* at 948.

46. *Grubka*, 858 F.2d at 1575.

47. 900 F.2d 233 (Fed. Cir. 1990).

48. *Id.* at 237.

Bradley is notable for two reasons. First, the court recognized the different disciplinary standards for false statements at the investigation stage, as opposed to the adjudication stage, which it failed to do in *Grubka*.[50] Second, the court cited no authority for the *Bradley* rule. It was as if the court did not recognize its own precedent in *Weston v. Department of Housing and Urban Development.*[51]

The key language, however, was in the *dicta*.[52] In *dicta*, the court recognized that agencies do have the authority to discipline employees who make false statements to supervisors or investigators. As in *Grubka*, agency investigators interviewed the employee in *Bradley.*[53] Also, as in *Grubka*, the employee denied the allegations.[54] In *Grubka*, the Federal Circuit held that the false statement charge was *improper* as a matter of law.[55] In *Bradley*, however, the court held that the false statement charge would be *proper.*[56] This inconsistency is confusing. The only possible explanation for allowing a false statement in *Bradley*, but not in *Grubka*, is if the employee in *Grubka* made his statement after being charged (adjudication stage).[57] The problem with this explanation, however, is that the opinion did not state that Mr. Grubka made the false statements after he was charged. In fact, this scenario is unlikely because agencies typically investigate and interview employees prior to charges, not afterward.

Beverly: Federal Circuit Goes Out on a Limb

In 1990, the same year as *Bradley*, the Federal Circuit went further "out on a limb" in *Beverly v. United States Post Office*[58] by stating that an employee's lie, so long as it is a "mere denial" of an agency charge, is not a lie at all.[59] In *Bradley*, the Federal Circuit recognized the general rule that agencies may discipline employees for false statements that they make during agency investigations.[60] In *Beverly*, however, the Federal Circuit recognized a type of "exculpatory no," in that it made an exception to the general rule that allows "mere denials." In other words, the court allowed employees to lie to agencies during investigations, if the lie is a mere denial of agency allegations, and the employee did not tell additional affirmative lies beyond the denial.

Beverly made an exception to the general rule in *Weston v. Department of Housing and Urban Development* that, during pre-charge inquiries, employees must speak the truth.[61] Under the *Beverly* exception, employees could make false statements, so long as they were "mere denials." While this concept has similarities to the exculpatory no doctrine, discussed *infra*, the court did not explicitly adopt that doctrine in its opinion. In fact, the Federal Circuit did not cite any authority for its decision. It did not explain how "mere denials" are lawful exceptions to the general rule that agencies may discipline employees for making false statements during agency investigations.

How Did the MSPB React to the Federal Circuit's New Decisions?

For a time after *Grubka*, the MSPB fought to maintain agencies' rights to discipline employees for false statements. In many ways, the board is closer to the everyday work of federal agencies than the Federal Circuit. For example, it is only one step removed from the administrative judge who adjudicates an agency's adverse actions. Additionally, the MSPB reviews an agency's disciplinary actions.[62] By contrast, the Federal Circuit

49. *Grubka*, 858 F.2d at 1575.

50. *Bradley*, 900 F.2d at 233.

51. 724 F.2d 943 (Fed. Cir. 1983).

52. *Id*. The rule is *dicta* because the agency did not charge the employee with the offense of making false statements.

53. *Id.* at 236.

54. *Id*.

55. *Grubka*, 858 F.2d at 1575.

56. The agency chose not to charge the employee with the offense of making a false statement.

57. If the *Grubka* denial were made after charging, the court could excuse it as a denial made pursuant to its concept of a "due process right" to deny agency allegations.

58. 907 F.2d 136 (Fed. Cir. 1990).

59. *Id.* at 137.

60. Bradley v. Veteran's Administration, 900 F.2d 233, 237 (Fed. Cir. 1990).

61. Weston v. Department of Housing and Urban Dev., 724 F.2d 943, 949 (Fed. Cir. 1983).

62. 5 U.S.C.A. § 7701(a) (West 1998).

is two steps removed from the agency, and it reviews a myriad of cases other than appeals from the MSPB's decisions.[63]

The Federal Circuit's decisions in *Grubka* and *Beverly* weakened agencies' abilities to discipline employees. The board recognized, however, that to operate efficiently, agencies need to discipline employees who make false statements. Thus, in *Greer*,[64] the board fought back for agency rights by sustaining a false statement charge. The board did so by making several strong arguments distinguishing *Grubka*.[65]

First, the board stated that Mr. Grubka's actions took place after hours, at a location away from the workplace.[66] In contrast, Mr. Greer's misconduct took place during work hours, at the agency work site.[67] Thus, the board held that, unlike the facts in *Grubka*, a nexus existed between the false statement and the agency's mission.

Second, the board reminded the Federal Circuit that, absent the possibility of self-incrimination, agency employees must cooperate in agency pre-charge investigations and provide truthful testimony.[68] According to the board, the privilege against self-incrimination did not exist, because there was no indication that the employee's acts were criminal in nature. Thus, the employee had a duty to cooperate and to speak truthfully to agency investigators.[69] The board also reminded the Federal Circuit that even if self-incrimination was possible in a case, the employee must cooperate and provide truthful answers to investigators. This duty of cooperation arises once investigators notify the employee that, under *Kalkines v. United States*, his answers would not be used in a criminal prosecution.[70]

Third, the board reminded the Federal Circuit that the court's own decisions had previously allowed agencies to discipline employees for making false statements at agency investigations.[71]

Fourth, the board addressed the Federal Circuit's due process rationale in *Grubka*.[72] In *Grubka*, the Federal Circuit noted that "the [Administrative Judge] denied Grubka his due process rights in that [the Administrative Judge] denied him the right to a trial on the charge without due process of law."[73] The court also stated in *Grubka* that it "has always been the rule and practice that a person charged with an offense can deny the charge and plead not guilty, either because he is not guilty or to force the charging party to prove the charge," and that "[o]therwise a person could never defend himself against a charge . . . for fear of committing another offense by denying the charge."[74] In *Greer*, the board pointed out that there was neither a charge, nor a case, at the time that Mr. Greer made the false statement(just an investigation.[75] The board implied that the due process concerns stated in *Grubka* did not apply to *Greer.*

Finally, the board relied on an old U.S. Supreme Court case that refused to recognize the right to make an exculpatory no type of statement.[76] The board quoted the Supreme Court's comment in *Bryson v. United States*[77] that "[o]ur legal system provides methods for challenging the government's right to ask questions; lying is not one of them. A citizen may *decline to answer* the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood."[78]

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63. 28 U.S.C.A. § 1295 (West 1998).

64. 43 M.S.P.B. 180, 185 (1990), *overruled by* Walsh, 62 M.S.P.B. 586, 589 (1994).

65. *Greer*, 43 M.S.P.B. at 185.

66. *Id*.

67. *Id*.

68. *Id*. *See* Weston v. Department of Housing and Urban Dev., 724 F.2d 943, 949 (Fed. Cir. 1983).

69. *Weston*, 724 F.2d at 949.

70. *Greer*, 43 M.S.P.B. at 180. *See* Kalkines v. United States, 473 F.2d 1391, 1393 (Ct. Cl. 1973).

71. *Greer*, 43 M.S.P.B. at 185. *See* Southers v. Veteran's Administration, 813 F.2d 1223, 1225 (Fed. Cir. 1987).

72. *Greer*, 43 M.S.P.B. at 184-86.

73. Grubka v. Department of Treasury, 858 F.2d 1570, 1575 (Fed. Cir. 1988).

74. *Id*.

75. *Greer*, 43 M.S.P.B. at 187 n.2.

76. *Id*. at 186.

77. 396 U.S. 64 (1969).

In this manner, the board boldly distinguished the *Greer* case from the Federal Circuit's decision in *Grubka.* In so doing, it supported federal agencies' rights to discipline employees who make false statements during agency investigations. Surprisingly, the employee never forwarded the case to the Federal Circuit for appellate review. Following *Greer*, the board continued to distinguish *Grubka* to uphold a number of other false statement cases.[79]

Walsh: The MSPB Misreads Grubka

In 1994, in *Walsh*,[80] the board finally yielded to the Federal Circuit's *Grubka* decision.[81] Unfortunately, in deciding *Walsh*, the board misread *Grubka*. *Grubka* held that *once charged*, employees have a due process right to deny agency charges.[82] Since Ms. Walsh lied during the agency investigation, *prior to charges*, even *Grubka* would have allowed the board to sustain agency discipline.[83]

In *Walsh*, the MSPB held that an agency may no longer charge a federal employee with making a false statement, if it has also charged him with the underlying conduct.[84] The board issued its decision with some regret. In his concurring opinion, Chairman Erdreich eloquently expressed grave reservations about the decision and its effects on ethical standards for federal employees.[85]

Chairman Erdreich made it clear that his vote was yielding to the weight, if not the wisdom, of the Federal Circuit precedent.[86] He noted the incongruity between the federal government having the authority to prosecute members of the general public who make false statements to federal agencies (under 18 U.S.C.A. § 1001), but lacking the authority to discipline its own employees who make similar false statements.[87] He also noted the incongruity between requiring federal employees to cooperate in agency investigations (unless they have the privilege against self-incrimination), but allowing them to lie during that cooperation without the fear of disciplinary action.[88]

Walsh Allowed Employees to Lie with Impunity

Practically, *Walsh* authorized employees to lie with impunity at agency investigations. Based on *Walsh*, the MSPB reversed agency discipline in a number of cases where the employee could have invoked the right to silence, but chose to lie instead. In those cases, the suspected misconduct was criminal in nature, and the employee could have invoked the right to silence.[89] Instead of invoking the Fifth Amendment, the employees chose to lie.[90]

In *Lowe*, the agency investigated Mr. Lowe for kissing a subordinate, a possible battery.[91] Mr. Lowe made two statements to investigators, first that he did not kiss the subordinate; second (two days later) that he did kiss her, but only to comfort her.[92] The administrative judge sustained the agency's disciplinary action.[93] The board reversed this decision on the basis of *Walsh*.[94]

78. *Greer*, 43 M.S.P.B. at 186 (quoting *Bryson*, 396 U.S. at 72 (1969)) (emphasis added). Of course, the board's reliance on *Bryson* was misplaced, as it admitted later in *Walsh*. Per *Weston*, federal employees cannot "decline to answer" questions during agency investigations. Absent the possibility of self-incrimination, federal employees must cooperate and provide truthful statements to agency investigators.

79. *See, e.g.*, Allen, 43 M.S.P.B. 192 (1990); Hill, 44 M.S.P.B. 607 (1990).

80. 62 M.S.P.B. 586, 589 (1994), *aff'd sub nom.* King v. Erickson, 89 F.3d 1575 (Fed. Cir. 1996), *rev'd sub nom.* LaChance v. Erickson, 118 S. Ct. 753, 756 (1998).

81. *Walsh*, 62 M.S.P.B. at 589

82. Grubka v. Department of Treasury, 858 F.2d 1570, 1575 (1990).

83. *Walsh*, 62 M.S.P.B. at 589.

84. *Id*. at 593.

85. *Id*. at 597-600.

86. *Id*. at 597.

87. *Id*.

88. *Id.* at 598.

89. *See, e.g.*, Lowe, 63 M.S.P.B. 73, 75 (1994); Gunn, 63 M.S.P.B. 513, 515 (1994).

90. *Lowe*, 63 M.S.P.B. at 76; *Gunn*, 63 M.S.P.B. at 515.

91. *Lowe*, 63 M.S.P.B. at 75.

92. *Id.* at 76.

In *Gunn*, the agency investigated Ms. Gunn for signing a third party's name to that person's leave form, a possible forgery.[95] Ms. Gunn told agency investigators that she met the third party in the building's lobby, and that the third party signed it.[96] She later admitted that she lied.[97] The administrative judge sustained agency discipline; however, the board, citing *Walsh*, reversed.[98]

Erickson: Federal Circuit Upholds the Right to Lie

King v. Erickson[99] was the Federal Circuit's decision on the appeals of *Walsh*, *Erickson*, *Barrett*, and *Kye*.[100] In *Erickson*, the Federal Circuit held that during agency investigations, employees must tell the truth. Once they are charged, however, employees have the right to respond to the charges, to include making false denials.[101] Unlike *Grubka*, the Federal Circuit laid out the correct law in *Erickson*, distinguishing the different due process rights in agency investigations and adjudications.[102] Yet, the court still erred in applying the law to the facts. The *Erickson* cases apparently involved lies during the investigation stage, not denials at the adjudication stage. Nevertheless, the court condoned the employees' making false denials to agency investigators.[103]

The court recognized that federal employees have a property interest in their employment and, under the Fifth Amendment, the government cannot deprive its employees of their property without due process of law.[104] Unlike in *Grubka*, the Federal Circuit distinguished between the *investigation* stage (before charges), and the *adjudication* stage (after charges).[105] The court stated that at the *investigation* stage, employees must tell the truth to investigators, and agencies can take disciplinary action against those who make false statements during investigations.[106] In other words, at the investigation stage, employees have no due process right to falsely deny allegations that the agency makes against them. At the later *adjudication* stage, however, the court reiterated that employees have a due process right to deny the charges and the underlying facts, to include false denials.[107]

The court claimed to limit denial rights. The court stated that "[b]eyond a denial . . . an employee may not make up a false story, or tell 'tall tales' in order to defend against a charge. These falsehoods . . . are actionable by agencies as falsification."[108]

93. *Id.* at 75.

94. *Id.* at 76.

95. Gunn, 63 M.S.P.B. 513, 515 (1994).

96. *Id*. at 517.

97. *Id*. at 515.

98. *Id*. at 517.

99. 89 F.3d 1575 (Fed. Cir. 1996), *rev'd sub nom*. LaChance v. Erickson, 118 S. Ct. 753 (1998).

100. *See* Walsh, 62 M.S.P.B. 586 (1994); Erickson, 63 M.S.P.B. 80 (1994); Barrett, 65 M.S.P.B. 186 (1994); Kye, 64 M.S.P.B. 570 (1994).

101. *Erickson*, 89 F.3d at 1583.

102. *Id.*

103. *Id.*

104. *Id.* at 1580.

105. *Id.* at 1583-84.

106. *Id*. at 1583.

107. *Id.* at 1584.

108. *Id*. at 1583.

After setting out these statements of law, the court disregarded them in its decision. As discussed, *supra*, Ms. Walsh lied at the investigation stage.[109] She made statements to investigators that were internally inconsistent and contradictory to the accounts of other witnesses.[110] Characterizing her contradictory statements, however, the court stated that "she *consistently denied* having an intimate relationship with the patient while he was an inpatient at the facility." The court then upheld the dismissal of the false statement charge.[111] The court did not care that Ms. Walsh made the false statement at the investigation stage, and went beyond a mere denial by affirmatively making up dates on which the sexual affair started.[112]

Likewise, in *Barrett*, Mr. Barrett made a false statement at the investigation stage.[113] He told investigators that he was working on his own time when helping his supervisor build a fishpond.[114] The court chose to read Mr. Barrett's response as indicating that he "knew nothing about the events in question . . . *in essence* a denial . . . ."[115]

Similarly, in *Erickson*, Mr. Erickson lied at the investigation stage.[116] He denied to agency investigators that he made harassing (mad laughter) telephone calls to fellow employees and encouraged others to make similar calls.[117] The court held that Mr. Erickson's statements were proper denials.[118]

In *Erickson*, the Federal Circuit acknowledged that employees had a duty to tell the truth during agency investigations, and a due process right to deny charges at the adjudication stage; without making affirmative false statements.[119] In its application of the law to the facts, the court demonstrated that it was willing to go far to strike down false statement charges, to include condoning investigation stage lies and affirmative false statements.

The Exculpatory No Doctrine

The *Grubka-Erickson* doctrine, creating a due process right of employees to deny agency charges, has some similarities to the exculpatory no doctrine. This doctrine allows individuals to deny accusations by federal agents without the risk of a conviction for making a false statement under 18 U.S.C.A. § 1001.[120]

Courts fashioned the rule to protect individuals from government overreaching, and they provided two bases for the rule.[121] First, courts have held that Congress did not intend for the statute to include these denials within its scope.[122] Second, courts have held that punishing individuals for making false statements, where they would have had the right to remain silent, comes "uncomfortably close" to chipping away at the Fifth Amendment.[123]

Not all of the federal circuit courts, however, have accepted the exculpatory no doctrine.[124] Also, the Supreme Court, while not directly addressing the doctrine, held in *Bryson v. United*

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109. Walsh, 62 M.S.P.B. 586, 589 (1994).

110. *Id.* at 589-91.

111. *Erickson*, 89 F.3d at 1585 (emphasis added).

112. *Walsh*, 62 M.S.P.B. at 589.

113. Barrett, 65 M.S.P.B. 186, 200 (1994).

114. *Id.*

115. *Erickson*, 89 F.3d at 1586 (emphasis added).

116. *Id.* at 82.

117. *Id.*

118. *Erickson*, 89 F.3d at 1585 (Fed. Cir. 1996).

119. *Id.*

120. Under 18 U.S.C.A. § 1001, it is a crime to make a false statement to a government agency. The elements of the offense are that the accused made a statement, that the statement was false, that the statement was material, that the accused made the statement knowingly and willfully, and that the government agency had jurisdiction. 18 U.S.C.A. § 1001 (West 1998).

121. *See generally*, Nedra D. Campbell & Anne Gallagher, *False Statements*, 33 AM. CRIM. L. REV. 679 (1996); Giles A. Birch, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273 (1990); Sandra L. Turner, *Would I Lie to You? The Sixth Circuit Joins the "Exculpatory No" Controversy in United States v. Steele*, 81 KY. L.J. 213 (1992).

122. *See, e.g.*, Paternostro v. United States, 311 F.2d 298, 309 (5th Cir. 1962), *overruled by* Brogan v. United States, 118 S. Ct. 805 (1998).

123. *See, e.g.*, United States v. Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1974), *overruled by* United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994).

States[125] that individuals do have a "right to silence," where appropriate, but that they do not have the right to lie.[126]

The court has since declared the exculpatory no doctrine dead.[127] In *Brogan*, a union officer lied to federal law-enforcement officers about whether he accepted cash or gifts from a company.[128] The Supreme Court held that "courts may not create their own limitations on legislation,"[129] that the Fifth Amendment does not provide a privilege to lie,[130] and that falsely denying guilt in a government investigation "pervert[s] governmental functions."[131]

Application of the Doctrine to Federal Labor Cases

For several reasons, the exculpatory no doctrine should not apply directly, or by analogy, to federal labor cases. First, federal labor cases involve agencies' rights to administratively discipline employees under the Civil Service Reform Act[132] (CSRA), not criminally under 18 U.S.C.A. § 1001.[133] Thus, the exculpatory no doctrine, which is a safeguard against government overreaching under 18 U.S.C.A. § 1001, should not apply in the federal labor sector.

Second, the doctrine is not needed because the CSRA itself protects against government overreaching by allowing agencies to take disciplinary actions only for "such cause as will promote the efficiency of the service" (the so-called "nexus" requirement).[134] In other words, the agency must prove that the misconduct diminishes the employee's work performance or the agency's mission performance Additionally, in certain egregious circumstances, reviewers may presume that a nexus exists.[135]

Third, although no explicit statement of congressional intent exists, at the time it enacted the CSRA, Congress believed that agencies could discipline employees who made false statements.[136] Also, after the board issued the *Walsh* decision, a member of Congress expressed disbelief that agencies could no longer discipline employees who make false statements during agency investigations.[137]

Finally, the federal employee does not need the exculpatory no doctrine to exercise his Fifth Amendment privilege against self-incrimination. Under *Weston* and *Kalkines v. United States*, employees have a right to silence under the Fifth Amendment in situations where they may incriminate themselves.[138] Otherwise, employees have a duty to provide information to agency investigators.[139]

The Supreme Court's Decision in *Erickson*

124. Campbell, *supra* note 121, at 691, n.77 (stating that among the federal circuits, only the Fourth, Eighth, Ninth, and Eleventh Circuits have explicitly adopted the "exculpatory no" doctrine).

125. 396 U.S. 64 (1969).

126. *Id.* at 72.

127. Brogan v. United States, 118 S. Ct. 805, 811 (1998).

128. *Id.* at 807.

129. *Id.* at 811-12.

130. *Id.* at 810.

131. *Id.* at 808.

132. 5 U.S.C.A. § 7513(a) (West 1998).

133. *See* 18 U.S.C.A. § 1001 (West 1998).

134. 5 U.S.C.A. § 7503(a), 7513(a); Merritt, 6 M.S.P.B. 585 (1981).

135. *See generally, Coleman*, 57 M.S.P.B. 537 (1993); *Ingram*, 53 M.S.P.B. 101, *aff'd* 980 F.2d 742 (Fed. Cir. 1992); Merritt, 6 M.S.P.B. 585.

136. STAFF OF HOUSE COMM. ON POST OFFICE AND CIVIL SERV., 96TH CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE CIVIL SERV. REFORM ACT OF 1978, at 1486 (Comm. Print 1979).

137. *Civil Serv. Reform II: Performance and Accountability. Hearing Before the Subcomm. on Civil Serv. of the House Comm. on Gov't Reform and Oversight*, 104th Cong., 1st Sess. 137 (1995) (Statement of Rep. Bass) ("The subcommittee's attention has recently been drawn to a decision in *Walsh v. Dep't of Veterans Affairs*, a 1994 decision where the Board held that federal employees cannot be punished for making false statement to agency investigators. One critical element of any investigator's job is an ability to be a credible witness in a trial. If that decision is applied to law enforcement agents, how could they possibly perform their job [sic]?").

138. *See generally,* Weston v. Department of Housing and Urban Dev., 724 F.2d 943, 947 (Fed. Cir. 1983).

Because of its impact on the federal workplace, the Office of Personnel Management (OPM) petitioned the Supreme Court to review *Erickson*. The Supreme Court's decision in *Erickson* was unanimous and unequivocal: employees have no right to lie, whether based on statute or due process, in response to agency charges.[140]

Before the Supreme Court, the OPM argued that the Federal Circuit was wrong on the law, the facts, and on policy grounds.[141] Regarding legal error, the OPM argued that there is no due process right to lie. While due process may provide the employee with the opportunity to respond at the appropriate stage of adjudication, under *Bryson*, he has no right to lie in that response.[142] Factually, the OPM pointed out that the lies under review took place during pre-charge investigations.[143] Finally, from a policy standpoint, the OPM argued that adopting an exculpatory no rule would impede federal operations.[144]

In their responses, the employees echoed the grounds cited by the Federal Circuit in its decision. First, they claimed that due process allows them to deny an agency's allegations. Second, they argued that if the agency can charge them with false statements on the basis of their denials, this may chill their right to respond.[145]

The Supreme Court's decision was a complete rejection of the employees' position. Brevity and unanimity marked the opinion. In the opinion by the Chief Justice, the Court first restated its opinion in *Bryson* that individuals have no right to make false statements in response to government questions.[146] Second, the Court reviewed the statutory disciplinary procedures for federal employees, as well as the Fifth Amendment due process protections.[147] The Court concluded that neither allowed an employee to lie in his response to agency charges of misconduct.[148] Finally, the Court noted that where answering agency questions would expose them to criminal penalties, employees would have the Fifth Amendment privilege against self-incrimination.[149]

The Court's opinion, however, did not directly address two issues. First, the OPM had argued that due process rights should not exist in the cases under review because they involved lies at the investigation stage.[150] Although the Court did not directly address the issue, its answer is obvious; it noted that under *Bryson*, individuals may never lie in response to government questions.[151] They may invoke the right to silence, if available, but they may never lie. Regardless of whether it was at the investigation stage or the adjudication stage, the Court would have held that the employees in *Erickson* had no right to lie.

Second, the employees had argued on appeal that they had a due process right to deny agency charges.[152] The Court did not directly address whether employees always have the right to deny agency charges. The Court did state that under *Cleveland Board of Education v. Loudermill*,[153] due process provides an "opportunity to be heard."[154] The opportunity to be heard implies that the employee can state his disagreement with the agency's legal position. When does this due process right

139. *Id.* at 949.

140. LaChance v. Erickson, 118 S. Ct. 753, 756 (1998).

141. Petitioner's Brief at 14, *Erickson* (No. 96-1395).

142. *Id.*

143. *Id.*

144. *Id.* at 15.

145. Respondent Erickson's Brief at 4, *Erickson* (No. 96-1395); Respondent Walsh's Brief at 2-3, *id.*

146. *Erickson*, 118 S. Ct. at 755 (quoting Bryson v. United States, 396 U.S. 64, 72 (1969)).

147. *Id.*

148. *Id.*

149. *Id.* at 756.

150. Petitioner's Brief at 14, *Erickson*, (No. 96-1395).

151. *Erickson*, at 755 (quoting Bryson v. United States, 396 U.S. 64, 72 (1969)).

152. Respondent Erickson's Brief at 4, *Erickson* (No. 96-1395); Respondent Walsh's Brief at 2-3, *id.*

153. 470 U.S. 532, 542 (1985).

154. *Erickson*, 118 S. Ct. at 756.

arise? It appears to arise at the adjudication stage, not at the investigation stage. Under *Kalkines*, employees have a duty to cooperate at the investigation stage.[155] Once charged, however, *Grubka* holds that employees have the right to deny an agency's allegations.[156] An employee's disagreement with the agency's legal position must be distinguished from false denials of facts. For example, if an agency charges that an employee assaulted someone by hitting him with his fists, the employee can argue, at the adjudication stage, that he did not commit assault (legal argument), but he cannot falsely state that he did not hit the person with his fists (factual denial).

Even the *Brogan* decision would allow the employee to disagree with the agency's legal position at the adjudication stage. In *Brogan*, government agents asked the employee whether he took any cash or gifts from a company.[157] The employee falsely denied the allegations. The Supreme Court held that the false denial was improper. The defendant in *Brogan* falsely denied a question of fact. That denial was improper. If the government charged him with taking bribes, however, the defendant could clearly deny that allegation at the trial. The bottom line for agency investigators is that they should elicit facts, not conclusions of law, when questioning employees during agency investigations.

After *Erickson*, employees have a duty to cooperate and to tell the truth in agency investigations.[158] Similarly, employees have no right to lie to federal agencies, either at the investigation or the adjudication stage.[159]

In addition, agency powers are limited in three respects. First, once a case progresses beyond the investigation stage into the adjudication stage, agencies can only obtain employee interviews on a voluntary basis.[160] Since there is no longer an investigation, employees no longer have a duty to cooperate. Second, under the Supreme Court's decision in *Erickson* and the *Weston-Kalkines* line of cases, employees have the Fifth Amendment privilege against self-incrimination when their answers may incriminate them.[161] Finally, under *Grubka*, and 5 U.S.C.A. § 7513(a), when employees do lie, agencies can only impose discipline for lies that have a nexus to the efficiency of the service.[162]

Guide for Questioning Federal Employees

The pre-charge investigation, is a very powerful instrument for the agency in its search for the truth. As discussed, employees have a duty to cooperate with the agency during pre-charge investigations and to tell the truth at those investigations.[163] Used the wrong way, however, this powerful weapon can backfire on the agency. The Federal Labor Relations Authority (FLRA) and the MSPB have imposed a Byzantine set of rules on government agencies in their interviews with employees. Below is one road map through the labyrinth.

First, draw a "bright line" between agency investigations, which take place prior to the agency's proposing charges against the employee (pre-charge investigations), and agency interviews in preparation for litigation (fact-gathering sessions). Employees must cooperate with the agency during pre-charge investigations, but they need not cooperate at fact-gathering sessions in preparation for litigation.[164]

Second, the labor counselor should consult with the appropriate civilian personnel specialists to discuss strategy, prior to interviewing federal employees. This should include discussions about: (1) which employees to interview, (2) the order in which to interview them, (3) the areas of discussion with each employee, (4) the appropriate notice to the union, (5) the appropriate coordination with supervisors, (6) the location of the interviews, (7) the presence of agency investigators at the interviews, and (8) the involvement of agency law enforcement officers in the interviews.

Pre-charge Investigations

The agency need not provide the union with notice of the pre-charge investigation, or with an opportunity to attend the

155. Kalkines v. United States, 473 F.2d 1391, 1393 (Ct. Cl. 1973).

156. Grubka v. Department of Treasury, 858 F.2d 1570, 1575 (Fed. Cir. 1988).

157. Brogan v. United States, 118 S. Ct. 805, 806-07 (1998).

158. Weston v. Department of Housing and Urban Dev., 724 F.2d 943, 949 (Fed. Cir. 1983).

159. *Erickson*, 118 S. Ct. at 756.

160. *See generally,* Griffis, 38 F.L.R.A. 1552, 1558 (1991).

161. *See generally,* Kalkines v. United States, 473 F.2d 1391, 1393 (Ct. Cl. 1973).

162. Grubka v. Department of Treasury, 858 F.2d 1570, 1574 (Fed. Cir. 1988).

163. *Weston*, 724 F.2d at 949.

164. *Id.* (discussing pre-charge investigations); American Fed'n Gov't Employees, Local 2354, 31 F.L.R.A. 541, 546 (1988) (discussing fact-gathering sessions).

interview sessions. Notification and rights only exist where the employee invokes his rights under *National Labor Relations Board v. Weingarten*,[165] or when the interview qualifies as a formal discussion.[166] Federal Labor Relations Authority (FLRA) decisions and 5 U.S.C.A. § 7114 (a)(2)(A) define formal discussions as discussions between management and one or more employees concerning grievances or personnel policies and practices affecting the general working conditions of bargaining unit employees.[167] In general, the FLRA finds fact-gathering sessions, but not pre-charge investigations, to be formal discussions.[168] The bottom line is that, for pre-charge investigations, the agency need not notify the union until the employee asks for a union representative under *Weingarten*.

When investigators call to request an interview, the first thing an employee wants to know is why the agency is asking him questions. Under *Alsedek*,[169] during pre-charge investigations, the agency need not inform an employee, even the target of an investigation, of his status as a suspect or the nature of the allegations.[170] The rationale is that the right to be informed of the charges is a due process right that does not attach at the pre-charge investigation.[171] Another rationale is that the agency is still in the investigation mode, and is not likely to have prepared specific charges.[172] As a practical matter, however, especially with third-party witnesses, it is generally a good idea to tell the employee the reason for the interview; this puts him at ease and establishes rapport. Also, where an agency did not inform the employee of the allegations, the MSPB has held that the employee's ignorance of the allegations excused a two-day refusal to cooperate.[173]

Employees will want to know whether they have the right to representation by counsel at the pre-charge investigation. Under *Ashford* and *Alsedek*, employees have no right to counsel at the investigation interview, unless the investigation may lead to a criminal prosecution and the interview is held in a custodial setting.[174] The key is the custodial setting. As long as agency personnel who conduct the investigation are not law enforcement officers, no custodial setting exists. Thus, the employee has no right to counsel.[175]

Next, employees will ask whether they have the right to have a union representative accompany them to the investigation. Under 5 U.S.C.A. § 7114(a)(2) and *Weingarten*, during pre-charge investigations, where the employee has a reasonable belief that the investigation may result in disciplinary action against him, the employee may request that a union representative attend the investigation.[176] The agency should heed even equivocal requests.[177] The agency, however, has no duty to inform the employee of this right during the investigation.[178] The agency is only required to give this notice annually.[179]

Even if the employee makes the request, the government need not delay the investigation to wait for the union representative.[180] The government has the following options: (1) wait for the representative, (2) stop the interview of the employee and proceed with the investigation without his input, or (3) pro-

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165. 420 U.S. 251 (1975).

166. *Id.* at 257 (holding that an employee must invoke); American. Fed'n Gov't Employees, Local 2567, 28 F.L.R.A. 1145, 1149 (1987); *American Fed'n Gov't Employees, Local 2354*, 31 F.L.R.A. at 550 (dealing with a formal discussion).

167. *See generally,* National Ass'n Gov't Employees, Local R1-25, 37 F.L.R.A. 747, 753 (1990).

168. *American Fed'n Gov't Employees, Local 2354*, 31 F.L.R.A. at 550.

169. 58 M.S.P.B. 229 (1993).

170. *Id.* at 240.

171. *Id.*

172. Ashford, 6 M.S.P.B. 458, 464 (1981).

173. Brown, 20 M.S.P.B. 524, 526 (1984).

174. *Ashford*, 6 M.S.P.B. at 464; *Alsedek*, 58 M.S.P.B. at 240.

175. *See generally,* Wilkes, 6 M.S.P.B. 732, 735 (1981).

176. National Labor Relations Bd. v. Weingarten, 420 U.S. 251, 267 (1975).

177. American Fed'n of Gov't Employees, Local 3148, 27 F.L.R.A. 874, 880 (1987).

178. 5 U.S.C.A. § 7114(a)(3) (West 1998); Sears v. Department of Navy, 680 F.2d 863, 865 (1st Cir. 1982); Anderson, 8 M.S.P.B. 686, 688 (1981).

179. *Anderson*, 8 M.S.P.B. at 688.

180. *American Fed'n of Gov't Employees, Local 3148*, 27 F.L.R.A. at 879.

vide the employee with the choice between proceeding with the investigation without the presence of the representative, or having no input into the investigation at all.[181]

Many times, the simplest option is the third option, due to the likelihood of complications when the union representative attends the investigation. If the agency allows the representative to attend, the agency must allow the representative to actively participate in the investigation interview.[182] The representative may assist the employee to present the facts.[183] The representative may also confer with the employee, although there is no right to interrupt the investigation to confer outside the hearing room.[184]

The agency must avoid one particular type of response, ignoring a *Weingarten* request. To do so is an unfair labor practice.[185] The FLRA's usual remedy for an unfair labor practice is to mandate that the head of the agency (usually the commanding general) issue a memorandum with his personal signature, for conspicuous posting around the installation, stating that the agency will no longer commit a similar unfair labor practice.[186] Needless to say, the labor counselor wants to avoid placing the commanding general in that position.

Regarding *Miranda* warnings, the agency has no duty to provide these warnings unless the investigation may lead to a criminal prosecution and the interviews were held in a custodial setting.[187] The key is the custodial setting. Where an investigator, who is not a law enforcement officer, conducts the interview, the MSPB has held that a custodial setting does not exist, and, therefore, the agency need not provide *Miranda* warnings.[188]

Regardless of whether the agency provided *Miranda* warnings, employees may invoke the right to silence in appropriate circumstances.[189] The employee must have a reasonable belief that the statement may be used against him in a criminal proceeding.[190] In reviewing the reasonableness of the invocation, the board will examine the reasonable possibility of criminal charges.[191] Where the witness invokes, he takes the risk that the agency will take final disciplinary action without his input. *Novak*[192] involved the indefinite suspension of an employee pending the outcome of a criminal case. The board allowed the agency to suspend the employee, where the employee invoked the privilege against self-incrimination.[193]

Once an employee invokes the privilege against self-incrimination, the agency must decide whether it intends to bring criminal charges against him. If the agency plans to make these charges, it has no option but to honor the right to silence. The investigators, however, may request another statement after giving the employee significant time to cool-off.[194] Where it does not plan to bring criminal charges, the agency can overcome the invocation by providing the employee with a *Kalkines* warning.[195] A *Kalkines* warning tells the employee both that his statement will not be used against him in a criminal prosecution, and that his failure to cooperate in the investigation will be grounds for removal.[196] Even in cases where the Fifth Amendment privilege against self-incrimination applies, the employee

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181. *Id.*

182. American Fed'n of Gov't Employees, Local 3434, 50 F.L.R.A. 601, 609 (1995).

183. American Fed'n of Gov't Employees, Local 171, 52 F.L.R.A. 421, 432-38 (1996).

184. *Id.*

185. American. Fed'n Gov't Employees, Local 2567, 28 F.L.R.A. 1145, 1150 (1987).

186. *Id.*

187. Gamber, 58 M.S.P.B. 142, 146 (1993); Chisolm, 7 M.S.P.B. 116, 120 (1981).

188. Wilkes, 6 M.S.P.B. 732, 735 (1981).

189. Ashford, 6 M.S.P.B. 458 (1981).

190. *Id.*

191. *Id.* at 466.

192. 12 M.S.P.B. 455, *enforced*, 723 F.2d 97 (D.C. Cir. 1983).

193. *Id.* at 457.

194. Michigan v. Mosley, 423 U.S. 96, 106 (1975).

195. Kalkines v. United States, 473 F.2d 1391, 1393 (Ct. Cl. 1973).

196. *Id.*

must cooperate with agency investigators once the agency provides the employee with a *Kalkines* warning.[197]

Once the agency passes these hurdles, it should place the employee in a position where he has the duty to cooperate with government investigators, as well as the duty to be truthful. At this point, the investigator should use both open-ended and leading questions to obtain information from the employee. Initially, the investigator should use open-ended questions to obtain narrative responses from the employee. Next, the investigator should use leading questions to "lock-in" the employee to his positions on the issues.

The investigator must prepare a record of the investigation to avoid "swearing contests" with the employee in front of a later tribunal. The best way is to obtain written responses. A tape-recording is an option, but preserving taped responses is more troublesome than preserving written responses.

Fact-Gathering Sessions

A different set of rules applies after the investigation is over, the agency has charged the employee with misconduct, and the agency's labor counselor wants to interview witnesses in preparation for litigation. Since the interview is not part of the investigation, employee witnesses have no duty to cooperate and attendance is voluntary.[198] In these fact-gathering sessions, management must: (1) inform the employee witness of the purpose of the questioning, that the employee's attendance is voluntary, and that there will be no reprisal for refusing to attend the interview; (2) ensure that the interview is conducted in an atmosphere that is not coercive; and (3) not ask questions that exceed the purpose of the interview.[199] The bottom line is that agency attorneys cannot coerce, directly or through the employee's supervisors, a reluctant employee to attend a pre-litigation interview. The agency's alternative in those cases is to depose the employee.[200]

The agency must notify the union of the fact-gathering session and provide the union with the opportunity to attend.[201] The FLRA has held that fact-gathering sessions are formal discussions.[202] The FLRA and 5 U.S.C.A. § 7114 (a)(2)(A) define a formal discussion as any discussion between management and one or more employees concerning grievances, or personnel policies and practices affecting the general working conditions of unit employees.[203] Failure to notify the union is an unfair labor practice; again, the FLRA's remedy would be to mandate that the agency head send out a notice over his personal signature, for conspicuous dissemination.[204]

Also, since their attendance at fact-gathering sessions is voluntary, employees can make their cooperation conditional upon having an attorney or a union representative present at the session. Because employees voluntarily attend, a custodial interrogation does not exist; therefore, *Miranda* warnings are not required. As long as the appropriate circumstances exist, the employee may invoke the privilege against self-incrimination, regardless of whether the agency has provided *Miranda* warnings.[205]

Conclusion

The Supreme Court's unanimous decision in *Erickson* highlights the pre-charge investigation's usefulness as a powerful tool for the agency in its search for the truth. The employee has no choice but to cooperate and to provide the truth to agency investigators. A tool, however, is only as good as its operator. Agency counsel and investigators must master the differences in the rules governing pre-charge investigations and fact-gathering sessions in order to take full advantage of the law.

The Supreme Court's *Erickson* decision made clear that federal employees have no right to lie to their federal agencies, either at the investigation stage or the adjudication stage of disciplinary actions. The only difference between the two stages is that employees have a duty to cooperate in agency investigations, but not in agency fact-gathering sessions.

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197. *Id.*

198. *See generally,* American Fed'n of Gov't Employees, Local 2612, 38 F.L.R.A. 1552, 1558 (1991).

199. Brookhaven Serv. Ctr., 99, 9 F.L.R.A. 930, 933 (1982).

200. 5 C.F.R. § 1201.75 (1998); FED. R. CIV. P. 30. *See generally,* Bromley, 46 M.S.P.B. 666, 680 n.10 (1991).

201. American Fed'n Gov't Employees, Local 2354, 31 F.L.R.A. 541, 550 (1988).

202. *But see* National Treasury Employees Union, Chapter 202, 15 F.L.R.A. 423, 425 (1984).

203. National Ass'n Gov't Employees, Local R1-25, 37 F.L.R.A. 747, 753 (1990).

204. American Fed'n of Gov't Employees, Local 2612, 38 F.L.R.A. 1552, 1560 (1991); American Fed'n of Gov't Employees, Local 2382, 52 F.L.R.A. 182 (1996).

205. Ashford, 6 M.S.P.B. 458, 465 (1981).