



# FRONTLINE

Issue 24

**SPECIAL EDITION**

October 2008

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- What You Need to Know to Protect Yourself!
- 10 Things to Do If You Are Under Investigation
- Liability Insurance

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*"While the overwhelming odds are that you will never be the subject of an investigation, it is important for you to know how to conduct yourself should the occasion arise."*

*Tony Pezza,  
New York Region*

National Council of Social Security Management Associations, Inc.

## Fair and Equitable Treatment – Why We Are Concerned

By Tony Pezza, New York Region  
NCSSMA Past President 2001-2003



During the past several years, the NCSSMA became aware of a number of cases involving managers and supervisors who have been subject to "investigation" because of alleged non-criminal wrong doing. Some of these cases have resulted in subsequent discipline. These cases have run the gamut from Systems Sanctions violations to improper purchases to violations of the Standards of Conduct to improper personnel practices. While we will never condone or excuse wrong doing by our members or any other Agency employee, we are extremely concerned about the manner in which some of these "investigations" were conducted prior to any decision being made about guilt or innocence and specifically whether by any reasonable appraisal, they met the test of being "fair and equitable" treatment.



First let us be clear about the role of the NCSSMA and its member Regional Associations in such matters. We do not, in fact cannot, represent individual management personnel. We are not and should not be confused with a union and we neither have nor do we seek to have the responsibilities to individual members that unions have such as the "duty of fair representation." But this does not mean that we are not concerned with assuring that our members, in fact all employees, receive "...fair and equitable treatment in all aspects of personnel management ..." as required by federal law.

Over the past two years, the NCSSMA engaged in an ongoing exchange with the Deputy Commissioner for Operations and the Deputy Commissioner for Human Resources regarding the treatment of management personnel suspected of non-criminal wrong doing. Our objective was to seek generally the same treatment for management employees as is afforded those in the bargaining unit under the so-called "Weingarten Rights" codified in federal statute by the Civil Service Reform Act of 1979. Based on Weingarten, a bargaining unit employee can request that the union be represented at any examination of the employee by an Agency representative in connection with an investigation that the employee reasonably believes may result in disciplinary action against the employee. If such a request is made at the outset, or any time during the examination, the examination must cease until the union is given the opportunity to be represented. What we wanted was the right of the management person to ask for a representative of his/her choosing at this initial stage of the process. Our efforts to balance the playing field for management personnel were ultimately unsuccessful.

Consider what this means in a practical sense. When such examinations materialize, they can come with little or no warning to management and bargaining unit personnel alike.

*(Continued on page 2)*

## What You Need to Know continued



In both cases there is no obligation to inform the employee that his/her responses may lead to disciplinary action. But a bargaining unit person who recognizes that possibility can effectively terminate the examination by invoking Weingarten. The benefit and advantage is that the individual is given time to collect and answer all questions immediately. Now we know that many of you are thinking that you would never put yourself in a position where you would need to fear disciplinary action or an investigation that might lead to it. You're thinking that you would answer without hesitation and forthrightly. You'd have nothing to fear and nothing to hide. We suggest that you may need to reconsider those thoughts. Based on some of the cases we've seen, those plans, like battle plans, rarely survive the first encounter with the opposition.

We are aware of cases over the past two or three years in which management employees who were completely innocent of any wrong doing were reduced to nervous wrecks by the very nature of the process. In some cases, the individual was left hanging literally for weeks or months between the initiation of the investigation and the proposal to discipline. We know of at least one case where the administrative process was preceded by OIG agents visiting unannounced, telling the person he was under criminal investigation and reading the individual his "Miranda Rights" only to later determine there was no criminal wrong doing and then remand the case to the Regional CSI for administrative action. Imagine how that person felt!

Could something like this happen to you? We are aware of similar situations occurring in over half of the 10 regions of Social Security. We strongly suspect that there have been other cases, perhaps many, which we don't know of because

the manager or supervisor was unaware of our concern and therefore did not contact their Regional Association. We also suspect that many of these folks have accepted the process and resulting discipline silently, not necessarily because of guilt, but because they were too embarrassed and perhaps intimidated to properly defend themselves.

Our purpose here is to shed light on the investigation, disciplinary and appeals process as it applies to management personnel. While the overwhelming odds are that you will never be the subject of an investigation, it is important for you to know how to conduct yourself should the occasion arise.

So here's what you need to know. First, you must understand the difference between a criminal and a non-criminal investigation. If you are the subject of a criminal investigation, you will be confronted by OIG agents who are obligated to tell you that you are under criminal investigation. In such cases all employees, management and bargaining unit, have the same basic rights under Miranda. If OIG investigates a situation and concludes that there is no criminal wrong doing, the matter most likely will be tossed back to the Agency (CSI) to determine whether they want to proceed administratively.

A tip-off that you may be suspected of a non-criminal infraction that may lead to disciplinary action is a call asking you to come into the Area Office without giving you a specific reason why. When you get there you will most likely be confronted by at least two other management people, one of whom may be the Area Director and the other may be from Regional CSI or a fellow management person.

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SOCIAL SECURITY EMPLOYEES'  
ACTIVITIES ASSOCIATION, INC.

<http://www.ssaeea.org/>

## What You Need to Know continued

They will proceed to ask you questions about the situation under investigation. They may or may not be forthcoming about telling you that you are specifically the subject of the investigation. In these circumstances, as you will see from the advice from the NCSSMA's general counsel appended to this article, you have no rights. You are required to cooperate. You should be aware of and follow the guidance given in the **10 Things to Do If You Are Under Investigation** on page 7.

What will be taking place is termed an "Investigatory Interview." A record will be made of the interview and of your answers to the questions posed. This will be reviewed and you may be contacted again for more questioning. At some point, a decision will be made to either drop the matter or to proceed to propose discipline. If it's decided to proceed you will receive a formal "Proposal to Discipline." At that point you have the right to a representative of your choosing. If you have Personal Liability Insurance, you should contact the insurance company as soon as you become aware that you are the subject of any investigation. The ability to get their advice and assistance is what you've been paying for. If you have no coverage you may contact Shaw, Bransford, Veilleux and Roth, PC for two free half hours of consultation as a member of the NCSSMA.

The Proposal to Discipline will advise you of your appeal rights. It will also advise you that you may have an attorney or another person of your choosing represent you. (Not having the opportunity afforded bargaining unit employees by Weingarten, this is the first point in the process where you are able to have the benefit of a representative who is formally involved.) At this point in the process you have entered the realm of the SSA Grievance Procedure (PPM S771\_1)

which generally covers all nonbargaining unit SSA employees.

This grievance procedure is essentially a two stage process. The first appeal may be directed to the Area level or to the ARC MOS. The second stage will generally be heard at the Regional level, perhaps by the Deputy Regional Commissioner. Normally you will be given an opportunity to make an oral presentation to the deciding official. The only avenue of redress beyond stage two is a request for reconsideration that is directed to the Deputy Commissioner for Human Resources. As indicated in the PPM: "A grievance decision will not normally be reconsidered unless it is shown to be in clear, specific and substantive violation of law or clearly arbitrary and capricious." The PPM also advises that a request for reconsideration doesn't obligate SSA to issue a decision on the merits of the case and a denial of reconsideration doesn't necessarily mean agreement with the grievance decision. Unlike the grievance process for the bargaining unit, you can't get the matter before an arbitrator.

As stated, the NCSSMA and the Regional Management Associations do not and cannot represent individuals in such matters. We are nonetheless concerned about how our members are treated when confronted with situations that may merit discipline. Our concern is that all be truly treated "fairly and equitably." We hope the need never arises, but don't hesitate to contact a management association official if you need advice and counsel because of such a situation.

*"If you have Personal Liability Insurance, you should contact the insurance company as soon as you become aware that you are the subject of any investigation. The ability to get their advice and assistance is what you've been paying for."*

*Our concern is that all be truly treated "fairly and equitably."*

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## President's Corner



*"NCSSMA does not condone wrongdoing by any SSA employee... We believe that in an exceptionally high percentage of cases, our employees are honest, and strive to do the right thing."*



<http://sprint.com/index.html>

## Why DCO's Response is Not Enough

By Greg Heineman, NCSSMA President

As referenced in the compelling piece written by Tony Pezza for this Special Edition of *FrontLine*, NCSSMA requested an extension to management of the same investigatory rights accorded bargaining unit employees in a memorandum written June 16, 2008. A copy of that request can be accessed at the following link:

<http://www.ncssma.org/Files/Position%20Papers/2008/061608%20NCSSMA%20Administrative%20Sanctions%20Response.doc>.

We received the following response from Deputy Commissioner for Operations Linda McMahon to the issues raised in this memorandum:

*Greg:*

*I appreciate the continuing interest of some of your members in the issue of management treatment relative to potential discipline, and I have given a lot of thought to what, if anything, more we should do to allay their concerns. I have discussed the issue with Reg Wells because Operations cannot act alone on this issue. The bottom line is that Reg and I agree there are no revisions we should make to the procedures for conducting Agency investigations of managers.*

*While I know there is a feeling among some managers that someone somewhere at sometime was or may be treated unfairly when faced with potential disciplinary action, I do not believe there is a widespread problem that needs to be solved. I will again reiterate to my direct reports that I expect managers to be treated fairly in the disciplinary process, and I will ask that they reiterate the same to their direct reports. Please assure your membership that should they become aware of a situation where someone has been mistreated, they are welcome to bring the matter to my attention, and I will look into it. In the meantime, I hope that none of our managers will put themselves into a position where they need to fear disciplinary action or an investigation that might lead to it.*

*I know this is not the answer you wanted to hear, and I understand that you are representing the interests of others. However, I really do not think it would be productive to meet further on this issue. Consequently, with all due respect, I decline.*

*I look forward to seeing you in New York. Thanks for continuing to work with us in a positive way even when we disagree.*

*Linda*

*(Continued on page 5)*

## Why DCO's Response is Not Enough<sup>continued</sup>

I do not for one second question Linda's sincerity in her response. Linda deserves a significant amount of credit for the improvements we've seen in the Systems Access Sanctions policies, also referenced in our memo to her. I do believe, however that her response in this case is inadequate for several reasons:

1. While Linda may have discussed this issue with her direct reports, an oral statement of expectations only goes as far as the memory or interpretation of those listening. A clearly written procedure outlining the expectations of management in the investigative process, however, will let both management and investigators alike know how such inquiries will be conducted.
2. Whether the problem with unfair investigations is widespread or limited to a few instances should not be the determinate as to whether managers receive fair and equitable treatment. Who decides if the problem is widespread or narrowly focused? Should we not be concerned if unfair investigations are tolerated under any circumstances?
3. With no guarantee of the basic tenets of fairness in investigations, the treatment of management in such investigations goes only as far as investigators and their superiors are willing to carry them. We have seen in more than one investigation in more than one region that the treatment of managers varies greatly depending on the investigator and the person being investigated.
4. Reports of such investigations continue to come to my attention on a regular basis. In the past two months since Linda's response, I have heard of at least three different situations in three different regions where the allegation of unfairness in the investigative process has at least been alleged. I'm not in a position to adjudicate these allegations myself, but I believe the continuing receipt of the allegations indicates that there is an issue to be resolved.
5. Although Linda has said we can bring an issue of mistreatment to her attention, what assurances can we have that future leaders in SSA will listen to this issue?

NCSSMA does not condone wrongdoing by any SSA employee, be it bargaining unit, field, RO, PSC or CO management, or Agency leaders. We believe that in an exceptionally high percentage of cases, our employees are honest, and strive to do the right thing. We also know that some employees do things they shouldn't and deserve to be punished. We also know that employees, both bargaining unit and management, take action that may on the surface appear wrong but when fairly investigated, are found to be appropriate. And sometimes folks just make honest mistakes. What NCSSMA wants to ensure is that managers and supervisors who are suspected of doing something inappropriate have a fair chance to state their case.

Per Linda's invitation, we will bring to her attention instances of unfairness in the investigations of managers as they surface. Let your Regional President or me know if you think this is occurring in your area. We fear that if the rights of management in investigative procedures are not spelled out, that there will be more instances of managers going through the problems that Tony describes.



## Professional Liability Insurance—Do You Need It?

By Bethany Paradis, Boston Region

The purpose of this article is to briefly explain what personal liability insurance is and why you might need it. All government employees, no matter where they work or what grade they are, can be sued by members of the general public alleging violations of their constitutional rights. Any irate claimant could file a lawsuit against any one of us over a management decision he or she disagreed with. Additionally, supervisors can be sued by their subordinates. A disgruntled employee could make an anonymous allegation to an OIG hotline or could accuse you of discrimination, sexual harassment, retaliation or creating a hostile work environment. In any of these situations you are forced to defend yourself. The federal EEO system allows employees to accuse managers or other employees of discrimination with impunity. They do not even need any real proof or justification of wrongdoing to make an accusation.

Generally, managers are immune from lawsuits while performing their official government duties. The Justice Department will enter the case and substitute the US government as the defendant. However, the Justice Department will first determine whether the employee was acting within the scope of his or her job before intervening. In a February 2000 article in *Government Executive*, G. Jerry Shaw gave the example of an employee accused of using a racial slur while dealing with a customer as one where the Justice Department might not feel that it is in the government's interest to

represent the employee. The employee is then responsible for defending himself or herself. Hiring an attorney at rates of \$275 to \$400 an hour gets very costly very quickly. You could easily spend \$25,000 or more just defending yourself. Shaw goes on to state, "Supervisors and managers who would never consider making racial comments or discriminating against citizens or their subordinates often discount the need for professional liability insurance. There is a world of difference, though, between being accused of discrimination or other wrongdoing and actually being guilty."

Professional liability insurance provides protection to an employee who is accused of misconduct or wrongdoing in the course of doing his or her job. It will cover legal fees in administrative investigations, EEO investigations where you are named as the responsible management official and in disciplinary actions until the Merit Systems Protection Board makes a final decision. It can

cover legal expenses when criminal charges are involved and will pay for liability damages in a civil suit. The specific details of coverage vary by plan and insurance company. Given the often contentious environment that we live and work in, now is the time to determine if this is something that you want to investigate in order to protect your assets. The good news is that federal agencies are required by law to reimburse managers and supervisors up to half of the cost of professional liability insurance. Making the decision to purchase professional liability insurance is a personal one that only you can make. Personal liability insurance plans often do not cover employment related situations, so if you have personal coverage already talk to your agent to find out exactly what is covered. If you decide to make this investment then where you purchase your insurance is also a personal choice. Surf the web and talk to coworkers for recommendations. Generally policies range from \$270 to \$300 per year.



Legal fees paid up to \$200,000 in administrative investigation or disciplinary action.

\$100,000 for criminal legal defense.

Up to \$1,000,000 for liability damages in a civil suit.

Visit [www.fedsprotection.com](http://www.fedsprotection.com) to learn more about the policy they offer.



## 10 Things to Do If You Are Under Investigation

Provided by Diana J. Veilleux of Shaw, Bransford, Veilleux and Roth, PC.

Number 1: Tell the Truth.

Number 2: Take your time answering questions.

Number 3: Remember you are making a record.

Number 4: Don't tease the bear: be polite.

Number 5: Never answer a question you don't understand.

Number 6: If you don't remember, say so.

Number 7: Never Guess.

Number 8: Do not volunteer information.

Number 9: Ask to see copies of any documents and/or prior statements pertinent to your involvement in the investigation.

Number 10: Don't be afraid to use your counsel.

### **Responsibilities in Administrative Investigations**

■ Answer questions.

■ Tell the truth.

### **Rights in Administrative Investigations**

**None.**

But, you can ask to have representation and can ask for information about what is being investigated beforehand.

Members of the NCSSMA are entitled to two free half hours of consultation with SBVR on federal employment issues. Visit <http://www.shawbransford.com/consultations.php> for more information.



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Fax: (202) 547-8532

[rachele@greystone-group.com](mailto:rachele@greystone-group.com)

**About Us:** The Management Association is a professional organization that strives to further the goals of SSA from a management perspective by having an open dialogue with regional and national leaders. Many current agency leaders are former members of our association. We are not a union. The Management Association serves as a voice for field and TSC management with the primary purpose of improving service to the public. Members can share input on many issues through their regional associations. We have been instrumental in advocating for higher budgets for SSA; increasing the rate of overtime pay for managers and supervisors; influencing policy changes; streamlining procedures within the agency; and gaining improvements in automation and other systems enhancements that are needed for greater efficiency.

For more information about NCSSMA visit our web page at  
[www.NCSSMA.org](http://www.NCSSMA.org)

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Send your feedback to: [Bethany.Paradis@ssa.gov](mailto:Bethany.Paradis@ssa.gov)

*FrontLine Editor: Bethany Paradis    Layout: Gina Ramer and Bethany Paradis*