Coates' Canons Blog: Questioning an Employee about Possibly Criminal Conduct

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There is reason to believe that an employee of the city has broken into a pharmacy to steal prescription drugs. There are reports that a public school teacher has touched female students in a terribly inappropriate way. It appears that a county inspections employee may have exploited money from a permit applicant in exchange for favorable treatment.

In each case you, the city manager or the superintendent of schools or the county manager, would like to have the employee questioned, perhaps by the employee's supervisor or the human resources director or the unit's attorney. You want to know what really happened. If the suspicions are true, you need to get rid of this employee right away. This is not conduct you can tolerate in an employee.

But you are aware of a problem. In each case, the conduct may be not only unacceptable but also criminal. The police have been informed and will be conducting their own examination. The district attorney may end up prosecuting, and he will not want his prosecution jeopardized. The police and the DA may wish you would hold off on your investigation entirely. After all, under the Fifth Amendment to the U.S. Constitution your employee, like every citizen, has the right to refuse to answer questions if the answers may implicate him in a crime. That right of refusal applies in criminal trials, by the very wording of the Amendment itself. It has also been interpreted to extend the privilege not to answer to any other kind of proceeding, civil or criminal, formal or informal, where the answers might incriminate the person in future criminal proceedings.

So, you want to question your employee, but you are aware he may assert his constitutional right not to answer. If he does, are you stuck? It's a *constitutional* right, after all. You can't make him answer. Can you fire him for not answering?

Here's the four-part rule.

(1) A governmental employer may ask questions of an employee even if those questions would elicit criminally incriminating information from the employee. The employer should warn the employee that refusal to answer could result in dismissal.

(2) The employee has the right to choose to remain silent or to choose to answer the questions. If the employee remains silent, he may be dismissed for failing to cooperate in the employer's investigation (as long as the employer did give the warning). If the employee answers the questions, he may be dismissed because of the information he reveals.

(3) Answers that the employee gives that are self-incriminating may not be used against him in a subsequent criminal prosecution. This is a form of "use immunity." Because the answers were not given in a fully voluntary way—loss of employment was at stake—they cannot be used criminally.

(4) The employer is under no obligation to inform the employee that the answers he gives may not be used against him in a criminal prosecution.

These rules are distilled from a North Carolina Supreme Court decision from 1993, *Debnam v. N.C. Department of Correction*, 334 N.C. 380. An inmate made an allegation that a jailer had taken a ring from him and extorted money from him for the return of the ring. Officials from the Department of Correction interviewed the jailer about the allegation. The jailer expressed his concern about possible criminal prosecution and said that he would not answer any questions until he was given a written decision as to whether criminal prosecution would be pursued. He was told that if he did not answer he could be fired. No one told him that any answers he gave could not be used against him in a later criminal prosecution. Because of his refusal to answer the questions, he was fired.

The jailer challenged his dismissal (his employment was subject to the state personnel act and he had a right to pursue the challenge). The North Carolina Court of Appeals overturned his dismissal. It concluded that "a person's right to be free from self-incrimination . . . is so basic, so fundamental, that the government is required to fully inform the person of that right in both grand jury and disciplinary proceedings." 107 N.C. App. at 525. A government employee who is being investigated, the appeals court held, must be told not only that refusal to answer can lead to dismissal but also that his answers could not be used in a subsequent criminal prosecution.

On this last point the North Carolina Supreme Court disagreed. Yes, the Supreme Court agreed, the employee must be warned that refusal to answer may lead to dismissal. And yes, the Supreme Court agreed, answers to the employer's questions that were self-incriminating could not be used in subsequent criminal proceeding. But no to the last point. The employer is under no obligation to inform the employee that his answers could not be used in a subsequent criminal proceeding.

Here's what the Supreme Court said: "[The governmental employer] does not violate a public employee's Fifth Amendment right against self-incrimination by terminating the employee for refusing to answer questions relating to his employment, when the employee is informed that failure to answer may result in his dismissal and the [governmental employer] does not seek a waiver of the employee's immunity from the use of his answers in any criminal action against him." 334 N.C. at 385.

When the jailer was told that refusal to answer could lead to his dismissal, it could not be said that from that point forward he would be answering voluntarily. His answers would, in effect, be coerced by the threat of dismissal. Since the answers would not be given voluntarily, but would instead be coerced by the government, they could not be used in a subsequent criminal prosecution. There would be immunity from the "use" of those answers.

But the public employer was not obligated to tell the jailer about the "use immunity," the Supreme Court said. He would not be any more protected than he already was—the use immunity attached automatically as soon as the threat of dismissal was raised.

So, what should a public employer in North Carolina do when the need to interview an employee arises and the employee may have engaged in criminal conduct? First, the employer should consider talking with the police or the district attorney. They may have advice the employer would be wise to consider. For the interview itself, the employer should:

(1) Warn the employee that refusal to answer questions could lead to dismissal.

(2) Make no representation one way or another about future criminal use of any information he may provide, but instead, if the employee asks, suggest that he consult with his own attorney.

(3) Decide whether the employee's answers, or refusal to answer, merit dismissal, and, if so, dismiss the employee.

A final note: There is one tactic that an employer may wish to try—attempting to create a fully voluntary situation. That is, in an initial interview the employer may tell the employee that he will be asked questions that may have some criminal implications, that the employee is fully free to answer or not answer, and that the refusal to answer will have no adverse consequences. In that case, if the court should subsequently agree that the interview situation was fully voluntary, not only could the employee be fired because of his answers but also his answers could be used against him in a criminal trial, since they were voluntarily given. This tactic is less straightforward than the tactic of telling the employee at the beginning of the interview that he is expected to answer and that failure to answer could lead to dismissal.