

## Garrity Rights of Public Safety Officers

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# Special Feature

Public employees find themselves in an odd position relative to the government. Most obviously they are workers hired by a governmental entity to carry out the work of that entity. But, public employees are also private citizens entitled to the same rights as citizens in other walks of life. This dual relationship with the government creates a unique situation when the sovereign, as employer, seeks to inquire into employee misconduct. When an errant public employee is questioned by his supervisor, is it the employer asking the questions or the government asking the questions? If the latter, the employee, as citizen, enjoys the protections of the Fifth Amendment privilege against self-incrimination. If it is the former, the employer certainly has the right to make inquiries about employee misconduct.

In 1967, the U.S. Supreme Court was faced with how to reconcile the inherent right of a governmental employer to pursue investigations of employee misconduct while at the same time protecting the Constitutional rights of the employee. What emerged became known as the *Garrity* rights of public employees, from a case of the same name. The case of *Garrity v. New Jersey*, 385 U.S. 493 (1967), and the subsequent decision in *Gardner v. Broderick*, 392 U.S. 273 (1968), laid the groundwork for the creation of the delicate balance between the authority of the government as employer and the rights of the public employee as citizen.

The *Garrity* case involved a group of police officers who were accused of fixing traffic tickets. During a state-level investigation, the officers were ordered to answer questions or lose their jobs. This placed the officers on the horns of a dilemma: if they invoked their Constitutional right to remain silent, they would be terminated for insubordination; if they answered investigators' questions, their responses might be used against them in a subsequent criminal prosecution. Ultimately, the officers answered the queries and, as feared, their responses were used against them in their criminal trials. On review by the Supreme Court the justices crafted a balance between the interests of the employer to determine the circumstances of employee misconduct and the rights of the officers, as citizens, to remain silent during governmental questioning. The high court said that the officers who were placed in a position of choosing between job forfeiture and assertion of their Fifth Amendment privilege were being coerced. The court ruled that in such circumstances their coerced statements were inadmissible in the subsequent criminal proceedings.

One year later in *Gardner v. Broderick* the justices ruled that an officer may not be disciplined for invoking the Fifth Amendment right to silence unless the officer receives immunity from the use of his answers in any subsequent criminal proceeding. Subsequent lower court rulings have made it clear that *Garrity* applies to all public employees, including fire fighters.

As a result of the rulings, the so-called *Garrity* rights of a public employee have emerged. Generally this means that a public employee can be ordered to answer ques-

tions that are specifically, directly, and narrowly related to job duties under threat of disciplinary action. However, if the employee responds to the questions, the answers may not be admitted in evidence against him in any subsequent criminal proceeding.

Often public safety personnel are subject to investigation as a result of allegations of misconduct. So long as such investigations involve violations of internal rules, *Garrity* rights never become an issue. The employee is ordered to answer questions or write a report about a particular event and, as a result, administrative discipline may or may not be meted out. But when the misconduct is so severe that it could lead to criminal charges, the investigation takes on a different tone. The target employee becomes the focus of interest on the question of disciplinary action but also on the issue of possible serious criminal charges.

*Garrity* rights, much like the general Fifth Amendment rights afforded citizens under *Miranda v. Arizona*, attach whenever the requisite circumstances arise. Thus, while many internal affairs investigators provide the target employee with a *Garrity* warning form, the rights exist irrespective of whether the employee receives a formal verbal or written warning. Even without the warning, if an employee is coerced into making statements under pain of disciplinary action, his statements will be inadmissible later in any criminal case against him.

The first element of *Garrity* is that the employee must be “ordered” to answer questions. Only an order creates the possibility of coercion. Case law holds that statements that an employee volunteers are not the product of compulsory self-incrimination and thereby not protected from later use in criminal court, much as the *Miranda* Rule does not bar use of purely volunteered statements.

Second, the employee must be directed to answer job-related questions. In other words, the employee cannot be compelled under threat of discipline to answer questions not related to his employment, such as queries about a relative or regarding off-duty, non-work-related behavior such as a pending divorce. While case law is sketchy on this point, it would appear that an employee’s refusal to answer questions regarding non-job-related situations cannot form the basis for disciplinary action.

Responses that are obtained in violation of *Garrity* may not be used directly or indirectly in a later criminal prosecution of the employee. Consequently, not only are the coerced statements inadmissible in court but derivative evidence, items of evidence found as a result of the statements, are similarly inadmissible. This rule places a heavy burden on a prosecutor to establish that evidence presented at trial was not the product, directly or indirectly, of the compelled statements of the employee-defendant.

When a public safety employee finds himself or herself under scrutiny for job misconduct that could result in a criminal prosecution, the employee is faced with two choices under *Garrity*. The employee may choose not to cooperate in the investigation. In such cases the employee may be lawfully disciplined, including termination, for insubordination. Or, the employee may choose to answer the questions posed. In this instance, the employee may still be disciplined for violating department rules even though the employee cooperates in the investigation. Additionally, the employee may be prosecuted for any criminal act that arose out of the misconduct, but any statements that the employer has compelled the employee to make may not be admitted into courtroom evidence.

Public safety agencies have adopted a variety of schemes to protect an employee’s rights while at the same time determining the facts of allegations of criminal misconduct. Many agencies actually read a *Garrity* warning to employees under investigation. This warning alerts employees to their rights while at the same time telling them they must respond to the questions under pain of discipline or dismissal. (At this time the employee may also have the right to the presence of a labor representative under the *Weingarten* Rule.) Other agencies conduct two separate investigations, using one set of investigators to handle the administrative investigation while a second set conducts the criminal investigation. Often, the two teams are prohibited from sharing the results of their respective investigations.

*Garrity* immunity has been criticized for potentially hamstringing prosecutors. Since most internal investigations — even those involving possible criminal charges — occur prior to the involvement of the prosecutor, the

potential exists for the process to create limitations on the availability of evidence for trial. If all fire fighters involved in the questionable incident are interviewed and ordered to answer, a prosecutor may be left with little admissible evidence come time for the criminal trial. At least one scholar has suggested that prosecutorial approval should be required before investigators may compel statements from public employees.

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**(While a *Garrity* warning’s wording may vary somewhat across jurisdictions, below is a sample form used by the Canton, Ohio, Police Department. It could easily be adapted to the fire service.)**

At this time, I am going to question you about\_\_\_\_\_

This questioning concerns administrative matters relating to the official business of the Canton Police Department. During the course of this questioning, if you disclose information which indicates that you may be guilty of criminal conduct, neither your self-incriminating statements nor the fruits of any self-incriminating statements you make will be used against you in any criminal legal proceedings. Since this is an administrative matter and any self-incriminating information you may disclose will not be used against you in a court of law, you are required to answer my questions fully and truthfully. This requirement is set forth in our Canton Police Department Rules and Regulations, Insubordination 427A and Truthfulness 435A and our departmental regulations requiring employees of this department to comply with all lawful orders. You are entitled to all rights and privileges guaranteed by the Constitution and the Laws of the State of Ohio and the Constitution of the United States, including the right to have legal counsel or union representation present with you during this interview. If you refuse to answer all my questions, this in itself is a violation of the rules and procedures of the department, and you will be subject to separate disciplinary action.

Do you understand what I have just explained to you? \_\_\_\_\_

Do you have any questions concerning what I have just explained to you? \_\_\_\_\_

I, \_\_\_\_\_, by my signature below, affirm that I have been advised of the “Garrity Warning” and have had its meaning explained to me.

Officer’s Signature \_\_\_\_\_ Date \_\_\_\_\_

Interviewer/Investigator \_\_\_\_\_

For the application of *Garrity* to particular situations, competent legal counsel should be consulted. A more in-depth discussion of *Garrity* rights may be found in Aitchison, Will, *The Rights of Firefighters (3rd Ed.)*, Portland, Ore: Labor Relations Information System. For a detailed discussion of the theoretical basis underlying the Fifth Amendment rights of public employees as well as the case law interpreting *Garrity*, see Clymer, Steven D., “Compelled Statements from Police Officers and *Garrity* Immunity,” *76 New York University Law Review* 1309 (Nov. 2001).