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By **DLG Learning Center**

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As I travel the country and work with different police departments, I am concerned with the inconsistency and the lack of knowledge of police management regarding use of Garrity in administrative investigations. I have learned that while investigators and management are aware of the practice of using Garrity warnings, as created by the case *Garrity v. New Jersey,* these warnings are misinterpreted and applied incorrectly throughout the country. In law enforcement organizations, *Garrity* warnings are an important tool in that they provide law enforcement officers necessary protections while enabling departments to conduct thorough and complete internal investigations. In your agency what is more important the criminal investigation or the discipline of the employee for a violation of department policy. I guess it matters who you ask? So, in your department when or is Garrity given to compel a statement if there is a potential criminal investigation. While the question is open to debate the purpose of a compelled statement is to allow the ability for proper employment discipline. During an administrative investigation of an officer the agency head or his/her representative (I/A investigators) can and should compel the subject officer to answer questions truthfully that are narrowly tailored to the scope of their job as a police officer. The basic principle of *Garrity* is that when the statement from the subject officer is compelled the statement and the evidence derived from the statement cannot be used against the subject officer in a criminal action against him. The confusion that this article attempts to clarify or asks you to at least consider is occurring because of a clear lack of judicial interpretation and perceived belief that the hands of the agency head are tied.

Garrity is a management prerogative that should not be part of the collective bargaining agreement and subordinates have no authority to invoke the protect themselves. With that being the standard, the question we should ask is why is it not being used more and/or consistently? Many departments have taken *Garrity* and stretched it beyond its intended purpose and have applied a blanket application to a routine part of an officer's job duty or routine documentation of activities. The result is the apparent exclusion of important evidence which may serve to quickly exonerate officers who have followed department policy and quickly discipline those officers who have failed to follow policy. Moreover, some departments have also failed to shield involuntary statements obtained through *Garrity* warnings from criminal investigators or prosecutors. This practice has the effect of tainting information obtained from these statements and the possibility to render unusable other critical evidence.

In Garrity v. New Jersey[1], the Court established some very straight forward rules regarding instances where police officers are compelled to provide statements. Under Garrity, an incriminating statement

obtained from an officer who is compelled to provide the statement under the threat that he may lose his job if the officer invokes the right to remain silent may not be used against the officer in a criminal proceeding. The Court found that such a statement is deemed coerced if the officer is denied a meaningful opportunity to assert his 5th Amendment rights. The Court reasoned that it is unacceptable to put an officer in the position of choosing whether to incriminate himself or to lose his job for invoking his 5th Amendment rights.

The application of *Garrity* warnings provides that an employee can be ordered to cooperate in an internal or administrative investigation and be compelled to truthfully answer questions that are specifically, directly, and narrowly related to the employee's official conduct. Any statements made pursuant to an order to cooperate in such an investigation, and any evidence derived from that statement, may not be used against the employee in a criminal proceeding. For *Garrity* to apply, the statement must be compelled and not voluntary.

On an operational side- when providing *Garrity* warnings, the officer must be informed that his or her compelled responses cannot be used against him or her in a criminal proceeding and will only be used for administrative purposes. The officer must be told that his or her failure to respond to the questions asked during the administrative process may result in discipline up to and including termination. Before a department may discipline an officer for refusing to answer questions, it must direct the officer to answer questions under the threat of discipline, the department must provide a warning that refusal to answer questions will result in discipline or termination; questions must be specifically, directly, and narrowly tailored to the officer's duties or fitness for duty; and the department must advise the officer that any responses will not be used against him in a criminal proceeding.

Under the *Garrity* warnings, however, an employee has no right to lie during his or her statement should he or she choose to provide a statement. In other words, if the employee is provided *Garrity* warnings, and a compelled statement is obtained, the employee could be subject to criminal charges if the employee perjures himself during the interview. If, after being given Garrity warnings, the employee chooses not to answer questions narrowly tailored to his job duties he can receives strong disciplinary action for insubordination up to and including termination. Now this is with the understanding that the practice of labor law is unique in specific areas. What I have seen, however, is an erosion of the basic principle because of fear of what a labor board or civil service commission will say or do in response, or improper knowledge, or the perception and influence of prosecutors who are more worried about their criminal matter.

In *McKinley v. City of Mansfield*[2], the police department conducted an internal/administrative investigation into the improper use of police scanners to eavesdrop on cordless and cell phones and

interviewed more than thirty police officers. One officer questioned under *Garrity* warnings was Officer McKinley, who was interviewed twice following allegations that he provided untruthful answers during his first interview. During the second interview, the investigator made it clear that he was interviewing McKinley a second time related to allegations of lying during the first interview. Therefore, at the time of the second interview, McKinley was under criminal investigation for lying. McKinley, however, was still under the *Garrity* warnings at the time of the interview. During the second interview, McKinley provided statements that contradicted statements made during the first interview and, in fact, admitted to providing false statements. Once the internal investigation was complete, investigators turned over the information they had gathered, including Officer McKinley's statements, to the prosecutor. Based on the findings of the internal investigation, the department terminated Officer McKinley (who was later reinstated with back-pay and benefits following CBA arbitration.)

McKinley, who was charged with falsification and obstruction of official business, moved to suppress his recorded statements provided during the internal investigation. The trial court denied the motion and McKinley was convicted. The appellate court held that McKinley's statements were inadmissible based on the departments agreement not to use his statements in any prosecution against him and vacated the convictions. McKinley then filed a lawsuit against the City of Mansfield and certain police officials alleging that they violated his Fifth Amendment rights by forcing him to make incriminating statements that were later used in a prosecution against him. The Defendants moved for summary judgment, which the trial court granted. On appeal the Appellate Court reversed in part the trial court decision and remanded for further proceedings.

The Appellate Court stated that as a matter of Fifth Amendment right, *Garrity* provides that an officer's compelled incriminating statements may not be used in a later prosecution for the conduct under investigation. *Garrity*, however, does not preclude the use of compelled statements in the prosecution for false statements or obstruction of official business. Consequently, McKinley false statements during the first interview could be used during the prosecution against him. The compelled statements made during the second interview, however, were still made under the promise of *Garrity* that they would not be used against McKinley.

The appellate court stated that the investigator targeted McKinley for a criminal investigation during the second interview and still compelled his statements under *Garrity.* Accordingly, the Court held that McKinley could pursue his claim against City and the investigators for giving his Garrity statements to the prosecutor, even though it was the prosecutor's decision to utilize the statements. Furthermore, the investigators were not entitled to qualified immunity for their actions.

In addition, another area that needs to be addressed is the completion of department reporting forms. Departments should educate themselves as to when and how to utilize *Garrity* warnings and when an officer's statements are a necessary part of the officer's job and do not constitute a compelled self-incrimination statement. For example, during the documentation and reporting of a standard use of force incident, an officer's statement regarding the circumstances surrounding the event is not a compelled statement under *Garrity*. To utilize *Garrity* warnings for every use of force statement overly expands the protections of *Garrity*.

So back to the question we started with – what is more important the criminal investigation or the discipline of the employee for a violation of department policy. It appears that prosecutors are trumping the rights of Police Chiefs to terminate an employee. What we do know from an operational perspective is that while a criminal investigation is important what is more important? While we want to have criminal acts punished- is it not more important to complete an administrative investigation and take the necessary action including termination. What seems to be forgotten is the agency head has an obligation to make a sound operational and personnel decision that is reflective of the integrity expected by the public. I have been told by police chiefs that the prosecutors have told them that the administrative investigation is to be suspended pending a criminal investigation so as to not taint any potential evidence that may be obtained through a compelled statement, rendering it unusable during a criminal proceeding. It is however, a rare instance when such a delay is necessary, one exception being where the involved law enforcement institutions do not fully respect and adhere to the legal parameters protecting compelled statements from disclosure to anyone outside of the administrative chain of command.

If departments conduct internal/administrative and criminal investigations simultaneously, they should be done in a manner that does not compromise the integrity of either investigation. In other words, during an internal investigation, investigators should compel statements from involved police officers only when considered a sound administrative move. For example, though the involved officer may have committed a criminal offense, it may be more important to quickly complete the administrative investigation and if warranted, rid the agency of the officer rather to endure the inevitable prosecution delays. In another instance where criminal prosecution is clearly warranted, it may be important to complete the administrative investigation and if warranted, discharge the officer prior to any criminal prosecution so as to not be appearing to rely on a conviction as the basis for discharge. In any event, the agency has an absolute obligation to the community and to the integrity of the agency to thoroughly investigate and expeditiously conclude administrative investigations.

Furthermore, if investigators provide *Garrity* warnings and compel an officer's statement, they may not provide such statements to a prosecutor for use in a criminal proceeding related to the matter under investigation. Providing a *Garrity* statement to prosecutors for any purpose, e.g. for their review, even if not used during proceedings, will open the agency head and the department to an onslaught of lawsuits from affected police officers.

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1. 385 U.S. 493 (1967) ↑

2. 404 F.3d 418 (2005) ↑
