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## Chief's Counsel

### Garrity Warnings: To Give or Not to Give, That Is the Question

By Eric P. Daigle, Esq., Daigle Law Group, Southington, Connecticut; and Secretary, IACP Legal Officers Section

As I travel the country and work with different police departments, I am troubled by 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*,<sup>1</sup> these warnings are misinterpreted and misapplied throughout the United States.

In law enforcement organizations, the *Garrity* principle is an important tool to provide officers the necessary protections while still enabling departments to conduct thorough and complete internal investigations. In a given agency, what is more important: the criminal investigation or the discipline of the employee for a violation of department policy? It may matter whom one asks. In a given department, is a *Garrity* warning given to compel a statement if there is a potential criminal investigation?


During an administrative investigation of an officer, the agency head or representatives (that is, internal affairs investigators) are permitted to and generally should compel the subject officer to truthfully answer questions that are narrowly tailored to the scope of the subject's job as a police officer. The basic principle of *Garrity* is that when the statement taken 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 the officer arising from the same circumstances about which the officer was questioned. This article attempts to clarify—or asks readers to consider—whether agencies are applying *Garrity* principles inconsistently because of a clear lack of judicial interpretation, creating the perceived belief that the agency cannot question its own employees.

### The *Garrity* Principle

In *Garrity v. New Jersey*, the U.S. Supreme Court established some straight forward rules regarding situations in which police officers are compelled to provide statements to their employers.

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Under *Garrity*, an incriminating statement obtained from an officer who is compelled to provide the statement under the threat of job loss 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 Fifth Amendment rights. The court reasoned that it is unacceptable to put an officer in the position of choosing whether to self-incriminate or to risk job loss for invoking the Fifth Amendment.

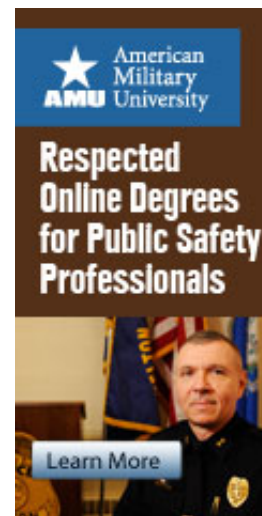
The application of *Garrity* warnings provides that an employee can be ordered to cooperate in an internal or administrative investigation and be compelled to truthfully answer questions that are specifically, directly, and narrowly related to the employee's official conduct. Any statements made pursuant 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.

*Garrity* is a management prerogative that should not be part of the collective bargaining agreement that would allow subordinate officers the authority to invoke it to protect themselves. The principle and its application have been established by the U.S. Supreme Court, and there is no reason for management to expand the privilege. Yet, why is the law not being consistently applied? Many departments have taken *Garrity*, allowed it to be stretched beyond its intended purpose, and have applied a blanket application to routine parts of an officer's job duty or routine documentation of activities. The result is the apparent exclusion or loss of important evidence that may serve to quickly exonerate officers who have followed department policy and quickly discipline officers who have failed to follow policy. At the other end of the spectrum, some departments have 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 a criminal prosecution.

### **Application of the *Garrity* Principles**

On the operational side, when providing *Garrity* warnings, the interrogating officer must inform the subject officer that compelled responses cannot be used against the officer in a criminal proceeding and will be used only for administrative purposes. The officer must be told that 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 and provide a warning that refusal to answer questions will result in discipline or termination. In addition, the questions asked 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 the officer in a criminal proceeding.

The *Garrity* warnings, however, do not give an employee a right to lie when giving a statement. On the contrary, if the employee is provided *Garrity* warnings and a compelled statement is obtained, the employee could be subject to criminal charges if the employee makes false statements during the interview. If, after being given *Garrity* warnings, the



employee chooses not to answer questions narrowly tailored to the officer's job duties, the agency can impose strong disciplinary action for this act of insubordination up to and including termination.

While the practice of labor law is unique in specific areas, what I have seen recently is an erosion of these basic principles because of fear of what a labor board or civil service commission will say or do in response to discipline imposed, inadequate knowledge, or the perception and influence of prosecutors who are more worried about their criminal prosecutions than the integrity of the police force.

In *McKinley v. City of Mansfield*,<sup>2</sup> the police department conducted an internal administrative investigation into the improper use of police scanners to eavesdrop on cordless phones and cellphones, 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 McKinley's statements, to the prosecutor. Based on the findings of the internal investigation, the department terminated McKinley—who was later reinstated with back pay and benefits following collective bargaining agreement 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 department's 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 the Fifth Amendment, *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's 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*.

The appellate court stated that the investigator targeted McKinley for a criminal investigation during the second interview but still compelled his statements under *Garrity*. Accordingly, the court held that McKinley could pursue his

claim against the city and the investigators for giving his *Garrity* statements to the prosecutor, even though it was the prosecutor's decision to use the statements. Furthermore, the investigators were not entitled to qualified immunity for their actions.

### **Distinguishing between Statements and Routine Reports**

Another area that needs to be addressed is the completion of departmental reporting forms. Department personnel must 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*.<sup>3</sup>

Back to the question with which we started. What is more important—the criminal investigation or the discipline of the employee for a violation of department policy? It appears that prosecutors are overreaching and trumping the rights of police chiefs to terminate employees by insisting that the employees not be questioned as part of an administrative investigation. From an operational perspective, while a criminal investigation is important, is internal discipline any less important? While we want to have criminal acts punished, is it not equally important to complete an administrative investigation and take necessary actions, including the timely termination of the employee? What seems to have been forgotten is the fact that an agency head has an obligation to make sound operational and personnel decisions that are reflective of the integrity expected by the public. Police chiefs have told me that prosecutors have instructed them that administrative investigations must 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, with one exception being when 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 for a sound administrative reason. 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 than 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 the 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, even just for review and even if not used during proceedings, will expose the agency head and the department to an onslaught of lawsuits from affected police officers. As with many legal issues, there is a delicate balance of interests and priorities that must be examined on a case-by-case basis. ♦

#### Notes:

<sup>1</sup>[Garrity v. New Jersey](#), 385 U.S. 493 (1967).

<sup>2</sup>[McKinley v. City of Mansfield](#), 404 F.3d 418 (2005).

<sup>3</sup>See Karen J. Kruger, "When Public Duty and Individual Rights Collide in Use-of-Force Cases," Chief's Counsel, *The Police Chief* 76, no. 2 (February 2009), [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article\\_id=1723&issue\\_id=22009](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=1723&issue_id=22009) (accessed October 25, 2012).

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