GARRITY RIGHTS AND PUBLIC EMPLOYEES

The Garrity rule comes from the United States Supreme Court case of Garrity v. New Jersey. It is the right of a law enforcement officer[1] to be free from compulsory self-incrimination. The basic thrust of the Garrity Rule is that a department member may be compelled to give statements under threat of discipline or discharge but those statements may not be used in the criminal prosecution of the individual officer. The courts have held that choosing to work in a police department does not give a person a "watered-down" version of their Fifth Amendment[2] right against self-incrimination.

Before a law enforcement agency can discipline an officer for refusing to answer questions, the agency must do the following:

- Order the officer to answer the questions under threat of disciplinary action,
- Ask questions that are specifically, directly and narrowly related to the officer's duties or the officer's fitness for duty, AND
- Advise the officer that the answers to the questions will not be used against the officer in **criminal** proceedings.

After being given this warning and the officer refuses to answer the questions, the officer may be disciplined for insubordination.[3]

When is an employee ordered to answer a question?
The order can be oral, written or implied.

An employee is ordered to answer a question if:

- the officer subjectively believes that he/she is compelled to give a statement upon threat of loss of job (or other discipline that would constitute a substantial economic penalty)[4]
- the officer's belief is objectively reasonable at the time the statement was made.

Routine reports:
The law in this area is not entirely settled. However, the general consensus is that routine reports prepared by law enforcement employees are not considered to be compelled. It is unlikely that any officer would believe that failure to prepare a routine report concerning an incident would result in a severe sanction such as

[1] Although the original matter involved a police officer and the issues arise primarily with police officers, Garrity protections apply to all public employees.
[2] The Fifth Amendment states: "No person . . . shall be compelled in any criminal trial to be a witness against himself."
[3] The department may also go forward and discipline on the underlying basis of the investigation, using only that evidence that has been obtained from other sources.
[4] Merely threatening an employee with a transfer or a short suspension may not be sufficient to invoke Garrity protections.

dismissal or a lengthy suspension. The few cases that have addressed the issue have agreed and held that unless there an officer has an objectively reasonable belief that failing to complete reports would lead to dismissal or some other serious sanction, it is not compelled. If under normal circumstances an officer would be punished for insubordination or poor work performance for failing to submit a report, it is not a severe enough sanction to be covered by Garrity. As of 2002, there are no reported cases that found that requiring an officer to file a report was a compelled statement. However, this is an emerging area of the law.

What type of immunity is granted by the warning?

A statement compelled by a Garrity warning is for immunity from prosecution in a subsequent criminal proceeding. The compelled statement may be used in other matters such as:

- civil matters including a lawsuit against the department or the officer
- disciplinary proceeding against the officer
- disciplinary proceeding against another officer
- criminal proceeding against another officer or other person

Under what other circumstances can an officer be ordered to give a statement?

An officer can be ordered to give a statement in any circumstance. The only issue is whether the order gives the officer immunity from self-incrimination. For example, you can order an officer to give a statement against another officer (i.e. if the officer being questioned is not the subject of the investigation.)[5] If there are no potential criminal sanctions (e.g. asking an employee whether they violated a work rule about computer use, or took too long of a work break, or was working out of an assigned area . . .) the officer can be ordered to give a statement. No immunity attaches because none is necessary. Garrity does not give an officer the right to refuse to answer a question if there are non-criminal consequences attached such as termination or other discipline. However, assuring an employee that there are no potential criminal sanctions has the same practical effect of giving a Garrity warning – there is no possibility of criminal sanctions.[6]

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[5] The constitutional protection is against self-incrimination, not against incriminating another person.

[6] This situation illustrates the stalemate that occurs: (1) the employee insists on a Garrity warning before answering any questions even though there is no possibility that any criminal charges will be brought against the employee. (E.g. in answering questions about the conduct of another officer.) An order can be given and immunity is granted, even though it's not needed. OR (2) the employer lets the employee know that no criminal sanctions will occur to them for anything that is in the statement. Therefore no Garrity warning is required to make them answer the questions. The employee refuses to answer the question without Garrity even though it doesn't give the employee any protections. The employer can choose not to ask any questions. That employee can then be disciplined for failing to cooperate.

Although it's not very efficient and it is cumbersome and adds unnecessary hostility to the process, the most certain way to get the information is to go ahead and give the Garrity protections to the non-accused witness even though they're superfluous.

Does the employee have any protections if the employee is untruthful in the compelled statement?

If an individual is untruthful when giving the compelled statement, Garrity does not provide any additional protections to the employee for the consequences of lying in an administrative investigation. Having given the warning does not prohibit an employer from taking severe administrative action, including termination, against individuals who lie during an administrative investigation.

Voluntary statements:

- If the employee gives a voluntary statement, it can be used in a criminal matter against the employee.
- The employee can refuse to give a voluntary statement and cannot be disciplined for refusing to make a voluntary statement without getting Garrity protections.
- The employer is not required to take a compelled statement from the accused officer. The employer may to allow the employee to choose whether make a voluntary statement. This means that an employee facing a pre-disciplinary hearing may be faced with a choice of:
    - making no statement at the hearing and having the discipline based on the other evidence that has been obtained, or
    - making a voluntary statement which could be used against the employee in a subsequent criminal proceeding.
- Having to make such a choice does not violate the employee's constitutional rights.