GARRITY RIGHTS FOR LAW ENFORCEMENT OFFICERS

By Aaron Nisenson

1. **What is Garrity Protection?**

When and how is it used by Law Enforcement Officers?

The Garrity protections are some of the most fundamental in law enforcement. In Garrity v. New Jersey, the Supreme Court held that Officers are not required to sacrifice their right against self-incrimination in order to retain their jobs. 385 U.S. 493 (1967). The basic premise of the Garrity protection is straightforward: First, an Officer cannot be compelled, by the threat of serious discipline, to make statements that may be used in a subsequent criminal proceeding; second, an Officer cannot be terminated for refusing to waive his Fifth Amendment right to remain silent. Gardner v. Broderick, 392 U.S. 273 (1968). Therefore, if an Officer gives a coerced statement, the statement is "protected," and cannot be used in a subsequent criminal prosecution.

However, the practical application of Garrity has been complicated and uncertain. The Courts have been all over the map in their application of Garrity: with some Courts applying Garrity to protect Officers' Constitutional rights, and other Courts seeming to try to evade Garrity. Thus, in the Garrity area, Officers are best served by following the old adage: prepare for the worst, and hope for the best. The initial issue in the application of Garrity is the Department's actions in extracting a statement from an Officer. In order for Garrity protection to apply, the government must have "coerced" a statement from an Officer. Generally, this coercion consists of an order, under threat of termination, to give a statement on a work related matter.

The first issue is what is required for an "order." One Court recently explained the general rule: "Before a Police Officer's testimony will be considered 'coerced' within the meaning of Garrity, he must show that he subjectively believed that he would lose his job if he refused to answer questions and that his belief was objectively reasonable." U.S. v. Waldon, 363 F.3d 1103 (11th Cir. 2004). Generally, Officers are able to show that they had a subjective fear of job loss, or other discipline. However, Officers must remember that, even in the best of circumstances, certain statements are generally not protected under Garrity: these include voluntary or spontaneous statements, statements to non-supervisory coworkers, and statements to third parties.

In Florida, the Courts recognize that explicit threats are not necessary for the Officer to feel coerced into giving a statement. United States v. Friedrick, 842 F.2d 382, 395 (D.C.Cir.l 988); United States v. Camacho, 739 F.Supp. 1 504, 1 514-15 (S.D.Fla.l 990). For example, in one case an Officer was told that his job depended on going to an interview, and was reminded of departmental policies requiring cooperation. The Court found Garrity protection, explaining that while the Officer was not "explicitly told he would be terminated if he did not talk to Franco, . . . those conclusions were logical and reasonable ones to draw from the totality of the circumstances." State v. Chavarria, 1 31 N.M. 1 72, 33 P.3d 922 (2001).

However, even though explicit threats of discipline are not required, the employees' fear of discipline must be "objectively reasonable," and there must be some governmental action leading to the employees fear. For example, one Court recently denied Garrity protection, explaining, "A subjective belief is not objectively reasonable unless it derived from actions of the governmental unit. The government argues that Waldon has failed to identify any law or regulation that required him to testify [before a Grand Jury] under threat of sanctions. Indeed, it appears that the regulations he relies upon

reflect only a general expectation that Police Officers will cooperate and testify." Waldon at 111 2. Thus, most Courts have held that rules requiring the filing of reports, answering of questions, or testifying before a grand jury, are not sufficient to constitute an order. People v. Sapp, 934 P.2d 1 367 (Col.1997).

In the end, Officers should prepare for the worst by ensuring that 1) management gives a direct explicit order to provide a statement, and 2) management explicitly states that failure to comply with the order may result in termination. However, if an Officer gives a statement without these safeguards, the Officer can seek Carrity protection, and hope for the best.

2. Why is Garrity Protection Necessary?

The two following cases provide examples.

The first case comes from the Court of Appeals for the State of Wisconsin. Since this is from a state Court, not a federal Court, it should not create too much damage. However, it is an example of how courts can view Garrity protections very narrowly.

In Wisconsin v. Brockdorf, 2004 WL 28521 1 8, Docket No. 04-1 51 9-CR (Dec. 14, 2004) (attached) a Police Officer gave two contradictory statements regarding the treatment of a prisoner by her partner. The Officer was then criminally prosecuted for "obstructing an officer." The issue for the Court was whether the first statement should be excluded due to Garrity.

The Appeals Court explained:

"The pivotal issue in this case is whether Brockdorf's October 3rd statement was given voluntarily. The State argues that Brockdorf was not threatened with job loss if she exercised her Fifth Amendment right to remain silent. Rather, the only "threat" was that if she did not answer questions, she could be charged with obstruction. Brockdorf admits that she was never told that she would be fired if she refused to answer questions, but that she believed if she was charged with obstruction and caught lying, then she would be fired. The trial court, relying on Garrity, concluded that Brockdorfs statement was coerced because it was made under threat of an obstruction charge and fear of job loss. This court concludes that Brockdorf s statement was not coerced; rather, it was voluntarily made and therefore should not have been excluded. "

The Court relied heavily on the fact that the Officer was not TOLD she would be fired if she refused to answer:

"She was not told that she would be fired if she exercised her Fifth Amendment right to remain silent. She was told that she would be charged with obstruction if she refused to answer questions in the criminal investigation. This, however, does not rise to the level of coercive conduct so as to negate the voluntariness of her statement. "

We believe that this is an incorrect interpretation of Garrity, and that the Court went too far in appearing to require that the Officer actually be told that she would be fired in order for Garrity protection to attach. We want to ensure that this interpretation does not spread further. Therefore, if you know of any pending cases where this is an issue, please let me know, and I.U.P.A. may be able to help.

In the meantime, this case highlights the need to have Officers give an explicit Garrity protection disclaimer. A Garrity disclaimer will provide use immunity so long as it is given to, or approved by, a governmental official with apparent authority to grant immunity. We recommend that the following

language be placed on any written statement, and be told to an investigator if there is an oral statement.

This Florida Garrity case demonstrates the need for clarity during investigations.
The United States District Court in Florida recently issued a decision illustrating why it is essential for officers to be clear on whether they are being interviewed as part of a criminal investigation or as part of internal affairs investigation. U.S. v. Green, 2006 WL 2947830 (M.D. FI. Oct. 16, 2006).

In this case, the Officer was called in for questioning regarding a child pornography case. The Officer was questioned by Detectives who read the Officer his Miranda rights. The Officer waived his Miranda rights and responded to questions. However, the Detective "did not tell the Defendant at the outset of the interview that it was a criminal investigation. He did state that as a 'courtesy' he was giving the Defendant his Miranda warnings. The questions concerning any criminal activity began after an hour of questioning." Further, the Court found that the Department never told the Officer it was conducting a criminal inquiry.

There was a dispute on one key point. The Officer asserted he was told that he "had to speak to investigators or else he would lose his job." The Department denied ever threatening the Officer. After reviewing the testimony and the audio tapes of the interviews, the Court found that none of the departmental officials told the Officer he would lose his job if he cooperated.

Ultimately, the Court found that the statements were not protected by Garrity. The Court recognized the clearly established Garrity rule that Officers cannot be terminated for refusing to waive Miranda rights, and that statements given under threat of termination are coerced and must be suppressed. In determining whether the latter occurred, the Court set forth the familiar Garrity standard:

> *Before determining whether a police officer's testimony is coerced, the officer must show that he "subjectively believed that he would lose his job if he refused to answer questions and that his belief was objectively reasonable." United States v. Waldon, 363 F.3d 1103, 1112 (11th Cir.2004), citing United States v. Vangates, 287 F.3d 1315, 1322 (11th Cir.2002)). To show that a subjective belief is objectively reasonable, the officer must show that his belief derived from the actions of the governmental entity.*

The Court accepted for the sake of argument that the Officer subjectively believed that he was compelled to respond. However, the Court then ruled that:

> *The Defendant's subjective belief that he would lose his job if he did not cooperate was not objectively reasonable. Objectively, the Defendant should have known that he was not in an administrative investigation, and that he was in fact, in a criminal investigation. The Court determines that the Defendant had the choice whether to cooperate with the investigators and waive his Fifth Amendment rights to self-incrimination or remain silent.*

This case illustrates several very important points:

1) Officers called in for questioning should clearly understand, and should confirm with the Departmental officials, whether the questioning is conducted as part of a criminal investigation or an internal investigation.

2) If Officers are EVER read Miranda rights, they must be extremely careful. Officers should understand that in most jurisdictions, if they give statements after voluntarily waiving their Miranda rights, these statements can be used in both a criminal and departmental proceedings.

3) Whenever Miranda rights have been read, Officers should clarify whether they will be subject to discipline if they exercise their Miranda rights.

4) If there are ever threats of termination or punishment, these threats should be repeated and confirmed on the record, preferably both in writing and on tape in a section that cannot be "accidentally ” erased (for example, after the official interview has actually started).

5) Finally, if Officers are actually threatened that if they do not waive Miranda they will be terminated, the Officers could challenge either outcome: if they are terminated they can contest the termination: and if they give the statement they can move to suppress the use of the statement in a criminal trial. However, it is generally easier to overturn a termination for refusal to waive Miranda, than it is to suppress a statement that was made after Miranda rights were waived. In addition, as this case illustrates, the Officer must be able to prove that there was an actual threat.

Since this is such an important issue for Officers, they need to be clearly aware of their rights in such investigations. Further, sometimes there are local variations on the law in this area, and locals and their members should consult with local counsel regarding the law in their jurisdiction.

3. The Garrity Rights Card

To prepare for a departmental internal investigation interview or interrogation, the following procedures are recommended to protect your rights:

- Request the presence of a Union Representative before questioning begins.
- Review your rights under any collective bargaining agreement and any state or local Law Enforcement Officers Bill of Rights.
- Request the identity of the complainant. Request to see all documents relative to the charges. Read these documents for content regarding facts, truthfulness and accuracy. Take notes to address any discrepancies noted.
- Ask whether you are the subject of the investigation or a witness and inquire as to the specific nature of the charges.
- Is the investigation administrative or criminal? If criminal, invoke your right to counsel immediately. Decline to give a statement. Do not succumb to pressure to give a statement.
- Require that you be given a reasonable amount of time to prepare properly before the interview begins.
- Answer all questions honestly. Be brief in your answers. Do not guess, if unsure of an answer, you may state, “I need to check my records.” “I am not sure.” “I do not recall.” Always be honest in your response, but do not volunteer information.
- In internal or administrative interviews and criminal matters, you should refuse to submit to a polygraph without consulting your attorney.
- At the beginning of any statement, read Garrity Statement.

4. Garrity Constitutional Protection Statement

If ordered to give a statement without your counsel present, state or write this at the beginning of your statement:
On (date & time) at (place), I was ordered to submit this statement by (name and rank). I give this statement at his/her order as a condition of employment. I have no alternative but to abide by this order or face termination. It is my belief and understanding that the department requires this statement solely and exclusively for internal purposes and will not release it to any other agency. It is my further belief that this statement will not and cannot be used against me in any subsequent proceedings. I authorize release of this report to my attorney or designated union representative.

I retain the right to amend or change this statement upon reflection to correct any unintended mistake without subjecting myself to a charge of untruthfulness.

For any and all other purposes, I hereby reserve my Constitutional right to remain silent under the Fifth and Fourteenth Amendment to the United States Constitution and any other rights prescribed by law. I rely specifically upon the protection afforded me under the doctrines set forth in Garrity and Spevack should this statement be used for any other purpose.

As always, there are significant variations in the law from jurisdiction to jurisdiction, and Officers should contact their local counsel if they have specific questions on the procedure in their department.