



# **Garrity Use Immunity:**

## **A Guide for Investigators**

### **Part 1**



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**THE RULE of LAW:** A statement of a public employee and evidence derived from any statement cannot be used against that employee in a criminal prosecution when the statement is taken under threat of potential termination of employment. Such a statement is considered “coerced” under the 5<sup>th</sup>/14<sup>th</sup> Amendments of the U.S. Constitution. Garrity v. New Jersey, 385 U.S. 493 (1967).

In Garrity, the Attorney General’s Office was conducting a CRIMINAL INVESTIGATION concerning “ticket fixing”. The police officers under investigation were told:

1. Anything you say can be used against you in a criminal case.
2. You can refuse to answer any questions if your answers would tend to incriminate you.
3. If you refuse to answer any questions, you can be fired.

Several officers provided statements which were used against them in the criminal prosecution. Ultimately, the statements were deemed coerced under the 5<sup>th</sup> Amendment – “No person ...shall be compelled in any criminal case to be a witness against himself....”

Essentially, when an investigator, supervisor, manager or a government official in a position of authority compels a public employee to answer questions, the interviewer is granting the employee Garrity “use immunity”. “Use immunity” means that neither the compelled statement nor any evidence derived from the statement can be used against the employee in a criminal prosecution.

Garrity “use immunity” does not mean that the employee cannot be criminally prosecuted. It means that the statement and incriminating evidence found as a result of the statement is inadmissible in a CRIMINAL case. Any witness statements and evidence obtained prior to the subject employee’s administrative statement can be used to prosecute the employee. Also, any witness statements or evidence, which was obtained independently and not derived from the employee’s administrative statement, can be used in a subsequent criminal prosecution of the employee.

Garrity “use immunity” is based upon the 5<sup>th</sup> Amendment protection against SELF-INCRIMINATION in a criminal prosecution. Statements taken by other public employees can be used, in a criminal prosecution, against a subject employee. A witness employee, who did not engage in criminal misconduct, cannot incriminate himself/herself. A witness employee can be compelled to cooperate under threat of job loss. When conducting an investigation involving potential criminal misconduct by employees, the investigator should initially determine whether any of the possible witness employees may have engaged in criminal misconduct. In other words: Are the witness employees TRUE WITNESSES?

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Additionally, Garrity “use immunity” does not prevent the public employee’s statement from being used to criminally prosecute the employee for perjury, false statement, or obstruction of justice. *U.S. v. Veal*, 153 F3d 1233 (11<sup>th</sup> Cir. 1998). “An accused may not abuse Garrity by committing a crime involving false statements and thereafter rely on Garrity to provide a safe haven by foreclosing any subsequent use of such statements in a prosecution for perjury, false statements or obstruction of justice.” “Garrity protection is not a license to lie or commit perjury.” See *Veal* at 1243. The *Veal* case involved the beating death of a street-level drug dealer by six City of Miami police officers. Statements by the police officers, which had been taken by investigators, were found to have been compelled under threat of potential dismissal. The statements and evidence derived from the statements were inadmissible at trial, which led to a partial acquittal and a hung-jury. In a subsequent federal criminal prosecution, the same statements were deemed admissible at trial and several of the officers were found guilty under the false statement/obstruction counts.

REMEMBER: IF there is no potential CRIMINAL MISCONDUCT on the part of the public employee, Garrity USE IMMUNITY is a non-issue.

### **ADMINISTRATIVE STATEMENTS**

Garrity issues most often arise when an investigator is conducting an administrative investigation related to workplace misconduct and the allegations or facts surrounding the investigation indicate potential criminal misconduct on the part of the public employee(s).

Public employers are expected to conduct administrative investigations concerning possible employee misconduct. Moreover, they can compel employees to answer questions or provide statements to supervisors or investigators. *Gardner v. Broderick*, 392 U.S. 273 (1968) and *Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 426 F2d 619 (2d Cir. 1970) – If a public employee “...had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties...the privilege against self-incrimination would not have been a bar to his dismissal” *Gardner* at 278. The police officer in the *Gardner* case had been ordered, under threat of dismissal, to “waive” his 5<sup>th</sup> Amendment protection. As in Garrity, the U.S. Supreme Court held that the threat of termination constituted coercion and any statement made or evidence derived from such statements were inadmissible in a CRIMINAL case. However, the Court also made clear that a public employee can be ordered to answer questions and can be disciplined for refusing to answer questions related to his/her job.

The vast majority of administrative investigations have no potential criminal misconduct. They involve incidents in which the employee may have violated an agency policy, rule or procedure. The sole consequence of any sustained misconduct is disciplinary-in-nature (counseling, reprimand, transfer, demotion, suspension, dismissal). In such instances, the investigator’s approach to taking the subject employee’s statement is straightforward.

- Comply with any state laws, union contract provisions, agency procedure for the notification and conduct of the administrative hearing.
- Notify the employee that you are conducting an administrative investigation.
- Direct the employee to appear for an interview.
- Be specific regarding the factual basis of the allegation(s).
- Prior to the interview, advise the employee of the possible administrative violations.

- Advise the employee that you will be asking questions “specifically, directly, and narrowly related to the employee’s official duties” or fitness for office.
- Advise the employee that he/she is required to provide a statement or answer questions.
- Advise the employee the possible consequences for refusal to answer (e.g. ...up to and including dismissal)
- Advise the employee that any statement or evidence derived from the statement cannot be used against him/her in a subsequent criminal prosecution, **EXCEPT** perjury, false statement or obstruction of justice.
- Advise that the statement is being recorded (if applicable)
- Administer oath (if applicable)
- Take statement
- End interview with “Is there anything I may not have asked that you (or your representative) believe might assist the agency in this investigation?”

Below is a sample preamble for an administrative statement of a subject employee.

While the above preamble format is not legally required, it is recommended because:

1. The authority of the agency to conduct the investigation and the requirement for the employee to cooperate are clear.
2. The preamble clarifies the administrative nature of the interview for the employee on the record.
3. The preamble specifies the consequences for refusal to answer questions.
4. The preamble removes ambiguity or confusion regarding the statement being voluntary or involuntary. An administrative statement is an involuntary statement.

**SEE NEXT PAGE**

**SUBJECT EMPLOYEE INTERVIEW: ADMINISTRATIVE**  
**FOR USE BY INTERNAL AFFAIRS UNIT or SUPERVISOR**

5. \_\_\_\_\_ This is an interview of \_\_\_\_\_, who is the subject of this administrative investigation, which is being conducted at (LOCATION). The date is ( ) and the time is ( ).
6. My name is (NAME and RANK) **OR** I am an Investigator with the Internal Affairs Unit, XXXXXX Police Department. I am assigned to this investigation and will be conducting this interview. At this time, I would like to inform you that this interview is being recorded.
7. Persons present during this interview are:
8. As I have already stated, you are the subject of this investigation. The nature of the complaint is: (DESCRIBE ALLEGATIONS).
9. The complaining party in this investigation is \_\_\_\_\_.
10. Have you read and do you understand the nature of the complaint that has been filed against you?
11. ***IF INTERVIEWEE IS A LA W ENFORCEMENT OFFICER - Have you been provided with an employee notification and a copy of the Law Enforcement Officer's Rights?***
12. ADMINISTER OATH – if applicable.
13. Are you on duty at this time?
14. This interview concerns administrative matters only and cannot be used as evidence in any criminal proceedings against you except for perjury or false statements that may arise from your statement. You will be asked questions specifically, directly and narrowly related to the performance of your official duties or fitness for office.
15. XXXXXX Police Department General Order 11-1 states that you are required to provide truthful or requested information during the course of any internal investigation. If you refuse to answer my questions, or if you answer untruthfully or if you omit any material facts you may be subject to disciplinary action, up to and including, your dismissal from the Department. DO YOU UNDERSTAND?
- 16. BODY OF STATEMENT**
17. *(If the employee's supervisor is present, have the supervisor direct the employee to answer any question that the employee refuses to answer and note for the record, the employee's actions.)*
18. Is there anything that I have not asked or that you want to say that may be relevant to this investigation?
19. Upon conclusion of this investigation you will be notified in writing of the disposition of the case.

20. \_\_\_\_\_ This  
interview is concluded and the time is \_\_\_\_\_.