



Garrity Use Immunity:

A Guide for Investigators

Part 2



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COMPLAINANT/ WITNESSES STATEMENTS & REPORTS/MEMOS

Just as with the subject employee, a public agency also has the authority to compel WITNESS EMPLOYEES to cooperate with an investigator and answer questions during an administrative investigation. While witness employees may not have the same statutory, contractual, or policy rights as a subject employee (e.g. right to representation, notice of the complaint), nonetheless they are subject to the same consequences for refusing to cooperate and answer questions.

Appendix D below is a sample preamble for an administrative statement of a witness employee.

However, non-employee witnesses or complainants are not subject to the same disciplinary consequences since the agency has no authority over them by reason of an employer-employee relationship. Therefore, when conducting an administrative interview of non-employees, it is recommended that the investigator explain that such interviews are voluntary-in-nature but that the non-employee witness's cooperation is important to conducting a thorough and impartial investigation.

Appendices B and C are sample preambles for a complainant and a non-employee witness.

RECOMMENDATION: When an employee (subject or witness) refuses to answer questions or provide a statement to an investigator or supervisor, do not stop immediately stop the interview or questioning. First, remind the employee of the agency rule requiring his/her cooperation. Second, advise the employee of the potential severe consequences for refusal to cooperate or answer questions. Third, have a supervisor, who has authority over the employee, issue a direct order for the employee to answer the questions. Fourth, have the supervisor advise the employee that failing to follow a lawful order constitutes an additional administrative violation for insubordination. Fifth, have the employee acknowledge that he/she understands the order and consequences.

Any such order, along with the consequences for disobeying, should be on the record or made in writing. Insubordination, particularly in public agencies, which have public safety sensitive positions, is generally considered a serious act of misconduct. It requires two elements of proof. Was the order lawful and did the employee disobey it?

THE GARRITY ISSUE

While the rule of law regarding Garrity use immunity and the law regarding a public agency's ability to compel employees to provide statements during an administrative investigation seems clear, there are situations when

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the alleged or suspected employee misconduct involves both administrative violations and potential criminal misconduct.

EXAMPLE: an employee is being investigated for sexual harassment of another employee and the complainant alleges that, along with a series of crude comments and e-mails, the harassment included a “groping incident in an elevator”. All public agencies have policies and rules related to unlawful discrimination and therefore the workplace misconduct will be investigated for possible administrative violations. However, the possible criminal misconduct, to wit: Battery or Sexual Battery is not within the exclusive control of the agency but rather may require a criminal investigation and a review by the State Attorney’s Office to determine whether to prosecute the subject employee.

In the above example, the questioning of the subject employee during an administrative investigation can adversely impact a criminal prosecution. Any admission or confession and any evidence derived from the administrative statement are likely to be deemed inadmissible and could result in insufficient evidence to prosecute the subject employee.

REMEMBER: Garrity use immunity renders the employee’s administrative statement inadmissible in a criminal case, along with any evidence derived from the statement.

In the above EXAMPLE, suppose the subject employee admits that he “groped” the complainant/victim and, unbeknownst to the victim, he and his cousin had also taken pictures of the victim when she was in her house at night. He showed the investigator the photos which were on his smart phone. The admission, the photos and the cousin are crucial evidence for any criminal prosecution. If the investigator took the statement from the complainant/victim and then immediately took an administrative statement from the subject employee, not only is the compelled subject employee’s statement inadmissible but the photos and the witness-cousin are inadmissible. With only the complainant’s statement, no other witnesses, and a subject employee who refuses to give a new voluntary statement to the criminal investigator, criminal prosecution is unlikely.

Although the criminal prosecution may be lost, *the subject employee can be disciplined/fired* for violations of agency policy based upon the complainant’s statement, his admission and the photos that were obtained.

PROTECTING THE CRIMINAL AND ADMINISTRATIVE CASES

Since Garrity use immunity can jeopardize an otherwise viable criminal case, preferred professional practices suggest a **wall of separation** between an administrative investigation and a criminal investigation of a public employee.

NON-LAW ENFORCEMENT AGENCIES: When a complaint is made of potentially criminal misconduct by an employee, an investigator should review the allegation and any preliminary facts to determine whether the allegation legally and factually establishes a criminal violation. If it does, REFER THE MATTER TO A LAW ENFORCEMENT AGENCY for criminal investigation. IF unsure, contact the LAW ENFORCEMENT AGENCY and advise them of the allegation and preliminary facts.

If the law enforcement agency decides to conduct a criminal investigation, the agency should open an administrative case but conduct no interviews of the subject employee without approval or notice to the law enforcement agency or the state attorney’s office.

If it does not adversely impact the criminal investigation, the administrative investigation can commence, including interviewing witnesses and gathering of information or evidence that may be related to any possible administrative violations.

While the criminal investigation generally takes priority and is handled separately, a concurrent administrative investigation can be conducted. It is not recommended to place the administrative investigation "on hold" until the conclusion of the criminal investigation and/or criminal prosecution, EXCEPT, when the administrative investigation interferes with a viable criminal investigation.

LAW ENFORCEMENT AGENCIES: Some agencies have both criminal investigators and investigators who handle administrative investigations of their employees. It is recommended that an allegation of potential criminal misconduct be handled by a criminal investigator who is separate from the administrative investigator. Such separation minimizes issues of Garrity "taint" in which a compelled administrative statement by a subject employee is used as part of the criminal investigation.

There are some law enforcement agencies in which the criminal investigator and the administrative investigator are the same person. While not recommended, in this instance, the investigator should first handle the criminal investigation and not commence the administrative investigation until the state attorney's office has given its approval, in writing.

The key objective of the investigator, when taking a statement from a subject employee that can be used in a criminal prosecution, is to be able to prove that the employee's statement was VOLUNTARY. Contrary to the administrative statement which is compelled, the admissibility in a criminal prosecution depends upon the subject employee's statement knowingly and freely given. It is recommended that the investigative take affirmative steps to prove the voluntariness of the statement.

- Advise the subject employee that the statement is being recorded.
- Advise the subject employee of the nature of the investigation (e.g. theft, battery, fraud).
- Advise the subject employee that it is NOT AN ADMINISTRATIVE INVESTIGATION.
- Advise the subject employee that he/she can refuse to answer any question(s).
- Advise the subject employee that no discipline will be taken against him/her for refusing to answer any question(s).
- Advise the subject employee that he/she is free to discontinue the interview and leave.
- Advise the subject employee that any statements made can be used in a criminal prosecution.
- Ask the subject employee if he/she understands and is voluntarily giving a statement

Appendix E below is an example of a standard preamble for taking a voluntary statement from an employee during a criminal investigation.

While the above notices are very similar to Miranda warnings, there is no mention of right to counsel. Miranda applies to custodial interrogations. Miranda v. Arizona, 384 U.S. 436 (1966). Unless the subject employee has been arrested or his/her freedom to move is restrained in a significant way, the 6th Amendment right to counsel under Miranda does not apply. Of course, if the employee will only give a voluntary statement with the presence of an attorney or representative, then the investigator cannot proceed with any questioning. The sole issue is voluntariness; not right to counsel.

REMEMBER: An administrative statement by a subject employee can only taint a criminal case under Garrity use immunity. A voluntary statement by a subject employee cannot taint an administrative investigation. A voluntary statement by a subject employee is admissible in a criminal or an administrative case.

REPORTS, MEMOS & OTHER DOCUMENTATION

An incident report, a memorandum or some other form of documentation (e.g. worker's comp form) **IS A STATEMENT** for the purposes of 5th Amendment protection and Garrity use immunity. Therefore, when a public employee writes a report or memo, after being ordered to do so under the threat of possible dismissal, the report, the employee's statement is compelled. The compelled report has the same protection against self-incrimination as a compelled administrative interview.

The vast majority of incident reports, memos or worker's compensation claim forms, which are prepared by public employees, *are not prepared under the threat of possible dismissal*. GENERALLY, a mere rule requiring reports or cooperation with an investigation is insufficient to create compelled atmosphere. "Garrity does not stand for the proposition that a statement made in a standard report is coerced whenever an officer faces both a remote possibility of criminal prosecution if he files the report and arguably even speculative possibility of termination if he declines to do so." U.S. v. Smith, 821 F. 3d, 1293, 1304 (11th Cir. 2016)

In the Comacho case, which is discussed below, the Court did not adopt the view that "the mere existence of a departmental policy of disciplining those officers who refuse to give statements always operates as a matter of law to render the statements involuntary." U.S. v. Comacho, 739 F. Supp. 1504, 1516 (S. Dist. 1990). "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." "Garrity Warnings: To Give or Not to Give, That Is the Question", Eric P. Daigle, IACP Legal Officers Section, *The Police Chief*, Volume 79, Number 12 (December 2012).

The primary concern of a report or memo written by an employee, who is potentially engaged in criminal misconduct, is that the employee statement/report might be deemed compelled and thus taint not only the statement but any evidence derived from the statement/report. When conducting a criminal investigation, it is important for an investigator to determine the circumstances under which the report or memo was prepared. IF prepared as part of a routine agency policy, the report/memo is admissible in both an administrative and criminal proceeding. IF the employee prepared the report/memo based upon some direct order and threat of severe disciplinary action by a supervisor or investigator, then the compelled report/memo and evidence derived from it may be deemed inadmissible in a criminal prosecution.

The issue of a subject employee's report, memo, etc. and its use in a criminal prosecution can arise during an Implied Garrity situation, which is discussed in PART 3 of the Garrity Use Immunity article.

SEE NEXT PAGE

APPENDIX B

COMPLAINANT INTERVIEW: ADMINISTRATIVE

FOR USE BY INTERNAL AFFAIRS UNIT or SUPERVISOR

This is an interview of _____ . This interview is being conducted at (LOCATION). The date is _____ and the time is _____.

My name is (NAME and RANK) **OR** I am an Investigator with the Internal Affairs Unit of the XXXXXX Police Department. I have been assigned this investigation and will be conducting this interview.

At this time I would like to inform you that this interview is being recorded.

Persons present during this interview are:

ADMINISTER OATH – if applicable.

Please state your full name and current address. [CONTACT INFORMATION & e-mail address].

It is my understanding that you filed a complaint against [NAME(s)] of the XXXXX Police Department. Please describe for me in detail the facts surrounding your complaint.

BODY OF STATEMENT

Is there anything that I have not asked or that you would like to say that you believe may be relevant to this investigation?

Thank you for your statement. You will be notified at the conclusion of the investigation of our findings and final disposition.

This interview is concluded and the time is _____.

APPENDIX C

CIVILIAN WITNESS INTERVIEW:

ADMINISTRATIVE FOR USE BY INTERNAL AFFAIRS UNIT or SUPERVISOR

This is an interview of . This interview is being conducted at (LOCATION). The date is _____ and the time is _____.

My name is (NAME and RANK) OR I am an Investigator with the Internal Affairs Unit of the XXXXXX Police Department. I am in charge of this investigation and will be conducting this interview.

At this time, I would like to inform you that this interview is being recorded.

Persons present during this interview are:

ADMINISTER OATH – if applicable.

Please state your full name and current address, including e-mail.

BODY OF STATEMENT

Is there anything that I have not asked or that you would like to say that you believe may be relevant to this investigation?

This interview is concluded and the time is _____.

APPENDIX D

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

This is an interview of . This interview is being conducted at (LOCATION). The date is _____ and the time is _____.

My name is (NAME and RANK) OR I am an Investigator with the Internal Affairs Unit of the XXXXXX Police Department. I am in charge of this investigation and will be conducting this interview.

At this time I would like to inform you that this interview is being recorded.

Persons present during this interview are:

ADMINISTER OATH – if applicable.

Are you on duty at this time?

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.

XXXXXX Police Department General Order 11-1 states that you are required to provide truthful or requested information during the course of any administrative 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?

BODY OF STATEMENT

Is there anything that I have not asked or that you would like to say that may be relevant to this investigation?

This interview is concluded and the time is _____.

APPENDIX E

CRIMINAL INVESTIGATIONS SECTION

SUBJECT EMPLOYEE INTERVIEW: CRIMINAL

My name is (NAME and RANK) I am an investigator with the (Department).

Today's date is _____ and the time is _____. This interview is being conducted at (LOCATION OF INTERVIEW) in _____ County, Florida.

We are conducting a criminal OR Shooting/In-Custody Death investigation into the events that occurred on (DATE & BRIEF DESCRIPTION OF NATURE OF INVESTIGATION). We want to obtain your statement concerning this incident but first I want to advise you of nature of this interview.

Do you understand that your statement is being recorded?

Has anyone ordered or compelled you to be here today?

Has anyone ordered or compelled you to give us a statement today?

- DO you understand that we are conducting a criminal OR independent investigation?
- This is NOT an administrative investigation.
- You are not compelled to be here or to provide a statement.
- Do you understand that your statement is voluntary and that you are free to leave or discontinue this interview at any time.
- Do you understand that your statement is voluntary and there will be no adverse job action taken against you regardless of your decision to speak or not speak with us today?
- Are you willing to make a statement and answer my questions at this time?

ADMINISTER OATH – if applicable.

Please state your full name, position, and work address.

Please state your work phone number.

How long have you been employed with _____?

BODY OF STATEMENT

Is there anything that I have not asked you or that you believe may be relevant to this investigation?

Thank you for your cooperation. This interview is concluded and the time is _____.