



Garrity Use Immunity: A Guide for Investigators Part 3

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IMPLIED GARRITY & MISCELLANEOUS ISSUES

The rule of law regarding Garrity use immunity is straightforward. It is the situations which arise that continue to create potential Garrity issues. Examples include:

- An audit that uncovers suspected theft by an employee
- Administrative misconduct that may also involve criminal misconduct (i.e. sexual harassment/battery)
- Incidents that initially seem justified (i.e. use of force, officer-involved shooting)

A complicating factor to these situations is the urgency of the moment or the direct or indirect pressure to quickly resolve either critical incidents or serious allegations of misconduct leveled against an agency's employee. Unlike the more deliberate approach to review the allegations and facts and determine whether potential criminal misconduct occurred, decisions on-the-scene or prompted by external scrutiny do not always lend themselves to a full understanding of the facts. Regardless of the cause, such situations have given rise to IMPLIED GARRITY issues.

IMPLIED GARRITY occurs in a non-traditional manner. The public employee is being questioned concerning a matter that later is determined to involve criminal misconduct.

- The employee IS NOT CLEARLY COMPELLED TO GIVE A STATEMENT to investigators or persons in authority.
- The employee IS NOT EXPRESSLY GIVEN Garrity USE IMMUNITY.
- The employee IS ALSO NOT GIVING A VOLUNTARY STATEMENT.

The leading Florida case involving **Implied Garrity** is U.S. v. Comacho, 739 F. Supp. 1504 (S. District, 1990). This was the same case that was appealed as U.S. v. Veal, 153 F.3d 1233 (11th Cir. 1998) and found that a public employee who receives Garrity use immunity cannot make false statements or lie.

Essentially, the case involved six City of Miami police officers who approached and fought a street-level drug dealer. The drug-dealer later died from his injuries. In the early hours of the in-custody death investigation, the use of force appeared limited to 1 or 2 officers and the other four officers were not involved. The four officers were deemed "witnesses" and told that they had no right to an attorney and could be ordered to give statements. The criminal investigator and assistant state attorney wanted to obtain VOLUNTARY STATEMENTS from the officers. One officer balked and said that he felt compelled. The investigator and prosecutor decided to drop the issue of voluntariness and take the statements with no preamble. It was later determined that all of the officers had punched, kicked and stomped the deceased.

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Prior to trial, all six defendants claimed that their Garrity rights had been violated. The judge citing U.S. v. Friedrick, 842 F. 2d 382 (D.C. Cir. 1988) found that the circumstances surrounding the officers' statements violated the officers 5th Amendment rights by virtue of the IMPLIED THREAT OF TERMINATION. The legal standard for Implied Garrity is:

1. Did the public employee subjectively believe that he/she was compelled to give a statement?
AND
2. Was the employee's belief objectively reasonable based upon the conduct of the government representatives (investigator, supervisor, prosecutor) at the time or proximate to the time the statement was given?

Since Implied Garrity is based upon the factual situation that led to the public employee's statement, no one procedure can address all situations. However, there are specific recommendations for investigators and supervisors to follow in order to minimize an inadvertent Implied Garrity violation.

First, if unsure whether a situation involves criminal or administrative violations – treat it as a criminal case.

Second, only clearly VOLUNTARY STATEMENTS should be obtained from the subject (or possible subject) employees. Recommend using a preamble that expressly states that the statement is voluntary, it is NOT an administrative investigation, the statement and/or evidence derived can be used in subsequent criminal prosecution, no consequences for refusal, etc. See sample preamble Appendix E.

Third, insure ON-THE-RECORD or IN-WRITING that the subject employee's statement is voluntary.

Fourth, if the subject employee indicates, in any way, that he/she is unsure whether they must give a statement – DISCONTINUE INTERVIEW. Only continue the interview if, after clarifying any questions or ambiguity, **you can prove** that any uncertainty has been resolved in the mind of the employee. The *burden of proving that the employee's statement is voluntary* is on the agency. Erwin v. Price, 778 F. 2d 668 (11th Cir. 1985). The government must prove that the statement is knowingly and willfully voluntary. Any uncertainty will be resolved in favor of the subject employee.

Fifth, particularly in the early stages of an investigation, *do not rush* to obtain a possible subject employee's statement. At a later time and once the criminal or administrative misconduct issues are resolved, you can always obtain an administrative statement.

Garrity use immunity and Implied Garrity are not limited to investigators. Any person, who has the authority or apparent authority to present a threat of possible termination, can trigger Garrity use immunity. In Benjamin v. City of Montgomery, 785 F. 2d 959 (11th Cir. 1986), the Mayor ordered officers to testify during a criminal case involving a defendant they had investigated. After refusing to testify under that condition, the mayor fired the officers. The Court found that the dismissals violated the officers' civil rights since the City had fired them for exercising their 5th Amendment right under Garrity.

An investigator should also be aware of **any communication between the subject employee and a superior** before attempting to obtain a voluntary statement from a subject employee. A supervisor, a police chief, a mayor or any superior employee, unbeknownst to the investigator, may communicate to the employee in a manner that leads the employee to believe he is compelled to cooperate with the criminal investigation. Particularly during critical incidents, it is not unusual for persons in the chain-of-command to speak briefly with the involved employee. Garrity use immunity is triggered by the conduct/communication between the supervisor and the subject employee's belief that the statement to investigators was compelled under threat of

job loss. These communications are rarely documented. Since the government had the burden of proving voluntariness, the benefit of the doubt goes to the subject employee. The preamble in Appendix E is designed to address this issue.

NOTE: In the Comacho case, some of the involved officers had made statements to a supervisor who had initially arrived at the scene of the incident. The Court found that such “on-the-scene” statements, even to a supervisor, are not protected by Garrity use immunity. Any questioning by the supervisor was related to public safety and police business. The officers were not the focus of the scene and had no reasonable basis to believe that they were coerced under threat of dismissal.

ADMINISTRATIVE INVESTIGATIONS – DELAYS BY THE CRIMINAL CASE

When there is a companion criminal case, the administrative case is often delayed because:

- The criminal case takes priority
- The criminal case takes longer to prove since the burden of proof is higher (“beyond a reasonable doubt”) compared to an administrative case (“a preponderance of credible evidence”)
- The subject employee has asked to postpone any administrative action pending the disposition of the criminal case
- The prosecutor is reviewing the criminal investigation before filing charges
- The prosecutor has not yet released the discovery in the criminal case
- The case is going to trial
- The criminal conviction is being appealed

While such reasons may form the valid basis for delaying the administrative case, many times such delay is unnecessary and places the agency in the position of delaying any disciplinary action despite sufficient evidence that a serious administrative violation has occurred. In cases where the investigation has garnered public attention, additional pressures may be exerted concerning the agency’s reluctance to take punitive action against an employee who committed serious misconduct.

An agency has a responsibility to move forward with its own administrative investigation in order to determine whether or not its employee engaged in serious misconduct. In cases where an employee is proved to have engaged in a serious breach of their public duties, it is important for the public to know that such conduct is not tolerated. Additionally, the agency has the responsibility to its other employees to demonstrate its commitment to ethical conduct. Keeping an employee “on the public doles” when there is sufficient evidence to support disciplinary action diminishes both the public’s and agency employees’ confidence in its ability to address serious breaches of official duty.

Therefore, when supported by credible evidence, the agency should move forward with appropriate disciplinary action, *regardless of the delays associated with a pending criminal case*. The only caveat is to insure that neither the administrative investigation nor the disciplinary action will adversely impact the on-going companion criminal investigation or prosecution. While it is recommended to obtain the approval of the criminal investigating agency and/or the prosecutor, at a minimum, **notice** to the criminal investigator and prosecutor should be provided PRIOR TO continuing the administrative investigation AND taking any disciplinary action against the subject employee.

REMEMBER: Evidence obtained during the course of a criminal investigation, including witness statements & any subject employee statement, can be used in the administrative case. Once the criminal case is no longer “cloaked with confidentiality” under the State’s Public Records Laws such evidence can be used to supplement the evidence obtained during the administrative investigation.

MISCELLANEOUS GARRITY ISSUES

Civil Suit Testimony – **Unless the 5th Amendment is invoked by the public employee during a civil deposition or a civil trial, Garrity use immunity does not apply.** U.S. v. Vangates, 287 F. 2d 1315 (11th Cir. 2002). In Vangates, a corrections officer, along with other officers, was sued for allegedly violating the civil rights of an inmate. The officers had been accused of beating the inmate. The agency had conducted an administrative investigation during which the corrections officer gave a compelled administrative statement to investigators. Following her civil trial testimony, the corrections officer was charged criminally in the beating of the inmate. Her civil trial testimony was used against her in the criminal prosecution. The Court in Vangates upheld the lower court’s ruling that the officer’s administrative statement to internal affairs was inadmissible based upon Garrity use immunity but held that her civil trial testimony was admissible in the criminal prosecution. Although subpoenaed to testify, the officer did not invoke her 5th Amendment right nor was she ordered to waive her 5th Amendment right.

Pre-disciplinary hearings – Unless otherwise compelled to make a statement or waive 5th Amendment rights, a public employee is not granted Garrity use immunity during a pre-disciplinary conference. Harrison v. Willie, 132 F. 3d 679 (11th Cir. 1998). Many public employees cannot be disciplined (suspended, demoted or fired) without just cause. Prior to the imposition of such discipline, those public employees are entitled to: 1) notice of the charges AND 2) the opportunity to be heard. Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487 (1985). Since the employee MAY or MAY NOT speak and is not ordered to speak, there is no compelled statement being under threat of job loss. Any statement made by the employee is voluntary and can be used in any subsequent administrative hearing or even a companion criminal case.