	Immunity Granted under Garrity Article 2 of 6 on Garrity by Jack Ryan	

Most grants of immunity occur under the jurisdiction of a court in accordance with a statute. See E.g. 18 U.S.C. 6002. One type of immunity that developed in the context of investigations of public and government employees is that is commonly referred to in the law enforcement setting as a *"Garrity"* interview. *"Garrity"* interviews and *"Garrity"* warnings derive their label from a United States Supreme Court decision, *Garrity v. New Jersey.*[1]

The *Garrity* case involved officers who were questioned regarding a ticket-fixing scheme. The officers were informed that their answers could be used against them in a criminal case and informed that the failure to answer could result in their dismissal from the police department in accordance with an existing state statute. The officers agreed to answer and were subsequently charged criminally. In its review of the case the United States Supreme Court held that the choice between incriminating one's self and losing one's livelihood amounted to coercion which is prohibited under the Constitution. Statements taken as the result of this type of coercion cannot be used in a criminal case. In essence, the Court held that when a police officer is coerced, under threat of discipline, to give a statement, the officer is immunized against the use of the statement in a subsequent criminal prosecution.

[1] *Garrity v. New Jersey,* 385 U.S. 493 (1967).

Shortly after the *Garrity* case, the Court reviewed a case that was the flip-scenario. In *Gardner v. Broderick*,[2] the Court was confronted with another investigation involving a police officer. In *Gardner*, a police officer was subpoenaed to appear before a grand jury investigating the bribery and corruption of police officers. An officer appearing before the grand jury exercised his Fifth Amendment privilege after being warned that his failure to sign a waiver of the privilege might lead to his dismissal from the police department. Because he refused to waive the privilege against self-incrimination, the officer was fired. In its review of the case, the Court decided that a police officer may not refuse to answer questions relating to the performance of his or her duties as long as the officer is immune from the use or derivative use of his or her answers in a subsequent criminal prosecution. However, an officer cannot be forced to waive his or her 5th Amendment privilege under the threat of dismissal from his or her position. An officer cannot be fired for failing to relinquish the 5th Amendment privilege.

A number of cases have been decided since *Garrity* and *Gardner* interpreting the scope of protection that public employees have during administrative interviews. In reviewing these cases, one must keep in mind that these cases create a form of immunity that is in the hands of investigators. There is no review by a neutral and detached magistrate to determine if the immunity granted is appropriate under the facts of the case being investigated. Some writers have criticized this agency-imposed immunity citing the possibility of abuse.[3]

Transactional Immunity

The state of Massachusetts and, according to some commentators Alaska, are the only state that requires a grant of transactional immunity before an officer can be forced to speak regarding matters that may result in departmental discipline.[4] Officer Carney was one of several officers being

[2] *Gardner v. Broderick*, 392 U.S. 273 (1967),

[3] See, "Code of Silence: Police Shootings and the Right to Remain Silent" Robert Myers, 26 Golden Gate U. L. Rev. 497 (1996).

[4] *See, Baglioni v. Chief of Police of Salem, 656 N.E. 2d 1223 (1995), Carney v. Springfield,* 532 N.E. 2d 631 (Mass. 1988).

investigated regarding violations of the narcotics law. On two occasions, Officer Carney was called in for interviews dealing with his fitness for duty. On both occasions, he was given Miranda warnings and informed that his answers could be used against him in a criminal proceeding. When Carney refused to waive his rights, the investigating officer acknowledged this refusal and then ordered Carney to answer questions under the threat of discipline. In both instances, Carney maintained his silence after the investigating officer failed to adequately explain the consequences of Carney's refusal. During the second interview, Carney's attorney sought a clarification of the threat of discipline and asked what steps had been taken to grant Carney immunity. Carney was suspended for his refusal to answer questions.

The Supreme Judicial Court of Massachusetts dealt with two issues in this case. First, whether the informal immunity offered in an administrative interview with a public employee is valid. The SJC acknowledged that absent a valid grant of immunity an officer could continue to exercise his or her constitutional privilege and refuse to answer questions. In resolving this initial question, the court acknowledged that informal grants of immunity "under the Fifth Amendment to the United States Constitution can also arise where public employees are compelled to answer questions narrowly and specifically related to their job performance."

In reviewing the warnings giving to Carney, the SJC concluded: "Where public employers compel answers in an investigation, however, the employer, at the time of the interrogation, must specify to the employee, the precise repercussions (i.e., suspension, discharge or the exact form of discipline) that will result if the employee fails to respond." The court found that the investigating officer failed to give Carney sufficient warnings.

On the second and more significant issue, the SJC found that in order to comport with the Massachusetts Declaration of Rights, an officer who is forced to answer incriminating questions under threat of job action, must be granted transactional immunity.

In a more recent case, the Supreme Judicial Court re-affirmed the requirement of transactional immunity under the Massachusetts Declaration of Rights, but further explained that such a grant would only translated to use/derivative use immunity in a federal prosecution.[5]

In *Baglioni,* union officials for the Salem Police Department sought to enjoin the police department from ordering two officers to take a polygraph examination unless the officers were first granted transactional immunity. The officers were subjects of an investigation of malicious damage to another officer's locker and filing a false police report. The district attorney for the Eastern District of Massachusetts had written a letter to the chief of police declining criminal prosecution on these matters; however the officers believed that the letter was insufficient to provide them with transactional immunity.

The Supreme Judicial Court reviewed the power of the district attorney to grant immunity outside of the immunity statute. The court asserted: "We shall assume, without deciding, that a district attorney has authority to grant immunity to a person with respect to events as to which that person is obliged to make statements at the risk of loss of employment. The district attorney's authority extends, however, only to the limits of his district. Immunity from prosecution by a district attorney in another district, by the Attorney General, or by a United States attorney does not automatically flow from such a grant of immunity… One who persists in the assertion that the promise does not fully protect his or her rights against self-incrimination must be assured that the purported immunity (a) is effective Statewide and (b) protects against the use of any statements in the prosecution of any Federal crime… The fact that an effective State grant of transactional immunity only translates into use and derivative use immunity for Federal purposes presents no obstacle to compelling a person to answer questions… The plaintiff officers have no right to insist on transactional immunity from Federal prosecution.

[5] Baglioni v. Chief of Police of Salem, 656 N.E. 2d 1223 (Mass. 1995).

Officers from Burlington Vermont sought a similar interpretation of the Vermont Constitution when they sought a declaratory judgment that the department's promise of use/derivative use immunity was insufficient to protect officers against self-incrimination.[6] In BPOA, an officer, charged with violating department rules on domestic abuse, was ordered to attend an interview and answer questions. He was informed that his refusal of the order would lead to his dismissal.

The Supreme Court of Vermont reviewed the options available with respect to grants of immunity. The court noted that the city has no power of prosecution "and certainly no power to offer immunity from prosecution by the State of Vermont." The court went on to express concern "about the prospect of police officers immunizing each other through disciplinary investigations, making decisions without the involvement of prosecutors. Even if we assume everyone will act in good faith, a very real risk exists that officers who commit criminal acts will escape criminal responsibility because of acts taken in disciplinary investigations." The court rejected the union's request for a declaratory judgment and went on to make the following suggestion: "Ideally, the Legislature should require that a prosecutor be informed of pending disciplinary investigations, and the prosecutor should have the power to prevent coerced interrogation that would lead to immunity claims that would defeat a criminal prosecution."

[6] . *See, Burlington Police Officers' Association (BPOA) v. City of Burlington,* 689 A.2d 1071 (Vt. 1996).