2006 IACP Annual Conference
Legal Officers Section

GARRITY REVISITED
The View in 2006

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I. ***Garrity*** rights are 5th Amendment rights, made applicable to the States by the 14th Amendment. ***Malloy v. Hogan*****,** 378 U.S. 1 (1964).

> Various New Jersey police officers were being investigated (for alleged fixing of traffic tickets) by the New Jersey Attorney General. In 1961, several were interviewed by a Deputy Attorney General who warned them that anything they said might be used against them in a state criminal proceeding; that they had the right to refuse to answer if the disclosure would be incriminating; and that refusal to answer would result in automatic forfeiture of office pursuant to a self-executing state statute.
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> Edward Garrity, among others, signed a waiver of immunity and incriminated himself. At trial, over his objection, his statements were used as evidence against him, and he was convicted.
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> At pages 496-497, the court said: "The choice imposed on petitioners was one between self-incrimination or job forfeiture…We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary." The convictions were therefore overturned. ***Garrity, et al. v. New Jersey,*** 385 U.S. 493 (1967).

II. "The protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and…it extends to all, whether they are policemen or other members of our body politic." ***Garrity*****,** *supra, at page 500. See also* ***Lefkowitz v. Turley,*** 414 U.S.70 (1973).

III. It appears that compelling a person to make a statement (as opposed to courtroom use of that statement at a criminal trial of the person compelled to give it) does not violate the 5th Amendment. ***Chavez v. Martinez,*** 538 U.S. 760 (2003***).***

IV. Removal of a police officer from office for his refusal to waive his constitutional rights and to testify in front of a grand jury is an unconstitutional infringement of his rights. ***Gardner v. Broderick,*** 392 U.S. 273 (1968)***.***

V. "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself,…the privilege against self-incrimination would not have been a bar to his dismissal. The facts of this case, however, do not present this issue…He was dismissed for failure to relinquish the protections of the privilege against self-incrimination." ***Gardner,*** *supra*, at page 278.

- Mandatory use of force reports
- Mandatory reports regarding line of duty vehicular accidents
- Mandatory firearms discharge reports
- Is the 5th amendment protection recognized in ***Garrity*** self executing or must it be triggered by official reference to it?
- Can officer conduct, coupled with standard department directive language, trigger the 5th Amendment protection?

VI. The exclusion of compelled statements from criminal courtroom usage against the maker thereof is not immunity in the traditional sense of that term. It is a matter of clearly established 5th Amendment principle, which functions like a grant of use immunity. ***Garrity,*** *supra*; ***Confederation of Police v. Conlisk***, 489 F.2d 891, at 894 (1973), *cert. denied sub nom*. ***Rochford v. Confederation of Police***, 416 U.S. 956 (1974); ***United States v. Veal***, 153 F.3d 1233 (11th Cir. 1998), *cert denied* 526 U.S. 1147 (1999).

Therefore, the "validity" of a typical ***Garrity*** admonition is not subject to attack simply because the official delivering it is unable to confer immunity.

VII. The 5th Amendment privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, in which the witness reasonably believes that the information sought, or discoverable as a result of his testimony, could be used in a subsequent state or federal criminal proceeding." ***United States v. Balsys***, 524 U.S. 666, 672 (1998), in part quoting ***Kastigar v. United States***, 406 U.S., 441, 444-445 (1972).

- Use of force reports.
- Firearms discharge reports.
- Line of duty vehicular accident reports.
- Supervisor directs subordinate to answer question(s).

VIII. Is there a necessary procedure for lawfully compelling an oral or written statement?

A. Yes. The employee must be informed that his compelled statements and their fruits

cannot be used against him criminally. ***Franklin v. City of Evanston***, 384 F. 3d 838 (7th Cir. 2004); ***Atwell v. Lisle Park District***, 286 F.3d 987 (7th Cir. 2002); ***Kalkines v. United States***, 200 Ct. Cl.570 (1973); ***Confederation of Police,*** *supra****; Uniformed Sanitation Men Association v. Commissioner of Sanitation*****,** 426 F.2d 619 (2nd Cir. 1970); ***Benjamin v. City of Montgomery,*** 785 F.2d 959 (11th Cir. 1986); *cert. denied* 479 U.S. 984 (1986).

A City, whose employees have a "property interest" in their jobs, was constitutionally required either to warn employee who was facing a criminal charge that he had "immunity" for any statements made during the disciplinary hearing (in which case he would be required to answer questions), or to continue the disciplinary hearing until the criminal case was resolved. ***Franklin ,*** *supra*, at 10-11.

B. The warning (of the inadmissibility of compelled statements and their fruits) described just above has been held not to be required in two circuits. ***Hill v. Johnson,*** 160 F.3d 469, 471 (8th Cir. 1998); ***Gulden v. McCorkle,*** 680 F.2d 1070, 1076 (5th Cir.1982). Failure to inform the employee of the "immunity" conferred by the compulsion is not the equivalent of compelling the employee to waive 5th Amendment rights. The former is permissible; the latter is unconstitutional.

C. Whether an employee who has been ordered to answer questions that are potentially incriminating must also be informed of the inadmissibility of any statements and their fruits has been left open in several circuits. ***Wiley v. Mayor & City Council of Baltimore***, 48 F.3d 773, 777 and n.7 (4th Cir. 1995); ***Grand Jury Subpoenas Dated Dec. 7 & 8 v. United States***, 40 F.3d 1096, 1102 n.5 (10th Cir. 1994); ***Fraternal Order of Police, Lodge No.5, et al. v. City of Philadelphia, et al***., 859 F. 2d 276 (3rd Circuit 1988).

D. At least two circuits consider the 5th Amendment protection afforded by ***Garrity*** to be self executing, arising by operation of law. ***U.S. v. Veal*** *supra***; *Wiley*****,** *supra***.**

IX. A public employer can compel employees to answer questions in an internal investigation (and discipline or terminate for refusal) as long as the employer does not compel the employee to waive 5th Amendment protection. The compelled statement(s) cannot be used against the employee who made them in a later criminal prosecution for the conduct under investigation. ***Garrity,*** *supra****, U.S. v. Veal,*** *supra*.

An accused may not abuse ***Garrity*** by giving false statements about the matter under investigation 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. ***U.S. v. Veal,*** *supra*; ***U.S. ex rel. Annunziato v. Deegan***, 440 F.2d 304 (2nd Cir. 1971)

In ***McKinley v. City of Mansfield***, 404 F.3d 418 (6th Cir. 2005), the police department was investigating unlawful scanner use by numerous officers. Officer McKinley was subjected to a compulsory interview during which he made exculpatory statements.

Because his statements were inconsistent with a fellow officer's and a victim's, he was subjected to a second compulsory interview which he alleges was a lying and falsification interview. At that interview, McKinley was accused of lying; he was confronted with the specific statements alleged to be lies; and he was told the basis for the conclusion that each statement was false. He admitted his earlier statements were false, and he corrected them with truthful statements, all of which were taped. He was prosecuted and convicted of falsification and obstructing official business. One of the IA investigators not only revealed McKinley's two compelled statements to the prosecutor, he also testified in detail about the content of McKinley's two statements.

Ultimately the conviction was overturned and McKinley sued under 42 U.S.C. §1983, alleging that his 5th Amendment rights were violated. The Court of Appeals overturned the grant of summary judgment in favor of defendants, concluding that there was a genuine issue of material fact whether the second interview was a scannergate follow-up interview or a new investigation centered on McKinley's apparent lies in the first interview. If a jury concludes that the matter under investigation in the second interview was falsification by McKinley, the combination of the compulsion and the courtroom usage of his compelled statements (from interview #2) establish a 5th Amendment violation.

The widespread belief that ***Garrity*** does not bar criminal trial usage of compelled IA statements that are false is incorrect if the subject of the internal investigation was whether the employee was truthful.
