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Enemies

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William S. Sessions,
Director

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Compelled Interviews of Public Employees

By
KIMBERLY A.
CRAWFORD, J.D.

Public employers sometimes find themselves between the proverbial rock and hard place. Like all employers, they want to ensure the honesty and integrity of their employees. However, unlike employers in private industry, public employers are "government actors" for purposes of the Constitution,¹ and therefore, are required to abide by constitutional dictates when dealing with their employees.

The dilemma becomes clearly evident when law enforcement administrators attempt to question employees about possible criminal behavior. These employers have an understandable interest in demanding answers from employees if the subject of the interview impacts on the employees' fitness for duty, integrity, or judgment. However, as government actors, public employers must be concerned with the employees' fifth amendment due process protection and the privilege against self-incrimination.²

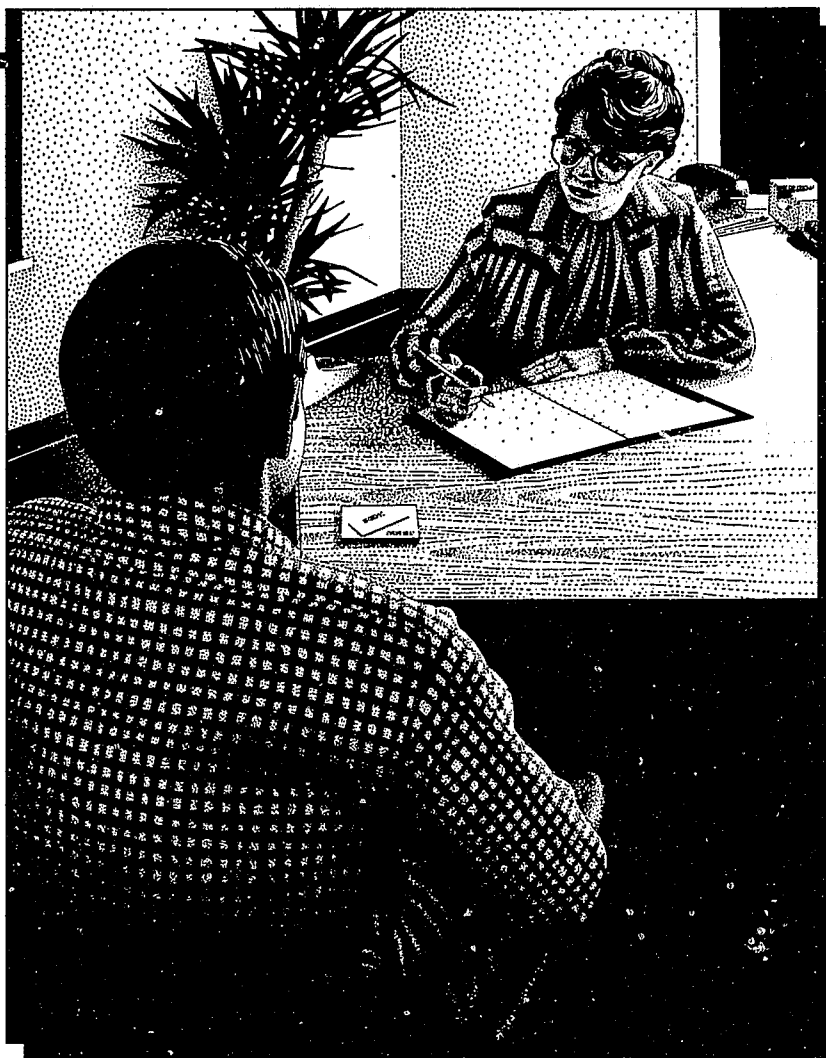
This article reviews³ the U.S. Supreme Court's efforts to resolve

this dilemma in *Garrity v. New Jersey*.⁴ It also discusses the lower courts' handling of related issues.

Compelled Statements in Criminal Prosecutions

In *Garrity*, a representative of the New Jersey Attorney General's office interviewed several police officers regarding their roles in a traffic ticket "fixing" scheme. Prior to being interviewed, the representative advised the officers that 1) anything they said could be used against

them in State criminal proceedings, 2) they had the right to refuse to answer if to do so would incriminate them, and 3) the failure to answer the questions would subject them to removal from office.⁵ In other words, the officers involved in the scheme were put in the position of either answering the questions and subjecting themselves to possible criminal prosecution, or refusing to answer the questions and facing dismissal from the police force.



Confronted with these warnings, several officers provided the requested information. This information was later used against the officers in a criminal prosecution, which resulted in their conviction for conspiracy to violate the administration of traffic laws. On appeal, the officers argued that in light of the warnings administered prior to each interview, the information provided was "involuntary," and the use of that information in court violated their fifth amendment privilege against compelled self-incrimination.⁶

On review, the Supreme Court agreed with the officers and found that the information provided by them was coerced by the threat of losing their jobs. Because police officers, like other members of the body politic, "are not relegated to a watered-down version of constitutional rights,"⁷ the coercion rendered the officers' statements inadmissible under the 5th and 14th amendments⁸ to the Constitution.

Employer Prerogatives

It is important for public employers to understand the proscription in *Garrity*. In essence, statements obtained from employees who are forced to choose between answering questions that may be incriminating and continued employment cannot be used against those employees in subsequent criminal proceedings.

Equally important, public employers must understand what the decision in *Garrity* permits. That is, employees may be compelled to answer questions related to their em-

ployment or face dismissal if, by doing so, they are not being compelled to incriminate themselves.

Obviously, if the matter under investigation is simply administrative and holds no possibility of criminal prosecution, the employees' constitutional protection against self-incrimination would not be jeopardized by the compulsion to answer job-related questions.⁹ However, if the conduct being reviewed could result in criminal, as well as administrative, sanctions, public employers are forced to choose between preserving employees' statements for later use in criminal court by avoiding compulsion during interviews or compelling interviews for disciplinary purposes and thereby immunizing employees' statements.

Immunization of Compelled Statements

If public employers interested in pursuing administrative sanc-

“...employees may be compelled to answer questions related to their employment or face dismissal if...they are not being compelled to incriminate themselves.”



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tions decide to compel employees to respond to job-related questions, then steps should be taken to assure employees that their statements will not be used against them in any subsequent criminal prosecution.¹⁰ Such assurance commonly takes the form of a grant of immunity.

Grants of immunity fall into one of two categories—"use" immunity or "transactional" immunity. Use immunity guarantees employees that neither their statements nor evidence derived therefrom can be used against them in criminal court. Transactional immunity, however, goes much further and exempts employees from prosecution for matters discussed during a compelled interview.

Neither use nor transactional immunity makes interviews any less compelled or employees' statements any more voluntary, but immunity does assure employees that their statements cannot be used to convict them. Because employees

granted immunity are not being forced to "incriminate" themselves during compelled interviews, the employees' fifth amendment protection against self-incrimination is not an issue.

Most Federal and State courts agree that use immunity is constitutionally sufficient to satisfy the requirements of *Garrity*.¹¹ If employees' statements are coerced as a result of a compelled interview, then the fifth amendment protections can be satisfied by the promise not to use those statements in subsequent criminal proceedings. In most jurisdictions,¹² transactional immunity is not required, and employees can still be prosecuted for criminal conduct discussed during compelled interviews, as long as neither the employees' compelled statements nor any derivative evidence is part of the government's case.

Public employers should keep in mind that use immunity in the compelled interview situation is automatic.¹³ Regardless of whether the employer promises use immunity, the *Garrity* decision mandates that the statements obtained from those employees cannot be used in any subsequent criminal proceeding if they are compelled to answer questions under the threat of dismissal.

Because use immunity is automatic when statements are compelled, employers do not further jeopardize subsequent prosecution by expressly proffering immunity. Moreover, employers that expressly grant use immunity create a better record on which to support the dis-

missal of employees who thereafter fail to answer employment-related questions.¹⁴

Discipline Based On Employee Responses

Whether discipline is a viable option for public employers depends on the employees' responses, which generally fall into three categories. First, when advised that statements could be used against them in a criminal prosecution and asked to waive their right to remain silent, employees may instead elect to invoke their fifth amendment privilege. Second, employees who are properly compelled to answer work-related questions may nevertheless refuse. Third, employees may choose to respond to questions during a compelled or voluntary interview.



It has long been held that employees who fall into the first category because of their failure to waive their fifth amendment privilege may not be fired. In *Gardner v. Broderick*,¹⁵ a police officer, called to testify before a grand jury investigating police corruption, was advised that under the State constitution and city charter, he was required to waive his fifth amend-

ment protections. When the officer refused to sign the waiver, he was fired. The Supreme Court subsequently found the dismissal to be unlawful, because it was based *solely* on the officer's refusal to waive his privilege against self-incrimination.¹⁶

Although employee discipline cannot be based solely on the exercise of the fifth amendment privilege, courts have made it clear that employees can be placed in the position of having to choose between asserting their fifth amendment privilege or defending themselves in disciplinary hearings. Moreover, employees who choose to exercise their privilege and refuse to defend themselves may be disciplined on the basis of uncontroverted evidence.

For example, in *Gniotek v. City of Philadelphia*,¹⁷ officers who were subjects of a criminal investigation for bribery refused to answer questions during pretermination hearings and were dismissed. The officers later argued that their privilege against self-incrimination was violated because they were compelled to choose between asserting their privilege and responding at the pretermination hearing.

The U.S. Court of Appeals for the Third Circuit found the officers' contentions meritless. The court noted that when the officers were confronted with the evidence against them, they exercised their right not to respond and were subsequently dismissed based on the city's uncontroverted evidence of bribery, not for exercising that right.¹⁸

Employees who comprise the second category by virtue of their failure to answer work-related questions after being properly compelled can be disciplined for their refusal to cooperate. In *Gardner*, the Supreme Court made this point clear when it stated:

"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."¹⁹

The key to determine if employees fall into the first or second category is whether they have been asked to waive their fifth amendment privilege, or instead, were given a grant of immunity.²⁰ Employees who have been asked to waive their constitutional privilege have a right to refuse. However, employees protected by a cloak of immunity have no right to refuse to answer work-related questions.

Any refusal by immunized employees to answer appropriate work-related questions may be the basis of discipline, including dismissal. In *Jones v. Franklin County Sheriff*,²¹ the court demonstrated this point and expressed its view as to why this rule is so important when the employee involved is a law enforcement officer.

In *Jones*, the Supreme Court of Ohio upheld a dismissal and ruled that a deputy sheriff could be

required to answer questions relating specifically and narrowly to performance of official duties. The questions were asked at an Internal Affairs Division (IAD) hearing after the deputy was informed that her answers could not be used against her in any subsequent criminal prosecution.

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other members of the
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”**

The IAD investigators advised the deputy of departmental policy that required answering such questions and gave her a direct order to answer specific questions relating to an incident where she allegedly engaged in vigilante-type activity when investigating the theft of her sister's purse. They also warned her that refusal to answer would constitute insubordination.

The court concluded that law enforcement officers can be fired for failing to answer incriminating questions, as long as they are not asked to surrender their constitutional privilege against self-incrimination. It then offered the following rationale:

"Since both the public and police officers themselves hold the police officer in a position of honor and respect, it is

incumbent upon a police officer to keep his or her activities above suspicion both on and off duty. Thus the IAD, within clearly defined constitutional parameters, must be given the latitude to conduct investigations to ensure the continued integrity of the department. It is critical to any meaningful IAD investigation that, once officers have been assured that their constitutional guarantees remain intact, they are required to respond to specific questions dealing with job performance. Without such a mandate, the IAD cannot ensure the integrity and trustworthiness of the department's officers and the public cannot be assured of the propriety of placing its trust in these public servants."²²

Finally, employees in the third category, who respond to questions during either a compelled or voluntary interview, can be disciplined based on the content of the answers. If employees lie, give evasive answers, or admit to conduct unbecoming an officer, they can be disciplined.²³ The fact that their answers were compelled is no bar to discipline, since the protections of the fifth amendment extend only to criminal prosecution.²⁴

Avoiding Compulsion When Contemplating Prosecutions

Law enforcement employers should consult with a prosecutor prior to interviewing employees where criminal prosecution is contemplated. This should be done because the admissibility of employees' statements will depend, in large

part, on whether those statements were compelled. Although there is some compulsion inherent in most employer-employee interviews, this compulsion does not always rise to fifth amendment proportions.

In *United States v. Friedrick*,²⁵ the Circuit Court of Appeals for the District of Columbia established a two-prong test for determining compulsion. First, employees must have a *subjective* belief that their continued employment depends on their cooperation. Second, this subjective belief must be *objectively reasonable*.²⁶ Moreover, courts have held that to be objectively reasonable, the subjective belief that there is compulsion must be derived from actions taken by the public employer or some other government actor.²⁷

Law enforcement employers effectively avoid compulsion by advising employees that they have a right to remain silent and that anything they say can be used against them. As long as employees are not thereafter required to waive this right, anything they say can be used in a subsequent prosecution.

Prohibited Uses of Compelled Statements

Garrity and its progeny make it clear that although compelled statements cannot be used against law enforcement employees in criminal prosecutions, they may be used for purposes of discipline. Moreover, compelled statements may also be discoverable in subsequent civil litigation.

Questions often arise as to what, if any, other lawful uses these statements may have. For

example, in the case of *In re Grand Jury Subpoena*,²⁸ a Missouri court was asked to decide whether an officer's compelled statement given after *Garrity* warnings could be subpoenaed by the grand jury. Although recognizing that grand juries may often consider evidence obtained by police in violation of the Constitution,²⁹ the court held that the promise made to the officer that his statements would not be used in a criminal proceeding extended to grand juries.

While there are no cases directly on point, analogous precedent suggests that courts will not permit compelled statements to be used to impeach employees in a subsequent criminal trial. Although the Supreme Court has determined that

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By making the interview incident-specific, employers control the extent of immunity granted employees.

”

statements taken in violation of *Miranda*³⁰ or the sixth amendment right to counsel may be used to impeach defendants if they later take the stand at trial, the Court has been careful to distinguish compelled statements from these holdings. In *Michigan v. Jackson*,³¹ the Supreme Court noted that they had “mandat-

ed the exclusion of reliable and probative evidence for *all* purposes only when it is derived from involuntary statements.”³²

However, in *Gwillim v. City of San Jose*,³³ the Court demonstrated that not every use of a compelled statement is a violation of the privilege against self-incrimination. The officer in *Gwillim* made statements only after he was ordered under threat of sanction and promised that the statements would not be used in a criminal prosecution. The Court found that these statements could be referred to the prosecutor and used to convince the victim of a sexual advance to initiate criminal charges.

Suggestions for Conducting Employee Interviews

In light of *Garrity* and its progeny, the following suggestions are made to assist public employers when interviewing employees. First, employers are encouraged to keep an accurate record of the information provided to employees prior to the interview. It is recommended that employers use two separate forms for this purpose. One form, to be used when criminal prosecution is contemplated, should advise employees that they have the right to remain silent and that their cooperation is voluntary. The other form, which would be used when employees are compelled to answer, should advise employees that neither their statements nor evidence gained therefrom can be used against them.³⁴

Second, the form that advises employees of their right to remain silent should make it absolutely clear that the matter under investiga-

tion could result in criminal prosecution.³⁵ Furthermore, if employees are subject to multiple interviews, they should be clearly advised prior to each interview whether their cooperation is being compelled. This advice is particularly important when there has been a change in what is being required of the employee.

Third, employers should ensure that compelled interviews are incident specific and that employees are informed of the specific incident under investigation. This information should also be noted on the forms mentioned previously. By making the interview incident-specific, employers control the extent of immunity granted employees. Failure to limit the interview to specific incidents could result in employees obtaining use immunity for statements pertaining to a variety of crimes not contemplated by the employer but mentioned during the interview.

Fourth, employers' compelled questions should be specifically, directly, and narrowly related to the performance of employees' official duties. At least in the realm of law enforcement, this does not limit employers to asking questions about officers' on-duty activities. On the contrary, courts have found that the off-duty activities of police officers can impact on their official duties. As stated by the court in *Michigan State Troopers Association v. Hough*,³⁶ "Police cannot fight crime by day and commit crime by night without cost to effectiveness."³⁷

Fifth, unless conferred by State law or union contract, employees

have no legal right to consult with an attorney or to have an attorney present during a noncustodial compelled interview.³⁸ The sixth amendment right to counsel "does



not attach until the initiation of an adversary judicial process in respect to a specific crime."³⁹ Consequently, any compelled interview that takes place prior to the filing of criminal charges does not carry with it the right to counsel.

Finally, employers are reminded that compelled statements can be used to discipline employees, but any other use should be cleared through a legal advisor or prosecutor. Furthermore, because there are some legitimate uses for compelled statements, employers should be careful not to exaggerate the extent of use immunity when advising employees of their rights. ♦

Endnotes

¹ *O'Connor v. Ortega*, 107 S.Ct. 1442 (1987).

² U.S. Const. Amend. V provides in part as follows: "No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...."

³ For an earlier discussion of *Garrity* and related cases, see Joseph R. Davis, "Interview of Public Employees Regarding Criminal Misconduct Allegations: Constitutional Considerations," *FBI Law Enforcement Bulletin*, March and April, 1980.

⁴ 385 U.S. 493 (1967).

⁵ Removal was mandated by statute. N.J. Rev. Stat §2A:81-17.1 (Supp. 1965). The statute is set out in *Garrity*, 385 U.S. at 495, n.3.

⁶ The officers' convictions were sustained on appeal. See *State v. Naglee*, 207 A.2d 689 (1965) and *State v. Holroyd*, 208 A.2d 146 (1965).

⁷ 385 U.S. at 500.

⁸ The 5th amendment was made applicable to the States through the 14th amendment in *Malloy v. Hogan*, 378 U.S. 1 (1964).

⁹ *National Federation of Federal Employees v. Greenberg*, ___ F.2d ___ (D.C. Cir. 1993).

¹⁰ There is some question as to whether immunity must be tendered. In *Arrington v. County of Dallas*, 970 F.2d 1441 (5th Cir. 1990), the court stated that "the government's mere failure to tender immunity cannot amount to an attempt to compel a waiver of immunity." Id. at 1446. However, in *Debnam v. North Carolina Department of Correction*, 421 S.E.2d 389 (1992), the court reversed the dismissal of an employee on the grounds that he had not been told that his statements would be immunized.

¹¹ In *Blunier v. Board of Fire and Police Commissioners of Peoria*, 545 N.E.2d 1363 (Ill. App. 1989), appeal denied, 553 N.E.2d 393 (Ill. 1990), the court held that a public employee is not entitled to a grant of use immunity directly from the prosecutor before being required to answer questions. A grant of immunity from the employer is sufficient. In addition, use immunity attaches automatically, as a matter of law, whenever an employee is compelled to submit to an interview. In such cases, the employee's responses cannot be used in a criminal prosecution, regardless of whether immunity has expressly been granted.

¹² Massachusetts State law requires that a public employee be granted transactional immunity before being compelled to answer questions. See *Carney v. City of Springfield*, 532 M.E.2d 631 (Mass. 1988); *City of Springfield v. Civil Service Commission*, 532 N.E.2d 636 (Mass. 1988); and *Doe v. City of Springfield*, 532 N.E.2d 639 (Mass. 1988).

¹³ 385 U.S. 493.

¹⁴ *Arrington v. County of Dallas*, 970 F.2d 1441 (5th Cir. 1992).

¹⁵ 392 U.S. 273 (1968).

¹⁶ Forfeiture of office statutes similar to that involved in *Gardner* are unconstitutional if they permit dismissal of employees solely on the basis of an exercise of their fifth amendment privilege. *Id.*

¹⁷ 808 F.2d 241 (3d Cir. 1986), *cert. denied*, 107 S.Ct. 2183 (1987).

¹⁸ *Id.*

¹⁹ 392 U.S. at 278.

²⁰ *Id.* See also, *Arrington v. County of Dallas*, 970 F.2d 1441 (5th Cir. 1992).

²¹ 555 N.E.2d 940 (Ohio 1990).

²² *Id.* at 945.

²³ *National Federation of Federal Employees v. Greenberg*, ___ F.2d ___, (D.C. Cir. 1993).

²⁴ *Id.*

²⁵ 842 F.2d 382 (D.C. Cir. 1988).

²⁶ *Id.* at 395.

²⁷ *United States v. Camacho*, 739 F.Supp. 1504, 1515 (S.D. Fla. 1990).

²⁸ 185 *Fire and Police Personnel Reporter* 54, (E.D. Mo. 2/6/90).

²⁹ *United States v. Calandra*, 414 U.S. 338 (1974).

³⁰ The U.S. Supreme Court held that statements taken in violation of the rule in *Miranda v. Arizona*, 384 U.S. 436 (1966), can be used to impeach a defendant if he takes the stand at trial in *Harris v. New York*, 401 U.S. 222 (1971).

³¹ 110 S.Ct. 1176 (1990).

³² *Id.* at 1181.

³³ 929 F.2d 465 (9th Cir. 1991).

³⁴ Although neither employees' answers nor any information or evidence gained by reason of their answers can be used against them in a criminal proceeding, employees that knowingly and willfully provide false statements or information may be criminally prosecuted for that action. Federal employees can be prosecuted under 18 U.S.C. §1001.

³⁵ *United States v. Friedrich*, 842 F.2d 1373 (9th Cir. 1988).

³⁶ 872 F.2d 1026, (6th Cir. 4/11/89), per curiam decision, text in Westlaw.

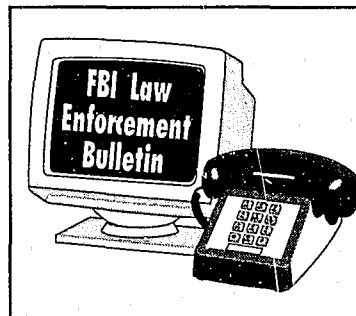
³⁷ *Id.*

³⁸ *Arrington v. County of Dallas*, 970 F.2d 1441 (5th Cir. 1992).

³⁹ *Id.* at 1445.

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

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