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Sorting Through an Employee's Assertion of Garrity Rights

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The ability of a public employee to assert their *Garrity Rights*, the Fifth Amendment right against self-incrimination, was first defined by the courts in *Garrity v. New Jersey*, 385 U.S. 493 (1967). Since then, it has been clarified in several subsequent cases. *Garrity Rights* apply when an employer requires an employee to answer questions related to an investigation that may include an allegation of criminal activity by the employee. In Michigan, MCL 15.391, et seq., *Disclosures by Law Enforcement Officers*, establishes that an involuntary statement made by a law enforcement officer is a confidential communication that is not open to public inspection. It can only be disclosed under very specific circumstances. Yet, there is still confusion on when *Garrity* can be asserted and what can be done as a result of employees exercising their rights. This issue of the LEAF Newsletters will help to clarify what can and must be done with *Garrity*.

Brief History

Garrity v. New Jersey is about New Jersey police officers under investigation because of alleged fixing of traffic tickets. During the investigation, each of the officers were warned before he was questioned: (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the right to refuse to answer if the disclosure would tend to incriminate him; but (3) if he refused to answer he would be subject to removal from office. The officers answered the questions and were not granted immunity. They were prosecuted and their answers were used against them. The officers were convicted despite their objection that their statements were not voluntary but coerced because they were faced with the possibility of forfeiting their jobs under state law if they refused to answer.

The United States Supreme Court described the officers' choice of being discharged under New Jersey forfeiture statute and self-incrimination by answering the questions as "a choice between the rock and the whirlpool," and ruled the statements were a product of coercion in violation of the Due Process Clause of the Fourteenth Amendment. The Court ruled: "We now hold 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 that it extends to all, whether they are policeman or other members of our body politic."

When Does It Apply?

LEAF Legal Advisor, Audrey Forbush, of Plunkett Cooney PC explained the applicability of *Garrity Rights* in an internal investigation. She first commented that it is important to recognize that *Garrity* does not affect management's ability to require officers to account for how they have fulfilled their duties by filing reports or activity logs, to appear on department video/audio recordings, or to otherwise perform their daily duties. Since self-incrimination protections apply only in a criminal context, the right to self-incrimination protections does cover every instance where an employer asks a police officer to account for the performance of his duties. Public employers may ask questions and compel officers to answer truthfully, under the threat of discipline or termination for refusal, without conjuring up *Garrity Rights* as long as the employer does not compel the officer to waive Fifth Amendment protection.

Forbush noted that management is often confused as to whether they grant *Garrity Rights* or whether the employee must assert them. The answer is that Fifth Amendment protections against self-incrimination are possessed by the employee who must assert them. In reality, however, it really doesn't matter if the employee knows to exercise them or not. If an employer compels an officer to answer questions about their actions by threatening discipline or termination in an incident where the officer is the focus of a criminal investigation, Fifth Amendment protections against self-incrimination apply. In those circumstances the prosecution cannot use the officer's statement in a criminal proceeding against him.

State Of Mind Can Matter

For *Garrity* to apply, the investigation must have a criminal component and the officer must be its particular focus. However, other factors apply. For example, it is important to determine whether officers being questioned about an incident by a superior officer believe that if they refuse to answer the questions truthfully, they will subject to discipline or termination. The state of mind of the individual being questioned and the totality of circumstances encompassing the questions can have an impact on the application of *Garrity*. The Sixth Circuit Court of Appeals in *McKinley v. City of Mansfield*, 404 F.3d 416 (6th Cir. 2005) ruled that "It is sufficient, we think, for a jury to conclude that he reasonably believed that substantial penalties were likely to result from his refusal to answer questions…although job termination is surely a substantial penalty, so, too, are other employer actions, such as ordering a demotion or suspension. Relevant to the question whether McKinley reasonably believed he faced a threat of substantial penalties are the totality of the circumstances…to the extent they are probative of McKinley's state of mind, and whether that state of mind was reasonable…."

In this case, McKinley was under investigation on another matter and gave untruthful answers to the questions that he was told he had to answer truthfully under the *Garrity* protections. The investigators re-interviewed McKinley and challenged him with the untruthful answers and told him to come clean and tell the truth. During the second interview, investigators told McKinley he was still under *Garrity* protection for the original offense being investigated and that he had to answer truthfully. He answered truthfully and both statements were used to subsequently convict McKinley of falsification and obstruction of official business.

The Sixth Circuit remanded the case and partially denied summary judgment for the defendants and determined there was a question of fact as to whether McKinley thought the investigators were investigating the original crime or were actually investigating a new crime of falsification and obstructing. The court said: "We conclude that there is a genuine issue of material fact as to whether, at the time of McKinley's second interview, he was the target of an independent falsification and obstruction investigation, and no longer a mere *Garrity* witness. We conclude that there is also a genuine issue of material fact as to whether defendants compelled McKinley to make statements that would incriminate him as to the crimes of falsification and obstruction. If McKinley was in fact a target of such an investigation, and if Fortney and

Goldsmith in fact forced him to make the incriminating statements later used against him in his trial for falsification and obstruction, he was "compelled in [a] criminal case to be a witness against himself." The court also said, in a footnote, referring to investigators forcing incriminating statements; "Lest there be any confusion regarding whether McKinley's answers in the second interview in fact incriminated him as to the crimes of falsification and obstruction, we observe that he not only provided answers that materially contradicted his earlier answers but also expressly admitted being untruthful in the first interview and doing so with the purpose of protecting fellow officers."

Forbush said *McKinley* demonstrates how essential it is for investigators to ensure that the focus of an investigation remains specifically and narrowly related to the incident being investigated. If, as a result of an investigation, other criminal behavior is identified, each instance should be separately investigated and not opportunistically consolidated. LEAF recommends in its *Manual for Law Enforcement Risk Control,* Chapter 13: Internal Investigation, that if an interview under *Garrity* diverges toward other criminal behavior, the investigator should pause and consult top management and the prosecutor to determine the best course of action. Doing so can eliminate confusion and reduces the probability that the suspected officer can prevail on Fifth Amendment issues in the other cases.

The Michigan Court of Appeals in *People v. Coutu*, 235 Mich. App. 695 (1999) also used the totality of the circumstances approach to determine whether coercion was used to elicit an involuntary statement from an officer. Coutu was under investigation for using work release prisoners improperly. During the investigation Coutu and others were questioned and made statements that were used at trial. The trial court suppressed the statements, but the appeals court reversed the suppression and remanded the case for further proceedings.

Forbush said that the Appeals Court looked at whether the officers in the investigation had been ordered to answer the questions under the threat of termination. However, no evidence supported that coercion or threat existed during the investigation. Two of those investigated decided to stop talking and both sought counsel. Neither was questioned any further. The court ruled that "Viewing all of the circumstances, the facts simply do not show that defendants were forced to choose between invoking their right to silence at the expense of their jobs or incriminating themselves. We find that because there was no overt threat of employment termination in the event that defendants chose to remain silent instead of answering questions as part of the investigation, *Garrity*, supra, does not apply, and suppression of defendants' statements was error."

Unlike the Sixth Circuit, the Michigan Court of Appeals in *Coutu* said the department's directives, rules and orders have no effect on the officer's frame of mind or the totality of circumstances unless the orders or a statute require termination if an officer fails to comply. The court said: "In addition, there are also no applicable statutes providing for termination in the event that an officer refuses to answer questions during an investigation. And there are no department regulations or rules that provide for automatic termination for failing to answer questions during an interview. Although there are disciplinary rules and regulations, particularly for acts of insubordination, the range of disciplinary actions span from oral reprimands to termination. Termination is not an imminent consequence of failing to answer questions during an investigation."

Because there is some conflict between the courts, Forbush cautions that when considering the state of mind and totality of circumstances evaluation, departments should look at the language of their rules, orders or statutes and collective bargaining agreements to determine if there are triggers to *GarrityRights*. Additionally, Forbush cautioned that from the federal context, when an officer is suspected of criminal activity, it may be argued that the language in the rules, orders and directive could establish a state of mind that officers are compelled to answer truthfully when a superior officer asks incriminating questions or face

sanctions. Forbush said it is important for supervisors to receive training in understanding their role and the triggers for *Garrity* protection should they be investigating an officer involved incident where there is any suspicion of a criminal conduct on the officer's part. Supervisors should be required to contact a commanding officer as soon as it is reasonable to report their suspicions of criminal behavior and seek guidance for moving forward.

They Have To Tell the Truth

Officers must know that they cannot misuse the *Garrity* protections by giving false statements during an investigation and then expect that *Garrity* will protect them in a prosecution for making the false statements. Forbush pointed to the Michigan Court of Appeals case *People v. Hughes*, 306 Mich. App. 116 (2014) where the court ruled that the Fifth Amendment does not provide a license to swear falsely. In *Hughes* the department had conducted an investigation and interviewed officers involved in a complaint of excessive force. Under the threat of dismissal, each officer denied that force had been used. When video from a security camera revealed otherwise, Hughes was prosecuted for felony misconduct in office and misdemeanor assault and battery. Each officer was also charged with obstruction of justice based on their involuntary statements. The trial court dismissed the charges, citing the Fifth Amendment and state law protections.

The Michigan Court of Appeals reversed, finding there was no *Garrity* or other protection in these circumstances with regard to the obstruction charges. The Court found that, while the statements could not be used in the criminal prosecution as evidence for the misconduct in office and assault and battery, the Fifth Amendment did not prohibit the use of the statements in a prosecution for the crime of obstructing the investigation by making false statements. Explaining that the Fifth Amendment does not provide a license to swear falsely, the Court concluded that when "the allegedly false statements are not admitted to prove any underlying charge, but rather to prove the independent offense of lying" during an investigation, *Garrity* offers no protection. The Fifth Amendment does not protect untruthful statements and false denials. Though a more thorough discussion of MCL 15.391, et seq, the *Disclosures by Law Enforcement Officers Act* follows, Forbush felt it important to include the *Hughes* court's analysis of MCL 15.395 in which it noted: "the broad language of MCL 15.393 appears to embrace any criminal proceeding… we conclude that the statute internally limits the phrase 'involuntary statement' to include true statements only, and that false statements and lies therefore fall outside the scope of the statute's protection."

Forbush said the Sixth Circuit Court of Appeals also reached a similar conclusion in *McKinley v. City of Mansfield* where false statements were given during the investigation of the original crime. The court ruled: "McKinley accepts the general rule that the Fifth Amendment permits the government to use compelled statements obtained during an investigation if the use is limited to a prosecution for collateral crimes such as perjury or obstruction of justice." The court went on to say *Garrity* does not preclude use of such statements in prosecutions for the independent crimes of obstructing the public employer's investigation or making false statements during it."

In Michigan It Is the Law

In Michigan, MCL 15.391, et seq., *Disclosures By Law Enforcement Officers* codifies *Garrity Rights* by defining an involuntary statement to mean "information provided by a law enforcement officer, if compelled under threat of dismissal from employment or any other employment sanction, by the law enforcement agency that employs the law enforcement officer." MCL 15.393 specifically says "An involuntary statement made by a law enforcement officer, and any information derived from that statement, may not be used against the officer in a criminal proceeding." In MCL 15.395 the law also requires that involuntary statements are confidential and are not open to public inspection. The statute also does not allow the statement to be disclosed by a law enforcement agency except as defined in the statute.

Forbush said it is important for a municipal entity to pay particular attention to the requirements of MCL 15.395 because failing to do so often creates problems. Forbush commented that there has been conversation that departments have either succumbed to pressure from investigators or prosecutors or are not aware of the statutory requirements and have disclosed their officer's involuntary statements. The Statute clearly states that the statement may only be disclosed by the law enforcement agency under the following circumstances:

- With the written consent of the law enforcement officer who made the statement.
- To a prosecuting attorney or the attorney general pursuant to a search warrant, subpoena, or court order, including an investigative subpoena.
- To officers of, or legal counsel for, the law enforcement agency or the collective bargaining representative of the law enforcement officer, or both, for use in an administrative or legal proceeding involving a law enforcement officer's employment status with the law enforcement agency or to defend the law enforcement agency or law enforcement officer in a criminal action.
- To legal counsel for an individual or employing agency for use in a civil action against the employing agency or the law enforcement officer.

It is of particular importance, Forbush cautioned, that departments must pay attention to the list of those authorized to receive a statement and the conditions that must be met for them to do so. Failure to comply with these requirements is the most often cause of controversy with the first two being the most frequent. Entities must understand they are violating the law if, without the officer's written consent, the statement is provided to any other person or agency that is not listed in the statute. And even though they are on the list, the person or agency must meet the conditions established in the statute before the statement can be provided.

Having said that, Forbush went on to say that the Michigan Court of Appeals ruled in *Myers v. City of Portage*, 304 Mich. App. 637 (2014) that "Plaintiffs make the facially appealing, but unavailing, argument that it is unfair for the Legislature to grant a right under MCL 15.395 without providing an effective remedy to enforce that right. But making public policy is the province of the Legislature, not the courts." The court went on to say, "We hold that (1) MCL 15.395 does not permit a private cause of action for monetary damages, and (2) defendants city of Portage and Richard White are immune from plaintiffs' claims under the Government Tort Liability Act. Accordingly, we affirm the trial court's rulings granting summary disposition in favor of defendants."

Even though the Michigan Court of Appeals ruled there are no private cause of action under MCL 15.395, Forbush opined that it is important for the preservation of the integrity of the municipal entity and its management that efforts are made to comply with all Michigan laws. Further, the improper disclosure of a *Garrity* statement may lead to other civil claims such as discrimination or retaliation.

Respect the Rights of All

Management, Forbush said, has to respect their employees' right not to incriminate themselves when their statements must be taken under the threat of dismissal. She also felt it was important to restate that the right to refuse to incriminate oneself does not extend to every occasion when management asks an employee to provide an accounting of how they have fulfilled their duties.

Police officers must understand they should not abuse *Garrity*. Forbush specifically reiterated that officers are not entitled to invoke their Fifth Amendment rights every time they are asked to fill out a report, activity log,

appear on a video, or otherwise perform their daily duties by attaching a statement of *Garrity Rights* to every report or documentation of activity they submit indicating they have completed the report as a condition of continued employment and that the report cannot be used against the officer in a criminal proceeding. If there is no presumption of wrongdoing or no criminal investigation that focuses on the officer, *Garrity Rights* do not apply.

Finally, Forbush cautioned officers that by unilaterally attaching the *Garrity* statement to a report or video, they are suggesting to management that their activity should be audited because they are self-reporting potential illegal activity through the declaration of immunity.

In her opinion, be careful what you wish for!

Are you a MML Insurance Program Member?

Go to the League's online Law Enforcement Risk Control Manual, now compatible with any browser, to establish a new account using the streamlined login process. Go either to http://www.mml-leaf.org/ or http://www.mml.org, under the Insurance tab/LEAF. Click the green Member Login box. At the Login screen click "Don't Have an Account". To add to the ease of use, the manual now contains a complete keyword search function.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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