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Law Enforcement Action Forum NEWSLETTER



Garrity

When and How It Applies To Your Employees

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INTRODUCTION

This past spring, a member of the Law Enforcement Action Forum (LEAF) posed two questions to the group: "Just when does the court decision, *Garrity v New Jersey* (1967), apply to the investigations and operations of a police department," and "How can the *Garrity* Rights be applied?"

These questions led to a vigorous discussion that lasted over several LEAF meetings. Several members indicated that discussions within their department revealed that there was a significant difference between management's administration of *Garrity* Rights and how labor felt they should be applied.

The members turned to LEAF Committee Legal Advisor, James I. DeGrazia, from O'Connor, DeGrazia & Tamm P.C. and asked that he review the *Garrity* Rights issue, provide the committee with an analysis of the law, and some direction concerning its applicability to police operations. It is that discussion and analysis that the Forum brings to this edition of the LEAF newsletter.

Although this edition focuses on *Garrity* Rights as they apply to police officers and their activities, it is important to remember that *Garrity* Rights apply to all municipal employees.

GARRITY V NEW JERSEY

The Supreme Court case of *Garrity v New Jersey* (385 U.S. 493; 87 S. CT. 616; 17 L.Ed. 2d 562 [1967]) involved New Jersey police officers under investigation for allegedly fixing traffic tickets. Before being questioned, each police officer received a warning that (1) that anything he said might be used against him in any state criminal proceeding, (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him, and (3) that any refusal might subject him to removal from office (*Id.* at 494).

The police officers proceeded to answer the questions without being granted immunity. Prosecutors subsequently used some of the answers the officers gave when they prosecuted them for conspiracy to obstruct the administration of traffic laws (*Id.* at 495). The police officers were convicted, and their convictions were sustained despite their protests that their statements were coerced because they feared they might lose their positions with the police department if they refused to answer (*Id.* at 495).

The Supreme Court clearly felt that the officers' statements were products of coercion, thus violating their Fifth Amendment right against self-incrimination. The Fourteenth Amendment makes the right against self-incrimination applicable to the states. The Court compared the coercion in *Garrity* to the interrogation practices found in *Miranda V. State of Arizona*. The Justices felt that the practice in *Garrity* was likely to exert such pressure upon an individual as to limit his ability to make a free and rational choice. The Court ultimately found that the statements that the officers made were infected by the coercion and could not be sustained as voluntary under prior decisions.

The Court's ruling recognized the importance of a municipality's right to an accounting of an officer's performance of his public trust. At the same time, the Court held that municipalities should not require officers to give a statement about their daily activities under the threat of discharge if that statement could be used against them in a criminal proceeding.

The municipality can require an officer to give a statement and can discharge the officer as a result of the statement. However, the prosecution cannot use that statement in a criminal proceeding against the officer.

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WHAT DOES THIS MEAN?



In his comments on the *Garrity* case and its progeny, Mr. DeGrazia pointed out that **the administration does not give *Garrity* Rights to the officer.** The officer already possesses the right against self-incrimination as guaranteed

by the Fifth Amendment of the United States. However, the right against self-incrimination arises only in a criminal context and must be asserted by the officer. Therefore, questions that arise out of the administrative investigative process do not invoke *Garrity* Rights.

GARRITY'S APPLICATION IN MICHIGAN

As a result of an October 21, 2001 consent judgment in the Eastern District of the Federal Court in Michigan, LEAF members raised a number of questions about whether departments should permit officers to invoke their *Garrity* Rights on all written reports, all activity logs, all videotapes, and any other documentation their departments require them to file. DeGrazia reviewed the consent judgment. In his opinion, the consent judgment does not alter the applicability of *Garrity* or change the law in Michigan in either a federal or state court context. To understand why, we must look at *Garrity*'s application in Michigan.

The Michigan Court of Appeals case of *People v. Coutu* (235 Mich App 695; 599 NW2d 556 [1999]) involved defendants who were employees of the Oakland County Sheriff's Department. These employees worked at the satellite facilities of the main jail, including the work release facility, an installation where individuals in custody are allowed to go to outside jobs. There were allegations that the employees gave preferential treatment to work release inmates and trustees in exchange for gifts and favors from the inmates, including money, alcohol, and other favors. An investigation followed.

The Appellate Court considered the conditions under which the defendants made their statements when their superior officers questioned them about the work-release facility. The District Court and the Circuit Court had suppressed the defendants' statements, finding that the officers made them involuntarily. However, the Court of Appeals opined that the totality of the circumstances demonstrated that the defendants voluntarily made their statements. Even though the defendants' superiors questioned them as part of an investigation, the Court found no evidence of coercion and determined that their superiors had never actually threatened the officers with the loss of their jobs had they refused to speak. The language of the Michigan Court of Appeals illustrates the point:

Viewing all 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 job 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*, does not apply, and suppression of defendant's statements was error (235 Mich. App 704 as follow).

WHEN GARRITY APPLIES

Mr. DeGrazia told the LEAF Committee that *Garrity* applies to all municipal employees. He went on to say that management has to respect their employees' right not to incriminate themselves when their statements must be taken under the threat of dismissal. He also said 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 are not entitled to invoke their *Garrity* Rights every time they are asked to fill out a report, activity log, appear on a video tape, or otherwise perform their daily duties. DeGrazia went on to explain that in determining whether *Garrity* is applicable, Michigan courts apply a totality of the circumstances test. Although each incident may differ, there are two common triggering factors in the *Garrity* progeny: (1) the individuals under investigation must receive explicit notice that they would be subject to discharge from public employment if they did not waive the constitutional right against self-incrimination, and (2) a state law or municipal ordinance must mandate the procedure.

Therefore, the fact that the department may have disciplinary rules and regulations, particularly for acts of insubordination, and that disciplinary actions may range from oral reprimand to termination does not necessarily mean that *Garrity* Rights apply. As long as termination is not an immediate consequence of failure to answer questions during investigations, *Garrity* Rights are not applicable. ***Garrity* comes into play for the municipality only when the investigation becomes criminal in nature, and the employee is the focus of the investigation.**

WHEN GARRITY DOES NOT APPLY

According to DeGrazia, it is an improper application of *Garrity* for officers to attach a statement of *Garrity* Rights to every report they submit, indicating that 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 investigation that focuses on the officer, the *Garrity* Rights do not apply.**

DeGrazia suggests that department heads issue an order to all officers as follows: (added to Chapter 11, Rules in the next edition of the LEAF Risk Reduction Manual)

"Officers shall not modify official department documents, reports, forms or audio or video tapes or electronic files by attaching non-authorized statements whether written or verbal."

In conclusion, he remarked, "It is a perversion of the law and an insult to our officers to imply that every report submitted invokes an employee's Fifth Amendment rights. The right against self-incrimination is no more invoked in the context of a written report than a citizen's Miranda rights are invoked every time that an officer talks to them."

IN BRIEF

- 🔊 The Supreme Court decision in *Garrity* recognizes officers' Fifth Amendment rights against self-incrimination when they are required to answer questions during an internal investigation that also has a criminal component to it, and they are the focus of the investigation.
- 🔊 If an employer wants to investigate with the intent to charge an officer with a criminal violation, the employer must advise the officer of his Miranda Warnings and the officer cannot be compelled to cooperate.
- 🔊 Departments cannot terminate officers solely because they exercise their right to protection from self-incrimination.
- 🔊 If an officer is under investigation for violation of department rules and the department does not contemplate criminal charges, then *Garrity* Rights do not apply. Departments can compel officers to provide official department documents, reports, tapes or electronic files as a matter of their normal job function without the attachment of any *Garrity* Rights.
- 🔊 *Garrity* Rights are not applicable when officers are compelled to answer questions about another officer's action behavior or performance.

OFFICERS SHOULD BE CAUTIONED!

Officers making *Garrity* assertions out of context may cause heightened scrutiny of their actions and behavior. Management must investigate all reports that are filed where officers are alleging their own criminal behavior.

By attaching a *Garrity* Rights statement to a report or document, officers, in effect, suggest that they may have violated the law. Departments should caution their officers as to the true impact that the statement can have. The purpose of the *Garrity* decision is to protect officers from self-incrimination when they are required to answer administrative questions in cases that include allegations of criminal violation. Unless officers find themselves in this situation, *Garrity* does not apply and the assertion of the statement will bring unnecessary scrutiny of their actions.

A WORD OF ADVICE

It is important for management to meet with the labor organizations to discuss the appropriate application of the *Garrity* decision. Management and Labor need to reach an understanding of the applicability of the *Garrity* Rights. This can help to avoid a surprise or disagreement concerning how the department will handle internal investigations.

The LEAF Committee of the Michigan Municipal League Liability and Property Pool and Workers' Compensation Fund has formulated an Internal Investigation Policy that fits most departments' operations. The Policy will appear as Chapter 13 in the next edition of the Manual for Law Enforcement Risk Reduction. If you need a copy of the policy in the interim, contact Loss Control Services at 800-482-0626. 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, Risk Management Services at 734-669-6344 or Loss Control Services at 800-482-0626, for your risk reduction needs and suggestions.

Typical Administrative Internal Investigation Interview Notice

You are hereby advised that this interview, held on _____, is for the purpose of an internal Department investigation in which the result can be discipline only. Pursuant to your Constitutional right not to incriminate yourself, neither your statements during this interview, nor any information or evidence which is gained by reason of such statements, can in any manner be used against you in any criminal investigation, prosecution, or other criminal proceeding. However, your statements can be used against you in relation to subsequent departmental charges and discipline. Your failure to answer questions and/or request for written statements in this investigation, may result in discipline up to and including dismissal from this Department.

A Typical Employee *Garrity* Rights Statement:

On _____(date) _____(time) at _____(place) I was ordered to submit this report (give this statement) by _____(name & rank). I submit this report (give this statement) at his order as a condition of my employment. In view of possible job forfeiture, I have no alternative but to abide by this order.

It is my belief and understanding that the department requires this report (statement) solely and exclusively for internal purposes and will not release it to any other agency. It is my further belief that this report (statement) will not and cannot be used against me in any subsequent proceedings. I authorize release of this report to my attorney or designated union representative. I retain the right to amend or change this statement upon reflection to correct any unintended mistake without subjecting myself to a charge of untruthfulness.

For any and all other purposes, I hereby reserve my constitutional right to remain silent under the FIFTH and FOURTEENTH AMENDMENTS to the UNITED STATES CONSTITUTION and any other rights PRESCRIBED by law. Further, I rely specifically upon the protection afforded me under the doctrines set forth in *Garrity v. New Jersey*, 385 U.S. 493 (1967), and *Spevack v. Klein*, 385 U.S. 551 (1956), should this report (statement) be used for any other purpose of whatsoever kind or description.

SHORT BARRELED SHOTGUN/RIFLE BILL HAS PASSED

Public Act 536 of 2002 took effect on July 26th 2002. Police officers can now use short barreled shotguns, rifles, and machine guns in the course of their duties. The Act also allows for the use of portable devices or weapons directing electrical current (stun gun) if the individuals using them have had proper training. For complete text of PA 536, log on to www.michiganlegislature.org.

A WORD OF CAUTION FOR ADMINISTRATORS

Public Act 536 also allows officers to **possess** silencers, bombs, blackjacks, metallic knuckles, sand clubs, sandbags or bludgeons, and other weapons. Officers can now carry pocketknives that open by mechanical device **as well as** daggers, dirks, stilettos, or stabbing instruments.

It is critical that departments ensure they have rules that outline what equipment, weapons or tools officers are **authorized** to carry or use while on duty or acting in the scope of their employment. If departments decide to allow officers the discretion to carry these weapons, they must formulate an effective policy and provide training **specific to these weapons**. The training a department provides should meet MCOLES' specifications and standards for validity.

The MML Pool and Fund Loss Control suggests that departments limit the use of these types of weapons to highly trained and technically accomplished units such as a special tactics or entry teams. In addition, they should allow the use of such weapons only when officers are acting in their capacity as team members.

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