

RIGHTS OF LAW ENFORCEMENT OFFICERS IN THE DISCIPLINARY PROCESS

PART I. THE GARRITY RULE

GARRITY v. NEW JERSEY, 385 U.S. 493 (1967)

A. ***The Fifth Amendment Right Against Self-Incrimination:*** The government cannot compel citizens to give testimony against themselves. In certain circumstances, the government must warn citizens of their right not to do so. *E.g.*, Police must give Miranda warnings to suspects during a custodial interrogation.

B. ***Internal Investigations by Public Employers: The Basic Garrity Rule.*** The U.S. Supreme Court held in 1967 that information obtained from public employees, including Police Officers, after a threat of discharge, is compelled and cannot be used in criminal proceedings. So, the basic Garrity rule is—

When a public employer conducts an internal investigation it may dismiss (fire) an employee who refuses to answer investigative questions, but it may NOT use incriminating responses against the employee in a criminal prosecution regarding the matter under investigation.

☞ **Pointer:** You are being called to an investigation. What should you say?

1. *I want my union representative.*
2. *Will I be disciplined if I do not answer your questions? [and if yes, then]*
3. *I am giving the following statement by reason of an order from my superior officer, advising me that refusal to obey could result in disciplinary action. It is my belief and understanding that the department needs this statement solely and exclusively for internal administrative purposes.*
4. *[if you are not given a Garrity warning], I refuse to answer on the grounds of my privilege against self-incrimination.*

C. ***Things Garrity Does Not Do.***

1. No warning of any kind need be given as a matter of federal

Law Enforcement Officers in the Disciplinary Process, page 2

constitutional law where the conduct in question is not subject to criminal prosecution.

2. Garrity applies only to the matter under investigation. The Fifth Amendment DOES allow use of compelled statements obtained during an investigation if the use is limited to prosecution for collateral crimes (e.g., perjury, obstruction of justice). United States v. Wong, 431 U.S. 174 (1977).

3. Garrity rights do not attach where there is no threat of discharge or other disciplinary action.

D. **Immunity.**

1. Another way to look at Garrity is that it provides immunity for statements made about the principal matter of the investigation. Failure to give the Garrity warning means that the statement is compelled (*i.e.*, cannot be used).

2. Failure to give Garrity warnings does NOT provide immunity from prosecution for giving false statements where there is no threat of discipline or prosecution and the circumstances do not contain implied threat. Herek v. Police & Fire Comm. of Menomonee Falls, 226 Wis. 2d 504, 515 (1999).

3. Garrity immunity is “use” rather than “transactional” (*i.e.*, it applies to the actual statement given—it cannot be used—rather than to prosecution for the entire matter under consideration). In other words, the statement cannot be used, but the officer can still be prosecuted for the matter investigation using other evidence.

E. **Prosecution for Collateral Crimes.**

1. As noted above, the Fifth Amendment privilege does not condone collateral criminal conduct such as perjury or obstruction.

2. Responses given during a Garrity-immunized interview must therefore be truthful. Garrity will not preclude use of the officer’s statement in a prosecution for obstructing the employer’s investigation or making false statements during it.

3. McKinley v. Mansfield, 404 F.3d 418 (6th Cir. 2005): If the focus of the investigation changes from the original subject to the untruthfulness of the officer during the investigation, a new Garrity warning must be issued.

Law Enforcement Officers in the Disciplinary Process, page 3

In McKinley, the officer was interviewed regarding abuse of scanners by other officers to eavesdrop on civilian cell phone calls. He lied to protect those other officers in his initial interview. Convinced that he was lying, the employer conducted a second interview — *by which time McKinley was now the target of a primary prosecution for perjury and obstruction*. He was therefore entitled to a second Garrity warning.

☞ **Pointer:** You are being called to a second interview following a primary investigation. What should you do?

1. *Ask for your union representative.*
2. *Ask why you are being interviewed a second time.*
3. *Ask whether you are now the target of an investigation of your own answers given in the prior interview.*
4. *Assert your Fifth Amendment privilege if not given a second Garrity warning.*

PART II. THE ODDSEN RULE

ODDSEN V. BOARD OF FIRE & POLICE COMMISSIONERS, 108 Wis.2d 143 (1982)

A. Absent admonitions that the statement cannot be used in a criminal prosecution (that is, if no Garrity warning is given), the statement is coercive and involuntary as a matter of law, and therefore cannot be used in subsequent *disciplinary proceedings*. NOTE: This rule is an expansion of the Garrity rule, which precludes use of the statement in a criminal prosecution. Wisconsin's Oddsens rule precludes use in disciplinary cases.

1. If given a Miranda warning, but no explicit assurance that statement will not be used for prosecution, and the officer is aware he can be fired for not giving a statement, then the statement is coerced and cannot be used at all for prosecution or discipline.
2. If given both a Miranda and Garrity warning, the statement cannot be used for prosecution, but can be used for discipline.
3. If given both a Miranda and Garrity warning, and the officer refuses to

Law Enforcement Officers in the Disciplinary Process, page 4

give a statement, the officer can be fired. See Confederation of Police v. Conlisk, 489 F.2d 891, 894 (7th Cir. 1973).

B. **Official Duties.** If the officer is advised of Miranda rights and Garrity rights, the employer may fire the officer for refusal to answer questions *relating to official duties*.

1. The Oddsens rule is that the questions must be tailored specifically, narrowly and directly to the officer's official duties.

2. As a practical matter, "official duties" includes much off-duty conduct, because officers have off-duty obligations, and because of the need to avoid even the appearance of impropriety, the need to foster public confidence in the integrity of the police force, etc.

C. **Requesting Representation.** Where there has been a request for representation during an interrogation, and that request is denied, evidence obtained cannot be used in a subsequent disciplinary proceeding. Oddsens at 157.

PART III. STATE v. BROCKDORF: When is a statement "compelled"?

A. **Two-Part Subjective/Objective Test.** The Wisconsin Supreme Court has adopted a two-part test to determine whether statements given by a police officer are "compelled" rather than voluntary.

[F]or statements to be considered sufficiently compelled such that Garrity immunity attaches, a police officer must subjectively believe he or she will be fired for asserting the privilege against self-incrimination, and that belief must be objectively reasonable.

State v. Brockdorf, 2006 WI 76, ¶35 (Wis. 2006).

B. The **Subjective Part** means that the officer really and sincerely believes he or she is under impending threat of job loss.

C. The **Objective Part** is assessed under the "totality of the circumstances test."

1. If an explicit threat of job loss is made, this test is met.

☞ **Pointer:** Go back and review page 1. State v. Brockdorf is the reason why we tell you to say —

Law Enforcement Officers in the Disciplinary Process, page 5

... *Will I be disciplined if I do not answer your questions?* [and if yes, then]

... *I am giving the following statement by reason of an order from my superior officer, advising me that refusal to obey could result in disciplinary action. It is my belief and understanding that the department needs this statement solely and exclusively for internal administrative purposes.*
[and]

... [if you are not given a Garrity warning], *I refuse to answer on the grounds of my privilege against self-incrimination.*

2. If no explicit threat is made, then court considers the “totality of the circumstances.”

D. ***What makes a belief objectively reasonable?***

In State v. Brockdorf, the Court found these factors persuasive in holding that the officer had ***no reasonable belief*** that she was in danger of adverse personnel action:

1. “First, it is important to note that Brockdorf was **not in custody at the time of the interview...**”
2. “Miranda warnings were not required.”
3. “Brockdorf was **questioned pursuant to a criminal investigation as opposed to a personnel investigation.**”
4. The “Policies and Procedures Manual clearly provides a detailed set of rules that investigators must follow for personnel investigations apart from criminal investigations” which of course include the Garrity warnings in what is known as a “PI-21 report” in that jurisdiction. [So, lack of a Garrity warning and a PI-21 report means that the answers were not compelled under threat of discipline.]
5. “Brockdorf was ... informed ... of the nature of the investigation prior to interviewing her.” That is, she was told it was internal affairs, not personnel matters.
6. Court also considered that **no state law or ordinance compels officers to choose between employment loss and self-incrimination.**

State v. Brockdorf, 2006 WI 76, ¶39 (Wis. 2006).

NOTE: Brockdorf was threatened with a charge of obstruction of justice unless she made a statement. This threat was NOT enough to trigger Garrity because she was not also threatened with job loss.

Law Enforcement Officers in the Disciplinary Process, page 6

E. Dissents to State v. Brockdorf were filed by Butler, Crooks and Prosser, JJ.

“If what occurred here is not coercion, without any of the required warnings, then I don’t know what is.” State v. Brockdorf, 2006 WI 76, ¶146 (Wis. 2006)

PART IV. UNION REPRESENTATION DURING DISCIPLINARY INTERVIEWS, or

So-Called “Weingarten Rights”---

A. The right to Union representation during disciplinary interviews arises from either the collective bargaining agreement or the decision in NLRB v. Weingarten, 420 U.S. 251 (1975). There is no “Weingarten law.” It is a rule made by the National Labor Relations Board. It does not apply to public employees by its own force (although Wisconsin has “adopted” the Weingarten rule as its own as a matter of state law for public employees).

B. *Wisconsin’s Summary of the Weingarten Rule*

The law with respect to an employee’s rights in investigative interviews is set out in NLRB v. Weingarten, Inc. and has been adopted by the WERC. Weingarten provides that an employee may refuse to participate in an investigative interview without union representative where the employee reasonably believes that the interview may result in discipline. The right only arises where the employee requests representation and he can participate in an interview without a representative if he forgoes his right to request one. The employee must reasonably believe that the interview may result in discipline and “reasonable” is measured by objective standards. The employer has no obligation to continue with an investigative interview once union representation is requested. It does not have to justify its refusal and can continue on its investigation without questioning the employee and the employee then forgoes any benefits that may be derived from participating in an interview.

Thorp School District, Dec. No. 29416 A (Crowley, April 20, 1998).

An Important Note: The collective bargaining agreement trumps all. If you have better rights in your contract to have a union representative present than the Weingarten rule allows, of course you should use them.

Law Enforcement Officers in the Disciplinary Process, page 7

PART V. GARRITY IN ARBITRATION: Some Examples of What Arbitrators Do When Confronted By Interrogations of Police Officers

A. City of Houston, 124 L.A. 755 (Moore 2007). Officer was involved in possible fraudulent land deal. He was questioned by his department, but believed that the department was also working with federal authorities. He refused to answer questions after properly being given Garrity warnings. Discharge upheld.

Note the problem here: The officer was concerned that he would be giving information for a potential federal prosecution rendering his use immunity meaningless.

B. State of Ohio, 114 L.A. 1040 (Ruben 2000). In a high-speed chase, the suspect-driver was shot in the head. Officers who gave chase had service revolvers which had recently been fired, but all denied shooting during the chase. Three officers involved in the chase were questioned. They were denied union representatives and were not given Garrity warnings. It was later determined that the suspect committed suicide by shooting himself in the head during the chase. The Arbitrator held that the officers' rights to representation had not been violated.

"Garrity simply prohibits use in a subsequent criminal proceedings of statements obtained under threat of removal from office. Garrity is thus an exclusionary rule, and is not applicable to the present case because, although the statements of the Grievants were coerced under threat of potential loss of employment, none of the Grievants was ever subject to criminal prosecution. The Criminal Investigation to which the interviews were appurtenant was not directed to the potential culpability of the three Troopers, but rather to ascertaining the events which led to the death of Mr. Anderson.

C. City of Carrollton, 90 L.A. 276 (Stephens 1988). Upholding discharge of officer who refused to take polygraph examination regarding possible fraudulent workers' compensation claim, because officer was given Garrity warning.

Note: Wis. Stats. §111.37 imposes severe limitations on use of polygraphs, including tests by law enforcement agencies. A similar federal law, the Employee Polygraph Protection Act of 1988, does not apply to law enforcement agencies.

Law Enforcement Officers in the Disciplinary Process, page 8

PART VI. WHAT I WILL DO WHEN I AM QUESTIONED...

A. I am summoned by my lieutenant to review procedures. I am asked no investigative questions, and it does not appear that I will be disciplined.

I will listen quietly and say nothing.

B. I am off duty and see my supervisor, who begins asking me questions that make me suspicious that he is fishing for information about me or my fellow officers.

I will politely decline to speak with him or her and walk away.

C. I am questioned by my supervisors concerning my political views.

I will refuse to answer these questions unless they concern activities on the job or activities relating to prohibited involvement by civil servants in the political process.

The answer is the same if I am questioned about my hobbies, sex life, personal life, union activities or anything else not related to the job.

D. I am questioned about my off duty conduct concerning a matter of questionable (possibly criminal) actions by my associates.

I will answer these questions because my off duty behavior reflects on my role as a law enforcement officer; however, I will request my union representative and follow the other instructions below.

E. I am formally questioned by my supervisors about conduct of other officers. The matter under investigation is a civil matter (for example, sexual harassment by creating a hostile working environment through crude jokes). Note that Garrity doesn't apply here (there's no criminal investigation going on).

I will request my union representative.

I will politely decline to answer questions unless ordered to speak under threat of punishment.

Then I will answer questions truthfully.

Law Enforcement Officers in the Disciplinary Process, page 9

F. I am formally questioned by my supervisors about conduct of other officers. The matter under investigation is a criminal matter (for example, a shooting).

I will request my union representative.

I will politely decline to answer questions unless ordered to speak under threat of punishment.

I will ask whether I am a target of investigation, and will not speak unless given my Garrity warnings if I am a target.

Then I will answer questions truthfully.

G. I am formally questioned about my own conduct (for example, sexual harassment). The allegations involve crude sexual jokes. (Same situation as "E," but you are the target rather than a co-worker.)

I will request my union representative.

I will politely decline to answer questions unless ordered to speak under threat of punishment.

Then I will answer questions truthfully.

H. I am formally questioned about my own conduct in the same situation as "G" above, except the questioning evolves into a potential third degree sexual assault. I believe I am innocent. (Garrity is now implicated because a criminal, rather than civil matter, is under investigation.)

I will request my union representative again if my first request was denied.

I will politely decline to answer questions unless ordered to speak under threat of punishment.

I will ask whether I am a target of investigation, and will not speak unless given my Garrity warnings if I am a target.

Then I will answer questions truthfully.

I. Same situation, except I believe I am guilty.

I will get competent criminal defense counsel. I will say nothing until I get the advice of counsel.

Note: You will lose your job, but it beats going to prison.

END