



Garrity Protection Employee Rights during an Administrative Investigation

BY KYLE BRADSHAW

As discussed in previous columns, the purpose of an internal affairs unit is to protect the public, the agency and the employees, with a duty to set ethical standards for the entire organization. The type of investigation conducted by internal affairs is administrative, and only concerns departmental issues.

The internal affairs unit should never investigate criminal behavior. If the employee is suspected of a criminal act, then the local law enforcement agency has jurisdiction and should handle the investigation. This is because the Fifth Amendment provides protection against self-incrimination in criminal allegations.

According to the Fifth Amendment, "No person ... shall be compelled in any criminal case to be a witness against himself." The Supreme Court has ruled that law enforcement must inform criminal suspects of their rights to counsel and to remain silent, now commonly known as Miranda rights.¹ It is not always mandatory to read the Miranda rights to suspects, only when a law enforcement authority asks questions that can cause the accused to self-incriminate. Confessions must be voluntary.

During an administrative investigation, the employee is compelled to give testimony. They do not have the opportunity to invoke their Fifth Amendment right. This definitively sets an administrative investigation apart from a criminal investigation. How can someone be forced to give up their constitutional right? This is enforceable under the First Amendment, which guarantees "the right of the people ... to petition the government for a redress of grievances." Therefore, as an employee of the government, you are accountable to the people and employee and departmental actions are subject to redress by the people. This process has given us open records laws, sunshine laws

and the Freedom of Information Act.

If a criminal admission happens during an administrative investigation, the administrative investigation should cease so that a criminal investigation can begin. The suspect would then be read the Miranda rights, allowing them to remain silent and seek counsel, and the case would be turned over to the proper law enforcement authority. Since the alleged criminal activity was discovered during a compelled statement, none of that statement could be used against the suspect. The employee's compelled statement is protected under their Garrity rights.

In 1961, Chief Edward Garrity and officers of the Bellmawr (N.J.) Police Department were accused of fixing tickets. During the investigation, the employees were told that they could invoke their right against self-incrimination; however, if they refused to answer questions their employment would be terminated. They were compelled to incriminate themselves in order to stay employed, and were subsequently prosecuted and convicted. Because their statements were compelled by the state, the Supreme Court ruled this was a direct violation of the Fifth Amendment. On *Garrity v. New Jersey* (385 U.S. 493 (1967)), the Supreme Court states, "the option to lose their means of livelihood or pay the penalty of self-incrimination is the antithesis of free choice to speak or to remain silent."²

Garrity rights consist of five main concerns: 1) the investigation is administrative, not criminal; 2) the employee must answer questions asked, or be punished; 3) questions are asked directly and specifically; 4) all answers are used administratively, not criminally; and 5) if the employee fails to answer, discipline or termination can result.

Your department should create a

form that outlines the basic points of Garrity. That form should be issued at the onset of the administrative investigation, signed and dated as acknowledgment, and included in the investigation file.

Other public employee rights include Weingarten rights and Loudermill rights. The first is *National Labor Relations Board v. J. Weingarten, Inc.*, (420 U.S. 251 (1975)), which applies to union-recognized administrative investigations. The accused union employee is allowed to have union representation if the investigation could potentially lead to disciplinary action. The latter, *Cleveland Board of Education v. Loudermill, et al.* (470 U.S. 532 (1985)), requires the organization to offer the employee due process prior to an action of termination.

Your internal investigations unit has a duty to protect the public, the agency and the employees. This is accomplished through proper investigation of organizational policy and procedure violations. The role of the unit is to be a fact-finder through the administrative investigation process. ||PSC||



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REFERENCES

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2. Garrity Rights. (n.d.) Garrity Basics. Retrieved March 31, 2014, from www.garrityrights.org/basics.html.