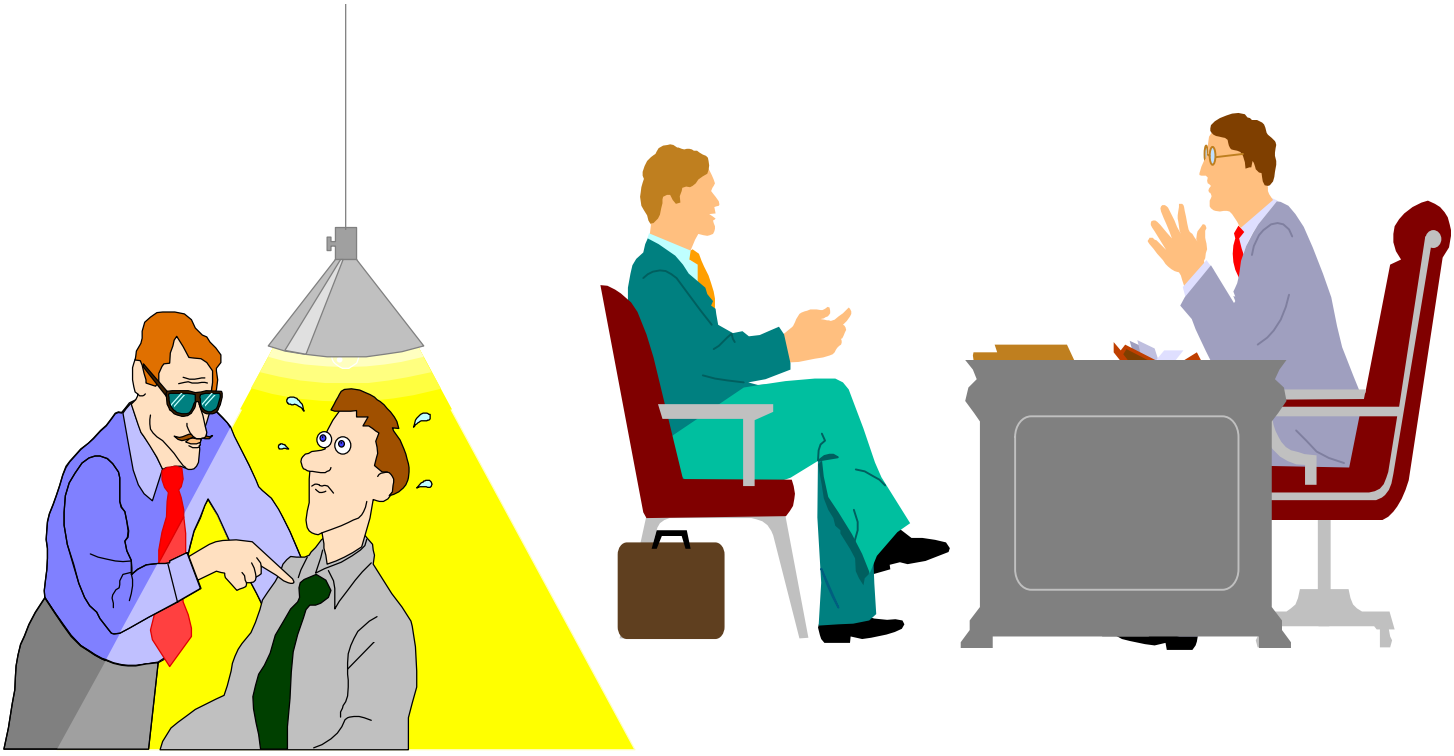
Criminal vs. Administrative Investigations
("Garrity" Issues and Workplace Searches)
May 16, 2000



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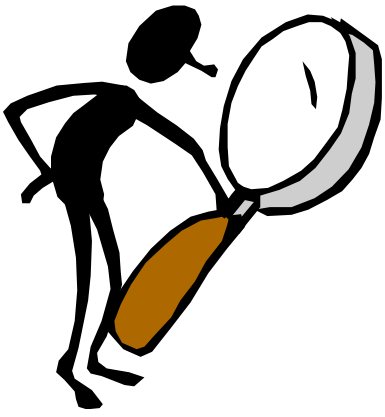

Criminal vs. Administrative Investigations
Presentation To Inspectors General (May 16, 2000)
Michael Ramage, FDLE General Counsel[1]

I. Why This Is An Important Issue?

- ✓ Failure to be aware of the factors discussed herein could result in criminal investigative efforts being thwarted.
- ✓ Understanding the law will help assure that evidence obtained will not be suppressed in criminal prosecution.
- ✓ Failure to abide by the law as discussed herein could result in a criminal prosecution being adversely affected.
- ✓ Understanding this area will help facilitate the resolution of investigations by clarifying goals and intent.

II. Criminal vs. Administrative Investigations

5th Amendment:
"No person shall…be compelled in any criminal case to be a witness against himself…"

Government As EMPLOYER
vs.
Government As COP & PROSECUTOR

Criminal vs. Administrative Investigative Statements

III. Garrity v. New Jersey

385 U.S. 493 (1967)

FACTS:

- Police called before criminal grand jury
- "Anything you say can be used against you"
- "Have a right to refuse to answer under 5th Amendment"
- But if you refuse, you could be fired for not providing a statement!

The Tension--

- Employer's need to control workplace and discipline workers for wrongdoing
- Society's expectation that those committing crimes are detected and prosecuted
- 5th Amendment's prohibition against compelled self-incrimination

The Court's HOLDING:

- This is COMPELLED SELF-INCRIMINATION by the government employer's "ultimatum"
- Fear of loss of job unless you testify is another form of "compulsion" by government action
- No use of statements so compelled--
- And…No derivative use, either!

IV. Subsequent Cases --

■ Cannot discipline/fire employee *SOLELY* upon employee's assertion of Fifth Amendment right. Gardner v. Broderick, 392 U.S. 273 (1968)

■ Can discipline/fire if employee not required to relinquish constitutional rights and still refuses to answer questions drafted specifically, narrowly and directly to employee's duties. Uniformed Sanitation Men Assn.. v. Commissioner, 392 U.S. 280 (1968).

- ✓ ***What if the employee lies during the interview?*** The U.S. Supreme Court unanimously ruled in 1998 that public employees can be terminated for untruthfulness to their superiors or to internal affairs investigators. Lachance v. Erickson, 118 S.Ct. 753, 139 L.Ed.2d 695. In the case, after employees made false statements to agency investigators regarding misconduct with which they were charged, the agency additionally charged the false statement as an additional ground for adverse action. Held: Neither the 5th Amendment nor federal employee acts and regulations preclude sanctioning an employee for making false statements. This was in accord with the Court's opinion in Bryson v. United States, 396 U.S. 64 that **a citizen may decline to answer a Government question, or answer it honestly, but cannot with impunity knowingly and willfully answer it with a falsehood.** A criminal defendant's right to testify does not include the right to commit perjury, and punishment for such perjury may be constitutionally imposed (U.S. v. Wong, 431 U.S. 174) or enhanced (U.S. v. Dunnigan, 507 U.S. 87). If answering an agency's investigatory question could expose an employee to a criminal prosecution, he may exercise his 5th Amendment right to remain silent (e.g. Hale v. Henkel, 201 U.S. 43). An agency, in ascertaining the truth or falsity of the charge, might take that failure to respond into consideration (e.g. Baxter v. Palmigiano, 425 U.S. 308), but there is nothing inherently irrational about such an investigative posture.

Five Rules From Garrity and Its Progeny--

1--An employee can be ordered to cooperate in an internal administrative investigation and answer questions specifically, directly and narrowly related to the employee's official conduct.

2-- Statements made pursuant to an order to cooperate in an internal administrative investigation and evidence that is derived from the statements cannot be used against the employee in any criminal proceeding.

3-- An employee may not refuse to answer specific, direct, and narrow job-related questions as long as the employing agency does not compel a waiver of constitutional rights.

(Thus, if an agency advises the employee that as a matter of Constitutional law, his/her answers cannot be used against him/her in a criminal proceeding, the employee can be required to answer the specific, direct, and narrow job-related questions, or suffer the administrative consequences. This provides us with the fourth rule…)

4-- An employee can be disciplined or fired for refusing to cooperate and provide statements in an internal administrative investigation after a Garrity advisory has been made.

5--An employee has no right to lie should (s)he choose to provide a statement.

V. Applying The Basic Concepts--When Dealing With "Government Employees"

- The Garrity protections apply whenever an employee is required by the employing agency to answer questions.
- If the questioning is by an external agency representative, who is not acting by or on behalf of the employing agency, Garrity should not be a factor.
- If a criminal investigator "inherits" the work product of an employing agency's administrative inquiry or investigation, the Garrity protections that may have attached to that work product continue to apply. Files and information turned over to law enforcement could be "tainted".
- In order for Garrity to apply, the statement must be compelled and not voluntary.
- An agency's policy or a supervisor's "orders" *might* give rise to a Garrity problem. The key is whether the statement has been "compelled" as that concept is utilized in Garrity.

VII. WHAT IS "COMPULSION"?

How will courts determine whether an employee was truly "compelled"?

✓ **UNITED STATES vs. COMACHO**

{United States v. Camacho, 739 F. Supp. 1504, 1990 U.S. Dist. LEXIS 6947 (S.D. Fla. 1990): See also: In re Federal Grand Jury Proceedings re Klausner, 975 F.2d 1488, 1992 U.S. App. LEXIS 25740, 6 Fla. L. Weekly Fed. C 1282 (11th Cir. Fla. 1992)}

✓ - Legal Standard For Determining "Compulsion" in Garrity Situations

- Employee must subjectively believe that he/she is compelled to give a statement under threat of job loss. ("I thought I was being compelled…")

AND

- Officer's belief must be objectively reasonable at time of statement based upon conduct of government representatives (i.e. prosecutors, investigators). ("Your subjective belief is, under the circumstances, a belief that other reasonable people would have had, too.")

VIII. The results of a "Garrity" violation.

- Since use and derivative use applies to compelled statements that incriminate, criminal investigators must guard against exposure to such "immunized" statements.
- That which is learned from such statements is "tainted" -- and cannot be used against the officer unless government can show information is "attenuated" from the "taint."
- If employee is advised statement will not, as matter of constitutional law, be used in prosecution, then employee can be compelled to answer for administrative uses and can be disciplined/fired for continuing to refuse. This is the "Garrity advisory."
- In general, to avoid the potential Garrity concerns, administrative inquiries should first give way to criminal investigation, allowing criminal investigative statements to be taken first.

- If government employee is potential suspect of a crime, or if the circumstances are such that there's a possibility that a crime may have occurred, BE ON GUARD FOR GARRITY ISSUES!

- Avoid conveying "mixed messages" such as having an agency representative, or supervisor, accompanying an external criminal investigator during the taking of investigative statement from an employee.

IX. Criminal vs. Administrative Statements

CRIMINAL INVESTIGATIVE STATEMENT--

- ✓ Voluntary Statement- Cannot be "coerced"
- ✓ No Threat of Job Loss Should The Employee Not Provide A Statement
- ✓ Admissible in Criminal Case or Administrative Case If "Voluntary" and "Not Compelled"
- ✓ Must be read Miranda or other rights, if applicable (i.e. custody, statutory, contract, etc.)
- ✓ May Have To Comply With Statutory or Collective Bargaining Requirements.

ADMINISTRATIVE INVESTIGATIVE STATEMENT--

- ■ Can Be Either Voluntarily Provided Or A Compelled Statement
- ■ Threat of Job Loss Can Be Based Only On Refusal After Advised Results Won't Be Used In Criminal Case, And Then, Only As To Specific, Narrow, Job-Related Questions
- ■ Statements So Compelled Are Not Admissible in Criminal Case but Admissible in Administrative Case
- ■ No Miranda Warnings Required.
- ■ May Be Required To Provide Administrative Warnings (i.e. statute, contract, dept. manual)
- ■ May Have To Comply With Collective Bargaining Contract or Statutory Requirements

Typical Criminal Investigative Statement Procedure

- ✓ Advise investigation is criminal.
- ✓ Advise the nature of the allegations.
- ✓ Advise he can refuse to answer questions.
- ✓ Advise he will not be punished for refusal.
- ✓ Advise that any statements made can be used against him in criminal proceeding.
- ✓ Read Miranda, if applicable.

Typical Administrative Statement Procedure (Questioning By Agency Representatives)

- ■ Advise that statement is administrative.
- ■ Advise work-related nature of investigation.
- ■ Advise he/she must answer questions, if you intend to compel answers.
- ■ (If compelling) Advise refusal can subject officer to dismissal.
- ■ (If compelling) Advise responses or evidence derived from the statement cannot be used in subsequent criminal proceeding, *EXCEPT PERJURY*.
- ❑ If you do NOT intend to compel answers, advise that any responses to questions are purely voluntary and that there will be no sanction or adverse effect should the employee choose not to answer.

- ■ Read applicable rights (statutory, contract, manual).

X. On-Scene Statements

Analysis Of Actions At Scene Of Police Action
(e.g. a police-involved shooting)

- ■ Made to conduct "POLICE" business.
- ■ To other officers or supervisors.
- ■ No compulsion demonstrated.
- ■ Subject officer not a target of interrogation.
- ■ No direct fear of job loss.
- ■ Mere rule requiring reports or cooperation with investigation is ordinarily insufficient to create compelled atmosphere.

THE SAME SHOULD HOLD TRUE FOR "ON-SCENE" STATEMENTS TAKEN BY ADMINISTRATIVE PERSONNEL IN WORKPLACE.

(e.g. employee fist fight)

- Made to assure orderly and safe workplace
- Made to one's supervisor who has responded to incident
- Circumstances are such to minimize "compulsion"
- No particular target of interrogation ("What's happened here? Is anyone hurt?")
- Mere rule requiring reports or cooperation with investigators should ordinarily be insufficient to create a "Garrity" compelled statement atmosphere.
- Avoid taking on too much of a role of fact-finder. Let the process work.

WITNESS OFFICERS OR EMPLOYEES:

- GARRITY does not apply to "true" witness.
- No right to refuse to give statement.

XI. Is There A Right to Representation At Questioning?

- No 6th Amendment right to legal counsel during criminal investigation--only if formally charged.
- Miranda may apply under certain situations--custodial interrogations.
- No 6th Amendment right to legal counsel during administrative investigation.
- May have right to counsel or representation derived from statute, contract, dept. manual.
- Right to union representation in administrative investigations (NLRB v. Weingarten, 95 S.Ct. 959 (1975), adopted by Florida Public Employee Relations Commission at 4 PERC 4294 (1978).

(If the employee asks for attorney, or wants to consult one prior to your administrative interview, the decision whether to allow access must be made on a case-to-case basis. Access to an attorney is not obligated unless such is provided by agency policy, by collective bargaining agreement, or the interview is considered to be a "custodial interrogation"--which will be determined later by the court based on the totality of circumstances. NLRB v. Weingarten, 95 Sct 959 (1975), indicates that a public employee has a right to union representation whenever the employee reasonably believes the interview may lead to disciplinary action. The employee must assert by requesting his/her union representative and questioning should not begin (or should be suspended if it began before the representative was requested) until the representative arrives. Some states have adopted Weingarten. Check on status under your state's law.)

(If the employee refuses to answer your questions, you can terminate the interview or you can "change the rules" and convert it from a voluntary session to a compelled answers session. I.E. Change the nature of the interview by compelling answers under threat of discipline (knowing that any answers given cannot be provided to criminal investigators and communicating this fact to the subject). Here's a sample "script" that shows how to "change the rules."

> "When we began today {"When we last met with you the other day"}, you were told you were not being compelled under threat of discipline to answer my questions. You then refused to answer my questions. I am now invoking our policy directive XYZ which indicates that all agency employees are to cooperate and disclose full information to agency personnel conducting an internal review or investigation.
>
> You are now under this directive as I now am investigating this matter to determine what, if any, agency disciplinary response is appropriate. I will ask you questions related to your job duties. All questions relating your performance of duties for this agency must be answered fully and truthfully.. The purpose of my questions is to determine whether there is a basis for disciplining you for the matters originally under consideration. Any such discipline imposed could include any sanction available to the agency, including your dismissal.
>
> As a matter of constitutional law, any responses you provide to me in this agency inquiry cannot be used in a criminal prosecution of you. As a result, your failure to answer my questions fully and truthfully or otherwise fail to comply with directive XYZ could constitute the basis for a separate disciplinary action that could result in any sanction available to the agency, including your dismissal.
>
> Do you understand what I have just told you?"

- ✓ **You have no right to compel the employee to stay while you interview him or her** in an administrative investigation. If he or she wishes to leave, document the intent, telling the employee that by leaving (s)he will be considered to have not cooperated by fully as required by agency policy. Holding the employee against his/her will might subject you to liability for false imprisonment or a similar tort.

WITNESS OFFICERS OR EMPLOYEES

■ No right to counsel (5th or 6th Amendment) and No right to Union representation unless provided by statute or contract or policy.

XII. The Courts' Application Of Garrity

Not many cases
Can expect defense or labor attorneys to make it an issue if given a chance.
Even if we win, diverts time and effort.
U.S. Dept. of Justice Civil Rights Division takes very broad view of Garrity.

XIII. Unresolved Issues--
Just what degree of "compulsive atmosphere" is necessary to invoke Garrity's protection?
Do general statements in agency policy such as "cooperate during investigation" support an objectively reasonable belief?
Can there be "implied" compulsion?

XIV. Garrity Issue Alert Factors, Strategies, and Considerations

ALERT FACTORS:
- ➢ "I was ordered to submit this report/give this statement by (supervisor)…"
- ➢ "I am submitting statement involuntarily and only because I was ordered…"
- ➢ "I understand this report will be used solely for administrative purposes…"
- ➢ "I reserve my 5th Amendment rights…"

Strategies For Dealing With Possible Garrity Issues
- ➢ Contact agency legal unit or prosecutor's office for guidance
- ➢ Avoid intentional or inadvertent "tainting" while strategy is being finalized
- ➢ Be aware that many prosecutors do not know about the Garrity case and issues
- ➢ **Have a clear concept of what the goal of the interviews are: administrative resolution or inquiring into possible criminal acts? If "criminal acts," the administrative inquiry should NOT proceed until and unless the criminal investigators or prosecutors have given the go-ahead.**
- ➢ Look at internal documents/statements at end of efforts
- ➢ May have to "put time in a bottle" or "build a wall" between criminal investigators if a "taint" surfaces

Situations You Might Encounter:
- ✓ Approached by another agency "with information" and asked to conduct "independent review". The original "information" has been derived from compelled statements, but you are not made aware of the circumstances.
- ✓ Administrative inquiry does sudden U-turn and becomes criminal in nature
- ✓ You're called upon to begin or resolve administrative inquiry while criminal investigative are active
- ✓ Called upon to review what's been done by others and you discover potential Garrity issues

Stay alert for "Garrity" issues--consult your agency legal staff for guidance
Make sure you clear further administrative investigative steps with the criminal investigators and prosecutors before continuing when a "Garrity" issue has surfaced

XV. Constitutional Limitations Upon Work-Related Searches:

THE GENERAL RULE IS THAT AN ADMINISTRATIVE SEARCH OF AN EMPLOYEE'S LOCKER, DESK, OR WORK AREA, WHEN INITIATED FOR WORK RELATED REASONS AND STAYING WITHIN THE REASONABLE SCOPE OF THE WORK RELATED REASONS, DOES NOT REQUIRE PROBABLE CAUSE OR A SEARCH WARRANT. HAVING REASONABLE SUSPICION OF A WORK RULE OR SECURITY-RELATED VIOLATION IS SUFFICIENT.

O'Connor v. Ortega, 480 U.S. 709 (1987).

A state governmental employee has a reasonable expectation of privacy in private property in his/her office, drawer and files within the office. A limited level of 4th Amendment protection against searches by his/her employer or supervisor applies.

Work related searches do not require search warrants and will not violate the 4th Amendment IF the search is reasonable in its inception and was reasonably related to the justification. "Reasonable" will be determined by the reason for, and the object of, the search. A search for work related materials or to investigate violations of work place rules would seem to be "reasonable" although every case will be reviewed on an individual basis.

The search's validity is not contingent upon whether the searcher had "probable cause" but on a more general standard of "reasonableness." In O'Connor, "reasonable suspicion" existed as a "given" so the question of whether at least "reasonable suspicion" is required was not answered.

"Reasonable suspicion" is generally the lowest level justifying searches & seizures in other contexts, however.

"In the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace. In our view, requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome." O'Connor at p. 722.

"We hold, therefore, that public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigation of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable. [There must be reasonable grounds for suspecting] that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file." O'Connor at 725.

The O'Connor "reasonableness" is measured on a case-by-case basis and depends upon balancing the public, governmental and private interests at stake in any given situation.

HYPOTHETICAL #1:

Supervisor suspects that employee's locker (assigned only to employee) contains stolen money. Supervisor searches the locker for the money. Money is found, employee prosecuted. Was 4th Amendment violated? Moore v. Constantine, 574 N.Y.S.2d 507 (Sup. 1991).

HYPOTHETICAL #2:

A cleanup crew member tells a security officer (off duty deputy) that a eight months earlier, he smelled marijuana smoke coming from a worker's office. Office used exclusively by worker. The security officer enters the worker's office, and seizes small round seeds believed to be marijuana seeds found in a vacuum cleaner's dust bag. The officer opens the worker's desk drawer and finds a closed prescription drug bottle. Opening the bottle, a small amount of cocaine is found. Lab tests come back "negative" on the seeds. Worker is prosecuted for cocaine possession. Was the 4th Amendment violated? Bateman v. State, 513 So.2d 1101 (Fla. 2nd DCA, 1987).

Final tip: If you're not sure of the process to follow, check with your agency's legal unit or local prosecutor's office before doing something you may regret later! An ounce of predetermined policy and direction is worth a pound of after-the-fact explanations!--MR.

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