

FAQ



Garrity FAQ: The Right of Public Employees During Internal Investigations

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Courtroom dramas make for good television and movie plots: the wrongly accused defendant, the surprise evidence, and, almost always, a witness who pleads the “Fifth” and refuses to answer a question. The “Fifth” —referring to the Fifth Amendment to the United States Constitution—prohibits the federal government from compelling a person to incriminate themselves. The Fourteenth Amendment extends that prohibition to state and local governments. Contrary to popular depictions in television and movies, the right to be free from self-incrimination is not restricted to the witness stand or interrogation room—it also applies to public employees.

When a public employee is being questioned by their employer as part of an internal investigation about alleged misconduct, they are being questioned by the government. If the questioning relates to potential criminal conduct and an employee’s answers could incriminate that employee in a criminal matter, that employee has the right to refuse to answer, without fear of termination or discipline. But, if an employee is given immunity from their statements being used in a criminal prosecution, the employer can discipline that employee if they continue to refuse to cooperate in the investigation. This FAQ answers some basic questions about public employee rights in the context of investigatory questioning—often called “Garrity rights”—to provide cities with a good understanding of this important constitutional doctrine.

1. What is the Fifth Amendment?

The Fifth Amendment to the United States Constitution is part of the Bill of Rights. Among other things, the Fifth Amendment states that no person “shall be compelled in any criminal case to be a witness against himself[.]” Put differently, the government cannot compel anyone to make statements that could implicate that person in criminal activity. Whether a statement is “compelled” depends on the penalty for refusing to answer questions. Statements that are given voluntarily are not “compelled.” As noted above, the Fourteenth Amendment extends the Fifth Amendment to state and local governments.¹ Therefore, state and local governments are prohibited from compelling public employees to incriminate themselves in possible criminal activity.

2. What is a Garrity Right?

Garrity rights protect public employees from compelled criminal self-incrimination during an investigatory interview conducted by their employer. A public employer cannot force a public employee to reveal criminal conduct under the threat of termination.

¹ *Malloy v. Hogan*, 378 US 1 (1964) (holding that the Fifth Amendment right against self-incrimination applies to the state via the Fourteenth Amendment).

As an example, say that a public works director has reason to believe that a city employee in a city's public works department stole valuable tools. The public works director requested the police department to investigate. As part of that investigation, two police officers talk with the employee about the alleged thefts. Of course, if the employee admits that they stole the tools, that admission could be used as evidence in a later prosecution against the employee for theft. Thus, the employee will likely decline to answer the questions. The city cannot force the employee to answer questions about criminal conduct under threat of discipline or termination. If it does, the city is "compelling" the employee to make incriminating statements about their involvement in a criminal matter. Instead, the employee must receive "immunity," (i.e. a promise) that their statements will not be used in a later criminal prosecution. If the employee receives immunity from criminal consequence, the city can then require the employee to cooperate in the investigation and can discipline the employee for refusing to cooperate.

3. Where Does the Name Garrity Come From?

The name "Garrity" refers to *Garrity v. New Jersey*, a 1967 decision by the United States Supreme Court.² In that case, the New Jersey attorney general was investigating two different police departments for allegedly "fixing" traffic tickets. The state investigators told the accused police officers that anything they said could be used in a criminal investigation and the suspects could refuse to answer the questions to avoid self-incrimination. However, the investigators also told the officers that they would be fired from their jobs if they refused to answer. The officers made incriminating statements to keep their jobs and those statements were later used in criminal prosecutions against the officers. The officers then appealed their convictions and the case eventually made its way to the U.S. Supreme Court. The Court ruled that using a public employee's incriminating statements in a criminal trial, when those statements were made under threat of termination, amounted to compelled self-incrimination and violates an employee's constitutional rights.

4. Can a Public Employee be Forced to Waive their Garrity Rights?

No. The U.S. Supreme Court determined that public employers cannot use the threat of disciplinary action or termination to force employees to waive their constitutional rights, including Garrity rights.³

5. What is "Immunity"?

Immunity refers to the prohibition of the government using compelled statements against a person in a criminal proceeding. When the government compels someone to incriminate themselves, the government is not allowed to use those statements, or any evidence derived from

² *Garrity v. New Jersey*, 385 US 493 (1967).

³ *Gardner v. Broderick*, 392 US 273 (1968).

those statements, as evidence against the person.⁴ In that situation, the person has immunity. Immunity, in the context of Garrity, means that the government cannot use a public employee's statements against them in a criminal proceeding if the employee made the statements under the threat of discipline or termination.

6. When an Employee has Garrity Protection, Can They Still Refuse to Answer Questions?

Yes, but they can be disciplined. Once an employee has Garrity protection—that is, once they have immunity and their statements cannot be used against them in a criminal proceeding—the employee no longer has a constitutional basis for refusing to answer questions.⁵ To put it another way: once an employee is assured that their statements will not be used to incriminate them in a criminal proceeding, the statements are no longer incriminating and the constitutional protection no longer applies. Of course, the employee may still refuse to answer questions or cooperate in the investigation. In that case, the public employer may discipline or terminate the employee.

7. Does Garrity Protect False Statements?

No. If an employee makes false statements during an investigation, the employee can be prosecuted for making false statements (perjury) and those statements may be used against them as evidence.⁶

8. Does Garrity Apply to Drug Tests and Breathalyzer Tests?

No. The right to be free from compelled self-incrimination only applies to compelled *statements*, not physical evidence.⁷ There is no Fifth or Fourteenth Amendment right to be free from giving a drug test or breathalyzer test. Note, however, that the Fourth Amendment's prohibition on unreasonable searches and seizures may prohibit drug tests or breathalyzers in some circumstances.

9. How Can Public Employers Conduct Thorough Investigations but also Inform Employees of their Garrity Rights?

Public employers need to be able to conduct thorough investigations into possible wrongdoing, but also need to explain and respect their employees' constitutional rights. It is recommended that every public employer use a consistent and accurate statement of an employee's rights before questioning an employee about an issue that may lead to disciplinary or criminal consequences. Below is a model "Garrity Statement" for use during internal investigations.

⁴ *Kastigar v. United States*, 406 US 441 (1972).

⁵ *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 US 280 (1968).

⁶ *United States v. Wong*, 431 US 174 (1977).

⁷ *Schmerber v. California*, 384 US 757 (1966).

STATEMENT OF RIGHTS

You are hereby ordered to fully cooperate with the investigating official or officials. Your failure to cooperate may result in disciplinary action, up to and including termination:

1. You have the right to be informed of the allegations involved.
2. You will be asked questions specifically directed and narrowly related to the performance of your official duties.
3. Statements made during any interviews may be used as evidence of misconduct or as the basis for seeking disciplinary action against you, up to and including termination.
4. Any statements made by you during these interviews cannot be used against you in any subsequent criminal proceeding, nor can evidence derived from your statements be used against you in any subsequent criminal proceeding.
5. You have the right to consult with a representative of your collective bargaining unit, or another representative of your choice, and have him or her present during the interview.
6. If you refuse to answer questions relating to the performance of your official duties, you will be subject to dismissal.
7. A copy of this Statement of Rights will be maintained, at a minimum, in the investigatory file related to this case and your personnel file.

ACKNOWLEDGEMENT: I have read and understand the above Statement of Rights.

Employee's Signature*

Date and Time

Investigator's Signature

Date and Time

Investigator's Signature

Date and Time

* Refusal to sign this Statement of Rights will be noted in the investigatory file.