

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

August 15, 2012

Opinion No. 12-81

Use of Government Employee's *Garrity* Statement in Criminal Prosecution of Another

QUESTION

Can a government employee who has been given a *Garrity* advisory form that includes the sentence, "These statements have been ruled inadmissible in state and federal criminal prosecutions," be called as a State's witness to testify concerning information in the employee's *Garrity* statement in a criminal prosecution against another government employee?

OPINION

Yes. The sentence in question does not prevent an employee who receives the advisory from being called to testify at the criminal trial of another.

ANALYSIS

The "Garrity statement" referenced in this opinion request relates to the principles enunciated by the United States Supreme Court in *Garrity v. New Jersey*, 385 U.S. 493 (1967). In *Garrity*, the Supreme Court considered the issue whether the government "can use the threat of discharge to secure incriminatory evidence against an employee." *Id.* at 499. The *Garrity* case arose from an investigation conducted by the New Jersey Attorney General into the alleged fixing of traffic tickets by police officers. *Id.* at 494. During the course of the investigation, the appellant police officers were told that if they did not answer questions regarding this matter then they would be subject to removal from office. *Id.* The police officers proceeded to answer the questions posed, and their statements were used in a subsequent prosecution against them. *Id.* at 495.

Upon consideration of these facts, the Court concluded that "[t]he option to lose their [the police officers'] means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." *Id.* at 497. Accordingly the Court found the use of these statements in subsequent criminal proceedings against these police officers unconstitutional under the Fifth Amendment of the United States Constitution, which prohibits compulsory self-incrimination. *Id.* at 500. Thus, under *Garrity*, a government employee who has been threatened with an adverse employment action by his or her employer for failure to answer questions posed by the employer receives immunity from the use of that statement in subsequent criminal proceedings. *Id.* at 500. *See also Gardner v. Broderick*, 392 U.S. 273, 278 (1968) (holding that the privilege against self-incrimination does not bar dismissal of an employee who refuses to answer questions "specifically, directly, and narrowly relating to the

performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself"); *Sher v. United States Dept. of Veterans Affairs*, 488 F.3d 489, 500-01 (1st Cir. 2007). This "Garrity immunity" protects the employee from the use of the compelled testimony, as well as evidence derived directly and indirectly therefrom. See *Kastigar v. United States*, 406 U.S. 441, 453 (1972). *Garrity* immunity is self-executing; it arises from the threat of an adverse employment action for refusal to answer questions rather than from an affirmative tender of immunity. *Sher*, 488 F.3d at 501-02.

This opinion concerns a *Garrity* advisory form used by the City of Memphis Police Department, which is provided to police department employees during investigations conducted by the department. This form provides in pertinent part:

Based upon the current state of criminal law and procedure, as outlined in *Garrity v. State of New Jersey*, 385 U.S. 493, 87 S. Ct. 616 (1967), and subsequent decisions, statements made during the course of an interview, such as you are currently engaged in, are considered to be given under duress. These statements have been ruled inadmissible in state and federal criminal prosecutions. This department will not attempt to use these statements against you in any criminal prosecution that could result from this investigation.

The second sentence of this passage does not prevent an employee who receives the advisory from being called to testify at the criminal trial of another. *Garrity* immunity stems from the Fifth Amendment privilege against self-incrimination; it protects the recipient from incriminating himself, not another employee. See *Garrity*, 385 U.S. at 497. Moreover, the immunity is self-executing, and police departments generally have no authority to enter into binding immunity agreements because that power rests with prosecutors. See *State v. Spradlin*, 12 S.W.3d 432, 436 (Tenn. 2000). Even if a *Garrity* advisory form could confer immunity, immunity agreements are construed according to ordinary contract principles. See *State v. Howington*, 907 S.W.2d 403, 408 (Tenn. 1995). Taken in context, the second sentence of the form characterizes the holding of *Garrity* and its progeny rather than promises any restriction on the use of the statements. Any "promise"—which in reality serves to notify the employee of the existing immunity—comes in the third sentence, which specifies that the statements will not be used "against you." Accordingly, an employee could not rely on either the second or third sentence to avoid testifying at the criminal trial of another, nor could the defendant in such an action claim to be the intended third-party beneficiary of a covenant restricting the use of the statements. See *Owner-Operator Indep. Drivers Ass'n, Inc. v. Concord EFS, Inc.*, 59 S.W.3d 63, 68-69 (Tenn. 2001) (setting forth third-party beneficiary doctrine which requires, among other things, that third-party benefit must be intended, not merely incidental).

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

JAMES E. GAYLORD
Assistant Attorney General

Requested by:

The Honorable Amy P. Weirich
District Attorney General
201 Poplar Avenue, Third Floor
Memphis, TN 38103-1947