

HR/LR General Memo #2015-3
Tennessee and *Garrity* Warnings Used in Misconduct
Investigations (Former Policy #1411)

Issued 10/14/2009
Revised 03/10/2015
Authority Labor Relations

GENERAL GUIDANCE AND INFORMATION

INTRODUCTION AND BACKGROUND

Several years ago, a county attorney's office declined to prosecute two cases referred by state agencies. The agencies' interview advisories used in those cases required the subject employees to answer the investigators' questions under threat of discipline or discharge. The county attorney determined that the statements given in response to the interview advisories were compelled because of the agency's threat of disciplinary action, so the county attorney could not use those statements, or any evidence derived from those statements, in a criminal prosecution without violating the employee's right against self-incrimination. As a result, the county attorney declined to prosecute the cases. Therefore, while the employees were successfully terminated for cause from their employment, the interview advisory negatively affected the prosecutor's ability to prosecute the cases.

This memorandum addresses investigative interview advisories and provides instruction on their appropriate use. The two required forms are attached and include:

- Form A is a combined *Garrity*/Tennessee advisory for use with the **subject** of the investigation.
- Form B is a combined *Garrity*/Tennessee advisory for use with **non-subjects** of the investigation.

TENNESSEN WARNINGS AND GARRITY WARNINGS

Tennessee warnings are a state law requirement for government entities requesting private or confidential data from individuals. The term "Tennessee warning" is derived from [M.S.13.04, subd. 2](#), and requires that an individual receive notice of certain information when a government entity requests private or confidential data from that individual. A Tennessee warning must include:

- a) The purpose and intended use of the requested data;
- b) Whether the individual may refuse or is legally required to provide the requested data;
- c) Any known consequences from supplying or refusing to supply the requested data; and,
- d) The identity of other persons or entities authorized by law to receive the data.

Garrity warnings are an advisory that puts a government employee on notice that they must cooperate in an investigative interview under threat of disciplinary action for failure to cooperate. It further informs the employee that any information obtained during the compelled interview, and any evidence resulting from the information provided, cannot be used against him/her in any subsequent criminal proceedings. "*Garrity* warnings" arise out of the Fifth Amendment right under the federal Constitution against self-incrimination. In [Garrity v. New Jersey, 385 U.S. 493 \(1967\)](#), the U.S. Supreme Court determined that if information is obtained from public employees during an employment investigation under threat of discipline or discharge, that

GENERAL GUIDANCE AND INFORMATION

information is “compelled,” and cannot be used against the employee in later criminal proceedings.

Later Supreme Court cases hold that government employers may indeed compel employees to give statements, even ones that incriminate themselves, so long as the employee is assured that the statement (and any evidence derived from that statement) will not be used against the employee in criminal proceedings. This assurance allows government employers to question employees and require that they respond, while protecting the employees’ right against self-incrimination in a criminal proceeding.

Tennessee warnings must be given regardless of whether the investigatory interview is voluntary or compelled. *Garrity* warnings, however, should only be used when an agency wishes to compel (require under threat of discipline or discharge) an employee to respond to questions during an investigatory interview. Please note that if an agency chooses to conduct a compelled interview, the information obtained in that interview cannot be used in any subsequent criminal prosecution, and may affect a prosecutor’s decision whether to prosecute a case.

The investigative advisories below reflect the distinction between Tennessee and *Garrity* warnings by:

- Providing one constant set of information that addresses elements A and D of the Tennessee warning (why the government is collecting data and to whom it will be available), since this information does not change regardless of whether the interview is voluntary or compelled; and,
- Providing a line to initial indicating whether the interview is voluntary or compelled. The information on the form associated with the choice of “voluntary” or “compelled” fulfills the employer’s obligations under elements B and C of the Tennessee warning (whether the individual is required to provide the data and any consequences for providing or refusing to provide the data). For compelled interviews, the form also provides the information necessary to constitute a *Garrity* warning.

VOLUNTARY INTERVIEWS

For voluntary statements, the interview advisories provide:

Voluntary Statement. You are not legally required to provide any information during this interview, and no adverse employment action will be taken against you based on your decision not to cooperate. However, your failure to provide the information requested will necessitate that a decision be made without the benefit of hearing the information that you could provide. If you do provide information, it is the expectation that any information you provide will be truthful.

The state does not have the ability to impose (or threaten) disciplinary action against individuals who are not employees of the state. Accordingly, only the voluntary statement advisory should be checked for non-employees.

For the subject of the investigation, conducting a voluntary interview preserves the ability to use the statement, and any evidence derived from that statement, in a later prosecution for any crimes at issue. This is because when an employee is told that, a) his/her cooperation in an investigative interview is entirely voluntary, and b) no disciplinary action will be taken based on his/her failure to respond to questions during the interview, then *Garrity* issues are not implicated. Taking a voluntary statement does not involve coercion, and therefore does not raise issues about compelled self-incrimination.

For the subject of the investigation, the voluntary statement language puts the employee on notice that this is his/her opportunity to provide the employer with his/her side of the story and if the subject elects not to do so,

GENERAL GUIDANCE AND INFORMATION

then the employer will make its decision without the benefit of hearing what could have been provided. Additionally,

- An employee has no right to demand that he/she be given a *Garrity* warning. That decision rests solely with the employer.
- If an employee chooses not to give a voluntary statement; the employer has the option of making its employment decision with the information they have minus input from the employee, or reconvening the interview and compelling a statement. In the latter, please refer to the section below on “Compelled statement considerations.”

COMPELLED INTERVIEWS

For compelled statements, the interview advisories provide:

Compelled Statement. You are not legally required to provide any information during this interview. However, as your employer, we are requiring you to cooperate in this interview. This means that you will be subject to disciplinary action, including dismissal if you fail to truthfully, accurately, and fully answer the questions that are being asked of you during this interview. Because you are being required to provide information under the threat of disciplinary action, the information you provide, and any evidence resulting from the information you provide, cannot and will not be used against you in any subsequent criminal proceeding.

Compelled statement considerations

A common misunderstanding is that employers should consider issuing a *Garrity* warning (i.e., taking a compelled statement) only when there is a possibility of criminal charges against an employee. This is not necessarily true. If there is no realistic possibility of a criminal prosecution given the nature of the allegations, then there is no legal downside to administering a *Garrity* warning.

When there is no realistic possibility of criminal prosecution, then taking a compelled (*Garrity*) statement from either the subject of the investigation or employee-witnesses is a discretionary decision depending on the most appropriate and effective means of investigation. In deciding, it may also be appropriate to take into account such issues as past practices and understandings, and the history and context of labor relations within the agency.

The employer may use the compelled statement option with employee-witnesses as well. A *Garrity* warning assures the interviewee that the information given in an interview will not be used against the interviewee in a criminal prosecution. However, the information obtained from compelled statements by employee-witnesses may be used against the subject of the investigation in a subsequent criminal proceeding.

If the investigation involves potential criminal conduct, it is critical that the agency consult its MMB Labor Relations Representative to determine the appropriate course of action. The decision to administer a *Garrity* warning to any interviewees needs to be carefully considered. Depending on the circumstances, it may be appropriate for MMB staff and the agency to consult with appropriate prosecutorial authorities in determining an appropriate course of action.

GENERAL GUIDANCE AND INFORMATION

REQUIRING SIGNATURES

The interview advisory forms have signature blocks for the individual being interviewed and for a witness. Although agencies may ask individuals to sign an interview advisory as verification that the individual was provided the notice, a signature cannot be required. However, it is at the agency's discretion to request signatures or not, provided that all employees are treated similarly. In all cases, if you do not obtain a signature, you should document that the Tennessee warning notice was provided to the individual, that the individual was given ample time to read the notice or the notice was read to the individual, and that the individual was asked if any clarification was needed prior to questioning. If you do obtain an individual's signature, a copy of the signed notice should be provided to the individual.

Please share this information with all staff in your agency who conducts employment investigations. If you have questions, please contact your Labor Relations Representative.

FORMS AND SUPPLEMENTS

Form A

STATE OF MINNESOTA - INTERVIEW ADVISORY: SUBJECT OF INVESTIGATION

The purpose of this interview is to collect data regarding allegations of employee misconduct raised against you. The data you provide will be used by this investigator and others within the _____ agency whose job assignments reasonably require access to the data to determine whether misconduct occurred and the extent, if any, of appropriate disciplinary action. It may also be used in subsequent hearings or proceedings related to this matter. The following individuals/entities have a legal right to access this data:

- Your exclusive representative;
- Minnesota Management and Budget Labor Relations Division;
- Minnesota Attorney General's Office;
- Minnesota Legislative Auditor's Office;
- Arbitrator chosen to hear the case, if discipline occurs and is appealed to arbitration;
- State and federal courts;
- State and federal enforcement agencies, including but not limited to the Federal Equal Employment Opportunity Commission, Minnesota Department of Human Rights, and the U.S. Department of Labor;
- Appropriate licensing entities and agencies;
- Unemployment Division of the Department of Employment and Economic Development;
- Law enforcement agencies and prosecutorial authorities;
- Persons/entities named pursuant to court order;
- Persons/entities whom you authorize to receive the data; and
- Any other person or entity authorized by state or federal law.

In addition, if any disciplinary action is taken and becomes final, the nature of the final disposition of the disciplinary action, together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify employees who are confidential sources, will become public data.

If you are a "public official" as defined in [M.S.13.43, subd. 2\(e\)](#), (e.g., division head or higher levels of authority), upon completion of the investigation, or if you resign or are terminated from employment while the

FORMS AND SUPPLEMENTS

complaint or charge is pending, all data relating to the complaint or charge are public unless access to the data would jeopardize an active investigation or reveal confidential sources.

___ **Voluntary Statement.** You are not legally required to provide any information during this interview, and no adverse employment action will be taken against you based on your decision not to cooperate. However, your failure to provide the information requested will necessitate that a decision be made without the benefit of hearing the information that you could provide. If you do provide information, it is our expectation that any information you provide will be truthful.

___ **Compelled Statement.** You are not legally required to provide any information during this interview. However, as your employer, we are requiring you to cooperate in this interview. This means that you will be subject to disciplinary action, including dismissal if you fail to truthfully, accurately, and fully answer the questions that are being asked of you during this interview. Because you are being required to provide information under the threat of disciplinary action, the information you provide, and any evidence resulting from the information you provide, cannot and will not be used against you in any subsequent criminal proceeding.

Interviewee Signature Date

Witness Signature Date

Form B

STATE OF MINNESOTA - INTERVIEW ADVISORY: NON-SUBJECT OF INVESTIGATION

The purpose of this interview is to collect information regarding allegations of employee misconduct concerning an employee of the State of Minnesota. The data you provide will be used by this investigator and others within the _____ agency whose job assignments reasonably require access to the data to determine whether misconduct occurred and the extent, if any, of appropriate disciplinary action. It may also be used in subsequent hearings or proceedings related to this matter. The following individuals/entities have a legal right to access this data:

- Exclusive representative for the employee under investigation;
- Minnesota Management and Budget Labor Relations Division;
- Minnesota Attorney General's Office;
- Minnesota Legislative Auditor's Office;
- Arbitrator chosen to hear the case, if discipline occurs and is appealed to arbitration;
- State and federal courts;
- State and federal enforcement agencies, including but not limited to the Federal Equal Employment Opportunity Commission, Minnesota Department of Human Rights, and the U.S. Department of Labor;
- Appropriate licensing entities and agencies;
- Unemployment Division of the Department of Employment and Economic Development;
- Law enforcement agencies and prosecutorial authorities;
- Persons/entities named pursuant to court order;

FORMS AND SUPPLEMENTS

- Persons/entities whom you authorize to receive the data; and
- Any other person or entity authorized by state or federal law.

In addition, if any disciplinary action is taken and becomes final, the nature of the final disposition of the disciplinary action, together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify employees who are confidential sources, will become public data.

If the subject of the investigation is a "public official" as defined in [M.S. 13.43, subd. 2\(e\)](#), (e.g., division head or higher levels of authority), upon completion of the investigation, or if the public official resigns or is terminated from employment while the complaint or charge is pending, all data relating to the complaint or charge are public unless access to the data would jeopardize an active investigation or reveal confidential sources.

Voluntary Statement. You are not legally required to provide any information during this interview, and no adverse employment action will be taken against you based on your decision not to cooperate. However, your failure to provide the information requested will necessitate that a decision be made without the benefit of hearing the information that you could provide. If you do provide information, it is our expectation that any information you provide will be truthful.

Compelled Statement. You are not legally required to provide any information during this interview. However, as your employer, we are requiring you to cooperate in this interview. This means that you will be subject to disciplinary action, including dismissal if you fail to truthfully, accurately, and fully answer the questions that are being asked of you during this interview. Because you are being required to provide information under the threat of disciplinary action, the information you provide, and any evidence resulting from the information you provide, cannot and will not be used against you in any subsequent criminal proceeding.

Interviewee Signature Date

Witness Signature Date

Contacts	Agency Labor Relations Representative or MMB Labor Relations Representative
Statutory References	M.S. 13.04, subd. 2 M.S. 13.43, subd. 2(e)