Ballard Spahr LLP

Public Employers: Understanding Loudermill and Garrity Rights

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Private v. Public Workplaces

- Public sector employees have constitutional rights in the workplace that private sector employees do not.
- Among other things, public sector employees are protected from losing their jobs without due process and from being forced to incriminate themselves in criminal misconduct.
- It is critical to understand and observe employees' procedural rights during the investigative and disciplinary process – failure to do so will result in problems ranging from unfair labor practice charges to reversal of your disciplinary decision.

Workplace Due Process

- Notice of workplace conduct and performance standards and any breach of such standards.
- Hearing (*i.e.*, notice of misconduct charges and an opportunity to be heard) before any action is taken and notice of the time and place of that hearing.
  - Right not to self-incriminate
- Timely investigation and follow-up.
- Progressive system of discipline to address violations of standards.
- Unbiased review and appeals process for disciplinary action.

Effective Investigations and Discipline

- Many public sector employees have a property interest in their job and are therefore entitled to workplace due process. The property right is created by state statutes, regulations or policies that require "sufficient cause" before a public employee can be dismissed.
- The Loudermill pre-termination hearing is constitutionally required, but is also the employer's chance to fill in any gaps in the discipline case by conducting a thorough questioning of the employee who is under investigation.
- Public sector employees cannot be forced to incriminate themselves in internal investigations.
- The Garrity warning prevents use of self-incriminating statements in criminal proceedings, enhancing the employer's ability to get at the truth in internal investigations when criminal conduct is involved and the employee otherwise would stay silent.

Loudermill

- In Cleveland Board of Education v. Loudermill (1985), the Supreme Court held that employees with a property interest in their jobs are entitled to certain due process rights prior to termination.
- Two 6th Circuit cases involving "classified civil servants" under Ohio law were consolidated for appeal.
  - The first involved a security guard employed by the Cleveland Board of Education who was fired for failing to disclose a prior felony conviction for grand larceny on his job application.
  - The second involved a school bus mechanic employed by the Parma Board of Education who was fired for failing an eye examination.
- Ohio law stated that "classified civil servants" could be terminated only for cause and were entitled to post termination administrative review of the decisions.
- Loudermill claimed the law was unconstitutional on its face because it provided him no opportunity to respond to charges against him before he was fired, depriving him of liberty and property without due process.

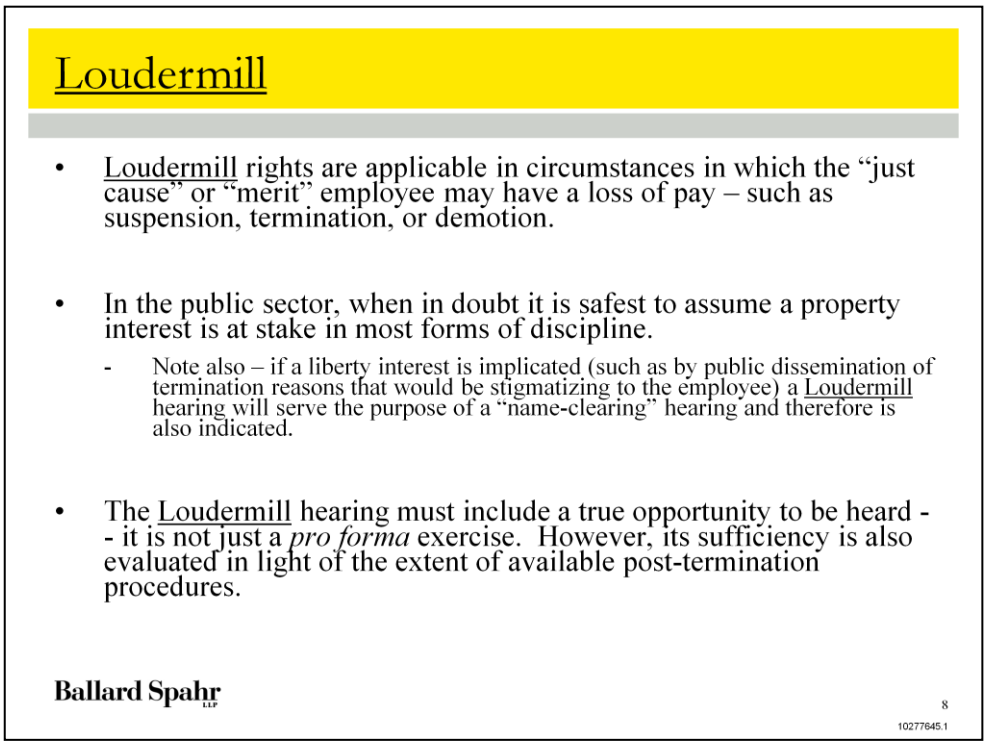
Loudermill

- The U.S. Supreme Court held that:
  - Tenured public employees "plainly" have a property interest in continued employment.
  - The scope of the property interest *is not determined by the procedures provided in the statute for its deprivation.*
    - The Due Process Clause provides that the substantive rights of life, liberty, and property cannot be deprived except pursuant to constitutionally adequate procedures.
    - Because substance and procedure are distinct, "'property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty."
  - Employees who have such a constitutionally protected property interest in their employment are entitled to "some kind of hearing" before being terminated.

Loudermill

- The U.S. Supreme Court held that:
  - The scope of the pre-termination hearing does not need to definitively resolve the propriety of the discharge, but should be an initial check against mistaken decisions – essentially a determination or whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

- The Loudermill rights include:
  - Oral or written notice of the charges
  - Explanation of the employer's evidence
  - Opportunity to be heard in response to the proposed action



Cox v. Roskelly, 359 F.3d 1105 (9th Cir 2004) – Spokane risk manager fired over the way he handled claims. Accusations include improper funneling of repair work to t friend's business, misrepresenting to the county that this business was the only one capable of handling the repairs. The reasons for the firing were place din his personnel file. When a newspaper then compelled the records under a record request and Washington's Public Disclosure law, a suit for violation of constitutional rights ensued. The 9th circuit held that a public employee has a constitutionally based liberty interest in clearing his or her name when stigmatizing information regarding the reasons for the termination is publicly disclosed. Even if the employer had no intention of public dissemination, the law permitting disclosure of the records caused an unconstitutional disclosure. So the public employee was entitled to a name-clearing hearing that involved notice of the charges and the opportunity to respond.

Loudermill in the 10th Circuit

West v. Grand County, 967 F.2d 362 (10th Cir. 1992)

- Legal secretary for Grand County DA's office who could be fired only for cause, curtailment of work or lack of funds challenged her dismissal through a reduction in force.
- She did not get a formal hearing but did have notice of her potential dismissal during a brief meeting with her new boss, was aware that her job likely was not going to be retained, and did have an opportunity to discuss her rights as a permanent employee with her new boss and the county commissioners. After discharge, she got a grievance hearing before the commissioners.
- Held:
  - Grand County's own merit system as delineated in its personnel policies and procedures manual, had a restrictive discharge policy and that gave West a property interest in continued employment that could not be curtailed without constitutional protections.

Loudermill in the 10th Circuit

West (cont.)

Held:

- Standards for a pre-termination hearing are not stringent because of the expectation that a more formal post-termination hearing will remedy any resulting deficiencies.
- Loudermill was met: The totality of the procedures and opportunities which the employer afforded plaintiff were sufficient to satisfy constitutional requirements. Plaintiff was not fired out of the blue. Plaintiff was not fired for reasons that she did not know. Plaintiff was not fired without being given the opportunity to present her side of the story.

Loudermill in the 10th Circuit

Hulen v.Yates, 322 F.3d 1229 (10th Cir. 2003)

- After collaborating with others to try to get another tenured faculty member fired, a tenured faculty member at Colorado State University got transferred from the Accounting Department to the Management Department in which he was not qualified to teach courses, which diminished his ability to attract research funds, publish, get salary increases, etc. He aired his concerns to his Dean several times before he was transferred. He filed grievances after the transfer. He claimed his transfer was without due process.
- Held:
  - The general rule: there is no protected property interest implicated when an employer *reassigns* or *transfers* an employee absent specific statutory provision or contract term to the contrary.

Loudermill in the 10th Circuit

Hulen (cont.)

- Held:
  - The general rule is not absolute if a professor can point to a specific contractual provision and surrounding circumstances establishing a property interest – here, the terms and conditions of his appointment, the Faculty Manual, and custom and practice established a property interest.
  - Loudermill was met: Hulen knew of the impending transfer. He wrote two memoranda and a letter outlining his concerns. His lawyer also wrote a letter. He had an extensive formal grievance process post transfer.

Loudermill in the 10th Circuit

Montgomery v. City of Ardmore, 365 F.3d 926 (10th Cir. 2004)

- Police officer went on extended medical leave beginning in July 1997. In May 1998 he was told he would be welcome back once he had a full medical release. On August 24, 1998, he called the Deputy Chief of Police and asked about returning to work in September. The Deputy told him he would not be permitted to return to work and that he should talk to the new Police Chief. He called the new Chief who told him that his rank "had been done away with" but that he had not been terminated.
- Internal documents dated September 24, 1998 showed that he was terminated effective August 15, 1998, nine days before his conversations with the Deputy and the Chief. Montgomery claimed denial of due process.

Loudermill in the 10th Circuit

Montgomery (cont.)

- Held:
  - Loudermill test was NOT met. The August phone calls did not provide him with an adequate pre-termination hearing. He had already been terminated when he talked with his superiors on that day. He did not have notice of the charges, a summary of the evidence and an opportunity to respond BEFORE he was fired.
  - Post-termination remedies, no matter how elaborate, do not relieve the employer of providing the minimal pre-termination procedural protections noted in Loudermill.

Loudermill in the 10th Circuit

Kirkland v. St. Vrain Valley School District NO. RE-1J, 464 F.3d 1182 (10th Cir. 2006)

- Assistant Superintendent of Auxiliary Services overseeing the District's Finance Department discovered his staff had reported a budget surplus when in fact there was a significant deficit. He entered an agreement to resign with the District Superintendent. That agreement was rejected by the District Board, which suspended him without pay and then fired him. He claimed his suspension was without due process.

Loudermill in the 10th Circuit

Kirkland (cont.)

- Held:
  - Loudermill was met. Assuming that a suspension without pay amounts to a deprivation triggering some degree of due process protections, Kirkland's lack of a pre-suspension hearing was not unconstitutional because
    - (1) he had a right to pursue a post-suspension grievance immediately following suspension,
    - (2) the likelihood that the suspension was baseless and unwarranted was reduced by the level of investigation done before the suspension, and
    - (3) the District had a significant interest and immediate need to have someone other than Kirkland analyze the situation and provide the Board with accurate information on the financial condition of the District.

Loudermill in the 10th Circuit

Riggins v. Goodman, 572 F.3d 1101 (10th Cir. 2009)

- Police officer Riggings had a psychiatric episode in May 2004, was hospitalized, placed on a mental health hold, placed on administrative leave, and relieved of his duties. After a psychologist and a psychiatrist expressed some concern about returning him to work, the police chief decided Riggins was unable to resume his duties, and began the process to terminate Riggins.
- The Chief sent a memo to the HR Director and the City Manager recommending termination and giving reasons why, which they approved. The Chief then sent Riggins a letter advising him of the decision to terminate his employment effective 10 days later.
- The letter gave 5 reasons for the termination and told Riggins he would remain on administrative leave without pay until the final outcome of any hearings he may request.

Loudermill in the 10th Circuit

Riggins (cont.)

- The letter said Riggins had the right to request a hearing with the police chief and the right to appeal the police chief's decision both to Human Resources and to the City Manager. Riggins claimed a lack of due process in his termination.
- Held:
  - Loudermill requires process before *actual deprivation* of significant property interest – that means process before the actual termination occurs, not process before *the initial decision* or recommendation to terminate is made.
  - Loudermill was met. The initial letter did not terminate him – it made clear that it was a proposed decision, what it was based upon, and that there was an appeal process before it would become final.

Loudermill in the 10th Circuit

Riggins (cont.)

- Also, with respect to the post-termination hearing:
  - The tribunal must be impartial.
  - The role of city employees in the process with some knowledge of the matter does not ordinarily create concern. An administrative tribunal member is not disqualified because that member has ruled strongly against a party in a prior hearing or because he or she may have participated in the initiation of the proceedings. A substantial showing of personal bias is required to disqualify a hearing officer or tribunal.

Loudermill in the 10th Circuit

Riggins (cont.)

- Personal bias may be shown by prior statements going to the merits or animus that establish the decision-maker cannot be fair. Bias can be established where decision-makers publicly state an intention to terminate prior to the hearing. That the same individuals made or approved the initial recommendation to terminate him and then presided over the hearings is not enough to establish a constitutional violation.

Loudermill in the 10th Circuit

Lauck v. Campbell County, 627 F.3d 805 (10th Cir 2010)

- Sheriff deputy and lead officer was *transferred* by the Sheriff over to the Civil Process Division at the same pay and rank, but without the lead officer rank. He had 2 separate meetings with superiors about it at which the decision and the reasons for it were discussed. Lauck said "no thanks," did not show up, and claimed *constructive discharge*. He also claimed he was denied due process in the transfer and in the constructive discharge.
- Held:
  - There is no property interest implicated when an employer reassigns or transfers an employee absent a specific statutory provision or contract term to the contrary, which was not present here.

Loudermill in the 10th Circuit

Lauck (cont.)

- Held:
  - Procedural due process in the constructive discharge context is peculiar and requires careful analysis. The claim has 3 elements:
    - (1) a property right was violated – *i.e.*, the resignation actually was forced and therefore was a constructive discharge;
    - (2) *mens rea* -- the employer knew or intended that such intolerable working conditions were being imposed on the employee; and
    - (3) denial of the necessary procedure – no appropriate hearing was conducted.

Loudermill in the 10th Circuit

Merrifield v. County Commission for County of Santa Fe, 654 F.3d 1073 (10th Cir. July 2011)

- Youth Services Administrator sent a sexually graphic image to a subordinate. He was placed on administrative leave with pay. One month later the County's Director of Corrections sent him a letter stating he was recommending Merrifield's termination based on an internal investigation that revealed Merrifield had sent pornographic images to a subordinate employee, had participated in a sexually inappropriate environment at the facility, had participated in other improper behavior among staff at the facility, and had been involved in failings as a supervisor and improper conduct in his supervisory dealings with employees.

Loudermill in the 10th Circuit

Merrifield (cont.)

- Merrifield got a lawyer, the lawyer demanded copies of all policies, protocols, or memoranda that Merrifield had violated. The County supplied various policies on cell phone use, sexual harassment and supervisor responsibilities.
- A pre-termination hearing was held that Merrifield attended with his lawyer and after which he was fired. He sued claiming denial of due process in the pre-termination process due to inadequate notice.

Loudermill in the 10th Circuit

Merrifield (cont.)

- Held:
  - Assuming, but not holding, that the letter was insufficient, the necessary notice may come at the hearing itself.
  - "Nothing in Loudermill suggests, nor do we hold, that a public employee is entitled to some type of pre-notification notice of the charges against her or him. Likewise Loudermill does not imply that in conducting the pre-termination hearing, there must be a delay between the notice and the opportunity to respond accorded to the public employee." *citing* Powell v. Mikulecky, 891 F.2c 1454, 1459 (10th Cir. 1989).

Loudermill in the 10th Circuit

Tilley v. Maier, unpublished (10th Cir. August 2012)

- Tenured assistant professor developed health problems and worked from home. On December 5, 2008, Kansas State University sent her a letter stating her sick and vacation leave would be applied to her absences. In between, there were some communications between KSU and Tilley's doctor.
- On March 30, 2009, KSU sent Tilley a letter that her sick and vacation leave were exhausted and she was on unpaid status and requesting that she contact the letter's author to schedule a meeting regarding her intentions concerning her return to work.
- On April 1, 2009 Tilley's lawyer sent a letter to the KSU Attorney's office demanding replenishment of Tilley's sick and vacation time.

Loudermill in the 10th Circuit

Tilley (cont.)

- On April 17, KSU sent Tilley a letter stating it appeared she had abandoned her position and had discontinued her communications with her employer. The letter indicated that she had not responded to phone messages or to the March 30 letter, and that KSU was therefore treating her actions as a resignation and were preparing paperwork accordingly.
- On April 20 KSU processed her resignation. She sued claiming denial of due process in that her employment was classified as abandoned without any notice to her.

Loudermill in the 10th Circuit

Tilley (cont.)

- Held:
  - The letters put Tilley on notice that KSU did not consider her to be actively working, that she had exhausted all of her leave, and that KSU needed further clarification from the doctor regarding her medical condition and whether she could perform the essential functions of the job.
  - The March letter gave her an opportunity to be heard on these matters.
  - When Tilley did not respond, the next letter gave her explicit notice that her position was being deemed abandoned. She did not rebut that assertion before her resignation was processed.
  - Due process does not require the employer to have a delay between the notice and the opportunity to respond.

Loudermill in the 10th Circuit

Collvins v. Hackford, unpublished (10th Cir. April 2013)

- Boiler inspector issued certificates of inspection, permits and invoices to schools and school districts for several boilers that had not been inspected, or had been taken out of service several years earlier. Upon learning of this, the Division Director sent Collvins a letter informing him that he was suspending his boiler inspector certification. Collvins claimed his due process rights were violated by the lack of a hearing before the suspension.
- Held:
  - Due process is flexible and calls only for such procedural protections as the particular situation demands.
  - In matters of public health and safety, the government must act quickly.

Loudermill in the 10th Circuit

Collvins (cont.)

- The 10th Circuit Court of Appeals has held that public health and safety reasons justified the lack of a pre-deprivation hearing in several circumstances:
  - When the government closed a restaurant for improper use of pesticides;
  - When the government suspended an employee for errors causing substantial budget deficit;
  - When the government quarantined animals suspected to have rabies;
  - When the government investigated a child care center for claims of abuse.
- This situation is like those – public safety's need for a prompt suspension outweighed Collvins' right to a pre-suspension hearing.

Loudermill in the 10th Circuit

Collvins (cont.)

- Collvin's inspections as a whole appeared to be unreliable. Considering the repeated errors despite retraining opportunities immediate suspension was warranted based upon public safety concerns.
- It does not matter whether in reality his actions actually jeopardized public safety.
- "The process one is due is not dependent on whether the government was right or wrong in the particular case but on whether, in general, constitutional norms require particular procedures to balance private and public interests. It only matters that due process does not require a pre-deprivation hearing when such issues are objectively at play."

Loudermill in the 10th Circuit

Koessel v. Sublette County Sheriff's Dept, unpublished (10th Cir. May 2013)

- Deputy Sheriff suffered a stroke in December 2007 and went on administrative leave. In April 2008 he returned to work in a temporary office job. In August 2008 he was cleared for full time work, but no overtime. He returned to a desk assignment, but was authorized to make traffic stops on his daily commute.
- Reports came in that he got flustered during a traffic stop for his inability to remember a word, that he lost his temper on the job, and that at least once he left early for blood pressure problems.
- The Sheriff placed him on administrative leave in April 2009 and ordered an IME.

Loudermill in the 10th Circuit

Koessel v. Sublette County Sheriff's Dept, unpublished (10th Cir. May 2013)

- The IME doctor concluded that neurologically Koessel was able to work but there were potential problems to cognitive functioning that may have resulted from the stroke and should be investigated. The doctor recommended evaluation by a neuropsychologist.
- The neuropsychologist found Koessel's scores on a standard psychological test were unchanged from before the stroke, but that his symptoms of mild to moderate fatigue, episodes of lightheadedness an episodes of emotional disinhibition (weeping) could interfere with some of his patrol officer duties. He recommended Koessel be placed in a low stress position in which he did not have regular contact with the public.

Loudermill in the 10th Circuit

Koessel v. Sublette County Sheriff's Dept, unpublished (10th Cir. May 2013)

- Kossel returned from leave on May 20, 2009 into a temporary position as an assistant to the Emergency Management Coordinator. On June 17, 2009, he was informed that funds for that position had not been approved.
- On August 12, 2009 Sheriff Bardin sent him a letter stating that he was terminating his employment based on the April 2009 medical reports that he was not physically fit to perform the duties of a deputy sheriff, and due to the unavailability of positions that he was medically cleared to perform. The letter said he had 5 days to file a written request for hearing to dispute the termination.
- Koessel did not file a request and he was terminated. Koessel claimed he was fired by virtue of the letter, without due process.

Loudermill in the 10th Circuit

Koessel (cont.)

- Held:
  - This letter was not itself a termination – it mentioned impending discharge, indicated that immediate termination would occur only if Koessel failed to request a hearing.
  - Loudermill was met. The letter gave him notice of the pending termination and of the reasons for it:
    - the doctor had concluded he was not physically fit to perform the duties of the job
    - there were no positions in the Sheriff's Department that he could perform
    - safety reasons and to prevent injury to himself and members of the public

    The letter also gave him an opportunity to contest the decision.

Loudermill Hearing

- The Loudermill pre-termination due process hearing requires a meeting with the affected employee before or during which s/he is advised of the allegations against him/her.
- The employee is given an opportunity to tell his or her side of the story before an employer takes any action to terminate employment.
  - A similar opportunity should be considered in connection with suspensions or transfers/demotions, depending on the circumstances.
- The public employer must make this hearing a *pre-determination* hearing (*i.e.* decision must not have already been made).
- The employee does not have to tell his side of the story, he just has to be given the opportunity
- The hearing provides a great opportunity for the employer to dig deeper into the facts, uncover additional information, and make the right decision, to increase its chances of prevailing in any future grievance, arbitration or other challenge.

Loudermill Hearing – Best Practices

- DO notify the employee well in advance of the date and time of the meeting so s/he has sufficient time to consider the accusations and prepare a response.
- DO include in the notice the reasons the proposed discipline is being recommended, the range of discipline being considered, and the fact that the hearing is the employee's opportunity to provide information to impact the decision.
- DON'T let the Loudermill hearing be the first time you hear the employee's side of things. Before you propose disciplinary action you should have thoroughly investigated the situation which included an interview with the accused.
- DO carefully read any investigation file before the Loudermill hearing, so you can identify any inconsistencies in the evidence as you listen to the employee's statements, and you can clarify those inconsistencies before you make the disciplinary decision.

Loudermill Hearing – Best Practices(cont.)

- DON'T feel compelled to permit the employee to have legal counsel or other representation present during the hearing (absent CBA).
- DO be respectful toward and considerate of the employee. Make the employee feel comfortable, explain the process at the beginning of the hearing, make eye contact with the employee while s/he talks, understand that the process may be emotional for the employee.
- DON'T engage in behavior that indicates agreement or disagreement with the employee's position – don't nod, frown, smirk, etc.
- DO keep your own emotions in check – remain professional and business-like, don't take what is said as a personal affront, practice good listening skills, and take good notes.
- DO ask clarifying questions if necessary to make an informed decision. But DON'T interrogate or cross-examine the employee. This is not a formal hearing and the employee is not on trial.

Loudermill Hearing – Best Practices (cont.)

- DON'T feel you must permit the calling of witnesses. If the employee wants to present witnesses, ask instead what the witnesses would say, and if it appears relevant, conduct additional witness interviews after the hearing (and provide an additional Loudermill hearing if those witnesses provide new reasons or evidence that you then would rely on to discipline the employee).
- DO follow-up on additional information that the employee presents that is new and could be material, prior to making your final disciplinary decision.
- DON'T feel rushed. Take the time you need to make the best final disciplinary decision that you can. You do not have to make it at the close of the hearing, or even on the same day. Make it only after you have fully considered what the employee has said and done any necessary follow-up.

Garrity Rights

- Garrity rights come from the 1967 case Garrity v. New Jersey. In that case, an investigation was being conducted into alleged ticket-fixing by police officers. The officers were told that they had to answer questions during the investigation or face discharge for insubordination. The statements made by the officers were then used against them in subsequent criminal prosecutions. The officers challenged their convictions.
- The U.S. Supreme Court found that the incriminating testimony was coerced, which violated the Fifth Amendment, and could not be used in subsequent criminal proceedings:
  - "The choice imposed on petitioners was one between self-incrimination or job forfeiture. Coercion that vitiates a confession ... can be 'mental as well as physical'; 'the blood of the accused is not the only hallmark of an unconstitutional inquisition.'" ... Subtle pressures ... may be as telling as coarse and vulgar ones. The question is whether the accused was deprived of his 'free choice to admit, to deny, or to refuse to answer.' ..."
- Garrity and a number of related cases have made clear that a public sector employee cannot face "substantial economic penalty" for refusing to waive his or her privilege against self-incrimination.

Garrity Rights

The Garrity rule has 3 essential components:

1. Whenever a public employee is required to give statements as part of a disciplinary investigation, the 5th Amendment privilege against compulsory self-incrimination will apply, assuming criminal misconduct is at issue.
2. If the employee is compelled to give a statement during a disciplinary investigation, neither the statement nor the fruits of the statement can be used against him in a later criminal prosecution.
3. The public employer must warn employees when it compels them as a condition of employment to give statements that might incriminate them, and those warnings must promise the employee that neither the employee's statement nor the fruits of the statement can be used to criminally prosecute the employee ("Garrity warning").

If no criminal conduct is implicated in the investigation an employee can be compelled to answer and no Garrity warning needs to be given.

Reasons to Investigate

- Sometimes, municipalities confronted with on-duty or off-duty criminal misconduct by employees "freeze up" and wait for the conclusion of criminal proceedings.
- Waiting for conclusion of criminal proceedings is often not the best strategy as it can result in an employee sitting out of work on suspension for a year or more.
- Waiting for a criminal verdict under the "beyond-a-reasonable-doubt" criminal standard can also put you in the awkward situation of facing a "not guilty" verdict or withdrawal of charges even though all of the evidence indicates that the employee committed a crime.
- And even if no crime was committed, the employee often clearly did violate disciplinary codes of conduct under the "more-likely-than-not" civil standard.

Garrity Warning

- Pubic employers often just want to conduct their administrative investigations to determined whether misconduct has occurred and to decide what disciplinary action, if any, is appropriate. They can't do that effectively if employees won't talk.
- To enable a full investigation and to ensure they do not violate their employee's constitutional rights, they may give a Garrity warning:
  - "1. The purpose of this questioning is to obtain information, which will assist in the determination of whether administrative disciplinary action is warranted.
  - 2. I am not questioning you for the purpose of instituting criminal proceedings against you.
  - 3. During the course of this questioning, even if you do disclose information which indicates that you may be guilty of criminal conduct in this matter, neither your self-incriminating statements, nor the fruits thereof, will be used against you in any criminal proceeding.
  - 4. I am ordering you to answer the questions that I direct to you concerning this matter.
  - 5. If you refuse to answer my questions, you will be subject to immediate dismissal."

"Garrity Warnings", www.garrityrights.org/garrity-warnings.html, October 13, 2013

Garrity Warning

- Having given this warning, two things might happen:
  1. The City might order the employee to cooperate, and tell him is he refuses to answer, he will be fired. If the employee admits to criminal misconduct, the City can discipline him for violating City policy, but his statements cannot legally be used as evidence against him in a prosecution.
  2. The City might order the employee to cooperate, and tell him is he refuses to answer, he will be fired. If the employee refuses to answer questions, asserting a 5th amendment privilege, the City may lawfully terminate him for insubordination.

Garrity Warning

- The City might elect, however, to handle it differently:
  1. The City might advise the employee that his participation is completely voluntary and that he can refuse to answer questions at any time, without penalty. And that as a consequence, his answers may be used against him in a criminal proceeding. If the employee admits to criminal activity, he is terminated for violation of City policy and his admission is turned over to law enforcement and is used to prosecute.
  2. The City might advise the employee that his participation is completely voluntary and that he can refuse to answer questions at any time, without penalty. And that as a consequence, his answers may be used against him in a criminal proceeding. If the employee refuses to answer asserting 5th Amendment rights, the City cannot take adverse action against him for failing to answer. It can, however, still discipline him if other compelling evidence demonstrates that misconduct has occurred.

Interesting Garrity Questions

- What if an outside agency is doing the investigating?
  - If the employer does not have clear policies and procedures that require severe discipline or termination for en employee's refusal to participate in such investigations, the employee likely is not protected by Garrity because his job is not being threatened.
- Do you have to tell the employee about their Garrity rights?
  - In a few jurisdictions, yes – Illinois, Indiana, Wisconsin, California -- and in others maybe – Connecticut, New York, Vermont. In the remaining states, no.
- What if employment threats short of termination are used to get the employee to talk?
  - They may be successful, and terminations based on employee's statements made under such threats are unlikely to have violated the employee's constitutional rights. Employees who give statements under threat of things that would not constitute substantial economic injury are not "compelled" to talk and are not protected by Garrity. The standard for compulsion differs by jurisdiction.

Interesting Garrity Questions

- Are Garrity rights automatically triggered or do they have to be invoked?
  - They are automatically triggered by the municipality ordering the employee to answer questions, if those questions can incriminate the employee, and if there is a severe penalty for refusing to answer.
  - Once they are triggered, the employee cannot "take the Fifth" and refuse to answer questions, because as a matter of law there is no threat of self-incrimination.
- Is threatened "disciplinary action up to and including termination" enough of a threat to trigger Garrity rights?
  - Maybe, maybe not. It depends on your jurisdiction. Maine, Massachusetts and New Hampshire are very likely to find Garrity was not triggered. Illinois, Florida, New Jersey, Idaho, Minnesota, Colorado, and Wisconsin are somewhat likely to agree with them. Utah has not ruled on this.

Interesting Garrity Questions

- What if the employee lies while under Garrity protection?
  - If the employee is making statements under oath or hase some other legal obligation to respond truthfully, then an employee who makes false statements under Garrity protection can be prosecuted for making false statements and those statements can be used against them in that prosecution.
- Does Garrity apply to breathalyzer tests, drug tests, etc.?
  - No. Garrity only applies to "communications" or "testimony", not to real or physical evidence.

D. Utah and Utah Law on Garrity

Kelly v. Salt Lake City Civil Service Commission, 8 P.3d 1048 (Ut. Ct. App. 2000)

- Police officer terminated after investigation into her intoxicated conduct that included inappropriate phone calls to dispatch. Firing was based on the gravity of her latest misconduct, coupled with her employment history of numerous tardies and absences, and the need to protect the citizens of Salt Lake City.
- Garrity was mentioned in connection with a discussion of Kelly's dishonesty: "She was not truthful with her superior about why she was not at work, and she lied again after being given a Garrity warning by her supervisor," and was explained in footnote 9 as follows: "A Garrity warning allows a police officer's superiors to order an officer to provide information during an investigation, and requires the officer to comply, but provides that any information elicited by such order cannot be used against the officer in a subsequent criminal prosecution."

D. Utah and Utah Law on Garrity

Harmon v. Ogden City Civil Service Commission, 171 P.3d 474 (Ut. Ct. App. 2007)

- Fire department captain was fired after an investigation showed he had engaged in various lewd actions. He appealed the decision as too harsh, asserted his constitutional rights were violated, and claimed that his failure to respond to specific inquiries by the hearing panel was an invocation of Garrity and that the panel failed to recognize or address his right to invoke his privilege to remain silent.
- Held:
  - "Garrity stands for the proposition that statements made by a public employee under threat of removal cannot be used subsequently in a criminal proceeding." (*citing* Kelly, note 9).
  - "Garrity does not protect public employees from having to answer questions concerning their conduct at their own termination hearings in a noncriminal investigation. Therefore, the Commission was not required to address Garrity in the context of Harmon's actions, and no procedural due process violation occurred." *

*Note: inaccurate articulation of the Garrity standard – it can apply in a noncriminal investigation so long as the conduct would in fact be criminal.

D. Utah and Utah Law on Garrity

Dinger v. Department of Workforce Services, 2013 Ut App. 59 (Ut. Ct. App. March 7, 2013)

- UTA police officer was denied unemployment benefits on the ground he was terminated for just cause. He had been fired after refusing to answer questions in an internal investigation after being given a Garrity warning.
- The ALJ who considered the appeal of the denial of unemployment benefits determined that the benefits were improperly denied because Dinger's refusal to answer questions was reasonable and did not amount to insubordination. The ALJ found that Dinger had little notice of the investigation meeting, had no prior notice that he would be given a Garrity warning, was not told his job was in jeopardy or that he would be fired if he refused to answer.
- UTA appealed the ALJ's decision to the Utah Labor Commission Appeals Board which reversed it.

D. Utah and Utah Law on Garrity

Dinger (cont.)

- Dinger then appealed to the Utah Court of Appeals, claiming in part that the Board exceeded the bounds of reasonableness and rationality when it determined that his refusal to answer questions in the Garrity interview constituted insubordination.
- The Court stated in dicta:
  - "Police departments routinely engage in the practice of advising officers who are the subject of an internal investigation that their answers will not be used in any criminal prosecution, while also warning the subject of the investigation that the refusal to answer questions may be grounds for termination. Here there is no evidence to suggest that Dinger was under investigation as a result of any suspicion that he was engaged in criminal activity. Thus, he is correct that the Garrity warning was likely unnecessary. ... However, he has pointed us to nothing that would prevent UTA from issuing the Garrity warning in the unlikely event that the interview uncovered unexpected criminal activity."

Common Employer Discipline Errors

- Failure to slow down investigation and follow-up with further investigation when investigation reveals additional misconduct, lies or cover-up.
- Failure to follow-up during Loudermill hearing if further potential lies or misconduct are revealed and to schedule additional Loudermill hearing(s) to give employee adequate notice and opportunity to rebut if further investigation reveals new evidence upon which the decision may be based, and to further confront the employee with evidence of further misconduct or lies made at previous hearing.
- Failure to recognize that multiple interviews of the employee can be had, and that multiple Loudermill hearings can be scheduled, to enable full questioning of the employee prior to a final disciplinary decision being made.

Common Employer Discipline Errors (cont.)

- Failure to amend/add disciplinary charges if further misconduct is revealed.
- Failure to confront employee regarding any lies/ misstatements and have employee either admit lies or provide his or her explanation.
- Failure to ask employee to provide any and all explanations or excuses/mitigating circumstances at the interview or the Loudermill hearing so that employer is not blind-sided with excuses at a later hearing.
- Failure to properly address potential criminal conduct.
- Failure to promptly proceed with a disciplinary investigation while appropriately dealing with any criminal issues.

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THANK YOU!

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