The Investigation:

Where Discipline Cases Are Built (Or Broken)

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UNION REPRESENTATION IN DISCIPLINARY INVESTIGATIONS

Weingarten Rights & Investigatory Interviews



How a 1975 dispute over whether a food service employee paid full price for 4 pieces of chicken ($1.00) turned into of the most important principles of labor law.

Introduction To *Weingarten*

- Origin: 1975 case involving a lunch counter worker accused of stealing chicken.
- The Supreme Court held that employees have a right to union representation during investigatory interviews.
- The case established the principle that the NLRA protects employees from coercive questioning by balancing the power dynamics.

The *Weingarten* Rule

- The *Weingarten* holding: An employee has the right under Section 7 of the National Labor Relations Act to request the presence of a union representative during an investigatory interview by the employer that the employee reasonably believes could result in disciplinary action.
- The basis for the Court's decision: The NLRA is designed to eliminate the "inequality of bargaining power between employees and employers."
- But why?

NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

The *Weingarten* Rule

> A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts and save the employer production time by getting to the bottom of the incident occasioning the interview.

***National Labor Relations Board v. J. Weingarten*, 420 U.S. 251 (1975).**

The *Weingarten* Rule: A Restatement



What Triggers *Weingarten*?

- The interview must be investigatory in nature — *i.e.*, it seeks to uncover facts about possible misconduct.
- The employee must reasonably believe that the interview could lead to discipline.
- The employee must clearly request representation—this right is not automatic or implied.

Who Is The Employer?

- *Weingarten* applies when the employer, or someone acting on the employer's behalf, requires the employee to answer questions.
- Even if the questions are asked by outside actors like a fitness evaluator or prosecutor, the union right applies if ordered by the employer.
- The key is whether the employer has directed the inquiry or created the obligation.

What Is "Questioning?"

- Any attempt to elicit facts or statements from the employee can qualify as 'questioning.'
- Being ordered to write a report may trigger the right if the purpose is to collect information that could lead to discipline.
- Routine conversations or updates without investigative intent generally do not qualify.

What Is "Questioning?"

California School Employees Assn (Cal. PERB 2018) (PSLN March 2019)

- *Weingarten* protections apply where employer ordered employee to write a report as opposed to participating in an interview.

Teamsters Local 117 v. Washington State Department of Corrections, (Wash. PERC 2024)(PSLN Dec 2024)

- *Weingarten* protections did not apply where employer cancelled supervisory conference because union steward planned to attend, then issued employee a negative performance evaluation.

When *Weingarten* Doesn't Apply

- Meetings limited to performance counseling, training, or job updates typically do not trigger *Weingarten*.
- If the purpose is to arrest the employee and no questions are asked, rights do not attach.
- Employer statements denying disciplinary intent may reduce applicability — though context still matters.

When *Weingarten* Doesn't Apply

Madison County Deputy Sheriff's Association (PSLN Oct 2023)

- Deputy Sheriff refers to his Sergeant as "a f---king asshole" to a uniform vendor. Ordered to meet with the Sgt and their Lieutenant, who impose a letter of counseling. Dispute over whether Q&A.
- "Representation will not attach to verbal interactions in a meeting or discussion with employees that is limited to counseling, training, evaluations, and updates on job assignments, but can attach when a meeting or a discussion metamorphosizes into questioning about an employee's conduct or omissions in a context that makes it reasonably appear that the employee may be a potential subject or target of discipline."

When *Weingarten* Doesn't Apply

State of New Jersey (N.J. PERC ULP Director 2022) (PSLN May 2022)

- *Weingarten* does not apply where the purpose of a meeting (unbeknownst to the employee) is to arrest the employee so long as no questioning occurs during the arrest.

Labels Don't Matter

- Employers may label a meeting as non-disciplinary or as involving a 'witness,' but labels don't control.
- What matters is the employee's reasonable perception of discipline risk based on tone, setting, and questions.
- Courts have repeatedly held that substance trumps form when evaluating representation rights.

Labels Don't Matter

We have consistently rejected the notion that an employee's right to a union representative at a given meeting hinges on the label the employer attaches to the meeting. Thus, whether characterized as a conference, interview, meeting, investigation, or interrogation - whether disciplinary or investigatory - the label does not determine an employee's *Weingarten* right. In the same manner, the classification attached to an employee as a witness or subject is not determinative of that employee's *Weingarten* right. Otherwise, a public employer could simply classify an employee as a 'witness' and deny her right to a union representative under *Weingarten*.

Bardelas v. City of Doral (PSLN October 2019)

Labels Don't Matter

Fraternal Order of Transit Police (PLRB ALJ 2020)(PSLN April 2020)

- *Weingarten* did not apply where employer assured police officers who were subject to interviews that no discipline would result from the meetings.
- Police Chief told the officers that they were in no jeopardy of discipline and that the inquiry was focused solely on the actions of the other officers.

Reasonable Belief Of Discipline

- A belief is reasonable if a typical employee would perceive the risk of discipline based on circumstances.
- Factors: seriousness of allegations, who's conducting the interview, whether prior discipline is involved.
- Being told one is a 'witness' doesn't preclude rights if questioning becomes accusatory.

Reasonable Belief Of Discipline

Canovas v. Miami-Dade County Board of County Commissioners, (Fla. PERC 2022)(PSLN July 2022)

- *Weingarten* does not apply where purpose of meeting was to discuss status of project and identify revised deadlines.
- Employee's multiple requests for representative denied BUT employer provided multiple assurances that discipline was not forthcoming.
- **P.S.:** Employee subsequently disciplined for her conduct during the non-investigatory meeting.

Waiver Of Rights

- Employees can waive their rights, but the waiver must be clear, unmistakable, and voluntary.
- Answering questions without a rep after being told "you don't need one" does not automatically equal waiver.
- Best practice: always restate the request and document any denial or confusion.

Waiver Of Rights

Brett Essick and City of Elgin (Ill. Lab. Rel. Bd., 2024) (PSLN August 2024)

- *Weingarten* not waived where officer requested union rep but then answered questions after Chief told him that be didn't need a rep.
- "You can have whoever you'd like in here, but you are still going to have to make the phone call."
- Employee's status as 10-year officer and his failure to repeat his request do not constitute waiver of the right.

Routine Interactions Are Exempt

- Normal supervisor check-ins or performance discussions aren't covered — even if critical.
- Courts distinguish between casual interactions and interviews meant to assign blame.
- Supervisors must avoid mixing performance feedback with hidden investigations.

Routine Supervisor-Subordinate Exchanges

Lozano v. City of Los Angeles (PSLN March 2022)

The " " case.

Weingarten does not apply to "normal exchanges between supervisors and subordinates," even though a supervisor might be "uneasy" about the employee's conduct.

Image Credit: DroidLife

Combining *Weingarten*, *Garrity*, *Miranda*

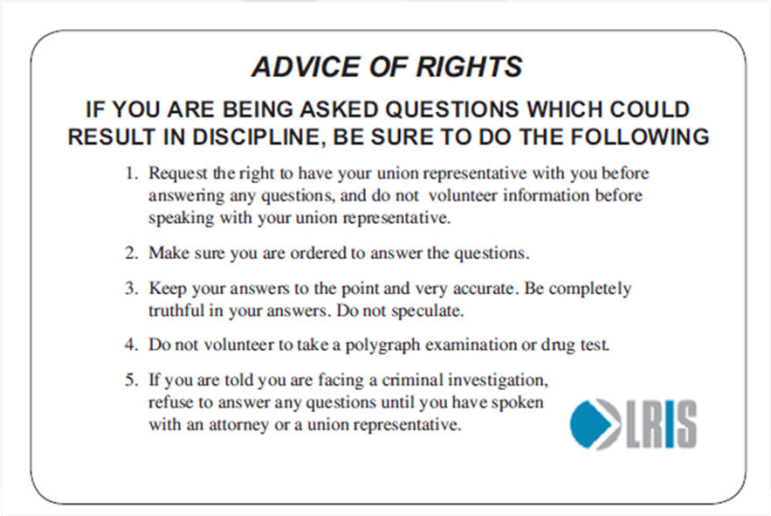
- These rights intersect in disciplinary and criminal matters involving public employees.
- Unlike *Garrity*, *Weingarten* is not self-executing. Employees must request the right to representation.
- *Garrity* protects against self-incrimination in compelled job-related statements.
- *Miranda* is required for custodial criminal interrogations — its mere presence can imply discipline is possible.

Combining *Weingarten*, *Garrity*, *Miranda*

Pennsylvania State Corrections Officers Association (PSLN November 2021)

- No ULP where corrections officer agreed to 45-60 minutes of questioning regarding contraband, signed *Miranda* waiver form, but never requested a union representative.
- Why is this rule as important to employers as it is to labor organizations?

Preparing Members – Advice Of Rights Cards



ADVICE OF RIGHTS

IF YOU ARE BEING ASKED QUESTIONS WHICH COULD RESULT IN DISCIPLINE, BE SURE TO DO THE FOLLOWING

1. Request the right to have your union representative with you before answering any questions, and do not volunteer information before speaking with your union representative.
2. Make sure you are ordered to answer the questions.
3. Keep your answers to the point and very accurate. Be completely truthful in your answers. Do not speculate.
4. Do not volunteer to take a polygraph examination or drug test.
5. If you are told you are facing a criminal investigation, refuse to answer any questions until you have spoken with an attorney or a union representative.

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Preparing The Member For The Internal Interview

- Describe the interview process for the member.
- Stress the ability to take breaks.
- Develop alternative communication modes – shin-kicking, if necessary.
- Review in painstaking detail the documentary evidence with the member.

Union Rep's Role During Interview

- Rep can consult with the member before the interview begins.
- During the meeting, the rep can take notes, review documents, and help the employee clarify responses.
- Rep can interrupt for clarifications, object to unfair or harassing questions.
- Rep may suggest witnesses or mitigating facts after the interview concludes.
- Rep's role is not to argue but to support and advise constructively.

Union Rep's Role During Interview

PSCOA v. Commonwealth of Pennsylvania, Case No. PERA-C-22-277-E (PDO 2023) (PSLN Dec 2023)

- Employer violated *Weingarten* when interviewer instructed union representative to "sit there and shut the f**k up," and then told member that his representative was an ass.
- Union representative permitted to interrupt interview and ask clarifying questions, so long as he did not "disrupt the interview and convert the interview into an adversarial confrontation."

Union Rep's Role During Interview

Department of Corrections v. PLRB (Pa. Commw. Ct.) (PSLN May 2024)

- *Weingarten* permits both the individual being questioned and the union representative to request a caucus once the employer engaged in a new line of questioning which could lead to additional or different discipline.
- "Requiring [a union] representative to stand mute when the employee's right should be asserted is tantamount to denying representation altogether."

What Reps Can't Do

- **Reps must not obstruct the interview or turn it into a cross-examination.**
- **Hostile, abusive behavior — like yelling or name-calling — can forfeit rights or trigger discipline.**
- **Reps walk a line: firm advocacy without adversarial disruption.**

No-Contact Orders

- Employers may issue no-contact orders during investigations BUT the orders must be narrowly tailored to protect the investigation—not to chill representation.
- Employers cannot prohibit communication between members and their union reps.

"There is no more fundamental right afforded employees under the statutory collective bargaining scheme than the right to communicate with others about working conditions. Working conditions include the circumstances underlying and surrounding an investigation into alleged employee misconduct."

Oakdale POA, (Cal. PERB ALJ 2019)

Top 5 Tips for Employees… Plus 1

1. Request a union representative at the first hint of discipline.
2. Stay calm, speak clearly, and avoid volunteering extra details.
3. Ask for breaks if needed—never rush through answers.
4. Decline to sign anything or confirm summaries unless 100% accurate.
5. Review evidence with your rep before making a statement.

and…

6. ALWAYS TELL THE TRUTH!!

Garrity Rights & Self-Incrimination

Introduction to *Garrity v. New Jersey*

- Investigation into "ticket-fixing scheme" in Belmar and Barrington, New Jersey.
- Six officers were told that if they did not cooperate with the investigation, they would be fired. They gave statements, and criminal charges resulted.
- 5-4 decision, with majority opinion written by William O. Douglas.



Justice William O. Douglas

Image Source: Harris & Ewing

Introduction to *Garrity v. New Jersey*

Conclusion:

The use of the statements in the criminal cases violated the self-incrimination clause of the Fifth Amendment and due process clause in the Fourteenth Amendment.

"We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights."

The *Garrity* Rule

A Simple Statement of the *Garrity* Rule

If an employee is compelled by threat of possible job forfeiture to make an oral or written statement...

Then

Neither the statement nor the fruits of the statement may be used against the employee in a subsequent criminal prosecution of the employee.

The *Garrity* Rule, Part 2: *Gardner v. Broderick*

- Gardner was an NYPD officer who was subpoenaed to appear before a grand jury investigating alleged corruption of police officers in relation to illegal gambling.
- Gardner was asked to sign a "waiver of immunity" and was told if he refused to sign the waiver, he would be fired. He refused and was fired.
- The US Supreme Court disagreed…

The *Garrity* Rule, Part 2: *Gardner v. Broderick*

- "The mandate of the great privilege against self-incrimination does not tolerate the attempt… to coerce a waiver of the immunity it confers on penalty of the loss of employment."
- "If appellant, a policeman, had refused 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, the privilege against self-incrimination would not have been a bar to his dismissal."

The *Garrity* Rule Summarized

- Employees may be compelled to talk as part of an internal investigation if they are granted immunity.
- Employee's statements cannot then be used in criminal case.

"So long as the appropriate immunity is given to the statement and notice of the immunity to the employee, *Garrity* does not prohibit a public employer from ordering an employee to provide a statement with potential criminal implications."

Homoky v. Ogden (7th Cir. 2016)

When *Garrity* Applies

- For *Garrity* to apply, the employee must reasonably believe their refusal to answer questions will result in termination.

United States v. Camacho (S.D. Fla. 1990)

- Officer will be considered "ordered" to answer questions or write a report if:
  1. Officer subjectively believes that he is compelled to give a statement upon threat of loss of job; and
  2. Officer's belief is objectively reasonable at the time the statement is made.

What Makes The Employee's Belief Reasonable?

Factors that bear on the reasonableness of an employee's belief:

- What was the rank and assignment of the person who conducted the interview?
- Where and under what circumstances was the interview conducted?
- What are the Department's rules?
- Was the employee told he/she was free to leave?
- Did the interviewer say anything about the consequences of failing to answer?
- Was the interview recorded?

Reasonableness Factors

United States v. Lewis (S.D.N.Y. 2021) (PSLN Jan 2022)

- Correctional officer alleged to have accepted bribes in return for facilitating the smuggling of drugs into facility.
- Officer provided statements and signed "voluntary statement" form which provided that no adverse employment consequences would follow solely from her refusal to answer questions in the interview.
- Statement will be rejected as involuntary "only where the pressure reasonably appears to have been of sufficiently appreciable size and substance to deprive the accused of his free choice to admit, to deny, or to refuse to answer. It must amount to a choice 'between the rock and the whirlpool'."

Reasonableness Factors

State of Florida v. Socarras (Fla. Dist. Ct. App. 2019) (PSLN May 2019)

- "When detained in the instant case, Socarras was stopped by an officer in the middle of the night, held at gunpoint, handcuffed, frisked, and transported in the back of a police cruiser to an unknown precinct. He was subjected to ultraviolet scan, relieved of his service weapon, read Miranda warnings, and divested of his police vehicle, which was treated as evidence."
- "Under these circumstances, it is unfathomable that a reasonable person, particularly an experienced law enforcement officer, would not be aware that a criminal investigation had commenced."

Who Gets *Garrity* Warnings?

- **To employee, not necessarily to counsel**

Wilson v. State **(Alaska 2021)(*PSLN* Jan 2022)**

- ***Garrity*** **warnings need only be given to the employee, not to the employee's attorney.**
- **Even though the employer knows that the employee is represented by counsel.**

Garrity & Routine Reports

United States v. Smith (11th Cir. 2016)

- "*Garrity* does not stand for the proposition that a statement made in a standard report is coerced whenever an officer faces both the remote possibility of criminal prosecution if he files the report and arguably even speculative possibility of termination if he declines to do so."
- "Rather, the touchstone of the *Garrity* inquiry is whether the defendant's statements were coerced and therefore involuntary."
- However…

Garrity & Routine Reports

State v. Reps (Minn. Dist. Ct. 2015)

- Indictment dismissed where prosecutor introduced in grand jury proceedings written report from trooper involved in collision where two motorists died.
- Court finds that trooper could reasonably believe that his report, which he was ordered to give by his commander, was required as a condition of employment.

What Does "Use" Mean?

- If public employer compels employee to answer questions or provide a written statement upon threat of possible job loss, then neither the employee's answers or statement nor the fruits of the answers or statement can be **used** to criminally prosecute the employee.
- Whether the prosecution has improperly relied on *Garrity* evidence is usually tested through what have been called "*Kastigar* hearings", bearing the name of a Supreme Court decision describing the process.

Kastigar v. United States, 406 U.S. 441 (1972).

What Does "Use" Mean?

State v. Ward (Ga. App. 2021) (PSLN Jan 2022)

- Former police officer convicted of child molestation.
- Two prosecutors admitted that they had read transcripts of the officer's internal affairs interview.
- In reversing the officer's conviction, the Court held that "the State did not meet its burden… of proving that it did not make derivative use of Ward's *Garrity*-protected statements…"

What Does "Use" Mean?

State v. Flynn (Ohio Mun. Ct., 2023) (PSLN Sept 2023)

- Beware the risks of conducting concurrent criminal and administrative investigations.
- Officer accused of dereliction of duty related to investigation of crimes against children.
- Charges dismissed because *Garrity* statement was provided to prosecutor's office and prosecutor failed to prove that the statement was not used as part of its investigation – even when primary investigator was walled off from administrative investigation materials.

Which Statements Are Protected?

Delaware v. MacColl (Del. Super. 2022) (PSLN Sept 2022)

- Officer-involved shooting investigation. Allegation that officer switched gun barrel after shooting.
- Officer denied charges during IA interview after being provided *Garrity* warning and ordered to answer questions. Later "clarified" during second interview.
- Officer charged criminally with providing false statements during interview. Moved to suppress the IA statement. Denied.

Which Statements Are Protected?

Delaware v. MacColl (Del. Super. 2022) (PSLN Sept 2022)

- "*Garrity* did not rewrite the Fifth Amendment. *Garrity* immunity parallels Fifth Amendment immunity, and the Fifth Amendment does not protect perjury. So *Garrity* does not protect false testimony. Indeed, *Garrity* protection is not a license to lie."
- "Accordingly, every post-*Garrity* decision has held that *Garrity* immunizes only truthful statements made by police officers under penalty of termination. False statements are not considered 'coerced' under the Fifth Amendment or *Garrity*."

Garrity Immunity Is Self-Executing

Scatchell v. Board of Fire and Police Commissioners, 2022 IL App (1st) (PSLN Dec 2022)

- Officer invoked 5th Amendment rights and refused to testify at an internal disciplinary hearing regarding allegation of theft of time – officer called out sick and went hunting (with a convicted felon).
- Officer represented by counsel at hearing. No active criminal investigation. No *Garrity* warning/form issued.
- Officer terminated for insubordination, appealed… and lost.

Garrity Immunity Is Self-Executing

Scatchell v. Board of Fire and Police Commissioners, 2022 IL App (1st) (PSLN Dec 2022)

- "Having been afforded protection against self-incrimination by this immunity, the employee may be subject to adverse employment action if they remain silent."
- "Neither the Board nor the Village ordered Scatchell to waive his *Garrity* immunity; to the contrary, they repeatedly told him that he would be protected by *Garrity* immunity and thus had no fear of self-incrimination if he testified before the Board. Scatchell's right against self-incrimination was never in doubt; it remained intact because of the immunity afforded him."

Limits On *Garrity* Protection

***Garrity* is a rule of criminal procedure and does not prohibit the use of a compelled statement in a non-criminal forum.**

***Hoban* (2019)**

- *Garrity* does not prohibit the use of compelled statements in a subsequent civil lawsuit against the employee.

***Chasnoff* (2015)**

- *Garrity* does not create a privilege prohibiting disclosure under a public records law.

***MacColl* (2022)**

- *Garrity*-insulated statements regarding past events under investigation must be truthful to avoid future prosecution for such crimes as perjury and obstruction of justice.

Limits On *Garrity* Protection

Hoffman v. Peace Officer Standards and Training Council (Utah App. 2022) (PSLN June 2022)

- Garrity warnings need not include the possibility that answers could result in decertification.
- "If a public employee is required to answer as a condition of their employment, the employer must remove the threat that the officer's statements given in a disciplinary interview could later be used against them in a subsequent criminal prosecution."
- That's it!

Drug And Alcohol Tests

***Guitierrez* (2015)**

Garrity does not apply to non-testimonial evidence such as a portable breath test.

However...

***Shoemaker* (2019)**

Garrity requires exclusion of the results of alcohol testing where the employee was told she would be terminated if she refused to be tested. The Court reasoned that the consent to the test was not voluntary.

5 Practical Tips For Protecting *Garrity* Rights

- Always ask if discipline is possible.
- Request *Garrity* warning in writing.
- Document all interactions.
- Don't mix *Miranda* and *Garrity* without clarity.
- Don’t rely on vague assurances.

Final Reminders On Procedure

- Rights must be invoked — train your members.
- Improper handling can sink cases or prosecutions.
- When in doubt — assert the right.

THANK YOU

