



RISK MANAGEMENT INFORMATION

GARRITY VS. TENNESSEN: DO YOU KNOW YOUR RIGHTS?

Employment investigations in the public sector can be tricky. There are many laws and procedural requirements specific to public employers. One of the most frequent areas of confusion and questions involve the rights and/or notices that must be given by a city to an employee under investigation. This article will discuss the two most common and important notice requirements: the Garrity Warning and the Tennesen Warning. It will also provide a simple formula for cities in deciding which right is right.

Garrity Warning

The Garrity Warning comes from the United States Supreme Court case of Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616 (1966). This case involved police officers who were under investigation for allegedly fixing traffic tickets. The officers were given a choice of either providing a statement to their employers (which may subject them to criminal prosecution) or to forfeit their jobs. The Supreme Court held that any employee statements made to the public employer under these circumstances were coerced and the Constitution prohibited their use in a subsequent criminal proceeding. The Garrity Warning was thus established: *An employee statement obtained under threat of removal from office cannot be used in subsequent criminal proceedings*. Therefore, before compelling a statement, a public employer should provide the employee notice and take steps ensuring the exclusion of the statement in subsequent criminal proceedings.

Tennesen Warning

The Tennesen Warning comes from the Minnesota Government Data Practices Act, Minn. Stat. §13.04, subd. 2. When collecting private or confidential data on employees, a city is required to provide a warning or notice to the employee of why the data are being collected and how it intends to use the data; whether the employee can refuse to supply the data and any consequences of either supplying or refusing to supply the data; and the identity of other persons or entities authorized by law to receive the data requested. If the city does not provide a Tennesen Warning but collects the private or confidential data, strict limitations may be imposed on the use of the data collected. It is important to note that the circumstances requiring a Tennesen Warning are limited to those in which the city is requesting data *about* the data subject *from* the data subject. It does not apply to situations in which the city is asking an employee to provide other information such as a description of events witnessed by the employee or information on other employees.

This material is provided as general information and is not a substitute for legal advice.
Consult your attorney for advice concerning specific situations.

Which Right is Right?

Because the Garrity Warning and Tennessen Warning have been in existence for a long time, some employment investigators unwittingly apply them both as a matter of course when conducting an investigative interview. **This practice should be stopped.** The overuse of Garrity Warnings, in particular, can result in unanticipated negative consequences for the city and the public at large. Before giving a Garrity, and assuming the risks of tainting future criminal proceedings should any self-incriminating statements or the fruits of any self-incriminating statements be leaked in anyway outside of the employment investigation, stop and ask the following question: Does the investigation require a compelled (or coerced) statement? The answer is rarely yes.

A safer course of action is to start by requesting that the employee provide a voluntary statement. If the employee gives a voluntary statement, no Garrity is required, and the statement itself may be used in a future criminal matter against the employee. A city can simply ask if the employee is willing to provide a response to allegations. Most employees will want to provide an explanation to the alleged misconduct. If the employee refuses, a city is free to make a determination on the investigation based on the other information gathered.

Giving an employee the choice of making no statement and having potential discipline based on other evidence or making a voluntary statement which could be used against the employee in a subsequent criminal prosecution does not violate the employee's constitutional rights. Remember, however, that even in the case of a voluntary statement, a Tennessen Warning should be given if you will be asking the employee to release private or confidential information about herself.

If the offer of a voluntary statement is rejected by the employee, the city should carefully balance whether or not to compel a statement. Questions to ask include:

- Can the city make a determination on discipline based on the other evidence gathered?
- What is the likelihood the conduct under investigation will result in future criminal proceedings?
- What is the impact on public safety if criminal prosecution is thwarted?
- Does the city have procedures in place ensuring the protection of the information in a compelled statement and preventing its dissemination outside of the employment investigation?
- Can the city wait to conduct the employment investigation until criminal proceedings are completed?

Only if the city is certain that compelling a statement is in its and the public's best interest, and adequate safeguard are in place for securing the data, should the employee be presented with the choice of talking or losing his/her job. A written Garrity Warning should then be provided, as well as a revised Tennessen Warning which details the new consequences of refusing to supply the information requested. Sample Tennessen and Garrity Warnings are available by calling the author of this article or the League's HR & Benefits Department.

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