



DATE: October 14, 2009 PERSL 1411

TO: Human Resource Directors/Designees  
Labor Relations Directors/Designees

FROM: Paul Larson *Paul a. Larson*  
Assistant Commissioner/State Negotiator

RE: Tennesen and Garrity Warnings Used in Misconduct Investigations  
Replaces PERSL #1372 – 1/29/03

### **Introduction**

This memorandum introduces revised investigative interview advisories and commentary on their appropriate use.

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

### **Background**

Several years ago, a county attorney's office declined to prosecute two cases referred by State agencies. The interview advisories used in those cases stated a consequence in the form of disciplinary action to the subject employees for failure to answer the investigators' questions. The county attorney determined that the advisories had deprived the employees of their Fifth Amendment rights under the U.S. Constitution because the agency's threat of disciplinary action constituted leverage to coerce the employee to self-incriminate. Therefore, while the employees were successfully terminated for cause from their employment, the information obtained in the investigative interviews could not be used in the employees' subsequent criminal prosecution. Based on these events, MMB developed sample Tennesen and Garrity warnings (one for the subject of the investigation and the other for witnesses).

Enclosed are revised sample advisories for use when conducting investigative interviews. These samples replace those sent to you in PERSL 1372, dated 1/29/03. Reasons for these revisions include:

- Reduced confusion by using one form for both voluntary and compelled interviews (i.e., "Garrity") interviews.
- Eliminating the need to "cut and paste" in order to create forms for interviews.

- Ensuring that agencies include language in their Tennessee warnings regarding investigative data that becomes public when the subject of an investigation is a "public official."
- Including an explanation of "final disposition."
- Adding "housekeeping" changes to ensure that information included in the samples is current and clear.

### Tennessee warnings and Garrity warnings

For background purposes, the term "Tennessee warning" is derived from Minnesota Statutes, §13.04, subdivision 2, which require that an individual receive certain information when a government entity is requesting private or confidential data from that individual. The information that must be provided is:

- a) The purpose and intended use of the requested data;
- b) Whether the individual may refuse or is legally required to provide the data;<sup>1</sup>
- c) Any known consequences from supplying/refusing to supply the data; and,
- d) The identity of other persons or entities authorized by law to receive the data.

Although it is easy to associate Tennessee warnings with voluntary interviews, and Garrity warnings with compelled interviews, this is not necessarily true. **When a Tennessee warning is required, it must be given whether the interview is *voluntary* or *compelled*.** The revised investigative advisories reflect this by:

- Providing one constant set of information that addresses elements A and D of the Tennessee requirement (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 (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."

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<sup>1</sup> Over the years, there have been concerns raised about whether individuals who volunteer or are compelled to provide private data of themselves are "legally required" to provide the data for purposes of the Tennessee warning requirement. How can we tell someone they are *not* legally required to supply the data and yet in the same paragraph tell them if they do not provide it we can take an adverse employment action against them? The answer lies within the context of legally required under the pain of "legal" consequences for their failure to provide the information, and the consequences of an adverse employment action for their refusal to supply the information. The two are distinctly different but appropriate; government cannot legally require you to provide the information but can take an adverse employment action against you if you elect not to provide the information.

### **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.

When government employers elect to conduct a compelled interview, they must provide the employee with an assurance of use immunity through a proper Garrity warning. This term is derived from a U.S. Supreme Court decision, *Garrity v. State of New Jersey*, 385 U.S. 493 (1967). The Garrity case examined the scope of a public employee's Fifth Amendment protections against compelled self-incrimination in a criminal proceeding. The Court held that threatening an employee with disciplinary action for refusing to answer questions during an interview amounted to coercion under the Fifth Amendment. As a result, statements obtained under the threat of discipline could not be used against the employee in later criminal proceedings.

Later Supreme Court cases held 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 therefrom) will not be used against the employee in criminal proceedings. In sum, a "Garrity warning" is an advisory that puts a government employee on notice that he/she 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.

### **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 him or her in a criminal prosecution. But the information obtained from witnesses may be used against the subject of the investigation in a subsequent criminal proceeding.

**If there is a possibility of criminal prosecution, then the decision to administer Garrity to any interviewees needs to be carefully considered. It is critical that the agency consult its MMB Labor Relations Representative to determine the appropriate course of action before conducting any interviews. 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.**

### 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 our 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, the voluntary option must be available for those individuals.

For the subject of the investigation, conducting a voluntary interview preserves the ability to prosecute the individual later 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, then the employer will make its decision without the benefit of hearing what could have been provided.<sup>2</sup> 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 above on “Compelled statement considerations.”

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<sup>2</sup> If disciplinary action is taken against a non-probationary employee that involves termination, demotion, or loss of pay, then the employee will again have an opportunity to provide his side of the story during a Loudermill hearing, thereby satisfying due process concerns.

**Requiring signatures**

The revised 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 Tennessen warning notice was provided to the individual, and that the individual was given ample time to read the notice or that the notice was read to the employee and asked if any clarification was needed prior to questioning. If you do obtain an employee's signature, a copy of the signed notice should be provided to the employee.

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

This memo supersedes previous memos written on this subject dated 7/18/97, 3/6/98 and 1/29/03.

Attachment: sample Tennessen and Garrity warnings

cc: MMB Labor Relations Staff

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;
- Labor Relations Division of the Minnesota Management and Budget Department;
- 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 Minnesota Statutes § 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 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:

- Your exclusive representative;
- Labor Relations Division of the Minnesota Management and Budget Department;
- 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 Minnesota Statutes § 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 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