



Law Enforcement Executive

**FORUM**

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## **Interviews and Interrogations of Public Employees: Beckwith, Garrity, Miranda and Weingarten Rights**

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A law enforcement officer or other public employee that is accused of potentially criminal conduct may face three different kinds of interviews or interrogations. The first is during a criminal investigation; the second is during a disciplinary investigation; the third is during the course of civil litigation, where damages are sought.

This article examines all three kinds of investigations, in light of four key Supreme Court decisions.

### **I - Criminal Investigations**

Two leading Supreme Court decisions that apply to criminal interviews of public employees are *Miranda v. Arizona* (1966) and *Beckwith v. U.S* (1976).

If an officer is under arrest, the *Miranda* decision applies. If he or she is not under arrest but is being interviewed as a criminal suspect, *Miranda* has no application because it is noncustodial interrogation. Oddly, some internal affairs (IA) investigators give the *Miranda* warnings to officers suspected of criminal actions, even though an officer has not been arrested or placed in custody.

The fact that a criminal interrogator is a superior officer does not create custodial interrogation. "Peripheral psychological pressures do not suffice," and the employee's subjective state of mind is immaterial. *Martin v. State* (1996).

The *Miranda* decision gives indigent defendants a right to representation by a public defender (or other free legal services) A person who is not in custody has no right to a court-appointed attorney and IA investigators should not recite the *Miranda* warnings.

What warning, then, should an officer receive during a criminal interview or

interrogation? The answer lies not in the *Miranda* decision, but in a lesser-known case called *Beckwith v. U.S.*

The holding in *Beckwith* was formally adopted by the Federal Services Impasses Panel in *Bureau of Engraving* (1999) “to ensure that due process is being observed” and to avert future litigation. The 1976 *Beckwith* decision did not mandate any warnings; the 8-1 ruling simply held that a criminal suspect, who was interviewed in his home, but was not placed under arrest, was **not** entitled to receive the *Miranda* warnings. The result was the “Beckwith Warning.” A typical version for federal employees follows:

“You have a right to remain silent if your answer may tend to incriminate you. Anything you say may be used against you as evidence later in an administrative proceeding or any future criminal proceeding involving you. If you refuse to answer the questions posed to you on the grounds that the answer may incriminate you, you cannot be discharged solely for remaining silent. However, your silence can be considered in an administrative proceeding for its evidentiary value that is warranted by the facts surrounding your case.”

Although the holdings of the Federal Services Impasses Panel have no direct application to state and local governments, some version of the Beckwith Warning should be given, in noncustodial criminal investigations, as a matter of policy. It is recommended that state and local agencies modify the federal version in two respects.

First, omit any reference to adverse inferences that may be drawn, if an employee exercises his or her Fifth Amendment rights. The inference has absolutely no place in a disciplinary setting because an officer can never be required to waive his right against self-incrimination.

Second, advise the employee of his or her right to consult with an attorney and to have counsel present during a criminal interview.

An “Advice of Rights” form should be given to the employee when he or she is requested to participate in a criminal interview, with sufficient time for him or her to consult with legal counsel. A suggested Beckwith-type warning follows.

### **Employee Criminal Interview – Advice of Rights**

“This interview is part of a criminal investigation.

“1. You have the right to remain silent if your answer might incriminate you.

“2. Anything you say can be used against you as evidence in a disciplinary or civil proceeding or any future criminal prosecution involving you.

“3. If you refuse to answer a question because the answer may incriminate you, you cannot be disciplined solely for remaining silent.

“4. You do not have the right to remain silent about another person’s commission of a crime, unless that information also implicates your involvement in a criminal offense.

“5. You have the right to consult an attorney of your choosing, and to have that attorney present to advise you during the interview.”

An officer who is interviewed as a criminal suspect has an absolute right to decline to answer any questions, or to insist that a lawyer of his choosing attend the interview. There is **no** professional, ethical or moral duty to participate in a criminal interview – especially without the assistance of an attorney who would represent the officer in his personal and private capacity.

It is surprising that many experienced officers will waive their right to silence and give criminal investigators an audio recorded statement – while some of the dumbest criminals are street savvy and never make a statement. One reasonable motive for cooperation is to avoid unfavorable publicity.

The local newspapers might write a story with the headline “Cop Takes the Fifth.” The same reporters are unlikely to waive *their* rights under the First, Fourth or Fifth Amendments, or to reveal *their* confidential sources. But in the eyes of the public, an officer who asserts his or her constitutional rights must have something to hide.

It should be remembered that the right against self-incrimination is a personal one. It cannot be asserted to protect an associate or accomplice. [2]

An officer who is given a Beckwith “Advice of Rights” form is likely to consult with an attorney. If the officer chooses to participate in the interview, he or she probably will be accompanied by an attorney. If the officer is a member of a bargaining unit, he or she may also want to have a union representative present, as discussed in Part Two of this article.

### **Who should conduct the criminal interview?**

It can be anyone except IA investigators, who will be asking similar questions of the officer in an administrative investigation. A good practice is for the chief of police to ask another agency to conduct the criminal investigation, such as the state police or county sheriff. Investigators from the outside agency, or an assistant county prosecutor, should conduct officer interviews.

One reason for asking another agency to conduct the criminal investigation is that it is an uncomfortable situation for the interviewer and a police officer interviewee, especially if they are coworkers. Additionally, there is also a danger that the media and community groups might perceive the investigation as whitewash.

Should, however, an officer give a statement to criminal investigators, the information can be used against him or her in a criminal case, in a disciplinary hearing, and in a civil lawsuit. *State v. Koverman* (2002).

One very practical reason that an officer should decline to be interviewed in a criminal setting, is that his or her answers might differ slightly from his or her answers at a civil deposition, giving rise to an inference that the individual was lying.

It should be noted that there could be two parallel or sequential criminal investigations, one related to state offenses and the other arising under federal law. The civil rights acts include criminal penalties for the willful violation of a person's civil rights under color of law. The LAPD officers who assaulted Rodney King were acquitted of state charges but were later convicted under federal laws.[3] The FBI has the duty to investigate federal civil rights complaints.

In a few jurisdictions, such as the District of Columbia, another version of the Beckwith warning is recited. It contains the same basic admonitions and, for some reason, has been called a "Reverse Garrity Warning."

### **Prosecutor or City Attorney Misconduct:**

What if a prosecutor obtains a copy of an officer's immunized statement? The Ninth Circuit has held that the transmittal, to the prosecutor, of an officer's *Garrity* immunized IA statements, which were then used to formulate charges against him, did not violate his civil rights. *Gwillim v. San Jose* (1991).

City attorneys, while ethically and legally bound to assist officers they represent, also want to rid the force of a bad officer. Deals are sometimes struck. A promise to an employee that his statement to IA investigators and resignation will avoid criminal charges is not binding on the prosecutor and a prosecution of the former employee does not violate due process. *People v. Early* (1987). IA commanders who want to strike a deal must involve the prosecutor in the bargaining process.

## **II - Disciplinary Investigations**

Because public entities function with the consent of the governed, there is a duty to internally investigate allegations of official and employee misconduct. All but the smallest law enforcement agencies have established a formal protocol for investigating complaints, whether they originate from a citizen, a member of the agency, or from an anonymous source. [4]

The two leading Supreme Court decisions that apply to IA interviews of public employees are *Garrity v. New Jersey* (1967) and *NLRB v. Weingarten* (1975). In a few states, such as Illinois, a police officers' "Bill of Rights" law also provides statutory rights to covered officers. [5]

Police officers who are interviewed in a disciplinary setting should be warned that they are under investigation for violation of departmental rules, that they are obligated to give statements for internal purposes, and their answers may not be used against them in a criminal proceeding. Without that admonition, persons who are interviewed are likely to assume that the Fifth Amendment's self-incrimination clause applies, and that they can decline to answer questions without any lawful penalty.

Absent a statute on point, a warning is technically unnecessary unless the employee declines to answer a question. However, state Bill of Rights laws, where applicable, might require a written warning. For example, 50 Illinois Compiled Statutes 725/3.8(a) reads:

“No officer shall be interrogated without first being advised in writing that admissions made in the course of the interrogation may be used as evidence of misconduct or as the basis for charges seeking suspension, removal, or discharge; and without first being advised in writing that he or she has the right to counsel of his or her choosing who may be present to advise him or her at any stage of any interrogation.”

Constitutionally, the warning is essential before any disciplinary action can be taken for a refusal to cooperate in the interview. *Lybarger v. Los Angeles* (1985).

Reciting a disciplinary warning is also a good practice, because it clarifies the purpose of the interview and delineates rights and responsibilities. A typical “**Garrity Warning**” follows:

### **Employee Disciplinary Interview – Advice of Rights**

“You are being questioned as part of an administrative investigation of the Police Department. You will be asked questions that are specifically directed and narrowly related to the performance of your official duties or fitness for office. You are entitled to all the rights and privileges guaranteed by the laws and the constitution of this state and the Constitution of the United States, including the right not to be compelled to incriminate yourself. You also have the have right to an attorney of your choice, to be present during questioning.

“If you refuse to answer questions relating to the performance of your official duties or fitness for duty, you will be subject to disciplinary charges which would result in your dismissal from the Police Department.

“If you do answer, neither your statements nor any information or evidence which is gained by reason of such statements can be used against you in any subsequent criminal proceeding. However, these statements may be used against you in relation to subsequent departmental charges.”

The exact wording of the Garrity Warnings often varies. This one was adapted from a

warning prepared for the Detroit Police Commissioner by IACP staff attorneys in 1971, after officers declined to testify before a grand jury. [6]

Although a few courts have held that there is no “right” to counsel at a disciplinary interview, in Illinois and other Bill of Rights states, the right to counsel is protected by law. In states without Bill of Rights legislation, the right to an attorney might be codified in a bargaining agreement or city personnel rules, or it might be a recognized past labor practice.

Some courts have reinstated officers that were fired after they refused to answer questions without the presence of the attorney. *Matter of William Carroll* (2001).

In jurisdictions where employees lack a right to legal representation, it is strongly recommended that they be allowed to be accompanied by counsel during disciplinary interrogations, especially if the lawyer is familiar with disciplinary investigations.

Unrepresented employees sometimes delay and confuse the interview process by raising unmeritorious objections, interjecting unsolicited and irrelevant comments, and asking bizarre questions of the interviewers.

An employee cannot, however, impose an unreasonable delay, by insisting on representation by an attorney who is not currently available. A California appeals court recently upheld a compelled disciplinary interview, without the officer’s lawyer present, when counsel was unable to appear for a rescheduled interview. *Upland POA v. Upland* (2003).

Initially, unions questioned whether IA investigators had the “power” to confer use immunity from prosecution, especially when the prosecutor has not been consulted. The Seventh Circuit answered that question in *Confederation of Police v. Conlisk* (1973):

“Appellants argue that the IAD is not empowered to grant immunity from prosecution to the police officers. Such a power, however, is not necessary. In *Garrity* the Supreme Court indicated that the Fifth Amendment itself prohibited the use of statements or their fruits where the statements had been made under the threat of dismissal from public office. Therefore, by advising the officers that their statements, when given under threat of discharge, cannot be used against them in subsequent criminal proceedings, the IAD is not ‘granting’ immunity from prosecution; it is merely advising the officers of the constitutional limitations on any criminal prosecution should they answer. *Uniformed Sanitation Men Ass’n, Inc. v. Commissioner of Sanitation*, 426 F.2d 619, 627 (2d Cir. 1970), cert. denied, 406 U.S. 961 (1972).”

It is the Fifth Amendment that gives rise to the immunity; it reads, “No person ... shall be compelled in any criminal case to be a witness against himself ...” The compulsion is the threat of disciplinary action if the employee fails to cooperate in the interview process. A person can be compelled to give a statement in a civil case or administrative hearing

unless the response can be used in a criminal prosecution.

The immunity that attaches from a compelled statement is limited. It is “use” [a noun, not verb] and not “transactional” immunity. The fact that an Oregon police officer had been ordered to give a statement to IA investigators did not immunize him from a parallel criminal prosecution. The officer was entitled to use immunity, not transactional immunity. *State v. Beugli* (1994). Only one state, Massachusetts, has held that public employees who are interrogated in a disciplinary investigation are entitled to full and final immunity from prosecution. *Carney v. Springfield* (1988).

### **Weingarten:**

*Weingarten* is a private sector case, arising under the National Labor Relations Act, 29 U.S. Code §157. Federal bargaining laws, and decisions of the National Labor Relations Board, do not directly apply to state and local government employees.

However, all but a few states allow bargaining by public employees, and most state public employment relations laws are similar or nearly similar in wording to the federal law. As a result, many state appellate courts have followed NLRB decisions to interpret state bargaining laws.

The *Weingarten* decision holds that a member of a bargaining unit is entitled to the assistance of a union representative, at an interview where disciplinary action reasonably might follow. In states like Illinois, which has a Bill of Rights law, the officer also is entitled to the assistance of counsel.

He or she also may want a union representative present. As a practical matter, the lawyer for an officer usually may not want a union representative to attend a disciplinary interview. The union representative might want to attend for two reasons. The first is that the union may be paying the lawyer’s fee, and the second is that the union representative wants first-hand knowledge about the inquiry.

Management should not force an employee to choose between a lawyer and a union representative.

A few points about *Weingarten* rights:

1. The right does not apply to persons who are not members of a bargaining unit. *IBM Corp. and Schult* (2004). This means, in many agencies, that *Weingarten* does not apply to probationary and command rank employees.
2. Generally, an employee does not have to be warned about his or her *Weingarten* rights. *Lackland A.F.B.* (1981); *AFGE L-3882 v. FLRA* (1989). Michigan, however, requires employers to give a *Weingarten* warning. *City of Lansing* (1996).
3. *Weingarten* rights also have been extended to questionnaires and written reports, where

disciplinary action could result. *City of Lansing* (1996). Management usually does not want an officer to have a union representative present when completing a use of force report.

Over the years, some IA investigators have tried to weasel out of the *Weingarten* decision, by informing an officer that the interview is nondisciplinary or that he or she is not the focus of a disciplinary investigation.

Recently a federal appeals court held that a member of a bargaining unit was entitled to a union representative during an interview, even if management characterized the investigation as “criminal” rather than administrative. *U.S. Dept. of Justice v. FLRA* (2001). The state labor board in New York has come to the same conclusion. *Rochester Police Locust Club and Rochester* (2004).

The Supreme Court also has held that a federal employee who was a member of a bargaining unit was entitled to the presence of his union representative at an interview conducted by the Office of Inspector General. Although the OIG was not a part of the management hierarchy, discipline could result from the interview. *NASA v. NLRA* (1999).

On the other hand, the Illinois Supreme Court upheld the termination of a sergeant who refused to speak with the sheriff without her union representative present. The court concluded that *Weingarten* was not applicable because the interview was “informal” and nondisciplinary. *Ehlers v. Jackson County* (1998).

An employee should obey the command and then file a grievance. If the interview violates *Weingarten* rights, the grievance process should provide a remedy. An employee who declines to be interviewed does so at his or her peril.

From a management perspective, when in doubt, the employee should be allowed his or her *Weingarten* representative.

It also should be noted that a union representative should **not** be asked by management to reveal the content of statements made to him or her as part of his or her role as a *Weingarten* representative. Nor should an officer be asked about conversations with the union representative. Such an inquiry will give rise to an Unfair Labor Practice complaint and is a direct interference with the rights of employees to engage in collective activities. *Lockheed Martin* (2000) and *Ohio SERB* (1988).

### **Gag Orders:**

Nothing will impair a disciplinary investigation more than when officers rehearse their stories to help a coworker defeat a citizen’s complaint. Several public agencies have a rule that prohibits officers from discussing among one another, their statements to I-A investigators. Arbitrators have enforced confidentiality directives. *Minn. Dept. of Corr.* (1996). [7]



In 1988 a California appellate court interpreted the state's Bill of Rights law to include the right to see statements taken of other employees before answering IAD questions. In a divided opinion, the California Supreme Court reversed. *Pasadena Police Officers Assn. v. Pasadena* (1988, 1990).

If employees are given a gag order, it should not include communications with their attorneys, *Weingarten* representatives or spouses. *Lockheed Martin* (2000).

It should be noted that a labor representative who attends an administrative interview has a duty to preserve the confidentiality of the session. Typically, union officials in smaller agencies may lack experience and have little formal training in representational matters. It is appropriate for management to remind union officials of their fiduciary obligations.

### **III - Civil Litigation – Investigations and Discovery**

All American courts have a procedure to take pretrial depositions of witnesses and parties, and to discover documents and other evidentiary items in the possession of an opponent or a third party.

Nearly all police officers and other public employees will receive legal representation at the expense of their employing entity, either by (1) a custom or practice, or (2) pursuant to a professional liability insurance policy, or (3) under a statute or ordinance, or (4) by a provision in the bargaining agreement.

While it is strongly recommended that IA investigators do not conduct a criminal investigation, there is no reason they cannot provide civil litigation investigative support. Unless an agency is large enough to need a full time litigation investigator, IA personnel should bifurcate their civil and disciplinary investigations, using a separate reporting system.

If the two investigations are combined, the results are discoverable by the adverse party and the legal work-product privilege will not apply. In some cases, discovery is not an issue. The attorney for the agency and officers will initiate any investigation requests, and should inform IA personnel what reporting procedures to use. For discovery purposes, it makes no difference whether the attorney is a governmental official, a lawyer in private practice hired by the entity, or counsel employed by an insurance carrier.

Bar regulations govern the conduct of public and private attorneys. Once a lawyer enters an appearance for a named defendant, the attorney-client relationship is formalized and confidentiality rules apply. In general, an attorney may not reveal the content of confidential disclosures made by the client. This sometimes causes a conflict of interest, and it may be necessary to employ outside counsel for an officer.

To illustrate the attorney-client relationship, suppose an officer is subjected to three interviews. At the criminal investigation, he exercises his right to remain silent. During the internal, administrative investigation, he lies to protect his job. When, however, he

speaks with the attorney assigned to defend him in a civil suit, he admits misconduct – hoping that the case will settle and that he can avoid the imposition of punitive damages, for which he probably would not be indemnified.

The civil attorney in such a situation cannot reveal to IA investigators that his client lied to them. Not only is that information barred from use in a disciplinary hearing, but also the attorney could face disbarment proceedings for disclosing it. [8]

There are some limitations. At least one appellate court has held that the attorney-client confidentiality did not apply because outsiders (two city council members) were present during a litigation-related conversation between the attorney and his client (a public official). *Reed v. Baxter* (1998).

Sunshine laws also might impair attorney-client confidentiality. For example, Florida's Attorney General has ruled that the state's Sunshine Law impairs attorney-client confidentiality between government officials and their legal advisors. *Florida Attorney General* (1997).

There is no specific warning related to a civil litigation investigation. There will be cases where an IA investigation was conducted and defense counsel is satisfied with the results. There are other cases where a suit is brought and the plaintiff did not make a disciplinary complaint, so no IA investigation occurred. In those cases, defense counsel should ask the IA unit to assist in getting statements, taking photographs, retrieving records and reports, and obtaining other necessary pretrial information.

Employees have a duty to cooperate in their own defense, the defense of coworkers, and the defense of their employing entity. Should an officer who is a civil defendant fail to cooperate with counsel, representation can be withdrawn. Disciplinary action, for refusing a direct order, also may be appropriate.

In a few cases, the officer was fired and either is facing prosecution or has been sentenced to imprisonment. He or she has little incentive to cooperate in the defense of civil claims.

### **Depositions and In-court Testimony:**

Generally, a person may not assert a Fifth Amendment right to remain silent in a civil proceeding, without showing a possibility of criminal prosecution. A California appellate court has held that the self-incrimination privilege was not applicable to a person's possible civil liability. *Blackburn v. Superior Court* (1993).

The Supreme Court has said that the Fifth Amendment not only protects an individual against being involuntarily called as a witness against himself in a criminal prosecution, "but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Baxter v. Palmigiano* (1976); *Boim v. Quranic*

*Literacy Institute (2004).*

Persons who frivolously claim their Fifth Amendment rights, to avoid answering questions that do not have criminal consequences, are subject to judicial sanctions. Sanctions include the imposition of adverse evidentiary inferences or, in extreme cases, the entering of a default judgment or a contempt of court citation.

### **Coordination of Multi Agency Lawsuits**

It is not unusual for a civil suit to name officers from two or more agencies, because of their participation on a metro drug enforcement squad, a tactical response team, or a vehicular pursuit through several communities. Some agencies are likely to have insurance with different carriers or risk pools; others might be self-insured.

Each entity might have its own law firm and expert witnesses. A lack of coordination among officers and agencies can produce conflicting official reports, investigation results, and defense strategies. Worse, one agency might hire an expert who attempts to put the blame on another agency.

Coordination of the investigation of a multi agency incident should be an initial priority. Once a lawsuit has been filed, it may be too late to manage parallel investigations and employee interviews.

It should be remembered, however, that investigators have been successfully sued after they attempted to falsify their reports to avoid liability. An unlawful conspiracy to defeat a civil rights lawsuit is itself a civil rights violation. *Hampton v. Hanrahan (1979).*

### **IV - Searching for Truth and Justice**

No public employee has a right to lie in court, or in a deposition, or during an IA interview, or at an administrative hearing. False statements in an official report, or when made to superiors, or to an attorney assigned to represent the employee also are punishable offenses.

The Supreme Court has made clear that a police officer can be fired for giving false or evasive answers to IA investigators or superiors, even if the underlying inquiry involves a matter not punishable by termination. *La Chance v. Erickson (1998).*

For that reason, IA investigators sometimes have interviewed an officer in a situation where the facts were known and the officer's statement was unnecessary – knowing that if the officer is untruthful, the penalty of termination will be imposed.

For example, although termination was not an appropriate penalty for making a false insurance claim fourteen years earlier, an arbitrator upheld a dismissal because the officer lied during the IA investigation and continued to mislead his superiors up until his time of termination. *Kitsap County (2003).*

Officers who have lied have little value to their agencies, as defense counsel will attack their testimony as untrustworthy.

### **Failure to Discipline Promptly:**

Although public officials have a duty to protect their agencies against unreasonable claims and to vigorously assert legal defenses, it is a mistake to postpone the termination of an officer simply because a civil suit is pending.

The negligent retention of an unfit subordinate is tortious conduct, and is a breach of the official's professional responsibilities. Prevailing in a lawsuit may be the least important consideration. Good public administration is not a sports contest where there are winners and losers.

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### **Arbitration Awards:**

*City of Lansing and Capitol City Post 141*, 106 LA (BNA) 761 (Ellmann, 1996). "... an employee must be informed of his right to a union representative prior to the time any investigative interview is launched by management, (or as in this case, management asks the grievant for a version of what happened.) She need not ask for a union representative; management has the burden of directing the grievant to consult her union representative."

*Minnesota Dept. of Corr. and AFSCME Council 6 (Henderson)*, RMS #96-PA-2070, unpublished but summarized at 1997 (9) Fire and Police Personnel. Rptr. 133 (Imes, 1996).

*Kitsap County and Kitsap Co. Deputy Sheriff's Guild*, 118 LA (BNA) 1173, AAA Case #75-L-390-00240-02 (Gaba, 2003).

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*Report by the Special Counsel for the Los Angeles County Sheriff's Dept.* [Kolts Commission] (1992). See p. 149, noting that the LASD does not interview officers

involved in shootings, so as not to compromise a possible criminal prosecution.

*Report of the Independent Commission on the Los Angeles Police Department* [Christopher Commission] (1991). See pp. 161-162, describing the LAPD practice of taking compelled statements in police shooting investigations despite adverse impact on criminal prosecutions.

Also see “Special Commissions and their Aftermath,” in *Shielded from Justice: Police Brutality and Accountability in the United States* by the Human Rights Watch at <<http://www.hrw.org/reports98/police/uspo18.htm>>.

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*Lackland A.F.B. and AFGE L-2911*, 5 FLRA 473, 1981 FLRA Lexis 266.

*Lockheed Martin and Fiala*, #27-CA-14557, 2000 NLRB Lexis 6, 330 NLRB No. 66, <[http://www.nlr.gov/nlr/shared\\_files/decisions/330/330-66.pdf](http://www.nlr.gov/nlr/shared_files/decisions/330/330-66.pdf)>.

*Ohio SERB and Rudolph*, #87-UPL-05-0209, 5 Ohio Pub. Emp. Rptr. (LRP) ¶ 5706, 1988 OPER (LRP) Lexis 2822 (Ohio SERB Hrg. Ofcr. 1988).

*Rochester Police Locust Club and City of Rochester*, #U-23938, 37 NYPER 3015, 2004 NYPER (LRP) Lexis 80 (NY PERB 2004).

### **Judicial Decisions:**

*AFGE Local 3882 v. FLRA*, 865 F.2d 1283 (D.C. Cir. 1989).

*Atwell v. Lisle Park Dist.*, #01-2520, 286 F.3d 987 (7th Cir. 2002), <<http://laws.findlaw.com/7th/012520.html>>.

*Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976), <<http://laws.findlaw.com/us/425/308.html>>.

*Beckwith v. U.S.*, 425 U.S. 341 (1976), <<http://laws.findlaw.com/us/425/341.html>>. “Although the ‘focus’ of the investigation may have been on petitioner when he was

interviewed, in the sense that his tax liability was under scrutiny, that is not the equivalent of ‘focus’ for *Miranda* purposes, which involves ‘questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.’”

*Blackburn v. Superior Court (Kelso)*, 27 Cal.Rptr.2d 204 (App. 1993).

*Boim v. Quranic Literacy Institute*, #00CV2905, 2004 U.S. Dist. Lexis 2060 (N.D. Ill. 2004).

*Carney v. City of Springfield*, 403 Mass. 604, 532 N.E.2d 631; *City of Springfield v. Civil Serv. Cmsn.*, 403 Mass. 612, 532 N.E.2d 636; *Doe v. City of Springfield*, 403 Mass. 1010, 532 N.E.2d 639 (Mass. 1988).

*City of*, see name of city.

*Confederation of Police v. Conlisk*, #73-1543, 489 F.2d 891 at n. 4 (7th Cir. 1973); also see *Hester v. City of Milledgeville*, 777 F.2d 1492 at 1496 (11th Cir. 1985) and Prof. Clymer’s article, 76 N.Y.U. L. Rev. 1309 at n. 43.

*Ehlers v. Jackson County*, #83949, 183 Ill.2d 83, 697 N.E.2d 717 (1998), <<http://www.state.il.us/court/Opinions/SupremeCourt/1998/June/Opinions/HTML/83949.txt>>.

*Franklin v. City of Evanston*, #03-2127, 2004 U.S. App. Lexis 20311 (7th Cir. 2004), <<http://caselaw.lp.findlaw.com/data2/circs/7th/032127p.pdf>>.

*Garrity v. New Jersey*, 385 U.S. 493 (1967), <<http://laws.findlaw.com/us/385/493.html>>.

*Gwillim v. City of San Jose*, 929 F.2d 465 (9th Cir. 1991).

*Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979).

*La Chance v. Erickson*, 522 U.S. 262 (1998), <<http://laws.findlaw.com/us/522/262.html>>.

*Lybarger v. City of Los Angeles*, 40 Cal.3d 822, 710 P.2d 329 (Cal. 1985). “... although an officer who refuses to cooperate in an investigation of this kind may be administratively disciplined, the discipline in the present case must be set aside because appellant was never advised that any statements he made could not be used against him in a subsequent criminal proceeding. Had appellant been properly so advised, he might well have elected to cooperate with his employer, thereby avoiding imposition of discipline based on his insubordination.”

*Martin v. State*, 113 Md. App. 190, 686 A.2d 1130 (1996).

*Matter of William Carroll*, #A-1003-99T3, 339 N.J. Super. 429, 772 A.2d 45, 2001 N.J.



Super. Lexis 175.

*Miranda v. Arizona*, 384 U.S. 436 (1966), <<http://laws.findlaw.com/us/384/436.html>>.

*NASA v. NLRA*, #98-369, 119 S.Ct. 1979, 1999 U.S. Lexis 4190 (1999), <<http://laws.findlaw.com/us/000/98-369.html>>.

*National Labor Rel. Bd. v. Weingarten, Inc.*, 420 U.S. 251 (1975), <<http://laws.findlaw.com/us/420/251.html>>.

*Pasadena Police Officers Assn. v. City of Pasadena*, 251 Cal.Rptr. 865 (2d App. Dist. 1988); reversed at 51 Cal.3d 564, 797 P.2d 608 (1990).

*People v. Early*, 158 Ill.App.3d 232, 511 N.E.2d 847 (1987).

*People v. Koverman*, #01SA210, 38 P.3d 85, 2002 Colo. Lexis 58 (2002); <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=co&vol=2002sc\168&invol=1>>.

*Reed v. Baxter*, #96-6384, 134 F.3d 351, 1998 FED App. 0011P (6th Cir. 1998); cert. den. #97-1966, 119 S.Ct. 61 (1998); <<http://pacer.ca6.uscourts.gov/cgi-bin/getopn.pl?OPINION=98a0011p.06>>.

*Santa Barbara, City of v. Superior Court (Stenson)*, #B175204, 2004 Cal. App. Lexis 1479 (2d App. Dist. 2004), <<http://caselaw.lp.findlaw.com/data2/californiastatecases/b175204.pdf>>.

*State v. Beugli*, 126 Or.App. 290, 868 P.2d 766 (1994).

*U.S. Dept. of Justice v. FLRA*, #00-1433, 2001 U.S. App. Lexis 21573 (D.C.Cir. 2001), <<http://laws.findlaw.com/dc/001433.html>>.

*U.S. v. Camacho*, #95-4427, 153 F.3d 1233 (11th Cir. 1998; certiorari denied sub nom *Veal v. U.S.*, 526 U.S. 1147 (1999), <<http://laws.findlaw.com/11th/954427man.html>>.

*U.S. v. Stacey Koon and U.S. v. Lawrence Powell*, 34 F.3d 1416 (9th Cir. 1994).

*Upland POA v. City of Upland*, #E032607, 111 Cal.App.4th 1294, 4 Cal.Rptr.3d 629, 2003 Cal. App. Lexis 1407 (4th App. Dist. 2003), <<http://caselaw.lp.findlaw.com/data2/californiastatecases/e032607.pdf>>.

### **Model Policies:**

International Association of Chiefs of Police. *Model Policies*: Investigation of Officer Involved Shootings (1999); Post-Shooting Incident Procedure (1990); Reporting Use of Force (2000); and Response to Civil Litigation (1996); and Use of Force (2001).

## Training Documents:

International Association of Chiefs of Police. *Training Keys*: #298 The Disciplinary Process: Supervisory Role (1981); #299 The Disciplinary Process: Internal Affairs Role (1981); #503 Standards of Police Conduct – Part I (1998); #504 Standards of Police Conduct – Part II (1998); and #531 Investigation of Public Complaints Part – III: The Investigation Process (2001).

## Notes:

1. For thirty years Mr. Schmidt has been the editor of the *Fire and Police Personnel Reporter*, which has discussed more than eight thousand employment and labor law decisions affecting police officers. He is the Chair of the Internal Affairs Subcommittee and Vice-Chair of the Legislative Committee of the International Association of Chiefs of Police, since 1988. Although he also serves as a management legal advisor to police chiefs and sheriffs, this article was intentionally written to minimize any pro-management bias. His vita appears at <http://www.aele.org/wws.html>.

2. For example, the LAPD Manual, §210.47 (2000) provides, “When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors and to testify freely concerning such facts when called upon to do so, even at the risk of self-incrimination. It is a violation of duty for police officers to refuse to disclose pertinent facts within their knowledge, and such neglect of duty can result in disciplinary action up to and including termination.”

3. *U.S. v. Stacey Koon* and *U.S. v. Lawrence Powell* (1994). The federal criminal civil rights statutes are 18 U.S. Code §241 and §242.

4. Sometimes the “anonymous” source is a coworker who is fearful of retaliation. See the Mollen Commission Report, pp. 53-58, “Officers who report misconduct are ostracized and harassed; become targets of complaints and even physical threats; and are made to fear that they will be left alone on the streets in a time of crisis.”

5. At least sixteen states have Bill of Rights laws: California (1976) Govt. Code §3301, Delaware (1986) Code Ann. 11 §9200, Florida (1974) Stat. §112.531, Illinois (1983, 2004) Compiled Stat. 50 ILCS 725, Kentucky Rev. Stat. Ann. §15.520, Louisiana Revised Stat. §2531, Maryland (1972, 1994) Ann. Code Art. 27, §727-734, Minnesota (1991) Stat. Ann. §626.89, Nevada (1983, 1989) Rev. Stat. §289.020, New Mexico (1978) Stat. Ann. §29-14-4, Rhode Island (1976) Gen. Laws §42-28.6-2, Tennessee (1989) Code §38-8-301, Texas (1997) Local Government Code §143.123, Virginia (1978, 1991) Code Ann. §9-1-502, West Virginia (1990) Code §8-14A-1, Wisconsin (1989, 1993) Stat. §164.02, and the Canadian Province of Alberta (1990) Police Act/Police Service Regulation 356/90 (1990).

6. The author was on the IACP professional staff at the time and participated in the drafting.

7. The Minnesota directive read: “Effective immediately you are not to discuss the subject matter of this investigation with any other Dept. of Corrections employees. Such discussion may give the appearance that you are attempting to influence the possible testimony in this matter with other Dept. of Corrections employees and may form the basis for disciplinary action against you.”

8. “California courts have long recognized that public sector attorneys have the same ethical duties of confidentiality and loyalty as their counterparts in the private sector.” *City of Santa Barbara v. Superior Court* (2004).

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