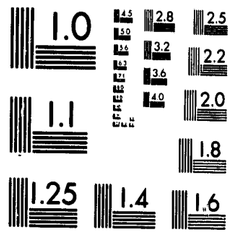

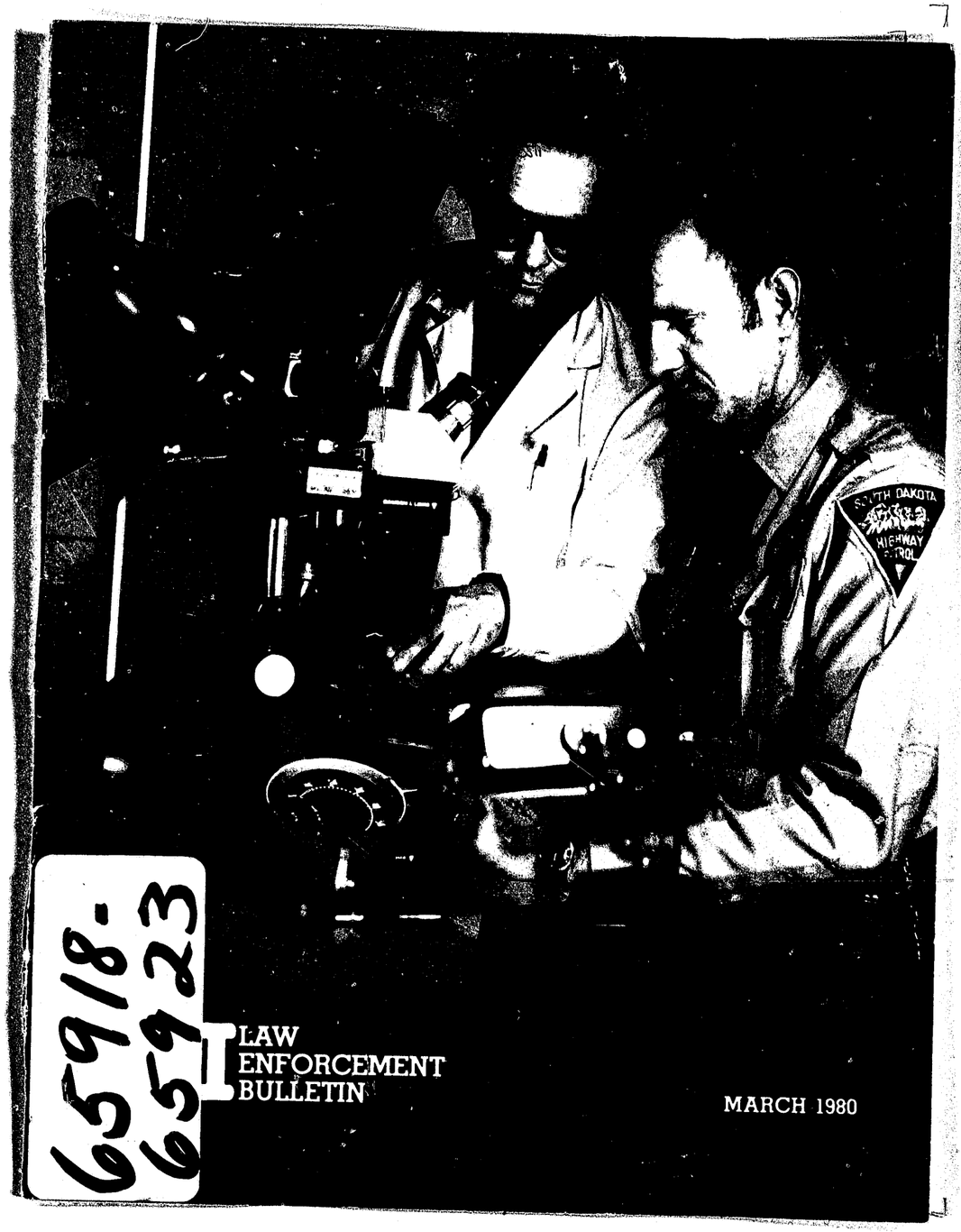

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Contents

The Cover: Law enforcement authorities conduct laboratory examination of speedometer. See article p. 11.

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Interview of Public Employees Regarding Criminal Misconduct Allegations

Constitutional Considerations (Part 1)

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Consider the following vignette:

Inspector: "Good afternoon Sergeant Wilson, I'm Inspector Johnson with Internal Affairs Division."

Sergeant: "Good afternoon, Inspector, what can I do for you?"

Inspector: "Well, as you may know, Internal Affairs is conducting an investigation into allegations that some officers of the department have received 'kick-backs' or 'payoffs' from certain individuals operating houses of prostitution under the guise of massage parlors. The allegations are rather specific, and frankly, some involve places of business within your precinct that you have investigated and reported on as being legitimate massage parlors. I would like to ask you a few questions regarding this matter. However, before I ask you any questions, since the matter does involve allegations of bribery, I want you to understand your rights." (The inspector then proceeds to read from a card the standard *Miranda* [1] warnings.)

Sergeant: "Do you understand those rights I have just read?"

"Sure I understand, I've given those a thousand times myself . . . but does this mean I'm a suspect in the investigation?"

". . . 'after proper proceedings' a public employee can be compelled to answer his employer's work-related questions. . . ."

Inspector: "Well, as you probably know the purpose of our inquiry is *primarily* disciplinary. But, since it does involve possible criminal violations, I thought it best to give *Miranda* warnings. Sergeant Wilson, I alsc want to remind you of Police Department Reg. 20.5. This regulation reads as follows: 'All officers must, when requested by their superior officers or other employees authorized to inquire into any official matter, respond fully and truthfully to all questions regarding the performance of their official duties. Any failure to respond completely and candidly to such inquiries may be punished by appropriate disciplinary action, including dismissal'."
"Sergeant, do you understand that regulation?"

Sergeant: "Yes, I'm familiar with the requirement that officers account for their official action."

Inspector: "Good. Sergeant, are you familar with the Kitty Kat Massage Parlor, operated by a Louis Carson, also known as 'Lucky Louis'?"

Sergeant: "I don't think I should answer that question . . . at least without talking to an attorney first."

Inspector: "Are you refusing to respond to my question?"

Sergeant: "Well, you told me I could refuse to talk, didn't you?"

Inspector: "I also informed you of a departmental regulation that authorizes your dismissal for failure to answer my questions regarding your official duties."

Sergeant: "Well, I'm not answering any questions. If you want to talk to me about this further, contact my attorney."

Inspector: "Do you have his name?"

Sergeant: "No, I don't, but I'll call your office and leave it for you."
(at this point the officer exits)

How would you assess the above dialog? Was the sergeant justified in refusing to answer? Doesn't a police officer, like any other citizen, have a right under the fifth amendment not to answer questions that may subject him to criminal prosecution?

On the other hand, doesn't a police department, like other employers, have a right to ask an employee to explain his conduct in regard to his assigned duties? Must a police department continue to employ an officer who refuses to account for the performance of his official duties? More specifically, if the sergeant is disciplined or fired for his failure to answer, will such action be supportable if challenged in a legal proceeding?

Assume that the sergeant, after the second warning by the inspector, decided to answer the question posed and related questions, and the answers implicated him in a criminal conspiracy. Could these answers be used in a subsequent criminal prosecution of the sergeant or in a subsequent disciplinary proceeding to determine his fitness for continued employment?

This article will address and attempt to resolve these and other related questions that often arise when a public employee is called upon to respond to allegations that may involve criminal misconduct.

At the outset, it should be recognized that the scope of this discussion is limited to the rights provided and obligations imposed by broadly applicable U.S. constitutional provisions, although occasional reference will be made to statutory provisions common to many jurisdictions.

Additional restrictions or requirements may be placed on such interviews by State or local statutes or regulations, such as "Police Officers' Bills of Rights," "privacy acts," Civil Service regulations, or by collective bargaining agreements.

When allegations of criminal misconduct are made against a police officer or any other public employee, there is a strong need to resolve them fully and fairly. The investigation must be seen by both the members of the community and by employees of the department as diligent and impartial.

An error in the conduct of the investigation may result in valuable evidence being inadmissible in a later proceeding or in administrative action being undertaken that cannot be sustained under challenge. Any failure to resolve adequately the allegations and to follow through with appropriate criminal prosecution or administrative action, if warranted, will result inevitably in erosion of public confidence in the agency, and indeed, in Government generally.

". . . a public employee may not be fired for asserting his fifth amendment right when no immunity for use of his answers has been given. . . ."

One of the most frequently used investigative techniques for resolving allegations of criminal misconduct is to question the employee involved.

Whenever a public employee is being interviewed about a matter where there is a substantial risk that the employee may be subject to criminal prosecution for his actions, there are two competing and sometimes conflicting interests. The first interest is the need of Government to require its employees to account fully for their actions in the course of official duties. The second interest is the right of a public employee, guaranteed by the 5th and 14th amendments of the Constitution, not to be *compelled* to answer questions or make a statement which could be used against the employee in a subsequent criminal proceeding.[2]

The Supreme Court and other Federal courts, as well as State courts, have established certain legal principles to accommodate the legitimate interests of both the Government and the employee.

Part I of this article will examine three major principles that are well-established in this area of the law and explain the reasoning that forms the foundation for these principles.

The conclusion of the article (Part II), which will be published in the next issue of the *FBI Law Enforcement Bulletin,* will suggest, in more concrete terms, the procedures that may be used in such employee interviews to avoid violation of these principles.

Coerced Statements Will Be Inadmissible in a Criminal Prosecution

The Supreme Court has consistently held that a statement given by a public employee under an express threat of dismissal for failure to answer cannot constitutionally be used against the employee in a subsequent criminal proceeding. This principle was first announced by the Supreme Court in *Garrity* v. *New Jersey,* decided in 1967.[3] Garrity and other defendants in the case were police officers in certain New Jersey boroughs. A State deputy attorney general questioned the officers concerning allegations that they had been involved in the fixing of traffic tickets in their jurisdictions. Prior to the questioning, each officer was warned: (1) Anything he said could be used against him in any State criminal proceeding; (2) he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) if he refused to answer he would be subject to removal from office. The warning concerning removal from office was based upon a New Jersey statute which provided, in effect, that anyone who held a public office or employment and who refused to answer any material question regarding the performance of his official duties when asked by a proper official would forfeit such job.[4]

After receiving the above warnings, the officers answered the questions. Some of the answers given were used against the officers, over their objections, in later criminal prosecutions for conspiracy to obstruct the administration of the traffic laws.

The Supreme Court reversed the convictions because, in the opinion of the Court, the statements obtained from the officers were coerced by the threat of loss of their jobs, and the use of the "involuntary" statements in a criminal proceeding violated the Due Process Clause of the 14th amendment. The Court stated that "policemen . . . are not relegated to a watered-down version of constitutional rights," and that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office. . . ."[5]

The *Garrity* prohibition against use of statements obtained after an *express* threat of dismissal for failure to answer has been consistently adhered to by Federal and State courts.[6] It should be recognized that when an officer is being interviewed by a superior officer or an internal affairs officer, there will be some inherent coercion, particularly if the department has a regulation that appears to require an officer to respond to inquiries as to his official duties. The Supreme Court has not ruled on whether an *implied* threat of dismissal may make such a statement inadmissible. Some Federal courts have indicated that an *implied* threat of termination may make such a statement inadmissible.[7] Several courts have taken the view that if no reference at all is made to adverse administrative action prior to the employee making a statement, then the statement will be considered "voluntary" and hence admissible.[8] A few courts have adhered to this view even when a job forfeiture statute was on the books and it appeared likely the employee was aware of it, when no reference was made to the provision in the course of the employee's interview.[9]

It seems fair to say that if there is no direct or clearly implied threat of dismissal, the courts will generally look to all the surrounding circumstances to determine, on a case-by-case basis, whether or not the employee's statement is voluntary. This approach is consistent with that taken by the Supreme Court in the ordinary confession case when the issue is the voluntariness of the statement.[10]

A Public Employee May Not Be Fired Solely For Asserting His Constitutional Rights

The next major principle laid down in this area by the Supreme Court also arose from an investigation into allegations of criminal misconduct on the part of a police officer. In *Gardner* v. *Broderick,*[11] a New York City officer was subpenaed before a county grand jury that was investigating alleged bribery and corruption of police officers in connection with unlawful gambling operations. He was informed of the purpose of the investigation and that he was to be questioned regarding his official duties. He was advised that he had the right, under the U.S. and New York State Constitutions, to refuse to testify against himself or to answer any questions that would tend to incriminate him. He was then requested to sign a "waiver of immunity," which would have acknowledged that any statements he made could be used against him in a later criminal proceeding. He was also told that pursuant to a New York State constitutional provision and the New York City Charter, he would be fired if he refused to sign the waiver of immunity. These provisions required public officers and employees to answer any questions put to them by a proper authority or a grand jury regarding the performance of their official duties and stated that failure to answer or to sign a waiver of immunity would result in forfeiture of employment.[12]

The officer refused to sign the waiver, and he was discharged *solely* for this refusal. The Court ordered the officer reinstated, declaring the job forfeiture provision, as applied, was violative of the officer's fifth amendment guarantee against compelled self-incrimination.[13]

The Supreme Court has reiterated this principle in several later cases,[14] and it has been followed and applied by numerous Federal and State courts to invalidate statutes or regulations that provide for forfeiture of Government employment as a penalty for the employee's assertion of the fifth amendment privilege or for failure to sign a "waiver of immunity" form.[15]

Although the Supreme Court has made it clear in *Gardner* and subsequent cases that a public employee may not be fired for asserting his fifth amendment right when no immunity for use of his answers has been given, the Court has been careful to note that these cases do *not* hold that a public officer may never be required to account to the Government for the performance of his official duties. In *Gardner* the Court stated:

> "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." [16]

In *Uniformed Sanitation Men Association* v. *Commissioner,*[17] a case decided the same day as *Gardner,* which also involved public employees who were fired for refusing to testify concerning their official duties based upon the same New York City Charter job forfeiture provision, the Supreme Court again explained this distinction:

> "(I)f New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake. But here the precise and plain impact of the proceedings against petitioners as well as of § 1123 of the New York Charter was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination. . . . At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, *after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."* (Emphasis added) [18]

"... [this] 'immunity' ... is simply protection against the use of compelled statements and their fruits in a criminal prosecution."

A Public Employee Can Be Compelled to Answer Work-Related Questions

Although the principle that "after proper proceedings" a public employee can be compelled to answer his employer's work-related questions was first stated by the Supreme Court in the above-mentioned cases, the task of establishing precisely what constitutes "proper proceedings" has been left largely to lower Federal and State courts.

A case which illustrates the approach that most courts have taken and which appears consistent with the Supreme Court's view on the issue was decided by the U.S. Court of Appeals for the Second Circuit in 1970, *Uniformed Sanitation Men Association* v. *Commissioner* (hereafter cited as Uniformed Sanitation Men II).[19] This case involved the same parties and arose from the same factual background as the Supreme Court case, *Uniformed Sanitation Men Association* v. *Commissioner* (hereafter, Uniformed Sanitation Men I), mentioned previously. After the Supreme Court held their firings improper, the employees were reinstated. On the same day, one of the employees was called before an inquiry being conducted by a high-ranking official of his department. The employee was advised that (1) he had a right to remain silent, although he could be subject to disciplinary action by the department for failure to answer material and relevant questions relating to the performance of his official duties, and (2) the answers he might give, or any information or evidence gained by reason of those answers, could not be used against him in a criminal proceeding, except for any false answer that could constitute a violation of applicable law.

Following this warning, the employee failed to answer several questions directly relating to the performance of his duties. It was stipulated that each of the other employees, if called, would follow the same course of action. Later, the employees were charged with misconduct for refusing to answer the questions, and after continuing their refusals to answer the relevant questions, were fired.

The court of appeals, in upholding the dismissals, reasoned that once an employee is assured that neither his answers nor their fruits may be used against him in a criminal prosecution, the employee is no longer faced with a choice between self-incrimination or job forfeiture. The court noted that:

> "In a case like this the state is asserting not its interest in the enforcement of the criminal law but its 'legitimate interest as an employer.' (citation omitted) To require a public body to continue to keep an officer or employee who refuses to answer pertinent questions concerning his official conduct, although assured of protection against use of his answers or their fruits in any criminal prosecution, would push the constitutional protection beyond its language, its history or any conceivable purpose of the framers of the Bill of Rights." [20]

Federal and State courts have generally adopted the approach and reasoning of the court of appeals in *Uniformed Sanitation Men II*.[21]

It should be recognized that the type of "immunity" referred to in these cases is simply protection against the use of the compelled statements and their fruits in a criminal prosecution. This immunity arises directly from the fifth amendment protection against the use of compelled statements in a criminal proceeding. No statutory immunity procedure is necessary for an employer to grant such immunity, because when the employer compels a statement upon threat of firing, the "immunity" arises by operation of law.[22] It should also be recognized that the protection is very similar to "use" immunity as opposed to "transactional" immunity. That is, the employee enjoys no protection against criminal prosecution based upon the same actions for which he is required to account to his employer, but only the *use* of his answers, or information gained by use of them (often referred to as the fruits), in the prosecution.[23] The Supreme Court has ruled that "use" immunity is sufficient to satisfy fully a witness' fifth amendment privilege against compelled self-incrimination and the broader "transactional" immunity, which protects against any prosecution arising from the offense to which the compelled testimony relates, is not constitutionally required.[24]

The three principles discussed may briefly be summarized as follows:

1) As a matter of constitutional law, any statement given by a public employee based upon a threat of dismissal from his job if he fails to respond will be inadmissible against the employee in a subsequent criminal proceeding.

2) An employee who is being questioned in any proceeding about a matter which could result in a criminal prosecution of him may not be discharged solely for invoking his fifth amendment privilege and refusing to answer or for refusing to sign a waiver of immunity.

3) A public employee does have an obligation to answer his employer's work-related inquiries. Therefore, if an employee is assured that his answers or information obtained as a result of those answers cannot be used against him in a criminal proceeding and that he may be disciplined or discharged for failure to respond, then he may properly be disciplined or discharged for any refusal to answer such questions.

FBI

(Continued Next Month)

Footnotes

[1] In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Supreme Court held that when an individual is in police custody or otherwise deprived of his freedom of action in any significant way, and police desire to question him, he must first be advised of certain rights set forth in the *Miranda* opinion. These rights consist primarily of the right to remain silent and the right to assistance of an attorney.

[2] U.S. Const. amends. V and XIV. The fifth amendment states in part: "No person shall . . . be compelled in any criminal case to be a witness against himself. . . ."

The 5th and 14th amendments provide that Federal and State governments may not deprive any person of "life, liberty, or property, without due process of law. . . ." These provisions are often referred to as the Due Process Clauses.

[3] 385 U.S. 493 (1967).

[4] N.J. Rev. Stat. § 2A:81-17.1 (Supp. 1965). The statute is set out in *Garrity* v. *New Jersey, supra* note 3 at 495.

[5] *Garrity* v. *New Jersey, supra* note 3, at 500.

[6] *Commonwealth* v. *Triplett*, 341 A.2d 62 (Pa. 1975).

[7] *Womer* v. *Hampton*, 496 F.2d 99, 107-108 (5th Cir. 1974).

[8] *People* v. *Wenstrom*, 356 N.E.2d 1165 (Ill. Ct. App. 1976); *Commonwealth* v. *Kelly*, 369 A.2d 438 (Pa. Super. 1976).

[9] *Commonwealth* v. *Kelly, supra* note 8; *DiCiacco* v. *Civil Service Commission*, 389 A.2d 703 (Pa. Comwlth. Ct. 1978) (dictum).

[10] *Brady* v. *United States*, 397 U.S. 742 (1970); *Davis* v. *North Carolina*, 384 U.S. 737, 741 (1966).

[11] 392 U.S. 273 (1968).

[12] The provisions, section 1123 of the New York City Charter and section 6 of article I of the New York Constitution, are set out in the *Gardner* v. *Broderick* opinion, *supra* note 11 at 275.

[13] *Gardner* v. *Broderick, supra* note 11, at 279.

[14] In *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973), the Supreme Court invalidated certain New York statutes which provided that any public contractor who refused to testify before a grand jury or refused to waive his immunity from prosecution would suffer cancellation of current State contracts and be barred for 5 years from other State contracts. In *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977), the Court enjoined enforcement of a similar New York statute providing for automatic forfeiture of a political party office for refusal to answer questions or waive immunity before a grand jury inquiring as to the conduct of the office.

[15] *Confederation of Police* v. *Conlisk*, 489 F.2d 891 (7th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974); *Dwyer* v. *Police Board of City of Chicago*, 334 N.E.2d 239 (Ill. Ct. App. 1975); *Luman* v. *Tanzler*, 411 F.2d 164 (5th Cir. 1969), *cert. denied*, 396 U.S. 929.

[16] *Gardner* v. *Broderick, supra* note 11, at 278.

[17] 392 U.S. 280 (1968).

[18] *Id.* at 284-85.

[19] 426 F.2d 619 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972).

[20] *Id.* at 626.

[21] *Hank* v. *Codd*, 424 F.Supp. 1086 (S.D.N.Y. 1975); *McLean* v. *Rochford*, 404 F.Supp. 191 (N.D. Ill. 1975); *Seattle Police Officer's Guild* v. *City of Seattle*, 494 P.2d 485, 491 (Wash. 1972); *Eshelman* v. *Blubaum*, 560 P.2d 1283 (Ariz. Ct. App. 1977).

[22] *Uniformed Sanitation Men II, supra* note 19, at 627; *Hank* v. *Codd, supra* note 21, at 1087.

[23] *Uniformed Sanitation Men II, supra* note 19, 627-28.

[24] *Kastigar* v. *United States*, 406 U.S. 441 (1972); also see the Supreme Court's discussion of the sufficiency of "use" immunity in the context of compelled statements from public officers and employees in *Lefkowitz* v. *Cunningham, supra* note 14, at 808-809.

END