Las Vegas Police Protective Association Metro, Inc.

To: CHRIS COLLINS, Executive Director
EXECUTIVE BOARD MEMBERS
BOARD OF DIRECTORS

From: DAVID ROGER, General Counsel DR
Date: November 27, 2012
Re: LVMPD Policy re: Garrity protection

Background:

In December 2011, as a result to changes to the Coroner's Inquest process, LVPPA advised officers that they should invoke their Fifth Amendment protections against self-incrimination. Our members followed your advice and declined to give voluntary statements, as involved officers, to FIT investigators.

Subsequently, in March 2012, Executive Director Chris Collins and I met with Sheriff Douglas Gillespie and Undersheriff Jim Dixon. Director Collins informed the Sheriff that we planned to advise our members to give statements to investigators provided the Department affords them protections pursuant to *Garrity v. New Jersey*.[1] While Sheriff Gillespie expressed reservations about affirmatively offering such protections to our members, he agreed to honor a officer's request.

As a result, we advised our members to invoke their Fifth Amendment rights, pursuant to the *Garrity* decision, in all reports and in response to any request for an interview, Specifically, we suggested that our members either include the following language in their reports or that they read the passage to FIT investigators prior to answering their questions:

"*My supervisor has ordered me to submit this statement. I give this statement at his order, as a condition of my employment because I have no alternative but to give this statement or face discipline or termination. I am giving this information based on the understanding that this statement, and any information derived from this statement, cannot be used against me in a criminal proceeding. I hereby reserve my right to remain silent under the U.S. Constitution and any other rights prescribed by law. I rely specifically upon the protection afforded me under the doctrine set*

[1] *Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616 (1967).*

9330 W. Lake Mead Blvd., #200 - Las Vegas - Nevada - 89134
Phone: (702) 384-8692 - Fax: (702) 384-7989
Email: office@lvppa.com - Website: www.lvppa.com

forth in Garrity v. New Jersey, 385 U.S. 493 (1967) should this statement be used for any other purpose."

Thereafter, Sheriff Gillespie changed his mind and implemented policy that prohibits our members from invoking their Fifth Amendment rights in reports. [2]

The policy mandates, "Members will not insert any form of Garrity admonishments or statement into any official LVMPD document or report. Garrity does not apply during the completion of required reports."

This memo will address whether our members are waiving their *Garrity* Fifth Amendment rights by complying with this new policy. The memo will not discuss whether Sheriff Gillespie or the Department is subject to liability, under 18 U.S.C. 1983 or any other theory of liability, for allegedly violating our members' constitutional rights.

Garrity Protections:

A. Garrity v. New Jersey its progeny.

In *Garrity v. New Jersey,* police officers were investigated for their roles in an alleged ticket-fixing scheme. Their employer ordered them to answer questions about their participation in the matter as a condition of their employment. The officers were given the option to remain silent, but if they did so, they would be terminated from their jobs. The officers gave incriminating statements, which lead to their conviction.

The United States Supreme Court, in reversing the conviction, explained:

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in *Miranda v. Arizona,* is likely to exert such pressure upon an individual as to disable him from making a free and rational choice. We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions." (Citations and internal quotes omitted.)[3]

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[2] *LVMPD, Policy 5/204.00 as amended October 2012.*

[3] *Id. 385 U.S. at 497*

Reversing the convictions of the officers, the Court underscored, "We conclude that policeman, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." [4]

One year later, in *Gardner v. Broderick*, the U.S. Supreme Court held that a department could not terminate an officer's employment because the officer refused to sign a waiver of his Fifth Amendment rights. [5] Additionally, the Court limited the scope of questioning to inquiries, "...specifically, directly, and narrowly relating to the performance of his official duties." [6]

Consequently, it is well established that if an employer orders an officer to answer questions, under threat of disciplinary action, such statements may not be used in a criminal prosecution. [7] The Constitution prohibits an employer from threatening termination or other sanctions to coerce an employee to waive their Fifth Amendment rights.[8] Additionally, the Department may not discipline an officer for invoking the Fifth Amendment at grand jury proceedings. *Confederation of Police v. Conlisk,* 489 F.2d 891 (7th Cir. 1973). *Garrity* protections apply to both involved officers and witnesses. *See, McCarthy v. Arndstein, 266 U.S. 34, 40, 45 S.Ct. 16, 17 (1924); Benjamin v. City of Montgomery,* 785 F.2d 959 (11th Cir. 1986).

B. Courts will preclude the use of an officer's statement even though a department does not expressly threaten sanctions for an officer's refusal to give a statement..

While the Department's policies requiring officers to complete written reports are mandatory, and subject to *Garrity* protections, courts may provide *Garrity* rights in ambiguous situations.

In *US v. Frederick, 842 F.2d 382, 395 (D.C. Cir. 1988),* the Court held that an FBI agent was entitled to *Garrity* protections if he actually and reasonably believed that he was compelled to give a statement to his employer, even if his employer did not expressly threaten to terminate his employment. [9]

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[4] *Id.. at 500.*

[5] *Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 913 (1968). See also, Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation of New York, 392 U.S.280, 88 S.Ct. 1917 (1968).*

[6] *Id. Gardner 392 U.S. at 288.*

[7] *Use of the statement and derivative evidence is prohibited.* ***Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, (1972);*** *US v. North, 910.F.2d 843 (D.C. Cir. 1990); US v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991).*

[8] ***Lefkowitz v. Cunningham, 431 U.S. 801, 805, 97 S.Ct. 2132 (1977)*** *(" These cases settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized. It is true, as appellant points out, that our earlier cases were concerned with penalties having a substantial economic impact. But the touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids."); Lefkowitz v. Turley,* ***414 U.S. 70, 82-83, 94 S.Ct. 316, (1973);*** *McKinley v. City of Mansfield, 404 F.3d 418, 435 (6th Cir., 2005).*

[9] *US v. Camacho, 739 F.Supp 150, 1515(S.D. Fla. 1990), (Also followed Frederick two prong test.)*

Thus, as will be discussed below, it is likely that a reviewing court will determine that the Fifth Amendment protects our members if the court determines that our members reasonably believe they are obligated to complete Use of Force reports, Accident reports and other mandatory documents as a condition of their employment.

Garrity is applicable to Nevada:

The Fifth Amendment privilege against self-incrimination is applicable to state proceedings. *Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489 (1964).* The Nevada Supreme Court, in *Gandy v. State ex. Rel. Division of Investigation and Narcotics, 96 Nev. 281, 607 P.2d 581 (1980)* addressed whether an employer must give *Garrity* admonitions to an employee during compelled questioning.

In *Gandy,* NDI Detective Larry Gandy was accused of using excessive force on a suspect. As part of the investigation, the NDI Chief ordered Gandy to submit to a polygraph examination. When Detective Gandy refused to acquiesce to the polygraph, the department terminated him for insubordination.

In reversing the NDI's decision to terminate Detective Gandy, the Court cited *Garrity* and held:

> *"By reason of the mentioned United States Supreme Court cases it is now recognized that an employee who is ordered to take a polygraph examination must be informed that the questions will relate specifically and narrowly to the performance of his official duty; that the answers cannot be used against him in any subsequent criminal prosecution, and that the penalty for refusing to answer is dismissal." (Citations omitted).*[10]

As will be discussed below, the Department has instituted policies that mandate that officers complete reports, which may be incriminating, as a condition of their employment. If the officers refuse to complete the reports, they will be subject to discipline for insubordination. Consequently, based upon the aforementioned cases, such reports may not be used against the officers in a criminal proceeding.

Additionally, the Department has an affirmative obligation to inform our officers of their *Garrity* rights before questioning them or ordering them to complete reports. At a very minimum, our members must be allowed to insert *Garrity* statements in department reports.

Department policies:

The Department has set forth several policies that require officers to complete reports that

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[10] *Id. 607P.2d 584.*

are available to prosecutors to charge our members with various crimes. [11] The policies include:

- 4/105.08 Completing Official Reports
- 5/103.28 Reporting Damage/Loss to Department Property and Equipment
- 6/002.00 Use of Force

In October 2012, the Department published the following amendment to policy 5/204.00:

> *"Members will not insert any form of Garrity admonishments or statement into any official LVMPD document or report. Garrity does not apply during the completion of required reports."*[12]

On November 6, 2012, Deputy Chief Gary Schofield issued the following directive to supervisors:

> *The policy concerning reports is going out today. The major change is the policy prohibits the insertion of Garrity statements into any official reports.*
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> *I need to you to take this information and develop a message to every Captain/Director and Supervisor of the agency that reviews reports. There has been a great deal of discussion on this issue and there has been information provided to officers by various groups that tells them to insert Garrity into reports. We wish to make sure that supervisors allow this change to occur and explain and coach employees to follow the policy. It is hoped that we do not have an employee who once advised by his or her supervisory to remove garrity statements refuses to do so.*
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> *I need the following explained to the supervisors in your message and we also need to start the protocols on report review we had already discussed last week.*
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> *1. All Use of Force reports that are reviewed by ISAS need to be examined for the insertion of any Garrity statement, in addition any official report produced by an*

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[11] *Charges include 18 U.S.C. 242 (Deprivation of Rights under Color of Law.); NRS 197.200 (Oppression under Color of Office); NRS 199.450 (Peace Officer Exceeding Authority in Execution of Search Warrant.); NRS 200.010 (Murder.)*

[12] *" The Fifth Amendment, in relevant part, provides that no person "shall be compelled in any criminal case to be a witness against himself." It has long been held that this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, 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." Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S.Ct. 316, 322, (1973). Neither the US Supreme Court, the Ninth Circuit Court of Appeals nor the Nevada Supreme Court has held that Use of Force Reports or other mandatory documents are excluded from Garrity protections.*

officer that we review as part of an IA investigation needs to be examined for such statements as well.

2. When a report is found with Garrity statements inserted we will FORMALLY notify the chain of command that the report needs to be corrected and ensure that a new report is completed that is in compliance with policy. If the report is in Blue Team we will send it back for correction via the system. Please track those reports with problems identified.

3. If after two weeks the report is not corrected then notify the me and the associated Deputy Chief of the failure of the employee to make the needed changes to the report.

4. If an employee fails to make changes by directly refusing the order then the chain of command will need to handle the issue as a normal internal investigation and they will need to initiate the SOC.

The goal is to get officers and employees to comply on their own with the policy and allow them to make the changes. See me for any needed clarification.

The directive makes clear that Supervisors are required to order officers to remove any reference to *Garrity* rights in reports. If the officer refuses to comply with the order, Supervisors are instructed to open an internal affairs investigation for Insubordination. A finding of Insubordination results in punishment including termination. Stated differently, the Department, by implementing the policy, is specifically denying officers the ability to invoke their constitutionally protected *Fifth Amendment* rights.

Conclusion:

The Fifth Amendment to the US Constitution and Article One, Section 8 (1) of the Nevada Constitution guarantee that people, "*... shall not be compelled, in any criminal case, to be a witness against himself.*" Officers do not forfeit those rights when they are sworn as peace officers. The cases of *Garrity v. New Jersey* and *Gandy v. State ex. Rel. Division of Investigation and Narcotics* guarantee officers immunity when they are compelled to give statements, as a condition of their employment, and under threat of punishment.

The *Gandy* decision requires the department to inform officers of their *Garrity* rights. However, not only does the Department fail to comply with the court's dictates, but the Department also forbids our members from invoking such protections. This conduct will also underscore our position that the department's policy is coercive within the meaning of the aforementioned decisions.

The policies enacted by the Department mandate that officers provide statements or other information about their conduct. If the officers fail to comply with the directives, they will be subject to discipline for insubordinate conduct. The underlying coerciveness of the department policy triggers the protections of *Garrity* and the Fifth Amendment. Officers are entitled to immunity from prosecution; at least as it relates to the use of their statements and reports because they are compelled to cooperate. Whether the coercive order to provide such information is express or implied, the court will likely suppress our officers' statement in a criminal case.

While it would be preferable for officers to invoke their constitutional rights before completing any reports, the Department has effectively eliminated that option. Nevertheless, a reviewing court will undoubtedly preclude a prosecuting agency from using such statements against the officers.

At your direction, I will also draft a letter to the Sheriff advising him that our members will not surrender their Fifth Amendment rights.