



U.S. Department of Justice

Civil Rights Division

Special Litigation Section - PHB
950 Pennsylvania Ave, NW
Washington DC 20530

NOV 23 2011

The Honorable Michael McGinn
Mayor
City of Seattle
600 4th Avenue, 7th Floor
Seattle, WA 98124-4749

Re: United States' Investigation of the Seattle Police Department –
Garrity Protections

Dear Mayor McGinn:

On March 31, 2011, the Civil Rights Division and the United States Attorney's Office for the Western District of Washington initiated an investigation of the Seattle Police Department ("SPD"), pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, as well as the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

At the beginning of our investigation, we committed to providing SPD with real time technical assistance to enhance SPD practices and procedures, and to ensure compliance with constitutional rights. During our meetings with Chief Diaz and the SPD command staff in May 2011 and September 2011, we advised that, if appropriate, we would provide in writing specific recommendations prior to completion of our investigation. In this letter, we convey our recommendations regarding SPD's practices relating to an officer's protections against self-incrimination pursuant to *Garrity v. New Jersey*, 385 U.S. 493 (1967).

Garrity provides important and fundamental protections for police officers, but its protections are limited. Our investigation has shown that SPD attempts to apply *Garrity* to all use of force and police involved shooting incidents. SPD's inappropriate blanket invocation of *Garrity* may result in the exclusion of important evidence from an investigation. Moreover, SPD's failure to shield criminal investigators from *Garrity* materials could taint and render unusable other critical evidence. These practices compromise both SPD's ability to supervise officers' use of force, and its ability to fully and efficiently conduct criminal and administrative investigations. Put simply: This practice makes it too difficult to quickly exonerate officers who have followed policy and to properly discipline officers who have not. Further, these practices compromise the ability of prosecutors or other outside agencies to adequately assess incidents and to hold officers accountable for their actions. The net effect of these consequences is diminished public trust in SPD.

This risk created by current SPD *Garrity*-related policies and practice is illustrated by a recent Seattle City Attorney's prosecution of an officer for fourth degree assault. It is our understanding that the defendant officer has filed a motion to dismiss the charge, claiming that prosecutors improperly used his "compelled and involuntary use of force statement" in deciding to bring the charges. While we take no position on the ultimate merits of the motions or this particular case, SPD's policies and practices on *Garrity* have exposed it to these claims, which have the potential to weaken both external public trust, and internal trust among the rank and file, who deserve a clear understanding of how their statements may be used.

Given the serious nature of our concerns, we are providing this technical assistance in a stand-alone letter that highlights our recommendations. The recommendations detailed below were developed in close consultation with our police practices consultants, who include a former chief of police and deputy sheriff, and follow the productive dialogue we have had with SPD to date. We strongly urge SPD to consider these recommendations immediately in revising its policies, procedures, practices, and training associated with *Garrity* admonitions. This letter is limited to providing guidance regarding the issues associated with improper administration of *Garrity* warnings, and does not address any other areas of our investigation.

I. *Garrity v. New Jersey*

In *Garrity v. New Jersey*, 385 U.S. 493 (1967), the Supreme Court held that an incriminating statement made by a police officer is inadmissible against the officer in a criminal trial if the officer made the statement under the threat that the officer would lose his or her job if the officer invoked the right to remain silent. The Court concluded that, under those narrow circumstances, the statement would be considered coerced because the officer was denied any meaningful opportunity to assert his Fifth Amendment rights. *Id.* at 499-500.

Garrity is premised on the fact that it is coercive for the government to put an officer "between a rock and a whirlpool," *Garrity*, 385 U.S. at 498, by forcing the officer to choose whether to incriminate himself or to lose his job for invoking the Fifth Amendment. *United States v. Cook*, 526 F. Supp. 2d 1, 6-7 (D.D.C. 2007). In order for an officer to establish that a statement is *Garrity*-compelled, he must demonstrate that he wanted to invoke the Fifth Amendment, but was prevented from doing so by an express or implied threat that he would be fired if he remained silent. *United States v. Trevino*, No. 05-51309, 215 Fed. App'x. 319, 321-22 (5th Cir. 2007). To make this showing, he must establish both that he subjectively believed that he would be fired for refusing to talk, and that this belief was objectively reasonable. *Cook*, 526 F. Supp. 2d at 7-8; *United States v. Vangates*, 287 F.3d 1315, 1322 (11th Cir. 2002).

Garrity is intended to apply narrowly to situations where the officer is required to give a statement or face termination, and the officer reasonably believes that the statement could be self-incriminating. It is not meant to apply to officers' routine documentation of their activities, including, for example, the completion of incident and use of force reports, or to discussing the same with department officials. *Cook*, 526 F. Supp. 2d at 8 ("*Garrity* does not stand for the proposition that a statement made in a standard report is coerced whenever an officer faces both the remote possibility of criminal prosecution if he files the report and the arguably even more

speculative possibility of termination if he declines to do so.”); *United States v. Camacho*, 739 F. Supp. 1504, 1516 (S.D. Fla. 1990) (declining to find that “the mere existence of a departmental policy of disciplining those officers who refuse to give statements always operates as a matter of law to render officer statements involuntary”); *United States v. Tsou*, 1993 WL 14872, at *4-5 (5th Cir. Jan. 18, 1993) (unpublished) (holding that an FBI agent’s statement was not compelled, despite an FBI policy requiring agents to cooperate with any administrative investigation).

II. Recommended *Garrity* Reforms

A. Standard Use of Force Statements Are Not Compelled Statements Under *Garrity*.

We recommend that SPD amend its Use of Force policy to clarify that standard use of force statements are not compelled under *Garrity*. Currently, SPD’s Use of Force policy requires that each use of force statement be preceded by the following language: “This is a true and involuntary statement given by me in compliance with Section 6.240 of the Seattle Police Department Manual.” The policy clarifies that “[n]o other language will be acceptable.” SPD Department Policy and Procedure (“DP&P”) 6.240.XII.A.4. Mandating the inclusion of this language in all use of force statements has resulted in all such statements being treated by some as potentially *Garrity*-compelled. Some SPD officers have stated that they subjectively believe that use of force statements are considered *Garrity*-compelled, and the SPD Office of Professional Accountability (“OPA”) also mistakenly considers this language to be a grant of *Garrity* protection. This shared understanding by various audiences could undermine a valid assertion that these routine use of force statements are not *Garrity*-compelled, and could severely limit the ability of prosecuting agencies to review and possibly use the statements.

Attempting to provide blanket *Garrity* protection for every use of force statement is bad policy and goes beyond what is required by law or necessary to protect officers’ Fifth Amendment rights. Use of force is sometimes unavoidable in police work, but is a serious event. Routine police practice requires departments to accurately record the circumstances surrounding uses of force. Use of force statements are an invaluable training and officer-safety tool, and they are critical for maintaining accountability and managing risk. A use of force statement should be a factual recitation of events that constitutes a necessary and routine part of an officer’s job duty. SPD officers file approximately 500 use of force reports each year as an obligatory part of their professional responsibilities. Of these 500 matters, we are aware of a very small number that resulted in a criminal referral, much less prosecution. Thus, in any given case, the completion of a report carries only a “remote possibility” of criminal prosecution or administrative investigation. See *Watson v. Cnty. of Riverside*, 976 F. Supp. 951, 955 (C.D. Cal. 1997) (finding that officer’s report regarding an arrest and use of force was “a requirement of [officer’s] job and did not constitute a compelled self-incrimination”); *United States v. Hill*, No. 1:09-CR-199-TWT, 2010 WL 234798, at *9 (N.D. Ga. Jan. 13, 2010) (finding that a Sheriff’s Department policy stating that adverse action may be taken against employees for refusal to cooperate in investigations was insufficient to invoke *Garrity*, as that interpretation would mean that “every public employee statement is subject to *Garrity* immunity”); *Devine v. Goodstein*, 680 F.2d 243, 247 (D.C. Cir. 1982) (holding that a public employee could not have reasonably believed that preparation of a routine report would be used in a criminal investigation).

SPD's attempt to treat all use of force statements as *Garrity* protected does not conform with best practices and is unlike its treatment of other SPD reports. For example, SPD does not require *Garrity* language to precede SPD incident reports, log sheets or booking records, even though those reports could expose officers to the same hypothetical jeopardy. Treating use of force statements differently is unnecessary. Moreover, the presumption implicit in SPD policy and practice, *i.e.* that every use of force implicates criminal conduct by an officer, is unfounded and undermines public trust. It also compromises the ability to hold officers accountable in those infrequent instances where there is officer misconduct. In those rare circumstances where an officer reasonably believes that a truthful statement will be self-incriminating, the officer can affirmatively exercise his or her Fifth Amendment rights and refuse to make a statement. However, the Fifth Amendment privilege should only apply where "the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Marchetti v. United States*, 390 U.S. 39, 53 (1968); *see also Hiibel v. Sixth Judicial District Court of Nevada, Humboldt Cnty.* 542 U.S. 177, 190 (2004) (defendant may invoke the Fifth Amendment privilege where there is "reasonable cause to apprehend danger from a direct answer"). Once an officer has invoked the right to refuse to make a statement, SPD, after consulting with a prosecutor as discussed below, can determine if the officer's statement should be compelled.

B. Officer-Involved Shooting Statements Should Not Be Treated As Compelled Under *Garrity*.

We recommend that SPD revise DP&P 8.060 regarding Officer Discharges of Firearm so that SPD does not treat all statements provided during officer-involved shooting ("OIS") investigations as *Garrity*-compelled. Currently, when a shooting results in death or injury, SPD's policies direct that SPD compel the following statements from the involved officer: (1) a public safety statement at the scene of the shooting, where a supervisor orders an involved officer to answer standardized questions related to the firearms discharge, such as suspects' descriptions, whether evidence requires protection, and whether there are any known witnesses; (2) a verbal narrative of what occurred with the Homicide/Assault Unit either on scene or at the office; (3) a scene walkthrough; and (4) a written use of force statement to be submitted within three days. DP&P 8.060.III.B.6.a-d; 8.060.I.D. This "*Garrity* advisement" "orders" the Involved Officer to answer questions and states that a "refus[al] to answer questions relating to the performance of ... official duties ... could result in dismissal."

For the same reasons stated in the preceding section, SPD should not attempt to confer automatic *Garrity* protections on the verbal and written statements provided following an OIS. As these are some of the most serious uses of force, SPD should also shield criminal investigators from any *Garrity* statements to avoid any potential issue of taint. As explained above, an officer may invoke the Fifth Amendment privilege if he or she believes a truthful answer will be self-incriminating. Absent affirmative invocation, SPD should not universally attempt to render these statements compelled under *Garrity*.

C. SPD Should Provide All Officers with the Opportunity to Give Voluntary Statements Following Use of Force Incidents.

One significant concern with SPD's policy is that the policy makes it more difficult for an officer to provide a voluntary statement. While SPD must abide by an officer's Fifth Amendment right against self-incrimination, SPD's application of *Garrity* attempts to overly expand this protection. In practice, this may undermine the enforcement of other constitutional rights by compromising prosecutors' ability to investigate and prosecute potential criminal misconduct by officers.

Attempting to automatically "Garritize" all officer statements risks generating protracted litigation that could result in inconsistent treatment of statements and create uncertainty as to the exact scope of the officer's protections. Use of force is a necessary reality in law enforcement. However, it is critical that the community has confidence that force will be used appropriately, and that individuals will be held accountable when it is not. As many agencies and officers recognize, it is almost always in an officer's best interest to provide his or her own statement regarding the force that was used. Even in the minority of cases that may result in a referral to a prosecutor, a review of an officer's statement usually provides a more complete view of an incident that quickly ends an investigation.

In those relatively rare circumstances where an officer might have engaged in criminal misconduct, it is a disservice to the Department, those officers who follow the law, and the community to unnecessarily create artificial obstacles to holding that officer accountable. SPD's current policies and practices do just that. SPD's automatic wholesale *Garrity* invocations could result in the exclusion of important evidence from an investigation, and SPD's failure to shield criminal investigators from *Garrity* materials could result in unnecessary litigation over the effects of any taint. While taint seldom constitutes the prohibited use contemplated by *Garrity*, careless practices can result in confusion, unnecessary litigation, and the unnecessary expenditure of resources. In short, these policies could prevent prosecutors from using statements that would make an officer's culpability more clear, which in turn has the effect of undermining the community's ability to hold officers accountable when they commit criminal misconduct.

In the San Diego Police Department's ("SDPD") peer review of the August 30, 2010, SPD shooting of the late John T. Williams, SDPD provided a description of its *Garrity* procedures, which appear consistent with generally accepted practices. The SDPD Homicide Unit "does not compel statements from shooting officers, since they would be inadmissible in a District Attorney's review." (emphasis in original).¹ Instead, when a shooting incident occurs, an officer's attorney is sent to the scene, and SDPD "ask[s] the attorney if the officer is willing to participate in a voluntary walk-through of the incident scene and provide a voluntary statement about the incident" (emphasis in original). If the officer agrees, the officer participates in both with an attorney present. *Id.* If the attorney or officer does not agree, the investigation continues without the officer's participation, even though, as SDPD recognizes, "the most important part of

¹ Letter from San Diego Police Department Lieutenant Kevin Rooney to Chief of Police John Diaz, Seattle Police Department, re August 30, 2010 Shooting Involving Officer Ian Birk #7505, Jan. 20, 2011, *available at* http://www.seattle.gov/police/OPA/Docs/Birk/SanDiego_Report.pdf.

an officer-involved shooting investigation is the shooting officer's statement." *Id.* In the peer review, SDPD Lieutenant Kevin Rooney observes that "absence of a legally-admissible officer statement" in the SPD shooting of the late John T. Williams made it "impossible to know what Officer Birk saw, how he felt, and why he chose to use deadly force" because there was "no first person account of what happened." *Id.* Adopting a similar type of protocol to SDPD would give an SPD officer the choice of providing a voluntary statement, as well as facilitate a full and fair investigation.

D. SPD Should Consult with the Prosecuting Agency Before Administering *Garrity* Admonitions Following Officer Involvement in Serious Use of Force Incidents.

As noted above, it is a best practice in law enforcement to not compel statements pursuant to *Garrity*, at least until the completion of the criminal investigation. If the officer invokes his or her Fifth Amendment right against self-incrimination, the criminal investigation proceeds without the officer's statement. Where a statement from the officer is compelled, usually after closure of the criminal investigation and as part of the agency's internal administrative investigation, a generally accepted practice is to consult with a prosecutor before compelling the statement and thereby granting *Garrity* protections. In contrast, SPD's policies automatically attempt to grant *Garrity* protection, depriving SPD of the opportunity to consult with prosecutors based on the circumstances of each incident. The protections of the Fifth Amendment should involve incident-specific consultation with a prosecutor in advance of granting Fifth Amendment privileges.

SPD should develop a formal process for conferring, from the outset, with prosecutors in every serious use of force or potentially criminal matter to determine whether a criminal investigation or prosecution is warranted. To ensure that this process is not itself an obstacle, serious uses of force can be defined by the level of injury sustained by a subject, or any use of deadly force, regardless of the severity of the injury. Trained investigators should roll-out to OIS and other serious uses of force to make the determination about whether to consult a prosecutor. Supervisors should similarly be trained to make determinations on scene about when to refer use of force incidents to OPA, which can then decide whether to refer the incident to a criminal prosecutor.

After consultation with prosecutors, SPD may learn that a criminal investigation is not warranted or viable and decide to compel the statement of the officer. If so, SPD should compel a statement only after taking appropriate steps (outlined below) to ensure the separation of the criminal and OPA administrative investigations in order to maintain the integrity of the criminal investigation, should it later become apparent that a criminal prosecution is appropriate.

E. SPD Should Carefully Administer Bifurcated Criminal and Administrative Investigations.

There is no question that SPD has its own need to determine what happened in an officer-involved shooting or use of force. Thorough, fair, and timely administrative investigations are one of the most critical responsibilities of a police department. Effective investigations of

shooting or use of force incidents can quickly identify whether there are any policy, training, officer-safety, or accountability concerns. Currently, SPD tolls its administrative OPA investigations pending the completion of a criminal investigation, which creates several problems. First, this can result in a lengthy time delay, which in turn can compromise an investigation as witness memories fade and facts become more difficult to gather. Second, a delay in corrective action diminishes the meaningfulness of the intervention or disciplinary action on the individual officer and the department as a whole. Third, unnecessary delays in completing an administrative investigation undermines the public's confidence that SPD takes police misconduct allegations seriously, and creates additional stress for the employee who awaits the final determination of the investigation.

To avoid the problems inherent in tolling an administrative investigation, we recommend that SPD develop procedures for conducting effective parallel criminal and administrative investigations that do not compromise the integrity of either investigation. To do so, SPD should not compel a statement from the subject officer until it has been determined that a criminal investigation is not viable or has been completed. This determination should be made in consultation with the prosecuting agency and the OPA Director. With the exception of compelling the officer's statement, the administrative investigation may proceed even while the criminal investigation is ongoing. SPD must also develop and implement processes to ensure the separation of the criminal and administrative investigations in the event that a statement is *Garrity*-compelled before completion of the criminal investigation. This process will ensure that any information learned from a *Garrity*-compelled interview statement does not accidentally taint other parts of the criminal investigation.

III. Recommended Remedial Measures

We recommend that SPD revise the following policies pursuant to the recommendations contained in this letter. These measures are not meant to be exhaustive, but highlight key recommendations that will remedy the deficiencies described in this letter. SPD should:

1. Revise SPD "Use of Force" Policy, "DP&P" 6.240.XII.A.4. SPD should make clear that all officer statements in use of force reports are part of each officer's routine job duties and are not compelled statements under *Garrity*. SPD DP&P 6.240.XII.A.4 should make clear that all use of force statements should be true and voluntary.
2. Add a provision to the SPD manual that officer's statements and reports are voluntary and provided as part of an officer's routine job duty. The only officer statements to be considered compelled under *Garrity* are those given following an explicit written *Garrity* advisement
3. Revise SPD "Officer Discharge of Firearm" Policy, DP&P 8.060:
 - a. Revise DP&P 8.060.I.D and 8.060.III.B.2 to eliminate any reference to the public safety statement being compelled or "*Garrity* protected."

- b. Revise DP&P 8.060.III.B.6 to eliminate the reference to the *Garrity* advisement so that the policy reads: “In summary, when a shooting results in death or injury, the Involved Officers may expect the following requests for information.” Where an officer believes that providing a verbal or written statement will be self-incriminating, the officer should not be compelled to provide a statement without a prior consultation with the prosecuting attorney’s office and the OPA Director subsequent to the completion of any criminal investigation.²
4. Ensure that criminal investigators and prosecuting attorneys are appropriately shielded from any *Garrity* compelled statement.
5. Develop a policy regarding the referral of potentially criminal conduct to the prosecuting agency by an OPA investigator or SPD supervisor who may determine whether there is sufficient reason to indicate that an officer or employee has engaged in criminal conduct in the course of complaint intake or investigation.
6. Revise SPD “Public and Internal Complaint Process” Policy, DP&P 11.001.V.J., to state that OPA administrative investigations will begin immediately, irrespective of the initiation of criminal proceedings, provided that the OPA administrative investigation does not interfere with a criminal investigation. The subject officer shall not be compelled to provide a statement to OPA where there is a potential or ongoing criminal investigation or prosecution of an officer, until the remainder of the OPA investigation has been completed, and only after consultation with the prosecuting agency and the OPA Director.

* * * *

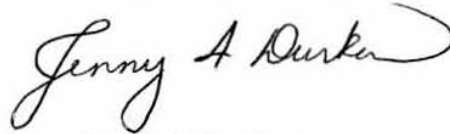
² If an officer consults with counsel on whether to invoke his constitutional rights, it is important that counsel be independent and not be counsel for SPD, the City of Seattle or a prosecuting agency.

We hope that this letter provides helpful useful technical assistance, and remain open to continuing a dialogue about how best to implement these policy changes. We greatly appreciate the cooperative and productive relationship that we have had with the City of Seattle thus far, and look forward to working with you as the investigation proceeds. Please note that this letter is a public document and will be posted on the Civil Rights Division's website. If you have any questions, please feel free to contact us.

Sincerely,



Jonathan M. Smith
Chief
Special Litigation Section



Jenny A. Durkan
United States Attorney
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cc: Chief John Diaz
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Peter Holmes
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