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TRAINING BULLETIN

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"TAKING THE FIFTH" PART II
The Nature and Consequences of Administrative Compulsion

In Part I of this three-part article, "TAKING THE FIFTH", the nature of *use immunity* was explored, in relation to administrative compulsion which effectively overrides invocation of the right to silence in an administrative setting. We saw that whenever the government, acting as an employer, compels an employee upon pain and penalty of insubordination, to answer questions, in a proper setting after assertion of the *right to silence* granted by the Fifth Amendment, the affected employee is *immune* from the *use* of the fruit of that statement in a subsequent criminal prosecution against him or her. Hence, the words, "use immunity" have been coined to described this result.

This is pure Fifth Amendment law. State statutes, such as *Government Code §3303(h)*, add some clarifications or refinements, but of course, cannot diminish the protection. In years past, states attempted to strip public employees of their Fifth Amendment rights, by making the loss of public employment the price for exercising the privileges, but these statues did not and could not, survive judicial scrutiny. (*See, for example, Garrity v. New Jersey (1967) 385 U.S. 493.*) As the Supreme Court has said many times since, public employment cannot be conditioned upon a waiver of constitutional rights.

So how does this principle apply in the context of internal affairs ("IA") or officer-involved shooting ("OIS") investigations? The answer depends on two variables: the identity of the person or agency doing the investigating; and, the decision to invoke the rights, or to waive them, on the part of the affected employee.

The law, as we have seen, permits the *employing* law enforcement agency to compel a statement from its employee, even after rights are invoked, because of the immunity from criminal use that automatically flows. Suppose however, that the OIS investigation is being conducted by someone from an agency other than the officer's or deputy's department. Do these same protections obtain? Assuredly, they do not. And, a failure to recognize the distinctions can result in a disastrous mistake: *waiver*. Because a non-agency member is in no position to compel a statement from a department employee, the necessary ingredient of compulsion is absent from the equation. Hence, there can be no immunity. Where there is no use immunity, there is a corresponding waiver of the right against self incrimination.

The scenario usually goes as follows. The employer, by its officials, desires to obtain the employee's statement in an IA or OIS. The employee, if not otherwise warned,

should inquire whether a refusal to answer could result in administrative discipline. The answer will be yes, so the employee should clarify on the record that he is cooperating only because he fears the lash of administrative discipline. Thus, the compulsory nature of the process is established. We're half-way to establishing use immunity.

Next, the employee should "invoke his Fifth", or simply refuse (expressly) to waive his right against self-incrimination. This will trigger a so-called *Lybarger* admonishment in which he will be told (1) he is *ordered* to answer; (2) refusal to answer will result in discipline or removal; and (3) whatever he says in response to the order cannot be used against him. Use immunity is now complete--the answers can be used administratively, but not criminally.

However, if the interrogator is not the employer (or its agent), then the interrogator cannot answer "yes" to the first question, that discipline will flow from a refusal to cooperate. If there is no threat of discipline for refusal to answer, there is no compulsion. If there is no compulsion, there can be no overriding of the right to remain silent, and therefore, no use immunity. So, if the employee talks under these circumstances, it will be deemed voluntary, and usable for all purposes.

The rule that emerges is this: if the interrogator or person who wants to get your statement is not from your agency, with the authority to order you to cooperate, *don't talk*, at least not until you are absolutely sure that the case has no criminal potential whatsoever, or you receive competent legal advice to cooperate. Remember, your statement has no protection at all.

A published decision in the Fifth Appellate District some years ago illustrates this point, with horrific consequences. A small-town police officer had an accidental discharge in the station that killed a young volunteer worker. His chief requested Fresno County Sheriff to send its OIS team to investigate, so as to avoid the appearance of impropriety. Naturally, these investigators wanted to interview the shooter, Officer Velez, since no one else could really explain what happened. The Chief requested that Officer Velez "cooperate" with the investigation. Velez gave a statement. It was "voluntary", and it was incriminating. Officer Velez was charged with the homicide, and was convicted at trial.

On appeal he argued that the trial court erroneously overruled his objection to the use of his statement by the prosecutor in his case in chief. The appellate court noted that a *Miranda* warning was not required since Velez was not subjected to "custodial interrogation". The Public Safety Officer's Procedural Bill of Rights Act (*Government Code §3303[h]*) was also inapplicable because Velez was not subjected to interrogation by a member of his "employing public safety department" (but rather, deputies from the county sheriff's department). So, his statement was construed to be a completely voluntary admission of a crime. His conviction for manslaughter was upheld. (*See: People v. Velez (1983) 144 Cal.App.3d 558, 564*)

Obviously, the safest way to proceed will always be with an order from your department making your participation "compulsory". If there is any chance of a criminal prosecution, (1) invoke your right to silence, (2) get a lawyer or competent representative, and (3) follow his or her advice. If you proceed, make sure the record is clear that you are invoking your rights, but that you are participating only because your employer has ordered you to do so, and your refusal will be regarded as insubordination and neglect of duty.

In the meantime, if there are any questions raised by this article, feel free to give us a call at the Legal Defense Trust, at (909) 653-5152 or at our Pasadena office at (626) 683-5600.

Stay safe!

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