

 <b>Corrections and Community Supervision</b>  <b>DIRECTIVE</b>	TITLE <b>Rights of Departmental Employees</b>		NO. 0102
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REFERENCES (Include but are not limited to) Article 75 of the Civil Service Law for M/C employees Collective Bargaining Agreements	APPROVING AUTHORITY 		

I. **DESCRIPTION:** This directive sets forth the rights of Department of Corrections and Community Supervision (the Department) personnel relating to investigations by the Department of Corrections and Community Supervision.

II. **INVESTIGATIONS BY THE DEPARTMENT**

A. References & Background:

The U.S. Supreme Court in Garrity v. New Jersey, 385 U.S. 493 (1967) and Gardner v. Broderick, 392 U.S. 273 (1968) held that where government employees being investigated for misconduct and/or criminal conduct were given a choice, either to give a statement or face disciplinary action, the government employees' confessions were not voluntary. Therefore, any such statements were taken in violation of the Fifth Amendment and cannot be used against the employee in a criminal trial.

Yet in subsequent cases, courts have made it clear that an employee cannot refuse to answer work related questions if they are given immunity under Garrity. This means any such statements are not admissible in a subsequent criminal prosecution but can only be used to discipline the employee. See, e.g., People v. Avant, 33 N.Y. 2d 265 (1973); Matt v. LaRocca, 71 N.Y. 2d 157 (1987). Thus, a public employee who is ordered to answer questions about work related matters and given Garrity protection, who thereafter refuse to answer questions may be terminated.

B. Procedures:

The Department recognizes the need to conduct investigations into the conduct of Department employees in order to safely and effectively perform all of the functions of the Department. The Department also requires that all employees be accorded the full protections of state and federal laws, the legal system, and the employee's union contract. These procedures accomplish both objectives.

The Department will pursue two types of investigatory questioning of Department employees;

1. Questioning by a Department supervisor or other representative of the Department (e.g., a member of the Office of Special Investigations (OSI) or Bureau of Labor Relations (BLR)) in which the employee is **specifically compelled by the employer to give information** (i.e., an order and a threat of discipline to give information), but is not compelled to waive assertion of the Garrity protection (i.e., no order and no threat of discipline to waive assertion of Garrity rights; and

2. Questioning by a member of the OSI concerning potential criminal conduct by the Department employee in which there is no compulsion or threat of discipline for a refusal to answer questions. Department employees, by this or any other directive, are **not automatically compelled** to answer questions posed by the Department and will be afforded all of their statutory, constitutional and contractual rights. The following outline will further define steps that the Department will take under particular circumstances.
  - a. Questioning regarding potential Disciplinary Action: When an employee is questioned by a Department supervisor or other representative of the Department (e.g., OSI) under circumstances in which it reasonably and objectively appears that the employee may be the subject of a potential disciplinary action, and the Department may use the employee's statement(s) for disciplinary purpose, the following shall apply;
    - (1) The employee shall be notified that personal counsel or union representatives may be present at all times during the interrogation if so requested by the employee.
    - (2) The employee shall be notified that a postponement may be granted until 10:00 a.m. the following day to provide the employee the opportunity to retain counsel or union representation.
    - (3) The interrogation shall be conducted at reasonable hours. For the purposes of this directive, the term "interrogation" is defined by the applicable collective bargaining agreement or Article 75 of the Civil Service Law for M/C employees.
    - (4) No threats or offensive language will be used.
    - (5) The length of the questioning period shall not be excessive and shall include breaks for meals and personal necessities.
    - (6) The following Garrity warnings will be given to the employee concerned (either in writing with a signed receipt or transcribed on the record with the employee acknowledging his or her understanding) prior to the commencement of the interrogation.
      - (a) You are being questioned as part of an official investigation by the Department of Corrections and Community Supervision. You will be asked questions specifically directed toward and narrowly related to the performance of your official duties.
      - (b) You are entitled to all the rights and privileges guaranteed by the laws of the State of New York, the Constitution of the United States, including the right not to be compelled to incriminate yourself and the right to have legal counsel present during any questioning.
      - (c) If you refuse to testify or to answer questions relating to the performance of your official duties, you will be subject to Departmental charges which could result in your dismissal from the Department of Corrections and Community Supervision.

- (d) 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.
  - (e) Do you understand your rights and what I have just informed you?
  - (f) Do you now wish to proceed with answering my questions?
- b. Questioning Regarding Potential Criminal Conduct: When a member of the OSI questions a Department employee regarding conduct which may result in criminal charges against that employee, but those answers are not sought for use for administrative or disciplinary purposes, the employee will be advised by the member of the OSI, in sum and substance, the following;
- (1) This is a voluntary interview;
  - (2) You are not being compelled or threatened by your employer to waive your constitutional rights;
  - (3) Whether or not you speak with me it will not be held against you;
  - (4) Do you understand your rights, and do you wish to speak with me now?

When this questioning of the Department employee by a member of the OSI is in a custodial setting under the "Reasonable Person Standard", then *Miranda* warnings also will be administered in a manner consistent with the following;

- (1) You have the right to remain silent
- (2) Anything you say can be used against you in a court of law
- (3) You have the right to an attorney present during questioning on this matter
- (4) If you cannot afford to hire an attorney, one will be appointed to represent you free of charge
- (5) You may decide at any time to exercise these rights.
- (6) Do you understand these rights?
- (7) Having these rights in mind, do you wish to waive your rights and to speak with me now?