

*Professional Firefighters of Wisconsin  
Wisconsin Affiliate Leadership Training Seminar  
October 9, 2018*

# Helping Protect Your Future

(and that of your members)

*Presented by:*  
Attorney Charles S. Blumenfield  
Blumenfield & Shereff, LLP

1001 West Glen Oaks Lane - Suite 110 • Mequon, WI 53092  
T: (262) 241-3400 • F: (262) 241-3403 • C: (414) 232-1700  
E: [blumenfield@cbcslaw.com](mailto:blumenfield@cbcslaw.com) • W: [www.cbcslaw.com](http://www.cbcslaw.com)

**STRATEGIES,  
ADVICE,  
& DIRECTION**

**DISCIPLINE**  
**INVESTIGATIONS**  
**WHEN TO TALK**  
**WHAT TO SAY**  
(and what not to say)

An overview of : Weingarten, Garrity, Loudermill, investigatory interviews, and PFC hearings.

## WEINGARTEN RIGHTS:

1. Employees have Weingarten rights only during **investigatory interviews**.
2. Must make a clear request for **union representation** before or during the interview.
3. Employer must either a) delay until union rep present; b) deny and end interview, or c) give choice to employee— no rep or end interview.

Unfair labor practice – refuse to answer—cannot be disciplined

**Weingarten Rights** apply to the right of a unionized employee to request union representation for any investigatory interview conducted by their employer, in which the employee has the reasonable belief that the discussion could lead to disciplinary action.

**Garrity Rights** protect you, as public employees from being **compelled to incriminate themselves** during investigatory interviews conducted by their employers.

This protection stems from the **Fifth Amendment** to the United States Constitution, which declares that the government cannot compel a person to be a witness against him/herself.

*Nota Bene:* It is only applicable if the member may be subject to criminal prosecution.

## ***GARRITY WARNING***

1. A warning given to FF
2. By the department
3. During dept. investigation
4. That requires FF to either provide information or be discharged for refusing to provide information.
5. If such a warning is given, FF may object to use of such information in a subsequent criminal proceeding
  - a. Statement was self-incriminating and
  - b. Made under duress. (compelled)

## **SAMPLE GARRITY WARNING**

*Garrity v. New Jersey*

385 U.S. 493 (1967)

I wish to advise you are being questioned as part of an official investigation of your employer. You will be asked questions specifically, directly and narrowly related to performance of your official duties or fitness for office. You are entitled to all the rights and privileges guaranteed by the law and the Constitution of the United States, including the right not to be compelled to incriminate yourself. I further wish to advise you that if you refuse to testify or to answer questions relating to the performance of your official duties or fitness for duty, you could be subject to discharge. If you do answer, neither your statement, nor any information or evidence which is gained by reason of such statement, can be used against you in any subsequent criminal proceedings. However, these statements may be used against you in relation to subsequent discipline.

By \_\_\_\_\_  
(For the Employer)

\_\_\_\_\_  
(Employee)

\_\_\_\_\_  
Date



## PROBLEM:

What do you do if the Chief orders you to speak with the police department?

1. Before a Garrity warning?
2. After a Garrity warning?
3. If no criminal charges are possible?

**Loudermill Rights** require due process before a public employee can be dismissed from their job.

A public sector employee possesses Garrity Rights and Loudermill Rights because their employer is the government, regardless of whether he/she works in a unionized workplace.

# **Disciplinary Process – Police and Fire Commission**

Suspension, reduction in rank or termination can only be imposed after a due process hearing before a PFC.

## **Initiation of disciplinary proceeding.**

### **Charges**

Seeking discipline of a firefighter

May be filed by chief, PFC member, PFC, or any aggrieved person.

Usually only when unpaid suspension or greater penalty sought.

Seven “just cause” standards

Must be provided adequate notice.

Impartial decision maker.

## THE LAW IN WISCONSIN

**§62.13 (5)(em)** No subordinate may be suspended, reduced in rank, suspended and reduced in rank, or removed by the board under par. (e), based on charges filed by the board, members of the board, an aggrieved person or the chief under par. (b), unless the board determines whether there is just cause, as described in this paragraph, to sustain the charges. In making its determination, the board shall apply the following standards, to the extent applicable:

## **SEVEN JUST CAUSE STANDARDS**

- 1.** Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
- 2.** Whether the rule or order that the subordinate allegedly violated is reasonable.
- 3.** Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.

4. Whether the effort described under subd. [3.](#) was fair and objective.
5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

Review of 7 JUST CAUSE standards:

1. Knowledge of consequences?
2. Reasonable rule?
3. Reasonable effort to discover violation?
4. Was investigation fair and objective?
5. Substantial evidence of violation?
6. Discrimination?
7. Relationship of discipline to a) seriousness of violation and b) service record.

## **PFC PROCESS**

**Hearing -> 5 - 30 days**

**Decision -> Quick**

**Review -> Supposed to be quick**



**REVIEW:** Circuit Court – Two avenues - legs

1. Statutory appeal §62.13 (5)(em) Stats.

Was there “just cause” to sustain charges

2. Writ of certiorari

Did the PFC exceed its jurisdiction, proceed on an incorrect legal theory?

Did it act in an arbitrary manner (will, not judgment)?

Did evidence support determination?

Not careful? Lose a leg.

- **Dealing with the Chief**

- Recognizing the chain of command

- Sublimating concerns

- Positive issue handling

- Acceptance?

## Early representation

- Insist on due process rights
- Never lie!
- *Garrity* may apply; *Weingarten* and *Loudermill* do
- Dealing with extortion behaviors

## The Union Can Make A Big Difference

1. Snuff happens
2. Restaurant
3. Computers (taxes, etc.)
4. Beat down
5. Retire days
6. Impropriety
7. Guns
8. Disorderly Conduct
9. Theft
10. OWI 2<sup>nd</sup> *et. seq.*
11. Mistaken reports

- **Resolution after charges issue**
  - Negotiations to resolve
  - Minimizing punishment
  - Positive approach
  - Last Chance Agreements

## Negotiating options

Can often extract concessions re future use of info developed

Terminate investigation before charges result in full fact-finding

Last chance possibility

Retirement

Actual  
Disability

## **Last Chance agreements**

Length of time

Employment probation

Department considerations

Options

Move and re-enter profession

Retirement