LEGAL DEFENSE TRUST TRAINING BULLETIN

MICHAEL P. STONE, GENERAL COUNSEL

6215 River Crest Drive, Suite A, Riverside, CA 92507
Phone (909) 653-5152 Fax (909) 656-0854

Vol. I, Issue No. 1 APRIL 1998

"TAKING THE FIFTH"

Although the parameters of the Fifth Amendment right against self-incrimination in connection with administrative and criminal investigations of law enforcement officers have been fairly clearly drawn for many years, we find in practice that there is still substantial confusion and doubt about the right as it is applied in specific factual situations.

I plan to write three articles that look at this issue. The first one will deal with the legal landscape of the Fifth Amendment in police disciplinary investigations. The next article will concern the application of the Fifth Amendment in specific investigatory proceedings such as disciplinary interrogations and officer-involved shooting investigations. The next and probably final article will deal with the testimonial privilege created by the Fifth Amendment, when law enforcement officers are summoned to give testimony in official proceedings such as coroner's inquests, grand jury investigations, and trials.

Turning now to the focus of this article, it has been said by a Justice of the United States Supreme Court in an often-quoted passage, "Policemen... are not relegated to a watered down version of constitutional rights." This refers to the fact that police officers do not relinquish their individual constitutional rights by embarking upon a law enforcement career. You still have the same rights to free expression, freedom from unreasonable searches and seizures, and freedom from compulsory self-incrimination that you had before you came on the job. The difference is, that there may be administrative consequences if you insist upon a complete exercise of these rights in an absolute sense.

Case law, particularly at the federal level, has defined when it is permissible for the law enforcement employer to exact administrative discipline as the consequence for the exercise of an otherwise absolute constitutional right.

For example, the First Amendment tells us that "Congress shall make no law" respecting freedom of expression. However, we also know that public employees, particularly law enforcement officers, are not at liberty to speak wherever and whenever they choose, but are subject to administrative discipline for failing to observe reasonable restrictions on the time, the place, the manner and the content of the speech. While one still has the right to say whatever one wants, one does not have an unqualified and absolute right to remain a deputy sheriff or police officer.

Hence, you still have the right to free expression, however you do not have the right to unbridled expression, free of administrative consequences. Whether a public employer is justified in restraining, punishing or otherwise inhibiting the free expression of its employees, depends upon a delicate balancing between the rights of the individual employee to speak, and the rights of the employer to protect its important and legitimate organizational objectives. The primary issue in employee speech cases is whether or not the speech pertains to a matter of important public interest, on the one hand, or on the other, is rather the expression of a private or personal grievance or issue.

More to the point of our quest here, the Fourth and Fifth Amendments also provide all persons with substantive protections in the criminal investigatory process. Over the years, the courts have attempted, here again, to balance the interest and rights of the individual

against those of the organization in preserving effective law enforcement. One may insist upon absolute observance of one's right not to incriminate oneself by words from one's own mouth, but one may not do so and necessarily retain public employment. Rather, the courts have endeavored to define and strike a proper balance which permits the public employer to seize evidence and obtain testimonial statements from its employees in proper circumstances, and on the other hand, guarantee affected employees that their evidence and testimony cannot be used against them in a *criminal setting*.

As a general proposition when these circumstances obtain, the employer is free to use such evidence and testimony against the affected individual in an administrative context. The key to these issues is always the fact of *compulsion*.

If one freely, voluntarily, knowingly and consensually provides testimonial evidence or physical evidence to a law enforcement authority without any hint of compulsion, that person may not complain that the agency has used such evidence or testimony against the individual either criminally or administratively.

On the other hand, where compulsion is present which negates a free will or voluntary surrender of evidence or testimony to the agency, that fact may well guarantee that the testimony or evidence so obtained cannot be used against the individual in a *criminal* setting.

For example, what legal principle permits department supervisors to give you an order to disclose information which may implicate you in a criminal act? Why does it not violate your Fifth Amendment right against self-incrimination, to be compelled by administrative threat of insubordination and discharge, to provide oral evidence of your participation in or responsibility for a crime? The answer is seen in the recognition, that, for example, the Fifth Amendment prohibits the *use* of such compelled testimony in a criminal proceeding against the speaker. Put another way, if there is no *use* made of the compelled testimony in a criminal setting, then the Fifth Amendment is not violated. An exception might exist if the means used to obtain the compelled statement are so shocking as to constitute a substantive violation of the Fifth Amendment. At least one federal appellate court has identified circumstances in which it found such a violation, based primarily on interrogation tactics that were so coercive as to constitute substantive violations in and of themselves.

Otherwise, merely threatening to take a public employee's job away for good if he refuses to answer questions which are specifically, narrowly and directly related to a legitimate investigation, does not violate the Fifth Amendment. The reason this is so is because of a protection that arises automatically, by operation of law, once an order such as this is given and promptly obeyed. We call this "use immunity". One has immunity from the use of a compelled statement against him in a criminal proceeding, if he responds to a direct order to testify or give a statement to his employer. We often hear that once a person's right to silence is invoked, and then overridden by a direct order on pain and penalty of insubordination, the subsequent interview is for administrative purposes only. This is simply a different way of saying that the fruit of the interview cannot be used against the speaker for any purpose in a subsequent criminal proceeding (including impeachment). Because the statement is "involuntary" it cannot be used even if the subject of the interview decides to testify at trial and tells a different story. This is to be distinguished from the present law regarding a failure to properly advise under *Miranda*. Non-Mirandized statements can still be used for impeachment, but not as part of the prosecution's case in chief, and as modified by the Peace Officer's Bill of Rights Act (to be discussed next month).

Therefore, the two most important considerations to this discussion of the Fifth Amendment and public employees are: (1) administrative compulsion; and (2) use immunity.

Whenever there is a specific objection to writing a statement, giving an answer, or participating in an interview based on the right to remain silent, followed by a direct order to cooperate on pain and penalty of insubordination, the compulsory nature of the interview is established and use immunity should automatically flow.

The same principles apply to compelled seizures of evidence, although for different reasons.

Here again, we are dealing with a constitutional right which may be lawfully invoked, and yet produce administrative consequences. Again, the guiding principle in the courts has been to strike a proper balance between the interest of the individual and of the agency. However, once a search is conducted, a seizure made, or evidence obtained by means of administrative compulsion, the fruit cannot be used against the person in a subsequent criminal proceeding, so long as he had proper constitutional standing to object to the seizure in the first place. Here, we refer to the disapproval of the so-called "vicarious exclusionary rule". One is not permitted to assert objection to the search and seizure of another's person, property or effects. *Just as with testimonial evidence, physical evidence turned over voluntarily with no compulsion, to law enforcement agencies (even employers) will waive any objection based on the Fourth Amendment, to its introduction in a criminal proceeding.* On the other hand, if sufficient compulsion is present so as to render the evidence or seizure involuntary, no criminal use can be made of the evidence. The exclusionary rule and the Fourth Amendment do not necessarily apply to administrative proceedings, but such evidence may be inadmissible on other grounds, statutory or otherwise.

This will suffice for our preliminary discussion on these important employee rights. In the next issue, we will observe how these important rights and distinctions are applied in the context of real employment circumstances such as disciplinary investigations and officer-involved shooting investigations, to name a few.

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!

- Michael P. Stone

Pasadena Office
600 South Lake Avenue, Suite 401
Pasadena, California 91106
office (626) 683-5600
fax (626) 683-5656

Riverside County Office
6215 River Crest Drive, Suite A
Riverside, California 92507
office (909) 653-5152 or (800) 655-4772
fax (909) 653-1943