

Police Protection: Who's Watching YOUR Back?

Basics you need to know in order to protect yourself as a Law Enforcement Officer in Massachusetts.

Program Objectives:

I. WEINGARTEN RIGHTS – POTENTIAL DISCIPLINE:

- **When am I entitled to Union Representation?**
- **Who can act as my Union Representative?**
- **What can my Weingarten representative do for me?**
- **What should I do if I believe my rights are violated?**

II. CARNEY RIGHTS – POTENTIAL CRIMINAL LIABILITY:

- **When can I refuse to answer investigator's questions?**
- **What types of Immunity are available?**
- **What happens if I don't answer?**
- **What if Internal Affairs wants a written report?**
- **Polygraph issues.**

III. COVER YOUR ASSETS – PROTECT YOURSELF AND YOUR FAMILY:

- **Civil Lawsuits and Homestead Protection**
- **Family Protection – Wills, Trusts and Durable Powers of Attorney**
- **Distribution of NEPBA Member Legal Benefits Program**

I. WEINGARTEN RIGHTS – POTENTIAL DISCIPLINE:

The right to union representation in certain disciplinary situations stems from a decision of the United States Supreme Court in *National Labor Relations Board v. Weingarten, Inc.*, 420 U.S. 251 (1975). Management is not required to inform the employee of his/her Weingarten rights; it is the employee's responsibility to know and request.

- **When am I entitled to Union Representation?** Under this rule, an employee may have a representative when he/she is called to an investigative interview which the employee reasonably believes will result in discipline AND when a valid request for a representative is made.
 - *Reasonable Belief is an objective analysis.* The court would examine whether a reasonable officer, in a similar situation, would believe the interview could result in discipline.
 - *The key point is “investigative interview.”* If the employer is seeking information from the employee, and the employee's responses may result in discipline, then the officer is entitled to representation. If the employee is just called in to receive information from the employer, whether it is disciplinary or not, there is no right to representation. It is the employee submitting themselves to questioning that gives rise to the right.
 - *You must go to the interview.* Even where it appears obvious that you need representation, an officer cannot refuse to show up at the interview if no questions have yet been asked. In other words, if you receive an order to appear for questioning, and the questions have not yet been presented, you must go. When the subject of the questioning is presented, you should immediately ask for a representative.
 - *Always request a rep. before hand.* If denied, you should still go to the interview, and again request a representative. If the interview is being recorded, state your reasons for the request (state all reasons you believe the interview may result in discipline).
 - *If you are still denied a union representative, assuming there are no potential criminal consequences, you should answer the interview questions.* If the Town violated Weingarten, an Unfair Labor Practice Charge can be filed with the Labor Relations Commission, seeking to rescind any negative consequences.

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➤ **Who can act as my Union Representative?**

- A member of the Unit, a Business Agent of the Union, or the Union Attorney
- A private attorney may not act as the Weingarten Representative. (*See Chaves Case Attached*).
- Purpose: While the involved employee may have the only direct interest in the case at hand, the Unit as a whole has an interest in the outcome (i.e. stopping unfair discipline or prohibited practices affecting the whole unit)
- The goal behind this rule is to entitle employees to mutual aid and comfort from the union and its members. A private attorney would be there to protect the personal interests of one member, and not the whole unit.

➤ **What can my Weingarten representative do for me?**

- The role of the representative is NOT to sit silently. Massachusetts Courts have found a violation where the representative was told he could not speak during the questioning.
- Employers will often assert that the only role of a union representative in an investigatory interview is to observe the discussion. The Supreme Court, however, clearly acknowledges a representative's right to assist and counsel workers during the interview.
- The Supreme Court has also ruled that during an investigatory interview management must inform the union representative of the subject of the interrogation.
- The representative must also be allowed to speak privately with the employee before the interview.
- During the questioning, the representative can interrupt to clarify a question or to object to confusing or intimidating tactics. While the interview is in progress the representative cannot tell the employee what to say but he may advise them on how to answer a question. At the end of the interview the union representative can add information to support the employee's case.

NOTES

- **When the employee makes the request for a union representative to be present, management has three options:**
1. It can stop questioning until the representative arrives;
 2. It can call off the interview; or
 3. It can tell the employee that it will call off the interview unless the employee voluntarily gives up his/her rights to a union representative (an option the employee should always refuse.)
- **What should I do if I believe my rights are violated?**
- If you are ordered under the threat of discipline to answer questions, and if there is no potential for criminal sanctions, then you should comply with the request.
 - Be sure to put on the record, either in writing or on the tape recording, that you requested a representative and were denied. State your reasons for the request.
 - At the conclusion of the interview, immediately make a detailed report of everything that happened, everything that was said, who was present, the time and place of the interview, and list all relevant facts.
 - Contact your Union Representative as soon as practicable and report the situation.
- **Important Function of the Representative – Record Everything**
- Take great and detailed notes
 - In addition to attempting to clarify and provide helpful information, the rep. must take detailed and accurate notes of all things said, people present, times, dates, etc. This is often the only record of the interview, other than the management version.
 - Memories fade – be sure to take notes and make reports at the time of the interview.

NOTES

WEINGARTEN RIGHTS – SUMMARY:

- ***Ask for Representation.*** Management is not required to inform the employee of his/her Weingarten rights; it is the employee's responsibility to know and request.
- ***When does it apply?*** You are entitled to Union Representation when you are called to an investigative interview which you reasonably believe will result in discipline AND when a valid request for a representative is made – you need both.
- ***When the employee makes the request for a union representative to be present, management has three options:*** (1) It can stop questioning until the representative arrives; (2) It can call off the interview; or (3) It can tell the employee that it will call off the interview unless the employee voluntarily gives up his/her rights to a union representative (an option the employee should always refuse.)
- ***You must go to the interview.*** If you receive an order to appear for questioning, and the questions have not yet been presented, you must go. When the subject of the questioning is presented, you should immediately ask for a representative.
- ***Always request a rep. before hand.*** If denied, you should still go to the interview, and again request a representative. If the interview is being recorded, state your reasons for the request (state all reasons you believe the interview may result in discipline).
- ***Put everything on the record.*** If the interview is recorded, make sure you make your request for representation on the record – if denied a representative, put that on the record as well. If not recorded, put it in writing and request that it be included in the record.
- ***Who can be your Rep.?*** A member of the Unit, a Business Agent of the Union, or the Union Attorney.
- ***Your Rep. cannot be told to remain silent.*** Reps. have an active role to play – speak privately with the member before the interview, learn the subject matter of the interview from management, clarify questions, give advice and counsel, add information.
- ***The Rep. should take great notes.*** Be sure to write down everything that happens – what was said, who was present, time, date, etc.

II. CARNEY RIGHTS – POTENTIAL CRIMINAL LIABILITY

Massachusetts grants public employees significant rights in the area of compelled statements which might result in criminal sanctions. In fact, the rights granted by the Massachusetts Declaration of Rights are greater than those granted under the Federal Constitution. Rights against self incrimination arise in the context of an Employer compelling a statement from a public employer, where the answer may tend to incriminate the employee.

The basic rule in Massachusetts is this – where an employee is compelled to give a statement which may result in incriminating responses, that employee is entitled to demand transactional immunity prior to giving the statement. If the immunity is not provided, the employee cannot be punished for refusing to give the statement. The case is *Carney v. Springfield*, 401 Mass. 610 (1988).

➤ **The Statement must be Compelled**

- Employee must be ordered to give the statement – voluntary requests do not qualify.
- Compelled means ordered to give the statement under threat of specific job sanctions (i.e. you may be terminated, etc.)
- Can be oral interview or request for written report to qualify. Form is irrelevant
- Very Important – Declare that you are exercising your Rights under the Massachusetts Declaration of Rights, Article 12, not to give a statement. Do this in writing, and if the interview recorded, state it for the record.

➤ **Officer must attend interview**

- Even if you believe your answers may tend to incriminate you, officer must still go to interview regardless of grant of immunity.
- If immunity is not granted, then officer should respond on a question by question basis that he asserts his/her Article 12 Right not to testify.
- Without knowing the questions, officer can't give a blanket refusal to answer. If provided with the questions, or given questions in writing, officer may refuse absent grant of immunity.

NOTES

➤ **Types of Immunity**

- Federal (5th Amendment) Gives Use Immunity. This means that if compelled to give a statement, any answers cannot be used against the officer in a criminal case. Officers can still be prosecuted if the government later obtains other, independent evidence. This is not a grant of immunity per se, but is more of a rule of evidence – if the officer is prosecuted, he/she would move to suppress statements on the basis of use immunity (compelled statement).
- **Significance of Use Immunity.** Where officer is sure no criminal charges will result, and not worried about administrative consequences, use immunity is at least available as a safety net.
- **Massachusetts Article 12 – Transactional Immunity.** Officers are entitled to request an actual grant of immunity from all District Attorneys and the Attorney General prior to giving a statement.
- This is not a letter from one Assistant District Attorney declining prosecution. The officer is entitled to receive a specific grant of transactional immunity from the AG and DA. Nothing less is sufficient to supplant the privilege.
- Absent a grant of transactional immunity, the Department may not punish an officer for refusing to answer incriminating questions.
- Again, this is not a blanket protection from answering any question – only ones that the answers thereto may be incriminating. This, of course, is a tricky area – anything can be incriminating, depending on the context. It is up to you, your reps., and union counsel to decide on a question by question basis.
- You must always attend the interview and subject yourself to questions – the issue is whether you need to answer, as set forth above.

NOTES

What if I am threatened with termination for not answering, and Immunity is refused?

- Consult with Counsel. Obviously, this should be done ahead of time to give Counsel the opportunity to negotiate and consult with the Chief or Town Counsel about the terms of the statement. Depending on the circumstances, the Federal Use Immunity may be sufficient to protect you.
- Depending on the likelihood of prosecution, it may be necessary to go to Court and request an injunction in order to stop either the (1) questioning or (2) the discipline.
- If discipline is issued, it can be addressed at Civil Service or at Arbitration (See Tewksbury AAA Case attached.)

CASE REVIEW:

1. *Mass. Parole Bd. v. Civil Service (Mass. App. Ct. – 1999).*

This case stands for the proposition that a public employee must attend an investigatory interview, regardless of the grant of immunity. It does not mean that answers must be given – just that the officer must go to the interview. Unless the questions are given in advance, the employee must go and find out what the questions are. If answers may tend to be incriminating, the officer may request a grant of Transactional Immunity, and refuse to answer. Note – some employers threaten employees with this case, suggesting that an officer must answer the questions. Not true. In the case, the officer asserted his right to immunity and did not show up at the interview – he never knew, however, what the questions were.

2. *Furtado v. Town of Plymouth (Mass. App. Ct. – 2007)*

The court confirmed that immunity under Carney was applicable to polygraph situations. In other words, questions posed during a polygraph exam, if they were compelled and were potentially incriminating, were subject to the requirement to grant transactional immunity. Court also held that where immunity was granted, and answers were no longer potentially incriminating, officer could not claim that polygraph was illegal (rule is that a polygraph can only be compelled in investigating a crime). Can't have it both ways.

CARNEY RIGHTS – SUMMARY

- **Assert your Rights under Article 12 of the Massachusetts Declaration of Rights.** If you are ordered to give a statement which may result in incriminating responses, you are entitled to demand transactional immunity prior to giving the statement. If the immunity is not provided, the employee cannot be punished for refusing to give the statement. The case is Carney v. Springfield, 401 Mass. 610 (1988).
- **The Statement must be Compelled.** Compelled means ordered to give the statement under threat of specific job sanctions (i.e. you may be terminated, etc.)
- **Very Important – Declare your Rights under Article 12, not to give a statement.** Do this in writing, and if the interview recorded, state it for the record.
- **Officer must attend interview. You can't skip the meeting. Go and assert your rights.** If immunity is not granted, then officer should respond on a question by question basis that he asserts his/her Article 12 Right not to testify.
- **Types of Immunity.**

Use Immunity/5th Amend't (*Garrity Rights*). This means that if compelled to give a statement, any answers cannot be used against the officer in a criminal case. This is not a grant of immunity per se, but is more of a rule of evidence – if the officer is prosecuted, he/she would move to suppress statements on the basis of use immunity (compelled statement).

Massachusetts Article 12 – Transactional Immunity. Officers are entitled to request an actual grant of immunity from all District Attorneys and the Attorney General prior to giving a statement.

- **What if I am threatened with termination for not answering, and Immunity is refused?** Consult with Counsel to determine best avenue to proceed. Note – privileged communication only with the attorney.

NOTES

POLYGRAPH ISSUES IN MASSACHUSETTS

The basic rule in Massachusetts is that a police officer may only be compelled to submit to a polygraph test if the department is investigating a crime. In other words, if the investigation is merely of a violation of a departmental regulation, a polygraph cannot be required. The courts have held that “a crime must be in the picture.”

The issue is governed by statute:

G.L . c. 149, Section 19B. Lie detector tests; use as condition of employment; penalty; civil action. This Statute provides, among other things:

- It shall be unlawful for any employer or his agent, with respect to any of his employees, or any person applying to him for employment, including any person applying for employment as a police officer, to subject such person to, or request such person to take a lie detector test within or without the commonwealth, or to discharge, not hire, demote or otherwise discriminate against such person for the assertion of rights arising hereunder. This section shall not apply to lie detector tests administered by law enforcement agencies as may be otherwise permitted in criminal investigations (Court has stated that this means a “crime must be in the picture”).
- Conducting a polygraph out of state is not a defense to a claim under this law
- Any person who violates any provision of this section shall be punished by a fine of not more than one thousand dollars nor less than three hundred dollars. Second and subsequent violations of any provision of this section shall be punishable by a fine of not more than fifteen hundred dollars or by imprisonment for not more than ninety days, or both such fine and imprisonment.
- In the case of a corporation, the responsible individual shall be the president, chief operating officer or any managerial or supervisory person who allows or condones such violation.
- No waiver of the provisions of this section by an employee or prospective employee shall be a defense to either criminal prosecution or civil liability.
- Any person aggrieved by a violation of subsection (2) may institute within three years of such violation and prosecute in his own name and on his own behalf, or for himself and for other similarly situated, a civil action for injunctive relief and any damages thereby incurred, including treble damages for any loss of **wages** or other benefits. The total awarded damages shall equal or exceed a minimum of five hundred dollars for each such violation. A person so aggrieved and who prevails in such action shall be entitled to an award of the costs of the litigation and reasonable attorney fees.

IV. As set forth above, polygraphs can only be compelled in criminal situations. Of course, that implicates the Carney right to immunity. So, it follows that if a polygraph is compelled, the officer should always assert his/her Article 12 Right to remain silent, and request transactional immunity. If it is refused, then refuse to answer any questions which may tend to be incriminating. This would be done on a question by questions basis.

- Often, employees are “encouraged” to voluntarily submit to the polygraph. Be wary of this tactic – the reason such tests are not admitted into evidence in Courts is that they are inherently unreliable. Volunteering for an unreliable test can often lead to discipline, and a long battle to clear your name.
- Always contact your Union Representative and Counsel when ordered or requested to submit to a polygraph exam.

Note: Recently, the Massachusetts Civil Service Commission denied the admittance of polygraph evidence in discipline case. The reason was the inherently unreliability of the test. Massachusetts Courts view the test the same way. We are watching what develops from that case.

NOTES

FAX REQUEST

NEPBA Estate Planning Questionnaire

TO: NPH Legal – Fax No. 978-454-2767

From: _____ Local No. _____

Date: ____ / ____ / ____

Re: Request for NEPBA Estate Plan

PLEASE DO YOUR BEST TO COMPLETE THIS QUESTIONNAIRE, AS IT WILL ALLOW US TO BEST DETERMINE YOUR ESTATE PLANNING NEEDS. Estimates are acceptable. This form is simply a guide to help us determine your estate planning needs. If you have questions about certain aspects of this form, just write them down and we can discuss them when we meet. This form will later serve as a guide to your assets and can be quite useful to those you name to take care of your estate.

FAMILY INFORMATION

Husband Wife

Name _____

Date of Birth _____

Email address _____

Street or Post Office Box _____

City, State, and Zip Code _____

Telephone _____

CHILDREN OF THIS MARRIAGE (include information for spouses of married children)

Name

Address

Date of Birth

1. _____

2. _____

3. _____

4. _____

DECEASED CHILDREN, if any:

PRIOR MARRIAGES (name and how terminated)

Husband _____

Wife _____

CHILDREN OF PRIOR MARRIAGES (include information for spouses of married children)

1. _____

2. _____

3. _____

4. _____

GRANDCHILDREN

<i>Name</i>	<i>Name of Parent</i>	<i>Address</i>	<i>Date of Birth</i>
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

BROTHERS/SISTERS AND STEPBROTHERS/SISTERS

HUSBAND's:

<i>Name</i>	<i>Address</i>	<i>Telephone #</i>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

WIFE's:

<i>Name</i>	<i>Address</i>	<i>Telephone #</i>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Other personal information you believe is important:

FIDUCIARIES (Executor/Trustee/Guardian)

A fiduciary is the person you name to be in charge of administering your estate (i.e. an executor, in the case of a will), will be in charge of administering a trust for your children (a trustee), or is charged with the care of your minor children (a guardian).

Please list in order of preference, in addition to each spouse, your choice for the person who will be in charge of your estate and/or trust assets. An Executor is the person who will be in charge of disposing of your estate upon your death. A trustee will be in charge of any assets left in trust for others (i.e. minor children), and a Guardian is the person you name to be the caretaker of any children). If you prefer, these jobs may be filled by the same person. Please list the full name, residence and your relationship to each person.

Executor – Name and Address (List your preference and one or two back-ups)

1. _____
2. _____
3. _____

Trustee - if Applicable – Name and Address (List your preference and back-ups)

1. _____
2. _____
3. _____

Guardian – Name and Address - if Applicable (List your preference and back-ups)

1. _____
2. _____
3. _____

Signature of Husband Date Signature of Wife Date