

The Garrity Doctrine and How it Affects an Employee's Rights
During an Internal Affairs Investigation

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Certification Statement

I hereby certify that this paper constitutes my own product, that where the language of others is set forth, quotation marks so indicate, and that appropriate credit is given where I have used the language, ideas, expressions, or writings of another.

Signed: _____

Abstract

Norfolk Fire-Rescue (NFR), Virginia, provides fire and emergency medical service in a 66 square mile city. The department is a 495 career member organization.

The problem is that the firefighter's union has taken the position that firefighters, being interviewed by the NFR Office of Professional Standards, have the right to remain silent under the Fifth Amendment. As a result, Norfolk Fire-Rescue needs to clarify when personnel can be compelled to answer questions as part of a professional standards investigation.

The purpose of this research is to reduce and/or eliminate employee rights violations during professional standards investigations by Norfolk Fire-Rescue.

The descriptive research method was used to answer the following research questions: (1) What procedures are other department's using to ensure that employee rights are not being violated (2) What are the substantial risks to members of NFR when they are investigated (3) what level is NFR required to advise members of their Garrity rights.

The procedures used by the author to conducted research were the review of published material including case law on the subject of administrative investigation with regards to internal affairs interviews. Additional information was obtained through interviews conducted with experts in the field of internal investigations.

The results show that Norfolk Fire-Rescue was not violating any rights of the employees, but that the employees did not understand what their rights were.

The recommendations by the author are as followed: adding additional procedures to reducing the chance that NFR member's rights will be violated, implement policies and standard operation procedures to deal with the Garrity rights afforded the employee, and finally the additional training provided to all chief officers explaining *Garrity v. New Jersey* and how it applies to the fire service.

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Introduction

Public safety positions have many responsibilities that are not conferred on the general public. Whether wanted or not, members of fire and police departments are held to higher ethical standards than lay people. This is apparent when a firefighter or police officer is charged with a crime. Frequently, news outlets will not only report the name of the person charged, but they will note that the person is a member of a public safety agency.

The idea for this applied research paper topic presented itself when the author was assigned to the Office of Professional Standards for Norfolk Fire-Rescue. The author did not have a full understanding of when to apply an employee's Fifth Amendment Rights and when to apply the protections under the Garrity rule. The author searched National Fire Academy research papers to see if this topic had been researched previously; there were no papers that addressed this topic. The lack of understanding of this topic and the importance for the fire service members to know their rights with regard to this topic is why this paper was researched.

The problem which prompted this research is that the firefighter's union has taken the position that firefighters, being interviewed by the Office of Professional Standards, have the right to remain silent under the Fifth Amendment. As a result, Norfolk Fire-Rescue needs to clarify when personnel can be compelled to answer questions as part of a professional standards investigation.

The purpose of this research is to reduce and/or eliminate employee rights violations during professional standards investigations by Norfolk Fire-Rescue. The descriptive research method was used to answer the following research questions:

1. What procedures are other departments using to ensure that employee rights are not being violated?

2. What are the substantial risks to members of NFR when they are investigated?
3. To what level is NFR required to advise members of their Garrity rights?

Background and Significance

Norfolk Fire Department was established in 1871 as an all paid fire department. On April 9, 1991 the Bureau of Paramedical Rescue Services and Norfolk Fire Department merged to become Norfolk Fire and Paramedical Services. Then in 2001 the name of the department was changed to Norfolk Fire-Rescue. The department is currently staffed with 495 full time uniformed personnel responsible for 66 square miles in an urban setting. Norfolk Fire-Rescue responds to about 45,000 calls annually utilizing 14 engines, 7 ladders, 12 ambulances and 2 heavy rescue companies. The residential population is 245,803 with an increase to approximately 350,000 during the day due to several local military bases and businesses. The average number of calls per station annually is about 3,134 which put a heavy demand on the departments' personnel. This call volume can put undue stress on the members and result in the release of stress in unhealthy ways.

Prior to 2009 the department used its Fire Marshall's Office to investigate both arson and internal affairs cases. The primary internal affairs investigator was the Battalion Chief who held the designation of Fire Marshal for the City of Norfolk. Then, in 2009, a transition was made to distinguish a separate position for the purpose of conducting administrative interviews of members of Norfolk Fire-Rescue, who violate departmental policies. The need for this separation resulted from the differences that are present in a criminal interview with regard to an arson case and an internal interview with regard to a policy violation.

The problem which prompted this research is the firefighter's union has taken the position that firefighters being interviewed by the Office of Professional Standards have the right to

remain silent under the 5th Amendment. This is true if the violation is not job related. However, if the violation is considered a job related violation, then an employee can be compelled to answer questions pertaining to the incident. The employee is protected under the Garrity Doctrine from any criminal prosecution with regards to honest answers given during the investigation. The confusion comes in whether or not the issue is job related. If violations occur while on duty there is the understanding that the department has the right to ask job related questions, but when the member is not on duty and gets in trouble for something like a driving while under the influence (DUI) it is not so clearly understood. The DUI conviction will potentially cost the member their driver's license and medical certification, greatly affecting their ability to perform their job responsibilities. So with this is it job related and can an employee be compelled to answer questions regarding this incident? As a result, Norfolk Fire-Rescue needs to clarify when personnel can be compelled to answer questions as part of a professional standards investigation.

This applied research project is significant to Norfolk Fire-Rescue for the following reasons. First, in the Commonwealth of Virginia, firefighters and emergency medical technicians have rights granted to them by the Code of Virginia § 9.1-301, Conduct of Interrogation. This research will review if the Virginia Code is being adhered to by Norfolk Fire-Rescue. Second, the fire service as a whole is affected by how departments conduct their internal affairs investigations. The professionalism of the fire departments will be called into question if they are not following the legal policies set forth by our governing bodies. Lastly, the proper understanding of Garrity and how the internal affairs administration investigation is required to be conducted will have large financial liabilities for organizations that do not follow the law.

The linkage between this applied research project and the specific content of areas of Executive Analysis of Fire Service Operations in Emergency Management class are that the internal affairs investigations administrative functions must be complete and concise just like the administrative functions used to manage the operational component of a major incident. The same areas covered in the class need to be taken into consideration when conducting the investigation: risk assessment, incident documentation, media/political considerations, standards, legal mandates, and emergency information systems. This type of investigation requires senior staff to extensively analyze the issues and take the appropriate action to deal with the incident. Knowing what can and cannot be done prior to the incident will put departments ahead of the curve.

The problem which prompted this research is the firefighter's union has taken the position that firefighters being interviewed by the Office of Professional Standards have the right to remain silent under the 5th Amendment. This study relates to the United States Fire Administration goal No. 1 reduce risk at the local level through prevention and mitigation. This goal not only applies to fires but all areas of the fire service. This research will assist other departments around the nation to better prepare for incidents that require an internal affairs investigation. With regard to goal No. 2, fire service organizations will be able to use the data review in this research to start to plan locally and prepare for the investigation that is sure to come at some point in ever department's history. Goal No. 4, improving the fire and emergency services professional status. By informing and educating the fire departments and members the fire service will move to a higher plane of professionalism, thereby enhancing the service to the citizens. Finally, goal No.5, to lead the Nation's fire and emergency services by establishing and sustaining USFA as a dynamic organization is accomplished when members of this program

look for potential pitfalls on the horizon. This applied research topic has not been properly addressed in the fire service as of the writing of this paper.

Literature Review

The literature review for this applied research project was conducted to determine the rights of members of Norfolk Fire-Rescue during administrative investigations by the Office of Professional Standards. The literature review focused on public employees' rights during administrative investigations. What might appear to be legal by one department may be illegal, dependent upon which Circuit Court of Appeals the jurisdiction resides. This does not seem fair, but until the United States Supreme Court rules on this type of case each jurisdiction will provide guidance. Therefore, the approach was to examine court cases from different jurisdictions to see the relationships from circuit court to circuit court.

The United States Court of Appeals is referred to as the Circuit Courts and make up the appellate courts of the United States Federal Court system. The United States Courts of Appeals have the ability to set legal precedent in the regions they have jurisdiction over, which make the decisions handed down by them so important. To date there are thirteen United States Courts of Appeals. The courts are numbered one through eleven, each having certain states as their responsibility. The other two are the D.C. Circuit and the United States Court of Appeals for the Federal Circuit. The latter has jurisdiction nationwide. Appendix A shows the geographic boundaries of the United States Court of Appeals.

1. What procedures are other departments using to ensure that employee rights are not being violated?

The assignment of an internal affairs investigation was shown to be initiated by the fire chief of the department involved. There was no indication the investigators or member of the

department could start an internal investigation without prior approval of the fire chief. Of all departments reviewed, the fire chief has the primary supervisory authority over the investigation. The fire chief was able to task the investigation to a member or members within the department “The Fire Chief shall appoint a trained Internal Affairs investigator from within the Unified Fire Authority to investigate any charge of conduct or behavior by any member that may result in major discipline” (Berry, 2004, p.1). The investigator was required to be a sworn member of the department in some organizations and was allowed to be a civilian in others. With the Rio Rancho Fire Rescue “The Fire Chief may designate any competent civilian, sworn person, or an investigative team comprised of civilian and /or sworn persons to conduct any investigation” (Rio Rancho Fire Rescue, 2012, p.33). The investigators rank was dependent of the department. Supervisors of a higher rank than the accused are required in the Rio Rancho department where in Norfolk Fire-Rescue, the rank of Captain normally conducts the investigations.

After the investigation is assigned, most of the departments reviewed required that notification be provided to the members who were under investigation. A notification of memorandum is produce to inform the person being investigated the reason for the investigation “the investigator shall draft a notification memorandum to the accused employee describing the nature of the notice/complaint the name of the person assigned to conduct the investigation, and the employee’s rights” (Rio Rancho Fire Rescue, 2012, p.33). With Rio Rancho, the memorandum shall be signed by the fire chief. In the Commonwealth of Virginia, the investigating officer shall comply with the Firefighter’s and Emergency Medical Technician’s Procedural Guarantees set forth in Virginia Code 9.1-300 to 9.1-304. which states,

No firefighter or emergency medical technician shall be subjected to interrogation without first receiving written notice of sufficient detail of the investigation in order to

reasonably apprise the firefighter or emergency medical technician of the nature of the investigation (Code of Virginia. § 9.1-301).

The author did find that the Unified Fire Authority in Utah policy states that “upon completion of the investigation, the involved members shall be notified of the investigation” (Berry, 2004).

Upon beginning an internal affairs investigation the employee should have been notified of the investigation and the reasoning for the need to investigate the complaint. There may be circumstances that make it necessary for the investigation to not be known by the primary suspect being investigated. In this case the fire chief of the department will give the approval for this delay in notification. Whenever the notification memorandum is given to the accused it should be signed by the accused as acknowledgment of receipt of the document.

In Norfolk Fire-Rescue there should be a five calendar day notice prior to any formal interview. The purpose of this notice is to allow the members of the department time to have someone of their choosing accompany them to the interview. This delay in the interview also allows the investigator time to interview any witnesses that may be involved in the case as well as allow for the collection of any evidence that may be available.

When the investigation is complete most all departments require the investigator to provide a disciplinary recommendation to the fire Chief. This recommendation shall be reviewed for the purpose of ensuring that consistent discipline is administered throughout the department.

At the beginning of the interview a Garrity Warning should be read. This is for the protection of the employee as well as for the employer. The importance of this warning is to ensure all members of the interview are aware that any self-incriminating statements made during the internal affairs investigation, or the fruits thereof, are a result of the employee being ordered to answer the question during this internal affairs interview. Therefore, any information pertaining

to this administrative interview cannot be used against the member in criminal hearings. Since this is an administrative process and the employee is protected against this information being used against them in a criminal hearing any refusal to answer, evade or mislead the interviewers' questions is a violation of policy which may subject the employee to further discipline up to and including termination.

2. What are the substantial risks to members of NFR when they are investigated?

Much like a professional sports player, members of public safety are under constant scrutiny both on and off duty. Regardless of whether they wanted the added responsibility by accepting the position of professional sports player or public safety, they are role models to the community. Fortunately, most members of public safety understand this responsibility and strive to set a good example.

Serving as a public employee thrusts one into a dangerous world of endless investigations and complaints. Virtually everything that goes wrong in connection with public agencies potentially gives rise to complaints and resulting probative internal and external investigations into the work and lives of America's public employees. Every traffic stop can expose police officers to a full blown multiyear series of overlapping investigations.The work and lives of American public employees are under constant scrutiny by agency bureaucracies, chief executives, interest groups, prosecutors, the media, and counsel for purported victims (McGuinness, 2008, p.702).

Since fire department personnel are public employees they are constantly at risk during the administrative interview. Their testimony is protected from being used in criminal prosecution but not in civil litigation. The reasoning for the protection during a criminal prosecution is due to the Fourteenth Amendment. "The protection of the individual under the Fourteenth Amendment

against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic”(*Garrity v. New Jersey*, 1967).

3. To what level is NFR required to advise members of their Garrity rights?

When it comes to Garrity rights, the requirement to advise members is a very gray area. Depending on which Circuit Court of Appeals the department resides in will determine to what extent the public employee needs to be advised of their rights. In the 1st Circuit Court of Appeals they have responded to the issue of Fifth Amendment rights as followed, “Public employees cannot be discharged simply because they invoke their privilege under the Fifth Amendment to the United States Constitution not to incriminate themselves in refusing to respond to questions propounded by their employers” (*Carney v. City of Springfield*, 1988).

Now while this does not specifically state Garrity rights, the Fifth Amendment deals with protections against unfair treatment in legal processes. The legal process as a whole is covered by the Fifth Amendment where Garrity applies to the legal process for public employees during administrative investigations.

In the 2nd Circuit Court of Appeals the courts made the following ruling.

“Statements compelled from employees at a disciplinary hearing, under threat of discharge, cannot constitutionally be held against them in a later criminal prosecution” (*Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation of New York*, 1968).

This safeguards the public employee from having any statements made during the administrative investigation used against them in a criminal hearing. The 2nd Circuit is telling employers that if you make employees give statements that they would not freely give without being threatened of

loss of employment, then the employer may not come back and use this information to pursue criminal charges against the employee. By compelling the employee to give the statement they are not allowing them to exercise their Fifth Amendment rights if the information would have been used in a criminal case.

This allows the employer a way to gain the information related to job performance but also protect the employee. The Supreme Court of New Jersey ruled as followed.

“Notwithstanding the Fifth Amendment prohibition, a public employer does not remain totally helpless in discovering information relevant to its employees' job performance”
(*Garrity v. New Jersey*, 1967).

These previous rulings do not safeguard the employee from their job related actions. They can still be disciplined for their actions. Their refusal to answer the administrator's questions can lead to employment termination depending on the policies of the organization. The Supreme Judicial Court of Massachusetts stated the following:

“public employees can be discharged for refusing to answer questions narrowly drawn and specifically related to their job performance, where the answers cannot be used against them in a criminal proceeding” (*Broderick v. Police Comm'r of Boston*, 1975).

So in summary the observations from this literature review show that public employees must answer the questions asked by the employer or face the discipline as outlined by the organization but, the employer may not use or give information to be used during a criminal investigation that came as a direct result of an administrative investigation.

Procedures

While attending the National Fire Academy (NFA) in June 2013 the Author began formulating a plan for research. The idea for the topic had been not been identified prior to

attending the Executive Analysis of Fire Service Operations in Emergency Management course. When the author met with Dr. Burton Clark to discuss ideas for the topics and direction of the research the current topic was formulated. A rough problem statement, purpose statement, research questions, research method, and research approach were postulated during the course. A draft applied research proposal was written upon completion of the Executive Analysis of Fire Service Operations in Emergency Management course.

The author sent a draft copy of the applied research proposal to the assigned evaluator, Mr. Justin Heim, in August 2013. The evaluator's response to the initial proposal was concern that the topic did not coincide with the Executive Analysis of Fire Service Operations in Emergency Management course. During an email conversation between the author and Mr. Justin Heim in August 2013, the author explained that he had originally had concerns about the topics connection to the Executive Analysis of Fire Service Operations in Emergency Management course. However, the discussion with Dr. Burton Clark pointed out that it ties in with the class because, in doing the research, the author will have to interview and work with our local Police Department. This relationship will be helpful when there is a big event that requires Norfolk Fire-Rescue to work with Norfolk Police Department. This building of a relationship will make the partnership more effective when Incident Management Teams (IMT) and Emergency Operations Centers (EOC) are stood up in the City of Norfolk. Dr. Clark also said that it ties in because the author will become a better investigator from doing this research, which will assist the author when there is a need to pull information from people during a major incident, if for the soul purpose of providing a better after action report. The proposal was approved on August 31, 2013.

The internal fire department survey was created to determine the current level of knowledge amongst the members of Norfolk Fire-Rescue related to internal affairs interviews (See Appendix B).

The author created the internal survey with six questions. The first question asked the number of years of service the member had in the department. This question was a mandatory response. The respondent was told that failure to complete this first question would have their data removed from the survey. The purpose of this was to provide the years of experience the members answering the follow-up questions had in the fire service. This information is pertinent because a high number of young or old members of the department (with regard to years of service) could give a false indication of the knowledge of the department.

The second question was designed to determine the member's level of knowledge of whether or not they may legally be interviewed regarding incidents they are involved in off duty. This question had two possible responses, yes or no.

The third question was designed to determine if the member had ever read the Firefighters' and Emergency Medical Technicians' Procedural Guarantees. The document was created by the Commonwealth of Virginia and provides the rights that members of fire and emergency medical services have with regard to being interviewed or interrogated during an internal affairs investigation. This question had two possible responses, yes or no.

The fourth question was designed to conclude whether or not members understood that the questions asked during the internal affairs questioning could not be used against them during a criminal case. This question had two possible responses, yes or no.

The fifth question was designed to determine if members understood that they do not have the right to remain silent during this investigation. The purpose of the ability to remain

silent is to not incriminate one's self during a criminal investigation. Since an internal affairs investigation is an administrative investigation and the answers given cannot be used against them criminally there is not right to remain silent. This question had two possible responses, yes or no.

The sixth question was designed to understand whether or not the members had ever heard of the Garrity Doctrine. This question had two possible responses, yes or no.

The author visited each of the 14 fire stations on each of the three shifts over a period of one month. The author explained the purpose of the survey and the approximate amount of time it would take to complete. The author explained that participation in the survey was not mandatory and allowed anyone who didn't wish to participate to leave the room. The author then thanked the remaining members who stayed to complete the survey. The surveys were handed out and complete by the members. When the members completed the survey, they were asked to put them in an envelope for the author to review once the station visits were complete.

On July 26, 2013, a face to face interview was conducted with Captain Jeffrey Shuey of the Norfolk Police Department. The author chose this person to interview as an expert in the field of internal affairs investigation since Captain Shuey was the commander of the internal affairs department for the Norfolk Police Department (See Appendix C). The interview was designed and created to solicit information from an expert in the field of internal affairs investigation. The volume of investigations Captain Shuey's department conducts versus the small number conducted by Norfolk Fire-Rescue makes this interview critical to this applied research project.

The author chose three questions that related to the first research question. This was to gauge how the Norfolk Police Department protected the employees' rights during the

investigation and how they may differ from how Norfolk Fire-Rescue respected those rights. The second research question was not used for this interview because in the author's opinion it did not apply to Norfolk Police department. The third research question was very crucial to the interview. The importance of the Garrity Doctrine is necessary in order to understand the difference of an internal affairs interview (which is an administrative interview) and an interview when performing a legal investigation.

On August 19th, 2013, a face to face interview was conducted with Curtis Varone, author of Legal Considerations for Fire and Emergency Services. The author chose this person to interview as an expert in the field of internal affairs investigation since he has twenty years of experience as a lawyer representing firefighters and fire departments along with 33 years in the fire service. He retired as a Deputy Assistant Chief from Providence Fire Department in Providence, Rhode Island. The author attended Fire Department Administrative Investigations and Enforcing Discipline class taught by Mr. Varone and he was willing to be interviewed for this applied research project (See Appendix D). The interview was designed and created to solicit information from an expert in the field of internal affairs investigation both for the legal and the fire service aspect.

The author chose three questions that related to the first research question. This was to gauge how fire services in the northeast part of the United States protected the employees' rights during the investigation and how they may differ from how Norfolk Fire-Rescue respected those rights. Mr. Varone's experience from this part of the country is very different from Captain Shueys from the first interview. Mr. Varone works in a strong union area of the United States where Captain Shuey is from Virginia which is a right to work state. The fire and police departments in Virginia do have unions but the cities do not have to meet and work with them.

The second research question was not used for this interview because in the author's opinion, Mr. Varone could not speak to the substantial risks to members of Norfolk Fire-Rescue when they are investigated. The third research question was very crucial to the interview. The importance of the Garrity Doctrine is necessary in order to understand the difference of an internal affairs interview and an interview when performing a legal investigation.

On September 23th, 2013, a face to face interview was conducted with Chief Jeffrey Wise, who is the Fire Chief of Norfolk Fire-Rescue. The author chose this person because of his thirty years of experience in the fire service and as the leader of Norfolk Fire-Rescue (See Appendix E). The interview was designed and created to collect information from an experienced leader of a large fire department.

The author chose three questions that related to the first research question. This was to determine how Norfolk Fire-Rescue protects their employees' rights during the investigation and how they may differ from how other organizations respected those rights. The second research question was used for this interview because in the author's opinion it specifically applies to the stance the department takes on job relationship to the incident being investigated. The third research question was very crucial to the interview. The importance of the Garrity Doctrine is necessary in order to understand the difference of an internal affairs interview (which is an administrative interview) and an interview when performing a legal investigation.

Limitations

There were several limitations in the research. First, the research found that the majority of fire services in the United States do not have a dedicated position of internal affairs or office of professional standards. There were a few departments that did not have a dedicated position but did have policies that addressed how the organization would handle the investigation and

who would conduct it. Second, the author was unable to find any legal cases that would delineate whether a person who is off duty and gets into legal trouble can be compelled to answer questions related to the trouble. The author was only able to find cases where the officer was on duty at the time of the incident in question. Finally, the lack of any cases being brought before the United States Supreme Court make each circuit court responsible for how cases are interrupted.

Results

The author asked 321 respondents to complete the internal survey. This was accomplished by station visits to the 14 stations that Norfolk Fire-Rescue has in service, on three different shifts. Participation was optional and 122 people completed the survey. The author reviewed the responses and then completed data entry to evaluate the results. Responses were received from active operations staff with the ranks of, Firefighter/EMT, Firefighter/EMT-Enhanced, Firefighter/EMT-Intermediate, Firefighter/EMT-Paramedic, Lieutenant, Captain, and Battalion Chief.

The first question in the survey asked the number of years the respondent has been in the fire service. The years of service were as followed; 0-5 years resulted in 19 percent of the respondents, 6-10 years resulted in 22 percent of the respondents, 11-15 years resulted in 15 percent of the respondents, 16-20 years resulted in 33 percent of the respondents, 21-25 years resulted in 7 percent of the respondents, 26+ years resulted in 5 percent of the respondents. This showed a strong response from the 0-20 years of service, but a poor response from members who had over 20 years. Question number 2 was if they felt the department had the authority to interview you regarding an incident that occurred off duty. The results were 72 percent of the

respondents felt that the department did not have the right to interview them regarding an incident that occurred off duty. Based on the data from the first question, (a majority of the respondents having less than 20 years) this is not surprising. With regard to the respondents having read the Firefighters' and Emergency Medical Technicians' Procedural Guarantees, it is surprisingly that 85 percent have not read the guarantees. Norfolk Fire-Rescue does reference the Firefighters' and Emergency Medical Technicians' Procedural Guarantees in their Office of Professional Standards policy but does not provide employees a copy. The members of the department are only given a copy of this document if the employee is about to be interviewed by the Captain of the Office of Professional Standards. The respondents showed a strong lack of understanding of the difference between an internal affairs interview and a criminal investigation. With 98 percent of the respondents answering that yes the responses during an internal interview could be used during a criminal investigation, there is a strong need for the members of Norfolk Fire-Rescue to be given additional training. When asked if they had the right to remain silent during the interview, the response were pretty much split. 52 percent said they did have the right to remain silent with 48 percent saying they did not. The final question was to determine if the respondents knew about the Garrity Doctrine. The overwhelming response saying no shows the fire service personnel in Norfolk Fire-Rescue do not have a basic understanding of the purpose of when an internal affairs/ administrative interview should be conducted. The results of this question were that on six percent of the respondents thought they knew the Garrity Doctrine. The knowledge level of the members was not tested to see if they truly did know the doctrine.

The author conducted a face to face interview with Captain Jeffrey Shuey of the Norfolk Police Department. The responses to the questions were provided in a conversational manner

during several interviews (See Appendix G). The interviews discussed not only how the police department conducted internal affairs investigations but also how the documentation of the cases were tracked and how discipline was hand out in the organization. The written research questions were presented orally to him as the interview was conducted. The author's goal for the interview was to gain a better understanding of the topic being researched and to create a strong working relationship between the two departments.

Captain Shuey expressed that he was glad that the author was taking the time and the initiative to create an ability to assist each other in investigations. He stated that the two departments have always had good communications and he was happy to continue that practice.

One of the first things Captain Shuey addressed was that any information developed by the criminal investigators would be provided to the Office of Professional Standards (OPS) investigator. The OPS investigator has a unique role in that they can receive information but cannot provide information to criminal investigators. He continued to talk about if the criminal investigation is impaired by the administrative investigation, then the OPS would suspend their investigation until such time as it may be resumed without impairing the criminal investigation.

From there the conversation moved into the process of questioning the employee and that the employee would be provided the name of the investigation officer, any persons present during the questioning, and the reason for the investigation. The employee is not permitted to have anyone present during an interview in an administrative investigation. The investigation should be conducted without any distractions and for that reason the employee will be interviewed alone. During the interview with Captain Shuey the importance of the employee being allowed reasonable opportunities to attend to personal needs and allow for breaks. If the

employee is questioned during meal hours, it is required to allow them to order meals and a private place to allow them to eat. He talked about if the interview continued past normal working hours that the employee should be allowed to make phone calls to handle any after work issues that needed to be taken care of. During these calls the employee would not be allowed to discuss the nature of the interviews with anyone.

The author asked Captain Shuey how his investigators would handle an employee who refused to answer questions during an administrative investigation. Captain Shuey responded that the OPS investigator would stop the interview and have another officer, lieutenant or above, join the interview and order the employee to answer the questions. If the employee persists in refusing to respond, then the ranking officer in the room would reiterate the consequences for the employees continued refusal. If the employee still refused to participate with the investigation, they would be relieved of duty immediately pending formal action.

The topic of conversation then turned to what Norfolk Police Department did as far as providing its members notification of their Garrity rights. Captain Shuey explained that prior to the interview beginning, the employee shall be explained their rights as they pertain to Garrity. Once their rights have been read they are required to sign a statement explaining that they had been informed of their Garrity rights. At that point the author was provided copies of all forms the Norfolk Police Department uses for OPS investigations.

The author conducted a face to face interview with Mr. Curtis Varone. The responses to the questions were provided in a conversational manner over dinner during the interview (See Appendix H). The written research questions were verbally asked to Mr. Varone during the interview. The author's goal for the interview was to gain as much information about the applied

research project as possible and to get a prospective from both a member of the fire service and a legal counselor. The fact that this interviewee had experience with unions was a plus.

Mr. Varone expressed a strong passion for the fire service and the rights of employees with regard to Garrity. He expressed his pleasure in the ability to educate members of the fire service in this area.

The conversation started with the importance of considering Garrity issues and consulting union contracts prior to OPS investigator beginning the questioning. Based on which state the department resides in will dictate much of how Garrity v. New Jersey is followed. With the states divided in the different Court of Appeals jurisdictions, it is important to know the rulings they have made.

Mr. Varone spoke of the importance of the employee invoking their Garrity rights at the beginning of the interview, even to the point of writing it on the any paperwork signed by the employee during the interview. That way, any answers given by the employee will be considered compelled by the courts and will be protected from being used in a criminal case against the employee. It was stressed, that even though the answers may not be used in a criminal proceeding, they could be used against the employee for administrative discipline. That Garrity does not give the employee immunity from the actions causing the administrative investigation. Next, it was explained that once the employee has invoked their Garrity rights, the questions asked by the investigator must be job related and be specific to the investigation.

When the author asked about what paperwork other departments required during an administrative investigation, Mr. Varone made reference to the class manual that had several examples of paperwork that could be used to document the investigation.

The conversation then moved into whether or not employees could have representation present when they were being interviewed. His response was that it depends on the state and any union contract.

The third research question was brought up next and Mr. Varone discussed that the response was based on the states requirements. He made reference to the state codes he had discussed in his class: California, Florida, Illinois, Indiana, Louisiana, and the authors Commonwealth of Virginia and that some states have codes to inform departments as to what extent Garrity warnings must be advised.

Finally, the conversation addressed the biggest area of confusion for the author. That was, are departments legally allowed to investigate incidents that happen when the members are away from work. Mr. Varone discussed that when the employee is away from work and conducts themselves improperly, that even if the employee may lose their job for those actions it does not mean the department has the right to compel the employee to answer questions regarding the incident. The author challenged Mr. Varone, what if the actions reflect poorly on the department. Mr. Varone reiterated that it is possible for the employee to be terminated based on off duty actions, but that the employer has no legal right to compel answers to questions that are not specific to performance to the employee's duties.

The author conducted a face to face interview with Norfolk Fire-Rescue Chief Jeffrey Wise. The responses to the questions were provided in a conversational manner over several meetings in the fall of 2013 and spring 2014 (See Appendix I). The written research questions were verbally asked to Chief Wise during the interview. The author's goal for the interview was to gain information about the perspective of an experienced fire chief. The fact that this

interviewee had over 30 years of experience in the fire service made him an excellent candidate to be interviewed.

In response to the interview questions, Chief Wise spoke of how Norfolk Fire-Rescue uses the Virginia Conduct of Interrogation, Code of Virginia § 9.1-301 as the guideline for how the department conducts their investigations. He stated to the author that when he wrote the General Order Internal Investigations Administration 006, he followed the Virginia Code. In the General Order it states that the employee shall be given written notice to the employee prior to the interview. Chief Wise demonstrated further in the discussion.

The investigating officer shall provide the employee, who is under investigation, with written notice of the investigation. This notice should provide enough detail to reasonably apprise the employee of the nature of the investigation. Absent a clear and compelling need for immediate action, an employee under investigation shall be provided a minimum of five calendar days' notice prior to any formal interview.

This lead into when the interviews shall be conducted. The interviews would be a reasonable time of day and it is preferred that the employee is on duty. In the discussion it was pointed out to the author that there are times when the investigation is so important that the investigation interviews will need to take place immediately.

From there the conversation was moved to the ability of employees to have representation present when the interview was taking place. The Chief responded that NFR did allow for a witness to be present during the interview, but the witness was not allowed to make any comments during the interview. The witness must also be an active duty NFR member, not

be directly involved in the investigation, and should not have direct factual knowledge of the events leading to the investigation.

Next the author asked about the substantial risks to members of NFR when they are being investigated. Chief Wise stated that it would be dependent on each individual case and the amount of cooperation of the employee. He referenced the General Order again which says the following:

It shall be the responsibility of the employee to answer fully and truthfully all questions asked by the investigating authority pertaining to the investigation. Dishonest or untruthful answers to questions during an investigation, will likely result in termination.

From there the author asked about incidents that occur off duty and how they can be considered job related. Chief Wise answered that the public and department expect employees to perform their official duties at a level consistent with expected public employment behavior. Anything less would erode the public's trust in NFR. Any improper actions that come to the attention of department command personnel that appear to be in violation of law or department policies, or may erode the public's trust Norfolk Fire-Rescue, will be investigated.

Finally, the question regarding the notification of Garrity rights to the employee was discussed. Chief Wise talked about the rights employees have during the interview process and that it was his understanding Norfolk Fire-Rescue did explain the process to the employee prior to the interview. He did not think that Norfolk Fire-Rescue spoke to Garrity specifically but did not think it was necessary because they followed the Conduct of Interrogation, Code of Virginia. He said that would be something the department will investigate and adjust accordingly.

Discussion

The author's approach to the literature review was based upon the legal decisions made by the thirteen United States Courts of Appeals. Once the author began reading the case review from the different courts, the author began to realize that the research was leading to the point that there was no direct answer some of the research questions. There was a point in the research when the author considered revising or changing the purpose statement and research. The author decided to continue on the path that the research was leading him for the purpose of a better understanding of the topic, even if it didn't solve the original problem.

The literature review showed that there are few departments across the United States that have a dedicated position to handle internal affairs investigations. Also, there were not many departments that specifically addressed how the internal affairs investigations would be conducted. This lack of policies made researching the first question difficult. Of the departments that did have policies, there were differences in how each department ensured the rights of their employee. Typically the fire chief of the department would assigned an investigation be opened and would assign who conducted the investigation "The Fire Chief shall appoint a trained Internal Affairs investigator from within the Unified Fire Authority to investigate any charge of conduct or behavior by any member that may result in major discipline" (Berry, 2004, p.1).

Notifying of the employee was an area where departments had different requirements. Some departments notified the employee at the beginning of the investigation and gave them time before the formal interview began. Other organizations did not inform the employee until the investigation was completed. In researching court findings the author did not find any

indication that court precedence had been established to address this issue. The states that had codes addressing how internal affairs investigations were to be conducted were the only guidance the author could find.

The response to the survey that was conducted showed that of the members who took the time to complete it there was a strong lack of understanding by the employee as to their rights during an internal affairs investigation. The survey overwhelmingly showed that this is not a topic that is well understood. The author had a lack of understanding of how Garrity should be utilized prior to the research.

The three interviews conducted showed a difference of opinion when they were asked about the first research question. The response from three interviewees were about the same. They all viewed the rights of the employees as a critical component of the internal. The understanding of the legal requirements were viewed a critical when conducting the internal affairs interview.

The substantial risks to members of Norfolk Fire-Rescue when they are investigated was the next question posed in the applied research project. The research of case law showed that the employees did not have to fear that the information obtained during the internal investigation would be used against them in criminal proceedings. The only deviation to this is if the employee willfully makes false statements to the investigator. If the employee choses to perjure themselves, the information obtained in the internal investigation can be used.

The other risks for the employee is that even if the information obtained during an investigation cannot be used against them criminally, it does not give them amnesty from their

actions administratively. They can be terminated from employment based on the findings of the internal investigation.

Again, the survey showed a lack of understanding of Norfolk Fire-Rescue members when it comes to the rights they are afforded during the investigation. The question number 4, can the answers you give during an internal affairs interview be used against you in a criminal trial. Shows directly the misunderstanding members of the department have when it comes to their rights. When 109 out of 121 members of the department believe their responses during an internal investigation can be used against them in a criminal trial, there is strong misunderstanding.

The interview with Chief Wise showed a strong commitment to the protection of the rights of the employee during this type of investigation. He spoke to the importance of protection of the information collected not being used against the employee in criminal investigations but also pointed out the fact that the information may be used to pursue administrative discipline up to and including termination when necessary.

The final research question proved to be the most difficult of all to research. This question was phrased as to what extent Norfolk Fire-Rescue was required to instruct employees of their Garrity rights. The author did not find any legal cases that required the employer to provide a Garrity warning prior to the interview. Cases involving Garrity were found but no specific responses that required any notification.

The survey results showed that employees of Norfolk Fire-Rescue did not have an understanding of Garrity. When the question was asked, "do you know what the Garrity Doctrine

is?" 115 responded that they did not know. When only 7 of the 122 respondents had an understanding of the Garrity doctrine there is a potential for the employees' rights to be violated.

During the expert interviews, Mr. Varone strongly recommended that the employee be advised of their Garrity rights prior to the interview, and that if they are not, the employee should exercise that right by writing it on any paperwork generated during the interview. Captain Shuey said that it was common practice to inform the employees of Norfolk Police Department of their Garrity rights at the beginning of the interview. Chief Wise also stated that it was understood that Garrity was addressed during the interview but that it was not addressed in the department's policies.

Recommendations

After completing this research, the following recommendations are based upon the interviews provided, literature reviewed and the procedures followed in the applied research project. Norfolk Fire-Rescue should start with adding additional procedures to reduce the chance that its member's rights will be violated. This can begin by training all personnel on the *FIREFIGHTERS' AND EMERGENCY MEDICAL TECHNICIANS' PROCEDURAL GUARANTEES* which is the Conduct of Interrogation, Code of Virginia. § 9.1-301. Additional follow-up training for the battalion chiefs and company officers of the departments should also be implemented. The organization needs to insure that the employees understand the difference between a criminal investigation and the internal investigation (administrative).

The next recommendation is to implement policies and standard operation procedures to deal with the Garrity rights afforded the employee. The policies and standard operation procedures will reinforce Norfolk Fire-Rescue's commitment to the employee. When

formulating policies and procedures, it is recommended to look outside of the fire service and adopt the guidance that can be provide from law enforcement organizations.

Finally, there needs to be operational changes made immediately. The author recommends that there be additional training provided to all chief officers explaining *Garrity v. New Jersey* and how it applies to the fire service. There needs to be an improved organizational understanding of the Garrity doctrine.

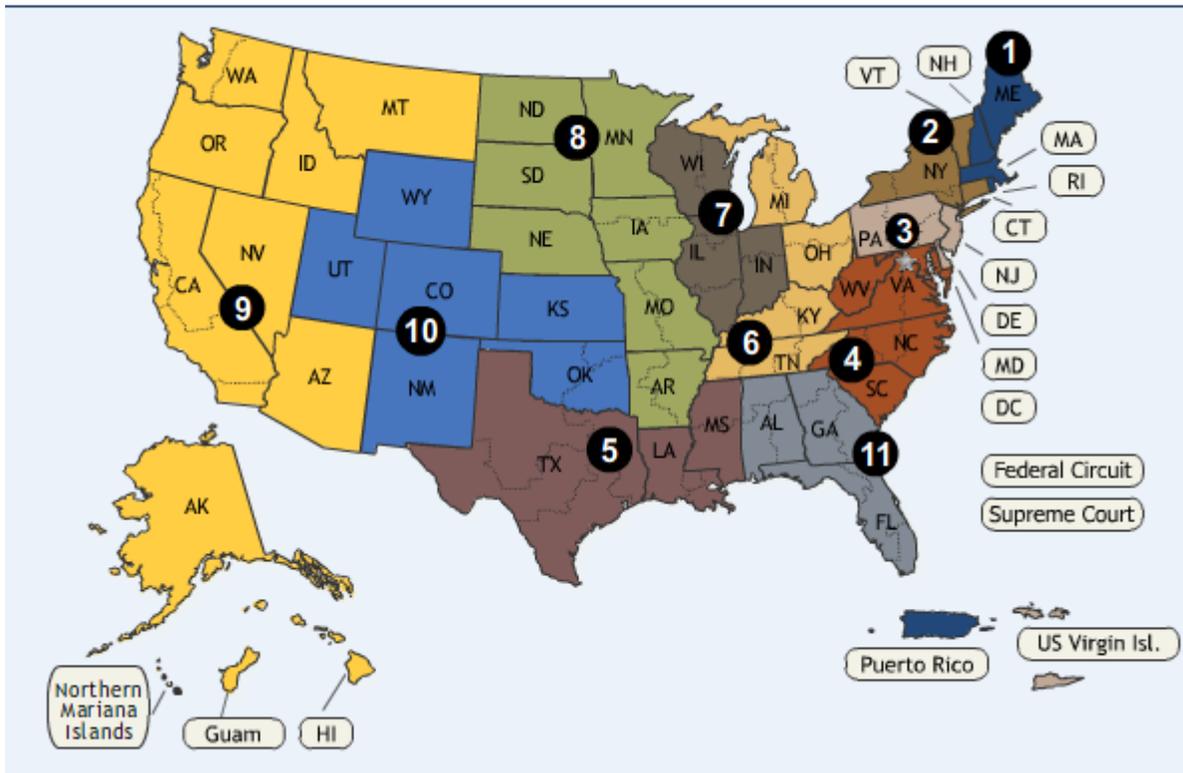
The author recommends that annual training should be provided by the Norfolk Fire-Rescue Training Center to ensure that the organization as a whole understands the short falls that have surfaced due to this applied research project.

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Appendix A

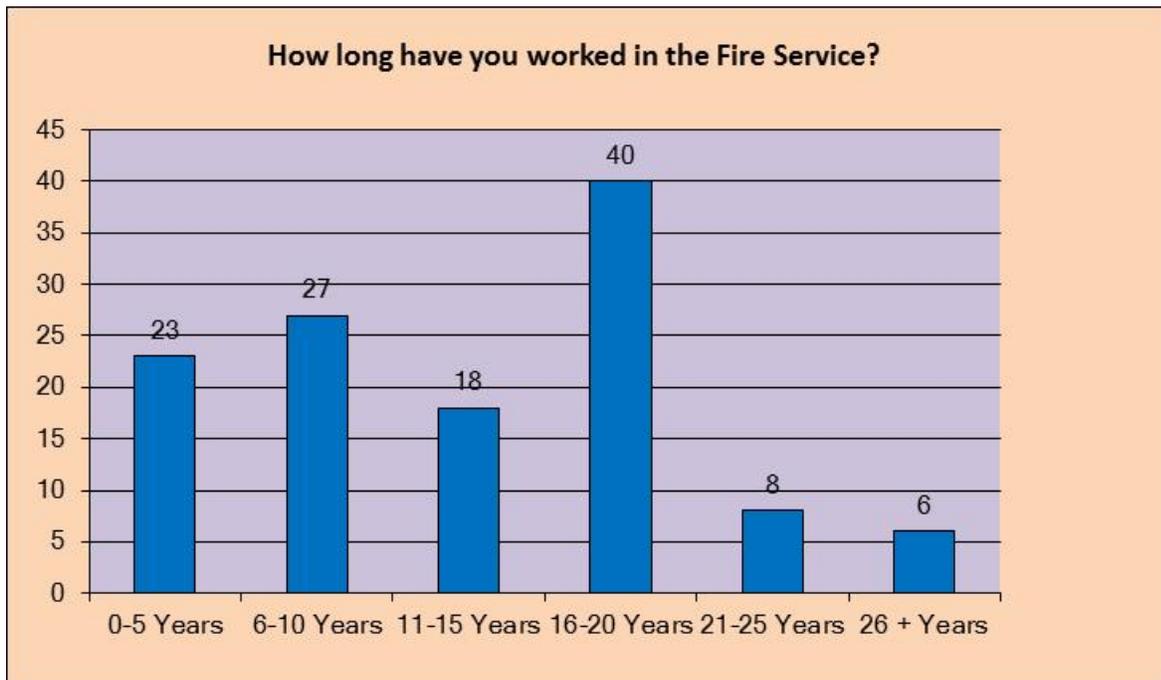
Geographic Boundaries of the United States Courts of Appeals



Appendix B

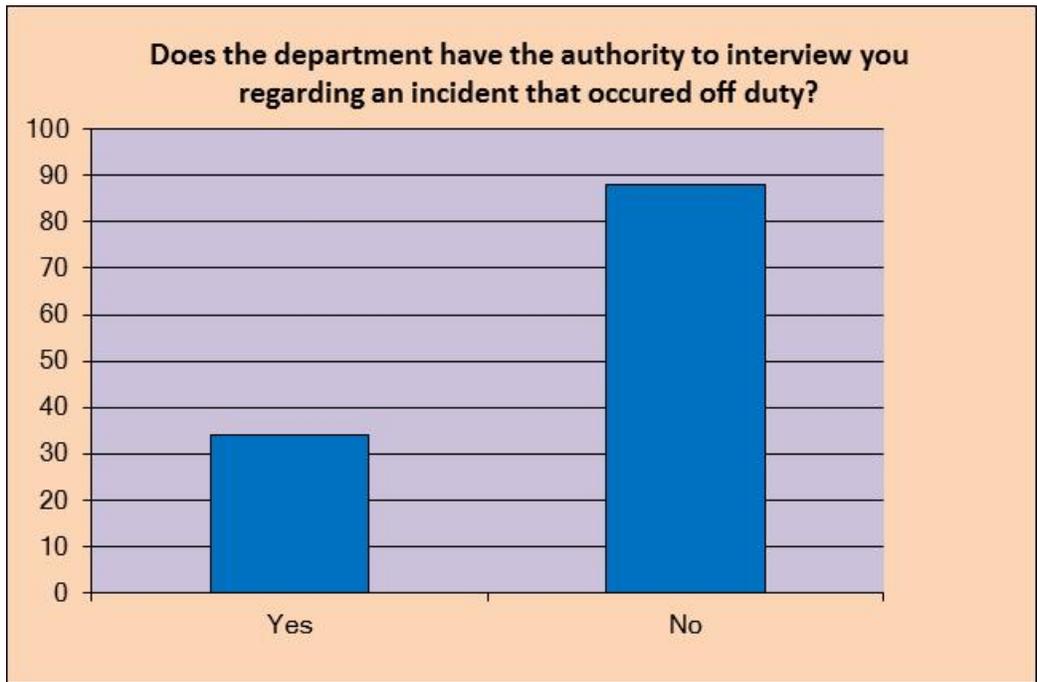
Office of Professional Standard Survey

1. How long have you worked in the Fire Service?	
Answer Options	Response Count
0-5 Years	23
6-10 Years	27
11-15 Years	18
16-20 Years	40
21-25 Years	8
26 + Years	6
<i>answered question</i>	122
<i>skipped question</i>	0

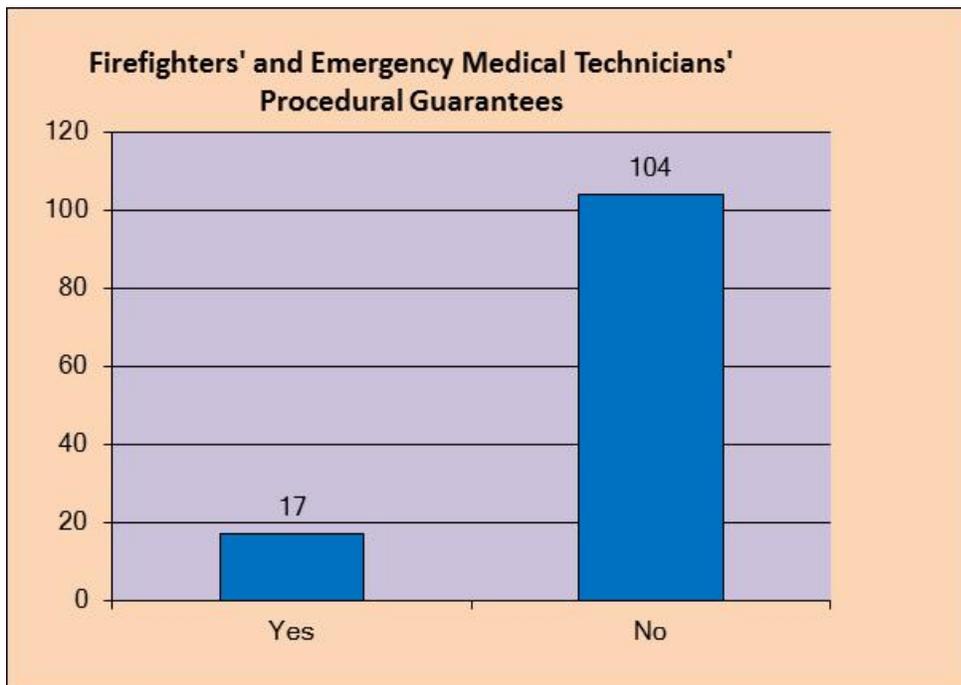


Office of Professional Standard Survey

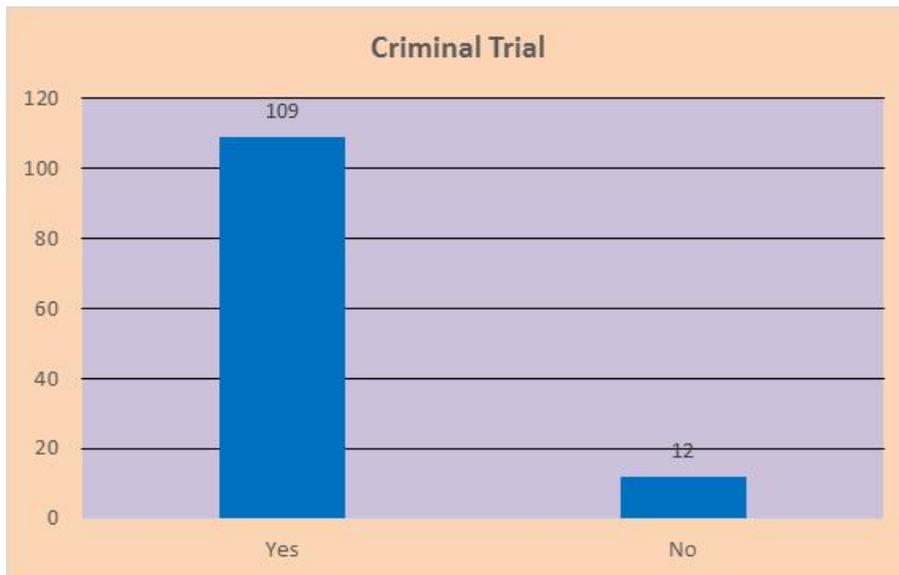
2. Does the department have the authority to interview you regarding an incident that occurred off duty?		
Answer Options		Response Count
Yes		34
No		88
<i>answered question</i>		122
<i>skipped question</i>		0



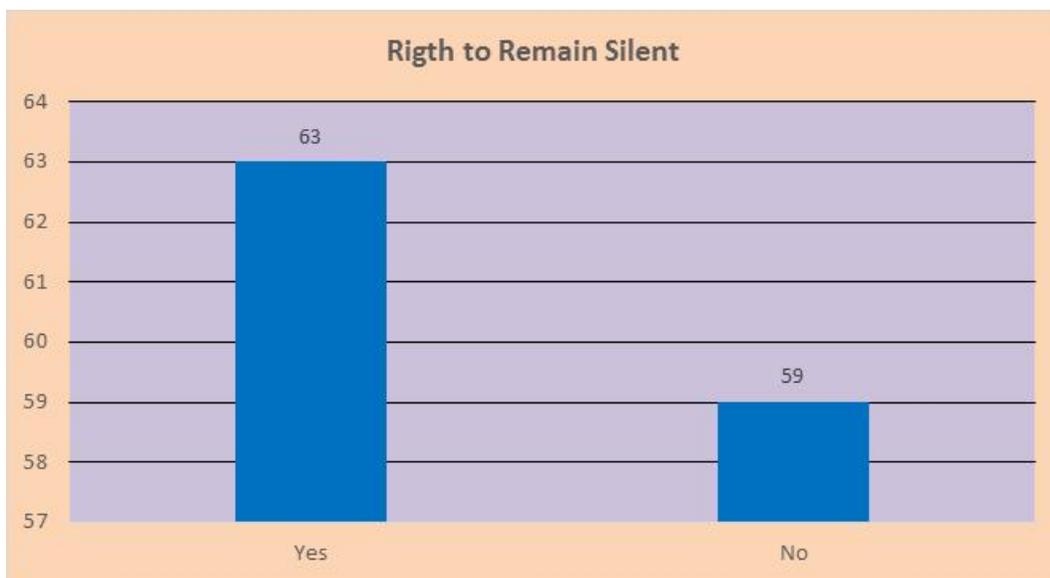
Office of Professional Standard Survey	
3. Have you ever read the Firefighters' and Emergency Medical Technicians' Procedural Guarantees to know your rights during an internal affairs administration interview?	
Answer Options	Response Count
Yes	17
No	104
<i>answered question</i>	121
<i>skipped question</i>	1



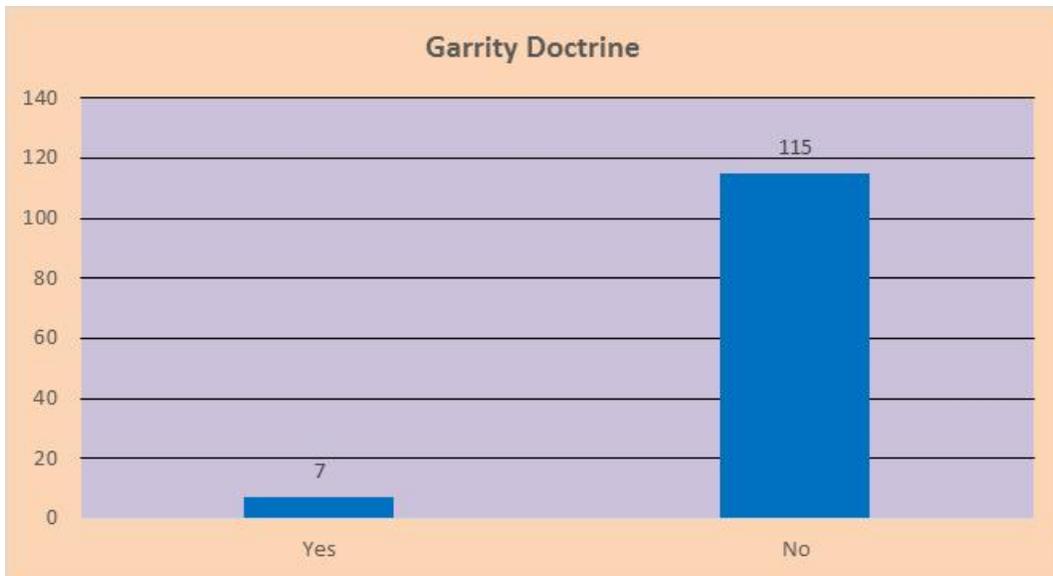
Office of Professional Standard Survey	
4. Can the answers you give during an internal affairs interview be used against you in a criminal trial?	
Answer Options	Response Count
Yes	109
No	12
<i>answered question</i>	121
<i>skipped question</i>	1



Office of Professional Standard Survey	
5. Do you have the right to remain silent when being interviewed by an internal affairs investigation?	
Answer Options	Response Count
Yes	63
No	59
<i>answered question</i>	122
<i>skipped question</i>	0



Office of Professional Standard Survey	
6. Do you know what the Garrity Doctrine is?	
Answer Options	Response Count
Yes	7
No	115
<i>answered question</i>	122
<i>skipped question</i>	0



Appendix C – Captain Jeffrey Shuey Interview 1

National Fire Academy
Executive Fire Officer
Executive Analysis of Fire Service
Operations in Emergency Management

Interview 1

Research question 1: What procedures are other departments verses NFR using to ensure that employee rights are not being violated?

1. What procedures does Norfolk Police Department use to ensure that their employees' rights are not being violated?
2. Is there paperwork that is provided to their members to explain the members' rights?
3. Are members allowed to have representation when they are being interviewed?

Research question 2: What are the substantial risks to members of NFR when they are investigated?

This question did not apply to this interviewee.

Research question 3: To what level is NFR required to advise members of their Garrity rights?

1. Research question 3 was specifically asked of the interviewee.
2. How do you see the Garrity rights as they apply to the fire service?

Appendix D – Curtis Varone Interview 2

National Fire Academy
Executive Fire Officer
Executive Analysis of Fire Service
Operations in Emergency Management

Interview 2

Research question 1: What procedures are other departments verses NFR using to ensure that employee rights are not being violated?

4. What procedures do fire departments in the Northeast use to ensure that their employees' rights are not being violated?
5. Is there paperwork that is provided to their members to explain the members' rights?
6. Are members allowed to have representation when they are being interviewed?

Research question 2: What are the substantial risks to members of NFR when they are investigated?

This question did not apply to this interviewee.

Research question 3: To what level is NFR required to advise members of their Garrity rights?

3. Research question 3 was specifically asked of the interviewee.
4. How do you see the Garrity rights as they apply to the fire service?
5. Are departments legally allowed to investigate incidents that happen when the members are away from work and justify it as work related?

Appendix E – Jeffrey Wise Interview 3

National Fire Academy
Executive Fire Officer
Executive Analysis of Fire Service
Operations in Emergency Management

Interview 3

Research question 1: What procedures are other departments verses NFR using to ensure that employee rights are not being violated?

7. What procedures does Norfolk Fire-Rescue use to ensure that their employees' rights are not being violated?
8. Is there paperwork that is provided to their members to explain the members' rights?
9. Are members allowed to have representation when they are being interviewed?

Research question 2: What are the substantial risks to members of NFR when they are investigated?

1. Research question 2 was specifically asked of the interviewee.
2. How is an incident that occurs off duty, considered job related?

Research question 3: To what level is NFR required to advise members of their Garrity rights?

6. Research question 3 was specifically asked of the interviewee.
7. How do you see the Garrity rights as they apply to the fire service?
8. Are departments legally allowed to investigate incidents that happen when the members are away from work and justify it as work related?

Appendix F – Captain Jeffrey Shuey Interview Summary

- Office of Professional Standards (OPS) is provided information developed by the detectives running the criminal investigation.
- OPS shall not disclose information developed by their office to criminal investigators.
- If the criminal investigation is impaired by the administrative investigation, the latter shall be suspended until such time as it may be resumed without impairing the criminal investigation.
- Prior to questioning the employee will be provided the name of the investigation officer and any individual to be present during the questioning, and the reason for the investigation.
- The employee is not allowed to have anyone present during an interview in an administrative investigation.
- Employees will be allowed reasonable opportunities to attend to personal needs to include meals.
- During the OPS interview, statements made by employees will be used by the department for administrative purposes only, and will not be used in any criminal prosecution of the employee.
- If the employee refuses to answer questions during an administrative investigation, the OPS investigator will stop the interview and have any lieutenant or above, to order the employee to answer. If the employee persists in refusing to respond, they will be relieved of duty immediately pending formal action.
- Potential findings of the investigation: unfounded, exonerated, unsubstantiated, substantiated and misconduct not bases on the complaint.

Appendix G – Curtis Varone Interview Summary

- Prior to questioning employees investigators need to consider Garrity issues and consult the union contracts.
- Depending on the state that the department resides in will dictate if the employee is required to Garrity.
- Once Garrity has been invoked all answers related to the internal investigation are considered compelled questions and must be answered as a condition of employment.
- Any information or evidence gathered from the employee's answers cannot be used against the employee in criminal prosecutions.
- Even if the employee is being compelled to answer administrative questions, they may be administratively disciplined based on the answers to those questions.
- Once the employee has invoked their Garrity rights, the questions asked by the investigator must be job related and be specific to the matter being investigated.
- Depending on the state and any union contract, is dependent on whether or not employees are allowed to have representation.
- States decide to what extent Garrity warnings must be advised to employees of the fire service.
- When the employee is away from work and conducts them self poorly that may result in the loss of their job does not mean it is job related.

Appendix H – Jeffrey Wise Interview Summary

- The use of Virginia Conduct of Interrogation. Code of Virginia. § 9.1-301
- The Conduct of Interrogation. Code of Virginia. § 9.1-301 is provided to them at the time they are given a notice of investigation.
- They are allowed to have an active member of the fire department to sit in as a witness.
- There is the risk of anything up to termination depending on the case and how the employee participates with the investigation.
- The fact that any of the employee's actions can have an effect on the organization as a whole can make the off duty incident considered job related.
- Garrity rights are not discussed with the employee during the interview.
- Currently we do not advise employees of the Garrity Doctrine.