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DATE: January 30, 2003

PERSL #1372

TO: Human Resource Directors/Designees
Labor Relations Directors/Designees

FROM: Paul Larson 
Deputy Commissioner

RE: **Tennessen and Garrity Warnings Used in Misconduct Investigations**

Attached are new sample Tennessen and Garrity warnings for use in conducting investigative interviews.

For background purposes, the term “Tennessen warning” is derived from Minnesota Statutes §13.04, subdivision 2, which requires that an individual receive certain information when a government entity is requesting private or confidential data from that individual. The term “Garrity warning” is derived from a U.S. Supreme Court decision [Garrity v. State of New Jersey, 385 U.S. 493 (1967)] regarding the Fifth Amendment right against compelled self-incrimination in the context of governmental employment investigations. A “Garrity warning” is a statement that requires an employee to provide information and to cooperate in an investigative interview under threat of a penalty, such as disciplinary action or job loss. It further informs the employee that any information obtained from that employee during the interview, or any evidence resulting from the information provided, cannot and will not be used against her/him in any subsequent criminal proceedings.

Recently a county attorney’s office declined to prosecute two cases referred by State agencies. The Tennessen warnings used in these cases stated a penalty in the form of disciplinary action to the subject employees for failure to answer the investigators’ questions. The county attorney determined that these Tennessen warnings had deprived the employees of their Fifth Amendment rights under the U.S. Constitution, because the threat of disciplinary action constituted leverage to coerce the employee to self-incriminate. Therefore, the information obtained in the investigative interviews could not be used in the employees’ criminal prosecution.

Based on these recent events, we have developed new recommended Tennessen and Garrity warnings. Several options are provided. The selection of the appropriate option should be based on: (1) the circumstances, (2) the person being interviewed, and (3) the desires of the agency.

The sample notices provided are examples only and should not be considered prescriptive. Agencies may modify these notices as dictated by their individual needs.

Remember, in all cases the required elements of a Tennesen warning must be provided when an individual is asked to supply private or confidential data regarding himself/herself (per Minnesota Statutes §13.04, subdivision 2). The required elements are as follows:

- a) The purpose and intended use of the requested data;
- b) Whether the individual may refuse or is legally required to provide the data;
- c) Any known consequences from supplying/refusing to supply the data; and,
- d) The identity of other persons or entities authorized by law to receive the data.

Although agencies may ask individuals to sign a Tennesen warning as verification that the individual was provided the notice, a signature cannot be required. However, it is at the agency's discretion to request signatures or not, provided that all employees are treated similarly. In all cases, if you do not obtain a signature, you should document that the Tennesen warning notice was provided to the individual, and that the individual was given ample time to read the notice and ask for clarification if needed. If you do obtain an employee's signature, a copy of the signed notice should be provided to the employee.

If an investigation involves potential criminal activity, it is critical that the agency consult its DOER Labor Relations Representative to determine the appropriate course of action before interviewing any employees.

As a final note, we want to inform you that the Court of Appeals has issued several opinions which state that employees under investigation do not need to be given a Tennesen Warning. However, after consulting with the Attorney General's Office, we continue to recommend that Tennesen Warnings be given, to ensure that we are not in violation of the Minnesota Government Data Practices Act.

Please share this information with all staff in your agency who conduct employment investigations. If you have questions, please contact your Labor Relations Representative.

This memo supersedes previous memos written on this subject dated 7/18/97 and 3/6/98.

cc: DOER Labor Relations Staff

Attachment: sample Tennesen and Garrity warnings

Sample Tennesen Warning Notice For Use Prior to Interviewing an Employee who is the Subject of an Investigation:

The purpose of this interview is to collect data regarding allegations of alleged employee misconduct raised against you. The data you provide will be used by me and others whose jobs reasonably require access to the data, in order to determine the facts of the case and if any action should be taken. It may also be used in subsequent hearings or proceedings related to this matter. The following individuals/entities have a legal right to access this data:¹

- Supervisors/administrators whose input is necessary in the decision-making process;
- Your exclusive representative;
- Labor Relations Division of the Minnesota Department of Employee Relations;
- Minnesota Attorney General's office;
- Minnesota Legislative Auditor's office;
- Arbitrator/Hearing Officer;
- State and federal courts;
- State and federal enforcement agencies, including but not limited to the Federal Equal Employment Opportunity Commission, Minnesota Department of Human Rights, and the U.S. Department of Labor;
- Appropriate licensing entities and agencies;
- Unemployment Division of the Department of Economic Security;
- Law enforcement agencies and prosecutorial authorities;
- Counsel for parties in litigation pursuant to court order;
- Persons/entities whom you authorize to receive the data; and
- Any other person or entity authorized by state or federal law.

In addition, if any disciplinary action is taken and becomes final, the nature of the final disposition of the disciplinary action, together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify employees who are confidential sources, will become public data.

***In addition to providing the above information, a Tennesen Warning requires that the individual be informed if s/he may refuse or is legally required to supply the data and must be provided any known consequences of supplying/refusing to supply the data. On the following two pages are several examples of recommended options from which to choose.**

¹**Note:** If the employee being investigated is a "public official", as defined in M.S. §13.43, Subd. 2. (e), that employee should be informed that upon the completion of the investigation (or if the employee resigns or is terminated from employment while the complaint or charge is pending), **all data relating to the complaint or charge are public**, unless access to the data would jeopardize an active investigation or reveal confidential sources.

Voluntary Compliance:

You are not legally required to provide any information during this interview. If you do provide the requested information, it will be used to assist in the investigation. Your failure to provide the information requested will necessitate that a decision be made without the benefit of hearing the information that you could provide. If you do provide information, it is our expectation that any information you provide will be truthful.

This option may be used whether or not the employee is subject to criminal prosecution.

Compelled Compliance Options:

1. You are not legally required to provide any information during this interview. If you do provide the requested information, it will be used to assist in the investigation. Your failure to provide the information requested, including any evasiveness, false statements, or failure to comply with any of the instructions given to you in connection with this investigation, may lead us to consider any allegations against you as unchallenged or unrefuted.

This option may only be used with employees who are not subject to criminal prosecution.

2. You are not legally required to provide any information during this interview. If you do provide the requested information, it will be used to assist in the investigation. Your failure to provide the information requested, including any evasiveness, false statements, or failure to comply with any of the instruction given to you in connection with this investigation, may lead us to consider allegations against you as unchallenged or unrefuted. In addition, your failure to cooperate may lead to disciplinary action against you, including dismissal.

This option may only be used with employees who are not subject to criminal prosecution.

3. You are not legally required to provide any information during this interview. If you do provide the requested information, it will be used to assist in the investigation. Your failure to provide the information requested, including any evasiveness, false statements, or failure to comply with any of the instructions given to you in connection with this investigation, may lead us to consider any allegations against you as unchallenged or unrefuted. Because we are advising you that you could be penalized for refusing to answer questions or otherwise failing to cooperate with the investigation, the information you provide, and any evidence resulting from the information you provide, cannot and will not be used against you in any subsequent criminal proceeding.

This is a Garrity warning. This option would only be used with an employee who is subject to criminal prosecution, and in a situation where the agency, DOER and the county attorney agree that any information obtained from the subject of the investigation will not be used against the employee in any subsequent criminal proceeding. Contact your DOER Labor Relations Representative prior to using this option.

4. You are not legally required to provide any information during this interview. If you do provide the requested information, it will be used to assist in the investigation. Your failure to provide the information requested, including any evasiveness, false statements, or failure to comply with any of the instruction given to you in connection with this investigation, may lead us to consider allegations against you as unchallenged or unrefuted. In addition, your failure to cooperate may lead to disciplinary action against you, including dismissal. Because we are advising you that you could be penalized for refusing to answer questions or otherwise failing to cooperate with the investigation, the information you provide, and any evidence resulting from the information you provide, cannot and will not be used against you in any subsequent criminal proceeding.

This is a Garrity warning. This option would only be used with an employee who is subject to criminal prosecution, and in a situation where the agency, DOER and the county attorney agree that any information obtained from the subject of the investigation will not be used against the employee in any subsequent criminal proceeding. Additionally, this option would be used when you want to inform the employee that failure to cooperate may lead to disciplinary action against the employee. Contact your DOER Labor Relations Representative prior to using this option.

Sample Tennesen Warning Notice For Use Prior to Interviewing an Employee who is NOT the Subject of the Investigation:

The purpose of this interview is to collect data as part of an investigation into alleged employee misconduct by another employee. You are being interviewed as a potential witness. You are being given this data practices notice in the event that any of the data you provide include private data on yourself. Data you provide will be used by me and others whose jobs reasonably require access to the data in order to determine the facts of the case and to determine if any action should be taken. This data may also be used in subsequent hearings or proceedings related to this matter. The following individuals/entities have a legal right to access this data:

- Supervisors/administrators whose input is necessary in the decision-making process
- Exclusive representative for the subject employee;
- Labor Relations division of the Minnesota Department of Employee Relations;
- Minnesota Attorney General's office;
- Minnesota Legislative Auditor's office;
- Arbitrator/Hearing Officer;
- State and federal courts;
- State and federal enforcement agencies, including but not limited to the Federal Equal Employment Opportunity Commission, Minnesota Department of Human Rights, and the U.S. Department of Labor;
- Appropriate licensing entities and agencies;
- Unemployment Division of the Department of Economic Security;
- Law enforcement agencies and prosecutorial authorities;
- Counsel for parties to litigation pursuant to court order;
- Persons/entities whom you authorize to receive the data; and
- Any other person or entity authorized by state or federal law.

In addition, if any disciplinary action is taken and becomes final, the nature of the final disposition of the disciplinary action, together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify employees who are confidential sources, will become public data.

***In addition to providing the above information, a Tennesen Warning requires that the individual be informed if s/he may refuse or is legally required to supply the data and must be provided any known consequences of supplying/refusing to supply the data. Included on the following page are two examples of recommended options from which to choose.**

Voluntary Compliance:

You are not legally required to provide any information during this interview. If you do provide the requested information, it will be used to assist in the investigation. Your failure to provide the information requested will necessitate that a decision be made without the benefit of hearing the facts that you could provide. If you do provide information, it is our expectation that the information you provide will be truthful.

Compelled Compliance:

You are not legally required to provide any information during this interview. If you do provide the requested information, it will be used to assist in the investigation. Your failure to provide the information requested, including any evasiveness, false statements, or failure to comply with any of the instruction given to you in connection with this investigation, may lead to disciplinary action against you, including dismissal.