FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,	**CRIMINAL CASE NO. 07-0107C** **DPS NO. 06-11232**
Plaintiff,	**ORDER DENYING DEFENDANT RITA I. TAROPE'S MOTION TO SUPPRESS STATEMENTS AS MADE IN VIOLATION OF *GARRITY* RULE**
vs.	**AND**
FRANCISCO F. FAISAO, *et al.*	**MOTION TO SUPPRESS STATEMENTS AS INVOLUNTARY AND/OR TAKEN IN VIOLATION OF *MIRANDA* RIGHTS**
Defendants.	

I. Introduction

THIS MATTER came before the Court for a hearing in Courtroom 220A at 1:30 p.m. on August 13 and 14, 2008, on the motion of Defendant Rita I. Tarope to suppress statements made directly or indirectly obtained in violation of the *Garrity* Rule, and her motion to suppress statements as involuntary and/or taken in violation of her *Miranda* rights, both filed on filed on March 25, 2008. Said motion seeks to suppress evidence consisting of statements made by her to officials of the Commonwealth Utilities Corporation ("CUC") and to suppress statements subsequently made to officers of the CNMI Department of Public Safety ("DPS") and/or the CNMI Attorney General's Investigative Unit ("AGIU") and any evidence derived therefrom. Defendant Tarope appeared and testified in support of the motion, with counsel Assistant Public Defender Richard C. Miller, Esq. The Commonwealth was represented by Assistant Attorneys General Mike A. Nisperos, Jr., Esq., and Joseph J. Przyuski, Esq. After receiving the testimonial and documentary evidence submitted by the parties and upon the conclusion of counsels'

arguments, the Court took the matters under advisement. Upon review of the evidence submitted, the written and oral arguments of counsel, and the applicable law, the Court issued its ruling from the bench on September 10, 2008, denying both motions for the reasons stated on the record and as set forth in the following written decision.

II. Factual and Procedural Background

1. Defendant Rita I. Tarope, among several codefendants, has been charged in the First Amended Information with Theft of Services, in violation of 6 CMC § 1607(a) made punishable by 6 CMC § 1601(b)(1), Conspiracy to Commit Theft of Services, in violation of 6 CMC § 303(a), punishable according to 6 CMC §§ 304(b), 1601(b)(1) and 4101, and Misconduct in Public Office, in violation of 6 CMC § 3202 and made punishable by the same. (First Amend. Information, filed Feb. 11, 2008)[1]. The charges arise from her alleged conduct as a customer services representative of the CUC at its main office on Saipan between March of 2005 and March of 2007. (*Id.*).

2. On March 21, 2007, CUC Fiscal and Budget Officer Bettina G. Terlaje met with Investigator Rolondo Decena and Donna Castro of the Office of the Public Auditor (OPA) and Investigator Juanette D. Atalig of the AGIU to report allegations of misconduct by several CUC employees, including Defendant.

3. Following the March 21st meeting, the Attorney General's Investigative Unit (AGIU), along with the Criminal Investigations Bureau of the Department of Public Safety (DPS), launched a joint investigation into the matter.

4. On March 29, 2007, CUC Executive Director Anthony C. Guerrero hand-delivered Defendant a letter captioned "RE: Notice of Proposed Adverse Action - Re: Termination" (Pl.'s Ex. 5, "Notice"). The Notice informed Defendant that she was suspended from her job

[1] The Commonwealth subsequently agreed to dismiss the Misconduct in Public Office charge. See Withdrawal of Opp'n to Def's Tarope and Terlaje's Mot. to Dismiss Count V of the First Amen. Information filed July 14, 2008.

without pay and that "the proposed termination will not be finalized until you have had the opportunity to respond to the statements made in this letter of proposed adverse action." (Notice, at 1.)

5. The nine-page letter outlined fifteen alleged violations of Human Resource Rules and Regulations and included the following notice:

> Section 7.4 of the Human Resource Rules and Regulations (HRRR) require that an interview with you be conducted. Further, the HRRR provides that you be invited to submit your response to the above allegations in writing after the interview. Therefore, pursuant to Section 7.4 of the HRRR, an interview with you is hereby scheduled for April 5, 2007 at 3:30pm at the Human Resource Office. If you decide not to attend this interview, your written response should be received by the Executive Director on April 12, 2007. You may submit information and evidence with your response. A notice of action will be issued upon the completion of the investigation including your interview and responses to the above allegations.

(Notice, at 8-9).

6. Section 7.4(C) of the HRRR reads:

> Before the Executive Director issues a notice to terminate employment, demote with a reduction in pay, or suspend without pay an employee, the Executive Director shall require HRM [Human Resource Manager] or designee to investigate the basis for the proposed corrective action. The investigation shall include an interview of the employee with Legal Counsel unless the employee has made him or herself unavailable.

(Def.'s Mem. in Supp. of Mot., at 7; Test. of Edward Manibusan).

7. CUC's Human Resource Manager and Legal Counsel testified that they were guided in their actions by their understanding that the purpose of Section 7.4(C) was to require CUC to provide a public employee facing discharge for cause the opportunity to answer or explain any alleged grounds for termination prior to their final termination. (Test. of Edward Manibusan; Test. of Frankie Cepeda). They also understood that the HRRR permitted the employee to bring legal counsel, or any other person, with them for assistance at the adverse action interview. (*Id.*) The Notice delivered to Defendant on March 29, however, did not include an express advisement of her right to counsel's assistance at the interview.

8. On April 5, 2007, the scheduled adverse action interview was held at the CUC office in

Dandan, Saipan. In attendance were Defendant, Human Resources Manager Frankie Cepeda, Human Resource Specialist Magdalena Attao, and CUC Legal Counsel Edward Manibusan. Defendant was not represented by counsel, nor was Defendant advised by those present that she and other CUC employees were already the focus of a separate criminal investigation.

9. Concerning Defendant's rights, the following dialogue took place near the start of the interview:

[Manibusan] *Are you ready to be interviewed this afternoon?*

[Tarope] *Um, I'm gonna try cause...I don't know what kind of interview.*

[Manibusan] *Ok. Is there any reason why this interview cannot proceed today?*

[Tarope] *Yes, I can.*

[Manibusan] *And you have the right to be represented by a lawyer or counsel. If you don't have a lawyer you can of course proceed without one. You will proceed without representation today?*

[Tarope] *Repeat the question again.*

[Manibusan] *Ok. Now you have a right to have someone represent you or help you at this...interview. Ah, if you choose to be interviewed without representation, that's fine if that's your desire. Have you thought about it?*

[Tarope] *No.*

[Manibusan] *You still wish to proceed to have the interview today?*

[Tarope] *Em, maybe no because I don't know what to.*

[Manibusan] *Ok. You received a copy of the proposed adverse action no? Right? This interview today is for you to provide information in regards to allegations that have been listed...on this.*

[Attao] *Basically, Rita, today what we're here to do is just: You received this letter, no? And in this letter we outlined specific actions that you have done. Ok? The interview today is to provide you the opportunity to respond to these. You know. Provide your justifications as to why or why not these claims are valid, invalid, whatever [unintelligible]... Ok, you understand?*

[Tarope] *Em...*

[Attao] *So it's basically to ask you to respond to what we have provided.*

[Cepeda] *And the other thing we are saying is that you have the right to be represented by a lawyer and you can waive that right and proceed with the meeting this afternoon. Or, you know, you can request to hold until you have a counsel.*

[Tarope] *Right now, em, I don't feel like getting one lawyer.*

[Attao] *So do you wish to continue to be interviewed today?*

[Tarope] *Regarding this?*

[Attao] *Yes. Only regarding what we have provided you.*

[Manibusan] *She's responding, "Yes."*

[Attao] *Yes.*

[Tarope] *Yes.*

(Pl.'s Ex. 5A; Def.'s Ex. A).

10. Defendant proceeded to respond to questions from CUC officials regarding each alleged incident of misconduct. The following exchange occurred near the end of the interview:

[Attao] *Do you have any other questions?*

[Manibusan] *Yeah, ah, let's start with, are you aware that this notice that you have received actually is a notification that, depending on the outcome of this interview and opportunity to respond, that the Director, Executive Director, may cause your termination from CUC? Are you aware of that?*

[Tarope] *I think so.*

(Pl.'s Ex. 5A; Def.'s Ex. A).

11. On April 23 and 24, 2007, Defendant was questioned by AGIU Investigator Juanette D. Atalig and Detective Jesse Dubrall at the CUC office in Dan Dan. Defendant was told that she was not under arrest; however Dubrall did advise Defendant of her constitutional rights, including the right to assistance of counsel, and Defendant executed a form acknowledgment and waiver of rights prior to questioning on both days. (Pl.'s Ex. 1 & 3). Defendant made admissions in the course of this interview which she now seeks to exclude from use in her criminal trial.

12. By a letter dated May 10, 2007, and received by CUC Executive Director Anthony Guerrero the next day, Defendant tendered her resignation from employment at CUC. The Executive Director accepted Defendant's resignation, therefore no final administrative decision was issued regarding Defendant's proposed termination.

III. Analysis

1. Defendant's Motion to Suppress under *Garrity*

Defendant moves to suppress any and all of her statements to CUC officials at her April 5, 2007, interview, and all further evidence derived therefrom, on the basis that her statements were elicited by the government under the threat that she would be terminated from her employment if she failed to answer the specific questions put to her, thus rendering her answers officially compelled and therefore

inadmissible against her in a criminal proceeding. U.S. Const. amends. V, XIV; N.M.I. Const. art. I, §§ 4, 5.[2] Defendant contends that the circumstances surrounding her March 29th notice of proposed termination and April 5th interview bring her within the rule set forth in *Garrity v. State of New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), and applied through a line of decisions in which the United States Supreme Court invalidated various state-imposed sanctions on the exercise of the individuals' privilege against self-incrimination. *Spevak v. Kline*, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967) (plurality opinion); *Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of City of New York*, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968); *Lefkowitz v. Turley*, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973); and *Lefkowitz v. Cunningham*, 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977).

With respect to public employees, the rule is that the government may *not* "use the threat of discharge to secure incriminatory evidence against an employee." *Garrity*, at 499. In the presence of such a threat, the employee's incriminatory statements are *deemed* to be involuntary and may not be admitted in a criminal proceeding against the employee. *Id.*, at 500. The privilege provided by the Self-Incrimination Clause of the Fifth Amendment may be invoked by a person "in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Turley*, at 77. Generally, a witness must timely assert the privilege in order to obtain its benefit, because "in the ordinary case, if a witness under *compulsion to testify* makes disclosures instead of claiming the privilege, the government has not

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[2] The Fifth and Fourteenth Amendments of the U.S. Constitution apply in the Commonwealth via the Covenant. *See* COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA, 48 U.S.C. § 1801 note, *reprinted in* CMC at lxxxi, § 501(a) ("Applicability of Laws"). Provisions of the Commonwealth Constitution that were adopted pursuant to Covenant § 501(a) are applied by using the same analysis applicable to the corresponding provisions of the U.S. Constitution. *Commonwealth v. Mettao*, 2008 MP 7, ¶ 16, n.2.

'compelled' him *to incriminate himself*." *Garner v. United States*, 424 U.S. 648, 654, 96 S.Ct. 1178, 1182, 47 L.Ed.2d 370 (1976) (emphasis added). But when the government penalizes an employee's reliance upon the privilege by threatening to discharge the employee for refusing to provide self-incriminatory answers, the privilege is self-executing and no such answers may be used in a criminal prosecution of the employee. *Minnesota v. Murphy*, 465 U.S. 420, 435, 104 S.Ct. 1136, 1146, 79 L.Ed.2d 409 (1984); *Garrity*, at 498-499. The privilege is made self-executing upon the government's objective manifestation of the threat, regardless of the actual effectiveness of the threat. *Gardner*, at 279. Thus, it automatically arises that, "when a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution." *Cunningham*, at 805.

The Court agrees with Defendant that if she provided incriminatory answers to CUC officials at her interview because the government caused her to reasonably believe that she would be fired for refusing to incriminate herself, the rule of *Garrity* is that her self-incriminatory answers are automatically immunized and may not be admitted in her criminal proceeding. *Garrity*, at 500. In this case, however, the circumstances under which Defendant produced the statements at issue differs materially from the situation faced by the defendants in *Garrity* and by the plaintiffs in the so-called "penalty cases" of *Gardner* through *Cunningham*, cited above.

In *Garrity*, four New Jersey police officers were summoned to testify before a state commission invested with the powers of a grand jury to investigate traffic ticket-fixing. A New Jersey statute provided that any public officer or employee who refused to appear or answer questions before any public body invested with the power to summon witnesses and receive sworn testimony "*upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself*" or who "*refuses to waive immunity when called by a grand jury*" would be terminated from their position

and barred from future public employment. *Garrity*, at 494, *citing*, N.J.Rev.Stat. § 2A:81-17.1 (Supp. 1965). The officers were told the following: (1) their answers could be used against them in a criminal proceeding; (2) they had the constitutional right to refuse to testify; but (3) they would be subject to dismissal if they refused to answer. *Id*. The officers answered the questions without apparent hesitation or protest. At their subsequent criminal trials, they moved to suppress their prior statements on the ground of coercion. After conducting an evidentiary hearing to determine whether the statements were voluntary, the trial court denied the motions and admitted the statements. *Id*., at 495. The officers were ultimately convicted and the New Jersey Supreme Court affirmed on the basis of substantial evidence that the officers' statements were in fact voluntary.[3]

The U.S. Supreme Court converted Garrity's appeal to a petition for certiorari, agreeing with the Supreme Court of New Jersey that the issue presented was not one of the validity of the statute. *Id.*, at 495-496. Rather, the statute's relevance to the matter was limited to its effect upon the voluntary character of the officers' statements. *Id.* at 496. Given the statute, which provided for automatic termination upon the sole condition of the officers' invocation of, or refusal to waive, their constitutional privilege, and the express warnings given to the officers prior to their testimony, the Court found: "The choice given petitioners was either to forfeit their jobs or to incriminate themselves... We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions." *Id*., at 497-498. It is in the foregoing context that the Court framed its holding in the language relied upon by Defendant in this case: "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in

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[3] *State v. Naglee*, 207 A.2d 689, 699 (N.J. 1965). Finding no error in the trial judge's omission of a jury charge on the issue of voluntariness, the New Jersey Supreme Court remarked: "In any event, it cannot be said in the circumstances of this case that the omission was prejudicial error since in our opinion the jury as reasonable men could not have found the statements to have been involuntary." *Id.*

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." *Id*., at 500.

The underlying facts of the other U.S. Supreme Court "penalty cases," consisting of *Spevak*, *Gardner*, *Uniformed Sanitation Men*, *Turley* and *Cunningham*, are substantially similar.[4] In each case, the state had enacted a statute aimed at preventing public officers, employees or contractors from invoking their Fifth Amendment rights before a grand jury. The statute in each case operated by mandating the automatic termination and disqualification of any officer, employee or contractor who refused to answer or to waive their immunity. The plaintiffs in each of these cases were asked by the state to waive their constitutional privilege against self-incrimination and were told of the statutory penalty should they refuse. When the plaintiffs were officially summoned to testify and refused to waive their rights, they were discharged and/or disqualified pursuant to state law. The Supreme Court found in each case that the state, by forcing the plaintiffs to choose between "surrendering their constitutional rights or their jobs," had impermissibly penalized the plaintiffs' exercise of their Fifth Amendment privilege. *Uniformed Sanitation Men*, at 284; *Cunningham*, at 806.

The circumstances preceding and under which Defendant in this case provided her answers to questions asked at her interview on April 5, 2007, are obviously different from the foregoing in a

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[4] *Garrity v. New Jersey* itself is the only U.S. Supreme Court decision in which the issue presented was the suppression of evidence in a criminal case. The "penalty cases" that followed arose from civil matters, but the inadmissibility in a criminal proceeding of statements obtained in violation of the *Garrity* rule is consistently implied throughout the cases. *Gardner* and *Sanitation Men* involved New York City Charter provisions, and *Turley* and *Cunningham* involved separate New York statutes, all derived from the same provisions in the New York State Constitution that forbade public officers from asserting their Fifth Amendment privilege in any formal inquiry into their performance in office. N.Y.Const., Art. I, § 6; *Gardner*, at 275, n.3. In *Spevak*, plaintiff was an attorney who refused to produce subpoenaed financial records in a disciplinary proceeding and was disbarred solely for that reason. *Spevak*, at 626-627. In *Turley*, the Supreme Court found that the threatened termination of a public contractor's contracts and disqualification from future public contracts were functionally equivalent to the penalties threatened in *Gardner* and were equally coercive. *Turley*, at 325. New York's statutory penalties fared no better when applied to the holder of a state political party office, despite the State's argument that it held greater discretion over the qualifications for political office. *Cunningham*, at 807-808. With these minor variations among the relationships of the individual plaintiffs to the government and in the economic consequences of the statutory penalties attached to the exercise of their privilege, each case procedurally unfolded in basically the same way.

number of ways. Certainly, the CNMI has no statute attaching the penalty of job forfeiture to the exercise by a public employee of his or her privilege against self-incrimination. Likewise, this Court has not been presented with any CUC administrative regulation which expressly, or by any reasonable construction, does the same. Defendant was not compelled by process to attend the April 5th interview and the CUC officials present at the interview did not comprise an official body with the power to summon witnesses and take testimony under oath. Defendant was never told by anyone at any time that if she elected not to answer the questions put to her, her termination would become final.

Nevertheless, Defendant correctly maintains that no one of these distinguishing features determines the applicability of the *Garrity* rule. The touchstone of the rule is the "compulsion" produced, or the "coercion" applied, by the government when it uses the threat of job loss to provoke speech or to punish silence. *Garrity*, at 618-619.[5] A statute or regulation may provide an express and potent source of the threat imposed on a witness, but the existence of a statute or regulation is neither necessary nor sufficient for the finding that a witness has actually been presented with such a threat. *Garrity*, at 496 (relevance of statute limited to the "compulsion" it may have produced); *Cf.*, *People v.*

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[5] In *Garrity*, as well as in the other cases, the U.S. Supreme Court does not articulate a distinction between "compulsion" and "coercion" and sometimes uses these terms interchangeably. *See*, *Garrity*, at 618-619. Also, as noted by the dissent in *Garrity*, and later amplified by commentators, the Supreme Court's opinions in these cases remain ambiguous as to whether the particular decisions are founded on the Due Process Clause of the Fourteenth Amendment and traditional tests of "voluntariness" as applied to the witness, or rest squarely on the Self-Incrimination Clause of the Fifth Amendment and its textual and historical ban on the use of illegitimate means to "compel" testimony. *Id*., at 620-621 (Harlan, J., *dissenting*); *See*, Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 Cal. L.Rev. 465 (2005); *also*, Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 Cal. L. Rev. 1567 (1986).

The *Garrity* dissent recognized that statements obtained by a violation of *either* constitutional clause must be excluded, but Justice Harlan clarified that the majority had conjoined the two doctrines by *deeming* the officers' statements "compelled" and "involuntary" on the basis of the state's *attempt* to "coerce" the officers. *Garrity*, at 621. Viewing the threat of termination as an "impermissible penalty" attached to the exercise of the privilege accords more naturally with the text of the Self-Incrimination Clause. *See*, Godsey, at 491-492. The Supreme Court's recent expositions of the *Garrity* rule tend to indicate a more direct and independent reliance on the Fifth Amendment text itself. *See*, *Chavez v. Martinez*, 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003) (plurality opinion); *McKune v. Lile*, 536 U.S. 24, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002).

Lannon, 436 N.Y.S.2d 177, 179 (N.Y.Sup. 1981) (The "mere existence" of police department rule requiring accountability to superior officers did not make police officers' self-incriminatory statements to superiors involuntary and inadmissible under *Garrity*, where departmental rule was not raised by either side during questioning and no threats were made by superiors.). Likewise, the fact that no CUC official expressly ordered Defendant to answer or to waive her rights, or told her that her termination would be made final if she refused, does not avoid the rule if there was an implied threat by the government to the same effect. *Minnesota v. Murphy*, 465 U.S. at 435 (a "threat of punishment for reliance on the privilege" may be made "expressly or by implication").

Defendant Tarope argues that the Notice of Proposed Termination that she received on March 29th indicating that a pre-termination interview was "required," the manner in which the questions were put to her at the interview, and her reasonable assumption that she would be unlikely to avert her pending termination if she refused to cooperate at her interview, all combined to create a coercive situation in which her answers were compelled by the implied threat of final termination. Defendant further contends that the failure of CUC, prior to the interview, to advise her of her constitutional right to remain silent and that she was the target of an AGIU criminal investigation failed to ameliorate, and by omission compounded, the inherently coercive situation in which she found herself on April 5th.

What is missing in this situation, however, is the key element of the government's *use of a threat*, express or implied, *in order to* force Defendant to relinquish her constitutional privilege against self-incrimination. In other words, the "classic penalty situation" that makes the Fifth Amendment privilege self-executing arises when the "threat of punishment" is attached by the government to the "invocation of the privilege" by the witness, and not merely from the situational pressures that are otherwise present and may influence the witness' decision to speak or to remain silent. *Murphy*, at 435; *McGautha v. California*, 402 U.S. 183, 214-217, 91 S.Ct. 1454, 1470-72, 28 L.Ed.2d 711 (1971). *See, also, United States v. Washington*, 431 U.S. 181, 186-188, 97 S.Ct. 1814, 52 L.Ed.2d 238 (1977). While

the government's use of even an implied threat would suffice to bring the present matter within the exclusionary rule of *Garrity*, the rule is not appropriately used to imply that such a threat was in fact made.

Defendant's interpretation of *Garrity* would suggest that, when a public employer asks an employee job-related questions and the employee reasonably believes that his or her answers would give the employer cause for the employee's termination, an inherently coercive situation has developed that calls for the exclusion of any answers actually given by the employee. This Court finds no basis in the cited authority for such a broad application of *Garrity*'s exclusionary rule, or for treating the interview between a public employer and employee, even when the subject is termination, as the equivalent of the kind of "custodial interrogation" that has been found "inherently coercive" so as to render the statements of a person under arrest presumptively involuntary under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). *See*, *Murphy*, at 435-438 (distinguishing *Miranda* from the "penalty" cases and holding that neither rule would support recognizing a self-executing privilege to exclude a probationer's incriminatory answers to his probation officer, despite court order compelling probationer to meet with officer and respond truthfully in "all matters" or suffer revocation). Even a legal compulsion to testify, such as provided by compulsory process or court order, the statutory duty to file a tax return, customs declaration, or an executor's report and account, do not give rise to a self-executing privilege against self-incrimination unless the government, additionally, attempts to penalize the exercise of the privilege. *Id*. If the government has not taken this "extra, impermissible step," neither the situational pressures felt by the witness, nor the interrogator's actual intention to obtain incriminatory evidence, are sufficient to find the privilege self-executing. *Id.*, at 431, 436.

In this case, CUC initiated Defendant's termination for cause and suspended Defendant without pay on March 29, 2007, informing her that her termination was for specific acts of misconduct in the performance of her duties. None of the fifteen acts of misconduct cited by CUC described any failure or

refusal by Defendant to answer questions. Defendant was hand-delivered the written Notice describing the alleged misconduct and informing her that Section 7.4 of CUC's Human Resource rules "require that an interview with you be conducted," but that "[i]f you decide not to attend this interview, your written response should be received by the Executive Director on April 12, 2007." The Court agrees with Plaintiff's witness that the inclusion of a pre-termination interview in the termination process is to afford the employee the due process right to be heard and to answer any allegations of cause prior to the termination of the employee's protected interest in public employment. But this requirement is put on CUC as a public employer. Defendant's appearance or answers pursuant to her exercise of this right do not become compelled by law unless there is some external sanction imposed upon her failure to appear or answer, over and above the natural consequences of her failure to rebut adverse charges. Likewise, Defendant's self-incriminatory admissions are not "impermissibly compelled" under *Garrity* unless the government attempts to impose a sanction on Defendant's exercise of her separate right to refrain from incriminating herself. *Murphy*, at 427; *Garner*, at 652-653. The evidence presented in this case establishes that Defendant's statements to CUC officers were not compelled in either respect.

In sum, this Court rejects a proposed rule that equates the situation faced by a public employee "under threat of termination" for cause, with the situation of a public employee "threatened with termination for reliance on their constitutional rights," which rule would fully and indiscriminately immunize the statements each makes to their employer. When a public employer initiates termination procedures for job-related reasons, and the government takes no additional step to sanction the employee's privilege against self-incrimination, the *Garrity* rule does not properly apply. *Harold v. Barnhart*, 450 F.Supp.2d 544, 557 (E.D.Pa. 2006). Based upon the evidence presented, and the foregoing authority, the Court determines that Defendant's statements at her interview on April 5, 2007 were not elicited by a violation of Defendant's constitutional privilege against self-incrimination or her

right to due process of law. Defendant's motion to suppress these statements as evidence is therefore DENIED.

2. Defendant's Motion to Suppress Under *Miranda*

The first of Defendant's motions to suppress statements that she made to AGIU investigators on April 23 and 24, 2007, based upon *Miranda*, is premised on her contention that these statements were derived from the unlawfully coerced statements that she made to CUC officials at her March 5th pre-termination interview and are therefore inadmissible as "fruit of the poisonous tree." *Commonwealth v. Pua*, 2006 N.M.I. 19, ¶ 25; *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964). The Court has determined that Defendant's statements at her prior interview were not unlawfully coerced, however, so Defendant's motion based upon this premise is DENIED.

Defendant separately moves to suppress the same statements on the grounds that they were involuntary and/or obtained through custodial interrogation without a valid waiver of Defendant's constitutional rights as required by *Miranda*, *supra*, 384 U.S at 444-445. In *Miranda*, the United States Supreme Court determined that statements stemming from a custodial interrogation are to be deemed involuntary and inadmissible unless the defendant is first apprised of his or her constitutional right to silence and assistance of counsel. *Id*. A person is "in "custody" when they are formally arrested or otherwise deprived of their freedom of action in any significant way. *Id*. The Commonwealth Supreme Court has summarized the test for determining whether a person is "in custody" for this purpose as follows:

> *Miranda* warnings must be given when a defendant is subject to police interrogation while in custody. In determining whether custody exists, a court must decide whether there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." The test to be applied "is whether a reasonable person in the defendant's position would believe that he or she was in police custody of the degree associated with a formal arrest." The factor of particular concern is whether the atmosphere was "police dominated."

Commonwealth v. Ramangmau, 4 N.M.I. 227, 235 (1995) (citations omitted).

If the person is in custody, any statements made by the person in response to express questioning, or in response to any words or conduct of the interrogators that are reasonably likely to elicit incriminating statements, are presumed to be involuntary and inadmissible. *Commonwealth v. Yan*, 4 NMI 334, 338 (1996). To rebut this presumption, the prosecution must prove by a preponderance of the evidence that the statements were voluntary:

> The Commonwealth has the burden of establishing that a defendant "intelligently, knowingly, and voluntarily waived his or her procedural due process rights." Thus, "[w]here *Miranda* safeguards apply, the prosecution may not introduce evidence procured without the protection afforded by both proper warnings and a valid waiver of those warnings." In assessing whether a defendant validly waived his or her *Miranda* rights, "we examine the totality of the circumstances." Relevant circumstances include "the characteristics of the defendant and the details of questioning by the government." Additionally, we examine whether a defendant endured "physical threats of harm, deprivation of sleep or food, lengthy questioning, and psychological persuasion." We also examine whether the "police knew that the respondent was unusually disoriented or upset at the time of [the] arrest." Absent coercive police activity, a confession will not be considered involuntary.

Commonwealth v. Mettao, 2008 MP 7, ¶ 19 (citations omitted).

The testimony of both prosecution and defense witnesses describing the circumstances surrounding Defendant's interviews with AGIU Investigator Atalig and DPS Detective Dubrall on April 23rd and 24th is materially consistent and credible. Defendant was asked to speak with criminal investigators and agreed to do so. On the morning of April 23rd, Detective Dubrall picked up Defendant at her sister-in-law's house and drove her to the place of interview, the third-floor conference room at CUC's Dan Dan office. Defendant was joined by her mother and sister prior to the interview, and Atalig met them all at the door prior to any questioning. Defendant was given a written form explaining her constitutional rights and a place for her to waive those rights, and Dubrall recited these rights in English and asked Defendant if she understood them. Defendant asked the detective if she was under arrest, and was told that she was not. Defendant acknowledged that she understood her rights by initialing each one separately and writing "Yes" to indicate that she wanted to talk without having a lawyer present. (Pl.'s

Ex. 1). Atalig asked Defendant to read the "waiver" portion of the form aloud, which she did before signing it.

The April 23rd interview began at about 12:25 p.m. and lasted approximately four and one-half hours, inclusive of more than one 10-minute bathroom or cigarette breaks. Present in the conference room were Detective Dubrall, Investigator Atalig, Defendant, Defendant's mother and Defendant's sister, Melicher Sablan. Both Atalig and Dubrall questioned Defendant while Atalig typed notes. Ms. Sablan testified that at one point, out of the presence of Defendant and her mother, Dubrall suggested she should urge Defendant to cooperate with investigators, commenting to the effect that: "If Rita helps us get through this investigation, there's a good chance she'll be a government witness." During one of the breaks, Sablan conveyed to Defendant her personal impression that "Detective Dubrall knows you're hiding something." The interview concluded just before 5:00 p.m., at which time Defendant was presented with a six-page interview statement typed by Atalig. Defendant read through and signed the statement after correcting a misspelling of her name, also initialing each page. Defendant agreed to come back the next day to continue the interview.

The second interview on April 24th proceeded much the same way, but was longer in duration. The same people were present, but were joined on this day by Defendant's husband. The interview began at approximately 10:30 a.m. and broke for lunch at 12:58 p.m. The next session lasted from 2:30 p.m. until 4:45 p.m., when the interview was adjourned for dinner. Everyone reconvened to resume the interview at 7:45 p.m., ending the interview at 10:10 p.m. that evening. Prior to the resumption of questioning at the beginning of each session, Defendant was reminded of her prior advisement of rights and orally agreed to continue the questioning while waiving her right to counsel. (PL.'s Ex. 4).

The foregoing facts are established by both the authenticated documentary evidence and the testimonies of Defendant, Investigator Atalig and Melicher Sablan. The Court finds that Defendant was not in custody during her interviews for the purpose of requiring *Miranda* warnings. The only events

with any tendency to produce an impression to the contrary would be the fact that Detective Dubrall provided the transportation for Defendant to CUC and possibly the *fact itself* that *Miranda* warnings were subsequently given. If such an impression were reasonable to any degree, it is objectively countermanded by the express assurance given by the detective that Defendant was not under arrest; Defendant's evident understanding of the situation and multiple express acknowledgments that her participation was voluntary; the fact that she actually did leave and return multiple times to continue the interview; that the questioning took place at Defendant's familiar place of employment, and that Defendant was accompanied throughout by supportive family members who collectively outnumbered the two investigators present in the room. Such an atmosphere is not "police dominated" to the point that a reasonable person would still believe that they were deprived of their freedom of movement. *Cf*., *Ramangmau*, at 235.

Because Defendant was not subjected to custodial interrogation, *Miranda* warnings are not required and the Commonwealth does not have the particular burden of proving that Defendant knowingly and voluntarily waived her constitutional rights. *Id*. The evidence actually presented, however, also strongly supports the finding that Defendant voluntarily answered the questions put to her by investigators during the April 23-24 sessions. As stated above, the answers Defendant provided at her CUC interview on March 5, 2007 were not the product of coercion and no other basis has been presented for finding that the statements were involuntary. At her April 23-24 interview with criminal investigators, Defendant may well have perceived it useless to assert her privilege against self-incrimination in response to questions regarding the very same incidents addressed at her prior administrative interview and with respect to which she had already made disclosures. There is no fundamental unfairness involved in permitting criminal investigators to ask the same questions posed in a prior civil investigation, however; the right to assert the privilege is retained even if the witness is uncertain of its scope. In this case, no act by the Commonwealth has overborne the Defendant's will,

and this Court finds from the totality of the circumstances that Defendant's statements to investigators given on April 23 and 24, 2007, were made voluntarily. Accordingly, Defendant's motion to suppress these statements on the claim of violations of *Miranda* and her right to due process of law is DENIED.

IV. Conclusion

For the foregoing reasons, Defendant Rita I. Tarope's Motion to Suppress Statement Directly and Indirectly Obtained in Violation of *Garrity* Rule is DENIED. Further, Defendant Tarope's Motion to Suppress Statements as Involuntary And/Or Taken in Violation of *Miranda* Rights is also DENIED.

IT IS SO ORDERED this 10th day of November, 2008.

/s/
RAMONA V. MANGLONA, Associate Judge