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LA COUNTY POLICE CHIEFS' ASSOCIATION
LEGAL UPDATE

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SPIELBAUER

As indicated in the January 24, 2007/LCW SPECIAL BULLETIN, a January 12, 2007 decision in *Spielbauer v. County of Santa Clara* held in brief that where a public employee reasonably believes that compelled administrative interview statements could be used against him/her in a criminal prosecution, the employee cannot be compelled to answer administrative questions without the District Attorney's office having first issued a grant of use immunity.

In rendering its decision, the Court of Appeal took the position that a number of other courts of appeal, and even the California Supreme Court in the *Lybarger* case, have failed to recognize the significant difference in the granting of immunity (by means of a pre-interrogation written grant of immunity by the District Attorney's office), and use of the exclusionary rule to exclude from criminal proceedings those interrogation statements that were the result of compelled administrative testimony *without* their having been a specific grant of immunity by the District Attorney's office.

Of course, the California Supreme Court has issued a *sworn peace officer* - applicable contrary opinion in its December 31, 1985 case of *Lybarger v. City of Los Angeles*. In that decision, the Supreme Court held that:

"We must construe the act [POBR] in such a manner as to encourage full cooperation with police department investigations of criminal offenses, so long as fundamental constitutional rights are protected in the process. Such a balance of interests is achieved by holding that, although the officer under investigation is not compelled to respond to potentially incriminating questions, and his refusal to speak cannot be used against him *in a criminal proceeding*, nevertheless such refusal may be deemed insubordination leading to punitive action by his employer. Seen in this light, the right to remain silent is not a "hollow" right; it may be exercised without fear of penal sanction." (40 Cal. 3rd 828.) (Emphasis added.)

In view of the Court of Appeal having strenuously disagreed with the above holding and analysis of the Supreme Court, the question has arisen as to whether or not *Spielbauer* prevails over the *Lybarger* decision, *as to sworn peace officers*. Even the *Spielbauer* court addressed this issue by stating:

"We are of course constrained to follow the holdings of the California Supreme Court The actual holding of *Lybarger* is that the officer's

interrogation violated a statute requiring that public safety officers be advised of their constitutional rights. The Court construed the statute to require advisement of the exclusionary rule we have described, i.e., the right to exclude from evidence in any future prosecution the answers he was compelled to give. ***The statute at issue there has no bearing on the case before us [the Spielbauer case], since plaintiff is not a public safety officer.***" (146 Cal.App 4th 937.) (Emphasis added.)

Therefore, it is the recommendation of LCW that as to sworn peace officers who are questioned pursuant to the POBR, said questioning continue to be done in accord with the compelled statement authority in *Lybarger*.

The County of Santa Clara has filed a petition for hearing with the Supreme Court. (The *Spielbauer* holding is only stayed if the petition is granted.) This office cannot predict whether or not such petition will be granted. Likewise, if the petition is granted, the Supreme Court could expand its review to include an issue not present in the *Spielbauer* matter, to wit; can a compelled statement be taken in the case of a *sworn peace officer*, even without there being a pre-interrogation grant of use immunity by the District Attorney's office.

Although such an expansive review is not likely given that it would address an issue not actually before the *Spielbauer* court, an important issue of this type could be broadly examined by the Supreme Court. However, *unless or until the Supreme Court reverses its own Lybarger holding, it must be noted that the Lybarger decision remains valid.*

Spielbauer is critical of *Lybarger* for among other reasons:

"At the same time, it does not appear that any issue of the interrogational privilege - the right to stand mute absent a grant of immunity - was argued to or considered by the court in *Lybarger*." (146 Cal.App. 4th 937.)

The above observation by the *Spielbauer* court is inaccurate.

In this regard, at 40 Cal. 3rd 834, the Supreme Court in *Lybarger* held that:

"Consistent with the spirit of *Gardener*, Section 3303(g) [now 3303(h) - requiring informing the officer of constitutional rights if it is deemed that he or she may be charged with a criminal offense] requires the investigating officers to inform the officer being questioned ***of his right to use immunity*** whenever he refuses to answer on self-incrimination grounds." (Emphasis added.)

Although the above is but one conflict between *Spielbauer* and *Lybarger*, and reflects a misstatement by *Spielbauer* of how the *Lybarger* court rendered its decision, there are other signposts which undermine the *Spielbauer* criticism of *Lybarger*.

Will the Supreme Court overrule its decision in *Lybarger*? Of course, this is always a possibility. However, *Lybarger* states at 40 Cal. 3rd 828, that the POBR shall be construed in such a manner as to "encourage full cooperation with police department investigations of criminal offenses."

It can be reported that there exist additional public policy and legal bases for the Supreme Court to either not address its specific *Lybarger* holding or to reaffirm it. In support of this proposition is the 1990 proclamation also of the state Supreme Court, in *Pasadena Police Officers Association v. City of Pasadena*, 51 Cal. 3rd 564, to the effect that:

"To keep the peace and enforce the law, a police department needs the confidence and cooperation of the community it serves Thus, when allegations of officer misconduct are raised, it is essential that the department conduct a prompt, thorough and fair investigation. Nothing can more swiftly destroy the community's confidence in its police force than its perception that concerns raised about an officer's honesty or integrity will go unheeded or will lead only to a superficial investiga-

tion." (51 Cal. 3rd 568.)

Given the above significant public policy considerations enunciated by the Supreme Court as regards the need for prompt investigations in peace officer matters, and given the Supreme Court's *knowing* determination that the POBR does indeed allow a police investigator to in essence grant use immunity in order to secure a prompt interrogation, it remains the opinion of LCW that absent a contrary holding by the Supreme Court, *sworn peace officer* interrogations should still be conducted in accord with the *Lybarger* holding and its allowance of compelling a peace officer statement without the necessity of first securing a grant of immunity from the District Attorney's office.

The above being said, LCW stresses that the same public policy proclamations that led the Supreme Court to endorse the grant of use immunity in sworn peace officer interrogations, do not necessarily exist regarding non-sworn peace officer interrogations. LCW does recommend significant consideration of *Spielbauer* when non-peace officers are subject to interviews in matters that may be reasonably believed as involving potential criminal matters.

Of course, no course of action in the law is without

risk. The state Supreme Court, or even the federal courts, could in the future overrule the *Lybarger* holding. The consequence of such action could be the exclusion from evidence of statements secured pursuant to *Lybarger*. This in turn, could impact disciplinary actions that have already been concluded. However, and in view of *Lybarger* specifically addressing concerns that are found in the *Spielbauer* decision, on balance it is this office's recommendation that *Lybarger* be adhered to.

In order to create even greater levels of comfort in complying with *Lybarger*, one approach being considered by this office is petitioning the District Attorney to issue a written determination that given the *Lybarger* holding that use immunity is granted by a police interrogator issuing an order that statements be made, the District Attorney shall consider such grant of immunity to be of the same effect as if issued directly by the District Attorney's office. As a practical matter, it is this office's perception that such a practice would reflect present reality. If this is an approach that the Los Angeles County Police Chiefs Association would desire to take, please advise, and this office will be pleased to draft such correspondence to the District Attorney.

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