

SPECIAL BULLETIN

February 9, 2009

California Supreme Court Rules That A Public Employer Can Discipline An Employee For Refusing to Answer Incriminating Questions Without a Formal Grant Of Immunity So Long As the Employee Is Not Required to Surrender His or Her Right Against the Use of the Statements in a Criminal Prosecution.

In our January 2007 *Special Bulletin*, we reported on the California Court of Appeal *Spielbauer v. County of Santa Clara* case which held that a public employer cannot discipline an employee for refusing to answer incriminating questions even though he was informed that his answers could not be used against him in any subsequent criminal proceeding. The California Supreme Court agreed to review the case to determine the following issue:

if a public employee exercises his or her Fifth Amendment right against self-incrimination in a public employer's investigation of the employee's conduct, must the public employer offer immunity from prosecution before it can dismiss the employee for refusing to answer questions asked in connection with the investigation?

On February 9, 2009, in a unanimous opinion, the California Supreme Court held that a public employer may compel an employee to answer questions in an administrative investigation regarding the employee's job performance without first obtaining a formal grant of immunity from criminal use of the employee's statements, as long as the employer does not force the employee to waive the employee's constitutional protection against criminal use of those statements. (*Spielbauer v. County of Santa Clara* (2009) ___ Cal.3d ___; 2009 WL 291191.) Since a formal grant of immunity is not required, the Court declined to define what constitutes a formal grant of immunity.

Facts

Thomas Spielbauer was a public defender employed by the County of Santa Clara. While representing a criminal suspect, Spielbauer sought to offer the suspect's roommate's hearsay statements during trial. Spielbauer told the court that the statements should be admitted into evidence because the witness was unavailable. Based on Spielbauer's representations, the court allowed the statements to come into evidence.

The prosecutor discovered that the day before the hearing, Spielbauer had spoken with the allegedly unavailable witness in person. Spielbauer provided an explanation for his actions, but the prosecutor contended that Spielbauer's previous statements to the court were affirmative false misrepresentations. The district attorney's office filed a misdemeanor charge against Spielbauer and the public defender's office simultaneously undertook its own administrative investigation.

The public defender office's investigator scheduled an interview with Spielbauer, Spielbauer's supervisor and Spielbauer's attorney. Relying on

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his attorney's advice, Spielbauer refused to answer any questions. Spielbauer's supervisor then gave Spielbauer a *Lybarger* admonition. Specifically, the supervisor told Spielbauer that he had the right to remain silent and to not criminally incriminate himself, but his silence could be deemed insubordination and lead to administrative discipline, including termination. Spielbauer's supervisor then said, in accordance with the California Supreme Court's decision in *Lybarger*, that any statement made by Spielbauer during the interview could not be used against him in any subsequent criminal proceeding.

Spielbauer refused to answer questions despite his supervisor's order and *Lybarger* admonition. The County eventually terminated Spielbauer's employment for (1) insubordination; (2) gross misconduct, or conduct unbecoming a County officer or employee which tends to discredit the County or County service; and (3) seeking to mislead or deceive a judge by an artifice or false statement of fact or law.

Spielbauer filed a writ of mandate and the trial court rejected each of his arguments, including his argument that he had to receive a formal grant of immunity, rather than just a *Lybarger* admonition, before he could be punished for refusing to answer potentially incriminating questions. The Sixth District Court of Appeal ruled that the insubordination charge could not be sustained because the County did not first offer Spielbauer formal immunity. As we predicted in our January 2007 *Special Bulletin*, the California Supreme Court reversed, finding that a formal grant of immunity is not necessary.

Court's Analysis

The Court reiterated that the Fifth Amendment to the United States Constitution declares that "no person ... shall be compelled in any criminal case to be a witness against himself." The California Constitution similarly provides that individuals may not "be compelled in a criminal cause to be a witness against themselves." The Court noted that the constitutional privilege against compelled self-incrimination in a criminal case or cause does not protect against the non-criminal adverse use of officially compelled answers. Consequently, a public employee's incriminating answers made under threat of discipline for refusal to answer may form the basis for job discipline as long as the employee has protection against the criminal use of such statements.

The Court stated that Spielbauer and the Court of Appeal improperly concluded that "immunity" and the right to exclusion from evidence in a subsequent prosecution are two separate concepts that cannot be combined. But various U.S. Supreme Court decisions have used the concepts of immunity and the right to exclude evidence interchangeably. An employer can require an employee to answer job-related questions, under threat of job discipline, but the employer cannot require the employee to "waive his immunity" or "relinquish his constitutional rights."

The key point is that the employee cannot be required to *surrender* the constitutional privilege against the direct or derivative use of his or her statements in a subsequent criminal prosecution. Neither the U.S. nor the California Constitutions require an employer to provide its employee with a formal grant of criminal use immunity before it can require the employee, upon threat of job discipline, to answer questions relating to the employee's job performance.

The Court also noted a significant public interest in the ability of public agencies to promptly investigate and discipline their employees' betrayals of the public's trust. According to the Court, "the urgent administrative need to root out and eliminate misfeasance by public employees takes priority over any penal implications." The Court also pointed out that it is not clear how a public employer could even obtain a formal grant of immunity as no official or public agency has the legal authority to confer a grant of immunity under these circumstances. Moreover, the Court noted that the public's interest in promptly investigating and remedying misconduct outweighs any incidental effect on enforcement of criminal laws that may arise from the rule that statements compelled by the employer cannot be used in a later criminal prosecution against the employee.

HOW THIS CASE MAY AFFECT YOU:

As the California Supreme Court noted in its opinion, this decision reiterates what lower courts and federal courts have stated for decades: An employer can require a public employee, under threat of discipline, to answer job-related questions as long as the employer does not require the employee to surrender his or her right against the use of any such statements in a subsequent criminal proceeding. While the Court did not specifically hold that a *Lybarger* admonition must be provided to non-peace officer public employees in that situation, the County of Santa Clara did provide a *Lybarger* admonition to Spielbauer. The Court made clear that a public employer may compel answers in an administrative investigation if it first provides a *Lybarger* admonition to a public employee and does not otherwise force the employee to waive his or her constitutional rights.

Public employers with fire employees should be advised that the Firefighters Procedural Bill of Rights Act has an explicit provision requiring employers to provide firefighters with a formal, written grant of immunity from prosecution before the employee may be compelled to respond to incriminating questions. (Gov. Code, § 3253(e)(1).) The *Spielbauer* case did not directly address this statutory provision or define what constitutes a "formal" grant of immunity. However, public employers will need to continue to follow the provisions of the FBOR for covered employees.

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*If you have questions about this issue, please contact our
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