

Spielbauer: California Supreme Court Reaffirms that Public Employers May Compel Administrative Statements Without Offering Immunity

By Todd Simonson and Ivan Delventhal

Introduction

Public employers across the state breathed a collective sigh of relief on February 9, 2009, when the California Supreme Court unanimously reversed the Sixth District Court of Appeal in *Spielbauer v. County of Santa Clara*.¹ The high court's decision reaffirmed the long-standing principle that public employers may compel employees to answer potentially incriminating questions during an administrative investigation, without the need for a formal grant of criminal use immunity.²

The ruling restores certainty to administrative investigations in California's public sector and allows public employers to discipline employees who refuse to answer questions about allegations of misconduct, even if the misconduct is criminal in nature.

Facts

Thomas Spielbauer was a deputy public defender in Santa Clara County. During evidentiary motions before the commencement of a trial in January 2003, he moved to introduce the statement given to police by his client's roommate for the apparent purpose of raising doubt about the ownership of ammunition that his client was charged with possessing. In order to introduce the hearsay statement, Spielbauer claimed that the roommate was unavailable to testify. Based upon Spielbauer's representations, the court initially ruled that the statement would be admissible at trial.³

The prosecutor later discovered that—on the day before Spielbauer told the court the roommate was unavailable—Spielbauer had spoken, in person, with the allegedly unavailable roommate as the man

watched the Super Bowl at home.⁴ The prosecutor argued that Spielbauer had made an affirmative misrepresentation to the trial judge and, in April 2003, the public defender's office initiated an internal administrative investigation.⁵ In May 2003, the district attorney's office filed a misdemeanor complaint charging Spielbauer with deceit upon the court.⁶

During each of the two administrative interviews conducted, the supervisor of the felony division of the public defender's office directed Spielbauer to answer questions, and provided him with admonitions derived from the *Lybarger*⁷ advisement regularly given to police officers—reiterating that his statement could not be used against him in a criminal proceeding and that refusal to answer questions would constitute insubordination and subject him to discipline, up to and including termination.⁸ On advice of his counsel, Spielbauer refused to answer any questions “on grounds of protection afforded him by the federal and state Constitutions and the laws of California.”⁹

The public defender's office terminated Spielbauer for insubordination, gross misconduct and misleading a judge. Following his discharge, Spielbauer initiated an action in mandate to set aside his termination. The superior court denied relief, and Spielbauer appealed.¹⁰

The court of appeal, in a significant departure from existing law—including the nearly 20-year-old

¹ No. S150402, 2009 Cal. LEXIS 1010 (Feb. 9, 2009). To view California Supreme Court briefs available on Lexis.com, go to 2007 CA S. Ct. Briefs 235378.

² *Id.* at *3–4.

³ *Id.* at *5–6.

⁴ *Id.* at *7; *see also id.* at *8 (Following this disclosure, the trial court determined that the roommate was an available witness.).

⁵ *Id.* at *8.

⁶ *Id.* at *9 n.1 (noting that according to the court of appeal, although the record did not discuss the disposition of the criminal case, Spielbauer asserted that the action was ultimately dismissed by stipulation).

⁷ *See Lybarger v. City of Los Angeles*, 40 Cal. 3d 822 (1985).

⁸ *Spielbauer*, 2009 Cal. Lexis 1010, at *8–11.

⁹ *Id.* at *9.

¹⁰ *Id.* at *11–12.

Lybarger decision by the California Supreme Court—overturned the trial court, concluding that the finding of insubordination could not be sustained because “a public agency cannot penalize one of its employees for refusing to answer incriminating questions unless the state first grants or offers *immunity*, i.e., a binding undertaking not to use his answers in any criminal prosecution.”¹¹

The court of appeal decision prompted widespread criticism from an array of employer and employee organizations, as well as district attorneys’ offices suddenly charged with making immunity decisions in the thousands of ongoing public sector investigations throughout the state. With the support of this unusual coalition of *amici*,¹² the County appealed to the California Supreme Court.

California Supreme Court Decision

The question before the California Supreme Court in *Spielbauer* was as follows:

When a public employee invokes 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 any criminal use of the employee’s statements before it can dismiss the employee for refusing to answer questions in connection with the investigation?¹³

The answer to this question, the court held, is no.¹⁴ Writing for the unanimous court, Justice Baxter concluded that in the context of noncriminal, public employment investigations, “the employer may discipline, and even dismiss, a public employee for refusing, on grounds of the constitutional privilege, to answer the employer’s job-related questions, so long as the employee is not required, as a condition of remaining in the job, to *surrender* his or her right against criminal use of the statements thus obtained. . . .”¹⁵ The court reiterated this central idea at several points in its opinion, stating elsewhere, for example, that a public employer could compel an employee to answer questions relating to job performance “so long as the

employee is not required, on pain of dismissal, to *wave* the constitutional protection against criminal use of those answers.”¹⁶ Further, the court explained, a public employer in such a circumstance is “not further required to seek, obtain, and confer a formal guarantee of immunity before requiring its employee to answer questions related to that investigation.”¹⁷

The court took issue with the court of appeal’s conclusion that a *Lybarger*-esque warning, like that provided to *Spielbauer*, improperly “conflated” the exclusionary rule with a grant of immunity and, in doing so, created a classic paradox.¹⁸ Instead, the Supreme Court noted that “official compulsion,” for purposes of the privilege against self-incrimination, may include a public employer’s threat to fire an employee for his or her refusal to answer potentially incriminating questions and that, as a consequence, “the law is clear that incriminating answers coerced from a public employee under threat of dismissal *cannot be used against the employee in a criminal proceeding.*”¹⁹ This is true even where an employee has not received an advance grant of immunity.²⁰

The court reasoned that public employees, in performing their official functions, “owe unique duties of loyalty, trust, and candor to their employers, and to the public at large.”²¹ Further, the court noted that public employers are neither equipped nor statutorily-authorized to obtain or confer criminal use immunity and “cannot be hamstrung, as a matter of constitutional law, by such concerns.”²²

Spielbauer’s Application

The *Spielbauer* holding raises several important issues that public employers should bear in mind when dealing with the questioning of a recalcitrant employee who is the subject of administrative investigation.

First, the *Spielbauer* Court expressly declined to resolve the question of whether a “*Lybarger* warning”—whereby a police officer questioned by his or her employer about potentially criminal misconduct must

¹¹ *Spielbauer v. County of Santa Clara*, 146 Cal. App. 4th 914 (2007), *rev’d*, No. S150402, 2009 Cal. Lexis 1010 (Feb. 9, 2009).

¹² See *Spielbauer*, 2009 Cal. Lexis 1010, at *13–14 n.3.

¹³ *Id.* at *13.

¹⁴ *Id.*

¹⁵ *Id.* at *41–42.

¹⁶ *Id.* at *4; see also *id.* at *24, 25.

¹⁷ *Id.* at *4–5.

¹⁸ See *id.* at *23; see also *Spielbauer*, 146 Cal. App. 4th at 937–39.

¹⁹ *Spielbauer*, 2009 Cal. Lexis 1010, at *16 (citing *Garrity v. New Jersey*, 385 U.S. 493, 496–497, 500 (1967)).

²⁰ *Id.* (citing *Garrity*, 385 U.S. at 495).

²¹ *Id.* at *42.

²² *Id.* at *42–43.

be advised of certain constitutional rights²³—was required in the context of non-police employees.²⁴ The court wrote in a footnote that it did not have to decide this issue because it was undisputed that Spielbauer's employer had provided him with the same advisements discussed in *Lybarger*.²⁵

Accordingly, public employers should consider providing all employees subject to potentially incriminating questions—peace officers or not—with the advisements discussed in *Lybarger*. Those are as follows: (1) the employee has a right not to incriminate himself or herself; (2) but that silence may be deemed insubordination and result in discipline; and (3) that any statement “coerced” by threat of discipline cannot be used in later criminal proceedings.²⁶

Second, a public employer faced with an employee who persists in refusing to cooperate in an employer's administrative investigation is best advised to take a methodical approach. In particular, the employer should do the following: remind the employee that he or she can be lawfully disciplined, even terminated, for refusing to answer the employer's questions; order the employee to answer the question; and, preferably, ask the first one or two questions before ending the interview. The employer should also follow up with a writing to the employee specifically describing the employee's refusal to answer questions despite the employer's order to do so. By laying this foundation, the employee's refusal to answer questions may be treated as insubordination and constitute a separate cause for discipline, in addition to any other policies violated.

Third, *Spielbauer* confirms that a public employee is not entitled to an affirmative grant of immunity from prosecution as a condition to his or her answering an employer's questions. Thus, employees being questioned under these circumstances who demand immunity should be advised that the agency will not grant immunity and is not required by law to do so.

Finally, due to the ill-considered inclusion of a provision in the recently-enacted Firefighters' Procedural Bill of Rights Act (“FBOR”),²⁷ California firefighters now stand alone as the only public employees entitled to the formal grant of immunity otherwise struck down by the Supreme Court in *Spielbauer*.²⁸ Until the Legislature fixes the FBOR statute to align it with the holding in *Spielbauer* and FBOR's older cousin, the Public Safety Officers' Procedural Bill of Rights Act,²⁹ fire department employers should proceed cautiously and consult with the local district attorney, as well as their own counsel, before questioning a firefighter about potentially criminal conduct.³⁰

Conclusion

The Supreme Court's decision in *Spielbauer*, at its core, recognizes the importance of ensuring a public employer's ability “to act promptly and freely, in its administrative capacity, to investigate and remedy misconduct and breaches of trust”³¹ and restores to public employers an important, and time-honored, investigative tool designed to make public entities—and those they employ—ultimately more accountable to the taxpayers who pay their salaries.

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²³ See Cal. Gov't Code § 3303(h); *Lybarger*, 40 Cal. 3d at 829.

²⁴ See *Lybarger*, 40 Cal. 3d at 828–30 (holding that a police officer in such a situation had to receive such an advisement because it was required by statute).

²⁵ *Spielbauer*, 2009 Cal. Lexis 1010, at *39–40 n.5.

²⁶ *Lybarger*, 40 Cal. 3d at 829.

²⁷ Cal. Gov't Code §§ 3250–3262.

²⁸ *Id.* at § 3253(e)(1); see also *id.* at § 3262 (providing that the protections in FBOR “shall only apply to a firefighter during events and circumstances involving the performance of his or her official duties”).

²⁹ Cal. Gov't Code § 3300 et seq.

³⁰ See Simonson & DuCaine, *The New Form of Immunity for Firefighters: Complicating the Lybarger Paradox*, 2008 Bender's Calif. Lab. & Empl. Bull. 1 (January 2008) at 1, 6.

³¹ *Spielbauer*, 2009 Cal. Lexis 1010, at *51.