

CLIENT NEWS BRIEF

No. 12

February 2009

A PUBLIC EMPLOYEE MAY BE DISCIPLINED FOR FAILING TO ANSWER JOB-RELATED QUESTIONS, SO LONG AS THE EMPLOYEE IS NOT REQUIRED TO WAIVE SELF-INCRIMINATION RIGHTS

Public employees (like everyone else) have federal and state Constitutional protections against being forced to make self-incriminating statements. Sometimes employees refuse to answer questions and assert their right to remain silent during employment-related investigations, thereby frustrating the employer's ability to obtain necessary information. This raises the question of whether public employers may direct employees to answer employment-related questions and discipline public employees when they refuse to answer such questions based on their right against self-incrimination.

The California Supreme Court recently held that a public employer may discipline a public employee for refusing to answer job-related questions, so long as the employee is not required to waive constitutional protections against use of those answers in criminal proceedings. In Spielbauer v. County of Santa Clara (February 9, 2009) __ Cal.4th __ (“Spielbauer”), the Supreme Court reversed an appellate court's decision that a public employee could not be terminated for failure to answer job-related questions unless he or she had first been granted formal immunity. A formal grant of immunity is an official assurance by a prosecuting authority (e.g., a court, a district attorney, the Fair Political Practices Commission, etc.) that the testimony obtained will not be used against an individual in criminal proceedings. In Spielbauer, the Supreme Court reversed an appellate court's decision and held that a public employer is not required to seek, obtain, and convey a formal guarantee of immunity before requiring an employee to answer questions related to a noncriminal public employment investigation. It is sufficient for the employer to inform the employee that any answers given by the employee under compulsion by the employer may not be used in any criminal proceeding.

This case confirms the holding of Lybarger v. City of Los Angeles (1985) 40 Cal.3d 822 (“Lybarger”). In Lybarger, the California Supreme Court ruled that a police officer's “self-incrimination rights are deemed adequately protected by precluding any subsequent use of his statements at a subsequent criminal proceeding.” Under Lybarger, a law enforcement employer can obtain compelled statements for administrative purposes by advising the employee that the compelled statement could not be used in a criminal prosecution. Spielbauer expands Lybarger's holding to all public employers and confirms that such employees are not entitled to a formal

grant of immunity (e.g., a written statement from the district attorney's office or a court) before they can be disciplined for failing to answer job-related questions.

In Spielbauer, a county public defender was accused of misrepresenting material facts to the superior court. When the public defender's office learned of the alleged deceptive conduct, it made several attempts to interview the employee about the incident. The employee was advised that his refusal to answer questions would be deemed insubordination warranting discipline up to and including dismissal, but his answers would not be used in any criminal proceeding. The employee refused to answer, asserting his right to remain silent, and was eventually terminated for insubordination (as well as on other charges).

The dismissed employee argued that his termination was wrongful and that he should have been given a formal guarantee of immunity before being required to answer questions that could incriminate him. The Supreme Court disagreed, holding that it is well established law that incriminating answers given by a public employee under threat of discipline for refusal to answer may themselves form the basis for job discipline, including termination, so long as the employee has protection against the use of such statements in a criminal proceeding.

The court declined to decide the extent to which an employee must be advised of the protections against subsequent criminal use of compelled statements. The court noted that several federal courts have suggested that, although the federal Constitution does not require formal immunity for public employees before they must answer their employers' questions, it may require appropriate *advisements* that the compelled answers may not be used against the employees in criminal prosecutions. In Spielbauer, the court did not decide this issue because the employee was specifically advised that he retained his rights against use of his statements in a criminal proceeding. Therefore, it was clear that the employer could discipline the employee for refusing to answer the job-related questions.

The emerging rule from Spielbauer is that public employees may be disciplined, up to and including termination, for failure to answer job-related questions so long as they are advised that by answering any questions they do not surrender their right against use of the statements in a criminal proceeding. However, the extent to which a public employee must be advised of such rights before discipline can be imposed remains unclear.

A sample advisement based upon the language implied to be adequate in the Spielbauer case may be:

You have a right to remain silent and not incriminate yourself. Your silence, however, may be deemed insubordination, leading to administrative discipline up to and including termination. Any statement made during this interview cannot be used against you in any subsequent criminal proceeding. Therefore, you are directed to answer the questions and your refusal to answer will be deemed to be insubordination.

This advisement may be given orally or in writing. For further information regarding the ruling and implications of this case, please contact any of our seven offices statewide.

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

N

*Written by Micah Nilsson and Thomas R. Manniello
Tom is a shareholder and the chair of our litigation practice group
(tmanniello@lozanosmith.com) and Micah is an associate (mnilsson@lozanosmith.com), both in
our Monterey office.*

©2009 Lozano Smith