



LEGAL DEFENSE TRUST TRAINING BULLETIN

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“SUPREME COURT UNANIMOUSLY REJECTS

CHALLENGE TO THE LYBARGER RULE

AND TO USE-AND-DERIVATIVE-USE IMMUNITY”

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Practical wisdom and common sense have prevailed in the California Supreme Court's long-awaited *Spielbauer v. County of Santa Clara* decision. We discussed this case at great length when the Court of Appeal announced its decision severely criticizing the holding of *Lybarger v. City of Los Angeles* (1985) 40 Cal. 3d 822, which enables law enforcement agencies to penalize peace officers for insubordination if they refuse to obey an order to make a statement after being assured that the statement will be inadmissible in any criminal proceeding. We also published a detailed report on the Supreme Court's oral argument of the case this past December.

This article will follow up by recapping the adopted the straightforward approach that the exclusionary rule of *Lybarger* is a self-executing use and derivative use immunity

Supreme Court's decision announced February 9, 2009. The Court unanimously gave a ringing endorsement of the *Lybarger* approach to compelled administrative statements, and thereby preserved the familiar framework whereby employers, with appropriate warnings, can compel employees to give statements that will not be able to be used against them in criminal proceedings. In so ruling, the Supreme Court roundly rejected the argument by *Spielbauer's* counsel that the employer should be required to obtain formal immunity from all potential prosecuting agencies before being able to compel a statement.

In reaching this decision, the Supreme Court that does not depend on prior agreement with prosecutors for its effectiveness. In other words, it arises by operation of law.

The new *Spielbauer* decision now gives Supreme Court imprimatur to a clarification that had previously been recognized at the appellate level in *People v. Gwillim* (1990) 220 Cal. App. 3d 1254, 1259, though the Supreme Court did not mention that appellate decision, and instead devoted most of its analysis to the United States Supreme Court Fifth Amendment precedents cited in the *Lybarger* opinion.

The opinion begins by describing the Lybarger-style warning given to Spielbauer by the employer, in terms that the employer “advised plaintiff--accurately--that no use in a criminal proceeding (i.e., criminal use) could be made of his answers.” Slip Opn. at 1. The single adverb “accurately” summarizes the Supreme Court’s critical finding in the opinion. In other words, the legal rule that a statement given under administrative compulsion cannot be used against the employee in a subsequent criminal proceeding is self-executing and unconditional, not dependent on the prosecutor’s prior agreement or formal acknowledgment. It is a rule the employee can assert in the criminal court and the trial judge is bound to honor it, upon pain of appellate reversal.

Like with any legal rule, the judicial system does in fact depend on judges doing what the law commands or being reversed if they do otherwise, and in turn, when a trial judge errs, the system depends on appellate jurists to set things straight. But that inevitable human factor does not need to topple the appellate, nor does it force employers to go through a gauntlet of negotiations with prosecutors before being able to compel an employee to reveal information that will be used for internal discipline and correction.

The reasoning of new *Spielbauer* decision opens with the observation that the original Supreme Court precedent on which *Lybarger* was based, *Garrity v. New Jersey* (1967) 385 U.S. 493, the opinion that contains the famous holding that police officers “are not relegated to a watered-down version of constitutional rights” (*Garrity* at 500), determined that employer-compelled statements cannot be used criminally, “even where the employee received no advance grant of formal immunity.” *Spielbauer*, slip opn. at 9-10, citing *Garrity* at 495.

The opinion then surveys precedent cited by Spielbauer’s counsel, such as *Lefkowitz v. Turley* (1973) 414 U.S. 70, to convince the Court of Appeal to insist on formal immunity as a precondition for compelling a statement. The key distinction in those cases is that the employer required not only a statement, but an affirmative waiver of the Fifth Amendment privilege. The *Spielbauer* opinion observes that the United States Supreme Court “has never held, in the context of a noncriminal investigation of public employee job performance, that an employee must be offered *formal immunity* from criminal use before being compelled, by threat of job discipline, to answer questions on that subject.” Slip opn. at 14-15.

Cases that have reversed convictions or employment discipline have held that “the employee may be punished for refusal to answer the employer’s job-related questions if he or she is not required to *surrender* the constitutional privilege against criminal use of the statements thereby obtained.” Slip opn. at 15. For example, in *Garrity*, there was a state statute that “called for the forfeiture of public employment by one who

invoked the Fifth Amendment, or refused to waive immunity, in response to official questioning about his or her job performance.” *Spielbauer* slip opn. at 15. As noted in the *Spielbauer* opinion, “the officers were told that unless they waived their constitutional right against self-incrimination, they would lose their jobs.” *Id.*

In a companion case to *Garrity*, the case of *Gardner v. Broderick* (1968) 392 U.S. 273, a police officer subpoenaed before a grand jury was asked to sign a waiver of his privilege against self-incrimination, and, based on the state constitution and city charter, was told his employment would be terminated if he refused. Similarly, in *Sanitation Men v. Sanitation Commissioner* (1968) 392 U.S. 280, employees were told that based on a provision in the city charter, their employment would be terminated if they invoked the privilege against self-incrimination to avoid testifying in an administrative hearing.

After the *Sanitation Men* case was reversed and remanded, the employees were recalled for administrative questioning under warnings essentially equivalent to the modern *Lybarger* warning, that they would be subject to discipline for refusing to answer, but that their answers could not be used in criminal prosecution **except for a perjury prosecution for any false answers**. The employees refused again and were terminated.

In an action for reinstatement, the federal district court found the city did not have authority to confer criminal immunity that would supplant the Fifth Amendment privilege and entitle the employer to compel a statement. The Second Circuit Court of

Appeals reversed the district court, in *Uniformed Sanitation Men’s Assn., Inc. v. Commissioner* (2d Cir. 1970) 426 F.2d 619 [“*Sanitation Men II*”]. Referring to *Garrity*, the Second Circuit stated that ““the very act of the attorney general in telling the witness that he would be subject to removal if he refused to answer was held to have conferred such immunity...”” *Spielbauer* slip opn. at 18-19, quoting from *Sanitation Men II*, 426 F.2d at 626.

The *Spielbauer* opinion observes that based on the Second Circuit’s *Sanitation Men II* decision, “many lower federal court cases have since held that the Fifth Amendment does not require a formal, affirmative grant of immunity before a public employee may be dismissed for his or her blanket refusal to answer official questions about performance of the employee’s public duties, so long as the employee is not required to surrender the constitutional privilege against the direct or derivative use of his or her statements in a subsequent criminal prosecution.” Slip opn. at 20. The Court then surveyed California decisions to the same effect, including *Lybarger*.

Based on this body of California precedent, the Supreme Court in *Spielbauer* concluded, “We are therefore persuaded that neither the federal nor the California constitutional privilege against compelled self-incrimination requires a public 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.” Slip opn. at 24. This rule, of course, applies only “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--at least where, as here, the employee is specifically advised that he or she retains that right." *Id.* at 25.

The *Spielbauer* opinion explains that "the competing public and personal interests are best reconciled by such a rule. In performing their official functions, government officers and employees owe unique duties of loyalty, trust, and candor to their employers, and to the public at large.... Public agencies must be able promptly to investigate and discipline their employees' betrayals of this trust. In the vast majority of cases, the urgent *administrative* need to root out and eliminate misfeasance or malfeasance by public employees takes priority over any penal implications.... The Constitution cannot mean that a public employee may refuse with impunity to account for his or her performance on the public payroll, and may delay the progress of any employer's inquiry, unless and until he or she obtains a formal and legally binding guarantee that any statements obtained by the employer will never be used to prosecute the employee on criminal charges." *Id.*

The opinion then recognizes that "it is not clear how the public employer could even obtain such a formal grant of immunity." *Id.* There is no constitutional or statutory provision authorizing the employer to grant immunity. The Court concluded that public employer investigations "cannot be hamstrung, as a matter of constitutional law, by such concerns." *Id.* at 26.

As we pointed out in previous articles about this case, and as argued vociferously at the Supreme Court hearing, if formal immunity were required in this situation, employers would be required to engage in a gauntlet of

consultations with the offices of the district attorney, the United States Attorney, and perhaps many other regulatory bodies with punitive powers, to secure sufficient immunity to replace the Fifth Amendment guarantee, and these officials would have no incentive or interest to yield to the employer's priorities and thereby jeopardize their own proceedings in advance.

The *Spielbauer* opinion closes by rejecting the reasoning underlying the Court of Appeal decision in the case. The most serious concern perceived by the Court of Appeal was that placing control over immunity in the employer's hands would hinder the prosecutors' effort to pursue criminal charges against the employee. The Supreme Court essentially explained that the issue in the *Spielbauer* case, whether the Constitution requires formal immunity as a precondition for terminating public employment for refusal to give an administratively compelled statement, has only an "incidental effect on enforcement of criminal laws that may arise from the rule...." Slip opn. at 30.

Of course, what makes the effect "incidental" is merely that the prosecution is only deprived of the employee's compelled statement and its fruits, and can still pursue criminal charges based on whatever other evidence can be independently obtained. In that sense, the Supreme Court did give somewhat short shrift to legitimate prosecutorial concerns.

But the Court was faced with the need to resolve an exceedingly difficult issue that will always present a direct conflict between two vital governmental and public interests. It did so in a way that will preserve a status

quo that has functioned effectively for several decades.

If the Court of Appeal decision had been allowed to stand, public employers across the State would have been forced to devise entirely new approaches to internal investigations, to the severe detriment of public employee and public agency accountability for official wrongdoing. As expressed at oral argument by amicus counsel Martin J. Mayer, law enforcement agencies “could no longer perform their public duty to investigate police misconduct if the *Lybarger* rule is overturned.”

Fortunately, the Supreme Court has preserved the balance reached in *Lybarger*, which has functioned effectively to deter misconduct and achieve public accountability while protecting the constitutional rights of individual employees. We congratulate Deputy County Counsel Marcy Berkman, Deputy Attorney General Karen Huster, amicus counsel Martin Mayer, and LDF attorneys Ron Yank and Gary Messing, for their outstanding

achievement serving the public interest in this case, and join with them in expressing our profound relief that through conscientious advocacy, the Supreme Court was able to devise the most wise and sensible legal rule to resolve this difficult issue.

STAY SAFE!

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