burke
BURKE, WILLIAMS & SORENSEN, LLP

www.bwslaw.com
(800) 333-4297

June 2007

Los Angeles
444 South Flower Street
Suite 2400
Los Angeles, California 90071
Telephone (213) 236-0600
Facsimile (213) 236-2700

Orange County
4 Park Plaza
Suite 850
Irvine, California 92614
Telephone (949) 863-3363
Facsimile (949) 863-3350

Inland Empire
3403 Tenth Street
Suite 300
Riverside, California 92501
Telephone (951) 788-0100
Facsimile (951) 788-5785

Ventura County
2310 East Ponderosa Drive
Suite 25
Camarillo, California 93010
Telephone (805) 987-3468
Facsimile (805) 482-9834

Palm Desert
73-939 Larrea Street
Suite 4A
Palm Desert, California 92260
Telephone (760) 776-5600
Facsimile (760) 776-5602

Labor & Employment Law Update

A CHANGE IN ADMINISTRATIVE INVESTIGATIONS?

Kelly A. Trainer, Esq.*

At the beginning of this year, a California Court of Appeal issued a decision that could change the way that public employers conduct administrative investigations involving potential criminal conduct by its employees. The case is currently before the California Supreme Court on review, and if the Supreme Court affirms, public employers will have to significantly change the way they conduct administrative investigations.

On January 12, 2007, the Sixth Appellate District of the California Court of Appeal issued its decision in *Spielbauer v. County of Santa Clara* (2007) 146 Cal.App.4th 914. The *Spielbauer* decision held that public employees cannot be compelled by threat of insubordination to answer questions during an internal investigation when the employee has refused to answer on grounds that he/she might incriminate himself/herself unless the public agency offers the employee immunity from subsequent prosecution. The decision calls into question the application of the so-called *Lybarger* warning during investigations, and whether that warning is sufficient to protect an employee from making incriminating statements during an internal investigation.

In 1985, the California Supreme Court decided *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822. The police officer in *Lybarger* invoked the protections of the Fifth Amendment to the U.S. Constitution, and refused to answer questions during an internal affairs investigation on the grounds that his answers might incriminate him in a pending criminal investigation. In response, the investigator told the officer that refusal to answer questions could lead to charges of insubordination and he might be terminated.

Finding against the City, the Supreme Court held that "although an officer who refuses to cooperate in an investigation of this kind may be *administratively* disciplined, the discipline in the present case must be set aside because appellant was never advised that any statements he

---

* Kelly A. Trainer is an Associate in Burke Williams & Sorensen LLP's Labor & Employment Law Group.

www.bwslaw.com
(800) 333-4297

June 2007

Los Angeles
444 South Flower Street
Suite 2400
Los Angeles, California 90071
Telephone (213) 236-0600
Facsimile (213) 236-2700

Orange County
4 Park Plaza
Suite 850
Irvine, California 92614
Telephone (949) 863-3363
Facsimile (949) 863-3350

Inland Empire
3403 Tenth Street
Suite 300
Riverside, California 92501
Telephone (951) 788-0100
Facsimile (951) 788-5785

Ventura County
2310 East Ponderosa Drive
Suite 25
Camarillo, California 93010
Telephone (805) 987-3468
Facsimile (805) 482-9834

Palm Desert
73-939 Larrea Street
Suite 4A
Palm Desert, California 92260
Telephone (760) 776-5600
Facsimile (760) 776-5602

made could not be used against him in a subsequent *criminal* proceeding." (*Id.* at 825). The Supreme Court stated that public employees have "no absolute right to refuse to answer potentially incriminating questions posed by his employer [because these rights are] adequately protected by precluding any use of his statements at a subsequent criminal proceeding." (*Id.* at 827). The Supreme Court also held that the Public Safety Officers Procedural Bill of Rights ("Bill of Rights") required that officers be advised of their *Miranda* Rights during an administrative investigation if the officer may be charged with a criminal offense, and that an officer may be subjected to administrative punitive action for refusing to respond to questions directly related to the investigation.

The Supreme Court thus stated that the officer should have been told "that although he had the right to remain silent and not incriminate himself, (1) his silence could be deemed insubordination, leading to administrative discipline; and (2) any statement made under the compulsion of the threat of such discipline could not be used against him in any subsequent criminal proceeding." (*Id.* at 829). In effect, the Supreme Court held that the exclusionary rule would keep these compelled statements out of any subsequent criminal proceeding.

Based on this decision, public agencies began issuing "*Lybarger* warnings" to employees who refused to answer investigatory questions on the grounds of self-incrimination. It has been common practice for public employers to give this warning to both public safety and non-public safety employees. *Spielbauer* calls this practice into question by finding that the exclusionary rule is a remedy for an unconstitutionally-obtained statement, and not a grant of immunity by the state. The Court found that the Fifth Amendment's protection extends to the investigations conducted by public employers because the right "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Thus, the Court held that based on federal constitutional law, "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." The *Spielbauer* decision limits the application of *Lybarger* by stating that its holding dealt with the interpretation of the Bill of Rights, and the

burke
BURKE, WILLIAMS & SORENSEN, LLP

www.bwslaw.com
(800) 333-4297

Labor & Employment Law Update

June 2007

Los Angeles
444 South Flower Street
Suite 2400
Los Angeles, California 90071
Telephone (213) 236-0600
Facsimile (213) 236-2700

Orange County
4 Park Plaza
Suite 850
Irvine, California 92614
Telephone (949) 863-3363
Facsimile (949) 863-3350

Inland Empire
3403 Tenth Street
Suite 300
Riverside, California 92501
Telephone (951) 788-0100
Facsimile (951) 788-5785

Ventura County
2310 East Ponderosa Drive
Suite 25
Camarillo, California 93010
Telephone (805) 987-3468
Facsimile (805) 482-9834

Palm Desert
73-939 Larrea Street
Suite 4A
Palm Desert, California 92260
Telephone (760) 776-5600
Facsimile (760) 776-5602

statements about a public employee's right to remain silent during an administrative investigation was dictum, and therefore not binding legal precedent.

What This Means to Public Employers

Spielbauer held that "in the absence of some semblance of legislative authority, a public employer has no power to peremptorily and unilaterally immunize statements of its employees, and that in the absence of such a grant of immunity, it cannot lawfully compel them to answer incriminating questions, or punish their refusal to do so."

Spielbauer does not stand for the proposition that public employers are prohibited from compelling *any* participation in an investigation with the threat of insubordination. *Spielbauer* only applies when an employee is investigated for a matter that could amount to criminal conduct (*i.e.*, theft, assault, battery, drug use, etc.). It does not apply to other non-criminal employee misconduct (*i.e.*, abuse of leave, discourteous treatment of co-workers/the public, insubordination, lying, etc.). As long as there is no criminal element of the alleged misconduct, an employee can be required to answer questions under threat of insubordination and disciplinary action.

Spielbauer also does not stand for the proposition that public employers are unable to administratively investigate alleged criminal misconduct by an employee. Public employers may still investigate these matters, and may still make findings of fact and take disciplinary action against an employee. Indeed, public employers may still ask questions related to alleged criminal conduct by an employee.

However, *Spielbauer* limits the employer's options when the employee refuses to answer these questions under the protection of the Fifth Amendment. A public employer can not threaten the employee with insubordination and discipline when he/she refuses to answer incriminating questions during an administrative investigation, *unless* the employer has made an offer of immunity from the prosecutor that has been approved by a court.

On May 9, 2007, the California Supreme Court granted review and to decide the issue of if "a public employee exercises his/her Fifth Amendment right against self-incrimination in a public employer's

www.bwslaw.com
(800) 333-4297

June 2007

Los Angeles
444 South Flower Street
Suite 2400
Los Angeles, California 90071
Telephone (213) 236-0600
Facsimile (213) 236-2700

Orange County
4 Park Plaza
Suite 850
Irvine, California 92614
Telephone (949) 863-3363
Facsimile (949) 863-3350

Inland Empire
3403 Tenth Street
Suite 300
Riverside, California 92501
Telephone (951) 788-0100
Facsimile (951) 788-5785

Ventura County
2310 East Ponderosa Drive
Suite 25
Camarillo, California 93010
Telephone (805) 987-3468
Facsimile (805) 482-9834

Palm Desert
73-939 Larrea Street
Suite 4A
Palm Desert, California 92260
Telephone (760) 776-5600
Facsimile (760) 776-5602

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." The parties have filed their opening briefs and answers. We will follow this matter and publish additional updates as necessary. In the meantime, please contact our office with any questions about appropriate handling of current or future investigations to make certain that your agency is complying with the law.

LA #4810-7190-4513 v1