

EMPLOYMENT LAW UPDATE

As long as Fifth Amendment Right is Protected, Public Employers May Discipline Employees For Not Answering Job Performance Questions.

Spielbauer v. County of Santa Clara., Case No. S150402 (Feb. 9, 2009)

By Ari A. Baruth and Jason A. Geller

In *Spielbauer v. County of Santa Clara*, the need to quickly investigate and remedy alleged misconduct of public employees.

FACTS

The County initiated an investigation based on allegations that Spielbauer had made deceptive statements to the court while representing a criminal defendant.

Spielbauer retained counsel who was present when the county interviewed Spielbauer. When asked to address the possible misrepresentation, on advise of counsel Spielbauer took the Fifth. A representative from the Public Defender's office told Spielbauer, "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, and I emphasize cannot, be used against you in any subsequent criminal proceeding."

At a second interview, the county again advised Spielbauer that because this was an internal investigation, he did not have a right to refuse to answer questions pertaining to the investigation and that such refusal would be insubordination warranting discipline up to and including California Supreme Court held that a public employer is within its rights to compel a public employee, by

threat of job discipline, to answer questions about the employee's job performance.

This is permitted as long as the employee is not required, on pain of dismissal, to waive the Fifth Amendment constitutional protection against any criminal use of those answers.

Thomas Spielbauer, a Santa Clara deputy public defender, was terminated when he refused to answer questions in an internal investigation into his alleged misconduct.

During the investigation, Spielbauer was not ordered to choose between his constitutional rights and his job. Rather, he was explicitly advised that no criminal use could be made of any of his answers. The California Supreme Court held that in the context of a non-criminal public employment investigation, the employer is not required to seek, obtain, and confer a formal guarantee of immunity before requiring its employee to answer questions related to an investigation. In this win for public employers, the California Supreme Court recognized a public employer's

termination. The representatives also reiterated that any information provided in Amendment right against self-incrimination in a public employer's investigation of the employee's job-related conduct, a public employer must offer immunity from any criminal use of the employee's statements before it can discipline the employee for refusing to answer questions in connection with the investigation. The California Supreme Court answered no.

The California Supreme Court examined prior federal and California cases and found that the law is well-established that incriminating answers coerced from a public employee under threat of dismissal cannot be used in a criminal proceeding, regardless of whether or not the employee has been granted advance formal immunity. Moreover, the court opined that it may be necessary for public employees to answer official questions and if an individual could invoke the privilege and avoid answering such questions, it would frustrate legitimate governmental objectives. Therefore, the court held that when a public employee refuses to answer such questions on the basis of the privilege against self-incrimination, a public employer is within its rights to discipline that employee.

The court also addresses the issue of whether the Constitution requires a public employer to obtain and provide an affirmative grant of criminal use immunity before using the threat of job discipline to compel answers from its employee in the course of its investigation. The court held that formal immunity is not required so long as the employee is not required to surrender the constitutional privilege against criminal use of any statements a public employee may be compelled, upon threat of job

discipline, to answer about his or her job performance. The interview could not and would not be used against him in a criminal case. Spielbauer still refused to answer the questions.

Approximately two months later, Mann recommended Spielbauer's termination for a variety of reasons including insubordination. Spielbauer utilized all of his administrative remedies to challenge the decision and, after the recommendation was upheld, Spielbauer filed a writ of mandamus in superior court.

THE COURT'S ANALYSIS

In superior court, Spielbauer argued that he could not be dismissed for refusing to answer potentially incriminating questions unless he received a formal grant of criminal use immunity in advance of answering the questions. The court disagreed, finding that substantial evidence supported the charges and discipline and that Spielbauer was not entitled to formal immunity before being compelled to answer his employer's questions.

On appeal, the appellate court reversed, agreeing with Spielbauer's contention that a public employee must receive a formal grant of criminal use immunity before being required, on the pain of discipline, to answer potentially incriminating official questions about job performance. The appellate court held that the employer's mere advisements and assurances that Spielbauer's statements could not be used in a later criminal proceeding were insufficient to compel his answers.

The California Supreme Court limited its review to determining whether, when a public employee invokes the Fifth

In so finding, the court recognized that

- Employers should ensure that questions in internal interviews related to alleged job misconduct are job and performance related.
- Employers must adequately advise employees that the information gathered through the investigation will not be used in a subsequent criminal proceeding.
- Employers must not require employees to waive or surrender their constitutional right to the privilege against self-incrimination under the threat of job discipline.
- Employers may enforce job discipline against employees who refuse to cooperate in an internal investigations into their alleged misconduct, provided that the decision complies with all other laws.

Employers should review prior disciplinary actions to ensure that its proposed action is consistent with its past practices. public employees, like all other citizens, are entitled to the privilege against self-incrimination. The court nonetheless found that public employees subject themselves to discipline – including dismissal – if they refuse to account for their conduct because they owe a special duty to the people and State of California. The right against self-incrimination does not protect employees from refusing to answer job-related questions. The privilege protects employees from criminal repercussions based on any information provided to the public employer through it's questioning.

As a result of the Supreme Court's ruling, public employees may face discipline for failing to answer the employer's questions so long as two conditions are met: (1) the

public employee must be advised of the fact that information given in the course of an internal investigation will not be used in a subsequent criminal proceeding against the employee; and (2) the employee cannot be required to waive his or her right to the privilege against self-incrimination under threat of job discipline.

Recommendations For Public Employers

This case is an important clarification for public employers. The California Supreme Court acknowledged the importance of public agencies promptly investigating and remedying public employees' conduct. Public employers, however, must keep several things in mind when proceeding with internal investigations and considering discipline against employees who fail to provide answers to job-related questions in such investigations: