LEGAL DEFENSE TRUST TRAINING BULLETIN

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SUPREME COURT HEARS ARGUMENT AFFECTING

RIGHTS OF POLICE OFFICERS AGAINST SELF-INCRIMINATION

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Police departments could no longer perform their public duty to investigate police misconduct if the *Lybarger* rule is overturned. That message was conveyed to the California Supreme Court by attorney Martin J. Mayer at oral argument of a case that tests the continuing validity of the rule announced in *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.

The Supreme Court displayed receptiveness to this message December 2, 2008, in entertaining oral argument in *Spielbauer v. County of Santa Clara* (2007) 53 Cal. Rptr. 3d 357, a Sixth District Court of Appeal opinion that refused to follow *Lybarger* and reinstated a public defender whose termination was based in part on refusing to answer his supervisor's questions about suspected misconduct. The Court of Appeal held that a public employer cannot impose discipline on an employee for refusing to answer questions about potentially criminal misconduct unless the employer first obtains a formal grant of immunity, presumably from all potential prosecuting agencies.

The California Supreme Court in *Lybarger* recognized that the constitutional protection against self-incrimination entitles an individual to remain silent in the face of questioning by law enforcement and prosecutors, but does not protect employees against

employment discipline. 40 Cal. 3d at 827. The Court reasoned that permitting an employer to impose discipline for refusing to answer questions does not violate the constitutional privilege, because any statement made under such compulsion, and any evidence derived therefrom, is inadmissible in a criminal case. *Id*.

The Court of Appeal in *Spielbauer*, however, found that although the Constitution makes employer-compelled statements inadmissible, employees should not be forced to rely on prosecutors and judges to respect the constitutional privilege. In the view of the Court of Appeal, the only way to make sure the prosecutor and judge will respect the constitutional privilege is through a formal grant of use and derivative use immunity, and a public employee therefore has a right to a formal grant of immunity before being required to answer the employer's questions.

The *Spielbauer* decision sparked intense interest in the law enforcement community, for numerous reasons, perhaps the most important of which is that the *Lybarger* rule has operated flawlessly for 25 years in creating a balancing of rights that serves all parties' interests, including the public's interest in police accountability. Law enforcement officers have a tremendous stake in this balancing of rights, because, as stated by attorney Mayer at the hearing, police work is the only field of employment where employees' job descriptions require them to engage in conduct that would be a crime if committed by a civilian, and that becomes a crime if it exceeds the officer's lawful authority. Alone among public employees, police officers are required to "lay hands on people against their will, use physical force against people, and take them into custody," conduct that becomes criminal if it crosses the line of what a court later decides was reasonable under the circumstances.

Because of the interest of the law enforcement community, the Supreme Court received several amicus curiae [i.e. "friend of the court"] briefs from interested law enforcement entities, and Santa Clara County Counsel Marcy L. Berkman shared her oral argument time with two notable amicus curiae counsel, Karen Huster from the Office of the Attorney General, and Martin Mayer on behalf of various law enforcement management organizations. Argument for appellant Spielbauer was presented by Douglas B. Allen.

County Counsel Berkman's basic argument was that the Supreme Court should simply confirm that *Lybarger* recognized an automatic, self-executing use and derivative use immunity for public employer-compelled statements, therefore a prior grant of formal immunity is not a prerequisite for compelling answers under penalty of insubordination. Amicus counsel Karen Huster assured the Court there is nothing radical about confirming such an implied immunity, as it already exists in mental competency and child custody

proceedings. Huster acknowledged that interference with prosecutorial prerogative is a legitimate concern, but argued that *Lybarger* immunity does not deprive the prosecutors of access to the information itself.

The emphasis given by the respondents' counsel enables the Supreme Court to reverse the Court of Appeal in *Spielbauer*, and to explicitly recognize the immunity principle that was previously implicit in the *Lybarger* opinion. Under that analysis, exclusion of compelled statements is viewed as a constitutional requirement that is triggered as soon as a compelled statement is made, not merely a remedy imposed when a court later finds that a constitutional violation occurred.

Martin Mayer followed with a panoply of policy arguments. In addition to the fact that law enforcement officers are required to engage in activity that would be criminal for civilians, Mayer pointed out that a requirement to obtain formal immunity would place an enormous burden on public employers.

Mayer explained that obtaining formal immunity entails at least three separate steps: First, there must be legislative authority for the immunity, which often does not exist and without which it is impossible to proceed to the other steps. Secondly, it requires approval of not only the local prosecutor, but since most crimes that can be committed by law enforcement officers also have a federal counterpart, immunity would also need to be obtained from the United States Attorney. Thirdly, immunity requires judicial oversight, which is largely impracticable outside the auspices of an actual pending criminal case.

On the opposite side of the ledger, when a citizen complaint is made, it is imperative for law enforcement agencies to obtain information expeditiously from the involved officers, without waiting for multiple prosecuting agencies to evaluate the request for immunity.

Mayer commended the amicus brief submitted by the Peace Officers' Research Association of California [PORAC], and pointed out that while PORAC is "not always marching in lock step" with his clients, it is doing so in this case. In the 25 years since the *Lybarger* decision, Mayer observed, he has never heard a prosecutor complain of interference.

Mayer concluded that it would be "tragic" if the Court of Appeal's *Spielbauer* decision "were allowed to be the law in California." It would interfere with employer investigations. It would prevent officers from being able to share their version of what happened in an incident. They often want to do that, but their attorneys would advise them against it. The *Spielbauer* rule would completely undermine law enforcement agencies' ability to comply with citizen complaint investigation requirement of *Penal Code*, section 832.5, which requires departments to have a written policy explaining how to file citizen complaints. And it would interfere with the *Government Code*, section 3304(d)

statute of limitations that requires investigations to be concluded in one year, because that deadline often could not be met if investigators were required to take all the steps necessary to obtain formal immunity before compelling statements from officers. While the other attorneys were peppered with questions from the panel, Mayer alone was given the opportunity to attain a level of sustained impassioned oratory.

Spielbauer's counsel, Douglas B. Allen, emphasized that a supervisor of public employees does not have the power to grant formal immunity from prosecution, but does have the power to terminate the employee. An employee should not be required to rely on a supervisor's assurance of immunity, because the employee must still hire an attorney to assert the immunity in court, and because permitting the supervisor to grant the immunity "makes inroads on the prosecutor's discretion."

Justice Baxter expressed a concern that since investigations would take longer to complete if the employer had to consult with prosecutors about immunity, there would be an increased burden of keeping employees on paid administrative leave. Allen answered that paid administrative leave has become a normal fact of life in public employment.

Echoing Justice Baxter, Justice Kennard pointed out that according to an amicus brief in the case, Los Angeles County conducts 4000 administrative investigations per year, many of which would be delayed if formal immunity were required. Allen responded that most investigations do not involve a potential criminal charge, and even those that do often do not depend on compelled statements. Allen cited a statistic that out of 200 administrative investigations conducted by Santa Clara County last year, only 30 to 40 entailed potential criminal charges.

Seeking to minimize the burden of consulting the district attorney, Allen argued that the district attorney always becomes involved at some point. Justice Corrigan branded that statement as "astonishing," observing that it is actually quite rare for the district attorney to become involved in investigating citizen complaints.

Although prediction based on oral argument is haphazard at best, none of the justices appeared sympathetic to the arguments made on Spielbauer's behalf, nor troubled by the County's arguments, except possibly for Chief Justice George, who mostly kept as silent as he often does. Of course, this case actually has little or no effect on the fate of attorney Spielbauer, who would probably be terminated for the underlying conduct of misleading the trial judge if his termination for insubordination is reversed.

Correspondingly, the Court's work is not done by simply declaring whether Spielbauer wins or loses. If the Court is inclined to reverse the *Spielbauer* decision and preserve *Lybarger*, it will nevertheless need to explain why the Court of Appeal erred in *Spielbauer*, and

in so doing, will likely need to interpret or explain *Lybarger* to some extent. In that context, the theory offered by the County furnishes a sound explanation: simply confirm that the Court in *Lybarger* recognized an automatic, self-executing immunity that is triggered as soon as the employee obeys an order to make a statement under penalty of insubordination.

But if the Supreme Court upholds the Court of Appeal decision in which Spielbauer prevailed, *Lybarger* would clearly be overruled. The overruling of *Lybarger* would inevitably raise several subsidiary legal issues that were mentioned at the hearing, but the discussion of those subsidiary issues made it clear that they are not raised by the *Spielbauer* case itself, and must await future cases for any definitive resolution.

For example, considerable attention was paid to the distinction that because Spielbauer was not a peace officer, he was not protected by the POBRA requirement that an officer under interrogation by the employer for a potential criminal charge must be advised of his or her constitutional rights (*Government Code*, section 3303(h)). The issue could not be decided in this case because Spielbauer was in fact given the standard *Lybarger* admonishment, even though it was not strictly required. But future cases would probably require the courts eventually to define the content of a post-*Spielbauer* admonishment for peace officers, and to determine whether independently of POBRA, similar admonishments should be given in other fields of public employment.

It would also be left to future cases to decide the precise threshold for imposing the immunity prerequisite on employers, and the extent of the immunity that would be required.

In the fullness of time, a case would reach the courts in which an employee who has not been offered immunity is terminated for disobeying an order to make a statement, and the employer defends the termination on the ground that there was no potential for criminal prosecution under the alleged facts. In that case, the courts would then decide the precise degree of probability of criminal prosecution that must exist before the employer is required to obtain immunity as a prerequisite for compelling a statement. There is considerable Fifth Amendment precedent in criminal law to give some guidance in resolving that question when it arises in employment law, and the courts would eventually set a legal standard for determining how probable criminal prosecution must be before the immunity prerequisite kicks in for the employer.

At some point, a case would arise where the employer obtained immunity from the district attorney, but the employee still refused to answer on the ground that federal immunity should also have been obtained. That case would give the courts the opportunity to decide whether or not immunity must be obtained from all potential prosecuting authorities.

If the law already requires state immunity, there seems to be no reason why federal immunity would not also be required. But additional future cases might raise the issue whether the immunity prerequisite also extends to the potential of regulatory and other quasi-criminal violations, and consequently whether under facts that raise such potentials, the immunity prerequisite also extends to bodies such as the Internal Revenue Service, or immigration authorities, or the Federal Trade Commission, or other similar bodies with quasi-criminal enforcement powers. Courts would probably tend to say yes to all these prerequisites when they arise, thus multiplying the employer burdens to speculate as to possible penal ramifications of personnel misconduct charges.

Meanwhile, if the Sixth District's *Spielbauer* decision is upheld, then without waiting for those hypothetical future cases, public employee and peace officer personnel investigations would immediately be crippled by the inability to compel statements without offering formal immunity. Many more investigations of citizen complaints against peace officers would result in letters to the complainant that the agency has conducted its investigation, that the time legally permitted for the investigation has elapsed without the agency being able to confirm or deny whether the alleged misconduct occurred, and that regrettably, the complaint must be classified as unresolved and no further action can be taken on the complaint. This is the predicable harm from abandoning the *Lybarger* rule, and is the main reason why that rule should be preserved.

We have written extensively in condemnation of the Court of Appeal opinion in *Spielbauer*, and why this opinion turns our long-trusted concept of police disciplinary investigations on its head. For example, see "What Will The Supreme Court Do With Spielbauer," a training bulletin at Vol. X, Issue 8 (2007).

STAY SAFE

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