LEGAL DEFENSE TRUST
Training Bulletin

MICHAEL P. STONE, GENERAL COUNSEL
6215 River Crest Drive, Suite A., Riverside, CA 92507
Phone (951) 653-0130 Fax (951) 656-0854

November 2007

WHAT WILL THE SUPREME COURT DO WITH *SPIELBAUER*?

Some Notes from Michael P. Stone

As we await the California Supreme Court's decision in *Spielbauer v. County of Santa Clara,* I thought it apropos to list the reasons why Spielbauer's analysis is problematic, and why, overall, we hope the Supreme Court will overturn it, and preserve the rule of *Lybarger v. City of Los Angeles*, in line with many other cases in the states and federal circuits.

What Does Spielbauer Hold?

In a highly unusual move, a lower appellate court (the Sixth District Court of Appeal) has seen fit to directly contradict our Supreme Court's holding in *Lybarger*, and opine that it was wrongly decided, at least insofar as *Lybarger* holds that a police employee can be discharged for insubordination and neglect of duty, provided before he is charged, he is told three (3) things, and thereafter is given a reasonable opportunity to answer, and avoid the lash of administrative discipline: (1) his/her Miranda rights; (2) that he/she is ordered to answer (compelled) for administrative purposes; and (3) that no fruits of the statement can be used against him/her for any purpose in a pending or subsequent prosecution against him/her; referring to the "use immunity" and derivative use immunity that arises by operation of law, rather than by way of a grant of prosecutorial or judicial immunity.

Spielbauer held that *Lybarger* and other cases missed the distinction in the Fifth Amendment's protections against compulsory self-incrimination, by commingling the two separable and different protections provided by that Amendment. The first of these is the right not to be compelled in any governmental inquiry, investigation or proceeding to incriminate oneself. This right is characterized as a protective right; i.e., to protect against self-incrimination. The other distinct right, says the *Spielbauer* court, is to be immunized from the use of that (unlawfully) compelled statement in any criminal proceeding. This "right" is characterized as remedial; that is, it ensures that after a person's right not to incriminate himself/herself has been unconstitutionally violated by compulsion (of whatever kind), the Fifth Amendment provides for a remedy, i.e., exclusion of the statement and its fruits. Indeed the *Spielbauer* court quarrels with other cases that this remedial device is not "immunity" at all, but rather operation of the exclusionary rule.

Consequently, *Spielbauer* held that a deputy public defender (Spielbauer) could not be discharged for refusing to speak by exercising his right against self-incrimination, notwithstanding that he was offered assurances of "non-use" roughly analogous to the *Lybarger* protocol, since he is not a peace officer. The ruling is that no public employer may compel an employee to make an incriminating statement, regardless of such assurances. Although, the court does acknowledge that if the employer does successfully compel the statement, any fruits would not be useable against the employee in a criminal setting.

On its face then, *Spielbauer* would aid only those who refused to speak; not those who permitted themselves to be compelled to speak, out of fear of discharge for the refusal to speak. So for these, whether we call it "use immunity," or "operation of the exclusionary rule," the result is the same.

What Is The Practical Effect Of Spielbauer?

Whether one views *Spielbauer* as good law or the right ruling, or as a wrong-headed aberration, probably more significant is the question of who the lawyer is and who is the client?

For the lawyer who is concerned solely with protecting the client's rights against self-incrimination, he/she would applaud this holding, because the client cannot be compelled to incriminate himself/herself, even in an "administrative only" setting, and cannot be penalized in his/her employment for invoking that right. And if the analysis were to stop right there, I would agree that it's a good rule.

However, when that rule is carried into the real world of police misconduct investigations, and its ramifications are critically analyzed, it may turn out to be not so good, after all.

First, the presently understood rules of *Lybarger*, *Garrity v. New Jersey*, *People v. Gwillum* and hundreds of others like them, have not, in my experience in nearly 30 years, been assailed by prosecutors or judges on the basis that the employers had no place in compelling statements in the first place, once adequate warnings were given. Indeed, in each federal or state prosecution I have been involved with, including the government's all-out assault on the officers in the federal "Rodney King" case in 1993, the prosecutors and courts have carefully walled-off any hint of compelled evidence to avoid a *Kastigar* challenge.

Second, in all those cases, my clients have not been actually prejudiced, because they made a compelled statement.

Third, I can point to a number of cases where strict application of the *Spielbauer* rule would have actually hurt the target defendants. Among these are the Rodney King cases, the 39th and Dalton raid case, the "Cargo Cats" corruption case, the Rampart corruption cases, and so on. The common thread running through all of these "high profile" cases is that there are multiple, potentially-targeted officers, participants and bystanders. After receiving independent legal advice that an officer could not be compelled to talk, and could not be punished for refusal, I doubt that any of the 20 or so LAPD officers within 200 yards of the King beating would have made a statement. The result is that none of the four targets would have had any clue what the other 16 plus officers would say. For if these choose to speak, they do so voluntarily and waive their Fifth Amendment rights because *Spielbauer* holds that they have no duty to speak.

The rule of *Lybarger* and others instead has permitted such officers to make statements without fear of criminal use because of the compulsion. If *Spielbauer* is correct, employers will no longer compel statements. The effect of this retreat will actually hurt the officers who are targeted because individual non-targets will not make "voluntary" statements if there is any chance those statements could be used against them administratively or criminally. And no competent lawyer would encourage them to make a voluntary statement. Thanks be to God in those cases I handled, non-targeted bystanders or participants were compelled to make statements and were compelled to testify by the Department's manual section on "duty to testify," with corresponding immunity for that testimony.

Fourth, it is also true that employers who cannot compel statements will have to rely only on voluntary statements. No targeted employee will make a voluntary statement. Hence, the cases will be adjudicated without essential information.

Fifth, delay in obtaining critical statements until the threat of any prosecution has passed works to the extreme disadvantage of the administratively targeted officers.

Sixth, when can an officer who wants to make a statement do so with protection? Never. Unless, that is, if he is "granted" official immunity as discussed below.

Seventh, how workable is the *Spielbauer* court's suggestion that employers can simply run down to the local prosecutor and get a grant of immunity so they can compel statements? Let's not be silly. At the outset of a serious case, no sober prosecutor is going to be handing out grants of immunity to some or all of the potential targets, just so the employer can do an administrative investigation.

Eighth, let's not forget the United States Attorney and the DOJ Civil Rights Criminal Division in Washington, and the California Attorney General. I would need grants of immunity from all these agencies before I would permit a target to make a statement.

Finally, I have always believed that a law enforcement agency must act promptly and diligently in investigating officer or deputy misconduct. Policies in many departments that put misconduct investigations into an indefinite limbo awaiting the outcome of a collateral criminal investigation do an injustice to the departments themselves, the public and the members of the agency. That is why the Bill of Rights Act at *Government Code* §3304(d) contains a one-year statute of limitations. Unfortunately, that section contains "tolling" provisions, that purport to exempt agencies from the statute, during the pendency of a criminal investigation or prosecution. But this tolling provision is misunderstood by agency officials, applied unevenly, and is most often employed to try to "save" a disciplinary proceeding that has not been completed with due diligence and timeliness. Often, cases are time-barred because agencies have misapplied the tolling provisions. I continue to believe that an agency should never attempt to "toll" a disciplinary investigation or action solely because of a "pending criminal investigation or prosecution" which is being carried out by the same employing public safety agency. No good reasons support doing this. Even where the "criminal investigation" is being conducted by an outside agency, there is no impediment to proceeding with due diligence on the administrative side. *"Tolling" delays justice; and justice delayed is justice denied.*

The Supreme Court has ordered the issue to be briefed and argued limited to this question: "*When a public employee invokes his or her Fifth Amendment right in a public employer's investigation of the employee's conduct, must the public employer offer immunity from any criminal use of the employee's statements before it can dismiss the employee for refusing to answer questions in connection with that investigation*?"

The grant of review of the Sixth Appellate District's *Spielbauer* decision triggered a spate of applications to file *amicus curiae* ("friend of the court") briefs in support of *Spielbauer* or the County of Santa Clara, with the scales tipped heavily in favor of the County. The only *amicus curiae* brief filed to date (September 14, 2007) in support of *Spielbauer* is that of the California Teachers Association. On the other hand, the lineup of *amicus briefs* in support of the County's position makes for some strange bedfellows: County of Los Angeles, Sacramento County District Attorney, California League of Cities, California State Association of Counties, California School Boards Association, California Public Employers Labor Relations Association, California State Sheriffs Association, California Police Chiefs Association, Peace Officers Research Association of California (PORAC) and its Legal Defense Fund (LDF).

It is rare indeed to find PORAC-LDF lined up with its customary adversaries in a case involving the constitutional rights of public (police) employees. The reason for this odd alignment is simple: the Sixth District Court of Appeals opinion is unworkable and actually poses a greater risk of harm or prejudice to officers who are targeted in mixed administrative and criminal prosecutions. The rule of *Lybarger* is a benefit to police employees which ought to be preserved.

Stay Safe!

Michael P. Stone

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 27 years, following 13 years as a police officer, supervisor and police attorney.