

## Public Employers May Discipline Employees for Not Answering Job Performance Questions So Long as Fifth Amendment Right is Protected

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The California Supreme Court, in [Spielbauer v. County of Santa Clara](#), S150402 (Feb. 9, 2009) recently 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.

In this case, Thomas Spielbauer, a Santa Clara deputy public defender, was terminated when he refused to answer questions in an internal investigation conducted by the public defender's office into his alleged misconduct. During the investigation, however, 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 significant win for public employers, the California Supreme Court recognized a public employer's need to quickly investigate and remedy alleged misconduct of public employees.

### Case Overview

Spielbauer was a Santa Clara County deputy public defender. The County initiated an investigation based on allegations that Spielbauer had made deceptive statements to the court while representing a criminal defendant.

When Chief Assistant Public Defender David Mann learned of Spielbauer's possible misrepresentation to a court, he contacted the District Attorney's office to discuss how to address this situation. The District Attorney stated that three options existed: to file misdemeanor charges against Spielbauer, to report him to the State Bar, or to leave it to the Public Defender's office to manage. Mann decided to initiate an internal investigation into Spielbauer's alleged misconduct.

Spielbauer retained counsel in the matter, who was present when Mann and two other Public Defender office representatives interviewed Spielbauer. When asked to address the possible misrepresentation, Spielbauer's counsel interjected that Spielbauer refused to answer on grounds of the protection of the Fifth Amendment, which insulates individuals from self-incrimination. A representative from the Public Defender's office told Spielbauer the following: "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 Public Defender office representatives again advised Spielbauer that because this was an internal investigation, Spielbauer 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 termination. The representatives also reiterated that any information provided in the interview could not and would not be used against him in a criminal case. Spielbauer's counsel objected that this protection only applied to peace officers, and again instructed Spielbauer not 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 granted review and limited its review to determining whether, when a public employee invokes the Fifth 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. To this, the California Supreme Court answered, no.

In its analysis, 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 *acriminal* proceeding, regardless of whether or not the employee has been granted advance formal immunity. Nonetheless, the court opined that it may be necessary for public employees to answer official questions, and where 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 next turned to 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 also 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.

In so finding, the court recognized that 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. What the privilege does is protect that employee from criminal repercussions based on any information provided to the public employer through its questioning. The court therefore opined that a public employee answering an employer's inquiries, even without a formal grant of immunity, would still be entitled to proper application of the privilege should an attempt be made to use the information in a subsequent criminal proceeding against the employee.

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:

- 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 *wave* 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.

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