SCHOOLS LEGAL SERVICE

LABOR AND EMPLOYMENT LAW UPDATE

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THE SPIELBAUER ADVISEMENT: INVESTIGATING JOB-RELATED CONDUCT WHICH MAY HAVE CRIMINAL RAMIFICATIONS

As a follow-up to the January 2014 Labor & Employment Law Update by Tim Salazar entitled *Weingarten Rights: Revisited*, district administrators involved in employee investigations of job-related conduct which may subject an employee to not only discipline but criminal prosecution should be aware of a fairly recent California Supreme Court ruling in *Spielbauer v. County of Santa Clara* (2009)[1] which suggests that protection of an employee's right against self-incrimination requires a clear advisement at the outset of the investigatory interview that the employee's compelled answers may not be used against the employee in a subsequent criminal proceeding.

The plaintiff in the case, Tom Spielbauer, was a deputy public defender for the County of Santa Clara under investigation by his employer for misrepresenting facts to the court. Deceit of a court can subject an attorney to State Bar discipline as well as criminal sanctions. As part of its investigation, the County Public Defender interviewed Spielbauer. It was explained to Spielbauer that the investigation was not a criminal proceeding. It was further explained that nothing that Spielbauer said in his interview could be used against him in any subsequent criminal proceeding. It was also made clear by Spielbauer's employer that in the event that Spielbauer refused to answer questions, his refusal would be deemed insubordination leading to administrative discipline up to and including termination. Spielbauer's attorney advised him to remain silent, and that is what Spielbauer did. Spielbauer was terminated on grounds of insubordination (stemming from his refusal to answer the investigator's questions) and the underlying ethical misconduct in misleading the court through false statements. Spielbauer challenged his termination based on his refusal to answer questions claiming that the County was first required to give him a "formal grant of criminal use immunity."

Spielbauer's challenge raised the following issue for public employers: In a noncriminal public employment investigation, does the public employer have to "seek, obtain, and confer a formal guarantee of immunity before requiring its employee to answer questions related to that investigation" where the result of the employee's refusal would be termination or other job discipline? The Supreme Court said, "no." Under both the federal and state Constitutions, a

[1] *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704.

public employer can compel an employee to answer questions about job-related conduct without making a formal grant of immunity, and can terminate or otherwise discipline an employee for refusing to do so, provided that the employer does not, on threat of dismissal, require that the employee waive the constitutional protection against criminal use of those answers. Notably, since Spielbauer was told that his compelled statements could not be used against him in a subsequent criminal proceeding, the Supreme Court refrained from deciding whether public employers must give such advisements in order to properly terminate an employee for his or her refusal to answer questions during a noncriminal, internal investigation.

In light of *Spielbauer*, districts should consider giving a *Spielbauer*-type advisement when investigating an employee for job-related conduct which could also lead to subsequent criminal prosecution, particularly where a charge of insubordination is based on a refusal to answer. Such an advisement may look something like this:

> "This is an internal investigation which could lead to employee discipline, not a criminal proceeding. Any statements made by you cannot be used in a subsequent criminal case. You are directed to answer my questions and any refusal will be deemed insubordination, leading to administrative discipline, up to and including termination of your employment."

In addition, districts are well-advised to involve legal counsel any time employee conduct may have criminal ramifications. While the court recognized the "strong interest" in a public employer's ability to act promptly and freely in response to employee misconduct and breach of public trust, the employer cannot force the employee to waive the constitutional right against self-incrimination in order to avoid discipline. Instead, the employee should be specifically advised that he or she retains that right and, therefore, may be disciplined for refusing to answer the employer's questions, including termination of his or her employment.

As always, if you have any questions concerning this update, please do not hesitate to contact us.

– Kelly A. Lazerson
