

Endorsements underway with IBPO blessing of Kerry

The season of endorsements of Presidential candidates by police unions has begun with the International Brotherhood of Police Officers (IBPO) announcing it is switching horses and backing presumptive Democratic nominee John Kerry. In 2000, the IBPO endorsed George Bush in his initial bid for the White House.

In making the endorsement, IBPO President David Holway said, "After three and a half years of disappointing leadership under George Bush, we need to change course in November and elect a president with a real record of supporting police officers and a lifetime of standing for law enforcement."

IBPO, an affiliate of the AFL-CIO through its parent union the Service Employees International Union, backed Bill Clinton in 1992 and 1996. It jumped to the Bush camp in 2000 while still under the leadership of its founder Kenneth Lyons.

Meanwhile, the Bush-Cheney campaign announced it will court the support of emergency personnel. In late April, the campaign announced establishment of the "Bush-Cheney '04 National First Responder Team." The group is headed by two well-known former New York City public safety officials. Ex-Fire Commissioner Thomas Van Essen and ex-Police Commissioner Bernard Kerik, who announced formation of the organization on April 21. In making

the announcement, the co-chairmen touted the administration's 2005 budget allocation of over \$3.5 billion to state and local first responders. They claimed the amount was a \$3.1 billion increase in funding from the previous administration's last budget.

Announcement of which candidate will receive the support of the Fraternal Order of Police (FOP), the International Union of Police Associations (IUPA), AFL-CIO, and the National Association of Police Organizations (NAPO) will likely not be forthcoming until late summer, when the groups have had the opportunity to review the candidates and, in the cases of IUPA and NAPO, hold their national conventions.

The Bush campaign's combining of both fire fighters and police officers into a single campaign organization provides some political cover for the lack of formal support from the national fire fighters' union. The International Association of Fire Fighters, AFL-CIO, was an early endorser of Senator Kerry.

Political observers see homeland security and concurrent first responder issues continuing to be one of the primary issues during the campaign. Consequently, endorsements from public safety unions are viewed as having greater political value in this campaign than in prior runs for the Presidency.

Police labor groups spar about overtime changes

In a cooperative effort the International Union of Police Associations (IUPA), AFL-CIO, the National Association of Police Organizations (NAPO), and the International Brotherhood of Police Officers (IBPO) have collectively questioned the Department of Labor's (DOL) claims that the new overtime rules will not harm police officers.

Leaders of the three organizations voiced misgivings about the candor and honesty of the DOL's pronouncement in April that the new overtime rules protect law enforcement officers "regardless of

rank or pay level." The coalition bases its suspicions on fears that officers who perform some supervisory duties will fall outside the protective category and lose overtime eligibility. Specifically, the unions note that the DOL's failure to explicitly name sergeants and higher ranks in the regulations or to adequately describe their duties may leave them without protection and subject them to losing overtime. The unions claim that the lack of a clear definition of the status of these officers may result in a significant amount of costly litigation to clarify the impact of the rules.

According to the three unions, police managers who have a primary duty of managing, even though they perform some police duties, could be considered ineligible for overtime under the new rules more easily than under the old rules. The parties criticized the DOL for not defining the line between management and police duties for officers above the street level.

The IUPA/NAPO/IBPO claim appears to be a shot at the Fraternal Order of Police (FOP) as much as a statement of concern over the actions of the DOL. When DOL issued the new rules, the FOP publicly took credit for protecting the overtime rights of police officers and publicized a "thank you" letter from Labor Secretary Elaine Chao. NAPO, in a legislative update on its website, claimed success for forcing the DOL to "back off" and asserted, "Any purported 'labor' group that takes pride in its efforts to help this DOL accomplish its goal of reducing overtime for so

many workers as long as its own members are taken care of should be ashamed of itself.'

The coalition of police unions claims that the only bar to future litigation is the so-called Harkin Amendment which would freeze overtime rights for workers at the level enjoyed on September 3, 2003. The proposal, named for its chief sponsor Senator Tom Harkin (D-Iowa), would allow updates to the Fair Labor Standards Act regulations but the changes would not affect overtime eligibility of current workers. The Senate narrowly approved the amendment on May 4 but its fate in the House of Representatives is uncertain.

FOP Grand Lodge President Chuck Canterbury expressed "profound disappointment" at the Senate's approval of the Harkin Amendment. The FOP claims that the Harkin Amendment is unnecessary and actually jeopardizes an expansion of overtime rights for public safety personnel.

New Hampshire police union drops unique job action

Police unions utilize a variety of techniques to gain public support and exert political pressure on municipal officials. Commonly, unions resort to billboards, newspaper advertisements, and pickets to present their case. Job actions such as work slowdowns or even the "blue flu" have been seen in recent years.

In early May, however, Rochester, New Hampshire, officers tried a technique that may well backfire. Local 580 of the International Brotherhood of Police Officers (IBPO) called for a boycott of local merchants. The union urged members of all unions to participate in the boycott after the city council rejected a factfinder's report that was favorable to the police officers. The union's labor contract expired last July,

The union admitted a boycott would hurt residents and businesses but believed business owners would blame the city council. "If businesses want

unions to put food on their table by patronizing them, then we're just asking them to stick up for us so we could put food on our tables," said Stephen Burke, President of Local 580.

However, the Greater Rochester Chamber of Commerce condemned the boycott, saying it was unacceptable to use businesses as leverage in contract negotiations. "The action proposed by the police union severely affects the strong relationship of support which has always existed to advance and promote the general welfare and prosperity of all chamber members and to enhance the quality of life in the area," the chamber said in a prepared statement.

A few days after instituting the boycott the union suspended it but refused to apologize to the town's merchants. Instead the union threatened to reinstitute the boycott if negotiations with the city languish.

Local 580 represents about 35 officers in the New Hampshire town.

San Antonio overtime pay scrutinized

While overtime eligibility is debated on the national level, some San Antonio, Texas, police officers have good reason to want maintenance of the *status quo*. A local newspaper discovered that

while the average San Antonio officer made \$3,000 annually in overtime compensation, the ten best-paid officers in the department made nine times that - more than \$27,000 in overtime. The discovery, reported

in early May by the *San Antonio Express-News*, comes against a backdrop of a city deficit of \$42 million and police overtime expenditure of more than \$2 million above its budgeted amount.

The top overtime earner, according to the newspaper, was a detective - Richard Martin. Martin made most of his \$45,000 in overtime compensation working on a federally-funded traffic enforcement grant targeting intoxicated drivers. Martin's salary for the year was a reported \$110,500. An officer in charge of handling parades has averaged \$32,000 per year in overtime since 1998 while a sergeant received in excess of \$25,000 every year since 2001 by working extra shifts at the automobile impound yard. In 2003, at least 15 officers boosted total earnings to more than \$90,000 thanks to overtime.

Police officials largely blame understaffing, a position the San Antonio Police Officers Association (SAPOA) agrees with. The parties disagree, however, on the degree of understaffing. A 2002 study by the union concluded that the department was short 1,500 officers, based on cities of similar size and crime rate. Chief Albert Ortiz places the shortage at about 140 officers. San Antonio employs 1.6 officers per 1000

population while the national average for cities over one million population is 3.5 officers per 1000. The San Antonio police/citizen ratio is the lowest of any of the major cities in Texas.

The newspaper's investigation found that court time was a major contributor to the overtime overrun. The police department has spent an estimated \$3 million since 1998 to pay officers for 80,000 hours they did not work. Because of the collective bargaining contract between the city and the SAPOA, off-duty officers who must attend court receive a minimum of three hours overtime pay regardless of the actual time spent at the courthouse. According to the newspaper, officers averaged 49 minutes of actual court time in qualifying for the three hours of overtime. Police officials lay part of the blame on an inefficient judicial system over which they have no control. The scheduling and resetting of criminal cases compounds the overtime problem, command personnel said.

Average base pay for a San Antonio police officer is about \$44,000. Department policy is to pay overtime in cash instead of using compensatory time as is common in many Texas agencies.

Supreme Court Update

As the Supreme Court moves towards its summer recess one case of interest to police labor professionals has been filed recently. In *Petit v. City of Chicago*, Illinois, No. 03-1458, a group of police officers is challenging a race-based promotion procedure initially implemented in 1975. Specifically, non-minority candidates for sergeant positions claim that the city's use of standardized test scores to resolve allegations of adverse impact was unwarranted and unconstitutional. No review decision has been made as of yet.

Litigation

Secondary Employment

In 2000, the union was engaged in picketing in support of a strike against Phillips at the company's Memphis, Tennessee, facility. Specifically, the picketers tried to call non-striking employees "scabs," tried to shout slogans at the non-picketing employees, and tried to use sound amplifying devices to convey their

message. In the course of the strike, the City of Memphis provided police services and Pro-tech Security provided security services at the facility. Certain security officers employed by Pro-tech were off-duty officers with the Memphis Police Department (MPD).

The union filed suit against Phillips, the city, and the security company alleging that during the strike on-duty and off-duty officers of the MPD attempted to

interfere with their members' rights under federal labor law. The union alleged that on-duty MPD officers conferred with agents of Phillips and Pro-tech before confronting members of the union and their sympathizers on the picket line. The union sought an injunction as well as monetary damages. The city, Phillips, and Pro-tech Security moved for summary judgment, which was granted by the trial court. The union

appeals.

HELD: The union alleges that the defendants conspired to violate the union's right to picket as protected by the National Labor Relations Act and the Constitution. To support a claim against a municipality, a plaintiff must allege that the agents of the municipality, while acting under color of law, violated the plaintiff's constitutional rights and that a municipal policy was the moving force behind the violation. No doubt exists that the union has pled sufficiently that on-duty officers were acting under color of law and that rights were violated.

The union must also plead that a municipal custom established by policymaking officials, or their acquiescence to an established practice, was the cause of the unconstitutional behavior. The union's allegations that the unlawful actions were part of an established practice of misconduct is sufficient to move this part of the suit to trial.

As to the allegations regarding off-duty police officers, the union should also be permitted to make its case in court. It is the nature of the act performed, not the clothing of the actor, or even the status of being on-duty or off-duty that determines whether the officer has acted under color of law. Manifestations of official authority include flashing a badge, identifying oneself as a police officer, placing an individual under arrest, or intervening in a dispute between third-parties pursuant to department regulations.

In this case, off-duty police officers are employed by a private firm to provide security services

for the private company. The union alleges that the officers harassed and intimidated them. Under the facts alleged it is possible that an on-duty police officer working the picket line confronts a union member one hour, goes home and changes uniforms, and comes back to the exact same picket line as an off-duty police officer working as a security guard and performs the same act. Under these circumstances the line separating what is or is not "acting under color of law" becomes blurred, if not indistinguishable. Consequently, the union has sufficiently pleaded that the off-duty police officers were acting under color of law.

To show the city responsible, the union must establish that the city was not merely negligent in allowing the on-duty/off-duty police officers to engage in unlawful behavior but was deliberately indifferent to the rights of union members. When deliberate indifference exists such a shortcoming can be properly thought of as city custom or policy for purposes of a federal civil rights suit. Construing the pleadings in the light most favorable to the union, it sufficiently alleges knowledge on the part of policymaking officials to permit the matter to go to trial.

Similarly, the union has alleged sufficient facts to raise the possibility of a conspiracy among the company, the security firm, and the city and its police officers. A civil conspiracy is an agreement between two or more persons to injure another by unlawful actions. Each conspirator need not have all the details of the illegal plan or

know all of the participants involved. All that must be shown is that there is a single plan the alleged co-conspirators shared in the general conspiratorial objective and that an overt act in furtherance of the conspiracy caused injury to the complainant. In the present case all the elements of conspiracy are sufficiently alleged. Summary judgments reversed and matter continued toward trial against city, business, and the security company. Reversed for union. [Memphis, Tennessee Area Local, American Postal Workers Union, AFL-CIO v. City of Memphis, Tennessee, 361 F.3d 898 (6th Cir. 2004)]

Handicap Discrimination

King suffered a line of duty injury when the patrol car he was operating struck a deer and then collided with a tree. As a result of the accident King suffered injury to his lower back. He was off the job nearly two years while he sought medical treatment for the injury. The doctors stated he was disabled from regular police duties but could perform light duty that did not require bending or lifting. The chief of police directed King to report for light duty. However, King opted not to report for light duty and filed an application for disability retirement. He continued to see various doctors, all of whom generally agreed that he could do sedentary work with minimum lifting. Pursuant to state law, he continued to receive his salary while on medical leave. His doctor drafted a report to the town stating that King could perform certain police activities but only for two to four hours per day.

Eventually he reported to work and asked the chief to inform him of his specific duties. The chief told King he did not know what specific duties would be assigned. King then asked for his

had no available light duty assignments nor any officers currently assigned to light duty. King was ultimately terminated from the force as there were no duty assignments for him in the

functions of the job. Evidence of whether a particular function is essential includes, but is not limited to, the employer's judgment as to which functions are essential, the written job description, the amount of time spent performing the function, the consequences of not requiring the employee to perform the function, the work experience of past employees in the position, and the current work experience of employees in similar positions.

Prior case law holds that reassignment of a disabled employee to a light duty position is well established as a reasonable accommodation under the ADA. However, the employer is not obligated to create a new light duty position for a disabled employee or make permanent previous temporary light duty positions.

In this case the record is unclear as far as what are the essential functions of a police officer. The collective bargaining agreement with the union does not contain a job description nor was a job description entered into evidence. Similarly, there has been no testimonial evidence concerning physical abilities that are absolutely essential for the performance of the job of police officer. Further evidence needs to be received on this matter and the motion for summary judgment on this issue is denied.

specific assignment in writing, which the chief declined to provide. The chief told King he would be disciplined if he did not perform his work assignments as given. At this point King informed the chief that he required a place to lie down in order to perform the light duties, an accommodation that the chief said was not mentioned in the medical reports. King also informed the chief that he might need to take pain medication while on duty. At that point the chief allegedly sent King home and told him to call daily about the availability of light duty. The next two days King reported to work and again the chief sent him home because he had no further information about King's duties.

police department. King sues his former employer alleging a violation of the Americans with Disabilities Act (ADA) as well as New York law prohibiting discrimination against handicap employees. He further sues various city officials, including the police chief individually, for handicap discrimination. Town and individual defendants move for summary judgment.

HELD: The town argues that King is not "a qualified individual with disability" as defined by the ADA because he is physically unable to perform the essential duties of a police officer. To be "a qualified individual" within the meaning of the law, the plaintiff bears the burden of proving that he is qualified to perform essential functions of the police officer position, with or without reasonable accommodation.

The city then moved to terminate King's injury-on-duty benefits. Following the hearing the town supervisor concluded that King had forfeited his injured-on-duty benefits by failing to perform the light duty. A few months later King requested the new police Chief to allow him to return to light duty. This request was denied on the grounds that the department

Whether an individual's inability to perform certain tasks renders him unable to perform the essential functions of police work requires a fact-specific inquiry. To make that determination the court must first determine what behaviors constitute the essential

The town argues that even if King is a qualified individual with a disability, his request for a regular light duty assignment is not reasonable because he seeks the assignment on a permanent basis. Prior case law holds that reassignment of a disabled employee to a light duty position is well established as a reasonable accommodation under the ADA. However, the employer is not obligated to create a new light duty position for a disabled employee or make permanent previous temporary light duty positions. Indeed, even lack of enforcement of the temporary nature of "temporary" light duty

assignments does not transform such assignments into permanent positions.

King's request for a permanent light duty assignment fails as a matter of law because the record clearly demonstrates that this position does not exist in the town's police department. With no permanent light duty police assignments available, the town is not required under the ADA or New York anti-discrimination law to accommodate King by creating such a position for him.

As to the individual liability of various municipal officials for alleged handicap discrimination, it is well-settled that under the ADA an individual may not be held personally liable. Liability belongs to the employer not to the individual supervisor or agency head. New York anti-discrimination law, however, does provide for individual liability if the individual in question actively participated in the conduct that gives rise to the discrimination claim. The record reveals evidence of active participation on all five named individual defendants. Their motion for summary judgment is denied. The matter to proceed to trial on the question of individual liability. [King v. Town of Wallkill, New York, 302 F. 2d 279 (S.D.N.Y. 2004)]

Dismissal Grounds

Sims had been a member of the police department for about one year when he was ordered to sign a felony complaint that he believed was unjustified. When he protested, a lieutenant told him he could be fired if he refused to sign the complaint. Sims

subsequently reported the incident to the state's attorney's office and an investigation ensued.

Meanwhile, Sims learned that a fellow officer had tested positive for drug use. Following an informal meeting with other officers Sims co-authored a memorandum expressing concern over working with an officer that tested positive for drugs. The memorandum requested the officer be terminated. Sims and nine other officers signed the memorandum and forwarded it to the chief of police and the village administrator. Several of the officers were subsequently approached by the police chief and requested they remove their name from the memo. All but four officers complied with the request.

A few days later an anonymous flyer was distributed throughout the police department reporting the officer's drug use and criticizing the department's handling of the situation. Sims became the focus of the investigation regarding the memo's author. As part of the investigation, he was fingerprinted.

About the same time Sims began experiencing problems with his knees and ankles. A physician diagnosed him with polyarthritis. Sims requested and was approved sick leave.

Several months later, while still on leave, Sims submitted a written request for leave under the Family and Medical Leave Act (FMLA). He subsequently received a letter advising him that his FMLA request was approved and that his employment was also being terminated for taking more than 12 weeks of leave. He was further informed that department

records were to reflect his failure to cooperate with the investigation concerning the flyer.

Sims filed suit claiming his termination was in violation of his First Amendment free speech rights as well as his rights under the FMLA. Village officials move for summary judgment.

HELD: Under the First Amendment, public employees enjoy a qualified right to speak out. In determining whether the First Amendment free speech right exists, the court must determine whether the employee speaks as a citizen upon matters of public concern. If the answer is affirmative, the court must balance the employee's interest in expressing himself with the interest of the state - his employer - in promoting the efficiency of the public service.

In determining whether speech is a matter of public concern the court must look to the content, form, and context of the speech. Contrary to the defendant's contention, speech designed to expose potentially unjustified felony charges brought against a member of the community and to prevent a police officer with a possible substance abuse problem from patrolling the community are both matters of public concern.

The village argues that the comments were not meant as public concern because they were made during the course of Sims' employment. This argument is without merit. Sims' decision to report the alleged unjustified felony charges and to write a memo criticizing departmental practices cannot

be characterized as part of his routine job duties. Since Sims' actions were not part of his routine job duties, prior case law that refuses to afford First Amendment protection to comments made during the course of one's duties does not apply.

The police chief and police lieutenant assert qualified immunity. Under the doctrine of qualified immunity, public officials performing discretionary functions are generally shielded from liability unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. The test is as to whether a reasonable official

have known that Sims was making protected statements.

Sims further alleges that he was deprived of his rights under the FMLA because his employer failed to notify him that his initial sick leave counted as FMLA leave. The village argues that there was no violation because employers are entitled to retroactively classify paid leave as FMLA leave. FMLA grants eligible employees up to 12 weeks of unpaid leave each year that they suffer serious health conditions. However, employers may require that any accrued paid leave be substituted for any of the 12 weeks of leave. Under federal regulations, employers generally have two business days to provide

summary judgment on this issue denied. Continued for further proceedings. [Sims v. Schultz, 305 F. Supp.2d 838 (N.D.ILL. 2004)]

Civil Liability

County dispatchers received a call about a domestic assault by Hanson. The dispatcher notified law enforcement that Hanson was driving a blue vehicle and was believed to be armed and intoxicated. Local authorities immediately initiated a search for Hanson. About 30 minutes later, a trainee dispatcher took a call from Hanson's girlfriend. She related that Hanson had told her he was going to get up to 80 miles per hour and crash into the police cars that were surrounding him. The trainee dispatcher considered these threats suspect because the police had not yet located Hanson. Nevertheless, upon completing the call the trainee told the on-duty dispatcher that Hanson was suicidal. It was not mentioned that Hanson intended to crash his car into the police.

A few minutes later, police officers spotted Hanson's vehicle and began pursuit. About the same time, Cubit, a state trooper, ended his dinner break and, upon turning on the radio, learned of the chase. Less than a minute later, the county sheriff asked the dispatcher to request state assistance. Cubit, hearing the request, told the dispatcher that he would head in the direction of Hanson. Cubit did not hear the broadcast saying that Hanson was suicidal.

Cubit subsequently parked his vehicle on the shoulder of the road and put out "stop sticks"

Contrary to the defendant's contention, speech designed to expose potentially unjustified felony charges brought against a member of the community and to prevent a police officer with a possible substance abuse problem from patrolling the community are both matters of public concern.

would understand that what he was doing was unlawful.

It has been clear for years that speech about police protection and public safety raises matters of public concern. It is also clear that law enforcement officers whose communications are not only designed to convey information of possible crimes but additional facts relevant to the manner and scope of an investigation are entitled to First Amendment protection, unless the communications fall within the routine discharge of assigned duties. The police chief and police lieutenant are not entitled to qualified immunity in this situation as a reasonable person in the same position would

an employee with notice that leave will be designated as a FMLA qualifying leave.

The village was aware from the start of Sims' sick leave that it was potentially FMLA qualifying yet failed to designate it as such until 12 weeks had passed. Had the village properly designated Sims' leave as FMLA leave, it is conceivable he might have taken intermittent or part-time leave so as not to exceed the allotted 12 weeks.

Looking at the matter from Sims' perspective, he can likely show he was prejudiced by the village's failure to immediately designate his leave as FLMA leave. Village motion for

to puncture the tires of Hanson's vehicle. As Hanson approached the "stop sticks", he swerved across several lanes of traffic directly towards Cubit's patrol car. Although Cubit started running he was struck by his patrol car when it was hit by Hanson's vehicle. The trooper was seriously injured.

Under department rules, trainee dispatchers were not to work on their own but to be supervised at all times. The trainee in this case, however, had not completed her training and was not supervised when she took the call from Hanson's girlfriend because the regular dispatcher was occupied with other duties. The trainee failed to pass on the information about Hanson's intention of crashing into officers chasing him despite the fact that she was supposed to do so.

Cubit filed suit against the county claiming the trainee dispatcher was neglect in failing to provide another dispatcher with the information regarding Hanson's intentions and that the county was negligent in failing to adequately supervise the trainee dispatcher. The county responded by claiming it was immune from liability under Iowa statute. Trial court dismissed the suit holding the county immune for suit. Injured trooper appeals.

HELD: Trial court found the county immune from liability under the Iowa statute granting immunity from a "claim based upon, or arising out of, an act or omission in connection with an emergency response." Cubit alleges, however, that this immunity does not apply to emergency responders, such as himself, but

only to members of the general public nor does it apply to his negligent supervision claim.

For the first proposition, Cubit cites an Iowa court ruling stating that the immunity exists because the government has a strong interest in providing services for citizens. Cubit mischaracterizes the holding in that case, however. It is well established that a statute is to be given its plain meaning if the meaning is clear. No language in the statute indicates a legislative intent to limit the immunity granted only to claims brought by non-governmental employees. The statute, in fact, uses the term "all claims." A court will not read a limitation of the statute that is not supported by words chosen by the legislature. There is no merit in Cubit's contention that emergency response immunity does not protect the municipality from liability for injuries to emergency responders.

Cubit further alleges that the negligent supervision claim falls outside the scope of statutory immunity. However, it is clear the statute applies to all claims arising out of and based on an emergency response. While the statute does not define the phrase "arising out of" the commonly understood meaning is "originating from, or growing out of, or flowing from" and requires some causal relationship between injury and the risk for which coverage is provided. The claim of negligent supervision must include as an element an underlining wrongful act committed by the employee. Here, the only wrongful act committed by the dispatcher was the failure to inform Cubit that

Hanson planned to drive his car into the police. It is undisputed this act occurred during an emergency response. Consequently Cubit's negligent supervision cannot be proved without the proof of the dispatcher's act during the emergency. As such, the negligent supervision claim is one arising out of an act or omission in connection with an emergency response and falls within the scope of an immunity statute.

Finally, Cubit claims that the county owed him a duty based on a special relationship between him and the county because he was assisting local law enforcement. He asserts this special relationship takes the county out of the statutory immunity coverage. Even if the special relationship did exist, however, the statutory immunity from liability continues to cover this case. Legislature has granted immunity for all claims arising out of an act or omission of an emergency response. Dismissal of case. Affirmed. [Cubit v. Mahaska County, 677 N.W.2d 777 (Iowa 2004)]

Criminal Liability

Espejel was a police sergeant who was assigned to be custodian of the evidence room. A part-time officer, Carpenter, told the chief of police that 19 pounds of marijuana that had been seized in a drug bust were missing from the evidence room. The chief contacted Espejel and, after warning him of his rights, questioned him about the disappearance of the marijuana.

Initially, Espejel informed the chief he had burned the marijuana in an incinerator to create more space in the evidence room. The

chief later received information from Carpenter that the bags that contained the marijuana were in the trunk of Espejel's patrol unit. After searching the trunk, the chief indeed discovered five empty brown bags with evidence tags attached to them. At that point Espejel was arrested and the state police were contacted to investigate the disappearance of the evidence. The state police detective interviewed Espejel and, once again, he said he had burned the marijuana in the incinerator. Two weeks later, however, Espejel recanted his first story and said he had left the marijuana in the trunk of his police unit and apparently it was stolen out of the trunk.

A few months later Espejel gave a final version of the circumstances surrounding the marijuana. At that time he admitted to a deputy sheriff that he had given

the evidence room key to Carpenter who had remove the marijuana and either sold it or disposed of it in some manner. Espejel said he received \$500 from Carpenter. Espejel was tried and convicted of malfeasance in office and was given a five year sentence. Espejel appeals.

HELD: Louisiana statute defines malfeasance in office as being committed when a public officer intentionally fails to perform any duty lawfully required of him or performs any such duty in an unlawful manner. At trial the state argued that Espejel violated the statute by failing to comply with the police department policy manual regarding destruction of evidence and misappropriation of evidence. However, under Louisiana law, prosecutions for malfeasance in office presuppose the existence of a statute or provision of law that

delineates an affirmative duty upon the official. Prior case law holds that if no such statute exists, the existence of a municipal ordinance will serve as the basis for prosecution.

In this case, however, the state failed to present evidence to prove the city actually adopted the police policy manual as a provision of law. Thus, the police policy manual cannot be considered "a provision of law" within the meaning of Louisiana statute because a certified copy was never offered as evidence of its authenticity and no showing was made that the manual had been enacted as a city ordinance subject to judicial review. The conviction cannot be sustained based solely on the violation of an internal departmental policy manual. [State v. Espejel, 867 So.2d 863 (La. Ct. App. 2004)]

Settlements

Anchorage, Alaska police officers

A five and one-half year labor deal has been inked between the Anchorage Police Department Employees Association and the Municipality of Anchorage. The union, which represents 450 police officers and civilian employees, agreed to no salary increase for 2004 in order to help the city balance the budget. The union also relinquished thousands of hours of unfunded accumulated sick leave. For 2005 to 2008, personnel will average an annual wage hike of about 3.3 percent. With the first year wage pass, Anchorage police officer base pay will continue to range between \$43,118 and \$62,941.

Hillsboro, Oregon police officers

The 84 police officers represented by the Hillsboro Police Officers' Association will receive a two percent wage hike for 2004 under a new labor accord with the city. The pay increase for 2005 will be between 2.5 and five percent, depending on the Consumer Price Index. The city also agreed to pay for 100 percent of the officers' medical benefits but the deductible was raised from \$100 to \$200. For the first time the city will contribute one percent of each employee's salary to a fund workers may access for health benefits before and after retirement.

Omaha, Nebraska police officers

To assist in closing a \$10 million shortfall in the city budget, members of the Omaha Police Union, Local 101, have agreed to take a wage postponement in the first year of a new multi-year contract. The contract, which runs through 2007, defers a 3.5 percent raise scheduled for 2004 and spreads it over later years of the pact on top of annual 2.25 percent hikes. The contract originally contained limited benefits for same sex domestic partners but those provisions were removed by the union after worries about legal challenges. Omaha officers start at a base pay of \$39,944.

West Union, Iowa police officers

The West Union City Council and local police officers have agreed to a tentative labor contract. Members of the local police department, who became union members of Chauffeurs, Teamsters, and Helpers Local 238 in 2003, will receive a three percent wage boost in each of the next two fiscal years. Under the agreement, the city will pay single health insurance for all full-time employees. Any new hires and current employees eligible for family health insurance will pay 20 percent of the premium, while the city will pay 80 percent of the family premium. The police union is recognized as the bargaining agent for all full- and part-time employees of the department except the police chief.

***For subscriber access to
PLM Archives:***

User name: 0604P

Password: service

***Password use is restricted to two designated
representatives within your organization.***