

Local Government Law News

Salmon P. Chase College of Law ♦ Kentucky Department for Local Government ♦ Northern Kentucky University

Volume V, Issue 1

Winter 2003

NO CONSTITUTIONAL RIGHT TO COMPETENT RESCUE SERVICES

Citizens have no constitutional right to competent rescue services held the United States Court of Appeals for the Third Circuit in *Brown v. Commonwealth*, 318 F.3d 473 (3d Cir. 2003). The court said, "This case presents another example of a trend among plaintiffs who try to transmute their garden variety torts into cases of federal constitutional dimension."¹

The suit arose from the death of one-year-old Shacqui Douglas, who choked on a grape while at the home of his aunt in Philadelphia. When the aunt called 911 for help, the operator dispatched two city fire department EMTs and told her help was on the way. After two more calls and the lapse of ten minutes, the EMTs arrived. They took the boy to the hospital and tried to restore his breathing on the way. The grape was removed at the hospital, but the boy died two days later from asphyxia due to choking.

Afterwards the parents sued the EMTs on a negligence claim in state court, and they sued the EMTs, the city, and the state health department on a civil rights claim in federal court. The civil rights claim under 42 U.S.C. § 1983 alleged violations of the boy's right to life, liberty, personal security, and bodily integrity as protected by the due process clause of the Fourteenth Amendment. The state court dismissed the state claims, and the federal district court dismissed the federal claims. The parents appealed the federal district court's decision to the U.S. Court of Appeals for the Third Circuit.

Section 1983 provides a remedy to redress violations of the federal constitution and federal laws.² To prevail in their action, the Browns had to allege a deprivation of a right secured by the federal constitution. They asserted a violation of the substantive component of the Fourteenth Amendment's Due Process Clause. The doctrine of substantive due process holds that the Due Process Clause not only protects basic procedural rights, but that it also protects basic substantive rights. Substantive due process concerns the reasonableness of government policy or action and involves balancing individual rights against governmental interests.

To see if there was a constitutional right of the kind asserted, the court turned first to *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). *DeShaney* involved an allegation that the county denied a child due process when its social service department failed to intervene and protect him from the injuries he suffered at the hand of his violent father. In *DeShaney* the U.S. Supreme Court held that the Due Process Clause generally does not require the government to provide intervention or rescue services. Without a duty to provide protective services, it follows that government is not liable for injuries that could have been averted had the government provided the services. The clause operates as a limitation on the state's power to act, not as a guarantee of minimal levels of safety and security. Applying the *DeShaney* rule, the Third Circuit said that Shacqui had no right to be rescued or to be provided with competent rescue services.

Courts recognize two exceptions to the general rule laid down in *DeShaney*. One is the "special relationship" exception. It applies in limited circumstances, such as when the state takes a person into custody and holds him there against his will. In such cases the Constitution imposes on the government some responsibility for that person's safety and well-being. Circumstances of that kind were not present in this case.

The other exception is the "state-created danger" exception. This involves situations where the govern-

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DIRECTOR'S DESK

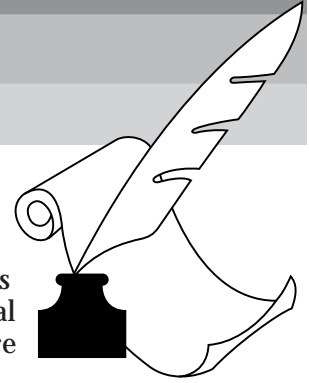
The fiscal situation for the states remains problematic in the short term. The Council of State Governments reports that states face a \$25 billion deficit for the remainder of 2003 and a projected revenue and spending gap between \$68 and \$85 billion for 2004. According to the National League of Cities, local governments face similar problems.

Several factors contribute to the situation. For example, the combination of a growing youth population and aging baby boomers stresses budgets. Sales taxes are becoming a less reliable source of revenue because of the shift to a service economy and because of a federal moratorium on taxation of internet sales. Further, the tobacco settlement agreement may not prove to be the windfall many expected.

The major state and local government associations are appealing to the federal government for relief. They endorse S. 201, the State and Local Aid and Stimulus Act of 2003. Sponsored by Sen. Charles Schumer (D-NY) and seven others, the bill would provide a one-time grant for state and local governments. It appropriates \$40 billion dollars for fiscal year 2003. The bill would distribute half the money to the states based on population. Of that \$20 billion, states would have to distribute \$10 billion to local governments, also on a population basis. The bill would distribute the other half of the money to states based on the change in each state's unemployment level from 2000 to 2002. Again, states would have to redistribute a portion of the monies received to local governments. The bill expresses the sense of Congress that priority for using the funds be given to homeland security, Medicaid, public health, highway construction, childcare, elementary, secondary, and higher education and the prevention of additional property tax increases. The bill is pending in the Senate Finance Committee.

The desire to prevent property tax increases underscores the dependency of local governments especially on the property tax. Nationally, the property tax contributes about 30 percent of state and local government revenues. In Kentucky, however, it contributes only about 17 percent. Sales taxes and income taxes carry most of the load in Kentucky. The sales tax share in Kentucky is near the national average, but the in-

come tax, including local occupational taxes, exceeds the national share by eight percent. Local property taxes remain well below the national average, although there are calls for reform.



In its 2002 report *The Road Ahead: Uncertainty and Opportunity in a Changed World*, the Kentucky Long Term Policy Research Center suggested that tax reform in Kentucky will likely be more successful to the extent it grapples with seven major issues. One is e-commerce. A study projects the loss of sales and use tax revenues from e-commerce at \$286 million in 2006. Another issue is the larger economy. A return to a period of low inflation, a transition from goods to services, and uncertainty about patterns of income growth will exert pressure on both revenues and spending.

The Center's report also identifies economic development as an issue. Tax credits from programs like those of KREDA, KDJA, KIDA, and KIRA, expanded availability of tax increment financing, and specific exemptions for certain businesses and investments reduce the growth of the tax base. As that happens, state and local governments respond by raising tax rates, which in turn increases demand for more exemptions from taxes. Changing demographic patterns, especially elderly population growth, also tend to weaken sales and income tax bases. The elderly tend to receive more in nontaxable or partially taxable income and make fewer taxable purchases. In addition, increased attention by business to minimizing the impact of state and local taxation, end runs around the states such as the federal moratorium on taxation of Internet access charges, and the prospect of increasing noncompliance with the tax laws present challenges to tax policy makers.

The Streamlined Sales Tax Project (<http://www.streamlinedsalestax.org>) is one response to these issues. The project is an effort of state governments, with input from local governments and the private sector, to simplify and modernize sales and use tax collection and administration. In March, with the passing and signing of HB 293, Kentucky became one of the first Streamlined Sales Tax Implementing States.

ment caused the harm or made someone more vulnerable to an existing harm. The Browns argued that the actions of the EMTs created or increased the danger to their son. Under this exception, however, it is not enough to show that a government or an official was negligent; one has to show “deliberate indifference.” Moreover, when the situation is one in which the government has to act with urgency, only conduct that “shocks the conscience” will suffice to establish liability under section 1983. Here, the actions of the EMTs in attempting a failed rescue did not shock the court’s conscience.

The city might also be liable under section 1983 for failure adequately to train its employees. To prevail on such a claim, someone in the Browns’ position would have to establish a causal link between some municipal policy and the alleged constitutional deprivation. Here the Browns could not establish that link

because the alleged failure to train the EMTs did not result in a constitutional harm since the city had no constitutional obligation to provide competent rescue services.

The U.S. Court of Appeals for the Seventh Circuit reached a similar result in *Salazar v. Chicago*, 940 F.2d 233 (7th Cir. 1991). In *Salazar* the estate of an intoxicated driver fatally injured in an automobile accident sued the paramedics who treated him at the scene. The extent of his injuries proved more serious than they appeared at the scene. By not taking Salazar to the hospital, the estate alleged, the paramedics and police deprived him of his life without due process of law. The Seventh Circuit also relied on *DeShaney* in concluding that “[g]overnment has constitutional duty to provide rescue services to its citizens, and if it does provide such services, it has no constitutional duty to

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KBEMS ENCOURAGES REVIEW OF FLOOD PLANS

[Editors Note: Our lead story this issue concerns liability under federal constitutional law when providing ambulance service. Kentucky, like most states, has a state agency that administers the state laws that regulate the provision of emergency medical services. It is the Kentucky Board of Emergency Medical Services. You can visit its home page at <http://www.kbems.org>. The Board issued the following advisory, which we pass along as a courtesy to our readers.]

KBEMS officials are issuing an advisory to EMS providers and medical first response agencies regarding emergency preparedness plans as they relate to potential flooding throughout the Commonwealth. Recent weather patterns have produced significant flooding in several Kentucky areas and those same weather patterns have set the stage for potential significant flooding in the near future including flooding along the Ohio. At this writing flood warnings still existed for multiple counties in the Commonwealth.

EMS entities should contact their local Emergency Management Agency to ascertain their role in the County Emergency Operations Plan (EOP) and to make preparations now for the provision of emergency medical services in flooding or high water conditions. This could potentially include maintaining service with reduced staff as a result of staff members or staff member’s family being involved in or directly affected by the flood. As a result, service directors should encourage their staff to get prepared as well.

Charles O’Neal, Deputy Executive Director stated that, “Ambulance providers should immediately make

plans to temporarily relocate their ambulance and dispatch operations should it become necessary. Providers should also be prepared to integrate into the operations of the local Emergency Operations Center should it be activated. Also, emergency medical personnel at all levels, should be prepared to operate in adverse environmental conditions for extended periods of time should flooding occur.”

EMS providers and personnel have functioned admirably during recent calamities that have included ice storms, flooding, and industrial explosions. The intent of this advisory is not to suggest that providers are not prepared to deal with emergencies that may face them, but merely emphasizes the need to bring out plans, review them, and provide staff with re-familiarization of those plans.

O’Neal further stated, “The old rule of the five P’s still applies – Prior Planning Prevents Poor Performance. Whether in the classroom or in the response arena, preparedness is key to success.”

Ambulance providers are encouraged to contact their regional Advisor/Inspectors, if needed, to assist them in reviewing their plans or developing an initial plan.

DECISIONS OF NOTE

KENTUCKY SUPREME COURT



Public Entity - Lawyer/Client Privilege

A discharged employee sought production of documents that the employer claimed were protected by lawyer/client privilege. Under Kentucky Rules of Evidence 503, whether a particular communication was privileged depends of the facts and circumstances under which a communication was made. The privilege does not attach just because the communication is subsequently forwarded to a lawyer. After the circuit court judge determined that certain documents were not privileged, the employer petitioned for a writ of prohibition. Because the employer was unable to show that the circuit court abused its discretion, the Supreme Court affirms the denial of the writ. *Lexington Public Library v. Clark*, 90 S.W.3d 53 (Ky. 2002).

Police Officers - Reverse Discrimination

Two police sergeants denied promotion to lieutenant challenged the practice of “banding.” The premise of “banding” is that all test results within a certain range are essentially equal. The practice was adopted to end the imbalance in the number of women and racial minorities in the ranks of sergeant, lieutenant, and captain and to facilitate the promotion of those historically underrepresented classes. The court’s majority finds no evidence to support a conclusion that the regulation in question was an invalid affirmative action plan. *Jefferson County v. Zaring*, 91 S.W.3d 583 (Ky. 2002).

Ethics Commission - Jurisdiction

The Commissioner of Insurance was appointed rehabilitator of the estate of an insurance company and later was appointed liquidator. After resigning as commissioner, his successor appointed him as deputy liquidator and later hired him as a consultant. The Executive Branch Ethics Commissioner initiated its own investigation into whether there were violations of KRS Chapter 11A. Arguing that the circuit court has exclusive jurisdiction over all matters related to the liquidation and that he was entitled to official immunity, the individual obtained summary judgment against the commission dismissing the proceeding. Reversing, the Supreme Court holds that the individual failed to exhaust his administrative remedies. Further, the individual is not entitled to official immunity from the charges. Immunity is not available to prevent an administrative agency from investigating that official for possible ethics violations. *Executive Branch Ethics Commission v. Stephens*, 92 S.W.3d 69 (Ky. 2002).

Zoning - Subdivision

A zoning commission rejected an application to divide a parcel into six lots because the septic discharge

from all six lots would drain into the same general area, contrary to the applicable ordinance. The owners challenged the ordinance on the ground that regulation of sewage disposal fell to the state government. The Court of Appeals rejected the preemption argument, which was not appealed. The owners also alleged a violation of section 2 of the Kentucky Constitution, arguing that the ordinance allowed for arbitrary discretion. In the opinion of the court, the ordinance’s direction that the condition “may not be permitted” confers no discretion on the commission. Neither does it invite arbitrariness by failing to provide sufficient standards on which to base a decision. *Stringer v. Reality Unlimited, Inc.* 97 S.W.3d 446 (Ky. 2002).

KENTUCKY COURT OF APPEALS



Land Use - Zone Change

Owners of land, denied a change of zone to allow them to construct a subsurface limestone mine, challenged the fiscal court’s decision as arbitrary. After examining the record, the court rejects the owners’ arguments that the proposed change complies with the comprehensive plan, that the existing zoning is inappropriate, and that changes within the area have altered its basic character. *Martin-Marietta Materials, Inc. v. Boone County Fiscal Court*, 89 S.W.3d 428 (Ky. App. 2002).

Ad valorem Taxes - Appeals

Taxpayers filed a class action suit challenging a city’s fixing of a tax rate in levying ad valorem real property taxes. The city claimed that the Kentucky Board of Tax Appeals (KTBA) had jurisdiction over the dispute. The trial court agreed and granted the city’s motion to dismiss for failure to exhaust administrative remedies. Finding that the city is not an agency of the state for KBTA purposes, the Court of Appeals reverses. City’s ad valorem real property tax rate was not part of integrated state tax system. Therefore, a taxpayer’s appeal of a denial of a refund is taken to the circuit court. *Light v. City of Louisville*, 93 S.W.3d 696 (Ky. App. 2002).

UNITED STATES COURT OF APPEALS



Police Officers - Unlawful Eviction

Residents of a transitional shelter for women were evicted with the aid of police and without following statutory eviction procedures. The tenants sued the police officers for violating their right against unreasonable seizures and for depriving them of property

without due process of law. The police officers claimed to be protected by the doctrine of qualified immunity. Recognizing that the participation of a police officer in an improper eviction constitutes a seizure in violation of the Fourth Amendment, the court finds the seizure here to be objectively unreasonable. In addition, the failure to afford these tenants notice and a hearing before eviction denied them due process. Because the police officers should have known that the evictions were unlawful and had no reason to believe that the evictions were justified by exigent circumstances, they are not entitled to qualified immunity. *Thomas v. Cohen*, 304 F.3d 563 (6th Cir. 2002).

Ethics in Government - Disclosure

An employee of the Lexington Fayette Urban County Government refused to comply with its Real Property Disclosure Policy. The policy required employees in certain divisions and members of their immediate families to disclose certain information about real property they owned. Disciplined and facing dismissal, the employee sought an injunction against the LFUCG arguing an invasion of privacy and an unreasonable search under the Fourth Amendment. As to the privacy interest, the court finds that the interest is not one of the fundamental interests protected by the right to privacy and, in any event, the public interest in disclosure outweighs any protected privacy interest. As to the unreasonable search, the court concludes that the employee has no reasonable expectation of privacy in the information sought. The appeals court upholds the trial court's denial of the injunction. *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566 (6th Cir. 2002).

Establishment of Religion - Capitol Grounds

Senate Joint Resolution 54, passed and signed in 2000, authorized public school teachers to post the Ten Commandments in classrooms when incorporated into a historical display. It also directed the monument inscribed with the Ten Commandments formerly displayed on the grounds of the state Capitol be taken out of storage and made part of an historical and cultural display there. The federal district court found the latter provision unconstitutional, and the appeals court affirmed. Applying the test of *Lemon v. Kurtzman*, the court finds that the state's purpose in drafting the provision was primarily religious rather than secular. In addition, the court found the provision to be an impermissible endorsement of religion. *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002).

Termination - Adulterous Affair

A deputy sheriff, discharged after his failure to comply with the sheriff's direction to end his cohabitation with woman married to another man, brought an action for wrongful termination. He asserted that the sheriff's action violated his right to freedom of asso-

ciation under the First Amendment, recognized in court decision protecting choices to enter into and maintain certain intimate relationships. Because prescriptions against adultery, like those against sodomy, have ancient roots, the court holds that the adulterous relationship does not warrant the constitutional protection afforded to other intimate associations. Therefore, the dismissal was not a violation of a constitutional right. *Marcum v. McWhorter*, 308 F.3d 635 (6th Cir. 2002).

UNITED STATES DISTRICT COURT



Establishment of Religion - Courthouse

A fiscal court gave a county resident permission to hang in the courthouse a display entitled "Foundations of American Law and Government." The display included the Ten Commandments among other documents. When opponents of the display moved for an injunction and for summary judgment, the court denied the motions and granted time for discovery to determine whether the county's stated secular purpose for the display was a sham. *American Civil Liberties Union v. Mercer County*, 219 F.Supp.2d 777 (E.D.Ky. 2002).

Juveniles - Strip Search

Juveniles in the custody of the Cabinet for Human Resources were suspected of having drugs concealed in their clothing or on their persons. When a search of their rooms revealed items associated with drug use, the juveniles were subjected to a warrantless visual strip search. No drugs were found during the search. The juveniles sued, alleging a violation of constitutional rights. Finding the searching officer qualifiedly immune, the court dismissed the complaint. Police officers are entitled to immunity, even if their conclusion turns out to be mistaken, if their conduct was reasonable. Here, the need to search wards of the state at a juvenile facility, the facts that heightened suspicion that the juvenile might have drugs, and the type and manner of the search made the search objectively reasonable. *Reynolds v. City of Anchorage*, 225 F.Supp2d 754 (W.D.Ky. 2002).

County Inmate - Medical Treatment

Staff of a county correctional center confiscated the medications of an inmate jailed on a shoplifting charge. The inmate later sued, alleging that the care received violated federal and state law. The court found that the former inmate failed to state a claim under the Americans with Disabilities Act, under the Eighth Amendment's prohibition on cruel and unusual punishment, and under state tort law. The claims against various persons in their official capacities were dismissed on official immunity grounds. *Smith v. Franklin County*, 227 F.Supp.2d 667 (E.D.Ky. 2002).

BE IT ORDAINED . . .

Elsewhere in this issue we reprint a story about motorized scooters. Reproduced below is an example of an ordinance regulating motorized scooters enacted by St. Louis, Missouri. Recently some states, including neighbors Ohio and Tennessee, adopted legislation at the state level specifically to regulate motorized scooters, but no bill of that kind was introduced in the 2003 Kentucky General Assembly.

St. Louis City Revised Code Chapter 17.37 MOTORIZED SCOOTERS

Sections:

17.37.010 Definitions.

17.37.020 Operator rights.

17.37.030 Equipment required.

17.37.040 Exemptions from code provisions.

17.37.050 Operation—Motor capable of disengagement.

17.37.060 Operation—Right-hand curb.

17.37.070 Operator restrictions.

17.37.080 Penalty for violation.

17.37.010 Definitions.

For purposes of this chapter a “motorized scooter” shall mean any two-wheeled device that has handlebars, is designed to be stood upon by the operator, and is powered by a motor that is capable of propelling the device with or without human propulsion at a speed of not more than 25 miles per hour.

17.37.020 Operator rights.

Every person operating a motorized scooter shall have all the rights and is subject to all the provisions applicable to the driver of any other vehicle as established by ordinance, including, but not limited to, ordinances concerning driving under the influence of alcoholic beverages or drugs, except those provisions which, by their very nature, can have no application.

17.37.030 Equipment required.

Every motorized scooter operated upon any street or alley during darkness shall be equipped with the following:

A. A lamp emitting a white light which, while the motorized scooter is in motion, illuminates the street or alley in front of the operator and is visible from a distance of 300 feet in front and from the sides of the motorized scooter;

B. A red reflector on the rear that is visible from a distance of 500 feet to the rear when directly in front of lawful upper beams of headlamps on a motor vehicle;

C. A white or yellow reflector on each side visible from the front and rear of the motorized scooter from a distance of 200 feet.

17.37.040 Exemptions from code provisions.

A person operating a motorized scooter is not subject to the provisions of this code relating to registration, and license plate requirements, and, for those purposes, a motorized scooter is not a motor vehicle.

17.37.050 Operation—Motor capable of disengagement.

A. A motorized scooter shall comply with one of the following:

1. Operate in a manner so that the motor is disengaged or ceases to function when the brakes are applied;

2. Operate in a manner so that the motor is engaged through a switch or mechanism that, when released, will cause the motor to disengage or cease to function.

B. It is unlawful for a person to operate a motorized scooter that does not meet one of the requirements of subsection A.

17.37.060 Operation—Right-hand curb.

Any person operating a motorized scooter upon a street or alley shall ride as close as practicable to the right-hand curb or right edge of the street or alley, except under the following situations:

A. When overtaking and passing another vehicle proceeding in the same direction;

B. When preparing for a left turn, the operator shall stop and dismount as close as practicable to the right-hand curb or right edge of the street and complete the turn by crossing the street on foot;

C. When reasonably necessary to avoid conditions, including, but not limited to, fixed or moving objects, vehicles, bicycles, pedestrians, animals, surface hazards, or substandard width lanes, which make it unsafe to continue along the right-hand curb or right edge of the street.

17.37.070 Operator restrictions.

The operator of a motorized scooter shall not do any of the following:

A. Operate a motorized scooter unless it is equipped with a brake that will enable the operator to make a braked-wheel skid on dry, level, clean pavement;

B. Operate a motorized scooter on a highway as defined under Section 226.010(7) of the Revised Statutes of the State of Missouri;

C. Operate a motorized scooter without wearing a properly fitted and fastened helmet or other headgear

that meets the standards of the Missouri Director of Revenue as provided for in Section 302.020.2 of the Revised Statutes of the State of Missouri;

D. Operate a motorized scooter when the operator is under the age of 16 years;

E. Operate a motorized scooter with any passengers in addition to the operator;

F. Operate a motorized scooter carrying any package, bundle, or article that prevents the operator from keeping at least one hand upon the handlebars;

G. Operate a motorized scooter with the handlebars raised so that the operator must elevate his or her hands above the level of his or her shoulders in order to grasp the normal steering grip area;

H. Leave a motorized scooter lying on its side on

any sidewalk, or park a motorized scooter on a sidewalk in any other position, so that there is not an adequate path for pedestrian traffic;

I. Attach the motorized scooter or himself or herself while on the street or alley, by any means, to any other vehicle on the street or alley;

J. Operate a motorized scooter at a speed in excess of 15 miles per hour.

17.37.080 Penalty for violation.

Any person found guilty of a violation of any of the provisions of this chapter shall be subject to a fine of not more than five hundred dollars (\$500) or a term of imprisonment of not more than ninety (90) days or by both a fine and imprisonment.

ORDINANCES, REGULATIONS KEY CONCERNS FOR SCOOTER USERS

By Tabari McCoy

[Editor's note: Tabari McCoy is a staff reporter for *The Community Recorder*. This story is reprinted with the permission of Community Recorder Newspapers.]

Police officers, store managers and city officials offer the same piece of advice for anyone considering whether to buy a motorized scooter: Educate yourself as to what the regulations are.

Motorized scooters are becoming more popular in Northern Kentucky as they become the item of choice for maturing skateboarders with money to spend. Emerging on the West Coast several years ago, the \$400 to \$1,500 devices are the latest attempt at reinventing the wheel, or wheels. The scooters come complete with motors and hand brakes with seats optional.

What they don't come with is a list of cities where they are illegal to operate.

The use of the scooters on city sidewalks on streets is something potential buyers may want to investigate before buying one. Several cities throughout Northern Kentucky have ordinances pertaining to use of skateboards on both city and private property – some of which may or may include language that includes motorized scooters as well.

The Erlanger Police Department has put an extensive amount of research into the matter and has even held several discussions about the scooters with the Kentucky State Police. Erlanger Police Lieutenant Kevin Gilpin said a scooter's CC rate and miles per hour define whether or not it classifies as a moped or not.

He said the department plans to keep researching the issue but does not anticipate an uproar about them in the meantime.

"A little battery-powered one, enforcement wise, there is not a whole lot we can do," Gilpin said. "If they are not doing anything unsafe, the odds of us stopping and doing anything other than saying 'hello' is slim."

But not all cities are so accommodating. In Fort Thomas, for example, the lesser-powered scooters are prohibited.

Fort Thomas Police Detective Mike Jansen said no one under the age of 16 will be allowed to operate a motorized scooter within Fort Thomas city limits in accordance with state and local definitions regarding mopeds and toy vehicles. Jansen said the scooters could fall under the definition of a moped.

If the scooter does not classify as a moped, Jansen said the department would have to examine whether or not it might violate Fort Thomas Traffic Code Ordinance 71.11. The ordinance prohibits any person "upon roller skates, or riding in or by means of any coaster, toy vehicle or similar device" from using any roadway except while using a crosswalk.

He said the ordinances create a "catch-22" situation for the public and officers alike.

"If it's not going to be considered a moped it's considered a toy vehicle, and you cannot drive a motorized toy in the street or sidewalk underneath the ordinances in Fort Thomas," he said. "If they want to consider it a moped, they can ride it in the street as long as they have a license."

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OPINIONS OF THE ATTORNEY GENERAL

SUMMARIES OF SELECTED FORMAL OPINIONS OF THE ATTORNEY GENERAL

OAG 02-6

Subject: Authority of local boards of education to determine the process by which teachers are elected to superintendent selection committees.

Syllabus: Local school boards do not have the statutory authority to determine the process by which teachers are elected to superintendent selection committees.

Synopsis: KRS § 160.352(3) provides that a screening committee for candidates for superintendent of schools is to include two teachers elected by the teachers in the district. The plain language of this statute indicates that the teachers are responsible for electing their own representatives to the committee. This interpretation of KRS § 160.352(3) reflects a primary Kentucky rule of statutory interpretation providing that where particular language is included in one section of a statute, but omitted in another section of the same statute, it is generally presumed that the legislature acted intentionally and purposefully.

Under KRS 15.020 the Attorney General furnishes written opinions to public officers touching any of their official duties. The opinions reflect the construction of the law that the Attorney General believes the courts would give if faced with similar facts. The opinions are not binding on the recipient, but the Attorney General, as the chief law officer of the Commonwealth, expects recipient officials to conform. Although they do not have the force of law, they are persuasive and may be cited in court. Copies of the decisions summarized here are available on-line at <http://www.law.state.ky.us/civil/opinions.html>.

SUMMARIES OF SELECTED OPEN RECORDS DECISIONS

02-ORD-120

In response to a request for statistical information on student athletes, a school district conducted a search for responsive records and found none. A follow-up inquiry revealed partially responsive records that existed at the time of the original request. The Attorney General has, since the 1994 amendments to the Open Records Act, which imposed records management requirements on public agencies, required agencies to document what efforts were made to locate the requested records. An agency must conduct a search that can reasonably be expected to produce the requested records. Here the school district did not. The school district should have extended its search beyond the first and most obvious source of the data sought.

02-ORD-125

After a city received requests for copies of proposals it solicited, it contacted the submitting companies and asked whether they wished to claim exemptions for disclosure of the documents. The companies claimed an exemption for confidential or proprietary information. After reviewing the claims, the city sent redacted copies of the proposals to the requester, who appealed the partial denial. Again distinguishing between responses to requests for proposals and responses to advertising for bids, the Attorney General upholds the city's action. The Attorney General opines that the companies are in the best position to assess the confidential and proprietary nature of the information submitted.

02-ORD-140

A county denied a request to review and copy records in a personnel file on the ground that it would be an unwarranted invasion of personal privacy. However, records reflecting public employee job qualifications, performance of official duties, misconduct and discipline, and termination or resignation are disclosable. KRS 61.878(3), which affords a public

employee a broader right of access to otherwise exempt personnel records, does not provide an independent basis for denying access to public records.

02-ORD-149

In response to a request for certain records, a police department explained that the records were destroyed by a computer virus. It did not search for copies from back-up systems or for paper copies in files. Consequently, the search was not a good faith effort to conduct a search using methods that can reasonably be expected to produce the requested records. Further, if the virus destroyed all departmental records, KRS Chapter 171 would require the department to submit a records destruction certificate to the Kentucky Department for Libraries and Archives. That did not happen here.

02-ORD-158

In response to a request for voluminous records, a zoning and planning commission replied that its review would take a month. The requester appealed the timeliness of the commission's response. Given the breadth and lack of specificity of the request (it spanned a twenty-two year period), the Attorney General concludes that the one-month delay was not out of line. The commission could have satisfied its obligation by affording the requester an opportunity to conduct its own on-site search for responsive records. Since the requester asked that the commission do the search, the delay was reasonable under the circumstances.

02-ORD-175

Relying on OAG 76-655 concerning honorary deputy sheriffs, a sheriff partially denied access to requested records. Because the information requested pertained to special deputy sheriffs, not honorary deputy sheriffs, that opinion is inapplicable to the specific request. The Attorney General then goes on to overrule that opinion, finding its reasoning flawed. Appointment of honorary deputy sheriffs, like the appointment of special deputy sheriffs, is not a "personal activity" of the sheriff, but a matter of legitimate public concern.

02-ORD-197

A city afforded access to certain requested documents concerning employees, but denied access to performance evaluations. Citing "twenty-five years of Attorney General's decisions recognizing the propriety

of public agency denials of open records requests for public employee performance evaluations," the Attorney General affirms the partial denial of the request. In only two instances, both involving persons with "a leadership role of ultimate responsibility," has the Attorney General required disclosure of performance evaluations. In the other instances, the privacy rights of public employees in information of a personal nature that appears in a performance evaluation generally outweighs the public's interest in disclosure of the evaluation.

02-ORD-198

A newspaper appealed the decision of a county solid waste and recycling board to charge twenty-five cents per page for copies and its determination that the newspaper had a commercial purpose that justified charging a higher fee under KRS 61.874(4)(c). The copying fee is limited to the proportionate cost of maintaining copying equipment by purchase or rental and the supplies involved. It does not include staff costs. The Attorney General presumes that ten cents per page is the threshold standard fee. Since the board did not substantiate its twenty-five cents per page charge, it was excessive. Further, KRS 61.870(4)(b)(1) specifically provides that "commercial purpose" does not include publication in a newspaper. Therefore, the board cannot require a newspaper to state its purpose before processing its request.

02-ORD-217

A county jail responded to a request for incident reports for a five-year period by saying that it would produce them within thirty days at a charge of fifteen cents per page plus labor costs. Since the jail could not substantiate that its actual cost for reproducing the records is greater than ten cents per page, the charge was excessive. Similarly, the failure to explain why it could not immediately comply with the request is a violation of the Open Records Act. The jail must explain in detail the problems associated with retrieving the records that would support a thirty-day delay.

02-ORD-218

A county clerk imposed a twenty-five cents per page copying charge, relying in part on the position of the Kentucky County Clerks Association concerning the actual cost of a copy and in part on information from the copier's vendor. Reviewing the clerk's figures, the Attorney General concludes that the clerk substantiated a cost of fifteen cents per copy. However, says the Attorney General, "we continue to believe that the better practice

is to impose a fee of \$.10 per page inasmuch as this fee 'str[ikes] a reasonable balance between the agency's right to recover its actual costs, excluding staff costs, and the public's rights of access to copies of records at a nonprohibitive charge.'" The opinion notes that commercial copying companies charge seven or eight cents a page and that, under 200 KAR 1:020, state agencies charge ten cents per page.

02-ORD-222

Seven Counties Services, Inc., a provider of community mental health and mental retardation services under KRS Chapter 210, denied access to requested information on the ground that it was not subject to the Open Records Act. It claimed to be a private corporation that derived less than 25% of its funds from state or local authorities. The Attorney General concludes that, although it is organized as a private non-profit corporation, its operation under a plan and budget approved by the Cabinet for Health Services and the comprehensive scheme of legislation subject it to the Act. The Attorney General also rejects the alternative ground advanced that the information sought is confidential or privileged.

02-ORD-230

A city denied a request for certain records, invoking the provision in KRS 61.872 (6) that allows a custodian of records to refuse inspection if there is reason to believe that repeated requests are intended to disrupt other essential functions of the agency. In a rare instance, the Attorney General affirms. The requester's past pattern of conduct and his conviction for harassing communication aimed at city employees support the city's position.

Under KRS 61.880 the Attorney General reviews complaints alleging violations of the Open Records Act and issues written decisions stating whether an agency violated the act. If no party timely appeals the decision, it has the force and effect of law. Copies of the decisions summarized here are available on-line at <http://www.law.state.ky.us/civil/openrec.htm>.

SUMMARIES OF SELECTED OPEN MEETINGS DECISIONS

02-0MD-126

A county public safety communications center board met and held an executive session concerning disciplinary action against an employee. When the

board returned to open session, the board informed the employee that she was terminated. Because no evidence suggests that the vote to terminate was taken in open session, the board violated KRS 61.815(1)(c). It prohibits taking final action in closed session. After discussing the matter of termination in closed session, the board would have been required to go back into open and public session and vote to terminate.

02-0MD-127

A city council met for a regular meeting and, lacking a quorum, rescheduled the meeting for another day. The later meeting was properly a special meeting, not a continuation of the regular meeting as the council maintained. The council's failure to comply with the provisions governing special meetings, including the requirements of a notice and an agenda, was a violation of the Open Meetings Act.

02-0MD-153

A city commission went into closed session to discuss a "personnel matter," allowing a probationary employee terminated by the mayor an opportunity to address the commission. This did not fit within the exception in KRS 61.819(1)(f) for "discussions or hearings which might *lead to* the appointment, discipline or dismissal of an individual employee" because the employee was already terminated. Therefore, the closed session was improper. Further, since under the commission plan of city government the mayor did not enjoy exclusive authority to hire and fire the employee, telephone conversations between the mayor and the commissioners violated the serial meetings provision of the Open Meetings Act.

02-0MD-166

A city council went into closed session pursuant to KRS 61.810(1)(b) to discuss the purchase of real property where public discussion could affect the cost. A previously undisclosed offer for the purchase was on the table, contingent on the council's approval. Since the purchase was still negotiable, public discussion of the council's options might have compromised a significant public interest. That the council, upon returning to public session, voted to accept the offer did not take the session outside the exception.

02-0MD-206

A member of a city council participated in a council meeting by speakerphone and, although not physically present, was counted as present for the purpose

of a quorum. The Open Meetings Act gives the public a right to see and hear a quorum of the members of a public agency discuss public business. It therefore allows videoconferencing, but not telephonic participation. As a result, the meeting was improper.

02-0MD-234

In addressing the propriety of a closed session to discuss proposed litigation, the Attorney General reiterates the applicable guidelines. When the public agency has become a party plaintiff or defendant in a lawsuit, when a public agency has been threatened with litigation, or when the chance of litigation involving that agency is more than a remote possibility, the

No Constitutional Right to Competent Rescue Service *continued from page 3*

provide competent services to people not in its custody.”³

Because in his condition Salazar might not have been free to seek private aid or self-help, the Seventh Circuit treated Salazar as a pretrial detainee. *Salazar* presents an example of the kind of exception not present in the *Brown* case. In a case such as *Salazar*, government will be liable only if it is deliberately indifferent to such a person’s medical needs. Negligence, even gross negligence, is not a sufficient basis for constitutional liability. “A ‘gross’ error is still only an error, and an error is not an abuse of power. Since an error by a government official is not unconstitutional, ‘it follows that ‘gross negligence’ is not a sufficient basis for liability.”⁴ Only intentional or reckless conduct violates the due process clause. The U.S. Court of Appeals for the Sixth Circuit, which covers Kentucky, applied this same deliberate indifference standard to a case involving an involuntarily committed mental patient. *Terrance v. Northville Regional Psychiatric Hospital*, 286 F.3d 834 (6th Cir. 2002). Coincidentally, the case also involved allegations of grossly inadequate care by emergency medical services personnel. The result was similar to *Brown* and *Salazar*.

Endnotes

1. 2002 WL 1815859 (3rd Cir. (Pa.)) at *2. This opinion was withdrawn because the court granted rehearing and vacated the opinion on September 9, 2002. The opinion on rehearing, *Brown v. Commonwealth*, 318 F.3d 473, omits this language.
2. Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding form of redress. 42. U.S.C. § 1983.
3. *Salazar*, 940 F.2d at 237. See also *Hill v. Shobe*, 93 F.3d 418 (7th Cir. 1996).
4. *Salazar*, 940 F.2d at 238 quoting *Archie v. City of Racine*, 847 F.2d 1211, 1220 (7th Cir. 1988) (en banc).

agency can legally and properly invoke the exception set forth in KRS 61.810(1)(c). The public agency can then discuss in a closed session such matters as strategy, tactics, possible settlement, and other matters pertaining to that case or that anticipated or probable case.

Under KRS 61.846 the Attorney General reviews complaints alleging violations of the Open Meetings Act and issues written decisions stating whether an agency violated the act. If no party timely appeals the decision, it has the force and effect of law. Copies of the decisions summarized here are available on-line at <http://www.law.state.ky.us/civil/openrec.htm>.

Ordinances, Regulations Key Concerns For Scooter Users

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Police issues aside, Crawford Insurance President Mike Crawford says buyers might want to consider buying insurance for their scooters just the same. The Bellevue insurance agent believes there is a misconception in the public the scooters might fall under the scope of any other automatic coverage they may have.

He said any injury stemming from an accident involving a scooter may prove a costly lesson to the contrary.

“Generally, if something is motorized, whether it’s licensed or not, if they take it off of their property, it probably doesn’t have automatic coverage.”

Christopher Averett, manager of the Montgomery Cyclery shop in Erlanger, said the store sells about 30 to 40 motorized scooters each year. Averett says the vehicles are definitely not toys.

He urges anyone considering buying one to stick to the old caveat of “let the buyer beware.”

“We make sure we say contact your local city hall to make sure you can have one in your area.”



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Local Government Law News

A publication of the Chase
Local Government Law Center

Nonprofit Organization U.S. Postage Paid,
Newport, Kentucky, Permit No. 2

Local Government Law News is published three times each year by the Chase Local Government Law Center, offices located in Room 406, Nunn Hall, Northern Kentucky University, Nunn Drive, Highland Heights, Kentucky 41099. *Local Government Law News* is printed by Northern Kentucky University with state funds (KRS 57.357) under a grant from the Kentucky Department for Local Government and is distributed free of charge to local government officials, attorneys, managers, and others in Kentucky. Articles and manuscripts for publication in the newsletter are solicited and may be submitted to the Local Government Law Center for consideration. Articles contributed are printed as received from the contributors. Articles printed represent the views of the contributors and do not necessarily reflect the views of the Department for Local Government, Northern Kentucky University, or the Chase Local Government Law Center.

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This publication was prepared by
Northern Kentucky University and printed with
state funds (KRS 57.375). Equal Education and
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