DISCHARGE AND DUE PROCESS

Ordinarily, an employer may discharge its employee for good cause, for no cause, or for a cause that some might view as morally indefensible. An employee has a symmetrical right to end the employment relationship without incurring legal liability. This is the doctrine of employment-at-will. Despite its symmetry, however, people perceive that the doctrine favors employers.

The doctrine of employment-at-will applies to public-sector employers and employees as well as to private-sector employers and employees. In Kentucky, many public employees are employees-at-will despite a widespread belief that satisfactory job performance should be rewarded with job security.

Employment-at-will has its origins in the idea that parties are free to impose mutually agreeable terms in an employment relationship. Kentucky courts describe the doctrine as “a longstanding corollary to mutuality of contract.” It follows that among an employee’s best protections against arbitrary discharge by an employer would be a written employment contract expressly protecting against discharge without just cause. Of course, very few employers – public or private – offer such agreements, especially to lower-paid employees. In some instances, a collective bargaining agreement may fill that void, but Kentucky has no comprehensive collective bargaining legislation for its public employees. In other instances, courts may infer the existence of a contract of employment that preserves employment unless termination is “for cause.” As the Kentucky Supreme Court recently pointed out in Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354, 362-4 (Ky. 2005), such a contract can arise from an employer’s policies or from an employment handbook.

Courts have made other inroads on the employment-at-will doctrine beyond the implied contract at issue in Beiswenger. These common law exceptions address terminations that, although they technically comply with the employment-at-will doctrine, do not seem just. Of particular relevance in Kentucky is the cause of action for wrongful discharge approved in Firestone Textile Co. Div. v. Meadows, 666 S.W.2d 730 (Ky. 1984). This cause of action arises in only two situations. One is where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment. The other is when the reason for a discharge was the employee’s exercise of a right conferred by well-established legislative enactment. Firestone is an example of the latter, a case of retaliation for filing a workers’ compensation claim (a matter now covered by KRS 342.197). Northeast Health Management, Inc. v. Cotton, 56 S.W.3d 440 (Ky. App. 2001) is an example of the former, a case of an employer asking employees to perjure themselves.

More important than the common law exceptions, however, are the legislative encroachments upon the doctrine of employment-at-will. These take various forms. One form is legislation that prohibits certain “bad” reasons for discharge. Among the earliest examples of this kind of legislation was the National Labor Relations Act, which made it illegal for employers to discipline or discharge employees because they engaged in certain “protected concerted activities.” Another familiar example is Title VII of the Civil Rights Act of 1964, which prohibits discharge of an employee because of his or her race, color, religion, sex, or national origin. State legislatures are also active in protecting employees. Examples from Kentucky include KRS 61.102 (“whistleblowing”), KRS 121.310 (exercise of suffrage), and KRS 29A.160 (jury service).

Other statutes approach the doctrine from the other direction; they allow an employer to fire an employee only with “good” reason. Civil service laws and teacher tenure laws are of this kind. For example, KRS 18A.095(2) provides with respect to state personnel that a classified employee with status “shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.” Similarly, KRS 161.790(1) provides with respect to teachers that the contract of a teacher shall remain in force “during good behavior and efficient and competent service by the teacher.” The subsection then specifically limits the causes that justify termination.

When a public employer seeks to discharge an employee, the employer necessarily confronts the problem of how to go about it. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that state and local governments may not “deprive any person of life, liberty, or property, without due process of law.” Since the 1970s, courts have recognized that the property interests so protected extend beyond traditional common law notions of property to include government benefits, licenses, and jobs.

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College seniors graduating in 2005 were freshmen when the World Trade Center towers fell. Theirs was the first class to have its whole college experience shaped by the 9/11 attacks and the war on terror. Recently the Partnership for Public Service surveyed members of the class to see how the war on terror shaped their view of government and their interest in public service. The Class of 9-11: Bringing a New Generation of Practical Patriots into Public Service, http://www.ourpublicservice.org/usr_doc/class-of-9-11.pdf, reports the findings.

The survey found that among participants interest in public service was up slightly, but not significantly so. Naturally, the events of September 11 affected how the graduates think about their government and the world, but those events are not driving the graduates’ career choices. Further, although the survey revealed a slightly higher level of interest in government service, it also showed that the view of government work as a form of public service continues to decline. According to the report, only 19 percent of this year’s graduating seniors described government work as “completely” a form of public service. By contrast, 30 percent said nonprofit work was public service and 81 percent said that volunteering was a form of public service. Two elements were common to this group’s definition of public service. First, they thought of it as having a direct, firsthand impact on the people being served. Public servants included people such as teachers, firefighters, and those working in community nonprofits. Second, they had a strong sense that public service is, by definition, very low paying or is something one does for free.

After looking at the data, the report considered what might convince more graduating seniors to serve. It concluded that, for the most part, what motivates this group are high salaries and prestige. Consequently, for them public service and government work were not a good fit. To counteract this, the report identifies three points of emphasis. On the salary issue, modernization efforts aimed at aligning pay with the market and rewarding high achievers with meaningful performance bonuses would go a long way toward reaching this new crop of college graduates. In terms of prestige, government agencies must be more aggressive in raising the perceived value of government jobs, especially among college students’ parents, teachers, and peers – key influencers of career choice.

Beyond that, the report says government agencies also have to do a better job of showing young recruits how their work in government will actually make a difference for their community and country. In answer to the question “Why would anyone work for the government?” one municipal attorney replied, “The daily routine of a government lawyer requires serious attention to major public issues, sometimes of constitutional significance. At the end of a typical week, if not daily, you can see that you had a hand shaping decisions and actions that will benefit an entire community, sometimes for generations to come…. Doing right by the client, for the government lawyer, means a sense of accomplishment worth more than money could buy.” That sense of satisfaction is not limited to government lawyers; it is common throughout government. It is a story we all need to tell, and not just to the class of 9/11.

Discharge and Due Process continued from page 1

Recently, in Romero v. Administrative Office of the Courts, 157 S.W.3d 638 (Ky. 2005), the Kentucky Supreme Court addressed a claimed property interest in government employment. The court said, “A person’s legitimate claim of entitlement to continued employment is a property interest.” But “an abstract need or desire for [employment] or merely ‘a unilateral expectation of it’ is not a property interest. In other words, ‘[i]t is not a property interest to arise, a government employee must have a ‘legitimate claim of entitlement’ to continued employment, as opposed to a mere subjective expectancy.’” In Romero, the Supreme Court held that freelance court interpreters had no property interest in continued employment. Without a protected property interest, the due process protections of the United States and Kentucky constitutions did not apply.

Like the interpreters in Romero (whom the court characterized as “independent contractors”), true at-will public employees do not have a protected property interest in their jobs. However, that does not necessarily mean that their employers owe them no process at all. Statutes sometimes confer procedural rights even on at-will employees. Hooks v. Smith, 781 S.W.2d 522 (Ky. App. 1989) provides an example. “At best, [KRS 161.162] gives an administrator with at least three years’ experience an additional procedural opportunity to convince the board of the lack of merit in the superintendent’s recommendation of demotion or that it violates a constitutional or statutory right. In short, our statutory scheme does not appear to have created a ‘property interest’ in a school administrator in continued employment as an administrator, although it does secure the right to certain procedural safeguards. The due process clause of the Fourteenth Amendment simply does not come into play.”

Where, as in the case of civil service or teacher tenure, a statutory scheme does create a property right, the statute usually prescribes the procedures the employer must follow in order to discharge the employee. See, e.g., KRS 18A.095 (executive department employees) and KRS 161.790 (tenured teachers). The issue then becomes whether the statu-
Occasionally, a statute will create a property interest in government employment without elaborating the procedure applicable to discharge. An example is KRS 161.011(5)(b). It provides that, after four years of continuous active service, a school board may dismiss a classified employee only for “incompetency, neglect of duty, insubordination, inefficiency, misconduct, immorality, or other reasonable grounds which are specifically contained in board policy.” KRS 161.011(5)(b) itself affords only the barest process to the employee being terminated: notice of nonrenewal, “a specific and complete written statement of the grounds” if requested, and an opportunity for the employee to respond. Subsection (9)(c) then charges the local school board to “develop and provide to all classified employees written policies which shall include, but not be limited to … [d]iscipline guidelines and procedures that satisfy due process requirements.” (Emphasis added.)

Fulfilling that responsibility involves a sometimes difficult balancing of the government’s interest against the private interest affected and the risk of an erroneous deprivation (so-called “Matthews balancing”). While at its core due process requires notice and a meaningful opportunity to be heard, the flexibility of the balancing test often leaves public employers guessing as to what procedures to have in place. The presumption is that some kind of hearing should occur before the government takes an action adverse to the employee’s interest. However, the formality for this pre-deprivation hearing will depend upon the promptness and fullness of any post-deprivation hearing that may be available.33

Mitchell v. Fankhauser, 375 F.3d 477 (6th Cir. 2004), considered whether a school board met its burden under KRS 161.011. The court said it did not. The employee got only “an abbreviated pre-termination hearing.” The court found that he was entitled to a more meaningful post-termination hearing that the board did not provide. Alternatively, noted the court, the board could have provided a more meaningful pre-termination hearing that would have made a post-termination hearing unnecessary.

The flexibility afforded the school board under KRS 161.011 and Mitchell led the school board’s attorney to ask the Kentucky Attorney General for advice about what elements must be present in a hearing in order for it to be sufficiently “meaningful” that it comports with due process. To be meaningful, the Attorney General responded, the hearing must have most of the features we associate with a trial. These include the right to be present, the right to have the assistance of counsel, the right to call witnesses and challenge the evidence (including the right to cross-examine witnesses), adequate notice of the hearing and the grounds asserted for it, an impartial decision-maker, and a statement of the reasons for the decision.36

Because its discussion of due process is useful beyond the scope of the particular statute and case addressed, we reproduce the Attorney General’s opinion below in its entirety. The reader should keep in mind that, while the opinion is authoritative,35 the balancing process gives rise to continuous disputes about what due process demands. As the opinion cautions in its concluding section, the law in this area continues to develop.

OAG 05-006
July 6, 2005
Subject: Constitutional requirements for a due process hearing prior to terminating the employment of a classified public school employee when statutes give no post-termination remedy
Requested by: Robert L. Chenoweth, Esq., Legal Counsel Fayette County Board of Education
Written by: James M. Herrick Assistant Attorney General
Syllabus: Minimum standards of due process require reasonable notice of hearing, right to appear and produce evidence, right to call witnesses and conduct cross-examination, right to counsel, impartial decision-maker, and statement of basis for decision.

Statutes construed: KRS 161.011, KRS 160.300, KRS 160.390
OAGs cited: OAG 90-129, OAG 92-141, OAG 94-37
Constitutional provisions construed: U.S. Const. Amend. XIV

Opinion of the Attorney General

KRS 161.011 establishes a personnel system for classified employees of local school districts. Classified employees, those employees who are not required to be certified by the Education Professional Standards Board, serve on a year-to-year basis. Pursuant to KRS 161.011(5)(b), a classified employee who has worked full-time for a continuous period of four years gains the right to have his employment contract renewed for another year unless he is dismissed for cause. This status creates a property interest in the employment for due process purposes. Cf. Riggs v. Commonwealth, 734 F.2d 262 (6th Cir. 1984).

A classified employee who is dismissed for cause has no post-termination statutory right to a hearing or other procedural remedy, unlike teachers, who are entitled by KRS 161.790 to an administrative hearing conducted under KRS Chapter 13B. The only opportunity for a classified employee to be heard is at whatever type of pre-termination hearing is afforded by policies enacted by local school boards pursuant to KRS 161.011(9)(c). Robert L. Chenoweth, legal counsel for the Fayette County Board of Education, has requested an opinion as to what elements must be present in this pre-termination hearing to comport with due process of law under the Fourteenth Amendment to the United States Constitution.
The federal courts have recently pronounced upon this issue. In Mitchell v. Fankhauser, 375 F.3d 477 (6th Cir. 2004), the Sixth Circuit Court of Appeals held that the “abbreviated” pre-termination hearing a school custodian received under the Fayette County Board of Education’s system did not give him adequate constitutional protection:

Mitchell was called in to meet with [the superintendent] and various other [school] officials. Mitchell was then informed of the allegations that had been made against him – by people who were not present at the meeting – to the effect that Mitchell had helped another custodian steal school property. At the meeting, Mitchell admitted only to having taken a sewing-machine cabinet home with him, but then returning it to the school.

Mitchell, 375 F.3d at 478-79. This meeting constituted an attempt by the school district to comply with Cleveland Bd. of Education v. Loudermill, 470 U.S. 532 (1985), a case in which the Supreme Court described the essentials of a pre-termination due process hearing as “oral or written notice of the charge against [the employee], an explanation of the employer’s evidence, and an opportunity to present his side of the story.” Loudermill, 470 U.S. at 546.

The Sixth Circuit ruled in Mitchell that compliance with Loudermill is not enough to provide due process when there is no post-termination remedy. Rather, the “abbreviated” form of a Loudermill hearing presupposes the availability of “a more ‘meaningful’ post-termination hearing. This is not to say that two hearings are always required to satisfy due process. If the pre-termination hearing is more ‘meaningful,’ ... then no post-termination hearing would be necessary.” Mitchell, at 481.

Conduct of hearing

For guidance as to what constitutes a “meaningful” hearing for due process purposes, the Mitchell court referred to Carter v. Western Reserve Psychiatric Habilitation Center, 767 F.2d 270 (6th Cir. 1985), citing the following analysis:

Where, as here, a court has approved an abbreviated pre-termination hearing, due process requires that a discharged employee’s post-termination hearing be substantially more “meaningful.” At a minimum, this requires that the discharged employee be permitted to attend the hearing, to have the assistance of counsel, to call witnesses and produce evidence on his own behalf, and to know and have an opportunity to challenge the evidence against him.

Mitchell, at 480-81 (quoting Carter, 767 F.2d at 273). Logically, then, where there is no post-termination hearing, the pre-termination hearing must comply with all the constitutional requirements to which a “meaningful” post-termination hearing would be subject.

Carter establishes that due process gives the terminated employee a right to be present at the hearing, to have counsel assisting, to call witnesses, and to present evidence. It is not clear from the language in Carter whether the “opportunity to challenge the evidence against him” includes the right to cross-examine the employer’s witnesses. In Goldberg v. Kelly, however, the Supreme Court addressed this point. “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” Goldberg v. Kelly, 397 U.S. 254, 269 (1970). The Supreme Court of Kentucky likewise affirmed this principle in Kaelin v. City of Louisville, 643 S.W.2d 590, 592 (Ky. 1983): “We hold that, in a trial-type adjudicatory hearing before an administrative body, the right of cross-examination is required by due process of law.”

The presence of witnesses raises the practical question of subpoena power. Although a school district obviously has the inherent authority to require its own employees to be present at a hearing as witnesses for either party, witnesses from outside could only be compelled to appear if the entity conducting the hearing had subpoena power. It is not a requirement of minimal due process that an administrative hearing be held by an entity with the power to issue subpoenas. Johnston-Taylor v. Gannon, 974 F.2d 1338 (6th Cir. 1992) (table decision; text at 1992 WL 214523); Ubiotica Corp. v. FDA, 427 F.2d 376, 381 (6th Cir. 1970) (citing a deportation case, Low Wah Suey v. Backus, 225 U.S. 460 (1912)); see also Tonkovich v. Kansas Bd. of Regents, 159 F.3d 504, 521 (10th Cir. 1998); Johnson v. U.S., 628 F.2d 187, 194 (D.C. Cir. 1980); Delong v. Hampton, 422 F.2d 21, 24-25 (3rd Cir. 1970). It is, however, frequently appropriate and desirable for both sides to be able to subpoena witnesses from outside the employing agency.

As we have observed in previous opinions, the local Board of Education no longer plays any role in personnel actions other than to receive notice of the action taken by the superintendent. OAG 90-129; OAG 92-111; OAG 94-37. Accordingly, since the pre-termination hearing would not be a “proceeding before” the Board of Education, it would not fall under the board’s subpoena power conferred by KRS 160.300. Therefore, for witnesses to be subject to subpoena, the hearing would have to be conducted under the auspices of some other entity with the statutory authority to issue subpoenas. This would most likely have to be an entity empowered to conduct hearings under KRS Chapter 13B.

Notice of hearing

There are further constitutional requirements for a meaningful due process hearing. Goss v. Lopez, 419 U.S. 565, 579 (1975), requires adequate notice, the timing and content of which “will depend on appropriate accommodation of the competing interests involved.” As in all applications of the Due Process Clause, the extent of the procedural protections required in a particular situation varies with the balance of public and private interests at stake. Mathews v. Eldridge, 424 U.S. 319 (1976). In Goldberg v. Kelly, supra, a seven-day notice was deemed constitutionally sufficient when it adequately disclosed the legal and factual bases for a proposed termination of welfare benefits. The Court indicated, however, that “there may be cases where fairness would require that a longer time be given.” Goldberg, at 268.

Although the Goldberg Court (at 264) described the due process interest of the welfare recipient as more critical than that of a discharged government employee, that characterization was made in the context of whether or not a post-termination hearing would give the welfare recipient adequate protection. The Court evidently assumed that discharged public employees would be given a full post-termination hearing. By contrast, a classified school district employee, who is only entitled to a pre-termination
hearing, stands more in need of advance notice than the hypothetical employee in *Goldberg*. Such an employee must at least be given more notice than the custodian in *Mitchell*, who apparently was called into the superintendent’s office without warning and suddenly informed of the charges with no time to prepare a response.

Since a public employee’s rights at the hearing include the right to counsel and the right to call witnesses, the school district must provide enough notice to permit the employee a reasonable time to retain counsel and to prepare an adequate defense. Typically, the facts involved in a termination of employment are more numerous and complex than those concerned in a termination of welfare benefits. Although there is no fixed constitutional rule on the subject, we are guided in this instance by the General Assembly’s requirement of a minimum 20-day notice for an administrative hearing as provided in KRS 13B.050(1), which governs post-termination hearings for classified state employees pursuant to KRS 18A.095(18).

**Impartiality of decision-maker**

In addition, it is an essential element of due process that the hearing be ruled upon by an impartial decision-maker. The situation of classified school district employees is distinct from cases such as *Moore v. Bd. of Ed. of Johnson City Schools*, 134 F.3d 781 (6th Cir. 1998), and *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988), which were concerned only with the abbreviated “right-of-reply” hearing required by *Loudermill*, supra. Where the pre-termination hearing is the only remedy the tenured public employee receives, due process requires an impartial decision-maker.

To ensure impartiality, “the investigative and adjudicative roles must be played by different persons” in cases “where common sense dictates that it would be necessary “in order to avoid inevitable bias.” *Nicholson v. Judicial Retirement and Removal Comm’n*, 562 S.W.2d 306, 309 (Ky. 1978). Examples of inevitable bias cited by the *Nicholson* Court include a public or private pecuniary interest in the outcome (Gibson v. Berryhill, 411 U.S. 564 (1973); Ward v. Village of Monroeville, 409 U.S. 57 (1972)) and a judge’s personal interest when ruling on a contempt charge against an attorney under circumstances of marked personal feeling on both sides (Taylor v. Hayes, 418 U.S. 488 (1974); Mayberry v. Pennsylvania, 400 U.S. 455 (1971)).

In every case, it is critical that the decision-maker in a meaningful due process hearing not be the person who is bringing the charge against the employee. Although the decision-maker may have had “prior involvement in some aspects of a case, ... [h]e should not ... have participated in making the determination under review.” *Goldberg*, at 271. This would exclude the superintendent from acting as the final decision-maker in cases where the superintendent has previously made a determination to dismiss the employee. We recognized in OAG 90-129 that under KRS 160.390(1) the superintendent is responsible for all personnel actions, including the dismissal of classified employees. Accordingly, to comport with due process, the superintendent must either designate another individual to make pre-hearing recommendations as to dismissal of classified employees or obtain an impartial and independent hearing officer to make a final determination after the superintendent has given notice of his intent to terminate an employee.

**Statement of basis for determination**

Finally, when announcing the result of the hearing, the decision-maker “should state the reasons for his determination and indicate the evidence he relied on, ... though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.” *Goldberg*, at 271 (citation omitted). The purpose of this statement is to demonstrate compliance with the constitutional requirement that the decision “rest solely on the legal rules and evidence adduced at the hearing.” *Id*. At a minimum, this would require an oral or written statement in the record of the decision-maker’s basis for the determination.

**Conclusion**

The procedures outlined above represent the opinion of this office, based on the present state of the case law, as to the minimum due process to which a classified school district employee with tenure is entitled prior to termination in the absence of any post-termination remedy. We take note of the fact that the law concerning pre-termination hearings under KRS 161.011 is continuing to develop in the Sixth Circuit as other cases from Kentucky school districts are litigated.

Pursuant to KRS 161.011(9)(c), local school boards should be advised to enact policies implementing due process hearing procedures applicable to classified employees. In the long term, it may be desirable for the General Assembly to provide for a post-termination due process hearing for classified school district employees in order to make such extensive pre-termination procedures unnecessary. Alternatively, the legislature might choose to enact a procedure for a full pre-termination due process hearing as it has done for the termination of teachers’ contracts in KRS 161.790.

**Endnotes**

2. See, e.g. *Martin v. Corrections Cabinet*, 822 S.W.2d 858 (Ky. 1991) (“An unclassified employee is a political employee, not a merit employee, and may be discharged for any reason, including a bad reason, no reason or for political reasons so long as there is no statutory authority for a protest.” *Id* at 860). One should be cautious about discharging for political reasons. Public employees may not be fired because of their political affiliation unless “party affiliation is an appropriate requirement for the effective performance of the public office involved.” *Brandi v. Finkel*, 445 U.S. 507, 518 (1980). See the discussion of the *Brandi* exception in *Heggen v. Lee*, 284 F.3d 765 (6th Cir. 2002) (Deputy sheriffs in Kentucky cannot be dismissed because of their political affiliation).
3. See *Garrard County Fiscal Court v. Layton*, 840 S.W.2d 208 (Ky. App. 1992) (County treasurer not entitled to continue in such position until just cause is found for his dismissal or until he resigns).

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Local Government Law News

DECISIONS OF NOTE

UNITED STATES SUPREME COURT

See Decisions of Note – Supreme Court Update elsewhere in this issue.

KENTUCKY SUPREME COURT

Planning Commission Action – Time to Appeal

A developer made numerous attempts over a number of years to obtain approval of a subdivision plan over the protests of neighboring property owners. Ultimately, the planning commission approved a plan in August 1999. However, development could not begin until the sewer district approved a soil and sedimentation control plan and the county works director approved the construction plan. That occurred in May 2000. In June, the neighbors sued to stop the project. The developer moved to dismiss the suit because it was not filed within 30 days of the August 1999 action by the planning commission. Reviewing the requirements of KRS 100.247, the Supreme Court agreed that the time within which to appeal began in August 1999, not in May 2000. The approvals by the sewer district and works director were ministerial and did not extend the appeal time set out in the statute. The failure to follow the statutory procedures for an appeal is fatal. Section 2 of the Kentucky Constitution, which prohibits arbitrary agency actions, does not provide an independent basis for appeal. Triad Development/Alta Glyne v. Gelhaus, 150 S.W.3d 43 (Ky. 2004).

Civil Rights Act – Private Clubs

The Kentucky Commission on Human Rights sought a declaration that it has the power to investigate private clubs to determine if they engage in discriminatory conduct such as would prevent members from deducting club payments on their tax returns. The court held that it does. The exemption for clubs in KRS 344.130 provides only that private clubs are not places of public accommodation. It does not exempt private clubs from the entire Civil Rights Act. For example, the court said, the clubs can be liable if they unlawfully discriminated in their employment practices. Similarly, the exemption is inapplicable to the issue of the deductibility of payments. In response to the clubs’ argument that the statute does not grant the commission the authority to investigate, the court held that the statute clearly implied such authority. Powers granted by statute are not limited to those expressly stated. They include the means necessary to effect statutory objectives. Commonwealth v. Pendennis Club, Inc. 153 S.W.3d 784 (Ky. 2004).

Board of Education – Tort Immunity

A person suffered personal injuries when a load on a forklift operated by a school maintenance employee shifted and struck him. He sued the board of education to hold it liable for the damages he sustained. The circuit court entered summary judgment for the board on the ground that, as an agency of state government, it was immune from suit. The injured party appealed, claiming that the General Assembly by statute waived sovereign immunity. The Court of Appeals agreed. On further appeal, the Supreme Court held that there was no waiver and reinstated the judgment of the circuit court. In doing so, the Supreme Court overruled its decisions in Taylor v. Knox County Board of Education and Board of Education v. Kirby. Amendments to the Board of Claims Act in 1986 abrogated Taylor and later cases interpreting KRS 160.310. That section does not waive a board of education’s governmental immunity. Kirby interpreted KRS 160.160, which the court now reads to “authorize[] suits on contracts or to protect one’s property, but not for torts.” Grayson County Board of Education v. Casey, 157 S.W.3d 201 (Ky. 2005).

Board of Education – Disqualification to Hold Office

At the time of his election to the board of education, the new member’s uncle was employed by the school district as a bus driver. KRS 160.180 declares that a person who has a relative (defined as including an uncle) employed by the school district is ineligible to membership on the board. The Attorney General, therefore, initiated an ouster action. The circuit court held that the statute was unconstitutional because it included aunts and uncles but not nieces and nephews. The Court of Appeals affirmed, but the Supreme Court reversed. Holding first that the statute was subject only to review using the rational basis test, the court found that the General Assembly had a legitimate purpose in eliminating the existence and appearance of nepotism. Excluding nieces and nephews from the definition of relative in the statute served to retain young, qualified persons in rural Kentucky and reflected that nepotism in favor of aunts and uncles was a greater problem. Commonwealth ex rel. Stumbo v. Crutchfield, 157 S.W.3d 621 (Ky. 2005).

Court Interpreters – Rights in Employment

After the Supreme Court made substantial changes to the procedures in the Kentucky Court of Justice concerning the appointment of court interpreters, freelance court interpreters sought review of the court’s order. They asserted a property interest in continued employment and claimed that the court made the order without notification to them in violation of their right to due process. Characterizing the relationship of the interpreters with the Court of Justice and the Administrative Office of the Courts as that of an independent contractor, the court said that interpreters had a continued interest in employment only for the specific project they had already been hired to do. Once the specific project was completed this interest no longer existed. Accordingly, interpreters had at most a mere expectancy of future employment, not a property interest entitled to due process protection. Romero v. Administrative Office of the Courts, 157 S.W.3d 621 (Ky. 2005).

IDEA Hearing – Judicial Review

Parents of a student with a learning disability sought an administrative due process hearing to address several issues surrounding the student’s education. They sought compen-
satory educational services and reimbursement for the cost of educating the student in a private school. A local hearing officer ruled in favor of the school district and denied the parents’ requests. They appealed to the Exceptional Children Appeals Board, which affirmed the decision of the local hearing officer. The parents then appealed to the circuit court, which found substantial evidence to support the decision of the ECAB and affirmed. The parents next sought review in the Court of Appeals, which conducted a modified de novo review. It concluded that the school board did not comply with the Individuals with Disabilities Education Act and ordered reimbursement. The Supreme Court reversed and reinstated the judgment of the circuit court. Kentucky law (CR 52.01) requires that, in appeals of administrative agency decisions, appellate courts review the determinations of the circuit courts for clear error. Thus the Court of Appeals erred in conducting a modified de novo review. Modified de novo review is the standard applicable to the initial reviewing court – the circuit court in this instance. Fayette County Board of Education v. M.R.D., 158 S.W.3d 195 (Ky. 2005).

Searches of Students – Immunity for Teachers

After a student in a gym class reported a missing pair of shorts, the teachers and an administrator unsuccessfully afforded students in the class an opportunity to return them. The administrator then directed a search of the students. The students were taken into the locker room two-by-two to see if they were wearing the missing shorts. Parents of the students searched objected and brought suit alleging a violation of the Fourth Amendment right against unreasonable searches and asserting tort claims for intentional infliction of emotional distress, invasion of privacy, and negligence. Citing Beard v. Whitmore Lake School District [see Sixth Circuit summaries below] for the proposition that at the time of these searches they were not clearly unreasonable, the court holds that the teachers and administrators were entitled to qualified immunity. Because immunity attaches only to discretionary acts, the parents asserted that a school board policy against strip searches deprived the teachers of immunity. The court rejected that argument, saying that the actions were in good faith, were discretionary in nature, and were within the scope of their authority. Lamb v. Holmes, 162 S.W.3d 902 (Ky. 2005).

Teacher Disciplinary Procedures – Lesser Sanctions

A school board sought termination of a principal on multiple grounds. She contested the charges against her before a tribunal convened under KRS 161.790. Finding for the board on only some of the charges, the tribunal ordered a reprimand and a suspension without pay rather than termination. Both sides appealed. In response to the board’s claim that the tribunal had no authority to modify the sanctions, the court held that the tribunal does have that power. The statute confers on the tribunal ultimate power to address termination and the power to address lesser sanctions, said the court, parallel and coextensive. The board also objected to procedures employed by the hearing officer including the use of jury-style instructions for the board and his decision to stay with the board during deliberations. As to the use of instructions, the court said that they were an accurate reflection of the law and the charges that did not prejudice the board. As to staying with the board, the court said that it was a reasonable exercise of the hearing officer’s power absent some showing of prejudice or an express prohibition. Fankhauser v. Cobb, 163 S.W.3d 389 (Ky. 2005).

Emergency Powers – Governor's Spending Plan

The Franklin Circuit Court declared the governor’s Public Service Continuation Plan unconstitutional [see Local Government Law News, Winter 2004], and the Governor appealed. The Supreme Court affirmed that the governor has no constitutional authority to exercise legislative powers even when the General Assembly fails to do so. Overruling its earlier decision in Miller v. Quertermous, the court went so far as to say that the governor possesses no emergency or inherent powers to appropriate money from the state treasury. “There is no constitutional mandate that the General Assembly enact a budget bill, and there is no statute providing for an alternative when it fails to do so.” Section 230 of the Kentucky constitution means what it says. Fletcher v. Commonwealth, 163 S.W.3d 852 (Ky. 2005).

Kentucky Court of Appeals

Whistleblower Act – Covered Reports

An employee of the Department of Military Affairs had outside employment as an officer of a corporation cited for violation of Kentucky’s mining laws. The corporation and the Cabinet for Natural Resources and Environmental Protection were in litigation over whether the cabinet’s hearing procedures were an abuse of discretion and a violation of state law. Citing the potential for conflicts of interest, the department asked the employee to resign. He did so, but responded with a suit alleging that the department was retaliating for his exposure of the cabinet’s wrongdoing. Holding as a matter of first impression, the court said that disclosure of information that is publicly known is not a disclosure within the meaning of the Whistleblower Act. Here, the employee did not report anything about the cabinet’s procedures that were not already known. The hearing procedures were set out in statute and regulation; they were not secretive or concealed. The purpose of the act is to help uncover and disclose unknown information about agency wrongdoing. Davidson v. Commonwealth, 152 S.W.3d 247 (Ky. App. 2004).

Conditional Use Permit – Adequate Findings

A developer applied for a conditional use permit to construct a golf course. Opponents raised concerns about safe access to the golf course over a railroad crossing. Following a hearing, the board of adjustment granted the permit subject to a condition that a proper railroad crossing be constructed before issuance of a final certificate of occupancy. The relevant provision of the zoning ordinance required the applicant to show “beyond a reasonable doubt” that the proposed use would not be detrimental to health, safety, and general welfare. That burden fell upon the developer, who did not meet it. The board never made a specific finding addressing the issue of safe access to the golf course via the proposed crossing. Murphy v. Key West Crossing, LLC, 152 S.W.3d 878 (Ky. App. 2004).
Annexation – Property Taxes

Following annexation of property into the city, the city failed to file the proper maps as required by statute. Taxpayers living in the area sued as a class, alleging that the city therefore improperly collected ad valorem property taxes from them. The circuit court agreed and in doing so rejected the city’s counterclaim that it could recover from the taxpayers the reasonable value of the benefits received as a result of the annexation. The city appealed arguing in part that the circuit court erred in permitting the class action, that a refund of taxes was unfair because the taxpayers requested annexation, and that the court erred in dismissing the counterclaim. The Court of Appeals rejected all the city’s arguments. The relevant statute, by deleting the phrase “in each case,” intended to authorize class actions. The court dismissed the second and third arguments saying that a fair and equitable tax system can exist only when the laws are properly followed. The court went on to say that while the taxpayers were entitled to a refund, they were not entitled to interest on the taxes they paid. City of Somerset v. Bell, 156 S.W.3d 321 (Ky. App. 2005).

Habitual Truants – Jurisdiction

Two students adjudged to be habitual truants contested the holdings. They alleged that the director of pupil personnel making the complaint failed to fulfill the duty imposed by statute to assess the child to ascertain the causes of truancy. The court agreed, holding that failure to comply with the statute deprives the court of subject matter jurisdiction. The General Assembly intended to create a rigorous process in order to bring a juvenile into the court system. The students further alleged that, in refusing to allow a closing statement, the lower court violated their rights to due process. The court agreed that the juvenile has a right to make a closing statement. T.D. v. Commonwealth, 168 S.W.3d 480 (Ky. App. 2005).

Compatibility of Office – County Magistrate

An employee in the county road department won election as a county magistrate. At the subsequent organizational meeting of the fiscal court, the judge/executive did not nominate him for continued employment with the road department. He sued for reinstatement. The circuit court found the positions to be incompatible; the court of appeals affirmed. The doctrine of incompatibility bars an individual from holding two positions of public trust where one is subordinate to the other. Here, if employed in the road department, the individual would be subordinate to the county road supervisor while having the capacity to exert control over the supervisor in the role of a member of the fiscal court. Webb v. Carter County Fiscal Court, 165 S.W.3d 490 (Ky. App. 2005).

Speed Limit – Failure to Enforce

A driver traveling 40 miles per hour in a 25 mile-per-hour zone struck and killed a child. The parents sued the city claiming that it violated the child’s substantive due process rights by failing to act on their earlier request to lower the speed limit and by failing to enforce the existing speed limit. The district court dismissed the claim, and the court of appeals affirmed because the parents did not establish a violation of a federally protected right. The Constitution does not guarantee that government will provide minimum levels of safety and security. The death of the child resulted from the reckless act of a private citizen, not from the actions of the city or its officials. Further, the creation of a street and the management of traffic conditions on the street are too indirect to say that the city played a part in the creation of the danger to the child. Setting the speed limit at 25 miles per hour represents a policy trade-off, but it does not rise to the level of a callous disregard for the risk of injury necessary to establish a constitutional violation. Schroeder v. City of Fort Thomas, 412 F.3d 724 (6th Cir. 2005).

Michigan

High School Students – Strip Searches

A student reported to her gym teacher that money was stolen from her at some point during class. The teacher so advised the acting principal, and the incident was reported to the police. The principal, with the assistance of teachers, searched the backpacks of the other students in the class. The male teachers searched the male students individually by requiring them to undress in the locker room. Upon the advice of police, female teachers conducted a similar search of the girl students in their locker room. The searches, the court of appeals said, were unconstitutional because the students had a significant expectation of privacy, the search was highly intrusive, and the governmental interest was diluted by the lack of individualized suspicion. However, said the court, because the law at the time of the search did not clearly establish that the searches were unreasonable under the circumstances, the teachers were entitled to qualified immunity from suit. Beard v. Whitmore Lake School District, 402 F.3d 598 (6th Cir. 2005).

Local Government Law News
Pre-trial Detainee – Medical Care

A person arrested on charges of retail fraud informed police during the booking process that she was a diabetic and would need insulin while locked up. She did not receive treatment for an extended period, resulting in a trip to an emergency room and an extended hospital stay. She sued the city, its police department, and several officers individually alleging violations of her constitutional rights and asserting state law claims. The district court granted the defendants’ motion for summary judgment. The court of appeals reversed as to some of the individual officers. Those officers knew that she was past due for treatment. Under the Fourteenth Amendment, the state has a duty to provide detainees with adequate medical care. The officers’ disregard of her condition posed a substantial risk of serious harm to her health and safety in violation of that right. Garretson v. City of Madison Heights, 407 F.3d 261 (6th Cir. 2005).

Handbills on Cars – Ordinances Prohibiting

A city ordinance prohibited the placement of leaflets, handbills, and advertisements on cars without the consent of the owner. Its purpose, together with other ordinances, was to address a general littering problem in the city. A person convicted and fined under the ordinance subsequently sought a declaratory judgment that the ordinance unconstitutionally infringed upon rights of free speech. The petitioner asserted that the leafleting occurred in a public forum – cars parked on public streets – while the city argued that the leafleting occurred on privately owned cars. The court reasoned that the public forum doctrine does not apply to private cars temporarily parked on a public street. The court then went on to conclude that the ordinance was a reasonable time-place-and-manner regulation of speech. First, the ordinance was content-neutral. Second, it advanced two significant governmental interests – prohibiting litter and protecting private property from those who do not have permission to use it. Third, the ordinance “targeted the precise problems … that it wished to correct.” Fourth, the ordinance left open ample alternative channels of communication. For example, it did not ban leafleting in its traditional sense – offering handbills to pedestrians who may take the handbill or leave it. The opinion sets out the ordinance in full and an appendix provides numerous other examples of like laws and ordinances from around the country. Jobe v. City of Catlettstburg, 409 F.3d 261 (6th Cir. 2005).

Vote Buying – Mixed Federal/State Elections

In a primary election that included contests for judge/executive and for the U.S. Senate, an individual offered $50 to seven persons to vote for a particular candidate for county office. A federal grand jury indicted him for vote buying in a federal election, and he pleaded guilty to one count for which the court sentenced him to 10 months in custody. He challenged his conviction on the ground that his conduct related solely to a candidate for local office. Looking at the statute in question, 42 U.S.C. § 1973i(c), the court found that it clearly and unambiguously applied to a mixed federal/state election. There was no requirement that the payment be made specifically on behalf of a federal candidate or that there be a specific intent to influence a federal race. If that is so, argued the defendant, then the statute exceeds the power of Congress to enact. The court answered that the statute is well within the power of congress under the Elections Clause, U.S. Const., Art. I, § 4, cl. 1. U.S. v. Sloane, 411 F.3d 643 (6th Cir. 2005).

Liquor License – Unconstitutional Conditions

A restaurant, the holder of a state-issued liquor license, complained that the city in which it was located subjected it to an unlawful harassment campaign. The city conducted daily drive-throughs of the parking lot, stopped vehicles of restaurant patrons, and parked police cars near the restaurant where customers would see them, all in an attempt to get the restaurant to close earlier than the time allowed under the license. With the same end in mind, the city also withheld administrative approvals under its site plan, zoning, and sign ordinances. Ultimately, the restaurant claimed, the city made it unfeasible to continue operations, and it closed. It sued the city, alleging a violation of the unconstitutional conditions doctrine. The doctrine prevents the government from conditioning the receipt of a benefit on the recipient’s agreement to refrain from exercising a constitutional right. The district court dismissed the claim, but the court of appeals reversed. Under Michigan law the restaurant had a property interest in the license and in the hours of operation set by rule. The city could not permissibly withhold its approvals or indirectly force the restaurant to close early without violating the constitutionally protected property right. R.S.W.W., Inc. v. City of Keego Harbor, 397 F.3d 427 (6th Cir. 2005).

Ohio

Smoking Ban – Takings, Preemption

After the city enacted a new Clean Indoor Air Ordinance restricting smoking in public places, an association of restaurant owners challenged the ordinance. They asserted that the ordinance was a regulatory taking of their property and that it was preempted by state law. The district court rejected those claims, and the court of appeals affirmed. On the takings claim, the ordinance did not deny the owners of all economically viable use of their properties. The loss of customers that the owners attribute to the ordinance is not enough to satisfy their burden of proof. Further, an ordinance does not effect a taking merely because compliance with it requires the expenditure of money (the construction of smoking lounges in restaurants that wish to allow customers to smoke). The court of appeals also rejected the preemption claim. The state law in question excluded the establishments regulated by the city, but did not indicate that they were immune from smoking-related regulation. D.A.B.E., Inc. v. City of Toledo, 393 F.3d 692 (6th Cir. 2005).

Street Festival – Freedom of Speech

A private organization secured a permit to hold an arts festival on a blocked-off city street open only to pedestrians. Among the pedestrians was a person displaying a sign with a religious message and distributing literature. An off-duty city police officer in uniform, hired as security for the event, approached the individual, told him that the organizers did not want him there, asked him to move outside the barricades, and threatened arrest if he did not. He complied. Subsequently his attorney wrote to the city seeking relief
from the ban. The city responded that the area covered by the permit was not a public area in which the client had traditional First Amendment rights. In response, the individual filed suit seeking an injunction, declaratory relief, and damages. The district court dismissed the complaint on the ground that the off-duty officer’s conduct was not state action. The court of appeals reversed, holding that the streets remained a traditional public forum despite the issuance of a permit to a private organization. In addition, the acts of the police officer were attributable to the city, not the permit holder. He presented himself as a police officer and, through his uniform and badge, manifested official authority. Further, the city and its agents supported the permit scheme that ostensibly provided a permit holder with unfettered discretion to exclude someone exercising his constitutional rights on a public street. This was state action that violated the individual’s First Amendment rights. Parks v. City of Columbus, 395 F.3d 643 (6th Cir. 2004).

Public Right-of-way – Structures

Members of a labor union picketed a car dealership. The protesters occupied the public right-of-way in front of the dealership and displayed signs and a 12-foot tall inflatable balloon rat. A city ordinance, amended specifically to cover the use of the balloon in this case, prohibited placing any “structure” in the right-of-way without permission of the public works director. The union sued to enjoin enforcement of the ordinance. Affirming the district court’s grant of a preliminary injunction against the city, a divided appeals court said that the right-of-way was a traditional public forum where the right of the city to limit expressive activity was limited. There was no evidence that the temporary placement of the balloon on the right-of-way had any of the adverse effects the ordinance sought to address. Tucker v. City of Fairfield, 398 F.3d 457 (6th Cir. 2005).

Curb Cuts – Duty to Provide

A woman who suffered from a neurological disorder and who used a motorized wheelchair to move often traveled on city streets rather than on the sidewalk. The sidewalk curbs, the unevenness of the sidewalk, and the slope of the sidewalk made it hard to maneuver the wheelchair or caused it to overturn. On several occasions citizens complained about her riding in the streets and the need to swerve to avoid hitting her. Police investigated the complaints, and citations sometimes resulted. Subsequently, the woman sued the city alleging violations of the Americans with Disabilities Act, the Rehabilitation Act, and other statutes. The district court determined that the city violated the ADA when it illegally failed properly to install or maintain curb cuts and ramps when resurfacing streets and altering sidewalks. On appeal, the city argued that the ADA did not give the woman a private right of action concerning accessibility. The appeals court rejected the city’s position based upon its holding last year in Ability Center of Greater Toledo v. City of Sandusky. The district court also determined that the city did not intentionally discriminate against the woman. On cross-appeal, the appeals court sustained the court below. Although the city’s acts had a disparate impact on the disabled, there were no specific acts of discrimination toward her. The police investigated her not because of her disability but because of citizen complaints of potential traffic violations. Dillery v. City of Sandusky, 398 F.3d 562 (2005).

Molestation of Student – School District Liability

A student alleged numerous instances of sexual molestation of him by his fourth-grade teacher. Other students and parents complained as well. The student sued the school district for repeatedly failing to take remedial action and for indifference to the student’s safety. Following a trial, a jury rendered a verdict in favor of the defendant school district. The district court denied motions for judgment as a matter of law and for a new trial, and the student appealed claiming that the court improperly instructed the jury about the applicable law. In the opinion, the appeals court quoted the instructions at length and found no error in them. Williams ex rel Hart v. Paint Valley Local School District, 400 F.3d 360 (2005).

Sex Discrimination – Transsexual Police Sergeant

A pre-operative male-to-female transsexual failed the probationary period required to become a police sergeant. A suit against the city followed that alleged that the failure to pass probation was due to illegal sex discrimination based upon failure to conform to sex stereotypes. The city argued that the failure was the result of poor performance. A jury returned a verdict against the city and the city appealed. The appeals court first addressed the city’s claim that the probationary sergeant did not prove a prima facie case. The record, the court said, tended to show that the city’s real reason for demoting the candidate was unlawful discrimination. Among other things, there was evidence that probationers with lower ratings passed probation, that no probationary sergeant had ever failed probation, and that no probationary sergeant ever had an evaluation program similar to that designed for this candidate. The jury could conclude that the police department targeted the candidate for failure. Barnes v. City of Cincinnati, 401 F.3d 729 (2005).

Water Service – Landlord and Tenants

City policy denied water service to tenants if the landlord owed the city for a prior tenant’s unpaid water bills. A tenant denied water service pursuant to the policy filed a class-action complaint alleging that the practice was a denial of due process. She asserted that the expectation of continued water service was a property right protected by the Fourteenth Amendment. The court rejected that assertion because the tenant could not claim a contractual or statutory entitlement to the water service. Neither could she demonstrate that Ohio law guaranteed water service to its residents. The argument that water is “an absolute necessity of life” does not, without more, constitute an entitlement for the purpose of the Fourteenth Amendment. Golden v. City of Columbus, 404 F.3d 950 (6th Cir. 2005). Accord, Midkiff v. Adams County Regional Water District, 409 F.3d 758 (6th Cir. 2005).

Police Officer – Self-incrimination

In the course of a police department administrative investigation into officers’ misuse of scanners to eavesdrop on citizens’ phone calls, an officer was interviewed by the department’s internal affairs unit. The officer read and acknowledged a written statement that was consistent with the immunity rule set out in Garrity v. New Jersey. As a result of the
Disabled Student – Representation by Non-lawyer Parent

Parents of a disabled child represented themselves and their child in a suit against the school district. They alleged that the district denied the child a free appropriate public education as required by the Individuals with Disabilities Education Act. The school district challenged the right of a parent acting pro se to enforce the child’s right. The court of appeals agreed that the act does not authorize non-lawyer parents to serve as legal counsel for their minor child. The court found no language in the IDEA that abrogates the common law rule that non-lawyers may not represent litigants in court. Under the IDEA, parents have rights and privileges in the administrative proceedings provided in the statute. However, in providing access to the federal courts, the statute makes no mention of parents whatsoever. Principles of federalism support that conclusion because the contrary conclusion would undermine the states’ strong interest in regulating the practice of law. Cavanaugh ex rel. Cavanaugh v. Cardinal Local School District, 409 F.3d 754 (6th Cir. 2005).

Traffic Barricades – Due Process

Acting in response to numerous complaints from neighbors, a city erected traffic barricades near the drive-in entrance to an ice cream store. With the drive-through blocked, the owners experienced a 22% drop in sales. They sued to have the city remove the barriers, and the district court entered an injunction against the city. The city appealed. In the lower court, the owners asserted substantive and procedural due process claims and an equal protection claim. The court of appeals affirmed the grant of an injunction, vacating the convictions. The city then sued the city in federal court claiming that it maliciously prosecuted him in violation of the Fourth Amendment and that it violated his Fifth Amendment right against self-incrimination in the course of the administrative investigation. Over a dissenting opinion, the court of appeals held that the officer presented sufficient evidence to overcome summary judgment “prematurely granted” by the district court. However, the Fourth Amendment claim failed because the city cannot be liable when it did not make the decision to prosecute; the county prosecutor did. Even so, said the court, the claim would fail because there was probable cause independent of the interview given by the officer to support the prosecution. McKinley v. City of Mansfield, 404 F.3d 418 (2005).

Excessive Force – Expert Testimony

A suspect shot by a police officer responding to a domestic violence incident sued the city alleging that the officer acted pursuant to an unwritten city policy that condoned the use of excessive force. The district court granted summary judgment in favor of the city, and the suspect appealed claiming that the court was wrong to reject the affidavit of his expert witness. On appeal, the court agreed with the district court that the expert’s opinion was conclusory because the affidavit did not explain how he came to the conclusion that the police department had an unwritten policy condoning excessive force. The expert’s experience way of lost profits, the owners were entitled to the injunction. Warren v. City of Athens, 411 F.3d 697 (6th Cir. 2005).

Defense Attorney – Defamation by Prosecutor

An attorney represented a client in a criminal matter that resulted in a jury verdict against the client. Following the verdict the prosecutor made statements to the media that the defense attorney regarded as defamatory and in retaliation for the attorney’s “exercising his First Amendment right to protect his client’s Sixth Amendment and other constitutional rights.” Whether an attorney can claim First Amendment protection on his own behalf for his filing motions and making courtroom statements on behalf of his client was, said the court, a question of first impression in the circuit. The court held that in the context of courtroom proceedings, an attorney retains no personal First Amendment rights when representing his client in those proceedings. Even if that were not so, the prosecutor’s conduct here would not deter a criminal defense attorney of ordinary firmness from vigorously defending his clients as a consequence of the alleged defamation. Mezibov v. Allen, 411 F.3d 712 (6th Cir. 2005).

Adult Business – Secondary Effects

An operator of an adult cabaret challenged a township ordinance that attempted to minimize the secondary effects of the sexually oriented business. The operator first claimed that the ordinance was invalid because it failed to provide prompt judicial review when an application for a license was denied. The court of appeals examined the resolution and concluded that it contained adequate safeguards against censorship. The operator also challenged the ordinance’s hours of operation provision. The court concluded that the provision was a valid time-place-and-manner restriction on First Amendment rights. In addition, the operator challenged the ordinance’s requirements for disclosure of certain personal information in the license application. The court recognized a tension between the legitimate governmental need for such information and the reasonable concerns for the personal safety on the part of the operators and employees. The court concluded that the disclosure provision was constitutional but that names and other information were protected private information under Ohio’s Public Records Act. Déjà vu of Cincinnati v. Union Township Board of Trustees, 411 F.3d 777 (6th Cir. 2005).

Tennessee

After investigation, the department ultimately terminated the officer. However, an arbitrator ordered his reinstatement. Subsequently, the local prosecuting attorney brought charges against the officer. The court denied his motion to suppress the statements given in the administrative investigation, and a jury convicted him on three counts. A state appeals court reversed the trial court’s decision to admit the statements and vacated the convictions. The officer then sued the city in federal court claiming that it maliciously prosecuted him in violation of the Fourth Amendment and that it violated his Fifth Amendment right against self-incrimination in the course of the administrative investigation. Over a dissenting opinion, the court of appeals held that the officer presented sufficient evidence to overcome summary judgment “prematurely granted” by the district court. However, the Fourth Amendment claim failed because the city cannot be liable when it did not make the decision to prosecute; the county prosecutor did. Even so, said the court, the claim would fail because there was probable cause independent of the interview given by the officer to support the prosecution. McKinley v. City of Mansfield, 404 F.3d 418 (2005).

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and expertise alone is not enough to require a court to take the expert at his word. The affidavit must provide the rationale for the expert’s conclusion. Further, the court said that the expert could not infer an illegal policy from the police department’s potentially insufficient investigation of the case. One has to reach beyond the facts of the case to show a pattern. Thomas v. City of Chattanooga, 398 F.3d 426 (6th Cir. 2005).

**Signs – Size and Height Restrictions**

To promote the city’s interest in aesthetics and traffic safety, a city ordinance limited the size and height of billboards within the city. An outdoor advertising company proposed to place billboards that did not conform to the limitations near an interstate highway. The city denied the company’s application for a permit, and the company sued. The district court concluded that the restrictions were not narrowly tailored to promote the city’s interest and invalidated certain parts of the ordinance. The court of appeals reversed. After a review of the cases governing time-place-and-manner restrictions, the court concluded that the city’s restrictions here satisfied the requirement that they be narrowly tailored. The city’s justification for this content-neutral regulation need not be as rigorous as that for a content-based regulation. Prime Media, Inc. v. City of Brentwood, 398 F.3d 814 (6th Cir. 2005).

**Wireless Towers – Telecommunications Act**

After a company filed permit applications to construct monopole communications towers, the city declared a moratorium on such permits to consider amendments to its zoning ordinance. At the time the proposed use of the property conformed to the zoning ordinance. The city proceeded to amend the zoning ordinance and, when the city lifted the moratorium, the applications did not comply with the amended ordinance. The city advised the company of the need then to procure a special exceptions permit, but the company took no steps to amend its applications and the city took no other action on the permits in the ensuing nine months. The company sued to compel the city to issue the permits and also asserted violations of the Telecommunications Act of 1996. The district court granted partial summary judgment to both the city and the company and ordered the city to grant or deny the applications within 60 days. On appeal, the court found that the city’s actions constituted an informal denial of the company’s application that contravened the timing and writing requirements of the Telecommunications Act. However, it disagreed with the district court regarding the 60-day order. The city’s informal denial violated the substantial evidence requirement of the Telecommunications Act. The proper remedy in such instances is an injunction compelling the city to grant the permits. This effectuates Congressional intent to avoid multiple rounds of litigation. Tennessee ex rel. Wireless Income Properties, LLC v. City of Chattanooga, 403 F.3d 392 (6th Cir. 2005).

**Police Promotions – Racial Discrimination**

African-American sergeants in the police department sued the city for engaging in discriminatory promotion policies. They claimed that the written test employed had a disparate impact on minority candidates. The district court found for the sergeants, promoted them to lieutenant, and awarded back pay. The city appealed. The appeals court agreed that the statistical evidence of discrimination was valid and that the test lacked a business justification because there was clear evidence that the scores from the written test did not approximate a candidates potential job performance. It was, therefore, proper to award promotion and back pay. The court rejected the city’s arguments that there was no assurance that the candidates would have been hired from the eligibility list. Isabel v. City of Memphis, 404 F.3d 404 (6th Cir. 2005).

**DEcisions of Note – Supreme Court Update**

Through the end of its most recent term, the United States Supreme Court had not experienced a longer span without an appointment since the 11-year stretch from 1812 to 1823. It is not surprising then that events since the end of the term – the resignation of Justice O’Connor and the death of Chief Justice Rehnquist – have since overshadowed the court’s work during the term. As usual, however, many of the cases decided by the court were of particular importance to local government.

A trio of property rights cases figured prominently among those cases. One of those, Kelo v. City of New London, received perhaps the most media attention of all the cases decided by the court last term. At issue in the case was whether the city of New London, Connecticut could, consistent with the federal constitution, condemn private property for the purpose of economic development. A sharply divided court held that it could.

The Takings Clause of the Fifth Amendment to the U.S. Constitution provides that government shall not take private property for a public use without just compensation. The clause does not prohibit the taking of private property; it imposes a condition of the exercise of the government’s power to do so. At the extremes, determining what is a public use is easy. Acquiring land from a private party and opening it to use by the general public – as a highway or a park, for example – is proper so long as the government justly compensates the owner. In contrast, acquiring land from one private party for the sole purpose of transferring it to another private party is improper even when the first party receives just compensation. Kelo presented a situation between these extremes. Could the government acquire property for a development from which the public would benefit, but where the property (or at least not all of it) would not be open to use by the general public?

The city of New London, Connecticut approved a development plan that it projected would generate more than 1,000 jobs, increase tax revenues, and revitalize its economically distressed downtown and waterfront areas. To assemble the land for the project, it used a nonprofit development corporation to purchase property from willing sellers and to condemn the property of the remaining owners. The project attracted a major pharmaceutical company to propose a $300 million research facility within the project area. Owners of the condemned properties claimed that to take...
their properties only because they happened to be in the development area violated the “public use” restriction in the Fifth Amendment.

Reviewing its precedents, Justice Stevens writing for the majority said that it had “long ago rejected any literal requirement that condemned property be put into use for the general public.” Since the close of the 19th century, it and other courts equated “public use” with “public purpose.” Thus, the majority said, the question here was whether the city’s development plan served a public purpose. Turning then to what constitutes a public purpose, the court said that its cases defined the concept broadly and reflected the court’s “longstanding policy of deference to legislative judgments in this field.”

The taking was part of a “carefully considered” comprehensive development plan and was undertaken pursuant to a state legislative finding that economic development served a public purpose. The city’s determination that the area was distressed and required redevelopment was entitled to deference. There was no indication that the development was undertaken with an improper motive to benefit particular private parties. The benefit to private parties was incidental and irrelevant to the analysis.

Four members of the court dissented in an opinion by Justice O’Connor. She sounded a note that echoed in popular accounts of the opinion. “Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded – i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public – in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings ‘for public use’ is to wash out any distinction between private and public use of property – and thereby effectively to delete the words ‘for public use’ from the Takings Clause of the Fifth Amendment.”

In response, the majority reminded states that they were free to place further restrictions on the exercise of the takings power and noted that many do so already. Since the decision, legislators in at least 14 states and members of Congress have introduced bills to limit the use of eminent domain for economic development purposes. Kentucky recognizes economic development as a public purpose, but it is among those states whose law restricts the use of eminent domain for economic development purposes.

A second property rights case was San Remo Hotel, L.P. v. City and County of San Francisco. It involved a hotel conversion ordinance designed to stem the loss of affordable rental housing by limiting the conversion of residential hotel units into tourist units. To accomplish the desired conversion, owners of the San Remo Hotel paid $567,000 into the city’s Residential Hotel Preservation Fund. They challenged this as a regulatory taking.

The owners sued in federal court. However, the court found that their claim was not ripe under the rule of Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City. That case requires property owners to pursue their takings claim first in state court, returning to federal court later. This rule creates a trap for the unwary. If the claimants do not adequately protect and preserve their federal claims and the state court decides them, the claimants cannot relitigate the issues in federal court. Lawyers call this collateral estoppel or issue preclusion.

In San Remo Hotel the “Williamson trap” sprung. The California courts held that the state law claims were co-extensive with the federal law claims. Upon returning to federal court, it gave full faith and credit to the California judgment. Arguing that there should be an exception to the requirement of full faith and credit to avoid the Williamson trap, the hotel owners appealed. A unanimous Supreme Court declined to create an exception. However, in a concurring opinion by Chief Justice Rehnquist, four justices suggested that the court should revisit Williamson County. Justice O’Connor joined that opinion.

The third property rights case was Lingle v. Chevron U.S.A., Inc. It involved a challenge to a Hawaii law that imposed limits on the rents that oil companies could charge dealers leasing company-owned service stations. The market for gasoline in Hawaii is highly concentrated, and the law was a response to the effect of that concentration on prices at the pump. Chevron challenged the rent cap claiming that it effected a taking of its property. Applying a rule first announced in Agins v. City of Tiburon, the trial court held that the rent cap failed substantially to advance a legitimate state interest and as such was a taking. The court of appeals held that the lower court applied the correct legal standard and affirmed. Hawaii asked the Supreme Court to decide whether the rule announced in Agins was the correct test to determine if a regulation effected a Fifth Amendment taking. In Lingle, the court decided it was not.

The usual example of a taking is government appropriation of private property such as occurred in Kelo. However, in some instances government regulation of private property may be so onerous that its effect is tantamount to appropriation. Such “regulatory takings” are subject to the Fifth Amendment’s requirement to pay just compensation. In Agins, a zoning case, the court declared that a law effects a taking if it does not advance legitimate state interests or if it denies an owner economically viable use of his property. Lingle presented the Supreme Court with its first chance to consider the validity of the “substantially advances” formula as a freestanding takings test. It is, the court unanimously concluded, properly a due process test that has no place in the law of takings.

Town of Castle Rock v. Gonzales was a due process case of considerable importance to local government. In it the court addressed a question it left unanswered in the earlier case of DeShaney v. Winnebago County Dep’t of Social Services. DeShaney held that the so-called “substantive” component of the Due Process Clause does not require the state to protect the life, liberty, and property of its citizens against invasion by private actors. Gonzales asked whether a police department policy of failing to enforce domestic violence restraining orders violated the rights of a victim of domestic violence protected by the procedural component of the Due Process Clause. The Supreme Court, in a 7-2 decision, said no.

The husband violated the restraining order when he abducted the couple’s three daughters. Despite the wife’s repeated pleas, the police department made no effort to find the children or to enforce the order. The husband later appeared at the police station and opened fire on the police;
they shot back and killed him. Inside the cab of his pickup truck, police found the bodies of all three daughters whom the father had already murdered. Believing that enforcement of the restraining order was mandatory under state law, the mother sued under 42 U.S.C. § 1983 to hold the town responsible for the refusal of the police to listen to her or to determine whether conditions were met for the husband’s arrest.

The court did not believe that the relevant provisions of Colorado law made enforcement of the restraining order mandatory. “A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.” This element of discretion was sufficient to defeat the claim that the victim was entitled to have the order enforced. The court went on to say that, even if enforcement of restraining orders were mandatory, it did not necessarily mean that state law gave a person in the victim’s position an entitlement to enforcement of the mandate. Had Colorado law intended to create a private right to require arrest, it would have explicitly said so. In light of *DeShaney* and *Gonzales*, “the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its ‘substantive’ manifestations.”

The decision was closely watched by cities and states and by organizations dedicated to increasing protection against domestic violence. It was seen as a victory for cities and states that feared costly lawsuits.

A pair of cases, one arising in Kentucky and another in Texas, split on the propriety of government displays of the Ten Commandments. *McCreary County v. ACLU of Kentucky* involved displays in the McCreary and Pulaski county courthouses. Initially the displays consisted of framed copies of the King James Version of the Ten Commandments. After the ACLU sued in District Court, the counties expanded the displays to include other historical documents with their religious references highlighted. After the District Court issued an injunction ordering the removal of the displays, the counties erected a third display that also included the Ten Commandments. The District Court also enjoined that display because it still had a religious purpose, and the Court of Appeals affirmed on appeal. A 5–4 majority of the Supreme Court upheld the injunction.

The Supreme Court began its analysis with a reminder that the First Amendment requires government neutrality between different religions and between religion and non-religion. To prevent the government from abandoning neutrality in favor of promoting a particular point of view in religious matters, *Lemon v. Kurtzman* requires the challenged law or display to have a secular purpose. The counties argued that the court should abandon or water down that test, but it declined to do so. The court concluded that the evidence showed that the counties were posting the Ten Commandments precisely because of their sectarian content and “presented an indisputable, and undisputed, showing of an impermissible purpose.” Subsequent efforts to recast that purpose, said the court, were merely a litigation position.

Justice Scalia wrote the dissenting opinion in which he made three arguments. First, he attacked “the demonstrably false principle that the government cannot favor religion over irreligion.” Historical practices, he said, demonstrate that there is a difference between the acknowledgment of a single Creator, as was common among the Founders, and the establishment of a religion. Second, he argued that the majority modified the *Lemon* test, turning it from a subjective test to an objective one and insisting that a secular purpose “predominate” over any religious purpose. Third, even under the majority’s test, argued Justice Scalia, the displays were constitutional. “Acknowledgment of the contribution that religion has made to our Nation’ legal and governmental heritage partakes of a centuries-old tradition,” he said.

The companion case was *Van Orden v. Perry*. It concerned a display on the grounds of the Texas statehouse. It consisted of a version of the Ten Commandments on a single monument donated by a benevolent society in the hope that it and similar monuments erected nationwide would combat juvenile delinquency. The lower courts found no purpose or effect of endorsing religion. A highly fractured court—a plurality opinion, three concurrences, and three dissents—affirmed. The plurality opinion said that the *Lemon* test was not useful in dealing with the sort of passive monument that Texas had erected on its capitol grounds. Instead, the analysis should be driven by both the monument’s nature and an unbroken history of official acknowledgment by all three branches of government of religion’s role in American life.

A third case involving the Religion Clauses was *Cutter v. Wilkinson*, another case from the Sixth Circuit that includes Kentucky. It involved a challenge to Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000. It provides in part that “[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution” unless the burden furthers “a compelling governmental interest” and does so by “the least restrictive means.” Current and former inmates in Ohio—Satanists, Wiccans, and white supremacist members of the Church of Jesus Christ Christian—complained that Ohio prison officials failed to accommodate their exercise of religion. The Sixth Circuit held that the law at issue violated the Establishment Clause; a unanimous Supreme Court reversed.

Writing for the court, Justice Ginsburg reaffirmed that “there is room for play in the joints between” the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause. Thus, section 3 of RLUIPA on its face does not exceed the limits of permissible government accommodation of religious practices. It simply alleviates exceptional government-created burdens on private religious exercise. At the same time, it does not elevate accommodation of religious observances over an institution’s need to maintain order and safety. Neither does it confer privileged status on any particular religious sect or single out a bona fide faith for disadvantageous treatment.

*Clingman v. Beaver* was an election law case in which the Supreme Court upheld Oklahoma’s semi-closed primary election system against a right of association attack. In Oklahoma, only members of a political party can vote in its primary election unless the party opts to invite voters registered as independents to vote as well. The Libertarian

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OAG 05-001

Subject: Whether Section 18 of House Bill 1 of the 2004 Extraordinary Session of the Kentucky General Assembly establishes a moratorium on new entities entering the County Employees Retirement Systems.

Syllabus: Section 18 of House Bill 1 of the 2004 Extraordinary Session of the Kentucky General Assembly prohibits the Personnel Cabinet from entering into any “new contracts required under KRS 78.530 for coverage of employees in the state health plan” from the effective date of the legislation through December 31, 2005, which has the effect of establishing a moratorium, during such period, on agencies beginning participation in the County Employees Retirement System.

Synopsis: Section 18 of House Bill 1 of the 2004 Extraordinary Session of the Kentucky General Assembly became effective on October 19, 2004. It provides: “The Personnel Cabinet shall not enter into any new contracts required under KRS 78.530 for coverage of employees in the state health plan” from the effective date of this Act through December 31, 2005.” It follows that an agency seeking to enter the County Employees Retirement System between October 19, 2004, and December 31, 2005, would not have the irrevocable contract for health insurance coverage under KRS 18A.225 that is required by KRS 78.530. Accordingly, the application of such agency for participation in the County Employees Retirement System would have to be denied.

OAG 05-002

Subject: County Attorney Office Operating Expenses.

Syllabus: A county attorney may use proceeds from the county attorney’s delinquent real estate tax collection account to pay for travel to board meetings and other events sponsored by the Kentucky County Attorneys’ Association because these constitute county attorney office operating expenses pursuant to KRS 134.545.

Synopsis: KRS 134.545 provides that certain moneys paid to the county attorney shall be used only for payment of “county attorney office operating expenses.” Funk v. Milliken, 317 S.W.2d 499 (Ky. 1958), holds that a necessary office expense includes expenses that are “reasonable in amount, beneficial to the public, and not predominantly personal to the officer in the sense that by common understanding and practice they are considered to be personal expenses.” The Attorney General’s office is currently promulgating regulations that should further delineate the appropriate uses of these moneys. Until then, county attorneys may rely upon the guidelines developed by the Kentucky County Attorneys Association, the Auditor of Public Accounts, and the Attorney General’s office.

OAG 05-005

Subject: Whether a local entity receiving state funds for a specific capital project may refuse to apply the name given to the project by the line item in the Executive Branch Budget.

Syllabus: When a local development project is referred to by name in a branch budget appropriation, the use of the project name is inseparable from a local entity’s receipt of the state funds.

Synopsis: Section 230 of the Kentucky Constitution and KRS 41.110 provide that no money can be drawn from the state treasury without a specific appropriation by the General Assembly. The purpose of these constitutional and statutory provisions was to prevent the expenditure of the state’s money without the consent of the legislature. Ferguson v. Oates, 314 S.W.2d 518, 521 (Ky. 1958). The purpose of the appropriation in question was to fund a convention center named in honor of a particular person, not to fund a convention center generally. The local government may not claim the funds without so naming the facility.

Summaries of Selected Open Meetings Decisions

Editor’s note: HB 59 (2005 Acts ch. 93, effective March 6, 2005) and HB 77 (2005 Acts ch. 45, effective June 20, 2005) amended the Open Meetings Act. The opinions summarized below cover the period up to the June effective date. These summaries retain the numbering system employed prior to either amendment.
Public Agency Defined – KRS 61.805(2)

A citizen complained that a city’s Master Plan Review Committee violated the Open Meetings Act by failing to take minutes of its meeting. The city responded that there was no violation because the committee was an informational citizens’ committee not subject to the act. The Attorney General concluded that the committee was a public agency subject to the act. As reflected in the city council’s minutes, the city council created and controlled the committee. The fact that its functions were advisory did not take it outside the act. As a public agency, it was subject to the act’s requirement that it keep minutes of its meetings. 05-OMD-117.

Acquisition or Sale of Real Property – KRS 61.810(1)(b)

Prompted by a letter offering to buy a parcel of property, a fiscal court went into closed session to discuss its sale and the possible acquisition of other properties. A newspaper objected that the closed session was improper where the fiscal court needed only to accept or reject the offer. The fiscal court responded that before it could do so, it was necessary to discuss whether to sell the property at all and to develop some idea of its value. Further, the fiscal court maintained, the possible sale of additional and unrelated tracts of real estate were subject to discussion in the closed session. The Attorney General agreed with the fiscal court that the discussion was “likely” to affect the value of the properties and was properly within this exception to the Open Meetings Act. The members of the fiscal court were not privy to the specific terms of the subject offer prior to the meeting. This necessitated a discussion of all relevant factors before the fiscal court could reach a determination to accept or reject it. 05-OMD-026.

Appointment, Discipline, or Dismissal – KRS 61.810(1)(f)

A city council announced in an open meeting that it would go into closed session to discuss employee matters, specifically two agenda items denominated “Assistant Clerk” and “Employees.” A citizen objected that it was improper to discuss general personnel matters in a closed session and appealed. The Attorney General agreed that an agency cannot discuss general personnel matters in a closed session. An agency can discuss in closed session only those matters that might lead to the appointment, discipline, or dismissal of an employee. The city council did not establish on the record that the closed session fell within the limitations of this exception. 05-OMD-011.

A city council went into closed session to discuss what course of action to take following the resignation in the previous week of the fire chief and most of the members of the fire department. A citizen objected to exclusion from the meeting. The Attorney General agreed that the closed session was improper. Discussion concerning what to do about the fire department related to general personnel matters; they were not matters that might lead to the appointment, discipline, or dismissal of an individual employee. Although the discussions did lead to the appointment of an interim fire chief, the council did not announce this purpose in the open portion of the meeting. Had it done so, it would not have been a violation of the act. 05-OMD-082.

Serial Meetings – KRS 61.810(2)

Members of the public alleged that a mayor telephoned six members of the city council and discussed a proposed loan guarantee that the council subsequently voted to approve. They maintained that the series of phone calls was a violation of the Open Meetings Act. The city responded that the calls were to educate the members of the council and permissible under the act. The city asserted that the mayor was merely advising the council on a matter within the exclusive authority of his office. The Attorney General rejected the city’s contention, citing the inconsistency with the action taken by the city council. The issue was one about which the council had the option to take action and so was public business. The telephone conversations fell within the zone of conduct prohibited by the serial meetings provision of the act. 05-OMD-026.

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 online at http://ag.ky.gov/civil/openrec.htm.

SUMMARIES OF SELECTED OPEN RECORDS DECISIONS

Editor’s note: HB 59 (2005 Acts ch. 93, effective March 6, 2005) and HB 77 (2005 Acts ch. 45, effective June 20, 2005) amended the Open Records Act. The opinions summarized below cover the period up to the June effective date. These summaries retain the numbering system employed prior to either amendment.

Public Agency Defined – KRS 61.870(1)

A Court Appointed Special Advocate (CASA) program did not respond to a request for records, and the requester appealed. The Attorney General reviewed the records sought, explained the government’s authority to deny access to some of the records, and found no violation of the Open Records Act. 05-ORD-004.

Records Management – KRS 61.8715

In response to a request for a copy of the employment application of its chief of police, a city acknowledged the “records had been lost three different times, so none were on file.” The Attorney General concluded that a city could not provide copies of records it did not have but referred the matter to the Department for Libraries and Archives to determine whether the city was fully discharging its duty.
to manage and preserve records under KRS Chapter 171. 05-ORD-077.

Records Not in Custody – KRS 61.872(4)

A city denied a journalist’s request for records related to a lawsuit because the records were not in the city’s possession. On appeal the journalist argued that the lack of possession did not relieve the city of the obligation to produce the records. The Attorney General agreed. The city did not deny the existence of the records or claim that they were inaccessible, only that it did not possess them. The Attorney General said that it is the nature and purpose of a document, not the place where it is kept, that confirms its status as a public record. The agency must make a reasonable search for the records and document the efforts made to locate them. Records in the possession of the city’s insurance carrier facilitating settlement of the lawsuit remain the city’s records, even though the insurance company made the direct payment. 05-ORD-015.

Unreasonable Requests – KRS 61.872(6)

In an appeal of the denial of a request for all documents referring to a named person, the Attorney General reaffirmed that a request for all documents that contain a name, term, or a phrase is not a properly framed open records request and can be denied as an undue burden. A request in that form does not identify records with “reasonable particularity,” nor are they records of an identified, limited class. 05-ORD-014.

A person engaged in litigation with a public water company made 14 requests of the agency over a period of seven months, many of which were voluminous and some of which were duplicative. The company expended 68 staff-hours in response to the requests. The company resisted the most recent request as an attempt to disrupt the essential functions of the company. Acknowledging that “this is a very close issue,” the Attorney General disagreed. Although the company made its argument in good faith, in the opinion of the Attorney General the record on appeal did not contain clear and convincing evidence supporting that argument. The submission of two requests per month and the allocation of staff resources of less than 10 hours per month were not indicative of an unreasonable burden or an intent to disrupt. 05-ORD-067.

An urban county government denied a request for division of police records in its entirety on the ground that the requester’s repeated duplicative, voluminous requests were intended to disrupt essential agency functions. On the facts presented, the Attorney General agreed that the agency made its case. The record showed that the requester engaged in a pattern of requesting voluminous documents to inspect and, after production of the documents, not inspecting the records or inspecting only a small fraction of them. In addition, the Attorney General found a pattern of requests that were overly broad and blanket in nature, placing an unreasonable burden upon the agency. 05-ORD-121.

Online Access – KRS 61.874(6)

A county clerk allowed online access to scanned images of documents to attorneys within the county with whom the clerk had had a working relationship. An out-of-county attorney who did real estate title searches was denied online access and appealed. The clerk took the position that the Open Records Act gave discretion to the custodian to provide records online and that a custodian could exercise that discretion favorably as to some persons and not as to others. The Attorney General disagreed. All persons have equal standing to request access to records. Once an agency determines to make records accessible online, the agency must afford access to anyone willing to accept the terms and conditions established by the agency. The act provides no basis for limiting access to those with whom the agency has a working relationship. “To hold otherwise would open the door to discriminatory records access practices.” 05-ORD-025.

Unwarranted Invasion of Personal Privacy – KRS 61.878(1)(a)

A county highway department removed some political signs along a right of way and left others. In response to a request for documents related to the targeted removal of the signs, the department provided the affected candidate with copy of a “service request detail” in which the name of the person who complained about the signs was redacted. The department asserted that it was justified in doing so because the complainant reasonably expected confidentiality and might be subject to retaliation. The Attorney General struck a different balance. Characterizing the election as “inconsequential,” the Attorney General said the asserted privacy interest was insubstantial. The record disclosed no basis upon which to conclude that the complainant reasonably expected anonymity. Moreover, the asserted public interest in determining whether political pressure influenced the department’s performance of its public duties and its failure to adhere to its own policies was substantial. The offense to personal privacy in this instance was not “clearly unwarranted.” 05-ORD-030.

Law Enforcement – KRS 61.878(1)(h)

A newspaper requested from a city police department copies of criminal complaints including “all information contained on the second page that does not specifically harm [the department’s] investigation.” On the advice of its attorney, the city denied the request on the ground that the second page was not subject to disclosure. The city did not cite the specific exception to disclosure upon which it relied. This was a procedural error. Assuming that the city was relying on the exception for records of law enforcement agencies, the Attorney General said that it did not support the police department’s policy of blanket non-disclosure of the second page of the requested records. As a general matter, police incident reports, unlike investigative files, are not exempt from public disclosure. The police may redact portions of the records if they can articulate a basis under one of the other exceptions. Further, in this instance the police department did not describe any harm to it or its investigation that might flow from disclosure of the records. The police department cannot base its response on supposition and conjecture. It must describe the specific harm that will occur. 05-ORD-003.

A city police department denied a request for a copy of a tape recording of radio and telephonic transmissions to
and from its dispatcher. The requester appealed the denial arguing that the communications were outside the exception because they were recorded in the ordinary course of business, not as part of a criminal investigation. The city maintained that because incriminating evidence was on the tape, it was exempt at least until the conclusion of the pending criminal matter. The Attorney General took the view that the exemption applied narrowly. It applies only to records “actively, specifically, intentionally, and directly compiled as an integral part of a specific detection or investigation process.” Here the audiotape is a recording of general radio traffic not unique to the related investigation. Although it is now a part of an investigative file, it was made collaterally to and independently of the criminal investigation. 05-ORD-078.

A city denied a request for police files related to an investigation into the sexual assault of a minor child. The investigation was complete and the Commonwealth attorney’s office decided not to prosecute. Nevertheless, the city asserted that the police records were exempt from disclosure under the clause pertaining to records of county attorneys and Commonwealth’s attorneys because the content of the city records mirrored those of the Commonwealth attorney. Because the statute does not mention police records, the Attorney General said, they do not fall within the exemption. Absent such language, one must presume that the General Assembly intended to distinguish the city’s records from those of county and Commonwealth’s attorneys. 05-ORD-095.

Confidential by Law – KRS 61.878(1)(k), (l)

An attorney representing a person subpoenaed in the course of an investigation made a broad request for records of a board of education in conjunction with a motion to quash the subpoena. The board partially denied the request on the ground that some of the records sought were attorney work product or subject to attorney-client privilege. The Attorney General took the position that most of the records in dispute were records of the board held by its attorney as custodian on the board’s behalf, not the attorney’s own records. The board did not meet its burden to show in detail and with particularity that it could withhold the records. The Attorney General went so far as to say that, with respect to the affidavits and witness statements sought, “it is unclear whether any set of facts would justify the invocation of the attorney-client privilege or work product doctrine as the basis for denying access.” If any exception applies, the opinion suggests, it is the exception for preliminary materials and then only until the investigation is complete. 05-ORD-007.

Mixed Records – KRS 61.878(4)

A city denied access to the personnel file of an employee on the authority of OAG 88-53. However, in 05-ORD-012, the Attorney General departed from the reasoning of that opinion and held that a request for a personnel record was sufficiently specific under the Open Records Act. In light of the later decision, the city had an obligation to separate the excepted and non-excepted material in the personnel file and make the non-excepted material available. The city must identify any material withheld, cite the statutory basis for withholding it, and explain in writing how the statute applies to the records. 05-ORD-073.

Denial of Inspection – KRS 61.880

A volunteer fire department denied a request for a copy of a petition that advocated removal of certain members of the department. The petition was in the possession of the chairman of the department’s board of directors, who regarded it as a personal communication. The Attorney General reiterated the view that petitions are not preliminary documents but become public records upon submission to the agency. The fact that the petition had not been presented to the rest of the board or to the department membership did not change the result. 05-ORD-106.

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 online at http://ag.ky.gov/civil/openrec.htm.

Decisions of Note - Supreme Court Update continued from page 14

Party of Oklahoma (LPO) wanted to open its primary not only to independents but to members of other political parties, too. When the Secretary of State refused permission, the LPO and several Republican and Democratic voters sued, alleging that Oklahoma’s law unconstitutionally burdened their First Amendment right to freedom of political association.

In an earlier case, Tashjian v. Republican Party of Connecticut, the Supreme Court struck down as inconsistent with the First Amendment a closed primary system that prevented a political party from inviting independent voters to vote in the party’s primary. Clingman presented a question that Tashjian left open: whether a state could prevent a political party from inviting registered voters of other parties to vote in its primary. The court was persuaded that any burden imposed by Oklahoma was minor and justified by legitimate state interests.

Part of the reason for concluding that any burden was minor is that a voter who is unwilling to disaffiliate from another party in order to vote in the LPO’s primary formed little “association” with the LPO. Further, Oklahoma’s law does not regulate the LPO’s internal processes, its authority to exclude unwanted members, or its capacity to communicate with the public. When a state electoral provision places no heavy burden on associational rights, “a state’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.” Here, Oklahoma’s semi-closed primary advances a number of regulatory interests that the Court recognizes as important: It “preserv[es] [political] parties as viable and identifiable interest groups,” enhances parties’ electioneering and party-building efforts, and guards against party raiding and “sore loser” candidacies by spurred primary contenders.

Two civil rights cases found their way to the court
through suits against local governments. Smith v. City of Jackson involved the Age Discrimination in Employment Act. In Smith, the court considered whether the act allowed for disparate impact claims. The dispute arose out of the city’s revisions to its pay scale for police officers that gave higher percentage raises to junior (generally younger) officers than to senior (generally older) officers. The court held in favor of the city, but recognized that that the ADEA allows for disparate impact claims. Jackson v. Birmingham Board of Education involved Title IX, which prohibits sex discrimination in federally funded education. In Jackson, the court considered whether Title IX affords a private right of action for claims of retaliation. The case arose when a male high school coach of the girls’ basketball team complained about unequal funding and then lost his coaching position. A divided court concluded that retaliation is itself a form of discrimination that fits within the act’s broad prohibition against sex discrimination.

Finally, another employment case – this time raising freedom of speech issues – was City of San Diego v. Roe. Roe was a city police officer who made video tapes of himself performing sexually explicit acts while wearing a police uniform and sold the tapes on eBay. He also sold police equipment and other official police items. An internal investigation revealed that Roe violated department policies, and the department ordered him to stop. When he did not fully comply, the department brought additional charges and dismissed him from the force. Roe claimed this violated his right to free speech. Balancing Roe’s right to speak on matters of public concern against the city’s interest in promoting the efficiency of its public services, the court had no difficulty in concluding that Roe’s expression did not qualify as a matter of public concern. The court said that the Ninth Circuit’s reliance on United States v. Treasury Employees was “seriously misplaced” and that “this is not a close case.” The speech in question was detrimental to the mission and functions of the employer. There was no basis for finding that it was of concern to the community.

Endnotes

1. Slip opinion at 8, quoting Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 244.
2. Slip opinion at 10.
3. In Kentucky, Representatives Brinkman and DeWeese prefiled a concurrent resolution (BR 134) urging the Congress of the United States to pass and present to the states for approval a constitutional amendment to protect the rights and security of citizens in their private property from government takings for the promotion of private economic development.
5. See Prestonia Area Neighborhood Ass’n v. Abramson, 797 S.W.2d 708 (Ky. 1990).

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domestic doctrines of mutuality of obligation and ‘special’ consideration justified the employment-at-will rule at its inception”). Berks cites Louisville & Nashville Railroad Co. v. Offutt, 36 S.W. 181 (Ky. 1896), as a typical explication of the mutuality doctrine.

5. The National Labor Relations Act does not give public employees the same rights as private employees to organize unions and engage in collective bargaining. The right of public employees to bargain collectively depends upon state law. Kentucky conforms a right to bargain collectively only upon certain public employees: KRS Ch. 67A, § 67A.6001 et seq. (fire fighters); KRS Ch. 67A, § 67A.6001 et seq. (urban county government employees); KRS Ch. 67C, § 67C.400 et seq. (consolidated local governments). In Executive Order 2001-623 Governor Patton instituted a hybrid form of collective bargaining for state employees, but Governor Fletcher rescinded it after he took office. Absent comprehensive legislation, case law holds that public employees in Kentucky may, but are not obligated to, bargain collectively with employee representatives. However, they may not recognize a single representative as the exclusive representative of a group of employees. See Board of Trustees v. Public Emp. Council, 571 S.W.3d 616 (Ky. 1978).

6. See Nork v. Fetter Printing Company, 738 S.W.2d 824 (Ky. App. 1987) and Shah v. American Synthetic Rubber Co., 655 S.W.2d 849 (Ky. 1983). Cf. Moss v. Robertson, 712 S.W.2d 351 (Ky. App. 1986). As these cases show, Kentucky courts are usually hesitant to find such contracts. However, public employees should remain alert to the possibility. See Meg Vergeront and Drew J. Cochrane, Employee Handbooks in the Municipal Workplace, Municipal Lawyer 18 (May/June 2003).


14. In a celebrated article, the late Judge Henry Friendly identified 11 features that in a particular case might be regarded as essential to a fair hearing: 1) an unbiased tribunal; 2) notice of the proposed action and the grounds asserted for it; 3) an opportunity to present reasons why proposed action should not be taken; 4) the right to call witnesses; 5) the right to know the evidence against oneself; 6) the right to have a decision made based exclusively on the evidence presented; 7) the right to counsel; 8) the making of a record; 9) the availability of a statement of reasons for the decision; 10) public attendance; and 11) judicial review. Henry Friendly, “Some Kind of Hearing,” 125 U. Pa. L. Rev. 1267 (1975).

15. KRS 15.020 and 15.025; Woodward, Hobson & Fulton, L.L.P. v. Revenue Cabinet, 69 S.W.3d 476 (Ky. App. 2002) (A reviewing court may give great weight to the reasoning and opinion expressed in attorney general’s opinions); York v. Commonwealth, 81 S.W.2d 415 (Ky. App. 1991) (Although an attorney general’s opinion is not binding on the recipient, it is highly persuasive, and therefore great weight will be given to the reasoning and opinion expressed); Op. Atty. Gen. 78-192.
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