Local Government Law News

Salmon P. Chase College of Law ◆ Governor's Office for Local Development ◆ Northern Kentucky University

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The Somewhat-Compensated Volunteer

One quarter of all people who volunteer donate their time to government, and 85 percent of them serve city and county governments. In response to greater service demands by citizens and cutbacks in federal aid, local governments have increasingly come to rely on a greater number of volunteers across a wider range of service areas.[1]

Many who volunteer do not expect and do not receive remuneration from the public agency with which they serve. Others, however, receive insurance coverage, parking, childcare, tax credits, tuition credits, a stipend, a uniform allowance, or some other benefit often intended in part to recruit or retain them. These payments potentially blur the distinction between a volunteer and an employee. This may become an issue under the Fair Labor Standards Act, for example. Several recent opinions of the U.S. Department of Labor address the issue.

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments. Originally, the FLSA did not apply to state and local governments. Congress extended the act to reach most state and local employees in 1974. However, the U.S. Supreme Court's decision in *National League of Cities v. Usury,* 426 U.S. 833 (1976), held this to be a violation of the Tenth Amendment to the U.S. Constitution. Congress, the court said, was not free to pass laws that interfered with the states' performance of "traditional governmental functions."

Much litigation ensued over the definition of a "traditional governmental function," a standard the lower courts found particularly difficult to apply. Ultimately, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1984), the Supreme Court overruled *Usury*. State and local governments then became subject to the FLSA, and the U.S. Department of Labor quickly adopted regulations to assure state and local government compliance.[2] In response to concerns raised by state and local governments about the costs of compliance, Congress amended the FLSA in 1985. The amendments allowed state and local government employers to compensate their employees' overtime hours with paid time away from work (compensatory time or "comp time"), and they included modifications to ensure that true volunteer activities were not impeded or discouraged. Congress liberalized the definition of volunteers who perform services at a public agency, but included provisions intended to minimize the risk of abuse and manipulation by employers.

Individuals who perform services for units of state and local government as volunteers are not employees under the FLSA and, therefore, are not subject to its minimum wage and overtime provisions.[3] To qualify as a volunteer, an individual must satisfy three criteria. First, the individual must perform hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation, or receipt of compensation for services rendered.[4] Second, the individual must offer to perform services freely and without pressure or coercion from an employer.[5] Third, the individual cannot be an employee of the same public agency performing the same type of services as those for which the individual proposes to volunteer.[6]

Although the FLSA provides that a volunteer may receive "no compensation," it allows a public agency to pay "expenses, reasonable benefits, or a nominal fee." A regulation, 29 C.F.R. 553.106, provides examples of permissible expense or benefit payments.[7] In addition, it discusses what constitutes a nominal fee and prescribes the factors to consider when determining if a stipend is nominal. If a fee is not nominal, the individual does not qualify as a volunteer and becomes subject to the minimum wage and overtime provisions of the FLSA.

Enforcement of the FLSA is the province of the Wage and Hour Division of the Employment Standards Administration in the U.S. Department of Labor.[8] Through its opinion letters, the division explains how the FLSA and the regulations apply in particular instances.[9] An opinion letter is an official ruling or interpretation of the Wage and Hour Division and provides a potential good faith reliance defense for violations of the FLSA.

In Opinion FLSA2005-51[10] the issue was whether a $3,675 stipend that a school district provided to non-teaching, non-exempt school employees such as secretaries and custodians who volunteered as coaches or advisors for the school's sports teams and clubs was a nominal fee. While the Labor Department maintains that it can provide "no guidelines on specific amounts applicable to all (or even most) possible situations,"[11] it looks to 29 C.F.R. 553.106 for guidance about whether a fee

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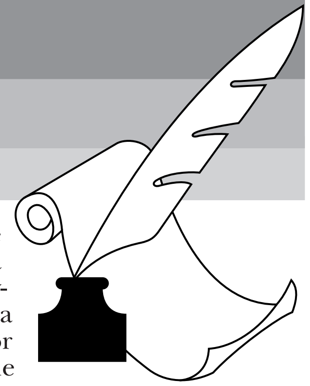
DIRECTOR'S DESK



The fall 2006 election in Kentucky was the largest in its history. According to the Secretary of State, 4,231 offices were on the ballot. I watched with delight the conscientious way in which the newly eligible voter in my household studied the races, including the local government ones, and cast his first ballot.

Congratulations to all the successful candidates. We invite you and the recently appointed local government officers as well to take advantage of the services of the Chase Local Government Law Center. Some of you will already be familiar with us through this newsletter. As you will see in this and future issues, it features stories about developments in local government law, updates on cases affecting local government, summaries of recent legislation, and reports on administrative decisions.

Also in this issue is an installment of a recurring feature we call *Be It Ordained….* It extends the model ordinance service we provide as part of our program of technical assistance, research services, and training. These services are available to Kentucky local governments free of charge. Our specialized library of local government materials includes a large collection of city and county ordinances from across the Commonwealth and across the country. Moreover, through the center you have access to the resources of the Salmon P. Chase College of Law library, Northern Kentucky University's Steely Library, and the expertise of the faculty. You need only ask and we will put that expertise to work for you. If you have a question pertaining to local government law, need a speaker for a program, or need a facilitator for a public meeting, help is a phone call or an e-mail away.

We at the center want not only to congratulate you, but also to thank you for responding to the call of public service. We would be remiss, however, if we did not also thank those candidates who did not win office. Their response to the call of public service was no less great and their efforts contributed to the American ideal of democratic elections. Of course, holding public office is not the only way one can serve in local government. A great many more people contribute to another American ideal and volunteer their services to local government.

Many programs of local government are dependent upon volunteers. Indeed, by one estimate 80 percent of the nation's firefighting force is volunteer. However, even as local government becomes increasingly dependent upon volunteers to deliver services, it becomes increasingly difficult to recruit and retain them. Many enticements now offered to volunteers push the very boundaries of that notion. Our lead story this issue sounds a cautionary note for local governments who provide payments and benefits to volunteers in their programs.

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is nominal. The regulation provides that a nominal fee "is not a substitute for compensation and must not be tied to productivity."[12] In determining whether a fee constitutes "a substitute for compensation" or whether it is "tied to productivity," the opinion explained that the department looks at the "economic realities of the particular situation."[13]

In the context of school coaching or advising a club, the opinion said, a key factor is whether the amount of the fee varies as the particular individual spends more or less time engaged in the volunteer activities or varies depending upon the success or failure of a particular team or school activity. Other factors the department considers when determining whether a given amount is nominal include "the distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year."[14] Citing an earlier opinion, the department explained that focus of these factors is upon "whether the fee is actually analogous to a payment for services or recompense for something performed and, hence, is not nominal."[15]

The opinion focused on the economic realities test. It said that economic realities should include a comparison between the volunteer stipend and what it would otherwise cost the school district to compensate someone to perform those services. The opinion took the position that, in the case of volunteer coaching, the appropriate dividing line between a permissible nominal fee and an impermissible payment is 20 percent of what the district would otherwise pay to hire a coach or advisor for the same services. It derived the 20 percent rule from the provisions of the FLSA and the implementing regulations that use a 20 percent test to assess whether something is insubstantial with regard to prohibited driving on public roadways by employees who are 17 years of age.[16] A willingness to volunteer for an activity for 20 percent of the prevailing wage for the job, the department asserted, is a likely indication of the spirit of volunteerism contemplated by the 1985 amendments to the FLSA. Therefore, when a public agency employee volunteers as a coach or extracurricular advisor, the department will presume the fee paid is nominal as long as the fee does not exceed 20 percent of what the public agency would otherwise pay to hire a full-time coach or extracurricular advisor for the same services. Whether the $3,675 amount is nominal under the circumstances depends on market information known to the school district, i.e., what the district would pay to hire a full-time coach or advisor for the same service.

The department invoked the presumption again last year when presented with a series of questions about certain payments to volunteer firefighters.[17] The International Association of Fire Chiefs asked the Department of Labor to consider the hypothetical situation where an individual serves as a volunteer firefighter for a county and the county provides the volunteer with some monetary payment or tax relief calculated on a yearly, monthly, shift, or on-call basis. In the association's example, the compensation varied based on factors such as the amount of time spent on the activities, length of service, number of calls, and number of shifts, but was not linked to expenses incurred by the volunteer. The association asked whether the payment negated volunteer status. USDOL reiterated the position it took the year before.

> A willingness to volunteer for 20 percent of the prevailing wage is also a likely indication of the spirit of volunteerism contemplated by the 1985 amendments to the FLSA. We believe this interpretation of "nominal fee" applies equally in the context of firefighters.

It cautioned, however, that a nominal fee must be considered in context with any other benefits or expenses paid. The economic realities test looks at the total amount of payments in a particular situation. In addition, the determination must be made in good faith using market information generally within the employer's knowledge and control.

As mentioned earlier, an employee of a public agency cannot volunteer to perform for the same public agency the same type of services the agency employs him or her to perform. However, under the FLSA an employee of a public agency may volunteer to perform the same type of service for a different public agency or may volunteer to perform a different type of service for the same public agency that employs him or her. The IAFC also posed some questions that concerned whether volunteer services were for the same public agency or were of the same type of service the volunteer is employed by the public agency to provide.

The labor department responded that whether two entities of a local government constitute the same public agency necessitates a case-by-case determination. Factors to consider include whether the two agencies have separate payroll and retirement systems, whether they both have the authority to sue and be sued in their own names, whether they have separate hiring and other employment practices, and how they are treated under state law. If the analysis leads to the conclusion that the entities are separate agencies, then an employee of one can volunteer to provide services of any nature for the other public agency.

Like the "same public agency" determination, the "same type of service" determination is done on a case-by-case basis. The regulations define "same type of services" to mean similar or identical services. For guidance in this regard, the regulations point to the *Dictionary of Occupational Titles*. That publication was recently replaced by the O*NET system.[18] An easier example than that presented by the IAFC can be found in FLSA2006-2.[19] There a city asked whether its code compliance officer could volunteer as a reserve police officer in the city police department.

The division first compared the lists of duties in the appropriate job classifications. Then the division, as required by its regulations, considered "all the facts and circumstances in [the] particular case including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee."[20] The division judged that the work of a code compliance officer was different from that of a reserve police officer. Therefore, the code compliance officer could volunteer as a reserve police officer without receiving compensation.

Shortly after responding to the IAFC, the division again addressed the use of school system staff to coach sports or assist with other extra-curricular activities.[21] One situation presented involved staff volunteering their services to the schools their children attended. The division responded that it does not enforce the provisions of the FLSA when a parent volunteers in activities directly involving the child's education and participation, even though the parent performs some of the same services they perform as district employees.

A second situation involved secretarial and clerical employees volunteering their services to a Parent Teacher Association for a nominal fee. The division responded that, although a PTA exists to support educational activities, generally it is a not-for-profit organization separate from and independent of the school and, therefore, not the same public agency. A secretary or clerical employee could provide the same services to the PTA as the employee provides to the school.

A third situation involved work at football games, basketball games, concerts, and theater performances. The division had fewer facts to work with here than it had in FLSA2006-2 (the code compliance officer opinion). Consequently, although its analysis was still instructive, its conclusion was more tentative. Still, the division concluded that secretarial and clerical employees would be allowed to volunteer.

The final situation presented concerned $10 to $20 fees paid to serve at extracurricular activities as dance chaperones, student proctors, crowd control monitors, and the like. The division reviewed the analysis it undertook in FLSA2005-51 and FLSA2006-28 described above, but concluded that it could not provide an answer because of the limited information at hand.[22]

Public employers must be mindful that violations of the FLSA wage and hour standards can result in liability for the unpaid wage or overtime as well as severe financial penalties. Over the last few years, public employers, especially public school systems, have paid tens of millions of dollars to settle lawsuits seeking unpaid overtime under the FLSA. Many of those suits arose from the practice of allowing nonexempt employees to volunteer.

With the guidance from the recent opinion letters in hand, public employers should assure themselves that their volunteers meet the definition of a bona fide volunteer under the regulations. The American Bar Association Section of State and Local Government Law advises having in place a volunteer agreement that specifies that the arrangement is not employment, the volunteer will not receive and does not expect compensation, the volunteer is volunteering by his or her own free will, and the volunteer understands that volunteering will not affect any future decision the employer may make with regard to the volunteer's employment. In ad-

dition, with regard to any stipend provided, the agreement should specify that out-of-pocket expenses incurred come out of the stipend, any remainder represents a nominal fee provided in appreciation for volunteer services, and the amount of the stipend will not change regardless of the number of hours actually invested by the volunteer, a win/loss record, post-season play, or student participation.[23]

Endnotes

1. Beth Gazley and Jeffrey L. Brudney, *Volunteer Involvement in Local Government after September 11: The Continuing Question of Capacity,* 65 Public Administration Review 131, 131-32 (2005).
2. *See generally*, 29 C.F.R. Part 553.
3. "The term 'employee' does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and (ii) such services are not the same type of services which the individual is employed to perform for such public agency." 29 U.S.C. § 203(e)(4)(A).
4. 29 C.F.R. § 553.101(a).
5. 29 C.F.R. § 553.101(b).
6. 29 C.F.R. § 553.101(d); 29 C.F.R. §§ 553.102 and 553.103.
7. 29 C.F.R. § 553.106 provides:
   (a) Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers.
   (b) An individual who performs hours of service as a volunteer for a public agency may receive payment for expenses without being deemed an employee for purposes of the FLSA. A school guard does not become an employee because he or she receives a uniform allowance, or reimbursement for reasonable cleaning expenses or for wear and tear on personal clothing worn while performing hours of volunteer service. (A uniform allowance must be reasonably limited to relieving the volunteer of the cost of providing or maintaining a required uniform from personal resources.) Such individuals would not lose their volunteer status because they are reimbursed for the approximate out-of-pocket expenses incurred incidental to providing volunteer services, for example, payment for the cost of meals and transportation expenses.
   (c) Individuals do not lose their status as volunteers because they are reimbursed for tuition, transportation and meal costs involved in their attending classes intended to teach them to perform efficiently the services they provide or will provide as volunteers. Likewise, the volunteer status of such individuals is not lost if they are provided books, supplies, or other materials essential to their volunteer training or reimbursement for the cost thereof.
   (d) Individuals do not lose their volunteer status if they are provided reasonable benefits by a public agency for whom they perform volunteer services. Benefits would be considered reasonable, for example, when they involve inclusion of individual volunteers in group insurance plans (such as liability, health, life, disability, workers' compensation) or pension plans or "length of service" awards, commonly or traditionally provided to volunteers of State and local government agencies, which meet the additional test in paragraph (f) of this section.
   (e) Individuals do not lose their volunteer status if they receive a nominal fee from a public agency. A nominal fee is not a substitute for compensation and must not be tied to productivity. However, this does not preclude the payment of a nominal amount on a "per call" or similar basis to volunteer firefighters. The following factors will be among those examined in determining whether a given amount is nominal: The distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year. An individual who volunteers to provide periodic services on a year-round basis may receive a nominal monthly or annual stipend or fee without losing volunteer status.
   (f) Whether the furnishing of expenses, benefits, or fees would result in individuals' losing their status as volunteers under the FLSA can only be determined by examining the total amount of payments made (expenses, benefits, fees) in the context of the economic realities of the particular situation.
8. The division also enforces the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq., and the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §1801 et seq.
9. The Wage and Hour Division homepage is at http://www.dol.gov/esa/whd/. The opinion letters are accessible by a link on that page.
10. FLSA2005-51 (November 10, 2005); http://www.dol.gov/esa/whd/opinion/flsa.htm
11. *See* 52 Fed. Reg. 2012 at 2021 (Jan. 16, 1987).
12. 29 C.F.R. § 553.106(e).
13. 29 C.F.R. § 553.106(f).
14. 29 C.F.R. § 553.106(e).
15. FLSA2005-51 at 2 citing FLSA2004-6 (July 14, 2004). The 2004 opinion concerns the use of non-exempt school system staff to assist with coaching sports or other extra-curricular activities.
16. Congress defined "occasional and incidental" activities to be less than 20 percent of an employee's hours worked in a workweek in that capacity. *See* 29 U.S.C. § 213(c)(6)(G).
17. FLSA2006-28 (August 7, 2006).
18. The Dictionary of Occupational Titles was last published by the Employment and Training Administration in 1991. O*NET, also prepared by the Employment and Training Administration, is available at http://www.doleta.gov/programs/onet/.
19. FLSA2006-2 (January 13, 2006).
20. 29 C.F.R. 553.103(a).
21. FLSA2006-40 (October 20, 2006). *See* FLSA2005-51 (November 10, 2005), discussed in the text, and FLSA2004-6 (July 14, 2004), which provides numerous other examples involving the same type of services.
22. The division also raised the possibility that the special overtime rules in FLSA section 7(p)(2) might apply, but could not decide that issue on the basis of the limited information.
23. Eric C. Scroggins, *Unpaid Overtime Under the Fair Labor Standards Act: A Litigation Explosion*, http://www.abanet.org/statelocal/lawnews/spring06/Unpaidovertime.html.

DECISIONS OF NOTE

Kentucky Supreme Court

Grand Jury Investigation – Effect of Pardon

After the governor pardoned those persons who committed or who might be accused of committing offenses related to the merit system hiring investigation, he asked the circuit court to instruct the sitting grand jury that it had no authority to issue further indictments. The circuit court declined. When the governor sought a writ of mandamus in the Court of Appeals, that court determined that the pardon did not compel the circuit court to issue the instructions. The governor then appealed to the Supreme Court, which affirmed in part and reversed in part. A divided court held that the governor had the power under the state constitution to issue a blanket pardon prior to indictment and that acceptance of the pardon could be inferred from the circumstances. It followed that the circuit court abused its discretion in declining to issue the instructions to the grand jury. *Fletcher v. Graham,* 192 S.W.3d 350 (Ky. 2006).

Political Contributions – Judicial Recusal

A party seeking discretionary review by the Supreme Court filed a motion to disqualify a justice. The motion claimed that the justice's impartiality might be questioned because the party's counsel hosted a fundraiser for the justice's election campaign. Although campaign contributions to a judge by a party or by counsel are not improper, the justice granted the motion. In this instance the donations, when considered cumulatively, were not minimal. In addition, the party requesting recusal was the party that is actually harmed by the decision to step aside. *Dean v. Bondurant,* 193 S.W.3d (Ky. 2006).

Prisoner Supervision – Qualified Immunity

A prisoner injured while performing voluntary roadside work sued the county jailor and deputy jailor in their official and individual capacities claiming negligent supervision and improper training. Reversing a summary judgment order in favor of the jailors, the appeals court found the jailors were not entitled to qualified immunity in their individual capacities. The Supreme Court reversed and reinstated the summary judgment. Using the test set forth in *Yanero v. Davis,* 65 S.W.3d 510 (Ky. 2001), the court first found that the jailors' actions were discretionary, not ministerial. Next, the court found that the prisoner produced no evidence that either of the jailors acted in bad faith. Despite a possible technical violation by the jailor in failing to adopt a written program policy, there was no implication of self-interest, deliberate indifference, or sinister motive. Additionally, there was no evidence to support an assertion that the supervising deputy knew the action of cutting down a tree would violate a clearly established right of the prisoner. Lastly, the court found that supervising the voluntary work program was not outside the scope of the jailors' authority. *Rowan County v. Sloas,* 201 S.W.3d 496 (Ky. 2006).

Kentucky Court of Appeals

Open Records – Performance Evaluations

Under the Open Records Act, a newspaper sought access to the performance evaluations of two county parks department employees. The evaluations were among the records sought by the newspaper in connection with its investigation of a theft. The city withheld the evaluations as an unwarranted invasion of the employees' privacy and provided the rest of the records. An opinion of the Attorney General agreed with the city's position, as did the circuit court. The court of appeals reversed and ordered the city to release redacted versions of the evaluations with all personal information removed. The court declined to state a bright-line rule completely permitting or completely excluding evaluations from disclosure. Engaging in a balancing test, the court agreed with the newspaper that an employee who commits a criminal act "has to some extent forfeited his privacy interest, and the public interest in the details of the operation of a public agency could be advanced by the disclosure of non-personal information contained in the evaluation." *Cape Publications v. City of Louisville,* 191 S.W.3d 10 (Ky. Ct. App. 2006).

Zoning Determinations – Due Process

A local legislative body's zoning determinations are subject to a "more relaxed" standard of due process. The court of appeals announced "that an impartial decision maker is not essential" to comport with due process in zoning determinations. In 1999, Hilltop applied for a zoning map amendment. After compiling an extensive record both in favor and against the proposal, the zoning commission recommended conditional approval of the amendment. Following an argument-style hearing, the fiscal court denied the amendment. Applying the "more relaxed" standard of due process, the court of appeals determined the county's decision was neither arbitrary nor erroneous and affirmed the decision denying the amendment. *Hilltop Basic Resources, Inc. v. County of Boone,* 191 S.W.3d 642 (Ky. Ct. App. 2006).

Teacher Pay Dispute – Credentials

A substitute teacher sued a school system claiming that he was underpaid for the 22 days he taught before receiving his certification. The lower court entered summary judgment on behalf of the school system, and the teacher appealed. Affirming the summary judgment, the court said KRS 161.720(3) prohibits anyone from being considered a "teacher" for contract purposes until his or her credentials are finalized. Because only the superintendent has authority to contract with teachers, summary judgment in favor of the school was proper even if the school's principal promised plaintiff retroactive pay. *Springer v. Bullitt County Bd. of Education,* 196 S.W.3d 528 (Ky. Ct. App. 2006).

Municipal Bonds –Tax Exemption

Kentucky taxpayers challenged the constitutionality of the state income tax exemption for interest income from bonds issued by Kentucky or its governmental subdivisions. The trial court granted summary judgment to the State, and the taxpayers appealed. Kentucky law exempts interest derived from

bonds issued by the commonwealth or its political subdivisions from state income taxes, but does not grant the same interest exemption to bonds of other states or outside municipalities. Reversing the summary judgment, the court held that the Kentucky bond taxation system is a facial violation of the Commerce Clause. The court of appeals also held that the plaintiffs had standing to assert claims on behalf of corporations, trusts, estates, and other non-individual plaintiffs. The court remanded for findings consistent with its holding. *Davis v. Department of Revenue of the Finance and Administration Cabinet,* 197 S.W.3d 557 (Ky. Ct. App. 2006).

Eminent Domain – Repurchase Rights

Former private landowners with a statutory right to repurchase unused land condemned for public purposes suffered no compensable injury when the commonwealth failed to give them timely notice of their repurchase rights. The trial court dismissed their action for monetary damages resulting from the commonwealth's failure to notify them of their repurchase rights under KRS 416.670. On appeal, the court stated that while KRS 416.670 gave former landowners the right to repurchase the land if it is unused, the statute does not create any reversionary property interest in previous landowners. The statute also does not provide for any compensatory damages resulting from injury to the land or loss of the land's use. Thus, the commonwealth's failure to notify former landowners of their right of redemption merely tolled the time for the landowners to repurchase the unused land. *Martin v. Commonwealth,* 199 S.W.3d 195 (Ky. Ct. App. 2006).

United States Court of Appeals

Kentucky

Juvenile Courts – Press Access

A not-for-profit corporation whose members include newspapers throughout Kentucky sued various court officials claiming a violation of its right of access to juvenile court proceedings and records. Because the corporation did not challenge the relevant statutes in state court, which might produce an interpretation providing for the access it seeks, the federal court dismissed the appeal for want of ripeness. In the opinion of the court, it was "far from certain" that Kentucky courts would deny access. *Kentucky Press Association, Inc. v. Kentucky,* 454 F.3d 505 (6th Cir. 2006).

Domestic Violence – Failure to Protect

On a call to the victim's house, sheriff's deputies and EMTs determined there was no evidence that the victim had recently been beaten. They left without arresting the victim's boyfriend. That night, the boyfriend beat the victim severely, killing her. The administrator of the victim's estate sued the county and the sheriff, alleging a failure to protect the deceased from domestic violence. The district court granted summary judgment in favor of the county and sheriff, and the court of appeals affirmed. On review, citing *Gonzales v. City of Castle Rock,* 545 U.S. 748 (2005), the court stated that the deceased did not have a statutorily created entitlement for a due process claim. Kentucky law did not mandate police action; it only authorized the police to take discretionary action. Further, the court concluded that even had Kentucky law provided some entitlement, it would entitle an arrest of the victim's boyfriend. *Howard v. Bayes,* 457 F.3d 568 (6th Cir. 2006).

Adult Bookstores – Injunction

Two adult bookstores obtained a preliminary injunction in district court against the city's enforcement of an ordinance regulating adult entertainment. On the city's motion, the court modified the preliminary injunction to enjoin only the licensing provisions, allowing the city to enforce the remaining provisions. The city then amended the ordinance to address the constitutional infirmities that led to the initial injunction. Seeking to have the injunction apply to the entire ordinance, the bookstores appealed the court order severing the licensing provisions. The court first held that the appeal was not moot because the new amendment was substantially similar to and operated "in the same fundamental way" as the old provision. Next, the court distinguished this case from *Déjà vu of Nashville v. Metro. Gov't of Nashville,* 274 F.3d 377 (6th Cir. 2001) and held that the order severing the challenged provisions was proper. Unlike the provisions in *Déjà vu of Nashville,* the remaining provisions of the ordinance here were sufficiently independent of the unconstitutional licensing provision. *Cam I, Inc. v. Louisville/Jefferson County Metro Government,* 460 F.3d 717 (6th Cir. 2006).

Mail Fraud – Election Fraud

A federal jury convicted a defendant of mail fraud and conspiracy to commit mail fraud in connection with campaigns for county judge/executive and county district judge. The alleged fraud consisted of the use of "vote hauling" checks to buy votes unlawfully and of the use of "straw contributors" to evade campaign contribution limits. On appeal, the court held that the conduct could not be prosecuted using the mail fraud statute. The prosecution advanced two theories – the "honest services theory" and the "salary theory." As to the former the court said, "While candidates may be dishonest in seeking election, such dishonesty does not deprive anyone of any right to honest 'services' for the simple reason that candidates, unlike the elected officials that they hope to become, provide no 'services' to the public." As to the latter it said, "The government and citizens have not been deprived of any money or property because the relevant salary would be paid to someone regardless of the fraud." *U.S. v. Turner,* 465 F.3d 667 (6th Cir. 2006).

Disability Retirement Plans – Age Discrimination

The Equal Employment Opportunity Commission asserted that Kentucky's state and county disability-retirement benefit plan violated the Age Discrimination in Employment Act. The challenged plan disqualified employees who had reached regular retirement age but chose to continue working. Six years after becoming eligible for retirement benefits, a deputy sheriff was denied disability-retirement benefits. The district court dismissed the case, stating that under *Lyon v. Ohio Ed. Ass'n and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995), the EEOC did not establish a *prima facie* violation of the ADEA. On appeal, the 6th Circuit overruled *Lyon* and remanded the case. The court found the plan was facially discriminatory and had a disparate impact on older employees. Because the plan was facially discriminatory, the EEOC was not required to show any additional evidence of an employer's ill intent. *EEOC v. Jefferson County Sheriff's Department,* 467 F.3d 571 (6th Cir. 2006).

Wrongful Discharge – Employee Dress Code

The state parks department discharged employees for failing to comply with the dress code. The discharged employees

sued, alleging First Amendment, due process, equal protection, and various state law claims. The district court dismissed some counts and granted the employer summary judgment on the remaining claims. The appeals court affirmed. A successful First Amendment claim against a government employer requires that the employee's speech be of public concern. The court determined that a refusal to tuck in shirts, even if it is in protest to the dress code, is not a matter of public concern. Further, the court found that an individual's decision to show support for the military by displaying a tattoo was not a clearly established right. The court stated that the due process claims failed because the employees did not have a property interest in continued employment. Similarly, there were no equal protection concerns because the dress code applied to all department employees. *Roberts v. Ward*, 468 F.3d 963 (6th Cir. 2006).

Michigan

Due Process – Failure to Protect

An estranged husband, drunk, angry, and armed, appeared at the house of his sister-in-law and her husband, who had taken in his wife. They called the police, who arrived as he was backing out of the driveway. He responded by driving back up the driveway, leaving the car, forcing his way inside the house, shooting the three occupants and killing his wife, and committing suicide. The surviving sister-in-law and husband sued the county, alleging that the way the officers handled the situation violated their constitutional rights. The district court granted summary judgment to the county. On appeal, the court held that the responding officers owed no duty to protect them from violence under the rule of *DeShaney v. Winnebago County Department of Social Services.* The court said the state-created-danger exception had never been extended to cover situations where the police simply respond to the scene of a 911 call. Neither did it matter that the police stayed back and established a perimeter. They did not know that the estranged husband would go on a shooting rampage within the home rather than shoot at the officers or attempt to flee. *Tanner v. County of Lenawee*, 452 F.3d 472 (6th Cir. 2006).

Fair Labor Standards Act – Overtime Compensation

Police officers assigned to the Wayne County airport who were members of four specialty units were required to carry pagers both on and off duty and remain within a specified geographic area to maintain availability. They sought overtime compensation for all hours not on duty, but during which they carried pagers. After the commencement of the suit, management asked them to turn in the pagers. Subsequently, they amended the complaint to include a claim of retaliation. The district court granted summary judgment to the employer, concluding that the officers were not severely restricted by the on-call policy since they admitted they could engage in all of their regular activities while off duty. The court of appeals affirmed. As to the retaliation claim, the appeals court said it was not retaliation for management to ask for the return of the pagers that the officers asserted were a burden. Neither was the county liable for placing a freeze on the accumulation and use of banked compensatory time. *Adair v. Charter County of Wayne,* 452 F.3d 482 (6th Cir. 2006).

Warrantless Search – Residence

A minor arrested for drunk driving informed the police about the house where she had been drinking. Police went to the front door and knocked, but no one answered despite indications that someone was inside. They went to the back of the house and through a window saw someone lying on a couch bleeding and not responding to their knocks and bright lights. Using a garage door opener from a car parked in the driveway, they entered the house, found three intoxicated minor males, including the one who was bleeding, and arrested them for possession of alcohol. The subsequent prosecutions were dismissed on the ground that the search was illegal. Thereafter the homeowner and his son, one of those arrested, sued the township police. The district court held that the state court decision regarding the legality of the search was not binding and granted the township's motion to dismiss. The appeals court affirmed. Although the police entered the curtilage, "we hold that where knocking at the front door is unsuccessful in spite of indications that someone is in or around the house, an officer may take reasonable steps to speak with the person being sought out even where such steps require an intrusion into the curtilage." Once lawfully at the back door, the reasonable belief that a medical emergency existed meant that the exigent circumstances exception to the warrant rule applied. *Hardesty v. Hamburg Township*, 461 F.3d 646 (6th Cir. 2006). [See "Residential Inspections without Search Warrants," *Local Government Law News*, Spring 2006. –Ed.]

License Plate Numbers – Expectation of Privacy

A police officer observed a van idling in a fire lane. While keeping the van under observation, the officer entered its license plate number into his computer linked to a law enforcement database. The result showed that the registered owner had an outstanding felony warrant. After a passenger got into the van and it drove off, the officer pursued and stopped the van for parking in the fire lane. The passenger was the wanted felon who, when searched, was in possession of firearms. At trial he successfully moved to suppress the search and the government appealed. Over a dissent, the appeals court vacated the suppression order. The court held that a motorist has no reasonable expectation of privacy in his license plate. The very purpose of a license plate number is to provide identifying information to law enforcement officials and others. So long as the officer had a right to be in a position to observe the license plate, any such observation and corresponding use of the information on the plate does not violate the Fourth Amendment. *United States v. Ellison*, 462 F.3d 557 (6th Cir. 2006).

Sexual Harassment – School's Liability

A high school soccer coach, who had an inappropriate relationship with a female player, threatened another player with violence if she interfered with his relationship with the other player. The player who was threatened by her coach sued the coach, school administrators, and school system alleging Title IX discrimination, §1983 constitutional violations, and various state claims. Following discovery, the lower court granted summary judgment in favor of the school and administrators. On appeal, the court noted that the player bringing the claims was not sexually assaulted. Despite the fact that the school had been informed of some misconduct and reprimanded the coach two weeks earlier, the court also determined that the school did not have sufficient notice of the specific actions to be liable. Without actual notice of the misconduct and deliberate indifference of the administrators, the Title IX claim failed. Similarly, the player's §1983 claims failed because there was no evidence that the officials' indifference amounted to tacit authorization or that the coach acted pursuant to school policy. Affirming the summary judgment, the court dismissed state law claims as well. *Henderson v. Walled Lake Consolidated Schools*, 469 F.3d 479 (6th Cir. 2006).

Public Bidding – Disappointed Contractor

Upon learning that another company was proposing to build a soccer complex for the township, an organization asked to be allowed to bid and asked the town to extend the bidding deadline. When the township did not and awarded the contract to another company, the organization sued. The lower court dismissed the claims for lack of standing, stating there was no injury in fact. On appeal, the court reiterated that the Sixth Circuit follows the rule announced in *Cincinnati Elec. Corp. v. Klepp*, 509 F.2d 1080 (6th Cir. 1975), that a "disappointed bidder" for a government contract lacks standing unless the claim is brought under the Administrative Procedure Act. However, the court held the "disappointed contractor" rule did not apply. Despite ruling that the contractor had standing, on the merits the suit fails because the township never besmirched the organization's name, there was no property interest to protect with due process, and the organization "will never be able to prove that [township] lacked a rational basis for its actions." *Club Italia Soccer & Sports Organization v. Charter Township of Shelby*, 470 F.3d 286 (6th Cir. 2006).

Ohio

Corporal Punishment – Failure to Train

A third-grader claimed that her substitute teacher slammed her into a chalkboard, threw her on the ground, and choked her. The case went to trial on the student's claim that the school district failed to train or supervise the teacher. At the close of the student's case, the trial court granted summary judgment to the school district. The student appealed, and the court of appeals affirmed. After first upholding the constitutionality of Ohio's Political Subdivision Tort Liability Act, the court addressed the cause of action for failure to train. To succeed, one must show that 1) the training was inadequate, 2) the inadequacy was the result of deliberate indifference, and 3) the inadequacy was closely related to the injury. Here the student failed the second test because the few incident reports offered to support her claim were not enough to put the district on notice of excessive constitutional violations. *Ellis ex rel. Pendergrass v. Cleveland Municipal School District*, 455 F.3d 690 (6th Cir. 2006).

Administrative Hearing – Preclusive Effect

City building inspectors found numerous violations in a building and posted a condemnation notice on its front door giving the owner until the next day to remedy the violations. The owner received an automatic stay when he filed an administrative appeal with a review board. Because the building posed an imminent peril, the city asked the board to lift the stay, which it did. After the city demolished portions of the building, the owner sued claiming the city's actions amounted to a taking without public purpose and without just compensation. The district court held that the administrative hearing established that the city properly condemned the building thus precluding the suit. The court of appeals affirmed. The owner had ample notice of the city's claim and an opportunity to be heard, and he could not establish that the city's actions were arbitrary and capricious. *Davet v. City of Cleveland*, 456 F.3d 549 (6th Cir. 2006).

Ballot Initiatives – Use of City Funds

Through a ballot initiative, citizens challenged a city resolution creating a fire department. The city council opposed the petition and used public funds to distribute information supporting its position. After the city prevailed in the referendum, citizens filed suit claiming that the city's spending to advocate its position was unconstitutional. The district court granted summary judgment in favor of the city and city manager. Over a dissent, the court affirmed the summary judgment. Citing *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990), the court noted governmental action can infringe on free speech by 1) granting differential access to a public forum based on viewpoint, 2) monopolizing the "marketplace of ideas," and 3) compelling citizens to support positions with which the citizens disagree. In this case, the taxpayers provided no evidence that they were denied access to the town newsletter. The court also found that the town treasury was not a public forum at all. Next, the court found this case was more like a compelled subsidy than compelled speech. The court then distinguished the subsidy in this case from other cases in which compelled subsidies constituted a First Amendment violation. The court said, "A limit on government speech during elections would allow hecklers to silence the government on issues in which it has an interest and expertise – and on which citizens have an interest in hearing their government's perspective." *Kidwell v. City of Union*, 462 F.3d 620 (6th Cir. 2006).

Heckling and Profanity – Sports Fan Arrested

An off duty police officer providing security services at baseball games forcibly removed and arrested a fan for using profane language. The convictions for disorderly conduct and resisting arrest were reversed and the fan filed a §1983 action against the officer for violating his right of free speech, use of excessive force, and arresting him without probable cause. The lower court granted summary judgment in favor of the police officer and the fan appealed. The appeals court reversed the summary judgment in favor of the officer and remanded. The court first determined that the statute of limitations for an excessive force claim did not begin to run until the conviction was overturned. Next the court determined that the off duty officer's actions and attire (his full police uniform including weapons) made him a state actor for §1983 purposes. Lastly, the court found genuine issues of fact remained as to whether the officer had probable cause to arrest, applied excessive force, and violated the fan's free speech rights. Thus, the officer was not entitled to qualified immunity. *Swiecicki v. Delgado*, 463 F.3d 489 (6th Cir. 2006).

Police Department – Pregnancy Discrimination

The doctor of a pregnant police officer prescribed a light-duty work restriction. No light-duty assignment was available within the department, and the officer went on leave. After returning to active duty, she sued the department, asserting claims for pregnancy discrimination. Finding that the officer failed to make out a *prima facie* case, the district court dismissed the pregnancy claims. The district court allowed the suit to continue on sex discrimination claims apart from the pregnancy discrimination, but ultimately dismissed those claims as well. Over a dissent, the court of appeals affirmed. Having to take extended leave, partly without pay, was an adverse employment event. However, departmental policy banned light-duty assignments for all police officers, and plaintiff failed to show a causal nexus between the adverse action and her infirmity. *Tysinger v. Police Department of the City of Zanesville*, 463 F.3d 569 (6th Cir. 2006).

Firefighter – Racial Harassment

An African-American firefighter successfully sued his city employer on claims of racial harassment and retaliation. The city appealed, arguing that the trial court should have dis-

missed the retaliation claim because the firefighter suffered no adverse employment action. The city also argued that the trial court should have dismissed the racial harassment claim because the actions complained of were neither race-based nor sufficiently severe to make out a claim. The court of appeals sustained the judgment. On the retaliation claim, the court held that the city's denial of acting time (i.e., time served as an acting officer) was a materially adverse employment action under Title VII. On the racial harassment claim, the court held that there was ample evidence from which a jury could conclude that the harassment suffered was motivated by race and that, from the facts taken together, a jury could conclude that the conduct was sufficiently severe. *Jordan v. City of Cleveland*, 464 F.3d 584 (6th Cir. 2006).

Tennessee

Felony Stop – Use of Force

Five highway patrolmen pulled over a car in the mistaken belief that the occupants were the perpetrators of a robbery. A husband, wife, and teenaged son were removed from the car at gunpoint, handcuffed, and separately placed in the back of three squad cars. The husband suffered a knee injury when police forcibly retrained him after the family's dog was shot to death on the scene. The family sued claiming unreasonable seizure and excessive force. The district court denied the officers' claims of qualified immunity, and the officers appealed. The court of appeals reversed. Based on the dispatcher's call, the troopers had a reasonable suspicion sufficient to conduct a *Terry* stop. However, pointing loaded guns at the family, handcuffing them, and placing them in patrol cars was not the least intrusive means necessary to conduct a preliminary investigation of a possible robbery. Still, the officers have qualified immunity because in the Sixth Circuit the use of guns and handcuffs during a felony stop is permissible, even if only as part of an investigatory seizure. A jury could, however, find that a reasonable officer would not have reacted this forcefully to a handcuffed man who showed no sign of noncompliance until his pet was killed in front of his family. *Smoak v. Hall,* 460 F.3d 768 (6th Cir. 2006).

Electric Cooperatives – Patronage Refunds

Customers of rural electric cooperatives sued the Tennessee Valley Authority and their cooperatives for failing to refund surplus revenues and for refusing to reduce electricity rates. The customers alleged, among other claims, violations of antitrust laws and the Fifth and Fourteenth Amendments. The court refused to review the TVA and rural cooperatives' contract terms that prohibited issuing refunds to the cooperatives' customers. The court reasoned that the TVA's contracts fell within the scope of its statutory ratemaking power, which barred judicial review. The court also determined that the constitutional claims failed because the electric cooperatives were not state actors and the customers had no legally cognizable property interest in the surplus revenue. Lastly, the court determined the TVA was immune from antitrust liability because the primary purpose of the TVA is to provide electric services. Concerns about competition would conflict with that purpose. The court then affirmed the summary judgment for all claims. *McCarthy v. Middle Tennessee Electric Membership Corporation,* 466 F.3d 399 (6th Cir. 2006).

Adult Entertainment – Amended Ordinance

An injunction prevented enforcement on constitutional grounds of a local government ordinance that required the licensing of adult entertainment businesses. Following extensive amendments and a change to state laws regarding judicial review, the lower court dissolved the injunction. The adult entertainment businesses appealed the order dissolving the injunction. Injunctions should only last as long as necessary to serve their purpose. Because the new state law allows for prompt judicial review and the amendments to the ordinance sufficiently narrow the scope of what conduct is being regulated, the injunction preventing enforcement of the ordinance was no longer needed. *Déjà Vu of Nashville, Inc. v. Metro Government of Nashville and Davidson County*, 466 F.3d 391 (6th Cir. 2006).

Public Official – Freedom of Speech

A former elected school superintendent was not appointed to the new position as the director of schools for the county after a newspaper article appeared incorrectly announcing that he would be the featured speaker at a convention sponsored by a church with a predominantly homosexual congregation. He sued the county board of education and some of its members alleging violations of his constitutional rights. The lower court granted summary judgment in favor of the board of education. On appeal, the court reversed and remanded for further proceedings stating the superintendent had alleged issues of fact sufficient to survive summary judgment. The court concluded that although the superintendent never actually gave a speech, his First Amendment rights were implicated. The court next determined that the speech touched on a matter of public concern and was subject to the balancing test announced in *Pickering v. Board of Ed.*, 391 U.S. 563 (1968). His intended speech would be given on his own free time and touched on a matter of public concern. A jury could find that, but for the intended speech, the board members would have voted for him. Lastly, the court determined that the board was acting in a municipal capacity for §1983 liability and that the individual board members were not entitled to qualified immunity. The desire to effectuate one's animus against homosexuals "can never be a legitimate governmental purpose." *Scarbrough v. Morgan County Board of Education,* 470 F.3d 250 (6th Cir. 2006)

United States District Courts

Bidding – Political Retaliation

A waste hauler, whose contract with the county was about to expire, did not receive a new contract despite submitting the asserted low bid. The hauler claimed that the county's motivation was the failure to support the successful candidate for county judge/executive. While a government may not terminate or prevent automatic renewal of a contract in retaliation for exercising First Amendment freedoms, the status of the plaintiff here was merely that of a bidder for a new contract not protected by the First Amendment. Even so, the plaintiff could not establish a case of retaliation. State law required the bidding of the new contract, and price was not the sole criterion for awarding the contract. *Sartaine v. Pennington,* 410 F.Supp.2d 584 (E.D.Ky. 2006).

Demotion of Principal – First Amendment Retaliation

An elementary school principal demoted to teacher sued the board of education alleging that the action was retaliation for speaking against a proposed school closure at a public hearing. The court concluded that the former principal engaged in protected speech and that her interests in speaking against the school closure outweighed the school board's interests in the

performance of her job responsibilities as principal. However, the court concluded that the speech in question was not a motivating factor in the decision to demote her. The reasons for the demotion pertained to multiple failures to perform job functions. The temporal proximity of the demotion to the protected speech made the case a close one, but it failed to create a genuine issue of material fact sufficient to overcome summary judgment for the school board. *Painter v. Campbell County Board of Education,* 417 F.Supp.2d 854 (E.D.Ky. 2006).

Diversity Training – Middle and High School Students

A consent decree required a board of education to conduct mandatory staff and student diversity training. Although mandatory, several parents withheld their children from participation. They sued, alleging that the school's policies and practices interfered with their right to direct the ideological and religious upbringing of their children, particularly with reference to homosexuality. The court found that the board's codes of conduct and harassment policies were constitutional. In addition, it found the diversity training to be constitutional. It is speech by the school that need not be (but was) neutral so long as the viewpoint or content is reasonably related to legitimate pedagogical concerns. As to the context of the diversity training, the court held that parents do not have the right to dictate curriculum. The training addressed harassment at school and related to a legitimate educational goal. *Morrison v. Board of Education of Boyd County,* 419 F.Supp.2d 937 (E.D.Ky. 2006).

Nuisance – Junk Vehicles

Pursuant to its nuisance ordinance and zoning ordinance, a city removed three cars from a property and refused to return them to the owner as he demanded. The owner then sued the city for towing the cars without providing him with due process of law. The court found that the city provided the owner with adequate notice both before and after towing the cars. Further, the owner never used the procedures available under the ordinances to contest that these were "junk vehicles." Therefore, there was no violation of due process, nor was there an unreasonable search or seizure. Having adequate notice and opportunity to contest the city's position, failure to contest it does not give rise to a claim under the Fourth Amendment. *Duffy v. City of Stanton, Kentucky,* 423 F.Supp.2d 683 (E.D.Ky. 2006).

Dismissed Employee – Reinstatement

A school superintendent dismissed his secretary without following the procedures in the board of education's policies or in KRS 161.011. She sued the school board and the superintendent in his personal and official capacities seeking reinstatement, back pay, and damages. The court found the superintendent's reasons for his actions to be insufficient and his actions disproportionate. It denied his claims of immunity and ordered the secretary's reinstatement. *Branham v. May,* 428 F.Supp.2d 668 (E.D.Ky. 2006).

Termination – Teacher with Head Injury

A physical education teacher sustained a closed head injury while bicycling. She returned to teaching, but a later automobile accident exacerbated the injury. Thereafter, the board of education created an individualized accommodation plan for the workplace. Some four years later, the teacher was involved in an incident at school in which she lectured some unsupervised students and allegedly threatened to kill them, resulting in criminal charges against her and a conviction. The school board terminated her. Her criminal appeal, her appeals to civil rights agencies, and her appeals to the state education authorities were all unsuccessful. She then sued in federal court alleging violations of the Americans with Disabilities Act. A magistrate judge dismissed the complaint. Here the evidence showed that the disability was not the sole reason for the adverse employment action. Conceding that the teacher established a *prima facie* case, the board of education offered a legitimate, nondiscriminatory reason for terminating the contract. No reasonable jury could conclude that the offered reason was mere pretext. *Macy v. Hopkins County Board of Education,* 429 F.Supp.2d 888 (W.D.Ky. 2006).

Section 8 Housing – Discrimination

Because of disputes with a housing authority over rent abatements, a landlord withdrew from the federal Section 8 voucher program. The Kentucky Fair Housing Council then filed a complaint with the local human rights commission alleging that the decision to withdraw constituted unlawful racial discrimination. The commission found probable cause to believe there was a violation and referred the matter to a hearing officer. The landlord filed a motion to stay the administrative proceedings in order to allow it to file a declaratory judgment action in federal court. The federal court held that the decision to withdraw from the Section 8 program, standing alone, was insufficient to establish a *prima facie* case of discrimination under the Fair Housing Act. This is so even where the withdrawal disproportionately impacts a protected class. *Graoch Associates v. Louisville and Jefferson County Metro Human Rights Commission,* 430 F.Supp.2d 676 (W.D.Ky. 2006).

County Prisoners – Charging Inmate Accounts

Prisoners in county jails challenged the manner in which counties deducted funds from inmate accounts and applied them to any fees owed the county. They claimed that KRS 441.265 did not authorize imposition of fees before sentencing, that county practices violated due process, and charges against non-inmate contributions to the accounts violated the First Amendment. The court granted summary judgment to the counties. Read correctly, the court said, the statute authorizes the imposition of fees whether or not the inmate is ever sentenced. As to the due process claim, the court relied on T*illman v. Lebanon County Correctional Facility*, 221 F.3d 410 (3d.Cir. 2000), to hold that due process did not require a pre-deprivation hearing and that prison grievance procedures were sufficient. Finally, the court held that reasonable legitimate charges in no way infringed on any right of expression or association. *Sickles v. Campbell County,* 439 F.Supp.2d 751 (E.D.Ky. 2006).

Daniel Cleveland, a third-year student at Salmon P. Chase College of Law, contributed to this article.

Be It Ordained . . .

Tree Protection Ordinances

A study done by the University of Florida suggests that municipal tree ordinances are a good way to preserve urban tree canopies and lower city residents' summer electricity bills. Due in part to the Tree City USA program of The National Arbor Day Foundation, many cities have tree protection ordinances. According to the foundation, 31 Kentucky cities qualify as a Tree City USA. The Kentucky Division of Forestry is an active participant in the program. For information about how to become a Tree City USA, contact the Division at (502) 564-4496 or visit the foundation's website – http://www.arborday.org/programs/treeCityUSA.cfm.

One of the standards a city must meet to qualify is a tree care ordinance. The foundation website provides the following description of the ordinance: "The tree ordinance must designate the establishment of a tree board or forestry department and give this body the responsibility for writing and implementing an annual community forestry work plan. Beyond that, the ordinance should be flexible enough to fit the needs and circumstances of the particular community. A tree ordinance provides an opportunity to set good policy and back it with the force of law when necessary. Ideally, it will provide clear guidance for planting, maintaining and removing trees from streets, parks, and other public places." A bulletin with more information is available from the foundation.

The following example of a tree care ordinance, more comprehensive than in many Tree City USA communities in Kentucky, comes from *Welcome to Tree City USA!,* a publication of the Kentucky Department of Forestry.

AN ORDINANCE RELATING TO THE PROTECTION OF TREES ON PUBLIC PROPERTY WHICH SERVE THE PUBLIC INTEREST BY PROVIDING OXYGEN, STABILIZATION OF THE SOIL, PREVENTION OF EROSION, SHELTER FOR WILDLIFE, CONSERVATION OF ENERGY BY PROVIDING SHADE, FILTERING AIR, AND ADDING TO THE BEAUTY OF THE CITY OF HOMETOWN.

WHEREAS, trees provide a setting with a variety of color unsurpassed in shade and hue; and

WHEREAS, trees are an invaluable physiological counterpart to the man-made urban setting; and

WHEREAS, trees absorb a high percentage of carbon dioxide and return oxygen, a vital ingredient to life; and

WHEREAS, trees are a valuable asset that can affect an area economically; and

WHEREAS, the city commission of the city of Hometown has determined that the protection of trees on public property within Hometown is not only desirable but essential to the present and future safety and welfare of all citizens; and

WHEREAS, the city of Hometown recognizes that trees on public property are valuable contributors to the city's environment;

NOW THEREFORE, be it ordained by the city commission of the city of Hometown, Kentucky:

Section 1: Definitions

Street Trees: "Street trees" are herein defined as trees, shrubs, bushes, and all other woody vegetation on land lying between property lines on either side of all streets, avenues, or ways within the city.

Park Trees: "Park trees" are herein defined as trees, shrubs, bushes, and all other woody vegetation in public parks having individual names, and all areas owned by the city or to which the public has free access as a park.

Section 2: Creation and Establishment of a City Tree Board

There is hereby created and established a city tree board for the city of Hometown, Kentucky, which shall consist of five members, citizens and residents of the city, who shall be appointed by the mayor with the approval of the commission.

Section 3: Term of Office

The term of the five persons appointed by the mayor shall be three years except that the term of two of the members appointed initially shall be for one year, and the term of two members of the first board shall be for two years. In the event that a vacancy shall occur during the term of any member, his successor shall be appointed for the unexpired portion of the term.

Section 4: Compensation

Members of the board shall serve without compensation.

Section 5: Duties and Responsibilities

It shall be the responsibility of the board to study, investigate, counsel, develop and/or update annually, and administer a written plan for the care, preservation, pruning, planting, replanting, removal, or disposition of trees and shrubs in parks, along streets, and in other public areas. Such will be presented annually to the city commission and, upon acceptance and approval, shall constitute the official comprehensive tree plan for the city of Hometown, Kentucky. The board, when requested by the city commission, shall consider, investigate, make findings, and recommend upon any special matter or question coming within the scope of its work.

Section 6: Operation

The board shall choose its own officers, make its own rules and regulations, and keep a journal of its findings. A majority of the members shall be a quorum for the transaction of business.

Section 7: Street Tree Species to be Planted

The tree board will formulate an official street tree species list for Hometown, Kentucky. The list of allowable species shall be broken down into categories of small, medium, and large trees. No species other than those included in this list may be planted as street trees without written permission of the city tree board.

Section 8: Spacing

The spacing of street trees will be in accordance with the three size classes referred to in Section 7 of this ordinance, and no trees may be planted closer together than the fol-

lowing: small trees, 30 feet; medium trees, 40 feet; and large trees, 50 feet.

Section 9: Distance from Curb and Sidewalk

The distance trees may be planted from curbs or curb lines and sidewalks will be in accordance with the three size classes listed in Section 7 of this ordinance, and no trees may be planted closer to any curb or sidewalk than the following: small trees, 2 feet; medium trees, 3 feet; and large trees, 4 feet.

Section 10: Distance from Street Corners and Hydrants

No street tree shall be planted closer than 20 feet to any street corner, measured from the point of nearest intersection of curbs and curb lines. No street trees shall be planted closer than 10 feet to any hydrant.

Section 11: Public Tree Care

The city shall have the right to plant, prune, maintain, and remove trees, plants, and shrubs within the lines of all streets, alleys, avenues, lanes, squares, and public grounds as may be necessary to ensure public safety or to preserve or enhance the symmetry and beauty of such public grounds. The city tree board may remove or cause or order to be removed any tree or part thereof that is an unsafe condition or that by reason of its nature is injurious due to fungus, insects, or other pests.

Section 12: Tree Topping

It shall be unlawful as a normal practice for any person, firm, or city department to top any street tree, park tree, or other tree on public property. Topping is defined as the severe cutting back of limbs to stubs larger than three inches in diameter within the tree's crown to such a degree so as to remove the normal canopy and disfigure the tree. Trees severely damaged by storms or other causes or certain trees under utility wires and other obstructions where alternative pruning practices are impractical may be exempt from this ordinance at the determination of the city tree board.

Section 13: Pruning, Corner Clearance

Every owner of any tree overhanging any street or right-of-way within the city shall prune the branches so that such branches shall not obstruct the light from any street lamp or obstruct the view of any street intersection and so that there shall be a clear space of eight feet (8') above the surface of the street or sidewalk. Said owners shall remove all dead, diseased, or dangerous trees or broken or decayed limbs that may constitute a menace to the safety of the public when it interferes with the proper spread of light along the street from a street light or interferes with visibility of any traffic control device or sign.

Section 14: Dead or Diseased Tree Removal on Private Property

The city shall have the right to cause the removal of any dead or diseased trees on private property within the city when such trees constitute a hazard to life and property or harbor insects or disease that constitute a potential threat to other trees within the city. The city tree board will determine hazardous trees that may constitute a menace to the safety of the public when it interferes with the visibility of any traffic control device, sign or street light.

Section 15: Interference with City Tree Board

It shall be unlawful for any person to prevent, delay, or interfere with the city tree board or any of it agents or servants while engaging in and about the planting, cultivating, mulching, pruning, spraying, or removing of any street trees, park trees, or trees on private grounds, as authorized in this ordinance.

Section 16: Arborist Licensing and Bond

It shall be unlawful for any person or firm to engage in the business or occupation of pruning, treating, or removing street or park trees within the city without first applying for and procuring a license. The license fee shall be $25 annually in advance provided, however, that no license shall be required of any public service company or city employee doing such work in the pursuit of their public service endeavors. Before any license shall be issued, each applicant shall first file evidence of possession of liability insurance in the minimum amounts of $25,000 for bodily injury and $10,000 property damage indemnifying the city or any person injured or damage resulting from the pursuit of such endeavors as herein described.

Section 17: Review by City Commission

The city commission shall have the right to review the conduct, acts, and decisions of the city tree board. Any person may appeal from any ruling or order of the city tree board to the city commission who may hear the matter and make the final decision.

Section 18: Penalty

Any person violating any provision of this ordinance shall be, upon conviction or a plea of guilty, subject to a fine not to exceed $500.

The Chase Local Government Law Center maintains a large collection of ordinances from local governments in Kentucky and elsewhere. For help with locating model or sample ordinances, contact the center by telephone at (859) 572-6313 or by e-mail at clglc@nku.edu.

Opinions of the Attorney General

Summaries of Selected Formal Opinions

OAG 06-002

Subject: Whether a person may lawfully serve as a member of the Lexington-Fayette Urban County Council, and, at the same time, hold the position of executive director of the Office of the Ombudsman of the Cabinet for Health and Family Services.

Syllabus: The position of executive director of the Office of the Ombudsman of the Cabinet for Health and Family Services is a "state office," and one who holds that position is a "state officer," such that one cannot hold that position and lawfully remain a member of the Lexington-Fayette Urban County Council.

Synopsis: Section 165 of the state constitution and KRS 61.080(1) prohibit one person's holding of an office in state government and an office in local government at the same time. In *City of Lexington v. Thompson,* 61 S.W.2d 1092 (1933), the Kentucky Supreme Court listed five elements that make a public employment a public office of a civil nature. Comparing the position of executive director of the Office of the Ombudsman of the Cabinet for Health and Family Services with that list leads to the conclusion that the position possesses each of the elements of a state office, as distinguished from a position of mere employment. The offices are incompatible. Pursuant to KRS 61.090, acceptance by one in office of another office incompatible with the first operates to vacate the first office.

OAG 06-004

Subject: Meaning of residency requirement for assistant county attorneys in KRS 69.300.

Syllabus: KRS 69.300's requirement that assistant county attorneys reside within 30 miles of the county line should be interpreted as 30 miles in a straight line.

Synopsis: As amended in 1994, KRS allows assistant county attorneys to reside within 30 miles of the county line or in a contiguous county. The question is whether to measure the 30-mile distance in a straight line or according to the mileage traveled along existing roads to reach the county line. The Attorney General adopts the rule that, "[i]n the absence on any specific statutory provision governing the manner of measurement of distances, distance is to be measured along the shortest straight line, on a horizontal plane, and not along the course of a highway, or along the usual traveled way." The Attorney General finds support for this rule in decisions from federal courts and courts in other states.

Summaries of Selected Open Meetings Decisions

Public Agency Defined – KRS 61.805(2)

A city council failed to treat all council committees as public agencies for Open Meetings Act purposes and adhere to the requirements of the Open Meetings Act in the conduct of committee meetings. After the council acknowledged that the express definition of public agency includes committees, the appeal became moot. The Attorney General reaffirmed that a committee established, created, and controlled by a public agency is itself a public agency within the meaning of KRS 61.805(2)(g). This is so even where the committee is comprised of less than a quorum of the members of the public agency that created it and is not empowered to take action, but instead operates in an advisory capacity. 06-OMD-170.

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

A citizen complained that a subcommittee of a board of health voted to go into closed session to discuss general personnel matters and so violated the Open Meetings Act. The board responded that the subcommittee was not a quorum of the board, was engaged in a preliminary study, and took no action in closed session. The Attorney General observed that the subcommittee, standing alone, was an agency subject to the Open Meetings Act. The fact that the subcommittee cannot take action on its own and operates in an advisory capacity does not take it outside the act. The board relied upon the meeting minutes in its defense, but the minutes lacked the specificity required to establish compliance with the act. The board could not establish that discussion was restricted to matters that might lead to the appointment, discipline, or dismissal of personnel of that particular agency. The Attorney General therefore concluded that the subcommittee "expanded the scope of the [personnel] exception and improperly concealed matters otherwise appropriate to the view of the public." 06-OMD-211.

A county solid waste recycling board went into executive session for the stated purpose of discussing "individual personnel matters." The discussion entailed eliminating a bookkeeper position and replacing it with a contract service.

The affected employee complained that the issue fell outside the claimed exception. The Attorney General agreed. The current employee's status related tangentially to the subject of the closed session discussion, but the primary focus of the discussion was the hiring of a bookkeeping service. No exception exists in the Open Meetings Act for discussions relating to the hiring of a bookkeeping service or for the elimination of a current position. 06-OMD-257.

Closed Sessions Generally – KRS 61.815

A reporter complained that a board of education voted to go into a closed or executive session to discuss personnel, but failed to announce whether the discussion related to the appointment, dismissal, or discipline of an individual employee, member, or student. In addition, the citizen complained that the board discussed pending litigation during the closed session without announcing its intent in open session. The Attorney General agreed that the board failed to observe the proper formalities before going into closed session. Although the reporter prevailed on the merits, the Attorney General did not grant the relief requested. The Attorney General has no authority to invalidate actions taken by a public agency during the course of a meeting that did not conform to the requirements of the Open Meetings Act. Relief of this nature is only available in the circuit court. 06-OMD-150.

Regular Meetings – KRS 61.820

A reporter complained that a school board failed properly to announce a committee meeting, but received no response to her complaint. Subsequently the board admitted its mistake, making the substantive issue moot. The Attorney General found that "no other course exists, other than to admit notice was not given" and that the board has taken the necessary steps to ensure that proper notice of meetings will be provided in the future. 06-OMD-235.

Notice of Special Meetings – KRS 61.823(3), (4)

A citizen complained that a special meeting of the city council was improper because the city did not post written notice of the meeting in a conspicuous place in the building that houses its headquarters. The Attorney General found that the city's notice complied with KRS 61.823(4). The Attorney General explained, "A bulletin board that is accessible to the public is 'conspicuous,' as that term is commonly interpreted notwithstanding the fact that more conspicuous places may be available or the fact that it may not be conspicuous to the public for the full 24 hours preceding the special meeting." 06-OMD-256.

Emergency Meetings – KRS 61.823(5)

A citizen complained that a fiscal court meeting was not a proper emergency meeting. When the meeting took place, the fiscal court faced a budget crisis with only 36 hours remaining in the fiscal year. Without the emergency meeting, the county faced an imminent possibility of a shutdown of vital services and risked placing its citizens' welfare in a dangerous state. The Attorney General concluded that the meeting was properly an emergency meeting notwithstanding the fact that the emergency resulted from the fiscal court's own failure to enact a budget ordinance before the expiration of the fiscal year. Whatever the circumstances that accounted for the delay, the fiscal court presented adequate proof of an imminent emergency that would result from its failure to enact a budget ordinance. 06-OMD-156.

Summaries of Selected Open Records Decisions

Right to Inspection Generally – KRS 61.872

A citizen requested copies of a city's noise ordinances and a transcript of a city council meeting. The city advised the citizen that copies of the noise ordinances were available for his inspection on the city's website. The Attorney General concluded that the city's response was not adequate under the Open Records Act because many citizens do not have access to a computer or do not have the skills necessary to operate a computer. The city's response effectively denied the citizen's request by not affording an opportunity reasonably to inspect the records. 06-ORD-273.

Suitable Facilities – KRS 61.872(1)

A citizen asked a city for records relating to an automobile accident in an effort to confirm his suspicion that someone altered the records. The city responded by providing all nonexempt responsive records. The requester's belief that the police report had been altered does not present an open records issue. With reference to such factual disputes, the Attorney General's office affirms that it "cannot . . . adjudicate a dispute regarding a disparity, if any, between records for which inspection has already been permitted, and those sought but not provided." 06-ORD-266.

Unreasonable Requests – KRS 61.872(6)

A city police department withheld some records requested by a citizen because it provided some of the requested documents in response to prior requests. Regarding duplicative requests, the Attorney General stated, "Unless a requester can explain the necessity of reproducing the same records twice, an agency is not required to satisfy the same request a second time." The police department properly denied the citizen's request where the citizen had a history of making duplicative requests and "imposed an unreasonable burden" on the police department. 06-ORD-159.

Exempt Records Generally – KRS 61.878

Lexington-Fayette Urban County Government Division of Police, citing several exceptions, denied a reporter's request for 911 tapes regarding the crash of Comair Flight 5191. After conducting an *in camera* review of the tapes, the Attorney General found that the public's interest in monitoring the actions of the Division of Police and its emergency 911 system outweighed the privacy interests of the 911 callers. The Attorney General pointed out that the reporter was not asking for documents in the nature of investigative reports, but rather recordings that took place as the event was happening. The Attorney General saw little appreciable difference in content between the content of the 911 tapes and contemporaneously released police dispatch tapes and fire dispatch tapes. 06-ORD-230.

A citizen submitted to a board of health a standing request for copies of meeting packets. The board declined to honor the request, and the citizen appealed. Citing an earlier open records decision, the Attorney General stated that "standing requests" for public records are not proper under the law, and an agency need not honor them. The right to inspection attaches only after documents are prepared, owned, used, in possession of, or retained by a public agency. The Attorney General provided guidance regarding the topic of packets.

A board must review the materials in the packet before issuing a blanket denial. If the packets contain material that is not excepted under KRS 61.878(1)(a) through (n), the board must make the non-excepted materials available to the requester. The board is not required to provide packets to the public before the meeting. It has discretion to create a uniform policy regarding the distribution of the packets in advance of the meeting. 06-ORD-171.

Information of a Personal Nature – KRS 61.878(1)(a)

An unsuccessful applicant to a law school asked the school for records relating to the entering class. The law school denied the request, asserting that its admissions committee was not a public agency and that the records were not subject to disclosure in light of the Family Educational Rights and Privacy Act. The Attorney General concluded that, while FERPA protected the records of successful applicants to the law school, it did not protect the records of unsuccessful applicants or successful applicants who had not commenced coursework. However, those applicants "enjoy absolute protection from disclosure pursuant to KRS 61.878(1)(a)." The Attorney General acknowledged that there are conflicting public policy interests between disclosure of information relating to the operations of a publicly funded institution and student privacy concerns, but the Attorney General agreed with the university that the conflict should be resolved in favor of protecting student privacy. The Attorney General rejected the argument that the admissions committee was not a public agency for open meetings purposes. Pursuant to KRS 61.805(2)(f) and (g), the committee is a public agency, but it may conduct closed session discussion of individual students' qualifications. 06-ORD-145.

A county health department denied a request for patient records of three individuals in the absence of the patients' consent or a court order requiring the disclosure. The Attorney General agreed this was proper saying, "It is well recognized that a person's medical records and medical information is information in which a person has a privacy interest and the disclosure of records containing such information would constitute an unwarranted invasion of privacy." 06-ORD-209.

Law Enforcement – KRS 61.878(1)(h)

A citizen requested a copy of a complaint filed by another citizen against city police officers. The city denied the request because the requested material was part of an ongoing administrative investigation within the police department. The Attorney General agreed with the city that non-disclosure was appropriate because the records in dispute were law enforcement records, the requested records were compiled in the process of detecting and investigating statutory or regulatory violations, and revealing the records would harm the ongoing police investigation. 06-ORD-149.

A citizen requested to see the police file involving an unsolved homicide that occurred 41 years ago. The police department denied access explaining that the investigation was still open. On appeal, the Attorney General found that the police had adduced sufficient proof that the denial was appropriate based on the decision to review the case file for DNA testing. However, the Attorney General said that the police could not characterize this investigation as open indefinitely. The police department has a duty to provide the citizen with a detailed explanation regarding the delay and provide the citizen with the earliest date certain when the testing will be concluded. If the testing does not yield concrete and relevant evidence, the division must disclose the records. 06-ORD-265.

A sheriff's department denied a request for a copy of the complete case file concerning the department's investigation into a death that occurred in December 2005. The department provided a KYIBRS report, explaining that it could release no other information without a court order. Believing that the department was not responsive to the request, an appeal followed. In response to the appeal, the department explained that the investigation was ongoing and that premature disclosure would be harmful to the investigation. The Attorney General accepted the department's explanation saying it is "within the sound discretion of the law enforcement agency to decide when a case is active, merely inactive, or finally closed." 06-ORD-190.

Records Related to Employee – KRS 61.878(3)

A former employee requested documents relating to his dismissal from state service. His employer responded with the requested documents, but withheld one document it said related to ongoing criminal or administrative investigations by an agency. The Attorney General agreed that this was proper. Although the right of access granted to public agency employees by KRS 61.878(3) overrides the remaining exceptions codified at KRS 61.878(1) when the employee requests access to records relating to him, the concluding sentence of KRS 61.878(3) suspends this right while the employee is the subject of an ongoing investigation. 06-ORD-272.

Denial of Inspection – KRS 61.880

A citizen asked to inspect 15 categories of records in general related to finances and operation of a city police department. The city agreed to make certain records available right away and make other records available within 10 days. It denied access to some of the records requested. The Attorney General found that the city improperly denied the request by failing to afford the citizen access to documents in a timely manner and failing to provide sufficiently particularized information relative to the denial. The information given to the city was specific enough to identify the documents that the citizen wanted to see. Therefore, the city must make "reasonable efforts to identify, locate, redact, and make available for inspection all existing nonexempt records that are responsive to [the citizen's] request." 06-ORD-270.

Under KRS 61.846 and 61.880, the Attorney General reviews complaints alleging violations of the Open Meetings Act and Open Records Act respectively and issues written decisions stating whether an agency violated the act. If no party timely appeals, the decision has the force and effect of law. Copies of the decisions summarized here are available online at http://ag.ky.gov/civil/openrecords.htm.

Under KRS 65.055(1), 160.395(1), and 164.465(1), certain public officers have a continuing duty to distribute written information prepared by the Office of the Attorney General pursuant to KRS 15.257 that explains the procedural and substantive provisions of the Open Meetings Act and the Open Records Act. See http://ag.ky.gov/civil/alert.htm. In addition, those officers must distribute information prepared by the Department for Libraries and Archives pursuant to KRS 171.223 concerning proper retention and management of public records.

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