“To the victor belong the spoils of the enemy,” said Senator William Marcy in an 1832 speech defending Secretary of State Martin Van Buren, nominated as minister to England, against an attack by Senator Henry Clay. However, cautions the U.S. Supreme Court, “To the victor belong only those spoils that may be constitutionally obtained.... [The] First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved.” Rutan v. Republican Party of Illinois, 497 U.S. 62, 64 (1990).

Political patronage, or what thanks to Senator Marcy we know as the “spoils system,” is the practice of awarding governmental benefits to the allies of those in political power and denying them to their opponents. Political patronage can embrace a variety of governmental benefits including contracts, loans, grants, and franchises. More commonly, people use the term in reference to government jobs. Defenders and critics of the practice in American politics go back well past Marcy and Clay.

Dissatisfaction with the practice grew over time, and legislatures responded accordingly. Statutes like the Pendleton Act of 1883, which introduced the federal civil service system, the Hatch Act of 1939, and similar state laws gradually reduced the vitality of the spoils system. Even so, pockets of strength survived into the 1970s, notably in Chicago and in some other big cities. It was then that the courts, too, started to curtail political patronage. The process began with the decision of the U.S. Supreme Court in Elrod v. Burns, 427 U.S. 347 (1976).

In 1970 Democrat Richard Elrod assumed the office of sheriff in Cook County, Illinois from the Republican incumbent. As was usual when a new sheriff was of another political party, Elrod replaced unprotected employees of the sheriff’s office with members of his own party. Several Republican employees – three process servers and a juvenile court bailiff – challenged the new sheriff’s right to discharge them solely because of their partisan political affiliation. In a 5-3 decision, the Supreme Court said that the sheriff could not fire them on that ground alone.

Justice Brennan wrote a plurality opinion announcing the judgment of the court. In it he said:

The cost of the practice of patronage is the restraint it places on freedoms of belief and association. In order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party, usually at the price of one of the first three alternatives. Regardless of the incumbent party's identity, Democratic or otherwise, the consequences for association and belief are the same. An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk. The financial and campaign assistance that he is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief.... Even a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs. Since the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties, the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished.

Continued on page 2
Thanks to a grant from Cinergy Corp., the Chase College of Law and the Local Government Law Center will shortly inaugurate a fellowship program in government law and public policy. Each year the program will select one highly qualified student in the College of Law who demonstrates a commitment to public service and an interest in the development of local government and public policy to be the Cinergy Fellow.

The fellowship program envisions an experience that will provide the fellow with exposure to the practical and intellectual aspects of public policy, public service, and civic leadership. Monies from the grant will be available to subsidize summer or school-year employment in the public sector working as a legal intern in an area of interest to the fellow.

Currently the college and the center are seeking expressions of interest from local governments and agencies in the public sector that might be willing to serve as partners in this program. Partners should be able to provide the fellow with a professionally stimulating work environment and be able to match the fellow with accomplished lawyers, government officials, or civic leaders who can serve as mentors. Projects that a fellow might perform include doing original research oriented to policy initiatives, legislative or regulatory drafting, implementing new initiatives, legislation, or regulations, or evaluating existing public policy. Subject areas for such projects might include housing, land use, economic development, taxation, education, and employment, among others. Placements might include city councils, school boards, fiscal courts, community development agencies, and civil rights commissions, to name a few.

If you would like to serve as a mentor for the inaugural fellow or a future fellow, or if you know of a project that would profit from the work of a fellow, please contact the director of the Local Government Law Center, Professor Phillip Sparkes. The address, phone number, and e-mail address appear on the back cover of this newsletter or you can reach us from our website.

Speaking of our website, we have a new look and a new address: chaselocalgov.org. The new site offers more features and more content. There you will find back issues of Local Government Law News, links to state and local government resources on the World Wide Web, and ready access to other services provided by the College of Law such as Kentucky Supreme Court Briefs Online. If you are unfamiliar with that project, the searchable archive contains scanned copies of briefs submitted to the Kentucky Supreme Court in cases decided since 2000. In addition, this past fall the Chase Law Library began to make available briefs in cases submitted to the Kentucky Court of Appeals. Come browse, and remember to add us to your bookmarks.

Like most websites, ours is a work in progress. In the future, we hope to make available though it distance learning opportunities for local government lawyers, officials, and employees as well as customized training. In addition, we will try to make it easier for you to solicit technical assistance, submit research requests, and seek information about our community outreach programs. We welcome your comments and suggestions for improvements. Click on “Contact Us” to ask your question, tell us of your training needs, or let us know of your interest in participating in the fellowship program.

Discharge and Patronage continued from page 1


Justice Brennan described patronage, to the extent that it restrained belief and association, as “inimical to the process which undergirds our system of government” and “at war with the deeper traditions of democracy embodied in the First Amendment.”

Proponents of political patronage asserted three justifications for the practice. One was that political patronage ensured effective government and the efficiency of public employees. Justice Brennan responded that wholesale replacement of large numbers of public employees every time political office changed hands was itself inefficient and that the prospect of dismissal after an incumbent lost office was a disincentive to good work. Further, there was no assurance that the replacement employee would be more qualified than the incumbent to do the job.

A second justification offered was that political patronage was necessary to avoid workforce obstruction of a new administration’s efforts to implement its policies. Conceding some force to this argument, Justice Brennan replied that limiting patronage dismissals to policymaking positions...
was sufficient to achieve this governmental end. A third justification for patronage was that it was necessary to the preservation of the two-party system. However, noted Justice Brennan, political parties existed in the absence of active patronage practice, and they survived the reduction of their patronage power through the establishment of civil service merit systems. He concluded:

In summary, patronage dismissals severely restrict political belief and association. Though there is a vital need for government efficiency and effectiveness, such dismissals are on balance not the least restrictive means for fostering that end. There is also a need to insure that policies which the electorate has sanctioned are effectively implemented. That interest can be fully satisfied by limiting patronage dismissals to policymaking positions. Finally, patronage dismissals cannot be justified by their contribution to the proper functioning of our democratic process through their assistance to partisan politics since political parties are nurtured by other, less intrusive and equally effective methods. More fundamentally, however, any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms. We hold, therefore, that the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments.


Four years later the Supreme Court revisited patronage systems in Branti v. Finkel, 445 U.S. 507 (1980). That case arose after control of a county legislature shifted from Republicans to Democrats. When the term of the Republican-appointed public defender expired, the Democratic majority appointed a Democrat to succeed him. As soon as the new public defender took office, he targeted assistant public defenders with Republican credentials for replacement with assistants sponsored by Democratic politicians. Finkel and another assistant public defender challenged their dismissals.

The trial court found that the public defender discharged the two assistants solely because of their political beliefs. Elrod would allow this only if they were policymaking or confidential employees. The trial court concluded they were neither. They were not policymakers because they exercised very limited responsibility with respect to the overall operation of the public defender’s office. They were not confidential employees because the only confidential information to which they had access was the product of the attorney-client relationship. They did not have access to confidential information related to office policy.

In the Supreme Court, the public defender advanced two arguments. First, he argued for a limited reading of Elrod, one that applied only to dismissals resulting from an employee’s failure to capitulate to political coercion. Writing for a 6-3 majority, Justice Stevens rejected that approach saying that such an interpretation “would require the Court to repudiate entirely the conclusion ... that the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs.”

Second, the public defender argued, even if Elrod makes party sponsorship an unconstitutional condition for low-level employees, it is an acceptable requirement for assistant public defenders because they are policymaking or confidential employees not protected by Elrod. In response, Justice Stevens acknowledged, “it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered. Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character.” He gave as an example election judges that state law requires to be of opposing parties. He continued:

It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position. The coach of a state university’s football team formulates policy, but no one could seriously claim that Republicans make better coaches than Democrats, or vice versa, no matter which party is in control of the state government. On the other hand, it is equally clear that the Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments. In sum, the ultimate inquiry is not whether the label “policymaker” or “confidential” fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti v. Finkel, 445 U.S. at 518.

Applying this “appropriateness” test, it was obvious to the majority that the continued employment of an assistant public defender could not properly depend upon allegiance to the political party in control of county government. In the majority’s view the primary, if not the only, responsibility of an assistant public defender was to represent his clients. Whatever policymaking these assistant public defenders did related to the needs of individual clients, not to any partisan political interests. Likewise, whatever access they had to confidential information arose out of the attorney-client relationship and had no bearing on partisan political concerns. Therefore, to condition continued employment on allegiance to a political party would undermine rather
than promote the effective performance of an assistant public defender.

Ten years after Branti, the Supreme Court considered whether the First Amendment applied to patronage practices other than dismissals. In Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), the court extended Elrod and Branti to decisions about hiring, promotion, transfers, and recalls from layoffs. The case arose after Illinois governor James Thompson instituted a hiring freeze. Exceptions to the freeze required permission from the governor’s office, which allegedly conditioned its decision on whether the individual had demonstrated support of the Republican Party. Justice Brennan again wrote the majority opinion, holding that patronage practices short of dismissal must also be narrowly tailored to further vital governmental interests.

After Rutan the question remained whether the First Amendment protections of Elrod and Branti extended to independent contractors who did business with government agencies. In O’Hare Truck Service v. City of Northlake, 518 U.S. 712 (1996), the Supreme Court held that it did. In O’Hare the city had a list of towing services that it called on a rotating basis. It dropped O’Hare Truck Service from the list when its owner declined to contribute to the mayor’s reelection campaign. Reaffirming the earlier cases in a 7-2 decision, the court could find no reason why the constitutional protection should turn on the distinction between employee and contractor. To do so would invite manipulation by the government.

In the thirty years since Elrod, the lower courts have decided hundreds of political patronage cases. In the Sixth Circuit, four cases interpreting and elaborating the Elrod-Branti exception are particularly important: Williams v. City of River Rouge, 909 F.2d 151 (6th Cir. 1990); Faughender v. City of North Olmsted, 927 F.2d 909 (6th Cir. 1991); Rice v. Ohio Department of Transportation, 14 F.3d 1133 (6th Cir. 1996); and McCloud v. Testa, 97 F.3d 1556 (1997).7

In Williams, the court held that the position of city attorney was a position for which political affiliation was an appropriate requirement. The court took care to distinguish that position from the assistant public defenders in Branti. The particular city attorney in question might defend the city in suits arising out of disputes over city policy, negotiate contracts on the city’s behalf, and serve as the city’s solicitor. This entitled the mayor to have a trusted advisor in that post.

The court acknowledged that not all city attorneys might have responsibilities so intimately linked to the city’s affairs. However, the court made clear that “[w]hen examining a public office for first amendment protection against politically-motivated dismissal, the relevant focus of analysis is the inherent duties of the position in question, not the work actually performed by the person who happens to occupy the office.”8 Given the various responsibilities potentially assumed by a city attorney, “it is necessary to consider the position of City Attorney itself, rather than the position as performed by appellant. Any other approach would tend to bind a later mayor to employ the City Attorney in the way that the official had been employed in the past.”9

Faughender involved the secretary to a former mayor. In her suit she alleged that her position involved no politically- or policy-related duties, hence the new mayor’s failure to rehire her violated her First Amendment rights. The Court of Appeals extended the approach it took in Williams saying, “we must examine the inherent duties of that position both in the abstract and the duties that the new holder of that position will perform.”10 Using this functional analysis, the court saw the position as inherently political given her access to confidential and political material and given the tasks the new mayor wanted her to perform. It concluded that “political loyalty, whether partisan or personal, is an essential attribute of the job.”11

Rice involved an employee in the Ohio Department of Transportation passed over for appointment to an administrative assistant position. The court described the position as, in effect, an ombudsman for the director of the department who was a gubernatorial appointee. As such, it fell within the Elrod-Branti exception. In Rice the court announced what it has come to call the “Rice canon.” Reasoning that the legislature has the ability to remove positions from the political sphere, the “Rice canon” requires the court to give “some deference” to the legislature’s determination regarding whether a particular job is political.12

The most recent case of the quartet, McCloud, involved factions within a single political party. The court held that the First Amendment protections apply to opposing factions of a single political party as much as to opposing political parties. In the course of the opinion, the court announced, “we believe that certain categories of positions falling into the Branti exception can be specified with reasonable certainty.”13 It set out four categories for the district courts of the circuit to apply in patronage cases.

In category one are “positions specifically named in relevant federal, state, county, or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted.” The court gave as an example a secretary of state who has statutory authority over various state corporation law policies.14

In category two are “positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction’s pattern or practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions.” The court gave as an example a deputy secretary of labor to whom the secretary of labor has delegated the responsibility for creating the department’s annual proposed legislative agenda.15
In category three are “confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority, or other confidential employees who control the lines of communications to category one positions, category two positions or confidential advisors.” The court’s example was a judge’s law clerk or secretary.16

Finally, in category four “are positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies.” Here the court might have chosen Justice Stevens’ example of election judges required by law to be of opposing parties. The example it gave is more complex.17

As the court noted later, “[w]hile no doubt helpful in analyzing whether a particular government position comes within the Elrod-Branti exception, McCloud does not require that a government position fall neatly within one of these generic categories.”18 Although the fit need not be perfect, once a former employee makes out a prima facie case of patronage dismissal, the burden falls on the defending official to show that there is a fit.

The recent case of Caudill v. Hollan, 431 F.3d 900 (6th Cir. 2005) shows how this line of cases applies. The case arose in Boyd County, Kentucky, when in 2002 a newly elected county clerk, Doris Hollan, did not reappoint four deputy county clerks who had supported her opponent in the election. Three of the four were incumbent deputy clerks who had each served in that capacity for several years. The fourth, Lynn Butler, was a former deputy clerk appointed upon the death of the incumbent county clerk to serve out the term of office. She did not seek election to the office either before or after her appointment.

After Hollan failed to reappoint the four, they filed federal civil rights actions claiming a violation of their rights of free speech and free association. The federal district court dismissed Butler’s claim, reasoning that as the former county clerk she had no expectation of continued employment or reemployment as a deputy county clerk. The district court dismissed the claims of the other three because they presented no evidence that the office of county clerk had final authority to establish county policy with respect to hiring matters. All four then appealed to the Sixth Circuit Court of Appeals.

After first disposing of a jurisdictional issue, the court turned to the merits of the deputy clerks’ cases, starting with those of the three deputy clerks.19 As mentioned, under Branti a discharged employee must make out a prima facie case of patronage dismissal. The court found sufficient evidence in the record to conclude that Hollan engaged in patronage dismissals and thereby violated the three clerks’ constitutional rights. Hollan then had to show that the job in question fell within the McCloud categories. This she could not do. The court found that the jobs were essentially clerical. They did not have and did not exercise the type of discretion or authority that one would normally associate with a job subject to patronage dismissal under McCloud.

Having reached that conclusion, the court invoked the “Rice canon.” Hollan pointed to three statutes as evidence of the General Assembly’s understanding of the deputy county clerk position. First, Hollan claimed, KRS 62.210 makes the office of county clerk liable “for the acts or omissions of deputy county clerks.” The court had considered a statute with almost exactly the same wording in Heggen v. Lee, 284 F.3d 675 (6th Cir. 2002). In Heggen the analogous language in KRS 70.040 was not enough to convert a deputy sheriff position into a position subject to patronage dismissal. For like reasons, KRS 62.210 did not convert a deputy county clerk position into one subject to patronage dismissal.

Second, Hollan pointed to KRS 382.990(5). It provides that a county clerk is guilty of a violation for failure to perform certain duties imposed on the office. She argued that because a county clerk can be criminally liable for the acts of her subordinates, this requires her to be able to pick politically compatible employees. The court rejected the argument because KRS 62.210 eliminates any personal criminal liability that could attach to the individual office holder and requires deputy county clerks to reimburse the clerk’s office for any fines levied on the clerk.

Third, Hollan cited KRS 61.035. It provides, “Any duty enjoined by law or by the Rules of Civil Procedure upon a ministerial officer, and any act permitted to be done by him, may be performed by his lawful deputy.” The court acknowledged that the statute could apply to deputy county clerks in the performance of some duties.20 However, the court said the statute was “not a clear enough expression of the Kentucky General Assembly’s wish to convert the position of deputy county clerk into a political position covered by one of the McCloud categories.”21

Because McCloud does not require that a government position fall neatly within one of its categories, the door is open to an official’s claim of qualified immunity. Hollan made that claim, but the court rejected it. She argued that, with respect to these particular positions, the law was not clearly established at the time of her decision to discharge the clerks. The court answered that given McCloud, Heggen, and Hager v. Pike County Board of Education, 286 F.3d 366 (6th Cir. 2002) (summarized below), she had sufficient notice that the patronage dismissals were constitutionally suspect.

Despite the Elrod/Branti/Rutan/O’Hare quartet in the U.S. Supreme Court and the Williams/Faughender/Rice/McCloud quartet in the Sixth Circuit, litigation over political patronage continues unabated. Taking a cue from Aliff v. Parker, 2002 WL 32005191 (S.D. Ohio 2002), this article concludes with capsule summaries of some of the other significant
Sixth Circuit patronage decisions between those in *McCloud* and *Caudill*.

*Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997): Sheriff's department employees (Tennessee). A newly elected sheriff, who campaigned on a platform of reorganizing the sheriff’s department, told nine of the department’s 64 employees that they would not be needed in the reorganized department. Six of the nine sued, alleging that they lost their positions because they supported the new sheriff’s opponent in the general election. Four, the department’s food service supervisor, two deputy sheriffs, and a jailer, lost their cases because they failed to establish a prima facie case of political motivation. Another, the former sheriff’s chief deputy, lost his case because it was clear to the court that political affiliation was an appropriate requirement for the effective performance of the chief deputy position. The sixth, a deputy sheriff, met his initial burden. Because the new sheriff characterized the position as “at the bottom of the chain of command” and “just enforced the policies that were made by someone else,” the court held that the sheriff failed to show that political affiliation was an appropriate requirement for the position.

*Cope v. Heltsley*, 128 F.3d 452 (6th Cir. 1997): Deputy county clerks (Kentucky). Two deputy county clerks sued Heltsley, the newly-elected county clerk who passed them over for reappointment, allegedly for their support of the losing candidates in the primary and general elections. The court assumed, without deciding, that it would be a constitutional violation for Heltsley to fail to rehire the two clerks. The court then went on to conclude that “[i]t would have been possible, at the end of 1993, for a reasonable person, newly-elected a Kentucky county clerk, to believe that the law entitled her to take political compatibility into account in deciding whom to retain as her deputy clerks.” *Rutan* was comparatively new, there was no clear precedent in the circuit, Kentucky statutes could be read to support her belief, and she might well perceive the position to be inherently political. The court granted Heltsley qualified immunity.

*Hoard v. Sizemore*, 198 F.3d 205 (6th Cir. 1999): County road department foreman/garbage coordinator, assistant road foreman/supervisor, garage supervisor/purchasing agent, and senior citizens director (Kentucky). Following his defeat of the incumbent, the new county judge/executive advised all county employees that they would have to reapply for their jobs. While many were rehired, 22 were not. They filed a civil rights action against the members of the fiscal court individually and in their official capacities. The court of appeals analyzed four positions in particular and found them within the *Branti* exception; the rest fell outside. The position of county road department foreman was inherently political, the court said, because it involved carrying out the judge/executive’s road maintenance policy and controlling the lines of communication between the public and the judge/executive. The court credited testimony that the position managed a budget between one-third and one-half of the county’s total budget and that there was a direct relation between keeping roads maintained and getting reelected. The assistant road foreman position was inherently political for essentially the same reasons. The court found the garage supervisor/purchasing agent position to be inherently political because of the broad range of responsibilities charged upon it and because it involved the highly political process of responding to citizen complaints regarding road conditions. The senior citizens director supervised the operations of two senior citizens homes, prepared and submitted budgetary information to the county and to state agencies, and concerned confidential matters such as personnel decisions and setting priorities. The discretionary authority so conferred and the advice the position provided on policy issues affecting senior citizens placed the position within either *McCloud* category one or category two.

*Sowards v. Loudon County*, 203 F.3d 426 (6th Cir. 2000): Jailer in sheriff’s department (Tennessee). Sowards began working as a road deputy in the county sheriff’s department and later transferred to the position of jailer in the department. Among the duties of the jailer were receiving and safely keeping convicts during transport, committing prisoners to or discharging prisoners from jail, guarding against escape, and preventing the importation of drugs. Her husband ran unsuccessfully against the sheriff in the Republican primary. Afterward the sheriff fired her, ostensibly for failure to serve a warrant, but Sowards claimed it was retaliation for her political association with her husband and sued. The district court granted summary judgment in favor of the sheriff and the county, and Sowards appealed. On appeal, the sheriff admitted that a jailer did not participate in any type of policymaking and was required simply to follow directives. This took the position out of *McCloud* category two. However, because the jailer served as a conduit for communications between prisoners and the sheriff, the sheriff argued it fell into category three. The court responded that the information contemplated by that category was of a political nature, and Sowards did not have access to that kind of information. Tennessee law imposed on jailers the duty to provide for inmates’ needs and safety, a duty that mirrored the duty of a prison guard for which political qualifications were not applicable under *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

*Heggen v. Lee*, 284 F.3d 675 (6th Cir. 2002): Deputy county sheriffs (Kentucky). After Lee won election as sheriff of Hopkins County, he did not rehire three deputies, two of whom served primarily on road patrol and one of whom served primarily as a courtroom bailiff. All three supported the incumbent sheriff, Lee’s opponent, in the primary election. Citing its decision in *Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997), in which it held that Tennessee deputy sheriffs did not fall within the *Branti* exception, the court proceeded...
DECIIONS OF NOTE

KENTUCKY SUPREME COURT

Liability Insurance – Scope of Coverage

In 1998 the Kentucky Supreme Court determined that the members of a fiscal court unlawfully increased their salaries. On remand, the trial court ordered the magistrates to repay the improper salary increases. Initially their liability insurer refused to defend and indemnify them against the claim seeking repayment of the salaries. Following the judgment, the insurer sought a declaration that the policy did not cover the judgment or require the insurer to reimburse the county for its defense of the magistrates. The trial court ruled for the insurer, but the Court of Appeals ruled that the claim sounded in tort and held that the claim fell within the policy’s coverage. The Supreme Court disagreed, saying that the action of the magistrates breached a “quasi-contract” with the people of the county. The policy did not provide coverage for that breach. The Supreme Court, in refusing to extend coverage, rejected arguments that it should construe ambiguities in the contract against the insurer and in favor of the reasonable expectations of the insured. Kentucky Association of Counties All Lines Fund v. McClendon, 157 S.W.3d 626 (Ky. 2005).

Searches of Students – Official Immunity

Parents of middle-school students sued teachers, administrators, and the school board over a search conducted for a missing pair of shorts. They alleged that the search caused the students to suffer “extreme indignities and humiliation.” The trial court dismissed the complaints, but the Court of Appeals reversed. At issue on appeal to the Supreme Court was whether there was a violation of the students’ Fourth Amendment rights and, if so, whether the teachers and administrators were liable in their individual capacities. The court compared the searches in this case to those in Beard v. Whitmore Lake School District, recently decided by the Sixth Circuit, and concluded that at the time of the search the law did not clearly establish that the searches were unconstitutional. Turning again to Sixth Circuit precedents, the Supreme Court held that the teachers and administrators engaged in good faith in a discretionary act and were entitled to qualified immunity against the students’ claims. Lamb v. Holmes, 162 S.W.3d 902 (Ky. 2005).

Whistleblower Act – University Researcher

A university professor obtained a grant to study welfare reform in the state. Based on his research, he intended to disclose at a hearing that welfare reform had a disproportionate impact upon African-American and Appalachian families. Alleging that the grantor cancelled his appearance at the hearing and that the university, at the direction of the grantor, removed him from the study, the researcher sued the cabinet, the university, and certain individuals for violations of the Kentucky Whistleblower Act. The trial court dismissed his claims against all except the university, but the Court of Appeals reversed. On further appeal, the Supreme Court addressed the question whether the researcher was an employee of the cabinet under the act. The court said that he was because the cabinet controlled the details of the researcher’s work and was able to remove him from the study altogether. The court went on to hold that while the cabinet and university may be liable under the Whistleblower Act, the act does not create a civil cause of action against individuals. They face only criminal liability for willful violations of the act. Cabinet for Families and Children v. Cummings, 163 S.W.3d 425 (Ky. 2005).

Administrative Office of the Courts – Judicial Review

The Administrative Office of the Courts (AOC) notified one of its employees that it proposed to terminate his services. The office dismissed the employee in accordance with applicable procedures, a decision ultimately upheld by the Employee Grievance and Appeal Committee. The employee then sought judicial review of the committee’s decision in circuit court, which transferred the case to the Supreme Court as the “proper court” in which to seek review. In some earlier cases the Supreme Court had held that its administrative arms (such as the AOC and the Kentucky Bar Association) could not properly be sued in any other court. The court noted that the cases upon which the lower court relied involved original suits. In contrast, the instant case involved an administrative appeal. Deciding that it did not have the resources to deal with direct appeals of AOC personnel actions, the court concluded that it could look to KRS 13B.140 to decide what court should hear those cases. That court, it concluded, is the circuit court. “The policy of this court is not to contest the propriety of legislation in this area to which we can accede through a wholesome comity…. We conclude that comity should be extended to KRS 13B.140 in this context.” Jones v. Commonwealth, 171 S.W.3d 53 (Ky. 2005).

Ballot Initiative – Timing

Citizens sought to enjoin the urban county government from expending any funds or taking any steps in furtherance of an election on a 2005 ballot initiative to acquire the assets of a water company. The lower courts allowed the election to proceed, and the citizens sought interlocutory relief from the Supreme Court. State law requires the submission of the ballot initiative in question “at the next regular election.” KRS 446.010(28) defines a regular election as one at which members of Congress are elected or one at which state officers are elected. The effect of the statute was to eliminate regular elections in 1997 and every four years thereafter. Because no regular election would occur in 2005, the court
remanded the case to the circuit court with instructions to issue the injunction. Rogers v. Lexington-Fayette Urban County Government, 175 S.W.3d 569 (Ky. 2005).

**Kentucky Court of Appeals**

**County Hospital – Power of Control**

A public hospital created by a city and a county pursuant to KRS Chapter 273 formed a separate not-for-profit foundation and transferred substantial assets to it. The city and county controlled the board of the hospital but did not control the board of the foundation. Allowing that in so restructuring the hospital intended to avoid public accountability and to circumvent the open records and open meetings laws, the county sued. The circuit court ruled that the actions in creating and funding the foundation were legal under KRS Chapter 273 and rejected the county’s argument that the transfer offended section 179 of the Kentucky Constitution. The purpose of that section is “to prevent local and state tax revenue from being diverted from normal governmental channels.” The Court of Appeals agreed with the county and reversed the circuit court saying that the power to dispense the state’s charities is one of exclusive legislative discretion. The hospital had no power under KRS Chapter 273 or its articles of incorporation to divest itself of public funds. The ultimate power of control of the public hospital remains subject to the fiscal court. Calloway County Fiscal Court v. Murray-Calloway County Public Hospital Corporation, 154 S.W.3d 286 (Ky. App. 2003).

**County Library – Site Selection**

After a county library board selected a site for the construction of a new library, a citizen challenged that selection. He alleged that the board did not act in the best interests of the taxpayers and that the board acted without proper authority and contrary to proper procedure. The trial court dismissed for want of standing to sue, and the Court of Appeals affirmed. The allegation that the new site was not readily accessible to the majority of taxpayers was insufficient to demonstrate standing. There was no injury distinct from that of the public generally. Deters v. Kenton County Public Library, 168 SW3d 62 (Ky. App. 2005).

**Education Records – Teacher’s Access**

A classroom teacher made an open records act request to view videotapes recorded in her special education classroom. The board of education installed the camera to monitor her performance after the board received complaints about her inappropriate treatment of the children. (See summary below.) The superintendent denied her request on the ground that they were exempt from disclosure under state and federal educational rights and privacy acts. In an open records act appeal (02-ORD-132), the Attorney General affirmed the superintendent’s decision. The teacher appealed to the circuit court arguing that she fit within an exception that permits teachers to inspect education records, but the circuit court agreed with the Attorney General that the teacher stood in the same position as any member of the public. For the court and the Attorney General, access depended on the nature of the records, not the identity of the person requesting them. The Court of Appeals found this reasoning flawed. It agreed that the records in question were educational records within the scope of the state and federal acts, but held that the request for access should be judged in light of her position as a teacher. The superintendent could deny access only if the teacher lacked a legitimate educational interest, and there was insubstantial evidence in the record to support such a conclusion. Medley v. Board of Education of Shelby County, 168 S.W.3d 398 (Ky. App. 2005).

**Disabled Students – Claims of Abuse**

High school students with severe disabilities and in the special education program at the high school complained that their teacher physically and mentally abused them. They sued the teacher and the administrators who allowed her to teach in their individual capacities alleging civil rights violations and making various state law claims. The defendants moved to dismiss the case for failure to exhaust administrative remedies under the Individuals with Disabilities Education Act (IDEA), and the trial court granted the motion. The Court of Appeals reversed, citing with favor a federal court decision that allegations of physical assault fall outside the scope of the IDEA. As such, those allegations are not subject to the requirement of exhaustion of administrative remedies. Therefore, the court remanded the matter to the circuit court. Meers v. Medley, 168 S.W.3d 406 (Ky. App. 2005).

**Property Valuation – Proof of Change**

In a contested proceeding before the Kentucky Board of Tax Appeals, the board determined the value of a taxpayer’s property for the first of four years in question. The board then applied that value to the later tax years, placing the burden on the property valuation administrator to show that a higher value resulted from a material change in the property or conditions. The PVA appealed the board’s ruling to the circuit court, which dismissed the case. On appeal to the Court of Appeals, the PVA argued that the burden imposed by the decisions below was contrary to the state constitution and the applicable tax statutes. In rejecting this argument and affirming the circuit court, the court said that once the circuit court upheld the board’s assessment, the PVA needed to show a material change in the property or conditions in succeeding years before establishing another value. Carr v. Continental General Tire, Inc., 168 S.W.3d 411 (Ky. App. 2005).

**Election Contest – Filing Period**

An unsuccessful candidate for judge/executive in the 2002 election filed an election contest in September 2004 after the incumbent’s conviction for vote buying in an earlier elec-
Teacher’s Insubordination – Support for Charges

A teacher took part in a political protest on federal property. She was prosecuted for trespass, fined, and sentenced to 90 days’ imprisonment. The day after she received instructions to report to prison she informed her principal that she would be absent to serve her sentence. Subsequently, the school superintendent suspended her, denied her leave to serve the sentence, and terminated her for insubordination (in particular, being absent without leave and conduct unbecoming a teacher). She appealed to an administrative tribunal, which directed her reinstatement with full back pay. The school board then appealed the administrative decision to the circuit court, which affirmed the tribunal except as to the back pay during incarceration. From that decision, both the teacher and the board appealed. The court of appeals began its analysis with the requirement in the statute that a written record of teacher performance support a charge of insubordination. Because the insubordination charge lacked the support of a written record, the charge had to be dismissed. Even though this disposed of the appeal, the board went on to note that the tribunal was within its rights, after considering all relevant circumstances, to reject the proposed termination and impose no penalty. James v. Secre-Duszynska, 173 S.W.3d 250 (Ky. App. 2005).

Qualified Teachers – Suitability for Appointment

KRS 161.100 allows a school district to hire teachers with emergency certification when “it is impossible to secure qualified teachers for a position.” A qualified special-education teacher, then unemployed and formerly the subject of unsatisfactory performance reviews and complaints from students and their parents, sued a board of education after it did not hire him and hired emergency certified teachers instead. He claimed that in doing so the school board violated the statute, and he sued for damages and injunctive relief. The circuit court found that the teacher was not qualified because pursuant to 16 KAR 2:120 the school district had documented evidence that the teacher was unsuitable for employment. On appeal, the court of appeals held that there was adequate documentary evidence in the record for the district to conclude that he was unsuitable for employment. The teacher produced no evidence to suggest an abuse of discretion. Roberts v. Fayette County Board of Education, 173 S.W.3d 918 (Ky. App. 2005).

Land Use – Judicial Rezoning

Citizens successfully sought to set aside an agreed judgment in litigation surrounding a rock quarry on the ground that it constituted illegal judicial zoning. The landowner appealed, seeking to distinguish the judgment as protection from an illegal zoning system. The Court of Appeals rejected that approach. Under Kentucky law, no court has the authority to order a particular classification of land. However, the judgment here made extensive provision for the operation of a quarry on the property where the applicable ordinance had no classification allowing for the use. Kentucky case law, said the court, makes clear that the judicial system is not to make decisions more appropriately made by a legislative body. Rogers Group, Inc. v. Masterson, 175 S.W.3d 640 (Ky. App. 2005).

United States Court of Appeals

Retirement System – Age Discrimination

The Equal Employment Opportunity Commission (EEOC) brought a public enforcement action against the Kentucky Retirement System, the Jefferson County Sheriff’s Department, and the Commonwealth of Kentucky. The suit alleged that the retirement plan paid lower disability retirement benefits to certain employees because of their age in a way that violated the Age Discrimination in Employment Act. The district court granted summary judgment to the retirement system, and the EEOC appealed. At issue was the practice of crediting a disabled worker with unworked years when calculating the amount of disability retirement. The court found the Kentucky plan comparable to an Ohio plan it approved in Lyon v. Ohio Education Association, 53 F.3d 135 (6th Cir. 1995). The court held that Lyon is controlling even though Congress in enacting the Older Workers Benefit Protection Act appears to have meant an opposite result. E.E.O.C. v. Jefferson County Sheriff’s Department, 424 F.3d 467 (6th Cir. 2005).

Patronage Dismissals – Deputy Clerks

Patronage dismissals of deputy county clerks with routine duties violate the First Amendment. See the lead story in this issue. Caudill v. Hollan, 431 F.3d 959 (6th Cir. 2005).

Michigan

Assistant Prosecutor – Politically Motivated Discharge

An assistant prosecutor with 18 years’ experience and his supervisor, the chief assistant prosecutor, each announced an intention to run for a vacant judgeship. After a primary, the chief assistant became a nominee; the other assistant did not. Subsequently, the chief assistant asked the other assistant for his support of her candidacy. He announced his intention to stay neutral. His brother, however, actively supported the chief
assistant’s opponent. Asked again to support the candidacy of the chief assistant and to curtail his brother’s support of the opponent, he again declared neutrality. After the chief assistant lost the election, the county prosecutor and the chief assistant complained that they were unhappy with his work. They proposed to demote him and reduce his salary. He treated this as a constructive dismissal and resigned. Subsequently he sued, alleging that the office wrongfully discharged him in retaliation for the exercise of his rights of free speech and free association. The defendants responded that they were entitled to fire him because he was in a policymaking position. The trial court rejected that argument and denied the defendants’ motion for summary judgment. The Court of Appeals reversed. However misguided and vindictive the constructive discharge may have been, said the court, it did not violate the constitution. Under Michigan law an assistant county prosecutor is in a policymaking or confidential position, and political affiliation is an appropriate consideration in the discharge of such an employee. Further, his failure to attempt to curtail his brother’s support for another candidate could cause the county prosecutor to question his loyalty and afford a valid reason to terminate him. Simasko v. County of St. Clair, 417 F.3d 559 (6th Cir. 2005).

Special Events Ordinance – Permits

A city’s special events ordinance required permits for any organized group using public streets or rights-of-way. The ordinance required organizers to apply for a permit at least 30 days in advance of the date of the event. After a group held a protest rally without a permit, the city issued a citation to its leader. Initially he pleaded guilty to protesting without a permit, but later he moved to vacate the plea. Subsequently, he sued to challenge the constitutionality of the ordinance, “raising a host of arguments.” The district court granted summary judgment to the city, but the Court of Appeals reversed. First, said the court, the 30-day notice provision was overly expansive and invalid on its face. Second, the permit scheme’s potential application to small groups was not sufficiently narrow. As written, the ordinance reached “any procession of people with a common purpose or goal, whether it be a small group of protestors or a group of senior citizens walking together to religious services.” In addition, because the ordinance imposed criminal liability for mere participation in a permit-less march, it had the potential to chill the exercise of First Amendment rights. Automatically criminalizing participation in a spontaneous demonstration places an unnecessary obstacle in the way of public access to use of streets and sidewalks for constitutionally protected speech. American-Arab Anti-Discrimination Committee v. City of Dearborn, 418 F.3d 600 (6th Cir. 2005).

Terminated Housing Subsidies – Due Process

A landlord whose tenant received Section 8 housing subsidies from a city housing commission initiated eviction proceedings against him for not keeping the apartment clean. While the proceeding was pending, the city terminated the subsidies after a hearing in which the tenant failed to dispute the landlord’s claims. The tenant then sued claiming that the action was improper under applicable regulations and that the commission denied the tenant adequate due process at the hearing. The district court granted summary judgment to the commission, and the court of appeals affirmed. No statutory provision specifically conferred a right relevant to the alleged violation of federal regulations by the commission. Absent such a right, the tenant cannot pursue his claim under § 1983. The court then easily disposed of the due process claim. Caswell v. City of Detroit Housing Commission, 418 F.3d 615 (6th Cir. 2005).

Zoning – Adult Entertainment

Wanting to open a topless bar on a site that was ineligible for such use under a township’s zoning ordinance, plaintiffs challenged the constitutionality of the requirements for site plan approval, “special” approval, and a sexually oriented business license. In the township’s scheme, site plan approval was a routine, nondiscretionary function that in the court’s view did not constitute a prior restraint on speech. Similarly, the requirements for “special” approval were objective and non-discretionary. The court found nothing constitutionally deficient in the procedures application to site plan approval and special approval. However, the court found that two of the nine criteria applicable to the issuance of the business license called for an exercise of discretion by government officials. Because the ordinance did not provide for speedy review of those determinations, the court severed the two offending provisions. With those provisions severed, the court said, the ordinance satisfied the requirements of the First Amendment. The plaintiffs also challenged the ordinance’s geographic restrictions on the location of adult businesses. The court affirmed the judgment of the trial court that the ordinance properly addressed the secondary effects of sexually oriented businesses and left numerous other sites open to development for sexually oriented businesses. The court also upheld the township’s 182-day moratorium that led to revisions in the ordinance. Bronco’s Entertainment, Ltd. v. Charter Township of Van Buren, 421 F.3d 440 (6th Cir. 2005).

Municipal Inspections – Administrative Searches

A property owner constructed a house on his land in a location obscured from view and far from the road that provided public access to the property. The owner did not obtain a building permit for the work. Once the work was discovered, the zoning administrator and the tax assessor visited the property on three occasions to confirm the violations, post a notice on the front door of the house, and observe the exterior of the house for a tax assessment. In doing so they walked past multiple “No Trespassing” signs and other signs warning off agents of various government agencies including “all local members of planning & zoning boards.” When they learned of these visits, the owner and his son filed suit alleging various violations of state and federal law. The district court granted summary judgment in favor
of the inspectors, and the landowner appealed. The Court of Appeals examined each of the three alleged searches in turn. The first inspection, the court said, occurred in the open fields and did not constitute a search covered by the Fourth Amendment. The presence of the signs did not transform the open fields into an area where an expectation of privacy was necessarily reasonable. The second inspection involved the posting of a civil infraction notice. In the court’s opinion this was not a search of any kind. The third inspection, conducted by the assessor, presented the court with “a more difficult question.” Although the court concluded that the third inspection occurred within the curtilage of the home (the area immediately surrounding a home and associated with the intimate activity of the home), it concluded that this, too, was not a search. In this case, naked-eye observations of the home’s plainly visible exterior attributes and dimensions, all without touching, entering, or looking into the house, were not unduly intrusive. However, the court warned, “Tax appraisers would be well advised to obtain consent or a warrant as a matter of course before breaching the curtilage because, in many instances, such an intrusion may be a Fourth Amendment search.” Widgren v. Maple Grove Township, 429 F.3d 575 (6th Cir. 2005).

Emergency Medical Services – Competence

Called to a shooting at a bar, fire department EMTs placed the victim, alive and bleeding profusely, in their ambulance where they later watched him die. The mother of the victim sued, alleging that the EMTs violated her son’s substantive due process rights by providing him no life support or medical care. In the district court, the EMTs moved to dismiss on the ground that they were entitled to qualified immunity. There was no constitutional violation, the court ruled, citing DeShaney v. Winnebago County Department of Social Services. “It is not a constitutional violation for a state actor to render incompetent medical assistance or fail to rescue those in need.” The court found that the two exceptions to this rule did not apply. The “custody exception” did not apply because the EMTs never had custody — merely moving an unconscious patient into an ambulance does not place the patient in custody. The “state-created danger exception” did not apply because the EMTs neither exposed the victim to greater danger nor hindered other persons in rendering aid. Jackson v. Schultz, 429 F.3d 586 (6th Cir. 2005). [See “No Constitutional Right to Competent Rescue Services,” Local Government Law News, Winter 2003.]

Ohio

Forced Entry – Qualified Immunity

A victim of domestic violence directed police officers to a neighboring house in search of the suspect. When the resident (who was not the suspect) came to the door and partially opened it, one officer inserted his foot to prevent the door from closing. Told by the officers that they smelled marijuana inside, the resident tried to break off the encounter and closed the door on the officer’s foot. Claiming this was an assault on a police officer, the officers forced their way into the residence relying on the “hot pursuit” exception to the warrant requirement. In a subsequent suit against the officers for a violation of the resident’s constitutional rights, the officers argued that the hot pursuit supported their claim of qualified immunity. The court found this argument to be without merit. It was highly questionable, said the court, whether the act of closing the door on the officer’s foot constituted an assault. Absent an underlying felony, the exception to the warrant requirement did not apply. Cummings v. City of Akron, 418 F.3d 676 (6th Cir. 2005).

Defective Search Warrant – No Qualified Immunity

Police impounded a car they believed was driven by a suspect in a murder. Later, they searched the car after obtaining a search warrant that identified a completely different car owned by a member of the same family. A state trial court suppressed the evidence obtained. Afterwards, the owner of the car (the suspect’s mother) sued in federal court, asserting that the search of the car was unlawful as was an earlier search of her residence. Reversing the court below, the appeals court concluded that because of the profound errors in the warrant and supporting affidavit, the search was not a lawful execution of a valid search warrant. The extensive defects precluded the availability of qualified immunity for the officers who executed the search of the car. As to the residential searches, there were genuine issues of material fact requiring the court to remand the case to the district court. Knott v. Sullivan, 418 F.3d 561 (6th Cir. 2005).

Medical Student Expulsion – Due Process

Following his arrest and conviction for a felony drug crime, a medical college expelled the student after an internal hearing. At the hearing the college allowed the student’s lawyer to be present but did not allow the lawyer to ask questions or speak with the student. Neither did the committee allow the student to cross-examine witnesses. Without receiving a written recommendation from the committee, the dean of the college sent a letter to the student advising him that he was expelled. The student then requested to meet with the dean, who advised him that an appeal was not available. He subsequently sued the college and various administrators claiming that they violated his right to due process. The district court dismissed the case for failure to state a claim. “Because Medical College of Ohio’s procedural approach was consistent with the bare-minimum requirements of due process, though perhaps less-than-desirable for an institution of higher learning,” the court of appeals affirmed. Here, the student was clearly on notice of the reasons for the hearing. There was no indication that the hearing was so complex that
only a trained attorney could effectively present the student’s case. In addition, a student does not have a constitutional right to cross-examine his accuser in a school disciplinary proceeding. Neither is there a constitutional right to written findings of fact. Finally, there is no constitutional right to appeal the decision of an academic institution. Flaim v. Medical College of Ohio, 418 F.3d 629 (6th Cir. 2005).

Water Authority – Anti-curtailment Provision

A village and a water authority sought a declaratory judgment as to which of them would supply water to a subdivision in an area annexed to the village. The district court determined that the district had the exclusive right to provide water, and the Court of Appeals affirmed. The authority claimed, and the court agreed, that because of a loan it procured from the agency formerly known as the Farmers Home Administration it was protected by the anti-curtailment provision of 7 U.S.C. § 1926(b). The village’s argument that the authority lost its right to service the subdivision after annexation failed because the village itself fell within the authority’s original service area. The village made no effort to provide water service to the subdivision until after the authority became indebted to the federal agency. The anti-curtailment provision therefore controls. Village of Grafton v. Rural Lorain County Water Authority, 419 F.3d 562 (6th Cir. 2005).

Academic Freedom – Retaliation

A part-time, non-tenured writing instructor at a state university gave a grade of incomplete to 13 of 17 students in her class. When students complained that they did not know what they needed to do to complete the course, the instructor’s supervisor directed her to provide each student with a specific explanation of what he or she had to do to earn a grade. The instructor did not comply. When subsequently her department denied her a second class to teach, the instructor sued alleging that this was in retaliation for her refusal to comply with the directive and so violated her rights to free speech and academic freedom. The district court dismissed her claims, and the court of appeals affirmed. This case, the court said, did not implicate the instructor’s First Amendment rights. Academic freedom is a right that inheres in the university, not in individual professors. The freedom of a university to decide what to teach and how to teach it would be meaningless if a professor were entitled to refuse to comply with university requirements whenever they conflict with his or her teaching philosophy. Johnson-Kurek v. Abu-Absi, 423 F.3d 590 (6th Cir. 2005).

Discharge – Post-termination Remedies

After a meeting about her job performance, the supervisor told the employee to clean out her desk and to submit a letter of resignation the following Monday. The employee did not come to work that week nor did she resign. Based on the unexcused absence and the poor job performance, the supervisor prepared a request for disciplinary action. The employer served notice of a pre-disciplinary conference at which the employee did not appear. It then notified the employee of her discharge and of her right to appeal, but the employee took no appeal. Instead, she sued for money damages, alleging a violation of her right to due process of law. On the instant facts, the court held, an adequate post-deprivation remedy satisfies the employee’s right to due process. She did not challenge the adequacy of the post-deprivation remedies afforded her. Accordingly, she could not demonstrate a violation of her rights. Walsh v. Cuyahoga County, 424 F.3d 310 (6th Cir. 2005). [See “Discharge and Due Process,” Local Government Law News, Fall 2005. ]

Classroom Teaching – First Amendment Protection

A high school English teacher, at the center of a controversy over books in school libraries and classrooms, did not receive her principal’s recommendation for a contract renewal. After the school board, on the recommendation of the superintendent, voted not to renew the contract, she sued the board, the principal, and the superintendent. She alleged that her termination was in retaliation for the curricular and pedagogical choices she made while teaching and violated her rights under the First Amendment. The court, with one judge concurring and one dissenting in part, held first that the activity at issue – assigning three well-respected novels and showing a movie adaptation of a Shakespeare play – was speech covered by the First Amendment and that the themes of those works touched on matters of public concern – race relations, censorship, spirituality, love, and politics. The court then held that the failure to renew the contract was retaliatory because doing so was sufficient to chill the continued pursuit of the rights protected by the First Amendment and was a response to the exercise of those rights. The majority denied qualified immunity to the individual defendants; the dissenting judge would have granted it. The concurring opinion argued that the court should re-think its application of the First Amendment to in-class curricular speech. Evans-Marshall v. Board of Education of Tipp City, 428 F.3d 223 (6th Cir. 2005).

Employment Discrimination – Similar Qualifications

A public housing authority had an opening for a safety and crime prevention manager for which a current female employee of the authority applied. The authority chose not to interview her for the position and ultimately hired a male candidate from outside the authority. Afterward, the female candidate filed suit alleging that the authority discriminated against her based on her sex in violation of Title VII. The district court dismissed the suit finding that the candidate failed to produce any direct evidence to support her claim. The Court of Appeals affirmed. It found the comments of the hiring committee upon which the candidate relied to show a bias toward men were ambiguous and insufficient to establish direct discrimination. It also found that the candidate could not establish all the necessary elements of a discrimination
claim, focusing in particular on the requirement of similar qualifications. Here the two were not similarly qualified; the qualifications of the person hired were far superior to those of the candidate denied an interview. *White v. Columbus Metropolitan Housing Authority*, 429 F.3d 232 (6th Cir. 2005).

**Tennessee**

Adult Entertainment – Overbroad Ordinance

After a county adopted an ordinance requiring a license for sexually oriented businesses, an existing business refused to apply for a license and instead challenged the constitutionality of the ordinance. Taking first the assertion that the law was a form of prior restraint because it did not afford prompt judicial review, the court concluded that the provisions for judicial review were more than adequate. The court then turned to the claim that the ordinance was overbroad because its definition of public place was effectively all-encompassing and so would prohibit performances that did not have the alleged harmful secondary effects that motivated the ordinance. The court agreed that the ordinance reached a substantial number of impermissible applications. As the ordinance did not even satisfy intermediate scrutiny, the court left for another day the question whether strict scrutiny ought to apply to an ordinance that prohibits not only nudity but also sexually suggestive acts performed while clothed. *Odle v. Decatur County*, 421 F.3d 386 (6th Cir. 2005).

Adult Entertainment – Attorney’s Fees

Following its successful challenge of a municipal ordinance imposing licensing and permitting requirements on sexually oriented businesses, the trial court awarded attorney’s fees in excess of $500,000. The city appealed arguing that in light of the U.S. Supreme Court’s decision in *City of Littleton v. Z.J. Gifts*, 541 U.S. 774 (2004), the business owner was not a prevailing party. A divided court said the city misconstrued that decision and failed to understand the distinction between cases still open on direct review and cases involving collateral attack. If the decision is to affect the award of fees, it must be because special circumstances render the award unjust. The court found no special circumstances here, although the dissent would have. *Odle v. Decatur County*, 421 F.3d 386 (6th Cir. 2005).

Discharge – Romantic Relationship

An attorney proposed marriage to a woman who was a deputy clerk for the circuit court of the county in which the attorney practiced. At the time of the proposal, he was still married to but lived apart from his wife who was a clerk in a different court in the same county. The wife and fiancée worked on the same floor of the county courthouse. Because of the resulting tension in the courthouse, the county clerk terminated the fiancée’s employment. She sued, alleging a violation of her right to intimate association. The trial court found the relationship to be adulterous and not entitled to constitutional protection. On appeal, the court found insufficient evidence of sexual intimacy to establish adultery. However, in deciding that it was unacceptably disruptive to the workplace for a woman employed in the office of one of the county’s courts to be openly and deeply involved in a romantic relationship with a man still married to a woman employed in another court down the hall, the county acted for a plausible policy reason. Viewing the policy as subject only to rational basis review, the court upholds the dismissal. *Beecham v. Henderson County*, 422 F.3d 372 (6th Cir. 2005). [See “Discharge and Due Process,” *Local Government Law News*, Fall 2005.]

Attorney-Client Privilege – Governmental Entity

A former city employee sued in his individual capacity raised advice of counsel as the basis of his qualified immunity defense. The trial court ordered the employee to reveal the content of his communications with counsel. The city objected on the ground that it held the privilege and filed an interlocutory appeal. The court first confirmed what it had previously assumed – that a governmental entity can assert attorney-client privilege in the civil context. In the court’s view, the privilege helps ensure that conversations between municipal officials and attorneys will be honest and complete. In doing so, it encourages and facilitates the fulfillment of government’s constitutional and ethical obligations to the citizenry. Having concluded that a municipality can assert the privilege, the court then held that a municipal official’s assertion of the advice-of-counsel defense does not require the city here to relinquish the privilege it holds. *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005).

Takings Claim – Ripeness

Purchasers of property obtained at a court-ordered auction sued the county and various others alleging that the county denied them proper title to the property because it conveyed less land to them than they had bid for at the auction. To have standing to bring this suit, the court said, the purchasers must investigate possible state procedures for compensation under the rule of *Williamson County Regional Planning Commission*, 473 U.S. 172 (1985). They had not, and the court directed dismissal of their claim without prejudice. *Peters v. Fair*, 427 F.3d 1035 (6th Cir. 2005).

**UNITED STATES DISTRICT COURT**

Juvenile Court – Press Access

Kentucky law excludes the general public from proceedings in juvenile court unless the party seeking admittance has a direct interest in the case or in the work of the court. A press association challenged the law, asserting that it violated the First Amendment of the U.S. Constitution and the right of access in the Kentucky Constitution. Finding first that the
association had standing to make the complaint and that the court appropriately had jurisdiction of the case, the court decided that the complaint failed to state a claim. Using the “experience and logic” test of Richmond Newspapers, Inc. v. Virginia, the court noted that juvenile records and proceedings historically have been closed to the public. Further, said the court, opening the proceedings would frustrate the purpose of the juvenile court rather than performing a significant positive role in its function. Publicity would likely diminish a juvenile’s prospect for rehabilitation. Kentucky Press Association v. Kentucky, 355 F.3d 853 (E.D.Ky. 2005).

Unlawful Arrest – Qualified Immunity

A woman arrested on a charge of hindering apprehension, a charge later dismissed, sued a city and one of its detectives alleging violations of her right to be free from arrest without probable cause. On a motion for summary judgment, the court dismissed the case against the city but not against the detective. As to the city, the court said that at best the woman showed a single instance of illegal activity. This would not rise to the level of a clear and persistent pattern of illegal activity necessary to demonstrate that municipal policy was the moving force behind the violation for which the city should be liable. As for the detective, he was not entitled to qualified immunity. The “bare-bones, conclusory affidavit” prepared by the detective in support of the arrest warrant did not establish probable cause and misled the magistrate who issued the warrant. Consequently, the detective’s actions were not reasonable. Butts v. City of Bowling Green, 374 F.Supp. 532 (W.D.Ky. 2005).

Negligent Hiring – Governmental Immunity

A minor, under court order to perform community service at the county court house, was raped by the janitor. The minor sued the county and certain of its officers, including the janitor, alleging violations of state and federal law. The court granted summary judgment in favor of the defendants except as to the janitor in his personal capacity. On the federal claim, there was no evidence of any official policy or widespread practice that resulted in the constitutional violation. In the context of this negligent hiring claim, the plaintiff could not show that it was “plainly obvious” that the janitor would rape her. On the state claims, the court relied in part on the recent case of Autry v. Western Kentucky University to hold that the county and its officers were immune from suit. Doe v. Patton, 381 F.Supp.2d 595 (E.D.Ky. 2005). After that judgment, the janitor was convicted of rape and the victim moved to set aside the earlier judgment due to testimony elicited at the criminal trial. The court allowed that the testimony was “another example of questionable judgment” on the part of the county. However, it did not alter the conclusion that the county had no policy in place that caused the constitutional violation. Neither did it alter the conclusion that the county was immune from suit for its performance of discretionary duties (a background check). Doe v. Patton, 377 F.Supp.2d 615 (E.D.Ky. 2005).

Domestic Violence – Police Protection

Sheriff’s deputies and paramedics responded to a call for assistance at a residence but left when the resident, though drunk, refused medical treatment. Her boyfriend was present, but the estate sued the county, the sheriff, and the deputies claiming that neglect of duties imposed by Kentucky’s domestic violence laws and inadequate training contributed to her death. The court examined the several statutes alleged to give rise to a duty to act on the victim’s behalf but found the duties imposed to be discretionary, not ministerial. Further, the court found, the victim had no clearly established right to police protection from the violent act that killed her. As a result, the sheriff was entitled to qualified immunity for his actions. For similar reasons the claim of liability for inadequate training failed. Howard ex rel. Estate of Howard v. Hayes, 378 F.Supp.2d 755 (E.D.Ky. 2005).

Merit System Employment – Political Affiliation

Kentucky law (KRS 18A.140) forbids discrimination in merit-based state government employment because of political affiliation or political beliefs. A citizen who wanted to recommend individuals for employment by the government in part because of their political activity challenged the statute on the ground that it had a chilling effect on his right of free speech. The court dismissed the complaint for lack of standing to sue. The court said that the plaintiff’s fear of prosecution was merely speculative. Mere recommendation for appointment is different from the conduct prohibited by the statute – the appointing, promoting, demoting, or dismissing of someone based on political affiliation. Private citizens do not have the power to hire, fire, promote, or demote a state employee. There is no evidence that the citizen suffered “specific present object harm of a threat of specific future harm.” No one threatened him with prosecution or warned him to stop writing letters of recommendation. Forgy v. Stumbo, 378 F.Supp.2d 774 (E.D.Ky. 2005).

Wrongful Discharge – Res Judicata

A city employee was dismissed from her position by state and federal courts. She alleged that the mayor ordered the city police department to investigate her personal life and made false allegations about an alleged affair with a third person. At the conclusion of her case in state court, the court issued a directed verdict in favor of the defendants. Defendants then moved to dismiss the federal case a res judicata. The federal court granted the motion. Failure to reserve the right to pursue her federal claims in federal court, and failure to amend her pleadings in state court to pursue her federal claims there, results in this bar of the claims not reserved. Bradley v. Fannin, 390 F.Supp.2d 625 (E.D.Ky. 2005).

Police – Use of Force

The administrator of the estate of a homeless, mentally ill person killed by police sued the city and certain police

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SUMMARIES OF SELECTED FORMAL
OPINIONS OF THE ATTORNEY GENERAL
OAG 05-009

Subject: Whether Commonwealth’s Attorneys are covered by the provisions of KRS 11A [Executive Branch Code of Ethics]

Syllabus: Commonwealth’s Attorneys are not covered by the provisions of KRS 11A.

Synopsis: The Executive Branch Ethics Commission proposed to reverse the position announced in Advisory Opinion 97-3 that Commonwealth’s Attorneys and County Attorneys were not employees or public servants subject to the Executive Branch Code of Ethics. After the adoption of a draft advisory opinion stating that Commonwealth’s Attorneys are subject to KRS 11A, a group of Commonwealth’s Attorneys and the commission asked the Attorney General for an opinion on the issue. Noting that KRS 11A.010 provides a lengthy list of those covered by the act, the Attorney General found that the absence of Commonwealth’s Attorneys in the list evinced the legislature’s intent that they are not covered. To conclude otherwise would expand the agency’s authority when Kentucky law favors a limited reading of agency power. Further, said the Attorney General, the more specific provisions of KRS Chapter 15 concerning prosecutors should prevail over the more general provisions of KRS 11A.

SUMMARIES OF SELECTED OPEN MEETINGS DECISIONS

Discussions of Business Proposals – KRS 61.810(1)(g)

The Louisville Arena Task Force relied on this exception to conduct a closed session to discuss the hiring of a consultant to aid the task force in the siting of a new arena, and a newspaper objected. The task force read the word “retention” in the statute to mean employment or selection, thus justifying its position. The Attorney General rejected this construction, saying that the statute used the word in the sense of keeping an existing business in the state. The purpose of the exception is to promote and facilitate economic development by private business in the Commonwealth. It does not authorize closed sessions to discuss the selection of a consultant to provide consulting services to a public agency. 05-OMD-148.

Conditions for Attendance – KRS 61.840

A city counsel circulated to visitors a pad on which to place their names for inclusion in the meeting minutes. Compliance was voluntary, although the city made no specific representation to that effect. A citizen challenged the practice and questioned whether it is ever proper to use a sign-in sheet or to allow its review by members of the city council. The Attorney General said that, absent proof in the record of an express or implied requirement that attendees identify themselves as a condition of attendance, a public agency does not violate this section merely by circulating a sign-in sheet. It is not a violation to include in the minutes the names of persons in attendance who voluntarily identify themselves. Nevertheless, the city agreed to advise persons attending any future meeting that signing in is purely voluntary. 05-OMD-200.

SUMMARIES OF SELECTED OPEN RECORDS DECISIONS

Public Agency Defined – KRS 61.870(1)

A not-for-profit corporation failed to respond to a request for financial and operational records. On appeal, it asserted that it was a private corporation not subject to the Open Records Act. It was a shell corporation formed in anticipation of serving as a conduit for future community projects. It had no funds or employees and owned no property. Its purpose, as stated in its Articles of Incorporation, was to be “a cooperative effort among the City of Barbourville, Union College, and Kentucky Communities Economic Opportunity Council, Inc. (KCEOC) to establish, operate, and maintain projects, services, and facilities undertaken by the corporation for the benefit of the residents of Knox County in support of tourism, education, recreation, and wellness.
activities.” Given that the city and KCEOC are public agencies, the Attorney General opined that this was enough to make the corporation an “interagency body of two or more public agencies” fully subject to the act. 05-ORD-156.

Public Record Defined – KRS 61.870(2)

A city denied a request for records related to the training and qualifications of volunteer firefighters asserting that personnel records were not directly related to any public funds provided to the fire department. The Attorney General disagreed saying that, to the extent that the department spends public funds on training, the public has a significant interest in monitoring the expenditure of those funds by accessing related records. In the opinion of the Attorney General, records relating to the qualifications of volunteer firefighters are directly related to the “functions, activities, programs, or operations” of the department and so are public records subject to disclosure under the act. 05-ORD-203.

Unreasonable Requests – KRS 61.872(6)

The wife of a person engaged in litigation with a county asked to inspect two years’ worth of financial records. The county judge/executive, in a letter to the husband/plaintiff’s lawyer, denied the request on the ground that it placed an unreasonable burden on the county. The judge characterized the request as a litigation ploy intended to harass the county. Asked to determine if the request was over-burdensome, the Attorney General said it was not. The county admitted that the records in question were subject to annual audit. Further, the requestor asked only to inspect the documents, not for copies of the documents. There was nothing to suggest that the cost of producing the records was excessive. As to the fact of the county’s reply to the lawyer rather than directly to the requestor, the Attorney General said this was improper. No ethical consideration prevents the judge from complying with the statutory requirement to respond to the person making the request. 05-ORD-203.

Abstracts, Memoranda, Copies – KRS 61.874(1)

A county permitted inspection of certain records but subsequently denied a request for copies of those records on the ground that it was too broad and an unreasonable request. On appeal, the Attorney General reiterated the position that “refusal to supply a copy of a record, after inspection has been permitted, is an action inconsistent with KRS 61.874(1).” The agency’s argument carried little weight where it already retrieved and produced documents from which the requestor identified those for copying. The burden of making copies is one that the act requires agencies to bear. 05-ORD-201.

Fees, Noncommercial – KRS 61.874(3)

A city agreed to honor a request for documents provided that the requestor paid a $0.50 per-page fee in advance. The Attorney General opined that this was not a reason-
able charge for copies. If a public agency charges more than $0.10 per page, it has the burden to establish that the fee is not excessive. The city arrived at its fee based upon the practices of other local governments in the area. The Attorney General concluded that this did not justify the city’s position given that the other agencies might also be in error. 05-ORD-194.

Agency Rules and Regulations – KRS 61.876

A dispute concerning a request for copies of the rules and regulations adopted by a county clerk to implement the Open Records Act led the Attorney General to criticize the clerk’s practices. In the opinion the Attorney General reiterated that the rules and regulations contemplated by the act are supposed to be a “how-to” guide for persons seeking access to records. The abbreviated policies provided in this case did not measure up. Further, the policy provided for a higher fee for copies when a person needed staff assistance. The Attorney General reminded the clerk that statute limits fees to the actual cost of reproduction and may not include staff costs. 05-ORD-281.

Exempt Records Generally – KRS 61.878

In response to a request for information related to certain persons and property, an industrial development corporation provided redacted copies of the minutes of its regular meetings. The redacted information, in the agency’s judgment, would have justified a closed session, but the agency discussed the matters in an open meeting because no one outside the agency was present. The requester appealed, asserting that information expressed in the minutes of an open meeting is subject to inspection. The Attorney General agreed. KRS 61.835 expressly opens minutes to inspection. If the agency wants to be able to protect certain information reflected in minutes, it must follow the formalities to close the meeting and reflect those formalities in the minutes. There is no authority for redacting portions of the minutes after the fact because they contain more information than is required. 05-ORD-209.

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

A housing authority conducted a hearing to determine the continued eligibility of a tenant for subsidized housing. It subsequently denied a request for records related to the hearing on the ground that releasing them would entail an unwarranted invasion of personal privacy. The Attorney General disagreed. Initially, the Attorney General pointed out that the denial failed to describe with the requisite specificity how the exception applied in this instance. The Attorney General then went on to say that the “official case file of a hearing” was not among the records to which the protection of KRS 61.878(1)(a) extended. Relying on Zink v. Commonwealth, the Attorney General concluded that, in balancing the privacy interest at stake and the public interest in disclosure, “the interest of the public in monitoring
the administration of the Section 8 program is paramount.”

05-ORD-258.

**Law Enforcement – KRS 61.878(1)(h)**

A television station requested a copy of an audio tape made in the county dispatch center pertaining to a domestic disturbance that resulted in two shooting deaths. The county denied the request, implicitly relying on the exception for records compiled in the course of investigating statutory violations. On appeal, the Attorney General agreed that the county properly denied the request. The opinion laid out the three-part test an agency must meet to justify its assertion of the exception that includes a demonstration of the harm to the agency that would result from premature release. Here the agency showed that premature release could, pending the result of forensic testing, influence the statements and testimony of the two witnesses to the shootings. This explanation satisfied the Attorney General. 05-ORD-193.

A newspaper asked to inspect an incident report regarding an infant with suspicious injuries. A city police department denied access to the report because portions of it contained undisclosed investigative details the disclosure of which might harm an ongoing investigation by compromising the credibility of witnesses. On appeal, the Attorney General reviewed the report in camera. While the Attorney General agreed that much of the report fell within the exception, some portions did not because they contained already disclosed details. As to those portions, the opinion said, the city had to separate them from the excepted material and disclose them. 05-ORD-259.

**Preliminary Materials – KRS 61.878(1)(i), (j)**

A citizen asked for records that pertained to pre-applications for a zoning change, a conditional use permit, or a subdivision of land. The planning department denied the request on the ground that they were “preliminary processes.” The department argued further that because the documents did not lead to a decision, they were not properly public records. On appeal, the Attorney General agreed with the citizen that the records were not preliminary drafts or notes. In the context of the statute, the Attorney General said, notes are simple aids to memory and drafts are tentative versions of formal and final written products. As such, the records did not qualify for exclusion. In addition, they did not qualify as correspondence with private individuals because that exclusion applies only to letters exchanged by private citizens and public agencies or officials under conditions in which the candor of the correspondents depends on assurances of confidentiality. In appropriate circumstances, the planning department might be able to withhold the documents on authority of KRS 61.878(1)(d), but the agency did not meet its burden to show that the exception applied in the instant case. 05-ORD-179.

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

A patient submitted an open records request for certain medical records related to his treatment at the hospital. The hospital denied the request citing KRS 311.377, which makes confidential the deliberations of medical peer review proceedings. The patient appealed asserting a right of access to records that pertain to him. After reviewing the statute, the Attorney General decided that medical peer review records are not subject to disclosure even though they pertain to the person making the open records request. 05-ORD-171. Accord, 05-ORD-220 (specialized children’s service clinic may withhold peer review records of child abuse medical examinations).

**Records Related to Employee – KRS 61.878(3)**

A deputy sheriff sought from a judge/executive a copy of a letter the judge sent to federal officials about the sheriff department’s administration of a grant. The judge asserted that the record fell within KRS 61.878(1)(j), which authorizes nondisclosure of preliminary recommendations in which opinions are expressed, and the Attorney General agreed. However, the Attorney General said, the sheriff and his employees have a greater right of access to the letter than does the public generally. KRS 861.878(3) allows a public employee access to records that relate to them. A document relates to a public employee when it has a connection to the employee. It does not require a specific reference in the form of a name. 05-ORD-181.

**Denial of Inspection – KRS 61.880**

A candidate for substitute teaching asked for a copy of board of education policies related to the hiring of substitutes. The board directed the individual to copies of the policies available at the board’s website and to the public library where copies were available. The candidate appealed to the Attorney General and argued that the board did not respond to the request within the statutory time frame. The Attorney General agreed, rejecting the board’s argument that its practice complied with the Open Records Act. In the opinion of the Attorney General, the act contemplates access to records by one of two means—on-site inspection or receipt of copies through the mail. (The act provides some exceptions, but they were not applicable here.) Invoking an earlier opinion, 95-ORD-52, the Attorney General said that an agency cannot avoid the requirements of the act by directing the requester to conduct his own search at the library. Further, said the Attorney General citing 05-ORD-050, furnishing a website address at which the records are available is not an adequate substitute for literal compliance with the terms of the statute. 05-ORD-277.

Under KRS 61.880 the Attorney General reviews complaints alleging violations of the Open Records Act and issues written decisions stating whether an agency violated the act. If no party timely appeals the decision, it has the force and effect of law. Copies of the decisions summarized here are available online at http://ag.ky.gov/civil/openrec.htm.
to address Lee’s argument that Kentucky deputy sheriffs did. The court said that the deputies’ duties in the two cases were not significantly different. The court granted that the deputies enjoyed some discretion to perform their duties, but not enough to put them into McCloud category one nor enough to show that party affiliation is necessary to effectively perform the position.

Hager v. Pike County Board of Education, 286 F.3d 366 (6th Cir. 2002): School gifted and talented teacher/coordinator (Kentucky). Hager twice supported the candidacies of other people against the candidacy of Welch for superintendent of schools. After Welch’s appointment to the position, he convinced the board of education to abolish Hager’s position as gifted and talented teacher/coordinator and reassigned Hager to a position with a lower salary. The superintendent restructured the position into two positions, but Hager’s applications for both positions were denied. She sued, asserting that her position was never really abolished and that the reassignment and demotions were in retaliation for her support of the other candidates for superintendent. The trial court held that the gifted and talented teacher/coordinator position was either a confidential advisor to the superintendent or a direct delegate of significant discretionary authority who the superintendent could remove without a constitutional violation. The court of appeals reversed. The court looked at the inherent duties of the position as reflected in Kentucky law and board of education policy and as performed. It concluded that the position did not fall within McCloud category three because 75 percent of it was devoted to teaching and did not allow the holder to spend considerable time advising policymakers. Neither did it fall into category two because the position was essentially ministerial, charged to implement discretionary decisions made by the superintendent. There was no delegation of broad discretionary authority to the position on the order of a “deputy secretary of labor.”

Justice v. Pike County Board of Education, 348 F.3d 554 (6th Cir. 2003): School grants department director (Kentucky). Justice was a supporter and defender of a school superintendent who resigned under fire. A new superintendent abolished her position and reassigned her, which Justice alleged was in retaliation for her support of the previous superintendent. She took the reassignment under protest, filed for disability retirement, and sued. In its defense the school board maintained that the grants director position fell within McCloud categories one, two, and three. The Court of Appeals disagreed. It fell outside category one because those positions are created by law. A mere job description adopted by the school board does not bring it within this category. It fell outside category two because those positions exercise political discretion. The discretion exercised by a grants director was not of political significance. It fell outside category three because those positions spend a significant portion of their time on the job advising policymakers. The job description did not even mention rendering advice, and what advice a grants director might render was not particularly sensitive or confidential. The position was similar to the gifted and talented teacher/coordinator position at issue in Hager v. Pike County Board of Education, 286 F.3d 366 (6th Cir. 2002). Identical considerations applied to hold the grants department director was not within the Elrod/Branti exception.

Simasko v. County of St. Clair, 417 F.3d 559 (6th Cir. 2005): Assistant county prosecutor (Michigan). Simasko, an assistant county prosecutor, failed to support his supervisor’s campaign for a judgeship. The supervisor had the support of the county prosecutor, but ultimately she lost. Afterward, the county prosecutor subjected Simasko to a performance evaluation and proposed to demote him. Simasko resigned, treated the proposed demotion as a constructive discharge, and sued. In Monks v. Marlinga, 923 F.3d 423 (6th Cir. 1991), the court determined that an assistant county prosecutor was a policymaking or confidential employee. Simasko’s decision not to support the prosecutor’s choice in the judgeship election was sufficient to implicate loyalty concerns, and discharge on that basis did not violate the Constitution.

Endnotes

1. “It may be, sir, that the politicians of the United States are not so fastidious as some gentlemen are, as to disclosing the principles on which they act. They boldly preach what they practice. When they are contending for victory, they avow their intention of enjoying the fruits of it. If they are defeated, they expect to retire from office. If they are successful, they claim, as a matter of right, the advantages of success. They see nothing wrong in the rule, that to the victor belong the spoils of the enemy.” Senator William Learned Marcy, remarks in the Senate, January 25, 1832, Register of Debates in Congress, vol. 8, col. 1325. <http://www.bartleby.com/73/1314.html>
5. Id., quoting Illinois State Employees Union v. Lewis, 473 F.2d 561, 576 (7th Cir. 1972).
7. See Fenne v. Shipley, 164 F.3d at 316.
10. Faughender v. City of North Olmstead, 927 F.2d at 913.
11. Id. at 914.
12. “Even after Elrod and Branti, the legislature’s decision as to whether a particular job should be classified as political or nonpolitical is at least entitled, as the First Circuit has said, to ‘some deference.’” Rice v. Ohio Dept. of Transp., 14 F.3d 1133, 1143 (6th Cir. 1994) quoting Jimenez Fuentes v. Torres Gaztambide,
19. 807 F.2d 236, 246 (1st Cir. 1986).
14. *Id.*
15. *Id.*
16. *Id.*
17. 97 F.3d at 1557-8. The court’s example is “a gubernatorially-appointed Democratic economist placed on a revenue forecasting committee consisting by law of two economists (one Republican and one Democrat) chosen by the state legislature, two economists of similar party affiliation chosen by the governor, and one economist of any party chosen by the president of the state’s most prominent university.”
19. As to Butler’s claim, the court ultimately held that she was the holder of a political position. She therefore had no expectation that Hollan would retain her. It is irrelevant, said the court, that she had been a deputy clerk before her appointment as County Clerk or that she did not run for office. *Caudill*, 431 F.3d at 910.
20. *Caudill*, 431 F.3d at 910, citing *Hallahan v. Cranfill*, 383 S.W.2d 374, 376 (Ky. 1964) (a deputy county clerk can participate in the public examination of absentee ballot applications by virtue of K.R.S. § 61.035) and *Asher v. Sizemore*, 261 S.W.2d 665, 666 (Ky. 1953) (a deputy county clerk can administer an oath in his or her own name pursuant to K.R.S. § 61.035).
21. 431 F.3d at 910.
22. Other cases within the Sixth Circuit since the decision in *McCloud* that found particular positions to fall within the Elrod/Branti exception include *Mumford v. Baskinski*, 105 F.3d 264 (6th Cir. 1997), chief referee of Domestic Relations Court (Ohio); *Smith v. Sushka*, 117 F.3d 965 (6th Cir. 1997), administrative assistant to county engineer (Ohio); *Pharris v. Looper*, 6 F.Supp.2d 720 (M.D.Tenn. 1998), deputy property assessors in county property assessor’s office (Tennessee); *Collins v. Voinovich*, 150 F.3d 575 (6th Cir. 1998), associate counsel, Lottery Commission (Ohio); *Feeney v. Shipley*, 164 F.3d 311 (6th Cir. 1999), traffic safety supervisor in state Department of Public Safety (Ohio); *Baker v. Hadley*, 167 F.3d 1014 (6th Cir. 1999), high-level administrators in county auditor’s office (Ohio); *Rose v. Stephens*, 291 F.3d 917 (6th Cir. 2002), state police commissioner (Kentucky); *Roupe v. Bay County*, 268 F.Supp.2d 825 (E.D. Mich. 2003); chief deputy register of deeds (Michigan); *Wargo v. Moon*, 323 F.Supp.2d 846 (N.D. Ohio 2004), bailiff/chief probation officer in sheriff’s office (Ohio); and *Lathan v. Office of the Attorney General of the State of Ohio*, 395 F.3d 261 (6th Cir. 2005), state assistant attorney general (Ohio).

**Decisions of Note continued from page 14**

Officers. The complaint alleged that the police employed excessive force, that the city failed to train the officers properly, and that the city violated the Americans with Disabilities Act. In analyzing the excessive force claim, the court segmented the events leading to the shooting. In each instance, the court said, there was a factual dispute about the appropriateness of some uses of force to preclude summary judgment for the city and some of the police officers. However, the court granted the motion for summary judgment on the claims of failure to train and violations of the ADA. *Ali v. City of Louisville*, 395 F.Supp.2d 527 (W.D.Ky. 2005).
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