FEB. 2018 – FIRE & EMS LAW Newsletter

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March 12, 2018 (9 am – 11:30 am) free seminar: BEST PRACTICES IN COMMUNITY PARAMEDICINE / QUICK RESPONSE TEAMS:
http://ceas.uc.edu/content/dam/aero/docs/fire/Community%20Paramedicine%20Flyer.pdf

CASES:
- IL: Social Media posts by Deputy Fire Chief – lawsuit dismissed;
- OH: Hoarder – Admin. Search Warrant lawful – meth lab discovered;
- OH: EMT driver speeding, passing no passing zone, no lights & siren – but not personally liable;
- CA: San Francisco promotion exam for Lieutenant – jury verdict finding age discrimination set aside;
- FL: Female not promoted to Fire Chief – no proof gender discrimination;
- U.S. Supreme Court: death penalty, juror affidavit showing racial prejudice – prisoner gets hearing;
- OH: “Mobile active shooter” – discipline of 4 police sergeants set aside by arbitrator;
- MI: Garrity Order – statements of police officer suppressed – not given immunity;
IL: SOCIAL MEDIA POSTS - DEPUTY FIRE CHIEF FIRED AFTER BEING Warned ABOUT “POLITICAL COMMENTARY” ON FACEBOOK - LAWSUIT DISMISSED

On Jan. 11, 2018, in Richard Banske v. City of Calumet City, U.S. District Court, Northern District of Illinois (Case No. 17C5263), Judge Harry D. Leinenweber granted City’s motion to dismiss. “[A] policymaking employee may be discharged ‘when that individual has engaged in speech on a matter of public concern in a manner that is critical of superiors or their stated policies.’ Hagan, 867 F.3d at 826 (quoting Kiddy-Brown v. Blagojevich, 408 F.3d 346, 358 (7th Cir. 2005)). *** Without well pled factual allegations, the Court is left to guess whether Banske's at-issue speech touches upon a subject of public concern. This the Court will not do. The Complaint fails to establish that Banske engaged in constitutionally protected speech, so it fails to state a claim upon which relief may be granted.”


FACTS:

“Plaintiff Richard Banske began serving as a firefighter in the Calumet City Fire Department in 1992. In 2009, Banske was promoted to Deputy Chief of the Fire Department. (Compl. ¶¶ 7-8.) That same year, Banske created a Facebook account. According to his Complaint, Banske thereafter began to post political commentary on his Facebook page. (Id. ¶¶ 12-13.)

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Banske alleges that around September 2016, Defendant Michelle Qualkinbush (‘Qualkinbush’) (then and now the Mayor of Calumet City) caught wind — allegedly via some anonymous messenger — of Banske's political Facebook posts, and that Banske, Qualkinbush's assistant (not a defendant here), and Defendant James Patton ("Patton"), then the Calumet City Director of Personnel, had a phone conversation about these posts. (Id. ¶¶ 19-20.) Banske states that during that conversation, neither the assistant nor Patton directed him to stop posting political commentary on Facebook. (Id. ¶ 21.) The Complaint does not further describe this conversation.

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Finally, Banske avers that in early December 2016, Defendant Fire Chief James Galgan (‘Galgan’) called Banske to his office and informed him that due to ‘concerns over [Banske's] private political views in his Facebook posts,’ Galgan and Qualkinbush wanted to terminate Banske's employment. (Id. ¶ 23.) Banske was let go that same day.”

HOLDING:

“Defendants move to dismiss Banske's Complaint for failure to state a claim under Rule 12(b)(6). FED. R. CIV. P. 12(b)(6). Defendants raise two central arguments: First, Banske fails to state a claim because his
Complaint does not plead the facts necessary to establish that he engaged in constitutionally protected speech; and second, Banske fails to state a claim because the Deputy Fire Chief is a ‘policymaking’ position, and thus one that Defendants may fire someone from simply for engaging in speech that could undermine the policy or political goals of Defendants.

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Under the so-called Connick-Pickering test, a public employee's speech is constitutionally protected if: (1) he made the speech as a private citizen; (2) the speech addressed a matter of public concern; and (3) his interest in expressing that speech was not outweighed by the state's interests as an employer in promoting effective and efficient public service. Swetlik v. Crawford, 738 F.3d 818, 825 (7th Cir. 2013) (internal quotation marks omitted) (quoting Houskins v. Sheahan, 549 F.3d 480, 490 (7th Cir. 2008)).

Notably, there is a corollary to this test under which ‘policymaking’ employees may be terminated without offending the First Amendment. Under this Connick-Pickering corollary, a policymaking employee may be discharged "when that individual has engaged in speech on a matter of public concern in a manner that is critical of superiors or their stated policies." Hagan, 867 F.3d at 826 (quoting Kiddy-Brown v. Blagojevich, 408 F.3d 346, 358 (7th Cir. 2005)).

So regardless whether Banske's former position — Calumet City Deputy Fire Chief — fits within the policymaker corollary, his claim cannot survive a motion to dismiss if he has not adequately pled facts sufficient to establish that he engaged in speech addressing a matter of public concern. Iqbal, 556 U.S. at 678.

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Banske avers he made ‘political Facebook posts’ (Compl. ¶ 21) that were ‘political commentary’ and not ‘expressions of private grievances’ (id. ¶ 14). But he does not quote from those posts nor even identify the subject of his commentary. Banske's threadbare assertion that his Facebook posts were ‘matters of public concern’ (Compl. ¶ 14), does not help him, Iqbal, 556 U.S. at 678."

Legal Lessons Learned: Fire, EMS, police and other public employees have only limited First Amendment rights under the “balancing test” of U.S. Supreme Court’s decision in Pickering v. Board of Education, 391 U.S. 563 (1968): “Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. *** In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. *** Footnote 3: It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal.”
OH: HOARDER – ADMINISTRATIVE SEARCH WARRANT ISSUED FOR INTERIOR OF HOME – METH LAB FOUND – DID NOT NEED TO WAIT FOR CLEANUP OF EXTERIOR OF HOME

On Oct. 30, 2017, in State of Ohio v. Joseph D. Griesbaum, Court of Appeals, 11th District (Ashtabula County), 2017-OH-8363, the court held (3 to 0): “there is no authority of which this court is aware that would require the City to obtain a search warrant for the interior of the premises at the time it cited Griesbaum for their exterior condition, or that would grant immunity to him for their interior condition merely because he had until April to remedy their exterior condition. The fact remains that the condition of the exterior of his premises justified an inspection of the interior at the time the warrant issued.”


FACTS:

“Griesbaum challenged the validity of an Administrative Search Warrant, issued by the Conneaut Municipal Court on March 4, 2016. The Warrant authorized the search of ‘[t]he residence and any and all garages and accessory structures located at 479 West Jackson Street, Conneaut, Ohio,’ for ‘‘[v]iolations of the Ohio Fire Code section 304.1;304.2; 304.3.2and violations of the City of Conneaut Zoning, Housing and Building Ordinances and regulations including but not limited to Section 1323.01(j) and 1323.02(a)-(b) pertaining to public nuisances.”

Footnotes:
1. “Combustible waste material creating a fire hazard shall not be allowed to accumulate in buildings or structures or upon premises.” Ohio Adm.Code 1301:7-7-03(D)(1).
2. “Storage of combustible rubbish shall not produce conditions that will create a nuisance or a hazard to the public health, safety or welfare.” Ohio Adm.Code 1301:7-7-03(D)(2).
3. “Containers with a capacity exceeding 5.33 cubic feet (40 gallons) (0.15 m) shall be provided with lids.” Ohio Adm.Code 1301:7-7-03(D)(3)(b).
4. Defining, in part, a “public nuisance” to include a residence “[h]aving an accumulation of demolition material, garbage, litter, rubbish or weeds, which accumulation creates a danger to health, life, limb or property” or “[w]hich will cause hurt, harm, discomfort, damage or injury to the public.” Conneaut Municipal Ordinance 304.1(j)(1) and (2).

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Hockaday was aware Griesbaum had already been cited for the exterior condition of the property in December 2015 and was given until April 2016 to remedy the situation. Hockaday had personally viewed the property and noted that debris ‘continued to accrue or [that the property] was in at least as worse of shape.’

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Steve Sanford, Assistant Fire Chief, viewed Griesbaum’s property in early 2016 and observed ‘combustible materials on the front of the structure or up against the front of the structure.’ Sanford submitted an affidavit in support of an administrative warrant wherein he stated: ‘Based upon my experience as a Firefighter and a trained Fire Inspector, it is my experience and opinion that when combustible materials are placed on the exterior of a residence in the abundance and manner as viewed * * * it is indicative of a house which hoards items and similar conditions are typically found inside the house which are fire and life safety hazards.’

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Michael Sullivan, Detective, accompanied the zoning inspectors in the execution of the warrant on March 4, 2016. The purpose of this assistance was ‘to make sure there’s no trouble.’ He described the interior of the home as reflecting ‘a definite hoarding issue.’ In a little room created by the partitioning of the garage, Sullivan observed ‘chemicals to manufacture methamphetamine.’ At this point, he declared that it was necessary to obtain a search warrant for the property [i.e., a criminal search warrant], but Griesbaum gave consent to continue the search.

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On December 19, 2016, a suppression hearing was held…. On January 17, 2017, the trial court denied the Motion to Suppress. … On March 2, 2017, Griesbaum entered a plea of no contest to third-degree Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs…. On April 21, 2017, a sentencing hearing was held. The trial court sentenced Griesbaum to two years Community Control/Intensive Supervision, advised him of post-release control of up to three years, and ordered him to pay court costs.”

HOLDING:

“Griesbaum does not challenge the veracity of the affidavits submitted in support of the warrant. Rather, his claim of unreasonableness is based on the fact that the City waited until March 2016 to obtain a warrant based on the condition of his premises when his premises had existed in the same condition since November 2015. According to Griesbaum, any issues the City had with the interior condition of his property should have been addressed when he was cited for the exterior condition of the property. Griesbaum notes that he was cooperative during the process and accepted, in good faith, his sentence to bring his property into compliance with municipal regulations by April 19, 2016. The various explanations proffered by city officials for not seeking a warrant prior to March 2016 are neither convincing nor reasonable. ‘The timing of the administrative warrant appears arbitrary and fueled by the frustration of the City Manager’ in having to deal with Griesbaum. Appellant’s brief at 11.

There is no authority of which this court is aware that would require the City to obtain a search warrant for the interior of the premises at the time it cited Griesbaum for their exterior condition, or that would grant immunity to him for their interior condition merely because he had until April to remedy their exterior condition. The fact remains that the condition of the exterior of his premises justified an inspection of the interior at the time the warrant issued.”

Legal Lessons Learned: If you are a hoarder and also have a meth lab in the garage, don’t delay in cleaning up exterior of your property.
OH: EMS DRIVER – SPEEDING, PASSING IN NO PASSING ZONE, NO LIGHTS & SIREN – LAWSUIT AGAINST COUNTY TO PROCEED, BUT NOT PERSONALLY LIABLE, NO RECKLESSNESS ALLEGED IN COMPLAINT

On Jan. 2, 2018, in Folmer v. Meigs County Commissioners, et al., 2018-Ohio-31, 4th Appellate District (Meigs County), the Court held that the EMS driver may have been negligent when transporting a patient traveling over 20 mph above posted speed limit, with no lights or siren, and attempted to pass vehicle in no passing lane, hitting oncoming vehicle. While the lawsuit may proceed against Meigs County EMS, the EMS driver enjoys immunity from personal liability since plaintiff did not alleged he “acted with malicious purpose, bad faith, or recklessness under R.C. 2744.03(A)(6)(b).”

FACTS:

“On the evening of March 23, 2013, Meigs County EMS received a 911 call from an urgent care facility, the Holzer Clinic, in Pomeroy, Ohio. The urgent care facility had requested that an ambulance transport a patient to the Holzer Medical Center in Gallipolis, Ohio. Supposedly, the patient was experiencing a medical emergency. A Meigs County EMS ambulance, driven by Lyons, responded to the facility, with its lights and sirens activated. Teresa Johnson (‘Johnson’) accompanied Lyons.

Upon arriving at the clinic, Lyons and Johnson spoke with the staff about the patient’s condition; and within five minutes, the patient was loaded in the back of the ambulance with Johnson. Lyons and Johnson determined that the patient was not in critical condition; therefore, Lyons drove to the Holzer Medical Center without the ambulance’s lights and sirens activated.

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While [transporting a patient, without red lights or siren] traveling southbound on State Route 7 in the Village of Cheshire, [EMT] Lyons veered left of center and hit a sedan traveling in the opposite direction. The sedan spun around due to the force of the collision. The sedan then hit Folmer’s vehicle which was traveling behind the sedan. Folmer sustained several injuries as a result of the collision, including a torn rotator cuff and multiple protruding and bulging discs in her spine.

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At his deposition, Lyons testified that just before the collision, the two vehicles in front of him were playing a ‘brake check’ game, erratically slowing down and speeding up. However, Lyons did not report any such ‘brake check’ game to the highway patrol when asked how the collision occurred. Lyons could not recall the specific moments before the collision, saying he ‘just lost everything’ and ‘blacked out.’ However, Meigs County EMS did not have a record of Lyons reporting a black-out episode. According to Lyons, when he ‘got [his] senses back’, Kearns’s vehicle ‘was there’, and he
was completely in the northbound lane of travel. He explicitly denied that he was attempting to pass at the
time of the collision.

Folmer and Kearns recalled a different version of events. At her deposition, Folmer testified that she had just
proceeded through an intersection with a flashing yellow light when she observed Lyons attempting to pass
the car in front of him. In doing so, Lyons came into the northbound lane and collided with Kearns’s sedan.

At his deposition, Kearns testified that just before the collision, Lyons accelerated
and drove completely into the northbound lane in an attempt to pass the vehicle in front of him. According
to him, after passing the vehicle—but before crossing back over into the southbound lane—Lyons hit his
sedan.

Folmer also attached an accident-reconstruction expert’s report to her motion for
summary judgment. The expert opined that, at the time of the collision, Lyons was approaching an
intersection and was traveling at a minimum speed of 55-58 m.p.h. The expert also remarked that Lyons’s
movement of the ambulance from the southbound lane to the northbound lane was not a gradual movement.
Rather, Lyons made an abrupt lane change in an attempt to pass the vehicle in front of him; or Lyons
swerved to the left to avoid a rear end collision with the vehicle in front of him.

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Importantly, the portion of State Route 7 where the collision occurred is a two-lane road with one lane of
traffic going in each direction. The posted speed limit is 35 m.p.h.;
and solid double yellow lines indicate that the roadway is a no-passing zone.”

HOLDING:

Meigs County Properly Denied Summary Judgment

“Appellants [Meigs County] argue that the trial court erred in concluding that genuine issues of material fact
existed regarding whether Lyons acted in a wanton and willful manner under R.C. 2744.02(B)(1)(c). We
disagree. We believe that genuine issues of material fact exist regarding whether Lyons acted in a willful and
wanton manner.”

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Appellants argued, inter alia, that they were immune from liability because Lyons was on an emergency call
at the time of the collision; and Lyons’s driving did not constitute willful or wanton misconduct.

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Here, the evidence indicates that Lyons was exceeding the posted speed limit by at least twenty miles per
hour at the time of the collision. He was also operating the ambulance without lights and sirens activated,
thus providing no warning to fellow travelers. This fact is especially concerning because the collision
occurred in the Village of Cheshire while Lyons was approaching an intersection. While [EMT] Lyons
denied that he was in the process of passing the vehicle in front of him at the time of the collision, both [injured drivers] Kearns and Folmer claimed that he had passed or was in the process of passing the vehicle in front of him when the collision occurred. Furthermore, Lyons’s own deposition testimony provides little detail of how he ended up in the opposite lane of travel.”

R.C. 2744.02(B)(1)(a): POLITICAL SUBDIVISION LIABILITY / DEFENSE IF EMERGENCY CALL

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct.…”

EMT Driver Should Be Dismissed From Case – No Allegation Recklessness

“[Plaintiff] Folmer did not allege that Lyons acted with malicious purpose, bad faith, or recklessly…. Thus, the trial court ‘strayed well beyond the pleadings’ in denying the motion for summary judgment with respect to whether Lyons acted with malicious purpose, bad faith, or recklessly.”

R.C. 2744.03(A)(6)(b): EMPLOYEE IMMUNITY / UNLESS WANTON OR RECKLESS

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner.”

Legal Lessons Learned: If transporting without lights and siren, then EMS driver must obey speed limit and no passing zone. The EMS driver was fortunate the plaintiff did not allege he was driving in “wanton or reckless manner.”
CA: PROMOTION EXAM FOR LIEUTENANT WAS FAIR – NO AGE DISCRIMINATION

On Oct. 3, 2017, in John Danner III, et al. v. The City And County Of San Francisco, the Court of Appeals For California, First District, unanimously held (unpublished opinion) that trial court properly threw out the $3.7 million jury verdict awarded to 16 firefighters claiming age discrimination. “The City conducted a thorough job analysis and designed an exam to test the important components of the lieutenant position. The Exam neither focused exclusively on a minor aspect of the position nor failed to test a required significant skill. The City relied on knowledgeable experts to create a scoring key, recruited outside raters and trained them to score the exams, and attempted to discover and correct scoring errors. Crediting Plaintiffs' evidence and all reasonable inferences to be drawn therefrom, there were areas in which the Exam could have been improved. But the law does not require perfection. We agree with the trial court that a verdict for the City on job-relatedness was compelled as a matter of law.”

https://www.leagle.com/decision/incaco20171003029

FACTS:

“Using the job analysis, the Exam Unit worked with a Fire Department Battalion Chief to develop the Exam. The first part of the Exam was a fire scene and first aid simulation exercise (the Fire Scene Component): candidates were shown photographs and street diagrams representing four different fire scenarios and, for each scenario, had to write down the initial communications they would make, the actions they would take, the equipment they would need, and other pertinent information. For the fourth scenario, candidates also had to complete a post-fire analysis and injury report documenting their actions in that scenario. The second part of the Exam was a training and counseling exercise (the Training Component), in which candidates were videotaped training and counseling or disciplining an actor playing the role of a probationary firefighter.

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[Footnote 10: The job analysis identified 42 job tasks and five abilities necessary to perform these tasks…]

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Approximately 750 candidates completed the Fire Scene Component in May 2008. Candidates who received a below average score on the Fire Scene Component were not invited to complete the Training Component. In August 2008, 409 candidates completed the Training Component. The City ranked these 409 candidates based on their combined scores for both components; the final scores ranged from 707 to 1000.

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With a few exceptions, promotions to lieutenant were made in rank order based on their Exam scores. Plaintiffs either received below average scores on the Fire Scene Component or, based on their combined score, ranked too low to receive promotions.
Following the Exam, the Exam Unit prepared a report (the Validation Report) describing the examination process and concluding the Exam was valid under professional standards of reliability. Outside consultant Harry Brull—who had provided consultation during the entire examination process—also testified the Exam was valid and job-related.”

HOLDING:

“Plaintiffs' evidence included the testimony of an expert in examination validity and job relatedness, Sheldon Zedeck. By special verdict, the jury found the Exam had a disparate impact on persons over the age of 40; that the purpose of the Exam was to operate the business safely and efficiently and in a job-related manner; but that the Exam did not substantially accomplish this business purpose.

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We note that Plaintiffs' argument implicitly suggests it is possible to objectively measure the relative importance of each job skill and the extent to which a test component measures each such skill. To the contrary, these are inherently subjective measurements. ‘[T]he science of testing is not as precise as physics or chemistry, nor its conclusions as provable.’ (Guardians, supra, 630 F.2d at p. 89.) Accordingly, ‘the task of identifying every capacity and determining its appropriate proportion is a practical impossibility.’ (Id. at p. 98.) The law does not hold employers to an impossible standard. An exam that tests all significant job skills in approximate proportion to their relative importance is sufficient.”

Legal Lessons Learned: Promotion exams do not have to be perfect; relying on experts to help develop and score helped avoid a $3.7 million liability.

File: Chap. 7, Sexual Harassment

FL: FEMALE APPLICANT FOR FIRE CHIEF – GENDER DISCRIMINATION CLAIM DISMISSED

On Jan. 19, 2018, in Shari Hall v. Marion County Board of County Commissioners, the District Court of Appeal of State of Florida, 5th District, held that: “Appellant failed in her burden of proving the county offered pretextual reasons, and thus failed to establish a case of gender discrimination using circumstantial evidence.” Case was remanded so Court can next dispose of retaliation claim.
http://www.5dca.org/Opinions/Opin2018/011518/5D17-1183.op.pdf

FACTS:

“Appellant points to two statements that she claims former Fire Chief Stuart McElhaney made to her as direct evidence of gender discrimination. First, Appellant asserts that approximately two years prior to his retirement, Chief
McElhaney promised her that ‘she would be the next Marion County Fire Rescue Chief.’ Second, she claims Chief McElhaney told her two years before he left that ‘he was starting to hear some grumblings from the commissioners about having a female fire chief.’ In his deposition, Chief McElhaney denied making this second statement.

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The second step of the McDonnell Douglas inquiry shifted the burden of proof to Marion County to offer legitimate, non-discriminatory reasons for promoting Nevels instead of Appellant to fire chief.

Marion County stated that its decision was based on legitimate, non-discriminatory reasons and was not motivated by discriminatory intent. Marion County provided the following reasons in its answer: (1) prior to his appointment as fire chief, Nevels held the second-in-command position of deputy fire chief; (2) Nevels scored higher than Appellant in the second round of interviews conducted by then-Acting County Administrator Bouyounes; (3) Nevels worked for the fire department several years longer than Appellant and had held every rank starting with entry level firefighter/EMT and progressing to lieutenant, captain, battalion chief, fire marshal, operations chief, and deputy chief; (4) Nevels had substantially more experience as a combat firefighter than Appellant; (5) Nevels had successfully exercised departmental and senior management authority over fire department employees beyond what Appellant had; and (6) Nevels was a certified law enforcement official.”

HOLDING:

“Mr. Bouyounes confirmed in his deposition that those reasons, together with knowing how Nevels works through serving on a county committee with him, were the basis for the decision. Because the reasons Marion County gave are facially legitimate, non-discriminatory reasons for its decision, any presumption of unlawful discrimination disappeared.

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However, since neither Appellant nor Nevels had a bachelor’s degree, disregarding the educational criteria equally as to both finalists did not prove unlawful discrimination. Thus, choosing Nevels, who had less formal education than Appellant, did not provide circumstantial evidence that the county administrator provided pretextual reasons for the hiring decision.

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Here, there is no dispute that both Appellant and Nevels were well-qualified for the position, and there was no record evidence that Appellant was vastly more qualified than Nevels. Appellant failed in her burden of proving the county offered pretextual reasons, and thus failed to establish a case of gender discrimination using circumstantial evidence.”

Legal Lessons Learned: Two well-qualified qualified candidates for Fire Chief; no proof of gender discrimination. Caution when current Chief tells subordinate that they are likely the next Chief.
US SUPREME COURT: JUROR’S AFFIDAVIT SHOWING RACIAL PREJUDICE WHEN VOTED FOR DEATH PENALTY - MURDER / KIDNAPPING IN GA COURT- REMANDED FOR FED. JUDGE HEARING

On Jan. 8, 2018, in Keith Tharpe v. Eric Sellers, Warden, 583 U. S. ____ (2018), the U.S. Supreme Court held (6 to 3) that a Georgia defendant convicted of murder and kidnaping is entitled to another habeas corpus hearing before U.S. District Court judge. Seven years after his conviction in Georgia state court by 12 jurors of murder and kidnaping, and a unanimous vote for death penalty, defense counsel located one juror – Barney Gattie - who signed an affidavit admitting his prejudice against African Americans. https://www.supremecourt.gov/opinions/17pdf/17-6075_p8k0.pdf

FACTS:

The 6-Justices voted to give the prisoner another hearing [in Per Curiam opinion; not written by one Justice].

“Petitioner Keith Tharpe moved to reopen his federal habeas corpus proceedings regarding his claim that the Georgia jury that convicted him of murder included a white juror, Barney Gattie, who was biased against Tharpe because he is black. ***

It may be that, at the end of the day, Tharpe should not receive a COA [Certificate of Appealability].

Gattie’s remarkable affidavit—which he never retracted—presents a strong factual basis for the argument that Tharpe’s race affected Gattie’s vote for a death verdict. At the very least, jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court’s factual determination was wrong.”

3-Justices dissented; Justice Thomas opinion provided additional facts about the case.

“Keith Tharpe’s wife, Migrisus, left him in 1990. Despite a no-contact order, Tharpe called her and told her that if she wanted to ‘play dirty’ he would show her ‘what dirty was.’ … The next morning, Tharpe ambushed his wife and her sister, Jaquelin Freeman, as they drove to work, pulling his truck in front of their car and forcing them to stop. Tharpe aimed a shotgun at the car and ordered his wife to get into his truck. He then told Freeman that he was going to ‘f— [her] up’ and took her to the rear of his truck…. Tharpe shot Freeman, rolled her body into a ditch, reloaded, and shot her again, killing her. After murdering Freeman, Tharpe kidnaped and raped his wife, leaving Freeman’s body lying in the ditch.

Freeman’s husband found her a short time later, while driving their children to school. A jury convicted Tharpe of malice murder and two counts of aggravated kidnaping. After hearing the evidence, the jury needed less than two hours to return a unanimous sentence of death.

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More than seven years after his trial, Tharpe’s lawyers interviewed one of his jurors, Barney Gattie. The resulting affidavit stated that Gattie knew Freeman, and that her family was ‘what [he] would call a nice [b]lack family.’…. The affidavit continued that, in Gattie’s view, ‘there are two types of black people: 1. Black folks and 2. Niggers.’ … Tharpe ‘wasn’t in the ‘good’ black folks category,’ according to the affidavit, and if Freeman had been ‘the type Tharpe is, then picking between life and death for Tharpe wouldn’t have mattered so much.’ Id. , at 16. But because Freeman and her family were ‘good black folks,’ the affidavit continued, Gattie thought Tharpe ‘should get the electric chair for what he did.

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A couple of days later, the State obtained another affidavit from Gattie. In that second affidavit, Gattie stated that he ‘did not vote to impose the death penalty because [Tharpe] was a black man,’ but instead because the evidence presented at trial justified it and because Tharpe showed no remorse…. The affidavit explained that Gattie had consumed ‘seven or more beers’ on the afternoon he signed the first affidavit. Ibid. Although he had signed it, he ‘never swore to [it] nor was [he] ever asked if [the] statement was true and accurate.’

Legal Lessons Learned: The case reflects the Court’s concern about racial prejudice in imposing death sentence. Justice Thomas predicted: “At most, then, the Court’s decision merely delays Tharpe’s inevitable execution.”

File: Chap. 16, Discipline; Chap. 17, Arbitration

**OH: “MOBILE ACTIVE SHOOTER” - 100 PD, 137 SHOTS FIRED - DISCIPLINE OF 4 PD SERGEANTS SET ASIDE – CHAOTIC INCIDENT - BUT DISCIPLINARY FILES NOT TO BE REMOVED**

On Dec. 21, 2017, in City of Cleveland v. Fraternal Order Of Police, Lodge 8, the Court of Appeals of Ohio, 8th Appellate District (County of Cuyahoga), 2017-Ohio-9174, held that trial judge properly upheld the arbitrator’s decision “finding that the City did not have ‘just cause’ to discipline any of the Grievants.” The Court of Appeals, however, reversed the arbitrator’s order that removed ‘all departmental records of these respective suspensions’ from the City’s files.


FACTS:

“On November 29, 2012, over 100 police officers in 58 patrol cars as well as several unmarked police cars were involved in a 23-minute pursuit of a speeding vehicle, which culminated in the shooting deaths of Timothy Russell and Malissa Williams. Two
investigations of the incident revealed that 13 Cleveland police officers fired more than 137 bullets into the vehicle, when the pursuit ended in a parking lot in East Cleveland. According to the investigations, Russell and Williams were unarmed. At least 25 of the officers involved in the pursuit, nine of whom fired their weapons, were under the command of Cleveland Police Sergeants Randolph Daley, Patricia Coleman, Brian Chetnik, and Matthew Putnam (collectively ‘the Grievants’).

On June 11, 2013, the City suspended without pay Coleman for 20 days; Daley for 15 days; and Putnam for ten days. On June 13, 2013, the FOP filed grievances pursuant to the collective bargaining agreement (‘the CBA’) between the City and the FOP on behalf of Coleman, Daley, and Putnam….  

***

During the arbitration in the case at hand, the City alleged that the Grievants failed to supervise their subordinates and failed to comply with various departmental policies, including ‘failing to determine the location and actions of all patrol officers assigned to them during the * * * pursuit” and shooting. The City specifically refers to the Grievants’ failure to use ‘communication and tracking resources to evaluate and control’ the incident.

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According to the FOP, none of the Grievants had prior disciplinary action taken against them, and they all ‘held the understanding that they were dealing with mobile active shooters.’

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The arbitrator concluded that, in some instances, the Grievants did not violate department policy, and that, in other instances, malfeasance occurred but was excused ‘given the exigent circumstances and chaotic incident and its aftermath.’ For these reasons, the arbitrator found that the City lacked just cause to discipline the Grievants.

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While the [City] is no doubt rankled by the number of responding units and patrolmen who ‘self-dispatched’ themselves to the chase it cannot by shear will affix blame to the [Grievants] for what [their] responding officers undertook on their own.

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On May 24, 2015, the arbitrator issued an award finding that the City did not have ‘just cause’ to discipline any of the Grievants. The award revoked Coleman, Daley, Putnam, and Chetnik’s suspensions in full and permanently removed ‘all departmental records of these respective suspensions’ from the City’s files.

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[City appealed to Court of Common Pleas.]  [T]he court upheld the arbitrator’s conclusion that the City did not have just cause to take any disciplinary action against the Grievants. In addition, the court found that the
arbitrator lacked authority to purge the Grievants’ disciplinary files. It is from this order that the City appeals.

HOLDING:

“On appeal, the City alleges that the ‘award is clearly beyond the arbitrator’s authority, is beyond the essence of the agreement, and denies the parties the benefit of their agreement.’ As support for its position, the City compares this case to Fraternal Order of Police, Lodge 8 v. Cleveland, 8th Dist. Cuyahoga No. 102565, 2015-Ohio-4188, in which this court affirmed the two-year demotion imposed by an arbitrator regarding Cleveland Police Sergeant Michael Donegan for his role in the same November 29, 2012 pursuit. Donegan held the same departmental rank as the Grievants in the case at hand and was also accused of failing to supervise and violating departmental polices during the pursuit. Therefore, according to the City, under the CBA, it is arbitrary and capricious if the Grievants are not subject to the same or similar discipline as Donegan. However, the discipline resulting from the two arbitrations is quite different: Donegan received a two-year demotion with loss of pay and the Grievants in the instant case received no discipline. This, the City argues, is arbitrary and capricious.

Furthermore, the City argues that the arbitrator’s thought process in finding no just cause for discipline was arbitrary and capricious. For example, the arbitrator found that the ‘systemic failure’ of the Cleveland Police Department during this incident should be applied to police members with rank of lieutenant and above, which does not include the Grievants, who are sergeants.

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“Upon review, we find that the arbitrator acted within his authority when revoking the Grievants’ suspensions. The arbitration concerned disputes over disciplinary actions, which are expressly authorized in the CBA. Thus, the arbitration award ‘draws its essence’ from the CBA. Furthermore, although it may be hard to reconcile a two-year demotion for one actor and no discipline for other actors, we cannot say that this award is arbitrary or capricious.”

Legal Lessons Learned: When entering into a collective bargaining agreement, both management and labor agree to arbitrator’s review of discipline. Courts are most reluctant to “second guess” an arbitrator who has heard the testimony.
MI: GARRITY ORDER – POLICE OFFICER, THEFT PERSONAL PROPERTY – FELT COMPELLED TO GIVE STATEMENT, NO PROMISE OF IMMUNITY – STATEMENTS INADMISSIBLE IN CRIMINAL CASE

On Oct. 24, 2017, in Michigan v. Crain William Ziecina, the Court of Appeals held (3 to 0) that the trial judge properly suppressed the statements made by the defendant while a member of Michigan State Police. “Defendant moved to suppress any written or oral statements he made to the investigating officer, arguing that those statements were involuntary under the Disclosures by Law Enforcement Officers Act (DLEOA), MCL 15.391 et seq. The trial court granted defendant’s motion, finding that the language in the notice would have caused a reasonable person to feel compelled to make a statement to their employer out of the fear of repercussions. *** The circumstances indicate that defendant’s January 7, 2015, written statement was given by defendant under compulsion. That defendant later attended an interview in which he was told that he did not have to answer questions is irrelevant, because the later, oral statement was a modification of the January 7 compelled statement; the trial court correctly held that it, too, must be suppressed.”

http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20171024_C337822_36_337822.OPN.PDF

FACTS:

“This case arose out of the alleged theft of personal property during the execution of two search warrants on two residences on December 23 and 24, 2014, in Leoni Township, Michigan. The search warrants were executed by members of the Jackson Narcotics Enforcement Team and the Home Security Team (HST). Defendant was a member of the HST.

During the investigation related to the theft, defendant received the following notice:

“This correspondence is to inform you that you will be interviewed, as a principal, concerning allegations of criminal misconduct. This investigation could result in criminal and/or disciplinary action against you. Any self-incriminating statements you may make pertaining to these allegations may be used against you in both criminal and/or administrative proceedings. You have the right to legal/association representation during the interview, and it is your responsibility to secure this representation.”

Defendant provided a written statement in lieu of attending an in-person interview with the investigating officer. Defendant later asked to meet with the investigating officer. In this interview, he made statements that contradicted his previous written statement. As a result, defendant was charged with lying to a peace officer during a criminal investigation, MCL 750.479c(2)(c), and willful neglect of duty, MCL 750.478.”
“MCL 15.393 provides that “[a]n involuntary statement made by a law enforcement officer, and any information derived from that involuntary statement, shall not be used against the law enforcement officer in a criminal proceeding.” An “involuntary statement” is defined as “information provided by a law enforcement officer, if compelled under threat of dismissal from employment or any other employment sanction, by the law enforcement agency that employs the law enforcement officer.” MCL 15.391. [See http://www.legislature.mi.gov/(S(qv0j0m55guczke45xaz2f02l))/documents/mcl/pdf/mcl-Act-563-of-2006.pdf] This Court has explained: In [Garrity v New Jersey, 385 US 493; 87 SCt 616; 17 L Ed 2d 562 (1976)], the United States Supreme Court held that self-incriminatory statements from a law-enforcement officer procured under the threat of discharge could not be used in subsequent criminal proceedings against the declarant. Essentially, a Garrity hearing allows ‘the interviewee to answer questions with the knowledge that any statements elicited therein will not be used against him in criminal proceedings.’ [People v Brown, 279 Mich App 116, 142; 755 NW2d 664 (2008), quoting Lenawee Co Sheriff v Police Officers Labor Council, 239 Mich App 111, 115 n 2; 607 NW2d 742 (1999).]

The United States Supreme Court stated in Garrity, 385 US at 497, that ‘[t]he choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.’

“Defendant was not asked to participate in an interview; he was told, ‘you will be interviewed[.]’ Even viewed objectively — looking past defendant’s subjective perception of a threat to his employment — this notice, from one’s employer, would cause a reasonable person to believe that he or she must actively participate in an interview in order to avoid adverse - employment consequences. This is bolstered by the email from defendant’s labor attorney, who stated that he was recommending that defendant make a written statement.

[Footnote 1] The prosecution contends that the notice was merely ‘letting [d]efendant know up front that this is a criminal investigation, as opposed to an administrative investigation,’ and that defendant could not be compelled during a criminal investigation. But the notice itself indicates that defendant was facing potential ‘criminal and/or disciplinary action.’ (Emphasis added.) In addition, defendant’s union appointed a labor lawyer to represent him.

We acknowledge that in cases interpreting Garrity, courts have rejected the use of implied threats in suppressing statements. See, e.g., People v Coutu, 235 Mich App 695, 701; 599 NW2d 556 (1999) (discussing Garrity’s progeny). However, the Harris
Court specifically noted that the DLEOA provides greater protections to law enforcement officers than those afforded under the United States Constitution. Harris, 499 Mich at 337-338. As also noted in Harris, id. at 358, ‘[t]he plain language of the DLEOA protects all statements given by officers under compulsion. This choice may seem odd, or reflective of questionable or even bad public policy, but it was the Legislature’s choice to make. We are not empowered to displace what the law actually provides with a judicial preference for what we believe it should provide.’

The circumstances indicate that defendant’s January 7, 2015, written statement was given by defendant under compulsion. That defendant later attended an interview in which he was told that he did not have to answer questions is irrelevant, because the later, oral statement was a modification of the January 7 compelled statement; the trial court correctly held that it, too, must be suppressed.”

**Legal Lessons Learned:** During an internal investigation that may involve criminal misconduct, before issuing a Garrity Order requiring person to answer / granting immunity, first review the case with a Prosecutor.