



## FIRE, EMS & SAFETY LAW NEWSLETTER

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[lawrence.bennett@uc.edu](mailto:lawrence.bennett@uc.edu)

Cell 513-470-2744

Larry Bennett, Esq. is the author of this newsletter; Program Chair, UC Fire Science & Emergency Management (see bio, last page).

### ITEMS COVERED IN THIS NEWSLETTER

- UC Fire Science - Community Paramedicine course – March 13-17, 2017;
- UC Fire Science - UAVs [Drones] For Emergency Responders – May 1-5, 2017;
- Emer. Veh. Ops. – lawsuit against FF in death motorist reinstated, witnesses-siren not on;
- Civilian paramedic – not eligible for State catastrophic injury benefits for FF;
- Sexual e-mails to 16 year-old after fire station tour; case to Admin. Law Judge;
- Letter to Fire Chief / HR – discipline for false allegations of bias to join SWAT;
- Chicago female paramedics – applicant physical test “disparate impact” on females;
- ADA - medical retirement after back injury; FD not req. provide light duty;
- Mock Trial – Oct. 14, 2016 – Improved EMS Report Writing; actual case;
- Flu Shots – mandatory for hospital employees, termination upheld;
- Discipline - Captain fired for repeatedly using FD e-mails for religious messages;
- Arbitration – arbitrator did not disclose pro-labor organ; new arbitration;
- Arbitration – FD past practices to pay for travel time on military leave, enforced;

### UC FIRE SCIENCE & EMERGENCY MANAGEMENT

- **COMMUNITY PARAMEDICINE:** March 13 – 17, 2017 course, with paramedics from Ohio and Indiana sharing their new programs:  
<http://ceas.uc.edu/content/dam/aero/docs/fire/CP%20Residency.pdf>
- **UNMANNED AERIAL VEHICLES [DRONES] FOR EMERGENCY RESPONDERS:**  
May 1 -5, 2017 course:  
<http://ceas.uc.edu/content/dam/aero/docs/fire/UAV%20residency.pdf>

Seminar: We had 165 RSVPs from fire, EMS, police, emergency management for our Aug. 10, 2016 seminar. See photos, PowerPoints (videos will soon also be posted): [http://ceas.uc.edu/aerospace/FireScience/continuing\\_education.html](http://ceas.uc.edu/aerospace/FireScience/continuing_education.html)

File – Chap. 5, Emergency Vehicle Operations

## OH: FIRE ENGINE – NO STOP AT RED LIGHT, SIREN MAY NOT BEEN ON, CIVILIAN KILLED – LAWSUIT REINSTATED

On Sept. 27, 2016, in *William Glenn v. City of Columbus*, 2016 Ohio 7011 (Ohio Ct. App. 2016), the Ohio Court of Appeals for Tenth District held (3 to 0), that the lawsuit against the FAO will be reinstated since there some evidence of “recklessness.”

<https://casetext.com/case/glenn-v-city-of-columbus-4>

Facts:

“This matter arises from a collision between an automobile driven by Elvyra Glenn (‘Glenn’) and a city fire truck (‘Engine 32’) driven by firefighter Sheridan. At approximately 3:09 p.m., on November 12, 2013, Engine 32 was dispatched to respond to a fire alarm at an elementary school. In addition to Sheridan, firefighters Tyler Heisterkamp and Dave Stone were on Engine 32. Sheridan drove Engine 32 through a curve and approached the Refugee Road and Brice Road intersection intending to go straight through the intersection to reach the elementary school. The fire truck’s emergency lights were on, and Sheridan activated the air horn in short bursts. Because vehicles were stopped in the lane where cars were going straight, Sheridan maneuvered Engine 32 into the left turn lane. The light was red for Sheridan but all incoming traffic was either stopped or, at most, one vehicle (driven by Glenn) was travelling at a slow speed. Sheridan did not stop Engine 32 and proceeded into the intersection. On entering the intersection, Engine 32 struck Glenn’s small sedan. Glenn died from injuries she sustained in the collision.

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After the curve, Sheridan could observe the Refugee Road and Brice Road intersection. At that time, Engine 32’s speed was approximately 35 m.p.h., which is the speed limit on Refugee Road. Sheridan observed ‘fairly heavy’ traffic at the intersection. (Sheridan Aff. at ¶ 16.) The light was red for the fire truck and other vehicles traveling westbound on Refugee Road. Sheridan testified that he scanned the oncoming lanes of traffic to look for moving vehicles, and he pulled the air horn on Engine 32 in ‘short bursts to warn vehicles’ of the approaching fire truck at approximately 40 feet from the intersection. (Sheridan Aff. at ¶ 17.) Sheridan further testified that nothing obstructed his view of the north and southbound lanes of Brice Road and, seeing no movement from vehicles in the oncoming lanes, he proceeded into the intersection without stopping. According to Sheridan’s testimony, he believed it was safe to enter the intersection against a red light because ‘every lane [was] full’ and ‘every vehicle [was] stopped.’ (Sheridan Dep. at 64.)

Sheridan testified that before he entered the intersection, he observed Glenn ‘sitting in the left turn lane [on southbound Brice Road] waiting on oncoming traffic so she could make her left turn.’ (Sheridan Dep. at 67.) Sheridan further testified that when he started to accelerate Engine 32 through the intersection, Glenn’s vehicle began to move to make the

left hand turn, from southbound on Brice Road to eastbound on Refugee Road, resulting in the collision. Sheridan estimated that when Engine 32 struck Glenn's vehicle, it was

travelling approximately 35 m.p.h. Thus, according to Sheridan's testimony, Glenn's vehicle was stationary as Engine 32 approached the intersection, but she then moved, causing the collision.”

#### Holding – City Has Immunity, But Not FF

“In December 2015, the trial court denied the city and Sheridan's joint motion for summary judgment. The court found that because reasonable minds could disagree as to whether Sheridan operated Engine 32 in a wanton or reckless manner, the city and Sheridan failed to demonstrate their entitlement to judgment as a matter of law on immunity grounds.

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“The city ... argue[s] the city is immune from liability as a matter of law because Sheridan did not operate Engine 32 in a manner constituting willful or wanton misconduct. We agree.

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The executor argues the city is liable because Sheridan operated Engine 32 in a manner constituting willful and wanton misconduct and because the city failed to properly train its employees, supervise its employees, and enforce its own policies. We are unpersuaded by these arguments.

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The Supreme Court of Ohio has explained the different degrees of care relevant to the liability of a political subdivision or an employee of a political subdivision. In *Anderson v. Massillon*, [134 Ohio St.3d 380](#), 2012-Ohio-5711, the Supreme Court noted that ‘a political subdivision has a full defense to liability when the conduct involved is not willful or wanton, and therefore, if the conduct is only reckless, the political subdivision has a full defense to liability.’ *Id.* at ¶ 23. Additionally, the Supreme Court clarified that ‘[t]he terms 'willful,' 'wanton,' and 'reckless' as used in [the political subdivision liability] statutes are not interchangeable.’ *Id.* at ¶ 40.

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“There is also a genuine dispute as to whether Engine 32's electronic siren was on as it approached and entered the intersection.... Bendik, the manager of a business adjacent to the Refugee Road and Brice Road intersection, testified that he was taking trash to a dumpster when he heard the fire truck's air horn and, two or three seconds later, the collision. Bendik testified that he did not hear a siren. Thus, while there is no dispute that

Sheridan activated Engine 32's air horn two or three seconds before the collision, the testimony was conflicting as to whether Sheridan also activated the fire truck's electronic siren.

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As to the issue of whether Sheridan engaged in willful misconduct, the executor argues that Sheridan acted willfully by intentionally violating the city's Standard Operating Procedure 01-01-01. This rule provides that during 'emergency response,' drivers of 'all Fire Division vehicles shall bring the vehicle to a complete stop' for red traffic lights. (Standard Operating Procedures 01-01-01, XII.) The executor's argument is unpersuasive. In *Anderson*, the Supreme Court noted that, 'it is well established that the violation of a statute, ordinance, or departmental policy enacted for the safety of the public is not per se willful, wanton, or reckless conduct, but may be relevant to determining the culpability of a course of conduct.' *Anderson* at ¶ 37.

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Construing the evidence most favorably toward the executor, the jury could find Engine 32's electronic siren was not activated on the emergency run, and not all vehicles were stopped as Sheridan decided to enter the intersection. A reasonable jury could conclude that Sheridan's conduct of not activating Engine 32's electronic siren during the emergency run, and entering the intersection at 35 m.p.h. against a red light, despite an observable vehicle continuing to move toward the intersection, constituted reckless conduct. Therefore, we agree with the trial court's finding that a genuine dispute exists as to whether Sheridan operated Engine 32 in a reckless manner."

**Legal Lesson Learned: Keep your siren on during emergency run, and also keep it on when advising dispatcher of the accident – so it is recorded on the radio.**

File – Chap. 6, Employment Litigation

## IL: CIVILIAN PARAMEDIC – NOT ELIGIBLE FOR STATE CATASTROPHIC INJURIES BENEFITS – NOT A FIREFIGHTER

On Sept. 8, 2016, in Jodie Mitchell v. Village of Barrington, 2016 IL App (1st) 153094, the Appellate Court of Illinois, First Judicial District, held (3 to 0) that Illinois Public Safety Benefits Act only extends to sworn members of a public fire department. Civilian paramedic injured her back, could not recover to perform duties of the job, and was eventually terminated. While she was covered under Workers Comp, but she was properly denied coverage under Illinois Public Safety Benefits Act, where employer pays 100% of health care insurance premiums, since not sworn member of FD.

[http://www.illinoiscourts.gov/R23\\_Orders/AppellateCourt/2016/1stDistrict/1153094\\_R23.pdf](http://www.illinoiscourts.gov/R23_Orders/AppellateCourt/2016/1stDistrict/1153094_R23.pdf)

Facts:

“On January 21, 2007, Mitchell responded to a call-for-service at a residential home in Barrington by driving an ambulance. Upon exiting the ambulance, Mitchell slipped on a patch of ice and injured her back. Mitchell worked several of her following shift days, but then went on a medical leave of absence in April 2007.

The Village terminated Mitchell's employment in January 2008, issuing her termination letter on January 29, 2008. In the letter, the Village explained that ‘you are at maximum medical improvement, and it appears there will be no significant change in your medical condition in the foreseeable future.’ The letter went on to explain that because of Mitchell's ‘ongoing inability to perform [her] job duties, the Village of Barrington Board of Trustees at its January 28, 2008 Board Meeting acted on a motion authorizing and approving [her] separation from employment.’

Mitchell disagreed that there would be no significant change in her medical condition and that the Village ‘jumped the gun’ in terminating her, believing that she would have been able to come back to work soon.

After her termination, Mitchell sought health benefits under the Public Safety Employee Benefits Act (Act) (820 ILCS 320/1 et seq. (West 2012)). The Act provides for health benefits for firefighters who suffer catastrophic injuries in the line of duty.

The Act provides for health benefits for firefighters who suffer catastrophic injuries in the line of duty. Section 10(a) of the Act states:

‘An employer who employs a full-time law enforcement, correctional or correctional probation officer, or firefighter, who, on or after the effective date of this Act suffers a catastrophic injury or is killed in the line of duty shall pay the entire premium of the employer's health insurance plan for the injured employee, the injured employee's spouse, and for each dependent child of the injured employee until the child reaches the age of majority or until the end of the calendar year in which the child reaches the age of 25 if the child continues to be dependent for support or the child is a full-time or part-time student and is dependent for support.’

820 ILCS 320/10(a) (West 2012).

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Mitchell was hired by the Village on August 1, 1988 as a ‘paramedic.’ At the time of that hire, Mitchell did not participate in any type of testing process administered by the Village's Board of Fire and Police Commissioners as that Board did not exist in 1988. At the time Mitchell was hired, she already possessed a ‘Firefighter II’ certification from a prior employer. Mitchell was not required to have that certification for her paramedic position with the Village. When hired, Mitchell worked a traditional 24-hour on, 48-hour off schedule.

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In 1994, the Village decided to convert its paramedic positions to full-time firefighters. Accordingly, the Village sent Mitchell and other paramedics a letter in March 1994 offering the paramedics an opportunity to become sworn full-time ‘Firefighters/Paramedics’ who would be subject to appointments and promotions by the

Village's Board of Fire and Police Commissioners. Among other things, the letter clarified that any paramedic that declined the offer 'will continue to be classified as a Civilian Paramedic under the Village's Pay Plan with continuing participation in the Illinois Municipal Retirement Fund.'

For personal reasons, Mitchell declined the Village's offer to become a sworn firefighter/paramedic and thus remained a civilian paramedic.

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In June 1999, the Village's Manager sent Mitchell a letter explaining a potential staffing concern that had arisen due to the 'two-in, two-out' respirator protection standards that had been promulgated by the U.S. Department of Labor. The letter also confirmed that Mitchell preferred to remain a civilian paramedic instead of becoming a full-time firefighter."

Holding:

"[in 2012 the] legislature modified the Act to add that the definition of a firefighter included licensed emergency medical technicians (EMTs) who are sworn members of a public fire department. Specifically, section 3 of the Act provides: 'For the purposes of this Act, the term 'firefighter' includes, without limitation, a licensed emergency medical technician (EMT) who is a sworn member of a public fire department.' 8 20 ILCS 320/3 (West 2012). We can determine whether Mitchell was eligible for health benefits under the Act by interpreting the language of the statute.

The record demonstrates that Mitchell was trained to perform some limited support roles to firefighters, such as locating fire hydrants, laying and connecting the hose, carrying ladders, changing air packs etc. Mitchell was allowed to go into a hazardous atmosphere to rescue one of the Village's firefighters or paramedics, but she was not allowed to rescue a member of the public. Mitchell was never trained to be part of an initial attack crew, and only firefighters/paramedics would be assigned as part of an initial attack crew.

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Although Mitchell had a support role for firefighters we see no merit to her claim she is a full-time firefighter."

**Legal Lessons Learned: Under Illinois statute, only full-time, sworn members of a public FD are covered. A full-time civilian paramedic is not covered, even if her job duties include helping at fire scenes.**

File: Chap. 7, Sexual Harassment; also Chap. 16, Discipline

CA: SEXUAL E-MAILS – TO 16-YR-OLD GIRL, FIRE STATION TOUR – FIRED - CASE TO GO TO ADMIN. LAW JUDGE

On May 13, 2016, in Grant Seibert v. City of San Jose, State of California, Sixth Appellate District, the Court held (3 to 0) that under Cal Firefighter's Procedural Bill Of Rights, the firefighter who was terminated after an evidentiary hearing before city's Civil Service

Commission is entitled to a hearing before an Administrative Law Judge. Court reversed decision by trial judge to reinstate the firefighter.

<http://www.courts.ca.gov/opinions/documents/H040268.PDF>

Facts:

“On the morning of Thanksgiving Day 2008, a female high school student who lived in the neighborhood of Fire Station 28 brought a cookie pie to the firefighters there. The girl, to whom we shall refer as ‘N.C.,’ was in 10th grade at the time, a few months short of her 17th birthday.

She was given a tour of the station by ... Seibert. At its conclusion he took a picture of her next to a fire engine. He obtained her e-mail address so that he could send the picture to her. At 11:00 a.m. he sent her the picture and thanked her for the baked goods, thus commencing the exchange of e-mails that ultimately included the messages underlying the first set of charges here.

On December 15, 2008, N.C. again appeared at the station, this time in the company of two or three male classmates. Seibert gave the youths a tour of the station. At least one of them played junior varsity football at their high school, and recognized a photograph of the station supervisor, Captain Leong, who was a varsity football coach at the same school. He was summoned to greet them.

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While at the station, N.C. apparently injured her elbow. At 2:54 p.m., after she left, she e-mailed Seibert, describing her injury. This led to an exchange of e-mails over at least a five-hour period, which grew increasingly risqué while playing on the conceit that Seibert might use his paramedic skills to treat the injury....”

[NOTE: Court the copies the e-mails in its opinion.]

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At about this point N.C.’s father entered the room and saw what she was doing. He printed out copies of the messages and went to the fire station, arriving in the late evening. He asked to see the person in charge, who was Captain Leong. Leong described him as appearing ‘very upset.’

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The then-chief explained that by virtue of the father’s charges, the Department ‘couldn’t keep [Seibert] on the line. As a paramedic, they just have too much intimate contact with people.’ Therefore, on a date not reflected by the record, he was assigned to the Department’s training center. Also assigned to the training center was fellow firefighter Leah Fazio.... Fazio described two incidents in which Seibert touched her in an unwelcome manner and multiple incidents in which he made inappropriate remarks about his or her private life.

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[After an internal investigation by outside attorney, a notice was sent to FF.] The notice went on to state that Seibert would be dismissed from his position with the Department effective November 18, 2009.

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On May 5, 2011, after taking testimony and receiving documentary evidence, the Commission upheld all of the charges asserted in the notice of discipline except the charge that Seibert had been guilty of dishonesty during the investigation. It sustained Seibert's dismissal based on the remaining charges."

Trial judge:

"On June 29, 2011, Seibert filed petition for writ of administrative mandate and other relief in the superior court.

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The court rejected, as less plausible than contrary evidence, the evidence suggesting that Seibert knew or should have known that N.C. was a minor. Nor did the court find the evidence sufficient to establish any of the other charges. In finding the evidence insufficient to establish the charges concerning Leah Fazio, the court concluded ... that the evidence established, 'at worst, inappropriate horseplay subject to admonition or perhaps minimal suspension without pay.'"

Holding:

[W]e have concluded that it is necessary to reverse the judgment on other grounds. Since this will set the matter at large in the trial court, the court is directed to give due regard to the Fukuda presumption [that Civil Service Commission findings are presumably correct] in its reconsideration of the issues.

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We conclude that in the absence of further evidence or new developments, any further administrative proceedings must take place before an ALJ as mandated by the FPBOR [California Firefighters' Procedural Bill of Rights, Gov. Code, §§3250-3262)].

**Legal Lessons Learned: These e-mails are completely unacceptable.**

File – Chap. 6, Employment Litigation; also Chap. 16, Discipline

OH: LETTER TO CHIEF/ HR - FALSE ALLEGATIONS BIAS IN SELECTING SWAT TEAM – NO FIRST AMEND. PROTECTION

On Aug. 19, 2016, in Scottie Bagi v. City of Parma, U.S. District Court Judge Donald G. Nugent granted City's motion for summary judgement, holding. Plaintiffs, Firefighters Scottie A. Bagi (34 tour suspension) and Gary C. Vojtush (13 tour suspension) sent letter alleging that testing for SWAT team was biased and/or rigged so that certain firefighters would be selected. Judge Nugent found otherwise: "Given their reckless indifference to the fact that there was no evidence to support the allegations set forth in the [l]etter, Plaintiffs' speech falls outside the realm of employee speech protected under the First Amendment and no reasonable jury could

find otherwise. Accordingly, the City of Parma is entitled to summary judgment as a matter of law.... This case is hereby TERMINATED. All costs to be borne by Plaintiffs.

[http://www.reminger.com/media/result/494\\_Doc\\_20160901100810898.pdf](http://www.reminger.com/media/result/494_Doc_20160901100810898.pdf)

Facts:

“In 2004, the Parma Fire Department, under the leadership of Captain Peter Poznako, developed and administered a test for membership on a Tactical Emergency Medical Service Team (the ‘TEMS Unit.’).... The TEMS Unit is a specialized team of select Firefighter/Paramedics from the Fire Department who provide direct support to the City of Parma Police Department SWAT Unit ....

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The 2004 TEMS Test consisted of five components, including a 100-question, multiple choice, written assessment. Candidates were required to score at least 80% on the written assessment to move forward with the other four components of the test.

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Firefighter Bagi scored a 55% on the written portion of the test - below the 80% threshold required to move forward.... Three other Firefighters Miady, DeCarlo and Patterson - also scored below an 80%.... In the end, Firefighters Whelan, Miady, DeCarlo and Bazemore received passing grades on the written portion of the TEMS Test and were later appointed to the TEMS Unit

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In 2011, the Fire Department began the process of selecting new members for the TEMS Unit. Chief French assigned the duties of supervising and administering the 2011 TEMS Test to Captain Poznako... (French Depo. at p. 71.) At Captain Poznako's request, Firefighter Michael Whelan designed the 2011 TEMS examination.

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The TEMS Test was administered on August 1, 2011. Five Firefighters ultimately participated in the 2011 TEMS test - Ricky Fetter, Ron Iacoboni, Joseph Posa, Joseph Owens and Jeff Patterson. Firefighter Bagi did not take test.

All five Firefighters who took the written exam received a score of 80% or greater and passed the exam.... Firefighters Fetter and Iacoboni had the two highest scores, with Fetter scoring the highest, and both were appointed to the TEMS Unit in October 2011.”

July 20, 2011 Letter

“Prior to the test being administered, Firefighter Bagi drafted a letter to Chief French (‘the Letter’), in which he ‘predicted’ that Firefighter Fetter would be selected for the TEMS Unit and alleged bias in the selection process.... The Letter was drafted over a couple of weeks, with help from an attorney.... On or about July 20, 2011 - twelve days prior to the TEMS Test being administered - Firefighter Bagi printed the final version of the Letter.

The Letter reads [in part] as follows:

‘In the near future, a member of this Parma Fire Dept will be selected for the SWAT team. It is important that an issue regarding the selection process be brought to your attention. The previous testing procedure for SWAT selection have [sic] given many of us great pause. We were concerned previously that there was bias in the SWAT selection by Captain Poznako. Specifically, friends or close associates with Captain Pozanko [sic] seemed to be selected when they were universally believed not to be the best candidates through both objective and subjective criteria. However, they made it onto the SWAT team regardless.’

[See decision for complete letter.]

There are over 100 Firefighters in the City of Parma Fire Department. Firefighter Bagi asked 8 Firefighters to sign the letter - 6 agreed and 2 refused.

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After obtaining the additional signatures, Firefighter Bagi sealed the Letter in an envelope and mailed it to himself. (Complaint at Paragraph 22.) Firefighter Bagi testified that if Firefighter Fetter was not selected for the TEMS Unit, he planned to throw the Letter away. (Bagi Depo. at p. 176.)

[The letter was given to the Fire Chief and the City’s Human Resources Manager, which led to an internal investigation.] In a letter dated January 3, 2012 to Chief French, Assistant Chief Ryan explained that his investigation uncovered no wrongdoing; that none of those interviewed provided any evidence to support the allegations set forth in the Letter; and, that he believed the allegations to be false and based on rumor rather than any factual evidence.

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Chief French reviewed Assistant Chief Ryan's recommendations and, based upon the seriousness of the allegations and Plaintiff Firefighter Vojtush's prior discipline for an unrelated matter, recommended to the Safety Director that both Plaintiffs be terminated.

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The Safety Director imposed a 2 tour suspension (approximately 48 hours) on the non-plaintiff signatories; Firefighter Vojtush received a 13 tour suspension based on his involvement with the Letter and because he had a prior 10 tour suspension; and, Firefighter Bagi received a 34 tour suspension based on his creation of the Letter, solicitation of signatures and insubordination in refusing to produce the Letter when requested.

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Plaintiffs filed their Complaint in this case on March 13, 2014, alleging Plaintiff Firefighters Bagi and Vojtush were retaliated against for exercising their right to freedom of speech, in violation of the First Amendment and 42 U.S.C. § 1983....

Holding:

“To establish that speech is constitutionally protected, a public employee must show that he was speaking as a private citizen, rather than pursuant to his official duties; that his speech involved a matter of public concern; and, if so, that his interest as a citizen in commenting on the matter outweighed ‘the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’ Garcetti v. [Ceballos, 547 U.S. 410, 417 (2006)] 547 U.S. at 417 (quoting Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568, (1968)). Decisions of the Sixth Circuit imply that ‘where an employee intentionally or recklessly makes false statements, the speech is not a matter of public concern and, as such, the Pickering balancing test is inapplicable.’ Westmoreland, 662 F.3d 714, 720....

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In this case, the City has indeed demonstrated that Plaintiffs' speech - the Letter - was written and signed off on with reckless indifference to whether the statements contained therein were false and, as such, is not a matter of public concern and not protected employee speech under the First Amendment, This lawsuit, like the allegations made by Plaintiffs in the Letter, is wholly without merit.”

**Legal Lessons Learned: Firefighters, and other public employees, have only limited First Amendment rights when commenting about their FD.**

File: Chap. 7, Sexual Harassment; also Chap. 14, Physical Fitness

IL: CHICAGO FD – FEMALE PARAMEDIC APPLICANTS -  
PHYSICAL SKILLS TEST – “DISPARATE IMPACT”

On Sept. 19, 2016, in Stacy Ernst v. City of Chicago, the U.S. Court of Appeals for 7<sup>th</sup> Circuit, held that five female applicants had proven their gender-discrimination lawsuit by showing an adverse impact from the physical fitness entrance exam. <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2016/D09-19/C:14-3783:J:Manion:aut:T:fnOp:N:1830018:S:0>

Facts:

“After Stacy Ernst and four other women applied unsuccessfully to work as Chicago paramedics, they brought this Title VII gender -discrimination lawsuit against the City of Chicago. These women were experienced paramedics from public and private providers of emergency medical services; they sought employment as paramedics with the Chicago Fire Department, but they did not apply to firefighting positions. All five women were denied jobs because they failed Chicago’s physical-skills entrance exam.

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[Validation study was made by Deborah Gebhardt, President of Human Performance Systems, Inc.]

First, Gebhardt measured the volunteers' physical skills by having them perform physical skills that she determined were necessary to the paramedic job: a modified stair-climb, leg lifts, arm-strength tests, and other tests. Gebhardt's volunteer paramedics [current Chicago FD members] had higher scores than the scores of other paramedics in both public-sector and private-sector jobs. The men in her study could handle an average of 281.9 pounds in leg-lift tests, for example, while the men in a study of several hundred paramedics could handle an average of 245.11 pounds in leg-lift tests. Gebhardt stated that this disparity between volunteers in her study and volunteers in other studies was 'especially' true between the tested female paramedics.

In an effort to soften the Chicago paramedics' unusually high scores, Gebhardt added scores from another physical test of New York City paramedics. She only used the New York City data, however, when setting a passing score. She did not use it to validate the Chicago study.

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In the lift and carry, a volunteer lifted a piece of equipment, carried it up a set of stairs, put it down, lifted another piece of equipment, carried that down the stairs, and then put that down. This required five timed cycles, with faster times resulting in better scores. In the stair-chair push, the volunteer navigated a stair chair over a ramp, with a dummy seated in the stair chair. Again, faster times resulted in higher scores. In the stretcher lift, volunteers lifted a simulated stretcher to an arm-locked position, held it for 20 seconds, rested for five seconds, and repeated. The stretcher weighed 90 pounds with the first lift, and 10 pounds was added each time, up to a maximum of 220 pounds. This test continued until the volunteer completed 13 cycles or could no longer lift the stretcher. Volunteers did not receive higher scores for performing this more quickly. Instead, scores were based on two measures: cycles completed and weight lifted.

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Between 2000 and 2009, nearly 1,100 applicants took Gebhardt's [city's contractor who developed FF and EMS physical fitness tests] entrance examination. Among these, 800 were men, and 98% of the male applicants passed. Another 300 were women; 60% of female applicants passed. Stacy Ernst, Dawn Hoard, Katherine Kean, Michelle Lahalih, and Irene Res-Pullano took the test in 2004, as licensed paramedics with experience working in other public fire departments or for private ambulance services. In their daily work, they moved patients and did so safely. When they took the Chicago physical-skills examination, however, they all failed."

#### Two Trials:

[Lawsuit was tried in part before jury, on "disparate treatment" charge that test was designed to keep women from being hired - jury found for the City of Chicago. Case was also tried before judge on disparate-impact charge that statistics show adverse impact - judge also found for the City.]

During the bench trial on disparate impact, the district court found it clear that the plaintiffs had established a disparate impact on women. The burden therefore shifted to Chicago, which had to prove that its physical-skills test was job-related and consistent with business necessity. In adopting Chicago's proposed conclusions of law, the district court concluded that Gebhardt's validation study satisfied Chicago's burden.

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Based on this work by Gebhardt, Chicago implemented a physical entrance exam with three components: the modified stair-climb, arm-endurance test, and leg lift. The passing score was set with this formula, which favored the modified stair-climb on which women did well:  $(7 \cdot \text{modified stair-climb score}) + (2 \cdot \text{arm-endurance score}) + (1 \cdot \text{leg-lift score})$ ."

Holding:

"In this case, at least two out of three work samples are not valid. The validity of the three skills that are tested in Chicago's entrance examination, however, depends on all three work samples being valid. This undermines the entire physical-skills entrance test that Chicago administers.

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Conclusion

The disparate-treatment claims are REMANDED for a new trial, with directions to read the original version of Jury Instruction 24. The disparate-impact trial verdict is REVERSED, with instructions to enter judgment in the plaintiffs' favor."

**Legal Lessons Learned: When the statistics show disparate impact on females, the employer must prove the physical stress tests are relevant to the duties to be performed.**

File: Chap. 9, ADA; Chap. 14, Physical Fitness

OK: HAZMAT CHIEF INJURED BACK – RETIRED AFTER 2 YRS. PAID MEDICAL LEAVE – NO LIGHT DUTY REQ. BY ADA

On May 26, 2016, in Robert E. Adair v. City of Muskogee, the U.S. Court of Appeal for the Tenth Circuit held (3 to 0) that the FD did not violate the ADA when forcing the firefighter to either retire or be terminated, since he was no longer physically able to perform the essential functions of the job. <https://www.ca10.uscourts.gov/opinions/15/15-7067.pdf>

Facts:

"Robert Adair was a firefighter with the City of Muskogee, Oklahoma (the City) when he injured his back during a training exercise. As a result of his injury, Adair completed a functional-capacity evaluation that measured and limited his lifting capabilities. After two years on paid leave, Adair received a workers' compensation award definitively stating that Adair's lifting restrictions were permanent. The same month he received his award, Adair retired from the Muskogee Fire Department (the Department).

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On May 6, 1981, Adair began his career as a firefighter with the Department. He served in the Department for about 32 years, with the last four years as the Department's Hazardous-Materials (HazMat) Director.

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In March 2012, Adair injured his back while he was at a training exercise in Utah. Adair said that 'he was going downstairs with equipment on and missed a tread resulting in a loss of balance and turning of body and twisting to the right.' Id. at 59.

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On October 15, 2012, Adair completed the functional-capacity evaluation. The evaluation's Functional Activities Summary showed that Adair could (1) occasionally lift 105 pounds from floor to shoulder; (2) occasionally lift 70 pounds from waist to shoulder; (3) occasionally lift 90 pounds from floor to waist; (4) occasionally carry 85 pounds; and (5) frequently lift 80 pounds from floor to waist, waist to shoulder, and floor to shoulder. The evaluation indicated that 'Adair demonstrated a maximal lifting capacity of 105 pounds [o]ccasionally and 90 pounds [f]requently.' Id. at 57.

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On March 4, 2014, Adair received his workers' compensation award. The Oklahoma Workers' Compensation Court concluded that from Adair's training-exercise fall, Adair had 'sustained 12 percent permanent partial impairment to the body as a whole attributable to the low back.' Id. at 226 (capitalization omitted).

According to Adair, after his workers' compensation award, the City 'encouraged' him 'to take a disability retirement rather than be terminated.'" Id. at 115. Adair said that, '[b]eing left with no apparent alternative from what the City required, and at their suggestion, [he] chose disability retirement rather than termination.' Id.

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Adair argues that his retirement was a constructive discharge—he claims that the City forced him to choose between being fired and retiring, which, he contends, discriminated against him in violation of the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (current version at 42 U.S.C. § 12101 et seq.), and retaliated against him for receiving a workers' compensation award in violation of the Oklahoma Workers' Compensation Act, Okla. Stat. tit. 85, § 341(A) (2011), repealed by 2013 Okla. Sess. Laws 208, § 171 (current version at Okla. Stat. tit. 85A, § 7).

The district court granted the City's motion for summary judgment."

#### Holding:

[W]e affirm. Even if the City regarded Adair as having an impairment, Adair cannot show that he was qualified to meet the physical demands required of firefighters or that the City could reasonably accommodate his lifting restrictions.

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Adair also challenges, as an illegal medical examination, the functional-capacity evaluation that the City required he complete, but the evaluation arose from Adair's workers' compensation claim, was job-related, and was a business necessity. Adair's retaliatory-discharge claim also fails as a matter of law because Adair cannot show that the City's non-retaliatory reason for terminating him (his permanent lifting restrictions) was pretext.

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Adair asserts that during his four years as HazMat Director, he 'never performed firefighting or other firefighter duties, other than being director of the [HazMat] operation.' Appellant's Opening Br. at 3. Adair 'could not contemplate a situation where it would be necessary for him to fight a fire.' Id.

But Adair concedes that the HazMat Director's 'job does have some lifting involved.'" Appellant's App. at 51. And as part of his functional-capacity evaluation, Adair said that 'his job duties as a firefighter for the City' required him to be able to 'walk, run, lift, push, pull, bend, carry, climb and squat.' Id. at 60. Though Adair asserts that his 'job as HazMat director did not require him to do the work of a firefighter,' he does not dispute that he was a firefighter. Id. at 101. Adair also testified that the Department had a policy, which 'ha[d] been talked about at the fire department for years, that firefighters could not have 'lifting restrictions.' Id. at 51. His 'understanding' was that 'in order to work as a fireman, you have to have unlimited restrictions and you need to be able to lift any amount of weight.' Id. The Department's Fire Chief, Derek Tatum, also testified that to work as a firefighter, the person 'would have to have a total release from a doctor.'" Id. at 214.

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In 2008, by passing the ADAAA, [ADA Amendments Act] Congress abrogated these Supreme Court rulings.... In Congress's view, both Sutton [Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999)] and Williams [Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002)] had improperly 'narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.' Id. § 2(a)(4).

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Today, a plaintiff bringing a 'regarded as' claim 'needs to plead and prove only that she was regarded as having a physical or mental impairment. Mercado, 814 F.3d at 588. Unlike pre-ADAAA plaintiffs, an ADAAA plaintiff no longer needs to plead and prove that the actual or perceived impairment 'substantially limited one or more major life activities.' Id.

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[T]he City argues that Adair's disability-discrimination claim would still fail because he is not a qualified individual. We agree.

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Here, Adair does not suggest any accommodations that the City could have made to retain him as a firefighter. Rather, he asserts that he should be able to continue in his role as HazMat Director because he sees himself as 'capable of doing his job for Defendant.' Appellant's Opening Br. at 13. As discussed above, we disagree. Regardless of his specialized title, Adair is still a firefighter and seeks to be retained as such."

**Legal Lessons Learned: When a FF has reached maximum medical improvement and cannot perform all the duties of a firefighter, disability retirement would be appropriate.**

File: Chap. 13, EMS

## MOCK TRIAL – OCT. 14, 2016 - IMPROVED REPORT WRITING - BASED ON \$1.2 MILLION SETTLEMENT

Author of this Newsletter, and Steven Halper, Esq., are conducting a Mock Trial on Oct. 14, 2016 (9 am – 11 am); Grandview Hospital, Dayton; free CE / will be videotaped; if you would like to attend, call Stephanie Harris, Cell 937-723-3485. Over 75 EMS & Nurses signed up. Case based on this Feb. 11, 2016 decision:

<http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2016/2016-Ohio-503.pdf>

File: Chap, 13, EMS

## NJ: FLU SHOTS FOR ALL HOSPITAL EMPLOYEES – DID NOT CLAIM RELIGIOUS OBJECTION - TERMINATION UPHELD

On Oct. 3, 2016, in Brown v. Our Lady of Lourdes Medical Center, the Superior Court of New Jersey, Appellate Division, held (3 to 0) that the hospital did not violate NJ religious discrimination laws by terminating the employment of a community health educator who refused to get an inoculation. The former employee “argues that because her employer's policy discriminated against employees who sought an exemption on non-religious grounds, its policy violated the LAD [NJ Law Against Discrimination]. We disagree and affirm.”

<http://www.judiciary.state.nj.us/opinions/a4594-14.pdf>

Facts:

“Plaintiff worked for Lourdes as a community health educator. In 2012, Lourdes implemented its Influenza Vaccination Policy (Policy) that required all employees to obtain an influenza (flu) vaccine each year. The policy's stated purpose was ‘to minimize transmission of the [flu] in the workplace by providing occupational protection to [staff] and thus preventing transmission to fellow [staff members] and to members of the community. . .’ served by Lourdes.

Employees ‘who [could not] receive vaccination for religious beliefs supported by documentation from clergy’ or due to ‘documented medical conditions’ were exempt from the Policy's requirement.

Those seeking an exemption for religious or medical reasons were required to file the appropriate form and were entitled to appeal the denial of any such request. For all others, failure to comply with the Policy would result in a one-week suspension without pay and, if they still failed to comply, termination of employment.

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In October and December 2012, plaintiff requested a medical exemption. 1 The requests were denied by Pope. 'Fearing for her health and relying on the recommendation of' her doctor, plaintiff refused to be vaccinated. On January 21, 2013, she was suspended without pay for one week. In March 2013, she was terminated from her employment for violating the Policy.

Footnote 1: Plaintiff alleged she had an adverse reaction to a flu shot in 1998.

[Trial court denied plaintiff's motion to amend her complaint, and dismissed the lawsuit.]

Holding:

"To establish a prima facie case for religious discrimination under the LAD, a plaintiff must demonstrate that '(1) [she] belongs to a protected class; (2) she was performing her job at a level that met her employer's legitimate expectations; (3) she suffered an adverse employment action; and (4) others not within the protected class did not suffer similar adverse employment actions.'" *El-Sioufi v. St. Peter's Univ. Hosp.*, 382 N.J. Super.145, 167 (App. Div. 2005).

\*\*\*

The pleading also did not allege that members of only certain religions were granted religious exemptions while members of other religions were denied the same relief. Nor did she allege that she had a religious objection to being vaccinated, or requested a religious accommodation and was denied same. Absent any of these allegations, and in light of the LAD's requirement that employers offer reasonable accommodations for their employees' religious beliefs, we conclude that plaintiff could not establish a prima facie case under the LAD and, accordingly, that the judge properly denied her motion.

**Legal Lessons Learned: Mandatory flu shots for hospital employees are becoming very common. The author of this Newsletter, when taking his pet therapy dog to Shriners Burn Hospital for Children, is required to have a flu shot (none required for the dog).**

File: Chap. 16, Discipline

WA: FD E-MAILS USED BY CAPTAIN FOR RELIGIOUS MESSAGES – REFUSED TO STOP – TERMINATION UPHELD

On Sept. 21, 2016, in [Jonathan J. Sprague v. Spokane Valley Fire Department](https://scholar.google.com/scholar_case?q=Sprague+v.+Spokane+Valley+Fire+Department&hl=en&as_sdt=6,36&as_vis=1&case=7690671863768577057&scilh=0), Court of Appeals of Washington, the Court held (2 to 1) that there was just cause for the Civil Service Commission to accept the FD's recommendation to terminate the Captain for failure to direct orders in violation of department practice and personnel policies.

[https://scholar.google.com/scholar\\_case?q=Sprague+v.+Spokane+Valley+Fire+Department&hl=en&as\\_sdt=6,36&as\\_vis=1&case=7690671863768577057&scilh=0](https://scholar.google.com/scholar_case?q=Sprague+v.+Spokane+Valley+Fire+Department&hl=en&as_sdt=6,36&as_vis=1&case=7690671863768577057&scilh=0)

Facts:

"Mr. Sprague served as a captain for SVFD. He formed the Spokane Christian Firefighters Fellowship (SCFF) and in 2011 began distributing newsletters and meeting

notices for that group via the SVFD e-mail system. Captain Sprague's use of the e-mail system begat controversy and spiraled into this litigation.

His messages concerning SCFF meetings often contained scriptural passages and mentioned the topics being discussed at the meeting. SVFD responded by reminding Captain Sprague that the e-mail system was to be used for business purposes only and that e-mails should not include religious references. SVFD allowed employees to access their personal e-mail while at work, but they were not permitted to make personal use of the department's system. Sprague complained in writing that the policy constituted religious discrimination.

Commissioner Monte Nesbit responded by letter and disagreed with the complaint. He summarized the SVFD e-mail policy:

You may not use department email to post, discuss, or in any way disseminate communications that are sent for any purpose other than official SVFD business. This means you cannot send messages using your official SVFD email which discuss the Fellowship or any other private purpose. [SVFD] email may only be used to disseminate communications concerning official SVFD business.

If you wish to send personal emails while on duty (if otherwise permitted under [SVFD] policy), you may do so using a personal email account (such as a Hotmail, Gmail, Yahoo, or Comcast account). Using a personal email account, you may only send messages to other personal email accounts. You may not use a personal email account to send messages or solicitations to official SVFD accounts.

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Captain Sprague, however, declined to follow the policy and insisted on using the SVFD e-mail system to distribute information about meetings of the SCFF. He also continued to employ scriptural passages in the e-mails and in bulletin board postings. A series of progressive disciplinary actions ensued. The first action resulted in a Letter of Counseling concerning misuse of the bulletin boards, followed two weeks later by a Letter of Reprimand involving misuse of the bulletin boards and the e-mail system. Six weeks later a two shift suspension without pay was imposed due to disobedience of an order and violations of the e-mail and bulletin boards policies. The suspension was stayed pending mediation, but the mediation efforts failed.

Three months after the suspension, SVFD gave notice of its intent to discharge Captain Sprague. The notice alleged that he had engaged in "conduct unbecoming an officer," insubordination for violating an order of a superior officer, and had willfully violated department rules, procedures, and personnel policies. CP at 208. The Board of Fire Commissioners accepted the termination recommendation and found that Captain Sprague had failed to obey direct orders in violation of department practice and personnel policies, resulting in just cause for termination."

Holding:

"The written policy also was content neutral. It distinguished between communications related to the SVFD's business and those that are personal to the employees. It is the nature of the communications, not the viewpoints expressed in them, that matters. There is no discrimination against some messages or in favor of some others. Instead, there is a

complete ban on private usage (absent work-related necessity) of the systems without regard to the message conveyed by the sender.

The written SVFD policy does not violate the First Amendment.”

Dissent:

“The precise issue before this court is whether the Spokane Valley Fire Department needed to permit Jonathan Sprague the use of the department's e-mail system to speak from a religious vantage point on topics affecting firefighters' mental health when the department disseminated information on those same topics. The majority does not directly address this critical question. I dissent from the majority because the answer is in the affirmative.

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The Spokane Valley Fire Department had no compelling, let alone important, interest in restricting Jonathan Sprague's speech. The fire department did not expose itself to violation of the Establishment Clause by tolerating Sprague's evangelism. Sprague did not increase the costs of the fire department's e-mail system by the sending of his messages.

**Legal Lessons Learned: A well-written policy on use of FD e-mail system, fairly enforced, prevailed in court.**

File: Chap. 17, Arbitration / Mediation

OH: ARBITRATOR DID NOT DISCLOSE WAS EXEC. DIRECTOR OF PRO-LABOR GROUP – AWARD FOR UNION SET ASIDE

On Oct. 3, 2016, in Mason v. Mason Professional Firefighters, IAFF Local 4049, 2016-Ohio-7194, the Ohio Court of Appeals for Twelfth Appellate District (Warren County) held (3 to 0) that the trial court should have granted the City's motion to vacate the arbitration award.

<http://www.supremecourt.ohio.gov/rod/docs/pdf/12/2016/2016-Ohio-7194.pdf>

Facts:

“The present dispute arises out of the termination of Joe Rosell, a former firefighter and paramedic for the city of Mason. In April 2014, the city terminated Rosell's employment due to alleged dishonesty in connection with a disciplinary investigation. Pursuant to the collective bargaining agreement between the city and the Union, the Union filed a grievance with respect to Rosell's termination. The city denied the grievance and the Union pursued the grievance to arbitration.

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After [first arbitrator excused herself for potential conflict of interest], the parties obtained a new FMCS [Federal Mediation Conciliation Service] arbitrator list and, utilizing the same strike method, selected Howard Tolley. On February 6, 2015, Tolley conducted a hearing on the matter and later issued a written decision and award on March 17, 2015. Tolley's decision upheld Rosell's grievance and ordered the city to reinstate Rosell with back pay and benefits. Specifically, Tolley found the city did not conduct a fair, objective investigation, and did not have substantial evidence of guilt.

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After issuing this decision, Tolley sent an invoice to the city through e-mail. For the first time, Tolley's signature block on the e-mail identified himself as the Executive Director of Unitarian Universalist Justice Ohio ('UUJO'), which is affiliated with the Unitarian Universalist Church. At no prior point did Tolley disclose this relationship, nor did he include this position on his curriculum vitae. According to the city, UUJO is 'a 'state advocacy network,' and among its purposes is to advocate for employees and causes supported by organized labor.' 1

Footnote 1: The mission statement for the UUJO states:

Unitarian Universalist Justice Ohio organizes justice seekers statewide to promote education, service and advocacy consistent with Unitarian Universalist liberal religious principles and to witness with and on behalf of marginalized groups and individuals.

[City filed action in Warren County Court of Common Pleas to vacate the arbitration award. Both a Magistrate and the trial judge denied the motion.]

Holding:

“In its sole assignment of error, the city alleges the trial court erred by denying its motion to vacate the arbitration award and by granting the Union's motion to confirm. The decision of the trial court to deny the City's motion to vacate is governed by R.C. 2711.10, which states:

In any of the following cases, the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if:

(A) The award was procured by corruption, fraud, or undue means.

(B) Evident partiality or corruption on the part of the arbitrators, or any of them.

(C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(D) The arbitrators exceeded their powers, or so imperfectly executed

them that a mutual, final, and definite award upon the subject matter submitted was not made.

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The concerning issue in this case is whether Tolley's involvement and nondisclosure of his position with UUJO amounts to 'evident partiality,' one of the grounds for vacation of an arbitration decision under R.C. 2711.10. The seminal case on the issue of undisclosed background information involving an arbitrator is Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 89 S.Ct. 337 (1968). In Commonwealth, the arbitrator failed to disclose that the defendant was a significant business customer of the arbitrator.

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While not every involvement in an organization needs to be disclosed, it is concerning that Tolley, serving in an executive position of influence, did not inform the parties of his involvement with UUJO until following the issuance of his arbitration decision.

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While UUJO aligns itself with many issues and causes, the record before the court does indicate the support of a number of positions that would be unacceptable to a party representing the management side of an arbitration decision. 2

Footnote 2: The city references a number of UUJO newsletters and documents and argues that UUJO is an 'employee-centric, directly focusing its attention on a litany of employee issues, including, but not limited to, making advancements in LGBT: Lesbian, Gay, Bisexual, and Transgender employment non-discrimination laws, eliminating the ability of employer's to screen applicants past on prior criminal convictions, and even pressuring [an] Ohio-headquartered restaurant, Wendy's, to participate in the Coalition of Immokalee Workers' Fair Food Program, an organized labor program aimed at, among other things, increasing farm employee wages.' The city also presented information regarding UUJO's affiliation with organized labor 'through its relationship with Ohio Organizing Collaborative, a self-described 'innovative statewide organization uniting community organizations, faith institutions, labor unions, and policy groups across Ohio.'

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Based on the facts and circumstances of this case, we find that the city has met the burden of proving 'evident partiality' for purposes of vacating the decision of the trial court. This decision is not made lightly, as we recognize that disgruntled parties may often attempt to seize on perceived bias in an attempt to get a second chance at litigating their claim. However, the law recognizes certain ways of vacating an arbitration decision. In the present case, it is difficult to comprehend why Tolley failed to disclose his executive role with the UUJO and the city's arguments for vacating that award are well-taken.

Accordingly, we sustain the city's sole assignment of error, vacate the arbitration award, and remand the matter to the trial court for further proceedings.”

**Legal Lessons Learned: Arbitrator impartiality is critical to the binding arbitration process in most CBAs; presumably the parties will now select a new arbitrator and have another hearing on the termination of the firefighter.**

File: Chap. 17, Arbitration / Mediation

## OH: MILITARY LEAVE – PAST PRACTICE TO PAY FOR FF TRAVEL TIME – ARBITRATOR DECISION FOR FF UPHELD

On Sept. 20, 2016, in State of Ohio v. Ohio Civil Service Employees Association, Local 11 AFSCME AFL-CIO, the Ohio Court of Appeals for Tenth Appellate District held (2 to 1) that the Franklin County Court of Common Pleas judge had improperly vacated the arbitrator's award for the FF. The Court found that the arbitrator "was not 'add[ing] to' or 'modify[ing] any of the terms of the Agreement' when he reversed the policy change instituted by the Adjutant General's Department in 2012, but rather, he was enforcing the terms of the CBA as originally interpreted, understood, and practiced by the parties."

<https://www.ca10.uscourts.gov/opinions/15/15-7067.pdf>

Facts:

"The Adjutant General's Department of the State of Ohio employs a number of firefighters who work at military bases in Ohio and are members of the Union. The relationship between these firefighters and their employer is governed by a collective bargaining agreement ('CBA'). The relevant version of the CBA for this case governed the period from March 1, 2012 through February 28, 2015. That CBA requires the employer to pay firefighters up to a maximum of seventeen 24-hour days (408 hours) annually of military leave time.

Prior to and until March 9, 2012, firefighters who requested military leave with pay were granted leave equal to the time they requested. However, this practice was discontinued by an e-mail from the human resources administrator of the Adjutant General's Department at 12:32 p.m. on March 9, 2012. According to the e-mail, the Adjutant General's Department would henceforth require a copy of the military order or letter specifying the start and end dates and times of military duty. While the agency would still 'release an employee for travel and rest time' in compliance with federal law, it would not pay unless the employee was acting in a 'military service' capacity" which it defined as the 'time specified on the orders or commander letter.'

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On March 19, 2012, the firefighters filed a grievance based on the fact that the Adjutant General's Department had reversed past practice and refused paid military leave to which the firefighters alleged they were entitled under the CBA. The employer issued a 'Step 3 Grievance Decision' shortly after the grievance was filed. (Compl. at Ex. F.) The employer's decision took the position that paid military leave under the CBA did not include travel to and from military assignments or rest periods following such assignments.

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The parties arbitrated the dispute, and as part of that process, a hearing was held on July 9, 2013. At the hearing, four firefighters testified on behalf of the Union as to the past practices of the parties in interpreting the CBA. According to the summary prepared by the arbitrator, firefighters testified that before the time of the e-mail in 2012, they routinely claimed and received paid military leave time for travel to and from military assignments.

The human resources administrator who sent the e-mail changing the policy, admitted that, before the time of her e-mail, if military leave was requested it was paid. She also expressed concern that the program had improperly been paying and might not receive federal funds sufficient to cover military leave if that concept included travel and rest. In addition, one witness testified as to a survey of practices on military leave at a variety of state agencies (with the result that some agencies pay for rest and travel time and some do not).

Finally, the State Judge Advocate testified about the laws and regulations governing the military, stating that rest and travel are not considered 'Duty' by the military or the Department of Defense and are not covered by federal funding. (Aug. 26, 2014 Pl.'s Mot. for Summ. Jgmt. Ex. A at 10.) {¶ 6}

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In a decision issued on August 26, 2013, the arbitrator concluded that, as the CBA is not silent on the topic of military leave, the topic was arbitrable. The arbitrator then factually found an 'undisputed' and 'long standing practice of paying for travel and rest as a Military Leave benefit.' (Pl.'s Mot. for Summ. Jgmt. Ex. A at 19.) He explained that, although the federal government does not consider travel and rest to be a payable part of 'Inactive Duty for Training' the CBA uses the term 'military leave' rather than 'Inactive Duty for Training' and is capable of granting greater rights than provided by federal or state law. In addition, the arbitrator noted that the CBA (which covers many types of employees) specifically recognizes the unique 24-hour schedule of firefighters and grants them additional military leave to accommodate that schedule. The arbitrator concluded that the grievance should have been granted and the new military leave policy reversed.

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On November 22, 2013, the State filed an application to vacate the arbitration award with the trial court. The Union answered on December 4, 2013. Both parties then moved for summary judgment on August 29, 2014, based on the arbitration decision, as well as stipulations and exhibits presented during the arbitration. Following briefing, the trial court rendered a decision on October 30, 2014. The trial court reasoned that 'military leave' is not defined in the CBA and that the arbitrator had exceeded his authority by construing the term. Thereby, the trial court concluded that the matter was not arbitrable and reversed the arbitrator's decision that overturned the State's new policy."

Holding:

"[T]he CBA is not only not 'silent' in the 'area' of military leave benefits, it specifically sets forth the number of such paid hours to be made available to state employees generally and firefighters specifically. The trial court incorrectly concluded that military

leave benefits are to be determined by law rather than the CBA and thereby incorrectly concluded that the matter was not arbitrable.

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The arbitrator was within his authority to interpret the CBA according to the ordinary meaning of the terms and the past practices of the contracting parties. Therefore, we conclude that the trial court erred in holding that the dispute was not arbitrable and that the arbitrator exceeded his authority. The Union's two assignments of error are sustained, the judgment of the Franklin County Court of Common Pleas is reversed, and the arbitrator's decision is reinstated.  
Judgment reversed.

Dissent – on issue of paying for rest time

BROWN, J., concurring in part and dissenting in part.

“While I agree the arbitrator did not err in considering past practices, I dissent from the majority's determination that the record supports the arbitrator's factual finding that it was undisputed the parties had a ‘long standing practice of paying for travel and rest as a Military Leave Benefit.’ (Emphasis added.) (Aug. 29, 2014 Mtn. for Summ. Jgmt. Ex. A at 19.) A review of the arbitrator's factual findings, including the arbitrator's overview of the testimony presented, contains no citation to specific evidence of past practices regarding payment of benefits for rest time; rather, the testimony cited involves payment for travel time.”

**Legal Lessons Learned: Past practices are enforceable under CBA arbitration provision.**

**Newsletter author:**

Lawrence T. Bennett, Esq.  
Program Chair  
Fire Science & Emergency Management,  
College of Engineering & Applied Science  
2220 Victory parkway  
Cincinnati, OH 45206

[Lawrence.bennett@uc.edu](mailto:Lawrence.bennett@uc.edu)

Cell 513-470-2744

