Aug. 2018 – FIRE & EMS LAW Newsletter

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NEW CASES COVERED IN THIS NEWSLETTER

Chap. 1 – MI: Arson conviction upheld, no Miranda warning req. if not in custody;

Chap. 1 – OH: Dying declaration in the back of ambulance, murder conviction upheld;

Chap. 6 – LA: Free speech rights, two paramedics fired after letter entitled to trial;

Chap. 6 – NJ: Borough cannot enforce $5,000 penalty for prob. police officer joined another PD;

Chap. 18 – WY: State statute, volunteer FFs who get pay entitled to be in union.
MI: HOMEOWNER CONV. ARSON – NO “MIRANDA WARNING” REQUIRED - PD INFORMANT & UNDERCOVER DETECTIVE


“The petitioner was not entitled to Miranda warnings when she was questioned by an informant at a restaurant or when questioned by Detective Morey in connection with her unemployment benefits because she was not in “Miranda custody.”


Facts:

“Michigan prisoner Cynthia Marie Stewart-Matzen is presently in custody following her convictions that resulted from her attempts to burn down her house. After she was sentenced to prison [20 years], and obtained no relief from the Michigan appellate courts, she filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254, alleging that the trial court should have suppressed certain evidence, including her statements to the police, and that her attorney mishandled the motion to suppress her confession. Finding no merit in any of the issues she has raised, the Court will deny the petition.

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A fire occurred at the Matzen home in Belding, Michigan on May 13, 2010. After a two-year investigation, the petitioner was charged with intentionally setting the fire so that she could collect proceeds from her homeowner’s insurance policy and her husband’s life insurance policy.

The petitioner and her husband, Gerald Matzen, dated for approximately 25 years. When the petitioner lost her employment — and her health insurance — she and Matzen decided to get married so that she could be added to Matzen’s health insurance. They entered into a prenuptial agreement; however, the petitioner became the beneficiary of Matzen’s 401(k) plan and his life insurance. The house they lived in was insured for $100,000.

Matzen was not in good health and spent most of his time in his living room chair, where Stewart cared for him. He could walk short distances, but could not go up or down the stairs. About two months after he married the petitioner, Matzen awoke to smoke coming from the kitchen. He called 911 and called for the petitioner.

The fire department, fresh from another call nearby, arrived at the petitioner’s house within two minutes. Fire Chief Gregg Moore and Captain Matt Smith assisted Gerald Matzen out of the house. When Matzen said that his wife was still in the house, Smith went back in for the petitioner. He found her in the kitchen ‘staring off into space,’ as if she were under the influence of something. When she did not respond to his calls, he pulled
her from the house. Smith observed that the petitioner had significantly more soot on her face, compared to
her husband’s.

Once Matzen and the petitioner were out of the house, firefighter Timothy Lubitz and his
partner, Captain Donald Eady, entered the house to put out the fire, entering through the side door. They
noticed a set of stairs leading to the basement, with a small fire at the top of the stairs. They extinguished the
first fire. They then proceeded down the stairs, when they came upon a plastic curtain on fire on the stair
landing. They extinguished the second fire. They then came upon a small fire the size of a dinner plate on the
basement concrete floor. They extinguished the third fire. Finally, they came upon a flaming box of kitty
litter in the back room, which Lubitz extinguished with his boot, putting out the fourth and final fire.

Eady went back into the basement to inspect the scene. He heard something that sounded
like air escaping and discovered a gas leak behind the washer and dryer. He could see that the coupling nut
was completely disconnected from the line. Eady immediately radioed instructions to turn the gas off to
prevent an explosion. Firefighter Darryl Childs later inspected the gas line and noticed wrench marks on the
copper line and no connection nut.

Michigan State Police technician Greg Stormzand began his investigation the next day and contacted the
petitioner. After she signed a consent form, Stormzand entered the home and began his physical investiga-
tion of the property. Stormzand concluded that the fires were intentionally set with gasoline in a number of
locations in the basement. Stormzand testified that he smelled a petroleum product and noticed burn patterns
that indicated that a liquid had spilled down the stairs.

A tested sample of charred carpet from the stairs and kitty litter confirmed that what he smelled was
gasoline. Agreeing with the prosecutor’s hypothetical question, Stormzand acknowledged that he would
expect to see a considerable amount of soot on the face of a person who had started multiple fires, used a
broom to push the flaming combustibles around the basement, started another fire, poured gasoline on the
staircase, and then lit the staircase.

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[Prior to her trial she] filed a motion to suppress certain statements she made to the police over the two-year
investigation, contending that no Miranda warnings preceded questioning, and at times she was represented
by an attorney. The trial court denied those motions, and all this evidence was considered by an Ionia County
jury, which
convicted the petitioner as charged of arson of a dwelling house, arson of insured property, and preparation
to burn property. The petitioner was sentenced to concurrent prison terms totaling six to 20 years.”

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On May 25, 2010, the petitioner agreed to speak with Officer David Thomas of the Belding Police
Department. She was not placed under arrest, nor was she placed in handcuffs or restrained in any way. The
petitioner concedes that she willingly went
to the Belding Police Department, but she alleges that the tone of the interview made her feel that she was in
police custody. The petitioner is not entitled to Miranda
warnings simply because the questioning took place in a police station or because she believed the officer viewed her as a potential suspect.

The [Michigan trial judge] conducted a hearing on that motion, and ruled from the bench that Miranda warnings were not required because the petitioner was not in custody when she made her statements to the police. The trial court stated:

‘With regards to the initial interview by Officer [David] Thomas, that was voluntarily arranged. It was a short interview of 20 to 30 minutes. There is no indication that she was in any way in cuffs or confined. It’s related also to voluntariness, but there’s no indication of any deprivation of food or water, or any concern so far as intelligence, or anything even that this Court, using an objective test, would cause this Court objectively to feel that Ms. Matzen was in custody. Listening to Ms. Matzen, here this afternoon, my inclination would be more in line with what the prosecutor has suggested. I don’t know if I would call it a cat/mouse, maybe more so that maybe the officers met their mental match, but even in consideration with what Ms. Matzen has said, at best, what she felt is that it would be detrimental if she left. And I think that reason and common sense probably applies to any time the police ask with you, whether it’s a simple speeding ticket or something much more serious, you — you do have that inherent feeling that you do need to talk to the police, but that’s not custody, that’s human nature. I think even more telling was her comment so far as the honest person. Whether this is an indication of guilt or an indication of innocence doesn’t really matter, but it’s clear that Ms. Matzen wanted to be perceived as an honest person, and by that, again, felt compelled to talk to the police. It did not mean that she was in custody. It did not mean that this was a custodial interrogation triggering the Miranda warnings. It simply was one explanation as to why she continued to talk with people, whether they be police officers or a detective or anyone related to the police. That, again, is not custody. The — the short term interviews, the interviews being voluntarily arranged, the accommodations made for Ms. Matzen, even the open door in that last interview, all are suggestive of a non-custodial interrogation, and the Court does so find.

With regards to the voluntariness of the — any statements made by Ms. Matzen to law enforcement or someone acting in behalf of law enforcement, there simply there are no red flags. There’s nothing so far as her intelligence, no deprivation of food or water, no ext — or inordinate length of interview, no time frame so far as to happening at two o’clock or three o’clock in the morning.

The only thing; and that’s really not even related, is they wanted to talk to her husband separately, and asked her or told her to stay outside when they did that, but that, certainly, is not anything that would affect the voluntariness of her interview with them. I think, to the contrary, she continued to speak with anyone that asked, whether it be police officer, detective, investigator, or someone she thought was her friend, and I mean this with no disrespect, but I think Ms. Matzen, rightfully or wrongfully, wants to make sure that people get what she wants them to know. Whether that is an effort to evade prosecution or whether that’s trying to be an honest person, I do not know and do not decide today. All I know is that there just are no red flags, no indications this was involuntary, no indications that it was custodial, and no triggering of the Sixth Amendment right.

Motion Hr’g Tr. at 67-69 (May 29, 2013).
The petitioner also insists that she was entitled to Miranda warnings when she met at a restaurant and gave statements to a confidential informant in July or August of 2010. The informant wore a live-transmission microphone to allow the police to listen in on the conversation. The petitioner spoke voluntarily with the informant and then left the restaurant.

The petitioner also met on November 24, 2010, with Detective Michael Morey of the Michigan State Police, who posed as an employee of the Michigan Unemployment Insurance Agency. The petitioner contends that Morey improperly elicited statements pertaining to her assets, income, and marriage, which were used against her at her trial. The petitioner testified that she initially was suspicious of Morey because she had already gone through one deposition with the insurance company.

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The petitioner met again with Detective Morey in April, 2010, and wrote a note to Morey acknowledging that ‘[i]t was okay for me to talk to Detective Morey.’ She voluntarily sat in his car and answered questions. Once again, she was not placed in custody during the discussions with the informant at the restaurant, Officer Thomas, or Detective Morey, and she testified that she agreed to talk to the officers on each of the four occasions.”

Holding:

The Fifth Amendment, applicable to the states by the Fourteenth Amendment, protects an accused against compulsory self-incrimination. In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that the prohibition against compelled self-incrimination requires a custodial interrogation to be preceded by advice that the accused has the right to remain silent, that any statement may be used against him, and that he has the right to retained or appointed counsel. Id. at 479. Miranda warnings are required when a suspect is in custody and subject to interrogation. Rhode Island v. Innis, 446 U.S. 291, 300 (1980).

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The Supreme Court has held that ‘Conversations between suspects and undercover agents do not implicate the concerns underlying Miranda.’ Illinois v. Perkins, 496 U.S. 292, 300 (1990). The petitioner was not entitled to Miranda warnings when she was questioned by an informant at a restaurant or when questioned by Detective Morey in connection with her unemployment benefits because she was not in ‘Miranda custody.’ The Supreme Court has noted in passing that ‘a surreptitious conversation between an undercover police officer and an unindicted suspect would not give rise to any Miranda violation as long as the “interrogation” was not in a custodial setting[,]’ Patterson v. Illinois, 487 U.S. 285, 296, n.9 (1988).

***

Accordingly, it is ORDERED that the petition and amended petition for a writ of habeas corpus are DENIED.”

Legal Lessons Learned: If suspect in arson case is not in custody, then Miranda warnings not required.
OH: DYING DECLARATION IN BACK OF AMBULANCE – “FRED SHOT ME” – ADMISSIBLE IN MURDER TRIAL

On July 25, 2018, in State v. Fred Taylor, 2018-Ohio-2921, the Ohio Court of Appeals for Summit County, upheld (3 to 0) his conviction of felony murder of Javon Knaff.

“Mr. Knaff’s repeated statements concerning the fact that he was dying, coupled with the severity of his condition, demonstrate his awareness of his impending death at the time that he stated, ‘Fred shot [me].’ Consequently, this statement was admissible as a dying declaration.”


Facts:

“On Memorial Day 2016, Mr. Taylor was at a cookout at an apartment complex on Nadia Court in Akron, commonly referred to as the Rosemary Apartments. There were multiple cookouts occurring at the apartment complex that day. The cookout that Mr. Taylor attended included the victim, Javon Knaff, and two witnesses who testified at trial, D.H.-B. and T.O.

At some point during the evening, D.H.-B. observed Mr. Taylor and Mr. Knaff ‘bickering’ over a cigarette. Later, D.H.-B. saw Mr. Taylor and Mr. Knaff in a group in the parking lot. At that point, Mr. Knaff was talking loudly and there appeared to be ‘[s]omewhat’ of a problem. D.H.-B. testified that she was not paying a lot of attention to the group because she was on her cell phone. But when she heard a gunshot, she looked up. She then saw Mr. Taylor fire more shots at Mr. Knaff. Mr. Knaff ran around the parking lot screaming, ‘I got shot. He tried to kill me.’ When he got to D.H.-B., he fell on her. He was crying as he told her, ‘I don’t want to die’ and asked her to call his mother. D.H.-B. applied pressure to Mr. Knaff’s wounds in an attempt to stop the bleeding.

An ambulance arrived within minutes. A paramedic testified that Mr. Knaff was alert and oriented. He further testified that, during the ambulance ride, Mr. Knaff appeared scared and anxious and was asking ‘a lot if he was going to die.’ The paramedic indicated that the wounds appeared to be life-threatening.

Officer Walter rode in the ambulance to the hospital. Mr. Knaff told him his name, date of birth, and social security number. Mr. Knaff also told Officer Walter, ‘Fred shot [me].’ At the hospital, Mr. Knaff was taken into surgery and died at 9:59 p.m.”
In his first assignment of error, Mr. Taylor argues that the trial court erred in admitting Mr. Knaff’s statement to Officer Walter identifying ‘Fred’ as the person who shot him. Mr. Taylor argues that this statement was (1) inadmissible hearsay and (2) admitted in violation of the Confrontation Clause of the United States Constitution. This Court rejects both arguments because Mr. Knaff’s statement was a dying declaration.

When determining whether a statement was a dying declaration, the state of mind of the declarant is decisive. State v. Woods, 47 Ohio App.2d 144, 147 (9th Dist.1972). At common law, the necessary state of mind was ‘a sense of impending death, which excluded from the mind of the dying person all hope or expectation of recovery.’ Id., quoting Robbins v. State, 8 Ohio St. 131, 163 (1857). ‘The declarant is not required to state that he believes that he will not survive; rather, the necessary state of mind can be inferred from the circumstances at the time of the declaration.’

Mr. Taylor notes that Mr. Knaff was aware, alert, and oriented while in the ambulance. These facts do not negate Mr. Knaff’s belief that his death was imminent. When asked whether Mr. Knaff was aware of the seriousness of his wounds, Officer Walter testified, ‘I believe he [was]. He was pretty distraught, but he was still able to communicate.’ Similarly, Officer Sosenko was asked whether he believed that Mr. Knaff believed that he was going to die, and he responded that he did.

Mr. Knaff’s repeated statements concerning the fact that he was dying, coupled with the severity of his condition, demonstrate his awareness of his impending death at the time that he stated, ‘Fred shot [me].’ Consequently, this statement was admissible as a dying declaration.

Legal Lessons Learned: Document on your EMS run report the actual words spoken by the patient; a “dying declaration” is admissible in evidence. Recording the words on your run report can help prosecution reach a plea agreement.

File: Chap. 6, Employment Litigation

**LA: FREE SPEECH RIGHTS – TWO PARAMEDICS FIRED AFTER SENT LETTER TO BOARD - LAWSUIT MAY PROCEED**

On July 18, 2018, in Patrick Alan Benfield & Brian Warren v. Joe Magee, et al., U.S. District Court Judge Elizabeth Foote, Western District of Louisiana, held that a lawsuit by two paramedics fired by Desoto Parish EMS may
proceed to trial. They were fired after Warren wrote a letter to a member of the Desoto Parish Police Jury (they appoint the Board of Commissioners of the Desoto Parish EMS). The Judge ruled:

“The motion [to dismiss] is **DENIED** as to Warren’s free speech claim because the facts alleged establish that his letter was protected speech.”

https://cases.justia.com/federal/district-courts/louisiana/lawdce/5:2018cv00034/160852/18/0.pdf?ts=1532079100

Facts:

“In Louisiana, paramedics must complete annual training and biannual recertification, the records of which are sent to the National Registry of Emergency Medical Technicians (“NREMT”).… The recertification form includes a box for the medical director to check, indicating his approval of the training hours completed.

Alleged at [Joe] Magee’s instructions [Administrator of Desoto Parish EMS], Warren would check this box when complete the NREMT forms without first receiving approval from Joseph Farguhar (“Farquhar”), the medical director.

Benfield [Plaintiff] was among the employees on whose NREMT forms Warren checked off Farquhar’s approval, but Benfield did not personally participate in Warren’s checking off Farquhar’s approval.

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In June, 2015, Warren sent a letter to Jim Davlin (‘Davlin’), a member of the Desoto Parish Police Jury (‘the Davlin letter’)… The letter criticized practices at the Desoto Parish EMS and recommended multiple changes, including replacing certain administrators. Allegedly, Magee then retaliated against Warren.

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Warren alleges a series of harassing actions in the nineteen months between the Davlin Letter and his firing including denying him a promotion, encouraging him to quit, criticizing his religious beliefs, and falsely accusing him of sexual impropriety.

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Eighteen months later, the new co-medical director of the Desoto Parish EMS asked Warren how he and Benfield had become recertified…. Warren explained that, per long standing practice, he had checked to box on the NREMT forms indicating Farquhar’s approval of the training hours…. A week and a half later, Magee allegedly told Warren to quit ‘before something bad happened.’ Around the same time, Magee asked Benfield to attest that McGee had not authorized Warren indicate Farquhar’s approval on the NREMT forms…. Benfield refused …. Magee then terminated both men for falsifying records.”
Holding:

“1. Adverse Employment Action

Discharge is a paradigmatic adverse employment action. *Serna v. City of San Antonio*, 244 F.3d 479, 483 (5th Cir. 2001) (citing *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000)). Because Magee fired Warren, this element is satisfied.

***

2. Speech Involving A Matter Of Public Concern

The second prong requires Warren to have spoken ‘as a citizen on a matter of public concern.’ *Garcetti v. Cellabos*, 547 U.S. 410, 418 (2006)(citing *Pickering v. Bd. Of Education*, 391 U.S. 563, 568 (1968)). The Fifth Circuit approaches this question of law through two inquiries: (1) whether the plaintiff spoke in his ‘his capacity as citizen, not employee’ and (2) whether his speech’s subject matter was of public concern. *Gibson v. Kilpatrick (Gibson III)*, 838 F.3d 476, 481 & n.1 (5th Cir. 2016)….

***

Because the content of the Davlin Letter renders it mixed speech, the Court must give greater weight to the context and form factors. The context of the letter favors a finding that the speech was private, but its form suggests that it was public. Although the question is close, the extensive amount of identifiably public concerns related to community safety and unrelated to Warren’s employment-specific grievances tip the scales enough. The Court finds that Warren has alleged facts that, if true, render the Davlin Letter speech on a matter of public concern.

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1. Pickering Balancing

Derived from the holding of *Pickering v. Board of Education*, 391 U.S. at 568, the third prong requires that Warren’s “interest in commenting on matters of public concern outweigh[ ] [Magee’s] interest in promoting workplace efficiency,” *Burnside*, (citing *DePree*, 588 F.3d at 287; *Click*, 970 F.2d at 113). At the motion-to-dismiss stage, “there is a rebuttable presumption that no balancing is required to state a claim.” *Id.* at 629 (citing *Kennedy*, 224 F.3d at 366 n.9). As Magee does not address this element, the Court holds that the presumption is unrebutted and that Warren’s claim survives dismissal as to the *Pickering* balance.

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4. Causation
To state a claim for retaliatory discharge, an employee must allege facts that plausibly lead to the conclusion that his speech was a “substantial or motivating factor” in his termination.  

*Id.* at 626 (citing *DePree*, 588 F.3d at 287; *Click*, 970 F.2d at 113).

***

Warren alleges a series of harassing actions in the nineteen months between the Davlin Letter and his firing including denying him a promotion, encouraging him to quit, criticizing his religious beliefs, and falsely accusing him of sexual impropriety. [Record Document 1 at 5]. These acts “follow[ed] the submission of the letter.” [*Id.*]. This chronology allows the Court to infer that these acts were a reaction to the letter and presaged Warren’s termination. The Court holds that Warren has sufficiently pleaded causation and so has adequately alleged facts that, if true, establish his entitlement to relief on his First Amendment retaliation theory.

**Legal Lessons Learned:** First Amendment free speech cases are increasing being permitted to go to the jury. Fire & EMS Departments should thoroughly document reasons for termination, including employees who serve “at will.”

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**File: Chap. 6, Employment Litigation**

**NJ: BOROUGH CANNOT ENFORCE $5,000 PENALTY – PROBATIONRY POLICE JOINS ANOTHER PD – NOT TIED TO COSTS**

On June 21, 2018, in *Borough of Madison v. Kevin Marhefka*, the Superior Court of New Jersey / Appellate Division (2 to 0) held “As the Borough’s complaint sought only to collect that unenforceable $5000 penalty, the complaint was properly dismissed with prejudice regardless of whether the penalty was negotiated with the PBA.”


**Facts:**

“The Borough had a collective bargaining agreement (CBA) with the Madison Policemen's Benevolent Association Local 92 (PBA), commencing on January 1, 2014, and continuing through December 31,2017. The CBA recognized the PBA ‘as the sole and exclusive representative for the purposes of collective negotiations concerning rates of pay, hours of employment and other conditions of employment for all full-time patrolmen in the Borough.’ The CBA specified the wages and benefits for such officers. The CBA did not provide either for any incentive if an officer remained on the police force, or for any penalties if an officer left the police force.

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In December 2014, defendant applied for a position as a uniformed police officer in the Borough. Administrator Codey signed a letter dated February 2, 2015 addressed to defendant. The February 2 letter stated:

'I am pleased to inform you that the Mayor and Council of the Borough of Madison will be approving your employment with the Borough of Madison's Police Department on February 9, 2015 at its scheduled meeting. You will be paid an (annual salary/hourly rate) of $40,804.00 and will be afforded all other benefits set forth in any applicable Collective Negotiations Agreement and Employee Handbook.

In accordance with Borough of Madison's practices, you will serve a one (1) year probationary term, that can be extended an additional year at the discretion of Police Chief Darren Dachisen, during which time you can be terminated with or without cause, and such termination is not challengeable through the grievance process and/or otherwise appealable in any manner. If you decide to leave your position with the Borough of Madison Police Department to accept another law enforcement position outside of the Borough of Madison you will be assessed the following penalties in accordance with relevant years of service: (1) $5,000 for the first year; (2) $4,000 for the second year; (3) $3,000 for the third year; (4) $2,000 for the fourth year; and (5) $1,000 for the fifth year.

No penalty will be assessed against you if you decide to leave your position at the conclusion of your fifth anniversary of employment with the Borough of Madison Police Department. Upon completing your fifth year of service you will receive a $5,000 retention stipend. The stipend will not be part of your base pay.'

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Defendant signed the letter underneath the words ‘Acknowledged and Accepted.’ Identical letters dated February 2, 2015, were sent to four other officer candidates, and were signed ‘Acknowledged and Accepted’ by them.

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Defendant became a member of the PBA. He served as an officer for the Borough without incident. However, he was offered a position as a police officer by the Township of Boonton where he resides. He accepted the Boonton position and voluntarily resigned his position on December 11, 2015…. In a letter dated January 20, 2016, [Police Chief] Dachisen quoted the February 2 letter and informed defendant that according to ‘the terms and conditions of your employment with the Borough’ you are contractually obliged to reimburse the Borough . . . $5,000.00 for resigning and accepting another law enforcement position outside of the Borough during the first year of your probationary appointment.’

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On February 16, 2016, the Borough filed a complaint against defendant seeking to recover the $5,000. After defendant filed an answer, he filed a motion for summary judgment. Plaintiff cross-moved for summary judgment. On June 20, 2016, the trial court heard oral argument on the motions, granted summary judgment in favor of defendant, and dismissed plaintiff’s complaint with prejudice. Plaintiff appeals.”

Holding:

“Historically, New Jersey courts have distinguished between liquidated damages and penalty clauses. Wasserman's, Inc. v. Twp. of Middleton, 137 N.J. 238, 248 (1994). On the one hand, ‘[l]iquidated damages is the sum a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damages that will probably ensue from the breach, is legally recoverable as agreed damages if the breach occurs,’ and are enforceable…. On the other hand, ‘[a] penalty is the sum a party agrees to pay in the event of a breach, but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach,’ and is unenforceable.

As the law has evolved, . . . ‘reasonableness' emerges as the standard for deciding the validity of stipulated damages clauses.

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First, the amounts assessed in the February 2 letter were not ‘a reasonable forecast of the provable injury resulting from breach.’ Wasserman's, 137 N.J. at 249 (citation omitted). The Borough principally contended an officer's resignation during the first five years deprives the Borough of ‘the experience and knowledge that the resigning officer earned while working for the Borough’ and compels the Borough to ‘hire a brand new, inexperienced officer.’ The Borough's argument suggested the cost of losing the resigning officer would increase with the increase in the officer's years of experience. However, the amounts assessed in the February 2 letter decrease with the increase in the officer’s years of experience at the time of resignation: $5000 in the first year; $4000 in the second year; $3000 in the third year; $2000 in the fourth year; and $1000 in the fifth year.

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Second, as the trial court found, the harm to the Borough was not ‘incapable or very difficult of accurate estimate.’ Wasserman's, 137 N.J. at 250 (quoting Westmount, 82 N.J. Super. at 206). The Borough contended it paid other officers overtime to cover defendant's duties, but the costs of overtime should not be very difficult to estimate. The CBA specifies the rate of overtime at ‘one and one-half time [an officer's] regular straight time hourly rate of pay,’ which is also specified in the CBA. Similarly, the cost of hiring a new officer does not appear very difficult to estimate.

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Third, the $5000 the Borough attempted to assess against defendant was not ‘reasonable under the totality of the circumstances.' Id. at 495 (citation omitted). As the trial court
noted, the February 2 letter’s provision would require this Officer to disgorge an amount of $5,000, dropping his first year salary to $36,000, a significant penalty to him.

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Footnote 3:

On appeal, the Borough concedes it ‘is not seeking the reimbursement of training costs’ through the assessments in the February 2 letter. As the trial court noted, the Borough demanded $4151.94 reimbursement from Boonton for the ‘costs incurred by the former employer in the examination, hiring, and training of defendant under N.J.S.A. 40A:14-178(a), and invoiced Boonton for the cost of his bulletproof vest. We are told Boonton paid the Borough.’”

Legal Lessons Learned: Penalties for resigning to take a new job are often challenged, and difficult to enforce, as compared to reimbursement for training costs and equipment. Some states impose training costs on the new public employer, such as NJ (2013 statute):

https://law.justia.com/codes/new-jersey/2013/title-40a/section-40a-14-178/

40A:14-178 Liability for training costs; terms defined.

1. a. Whenever a person who resigned as a member of a county or municipal law enforcement agency is appointed to another county or municipal law enforcement agency, the police department of an educational institution pursuant to P.L.1970, c.211 (C.18A:6-4.2 et seq.), a State law enforcement agency or the New Jersey Transit Police Department pursuant to section 2 of P.L.1989, c.291 (C.27:25-15.1) within 120 days of resignation, and that person held a probationary appointment at the time of resignation or held a permanent appointment for 30 days or less prior to resignation, the county or municipal law enforcement agency, educational institution or State law enforcement agency appointing the person, or the New Jersey Transit Corporation, is liable to the former county or municipal employer, as appropriate, for the total certified costs incurred by the former employer in the examination, hiring, and training of the person.

File – Chap. 18, Legislation

**WY: STATE STATUTE ALLOWS “VOLUNTEER” & “POOL” FF WHO RECEIVE PAY TO BE IN UNION**

On July 6, 2018, in IAFF Local 5058 v. Gillette / Wright / Campbell County Fire Protection Joint Powers Board, and IAFF Local 5067 v. Teton County and Town of Jackson, the Wyoming Supreme Court held (5 to 0) that the two new unions were not properly elected, and the Fire Districts did not need to negotiate collective bargaining agreements, because the “volunteer” and “pool” firefighters all receive pay for making runs.

“The district courts in both cases held that the Wyoming Collective Bargaining for Fire Fighters Act’s definition of ‘fire fighters’ includes volunteers because they are ‘paid members of . . . regularly
constituted fire department[s].’ Consequently, the district courts concluded that IAFF Local 5058 and IAFF Local 5067, which were formed by and consist of only full-time, career fire fighters, were not properly constituted bargaining units under the Act. We affirm.

https://services.courts.state.wy.us/Documents/Opinions/2018WY75.pdf

Facts:

CAMPBLE COUNTY FIRE DISTRICT

“The City of Gillette, the Town of Wright, and Campbell County formed a Fire Protection Joint Powers Board (the Campbell County Joint Powers Board), which oversees the Campbell County Fire Department (CCFD). CCFD covers 5,000 square miles and responds to ‘approximately 2,000 calls for assistance each year. ’CCFD employs two categories of fire fighters: full-time, career fire fighters and volunteer fire fighters. Currently there are 23 career fire fighters and 200 volunteer fire fighters in the CCFD.

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Unlike full-time, career fire fighters, CCFD volunteer fire fighters do not have a set schedule and receive no consequences for refusing a shift. They are not eligible for sick or vacation leave. Like their full-time counterparts, however, volunteers are compensated for their efforts. They earn compensation for responding to incidents and attending trainings and meetings. In 2015, CCFD paid volunteers a total of $213,051.41 for 23,383.56 hours of work, an average of $9.11 per hour.

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In July 2015, a majority of the CCFD career fire fighters voted to select IAFF Local 5058 as their sole and exclusive bargaining agent pursuant to Wyo. Stat. Ann. § 27-10-103. Full-time, career fire fighters with the rank of Captain or below were eligible to vote for the establishment of IAFF Local 5058. Volunteer fire fighters were not allowed or invited to vote in the election. The IAFF approved the constitution and by-laws of IAFF Local 5058 on September 10, 2015.

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By letter dated September 11, 2015, a copy of which was provided to IAFF Local 5058 President Borgialli, the Campbell County Attorney requested the opinion, and on November 16, 2015, the Wyoming Attorney General’s office responded. The Attorney General concluded that the Campbell County Joint Powers Board is the appropriate corporate authority to negotiate with IAFF Local 5058 and that volunteer fire fighters are ‘paid members’ of the CCFD…. The Campbell County Joint Powers Board responded on February 25, 2016, and, relying upon the Attorney General’s opinion, it concluded that it would ‘not recognize Local Union No. 5058 as the collective bargaining unit for the Campbell County Fire Department because the volunteer firefighters were not included in the election process.’”

TOWN OF JACKSON & TENTON COUNTY
The Town of Jackson and Teton County entered into a joint power agreement, pursuant to Wyo. Stat. Ann. § 16-1-105, to form a joint fire and emergency medical services department known as the Jackson Hole Fire/EMS Department (JHFD). JHFD employs 18 full-time, career fire fighters; 7 part-time ‘pool’ fire fighters; and 79 volunteer fire fighters.

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JHFD volunteer and pool fire fighters also receive compensation for their work. Volunteers are paid pay per call for responding to incidents and approved training, and Receive hourly pay for ambulance transfers and special events. Pool fire fighters receive hourly pay, including a $1 per hour bonus for each hour worked in each shift completed, and special event pay (double time if the event is outside their normal shift).

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On July 13, 2015, the full-time, career fire fighters employed by the JHFD formed the IAFF Local 5067, Jackson Hole Professional Firefighters union. Only ‘paid full-time firefighters’ are eligible for membership in IAFF Local 5067. Neither the volunteer nor the pool firefighters were included in the union voting.

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On March 21, 2016, relying upon the Attorney General’s opinion, Teton County and the Town of Jackson informed IAFF Local 5067 that they would not recognize the union as the exclusive bargaining agent for the fire fighters and that negotiations would cease.”

Holding:

“The Unions claim that an interpretation of the statute that includes volunteers as fire fighters who can collectively bargain in the same unit as full-time, career fire fighters would disregard the discrepancy in interests between the full-time and volunteer members of their departments. However, the record belies this contention and illustrates that the full-time and volunteer fire fighters have numerous common interests. Mr. Borgialli, president of IAFF Local 5058, set forth the reason for unionizing in Campbell County in an email to the president of Federated FireFighters of Wyoming:

‘The points we would like to stay away from is pay, insurance and benefits. Our reason for joining the union at this point is Staffing, Safety, Job Security/Protection, Due Process, and Communication. We do not wish to drive a wedge between career and volunteer staff. We look forward to building a relationship with them and continue to move the fire department in a positive, forward direction.’

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The Unions also contend that in our examination of ‘context,’ we should look to other states’ laws regarding collective bargaining for fire fighters. They argue that because other states such as Utah, Oklahoma, Rhode Island, and Colorado specify that only
full-time or permanent members of any fire department are considered ‘fire fighters’ for collective bargaining purposes, we should likewise conclude that our legislature meant to exclude volunteers from collective bargaining. Those other states’ statutes, however, expressly define ‘fire fighters’ as either ‘permanent’ or ‘full time’ employees of their fire departments.

In contrast, our statute contains no such language. We will not add that language in the guise of statutory interpretation.

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CONCLUSION

The definition of ‘fire fighters’ as ‘paid members of any regularly constituted fire Department’ is unambiguous and includes volunteer and pool fire fighters in Campbell and Teton counties. Further, the ‘context’ in these consolidated cases does not require a different interpretation. Accordingly, we affirm.”

Legal Lessons Learned: Drafting of legislative language is very important, along with creating a clear “legislative history” to avoid any question about whether volunteer and part-time firefighters can be covered in a collective bargaining agreement.