FIREHOUSE LAWYER

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FIREHOUSE LAWYER HOSTS ON INFERNO

For those of you on the Internet, we are excited to announce that in early February I have debuted as a host on the Inferno fire and EMS forum website, which is also the home of the Washington State Association of Fire Chiefs and various other hosts. The URL is www.ifsn.com. On my website there you can read the current and back issues of *The Firehouse Lawyer*, and also order products I have created, as well as find other links to law related services. My e-mail address is shown elsewhere in this publication.

BOARD MEMBERS AND THE FIRST AMENDMENT

Often, I have been asked for legal opinions concerning the First Amendment freedom of expression and freedom of association rights of elected fire commissioners. This is an area fraught with danger, as a recent federal case shows. A Missouri woman was elected to the board of a county ambulance district. The board adopted, over her objection, a resolution limiting her participation as a member of the board because her husband had worked as an emergency medical technician and supervisor for the district for the past two years. The board was seeking to prevent misuse of information for personal gain and the appearance of impropriety. The board also wanted to promote free and open discussion among members of the board. However, the resolution restricted her participation in discussion and voting on various employment matters, without regard to whether her husband was associated with the matters. She filed suit in federal district for injunctive relief, alleging violations of her rights under the First and Fourteenth Amendments to the U.S. Constitution and the free speech provisions of the Missouri Constitution. When the district court ruled against her, she appealed to the 8th Circuit Court of Appeals.

The Court of Appeals reversed, finding that the resolution violated her First Amendment associational rights and her Fourteenth Amendment equal protection rights. The Court applied what is known as the rational basis standard, which ordinarily is a relatively easy standard to satisfy. The government is only required to show that the restriction in question is rationally related to a legitimate state interest. The Court reasoned that this standard, as applied to restrictions on candidacy for office should also be applied to such restrictions after election. The resolution's restraint on the woman's interactions with other board members by restricting her participation or even listening to discussions, not directly related to her husband, did not meet the rational basis test. The resolution was not rational in the sense that it would not tend to achieve the

First Amendment...

(continued)

interests asserted by the board to support it. The Court further found that the resolution violated her equal protection rights because it created a standard specific to her that treated her differently from other board members. See Peeper v. Callaway County Ambulance District, 122 F.3d 619 (8th Cir. 1997).

The lesson to be learned from this case is that, while a board of commissioners or other legislative body may adopt rules of procedure, and while such rules may address restrictions on participation by board members in deliberations, meetings, hearings and discussions of the board, such regulations must be carefully tailored. For example, if a board member had a direct or indirect pecuniary interest in a certain company, clearly the board could excuse that board member from participation whenever that company was involved in any kind of business dealings with the municipal corporation. Similarly, a restriction on a board member dealing with personnel matters directly affecting or actually involving the performance, evaluation or discipline of a member of their immediate family would appear to be a defensible restriction. The rational basis test, as opposed to some stricter form of scrutiny sometimes found under the First or Fourteenth Amendments to the U.S. Constitution would seem to be the appropriate standard. However, the board must be careful as to the scope and breadth of the restrictions.

FLUCTUATING WORKWEEK DOES NOT VIOLATE FLSA

A federal district court in South Carolina has held that the fluctuating workweek method of calculating overtime payments to pay law enforcement deputies and jailers does not violate the FLSA. Under the fluctuating workweek method allowed by 29 C.F.R. Section 778.114, an employee is paid a weekly wage on a salary basis with the understanding that for all overtime work, they will receive a rate not less than one-half the regular rate of pay. In this particular case, county policy provided that the employees would receive full regular pay during any week even if they did not work 40 hours. Leave time and holiday pay were subject to reduction. The district court noted that because there was no actual practice of making deductions for time off from work, nor a policy creating a significant likelihood of such deductions, the employees were salaried and not hourly employees. Because accrued leave and holiday pay are fringe benefits and not predetermined pay, any reduction in those did not affect the employees' status as salaried employees. The district court granted the county's Motion for Summary Judgment and held the FLSA not violated. See Aiken v. County of Hampton, South Carolina, 977 F.Supp. 390 (D.S.C. 1997).

WORKPLACE SEARCH HELD REASONABLE

In Illinois, a child protective investigator in her employment was required to investigate child abuse, neglect and sexual abouse. Her duties included photographing evidence for use in court. Because her office had limited storage, she bought a file cabinet and storage unit in which she locked the evidentiary photographs and other equipment, files and documents. A co-worker anonymously informed a detective in the Sheriff's Department that this investigator had pornographic pictures of children in her file cabinet at work. Law enforcement officers then came to the investigator's office, entered it, unlocked the storage unit and pried open the file cabinet and desk. The supervisors called the detective who had received the tip, who came to the office and then told them the photographs were evidence and not pornography. When the employee/investigator found out about the search, she sued her supervisors and police officers in

WORKPLACE SEARCH... (continued)

state court under 42 U.S. Code Section 1983 for violating her rights to be free from unreasonable searches and seizures under the Fourth Amendment. The case was removed to federal district court, which dismissed the case, but the investigator appealed it to the 7th Circuit Court of Appeals.

The investigator argued on appeal that the reasonableness test as to workplace searches from O'Connor v. Ortega, 480 U.S. 709, 107 S.Crt. 1492, 94 L.Ed.2d 714 (1987) was inapplicable because the search was not a workplace search but a criminal investigation.

The Supreme Court has held that a warrant or probable cause standard does not apply when a government employer searches an employee's office, desk or file cabinet to retrieve government property while investigating work related misconduct. Here, even though the cabinets were purchased by the employee, she used them primarily for the storage of work related materials. Therefore the court said she did not have a reasonable expectation of privacy in the file cabinet or storage unit. Her desk also likely had work related materials in it. Under Ortega, a workplace search is reasonable if it is justified at its inception and reasonably related in scope to the circumstances that prompted the search. The search here met both prongs of the test.

Although the tip was anonymous, it showed sufficient signs of reliability and made serious and specific allegations of misconduct. The tip stated where the pictures could be found. Even if the supervisors were sloppy in the search procedures, their search did not extend to places where the pictures would not reasonably have been found. Finally, the presence of police officers did not transform the supervisor's work related search into a criminal search requiring probable cause and a warrant. Therefore the Court affirmed the dismissal of the case. See Gossmeyer v. McDonald, 128 F.3d 481 (7th Circuit 1997).

One thing that strikes me about the case is the incredible stupidity of the supervisors. If it was the job of the child protective investigator to investigate child abuse, including sexual abuse, and if her job included evidentiary photographs, the supervisors had other options. I would recommend that given such an anonymous tip, if the police showed up with that allegation, the supervisors should have notified the employee and called her in to be present at the very least. If the supervisors knew what the investigator's job was, they could have realized the possible false allegation, confronted the employee with the allegation and gotten a very reasonable explanation.

Of course, there is a potential for abuse of such photographs. Recently, in Pierce County, Washington there have been allegations that a coroner's investigator used photographs of deceased persons in an improper manner. While the photographs were properly collected as part of evidence in a coroner's investigation or in relation to an autopsy, the photographs were thereafter released to persons with no right to the information. This caused grief and anguish for relatives of the deceased, who asserted various claims of intentional or negligent infliction of emotional distress, the tort of outrage and related invasion of privacy claims against the county. Thus, while it is possible for evidence correctly collected to be the subject of misuse, we submit that warrantless searches of employee areas should not be done lightly, and that there are other options.

Recently, the author has participated in the drafting of a detailed resolution on this subject, after researching all of the relevant case law and a reasonably well-balanced and crafted resolution has been the result of that work.

LAYOFF DISTINGUISHED FROM TERMINATION FOR CAUSE

In the State of Indiana, a town council held its annual public hearing on the budget. At the hearing, a council member proposed that the number of law enforcement deputies be reduced by two. The budget was adopted, effectively terminating the employment of the two least senior police officers as of the end of the year. The officers filed suit in state court, asserting that the council had illegally terminated their positions by failing to give them notice and a hearing as required by state law. They also alleged that the council had not acted in good faith in eliminating their positions. After losing in the trial court, the officers appealed to the Court of Appeals of Indiana. On appeal, the town argued that the statute contained an economic exception authorizing elimination of positions when economic conditions dictated. The Court agreed, holding that the officers were dismissed for economic reasons as distinguished from disciplinary reasons. The actions were position-directed and not person-directed and therefore the officers were not entitled to the procedures available in "for cause" dismissals. The Court also determined there was no showing of bad faith on the part of the council when it reduced the budget, eliminating the positions.

We submit that this particular result would be the traditional and readily predictable result given the factual circumstances. See Pfifer v. Town of Edinburgh, 684 N.E.2d 578 (Ind.App. 1997).

OVERTIME EXEMPTION - COMPUTER PROFESSIONALS

Currently, both Washington State and the federal Dept. of Labor recognize an overtime exemption for computer professionals. Unlike most of the exemptions, computer professionals need not be paid on a salary basis to be exempt. Their rate of pay must be at least $27.63 per hour. In Washington the exemption is limited to highly skilled employees who possess a high degree of theoretical knowledge and understanding of computers, system analysis, programming and software engineering, and are able to apply that knowledge and understanding to highly specialized computer fields. To qualify, the computer professional's primary duty must be either: (1) applying systems analysis techniques and procedures to determine hardware, software or system functional specifications for a user; (2) following specifications to design, develop, document, analyze, create, test or modify any computer system, application or program including prototypes; or (3) designing, documenting, testing, creating or modifying computers systems, applications or programs for machine operations systems.

Also, other typical professional requirements apply. The employee must consistently exercise discretion and judgment in the application of their specialized knowledge and must engage in work that is predominately intellectual and inherently varied in character. The state exemption does not apply to employees covered by collective bargaining agreements, which typically would provide for overtime.

This new Washington rule parallels the FLSA. DOL regulations issued in 1992 allow computer employees to qualify for the professional exemption under a special duties test. If their primary duty consists of applying systems analysis techniques and procedures; designing, developing, documenting, analyzing, creating, testing or modifying certain operating systems or programs or a combination of the above, then they should qualify. See 29. C.F.R. Section 541.303(b). The federal regulations note that while

OVERTIME EXEMPTIONS... (continued)

employees typically have a bachelors or higher degree, no degree is required for the exemption. This is a significant difference as compared to other

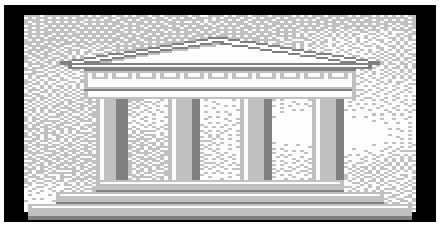
professionals who are exempt. Until the 1992 Dept. of Labor regulations were enacted, court cases on this issue were conflicting. While some courts had held systems analysts and technical writers exempt, this was not a unanimous situation.

EXEMPT EMPLOYEES - ALLOWABLE DEDUCTIONS

There has been much activity and commentary lately on the effect of deductions from salary of exempt employees, and whether that creates non-exempt status for purposes of FLSA overtime regulations.

In a recent Dept. of Labor opinion letter, further clarification was added. Deductions from the salary of exempt employees for infractions of major safety rules or in increments of an entire week are permissible under the FLSA's salary basis test. In an opinion written by Daniel F. Sweeney of the Office of Enforcement Policy, Fair Labor Standards Enforcement, the DOL clarified this exception. Sweeney noted that according to FLSA regulations, penalties imposed in good faith for infractions of safety rules of major significance are the only type of disciplinary deductions an employer can make from the pay of an exempt employee. Major safety rules include only those relating to the prevention of serious danger in the workplace or to other employees such as rules prohibiting smoking in explosive places, such as oil refineries and coal mines. Therefore, as to the employer's first proposed provision, Mr. Sweeney stated that allowing deductions in pay for employee violations of major safety rules would not violate the salary basis test. As to the second provision suggested by the employer on suspending workers for entire weeks, Sweeney said that DOL's position has been that an employee need not be paid for any work week in which they perform no work.

With respect to fire departments, given the promulgation of detailed safety standards by OSHA at the federal level and by, for example, the Dept. of Labor & Industries in Washington under the authority of the Washington Industrial Safety & Health Act, it would behoove fire departments to specify what <u>are</u> the major safety regulations. Typical examples might be intentional disregard for statutory guidelines on operation of emergency equipment while operating a motor vehicle, failure or refusal to wear breathing apparatus when required due to operating in hazardous atmospheres or other failure to follow safety related rules on the fire ground.



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INFERNO WEBSITE: If you're not reading this issue online, you could be. Go to www.ifsn.com and you'll find The Firehouse Lawyer <u>and</u> many fire-service features.

NOTA BENE:

Since January 1, 1997, I have developed a fire department safety checklist and a set of forms for safety officers. Designed to help fire departments comply with the new WAC 296-305 safety standards, these materials are available to fire departments throughout the state, subject to payment of $50.00 to defray reasonable copying and mailing costs.

In June, 1997, a model Safety Resolution and complete set of operating instructions (SOPs) were completed, to comply with the "vertical standards". Cost $100.

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