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IN THIS ISSUE . . .

THE REMEDIES IN ARBITRATION

In a decision out of San Joaquin County, California, Arbitrator Bonnie Bogue dealt with a wide range of issues concerning the remedies available in arbitration when an employee has been wrongfully discharged. The Arbitrator had already held that the County had no just cause to terminate the employee; what gave rise to a supplemental decision was a disagreement between the employer and the labor organization over the appropriate remedies.

The most important remedial issues were whether the employee was entitled to compensation for missed overtime, how missed health care benefits and pension contributions should be dealt with, whether the employee was entitled to missed leave accruals and holiday pay, whether the employee should be reimbursed for attorney fees, and what level of interest was appropriate on the back pay.

The Arbitrator began by finding the employee was entitled to compensation for missed overtime. The Arbitrator acknowledged that "finding a reasonably accurate measure of the amount of overtime a terminated employee would have worked, but for the termination, is often problematic. A remedy must not be speculative, but rather should be grounded on persuasive evidence of the amount of overtime the employee would have worked, but for the improper termination."

The Arbitrator concluded that the evidence showed "a significant and consistent pattern of the employee taking overtime work, and her argument is persuasive that she would have worked more overtime than did her replacement because of her technical expertise and years of experience. The evidence supports the conclusion that she, at a minimum, would have worked 3.7 hours a month. The employee may have worked more overtime than that, given her consistent history of accepting overtime and working significantly more overtime than those under her supervision; however, estimating how much more overtime would have been available to her would require speculation that cannot be substantiated by the evidence."

The Arbitrator then turned to the issue of health care benefits. The County had already restored the employee's medical, dental, and vision benefits as though she never had a break in service. When she was reinstated and these benefits were restored, the County told the employee that she could submit any claims and expenses for medical, dental or vision expense she incurred during her absence from employment.

The Arbitrator found that the County had to do more: "Instead of a 'retroactive restoration' of benefits, the employee is entitled to a make-whole award reimbursing her for out-of-pocket medical, dental or vision expenses she had to pay, that would have been covered had she been covered by the County's plan, and/or for her contribution or premiums paid, if any, to obtain medical, dental and vision insurance coverage during the period of her separation, including an employee's contribution to any plan provided by her alternative employment."

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CONTRACTS IN THE NEWS

JURISDICTION	THE MONEY	THE DETAILS
Billings, Montana Police Department	• July 1, 2013, 2.9%	▸ Two-year agreement. ▸ The new contract includes an "absence control agreement," that subjects an employee to progressive discipline for using sick leave under false pretense.
Bristol Township, Pennsylvania Police Department	• January 1, 2013, 4% • January 1, 2014, 3.5% • January 1, 2015, 3.5% • January 1, 2016, 4%	▸ Arbitrated contract. ▸ New agreement institutes a Deferred Retirement Option Plan.
Lawrence, Massachusetts Fire Department	• July 1, 2013, No increase • July 1, 2014, No increase • July 1, 2015, 2.5% increase • July 1, 2016, 2.5% increase	▸ The new contract includes no givebacks by the union, adjusts the formula for calculating longevity and gives firefighters more flexibility in scheduling the three personal days off that they receive. ▸ Health benefits are unchanged.
Los Angeles County, California Sheriff's Office	• July 2013 to January 2015, 6% raise in three increments of 2%	▸ First wage increase for deputies in five years.
Parma, Ohio Police Department	• January 1, 2012, No increase • January 1, 2013, 1.75% • January 1, 2014, 2.25%	▸ Raises recommended by fact finder's report.
Taunton, Massachusetts Police Patrolmen's Association, Police Supervisory Personnel Association and Firefighters	• July 1, 2011, 1.0%, but no retro pay • July 1, 2012, 2%, but only 1.0% retro • July 1, 2013, 3%	▸ Sick time buy-backs capped at 200 days for retiring employees.
Tinley Park, Illinois Police Department	• May 1, 2012, 2% • May 1, 2013, 2% • May 1, 2014, 2.5% • May 1, 2015, 2.5%	▸ Under the new agreement, officers will pay a percentage of their health care costs rather than a flat amount.

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Florida Fire Chief Not Entitled To Notice Before Termination

William Amador was the Fire Chief for the Town of Palm Beach in Florida. As Fire Chief, Amador was a part of the Town's management team involved in negotiations with the firefighters' union concerning the Town's pension plans.

Evidence came to the attention of Town Manager Peter Elwell that Amador had been feeding confidential information to the Union and that he had participated in the creation and maintenance of a website, www.palmbeachpensions.com, supporting the Union's position. Amador denied any wrongdoing. Believing that Amador had deceived the town, Elwell decided to fire Amador and explained in a memorandum that Amador's release was due to his involvement with the website and his alleged sharing of confidential information. The termination occurred without notice, a hearing, or an interrogation, and the firing was solely Elwell's decision. The Town offered Amador a post-termination hearing to clear his name, but Amador refused.

Nothing in the Town's ordinances required a hearing before Amador's termination, and Amador admitted in a deposition that he understood himself to be an "at-will" employee. Under the Town's ordinances, the Fire Chief serves at the pleasure of the Town Manager and may be removed for the "good of the Town."

Amador sued the Town, claiming that under Florida's statutory Firefighters' Bill of Rights, he could not be fired without notice and a hearing. The federal Eleventh Circuit Court of Appeals disagreed, and rejected Amador's lawsuit.

The case turned on a provision in the Bill of Rights that lays out ground rules for "interrogations." The Court found that nothing in the Bill of Rights actually required an investigation prior to discipline; rather, the Bill of Rights simply laid out the procedures that would have to be followed in the event the employer conducted an investigation:

"There is nothing in the statute that requires supervisors to conduct a formal investigation before termination. A plain reading of the phrase 'whenever a firefighter is subjected to interrogation' strongly suggests that the Legislature intended to provide firefighters with certain rights only if and when they are made the subject of an interrogation. Neither does any other provision of the statute require that firefighters receive pre-termination notice. Rather, the notice provisions can only be found in connection with interrogation.

"This statutory structure is different from that of the 'Policemen's Bill of Rights' (PBR). Under the PBR, the rights of law enforcement officers under investigation are roughly analogous to the firefighter rights, but a separate section of the PBR specifically references 'notice of disciplinary action' and makes clear that no punitive action can be taken against a police officer without notice. The FBR does not contain a similar notice section. Where the Legislature has chosen to use a term in one section of a statute but omitted it in another, courts should not imply the term where it has been excluded."

Amador v. Town of Palm Beach, 2013 WL 1748939 (11th Cir. 2013).

One Council Member's Improper Motive Does Not Void Entire Council's Termination Decision

Laura Watson was a police officer for the Borough of Susquehanna, Pennsylvania. Michael Matis was president and William Perry, Jr. was vice-president of the Borough's Council, which makes decisions regarding disciplining or terminating Borough police officers. Such decisions require a majority vote of the Council members present.

In May 2008, Watson brought charges against William Perry, Sr., father of Perry, Jr., for filing false reports. Watson provided sworn testimony in connection with the charges in July 2008. Perry, Sr. eventually pled guilty to the charges against him. Shortly thereafter, Watson learned that her Section 8 housing assistance form had been seen by some members of the Council.

Watson believed the disclosure of this form violated her rights and confronted the Secretary-Treasurer of the Council, Ann Stewart, who was in charge of the housing forms. According to Stewart, Watson grew angry and threatened her. The Council called a special meeting to address the incident between Watson and Stewart. At this meeting, Watson again became angry and aggressive. Six members of the Council, including Perry, Jr. and Matis, voted unanimously to terminate Watson.

Watson sued the Borough, Perry, Jr., and Matis, claiming that she was retaliated against for exercising her First Amendment right to speech. In May 2012, a jury rendered a verdict in favor of all Defendants, except Perry, Jr. The jury found that Perry, Jr. had voted to terminate Watson in retaliation for her testimony against his father.

The federal Third Circuit Court of Appeals overturned the jury's verdict. The Court found that "Watson cannot establish the required causal link in order to hold an individual decision maker liable when less than a majority of the decision-making body acted for an impermissible retaliatory reason. Because the jury found that Perry, Jr. was the only Council member who acted for an impermissible purpose, and the votes of a majority of Council members are required to terminate Watson, Perry, Jr.'s vote alone cannot establish the causal link between Watson's protected activity and her termination."

Watson v. Borough of Susquehanna, 2013 WL 3803893 (3d Cir. 2013).

The Remedies In Arbitration

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On the issue of pension benefits, the employee asked the Arbitrator to require the County to make retroactive contributions to the pension plan, but was unwilling to pay the mandated employee contribution. The Arbitrator was unwilling to go that far, finding that "requiring the employee to pay her own contribution is consistent with the law, and places her in the same position she would have been in had she not been terminated. Because the contribution goes into the pension plan to credit the employee's account, the deduction from her backpay award for that purpose benefits her, and does not enrich the County."

The Arbitrator then turned to the dispute over how to treat the employee's leave accruals during the period of her discharge. The arbitrator ruled that the employee was entitled to "all vacation and sick leave accruals she would have earned but for her termination," including paid holidays.

The Arbitrator rejected the employee's request for attorney fees. The Arbitrator noted that the employee "elected to use an independent attorney rather than a union representative or an attorney provided by the union. The union has a duty under the law to fairly represent her in a grievance, representation that the union pays for and for which she would have incurred no expense.

"In labor arbitration, the common approach to attorneys' fees is known as the 'American Rule,' under which each party bears its own attorneys' fees. In lawsuits, an award of attorneys' fees to the prevailing party is often part of the judgment. In contrast, in labor arbitration or civil service appeals, the American Rule is the norm; each party bears its own costs of representation, be it by in-house staff or by an outside consultant or attorney. The employee has offered no rationale for the award of attorneys' fees as an exception to this long-established standard or the state statute incorporating that standard."

On the question of interest, the Arbitrator concluded that "justification for an award of interest is that, during the period in which the employee was off the job due to her wrongful dismissal, she lost the opportunity to use the moneys she would have earned but for her termination. An award of interest serves to make her truly whole for the lost use of the earnings to which she was entitled.

"However, interest accrual is tolled for certain periods, for the following reasons. The delay of 25 months (so far) after the award in implementing the backpay remedy is extraordinary, in this Arbitrator's 30-plus years of experience. A certain amount of delay may be reasonable and even necessary, to allow time to study the County's calculations, to determine what evidence is needed to rebut those calculations, to study detailed payroll records, and to come up with alternate backpay calculations. Likewise, some delays can be attributed to time constraints owing to counsel's workload (such as trials and trial preparation) or possibly personal circumstances that could have affected both the employee and her counsel's ability to focus on this issue.

"But since neither the employee or her counsel has plead any exceptional circumstances, these two lengthy periods (one of 34 weeks and one of over 12 weeks) were unreasonably long, unnecessarily delaying the County's ability to discharge its liabilities by issuing the employee the backpay to which she is entitled. The County's liability in the form of interest must not be increased by extraordinary and unexplained delays caused by the employee and over which the County had no control. The County itself showed due diligence by responding in a timely manner to requests for documents, to requests for discussions, or to correspondence received from Appellant's counsel."

County of San Joaquin, 130 LA 697 (Bogue, 2012).

The Importance Of How A Grievance Procedure Is Worded

Often, the parties to collective bargaining agreements pay little attention to how a grievance procedure is worded, simply renewing the old version of the grievance procedure each time a new contract is negotiated. A recent case from the Illinois Court of Appeals illustrates why the specific wording of a grievance procedure can be critical in how a contract will be interpreted.

The case involved William Kovarik, a police officer for the City of Naperville. The City's Department of Public Works (DPW) is responsible for snow removal from city streets and cul-de-sacs. Each snow season, the DPW hires employees from other City departments to drive snow plows and remove snow from cul-de-sacs. It is a voluntary program available to employees during their off-duty hours. The program is solely controlled and managed by DPW. The Police Department does not have a role in hiring, firing or managing snow plow drivers.

During the winter of 2009, Kovarik applied with the DPW to participate in the voluntary snow removal program. After he was not hired, he filed a grievance under the contract between the City and the Fraternal Order of Police (FOP), Kovarik's labor organization, claiming that he had a contractual right to snow plow work and that he was wrongly denied the opportunity to plow snow. An arbitrator granted the grievance, and the City challenged the Arbitrator's opinion on the grounds that the grievance was not subject to arbitration under the grievance procedure.

The Court of Appeals sided with the City. The Court reasoned that "here, the parties' CBA indicated that only a grievance that involved an express provision would be subject to arbitration. This necessarily means that not every grievance a police officer had with the City would be subject to arbitration. Further, 'express' means that which is 'clearly and

unmistakably communicated; directly stated.' There is no provision in the CBA that directly states that a police officer may seek to arbitrate the City's failure to hire him to drive a snow plow while he was off duty. As the CBA indicates that the parties had the right to seek the inclusion of such an issue in the agreement, but none is included, there is an inference that the parties did not reach an agreement to arbitrate that issue. Pursuant to the plain language of the CBA, the City was not obligated to arbitrate the underlying dispute with the FOP.

"In so ruling, we reject the FOP's argument that the section 4.1 of the CBA constituted an express provision that required the parties to arbitrate the underlying dispute. Section 4.1 refers to the City's ability to make reasonable rules, regulations, and orders in determining the services and missions of the Police Department. That section does not specifically refer to the City's ability to establish rules for other work that police officers do for the City while they are off duty. To interpret section 4.1 as broadly as the FOP asks that we do would essentially render meaningless the contract's requirement that only a grievance involving an express provision of the CBA be subject to arbitration. That, of course, we decline to do."

City of Naperville v. Illinois FOP, Labor Council, 2013 WL 3880127 (Ill. App. 2013).

Are Statements Made In A Background Check Completely Privileged?

Travis Minke was a Community Service Officer (CSO) for the Minneapolis Police Department. In December 2007, Minke resigned from the CSO program after his conditional job offer with the Minneapolis Police Department was rescinded.

After separating from his employment with the City, Minke applied to work for other police departments. Minke applied for a position with the Mounds View Police Department. As part of a background investigation, Minke named Sergeant Janice Callaway as the contact person regarding his prior employment with the City, and authorized her to release information about him. A Mounds View investigator, Officer Kirk Leitch, interviewed Callaway regarding Minke. During the interview, Callaway made several statements that Minke asserted were defamatory, including "attacks on Minke's honesty, integrity, character, work ethic, and performance." Minke contended that Callaway's statements to Officer Leitch caused Mounds View not to hire him.

Minke sued the City and Callaway, claiming he was the victim of defamation of character. The Minnesota Court of Appeals recently had to decide whether Callaway's statements were "absolutely privileged" – meaning they could never be the basis for a lawsuit – or were "conditionally privileged," meaning that they could be the basis for a lawsuit if Minke could prove that the statements were made with malice.

The City argued that Callaway's statements were entitled to absolute privilege because they concerned the fitness of a potential hire for a police department, and that the public interest at stake in ensuring the good character of police officers outweighs Minke's interest in having his defamation claim vindicated. The City relied on a prior court decision holding that preparing a police report is a key part of an arresting officer's job, and that without absolute privilege instead of preparing a detailed report, the officer will be tempted to leave out certain details, thus frustrating the execution of a police officer's important job duties.

The Court was not convinced. The Court noted that the prior case also held that "although statements made by an arresting officer in a police report are absolutely privileged, those same statements are not privileged if given to the media, even if making a statement to the media is allowed under police department policy. Based on this record, we conclude that responding to requests for information regarding the fitness of former employees was not essential to the performance of Callaway's job duties.

"We have allegedly defamatory statements made within the context of an administrative personnel matter, not unlike those that occur in the private sector. We conclude that the interests raised in this case involve an employment issue that does not implicate the same policy interests that underpinned the decision concerning police reports.

"The City also pointed to a state statute that provides that law enforcement agencies must conduct thorough background checks of officers, and argues that the statute militates in favor of absolute privilege because it demonstrates that there is an important public interest at stake. We disagree. The statute requires employers to provide employment information regarding any current or former employee to a law enforcement agency upon request. The statute also provides that employers are immune from liability for statements made while responding to a background request, in the absence of fraud or malice. Because this statute demonstrates the Legislature's intent to provide employers with a qualified privilege, which may be defeated by a showing of fraud or malice, this statute supports our conclusion that absolute privilege does not apply in this case."

Minke v. City of Minneapolis, 2013 WL 3968762 (Minn. App. 2013).

Arbitrator Can Convert Termination To Resignation Without Employee's Consent

In July 2011, Sergeant Michael Matala was terminated from his employment with the Trenton, Ohio Police Department stemming from six alleged violations of the Department's Code of Conduct. The events leading to Matala's termination began on May 16, 2010, when Matala issued a traffic citation to Melissa Green for running a red light. Matala later learned that the traffic citation had been "voided" by Lieutenant Michael Gillen. Matala sent a sarcastic email to Gillen complaining about Gillen's actions and also complained about the incident to Police Chief Timothy Traud.

Matala and Traud then met with the Trenton safety director and City Manager John Jones. Jones stated that he believed this situation was an internal matter and that Traud should schedule a meeting between Jones, Traud, Gillen, and Matala so that the situation could be resolved. According to Jones and Traud, Matala was instructed to take no further action until that meeting took place.

Nevertheless, Matala went to the home of Melissa Green to reissue the traffic citation and, at this time, spoke with Green's husband, Matthew Green. Matala informed Matthew Green that Gillen's conduct in voiding the ticket was unlawful and that Gillen might face criminal charges. Matala then reissued the citation to Melissa Green, noting in his supplemental report, "Lieutenant Gillen improperly voided the traffic citation to show Melissa's husband 'a little love' due to the fact that he's an Oxford Fireman." Ultimately, Green was convicted on the citation after a bench trial.

Around this same time period, Matala began an investigation into Gillen's possession of a vehicle that had previously been located in the City's impound lot. Matala used a law enforcement database to investigate whether Gillen took possession of the impounded vehicle. Based upon Gillen's conduct involving the traffic citation and the impounded vehicle, Matala met with a Butler County prosecutor. During the meeting, Matala was on duty but notified dispatch as to where he was going and remained in radio contact during the entire time.

When the Department fired Matala for his conduct, the Ohio Patrolmen's Benevolent Association challenged the discharge in arbitration. An arbitrator found that Matala's conduct of reissuing the traffic citation to Melissa Green was "insubordinate and warranted disciplinary action" and that his conversation with Matthew Green warranted "some significant disciplinary action." On the remaining charges, the Arbitrator did not find Matala's conduct to warrant discipline.

After further stating that Matala's conduct, as well as the conduct of Gillen and Traud, created such distrust among the three commanding officers of a small department, the Arbitrator reduced the termination to a 30-day unpaid suspension but ordered that "Matala shall not be reinstated to employment. Matala is awarded back pay from August 20, 2011 to the date of this Award together with benefits and any out of pocket loss as a result of the termination of benefits from the date of his termination to the date of this Award. The termination shall be removed from his personnel file and he will be considered to have resigned from employment effective on the date of this Award."

The Association challenged the Arbitrator's decision in court, arguing that when the Arbitrator found that there was no just cause for Matala's discharge, she had no power to convert

Discipline Briefs

OFFENSE	EMPLOYER'S PENALTY	RESULT ON APPEAL	DESCRIPTION	CASE NAME
Conduct Unbecoming	2-Day Suspension	2-Day Suspension	Lieutenant wrongly made accusation in meeting with Fire Chief that dispatch tape about delayed fire response had been altered, commenting that he would "bet his paycheck" on the matter. Lieutenant's statements were made intentionally and not in a joking manner.	*King v. Tangipahoa FPD A#1*, 2013 WL 3367569 (La. App. 2013).
Violation Of Law	Written Reprimand	Written Reprimand	Officer placed a window tint on her personal vehicle in violation of state law. Court found that officer's actions "impaired the efficiency" of the Department.	*Regis v. Department of Police*, 2013 WL 3766564 (La. 2013).

the termination to a resignation. The Ohio Court of Appeals rejected the Association's arguments, and upheld the Arbitrator's decision.

The Court's decision was based on the traditional deference courts show arbitration decisions: "Because arbitration is championed, the courts have limited authority to review an arbitration award. An arbitrator's award draws its essence from the collective-bargaining agreement when there is a rational nexus between the agreement and the award. An arbitrator's award departs from the essence of a collective bargaining agreement when: (1) The award conflicts with the express terms of the agreement and/or (2) the award is without rational support or cannot be rationally derived from the terms of the agreement.

"After finding a violation of a collective bargaining agreement, an arbitrator is presumed to possess implicit remedial power, unless the agreement contains restrictive language withdrawing a particular remedy from the jurisdiction of the Arbitrator. From our review of the record, we find that the Arbitrator's decision does draw its essence from the Collective Bargaining Agreement. This result best provides for the Collective Bargaining Agreement's overall principle that the punishment fit the crime. Based upon their ordinary meanings and their use in the Collective Bargaining Agreement, the terms dismissal and discharge include the removal of an employee from employment.

"Because the Arbitrator found that Matala's conduct constituted insubordination, and the CBA lists insubordination as an example of just cause warranting the discharge of an employee, the Arbitrator's holding that Matala should resign is within the essence of the Collective Bargaining Agreement which permits the removal of an employee from employment."

Ohio Patrolmen's Benevolent Association v. City of Trenton, 2013 WL 3947761 (Ohio App. 2013).

Bill of Rights Does Not Impose Additional Duty Of Fair Representation

Laurie Bisch is an officer with the Las Vegas Metropolitan Police Department. Officers in Metro are represented by the Las Vegas Police Protective Association (PPA).

In 2008, while Bisch was off duty, her dog bit her daughter's 17-year-old friend. Bisch took the girl to an urgent care facility for treatment. Unable to contact the girl's mother and concerned that the urgent care would not provide treatment without a legal guardian present, Bisch represented to the urgent care staff that the girl was actually her own daughter, using both her daughter's name and birthday. Bisch paid for the treatment with her own funds and did not use her employer-provided health insurance.

Upon learning of the dog bite and ensuing medical treatment, the girl's mother filed a complaint with Metro, alleging that Bisch had committed insurance fraud by misrepresenting the girl's identity to the hospital. The complaint resulted in an internal affairs investigation into Bisch. Although the IA investigator confirmed that Bisch had not used her insurance to pay for the treatment, IA nonetheless scheduled an interview with Bisch.

Bisch informed her PPA representative that she would bring her private attorney to the interview, but requested that a PPA representative also be present. The PPA responded that per its bylaws, it provided representation only when the member did not procure his or her own attorney. The interview proceeded without PPA representation.

After considering and rejecting charges of identity theft, Metro eventually sustained a conduct unbecoming charge against Bisch, and imposed a written reprimand. Bisch responded by filing a complaint with Nevada's Employee Management Relations Board against both the PPA and LVMPD. Bisch alleged that the PPA had breached its duty of fair representation when it refused to represent her at her IA interview.

The Nevada Supreme Court turned away Bisch's complaint. Bisch argued that the PPA's policy of not providing a representative to appear on behalf of an officer who has retained counsel was a violation of the representation rights provided to peace officers under Nevada's statutory Peace Officer Bill of Rights. Bisch contended that the Bill of Rights unambiguously granted her a right to have two representatives of her choosing at her interview, and that the PPA's refusal to provide her with a second representative constituted a violation of the statute.

The Court demurred, finding that the Bill of Rights "does not expressly impose any affirmative duties, but only provides the employee the right to have two representatives of his or her choosing present at an interrogation, which would necessarily prevent the employer from barring the employee from having two representatives. The statute does not impose any duty for any entity to provide a representative. Nothing in the Bill of Rights governs the PPA's responsibility toward its members."

Bisch v. Las Vegas Metropolitan Police Department, 302 P.3d 1108 (Nev. 2013).

Note: Curiously, the Court did not address a more basic problem with Bisch's claim. The duty of fair representation only exists where a union has taken on the role of acting as the employee's exclusive representative. This means that usually DFR claims are confined to the bargaining process itself and the grievance procedure in the union contract. Under Nevada's Bill of Rights, the PPA was not the exclusive representative since the statute allows more than one representative. Many courts would have simply found that the possibility of alternate representation meant that the duty of fair representation simply did not apply to an internal affairs interview.

Applicant's Views On Homosexuality, Not His Religion, Basis For Employment Decision

An applicant referred to anonymously in a court's opinion as "Farhan Doe" sued the New York Police Department, alleging he had been turned down for employment because of his religious beliefs. In 2009, Doe applied for appointment as an NYPD cadet. A NYPD psychologist found that Doe was psychologically unsuitable for appointment due to a combination of factors including: (1) Depression because psychological testing suggested the presence of depressive feeling and social withdrawal; (2) bias because Doe answered in the affirmative to the question "Do you think that homosexuals should be locked up?" and stated that he believed that homosexual people were criminals and should be incarcerated to keep them from committing any more crimes; and (3) poor work history because Doe dropped out of high school, took two years to complete his GED, and had never even held a part-time job.

In 2010, Doe tried again. NYPD provides police officer candidates with a new and individual evaluation with a different psychologist for each exam. Doe fared no better this time, with the psychologist disqualifying Doe in part because Doe's bias against homosexuals "serves as a significant liability should he be unable to perform his duties when working with homosexuals or if a fellow officer or supervisor would identify as homosexual."

Doe appealed to New York's Civil Service Commission. During the appeal, Doe no longer claimed that he believed homosexuals should be incarcerated, although he maintained that homosexuality was against his Islamic religious belief. Doe also contended that he had also made progress in life by successfully working part time as a pizza delivery person and getting married. The Commission wasn't impressed enough, and turned Doe down again. He then sued, contending that he was the victim of religious discrimination.

A trial court rejected Doe's lawsuit. The Court noted that "in determining whether a candidate is medically qualified to serve as a police officer, the appointing authority is entitled to rely upon the findings of its own medical personnel, even if those findings are contrary to those of professionals retained by the candidate, and the judicial function is exhausted once a rational basis for the conclusion is found. Bias against a protected group may be considered as a factor in determining whether an individual is psychologically suited for police work.

"Here, the Commission found that there was a rational basis to support the disqualification after an extensive appeal process in which copious documentation was submitted and Doe was examined by both private and NYPD mental health professionals. The disqualification did not rest on Doe's religious belief that homosexuality is a sin but rather regarded Doe's stated belief that homosexual behavior is grounds for arrest as a single factor to consider along with his depression, poor stress tolerance, limited education, and lack of relevant work experience. This Court finds that the Commission's final determination was rational and did not violate Doe's right to freedom of religious belief.

"This Court would look at this matter in a different light if the NYPD refused to hire Doe as a police officer due to his Islamic religious beliefs, for instance, because he was requesting breaks for prayer. However, there is no indication in the instant proceeding that Doe was found psychologically unsuitable for police officer work because he was a Muslim. While this Court cannot draw a bright line, it finds that personal beliefs or biases, which might lead to actions that put the public or fellow police officers at risk, may be considered by the NYPD as factors in determining whether an applicant is a suitable candidate for employment as a police officer."

Doe v. New York City Police Department, 2013 WL 2169691 (N.Y. Sup. 2013).

How The 'World Trade Center Presumption' Works

In the wake of the World Trade Center disaster, the City of New York amended its administrative code to create what is known as the "WTC presumption." Under the Code, there is a presumption that "any condition or impairment of health caused by a qualifying WTC condition shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident unless the contrary be proved by competent evidence." Qualifying WTC conditions include, among other things, diseases of the respiratory tract, diseases of the gastroesophageal tract, and psychological conditions such as post-traumatic stress disorder, anxiety, and/or depression.

Under a separate Code provisions, NYPD and FDNY members who suffered from disabilities that result from on-the-job "accidents" are entitled to an enhanced disability benefit. Although the WTC presumption does not mandate enhanced accidental disability retirement benefits for first responders in all cases, it is nonetheless incumbent on the City to come forward initially with affirmative credible evidence to disprove that the officer's disability was causally related to his work at the WTC site.

Demetrius Samadjopoulos was a police officer who responded to the attacks on the WTC. He later developed

reactive airway disease and asthma as well as depression and anxiety. When the City denied his claim for accidental disability benefits, the matter wound up in New York's Appellate Division.

The Court ordered that Samadjopoulos receive accidental disability benefits. The Court found that the City had "utterly failed to rebut the presumption that Samadjopoulos's qualifying conditions were not caused by hazards encountered at the WTC site. The City does not even purport to offer an alternative cause for Samadjopoulos's debilitating conditions. Indeed, the record contains no proof whatsoever that Samadjopoulos's disabling conditions were attributable to any other cause.

"No fewer than four doctors from the WTC Medical Monitoring and Treatment Program (MMTP) found – and not one doctor disputed – that Samadjopoulos suffers from reactive airway disease and/or asthma as well as reflux, and another MMTP doctor, as well as the City's own doctor, found that Samadjopoulos also suffers from depression and anxiety. The fact that Samadjopoulos's spirometer incentive tests and chest X rays – taken in a physician's office and not a work environment which aggravates his symptoms – were normal does not negate the causal connection between his work at the WTC site and his injuries. MMTP physicians explained that normal results on these tests in an office environment are not only consistent with Samadjopoulos's diagnosis, but expected. While medical boards may resolve conflicting evidence, they may not simply ignore medical evidence, particularly here, where the Medical Board must rebut a statutory presumption.

"Samadjopoulos's respiratory and psychological conditions did not exist prior to his work at the WTC site. The City does not – and cannot – dispute this. The causal connection between his physical and psychological conditions is buttressed by the reports of not only MMTP doctors but also by the City's own doctors."

Samadjopoulos v. New York City Employee's Retirement System, 961 N.Y.S.2d 410 (A.D. 2013).

Union Entitled To Sick Leave Records Of Supervisors

Part of the obligation to collectively bargain in good faith is the obligation to exchange information about mandatory subjects of bargaining. This obligation frequently arises in a grievance arbitration setting, where either the employer or the union is seeking records in the other's possession.

A slight twist on the usual case occurred in Newark, New Jersey, where Lodge 12 of the Fraternal Order of Police (FOP) was processing four grievances involving alleged disparate treatment of bargaining unit officers who received sick leave counseling. The FOP requested that the City provide it with the sick or injured leave records and the counseling forms for unit and non-unit employees in the 12-month period preceding the filing of the grievances. When the City rejected the request, and particularly that portion of the request seeking the sick leave records of supervisors, the FOP filed an unfair labor practice complaint.

New Jersey's Public Employment Relations Commission ruled that the City had an obligation to provide sick leave records. PERC ruled that "an employer must supply information if there is a probability that the information is potentially relevant and that it will be of use to the representative in carrying out its statutory duties. The Hearing Examiner was concerned that the FOP's effort in that regard is beyond its legal entitlement and is burdensome to the City. The Hearing Examiner should have determined whether the comparative information for non-unit members was relevant to the grievances.

"The FOP cites to the undisputed fact that the sick leave policy applies equally to both FOP members and supervisors. Relevance is determined through a discovery-type standard, therefore a broad range of potentially useful information is allowed to the Union for effectuation of the negotiations process. However, a union's right to receive information from an employer is not absolute. The employer is not required to produce information clearly irrelevant, confidential or information it does not possess.

"The four grievances at issue here involve alleged disparate treatment of officers who received sick counseling. Each officer alleges that other officers in their command had worse sick records, but were not counseled. The FOP alleges it requires the documentation of non-unit employees to evaluate the merits of the grievances. In one grievance, the officer alleges that she was counseled by her superior officer who has a worse sick record. The sick records of non-unit employees, on this record, are relevant to the grievances in issue as there is a possibility the information is potentially relevant to the grievances and will be useful to the FOP in carrying out its statutory duties. The probative value of the information, if used, is for the Arbitrator to determine."

City of Newark, No. 2013-73 (N.J. PERC 2013).

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Double Damages Under The FLSA

The Fair Labor Standards Act (FLSA) is often referred to as a "double damages statute." Under the FLSA, an employee bringing a successful suit is usually entitled to recover as "liquidated damages" an amount equivalent to the back wages. A recent case involving Records Clerks for the Manchester, Missouri Police Department illustrates how liquidated damages work under the FLSA.

The case began in 2009 when Chief Timothy Walsh decided to move the Record Clerks from City Hall to the Department's new location. As part of that move, the Record Clerks were to wear a uniform consisting of khaki pants, a blue polo shirt, a small badge, and a Manchester Police Department patch on the shirt. Additionally, the Record Clerks became subject to pre-employment background checks, drug screening, and fingerprinting.

The Chief then issued what was known as Special Order 9.8E, under which the Record Clerks began working 12-hour shifts with four days on duty followed by four days off duty – the same schedule as police officers. Like police officers, the Record Clerks did not receive overtime unless their work schedule exceeded 171 hours in a 28-day period. Prior to the 2009 change, Record Clerks were paid time-and-a-half for work over 40 hours per week.

The Records Clerks eventually sued, and a federal court ruled that as non-sworn employees, they were not covered by the Section 7(k) exemption under the FLSA and thus had to be paid overtime when they worked more than 40 hours in a workweek. The Court calculated the amount of back overtime they were owed, and then turned to whether the Records Clerks were also entitled to liquidated damages.

The Court accepted as a given that "Chief Walsh and the City never intended to violate the FLSA. The violation was a mistake. Chief Walsh believed that the use of the term 'law enforcement activities' in Section 7(k) of the FLSA included Record Clerks because of their new responsibilities relating to law enforcement."

Nonetheless, the Court awarded the Records Clerks liquidated damages. The Court noted that "liquidated damages are not considered punitive, but are intended in part to compensate employees for the delay in payment of wages owed under the FLSA, such delay having possibly resulted in damages too obscure and difficult of proof for estimate other than by liquidated damages. An amount of liquidated damages under § 216(b) is mandatory unless the employer can show good faith and reasonable grounds for believing that it was not in violation of the FLSA."

In the case of the Chief's decision, the Court found that the decision to place the Records Clerks on a 12-hour schedule did not meet the FLSA's reasonableness test: "Chief Walsh did not solicit either advice or an opinion on whether the new schedule order for Record Clerks complied with the FLSA. He is a career police officer who knows the difference between exempt and non-exempt status and knows that police officers are exempt because of their unusual work schedules. He testified that he read the FLSA, although it is unclear what sections of the FLSA he read.

"When testifying, he could not cite to the Court what he had read or how much time he took to research the FLSA or any portion thereof. Based on his testimony that the FLSA exempts employees who engage in law enforcement activities, he may have read § 207(k). He never talked to anyone about his decision except Sergeant West and senior members in the Department. He performed no other independent research, did no internet research, did not talk to an attorney, did not talk to anyone in the Missouri Department of Public Safety, did not use any law enforcement resource, and did not research or talk to anyone in the DOL. The use of any one of those tools may have resulted in Chief Walsh discovering his mistake.

"Chief Walsh testified that the change in duties, hours, and location of Record Clerks was a significant change in Departmental procedure for

the City. It would, therefore, have been prudent for the Department head to do some independent research before making these significant changes."

Adams v. City of Manchester, 2013 WL 3091767 (E.D. Mo. 2013).

Volunteers Do Not Necessarily Become Employees When Benefits Are Provided

Frank Estrada was a reserve police officer for the City of Los Angeles. The City considers reserves to be volunteers, not employees. However, the City does provide workers' compensation benefits to reserves.

For example, in 1995, while on duty, Estrada was involved in a traffic collision and sustained leg and back injuries. In 1996, while on duty, Estrada again was involved in a traffic collision and injured his right shoulder. In both instances, he obtained workers' compensation benefits and continued to receive benefits, as his injuries were not fully resolved.

After an investigation by the FDA into Estrada's nutritional supplement company, Body Basics, Inc., the City terminated Estrada in 2005. Estrada responded with a lawsuit, alleging that his termination violated California's non-discrimination laws, and that he was fired in retaliation for filing workers' compensation claims.

The California Court of Appeals dismissed Estrada's lawsuit. The Court ruled that "an aggrieved plaintiff must have the status of an employee; an uncompensated volunteer is not an employee. The State's discrimination law confers employee status on those individuals who have been appointed, who are hired under express or implied contract, or who serve as apprentices.

"Under Title VII of the Civil Rights Act, courts turn to the 13 factors articulated by the Supreme Court to determine whether an employment relationship exists. However, to satisfy the hiring prong, a purported employee must establish the existence of remuneration, in some form, in exchange for work.

"Pursuant to the language of the L.A. Administrative Code, Estrada was appointed to his volunteer position by the Chief of Police. Estrada was not appointed to an employee position. The civil service rules define an employee as 'a person occupying a position in the classified civil service.' Estrada admittedly was not appointed to a position in the classified civil service. Accordingly, Estrada was not an employee of the City.

"The fact the City provides Police Reserve Officers with workers' compensation coverage does not compel a different conclusion; workers' compensation benefits do not amount to remuneration giving rise to employee status. Clearly, the City has made a policy decision to extend such benefits to volunteer reserve officers, who serve gratuitously and put themselves in harm's way to protect the community. However, the consequence of this policy decision by the City is not to convert these uncompensated volunteers into municipal employees for all purposes. The fact the City provides volunteer reserve officers with workers' compensation benefits if they sustain industrial injuries does not change the fact they serve without remuneration. The City's workers' compensation benefits, similar to the recurring $50 reimbursement for a volunteer's out of pocket expenses, simply serve to make a volunteer whole in the event the volunteer were to sustain injury while performing his or her duties."

Estrada v. City of Los Angeles, 159 Cal.Rptr.3d 843 (Cal. App. 2013).

Q&A

From Illinois

Question: Is travel time to the station for a callout from an officer's home paid? I am not on call, but if I am called out I am expected to respond. Do I get paid from the minute I received the call and my travel time to the station?

Answer: Under the Fair Labor Standards Act, home-to-work travel is almost always not compensable. However, under many collective bargaining agreements, unions and employers have negotiated clauses providing that "the clock starts" on callouts with the receipt of the phone call. This would purely be a function of bargaining, and wouldn't be mandated by the FLSA.

From Connecticut

Question: Can a police chief, after preferring eight charges against an officer arising out of a single Internal Affairs investigation, issue discipline on some of the charges and then refer the remaining charges to the Police Commission for discipline?

Answer: This would depend upon the structure of your disciplinary system. The principles of due process generally require that the ultimate decision maker on discipline be unbiased. In turn, that requires that the decision maker be uninvolved factually with the events that gave rise to the discipline and have no meaningful role in the investigation of the incident. In evaluating how these principles would apply to the situation you describe, we'd want to know things like (1) who is the ultimate disciplinary decision maker for your employer – the police chief or the police commission; (2) did the police chief do more in the IA process than simply lodge the charges. Put another way, did the police chief actually conduct the investigation; (3) What level of discipline was actually issued for the charges that were sustained; and (4) What appeal rights exist from the police commission's decision.

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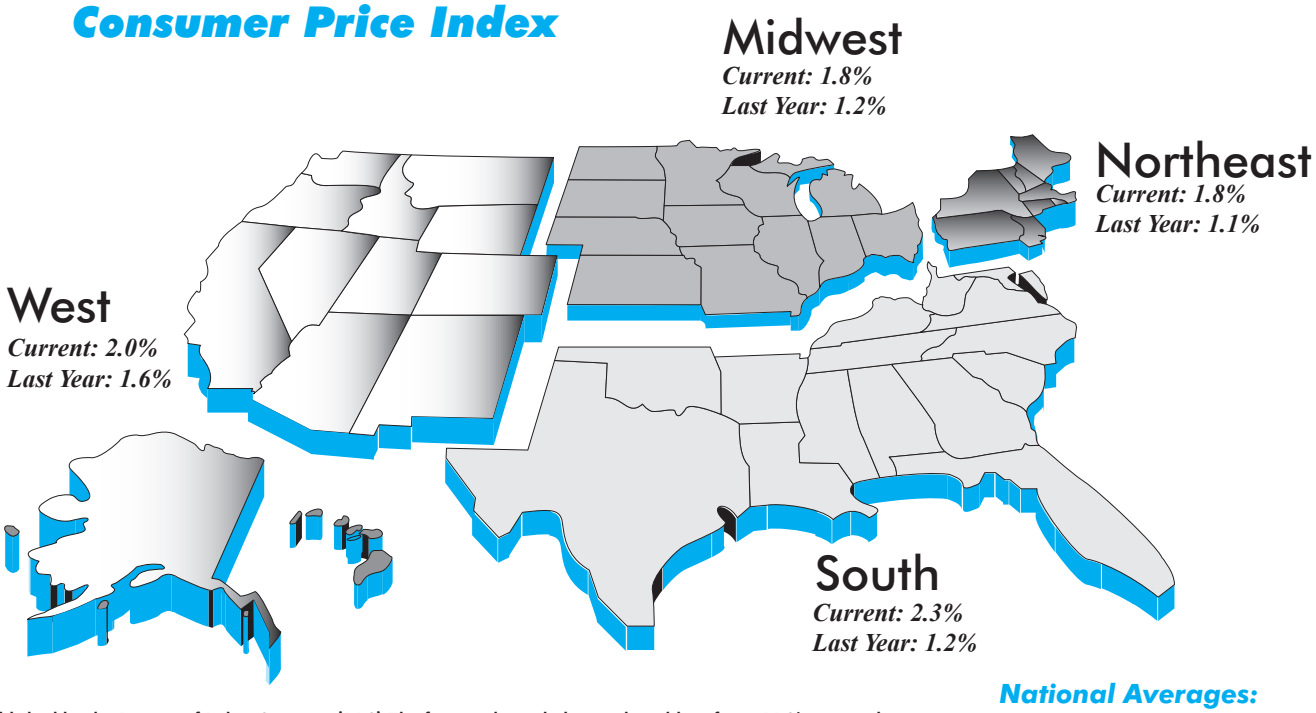
Consumer Price Index



Published by the Bureau of Labor Statistics (BLS) The figures shown below in the table refer to BLS's national indexes, and reflect the annual rate of change in the Urban Wage Earner (known as the CPI-U) and Clerical Worker index (known as the CPI-W) released in August 2013 and for the same month in the previous five years. The CPI-U represents about 87 percent of the total U.S. population and is based on the expenditures of almost all residents of urban or metropolitan areas. The CPI-W is a subset of the CPI-U and represents approximately 32 percent of the total U.S. population. The figures shown in the map represent the BLS's "regional" indexes, and reflect the annual rate of change in the CPI-W for July 2013 and July 2012.

National Averages:

U.S. CPI-2.0 0%	U.S. CPI-W 2.0%
2012: 1.4%	2012: 1.3%
2011: 3.6%	2011: 4.1%
2010: 1.2%	2010: 1.6%
2009: -2.1%	2009: -2.7%
2008: 5.6%	2008: 6.2%