Navigating Issues Related to Public Safety Bargaining, Discipline, Investigating Officer Involved Deaths, and Recent Legal Decisions Impacting Law Enforcement

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Agenda Overview

- Public Safety Bargaining: The Art of the Process and What We are Seeing
  - Kyle Gulya & Jim Macy
- “New” Legal Challenges: Sanctuary Cities and Immigration Concerns for Law Enforcement
  - Ryan Heiden & Jim Korom
- Department of Justice Guidance Regarding Investigating Officer Involved Deaths
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- Recent Labor, Employment and Open Meetings Cases Impacting Law Enforcement
  - Andy Phillips, Kyle Gulya & Jim Macy
- How to Properly Discipline Public Safety Employees and Managing Off-Duty Misconduct
  - Kyle Gulya & Jim Macy

Public Safety Bargaining: The Art of the Process and What We are Seeing

Collective Bargaining

- The Golden Goose
- Interest Arbitration.
  - Still no decisions since the second half of 2016 or 2017.
- CPI Index
  - January 1, 2017: 0.68%
  - July 1, 2017: 1.26%
  - January 1, 2018: 1.84%

Fulfilling the Duty to Bargain

- At reasonable times, in Good Faith, with the intention of reaching an Agreement
- What fulfilling the duty to bargain may encompass?
  - Meeting
  - Exchanging proposals
  - Sharing information
  - Dispute resolution
- Management reserves its rights, Unions acquire rights.
- The Union must demand bargaining or waive the right.
- When in doubt, fulfill the duty to bargain anyway and negotiate “in good faith.”

Prohibited Practices – What the Employer is Not Permitted to Do

- Interfere with, restrain or coerce employees from exercising their right to organize for the purpose of collective bargaining
- Involve itself in the formation or administration of the union
- Encourage or discourage membership in the union
- Violate the duty to bargain
- Bargain with individuals or groups of employees who hold positions within the bargaining unit (e.g., early retirement)
- Violate the Agreement
- Fail to implement arbitrator's decision
- SPIT!

Communicating with the Workforce

- ***Kettle Moraine School District*, Dec. No. 30904-D (WERC April 2007).**
  - Employer did not violate MERA by comments made to employees and Union in an effort to pressure Union into changing their bargaining position. Employer communications remain within the employer's rights and tactical choices as long as any direct communications to employees discuss
    - (A) an offer already made to union,
    - (B) are not deceptive, misleading or threatening,
    - (C) do not directly disparage the union; and
    - (D) do not offer a better deal to employees.
  - An employer is also entitled to predict the negative consequences of a settlement or interest arbitration award sought by the union so long as the prediction is based on demonstrable realities and not unlawful animus.

Negotiations in 2017: What are the Issues?

- Bargaining Trends – Union Proposals
  - Benefit Enhancement Proposals from Unions
    - Uniform allowances
    - Vacation enhancement
    - Comp time bank increases and changes to comp usage
    - Overtime eligibility enhancements (e.g., court call-in time)
    - Trainer/Instructor pay enhancements
  - Changes to call-in structures
  - The problem: budgets remain tight, the Union remains inflexible to giving back management rights bargained away in the contract, the parity problem with non-represented municipal employees, health insurance remains a big problem, and, what I call, “fatigue.”

Preparing for Negotiations

- Analyze the contract – meet with command staff, human resources, administration, finance, and payroll and identify all problematic areas of the contract, including whether specific provisions are not being followed.
- Analyze past grievances
- Analyze whether any past practice has developed that must be discontinued
- Develop goals
- Identify permissive and illegal subjects of bargaining

Identifying the Mandatory, Permissive, and Prohibited Subjects and Understanding WERC's "Primarily Related" Balancing Test

- Mandatory Subjects of Bargaining primarily relate to wages, hours, and working conditions.
- Permissive Subjects of Bargaining primarily relate to policy and management of the Department.
- Prohibited Subjects of Bargaining relate to matters where neither the Department nor the bargaining unit could legally enforce such provisions if agreed into the collective bargaining agreement.
- WERC Procedure and Process for Determining Permissive and Mandatory Subjects of Bargaining.

Specific Cases & Scenarios Related to Mandatory and Permissive Subjects of Bargaining Involving Public Safety

Assignments

- **Assignment of work "fairly within the scope" of an employee's job responsibilities.** *City of Wauwatosa*, 15917 (1977); *City of Wauwatosa v. WERC*, 100 Wis. 2d 742, 301 N.W.2d 464 (Ct. App. 1980) (Unpublished).
- **Duties Proposal:** No firefighter shall perform duties other than those considered regular Fire Department type duties. *City of Glendale*, 27907 (01/94)
- **Duty Days.** *City of Wauwatosa*, 15917 (1977); *City of Wauwatosa v. WERC*, 100 Wis. 2d 742, 301 N.W.2d 464 (Ct. App. 1980) (Unpublished).
- **Duty Day Proposal.** The duty day shall terminate for the purposes of cleanup, training procedures, and other regular routines on or before 5:00 P.M. The balance of the twenty-four hour period shall be spent in stand-by awaiting and/or serving in matters of emergency and occasional public relations demonstrations as may be reasonably required. Maintenance and servicing of equipment, vehicles, and other property after 5:00 P.M. shall be solely limited to items necessary for efficient response to alarms. Apparatus room floors should be made reasonably safe and dry in all areas utilized by men in response to alarms. Normal vehicle and house cleanup will be postponed to the following duty crew.

Specific Cases & Scenarios Related to Mandatory and Permissive Subjects of Bargaining Involving Public Safety

Other Assignment Issues

- **a. Assignment to Apparatus.** *City of Brookfield*, 19444 (09/82).
- **b. Training and Instructor Assignments.** *City of Wisconsin Rapids*, 27466-A (05/93).
- **c. Payment for Qualifications.** *City of Brookfield*, 20635 (05/83).

Specific Cases & Scenarios Related to Mandatory and Permissive Subjects of Bargaining Involving Public Safety

Minimum Staffing

- **Minimum Staffing.** *City of Glendale*, 27907 (01/94); *City of Ladysmith*, 28432 (07/95); *City of Manitowoc*, 18333 (1980); *City of Milwaukee*, 27997 (1994).
- **Minimum Staffing Proposal:** The City agrees the most efficient operation of the Paramedic squad requires three paramedics. In accordance with this, the following is agreed to:
  - (a) All cases of paramedic overtime should be treated consistently, whenever possible.
  - (b) When only two (2) paramedics are available for duty, an off-duty paramedic should be called back for overtime, whenever possible. However, when more than five (5) personnel are on duty in the fire division, one (1) of these personnel will be assigned to be the EMT driver.
  - (c) When no paramedic is available for overtime, an off-duty EMT qualified person should be called back for duty as EMT Driver.
  - (d) As necessary, when a paramedic or EMT Driver is coming in from home, an offgoing paramedic will be held over to provide coverage.

Specific Cases & Scenarios Related to Mandatory and Permissive Subjects of Bargaining Involving Public Safety

Promotions

- A proposal requiring the Chief to appoint the most senior qualified candidate for promotion does not contradict the requirements of Section 62.13, Wis. Stat. *Glendale Prof. Policemen's Ass'n v. City of Glendale*, 83 Wis. 2d 90, 264 N.W.2d 594 (1978).
- **a. Minimum Service Requirements for Promotional Candidates.** *City of Waukesha*, 17830 (05/80); *City of Glendale*, 27907 (01/94).
- **b. The Number of Interviewers and Oral Interviews.** *City of Waukesha*, 17830 (05/80).
- **c. Weight and Measurement of Qualifications.** *City of Waukesha*, 17830 (05/80); *City of Glendale*, 27907 (01/94).
- **d. Application of Seniority to Qualified Applicants.** *City of Waukesha*, 17830 (05/80).
- **e. Broad proposals related to promotions and vacancies of nonbargaining unit personnel.** *City of Sheboygan*, 19421 (03/82); *City of Glendale*, 27907 (01/94)

Specific Cases & Scenarios Related to Mandatory and Permissive Subjects of Bargaining Involving Public Safety

Other Issues

- **Training Repayment Agreements.** *City of Milwaukee*, 29402 (06/98).
- **Proposals related to home inspections and inspections of fire hydrants.** *City of Wauwatosa*, 15917 (1977).
- **The Department's right to schedule employees on holidays.** *City of Wauwatosa*, 15917 (1977).
- **Off-duty time and call back requirements.** *City of Waukesha*, 17830 (1980).
- **Performance of Personal Vehicle Maintenance and Car Washes on Department Property.** *City of Oshkosh*, 29971 (10/00).

Problematic Example #1

Existing or new work rules and regulations where they are primarily related to wages, hours or conditions of employment cannot be modified or created without mutual accord. The City agrees to precede the implementation of new rules or regulations not primarily related to wages, hours or conditions of employment with ten (10) days written notice and to commence bargaining over the effects of such rules and regulations within ten (10) days of a written notice to the City requesting such impact bargaining. Disputes arising regarding whether a particular topic is mandatory or permissive shall be resolved by recourse to the declaratory ruling procedure of the WERC. Any party aggrieved may file a petition for review pursuant to 111.70(4)(b), Wis. Stats.

Problematic Example #2

The Union and the City recognize that grievances involving interpretation, application or enforcement of the terms of this Agreement, and the application of work rules, regulations, and conditions of employment should be settled promptly and in a just manner.

Problematic Example #3

The Employer agrees to pay the greater of 80% of the gross average premium of the qualified plans in the County's service area as designated by the Wisconsin Public Employers Group Health Insurance in the County's service area or the amount of the premium paid for other county employees for single and family health insurance coverage. Only an employee starting work between the 1st and the 15th of the month will be eligible for coverage the first of the following month. The Employer may change insurance plans or carrier (including a new plan with the existing carrier) without bargaining that change, provided that the benefits under the proposed plan or with the proposed insurance carrier shall be equivalent to, or better than, the existing benefits. Employees who retire from the County with at least ten years of service may remain on the County's health insurance plan until Medicare eligibility, and the employee's spouse may remain until Medicare eligibility if the retiree dies. The County will pay 50% of the cost of retiree health insurance.

Problematic Example #4

The Employer agrees to continue its practices regarding the assignment of personnel shifts.

So What Should the Employer Do?

- EVAPORATION
  - Evaporation is often confused with discontinuance of Past Practices.
  - Only applies to permissive subjects of bargaining.
  - Can be used to eliminate practices and specific contract language.
  - Evaporation occurs on expiration date of the contract.
  - Some possible "evaporation" language to use by management: "We hereby notify the Union that Article __, Section __ [insert the applicable language] is a non-mandatory subject of bargaining. That Section of the Collective Bargaining Agreement will be evaporated from the Agreement upon the expiration of this Agreement, and this language will not be included in a successor agreement."

“New” Legal Challenges: Sanctuary Cities and Immigration Concerns for Law Enforcement

What is a "Sanctuary City"?

- While no formal definition exists, the most widely understood definition of a "sanctuary city" is a municipality that opts not to cooperate with federal immigration enforcement authorities ("ICE") upon coming into contact with an undocumented immigrant.
- Such "contact" may involve a 911 call, a routine traffic stop, an investigation of a crime, etc.
- The cooperation that is sought from ICE is generally the adherence to a "detainer request." A "detainer request" is a written request that the local jail or other law enforcement agency detain an individual for an additional 48-hours (excluding weekends and holidays) after his or her release date in order to provide ICE agents extra time to decide whether to take the individual into federal custody for removal purposes.
- Another form of cooperation often sought from ICE is the provision of information surrounding the immigration status of individuals housed within local prisons and jails.
- There are over 300 jurisdictions across the country that fall under the above-definition of a "sanctuary city."
- Interestingly, counties are typically affected at a greater level than cities with regard to requests from ICE. This is because the bulk of detained individuals reside in county jails or prisons.

What are the Arguments for Sanctuary Cities?

- Municipalities that opt not to cooperate with ICE or otherwise enforce federal immigration law to the extent possible argue that the basis for that decision is to ensure maximum cooperation between all of the municipality's citizens and local law enforcement.
  - The argument goes, if illegal immigrants believe they may be deported or detained for a 48-hour period as a result of their illegal status, then illegal immigrants will avoid contacting law enforcement to report known criminal activity and/or avoid cooperating with police during active investigations. According to those in support of sanctuary cities, the result would be a less-safe community for everyone, as information sharing between community members and law enforcement would be imperiled.
  - Proponents of sanctuary cities further argue that the practice of detaining illegal immigrants for 48-hours who have not been charged with a crime is unconstitutional.
  - Another popular argument against adhering to detainer requests is that it is a drain on local resources, as federal immigration law explicitly prohibits the federal government from providing federal funds to localities in return of costs expended in enforcing ICE detainer requests.

What are the Arguments against Sanctuary Cities?

- Municipalities that choose to cooperate with ICE or otherwise enforce federal immigration law to the greatest possible extent argue that it is law enforcement's duty to enforce any and all laws for which they are charged with enforcing. Further, proponents of this position argue that illegal immigrants are given such title for a reason – they are here illegally. Thus, cooperation with ICE is part and parcel of law enforcement's duty to enforce the law to the fullest extent possible.
  - Multiple states in opposition to sanctuary jurisdictions have taken formal action to prevent local agencies from ignoring ICE detainer requests.
  - For example, Virginia's House of Delegates passed a bill on January 27, 2017 seeking to require that state and local jailers hold detainees under ICE detainer requests.
  - Texas has taken an even stronger approach, as the State is attempting to pass through a piece of legislation that would waive sovereign immunity and hold municipalities liable for all felony-related damages resulting from any person freed from custody while subject to an ICE detainer request – for ten years following release.

What is the Law?

- Immigration law is enforced by U.S. Immigration and Customs Enforcement ("ICE"), a subset of the Department of Homeland Security. The pertinent law which ICE enforces is the Immigration and Nationality Act ("INA"). See 8 U.S.C. § 1101, *et seq*. The specific provisions of the INA that are applicable with regard to sanctuary cities are the following:
    - (a) . . . a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
    - (b) . . . no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
        - 1. Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
        - 2. Maintaining such information.
        - 3. Exchanging such information with any other Federal, State, or local government entity.
- Under 8 U.S.C. § 1373, local law enforcement officials are not required to turn over information about the citizenship or immigration status of prisoners in their custody, especially if no such information exists; however, the law prohibits efforts by cities and states to prevent the sharing of that information once it is collected.

Executive Order 13768

- On January 25, 2017, President Trump signed Executive Order 13768. The Executive Order states that the policy of the executive branch is as follows:
  - (a) Ensure the faithful execution of the immigration laws of the United States, including the INA, against all removable aliens, consistent with Article II, Section 3 of the United States Constitution and section 3331 of title 5, United States Code;
  - (b) Make use of all available systems and resources to ensure the efficient and faithful execution of the immigration laws of the United States;
  - (c) Ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law;
  - (d) Ensure that aliens ordered removed from the United States are promptly removed; and
  - (e) Support victims, and the families of victims, of crimes committed by removable aliens.

Executive Order 13768 (cont'd)

- The Executive Order states that illegal immigrants who meet any of the following criteria are considered "priorities" under the terms of the Executive Order:
  - (a) Have been convicted of any criminal offense;
  - (b) Have been charged with any criminal offense, where such charge has not been resolved;
  - (c) Have committed acts that constitute a chargeable criminal offense;
  - (d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
  - (e) Have abused any program related to receipt of public benefits;
  - (f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or
  - (g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

Executive Order 13768 (cont'd)

- The Executive Order further provides that the Secretary of the Homeland Security will seek to engage with Governors of the States, as well as local officials, for the purpose of entering into agreements under section 287(g) of the INA (8 U.S.C. 1357(g)).
  - These agreements give local law enforcement officers the powers of ICE agents with regard to enforcing the laws under the INA. However, the INA explicitly states that no federal funds are to be spent to reimburse localities for their costs in enforcing detainers.
- To give the Executive Order teeth, section 9(a) of the Order states: "the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary."

Attorney General Sessions' Clarification of Executive Order 13768

- On May 22, 2017, Attorney General Sessions issued a memorandum entitled "Memorandum for all Department Grant-Making Components." The purpose of this memorandum was to clarify the extent to which Executive Order 13768 changed federal immigration law as it existed prior to the Order.
- The memorandum clarifies that the Order applies solely to federal grants administered by the Department of Justice or the Department of Homeland Security, and not to other sources of federal funding. In other words, only the following three federal grants could actually be blocked by the Department of Justice without Congressional approval: (1) the Edward Byrne Memorial Justice Assistance Grant Program ("JAG"); (2) the Community Oriented Policing Services ("COPS"); and (3) the State Criminal Alien Assistance Program ("SCAAP").
- In 2016, $274.9 million in JAG funds were allocated to the U.S. states and territories. Over the past 5 years, on average $200 million in COPS funds were annually allocated to the U.S. states and territories. Although SCAAP was awarded $210 million in 2016, the program's website indicates that no funding is being sought for 2017 and the program is not being renewed.
- Another substantial clarification made in the May 22 memorandum is what the definition of "sanctuary jurisdiction" means as it is used in Executive Order 13768. Specifically, the memo states that the term refers only to jurisdictions that "willfully refuse to comply with 8 U.S.C. 1373."
- The memorandum further provides: "While the term 'sanctuary jurisdiction' is narrow, nothing in the Executive Order limits the Department's ability to point out ways that state and local jurisdictions are undermining our lawful system of immigration or to take enforcement action where state or local practices violate federal laws, regulations, or grant conditions."
- The blocking of federal grants to jurisdictions which "willfully refused to comply with 8 U.S.C. 1373" was permitted before the issuance of Executive Order 13768.

Can the DOJ Enforce Executive Order 13768 in Accordance with its Original Intent?

- A debate exists as to the legality of Executive Order 13768. A growing number of states and localities, including California, Connecticut, New York City, Newark, Cook County, New Orleans, and Washington D.C., have adopted laws or policies limiting their involvement with ICE detainers, or declining to treat them as a basis for detention. The Florida Sheriffs Association, the largest union in the country, has also come out against the Executive Order and the manner in which it is being enforced.
- A number of other localities, including Seattle and San Francisco, have sued the federal government, alleging that the Executive Order is unconstitutional on the grounds that it violates the 10th Amendment.
  - On April 25, 2017, a judge in the Northern District of California issued an injunction to enjoin the federal government from withholding federal grant money under the Executive Order. The injunction was issued because the judge determined that San Francisco and Santa Clara County were likely to succeed on the merits of all five of the following claims: (1) a violation of separation of powers; (2) a violation of the Spending Clause; (3) a violation of the Tenth Amendment; (4) a violation of the Fifth Amendment due to vagueness; and (5) a violation of the Fifth Amendment's procedural due process requirements. See County of Santa Clara, City and County of San Francisco County v. Donald J. Trump, et al., Case No. 17-cv-00574-WHO (N.D. Cal. 2017).
  - With regard to the Counties' claims that the Executive Order violates the 10th Amendment, the court quoted Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 579 (U.S. 2012), stating it is well-established that "[l]egislation that 'coerces a State to adopt a federal regulatory system as its own' 'runs contrary to our system of federalism.'" See Id. at p. 39.
    - Instead, states must have a "legitimate choice whether to accept the federal conditions in exchange for federal funds." Id. (quoting Sebelius, 567 U.S at 578).
    - The court continued: "The Executive Order threatens to deny sanctuary jurisdictions all federal grants, hundreds of millions of dollars on which the Counties rely. The threat is unconstitutionally coercive." Id.
  - The result of the temporary injunction is that the Department of Justice is temporarily blocked from placing new restrictions on federal funding without going through Congress; however, the ruling does not prevent the Department of Justice from enforcing existing rules on federal grants (i.e., 8 U.S.C. § 1373 cited above).

Can the DOJ Enforce Executive Order 13768 in Accordance with its Original Intent? (cont'd)

- Adding to the 10th Amendment concerns surrounding Executive Order 13768, multiple courts have ruled that ICE detainers violate the 4th Amendment and 5th Amendment rights of illegal immigrants.
- For example, the Third Circuit of the U.S. Court of Appeals held on March 5, 2014 that Lehigh County Prison's action of holding Ernesto Galarza, a U.S. citizen, for three days after he was subject to release violated his 4th Amendment and procedural due process rights. See Galarza v. Szalczyk et al., 745 F.3d 634 (3rd Cir. 2014).
  - The court reached this conclusion for various reasons. First, guidance issued to ICE states that detainers "shall be for a maximum of 48 hours." Galarza was detained for nearly 72 hours. Second, Lehigh County Prison officials refused to look into Galarza's status as a legal U.S. citizen despite his repeated claims that he was born in Newark, NJ and, therefore, a legal citizen. Third, officials refused to tell Galarza why he was being detained.
  - The court noted that state and local law enforcement agencies must be careful with regard to detainers, as ICE routinely issues detainers that are not adequate with regard to establishing "probable cause" for detaining alleged illegal immigrants. Holding an alleged illegal immigrant without such "probable cause" can lead to violations of the individual's constitutional rights.
  - The court also noted that detainers are a request, not a mandate, from ICE that state and local law enforcement agencies detain an alleged illegal immigrant on behalf of ICE. To construe detainers otherwise would violate the principles of federalism clearly established under 10th Amendment.

Can the DOJ Enforce Executive Order 13768 in Accordance with its Original Intent? (cont'd)

- Similarly, on March 9, 2016, a judge in the Northern District of Illinois for the Eastern District held that detainers issued for two individuals already in prison violated the individuals' constitutional rights. Both of the individuals were U.S. citizens despite the issuance of the detainers. The legal analysis surrounding the court's holding was much the same. See Moreno v. Napolitano, 2014 U.S. Dist. LEXIS 136965 (N.D. Ill. Sept. 29, 2014).
  - The court spent a considerable amount of time warning local law enforcement agencies that detainers issued by ICE, without more, may be insufficient to establish "probable cause" under the Fourth Amendment.
  - The court noted precedent which requires a showing that the arresting officer must "reasonably believe that the alien is in the country illegally and that she 'is likely to escape before a warrant can be obtained for her arrest.'" According to the court, the language "reasonably believe" requires a finding of probable cause.
  - To ensure compliance with the U.S. Constitution, local law enforcement agencies must be sure a determination is made by ICE that such illegal immigrant is "likely to escape" within the meaning of 8 U.S.C. § 1357(a)(2).
  - The court clarified that one's status as an illegal immigrant does not result in a per se finding that he or she is "likely to escape." A more particularized inquiry must be conducted into that individual's background and propensities.
  - The court also reinforced the concept that compliance with ICE detainers is not mandatory, but rather permissive, under the 10th Amendment.
  - While the above cases involve U.S. citizens, the United Supremes Court has made it clear that illegal immigrants enjoy the protections found under the First, Fourth, Fifth, Sixth, and Fourteenth Amendments. See Almedia-Sanchez v. United States, 413 U.S. 266 (U.S. 1973). Thus, the principles discussed above apply to illegal immigrants, too.

What Law Enforcement Agencies Seeking to Ignore ICE Detainers Should Know

- State and local agencies are legally permitted to ignore ICE detainer requests. As stated above, numerous courts have made this clear. Therefore, such conduct will not subject local agencies to the loss of federal grants. If federal grants were to be reduced or eliminated on those grounds, it would constitute coercion and would therefore be contrary to the 10th Amendment.
- That being said, agencies must be careful not to go too far. Current law prevents state and local law enforcement agencies from instituting and enforcing policies that altogether prohibit communication with ICE altogether with regard to the citizenship of prisoners in their custody. While the law does not require state and local agencies to turn that information over, the outright prohibition via departmental policy against such communication would violate the law and could result in the loss of federal grants.
- Many agencies have instituted policies that prohibit officers from inquiring about the immigration status of individuals detained in the respective agency's jail or prison. This prevents agencies from having information to share with ICE when asked to do so, thereby preventing agencies from being accused of "prohibiting communication with ICE" about the immigration status of incarcerated individuals.
- Whatever the policy of the respective agency is, such policy should be clearly communicated to all employees to ensure consistent application of the policy. One wrong step by a particular employee can lead to constitutional violations or the loss of federal funding.
- As with all matters, the decision to ignore ICE detainer requests may lead to publicity. Some may perceive this approach as "soft on crime." Further, agencies should be aware that the Department of Justice has issued various letters via press releases essentially shaming "sanctuary cities" for their "soft on crime" mentalities. Agencies should be prepared to deal with such publicity.

What Law Enforcement Agencies Seeking to Adhere to ICE Detainers Should Know

- State and local agencies are legally permitted to adhere to ICE detainer requests.
- However, such agencies must proceed with caution when doing so. To legally comply with detainer requests, an arresting officer must "reasonably believe that the alien is in the country illegally and that she 'is likely to escape before a warrant can be obtained for [her] arrest.'"
- Agencies must ensure both of the above-requirements are met before detaining an alleged illegal immigrant to avoid violating the individual's constitutional rights and incurring liability under § 1983 of the U.S. Code.
- One way to do this is to obtain a determination from ICE that the alleged illegal alien is "likely to escape" within the meaning of 8 U.S.C. § 1357(a)(2), although ICE has historically been hesitant to issue such determinations.
- Another approach to ensure the aforementioned requirements have been met is to demand a warrant from ICE in conjunction with its detainer request.
- Agencies should also conduct their own due diligence with regard to the immigration status of the alleged illegal immigrant for purposes of determining whether the individual is truly here illegally. Ignoring statements from the individual or failing to otherwise conduct such due diligence is another avenue for potentially violating the individual's constitutional rights and incurring liability under § 1983.
- Whatever the policy of the respective agency is, such policy should be clearly communicated to all employees to ensure consistent application of the policy. One wrong step by a particular employee can lead to constitutional violations or the loss of federal funding.
- The decision to adhere to ICE detainer requests may lead to negative publicity. Some may perceive the decision to adhere to such detainer requests as a violation of an individual's civil liberties and as discriminatory. Further, some may argue that the practice will chill communication between community members and law enforcement, thereby making the community a less-safe place to live. Agencies should be prepared to deal with such publicity.

That Said, a Middle Ground Exists…

- For agencies that would like to assist ICE with detainer requests supported by probable cause, but fear doing so could chill communication between law enforcement and illegal immigrants within the community, one option to consider is the U visa.
- The U visa is an immigration benefit that can be sought by victims of certain crimes who are currently assisting or have previously assisted law enforcement in the investigation or prosecution of a crime, or who are likely to be helpful in the investigation or prosecution of a criminal activity.
- The U visa provides eligible victims with nonimmigrant status for purposes of allowing the victims to temporarily remain in the United States while assisting law enforcement. If certain conditions are met, an individual with U nonimmigrant status may adjust to lawful permanent resident status. It should be noted that Congress has capped the number of available U visas to 10,000 per fiscal year.
- One of the primary conditions that must be met before an illegal immigrant may obtain a U visa is that he or she must receive certification from the law enforcement agency which he or she has assisted, or is likely to assist. The form which must be certified is the USCIS Form I-918, Supplement B.
- Another primary condition that must be met is that illegal immigrants seeking a U visa must have been victim to one of the specific crimes listed within the U visa certification guide, which is available on the Department of Homeland Security's website. The crimes contained within that list are those which are more serious in nature, such as abduction, abusive sexual contact, domestic violence, felonious assault, kidnapping, manslaughter, murder, rape, prostitution, etc.

Department of Justice Guidance Regarding Investigating Officer Involved Deaths

DOJ Investigative Guidelines for Officer-Involved Death Investigations

- Released on Monday, May 22, 2017.
- Sets forth the process DCI will follow when serving as the lead agency in the investigation.
- Mechanics of the investigative process generally well done, if a bit bureaucratic.
- All investigative agencies should review and revise their own policies in light of these new guidelines.

Key Concerns for Local Law Enforcement Agencies

- Control of your records
  - Investigative reports
  - Squad videos/audios
  - Body cam videos/audios
- Treatment of your employees
  - Who can be involved conflict of interest definition is very vague: "Casual Knowledge"
  - Definition of who is an "involved officer"
- Interviews
  - Can you attend?
  - Voluntary vs. compelled questioning
  - What evidence will be shared, and when

Key Concerns for Local Law Enforcement Agencies (cont'd)

- Public statements/comments
  - Timing of statement of support for your employees
  - Release of video/audio evidence to the public
- Coordination with your internal.
  - Garrity
  - Timing
- Your input in reaching a conclusion

Pros of New Guidelines

Pros

- Limits investigations solely to whether death is the result of criminal conduct.
- Creates supportive environment for the accused officer (access to family, clergy, counsellors, legal counsel, time to reflect, etc.).
- Controls release of information, with input from employing agency and prosecutor (especially access to video or audio recordings).

Cons of New Guidelines

Cons

- If DCI is not the lead agency, their "guidelines" will become the new "floor" for others.
- Internal investigations into possible rule violations could be delayed, and perhaps undermined, by the OID investigation.
- The "walk through" informal interview immediately after the incident is voluntary, which could lead to the loss of critical information, evidence and witnesses.
- There are several gray areas related to use of internal department reports, who can be present during the interview of the officer, and whether an investigator is "too close" to the involved officer to be eligible to serve.
- The officer's legal counsel can manipulate the process to get access to evidence, and then refuse to provide a statement.

Recent Labor, Employment and Open Meetings Cases Impacting Law Enforcement

WISCONSIN'S OPEN MEETINGS LAW AND EMPLOYEE COMMITTEES, ADMINISTRATOR COMMITTEES AND WHEN THE LAW APPLIES.

Krueger v. Appleton Area School District Bd. Educ., (Wisconsin Supreme Court June 2017).

- Summary of Facts:
  - Parent complaint regarding book list for a 9th grade class
  - 2 Administrators created a committee to review the book list
  - The committee was based on curriculum committees as detailed in a department handbook that had been adopted by the Board
  - A board rule provided that the Board is legally responsible for all educational materials
  - Committee met 9 times throughout the school year
  - Made a recommendation first to a Board committee, and then to the Board as to the book list for the 9th grade class

What was the Issue in *Krueger*?

- What is a governmental body created by "rule" of the Board?
  - Based on:
    - The form it takes
    - The source of its existence – a "rule" of the Board

What did the Supreme Court Hold?

- The review committee was a "governmental body" created by rule
  - Defined membership
  - Conferred the authority to review books based upon Board rule and the Board adopted Handbook
  - When the Review Committee was created, it was created by District employees on the basis of the Board rule and the Handbook

What did the Supreme Court Hold, cont'd.

- "Rule" includes any authoritative, prescribed direction for conduct, such as the regulations governing procedure in a governmental body
  - Here, the Board rule and the Handbook constituted the "rule"
- "[A] committee is created whenever a governmental body, by rule, authorizes the committee and assigns the duties and functions of the committee"

How the Court Viewed the Facts

¶27. "… First, it qualifies as a "committee" for purposes of the open meetings law because it had a defined membership of 17 individuals upon whom was conferred the authority, as a body, to review and select recommended educational materials for the Board's approval. This authority to prepare formal curriculum recommendations for Board approval was not exercised by teachers and curriculum specialists on their own. The Board——acting through Rule 361 and the Handbook——provided that the members of review committees would exercise such authority collectively, as a body."

The Court's View, cont'd

"Second, CAMRC was created by rule because District employees, when they formed CAMRC, relied on the authority to form review committees that was delegated to them by Rule 361 and the Handbook."

Troubling Statements in the Decision…

¶36. "Underscoring the nature of the rule under which CAMRC was formed is the fact that, after forming CAMRC, [an administrator] went before the Board to explain how the Handbook procedures had been modified to create CAMRC. The Board had a chance to ask questions, and it permitted CAMRC to continue. …"

Troubling Statements, cont'd.

¶37. "… we conclude that CAMRC was created by Rule 361 and the Handbook, because ***even though it was [two administrators]*** who put the Handbook process into action when they formed CAMRC, it was the Board's Rule 361 and the Board-approved Handbook that authorized review committees like CAMRC to be created and conferred on them the collective authority to review curriculum materials and make recommendations to the Board." (emphasis added)

Troubling Statements, cont'd.

¶42. "… we are not at liberty to exempt CAMRC from the definition of "governmental body" simply because government officials would find it convenient. "Mere government inconvenience is obviously no bar to the requirements of the [open meetings] law." Conta, 71 Wis. 2d at 678."

What did the Supreme Court Leave Unresolved?

- Whether a "high ranking official" can create a committee by rule or order?
  - Krueger had argued, in the alternative, that if the school board did not create CAMRC by "rule or order," then the fact that high-ranking administrators created CAMRC is enough to bring it under the Open Meetings Law.
  - Attorney General voiced support for this proposition.
  - Court did not address the question because of its finding that CAMRC was created by board rule.

Implications of the *Krueger* Decision

- Determine what committees are created by "rule" of the governing body – ordinances, by-laws, resolutions, policies, handbooks, etc.
- Ensure policies are consistent with practices.
- Revise and amend policies to reflect accurate interpretations of what groups constitute committees created by rule.
- Counsel board members, administrators/managers, department heads, etc., as to proper application of the Open Meetings Law.

Questions to Ask in Determining if a Committee is a "Governmental Body"

1. What body created the committee?
2. To whom does the committee report?
3. Is there a rule or policy of the governing board that relates to the topic of the committee's work?
4. Is the committee addressing a topic that is explicitly the governing board's responsibility?

July 26, 2016 Letter from the DOJ to Winnebago County District Attorney's Office and Winnebago County Corporation Counsel

Summary of the Opinion:

- For four years, meetings of the Winnebago County Judicial Courthouse and Security Committee (JCSC) – a courthouse security committee not governed by the Open Meetings Law – had been regularly attended by a quorum of two subcommittees of the Winnebago County Board of Supervisors, the Judiciary and Public Safety Committee (JPSC) and the Facilities and Property Management Committee (FPMC) – committees subject to the Open Meetings Law. The JCSC considered matters that fell within the area of authority of each of the County Board subcommittees. At issue was whether the attendance of a quorum of the subcommittee members at a meeting of a committee not subject to Open Meetings Law required compliance with the Open Meetings Law.
- The Attorney General opined that when a quorum of the members of one governmental body attend a meeting merely for purposes of gathering information – even if the members do not interact – or to otherwise engaging in governmental business, a meeting takes place and notice must be provided. The facts of the situation demonstrated that attendance of a quorum of each of the two County Board subcommittees, the JPSC and the FPMC, at the JCSC meetings satisfied the two requirements for the definition of a meeting.

July 26, 2016 Letter from the DOJ to Winnebago County District Attorney's Office and Winnebago County Corporation Counsel

Summary of the Opinion cont'd:

- Further, Winnebago County had engaged in the practice of placing boilerplate language on its meeting notices – referred to as a *Badke* notice – that essentially stated that any county board subcommittee may have a quorum attending any county meeting. The Attorney General opined that such boilerplate language was insufficient under the Open Meetings Law. Such a notice did not provide notice of an actual meeting, but rather of the possibility of a meeting. The Open Meetings Law requires that a separate public notice shall be given for each meeting of a governmental body. The Attorney General did advise that a single notice could be used by the subcommittees, provided the notice clearly indicated that a joint meeting would be held and identify the names of each governmental body involved.

July 26, 2016 Letter from the DOJ to Winnebago County District Attorney's Office and Winnebago County Corporation Counsel

Issues Remaining:

- How far does the Attorney General's opinion extend?
- The interpretation is very expansive in that any time a quorum of members is present at another gathering, the Open Meetings Law applies.
- Does attendance by a quorum of members at any organized gathering require compliance with the Open Meetings Law?
- How can a governmental body comply with notice requirements in a manner other than *Badke* notices?

Potential Legislative Fixes to Open Meetings Conundrum Created by *Krueger* and the Winnebago County Opinion

- Counties, and other local governments, deserve clarity. Despite efforts by the Supreme Court and the Attorney General to provide clarity, ambiguity remains. The purpose of a legislative fix would not be to overturn the decision of the Supreme Court in *Krueger* or to discredit the guidance of the Attorney General, but rather, to provide clarification to local governments as to what constitutes a governmental body subject to the Open Meetings Law.

Potential Legislative Fixes to Open Meetings Conundrum Created by *Krueger* and the Winnebago County Opinion

- First, legislation would focus on clarifying the definition of "governmental body" set forth in Wis. Stat. § 19.82(1) to make clear that formal action by a governmental body is required to create a committee.
- Second, statutory revisions would focus on defining who can create a committee that would be subject to the Open Meetings Law in order to bring clarity to the "high ranking official" argument that the Supreme Court declined to address in the *Krueger* matter.
- Third, legislation would address the Winnebago County problem of a quorum of committee members attending another meeting and when and how to provide notice and comply with the Open Meetings Law. After all, it seems logical that our laws ought to be written and interpreted in a manner that would support an informed governing body, rather than discouraging elected officials from attending other meetings

Labor & Employment Cases Impacting Law Enforcement

EXTRORDINARY STRESS AND WORKER'S COMP AND DUTY DISABILITY. *Burt Redding v. LIRC*, 2016AP916 (July 18, 2017 Ct. App).

- Burt-Redding worked as a patrol officer in the Grand Chute Police Department. On August 29, 2002, and while in the line of duty, she shot a street gang member who was threatening motorists and wielding a knife. Following the shooting, Burt-Redding allegedly received threats which fell into three categories: (1) threats made directly to her; (2) threats made directly to her son; and (3) instances where the police chief warned her about the shooting victim's family threatening her life. She alleged the "repeated threats against her life and the unresolved reminders of those threats that continued over a period of several years" caused anxiety attacks, chronic depression, and post-traumatic stress disorder. She sought permanent total disability benefits or, in the alternative, loss of earning capacity.

Labor & Employment Cases Impacting Law Enforcement

EXTRORDINARY STRESS AND WORKER'S COMP AND DUTY DISABILITY.

In his written decision denying benefits, the ALJ found:

- [The shooting victim] and his brothers were associated with an Asian street gang called the Crazy Hmong Boy Gang . . . . The . . . Police Department was familiar with this gang and had an officer who "dealt with gangs and kept files and information on such subjects," so the officers in the . . . Police Department were fully aware of the CMB gang.
- Chief Kopp testified credibly that in the law enforcement profession, police officers deal with people who are not "the nicest people in society." He further testified that because of this, "any police officer knows that they potentially are setting themselves up for some kind of revenge or retaliation" from the people they deal with. According to the respondents' expert, Robert Willis, who taught street gang awareness, "Asian gangs are very often likely to seek retribution." Applicant embraced this fact in her posthearing brief, page 4, when she stated: "The []Xiong brothers were gang members and it was common knowledge in law enforcement circles that, 'Asian gangs are very often likely to seek retribution.'"

Labor & Employment Cases Impacting Law Enforcement

EXTRORDINARY STRESS EXTRORDINARY STRESS AND WORKER'S COMP AND DUTY DISABILITY. .

Affirming the LIRC's denial of her benefits, the Court found:

- [T]he record is replete with credible and substantial evidence supporting LIRC's determination that the threats in the present case did not amount to extraordinary or unusual stress for a patrol officer like Burt-Redding. Grand Chute Police Chief Edgar Kopp testified the threats perceived by Burt-Redding "were not unusual or atypical for a police officer." Police science instructor Robert Willis, who has testified in many cases involving police use of force, also opined the threats "were not unusual nor should be considered atypical to the law enforcement profession." Willis also stated in his report that threats against law enforcement officers are a "common experience" and "[m]ost police officers accept that the possibility of threats just 'goes with the territory."

Labor & Employment Cases Impacting Law Enforcement

SOCIAL MEDIA AND THE PUBLIC SAFETY EMPLOYEE. *Grutzmacher v. Howard County* (4th Cir. 2017)

- Plaintiff was watching news coverage of a gun control debate in his office and posted the following statement to his Facebook page while on-duty: *My aide had an outstanding idea . . lets all kill someone with a liberal . . . then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberal . . . its almost poetic . . .*
- Twenty minutes later, a county volunteer paramedic, replied to Plaintiff's earlier post with the following comment: *But . . . . was it an "assult liberal"? Gotta pick a fat one, those are the "high capacity" ones. Oh . . . pick a black one, those are more "scary". Sorry had to perfect on a cool idea!*
- Six minutes later, Plaintiff "*liked*" Grutzmacher's comment and replied, "*Lmfao! Too cool Mark Grutzmacher!*"
- Plaintiff was directed to remove content in violation of policy.

Labor & Employment Cases Impacting Law Enforcement

SOCIAL MEDIA AND THE PUBLIC SAFETY EMPLOYEE.

A few hours after Plaintiff informed Assistant Chief Jerome that he had removed the posts—Plaintiff posted the following to his Facebook "wall":

- *To prevent future butthurt and comply with a directive from my supervisor, a recent post (meant entirely in jest) has been deleted. So has the complaining party. If I offend you, feel free to delete me. Or converse with me. I'm not scared or ashamed of my opinions or political leaning, or religion. I'm happy to discuss any of them with you. If you're not man enough to do so, let me know, so I can delete you. That is all. Semper Fi! Carry On.*

One of Plaintiff's Facebook friends then replied, "*As long as it isn't about the [Department], shouldn't you be able to express your opinions?*"

Labor & Employment Cases Impacting Law Enforcement

SOCIAL MEDIA AND THE PUBLIC SAFETY EMPLOYEE.

Plaintiff responded:

- *Unfortunately, not in the current political climate. Howard County, Maryland, and the Federal Government are all Liberal Democrat held at this point in time. Free speech only applies to the liberals, and then only if it is in line with the liberal socialist agenda. County Government recently published a Social media policy, which the Department then published it's own. It is suitably vague enough that any post is likely to result in disciplinary action, up to and including termination of employment, to include this one. All it took was one liberal to complain . . . sad day. To lose the First Amendment rights I fought to ensure, unlike the WIDE majority of the Government I serve.*

Labor & Employment Cases Impacting Law Enforcement

SOCIAL MEDIA AND THE PUBLIC SAFETY EMPLOYEE.

- In balancing these interests, the court must "consider the context in which the speech was made, including the employee's role and the extent to which the speech impairs the efficiency of the workplace." Factors relevant to this inquiry include whether a public employee's speech (1) impaired the maintenance of discipline by supervisors; (2) impaired harmony among coworkers; (3) damaged close personal relationships; (4) impeded the performance of the public employee's duties; (5) interfered with the operation of the institution; (6) undermined the mission of the institution; (7) was communicated to the public or to coworkers in private; (8) conflicted with the responsibilities of the employee within the institution; and (9) abused the authority and public accountability that the employee's role entailed.

Labor & Employment Cases Impacting Law Enforcement

SOCIAL MEDIA AND THE PUBLIC SAFETY EMPLOYEE.

- To demonstrate that an employee's speech impaired efficiency, a government employer need not "prove that the employee's speech actually disrupted efficiency, but only that an adverse effect was 'reasonably to be apprehended.'" ("While [it] is correct that 'concrete evidence' of an actual disruption is not required, there must still be a reasonable apprehension of such a disruption.").
- Additionally, this Court has previously recognized that "[a] social media platform amplifies the distribution of the speaker's message—which favors the employee's free speech interests—but also increases the potential, in some cases exponentially, for departmental disruption, thereby favoring the employer's interest in efficiency."

Labor & Employment Cases Impacting Law Enforcement

SOCIAL MEDIA AND THE PUBLIC SAFETY EMPLOYEE.

- First, Plaintiff's Facebook activity interfered with and impaired Department operations and discipline as well as working relationships…. "[F]ire companies have a strong interest in the promotion of camaraderie and efficiency" as well as "internal harmony [and] trust," and therefore we accord "substantial weight" to a fire department's interest in limiting dissension and discord. ("When lives may be at stake in a fire, an *esprit de corps* is essential to the success of the joint endeavor. Carping criticism and abrasive conduct have no place in a small organization that depends upon common loyalty—'harmony among coworkers.'").
- Here, Plaintiff's Facebook activity led to "dissension in the [D]epartment" and resulted in "[n]umerous" conversations between at least one battalion chief and lower-level employees in which the battalion chief "had to[,] . . . as a supervisor[,] justify[] that it's okay for anybody to say or do anything against the policy."
- Additionally, at least one lieutenant perceived Grutzmacher's comment regarding "picking a black one," which Plaintiff "liked," as "referr[ing] to a black person." Three African-American employees [complained]. . . ., with one member stating, "I don't want to work for [Plaintiff] anymore. I don't trust him."

Labor & Employment Cases Impacting Law Enforcement

SOCIAL MEDIA AND THE PUBLIC SAFETY EMPLOYEE.

- Second, Plaintiff's Facebook activity significantly conflicted with Plaintiff's responsibilities as a battalion chief. Courts have long recognized that "[t]he expressive activities of a highly placed supervisory . . . employee will be more disruptive to the operation of the workplace than similar activity by a low level employee with little authority or discretion." ("[Plaintiff's] position as a supervisor . . . weighs heavily on the agency's side."). As a leader within the Department, Plaintiff was responsible for acting as an impartial decisionmaker and "enforcing Departmental policies and taking appropriate action for violations of those policies." The record demonstrates that Plaintiff's actions led to concerns regarding Plaintiff's fitness as a supervisor and role model, and concerns that Plaintiff's subordinates would not take him seriously if Plaintiff tried to discipline them in the future. By flouting Department policies he was expected to enforce, Plaintiff "violated the trust [his inferiors] have in him to be in his administrative role as a battalion chief, because people count on him to be fair." Accordingly, Plaintiff's managerial position also weighs in the Department's favor.

Labor & Employment Cases Impacting Law Enforcement

SOCIAL MEDIA AND THE PUBLIC SAFETY EMPLOYEE.

- Third, Plaintiff's speech frustrated the Department's public safety mission and threatened "community trust" in the Department, which is "vitally important" to its function. "[T]he more the employee's job requires . . . public contact, the greater the state's interest in firing her for expression that offends her employer." "[F]irefighters . . . are quintessentially public servants. As such, part of their job is to safeguard the public's opinion of them, particularly with regard to a community's view of the respect that . . . firefighters accord the members of that community."

Labor & Employment Cases Impacting Law Enforcement

SOCIAL MEDIA AND THE PUBLIC SAFETY EMPLOYEE.

- Fourth, Plaintiff's speech—particularly his "like" of the image depicting a woman raising her middle finger—"expressly disrespect[ed] [his] superiors." A public employee's interest in speaking on matters of public concern "does not require that [a public] employer[] tolerate associated behavior that [it] reasonably believed was disruptive and insubordinate." ("The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."). Here, Plaintiff's "continued unrestrained conduct" after already being reprimanded "'smack[ed] of insubordination.'" Employees within the Department viewed Plaintiff's "like" of Donnelly's Facebook picture of an older woman with her middle finger raised as a "sparring match between the battalion chief and an assistant chief [that publicly] escalated to the level of telling the fire chief to f__k off."

Labor & Employment Cases Impacting Law Enforcement

SOCIAL MEDIA AND THE PUBLIC SAFETY EMPLOYEE.

- Lastly, we observe that the record is rife with observations of how Plaintiff's Facebook activity, subsequent to Assistant Chief Jerome's request that Plaintiff remove any offending posts, disregarded and upset the chain of command upon which the Department relies. Fire departments operate as "paramilitary" organizations in which "discipline is demanded, and freedom must be correspondingly denied." Accordingly, we afford fire departments "greater latitude . . . in dealing with dissension in their ranks." *Id.* Although the Department's status as a paramilitary organization is not dispositive of the *Pickering* analysis, *see Liverman*, 844 F.3d at 408, it does further tip the scale in the Department's favor.

Labor & Employment Cases Impacting Law Enforcement

WHAT DOES IT MEAN TO FIRE AN EMPLOYEE *BECAUSE* OF THEIR DISABILITY?
Wisconsin Bell, Inc. v. Labor & Indus. Review Comm'n, 2017 WI App 24, 375 Wis. 2d 293, 895 N.W.2d 57, 62.

- Employee worked at a call center and during his employment was diagnosed with bipolar disorder. He informed his supervisor who allowed him accommodations including time spent offline. Employee moved to a different call center, but did not inform supervisors of his condition or accommodations. He was disciplined at the new position for disconnecting eight straight customer calls. Management was not aware of his disability, but during a review board hearing documentation was provided information regarding his disability. Management determined that intentionally disconnecting customers would not be allowed under any condition. He was suspended and had to enter into a back to work agreement where he could be terminated for just cause during a 1 year time period.
- During this period he left early due to illness but had activated a health code which prevents calls. During that time he was chatting with employees about personal matters on the system chat. Management did not think he was actually ill and fired him.

Labor & Employment Cases Impacting Law Enforcement

WHAT DOES IT MEAN TO FIRE AN EMPLOYEE *BECAUSE* OF THEIR DISABILITY?
Wisconsin Bell, Inc. v. Labor & Indus. Review Comm'n, 2017 WI App 24, 375 Wis. 2d 293, 895 N.W.2d 57, 62.

- The LIRC found that the suspension did not violate WEFA because the people who disciplined the employee were not aware of his disability, and it would not have been a reasonable accommodation to hang up on customers. However, at the time of termination, the employer had knowledge of the bipolar disorder and symptoms. The conduct involving the chat system and medical code activation were consistent with evidence submitted regarding descriptions from doctors describing the symptoms. The LIRC interpreted "because of" in the WFEA to include discriminatory animus which occurs "from the employer acting on the basis of dissatisfaction with a problem with that employee's behavior or performance which is caused by the employee's disability." It is possible to escape liability if an employer acts in good faith or determines no reasonable accommodation exists, but based on the evidence the LIRC found that the employer did not act in good faith or consider whether hardship prevented an accommodation.

Labor & Employment Cases Impacting Law Enforcement

WHAT DOES IT MEAN TO LOSE CREDENTIALS? *Local 311, IAFF v. City of Sun Prairie*, A/P M-14-026 (Arbitrator Richard McLaughlin, 2/17/15 and 1/19/17)

- Just because someone loses licensure that is required for his or her job, that does not equate to just cause being established for purposes of termination. Rather employers must thoroughly conduct a just cause analysis before terminating an employee with such protections.
- This decision has been appealed to circuit court and now to the court of appeals and the City's first appellate brief is due in early September 2017.

How to Properly Discipline Public Safety Employees and Managing Off-Duty Misconduct

Collective Bargaining Agreements and Section 59.26(8)(b), Stats.

- History of the Conflict – *Janesville*, 193 Wis.2d 492 (1995)
  - The County Distinction – *Waukesha County*, 352 Wis.2d 707 (2014)
    - Choice after Grievance Committee Hearing
- Type of Action that Applies and that Does Not Apply
  - Suspension, Demotion or Dismissal
  - But Not Probation, Layoff, Evaluations

STANDARDS FOR DISCIPLINE

What is the difference between:

- Arbitrary and Capricious Standard (for general municipal employees);

AND

- Just Cause Standard (for police officers and firefighters)?

ISSUES INVOLVING AN INTERNAL INVESTIGATION

- Personnel vs. Criminal
- Internal vs. External
- Law Enforcement Officer's Bill of Rights Sec. 164, Stats.
  - Informed of the nature of the investigation
  - At request, may be represented - Weingarten
  - If violated, evidence excluded

WEINGARTEN RIGHTS

- The subject of the internal investigation has the right to union representation during any interview. Chapter 164 rights allow any person to serve as representative for the sworn employee.
- Union representative may participate but not interfere with the interview.
- Employee must request union representation; employer is not required to offer it – But best to inform. Chapter 164 rights require notice.

WEINGARTEN RIGHTS

- Union representation is not legally required at the meeting where discipline is imposed.
- The employee has the right to choose the person designated as their union representative, unless that union representative is not available.
- The union representative must have a meaningful opportunity to represent the employee during the interview.

The Garrity Warning

- *Garrity v. New Jersey*, 385 U.S. 493 (1967)
  - Resolving the Conflict between the Right Not to be Compelled to Testify Against Themselves vs. Governments Need to Know.
  - Compels Answers or Face Termination
  - Cautions Against Use of Information Gained

Other Internal Investigation Directives

- Communication with Others During the Investigation
- To Tell the Truth
  - Brady Issues and Their Impact

Statutory “Just Cause”

- Whether the deputy could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
- Whether the rule or order that the deputy allegedly violated is reasonable.
- Whether the sheriff, before filing the charge against the deputy, made a reasonable effort to discover whether the deputy did in fact violate a rule or order.
- Whether the effort described under subd. 5m. c. was fair and objective.

Statutory “Just Cause” (continued)

- Whether the sheriff discovered substantial evidence that the deputy violated the rule or order as described in the charges filed against the deputy.
- Whether the sheriff is applying the rule or order fairly and without discrimination to the deputy.
- Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the deputy's record of service with the sheriff's department.

ASSESSING THE LEVEL OF DISCIPLINE WARRANTED FOR OFFENSE

(1) Facts and circumstances, such as breach of trust

(2) Employee's length of service

(3) Severity of the infraction

(4) Past disciplinary record

(5) Collective bargaining agreement

(6) Mitigating factors, such as remorse

ASSESSING THE LEVEL OF DISCIPLINE WARRANTED FOR OFFENSE

(7) Aggravating factors

(8) Legitimate performance obstacles

(9) Consistency with other cases

(10) Amount of warning/notice

(11) Opportunity to correct problems

(12) Reasonableness of rule or order violated

TIPS FOR MEETING WITH EMPLOYEE TO IMPOSE DISCIPLINE

(1) Be positive, direct, and fair

(2) Keep the meeting short and to the point

(3) Emphasize that the decision is final and irrevocable

(4) Do not engage in "bargaining" or side discussions with the employee

(5) Do not discuss other employees' discipline (or lack thereof) for similar conduct

(6) Send the employee a letter confirming the discipline imposed (even when it is a verbal warning)

INFORMATION TO INCLUDE IN DOCUMENTATION

(1) Background and identifying information

(2) Relevant dates

(3) Name of supervisor

(4) Name of person conducting investigation

(5) Facts developed during investigation, particularly any admissions made by the employee

(6) Names of witnesses and information collected from each witness if not confidential

(7) Identification of the rule, policy or order violated

INFORMATION TO INCLUDE IN DOCUMENTATION

(8) Summary of employee's prior disciplinary actions and dates received

(9) Employee's length of service and overall performance

(10) The employee's statement or explanation of incident

(11) Specific details on the action taken

(12) Person who made decision to impose discipline

(13) Consequences of future acts of misconduct

Tools for Discipline and Performance Improvement

- Traditional Progressive Discipline
- Evaluations
- Programs of Improvement
- Last Chance Agreements
- Separation Agreements

Due Process in Discipline

- Property Deprivation
- Liberty Deprivation
- Property interest hearing
- Liberty interest hearing

The Commonly Referred to "Nexus Test" for Off-Duty Misconduct

- Three Avenues for Nexus:
  - Conduct that renders the employee unable to perform his job duties.
  - Conduct that harms the reputation and good name of the municipal employer.
  - Conduct that makes other employees unwilling, reluctant, or refuse to work with the employee.

Off-Duty Misconduct: Other Angles & Issues

- Rules and regulations adopted by the employer regulating off-duty misconduct:
  - Unbecoming Conduct
  - Moonlighting
  - “Compliance with Laws”
  - Antifraternization
  - Drug and alcohol testing
- Nature and Seriousness of the misconduct.
- Characteristics/type of the employer and occupation .

Off-Duty Misconduct: Other Angles & Issues

- Location of the employer (Small town v. Large city).
- Extent and kind of publicity surrounding the misconduct.
- Damage to the Department's good name and reputation.
- The Popularity Contest – the response of coworkers and other employees to the misconduct of the employee.

Off-Duty Misconduct cont'd

- Investigation responsibilities, including *Garrity* and *Weingarter*/Chapter 164 Rules still apply.

Discipline or Disqualification

- Lautenberg Amendment
- Licensure Issues
- Felony convictions and service as a LEO

A Sampling of Decisions on Discipline for Off-Duty Misconduct

- *Boyce v. Ward*, 551 N.Y.S.2d 7 (App. Div. 1990). An off-duty police officer who went on a drinking rampage with three other officers after being denied oral sex at a massage parlor was properly terminated as dismissal "was not so disproportionate to the offenses as to shock one's sense of fairness."
- *In re City of Houston*, 124 LA 1508 (BNA) (2008) (Moore, Arb.). Arbitrator upholds 15-day suspension of police officer based on the officer's unprofessional conduct at a hospital while waiting too long in the waiting room with her mother for her mother's MRI. The officer engaged in loud, derogatory, and threatening conduct with receptionists and security guards, and she loudly expressed that she herself was a cop. The arbitrator found that her outrageous conduct reflected negatively on the police department and its officers, but the arbitrator suggested that had she not verbalized the fact that she was an officer, the result would perhaps have been different.

A Sampling of Decisions on Discipline for Off-Duty Misconduct

- *Taylor County*, Dec. No. 59145 (Greco, 06/01). Arbitrator reinstates terminated deputy sheriff (Thums) who, immediately after witnessing another man kiss his wife, planned to strike the man with a 2 x 4 but instead slashed the man's tires. The arbitrator found termination was not the proper level of discipline in this case due to a multitude of mitigating factors: Thums saw another man kiss his wife; which put him into an emotional state that precluded him from thinking clearly; that he changed his mind from hitting the man with a 2 x 4 and instead slashed his tires, thus never actually physically harming anyone; that he offered to pay for the damage; that the man refused to press charges; that Thums disclosed what happened without any obligation to do so; that officers did not view him as a danger to anyone after the incident; that all criminal charges against him were eventually dropped; and that he successfully completed an anger management course. The arbitrator also found that although there was "publicity galore" about the incident, such publicity could have been avoided but for the sheriff's personal quest to impose the maximum penalty and publicize the incident via his own actions.

A Sampling of Decisions on Discipline for Off-Duty Misconduct

- *Eilers v. Civil Serv. Comm'n of the City of Burlington, Iowa*, 544 N.W.2d 463 (Iowa Ct. App. 1995). An officer and his teenage son were visited around midnight at their home by a group of the son's friends. The off-duty officer followed his son outside to the group of boys who appeared to be getting ready to fight. The officer used profanity and ordered the boys to leave. After some futile attempts to get the boys to leave, the officer ended up striking one of the boys, and went to the ground fighting him. The officer was properly suspended without pay for five days on misconduct grounds. Acknowledging that the officer was "thrust into the incident with little time to deliberate, and was involved as a parent as well as an off-duty officer," the court found that the circumstances nevertheless did not justify his conduct and use of force. "Police are community representatives, and [the officer's] actions did not comport to the leadership required of a representative of law enforcement."

A Sampling of Decisions on Discipline for Off-Duty Misconduct

- *Liley v. City of Carmel*, 527 N.E.2d 224 (Ind. App. 1988). A firefighter who appeared in an intoxicated state at the fire station while off-duty, and who was found to have siphoned gasoline from one of the emergency vehicles and to have stolen meat from the fire station freezer, engaged in conduct unbecoming an officer. Even though he was eventually acquitted of the thefts, the court found that "an administrative determination that a criminal act has been committed does not depend upon a criminal conviction of that act." In any event, his intoxication at the station, in front of his subordinates (he held the rank of Lieutenant), was alone conduct unbecoming. The court affirmed the Board's decision to dismiss him from the department. The fire department relied on its off-duty officers to be able to respond appropriately in an emergency, and the requirement that he not engage in conduct that might impair his ability to so respond was a reasonable rule. Moreover, because he held the rank of Lieutenant and was a shift commander, if called upon while off-duty to respond in an emergency, he would have been in charge of the fire scene and emergency medical care. His conduct clearly was related to his "position of authority [and the fact that he] could be called in to make decisions affecting the safety of other firefighters."

Arrest and Conviction Record Discrimination

- Arrest Record. An "arrest" is defined broadly as "information indicating that an individual has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority." Wis. Stat. § 111.32(1).
- Two key defenses in Arrest Record Cases:
  - Substantially Related Defense (suspension)
  - *Onalaska* Defense

Arrest and Conviction Record Discrimination

Suspension pending disposition of criminal charges and the Substantially Related Test.

- An employer has an affirmative defense against a discrimination claim under the arrest and conviction record statute, wherein the statute permits an employer to suspend an employee subject to a pending charge if the circumstances of the charge substantially relate to the circumstances of the job.
- When does this defense apply—when does "the circumstances of the charge substantially relate to the circumstances of the particular job?" Does the job present circumstances which foster criminal activity including the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person. *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 407 N.W.2d 908 (1987).

Arrest and Conviction Record Discrimination

The *Onalaska* Defense.

- Independent action by the employer instead of reliance on the criminal investigation and disposition of the pending charges.
- *Betters v. Kimberly Area School District*, ERD Case No. CR200300554 (Nov. 28, 2007 LIRC) An employer does not violate the arrest record discrimination law when it conducts its own investigation and concludes from its own investigation that the individual violated Department rules based on information independent of the arrest and of the arresting authority.
- The employer must consider independent information. Independent information is not the police report, the criminal complaint, or statements made by or other information provided by the prosecuting or arresting authority. Independent information is interviewing and obtaining an admission from the employee, statements to the employer by others who witnessed the conduct, direct observations made by the employer, an investigation by the employer that made use of information obtained from a contemporaneous police investigation.

Arrest and Conviction Record Discrimination

- An employer has no duty to accommodate an arrest or conviction record.
- Disqualification from employment if convicted of certain crimes (e.g. Class C Drivers Licenses, or the Lautenberg Amendment precluding a sworn law enforcement officer from possessing a firearm if convicted of a felony or of a domestic violence related misdemeanor).

QUESTIONS?

THANK YOU!!!

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