



THE CLINE NEWSLETTER

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A NOTE FROM THE EDITOR

The primary purpose of this newsletter is to provide information on recent developments in public safety labor law for Washington public safety labor organizations. Often that involves reports on the Public Employment Relations Commission decisions and in-state court and arbitration cases. But often the rulings of courts and arbitrators from out of state can have important impacts on our body of law, or at least may provide good examples of how in-state cases might be decided.

So, from time to time we will present out-of-state cases. But reliance on out of state cases must be done carefully — often I hear from clients who pick up information from national newsletters or out of state training which does not necessarily apply to the situation here, or at least not in the manner sometimes described. For example, out-of-state federal cases are important in understanding federal rights. But because the Ninth Circuit often might take a different approach to those courts elsewhere, for our purposes, the rulings of the Ninth Circuit have a much stronger bearing on how Washington State and federal district courts will interpret and apply those federal issues. Ultimately, the Supreme Court resolves these appellate court disputes, but often not until years after the fact.

This newsletter issue provides good examples of this situation. In this issue we discuss three out of state cases but in each instance we explain the extent to which the case might — or might not — apply in-state. We will continue to do so in the future together with our editorial commentary explaining what we believe the decisions likely will mean for you and your members.

Jim Cline

FEDERAL COURT OF APPEALS REFUSES TO ENFORCE DOL COMPENSATORY TIME RULE

The Fifth Circuit Court of Appeals, the federal court of appeals which covers a number of the southern states, has refused to enforce the Department of Labor interpretative regulation concerning compensatory time. In *Houston Police Officers Union v City of Houston*, 8 Wage Hour Cases 2d (2003), the court held that the employer was not required to provide compensatory time at the time requested by the employees despite the DOL rule which indicates that an employee's request will be honored absent "undue hardship."

The FLSA compensatory time provisions indicate that employees shall be permitted "to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." The DOL has ruled that this means employees shall be granted the day requested unless fulfillment of that request would cause an undue hardship such as a staffing problem. The DOL has also opined that mere reluctance by the employer to backfill the shift opening with overtime is *not* an undue hardship.

The Fifth Circuit declared the DOL regulation void. It concluded that the FLSA provisions meant that comp time off shall be granted within some reasonable period of time off, not on a day necessarily of the employee's choosing but instead on a day chosen by the employer. The court stated: "The language offers a span of time to the employer, the beginning of which is the date of the employee's request."

This is a some what unexpected decision as no previous court we are aware of has refused to honor this DOL interpretative regulation. In our view it is unlikely, absent adoption of this approach by the Supreme Court, that the existing Ninth Circuit Court of Appeals would follow the Fifth Circuit and refuse to abide by this DOL regulation. (The refusal of the Fifth Circuit to follow the DOL regulation is in no way binding on the Ninth Circuit.) In our view, the state of the law applicable to Washington public safety labor organizations is that employee's have a right to a comp time day off requested even if overtime is incurred as long as they make their request with a reasonable amount of time prior to the requested day.

You should also be aware that the even if this regulation were ultimately stricken, the past practice established by the parties in a collective bargaining relationship establishes the floor of rights enjoyed by employees. Therefore, if you have adopted by past practice or in your CBA comp time permitted at a time of the employee's choice, that standard should continue absent an agreement to the contrary. Occasionally in the

face of favorable FLSA interpretations such as this one, employers will raise ruling as a basis for changing existing standards, but you should be aware that in a case such as this, the collective bargaining law would trump their ability to make changes unilaterally.

This decision reflects a broader growing problem in federal courts. On an increasingly wide basis, federal courts are refusing to follow the apparent Congressional intent in statutes designed to confer protections for employees. The FLSA, the ADA and a number of other federal employment laws have been increasingly given restrictive interpretations by an increasingly conservative judiciary. The author of this Fifth Circuit decision, Judge Edith Jones, has been widely reported to be on the White House's "short list" of possible Supreme Court nominees. If her other decisions reflect the type of biases apparent in this decision, one would expect that she would face a rocky appointment process.

Jim Cline

ILLINOIS FEDERAL DISTRICT COURT RULES THAT POLICE OFFICER PLACED INTO LIGHT DUTY INVESTIGATIVE POSITION DOES NOT HAVE THE RIGHT TO KEEP THE JOB PERMANENTLY

A federal district court in Illinois has rejected the claim of a City of Rockford police officer that the federal disability discrimination laws provided him a right to retain a light duty investigative position even though the department had allowed him to work in the position in a light duty capacity for several years. *Doner v. City of Rockford Illinois*, 2003 U.S. Dist. Lexis 1792, 2003 WL 262514, (2003).

William Doner was a police officer for the City since 1972 and a detective since 1985. He was diagnosed with multiple sclerosis in 1990 leading eventually to deterioration in his job performance. In 1992 his job was modified so that he did his investigations from inside the police station. By 1996, the City forced him to retire.

The Court found that although an assignment may not require a great deal of physical mobility on a daily basis, this does not diminish the reasonable expectation that all police officers be able to handle physical altercations and emergencies when they arise. In this case the Employee was working light duty for a time in order to see if his condition would improve. The City was not under an obligation to accommodate the Employee by making a light duty position permanent.

This decision is the expected result on these facts, even though the employee had been allowed to work in a light duty capacity for a number of years. Even the more liberal Washington disability discrimination law has not been interpreted to require the continuation of light duty work where the employee is unable to fulfill the minimum requirements of the classification.

The key to understanding this area of law is to understand that it is the requirements of the broader classification which determine an individual's ability to continue, not their ability to work in a discrete job assignment. In a very limited number of cases, including a Ninth Circuit decision a couple years ago involving the San Jose Police Department, courts have held that the creation of a particular light duty position imposed a duty to continue the accommodation of employees in them. But all of these cases arose from special circumstances where the light duty positions had been created as discrete classifications.

In our experience, it is rare in Washington State, especially given the civil service system, that public safety classifications have been split into regular and light duty classifications. Although labor organizations should probably bargain for the creation of discrete classifications, we are unaware of an employer that has yet embraced such an approach.

Kate Kremer and Jim Cline

PENNSYLVANIA ARBITRATOR OVERTURNS DISCHARGE FOR INSUBORDINATION WHEN SUPERVISOR FAILS TO TESTIFY AT HEARING

A Pennsylvania Corrections Officer discharged for insubordination was reinstated after the Arbitrator determined that the only evidence used by the Employer was hearsay evidence since the Supervisor present at the alleged insubordination did not testify at the hearing. *In re Wackenhut Corrections Corp.*, 118 LA 63 (2003).

According to the employee, she was going to lunch one day and was given a note by another correctional officer. It had her name on it and had been stapled shut but subsequently opened. It was from an abortion clinic, where the Employee had an abortion two days earlier. She asked everyone at the Center Desk where the note had come from and no one knew. She went to the shift commander's office and he said that he had taken the message about earlier in the morning and he then gave the note to another correctional officer (not a supervisor) to give to her.

The shift commander no longer worked for the employer by the time of the arbitration hearing and was not subpoenaed to testify. Instead the Employer submitted a written statement signed by this shift commander stating that the employee had stormed into his office and said that she was going to “‘fucking’ sue me.” When the supervisor told her to be a little more respectful she allegedly stated, “Fuck you and Fuck that. I am writing you the fuck up and all you and all you Mother Fucking Supervisors”.

The employee testified that she told the Shift Commander that he should have delivered the message directly to her or called her to come and get it and he should not have given the note to another correctional officer. She acknowledged being upset over the note because she felt it exposed a very private matter.

The arbitrator concluded that absent a live witness, he would not rely on the employer’s hearsay testimony and had to sustain the grievance and reinstate the employee. The Arbitrator also suggested that *even if* the Employer had provided enough evidence to satisfy their burden of persuasion, the manner in which the note was handled might have provided a sufficient mitigating circumstance to justify reducing the termination to a disciplinary suspension.

In discipline grievances, the Employer has the burden of proof. Arbitrators may allow hearsay evidence, but they do not often give it much weight. In this case, the hearsay evidence was contradicted by the testimony of a witness, the Employee. The Employer’s entire case was based on hearsay evidence and therefore it was not able to persuade the Arbitrator that it had just cause to terminate the Employee.

Loud, profane and challenging statements such as those involved here generally do form a basis for an “insubordinate conduct” charge which, in a paramilitary organization, will generally be viewed as serious infractions, although it is not necessarily the case that all such conduct will automatically call for discharge. In this case the employee had a history of some progressive discipline, leaving her more exposed to the potential for discharge.

On the other hand, as this arbitrator suggested, the circumstances of this case, which involved the exposure of very private information, constituted a mitigating factor which would justify some possible leniency. Arbitrators have especially considered such mitigation where, as here, the employers mishandling of the situation with the employee caused the outburst at issue. The failure to produce the supervisor here was likely fatal even if the mitigating circumstances had not been raised, but since they were at issue, the failure to present the possible provocateur was even more glaring.

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