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Supreme Court denies Affirmative Action planners

But it's not a final decision on 'Equal Rights' vs. 'Reverse racism'

— Excerpted from LRIS News and media reports

On the last day of its 2008-2009 term, the U.S. Supreme Court set off an uproar when it issued a decision in a contentious lawsuit involving public safety Affirmative Action promotions.

POLC Director Richard Weiler cited the importance of the case to Michigan police in particular, because of similarities between the involved New Haven, Conn. fire department contract issues and many Michigan communities with Affirmative Action programs and similar police union contracts.

In the New Haven case, Justice Antonin Scalia, writing a concurring opinion, lamented that the Supreme Court had only postponed the "evil day" when it would be forced to consider the overall legality of affirmative action plans. The Court's decision most certainly imposes new hurdles for any public agency wishing to maintain an affirmative action program.

'The Court's order and opinion, I anticipate, will not have staying power.'
—Dissenting Justice Ruth Bader Ginsburg

The New Haven case produced four opinions. The majority decision, written by Justice Anthony Kennedy, was joined by Chief Justice John Roberts and Justices Samuel Alito, Scalia, and Clarence Thomas. Justice Scalia also wrote separately, strongly suggesting he would find **any** affirmative action measures based on race—even those measures taken to comply with Title VII, would violate the 14th Amendment.

In the 5-4 decision, the Supreme Court found the City's decision to scrap the test results violated Title VII of the Civil Rights Act.

CASE BACKGROUND

In 2003, 118 New Haven firefighters took examinations for promotions. New Haven's civil service system uses the "rule of three," under which each vacancy is filled by choosing one candidate from the top three scorers on the list. Certified promotional lists remain valid for two years. The City's union contract specifies additional requirements under which applicants for lieutenant and captain positions were screened using a written exam accounting for 60 percent and an oral exam for 40 percent of the applicant's total score.

Industrial/Organizational Solutions, Inc. (IOS), an Illinois firm, developed and administered the exams. After a process that involved job analyses, interviews and ride-alongs with incumbents, sample testing, and procedures to assure the testing was race-neutral, IOS drafted a 100-question multiple-choice test for each position. It met civil service rules, and was written below a 10th-grade reading level.

EXAMINATION RESULTS

Candidates took the examinations in November and December 2003. Seventy-seven candidates completed the lieutenant exam—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics. Eight lieutenant positions were then vacant. As the rule of three, this meant that the top 10 candidates were eligible for immediate promotion. All 10 were white. Subsequent vacancies would have allowed at least 3 black candidates to be considered for promotion.

Forty-one candidates completed the captain's exam—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics. Seven captain posts were vacant. Under the rule of three, 9 candidates were eligible for an immediate promotion to captain—7 whites and 2 Hispanics.

In the early 1970's, African-Americans and Hispanics composed 30% of New Haven's population, but only 3.6% of the City's 502 firefighters. The City made efforts to increase minority representation after a lawsuit and settlement agreement. Today, nearly 40% percent of the City's residents are African-American and more than 20 percent are Hispanic. African-Americans and Hispanics now constitute 30 percent and 16 percent of the City's firefighters, respectively. In senior officer ranks (captain and higher), 9% are African-American and 9% Hispanic. Only one of the Department's 21 fire captains is African-American.

After the test results were released, a "rancorous" public debate ensued. The City's Civil Service Board split 2-2 on whether to certify the results. The tie meant the results were not certified, and the tests nullified. A lawsuit was filed by firefighters denied promotions when the Board refused to certify the test results.

VIOLATING CIVIL RIGHTS

The Court started with the proposition that *"the City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense…the City chose not to certify the examination results because of the statistical disparity based on race—i.e., how minority candidates had performed when compared to white candidates."* Without some other justification, this express, race-based decision violates Title VII's command that employers cannot take adverse employment actions because of race.

The Court also used an earlier affirmative action case—one involving the equal protection guarantees of the Fourteenth Amendment rather than Title VII—for the test. In the earlier case, a plurality (not a majority) of the Court recognized the tension between eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other, and commented that those *"related constitutional duties are not always harmonious," and that "reconciling them requires...employers to act with extraordinary care."* The plurality required a *"strong basis in evidence"* for an affirmative action plan because *"evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees."*

The Court found the same test should apply under Title VII: *"Applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances."*

NO STRONG BASIS...

The Court concluded that New Haven's concerns about potential litigation from minority firefighters failed to meet the "strong basis in evidence" test. The Court observed that *"the City could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt. There is no strong basis in evidence to establish that the test was deficient in either of these respects."*

The City argued that a different composite-score calculation—weighting written and oral examination scores 30/70—

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Supreme Court

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would have allowed the City to consider two black candidates for the open lieutenant positions and one black candidate for an open captain position. The Court noted, however, that the 60/40 *"formula was the result of a union-negotiated collective-bargaining agreement, we presume the parties negotiated that weighting for a rational reason."* The court said there was no evidence that a 30/70 weighting would be an equally valid way to determine the knowledge and situational skills needed to earn promotions. Changing the weighting formula, moreover, could well violate Title VII's prohibition of altering test scores on the basis of race.

The Court carefully noted it was not deciding the ultimate question many had anticipated—whether affirmative action measures taken to comply with Title VII would violate the Equal Protection Clause of the 14th Amendment.

"Our statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII. We also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case.…Because respondents have not met their burden under Title VII, we need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment."

Justice Ruth Bader Ginsburg wrote a dissenting opinion, joined by Justices Stephen Breyer, David Souter and John Paul Stevens. Not-subtly looking towards the possibility that the Court's composition might change in the future, Justice Ginsburg predicted: "The Court's order and opinion, I anticipate, will not have staying power."

Note: The New Haven decision may well bring to an abrupt halt any affirmative action hiring or promotion plans that allow an employer to take race into account. The logical application of the decision would require an employer to have a "strong basis in evidence" that its own testing programs were not job-related and consistent with business necessity in order, evidence presumably in place when the affirmative action plan was implemented. This leads to the logical question as to why the employer would ever have such tests to begin with.

From The Cleveland Plain Dealer:

Cleveland Battalion Chief Chester Ashton, president of the Fire Fighters Local 93 union, called the ruling a triumph for all firefighters and a warning to cities.

"We want a test that is fair to everyone," Ashton said. "I think this is more of a heads up to the city. You have to get a good quality tester."

Lt. Terence Watson, president of the Vanguards, an association of Cleveland black firefighters, said Cleveland needs to look at different models for testing rather than ones that focus on books and paper. Regardless of test results, some group will be unhappy. It's going to end up in court, Watson said.

From The Detroit Free Press:

In a major ruling that could impact workplaces across the country, the U.S. Supreme Court ruled in favor of white firefighters who said they were denied promotions in favor of blacks because of their race. The decision might make it harder for cities like Detroit to sustain programs that give preferences to African Americans in favor of whites, legal experts said.

The Rev. Horace Sheffield, a civil rights leader, said the decision wrongly played to populist sentiments and wasn't grounded in the law. "It's amazing that people who have had 300 years of advantage at the expense of the brown and black and red people feel that they're the ones who are being discriminated against," Sheffield said.

Terry Pell, president of the Center for Individual Rights, a conservative public interest law firm, said "the court tackled a difficult problem and saw clearly the way" that the pulling of the exam was "very unfair to...the white firefighters."

Pell said the ruling "will affect municipalities all over the country that use hiring tests and promotion tests."

From The Philiadelphia Inquirer:

"We'd like to have some processes in place that allow us to avoid the infighting and find the most qualified candidates to do this important work," Philadelphia attorney Rick Poulson said. "Every time there's a list that comes out, there's a lawsuit."

The New Haven case, in which that city threw out the results of a 2003 written test when it produced no minority candidates, might cause cities to rely even more on oral exams, said attorney Arthur L. Bugay.

"Cities may try to make examinations entirely oral, and that would be problematic," he said. "Because the written part of the exam is actually the most objective part of the promotional exam process, by definition."

Poulson, a union lawyer, said New Haven "gives us an excuse to re-examine a promotional process that is broken."

Blizzard of new Laws/Regulations sends employers scurrying to comply

Major changes for Public Safety workers

— Excerpted from Public Safety Labor News and media reports

The last 12 months saw the most active period of federal employment legislation and regulation changes in the last 25 years. A spate of new laws—with more likely to arrive in upcoming months—has left employers scrambling to comply.

The deluge started May 21, 2008, when President Bush signed into law the ***Genetic Information Nondiscrimination Act*** (GINA). GINA prohibits employers from using genetic information in hiring, firing, pay, or promotion decisions. GINA also applies to health insurers, and prohibits them from rejecting coverage or raising premiums for healthy individuals based on personal or familial genetic predisposition to develop particular diseases. GINA also forbids health insurers from requiring a genetic test.

In Fall 2008, Congress passed the ***Americans With Disabilities Act Amendments Act*** (ADAAA). Effective January 1, 2009, this amendment to the Americans With Disabilities Act (ADA) overturns many Supreme Court decisions and completely changes the ADA's legal landscape. The core of the ADA defined a disabled individual as one who suffers from a physical or mental impairment if it substantially limits one or more major life activities. Over a ten-year period, a series of Supreme Court decisions had weakened this definition to where claims were not only relatively rare, but courts were ruling in employers' favor more than 95 percent of the time.

ADAA RE-DEFINED

The definition of major life activities now includes *"caring for one's self, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."* This list is illustrative, not exhaustive.

Major life activities also expand to include "major bodily functions," including but not limited to *"functions with the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."* This broad definition effectively overturns a number of federal court decisions that limited the scope of "major life activities."

The new definition of "major life activities" provides that an impairment need only substantially limit one major life activity to qualify as a disability, and not just life activities that are of "central" or primary importance to individuals' lives. This overturns the narrower interpretation by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).*

The ADAAA provides that the determination as to whether someone is disabled must be made without considering corrective or mitigating measures. Thus, a person whose condition is controlled by medication, medical supplies or equipment, hearing aids, prosthetics, or other assisted technology can no longer be excluded from the definition of "disabled." This overturns the Supreme Court decision in *Sutton v. United Airlines, Inc., 527 U.S. 471 (1999).* The only notable exception is that poor vision correctable with lenses is not considered an impairment. However, the ADAAA prohibits employment tests or standards based on uncorrected vision, unless a certain level of uncorrected vision is consistent with business necessity. The ADAAA definition of "disability" specifically includes impairments that are in remission or are episodic.

The *"regarded as"* portion of the definition of disability significantly changes. Employees will not be required to prove the employer believed the impairment affected a major life activity or that the impairment actually did so. The *"regarded as"* prong of the definition of disability will not apply to impairments that are "transitory and minor," which is defined to mean "an actual or expected duration of six months or less." This six-month limitation applies only to the "regarded

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New Laws/Regulations

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as" portion of the definition.

No claim of *"reverse disability discrimination"* may be made by a non-disabled person.

FMLA CHANGES

A third major revision came with the Department of Labor's (DOL) new ***Family And Medical Leave Act*** (FMLA) regulations that were effective January 16, 2009. The regulations dealt with a number of lingering FMLA issues, and the ***National Defense Authorization Act of 2008,*** which amended the FMLA to extend coverage for military families. The changes include:

(1) Exigency Leave. Eligible employees with a spouse, child, or parent on active duty or called to active duty in the National Guard or Reserves in support of a contingency operation may take up to the normal 12 weeks of leave because of any "Qualifying Exigency." The regulations define "Qualifying Exigencies" as:

- Short-notice deployment;
- Military events and related activities;
- Childcare and school activities;
- Financial and legal arrangements;
- Counseling;
- Rest and recuperation;
- Post-deployment activities; and
- Additional activities agreed to by the employer and the employee. *(Note: Exigency leave is not available to families of service members in the regular armed forces).*

(2) Military Caregiver Leave. An eligible employee who is the spouse, son, daughter, parent or next of kin of a covered service member (includes a current member of the Regular Armed Forces, as well as the National Guard or Reserves) may take up to 26 weeks of leave to care for such service member with a serious injury or illness incurred in the line of duty, on active duty. The 12-month period begins on the first day the employee takes leave for this purpose.

(3) Light-duty. If an employee who qualifies for FMLA leave voluntarily accepts a *light-duty* assignment, the time spent performing light-duty work does not count against the employee's 12-week FMLA entitlement.

(4) Attendance Awards. An employer may disqualify a worker from a bonus for a job-related performance goal, such as "perfect attendance" bonuses, even where the employee has not met the goal due to FMLA absences, unless the bonus is otherwise paid to employees on an equivalent leave status for a non-FMLA reason. *(Note: This changes the DOL's position on the issue)*

(5) Intermittent/Reduced Leave/ Leave Increments. Employers must account for FMLA leave in increments no greater than the shortest period of time the employer uses to track other forms of leave (as opposed to the shortest increments tracked on the employer's payroll system), provided the increment used for tracking FMLA leave is not greater than one hour. *(Note: This rejects employer requests for intermittent leave in increments of four hours or more).*

(6) Serious Health Condition. The DOL modified the definition of "serious health condition" in three ways:

- Where a condition involves more than three consecutive days of incapacity plus two visits to a healthcare provider, the first healthcare visit must take place within seven days of the first day of incapacity, and both visits must occur within 30 days of the start of incapacity.
- Where a condition involves more than three consecutive days of incapacity plus one visit to a healthcare provider and continuing treatment, the regulations require a visit to a healthcare provider within the first seven days of incapacity.
- The new regulations define "periodic visits" for chronic conditions as at least two annual visits to a healthcare provider.

(7) Employee Notice of FMLA Leave. In a regulation sure to spawn litigation, the DOL now requires employees requesting FMLA leave for the first time for a particular condition to provide sufficient information for the employer to determine whether the leave qualifies under the FMLA. The regulation also states

- Employees are not required to specifically mention the FMLA when requesting leave; and
- Calling in "sick" is insufficient to trigger the FMLA.

(8) Medical Certification. For the first time, employers will be allowed to contact healthcare providers directly to determine the reasons for FMLA leave, but only after the employer has first given the employee an opportunity to correct any problems with the medical certification already provided. The employer representative contacting the healthcare provider must be either a healthcare provider, a human resources professional, a leave administrator or a management official. The employee's direct supervisor is specifically prohibited from contacting the employee's healthcare provider. In addition, the DOL has developed two new forms for medical certification, one for the employee's serious health condition, and the other for a family member's.

COURT OVER-RULED

In one of his first acts as president, Barack Obama signed the ***Lilly Ledbetter Fair Pay Act*** on January 29, 2009. The Act amends Title VII of the *Civil Rights Act,* the *Age Discrimination In Employment Act, The Americans With Disabilities Act,* and the *Rehabilitation Act*. The new legislation declares that an unlawful employment practice occurs when:

- A discriminatory compensation decision or other practice is adopted
- An individual becomes subject to the decision or practice; or
- An individual is affected by application of the decision or practice, including each time there is a payment of compensation.

The new statute overturns the Supreme Court decision in *Ledbetter v. Goodyear Tire and Rubber Co., 550 U.S. 618 (2007),* which dismissed on statute of limitations grounds a lawsuit by a female employee contending she was the victim of the present effects of past pay discrimination. It eliminates the normal filing period for pay discrimination claims, and allows employees to file charges with the issuance of each paycheck tainted by past discrimination.

A temporary change in ***COBRA*** rules went into place March 1, 2009, in the federal Stimulus Bill. Under the rules, employees terminated involuntarily between September 1, 2008, and December 31, 2009, as well as their covered dependents, are eligible for a subsidy of 65 percent of the health insurance premiums they are required to pay for up to nine months. Under normal COBRA rules, employees must participate in the same group health plan which they had at the time of termination. These *"assistance eligible individuals"* are required to pay 35 percent of the premium. Employers recover the other 65 percent of premiums in the form of credits against their income tax withholding and FICA taxes. If premiums due an employer exceed its tax obligations, the federal government issues a check for the difference.

The subsidy does not apply to employees or dependents with an adjusted gross income of more than $125,000 ($250,000 for joint taxpayers) in the year they received the subsidy. The new law also gives involuntarily terminated employees and dependents 90 days to select coverage under a different, lower-cost option than the one they had at the time of their involuntary termination.

MORE TO COME

It is clear that Washington will not be quiet in upcoming months with respect to employment legislation. Congress has already signaled it will consider bills that would:

- Establish a national collective bargaining law covering public safety employees;
- Consider changes to the Fair Labor Standards Act's overtime requirements;
- Eliminate or substantially modify an employer's ability to compel arbitration of employees' claims under Civil Rights laws;
- Enact an "equal pay for equal work" statute;
- Expand OSHA to specifically include federal, state, and local employees;
- Substantial changes in the way private sector labor unions are allowed to organize for collective bargaining purposes, including the lightning-rod bill, known as the *Employee Free Choice Act.*

Grand Rapids, Gaylord, host POLC seminars

By Danny Bartley
Member Services

In keeping with our goal to provide the best labor representation services available, the Police Officers Labor Council hosted two exceptionally successful training seminars recently for the new stewards and officers of recently added bargaining units.

Nearly 125 POLC members, including many special non-member guests attended the day-long sessions on May 2, in Grand Rapids and on May 5, in Gaylord.

Health care issues, Pensions, and details of how the Arbitration process is working in Michigan are key parts of what bargaining unit members need to know. Reaction and participation to the program and its guest speakers was well-received.

POLC believes that a well trained steward is a valuable asset to both the local unit and the POLC. That's why we hold a regular schedule of regional seminars as well as our annual training seminar at our delegates meeting. While the training is usually only for our members we often allow non-POLC people to attend, as happened at the Grand Rapids Seminar.

2009 Annual POLC Meeting and Labor Seminar

Friday – Saturday, Aug. 28th-29th

Photos courtesy Grand Traverse Resort

Grand Traverse Resort
100 Grand Traverse Village Blvd.
PO Box 404 • Acme, MI 49610-0404
Attendance limited to registered delegates and invited guests only

Questions?
Call the POLC Office: 248/524-3200

Seminar sessions
POLC Business Meeting

- *Labor contracts update*
- *Current Public sector issues*
- *Pending Legislation affecting First Responders*
- *Financial/Retirement planning tips*

- *LEEP Dream Scholarship awards*
- *POLC Business Agenda*
- *POLC Board and Officers elections*

The scenic Grand Traverse Resort's Wolverine course provides a scheduled diversion for attendees of the Police Officers Labor Council annual Business meetings in Traverse City Aug. 28-29, 2009. Reserve your spot now.

RESERVE ROOMS NOW: Call 800/748-0303 or FAX: 231/534-6670

A reserved block of prime rooms for the POLC gathering is being held on an availability-only basis. Reserve yours now by calling 800/748-0303.

2009 Delegate Registration:
Annual POLC Meeting and Labor Seminar

Friday, August 28, 2009:
8:30 a.m. – 1:00 p.m.

Saturday, August 29, 2009:
9:00 a.m. – Conclusion

ARTICLE V (By-laws)
DELEGATES TO ANNUAL MEETING

SECTION 1. Each participating bargaining unit in the Labor Council shall be entitled to one (1) delegate to the Annual Meeting for each ten (10) members or major portion thereof in their unit, provided however, that each participating unit shall have at least one (1) delegate.

SECTION 7. Any delegate from a bargaining unit that is delinquent in payment of dues shall not be admitted or seated at the Annual Meeting.

Please fill out and return this registration form with non-refundable $50 per person fee.
Make conference checks payable to POLC.

_____ _____
Name of your unit and its current enrollment. Number of delegates allowed

List names of all unit delegates here: (Please type or print neatly)

_____ _____
_____ _____
_____ _____
_____ _____

This registration must be returned before Friday, August 14, 2009 to:
Police Officers Labor Council • 667 E. Big Beaver Rd, Ste. 205. • Troy, MI 48083-1413

12th Annual POLC Golf Outing

Four-person Scramble
(Limited to first 100 golfers)
The Wolverine
Grand Traverse Resort course
Friday, August 28, 2009
Tee-off time: 2:30 p.m. (Shotgun Start)

Cost: $69 per person
Includes 18 holes with cart (non-refundable)
Reservations guaranteed only when golf is paid in full.

The Wolverine - Grand Traverse Resort course. Golf attire is required by the course; all golfers must be in a collared shirt, walking shorts or long pants. Denim jeans or denim shorts are NOT permitted. NO tank tops, NO tee shirts, NO spikes.

RETURN REGISTRATION FORM: Make checks payable to POLC/Golf

Golfer's Names	Phone # and Department Name

This registration must be returned before Friday, August 14, 2009 to:
POLC Golf Outing • Police Officers Labor Council • 667 E. Big Beaver Rd., Ste. 205 • Troy, MI 48083-1413

One-time Police Stimulus Funds pose long-term 'trap' for states

Three weeks after Congress approved his $787 billion economic stimulus plan, President Obama traveled to cash-strapped Columbus, Ohio, to highlight the huge infusion of federal cash to state and local law enforcement. Obama attended a graduation ceremony for 25 Columbus police recruits whose jobs were saved with the help of stimulus money for law enforcement that is beginning to flow to states and localities.

"Because of this plan, stories like the one we're celebrating here in Columbus will soon take place all across the nation," Obama said at the March ceremony. Police, prosecutors and other law enforcers around the country are welcoming the stimulus.

The money, they say, will buy new equipment, pay for extra police patrols or—as Obama stressed in Ohio—avoid layoffs or hire more manpower during a recession, when crime can spike.

But for some state legislators who attended the spring meeting of the National Conference of State Legislatures in Washington, D.C., the sudden influx of hundreds of millions of federal dollars for public safety presents its own set of questions and concerns. Some are alarmed that they have no stake in managing or overseeing the money and are worried about what happens when the federal cash runs out.

Executive-branch agencies, such as police departments, state attorneys general offices or state crime commissions, usually handle federal grants for law enforcement. Most governors have named "czars" to oversee how stimulus money is spent. With so much stimulus money at stake much state oversight will be required.

'MATCHING' – PROBLEM

Some federal grants require state matches, which legislatures need to approve. Massachusetts state Rep. Mike Costello (D), who chairs his state's Joint Committee on Public Safety and Homeland Security, said at the NCSL meeting in April that he didn't know what stimulus law-enforcement money his state has applied for. Worse, he said, he hoped that state lawmakers are not seeking to obtain state money for criminal justice efforts in their districts that—unbeknownst to them—are getting stimulus money as well. With his state in the middle of a fiscal "disaster," Costello said, "duplicating funds" would be a waste.

He suggested convening an oversight hearing so that all stakeholders in the state are on the same page; in Pennsylvania, lawmakers already have held such a hearing. Other states, such as California, have legislative oversight panels to track where the incoming stimulus money goes. Complicating the task for state legislators is that the biggest single slice of the federal law enforcement money—roughly $2 billion in federal grants that pay for everything from drug task forces to prosecutors—will flow through states, not to them. Executive agencies in the states redistribute the money to cities and counties for scores of initiatives that state legislators may not be familiar with.

Kansas State Sen. Tim Owens (R), chairman of the Senate Judiciary Committee, raised a separate, issue echoing a recent debate among governors over the stimulus plan's unemployment provisions: What happens when the federal money runs out? While a handful of Republican governors have considered rejecting stimulus money to expand help to more of the unemployed—because, they say, it would amount to a tax increase on business when the federal money expires—Owens worries about expanding criminal justice efforts using federal cash, only to have the state stuck with the tab in the end.

ONE-TIME MONEY

"At some point you run out of money. It's one-time money and then it's back on the locals," he said. If the locals can't afford the expanded spending when the stimulus funds expire, police officers or other law enforcers could be out of a job.

Utah state Rep. Paul Ray (R) said that a city councilor in his district recently asked him whether stimulus money could be used to hire four new police officers. Ray said he told the councilor yes, "but in two to four years, that money's gone."

New Jersey doesn't seem as concerned. The state's plan to ask for federal stimulus money to hire 150 new state troopers anticipates retirements and other attrition in the force down the road, said Peter Aseltine, a spokesman with the state attorney general's office, which oversees the state police.

Debate over the criminal justice money in the stimulus also reflects some Republican legislators' frustrations with the larger plan. Ray, who also serves as chair of a public safety task force for the American Legislative Exchange Council, a conservative state legislators' association, said that while extra law enforcement help is always welcome, he could not see how hiring more police officers will help boost the economy.

Ray called the American Recovery and Reinvestment Act a "great spending bill," but "a lousy stimulus bill."

— Excerpted from media reports

New 'Arbitration Fairness Act' could overturn Court decisions

Sen. Russell Feingold, D-Wis., has reintroduced his *"Arbitration Fairness Act"* to the 111th Congress and, in view of the inroads the Democrats made in last November's national election, many observers believe this time it stands an excellent chance of being enacted into law. If that happens, it will mark the death knell of pre-dispute arbitration clauses in consumer, employment and franchise agreements.

The proposed legislation is a reaction to "mandatory arbitration" clauses often found in the fine print of brokerage, cell phone, HMO or credit card agreements, and it would also nullify the acts of corporations who insist that their employees agree to such provisions as a condition of employment.

The bill could circumvent federal judges who, mindful of the strong policy favoring arbitration as annunciated in the Federal Arbitration Act, have issued pro-business decisions enforcing arbitration clauses across-the-board. Earlier this year for example, the *U.S. Supreme Court in 14 Penn Plaza v. Pyett* ruled valid under federal law collective bargaining agreements that clearly and unmistakably require union members to arbitrate (rather than litigate) age discrimination claims.

The proposed Senate legislation includes a new provision specifically intended to reverse *14 Penn Plaza,* thereby permitting employees to enforce employment discrimination claims in court. Unfair labor practices and other types of collective bargaining disputes are exempt from the proposed legislation.

'INHERENTLY UNFAIR'

Proponents of the Arbitration Fairness Act say individual consumers and employees lack equal bargaining power when dealing with large companies. They see mandatory arbitration clauses as inherently unfair and intended to force an individual to forfeit his or her day in court and instead proceed before a private arbitration company whose arbitrators are unaccountable and may actually be predisposed to rule in favor of big business.

"Americans are sick and tired of a system that so strongly favors big corporations over consumers and in this case robs them of their constitutional right to their day in court," Sen. Feingold contends on his Web site. "Americans are often given no choice but to give up their rights if they want to sign credit card agreements, cell phone contracts, job applications or other basic contracts. It's time for Congress to side with consumers and employees and end the practice of forced arbitration, which stacks the deck against the people Congress is supposed to represent."

The House version of the bill, sponsored by Rep. Hank Johnson, D-Ga., was introduced Feb. 12, 2009 and referred to the House Judiciary Committee. Its proposed 2007 predecessor was ambiguously worded and arguably could have been interpreted as not only barring mandatory arbitration provisions in consumer, employment and franchise disputes, but also in any contracts between parties of unequal bargaining power. Sen. Feingold said the proposed 2007 legislation was never intended to be so broad, but critics of the 2007 bill seized on the language and the act never made it out of either its Senate or House subcommittee.

This time around the House version contains no reference to *"unequal bargaining power,"* rather, in addition to consumer, employment and franchise disputes, it expressly prohibits pre-dispute arbitration clauses governing disputes arising under any statute intended to protect civil rights.

The proposed legislation also seeks to amend the Federal Arbitration Act by providing that "the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement." This specific language is intended to address a concern that if any initial inquiry involving arbitration is left up to the arbitrator to decide, the dispute is likely to remain in arbitration.

—From The New York Law Journal

POLC Corrections officers wonder over Oakland case

Status is quo on Act 312 eligibility, for now

By Brendan J. Canfield, POLC Legal Staff

When the Michigan Court of Appeals released its decision in *Oakland County—and—Oakland County Sheriffs Association, 20 MPER 63 (2007),* on February 3, 2009, it affirmed a decision by the Michigan Employment Relations Commission (MERC) which may have permanently closed the door on many corrections officer seeking the benefits of Act 312 arbitration.

Known informally as "Act 312," the process gives public safety labor unions the right to bring contractual disputes before an independent arbitrator. Without doubt, Michigan's Act 312 has led to significant financial gains and an improvement in working conditions for police and fire personnel, while protecting public safety and preventing strikes by public safety workers.

In the Oakland County case, a union for a combined group which represented both Sheriff's deputies and corrections officers filed for an Act 312 petition during stalemated contract talks. The Employer responded by seeking a dismissal of the petition as to corrections officers, only. Here, MERC sided with the employer and removed corrections officers from the unit under the rationale that they are not eligible for Act 312 arbitration.

At first glance, the decision in the Oakland County case appears to reflect longstanding legal precedent cases dating as far back as 1984, which have consistently found corrections officers ineligible for Act 312. Much to the bewilderment of police unions, these cases seem to reason that a strike by corrections officers does not pose a serious threat to public safety. Nonetheless, unions have always had the opportunity to challenge the Act 312 eligibility of corrections officers.

A closer reading of the Oakland County case reveals that MERC went much further than any prior case on this issue. Although discussing legal precedent regarding the impact of striking corrections officers on public safety, MERC also placed significant emphasis on the wording of the statute. In doing so, MERC found that Act 312 unequivocally excluded corrections officers from Act 312 proceedings, without exception. Neither MERC nor Michigan courts had ever reached this conclusion in previous cases.

In affirming the MERC ruling, the Michigan Court of Appeals gave little analysis to its interpretation of the statute. Notably, the Court stated it did not have to address the MERC's unprecedented reading of Act 312, although the court implied that it concurred with it.

The result: MERC's rationale still stands.

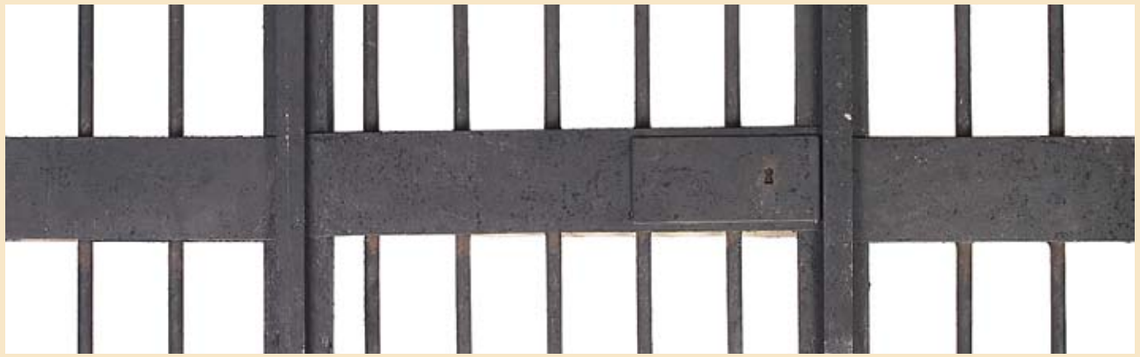
The practical impact of the Oakland decision?

- Eligibility of corrections officers for Act 312 remains status quo.

Those corrections officers who are already severed from sheriff's deputies remain ineligible for Act 312;

Those corrections officers presently in the same bargaining unit as sheriff's deputies may continue submitting contract disputes to Act 312 as long as the employer does not seek to sever them from the unit.

The Oakland County case may very well be the death knell for more corrections officers obtaining Act 312 eligibility, unless the legislature intervenes to alter the statute.



– As reported by POLC Legal Staff

Arbitrated award doesn't end Milan grievance

It evidently takes more than medical releases from a police veteran's doctors, the city's own physicians, and other medical evaluations, as well as—almost finally—an Arbitrator's award, to get the City of Milan to restore a police officer to duty. The officer had suffered a pulmonary embolism, spent a month in a hospital and six months recuperating before receiving required medical clearances to return to work. The officer passed all tests, which showed his illness had only caused a slight loss of hearing in his left ear, which would not disqualify him for police work.

POLC attorneys filed a grievance after the city continued to delay returning the officer to work, and then ordered him to take additional MCOLES physical agility and hearing tests and a psychological evaluation.

The Arbitrator granted the POLC grievance, noting the City must abide by the conclusions of its own physicians. In returning the grievant to duty, with back pay to the filing of the arbitration hearing, it was noted the only permissible offsets to the award would be unemployment compensation benefits and earned income, which the Grievant received to the date of the award.

While continuing to pay the Grievant's health insurance, the city had sent him a letter indicating that it planned to cancel his health insurance, and that to retain health insurance benefits he would have to pay $1,830.62 per month.

When the City attempted to offset the back pay Award with three months worth of health care premiums that it had paid on the Grievant's behalf, the POLC filed a second brief. Once again the Arbitrator ruled for the union, concluding that the health insurance premiums were neither the type of offsets permitted nor specified by the award.

POLC attorneys expect the City will attempt to deduct the disputed health care premiums from the Grievant's future paychecks. This will likely lead to additional challenges or a complaint filed with the Michigan Wages and Hours division.

Arbitrator upholds POLC on court-time pay

As expected, an Arbitrator upheld a POLC grievance over Chesterfield Township's policy of reducing court time benefits for employees on a contractual leave days.

The Township had determined that employees required to appear in court after taking a vacation day will not be paid time and half, as required by the collective bargaining agreement's court time provision. The arbitrator relied on the plain language of the contract, which provides that employees are paid time and a half for appearing in court when "they are not scheduled to work." Employees on vacation when called into court are "not scheduled to work" under the contract.

The POLC challenged two Township policies aimed at cutting court-time costs. Another case involving the Township's failure to distribute subpoenas for officers to appear at preliminary examinations, was denied. The Arbitrator ruled the right to stand-by benefits did not materialize until the Township exercises its management right to place an employee on stand-by status.

Iraqi service costs cop his rehiring rights

The Connecticut Supreme Court recently dismissed two lawsuits, ruling against a former detective sergeant who sought to be rehired with the City of Bristol, Conn., after serving a year in Iraq for a private company contracted by the U.S. Department of State to recruit, select, equip and deploy police officers for overseas service.

The officer requested a military leave of absence from the Department in 2004. While awaiting the City's response, the president of his Union Local suggested the officer resign, noting that the officer might be entitled to his former job back upon his return. The Union Local's lawyer later reiterated the same advice.

The officer later testified he would have gone to Iraq even if the Union had not given the assurances. After his departure, the City provided retirement benefits consisting of a pension, an unused leave payout of $22,386, and health insurance.

When he returned in 2005 and requested reinstatement the City refused, taking the position he had retired. The AFSCME local's executive board had voted to ***not*** represent former AFSCME members attempting to be reinstated under the Connecticut state law. The officer then sued both the City and the Union Local. He claimed the state statute obliged the City to reinstate him; his claim against the Union was that he had relied on the Union's negligent misrepresentations on reinstatement rights.

In ruling against both lawsuits, the Connecticut Supreme Court keyed on the law's statement that *"any sworn police officer employed by the State or a municipality who resigns to volunteer for participation in international peace keeping operations shall be entitled, upon return to the United States, to be reinstated by such officer's employer to the position of employment held by the officer when a leave commenced."* To the Court, the word "resigns" did ***not*** include individuals who ***retired***.

As to the claim against the Union Local, the Court ruled that "the testimony shows that the lawyer merely offered an opinion that the statute applied to the officer's situation and did not constitute negligent misrepresentation."

Barton v. City of Bristol, 967 A.2d 482 (Conn. 2009).

— From Public Safety Labor News

Contract Settlements

– As reported by POLC Labor Reps.

Perry Police Patrol unit

- **Three-year contract** expires June 31, 2012
- **Wages:**

  3.0% increase effective July 1, 2009

  3.0% increase effective July 1, 2010

  3.0% increase effective July 1, 2011
- **Health Care:** Deductible raised, but employee reimbursement increases to $1,000 per year to cover deductibles.
- **Manning, Safety & Misc.:** Shift assignment changes twice yearly, available shifts picked by seniority.
- **Bargaining team:** Mike Monroe, aided by POLC Labor Rep. Duane Smith.

2/3 of Public Employers considering changes in Health Care benefits

— F rom The Charlotte Business Journal

Public employers nationwide are modifying their employee health-care benefits to save money, according to a report by the International Foundation of Employee Benefit Plans.

The survey found 72 percent of public employers are increasing or considering an increase in employee deductibles, co-insurance or co-pays. In addition, 74 percent of public employers are increasing or considering an increase in employee premiums.

When asked why they were considering higher deductibles, 46 percent of public employers cite the financial crisis. And 45 percent cite the economic downturn as the reason why they want higher employee premiums.

"These findings are surprising. Although cost-sharing measures have been common in the corporate world for quite some time, public employers have traditionally not modified their health-care plans in this direction," says Sally Natchek, the foundation's senior director of research. "The fact that the majority of public employers are now increasing deductibles, co-pays and premiums illustrates the dual effect rising health-care costs and the financial crisis are having on their plans."

Other cost-saving programs that public employers are instituting include adding a consumer-driven health plan, shifting to a self-funded plan and introducing spousal surcharges.

Nearly three-fourths of public-plan sponsors place more emphasis on controlling prescription-drug costs. The majority of public employers are expanding participant education about drug options and costs, increasing co-payments or co-insurance for drugs and mandating the use of generic drugs, the survey found.

The International Foundation of Employee Benefit Plans is a Wisconsin-based nonprofit providing information on employee benefits, compensation and financial literacy.

Police experience more than a plus, for newest POLC legal representative

Retired Wyoming Police Officer David R. Durell, a 12-year law enforcement veteran and a former bargaining unit steward, is continuing what he calls "a very pleasant relationship" with the POLC as he embarks on a new career as a practicing attorney with the law firm of Durell & Jackson, PLC, of Grand Rapids. He will represent POLC officers throughout western Michigan as the need arises.

Durell earned his law degrees while employed as a police officer. He was in the Patrol Division, Training Unit, Neighborhood Enforcement Team, Tactical Unit, and served as a firearms instructor, as well as union steward in Wyoming.

His service as an executive board member of the Wyoming police officers association where he negotiated employment contracts, participated in alternative dispute resolution (mediation and arbitration), represented employees in internal investigations and disciplinary hearings, makes him an outstanding asset for the POLC, said Director Richard R. Weiler.

David R. Durell

Durell is a graduate of Grand Valley State University (B.A., Criminal Justice, 2001) and Ferris State University (M.S., Criminal Justice, 2004, Honors of Highest Distinction).

He graduated from of Thomas M. Cooley Law School (J.D., 2008, Cum Laude) where he was on the Dean's List and Honor Roll. He was admitted to the practice of law in 2008 as a member of the State Bar of Michigan. His section memberships of the bar include Environmental Law, Labor and Employment Law, Probate and Estate Planning, and Taxation. David is also a member of the American Bar Association and the Grand Rapids Bar Association.

Nation's longest-serving officer dies at 84, in New Orleans

— Excerpted from media reports

Sergeant Major Manuel Curry, a member of the New Orleans police force for more than six decades and the longest-serving full-time law-enforcement officer in the nation, died in June at the age of 84.

New Orleans Police Superintendent Warren Riley said Mr. Curry died at an area hospital of heart failure. He was still an active member at the time of his death.

Research in 2002 found that Mr. Curry had the longest active service career of any police officer in the country. He joined the department in 1946 and served the city for 62 years, five months and four days. A veteran of World War II, Curry was a legendary officer in the city's tough 6th District the *New Orleans Times-Picayune* said.

He had wrestled bank robbers and nabbed shooting suspects, but his most lasting impact may be that of mentor to countless police officers. They called the white-haired veteran "Paw-Paw," a nod to his all-knowing, grandfather-like status. His work earned him the honorary official title of "Sergeant Major." Even officers who never worked beside Curry spoke of him in reverential terms.

Curry had earned the Medal of Merit, the NOPD's second highest award, and

Sgt. Maj. Manuel Curry

three Medals of Commendation during his career.

He could have taken a pension as early as 1963, after completing 16 years on the job. For decades, he essentially worked for free, the *Times-Picayune* noted.

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Vacationing unit members of the Police Officers Labor Council planning to stay at ***Days Inn®, Ramada®, Super 8®, Howard Johnson®, Travelodge®*** and ***Knights Inn®*** hotels this summer can now search for the nearest worldwide locations to book or modify reservations directly from their access-enabled mobile devices through newly launched mobile Internet web sites.

POLC members can easily locate the nearest Wyndham group hotel, and use their member discounts to book, modify or cancel a reservation, download maps, turn-by-turn directions, view property photos and research hotel amenities and brand promotions while traveling. Be sure to use the POLC membership ***"68386"*** identification number when making reservations.

The new sites are optimized for use by more than 5,000 mobile devices, including Apple iPhone and Blackberry. Access is via standard Web addresses, such as ***www.daysinn.com*** and ***www.super8.com***, which, when entered into a mobile phone's Internet browser, detect the type of phone being used and adapt to provide the best possible connection.

Baymont Inn and Suites®, Microtel Inns and Suites®, Hawthorn Suites® and ***Wingate by Wyndham®*** brands will launch shortly. Microtel recently became part of the Wyndham offerings, which includes a **free** travel rewards program where you earn points redeemable for hundreds of rewards just for staying at one of our more than 6,000 locations around the globe.

The Wyndham Hotel group is providing the mobile websites for the growing number of *mCommerce* users which are expected to increase by over one-third by 2010, from 76.9 million users in 2009, to 104.6 million users in 2010.

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