



Cumberland County Fire Chief's Association
Minutes of August 22, 2011 Monthly Meeting



The meeting was hosted by Stoney Point Fire Department. We thank Chief Johnson and his staff for their hospitality.

Opening Prayer: J.F. Hall provided the opening prayer.

Roll Call: Roll call was conducted with 20 departments and 5 associate members present.

Members Absent: Eastover, EMS

Associate Members Absent: Sheriff's Office, FTCC, County Commissioners, Christian Firefighters, Life Link, SBI, Fort Bragg EMS

Approval of Minutes: Minutes from July were approved as presented.

Guests: Wesley Meredith – State Senator thanked everyone for their support and pledged to support the fire service
Judge Ammons – thanked everyone for their support
District Attorney Billy west – thanked everyone for their support

Vendors Present: None

Treasurer's Report: None.

Meeting Point of interests:

Next Chief's Meeting will be September 26, 2011 at Westarea FD Station #15. The meeting will begin at 7:00 pm

- President Johnson distributed the, legal briefs, training information in the department's packages.
- President Johnson introduced Teddy J. McLamb as the new Fire Chief for Spring Lake and Fire Chief Todd Wood of Rockfish FD in Hoke County. Deputy Fire Chief Freddy Johnson Jr. introduced Captain Plotts the Troop "B" Commander with the Highway Patrol.
- President Johnson advised that Stoney Point will pick up air truck duties in September.

- President Johnson advised the membership of the upcoming retirement of Chief Steven Blackburn from Fort Bragg Fire and Emergency Services. Please RSVP per the email if you would like to attend his retirement ceremony on January 13, 2012.
- President Johnson announced that Fayetteville FD will be in Atlanta Ga. attending Fire Rescue International (FRI) where the Center For Public Safety (CPSE) Board of Directors is scheduled to announce and award the FFD as a Nationally Accredited Organization. President Johnson congratulated Chief Majors on the great accomplishment.

OLD BUSINESS

- Neil Yarbrough gave the members a presentation on FLSA issues regarding paid employees of Fire Departments coming back as volunteers is a violation of the FLSA laws unless that employee is paid overtime for hours in excess of 40 hours worked. An exception to this rule is the 7 k exemption allowed for certain municipal and county governments.

NEW BUSINESS:

- President Johnson provided a quick review and update on the associations quest to fund several up-coming critical projects consisting of the P-25 Digital Upgrade 800 MHz Radio Upgrade, Fire House Software upgrade to Firehouse-Web, mobile data terminals for the 1st and 2nd out Fire Trucks, along with Automatic Vehicle Locator capabilities (AVL) and the associated licenses and fees. He stated that he and Director Currie have a meeting scheduled with County IT representatives to discuss IT support for the before mentioned programs. He stated that hopefully and he and Kenny can consolidate the package in time for the September County Board of Commissioners Finance Committee meeting.
- President Johnson stated that a Motorola representative will be at our next meeting to discuss Narrow Banding that will affect our VHF radios and paging capabilities.
- President Johnson also stated that a Technology Briefing consisting of state of the art communications links that will link our Chief's Meeting with the Concord Fire Chief Randy Holloway will be conducted next month during the September meeting at Carver's Fall.
- President Johnson also reminded everyone about the current open application period for the AFG Grants and stated that another new representative had been appointed to mitigate the 2006 radio grant issue.

COMMITTEE REPORTS:

ID CARD COMMITTEE Lt. Tara Whitman (Stoney Point) Chairperson

- **FYI.** Fire Chiefs are required to send a signed letter or memo with a firefighter requesting an ID Card. For any questions or an appointment contact 424-0694 or e-mail at tara@stonepointfire.com

FIRE PREVENTION/EDUCATION COMMITTEE Retired Chief J.F. Hall, Chairperson

- JF Hall advised everyone that the Fire Prevention sign was at the Fayetteville Motor Speedway and is seeking some promotional coverage of our commitment to fire prevention. The new banner is in and will be kept at the safety trailer. JF also stated the banner costs about \$ 100.00.
- President Johnson stated that Fire Prevention and Education pays for itself and that currently the association is participating with the City of Fayetteville's annual Fire Safety Day conducted on Skibo Road at a major shopping area as well as our Fire Safety House initiatives that is available to all departments.

COMMUNICATIONS COMMITTEE Chief B. Bullard (Stedman) Chairperson

- Chief Hodges discussed some issues relating to the 800 radios having areas within the system turned off which increases the chances of the radio not hitting a tower connection.

STANDARDS & POLICY COMMITTEE Chief K. Hall (Cumberland Road) Chairperson

- A motion was made by Chief Hodges to accept the SOGS on Helicopter Operations, Lockouts, and Mayday procedures. The motion was seconded by Chief Hall. The motion was passed by all members present.
- President Johnson asked the Standards Committee to present several new operational SOG's every month if that is possible. This will keep the process moving and we can finish this overdue project.

MEMORIAL COMMITTEE Chief R. Marley (Pearce's Mill) Chairperson

- Chief Marley reported gave an update on the memorial event planned for Saturday October 15, 2011.

AUTOMATIC AID/MUTUAL AID COMMITTEE Chief Ake (Beaver Dam) Chairperson

- No report.

FINANCE COMMITTEE Deputy Chief Freddy Johnson Jr. (Stoney Point) Chairperson

- No report.

RESCUE COMMITTEE Deputy Chief Hank Harris (Cotton FD) Chairperson

- Deputy Chief Hank Harris reported that the Trench Rescue SOG has gone to the Standards Committee for review.

BULK PURCHASE COMMITTEE Chief Pierce (EMS) Chairperson

- No report.

ASSOCIATE MEMBERS REPORT

EMERGENCY SERVICES DIRECTOR/ ECC-911 Kenny Currie, Director

- Timmy Mitchell announced Gene Booth as the new EM director. Timmy gave out the Departments relief fund checks and some additional paperwork

EMS DIRECTOR: Brian Pearce, Director

- Not Present.

HAZMAT BC Brian Mims, FFD - POC telephone for HAZMAT is 433-1729

- No report.

FORESTRY DISTRICT Andrew Synder, County Ranger

- Ranger Synder thanked everyone for their continued support during this active summer fire season.

FTCC Ernest Ward, Director

- Not Present

SHERIFF'S OFFICE Sheriff Butler

- Not Present.

HIGHWAY PATROL

- No report.

CHRISTIAN FIREFIGHTERS Chaplain Cassanova

- No report.

COUNTY COMMISSIONERS Fire Commissioner Ed Melvin

- Not present.

FOR THE GOOD OF THE ASSOCIATION:

- President Johnson thanked all the members that supported the Fund Raiser on behalf of Fire Chief Ronnie Godwin last Saturday.

ADJOURNMENT: A motion was made to adjourn by Chief Hill, seconded by Timmy Mitchell. The meeting was adjourned at 2050 hours.

Respectfully Submitted By:

Freddy L. Johnson
Freddy L. Johnson Sr. CFO
Fire Chief / President

Mark A. Melvin
Mark Melvin, CFO
Deputy Fire Chief / Secretary

7 Enclosure

1. Roll call form
2. Legal briefs
3. Training information
4. Golf information
5. Business cards
6. SOGs (3)
7. Motion / roll call vote

**CUMBERLAND COUNTY FIRE CHIEF'S ASSOCIATION
ROLL CALL 2011**

MEMBERS PRESENT (22)	17	20	20	22	20	20	16	20				
ASSOCIATES PRESENT (12)	7	7	7	7	4	6	8	5				
CC Fire Chiefs DEPARTMENT ORGANIZATION * Chief's Only Meeting	24-JAN-11 *	28-FEB-11	28-Mar-11	25-Apr-11 *	23-May-11	27-June-11	25-Jul-11	22-Aug-11				
MEMBERS												
BEAVER DAM STA 26	P	P	P	P	P	P	P	P				
BETHANY STA 12	P	P	P	P	P	P	A	P				
CEDAR CREEK STA 8	P	P	P	P	P	P	P	P				
COTTON STA 4	P	P	P	P	P	P	P	P				
CUMBERLAND ROAD STA 5	P	P	A	P	P	P	A	P				
EASTOVER STA 1	E	P	P	P	P	P	A	A				
EMS EMERGENCY MEDICAL SERVICES	P	A	P	P	P	A	P	A				
FAYETTEVILLE FIRE DEPT	P	P	P	P	P	P	P	P				
FORT BRAGG FIRE DEPT	P	P	P	P	P	P	P	P				
GODWIN - FALCON STA 17	P	P	P	P	P	P	P	P				
GRAYS CREEK STA 18	P	P	P	P	P	P	P	P				
GRAYS CREEK STA 24	A	P	P	P	P	P	P	P				
HOPE MILLS STA 21	A	P	P	P	A	P	A	P				
PEARCE'S MILL STA 3	P	P	P	P	P	P	P	P				
SPRING LAKE STA 22	A	A	A	P	A	A	A	P				
STEDMAN STA 23	P	P	P	P	P	P	P	P				
STONEY POINT STA 13	P	P	P	P	P	P	P	P				
STONEY POINT STA 19	P	P	P	P	P	P	P	P				
VANDER STA 2	P	P	P	P	P	P	P	P				
WADE STA 16	P	P	P	P	P	P	P	P				
WESTAREA STA 15	A	P	P	P	P	P	A	P				
WESTAREA STA 20	P	P	P	P	P	P	P	P				
ASSOCIATE MEMBERS												
HAZMAT	P	E	P	P	P	P	P	P				
SHERIFF'S OFFICE	A	P	P	A	A	P	P	A				
HIGHWAY PATROL	P	P	P	P	P	A	A	P				
CC EMERGENCY SERVICES	P	P	P	P	P	P	P	P				
FORESTRY	P	P	P	P	A	A	P	P				
FTCC	A	P	A	A	A	A	A	A				
COUNTY COMMISSIONERS	P	P	P	P	P	P	P	A				
CHRISTIAN FIREFIGHTERS	A	A	A	P	A	A	P	A				
LIFE LINK	P	A	P	P	A	A	P	A				
SBI	A	A	A	A	A	A	A	A				
HOPE MILLS POLICE	A	A	A	A	A	P	A	P				
FORT BRAGG EMS	P	P	A	A	A	P	P	A				

Special Notes:

CODES: (P) - Present (A)-Absent (E) - Excused

Legal Briefings for Fire Chiefs

How fire chiefs, fire commissioners, and other fire service officers use the law to protect their communities... their departments... their officers... and themselves.

Vol. 24, No. 8

FireChiefLaw.com

August 2011

In This Issue

Hiring Military Veterans - Special Preference Demanded

The candidate for a firefighter position needed two full years of active military duty to be eligible for *special consideration*. After taking the examination, he was advised he passed but still was shy of two full years of duty. However, by the time he was discharged, he had served the required two years.Page 2

Disability Benefits Denied – Conflicting Medical Testimony

How do hearing officials choose between two differing medical opinions? The fire district brought in medical testimony which established that the firefighter's injury was *not work related*. Rather, the back condition was caused by a lumbar condition dating several years before the alleged on-duty accident.Page 3

Immunity – Firefighters Charged with Tortious Operation of Fire Truck

The property owners were directed to sit in the fire truck while firefighters attempted to save their mobile home from further fire damage. As the fire got out of control, it spread to the fire truck, killing one owner and injuring another. Are the firefighters immune?Page 4

Financially Distressed City – Union Challenges Fire Department Cuts

Under a recovery plan, the city eliminated any minimum manning and past practices covered by a collective bargaining agreement. The city decided to reduce response to automated alarms by one engine company. The union challenged the decision as not being an economic issue. Rather, the reduction would impact firefighter safety.Page 5

Terminated for Sending Email Supporting Political Candidate

The email was *constitutionally protected speech*. The firefighter sent the email from his personal computer while off-duty. He sued both the township and fire chief in his official and personal capacity.Page 7

Settlement—\$250,000—Sexual Harassment

Weighing the cost of litigation against cutting losses and avoiding the uncertainty of a jury verdict. The financial factors of all such cases must be considered before embarking on litigation, no matter how strong the case isPage 8

In The Next Issue

Firefighter Struck and Killed at Traffic Accident

The driver was a paraplegic, driving an illegally configured vehicle. Found guilty of murder, he appealed contending that the deceased firefighter was not fighting a fire when struck. Thus, the charge should be reduced to manslaughter.

Legal Briefings for Fire Chiefs

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A Division of EDM Publishers
FireChiefLaw.com

Post Office Box 2423
Duxbury, MA 02331
1-877-588-0048
Fax 1-781-934-6644
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Subscription Price \$169
(ISSN 1931-602X)
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Hiring Military Veterans

Demands for preference – eligible but lacking two years of service

Lesson Learned: To be qualified, the candidate must have two full years of active duty. In this instance, the candidate was placed on the eligible list prior to his separation from the Army and before he had two full years. However, by the time he was discharged, he had the necessary two years. Thus, he should have been placed on a special eligible list.

In 2002, Thomas Woods (“Woods”) took an open competitive civil service examination with the intention of becoming a firefighter with the Fire Department of New York (“FDNY”).

At the time, the successful candidate was required to have at least 30 semester hours at an accredited college or university or a high school diploma and having served in the armed forces for at least two years as a full-time serviceman.

When Woods took the examination he had neither of these qualifications. However, he received a passing grade on the examination and was placed on the eligible list, which was scheduled for expiration on May 5, 2008.

Woods enlisted in the United States Army in April 2006. In April 2007, while he was still on active duty, the FDNY sent a letter to Woods advising him that he was to be appointed from the eligible list. He was further advised that he was required to complete medical and psychological testing.

Wood’s mother received the letter and responded to the FDNY that Woods would be discharged from the Army in September 2008. FDNY officials answered by advising Mrs. Woods that Woods should contact FDNY to complete the remaining parts of the examination.

In January 2008, while Woods was still on active duty, his eligibility number came up for possible certification and appointment. All other names certified at that time were later appointed.

Woods was finally discharged in July 2008, when he contacted the FDNY to take the medical and psychological parts of the examination along with his background check. In August 2008, Woods filed an “Application Under State Military Law for Determination of Rights on Eligible List” with the Department of Citywide Administrative Services (“DCAS”) asking for a determination of his rights under *Military Law § 243*, which provides that any candidate whose name is on an eligible list and comes up for certification while on active duty shall be placed on a special eligible list if that request is made within 90 days of discharge.

The DCAS denied the request, reasoning that when Woods’ name came up for certification in January 2008, he had not completed two years of full-time duty with the Army.

Woods brought this action, alleging the DCAS decision was *arbitrary and capricious* and a violation of Military Law.

The Supreme Court denied the petition, and Woods appealed. The Appellate court affirmed the denial, noting again that by January 2008, Woods had not completed two years of full-time duty with the Army.

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Woods appealed.

Decision: Reversed.

The court noted the exact wording of *Military Law § 243 (7)*, which provides "...If the name of any such person is reached for certification during his military duty, it shall be placed on a special eligible list in the order of his original standing, provided he makes the request thereof following termination of his military duty..."

In this instance, it is not disputed that Woods' name appeared on the eligible list. While at that time he had not completed two years of active duty, by the time of his discharge he had done so.

DCAS has no discretion in this matter, because the applicable law uses the word "shall"—not "may." The matter was sent back to the DCAS with the court order to place Woods on the "special eligible list."

Citation: Woods v. New York City Department of Citywide Administrative Services, No. 54, Court of Appeals of the State of New York (2011).

Claim for Disability Denied

Pre-existing condition — conflicting medical opinions

Lesson Learned: The court has a limited scope of review of administrative decisions. In this case, the court is charged with whether the decision was supported by substantial evidence, not whether it would have made a different decision. Further, the administrative body has discretion to resolve conflicting medical opinions.

Kevin Nowack ("Nowack"), a firefighter with the Ridge Road Fire District ("District") suffered an injury to his back while on duty on November 7, 2002. Nowack alleged that he sustained his injury as he was driving a fire truck when he hit a manhole or "low spot" which caused the truck's air suspension seat to elevate and "shoot" in a downward direction causing him to twinge his back.

Later, Nowack applied for benefits under *New York General Municipal Law § 207*, which provides benefits to firefighters that are "injured in the performance of their duties."

In the process of applying for these benefits, Nowack filled out an "accident-sickness packet," which contained the injury report plus a physician report as well as authorization for medical records.

The District considered the application and, in the end, denied Nowack's claim, reasoning that his injury was not work related. Rather, the District found that the claimed injury was the result of a pre-existing event that occurred while Nowack was off duty.

Nowack appealed by demanding a hearing pursuant to the Collective Bargaining Agreement ("CBA") between the District and the Ridge Road Firefighters Association, IAFF, Local 3799 ("Local 3799"). The rules of the hearing provide that the burden is on Nowack to prove he is entitled to § 207 benefits.

Hearing officer Michael Schiano heard testimony from witnesses on

Continued on the next page ➤

Mission Statement

Our intention is to report legal matters and the outcomes of lawsuits to fire service officers in order that they learn from the experiences of their colleagues. We do not give legal or any other professional advice, nor do we guarantee the accuracy of our content. Rather, we strongly urge subscribers to have access to competent, experienced attorneys. We hope that this information will help you avoid needless litigation; successfully defend against legal claims that are unavoidable; and use the law to protect your community.

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Around the Nation

Wrongful Termination City Sued

Psychologically unfit for duty?

A former firefighter-paramedic recently filed a lawsuit against his city, claiming he was wrongfully terminated allegedly because he was disabled.

The lawsuit demands unspecified damages and injunctive relief.

The claimant alleges that he was required to submit to a "fitness for duty examination" administered by a clinical psychologist who allegedly issued a clinical report that was false. The report included the opinion of the clinical psychologist that the claimant was not psychologically capable of working for the city as a firefighter or paramedic.

City attorneys have, thus far, refused to comment on the merits of the legal claims.

It was noted that claimant was involved in an incident a few years ago wherein he complained about another firefighter who displayed sexually and offensive conduct towards him.

He complained to the fire department, but, when he was not satisfied with the response, he went to the city's human resources department.

Claimant also alleges that the city refused to allow him to seek advancement by engaging in required training and testing.

Here, claimant alleges that the city official's actions were racially motivated.

Later, claimant alleges that the city retaliated against him by warning him that he would be placed on administrative leave and thus be required to take part in a fitness examination before returning to active duty.

In the end, claimant was terminated, and the report supporting this decision included statements that he had

both sides, and, in the end, applied the *incorrect standard of review*: "whether or not substantial evidence was presented to override the Fire District's determination." Schiano reversed the denial of benefits.

The District appealed, and the Supreme Court remanded the case back to the hearing officer to determine if the District's determination to deny benefits was supported by substantial evidence.

The hearing officer applied the same incorrect reasoning and came to the same conclusion that the District wrongfully denied benefits to Nowack.

The District appealed once again, and the Supreme Court again reversed the hearing officer declaring his decisions as arbitrary and capricious.

On appeal, the Supreme Court's decision was reversed, wherein the court decided that the District's denial of benefits was not supported by substantial evidence, *300 Gramatan Ave. Assocs. v. State Div. of Human Rights, 45 NY2d 176 (1997)*.

Decision: Reversed. Benefits were properly denied by the District.

The District provided testimony of medical experts who opined that Nowack's back injury was not causally related to the November 2002 accident. Instead, the back condition was caused by a fractured lumbar vertebra Nowack sustained in an accident that took place in 1993.

The battalion chief also testified that when Nowack complained of suffering back pain, he did not explain the cause of the injury as he now does. The District also had a mechanic and a representative of the manufacturer to examine the seat.

Even though Nowack provided the testimony of a neurosurgeon, the District provided substantial evidence to support its decision to deny benefits.

Citation: Matter of Ridge Road Fire District v. Schiano, et al., No. 55, Court of Appeals of the State of New York (2011).

Firefighter Negligence – Immunity Claimed

Tortious operation of a fire truck

Editor's Note: Firefighters at the scene of a fire should be immunized for their actions and decisions in furtherance of fighting the fire, protecting property and saving lives. Holding otherwise might deter firefighters for making the difficult and prompt decisions under stressful conditions.

In 2007, there were a number of serious wildfires spreading throughout the San Diego, California area. One of the fires devastated over 90,000 acres and destroyed over 400 structures, including many private homes.

The fire was being fought by many fire departments, including the California Department of Forestry and Fire Protection ("CAL-FIRE").

A mobile home owned by the Varshock family was perilously close to the spreading fire. As Thomas and Richard Varshock vacated the area in their all-terrain vehicle ("ATV"), they approached firefighters demanding

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that they try to save their mobile home.

The firefighters drove a fire truck toward the mobile home, and, in doing so, collided with the ATV, which had apparently broken down.

The fire captain at the scene directed Thomas and Richard to sit in the fire truck while firefighters tried to save the property. As the conditions deteriorated, the fire captain decided that the mobile home could not be saved. He directed the firefighters to get back into the fire truck so as to get away from the flames.

As the fire truck backed out, flames enveloped the engine area causing the truck to stall. As the fire truck became covered by the fire, the fire captain ordered everyone out.

Thomas Varshock was unable to get out and suffered fatal burn injuries. Richard Varshock and the other firefighters suffered serious injuries.

Members of the Varshock family ("Plaintiffs") sued CAL-FIRE for negligent operation of a fire truck resulting the death of Thomas and the injuries sustained by Richard.

The trial court dismissed the case in favor of CAL-FIRE by granting a motion for summary judgment.

The issue in this case is whether CAL-FIRE is entitled to sovereign immunity protection.

Plaintiffs argue that there is an exception to government immunity, wherein the negligent operation of a motor vehicle applied, and the trial court should not have dismissed the case.

Decision: Affirmed.

The language of the immunity statute is similar to that of other statutes in other jurisdictions. *Section 850.4* provides: "Neither a public entity, nor a public employee acting in the scope of his employment, is liable for any injury resulting from the condition of fire protection or firefighting equipment or facilities or, except as provided in *Article 1* (commencing with *Section 17000*...)"

Plaintiffs conceded that the firefighters were acting within the scope of employment when Richard was injured and Thomas died. However, they pointed to the express language of *Section 17000*: "A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity with the scope of his employee."

This provision simply means that a firefighter who otherwise would be immune would not be protected if an injury results from a tortious operation of a fire truck. The court rejected that *Section 17000* removed immunity protection from the firefighters in this instance. This section has a latent ambiguity. In the end, the court decided that the legislative intent was to "immunize the conduct of firefighters while at the scene of a fire and actually combating a fire.

Finding otherwise, would deter them from making necessary decisions quickly under extremely stressful and dangerous circumstances." *City and County of San Francisco v. Superior Court, supra, 160 Cal. App.3d 837,842. (1954).*

Citation: Varshock, et al., v. California Department of Forestry and Fire Protection, D057709, Super. Ct. No. 37-2008-0006636326-CU-PO-EC, Court of Appeal, Fourth Appellate District Division One State of California (2011).

Around the Nation

psychological impairments that made it impossible to continue to perform his duties as a firefighter/paramedic.

Female Fire Chief Claims She was Forced Out

Did the city council and union conspire?

The first female fire chief has sued the city, alleging that the city council and union conspired to undermine her authority as fire chief and to force her into retirement. She is seeking unspecified damages and alleges the city and union actions were motivated by gender and sexual orientation.

At this writing, the claimant is on administrative leave. She was hired in 1999 but had previously served with two other fire departments.

Refusing to comment on the particular allegations, the city has simply rejected the claims.

One city official stated that once the claims were made known, the claimant refused to take part in an interview.

Personal Emails on Town Computers - Firefighter Sues Town

Claims expectation of privacy

Lesson Learned: All fire departments, indeed all local governments, should have a rigid, consistently enforced policy of allowing no personal use of computers owned by either the fire department or the city or town it serves. There is an increasing body of law involving all kinds of claims involving inappropriate use of the internet, harassment, and the use of email communications to support disciplinary actions. Generally, if the fire department or local governments own the computers,

(Continued on next page)

Around the Nation

firefighters will have a difficult time proving any expectation of privacy in email communications on department computers of an incriminating nature.

In a lawsuit recently filed, a firefighter who happens to also be a high ranking firefighter union official has sued the town he serves and named town officials of violating his expectation of privacy by accessing his emails sent and received on the town's computer without his authorization. The claimant concedes that the emails contain communications related to fire department and town business. However, he admits that he also has used his email account for personal communications.

Town officials were conducting an investigation of past harassment claims and allegedly accessed and copied the firefighter's town email account.

The pivotal issue in this case will be whether this firefighter had an *expectation of privacy* in these retrieved emails.

Here, the firefighter will argue that since firefighters served long shifts away from their families, they must communicate with family members and loved ones about matters not relevant to firefighting and town business. He also will claim that some of the emails are about union business and, thus, are privileged.

Town officials maintain that the email policy is spelled out clearly in the employee handbook.

The policy statement provides that no messages should be assumed to be confidential or that the town will not access these accounts.

It is also important to note that the town's email policy will be closely examined to determine if the terms have been applied consistently and fairly. Unless settled by the parties, we will report the outcome and any appeals.

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Financially Distressed City Cuts in Fire Budget

Minimum manning and "past practices" protection eliminated? – Union challenge

Lesson Learned: Look for more cases like this in the future. Local governments facing dire financial problems, will challenge matters heretofore covered by collective bargaining provisions with firefighter unions.

The City of Scranton, Pennsylvania ("City") was declared a financially distressed city for the purposes of the Municipalities Financial Recovery Act ("Act 47"). In 2002, the City executed its third recovery plan, referred to as the 2002 Recovery Plan ("Plan"). The firefighters are represented by Fire Fighters, Local Union No. 60 ("Union").

The Plan included three important provisions related to this case.

The first referred to as "Management Rights," provided that the City "shall have the right ... to determine and change job duties ... any provision in any collective bargaining agreement which is inconsistent ... shall be eliminated to the extent such inconsistency or interference, and the City management rights, as set forth above, shall not be the subject of any grievance procedure..."

The second referred to as "Elimination of Minimum Manning," provided any CBA provision "concerning minimum manning requirements ... shall be eliminated. The City shall have to sole right to determine the number of personnel employed and utilized by the City. Further, the City shall have the right to layoff any employees for economic reasons or any other reason, without limitation."

The third referred to as "Elimination of Past Practices" provided "any provision in any CBA which protects past practices ... shall be eliminated."

For the past several years, the Fire Department responded to automated alarms with two engine companies, one rescue company, one truck company, and a supervisor's vehicle. This effort would be staffed with 13 firefighters.

An arbitrator determined that 98-99% of all automated alarms were false. Thus, the City decided to reduce the response by eliminating one engine company, resulting in 10-11 firefighters responding instead of the previous 13. Here, City officials concluded that this reduction would not compromise firefighter safety. Further, the City decided that there was no mandate to discuss this mandate with the Union.

The Union responded by challenging the arbitrator's award. The trial court denied the petition, but the Union appealed to the appellate court, which decided that the City's decision failed to comply with the standards of fairness and due process. The case was sent back to the arbitrator, who decided that past automated response practice is binding and subject to change only by mutual agreement. Thus, the arbitrator sustained the Union's grievance.

The City filed a petition to vacate the arbitrator's decision, and the trial court granted the petition, reasoning that the protection of past practices has been eliminated, and the arbitrator exceeded his authority. The Union

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appealed. Among the reasons for appealing is that this matter is not purely economic. Rather, it relates more to *safety concerns*.

Decision: Affirmed.

The 2002 Recovery Plan “specifically eliminates protection of past practices.” Nothing in the Plan or subsequent decisions preserves the past automated alarm response practice. Thus, the arbitrator exceeded his authority. The court noted that in his previous decision, the arbitrator conceded that the past practice of sending two engine companies in response to an automated alarm would be “deemed a basic prerogative of management.” Further, inherent managerial prerogatives are not subject to mandatory collective bargaining.

The court disagreed that staffing automated alarm responses is not an economic issue. The court reasoned that there is a *rational relationship* to cost containment and improved efficiency when it was decided to eliminate one engine company.

Citation: City of Scranton v. Fire Fighters Local Union No. 60, No. 1253 C.D. 2010, Commonwealth of Pennsylvania (2011).

Termination – Email Falsehoods Alleged

Is email communication protected speech?

Editor's Note: Sending emails is a form of communication that, at first glance, will fall under protection afforded by the First Amendment. Unlike the recently filed case on page 5 (sidebar), this email was sent by a firefighter from his own computer at his home and concerned an upcoming election. Much of the content was directly related to fire department business.

Brad Love, a part-time, volunteer firefighter for the Sugar Creek Township Fire Department (“Department”), which also has paid, full-time firefighters, sent an email from his personal computer while off-duty at his home about matters related to a 2006 Township election for a trustee position.

Love was supporting the candidacy Bob Boyer, a retired volunteer firefighter, who was challenging the incumbent. If elected, one of his duties would be to appoint a new fire chief.

One of key elements to Boyer’s campaign was the alleged unnecessary spending and inefficient management of the incumbent, particularly in regards to Department matters. He challenged the purchase of five new vehicles and the personal use by Department paid firefighters.

Boyer also claimed that the incumbent made a mistake in hiring the present fire chief, Robert Rehfus (“Chief Rehfus”). Boyer allegedly referred to Chief Rehfus as a “big city fire chief” with “big city” ideas.

The election became more and more contentious, with volunteer firefighters supporting Boyer and career firefighters supporting the incumbent.

Shortly before the election, Love sent out his email supporting Boyer to a small group of citizens associated with a local children’s athletic

Around the Nation

An Agreement With the Firefighter Union – Is NOT a Signed Contract?

Union sues for back wages - city council seems reluctant to sign onto the mayor's and union's agreement

Like every other local city or town, local officials and fire departments are considering all kinds of creative ways of dealing with budgets getting tighter and tighter.

In a recently filed lawsuit, a firefighters' union has filed a lawsuit against the city demanding as much as \$4 million in back wages.

Facing critical fiscal constraints the city's mayor and firefighters' union finally came to an agreement to freeze wages for 2009 and 2010 calendar years.

The attorney representing the union has noted that both parties came to an agreement after working together, but the agreement only related to salary and wages.

Importantly, the agreement did not cover health coverage, pension and other staffing issues.

The city council has yet to agree to sign the agreement into a labor contract.

As with all other local governments, pension and uncovered liability loom almost as onerous as wages.

The union responded to the inaction by filing a lawsuit demanding back wages.

To some, this may seem as an effort on the part of the union to force the issue.

Will the terms in the agreement be reduced to a provision in the next labor contract?

Continued on the next page ➤

league. Among comments in the email, were the following: "I have been on the fire department here in town since 1994 and have known Bob since then ... The sad issue actually is that this rumor has been started by career firefighters that are afraid of loosing [sic] free reign of the check book.

They have started this and several rumors to take away from the real issues. The fact is that most of these firefighters want to tell us how to vote, but they don't think our community is good enough to live in."

The same email pointed to alleged evidence of substantially increased expenditures, and other financial matters.

Chief Rehfus found out about Love's email, and read it. He concluded that the email included some falsehoods. For this reason, Chief Rehfus terminated Love from the Department.

Love responded by suing Chief Rehfus and the Township ("Defendants") under §1983 (civil rights) for violating his *First* and *Fourteenth Amendment* rights.

Defendants filed a motion for summary judgment, arguing that false statements are not protected by the *First Amendment* and that the Township cannot be held liable under §1983 on the theory of *respondeat superior*.

The trial court granted summary judgment, and Love appealed.

Decision: Reversed.

Love's email, sent while off-duty from his personal computer is constitutionally protected speech. *Pickering v. Board of Education*, 391 U.S. 563 (1968).

The court also determined that the trial court erred in dismissing the case because there are as yet unresolved genuine issues of fact that would determine whether the Township is liable under §1983.

The case is silent as to whether Love availed himself to an administrative review of his termination. It must also be determined if the Township Trustee has delegated to Chief Rehfus policymaking authority with respect to firefighters.

Citation: Love v. Rehfus, et al., No. 30S01-1004-CV-162, Indiana Supreme Court (2011).

Settlement - \$250,000 – Sexual Harassment – Female Firefighters

Editor's Note: A significant portion of lawsuits involving fire departments, firefighters, and third parties are settled before actually going to trial. Attorneys will urge their clients to settle when the underlying risk of litigation far exceeds that amount of the offered settlement figure. In most cases, the particulars of settlement agreements are not divulged, and all parties neither admit nor deny any liability.

In an unusual case, a sexual harassment lawsuit filed by four female firefighters was settled after attorneys representing the city warned city officials that going to trial could result in substantial seven figure liability.

In the end, the city agree to settle the case by paying \$250,000 and agreeing to a number of non-monetary measures including sensitivity training for all firefighters to prevent any future such incidents.

The case did not end with the settlement, however. The attorneys representing the four claimants demanded well over \$1 million in legal fees.

Recently, a federal judge has issued an order that the city pay the claimant's attorney about \$260,000 in fees and costs.

Settlement - \$130,000 - Forced Retirement

A twenty-eight year former firefighter was terminated after having suffered a number of physical problems, including a heart attack and the removal of a lung. His physician signed a release indicating that the claimant could return to limited duty with certain restrictions.

The city's pension board sent the claimant to be examined by a physician before claimant retired. However, the physician refused to provide an opinion as to claimant's fitness for duty. In his lawsuit, the claimant argued that due to his medical condition, he was protected by the provisions of the *Americans with Disabilities Act* ("ADA"). Before the settlement, the EEOC considered the claim and issued a right-to-sue letter.



For Immediate Release: August 8, 2011

Raleigh – From the N.C. Office of State Fire Marshal

CO Alarms: The End of Life Warning

How do you know when you should replace a carbon monoxide alarm? That's a common question fielded by the North Carolina Department of Insurance Office of State Fire Marshal, and a topic that's of importance to homeowners, firefighters and code officials.

Beginning in March 2007, UL 2034, the standard for single and multi-station carbon monoxide (CO) alarms required that all CO alarms have an audible "end of life" warning. The end of life warning alerts you that the unit has reached its expiration and should be replaced. Some manufacturers have voluntarily included this warning on their products since 2001; pursuant to UL 2034, any CO alarm manufactured after April 2007 with a UL listing must include an end of life warning.

Additionally, UL 2075 aligned with UL 2034 in September 2009 in requiring end of life warnings for gas and vapor detectors and sensors covered under the standard.

It is important for people to be able to recognize and understand the different alert sounds generated by smoke alarms and carbon monoxide alarms; different manufacturers use a variety of alarm sequences to indicate the end of the carbon monoxide alarm's life.

For example, a Kidde-brand carbon monoxide alarm will begin "chirping" every 30 seconds when it is reaching its operational end of life. When in this mode, the alarm will not be able to detect carbon monoxide, and the chirping will only stop if power is cut off from the unit. During the end of life warning, Kidde CO alarms with a digital display will read "ERR," and when the Peak Level Memory Button is pressed, the display will show "E," "O" and "9." The user will know that this is the end of life warning, and not a low battery warning, because the chirp will return if the batteries are replaced.

If you are ever unsure about the expiration date of the carbon monoxide alarms, it is best to replace it with an alarm that meets the newest standards.

About Carbon Monoxide

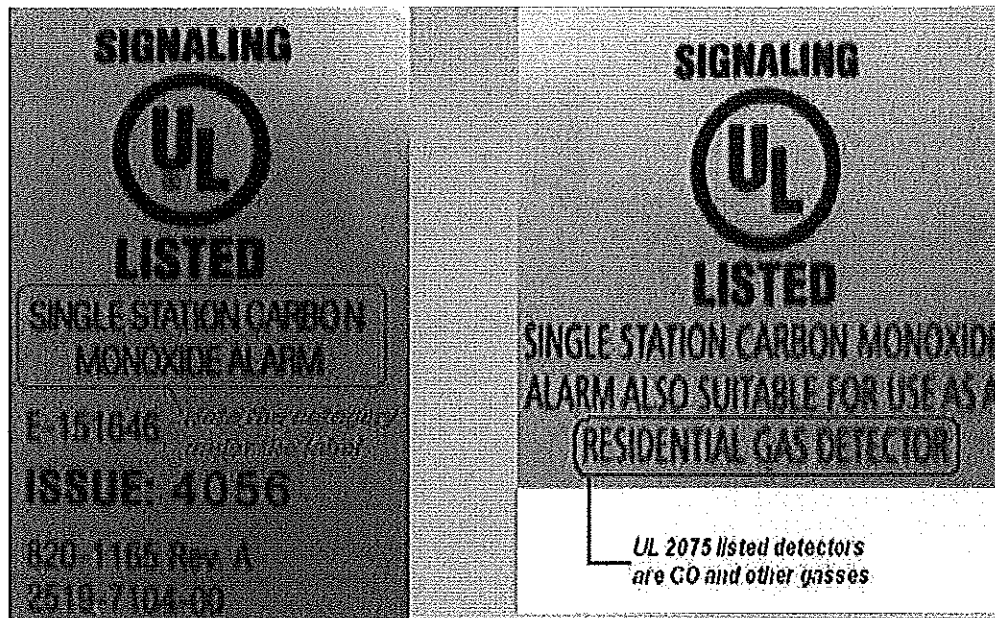
Carbon monoxide, or CO, is a deadly gas that is invisible, odorless and colorless. It is created during the combustion process when fuels, such as gasoline, wood, coal, natural gas and oil, burn incompletely. Potential sources of carbon monoxide around the home include heating and cooking equipment, and vehicles or generators running in attached garages.

A person can be poisoned by a small concentration of CO over a longer time period, or by a larger concentration in a shorter period; the dangers depend on a number of variables, including the person's health and activity level. Symptoms of CO exposure can be similar to those of the flu, food poisoning or other illnesses.

If your carbon monoxide alarm sounds and you believe anyone in the household is experiencing carbon monoxide poisoning, everyone should move into fresh air and then call 911. If the alarm sounds and no one is experiencing symptoms, move into fresh air and call the fire department or a qualified technician to have the problem inspected. If you are unable to leave the home, call for help, open doors and windows, and turn off all possible sources while you wait for assistance to arrive. Never ignore an alarm!

Safety Tips

- CO alarms should be installed in a central location outside each sleeping area, on every level of the home and in other locations where required by applicable laws, codes or standards. For best protection, interconnect all CO alarms throughout the home, so that when one sounds, they all sound.
- Follow the manufacturer's instructions for placement and mounting height.
- Choose a CO alarm that has the label of a recognized testing laboratory.
- Test CO alarms at least once a month; replace them according to the manufacturer's instructions.
- If the audible trouble signal sounds, check for low batteries. If the battery is low, replace it. If the alarm still sounds, call the fire department.
- If you need to warm a vehicle, remove it from the garage immediately after starting it. Do not run a vehicle or other fueled engine or motor indoors, even if the garage doors are open. Make sure the exhaust pipe of a running vehicle is not covered with snow.
- During and after a thunderstorm, make sure vents for the dryer, furnace, stove and fireplace are clear of snow build-up.
- A generator should be used in a well-ventilated location outdoors away from windows, doors and vent openings.
- Gas or charcoal grills can produce CO; only use them outside.



National Preparedness Month 2011

This September: A Time to Remember. A Time to Prepare.

National Preparedness Month is the Federal Emergency Management Agency's (FEMA) annual campaign to encourage Americans to take steps to prepare for emergencies in their homes, schools, organizations, businesses, and communities. National Preparedness Month is sponsored by FEMA's *Ready* Campaign in partnership with Citizen Corps, FEMA's grassroots strategy to bring together government and community leaders to involve all citizens in emergency preparedness planning. The goal for this September's National Preparedness Month is to turn awareness into action by motivating all Americans to make and practice an emergency plan. FEMA relies on federal, state, and local partnerships and its Coalition Members to help bring this call to action to all communities throughout the U.S. As the first wave of response to every emergency and disaster of all kinds, the United States Fire and Emergency Medical Services (EMS) community will play a key role in National Preparedness Month.

National Preparedness Month Coalition

Sign up to be a National Preparedness Month Coalition Member! Coalition Membership is easy, free, and important and is open to all individuals, businesses and organizations. Register your department at community.fema.gov. As a member, you'll have access to tons of information and ready-to-use templates and messaging, including the ability to connect with the thousands of other members across the country. Help us encourage everyone to sign up at community.fema.gov. Here are a few easy ways to participate as a Coalition Member:

✔ **Leverage Existing Events**

Participate in events and meetings that already exist within your community, through local farmers markets, Rotary Clubs, Lions Clubs, Kiwanis, VFW, or the American Legion. Whether it's offering to talk about preparedness or having a representative available to talk to community members and pass out information, tapping into something that is already planned and scheduled is a great way to reach members of your community. Be sure to post your preparedness activity at community.fema.gov to help others in your community find you.

✔ **Host an Event, Meeting, or Workshop**

Host an event, such as a preparedness workshop, day, or fair. Ladder trucks and ambulances serve as a perfect backdrop for an educational booth where you distribute home fire safety checklists or surveys, schedule smoke alarm installations, and/or answer questions about smoke and CO alarms and offer fire safety tips. You may even offer to provide CPR training and/or blood pressure checks to community groups. Be sure to post your preparedness activity at community.fema.gov.

✔ **Be Part of a Much Larger Event or Initiative**

Individuals want to be part of something bigger. For example, September 11th is now an annual day of service and this year will mark the ten year anniversary of the terrorist attacks. Since fire and EMS were a critical part of the 9/11 response, you might consider doing a preparedness event for this year's annual day of service. Be sure to post your event both on 911dayofservice.org and community.fema.gov so people in your community can find you.

✔ **Spread the Preparedness Message**

Include preparedness messaging in existing forms of communications, such as emails, websites, blogs, social media, newsletters, and even as bill stuffers. Once you're signed up as a Coalition Member, you will have access to ready-to-use messaging that you can use or customize.

The U.S. Fire and EMS Community Involvement

A few initial ideas for how fire and EMS communities throughout our nation can get involved in National Preparedness Month include:

- ✓ **Host a Preparedness Open House that doubles as a volunteer recruitment event to assist you in Fire Prevention activities.**
- ✓ **Reach out to youth and families by planning a visit to a local school or day care to discuss emergency plans and fire safety and distribute information that they can take home about the importance of emergency preparedness and the steps they can take to be prepared.**
- ✓ **Consider announcing the launch of Teen CERT (Community Emergency Response Team) or a new partnership with a local youth program that will integrate preparedness with a press release and social media effort.**
- ✓ **Reach out to senior citizens by visiting local senior centers to discuss emergency plans and fire safety.**

Available Resources

- ✓ Community.fema.gov. Join us as a National Preparedness Month Coalition Member where you will have access to ideas and ready-to-use messaging, including press releases, posters, graphics, web banners, social media messaging, articles, best practices from 2010, and much more.
- ✓ Ready.gov. *Ready* has resources such as checklists and different information tailored to specific groups of people, including kids, businesses, and those with access or functional needs.
- ✓ CitizenCorps.gov. Citizen Corps is a national network of state, local, and tribal Citizen Corps Councils who work to bring preparedness programs and carry out local strategies to involve government, community leaders, and citizens in all-hazards preparedness and resilience.
- ✓ ReadyRating.org. The American Red Cross Ready Rating Program helps organizations take the necessary steps to become prepared to respond to and successfully withstand a disaster and other emergencies.
- ✓ USFA.dhs.gov. The U.S. Fire Administration is an entity within FEMA that provides national leadership to foster a solid foundation for our fire and emergency services stakeholders in prevention, preparedness, and response.
- ✓ NFPA.org. The National Fire Protection Association advocates for fire prevention and is the leading source on public safety, providing and advocating consensus on codes and standards, research, training, and education.
- ✓ ShakeOut.org. Across the country, states are participating in this earthquake drill. Check the site to see if there is a ShakeOut coming to your community.
- ✓ GreatHurricaneBlowout.org. The Great Hurricane Blowout is led by the Federal Alliance for Safe Homes, Inc., or FLASH, to help families get ready for hurricane season. Check the site for future events happening in your community.
- ✓ Safekids.org. Safe Kids USA is a nationwide network of organizations working to prevent unintentional childhood injury, the leading cause of death and disability for children ages 1 to 14. Safe Kids USA educate families, provides safety devices to families in need, and advocates for better laws to help keep children safe, healthy, and out of the emergency room.

For more information and ideas, contact NPM@fema.gov.