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MMAA NEWS

SUMMER SEMINAR: Enclosed with this issue of the *Newsletter* is registration material for the City Attorney's Annual Summer Seminar. This year's Seminar will be held July 13-15, 2007 at Tan-Tar-A Resort. Please return the registration material to the Municipal League headquarters. There is no separate room reservation card for Tan-Tar-A this year. For reservations call 800-Tan-Tar-A. Room rates are \$116. The tentative program listed on the registration materials is just that – tentative. If you have a better idea for topics, please let us know.

DUES: You will find enclosed a dues statement for membership in the Municipal Attorneys Association. Please pay promptly.

If you are not currently a member of the association and would like to join, simply complete the enclosed form and return it along with payment.

LOU CZECH AWARD NOMINATIONS: The committee appointed by the Missouri Municipal Attorneys Association is soliciting nominations for the Lou Czech Award, which will be presented at the Summer Seminar July 13-15, 2007, at Tan-Tar-A.

Nominees are limited to full members of the Missouri Municipal Attorneys Association and former members of the association gone from the state or profession less than three years. The committee will review the applications using the following criteria:

1. The individual's professional accomplishments in serving the public's interests and the various governmental jurisdictions wherein the nominee was employed.
2. The professionalism exhibited by the nominee in his/her relationship with elected officials, the public and other local government professionals. The committee also will consider the nominee's time and effort spent in training and supporting young professionals just entering the field.
3. The individual's accomplishments in addition to service to the employing jurisdiction; time and effort spent serving the local, state and international city attorneys associations; serving on Municipal League committees and in other capacities that have proven beneficial to the public welfare or the promotion of the profession of municipal law.
4. The nominee's record of ethical conduct in all private and professional matters that bear on the individual's acceptability of the Lou Czech Award.

If you have a nomination, please submit the name and reasons you think the person should receive the award to Gary Markenson, Missouri Municipal League, 1727 Southridge Drive, Jefferson City, MO 65109.

CASE OUTLINES (MISSOURI)

CIRCUIT COURT INVALIDATES 2006 LAW THAT REQUIRED PAYMENT OF TAXES TO BE A CANDIDATE: In a case of unusual importance to municipal lawyers, Cole County Circuit Court Judge, Richard Callahan declared several provisions of H.B. 1900 invalid including Sections 115.342 (requirement of payment of taxes) and 115.350 (prohibition against felons). H.B. 1900 was adopted by the General Assembly and signed by the Governor on July 12, 2006. H.B. 1900 was challenged on a number of grounds including a change in its original purpose, lack of clear title and multiple subjects. In addition, the contribution black out during the legislative session was challenged on free speech and equal protection grounds. The title to H.B. 1900 stated it was "relating to ethics." While the title was very broad it was not impermissibly broad since the title "relating to ethics" indicates in a general way the kind of legislation that was being enacted and the reference to statutes being repealed all in Chapter 105 and 130 helped clarify and further bolstered the clarity of the bill as it related to ethics. The purpose as measured by its title and contents purported to address matters regulated by the Missouri Ethics Commission. Article III, Section 21 of the Missouri Constitution prohibits a bill from being amended in its passage through either house as to change its original purpose. Adding candidate-disqualification provisions (requirement of payment of taxes and prohibition of felons from running for office) to Chapter 115 after the bill had been introduced violated Article III, Section 21 because this was a change in the original purpose. The added subjects were not subjects overseen by the Ethics Commission. With respect to the issue of the single subject requirement of Article III, Section 23 the test is whether the challenged provision fairly relates to the subject matter described in the title of the bill, has a natural connection to the subject or is a means to accomplish the law's purpose. For purposes of Article III, Section 23 the subject "includes all matters that fall within or reasonably relate to the general core purpose of the "legislation." This determination is made to the bill as finally passed. The court finds that as enacted H.B. 1900 contained a second subject, matters relating to candidate disqualification (payment of taxes and felons) that was in violation of Article III, Section 23 of the Missouri Constitution. With respect to the campaign contribution limits that limit a member of the General Assembly from accepting campaign contributions during the legislative session, the court finds that the total prohibition during the legislative session was not sufficiently narrow and therefore violates the plaintiff's First Amendment rights under the federal and state constitutions. The court severed invalid provisions from the rest of the bill and enjoins enforcement of the provisions that are unconstitutional. *Trout v. State of Missouri, Ethics commission et al.* (Cole County Circuit Court Case #07AC-CC00002, March 28, 2007).

Comment Howard: A copy of the opinion can be obtained on the MML Web site. Go to Attorney's Newsletter, and then click on MMAA Materials on the upper left. I assume the decision will be appealed so for now we can watch and wait although we can advise our clients that enforcement of candidate disqualification provisions in Sections 115.342 and 115.350 has been enjoined. These Sections were the subject of an opinion by Kevin O'Keefe in December of 2004 that is on the MML Web site relating to duties of city clerks. Kevin opined that city clerks did not have a duty any responsibility with respect to these Sections. It is important to also

remember that Section 115.346 prohibiting the certification of a candidate for municipal office who is in arrears for any unpaid city taxes or municipal user fees is still on the books. That Section is discussed in the latter part of the Kevin O'Keefe opinion in which he opines that this section is valid.

COUNTY LIABLE ON IMPLIED CONTRACT THEORY: Employee of St. Louis County (employee) who worked in the Recorder of Deeds office handled an account for Investors Title Company (Investors). In 1995, the Recorder of Deeds changed the procedures for handling the account. Instead of paying each time the recorder filed a document; Investors paid at the end of each day. In order to secure the payment, Investors signed a blank check and the employee tallied up the charges for the day and filled in the amount. Employee devised a scheme whereby she would overcharge Investors, prepare a false tally, and take the difference from the cash drawer. As you would expect none of the safeguards to prevent fraud were followed and the scheme went unnoticed until 2001 at which time Investors determined they were being overcharged. After notification to the recorder, the practice stopped and an audit was performed showing that over three years the amount of the overcharges was about \$500,000 and over five years the amount was about \$725,000. Investors sought a refund from St. Louis County (County) that was denied and thereafter they brought suit in circuit court based on a claim of money had and received. Other counts brought by Investors were dismissed by the court prior to trial or at the close of evidence. The jury returned a verdict on the claim for money had and received for three years in the amount of about \$500,000 plus interest. County appealed and the appeal was transferred to the Missouri Supreme Court. The County argued on appeal that because there was no written contract as required by Article 432.070 that Investors could not recover under a contract theory. Investors argued that the County's obligation is to make restitution based upon a contract implied by law specifically under Chapter 59 that establishes the charges the County made for recording documents. Contracts in law are "implied in law" or "quasi-contract" which is not a contract at all but an obligation to do justice even though it is clear that no promise was ever made or intended. The Court distinguished between contracts in law and contracts in fact where the obligation to pay would be based upon a contract implied in fact. Since this was a contract in law, the County had an obligation to repay the overcharges. The County also argued that it did not get the money and there was no benefit (two of the elements of the claim of money had and received) since the employee stole the money. The court cleverly sidestepped these issues by breaking down the scheme that showed the money taken was money from the cash drawer and that the County got the money from Investors. Thus according to the Court's analysis the County accepted and retained the money from Investors. The Court rejected the County's argument that Investors was negligent in not checking the records it received from the County by affirming the trial court's decision to not allow a withdrawal instruction on Investors negligence. The Supreme Court also affirmed a refusal of a proffered instruction on "change of circumstances" based on the County theory that the Employee stole the cash in the exact amount of the overcharge to Investors. Investors filed a cross appeal alleging several counts in tort arguing that the purchase of theft insurance by the County was a waiver of sovereign immunity. The fact that the County had insurance to cover the theft did not constitute a waiver of sovereign immunity because the policy is an employee dishonesty policy and not a liability policy as required by the insurance provision of the sovereign immunity statute. *Investors Title Company, Inc. v. Hammonds, et al.* (SC87669, 03/12/07).

Comment Howard: The outcome in this case is surprising since traditional theory is that government cannot be liable under an implied contract theory. This case looks pretty much like a rerun of the earlier court of appeals decision discussed in the May 2006 *Newsletter*.

PRIOR JURISDICTION TRUMPS LATER VOLUNTARY ANNEXATION: The city of St. Joseph introduced on December 4, 2004, an ordinance to annex certain tracts of land south of the city limits as an involuntary annexation. The village of Agency located right next to the City's proposed annexation on March 22, 2005, initiated efforts to voluntarily annex the land in question by submitting a petition pursuant to the voluntary annexation procedures set forth in RSMo 71.015. The Village subsequently adopted two ordinances to annex the property in question some of which overlapped the City's proposed annexation. The Village did not dispute that the City took the first step, rather it argued that voluntary annexations are exempt from the common law doctrine of prior jurisdiction. The Village argued that the phrase "Notwithstanding the provisions of 71.015, 71.680, and 71.920, the governing body of any city, town, or village may annex unincorporated areas which are contiguous and compact to the existing corporate limits ..." and this language indicates a preference by the legislature for voluntary annexations. The Village lost at the circuit court level and appealed to the Western District. The court construed the word "notwithstanding" to be the equivalent of "in spite of" and that this language simply offers an alternative to other forms of annexations; therefore, the circuit court properly applied the doctrine of prior jurisdiction. The decision was affirmed with the judgment for St. Joseph. *City of St. Joseph v. Village of Agency*, (WD66205, 04/03/07).

TIME OF ACCIDENT AND TIME WHEN DEFENDANT LOCATED CRITICAL ELEMENT: Driver had accident and left car. Police arrived after the accident and later located the driver. After an investigation, the police charged the driver with a DWI. Driver admitted to driving the car. The driver was found guilty in circuit court and appealed to the Western District. The prosecutor was unable to show how long it had been between the accident and the arrest; therefore, prosecutor failed to provide a critical component of the case. The decision was reversed. *State of Missouri v. Davis*, (WD66397, 03/27/06).

LABORATORY REPORT IS TESTIMONIAL EVIDENCE: Police officers for the city of Poplar Bluff entered the home of Davis to execute a search warrant. Upon entering the home they went to the bedroom where they found Davis sleeping with her boyfriend March. During the course of the search they found a plastic bag containing several rocks that were sent to the crime lab for testing. The lab report came back positive for cocaine. March was charged and convicted of drug trafficking in the second degree. At the trial, the person who prepared the lab report was unavailable because they had moved to North Carolina; therefore, the prosecutor introduced the lab report as a business record as permitted under existing case law. On appeal, the case was transferred to the Missouri Supreme Court to consider whether or not the lab report should have been admitted under *Crawford v. Washington* decided by the United States Supreme Court in 2004. In *Crawford*, the Court significantly changed the Confrontation Clause for hearsay evidence. Under *Crawford*, the United States Supreme Court held that the Confrontation Clause demands that all testimonial evidence be excluded unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. The Missouri Supreme Court reasoned that the lab report was testimonial and reversed the conviction since no opportunity was provided for cross-examination. *State of Missouri v. Robert March*, (SC87902, 03/20/07).

Comment Howard: If you handle these types of cases you need to look at Footnote #2 citing cases from other jurisdictions where reports have been found to have been testimonial. Examples used are autopsy reports, blood alcohol reports, urine samples, and other scientific reports. Take note, it seems pretty clear where we are headed.

CASE OUTLINES (FEDERAL)

STANDARD FOR RETALIATORY PROSECUTION CASES: Williams was an admitted “vociferous critic” of the City and an acknowledged “pain in the neck” to city officials. He regularly attended City Council meetings and expressed his views in opposition to numerous city policies. He was given some 26 municipal citations over a two-year period involving failure to yield to an emergency vehicle, failure to obtain a business license, solid waste infractions, etc ... Williams filed a complaint under 42 U.S.C. 1983 claiming these citations were in retaliation for the exercise of his First Amendment rights in criticizing city officials. Williams admitted with respect to 25 of the 26 citations that the police or code enforcement officials investigated his behavior and personally observed him engaging in the conduct that led to the issuance of the citations. The district court found that the City had probable cause to issue the citations on 25 of the 26 complaints. With respect to the one remaining complaint, the police officer had stopped the defendant for a traffic violation and after issuing a summons the officer drove off. Williams followed the officer for several blocks and the officer turned his police car around, pulled behind Williams turned on his emergency lights and stopped Williams threatening him with stalking a police officer; however after consulting with the police chief, he gave Williams a ticket for failing to yield to an emergency vehicle. The district court granted the City’s motion for summary judgment. On appeal, the 8th Circuit noted that in 2004 the United States Supreme Court issued its decision on *Hartman v. Moore* holding in a retaliatory prosecution claim that the plaintiff must show that the non-prosecuting official acted in retaliation and induced the prosecutor to bring charges that the prosecutor would not have been initiated without the non-prosecuting officials urging. With respect to 25 of the 26 charges the 8th Circuit sustained the motion for summary judgment on the grounds that the officers or code officials had probable cause to issue the citations at the time they were issued. The 26th charge was more difficult since there was no probable cause for the ticket. Nevertheless Williams failed to show that the officer was motivated because of Williams’ exercise of his constitutional rights and that the officer’s action would “chill a person of ordinary fitness” from continuing the protected activity; therefore, the motion for summary judgment was sustained. *Williams v. City of Carl Junction et al*, (8th Cir., No. 06-2130, 03/28/07).

Comment Howard: How to handle the issues that arise with a chronic critic is one of our most difficult jobs. In this case, Carl Junction appears to have handled this by the book except for one charge. Even in that situation the Court recognized city officials are human. New standards adopted in 2004 by the United States Supreme Court for retaliatory prosecutions make this case a must read.

PREGNANCY DISABILITY ACT DOES NOT REQUIRE MEDICAL BENEFITS FOR CONTRACEPTION: Union Pacific (employer) was sued by female employees (employees) for failure to provide insurance benefits under the Pregnancy Disability Act (PDA) on the grounds that the medical benefit plan of the employer did not provide coverage of prescription contraception as required by the PDA and for discrimination under Title VII as amended by the

PDA. Plaintiffs won at the district court level and employer appealed to the 8th Circuit. In the first court of appeals decision to deal with these issues, the 8th Circuit held that the PDA does not apply to contraception. The court concluded that the phrase “related medical conditions” in the PDA refers only to medical conditions associated with “pregnancy” and “childbirth,” the specific terms that precede the general phrase in the PDA statute. Contraception is not “related to” pregnancy for PDA purposes because it occurs prior to pregnancy and prevents pregnancy from occurring. Employees contended that the plan had a disparate impact on female employees and is in violation of Title VII. The 8th Circuit found no disparate treatment between males and females because neither sex was entitled to benefits for contraception. In addition, for purposes of determining if there was disparate treatment the base used by the District Court was too broad. The appropriate base should have been contraception in which case both sexes are treated the same. The district court decision was reversed. *In re: Union Pacific Railroad Employment Practices Litigation, Standridge. and Fitzgerald et al v. Union Pacific Railroad Company*, (8th Cir. No. 06-1706, 03/15/0).

PRIVATE CORPORATION IS A STATE ACTOR BECAUSE OF ITS RELATIONSHIP WITH CITY IN HOLDING AIR SHOW: It is pretty common for cities to have festivals that are turned over in whole or in part to private civic organizations. These organizations of course want to promote their views and generally take a dim view of any controversy that diminishes the event. *Wickersham and Doyle v. City of Columbia and Memorial Day Weekend Salute to Veterans Corporation*, (8th Cir No. 06-1922, 03/22/07), is a classic case that represents the clash between these two divergent views. The city of Columbia (City) and a not-for-profit corporation known as the Memorial Day Weekend Salute to Veterans Corporation (Salute) hold an annual, two-day event at the City’s airport where tens of thousands of persons gather to watch feats of aerial acrobatics performed by military planes, static airplane displays, exhibits by military recruiters, and consume food on the airport’s secured tarmac. At noon, each day, there is a ceremony to honor fallen veterans at which the national anthem is played and the names of fallen veterans are read. Under the agreement for the event, the City turned exclusive control over the airport to Salute, subject to the City’s right to take control in the event of an emergency. Salute is responsible for deciding on the content of the air show, the schedule of events, the list of guests, and the exhibits. Salute pays for all of the costs during the event. Notwithstanding the exclusivity provision city personnel are responsible for the operation of the airport during the Salute’s air show and the president of the Salute conceded that the airport manager is “absolutely essential” to the event. During the remainder of the year, the airport is operated by the City. Salute imposes a number of restrictions on behavior at the air show, including limits on expressive activities like soliciting, leafleting, political campaigning, and unauthorized signs. Protesters are advised that should they attempt to enter the premises the command center will be notified, the police will stop their forward progress, and that those who intend to protest will be barred from entering the area. The president of the Salute is the final arbiter of what constitutes a protest and the police will respond in the event they are called by the Salute to enforce the restrictions. In 2004, Doyle was prevented from handing out leaflets and Wickersham was arrested for first-degree trespass after he refused to stop collecting signatures inside the restricted tarmac area. Wickersham and Doyle filed a suit against the City and Salute under 42 U.S.C. 1983 in federal court alleging that their First Amendment right to free expression was violated characterizing the air show as a public forum. They argued that while Salute was a private corporation, it was a state actor given the degree of participation between Salute and the City in the enforcement of the restrictions.

Prior to the 2005 event, the district court granted a TRO against certain protest activities which was made permanent after the 2005 air show. Salute appealed to the 8th Circuit alleging that Salute was a private party and that the injunction interfered with the right of Salute to deliver its own message unimpeded by others. The 8th Circuit affirmed finding that the relationship between Salute and the City made Salute a state actor. Key to the finding was the involvement of the police in the planning and execution of enforcement by Salute against the protesters creating the necessary nexus between the state and the deprivation. Salute argued that the protest interfered with the right of Salute to be able to deliver its chosen message. The court sidesteps this issue because the injunction was narrowly tailored to allow Salute to hold its noon time ceremony honoring veterans without the presence of protesters.

Comment Howard: This case provides a focus to examine the fine line between the police enforcing city ordinances and assisting a private party in dealing with protesters at a private gathering or event on public property. The opinion is well written and provides guidelines helpful in avoiding civil rights liability.

REQUESTING ATM STATEMENT FROM POLICE OFFICER DID NOT VIOLATE FOURTH AMENDMENT: Requiring a police officer who is under investigation for theft of property to provide a copy of his ATM statements for two days in question did not violate the officer's right to be free from unreasonable searches under the Fourth and Fourteenth Amendments. City procedures for pre-termination and post-termination were adequate under *Loudermill*. City officials are entitled to qualified immunity. *Westbrook v. City of Omaha et al.*, (8th Cir. No. 06-1935, 03/30/07).

CLEANING UP THE AIR: EPA claimed it did not have the power from Congress to regulate greenhouse gases under the Clean Air Act (Act), as a result of that decision the state of Massachusetts and others brought a suit claiming that the EPA had abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide. Petitioners asked the court to answer two questions under the Act; whether or not the EPA has the statutory authority under the Act to regulate greenhouse gas emissions from new motor vehicles and if so, whether or not its stated reasons for refusing to do so are consistent with the statute. By a five to four majority the United States Supreme Court held that the state of Massachusetts had special standing as a state under the case and controversy provision of the United States Constitution to petition for review; that the Clean Air Act authorized the EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it formed a "judgment" that such emissions contributed to climate change; and that EPA could avoid taking regulatory action with respect to greenhouse gas emissions from new motor vehicles if it determined that greenhouse gases did not contribute to climate change, or if it provided some reasonable explanation as to why it could not, or would not, exercise its discretion to determine whether they did. *Massachusetts et. al. v. Environmental Protection Agency*, (No. 05-1120, April 2, 2007).

Comment Howard: While this case will have minimal impact in the short run on municipal law practice, it does set in motion a legal proceeding on a central issue in our time. Do greenhouse gas emissions contribute to climate change?

LEGISLATION, NEWS, AND OTHER MATTERS

POSTSCRIPT: Last month we reported on the St Louis pension case in *Neske et al., v. City of St. Louis, et al., (consolidated with) Firemen's retirement system et al., v. City of St. Louis, et al.,* (SC87976 and SC87977, 03/13/07). I failed to note at least one positive outcome which is that the Court without discussing why, undertook an analysis of the Hancock issue. It seems that this part of the decision is strong support for the proposition that a municipality can raise the Hancock question and that a taxpayer is not needed. There are other cases indicating that only a taxpayer has standing to raise the Hancock issue and in fact that is what the now withdrawn Court of Appeals decision said. Still it makes sense to me to have a taxpayer join with the city if it challenges on the basis of the Hancock Amendment.

BOOK NEWS: *Ethics In Government at the Local Level* by Vincent R. Johnson, is available at <http://www.stmarytx.edu/law/pdf/JohnsonEthicsinGovt.pdf>, looks at common issues such as outside employment and other prohibited interests by current and former city officials, disclosure requirements, ethics training, and contains an appendix of selected local government ethics code provisions at the end.

BORED – WANT TO BLOG ABOUT MUNICIPAL ETHICS?: Consider <http://www.cityethics.org/>. According to the site, City Ethics “is a non-profit organization formed in 2000. Its purpose is to provide a centralized location for information and resources for all forms of municipal ethics programs.” The *Municipal Ethics Code Project*, accessible at <http://www.cityethics.org/mc/introduction>, is aimed at allowing municipal ethics practitioners to share their ideas and experiences by the designated forum discussion areas.

HOW TO OBTAIN OPINIONS

The material contained in this *Newsletter* is summarized as a service to MMAA members. Almost everything cited in the *Newsletter* can be found on the Internet. There are a variety of places to search for cases on the internet. Below are several sites that I use for searches. If you have questions or comments please feel free to email me at howardcwright@mchsi.com.

Missouri: <http://www.courts.mo.gov/courts/pubopinions.nsf>,

Federal: <http://www.ca8.uscourts.gov/onestop.html>.

Supreme Court: <http://www.supremecourtus.gov/>

Other sources: www.findlaw.com and <http://www.molawyersweekly.com/>.

The opinions cited in this Newsletter may be subject to revision or withdrawal prior to publication.