Hodges, Loizzi, Eisenhammer, Rodick & Kohn

PARK DISTRICT EDITION

September/October 2006

THE Extra Mile

GOING THE EXTRA MILE SO YOU DON'T HAVE TO

Welcome to *The Extra Mile*

Legal News for The Park District Community

The attorneys of Hodges, Loizzi, Eisenhammer, Rodick & Kohn ("HLERK") wish to welcome you to the first publication of our park district newsletter. This journal is written exclusively for the park districts of Illinois and will report the most current news regarding legislation, notable decisions, conferences, and other essential information vital to the success of your district.

If you have questions concerning an article or subject raised in our newsletter, please do not hesitate to call or write. We welcome your suggestions. and comments.

Relax and enjoy *The Extra Mile.*

New Changes to the Illinois Open Meetings Act Regarding Electronic Meetings

Illinois Senate Bill 585 amends the *Illinois Open Meetings Act* by changing the definition of "meeting" to include any gathering that is in person or by video or audio conference, telephone call, electronic means (such as e-mail, chat rooms, or instant messaging) or "other means of contemporaneous interactive communication," of a majority of a quorum of the members of the public body held for the purpose of discussing public business.

The definition of a meeting can include:

E-mails

Chat rooms

Instant messaging.

Under the bill, a quorum of members must be physically present at the location of open and closed meetings of public bodies. The bill does permit members not physically present to participate in a meeting through a video or audio conference when a majority of a quorum is physically present. However, such participation is limited to situations when a member is prevented from attending due to personal illness, disability, employment purposes, the business of the public body, or a family or other emergency. Moreover, such members can only attend meetings by video or audio conference to the extent allowed by rules adopted by the public body, which rules must conform to the requirements and restrictions of this new section of the Act.

The bill also provides that members wishing to attend a meeting by video or audio conference must notify the recording secretary or clerk of the public body before the meeting unless such notice is impractical. The meeting minutes shall also now include a statement as to whether members attend by video or audio conference.

Please contact Bob Kohn for more information.

AREAS OF PRACTICE

Board Governance

Finance

Employment and Labor

Real Estate & Construction

Contracts

Commercial Transactions

Litigation

Intergovernmental Agreements, Easements, Annexation, etc.

HLERK AT THE 2007 IAPD-IPRA STATE CONFERENCE

Friday, January 26, 2007
Cynthia L. DeCola and Robert E. Swain present:
Limiting Your Exposure to Harassment Complaints.

Saturday, January 27, 2007
Robert A. Kohn presents:
Understanding the Requirements of the Open Meetings Act.

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info@hlerk.com

A copy will be delivered directly to your inbox. Our electronic edition contains convenient web links to information mentioned in our articles.

Supreme Court Expands the Scope of Retaliation in Title VII Discrimination Cases

In a significant decision potentially increasing liability for Illinois park districts, the Supreme Court clarified the standard that an employee or job applicant must satisfy to show that an employer has retaliated against that individual for opposing an unlawful employment practice. In *Burlington v. White*, 2006 WL 1698953 (June 22, 2006), the Supreme Court upheld a jury verdict finding that the employer had illegally retaliated against the employee where the employer had merely changed an employee's job responsibilities from operating a forklift to performing only the physical track laborer tasks (both tasks being part of the employee's job description) and a 37-day suspension for alleged insubordination after she complained that her supervisor had sexually harassed her.

The employer argued that the employer should only be liable for retaliation if the alleged retaliatory act results in an adverse effect on the terms, conditions, or benefits of employment. Because the employee remained employed at the same rate, the employer argued, no claim could exist. The Supreme Court, however, rejected this argument and held that a plaintiff must only show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Applying the standard to this case, the Court found that one good way to discourage an employee from bringing discrimination charges was to make the employee spend more time performing the more arduous tasks of a position. Moreover, the Court found a month of suspension without pay to be a serious hardship that could also constitute retaliation.

Burlington materially increases the potential liability of public employers facing claims of retaliation.

For more information, please contact Cindi DeCola or Tina Christofalos.

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Supreme Court Limits First Amendment Rights of Public Employees

The Supreme Court has held that the First Amendment *does not* protect any speech of a governmental employee that is part of his or her official duties. In *Garcetti v. Ceballos*, 126 S.Ct. 1951, a prosecutor filed a lawsuit in federal court against his county-employer and his supervisors at the district attorney's office, alleging he had been retaliated against for writing a memorandum in which he recommended dismissing a case because of governmental misconduct.

The trial court entered an order in favor of the employer finding that the memorandum was part of the employee's official duties and subject to his employer's control. Although the appellate court reversed the trial court's order, the Supreme Court held that the trial court's reasoning was correct and that a public employer, such as a park district, has the right to control the expressions an employee makes in his or her professional capacity.

Public employers have the right to control the expressions an employee makes in his or her professional capacity.

The Court reasoned that the First Amendment only protects the speech of an employee who is speaking *as a citizen* on a matter of public concern, explaining, "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee may have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." The Court was careful to note, however, that not all expressions at work are part of an employee's official duties, and not all speech concerning the subject matter of employment will be part of the employee's job responsibilities; for example, a park district employee still receives the protections of the First Amendment while writing articles for a newspaper or while speaking as a citizen at a park district board meeting.

However, for speech that is part of the performance of an individual's job, employers may ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission.

For further information regarding the impact of this decision on your district, contact Nancy Krent or Steven Richart.

Federal Court Orders Release of Closed Session Audiotape to Former Employee

In the recent case of *Kodish v. Oakbrook Terrace Fire Protection District*, 235 F.R.D. 447 (N.D. Ill. 2006), the Northern District of Illinois ordered the Fire Protection District Board to turn over certain portions of its closed session audiotapes containing discussions regarding the decision to terminate an employee.

The need for truth outweighed the confidential treatment of closed session audiotape.

After he was dismissed, the employee brought state and federal claims against the Fire Protection District in federal court. During the course of the litigation, the former employee petitioned the court to compel the District to produce the audiotapes from the closed session meeting. The Board contended that it did not have to turn over the audiotapes based on a provision of the *Illinois Open Meetings Act,* which provides that unless a public body has determined that the verbatim recording of a closed session meeting no longer requires confidential treatment or otherwise consents to its disclosure, the recording cannot be subject to disclosure in any judicial proceeding. The Board also asserted an attorney-client privilege.

The court weighed the need for truth against the Board's claim of privilege under the *Open Meetings Act*, and found that the privilege was outweighed by the need for probative evidence. Thus, the court refused to extend federal common law to encompass the *Open Meetings Act* privilege. The court then held that because an attorney was present and consulted with during the closed session meeting, those portions of the closed session recording during which the Board's attorney gave legal advice, or the Board members discussed the attorney's legal advice, were entitled to protection under the attorney-client privilege. The Board was still compelled by the court to release those portions of the audiotapes that pertained to factual information about the employee, such as the employee's work history, and the reason for termination.

For more information, please contact Bob Kohn.

Open Session Action Is Not Invalidated by Failure to Properly Enter Closed Session

In *Roller v. Board of Education of Glen Ellyn School District No. 41*, No. 05 C *3638, 2006 WL 200886 (N.D.Ill. Jan. 18, 2006),* a Chicago federal trial court dismissed an employee's allegations that a school board violated the *Open Meetings Act* when deciding not to renew her contract. The employee alleged the Board violated the *Open Meetings* Act when it entered into closed session to consider her non-renewal without reciting her name individually and without first taking a majority vote to enter into closed session. The district court found that, even if the Board failed to take a majority vote before entering closed session, so long as the final action was taken in open session, it could not invalidate the Board's final action simply because of a procedural infirmity that occurred in closed session. The court further held that the *Open Meetings Act* does not require public recitals to personally name those individuals being considered in closed session, but rather only requires a board to recite the "nature of the matter being considered" and "inform the public of the business being conducted."

Please contact Bob Kohn for more information.

Park Zone Speed Limits

Following the decades-old legislation restricting speed limits near schools, this new law adds section 11-605.3 to the *Illinois Vehicle Code*, which restricts speed limits on streets adjacent to land owned or operated by any park district or unit of local government for recreational purposes. On any such street or intersection designated by ordinance or resolution of the local unit of government as a "park zone street," appropriate park zone warnings and speed limit signs must be posted. Anytime children are present and within 50 feet of the designated park zone street, individuals may not drive in excess of 20 miles per hour or any lower posted speed. Additionally, it is a violation to fail to come to a complete stop at any stop sign or red light on a park zone street or when turning right onto a park zone street. Violations of this law are petty offenses, punishable by a minimum fine of $250 for the first offense, and $500 for each subsequent offense. Violators will be charged an additional $50 per offense, which will be paid to the park district for safety purposes such as park zone safety education, roadway painting, and caution signs and lights.

Within six months of the law's effective date, the Department of Transportation will design a set of standardized traffic signs for park zones and park zone streets, the design of which will be available to units of local government for free (except for costs of reproduction and postage).

Attorney Listing

Shayne L. Aldridge	Debra H. Kaplan
Sara G. Boucek	Robert A. Kohn
Heather K. Brickman	Jay R. Kraning
Athena A. Christofalos	Nancy F. Krent
Vanessa V. Clohessy	Dean W. Krone
Cynthia L. DeCola	James S. Levi
John L. Di John	Michael A. Loizzi, Jr.
Stanley B. Eisenhammer	Steven M. Richart
Barbara A. Erickson	Bennett Rodick
Timothy E. Guare	Ellen B. Rothenberg
Terry L. Hodges	Robert E. Swain
Stephanie E. Jones	Sonja H. Trainor

All attorneys may be reached through our Arlington Heights office.

CONTACT US:

3030 Salt Creek Lane, Suite 202
Arlington Heights, Illinois 60005
(847) 670-9000 phone
(847) 670-7334 fax

3048 Spring Mill Drive
Springfield, Illinois 62704
(217) 546-9200 phone
(847) 670-7334 fax

23 Public Square, Suite 260
Belleville, IL 62220
(618) 355-7850 phone
(618) 355-7851 fax

The Extra Mile is intended solely to provide information to the Parks community. It is neither legal advice nor a substitute for legal counsel. The Extra Mile is intended as advertising but not as a solicitation of an attorney/client relationship.

Hodges, Loizzi, Eisenhammer, Rodick & Kohn
3030 Salt Creek Lane, Ste. 202
Arlington Heights, IL 60005