

**Illinois State Bar Association
Local Government Law Section Council
Friday, February 13, 2009
Illinois State Bar Association, Chicago Office
20 North Clark Street, Chicago, Illinois**

I. Call to Order

Meeting called to order at 12:00 p.m. by Chair Phil Lenzini. Present: Maryann Bullion (arrived at 1:00 p.m.), Trisha Crowley, Rita Elsner, John Foltz, Sherri Freeman, Mike Jurusik, Kathy Orr, Jim Schrempf and Sonni Williams. Also in attendance via conference call: Mike Bersani, Kimberley Mickelson, Mark Palmer, Lynne Davis (ISBA Staff Liaison).

II. December 12, 2008 Meeting Minutes

The Minutes, as amended, were approved by unanimous vote (motion: Rita Elsner; seconded: Trisha Crowley).

III. Old Business

Chair Lenzini recognized Mario Gloriso who advised that he is running for re-election to the ISBA Board of Governors and requested support.

A. Newsletter Update

1. Newsletter Assignment Schedule: In John Brechin's absence, Chair Lenzini reminded the members of the 2009 schedule for the newsletters that was contained in the meeting packets.

B. Committee Reports

1. Simultaneous Tenure Rewrite Committee:

The group discussed the latest version of the Simultaneous Tenure Statutory Rewrite Proposal and prior Meeting Minutes. Mike Jurusik will confer with John Covington relative to the next steps for approval of the Proposal.

2. Legislative Committee:

Maryann Bullion distributed a handout relative to pending legislative amendments (SCIS Bill Tracking Report) and provided a brief overview of the proposed amendments. The members engaged in discussion on each of the proposals. It was agreed that member comments via email should

include a clear indication of: support, no support or neutral position. Maryann Bullion agreed to find out if the Council's position can be added to the SCIS Bill Tracking Report. Attached to these Minutes is a chart that Maryann Bullion agreed to provide that lists the Council's comments relative to pending local government related legislative bills.

House Bill 831, which allows the Governor to appoint a public access counselor, was discussed. It was noted that this legislative proposal would create a conflict with the role of the public access counselor appointed by the Illinois Attorney General. The members reached a consensus that "no position" be taken by the Council on House Bill 831.

Trisha Crowley and Rita Elsner reported on new pending FOIA legislation that the Illinois Attorney General is drafting and promoting as well as the FOIA Committee's draft ISBA Legislative Proposals on FOIA. The members engaged in a rousing and highly spirited debate on the issues and flaws apparent in the AG's legislative proposal and agreed that the entire Council should cast a vote on the various text option contained in the FOIA Committee's draft ISBA Legislative Proposals on FOIA. The FOIA Committee's draft Proposals are to be circulated via email and each member will be asked to vote with a vote total to be returned at the next meeting.

There was strong support of the members for House Bill 793, a proposed amendment that relaxes the "must be physically present" quorum requirements of the Open Meetings Act that apply to regional library systems.

3. **Litigation Committee:**

Mike Bersani and Rita Elsner presented a number of cases of interest. A copy of the Case Notes and Case Summaries are attached.

4. **Continuing Legal Education:**

a. Future Programming – Kathy Orr provided an update on the status of the CLE/FOIA and Open Meetings Act Program and advised that the Program dates and locations are: April 16, 2009 (Springfield, Illinois) and May 21, 2009 (Chicago ISBA Offices). Kathy Orr agreed to provide addition information on the Springfield location and speaking times in the near future. She noted that each speech will be limited to 30 minutes per person.

b. Program Submission Deadlines

1/15/09 June/July (and Annual Meeting)

3/15/09	September
5/15/09	October/November
7/15/09	December/January (and Mid-Year Meeting)
9/15/09	February/March
11/15/09	April/May/early June

- c. A CLE proposal form was attached to the Agenda but not discussed.
- d. CLE Master Planning Calendar, which was a handout in the Agenda packet, was briefly discussed by the attendees as part of the above discussion.

C. Report from Web Site Subcommittee

No report was provided.

D. Update on Proposal to Create New Illinois Supreme Court Rules 570-581

Mark Palmer advised that a favorable vote on the proposed new Rules was taken by the Supreme Court Rules Committee on December 12, 2008, and the Rules have been sent to the Illinois Supreme Court for final action.

E. Supreme Court Rules Proposal – Update on Rule 1.15

No report was provided.

F. Update of Taxpayers’s Federation of Illinois Guide

Chair Lenzini reported that none of the requested information had been obtained yet and he agreed to report back to the members once available.

IV. New Business

A. Open Meetings Act Concerns

This matter was discussed earlier during the meeting.

B. FOIA Proposal

This matter was discussed earlier during the meeting.

V. Informational

- A. Roster: Chair Lenzini reminded the attendees that the LGSC’s Roster needs to be updated on a regular basis and any changes should be communicated to the ISBA Staff Liaison.

- B. Section Council Counts: The handout regarding the Section Council Counts was briefly discussed by the attendees.
- C. Listserv – isba-leg-localgov@list.isba.org. The attendees engaged in a brief discussion of the use of the Listsev.

VI. Next Meeting

The attendees agreed to hold the next meeting on April 16, 2009 in Springfield prior to the CLE/FOIA and Open Meetings Act Program. Lynne Davis agreed to arrange for a meeting room and to confirm the time and location with all members via email.

VII. Adjournment

The Meeting was adjourned at 2:30 p.m. by unanimous vote of the members (motion: Rita Elsner; seconded: Trisha Crowley).

By: _____
Michael T. Jursik, Secretary

Case Notes and Case Summaries

Arizona v. Johnson, 2009 WL 160434 (USSC 2009) [Mike Bersani]

A police gang task force was patrolling a Tucson neighborhood known for gang activity. They pulled over a vehicle for a minor traffic violation. At the time of the stop, the police did not suspect anyone of criminal activity. The defendant was in the back seat. One of the officers noticed that the defendant looked back and kept his eyes on the officer as she approached. The defendant was wearing a blue bandana consistent with the Crips gang membership, and he had a police scanner in his jacket pocket. He had no identification, but he stated that he lived in an area known as a home to the Crips gang. He also told the officer that he had served time for burglary. The officer asked defendant to exit the car in order to gain information about the Crips gang. Based on her observations and what he told her, the officer suspected that he might have a gun on him, so she searched him and felt the butt of a gun near his waist. The Supreme Court held that the pat down search was lawful under Terry v. Ohio, 392 U.S. 1 (1968). The Court rejected the argument that the officer's authority to conduct the pat down ceased once the officer began to question the defendant about matters unrelated to the traffic stop. The Court concluded that "An officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."

Crawford v. Metropolitan Gov't, 2009 WL 160424 (USSC 2009) [Mike Bersani]

School district employee brought Title VII claim alleging that she fired in retaliation for reporting sexual harassment. The twist in this case was the fact that the employee did not report the harassment on her own initiative, but rather she answered questions during her employer's internal investigation into rumors of sexual harassment by another employee. Title VII makes it unlawful, in part, to discriminate against any employee who opposes any unlawful employment practice ("opposition clause"), or who has made a charge, testified, assisted or participated in any manner in any investigation ("participation clause). The Supreme Court held that answering questions posed during an internal investigation satisfies the opposition clause of Title VII.

Jones v. City of Springfield, 2009 WL 160788 (7th Cir. 2009) [Mike Bersani]

A white police officer brought Title VII claim alleging that he was not promoted to sergeant because of his race. The officer was next on the sergeant's list when the list expired. There was no vacancy when the list expired, but the officer alleged that the City had an informal practice of making early promotions before a vacancy became official. He cited four prior instances where early promotions were made, including the Civil Service Commission's extension of the list by one year so that a specific black officer could be promoted. The 7th Circuit affirmed summary judgment for the City, holding that there was no evidence of discrimination, because only one of the four prior instances of early promotions involved a black officer. The Court also held that the lack of an opening is always a legitimate reason for refusing to hire or promote.

Employees – Discrimination – Retaliation *Nagle v. Village of Calumet Park*, No. 07-1157
(7th Cir. Feb. 04, 2009) [Rita Elsner]

Nagle was a white, 54-year-old police officer with the Village of Calumet Park. He sued the Village and certain individual defendants, claiming (1) he had been discriminated against because of his race and age; (2) that after he complained about his treatment and filed charges with the Equal Employment Opportunity Commission (EEOC), the defendants retaliated against him; and (3) that the defendants also retaliated against him after he made statements at a union meeting regarding manpower reductions of police officers. Nagle had helped form a local union to represent Calumet Park police officers. He served as the union's safety and grievance officer, and filed grievances on behalf of members. In 2002, the mayor appointed an African-American man as the police chief. Nagle alleged that after a conversation in which the chief asked him when he would retire, he was subjected to unwarranted discipline and reassignment to undesirable duties. He claimed that this was part of general campaign in which the chief treated younger, non-white officers better than older, white officers (whom the chief referred to as "those old white motherf—ers"). After Nagle spoke at a labor-management meeting about staff reductions, the chief warned Nagle that if he ever spoke to the chief in the same manner again, he would be disciplined. Two days after, Nagle was suspended for two days. Nagle filed the first EEOC complaint alleging age discrimination after the chief told him he was tired of his "bullsh*t grievances"; he filed a second one after he was suspended and the suspension overturned; and filed a third EEOC complaint alleging that a work reassignment was due to his age and race and was in retaliation for his earlier EEOC complaints. The defendants moved for summary judgment, and the district court granted the motion.

The Seventh Circuit affirmed. Nagle could not show that he engaged in protected speech at the union meeting, and had not sufficiently shown that he was discriminated against on the basis of age and race or that he suffered retaliation because of his complaints. Specifically, using the direct method, there was no evidence, statistical or otherwise, to corroborate Nagle's belief that the chief hired primarily from the younger, non-white demographic; Nagle failed to show that any of his reassignments were adverse employment actions or undesirable (apart from his contention that he didn't like "being stuck at the mall"); and the chief's discriminatory remarks were not made in the same temporal proximity as the allegedly discriminatory acts. Likewise, under the indirect method, Nagle failed to show a prima facie case of discrimination because he could not show that similarly situated individuals were treated better. On the First Amendment claim, although Nagle was speaking in his capacity as a union representative and *Garcetti* did not deprive his comments of First Amendment protection, his claim failed because he could not show that he engaged in constitutionally protected speech. The content or form of his statements were unclear from the record, nor was it apparent how these statements related to his job as an officer, his position as a union rep, or to him as a citizen. See <http://tinyurl.com/dbxwm6>

Employee Speech Rights – Political Affiliation and Termination *Zerante v. DeLuca*, No. 08-1381
(7th Cir. Feb. 09, 2009) [Rita Elsner]

Zerante had been a City employee in the purchasing department since 1995. DeLuca was elected mayor in 2003, having promised to cut waste (including a "bloated workforce") and run the local government more like a private business. DeLuca hired Proft as his Chief of Staff, and began

eliminating positions and firing employees. They concluded that the purchasing department was inefficient and underperforming, and decided to fire Zerante “to send a signal to the people that had just elected us into office that we were serious about those things that we campaigned on.” Zerante’s replacement was the treasurer of the DeLuca campaign. Zerante bought a Section 1983 action claiming that the firing was in retaliation for her support of the prior administration and her later support for a different mayoral candidate during the 2003 primary campaign.

The Seventh Circuit affirmed the grant of summary judgment for the defendants. While Zerante’s position did not fall under the policymaking exception and her support for the prior regime and a different candidate were all protected activities, she could not show that any political motivation was a substantial factor in the decision to terminate – it was not even clear that DeLuca and Proft were aware of Zerante’s political affiliation or activities (in fact, Zerante later admitted she voted for DeLuca in the general election). The fact that she remained “politically neutral” during the campaign and her replacement had not was insufficient to support an inference that her firing was politically motivated. See <http://tinyurl.com/aq4nf6>

CIVIL – DUE PROCESS

***Idris v. City of Chicago, Illinois*, No. 08-1363 (1/5/09). Appeal, N.D.Ill., E. Div. Aff’d. [Rita Elsner]**

Dist. Ct. did not err in granting defendant-City’s motion for summary judgment in action alleging that City’s ordinance violated plaintiff’s due process rights by imposing \$90 fine on vehicle’s owner, regardless of identity of driver, where defendant’s cameras took photos of vehicles that ran red lights and made illegal turns at intersections. Defendant could rationally fine vehicle’s owner even though State of Illinois fines drivers, as opposed to owners of vehicles, for moving violations. Moreover, ordinance’s imposition of vicarious liability did not violate notions of substantive due process since \$90 fine imposed by ordinance did not concern fundamental property interest.

CIVIL – ZONING

***Flying J Inc. v. City of New Haven*, No. 08-2319 (12/5/08). Appeal, N.D. Ind., Ft. Wayne Div. Aff’d. [Rita Elsner]**

Dist. Ct. did not err in dismissing for failure to state cause of action plaintiff’s lawsuit alleging that defendant violated plaintiff’s equal protection rights by amending its zoning ordinance so as to prevent plaintiff from building travel plaza on its 53.3 acre site. While plaintiff alleged that defendant was “malicious and spiteful” by enacting amended ordinance in response to state appellate court decision finding that said development was consistent with original zoning ordinance, plaintiff failed to adequately allege class of one equal protection claim where facts in complaint did not establish that amended ordinance was irrational.

CIVIL – ROAD AND BRIDGES/TOWNSHIPS/MUNICIPAL LAW

***The Village of Montgomery v. Aurora Township*, No. 2-07-0539, 2-07-0632 Cons. (December 10, 2008) Kane County (Hutchinson) Affirmed. [Rita Elsner]**

Municipalities on either side of bridge between them established their entitlement of summary judgment, declaring that responsibility for maintaining bridge lies with Township in which both municipalities are located. Both cities passed ordinances detaching land adjacent to the bridge; records and testimony establish that township built and maintained the bridge for 40 years and

rebuilt it after it could not work out maintenance agreement with adjoining city; and township has not proved that municipalities ever assumed responsibility for the bridge.