Firehouse Lawyer

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E-mail and Internet Policies

A recent Ninth Circuit Court of Appeals decision, in *U.S. v. Ziegler*, points up again the necessity for having a good, updated policy governing use of agency e-mail, internet, and other electronic communications devices, such as PDA's. It goes without saying that, at fire districts as well as cities and other local governments, the use of e-mail for communications (both internal and external) is very prevalent. Mr. Ziegler was Director of Operations at a private company in Montana that services internet merchants by processing on-line payments. The FBI received a complaint from the company's internet service provider, that someone at the company was accessing child porn sites from a workplace computer.

The FBI contacted the company's IT Administrator whose job it was to monitor employee use of the computers including internet access. The company's firewall allowed constant monitoring of such activities. The company trained the employees so they knew of such monitoring, and the employee manual also warned of this practice. The company cooperated with the FBI, allowing entry into Ziegler's locked office and copying of the hard drive of his workplace computer. The company policy stressed that the computers were all owned by the company. The government charged Ziegler with downloading obscene materials including child pornography. Ultimately, he pled guilty to receipt of obscene material in exchange for the government dismissing the child porn counts, after the trial judge denied his motion to suppress evidence found in the search. But his plea agreement was conditioned on his right to appeal the denial of that motion, so the search issue proceeded to the Ninth Circuit Court of Appeals.

While the legal issues focused on the search powers of the governmental agents, the Ninth Circuit did hold that the employer had the authority to consent to such a search, as the employer owned the computer. The contents of the hard drive, as well, were work related property, due to the company policy that said such property was *only* to be used for work related matters. It was all created in the context of a business relationship. Thus, the company's policies that informed all employees that electronic devices are company-owned and subject to monitoring, were given effect by the court. Lesson learned: have a

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Upcoming seminars on March 3 and 10, and April 7, 2007 in King, Pierce, and Thurston counties.

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good policy and then enforce it.

I like to see an e-mail and internet policy that includes the following provisions:

- All electronic devices *and the data contained thereon* are company property and not private property of the employee;
- All such devices are to be used for work-related purposes only;
- This means such devices cannot be used at any time for personal gain or outside businesses employees might participate in;
- All e-mails and internet access are monitored and subject to review;
- The e-mail server itself is district property;
- E-mail is not to be used to harass anyone (inside or outside of the organization) and shall not disrupt the workplace. This is not limited to, but includes, sexual or racist content, as well as other "protected classes" such as religion or ethnicity;
- Policy violations will be enforced through discipline.

Based on a recent question from a client, I might add another element. If employees are allowed to use, or in fact use, their own personal PDA or laptop (for example) for business purposes **or** during work time (when they are paid to be working) they are consenting to the search of that device and its contents to ensure enforcement of the policies, just as if the employer owned the device. This may discourage employees from engaging in that practice, but employers should provide the employees the tools they need in the first place.

Based on the result in the Ziegler case, it looks like the employer had a good policy and enforced it. If you do the same, it appears that the Ninth Circuit at least will support your policies.

UPCOMING SEMINARS

Training Unlimited, with this author as the instructor, is sponsoring a seminar on three upcoming dates for fire commissioners, chiefs, and district secretaries. This day-long seminar outline covers all of the pertinent laws these officials need to know to do a good job. More than a seminar on open meetings and open records, we cover fire district finances, running your meetings, bid laws, personnel and discrimination laws, mergers, annexations and other combinations, etc. It also comes with our "book" on these topics; the "book" as updated is well over 100 pages of useful information. The dates are March 3 and 10, as well as

April 7, 2007, so if you cannot make one, try another date. The venues will be located in King, Pierce and Thurston counties. Please keep your eye on the mailbox for those brochures, or you can download a Registration Form from the 'Training' link on this web site.

PERC ISSUES DECISION ON KITSAP SHERIFF'S GUILD CASE

By the time this issue goes to press, I understand that the PERC Commissioners will have issued a decision in the case of Kitsap County and Kitsap County Sheriff's Guild, on which we reported in depth in the July 2005 issue of the *Firehouse Lawyer.* The Commission affirmed Hearing Officer Katrina Boedecker, in that they held no past practice was established, so as to require the employer to pay union members for release time for certain union activities. On the other hand, the Commission vacated the parts of the decision below, in which the Hearing Officer held that the employer cannot bargain to allow release time for certain union activities, as such would be an *illegal subject,* as opposed to a mandatory or permissive subject of bargaining. Because the Hearing Officer found that it would be illegal "assistance" for an employer to allow release time for activities such as executive board and general union membership meetings, attendance at PAC or other political action meetings, negotiating planning meetings or consultations with legal counsel on arbitrations, and participation in mediations, arbitrations, and other union activities as union representatives, the narrower ruling by the Commission is significant. They affirmed on the sole basis that the union had not proved an established past practice, under which labor and management had tacitly agreed by their conduct that release time was approved for such activities.

The upshot of the Commission's decision is that we cannot say with any assurance that an employer cannot allow such payment for release time or other such use of facilities. Indeed, if there is an established past practice sanctioning such activities, I would say that the employer can and should keep allowing the same. Obviously, as an employer you do not have to agree or establish such a precedent, if you are not doing it already.

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REMINDER - ELECTION LAW CHANGES

Since many districts are contemplating "lid lift" elections or other types of ballot measures in 2007, I thought it might be timely to remind you of changes to the election laws regarding dates and deadlines. RCW 29A.04.321 now provides that, if you want to hold a special election on the allowed February, March, April or May dates you must present your

resolution to the county auditor at least 52 days prior to the election date. A resolution calling for a special election on either the primary or general election date must be presented at least 84 days prior to the election date. And do not forget that under RCW 29A.04.311 the primary is now in August, so that means your submittal deadline is now some time in May! (When the primary was in September and the rule was 45 days that meant a late July deadline, so there is a big difference.)

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NO INDIVIDUAL LIABILITY UNDER ADA

A Nevada state employee sued the state of Nevada, and tried to sue two individual supervisors, alleging violations of the Americans with Disabilities Act. The Ninth Circuit Court of Appeals ruled that states enjoy immunity from such federal actions under the Eleventh Amendment. More interestingly (to my clients), the Court ruled that individuals cannot be sued—only employers with 15 or more employees as under Title VII can be sued under the ADA—so the attempt to amend the complaint failed. Thus, while such co-workers and supervisors could be targeted individually under state law theories or tort theories, there is no ADA cause of action against individuals. *Walsh v. Nevada Dept. of Human Resources,* Case No. 04-17440 (9th Cir., December 18, 2006).

DISCLAIMER

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