

February 28, 2005

To the Honorable
Common Council of the
City of Milwaukee
Room 205 – City Hall

Re: Claim of Leslie Barber

Dear Council Members:

This opinion is in response to the Notice of Injury and Claim for Damages filed on December 23, 2004, by Leslie Barber. Leslie Barber retired from the rank of Assistant Chief of Police for the City of Milwaukee on October 7, 2004. He retired on that date because on the previous day Chief of Police Nannette Hegerty issued Personnel Order 2004-234 removing him from the position of Assistant Chief effective immediately. Barber's claim against Chief Hegerty, the City, and the Fire and Police Commission alleges that his removal violated his rights under the department rules, state and federal law, and the federal constitution. He claims damages for the loss of unused flex time, damage to reputation, emotional distress, and attorney's fees.

In our opinion, Barber's violation-of-employment-rights claim is without merit because under Wisconsin law, the Chief of Police had the lawful authority to remove the Assistant Chief without cause. Wis. Stat. § 62.50(7)(a), states, "Removal of the assistant chief shall be pursuant to s. 17.12(1)(c)." Wis. Stat. § 17.12(1)(c), states that city officers who were not appointed by the Common Council may be removed from office by the appointing official "at pleasure." Because Barber had no right to continue in his employment as Assistant Chief under state law, he had no protected property interest in his employment under federal law. *Listenbee v. City of Milwaukee*, 976 F.2d 348 (7th Cir. 1992). Also, Chief Hegerty gave no reason for his removal, but she did state that the investigation into his residency had not been completed, and, therefore, was not the reason for his removal. Under those circumstances, Barber has no claim for violation of his federally protected liberty interest. *See, e.g., Pleva v. Norquist*, 195 F.3d 905 (7th Cir. 1999).

Apart from his violation-of-employment-rights claim, Barber seeks payment for his accrued flex time. He claims he had accrued 1,006 hours of flex time totaling \$52,895.48 in lost

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compensation. He calculates this loss at \$52.58 per hour, which was his hourly pay immediately prior to his retirement.

Flex time refers to a flexible schedule policy for certain management-level City employees created by Milwaukee Ordinance § 350-5. Milwaukee Ordinance § 350-5-1 specifies the pay ranges and salary grades of the positions entitled to flex-time. The position of Assistant Chief of Police is subject to the flex-time ordinance. Flex time should not be confused with either overtime or compensatory time off. The flex time ordinance specifies that designated management employees “are specifically excluded from those provisions relating to payment in cash or compensatory time for overtime worked . . . because of their significant management responsibilities.” § 350-5-2. Those management employees also are exempt from the overtime rules of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201-219. Moreover, those management employees are not represented by any labor organization and, accordingly, the terms and conditions of their employment are not governed by a collective bargaining agreement.

Neither overtime nor compensatory time off had been made available to those management employees because their compensation is based upon their duties and responsibilities, not the hours that they work.

Persons employed in such positions are so compensated not primarily on the basis of their specific hours of labor, but on the basis of total duties and responsibilities assigned. Such employees are required to satisfactorily discharge the full duties and responsibilities of their positions whether overtime work in the usual sense is required or not. When any such positions, because of special or unique circumstances, regularly or frequently require to work in excess of 40 hours per week, such circumstances and hours of work characteristics are considered as factors in establishing the classification and compensation of such positions. It is the policy of the city, however, to provide sufficient staffing to permit a normal 40 hour week for such positions insofar as may be practical and consistent with efficient operations.

§ 350-5-2.

Section 350-5-3, states the flexible schedule policy. The section describes the 40-hour work week for management employees as a “minimum average,” and states that management employees normally are expected to work those 40 hours in the form of 5 work days a week of 8 hours each. The ordinance permits flexibility in scheduling the work time.

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Such employes shall be considered, however, to work on a flexible schedule, within the limits of the minimum 40-hour week, existing workload demands, and approval of the department head. Under this flexible schedule provision, the daily work schedule of such employes may be adjusted from time to time as necessary and appropriate in order to fulfill their assigned duties and responsibilities. Such adjustments may include starting and quitting times that are earlier or later than established in the normal work schedule of the department, and may include hours of work that are more or less than 8 hours in any particular day and more or less than 40 hours in any particular week, within the limits described above.

§ 350-5-3.

The flexible schedule ordinance makes no provision for the cash pay out at retirement, or at any other time, of accumulated flex time. Nor does it permit the accumulation of flex time for the purpose of taking extended periods of time off from work. § 350-5-3. Department heads are primarily responsible for administering the ordinance. Section 350-5-4, states:

Department heads shall enforce the provisions of the section as it applies to personnel with their own department. The director of employe relations shall interpret the provisions of this section and shall report to the finance and personnel committee of the common council any apparent problems or abuses concerning the interpretation or administration of this section.

There is no provision in the flex time ordinance authorizing department heads to buy out or otherwise pay cash for flex time earned. Nevertheless, the Common Council has approved the payment of flex time hours to five retired employees in the past.

On May 30, 2001, the Common Council approved the payment of flex time to retiring Police Captain Dennis Drazkowski. The City Attorney in an opinion dated April 3, 2001, concluded that the Common Council was authorized to pay straight-time compensation to the retiring captain to buy out his accumulated flex time. The opinion explained that the captain had worked many extra hours, but, apparently, was unable to take time off because of the demands of the job. Had the captain taken the time off immediately prior to his retirement, he might have been deemed as taking an extended vacation, which is prohibited by the ordinance. § 350-5-3 (prohibits using flex time in lieu of sick leave or vacation). Also, the Chief would have been prohibited from filling the position while the captain was on the payroll. To avoid this dilemma, the Chief asked the Common Council to buy out the captain's accumulated flex time by paying

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him straight-time compensation. The resolution would allow the captain to retire immediately and allow the Chief to fill the position immediately.

An additional factor presented to the Common Council in the Drazkowski matter was the position taken by the City Labor Negotiator. A report from the budget office dated May 11, 2001, attached to the Drazkowski file (#010147), stated that the current practice in most departments is to allow employees to stay on the payroll until flextime accrued has been spent. (The report does not state the source of this sweeping statement, nor provide any documentation in support of the statement.) Nevertheless, the report further stated that, because Drazkowski had started working for another police agency, he was not allowed to stay on the police department payroll while employed in law enforcement elsewhere. The City Labor Negotiator advised the Common Council to authorize the payment of flex time in order to resolve the need to arbitrate the matter, i.e., whether Drazkowski was entitled to a flex-time payout or whether Drazkowski could stay on the payroll and work elsewhere at the same time.

The Common Council concluded in the Drazkowski case that this resolution was in the best interests of the city. Under those circumstances, the City Attorney concluded that the flex-time ordinance, while it does not permit department heads to buy out flex time, does not prohibit the Common Council from doing so when it deems it to be in the best interests of the city.

In 2004, the city also bought out the flex time of four retired police captains (Captains Kenneth J. Meuler, Earnell R. Lucas, Paul Stuhmer, and Robert W. Puente—now serving as a City Alderman). (Council File # 000999). These captains of police were represented by the Milwaukee Police Supervisors' Organization. Each of these four captains retired during the term of the 2001-2003 collective bargaining agreement between the City and the MPSO. They all retired before the contract was approved in the summer of 2004, but each had the benefit of the retroactive aspects of the contract. Article 12B of the 2001-2003 contract, for the first time, authorized the payment of flex time for employees represented by the MPSO under certain circumstances. Each of these four former captains was paid for their accumulated flex time under the terms of this contract.

The MPSO represents employees holding these ranks, listed in ascending order: (1) sergeant, (2) lieutenant, (3) captain, and (4) deputy inspector of police. The MPSO also represents employees in a few special titles, which are not relevant to this matter. The MPSO does not represent the top command of the MPD, which are as follows: 1 Chief of Police, 1 Assistant Chief of Police, 3 Deputy Chiefs of Police, and 2 Inspectors of Police (until recently titled "Commander").

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Former Assistant Chief Barber did not hold a rank represented by MPSO at the time of his retirement from the department, nor did he hold such a rank at any time during the term of the 2001-2003 city/MPSO contract. Barber was promoted to Deputy Chief on October 1, 2000, and to Assistant Chief on December 7, 2003. He was not a member of the MPSO during the 2001-2003 contract period. Prior to October 1, 2000, he was a Deputy Inspector, and would have been represented by the MPSO.

Accordingly, we submit Barber's flex-time claim to the Common Council for resolution without recommendation. Former Assistant Chief Barber's circumstances are distinguishable from those of retired Captains Meuler, Lucas, Stuhmer, and Puente, who were paid accumulated flex time pursuant to a collective bargaining agreement, and his circumstances are distinguishable in at least one respect, and possibly others, from those of former Captain Drazkowski, where payment resolved a potential arbitration proceeding and permitted the Chief of Police to immediately fill a vacancy. Nevertheless, the Chief was able to replace Barber immediately because he was removed with no advance notice, and, consequently, had no opportunity to reduce his accrued flex-time hours by taking time off. Moreover, settlement of his flex-time claim, if it included his remaining claims, would resolve potential litigation stemming from his removal.

It is incumbent upon the claimant to explain to the appropriate Common Council committee the circumstances that resulted in his accumulation of flex time and why payment of his particular flex-time claim is in the best interest of the city. Because Barber has filed a claim for his flex time and other claims, the Common Council should not agree to payment of the flex-time claim without obtaining from Barber a full release of all claims.

Very truly yours,

GRANT F. LANGLEY
City Attorney

RUDOLPH M. KONRAD
Deputy City Attorney
RMK:lmb
c: Attorney Thomas G. Halloran
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