

Labor and Employment

June 28, 2016

AALRR Alert

**Court of Appeal Broadly Applies Appeal Rights Under Firefighters Procedural Bill of Rights Act**

Nate J. Kowalski
Cerritos
562.653.3200
nkowalski@aalrr.com

Jay G. Trinnaman
Cerritos
562.653.3200
jtrinnaman@aalrr.com

Kevin R. Dale
Fresno
559.225.6700
kdale@aalrr.com

In *Seibert v. City of San Jose*, No. H040268, 2016 WL 3085205 (___ Cal. App.4th___ May 31, 2016), the California Court of Appeal determined:

- A firefighter is entitled to appeal punitive action to an administrative law judge (“ALJ”) if some of the alleged misconduct occurred when the firefighter was working.
- A firefighter who sent salacious emails to a minor while on duty did not violate his department’s rules or policies if he did not know that the recipient of his emails was a minor.

Relevant Facts

Grant Seibert served as a Firefighter/Paramedic for the City of San Jose (“City”). A 16-year old girl, whom the courts referred to as “N.C.,” met Seibert when she visited his fire station. After N.C.’s second visit, Seibert and N.C. exchanged risqué e-mails. N.C.’s father reported the incident to the fire department, which assigned Seibert to work in its training center in order to minimize his contact with the public. While there, he allegedly sexually harassed a coworker.

Procedural Background

After a formal investigation, the fire department determined that Seibert should be dismissed from his job. The City asserted that its status as a charter city exempted it from the Firefighters Procedural Bill of Rights Act (“FBOR”) set forth in the California Government Code. Therefore, the City claimed, Seibert could not rely on the FBOR to appeal his dismissal to an ALJ or arbitrator. Seibert did not object to this assertion. Instead, he appealed to the City’s Civil Service Commission, which upheld his dismissal.

The California Court of Appeal subsequently ruled, in a separate action filed by Seibert’s union on behalf of all of the City’s firefighters, that the FBOR applied to the City. *International Assn. of Firefighters Local Union 230 v. City of San Jose*, 195 Cal.App.4th 1179 (Cal. Ct. App. 2011).

Seibert asked the Santa Clara County Superior Court for relief from the Civil Service Commission’s decision. In granting such relief, the superior court held that Seibert did not know N.C. was a minor and that his e-mail exchange with her did not violate any fire department policies. It also determined that evidence of Seibert’s alleged sexual harassment

at the training center was inadmissible. The court ordered Seibert’s dismissal set aside. The case was appealed to the California Court of Appeal.

Appellate Court’s Procedural Holdings

The California Court of Appeal reversed the superior court’s ruling that evidence of Seibert’s alleged harassment at the training center was inadmissible. It remanded the case back to the trial court.

Seibert contended that if the trial court were to set aside the Commission’s decision again, the termination order should be remanded to an ALJ or arbitrator for appeal pursuant to the FBOR. The City argued that the appeal rights under the FBOR did not apply

--> “For purposes of section 3262, the question cannot be whether the conduct alleged by the employing agency falls outside a firefighter’s duties. The question must be more along of [sic] the lines of whether the firefighter was engaged in the performance of his or her duties when the misconduct is alleged to have occurred.”

because Seibert's actions did not involve his official duties. Under Cal. Gov't Code § 3262, FBOR rights and protections "shall only apply to a firefighter during events and circumstances involving the performance of his or her official duties."

The Court of Appeal rejected the City's argument. The court determined: "For purposes of section 3262, the question cannot be whether the conduct alleged by the employing agency falls outside a firefighter's duties. The question must be more along of [sic] the lines of whether the firefighter was engaged in the performance of his or her duties when the misconduct is alleged to have occurred." *Id.* at *25. The court found "little doubt" that the alleged sexual harassment of Seibert's coworker at the training center arose while Seibert was performing his duties. The court stated it was less clear whether Seibert's email activities fell within the FBOR's reach. However, since the sexual harassment charges and inappropriate email charges were joined together and "since some of the charges fall squarely within the [FBOR], all of them must be resolved in accordance with that act." *Id.* at *26. The court concluded that Seibert was entitled to appeal rights under the FBOR.

However, the court rejected Seibert's contention that the memorandum of understanding ("MOU") between his union and the City entitled him to have an arbitrator hear his appeal. Though subsection 3254.5(b) of the FBOR states that a firefighter may invoke an arbitration provision "if the employing department is subject to a memorandum of understanding that provides for binding arbitration of administrative appeals," the

court noted that this was "an exception to the rule [in subsection 3254.5(a)] that all administrative appeals must be heard by an ALJ." The MOU at issue required Seibert's union to agree to arbitration. Because Seibert did not procure such agreement, the court ruled that he was statutorily only entitled to an appeal hearing before an ALJ under the FBOR.

Appellate Court's Rulings on the Merits

The appellate court also ruled that "the trial court properly concluded that the e-mail exchange, ... which made no reference to the recipient's age, could not be found to violate any applicable rule or policy." *Id.* at *1. The court upheld the trial court's finding that Seibert did not know or have reason to know N.C. was a minor. The court pointed to evidence that the City's firefighters were allowed to indulge in private communications while on duty. Firefighters brought their personal computers, tablets, and cell phones to the fire station and used them frequently. *Id.* at *11. The court also noted that the fire department had no specific written policy prohibiting firefighters from developing social contacts resulting from official on-duty contacts. *Id.* at *14.

The court added, "It may well be that indiscriminate exchanges of salacious messages with relative strangers on company time creates an undue risk of embarrassment or even scandal. Indeed, this case illustrates the danger. ... We have no doubt, in short, that policies restricting such exchanges would be in order." *Id.*

Significance

Fire departments should be aware that the timing of alleged firefighter misconduct will

impact the forum in which a disciplinary appeal will be heard. The Court of Appeal applied FBOR protections generously, holding that firefighters should be allowed to appeal punitive actions to an ALJ if at least some of their alleged misconduct occurred while working.

In addition, fire departments and other employers should take the Court of Appeal's advice and enact written policies prohibiting specific inappropriate conduct during working hours. Allowing firefighters to watch television or surf the Internet while waiting to respond to calls for service is understandable. However, allowing firefighters to send salacious emails while on duty should be clearly prohibited by policy.

Finally, the First Amendment limits public agencies' restrictions on their employees' speech. But the Supreme Court has ruled that public employers may terminate an employee for speech which is a matter of private interest rather than public concern and is detrimental to the mission and functions of the employer. *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 83-84 (2004) (upholding discharge of police officer who sold online videos of himself engaged in sexually explicit acts while in uniform). If a firefighter sends salacious emails to someone he met at the fire station, it is a matter of private interest and is detrimental to the mission and function of the fire department. Fire departments and other employers should enact clear policies forbidding this type of behavior.