

THE  
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**Seventh Circuit Upholds Employee Constitutional Claims Against Public Employer Based on Information From Closed Session Tapes**--The *Extra Mile* has followed the case of [Kodish v. Oakbrook Terrace Fire Protection District](#), 604 F.3d 490 (7th Cir. 2010) (See, [August 2006](#), *Extra Mile*.)

Kodish involved the key question of whether an employee could use closed session audio tapes as evidence in his lawsuit against the District. Now, the federal appellate court governing all Illinois school districts has allowed the case to proceed to trial based, in large part, on information contained in the closed session tapes.

In 2006, the trial court ordered disclosure of closed session tapes containing a discussion about the plaintiff's performance, rejecting the district's assertion that the *Illinois Open Meetings Act*, 5 ILCS 120/1.01 *et seq.*, prohibited disclosure.

The court found that the need for disclosure outweighed the importance of the policy asserted by the privilege, noting that the state law privilege should not bar disclosure of information necessary for legal inquiry in federal court.

The district court, in 2008, granted defendant's motion for summary judgment on plaintiff's federal due process claim and dismissed the

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**Illinois Appellate Court Upholds Validity of Goals Included in Superintendent's Contract**--The Illinois appellate court has, for the first time, interpreted the requirement in Section 10-23.8 of the *School Code* that multi-year superintendent's contracts include performance goals.

The appellate court has ruled that "in the absence of clear abuse of the Board's statutorily granted discretion in setting goals and measuring progress toward those goals, it would be improper for the courts to interfere with the Board's exercise of that discretion...there is no doubt that the Code permits each school board to create goals, identify specific criteria with which to determine whether those goals are being met and make findings as to whether those goals have in fact been satisfied by a particular superintendent."

In [Board of Education of Proviso Township High School District No. 209 v. Jackson](#), 2010 WL 1254992 (1st Dist. 2010), the school district argued that an amendment extending a superintendent's contract and adding performance goals was void because it failed to enumerate goals to measure the superintendent's performance and because the superintendent failed to meet the performance goals during the previous contract term.

The appellate court found the

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**Consumer Price Index**

Percent change for the month of **April 2010**, for the urban wage earners & clerical indices as reported by the Bureau of Labor Statistics.

	All Urban (CPI-U)	Workers (CPI-W)
Chicago-Mthly	0.0	0.0
12 Mth	2.4	2.9
St. Louis-6 Mth	1.1	1.6
12 Mth	0.2	0.3
U.S. Mthly	0.2	0.2
12 Mth	2.2	2.9

May CPI figures will be released June 18, 2010. For the most recent CPI, visit our website at: [www.hlerk.com](http://www.hlerk.com)

*The Extra Mile is intended solely to provide information to the school 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.*

**Reminders & Notes**

- **HLEK is pleased and proud to announce the twentieth anniversary of our founding! Thanks to all of you for the opportunity to serve the school community.**
- **Join Jay Kraning at the ISBE [Special Education Directors' Conference](#) in Peoria on July 28-30. Jay will be a featured speaker at the Conference.**
- **Enclosed is a reprint of a November 2005 article published in the IAASE Newsletter by Bennett Rodick regarding District responses to due process hearing requests. The information there contained continues to be highly relevant.**

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**Contract Cont.** provision was enforceable and the superintendent was entitled to compensation as provided in his contract.

Section 23.8 of the *School Code* requires multi-year superintendent contracts to be performance-based and linked to student performance and academic achievement. 105 ILCS 5/10-23.8. Such agreements must include the goals and indicators of student performance and academic achievement determined and used by the board to measure the superintendent's performance. *Id.* Contracts may not be renewed unless all of the per-

**Closed Session Cont.** remaining state law claims.

The Seventh Circuit has now reversed, finding sufficient evidence to survive the summary judgment motion on the plaintiff's due process and First Amendment claims. It found that the plaintiff demonstrated that his speech was constitutionally protected, that but for the protected speech the employer would not have

formance and improvement goals have been met. *Id.*

The court found that the amendment extending the contract clearly comported with section 10-23.8 of the *School Code*. It also noted that the six goals listed in the exhibit to the amendment were all measurable goals.

**Issues involving administrator contracts and performance goals continue to grow in complexity. Contact Stan Eisenhammer with inquiries regarding the impact of this decision on your administrator contracts.**

taken the same action, and that he suffered a deprivation via constructive discharge when he was told his health benefits would be terminated if he did not resign. The court's finding was based, in large part, on the statements made by the Chief during a closed meeting.

**Contact Bob Kohn with questions concerning tapes of closed session meetings.**

### **Appellate Court Expands Protections of FMLA--**

The Seventh Circuit has ruled that an employee is protected from retaliation for or interference with leave taken under the federal *Family Medical and Leave Act* ("FMLA"), even if the employer may have terminated the employee because of a plan to restructure the job position in a way that would have required a more skilled employee.

Employers covered by the FMLA must provide up to twelve weeks of unpaid leave for an eligible employee as a result of his or her own serious medical condition or that of a qualifying family member. The FMLA protects employees from retaliation for or interference with such protected leave.

In *Goelzer v. Sheboygan County, Wis.*, No. 09-2283, Goelzer, a longtime county employee had taken a significant amount of FMLA leave in the recent past and was scheduled to take more leave. Shortly before she was scheduled to take additional FMLA leave, the employer terminated her with a later effective date so that

she would receive the FMLA leave that had been previously approved.

The court in Goelzer decided that although she received the leave to which she was entitled, Goelzer's termination may have constituted retaliation for and interference with her FMLA leave.

In reaching this conclusion, the court found it relevant that Goelzer's supervisor had negatively commented on her absences both orally and in written performance evaluations. The court also noted that the timing of the termination, two weeks before additional FMLA leave was to be taken, shone unfavorably on the employer. Moreover, the court indicated that the lack of any documents evidencing a plan to restructure Goelzer's position shed doubt on the employer's alleged motive for the termination.

**Termination of an employee who has exercised FMLA leave can create a variety of legal issues for unwary employers. Please contact John DiJohn with questions on FMLA issues or to update your FMLA policy and administrative procedures.**