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## Features



## Departments



*Cover: Police working with citizens to remove graffiti from neighborhoods strengthens community relations. See article p. 1.*

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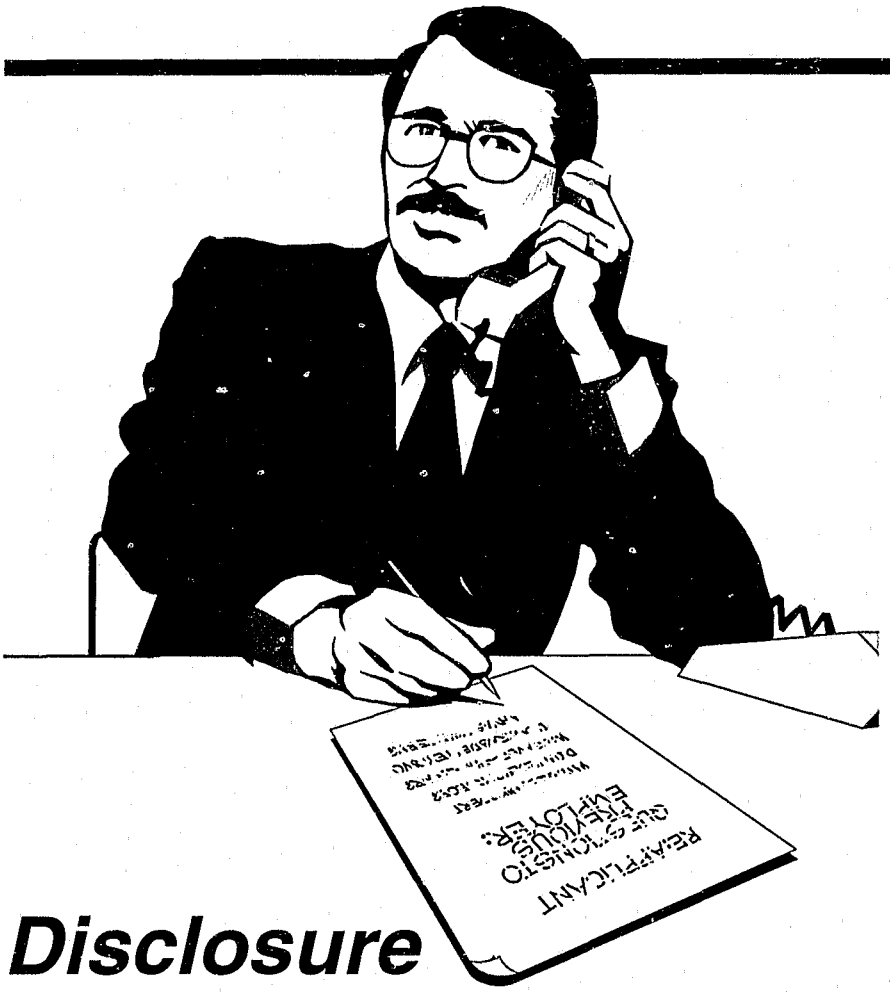



# Disclosure of Personnel Information

## Constitutional Limitations

By
JEFFREY HIGGINBOTHAM, J.D.

"Hello, Chief Smith? This is Chief Jones. I am calling to inquire about one of your former employees who has applied for a position with my department. What can you tell me about John Doe's performance as a police officer and the circumstances that led to his departure from your agency?"

This hypothetical conversation likely occurs many times a day across the United States as law enforcement organizations attempt to acquire relevant information about the past work experience of applicants. A prospective employer generally seeks all information bearing upon the decision to hire, including evaluations concerning performance and the circumstances and reasons for the applicant's departure from the former job. However, a fear of being sued for disclosing derogatory information inhibits many former employers from releasing such information, particularly when the departure was the result of an involuntary termination.

This article discusses the Federal constitutional limitations on the disclosure of personnel information to prospective employers. It tells how law enforcement organizations can best serve the collective interests of the law enforcement profession by ensuring that relevant information bearing upon an applicant's law enforcement qualifications is disclosed when properly requested.

The article begins with a discussion of the contours of the constitutional liberty interest claim and then discusses the procedural measures required when such a liberty interest is implicated. The article concludes with some recommended procedures to ensure that any disclosure of relevant personnel information bearing on one's law enforcement qualifications are legally defensible.

### Basic Elements of a Liberty Interest Claim

The 5th and 14th amendments to the U.S. Constitution provide that persons may not be deprived of their life, liberty, or property without due process of law. In the employment context, the protection of liberty is closely associated with reputation and the right to seek employment in the field of one's choosing. In a series of four cases, the U.S. Supreme Court established three basic elements of a liberty interest claim.

These cases make clear that a plaintiff establishes a liberty interest claim only if there is: 1) Governmental publication or dissemination of 2) stigmatizing information concurrent with the loss of employment or alteration of one's legal status, and 3) the information disseminated is false.

In *Board of Regents* v. *Roth*,[1] a college professor whose 1-year contract was not renewed filed a lawsuit claiming that this action, done without any type of hearing in which he could contest that decision, deprived him of his liberty interest. The Supreme Court rejected that argument, noting that the "requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property...But the range of interests protected by procedural due process is not infinite."[2]

The Court found no deprivation of a liberty interest, since the decision not to renew Roth's teaching contract did not make a "charge against him that might seriously damage his standing and associations in the community,"[3] or create a "stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities."[4] Roth's inability to show a cognizable injury to his reputation was fatal to his liberty interest claim.

### Injury to Reputation Alone Not Sufficient

In *Paul* v. *Davis*,[5] two local law enforcement agencies distributed a "flyer" of active shoplifters to area merchants. The flyer included a named photograph of Davis. Davis sued, claiming that his inclusion in the flyer damaged his reputation, and thereby, infringed his liberty interest.

The Court disagreed and held that even assuming that Davis' inclusion in the shoplifter flyer was stigmatizing and damaging to his reputation, such injury to "reputation alone, apart from some more tangible interests such as employment..."[6] does not constitute a constitutional claim. To hold otherwise, ruled the Court, would allow all State tort defamation claims to assume constitutional significance. The Court held that a plaintiff must establish that the government's defamatory statements were coupled with either a "loss of government employment" or a significant "alteration of legal status."[7]

### Public Disclosure Required

In *Bishop* v. *Wood*,[8] a police department dismissed an officer for causing low morale, not following certain orders, poor attendance at training classes, and exhibiting conduct unsuited to a police officer. The department communicated the reasons for the dismissal privately to the employee, but had not revealed the reasons in any other context prior to the litigation. Bishop claimed that the defamatory information, coupled with his termination from employment, deprived him of his 14th amendment liberty interest.

The Supreme Court rejected the claim on the ground that there was no proof that the government had ever publicly disclosed the reasons for the officer's dismissal. The Court ruled that no liberty interest is implicated absent some public disclosure of the derogatory information.

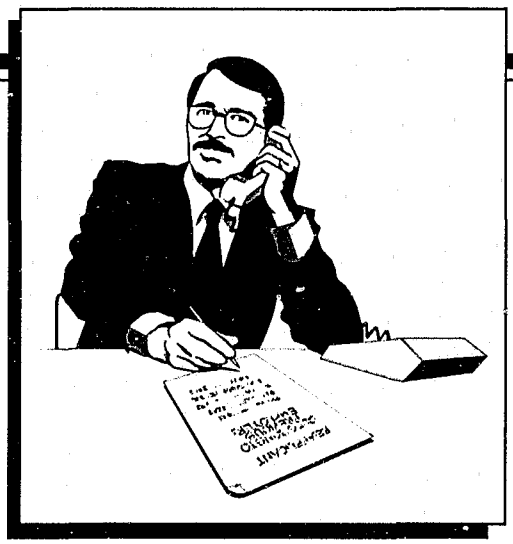
*Special Agent Higginbotham is a legal instructor at the FBI Academy.*

### Derogatory Information Must be False

In *Codd* v. *Velger*,[9] the New York City Police Department (NYPD) terminated a probationary police officer after he put a gun in his mouth and threatened suicide. When his new employer, the Penn Central Railroad Police Department, learned of that information while examining his NYPD personnel file, it dismissed Velger. The officer sued, claiming the information concerning his threatened suicide was stigmatizing and had been disseminated when the NYPD released the information to Penn Central.

The Supreme Court denied the officer's claim because he failed to allege or prove that the information concerning his threatened suicide was false. The Court stated that "the hearing required where a nontenured employee has been stigmatized in the course of a decision

to terminate his employment is solely 'to provide the person an opportunity to clear his name.' If he does not challenge the substantial truth of the material in question, no hearing would afford a promise of achieving that result for him."[10]



### What Constitutes Public Dissemination?

In *Bishop* v. *Wood*,[11] the Court held that private communication with an employee and disclosure during the course of employee-initiated litigation do not constitute public dissemination to support a liberty claim. Similarly, other courts have dismissed liberty claims for a variety of reasons.

Primarily, these claims failed because there was no allegation or proof of public disclosure where:

1) A chief reports to a board of commissioners that the applicant failed to pass the background check[12]

2) A public official made private threats to the terminated employee[13]

3) Dissemination of information was "intra-government"[14]

4) Information was simply included in a personnel file[15]

5) Discussion occurred at public forums requested by the former employee[16] and

6) Media coverage was not attributable to the governmental release of information.[17]

Conversely, public dissemination has been found where the employer issues a press release[18] or makes files or records available for others to inspect.[19]

### What Disclosures are Stigmatizing?

A public disclosure of derogatory information does not rise to a liberty interest unless the information disclosed is stigmatizing *and* concurrent with the loss of employment or a significant alteration of legal status. In determining whether publicly disclosed information imposes a stigma on a government employee, courts look to the content of the information. Although "[a]ny time an employee is involuntarily terminated some stigma attaches which affects future employment opportunities,"[20] courts hold that not every injury to reputation is of constitutional dimension. Instead, only information that denigrates the employee's good name, reputation, honor or integrity, or imposes a badge of infamy, is deemed to rise to the level of a constitutional claim.

Courts have found that a public disclosure of information concerning an employee's honesty,[21] morality,[22] commission of a serious felony,[23] and manifest racism or serious mental illness[24] is sufficiently injurious to be stigmatizing. On the other hand, courts have found the following disclosures not stigmatizing:

1) An employer's statements labeling disputed allegations as "not worth a damn"[25]

2) Accusations that an employee repeatedly questioned the chief's authority[26]

3) An alleged failure to perform satisfactorily or to the satisfaction of a superior[27]

4) Charging an employee with insubordination for neglect of duty or failure to follow orders[28]

5) Claiming the employee had poor work habits[29] and

6) Characterizing the employee as unreliable.[30]

### Employment Actions that Constitute an Alteration of Legal Status

*Paul* v. *Davis*[31] made it clear that damage to reputation alone does not create a constitutional injury, unless it is "...entangled with some other tangible interest,"[32] such as loss of employment or significant alteration of legal status. A public defamatory statement uttered by the government incident to a termination that "foreclose[s]...[the] freedom to take advantage of other employment opportunities"[33] implicates a liberty interest.

However, it "is not necessary...that the right be completely extinguished, as in the case of a discharge, but merely that it be 'distinctly altered.' "[34] Thus, it is possible that an employment action short of an involuntary termination can implicate one's liberty interest.

For example, where an employee has a contractual right to either continued employment without discretionary demotion or to de-

served promotion, the denial of those rights in conjunction with a public derogatory statement could give rise to a liberty interest claim.[35] While "an employer cannot avoid liability by offering the employee a job far beneath the one he had,"[36] courts generally hold that an employee has no protected liberty interest in a particular position or assignment. Thus, courts have held that reassignment, coupled with the release of defamatory information, does not constitute a liberty interest violation.[37]

The lack of an actual injury defeated a liberty claim in *Schneeweis* v. *Jacobs*,[38] where a high school basketball coach was suspended during mid-season, but was still paid the entire contractual stipend. The court ruled that she suffered no liberty deprivation, since she had no right to the renewal of her contract. Also, since she was fully paid, there was no alteration of her legal status. Similarly, in *Lawson* v. *Sheriff of Tippecanoe County, Ind.*,[39] the court held that a police dispatcher, who was terminated following the arrest of her husband but who was thereafter offered alternative county employment, had not suffered an employment-related injury sufficient to support a liberty interest claim.[40]

Courts also hold that the injury to protected job interests must be tangible to support a liberty claim. In *Mosrie* v. *Barry*,[41] a police officer challenged his lateral transfer, which did not cause any loss of rank or pay. He claimed that the publicly disclosed derogatory information that attended his transfer caused him the loss of certain job responsibilities and perquisites and a decrease in promotional potential. He also claimed his outside business interests suffered as a result of the adverse publicity surrounding his reassignment. The court rejected those claims and held that the constitutional protection against loss of liberty without due process of law does not encompass job reassignments not involving loss of rank or pay.

Likewise, the court in *Clark* v. *Township of Falls*,[42] refused to find a deprivation of liberty where the plaintiff alleged only that the publicly disclosed information concerning his dismissal had been harmful in his informal job discussions with other employers. Since there was no concrete proof that his opportunity to seek other employment had been tangibly injured, there was no liberty interest impingement.[43]

> ***"...each agency must be prepared to share all relevant information concerning the qualifications of police applicants."***

### Disclosures Following Resignations

The Supreme Court recently decided that a disclosure of personnel information concerning a former employee who resigned does not implicate a liberty interest. In *Siegert* v. *Gilley*,[44] a doctor resigned from his job at a government-run hospital. Sometime later, he applied for a position at another government facility. In the process of accrediting the doctor for practice, a letter was sent to the doctor's former supervisor, who replied that the doctor was inept, unethical, and untrustworthy. When the accreditation was denied, the doctor sued, alleging a denial of his liberty interest without due process of law.

The Supreme Court rejected the claim and concluded that because the release of defamatory information did not accompany the doctor's termination, but came weeks later after the doctor resigned, no liberty interest deprivation occurred. The importance of *Siegert* is that the defamatory statement must be associated with an involuntary employment action to support a liberty interest claim.

Where an employee voluntarily resigns, derogatory information can be disclosed to a prospective employer without offending any protected liberty interest. However, it should be noted that *Siegert* only pertains to constitutionally based liberty interest claims and does not affect the viability of a State tort claim for defamation of character.[45]

### False Information Attributed to Government Action

A liberty interest claim can only be sustained where the government discloses false information.[46] Where the information stems from the media's inaccurate reporting, no claim may lie against the government employer.

For example, in *Beckham* v. *Harris*,[47] a police department fired an officer for filing false information in a police report and in affidavits for search and arrest warrants. After his discharge, the department issued a press release stating that the officer had been an "active participant in furnishing false information" to the department.[48]

## Sample of a Due Process Notice:

"This letter serves as notice that disciplinary action is being contemplated against you. The reason(s) for the contemplated action are (fill in the basis for the employment action). Your actions, as described above, constitute a violation of the policies and procedures of this department, namely, (provide citation to the specific section(s) of the department's manuals or rules violated). You have the right to reply, in writing, to the above charges within (xx) days. The reply you provide, if any, will be considered in deciding the final disciplinary action to be taken."

Thereafter, the local newspaper printed several stories that misstated the facts surrounding the officer's termination. The court refused to sustain the officer's liberty interest claim, finding that proof that "...a newspaper got things wrong in a manner injurious to [plaintiff] creates no cause of action against the [former employer]."[49]

### Due Process

Once a liberty interest has been infringed, the protection granted by the Constitution is due process of law. Due process guarantees reasonable notice and a hearing, the purpose of which "...is to provide the person an opportunity to clear his name."[50]

The exact contours of the required notice and hearing were described in *Cleveland Board of Education* v. *Loudermill*,[51] where a school dismissed a security guard when it learned that he failed to disclose a felony conviction on his application. The Supreme Court defined procedural due process to require oral or written notice of the charges, an explanation of the evidence supporting those charges, and an opportunity for employees to present their sides of the story.[52]

Due process does not require a definitive resolution of the propriety of the employment action, but only serves as an initial check against a mistaken decision.[53] The "hearing"[54] should be conducted by unbiased persons,[55] but does not include the right to confront or cross-examine witness[56] or to be represented by counsel.[57]

### Recommended Disclosure Policies

A law enforcement agency may choose from several legally defensible responses when a prospective employer makes an inquiry about a former employee. These responses include:

1) Providing only confirmation of employment but no substantive information that might be derogatory

2) Releasing only information known to be truthful

3) Disclosing only information that either does not stigmatize the former employee or is not associated with a termination or alteration of legal status or

4) Fully disclosing all relevant information.

The first three options ill-serve the law enforcement profession because they may result in the withholding of information that is extremely relevant to one's law enforcement qualifications. Choosing to release only information known to be truthful is an unnecessarily restrictive standard because absolute truth is hard to ascertain in the myriad fact situations that surround employment actions. Disclosing only information that imposes no stigma, is not derogatory, or is not related to a job termination or other significant job alteration may deprive prospective law enforcement employers of information critical to the hiring decision.

Only full disclosure of all relevant information best serves the law enforcement profession. To facilitate that objective, each agency must be prepared to share all relevant information concerning the qualifications of police applicants.

To ensure that full disclosure of relevant information is legally defensible, a law enforcement agency that demotes with loss of pay or rank or terminates an employee should provide that employee with at least minimal due process. It is recommended that prior to any such adverse personnel action, the employee be given a written statement of the reasons for the contemplated action, an explanation of the evidence supporting those charges, and an opportunity to respond.

### Conclusion

Affording due process to all adverse personnel actions produces both immediate and future benefits. It serves as a safeguard against mistaken actions and allows for the consideration of relevant and mitigating factors. In addition, affording due process prior to final adverse personnel actions permits law enforcement employers to disclose all relevant personnel infor-

mation to prospective law enforcement employers without fear of violating a former employee's liberty interest.[58] ✦

**Endnotes**

[1] 408 U.S. 564 (1972).
[2] *Id.* at 569-570.
[3] *Id.* at 573.
[4] *Id.*
[5] 424 U.S. 693 (1976).
[6] *Id.* at 701.
[7] *Id.* at 706-708.
[8] 426 U.S. 341 (1976).
[9] 429 U.S. 624 (1977).
[10] *Id.* at 627-628.
[11] 426 U.S. 341 (1976).
[12] *Ratajack* v. *Board of Fire and Police Commissioners*, 729 F.Supp. 603 (N.D. Ill. 1990); *Moore* v. *Martin*, 764 F.Supp. 1298, 1305 (N.D. Ill. 1991).
[13] *Brocknell* v. *Norton*, 688 F.2d 588 (8th Cir. 1982).
[14] *Harrison* v. *Board of County Commissioners for Adams County*, 775 F.Supp. 365, 367 (D. Colo. 1991).
[15] *Johnson* v. *Martin*, 943 F.2d 15 (7th Cir. 1991); *Ceko* v. *Martin*, 753 F.Supp. 1418 (N.D. Ill. 1990). *But see, Brandt* v. *Board of Cooperative Educational Services*, 820 F.2d 41 (2d Cir. 1987); *Cf. Buxton* v. *City of Plant City, Florida*, 871 F.2d 1037 (11th Cir. 1989); *Duck* v. *Jacobs*, 739 F.Supp. 1545 (S.D. Ga. 1990).
[16] *Arnold* v. *McClain*, 926 F.2d 963 (10th Cir. 1991); *Campos* v. *Guillot*, 743 F.2d 1123 (5th Cir. 1984).
[17] *Melton* v. *City of Oklahoma City*, 928 F.2d 920 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 296 (1991).
[18] *Beckham* v. *Harris*, 756 F.2d 1032 (4th Cir. 1985), *cert. denied*, 474 U.S. 903 (1985); *FOP Lodge No. 5* v. *Tucker*, 868 F.2d 74 (3d Cir. 1989); *White* v. *Thomas*, 660 F.2d 680 (5th Cir. 1981), *cert. denied*, 455 U.S. 1027 (1982); *Bunting* v. *City of Columbia*, 639 F.2d 1090 (4th Cir. 1981); *Robinson* v. *City of Montgomery*, 809 F.2d 1355 (8th Cir. 1987).
[19] *See*, note 18, *infra*. The Supreme Court in *Codd* v. *Velger*, 429 U.S. 624 (1977), declined to address the issue of whether a review of a personnel file done after the employee had signed a release permitting such an inspection constituted a public disclosure. Despite the lack of controlling Supreme Court precedent, it is recommended that law enforcement agencies assume that allowing inspection of personnel files, even pursuant to a signed release, does constitute a public disclosure of that information.
[20] *Ratliff* v. *City of Milwaukee*, 795 F.2d 612, 625 (7th Cir. 1986).
[21] *Id. See also, Lentsch* v. *Marshall*, 741 F.2d 301 (10th Cir. 1984).
[22] *Melton*, 928 F.2d 920; *Zueck* v. *City of Nokomis*, 513 N.E.2d 125 (Ill. App. 5 Dist. 1987).
[23] *Green* v. *St. Louis Housing Authority*, 911 F.2d 65 (8th Cir. 1990); *Wellbanks* v. *Smith County, Texas*, 661 F.Supp. 212 (E.D. Tex. 1987).
[24] *Green*, 911 F.2d at 65; *Ceko*, 753 F.Supp. 1418.
[25] *Wulf* v. *City of Wichita*, 883 F.2d 842 (10th Cir. 1989).
[26] *Kennedy* v. *McCarty*, 778 F.Supp. 1465 (N.D. Ill. 1991).
[27] *Bailey* v. *Kirk*, 777 F.2d 567 (10th Cir. 1985); *Fleisher* v. *City of Signal Hill*, 829 F.2d 1491 (9th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988).
[28] *Conaway* v. *Smith*, 853 F.2d 789 (10th Cir. 1988); *Hicks* v. *City of Watonga, Okla.*, 942 F.2d 737 (10th Cir. 1991). *But see, Ratliff* v. *City of Milwaukee*, 795 F.2d at 612.
[29] *Hicks*, 942 F.2d at 737.
[30] *Sipes* v. *United States*, 744 F.2d 1418 (10th Cir. 1984).
[31] 424 U.S. at 693.
[32] *Wulf*, 883 F.2d at 869.
[33] *Roth*, 408 U.S. at 573.
[34] *Kamenesh* v. *City of Miami*, 772 F.Supp. 583, 591 (S.D. Fla. 1991).
[35] *Id.*
[36] *Lawson* v. *Sheriff of Tippecanoe County, Ind.*, 725 F.2d 1136, 1139 (7th Cir. 1984).
[37] *Morash* v. *Strobel*, 842 F.2d 64 (4th Cir. 1987); *Altman* v. *Hurst*, 734 F.2d 1240 (7th Cir. 1984), *cert denied*, 469 U.S. 982 (1984).
[38] 771 F.Supp. 733 (E.D. Va. 1991).
[39] 725 F.2d 1136 (7th Cir. 1984).
[40] *See also, Dobosz* v. *Walsh*, 892 F.2d 1135 (2d Cir. 1989).
[41] 718 F.2d 1151 (D.C. Cir. 1983).
[42] 890 F.2d 611 (3d Cir. 1989).
[43] *See also, Piesco* v. *City of New York, Dept of Personnel*, 753 F.Supp. 468, 478 n. 5 (S.D.N.Y. 1990).
[44] 111 S.Ct. 1789 (1991).
[45] *Id.* at 1794. Some States have legislatively eliminated such suits. For example, Florida has a law granting absolute immunity for former employers who, in good faith, disclose information about previous employees to prospective employers. *See*, Individual Employment Rights Manual, Section 550:25 (BNA 1991); and Arizona Revised Statutes, Section 23-1361.
[46] *Buxton*, v. *City of Plant City, Fla.*, 871 F.2d 1037 (11th Cir. 1989); *Rosenstein* v. *City of Dallas, Texas*, 876 F.2d 392 (5th Cir. 1989); *modified on other grounds*, 901 F.2d 61, *cert. denied*, 111 S.Ct. 153 (1990). *See also, Codd* v. *Velger*, 429 U.S. 624 (1977).
[47] 756 F.2d 1032 (4th Cir.), *cert denied*, 474 U.S. 903 (1985).
[48] *Id.* at 1038 n.12.
[49] *Id.* at 1039.
[50] *Board of Regents* v. *Roth*, 408 U.S. at 573 n. 12.
[51] 105 S.Ct. 1487 (1985).
[52] While there is apparently no legal requirement that the hearing precede the employment action where only a liberty interest is at stake, a policy that requires a predeprivation due process hearing in all cases would protect against both liberty and property interest claims and would also provide ease and uniformity of application. *See, e.g., Johnson* v. *City of Tarpon Springs*, 758 F.Supp. 1473 (M.D. Fla. 1991). However, for employees with a property interest in their jobs, a predeprivation hearing is required. *Cleveland Board of Education* v. *Loudermill*, 105 S.Ct. 1487 (1985).
[53] *See, e.g., Rosenstein* v. *City of Dallas, Texas*, 876 F.2d at 398.
[54] The use of the term "hearing" does not mean a public forum is required. *Duchesne* v. *Williams*, 849 F.2d 1004 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1535 (1989); *Sewell* v. *Jefferson County Fiscal Court*, 863 F.2d 461 (6th Cir. 1988), *cert. denied*, 110 S.Ct. 75 (1989).
[55] *See e.g., Hicks* v *City of Watonga, Okla.*, 942 F.2d 737 (10th Cir. 1991).
[56] *Meder* v. *City of Oklahoma City*, 869 F.2d 553 (10th Cir. 1989).
[57] *Panozzo* v. *Rhoads*, 905 F.2d 135 (7th Cir. 1990).
[58] It is recommended that if the employee chooses to respond orally, a written record be made and retained to memorialize that response. Written responses should also be retained. Disclosures to prospective employers should contain both the information generated by the former employer and any employee responses to that information.

*Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.*

# The Bulletin Notes

Law enforcement officers are challenged daily in the performance of their duties; they face each challenge freely and unselfishly while answering the call to duty. In certain instances, their actions warrant special attention from their respective departments. The *Bulletin* also wants to recognize their exemplary service to the law enforcement profession.

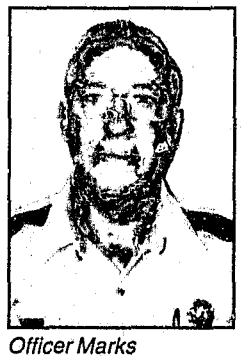
*Sergeant Lee*

While driving off duty during the early morning hours, Sgt. Michael Lee of the Jefferson County, Alabama, Sheriff's Department observed smoke and flames coming from a residence. He immediately notified the fire department, via a cellular telephone, and attempted to alert the residents by blowing his car horn. Sergeant Lee then entered the burning home and led the three occupants to safety.

*Officer Clark*

While driving off duty, Officer William Clark of the Boys Town, Nebraska, Police Department came upon a multivehicle accident. He stopped to render first aid to those with injuries and observed an unconscious woman still trapped in her burning automobile. Officer Clark released the victim's seatbelt, pried away the damaged dashboard that pinned her in the seat, and removed her from the car before it became engulfed in flames.

*Sheriff Picou*



*Officer Marks*

Sheriff Benjamin R. Picou and Correctional Officer Earl Marks of the Randolph County, Illinois, Sheriff's Office saved the life of a suicidal woman who jumped 60 feet from a bridge into the Mississippi River. Sheriff Picou and Officer Marks navigated a small boat through dark and treacherous waters, using flashlights to track the victim's weak pleas for help as the currents carried her quickly downstream. After rescuing the woman, the officers adeptly maneuvered their boat out of the path of an approaching barge that was bearing down on them. They then carried the victim, who was suffering from hypothermia and shock, one-half mile to an awaiting ambulance.

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