

Volume 26, No. 1 -- Spring 2019

## Court determines police officers entitled to qualified immunity in videotaped taser deployments

by John E. Motylinski

The U.S. Court of Appeals for the Seventh Circuit recently dismissed a case against two police officers alleged to have used excessive force in using a taser against an uncooperative and hostile suspect. Specifically, the court in *Dockery v. Blackburn*, 911 F.3d 458 (7th Cir. 2018), found that the officers were entitled to “qualified immunity” from suit, thanks in part due to the availability of video footage of the incident.

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By way of background, the doctrine of qualified immunity protects government officials from liability for civil damages where their conduct does not violate clearly established statutory or constitutional rights of which a “reasonable person” would have known. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). In that sense, “qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). When properly applied, it protects “all but the plainly incompetent or those who knowingly violate the law.” *Id.*

In the *Dockery* case, Mr. Dockery barged into his girlfriend’s apartment in Joliet, Illinois, while high on phencyclidine (“PCP”). Dockery had previously been

banned from the apartment complex due to a prior domestic incident, but proceeded to cause a ruckus. Sergeant Sherrie Blackburn and Officer Terry Higgins responded to the scene and found Dockery sitting on a bed. Dockery was calm and cooperative until after he was taken to the police station for booking. There, the officers uncuffed Dockery and allowed him to make a phone call.

When Dockery was being fingerprinted, however, he grew confrontational. The officers told him that he needed to be handcuffed to a bench for the rest of the booking process. In response, Dockery noticed that Sergeant Blackburn unholstered her taser, abruptly moved towards her, and aggressively pointed his arm at her face. Other officers tried to handcuff Dockery, but he angrily pulled away, fell over, and kicked wildly at them.

Sergeant Blackburn activated her taser and fired, hitting and stunning Dockery for about two seconds. Dockery continued to struggle and pulled out one of the taser prongs. Sergeant Blackburn put the taser into a “stun gun” mode and shocked Dockery three additional times

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## Limits on public comment must be contained in established and recorded policies

by Michael Castaldo, Jr.

The importance of established and recorded policies on limits imposed during public comment was reiterated in a recent binding opinion. Opinion 19-002 was issued by the Illinois Attorney General’s Public Access Counselor (PAC) on January 9, 2019, regarding Section 2.06(g) of the Open Meetings Act - the section providing for public comment - and a school district’s 15-minute cap on public comment (5 ILCS 120/2.06 (g)).

On October 22, 2018, the Lyons Elementary School District Board held a meeting after hiring an English teacher who was previously charged with 9 counts of attempted murder after being accused of shooting a person seven times. Approximately 100 members of the public attended the meeting to express concerns; however, the Board announced that it would allow the public to speak only for a total of 15 minutes. Furthermore, each speaker was limited to three minutes of public comment.

Because of the high turnout, not every person who attended the meeting was allowed to comment. Martin Stack filed a request for review with the PAC, complaining that these limits violated the Illinois Open Meetings Act (“OMA”). Mr. Stack also pointed out that the Board’s

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## Increased threshold for waiver under the Local Government Professional Services Selection Act

by Meganne Trela

The 2019 changes to the Local Government Professional Service Selection Act (“Act”), 50 ILCS 510/0.01 *et seq.*, allow local government entities to waive the process for retaining professionals providing architectural, engineering, and land surveying services if the services for the project are expected to cost less than \$40,000.

Prior to the enactment of Public Act 100-0968, local government entities could only waive the process if costs were expected to be less than \$25,000. Furthermore, the threshold amount will increase *annually* “by a percentage equal to the annual unadjusted percentage increase, if any, as determined by the consumer price index-u.”

As a reminder, the law requires local governments to publish notice, by way of

the newspaper, mail or e-mail, or the local government’s website before selecting a professional. The law also outlines specific considerations that can be used to select the service provider. Considerations may include qualifications, past record and experience, availability to meet time requirements, location, and workload, among other items.

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Local governments can also conduct discussions or require public presentations by firms providing services that are deemed the most qualified. However, estimates of costs cannot be

obtained as part of the proposal process. The local government must then select at least three firms it determines to be the most qualified, rank the selected firms in order of qualifications, and begin to negotiate a “a contract at a fair and reasonable compensation” with the firm holding the best qualifications. Should the negotiations fail, the local government entity may cease negotiations with the first firm and move on to the next most qualified firm. Services provided by firms that hold a satisfactory relationship for services with the local government body are exempt from this process.

The law was effective on January 1, 2019. For questions on selecting professionals to handle architectural, engineering, and land surveying services, please contact an attorney at Ottosen Britz. ■

## Local governments lose control of prevailing wages

by Ryan R. Morton

When Governor J.B. Pritzker took office in mid-January, the first bill he signed made significant changes to the Illinois Prevailing Wage Act (820 ILCS 130/0.01 *et seq.*), a statute his predecessor tried to repeal in its entirety. The amendment gives the State more control over how much local governments should pay contractors by eliminating the option of setting local rates.

The IPWA requires local governments to pay their contractors or subcontractors “the general prevailing hourly rate as paid for work of a similar

character in the locality in which the work is performed.” (820 ILCS 130/1) In years past, a public body could ascertain for itself the prevailing rate “for each craft or type of worker or mechanic needed” in the county. (820 ILCS 130/4 (*until June 1, 2019*)) Alternatively, the public body could simply adhere to the prevailing wages determined by the Illinois Department of Labor for each county and trade.

Under the amended Section 4 of the IPWA, prevailing wage rates will now be determined solely by IDOL. Local governments no longer have the option

of calculating their own prevailing wage rates. The rates currently on IDOL’s website were updated April 5, 2019, reflecting data submitted by trade unions. Any objections to the rate must be filed within 30 days.

The Governor’s office touted other changes to the IPWA. The new version tasks the Illinois Department of Labor with releasing regular reports on worker diversity in public projects. IDOL also must provide recommendations on how to increase the employment of women and people of color on those projects.

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## Public comment

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policy manual *only* stated that public participation in meetings is limited to three minutes per person and made no mention of a 15-minute cap for public comments.

The superintendent provided both a written response to the PAC on behalf of the Board and copies of the Board's Policy Manual in November, 2018. Additionally, the superintendent provided copies of a supplementary handout outlining public comment procedures. This handout stated in part that public comments are limited to "a maximum of 15 minutes, per topic, per meeting." According to the District, the handout was read aloud at every meeting and placed on a table next to the agenda and sign in sheet. The Attorney General addressed both the Board Policy Manual and the Board handout in analyzing the alleged OMA violation.

Under the OMA, public bodies are charged with the responsibility of aiding in the conduct of the people's business. More specifically, the OMA affords any person the opportunity to "address public officials under the rules established and recorded by the public body." (5 ILCS

120/2.06(g)). However, the ability to publicly comment is not unlimited and rules "established and recorded" by the public body could limit the scope of public comment at meetings. Thus, the PAC sought to determine whether the Board Policy Manual, Board Handout, or both documents, governed the meeting at issue.

The PAC first looked to the legal definition of "established" and concluded that the term "established" means "to enact permanently." The PAC determined that the Board Policy was established and recorded by the Board. The Board Policy stated that it was adopted on December 15, 2014 and was also incorporated in the Board's official policy manual. Therefore, the Board policy limiting comments to three minutes per person was both recorded and established within the meaning of the statute.

However, the Board policy manual was silent regarding the 15-minute cap on public comments. Even though the Board's handout outlined the practice of limiting comments to 15 minutes per topic per meeting, this policy was never officially incorporated into the Board Policy Manual

or adopted by the Board in any way. Thus, the handout provisions were not "established" or "recorded" within the meaning of the statute and did not constitute a valid restriction on public comment. Thus, the Board was in violation of Section 2.06(g) of the OMA at its October 22, 2018, meeting. The PAC instructed the Board to "refrain from applying unestablished and unrecorded rules to restrict public comment at future meetings."

This opinion stresses the importance of setting Board policy. The Board could have avoided this outcome if the 15-minute cap on public comment was properly "established" and "recorded" in the Board's Policy Manual. This opinion serves as an important caution to review policies and procedures and ensure that longstanding practices, such as a 15-minute cap on meeting topics, are officially recorded in the Board's Policy Manual. ■

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## Prevailing wages

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Although this amendment creates another mandate from the state, many local elected officials have voiced support for the change. Few units of local government actually performed the detailed investigation needed to determine prevailing rates due to the high cost and time required of such a project. Instead, most municipalities, schools, fire districts, and other entities simply chose to adopt the state's prevailing wages.

Practically speaking, then, the biggest change is that ordinances will not have to be drafted and voted upon every June, which means the amendment actually reduces the burden on local governments.

Remember that all pre-existing requirements of the IPWA are still in effect. Therefore, although a public body no longer needs an attorney to draft the annual prevailing wage ordinance, be sure

to consult with your legal counsel when bidding projects and hiring contractors, to ensure compliance with those other provisions.

For questions on prevailing wages, bidding projects, and hiring contractors contact an attorney at Ottosen Britz. ■

## Videotaped taser deployments

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until he could be handcuffed. Surveillance footage from the police station and Sergeant Blackburn's taser captured the entire incident.

Nearly two years after the event, Dockery sued Sergeant Blackburn and Officer Higgins, as well as the City of Joliet and other police officers. The trial court dismissed the bulk of the case, but allowed

to Dockery, the court found there was enough evidence to warrant a trial.

The officers appealed and won. The Seventh Circuit noted that although it is true that the record should have been construed in favor of Dockery, his explanations and testimony were not enough to overrule the "irrefutable facts preserved on the video."

The *Dockery* decision highlights the power of hard data in litigation. Although courts are bound to accept factual assertions in a manner most favorable to the plaintiff in handling dispositive motions, that deference cannot overcome the hard factual evidence that photos or video provide. This highlights the need to ensure records and potential evidence are properly preserved if a lawsuit is anticipated.

For questions about the preservation of photo and video recordings, contact an attorney. ■



the charges against Blackburn and Higgins to proceed -- finding they were not entitled to qualified immunity as they claimed.

The District Court ruled this way because it perceived there were disputed issues of fact that required a jury to resolve. For one, Dockery maintained he was not actively resisting when Sergeant Blackburn first used her taser. Additionally, Dockery asserted that he was not intentionally resisting the officers' efforts to handcuff him; rather, he had lost his balance because he was overweight and inflexible.

He also argued that his conduct was explained by the fact that his handcuffs were too tight. Dockery also asserted that his behavior after the first taser shock was explained by involuntary reactions to the shock -- not intentional acts of resistance. Because the District Court was bound to construe the record in a light most favorable

First, the initial taser shock on Dockery was justified. The video of the incident clearly showed that "Dockery was uncooperative and physically aggressive when the officers tried to handcuff him, rocking back and forth and twice escaping their grasp" and when he fell backward "he wildly kicked in their direction and immediately jumped to his feet."

The court also found the successive taser shocks were reasonable. Thanks to the video, the court saw for itself that Dockery's "combative demeanor never changed, and he did nothing to manifest submission to being handcuffed." Because this hard video evidence took precedence over Dockery's testimony, the court found no issue of fact, concluded that the officers enjoyed qualified immunity, and instructed the District Court to dismiss the case.

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