**Daily Labor Report**

**First Amendment**

# County Violated Sheriff Deputies' Rights By Religious Presentations, Court Affirms

A Wisconsin county violated the First Amendment rights of public sheriff's deputies by allowing representatives of a Christian peer support group to speak at employee meetings at which deputies' attendance was mandatory, the U.S. Court of Appeals for the Seventh Circuit ruled Dec. 4 (Milwaukee Deputy Sheriffs' Ass'n v. Clarke, 7th Cir., No. 08-1515,12/4/09).

Affirming a district court decision in favor of the Milwaukee Deputy Sheriffs' Association and two individual deputies, the appeals court said Milwaukee County and Sheriff David A. Clarke Jr. violated the First Amendment's establishment clause by requiring deputies to listen to representatives of Fellowship of the Christian Centurions, a religious peer support group created specifically for law enforcement officers.

The ruling affirms a sheriff “cannot force members of the department to sit through a religious presentation,” said lawyer Linda Vanden Heuvel of Vanden Heuvel & Dineen in Germantown, Wis., who represented the union and individual plaintiffs. Americans United for Separation of Church and State in Washington, D.C., which participated as amicus curiae for the plaintiffs, also hailed the Seventh Circuit's decision. The ruling is “a strong reaffirmation of religious liberty,” the Rev. Barry W. Lynn, the group's executive director, said Dec. 4. “Sheriff Clarke is free to engage in whatever religious activities he wants in his personal time, but he has no right to use official channels to impose religion on his staff.”

However, lawyer James Scott, who represented the sheriff and county, said Clarke's motives had been “misrepresented,” there was no intent to proselytize, and the complained-of speech was no different from other solicitations deputies had heard during roll calls. “These are hardened police officers who heard a two-minute pitch during roll call,” not impressionable public school children forced to listen to religious messages, said Scott, who is with Lindner & Marsack in Milwaukee.

## Roll Call Presentations

At a sheriff's department leadership conference in April 2006, Clarke had introduced written materials that contained a Bible quotation and then allowed two Centurions' representatives to speak about the fellowship's inaugural seminar, to which all deputies were invited. The leadership conference was a mandatory event for deputies at the rank of sergeant or above.

With Clarke's approval, Centurions' representatives subsequently spoke briefly at 16 departmental roll calls between May 9 and May 16, 2006. Attendance at roll call is

mandatory for deputies scheduled to work. The Centurions informed the deputies of their kickoff seminar and distributed flyers and books with a Christian-focused message that also had been handed out at the leadership conference.

Two deputies (one Muslim and one Roman Catholic) who objected to the presentations and their union sued the county and Clarke under the Civil Rights Act of 1871 (42 U.S.C. § 1983), alleging infringement of the First Amendment ban on government establishment of religion. In September 2007, the U.S. District Court for the Eastern District of Milwaukee granted summary judgment for the plaintiffs.

Sheriff's Real or Perceived Endorsement

On appeal, the Seventh Circuit affirmed the plaintiffs had established a First Amendment establishment clause violation based on Lemon v. Kurtzman, 403 U.S. 602 (1971). In that case, the U.S. Supreme Court said government action violates the establishment clause if it has any of the following characteristics: a nonsecular purpose; the principal or primary effect of advancing or inhibiting religion; or fostering excessive government entanglement with religion.

In this case, the sheriff's “perceived or actual endorsement” of the fellowship's message, delivered at employee meetings where attendance was mandatory, established a First Amendment violation under the Lemon criteria, the court decided. It emphasized that outside groups had “limited access” in disseminating information to the sheriff's deputies and that “very few organizations” had been invited to make personal presentations. Groups that were invited were those that “partnered with the department in some form,” the court said.

“We do not suggest, however, that religious affiliated groups are always constitutionally barred from working with or speaking to government employees,” Judge Ann Claire Williams wrote. “Rather, we limit our analysis to the facts of this case, where an authority figure invited a Christian organization that engaged in religious proselytizing to speak on numerous occasions at mandatory government employee meetings.”

The court decided the “sheriff's actual or perceived endorsement of the Centurions' message is readily apparent from these facts” and the plaintiffs therefore made an establishment clause case.

No Free Speech Right to Access

Although the county defendants argued that numerous secular peer support group representatives had talked at prior mandatory employee meetings, the court said that activity did not create a “nonpublic forum” in which the government could not constitutionally discriminate based on viewpoint.

“The sheriff is mistaken that the department has created a forum of any kind and so, the Centurions' desire to access the deputies present at the leadership conference and roll

calls does not trigger a free speech forum analysis," Williams wrote. "The Supreme Court recognizes a distinction between claims asserting access to a forum and claims asserting access to a captive audience."

The court said this case in analogous to decisions in which the U.S. Supreme Court and Seventh Circuit have ruled that the "forum analysis" did not apply when a college faculty group sought access to specific state representatives or when a Christian group sought to distribute Bibles at a public elementary school.

"We recognized that the organization sought access to the children (the audience) and not the facilities," Williams wrote. "That is equally true here. The Centurions' real desire is not to access a public space in which to hold their meetings; their interest lies in accessing the sheriffs' deputies as an audience." Judges William J. Bauer and Richard D. Cudahy joined in the decision.

Reactions to Decision

Plaintiffs' lawyer Vanden Heuvel said that although Sheriff Clarke "staunchly believes" that Wisconsin law empowers him to present such material at employee meetings, those asserted state powers "do not trump" individual rights under the federal constitution. In a Dec. 4 interview with BNA, Vanden Heuvel called the ruling a victory for "each individual deputy, the Association, and the community as a whole."

Alex Luchenitser, a senior litigation counsel with Americans United for Separation of Church and State, said the case illustrates a trend in which some religious groups are "trying to use the First Amendment as a sword" to gain access to public workplaces and schools. Their argument is that once a public employer or school allows other nonprofit organizations to speak, it has created a forum from which a religious viewpoint cannot constitutionally be excluded, Luchenitser told BNA Dec. 4.

But in this case, the Seventh Circuit ruled the county had not created any forum by allowing groups such as black and Latino officers' associations to speak at mandatory employee meetings. Rather, it held the Centurions were seeking access to an audience, not a public space, Luchenitser said. Luchenitser said he is unaware of any other pending cases directly involving religious speech at public law enforcement agencies, as such cases are more apt to arise in the public school context. "As far as we know, this is not a common practice" among sheriffs around the country, he told BNA.

Scott, who represented the sheriff and the county, said the lawsuit was part of the union's efforts to "embarrass" Sheriff Clarke, with whom the union had clashed on other matters. Clarke merely facilitated a "worthwhile" invitation for deputies to "go see something" that might interest some of them, Scott told BNA Dec. 4. The complained-of conduct consisted of "two to three minutes" at roll call in which fellowship representatives announced "we're putting on this program," no different from other solicitations officers heard at such meetings, Scott said.

Law enforcement organizations have “a closer tie to religion than typical workplaces,” perhaps because of the dangers officers routinely face on the job, Scott added. For example, in Milwaukee, priests bless squad cars and dogs who are part of K-9 crews, he said. The defendants presented evidence of “a long history of religious involvement” in city law enforcement agencies so the court could view the sheriff's conduct in context, Scott said. Scott said he will confer with his clients on whether to seek further review by the Seventh Circuit.

Linda S. Vanden Heuvel of Vanden Heuvel & Dineen in Germantown, Wis., represented the union and individual plaintiffs. James R. Scott of Lindner & Marsack in Milwaukee represented the county. Louis R. Cohen of Wilmer Hale in Washington, D.C., represented Americans United for the Separation of Church and State as amicus curiae.

By Kevin P. McGowan

Text of the decision appears in Section E and also may be accessed at http://op.bna.com/dlrcases.nsf/r?Open=kmgn-7yenf7.