



A FOLLOW UP ON ISSUES FROM PAST NEWSLETTERS WITH SOME NEW CASES THROWN IN!

By Gene King, MML Loss Control Consultant

Volume 10, Issue 4

December 2003

The Law Enforcement Action Forum's Newsletter is LEAF'S attempt to keep law enforcement executives informed of issues that present risk exposures to their organizations. In past issues, we have addressed numerous topics by giving a snap shot of what was occurring at that time and how the particular topic could affect law enforcement agencies, their employees, or their communities.

This edition of the Newsletter revisits some of those topics and providing new or updated information. We also are including some of the latest court decisions that are important to your operation.

But first the LEAF Committee would like to express its hope that you had a happy Holiday Season and its wishes for a prosperous New Year. Be safe and enjoy!

THE LEAF MANUAL FOR LAW ENFORCEMENT RISK CONTROL

The Michigan Municipal League's Liability and Property Pool and Workers' Compensation Fund are proud to announce that the 2003 Edition of the Law Enforcement Action Forum's **Manual for Law Enforcement Risk Control** is now available on the World Wide Web at mml-leaf.org. The manual addresses many new topics and contains updated versions of the policies from previous editions. It also includes an updated **Review of Law** from James DeGrazia, LEAF's Legal Advisor and refers to the CALEA Core Compliance Standard as applicable.

We are excited about publishing the manual on the Web. The LEAF Committee has always striven to ensure that the materials contained in the manual are timely and useful for today's police executive. Publishing the manual on the web enables us to deliver policy revisions and current information that law enforcement executives need for their risk management efforts rapidly. Any time we add a policy update or new information, a message will appear on the site. The web site also allows you to provide feedback to our Loss Control Consultants who can quickly respond to your questions or concerns. We welcome your suggestions and comments on our continuing efforts to provide you with important information and resources.

GARRITY AFTER *THE PEOPLE OF MICHIGAN v. CITY OF GARDEN CITY*

The September, 2002 issue of the LEAF Newsletter discussed the United States Supreme Court case of *Garrity v New Jersey* 385 U.S. 493; 87 S. CT. 616; 17 L.Ed. 2d 562 (1967). In this case, the Court's recognized the importance of a municipality's right to an accounting of an officer's performance of his public trust. At the same time, the Court held that municipalities should not require officers to give a statement about their daily activities under the threat of discharge if that statement could be used against them in a criminal proceeding.

Law Enforcement Action Forum NEWSLETTER



MICHIGAN MUNICIPAL LEAGUE LIABILITY & PROPERTY POOL
MICHIGAN MUNICIPAL LEAGUE WORKERS' COMPENSATION FUND
SPONSORED BY THE MICHIGAN MUNICIPAL LEAGUE

In the Newsletter Mr. James DeGrazia of O'Connor, DeGrazia, Tamm, and O'Connor, PC, Legal Advisor to LEAF, said a municipality can require an officer to give a statement and can discharge him or her as a result of the statement. However, the prosecution cannot use the statement in a criminal proceeding against the officer. Mr. DeGrazia pointed out that the municipal administration does not give *Garrity* Rights to the officer. The officer already possesses the right against self-incrimination because the Fifth Amendment to the United States Constitution guarantees it. However, this right arises only in a criminal context and the officer must assert it.

Subsequent to the September 2002, Newsletter, the Michigan Court of Appeals decided *People of Michigan v City of Garden City*, 258 MichApp 507, (9/18/03). LEAF turned to Mr. DeGrazia to explain how the *Garden City* case affects the *Garrity* protection against self-incrimination. According to DeGrazia, the decision in *People of Michigan v City of Garden City* did nothing to change *Garrity*. In the *Garden City* case, three officers were involved in an incident involving the shooting death of a suspect. The suspect had fired several shots at some police officers, wounding one seriously. The *Garden City* Police Department conducted an internal investigation and compelled the officers to make statements regarding their actions. The officers exercised their rights allowed under the *Garrity* decision and gave statements.

In addition to the internal investigation, a criminal investigation also took place, the results of which went to the Wayne County Prosecuting Attorney. The Prosecutor also wanted the officers' statements, so he would know what they said. He would then make a determination on whether charges should be brought. The *Garden City* Police Chief refused to provide the documents because of the self-incrimination protections that the officers had exercised. However, at no time, did the officers themselves object to their statements being turned over. The Prosecutor was not satisfied with the refusal and obtained an investigative subpoena from the Wayne County Circuit Court requiring the Chief to turn over the police reports and statements in his possession. The Chief objected to the subpoena based on the Fifth and Fourteenth Amendments, but the trial court upheld the subpoena. *Garden City* appealed.

The Court of Appeals ruled that *Garden City* lacked standing to raise its officers' Fifth Amendment rights. Basically, Mr. DeGrazia reaffirmed his original analysis of *Garrity*, stating that the Fifth Amendment Rights and the decision to exercise them belonged to the individual officers not the Chief. The City was merely a possessor of the documents. The City lacked the standing to object to the release, and the officers had not asserted their right to object.

Mr. DeGrazia recommended that law enforcement executives pay close attention to these types of situations. Why the Prosecutor felt it was so important to have the officers' statements is unknown. The law is clear that the statements cannot be used in a prosecution. The Prosecutor's possession of the statements would surely call into question the integrity of the criminal case and its probability of success. This could be very damaging in situations where the employees should be prosecuted for their actions. From an employee's point of view, it is advantageous to let the Prosecutor have the statement because it gives the defense a strong argument of impropriety by the Prosecutor, alleging that the evidence is the fruit of the poisonous tree.

Mr. DeGrazia noted that Court of Appeals ruled that the Chief has to release the *Garrity* statement if the Prosecutor requests it. The Court said the case involves producing statements not the improper use of the statement in a criminal proceeding, so the Fifth Amendment does not apply. Right or wrong the court has spoken. Until the next case arises, it is the law of the land. The good side of the ruling is that the Chief and municipality are out of the loop of liability for civil rights violations as a result of the release of the statements.

THE CONCEALED PISTOL LICENSING ACT

So much has changed with this law that the original LEAF Newsletter published in December of 2001 is outdated and is no longer accurate. The Michigan Legislature has addressed and/or modified most of the issues that LEAF raised in the Newsletter. There is one issue that has made its way through the courts that should be discussed. It is a Michigan Court of Appeals, April 29, 2003 decision titled *Michigan Coalition for Responsible Gun Owners v City of Ferndale*, 256 MichApp 401, with leave to appeal denied 688 NW 2d, 147 (table), 8/29/03. At issue in this case is whether local units of government are precluded from enacting and enforcing ordinances that make local public buildings gun-free zones. The City of Ferndale had enacted an ordinance that prohibited the possession or concealment of weapons in all buildings that the City owned or controlled. Ferndale said they had the ability to enact the ordinance under the Michigan Constitution and The Home Rule City Act.

Mr. DeGrazia noted that the Court of Appeals ruled that the Michigan Legislature enacted MCL 123.1101 *et seq.*, 1990, PA 319, Firearms and Ammunition, § 1102, to specifically prohibit local units of government from imposing, taxes, regulations or ordinance that put restrictions on the ownership, registration, purchase, sale, transfer, transportation, of possession of pistols or other firearms, ammunition for pistols or other firearms or components of pistols or other firearms. The Court went on to say that the specific language of the 2000 amendments of MCL 28.421 *et*

seq., Firearms, (Concealed Weapons Law) specifically does not repeal MCL 123.1101 and that the Ferndale ordinance is pre-empted by state law and is invalid.

EASTERN MICHIGAN U.S. DISTRICT COURT RULES BAY CITY ORDINANCE UNCONSTITUTIONAL

On November 18, 2003 the U.S. District Court for the Eastern District of Michigan held that it is unconstitutional for police officers to demand underage pedestrians to submit to a Breathalyzer without a search warrant. In *Spencer v. City of Bay City*, F.Supp.2d, 2003 WL22801139 (E.D.Mich. 2003), **The City of Bay City had an ordinance that followed State law and required underage drinkers to submit to a breath test upon demand of a police officer or face penalties.** If the BAC was above .02 the underage person was issued a citation and could be fined up to \$500 and the Secretary of State was notified. The Court ruled that taking a breath sample to test for a BAC in the circumstances of this case constituted a search within the meaning of the Fourth Amendment. There were no special needs that excuse the application of the warrants clause to this practice. Since the purpose of the breath test was to gather evidence of a violation of the City's criminal ordinance, it was a warrantless search with no exigent circumstances and was unconstitutional.

The Michigan Liquor Control Code at MCL 436.1703 (5) does allow that a peace officer who has reasonable cause to believe a minor has consumed alcoholic liquor may require the person to submit to a preliminary chemical breath analysis. A peace officer may arrest a person based in whole or in part upon the results of a preliminary chemical breath analysis. The results of a preliminary chemical breath analysis or other acceptable blood alcohol test are admissible in a criminal prosecution to determine whether the minor has consumed or possessed alcoholic liquor. A minor who refuses to submit to a preliminary chemical breath test analysis as required in this subsection is responsible for a state civil infraction and may be ordered to pay a civil fine of not more than \$100.00.

Mr. DeGrazia recommends that if municipalities have this type of ordinance they need to stop the practice of on demand PBT testing to obtain a BAC. Since the Bay City ordinance mimics the state law and is in violation of the Fourth Amendment right to be free from unreasonable search and seizure, it can be analogized that this section of law also is unconstitutional. DeGrazia went on to suggest that the Prosecutor responsible for handling these cases should be consulted before any further enforcement is taken under this or any similar law

A U. S. SUPREME COURT RULING -- HOT OFF THE PRESSES

A police officer stopped a car in Maryland for speeding at 3:16 am; searched the car, seizing \$763 from the glove compartment and cocaine from behind the back-seat armrest; and arrested the car's three occupants after they denied ownership of the drugs and money. In the U. S. Supreme Court case of *Maryland v Pringle*, 540 US 02, 809 (2003) decided on December 15, 2003, the Court held that the officer had probable cause to arrest Pringle, one of the occupants, and that the arrest did not disregard the Fourth or Fourteenth Amendments. The next day Pringle admitted to ownership of the drugs in a written confession after receiving his Miranda Rights. At trial, Pringle wanted to suppress his confession as the fruit of an illegal arrest, holding that the officer had no probable cause to arrest him. A jury convicted him and he got 10 years without parole.

The Court ruled that once the officer recovered five plastic glassine baggies containing suspected cocaine that they had probable cause to believe a felony had been committed as outlined by Maryland law prohibiting possession of controlled substances. The question was whether the officers had probable cause to believe that Pringle committed that crime. DeGrazia said the Court relied upon past rulings in *Brinegar v United States*, 338, U.S. 160, 176 (1949) and *Illinois v Gates*, 462 U.S. 213, 231 (1983) "Probable cause is a fluid concept—turning on the assessment of probabilities in a particular factual context – not readily, or even usefully, reduced to a neat set of legal rules". *Gates*, 462 U.S., at 232. The Court went on to say that in determining whether an officer had probable cause to arrest an individual, the Court examines the events leading up to the arrest and then decides "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause" *Ornelas v United States*, 517 U. S. 690, 695 (1996).

In this case, the officer found the cocaine in the backseat armrest that was easily accessible to all three men. When questioned, no one admitted ownership. The Court ruled that it is entirely reasonable, given the facts of this case, to draw the inference that all three of the occupants had knowledge of and exercised dominion and control over the cocaine. The Court went on to say a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly. In *Wyoming v Houghton*, 526 U.S. 295 (1999) the court ruled that passengers in a car will often be engaged in a common enterprise with the driver and have the same interest in concealing evidence of there wrong doing.

DeGrazia said the Court drew a parallel from *Houghton* to *Pringle* indicating that it was reasonable for the officer to

infer a common enterprise among the three men. The quantity of drugs and the cash indicated the likelihood of drug dealing to which it was unlikely the three men would admit.

The Court has given officers the ability to arrest all subjects in a small place, like a car, if the officers can articulate probable cause to believe all the occupants are involved in a “common enterprise” to commit a felony.

Mr. DeGrazia cautions that while this case gives law enforcement broad powers to arrest, the key to being able to support the arrest still remains in the ability of the officer to articulate the reasonable suspicion that led to the probable cause. When the Court broadens the ability of law enforcement to work to the common good of society through the extension of discretion, law enforcement executives must train their officers to the definitions and limits of that discretion. As he has said many times, DeGrazia emphasizes the importance of officers being able to define, in plain English, why they made the conclusions they made and what action they took as a result of those conclusions.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League’s, Loss Control Services at 800-482-0626, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our reader’s are encouraged to consult with their attorneys for specific legal advice.

Inside This Issue: **A FOLLOW UP ON ISSUES FROM PAST NEWSLETTERS WITH SOME NEW CASES THROWN IN!**



MICHIGAN MUNICIPAL LEAGUE LIABILITY & PROPERTY POOL
MICHIGAN MUNICIPAL LEAGUE WORKERS' COMPENSATION FUND

Sponsored by the Michigan Municipal League

Presorted Standard
U.S. Postage
PAID
Detroit, MI
Permit No. 2217

PO Box 2054
Southfield, MI 48037

Phone:
Risk Management Services – (800) 653-2483
Loss Control Services – (800) 482-0626, ext. 8036

Email:
Risk Management Services – jorr@mml.org
Loss Control Services – bbooker@meadowbrook.com

Knowledgeable and professional staff serving your needs consistently and with integrity.

We're on the Web!
www.mmlpool.org and www.mmlfund.org

Law Enforcement Action Forum
NEWSLETTER