California Bar Examination

Performance Tests and Selected Answers

February 1998

THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS

PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 1998 CALIFORNIA BAR EXAM

This publication contains two performance tests from the February 1998 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The handwritten answers were typed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

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California Bar Examination

Performance Test A

INSTRUCTIONS AND FILE

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Instructions

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States. Columbia is located within the jurisdiction of the fictional United States District Court for the Eastern District of Columbia and the United States Circuit Court of Appeals for the 15th Circuit.

3. You will have two sets of materials with which to work: A File and a Library. The File contains the factual information about your case. The first document is a memorandum containing instructions for the task you are to complete.

4. The Library contains the legal authorities needed to complete the task. The case reports may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing from the Library, you may use abbreviations and omit volume and page citations.

5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should

probably allocate at least 90 minutes to organizing and writing.

7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness and organization of your response. Grading of the subparts of the assigned task:

A - 70%

B - 30%

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MEMORANDUM February 24, 1998

TO: Applicant
FROM: Roberta Eisen
SUBJECT: City of Altaville - Altaville Police Department

As you know, I am City Attorney for the City of Altaville. I have been asked by Charles 0. Potter, the Chief of Police of the Altaville Police Department ("APD"), to advise him on the matter contained in a letter he recently received from the attorneys for the Altaville Police Officers League ("APOL"), the labor union that has represented the City's rank and file police officers for the past 15 years or so. That letter, dated February 4, 1998 from Jon Bales, is in the File.

Here's the situation. APD and APOL are currently engaged in negotiations for a new collective bargaining agreement (which, in their jargon, is called a memorandum of understanding or MOU) to replace the one that's about to expire. For some time, there has been a controversy over whether the police officers are entitled to be paid for their meal periods. APOL has decided to make an issue of it during these negotiations. Ordinarily, the police officers work five days a week in shifts of 8% hours, included in each of which is a half-hour meal period. It has been customary in the APD to treat the meal period as unpaid time and to pay the officers only for the basic 8 hours of work, plus, of course, whatever recognized overtime they might work. In fact, Chief Potter tells me that the existing MOU, as well as all previous ones, states that meal periods shall be unpaid. In the File you'll find some excerpts from the existing MOU.

The other day, I met with Chief Potter and talked about this matter and recorded our conversation. A transcript is in the File, along with some documents the Chief gave me. I've also collected some cases and other authorities that may bear on the subject. You'll find them in the Library.

Chief Potter wants me to sit in on the negotiations when they resume next week and to advise him on what the APD's rights and obligations are with respect to the dispute.

A. Please write a memo to me that discusses and explains the following:

- Under what circumstances is an employer of law enforcement personnel required to treat meal periods as paid time?
- In light of your analysis, has there been a violation of the requirement by the Altaville Police Department?
- Assuming there is a violation of the requirement, are the claims for relief for which APOL threatens to sue, as set forth in the letter from Jon Bales, available to it?

B. Once I understand the legal situation, I will be meeting with the Chief to discuss our upcoming negotiations with the Union. To assist me at the meeting, please write a memo discussing the options available to the APD that will meet the Chief's stated goals and address the demands set forth in the final paragraph of Jon Bales' letter.

TRANSCRIPT OF CONVERSATION WITH
CHIEF CHARLES 0. POTTER
FEBRUARY 19, 1998

Eisen: Hi, Chief. Nice to see you again. I've read Jon Bales' letter and the other documents you sent me yesterday. I get the gist of it, but I thought it best to meet with you to get filled in on the background and to get a better idea of just what it is you want me to do.

Potter: Well, this dispute has been brewing for a long time, but this is the first time APOL has threatened to do anything about it. Back in 1986, the Supreme Court came down with a decision that made the federal minimum wage and overtime law applicable to state and local government employees. Before that, public sector employees were not covered, so we never had to deal with the issue.

Eisen: That's the Garcia case mentioned in Bales' letter -- dealing with the Fair Labor Standards Act?

Potter: Yeah, I guess so. I've never really understood how it works, so I've never paid much attention to it. Our department personnel policy that sets out the ground rules for meal periods has always stated that meals are not working time. Besides, the MOU between my department and APOL has always provided that the officers are on their own for meal times and that it's not considered time worked, so, as far as I'm concerned, that's the end of it.

Eisen: Well, I don't know, Chief. You may be right. I'll have to do some research on that point. But what is it that APOL really wants?

Potter: Ever since that Garcia case, they've been claiming that they're entitled to get paid for their meal periods. Aside from the fact that I can't see why the APD should have to pay people for eating lunch, it would be a double hit on my already strained budget: not only would we have to pay each officer for another 2'/z hours a week, it would almost always be at overtime rates.

Eisen: What do you mean, at overtime rates?

Potter: Well, under our MOU, and I believe under the federal wage law -

Eisen: You mean the FLSA?

Potter: Yeah. Like I say, we are required to pay overtime at the rate of time and one half whenever an officer works over 40 hours a week. They get a half hour per shift for meals. If we had to count meal periods as time worked, that would mean that in a 5-

day week there'd be an additional 2 %2 hours at time and one-half. It would knock my budget for a loop.

Eisen: Let's suppose that Jon Bales is correct about what he says in his letter -- that the APD should've been paying for meal periods all along. What then?

Potter: Wow! That'll be a huge hit. If we had to, we might be able to start paying straight time for meal periods prospectively, but if we had to pay overtime for meal periods or a lot of back pay it would be a disaster! Can they go all the way back to 1986? And what's this business about "liquidated damages" Bales mentions in his letter?

Eisen: I don't think they can go back that far, but on both points I'll have to look into it and let you know exactly.

Potter: You know, I really thought this had all been taken care of back in 1987 when the City Council passed that resolution about overtime for the police officers.

Eisen: I was meaning to ask you about that. I saw it among the papers you sent me. What's that all about?

Potter: I don't pretend to understand it, but just after the Garcia case came down our previous City Attorney advised me to get the City Council to adopt something they called the "7(k) work period." Apparently, under the FLSA, if the governing body adopts such a resolution for law enforcement personnel, then the officers are somehow exempt from overtime for the first 171 hours they work in a period of 28 consecutive days.

Eisen: What was APOL's reaction to that?

Potter: They objected to it. They said it was contrary to the MOU, which says they're entitled to overtime after 40 hours a week. I never told the Union I would ignore the City Council's resolution. Instead, we kept paying overtime after 40 hours a week and never implemented the "7(k)" thing.

Eisen: Okay. Where do the negotiations stand at this point?

Potter: Aside from a few nits, the only major thing hanging up agreement on a new MOU is this meal period dispute. We've scheduled a negotiating session with the Union at City Hall for next week to try to work out an agreement on that issue. I'm not confident that I have enough knowledge about the law and what the position of the APD ought to be to handle the negotiations myself. I'd like you to be there and represent me and the department in the negotiations. It's a very important issue, but as important as it is, I don't want to give the Union the feeling that I'm trying to bust it or reduce the officers' income or cut back the police force. I want to stick to resolution of the meal period issue in a way that satisfies our legal obligations. In other words, I don't want to make proposals that threaten

the Union's interests on other issues.

Eisen: Yes, okay. I'll get up to speed, but let me make sure I know where you want to end up. In other words, what would be an acceptable result for you on the meal period issue?

Potter: I guess the best result would be for things to stay as they are. APOL's major objection seems to be that the officers are too tied down to their duties during meal times. I don't really think that's true, but if our position is weak on that point, I wouldn't resist changing the personnel policy so that the officers have fewer restrictions on their freedom during meal times.

Eisen: Does the personnel policy pretty well describe the restrictions the officers are under during their meal periods?

Potter: Not really. I mean, as a practical matter, an officer has to respond to a call at any time during his or her 8 % hour shift, whether it happens during lunch or any other time. I don't think it happens that an officer's meal period is interrupted as often as the Union claims. The other examples Bales puts in his letter are probably accurate enough.

Eisen: What about Bales' contention about the rules made by the supervising officers?

Potter: Yeah. That happens, but I've never tried to control that practice. It would be easy enough for me to put a stop to that. And to be honest, there are other rules - like what they can read at lunch - that we don't try to enforce.

Eisen: Well, are there any mealtime restrictions you can't give up?

Potter: Certainly. I can't allow officers to drink alcohol at meals or be seen sleeping in their cars or do personal errands using official cars. You know. Those sort of public image things.

Eisen: Okay. Anything else?

Potter: Well, as I've already said, we might be able to afford to change the MOU so that the officers would be paid straight time for meal periods from here on out. It would be a real stretch, but we might be able to squeeze it into the budget. However, I don't see how we would ever be able to come up with the money to pay for meal periods at overtime rates and back wages all the way back to 1986.

Eisen: Do you know what the comparative costs are of paying overtime under the MOU versus under Section 7(k??

Potter: I'll have someone figure it up and send you a memo.

Eisen: Okay. Let me get to work. I'll be in touch.

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February 4, 1998

Charles 0. Potter
Chief of Police
Altaville Police Department
City Hall, Room 329
Altaville, Columbia 94501

Re: Altaville Police Officers League Claim for Compensation for Meal Periods

Dear Chief Potter:

I write on behalf of my client, the Altaville Police Officers League ("APOL"), regarding an issue that has been festering for many years. It is our intention to resolve this matter once and for all, either by litigation or by good faith bargaining during our current negotiations for a new memorandum of understanding.

As you know, in 1986, as a consequence of the U.S. Supreme Court's decision in Garcia v. San Antonio Metropolitan Transit Authority, the Fair Labor Standards Act ("FLSA") became applicable to all public sector employees. The FLSA requires employers to compensate employees for all hours worked and to pay overtime at the rate of time and one-half for hours worked in excess of 40 a week.

Since 1986, APOL has consistently taken the position that, under the FLSA regulations, the officers employed by the APD are entitled to be paid for their meal periods. Discussions in an effort to convince the APD that the 30-minute meal periods allowed during each shift are compensable have gotten nowhere.

I will not repeat all the reasons we have proffered in support of our position that meal periods are compensable. The regulations promulgated by the U.S. Department of Labor provide that, unless "[t1he employee [is] completely relieved from duty for the purpose of eating regular meals," the meal periods must be treated as time worked and paid for at the appropriate rate. 1jp&, 29 C.F.R. Part 785.19(a).

The APD's own personnel policies (Policy No. 120.3, Hours Worked [1985)), which prescribe the highly restrictive conditions under which on-duty officers are allowed to take

a 30-minute meal period, make it abundantly clear that the officers are not "completely relieved from duty" during meal periods.

In addition to the written instructions, however, there are other circumstances and rules that the officers are subject to. For example: about 30% of the time, the officers' meal periods are interrupted by requests by citizens for assistance and ongoing crimes; the daily paper work burden is so heavy that the officers, as a practical matter, do their paper work at lunch; the dispatcher often limits the officers' choice of mealtimes because of the requirement in the personnel policy that the meal be taken at the "midpoint" of the shift; the APD makes the overtime approval process so burdensome that officers are discouraged from applying for overtime even for interrupted meal periods; and the supervising officers are always making their own ad hoc rules that result in even further restrictions.

Accordingly, in a typical 5-day workweek, the APD has been cheating its police officers out of 2'/$_2$ hours of overtime pay a week since 1986.

Unless this matter is satisfactorily resolved within 30 days, APOL will file suit against the City of Altaville and the APD under the FLSA and will assert the following claims for relief:

- Back wages at time and one-half for 2 % hours per week from 1986 to the present for each past and present police officer represented by the Union;
- Liquidated damages in an amount equal to the back wage recovery;
- An injunction prohibiting the City and the APD from refusing to pay for meal periods; and
- Attorney's fees.

I urge your department to reconsider its intransigent position and to propose a reasonable settlement which includes retroactive compensation and either prospective relief from the oppressive mealtime restrictions or an agreement to begin treating meal periods as compensable hours. Failing that, we will have no choice but to initiate litigation that will prove costly to the taxpayers of Altaville.

Very truly yours,

Jonathan Bales

Jonathan Bales

Personnel Policy No. 120.3 -- Hours Worked Revised: 3/4/85

Application: This policy applies to all non-management officers employed by the APD.
Purpose: To set forth the customary hours of work for non-management officers. Policies relating to hours of work during periods of emergency and other extraordinary circumstances are found elsewhere in this manual. Shifts: It is the policy of the APD to provide police and law enforcement services to the citizens of Altaville 24 hours a day, seven days a week. In order to carry out this policy, the workday is divided into three shifts, as follows:

- Day shift: Begins at 7:00 a.m. and ends at 3:30 p.m.
- Swing shift: Begins at 3:00 p.m. and ends at 1 1:30 p.m.
- Graveyard shift: Begins at 1 1:00 p.m. and ends at 7:30 a.m.

Overtime Hours: Non-management officers shall receive overtime compensation at the rate of time and one-half their regular rate of pay for all hours worked in excess of 40 in a week. The APD policies regarding .authorization and recognition of overtime for purposes of compensation are found elsewhere in this manual.
Meal Periods: Non-management officers are entitled to take a one-half hour meal period at or about the mid-point of each full shift worked. Meal periods shall not be counted as hours worked for purposes of compensation and shall be subject to the following restrictions:

- All meals shall be taken within the city limits of the City of Altaville;
- Motorcycle or patrol car officers shall, before commencing a meal period, call in to the central dispatcher to receive clearance to take a meal break;
- Beat officers shall call into the central dispatcher to advise the dispatcher of the commencement of a meal break;
- All officers shall advise the central dispatcher of the location where they are taking their meal break;
- All officers shall carry with them during meal break their assigned

portable radio communication devices, switched to the "open/receive" mode so that they can be contacted in the event their services are required;

- All officers shall respond immediately to any call received on their radio communication devices during meal breaks;
- All officers shall remain in uniform during meal breaks;
- All officers shall respond during meal breaks to any citizen request for information or assistance, to any emergency situation, to any occurrences of criminal activity, or any other situation to which they would be expected to respond during normal duty hours.
- Officers may not consume any alcoholic beverage during meal breaks.
- Officers may not-conduct personal errands during meal periods and shall not use official vehicles for non-official business.
- Officers may not, during meal periods, read any materials that do not pertain to their official duties.

EXCERPTS FROM
MEMORANDUM OF UNDERSTANDING
BETWEEN
ALTAVILLE POLICE DEPARTMENT
AND
PLTAVILLE POLICE OFFICERS LEAGUE

* * *

Meal Periods: Officers covered by this MOU shall have the right to take an unpaid meal period of 30 minutes in each 8-hour shift worked. Except where emergency or other extraordinary circumstances require otherwise, the meal period shall be taken at or about the mid-point of each shift.

* * *

Overtime Compensation: Officers shall receive overtime compensation for all hours worked in excess of 40 hours in any workweek. Such compensation shall be at the rate of time and one-half the officer's regular rate of pay. Authorization for and recognition of compensable overtime shall be in accordance with the policies set forth in the APO Personnel Policy Manual.

CITY OF ALTAVILLE
CHAMBERS OF THE CITY COUNCIL

RESOLUTION-No. 2-87

WHEREAS, by reason of a recent decision of the United States Supreme Court, employees of State and local governments have been made subject to the provisions of the Fair Labor Standards Act; and

WHEREAS, the City Council of the City of Altaville finds that it would be in the best interest of the taxpayers for the non-management police officers employed by the City to be subject to the partial overtime exemption under Section 7(k) of said Act;

NOW, THEREFORE, IT IS HEREBY RESOLVED that the City Council declares it to be the policy of the Altaville Police Department that, commencing immediately, non-management law enforcement personnel employed by said Department, shall, for purposes of overtime compensation, be employed subject to Section 7(k) of the Fair Labor Standards Act, such that they shall be entitled to receive overtime compensation only after they have worked more than 171 compensable hours in a 28-day work period.

DATED: February 14, 1987

Arnold Persoff

Arnold Persoff
City Clerk

ALTAVILLE POLICE DEPARTMENT

MEMORANDUM

TO: Roberta Eisen

FROM: Charles 0. Potter, Chief of Police

DATE: February 21, 1998

SUBJECT: Overtime Analysis - NIOU vs. Section 7(k)

Here is the analysis I said I'd send to you. The first line shows that the officers now work an average of 41 MOU compensable hours; if we have to pay, in addition, for 2 1 /2 hours of mealtimes our overtime costs will be $6,150 per week. The second line shows what our overtime costs will be if we implement a pure 7(k) approach without regard to the MOU.

	Average Weekly Compensable Hours	Total Weekly Overtime Expense
Overtime Under Current MOU:	41	$6,150
Overtime if §7(k) Implemented:	$43^1/_2$	$2,250

Obviously, the inclusion of the meal periods increases the average compensable weekly hours, but our overtime expense goes down until after 171 hours.

TUESDAY AFTERNOON
FEBRUARY 24, 1998

California Bar Examination

Performance Test A

LIBRARY

Altaville Police Department

LIBRARY

EXCERPTS FROM THE
FAIR LABOR STANDARDS ACT

Section 7(a) - 29 U.S.C. §207(a):

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is employed in an enterprise engaged in commerce for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

Section 7(k) - 29 U.S.C. § 207(k):

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in law enforcement activities if the governing body of such public agency makes an election to avail. itself of the exemption provided for hereby and if any law enforcement employee who is employed on the basis of a work period of not more than 28 consecutive days receives compensation at the rate of not less than time and one-half the regular rate at which he is employed for all hours worked in excess of 171 hours in any such work period.

* * *

Section 16 - 29 U.S.C. § 216:

Any employer who violates the provisions of section 206 or 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. The court in an action brought hereunder shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and the costs of the action.

* * *

Section 17 - 29 U.S.C § 217:

The district courts shall have jurisdiction, for cause shown, to restrain violations of sections 206 and 207 of this title, including the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act.

EXCERPTS FROM THE
PORTAL-TO-PORTAL ACT

Section 253 -29 U.S.C § 253:

Any cause of action under the Fair Labor Standards Act or any action commenced to enforce such a cause of action may be compromised in whole or in part, if there exists a bona fide dispute as to the amount payable by the employer to his employee; except that no such action or cause of action may be compromised to the extent that such compromise is based on an hourly rate less than the minimum wage required under the Act, or on a payment for overtime at a rate less than one and one-half times such minimum hourly wage rate.

* * *

Section 255 - 29 U.S.C. § 255:

Any action commenced to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages under the Fair Labor Standards Act may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

* * *

Section 259 - 29 U.S.C. § 259:

In any action or proceeding based on any act or omission, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act if he pleads and proves that the act or omission complained of was in good faith reliance on and in conformity with any written administrative regulation, order, ruling or interpretation of the U.S. Department of Labor.

* * *

Section 260 - 29 U.S,C. § 260:

In any action commenced to recover unpaid minimum wages, unpaid overtime, or liquidated damages under the Fair Labor Standards Act, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act, the court may, in its sound discretion, award no liquidated

damages or award any amount thereof not to exceed the amount specified in section 16 of said Act.

EXCERPTS FROM REGULATIONS OF
THE U.S. DEPARTMENT OF LABOR
(29 C.F.R. Parts 553 & 785)

§ 553.221 - Compensable hours of work.

The general rules on compensable hours of work are set forth in 29 C.F.R. Part 785 which is also applicable to employees for whom the section 7(k) exemption is claimed.

Compensable hours of work generally include all time during which an employee is on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such time includes all pre-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity, such as attending roll call, and writing up and completing tickets or reports.

Time spent away from the employer's premises under conditions that are so circumscribed that they restrict the employee from effectively using the time for personal pursuits also constitutes compensable hours of work.

An employee who is not required to remain on the employer's premises but is merely required to leave word at home or with agency officials where he or she may be reached is not working while on call. Time spent away from the employer's premises on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits.

* * *

,§5'53.223 - Meal time.

The public agency may, in the case of law enforcement personnel, exclude meal time from hours worked provided that the employee is completely relieved from duty during the meal period, and all the other tests in 29 C.F.R. 785.19 are met. On the other hand, where law enforcement personnel are required to remain on call in barracks or other similar quarters, or are engaged in extended surveillance activities (e.g., "stakeouts"), they are not considered to be completely relieved from duty, and any such meal periods would be compensable.

* * *

§ 553.224 - "Work Period" defined.

As used in section 7(k), the term "work period" refers to any established and regularly recurring period of work which, under the terms of the Act, cannot be more than 28 consecutive days. Once the beginning and ending of an employee's work period is established, it must remain fixed regardless of how many hours are worked within the period.

For those employees engaged in law enforcement activities, no overtime compensation is required under section 7(k) until the number of hours worked in the work period exceeds 171.

* * *

§ 785.19 - Bona fide meal periods.

Bona fide meal periods are not worktime. In order for the meal period to be excluded from work time, the employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.

It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

LAMON v. CITY OF SHAWNEE
QNJJED STATES COURT OF APPEALS 15TH CIRCUIT (1992)

Plaintiffs, fifteen current and former police officers of the City of Shawnee Police Department ("SPD"), brought this action in district court against defendant asserting violations of the Fair Labor Standards Act ("FLSA" or "Act"). Plaintiffs alleged that the City violated the Act's compensation provisions by failing to pay plaintiffs for meal periods occurring during work shifts. These issues were tried to a jury, which returned a verdict in favor of plaintiffs on the question of compensability of the meal periods. Based on the jury's further finding that the City had established a 28-day work period in accordance with the FLSA, the district court awarded liquidated damages, attorneys' fees and costs to plaintiffs.

I. BACKGROUND

The dispute arises out of the City's promulgation of new compensation policies for the SPD when the FLSA became applicable to state and local government employers in 1986. The City adopted Administrative Code No. 2-5, effective March 30, 1986, setting forth a 28-day work period and providing for overtime payment for hours worked in excess of 171 hours within the 28-day cycle. The 24-hour work day is divided into three slightly overlapping shifts of 8'/Z hours each. For each shift, the City pays for 8 hours of work, not compensating the officers for a 30-minute meal period, unless the meal period is interrupted by a call to duty.

In a 28-day period (based on four 5-day workweeks), SPD officers are entitled to 10 hours of meal periods in the aggregate.

Although the City's compensation policies only require overtime compensation for work in excess of 171 hours during the cycle, the SPD has never officially changed the practice of paying overtime for all work, excluding uninterrupted meal periods, in excess of forty hours per week, or 160 hours per 28 days.

An officer's meal period begins once the officer arrives at a luncheon location and reports in to the dispatcher, signifying suspension of patrol duty. During meal periods, officers are relieved of their patrol assignments, but are subject to call and are required to leave a telephone number where they can be reached or to monitor a portable radio. While on meal break, an officer must respond to emergency calls or personnel shortages if instructed to do so, and retains some responsibilities, such as responding to citizen requests

or inquiries, responding to crimes committed in the officer's presence and acting in a responsible and professional manner. Officers may take their meal breaks at any location within the City limits, or, with approval, outside the City at their homes or at restaurants within close proximity to the City. The officers may not conduct personal business errands during the 30-minute period, such as picking up laundry at the cleaners, getting a haircut or grocery shopping.

II. DISCUSSION

Pursuant to the FLSA, 171 hours is the maximum number of straight time hours a law enforcement officer may work in a work period of 28 days before the officer must be paid an overtime wage. Accordingly, in a 28-day period, a law enforcement employer may pay its police officers a regular, straight time wage for the first 171 hours worked.

Plaintiffs contend that, although the City may have adopted a 28-day work period on paper, the program was never put into effect, consequently making the 29 U.S.C. Section 207(k), (Section 7(k)) exemption unavailable to the SPD. That is to say that the City's mere adoption of Administrative Code No. 2-5 was nothing more than paying lip service to § 7(k).

Plaintiffs, however, fail to cite, and this court is unaware of any, authority supporting the contention that an employer, once having elected the § 7(k) option, may pay overtime only for hours worked beyond the 171-hour maximum. Plaintiffs' argument is based on the untenable notion that the City does not possess any rights under § 7(k) until it chooses to exercise them. There is nothing improper about a state or local government employer adopting the 7(k) framework in order to take advantage of the subsection's provisions. Even if defendant's sole purpose was to avoid the prospect of paying overtime rates for meal periods, plaintiffs do not demonstrate in what way that aim would be improper.

We now turn to the issue of the compensability of meal periods. As discussed below in detail, in the § 7(k) context a law enforcement employee is considered to be completely relieved from duty during a meal period when the employee's time is not spent predominantly for the benefit of the employer. FLSA requires remuneration for meal periods during which a police officer is unable comfortably and adequately to pass the mealtime because the officer's time or attention is devoted primarily to official responsibilities.

During meal periods, SPD officers are required either to leave a phone number where they can be reached or monitor a portable radio. In addition to responding to emergency calls, they must answer to personnel shortages if instructed to do so. Furthermore, an officer on meal break is obligated to respond to citizen requests or inquiries, to confront

crimes committed in the officer's presence and to act in a responsible and professional manner. In selecting a meal location, the SPD restricts its police officers to the city limits, or, with approval, to locations in close proximity to the City. Finally, officers may not conduct personal business errands during the meal period.

Based on those restrictions placed on plaintiffs, the jury returned a verdict for the plaintiffs on this issue.

The problem, however, is that the trial court allowed the jury to apply the wrong standard. The trial court's instruction on the law, relying solely on the language of 29 C.F.R. 785.19, charged the jury with applying a "completely relieved from duty" standard in deciding plaintiffs' entitlement to compensation for meal periods.

This was erroneous because it is 29 C.F.R. Section 553.223 that governs the compensability of meal periods for law enforcement personnel. Like § 785.19, this section requires compensation for meal periods during which an employee is not "completely relieved from duty." Not appearing in § 553.223, however, is the § 785.19 statement: "The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating." Furthermore, § 553.223 goes on to illustrate circumstances involving law enforcement personnel that cast a different gloss on the "completely relieved from duty" standard, citing examples of personnel required to remain on call in barracks or similar quarters or assigned to extended surveillance duties, such as stakeouts.

We find these differences instructive in determining the reach of the "completely relieved from duty" standard which appears in § 553.223. Hence, a police officer must primarily be engaged in work-related duties during meal periods to warrant compensation therefore. That a police officer is on-call and has some limited responsibilities during meal periods does not perforce mean the officer is working.

Instead, consistent with the language of § 553.223 and with traditional principles underlying the FLSA, a law enforcement employee is completely relieved from duty during meal periods, for purposes of § 553.223, when the employee's time is not spent predominantly for the benefit of the employer.

If during meal periods a police officer's time and attention are primarily occupied by a private pursuit, presumably the procurement and consumption of food, then the officer is completely relieved from duty and is not entitled to compensation under the FLSA. Conversely, a police officer is entitled to compensation for meal periods if the officer's time or attention is taken up principally by official responsibilities that prevent the officer from comfortably and adequately passing the mealtime. Which of these opposing conditions

prevails may, and probably will**,** vary from meal period to meal period.

The flaw in the trial court's instruction, relying as it did, exclusively upon the language of § 785.19, is that it countenanced the misapprehension that the performance of any official duty, no matter how insignificant, during meal periods rendered the time compensable. Whether the jury, if properly instructed, would have returned a verdict for plaintiffs based on these facts is questionable.

Finally, we address the issue of liquidated damages. Under § 16 of the FLSA, the court is empowered to award liquidated damages in an "amount equal" to the amount of the unpaid overtime found by the court to be due. The purpose of the award of liquidated damages is the reality that the retention of a worker's pay may well result in damages too obscure and difficult to prove or estimate other than by liquidated damages.

The penalty aspect of liquidated damages is, however, capable of mitigation under § 260 of the Portal-to-Portal Act, which allows an employer to "show to the satisfaction of the court that the act or omission ... was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the FLSA." Upon such a showing, the court, in its discretion, may refuse to award any liquidated damages or may, depending upon the degree of culpability of the employer's conduct, award any amount up to the amount of the back wage award.

The employer has the burden of proving both his good faith and the reasonableness of the grounds upon which he relied, and must be given the opportunity do so. In this case, the trial court awarded liquidated damages without giving the SPD an opportunity to present evidence on those issues, and for that reason we vacate the award of liquidated damages.

Accordingly, we AFFIRM in part, REVERSE in part, and REMAND for further proceedings consistent with this opinion.

BRINKHURST et al v MILBAUGH POLICE DEPARTMENT
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF COLUMBIA (1992)

Plaintiffs are present and former police officers of Milbaugh, Columbia. The case, before the court on cross-motions for summary judgment, presents three issues: (1) Whether the City of Milbaugh violated the Fair Labor Standards Act ("FLSA") by failing to treat the daily 30-minute meal periods allowed to officers of the Milbaugh Police Department ("MPD") as compensable time and to pay for them at overtime rates; (2) whether the collective bargaining agreement ("MOU") between the labor organization representing the plaintiffs and the defendant, which is silent on the question of payment for meal periods, prevents plaintiffs from asserting their claim for compensation; and (3) whether the applicable statute of limitations is two years or three years.

The only one of these issues the court can dispose of on summary judgment is the one relating to the impact of the collective bargaining agreement. The remaining issues are so inherently fact laden that they present disputed issues of fact that can not be disposed of on summary judgment.

I. The Impact of the MOU:

Defendant correctly states that, although the MOU in question grants the officers a 30-minute meal period during each shift, it does not mention the compensability of the meal periods one way or the other and that plaintiffs' bargaining representatives never raised the subject of meal period compensability during collective bargaining negotiations. Therefore, asserts defendant, plaintiffs are barred from raising their claim in this lawsuit. The court disagrees.

Every court that has considered the issue has held unequivocally that the rights guaranteed employees by the FLSA are not rights subject to contract. Rather, those rights are independent of, and superior to, contract arrangements between employer and employee. As plaintiffs point out, if the provisions of a pay plan or collective bargaining agreement run counter to the FLSA, the provisions are to be given no effect. Barrentine v. Arkansas - Best Freight Systems. Inc., U.S. Supreme Court (1981).

Accordingly, defendant's motion for summary judgment, insofar as it is based on this ground is denied.

II. Compensability of the Meal Periods:

Plaintiffs ordinarily work regularly assigned shifts of 40 hours a week -- five days a week, eight hours a day. Their work hours actually span a period of 8'/z hours a day, but

they are allowed an unpaid 30-minute meal period. They are paid overtime at the rate of time and one-half for all hours worked in excess of 40 hours a week in accordance with § 7(a) of the FLSA.' They allege that their meal periods are so much proscribed by restrictions and so frequently interrupted that they are not "completely relieved from duty" and that, therefore, they are entitled to compensation for the meal periods at the rate of time and one-half. Defendant acknowledges that certain restrictions apply to the officers during meal periods, but disputes both the extent and effect of the restrictions.

Plaintiffs rely on a regulation of the Secretary of Labor which states without reservation that, for a meal period to be non-compensable, "[the employee must be completely relieved from duty for the purpose of eating regular meals" and that "[the employee is not relieved if he is required to perform any duties, whether active or inactive, while eating." 29.C.F.R. § 785.19.

Defendant, on the other hand, asserts that the controlling regulation, in view of the fact that plaintiffs are law enforcement officers, is the regulation found in 29 C.F.R. § 553.223, and directs the court to the 15th Circuit's recent opinion in Lamon v. City of Shawnee (1992). According to Lamon, the relevant question is whether, during the meal period, the officer's time and attention are spent predominantly for the benefit of the employer. No compensation is required unless an "officer's time or attention is taken up principally by official responsibilities that prevent the officer from comfortably and adequately passing the mealtime."

This court is, of course, bound by the standard enunciated in, Lamon, but cannot apply that standard at this point in the case because of the factual disputes.

Plaintiffs proffer evidence that the following limitations placed on them during meal periods are specified in defendant's personnel rules and regulations and, in addition, are augmented by unwritten, informal rules enforced by their supervisors:

- They must contact a .dispatcher before being allowed to go on meal break;
- They may not request a meal break during the first two hours of a shift;
- The dispatcher may grant the request, subject to weather conditions, the availability of other officers in the "team area" and the level of police call load;

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[1] It should be noted that, although plaintiffs are "law enforcement employees" within the meaning of the FLSA, defendant is not asserting that the employees are subject to the partial overtime exemption provided for in § 7(k) of the Act.

- Unless they receive special permission, they may not leave their "team area" during a meal break;
- Their travel time to the place where they take their meal is included in the 30-minute meal period;
- They must remain in radio communication or be available by telephone during meal break; they may not take meals in buildings whose structures inhibit the functioning of their radios or where no telephone is available;
- For public relations purposes, only two police vehicles are allowed at any one location, and only a "few" officers are permitted in the same restaurant;
- They may not take meals in taverns, private clubs or pool halls;
- They remain subject to emergency calls and must respond to crimes committed in their presence during meals;
- They must respond to citizen requests and inquiries;
- Concern for proper use and care of police vehicles prevents the officers from carrying and consuming homemade meals in the cars;
- Although there is no written rule requiring it, officers are tacitly expected to remain in uniform;
- They must at all times "conduct themselves in a highly professional manner";
- They may not read during meal periods any materials that do not pertain to their official duties;
- There is no express prohibition against sleeping during meal periods, but the fact that they are required to monitor their radios during meal periods, in practical terms, prevents their taking even a brief nap;
- They may not conduct any personal business if to do so would involve the use of a police vehicle;
- They may not do such common things as shopping, getting a haircut or go to the dentist during mealtimes;
- Because of the paperwork load, officers frequently, by force of circumstances, are required to complete reports and other documents during meals; and
- The MPD informally discourages the submission of overtime requests for interrupted meal periods.

Whether plaintiffs' factual contentions will withstand scrutiny and cross-examination

remains to be seen, but if they do, a finder of fact is almost certain to conclude that the benefit conferred upon the employer by these restrictions overwhelms the ability of the officers adequately and comfortably to use meal periods for their own pursuits.

Thus, plaintiffs' motion for summary judgment as to the compensability of meal periods is denied.

III. The Statute of Limitations:

The statute of limitations applicable to actions for back wages under the FLSA is found in § 255 of the Portal-to-Portal Act, and provides that such actions must "be commenced within two years ..., except that a cause of action arising out of a willful violation may be commenced within three years ...."

The definition of "willful," as the term is used in this statute, has evoked a good deal of judicial discussion over time, but the almost universally adopted definition holds that it does not require proof of deliberateness and calculated intention to violate the law. Rather, this statutory concept denotes a situation where an employer has engaged in a practice that results in a violation of the Act under circumstances where the employer knew or should have known the requirements of the FLSA.

Not every violation of the Act can be characterized as a willful violation. If the employer acted in the honest belief that it had a valid justification or statutory defense for the disputed action, the violation can not be said to be willful, and this is true even though the perceived justification or defense later turns out to be untenable. The justification or defense must, of course, have a legitimate basis in fact or law and must not rest upon factual or legal arguments that are well-settled to the contrary. Oppenheimer v. Secretary of Labor, U.S. Supreme Court (1980).

The court cannot grant summary judgment on this issue because whether defendant acted willfully is a question of fact. Defendant, however, has the burden of proof on the issue.

Plaintiffs' motion for summary judgment urging the application of a three year statute of limitations is therefore denied.

ANSWER 1 TO PERFORMANCE TEST A

Memo re: Meal Time

I. What circumstances require mealtime to be paid

A. Statutory Authority

An employer is required to pay compensation at the rate of time and a half for any time worked over 40 hours. FLSA, 29 USC §207(a) To determine if, under the FLSA,, a meal time constitutes part of the 40 hour work week, one must look to regulations from US Dept. Labor §553.223 - Meal Time (CFR §553.223). According to CFR §553.223, "a public agency may, in the case of law enforcement personnel, exclude meal time from hours worked provided that the employee is completely relieved from duty."

B. Case Law

According to Lamon v. City of Shawnee, CFR §553.223 is the section that governs compensable meal time. Lamon has interpreted the language of §553.223 to set the standard as to what the officer's primary pursuit was during the meal time. If the officer is primarily engaged in private pastimes, presumably procuring and eating a meal, then the officer is basically relieved from duty and not entitled to compensation. However, if the officer is primarily engaged in work-related activity, such activity may warrant compensation.

1. What is work related?

The officers in the Lamon case were subject to certain restrictions during their lunch break. The officers had to leave a phone number where they could be reached or take their radio with them. Also, the officers had to respond to emergencies and citizen requests and crimes being committed in the officers presence. In addition they had to stay within the city limits or seek permission to go outside city limits. Lastly, officer could not conduct personal errands during meal time.

Even with all these restrictions, the court held that the officers' time during meal breaks did not predominantly benefit the employer. Rather, the officers were occupied by personal pursuits. So, it is not necessary that an officer have total freedom and no job related responsibility for his meal time to be his own uncompensated time.

2. When does meal time become work time?

It has yet to be conclusively determined how many restrictions equal too many restrictions and require an officer to be compensated. In Brinkhurst, the court articulated the Lamon standard of the relevant question being whether the officer's time and attention were being spent predominantly for the benefit of themselves or the employer. However, the court in Brinkhurst, faced with a list of 19 different restrictions placed on an officer's meal time, refused to grant a summary judgment motion.

Given the disposition of Brinkhurst it has yet to be determined how much control is too much by the employer. The Brinkhurst police officers faced the same restrictions as the officers in Lamon, but also many additional restrictions.

II. Violation by Altaville Police Dept.

The restrictions the Altaville Police Department placed upon the activities of the officers during meal time fall somewhere between the restrictions involved in Lamon and Brinkhurst.

All the restrictions present in Lamon are also present in the APD, and then some. However, the restrictions are not quite as numerous as those involved in Brinkhurst.

Given that Brinkhurst has not yet been resolved, the best we can do is analyze the nature of the restrictions enforced by the APD and make a conservative guess.

In addition to remaining in the city limits, and monitoring their radios so that they can respond to calls during meal time (all restrictions also present in Lamon) the Personnel Policy Manual requires that officers receive clearance from the Dispatcher for meals and remain in uniform. These additional regulations can be said to be of the same general character as keeping the radio on and acting in a professional manner (Lamon) so that the officers are available' if needed. They are not really any additional burden, just more explicit standards. The APD Personnel Manual also prohibits alcoholic beverage consumption during meal time. Though this is not articulated as a regulation in Lamon, it likely falls into the rubric of remaining professional and will not be viewed as restricting an officers private pursuits during meal time.

Lastly APD does not allow officers to read anything that does not pertain to official duties during meal time. This restriction is not in Lamon but is present in Brinkhurst. It is a factor that may lean toward too much restriction of an officer's private pursuit during meal time.

There are other factors not in the policy manual, but that Chief Potter admitted to being true: doing paperwork at lunch and overtime approval being burdensome. These factors are not present in Lamon but are present in Brinkhurst and tend to be of benefit to the employer to the point that they may dominate the primary pursuit during an officers meal time.

As I indicated before, because Brinkhurst has yet to be decided on its facts, its impossible to know if APD has violated FLSA.

Conclusion re violations

I would say that given the additional restrictions placed upon the APD officers, including doing paperwork at meal time, not being able to get overtime approval for interrupted meal time, and being subject to supervisors' ad hoc regulations, it is more likely than not that APD has in fact violated FLSA requirements.

However, given the undecided and unclear state of the law, I would argue in negotiations with APOL and to a tribunal that APD has violated nothing.

207(k) exemption

Even if APD is violating FLSA rules, its violations are limited by the City Council adopting 29 USC §207(k). 207(k) provides that law enforcement employees, employed on the basis of a 28 hour work week, are not entitled to time and a half compensation until they have worked in excess of 171 hours for that work period.

Lamon held that just because the city has not been enforcing the exemption, doesn't mean they waive it. The city may still take advantage of §207(k) even if to date they have not.

Accordingly, if APD is found to have violated FLSA regulations, it will only be to the extent that overtime was over 171 hours per 28 day work period; and not anything over 40 hours per week.

III. APOL Relief

29 USC §216 holds that an employer who violates the provisions of 29 USC §206 or 207 shall be liable to the employees for unpaid overtime compensation, liquidated damages, and attorney's fees. In addition 29 USC §217 allows the courts to issue an induction forcing APD to pay the compensation due.

However, the Portal to Portal Act provides a good faith exception, 29 USC §259, if the employer can prove his acts were in good faith and in reliance on US Dept. Labor rules or regulations.

Furthermore, 29 USC §260 provides that the employer acting in good faith may be relieved of the liquidated damages award in the courts discretion.

Back wages from 1986

The Statute of Limitations is 2 years, or 3 years for willful violations. §25.5 Portal to Portal Act. Given this time frame, APOL cannot recover for anything more than 3 years ago (1995). Willful means where the employer should have know the requirements of FLSA. In this case if APD can show a good faith belief that it was complying with the FLSA, APOL will be limited to the 2 year statute of limitations and only able to collect back pay for 1997 and 1996.

Liquidated Damages

It is in the judge's discretion to award liquidated damages or not. If the judge determines ADP was acting in good faith, the court may decide not to award liquidated damages or to award a lessor amount. ADP needs to demonstrate good faith. 29 USC § 260.

Injunction and Attorney's fees

The court may enjoin APD from future violations of FLSA and require them to make the back pay, in whatever amount is determined as owing. This is to be expected, as are

reasonable attorneys fees. 29 USC §2 16.

Memo for Union Negotiations

Avoid Litigation

Given that APD is likely to be held responsible for some amount of back pay due to violations of FLSA, it's in APD's interest to not litigate that issue.

Come into line with Lamon

Chief Potter has indicated that he can change the personnel policy to allow fewer restrictions during meal time and to do away with ad hoc supervisor's rules. He ought to offer to do this so that the officers do not feel as if their meal is spent working, and so that if this issue did go to litigation, APD has a stronger case that break time is predominantly the officers' private time.

Straight time not allowed

Under the FLSA, Chief Potter cannot offer to pay the officers just straight time for overtime. Brinkhurst indicates that the rights in the FLSA are not subject to contract.

Overtime

Chief Potter will have to pay overtime for meal time if it's determined that meal time is compensable. He should offer to begin implementing §207(k), while at the same time making meal breaks less restrictive.

Back Pay

Chief Potter wants to avoid back pay at all costs, though any judgment for back pay will likely only extend back 2 years, not all the way to 1986. Perhaps Potter can offer to pay time and a half for anything over 40 hours for a period of 1 or 2 ,years, and then implement the 207(k) exemption in exchange for APOL dropping the back pay claim.

Strongest Argument/Offer

Potter's best offer, if his budget can withstand it, is to make meal time less restrictive (coming into line with Lamon) so that in the future there is no doubt that meal time is non-compensable. In addition, to make amends for past FLSA violations (which APD is likely guilty of) to continue paying overtime for anything over 40 hours a week, for a period of time - perhaps a year or 18 months, then to start with the 207k exemption after that time period.

In this way, APOL won't feel as if it's getting nothing, and APD won't be on the line for 2 years of back wages plus liquidated damages and attorney's fees. Chief Potter is giving up the right to the 207k exemption for a time period, and APOL is giving up a chance at a back pay award. Further, Chief Potter should downplay the possible liability under FLSA and play up the unsettled state of law and risk involved in APOL pursuing a claim in that area.

ANSWER 2 TO PERFORMANCE TEST A

Memorandum A

To: Robert Eisen
From: Applicant
Re: FLSA Meal Time Compensation Requirements

I. Circumstances where Altaville Police Department are required to treat meal time periods as paid time for its law enforcement Personnel

Under the Fair Labor Standards Act (FLSA), the minimum wage and overtime laws are to be applied to the APD and require per §553.221, §553.223, and §785.19 that unless an law enforcement employee is "completely relieved" from duty during his/her meal time (in this case '/z hr per shift) the employee is entitled to compensation. Specifically, §553.223 provides that a

> "public agency can exclude meal time provided that the employee is completely relieved from duty" during the meal time."

Taken alone, this regulation might suggest that absolutely no work of whatever kind can be required of the employee without subjecting it to compensation. However, the 15th circuit in Lamon clearly pointed out that §553.223 cannot be read in a vacuum and must be interpreted in light of §785.19 or §553.221.

Section 785.19 states that bona fide meal periods are not worktime, but an employee is "not relieved" from duty "if required to perform any duties, whether inactive or active while eating." Id.

However the court in Lamon found that such broad brush is not what the regulations truly require in light of §553.221 which gives illustrations of duties a police officer can be engaged and not be considered working during meal time. For example, 553.221 states that being required to be "on call" or if employee is permitted to leave the premises without further restrictions do not necessarily restrict an officer enough to require compensation.

On the other hand, §553.223 strongly suggests illustrations which do not relieve an officer - on call while in the barracks or doing surveillance. Over all Lamon, taking all the statutes combined, requires a "police officer is entitled to compensation for meal periods if the officer's attention is taken up principally by official responsibilities that prevent the officer from comfortably and adequately passing the mealtime." If the officer's time is principally taken up by "private pursuit," (the procurement of food) then the officer is not entitled to compensation.

It should be noted at the outset, the fact that the MOU says that meal time is unpaid is not relevant to whether APD has violated FLSA. See Brinkhurst. (Rights guaranteed to employees under FLSA are not subject to contract). It may be relevant to APD's good faith, however. This will be discussed infra at III.

II. APD violates FLSA:

With respect to the FLSA standard (as interpreted by Lamon) here based upon Bales' letter and what Chief Potter could tell us, it is likely that APD will be required to provide compensation for meal time to the extent a system can be implemented to determine when an officer is using meal time for principally APD duties versus "private pursuit."

Assuming Bales has accurately described the employees' conditions during meal time, it is likely that most officers are being required to "work" during meals and are not "completely relieved" as required. Officers are required to respond to calls during meals, to assist citizens when requested or respond to crimes regardless of whether meal time or not. Bales claims that 30% of the time officers are required to respond to such requests. Moreover, because of the burden of police paper work officers (when not responding to citizens requests or crimes) are using meal times to do the paperwork.

I don't believe when a dispatcher permits the 30 min. meal is relevant, because it is unpaid if the content of the time is for purely personal pursuits. Timing of the break is irrelevant to the standard.

Bales also contends that the overtime process alone is burdensome. Again that is really not relevant to whether an officer is relieved or not during the meal. If anything, permitting overtime pay for meal time will only increase the paperwork:

APD's policies regarding work during meals gives more insight into the activities (or lack thereof) that can be required of an officer, although Chief Potter said some are not enforced, such as the policy that an officer can only read work related materials during meal time. If this is not a real policy and APD does not want to pay for meal time, this would be the first policy I would eliminate. I would break down the activities into ones that suggest meal time pay is required and a second category for those that have no real impact in the issue.

Category 1): Policy that can restrict a police officer's activities during meal time sufficient to require meal time pay.

All officers shall respond immediately to any call

All officers shall respond to citizen request or any emergency

Police Officers may not conduct personal errands during meal periods

Officers may not read materials that do not pertain to duties

Each of these clearly either take away "private pursuit" directly or require the taking away if it occurs. If any officer has to respond immediately to citizens, emergencies, the dispatcher "as if" not a meal time, then clearly officers are not relieved and must be paid.

Category 2): policies that do not directly interfere with police officer's private pursuit during meal time are:

Taking meal within City limits
Calling - in to dispatcher, to receive clearance
Advising disposition of location
Carrying their radios
Not permitting drinking alcoholic beverages
Remaining in uniform
Not using police cars for personal errands

None of these directly (or indirectly) in and of themselves impair a police officer's ability to pursue private matters during a meal - which is only 30 minutes. An employee can be on the police quarter premises and be "completely relieved" - see 553.221 - it depends on how circumscribed their behavior really is - on or off "duty".

Thus, if the APD police officers are truly limited or circumscribed in their behavior during meal time that does not allow them to pursue private matters, then compensation is due.

111. Assuming that the APD violates FLSA. what claims of relief do the employees via APOL have?

A. APD is only liable to violations occurring in the past two years

It is clear under the Portal to Portal Act that any action for unpaid compensation due under FLSA must commence within 2 years after the cause of action accrues. §255; 29 U.S.C.; §255. If the court finds a "willful" violation then the statute of limitations is 3 years. Id. Thus, the first thing to mention is that APD will not be liable for violations which occurred back to 1986 even if it could be proven.

Although overtime pay for meals has been "debated" between APD and the union, it is unlikely that APD will have been found to willfully violate the statutes. This is especially true in light of the fact that it is not involved in the MOU. Moreover, as will be discussed more fully infra, APD probably has been paying more overtime than required because of the City's adoption of 7(K) exemption under FLSA (no overtime until 171 hours worked in 28 consecutive days)

Thus, at best the union may be able to recover unpaid meal time compensation for 1996 and 1997 (the past 2 years).

B. Under Lamon and the 7(K) exemption. the city would only be required to pay regular time for meal periods under 171 hours in a 28 day work period.

In 1987 the City of Altaville passed resolution No. 2-87 opting to take the 7(K) exemption under FLSA. It provides that employees only get overtime for hours worked in excess of 171 in a 28 day work period. This is true despite the fact that the MOU and police policy and practice has been to pay overtime for all work in excess of 40 hours in a week (or 160 hours per 28 days). In Lamon even though the 7(K) exemption was never

implemented the court held that it is not required to pay overtime in excess of 171 hours, per 28 days. Similarly, here even though 7(K) was not implemented (even Chief Potter was under the belief that the City never passed it) the court will not require overtime pay (for meals not completely relieved) in excess of 171 hours. Hours up to 171 get regular pay.

C. APD Employees are not entitled to Liquidated Damages because it acted in Good Faith

Under §260 of the Portal-to-Portal if the employer (here APD) can prove that it acted (or failed to act) in good faith and had reasonable grounds for believing acts/omissions did not violate Act than the court can refuse to award liquidated damages (equal amount of unpaid compensation due).

Here, APD could prove it acted in good faith because it did not believe it was required to provide mealtime pay under its MOU and it has in fact been paying a substantial amount of overtime (the difference between 171 hr month and a 160 hr month) since 1986. Chief Potter has made clear that it would like to comply with the law and he will make a good witness that due to budget constraints and ignorance of its rights/obligations it did not comply. But see Brinkhurst (willful if employer know or should have known of violation if FLSA).

D. Compensation

If officers were not completely relieved during these meals and such work would have been overtime under 207(a) or 207(k), the court can require payment for compensation due and require the city to pay all fees. It will also be enjoined if it continues to violate FLSA. See 29 USC §217.

Thus, all the claims of relief by Bales are not necessarily available. To the extent meal time must be paid at regular or overtime rates, it only needs to pay 2 years back. It is unlikely that the city will have to pay liquidated damages. It may be required to pay attorney fees and could be subject to injunction if it refuses to pay unpaid time.

Memorandum #2

To: Roberta Eisen
From: Applicant
Re: Options available to APD

It is clear from the transcript that Chief Potter has conflicting goals and objectives and that the demands on APD may prohibit it from fully acquiescing to Bales' demand. Chief Potter has identified 3 goals.

1) Negotiate in good faith to obtain resolution in such a way that satisfies legal obligations (in past)

2) Live within budgetary constraints

3) Develop standard for future compliance (future)

OPTIONS:

It seems to me that we can assist Chief Potter in working out a solution that satisfies all concerned.

First, I would recommend that the Chief admit that certainly in some circumstances officers are not being permitted to use their meal time for purely personal pursuits. To the extent the police officers can't, they will not be paid. If, however, they are asked to perform duties during their meal they will get paid regular compensation up to 171 hours for a 28 day period. Lamon permits such result despite MOU and past practices of paying overtime in excess of 40 hr week/160 hour month. If an officer exceeds 171 hours and is required to work during a meal period than he/she will be entitled to overtime.

Second, consistent with this policy change the Chief should offer to compromise the past claims (for 2 years) in accordance with §253 of the Portal-to-Portal act. All the numbers would have to be worked out, but Chief's Feb. 1998 memo showing the difference in overtime should get the parties started. It should be emphasized that some OT pay was paid that APD was required to under it 7(K) exemption.

Third, the Chief would be willing to discuss ways to relax the policies regarding an officers use of meal period. It is unlikely that Chief will give up on the requirements of no alcohol, no personal errands in patrol cars or permitted sleeping. Public safety and appearance are still the Chief's main concern. He is probably willing to eliminate the 'read only work material' requirement altogether.

Fourth, because this is a public entity there are budget constraints and anything that can be done to allow more personal freedom of the officers during meal periods will be considered, with public safety in mind. However, if an officer is required to work - answer calls of dispatch, respond to crises, or requests or emergencies or must perform paper work required during the meal period, there must be a procedure set up to monitor this and assure that the city is paying for work actually done. The city will not just start paying for that %2 hour. The police officer must be working in order to be paid.

Points 1 and 2 should address Bales' demands as well as the points raised in Memo#1. It should be noted that the city will only compromise the employees claims that may exist for past 2 years because the city has a valid statute of limitations defense. It will also raise the 7(K) exemption and only compensate at the regular rate up to 171, then overtime. It should get an offset for overtime paid (between 171 and 160 hours) as well.

THURSDAY AFTERNOON
FEBRUARY 26, 1998

California Bar Examination

Performance Test B

INSTRUCTIONS AND FILE

F&R v. Michael Klarce, et al.

F&R v. Michael Klarce, et al.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States. You are an associate to a senior attorney appointed as a Special Master to resolve a "Superfund" cleanup case.

3. You will have two sets of materials with which to work: a File and a Library. You will be called upon to distinguish relevant from irrelevant facts, analyze the legal authorities provided, and prepare a legal memorandum from the senior attorney (Master) to counsel for the parties, and a settlement proposal letter from the senior attorney (Master) to counsel for the parties.

4. The file**.** contains factual information about your case in the form of five documents. The first document is a memorandum to you from Susan Easterly containing the instructions for the two tasks you are to perform.

5. The Library consists of four cases. The materials may be real, modified, or written solely for the purpose of this examination. Although the materials may appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that the cases were decided in Columbia on the dates shown.

6. Your documents must be written .in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the and Library provide the specific materials with which you must work.

7. In citing cases from the Library, you may use abbreviations and delete citations.

8. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing your documents.

9. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, organization, and persuasiveness of the documents you write. In grading the answers to this question, we anticipate that the following, approximate weights will be assigned to each part:

A: 60 %
B: 40 %

Rice, Lichtstein & Nawoc
1200 Meade Meadow Plaza
Redding, Columbia

MEMORANDUM February 26, 1998

To: Associate
From: Susan Easterly
Re: Special Master in F&R v. Michael Klarce. et al.

Because of my service as chair of the Alternative Dispute Resolution Committee of the Columbia Bar Association, Federal Judge Robert D'Force appointed me as Special Master under the Federal Rules of Civil Procedure in Frackville & Redding Railroad v. Michael Klarce. et al., a cutting edge environmental law case pending in the Southern District of Columbia. This case concerns the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), popularly known as "Superfund." Under CERCLA, sites contaminated with toxic substances are designated by the government for cleanup. The parties responsible under CERCLA for the discharge of the hazardous substances are charged with the cleanup costs.

The plaintiff railroad (F&R) sued individuals who were officers, directors, or shareholders of A.L. Klarce Company, a company that for many years manufactured railroad ties treated with creosote, a hazardous substance. The land on which the company's facility was located was designated by the U.S. Environmental Protection Agency (EPA) as a priority "Superfund" site. F&R, the former owner of the Klarce property, has been sued by the EPA and entered into a consent decree to clean up the site at a cost of several million dollars. F&R, in turn, now seeks contribution from the defendants under CERCLA.

I have no authority to impose a settlement. Rather, my role as Special Master is to facilitate a settlement regarding "Superfund" contributions as among the plaintiff and the several individual defendants. Thus far, I have arranged a negotiated agreement between the plaintiff and all defendants except Jose Cabranes, a shareholder and director of the now defunct A.L. Klarce Company.

Cabranes' remaining assets may be sufficient for a settlement if F&R can somehow get to any

other assets of his, if F&R uncovers nondisclosed assets, and if Cabranes doesn't walk away with the site, after F&R has paid $20 million to clean it up.

I want you to do two things. First, write a memo for me to send to counsel for F&R and Cabranes analyzing the legal meaning of "owner or operator" under the CERCLA, and then applying that meaning to the facts of this case. Your memo is to be from me to counsel for the parties; please do not write a memo to me evaluating Cabranes' potential liability. The purpose of this memo is to inform the parties that I believe there is some likelihood that the defendant Cabranes will be found individually liable as an owner or operator if the case does not settle and proceeds to trial. At this point, I'm not sure how likely it is. I'm relying on your memo to communicate to the parties whether it is certain, very likely, likely, somewhat likely, or unlikely that Cabranes will be held liable.

Neither our federal Circuit nor our District Court has ruled on when the corporate structure can be ignored and officers, directors, and shareholders held liable under CERCLA. The other federal District Courts of Columbia have written on the subject and I have collected those recent cases in the Library. I have also included a recent opinion of the Columbia Attorney General that bears on the subject.

The second task is to write a letter from me to the two lawyers in which I set forth a specific proposal for settling the dispute. You can get some ideas for potential settlement mechanisms from the settlements entered into with the other defendants. You will notice from the file that there is a controversy over the veracity of Cabranes' financial statement. This is a problem, but maybe a settlement could be structured in a way that gives F&R an opportunity to verify the statement. It is my sense that Cabranes' interest in the Klarce property offers the most flexibility for crafting a settlement. In any case, use your ingenuity and draft a settlement proposal that has the following characteristics:

a. It is viewed by both sides as fair and plausible;
b. It takes into account the needs, interest and resources of the parties;
c. It factors in the estimate of liability you set forth in the memo referred to above; and
d. It articulates the major and essential elements of the proposed settlement.

As I said, I have no authority to force settlement. This proposal, therefore, must be persuasive to both sides.

F&R v. Klarce

Special Master's File Notes

MEMORANDUM January 27, 1998

To: File
From: Susan Easterly, Special Master .
Re: Summary of Case

In the period since my appointment as Special Master in this case, I have reviewed the pleadings, studied the federal cases collected in the Library, conducted a joint meeting of all counsel, met individually with each party and his attorney, and reviewed verified financial statements filed by each defendant.

History of A.L. Klarce Co.

The A.L. Klarce Co. (Company) was a family owned business founded in Columbia in 1922 and organized as a close corporation. The founder, A.L. Klarce, was its longtime president. Members of the family or close friends served as the only members of the Board.

In 1939, at the request of F&R Railroad, the Company constructed a wood treatment facility on 35 acres of land owned by F&R along its right-of-way between Redding and Frackville. The Company treated railroad ties with a heated mixture of creosote and coal tar, stored the ties on other parts of the same property, and exposed the ties to the elements to dry out before they were delivered to various customers. F&R was the Company's largest customer, purchasing up to 30% of output for many years.

Over the course of the Company's 40-odd years of operation, the soil and vegetation on the land on which the ties were stored became saturated with the hazardous by-products of the creosoting process. In 1970, A.L. Klarce died and his son, Michael, then a vice-president of the Company and a member of the Board, assumed the presidency. In 1974, A.L. Klarce Co. purchased from F&R the 35 acres on which the treatment facility was located. During the mid-

1970s, studies by the Columbia Department of Environmental Resources (CoDER) determined that rain runoff from the creosote soil eventually drained into the Frack River.

Under weaker management under Michael Klarce, the Company came to the brink of financial disaster. In 1980, Michael Klarce sold all but 100 shares of the common stock in A.L. Klarce Co. to a group of investors (the Group) for $500,000. The Group consisted of Kurt Marcus, Clark Williams, and Jose Cabranes. Each member of the Group received 1,500 shares of stock and each became a member of the Board. Kurt Marcus served as president and operations director of the business. Michael Klarce remained with the reorganized company for 15 months, during which time he was the primary contact for environmental matters.

The Company's debt was restructured through the National Bank of Columbia (NBC), with the members of the Group listed as the guarantors on promissory notes totaling $1.3 million and secured by a first mortgage on the Company's 35-acre treatment facility.

In early 1987, A.L. Klarce Co. filed for relief under Chapter 11 of the Bankruptcy Code. A short time later, NBC filed suit against the Group as guarantors on the A.L. Klarce debt.

The NBC suit was settled when the Company agreed to pay the bank $575,000. A member of the Group, Jose Cabranes, supplied the $575,000. In return, Cabranes was assigned NBC's promissory notes and the first mortgage.

The Company attempted to continue operating, but, in 1988, CoDER revoked the Company's permit to operate after EPA placed the site on the Superfund Priorities List. In July, 1988, the Company ceased all operations. Cabranes still holds the promissory notes and the mortgage on the property, which is the only remaining viable asset of the Company.

CERCLA Action

In 1988, the EPA notified F&R Railroad that it was a "potentially responsible party" (PRP), and therefore strictly liable under Section 107 of CERCLA for the costs of the clean-up of the Klarce site, because F&R owned the property until it was sold to A.L. Klarce Co.

Recognizing that it is the only available "deep pocket," F&R, under the threat of litigation,

agreed to conduct and fund clean-up response costs at the site. To date, F&R has spent $2.28 million in prior response and clean-up costs. Estimates of the total cost of on-going work to clean up the site run from $8.5 to $22 million.

F&R has brought this action under Section 113(f) of CERCLA seeking contribution from Michael Klarce and the three other members of the Group as "other parties . . . liable or potentially liable under Section 107."

Meeting with Counsel for All Parties

At this meeting, I informed counsel that there was no doubt that CERCLA liability had attached and that F&R was entitled to contributions from any other "owners or operators" of the Company. The case came down to a determination as to whether any or all of them were "owners or operators" under CERCLA.

Counsel for Michael Klarce and the Group agreed with my assessment, but asserted that their clients were not owners or operators because each was protected by a corporate framework. They suggested that the combined costs of litigating this novel matter in the Southern District would exhaust their clients' limited financial resources and exceed the total dollars available to F&R.

I pointed out to the defendants that, even if each were held to be only 5% responsible, it would mean a judgment that could run from $425,000 to $1.1 million depending on the cost of cleanup. Recognizing, however, that the ability to pay was a practical constraint on settlement, I ordered each defendant to send me a verified financial statement and a detailed estimate of their litigation costs that I would review and share with the other parties. I will meet with each of the parties privately after I receive these data.

Michael Klarce

Michael Klarce conceded that he was likely to be found to be an "owner or operator." As the president of the Company for a decade, he was deeply involved in the day-to-day management of the Company and was personally responsible for environmental issues.

Klarce's financial statement showed a net worth of $1.65 million comprised primarily of real estate and stocks and bonds. He offered $50,000 to settle the case and claimed that his litigation costs would run about $80,000.

Kurt Marcus

Kurt Marcus served as president from the time the Group took over and was involved in all management activities, including the ever-growing environmental problems.

Marcus is resigned to paying something to F&R because he was "the operational guy" in the Group. He said that Williams was "just an investor who never came around" and that Cabranes was the "guy with the money when we needed it."

Marcus is retired and living in Florida. Virtually all of his assets (home, auto) are protected from seizure and he is living on Social Security and a small annuity. His financial statement reveals little in the way of assets.

Marcus offers to settle with the Railroad for $20,000, payable $5,000 in cash and $3,000 per year for five years.

Clark Williams

Williams is terminally ill and cannot participate in these proceedings.

While Williams' financial statement reveals liquidity of about $225,000, his lawyer says that the money will be needed to take care of his medical expenses.

Counsel claims it is very unlikely that her client will be found to be an owner or operator. Williams invested $150,000 in the purchase of A.L. Klarce. He went to no more than one or two Board meetings a year through 1986, sending his proxy to Jose Cabranes when Williams did not attend. After the onset of his disease, he never went to a meeting or otherwise participated in the business. The only thing he did at Board meetings was to "vote when Jose told me to and sign a paper if I was asked." On behalf of her client, counsel made a $5,000 offer of settlement because of its "nuisance value."

Jose Cabranes

Cabranes borrowed on a trust expectancy to get his original $150,000 investment. When he saw his "investment crumbling under oppressive environmental regulations and the lies of Michael Klarce," Cabranes dug deeply into the corpus of his recently matured trust to put up the $575,000 to pay off NBC. Now all he has to show for it is "an expensive lawsuit, a sheaf of worthless notes and a worthless mortgage."

Cabranes claims that the $1.75 million he received when his family trust was distributed in 1993 is "gone," taken up in taxes, investment in A.L. Klarce, his divorce settlement, his kids' education and the like. Cabranes now works in sales and earns about $50,000 per year. He is willing to make a "token offer" of $10,000 to "get rid of it." He expects his legal fees to defend the suit will approach $50,000. He doesn't know how he will "pay the bill."

Cabranes claims he was nothing more than the "biggest investor" and a member of the Board. Although he was a "nominal officer" from time to time to fulfill legal formalities, he "never ran any part of the operation." He admitted he tried "darn hard to protect" his investment by "asking a lot of questions about the environmental problems and suggesting some alternatives." Marcus, however, was the "operator of the business." Cabranes wanted to foreclose on the mortgage, but he was advised by his lawyer that such action "might cost me more because I would own a Superfund site."

The Railroad

John Novak, the CEO of F&R, sees this dispute in simple terms. The Railroad is "stuck for $20 million because these guys didn't know how to run their business." He's particularly upset about paying $20 million to clean up the site and "let them keep what will be a valuable piece of property." He realizes that the defendants do not have enough funds to "make a real dent in our clean-up costs." Nevertheless, he owes it to his shareholders to "pursue each of them to the fullest, even the guy who's on his death bed."

Based on the advice he's received from counsel, Novak believes that all the defendants are liable as "owners or operators." Klarce and Marcus were "in charge of manufacturing, selling and managing" for the Company. Cabranes was a "shadow president and a shadow environ-

mental auditor who second-guessed all decisions." Williams "wasn't as involved but, he signed off on all the major decisions that led to continued discharge of hazardous materials."

Based on F&R's analysis of the submitted financial statements, his demands are:

Michael Klarce	$500,000
Kurt Marcus	$100,000
Jose Cabranes	$1,000,000
Clark Williams	$100,000

Novak estimates that F&R's attorney fees and other costs for litigation and collection, the transactional costs, will exceed $100,000 if the case goes to trial.

F&R v. Klarce
Special Master's File Notes

MEMORANDUM February 7, 1998

To: File
From: Susan Easterly, Special Master
Re: Report of Partial Settlement

After 15 hours of negotiation, the plaintiff and three of the defendants have reached individual settlements. I excluded Cabranes and his lawyer from the session because they have refused to budge from their refusal to consider a purely token offer. Following is a summary of the agreements.

Michael Klarce will pay F&R $350,000. Upon signing the agreement, Klarce will turn over $150,000. The balance will be paid in annual installments of $40,000. Payment will be secured by a mortgage on Klarce's home *which is* free of any encumbrance and is valued at $550,000. Klarce's spouse will co-sign the mortgage.

Kurt Marcus will pay F&R a total of $50,000. An initial $10,000 payment will be followed by payments of $5,000 per year for eight years. Settlement is conditioned on Marcus' ability to obtain a $20,000 equity loan on his home. The installment payments will be secured by a mortgage on his home which will be subject to a pre-existing first mortgage and the proposed equity loan. The equity in the Marcus home presently is $40,000. Marcus' spouse will sign the mortgage.

Clark Williams will pay F&R $25,000 in cash.

Hardy & McGuire
Attorneys at Law
19191 Columbia Avenue
Park City, Columbia

January 22, 1998

Susan Easterly, Esq.
1200 Meade Meadow Plaza
Redding, Columbia

RE: F&R v. Klarce, et al.

Dear Ms. Easterly:

As you know, Mr. Cabranes received $1.75 million from a family trust in 1993. Apart from income derived from his $50,000 annual salary, it represents his only source of income in recent years. The trust funds and his net salary for the past five years were spent as follows:

$485,000	State and Federal taxes
575,000	Financing A.L. Klarce's debt reorganization
150,000	Repaid principal of original A.L. Klarce's investment - Columbia Mutual Bank
200,000	Ex-wife (divorce settlement)
85,000	Repaid loan to Bruce Gann
15,125	Down payment on condo
12,000	Closing costs
17,500	Gift and engagement ring (Ann Halsey)
10,000	Auto for son
7,500	Auto for daughter
24,000	Auto for self (Jaguar)
42,000	Investment in second mortgage (Blenex)
150,000	Unsecured loan to Bruce Gann
58,500	Child support
25,500	Legal fees (divorce and present case)
6,000	Travel
4.500	Pay off ex-wife's auto loan
$1,867,625	TOTAL

Available for your examination are certain materials which verify this financial information, including tax returns from 1993 to date, the HUD-1 settlement form for his residence, the divorce decree and property settlement agreement.

Mr. Cabranes has established an educational trust for the benefit of his children. . He has funded the trust by depositing in it the Blenex mortgage and the promissory note from the $150,000 loan to Bruce Gann. The trust is designed to insure Cabranes will be able to meet his legal obligation incorporated in his divorce decree to pay for the education of his children over the five years. To cover all anticipated expenses, he plans to add funds in the future. The trustee, Bruce Gann, now controls the trust. The only interest Cabranes has is a remainder in the event funds are left over after all educational expenses are paid for.

Mr. Cabranes is engaged to marry Ms. Halsey. His marriage will have an impact on the ability of creditors to reach his assets. He intends to transfer all property possible to a tenancy by the entirety. Under Columbia law, such property acquires protection from attachment or lien.

Please let me know if you wish additional information.

Sincerely,

Scott King

Scott King
Counsel for Jose Cabranes

cc: all counsel in F & R v. Klarce

F&R v. Klarce

Special Master's File Notes

MEMORANDUM February 16, 1998

To: File
From: Susan Easterly, Special Master
Re: Reconsideration of Cabranes Settlement Offer

I have determined that President Novak is reluctant to modify F&R's demand because he believes Cabranes is clearly liable under CERCLA and has misrepresented his financial condition.

F&R's Position

On the question of owner-operator liability, F&R provided me with documents and testimony supporting the following claims:

1. During the time Cabranes was on the Board, there were 87 Board meetings, including numerous special ones during the time of the Chapter 11 filing, the debt reorganization and closing of the Company. Cabranes missed only six of these Board meetings. He not only participated in environmental decisions but appeared to be the leader of A.L. Klarce environmental policy. According to the Minutes, more than 80% of the Board's environmental motions were made by Cabranes.

2. Between 1984 and 1989, when state and federal agencies were pressing the Company to make significant and expensive environmental accommodations, Cabranes "always tried to get Marcus to take the least expensive option." At various times during this period Cabranes was listed on corporate documents as secretary, treasurer, and Managing Director as well as a member of the Board.

3. After he advanced the Company $575,000 to allow it to emerge from Chapter 11, no significant transactions could take place or agreements with creditors be reached without the express approval of Cabranes. From 1987 through mid-1988, Cabranes co-signed with

Marcus all Company checks in excess of $5,000.

4. Cabranes was present at the facility on two occasions to negotiate with CoDER officials about steps the Company must take to remediate the hazardous waste disposal.

5. The following two statements allegedly were made by Cabranes: "I'm the head man at A.L. Klarce rind you've got to deal with me." and "No money can be spent at the Company without my approval."

6. An independent appraiser reported that, even though the land currently has no market value, once the cleanup is complete, the land will be worth $1.4 million.

7. F&R claims that Cabranes' friend, Bruce Gann, is helping Cabranes to conceal assets. There never was a promissory note covering the alleged $85,000 loan from Gann which Cabranes "paid off"; the promissory note for the $150,000 loan to Gann wasn't executed until six months after the money was allegedly given to Gann.

F&R President Novak is sure Cabranes has engaged in fraudulent transactions in an attempt to avoid CERCLA responsibility. He points to unsecured loans repaid and extended to "the best friend" of Cabranes as an example of what he calls "fraud." Novak also questions the educational trust set up by Cabranes and the gifts to his fiance. In the end, Novak believes it is worth "spending the money to get a fat judgment against Cabranes and then dig, dig, dig till we uncover that pot of gold that he's socked away."

Novak is convinced that Cabranes can come up with $250,000 and says that F&R will accept nothing less "in terms of cash." I believe the Railroad will take substantially less cash if it can be convinced that Cabranes is telling the truth about his finances and its other terms are met.

Cabranes' Position

Cabranes laughed at F&R's $250,000 demand and said Ann Halsey will not permit him to pay F&R if that will interfere with their ability to get the marriage off on the right note. Cabranes says that if F&R is "foolish enough to persist to judgment, the most they'll get is garnishment

one-fourth of my net salary."

He insisted that there was "no pot of gold" and that all of the information he revealed about his finances was "legitimate." He showed me the court approved agreement accompanying his divorce decree specifying the lump sum payment to his ex-wife and his obligation to educate his two children. He persisted in claiming the authenticity of the unsecured loans from and to his friend, Bruce Gann. At his suggestion, I spoke with Gann who confirmed Cabranes' statements.

Cabranes conceded he attended most Board meetings ("that's what a Board member is supposed to do") but denied that he "led" the environmental defense of the Company ("there were only four Board members, some of whom never showed up, so I had to make motions"). He did serve as an officer of the corporation "on occasion, when they needed a figurehead to meet legal requirements." He disputed that he exerted "undue influence in the environmental or any other area."

Cabranes claimed he needed to "monitor" his investment and "protect" his security interest and that is why he asked that major expenditures and "deals with other creditors" be "run by" him. Under such circumstances, "it made good sense" for him to co-sign large checks. He denies he ever told anyone that he "ran the A.L. Klarce business."

Cabranes challenges anyone to prove that he "meddled" in the business. He "hardly ever" visited the facility, spending less than 5% of his time at the site. He admits being there "on a couple of occasions" when government officials were present. But, he said, "they were in and out all the time and I just happened to be there by chance." He says that he "didn't negotiate" with environmental auditors but he "did ask a lot of questions and pointed out the economic realities to them."

Based on all the information available to him, Cabranes believes he has "a much better than even chance" to avoid being found liable as an owner-operator. Therefore, he is not willing to do much to accommodate F&R. However, given the costs and risks involved, he would be willing to "come up to $50,000 or so" if payments can be "spread out beyond the time" his children are in school.

THURSDAY AFTERNOON
FEBRUARY 26, 1998

California Bar Examination

Performance Test B

LIBRARY

F&R v. Michael Klarce, et al.

LIBRARY

Opinion of the Attorney General
August 23, 1990

Introduction:

The Director of the Columbia Department of Environmental Resources has asked the Attorney General to render an Opinion regarding a legal standard by which corporate officers, directors and shareholders may be personally liable under CERCLA. This Opinion sets forth the Attorney General's view of that standard.

Opinion:

Although CERCLA does not explicitly address whether a corporate officer may be liable for clean-up costs, courts have not hesitated to hold corporate individuals personally liable for unlawful hazardous waste practices. In United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO) (8th Cir. 1986), the president and major shareholder of **NEPACCO** was held liable as a "generator" under the Resource Conservation and Recovery Act despite a finding that he had no knowledge of the plan to dispose of hazardous waste, nor was he present at the plant during the period of waste disposal. The Court reasoned that although the president was "not personally involved in the actual decision to transport and dispose of the hazardous substances," he in fact was "in charge of and directly responsible for all of NEPACCO's operations and he had the ultimate authority to control the disposal of NEPACCO's hazardous substances."

In a Second Circuit case, the Court held the principal officer and shareholder liable as an operator under 107 of CERCLA where a close corporation purchased contaminated property, but did not actually dispose of hazardous substances. New York v. Shore Realty (2d Cir. 1985). As in NEPACCO; the Shore Realty court found the vital factor to be that the corporate official was in charge of the operation of the facility in question, and as such was an 'operator' within the meaning of CERCLA. A recent Vermont case imposed personal liability on the officers of a close corporation because they were managing stockholders who made decisions about the management, marketing and sales aspects of the business as well as supervising the overall operations of the company. Vermont v. Staco, Inc. (S.D.Vt. 1988).

There are a number of recurring factors in these cases from which a standard for individual corporate liability can be identified. Although liability under CERCLA is essentially a strict

liability scheme, where CERCLA seeks to impose liability beyond the normal corporate form, an individual's power to control the practice and policy of the corporation, and the responsibility undertaken by that individual in this area should be considered. The corporate individual's degree of authority in general and specific responsibility for health and safety practices, including hazardous waste disposal, must be weighed in order to answer the question whether the individual in the close corporation could have prevented or significantly abated the hazardous waste discharge that is the basis of the claim.

Evidence of an individual's control, including among other things, waste handling practices will be taken into account: does the person hold the position of officer or director, especially where there is a co-existing management position; what is the distribution of power within the corporation, including the person's position in the corporate hierarchy; what percentage of shares does the person own? Weighed along with the power factor will be action in relation to waste disposal practices, including evidence of formal and informal responsibility undertaken and neglected, as well as affirmative attempts to prevent unlawful hazardous waste disposal. It is also important to look at the positive efforts of one who took clear measures to avoid or abate the hazardous waste damage. Therefore, the person's capacity to make timely discovery of unlawful discharge, his power to direct the activities of those who control the causes of pollution, and his capacity to prevent and abate damage will be considered.

This standard is different from and more stringent than the standard for traditional corporate tort liability, yet it requires more than mere status as a corporate officer or director, which under CERCLA would be the equivalent of a strict liability standard. The test allows the fact-finder to impose liability on a case-by-case basis, a result to be favored where there is great potential liability. The test for liability of corporate individuals under CERCLA is thus heavily fact-specific, requiring an evaluation of the totality of the situation.

Consistent with CERCLA's goals, this standard will encourage increased responsibility. As a person's power in the corporation grows, the ability to control decisions about waste disposal increases. At the same time, as one's stake in the corporation increases, the potential for benefiting from less expensive (and less careful) waste disposal practices increases as well.

James Boggs
Attorney General of the State of Columbia

Phillip and Brenda Guidance v. BFG Electroplating, Inc.

U.S. District Court, W.D. Columbia (1989)

Residents of Putawney, Columbia commenced this action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) against BFG Electroplating and Manufacturing Company (BFG) alleging that BFG unlawfully contaminated the environment causing personal injuries.

BFG then filed a third-party complaint against current and past owners of adjacent land known as the "Berlin Property." BFG sought indemnification, contribution and response costs from those owners, including the Commonwealth National Bank (Bank) as an eight-month record title owner of the Berlin Property. Thereafter, the Bank filed a motion for summary judgment, the subject of the instant ruling.

During the 1970s, Berlin Metal Polishers (Berlin) operated a metal polishing company at the Berlin Property. Berlin Metal was managed and owned by the Runco family (Runcos). In May 1971, the Bank approved a line of credit and other loans for Berlin Metal. One loan was for the construction of a new treatment facility to satisfy Columbia Department of Environmental Resources (CoDER) requirements.

By 1980, Berlin Metal had defaulted on its obligations to the Bank. In January 1980, Bank representatives toured Berlin Metal and met with plant officials to discuss management. At that meeting, the Bank representatives were informed of the number of work shifts, the status of Berlin Metal's accounts, the composition of the management and the presence of raw materials.

On April 9, 1980, the Bank obtained a confession of judgment against Berlin in the amount of $164,000. Attempts by the Runco family and the Bank to locate a purchaser of the Berlin facility were frustrated in part because Berlin could not obtain a permanent permit to use the Putawney sewer system. In response to the Bank's inquiry, CoDER sent information concerning a May 1979 fish kill in Mahoning Creek which was attributed to a cyanide discharge from the Putawney sewage treatment plant. Samples taken at the Berlin and BFG facilities showed

cyanide and heavy metal discharge in excess of CoDER limits.

In 1981, the then vacant Berlin Metal facility was leased to Season-All, a manufacturer of windows. The parties agreed that Season-All would remit its payments directly to the Bank to be credited to the outstanding debt of Berlin Metal.

A series of meetings between the Bank and Runcos resulted in an understanding that there would be a foreclosure of the Berlin Property with the Bank providing financing if a certain member of the Runco family purchased the property at foreclosure. At the sheriff's sale in April 1982, the Bank purchased the property for $145,000. During the Bank's ownership, the Bank paid insurance premiums and property taxes for the Berlin Property. In January 1983, the Bank conveyed the property to Russell D'Aiello as trustee for members of the Runco family.

Season-All discovered several drums of chemicals left by Berlin Metals, which CoDER officials determined contained hazardous wastes. CoDER sent orders to the Runcos, the Bank and Season-All to remove the materials to a hazardous waste disposal facility. In September 1982, at the request of the Bank and Season-All, Ecology Chemical Company removed 41 drums from the site. The transportation manifests signed by Anthony Runco identify Berlin Metal as the generator of the hazardous waste. Records indicate that the $20,000 cost of removal was shared by the Bank and the Runcos.

The parties agree that the main issue is whether the Bank is a potentially responsible defendant as a former "owner or operator" of the Berlin Property at a time when there was a disposal of hazardous wastes. There are two time frames in which we must consider whether the Bank was an "owner or operator" of the Berlin Property and therefore liable under CERLCA: the period prior to the Bank's foreclosure and-purchase of the Berlin Property and the period of the Bank's ownership.

A. Liability of the Bank prior to its Purchase of the Property

Congress provided an exception to liability as an "owner or operator" of a hazardous site for

"a person who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the facility." Under Columbia law, the holding of a mortgage constitutes an indicium of ownership. Prior to foreclosure, a mortgagee is exempt from CERCLA liability so long as the mortgagee did not participate in the managerial and operational aspects of the facility. Interpretation of "participating in the management" "primarily to protect its security interest" permits secured creditors to provide financial assistance and general, and even isolated instances of specific management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation.

The activities of the Bank prior to foreclosure did not void the security interest exemption of CERCLA. There is no evidence suggesting that the Bank controlled operational, production, or waste disposal activities at the Berlin Property. The actions of the Bank prior to its purchase of the Berlin Property at the foreclosure sale were prudent measures undertaken to protect its security interest in the property.

B. Liability of the Bank after its Purchase of the Property

There is a divergence in case law as to whether the security interest exemption is applicable when a secured creditor purchases its security interest at a foreclosure sale. The two principal decisions, United States v. Mirabile (E.D.Pa. 1985) and United States v. Maryland Bank & Trust Co. (D.Md. 1986), approach the issue of lender liability from different directions.

The focus in Mirabile was whether a lender is precluded from invoking the security interest exemption rather than whether the exemption applies in the first place. There, one of the secured creditors, American Bank, foreclosed on and took title to a defunct business that had created a hazardous waste. Four months later, American Bank sold the site to the Mirabiles. When the EPA sued the Mirabiles to recover its clean-up costs, the Mirabiles joined American Bank as a third-party defendant. During its four-month ownership, American Bank took steps to secure the property, showed the property to prospective purchasers, and made inquiries as to the removal of the drums of hazardous waste.

The Mirabile court found that regardless of the nature of title American Bank received, the actions after foreclosure were undertaken merely to protect its security interest in the property and did not constitute an attempt to participate in the management of the site. Thus, exemption from CERCLA liability applied as long as a lender limited its activities to the financial aspects of management and did not become too embroiled in the "nuts-and-bolts, day-to-day production aspects of the business." Foreclosure and repurchase were natural consequences in protection of a security interest.

The Maryland Bank & Trust court held that when a mortgagee becomes an owner of the property, the security interest exemption is lost. There, Maryland Bank foreclosed on the mortgage, took title and had owned the property for nearly four years when the EPA sued for recovery costs.

The court found that exemption of Maryland Bank would contradict the policies underlying CERCLA because the federal government would then shoulder the clean-up costs while the bank would enjoy a windfall by the increased value of the improved land and a possible sale at a profit. Accordingly, when a lender is the successful purchaser at a foreclosure sale, the lender should be liable to the same extent as any other bidder at the sale would have been.

In the instant action, we find that the security interest exemption of CERCLA does not apply for the period the Bank was record owner of the Berlin Property. During that period, the Bank was a potentially responsible party as defined in CERCLA. The Bank's motion for summary judgment is denied.

Amcast Corporation v. EPC's Former Shareholders

U.S. District Court, N.D. Columbia (1990)

This case is before the court on motions for summary judgment by the group of defendants referred to as the "Former Shareholder Defendants." For the reasons which follow, the court orders that the motions for summary judgment and the motion to dismiss be granted.

After purchasing all of the shares in Elk Products Corp. ("EPC"), the Amcast Industrial Corporation ("Amcast") learned that the soil and groundwater under EPC's plant in Elk, Columbia were polluted with trichloroethylene ("TCE"), an industrial solvent which EPC had used for several years in manufacturing copper pipe fittings. Amcast filed the present action seeking the recovery of damages to real property, together with past and future costs resulting from the pollution, against, inter alia, EPC's former shareholders, the alleged "owners" of the plant.

Amcast alleges that because the former shareholders "were the owners of the Plant" when the spills occurred, they are "strictly liable to reimburse Amcast for the amounts Amcast has expended or will hereafter expend in taking removal and remedial actions," pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA").

The Former Shareholder Defendants argue that as corporate shareholders in EPC, they were not the "owners" of EPC's plant. Under long-established principles of corporation law, they urge that they cannot be held liable.

CERCLA, the "Superfund" statute enacted by Congress in 1980, imposes liability for "necessary costs of response" upon "any person who at the time of disposal of any hazardous substance owned or operated any facility at which [certain] hazardous substances were disposed of . . . ." According to the Act, owner or operator "does not include a person who, without participating in the management of a facility, holds indicia of ownership primarily to protect his security interest in the facility."

It is clear that none of the Former Shareholder Defendants held title to the property during the period in question, and that the property was, in fact, owned by EPC. Accordingly, the defendants argue that since they were merely shareholders in the corporation, and had no ownership interest in EPC's property, they cannot be held liable as "owners" under CERCLA. The court must agree.

Nothing in the language of CERCLA even remotely suggests a congressional intent to abrogate the common law of corporations by subjecting shareholders to liability as the "owners" of corporate property.

Under Columbia law, a corporation is an independent legal entity, separate and distinct from its stockholders. It is elementary that a stockholder has no claim to the assets of the corporation until all of the debts and obligations have been paid and the officers have been directed to make distribution of assets to the shareholders. It is also well-established that a corporate officer or shareholder may not be held liable for acts by the corporation merely because he is an officer or shareholder. Nor can shareholders be held liable for the debts of a corporation, except to the extent of any unpaid portions of their subscriptions for shares.

EPC's plant was a corporate asset, and was not the property of individual shareholders. The plaintiff's memorandum in opposition to defendants' motion effectively concedes that defendants were not the "owners" of EPC's plant. Instead, the plaintiff maintains that "there exist genuine issues of material fact regarding the extent to which Defendants controlled, operated and managed EPC in order to permit imposition of strict CERCLA liability on the Defendants as 'operators' of a facility, as opposed to 'owners.'" The court finds, however, that there is no evidence that the defendants were "operators."

Although the plaintiffs have pointed out a number of cases in which shareholders have been held liable under CERCLA (see United States v. Northeastern Pharmaceutical (NEPACCO) (8th Cir. 19861; New York v. Shore Realty Corn. (2d Cir. 1985), in each of those cases, liability was imposed upon shareholders or corporate officers, not solely because of their status as shareholders, but because of their direct personal involvement in the operation of the facilities in question. The plaintiffs have cited no case, and the court has found none, holding that

corporate shareholders can be held liable as "owners" of a facility under CERCLA based upon nothing more than their status as shareholders.

The Former Shareholder Defendants are, therefore, entitled to summary judgment.

Riverside Market Development Corp. v. International Building Products

U.S. District Court, E.D. Columbia (1990)

On March 11, 1984, International Building Products, Inc. ("IBP"), purchased the National Gypsum Company, an asbestos manufacturing facility located in Orleans, Columbia. IBP continued to manufacture asbestos cement products at the facility for four years. After the plant closed in March 1988, a few IBP employees were retained to clean up the site to make it presentable for sale. In May 1988, plaintiff ("RMDC") agreed to purchase the site, demolish the building, and build a shopping center. Columbia and federal law required that all asbestos be removed prior to demolition of any building.

Cleanup of the asbestos at the IBP facility was completed by RMDC. Thereafter, RMDC sued IBP and its two corporate officers, Gerard von Dohlen and T. Gene Prescott, to recover clean up costs. The defendants filed a motion for summary judgment asking the Court to dismiss plaintiff's federal CERCLA complaint in its entirety against von Dohlen and Prescott. The Court ORDERS that the defendants' motion for summary judgment BE GRANTED IN PART AND DENIED IN PART.

CERCLA provides a private cause of action where a release or threatened release of a hazardous substance causes response costs to be incurred. Among the persons covered are those who, at the time of disposal of any hazardous substance, owned or operated any facility at which such hazardous substances were disposed of.

CERCLA covers past and present owners and operators. Because neither von Dohlen nor Prescott ever held title to the asbestos manufacturing facility, neither can be liable as an owner under CERCLA. However, if hazardous wastes were "disposed of" during IBP's ownership of the Orleans facility and if Prescott and von Dohlen "operated" the facility during that time, they would be liable under CERCLA.

CERCLA defines "operator" only in the negative: "Such term does not include a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility." The Court then must look at the activities

of Prescott and von Dohlen to determine their degree of participation in the operations of the IBP facility at Orleans.

When IBP purchased the National Gypsum plant, Prescott and von Dohlen were the sole shareholders: Prescott held eighty-five per cent (85%) of the stock and served as Chairman of the Board; von Dohlen held fifteen percent (15%) of the stock and served as President. From March 1984 through December 1987, von Dohlen also served as Chief Executive Officer.

During the time that IBP owned the plant, Prescott lived in New York and only visited the Orleans site on one to three occasions per year to attend the annual Christmas party and occasional meetings of the Erectors' Association, a group whose members used the plant's products. Prescott also had brief visits with executive personnel on site. Von Dohlen testified that Prescott was principally the source of money to fund the IBP operation. Also, as an IBP officer, Prescott reviewed financial statements regularly. During meeting of officers, he consulted with Von Dohlen and others. The Court finds that this limited activity did not make Prescott an operator of the asbestos manufacturing facility within the meaning of CERCLA.

As to von Dohlen, however, the Court finds that a genuine issue of material fact exists as to whether or not he was an "operator" under CERCLA. Unlike Prescott, von Dohlen spent forty percent (40%) of his time at the Orleans factory. Although his major duties involved sales, he was occasionally involved in the actual day-to-day operations of the factory. For example, he operated some of the machines himself from time to time in order to solve problems in the manufacturing process, and he was actually out on the plant floor supervising at other times.

As to his role in the sale of asbestos products and the disposal of hazardous wastes, von Dohlen testified that he ordered asbestos fiber from various companies and negotiated contracts with various fiber suppliers to supply raw asbestos to the plant. He also explained that he participated in altering the formulations of products previously produced by National Gypsum and participated in decisions as to which formulations were to be used in those products. Despite his assertions that he was not involved in decisions about compliance with environmental regulations, von Dohlen admitted that during his tenure IBP disposed of asbestos pursuant to licenses in the regular course of business. Von Dohlen was not sure whether there were

different regulations for removing asbestos when the plant was demolished. Von Dohlen also sent and received information letters to and from state and federal agencies concerned with IBP's compliance with environmental standards.

All of the foregoing evidence raises a significant question about the extent of von Dohlen's participation in the operations of the IBP plant and prevents the Court's granting summary judgment in von Dohlen's favor on the CERCLA issue.

ANSWER 1 TO PERFORMANCE TEST B

MEMORANDUM

To: All Counsel

Re: Owner v. Operator Under CERCLA

Enacted by Congress in 1980, CERCLA imposes liability for necessary costs of` response upon any person who at the time of disposal of any hazardous substance owned or operated any facility at which hazardous substances were disposed of. Further, owner operator does not include a person who, without participating in the management of a facility, holds indicia of ownership primarily to protect his security interest in the facility.

As you know, our main concern is to determine whether Mr. Cabranes will be held individually liable (in the event this case goes to trial) for the cleanup costs. It is my position that he will and thus this case needs to be settled, as liability will be expensive and time consuming.

Case Law There are no cases in our federal circuit or D.C.A. where rulings have been made on when the corporate structure may be ignored and officers, directors and shareholders (SH) liable under CERCLA. However, other courts have written on the subject, and their decisions seem to indicate that if the logic is followed, Cabranes will be liable.

Factors In 1990, the A.G. issued an opinion on whether officers, directors and SH's may be personally liable under CERCLA. The AG pointed out that several cases have allowed corporate individuals to be found personally liable for unlawful hazardous waste practices. The AG stated that there are a number of recurring factors from which a standard for individual corporate liability can be identified. These will be enumerated and applied to the instant case.

Control An individual's power to control the practice and policy of the corporation and the responsibility of the individual undertaken should be considered. The corporate individual's degree of authority in general and specific responsibility for health, safety and waste disposal must be addressed to answer whether the individual in a close corporation could have prevented/significantly abated the hazardous waste discharge that is the basis of the claim.

Evidence of Control Evidence of control includes 1) waste handling practices. The cases ask if a person holds the position of officer or director. In this case, Cabranes was on the Board of Directors of a close corporation as the group held 6000 shares of stock and Klarce held 100 shares. The second factor for control is the distribution of power within the corporation, including the persons' position in the corporation.

Hierarchy Cabranes was a member of a Board - there were four members that we know of. The power before the foreclosure was that of each director having a great deal of power. Cabranes held the proxy vote of Clark Williams, who voted "when Jose told me to and signed a paper if I was asked." This relationship makes Cabranes appear to be a very

dominant power in the corporation, as he held two of the four directors' votes.

Further, after the restructuring of the debt, Cabranes supplied $575,000 to get the promissory notes and mortgage. Again, this makes it appear as if Cabranes had a great deal of power. Also, comments have been made about Cabranes making it so no significant transactions could take place on agreements reached without his express approval. He also co-signed all checks greater than $5,000.00 Although I am aware that Cabranes said it just made good sense for him to sign large checks, it still looks as if there is a great deal of power residing in Cabranes. There are also disputed facts about whether Cabranes said he was the "head man" at Klarce. I am aware Cabranes denies this, but it is certainly not something one wants a jury to hear when it is explaining these factors.

Factors Next, the percent of shares a person owns is at issue. Cabranes claims almost 25 % of shares, but also claims the promissory note and 2nd mortgage. As such, it looks as if he has a great deal of power.

Waste Disposal Practices The courts also weigh action in relation to waste disposal practices. First, evidence of formal and informal responsibility that is undertaken or neglected is weighed. Again, I think Cabranes needs to be aware, as I am, that the evidence appears to show him having a great deal of control over this area. First, although Cabranes claims he was just "protecting his investment" by asking a lot of questions about the environmental problems and suggesting some alternatives, Cabranes should be aware that there is testimony that Cabranes participated in environmental decisions not sporadically, but rather "appeared to be the leader" of Klarce's environmental policy. The minutes show more than 80% of the Board's environmental motions were made by Cabranes.

Cabranes therefore looks as if he had responsibility for the environmental policy of Klarce. In fact, another factor the courts tend to look at with favor is affirmative attempts to prevent unlawful hazardous waste disposal. Cabranes should be aware there is testimony that when state and federal agencies were pressing the company to make significant and expensive environmental accommodations, Cabranes always tried to get Marcus to take the least expensive action. This looks especially bad when viewing the next factor: positive efforts of one who took clear measures to avoid or abate the hazardous waste damage. It looks on the face like Cabranes was more interested in dollars than in the environment, and that doesn't set well with jurors.

A. The Capacity to Make Timely Discovery of Unlawful Discharge is another Factor. as is a Person's Power to Direct the Activities of those who Control the causes of the Pollution

Cabranes was listed as secretary, treasurer and managing director, as well as a member of the board. Because of that, it looks like he had the power to direct as managing director. Finally, the capacity to prevent and abate damage will be considered. Again, it looks bad for Cabranes that he always tried to go with the cheap route.

The A.G.'s opinion says the test goes along a case-by-case basis which is fact specific as to the totality of the situation. It also states that as a person's power in the corporation grows, the ability to control decisions about waste disposal increases. Here, Cabranes' power grew from a less than 25 % interest to a holder of the mortgage. As such,

his power grew too and it would be difficult to persuade a jury otherwise.

Holding a Mortgage I am aware that Cabranes held a mortgage on the property and that because of that, there is a possibility he might be exempt from CERCLA. However, again, I think this case ought to be settled, as Cabranes will undoubtedly be found to be excluded from such an exemption.

In Phillip The court held that prior to foreclosure a mortgagee is exempt from CERCLA liability as long as it didn't participate in the managerial and operational aspects of the facility. Unlike Phillip, there is evidence here that Cabranes controlled operational , production, or waste disposal activities of the property prior to his purchase of the mortgage. He held just under 25% of the stock, he was a board member (1 of 4) and attended 81 out of 87 meetings. He made 80% of the Board's environmental motions. As such, it will be difficult for him to claim he had no control prior to his purchase of the mortgage.

Subsequent to his purchase, a mortgagee is not liable if he limits his activities to the financial aspects of management and does not become too embroiled in the day-to-day production aspects of the business. Again, Cabranes was at 81 /87 board meetings, he was present on 2 occasions to negotiate with CoDER officials regarding steps to remediate hazardous waste disposal. He required checks to be co-signed with him over $5,000.00. I am aware that Cabranes claimed he spent less than 5 % of his time on site and says the meetings with CoDER officials were coincidence/chance. However, given the factors, it looks bad for Cabranes. He may therefore be found liable under the Phillips test. Again, settlement here is very important.

In Amcast, the court addressed whether shareholders could be considered "owners" under CERCLA. The court there said nothing in CERCLA suggests an intent to subject shareholders to "owner" liability. The court, however, stated that it was possible for liability to be imposed on shareholder or corporate officers, not solely because of their status as shareholder, but because of their direct personal involvement in the operation of facilities in question.

Again, Cabranes may claim he was not personally involved, but that will be hard for jurors to swallow, considering that he was listed as secretary, treasurer, and managing director and member of the board. Also, after he advanced the company the $575,000.00, it will be difficult to say that he was not directly personally involved, as who wouldn't be involved with over half million dollars at stake? He made the rules so that no significant transactions could take place or agreements with creditors could be reached without his express approval. That exhibits a strong example of direct personal involvement. Again, I think it likely he will be liable.

Finally, Riverside discusses further the degree of participation required to be an operator under CERCLA. (Recall also that it may be difficult for Cabranes to state that he was/is not the owner, due to the mortgage, and so may get CERCLA liability due to ownership). The court in Riverside found one shareholder to be limited in his activity so as to not be an operator. The shareholder had lived elsewhere and visited the site only 1 to 3 times a year and was primarily a source of dollars who reviewed financial statements regularly. This resulted in him not being found an operator. Cabranes, on the other hand, was there at 81 /87 meetings, was a source of dollars, but did more than financial

statements - his involvement was a high degree of participation, even to the point of requiring he be consulted for approval before significant transactions.

The other shareholder in Riverside is reminiscent of Cabranes - he was on the floor of the plant and involved in day-to-day activity. He negotiated for asbestos and participated in altering the formulations of products. This level of participation is strongly reminiscent of Cabranes, as it appears he made the majority of environmental motions, controlled funds by requiring his approval be sought, encouraged the least expensive option for environmental accommodation to be taken.

Cabranes claims he spent less than 59 % of his time at the site, which may help him, but he did end up speaking with environmental auditors about "economic realities." As such, it looks like he would have a high degree of participation and be seen as an owner or operator under CERCLA.

Summary Of course, both parties are aware as am I, that factual disputes exist. The point of this memo, though, is to encourage the parties to reconsider settlement. With factors for liability as owner/operator under CERCLA being control of practice and policy in a corporation and responsibility of the individual, it seems likely that Cabranes' mortgage on Klarce, his position on the Board, his stock ownership of a close corporation and his proxy vote from Williams, his power to determine which transactions could take place, his presence at over 90% of the board meetings, and his suggesting over 80% of the environmental motions (which were then implemented in the company) all encourage a jury to see a man with control and power who determined the policy of a company. As such, I strongly encourage both parties to consider the strong likelihood that Cabranes will be held liable (and the corporate veil will be pierced) and work on a settlement instead of incurring more litigation costs.

B. Proposal for Settling Dispute

Dear Attorneys,

As I have mentioned in my memo, I anticipate Cabranes being found liable at trial. As a result, I strongly encourage the parties to iron out a settlement. I enclose the following proposal for settlement, in the hope that it will be acceptable. Please feel free to alter it to further accommodate your needs.

According to Mr. Cabranes' counsel, Mr. Cabranes has very little in the way of liquid assets. Mr. Cabranes originally made an offer of $10,000 on this case (expecting his legal fees to approach $50,000), but later said he -would be willing to come up with $50,000.00 or so if there were structured payments. F&R asked for $250,000 from Cabranes in cash. Obviously, the two of you are far apart. I suggest the following:

1. Another verified accounting of Cabranes' finances. This will, in a sense, be offered as "goodwill" to F&R to show Cabranes is willing to negotiate. It will also accomplish showing F&R there is little in the way of liquid assets to go after from Cabranes.

2. F&R anticipates paying up to $22 million for cleanup. To date, it has spent $2.8 million in prior response and cleanup costs for land it does not occupy. F&R is aware that it is the "deep pocket," and that it does not expect to get a great percentage of these cleanup expenditures back. However, it seems reasonable to require those who were owners/operators under CERCLA to pay what they possibly can. As I set out in my memo, I think Cabranes will be found liable and thus encourage some combination of monetary/property settlement. Mr. Cabranes states that he has very little in the way of liquid assets. The Railroad would be interested in the land after cleanup, which will be worth approximately 1.4 million. It seems that Cabranes has something F&R wants (land/mortgage) and F&R has something Cabranes wants (settling of dispute with minimal monetary payout.)

It would make sense if Cabranes either: (a) paid no cash, but assigned a percentage of his mortgage on the land or (b) paid $10,000 cash in good faith and made graduated payments with the mortgage as security for a long period of time - say $8,000 a year for 30 years or even an increased settlement payment after Cabranes' children finished college.

Since Cabranes doesn't want to upset the apple cart with his fiancee by paying F&R right up front, he could pursue the first option and Ann wouldn't be angered with him.

F&R could then give him a release from future liability.

F&R could also offer to buy the land at a discount from Cabranes for say $1.5 million. In that way, he gets rid of a "worthless mortgage" and F&R gets the land for a great deal. ($350,000 less than it's worth)

3. I would estimate that Cabranes would be found liable for in the neighborhood of $500,000 because of his in-depth involvement with the transactions of the corporation. His legal expenses would also be enormous, probably $75,000.

F&R would be likely to get a judgment from Cabranes or 71 garnishment of his $50,000 salary. Of course, F&R would have to pay in the neighborhood of $100,000 to try the suit. As a result, I would split the difference between the two and try to structure a settlement for $350,000 total, property and/or cash. This way, Cabranes pays less than his anticipated costs of $425,000 (that he would be liable for even if found only 5 % responsible) and F&R gets more than the second $250,000 demand they made. My suggestion, succinctly put, would be either:

1. $350,000 interest in mortgage for F&R or

2. $10,000 cash by Cabranes to F&R with $6,000 a year for 40 years or $8,000 a year for 30 years or some sort of graduated payment which ballooned after his children finished college (secured by mortgage).

3. A release of liability Again, I stress that a verified financial

statement made by independent auditors is the first step here to encourage good faith dealing. That way Mr. Cabranes is redeemed when he states that he truly has no assets and F&R is satisfied he is not holding anything back. Further, interviews with Bruce Gann by the independent auditor should be made available without argument. I stress that both sides benefit from this, as they then feel as if they are dealing in good faith and each is getting the best deal possible.

The release must contain language which requires both parties to immediately cease and desist speaking with anyone regarding this case and to cease and desist discussing the intricacies of the case, so that hard feelings are alleviated (especially comments like Novak's dig, dig, dig . . .).

This settlement is fair and plausible to both sides. F&R gets either land and secured debt or land it wants for a low price and Cabranes gets rid of a case in which he is likely to be found liable. Also, as he is the last defendant, the jury will be likely to give him a large amount of liability if it finds him liable and he therefore should settle.

This settlement takes into account Cabranes' need not to spend cash (he can either spend no cash or very little cash under my options) and anger his fiancee. He also has the opportunity to structure the settlement so it does not endanger the education of his children (make balloon payment at the end). It also takes into account his relatively few resources - little to no liquid assets and a mortgage interest.

It takes into account F&R's need and obligation to it's shareholders to try to recoup some of its loss. F&R would also receive land which is worth a lot of money for less than its fair market value or it would have a yearly payment of cash secured by a mortgage.

The settlement factors in the fact that I firmly believe that Cabranes will be found liable as an individual in a CERCLA suit and so will be subject to quite possibly a large judgment.

The major elements of this settlement are again, cash + mortgage or solely mortgage; release; agreement to cease and desist communicating about the case with a precedent condition of a good faith audit of Cabranes' finances for the benefit of both parties.

I think both parties will benefit greatly from such a settlement as the process will be over, they will each fare better than they would in court and other things, such as a cease and desist name - calling order, are added that are not available at law. Therefore, I strongly encourage you to consider this proposal carefully, in conjunction with my memo, and inform me in a few days of your take on the settlement. I appreciate your cooperation and I look forward to ironing out the smaller details of this matter.

Very Truly Yours,

ANSWER 2 TO PERFORMANCE TEST B

MEMORANDUM

To: Susan Easterly

From: Counsel for F&R and Cabranes

Re:Likelihood that Cabranes will be found individually liable as an 'owner or operator' under CERCLA if case goes to trial

CERCLA provides a private cause of action for response costs due to release of hazardous substances. Those persons who, at the time of disposal of any hazardous substance, owned or operated any facility at which the hazardous substances were disposed, are liable. CERCLA applies to past and present owners and operators.

Cabranes was a shareholder of the A.L. Klarce Co. (Company), holds a mortgage on the facility where the hazardous waste was disposed and was active (at a disputed level) in management of the facility. His contention is that he will not be found to be an owner or operator under CERCLA. F&R disagrees. This memo will assess the likelihood that Cabranes will be found liable as an owner or operator under CERCLA.

A. Analyze the legal meaning of 'owner or operator' under CERCLA.

CERCLA excludes "a person who, without participating in the management of a facility, holds indicia of ownership primarily to protect his security interest in the facility."

Shareholders, therefore, have been held not liable as 'owners' under CERCLA based merely on their share ownership. Amcast. Those shareholders who do participate in management of the facility may be held liable as operators, however. , Riverside Market.

An 85 % shareholder who was Chairman of the Board but visited only three times per year was held not to be an operator within the meaning of CERCLA. Riverside Market. A 15 % shareholder was found liable as an operator, however, when he served as President and CEO, spent 40% of his time at the site, and was involved in hazardous material acquisition and corresponded with state environmental officials. Riverside Market.

The Attorney General has established several factors for establishing 'operator' liability under CERCLA in his 08/23/90 opinion. He looks to the person's capacity to discover the means of hazardous waste disposal, power to control the corporation -in general and with respect to hazardous waste disposal, and the person's capacity to prevent improper hazardous waste disposal.

Power to control is defined generally by reference to whether the person was an officer or director, his position in the corporate hierarchy, and the percentage of shares the person held.

Power to control hazardous waste disposal specifically is defined by the person's responsibility for hazardous waste disposal efforts and that person's positive efforts to prevent improper disposal of such waste.

Thus, although a shareholder may not be held liable under CERCLA based solely on his status as a shareholder, he may be liable if he participates in management of the facility, particularly with respect to hazardous waste disposal.

A mortgagee who does not participate in day-to-day management of the facility also is not an 'owner or operator' under CERCLA, Guidice. A mortgagee may give general management advice and occasional specific advice solely to protect its security interest without being held an owner or operator. Guidice.

A mortgagee who forecloses on the property and subsequently becomes involved in management loses the exemption for security interests and may be liable, however, under Guidice.

B. Apply the meaning of 'owner or operator' to the facts of this case.

Cabranes is approximately a 25 percent shareholder, since he holds 1500 of 6100 total shares. He holds a mortgage on the facility. He acquired these interests while the facility was improperly disposing of hazardous waste.

He will not be liable on his mere status as a shareholder or mortgagee, however. He is only personally liable if he satisfies the test for an 'operator' of the facility described above.

1. Cabranes' capacity to discover the means of hazardous waste disl2osal

   Cabranes, both parties agree, was a board member who was present at most board meetings. Cabranes was very involved in environmental policy for the Company and made more than 80% of the Board's environmental motions.

   Cabranes co-signed large checks, and had ample opportunity to know if Company was paying (and how much) for hazardous waste disposal. Cabranes also discussed Company's hazardous waste disposal policies with CoDER officials.

   Cabranes did have the capacity to discover Company's means of hazardous waste disposal.

2. Cabranes power to control Company. specifically with respect to hazardous waste disposal.

   Cabranes was a shareholder controlling a block of stock with approximately 25 percent of the voting power. He also sometimes voted Williams' stock, as well, for a total block of approximately 50%.

   Cabranes was a director for all of this time and sometimes acted as secretary, treasurer, or managing director. He was very influential with respect to

Company's overall management, co-signing large checks and discussing arrangements with creditors. He made most of the environmental motions at the board meetings, and was very concerned with costs.

Although Cabranes spent only 5 % of his time at Company, he was very influential while he was present. Also, Company records should disclose the extent of his dealings with Company. Cabranes had the opportunity, even at only 5 % time, to set Company policy and direct Company procedure with respect to hazardous waste disposal.

Cabranes had the power to control Company's hazardous waste disposal practices. Cabranes did so by pursuing only lower-cost options.

3. Cabranes' capacity to prevent improper hazardous waste disposal by

Cabranes admits that he talked with CoDER officials. We can therefore infer that he was cognizant of proper waste disposal practices.

Cabranes also knew of Company's actual practices, since he co-signed the checks and presumably 'monitored expenditures while protecting his security interest.' Such extensive involvement also may expose him to liability in his capacity as mortgagee of the facility.

Since Cabranes knew what was proper and had control over what was actually done, he had the capacity to prevent improper waste disposal practices.

While it is not certain that Cabranes will be held personally liable, it is likely to very likely.

B. Letter from Susan Easterly to Counsel for F&R and Cabranes

A Settlement proposal.

Since Cabranes represents himself as cash-poor, although F&R disputes this, a settlement between F&R and Cabranes might best be arranged with Cabranes' property interest in the facility rather than with cash.

If Cabranes can bring bank records or a deed of trust to substantiate his claim that the $150,000 loan to Gann is not his property, but belongs to the trust, this would help establish his credibility and good faith bargaining position to F&R.

Cabranes is willing to make payments to F&R but would prefer to stretch the payments over 10 years.

It is likely to very likely that Cabranes would be found liable to F&R. Therefore, he should pay more to F&R than he otherwise would to settle this matter before trial.

Therefore, Cabranes should assign his mortgage on the facility to F&R. He may

either assign the mortgage in full settlement of all F&R's claims, or he may do something less if he is willing to pay some reasonable amount in cash to F&R.

Cabranes' offer of $50,000 over 10 years (approximately) is too low in view of his likely liability. If he is 5 % responsible (and he may be more responsible), he will be liable for a judgment between $425,000 and $1.1 million. This is an acceptable range for settlement to F&R, but is unlikely to be acceptable to Cabranes.

A lower total amount is more likely if Cabranes will commit to more of it as cash. The settlement should be between $350,000 (the Klarce settlement) and $50,000 (the Marcus settlement).

F&R has suggested $250,000 in cash, which is probably excessive in view of Cabranes' assets compared to the assets of (and settlements with) Klarce and Marcus.

Therefore, Cabranes should pay F&R $10,000 in cash, and assign 15 % of his interest in the facility mortgage (approximately $195,000) to F&R.

This settlement proposal reflects that his liability is less certain than that of Klarce and Marcus. It also reflects Cabranes cash-poor financial statement, assuming he can better establish the existence of the educational trust for his children.

In return for Cabranes' payment and assignment, F&R will release Cabranes from its claim for contribution.

If the parties so desire, perhaps Cabranes could make payments at a reasonable interest rate and eventually redeem his assignment of a percentage of the mortgage on the facility.

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