

Who Says No to More?

By: Brad Cunningham, City Attorney, Lexington, South Carolina

Yes, I have borrowed the above title from a television commercial. We have all seen it. The kid gets one more birthday present, but says "No thanks!" The business worker gets raise but refuses it. Each act leaves the offeror confused and puzzled. After all, indeed, who says no to more?

Well, a real life example of the subject arose in an IMLA Listserv discussion not so long ago. A colleague sent the following request for input:

"An employee who will become eligible for overtime under the new rule adamantly desires NOT to be paid any overtime. Nor does (s)he want his/her salary raised to meet the new threshold.... Has anyone faced such a scenario... Or have dire warnings of such?"

"Adamantly" desires not to be paid overtime? This reminds me of Demi Moore in *A Few Good Men*: "Your honor, the defense *strenuously* objects." "Strenuously? Really Jo?" So, if the employee only politely objects, you can ignore him/her? Does the adjective really make any difference?

The issue provoked a lively discussion of the potential reasons for such a request, and offered a few options or alternatives. It also evoked memories of an episode of Gomer Pyle, USMC. In that episode, Sgt. Carter jumps all over Pyle for being slack, and at one point tells him he should feel bad for accepting all of his pay this month because he hasn't done a decent day's work all week. Taking the criticism and suggestion to heart, once the Paymaster gives Pyle his loot, Pyle counts out a certain sum and gives it back. Of course, the Paymaster reacts like the folks in the aforementioned commercial, and tells him he has to accept it. Pyle refuses and walks away.

What ensues is a calamity of scenes where each level of Government tries to figure out what to do with the money Pyle returned. At each step along the way, a Government official ponders the situation and reaches the same conclusion that "This Pyle is either very conscientious or he's a nut!" Not knowing what to do in such an unprecedented situation, each official pushes the matter up the chain until it reaches from Camp Henderson all the way through military channels to the Pentagon.

All sorts of trouble ensues, and the "twist" comes when the General congratulates Carter for instilling such an attitude in his recruits, and Gomer offers to work "extra" to earn the money back. But, was it worth all the trouble? Our Listserv example and the responses evoked were pretty decent comparisons to Gomer's saga. What does an employer do with an employee who doesn't want to earn more money, even though the law requires it?

The City probably wishes it could clone workers with such an attitude, but soon the troublesome issues came forth. The first suggestion was to have the employee donate the money back to the city along with a clearly written waiver indicating the voluntary nature of the act. Or, it was suggested the employee could be advised (s)he could take comp time up to the maximum number of hours, but then not use it. But, each suggestion met with regulatory problems and potential legal compliance issues.

The doubters felt there might be some sort of tax avoidance or child support issue at hand, i.e., "I don't want to make more because somebody else is going to want to get it." As I remember the Internal Revenue Code, receiving the money and then donating it doesn't negate the fact that YOU received it and owe the tax—and assume other ramifications of the income. Regardless of its ultimate destination, you received it and controlled the decision. That's the definition of income.

Most responses felt the act, be it altruistic or not, was worth more trouble than it caused and the masses generally concluded it was in the city's best interest to just pay the employee as the law required. Too many implications arose, including potential non-compliance with the FLSA among them. "Law beats personnel preference in my book," concluded one contributor.

Furthermore, if the employee were truly altruistic, as one contributor suggested, (s)he could donate the money after receiving it and accomplish the mission. "Why do you NOT want to receive it?" was a common question. The potential good intentions of the employee were not totally dismissed, but the overriding thought through the whole discussion ended as "This employee is either trying to hide money, or he's either very conscientious – or he's a nut!"

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Even more recently, a Listserv member advised of a situation where the city's W-2's were inadvertently delivered to a private party instead of the city. The private party opened the package, only to discover what it was and advised the city of the error. The W-2's were then taken to their proper destination. Problem solved? Probably not likely!

The collective wisdom was that the city should disclose the error to

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the employees, regardless of who was at fault. But, as one contributor suggested, is that enough? Does notice that your employees' information may have been "compromised" require further action? There was no suggestion of ill-intent on the part of the private party who "received" the information, as it had no idea the W-2's were in transit and dutifully notified the city of what appears to be a delivery error. But, does that "lack of intent" nullify the fact that the information was "exposed" or "compromised?" "Probably not," most contributors thought, and there were suggestions about what (if anything) the city should do beyond giving notice to the employees. Everyone likes the notion thought that a city (or any employer) should protect its employees.

There were many calls for the city to provide a free year of credit monitoring to all employees by signing up with a well-known identity theft / credit monitoring company. This can actually be done for less cost than one would think. Several years ago, the Department of Revenue here in South Carolina was hacked. Information from anyone who had filed tax returns electronically was supposedly compromised. The State offered ID theft and credit monitoring as one remedy, and made other changes to help ensure the safety of our electronic information. Most notably, this year we have to provide a South Carolina driver's license number to file electronically. "Now the thieves can get that information too," I thought.

Municipalities, like any other employers or businesses, want to be sure our employee- and customer information is safe. It seems there is always an impulse to rely on one of those well-known identity theft protection organizations. Many folks seem to point to those firms as the panacea and know all / tell all of ID theft protection. (Just as everyone heads for Snopes.com when they want to know "definitively" if something is true) Query – What happens if the ID theft company is hacked?

I realize those companies are in the business, but how are they any less vulnerable than the rest of us? What makes their systems impervious to breach? Probably nothing! But, yes, perhaps this is the best we can do. There is a point at which you have done all you can do to protect online information, and then you just have to hope for the best.

Be it good or bad, we are living in a digital age. We just have to get used to a different kind of protection. Hacking digital communication is the contemporary version of stealing the mail out of someone's post mail box. I guess the problem has always been around, but has merely changed formats. It has also gotten quicker and easier due to automation. (Big Sigh!) Are we ever safe?

Hopefully, many of you have already signed up for the IMLA Mid-year Seminar, taking place in mid-April in Washington DC, again at the Omni Shoreham Hotel. Another top-notch program is in store, and we look forward to conjuring up another Water Cooler Mid-Year gathering. Be sure to also book your plans for the 2017 Annual Conference in Niagara Falls, Ontario, where we will stage our 6th Annual Water Cooler Reunion. Suggestions for a location are welcome. Please be sure to join us if at all possible. This will be our first Water Cooler foray outside of the United States, and it is sure to be worthwhile. Feel free to bring a friend.

From the humor corner, we had a man in court recently who represented himself in a jury trial. During the closing argument as he realized his goose was cooked, he turned to the Judge and said "Your Honor, may I have a mulligan?"

Another gentleman appeared in Municipal Court and requested a change in venue. When asked for the reason, he shifted back and forth from foot to foot as he looked at the floor. The Judge again asked "Why do you request a change in venue? Do you know what that means?" Continuing to shift back and forth from foot to foot, he finally looked up and said "No Sir."

"Well, how do you know you want one then?," the Judge asked. "Well, I read about it in a book once and it worked then," he replied. "Motion denied," responded the Judge.

Not to pick on *pro se* defendants, but there is certainly a risk to representing yourself. Another story came out of a shoplifting trial. During the prosecutor's closing argument, the Defendant jumped out of his chair and screamed "Objection!" The Judge asked for his objection and the defendant screamed "He's trying to make me look like a thief!" The Judge smiled broadly without laughing and said "Overruled!" An inmate busted out laughing, as did a couple of onlookers. Even the jurors cracked a smile. And they rendered a guilty verdict, too.

Lastly, lest you wonder, these incidents all really did happen in our Municipal Court. On some days, it's better than the State Fair.

The prosecution rests, your honor... ML

