

***Garcetti v. Ceballos: Where Are We Now?***  
**An Updated Overview of Police Officers'  
Right to Free Speech**



**NFOP Division Of Labor Services**  
**June 5, 2014**

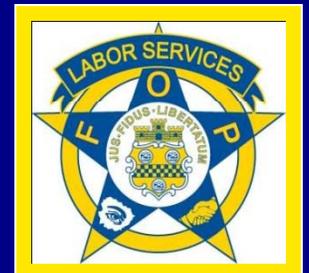
# Authorship Credits

- Will Aitchison, Esq.

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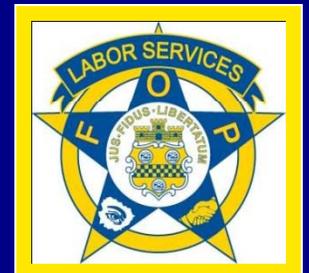
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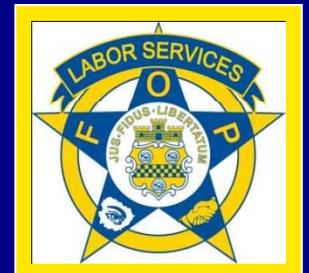
# Officers' Right to Free Speech

- Speech is protected due to penalties suffered by colonists for criticizing the king;
- The law favors the free exchange of information and ideas;
- Discourse and debate are beneficial to democracy;
- Not all speech is protected;
- Must be the truth or in good faith.



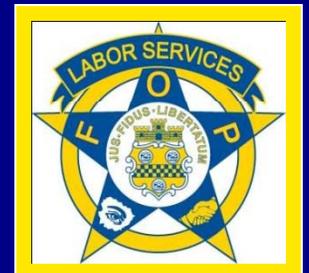
# Free Speech (continued)

- Yelling “FIRE!” in a crowded movie theater;
- Time, Place, and Manner restrictions
  - Signage
  - Permits
  - Employment
- *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968)
- *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006)



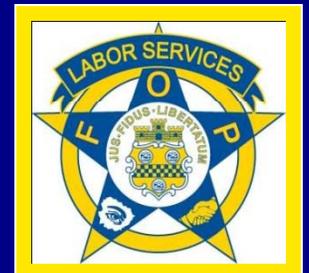
# Free Speech (continued)

- *Pickering* balancing test
  - Weighs the need for the public discourse of certain information, matters of public concern
  - Against the potential harm to agency's mission.
- *Garcetti*
  - Scope of employment
  - Statutory obligations
  - Whistle blower rights



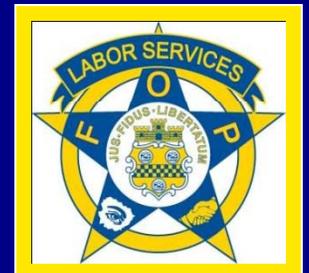
## *Garcetti v. Ceballos*, 541 U.S. 410 (2006).

- Assistant district attorney alleged that he was the victim of retaliation because of a memorandum he wrote questioning the truthfulness of a deputy sheriff's affidavit. By a 5-4 margin, the Supreme Court concluded that the First Amendment offers no protections to employees for speech made as part of their job duties. "Proper application of our precedents thus leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities."



# *Garcetti* Aftermath

- There have been many cases decided in the federal courts applying *Garcetti*.
- The courts have rendered decisions both for and against employees.
- Each decision has focused on what the specific duties of the employee were at the time of the speech.
- There is no bright line rule.
- DO NOT BE A TEST CASE!!



# *Garcetti* and Whistle Blowing

- *Schuster v. Henry County, GA*, Slip Copy, 2008  
WL 2350947 (11th Cir., 2008)

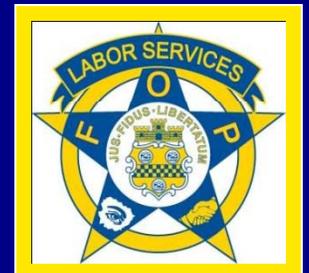
– Schuster was a CPA employed by the County as a finance director. He questioned certain expenditures and vouchers and the accuracy of audits. He brought these concerns to a staff attorney and a commissioner. He was on the agenda of an upcoming commission meeting but was fired before the meeting.



# *Garcetti* and Whistle Blowing

- “To establish a claim of retaliation for protected speech under the First Amendment, a public employee must show, among other things, that the employee spoke as a citizen addressing a matter of public concern.”

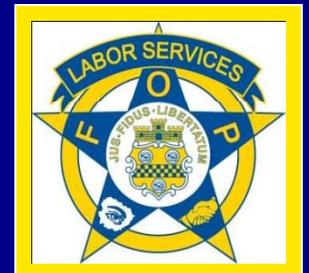
AND,



# *Garcetti* and Whistle Blowing

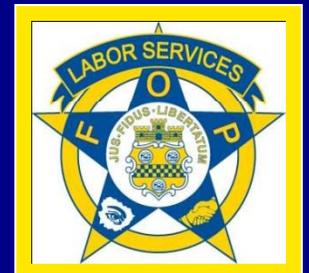
- “A government employee whose speech is made pursuant to official responsibilities enjoys no First Amendment protection upon which a retaliation claim may be founded.”  
Quoting *Garcetti*.

AND,



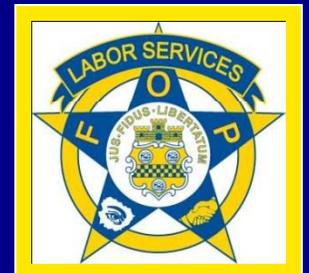
# *Garcetti* and Whistle Blowing

- “When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”



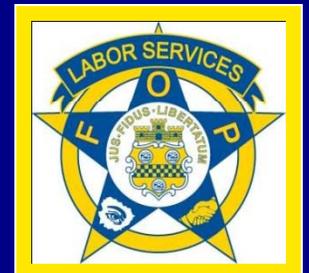
# *Garcetti* and Whistle Blowing

- “Whether the subject speech was made by the public employee speaking as a citizen or as part of the employee's job responsibilities *is a question of law that the court decides.*”



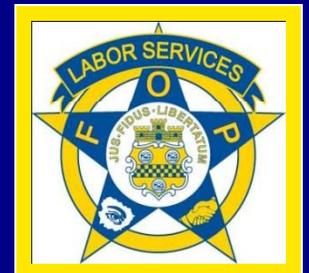
# *Garcetti* in Internal Affairs

- *Bradley v. James*, 479 F.3d 536 (8<sup>th</sup> Cir. 2007)
- Officer giving a witness statement to internal affairs regarding chief being intoxicated on duty was terminated
- Court dismissed retaliation lawsuit.



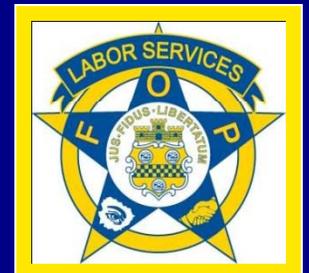
# *Garcetti* in Internal Affairs

- “as a police officer, the employee had an **official responsibility to cooperate with the investigation** being conducted into the response to the incident. The officer’s allegations of intoxication against the chief were made at no other time during this investigation, and thus **his speech was pursuant to his official and professional duties**. We cannot find that the officer spoke as a citizen, and thus he has no First Amendment cause of action based on his employer’s reaction to the speech.”



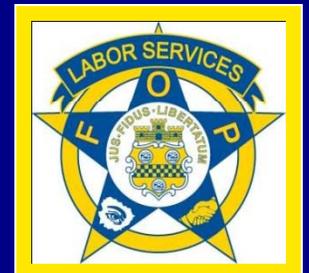
# *Garcetti* in Internal Affairs

- *Pearson v. City of Big Lake, Minn.*, 689 F. Supp. 2d 1163 (D. Minn. 2010)(speech made in mandatory internal affairs interview not protected by First Amendment); *Burns v. Borough of Glassboro*, 2007 WL 1672683 (D. N.J. 2007)(statements made in internal affairs process unprotected by First Amendment);



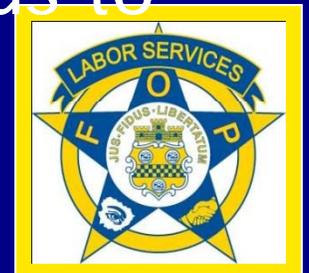
# *Garcetti* in Internal Affairs

- *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007) (one officer's speech to another officer regarding alleged misconduct by police chief and deputy chief was made pursuant to the speaking officer's official duties and thus was unprotected under *Garcetti*; another officer's speech to assistant district attorney about the same alleged misconduct by the police chief and deputy chief was also made pursuant to that officer's official duties); *Pottorf v. City of Liberty, Missouri*, 2007 WL 2811098 (W.D. Mo. 2007) (statements made in internal affairs process about an officer's excessive force unprotected by the First Amendment).



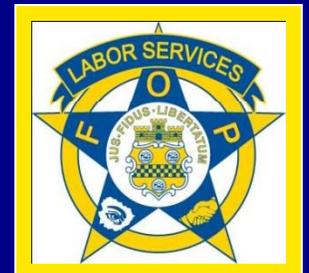
# *Garcetti* in Criminal Investigations

- *Cheek v. City of Edwardsville, Kansas*, 514 F. Supp. 2d 1220 (D. Kan. 2007). Cooperation by two police majors in criminal investigation by attorney general's office unprotected by First Amendment. Majors gave statements about alleged fixing of DWI citation by police chief, interference by city council member with cocaine investigation, and use by another city council member of his status to get free remodeling done on his home.



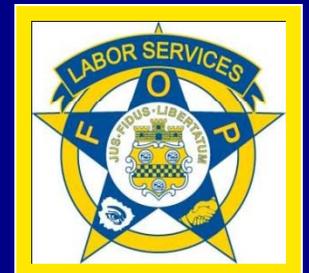
# *Garcetti* in Criminal Investigations

- *Sigsworth v. City of Aurora*, 487 F.3d 506 (7th Cir. 2007). Police detective's report to his supervisors that he believed members of his task force broke the law by tipping off suspects regarding arrest warrants and jeopardized the success of the operation was speech made pursuant to official duties.



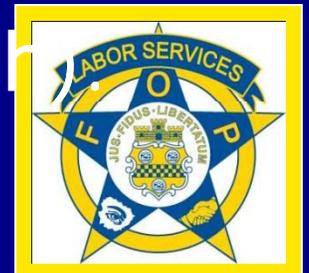
# Officer Testimony

- *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008) (since the duty to testify is a basic duty of every citizen, a police officer testifying in court about his role in an investigation is testifying “as a citizen,” and is potentially protected by the First Amendment)



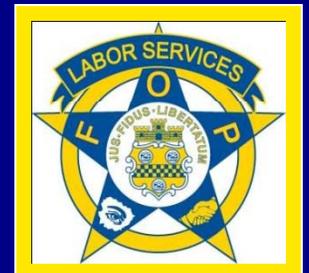
# Officer Testimony

- *Deprado v. City of Miami*, 446 F. Supp. 2d 1344 (S.D. Fla. 2006) (testimony by police officer before grand jury as part of job not protected by the First Amendment).
- *Walker v. Town of Hennessey*, 951 F.Supp.2d 1263 (W.D.Okla.2013) (officer's proposed testimony on behalf of accused in criminal trial involving shooting of mayor's son constituted citizen speech)



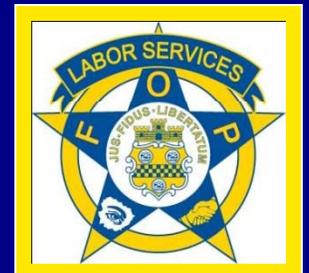
# Complaints About Fellow Officers

- *Callahan v. Fermon*, 526 F.3d 1040 (7th Cir. 2008) (First Amendment provides no protection to a police officer's report to supervisors of a fellow officer's potential misconduct because the report was made pursuant to his official duty to report wrongdoing).



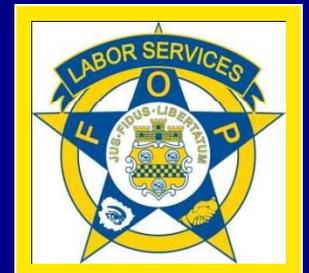
# Complaints About Fellow Officers

- *Gibson v. Kilpatrick*, 734 F.3d 395 (5th Cir. 2013). Police chief acted pursuant to his official job duties when he reported to outside law enforcement agencies that mayor had misused city gasoline card, and thus his report was not protected by First Amendment



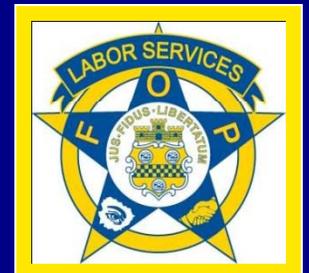
# Complaints About Fellow Officers

- *Williams v. Riley*, 481 F. Supp. 2d 582 (N.D. Miss. 2007)(county police officers did not speak as citizens when they submitted a written report which detailed the beating of a restrained prisoner by a fellow officer).



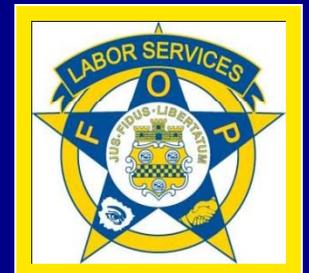
# Complaints About Fellow Officers

- *Whittenbarger v. Kirby*, 2013 WL 3967142 (N.D. Ga. 2013) (First Amendment not implicated when deputy terminated for reporting the criminal conduct of other deputies).



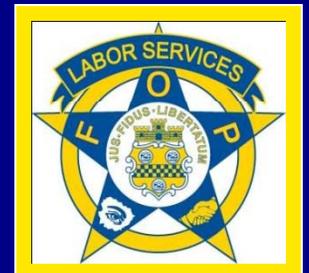
# Complaints About Fellow Officers

- *Carter v. Incorporated Village of Ocean Beach*, 693 F. Supp. 2d 203 (E.D. N.Y. 2010) (First Amendment does not protect complaints about other officers who were drinking on duty).



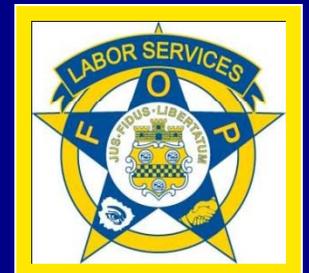
# Complaints About Policies

- *Haynes v. City of Circleville, Ohio*, 474 F.3d 357 (6th Cir. 2007). The First Amendment offers no protections to canine officer allegedly fired in retaliation for writing critical memorandum about cutbacks in canine unit.



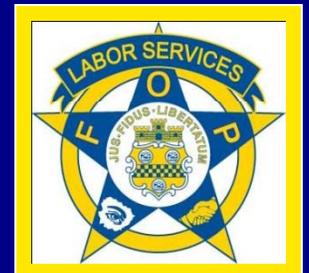
# Complaints About Policies

- *Irons v. City of Bolivar*, 2012 WL 4829185 (W.D. Tenn. 2012)(no First Amendment protection for police chief who complained to mayor about policies concerning detaining individuals without probable cause).



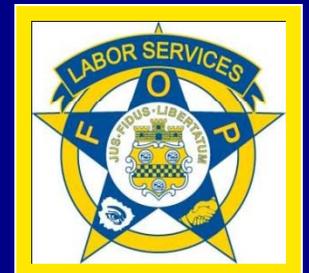
# Complaints About Policies

- *Roman v. Velleca*, 2012 WL 4445475 (D. Conn. 2012)(no First Amendment protection for major crime scene detective who criticized department procedures concerning the operation of the unit)



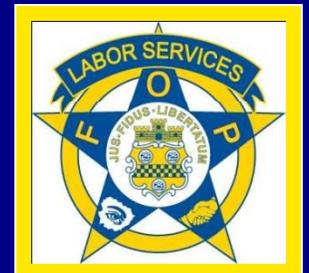
# Complaints About Policies

- *Taylor v. Pawlowski*, 2013 WL 6697873 (3rd Cir. 2013) (raising through chain of command protests of quota system part of corporal's job, and thus unprotected);



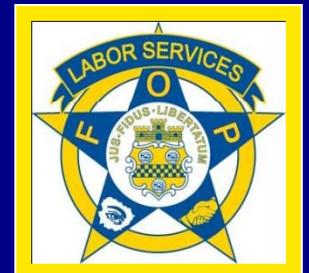
# Complaints About Policies

- *Matthews v. City of New York*, 2013 WL 3879891 (S.D.N.Y. 2013) (no First Amendment protection for officer who complained to precinct commanders that City's stop-and-frisk policies were inappropriate)



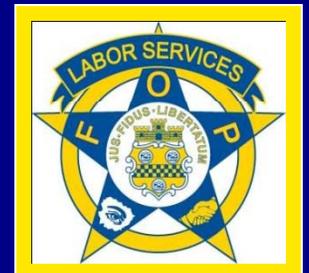
# Misuse Of Funds

- *Richards v. City of Lowell*, 472 F. Supp. 2d 51 (D. Mass. 2007). The fiscal manager for a workforce investment board lost his free speech lawsuit when the Court concluded that complaints he made about the allegedly wrongful deposit and use of funds were made pursuant to his job, and thus were unprotected under *Garcetti*.



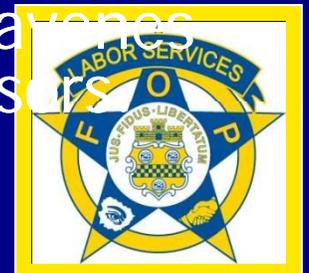
# Public Corruption

- *Buehrle v. City of O'Fallon, Mo.*, 2012 WL 4009616 (8th Cir. 2012). . First Amendment does not prohibit retaliation against sergeant who, pursuant to instructions of mayor, reported results of corruption investigation to City Council).



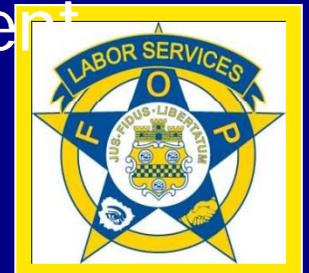
# Job Duties

- *Dahlia v. Rodriguez*, 2013 WL 4437594 (9th Cir. 2013). The scope of a police officer's job is a "practical inquiry" that involves more than simple analysis of a job description: ". Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." Relevant factors include whether the employee communicated the concerns outside of the chain of command, whether the speech is contained in a routine report, and whether the speech contravenes the specific orders from the employee's supervisor.



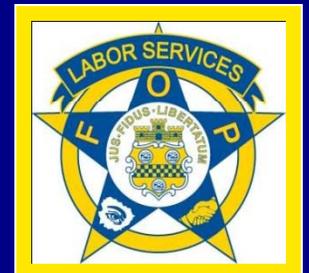
# Job Duties

- *Nixon v. City of Houston*, 511 F.3d 494 (5th Cir. 2007). Police officer's comments to media after police pursuit and suspect crash were unprotected under *Garcetti* rule even though the officer was not authorized to speak to the press. "The fact that Nixon's statement was unauthorized by the Department and that speaking to the press was not part of his regular job duties is not dispositive – Nixon's statement was made while he was performing his job, and the fact that he performed his job incorrectly, in an unauthorized manner, or in contravention of the wishes of his superiors does not convert his statement at the accident scene into protected citizen speech."



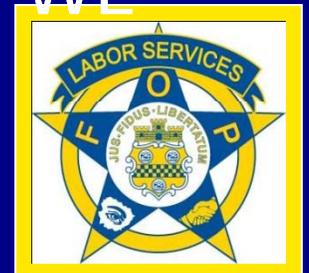
# Union Speech

- *Ellins v. City of Sierra Madre*, 710 F.3d 1049 (9th Cir. 2013) (Given the inherent institutional conflict of interest between an employer and its employees' union, we conclude that a police officer does not act in furtherance of his public duties when speaking as a representative of the police union)



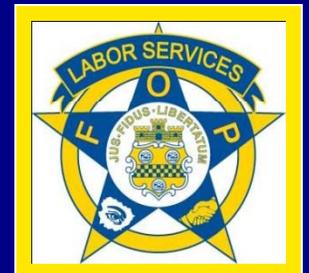
# Union Speech

- *Fuerst v. Clarke*, 454 F.3d 770 (7th Cir. 2006) (*Garcetti* does not apply where statements made in deputy sheriff's capacity as union president) *Fitzgerald v. City of Troy, N.Y.*, 2012 WL 5986547 (N.D. N.Y. 2012)(same); *Baumann v. District of Columbia*, 744 F. Supp. 2d 216 (D. D.C. 2010)(same); *Shefcik v. Village of Calumet Park*, 532 F. Supp. 2d 965 (N.D. Ill. 2007)(same); *Glass v. Snellbaker*, 2007 WL 1723472 (D. N.J. 2007)(same).



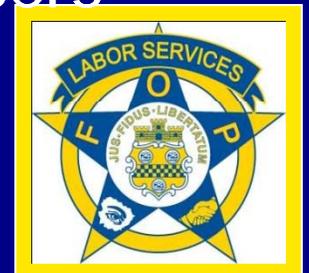
# Union Speech

- However, in, *Bergeron v. Cabral*, 535 F. Supp. 2d 204 (D. Mass. 2008), a federal court has held as unprotected speech by corrections union officers in direct mailings to voters criticizing a sheriff for her treatment of pension funds, holding that “by disparaging the Sheriff’s management style, the plaintiffs sought to advance the union’s bargaining position for their benefit and the benefit of other union members. Although the public would likely be concerned with revelations of discord and dysfunction in the Sheriff’s Office, **the import of plaintiffs’ message was diminished by their preoccupation with personal disagreements and internal disputes over the workings of the Department.** Plaintiffs’ speech did not purport to alert the public to a significant safety threat; they complained instead of pay raises given by the Sheriff to her friends and the creation of a fiscal mess in the Department.”



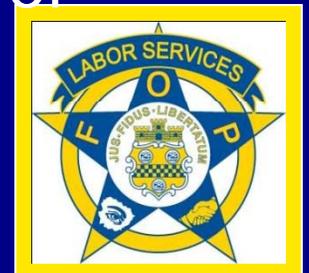
# Off-Duty Speech

- *Roe v. City of San Diego*, 543 U.S. 77 (2004) "Far from confining his activities to speech unrelated to his employment, Roe took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer. The use of the uniform, the law enforcement reference in the Web site, the listing of the speaker as "in the field of law enforcement," and the debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and the professionalism of its officers into serious disrepute."



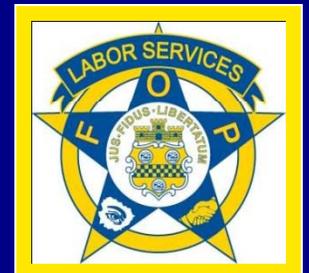
# Off-Duty Speech

- *Dible v. City of Chandler*, 502 F.3d 1040 (9th Cir. 2007). Maintenance of web page by officer and his wife not protected by First Amendment. Web page allowed users, for a fee, to view sexually explicit videos of Dible and his wife. Web page did not identify Dible as a police officer, though when the Department began investigating the matter, the media featured the story prominently. “Whatever a periplus of the outer limits of public concern might show, it was pellucid that Roe's vulgar behavior would be discovered to be outside of those borders.”



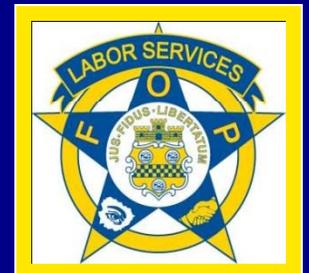
# Off-Duty Speech

- *Locurto v. Giuliani*, 447 F.3d 159 (2d Cir. 2006). Off-duty firefighters had no First Amendment right to participate in a holiday parade that featured mocking racial stereotypes.



# Lane v. Franks

- Currently before the U.S. Supreme Court
- At issue is whether a law enforcement employer may retaliate against an officer for truthful compelled sworn testimony
- TBD



# Contact Information

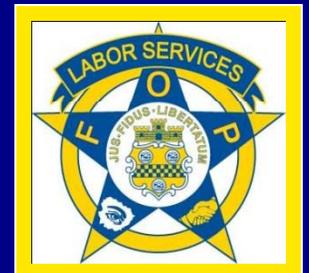
Fraternal Order of Police  
Labor Services

222 E. Town St.

Columbus OH 43215

800-451-2711

or by email at: [labor@fop.net](mailto:labor@fop.net)



**THANK YOU**