The Firehouse Lawyer

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Be sure to visit firehouselawyer.com to get a glimpse of our various practice areas pertaining to public agencies, which include labor and employment law, public disclosure law, mergers and consolidations, financing methods, risk management, and many other practice areas!!!

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Inside this Issue

An Exciting Opportunity for Our Clients

We have been getting a lot of compliments about our in-house availability to our clients. After all, we may be the only attorneys in the country that are physically present—renting office space—in a fire station. In that spirit, and because of the changing technological climate, we have decided to introduce the concept of "circuit riding" into our practice. Under this concept, we would set office hours at various fire stations operated by our clients, and would provide one lawyer to be "in the house," i.e. physically present, in those fire stations, for approximately three hours out of each month. Such office hours would give the client the opportunity to consider any legal issues that arise, and ask those during our office hours, while we are "riding the circuit" and are physically present, for a face-to-face discussion.

Housing Authorities Exempt from the Benefit Charge? Don't Despair

We recently discussed SHB 1467, which contains broad exemptions for housing authorities from the benefit charge.[1] But let us not despair too much. The Washington Supreme Court has specifically held that "[P]ursuant to RCW 52.30.020, housing authorities are **required** to contract with fire protection

[1] http://www.firehouselawyer.com/Newsletters/April2017FINAL.pdf

districts for fire protection and emergency medical services." *King Fire District 16 v. King County Housing Authority* 123 Wn.2d 819, 826 (1994) (emphasis added). In *Housing Authority*, various fire districts successfully obtained a ruling from a King County superior court, ordering that a housing authority enter into a contract with the fire districts and pay past benefit charges. This ruling was certified directly from the Court of Appeals to the Washington Supreme Court, which affirmed the superior court.

Admittedly, SHB 1467 has "overruled" that aspect of the *Housing Authority* case that was applicable to **benefit charges** and housing authorities. SHB 1467,[2] however, says nothing about RCW 52.30.020, which mandates the following:

> Wherever a fire protection district has been organized which includes within its area or is adjacent to, buildings and equipment, *except* those *leased to* a nontax exempt person or organization, owned by the legislative or administrative authority of a state agency or institution or a municipal corporation, the agency or institution or municipal corporation involved **shall** contract with such district for fire protection services necessary for the protection and safety of personnel and property pursuant to the provisions of chapter 39.34 RCW

(emphasis added). There are additional exceptions to the contract requirement in RCW 52.30.020, but none of those exceptions apply to housing authorities.

Consequently, the *Firehouse Lawyer* believes that properties owned by housing authorities, within or adjacent to a fire district—or a regional fire authority that has adopted the powers of a fire district—shall generally be subject to RCW 52.30.020. Therefore, under the *Housing Authority* case, which has not been overruled, or even questioned, housing authorities shall contract with fire departments for services.

But that does not end the inquiry. At the bargaining table, how would a fire district or RFA prove to a housing authority the value of its services? This is not answered by RCW 52.30.020. Nothing in that statute gives guidance to fire districts or RFAs on how fees for service may be established. Yes, the statute sets a benchmark for how *schools*—which are not required to contract for services—will be charged for services, using a model adopted by the Superintendent of Public Instruction.[3]

But that is not enough. Perhaps some legislation is in order. Perhaps RCW 52.30.020 needs to be clarified, to give fire departments some clear idea of how they might approach a municipal corporation or state agency with an objectively clear method for charging fees for service under the statute. Pointing to a statute that *requires* a contract is great. But what will the contract say?

[2] *See* link to SHB 1467: http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/House%20Bills/1467-S.pdf

[3] The current per-pupil cost for fire protection is $1.213953 per pupil, as established by the Office of the Superintendent of Public Instruction (see page 75): http://www.k12.wa.us/safs/PUB/ORG/15/OrganizationFinancing2015.pdf

Various contract parameters have been tried and some others suggested in the past. For example, we have seen the assessed value—as shown on the records of the county assessor—used in an attempt to collect the same tax rate as charged to other properties in the regular "fire tax" levies allowed under chapter 52.16 RCW. But agencies often balk at paying that much, and besides we believe county assessors now do not assign assessed values to buildings owned by local governments.

Square footage has also been used, but we feel that makes it seem as though the service is limited to fire, and ignores your EMS services. After all, 75% or more of your responses are not fire calls but more likely EMS calls.

We have seen the State Fire Chiefs' fee schedules, which are revised annually I believe, used to provide some objective rates. The bottom line, however, is that no method seems to satisfy the "customers," who seemingly would rather not pay anything at all to their fire and EMS providers. It may be time for a legislative solution to clarify how it should be done.

Upcoming Municipal Roundtable

Ever wonder about the alternative funding sources that are out there for fire departments? Come find out, by attending our next Municipal Roundtable at East Pierce Fire and Rescue, at 18421 Veterans Memorial Dr E, Bonney Lake, WA 98391, from 9-11:00 AM on June 16, 2017. Come learn more about impact fees, benefit charges, contracts for service, and grants, among other alternatives—other than property taxes. We learn better when we talk to each other about the issues we face.

Revisiting the Discussion of Impact Fees

Long ago, the Washington Legislature granted counties, cities and towns the authority to impose impact fees, by ordinance, in order "that new growth and development pay a proportionate share of the cost of new facilities needed to serve new growth and development." More recently, in 2010, the legislature added more eligible municipal corporations to that list. RCW 82.02.050 (1)(b). Impact fees may be utilized to pay for new "fire protection facilities," wherever located; this means that fire protection districts and regional fire authorities may collect impact fees. *See* RCW 82.02.090 (7). Prior language in the definition of "public facilities," that disallowed impact fees in fire districts, was deleted from the definition.

Of course, to successfully collect impact fees, the fire district or RFA must adopt a capital facilities plan (CFP); and that CFP must be adopted by the county—or city that is required to or chooses to have a comprehensive plan—as part of the "capital facilities" element of the comprehensive plan of that city or county. This requires political will, but it can be done.

SAFETY BILL

Much like Death Valley, the subject of training can be rather dry. Today we consider the training requirements set forth under WAC 296-305, the Vertical Safety Standards applicable to all firefighters. Some of these training requirements have actual deadlines. Others do not. As for those training requirements that have actual deadlines, these include, but are not limited to the following:

1. Asbestos awareness training: must be provided prior to initial assignment and annually thereafter. WAC 296-305-05502 (7) (c)[4];

2. Training on "specific positions" and duties deemed by the fire department as "critical to the safety of responders": at least annually. 05502 (2);

3. Interior structural firefighting: at least quarterly. 05502 (4);

4. Interior structural firefighting in IDLH conditions: at least every three years. 05502 (6) (a);

5. Wildland firefighting—the ten fire orders, the 18 "watch out" situations, and the four common denominators of tragedy fires: annual. 07010 (6);

6. Review the infectious disease plan, updates and protocols used in the program: annual. 02501 (13); and

7. Knowledge of respiratory protection equipment operation, safety, organizational policies and procedures, and facepiece seals, to the fire department's standard: at least annually. 04001 (17).

[4] Hereinafter, we will only refer to the final identifying numbers of WAC 296-305. For example, a regulation such as WAC 296-305-05502 will be cited as "05502"

As for those training requirements without deadlines, those include, but are not limited to, the following:

1. Incident command system. 05000 (1)(b);

2. Department guidelines related to heat and cold stress. 05004 (6);

3. Various different issues arising out of exposure to high levels of outdoor heat. 05004 (2);

4. For operators of emergency vehicles, training in the operation of such apparatus. 04505 (8); and

5. The step-by-step procedure for donning and doffing respiratory equipment in use at the fire department—such as SCBA—and ensuring the proper function of such equipment, and at least quarterly thereafter. 04001 (15)-(16).

These are many of the training requirements set forth under WAC 296-305, but there are certainly others, as established in the table included in WAC 296-305-05502.

INCOMPATIBILITY DOCTRINE REVISITED

Due to recent questions by two of our contract clients, we felt it might be time to review again the Washington doctrine of incompatibility. This is a common law

rule (derived from case law) that dates back to the seminal case of *Kennett v. Levine,* 50 Wn.2d 212, 216, 310 P.2d 244 (1957). In essence, the doctrine prohibits a person from occupying two elected or appointed positions simultaneously when that would present too much chance of divided loyalty. The remedy is to give up one position or run the risk of being removed, either by legal action or recall.

For example, the question was asked: Can a fire commissioner also serve as a paid firefighter for the same district, even as a part-time employee? The answer is no. In AGO 1973, No. 24, the AG opined that a city firefighter cannot also serve on the city council (absent a state statute allowing it).

Here are some typical incompatibility questions the AG has addressed over the years:

1. Can a fire district commissioner simultaneously be district secretary? Absent a statute allowing it, no. AGO 59-60, No. 157.

2. Can a volunteer of a *city* fire department also serve on city council? Same answer. AGO 61-62, No. 162; *But See* RCW 52.14.010.

3. Can a county commissioner serve as Chair of local civil defense council? No. AGO 63-64, No. 92.

4. Can a county commissioner also serve as a school board member in the same county? No. AGO 65-66, No. 7.

5. Can a city firefighter also serve on city council? No, absent statute allowing it. AGO 1973, No. 24

6. Can a Mayor also serve as Port Commissioner when Port is subject to city zoning code? No. AGO 1978, No. 12.

7. Can a city council member also serve as volunteer firefighter in nearby district when city is annexed (or proposed to be) to fire district? Yes! See AGO 1983, No. 3. Interesting. Can you explain or analyze why this result is correct?

NEW LEGISLATION: HB 1314

This new legislation may have slipped under your radar. It may not interest all of our clients but we know some who would be very interested to know about this bill. Some legislators such as Michelle Caldier have become concerned as to whether audits of Medicaid billing may be overly aggressive at times. As reported recently in Kitsap county news media, apparently a dentist made a $10,000 billing error and the Health Care Authority made an audit finding that the dentist owed $946,000. Apparently, the HCA feels it can "extrapolate" or use statistical methods to exponentially increase the amount Medicaid providers need to pay back if they make a billing error.

HB 1314, now signed by the Governor to go into effect later this year, requires:

- 30 days notice before scheduling any on-site audit, absent a danger to public health or fraudulent activities;
- extrapolation not be used unless there is a determination of sustained high level of payment error or when documented educational intervention has failed to correct the level of payment error (this surely implies extrapolation cannot be used against a "first offender");
- the HCA to offer the provider the option of a repayment plan of up to 12 months; and
- the HCA to provide educational and training programs annually for providers.

Based on personal experience, we feel that this bill deserved to be adopted unanimously by the legislature, which it was, in both houses!