The Firehouse Lawyer

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Upcoming Municipal Roundtable

The Firehouse Lawyer holds a quarterly Municipal Roundtable in which members of the fire service and other municipal corporations gather to discuss issues that are relevant to public agencies. We learn better when we talk to each other about the issues we face. The Firehouse Lawyer did not hold a Municipal Roundtable in the third quarter of 2017 due to legal work volume. However, we will be holding another MR at the end of December. We have not settled on a topic or location yet. Please inform us if your department or agency would like to host an MR, and please inform us what topics you would like discussed.

When Minimum Staffing is a Mandatory Subject of Bargaining

The Public Employment Relations Commission (PERC) recently found that when "shift staffing [has] a demonstratedly (sic) direct impact on employee workload and safety," that minimum staffing is a **mandatory subject of bargaining.** *City of Everett (International Association of Fire Fighters, Local 46)*, Decision 12671-A (PECB, 2017) (hereinafter "*Local 46*"). Of course, we have talked before about the test to decide whether a subject of bargaining is mandatory or permissive[1]:

[1] Not to paint with too broad a brush, if a subject is mandatory, the employer must bargain a decision that impacts that subject *and* bargain the effects of

Ultimately, to make this determination, PERC balances "the relationship the subject bears to [the] 'wages, hours and working conditions'" of employees and "the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative." *International Association of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission (City of Richland),* 113 Wn.2d 197, 203 (1989) (hereinafter this shall be referred to as "*1052* Balancing"). In other words, this requires a balancing of the employer's management rights against the rights of employees to bargain a decision that impacts their wages, hours and working conditions.

Determining whether minimum staffing constitutes a mandatory or permissive subject requires *1052* Balancing, on a case-by-case basis. Consequently, this determination hinges on the evidence put forward by each party (the employer and the local). In *Local 46*, the local produced a broad swath of evidence demonstrating that minimum staffing had " a demonstratedly (sic) direct impact on employee workload and safety":

1. Statistical analysis showing that a decrease in the minimum number of firefighters on duty and the increase in call volume resulted in firefighters responding to more calls throughout their shifts;

2. Expert testimony that when "firefighters respond to more calls, their risk of contracting certain illnesses increases";

3. Expert testimony that when "firefighters respond to more calls, they become more fatigued, lose stability, lose muscular ability, and are at a greater risk of strain or sprain and experience decreased mental abilities";

4. Testimony from a battalion chief that when responding to more calls, firefighters have "little opportunity to recover when they are responding to calls timed close together." PERC opined that "[F]atigue directly impacts safety";

5. Evidence suggesting that increasing staffing levels would cause a 20-percent improvement in an eight-minute response time on roads within the department's boundaries. PERC did not comment extensively on this evidence;

6. Evidence that when firefighters respond to more calls, they have less time to conduct inspections. PERC found that "[D]uring an inspection, firefighters are able to familiarize themselves with a building and learn information that could be helpful in the event of a fire" and that "inspecting buildings can increase safety";

7. Finally, evidence that if firefighters have to respond to more calls they will get less training. PERC found that "[T]raining helps firefighters work as a team on skills necessary to perform their job. Less training means less competence—a direct impact on safety."

How did the employer respond to all of the above? Very little, or so it appears from the PERC decision. According to PERC, "[T]he employer asserted that 'more time in a day on

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that decision; if a subject is permissive, the employer need only bargain the effects of that decision.

911 calls simply means less time on other tasks or less free time.' The employer argued there was 'nothing exceptional, unexpected, burdensome, or onerous about the overall workload.'" Furthermore, PERC found that "T]he employer's argument that it could not afford the union's proposal is not persuasive." Conducting *1052* Balancing, PERC found that the above seven items of evidence submitted by the local union outweighed the employer's right to "manage its affairs." Perhaps PERC so concluded because the employer furnished *little, if any, evidence* to rebut the local, according to PERC. Because the union's evidence outweighed the employer's evidence, PERC found that the extent the subject (minimum staffing) impacted "wages, hours and working conditions" outweighed the employer's "management prerogatives." Consequently, minimum staffing, in this case, was found to be a **mandatory subject of bargaining.**

What have we learned from *Local 46*? Well, it is not so much that we have learned anything new. As we already mentioned, the question is always a matter of evidence because *1052* Balancing is conducted each time this question regarding minimum staffing arises. *Local 46* only reminds us that the employer actually has to present *evidence* to demonstrate that minimum staffing should not be a mandatory subject of bargaining. The employer cannot simply rely on numerous past precedents, in which minimum staffing was found to be permissive. The employer cannot simply argue that the evidence submitted is "anecdotal." Most importantly, the employer cannot rest on a management rights clause. The employer needs to provide its own evidence that tips the scales in favor of its "management prerogative" to reduce staffing if necessary. Otherwise, the employer loses.

Perhaps the best way to illustrate how the employer could have at least had a shot in *Local 46*, we will copy and paste the above seven items and include a proposed response, in red:

1. Statistical analysis showing that a decrease in the minimum number of firefighters on duty and the increase in call volume resulted in firefighters responding to more calls throughout their shifts. Perhaps the employer could submit evidence that firefighters responding to more calls increases competency and firefighter morale; the employer should submit evidence establishing the amount of time its firefighters *do not spend on calls* versus the amount of time actually spent on calls (including turnout all the way to overhaul and return to station), to outline the employer's argument that putting their hands to work actually increases these firefighters' physical fitness and overall competency, rather than the firefighters wasting away behind a TV at the station;[2]

2. Expert testimony that when "firefighters respond to more calls, their risk of contracting certain illnesses increases" (no one could really argue otherwise). The

[2] To be clear, this author is not arguing that this is what firefighters do all day; firefighting is an honorable profession and this author does not doubt that firefighters want to be at scenes, and therefore spend much of their down time at the station studying on how to be better firefighters. The purpose of this article is to only discuss why the local won in this case, not to opine on the work ethic of firefighters.

employer responds that "contracting certain illnesses" is a risk specific to employment as a firefighter, and a firefighter could go on one call in a day and be exposed to hazardous materials when another firefighter could go on five calls and encounter none. Furthermore, the employer could argue that "contracting certain illnesses" is much more relevant to whether firefighters suffer an occupational disease at a later time, and bears less on "working conditions" because at the time of any exposure to certain toxins or other hazardous materials, the employer will have a thorough safety program that is rigorously followed by staff in order to minimize any risks of contracting illnesses. Furthermore, the employer could argue that the decision over whether a subject is mandatory or permissive is a legal argument that requires an analysis of the present and direct impacts of a particular decision, not the cumulative impacts;

3. Expert testimony that when "firefighters respond to more calls, they become more fatigued, lose stability, lose muscular ability, and are at a greater risk of strain or sprain and experience decreased mental abilities." Perhaps the employer can submit its own expert testimony that responding to more calls incentivizes firefighters to remain physically fit and increases their competency in areas which they were not exposed to before, and therefore firefighting does not cause "decreased mental abilities" as the expert for the local opined;

4. Testimony from a battalion chief that when responding to more calls, firefighters have "little opportunity to recover when they are responding to calls timed close together." PERC opined that "[F]atigue directly impacts safety." The employer could respond with actual data. This data would hypothetically illustrate that an increase in call volume would have a tangential (not direct) impact upon recovery time because the fire department has specific policies relating to rehab time after and during fires/EMS incidents. The employer could graphically indicate how rehab time would be impacted if calls were increased by stated percentages, and establish an average rehab time, to argue that the average rehab time would be negligible balanced against the employer's ability to control costs and encourage productivity. The employer could indicate, with data, the amount of time during a given shift that a firefighter is physically present at a scene versus the amount of time that the firefighter is back at the station. To the extent that "fatigue has a direct impact on safety," as PERC found, the employer could respond that knowledge of fire science, incident command, and signs of stress-induced fatigue, etc. also have an equally direct impact on safety by virtue of improving how the firefighter responds in a given incident;

5. Evidence suggesting that increasing staffing levels would cause a 20-percent improvement in an eight-minute response time on roads in the department's boundaries. PERC did not comment on this evidence. Perhaps the employer could introduce evidence of what its average current response time is, to establish a floor for how response times would be impacted by a reduction in staffing;

6. Evidence that when firefighters respond to more calls, that these firefighters have less time to conduct inspections. PERC found that "[D]uring an inspection, firefighters are able to familiarize themselves with a building and learn information that could be helpful in the event of a fire" and that "inspecting buildings can increase safety." This depends on the culture of the fire department. In *Local 46*, each firefighter was assigned to a certain number of inspections. If the employer does not assign firefighters to conducting inspections but instead reserves this function to fire prevention bureau employees, then this concern would be substantially mitigated if not irrelevant. Of course, even if every firefighter was assigned to perform inspections at certain times, the employer could always argue that the experiential or on-the-job training effect of actually responding to a scene outweighs the passive experience of inspecting a building.

7. Finally, evidence that if firefighters have to respond to more calls that they will get less training. PERC found that "[T]raining helps firefighters work as a team on skills necessary to perform their job. Less training means less competence—a direct impact on safety." The employer could present evidence that training pales in comparison to time actually spent on scene. Training is the public safety equivalent of "book smarts," while actual responses would be the public safety equivalent of "street smarts." Any reasonable CEO of a baseball team wants to know how many minor/major league baseball games a person has played, not how many times that person has been to batting practice. Any reasonable owner of a law firm wants to know how many trials an applicant-attorney has under his or her belt, not how many times the applicant-attorney has been to a seminar on how to effectively elicit testimony or present exhibits at trial. Finally, any reasonable general knows that when troops face more battle together, their solidarity and camaraderie grows. Some would argue that soldiers are made in combat, not at basic training.

Beware the Recall Laws for OPMA Violations and Dereliction of Duty

The Washington Supreme Court has delivered a very helpful case for recall petitioners and recall opponents alike: *In Re Recall of Pepper*, NO. 94574-8 (2017). This case dives into what may constitute a "violation of the oath of office."[3]

Elected officials may be recalled from office under Article I § 33 of the Washington Constitution. A successful petition for recall must demonstrate both "factual and legal sufficiency" prior to being put to a vote. *See Chandler v. Otto*, 103 Wn.2d 268, 274 (1984).[4]

A recall petition is "legally sufficient" when the petition states "with specificity substantial conduct clearly amounting to misfeasance, malfeasance or violation of

[3] Generally, "Violation of the oath of office" means "the *neglect* or knowing failure by an elective public officer to perform faithfully a duty imposed by law." RCW 29A.56.110(2) (emphasis added).

[4] Joseph Quinn, Editor, has argued numerous recall cases, before the Washington Supreme Court and Washington appellate courts, throughout his career.

the oath of office." *Id.*[5] To establish "factual sufficiency" generally, the petition must identify for the electors and the official being recalled the *acts* that would constitute "misfeasance, malfeasance, or violation of the oath of office." *Id.* The burden is on the recall petitioner to establish "misfeasance, malfeasance, or violation of the oath of office." *In re Recall of Bolt*, 111 Wn.2d 168, 181 (2013). To establish "factual sufficiency" when commission of an "unlawful act"[6] is alleged, the recall petitioner must demonstrate that the elector had knowledge of and intent to violate a particular law. *See In Re Recall of Telford*, 166 Wn.2d 148 (2009).

Pepper presented various questions, three of which we will address here:

1. Whether a city councilmember ("Pepper") violated the Open Public Meetings Act ("OPMA") by convening closed meetings of a majority of the city council of Black Diamond ("City");
2. Whether the failure to attend City meetings and failure to approve meeting minutes is factually and legally sufficient for recall; and
3. Whether the failure to enact a budget is factually and legally sufficient for recall.

OPMA Violations

Pepper, as part of a council majority, passed a resolution that would have required that a majority of council members be on each standing committee of the City. Of course, the City did not hold meetings of standing committees in an open forum, after passage of this resolution. This clearly violated the law:

The OPMA requires that all meetings of a governing body be held in open session, unless otherwise provided for in the OPMA. RCW 42.30.030. Committees are generally not subject to the OPMA unless the committee may "act on behalf of the governing body." RCW 42.30.020 (2) (defining "governing body"). Of course, a majority of council members (i.e. a quorum) are clearly subject to the OPMA because that would constitute a "governing body." Furthermore, discussions of government business between members of a standing committee composed of a majority of a governing body would constitute a "meeting" under the OPMA.

Such was the advice of the City's attorney, and outside attorneys. Instead of following

[5] If a particular oath of office is not set forth by statute, the official must pledge "that he or she will faithfully and impartially discharge the duties of the office to the best of his or her ability." RCW 29A.04.133 (3)

[6] Violation of the *oath of office* does not necessarily constitute an "unlawful act." Commission of an "unlawful act" is more a question of "malfeasance"; under *Pepper* and RCW 29A.56.110(2) (see footnote 3), neglect of duties may constitute violation of the oath of office.

this advice, Pepper and a majority of the council met in standing committees and decided to alter contracts. Our Supreme Court found that there was factual and legal sufficiency to demonstrate that Pepper knew her conduct violated the law and then proceeded to violate the law by having "meetings" in secret. The Court did not specifically state if the above constituted a violation of the oath of office, but the Court did hold that Pepper had "knowledge of potential OPMA violations" because of the above legal advice.[7]

Because of *Pepper*, a recall petitioner can successfully argue that failure to follow legal advice, when that advice is meant to prevent the official from violating the law, constitutes legal and factual sufficiency for recall. Interestingly, in past cases the Supreme Court has found that *following* legal advice negates legal sufficiency because that tends to indicate an intent not to break the law, so to speak. *See In re Recall of Boldt*, 187 Wn.2d 542, 386 P.3d 1104 (2017).

Refusal to Attend Meetings and Approve Minutes

[7] The original recall petition alleged that Pepper hindered the ability of the City to obtain legal advice by hiring and firing attorneys, but the Court seemed to weave this allegation into the charge of OPMA violations.

The recall petitioner, a fellow City councilmember of Pepper, argued that Pepper violated her "duty as a council member" because she colluded with two other council members to prevent meetings from taking place. The petitioner was *not* arguing that absenteeism alone constitutes grounds for recall, but that being absent for purposes of preventing meetings constituted grounds for recall (a subtle but true distinction). Pepper never denied that she missed council meetings. She merely asserted that her belief that "absences were legal" answered the above allegations. The Court disagreed.

The Court found that Pepper attended various "standing committee" meetings with two other council members. This resulted in a majority of council members not being in attendance at regular meetings of the City council, thus making the meetings a nullity for lack of a quorum. The Court rebuffed Pepper's argument that her absences were lawful by reiterating that the recall statute **"does not require an act to be unlawful to form a legally sufficient basis for recall."** Instead, the Court underlined that an official may be recalled for violation of the oath of office, which again is the "neglect or knowing failure...to perform faithfully a duty imposed by law." RCW 29A.56.110 (2). The Court agreed with the petitioner that "purposefully defeating quorums to obstruct the functioning of the City is a neglect to perform faithfully" Pepper's

duties as a council member. (This would seem to necessitate delving into the reasonableness of the excuses for missing meetings.)

With respect to the failure to approve meeting minutes, RCW 42.32.030 specifically states that minutes of all regular and special meetings (excluding executive sessions) "shall be *promptly* recorded and such records shall be open to public inspection." (emphasis added). The Court found that Pepper's failure to attend regular meetings defeated quorums and therefore resulted in a failure to "promptly" record meeting minutes. Furthermore, the Court found that these actions potentially violated the City's *own regulations*, which stated that "[T]he City Clerk shall cause to be prepared action minutes of all the Council meetings."

Under *Pepper*, the member of a governing body whose actions result in meeting minutes not being recorded "promptly" is subject to recall. Again, an unlawful act is not required to form a legally sufficient basis for recall. Instead, *neglect* to perform one's duties (approving minutes) may constitute grounds for recall.

Failure to Enact a Budget

Essentially, Pepper allegedly presented a substitute budget at the eleventh hour for getting a budget approved in accordance with RCW 35A.33.075, which states that a city must adopt a budget in "its final form and content" by the beginning of the city's fiscal year. The recall petitioner admitted that the City ultimately passed a budget, but that Pepper's "wrongful conduct in delaying that passage can still support a recall." The Court agreed.

Ultimately, *Pepper* stands for the following proposition: An elected official's failure to perform his or her duties in a timely fashion, resulting in the impairment of the governing body's essential functions, such as passing budgets or having a necessary quorum to conduct *any* business, constitutes grounds for recall. This case is very important because it creates greater potential for elected officials being recalled for acts that are less intentional than they are neglectful.

Names and Dates: Where Privacy Meets Public Policy

Recently, the Washington Court of Appeals, Division Two, found that "[P]ublic disclosure of state employees' full names associated with their corresponding birthdates" would violate Article I § 7 of the Washington Constitution. *UFCW Local 365, Washington Center for Childhood Deafness and Hearing Loss*, No. 49224-5-II (2017). This case, *Local 365*, preserves the rights of public employees to claim that disclosure of public records concerning them may violate their

constitutional rights (their privacy), depending on the nature of the request:

Article I § 7 of the Washington Constitution states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Under the Public Records Act ("PRA"), an individual to whom certain requested records pertain may seek an injunction preventing those records from disclosure. RCW 42.56.540. Ultimately, the *Local 365* court reminds us, to obtain such an injunction, the individual must demonstrate that (1) the record in question specifically pertains to that person, (2) an exemption applies, (3) the disclosure would not be in the public interest, and (4) disclosure would substantially and irreparably harm that party or a vital government function.

Applying the above four-part test, Division Two (the "court") began by concluding that because the request asked for the names and birthdates of various employees, all members of a union, that the information requested "specifically pertained" to those employees.

Turning to whether an injunction should be issued on the basis that the records requested are exempt, the court noted that under the PRA, a record is only exempt from disclosure when a specific exemption in the PRA applies, or an "other statute" would prohibit disclosure. *See* RCW 42.56.070 (1). However, the court noted, because the Washington Constitution "supersedes contrary statutory laws," *the Constitution may also be construed as providing exemptions from the PRA*. Acknowledging this, the court held that under Article I § 7, public employees "have a constitutionally protected expectation of privacy in their full names associated with their corresponding birthdates."

The court next considered when the PRA would justify invasion of these interests. The court found that despite the strongly worded mandate for broad disclosure set forth in the PRA, revealing employees' names *and* birthdates would have no positive effect on ensuring government transparency. Ultimately, the court found that a reasonable citizen would expect that the names *and* birthdates of public employees "remain private."[8]

From *Local 365*, we conclude that a public records request that explicitly asks for or would require the disclosure of the names *and* birthdates of public employees or volunteer is *exempt* from disclosure. With that being said, we further conclude that public employees and volunteers likely do *not* enjoy a reasonable expectation of

[8] Note that RCW 42.56.250 (4) does *not* specifically exempt the names and birthdates of public employees and volunteers, but *does* exempt the names and birthdates of their *dependents*; that is probably why the employees had to pursue another route to "exempt" their names, with accompanying birthdates, from public disclosure.

privacy in their name alone. *See Also Predisik v. Spokane Sch. Dist. No. 81*, No. 90129-5 (2015) (specifically finding that a public employee has no reasonable expectation of privacy in their name alone).

Perhaps most importantly, based on this *Local 365* case, we are starting to believe that information pertaining to private citizens contained within public records, although not specifically exempted from disclosure under the PRA, would also be "exempt" under Article I § 7 of the Washington Constitution. We believe that *Local 365* may have, unintentionally or not, created or laid the groundwork for a generalized "privacy" exemption that has never been explicitly recognized before by any Washington court.

Some public disclosure advocates have made the argument that this "Section 7 exemption" would "drive a tank" through the Public Records Act. We disagree.

The sort of information that Article I § 7 is designed to protect is information that is so sensitive that no reasonable citizen would want, or need, to know it. What business does the average citizen have in knowing the name of a patient in an incident report? What business does a citizen have in learning the eating or exercise habits of a public employee? We do not feel that Article I § 7 is going to "drive a tank" through the Public Records Act, because the courts will always recognize when the public's "right to know" is not even implicated by a particular request.

Of course, this was a decision by an appellate court, Division Two. This has not yet been decided by the Washington Supreme Court. This is a case that we will be following very closely. Stay tuned.

SAFETY BILL

Safety Bill says: "Be safe this holiday season." Hopefully, we will have room for him next month.

DISCLAIMER