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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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REMINDER: OUR NEXT MUNICIPAL ROUNDTABLE IS ON THE WAY!

Please join us for a *virtual* Municipal Roundtable (MR), in which we will be discussing fire district and RFA finances, to include a discussion of the following: property taxes, benefit charges, GEMT, local improvement districts, impact fees, and more! We welcome our readers, and any of your friends in government, to this *free* discussion forum.

This *virtual* MR will take place on Friday, January 6, 2023 from 9:00 to 11:00 AM. See the Zoom link to this free training opportunity[1]:

https://us06web.zoom.us/j/89132107467?pwd=Vm9iOVV6aEJ1dm5HOWt2STE0U2lCZz09

WASHINGTON SUPREME COURT RULES ON IMPORTANT COLLECTIVE BARGAINING ISSUE

On December 8, 2022, in *Local 270 v. Spokane,* the Washington State Supreme Court ruled that a Spokane city charter provision mandating that collective bargaining be done in an

[1] If you are less tech savvy and need other ways to access the MR, please let us know via email: ericquinn@firehouselawyer2.com

open and transparent manner is unconstitutional, as it is pre-empted by RCW 41.56.[2]

In the *Local 270* case, the city amended its charter in 2019, adding Section 40, which one of the city unions eventually challenged in court. Section 40 required that all collective bargaining in which the city was involved as employer be open and transparent. Notice of such bargaining was required, as in the Open Public Meetings Act (chapter 42.30 of the RCW). The city required that all notes, documents and proposals be published on its website within two business days of transmission between the parties, and all collective bargaining agreements (CBA) be listed there for the life of the agreement. Meetings held to enforce agreements (once negotiated), such as grievance proceedings, were exempted from the openness requirements.

Although the City of Spokane was at first somewhat ambivalent about enforcement of Section 40, ultimately the city and union were unable to agree on ground rules for negotiations, because the city continued to urge greater openness. Eventually, the Washington State Council of County and City Employees, AFSCME Council 2 (hereinafter the "Union") filed for a declaratory judgment, alleging that the charter provision violated RCW 41.56, the Public Employees Collective Bargaining Act, or PECBA. Upon a motion for summary judgment filed by the Union, the trial court ruled that PECBA preempted section 40 and thus made it unconstitutional under article XI, section 11 of the Washington State Constitution.

That section of our state constitution is succinct. It provides: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws (emphasis added)." Clearly, RCW 41.56 is a general law; even a county charter is subservient to general laws of the state.

The Court first discussed the question whether the case was justiciable, because apparently the parties ultimately agreed to a CBA prior to the Court's ruling, so the city argued the case was moot. Not so, said the Court, probably because the case is of so much public importance. The issue had arisen before in Lincoln County, and undoubtedly would arise again.

In preemption cases like this one, the legal issue is whether the state statute preempts the local law, either because of an express conflict or because the two laws cannot be harmonized. *See Brown v. City of Yakima,* 116 Wn. 2d, 556, 559, 807 P.3d 353 (1991). There is no explicit preemption provision in RCW 41.56 itself. The trial court agreed with the Union, however, that there is either total preemption of the field or a conflict in the language that cannot be harmonized, and therefore the section was in violation of article XI, section 11 of the state constitution.

Field preemption occurs where there is express legislative intent to occupy the entire field (which did not exist here as mentioned above) or when such legislative is otherwise established. In this case, legislative intent could be reasonably inferred from the statute's purpose and the factual circumstances. *Watson v. City of Seattle,* 189 Wn. 2d 149, 171, 401 P.3d 1 (2017). Conflict preemption, on the other hand, occurs "when an ordinance permits what state law forbids or forbids what state law permits." *Lawson v. City of*

[2] See the link to this case: https://www.courts.wa.gov/opinions/pdf/1006764.pdf

Pasco, 168 Wn. 2d 675, 682, 230 P.3d 1038 (2010).

The City of Spokane argued PERC had ruled in the Lincoln County case and their decision supported the city's position that section 40 only impacted permissive subjects and not mandatory subjects of bargaining. In *Lincoln County,* No. 128814-U-17, PERC said that RCW 41.56 does not prescribe how parties will bargain. PERC has held before that it is an unfair labor practice (ULP) for one party to set rules on permissive subjects prior to the commencement of bargaining. In the *Lincoln County* decision, the board concluded that a party unlawfully refuses to bargain when it requires that the parties bargain in a certain way as a condition of bargaining about mandatory subjects.

When the Lincoln County case reached the Court of Appeals in 2020, that court held that parties may not unilaterally impose preconditions to bargaining. *See* 15 Wn. App. 2d 143, 157, 475 P.3d 252 (2020), *review denied,* 197 Wn.2d 1003 (2021). It is also settled law that it is a ULP to bargain to impasse over a permissive subject of bargaining. *See, e.g. Klauder v. San Juan County Sheriffs' Guild,* 107 Wn. 2d 338, 341, 728 P.2d 1044 (1986).

Essentially, what the Court said in *Local 270* is that the City of Spokane created an impasse on a permissive subject by trying to mandate that negotiations could only proceed openly and transparently, and otherwise in accord with section 40. Therefore, the Court ruled, any city charter provision or ordinance that sets mandatory ground rules before the negotiations may begin is totally inconsistent with PECBA and cases interpreting that statute.

Next, the Court enumerated some of the harms inherent in opening collective bargaining to public observation. The Court implied that it would have a chilling effect or might even invite public posturing, and politicizing of the process. This struck the Court as inconsistent with the purpose of the PECBA, which is designed to improve the labor-management relationship.

The Court also emphasized the statutory language of fostering *uniformity* in the implementation of the rights of public employees, stating that "a patchwork system of rules by local governments is inconsistent with" the uniformity purpose of the laws.

The Court also looked to the way in which other statutes addressed collective bargaining and how that related to those laws. For example, the Court noted that the Public Records Act (PRA), RCW 42.56, exempts from disclosure preliminary drafts, notes and recommendations (often called the "deliberative process exemption). And perhaps more directly applicable, the Court noted that the Open Public Meetings Act, RCW 42.30, excludes collective bargaining from its scope (See RCW 42.30.140(4)(b).

The Court also cited Division One of the Court of Appeals, which has held that lists of collective bargaining issues were exempt from disclosure under the PRA in *Am.Civ.Liberties Union of Wash. v. City of Seattle,* 121 Wn. App. 544, 553, 89 P.3d 295 (2004).

For these reasons, the Washington Supreme Court unanimously held (9-0) that section 40 is unconstitutional as violative of article XI, section 11. We think the Court has made a wise decision in this case. The matter was left undecided in the decisions of PERC and the Court of Appeals in the *Lincoln County* dispute. Now there can be no

doubt: The parties have to agree on the ground rules prior to bargaining and neither party can insist to impasse that bargaining will be done in a public forum.

The author of this article served on the PERC Commission, or board, from 1986 to 1990, having been appointed by Governor Booth Gardner. Joseph Quinn served as the labor lawyer for Pierce County from 1980 to 1983, when he left county employment and went back into private practice.

EMTALA – WHAT IS IT AND HOW DOES IT AFFECT EMS?

Many of our clients have been having some difficulties at local hospitals, when the hospital staff does not address patients delivered to their facilities by emergency personnel, in a timely manner. The question becomes…is it appropriate under existing law to leave the hospital grounds and try to transport the patient to a different hospital?

EMTALA is the Emergency Medical Treatment and Labor Act,[3] enacted in 1986 due to some egregious cases of emergency medical patients being "parked" too long at ERs, with disastrous consequences. Contained in Section 1867 of the Social Security Act, EMTALA requires hospitals to assess patients who have presented at the hospital (usually the Emergency Department) in a timely manner and to treat them. The law does not create liabilities for Emergency Medical Services responders who transport the patients to the hospital, but recently a Medical Program Director counseled our client's EMTs against moving the patients to a new hospital when the original hospital has been presented with the patient and then delay ensued, sometimes called "parking" patients.

It is apparently settled that hospital staff cannot thereby delay the transfer of the patient to their custody and responsibility, as the patient is their responsibility as soon as the patient is delivered to the ER and the staff there is made aware of the patient being presented. Of course, in some cases, the Emergency Room staff is overwhelmed by patients and will ask the EMS responders to remain there with the patient. (We were made aware of one hospital recently that asked EMS personnel to assist with the "triage" of patients at the ER, due to short staffing, and the EMTs agreed to help. We do *not* recommend that practice at all, and even wonder if that acceptance of additional responsibilities is outside the scope of practice authorized to EMTs!)

Nonetheless, we agree with the MPD mentioned above who said that it is unwise to move the patient to a new facility due to delay. Instead, we recommend that EMTs inform the hospital staff of EMTALA and its requirement that the hospital staff must assess and treat patients in a timely manner. Also, they might mention to the staff that they are out of service, and ask them if they would want their mother or sister who is having a heart attack to be saddled with undue delay simply because the EMTs are stuck at the hospital due to the delay in transfer!

SEBRIS BUSTO JAMES DECEMBER NEWSLETTER

We have subscribed to the Sebris Busto James newsletter for many years and often find it helpful. Their December issue featured an article entitled "New Year's Resolutions for Best

[3] https://www.law.cornell.edu/uscode/text/42/1395dd

Employment Practices"[4] by Amanda Masters, Attorney.

This article operated, for me, as mostly a reminder of the importance of having an Employee Handbook, which is a necessary document to provide to employees, so they have in one place all applicable personnel policies of your organization. All of the usual vital policies such as those applicable to harassment and discrimination, wage and hour policies, the Washington Paid Family and Medical Leave Act, and sick leave and vacation policies. One good additional policy to have is a policy on reporting of, and investigating, any and all violations of the organization's policies. I might add a Whistleblower Policy, which incidentally is required by state statute.

Also, the article stressed the necessity of having job descriptions, which should set out clearly all of the essential functions of the job. This provides the needed guidance to your HR department, especially when it comes to a question of accommodation of qualified individuals with a disability.

We would like to thank Sebris Busto James for their efforts. We find their newsletter, and our own, to be helpful in our practice.

In that regard, Joseph F. Quinn has started to compile *Firehouse Lawyer* articles into a book format to be published at some point in 2023. If you peruse our free newsletter at www.firehouselawyer.com, you will see that, over the years since we started in 1997, there is hardly an issue that a fire department in the State of Washington (or anywhere in the U.S. really) might face that we have *not* addressed at some point. The *Best of the Firehouse Lawyer* book will try to compile the many articles on frequently discussed important topics in the 20 volumes of the newsletter published through 2022.

[4] https://sbj.law/wp-content/uploads/December-2022-Resolutions-for-Best-Employment-Practices.pdf

THE RESPONSIBLE BIDDER COLUMN: PROCUREMENT WITH FEDERAL MONEY

Herein, we continue our monthly efforts to cover, comprehensively, the laws relative to the public bid laws and exceptions thereto. Sometimes clients will ask us about the special rules applicable to contracts that are being funded in part by federal grants.

We have found it to be effective to include a reference to certain federal regulations in the Special Provisions to every contract funded through federal grants or agreements. Please refer to Title 2 of the Code of Federal Regulations, and particularly to Subtitle A, Chapter II, the OMB Guidance. Appendix II to Part 200 contains the necessary contract provisions.[5] In the Special Provisions to your contracts, just refer specifically to each of the 12 contract provisions set out in Appendix II.

But then take one further step: indicate at the end of each of the 12 provisions that section or subsection of your contract that satisfies that provision. One example: Provision B of the appendix requires "All contracts in excess of $10,000 must address termination for cause and for convenience…." Just add at the end: "See section ____ of our contract."

[5] See Appendix II: https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/appendix-Appendix%20II%20to%20Part%20200

JOSEPH QUINN, NOW ASSOCIATED WITH ESCI

Many of our readers are probably somewhat familiar with Emergency Services Consulting International (ESCI), which is affiliated with the International Association of Fire Chiefs. ESCI traces its roots to a company founded by Fire Chief Jack Snook, a chief of the Tualatin Valley Fire Department in Oregon.

The company has grown and evolved over the years into an organization with a Human Capital Division and Planning & Strategic Services Division. The Human Capital Division employs industry experts in industrial and organizational psychology to create public safety promotional tests, assessment centers, succession plans, and executive searches.

Planning & Strategic Services, in which Joseph Quinn now serves as an Associate, provides management consulting including strategic planning, master plan development, community risk assessments, standards of cover, station location studies, cooperative service studies, and many other customized services to help municipal agencies with their emergency services needs.

Quinn has been extensively involved in cooperative efforts such as mergers and consolidations and the formation of regional fire authorities, so he felt he was uniquely qualified to work as a consultant with ESCI.

Those interested in more information about ESCI or contacting Joseph Quinn in his capacity as an ESCI consultant should contact him at joseph.quinn@esci.us.