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Intent is Always a Factor in OPMA Violations

Under Washington law, all meetings of a governing body of a public agency, or a committee thereof, when said committee acts on behalf of the governing body, shall be open to the public, unless an exception applies. RCW 42.30.030.

Recently, the Washington Court of Appeals utilized previous case law to establish that members of a governing body must "intend to engage in a meeting to transact official business" in order for an email exchange between members of a governing body and a third party to be considered a "meeting."

In *West v. Pierce County Council*, No. 48182-1-II (February 22, 2017), the Court of Appeals was asked whether the following was a "meeting" conducted in violation of the Open Public Meetings Act. The facts of this case are somewhat complex, but we summarize them as follows:

Various members of the Pierce County Council sent emails to the Pierce County Prosecutor's Office. Individual Council members asked whether the Council had authority to initiate a legal challenge to a referendum. Arthur West sued for violation of the OPMA. There was no evidence to suggest that the Council

members met with one another to discuss what they had learned from these emails.

In the trial court, the Council submitted declarations from all the Council members stating that, at the time of the email communications at issue, most of the Council members did not believe that the Council had any role in deciding whether to pursue the lawsuit challenging the referendum. Instead, the Council members believed that the Pierce County Executive was the only decision maker.

The Court of Appeals, in an *unpublished* opinion, held that there had been **no** "substantive violation" of the OPMA when these emails were exchanged between Council members and the Prosecuting Attorney's Office.[1] In the context of email communications, the court cited the general rule: "When dealing with alleged meetings that occur over electronic communications, a plaintiff alleging a violation of the OPMA must show that (1) a majority of the governing body met, (2) the participants in the communication must collectively intend to meet to transact official business, and (3) participants must take "action" as defined in the OPMA."

The court reiterated the rule that "the mere use or passive receipt of e-mail does not automatically constitute a 'meeting,'" citing *Wood v. Battle Ground Sch. Dist.,* 107 Wn. App. 550, 564, 27 P.3d 1208 (2001). The court opined that "the Council members were communicating with the prosecuting attorney, rather than with each other as a council," and therefore did not "meet" to discuss whether a lawsuit was proper.

Of course, "action" means "the transaction of the official business of a public agency," and includes but is not limited to "discussions." *See* RCW 42.30.020 (defining "action). Noting that the Council asserted that it did not believe it was the *final authority* to decide whether to proceed with a lawsuit, the court found no violation. Perhaps this is because, the court found, the "official business" of the Council was not to initiate lawsuits, and therefore there was insufficient evidence to establish that "action" was taken by the Council. What was ultimately expressed in *West*? For an email exchange to constitute a meeting:

First, a majority of the governing body must *meet*, which may occur through a series of emails. A majority need not be included in the original email, but eventually a majority must be included in an exchange of the same subject matter of the initial email exchange, such as a gathering with one another to discuss the substance of the emails[2];

[1] An unpublished opinion is an opinion that may not be relied upon by a party in a court of law, and therefore has no precedential value, but serves as useful guidance.

[2] This is also true in the context of social media: http://www.firehouselawyer.com/Newsletters/May_2015.pdf

Second, the body must *intend* to conduct business that the body conducts, i.e. the body must have the *authority* to engage in the business being discussed and must intend to decide whether it *should* exercise that authority[3];

And finally, there must be a sufficient quantum of evidence to show that a majority discussed or deliberated on the substance of the emails. The second question, to us, is the most tricky: When would a governing body ask a question of a third party, that may be a member of the agency itself—such as a prosecuting attorney for the same municipal corporation, or a fire chief—when that third party is the person that actually has the authority being discussed? This seems rare.

May a majority (and recall that a majority need not be included in the original email) of the members of a governing body, via email, ask a fire chief whether he or she intends to discipline a particular individual? Yes. Pretend that three commissioners on a five-member board, each individually send an email to a fire chief, asking whether he or she intends to discipline an employee for off-duty misconduct. These facts are very similar to those in *West.* Has a meeting occurred? Not yet—there has been no deliberation and the commissioners have not met to discuss the issue.

What if the three commissioners discuss the disciplinary issue with one another, via email or otherwise? Under *West,* this **is** a "substantive violation" of the OPMA. Although the fire chief is the person who has the *initial* authority to decide whether or not to discipline the individual, if that individual grieved his or her discipline, the commissioners would be the final arbiters within the agency to approve or deny the grievance, depending on the language of any contracts; and the commissioners met to discuss the issue, therefore satisfying *all three* of the *West* requirements.

Even if the fire chief had been fully delegated the authority to hire and fire personnel, and the commissioners had no jurisdiction to affirm or deny a grievance, the commissioners under this hypothetical *met to discuss* the issue, so the question would be close under such facts. Therefore, members of a governing body should not attempt to avoid the requirements of the OPMA by meeting to discuss issues the body does not believe it has the *ultimate authority* to decide upon. Instead, the body should consult legal counsel and/or refrain from meeting to discuss such issues.

Ultimately, the *West* court found, the email communications at issue in the case were "related more to information gathering and communication rather than to the transaction of official council business." Again, *West* is an **unpublished opinion,** and is therefore not a binding precedent. Also, this decision may be affirmed or

[3] Recall that a board of fire commissioners has the plenary authority to "manage the affairs" of the fire district. *See* RCW 52.14.010.

reversed on review by the Washington Supreme Court.

The Presumption of Occupational Disease for Firefighters: When does the Buck Stop?

Under RCW 51.32.185, the Washington Legislature has promulgated a strong presumption in favor of firefighters who suffer from an occupational disease. Generally, an "occupational disease" is defined as a disease or infection that arises "naturally and proximately" out of employment. RCW 51.08.140. In the traditional occupational disease case, the worker is the one with the burden of proof to establish that he or she suffers from such an occupational disease.[4]

In the case of firefighters, except under narrow circumstances, the burden of production (of evidence) and the burden of persuasion (to prove or disprove the ultimate issue) rests with the employer, under RCW 51.32.185. *See Larson v. City of Bellevue,* No. 91680-2 (2017). The firefighter enjoys what is called a rebuttable presumption of occupational disease. Washington Courts liberally construe the Industrial Insurance Act in favor of the worker. However, the rebuttable presumption "may be rebutted by a preponderance of the evidence," i.e. on a more probable than not basis. RCW 51.32.185 (1). This preponderance of the evidence may include lifestyle, hereditary factors, and exposure from other employment or nonemployment activities. *See Id.* If the employer rebuts the presumption, the firefighter must prove that his or her occupational disease rose "naturally and proximately" out of employment as a firefighter.

In *Larson*, supra., a unanimous Washington Supreme Court found that the rebuttable presumption for firefighters "does not disappear on the production of contrary evidence." Instead, the burdens remain with the employer and/or the State throughout the proceedings, and the presumption must be rebutted on a more likely than not basis. To what extent is the firefighter presumption rebuttable?

Some have argued that the firefighter presumption is effective until the employer and/or the State demonstrate that firefighting is not even **a** cause of the occupational disease. Of course, the *Larson* Court found that the firefighter presumption was established for those cases in which medical evidence fails to definitively establish the cause of a particular disease. But does that mean that even when medical evidence overwhelmingly supports a finding that the disease was naturally and proximately caused by factors unrelated to firefighting, the presumption still applies? This cannot be so.

For example, pretend that a 55-year-old retired firefighter's family history evidences an overwhelming predisposition to heart disease (hereditary factors). And the firefighter is obese and in terrible shape: Outside of his employment, he has not exercised in years; he eats bacon for breakfast, lunch and dinner; he has smoked for 30 years and still smokes; and he openly admits in a deposition that he has been "out of shape for years" (lifestyle factors). And he has been a firefighter for only ten years:

[4] A "respiratory disease," such as lung cancer, is an "occupational disease," but a "respiratory disease" must be diagnosed as such prior to obtaining the benefit of the presumption: http://www.firehouselawyer.com/Newsletters/November2015FINAL.pdf

Before that, he was a food-taster, sampling hamburgers and other fat-ridden foods, for 10 years (other employment). Each of the above factors (heredity, lifestyle and other employment) are specifically enumerated in RCW 51.32.185 as evidence that may rebut the presumption. Pretend that this firefighter is diagnosed with heart disease, two years after his retirement. He applies for L&I benefits as a firefighter with an occupational disease. His benefits are denied.

At a deposition, his physician, who diagnosed him with heart disease, testifies that medical studies conducted by cardiologists demonstrate that firefighters who run up flights of stairs with bunker gear are at an increased risk of heart disease, as compared to a mailman carrying an envelope up a flight of stairs. Because the firefighter is wearing bunker gear, he is more at risk of having heart disease—his heart must work harder, going from place to place, therefore increasing his propensity for heart disease. His firefighting is more than likely *a* cause of his heart disease. (This hypothetical may be contrived or absurd, but we are trying to make the point that the firefighter presumption cannot be irrebuttable.)

Be that as it may, it would be absurd if an employer must disprove firefighting as **a** cause to rebut the presumption. If the presumption operated this way, the presumption has not been rebutted in the case above, and hypothetically may be impossible to rebut at all. That is because a firefighter—even a grossly out of shape firefighter—who runs up a flight of stairs in bunker gear is more likely to have heart disease (assuming that this is true, we are not doctors). His firefighting is **a** cause. In no way does the author believe that a firefighter should not enjoy a very, very strong presumption of occupational disease. Firefighters are exposed to innumerable risks on any given day. Their heroism cannot be denied. They deserve this presumption.

Ultimately, the *Larson* Court found that the firefighter presumption "requires that the employer provide evidence from which a reasonable trier of fact could conclude that the firefighter's disease was, more probably than not, caused by nonoccupational factors." This is not a holding that the employer must disprove that firefighting is **a** cause. The Court did not say that the occupational disease must be *solely* related to "nonoccupational factors" in order for the presumption to be rebutted. But what if RCW 51.32.185 could be interpreted that way?

As the *Larson* Court indicated, the firefighter presumption relieves the firefighter of the "nearly impossible burden of proving fire fighting actually caused their disease." But perhaps RCW 51.32.185 should be re-written, or construed, to relieve the employer from the "nearly impossible burden" of demonstrating that firefighting is not even **a** cause of a particular occupational disease. Otherwise, benefits will be available to any firefighter found to have an occupational disease—a disease which must be diagnosed by medical professionals as such—regardless of his or her medical history, lifestyle, or other factors, just because he or she is or was a firefighter. The "nonoccupational factors" alluded to in *Larson* would be rendered meaningless, as would the phrase "preponderance of the evidence" set forth in RCW 51.32.185. This cannot be so. After all, taxpayer dollars pay for L&I benefits.

Upcoming Municipal Roundtable

Our next Municipal Roundtable shall address Medicaid and Medicare billing issues, in addition to a discussion of contract negotiation with public agencies, such as hospitals. We are still working on hammering down a location, but the next roundtable will occur on March 31, 2017. Be there. We learn a lot from discussion, rather than lecture.

Paying Vouchers Prior to Board Approval

Under Washington law, our Legislature has set forth a process to expedite claims prior to board approval. *See* RCW 42.24.180. Under this law, a legislative body may authorize the "issuance of warrants or checks in payment of claims…before the legislative body has acted to approve the claims." *Id.* Very specific procedures must be followed prior to adopting this process by resolution of the Board.

Under RCW 42.24.180, the legislative body may set forth what sorts of claims must be approved by the legislative body prior to payment, but must follow certain steps to legitimize claims paid without such prior approval:

First, the body must appoint an auditing officer, **by resolution,** and this officer must furnish a bond for the faithful discharge of his or her duties; second, the body must have adopted policies that implement effective internal controls over the finances of the corporation; third, the body must provide for a process to review these paid claims at its next regularly scheduled public meeting; and finally, if the body ultimately decides, upon such review, that some or all of these claims should be disapproved, that such claims which have been paid be recognized as receivables of the corporation.

If your board or legislative body follows the above four requirements, you may appoint an auditing officer to pay those claims that absolutely must be paid prior to board approval, such as credit card payments (which have specific deadlines -- to avoid late fees or penalties—that may fall before a board meeting). Of course, the board may, by policy, set parameters (amounts) for claims that require board approval prior to being paid.

The Levy Swap: A Fundamental Change in the Law

SSB 5607 is cause for concern for all junior taxing districts. The Washington Constitution clearly states that education is of paramount importance, and the Washington Supreme Court has been demanding that the Legislature address the underfunding once and for all, pursuant to the *McCleary* decision.

The portion of the bill of concern is the Local Levy Support provision. It allows for a regular levy, to commence in 2018, of up to $1.80 per thousand of assessed

valuation for the school districts. But since this is a regular levy, that $1.80 creates a potentially large problem for junior taxing districts. Here's why:

Under Washington law, generally, “the aggregate of all tax levies upon real and personal property by the state and all taxing districts, now existing or hereafter created, shall not in any year exceed one percentum of the true and fair value of such property in money.” RCW 84.52.050. In other words, generally, the aggregate of all tax levies may not exceed $10.00 per $1,000.00 of assessed value.

The following is a direct quote from the Substitute Senate Bill Report for SSB 5607:

"The Constitution limits regular property tax levies to a maximum of 1 percent of the property's value--$10 per $1,000 of assessed value. The Legislature established individual district rate maximums and aggregate rate maximums to keep the total tax rate for regular property taxes within this constitutional limit. For example, the state levy rate is limited to $3.60 per $1,000 of assessed value; county general levies are limited to $1.80 per $1,000 of assessed value; county road levies are limited to $2.25 per $1,000 of assessed value; and city levies are limited to $3.375 per $1,000 of assessed value. These districts are known as senior districts. The junior districts, such as fire, library, hospital, and metropolitan park districts, each have specific rate limits as well. The tax rates for most of these senior and junior districts must fit within an overall rate limit of $5.90 per $1000 of assessed value.

State statutes contain schedules specifying the preferential order in which the various junior taxing district levies are prorated in the event that the $5.90 limit is exceeded. [See RCW 84.52.010 -Ed.] A few regular property tax levies are not placed into the $5.90 aggregate rate limit: emergency medical services, conservation futures, affordable housing, certain metropolitan park districts, county ferry districts, criminal justice, fire districts [Remember that $0.25 per $1,000 of regular levy may be levied outside of the $5.90 limit under RCW 84.52.125 - Ed.] and county transit are some examples. However, these districts **are subject to reduction** if the rates for these districts, the state property tax, and the districts subject to the $5.90 limit together exceed the constitutional [$10.00 per $1,000] limit. These districts are in what has been called the "gap", the $0.50 remaining after subtracting the maximum $3.60 state levy and the $5.90 in local regular levies from the statutory $10 limit." That was a mouthful. Here goes:

One does not have to be a math wizard to deduce that this tax increase scheme would be potentially disastrous to junior taxing districts and particularly devastating to EMS, fire districts, and regional fire authorities. That 50-cent "gap" or what I call "freeboard" disappears when you consider that the EMS levy is often fifty

cents all by itself, not to mention the other "districts" or levies that count toward the $10.00 but not the $5.90 limit.

Some might argue that the state and the county seldom levy the entire statutory maximum set out for them above. But they could eventually. There really is NOT $1.80 or even $1.25 of "freeboard" available for this new tax, the so-called "local support levy." Or maybe the legislature is quietly telling us that schools are a higher priority than EMS, fire protection or hospitals, which could all be subject to prorationing if this bill passes, along with many, many other junior taxing districts. This is a tax increase, plain and simple. Why not admit it? Or why do it this way, sacrificing all of the other junior taxing districts, especially in King and Pierce counties?

SAFETY BILL

For this month's safety column, the Editor of the *Firehouse Lawyer* just wanted to remind everyone that WAC 296-305 was comprehensively changed a few years ago. Some of you may recall that, when WAC 296-305—the "vertical standards" to assure firefighter safety—was first really promulgated in the late 1990's, this attorney created some safety policies and forms.

Many of my clients and others adopted those policies and forms to guide all parts of their safety programs. At that same time, however, I also created a safety checklist, which was designed as a sort of self-inspection or self-audit tool. The idea was that the department's Safety Officer could assign various pages or parts of the checklist to members of the Safety Committee and then, as a team, the committee could check safety law compliance for themselves.

We felt it could be a very valuable tool to prevent a real embarrassment should you receive an unannounced visit from the Department of Labor & Industries, only to find out that you have unrecognized safety violations throughout your facilities and operations. In August through October 2015, we reviewed the extensive WAC 296-305 changes that had recently been completed and adopted into that chapter of the WAC. Then we revised the safety checklist, which now extends to 51 pages of questions and issues for the committee to ask or consider. We are willing to provide the revised checklist to clients and non-clients alike, for a nominal charge of $30 to cover any time spent in sending the checklist to you by email. This is something all Safety Officers should want to have in their toolbox.

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