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Inside this Issue

QUO WARRANTO – WHAT IS THAT?

Last month, the Washington Supreme Court handed down a significant decision in a public records case that also included a *quo warranto* claim. Naturally, you ask, what the heck is a *quo warranto* claim?

The case is *Kilduff v. San Juan County*, No. 95937-4 (December 2019). In the first portion of the opinion, the Court made it clear that a local agency cannot create an administrative appeal that PRA requestors must file before they go to court. San Juan County had adopted a local ordinance that basically required such PRA requestors to exhaust their administrative remedy before filing suit alleging a PRA violation. For various reasons, the Court held a local agency simply cannot add that procedural requirement.

But since we have written so much in recent months about PRA cases, here we would prefer to discuss the second issue involving an old action known as *quo warranto*. In *Kilduff*, the plaintiff also claimed that the public record officer cannot also serve in a dual capacity as a member of the county council. Mr. Kilduff claimed those two post were incompatible or in other words, this person could not wear those two hats simultaneously and should therefore be ousted from the county council seat.

The *Kilduff* Court held unequivocally that "the proper and exclusive method of determining the right to public office" is a direct attack using the

old writ of *quo warranto.* The Court cited *Green Mountain Sch. Dist. No. 103 v. Durkee,* 56 Wn.2d 154, 157-58, 351 P.2d 535 (1960). RCW 7.56.0020 provides the standing requirements for a *quo warranto* action. First, the statute provides that a public action of this type may only be brought by the county prosecuting attorney. Second, if the plaintiff or petitioner has some special interest in the office then that person may bring a *private quo warranto* action. A special interest is one that the person does not have in common with the general public, since that protection is the entire purpose of the public type of *quo warranto* action. We believe the typical type of special interest might be that the plaintiff/petitioner believes that they actually are the rightful incumbent of that office.

The Court further clarified that, if a person believed the prosecuting attorney was not fulfilling their duty to bring a public type of *quo warranto* action, the remedy would be for that plaintiff/petitioner to seek a writ of mandamus. This is another type of ancient writ, designed to ask the court to compel a public officer to do their duty when they are refusing or failing to do so.

In the *Kilduff* case, the trial court held and the Supreme Court agreed that Mr. Kilduff did not have standing as he had no special interest and so only the prosecutor could legally bring such an action for ouster of the official.

Aren't you glad that we have made that clear? Now you know more about *quo warranto* than 90% of the attorneys in the State of Washington! Well, maybe.

THE BOARD AND THE FIRE CHIEF:

WHO'S RESPONSIBLE FOR WHAT?

(A paper written in 2008)

1. Introduction. About 12 years ago, in 1996 if not earlier, I wrote a paper entitled, "The Board and the CEO-Working Together", to be delivered at a fire district retreat. In that paper, and many times since then, I have shared my advice concerning the relative roles, responsibilities, or "spheres of influence" of fire commissioners and fire chiefs. There, and ever since then, I (and others) have stressed that the fire commissioners should be the policy makers at the fire department, and the Fire Chief should implement but not make policy. Because both the Board and the Chief should stay in their appropriate sphere of influence, the advice continues, micro-management of district affairs by the Board is not recommended. Well, this is all fine and dandy as far as it goes, but 12 more years of experience working intensely with fire departments has led me to believe it is time to get more specific. That belief is based upon observations of districts that continue to struggle with making these general principles work effectively in particular fact situations. Like the first paper, this paper is based more on observations of what works and what does not work in actual instances. It is not based on the law, which provides little guidance in this area. (Title 52 merely provides that the commissioners are elected to manage the affairs of the district, but it also authorizes them to hire a Fire Chief, and then delegate some or many of their duties and powers to the Chief and other personnel.) The views expressed in this paper, about the relative roles of the Board and the

Chief, are consistent with the NFPA standard on the organization of the fire department.

II. In General. Generally speaking, it is the proper role of the governing board to make policy and the proper role of the Fire Chief and his/her staff to implement that policy. The board is partly a legislative body and so in that arena the board acts collaboratively as a body, rather than simply as individuals. Of course, such a board also has executive powers to manage the district, so the fire district and fire authority (see RCW 52.26) model is different from some state and local government governance models that have a clear delineation between the legislative and executive branches. Compare state government (the Governor v. the Legislature) and some charter county governments (the County Executive and the County Council) with the organization of a fire district and you will see that most fire departments have governing boards that have some executive functions as well as "legislative" functions, such as executing contracts. As implied above, however, we need to go beyond the "making policy/implementing policy" dichotomy in order to really understand some of the issues occurring in the field in actual fact.

III. Actual Functions. By examining some actual individual functions of fire districts or fire authorities we may be able to elaborate on these concepts, and see why these issues keep arising.

A. Budget/Financial Issues. In accordance with a state statute, the governing board is the body that adopts the municipal corporation's annual budget. But the practice, nearly everywhere, is to delegate to the Chief and other administrative persons the responsibility to draft the budget for the department, and the Board's consideration. Input into various line item expenditures is often sought by the staff in a very broad fashion, from many stakeholders or interests within the department. Certain key financial decisions are often (and properly) reserved to the Board, such as the appropriate amount of any Reserve funds, whether any non-voted bonds need to be issued (borrowing money) and other major financial decisions. But the details of how to invest surplus funds are generally left to others; some departments have officially appointed an Investment Officer. Typically, after several study sessions with the Board, and at least one public hearing, the budget for the year, for each fund maintained by the district, is adopted by Board resolution. Thus, it can be seen that on the budget/financial issues, the role of the Board is that of final decision maker and the role of the staff is to be the proposer.

B. Development, Adoption, and Implementation of Policy and Procedure. I would say this topic is handled very similarly to the above. The staff develops, presents, and then implements policy, but the board is "The Decider" as President George W. Bush calls it. The one legitimate exception is probably in the area of operational policies and procedures. For example, a department may want a policy or operational guideline on responding to mass casualty incidents. Since the details of how this technical rescue or EMS work would be accomplished are not fundamental to the managing of the corporate enterprise itself, I would say this is operational. My recommendation is that such operational

policy or procedural guidelines are provided to the Board as adopted guidelines, not for their approval, as they are technical in nature, as opposed to representing policy guidance for the district. As such, I would place these operational guidelines at most in an appendix to the official policy and procedural guidelines of the fire department. All other PPG's, of general application at the department, are best included in the primary policy manual approved wholly by the board.

C. Contracts, In General. Since the board manages district affairs, in general, only the board should execute and sign contracts. However, having said that, I would hasten to add that the board can certainly *delegate* that contracting function to the Fire Chief or a delegee, and not violate state law. And many departments do just that. Some delegate to the Fire Chief the power to execute all contracts up to a specified maximum amount, or any amount that has been budgeted to expend for that purpose during the year. A few delegate all contract execution to the Fire Chief. Most departments, especially in the smaller fire districts, reserve the contracting power to the board. Finally, some will approve the contracts and then by motion authorize either the Chair of the Board, or the Chief to actually sign the contract, on a case by case basis.

D. Personnel Decisions. The statutes provide authority for districts to employ personnel, and districts handle those duties ordinarily by having the board delegate a good deal of authority to the Fire Chief. Recruitment, hiring or appointing paid employees is usually the duty of the Fire Chief, but some districts still have the Board act as the "appointing authority" for paid firefighters. It appears to me to be almost a ceremonial duty, in those departments that do that, as often the district has already made a conditional offer of employment to the candidate when the Board actually takes the action of appointing. At the other end of the spectrum, firing or discharge decisions are often reserved to the Board. However, even there, some boards have delegated to their Fire Chief the power to discharge-- at least with lower level employees. With respect to lesser discipline, it is even more common to delegate disciplinary decisions to the Fire Chief, and verbal reprimands or counseling are often done at a level below Fire Chief in many districts. Promotional testing and eligibility lists are usually done with little or no Board involvement, except perhaps for making a final or formal decision, which some Chiefs take to the Board for approval. Creating a new position, especially if unbudgeted, normally takes Board approval. Negotiating collective bargaining agreements is typically something that does not include the entire Board, although we have seen some departments that have one board member serving on the negotiating team. We recommend that the Board be responsible for laying out the parameters for the bargaining team, such as the ultimate maximum pay raise %, the extent of benefits, and other bread and butter issues, and then leaving the negotiating, within those parameters, to the negotiating team. At least for a first collective bargaining agreement, we recommend that the district hire a professional negotiator as the lead person on

the team. The Fire Chief can and should serve on the team, in our opinion, since he/she has to implement the CBA or live with the contract during the time it is in effect. On the other hand, if the Chief's salary is a percentage of the pay scale in the CBA or tied thereto, the Chief should not be on the team at all. The Chief is often delegated the power to negotiate and maybe even execute non-union contracts or personal service contracts. However, Boards that do so delegate should make it crystal clear to the Chief just how much authority he is being given and whether final approval is for the Board only. In one case recently, we had hard feelings between the Chief and the Board, as the latter did not clearly inform the Chief that they wanted the agreements brought back to the Board for approval; when they saw the final version of the agreements apparently they felt he was too generous in some terms of the contract.

E. Procurement/Purchasing. With regard to public works projects, usually the Chief's staff prepares the specifications with little board input. Ordinarily, however, bids are opened at board meetings and the board is involved in the award of the contract to the best bidder. The same is usually true with regard to hiring architects, engineers, and other professionals such as attorneys, physicians, political consultants and the like. Once these contracts are awarded, the monitoring of performance of the contracts is left to the Fire Chief or his staff. Board members seldom interact directly with such outside professionals or contractors, but in some cases it does occur. I have found that, with public works contracts, it is best for individual board members not to get too involved with the details of performance. Let the architect, Fire Chief or hired project manager deal with those details. More than one construction contract has gone awry, with disastrous financial consequences, due to "interference by owner", and that owner has in some cases been an individual fire commissioner. In most departments, the custom or practice is for the Fire Chief (and often several subordinates) to be the primary point of contact for the district's attorney. Sometimes, for various reasons, the Chair may be the primary contact, as for example, when the issue at hand is disciplinary issues or misconduct by the Fire Chief. Albeit rarely (in the last 22 years), I have seen problems ensue when several fire commissioners have free rein to just call the attorney for legal opinions. On at least one occasion, I have personally experienced some "opinion shopping" by board members, who for some reason unbeknownst to me, were unable to provide complete or objective facts to the attorney. Then I later learned from a different Board member or the Fire Chief, that there were facts I had not heard! Needless to say, when that happens you may even need a board policy or resolution stating who is allowed to call the attorney and who is not. If nothing like that is in place, and a fire commissioner calls for advice, my practice is to respond to this apparently legitimate client request. Many departments do not need any such restrictions, but "if the shoe fits, wear it." I have a standard resolution for that situation. In summary, the best practice is to let the staff and the Fire Chief deal with procurement and purchasing of goods and services, except for the big decisions.

F. Resolutions. Obviously, only the Board of Commissioners can adopt

resolutions, which are by definition legislative actions. Of course, staff is often delegated the responsibility of drafting resolutions for Board approval. Sometimes, with sophisticated resolutions such as those related to bond issues, or primary programs, or election/ballot propositions, it is often prudent to have counsel do the drafting.

G. Board Committees. With the advent of so many five-member boards at fire districts, and with regional fire protection service authorities, the governing board may be large enough to have committees. Many of my larger, more sophisticated client departments have multiple board committees, some of which meet every month. These committees may, for example, do all of the preparatory work prior to an issue coming before the full board. Chiefs and Boards sometimes ask, "How does the staff relate to the committee, as opposed to the entire Board?" Frankly, I do not see that the laws require any different treatment for these committees. Since no quorum is present, and since the committees have no final deciding authority, these committee meetings are not subject to the Open Public Meetings Act, in my opinion. While formal minutes may not technically be required, it may be a good idea for someone to take informal minutes of such meetings. Staff could perform that function. Staff should support fully the work of the board committees and be just as diligent at providing information and doing research for such committees as they would be for the whole Board. In general, Board members have a right to all information they need to perform their managerial and leadership functions at the department. They are not just members of the general public, and subject to the Public Records Act. So, when a board member asks for a document, such as a copy of a chief's contract, it should be immediately provided, and not with a caveat that "I will have to tell Chief X that you asked for a copy of his contract. Otherwise, I am reluctant to give it to you." (It is a public record, and you could not even tell a member of the public that such a condition will be imposed, so how could you insist on that to a Board member?)

H. Access to Information. In my view, elected commissioners are different than members of the general public. This implies that they would have at least as much access to district records or information as a citizen, and probably considerably more. Generally, commissioners should have access to all district records and matters, since they are the "managers" of the enterprise. However, I recommend that some matters and records be kept confidential from all persons (including but not limited to commissioners) except those with an absolute "need to know". Examples of such confidential material would be employee medical records and patients' protected health information. Only rarely will a commissioner's duties actually require them to access such records or information, such as the case of an employee seeking leave of absence for medical reasons.

IV. Conclusion. As you can see, there are very few areas where the power is exclusively reserved by statute to the Board or the Fire Chief. The law is flexible enough to allow

boards to delegate to the Fire Chief or his staff nearly all of the duties or functions discussed above. The lesson to be learned, however, is that your local rules, SOPs, policies, PPG's, or whatever you call them are clearly written so that you know locally, in your department, what the Board's expectations are, with respect to the role of the Board and the Fire Chief, respectively, in all of the various sectors of the department's administration and operations. At a recent retreat, we discussed the related topic of Board/Fire Chief communications. We did so by asking the question, "What should the Chief tell the Board, between meetings, concerning the day to day events at the department?" For example, I expressed my opinion that most board members would appreciate being advised between meetings in the event of (1) a fatal fire in the district; (2) a significant injury to a firefighter, whether paid or volunteer; (3) any serious discipline needing to be imposed, and similar "big events". Of course, what is a "big event" may vary from one department to another. Therefore, here is a novel idea: Have the Board write out their expectations in this regard! In fact, that may point up the advantages of having the Board memorialize their wishes in a much broader sense than just the things they want to be apprised of between meetings. That might come in handy during the Chief's annual evaluation. I hope you have found this paper thought provoking at the very least.

(Twelve more years have passed since this re-write of the original article was completed, and I hardly changed a word of it. The points made are still valid in my opinion.)

ANOTHER PRA CASE?

Division II of the Court of Appeals handed down another significant Public Records Act (PRA) case this month. The case of *West v. City of Tacoma*, No. 51487-7-II, is very complex and dealt primarily with the exemption for "intelligence" information, which applies more to police than fire, so we will not dwell on that part of the case here.

We did find another part of the decision very instructive for our clients: never forget that "the failure to adequately search for responsive documents is a violation of the PRA" according to this case and prior precedent. The responsible city official did not search for emails or other correspondence when the requestor asked for "records" (a very broad word) pertaining to the acquisition, use, or operation of stingray technology. The court stressed that, while an agency does not have to search *every* possible place a record might be stored, the law does require the agency to search more than one place, and that means "those places where it is *reasonably likely*" to find such records. Please remember this admonition.

LABOR CONCEPTS: DEFERRAL OF UNFAIR LABOR PRACTICES COMPLAINTS TO ARBITRATION

One doctrine of Washington—and national—labor law that has been enshrined for decades (at least since Joe Quinn was a PERC commissioner in the 20th century) receives too little attention. This is the "deferral doctrine." Pursuant to this doctrine, there are circumstances under which the PERC (Public Employment Relations Commission) receives an unfair labor practices (ULP) complaint, but

instead of reviewing the merits of the complaint and issuing an opinion as to whether a ULP was committed, the PERC "defers" the matter to arbitration. To be clear, the common understanding is that complaints, or grievances, arising out of a collective bargaining agreement are resolved by arbitrators if not resolved by the governing body of the agency.

The PERC often renders decisions as to whether ULPs have occurred, but, as we were reminded in the *Shoreline Community College* case, (CASE 129773-U-17, January 2020), there are circumstances under which the PERC will defer the ULP complaint to an arbitrator. In *Shoreline*, the subject collective bargaining agreement defined a "grievance" as a complaint or claim "arising out of the interpretation or the application of or any alleged violation by the Employer of the terms of this Agreement."

The educator employees filed a grievance for "bargaining in bad faith, withholding information, abandoning the parties' agreed-upon application of the language in the CBA, and instead unilaterally altering the approach to calculating the retroactive pay owed to the bargaining unit, the District has violated RCW 28B.52.073(1)(e) and 28B.52.073(1)(a)." This grievance made its way to PERC.

The employer argued that the complaint, although containing language suggesting that it may be heard as a ULP complaint, arose out of the interpretation of the CBA and should be deferred to arbitration. A PERC hearing examiner disagreed with the employer and referred the matter to the full PERC. However, the PERC reversed the examiner and referred the matter back to arbitration, citing the Washington legislature's "preference for arbitration."

We may discuss this case in more detail in the coming months, but we do not view *Shoreline* as particularly earth-shattering—given that Joe Quinn, as a PERC commissioner, deferred matters to arbitrators on various occasions.