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Be sure to visit firehouselawyer.com to get a glimpse of our various practice areas pertaining to fire departments, which include labor and employment law, public disclosure law, mergers and consolidations, and property taxes and financing methods, among many others!!!

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Inside this Issue

Privacy in your home email? Sorry, but no

The Washington State Court of Appeals, Division Two, recently held that "that the First and Fourth Amendments to the United States Constitution and article I, section 7 of the Washington Constitution do not afford an individual privacy interest in public records contained in" an individual public official's home computer. *West v. Vermillion,* No. 48601-6-II (2016). No surprise there.[1]

Dissension Among the Ranks

We remind our readers—particularly fire commissioners—that their own colleagues, sitting on the same Board, may petition for their recall from office. Elected officials in Washington may be recalled for malfeasance, misfeasance, violation of oath of their office, or a violation of the Washington Constitution. WASH. CONST. art. I, §§ 33-34; RCW 29A.56.110. Essentially, a fire commissioner may be recalled for violating the law—because every fire commissioner swears not to violate Washington law. For example, a fire commissioner may be recalled for intentionally participating in a meeting in violation of the Open Public Meetings Act.

Recently, the case of *In Re Recall of Boldt*, 93522-O (2017), evidences dissension among a

[1] http://www.firehouselawyer.com/Newsletters/v12n03sep2014.pdf

county council. One county councilor petitioned for the recall of three other fellow councilors. He alleged that (1) the councilors took an unlawful vote, without giving the necessary notices, in violation of the OPMA; and (2) improperly awarded a contract to a bidder that did not bid the lowest price. He made other allegations, but those are less relevant to our discussion here.

In *Boldt,* voters in Clark County voted to increase the number of councilors sitting on the Board from three to five. Without reciting the details of this case ad nauseam, the new five-member Board quickly diverged into a "three against two" legislative body, constantly arguing. One of the two minority councilors became suspicious of the county prosecutors. He accused the prosecutors of providing false information to the Board. He even posted his opinion as to this information on the county website, calling it false. A union for county employees filed a grievance against him for "defamatory comments." A county prosecutor sought "guidance" from the Board as to whether there should be an investigation of this allegedly false information.

Three members of the Board did not find that an investigation was necessary. A month later, the Board discussed "moving forward" with an investigation. After an employee complained that the minority councilor was creating a hostile workplace, the county manager decided to launch an investigation. He hired a third-party investigator and executed a contract without Board approval. The Board went about its business.

Meanwhile, the Board received bids from four different newspaper companies, to establish a local newspaper. Three of the councilors approved of the *Columbian* newspaper; the minority councilors preferred the *Reflector*. The county purchasing manager had informed the Board that although the *Columbian* newspaper would cost more in some respects, it was essentially not in the best interest of the county to contract with the *Reflector*. As a result, the Board resolved to contract with the *Columbian*.

Count One

One of the minority councilors filed a recall petition against the majority councilors. First, he argued that the majority councilors must have taken a vote to hire the third-party investigator without him, because the county manager could not act without Board approval. He argued that the Board held a "clandestine meeting" without him.

We will not expand on the vagaries of recall law ("factual and legal sufficiency") with respect to this case, but shall simply say that the court disagreed with the minority councilor/recall petitioner, with respect to count one. The court admitted that the record did not "definitively establish when the Board discussed hiring an independent investigator," but further found that there was no "direct evidence" that a "clandestine meeting" occurred.

The court underlined the county manager's admission that "four [councilors] ... specifically voted in favor of going forward with the investigation." But the court could not discern, based on the petition for recall itself, and the factual record, whether the county manager "meant **'voting'** in the context of the OPMA." (emphasis added). Therefore, the court could not decide whether the Board took a "vote" in public or executive session. Thus, there was no way to determine, for purposes of adjudicating a

recall petition, whether any councilor intentionally violated the OPMA

Count Two

Second, the minority councilor argued that the Board "grossly wasted public funds" by awarding the contract to the *Columbian*—which was not the lowest-priced bidder. The court disagreed. The court noted that the bid law at issue—RCW 36.72.075—requires that a newspaper contract shall be awarded to the "best and lowest responsible bidder," and therefore did not require that a particular contract be awarded to the lowest-priced bidder. In fact, the court underlined an important principle: Washington Courts have consistently held that "[T]he determination of the municipal officials concerning the lowest responsible bidder will not be disturbed by the courts, unless it is shown to have been influenced by fraud, or unless it is an arbitrary, unreasonable misuse of discretion." *Chandler v. Otto*, 103 Wn.2d 268, 274, 693 P.2d 71 (1984), quoting 10 EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS§ 29.73, at 398 (3d rev. ed. 1981)).

Takeaways from Boldt

First, let us leave the "four corners" of this case, for an underlying takeaway. Let us pretend that a fire chief is much like a county manager: He or she may not make the "laws" applicable to the department; but within certain parameters—established by the Board—the chief may execute those laws and implement Board decisions as he or she sees fit. In other words, the fire chief may not exceed the authority given him by the Board to "manage the affairs" of the fire department. Essentially, the fire chief is the CEO.

The county manager in *Boldt* decided to move forward with an investigation, executing a contract with a third-party investigator, without explicit Board approval. Does your fire department simply give the fire chief discretion to conduct employee investigations and therefore enter into contracts with third-party investigators, without Board approval?[2] The fire chief should always have leeway to efficiently perform his or her role, within the parameters defined by the Board. The issue in *Boldt* was whether the Board took a *vote* to give the county manager permission to conduct the investigation, but what if the Board did not even have to conduct such a vote? If the Board did not have to take such a vote, the dispute giving rise to count one in *Boldt* would less likely arise. If the Board did not have to take a vote, then the inference that they *may* have taken a vote could not logically be made, or would be irrelevant.

A second takeaway: A fire commissioner—or any member of a governing body—may not be recalled from public office unless that person *intended* to violate the law. *See In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 263 (1998) (cited by the *Boldt* court, and incidentally, a case which Joseph Quinn argued and won before the Washington Supreme Court). Because there was a factual discrepancy as to whether the Board took a "vote," in executive session or in public, there was no way to measure the intent of these public officials. This is important because every public agency should have thorough mechanisms to establish a "paper trail," such that any reliable evidence of compliance with the law may be heard.

[2] Incidentally, the county code in *Boldt* stated that the county manager may execute contracts not exceeding $100,000 for professional services funded by the county's general fund, without board approval.

Third, with respect to the bid law question in *Boldt*, there is no Washington statute applicable to fire districts and regional fire authorities that permits a contract to be awarded to the "*best* and lowest responsible bidder." But what if a bid-law statute does not define whether a contract should be awarded to the "lowest," or the "best and lowest," responsible bidder? For example, such language is not included in the bid laws with respect to contracts for public works above $300,000, or contracts for goods above $50,000. See the *Firehouse Lawyer*.[3] *See Also* RCW 39.04.155 (1); RCW 39.04.190; and RCW 52.14.110.

Guidelines Regarding Conditional Offers of Employment

Under Washington law: "[A]fter a conditional offer of employment is made, an eligible candidate may be required to pass a medical or psychological examination *relevant to* the demands of the work." WAC 357-16-195 (emphasis added). But what is the rule under federal law? Essentially, the law is the same.

The Equal Employment Opportunity Commission (EEOC) has recently published insights pertaining to employer inquiries into mental health conditions, prior to or during employment.[4] These insights do not change the legal landscape, but provide useful information.

For example, these insights state that "[A]n employer is only allowed to ask medical questions (including questions about mental health)" in four specific scenarios. Those include (1) when the individual asks for a reasonable accommodation; (2) when the employer is engaging in affirmative action for people with disabilities; (3) when, "on the job," it becomes objectively clear that the potentially disabled employee may pose a safety risk because of his or her condition[5]; and (4) when a conditional offer of employment is made, but only if the same questions are asked of each job applicant. For purposes of this article, we focus **only on the fourth scenario.**

Under the ADA, the questions asked during a "post-offer medical examination…are not required to be job-related and consistent with business necessity." 29 CFR § 1630.14 (b). But if the employer, after a "post-offer medical examination," withdraws a conditional offer of employment, the "exclusionary criteria" established by the employer must not have been designed to "screen out" persons with disabilities, and such criteria must be "job-

[3] http://www.firehouselawyer.com/Newsletters/August_2015.pdf

[4] https://www.eeoc.gov/eeoc/publications/mental_health.cfm

[5] We will not discuss this particular scenario herein, but under the vertical safety standards, fire departments generally may not permit employees with "known physical limitations" to participate in physically demanding activities, such as firefighting, unless those persons are cleared to do so by a physician. WAC 296-305-01509 (7)(b).

related and consistent with business necessity." *Id.*

In other words, criteria established for conditional offers of employment—for physical and psychological examinations—must only be designed to determine whether the applicant may perform the essential functions of the job being applied for. And such "exclusionary criteria"—i.e. questions related to physical and psychological conditions—must be applied equally to all applicants.

"Safety Bill" Column

We decided this year we are going to add a new column: "Safety Bill"—named after the great Fire Marshal Bill, of In Living Color fame: "Let me tell ya something." In this column, we will underline, monthly, a different provision of WAC 296-305, the vertical safety standards applicable to all firefighters in Washington State. We may also discuss how this law coincides with OSHA and WISHA, and the requirements of those laws. Incidentally, if your fire department has a question about the safety regulations, please ask and we shall answer in Safety Bill, on a monthly basis.

The "Safety Bill" column will also be dedicated to our long-time friend and fire commissioner Bill Jarmon, who passed away recently. Bill was known as a tireless risk management, insurance and fire prevention advocate and was much loved here in Gig Harbor and throughout the fire service community in Washington. We miss you, Bill.

SAFETY BILL

The fire department employer needs to make sure a safe workplace is provided for firefighters. WAC 296-305-01509. Actually this is the underpinning of the two-in, two-out rule in the first place. But in recent years this WAC has been supplemented with the idea that if you as the employer know, or reasonably should know, that a firefighter has some physical limitations, you had better be sure not to place them in harm's way. For whatever reason, for example, if you have knowledge of a firefighter's precarious heart condition, would you be wise in keeping them "on the fire line"? We think not. Common sense, concern for your firefighter's safety and that of his/her colleagues, and risk management concepts all call for heeding this regulation. It is now the law.