The Firehouse Lawyer

Volume 14, Number 7

July 2016

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!!!

Joseph F. Quinn, Editor

Eric T. Quinn, Staff Writer

Joseph F. Quinn is legal counsel to more than 40 Fire Departments in the State of Washington.

His office is located at:

10222 Bujacich Rd. NW
Gig Harbor, WA 98332
(Gig Harbor Fire Dept., Stn. 50)

Mailing Address:
20 Forest Glen Lane SW
Lakewood, WA 98498

Office Telephone: 253-858-3226
Cell Phone: 253-576-3232

Email Joe at firelaw@comcast.net
Email Eric at ericquinn@firehouselawyer2.com

Access and Subscribe to this Newsletter at:
firehouselawyer.com

Inside this Issue

Ambiguity and Unequal Protection: The Pension Laws Need a Re-Write

Recently, we have come to learn that the Department of Retirements Systems (DRS) views all elected fire commissioners as being eligible for a pension under the Public Employees Retirement System (PERS), because DRS believes they have the option of applying for membership in PERS. This raises many legal issues and violates well-settled law in multiple respects.

We learned of the issue when DRS suspended the pension of a retired teacher pursuant to RCW 41.32.860 and RCW 41.32.862, finding that he or she[1] was not eligible for her teacher's pension under the "return to work" rules. The teacher was a fire commissioner long before she retired. She never enrolled in PERS as both she and her employer assumed she was not eligible, or working full-time in a PERS-eligible position. Many years later (in 2013) she retired, but learned after a DRS audit of payroll that they were going to suspend her pension because her (compensated) commissioner service violated the return-to-work rules. DRS stopped her pension without any hearing but later recanted somewhat and reinstated it until a hearing could be held on the issues stated herein. But DRS still contended she had to pay back many thousands of pension dollars received since 2013 because her "employment in an eligible position" disqualified her from keeping her pension!

[1] We shall use the term "she" or "her" in this article to signify both genders.

This is wrong in many respects:

PERS Itself Exempts Elected Officials from PERS

> **"Membership in [PERS] shall consist of all regularly compensated employees and *appointive and elective officials* of employers as defined in this chapter, *with the following exceptions*…Persons holding *elective offices* or persons appointed directly by the governor: PROVIDED, That such persons shall have the *option* of applying for membership during such periods of employment."**

RCW 41.40.023 (3) (emphasis added).[2] This statute should guide our entire inquiry, however ambiguous it may be, and helps us analyze the issues below. To discuss why fire commissioners should not have their pensions stripped, we begin with a definition.

Fire Commissioners Are Not "Employees"

First, in addition to elected officials being generally exempt from PERS, as per RCW 41.40.023 (3), fire commissioners are not "employees," under the common law, or any definition of "employee" espoused by the DRS. For example, the PERS definitional statute itself states that an "employee" is "a person who is providing services for compensation to an employer, *unless* the person is free from the employer's *direction and control* over the performance of work. [DRS] shall adopt rules and interpret this subsection *consistent with common law*." RCW 41.40.010 (12)(emphasis added). The key phrases here are "direction and control" and "consistent with the common law."

Fire commissioners "manage the affairs" of fire districts, and therefore "direct and control" fire districts, not vice versa. *See* RCW 52.14.010.

Importantly, the DRS itself shall consider a series of factors (21 in total) to determine whether an individual is subject to the "direction and control" of the employer, and therefore an "employee." WAC 415-02-110 (2)(d)(i)-(xxi). Among these factors, the DRS will consider whether the person is: (1) "required to comply with detailed work instructions or procedures"; (2) working for the employer "full time"; (3) subject to routine hours and a set schedule for which the work must be performed; (4) required to give regular oral reports to the employer; and (5) terminable "at will" by the employer. WAC 415-02-110 (2)(d)(i)-(xxi). Analysis of the 21-factor test suggests that commissioners are not employees.

Interpreting the regulations above, fire commissioners are not working full time for the fire district, or required to comply with detailed specifications as to how their work is to be performed—aside from complying with their own by-laws. Additionally, fire commissioners set their own schedule. *See* RCW 42.30.070, 080 (times for holding regular meetings and special meetings specified by the governing body). Additionally, fire commissioners are not terminable at will by the employer. DRS's own regulations support a finding that fire commissioners are not employees. The common law of employment, or "master and servant" strongly supports that conclusion, because

[2] The statute itself is ambiguous, and essentially states, in other words, "you are in, no you are out, but provided you may opt in." This is nonsense. Therefore, we construe that ambiguity to find that elective officers are generally exempt from PERS but may opt into PERS.

clearly commissioners and other elective officials are more "master" than "servant."

An agency may not ignore its own enabling statute when promulgating and enforcing regulations to implement that statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The DRS may have adopted regulations that follow the common law interpretation of "direction and control," but the DRS has not **applied** those regulations consistently with the common law, as required by RCW 41.40.010.[3] Consequently, the DRS has acted contrary to the statute enabling it to define what an "employee" is. Thus, the DRS has violated RCW 34.05, the Administrative Procedure Act, and *Chevron*, previously cited. But that is not all.

DRS Statutes ignore compensation as a trigger for suspending benefits, violating due process

Second, the DRS has interpreted fire commissioners as holding "eligible positions," and this would preclude those persons from receiving benefits under a separate pension system in which they were already receiving benefits. Under RCW 41.40.010 (11)(b), an "eligible position" means, among other things, "[A]ny position occupied by an elected official," and this definition seems to apply whether the commissioner is compensated for their services or not. For example, a fire commissioner receiving benefits under the Teachers' Retirement System (TRS) may have his or her[4] benefits suspended under RCW 41.32.860, by virtue of being in an "eligible position." (and this definition seems to apply regardless of the compensation received).

This results from a plain reading of Washington statutes: Under TRS Plan 3, subject to a limited exception, "no retiree [under TRS Plan 3] shall be eligible to receive such retiree's monthly retirement allowance if he or she is employed in an eligible position as defined" in, among other statutes, RCW 41.40.010, cited above.[5] RCW 41.32.860. When read in conjunction with RCW 41.40.010 and interpreting the definition of "eligible position," RCW 41.32.860 clearly states that a TRS Plan 3 pensioner who is a fire commissioner may have her benefits suspended, whether or not that commissioner is compensated. This is preposterous and wrong.

The DRS might actually not suspend the pension if they learned that a commissioner was waiving compensation, as they have a right to do under RCW 52.14.010. The DRS appears to maintain that a person is not "employed" if they are not being paid, so that covers it. But a commissioner can waive compensation one month and not do so the next. Does that mean they are "employed" one month and "unemployed" the next?

Under the Due Process Clause of the Fifth Amendment to the United States Constitution, no person may be deprived of property without due process of law. If a fire commissioner waives compensation as a fire commissioner,

[3] Additionally, the DRS has enacted statutes that conflict with the direct mandate of RCW 41.40.023 (3), which states that elective officials have the option of receiving PERS benefits. *See below* on Equal Protection.

[4] For the sake of convenience, we shall use "her" or "she" to signify both genders, throughout this article.

[5] The same suspension of TRS Plan 3 benefits may occur if the commissioner becomes employed as a firefighter as that term is defined in RCW 41.26.030.

and even then may have their benefits suspended by virtue of being an elected official, and nothing more, that fire commissioner has been deprived of property without due process. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) (finding that a person must have a property right when arguing a violation of due process, which a pensioner surely does).[6] RCW 41.32.860 accomplishes that unjust result, whether the DRS intended to do so or not.

DRS Statutes Violate the Equal Protection Clause

Third, DRS statutes ignore the Fourteenth Amendment to the United States Constitution, which requires that "similarly situated people should be treated alike," and that all persons shall be afforded "the equal protection of the laws." *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Fire commissioners are surely "similarly situated" to one another, as they each perform the same service: managing the affairs of the fire district.

In particular, the DRS statutes violate equal protection, without a rational basis for doing so, in the following circumstance:

Suppose one commissioner—elected five years ago—is a teacher. Suppose a second commissioner—also elected five years ago—is a uniformed (career) firefighter. Both get paid a small stipend each month for their board work under RCW 52.14.010 and neither has any idea (nor does the employer) that they might be eligible for PERS pension service credit in those positions. They neither want nor need those service credits, which would be miniscule anyway. Now both retire and continue as commissioners for three more years. Oops. The DRS finds out that—in their view—the two retirees have "returned to work" in a PERS-eligible position. What? (If these commissioners wanted to be in PERS they would have done that long ago.) But take note of what happens, below, because of the 180-degree difference between the statutes applicable to firefighters, as compared to teachers. You will see why we think RCW 41.32.860 and .862 unconstitutionally discriminate against teachers.

The DRS statutes create an arbitrary distinction between fire commissioners receiving LEOFF II benefits versus those receiving TRS Plan 3 benefits:

> A member or retiree [under LEOFF II] who becomes employed in an **eligible position** as defined in **RCW 41.40.010**…shall have the option to enter into membership in the corresponding retirement system for that position…A retiree who *elects* to enter into plan membership shall have her benefits suspended as provided in subsection (1) of this section. A retiree who does not elect to enter into [PERS] plan membership shall continue to receive her benefits without interruption.

RCW 41.26.500 (3) (LEOFF II)(emphasis added). Based on a common-sense reading of this statute, a fire commissioner that receives benefits under LEOFF II may *opt in* to receiving PERS benefits, provided that her LEOFF II benefits will be suspended if she does so.[7]

[6] Of course, the DRS WACs create an avenue for appeal of a DRS suspension of benefits, but the WACs do not provide for a pre-suspension hearing.

[7] This, of course, complies with the direct mandate of RCW 41.40.023 (3), cited on page one, which states that elective officials may opt in to PERS.

However, the commissioner may *opt out (by doing nothing)* and therefore continue to receive her LEOFF II benefits. This is not true for former teachers:

> Except under RCW 41.32.862,[8] no retiree [under TRS Plan 3] shall be eligible to receive such retiree's monthly retirement allowance if he or she is employed in an **eligible position** as defined in **RCW 41.40.010**

RCW 41.32.860.[9] This statutes carries the same mandate as LEOFF II: If a pensioner is employed in an "eligible position", that pensioner may have her benefits suspended. In other words, unlike the firefighter, the teacher who does nothing to enroll in PERS has the pension suspended, at least as long as they accept their compensation as commissioner. On its face, RCW 41.32.860 violates the Fourteenth Amendment, when compared to RCW 41.26.500. This is so because "similarly situated people shall be treated alike" under the Fourteenth Amendment, and former teachers and professional firefighters (both of whom are essentially identical as being elected commissioners even before retirement) are not being so treated. But that is not all.

Do The DRS Statutes Also Violate the First Amendment?

Fourth, DRS statutes present certain fire commissioners—TRS Plan 3 pensioners—with an unconstitutional Hobson's Choice: Either be a fire commissioner and forfeit your pension, or keep receiving your pension and forfeit your First Amendment right to freedom of association and/or freedom of speech. If a person cannot run for elective office, for an arbitrary reason that does not relate to her actual eligibility for a vested pension benefit, this violates the First Amendment to the United States Constitution. So the question becomes….

How Do We Fix This?

The answer: Speak to the legislature. First, the legislature should make it clear that the DRS is not to construe elected officials as "employees," unless to do so would be consistent with the common law, and only insofar as DRS regulations necessitate. Second, the legislature should give TRS Plan members the option of whether or not to be a member of PERS, without risking the suspension of their benefits, the same way this is afforded to LEOFF II pensioners.[10] Finally, the term "eligible position" should include a dollar threshold or a monthly hours served threshold (such as 100 hours per month worked) by which a particular elected official may be deemed to be in an "eligible position," to make it clear that *compensation* is the determinative factor as to whether an elected official is "eligible," not

[8] For the sake of convenience, we will only state here that RCW 41.32.862 espouses an untenable circumstance in which the TRS Plan 3 pensioner withdraws from his or her elected position for a period of time and is re-appointed.

[9] This statute is also in conflict with a direct mandate of PERS: "Membership in [PERS] shall consist of all regularly compensated employees and *appointive and elective officials* of employers [except for] Persons holding elective offices or persons appointed directly by the governor: PROVIDED, That such persons shall have the *option* of applying for membership during such periods of employment." RCW 41.40.023 (3).

[10] Additionally, permitting teachers that are fire commissioners to opt in to PERS comports with RCW 41.40.023 (3), cited above.

whether that person has simply chosen to serve her community as a fire commissioner. We are not contending that full-time local elected officials should be ineligible to enroll in PERS, but we are contending that part-time elected officials should not be. A minor tweak in the definition of "eligible position" to exclude part-time elected officials would do the trick.

Upcoming Municipal Roundtable

In late September, the Firehouse Lawyer will be holding our third quarterly Municipal Roundtable, a free discussion group in which we consider issues that are relevant to the fire service. Topics lately have included medical records, public disclosure regulations, and unfair labor practices. We have not settled on a topic or location for our next roundtable. Consequently, if your department is interested in hosting us, please let us know. Our latest roundtables have been hosted at West Pierce Fire and Rescue and Valley Regional Fire Authority. We want to keep branching out to other client locations. Furthermore, if you have a topic you would like to discuss, please let us know. The Municipal Roundtable gives us all an opportunity to learn from each other. Make sure to attend: you will be better for it.

Correction of 2015 Article

In a 2015 article, we stated that the Washington Wage Rebate Act is set forth at RCW 49.48.[11] The correct statutory citation to the Wage Rebate Act is RCW 49.52. The former statute, RCW 49.48.030, generally applies to actions by an employee to recover wages owed, and does not apply generally to public employees. *See* RCW 49.48.080. Under this statute, "[D]ebts due the state or a county or city for the overpayment of wages to their respective employees may be recovered by the employer." RCW 49.48.200. Note that fire districts and regional fire authorities are not states, counties or cities, to which this overpayment statute applies. In the event of an inadvertent overpayment of wages, perhaps RCW 49.48.200-210 may be applied by analogy.

Open Meetings Case: When Can a Person Sue for OPMA Violations?

As we all know, under the Open Public Meetings Act, "[a]ll meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency." RCW 42.30.030. All actions taken in violation of the OPMA are null and void. RCW 42.30.060. But when does a citizen have "standing" to sue for a violation of the OPMA?[12] The Washington Court of Appeals, Division One, recently ruled on this issue in *West v. Seattle Port Commission*, No. 73014-2-1 (2016). Stay tuned for our discussion of *West.*

[11] See the referenced article: http://www.firehouselawyer.com/Newsletters/July_2015_FINAL_2.pdf

[12] "Standing" generally means that the person has suffered an injury, as determined by the statute at issue, that is sufficient to give them the right to sue for that injury.