The Firehouse Lawyer

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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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Upcoming Municipal Roundtable

The Firehouse Lawyer holds a quarterly Municipal Roundtable in which members of the fire service and other municipal corporations gather to discuss issues that are relevant to public agencies. This roundtable will be held on Friday April 7, 2017, from 9:30 AM to 11:30 AM, at West Pierce Fire and Rescue, Station 20, located at 10928 Pacific Highway SW, Lakewood WA 98499. The topic of this roundtable: Medicaid billing issues and negotiating fair (non labor-related) contracts, for example, contracts with other public agencies for fire protection, pursuant to RCW 52.30.020.

Sometimes State Agencies Get it Wrong, Period

Recently, we represented an elected official who was appointed and then elected to serve on the governing board of a fire district or regional fire authority. A dispute arose between him and the Department of Retirement Systems (DRS) about whether he should have been reported by his employer as earning money as an elected official of a local public agency, when he had previously been enrolled in a DRS pension system (TERS in his case) but was now retired and receiving a DRS pension under TERS. An audit conducted by DRS or at its behest by the State Auditor concluded he should have been reported. Eventually, DRS insisted that he was

being "re-employed" by a public agency in violation of the return to work rules, by accepting compensation as an elected fire commissioner, which they claimed constituted "employment" in an "eligible position."

We took issue with that conclusion, stating that he **was in fact ineligible to enroll in PERS as such a commissioner does not work nearly enough hours monthly to qualify for any pension service credit**. We argued they are neither "employed" (because elected officials are not employees under DRS definitions) nor are they occupying an eligible position. We even filed a petition or appeal to DRS, as we have never heard of a fire district commissioner or RFA commissioner—who are very part-time usually—applying for or being accepted into PERS by reason of such elected service. Roger Ferris, the Executive Director of WFCA, agreed with us, stating that he had never heard of any fire commissioner being eligible for a PERS pension, or of applying, or being enrolled.

Unfortunately, the client did not want to deal with the hassle of such an appeal, or to jeopardize his TERS pension allowance, so he caved in to the DRS's demands. He had asked them whether, if he had been paid nothing for his elected service or if he paid back what he earned since he retired as a teacher, they would be satisfied. They answered affirmatively so he paid the money back and the petition/appeal was dropped. That cost him approximately $7,000.00, which clearly was compensation he had earned over about three years. We also learned the DRS contended he could not work for the county at a county fair (something he had done for a few years earning a small stipend) without jeopardizing his teacher's pension. The DRS sent the county an invoice for more than $8000.00 and we have learned that the county did not contest but paid that invoice! Apparently that represented an amount equal to his pension for those months he worked at the fair!

Meanwhile, we had filed a Public Records Act request of DRS asking them to provide information about how many elected officials of local government were actually enrolled in PERS. That request was submitted in June of 2016. In March of 2017—nine months later—the DRS finally produced redacted records pertaining to approximately 330 local and state elected officials, which (assuming the records are complete and correct, as we believe) show exactly what we suspected:

Many full-time elected officials serving in county government, cities, PUDs and a few other agencies are properly enrolled in PERS because they are clearly eligible. *They are full time elected officials*. Guess how many elected officials serving in fire districts or RFAs are enrolled in PERS and earning service credit as elected officials? Apparently, none. What a surprise. Indeed, here are some key excerpts from the typical letter DRS sends to accepted elected officials who enroll in PERS.

"February 9, 2015

The Honorable_____

____ County Prosecuting Attorney

...As an elected official you are eligible, but not required, to enroll in a state retirement plan.

..To receive service credit,...you must earn a monthly salary at least 90 times the state minimum hourly wage (.....or $852.30 per month) ...."

In other similar letters, the DRS also informs the elected official that they must be compensated for 90 or more hours per month to get a full month of service credit. Often the letter includes a statement that they are not eligible unless they waive their right to be exempt, by submitting a waiver form! Oddly enough, they did not apply that concept to our client.

RCW 52.14.010 provides now that a fire commissioner shall be paid $104.00 per day and no more than $9,984.00 per year. But that law allows periodic adjustments by the Office of Financial Management of the State. Currently, the adjusted figures are $114.00 and $10,944.00 respectively. While it would be possible and lawful to exceed 90 times the minimum wage in one month, we just do not think that happens in fire districts or RFAs. By the way, the minimum wage increased to $11.00 in 2017 in Washington and 90 times that is $990. $114 times 8 (the average monthly maximum for commissioners works out to 8 days per month or any portion thereof) is only $932.

So you see...basically the minimum to qualify for PERS pension credit is higher than the maximum fire commissioners can legally be paid on any regular basis! It seems virtually impossible to us that an elected fire commissioner could ever qualify for significant service credit.

Interestingly, our analysis of the approximately 330 elected officials disclosed in the PRA response from DRS showed this: a total of two (yes, exactly two) elected "fire commissioners" in the whole state have *applied* for enrollment in the PERS pension plans. One was previously a PERS member, before being elected a fire commissioner where the person resides, because the person has been employed full time for years by a different employer in a PERS-eligible full time job. We can pretty well guarantee this person has never earned one service credit for elective service because the author has directly spoken recently with that elected official. The other may never have been enrolled; all DRS sent us as to him was application materials and no eligibility determination or enrollment letter, which was often included as to other elected officials. Actually, this person was and is a city council member and numerous city council members are PERS members so we do not really consider that a "fire commissioner" application.

The statistical breakdown of the 1,221 pages the DRS sent us was approximately as follows:

- Almost 200 county elected officials are PERS members
- Slightly more than 50 city officials are members
- Almost 25 elected PUD commissioners are members

- About 20 court personnel are members (mostly district court)
- State officials and "other" comprised about 25 members (elected water/sewer district commissioners, parks officials, port commissioners, etc.)
- But no fire district or RFA commissioners are enrolled and earning service credit toward a pension due solely to elective service for the reasons outlined above—their hours and compensation are entirely too low so they are basically ineligible, but DRS will never admit it.

[Editor's note: Many elected officials qualified for PERS while employed in an eligible position and then stayed in PERS after they were elected. Hopefully, we have not included any individual members in our count more than once, but the above numbers are approximate anyway.]

The upshot of all this analysis is that no fire or RFA commissioner is really eligible for service credit, so no such part-time elected official would ever enroll! Given the results of our statistical analysis of the records provided by DRS, we think that agency owes our client (1) an apology[1] and (2) his money back, by authorizing or advising the employer to pay that money right back to him, which he fully earned and should not have been forced to forfeit by the DRS's bullying tactics. They have no legal basis to be requiring fire district and RFA employers to report the hours or compensation of ineligible (part-time!) elected officials. It is hard to believe they wasted taxpayer money paying for or charging the agencies for audits of payroll to discern how many fire commissioners were on the district payrolls.

Drug Addiction and Mental Illness: When to Loosen the Shackles

Under Washington law, the following individuals may be involuntarily detained for evaluation and treatment:

(1) Persons with developmental disabilities (as defined at RCW 71A.10.020 (5));

(2) Those impaired by chronic alcoholism or drug abuse; or

(3) Persons suffering from dementia

RCW 71.05.040. The four health issues above are hereinafter entitled "Conditions." Persons with the above Conditions may be involuntarily detained[2] for evaluation and treatment—such evaluation and treatment would be performed by a mental health professional.[3] **But note:** Such detention is only lawful if the person's Condition results in a "mental disorder" which

[1] See also the *Firehouse Lawyer* article on the constitutional issues raised by this situation: http://www.firehouselawyer.com/Newsletters/July2016FINAL.pdf

[2] Such persons may also be involuntarily committed, but we shall not discuss that here.

[3] EMTs and paramedics are not "mental health professionals" as that term is defined at RCW 71.05.020 (3), but are indeed empowered to detain persons suffering from a Condition, accompanying a "mental disorder," for evaluation and treatment.

may result in serious harm to that person or another person. *Id.*

A "mental disorder" means "any organic, mental, or emotional impairment which has substantial adverse effects on a person's cognitive or volitional functions." RCW 71.05.020 (29).

Again: Persons may not be involuntarily detained for evaluation and treatment based *solely* on having a Condition. *See* RCW 71.05.040. In order for an individual suffering from a Condition to be detained, the facts must suggest that the individual or another person is very likely to be harmed if the individual—suffering from a "mental disorder"—is not involuntarily detained for evaluation and treatment.

Importantly, employees of a public agency are immune from criminal or civil liability for detaining an individual for evaluation and treatment by a mental health professional, provided those employees act in good faith and without gross negligence. RCW 71.05.120 (1).[4]

[4] Of course, we have counseled our clients not to permit law enforcement to make emergency responders agents of law enforcement, for liability purposes: http://www.firehouselawyer.com/Newsletters/v13n02feb2015.pdf

Consequently, the employer should provide adequate training on determining whether an individual not only has a Condition, but whether the facts suggest that this person is suffering from a "mental disorder," which may cause serious harm to themselves or another. The employer should also instruct non law-enforcement personnel, such as firefighters or administrative personnel, to leave questions of involuntary detention to law enforcement.[5] This will help prevent liability, and ensure fairness.

Child Abuse and Neglect: Mandatory Reporters Have a Duty to Report even when they are not "On the Clock"

Recently, the Washington Court of Appeals held that the plain language of RCW 26.44.030 (1), the child-abuse-and-neglect statute, "unambiguously provides that the mandatory reporting duty for the professionals identified applies in all circumstances and **not only when information about child abuse is obtained in the course of employment."**

[5] To claim a violation of one's constitutional rights, one must generally demonstrate that there was "state action"; the Washington Courts have not explicitly held that paramedics and EMTs are state actors, but in an unpublished opinion, the courts have found that an EMT acting at the behest of law enforcement is a state actor. *See State v. Saintcalle*, 63152-7-I (2010)

State v. James-Buhl, No. 48393-9-II (March 21, 2017) (emphasis added).

What could this case mean? Unless the *James-Buhl* decision is reversed by the Washington Supreme Court, then persons such as EMTs and paramedics[6] should be informed that **even when they are not working in the scope of their employment**, if they encounter a situation in which they have reasonable cause to believe child abuse and neglect has occurred, that they are required to report this to either the Washington State Department of Social and Health Services, or some other appropriate law enforcement agency, or face civil or criminal liability.[7]

A Visit From the Auditor: Why Are Fire Departments Getting Findings?

Recently, Mark Rapozo, Deputy Director of Local Audit, of the State Auditor's Office presented a program to our client, the Pierce County Fire Commissioners Association. (They have long been a client of ours and we handled their incorporation papers and process, and also recognition by the IRS as a 501(c)(4) tax exempt organization.) Mark's program was interesting and informative. He provided us with a copy of the guide used to assist auditors in understanding the special issues presented to them when auditing a fire district, RFA, or even city fire departments or other providers of EMS. In this article, we will highlight some of the more important points Mark made in the presentation, which are set out in a "Fire District and Emergency Services Audit Planning Guide."[8]

Introduction: For each of the following highlights we will share "Our View" on the same matter or issue after either quoting or paraphrasing the SAO's wording in the guide itself. These are some things the SAO guide alerts auditors to be on the lookout for, so agencies had better be on the lookout too:

1. Exceeding Statutory Authority. The SAO: "We have noted an increase in districts providing services which are outside their legislative authority as defined in RCW...." The SAO noted that "any services provided outside these areas [as specified by RCW] should be considered as potentially outside their authority."

Our View: Local government agencies do have to be careful to stay within the authority expressly granted by the legislature or *necessarily implied therefrom.* The implied powers doctrine means that, in some narrow

[6] The Firehouse Lawyer has already stated that more likely than not, EMTs and paramedics are mandatory reporters under RCW 26.44.030 (1): http://www.firehouselawyer.com/Newsletters/v08n03mar2008.pdf

[7] RCW 26.44.030 (1) enumerates various individual types of persons that are mandatory reporters, so your agency or organization should determine if any of your employees are "mandatory reporters."

[8] Unfortunately, we noticed that we cannot seem to locate a copy of the "Fire District and Emergency Services Audit Planning Guide" online at the State Auditor's website. We will scan a copy of this document and provide it upon request.

circumstances, we need not limit our exercise of district power to the statutory powers. But, for example, on one occasion we advised a district it could not lawfully go into the business of a being a landlord to the extent of acquiring properties primarily for the purpose of charging rent and making money in that fashion. *See* RCW 52.12.021 and RCW 52.12.031. We also spotted a potential powers and "scope of practice" issue when we first learned of the fire districts' desire to provide non-emergent medical care in programs that later came to be known as CARES programs (but only after some legislative enactments to address the powers problem we noted). We reasoned that EMS means "emergency medical services" so the power is limited to emergencies, at least as far as EMS is concerned.

2. Understanding organization structure and statutory requirements. The SAO discussed different organizational structures used in consolidations such as RFAs, mergers and interlocal agreements. They advised auditors to be aware that when an RFA is formed, it is not mandatory that the fire districts forming the RFA be dissolved. Moreover, the SAO says that such "undissolved" fire districts still need to do an annual financial statement and may be subject to audit. Some legal obligations may not have been fully transferred, they noted.

Our View: Good to know. We have at least one such RFA client that did not dissolve the districts. And one RFA asked us whether the fire district still needed to hold board meetings, since it was not dissolved but basically had no business to conduct. We answered in the affirmative, because the statute says a fire district board "shall" meet monthly.

3. Interlocal Agreements. In discussing interlocal agreements authorized by Chapter 39.34 RCW, relative to providing services to other jurisdictions or expanding services, the Guide added: "Although contracting with other governments may be acceptable, districts/departments cannot create a new district through interlocal agreements."

Our View: This statement needs to be qualified and clarified. It is true that solely by an interlocal agreement under RCW 39.34 local governments cannot thereby create a new *taxing district*, but they can create a new separate legal entity. Indeed, RCW 39.34.030 says exactly that. We have seen new legal entities created by such ILAs. For example, Eastside Fire and Rescue is an entity created by three cities and two fire districts solely through an ILA. We can name several other entities so created, and many of them are recognized as local government agencies by the IRS, and state departments such as the Department of Labor and Industries and the Employment Security Department and/or State Department of Revenue.

South Sound 911 might be another such example as it was created in an ILA executed by Pierce County, City of Tacoma, City of Lakewood, and West Pierce Fire and Rescue, a fire district. In some cases, nonprofit corporations are created, as has been done with some emergency dispatch (911) agencies in Washington. But not in all cases, so we think perhaps the SAO should clarify what they meant

to say. It is true that none of the above examples involved the creation of a brand new taxing district, which would seem to be impossible to do merely with an ILA. So we think that was the intended point.

4. Community Assistance Activities. The Guide states: "RCW 35.21.930 was approved by the Legislature...in 2013, allowing any fire department the ability to develop a community assistance referral and education service [CARES] program to provide community outreach and assistance to residents to advance injury and illness prevention within its community. The intent of this bill is to reduce the number of 911 phone calls for non-emergency related items." The Guide suggests auditors ask the auditees if they have such programs and how they are funded. With new such programs auditors are asked to contact the Fire District Specialist or Program Manager of the SAO.

Our View: Good idea. CARES programs have very specific statutory requirements and therefore departments would be well-advised to consult knowledgeable legal counsel prior to implementation. There are many programs now ongoing and perhaps soon we will see CARES programs almost everywhere, so get started right. Of course: What if the Affordable Care Act is repealed? How might that affect community paramedicine?

5. Revenue Issues. The Guide alerts auditors about ambulance transport revenues and some of the special internal controls and policies needed to account for and manage such revenue streams. Billings, collections, and adjustments (write-offs?) need to be carefully addressed. Reimbursement revenue, such as that from State Mobilization for wildland fires, is also audited.

Our View: There have been some infamous misappropriation cases of which we have personal knowledge relative to these "other revenue" sources, so the Auditor is right. Locally receipted revenues are inherently risky, so districts need lots of checks and balances; avoid having one person in charge of the whole process as that is not sufficient internal control.

6. Expenditures. The Guide has several good pointers here in this section, cautioning auditors to be on the lookout for "small and attractive assets" policies, careful inventory control over pharmaceuticals (for obvious reasons) and controlling policies about vehicles, especially take-home vehicles. The importance of segregation of funds between the district and any volunteer association or foundation is stressed. Do not commingle any government funds with association moneys and always make sure any money that changes hands is done pursuant to written agreement and for good and valuable consideration to avoid any sort of gift of public funds.

Our View: We cannot agree more!

7. Bid Law Requirements. The Guide flatly states: "The most common [audit]exceptions for fire districts are related to bid compliance." The SAO re-states their position that a municipal corporation cannot use its own employees to perform public works projects.

The SAO and AG apparently believe that a municipal corporation cannot act as its own general contractor. The SAO concedes that basic maintenance may be done in that manner but the agency must stay within the true definition of "maintenance."

Our View: We do not want to write a book on this subject because the author has already done a great deal of research and written legal opinions refuting the State's interpretation. Of course, that is only one of many bid law findings that departments need to beware of getting. I think a more fertile area for findings and management letters revolves around sole source determinations, piggybacking agreements under RCW 39.34, and use of cooperatives for purchasing. Expect to see strict scrutiny in such areas and if you are in doubt, call us or your favorite lawyer who specializes in this sort of work.

SUMMARY AND CONCLUSION: The Guide would be a useful tool for any fire district or RFA preparing for its periodic audit by SAO, because it warns you what they may be looking for. Another interesting sidelight for us came in the statistics. Did you know that the number two in frequency of exceptions was Federal Grants? In 2016 alone there were 529 audit exceptions on that area of audit; only accounting/financial reporting had more exceptions. In that regard, we are completing a Model Policy on Administering Federal Grants so clients should ask us for a copy and we will send it to you when we are done with the drafting.

In sum, we would like to thank Mr. Rapozo for a highly informative presentation.

SAFETY BILL

Just a reminder: Under WAC 296-305-01511 (Employee's Responsibility), firefighters **shall** (1) cooperate with the employer to eliminate workplace accidents; (2) comply with all of the provisions of WAC 296-305; (3) notify the employer of unsafe work practices and unsafe conditions; (4) apply the principles of accident prevention in their work; (5) take proper care of all personal protective equipment; (6) attend training to increase their competency in occupational safety and health; and (7) **shall not** participate in fire department operations when "under the influence of alcohol or drugs," with the exception of drugs prescribed by a physician, provided the use of such prescription drugs "does not endanger the worker or others."