

# The Firehouse Lawyer

Volume 21, Number 3

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March 2023

## UPCOMING PRESENTATION ON DEI

On April 28, Attorney Eric Quinn will be presenting a seminar on Diversity, Equity and Inclusion Programs and their effective and lawful implementation. The seminar will take place at South Sound 911 Headquarters, 3580 Pacific Ave, Tacoma, WA 98418, **and** virtually. The seminar takes place from 9:00 AM to 12:00 PM. Please **register** for this event for attendance-monitoring purposes. See the attached flier for the **virtual link** to the seminar along with information about registration. **This seminar is sponsored by the Pierce County Fire Commissioners Association and is therefore free to attendees.**

## MORE BILLS OF INTEREST IN 2023 LEGISLATIVE SESSION

Who knew? There must be a malfeasance problem in the special purpose districts! Or at least one legislator must think so. HB 1538 is proposed legislation to deal with the issue of malfeasance in special purpose districts.

In this bill, which would add a new section to RCW 36.96 and amend a section of RCW 36.27 (the county prosecutor statute), the legislature “finds that there currently exists confusion over the responsibility of prosecuting official malfeasance and misuse of funds in special purpose districts....” Apparently, there is overlapping responsibility between the attorney general and the county prosecutors.

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It must appear to someone that the efforts of the state auditor and the attorney general, supplemented of course by the recall statutes, are simply inadequate to deal with the rampant malfeasance that exists.

To us, the most significant change in the law that this bill would effect is in the final section of this short bill, section 3, which would add a section to chapter 36.96 RCW. It provides that whenever an action is commenced against a member of a special district governing body, based upon Chapter 42.20 RCW or otherwise based on “official misconduct” a county legislative authority may suspend the member from office until the action is concluded. Currently, the county legislative body in Washington has no authority whatsoever over the elected officials of a special purpose district. It would seem that general laws of the state should prevail over special legislation like this bill. We believe that the election and recall laws are sufficient to deal with this rare phenomenon. For obvious reasons, the WFCOA opposes this bill and we predict that it will not become law.

Under SB 5648, firefighters who are promoted would remain in the LEOFF system, as long as they are in a post requiring an experienced firefighter.

The Department of Retirement Systems has threatened to take people in administrative positions and put them into a different pension system such as PERS. This bill would ensure that they do not. There is an assumption that experienced firefighters who move into a position that does not respond to calls would be moved to a new pension system. This assumption is problematic as it creates a disincentive to candidates who might otherwise apply for those positions. Firefighters need to be able to move

freely between positions to ensure a stable workforce in all positions, without concerns over pension systems.

Substitute Senate Bill 5437 would change the law relating to filling vacancies on boards of certain special purpose districts, including the larger fire protection districts. The bill would not change the process for filling vacancies in these nonpartisan offices under RCW 42.12.070 as long as the district’s assessed valuation totals less than \$5 billion. In the larger districts, however, the bill would now require a nomination process, whereunder the remaining board members could nominate at least one person for appointment to fill the vacancy. The district must also post notice of the vacancy in three public places and post it on their website, for at least 15 days. The bill also allows registered voters residing in the district to nominate persons who are qualified.

We have been recommending a similar process to our clients for many years. Our “best practice” includes a notice to the public that there is a vacancy and inviting interested persons to apply or submit a resume. It does not include a “nomination” process, except insofar as one might be said to nominate oneself.

As might be expected, WFCOA opposes this bill.

## **MUNICIPAL CORPORATION NOT SUBJECT TO CONSUMER PROTECTION ACT**

Maybe it is not new or surprising, but a recent Court of Appeals decision has reminded us that municipal corporations such as fire districts and regional fire authorities are not subject to the Consumer Protection Act (CPA). The Sauk-Suiattle Indian Tribe (Tribe) sued the City of

Seattle over a hydroelectric project on the Skagit River, alleging public and private nuisance, but also alleging a CPA violation. The Tribe contended that the city's statements about the project amounted to "greenwashing", which can be a CPA violation.

In *Sauk-Suiattle Indian Tribe v. Seattle*, No. 83632-3-1, Division 1 of the Court of Appeals held on March 6, 2023 that a municipal corporation cannot be held liable under the CPA. The Court noted that the Supreme Court had already held municipal corporations to be exempt from the CPA. *See Washington Natural Gas Co. v. Publ.Util.Dist. No. 1 of Snohomish County*, 77 Wn. 2d 94, 97 (1969). The Supreme Court in that case said that by its terms, the CPA included only "natural persons, corporations, trusts, ...." That Court also said that the language of the CPA did not imply that municipal corporations or political subdivisions were within the definition of persons or the entities listed.

That reasoning is somewhat surprising in light of federal court decisions (including those of the U.S. Supreme Court) holding that corporations can certainly be considered to be "persons." Numerous high Court decisions could be cited here but of course this is common knowledge, suggesting that the situation may have changed since the 1969 *Washington Natural Gas* case. For example, as early as 1978, in *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978) the Supreme Court held that a local government is a person subject to suit under 42 USC 1983.

In defense of the Division One decision in this case, we do admit that the doctrine of *stare decisis* dictates that the Court of Appeals *must* follow the prior decisions of the state Supreme Court when the issue is the same as one the high Court has decided. Of course, the previous decisions could

be overruled if the Tribe ultimately petitions for review by the Supreme Court of Washington in this case. Meanwhile, Division One remanded to the trial court in any event because it agreed with the Tribe that it may have stated a claim sufficient to withstand a motion to dismiss on its allegations of private and public nuisance. Thus, this case may not be over at all.

## THE SILENCED NO MORE ACT

The Washington Legislature passed a law in 2022 that has not gained much attention yet. RCW 49.44.211 now prohibits nondisclosure and nondisparagement clauses in employment agreements, independent contractor agreements, and settlement agreements, entered into after the effective date in July 2022. If an employee reasonably believes they have a claim of discrimination, harassment or retaliation, or a wage and hour violation claim, or a claim that the employer has violated a public policy, then the prohibition is applicable, whether the offensive conduct occurred in the workplace or even elsewhere if a work-related event is involved.

In a somewhat related development, the NLRB decided on February 21, 2023, that employers are generally prohibited from including nondisparagement and nondisclosure clauses in severance packages for separating employees. The NLRB overruled two cases, in deciding that Section 7 of the National Labor Relations Act—which protects the right to organize collectively—is violated unless such clauses are narrowly tailored to ensure they do not impinge on Section 7 rights.

The case is McLaren Macomb, 371 NLRB No. 58.<sup>1</sup> It arose from this Michigan hospital

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<sup>1</sup><https://www.nlr.gov/case/07-CA-263041>

furloughing 11 employees due to Covid-19 limits on certain medical procedures. The severance agreements included a waiver and release that allowed different severance packages if the employee would agree to release any claims arising from their employment. Two other provisions required confidentiality and prohibited disparagement of the hospital.

While McLaren is a broad decision of the board it left many questions unanswered. The Board said extreme statements contrary to the core interests of the employer were not protected. The decision did not deal with trade secrets or proprietary information of the employer, so we believe those also fall outside the scope of the protections.

Of course, Washington public employers are generally not subject to NLRB decisions, but rather to Washington PERC decisions. But PERC generally does follow NLRB precedents unless the statutory language is different.

There seems to be a nationwide trend to weaken or prohibit these kinds of nondisclosure and nondisparagement agreements.

## **SOME BID LAW ADVICE**

In our law practice, the following question arises from time to time, and even shows up in audit findings occasionally: Is it questionable to divide projects or purchases into smaller parts, when the result is that no bid threshold is exceeded? Unequivocally, the answer is yes. Auditors are plainly looking for this trick, so do not do it! No matter whether the bid thresholds

are changed by statute, this phenomenon never seems to go away.

The following issue arises every year in our practice too, so we include our thoughts here. Suppose the fire department wants to have installed a whole new HVAC system in an existing building. Or suppose you need to replace your existing equipment for removing exhaust emitted from fire engines in your apparatus bay. Are these simply purchases of equipment subject only to the part of RCW 52.12.110 on such equipment purchases? Or are they public works projects? Once, a client intended to buy a manufactured home and then locate the structure on the land near the fire station, with “tiedowns” and also installing a septic tank and drainfield. The project was designed to create a viable resident volunteer program without an extensive remodel to the adjacent station.

We have concluded in all of the above situations that there really is a public works project here and not just a purchase of equipment.

RCW 39.04.010(4) defines “public work” very broadly, to include “all work, construction, alteration, repair, or improvement other than *ordinary maintenance*” executed at the cost of any municipality. Therefore, the work described above are all examples of public work. They are not merely examples of equipment purchases.

## **REMINDER: PDC FORMS DUE APRIL 15<sup>TH</sup>**

**The headline says it all. Please remember that elected officials have disclosure forms due soon.**

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**PIERCE COUNTY FIRE COMMISSIONERS'  
ASSOCIATION PRESENTS**

**Diversity, Equity  
and Inclusion (DEI)**

**Date:** April 28, 2023

**Time:** 0900 - 1200

**Location:**

In person at South Sound 911, 3580 Pacific Ave., Tacoma, WA  
or Remotely via Zoom:

<https://us02web.zoom.us/j/8151456645?pwd=NHFTa2o2ZWZWMzenU4Qlg2Q2tLejNFUT09>

Meeting ID: 815 145 6645      Passcode: 123456

**Cost:** Free

**Presenter:** Firehouse Lawyer, Eric Quinn

**Registration:** Please email Denise Ross at [dross@centralpiercefirer.org](mailto:dross@centralpiercefirer.org)  
*Please state whether you plan to attend in person or remotely so we can plan accordingly.*

*Join the Pierce County Fire Commissioners Association and other friends in government for a presentation by Firehouse Lawyer, Eric Quinn, on the benefits and risks of Diversity, Equity and Inclusion (DEI) initiatives in the public sector. Come learn how these initiatives intersect with the Washington Law Against Discrimination and other laws. Don't miss out on the opportunity to promote a more diverse and inclusive workforce! This presentation is sponsored by the Pierce County Fire Commissioners Association and is free to all participants.*



Topic: PCFCA Diversity Equity and Inclusion Presentation  
Time: Apr 28, 2023 09:00 AM Pacific Time (US and Canada)

Join Zoom Meeting

<https://us02web.zoom.us/j/8151456645?pwd=NHFTa2o2ZWMzenU4Qlg2Q2tLejNFUT09>

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Passcode: 123456

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