The Firehouse Lawyer

Volume 14, Number 11

November 2016

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Inside this Issue

Upcoming Municipal Roundtable-The Board and Chief, Working Together

On Friday, December 17, 2016, the Firehouse Lawyers will hold our next quarterly Municipal Roundtable, a free discussion group in which we consider issues that are relevant to the fire service and other municipal corporations. Topics lately have included medical records, public disclosure regulations, and unfair labor practices. This roundtable will be held at West Pierce Fire and Rescue, Station 21, on Steilacoom Blvd. in Lakewood, WA. The topic of this Roundtable will relate to "The Board and the Fire Chief": A discussion of the roles and responsibilities of the fire chief vis-a-vis the fire commissioners, and how to avoid conflicts in the performance of those separate roles. The Municipal Roundtable gives us all an opportunity to learn from each other. Make sure to attend: you will be better for it.

News Flash: Put It in Writing

For the sake of discussion, let us pretend that an Agency intends to conduct a "Tactical Examination" (hereinafter "Exam"), in which examinees are assessed on how they react to a school shooting. Let us pretend that the Agency's collective bargaining agreement states that the processes for the Exam "shall be mutually agreed upon by the Agency and the Local." But neither the Local nor the Agency has such a "mutual agreement" in writing. They have only a verbal agreement about the testing process.

There are two "pass-fail" components—which are interviews with chiefs—on the Exam. There are six other components to the Exam. The Local and the Agency verbally agree that the six other components of the Exam will be weighted equally (50 points each), but that the pass-fail portions shall be worth nothing, only a "pass" or "fail." But a week later after this verbal agreement, the CEO of the Agency informs the Local bargaining representative—during a meeting of the Board—that 25 points shall be allocated for each "pass," with no points allocated for a "fail." This statement by the CEO is recorded in the meeting minutes. Ten employees take the Exam, but for our purposes, we shall focus on two employees.

Ultimately, the examinee with the highest "raw score" shall receive a gold trophy. Employee One scored 260 out of 300 on the six other components. She failed both "pass-fail" components. Employee Two scored 250 out of 300 on the six components. But he also passed one of the "pass-fail" components. The Agency finds that Employee One shall be promoted because she had the highest "raw score." The Agency bases its decision on the previous verbal agreement between the CEO and the bargaining rep that the "pass-fail" components would not have a numerical value. The Local disagrees, arguing that Employee Two should be awarded the gold trophy, because his "raw score" is actually 275 (250 + the 25 points for his "pass") Spoiler Alert: the Local wins.

After grieving how the Agency weighed scores, and losing, the Local and the Agency proceed to arbitration. Admittedly, the role of an arbitrator is to interpret the CBA itself, not to re-write the agreement. But when an article of a CBA does not define the specific issue before the arbitrator, he or she may look to ancillary writings and agreements to interpret the CBA. In this case, the arbitrator would be called upon to decide whether the "mutually agreed upon" testing procedures have been violated. Consequently, the arbitrator must look to what in fact was "mutually agreed upon."

Of course, the six other components were verbally agreed upon; the Local and the agency both admit, before the arbitrator, that the six components were to be scored equally. But there is a writing—meeting minutes—which indicates that the two "pass-fail" components shall have a numerical value of 25 points each. The Agency contends to the arbitrator that the verbal agreement—that the "pass-fail" components shall have no numerical value—should control. Having been a PERC commissioner for many years, this editor believes that the arbitrator would side with the Local. This is because written evidence is much easier to prove—and much less difficult to lie about, i.e. more reliable—than verbal "evidence." Employee Two is declared the winner by the arbitrator, and receives the gold trophy. When in doubt, put it in writing.

This may seem like old news to some of our readers. But a situation will always arise when labor and management neglected to formalize a particular procedure, and one party argues that a new writing supplementing that procedure should control the results of a dispute. In those cases, an arbitrator—nine times out of ten—will find that a written document supersedes a verbal agreement. When in doubt, put it in writing.

"Public Records Requests" From the Union

Bargaining representatives serve at the pleasure of their members. When a grievance is filed, the union has a duty of fair representation, and a broad right to disclosure of any relevant information:

Under RCW 41.56.140, as part of the good faith bargaining requirement, upon request, the parties must provide each other with relevant information needed to properly perform their duties in the collective bargaining process. *Seattle School District,* Decision 10664-A-PECB (2010). Failure to provide relevant information upon request constitutes a refusal to bargain. *Seattle School District,* Decision 10664-A-PECB. In fact, "[T]he obligation to provide information extends to information that is necessary for the union to evaluate the merits of a grievance." *City of Seattle,* Decision 10249 (PECB, 2008).

Of course, under the Public Records Act, RCW 42.56.070, the responsibility of the public records officer is to discern (1) whether the record(s) is a public record, and (2) whether the record(s) is exempt. But under RCW 41.56.140, the ultimate inquiry is <u>not</u> whether the record is public or exempt: The issue is whether the information is <u>relevant to a grievance or collective bargaining.</u> Consequently, requests for records by a union are quite different than the typical public records request. But when a union makes a public records request, under the Public Records Act *only*, this creates a quandary for the employer. How must the request be treated?

The Public Employment Relations Commission (PERC) has essentially found that where the union makes a records request pursuant to RCW 42.56 *and* RCW 41.56, that the employer must provide *relevant* information, irrespective of whether the records requested are exempt under the Public Records Act. *City of Seattle*, Decision 10249 (PECB, 2008). Of course, the Public Records Act requires that public agencies provide the "fullest assistance" reasonably possible to the requestor. RCW 42.56.100.

Consequently, if an employee makes a public records request—*without mentioning* RCW 41.56—on behalf of the union, and this request is somehow relevant to a grievance or collective bargaining, the employer should either (1) inform the employee that he or she should couch his request as one made under RCW 41.56, if that is the case, in order to provide the "fullest assistance" to the requestor, or (2) treat the request as a public records request only—determining if some records are exempt under the PRA. We counsel that the employer do the former. We also counsel that the *union* should be upfront with the employer, and inform the employer that the request is being made pursuant to RCW 42.56 *and* RCW 41.56. That way, there will be no confusion over which law the employer should apply in evaluating the request.

That is because, in the end, the relevant inquiry, when a <u>union</u> makes a request for information, is whether the information is relevant, not whether the information is exempt under the PRA. Recall that the failure to provide information relevant to collective bargaining or evaluating the merits of a grievance constitutes a refusal to bargain, when the requestor is the bargaining representative or a member of the union.

One last thought: Keep in mind that a public agency cannot require the requestor to state the

purpose of their request, under the PRA. RCW 42.56.080. Perhaps the rules are different under RCW 41.56…after all, how would the employer decide whether the requested information is relevant?

ANOTHER NEWS FLASH

Some might remember that, in a recent *Firehouse Lawyer* article, we noted that newly proposed regulations by the Obama administration would raise the salary threshold for FLSA-exempt executives to about $47,000? Well, a federal judge has just thrown a monkey wrench into that idea by issuing an injunction that applies across the nation, enjoining that regulation from going into effect, which was imminent. We doubt that this Department of Labor regulation will now go into effect at all, regardless of the ultimate outcome of that litigation, because of the election of Donald Trump as President. It is the widely held belief that most administrative agencies will draft and enforce regulations that are less restrictive upon businesses, under the new administration. Therefore, a regulation that would have required employers to pay more overtime pay has little chance of being enacted in the immediate future. Thus, you can see that not all news is bad news--it depends on your perspective!