# The Firehouse Lawyer

Volume 16, Number 11

November 2018

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## Inside this Issue



## New Column: Labor Concepts

The Firehouse Lawyer is receiving many questions related to labor law, and felt that a new column, in addition to our monthly Safety Bill, is necessary. This column is called "Labor Concepts." This month, we discuss an age-old concept that is often utilized in arbitration proceedings: double jeopardy.

Under the Fifth Amendment to the United States Constitution, no person may "be subject for the same offence to be twice put in jeopardy of life or limb." This is known as "double jeopardy." The "double jeopardy" prohibition applied in the criminal context, originally. However, the prohibition against double jeopardy has been enshrined in labor law for decades.

The double jeopardy concept has typically been applied when an employee has been suspended or terminated after receiving a lower level of discipline for the same conduct. Double jeopardy arises in the following context: two Disciplines, A and B. Discipline B is based on the same underlying conduct giving rise to Discipline A. Arbitrators have found that an employer generally may not impose Discipline A then issue a new more-severe Discipline after discovering facts that necessitate Discipline B, if those facts relate to the same conduct. *Gulf States Paper Corp.*, 97 LA 60 (Welch, 1991). The question becomes, what is the "same conduct" subject to double jeopardy?

The United States Supreme Court has found that certain conduct may qualify as two or more

separate *criminal* offenses when *each* offense requires "proof of an additional *fact* that the other does not." *Blockburger v. United States,* 284 U.S. 299 (1932) (emphasis added).

Based on the "*Blockburger* Rule," the same conduct may give rise to three separate levels of discipline when Offense One requires proof of elements 1, 2 and 3 but Offense Two requires proof of elements 1, 2 and *4*, and Offense Three requires proof of elements 1, 2, and *5*. If such is the case, then three separate levels of discipline are permissible for the same underlying conduct. Note that each offense above has three separate factual "elements."

But let's play with the facts: Pretend that an employer's disciplinary policy contains three separate levels of discipline for violations of workplace safety rules:

Offense One requires proof of (1) a *negligent* violation of a (2) workplace safety rule, which is punishable[1] by an oral reprimand for a first offense.

Offense Two requires proof of (1) a *negligent* violation of a (2) workplace safety rule that (*3*) adversely affects the public reputation of the employer, which is punishable by a written reprimand for a first offense.

Offense Three requires proof of (1) an *intentional* violation of a (2) workplace safety rule that (*4*) physically injures a fellow employee or citizen, which is punishable by a suspension for a first offense.

[1] Of course, the purpose of progressive discipline is to correct behavior, not punish an employee. However, because we are talking about a long-standing principle of criminal procedure, we use the word "punish" for convenience.

The outcome of any potential discipline is fundamentally altered by removing the "third element" from Offense One.

Under the *Blockburger* Rule, Offenses Two and Three require proof of an element that the other does not: Offense Two requires proof of injury to the public employer's reputation, and Offense Three requires proof of a physical injury to a fellow employee or citizen. Therefore, Offenses Two and Three are different offenses under the *Blockburger* Rule. But the only two "elements" of Offense One are the same as the first two "elements" of Offense Two.

Let's apply Offenses One through Three to these facts: Imagine that a police officer (hereinafter the "Grievant") is texting while driving his department-issued vehicle. The employer has a safety rule prohibiting officers from texting or operating personal electronic devices while driving department-issued vehicles. A citizen sees the officer in the car and takes a picture. The citizen sends the picture to the newspaper. Furthermore, the Grievant, after taking his eyes off of his cell phone, notices that the stoplight is about to turn red. He runs the light with lights and siren, but has to jerk the wheel in order to miss an oncoming car. The Grievant and his partner get out of the vehicle to discuss what happened. The partner does not appear to have any signs of injury.

The next day, the Grievant's partner reports this to management. The employer agrees that this constitutes, at the very least, a negligent violation of a workplace safety rule: Offense One. But there are not yet any signs of an injury to the partner or the employer's reputation, after a brief investigation by the employer in which the employer conducted no interviews. Consequently,

the employer could not discipline the Grievant for Offenses Two or Three, at that stage.

Getting antsy, the employer issues an oral reprimand to the Grievant for Offense One. What the employer did not see, which any local citizen could see, is that the newspaper published, on the front page, a picture of the Grievant texting in his department-issued vehicle. What the employer did not know, and could have discovered through diligent investigation, was that the partner had told other employees she was feeling tingling down her right arm, right after the incident, and that the Grievant told her prior to the accident that "[T]his no-texting policy is ridiculous. We have lives to live and if I need to text I am going to text."

A week later, the employer discovers the front page article in the newspaper and issues a written reprimand for Offense Two. The following week, the partner directly reports to the employer the tingling in her right arm, that she contends is a result of the sudden jerking of the vehicle which occurred when the Grievant realized the light was about to turn red and ran the red light, and abruptly swerved away from on oncoming vehicle. She also told the employer about the Grievant's "no texting" statement evidencing his intent to violate the workplace safety rule.

After discovering this, and getting verification from the injured partner's doctor that the whiplash could have easily been caused by the abrupt swerving of the vehicle, the Employer suspends the Grievant for Offense Three. The Grievant alleges that the written reprimand and the suspension constitute "double jeopardy" because the disciplines for Offenses Two and Three arise from the same underlying conduct—the texting. The Grievant has a clean work history. The grievance process ensues.

The Grievant insists on arbitration. The arbitrator is faced with this question: Was the Grievant disciplined three separate times for the same offense? Yes and no. The arbitrator sustains the *suspension* of the employee but nullifies the *written reprimand*. The arbitrator did so because the Grievant was (1) issued an oral reprimand for what initially appeared to be a *negligent* violation of a safety rule (Offense One) but was also issued a written for a negligent violation of a safety rule (Offense Two), but *both offenses* did not require proof of an additional fact that the other offense did not (only Offense Two required proof of an additional fact: injury to employer reputation); however, (2) the later-discovered facts uncovered an *intentional* violation of a safety rule that resulted in an injury to another employee, and therefore Offense Three was not the "same offense" as Offense One. That is because Offense One required a "negligent" violation and Offense Three required an "intentional" violation.

But let's turn the facts on their head. Pretend that the employee was only disciplined for Offenses One and Three. Again, Offense One (oral reprimand for first offense) requires proof of a (1) *negligent* violation of a (2) workplace safety rule. But this time, Offense Three requires proof of a (1) a *negligent* violation of a (2) workplace safety rule that (3) injures a fellow employee or citizen (suspension for first offense). And again, the Grievant has a clean work history.

Both offenses share a common core: a *negligent* violation of a workplace safety rule. But the two offenses, standing together, do not satisfy the *Blockburger* Rule because Offense One does *not* require proof of an additional fact that Offense Three does not. Both offenses require proof of the negligent violation of a safety rule, but only one, Offense Three, requires proof an additional

factual "element"—physical injury to a citizen or employee.

Under the facts above, the employer could have easily discovered, with diligent investigation, that the partner had tingling in her arm and that therefore Offense Three had been committed. If the employer issued an oral reprimand under Offense One but then discovered that the partner had tingling in her arm and suspended the Grievant, then the employer would have a double jeopardy problem (which is what happened in the above hypothetical). This is because Offenses One and Three are technically the "same offense" under the *Blockburger* Rule because only one offense requires proof of an additional fact that the other does not. Therefore, any reasonable arbitrator would find that first issuing an oral reprimand for Offense One and a suspension for Offense Three, for the same underlying conduct, constitutes double jeopardy—as unfair and ridiculous as this may seem.

Consequently, the employer, to avoid a double-jeopardy problem, should thoroughly investigate the situation prior to implementing *any* form of discipline. If the employer above had waited for the injured employee to come forward, or inquired with that employee about any potential injury during the accident, the employer could have suspended the Grievant without facing an allegation of double jeopardy.

Thus concludes our new column: "Labor Concepts." We hope you liked it.

**Impact Fees, SEPA Mitigation and RCW 52.30.20**

Fire departments, schools, counties and cities and public park districts may be entitled to "impact fees" for new construction and development. *See* RCW 82.02.090 (7). A city or county may adopt a series of specific impact fees set forth in an impact-fee schedule. RCW 82.02.060 (1). To impose such impact fees, a qualified agency must adopt a capital facilities plan (CFP), and the CFP must be adopted by the county legislative authority as part of the county's comprehensive plan. *See* RCW 82.02.090 (5).[2] Put another way, although an agency may request *specific* impact fees with a concrete cost, to appropriately obtain impact fees, a fire department, school or other statutorily authorized municipal corporation must be granted the right to do so by *legislation* at the *local* level, *i.e. the city or county.*

As for SEPA mitigation, a city or county, when considering the specific probable adverse environmental impacts of a proposed action, may impose mitigation measures as a condition of approval of that action. See RCW 43.21C.240 (2)(a)-(b). But most importantly, a municipal corporation must have substantive SEPA authority to impose such mitigation measures, as set forth in the adopted codes of the county or city in which the municipal corporation is located. See RCW 43.21C.060. In other words, to appropriately obtain SEPA mitigation, a fire department, school or other municipal corporation must be granted the right to do so by *legislation* at the *local* level.[3]

[2] See the attached *Firehouse Lawyer* article on impact fees: https://www.firehouselawyer.com/Newsletters/v10n3Emar2010.pdf

[3] See the attached *Firehouse Lawyer* article on SEPA mitigation:

As for RCW 52.30.020, a fire protection district may compel a public agency, which is not the State, a school or an Indian Tribe, to contract for fire protection services. However, RCW 52.30.020 does not specify whether the costs for these services only apply to the buildings and equipment of the public agency, or also to the land upon which these buildings and equipment rest. Furthermore, RCW 52.30.020 does not provide any mechanism by which the parties may establish a cost for the services rendered. Put another way, to receive fair compensation for the services rendered under RCW 52.30.020, fire districts should push for *legislation* at the *state* level that establishes exact methods for determining fair compensation.

**SAFETY BILL**

All agencies subject to the health and safety regulations promulgated by Labor and Industries (L&I) must retain records of training issued to all of their employees on personal protective equipment. WAC § 296-800-16035. Such records must include, at a minimum, (1) the name of the employee(s); (2) the date(s) of the training and (3) the subject of the training. *Id.*[4] These records may be stored in electronic format so long as the records are accessible to L&I. *Id.* For other specific provisions related to PPE, *see* WAC § 296-305-02001 (firefighting); § 296-155-200 (construction workers); § 296-32-22540 (telecommunications), or WAC 296 generally.

https://www.firehouselawyer.com/Newsletters/July_2015_FINAL_2.pdf

[4] "*Id*" stands for the previously cited authority.

**Indefinite Disability Leave**

This is only a reminder that federal courts have found that granting unpaid leave of an indefinite duration is not a "reasonable accommodation" under the Americans with Disabilities Act. *See Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167, 1169 (10th Cir.1996); *See Also Peyton v. Fred's Stores of Arkansas, Inc.*, 561 F.3d 900 (8th Cir. 2009); *Stanley Kieffer v. CPR Restoration and Cleaning Services, LLC*, No. 16-3423 (3rd Cir. 2018); *Dick v. Dickinson State University*, 826 F.3d 1054 (8th. Cir. 2016) (finding that to provide a "reasonable accommodation," an employer is not required to "give the disabled employee *indefinite leave*.") (emphasis added).[5]

**DISCLAIMER**



[5] The federal appeals court jurisdiction encompassing Washington State is the Ninth Circuit.