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APPEALS COURT DECIDES IMPORTANT 'MINIMUM STAFFING AS MANDATORY SUBJECT OF BARGAINING' CASE

The Court of Appeals has ruled on a case that may sound familiar to readers of the *Firehouse Lawyer.* That is because we wrote about this important labor law case in a previous issue of this newsletter, when PERC rendered its decision ruling that minimum staffing may indeed be a **mandatory subject** of bargaining, if the facts in evidence show a direct connection to firefighter safety.[1]

In *City of Everett v. PERC*, No. 77831-5-I, the court said the PERC Hearing Examiner presided over an administrative hearing during which there was introduced considerable evidence, including about 100 exhibits and substantial (unrebutted) expert testimony on the issue of how high call volume and work intensity may create firefighter fatigue, illnesses, and decreased safety.

The employer contended that the union committed an unfair labor practice by

[1] We wrote about this case when the matter came down from PERC: https://www.firehouselawyer.com/Newsletters/November2017FINAL.pdf

insisting to impasse with respect to a permissive subject. Although the Examiner sided with the employer, the PERC Commission reversed, ruling for the union and finding that under the record as presented, minimum staffing was a mandatory subject. This appeals court agreed.

Division I of the Court of Appeals affirmed the PERC decision and gave the issue very thorough consideration. But before we discuss the reasoning of the Court, let us review the facts of the case as presented to the Hearing Examiner.

THE EVIDENCE

The testimony and exhibits, as recited by the court, showed that the City of Everett had a population of 52,000 in 1978 but had grown to a population of 104,900 by 2014. From less than 5,000 annual calls in 1978 the call volume had increased four-fold to 21,839 by 2014. The minimum staffing of 26 in 1978 had grown to only 28 per shift by 2014.

A "needs assessment" done in 2007 concluded that, when an engine company responds to 10 or more alarms per day, they are considered ineffective for subsequent responses or added duties, such as training or inspections. Testimony showed the typical Everett firefighter responded to more than 1,000 calls per year and the "vast majority" of other jurisdictions would number less than 600.

Other (unrebutted) testimony showed that such increases in call volume caused delayed response times as well, and correlated those delays with increased risks to firefighter safety. Staffing shortages also resulted in firefighters being held over for extra shifts after having worked a 24-hour shift. The call volume increase and related issues also caused an increase in on-the-job injuries.

Moreover, the call volume increase resulted in training not occurring, but training is absolutely essential for firefighters. Given the unrebutted testimony, it is not difficult to understand why the Court concluded that the union had proven the demonstrably "direct relationship" between workload and safety, thus making minimum staffing in this instance a mandatory subject of bargaining.

We felt it might also be relevant to note, as the Court of Appeals did, that minimum staffing had been part of the collective bargaining agreement for years (since 1974). The court also pointed out that the parties went into litigation and then interest arbitration in 1976 over the same issue. The arbitration panel concluded that minimum staffing of the on-duty crew did relate to safety in that city, and held minimum staffing was therefore a mandatory subject of bargaining there. Between 2008 and 2014, budgeting issues caused the city to reduce minimum staffing from 33 to 28. However, the city

maintained the staffing of seven firefighters or EMTs for all medical emergency responses, and a minimum of 17 firefighters for residential fires and 21 for commercial fires. This case arose out of the 2014 bargaining process.

It is clear to this writer that, in any case, where the call volume can be shown to have increased significantly but the staffing has not commensurately increased, a case could be made that minimum staffing is a safety issue and therefore a mandatory subject, particularly in one of the larger, metropolitan or urban fire departments in Washington. While this firm represents many smaller fire departments, we have no doubt that some of our larger fire department clients in King, Pierce and perhaps some other urbanized counties would have to assume this case means they have to bargain (the decision, not just the impacts) on the issue of minimum staffing. The days of arguing that staffing is a management prerogative are over in such environments. We believe that the union could produce enough evidence, expert and otherwise, to demonstrate clearly that in those urban departments, safety is an issue impacted by minimum staffing and therefore they can treat it as a mandatory subject.

ANOTHER IMPORTANT PUBLIC RECORDS ACT CASE

It may seem like every month we report on another important Public Records Act (PRA) case in the *Firehouse Lawyer.* Now here we discuss the Washington State Supreme Court decision in *Washington Public Employees Association v. Evergreen Freedom Foundation et al.,* No. 95262-1, decided by the Court on October 24, 2019. If the facts sound familiar that is because we reported on the same case when the Court of Appeals ruled on the issue in 2017.[2] Interestingly, the Supreme Court reversed the Court of Appeals in this decision.

The issue to be decided was whether the state employees had a protected privacy interest against disclosure of their birth dates associated with their names. The Court of Appeals found that they had a constitutional right of privacy found in Article I, section 7 of the Washington Constitution (which, as we noted in our earlier article, opened up the potential for a constitutionally-based privacy argument to add to the statutory privacy exemptions). The Supreme Court in this case held, however, that such information is already in the public domain and therefore there is no constitutional privacy right that protects these birth dates from disclosure.

Because the courts generally do not rule on constitutional claims if there is a statutory basis on which their decision might rest, the Court first addressed whether any statutory exemption applied to protect the birth dates from disclosure. The Court quickly found

2 https://www.firehouselawyer.com/Newsletters/November2017FINAL.pdf

that the privacy laws in the PRA provided no exemption for such information. Finding no such exemption in the PRA, the Court proceeded to analyze the constitutional issue.

Several times in its opinion, the Court stressed that it was the province of the legislature, not the courts, to address the policy issues surrounding whether birth dates of public employees should be deemed "private" under the statute, and therefore exempt from disclosure.

The unions also argued that the Freedom Foundation wanted this information for commercial purposes, which of course is addressed in the PRA. The law provides that the agency may ask if the requestor is making the request to compile a list of individuals to be used for commercial purposes. *See* RCW 42.56.070 (8). However, the Court readily concluded that was not the motivation for the records request at all. The foundation wanted the information so they could "inform the employees of their constitutional rights," such as the right to not join or remain a member of a public-employee union after the *Janus* decision of the U.S. Supreme Court was announced last year. (I am going to assume that our readers know the meaning of *Janus*.)

The Court went on to find no conflict with Article I, section 7 by allowing disclosure of such birth dates. The Court applied the "rational basis" test and did not apply the "strict scrutiny" test applied by the Court of Appeals, resulting in a quite-different conclusion. The Court applied this looser test because they did not find a fundamental right in the confidentiality of the birth date.

Five justices concurred in the majority opinion authored by Justice Stephens. Justice Charles Wiggins filed a spirited dissent, joined by two other judges. He made several good points in the dissenting opinion about how perhaps technology may force us to re-define (eventually) the meaning of privacy in this era of identity theft. As Justice Wiggins succinctly put it: "The consequences of technology knock ever more loudly at privacy's door."

To be clear, we are not stating herein that Article I Section 7 of the Washington State Constitution may *never* be cited as an exemption from disclosure. Quite the contrary: the Washington courts recognize this exemption. But names and birth dates will generally not be protected by Article I Section 7. Instead, this exemption should be considered under narrow circumstances, on a case-by-case basis. Consult legal counsel in the event you are unsure whether this "constitutional exemption" may apply.

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