FIREHOUSE LAWYER

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Preventive Law Programs - Wave of the Future

In 1994, the City of Seattle filed an unfair labor practice complaint against the union that represents approximately 900 firefighters, lieutenants and captains in the Seattle Fire Department. The union had insisted on taking its supplemental pension benefits proposal to interest arbitration. The city maintained that it had no duty to bargain about supplemental pension benefits, which would have greatly changed its pension responsibilities to its uniformed personnel, above and beyond what's provided by LEOFF II. The union proposal would have replaced one paragraph in the existing collective bargaining agreement which simply made reference to the LEOFF pension statute, with a 20 page detailed comprehensive proposal on supplemental pension benefits. Essentially the union wanted service retirement at age 50 with benefits based on 2% of final average salary, a duty disability retirement of 60% of base salary if unable to return to work after 365 days of disability, and a duty death benefit of between 45% and 90% of base salary. In a sense, the union wanted to provide more of the LEOFF I level of benefits to these LEOFF II employees and also enhance disability benefits.

To the Public Employment Relations Commission (PERC) hearing examiner the city argued that the union proposal would violate Seattle City charter and was pre-empted by state law anyway. In other words, the employer maintained that RCW 41.26 presents a comprehensive statewide scheme on pension benefits for firefighters and that occupies and pre-empts the field of pensions for such employees. Therefore, an employer is bound by state law and cannot provide something different through the process of collective bargaining. The contract also contained a subordination clause, stating that the contract language, to the extent it conflicted with state law or city charter or federal law, would be subordinate.

The hearing examiner mentioned that pensions are certainly encompassed within the terms "wages" and "conditions of employment" as used in the Public Employees Collective Bargaining Act, RCW 41.56. There have been similar holdings under the National Labor Relations Act, which is deemed to be persuasive if not controlling when interpreting the similar state law. The hearing examiner said that the union described its proposal as requiring the employer to create an auxiliary pension system. Certainly the proposal would have dramatically changed certain items specified in the LEOFF statute and the disability laws.

The examiner noted that PERC has recognized the concept of pre-empted subjects

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of bargaining before. For example, in one earlier case the Commission ruled that

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determination of minimum manning requirements for safe operation of vessels was pre-empted by federal law, having been delegated by Congress to the United States Coast Guard. The PERC Commission therefore could not review or overrule safety standards determined by the Coast Guard. Also, PERC had previously dealt with a situation where two state laws were in conflict and a pre-emption argument was made. In the Hoquiam School District case, Decision 2489 (PECB, 1989), the hearing examiner held that a school statute pre-empted the ability of the school district to use its own employees to accomplish particular work and therefore had to contract such work out, irrespective of RCW 41.56 and therefore there was no duty to bargain the contracting out.

The hearing examiner rejected all of the cases from New York and Rhode Island law submitted by the union, stating that one must keep in mind the statutory context when reading statutory language.

Turning to the specific provisions of the LEOFF Act, Chapter 41.26 RCW, the hearing examiner concluded that a single comprehensive statewide system had been established by the legislature and it was not the legislature's intent to allow local governments like Seattle to have a different pension system. Also, RCW 35A.11.020 specifically states that nothing in the section permitted any city to enact provisions establishing a merit system or civil service for firemen or police or enabled a provision to provide different pensions or retirement benefits that are provided by "general law." The concept of general law obviously applies to other state statutes such as the LEOFF statute. In conclusion, the examiner then concluded that the state had occupied the field of retirement and pension benefits for law enforcement officers and firefighters by passing the LEOFF statute and therefore Seattle had no authority to adopt a supplemental pension benefits program. Therefore, it had no duty to bargain on the pre-empted subject.

This case was decided by the PERC hearing examiner in June, 1996, and was appealed to Superior Court, but then referred directly to the Court of Appeals of the State of Washington. In October 1997 at the Leavenworth labor conference of the WFCA, I stated my opinion that the hearing examiner was correct in his interpretation of the balance that must be struck between these state statutes. The examiner correctly concluded that municipal corporations with firefighter employees in Washington do not need to bargain for different or better pension benefits with their respective unions.

Now, on November 30, 1998, Division 1 of the Court of Appeals filed an opinion affirming the decision and order of the Public Employment Relations Commission. Citing well settled precedence, the court noted that great deference is usually given to PERC's interpretation of the law it administers, the Public Employees' Collective Bargaining Act - RCW 41.56. As the PERC examiner stated, the Court of Appeals stressed that the purpose of the Law Enforcement Officers and Firefighters (LEOFF) Statute was to create a single uniform statewide system for all fulltime firefighters and law enforcement officers. This comprehensive pension system replaced a multitude of separate retirement systems that previously existed. The legislature included an exclusivity provision to make it crystal clear that the LEOFF Retirement System was to be the only pension system in the state for such public employees. Thereafter, the court rejected all of the union arguments and concluded that the state statute preempted any other state statute or city charter. Therefore, the court held that the LEOFF two

provisions are the exclusive

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retirement system for fulltime firefighters. Management therefore has no duty to bargain concerning any supplemental pension benefits requested by the unions.

90-Day Statute of Limitations for Constitutional Writs

Sometimes, there is no statutory appeal and therefore no definite appeal deadline. In International Brotherhood of Electrical Workers, Local 125 v. Clark County Public Utility District Number 1, decided by Division 2 of the Court of Appeals on December 4, 1998, the court stated that a 90-day period (or "statute of limitations") should be applied with respect to the proposed vacation of an arbitration award in a public employee's dispute.

The IBEW represented certain PUD employees. The PUD is a municipal corporation in Washington and provided public utility service to the residents of Clark County. The PUD and IBEW executed a collective bargaining agreement. Under that agreement, the IBEW submitted a grievance after a layoff of ten employees. Unable to resolve the grievance under the dispute resolution provisions of the CBA, the grievance was submitted to arbitration. Ultimately, in an amended award, the arbitrator held that two of the employees should be placed in non-CBA positions.

More than 90 days later the PUD filed a petition for constitutional writ of certiorari (writ of review) of the arbitrator's decision in Clark County Superior Court. The trial court ruled in favor of the PUD rejecting IBEW's arguments regarding timeliness. The IBEW appealed and the court of appeals reversed, holding that a 90-day period is the applicable time to apply for such a writ of review.

There is no statutory mechanism for judicial review of public employment labor arbitrations. While the Public Employees Collective Bargaining Act provides for binding arbitration in public employee labor disputes, it does not deal with judicial review of those arbitrations. RCW 41.56.125 provides that RCW 49.08, a statute governing arbitration of general labor disputes, shall not apply to public employment arbitrations. Also, Washington's general arbitration statute, RCW 7.04.01 requires that parties to a collective bargaining agreement specifically provide that the procedures of that act shall be applicable or else it does not apply.

Prior cases have held that where such a statutory and contractual vacuum exists, judicial review must nevertheless be available. The mechanism for that review is the constitutional writ of certiorari. This is because, essentially, under Article 4, Section 6 of the State Constitution, the superior courts possess the inherent power to review administrative agency decisions, including arbitration decisions, by issuing such a writ. This inherent power was not always clear.

In the early 1980s, the author participated in Pierce County Sheriff v. Pierce County Civil Service Commission, 98 Wn. 2d. 690, 658 Pac. 2d. 648 (1983). In that case, and in Williams v. Seattle School District 1, 97 Wn. 2d. 215, 221-22, 643 Pac. 2d. 426 (1982), the supreme court made it clear once and for all that superior courts have the inherent power and authority to review administrative decisions. Prior decisions had held or implied that it was necessary for the plaintiff to assert some fundamental right requiring protection, but the Williams and Pierce County cases made it clear that the right to appeal arbitrary or capricious administrative actions is itself a fundamental right.

What the current case makes clear is that the statute of limitations or the "appeal period" in such constitutional writs, where there is no otherwise applicable statutory time limit shall be specified by analogy to the time allowed for appeal of a similar decision as prescribed by statute, rule of court or other provision. The court also reiterated a prior ruling that when more than one appeal period applies, the longer period controls. The court analogized to the 90-day statute of limitations applicable in the general arbitration statute, RCW 7.04.180. The rules on appeal to the court of appeals at RAP 5.2(a) provided an analogous 30-day appeal period. Finally, the mandatory arbitration rules for superior court at MAR 7.1 provided a third analogous period, i.e., 20 days. However, in this case, the court favored the 90-day statute over the 20- or the 30-day statute, under the rule applying the longer appeal period. Unfortunately, the PUD had waited more than 90 days and therefore their petition was untimely. For public employers, the ultimate teaching of this case is that, if you want to appeal an arbitration award, while the constitutional writ to superior court may be the appropriate vehicle, you had better file within 90 days after the arbitrator's award.

Handicap Discrimination - Reasonable Accommodation (Continued)

stated that anxiety disorders may be a recognized physical or mental impairment, whether caused by job stress or off the job stress stimuli.

FLSA - Preemption?

A recent case from the U.S. District Court for Eastern Louisiana makes it clear that, when the FLSA is less beneficial to employees than the applicable state law, the FLSA will not preempt state law. A group of police lieutenants sued the City of Slidell, Louisiana seeking overtime pay for work in excess of 40 hours in a work week. The so-called 7(k) exemption under 29 U.S.C. Section 207(k) provides a partial exemption from overtime requirements for public sector law enforcement officers and firefighters, increasing the number of hours they must work before receiving overtime pay. The FLSA also provides a full exemption from overtime pay for bona fide executive, administrative and professional employees.

In the particular case, the provisions of 29 U.S.C., Section 218(a) became important. This section essentially provides that if a state or local law provides a minimum wage higher than the FLSA minimum wage, or provides a maximum work week lower than the maximum work week established under the FLSA, those more liberal provisions of state or local law will be respected. Under Louisiana law, police lieutenants serving in towns falling into a specific population range (into which the city did fall) must be paid time and a half for all hours worked over 40 in a week.

The FLSA also provides a full exemption from overtime for employees exempt from an employee assistance program. While the court did not make a decision as to whether the plaintiffs were actually EAP exempt, it noted that in the past police lieutenants have been found to qualify for that exemption, but there is no such exemption.

Finally, in comparing state law with federal law the court noted that the FLSA's statute of limitations is shorter than the Louisiana law. The FLSA's limitations period generally is two years (except for willful violations) and the Louisiana statute of limitations is typically three years for recovery of wage payments. The effect of a statute of limitations is to define the

amount of time within which claims can be brought, but also has been held to limit the amount of back pay successful plaintiffs can recover.

In light of the above findings and comparisons, the court determined that in several respects Louisiana law was more generous than the FLSA and therefore held that state law applied to the plaintiffs. The court ordered the city to pay the plaintiffs overtime in accord with Louisiana law and to pay three years worth of back overtime to the plaintiffs.

Thus, a word to the wise: After you satisfy yourself of the answer under the FLSA, it might be worthwhile to check state law to make sure it is not more beneficial to the employee.

COBRA Strikes Again

In June, the U.S. Supreme Court ruled that employers may not deny COBRA benefits to an otherwise eligible beneficiary covered under another group health plan at the time of a COBRA election. See Geissal v. Moore Medical Corp., No. 97-689. Any company or employer that denied COBRA to otherwise qualified beneficiaries because

COBRA Strikes Again (Continued)

of the existence of other coverage or Medicare prior to COBRA, at a minimum should have changed this policy effective June 8, 1998, the date of the Supreme Court decision. Until June 8, the IRS has said that following the original interpretation from the 1987 proposed regulations would be considered a good faith interpretation.

FMLA Notification

The FMLA regulations issued by the Department of Labor state that an "employer must give notice of a requirement for medical certification each time a certification is required." (29 C.F.R. Section 825.305(a).) A recent U.S. District Court decision held that these regulations mean exactly what they say.

An employer with an employee handbook must include information about the Family and Medical Leave Act (FMLA) in the handbook. However, the employer cannot rely solely on the handbook to notify workers of their FMLA rights and obligations, according to the U.S. District Court for Northern Oklahoma.

The employee was terminated for excessive absenteeism. She had been on and off medical leave a few times. The debate between her and the employer was who had the burden of providing proper medical certification of the need for leave. According to the employer's attendance policy as stated in the handbook, an employee was required to submit medical certification supporting a need for FMLA leave. But the employee argued that the FMLA obligates an employer to request medical certification each time an employee asks to take leave under the FMLA, if it desires such certification. Because the employer failed to request certification, she maintains she was not required to provide it.

According to the court, the handbook did not fulfill the company's obligation to notify the employee each time a certification is required. So, this case makes it clear that the burden is on the employee to provide medical certification, but only after the employer fulfills its burden to give the employee a notice of the requirement for medical certification. A handbook or policy is not sufficient to meet that certification requirement on a case-by-case basis. See Henderson v. Whirlpool Corp., N.D. Okla., Case No. 97-C-1052-H, Aug. 13, 1998.

Sector Boss

An arcane and archaic term in the fire service, a sector boss was the guy who was called upon when the chips were down, to put out the fire. In other words, the sector boss has all the answers. (You have to admit, it is much more exciting than "Q&A column".)

Disclaimer

The purpose of this feature is to allow readers to submit short questions which lend themselves to general answers, on various legal issues. More detailed questions would require a formal legal opinion and are beyond the scope of the Q&A column. By giving answers in the Q&A column, the Firehouse Lawyer does not purport to give legal advice and disclaims any attorney/client relationship with the reader. Detailed legal opinions require a greater explanation of the facts, possible legal research and a more thorough discussion of the issue. Readers are therefore urged to contact their legal counsel for legal opinions.

Q: What are the actual Washington requirements for live structure fire training?

Sector Boss (Continued)

A: Several clients and others asked that question this month, so here goes. Apparently there was a news story in the *Daily Olympian*, or some other Olympia area newspaper allegedly quoting a Labor and Industries Department spokesman who said that 120 hours of training per year were required. We find no such specificity in the training requirements.

The starting point for analysis is WAC 296-305-05501 entitled "Fire Training". As you can see from the partial quote contained below, the requirements are flexible rather than definite:

> (1) All members who engage in emergency operations shall be trained commensurate with their duties and responsibilities. Training shall be as frequent as necessary to ensure that members can perform their assigned duties in a safe and competent manner but shall not be less than the frequency specified in this standard. Minimum training shall be as specified in this part.

The rest of the subsections of Section 05501 relate more to how such live structure fire training and other training shall be provided, rather than "how much" or "how frequently".

So what about the language relating to ". . . the frequency specified in this standard . . ." and the sentence: "Minimum training shall be as specified in this part." Obviously, "this part" refers to more than Section 05501.

WAC 296-305-05503 entitled "Summary of Training Requirements" does contain some provisions relating to live fire training including interior structure fires. For example, subsection (8) states: "Live fire training in structures shall conform to NFPA 1403 and this section." Subsection (10) of 05503 does discuss frequency. That subsection provides:

> The employer shall assure that training and education is conducted frequently enough to assure that each member is able to perform the member's assigned duties and functions satisfactorily and in a safe manner so as not to endanger members or other employees. All members shall be provided with training at least annually. In addition, members who are expected to perform interior structural fire fighting shall be provided with an education session or training at least quarterly.

Thus, in our search for frequency or minimum requirements, we find, in summary, only this:

(1) All members must be provided with some training at least annually.

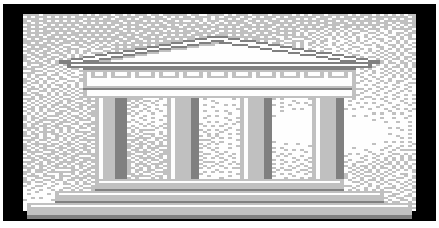
(2) If members of a department are expected to perform interior structural firefighting, they must be provided with either an education session or training at least quarterly. This of course leaves open the possibility that the minimum requirement would be met by a class rather than by live structure fire training.

(3) Although it is evident that actual emergency operations including fires can be considered and treated as "training" (on-the-job training) there is also a section in 05503(9) stating: "Such training and education shall be provided to members before they perform emergency activities."

Therefore, one could certainly argue that it would violate the safety standards to send a member into combat fire without any training from the employer on interior structural firefighting. This would imply that an employer cannot send a firefighter into their first active fire or other emergency activities without first providing training and education.

Sector Boss (Continued)

The NFPA 1201 standard, 1994 edition, contains chapter 8 on training. Again, we have not found absolute specificity requiring minimum training. However, section 8.7.1 provides that new personnel shall receive training before engaging in emergency duties to ensure that trainees can work safely and effectively at fires. This training shall be a foundation for subsequent in-service training. With respect to training of company members, section 8-6.2 provides that sufficient time shall be spent on training during company duty tours in career departments and at convenient times for volunteers so that regular tests of proficiency are met. Training shall be in the form of classroom instruction, practice drills, familiarization inspection, and pre-fire planning. Also, section 8-6.5 requires company officers "periodically" to evaluate members assigned to their company to determine that the training is effective and to provide a basis for evaluation of the performance of individuals. Thus, the 1201 standard makes it clear that training includes more than classroom instruction and that new personnel cannot be sent into emergency situations without first having been trained. We find no specific minimum number of hours required for drills or classroom instruction.



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