Firehouse Lawyer

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Inside This Issue

The Legal Questions You Ask:

This month I decided to do something quite different from my usual discussion of recent judicial decisions or statutes. I decided to provide the reader with a bird's-eye view of the sorts of legal questions that my clients ask me, day in and day out, in the ordinary course of my legal practice. The following legal issues or questions are a representative sample of the many questions presented to me—just since July 15, 2005—primarily by fire district clients in King and Pierce Counties

MINUTES OF BOARD MEETINGS:

The question was again asked—just how specific do Board meeting minutes have to be? For example, should we include the comments of every citizen who speaks during the public comment period? There is only one statute relating to minutes of public meetings, and it is not terribly instructive. It does make it quite clear that minutes do not need to be a verbatim transcript of the meeting. They only need to include a reasonable and fair summary of what takes place and what is said at the meeting. However, it is my considered opinion that minutes describing only Board motions and discussion are not a reasonable and fair summary, if there has been public comment. If a district allows a public comment period at their meetings—and most do—then I believe you must at least summarize the comments of all speakers. Assuming that a person is properly recognized by the Chairperson (and has the floor) then in my opinion any comments they make should be at least briefly summarized.

The question of retention of audiotapes of meetings has also arisen again. Many districts tape the meetings, but only to help the District Secretary prepare the minutes, which alone are the official record of proceedings. When the district "transcribes" the tapes, they often reuse them. Did you know that the Washington State retention guidelines provide that such tapes should be kept for one year? So if you use that method of "transcription" you should still not be erasing or re-using those tapes for 12 months.

DISCOVERY OF E-MAILS:

Please be advised that e-mail messages between Board members, or between members of the Board and the Fire Chief, are certainly discoverable and subject to disclosure as open public records, absent some evidentiary privilege or, in the case of public disclosure, some applicable exemption. Even if the computer is a home computer, if a Board member uses it for District business, the e-mail records in the hard drive are district records. I would advise against destruction of such e-mail records, at least within six years after creation of the record.

PUBLIC RECORDS REQUESTS:

Some fire district records custodians or clerks still do not know that the Open Public Records Act does allow you five business days after receipt of a request to provide a written response. Not 5 days to produce the records, but five days to respond. Your response might include copies, or an estimate of the time needed to search and produce the records, or even a refusal. Of course, if it is the latter, you had better be prepared to cite the exemption section in the law, or you cannot refuse.

One technique we have used effectively for years is worth discussing. Sometimes we decide there is no applicable exemption and a sensitive record must be produced, but we want to warn the person who is the subject of the record. The statute contemplates a sort of notice to that person, with a copy to the requestor, so we sometimes will notify the subject party of our intent to disclose and produce a sensitive record by a date certain, unless the subject person obtains a protective order from the court prior thereto. We have found this method to be effective and fair, as it gives fair notice at least to the person who may feel their privacy has been invaded when the document is disclosed.

HIPAA:

A client recently asked me whether it was all right to release to the water company just the name and address of a patient. Apparently, the water company wanted that information for billing purposes. Since HIPAA controls the release of "protected health information", it is my opinion that releasing only the name and address of a patient, without any health information attached, does not per se violate HIPAA. While it is important to view PHI in connection with individually identifiable information, I still think some health care information is assumed.

WASHINGTON HEALTH CARE INFORMATION ACT:

RCW 70.02 is the Washington State statute equivalent to HIPAA, the federal privacy rule. Even many attorneys, including prosecutors in criminal cases, do not understand the proper procedures to follow to obtain health care information under this law. RCW 70.02.060 provides a procedure, by which a person requesting health care records of any patient can obtain them without patient authorization. The statute provides that the requestor can give the health care provider and the patient notice (at least 14 days) that they want the records by a date certain, and if you (or the patient) do not obtain a protective order before that deadline, you must produce the records. Actually, under that statute the requesting attorney cannot just serve you with a subpoena or subpoena duces tecum (for records) without first giving the 14-day notice. But if they follow this statute correctly, it does put the onus on you to either produce the records by the deadline or seek a protective order from court. It seems that every month, I see another subpoena demanding the records, without a prior notice, and many times by a date sooner than 14 days hence. This is NOT in compliance with the statute.

DONATION OF HOUSES TO BURN:

Quite often, members of the public donate residential structures to the local fire department, which will use such buildings for training burns. It is permissible to give letters to such individuals, acknowledging receipt of the property, so that the donor can claim a charitable deduction. You should, however, refrain from delving into any opinions about the value of the property or the amount of the deduction. You can only acknowledge that the district is a public, not-for-profit agency, authorized by statute to accept charitable donations. Also, be advised that such donations often necessitate certain extra precautions such as asbestos removal permits/assessments. Moreover, we use a hold harmless and indemnification agreement to protect the fire district from any hazardous wastes or pollution that might be found upon the property.

SCHEDULING OF SUSPENSIONS:

Sometimes I am asked, "When we suspend an employee for several days or shifts, can we dictate the scheduling of the days off without pay?" Employees in such situations have figured out that, by using vacation or other leaves, or spreading the days off over two pay periods, the economic impact of the suspension can be mitigated. But in my opinion, you can make it part of the discipline that they cannot do that, but must take the days off without pay when the employer dictates. After all, what good is a penalty if it does not really hurt!

HYDRANT MAINTENANCE:

One of my clients this month had me draft a contract of services—hydrant maintenance work. It reminded me that one must be careful to delineate, as between the water purveyor (which ordinarily owns the hydrants and related facilities and lines) and the fire department. There is a Washington case holding that the water provider or hydrant owner can be liable if there is fire damage to property and the hydrant is dry. Therefore, I always try to make it clear in such

agreements that the water company is legally responsible for the provision of water to the hydrant (at adequate pressure) as well as the maintenance of the inner works of the hydrant. While the department may do external maintenance, painting, vegetation removal, and possible flow tests, we want the agreement to provide that the fire department does not bear any responsibility for getting water to the hydrant!

BARGAINING UNIT STATUS:

This month there were two instances where clients asked general or specific questions about whether a newly-created position "belongs" in the union. This is frequently not an easy question at all, and it is one on which you ordinarily need legal advice from an attorney knowledgeable in PERC practices and statutes. An important factor to consider, usually, is the history of performance of the tasks that the new position will undertake. If the tasks have historically been performed by bargaining unit personnel primarily, you may have to include the new position in the unit. If the work is new to the agency (say, for example, you have never had a fire marshal, and you are creating that position for the first time in your history) then it is a bit easier, but you still have certain criteria to review. I think it is best to assume that PERC has a presumption that public employees are entitled to union representation. Of course there have to be at least two employees with a community of interest or there can be no bargaining unit. An early PERC case held there cannot be a bargaining unit of one employee. Moreover, there is an exclusion for "confidential" employees. As I stated up front, when in doubt on these thorny issues, feel free to call legal counsel.

PURCHASE OF ENGINES – PERFORMANCE BOND:

Frequently, we get to review contracts for the purchase of fire engines, ambulances, and ladder trucks. There was a time when the State Auditor would make findings if a fire department paid any money in advance of receiving the completed apparatus. Many of you, however, are familiar with the practices in the industry, including giving significant discounts for prepayment. Alternatively, some vendors insist on partial payment upon chassis delivery to the factory, or other partial payments. In more recent years, the State Auditor has begun to accept such prepayment arrangements, but only if the fire district receives a 100% performance bond with good and sufficient surety. So make sure you do this correctly or you may get an audit finding.

ANOTHER BID LAW QUESTION:

Two clients actually asked the same question this month: what special bid laws apply to purchase of used (or demo) equipment? Well, actually, no special laws apply. The bid law applies, in my opinion, equally to used equipment and apparatus as it does to brand new equipment. Since sources or vendors of used equipment may be much more difficult to find than vendors of new equipment/apparatus, I recommend not only the statutory advertising but also notifying any vendor you know may have something for sale. There is no law prohibiting you from giving a copy of your specs or advertisement for bids directly to known vendors.

CONCLUSION:

That concludes my "sampler" of some of the issues/questions I have answered this month. Hopefully, some of these issues have come up at your department. Also, this sampler gives you some idea of what my law practice is like.

DISCLAIMER