Firehouse Lawyer

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Inside This Issue

1	Frequently Asked Questions
2	You Complied with the Law, but Did You File with the Auditor
2	And Speaking of Filing
3	Female Firefighters and Sex Discrimination
3	FLSA Requires Sick Leave Buy-Back to Count in Regular Rate of Pay
4	Alleged Wrongful Termination for Violation of Public Policy
4	Disclaimer

Frequently Asked Questions

Again, it seems that the articles most needed relate to questions that keep coming up, in my practice, over and over again. As always, I figure that if one or more clients are having issues on a certain topic, probably other districts are having the same problem as well.

The most frequently asked question lately has been about "piggybacking" on another agency's public bid law process. For many years, RCW 39.34.030 has allowed an agency to use another agency's bid specifications, under certain described conditions, in lieu of soliciting bids directly pursuant to RCW 52.14.110. Before 2004, we always recommended that an agency wanting to piggyback on another agency's bid process should (1) sign an interlocal agreement with the first agency, allowing the second agency to piggyback and (2) make sure the original specifications allowed "piggybacking" in the first place.

In 2004, an added condition was included in RCW 39.34.030(5)(b). We have brought this to the attention of clients many times, and previously written about it in this newsletter. Nevertheless, it seems to be a persistent question, and this added condition quite often seems to prevent piggybacking.

The added language pertains to the notice requirement, i.e. notifying the public or potential bidders of the procurement. The contracting agency must not only follow the pre-existing notice provisions of the statute, but also must have "either (i) posted the bid or solicitation notice on a web site established and maintained by a public agency, purchasing cooperative, or similar service provider, for purposes of posting public notice of bid or proposal solicitations, or (ii) provided an access link on the state's web portal to the notice."

So…what does all that mean and how does one comply? One client reported a total lack of success in using the state's web portal. It seems to me the language means at least this much: if the original agency had no notice posted on any internet web site, and used only conventional advertising in a newspaper under RCW 52.14.120, then you can forget about piggybacking on that bid. The language certainly suggests that someone, or some agency such as WFCA or the WSAFC, needs to

establish itself as a service provider. This service provider would act as a sort of web host or clearinghouse, listing all solicitations submitted for fire districts or cities, for example, for a reasonable fee. The agencies would simply submit the notice or advertising copy to the service provider and then make it known that others can piggyback on that procurement.

Until something like that is made available, I will continue to hear frequent anecdotes that an agency was unable to piggyback on a very good specification because of this 2004 addition to the statute. I am sure the legislature thought they were just keeping pace with modern technology, and offering a good high-tech alternative. Unfortunately, many agencies still do not routinely post these notices of bids on web sites. Thus, the legislature actually added an obstruction, rather than making our lives easier.

YOU COMPLIED WITH THE LAW, BUT DID YOU FILE WITH THE AUDITOR

Now that we are writing about the Interlocal Cooperation Act, which is chapter 39.34 of the Revised Code of Washington, did you know about RCW 39.34.040? The first sentence of that statute provides that prior to an interlocal agreement going into force, it must be filed with the county auditor. We have many interlocals between fire districts, but I suspect that many of them never get filed or recorded with the county auditor.

AND SPEAKING OF FILING

Did you know that a similar "filing with the auditor" requirement is contained within RCW 4.96.020? This statutory provision requires each local government agency to identify an agent to receive claims for damages against the agency. Not only do you have to identify the agent and the address where he or she may be reached during the normal business hours of the agency, this must be kept in a public record and "recorded with the auditor of the county in which the entity is located." In my practice, I have long recommended (1) that you achieve compliance with a written resolution and (2) that you name a natural person by name in that resolution, as opposed to identifying a position such as "Fire Chief" or "District Secretary". My reasoning? The statute says to "identify" and mentions "he or she"; to me this implies that you name a person. After all, you are not saving all that much by doing otherwise, and if the designated agent needs to change, it is not that difficult to prepare a new resolution.

FEMALE FIREFIGHTERS AND SEX DISCRIMINATION

In March, the 8th Circuit Court of Appeals affirmed a trial court's $335,000 judgment against Kansas City, Missouri for sex discrimination under Title VII. Unlike most cases, this employment discrimination case did not arise out of discipline, hiring, or promotion. Instead, the adverse actions related to denying the two female firefighters (battalion chiefs) adequate protective clothing and refusing to provide them adequate bathroom and shower facilities.

It goes without saying that a firefighter's job can be dangerous, especially with ill-fitting personal protective clothing. After a fire and otherwise, firefighters need adequate shower facilities. The court found that the female firefighters were only provided with male PPE and that protective clothing meant for females is available in the marketplace. Also, the court said that a number of the fire stations the firefighters had to visit on a daily basis had restrooms that did not lock and were located only in the male locker rooms near the male showers. Where female restrooms existed, they were dirty, did not have showers or could be accessed only through a male sleeping room.

This case certainly provides again a lesson to all who employ female firefighters: you must provide separate but equal facilities with adequate privacy for females.

FLSA REQUIRES SICK LEAVE BUY-BACK FUNDS TO COUNT IN REGULAR RATE OF PAY

Those employers who have sick leave "buy-back" programs might want to be aware of another 8th Circuit case. Many of you are familiar with the concept of "regular rate" inherent in the overtime calculations required under the FLSA. How much money you owe for overtime is affected by the determination of the "regular rate", which is different than just the firefighter's hourly rate for base wages. Some types of special pays do not count toward "regular rate", but some others do.

The Eighth Circuit held, in *Acton v. City of Columbia*, 436 F.3d 969 (8th Cir. 2006) that money paid for sick leave buy-back counts in the calculation of regular rate because it was money paid to encourage workers to attend regularly, and discourages using sick leave as added vacation. It did not matter that the program was intended as a sort of short-term disability insurance. Instead, the Court said this is money paid as compensation for a general or specific work-related duty, and is similar to on call pay.

The Court found that the City's per diem meal allotment program should not be included in regular rate. Some other examples of non-includable types of pay: bereavement leave, severance pay, premium pay at time-and-one-half or for call back, show up pay, and the like. The lesson to be learned is that determination of what is included in "regular rate" is not necessarily always easy. Sometimes you have to look up the FLSA regulations, or ask legal counsel to do it for you!

ALLEGED WRONGFUL TERMINATION FOR VIOLATION OF PUBLIC POLICY

A local case involving a fire district client of mine was reported in Legal Briefings for Fire Chiefs, an EDM Publishers publication. The Fire Chief of Pierce County Fire Protection District No. 13 (Browns Point-Dash Point) was terminated, allegedly due to financial constraints. He sued in federal district court, claiming that he had a First Amendment right to speak out on matters of public concern, and that is why he wrote letters to the Board, warning of the difficulties of maintaining sufficient staff to do the job, with obvious safety implications. He also alleged the Board may have violated the Open Public Meetings Act, and contacted the district's attorney for advice. He noted in the suit that one week after that contact, the Board limited his right to contact the attorney. He wrote another letter advising of severe staff shortages, and again mentioned the safety issues.

Then, 11 days later, the Board terminated him "without cause" under the clause of his contract allowing such terminations for budgetary reasons. They hired an interim chief for lesser pay, with somewhat better credentials (certified EMT), but paid the former chief severance pay, so initially the district did not save money.

A motion to dismiss was denied and the matter was settled for a significant amount prior to trial.

This case just reminds us of the growing body of law recognizing that public employees can engage in protected speech under the First Amendment. If the Employer takes adverse employment action against an employee who exercises those rights, and if the speech was a substantial or motivating factor for the adverse employment action, the action may be set aside for violation of public policy. See *Coszalter v. City of Salem,* 320 F. 2d 968 (9th Cir. 2003). If the plaintiff satisfies all of these elements, the burden shifts to the Employer to show, under the balancing test of *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968), that its legitimate administrative interests outweigh plaintiff's First Amendment rights, or that the decision would have been the same irrespective of the conduct of plaintiff. *Ulrich v. City and County of San Francisco,* 308 F.2d 968, 976 (9th Cir. 2002).

While it is impossible to know how a trial may have resolved these issues, suffice it to say that timing of adverse action is also very critical, as decisions can be seen as a quid pro quo for speaking out, when they follow closely in time after the protected speech.

DISCLAIMER