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Inside This Issue

Interlocal Agreements – An Audit Finding Waiting To Happen?

Once again, here is an article prompted by a client inquiry. A District Secretary mentioned recently that the State Auditor representative was on site, finishing up the audit for 2005. Apparently, the auditor questioned the financial aspects of some rather complex interlocal agreements, involving their district as "lead agency" and two other smaller districts, which were operating in a fully consolidated fashion during the audit period. The basic concern of the auditor is that it is difficult to determine if the property taxes raised in Districts B and C were properly spent for the benefit of the respective taxpayers of Districts B and C, or on the other hand, benefited the lead agency or its taxpayers in District A.

In the course of discussion, both with counsel and the auditor, the District Secretary revealed that the potential finding is based upon analysis contained in an audit, with finding, issued in June 2005 in a different county, but related to a similar consolidation of several fire districts. We think the reasoning and analysis of that audit, if it represents the current official position of the Office of the State Auditor, bodes ill for consolidation interlocal agreements throughout the state, and even calls into question very widely accepted mutual aid agreements in this State. The purpose of this article is to show that, if this analysis is correct, then the legality of all such agreements is questionable. Thus, maybe it is time either to re-examine the analysis or time to amend RCW 39.34, the Interlocal Cooperation Act.

The statutory basis for the concern seems to be as follows: First, RCW 43.09.200 provides in pertinent part:

> "The accounts shall show the receipt, use, and disposition of all public property,…all receipts, vouchers, and other documents kept, or required to be kept, necessary to isolate and prove the validity of every transaction…."

I would say the intent of this statute is that all accounts shall be maintained so as to document financial transactions.

Second, and perhaps more importantly, RCW 43.09.210 provides:

> "Separate accounts shall be kept for every appropriation or fund of a taxing or legislative body showing date and manner of each payment made therefrom…
>
> Separate accounts shall be kept for each department, public improvement, undertaking, institution, …under the jurisdiction of every taxing body.
>
> All service rendered by, or property transferred from, one department, public improvement, undertaking, institution,…shall be paid for at its true and full value by the department…receiving the same, and no department…shall benefit in any financial manner whatever by an appropriation or fund made for the support of another."

That last concept is critical to the analysis. In our example above, this statute would seem to imply that all service rendered by District A to District B and/or C "shall be paid for at its true and full value" by B and C and furthermore A should not benefit financially from appropriations or funds (i.e. property taxes) made for the support of B and C (and presumably vice versa).

Now, thus far that all sounds logical, appropriate and fair to all concerned, doesn't it? We would probably all agree that no district or department should get a gift, or a "free ride", at the expense of another district or department, or of course, in a representative sense…at the expense of that district's taxpayers! Well, then, how does one reconcile that with the spirit and intent of the Interlocal Cooperation Act, which is codified at Chapter 39.34 of the Revised Code of Washington? (Bear with me, here, this is about to get even more complicated.)

RCW 39.34.010 provides:

> "It is the purpose of this chapter to permit local government units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population and other factors influencing the needs and development of local communities."

We think this is a rather broad grant of authority, with an obvious intent of enabling efficiency in government, saving taxpayers money by using economies of scale and even contemplating modified forms of

organization. But read on.

RCW 39.34.030 elaborates on this cooperative theme and fleshes out some details. It provides a list of some of the required and optional elements that need to be contained in the interlocal agreements, including (3)(d): "The manner of financing the joint or cooperative undertaking and of establishing and maintaining a **budget** therefore;…." The statute continues by addressing some other elements that shall be included in such agreements if no "separate legal entity" is created (e.g. if one of the cooperative agencies acts as the "lead agency" instead). One important part to be included is: (4)(b) "The manner of acquiring, holding and disposing of real and personal property used in the joint or cooperative undertaking."

Finally, a critical statute to this discussion is RCW 39.34.060 which very tersely but cogently states: "Any public agency entering into an agreement pursuant to this chapter may appropriate funds and may sell, lease, **give** or **otherwise supply property, personnel, and services,** to the administrative joint board or other legal or administrative entity created to operate the joint or cooperative undertaking." Although this statute of course must be read in harmony with the rest of the chapter, and must be deemed to be subject to the overall legislative intent that such agreements must be for "mutual advantage" (the words of RCW 39.34.010), I think this statute has a rather plain meaning and intent. It means that, so long as the **giving or supplying** of property is done pursuant to the agreement and of mutual benefit to the agencies and their citizens or taxpayers, it is not unlawful.

Thus, the legal analysis that must be engaged in, if one tries to harmonize and reconcile the intent of RCW 43.09.200, RCW 43.09.210, and these provisions of the Interlocal Cooperation Act, is relatively complex and not at all simplistic. We have only begun to delve into the intricacies of that analysis. However, you might well ask: "Has the Office of the State Auditor engaged in that analysis? Or, on the other hand, are they only looking at one set of statutes, and not including any consideration of the other statutes?"

Incidentally, I have also looked at RCW 39.34.130 et seq., which shows there are statutes directly applicable to transactions between state agencies (not local government units), and these statutes **expressly require** strict accounting and reimbursement between state agencies. I would argue that the legislature could have gone that far with local units, but it did not do so, even though it clearly knew how to be that precise in requiring exact reimbursement. This shows an intent not to do so, because of other legitimate state policies such as encouraging efficiency, regionalization, and in fact elimination of the surplus or redundant local units by merger or consolidation.

I have reviewed the audit, with finding, from that other county, dated June 2005. I found no discussion or analysis whatsoever of the applicability or relevance of the statutes contained in RCW 39.34. Perhaps I do not have the complete audit. I know that there was an earlier audit, so perhaps that mentioned the issue that I have noted. But I doubt it.

Let us now consider the implications of such findings in the light of reality. Since in my practice I represent

about 30 fire districts, and since in my 20 years or so of focusing on fire districts in Washington I have encountered hundreds of interlocal agreements and mutual aid agreements, I believe I know what types of situations are "out there". Here is a simple example: District A and City B have an interlocal agreement to share a Battalion Chief, because data for three prior years suggested neither one needed or could afford such a chief, but together they need that supervisory post. The data shows the call volume is approximately 50-50 so they agree it would be efficient and to their mutual advantage to create this post and share the cost equally. Oops. In 2007, the call volume shifts slightly and the BC responds 65% to A and only 35% to B. Does this make the agreement "illegal" using the auditor's analysis and those statutes in chapter 43.09 RCW? One could so argue.

An even simpler example relates to mutual aid agreements. They are premised on the assumption that, over time, the aid rendered across municipal boundaries will be roughly equal and reciprocal. But they are seldom exactly equal, and no money ever changes hands (well, rarely). Would those not also be clearly illegal under a strict application of the auditor's analysis, absent strict equality? We think so. This shows the analysis is flawed, unless it begins to take into account RCW 39.34. (And common sense.)

Hopefully, this article will be thought provoking. And I am sure that I will hear about it…both pro and con. But that is my opinion, and I plan to send my old friend Brian Sonntag, the State Auditor, a copy of this article. (We may not always agree, but I believe we have mutual respect, having known each other for about 25 years.)

Regardless of the ultimate outcome, I would suggest that auditors need to look at the big picture, or perhaps the whole picture, rather than focusing on one or two statutes in the accountancy laws, without considering how they fit with other applicable laws. Moreover, if this position is official, I suggest that there are thousands of interlocal agreements and mutual aid agreements in the State of Washington that are therefore illegal and need to be re-drafted or changed.

PUBLIC DUTY DOCTRINE AND BYSTANDER NEGLIGENCE CASE

On December 19, 2006, the Court of Appeals, Division II, affirmed dismissal of a claim for damages based on negligent infliction of emotional distress. The case presented issues related to the public duty doctrine, and perhaps more interestingly, "bystander negligence" at emergency scenes.

Plaintiff is the mother of AT. She and AT reside with Don Anderson, whose son is BA. Apparently, BA and AT were riding with Joshua Godeaux in an SUV when Godeaux failed to stop at a stop sign and caused a serious motor vehicle accident. AT, who was riding in the rear seat without a seat belt, somehow ended up in the rear area of the SUV after the collision, and she was apparently to some degree covered with debris or other contents in that area, when fire district personnel arrived at the scene after being dispatched at 4:06 p.m. Two bystanders told them there were three injured parties—Godeaux, BA, and the driver of the other vehicle. The fire district personnel began extricating Godeaux, who was trapped in the driver's seat, and treating the other two injured persons, who were apparently outside their respective vehicles.

When BA asked about his "sister", the fire district personnel looked in the back of the vehicle but saw only a spare tire and wheel and similar items.

By about 4:30 p.m., while the injured parties were being prepared for transport to the hospital, the plaintiff arrived at the scene. She testified that she spoke with BA, who said AT was with them in the vehicle. She testified she then looked in the vehicle and immediately saw AT; she then got in the vehicle (back seat) and claims she saw AT in plain sight. Fire district personnel then immediately attended to AT, extricated her, and then assigned her to the airlift originally intended for Godeaux.

The plaintiff/mother sued, not for injuries to AT (that would be AT's claim, not hers) but for damages for the infliction of emotional distress upon her, resulting apparently from the delayed discovery of her daughter.

We find the case interesting not so much for the discussion of the public duty doctrine, but the bystander issue. The court found that the facts did not fit within any exception to the doctrine, and that the fire district owed no duty to the plaintiff that was not owed to the public in general. Since we have explained the doctrine and its exceptions several times in these pages, we will not elaborate here.

Washington, in 1976, did recognize that a bystander who witnesses a traumatic event may have a cause of action against a negligent party who causes that event. *Hunsley v. Giard,* 87 Wn. 2d 424, 553 P.2d 1096 (1976). The court here said, however, that since plaintiff was not a bystander (not present to witness) at the MVA, she can have no such claim. Of course, the defendants including the State Patrol, argued that the driver inflicted the injuries, not them.

Although the result in this case was favorable, the case does make one wonder if responding emergency departments might have some theoretical liability exposure. Suppose that the evidence showed that the daughter's injuries were not that severe, but she bled to death due to belated discovery, when otherwise her injuries were not life-threatening. Further suppose that the mother was at the scene all during the delay. Is she not a bystander to an allegedly negligent act or event, albeit not the collision? Of course, this does not even address the question whether AT might have had a claim in her own right.

The moral of the story would seem to be that fire departments need to train personnel to perform a very in depth size up or search at the scene of multiple vehicle/multiple party motor vehicle accidents. This is the second case of which I have been made aware in the last 2-3 years where a passenger was not found upon the initial size up. I have been told that there are some bona fide experts in this particular field, who may be available to train your personnel on the "best practices" to follow when faced with this difficult situation. We fully realize that, with the vagaries of rainy, dark Northwest weather, coupled with the confusion and chaos of multiple vehicle accident scenes, it is possible that an injured person could be very difficult to find. I am just saying that you need a plan in place for such events, and then you need to spend some time training your firefighters and/or EMTs on that plan.

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