

# Firehouse Lawyer

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## **The Good, the Bad, and the Ugly**

Sometimes very pleasant **and** very unpleasant events occur at firehouses. This month's edition will start with a discussion of some of those. This article will illustrate that, in the fire service, we need to be prepared for any eventuality because the public, and even our own personnel, sometimes present us with unexpected challenges.

I was at Woodinville recently for a board retreat with staff to discuss planning for that department's future. It was a good day, with a lot of useful exchange of ideas. At one point, the Deputy Chief jumped up to deal with a member of the public who came in the front door of the station. While the discussion continued, I noticed the ladder truck leaving the station "non-priority", i.e. no sirens or lights. Later, during a break in the action at the retreat the D.C. mentioned that the visitor was a lady who saw a duck with tiny ducklings trapped in a storm drain along a street; she wondered if the fire department could rescue the ducklings from their plight. So that is where the ladder truck was going...to perform an essential public service. Someone commented that he hoped there was a camera on board. Anyway, it was a heart-warming story...and it was good.

Sometimes, the unexpected events are not so good. Just a few days after the mass murder and tragedy at Virginia Tech University, Burien Fire had a bizarre event of its own. On a recent Thursday night, the firefighters at Station 29 heard a loud "bang", which sounded like something smashing into the station near the apparatus bay doors. They ran outside to find that a vehicle had driven into the station right next to the app bay door, after first striking about three parked cars owned by firefighters! The Lieutenant approached the driver, who was still inside the vehicle, to see if he was hurt or needed assistance. He asked the driver a question through the open driver's door. At first, the driver seemed cooperative and leaned over to the side, indicating maybe he hurt his wrist. But he came up into an erect, seated position, pointing a sawed-off shotgun into the Lieutenant's face!! He made some threatening comment, which the Lieutenant really did not hear, as he was rapidly retreating into the station, locking the door behind him. Chaos ensued. Firefighters called 911 and asked for a police response. Although they turned the lights off in the station for their own safety, the

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lights came back on automatically when the dispatcher dispatched rescue units from other fire departments in the area. Feeling unsafe, one firefighter jumped out the window and ran. The Lieutenant and another firefighter retired to a lockable restroom upstairs to await arrival of the police. The driver never entered the station, but some of the firefighters did not know that.

Ultimately, the police arrived rather quickly, with many units. The armed gunman was apprehended nearby. The driver may have been intoxicated and admitted to snorting cocaine. Additionally, he may have been in a bit of a hurry, at the time of the incident. It turned out that he had just been involved in an armed robbery at a deli approximately half a mile from the station. Needless to say, this incident was very upsetting to the Lieutenant and his crew, as there was initially much confusion about the motives of the driver and exactly what was happening. In such situations, firefighter safety is uppermost. It seems to me that the crew acted appropriately by essentially trying to withdraw and "lock down" the station, while calling for police. The Chief and I have discussed the need for a safe "rally point" (pre-arranged, in training) where the crew could meet in such an emergency, where the station itself is compromised. I am sure many safety ideas could come out of this experience. Nonetheless, it caused me to review my previously drafted Prevention of Workplace Violence policies that I have on file to see if such a situation would be addressed therein.

In any event, that is the "bad" and now for the "ugly".

Last week, I was personally involved in an ugly scene...a physical assault by one fire commissioner against another commissioner. Since the matter is still unfolding in the Superior Court, where felony assault charges are apparently pending, and since the author will probably be a witness, I will not comment about the particular facts at the present time. Suffice it to say here that every employer needs a policy in place to deal with workplace violence. Also, commissioner rules and policies should address the powers and duties of the Chairperson, who has some authority to ensure civility and polite discourse during meetings of the commissioners. **Public agencies will lose the confidence of the voters if they cannot properly conduct meetings characterized by treatment of all participants with dignity and respect.** Respect for the rule of law means that, in a civilized society, we create rules and expect all citizens (including elected officials) to follow them. I suppose that if we cannot govern our own house, to maintain order, the criminal law will necessarily have to intervene. It is really sad when the process descends to that level. So that is the ugly.



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## COMMISSIONER COMPENSATION LAW REVISED

As this edition of the *Firehouse Lawyer* goes to press early (the author is going back to New York and Cape Cod for a much-needed two week vacation from May 5 to May 19) it appears that the bill revising or amending RCW 52.14.010 will become law. I believe it is on the Governor's desk for signature and there is no reason to believe she will veto it. ESHB 1368 would amend the compensation or "per diem" statute to increase fire commissioner compensation to \$90 per day from the current amount of \$70 per day (or portion thereof) for any services rendered. The law also raises the "cap" on annual compensation to \$8,640 per year. Since the law will be effective 90 days after adjournment, it will become law in late July, and therefore applies to 2007 annual compensation.

The statute will now have language stating that the compensation is meant for "time spent in actual attendance at official meetings of the board or in performance of other services or duties on behalf" of the district. Of course, the language is still open to some interpretation and potential disagreement about what constitutes "services" or "duties" or what is done "on behalf" of the district as opposed to being done for personal reasons. Is wearing the Santa suit and

riding on the fire truck at Christmas within the definition of "services" being performed "on behalf of" the district? How about attending the annual awards banquets for paid and/or volunteer firefighters? These kinds of issues will always be with us. Therefore, we still think it is advisable to adopt local policies to assist in interpreting the statute. While you cannot give more compensation than the statute provides (and arguably not less either, without a clear waiver of compensation) you certainly can locally define what is meant by services or performance of duties. You can provide representative lists or examples of what your district believes are and are not appropriate for a compensation or claim submittal by a commissioner.

The amended law also provides for revising the \$90 per day compensation at five-year intervals, using the CPI to adjust for inflationary pressures. This is a good thing, since then it will not take legislative action just to raise the per diem periodically.

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## MULTI-YEAR LID LIFTS - NEW LEGISLATION

As this edition goes to press, it appears that this legislation also passed, and we see no Governor's veto on the horizon. I have been asked for a legal opinion as to whether this new law would allow multi-year "lid lifts" to be placed on the August primary ballot, since the new legislation will be effective in late

July (90 days after adjournment of the legislature). In my opinion, as long as the law is in effect at the time of the election, it is appropriate. A county auditor or elections division that accepts papers for filing before the effective date is only performing a ministerial act, not a discretionary act, and therefore I doubt that such officials can exercise their discretion and refuse the papers. They do not have to do anything official, or would not be doing anything unlawful if they accept the papers prior to the effective date. Of course, I recognize that they would be commencing work on ballot title drafting or review, local voters pamphlet preparation, etc. before the effective date, but it all relates to an election that is perfectly "legal" and therefore the preliminary work is "legal" in my view. The Auditors have no jeopardy whatsoever in doing such preparatory work and so I think it would be "ultra vires" or in other words beyond their authority to decline to process what would otherwise be a fully "legal" election requested by a governing body with the power to do so.

By all means, local agencies wanting to call for an election under this legislation at the new August 21 primary should raise the question with their county auditor or elections officials.

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## SOCIAL SECURITY AND MEDICARE QUESTIONS PERSIST

At a recent Washington State Fire Commissioners Association seminar it was evident that questions still remain as to the proper method of dealing with Social Security and Medicare for both volunteers and paid personnel. These questions are complicated. Also, they are not answerable the same way every time for every agency or public employee group. That is why I demurred when I was asked for my views on a part of the subject. For attorneys, it is best if we are given a fully "fleshed out" fact pattern and have a chance to research the law and facts before responding. Believe it or not, we do not have all "rules" or laws memorized!

With respect to volunteers, there is not universal agreement among attorneys, CPA's, the IRS and the Social Security Administration on the question whether volunteer firefighters are "employees" for purposes of Social Security (FICA) and Medicare. Some attorneys and CPA's maintain that they do not fall within the definition of "employees" because of Internal Revenue Code Section 3121(b)(7)(F)(iii), which applies to temporary employees hired to deal with unforeseen emergencies such as fire, storm, earthquake, flood or other similar emergency.

I respectfully disagree. The clear intent of that particular exemption is to exempt from FICA any temporary employees hired by an employer to deal with a temporary crisis caused by an unforeseen disaster, natural or man-made. First, I would interpret exceptions from coverage narrowly, not broadly, in view of the remedial purpose of the Social Security system. Second, I would point out that volunteer firefighters are not temporary, but rather are part-time personnel. Some of them perform duties for years as basically permanent part-time quasi-employees. Third, for them the business at hand is hardly unforeseen, nor is it an emergency in the sense intended in the Code. In other words, firefighters—be they career or volunteer—are "employed" for the very business of dealing with other people's unforeseen

crises. Their "employer"—the fire department—is an emergency agency. If a private timber company had to hire temporary firefighters to respond to a wildfire threatening a valuable stand of timber, that would meet the statutory intent and no FICA would be deducted. But this is hardly that situation.

In fact, when I was researching this matter further I perused a Social Security Administration web site. Among other valuable bits of information on that site, I found a discussion of police officer and firefighter positions. The following Note was included:

"Note: Police officers and firefighters are not considered emergency workers under the Social Security and Medicare exception for emergency workers defined in Internal Revenue Code section 3121(b)(7)(F) (iii). The emergency exclusion applies only to services of an employee who was hired because of an unforeseen emergency to do work in connection with that emergency on a temporary basis... [giving examples]"

So, obviously the Social Security Administration shares my opinion.

Actually, I would start the analysis by asking the question whether volunteer firefighters have access to a retirement system. I agree with the apparent position of the Internal Revenue Service, i.e. that the Washington State pension system offered to volunteers through the Volunteer Pension Board (see Chapter 41.24 RCW) does not qualify as such a retirement system.

As for Medicare, it is my understanding that such coverage is mandatory for all police officers and firefighters not covered by a public retirement system, subsequent to March 31, 1986. I would apply that to these volunteers as well. In summary, it is my conclusion and recommendation that fire districts with volunteers should be deducting and paying both the employer and the employee portion of FICA. By that, I refer to both the Old Age, Survivors and Disability Insurance (OASDI) part and the Medicare part.

OASDI is currently 6.2% of gross compensation from the Employee and the same from the Employer. Medicare is now 1.45% from each. In summary, it is not only the best interpretation of the Internal Revenue Code, in my opinion, but also, best for the workers. And, I respectfully submit, it should not break the fire districts, economically.

## FICA for Paid Employees

While the question about volunteers prompted this article, I will comment upon the related questions of FICA and Medicare for the career firefighters and other personnel employed by fire districts. Career firefighters could theoretically be covered by the Social Security system pursuant to a State's Section 218 agreement with the federal government. However, in Washington fire districts, the career firefighters are covered by a public retirement system (either LEOFF I or II). Therefore, the only way they could be covered is if there had been a majority vote referendum of the employees. To my knowledge, that has not occurred in very many districts, so as to place their paid firefighters under the Social Security system. See generally 20 C.F.R. § 404.1212.

Also, for firefighters hired after March 31, 1986, Medicare coverage is mandatory. However, if a firefighter has been in continuous employment with the same employer since a date prior to March 31, 1986 it is not mandatory.

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